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## Assisting Minors Seeking Abortions in Judicial Bypass Proceedings: A Guardian ad Litem Is No Substitute for an Attorney

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# NOTES

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## I. INTRODUCTION

Since the 1973 decision in *Roe v. Wade*,<sup>1</sup> minors have been particularly affected by the efforts of pro-life activists and state legislatures who have curtailed abortion rights by lobbying for and passing legislation that restricts reproductive freedom.<sup>2</sup> Forty-three states have enacted laws requiring a minor either to obtain consent from or to notify one or both parents before undergoing an abortion,<sup>3</sup> and thirty-three of these statutes are currently enforceable.<sup>4</sup>

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1. 410 U.S. 113, 153, 163-65 (1973) (holding that the right to privacy encompasses a woman's decision to have an abortion and establishing a trimester framework under which the state may place no restrictions on abortion during the first trimester, limited restrictions to protect the woman's health during the second trimester, and a complete prohibition on abortion post-viability provided that there is an exception for the life and health of the woman).

2. See NAT'L ABORTION & REPROD. RTS. ACTION LEAGUE (NARAL) & NARAL FOUND., WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS 1-14 (11th ed. 2002) [hereinafter NARAL STATE-BY-STATE] (providing summary of key findings in comprehensive review of status of current restrictions on reproductive freedom at the state level), available at <http://www.naral.org/mediaresources/publications.html>. While comprehensive and detailed, the NARAL review of state level activity reflects only part of the landscape of restrictions on reproductive rights. Numerous restrictions have been installed or attempted at the federal level in a variety of areas, including federal funding of abortions for low-income women, women in prison, and federal employees, federal funding of both domestic and international family planning programs, restrictions on the reproductive rights of minors, and restrictions on medical and surgical abortion techniques. This Note does not encompass the broad range of federal legislative activity in the reproductive rights arena, and thus it is not discussed in any greater detail.

3. *Id.* at 11-12; see ALA. CODE § 26-21-3(a) (1992); ALASKA STAT. § 18.16.020(1) (Lexis 2000); ARIZ. REV. STAT. ANN. § 36-2152(A) (West Supp. 2001); ARK. CODE ANN. § 20-16-801 (Lexis 2000); CAL. HEALTH & SAFETY CODE § 123450(a) (West 1996); COLO. REV. STAT. ANN. § 12-37.5-104(1) (West Supp. 2001); DEL. CODE ANN. tit. 24, § 1783(a) (1997); FLA. STAT. ANN. § 390.01115(3)(a) (West Supp. 2002); GA. CODE ANN. § 15-11-112(a) (2001); IDAHO CODE § 18-609A(1)(a)(i) (Michie Supp. 2001); 750 ILL. COMP. STAT. 70/15 (1999); IND. CODE ANN. § 16-34-2-4(a) (Michie 1993); IOWA CODE ANN. § 135L.3(1) (West Supp. 2001); KAN. STAT. ANN. § 65-6705(a) (Supp. 2000); KY. REV. STAT. ANN. § 311.732(2)(a) (Lexis 2001); LA. REV. STAT. ANN. § 40:1299.35.5(A)(1) (West 2001); ME. REV. STAT. ANN. tit. 22, § 1597-A(2)(A) (West 1992); MD. CODE ANN., HEALTH-GEN. I § 20-103(a) (2000); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1996); MICH. COMP. LAWS ANN. § 722.903(1) (West 1993); MINN. STAT. ANN. § 144.343(2) (West 1998); MISS. CODE ANN. § 41-41-53(1) (2001); MO. REV. STAT. § 188.028(1) (2000); MONT. CODE ANN. § 50-20-204 (2001); NEB. REV. STAT. § 71-6902(1) (1996); NEV. REV. STAT. ANN. 442.255(1) (Lexis 2000); N.J. STAT. ANN. § 9:17A-1.4(a) (West Supp. 2001); N.M. STAT. ANN. §§ 30-5-1(C), -5-3 (Michie 1994); N.C. GEN. STAT. § 90-21.7(a) (1999); N.D. CENT. CODE § 14-02.1-03.1(1)(a) (1997); OHIO REV. CODE ANN. § 2919.12(B)(1)(a)(i)-(ii) (West 1997); OKLA. STAT. ANN. tit. 63, § 1-740 (West Supp. 2002); 18 PA. CONS. STAT. ANN. § 3206(a) (West 2000); R.I. GEN. LAWS § 23-4.7-6 (2001); S.C. CODE ANN. § 44-41-31(A)(1) (Law. Co-op. Supp. 2000); S.D. CODIFIED LAWS § 34-23A-7 (Lexis Supp. 2001); TENN. CODE ANN. § 37-10-303(a) (2001); TEX. FAM. CODE ANN. § 33.002(a)(1) (Vernon Supp. 2002); UTAH CODE ANN. § 76-7-304(2) (1999); VA. CODE ANN. § 16.1-241(V) (Michie Supp. 2001); W. VA. CODE § 16-2F-3(a) (2001); WIS. STAT. ANN. § 48.375(4)(a)(1) (West 1997); WYO. STAT. ANN. § 35-6-118(a) (Lexis 2001).

