DISABILITY LAW—BURDEN OF PROOF—AN INDIVIDUAL CHALLENGING THE CAPACITY OF A DEVELOPMENTALLY-DISABLED PERSON TO MAKE AN INDEPENDENT DECISION BEARS THE BURDEN OF PROVING BY CLEAR AND CONVINCING EVIDENCE THAT THE DISABLED PERSON HAS THE SPECIFIC INCAPACITY TO DECIDE—*In re M.R.*, 135 N.J. 155, 638 A.2d 1274 (1994).

The treatment of the developmentally-disabled, particularly the mentally retarded, evidences a long history of oppression, segregation, and prejudice.[1] Recently, however, a growing concern for the rights of the physically and mentally disabled has developed.[2] At the federal and local level, lawmakers have enacted ex-

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[1] Marie Appleby, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109, 112-13 (1987). The discrimination and mistreatment of persons with mental retardation created the need for an intermediate level of scrutiny to review governmental action that singularly affects mentally-retarded citizens. *Id.* at 130. The mistreatment of the mentally retarded can be traced back to the colonial period during which society classified retarded individuals as witches. *Id.* at 113. The evil perception of the mentally retarded continued for centuries until physicians eventually began to conduct research in the 19th century. *Id.* The studies incorrectly concluded that all types of mental retardation were hereditary. *Id.* It was not until the 1940s that professionals and society finally understood that genetics only contributed to a small percentage of mental retardation and that the majority of the underlying causes were unknown. *Id.*

The earliest governmental institutionalization of the mentally retarded reflected sub-human conditions. *Id.* at 114. Many residents were routinely handcuffed and chained and, in some instances, were displayed for profit. *Id.* With studies confirming mental retardation as a genetic trait, support grew for sterilizing and eliminating the mentally retarded from society. *Id.* at 113, 115.

Conditions in the first half of the 20th century continued to subject the mentally retarded to discrimination and mistreatment. *Id.* at 115. Institutionalized individuals continued to receive less than adequate care. *Id.* For instance, treatment for the mentally retarded consisted of straitjackets, lock-ups, medication, and physical punishment, and residents were often restricted to bed with no more than a diaper. *Id.* at 116. Reform finally occurred in the 1970s with the advent of deinstitutionalization. *Id. See also* William Christian, Note, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409, 410-11 (1994) (suggesting the goal of normalization as a means to enable mentally-retarded individuals with a lifestyle most closely analogous to nondisabled society); Laura A. Lorenzo, Comment, *Societal Prejudice Reflected in Our Courts: The Unfavorable Treatment of the Mentally Retarded*, 2 SETON HALL CONST. L.J. 771, 771 (1992) (exposing the discriminatory treatment of persons with mental retardation by society and the courts). *But see* Savidge v. Fincannon, 836 F.2d 898, 900 (5th Cir. 1988) (noting that as recently as 1986, inadequate conditions existed at the Fort Worth State School for the Retarded).

[2] *See* James W. Ellis, *Decisions By And For People With Mental Retardation: Balancing Considerations of Autonomy and Protection*, 37 VILL. L. REV. 1779, 1779 (1992) (recognizing the difficulty in accommodating the autonomy of disabled individuals with society's interest in protecting these individuals from harm). Ellis discussed the need to strike a balance between a mentally-retarded person's interest in autonomous decision making and the need to protect that person from being deprived of her liberty

tensive legislation to protect the disabled from discrimination.[3] In addition to the recent legislative efforts, judicially appointed guardianships[4] have also served as a means to protect the best interests of the developmentally-disabled.[5]

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under the false pretext of consent. *Id.* at 1809. *See also* Lawrence A. Frolik, *Plenary Guardianship: An Analysis, A Critique and A Proposal For Reform*, 23 ARIZ. L. REV. 599, 601, 660 (1981) (emphasizing that guardianship reform is urgently necessary to better protect the rights of the mentally incompetent and that any comprehensive reform requires the abolishment of plenary guardianship); *cf.* Steven J. Schwartz, *Abolishing Competency as a Construction of Difference: A Radical Proposal to Promote the Equality of Persons with Disabilities*, 47 U. MIAMI L. REV. 867, 881-82 (1993) (proposing a reconstruction of the traditional model of legal decision making by implementing a rights analysis from the perspective of individuals with disabilities).

[3] *See, e.g.*, Equal Opportunity for Individuals with Disabilities (American Disabilities Act), 42 U.S.C. §§ 12101-12213, §12101(b) (Supp. II 1991) (mandating the cessation of discrimination against the disabled in the workplace, state and local government services, public transportation, and public accommodations); *see also* Developmentally Disabled Rights Act, N.J. STAT. ANN. §§ 30:6D-1 to 6D-22 (West 1981 & Supp. 1995) (defining developmental disability and protecting the rights of the developmentally disabled).

As indicated by the timely enactment of legislation, the New Jersey State Constitution, and recent judicial decisions, "the clear public policy of this state is to respect the right of self-determination of all people, including the developmentally-disabled." *In re* M.R., 135 N.J. 155, 166, 638 A.2d 1274, 1279 (1994). Justice Pollock indicated that all persons, including the developmentally-disabled, derive such rights from the state constitution, which states that "'[a]ll persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty . . . and of pursuing and obtaining safety and happiness.'" *Id.* (quoting N.J. CONST. art. I, cl. 1.).

[4] A guardianship is defined as "a legal arrangement under which one person (a guardian) has the legal right and duty to care for another (the ward) and his or her property." BLACK'S LAW DICTIONARY 707 (6th ed. 1990). A court establishes a guardianship as a result of the ward being unable to legally act on his or her own behalf. *Id.* For a discussion of guardianship arrangements, see John Parry, *Selected Recommendations from the National Guardianship Symposium at Wingspread*, 12 MENTAL & PHYS. DISABILITY L. REP. 398, 399 (1988) (describing the guardianship concept and guardianship arrangements).

The need to establish a formal guardianship arrangement grew from society's need to effectuate substitute decision making concerning such questions as "when should a substitute decision-maker be appointed; over what personal and property rights should the substitute make decisions; and who should be the one to exercise these powers." *Id.* at 398. Parry indicates that guardianship arrangements can be classified into four categories: plenary guardianship, guardianship of the person, guardianship of the estate, and limited guardianship. *Id.* at 399. A plenary guardianship arrangement vests the guardian with the authority to make decisions on behalf of the ward at an incompetency adjudication. *Id.* A guardianship of the estate appointment concerns the financial and property rights of the incompetent while a guardianship of the person arrangement encompasses the remaining rights involved with personal decision-making. *Id.* The last arrangement, a limited guardianship, particularizes the decision making dynamics to the individual needs of the ward. *Id.* The guardianship order only comprises those decisions that concern the ward's incapacity. *Id.*

[5] *See* Frolik, *supra* note 2, at 601-02. Instituted as a means of protection for those

Despite these efforts to maximize a disabled person's autonomy, a guardianship appointment, in particular, raises crucial questions as to the effective preservation of a developmentally-disabled person's right to self-determination.[6] Courts are placed in a precarious situation that requires a balancing between a developmentally-disabled person's individual autonomy and the longstanding judicial concerns for their best interests.[7]

In April 1994, the New Jersey Supreme Court was called on to determine the extent to which a generally incompetent developmentally-disabled person should determine where to reside.[8] In a unanimous opinion, the court held in *In re M.R.* that the individual challenging a developmentally-disabled person's capacity to make an independent decision bears the burden of proving by clear and convincing evidence that the disabled person has the specific incapacity to decide.[9] The court further declared that a finding that an individual is mentally incompetent does not necessitate an absolute deprivation of an individual's right to make all decisions for himself.[10] In furtherance of that finding, the court held that the pri-

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unable to protect themselves, state law mandates the appointment of a guardian for those persons who do not possess the capacity to take care of themselves or their property. *Id.* The state requires a guardianship appointment if an individual is mentally incapacitated because of mental illness, mental retardation, senility, old age, or drug/alcohol conditions that render her unable to make responsible decisions regarding her person or property. *Id.* at 602-03.

6 *See M.R.*, 135 N.J. at 165, 638 A.2d at 1279 (finding that the best interest of the developmentally-disabled must be balanced with their right of self-determination). *See also* Parry, *supra* note 4, at 399 (indicating the difficulty in finding a balance between an incompetent individual's rights and society's need to ensure their protection in modern society where such interests are not clearly defined); Ellis, *supra* note 2, at 1779 (stating that decisions regarding the lives of individuals with mental retardation must weigh the personal interests of those individuals against the public policy concerns of the state). Ellis contends:

> On the one hand there is the desire to accommodate the autonomous choices of individuals with disabilities and enhance their ability to make decisions affecting their own lives. On the other hand, there is also a commonly felt need to protect individuals with substantial mental disabilities from the adverse consequences of potentially unwise, ill-informed or incompetently made decisions. Each of these two impulses is a fully understandable and reasonable concern, and yet each may be the source of abuse of persons with disabilities.

Id.

