Guardianship and the Abortion: A Model for Decision-Making

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I. Introduction

What happens when a woman is not legally capable of consenting to an abortion? Are her personal beliefs and values weighed when a decision is made for her? Should those personal beliefs and values be considered?

When a woman is deemed legally incompetent or incapacitated, a guardian is given legal authority to make health care decisions for her.1 When the woman has an

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1. See, e.g., ALA. CODE § 26-2A-105(b) (2009). The various state statutes use both competence and capacity to determine when appointment of a guardian is warranted. Compare WASH. REV. CODE ANN. § 7.70.065(1) (2011)(using competence language to refer to a person who is under a guardianship) with GA. CODE ANN. §§ 29-4-1, 29-4-23 (2013) (using capacity language to refer to a person who is under a guardianship). Competence is "a basic or minimal ability to do something," BLACK'S LAW DICTIONARY (9th ed. 2009). Capacity is "[t]he power to create or enter into a legal relation; specif., the satisfaction of a legal qualification, such as legal age or soundness of mind, that determines one's ability to sue or be sued, to enter into a binding contract, and the like." Id. "The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person . . . ." ALA. CODE § 26-2A-105(b) (2009). "The court, on appropriate findings, may (i) treat the petition as one for a protective order...and proceed accordingly, (ii) enter any other appropriate order, or (iii) dismiss the proceedings . . . ." Id. The court determines the scope of the guardianship and determines the duties of the guardian. See, e.g., ALA. CODE § 26-2A-105(c) (2009).

The court, at the time of appointment or later, on its own motion or on
advanced directive stating that decisions are to be made according to a specific set of religious tenets, decision making is a fairly simple and straightforward task.\(^2\) If the woman does not have such a directive or proxy decision-making becomes more complicated.\(^3\) In the absence of a directive, difficult health care questions then turn on who should make the decisions, and upon what should the decisions be based.\(^4\) Additionally, the decision-making may be further complicated by the incapacitated person’s religious beliefs; in this instance, states must consider the “optimum result,” and ensure that this optimum result is reached consistently.

This note will explore the intersection of religious and cultural beliefs with the authority of surrogate decision makers when it comes to major health decisions. Part II will investigate how states govern guardians and their decision-making abilities through legislation, and seek to categorize the states’ differing approaches. Part III will outline the best outcome in the event that a previously competent adult becomes ill and can no
longer make her own health decisions. Finally, this note will conclude with an analysis of whether there is a single method the states can employ to ensure that the best possible outcome is reached consistently.

II. History

The First Amendment to the United States Constitution guarantees the freedom to practice religion.\textsuperscript{5} If an incapacitated person's choice of religion is previously documented, her incapacity should not negate that choice.\textsuperscript{6} Instead, the person's choice of religion should dictate what medical procedures are performed regardless of her ability to presently communicate that choice or preference.\textsuperscript{7} Although the decision-making process is complicated by the fact that an incapacitated person cannot communicate religious-based preferences, the process should not result in the loss of the person's First Amendment freedoms.\textsuperscript{8} Through legal guardianship, the states should attempt to protect the rights of incompetent patients.\textsuperscript{9}

\begin{quotation}
5 U.S. CONST. amend. I. This freedom is not absolute; it is not a free pass to do anything in the name of religious exercise. \textit{See, e.g.}, Employment Div. of Oregon v. Smith, 494 U.S. 872 (1990) (holding that peyote can be a banned substance even when used in a religious ceremony). There are certain religious acts that are prohibited by law such as polygamy. Reynolds v. US, 98 U.S. 145 (1879). However, religious pacifism can be an excuse from compulsory service in the armed forces. Gillette v. United States, 401 U.S. 437 (1971). The free exercise clause of the First Amendment is interpreted using strict scrutiny. Wisconsin v. Yoder, 406 U.S. 205 (1972). The government must demonstrate that it has a compelling interest in curbing the free exercise of religion before doing so. \textit{Id.}

6 \textit{See} Tom Stacy, \textit{Death, Privacy, And the Free Exercise of Religion}, 77 CORNELL L. REV. 490, 533-36 (1992) (outlining one interest that an incompetent patient might have in assuring his/her rights are protected).

7 \textit{See id.; see also infra part VI} (discussing some of the reasons why a person would write a living will or have advance directive planning).

8 \textit{See} April L. Cherry, \textit{The Free Exercise Rights of Pregnant Women Who Refuse Medical Treatment}, 69 TENN. L. REV. 563, 589-92, 608-09 (2002) (advocating for a woman's right to refuse treatment on religious grounds); \textit{see also} Stacy \textit{supra} note 6 at 533-36 (stating that capacity is not a requirement for constitutional protection).

A legal guardian is an individual appointed by the court to make decisions on behalf of an incompetent or incapacitated patient. In many circumstances, the legal guardian may act as a surrogate decision-maker. When a patient does not have an advanced directive or living will, the guardian must make decisions seemingly without guidance. The states have taken up the issues that arise in the absence of an advance directive through the institution of guardianship statutes that attempt to aid the legal guardian in the decision-making process.

Each state has passed its own statute regulating the types of decisions a guardian may make with respect to the health and medical care of the incapacitated individual. These statutes either instruct the guardian to make the decision based on...


10 BLACK'S LAW DICTIONARY 86 (9th ed. 2009).

11 See 755 ILL. COMP. STAT. ANN. 40/25(a) (2013). These circumstances include provision of “support, care, comfort, health, education and maintenance.” Id. at 5/11a-17. The surrogate decision maker refers both to the guardian appointed by the court and a guardian chosen by the incapacitated person prior to their incapacitation. Id. at 40/25(a); see also Rebecca J. O'Neill, Surrogate Health Care Decisions for Adults in Illinois—Answers to the Legal Questions That Health Care Providers Face on a Daily Basis, 29 LOY. U. CHI. L.J. 411, 417-18 (1998). In other states, the person chosen by the incapacitated person might be referred to as a proxy. The proxy differs from the guardian in that it is the incapacitated person who determines the scope of the proxy and the powers and duties granted to the proxy. BLACK'S LAW DICTIONARY 46 (9th ed. 2009) (defining “advance directive”). This is generally done through a living will, health care proxy, or advance directive. Id. Similar to a last will and testament, the living will outlines the patient's wishes at a time when the person was competent to declare those wishes. The “living will” generally is used to declare that the person does not want his life prolonged using extraordinary measures. Id.

12 See 755 ILL. COMP. STAT. ANN. 40/25(a) (2013). An “advance directive” is a document that outlines the decisions that the patient wants made in the event she will become incapacitated. BLACK'S LAW DICTIONARY 46 (9th ed. 2009). It generally appoints a specific person to make decisions as well as the way in which that person should make those decisions. Id. When a patient has an advance directive, the surrogate's decision-making is easier because the directive generally will outline the way the incapacitated person wants decisions made. See O'Neill, supra note 11, at 417-18.

13 See supra notes 2, 11, & 12 (discussing advance directives); see, e.g., MASS. GEN. LAWS ANN. ch. 190B, §§5-306(c), 5-309(c) (2013). “A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions . . . .” Id. at §5-309(c). But see, e.g., OHIO REV. CODE ANN. §2111.13(c) (2011). “A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services unless the ward or an interested party files objections with the probate court, or the court, by rule or order, provides otherwise.” Id. See generally Patricia M. Cavey, Esq., Parents Patriae: Compromised Justice for Guardianship Defendants? Using Advance Directives to Move Beyond Parents Patriae, NAELA Q., Fall 2001, at 13-14.