Seven states (Connecticut, Hawaii, New Hampshire, New York, Oregon, Vermont, and Washington) and the District of Columbia currently have no law requiring parental involvement in a minor's decision to have an abortion. Three states (Delaware, Maryland, and West Virginia) have parental involvement statutes with special provisions allowing waiver of parental involvement

The Supreme Court has recognized the right of parents to be involved in a child's upbringing<sup>5</sup> and the prerogative of the state to limit a minor's freedom to make major life choices due to a minor's lack of experience or judgment.<sup>6</sup> The Court, however, has held that the Fourteenth Amendment protects minors and adults alike<sup>7</sup> and that a minor has the right to choose whether or not to terminate

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by a physician or health professional. NARAL STATE-BY-STATE, *supra* note 2, at 12. Maine has enacted a parental consent statute that permits a minor to terminate her pregnancy without parental involvement provided a physician has obtained her written informed consent and has determined that she is mentally and physically competent to offer consent. *Id.* In addition, Delaware, Illinois, Iowa, Maine, North Carolina, Ohio, South Carolina, and Wisconsin permit a minor, under certain circumstances, to involve a nonparent adult figure in her decision to terminate her pregnancy. *Id.*

The state parental involvement statutes vary in their counsel provisions for minors in bypass hearings as to whether the state provides for counsel (meaning an attorney to represent the minor), provides for an attorney and a guardian ad litem, or provides for a guardian ad litem only.

While proponents of parental involvement statutes argue that parents should always be actively involved in their child's decision to have an abortion, there are many minors who are unable to confide in their parents for fear that they will be expelled from the home, abused, or will cause their parents great emotional distress or embarrassment. See Council on Ethical and Judicial Affairs, Am. Med. Ass'n, *Mandatory Parental Consent to Abortion*, 269 J. AM. MED. ASS'N 82, 83 (1993) (discussing abuse in families that may prevent minor from involving parent in the decision); Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 262 (1983) (citing substance abuse, parental illness and marital difficulties, parental opposition to abortion, and parental disappointment as reasons why a minor chooses not to involve her parents); J. Shoshanna Ehrlich & Jamie Ann Sabino, *A Minor's Right to Abortion—The Unconstitutionality of Parental Participation in Bypass Hearings*, 25 NEW ENG. L. REV. 1185, 1201 (1991) (discussing reasons why a minor may choose not to involve a parent in her decision to have an abortion, including abuse, family stress, or serious illness); Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 207 (1992) (citing reasons, including physical harm or eviction from the home, why minors choose not to involve parents in the decision).