7 *M.R.*, 135 N.J. at 165, 638 A.2d at 1279.

8 *Id.* at 159, 638 A.2d at 1276.

9 *Id.* at 169, 638 A.2d at 1281. Chief Justice Wilentz and Justices Clifford, Handler, O'Hern, Garibaldi, and Stein joined Justice Pollock in ruling for the affirmance, reversal, and remand of the appellate division's judgment. *Id.* at 179, 638 A.2d at 1286.

10 *Id.* at 177, 638 A.2d at 1285.

mary duty of counsel for a developmentally-disabled person is to protect that person's fundamental rights,[11] particularly the right of self-determination.[12]

Since her parents divorced in 1979, M.R. has resided with her mother while visiting with her father on weekends and in the summer.[13] M.R. is a twenty-one-year-old woman with Down's Syndrome[14] whose condition is considered to be one of mild to moderate mental retardation.[15] As she reached her eighteenth birthday, M.R. began to express a desire to leave her mother's home and move to her father's residence.[16] The court recognized that each home presented a loving environment for M.R. but

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11 The Supreme Court has long recognized that the concept of liberty embodied in the Fourteenth Amendment protects those personal rights which are fundamental. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that a woman's right to privacy in deciding whether or not to terminate her pregnancy is a fundamental right under the Fourteenth Amendment); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972) (extending the right to use contraceptives to all persons); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (recognizing that the right to privacy encompasses an individual's right to marry); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (finding a state act that prevented parents from sending their children to private schools was an unreasonable interference with a parent's right to decide the upbringing and schooling of their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing that the liberties guaranteed by the Fourteenth Amendment encompass the right to marry, raise children, and establish a home).

12 *M.R.*, 135 N.J. at 177, 638 A.2d at 1285. The court recognized the potential for a conflict to arise between a mentally disabled person's preference and what serves that person's best interest. *Id.* at 178, 638 A.2d 1285 (citation omitted). In such a situation, the attorney for the disabled person may advise the court of the possible need for an appointment of a guardian *ad litem*. *Id.*

13 *Id.* at 159, 163, 638 A.2d at 1276, 1278.

14 *Id.* at 159, 638 A.2d at 1276. Down's Syndrome is a "condition characterized by a small, anteroposteriorly flattened skull, short, flat-bridged nose, epicanthal fold, short phalanges, and widened space between the first and second digits of hands and feet, with moderate to severe mental retardation." THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 691 (1987). The scientific name for Down's Syndrome is trisomy-21. BUTTERWORTH'S MEDICO-LEGAL ENCYCLOPEDIA 172 (1987). The classification as trisomy-21 stems from the condition of the affected child's nuclei which only contains 47 chromosomes. *Id.*

15 *M.R.*, 135 N.J. at 159, 638 A.2d at 1276. According to the American Association on Mental Retardation:

> "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18."

See Ellis, *supra* note 2, at 1781-82 (quoting AMERICAN ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

16 *Id.* at 159, 638 A.2d at 1276. M.R.'s mother instituted legal action to be ap-

noted that the mother and the father disagreed as to the appropriate amount of freedom M.R. should have in her daily life.[17] The father's parenting method concentrated on presenting M.R. with options that ultimately were to be decided by her.[18] In contrast, the mother's approach focused on maintaining a balance between M.R.'s freedom of choice and the need for structure in her daily life.[19]

Once M.R. began to verbalize her desire to remain in the less-structured environment created by her father, M.R.'s mother instituted a guardianship action in the New Jersey Superior Court, Chancery Division.[20] Seeking an appointment as M.R.'s general guardian, M.R.'s mother claimed that her daughter lacked the specific capacity to decide where to reside.[21] The trial court deter-

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pointed as M.R.'s legal guardian after M.R. expressed that she wanted to live with her father. *Id.*

17 *Id.* at 161, 638 A.2d at 1277.

18 *See id.* (indicating that M.R.'s father gave her the freedom to select her clothes, her daily activities, and most other decisions that affected how she spent her time). While staying at her father's, M.R. answered the phone, attended dances, went bowling, and attended Sunday School. *Id.* If M.R. was given the opportunity to live with her father, M.R. would be given the choice to attend dances and participate in sports, such as swimming, aerobics, and basketball. *Id.* Her father described his home as one that provided a good, comfortable atmosphere for M.R. *Id.*

19 *M.R.*, 135 N.J. at 162, 638 A.2d at 1277. M.R.'s mother testified that having rules and a structured life, at both home and school, is important for M.R. *Id.* She stated that she gave her daughter some choices but believed being too free could be detrimental. *Id.* While at her mother's home, M.R. performed household chores, assisted with the food shopping, participated in track and field at school, went to the movies with friends, and camped with her mother and stepfather. *Id.* Occasionally, M.R.'s mother allowed her to accompany her stepfather to work on his company's truck, but she was not permitted to answer the business phone. *Id.* She was, however, allowed to answer the family phone. *Id.*

20 *Id.* at 159, 638 A.2d at 1276. As required by Rule 4:86-4(b) of the New Jersey Rules Governing Civil Practice, the trial court appointed Paul G. Hunczak to serve as M.R.'s attorney. *Id.* at 159-60, 638 A.2d at 1276 (citing N.J. Ct. R. 4:86-4(b)).

21 *Id.* at 160, 638 A.2d at 1276. Conversely, M.R.'s father contended that M.R. had the ability to decide for herself where to live and her decision was to live with him. *Id.* at 163, 638 A.2d at 1278.

In determining the crucial issue as to M.R.'s capacity to express her desire to live with her father, both sides presented several witnesses. *See id.* at 160, 638 A.2d at 1276. The court selected Dr. Deborah Dawson, a psychologist who serves as the director of the Guardianship Evaluation Project of the Center for Applied Psychology at Rutgers University, to examine M.R. *Id.* The tests conducted by Dr. Dawson revealed that M.R. was mildly retarded, placing her level of social behavior to be the equivalent of a six or eight-year-old and her adaptive behavior skills at the level of approximately an eight-year-old. *Id.* As a result of her examination, Dr. Dawson concluded that M.R. had the ability to express a preference. *Id.* Her testimony indicated that the choice of where to live was a very specific choice and one that M.R. was capable of understanding. *Id.*

To support her contention that M.R. lacked the specific capacity to decide where

mined that M.R. was unable to consider the consequences of the appointment of either parent as her guardian and lacked the specific capacity to decide where to live.[22] As the party seeking to change the status quo, the trial court held that M.R.'s father bore the burden of proof to establish M.R.'s competency.[23] Because

to live, M.R.'s mother presented two witnesses. *Id.* The mother's first witness was David Hegner, the chairman of the Special Education Department at M.R.'s school. *Id.* Mr. Hegner holds a master's degree in special education and also had been M.R.'s special education teacher for the two years prior to the trial. *Id.* Mr. Hegner's analysis of M.R. revealed that she functioned at the second or third-grade level, which is at the level of an eight or nine-year-old. *Id.* He expressed skepticism regarding M.R.'s ability to make rational adult choices despite his acknowledgment that M.R. was able to make certain decisions at a level more advanced than a third grader. *Id.*, 638 A.2d at 1276-77. Mr. Hegner concluded that M.R.'s expressed preference to live with her father was merely attributable to M.R.'s association of fun with her father's house. *Id.*, 638 A.2d at 1277. Therefore, Mr. Hegner determined M.R. was unable to make an "adult decision" regarding her residence. *Id.*

The second witness to testify on the mother's behalf was Ira Yorn. *Id.* at 161, 638 A.2d at 1277. Mr. Yorn is a certified school psychologist and was M.R.'s school psychologist and case manager for the previous two years. *Id.* Mr. Yorn conducted tests that revealed M.R.'s educable level was in the mentally-deficient range. *Id.* Specifically, M.R.'s verbal skills were equal to that of a seven to ten-year-old and her nonverbal skills fell into the range between a six-and-one-half-year-old and an eight-year-old. *Id.* Mr. Yorn categorized M.R.'s practical and social judgment to be that of a six-year-old and considered her overall functioning to be the equivalent of an eight or nine-year-old. *Id.*

[22] *Id.* at 164, 638 A.2d at 1278. When interviewed by the court, M.R. expressed enthusiasm about her summer job, which required living with her mother. *Id.* at 163, 638 A.2d at 1278. M.R. selected her father, however, when asked whom the court should appoint to assist her in making difficult decisions. *Id.*

Despite the fact that M.R. expressed a preference, the court found M.R. was difficult to understand. *Id.* at 164, 638 A.2d at 1278. According to the court, M.R.'s reasons for wanting to live with her father were illogical and irrational. *Id.* The court felt that M.R. associated her father's house with happier times in contrast to her mother's home, which represented school and rules. *Id.* at 163, 638 A.2d at 1278. M.R.'s reasons for wanting to live with her father, as summarized by the court, were "boys, babies, and boyfriends." *Id.* The court determined that M.R. did not fully comprehend the nature of the proceeding and she was unable to truly consider the ramifications of either parent's appointment. *Id.* at 164, 638 A.2d at 1278. The court relied on Mr. Hegner's testimony that indicated it was difficult to determine whether M.R. would understand the significance of where she chose to live. *Id.*

The court disregarded testimony from Dr. Dawson, who indicated that ignoring M.R.'s wishes would result in a significant impact to M.R.'s self-esteem. *Id.* at 163, 638 A.2d at 1278. Dr. Dawson's testimony, according to the court, proved to be inconsistent with her written findings. *Id.* Dr. Dawson testified that M.R. was capable of choosing with whom she wanted to live but indicated in her reports that M.R. was incapable of deciding which parent should be her guardian. *Id.* The court was unable to reconcile how M.R. could have the capacity to know with whom she wanted to reside but not have the ability to know who should serve as her guardian and look out for her best interest. *Id.* at 163-64, 638 A.2d at 1278.

