

IN THE MATTER OF ANONYMOUS, A MINOR: FETAL REPRESENTATION IN HEARINGS TO WAIVE PARENTAL CONSENT FOR ABORTION

*Helena Silverstein**

According to the United States Supreme Court, states may require that a pregnant minor obtain parental consent before terminating her pregnancy, but only if the minor has the opportunity to seek a waiver, or bypass, of that consent.¹ The Supreme Court has further established that a minor who requests such a waiver must be granted her request upon successful demonstration that she is mature and sufficiently informed to make a decision about abortion, or, even if not mature and informed, that the abortion is nonetheless in her best interest.²

While Supreme Court precedent elaborates the general parameters of parental involvement requirements, the practical meaning of these mandates emerges in local arenas. The meaning of parental involvement mandates takes shape, for example, when minors approach abortion providers to obtain abortions, when trial courts respond to minors' petitions to waive parental involvement, and when appellate courts are called upon to further define the terms of the law.³ The meaning of "mature and informed" is a contested matter played out time and again in waiver of parental consent hearings, and what counts as the "best interest" of a pregnant minor is fashioned by trial court judges and state appellate

* Associate Professor, Department of Government and Law, Lafayette College. B.A., University of Pennsylvania, 1983; Ph.D., University of Washington, 1992. This article is based, in considerable part, on information obtained during interviews with those familiar with Alabama's parental consent requirement and accompanying judicial waiver proceedings. I am much indebted to those who agreed to share with me their knowledge and experiences. I also find myself, once again, in the debt of Wayne Fishman, whose conceptual and editorial input contributed to this article. My appreciation extends as well to Steve Winnie and Michael Tollini for their fine editorial work.

¹ See *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622 (1979).

² *Id.* at 643-44.

³ Examinations of the implementation of parental involvement requirements frequently note the Supreme Court's failure to provide guidance for determining when a judicial bypass should be granted. See, e.g., Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 *FORDHAM L. REV.* 1873, 1889 (1996) (commenting that the Court has given no direction as to how a child's maturity is to be ascertained); Anita J. Pliner & Suzanne Yates, *Psychological and Legal Issues in Minors' Rights to Abortion*, 48 *J. Soc. ISSUES*, at 203, 208 (1992) (noting that the Supreme Court and state legislatures have offered judges little guidance for determining when a judicial bypass should be granted).

courts that hear appeals of denied waivers.⁴ Even with the oversight of the appeals process, how trial judges conduct waiver hearings is, within certain broadly defined boundaries, a matter of substantial discretion.⁵

Indeed, consider the following events that unfolded in 1998 in an Alabama juvenile court.⁶ A pregnant minor petitioned the juvenile court for a bypass of parental consent and, in accordance with the state's mandate, the court appointed an attorney to represent her. In an unusual move, the trial court judge appointed a guardian ad litem to represent the interests of the unborn fetus and permitted the guardian to cross-examine the minor at the waiver hearing.⁷ The guardian ad litem questioned the minor about her familiarity with certain Bible scriptures and asked whether she was aware that, by choosing abortion, she would be "snuffing out" the life of her own child.⁸ The guardian called witnesses from pro-life organizations to testify on behalf of the fetus. The hearing lasted nearly four hours.⁹

Whether foreseen by the Supreme Court when it handed down the basic guidelines of parental consent mandates, and whether such a move will ultimately withstand constitutional scrutiny, trial court judges in Alabama presently have the option to appoint guardians ad litem for the fetus.¹⁰ Although this maneuver has yet to achieve widespread popularity, in Alabama's fourth largest county, two of the three juvenile court judges routinely designate such guardians in waiver hearings. As a result, the option to appoint guardians is an added component of Alabama's parental involvement law.

Because of the change in the conduct of waiver hearings that accompanies these appointments, and because this approach to waiver hearings is likely to gain momentum,¹¹ it is worth considering whether guardianship appointments—both generally and as applied in Alabama—would withstand constitutional challenge. This paper argues that the appointment of guardians to represent the unborn transforms waiver hearings into adversarial proceedings, thereby increasing the burden a

⁴ See, e.g., Helena Silverstein, *The View from the Bench: Judging Parental Consent Bypass Requests in Alabama* (March 2001) (unpublished manuscript, on file with author) (explaining how Alabama appellate courts have elaborated standards for determining maturity and best interests, and how trial courts often construct their own standards during waiver hearings).

⁵ See, e.g., Suellen Scarnecchia & Julie Kuncie Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 113 (1995) (arguing that, because trial judges in Michigan have little guidance on how to conduct bypass hearings, their actions are clearly discretionary).

⁶ See *In re Anonymous*, 720 So. 2d 497 (Ala. Civ. App. 1998); see also *infra* Part II.A.

⁷ *Id.*

⁸ See Amy Bach, *No Choice for Teens*, THE NATION, Oct. 11, 1999, at 7.

⁹ *Id.*

¹⁰ See *infra* Part II.B.

¹¹ See *infra* Part II.D.

minor confronts when seeking an abortion. In addition, guardian appointments are, at bottom, moral regulations that advance a particular view about the nature of human life and personhood. However, despite these shortcomings, guardianship appointments are consistent with federal precedent. Although the use of guardians in Alabama juvenile courtrooms does raise some constitutional questions, because *Planned Parenthood v. Casey*¹² allows states to encourage childbirth over abortion, designating guardians to represent fetuses turns out to be a constitutionally permissible regulation of a woman's abortion rights. Finally, this paper contends that the inadequacy of standing precedent on abortion is evidenced by the fact that guardianship appointments are likely to pass constitutional muster.

Part I of this paper reviews the constitutional status of parental involvement requirements. Part II examines the use of guardians ad litem in one Alabama juvenile court and the associated Alabama case law. Part III suggests that while guardianship appointments intrude on a woman's right to choose abortion, they are nonetheless permissible given that *Planned Parenthood v. Casey* permits states to encourage childbirth over abortion. Part IV concludes by pointing to the substantial shortcomings of *Casey* made evident by the case of guardianship appointments.

I. PARENTAL INVOLVEMENT STATUTES AND LEGAL PRECEDENT

Parental involvement requirements are among the many abortion regulations states have instituted since *Roe v. Wade*¹³ held that abortion is a constitutionally protected right.¹⁴ Parental involvement legislation takes one of two forms: parental consent or parental notification. Some states prohibit physicians from performing abortions on minors without parental consent,¹⁵ while others direct physicians to notify one or both parents before performing an abortion.¹⁶ Currently, 17 states require pa-

¹² 505 U.S. 833 (1992).

¹³ 410 U.S. 113 (1973).

¹⁴ For instance, states have imposed such things as informed consent requirements and mandatory waiting periods for adult women seeking abortions. For an overview of legislative regulations of abortion since *Roe*, see, e.g., Kenneth J. Meier et al., *The Impact of State-level Restrictions on Abortion*, 33 DEMOGRAPHY 307 (1996); MARY C. SEGERS & TIMOTHY A. BYRNES, *ABORTION POLITICS IN AMERICAN STATES* (1995); BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* (1993).

¹⁵ See, e.g., 18 PA. CONS. STAT. ANN. § 3206 (West 2000) (requiring the consent of one parent); MISS. CODE ANN. §§ 41-41-51 to 41-41-63 (1999) (requiring the consent of both parents).

¹⁶ See, e.g., OHIO REV. CODE ANN. § 2919.12 (Anderson 1999) (requiring the notification of one parent); MINN. STAT. ANN. § 144.343 (West 1998) (requiring the notification of both parents).

rental consent in a minor's decision to choose abortion,¹⁷ 15 mandate parental notification,¹⁸ and another 10 have passed parental involvement bills that remain unenforced.¹⁹

Typically, statutes requiring parental involvement include exceptions. For instance, in most states an emancipated minor can obtain an abortion without informing her parents.²⁰ In addition, states include exceptions for "medical emergencies."²¹ Some states specify that parental involvement is not required in instances of reported child abuse or neglect.²²

Statutes vary across states in a number of ways. In most states, the consent or notification of one parent is sufficient. In a few states, the involvement of both parents is required,²³ although exceptions are often included for separated parents.²⁴ Some states require a waiting period between the time that a parent is notified and the abortion.²⁵

Most states have conformed their statutory language to the language of Supreme Court rulings on parental involvement. Although initially

¹⁷ These are Alabama, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Tennessee, Wisconsin, and Wyoming. *See Parental Involvement in Minors' Abortions, in STATE POLICIES IN BRIEF 1* (The Alan Guttmacher Institute, Nov. 1, 2001), at http://www.agi-usa.org/pubs/spib_PIMA.pdf (last visited December 16, 2001). In addition to these seventeen states, Maine allows minors to receive counseling instead of obtaining parental consent or court authorization for abortion. *See id.*

¹⁸ These are Arkansas, Delaware, Georgia, Iowa, Kansas, Maryland, Minnesota, Nebraska, Ohio, Oklahoma, South Dakota, Texas, Utah, Virginia, and West Virginia. *Id.* Although Oklahoma is listed among the states requiring parental notification, that state's law does not, strictly speaking, mandate such notice. Instead, the law states: "Any person who performs an abortion on a minor without parental consent or knowledge shall be liable for the cost of any subsequent medical treatment such minor might require because of the abortion." *Id.*

¹⁹ These are Alaska, Arizona, California, Colorado, Florida, Illinois, Montana, Nevada, New Jersey, and New Mexico. Some of these statutes have been found constitutionally infirm; others are currently under challenge. *Id.* In addition to these ten states, Ohio's parental consent legislation has also been enjoined, but the state's parental notification law is currently enforced. *Id.*

²⁰ *See, e.g.*, 18 PA. CONS. STAT. ANN. § 3206(a) (West 2000).

²¹ *See, e.g.*, MINN. STAT. ANN. § 144.343, Subd. 4 (West 1998) (waiving required notification when "the attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice").

²² *See, e.g.*, ARK. CODE ANN. § 20-16-805 (Lexis 2000).

²³ Arkansas, Minnesota, Mississippi, North Dakota, and Utah require the involvement of both parents. *See STATE POLICIES IN BRIEF, supra* note 17.

²⁴ Mississippi mandates two-parent consent, but allows for exceptions when parents are separated. *See* MISS. CODE ANN. § 41-41-53(2) (West 1999). In contrast, Minnesota requires two-parent notification, but does not provide an exception when the parents of the minor are separated. *See* MINN. STAT. ANN. § 144.343 (West 1998).

²⁵ The Minnesota statute prohibits abortions until 48 hours after the minor's parents have been notified. *See* MINN. STAT. ANN. § 144.343 (West 1998).

held unconstitutional,²⁶ the Supreme Court has affirmed state mandated parental involvement in a line of more recent cases.²⁷ However, with respect to parental consent, the Supreme Court has invalidated statutes that do not include a bypass alternative.²⁸

The Supreme Court's logic in upholding only those parental consent statutes that incorporate a bypass option rests on the view that minors have a constitutionally protected right to abortion.

Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor'. . . . Thus, the constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women.²⁹

While not providing the same level of protection for teens as for adult women, the Court has held that a pregnant minor's right to abortion may be regulated only when the state's interest in doing so is significant.³⁰ In addition, regulation of abortion may not impose an "undue burden" on a woman.³¹ "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."³²

²⁶ See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (striking down a Missouri parental consent statute on the grounds that it gave parents a veto over the minor's abortion decision).

²⁷ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding Pennsylvania's one-parent consent requirement with a judicial bypass option); *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding Minnesota's two-parent notification requirement with a judicial bypass option); *Ohio v. Akron Ctr. for Reprod. Health (Akron II)*, 497 U.S. 502 (1990) (upholding Ohio's one-parent notification requirement with a judicial bypass option).

²⁸ See, e.g., *Bellotti II*, 443 U.S. 622 (1979) (invalidating a Massachusetts law that allowed minors to seek a judicial bypass of parental consent but only after first being denied such consent). All parental involvement mandates currently in effect, except those in Utah and Maryland, include a judicial bypass option. Utah requires that physicians notify the minor's parents "if possible." UTAH CODE ANN. 76-7-304 (Lexis 1999). The Supreme Court upheld this statute as applied in the case of an immature minor. See *H.L. v. Matheson*, 450 U.S. 398 (1981). Maryland requires parental notification, but physicians may waive notice upon finding that the notice to a parent would lead to abuse, that the minor is mature, or that notification would not be in her best interests. MD. CODE. ANN., HEALTH-GEN. II § 20-103 (2000).

