INCOMPETENTS—STERILIZATION—COURT OF EQUITY HAS INHERENT POWER TO EXERCISE MENTALLY RETARDED INDIVIDUAL'S RIGHT TO STERILIZATION—*In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981).

Following a "history of isolation and neglect," mentally impaired individuals are finally gaining recognition of their constitutional rights.[1] In this spirit of heightened sensitivity the Supreme Court of New Jersey recently considered whether the chancery division could authorize the sterilization of a severely retarded woman absent statutory jurisdiction, and if so, under what circumstances such power should be exercised.[2] In *In re Grady*,[3] the court held that the chancery division has inherent jurisdiction to authorize sterilization when an individual is incapable of making her own decision and sterilization would clearly be in her best interests.[4]

Since birth, Lee Ann Grady was afflicted with Down's syndrome,[5] a chromosomal disorder which left her mentally retarded.[6] As an alternative to institutionalization, her parents chose to raise her at home with her brother and sister.[7] Although Lee Ann's intelligence quotient was within the range of severe mental retardation,[8] she attended special education classes in the public school system.[9] The medical evidence indicated that she probably would require lifetime

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[1] *In re* Grady, 85 N.J. 235, 245, 426 A.2d 467, 472 (1981) (citing HUMAN SEXUALITY AND THE MENTALLY RETARDED 145-46 (F. de la Cruz & G. LaVeck ed. 1973); P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS (1976)).

[2] *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981).

[3] 85 N.J. 235, 426 A.2d 467 (1981).

[4] *Id.*

[5] Lee Ann's particular variety of the disorder, trisomy 21, is its most common form. *In re* Grady, 170 N.J. Super. 98, 102, 405 A.2d 851, 853 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). Here, nuclei of the cells in her body contain "47 chromosomes instead of the usual pair." *Id.* at 103, 405 A.2d at 853.

[6] 85 N.J. at 240 & n.1, 426 A.2d at 469 & n.1. Mental retardation is characteristic of the disorder, and individuals afflicted with Down's syndrome represent the largest identifiable group among the mentally retarded. *In re* Grady, 170 N.J. Super. 98, 103, 405 A.2d 851, 853-54 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981).

[7] 85 N.J. at 240-41, 426 A.2d at 469-70.

[8] *In re* Grady, 170 N.J. Super. 98, 106, 405 A.2d 851, 855 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). Lee Ann's intelligence quotient was in the upper twenties to upper thirties. Severe retardation includes intelligence quotient ranges from 20 to 35, while intelligence quotients between 36 and 51 are within the moderate range. *Id.* at 105-06, 405 A.2d at 855.

[9] 85 N.J. at 241, 426 A.2d at 470. Lee Ann has never been institutionalized. Although she remains unable to read, she can differentiate the letters of the alphabet and manages to write her name and count low numbers. *Id.*

supervision for her support and maintenance because it was unlikely that there would ever be any significant change in her mental condition.[10]

At age nineteen,[11] Lee Ann's physical maturation and life expectancy were relatively normal.[12] Due to her severe mental impairment, however, Lee Ann had little, if any, emotional development with regard to sexuality.[13] She had no significant comprehension of sexual relationships, contraception, or procreation, and was incapable of making rational decisions concerning these issues.[14] If Lee Ann did become pregnant and bear a child, she would be unable to care for it.[15]

Lee Ann's parents had hoped to arrange their daughter's future so as to enable her to live less dependently on her family.[16] To this end, they had hoped to place Lee Ann in a group home for retarded adults, but believed reliable contraception was a necessary precondition to such a change in environment.[17] Accordingly, they attempted to have their daughter sterilized by tubal ligation at Morristown Memorial Hospital.[18]

The hospital refused to perform the operation without judicially authorized consent for Lee Ann.[19] Consequently, Lee Ann's parents applied to the superior court, chancery division, for appointment of a guardian authorized to consent to the procedure on Lee Ann's behalf.[20] The trial judge appointed a guardian *ad litem* to indepen-

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[10] *In re* Grady, 170 N.J. Super. 98, 102, 405 A.2d 851, 853 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981).

[11] Lee Ann was born in 1961. 85 N.J. at 240 n.1, 426 A.2d at 469 n.1. She was 17 years old when the action was first commenced in the chancery division. *See* Complaint, *In re* Grady, 170 N.J. Super. 98, 405 A.2d 851 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981).

[12] 85 N.J. at 241-42, 426 A.2d at 470. Lee Ann did not exhibit many of the physical infirmities usually associated with Down's syndrome, and her sexual development was physically normal for her age. *Id.*

[13] *Id.* at 242, 426 A.2d at 470.

[14] *In re* Grady, 170 N.J. Super. 98, 102, 405 A.2d 851, 853 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981).

[15] *Id.* As the supreme court noted, "she will probably need lifetime supervision to care for her own needs." 85 N.J. at 242, 426 A.2d at 470.

[16] 85 N.J. at 242, 426 A.2d at 470.

[17] *Id.* Although there is no indication that Lee Ann has been sexually active, her parents have provided her with birth control pills for the past four years as a purely precautionary measure. *Id.*

[18] *Id.* The court noted that tubal ligation is a conventional method of sterilization. *Id.* at 243, 426 A.2d at 470.

[19] *Id.* The hospital's action was understandable in light of recent malpractice actions arising out of similar factual circumstances where sterilization of an allegedly incompetent individual was permitted without judicially authorized consent. *See* Downs v. Santelle, 574 F.2d 1 (1st Cir. 1979), *cert. denied*, 439 U.S. 910 (1978); Gooley v. Moss, 398 N.E.2d 1314 (Ind. Ct. App. 1979); Petro v. McCullough, 385 N.E.2d 1195 (Ind. Ct. App. 1979).

[20] 85 N.J. at 242-43, 426 A.2d at 470.

dently represent Lee Ann's interests, ordered a plenary hearing,[21] and permitted the Public Advocate and the Attorney General to intervene on behalf of the interests of the public and the state.[22]

At the hearing, testimony was offered by Lee Ann's father and various medical experts, and several reports were submitted regarding her mental condition and abilities.[23] Significantly, no party contended that sterilization could not be ordered in such a case. Rather, the litigated issues concerned "the standards the court should apply before deciding to authorize sterilization and whether Lee Ann's situation met those standards."[24] The chancery division granted the relief sought by the Gradys and appointed them general guardians over Lee Ann with authority to exercise substituted consent to the sterilization.[25]

In reaching this decision, the chancery division reviewed the constitutional objections to compulsory sterilization statutes.[26] Analyzing the constitutional right to privacy as established in the contraception and abortion cases,[27] the court recognized that the right to privacy includes the fundamental right to voluntary sterilization.[28] The court then addressed two New Jersey statutes which delineate the rights of mentally retarded individuals who are residents or outpatients of certain institutions,[29] but found them to be inapplicable because Lee Ann was not institutionalized.[30]

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[21] *In re* Grady, 170 N.J. Super. 98, 101, 405 A.2d 851, 852-53 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). At the request of the guardian *ad litem*, the initial proceedings were held *in camera*. *Id.*

[22] 85 N.J. at 243, 426 A.2d at 471.