[23] *M.R.*, 135 N.J. at 164, 638 A.2d at 1278. Although the court acknowledged that M.R. expressed a preference to live with her father, the question remained whether M.R. was capable of expressing a reliable preference. *Id.* at 163, 638 A.2d at 1278.

M.R.'s father failed to meet his burden, the trial court awarded guardianship to M.R.'s mother.[24]

The New Jersey Superior Court, Appellate Division affirmed the lower court's decision placing the burden of proof to establish specific capacity on M.R.'s father.[25] One judge dissented, contending that the burden of proof should have been imposed on M.R.'s mother as the individual claiming that her daughter lacked the specific capacity to select her residence.[26] M.R.'s father appealed the appellate division's ruling to the New Jersey Supreme Court, which granted certification to identify the correct standard for determining the specific capacity of a developmentally-disabled person to select her residence and to clarify the appropriate role of appointed counsel in a guardianship action.[27]

Justice Pollock, writing for the court, affirmed the declaration of M.R.'s incompetence, reversed the appellate division's appointment of M.R.'s mother as guardian, and remanded the case to the Chancery Division.[28] The justice reasoned that the court needed to strike a better balance between a developmentally-disabled person's right of self-determination and the traditional judicial concerns for that person's best interest.[29] Accordingly, the New Jersey Supreme Court imposed the burden of proof on the individual challenging the specific capacity of a developmentally-disabled person rather than on the person affirming the disabled person's capacity.[30] To further support a mentally-disabled person's right to individual autonomy, the court clarified that the primary role of appointed counsel for a mentally-disabled person is to vigorously protect that person's rights, particularly the right to make decisions.[31]

Because the father was the individual claiming M.R. had the capacity to express a preference, the court imposed the burden on him "to convince the court by a preponderance of the evidence that it's more likely than not that [M.R.] has the capacity in this limited area to decide for herself." *Id.*

24 *Id.* at 165, 638 A.2d at 1279. *See supra* note 21 and accompanying text (discussing M.R.'s father's inability to establish his daughter's specific capacity to determine where to reside).

25 *Id.* at 164, 638 A.2d at 1279.

26 *Id.*

27 *In re* M.R., 133 N.J. 444, 627 A.2d 1148 (1993).

28 *M.R.*, 135 N.J. at 179, 638 A.2d at 1286. Justice Pollock indicated that pending the result of the remand, M.R. would remain with her mother and continue to visit with her father in accordance with the judgment of the chancery division. *Id.*

29 *Id.* at 165, 638 A.2d at 1279.

30 *Id.* at 168-69, 638 A.2d at 1281.

31 *See id.* at 177-78, 638 A.2d at 1285 (noting that an attorney should advocate any decision his developmentally-disabled client makes).

The New Jersey Supreme Court's decision in *M.R.* was decided against a backdrop of existing New Jersey case law that slowly forged new ground for the rights of the mentally disabled.[32] *Levine v. Institution and Agencies Department of N.J.*[33] was an early case that failed to recognize the Legislature's strong moral and legal obligation to provide care for the handicapped.[34] The plaintiffs in *Levine* were the parents of two severely retarded children who were residents of a state institution for the mentally disabled.[35] The parents, having the financial resources, were required by statute to pay the cost of their children's care.[36] The parents contended that their children were being denied their right to a free public education because the governing statutory framework did not consider the residential care provided by the plaintiffs as education.[37] The court held that the education clause's guarantee of a thorough and efficient education did not extend to profoundly retarded children and the residential care programs entailed in their total habilitation.[38]

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[32] *See, e.g.*, New Jersey Ass'n for Retarded Citizens, Inc. v. New Jersey Dep't of Human Servs., 89 N.J. 234, 251, 445 A.2d 704, 713 (1982) (holding that state statutes grant mentally-retarded people the legal right to adequate training, habilitation, education, care, and protection in accordance with their individual needs in an environment that is least restrictive of their personal liberty); *In re* Conroy, 98 N.J. 321, 345, 486 A.2d 1209, 1221 (1985) (recognizing that courts, as guardians of personal rights, have a particular responsibility to protect the right of self-determination).

[33] 84 N.J. 234, 418 A.2d 229 (1980).

[34] *See id.* at 269, 418 A.2d at 247-48 (Pashman, J., dissenting).

[35] *Id.* at 238, 418 A.2d at 231.

[36] *Id.*

[37] *Id.* at 244, 418 A.2d at 234. The New Jersey Constitution provides that "the Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII, § 4, cl. 1. Building upon the goals espoused by the constitution, the New Jersey Legislature enacted the Public School Education Act of 1975. *Levine*, 84 N.J. at 247, 418 A.2d at 236. (citing N.J. STAT. ANN. § 18A:7A-4 (West 1989)). The court stressed that the Education Act further articulated the constitution's objective of providing children with an education so that they may become productive individuals in society. *Id.*

The plaintiffs contended that the rehabilitative care they provided for their institutionalized children should be considered education within the meaning of the constitution. *Id.* at 244, 418 A.2d at 234. If considered education, the plaintiffs would be entitled to have the residential care furnished free of charge at the expense of the public. *Id.* at 255, 418 A.2d at 240.

[38] *Levine*, 84 N.J. at 250, 418 A.2d at 236. The court maintained that the analytical framework behind the New Jersey Constitution's free public education clause was to encourage effective representation and create an enlightened democracy. *Id.* at 245, 418 A.2d at 234-35. *See also* Robinson v. Cahill, 62 N.J. 473, 515, 303 A.2d 273, 295 (1973) (emphasizing that the thorough and efficient education clause serves as a means to provide a child with the opportunity to equip himself as a citizen and a competitor in the work force).

Although the *Levine* court failed to extend the right of education to the disabled, the New Jersey Supreme Court in *In re Grady*[39] recognized a developmentally-disabled person's fundamental right to privacy concerning forced sterilization.[40] In *Grady*, parents of a mentally-retarded woman with Down's Syndrome[41] sought to have their daughter sterilized.[42] In reaching its decision, the *Grady* court recognized that the fundamental right of privacy encompasses the right to choose among procreation, sterilization and other modes of contraception.[43] The court indicated, however,

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Building upon this framework, the *Levine* court submitted that every child's right to education is not protected under the education clause of the constitution. *Levine*, 84 N.J. at 251, 418 A.2d at 237. The court distinguished those children who fell into the category of severe mental retardation and considered it unrealistic "to equate the type of care and habilitation which such children require for their health and survival with 'education' in the sense that that term is used in the constitution." *Id.* at 250, 418 A.2d at 237. The *Levine* court posited that the children falling into the severely-handicapped category were best served by being institutionalized and were not "capable either of receiving or of benefitting from any additional instruction or education as such." *Id.* at 254, 418 A.2d at 240. Therefore, the court rejected the notion that the residential care needed to ensure their daily well-being qualified as education within the meaning of the constitution's education clause. *Id.* at 254-55, 418 A.2d at 240.

39 85 N.J. 235, 426 A.2d 467 (1981).

40 *Id.* at 245, 426 A.2d at 472 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

41 *See supra* note 14 (defining Down's Syndrome).

42 *Grady*, 85 N.J. at 242, 426 A.2d at 470. Lee Ann Grady has remained in the care of her parents since birth. *Id.* at 240-41, 426 A.2d at 469-70. At age 19, Lee Ann's physical development has progressed normally but her emotional and social development has not. *Id.* at 242, 426 A.2d at 470. Recognizing her lack of sexual awareness, Lee Ann's parents have provided their daughter with birth control pills. *Id.* Motivated by their desires to provide Lee Ann with a more independent lifestyle, her parents seek permanent contraception prior to placing Lee Ann in a less restrictive environment. *Id.*

43 *Id.* at 252, 426 A.2d at 475. The *Grady* court acknowledged that the right to procreate is a basic, fundamental right of which an individual is permanently deprived by forced sterilization. *Id.* at 245, 426 A.2d at 472 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). The court in *Grady* observed that personal autonomy over procreation and contraception had been given constitutional recognition by the Supreme Court. *Id.* at 247-48, 426 A.2d at 473 (citing Griswold v. Connecticut, 381 U.S. 479, 485 (1985)). The *Grady* court added that the limitation of the *Griswold* decision to only married persons was abandoned in *Eisenstadt v. Baird* by extending the right to use contraceptives to all persons. *Id.* at 248, 426 A.2d at 473 (citing Eisenstadt v. Baird, 405 U.S. 438, 443 (1972)).