²⁹ *Hodgson*, 497 U.S. at 434-35 (Stevens, J., concurring) (quoting *Bellotti II*, 443 U.S. at 642).

³⁰ *Akron v. Akron Ctr. for Reprod. Health (Akron I)*, 462 U.S. 416, 427 n.10 (1983) (noting that "the Court repeatedly has recognized that, in view of the unique status of children under the law, the States have a 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult'" (quoting *Danforth*, 428 U.S. at 75).

³¹ *Casey*, 505 U.S. at 874-75.

³² *Id.* at 877. For further explanation of the undue burden standard, see *infra* Part III.A.

Proceeding with these established standards, the Court has held that states do have a significant interest in encouraging parental involvement when a minor seeks an abortion. Members of the Court have commented that, “[t]he State has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”³³ In addition, the state has an interest in protecting the right of parents to guide the lives of their children and advancing the “family unit.”³⁴ “[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.”³⁵

While finding a state interest justifying parental consultation, the Court has overturned statutes when they impose an undue burden on minors. Most important in this regard, the Court has ruled that mandated parental consent, when not accompanied by an alternative for the avoidance of that consent, amounts to a “parental veto” over a minor’s abortion decision. As stated in *Planned Parenthood v. Danforth*, the Court’s first ruling on parental consent, a state “does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto” over a woman’s abortion decision.³⁶ However, in a ruling handed down on the same day as *Danforth*, the Court suggested that a statute preferring parental involvement, but permitting the mature and informed minor to obtain an abortion without parental consultation, would be “fundamentally different from a statute that creates a ‘parental veto.’”³⁷

In *Bellotti v. Baird II* (hereinafter “Bellotti II”), the Court outlined a method for creating a constitutionally sound parental consent requirement. The Massachusetts statute under consideration in *Bellotti II* incorporated a judicial bypass procedure as part of its parental consent mandate. Overturning the statute, the Court noted that, even though the law included a bypass option, the minor could only exercise that option

³³ *Hodgson*, 497 U.S. at 444 (Stevens, J., concurring) (citations omitted).

³⁴ *Id.*

³⁵ *Bellotti II*, 443 U.S. at 637. Furthermore, “the family has a privacy interest in the upbringing and education of children and the intimacies of the marital relationship which is protected by the Constitution against undue state interference.” *Hodgson*, 497 U.S. at 446 (Stevens, J., concurring) (citations omitted).

³⁶ *Danforth*, 428 U.S. at 74.

³⁷ *Bellotti v. Baird I*, 428 U.S. 132, 145 (1976). In this case, the Court vacated the lower court judgment that enjoined enforcement of a Massachusetts parental consent statute and remanded the case for certification of relevant issues of state law to the Supreme Judicial Court of Massachusetts. The Court commented that

[t]he picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation . . . The statute, as thus read, would be fundamentally different from a statute that creates a ‘parental veto.’

Id.

after her parents refused to consent to the abortion. Finding fault with this arrangement, the Court stated that “every minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents.”³⁸ Furthermore, the Court established guidelines that would save parental consent statutes from constitutional infirmity. A pregnant minor, seeking a waiver of mandated parental consent, is entitled

to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the ‘absolute, and possibly arbitrary, veto’ that was found impermissible in *Danforth*.³⁹

Although this procedure was initially elaborated as dictum, many states have followed the Court’s lead when crafting parental consent and notification statutes. *Bellotti II* has thus functioned as a guide for legislative construction of bypass provisions. Significantly, since its ruling in *Bellotti II*, the Court has upheld all but one parental involvement statute.⁴⁰

Bellotti II, though, is hardly the end of the story. For example, although *Bellotti II* clearly states that parental consent statutes must be accompanied by some type of bypass alternative, the Court has yet to decide whether the same is true of parental notification laws.⁴¹ In fact, the Court has declined the opportunity to so rule, explicitly stating that it

³⁸ *Bellotti II*, 443 U.S. at 647.

³⁹ *Id.* at 643–44.

⁴⁰ The one regulation overturned by the Court was an Ohio regulation. See *Akron I*, 462 U.S. at 440 (invalidating a blanket parental consent requirement for all minors under 15 years of age).

⁴¹ The Court has commented that mandated notification does not appear to impose the same types of obstacles as mandated consent. See, e.g., *Matheson*, 450 U.S. at 409 (noting that mandated consent demands parental approval and could amount to a veto, whereas under a “mere requirement of parental notice,” a minor may still obtain her abortion even without parental approval).

would leave for another day a determination of whether mandated notification must contain a bypass alternative.⁴²

In addition, while *Bellotti II* establishes two criteria upon which minors can seek a waiver of parental consent—the “mature and informed minor” standard and the “best interests” standard—neither that case nor any other Supreme Court ruling clearly defines these criteria.⁴³ Trial court judges thus have substantial discretion when deciding whether and under what conditions to grant a bypass request. Owing to the confidential nature of bypass hearings and records, the discretionary power of trial judges is particularly insulated from oversight and scrutiny.

Finally, some parental involvement laws incorporate provisions either allowing for or mandating the appointment of a guardian ad litem to protect the interests of the minor;⁴⁴ not included, though, are provisions pertaining to the appointment of guardians to protect the interests of the unborn. Nonetheless, and as detailed below, some judges have appointed guardians to represent the unborn during waiver hearings.⁴⁵ The opportunity to consider such appointments has yet to present itself to the Supreme Court. Thus, whether guardianship appointments⁴⁶ pose constitutional problems remains an open question.⁴⁷

⁴² See *Akron II*, 497 U.S. at 510 (“[A]lthough our cases have required bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. We leave the question open, because, whether or not the Fourteenth Amendment requires notice statutes to contain bypass procedures, [Ohio] H.B. 319’s bypass procedure meets the requirements identified for parental consent statutes in *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*.”) (citations omitted).

⁴³ *Bellotti II* gives some guidance upon which lower courts have drawn. “[T]he peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.” 443 U.S. at 643–44 n.23. In addition, the Court states that, “an abortion may not be the best choice for the minor. The circumstances in which the issue arises will vary widely. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor’s best interests.” *Id.* at 642–43. Despite these statements, commentators frequently note the absence of guidelines for determining maturity and best interests. See *supra* note 3.

⁴⁴ See, e.g., MINN. STAT. ANN. § 144.343, Subd. 6 (West 1998) (stating that a pregnant minor petitioning to waive parental notification “may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel”).

⁴⁵ See *infra* Part II.

⁴⁶ Unless otherwise noted, “guardian ad litem” or “guardianship appointments” refers to those guardians designated to represent the fetus.

⁴⁷ While the Supreme Court has not dealt with guardianship appointments, some state courts have. See, e.g., *In re Anonymous*, 720 So. 2d 497 (Ala. 1998) (per curiam) (invalidating a guardian’s appeal of the granting of a waiver petition without addressing the general propriety of guardianship appointments); *In re T.W.*, 551 So. 2d 1186, 1190 (Fla. 1989) (finding that “the appointment of a guardian ad litem for the fetus was clearly improper”).

II. THE ALABAMA PARENTAL CONSENT STATUTE AND THE CASE OF GUARDIANS AD LITEM⁴⁸

Mirroring the outline put forward in *Bellotti II*, Alabama enacted its parental involvement mandate in June 1987.⁴⁹ In setting forth a one-parent consent requirement for unemancipated minors under 18 years of age, the Alabama statute provides the conditions for a waiver of that consent. Specifically, if the minor elects not to or cannot obtain parental consent for an abortion, she may petition the juvenile court or a court of equal standing for a waiver of the consent requirement.⁵⁰ Consent “shall be waived if the court finds either: (1) That the minor is mature and well-informed enough to make the abortion decision on her own; or (2) That performance of the abortion would be in the best interest of the minor.”⁵¹ Consistent with *Bellotti II*, the Act stipulates that the waiver proceeding be confidential.⁵² In addition, “court proceedings shall be given such precedence over other pending matters as is necessary to insure that the court may reach a decision promptly, but in no case, except as provided herein, shall the court fail to rule within 72 hours of the time the petition is filed, Saturdays, Sundays, and legal holidays excluded.”⁵³

Beyond the parameters established in *Bellotti II*, the Alabama statute provides that the court shall advise a minor seeking to waive consent that she has a right to counsel and will be provided with an attorney if she is unable to pay for one on her own.⁵⁴ In addition, a court conducting waiver proceedings “shall issue written and specific factual find-

⁴⁸ The following discussion of waiver hearings and the use of guardians ad litem is based, in part, on interviews I conducted with those who have firsthand experience with the process (full text of interview notes on file with author). Because waiver hearings are closed and confidential, there is little publicly available information that offers insight into the conduct of these hearings. Information that is publicly available derives largely from appellate court decisions. These decisions typically indicate the basic facts of the case and the grounds for the trial court's denial. However, appellate court decisions leave much unrevealed. Therefore, between March and July 2001, I interviewed 28 people in Alabama who are familiar with waiver hearings. The interviews were designed to elicit a wide range of information on the conduct of waiver hearings, including, for example, the nature of the questions posed to the minors, the role played by judges, attorneys, and witnesses, the frequency of grants and denials, and the perceived fairness of the hearings. The interviews were open-ended phone interviews that lasted, on average, about 45 minutes. Those interviewed include court personnel, attorneys representing minors, attorneys appointed to represent the unborn, and abortion providers. In the discussion that follows, I do not identify the names of those interviewed, except where the participants have consented to my inclusion of their names.

⁴⁹ See 1987 Ala. Acts 87-286.

⁵⁰ ALA. CODE § 26-21-3(e) (Michie 1992). The minor may petition the court in the county in which she resides or the county in which the abortion is to be performed. *Id.*

⁵¹ § 26-21-4(f).

⁵² § 26-21-4(i).

⁵³ § 26-21-4(e).

⁵⁴ § 26-21-4(b).

ings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained for at least four years.”⁵⁵ Finally, the statute specifies the terms for appealing the outcome of a waiver hearing: an “expedited confidential and anonymous appeal shall be available to any minor to whom the court denies a waiver of consent. If notice of appeal is given, the record of appeal shall be completed and the appeal shall be perfected within five days from the filing of the notice of appeal.”⁵⁶ Among the things not specified is whether a guardian ad litem may be appointed to represent the interests of the minor⁵⁷ or the fetus.

The Alabama parental consent provision took effect on September 23, 1987, three months after its enactment.⁵⁸ Just two weeks later, the Court of Civil Appeals of Alabama handed down its first ruling in an appeal of a trial court’s decision to deny a waiver of consent.⁵⁹ Between October 1987 and July 2001, the Court of Civil Appeals handed down at least 34 rulings in cases involving petitions to waive parental consent.⁶⁰ The Supreme Court of Alabama handed down another 11 rulings in waiver cases.⁶¹

These appellate decisions have elaborated some of the parameters for determining when courts should grant waiver requests.⁶² In addition, the courts in some of Alabama’s largest counties (e.g., Jefferson, Montgomery, and Mobile) have put the law into effect by establishing routine procedures for handling waiver petitions. Generally speaking, minors who wish to avoid parental involvement in their abortion decisions are advised by abortion providers to contact the intake officer at the juvenile or family court of their home county or the county in which the abortion is to be performed. In those counties prepared to handle waiver petitions,⁶³ the intake officer assigns the minor an attorney. In some coun-

⁵⁵ § 26-21-4(g).

⁵⁶ § 26-21e4(h).

⁵⁷ Although the statute is silent on this point, the Alabama Supreme Court has held “that the attorney to be appointed under the parental consent act is to be a guardian ad litem, and that future appointments should be so designated and shall entail the responsibilities attendant to such appointments.” *Ex parte Anonymous*, 531 So. 2d 901, 905 (Ala. 1988).

⁵⁸ See *In re Anonymous*, 515 So. 2d 1254, 1254 (Ala. Civ. App. 1987).

⁵⁹ See *id.*

⁶⁰ See, e.g., *In re Anonymous*, 549 So. 2d 1347 (Ala. Civ. App. 1989); *In re Anonymous*, 515 So. 2d 1254 (Ala. Civ. App. 1987); *In re Anonymous*, 531 So. 2d 895 (Ala. Civ. App. 1988).

⁶¹ See, e.g., *Ex parte Anonymous*, 597 So. 2d 711 (Ala. 1992); *Ex parte Anonymous*, 595 So. 2d 499 (Ala. 1992); *Ex parte Anonymous*, 531 So. 2d 901, 905 (Ala. 1988).