[23] *Id.* Judge Polow, the trial judge, met with Lee Ann to formulate his own conclusions as to her condition. Aside from this meeting and interviews with the various medical experts, Lee Ann did not otherwise participate in and was not present at the proceedings. *Id.*

[24] *Id.*

[25] *In re* Grady, 170 N.J. Super. 98, 126-27, 405 A.2d 851, 865-66 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981).

[26] *Id.* at 109, 405 A.2d at 856-57. Such statutes are usually subjected to strict scrutiny and have been invalidated on equal protection grounds. *Id. See* Skinner v. Oklahoma, 316 U.S. 535 (1942). *But see In re* Moore, 289 N.C. 95, 221 S.E.2d 307 (1976) (constitutionality of statute authorizing involuntary sterilization of mentally retarded upheld).

[27] *See* cases listed in notes 45 & 50 *infra*.

[28] *In re* Grady, 170 N.J. Super. 98, 110-11, 405 A.2d 851, 857-58 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). In making this determination, the chancery division cited Ponter v. Ponter, 135 N.J. Super. 50, 342 A.2d 574 (Ch. Div. 1975) (married woman has constitutional right to be sterilized without husband's consent). *See* notes 43-51 *infra* and accompanying text.

[29] N.J. STAT. ANN. § 30:4-24.2 (West 1981) (Bill of Rights for the Mentally Retarded), and *id.* § 30:6D-5 (Developmentally Disabled Rights Act). Such individuals, if incapable of giving informed consent, can be sterilized only upon the substituted consent of a court appointed guardian. *See* notes 55-58 *infra* and accompanying text.

[30] *In re* Grady, 170 N.J. Super. 98, 112-17, 405 A.2d 851, 858-61 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). *See* notes 55-58 *infra* and accompanying text.

The chancery division concluded that its inherent *parens patriae*[31] jurisdiction could be invoked to authorize the parents' substituted consent for Lee Ann's sterilization.[32] To guide the exercise of this power, the court enumerated a five-part standard which included both procedural and substantive safeguards.[33] The Public Advocate and the Attorney General both disagreed with the trial court and appealed.[34] Before the case could be argued in the appellate division, however, the guardian *ad litem's* motion for direct certification was granted.[35]

In *In re Grady*, the New Jersey supreme court vacated the decision of the trial court, delineated more stringent standards for judicial authorization of sterilization, and remanded the matter to the chancery division for redetermination in light of the new standards.[36]

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[31] "*Parens patriae*, literally 'parent of the country,' refers traditionally to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles, the insane, or the unknown." West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). *See generally* 67A C.J.S. *Parens Patriae* at 159 (1978).

[32] *In re* Grady, 170 N.J. Super. 98, 117-22, 405 A.2d 851, 858-61 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). While the court acknowledged that in the past the weight of authority excluded the exercise of *parens patriae* jurisdiction absent statutory authorization, the court relied upon the Supreme Court's reasoning in Stump v. Sparkman, 435 U.S. 349 (1978), to reach its conclusion. 170 N.J. Super. at 117-18, 405 A.2d at 861. *See* notes 101-06 *infra* and accompanying text for a criticism of this reliance.

[33] *In re* Grady, 170 N.J. Super. 98, 125-26, 405 A.2d 851, 865 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). While the Public Advocate and the Attorney General argued that a standard of "necessity" should govern, *id.* at 122, 405 A.2d at 863-64, the court opined that such a standard would relegate incompetents " 'to the status of second class citizens.' " *Id.* at 123, 405 A.2d at 864 (quoting the summation of the guardian *ad litem*). Accordingly, the court outlined the following five part standard:

> [B]efore this court may exercise its inherent power to grant this application the following conditions must exist:
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> 1. That the subject is incapable of understanding the nature of the sexual function, reproduction or sterilization and cannot comprehend the nature of these proceedings, hence is incompetent;
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> 2. That such incompetency is in all likelihood permanent;
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> 3. That the incompetent is presumably not infertile and not incapable of procreation;
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> 4. That all procedural safeguards have been satisfied, including appointment of a guardian ad litem to act as counsel for the incompetent during court procedings, with full opportunity to present proofs and cross-examine witnesses;
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> 5. That the applicants have demonstrated their genuine good faith and that their primary concern is for the best interests of the incompetent rather than their own or the public's convenience.

Id. at 125-26, 405 A.2d at 865 (footnote omitted).

[34] 85 N.J. at 244, 426 A.2d at 471.

[35] *In re* Grady, 84 N.J. 389, 420 A.2d 317 (1980).

[36] 85 N.J. at 244, 426 A.2d at 471.

Writing for the majority, Justice Pashman first noted the parallel to the widely publicized dilemma of Karen Ann Quinlan,[37] observing that the underlying paradox was the same—"how . . . [to] preserve the personal freedom of one incapable of exercising it by allowing others to make a profoundly personal decision on her behalf."[38] Accordingly, much of the court's analysis was strongly influenced by its earlier holding in *In re Quinlan*.[39]

At the outset of its analysis the court emphasized the awesome nature of the sterilization process, noting its direct conflict with the fundamental right to procreate.[40] The court also traced the history of abuse surrounding compulsory sterilization of the mentally retarded and its dubious origins in eugenics.[41] After concluding that sterilization in the instant matter was neither "compulsory" nor "voluntary," the court created a third category of sterilization—that which "lack[s] personal consent because of a legal disability."[42]

Within the framework of this third category of sterilization the court outlined the development of the constitutional right of pri-

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[37] *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976) (family of irreversibly comatose individual being kept alive by extraordinary means given authority to discontinue treatment with concurrence of treating doctors and hospital's ethics committee).

[38] 85 N.J. at 240, 426 A.2d at 469.

[39] 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). *See* notes 111-20 *infra* and accompanying text.

[40] 85 N.J. at 244-45, 426 A.2d at 471-72 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate is fundamental)).

[41] 85 N.J. at 245-46, 426 A.2d at 472-73. Eugenics was defined by its originator "as 'the study of agencies under social control that may improve or impair . . . future generations either physically or mentally.' " *Id.* at 246 n.2, 426 A.2d at 472 n.2 (quoting Ferster, *Eliminating the Unfits—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591 (1966)). The court also noted the decision of Buck v. Bell, 274 U.S. 200 (1927) (constitutionality of Virginia compulsory sterilization statute upheld), where it was stated by Justice Oliver Wendell Holmes:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough.