4. NARAL STATE-BY-STATE, *supra* note 2, at 12. The parental involvement statutes in ten states (Alaska, Arizona, California, Colorado, Florida, Illinois, Montana, Nevada, New Jersey, and New Mexico) have been invalidated or enjoined. For a helpful summary of these state challenges, see generally NARAL STATE-BY-STATE, *supra* note 2.

5. See *infra* note 31.

6. See *Bellotti v. Baird*, 443 U.S. 622, 635-39 (1979) (plurality opinion) (recognizing that the state may permissibly limit the freedom of minors to make significant life decisions on their own and that parents play a crucial role in the nurturing and upbringing of their children); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults.").

7. See *Bellotti*, 443 U.S. at 633-34 ("A child, merely on account of his minority, is not beyond the protection of the Constitution. . . . With respect to many [claims by minors that they are constitutionally protected against deprivations of liberty or property], [the Court has] concluded that the child's right is virtually coextensive with that of an adult."); *Danforth*, 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

her pregnancy, subject to certain limitations imposed by the state.<sup>8</sup> The Supreme Court has held that if a state requires a minor to consult with a parent before deciding to terminate her pregnancy, the state must offer the minor a judicial bypass option<sup>9</sup> if she chooses not to involve a parent.<sup>10</sup> The Court reasoned that, in order to protect a minor's right to choose, the state cannot allow parents an absolute veto over a minor's decision if she is mature enough to make the decision on her own or if she can demonstrate to a court that an abortion would be in her best interests.<sup>11</sup>

While the Supreme Court has not ruled whether a minor has a right to counsel in civil proceedings,<sup>12</sup> child advocates argue that

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8. See *Bellotti*, 443 U.S. at 642-44 (recognizing that the state may not impose a third-party veto over a minor's decision to obtain an abortion and that a minor has the right to seek a judicial waiver of parental consent in order to make the decision independently); *Danforth*, 428 U.S. at 74-75 (recognizing that a pregnant minor's right to privacy is equally important to the interest of the parent in the minor's decision and that, as such, the parent does not have the right to act as "an absolute, and possibly arbitrary" third-party veto over the minor's decision to have an abortion).

9. The "judicial bypass" option permits a minor to bypass the parental involvement requirement generally by appearing before a judge in a court proceeding to explain her situation. An order from the judge, which either finds that the minor is mature enough to make an independent decision or that an abortion is in the minor's best interests, allows the minor to decide whether to terminate her pregnancy without parental involvement. See *Donovan*, *supra* note 3, at 260; *Ehrlich & Sabino*, *supra* note 3, at 1193. A court generally determines a minor's maturity or best interests on the basis of evidence presented by the minor or her legal representation in the hearing that may attest to a range of factors, including the minor's level of independence at home, involvement in extracurricular activities, employment (e.g., work after school, babysitting), consultation with medical personnel or clergy about the emotional and physical consequences of having an abortion, the risk of abuse or family trauma at home, risk of eviction from the home, or stress on the minor's financial situation or educational plans. See *Donovan*, *supra* note 3, at 261; see also *Ehrlich & Sabino*, *supra* note 3, at 1202 (describing hearing process with judge).

10. See *Bellotti*, 443 U.S. at 643-44 (holding that if a minor is required to involve a parent in order to obtain an abortion, then the state "must provide an alternative procedure" by which the minor can obtain a judicial waiver of parental involvement).

11. *Id.* at 644 (holding that the judicial bypass 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*").

12. See Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, But Who Am I?," 64 *FORDHAM L. REV.* 1917, 1920 (1996); see also Marvin R. Ventrell, *Rights & Duties: An Overview of the Attorney-Child Client Relationship*, 26 *LOY. U. CHI. L.J.* 259, 267 (1995) (noting that *In re Gault* only extended the right to counsel to delinquent minors and that no "universal declaration of the right to counsel exists in protection proceedings"); Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 *CAL. L. REV.* 681, 688 (1987) (noting that support for independent representation for minors varies outside of the juvenile delinquency context). Civil proceedings might include child abuse and neglect, termination of parental rights, custody and visitation disputes, adoption, or institutionalization of a minor with mental illness. Shepherd & England, *supra*, at 1932-33.