14 See supra note 9.
substituted judgment, best interest, or they do not provide any guidance.¹⁵

A. The Right to Choose an Abortion

The Supreme Court has affirmed that a woman is entitled to make reproductive choices regarding her own body by herself.¹⁶ She is entitled to use contraception and, with certain restrictions, to obtain an abortion.¹⁷ Incapacitation should not eliminate

¹⁵ See Alexia M. Torke et al., Substituted Judgment: The Limitations of Autonomy in Surrogate Decision Making, 23 J. GEN. INTERN. MED. 1514, 1514-15 (2008). Black’s Law Dictionary defines the substituted judgment doctrine as: “A principle that allows a surrogate decision-maker to attempt to establish, with as much accuracy as possible, what healthcare decision an incompetent patient would make if he or she were competent to do so.” BLACK’S LAW DICTIONARY 712 (9th ed. 2009). Massachusetts is one of the states that employs the substituted judgment doctrine; its guardian statute reads: “A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person’s best interest and exercise reasonable care, diligence, and prudence.” MASS. GEN. LAWS ANN. ch. 190B, §5-309 (2013). In the context of adult guardianship, best interest is the same as the best interest of the child doctrine which Black’s Law Dictionary defines as: “A standard by which a court determines what arrangements would be to a child’s greatest benefit . . . .” BLACK’S LAW DICTIONARY 712 (9th ed. 2009). Delaware employs the best interest doctrine; its guardian statute reads:

The guardian may give such consent or approval as may be necessary to enable the disabled person to receive medical or other professional care, counsel, treatment or service and shall have power to authorize release of medical records. The guardian shall not unreasonably withhold such consent or approval nor withhold such consent or approval on account of personal beliefs held by the guardian or the disabled person, but shall take such action as the guardian objectively believes to be in the best interest of the disabled person.

DEL. CODE ANN. tit. 12, §3922(b)(3) (2007). Ohio is an example of a state which provides no guidance for the guardian on how to make medical decisions. Its guardianship statute reads: “A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services unless the ward or an interested party files objections with the probate court, or the court, by rule or order, provides otherwise.” OHIO REV. CODE ANN. §2111.13(C) (2011).

¹⁶ See infra notes 20-28 and accompanying text.

¹⁷ See Griswold v. Connecticut, 381 U.S. 479, 507 (1965). The Court in Griswold explained that reproductive freedom is protected by the right to privacy, which stems from the penumbras of the Bill of Rights. Id. at 484-85. The Court held that the privacy rights of married couples are sacred and should be protected as broadly as possible. Id. at 486. Thus, the Court held that when a married couple chooses to use contraception, the state should not be allowed to deem that illegal. Id. at 485-86. See also Roe v. Wade, 410 U.S. 113, 154 (1973) (establishing right to have an abortion); Planned Parenthood v. Casey, 505 U.S. 833, 856-857 (1992) (reaffirming Roe
these rights.\textsuperscript{18} In the context of a guardianship, the woman may exercise her right to seek an abortion through her surrogate decision maker, the legal guardian.\textsuperscript{19}

1. \textit{Roe v. Wade}

In 1973, through \textit{Roe v. Wade}, the Supreme Court determined that implementation of an outright ban on abortions not necessary to save the life of the mother was unconstitutional.\textsuperscript{20} In its decision, the Court sought to balance the rights of the mother with the state's interest in the life of the fetus.\textsuperscript{21} Utilizing a trimester scheme, the Court determined the time during pregnancy when the state's interest in the life of the fetus outweighs the woman's right to choose an abortion.\textsuperscript{22} The Court further held that the state may not ban abortions before the point in which the state's interest in the life of the fetus outweighs the mother's interest in self-determination.\textsuperscript{23} The Court emphasized state statutes limiting access to abortions must also provide exceptions in the event that a woman's life is in danger.\textsuperscript{24} The basic principle of \textit{Roe},

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  \item \textsuperscript{18} Matter of Barbara C., 474 N.Y.S.2d 799, 799-801 (N.Y. App. Div. 1984) (stating mentally incapacitated women have equal rights to any other woman regarding contraception and abortion); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 428 (Mass. 1977). “The trend in the law has been to give incompetent persons the same rights as other individuals.” Id.
  \item \textsuperscript{19} Catherine M. French, Note, \textit{Protecting the 'Right' to Choose of Women Who Are Incompetent: Ethical, Doctrinal, and Practical Arguments Against Fetal Representation}, 56 CASE W. RES. L. REV. 511, 522-23 (2005). French argues that abortion requires a greater deference to the wishes of the woman because it is a significant decision. Id. at 520.
  \item \textsuperscript{20} Roe v. Wade, 410 U.S. 113, 164-65 (1973). The Court acknowledged that there could be limitations on abortions but not until after viability. Id. at 163. Viability is the point in the pregnancy where the fetus could survive outside of the womb, independent of the mother. Id. at 160. At the time of the \textit{Roe} decision, viability was considered to start during the third trimester. Id. With the advances in medicine, especially neonatal medicine, viability happens earlier during the pregnancy and the trimester scheme set up in \textit{Roe} is no longer tenable. \textit{Planned Parenthood}, 505 U.S. at 860.
  \item \textsuperscript{21} Roe, 410 U.S. at 147-152.
  \item \textsuperscript{22} Id. at 163-64. The trimester framework was implemented to draw a bright line of viability, the point in time after which the fetus could survive outside the womb. Id. at 160.
  \item \textsuperscript{23} Id. at 163-64. The Court determined that the state could regulate abortion in the interest of protecting the health of the mother during the second trimester and ban abortion during the third trimester (while recognizing that there is an exception for the health of the mother). Id. However, the abortion decision during the first trimester must remain between a woman and her physician. Id.
  \item \textsuperscript{24} Roe, 410 U.S. at 164-65. The court held the Texas statute violated the Due Process Clause and noted that states may create their own laws allowing for abortion in any trimester, even beyond viability, in order to preserve the health of the mother. Id. at 165.
\end{itemize}
that a woman has the right to choose an abortion absent the state's interest in the life of the unborn child, still continues today.\(^{25}\)

2. Planned Parenthood v. Casey

Later, in 1992, the Supreme Court reaffirmed the right to abortion as outlined in Roe v. Wade, but reconsidered the trimester framework.\(^{26}\) In Planned Parenthood v. Casey, the Court rejected the trimester framework in favor of an "undue burden" approach.\(^{27}\) The Court explained that while the state has an interest in the life of the fetus from conception, that interest must be weighed against the mother's interest in her bodily integrity.\(^{28}\)

B. Guardianship Decisions (End of Life Model)

Abortion is a significant and potentially life-changing decision for a guardian to make on behalf of another individual, the result of which will have a significant impact on the life of the incompetent or incapacitated woman.\(^{29}\) Considering the extraordinary

\(^{25}\) See Gonzales v. Carhart, 550 U.S. 124 (2007). The right still exists but the state's interest in the life of the unborn child has been adjudged to be much stronger. See id. at 163-67.

\(^{26}\) Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992). While Casey ultimately upheld Roe, it did not leave it unharmed. Id. The Court allowed several provisions to stand that would limit the access to and availability of abortions. Id. at 875-76. But cf. Roe, 410 U.S. at 115-16. The reasoning that the Court used in Casey, also lead to further weakening of a woman's right to choose in Gonzales v. Carhart, where the court upheld a ban on partial-birth abortions. Gonzales v. Carhart, 550 U.S. 124, 132 (2007). The ban on partial-birth abortions is now a major obstacle in the path of a woman being able to choose an abortion because of its wording. See id. at 150-52 (upholding ban on intentional, intact D&E abortion). See also id. at 170-171 (Ginsberg, J., dissenting). While the Court has not completely overturned Roe, it has done a lot to gut the original right as it was outlined. Id. at 186-87 (Ginsberg, J., dissenting).

\(^{27}\) Planned Parenthood, 505 U.S. at 874-75; Roe, 410 U.S. at 163-66 (specifically referencing trimester framework).