Id. at 207. Although *Buck v. Bell* has never been expressly overruled, its continued validity is questionable. *See* Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1023-33 (1977).

[42] 85 N.J. at 247, 426 A.2d at 473. The court noted that Lee Ann's sterilization could not be deemed compulsory on the part of the state since her parents and guardian *ad litem* concurred that it was in her best interests. Moreover, given her mental condition, it could not be said that sterilization "would be against her will." *Id.* Since Lee Ann could never give informed consent, labelling the sterilization voluntary was likewise thought to be inappropriate. *Id.*

vacy,[43] noting that the United States Supreme Court has recognized the fundamental right to procreate,[44] as well as the complimentary right to prevent conception by use of contraceptives.[45] Although the Supreme Court has not given express constitutional recognition to a right to voluntary sterilization,[46] the court observed that several lower courts,[47] and at least one New Jersey court,[48] have recognized its existence.[49] The *Grady* court also found that such a right was implicit in the Supreme Court's contraception and abortion cases,[50] and concluded that a right to voluntary sterilization derives from both the federal and New Jersey constitutions.[51]

The court next reasoned that implicit in these rights "is the right to make a meaningful choice between them."[52] Because Lee Ann Grady was not capable of making such a choice, the court decided that "[t]o preserve that right and the benefits that a meaningful decision would bring to her life, it may be necessary to assert it on her behalf."[53] The court held that regardless of who might have the power to assert that right, the final determination of whether substi-

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[43] *Id.* at 247-50, 426 A.2d at 473-74.

[44] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate is "fundamental to the very existence and survival of the race").

[45] Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to use contraceptives extends to all individuals, married or not). *See also* Carey v. Population Serv. Int'l., 431 U.S. 678 (1977); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976); Griswold v. Connecticut, 381 U.S. 479 (1965).

[46] 85 N.J. at 248, 426 A.2d at 474.

[47] *See* 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).

[48] *See* Ponter v. Ponter, 135 N.J. Super. 50, 342 A.2d 574 (Ch. Div. 1975) (married woman has constitutional right to be sterilized without spouse's consent). The *Grady* court opined that the logic of the *Quinlan* decision also conferred the right to be sterilized, reasoning:

> [t]here 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 part of an individual's personal right to control her own body and life. The state's interest in procreation cannot 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.

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

[49] 85 N.J. at 247-49, 426 A.2d at 473-74.

[50] *E.g.*, Doe v. Bolton, 410 U.S. 179 (1973). Roe v. Wade, 410 U.S. 113 (1973). *See generally* 85 N.J. at 247-51, 426 A.2d at 473-74. In the opinion of the court, these cases "expanded the right to control one's own body." *Id.* at 248, 426 A.2d at 473.

[51] 85 N.J. at 249-50, 426 A.2d at 474.

[52] *Id.* at 250, 426 A.2d at 474.

[53] *Id.* at 250-51, 426 A.2d at 475.

tuted consent to sterilization should be authorized must be made by an appropriate court.[54]

The majority rejected the argument made by both the Attorney General and the Public Advocate that the standards and procedural guidelines set forth in sections 30:4-24.2(d)(2) (Bill of Rights for the Mentally Retarded) and 30:60-5(a)(4) (Developmentally Disabled Rights Act) of the New Jersey Statutes Annotated[55] governed the Gradys' request for substituted consent.[56] The court recognized that if these statutes controlled, the "necessity" of the proposed sterilization would have to be proved by the Gradys, and Lee Ann would have to be present at the hearing.[57] Because the statutory language referred only to those patients who were institutionalized or outpatients of certain facilities, of which Lee Ann was neither, the court agreed with

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[54] *Id.* at 251, 426 A.2d at 475. The court recognized that this was a departure from *Quinlan*, where it was held that the final determination to discontinue the hopelessly comatose Karen Ann Quinlan's artificial life support rested with the guardian and her family, not with the court. *Id.* at 250-51, 426 A.2d at 474-75. Nonetheless, the *Grady* court acknowledged that a greater involvement by the courts was necessary in light of past abuses with regard to sterilization of the mentally impaired. *Id.* at 251-52, 426 A.2d at 475.

[55] N.J. STAT. ANN. §§ 30:4-24.2(d)(2),:6D-5(a)(4) (West 1981). Section 30:4-24.2(d)(2) provides that each patient has a right:

> Not to be subjected to experimental research, shock treatment, psychosurgery or sterilization, without the express and informed consent of the patient after consultation with counsel or interested party of the patient's choice. Such consent shall be made in writing, a copy of which shall be placed in the patient's treatment record. If the patient has been adjudicated incompetent a court of competent jurisdiction shall hold a hearing to determine the necessity of such procedure at which the client is physically present, represented by counsel, and provided the right and opportunity to be confronted with and to cross-examine all witnesses alleging the necessity of such procedures. In such proceedings, the burden of proof shall be on the party alleging the necessity of such procedures.

Id. § 30:4-24.2(d)(2).

Section 30:6D-5(a)(4) provides that patients receiving treatment at a facility shall not:

> be subjected to shock treatment, psychosurgery, sterilization or medical behavioral or pharmacological research without the express and informed consent of such person, if a competent adult, or of such person's guardian ad litem specifically appointed by a court for the matter of consent to these proceedings, if a minor or an incompetent adult or a person administratively determined to be mentally deficient. Such consent shall be made in writing and shall be placed in such person's record.
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> Either the party alleging the necessity of such procedure or such person or such person's guardian ad litem may petition a court of competent jurisdiction to hold a hearing to determine the necessity of such procedure at which the client is physically present, represented by counsel, and provided the right and opportunity to be confronted with and to cross-examine all witnesses alleging the necessity of such procedure. In such proceedings, the burden of proof shall be on the party alleging the necessity of such procedure.

Id. § 30:6D-5(a)(4).

[56] 85 N.J. at 253, 426 A.2d at 476.

[57] *Id.*

the trial judge that the legislature could not have intended the statutes to govern in this situation.[58]

Instead, the court found that the inherent *parens patriae* power of the chancery division conveyed sufficient jurisdiction for that court to decide the sterilization issue.[59] Consequently, by making sterilization available to noninstitutionalized as well as institutionalized individuals, the court avoided the equal protection argument which otherwise might have arisen.[60] Although the court acknowledged that the weight of authority did not support a determination of jurisdiction,[61] it concluded that these decisions "[did] not reflect adequate sensitivity to the constitutional rights of the incompetent person," and instead "agree[d] with the minority of courts that have found inherent power to decide these issues."[62] In addition, the court opined that New

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[58] *Id.* at 256-58, 426 A.2d at 478-79.