⁶² Except as otherwise noted, this discussion of waiver procedures is drawn from information obtained during interviews. Interview notes *supra* note 48. See also Silverstein, *supra* note 4.

⁶³ Interviews with those involved in waiver proceedings indicate that some minors have petitioned for waivers in the larger counties after discovering that the courts in their home counties have no procedures in place to handle waiver requests. This would be consistent with

ties these are legal aid attorneys; in other counties there is a list of attorneys who have agreed to handle waiver requests. After meeting with her attorney, the minor appears before a judge in a confidential waiver hearing. According to most accounts, the average hearing takes less than 30 minutes.⁶⁴ Usually only the minor offers testimony, although on occasion the minor's legal counsel calls a friend or relative of the minor to testify on her behalf. After the hearing, and within the specified timeframe required by the Alabama Code,⁶⁵ the judge issues a written order either granting or denying the waiver request. If granted, the minor can then proceed with an abortion absent her parents' involvement.⁶⁶ If denied, the minor may file an expedited appeal.⁶⁷

A. THE ORIGINS OF GUARDIANSHIP APPOINTMENTS IN ALABAMA⁶⁸

On July 6, 1998, a pregnant minor, three months shy of her eighteenth birthday, sought a waiver of parental consent from the juvenile court in Montgomery County.⁶⁹ Her petition to waive consent was assigned to Judge W. Mark Anderson, one of three judges responsible for reviewing waiver petitions in Montgomery. Based on routine procedures established by the courthouse, the court intake officer assigned Beverly Howard as counsel for the minor.⁷⁰ Going beyond established procedures, Anderson appointed a guardian ad litem to represent the interests of the fetus.⁷¹ Rather than choosing from the typical list of attorneys who represent juveniles at the Montgomery Juvenile Court, Anderson appointed Julian McPhillips, a locally well-known pro-life attorney who had represented abortion protesters in previous cases.⁷²

Attorneys rarely file motions in advance of waiver hearings. But when Beverly Howard received notice of the appearance of "Baby Ashley," she filed two motions. Howard moved to strike the appointment

research findings demonstrating that in Pennsylvania two-thirds of the county courts are not prepared to handle judicial bypass inquiries. See Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73, 79-88 (1999).

⁶⁴ Interview notes *supra* note 48.

⁶⁵ *Supra* note 53 and accompanying text.

⁶⁶ The order is typically limited to the particular county where the minor plans to obtain the abortion.

⁶⁷ *Supra* note 56 and accompanying text.

⁶⁸ Except as otherwise noted, this discussion of guardianship appointments in Alabama is drawn from information obtained during interviews. Interview notes *supra* note 48.

⁶⁹ *In re Anonymous*, 720 So. 2d at 499. The ruling does not specify that the minor sought the waiver in Montgomery County.

⁷⁰ Howard's name was among those of several attorneys who regularly represented minors. Interview notes *supra* note 48.

⁷¹ See CARROLL DALE SHORT, *THE PEOPLE'S LAWYER: THE COLORFUL LIFE AND TIMES OF JULIAN L. MCPHILLIPS, JR.* 305-27 (2000); Bach, *supra* note 8, at 7.

⁷² SHORT, *supra* note 71, at 325-27.

of the guardian for the fetus and also requested that Anderson recuse himself from the case.⁷³

Anderson denied the motion to strike the guardian and explained the legal authority for his decision. Lacking authority under the parental consent statute to appoint such a guardian, Anderson turned to Rule 17(c) of the Alabama Rules of Civil Procedure. According to Rule 17(c), “[w]hen the interest of an infant unborn or unconceived is before the court, the court may appoint a guardian ad litem for such interest.”⁷⁴ To justify his use of Rule 17(c), Anderson noted the importance of giving the “unborn child” an “opportunity to have a voice, even a vicarious one, in the decision making.”⁷⁵

Howard based the second motion requesting recusal on an earlier waiver case heard by Anderson. In that case, the judge granted the minor’s waiver request, but only after writing a lengthy judicial order that expressed, among other things, his “fixed opinion that abortion is wrong.”⁷⁶ According to the order, the minor’s decision to proceed with the abortion would compound one mistake with another more terrible one, namely, the death of her unborn child. Still, Anderson waived parental consent upon finding that the minor was sufficiently mature and informed to have the abortion, and upon concluding that, given the maturity finding, the law allows the judge no alternative but to grant the waiver. The order noted that the minor would turn 18 in a month and could wait until then to have the abortion without a judicial waiver. But, quoting from Shakespeare and referring to Macbeth’s plan to assassinate his own father, the judge wrote,

If it were done when ‘tis done, then ‘twere well It were done quickly. If th’ assassination Could trammel up the consequence, and catch With his surcease success: that but this blow Might be the be-all and the end-all-here, But here, upon this bank and shoal of time. We’d jump the life to come. But in these cases We still have judgment here; that we but teach Bloody instructions, which being taught, return To plague th’ inventor. This even-handed justice Commends th’ ingredients of our poison’d chalice To our own lips.’⁷⁷

Concluding the order, Anderson wrote, “Judgment is the Lord and is eternal, yet his forgiveness and mercy are limitless.”⁷⁸

⁷³ Interview notes *supra* note 48.

⁷⁴ ALA. R. CIV. P. 17(c).

⁷⁵ Bach, *supra* note 8, at 7.

⁷⁶ *Id.*

⁷⁷ Interview notes *supra* note 48.

⁷⁸ *Id.*

Anderson denied the motion to recuse, stating that the grant of the judicial waiver in that earlier case contradicted Howard's conclusion that his views about abortion might problematically interfere with his ability to follow the law.⁷⁹

After Anderson denied the motions, the waiver hearing went forward. McPhillips used his position as guardian ad litem to summon witnesses on behalf of the fetus. A physician testified on the physical development of the fetus.⁸⁰ McPhillips also called the executive director of Sav-A-Life, a nondenominational Christian ministry that opposes abortion and encourages women to consider alternatives to ending their pregnancies.⁸¹ McPhillips questioned these witnesses over the continuous objections of the minor's legal counsel.⁸²

McPhillips sought to elicit testimony establishing that the fetus is a human life with an interest in being born. In a televised interview after the case, McPhillips stated, "What I'm saying is that an unborn child is at stake, here. A heart that's beating at four weeks, brain waves that are very strong at six to seven weeks. At eight weeks you've got all the organs in place, and the rate of maturation is terrific."⁸³ It is precisely this type of information that McPhillips put on the record by calling a physician. In addition, Sav-A-Life's executive director testified about her experiences with post-abortive women.⁸⁴

McPhillips also questioned the minor at length. At one point he asked the minor whether she was familiar with a quote in which God says to the prophet Jeremiah: "Before I formed you in the womb I knew you."⁸⁵ In addition to quoting Bible scripture over the objections of the minor's counsel, he asked the young woman whether she was aware that the "baby" already had a heart beat and questioned whether she minded "killing" her baby. Specifically, after the minor indicated that she believed abortion to be a sin, McPhillips asked her the following: "You say that you are aware that God instructed you not to kill your own baby, but you want to do it anyway? And are you saying here today that notwithstanding everything that you want to interfere with God's plan for your

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ "Sav-A-Life is a non-denominational Christian ministry which offers positive alternatives to abortion through confidential counseling." <http://www.members.tripod.com/~savalive/> (last visited Dec. 1, 2001). According to one account, the organization "provides counseling for pregnant girls and women who are considering an abortion. The counselors' purpose is to urge them instead to put their babies up for adoption, and they pave the way with referrals to adoption agencies." SHORT, *supra* note 71, at 306.

⁸² Interview notes *supra* note 48.

⁸³ SHORT, *supra* note 71, at 319.

⁸⁴ Interview notes *supra* note 48.

⁸⁵ See Interview notes *supra* note 48 (quoting *Jeremiah* 1:5).

baby?”⁸⁶ McPhillips further asked: “Here you have the chance to save the life of your own baby. . . . And still you want to go ahead and snuff out the life of your own baby?”⁸⁷

McPhillips’ use of the term “kill” prompted an objection by the petitioner’s counsel.⁸⁸ In response, McPhillips explained, “I didn’t say ‘murder,’ although it’s murder.”⁸⁹ This provoked another objection from Howard, who argued that waiver hearings do not extend the right to kill but rather determine whether a minor is in a position to make a decision about abortion without parental consent.⁹⁰ In an effort to make the questioning “more palatable,” Anderson suggested that the parties refer to the procedure as “cooperating in terminating the life of her unborn child.”⁹¹

For her part, Howard questioned the minor in order to elicit testimony to demonstrate that the minor would meet both prongs of the waiver requirement. In such hearings it is typical for minors to be questioned about their age, level of education, grades, future plans, career interests, and marital status.⁹² Responses to these questions speak to the minor’s level of maturity. In order to determine whether the minor is sufficiently informed to proceed with the abortion, attorneys commonly pose questions about the medical aspects of the abortion procedure and its risks. Attorneys also ask minors whether they have considered alternatives to abortion and what plans they have made to handle any physical or emotional consequences associated with the abortion. Finally, to determine whether the abortion is in the minor’s best interests, the attorney asks the minor why she would choose abortion over other alternatives and why she would make such a choice without involving her parents.⁹³

In this case, Howard’s questioning revealed that the minor had obtained a scholarship for college, claimed her mother would not support her financially should she have a child, and received counseling from Sav-A-Life about the alternatives to abortion.⁹⁴ The minor further testified about the risks of abortion and expressed her view that proceeding with childbirth would interfere with her ability to pursue college. Finally, the petitioner expressed fears about her father discovering her

⁸⁶ Bach, *supra* note 8, at 7.

⁸⁷ *Id.*

⁸⁸ Interview notes *supra* note 48.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Interviews with several attorneys who have represented minors in Alabama indicate that these are the types of questions posed during waiver hearings. Interview notes, *supra* note 48.

⁹³ *Id.*

⁹⁴ Bach, *supra* note 8, at 7.

pregnancy, explaining that he “had been known to point a gun at boys who looked at her provocatively.”⁹⁵

Although waiver hearings in Alabama and elsewhere ordinarily take less than 30 minutes, this hearing lasted nearly four hours⁹⁶ and produced approximately 150 transcript pages.⁹⁷ In the end, Anderson granted the waiver, indicating that while he did “not condone abortion,” he felt “confined to the issue of waiver of parental consent” pursuant to state law.⁹⁸ Explaining his decision, Anderson’s order reads,

From the record made through almost 4 hours of testimony and arguments of the most acrimonious nature, it is clear to the court that a waiver is not in the best interest of this young woman. It certainly is not in the best interest of the unborn child. Those findings are abundantly clear from the efforts and evidence of Mr. McPhillips. But unfortunately those two findings are not determinative of the issue raised by this proceeding. This court is bound to uphold the law, however distasteful that may be and regardless of whether the law is consistent with the court’s fixed opinions.⁹⁹

In addition, Anderson’s order praises the performance of the guardian ad litem, stating that McPhillips had done “a yeoman’s job of protecting the interests of his ward, to the extent that this unfortunate law allows.”¹⁰⁰ The order further expresses Anderson’s views about abortion in the following passage: “What we call life is but a brief passage in eternity. There must be a special providence for the unborn who not only are deprived of the opportunity to live but of the opportunity of having a saving faith in spite of the sin whose commission is the natural inheritance of man.”¹⁰¹

B. APPELLATE REVIEW OF GUARDIANSHIP APPOINTMENTS

Upon receiving the order waiving parental consent, McPhillips sought and received a stay of the waiver and then appealed Anderson’s ruling to the Court of Civil Appeals. In so doing, McPhillips provided the Alabama appellate courts an opportunity to rule on the permissibility of guardianship appointments. But rather than ruling on the broad ques-

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Interview notes *supra* note 48.

⁹⁸ *In re Anonymous*, 720 So. 2d at 504.

⁹⁹ Interview notes *supra* note 48. It is worth noting that the minor receives a copy of the judicial order.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

tion of whether guardian appointments are legally appropriate in the context of waiver hearings, the Court of Civil Appeals confined itself to the narrow question of whether a guardian, once appointed, has the right to appeal the grant of a waiver petition. Dismissing the appeal in a one-page per curiam opinion, the appellate court explains that the right to an appeal in such cases is "purely statutory."¹⁰² Furthermore,

[t]he legislature did not provide a right to appeal from the *granting* of a petition for waiver of parental consent. The statute specifically states that an appeal may lie for any "minor" to whom the court "denies" the petition. This specific wording does not leave room for judicial interpretation. In this case no minor was denied a waiver. Therefore, there is no right to appeal.¹⁰³

Faced with this dismissal, McPhillips appealed to the Supreme Court of Alabama. In a ruling issued on August 3, 1998, the high court affirmed Anderson's decision to grant the waiver of consent.¹⁰⁴ All the justices concurred in the finding that the minor proved herself to be sufficiently mature and well informed to proceed with the abortion absent parental involvement. Nevertheless, the ruling was sharply divided.