The court in *Grady* maintained, however, that the right to sterilization had not yet been expressly protected by the Supreme Court. *Id.* at 248, 426 A.2d at 474. Incidentally, the court advised that several district courts have acknowledged the existence of such a right. *Id.* at 248-49, 426 A.2d at 474 (citing Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973); Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978); Peck v. Califano, 454 F. Supp. 484 (D. Utah 1977); Ponter v. Ponter, 135 N.J. Super. 50 (Ch. Div. 1975)).

that a developmentally-disabled person may be incapable of exercising his or her constitutional right to privacy.[44] In the event of such a situation, the *Grady* court held, a court incurs the responsibility to exercise that right on the incompetent's behalf in a manner that reflects the best interests of the incompetent.[45]

The court in *Grady* further declared that the *parens patriae* power[46] of the state encompasses the decision of whether a court may give consent for sterilization on behalf of an individual who does not have the capability of consenting or withholding consent herself.[47] The *Grady* court reasoned that having the court exercise

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> The *Grady* court also offered the reasoning of the New Jersey Supreme Court:
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> The right to be sterilized also derives from the rationale of our decision in *In re Quinlan*. There we held that a person has a constitutional right to discontinue use of artificial life-sustaining apparatus when the prognosis for returning to cognitive or sapient life is dim. Our holding grew out of a belief that, under some circumstances, an individual's personal right to control her own body and life overrides the state's general interest in preserving life. A decision to be sterilized is also a part of an individual's personal right to control her own body and life. The state's interest in procreation can not be greater than its interest in preserving life. If one can decide to forego artificial life-preservation and thereby sacrifice life, then one can certainly decide to forego reproductive capacity and thereby relinquish the ability to procreate. Therefore, the right to be sterilized is included in the privacy rights protected by the federal Constitution.

Grady, 85 N.J. at 249, 426 A.2d at 474.

[44] *Id.* at 250, 426 A.2d at 474. The *Grady* court recognized that Lee Ann, like the comatose individual in *Quinlan*, was incapable of exercising her fundamental rights. *Id.* As a result of her mental deficiencies, Lee Ann was unable to make a meaningful choice between sterilization, procreation, or an alternative means of contraception. *Id.* The court maintained, however, that "her inability should not result in the forfeit of this constitutional interest or of the effective protection of her 'best interests.'" *Id.* To preserve her right of whether to procreate, the *Grady* court instructed that the right must be asserted on Lee Ann's behalf. *Id.* at 250-51, 426 A.2d at 475.

[45] *Id.* at 252, 426 A.2d at 475.

[46] *Black's Law Dictionary* defines *parens patriae* as "the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). *Parens patriae* literally means "parent of the country." *Id.* Traditionally, *parens patriae* referred to the state's role as sovereign and guardian of individuals under a legal disability. *Id.*

[47] *Grady*, 85 N.J. at 259, 426 A.2d at 479. The *Grady* court rejected the imposition of a strict necessity showing prior to authorizing the sterilization of an incompetent person. *Id.* at 262, 426 A.2d at 481. The court reminded that the situation was not one of compulsory sterilization but rather one requested by the parents of an incompetent person. *Id.* Therefore, the state's interest, according to the court, was much broader than merely preventing the birth of genetically impaired children. *Id.* The court warned that imposing a strict necessity standard would infringe on the *parens patriae* power of the state to "compensate for an incompetent person's inability to exercise her own constitutional rights concerning contraception." *Id.* at 262-63, 426 A.2d at 481 (citation omitted).

a decision on behalf of an incompetent person produces a more humane and compassionate result than leaving the incompetent person without a means to exercise a constitutional right.[48]

In further support of the rights of the disabled, the New Jersey Supreme Court significantly altered its understanding of the education clause of the State constitution in *New Jersey Association for Retarded Citizens, Inc. v. New Jersey Department of Human Services.*[49] In *Association for Retarded Citizens,* the New Jersey Supreme Court addressed the need for state statutes to maximize the potential of developmentally-disabled persons while preserving the maximum extent of personal liberty.[50] The court posited that emotionally-disabled children at institutions for the mentally retarded have the legal right to a thorough and efficient education as granted by state statutes.[51]

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[48] *Id.* at 261, 426 A.2d at 481. The court in *Grady* indicated that Lee Ann shared the same constitutional right as everyone else to decide whether to be sterilized. *Id.*, 426 A.2d at 480. The court admitted, however, that Lee Ann did not have the ability to make such a decision for herself. *Id.*, 426 A.2d at 481. Although the decision would not be made personally by Lee Ann, the *Grady* court recognized that the decision made by the court is a genuine decision governed by the same interests Lee Ann might pursue if she had the opportunity to decide herself. *Id.*

[49] 89 N.J. 234, 445 A.2d 704 (1982).

[50] *Ass'n for Retarded Citizens,* 89 N.J. at 252, 445 A.2d at 713. The plaintiffs in *Ass'n for Retarded Citizens* were residents of the Hunterdon State School. *Id.* at 238, 445 A.2d at 706. Hunterdon is a residential facility for the mentally retarded operated by the Division of Mental Retardation of the New Jersey Department of Human Services (hereafter "Division"). *Id.* As of 1979, the Division operated eight similar facilities that housed approximately 8,000 persons. *Id.* At the time of trial, 988 residents lived in Hunterdon, more than half of whom were school-age children. *Id.* The Division reported that over 90% of the Hunterdon population was considered to be severely or profoundly retarded. *Id.*

On March 16, 1977, the residents of Hunterdon filed a complaint in the Chancery Division of the Superior Court of New Jersey against the state agencies responsible for running the Hunterdon facility. *Id.* at 238-39, 445 A.2d at 706. The complaint alleged that the defendant state agencies violated the residents' federal and state statutory rights as well as their constitutional rights to education and training befitting their specific needs in the least-restrictive environment possible. *Id.* at 239, 445 A.2d 706. Although the court accepted the plaintiffs' understanding of their legal rights, the trial court dismissed the complaint because the defendants, according to the court, were satisfying their legal obligations to the residents of Hunterdon. *Id.* at 240, 445 A.2d at 706. Premised on the same reasoning expressed by the trial court, the appellate division affirmed. *Id.*

On appeal, the court examined the three sets of rights in dispute: "(1) education and training of the children at Hunterdon; (2) habilitation for adult residents at the facility; and (3) provision of these services in the least restrictive setting feasible." *Id.* at 243, 445 A.2d at 708.

[51] *Id.* at 251-52, 445 A.2d at 712-13. Discussing the rights of the children, the court held that the Legislature had "expressly granted the children at Hunterdon the right to a thorough and efficient education suited to their individual needs and abilities" as provided in the Developmentally Disabled Rights Act of 1977. *Id.* at 243, 445 A.2d at

Additionally, the court asserted that state law grants residents at an institutional facility the legal rights to habilitation, education, care, and protection.[52] The court held, in both instances, that the services must be adapted to residents' individual needs and provided in an atmosphere that is least restrictive of their personal liberty.[53] In so ruling, the court substantiated the Legislature's obligation to ensure that the mentally retarded are included in the community and given the opportunity to pursue their right to happiness as are all other citizens.[54]

In the same year the New Jersey Supreme Court decided *Asso-*

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708 (citing N.J. STAT. ANN. §§ 30:6D-1 to 6D-12 (West 1981 & Supp. 1995)). In addition to being governed by the policy considerations enunciated in the Disabled Rights Act, the Division is also required to follow the State Board of Regulations regarding the length of the school day, class size, and minimum hours of instruction. *Id.* at 245-46, 445 A.2d at 709.

The State claimed that Hunterdon, in providing mandated educational services, should be afforded flexibility in establishing educational programs for mentally-retarded children. *Id.* at 246, 445 A.2d at 709-10. Recognizing the special needs of disabled children, the court emphasized that the Disabled Rights Act called for education to be suited to the individual needs and abilities of each child. *Id.* at 246, 445 A.2d at 710. Therefore, the court stressed that Hunterdon could make an individualized determination to meet a child's educational needs in a different manner than proscribed by the Regulations. *Id.*

[52] *Id.* at 251-52, 445 A.2d at 713. The defendants contended that state law only required that they make such services available at the facility rather than actually imposing a duty to provide every habitant with each specific service. *Id.* at 247, 445 A.2d at 710.