[59] *Id.* at 258-59, 426 A.2d at 479.

[60] *Id.* The equal protection problem was noted by the trial court. If jurisdiction were to stem solely from the statutes, it was argued that institutionalized persons would have access to sterilization while noninstitutionalized persons would not. *In re* Grady, 170 N.J. Super. 98, 118-19, 405 A.2d 851, 861-62 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981). *See* Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978) (noninstitutionalized mentally retarded individuals granted same access to sterilization procedures as provided to institutionalized individuals by statute on an equal protection basis).

[61] 85 N.J. at 260-61, 426 A.2d at 480. The following decisions have held that a court lacks jurisdiction to authorize the sterilization of an incompetent individual absent legislative authority: Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971); Hudson v. Hudson, 373 So.2d 310 (Ala. Sup. Ct. 1979); Guardianship of Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978), *cert. denied*, 440 U.S. 967 (1979); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976); Holmes v. Powers, 439 S.W.2d 579 (Ky. Ct. App. 1968); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974); *In re* A.D., 90 Misc.2d 236, 394 N.Y.S.2d 139 (Sur. Ct. 1977), *aff'd on other grounds*, 64 A.D.2d 898, 408 N.Y.S.2d 104 (1978); *In re* Lambert, No. 61-156 (Tenn. Ct. App. Oct. 29, 1976),*noted in* 44 TENN. L. REV. 879 (1977); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969); *In re* Eberhardy, 97 Wis. 2d 654, 294 N.W.2d 540 (1980). *See generally* Annot., 74 A.L.R.3d 1210 (1976); *see also* Annot., 74 A.L.R.3d 1224 (1976).

[62] 85 N.J. at 261, 426 A.2d at 480. Only a few courts have found jurisdiction without express legislative authorization. *See* C.D.M. v. State, 627 P.2d 607 (Alaska Sup. Ct. 1981) (decided subsequent to New Jersey supreme court's holding in *Grady*); *Ex parte* Eaton. Baltimore Daily Record, Nov. 12, 1954 (Md. Cir. Ct. Nov. 10, 1954), *cited in* O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 39 (1956); *In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (Sup. Ct. 1976); *In re* Simpson, 80 N.E.2d 206 (Ohio P. Ct. 1962); *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980); *cf.* Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978) (noninstitutionalized individuals granted same access to sterilization procedures as provided to institutionalized individuals by statute on an equal protection basis). *See also* Stump v. Sparkman, 435 U.S. 349 (1978) (Indiana circuit court judge had jurisdiction to entertain petition for authorization of minor's sterilization and therefore was entitled to judicial immunity). *But see* notes 100-05 *infra* and accompanying text.

Jersey case law provided an ample basis for invoking *parens patriae* jurisdiction.[63]

Following its disposition of the jurisdiction issue, the court considered circumstances under which sterilization could be judicially authorized. The Public Advocate argued that strict necessity must first be demonstrated "because the State's interest in authorizing sterilization is limited to preventing the birth of genetically defective children and children whose parents are unable to provide adequate care."[64] The court flatly rejected this contention, however, finding that the state's interest is not in authorizing sterilization for the benefit or convenience of society, but rather is only in authorizing sterilization when it is in the best interests of the incompetent individual.[65] Furthermore, the majority iterated that the court, and not the parents, must ultimately determine whether sterilization is warranted.[66]

Adopting the procedural safeguards enunciated by the trial court,[67] the court decided that whenever an application for sterilization is made, an independent guardian *ad litem* must be appointed to represent the interests of the incompetent individual.[68] In addition, independent psychological and medical evaluations must be conducted and the results thereof presented to the court.[69] Furthermore,

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[63] 85 N.J. at 259-62, 426 A.2d at 479-81. The court opined that "compelling considerations" similar to those which justified judicial intervention in *Quinlan* were also present in this case. *Id.* at 260, 426 A.2d at 480. Other holdings supporting jurisdiction include State v. Perricone, 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962) (court authorized blood transfusions over objections of minor's parents);*In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (Ch. Div. 1977) (court authorized amputation of incompetent adult's leg); Muhlenberg Hosp. v. Patterson, 128 N.J. Super. 498, 320 A.2d 518 (Law Div. 1974) (court authorized blood transfusions over objections of minor's parents).

[64] 85 N.J. at 262, 426 A.2d at 481.

[65] *Id.* at 262 & n.8, 426 A.2d at 481 & n.8. The court feared that by adopting a necessity standard, it would appear to lend its imprimatur to compulsory sterilization. *Id.* at 262-63 & nn. 8 & 9, 426 A.2d at 481 & nn.8 & 9.

[66] *Id.* at 264, 426 A.2d at 482. *See* note 54 *supra* and accompanying text. Although it is true that " 'the custody, care and nurture of the child reside first in the parents,' " the *Grady* court concluded that because the constitutional rights under consideration were so personal to the individual any decision to be made lies with the individual and not the parent. *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). Where the individual is incompetent, responsiblility falls upon the court to decide whether sterilization is in his or her best interests. *Id.* (citing Bellotti v. Baird, 443 U.S. 662 (1979) and Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976)). For a discussion of the potential conflict of interest between the parents and their incompetent child, see Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CAL. L. REV. 917, 932-34 (1974). *See generally* Comment, *Sterilization, Retardation, and Parental Authority*, 1978 B.Y.L. REV. 380 (1978).

[67] 85 N.J. at 264, 426 A.2d at 482.

[68] *Id.* The guardian *ad litem* must be afforded access to the incompetent individual and be able to "represent zealously the interests of his ward." *Id.*

[69] *Id.*

the trial judge must personally meet with the alleged incompetent individual in order to form his own impressions regarding competency.[70]

Once these procedural safeguards have been employed, the trial judge must then determine whether the individual is in fact incapable of choosing between sterilization and procreation, and if so, whether this incapacity is permanent.[71] The importance of this aspect was underscored by the court's observation that many retarded persons are fully capable of making such a decision.[72] For this reason, the court held that the party seeking sterilization must prove incapacity "by *clear and convincing evidence.*"[73]

Finally, the trial court must determine whether sterilization is truly in the best interests of the incompetent individual.[74] Like the determination of capacity, this also must be based on "*clear and convincing*" evidence.[75] Establishing its own best interests test, the *Grady* court adopted standards more stringent than those of the trial court in order to eliminate potential abuse of judicial authority.[76] The court outlined nine factors to be considered in making this determination:

> (1) The possibility that the incompetent person can become pregnant. There need be no showing that pregnancy is likely. The court can presume fertility if the medical evidence indicates normal development of sexual organs and the evidence does not otherwise raise doubts about fertility.
> (2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.