In the 1967 decision of *In re Gault*, the Supreme Court held that, under the Due Process Clause of the Fourteenth Amendment, a minor is entitled to notice that he has the right to coun-

the appointment of counsel for minors in civil proceedings is necessary to ensure effective legal representation and adequate protection of a minor's interests.<sup>13</sup> In states that mandate appointment of independent counsel on behalf of a minor in a civil proceeding, a juvenile court may appoint an attorney or a guardian ad litem to represent the minor.<sup>14</sup> In addition to judicial bypass proceedings, a guardian ad litem may be appointed to represent a minor in proceedings involving child abuse and neglect, custody disputes, termination of parental rights, and adoptions.<sup>15</sup> A guardian ad litem is often a lawyer "appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party."<sup>16</sup> In circumstances in which there is no conflict of interest between parent and child, parents may serve as guardians ad litem because they are the natural guardians of their children.<sup>17</sup> A judicial bypass proceeding, however, is a situation in which the court appoints representation because there is clearly either a conflict of interest between parent and child or the minor has chosen not to involve her parents.<sup>18</sup>

An attorney and a guardian ad litem, however, are bound by very different professional standards defining each one's obligations towards their clients. The representative serving in the role of an attorney is generally bound by guidelines of professional responsibility,<sup>19</sup> while a representative serving as a guardian ad litem is not

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sel in juvenile delinquency proceedings where the minor's liberty interests are at stake because the minor faces the possibility of incarceration. 387 U.S. at 41.

13. Tari Eitzen, *A Child's Right to Independent Legal Representation in a Custody Dispute*, 19 FAM. L.Q. 53, 60-66 (1985) (arguing that a child in a custody dispute is entitled to independent legal representation to ensure due process for the child and to ensure that his or her interests are protected); Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1595-1614 (1996) (discussing importance of appointment of independent counsel for minors to protect interests and ensure access to courts); Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349, 350-51 (1993) (discussing importance of independent advocate for child when interests of child differ from those of parents).

14. Shepherd & England, *supra* note 12, at 1933; *see also infra* note 78 (discussing passage of federal Child Abuse Prevention and Treatment Act, which required states to appoint a guardian ad litem for a minor in abuse and neglect cases in exchange for federal aid).

15. 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 12.04, at 536-38 (2d ed. 1994); Shepherd & England, *supra* note 12, at 1920-22, 1932-33; Roy T. Stuckey, *Guardians ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1785 n.4 (1996).

16. BLACK'S LAW DICTIONARY 713 (7th ed. 1999). States vary in their requirements as to who is qualified to serve as a guardian ad litem and in what capacity. *See infra* notes 78-88 and accompanying text.

17. 1 KRAMER, *supra* note 15, § 12.03, at 534; Stuckey, *supra* note 15, at 1785.

18. 1 KRAMER, *supra* note 15, § 12.03, at 535; Stuckey, *supra* note 15, at 1785 & 1785 n.4.

19. *See generally* MODEL RULES OF PROF'L CONDUCT (1983) [hereinafter MODEL RULES] (containing rules promulgated by the American Bar Association that define basic professional

necessarily bound by the same client obligations.<sup>20</sup> In general, a guardian ad litem is not bound by the client's expressed wishes and is able to advocate for a result that he or she believes to be in the minor's best interests.<sup>21</sup> By contrast, an individual serving as an attorney is obligated under professional and ethical rules to advocate for a minor's expressed preferences, irrespective of what the attorney believes to be in the minor's best interests.<sup>22</sup> Furthermore, an attorney is obligated to maintain client confidentiality under ethical guidelines,<sup>23</sup> while a guardian ad litem generally does not have any confidentiality obligations towards his or her minor client.<sup>24</sup>