Relying on the Disabled Rights Act, the court rejected the defendants' claims. *Id.* at 247-48, 445 A.2d at 710-11. As provided by the Act, the court indicated that the facilities that house developmentally-disabled persons are "legally required to provide comprehensive evaluation, functional and guardianship services as hereafter designated, in order that eligible mentally-retarded persons may be provided with adequate training, care and protection." *Id.* at 248, 445 A.2d at 711 (citing N.J. STAT. ANN. § 30:4-165.1 (West 1981 & Supp. 1995)). Additionally, the court noted that the Act further requires that services provided for mentally-retarded residents shall be provided on an individual basis in accordance with each person's individual needs. *Id.* (citing N.J. STAT. ANN. § 30:6D-2 (West 1981 & Supp. 1995)). The court therefore concluded that Hunterdon was not merely required to make the services generally available to the residents but, rather, specifically available to each resident. *Id.* at 249, 445 A.2d at 711. The court reasoned that Hunterdon had such an obligation not only because it is moral and just but also because it was the law. *Id.*

[53] *Id.*

[54] *Ass'n for Retarded Citizens*, 89 N.J. at 252, 445 A.2d at 713. The court emphasized that the services provided to the mentally disabled should be offered in the spirit of optimism:

> Like all other citizens, the mentally retarded have the right to pursue happiness. Unlike other citizens, they have unique hurdles to overcome in doing so. Rather than exclude them from the pursuit of happiness, the Legislature has made an effort to include them in our civic community by providing them the special services they need to develop and grow. This public policy affirms our common humanity. Their con-

ciation for Retarded Citizens, the United States Supreme Court, in *Youngberg v. Romeo*,[55] considered the substantive due process rights of a mentally-retarded person who had been involuntarily committed.[56] In *Youngberg*, the mother of Nicholas Romeo filed charges on behalf of her profoundly-retarded son contending that his constitutional rights had been violated by the Pennhurst State Institution.[57] Romeo's mother sought his admittance to a state facility as a result of her inability to properly care for his condition.[58] Throughout her son's residence at Pennhurst, Romeo's mother continually objected to the abusive treatment her son received.[59] Pennhurst, however, ignored the complaints and refused to alter the treatment given to Romeo.[60]

The *Youngberg* Court noted that commitment alone does not deprive an individual of all substantive rights under the Fourteenth Amendment.[61] Conceding that Romeo had a right to sufficient

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> cerns are our concerns. In this State, we do not set people adrift because they are the victim of misfortune. We take care of each other.

Id.

55 457 U.S. 307 (1982).

56 *Youngberg*, 457 U.S. at 309. The Fourteenth Amendment provides that a state cannot deprive "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

57 *Youngberg*, 457 U.S. at 310. The Court described Romeo's condition as one of profound retardation. *Id.* at 309. Romeo had resided with his parents until his father's death, at which time his mother sought Romeo's admittance to a state facility. *Id.* Upon examination by a court-appointed physician and psychologist, the Philadelphia County Court of Common pleas determined that Romeo was unable to care for himself, and the court ordered his commitment to Pennhurst State School and Hospital. *Id.* at 309-10.

In the original complaint, the Court noted, Romeo's mother alleged violations of her son's constitutional rights under the Eighth and Fourteenth Amendments. *Id.* at 310. The Court of Appeals for the Third Circuit held that the Eighth Amendment was an inappropriate source for determining the liberty interests of the involuntarily committed. Romeo v. Youngberg, 644 F.2d 147, 156 (3d Cir. 1980), *aff'd*, 457 U.S. 307 (1982). The correct constitutional basis, according to the Third Circuit, was the Fourteenth Amendment. *Id.* at 156.

58 *Id.* at 309.

59 *Id.* at 310.

60 *Id.* In late 1976, Pennhurst transferred Romeo from the commitment ward to the hospital to treat a broken arm. *Id.* During his treatment at the hospital, Dr. Gabroy ordered Romeo to be physically restrained. *Id.* The doctor ordered the restraints to ensure Romeo's safety as well as the safety of the other patients. *Id.* at 310-11. While the hospital's general policy was to return a patient to the ward once his injury healed, Romeo did not return to the ward. *Id.* at 311. Rather, the defendants decided Romeo should remain in the hospital as a result of the pending lawsuit. *Id.* Due to the hospital's subsequent treatment of Romeo, his mother filed a second amended complaint which alleged Romeo's prolonged restraint on a regular basis and added a damages claim to compensate Romeo for the defendants' failure to provide adequate treatment for his condition. *Id.*

61 *Id.* at 315.

food, clothing, shelter, and medical care,[62] the Court indicated that the issue at hand was whether an individual properly committed under state law enjoys a constitutionally protected liberty interest in safety, freedom of movement, and training.[63] The Court recognized the existence of liberty interests in safety and freedom of movement regardless of involuntary commitment.[64]

The *Youngberg* Court next addressed whether a protectable liberty interest in minimally-adequate habilitation existed.[65] The Court found that a state does have a duty to provide certain services to those who are institutionalized.[66] According to the Court, Romeo held liberty interests that required the state to provide him with sufficient training that ensured his safety as well as freedom from any undue interference.[67]

Building upon the framework established by state and federal precedent, the New Jersey Supreme Court, in *In re M.R.*, identified

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62 *Youngberg*, 457 U.S. at 315.

63 *Id.*

64 *Id.* The Court explained that Romeo's liberty interest in safety constituted a right to personal security. *Id.* The *Youngberg* Court noted further that "the right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause." *Id.* (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977)). The Court reasoned that because these liberty interests survived criminal conviction or incarceration, they certainly would survive involuntary commitment. *Id.* at 315-16.

In recognizing Romeo's right to freedom of movement, the Court emphasized that freedom from bodily restraint has always been a longstanding protectable interest at the core of the Due Process Clause. *Id.* at 316. As such, the Court indicated that the existence of such a right remains intact for incarcerated criminals and, therefore, must also exist for the involuntarily committed. *Id.*

65 *Id.* Romeo defined his liberty interest as a "constitutional right to minimally adequate habilitation." *Id.* The Court noted the inconsistent interpretations of the term habilitation, but referred to the American Psychiatric Association's definition of habilitation as "training and development of needed skills." *Id.* at 316-17, 309 n.1 (citation omitted).

66 *Id.* at 317. In determining the existence of a right to training, the court emphasized that a state is ordinarily not required to provide services for persons within its borders. *Id.* The court noted, however, when a person is institutionalized they are entirely dependent on the state and the state subsequently acquires a duty to provide particular services and care. *Id.*

67 *Youngberg*, 457 U.S. at 319. To reach its holding, the Court considered a concurring opinion by Chief Judge Seitz of the Third Circuit, in which he observed, "[t]he existence of a constitutional right to care and treatment is no longer a novel legal proposition." *Id.* 318-19 (quoting Romeo v. Youngberg, 644 F.2d 147, 176 (3d. Cir. 1980) (Seitz, C.J., concurring)).

The *Youngberg* Court limited the scope of its holding to those instances where habilitation or care is necessary to avoid unconstitutional infringement on the individual's liberty interest in safety and freedom. *Id.* at 317-18. Therefore, the *Youngberg* decision does not address whether an involuntarily-committed mentally-retarded person has a general constitutional privilege to training per se. *Id.* at 318.

two issues to be considered on appeal.[68] First, the court addressed the applicable standard for determining the specific capacity of a developmentally-disabled person to decide where to live.[69] Second, the court analyzed the appropriate role of appointed counsel in a guardianship action.[70]

Prior to addressing these main issues, Justice Pollock identified several concerns arising out of an incompetency determination.[71] Although only nominally considering the burden of proof, the justice acknowledged that underlying such an allocation of proof remained significant policy considerations regarding a developmentally-disabled person's right to make independent decisions and the court's role in that decision-making process.[72] The court noted that the definition of "developmentally disabled" encompassed many conditions unrelated to an individual's intellectual capacity.[73] Therefore, given the expansive definition, the justice recognized that the scope of the decision will impact the ability of developmentally-disabled people to have control over their lives.[74]

Justice Pollock next explained that our traditional sources of law evidence a commitment to preserving a person's right to self-determination, including the developmentally disabled.[75] In fur-

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68 *In re* M.R., 135 N.J. 155, 159, 638 A.2d 1274, 1276 (1994).

69 *Id.*

70 *Id.*

71 *Id.* at 165, 638 A.2d at 1279.

72 *Id.*

73 *Id.* According to the Disabled Rights Act:

> a. Developmentally Disabled means a severe chronic disability of a person which:
> (1) is attributable to a mental or physical impairment or combination of mental or physical impairments;
> (2) is manifest before age 22;
> (3) is likely to continue indefinitely;
> (4) results in substantial functional limitations in three or more of the following areas of major life activity . . . ;
> (5) reflects the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services which are of lifelong or extended duration and are individually planned and coordinated. Developmental disability includes but is not limited to sever disabilities attributable to mental retardation, autism, cerebral palsy, epilepsy, spina bifida and other neurological impairments . . . .

N.J. STAT. ANN. § 30:6D-3(a) (West 1981 & Supp. 1995).

74 *M.R.*, 135 N.J. at 166, 638 A.2d at 1279. The varying nature and severity of disabilities result in different situations from person to person. *Id.* at 165-66, 638 A.2d at 1279. Therefore, the consequence of the disability does not always affect an individual's ability to make decisions. *Id.* at 166, 638 A.2d at 1279.