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[70] *Id.* at 265, 426 A.2d at 482. Every opportunity should be afforded the incompetent individual to voice his or her opinion on the proposed sterilization. *Id. See In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980). The incompetent individual need not be present at the proceedings, however, if physical presence is unnecessary to protect his or her interests. 85 N.J. at 265, 426 A.2d at 482.

[71] 85 N.J. at 265, 426 A.2d at 482-83.

[72] *Id.* (citing Neuwirth, Heisler & Goldrich, *Capacity, Competence, Consent: Voluntary Sterilization of the Mentally Retarded*, 6 COLUM. HUMAN RIGHTS L. REV. 447, 449-53 (1974 - 1975)). One authority has suggested that at least 90% of the individuals categorized as mentally retarded suffer only mild retardation and are fully able to make decisions regarding sterilization. Murdock, *supra* note 66, at 933.

[73] 85 N.J. at 265, 426 A.2d at 483 (emphasis in original).

[74] *Id.* at 266, 426 A.2d at 483.

[75] *Id.* (emphasis in original).

[76] *Id.* at 263, 426 A.2d at 482.

> (3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.
> (4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability.
> (5) The feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances.
> (6) The advisability of sterilization at the time of the application rather than in the future. While sterilization should not be postponed until unwanted pregnancy occurs, the court should be cautious not to authorize sterilization before it already has become an advisable procedure.
> (7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child.
> (8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures.
> (9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interests of the incompetent person rather than their own or the public's convenience.[77]

Because it was unclear whether the trial court used a clear and convincing standard of proof in its "best interests" determination, and because stricter standards were adopted, the court deemed it necessary to remand for further proceedings.[78]

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[77] *Id.* at 266-67, 426 A.2d at 483. It was noted that these factors were not exclusive. *Id.* at 266-67, 426 A.2d at 483. Furthermore, it was pointed out that the clear and convincing standard applies to the findings as a whole, and not to each individual consideration. *Id.* at 267, 426 A.2d at 483. Finally, the court indicated that a similar analysis would pertain where the incompetent individual was male, although some of the factors would not apply. *Id.* at 267 n.10, 426 A.2d at 483 n.10.

[78] *Id.* at 267-72, 426 A.2d at 483-86. The trial court had set forth a more limited five point test. *See* note 33 *supra* and accompanying text. Upon remand Judge Polow denied the parents' application, holding that although sterilization was proper under the supreme court's standards, the procedure would presently be premature. This determination was based on the finding that there currently was little likelihood of sexual activity since Lee Ann would continue to live at home for another year. Judge Polow left the door open to future sterilization by inviting a renewal of the application if Lee Ann were to be placed in a group living arrangement, thereby increasing the possibility of sexual activity. *In re* Grady, No. C-1917-78E (N.J. Super. Ct., Ch. Div. Aug. 3, 1981).

In a concurring opinion, Justice Handler reflected his general agreement with the majority's opinion and the standards enunciated therein, but maintained that their "articulation of . . . [the appropriate] standards [was] somewhat misdirected and potentially misleading."[79] The justice urged that the standards outlined by the majority amounted to a requirement of necessity, and that such a showing was "an extremely important, if not an indispensable predicate" to judicial authorization of sterilization.[80] He further contended that although the New Jersey statutes[81] addressed by the majority did not directly govern, their broad objectives should still have been taken into account.[82] Justice Handler reasoned that because the statutes imposed a necessity standard, such a requirement is implicit in the majority's opinion.[83] Finally, he indicated that although the majority maintained that clear and convincing evidence regarding the various factors in the best interests determination was only necessary in the aggregate, "substantial proofs with respect to all facets" should be required.[84]

An examination of the legal issues posed by *Grady* entails a twofold analysis. First, it must be determined whether the court has jurisdiction to authorize sterilization. Once jurisdiction is established, it must then be ascertained under what circumstances such power should be exercised. Surprisingly, none of the parties really contested the threshold issue of jurisdiction.[85] Instead, much of the litigation centered on the appropriate standards by which to guide judicial intervention.[86] Nonetheless, much of the *Grady* opinion,[87] and most of the applicable case law,[88] involved resolution of the arduous issue of jurisdiction.

As noted in the *Grady* decision, the existing weight of authority holds that absent legislation a court lacks jurisdiction to authorize the

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[79] 85 N.J. at 273, 426 A.2d at 486 (Handler, J., concurring).

[80] *Id.* at 273-75, 426 A.2d at 486-87 (Handler, J., concurring). In a footnote, the majority expressly rejected Justice Handler's analysis of necessity, stating that "[a] necessity standard would result in an unacceptable degree of State interference in the exercise of these rights concerning sterilization." *Id.* at 263 n.9, 426 A.2d at 481 n.9.

[81] N.J. STAT. ANN. §§ 30:4-24.2(d)(2), :6D-5(a)(4). *See* note 55 *supra* and accompanying text.

[82] 85 N.J. at 275, 426 A.2d at 487 (Handler, J., concurring).

[83] *Id.* at 276, 426 A.2d at 488 (Handler, J., concurring).

[84] *Id.*

[85] *Id.* at 243, 426 A.2d at 471. The Attorney General and the Public Advocate did contend, however, that the standards and procedures enumerated in the statutes governed the instant procedings. *See* notes 55-58 *supra* and accompanying text.

[86] *See* note 24 *supra* and accompanying text.

[87] 85 N.J. at 250-62, 426 A.2d at 474-81. *See* notes 59-63 *supra* and accompanying text.

[88] *See* authorities listed in notes 61 & 62 *supra*.

sterilization of an incompetent individual.[89] The basis for such holdings, however, is not entirely clear. In a recent case, the Supreme Court of Alabama indicated that "[t]he profound nature of the constitutional issues raised . . . and the irreversible character of the physical consequences of the requested relief preclude judicial resolution absent legislative action."[90] This language, as well as the language of similar holdings,[91] implies that the reluctance to act is more an exercise of judicial restraint than the existence of a total bar to jurisdiction.[92]

Undoubtedly, *Wade v. Bethesda Hospital*[93] and *Sparkman v. McFarlin*[94] were of primary influence in many of those decisions which declined jurisdiction. In *Wade*, an individual who had been sterilized pursuant to a court order brought suit in federal district court against the Ohio probate judge[95] who authorized the sterilization.[96] The court held that the judge acted wholly without jurisdiction in ordering plaintiff's sterilization because there was no enabling legislation, and that he was therefore not entitled to any judicial immunity.[97] In *Sparkman*, the Court of Appeals for the Seventh Circuit reached a similar result in an action brought against an Indiana judge.[98] Confronted with the prospect of potential liability, it is thus not surprising that many courts have declined jurisdiction to authorize sterilization. Although one such court expressed its disagreement with *Sparkman*, noting that "a mentally retarded child is penalized if she is fortunate enough to have parents who . . . elect to keep her at home," it nonetheless felt compelled to decline jurisdiction because of the federal court's holding.[99]

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[89] 85 N.J. at 260-61, 426 A.2d at 480.