The key issue of division concerned one of three legal questions that McPhillips raised: "[D]oes a guardian ad litem, duly appointed by the Court to represent the unborn child, have a right to appeal the [trial] court's decision adverse to his (or her) life interest, which may ultimately result in the involuntary death of the unborn child[?]"¹⁰⁵ Answering this question in the negative, the Court's per curiam ruling, joined by four justices and concurred with by a fifth,¹⁰⁶ states:

The Legislature, as the Court of Civil Appeals correctly noted, did not provide a right to appeal from an order *granting* a petition for a waiver of parental consent. We can conclude only that the Legislature understood its subordination to the Supremacy Clause of the United States Constitution and that it recognized that, pursuant to the United States Supreme Court's decision in *Roe v. Wade*, it could not constitutionally confer upon a non-viable fetus the right to appeal, through a guardian ad

¹⁰² *In re Anonymous*, 720 So. 2d 497, 497 (Ala. Civ. App. 1998) (per curiam).

¹⁰³ *Id.* at 497.

¹⁰⁴ *In re Anonymous*, 720 So. 2d 497, 497 (Ala. 1998).

¹⁰⁵ *Id.* at 499 (alteration in original).

¹⁰⁶ Justices Almon, Shores, Houston, and Kennedy joined the per curiam opinion. Justice Cook concurred, without opinion. *Id.*

litem, an order granting a minor's request to have an abortion.¹⁰⁷

The per curiam opinion rejects the right of the guardian to appeal, but does not reject, nor confirm the trial court's authority to appoint the guardian ad litem in the first place. Instead, the per curiam ruling, like the decision of the Court of Civil Appeals, is silent on this point.¹⁰⁸

Diverging from the per curiam opinion, four justices¹⁰⁹ would have granted the guardian a right to appeal. Concurring in part and dissenting in part, these justices expressly address the legitimacy of guardianship appointments. They support the trial judge's application of Rule 17(c) and cite precedent requiring the appointment of a guardian ad litem to represent the interests of an unborn child during certain types of divorce proceedings.¹¹⁰ Their opinion argues:

If a guardian ad litem is required for an unborn child when its legitimacy is at stake, then, *a fortiori*, it would appear that the appointment of a guardian ad litem, although not specifically provided for in the Parental Consent Statute, would at least be authorized, if not required, in a case such as this one, involving a minor who is seeking a waiver of parental consent to have an abortion.¹¹¹

Having established their position on the legitimacy of guardianship appointments, the dissenters also note, "[i]t is well settled that a guardian ad litem appointed to protect the interests of the unborn has a right to appeal."¹¹² Furthermore,

it seems clear that the Legislature intended, in adopting the Parental Consent Statute, to preserve the life of the unborn, and that it deliberately was doing what it could within the constraints of the Federal Constitution, as interpreted by the Supreme Court of the United States, to

¹⁰⁷ 720 So. 2d at 499–500 (citations omitted).

¹⁰⁸ The court's opinion does address another issue raised by McPhillips, namely, whether the judicial waiver provision of the Alabama parental consent statute deprives parents of due process of law. The court notes the legislature's intention "to foster 'the family structure,' to preserve the family 'as a viable social unit,' and to protect 'the rights of parents to rear children who are members of their household.'" *Id.* at 500 (quoting ALA. CODE § 26-21-1(a)). Nevertheless, the court concludes, and with little elaboration, that the statute does not unconstitutionally deny the due process rights of custodial parents. *Id.*

¹⁰⁹ Chief Justice Hooper, and Justices Maddox, See, and Lyons. *Id.*

¹¹⁰ *In re Anonymous*, 720 So. 2d at 501 (citing *Ex parte Martin*, 565 So. 2d 1 (Ala. 1989)).

¹¹¹ *In re Anonymous*, 720 So. 2d at 502 (Hooper, C.J., Maddox, J., See, J., and Lyons, J., concurring specially in part and dissenting in part).

¹¹² *Id.*

accomplish that purpose The general rule of law is that guardians ad litem are desirable in many proceedings to ensure that the proceedings will have the adversariness necessary for the full presentation of the issues, and in the proceedings now here for review such an appointment would be consistent with the purpose and intent of the Legislature in adopting the Parental Consent Statute [W]e conclude that the Legislature, when it provided the minor a right to appeal, did not intend to prohibit a guardian ad litem appointed to represent the interest of an unborn child from appealing from an adverse order. Stated differently, we do not believe that the Legislature, by failing specifically to provide in the Parental Consent Statute for a guardian ad litem's right to appeal, intended, by omission, to defeat such a right of appeal.¹¹³

Despite supporting this right to appeal, the four dissenting justices concurred with the per curiam opinion in its judgment that the trial court did not err in granting the waiver request.¹¹⁴

However, with four justices indicating that trial courts may appoint guardians ad litem to represent the fetus in waiver hearings, and with another five justices remaining silent on this point, trial courts have retained the discretion to designate an agent to speak on behalf of the fetus.

Appellate review has established little else about guardianship participation in waiver hearings. The Court of Civil Appeals did, in one case, reject a guardian's motion to file an appellate brief in favor of Anderson's decision to deny a waiver.¹¹⁵ Beyond that, the appellate courts

¹¹³ *Id.* at 502–03.

¹¹⁴ *Id.* at 504. The dissenters also concurred in the judgment that the statute did not violate due process rights of custodial parents. *Id.* at 503.

¹¹⁵ See *In re Anonymous*, 733 So. 2d 429 (Ala. Civ. App. 1999) (overturning the trial court's denial of a waiver petition). In a footnote and without explanation or support, the Court of Civil Appeals writes:

A majority of the [Alabama Supreme] court did not address whether the trial court had the authority to appoint a guardian for the fetus. Likewise, in this case, we do not address the propriety of appointing the guardian, and we have denied the guardian's motion to file a brief in support of the trial court's order.

Id. at 431 n.1. The denial of the guardian's motion prompted a separate, one-paragraph concurrence written by Presiding Judge Robertson and joined by Judge Thompson. Agreeing that the trial court erred in failing to grant the waiver, Robertson expresses his disagreement with the majority's decision to deny the guardian's motion to file a brief. Citing the Alabama Supreme Court's ruling on guardianship appointments, Robertson states:

[I]t appears that Rule 17(c), Ala.R.Civ.P., would permit the appointment of a guardian ad litem to represent the interests of the fetus. It follows that when the trial court has made such an appointment, the guardian should be entitled to appear before an appellate court that is considering whether the trial court properly denied a waiver of

have declined the few opportunities to address guardianship involvement in waiver hearings.¹¹⁶

C. IN THE MATTER OF OTHER ANONYMOUS MINORS: THE CONTINUED USE OF GUARDIANS AD LITEM

The practice of designating guardians ad litem to represent fetuses in waiver hearings is uncommon. Although there may be instances of such appointment that I have yet to discover, reports suggest that most judges who handle waiver petitions in Alabama typically do not assign a guardian as a voice for the fetus. There are, however, at least two judges who have adopted the practice as a routine part of waiver proceedings: Judge Anderson, who inaugurated the practice, and Judge John Cappel, also of Montgomery County.¹¹⁷

Including the first case of guardianship appointment, there have been at least 17 instances in which minors, seeking to waive parental consent, have been questioned by an appointed representative of the fetus.¹¹⁸ Even though four different attorneys have represented the unborn in Montgomery County,¹¹⁹ their objective has been the same: to protect the fetus' interest in being born. To achieve this end, the guardian attempts to persuade the minor to forgo the abortion or, short of achieving that goal, to secure a denial of the minor's waiver request.

The guardians' strategies and the character of the hearings have varied. While all minors have faced extensive questioning by the guardian, witnesses have testified on behalf of the fetus in only four of the 17 cases.¹²⁰ With regard to the character of the hearings, the first was, by

parental consent to the minor . . . and should be allowed to submit a brief in support of the trial court's judgment, as the guardian sought to do here.

Id. at 433 (Robertson, J., concurring in the result) (citation omitted).

¹¹⁶ The Alabama Supreme Court recently sidestepped an occasion to address the propriety of designating guardians. *See Ex parte Anonymous*, No. 1001856, 2001 Ala. LEXIS 295 (Ala. July 30, 2001). The minor appealed the denial of her waiver petition and questioned whether the trial court had violated her constitutional rights by designating fetal representation. *Id.* at *6. Finding that the trial judge had erred in denying the waiver, the court further stated, "[i]n light of our holding, we pretermitt any discussion of [the minor's] argument concerning the trial court's appointment of a lawyer to represent the fetus." *Id.* at *24.

¹¹⁷ The presiding judge in Montgomery County, Judge Richard Dorrough, conducts waiver hearings without designating fetal representation. Interview notes *supra* note 48.

¹¹⁸ Interview notes *supra* note 48. In an additional instance where the court appointed a guardian ad litem to represent the fetus, the minor did not pursue a waiver and the hearing was cancelled. The reason for the minor's failure to pursue the waiver is unclear. *Id.*

¹¹⁹ After Julian McPhillips' involvement in the first case of guardianship appointment, Judges Anderson and Cappel turned to three other attorneys to represent the unborn. One of these three attorneys acted as guardian in 13 of the cases heard after the Alabama Supreme Court rejected the appeal brought by McPhillips. Interview notes *supra* note 48.

¹²⁰ Among the witnesses called were the director of Sav-A-Life, the director of COPE Crisis Pregnancy Center, and a woman who performs counseling at Sav-A-Life. *See In re Anonymous*, 733 So. 2d at 430.

all accounts, acrimonious.¹²¹ Two other early hearings involving guardians were lengthy and intense, but somewhat less contentious. Since those hearings, guardian participation has become more routine. As a result, the hearings have become more expedient and less confrontational.

If part of the guardian's goal is to secure a denial of the waiver petition, we can measure their success in this regard. In 13 of these 17 cases, the trial court granted minors their waiver requests. Of the four minors denied their petitions, three ultimately obtained permission to bypass parental involvement.¹²² In short, all but one of the 17 minors faced with questioning by a representative of the fetus successfully waived parental involvement.¹²³

However, to measure a guardian's success only in terms of the denials of waiver petitions presents a misleading picture of what the guardians seek to accomplish at these hearings. There is no question that, through their questioning and calling of witnesses, the guardians hope to convince the minor to carry the fetus to term. Guardians who have represented fetuses do not deny that this is their aim. Among other things, they endeavor to demonstrate to the minor that there is a living human being growing inside her body, that the minor may suffer physically and emotionally as a result of aborting the fetus, that some women who have abortions develop psychological problems and may even become suicidal, that there are many families willing to adopt, and that money is available to assist with both prenatal care and the raising of children.¹²⁴

¹²¹ Juvenile Judge Mark Anderson provided this description. See Bach, *supra* note 8, at 7.

¹²² See *In re Anonymous*, 733 So. 2d 429 (Ala. Civ. App. 1999) (reversing the trial court's denial of a waiver petition); *In re Anonymous*, No. 2000932, 2001 Ala. Civ. App. LEXIS 312 (Ala. Civ. App. June 15, 2001) (concluding that the judgment of the trial court was fatally flawed and remanding the case to the court to enter an order complying with the applicable statute); *Ex parte Anonymous*, No. 1001856, 2001 Ala. LEXIS 295 (Ala. July 30, 2001) (reversing the trial court's denial of a waiver petition). On remand, the trial court reportedly granted the waiver petition. Interview notes *supra* note 48.

¹²³ The one minor who did not succeed in her appeal of the trial court's ruling lost her case on technical grounds. The Court of Civil Appeals voided the trial court's judgment and dismissed the appeal because the waiver petition was wrongly filed in Montgomery County. See *In re Anonymous*, No. 2000887, 2001 Ala. Civ. App. LEXIS 308 (Ala. Civ. App. June 13, 2001). Whether the minor filed another waiver petition is unclear.