\(^{28}\) Id. at 875-76; see also Roe, 410 U.S. at 162-63. However, the woman's right to choose is limited by her ability to pay for the abortion. See generally Harris v. McRae, 448 U.S. 297 (1980). In 1980, the Supreme Court held that Medicaid does not have to cover abortion. Id. at 326. If the incompetent woman is unable to pay for an abortion and lives in a state that refuses to cover abortion using Medicaid, her inability to pay may negate the debate on how a guardian makes the decision. See id.

measures involved, the decision of whether to have an abortion can be analogized to the
decision whether or not to continue life-sustaining treatment.\(^{30}\)

A fair amount of research, analysis, and law exists regarding the topic of
determining what decisions a guardian is entitled to make with respect to the
continuation or cessation of end of life care.\(^{31}\) This body of research and law provides
some insight into the question of whether a guardian can or should authorize an
abortion for an incapacitated person.\(^{32}\) By definition, both the decision to end life-
sustaining treatment and the decision to have an abortion have lasting implications for
the patient; one ends a life and the other prevents life from beginning.\(^{33}\) More material
exists on end of life care due to the greater implementation of guardianship for
individuals who are incompetent due to age; such material provides insight for a
guardian’s consideration when making major medical decisions for an incapacitated

(noting abortion may be in fetus’ best interest when considering its pending quality of life); see
generally Scott Woodcock, Abortion Counseling and the Informed Consent Dilemma, 25 BIOETHICS 495
(2011) (noting the decision to have an autonomous abortion not influenced by informed consent
is critical); Meryl A. Joseph, Note, The Massachusetts Parental/Judicial Consent Law for Minors’
Gene Lindsey, Comment, The Viability of Parental Abortion Notification and Consent Statutes: Assessing
effects of abortion on the woman; however these concerns seem to come solely from anti-
abortion advocates. See, e.g., NRL News Staff, Abortion’s Deleterious Effects on Women: Mental Health,
\(^{30}\) MacBride, supra note 29, at 792-95 (comparing the privacy interest at stake in right-to-die cases
to that in abortion cases).
\(^{31}\) See, e.g., HOOPER, LUNDY & BOOKMAN, TREATISE ON HEALTH CARE LAW § 18.04 (Matthew
Bender, Rev. Ed. 2013).
\(^{32}\) Id. Both decisions have lasting impact on the ward and both evoke strong moral and religious
commentary. See infra Part V (further explaining religious commentary surrounding Cruzan v.
Director, Missouri Dept. Health); see Cruzan v. Director, Missouri Dept. Health, 497 U.S. 261, 261
(1990); see also e.g. Tom Stacy, Reconciling Reason and Religion: On Dworkin and Religious Freedom, 63
GEO. WASH. L. REV. 1 (1994). Furthermore, both Cruzan and Roe involve the end of life, one the
end of the life of the terminally ill, the other the end of a potential life. See Cruzan, 497 U.S. at
261 (1990). Many of the same issues come up, such as: what would the incompetent patient
really want?; What if her preferences have changed since the last time she was consulted?; Who
should be consulted?; and What information should be considered? The guardianship statutes
are the major source of guidance on these issues. See supra note 9 (listing state statutes). When
the guardianship statutes are silent on how to make decisions, the guardian and the courts are left
on their own to make the decisions and outline how the decisions should be made. See infra 0
(discussion of statutes that do not give guidance to guardians).
\(^{33}\) See generally, Phillip Kim, Comment, Navigating the End of Life Decisions Regarding the Rejection of Life
Sustaining Treatment, Medical Futility, Physician-Assisted Death, and Abortion, 14 SMU SCI. & TECH. L.
person because they both end of life care and making medical decisions involve extraordinary measures. However, the comparison between end of life care and medical decisions for a ward is not a perfect match. The possibility that an incompetent woman will become competent again and the possibility that an incompetent woman is conscious of the abortion complicate the analysis.

In the end of life discussion, consideration of the family’s wishes when making a decision regarding the continuation of life sustaining care has been encouraged. The permanently incapacitated patient will not regain consciousness in order to understand the treatment decisions made for her. As the permanently incapacitated patient is no longer affected by the treatment decisions others make for her, the guardian should seek out a family’s wishes before finalizing any decisions on her behalf. Because the incapacitated individual cannot object to those decisions, the guardian should follow the family’s wishes, including those that are religiously motivated, when determining care. Conversely, in the event that the family’s wishes and the patient’s known desires are widely divergent, the family’s wishes should be ignored. Another consideration is the

35 See Stacy, supra note 6, at 534 (explaining patients can fall into a state of permanent unconsciousness). In end-of-life cases, where the court allows the guardian to remove the life support, the patient will not regain consciousness after the life-support is removed. See Lois Shepherd, In Respect of People Living In a Permanent Vegetative State-and Allowing Them to Die, 16 HEALTH MATRIX 631, 649 (2006). However, it is possible, and even likely in some cases, that the incompetent woman will regain competence after the abortion is performed. Id.
36 See Stacy, supra note 6, at 495; Kathleen M. Boozang, An Intimate Passing: Restoring the Role of Family and Religion in Dying, 58 U. PITT. L. REV. 549, 552 (1997) (arguing families should be decision makers for incapacitated patients who will not regain competence). The argument in favor of allowing the family to make the decision has merit because, if the woman is unlikely to regain her legal capacity to make decisions, it is the family that will be most affected by the decisions made on her behalf. Id. In the context of abortion, for example, if the woman is likely to remain incapacitated, the family will have to care for the child, decide to place the child for adoption, or make the final decision for abortion. See Wieber, supra note 34, at 815 (stating guardian has power to make decisions for ward).
37 Stacy, supra note 6, at 533-41.
38 See supra note 36 and accompanying text.
39 See Stacy, supra note 6, at 582. See also Boozang, supra note 36, at 552 (arguing that patient autonomy is no longer relevant when the patient will not regain consciousness). Giving the family greater power in the decision making process gives them a greater sense of control in a stressful situation in which they may feel powerless. Id. at 609.
40 See Boozang, supra note 36, at 553. If a family disagrees with the patient’s wishes, a fight may arise between the conscious family and the guardian of the unconscious or incompetent patient’s guardian, with the healthcare provider caught in the middle. See id. Boozang goes on to argue
guarantee of equal protection of all persons under the law, provided by the Fourteenth Amendment.\textsuperscript{41} If all people are entitled to the equal protection of the law, then it follows that competent patients should not be treated more favorably with regard to their religious motivations than incompetent patients.\textsuperscript{42} For this reason, the wishes of the incapacitated patient, to the extent reasonably known to the guardian, should be adhered to as closely as possible.\textsuperscript{43}

C. The States’ Approaches

When a woman becomes incompetent, she does not necessarily lose all ability to function.\textsuperscript{44} Though she may be unable to make decisions on her own behalf, not all of that this is one area of the care of incompetents that has been successful. \textit{Id.} Safeguards that dictate how the healthcare provider should approach such disagreements have been implemented. \textit{See id.} These safeguards include bioethics committees, as well as legal and ethical consultants. \textit{Id.} Boozang believes that this specific area has received sufficient attention and, recommends that efforts be aimed at further reforming other aspects of the system of surrogate decision-making. \textit{Id.}

\textsuperscript{41} U.S. CONST. amend. XIV, § 1. The equal protection clause should be applied to say that a woman who is competent should not be granted more rights than a woman who is incompetent. French, \textit{supra} note 19, at 522-23. The guardian is in place to make sure that the rights of the incompetent woman are not infringed upon. \textit{Id.}

\textsuperscript{42} \textit{See} Strasser, \textit{supra} note 3, at 737-39. Protecting the rights of incompetent individuals is tricky because incompetent patients are less able to express their preferences. \textit{Id.} Though it may not be impossible for incompetent individuals to express their preferences in all situations, guardians may encounter difficulty in separating the preference from the incapacitating situation. \textit{Id.} at 737-40. For example, in the case of Mary Moe, the incapacitated person had a psychotic break sometime after her first pregnancy. \textit{See In re Guardianship of Moe,} 960 N.E.2d 350 (Mass. App. Ct. 2012); \textit{see also infra} section Part 0. Her parents and the court had difficulty determining whether her preference for carrying her baby to term was a result of her schizophrenia or if she did not want the abortion regardless of the schizophrenia. \textit{Moe,} 960 N.E.2d at 352-54.

\textsuperscript{43} Strasser, \textit{supra} note 3, at 799.

\textsuperscript{44} \textit{See, e.g.,} ALA. CODE § 26-2A-78(e) (2009).