[90] Hudson v. Hudson, 373 So.2d 310, 312 (Ala. Sup. Ct. 1979).

[91] *See, e.g.*, Guardianship of Tulley, 83 Cal. App. 3d 698, 701, 146 Cal. Rptr. 266, 268 (1978), *cert. denied*, 440 U.S. 967 (1979) ("awesome power . . . must derive from specific legislative authorization.").

[92] None of these holdings "demonstrates any controlling legal principle prohibiting a court of general jurisdiction from acting upon a petition for sterilization. They suggest instead a preference that the difficult decisions regarding sterilization be made by a legislative body. This is not simply a denial of jurisdiction, but an abdication of the judicial function." *In re* Hayes, 93 Wash. 2d 228, 231, 608 P.2d 635, 637 (1980); *see also id.* at 240, 608 P.2d at 642 (Stafford, J., concurring specially in part and dissenting in part).

[93] 337 F. Supp. 671 (S.D. Ohio 1971).

[94] 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

[95] The same Ohio probate judge had issued what is probably the only reported decision prior to 1976 holding that a court has jurisdiction to authorize the sterilization of a mental incompetent absent specific legislation. *See In re* Simpson, 180 N.E.2d 206 (Ohio P. Ct. 1962).

[96] 337 F. Supp. at 672.

[97] *Id.* at 673-74.

[98] 552 F.2d at 174-76.

[99] *In re* S.C.E., 378 A.2d 144, 145 (Del. Ch. 1977).

In *Stump v. Sparkman*,[100] the United States Supreme Court, reversing the Seventh Circuit decision, held that the judge who ordered the sterilization was entitled to judicial immunity.[101] The *Stump* holding, however, is not persuasive authority for the proposition that a court has jurisdiction to sanction the sterilization of a mentally incompetent individual absent legislation,[102] since the scope of the court's holding is limited to the issue of judicial immunity.[103] Although some courts have erroneously relied on *Stump* to support a finding of inherent jurisdiction,[104] the New Jersey supreme court correctly refrained from citing it for this proposition.[105] Instead, the *Grady* court found sufficient justification for a court to exercise such jurisdiction in the case law relating to *parens patriae* jurisdiction[106] and in the need to adequately consider the incompetent individual's constitutional rights *in toto*.[107]

Grady is one of the first decisions of this nature to give countenance to an incompetent individual's right to be sterilized.[108] While most courts have simply ignored this right,[109] the Supreme Court of New Jersey has determined that a retarded individual deserves a choice between sterilization and procreation despite his or her incompetence.[110] Substantial precedent for this conclusion was found in *Quinlan* because inherent similarities exist between the plight of a

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[100] 435 U.S. 349 (1978), *rev'g sub nom.* Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977).

[101] *Id.* at 355-64.

[102] *See* C.D.M. v. State, 627 P.2d 607, 615-16 (Alaska Sup. Ct. 1981) (Matthews, J., dissenting); *In re* Hayes, 93 Wash. 2d 228, 247-48, 608 P.2d 635, 646 (1980) (Rosellini, J., dissenting); *In re* Eberhardy, 97 Wis. 2d 654, 667, 294 N.W.2d 540, 546-47 (Ct. App. 1980).

[103] The Court merely held that the judge had jurisdiction to entertain the action and was therefore entitled to judicial immunity, noting that under Indiana case law the "judge would err as a matter of law if he were to approve" the requested sterilization. 435 U.S. at 358-59.

[104] Both *In re* Grady, 170 N.J. Super. 98, 118, 405 A.2d 351, 361 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981), and *In re* Hayes, 93 Wash. 2d 228, 231-32, 608 P.2d 635, 637-38 (1980), relied on the *Stump* holding.

[105] Although the supreme court did not rely upon the *Stump* decision, it did note it in its citation to the Seventh Circuit's holding in *Sparkman*. *See* 85 N.J. at 261, 426 A.2d at 480.

[106] *See* notes 31 & 63 *supra* and accompanying text.

[107] *See* notes 46-54 *supra* and accompanying text.

[108] Judge Polow's decision in *In re* Grady , 170 N.J. Super. 98, 405 A.2d 851 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981), was one of the first substantial opinions on this topic to recognize the mentally retarded individual's right to sterilization. *Id.* at 110-12, 405 A.2d at 857-58. *See also* Rubey v. Massey, 452 F. Supp. 361, 366 (D. Conn. 1978). One considerable opinion decided prior to the Supreme Court of New Jersey's holding in *Grady*, *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980), reached the same result as *Grady* but did not expressly consider the constitutional right to sterilization.

[109] Most courts denying jurisdiction neglect the incompetent's constitutional right to sterilization, recognizing only that the right to procreate is fundamental. *See, e.g.*, Hudson v. Hudson, 373 So.2d 310, 311 (Ala. Sup. Ct. 1979).

[110] 85 N.J. at 250, 426 A.2d at 474.

retarded individual incapable of consenting to sterilization and that of a comatose person unable to acquiesce in the discontinuance of artificial life sustaining treatment.[111]

Quinlan involved a twenty-one year old woman who, due to extensive brain damage, was "in a chronic and persistent 'vegetative' state, having no awareness of anything or anyone around her and existing at a primitive reflex level."[112] All of the medical evidence indicated that Karen Ann Quinlan's comatose condition was irreversible, and that her life was being artificially sustained by use of a respirator and intravenous feeding.[113] Because there was no hope for his daughter's recovery, Karen Ann's father applied to the chancery division seeking appointment as guardian with power to authorize discontinuance of the extraordinary medical treatment.[114]

The New Jersey supreme court posited that the comatose patient's right to privacy encompasses the right "to permit this non-cognitive, vegetative existence to terminate by natural forces," and that Karen Ann was entitled to have this right "asserted on her behalf by her guardian."[115] The court went on to hold that if a hospital ethics committee as well as the treating physicians concurred in the determination that there was "no reasonable possiblity of [Karen Ann] ever emerging from her present comatose condition to a cognitive, sapient state," then the artificial life support system could be removed without civil or criminal liability.[116]

Despite the similarities between *Quinlan* and *Grady*, these two situations are substantially distinguishable. Prior to her affliction, Karen Ann Quinlan was a competent individual.[117] Had Karen Ann been able to momentarily regain consciousness, she herself could have decided to discontinue the extraordinary medical treatment.[118] Lee Ann, on the other hand, had been retarded since birth and was never capable of formulating a sterilization decision.[119] Thus, a truly sub-

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[111] *Id.*

[112] 70 N.J. at 25, 355 A.2d at 655.