Because of the different ethical guidelines that govern attorneys and guardians ad litem, the appointment of a guardian ad litem in a judicial bypass hearing could be problematic for a minor. If a court appoints a guardian ad litem rather than an attorney, it is possible that the guardian ad litem will subvert the minor's expressed interest in seeking a judicial waiver of parental involvement by advocating that the minor should consult her parents or that an abortion is not in the minor's best interests. The Supreme Court has recognized the special nature of the abortion decision relative to other decisions that a minor might face,<sup>25</sup> and has held that, despite her youth, if a minor chooses not to involve her parents in her decision, she is entitled to the opportunity to show a

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duties to which attorneys must adhere when representing clients). Approximately two-thirds of the states have since adopted the *Model Rules* with some modifications. Shepherd & England, *supra* note 12, at 1935.

20. See *infra* notes 73-77 and accompanying text.

21. See ANN M. HARALAMBIE, *THE CHILD'S ATTORNEY* 6 (1993) (stating that a guardian ad litem is permitted to advocate for what he or she perceives to be in the best interests of the minor and is not bound by the minor's expressed preferences); 1 KRAMER, *supra* note 15, § 12.05, at 542 (stating that a guardian ad litem is responsible for representing a minor's best interests); Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699, 1731-32 (1996) ("[Guardians ad litem] abandon the most fundamental aspect of the client-lawyer relationship: They strip their clients of any decision-making control and assume responsibility for ascertaining the child's best interests."); Stuckey, *supra* note 15, at 1787-88 (stating that the guardian ad litem advocates for what he or she believes to be in the minor's best interests).

22. See *MODEL RULES*, *supra* note 19, R. 1.2, 1.14; see also HARALAMBIE, *supra* note 21, at 12 (stating that the attorney for a minor is expected to maintain his or her traditional role as a zealous advocate for the minor's interests).

23. *MODEL RULES*, *supra* note 19, R. 1.6.

24. HARALAMBIE, *supra* note 21, at 10, 35.

25. See *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (plurality opinion) (recognizing that "[t]he abortion decision differs in important ways from other decisions that may be made during minority" because of the "potentially severe detriment" that a minor faces in becoming a young mother and because it is one of the "few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible").

court that she is mature enough to make the decision on her own or that it is in her best interests to have an abortion.<sup>26</sup> If a guardian ad litem advocates a result that he or she believes to be in the best interests of the minor, but that is expressly opposite (i.e., that the minor should involve her parents or that the minor should not obtain an abortion) to the option that the minor desires, then the guardian ad litem is effectively depriving the minor of her right to seek the judicial bypass. By substituting his or her judgment for that of the minor, the guardian ad litem is serving as the adjudicator of the minor's interests when that role should be properly left to the court in a judicial bypass hearing. In this situation, the guardian ad litem essentially exercises the third-party veto that the Supreme Court expressly rejected in *Planned Parenthood v. Danforth* and *Bellotti v. Baird*,<sup>27</sup> and imposes an undue burden<sup>28</sup> on a minor's right to seek a judicial waiver. An attorney, on the other hand, does not have the freedom to impose such a choice on a minor since the attorney is professionally and ethically bound to advocate for the result that his or her client desires. As a result, appointing a guardian ad litem in a judicial bypass proceeding may potentially compromise a minor's constitutionally protected right to seek a judicial waiver of parental involvement, given that a guardian ad litem has the power to contradict a minor's wishes.