\textit{In the interest of developing self-reliance on the part of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the minor or other interested person, may limit the powers of a guardian otherwise conferred by this section and thereby create a limited guardianship.}\textit{Id.} Nearly all of the states have a similar provision, but some put the duty more firmly on the guardian to encourage the ward’s participation. \textit{See, e.g.,} ALASKA STAT. §13.26.150(a) (2012): “In carrying out duties and powers, the guardian shall encourage the ward to participate to the maximum extent of the ward’s capacity in all decisions that affect the ward . . . .” \textit{Id.} However, in the eyes of the law, the incapacitated person is not capable of making major medical decisions on her own, which is the purpose of assigning the guardian. \textit{See id.} §13.26.150. The laws,
her rights should be lost. In response to this inability to make decisions, states have implemented guardianship statutes, instructing the guardian to act on the behalf of the patient to ensure that her rights are not infringed upon. The states regulate the guardianship relationship differently. Some states clearly define how the guardian should make his or her decision, while others solely maintain that the guardian is empowered to make decisions without guidance for how those decisions should be made. The varying forms of guardian statutes are divisible into three categories of decision-making approaches: best interest, substituted judgment, and silence.

Further, states are divided as to how much deference should be given to the beliefs or values of the incapacitated person; however, no state looks to the beliefs or values of the family when making the decision. Rather, the states assert that it is either the best interest of the patient or the substituted judgment of the patient that matters.

Many states also limit the guardian’s ability to make decisions regarding abortion. These states require a guardian to petition the court for authorization to

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45 Strasser, supra note 3, at 739; French, supra note 19, at 517; Wieber, supra note 34, at 802; see Ala. Code § 26-2A-78(e) (2009) (discussing statutes that encourage the guardian to include the ward in decision making).
46 Strasser supra note 3, at 739; French supra note 19, at 517 (explaining how courts maintain the rights of incapacitated individuals through limiting guardianships).
48 Compare Mass. Gen. Laws Ann. ch. 190B, § 5-309(a) (2013) (stating that a guardian should consider the “expressed desires and personal values of the incapacitated person”), with Ohio Rev. Code Ann. § 2111.13 (2011) (stating that a guardian may make medical decisions provided there are no objections).
49 See supra note 9 and accompanying text.
50 See Boozang, supra note 36, at 558 (stating that even progressive statutes do not include family interests).
51 See, e.g., Mass. Gen. Laws Ann. ch. 190B, §§ 5-309(a) (2013) (asserting substituted judgment); Del. Code Ann. tit. 12, § 3922(b)(3) (2007) (asserting best interest of patient). The family’s interest or beliefs do not play a statutory role in the guardian’s decision making ability because the law is only concerned with the impact of the decision on the patient. See generally Boozang, supra note 36, at 572-583 (explaining substituted judgment and best interest as decision-making schemes that only consider the patient).
52 See, e.g., 20 Pa. Cons. Stat. Ann. § 5521(d) (2005). Section 5521(d) provides “[u]nless specifically included in the guardianship order after specific findings of fact or otherwise ordered after a subsequent hearing with specific findings of fact, a guardian or emergency guardian shall
consent to an abortion for an incompetent patient. The state must balance its interest in protecting the incapacitated person with its interest in keeping the decision-making process out of the courts as much as possible, interests that may be in conflict.

The power of a guardian should be limited given that, "power tends to corrupt, and absolute power corrupts absolutely." Far too many factors could lead a guardian to abuse his or her power, thus allowing the guardian free reign over all decisions. The states have recognized the possibility of an abuse of power by placing limitations on the ability of guardians to make major healthcare decisions for the incapacitated person.

While the states want to ensure that a guardian does not abuse his or her power, requiring the guardian to receive court approval for all medical decisions is inefficient. The balancing of the states' interests, namely protecting the incapacitated person from abuse of the guardian's power and ensuring that the system is not overly burdened with

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54 See Strasser supra note 3, at 785-87 (discussing the pros and cons of requiring court approval for guardians' decisions). Probate courts are busy enough without having to approve of every decision that the guardian makes on behalf of the ward. Id. If the courts had to approve of every decision that the guardian made, there would be no reason to have a guardian, as the courts could simply confer with the doctors. Id.


56 See Alison Barnes, Article, The Virtues of Corporate and Professional Guardians, 31 Stetson L. Rev. 941, 956 (2002) (stating reasons for and evidence of guardian abuse of power). If the guardian is a member of the family and a decision could have financial implications, the guardian would have an incentive to make the decision that is in the guardian's interest rather than that of the ward. Strasser, supra note 3, at 781-782.

57 See, e.g. PA. CONS. STAT. ANN. § 5521(d), (f) (consenting to extraordinary medical procedure requires specific court authority); FLA. STAT. ANN. § 744.3215(4) (2006) (requiring special authorization from the court for commitment and biomedical research); ALASKA STAT. § 13.26.150(e) (2012) (prohibiting guardian consent for “abortion, sterilization, psychosurgery, or removal of bodily organs”); OKLA. STAT. tit. 30, § 3-119 (2012) (noting a guardian may only consent to routine medical care).

58 O'Neill, supra note 11, at 433-434 (1998) (explaining extraordinary situations where the courts have determined approval is required). Requiring a guardian to seek court approval to consent on behalf of the incapacitated person to fill a cavity or receive stitches for a gash would be inefficient. Id.; see also, Hal Fliegelman and Debora C. Fliegelman, Giving Guardians the Power To Do Medicaid Planning, 32 Wake Forest L. Rev. 341, 367-373 (1997) (outlining judicial approval in the context of estate and Medicaid planning).
routine decisions, has led to the states requiring the guardian to seek court approval only for extraordinary medical treatments such as abortion and sterilization.59

Requiring that a guardian receive authorization from the court to consent to an abortion on behalf of the incapacitated person may be problematic when the abortion is necessary in an emergency situation. Most state statutes requiring court authorization also have exceptions for emergency situations where waiting for court be impractical or impossible.60 These exceptions generally allow for the guardian, in conjunction with the physician, to make a good faith decision that the abortion is necessary for the preservation of the woman's life.61

1. Best Interest

A best interest decision-making model only looks at the objective facts surrounding the situation that necessitates the guardian making a decision for the patient.62 A few states have implemented a pure best interest rubric for decision-making.63 These statutes look at the incapacitated person through the lens that a

59 See, e.g., CAL. PROB. CODE § 2353(b) (2000); 755 ILL. COMP. STAT. ANN. 5/11a-17(d) (2013).
60 O'Neill, supra note 58, at 414-15 (discussing the exception to court approval in emergency situations); see also, e.g. KY. REV. STAT. ANN. § 387.660(3) (2011).

A guardian of a disabled person shall have the following powers and duties, except as modified by order of the court: (3) to give any necessary consent or approval to enable the ward to receive medical or other professional care, counsel, treatment or service, except that a guardian may not consent on behalf of a ward to an abortion, sterilization...unless the procedure is first approved by order of the court or is necessary, in an emergency situation, to preserve the life or prevent serious impairment of the physical health of the ward.

Id.; see also KAN. STAT. ANN. §59-3075(e)(4) (2012).

61 See, e.g., KAN. STAT. ANN. § 59-3075(e)(4) (2012) (describing one of the limitations on a guardian’s power to consent to certain medical procedures).
63 See, e.g., DEL. CODE. ANN. tit. 12, § 3922(b)(3) (2007). “The guardian shall not unreasonably withhold such consent or approval nor withhold such consent or approval on account of personal beliefs held by the guardian or the disabled person, but shall take such action as the guardian objectively believes to be in the best interest of the disabled person.” Id. See also R.I. GEN. LAWS § 33-15-29 (2011). “Every limited guardian or guardian with authority to make
patient's only interest is the objective best health outcome. Under this rubric, a health decision, such as an abortion decision, should only be made in order to ensure the best outcome for the incapacitated person's health. Consequently, an abortion would be allowable under this model if the woman's health was in danger, but not if she simply did not want to carry the baby to term or stated that she never wanted to be a mother.

Missouri is one state that operates under a best interest decision-making scheme. Specifically, the Missouri statute states that "[a] guardian or limited guardian of an incapacitated person shall act in the best interest of the ward." In *Cruzan v. Harmon*, the Supreme Court of Missouri interpreted this provision to mean that a guardian does not have the power to consent to the removal of life-support. The court reasoned that the power of the guardian does not arise from the rights of the patient to make her own medical decisions, but from the power that the government has under *parens patriae*. Since the guardian's power comes from acting on behalf of the state rather than acting on behalf of the patient, the only decision a guardian may make is to continue the administration of life-sustaining treatment. By grounding the guardian's power in the state's ability to act, the Supreme Court of Missouri held that a guardian is only allowed to act in the objective best interest of the patient.