¹²⁴ For example, the Alabama Supreme Court relayed the questioning of a minor by one guardian:

The lawyer appointed for the fetus, described in the record as a guardian ad litem, subjected [the minor] to a probing cross-examination concerning her knowledge of the negative consequences of undergoing an abortion and the possible consequences, including depression, sterility, and death. The appointed lawyer's cross-examination also explored at some length [the minor's] knowledge of the alternatives to abortion, including having her family help raise the baby or placing the baby for adoption.

Ex parte Anonymous, Ala. LEXIS No. 1001856 at *8 (Ala. 2001).

Whether guardians are successful in convincing pregnant minors to give birth is an open question. While some guardians have reported their impressions that minors may have changed their minds about proceeding with an abortion, their impressions cannot be confirmed.¹²⁵

Nevertheless, hearings with guardians ad litem have resulted in some rather unusual judicial orders. According to the accounts of those interviewed, in one case the court granted a minor's waiver request, but the trial judge ordered a three-day "cooling off" period between the time the waiver was granted and the time the minor could obtain an abortion.¹²⁶ In two other cases, the guardian moved for a continuance of the waiver hearing so that the minor could seek counseling from a pro-life organization. The court granted the guardian's motion in each of these instances, and the minors in question sought counseling from a pro-life group before returning, again, to the court for a continuation of the judicial proceedings and the ultimate granting of their waiver requests.¹²⁷

Guardianship appointments have substantially altered the nature of waiver hearings in Montgomery County. To be sure, Julian McPhillips' handling of guardianship responsibilities has not become the norm. Still, those who petition for a waiver of parental consent before Anderson or Cappel face very different hearings than do minors who appear before most other Alabama juvenile court judges.

D. THE FUTURE OF GUARDIANSHIP APPOINTMENTS

Some have suggested that the appointment of guardians to represent the unborn is "the wave of the future" in abortion regulations.¹²⁸ Whether this is true remains to be seen. Still, the state has already made efforts to advance its interest in protecting the unborn. In 1999, the Alabama state legislature proposed a bill requiring a court to appoint an attorney in waiver hearings to represent the state, and granting to the trial court the option of designating a guardian to represent the unborn.¹²⁹

¹²⁵ Since the identities of minors are confidential, determining whether they have gone through with the abortion is not possible.

¹²⁶ Interview notes *supra* note 48.

¹²⁷ *Id.* A public record of these two cases is not available since the minors were granted their waiver requests.

¹²⁸ Among those who have described guardianship appointments in this way is Julian McPhillips. Asked on a television news program whether he expected that his case would be "used in other states in the future," he responded by saying, "Very much so. In fact, I've gotten calls from many other states and many other lawyers about this, and I think it will be the wave of the future." SHORT, *supra* note 71, at 325.

¹²⁹ S.B. 389, 1999 Reg. Sess. (1999 Ala.). Sections 26-21-4 (i)-(j) of the proposed legislation would have provided for the following:

(i) . . . [T]he Attorney General or his or her representative shall participate as an advocate for the state to examine the petitioner and any witnesses, and to present evidence for the purpose of providing the court with a sufficient record upon which to make an informed decision and to do substantial justice.

Drafted by the president of the Alabama Pro-Life Coalition, the bill died in committee, but not before Alabama Attorney General Bill Pryor endorsed it.¹³⁰ Pryor stated that “[a]n attorney representing the government should be involved to protect the state’s interest in preserving life.”¹³¹ In addition, “Pryor said he envisioned attorneys with networks like Alabama Lawyers for Life, of which he was a member, agreeing to represent the state for free and ‘potentially’ taking an adversarial [position] against abortions.”¹³²

In addition, the 1998 Alabama Supreme Court ruling denying a guardian the right to appeal the granting of waivers may not have staying power. Since that ruling, Alabama has elected a new Chief Justice to its high court, Roy Moore, popularly known as the “Ten Commandments Judge” for his fight to display the Ten Commandments in his courtroom.¹³³ Along with Moore’s election, two new Republican justices (replacing two Democratic justices) joined the state’s highest court. The election expanded Republican control of the Court from 5-4 to 8-1.

With the shifting composition of the Alabama Supreme Court, rulings on waiver petitions have already begun to change. On June 1, 2001, the Court upheld a trial judge’s decision to deny a waiver of parental consent. Notably, the Moore Court used its first opportunity to review a waiver of consent denial to reverse standing precedent. In its *per curiam* ruling, the Court altered the standard of review appellate courts are to apply in cases where minors appeal denials of waiver requests. For many years, when reviewing denials of waiver petitions, Alabama precedent held that the role of the appellate court was “to determine whether the trial court ‘misapplied the law to the *undisputed* facts.’”¹³⁴ Under

(j) In the court’s discretion, it may appoint a guardian ad litem for the interests of the unborn child of the petitioner who shall also have the same rights and obligations of participation in the proceeding as given to the Attorney General.

¹³⁰ See Jay Reeves, *Bill Would Involve State Attorneys in Juvenile Abortion Cases*, ASSOCIATED PRESS NEWSWIREs, Feb. 23, 1999. The Legislative Reference Service of the State of Alabama reported to me that the bill died in committee.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See Phillips Rawls, *Moore Says Courts Misinterpret Separation of Church and State*, ASSOCIATED PRESS STATE & LOCAL WIRE, May 30, 2001. “When Moore was a circuit judge in Gadsden, he fought a legal battle with the ACLU and others to keep his handmade plaque of the Ten Commandments posted in his courtroom. The litigation ended without a ruling on the merits of the case, but Moore’s fight made him a national figure and helped get him elected chief justice.” *Id.* Since becoming Alabama’s Chief Justice, Moore has continued to live up to his reputation as the Ten Commandments Judge. On August 1, 2001, Moore unveiled a two-ton monument displaying the Ten Commandments in the Alabama Supreme Court rotunda. Moore installed the monument on his own authority and without consulting the other justices on the Court. See Mitch Albom, *Why We Need Wall Between Church, State*, DETROIT FREE PRESS, Aug. 5, 2001, at 1E.

¹³⁴ *Ex parte Anonymous*, 618 So. 2d 722, 725 (Ala. 1993) (quoting *In re Anonymous*, 515 So. 2d 1254, 1256 (Ala. Civ. App. 1987)).

the new standard, the appellate courts apply the *ore tenus* rule, whereby a trial court's finding "is accorded, on appeal, a presumption of correctness which will not be disturbed unless plainly erroneous or manifestly unjust."¹³⁵ This change makes it substantially more difficult for an appellate court to overturn a trial judge's order denying a waiver. As Presiding Judge Sharon Yates of the Court of Civil Appeals states in that court's first application of the new standard, "a minor appealing a trial judge's denial of an application for a judicial waiver of parental consent will meet an impossible hurdle. I cannot conceive of any fact situation where a minor would be able to overcome the trial judge's denial of the waiver."¹³⁶

The shift in membership on the Alabama Supreme Court and the Court's reversal of precedent may foreshadow other changes. Should the Alabama Supreme Court decide to explicitly rule on the propriety of guardianship appointments, it will likely validate them. In addition, should the court decide to reverse precedent by holding that guardians do have a right to appeal the granting of a waiver, this should come as no surprise.

III. THE CONSTITUTIONALITY OF GUARDIANSHIP APPOINTMENTS

Given the continued use and likely expansion of guardianship appointments, it is worth investigating whether such appointments are consistent with constitutional mandates concerning parental involvement in minors' abortion decisions. The assessment will take into account the constitutionality of both the specific case of guardianship appointments in Montgomery, Alabama, as well as the general case of guardianship appointments. This section begins with an analysis of *Planned Parenthood v. Casey* and the standard to be applied in determining the constitutional soundness of the use of guardians. The section then turns to an assessment of the purpose of guardianship appointments (both in Alabama and the general case), followed by an evaluation of the effect of guardianship appointments (again, both in the specific and general cases).

¹³⁵ *Ex parte Anonymous*, No. 1001488, 2001 Ala. LEXIS 202, at *8 (Ala. June 1, 2001) (quoting *Noland Co. v. Southern Dev. Co.*, 445 So. 2d 266, 268 (Ala. 1984)).

¹³⁶ *In re Anonymous*, No. 2000884, 2001 Ala. Civ. App. LEXIS 305, at *3 (Ala. Civ. App. June 8, 2001).

A. PLANNED PARENTHOOD V. CASEY¹³⁷

As noted earlier, the joint opinion in *Planned Parenthood v. Casey* establishes the constitutional standard for evaluating state abortion regulations, namely, the undue burden standard.¹³⁸ Thus, to determine whether guardianship appointments in waiver hearings are constitutionally sound, the following question must be answered: Does the appointment of a guardian ad litem to represent the fetus during a waiver hearing impose an undue burden on a pregnant minor? That is, does such an appointment have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus?”¹³⁹ If not, then a state’s employment of guardians need only be reasonably related to advancing its legitimate interests.¹⁴⁰

The Supreme Court offers the following guidance in an effort to elaborate the undue burden standard:

What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose. . . . Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.¹⁴¹

Under certain circumstances states clearly may declare a preference for childbirth over abortion.¹⁴² Moreover, in direct contrast to the

¹³⁷ Although the Court ruling in *Casey* did not gain majority support, it is nonetheless taken to be standing precedent on abortion. See, e.g., *Planned Parenthood v. Miller*, 63 F.3d 1452, 1456 n.7 (1995) (“We view the joint opinion [in *Casey*] as the Supreme Court’s definitive statement of the constitutional law on abortion”). As such, when discussing *Casey*, I will take the joint opinion of Justices O’Connor, Kennedy, and Souter to be the operative precedent.

¹³⁸ *Casey* does not explicitly apply the undue burden test when upholding Pennsylvania’s parental consent mandate. However, it is fair to say, given Supreme Court precedents and other federal appellate rulings, that the undue burden test governs state regulations of minors’ abortion rights. See, e.g., *Akron II*, 497 U.S. at 519–20 (holding that Ohio’s parental notification requirement does not impose an undue burden on minors); *Planned Parenthood v. Miller*, 63 F.3d at 1460 (invalidating South Dakota’s parental notification requirement based on the undue burden standard).

¹³⁹ *Casey*, 505 U.S. at 877 (joint opinion).

¹⁴⁰ *Id.* at 878.

¹⁴¹ *Id.* at 877–78 (citations omitted).

¹⁴² See, e.g., *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 511 (1989) (“[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a prefer-

Court's earlier holding in *Roe v. Wade*, regulations designed to protect potential life are permissible throughout pregnancy. While acknowledging the state's "important and legitimate interest in protecting the potentiality of human life,"¹⁴³ *Roe* established that only with the onset of the third trimester of pregnancy does the state's interest in potential life become compelling enough to warrant measures to protect that life.¹⁴⁴ Altering this holding, *Casey* declares that the state's substantial interest in potential life justifies efforts to protect that life throughout pregnancy.¹⁴⁵

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "The Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.'" It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.¹⁴⁶

Thus, the authors of the joint opinion in *Casey* conclude:

To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.¹⁴⁷

Casey is not specific with respect to how far states may go in persuading women to pursue childbirth rather than abortion. Indeed, notice-

ence for normal childbirth."); *Maier v. Roe*, 432 U.S. 464 (1977) (upholding Connecticut's prohibition of funding for non-therapeutic abortions).

¹⁴³ *Roe*, 410 U.S. at 162.

¹⁴⁴ *Id.* at 163, 164.

¹⁴⁵ *Casey*, 505 U.S. at 876 (joint opinion).

¹⁴⁶ *Id.* at 872-73 (quoting *Webster v. Reprod. Health Serv.*, 492 U.S. 490, 511 (1989)) (citations omitted).

¹⁴⁷ *Id.* at 878.

ably absent from the joint ruling is treatment of the distinction between persuasion and pressure. Justice Blackmun, writing separately, attempts to limit what the state may do when encouraging abortion, saying that such “measures must be designed to ensure that a woman’s choice is ‘mature and informed,’ not intimidated, imposed, or impelled.”¹⁴⁸ But the joint opinion, in telling silence, offers no such guidance.

Casey does indicate that measures aimed at encouraging pregnancy must not impose an undue burden on the right to abortion.¹⁴⁹ So what constitutes an undue burden? The joint opinion explains that,

the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.¹⁵⁰

In addition to the Court’s attempts to delineate what counts as unduly burdensome, its rulings on specific abortion regulations are instructive. According to the *Casey* joint opinion, informed consent requirements that mandate the provision of certain information before an abortion may be performed on a woman—minor or adult—do not necessarily run afoul of the Constitution. Even if that information pertains not to the woman’s health but to the health and development of her fetus, states may thus regulate abortion as long as,

the information the State requires to be made available to the woman is truthful and not misleading In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement can-

¹⁴⁸ *Casey*, 505 U.S. at 936 n.7 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting *Casey* joint opinion, 505 U.S. at 883) (citation omitted). Blackmun continues by saying,

To this end, when the State requires the provision of certain information, the State may not alter the *manner* of presentation in order to inflict “psychological abuse,” designed to shock or unnerve a woman seeking to exercise her liberty right. This, for example, would appear to preclude a State from requiring a woman to view graphic literature or films detailing the performance of an abortion operation.