[113] *Id.* at 26, 355 A.2d at 655-56.

[114] *Id.* at 18, 355 A.2d at 651.

[115] *Id.* at 41, 355 A.2d at 664.

[116] *Id.* at 54-55, 355 A.2d at 671-72.

[117] *See id.* at 21, 355 A.2d at 653.

[118] *Id.* at 39, 355 A.2d at 663. Evidence was offered that Karen Ann had expressed her disapproval of artificial life prolonging treatment while competent, thus indicating her desire to terminate treatment. The court concluded that these statements lacked sufficient probative value because they were not made while Karen Ann was in similar circumstances and therefore did not consider them in its determination. *Id.*

[119] *See In re* Grady, 170 N.J. Super. 98, 102, 405 A.2d 851, 853 (Ch. Div. 1979), *vacated and remanded*, 85 N.J. 235, 426 A.2d 467 (1981).

jective determination could not be made on her behalf.[120] Right to die cases subsequent to *Quinlan*, however, have examined the issue of judicially authorized substituted consent specifically within the context of mentally impaired individuals. Consequently, these cases provide a more relevant framework for analysis of the *Grady* dilemma.

In *Superintendent of Belchertown v. Saikewicz*,[121] the Supreme Judicial Court of Massachusetts held that life prolonging chemotherapy treatment could be withheld from a mentally retarded individual afflicted with terminal leukemia. Although the individual was never capable of important decision-making, the Massachusetts Court utilized a "substituted judgment" standard,[122] a subjective approach that seems misapplied in the context of the mentally retarded individual.[123] Nonetheless, the court reasoned that the objective should be "to ascertain the incompetent person's actual interests and preferences,"[124] thereby attempting to reach the decision "which would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual."[125] While urging that this determination be "subjective in nature," the court recognized that "it may be necessary to rely . . . on objective criteria."[126]

Under similar circumstances, the New York Court of Appeals reasoned that a subjective determination would be impractical. In *In*

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[120] *See In re* Grady, 85 N.J. at 274, 426 A.2d at 487 (Handler, J., concurring).

[121] 373 Mass. 728, 370 N.E.2d 417 (1977).

[122] *Id.* at 750-53, 370 N.E.2d at 430-31.

[123] *See In re* Storar, 52 N.Y.2d 363, 380, 420 N.E.2d 64, 72-73, 428 N.Y.S.2d 266, 274-75 (1981).

[124] 373 Mass. at 752-53, 370 N.E.2d at 431.

[125] *Id. Cf.* Strunk v. Strunk, 445 S.W.2d 145 (Ky. Ct. App. 1969) (utilization of substituted judgment to authorize removal of incompetent's kidney for purpose of transplant into brother). *See generally* Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48 (1976).

[126] 373 Mass. at 750-51, 370 N.E.2d at 430. The substituted judgment approach was reaffirmed by the Massachusetts court in *In re* Spring, 380 Mass. 629, 405 N.E.2d 115 (1980). The court found that life prolonging hemodialysis treatment could be withdrawn from an elderly man who was suffering from a terminal kidney disease and was unable to give informed consent due to senility. The court held that the trial judge had properly applied the substituted judgment doctrine, and concluded that the incompetent would have refused the treatment if able to make this decision in light of his incompetence. *Id.* at 634, 405 N.E.2d at 118-20. Interestingly, this finding was made despite the fact that the individual had acquiesced to the treatment prior to becoming incompetent. *Id.* at 636, 405 N.E.2d at 120. The substituted judgment doctrine as applied by the *Saikewicz* court has been criticized because it results in treatment being withheld from an incompetent individual that would not be refused by most competent persons, thus creating the possibility of equating "a right to die by proxy with a requisite quality of life." Collester, *Death, Dying and the Law: A Prosecutorial View of the* Quinlan *Case*, 30 RUTGERS L. REV. 304, 327 (1977). Although the *Saikewicz* court expressly rejected any "quality of life"

re Storar,[127] the highest New York court held that blood transfusions could not be withheld from a severely retarded individual afflicted with terminal bladder cancer. The court acknowledged that a competent patient has a right to refuse medical treatment, but indicated that where an individual has always been incompetent "it is unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent."[128] In the same opinion, the court considered the case of an irreversibly comatose Catholic Brother who had previously expressed a desire not to have his life artificially prolonged should he meet the same fate as Karen Ann Quinlan. Because it was proven by clear and convincing evidence that he had previously indicated his desire not to receive treatment, it was held that the court could exercise his personal right and authorize the discontinuance of treatment.[129]

These cases, by analyzing the problem of consent in terms of the incompetent individual's full spectrum of constitutional rights and the court's ability to assert them on their behalf, support a finding of jurisdiction in *Grady*. Because the Massachusetts court's holding in *Saikewicz* concerns the termination of life itself, it exemplifies a more profound exercise of substituted consent than *Grady*. Even the *Storar* holding, which implicitly rejects a subjective exercise of substituted consent,[130] supports jurisdiction within the *Grady* context by considering the retarded patient's right to decline medical treatment, and by not precluding the court's exercise of this right under different circumstances. Considering *Quinlan* in conjunction with these cases, it is clear that the *Grady* court reached the correct result on the issue of jurisdiction.

The remaining analysis of the court's holding centers on the appropriate standards to be utilized when considering sterilization. The *Grady* court adopted a "best interest" standard and rejected the necessity requirement urged by the Public Advocate and Attorney General.[131] As discussed in the concurring opinion, however, there is

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considerations, 373 Mass. at 754, 370 N.E.2d at 432, the *Spring* court's holding that an individual would acquiesce to treatment while competent, but decline treatment once incompetent, gives added credence to this criticism.

[127] 52 N.Y.2d 363, 420 N.E.2d 64, 148 N.Y.S.2d 266 (1981).

[128] *Id.* at 376-80, 420 N.E.2d at 70-72, 438 N.Y.S.2d at 272-74. The court thereby implicitly rejected the subjective substituted judgment approach utilized by the Massachusetts courts.

[129] *Id.* Although it did not reach the issue, the implication of the court's holding is that absent such a showing the court will not authorize the discontinuance of treatment.

[130] *See* note 128 *supra* and accompanying text.