Several other state statutes begin with instructing guardians to make the decision based on the best interest of the ward, but then go on to include the incapacitated person's preference in the decision as well, placing it outside the best interest model. These statutes instead implement a substituted judgment model which

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64 E.g., DEL. CODE ANN. tit. 12, § 3922(b)(3) (2007); MO. ANN. STAT. § 475.120 (2009).
65 See MO. ANN. STAT. § 475.120 (2009) (requiring that a guardian act in the best interest of the incapacitated person).
66 Id.
68 Harmon, 760 S.W.2d at 424.
69 Id. at 425. *Parens patriae* is the state's power to care for those who cannot care for themselves. BLACK'S LAW DICTIONARY 960 (9th ed. 2009).
70 Harmon, 760 S.W.2d at 425.
71 Id. at 427.

'Best interest' means that the benefits to the disabled person resulting from a treatment outweigh the burdens to the disabled person resulting from that treatment, taking into account: . . . (7) The religious beliefs and basic values of
relies principally on the subjective preference of the patient.\textsuperscript{73}

2. Substituted Judgment

Most states claiming to look at the best interest of the patient actually employ a substituted judgment method of decision-making.\textsuperscript{74} These states primarily look at the whole picture, including the best interest of the patient, as well as her subjective values and beliefs.\textsuperscript{75} Although the language of these statutes declare that the guardian should act in the best interest of the patient, when determining what the best interest of the patient is, the guardian must consider the wishes, beliefs, and values of the patient as they are reasonably known to the guardian.\textsuperscript{76} The states vary on how well the guardian must know the wishes of the incapacitated person.\textsuperscript{77} For instance, some states require that the guardian have evidence sufficient to demonstrate the desires of the incapacitated person "clear[ly] and convinc[ing[ly]]."\textsuperscript{78} States that employ a substituted judgment

the disabled person receiving treatment, to the extent these may assist the decision maker in determining best interest.

\textit{Id.}

\textsuperscript{73} See infra Part 0.


\textsuperscript{75} See supra note 75 and accompanying text.

\textsuperscript{76} See, e.g., Cal. Prob. Code § 2355(a) (2000). "In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator."

\textit{Id.}

\textsuperscript{77} Compare CAL. PROB. CODE § 2355(a) (2000) ("... to the extent known to the conservator"), with MD. CODE ANN. EST. & TRUSTS § 13-712(b) (2011) ("... only on the basis of clear and convincing evidence").

\textsuperscript{78} See, e.g., MD. CODE ANN. EST. & TRUSTS § 13-712(b) (2011); supra note 77. Maryland, for example, only allows the decision to be based on evidence that meets the clear and convincing standard. \textit{Id} §13-712(b). Black's Law Dictionary defines clear and convincing evidence as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY 500 (9th ed. 2009). It further explains that this standard is falls
framework require the guardian to look at a variety of factors when making a decision on behalf of the ward. However, none of these factors include the interests of the family. Some states are concerned that the family will force its beliefs on the incompetent patient even if that patient does not subscribe to those beliefs.

California provides a good example of how the substituted judgment model is applied. The California Probate Code requires that the guardian make decisions based on the patient's value system as they are known to the guardian. In *Conservatorship of Wendland*, the California Supreme Court addressed the meaning of deference to the patient's values. The California Supreme Court held that the guardian is required to use the patient's values and beliefs when making medical decisions, regardless of the informal communications of these wishes to the guardian.

between preponderance of the evidence and beyond a reasonable doubt in terms of difficulty of the burden. *Id.* Others simply require that the ward discuss preferences with the guardian before the point of incompetency. *See, e.g.*, CAL. PROB. CODE § 2355(a) (2000); *supra* note 76. As an illustration of this, California merely requires that the guardian act in good faith when considering the values and beliefs of the patient. CAL. PROB. CODE § 2355(a) (2000). "If the conservatee has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make health care decisions for the conservatee that the conservator in good faith based on medical advice determines to be necessary." *Id.* § 2355(a) (2009).

*See*, e.g. Guardianship of Jane Doe, 583 N.E.2d 1263, 1267-68 (Mass. 1992) (citing Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1977)). In judicial proceedings:

After a determination of incompetency has been made, there are five factors that judges must consider in substituting their judgment for that of incompetent people. They are: the patient's expressed preferences; the patient's religious convictions and their relation to refusal of treatment; the impact on the patient's family; the probability of adverse side effects; and the prognosis with and without treatment.

*Id.* at 1268.

*See* Boozang, *supra* note 37, at 558 (stating that no state includes family wishes in its guardianship statute).

*See* Strasser, *supra* note 3, at 779-83.

*See* CAL. PROB. CODE § 2355(a) (2000).

*Id.* at § 2355(a). "In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator." *Id.*; see generally Conservatorship of Wendland, 26 Cal. 4th 519 (2001). *See also* Conservatorship of Drabick, 200 Cal. App. 3d 185, 208 (Cal. App. 6th Dist. 1988). "These cases recognize that medical care decisions must be guided by the individual patient's interests and values." *Id.*

Conservatorship of Wendland, 26 Cal. 4th 519, 541 (2001).

*Id.*
3. Silence

Some states do not provide guidance as to how a guardian ought to make a medical decision on behalf of another.\(^8\) These state statutes simply grant the guardian the power and responsibility to consent to medical treatment.\(^8\) Most of these states further declare that an abortion can only be performed on an incompetent woman if authorized by the court.\(^8\)

Ohio, one state within this category, nevertheless has a provision where incompetent woman can object to the decision made by the guardian.\(^8\) The statute does not provide guidance on how to make the decision, but it does allow for the ward to make an objection. This provision suggests that Ohio might fit into a quasi-substituted judgment category because the incompetent woman can presumably object.


A guardian of the person may give any necessary consent or approval to enable the ward to receive medical or other professional care, counsel, treatment, or service or may withhold consent for a specific treatment, provided that the court has previously authorized the guardian to have this authority, which authority shall be reviewed by the court as part of its review of the guardian’s annual report.

Id. at §464-A:25(d).


\(^{89}\) See OHIO REV. CODE ANN. § 2111.13(C) (2011). “A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care . . . unless the ward . . . files objections with the probate court . . . .” Id. This provision is interesting because it allows the presumption that the incompetent woman, even though she has been declared incompetent, should still have a say in what happens to her. See id. It recognizes that even though her judgment may be impaired, she still understands and is affected by the decisions made on her behalf. See French, supra note 19, at 515.
on the basis of her personal values and morals and the court would be put in the position of weighing her best interest against other subjective considerations such as her religious beliefs.90

D. Premise: The Newly-Incapacitated Pregnant Woman

This note focuses on the narrow situation in which a pregnant woman is unable to make decisions regarding her body, thus requiring her next of kin to make the decision for her, a situation illustrated in the 2012 Appeals Court of Massachusetts case In re Guardianship of Mary Moe.91 In Massachusetts, the statutes require the courts to apply a substituted judgment decision making standard.92 Mary Moe, a pregnant woman, was diagnosed with schizophrenia and bi-polar disorder sometime between her first and second pregnancies.93 She terminated her first pregnancy, but her second pregnancy was carried to term.94 At the time of the case, she was pregnant for the third time.95 Her parents wanted the ability to consent to an abortion on her behalf.96 The Appeals Court, applying a substituted judgment rationale, determined that had Mary been competent, she would have chosen not to have an abortion.97 The court remanded the case back to the trial court to make a determination on the issue.98

III. Analysis

The following analysis will look at the inconsistency that arises when an incapacitate woman’s health and her beliefs are at odds and the guardian is forced to choose between the two. It will seek to introduce a system that will more adequately serve the interest of incapacitated women in the arena of the bodily integrity as it relates to reproduction.