Id. (quoting *Casey* joint opinion, 505 U.S. at 893) (citation omitted).

¹⁴⁹ *Casey*, 505 U.S. at 878 (joint opinion).

¹⁵⁰ *Id.* at 877.

not be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.¹⁵¹

Like informed consent, a state mandated 24-hour waiting period between the provision of consent information and the performance of an abortion is permissible. “In theory, at least, the waiting period is a reasonable measure to implement the State’s interest in protecting the life of the unborn”¹⁵² Even though informed consent and waiting requirements may entail added costs, they do not necessarily amount to a substantial obstacle.

[N]ot every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.¹⁵³

In contrast, a substantial obstacle is imposed when states require spousal notification before the performance of an abortion.¹⁵⁴ Unlike 24-hour waiting periods and informed consent, spousal notification is,

likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.¹⁵⁵

Also unconstitutional are certain prohibitions of so-called “partial-birth abortions.” In *Stenberg v. Carhart*,¹⁵⁶ the Court invalidated a Nebraska statute that criminalized the performance of “partial-birth abortions.” Because the statute endangered rather than protected a woman’s health, the Court found it unduly burdensome. In addition, since the “partial-birth abortion” statute proscribed only a certain type of abortion

¹⁵¹ *Id.* at 882–83.

¹⁵² *Id.* at 885. The Court leaves open the possibility that an “as applied” challenge might demonstrate the unduly burdensome character of 24-hour waiting periods. However, the joint opinion concludes, based on the record and in light of the facial challenge, that a 24-hour delay does not create an undue burden. *Id.* at 887.

¹⁵³ *Id.* at 873–74.

¹⁵⁴ *Casey*, 505 U.S. at 895.

¹⁵⁵ *Id.* at 893–94.

¹⁵⁶ 530 U.S. 914 (2000).

procedure, it could not be justified by the state's interest in protecting potential life.

We can infer from its analysis of these different measures what the Court means by "substantial obstacle." An abortion regulation is not a "substantial obstacle" if it merely makes abortion more difficult to obtain. To rise to the level of a "substantial obstacle," an abortion regulation must have the purpose or effect of stopping women from obtaining safe abortions. That women would confront considerable challenges in the face of an abortion measure is not sufficient to find the measure constitutionally flawed.

The joint opinion in *Casey* declares that states may not "hinder" abortion.¹⁵⁷ Nevertheless, the joint opinion's declaration belies everything else established in *Casey* about what states may do with respect to impeding abortion. As Justice Scalia correctly observes,

The joint opinion explains that a state regulation imposes an "undue burden" if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." An obstacle is "substantial," we are told, if it is "calculated[,] [not] to inform the woman's free choice, [but to] hinder it." This latter statement cannot possibly mean what it says. Any regulation of abortion that is intended to advance what the joint opinion concedes is the State's "substantial" interest in protecting unborn life will be "calculated [to] hinder" a decision to have an abortion.¹⁵⁸

This point could not have been lost on the authors of the joint opinion. Thus, the line drawn by the joint opinion in *Casey* is not between encouragement of childbirth and hindrance of abortion, but between encouragement of childbirth and discouragement of abortion on the one hand and the prevention of safe abortions on the other hand. We can fairly surmise, then, that the joint opinion establishes that states may hinder abortion, at least insofar as the encouragement of childbirth constitutes a hindrance to abortion. The only thing states may not do when encouraging childbirth is set up mechanisms that are likely to stop women from successfully obtaining abortions (e.g., spousal notification) or are likely to undermine the women's health and safety (e.g., outlawing certain types of abortion procedures). This, then, is what undue burden means: regulations that fall short of stopping abortion and do not entail

¹⁵⁷ 505 U.S. at 877. See *supra* note 150 and accompanying text.

¹⁵⁸ *Id.* at 986–87 (Scalia, J., concurring in judgment in part and dissenting in part) (quoting *Casey* joint opinion, 505 U.S. at 877, 877–79, 877 n.4) (citations omitted) (alteration in original).

health risks are permissible, regardless of their otherwise burdensome qualities.

B. THE PURPOSE OF GUARDIANSHIP APPOINTMENTS

Let us turn now to the purpose of designating guardians. As noted earlier, the Alabama Parental Consent Statute is silent with respect to the fetus.¹⁵⁹ Even in the statute's recitation of legislative purpose and findings, there is no explicit reference to the fetus, to its interests, or to the state's interest in the life of the fetus:

Legislative purpose and findings.

- a) It is the intent of the legislature in enacting this parental consent provision to further the important and compelling state interests of: (1) protecting minors against their own immaturity, (2) fostering the family structure and preserving it as a viable social unit, and (3) protecting the rights of parents to rear children who are members of their household.
- b) The legislature finds as fact that: (1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, (2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, (3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, (4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and (5) parents who are aware that their minor daughter has had an abortion may better insure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.¹⁶⁰

Despite the lack of explicit reference to the fetus, it is possible to infer an interest in the life of the unborn from the Parental Consent Statute. Four justices of the Alabama Supreme Court made such an inference in 1998:

¹⁵⁹ See *supra* Part II.

¹⁶⁰ ALA. CODE § 26-21-1 (Michie 1992).

In view of this stated legislative intent and purpose, it seems clear that the Legislature intended, in adopting the Parental Consent Statute, to preserve the life of the unborn, and that it deliberately was doing what it could within the constraints of the Federal Constitution, as interpreted by the Supreme Court of the United States, to accomplish that purpose.¹⁶¹

Even without this inference from the statute, Rule 17(c) of the Alabama Rules of Civil Procedure provides some indication of the state's interest: "[W]hen the interest of an infant unborn or unconceived is before the court, the court may appoint a guardian ad litem for such interest."¹⁶² With Rule 17(c) in place, the state has an explicit expression of its own interest in providing guardianship for the unborn.

However, since Rule 17(c) leaves the decision to appoint a guardian to the discretion of the court, and since the legislature did not directly provide for the appointment of guardians for the fetus in the context of waiver hearings, it is appropriate to look to the judges' purpose in making these appointments. Upon doing so, it becomes apparent that guardianship appointments are designed to protect the life of the fetus by persuading the minor to choose childbirth rather than abortion. Two points, taken together, demonstrate that this is the case: (1) the ideological motivations of the judges who appoint guardians, and (2) the fact that no other purpose, aside from advocating childbirth over abortion, is served by these appointments.

By all accounts, even their own, Judges Anderson and Cappel are opposed to abortion. There is little question that it is their opposition to abortion that generated the unusual move of appointing guardians for the unborn.

It is not surprising that some of the attorneys representing minors explain the appointment of guardians in terms of the ideological views of the judges. As Beverly Howard stated in a televised interview after representing the minor in the first case involving a guardian:

I think this case came about because the judge assigned to hear it is well-known as an opponent of abortion—as is Mr. McPhillips, who is a member of 'Attorneys for Life'—and not necessarily because he believes that's the law What's happening is that people who oppose abortion are using this as a *forum* to get to people—or to girls—that they normally wouldn't even be able to speak

¹⁶¹ *In re Anonymous*, 720 So. 2d 497, 502–03 (Ala. 1998) (Hooper, C.J., Maddox, J., See, J. and Lyons, J., concurring specially in part and dissenting in part).

¹⁶² *Id.* at 499 n.2.

to outside of a clinic. In the courtroom they're able to get within two feet of them, and a girl—in this case a minor girl—is ordered to answer the questions asked. And some of them, I think, are highly inappropriate for a judicial setting.¹⁶³

Others who have represented minors before Anderson and Cappel share Howard's interpretation. But they are not alone. Designated guardians have similarly characterized the pro-life views of these two judges as the motivating force behind the appointments. Consider Julian McPhillips's explanation of why he was chosen to act as guardian: "I have a heart for unborn children just as I do for other underdogs and victims I represent in my law practice. In fact, I say there's no greater underdog, or victim, in life . . . and I emphasize the words 'in life' . . . than a baby who's about to be killed in his or her mother's own womb."¹⁶⁴ When McPhillips explained to me how he came to represent the fetus, he said, "Well, the judge who was handling the case was a conservative Republican, very pro-life and he knew I was pro-life." Another guardian suggested that the judges' decisions to appoint representation for fetuses were motivated, in part, by a desire to persuade the minor to carry the pregnancy to term.

In addition to these characterizations, the judges' conduct in waiver hearings reveals their opposition to abortion as their motivation to appoint guardians.¹⁶⁵ In their written rulings on waiver petitions, Anderson and Cappel express their pro-life views. When granting waivers, it is not uncommon for these judges to state that, despite their opposition to abortion, they are constrained by the parameters of the law to grant the petition. Both judges typically remind the minor in the written order that such a grant does not require her to have an abortion.

Furthermore, Anderson indicated in one of his written orders his "fixed opinion that abortion is wrong."¹⁶⁶ In another case, he granted the waiver only after writing that it was his "regretful" finding that the minor was sufficiently informed to have the abortion.¹⁶⁷

Reports about Cappel's handling of waiver hearings suggest that he makes his pro-life views clear to the minors who petition for relief from mandated parental consent. He tells the young women that he wants

¹⁶³ Quoted in SHORT, *supra* note 71, at 320.

¹⁶⁴ *Id.* at 320–21 (alteration in original).

¹⁶⁵ Evidence concerning the judges' conduct derives from four sources: 1) appellate rulings that recount the judges' written findings, 2) reports of those in attendance at waiver hearings, 3) news reports of waiver hearings, and 4) an interview with Judge Anderson. Where my description of judicial conduct derives from appellate rulings and news reports, I will note it as such.

¹⁶⁶ Bach, *supra* note 8, at 7.

¹⁶⁷ *Id.*

them to consider the life of this baby and to understand that choosing abortion will stop the beating heart of a perfectly formed baby. He further suggests that should the young woman requesting a waiver decide not to pursue an abortion, then several months down the road she will be a mother with her own baby.

In light of their views about abortion, it is a short leap to conclude that Anderson and Cappel appoint guardians in order to protect the life of the fetus. Anderson's case however, requires no leap at all. In an interview about his handling of waiver petitions, Anderson explained his practice of appointing guardians. Reading from an unspecified Alabama ruling not dealing with parental consent for abortion, Anderson said that the trial court "has a heavy burden in proceedings involving minor children . . . [O]ur supreme court has said 'It is the . . . court's duty to guard and protect the interest of its infant wards with scrupulous care.'"¹⁶⁸ Anderson went on to explain that, in light of this, judges have a heavy burden in waiver cases, and, specifically, a duty to protect children, both born and unborn. He further described why he requires minors to go to Sav-A-Life prior to any ruling he might make on their waiver requests: "Both Judge Cappel and I will want them to have been to Sav-A-Life to see what there is to help them make the right decision. And hopefully to make them see that abortion is not the right decision, because I believe it is the wrong decision."¹⁶⁹ When asked to reflect on the fact that his appointment of a guardian may turn out to be a precedent-setting move, he offered the following telling response: "I don't really focus on being the father of something, because I've got plenty more stuff to do. But if it saves a life, it was worth it."¹⁷⁰

In further explaining his application of Rule 17(c), Anderson stated that waiver petitions should not be taken lightly by minors or rubber-stamped by the judiciary. He admitted that the presence of a guardian ad litem makes waiver hearings more challenging, but not so challenging that it creates an unconstitutional obstacle in the minor's path to obtaining an abortion.¹⁷¹ Instead, Anderson suggested that, in addition to protecting the interests of the fetus, these appointments also serve the interests of the minor.¹⁷² In particular, these appointments provide the opportunity for the proper questioning to determine whether the minor is sufficiently mature and informed to make the abortion decision and

¹⁶⁸ Interview notes *supra* note 48. While Anderson did not specify what ruling he was referring to, the quoted language is from *Stevens v. Everett*, 784 So. 2d 1054 (Ala. 2000) and *Ray v. Ray*, 782 So. 2d 797 (Ala. 2000) (both quoting *Davis v. Davis*, 743 So. 2d 486, 487 (Ala. Civ. App. 1999)).