This Note argues that, in states that permit the appointment of independent counsel on behalf of a minor in judicial bypass proceedings, the appointed counsel must represent a minor as an attorney and not as a guardian ad litem. Part II of this Note discusses the Supreme Court jurisprudence establishing a minor's right to seek a waiver of parental involvement and the bypass framework, as well as the "undue burden" standard articulated by the Supreme Court in *Planned Parenthood v. Casey*. Part III explains the rules governing attorney-client relationships and guidelines for guardians ad litem. Part IV argues that the appointment of a guardian ad litem in a judicial bypass hearing is an undue burden on a minor's right to seek a judicial waiver and that the traditional role of a

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26. See *id.* at 643-44.

27. See *id.* at 644 (stating that the judicial bypass process "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*"); *Planned Parenthood v. Danforth*, 426 U.S. 52, 74 (1976) ("[T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the [minor's] decision . . . to terminate [her] pregnancy.").

28. See *Planned Parenthood v. Casey*, 505 U.S. 833, 876-77 (1992) (setting forth "undue burden" as the appropriate standard under which a state restriction on a woman's right to terminate her pregnancy should be evaluated); see also *infra* Part II.B (describing the *Casey* decision in greater detail).



guardian ad litem is not appropriate for the judicial bypass context. Part V concludes by summarizing the ethical implications of appointing a guardian ad litem rather than an attorney and the reasons why appointment of a guardian ad litem constitutes an undue burden.

## II. THE ABORTION RIGHTS OF MINORS

The Supreme Court's landmark decision in *Roe v. Wade* established that a woman's right to an abortion is a fundamental liberty protected by the Fourteenth Amendment of the U.S. Constitution.<sup>29</sup> Since *Roe*, the Court has decided several cases concerning the right of a minor to have an abortion.<sup>30</sup> The Court has acknowledged the rights of parents to raise their children in a manner of their own choosing.<sup>31</sup> Accordingly, the Court has recognized that "constitutional principles [must] be applied with sensitivity and flexibility to the special needs of parents and children,"<sup>32</sup> and therefore, "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors."<sup>33</sup> The Court has offered three reasons in support of its view: (1) "the peculiar vulnerability of children"; (2) "their inability to make critical decisions in an informed, mature manner"; and (3) "the importance of the pa-

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29. 410 U.S. 113, 153 (1973) ("[The] right of privacy [as it is] founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). The Court reasoned in *Roe* that the fundamental privacy interest as protected by the Due Process Clause of the Fourteenth Amendment extended to cover the right to choose to terminate one's pregnancy. *Id.* The Court in *Roe* established a trimester framework: in the first trimester, the woman, in consultation with her doctor, has the right to choose to terminate her pregnancy without any state interference; in the second trimester, the state is permitted to regulate abortion in relation to preservation and protection of the woman's health; and in the third trimester, the state is permitted to prohibit abortion post-viability only if the state provided *exceptions for the life and health* of the woman. *Id.* at 163-64.

The right to privacy in the area of procreation was first set forth in *Griswold v. Connecticut*, in which the Court held that personal privacy interests—in this case, the right of married couples to use birth control for the prevention of conception—were protected by the Due Process Clause of the Fourteenth Amendment because they were "implicit in the concept of ordered liberty." 381 U.S. 479, 500 (1965) (Harlan, J., concurring). In other words, personal privacy interests were fundamental interests that could not be infringed upon by the state. *Id.*

30. See *infra* note 38.

31. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that parents have an interest in directing the upbringing of their children with respect to educational choice); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (holding that parents have the right to raise their children as they choose, including the choice of what foreign language a child could learn in school).

32. *Bellotti*, 443 U.S. at 634.

33. *Id.* at 637.

rental role in child rearing.”<sup>34</sup> The Court has thus concluded that the state has the right to make adjustments to its legal system when considering the rights of children.<sup>35</sup> The Court, however, has also recognized that the Fourteenth Amendment protects minors as well as adults,<sup>36</sup> and in this context, it has explicitly recognized the right of a minor to demonstrate that she is capable of deciding on her own whether or not to terminate her pregnancy or that an abortion is in her best interests.<sup>37</sup> It is within this constitutional framework that the Court has reviewed the abortion rights of minors.