75 *Id.*, 638 A.2d at 1279. The right of self-determination is implicit in the state constitution that recognizes that all persons have certain inalienable rights, including the enjoyment of life, liberty, and the pursuit of happiness. *See* N.J. CONST. art. I, cl. 1.

therance of that concern, the justice maintained that courts, as protectors of personal rights, have a responsibility to preserve the right of self-determination.[76] Justice Pollock recognized, however, the difficulty that arises in preserving an incompetent person's right of self-determination while meeting the judicial obligation to protect that person's best interests.[77]

The New Jersey Supreme Court, the justice observed, had never been confronted with a balancing of the competing interests involved in the case *sub judice*.[78] Therefore, the *M.R.* court looked to an analogous line of cases concerning the termination of medical treatment.[79] Justice Pollock acknowledged that, in those cases, the court applied one of two tests: a substituted-judgment test[80] or

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Similarly, the Legislature declared that the developmentally disabled, as citizens, are entitled to certain fundamental rights that can not be abrogated by admission to a facility for disabled persons. *See* Developmentally Disabled Rights Act, N.J. STAT. ANN. § 30:6D-2 (West 1981 & Supp. 1995).

[76] *M.R.*, 135 N.J. at 166, 638 A.2d at 1280 (citing *In re* Conroy, 98 N.J. 321, 345, 486 A.2d 1209, 1221 (1985)).

[77] *Id.* at 167, 638 A.2d at 1280.

[78] *See id.* (stating that the New Jersey Supreme Court had balanced competing interests in analogous cases).

[79] *Id.*; *see, e.g.*, *In re* Farrell, 108 N.J. 335, 349, 529 A.2d 404, 411 (1987) (holding that a competent, terminally-ill patient's right to privacy and self-determination outweigh the state's countervailing interest in preserving that person's life); *In re* Conroy, 98 N.J. 321, 359, 486 A.2d 1209, 1229 (1985) (concluding that certain individuals—newborns, mentally retarded persons, and permanently comatose individuals—do not lack a right of self-determination because they are unable to speak for themselves on life-and-death issues regarding their medical care); *In re* Quinlan, 70 N.J. 10, 40-41, 355 A.2d 647, 663-64 (1976) (recognizing that the right to terminate a noncognitive, vegetative existence is a valuable right incident to an individual's right to privacy and should not be discarded solely on the basis that such a condition prevents an individual from exercising that choice).

A competent patient's right of self-determination encompasses the right to select treatment alternatives, including the right to terminate medical treatment. *Farrell*, 108 N.J. at 348, 529 A.2d at 410 (citing *Conroy*, 98 N.J. at 347, 486 A.2d at 1222). A person's right to refuse medical treatment, however, is not absolute. *Id.* Countervailing societal interests may outweigh the right to decline life-sustaining treatment. *Conroy*, 98 N.J. at 348, 486 A.2d at 1223. The state may limit a patient's right to refuse life-sustaining treatment to preserve life, prevent suicide, safeguard the character of the medical profession, or to protect innocent third parties. *Id.* at 348-49, 486 A.2d at 1223.

[80] *M.R.*, 135 N.J. at 167, 638 A.2d at 1280. The substituted judgment approach is "intended to ensure that the surrogate decision-maker effectuates as much as possible the decision that the incompetent patient would make if he or she were competent." *In re* Jobes, 108 N.J. 394, 414, 529 A.2d 434, 444 (1987). In the instances where an incompetent's wishes have not been clearly articulated, a surrogate decision-maker must consider the patient's value system, prior statements regarding medical issues, and any personality traits, particularly pertinent philosophical, theological, and ethical values that would provide guidance as to the patient's choice of conduct. *Id.* at 414-15, 529 A.2d at 444. The focus of the substituted judgment test, according to

a best-interest test.[81] According to the justice, application of either test represented a balancing of both subjective and objective information in order to reach a decision that best respects the right of self-determination.[82]

After laying this foundation, Justice Pollock commenced his analysis by recounting the court's decision in *Grady*.[83] In *Grady*, the justice reminded, the court held that an application of the best interest test should only be instituted when the proponents of sterilizing a developmentally-disabled person demonstrate by clear and convincing evidence that the disabled person is incapable of making the decision of whether to be sterilized.[84] The *Grady* court jus-

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Justice Pollock, is the choice the patient would have made and not what a reasonable person would decide. *M.R.*, 135 N.J. at 167, 638 A.2d at 1280.

[81] *Id.* Alternatively, the *M.R.* court explained, patients who are unable to produce evidence of their preference are relegated to a best-interest determination. *Id.* The *Conroy* court acknowledged that the state, in exercising its *parens patriae* power, "supports the authority of its courts to allow decisions to be made for an incompetent that serve the incompetent's best interests, even if the person's wishes can not be clearly established." *Conroy*, 98 N.J. at 364-65, 486 A.2d at 1231. Exercising this authority, a state may permit guardians to deny an incompetent patient life-sustaining medical treatment if it is evident that such conduct would advance the patient's best interest. *Id.* at 365, 486 A.2d at 1231.

The court in *Conroy* divided the best interest test into two methods of analysis: a limited-objective test or a pure-objective test. *Id.*, 486 A.2d at 1231-32. According to the limited-objective test, where there is reliable evidence that an incompetent patient suffering from irreversible physical and mental impairments would have refused life-sustaining treatment, the treatment may be withheld or withdrawn, if the decision-maker is clearly satisfied that the burdens of continuing the patient's life with the treatment outweigh the benefits of that life. *Id.*, 486 A.2d at 1232.

Under the pure-objective test, life-sustaining treatment may still be withheld even in the absence of evidence that the patient would have refused the treatment. *Id.* at 366, 486 A.2d at 1232. The pure-objective test requires that the net burdens of continuing the patient's life outweigh any benefits that patient derives from life and that the effect of the continual and severe pain endured by the patient is such that administering the medical treatment would be inhumane. *Id.*

[82] *M.R.*, 135 N.J. at 167-68, 638 A.2d at 1280 (citation omitted). Some commentators have criticized the inadequacies of the substituted-judgment and best-interest tests to protect an incompetent patient's right to self-determination. *See, e.g.*, John Parry, *A Unified Theory of Substitute Consent: Incompetent Patients' Right to Individualized Health Care Decision-Making*, 11 MENTAL & PHYS. DISABILITY L. REP. 378, 378 (1987) (favoring a unified substitute consent theory as the best method to preserve personal autonomy while achieving judicial consistency).

[83] *M.R.*, 135 N.J. at 168, 638 A.2d at 1280 (citing *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981)). The *Grady* decision involved a mentally-disabled woman suffering from Down's Syndrome whose parents sought to have her sterilized. *Grady*, 85 N.J. at 240, 242, 426 A.2d at 469, 470. For a detailed discussion of the *Grady* case, see *supra* notes 42-48 and accompanying text.

[84] *M.R.*, 135 N.J. at 168, 638 A.2d at 1280-81 (citing *In re Grady*, 85 N.J. at 265, 426 A.2d at 483). The *Grady* court expounded that the *parens patriae* power of the state is expansive enough to include the decision "whether consent for sterilization should be given by a court on behalf of a person who lacks the capacity to give or withhold

tified its conclusions, Justice Pollock recalled, by emphasizing the importance of protecting a mentally-impaired person's right of self-determination.[85]

Building upon the *Grady* holding, Justice Pollock maintained that a party seeking to overcome a generally competent person's right of self-determination bears a significant burden.[86] As indicated by the varying degree of mental capacities, Justice Pollock asserted that developmentally-disabled persons can differ greatly in their capability to make decisions.[87] Therefore, Justice Pollock acknowledged, a generally incompetent person is not automatically

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consent for himself." *Grady*, 85 N.J. at 259, 426 A.2d at 479. In determining whether to authorize sterilization, the *Grady* court delineated several conditions. *Id.* at 263, 426 A.2d at 482 (citation omitted). First, the duty to decide the necessity of sterilization rests with the court rather than the parents. *Id.* at 264, 426 A.2d at 482 (citing Prince v. Massachussets, 321 U.S. 158, 166 (1944)). Second, in instances where an application is made to receive authorization to sterilize an alleged mental incompetent, the court must appoint an independent guardian *ad litem*. *Id.* Third, the court must determine that the incompetent is incapable of making a decision regarding sterilization and that the incapacity is not likely to dissipate in the future. *Id.* at 265, 426 A.2d at 482. Lastly, the proponents of sterilization must persuade the court by clear and convincing evidence that the sterilization is in the best interest of the incompetent person. *Id.* at 266, 426 A.2d at 483. By application of such standards, according to the *Grady* court, "courts will be able to protect the human rights of people least able to protect themselves." *Id.* at 272, 426 A.2d at 486.