The facts of In re Guardianship of Mary Moe can be used as the basis of analysis of substituted judgment and best interest methods of guardianship powers. The

90 See OHIO REV. CODE ANN. § 2111.13(C) (2011).
92 See MASS. GEN. LAWS ANN. ch. 190B, §§ 5-209, 5-306, 5-309 (2013); see Moe, 960 N.E.2d at 354-55.
93 See Moe, 960 N.E.2d at 352.
94 Id.
95 Id.
96 Id.
97 Id. at 354-55. Massachusetts is one of many states that apply a substituted judgment decision making standard. Id. at 354-355.
98 See Moe, 960 N.E.2d at 355.
substituted judgment method of decision-making set forth in the Massachusetts statute was integral in deciding this case.\textsuperscript{99} If Massachusetts employed a best interest rubric then Mary Moe would likely have received an abortion because the procedure likely would have been in her best interest, as she would have continued taking her medication for schizophrenia rather than carrying the fetus to term.\textsuperscript{100} However, because Massachusetts employs a substituted judgment standard, the Appellate Court stated that if Mary Moe was against having an abortion and had been for some time, the lower court should not allow her parents to force an abortion.\textsuperscript{101}

\textbf{A. Optimizing the Outcome}

The question in cases like this becomes what is the best outcome for a woman in Mary Moe's position. Mary is schizophrenic, but her symptoms are controlled with medication.\textsuperscript{102} The medication posed some risk to the health of the fetus, but her physician ultimately determined that the harm to the fetus was outweighed by the harm that would occur if Mary stopped taking her medication.\textsuperscript{103}

The first step in deciding whether Mary's health is more important than the health of her fetus should be the determination of whether or not Mary is competent to make medical decisions for herself.\textsuperscript{104} This determination should be based on the evaluation of a medical professional, preferably the doctor who prescribes the medications for her schizophrenia.\textsuperscript{105} This physician will presumably have the best

\textsuperscript{99} Id. at 354-55.
\textsuperscript{100} See supra notes, 62-63 and accompanying text (discussing the best interest doctrine).
\textsuperscript{101} See Moe, 960 N.E.2d at 354-55. The lower court would have to hear evidence on this matter to determine if Moe would receive an abortion. \textit{Id.}
\textsuperscript{102} Id. at 353 (stating that the risk of stopping the medication outweighed the risk of harm to fetus). The fact that the physician recommended that Mary continue her medication does not mean that there was minimal risk to the health of the fetus; it means that the risk of her going off of her medication was that much greater than the risk of continuing the medication. \textit{Id.} The court gave more weight to the fact that Mary would have aborted pregnancy in favor of continuing to take her medications. \textit{Id.}
\textsuperscript{103} \textit{Id.}
\textsuperscript{104} See generally supra note 9 (citing guardianship statutes that require showing of incapacity/incompetence before appointing guardian); see also O'Neill, supra note 11, at 412-13 (discussing situations in which surrogate decision-making is necessary). This analysis should be focused solely on the issue of abortion; the incompetency question should be narrowly tailored to concern only whether Mary is competent to make the decision of whether or not to abort her pregnancy. \textit{Id.} The Massachusetts Appeals Court found that the only relevant evidence on record on this matter was the fact that she denied her pregnancy. \textit{Moe}, 960 N.E.2d at 354.
\textsuperscript{105} See Strasser, supra note 3, at 737 (discussing difficulty of determining incompetence but
perspective on the extent of Mary's illness and her ability to make rational decisions.\textsuperscript{106} The determination of Mary's competence should also include the observations of her family and close friends in order to shed light on her ability to function on a day-to-day basis.\textsuperscript{107}

If Mary is deemed incompetent with respect to her ability to make medical decisions, a guardian will be appointed to make those medical decisions for her.\textsuperscript{108} How the guardian makes decisions should depend on a determination of the rights that an incompetent patient retains during their incompetency.\textsuperscript{109}

The incompetent woman should retain the same rights to obtain an abortion that she would have if she were competent.\textsuperscript{110} She should also retain the same right to choose to carry the fetus to term that she would have if competent.\textsuperscript{111} The balancing of

\textsuperscript{106} See, e.g., Jamie S. King and Benjamin W. Moulton, \textit{Rethinking Informed Consent: The Case for Shared Medical Decision-Making}, 32 Am. J. L. and Med. 429, 455 (2006). Though the physician brings her own biases to the decision making process, his perspective is still valuable. \textit{Id.}

\textsuperscript{107} See Boozang, \textit{supra} note 36, at 609 (proposing that the family's concerns should be taken into account). However, the court should use its discretion when determining if the family and friends are speaking to what the patient herself would prefer. Strasser, \textit{supra} note 3, at 778-85 (discussing the role that the family should play in decision-making and the concerns that go along with family involvement). Furthermore, the guardian who disagreed with the preference of the ward could use the reasoning from \textit{Harris v. McRae} to say that the incapacitated woman does not have the right to the abortion. \textit{Harris v. McRae}, 448 U.S. 297, 326 (1980). In this case, the Supreme Court determined that the right to an abortion does not also include the right to have the government pay for an abortion that is not medically necessary. \textit{Id.} The guardian could state, in the situation where the choice is not between the mother's life and the life of the fetus, that the woman does not have the right for the guardian to consent to the abortion. \textit{Id.} The guardian could claim that it is not in her best interest because of the guardian's religious or moral objections. \textit{Id.} A guardian with a moral or religious objection to abortion could possibly try every method possible to prevent the incapacitated woman from having an abortion. \textit{Id.}

\textsuperscript{108} See \textit{Moe}, 960 N.E.2d at 355 (explaining that the district court would have to determine if a guardian is necessary). The guardian would then have to be chosen according to the state's statute. \textit{See, e.g., Mass. Gen. Laws Ann. ch. 190B, § 5-306(b) (2013) (stating that appointed guardian will be able to exercise his/her authority under the statute)}.

\textsuperscript{109} See \textit{supra} note 42 and accompanying text (discussing importance of protecting the rights of the incompetent/incapacitated person).

\textsuperscript{110} See French, \textit{supra} note 19, at 528-29 (discussing the unconstitutionality of fetal representation owing to the discriminatory treatment of incompetent patients). Fetal representation is a proposal by some right-to-life advocates that the fetus should have a representative in the same way that the incompetent woman has a guardian. \textit{Id.} at 512. The fetal representative would advocate for the life of the fetus against the performance of an abortion. \textit{Id.}

\textsuperscript{111} \textit{Id.} at 521-23.
the incompetent woman's rights is a tricky one for any guardian.\textsuperscript{112} The guardian, in the name of enforcing the woman's right to withhold consent, can make the determination that the woman should carry the fetus to term even if she is unconscious and will never regain consciousness.\textsuperscript{113} If her wishes dictate that she carry the baby to term, the guardian is in the position of allowing her to become an incubator for a fetus that she may never meet and for whom she may be unable to care.\textsuperscript{114} Conversely, an incompetent woman should not be forced to become an incubator for a child and put her own health in jeopardy if that is not what she would otherwise choose.\textsuperscript{115} The incompetent women's family should know that her wishes are respected.\textsuperscript{116} This knowledge gives families a better sense of control over the situation and a better sense that their loved one has not become a nameless, faceless medical file.\textsuperscript{117}

The best outcome in any situation where the guardian has to decide for or against abortion is the one that maximizes the patient's bodily integrity.\textsuperscript{118} The purpose