### A. *The Bypass Framework: Bellotti v. Baird*

The seminal Supreme Court case concerning a minor’s right to decide whether or not to terminate her pregnancy is *Bellotti v. Baird*.<sup>38</sup> *Bellotti* involved a challenge to a Massachusetts parental

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34. *Id.* at 634.

35. *Id.* at 635 (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971) (plurality opinion)).

36. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”); *In re Gault*, 387 U.S. 1, 13 (1967) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

37. See *Bellotti*, 443 U.S. at 643-44.

38. 443 U.S. 622 (1979). *Planned Parenthood v. Danforth* laid the groundwork for the *Bellotti* decision. 428 U.S. at 52. In *Danforth*, the Court struck down a provision of Missouri’s abortion statute requiring a minor to obtain the consent of one parent before obtaining an abortion on the basis that the State was offering a third party unilateral, and potentially arbitrary, veto power over the decision of the minor and her physician that she have an abortion. See *id.* at 56-58, 74. The Court concluded that the State did not have the constitutional authority to provide such veto power because the State did not have a sufficient state interest in such a restriction. See *id.* at 74-75. The Court reasoned that the family unit and parental authority—preservation of which was the State’s asserted interest—was not likely strengthened by allowing a parent absolute veto power over a minor’s personal decision, particularly in a situation where the existence of the minor’s pregnancy itself has caused the family great distress. *Id.* at 75.

Since *Danforth*, the Court has decided several other cases regarding the constitutional validity of state parental involvement statutes. See *Lambert v. Wicklund*, 520 U.S. 292, 297 (1997) (per curiam) (upholding a Montana parental notice statute on the basis that the language, which required the court to grant a waiver of the notification requirement when notice—not an abortion—was not in the best interests of the minor, was consistent with language upheld in the decision of *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (“*Akron II*”)); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (upholding a one-parent consent statute on the basis that it complied with the judicial bypass requirements under *Bellotti*); *Hodgson v. Minnesota*, 497 U.S. 417, 458-61 (1990) (O’Connor, J., concurring in part and dissenting in part) (concluding that a two-parent notice statute in Minnesota was constitutional on the basis that the statute contained a judicial bypass provision that satisfied *Bellotti* requirements); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 507-08, 511-14 (1990) (“*Akron II*”) (upholding an Ohio statute that required a physician to give notice to one parent, or a court to approve a waiver of parental involvement, before a minor could obtain an abortion on the basis that the judicial bypass procedure in the statute provided the two-part test and satisfied the conditions of ano-

consent statute that required a minor to seek first the consent of both parents; if the parents refused permission, the statute permitted the minor to obtain consent from a judge for "good cause," provided that the parents were notified of any court proceedings.<sup>39</sup> A plurality of Justices struck down the statute on the grounds that it was unconstitutional.<sup>40</sup> The plurality opinion, written by Justice Powell, concluded that the statute impermissibly required parental consultation in all circumstances, even once a minor sought permission from a court to obtain the abortion.<sup>41</sup> He also concluded that the statute impermissibly allowed for judicial disregard of the minor's desire to have an abortion, even when the judge had found the minor to be mature and well informed.<sup>42</sup> He recognized that the State had a valid interest in encouraging a minor to seek the advice and support of her parents before undergoing an abortion.<sup>43</sup> Justice Powell also recognized, however, "the unique nature of the abortion decision," particularly for a minor, and the "potentially severe detriment" that she faces with an unwanted pregnancy.<sup>44</sup> In addition to the limited timeframe for having an abortion,<sup>45</sup> he recognized that "considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."<sup>46</sup>

The lasting significance of *Bellotti* is the Powell plurality's mandate that a state establish a bypass provision to avoid the con-