85 *M.R.*, 135 N.J. at 168, 638 A.2d at 1281 (citing *Grady*, 85 N.J. at 261, 426 A.2d at 480-81). The *Grady* court reaffirmed that "the right to choose among procreation, sterilization and other methods of contraception is an important privacy right of all individuals." *Grady*, 85 N.J. at 252, 426 A.2d at 475. The *Grady* decision recognized that it is the courts' obligation to preserve a person's right to privacy. *Id.* The *Grady* court indicated, however, that an incompetent may fail to have the mental capacity to make a choice regarding sterilization. *Id.* In such a situation, the *Grady* court held that a court incurs the responsibility to exercise that right on the incompetent's behalf in a manner that reflects the best interest of the incompetent. *Id.*

86 *M.R.*, 135 N.J. at 168, 638 A.2d at 1281.

87 *Id.* at 169, 638 A.2d at 1281. Justice Pollock distinguished M.R.'s mental impairment from that of Lee Ann Grady. *Id.* The justice classified M.R.'s impairment as moderate in contrast to Lee Ann, who the justice categorized as severely impaired. *Id.* The different level of impairment between M.R. and Lee Ann, Justice Pollock reminded, substantiates the wide spectrum of abilities possessed by the developmentally disabled. *Id.*

Justice Pollock enumerated the seriousness of the incompetents' decision as a second distinction between the two cases. *Id.* The justice explained that the nature of M.R.'s decision of where to live is one that could be easily changed. *Id.* In contrast, Justice Pollock asserted, the decision to be sterilized is one much more difficult to correct. *Id.* Despite the acknowledgment that the greater the importance of the decision the greater the right of the affected person to make the decision, Justice Pollock refused to abandon the court's obligation to those persons unable to make independent decisions. *Id.* To balance the competing interests at stake, Justice Pollock elucidated the court's goal as one that permits "developmentally-disabled people to make as many decisions as possible, while protecting them from the harmful effects of bad decisions that they do not fully understand." *Id.*

considered incompetent for all purposes.[88]

Following the court's recognition of the varying abilities among the developmentally disabled, the court addressed the growing awareness and concern for the rights of the developmentally disabled.[89] The court noted that recent legislation at both the state and federal level has shown greater sensitivity to the right to individual autonomy of the developmentally-disabled.[90] Additionally, Justice Pollock commented that guardianship actions have similarly reflected an attempt to maximize the disabled's right to self-determination by contemplating limited—rather than complete—guardianship arrangements.[91]

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88 *Id.* (citing *Grady*, 85 N.J. at 265, 426 A.2d at 483). Justice Pollock indicated that a generally incompetent person can still have the ability to make decisions about specific matters. *Id.* Considering the facts and circumstances of a particular case, the justice contended that a person incapable of managing his daily affairs may still possess the capability to decide with whom and where to reside. *Id.*

89 *Id.* at 169, 638 A.2d at 1281. For a further discussion of the evolution of the rights of the developmentally disabled, see *supra* notes 1-6 and accompanying text.

90 *See id.* at 169-70, 638 A.2d at 1281 (illustrating actions taken by both the United States Congress and New Jersey Legislature). In 1990, the United States Congress enacted the Americans with Disabilities Act (ADA). 42 U.S.C. §§ 12101-12213 (Supp. II 1991). In passing the ADA, Congress recognized the increasing number of persons suffering from mental disabilities and the pervasive history of society to unjustly isolate and discriminate against those individuals. 42 U.S.C. § 12101(a) (Supp. II 1991). In seeking to rectify the disparate treatment of the disabled, the ADA proposes:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
> (4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b) (Supp. II 1991).

In addition to legislation at the federal level, New Jersey has enacted similar statutory provisions to ensure the protection of the fundamental rights of the developmentally disabled. Developmentally Disabled Rights Act, N.J. STAT. ANN. §§ 30:6D-1 to 6D-22 (West 1981 & Supp. 1995). Recognizing that growing numbers of the developmentally disabled are being placed in state community residences rather than institutions, the Act attempts to clarify the rights of the developmentally disabled to best protect their well-being. N.J. STAT. ANN. § 30:6D-13 (West 1981 & Supp. 1995).

91 *M.R.*, 135 N.J. at 170, 638 A.2d at 1281 (citing *Guardianship: An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 MENTAL & PHYS. DISABILITY L. REP. 274, 274 (1989) [hereinafter *Agenda for Reform*]). Justice Pollock praised the recommendations of the symposium, which sought to meet the needs of the disabled while providing the maximum individual autonomy possible. *Id.*, 638 A.2d at 1281-82 (quoting *Agenda for Reform*, *supra* at 275). Additionally, Justice Pollock mentioned other recommendations made by the

The court indicated, however, that the issue at hand concerned the appointment of M.R.'s mother as guardian and the decision that M.R. should reside in her home.[92] To resolve this issue, Justice Pollock mandated that a remand was necessary to reconsider the guardianship appointment in light of the findings by the New Jersey Supreme Court.[93]

After ordering a remand of the case to the chancery division, Justice Pollock next addressed the second issue on appeal, the appropriate role of appointed counsel in a guardianship action.[94] The court recognized that solving the issue required answering the question of whether the appropriate role of counsel in a guardianship action for an incompetent is to vigorously advocate the incompetent's position or merely advise the court of counsel's judgment

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committee, including a statutory presumption favoring a limited, in contrast to a general, guardianship. *Id.*, 638 A.2d at 1282 (citing *Agenda for Reform*, *supra* at 301).

Although New Jersey has not adopted section 5-306(c) of the Uniform Probate Code (UPC) that allows limited rather than general guardians, the justice suggested that trial courts follow the lead of other states which have adopted the UPC and appoint limited guardians in appropriate instances. *Id.* at 170-71, 638 A.2d at 1282 (citing UPC § 5-306(c)).

92 *M.R.*, 135 N.J. at 171, 638 A.2d at 1282.

93 *Id.* Justice Pollock remanded the case to the chancery division to determine whether M.R. is capable of expressing a preference to live with her father. *Id.* Justice Pollock indicated that if M.R. again conveys a preference to reside with her father, the burden rests with M.R.'s mother to prove by clear and convincing evidence that M.R. is incapable of making that decision. *Id. See also Grady*, 85 N.J. at 265, 426 A.2d at 483 (requiring a clear and convincing standard of proof that the individual to be sterilized does not have the capacity to consent or withhold consent); Addington v. Texas, 441 U.S. 418, 431-33 (1979) (finding that the clear and convincing standard of proof strikes an appropriate balance between an individual's rights and the interests of the state with regards to civil commitment cases); *In re* Hayes, 608 P.2d 635, 641 (Cal. 1980) (emphasizing that the person requesting sterilization must overcome a strong presumption against sterilizing an incompetent person by clear, cogent, and convincing evidence); *In re* Penny N., 414 A.2d 541, 543 (N.H. 1980) (holding that the proponent of sterilizing an incompetent person bears the burden of proving by clear and convincing evidence that the incompetent person lacks the capacity to consent to the sterilization).

Justice Pollock instructed further that if, on remand, the trial court determines M.R. is incapable of deciding where to reside, the burden falls on M.R.'s father, as the party altering the status quo, to prove that a change in domicile would be in the best interest of M.R. *M.R.*, 135 N.J. at 171-72, 638 A.2d at 1282 (citing State v. Fields, 77 N.J. 282, 304 n.9, 390 A.2d 574, 585 (1978)) (submitting that the burden of proof rests with the party attempting to change the status of the committed person); Sorentino v. Family & Children's Soc'y, 74 N.J. 313, 317, 378 A.2d 18, 20 (1977) (placing the burden of proof on the natural parents as the party seeking to change the status quo by removing the child from the custody of the adoptive parents).

94 *Id.* at 172, 638 A.2d at 1282. M.R.'s father contended that the appointed counsel in the guardianship hearing failed to adequately advocate his daughter's preference to reside with him. *Id.* M.R.'s father claimed that as a result of counsel's failures, the hearing was unfair to M.R. *Id.*

of the incompetent's best interest.[95] The problem, Justice Pollock indicated, rested in the confusion between the respective roles of an attorney and a guardian *ad litem*.[96] To correct the confusion, the court turned to the determination of several fact-finding committees[97] that recommended an advocacy role for the attorney of a minor rather than the more neutral role of a guardian *ad litem*.[98]

Building upon the analogous context of counsel's role with

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[95] *Id.* According to R. 4:86-4(b) of the New Jersey Rules Governing Civil Practice, appointed counsel in a guardianship proceeding:

> shall be responsible to meet with the alleged incompetent; to make inquiry of persons having knowledge of the alleged incompetent's circumstances, his or her physical and mental state and his or her estate; and to file, in lieu of an answer, a written report of findings and recommendations to the court at least three days prior to the hearing.

Id., 638 A.2d at 1283 (citing N.J. Ct. R. 4:86-4(b)).