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 116-17 (noting competing interests inherent in guardianship determinations).
\item See Strasser, supra note 3, at 758-59 (discussing guardian’s ability to make medical treatment determinations based on personal knowledge of patient’s values).
\item See id. (explaining guardian’s responsibility to take into account incompetent patient’s wishes regarding medical decisions).
\item See id. at 760-61 (discussing danger in guardian using own personal values in decision making for incompetent person).
\item See Stacy, supra note 6, at 535. The interest that other conscious patients have in making sure that an incompetent woman’s wishes are followed can be extended to the interest that her family has in making sure that her wishes are followed. \textit{Id.} The family will want to understand that their daughter is being treated the way she would have wanted to be treated and will want to be sure that if they were in a similar position, their wishes would also be followed. \textit{Id.}
\item See Boozang, supra note 36, at 549-50 (arguing that death is a community event). Boozang claims that death is a community event because of the closeness that develops between the terminally ill and the caretaker. \textit{Id.} Similar to an incompetent patient, the terminally ill patient is not the only one affected by end-of-life decisions. \textit{Id.} Presumably the same closeness would arise between a caretaker and the incompetent patient. \textit{Id.} The decision of whether the incompetent woman should have an abortion or not will affect more than just the woman because her caretakers will have to help raise the child or help make the decision to put the child up for adoption if the woman carries the baby to term. \textit{Id.}
\item See Strasser, supra note 3, at 737-40 (discussing the rights that should be retained by incompetent patients). Many of the states agree with this proposition and structure their guardianship statutes accordingly. See, e.g., \textsc{Alaska Stat.} \textsection{} 13.26.150(a) (2012):
\begin{quote}
In carrying out duties and powers, the guardian shall encourage the ward to participate to the maximum extent of the ward’s capacity in all decisions that affect the ward, to act on the ward’s own behalf in all matters in which the ward is able, and to develop or regain, to the maximum extent possible, the capacity to meet the essential requirements for physical health or safety, to
\end{quote}
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\end{footnotesize}
of the guardianship is to assert the right bodily integrity that the woman is not competent to assert herself.\textsuperscript{119} The preservation of Mary's bodily integrity is important both for Mary as an individual and for her family.\textsuperscript{120} Furthermore, it is important for Mary to maintain bodily integrity even if she is unable to make decisions regarding her healthcare, because women should understand that if they become incompetent, their wishes and beliefs will still be followed.\textsuperscript{121} Even as a woman with schizophrenia, Mary should still maintain her identity as a human being.\textsuperscript{122} Thus, she should not be forced into having an abortion if she does not believe it is right.\textsuperscript{123} Asserting her bodily integrity may mean vehemently sticking to the woman's religious beliefs, or it may mean choosing what is in her best interest; however, it is critical to analyze each case by its own facts and circumstances.\textsuperscript{124} A blanket rule that will apply in all cases is unlikely, as establishing such a rule would diminish the idea that every woman, competent or not, is 

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\textit{Id.} See also, e.g., \textsc{Conn. Gen. Stat. Ann.} \S 45a-656(b) (2011):

In carrying out the duties and authority assigned by the court, the conservator of the person shall exercise such duties and authority in a manner that is the least restrictive means of intervention and shall (1) assist the conserved person in removing obstacles to independence, (2) assist the conserved person in achieving self-reliance . . . The conservator shall afford the conserved person the opportunity to participate meaningfully in decision-making in accordance with the conserved person's abilities and shall delegate to the conserved person reasonable responsibility for decisions affecting such conserved person's well-being.

\textit{Id.} Provisions such as the two preceding are a common element in many of the state's guardianship statutes. Allowing the incompetent person the ability to participate in decision-making is one right on which the majority of the states agree.

\textsuperscript{119} See French, \textit{supra} note 19, at 519-20; see also Wieber, \textit{supra} note 34, at 803-06 (arguing that it is the guardian's duty to assert the rights of the ward, as the state supplies them).

\textsuperscript{120} See Stacy, \textit{supra} note 6, at 535 (arguing state has some interest in enforcing proxy of irreversibly comatose person and its effect on the family); \textit{but see} Boozang, \textit{supra} note 36, at 616 (arguing that the irreversibly comatose patient has no interest in her continued life); \textit{see also} Stacy, \textit{supra} note 36, at 536-37 (arguing where there is no living will, interests of irreversibly comatose patient need not be honored).

\textsuperscript{121} See Stacy, \textit{supra} note 6, at 502; \textit{see also} Boozang, \textit{supra} note 36, at 550-52 (discussing the law of death and dying being based on personal autonomy). Mary does not fit into the analysis from Stacy and Boozang because she is not an irreversibly comatose patient. Stacy, \textit{supra} note 6, at 502-09 (comparing concepts of death based on consciousness to those not based on consciousness). She was conscious of what was happening, though her condition might have made that consciousness unstable. \textit{In re Guardianship of Mary Moe}, 960 N.E.2d 350, 352 (Mass. App. Ct. 2012).

\textsuperscript{122} See Moe, 960 N.E.2d at 353-55.

\textsuperscript{123} See \textit{id}.

\textsuperscript{124} See Strasser, \textit{supra} note 3, at 749-50 (stating the different situations under which substituted judgment might arise).
an individual and is therefore entitled to an individualized decision.125

B. Substituted Judgment vs. Best Interest

1. Substituted Judgment

States that implement a substituted judgment framework for surrogate decision making generally consider multiple methodologies, including best interest.126 Pure substituted judgment looks to what decision the woman would make if she were competent, and then requires the guardian to enforce that decision.127 This process could be problematic in a situation like Mary Moe's because when the woman voiced her beliefs she may not have considered her current condition: pregnant and incompetent.128 By definition, a decision cannot be informed if the current circumstance is not considered.129 Nonetheless, one remaining benefit of substituted judgment is that a guardian is required to make sure that the medical treatment the patient receives is as close to what she would choose herself as possible.130 This means the woman’s rights are respected through the guardian verifying that the woman’s wishes are followed.131

125 See id. (discussing Massachusetts Supreme Judicial Court suggesting that a shift from the paternalistic view of best interest would be appropriate); see also id. at 740 (discussing the difficulty of creating a paradigm to follow in making decisions for incompetents as their condition is constantly in flux). Creating one set rubric where all elements of a decision are weighed the same will lead to a decision-making process that will disregard the weight that the woman would give to each element. A devout Catholic woman would likely find that the life of the fetus is more important than her own life where the two are in conflict and an affirmative action is necessary to save her own life. However, a woman who is Catholic but does not structure her life around Catholic tenets might look to another consideration rather than her Catholic faith when making a health care decision.

126 See supra Parts 0-0; see, e.g., MASS. GEN. LAWS ch. 190B, § 5-309(a) (2013). “A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person’s best interest and exercise reasonable care, diligence, and prudence.” Id.

127 See supra part 0; see, e.g., MINN. STAT. § 524.5-313(c)(i) (2012). “The guardian shall not consent to any medical care for the ward which violates the known conscientious, religious, or moral beliefs of the ward.” Id. In Minnesota, if the guardian knows that the ward would object to a particular procedure, it would not matter if it is in her best interest, the guardian could not consent. Id.

128 See Strasser, supra note 3, at 741 (considering when incompetent patient expressed preference for care but did not understand current situation).

129 See id.

130 See supra Part II.c.ii.

131 See id. In a substituted judgment model of decision making, the guardian protects the right of the woman to assert her beliefs by acting as she would act if she were capable. Id.
This process is important for the protection of bodily integrity as it ensures that the woman's wishes are respected.132

The substituted judgment approach also has several drawbacks. One such drawback is possible difficulty discerning what a woman would consider were she competent to make the decision, particularly since the only information with which the guardian has to work is those preferences the woman expressed before becoming incompetent.133 Predicting what a woman would choose if she were competent to make a decision is impossible. The difference between discussing values in the abstract and actually following those values once a situation presents itself is drastic.134 Before facing such a decision, a woman might say that she opposes abortion under all circumstances. When a situation arises where she has to choose between her life and the life of the fetus, she may think differently. Following the preferences she expressed in the abstract must be compared to the fact that in a time of illness, the patient may put her physical health over her religious beliefs.135

Furthermore, the guardian might not know if the patient has changed her mind since the last time she discussed her wishes with the guardian. The guardian is placed in the difficult situation of trying to determine how the patient would weigh the factors when making a decision.136 The guardian must use his or her best estimate of what the patient would want, but he or she can never be certain that the decision made is the one

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132 See Stacy, supra note 6, at 505-06. Stacy also claims that it is important to both the incompetent woman and those around her that her wishes are followed. Id. at 582.

133 See Alexia M. Torke et al., Substituted Judgment: The Limitations of Autonomy in Surrogate Decision Making, 23 J. GEN. INTERN. MED. 1514, 1514-15 (2008). This issue becomes an even greater problem when the woman was never competent to make medical decisions. See Strasser, supra note 3, at 763-66. See supra note 42 and accompanying text; Wieber, supra note 34; French, supra note 19.