[131] *See* notes 64, 65 & 74 *supra* and accompanying text.

some question as to the actual distinction between a necessity requirement and the approach adopted by the court.[132]

In its analysis of necessity, the *Grady* majority employed the definition of necessity advanced by the Public Advocate. This definition stressed two factors: the probability of sexual activity or pregnancy, and the "availability of feasible, less drastic means of contraception."[133] Both of these considerations are incorporated into four of the majority's nine factors listed for its "best interests" determination.[134] For this reason Justice Handler opined that a necessity standard was implicit in the majority's holding.[135] The majority responded to this contention in a footnote, charging that "[t]he concurring opinion misconstrues our position on a showing of necessity, a position that we have stated clearly."[136] Actually, the two opinions only differ in degree, with Justice Handler ascribing greater significance to the factors urged by the Public Advocate.

The majority's rejection of "necessity" raises the question of what impact the *Grady* holding will have on the interpretation of sections 30:4-24.2 and 30:6D-5 of the New Jersey Statutes Annotated[137] which require a demonstration of necessity.[138] Arguably, an equal protection problem could arise if an individual governed by the statutes were unable to satisfy the necessity requirement, but would otherwise qualify for sterilization under the *Grady* standards.[139] Moreover, since the court held that an incompetent individual has a constitutional right to sterilization,[140] the necessity requirement of the statutes should not be used to deny access to sterilization beyond the limits set

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[132] *See* note 80 *supra* and accompanying text.

[133] 85 N.J. at 262, 426 A.2d at 481.

[134] *Id.* at 266, 426 A.2d at 483 (factors 1, 3, 5, & 8).

[135] *Id.* at 273-75, 426 A.2d at 486-87 (Handler, J., concurring).

[136] 85 N.J. at 263 n.9, 426 A.2d at 481 n.9. The footnote goes on to maintain that the adopted standards are more protective than those of the concurrence or the statutes. It is then stated that adoption of a necessity standard "might prevent an individual who wishes to be sterilized from being so." *Id.* This observation is incomprehensible. If an individual "wishes to be sterilized," she would necessarily be capable of consenting to the procedure herself. If, however, her mental state were such that she were incapable of giving informed consent, her "wishes" would lack sufficient probative value and would therefore be irrelevant.

The footnote next suggests that "adoption of a necessity standard might also result in the imposition of sterilization upon someone against his wishes." *Id.* To claim that a pre-requisite demonstration of the likelihood of sexual activity or pregnancy and the unavailability of less drastic alternative forms of contraception (the instant definition of necessity) somehow connotates a justification of compulsory sterilization defies explanation.

[137] N.J. STAT. ANN. §§ 30:4-24.2, :6D-5 (West 1981).

[138] *See* notes 29, 55, & 57 *supra* and accompanying text.

[139] *See* Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978).

[140] 85 N.J. at 249-50, 426 A.2d at 474.

forth in *Grady*. Consequently, the standards enunciated in *Grady* are likely to have the effect of superseding the statutory requirement of necessity.[141]

The *Grady* holding delineates three conditions which must be satisfied before a court can authorize a sterilization: 1) procedural safeguards must be followed; 2) the individual must lack the capacity to make her own decision; and 3) sterilization must be in the individual's best interests.[142] These prerequisites provide sufficient protection from potential abuses which might otherwise occur.[143] While any "best interest" determination is an imperfect process, the nine non-exclusive factors listed by the court provide ample guidelines for the decision.[144]

In addition to its effect on access to sterilization, the *Grady* holding is likely to affect the mentally impaired individual's exercise of other rights which require informed consent. Most notable of these are abortion and the right to refuse medical treatment. Although the United States Supreme Court has not yet made such a determination regarding sterilization, the Court has expressly held that the right to privacy includes the right to an abortion.[145] Accordingly, the procedures and standards utilized in *Grady* should be applied to effectuate the mentally impaired individual's right to abortion in the same manner used to afford access to sterilization. Thus, if the procedural safeguards are followed and it is shown that the individual is incapable of making her own choice, a court can authorize an abortion if it is in the "best interests" of the mentally impaired individual.[146]

Under the combined holdings of *Quinlan* and *Grady* it is also clear that New Jersey should allow a court to exercise a mentally incompetent individual's right to decline life prolonging medical treatment. *Quinlan* established that an individual has a right to decline life prolonging treatment under certain circumstances,[147] whereas *Grady* demonstrated that courts have a duty to assert such

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[141] This likelihood gives added credence to Justice Handler's views on necessity. *See* note 136 *supra* and accompanying text. Had the majority simply held that necessity was implicit in its standards, the same result would have been obtained and the problem would have been avoided.

[142] 85 N.J. at 264-66, 426 A.2d at 482-83.

[143] For examples of past abuses, see Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978); Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971); cases listed in note 19 *supra*.

[144] *See* note 77 *supra* and accompanying text.

[145] *E.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). The Court has not spoken directly on the right to sterilization. *See* note 47 *supra* and accompanying text.

[146] Of course, since the nature of abortion differs from sterilization, the factors in the "best interests" determination will necessarily differ.

[147] 70 N.J. at 40-41, 355 A.2d at 663-64.

rights on behalf of the mentally impaired individual.[148] Thus, when considering the propriety of withholding life prolonging treatment from a mentally retarded individual, the court should employ an analysis similar to *Grady* and utilize a "best interests" determination. Such an approach would be more reasonable than the substituted judgment method adopted by the *Saikewicz* court.[149]

The *Grady* court's decision recognizes the mentally impaired individual's sincere need for access to sterilization, while at the same time insuring that adequate protections are employed. By giving equal weight to the right to procreate and the right to sterilization, the decision enables a mentally impaired individual to come closer to attaining the same constitutional status as a competent individual. Equally significant, the *Grady* holding affords an individual capable of making his or her own choice an opportunity to refuse unwanted sterilization,[150] and expressly rejects any form of involuntary sterilization.[151] Nonetheless, where the right to procreate is not of primary importance to an individual, that right should not be used to deprive her of a "richer and more active life" which may only be provided by the permanent elimination of the risk of pregnancy.[152]

James R. Ottobre

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[148] 85 N.J. at 250-51, 426 A.2d at 474-75.

[149] *See* notes 122-26 *supra* and accompanying text.

[150] The holding requires that the individual be incapable of making the decision on her own, and that she be afforded every opportunity to voice her opinion on the proposed sterilization. 85 N.J. at 265, 426 A.2d at 482-83. Thus, an individual capable of forming an opinion on the matter can refuse the procedure.

[151] "[N]othing in this opinion should be read as approving compulsory sterilization." *Id.* at 262 n.8, 426 A.2d at 481 n.8.

[152] *Id.* at 273, 426 A.2d at 486.