As required, the trial court appointed Mr. Hunczak as M.R.'s attorney. *Id.* at 173, 638 A.2d at 1283. In accordance with R. 4:86-4(b), Mr. Hunczak conducted interviews with M.R., her mother, and her father. *Id.* As a result of his findings, Mr. Hunczak submitted a written report concluding that M.R. was competent and that considerable weight should be given to her preference to reside with her father. *Id.* Mr. Hunczak reached a different conclusion, however, following M.R.'s interview in chambers. *Id.*

Mr. Hunczak's changed position indicated that "less weight should be afforded to [M.R.'s] choice to live with [her father] than he had originally indicated and that either household would serve M.R.'s best interests." *Id.* Although counsel's written report complied with R. 4:86-4(b), Justice Pollock proffered that Mr. Hunczak's change in position raised questions as to the proper role of appointed counsel for an incompetent in accordance with R. 4:86-4(b). *Id.*

[96] *Id.* at 173, 638 A.2d at 1283. Justice Pollock recounted the related context of child-custody cases to clarify the confusion among the respective roles of court-appointed counsel and court-appointed guardians *ad litem*. *Id.* (citation omitted). The justice advised that the 1987-88 Annual Report of the Supreme Court's Family Division Practice Committee distinguished the purpose of the roles. *Id.* According to the report, Justice Pollock submitted, the services of court-appointed counsel are to be performed for the child. *Id.* The justice agreed that "'[c]ounsel acts as an independent legal advocate for the best interests of the child and takes an active part in the hearing, ranging from subpoenaing and cross-examining witnesses to appealing the decision, if warranted.'" *Id.* (quotation omitted). Conversely, Justice Pollock responded, the services of a court-appointed guardian *ad litem* are to the court on the child's behalf as indicated by the report. *Id.* Justice Pollock agreed with the report that the role of a court-appointed guardian is that of an independent fact-finder, evaluator, and investigator to determine what advances the child's best interest. *Id.* The report further indicated that a guardian *ad litem* would be appointed if the court's purpose of the appointment is for fact-finding and independent investigation. *Id.*

[97] The justice relied on the findings of the Judiciary Surrogate Liaison Committee, the Civil Practice Committee, and the Family Division Practice Committee. *Id.* at 173-74, 638 A.2d at 1283.

[98] *M.R.* 135 N.J. at 173-74, 638 A.2d at 1283. The report of the Judiciary Surrogates Committee provided:

> "[t]he role of the representative attorney is entirely different from that of a guardian *ad litem*. The representative attorney is a zealous advocate for the wishes of the client. The guardian *ad litem* evaluates for himself

regard to a minor, the court similarly urged an advocacy role for the attorney of an incompetent.[99] At present, according to Justice Pollock, the Rules of Professional Conduct[100] serve as a guidepost in defining the role of an attorney for an incompetent.[101] By recognizing an adversarial role for the attorney of an incompetent,

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> or herself what is in the best interests of his or her client-ward and then represent[s] the client-ward in accordance with that judgment."

Id. (quotation omitted). Additionally, Justice Pollock indicated that the Family Division Practice Committee has proposed an amendment to the Official Comment to Rules 5:8A and 5:8B to further clarify the roles of counsel and guardians *ad litem*. *Id.* at 174, 638 A.2d at 1283. The proposed amendment advises attorneys who are representing children in abuse or neglect cases and parental rights cases to act as counsel for the child in accordance with R. 5:8A rather than as a guardian *ad litem* pursuant to R. 5:8B. *Id.*

The proposed amendment indicates that an attorney appointed for a child in a termination of parental rights case usually assumes a hybrid role, acting as counsel as well as guardian *ad litem*. *Id.* at 174, 638 A.2d at 1283-84. The Committee urges that the role of an attorney should be more clearly defined as one serving as an advocate for the child. *Id.*, 638 A.2d at 1284. To adequately protect a child's fundamental rights, only zealous representation is appropriate. *Id.* In those instances where an appointment of a guardian *ad litem* is equally necessary, the Committee advises that counsel for the child may request such an appointment. *Id.* Furthermore, the Committee contends that by clarifying the role of an attorney as counsel for the child, evidentiary and procedural problems will also be solved. *Id.*

99 *M.R.*, 135 N.J. at 175, 638 A.2d at 1284. Justice Pollock recognized that the situation between minors and incompetents is not identical; however, the similarities shared by both warrant consideration of the Family Division's findings in the context of an incompetent. *Id.* In so doing, the justice suggested that the Committee consider amending Rule 4:86 in accordance with the changes made to Rules 5:8A and 5:8B. *Id.* The justice noted further that incorporating such changes in the present rule will more adequately protect those incompetents who need an attorney and a guardian *ad litem*. *Id.*

100 *Id.* Justice Pollock referenced New Jersey Rule of Professional Conduct 1.14, which provides:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian, or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Id. (citing N.J. R.P.C. 1.14).

101 *Id.* at 175, 638 A.2d at 1284. In representing a client, Justice Pollock reminded, an attorney's course of conduct must be governed by the client's decisions regarding the objectives of the representation. *Id.* at 176, 638 A.2d at 1284 (citing N.J. R.P.C. 1.2(a)). The role of an attorney, according to the justice, "is not to determine whether the client is competent to make a decision, but to advocate the decision that the client makes." *Id.* The justice added, however, that the attorney's role does not encompass advocating decisions that are obviously ridiculous or that present a risk of danger to the client. *Id.*, 638 A.2d at 1284-85.

Justice Pollock acknowledged that the opportunity for other issues to be contested would no longer be foreclosed.[102] To further substantiate the need for redefining an attorney's obligations to an incompetent client, Justice Pollock turned to other jurisdictions that have mandated counsel to vigorously protect the desires of an incompetent in a civil commitment proceeding.[103]

While the court awaits the amendments to Rule 4:86, Justice Pollock offered several guidelines to aid an attorney for an incompetent.[104] First, the justice emphasized that the declaration of a developmentally-disabled person as incompetent does not necessarily deprive the disabled individual of the right to make every decision.[105] Second, Justice Pollock continued, the attorney for a developmentally-disabled person should advocate all decisions made by the disabled person.[106] The *M.R.* court added, however, that if the attorney perceived a conflict between the individual's preferences and the individual's best interests, the attorney was fully able to inform the court of the necessity for a guardian *ad litem*.[107] Finally, Justice Pollock requested that adequate training be provided for judges to better communicate with the developmentally-disabled.[108]

In light of the historic past of discrimination and mistreatment

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102 *Id.*, 638 A.2d at 1285 (citing *An Agenda for Reform*, *supra* note 91, at 284). Justice Pollock noted that the attorney, by assuming the role of advocate, could pursue other concerns such as the guardian's identity or the incompetent's place of residence. *Id.* Justice Pollock contrasted the troubling results where an attorney's advocacy is diluted by misplaced concern for the incompetent's best interest. *Id.*

Commentators have suggested that attorneys who interject their perceptions of the incompetent's best interest provide merely procedural formality rather than zealous representation. Frolik, *supra* note 2, at 634-35. Frolik also warned that an attorney who assumes a role guided by the best interest standard may be venturing into an area that the attorney is ill-equipped to address. *Id.* at 635.

103 *M.R.*, 135 N.J. at 177, 638 A.2d at 1285 (citing Lynch v. Baxley, 386 F. Supp. 378, 389 (M.D. Ala. 1974) (establishing that the proposed civil committee is entitled to the right to representative counsel occupying a traditional adversarial role); *In re* Link, 713 S.W.2d 487, 496 (Mo. 1986) (deciding that the role of appointed counsel is to act as an advocate for the proposed ward); Quesnell v. State, 517 P.2d 568, 576 (Wash. 1974) (commenting that a guardian *ad litem* is appointed to preserve the rights and protect the best interest of the alleged incompetent); State v. Lazaro, 202 S.E.2d 109, 126 (W. Va. 1974) (holding that the role of an appointed guardian *ad litem* is to vigorously represent the alleged incompetent as the bounds of ethics will allow).

104 *Id.* at 177, 638 A.2d at 1285.

105 *Id.*

106 *Id.* at 177-78, 638 A.2d at 1285.

107 *Id.* at 178, 638 A.2d at 1285 (citation omitted).

108 *Id.*, 638 A.2d at 1286.

against the developmentally-disabled,[109] the New Jersey Supreme Court correctly recognized in *M.R.* the need to better protect the rights of the developmentally-disabled. The *M.R.* decision reflects a well-needed effort to grant greater respect to the interest of developmentally-disabled individuals in autonomous decision-making.[110] Although the *M.R.* court placed the burden on the party challenging the disabled person's capacity,[111] the court gave little credence to M.R.'s expressed preference to live with her father.[112] Recognizing M.R.'s expression of a preference, even if that preference stemmed from a simplistic understanding,[113] is the only means to truly respect M.R.'s right to self-determination.

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109 *See supra* note 1 (discussing the mistreatment and discrimination suffered by the developmentally disabled).

110 *See* Frolik, *supra* note 2, at 660 (discussing the need for guardianship reform to strike a better balance between a developmentally-disabled person's interest in autonomous decision-making and the need to protect that person from being deprived of their liberty under the false pretext of consent).

111 *M.R.*, 135 N.J. at 169, 638 A.2d at 1281.

112 *Id.* at 171, 638 A.2d at 1282.

113 *Id.* at 163, 638 A.2d at 1278; *see supra* note 21 (discussing M.R.'s capacity to express a preference).