134 See, e.g., Jeremy W. Peters, G.O.P. Senator Says He Has a Gay Son, and Backs Gay Marriage, N.Y. TIMES, March 15, 2013, http://www.nytimes.com/2013/03/16/us/politics/ohios-portman-says-he-supports-gay-marriage.html?_r=0. This phenomenon is analogous to legislators who are zealous advocates for a particular legislation until they realize that the legislation will negatively impact someone they know and love. Id. Congressman Rob Portman, a Republican member of the US House of Representatives, was vociferously opposed to same-sex marriage for years but recently changed his position because he has a son who is gay. Id. The Congressman had been opposed to the abstract idea of same sex marriage, but when he realized that his position affected someone he loved, he could no longer maintain that position. Id.

135 See generally Stacy, supra note 6, at 529-32.

136 See Strasser, supra note 3, at 752 (explaining the concerns surrounding the power granted to the guardian under substituted judgment).
the woman herself would make.137

2. Best Interest

Pure best interest cannot obtain the optimal outcome because it treats the patient as a medical chart.138 It does not allow for religious or personal beliefs of the patient as a person.139 Instead, pure best interest only allows the guardian to make the decision that will have the best result for the physical health of the patient.140

With pure best interest decision-making, decision-making by the guardian is almost unnecessary.141 A doctor can determine herself what is in the patient's best interest and then implement that treatment.142 The benefit of a best interest method of decision making is simplicity; if the treatment would be best for the health of the woman, it is used, and if the treatment would not benefit the woman then it is not used.143 This streamlines the decision making process.

The best interest approach, however, removes all individuality from the patient; the patient becomes a list of symptoms and treatments.144 Under a best interest approach, a devoutly Catholic woman, who does not believe that abortion should be performed in any situation, could be forced into having an abortion when a doctor determines it necessary for her health.145 This decision making process flies in the face of the woman's First Amendment right to freely exercise her religion.146 The doctor is

137 Id. at 752. But see supra note 80 (outlining states where the guardian must make decisions based on an evidentiary threshold).
138 Id. at 770 (explaining best interest as an approach that completely ignores the stated interests of the patient).
139 Id. at 752 (explaining best interest does not take into account patient’s personal values). See also DEL. CODE ANN. tit. 12, § 3922(b)(3) (2007). “The guardian . . . shall take such action as the guardian objectively believes to be in the best interest of the disabled person.” Id.
140 See Strasser, supra note 3, at 770-71.
141 See supra notes 67, 69-70 and accompanying text. In these states, the guardian is limited to what is in the best interest of the patient, a determination that will require deference to the physician’s recommendations. Id.
142 See supra notes 67, 69 and 70 and accompanying text.
143 See supra Part 0.
144 See, e.g., OHIO REV. CODE ANN. § 2111.13 (2011) (forbidding the guardian to consider the beliefs of the incapacitated person when making medical decisions).
145 See supra note 93 and accompanying text (implying that religious beliefs of disabled need not enter into the best interests determination).
essentially acting as the State’s proxy in denying the woman her right to practice her religion.

C. Structuring Guardianship Law to Achieve the Optimal Outcome: A Proposal

Both the best interest and the substituted judgment approaches have benefits. The best interest doctrine is simple to apply, yet does not allow for the individuality of the patient.147 On the other hand, the substituted judgment doctrine allows for the individuality of the patient, but is complicated in its application.148 The best approach, therefore, would be a combination of substituted judgment and best interest.149 Under such a schema, the guardian would consider all of the circumstances; however, in certain situations it might be necessary to weigh best interest more than other factors even when the woman would not have made that decision.150 Maintaining the woman’s interest in what happens to her body during her incompetency is important to make sure that she continues to feel like an individual regardless of her ability to make the decision.151

Additionally, the guardian should take into consideration what the patient says at the time the decision is made.152 The guardian has a duty to the woman which implies that he should pay attention to her current wishes.153 Her legal incompetency does not

147 See supra note 144-148 and accompanying text (discussing drawbacks of best interest approach).
148 See supra notes 133-137 and accompanying text (discussing drawbacks of substituted judgment doctrine).
149 This combination could be structured like the statute in Massachusetts. See supra note 105 and accompanying text. This would give the guardian and the courts guidance on how decisions can be made when the woman cannot make her own decisions and has not left a legal document outlining the way decisions should be made. See id.
150 See id. For example, where the life of the woman is in jeopardy, what is in her best interest might be weighed more heavily against the other considerations. Id.
151 See O’Neill, supra note 11, at 418 (explaining that the right to self-determination includes the right to control medical treatment when incapacitated).
152 See, e.g., ALASKA STAT. § 13.26.150(a) (2012); KAN. STAT. ANN. § 59-3075(a)(2) (2012). Many of the states already accept that this is beneficial by requiring guardians to encourage the incapacitated person to assist to the best of their ability in decision making. See, e.g., ALASKA STAT. § 13.26.150(a) (2012); KAN. STAT. ANN. § 59-3075(a)(2) (2012).
necessarily mean that she cannot provide input on the decision.\textsuperscript{154}

Determining what a person would choose for herself in a situation where she is unable to make a decision is difficult.\textsuperscript{155} The guardian should look to what the patient expressed when she was competent by speaking with her family members and close friends: those people with whom she would have discussed possible health complications.\textsuperscript{156} The guardian should look at religious beliefs, moral values, and other factors that the woman herself would consider. If she did not have an expressed aversion to abortion, but expressed a desire to have a child, that desire might be weighed more than her life.\textsuperscript{157}

D. Applying the Proposal

In the case of Mary Moe, Mary's parents would have to look at her conversion to Catholicism and then determine if she would want to remain on her medications and thus need to terminate the pregnancy or if she would want to go off of the medications in order to safely carry the child to term. In this situation, it might be necessary to weigh the patient's best interest more than her interest in asserting her Catholicism because her conversion happened after her schizophrenia emerged.

IV. Conclusion

Many of the guardianship statutes enacted by the states do not provide the guidance necessary for the guardian to know how to make a decision regarding the which limits the deprivation of civil rights and restricts his personal freedom only to the extent necessary . . . .” Ky. Rev. Stat. Ann. § 387.660(4) (2011).

\textsuperscript{154} See generally ALASKA STAT. § 13.26.150(a) (2012); KAN. STAT. ANN. § 59-3075(a)(2) (2012). “In carrying out duties and powers, the guardian shall encourage the ward to participate to the maximum extent of the ward's capacity in all decisions that affect the ward . . . .” ALASKA STAT. § 13.26.150(a) (2012). “A guardian shall encourage the ward to participate in making decisions affecting the ward.” KAN. STAT. ANN. § 59-3075(a)(2) (2012).

\textsuperscript{155} See Stacy, supra note 6, at 536-37 (discussing the difficulty in assigning wishes to a person who cannot communicate those wishes).

\textsuperscript{156} See Strasser, supra note 3, at 779-80 (explaining reasons for and against family members as most knowledgeable of incapacitated person's wishes).

\textsuperscript{157} See In re Guardianship of Mary Moe, 960 N.E.2d 350, 353, 355 (Mass. App. Ct. 2012) (holding that religious belief could outweigh mother's mental health). However, the guardian should also consider whether she would have wanted to be a mother, which would include actually caring for the child. If her desire was to be a mother, than that fact might be used to demonstrate her desire not to have the child enter the world motherless. See supra note 44 (discussing that the guardian should involve the patient in decision-making).
health of the ward. In the case of a woman who becomes incompetent during or shortly before pregnancy, this is an issue because the guardian is left without a rubric by which to make the decision about an abortion. The states should enact guardianship statutes that maximize the woman’s autonomy while still allowing the guardian the ability to make difficult decisions. This means that the states should combine the substituted judgment and best interest approaches. This will allow the guardian to consider what the woman would have chosen were she competent to make the decision, but also take her interests into account such as her quality of life. Lastly, including the best interest approach will allow the guardian to make a decision even if the woman did not express her preferences.