¹⁶⁹ Interview notes *supra* note 48.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

whether the abortion is in the minor's best interest. In other words, the appointment of a guardian serves the purpose of ensuring that the minor is asked the right questions at the waiver hearing, and that the judge is not forced into the position of cross-examining the young women. Anderson, not wanting to take on the role of inquisitor, can thus leave the questioning to the guardian.

That the participation of the guardian *ad litem* relieves the judge from the position of extensively questioning minors does not mean that this is the primary intent of guardianship appointments. If this were indeed the primary motivating factor, the judge would not appoint a guardian to represent the fetus. Instead, the judge would, in addition to appointing legal counsel for the minor, appoint a guardian to protect the interests of the minor. The only reason to appoint a guardian for the fetus rather than the minor is to protect the fetus' interest, not to guarantee that the minor has met her burden of proof to obtain a waiver.

Consider also the position of the designated guardian of the fetus. The guardian must, by law, do what is in her power to protect that fetus. Under such direction, guardians will in most circumstances define the interests of the fetus in terms of an interest in being born.¹⁷³ That interest, in the context of a waiver hearing, translates directly into one clear goal: preventing the minor from aborting the fetus. Anderson and Cappel surely understand this and appreciate the consequences of appointing a guardian for the fetus as opposed to appointing a guardian for the minor.

Thus, while Anderson is right to suggest that designating a guardian for the unborn saves the judge from having to extensively question the minor, this benefit is ancillary. By choosing to appoint a guardian for the fetus, it is reasonable to conclude that these judges seek to protect the interests of the fetus not the pregnant teen. As Anderson explained to a minor in a recent waiver hearing,

What you have asked the Court to allow you to do is something that is extremely serious and fatal for your child. And it has been my practice for three years now when I'm faced with these cases to not only have a lawyer for you but to have a lawyer to represent the interest of the unborn child, and that's why he is here. Both of these lawyers have been in many—I would even say too many—of these cases, because even one is too many.¹⁷⁴

¹⁷³ In fact, this is what guardians say when asked what their goal is at waiver hearings. Interview notes *supra* note 48.

¹⁷⁴ *In re Anonymous*, No. 2001026, 2001 Ala. Civ. App. LEXIS 347, at *4 (Ala. Civ. App. July 18, 2001) (Yates, J., dissenting).

In view of the above, it is clear that these two pro-life judges intend to encourage childbirth and discourage abortion, and that guardianship appointments serve this end. Indeed, by designating guardians to represent the fetus, these judges provide a forum to present the minor with pro-life views, views that seek to dissuade the minor from aborting her fetus. These are self-described pro-life judges confronted by a statute that requires them, in certain circumstances, to allow the performance of an abortion. Faced with a law that requires a judicial decision grounded not on whether abortion is moral or immoral, a judge's strongly held personal views about abortion are put to the test. Unlike other judges who have recused themselves in such circumstances,¹⁷⁵ these judges, employing their discretionary powers, have found a way not to avoid the waiver process, but to alter it in a manner that places the pro-life position at center stage.

Is it fair, then, to conclude that Anderson and Cappel intend to place a "substantial obstacle" in the minor's path to abortion by appointing guardians? There can be no doubt that the expression "substantial obstacle," understood as an expression in ordinary language, is predicable of these judges' intent. However, in the current context, this expression is a technical term, given meaning by the stipulative pronouncements of the U.S. Supreme Court. This, of course, is the context within which the question arises.

As detailed above, the state and agents of the state may "create a structural mechanism . . . [to] express profound respect for the life of the unborn"¹⁷⁶ This is precisely what the appointment of a guardian for the fetus is designed to achieve. The designation of a guardian is "aimed at ensuring that a woman's choice contemplates the consequences for the fetus,"¹⁷⁷ and this aim, *Casey* tells us, does "not necessarily interfere with the right recognized in *Roe*."¹⁷⁸

The appointment of guardians ad litem in Alabama has forced minors to confront new and considerable challenges. Facing a guardian is, as I will argue in the following section, burdensome and makes an already challenging waiver hearing all the more burdensome. We can also surmise that these appointments are intended, in part, to make the hearing more difficult. But because we can reasonably cast the judges' primary purpose in terms of encouraging childbirth and discouraging abortion, rather than in terms of preventing abortion, *Casey* makes it pos-

¹⁷⁵ Judges in Massachusetts and Minnesota, for example, have cited moral considerations when recusing themselves from handling waiver petitions. See Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 264, 265 (1983); see also Scarnecchia & Field, *supra* note 5.

¹⁷⁶ *Casey*, 505 U.S. at 877 (joint opinion). See also *supra* Part III.A.

¹⁷⁷ *Id.* at 873.

¹⁷⁸ *Id.*

sible, even plausible, to conclude that the motivation behind appointing guardians in Alabama is constitutionally permissible. Although the line between encouraging childbirth and preventing abortion is a fine one,¹⁷⁹ *Casey* requires that line to be drawn in determining the constitutionality of abortion regulations. Thus, since we can say that guardianship appointments are intended to encourage childbirth by discouraging minors from waiving parental consent and obtaining abortions, and since such discouragement is allowable under *Casey*, the purpose of guardianship appointments in Alabama could and arguably would pass the undue burden test.

Perhaps Anderson and Cappel have crossed the line, and their behavior is not consistent with an intent to merely encourage childbirth over abortion. Perhaps it could be argued that their behavior manifests a clear intent to prevent abortion. It is not clear to me that we have yet invented a razor fine enough to split this hair. Nevertheless, even if it is true that Anderson and Cappel have, as it were, said too much, this would only lead to the conclusion that *their* application of Rule 17(c) is unconstitutional. It would not, of course, prevent Alabama or any state, with the specific and stated intent of encouraging childbirth over abortion, from passing legislation requiring fetal representation at waiver hearings. As long as states articulate their interest as protecting potential life, and not as preventing abortion, guardianship appointments will fit into the *Casey* framework and the states' purposes for regulating abortion will be constitutionally acceptable.

C. THE EFFECT OF GUARDIANSHIP APPOINTMENTS ON MINORS

If guardianship appointments are not intended to stop minors from obtaining abortions, they may yet be unduly burdensome under *Casey* if their effect creates such an impediment. A comparison of Alabama waiver hearings with and without guardians will illuminate the impact of fetal representation.

Consider what we know about a typical waiver hearing in Alabama, that is, one that does not include a guardian ad litem for the fetus. The minor has to make arrangements to travel to the courthouse, meet with an attorney, and go before a judge, all the while trying to maintain her anonymity and during what is already a trying time in the young woman's life. The result is added delay in obtaining an abortion and the probability of the need for additional excuses to explain her absence from school, work, or home. The hearings, though, are relatively short. Present at the hearing are the judge, the minor, her legal counsel, any witnesses her counsel chooses to call, and maybe one or two members of

¹⁷⁹ See *supra* Part III.A and *infra* Part IV.

the court (e.g., a court reporter, a member of the clerk's office). By all accounts, minors are nervous, intimidated, and anxious at the prospect of being questioned about a private and personal matter in front of a judge and other strangers.

Now consider what we know about those minors who have encountered guardians during waiver hearings. The minor still has to make the requisite arrangements to go to court, meet with an attorney, and so forth. But with the presence of a guardian, the hearings are longer. As already noted, some have lasted on the order of several hours; most others average about an hour.¹⁸⁰ In addition, some minors have confronted testimony from pro-life advocates. All have faced extensive cross-examination from an attorney whose legal mission it is to see to it that the minor gives birth.¹⁸¹ In short, what is, in the absence of a guardian, essentially a non-adversarial, fact-finding inquiry becomes, with the presence of a guardian, an adversarial proceeding.¹⁸²

With guardians and the possibility of witnesses, the anonymity of the minor is put at greater risk, although there is no evidence to suggest that a minor's identity has been compromised as a result of the additional parties and witnesses. Furthermore, in some instances, the courts have lengthened the delay associated with the required waiver hearings, in one case by a three-day cooling-off period,¹⁸³ in another case by two appeals filed by the guardian,¹⁸⁴ and in two more cases by a judicial order requiring counseling from pro-life advocates.¹⁸⁵ In the cases of the two minors who were ordered to seek pro-life counseling, an abortion without parental consent was only attainable after initial consultation with an abortion provider, a trip to the courthouse for a waiver hearing, a trip to a pro-life organization for counseling, and another trip to the courthouse for the continuation of the waiver hearing—four trips in all before the final trip to have an abortion. All this while the minor attempts to keep her parents from learning of her pregnancy. Thus, in several cases involving guardians, the court further encumbered the already slow process of seeking a waiver through additional delays. In addition, the obvious is

¹⁸⁰ See *supra* Part II.A, II.C.

¹⁸¹ For example, one of the parties interviewed indicated that, even in the shorter hearings, the guardian is prepared with a list of 70 questions, only about half of which are covered by the minor's attorney. Interview notes *supra* note 48.

¹⁸² The Alabama Supreme Court recently noted that the typical non-adversarial character of waiver hearings is altered by the presence of fetal representation. See *Ex parte Anonymous*, No. 1001856, 2001 Ala. LEXIS 295 (Ala. July 30, 2001). Describing a waiver hearing that included "probing cross-examination," *Id.* at *8, the court commented that "this was not a 'non-adversarial' proceeding." *Id.* at *12.

¹⁸³ See *supra* note 127 and accompanying text.

¹⁸⁴ See *supra* notes 102 and 104 and accompanying text.

¹⁸⁵ See *supra* note 127 and accompanying text.

probably worth stating—delaying an abortion has potential medical consequences that are not inconsiderable.

With the participation of guardians, the questions posed at hearings have taken on a very different character. Owing to the fact that guardians are obligated to advance the interest of the fetus, the questions they put to the minor are in some instances normative, designed to compel her to consider the nature of human life, personhood, and killing. For example, minors have been asked whether they believe abortion is wrong, and, if so, why they would choose abortion over other alternatives. One minor who already had a child was asked whether she could imagine killing that child and, upon saying no, was asked to explain how she could justify aborting the fetus.¹⁸⁶ Consider also the following description of guardianship participation offered by the Alabama Supreme Court:

[The minor] was cross-examined by a lawyer appointed to represent the fetus, and she adhered to her testimony and to her position that an abortion was the most appropriate course of action for her, despite being given full exposure, through an extended cross-examination, to opposing viewpoints that strongly emphasized the negative effect of the abortion procedure and that advocated the benefits of having the child.¹⁸⁷

Thus, inquiry as to the first prong of the waiver proceeding does not end with determining whether the minor is mature or with whether she is capable of giving informed consent to a medical procedure. Rather, the inquiry seeks to determine whether she comprehends the “philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term.”¹⁸⁸

Finally, in light of the above changes, the anxiety produced by a typical waiver hearing is, no doubt, intensified by the presence of a guardian. The participation of a guardian who speaks on behalf of the fetus is likely to make the minor more apprehensive. It is also true that the adversarial character generated by the presence of a guardian is likely to increase tension and conflict—as it certainly did when Julian McPhillips took on the role of guardian.

These are among the things we know about the effects of appointing guardians to represent the fetus. But there is much we do not know. We do not know whether other pregnant minors have heard about these appointments and the resulting proceedings. We do not know whether minors have been dissuaded from pursuing waiver requests upon learning

¹⁸⁶ Interview notes *supra* note 48.

¹⁸⁷ *Ex parte* Anonymous, No. 1001856 at *12–13 (Ala. 2001).

¹⁸⁸ See *supra* note 146 and accompanying text.

that hearings in front of some judges have lasted as long as four hours and may include questioning by a representative of the fetus. We do not know whether minors, confronted by such questioning and by the testimony of witnesses, feel pressured to change their minds about abortion.

While the full impact of guardianship appointments on pregnant minors remains unclear, we can conclude that what is already a challenging process becomes more challenging when the court adds a guardian ad litem. But do the added challenges constitute a “substantial obstacle?” Again, in an ordinary sense of “substantial obstacle,” the answer is yes. Like the proverbial straw that breaks the camel’s back, the addition of a guardian places one more obstacle on top of another, thereby making the hurdle the minor confronts more difficult to overcome. As the New Jersey Supreme Court wrote in overturning its state’s parental notification law, “[A]dditional impediments added to existing impediments may well prevent the exercise of a fundamental right altogether.”¹⁸⁹

Nevertheless, under the authority of *Casey* the added challenges do not unduly burden minors. First, hearings involving the use of guardians are not invalid merely because they last longer than the typical waiver hearing. Few hearings last more than two hours, and even those delays might withstand constitutional scrutiny given the Court’s acceptance of 24-hour waiting periods.¹⁹⁰ With respect to what are now more routine hearings—hearings that usually last less than 90 minutes—the additional time is inconsequential under *Casey*.¹⁹¹

Second, while waiver hearings have become increasingly adversarial with the involvement of guardians, this does not necessarily constitute an unacceptable barrier to abortion. McPhillips may have gone too far in his interrogation, thereby posing an undue burden on that particular minor. Still, *Casey* does not preclude adversarial waiver hearings. To the contrary, because *Casey* permits the state to make women aware that there are strong arguments in favor of childbirth and against abortion,

¹⁸⁹ *Planned Parenthood v. Farmer*, 165 N.J. 609, 638 (N.J. 2000) (holding that, despite the inclusion of a judicial bypass option, New Jersey’s parental notification statute violates the equal protection provision of the New Jersey State Constitution).

¹⁹⁰ See *supra* note 152 and accompanying text. In addition to upholding a state mandated 24-hour waiting period for adult women seeking abortions, the Court has upheld a Minnesota statute prohibiting the performance of an abortion on a minor until at least 48 hours after parental notification of the abortion. Indeed, the Court validated that waiting period notwithstanding its acknowledgement that “the District Court found that scheduling factors, weather, and the minor’s school and work commitments may combine, in many cases, to create a delay of a week or longer between the initiation of notification and the abortion” See *Hodgson*, 497 U.S. at 449 (citation omitted).

¹⁹¹ 505 U.S. 833. The additional time is inconsequential only if guardians do not have the right to appeal grants of waiver petitions, as is currently the case in Alabama. Because the right to appeal a grant of a waiver forces the minor to further delay abortion, the minor’s health is put at greater risk by allowing such appeals. However, guardianship appointments need not be accompanied by a right to appeal.

and because guardians work toward this end, the adversarialness they create appears to be acceptable.

Third, and maybe most important, there is little indication that the presence of fetal representation prevents minors from obtaining abortions. The appointment of a guardian for the fetus would create a “substantial obstacle” if a significant number of minors were “deterred from securing an abortion as surely as if the [state] had outlawed abortion in all cases.”¹⁹² But unlike the case of spousal notification, evidence does not, at this point, demonstrate that guardian appointments have deterred minors from pursuing waiver requests in Montgomery County. In fact, even with the presence of guardians, minors have successfully petitioned for waivers of consent, and there is no reliable evidence to suggest that minors forgo abortions because of guardians.

In response to the above, it might be argued that the orders of Montgomery County judges requiring cooling-off periods and pro-life counseling are constitutional violations. It might also be argued that the religious overtones of these waiver hearings are constitutionally suspect. When direct questioning related to Bible scripture comes into play, so too do First Amendment considerations. Similarly suspect are questions like the following one posed by a guardian to a minor in a recent hearing: “If you did have a complication and you had to go to the hospital, your church congregation is going to find out what’s happened. How is that going to effect [sic] your going to church every Sunday?”¹⁹³

These arguments are persuasive but beside the point. Mandated pro-life counseling, cooling-off periods that impose additional delays, and religious questioning raise serious constitutional issues. However, the occurrence of such events during waiver hearings involving guardians does not demonstrate the constitutional impermissibility of the guardianship appointments themselves. Though generated out of proceedings in which guardians have been present, it is the orders and the religious questions themselves, not the guardians, that may violate the constitution. These events are not necessarily connected to the presence of guardians at waiver hearings. It is easy to imagine hearings at which guardians are present and no such alleged violations occur. Moreover, we need not employ our imagination to find cases in which such alleged violations occur in the absence of guardianship appointments. In fact, some judges in Birmingham, Alabama, ask religiously-laden questions during waiver hearings despite the absence of guardians.¹⁹⁴ Therefore, while it is possible for any judge to conduct a waiver hearing in such a

¹⁹² See *supra* note 155 and accompanying text.

¹⁹³ *In re Anonymous*, No. 2001026, 2001 Ala. Civ. App. LEXIS 347, at *5 (Ala. Civ. App. July 18, 2001) (Yates, J., dissenting).

¹⁹⁴ Interview notes *supra* note 48.

way as to violate the constitution, and possible for guardians to pose constitutionally inappropriate questions, it cannot be said, in light of *Casey*, that the mere appointment of a guardian to represent the fetus has the effect of imposing a "substantial obstacle" between a minor and her right to an abortion.

IV. THE INADEQUACY OF *CASEY*

With *Casey* replacing *Roe* as the law of the land, it should not be surprising that states may well find constitutional support when requiring fetal representation to persuade young women to carry their pregnancies to term. Moreover, if the presence of guardians in waiver hearings is constitutional, we should not be surprised to see future regulations that require adult women to meet with a designated representative of the fetus prior to obtaining an abortion.¹⁹⁵ An interest in protecting potential life that justifies encouraging childbirth over abortion would, it seems, also justify a requirement that adult women meet with a representative of the fetus. As long as there is a time limit on such a meeting and women remain free to choose abortion over childbirth after the meeting, such a regulation is arguably consistent with *Casey*.¹⁹⁶ What measure would better serve the goal of "ensuring that a woman's choice contemplates the consequences for the fetus"?¹⁹⁷

Requiring an adult woman to discuss her abortion decision with a guardian who speaks for the fetus is a chilling prospect, one that should be seen as striking at the heart of liberty. As Justice Stevens rightly notes,

Serious questions arise, however, when a State attempts to "persuade the woman to choose childbirth over abortion." Decisional autonomy must limit the State's power to inject into a woman's most personal deliberations its own views of what is best. The State may promote its preferences by funding childbirth, by creating and maintaining alternatives to abortion, and by espousing the vir-

¹⁹⁵ Such a measure could be incorporated into the informed consent provisions that states have adopted.

¹⁹⁶ If the measure gave guardians or a third party the authority to stop women from having abortions, it would violate *Casey*. But imagine a measure that provides guardians with the opportunity to "inform" the women of the nature of potential life and that includes time restrictions and safeguards for women's confidentiality. The fact that women would be required to meet with guardians would not, by itself, prevent abortions. Nor would such a measure be likely to deter women from pursuing an abortion. Therefore, a provision requiring pregnant women to meet with an appointed guardian for the fetus would impose some added costs, but not so much as to amount to a substantial obstacle.

¹⁹⁷ *Casey*, 505 U.S. at 873 (joint opinion).

tues of family; but it must respect the individual's freedom to make such judgments.¹⁹⁸

Requiring an adult woman to meet with an agent for the fetus would inject the state's preferences into a woman's personal decisions. While this might appear to be a more egregious interference with liberty than requiring guardianship appointments in waiver hearings, it is not. Like an adult woman, the mature and well-informed minor finds her freedom to make judgments about abortion, childbirth and family invaded when forced to confront fetal representation. Unlike the adult woman, a minor who faces a guardian knows that her future rests not in her own hands but on the outcome of the waiver hearing. The fact that the minor is, after all, a minor and not an adult does not make guardianship appointments less intrusive. Since waiver hearings are designed, in the first instance, to determine the minor's level of maturity and the extent to which she is informed about abortion and its alternatives, the introduction of representation for the fetus *before* that determination is made cannot be defended on the grounds that the minor may not be mature and well-informed.

Therefore, if the prospect of compelling an adult woman to have a conversation with a guardian for the fetus appears problematic, the current reality for minors who seek abortions in Montgomery, Alabama, should appear all the worse. Whether in Alabama or elsewhere, guardianship appointments are appropriately seen as constitutive of a state's "efforts to prejudice a woman's choice . . . by requir[ing] the delivery of information designed to influence the woman's informed choice between abortion or childbirth."¹⁹⁹ With these appointments and their attendant impediments, "the power of the State reach[es] into the heart of the liberty protected by the Due Process Clause,"²⁰⁰ thereby interposing a state's views about abortion into an individual's most intimate decisions.

Even in the best case scenario, where hearings last less than an hour, where guardians call no additional witnesses and avoid intimidating tactics, where religious questions are disallowed, and where guardians are denied the right to appeal the grant of a waiver petition, the participation of an agent for the fetus is troubling. Because the designation of fetal representation is a moral regulation that advances a particular view of human life and personhood, minors who confront guardians must contest that view. This is a formidable task for anyone, let alone an anxious pregnant teenager who must make her case in a courthouse, with all its

¹⁹⁸ *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part and dissenting in part) (quoting *Casey* joint opinion, 505 U.S. at 878) (citation omitted).

¹⁹⁹ *Id.* at 917 (internal quotations and citations omitted) (alteration in original).

²⁰⁰ *Id.* at 874 (joint opinion).

symbols of authority and power, under the direct questioning of a trained lawyer and under the scrutiny of a judge.

The imposition of this formidable task is made possible by the permissive character of the undue burden standard. Furthermore, that the imposition of this task would be sustainable under the undue burden standard reveals serious shortcomings in *Casey*. If states may, consistent with the undue burden test, require that a woman—minor or adult—be questioned by an agent of the fetus, then there is something fundamentally wrong with that test.

In particular, *Casey*'s elaboration of the undue burden standard fails—as Justice Scalia has argued²⁰¹—to intelligibly distinguish between encouraging childbirth and hindering abortion. Still, *Casey* relies on the purported distinction and, in so doing, permits slippage between what it means to encourage childbirth and what it means to hinder abortion. This slippage empowers states to, under the guise of advocating childbirth, place substantial obstacles in the path to abortion, precisely what the *Casey* ruling purports to forbid. Indeed, *Casey* invites states to devise, for the sake of the fetus, whatever obstacle course they wish women to maneuver through, as long as the obstacles, however high and onerous, are capable of being hurdled and do not impose serious health or safety hazards.

Absent an intelligible distinction between encouraging childbirth and hindering abortion, the notion of “substantial obstacle” becomes a euphemism for those regulations that prevent abortion or pose substantial health risks for women. If this is the Court's definition of “substantial obstacle,” then the right to abortion has been considerably stripped of its power to protect the individual from state intrusion. For if having a right—whether to abortion or something else—means that the state may, short of preventing the exercise of the right, regulate that right as it sees fit, then rights are no longer what they once seemed.²⁰²

Acknowledging this shortcoming in *Casey* is not new. As noted earlier, Justice Scalia criticized the joint opinion in *Casey* for its failure to differentiate between efforts to encourage childbirth and efforts to hinder abortion. However, the case of guardianship appointments in waiver hearings illuminates the consequences of this shortcoming, providing a salient example of *Casey*'s inadequacy.

²⁰¹ See *supra* note 158 and accompanying text.

²⁰² Justice Scalia expresses a similar concern in his dissenting opinion in *Casey*. Although not concerned with restrictions on abortion—Scalia argues that abortion is not a constitutionally protected right—he does express strong reservations that the creation of the undue burden test places “all constitutional rights at risk.” *Casey*, 505 U.S. at 988 (Scalia, J., dissenting).

V. CONCLUSION

Roe sought “to ensure that the woman’s right to choose not become so subordinate to the State’s interest in promoting fetal life that her choice exists in theory but not in fact.”²⁰³ It would be an exaggeration to say that the “undue burden” standard has taken us to a point where the choice of abortion is only a theoretical one. However, it is neither exaggeration nor hyperbole to say that a woman’s right to choose abortion free from state pressure is no longer protected by the Constitution, as it was in *Roe*. This is indeed true because, owing to *Casey*, a woman’s right to choose abortion free from state pressure has been subordinated to the State’s interest in promoting fetal life.

Subordinating a woman’s right to choose abortion to the State’s interests in promoting fetal life justifies the appointment of guardians ad litem to represent the unborn at waiver of parental consent hearings. This is why guardianship appointments are likely to be validated under the “undue burden” standard, despite their onerous quality. And this is why we should conclude that “the undue burden test itself is undue.”²⁰⁴

²⁰³ *Casey*, 505 U.S. at 872 (joint opinion).

²⁰⁴ Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein’s Analysis of Casey*, 45 HASTINGS L.J. 961, 967 (1994). West draws this conclusion for different reasons, finding that

until the societal demand that the woman’s right to choose be exercised justly and responsibly is circumscribed by a requirement that society itself be minimally just—the imposition by the state of a requirement that the woman make the decision to abort justly (which is what *Casey*’s undue burden test at heart is) constitutes, itself, an arrogant act of injustice.

Id.