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nymity and expedition required under *Bellotti*); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439-41 (1983) (invalidating an ordinance that required either the informed written consent of one parent, or a court order allowing the abortion, before a physician could perform an abortion on a minor less than fifteen years of age on the basis that the ordinance did not provide adequate alternative procedures for minors seeking abortions as required under *Bellotti*); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 479 & n.4, 493 (1983) (upholding a Missouri statute that required minors to obtain the informed written consent of one parent, or a waiver of parental consent from the court in a judicial bypass procedure, on the basis that the statute complied with *Bellotti* judicial bypass requirements); *H.L. v. Matheson*, 450 U.S. 398, 407, 411 (1981) (sustaining a Utah parental consent statute on the specific facts of this case, even though the statute did not contain a judicial bypass option, because the Court found that parental consultation in the case of this particular immature minor would be in her best interests).

39. 443 U.S. at 625-26, 630.

40. *Id.* at 651.

41. *See id.* at 647-48.

42. *Id.* at 650.

43. *Id.* at 649.

44. *Id.* at 641-42.

45. In recognizing "the unique nature of the abortion decision," Justice Powell stated that a minor could not wait long to terminate her pregnancy because the opportunity to abort "effectively expires in a matter of weeks from the onset of pregnancy." *Id.* at 642.

46. *Id.*

stitutional problem of allowing the parental involvement requirement to serve as a third-party veto over the minor's decision to have an abortion.<sup>47</sup> The plurality opinion directed that, where the alternative bypass procedure takes the form of a court proceeding, the minor is entitled to the opportunity to demonstrate that: (1) she is sufficiently mature and well informed in order to reach her decision independently, or (2) the abortion would be in her best interests.<sup>48</sup> Under *Bellotti*, if a court finds that the minor satisfies either criterion, then the court must grant the petition.<sup>49</sup> In addition, the plurality opinion in *Bellotti* mandated that the proceeding be completed anonymously and expeditiously to ensure that abortion remains a viable option.<sup>50</sup>

### B. *Undue Burden*: Planned Parenthood v. Casey

In *Planned Parenthood v. Casey*, the Court evaluated the constitutionality of several provisions in a Pennsylvania abortion statute, including a parental consent requirement.<sup>51</sup> The primary significance of *Casey* lies in the Court's rejection of the trimester framework established in *Roe* and its subsequent replacement with an "undue burden" standard.<sup>52</sup> The Court reaffirmed the core holding of *Roe*<sup>53</sup>—that a woman has a right to an abortion before fetal viability and that the state cannot proscribe abortion post-viability without a life or health exception for the mother. The Court, however, replaced the trimester framework with an "undue burden" standard that grants the states greater flexibility in regulating abortion in the pre-viability time period.<sup>54</sup> The Court defined a finding of undue burden as "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."<sup>55</sup> Under *Casey*, if an abortion restriction is found to impose an "undue burden" on

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47. *Id.* at 643 ("[I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." (footnote omitted)).

48. *Id.* at 643-44.

49. *Id.* at 644.

50. *Id.*

51. 505 U.S. 833, 844 (1992).

52. *See id.* at 873-76.

53. *Id.* at 846 ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

54. *See id.* at 873-77.

55. *Id.* at 877.

the woman's ability to obtain an abortion, then the statute is unconstitutional and will be struck down.<sup>56</sup>

In sum, the Court has recognized that the state interest in encouraging parental consultation and guidance when a minor is deciding whether or not to have an abortion justifies different restrictions on abortion than those imposed on adult women.<sup>57</sup> In balancing the competing interests of parental involvement and a minor's desire to decide independently whether or not to have an abortion, the Court has recognized the significance of such a personal decision.<sup>58</sup> It has concluded that a minor has the right to demonstrate to a court that she is capable of choosing on her own whether or not to terminate her pregnancy or that it is in her best interests to have an abortion.<sup>59</sup>

### III. ATTORNEY VERSUS GUARDIAN AD LITEM: A COMPARISON OF PROFESSIONAL AND ETHICAL DUTIES

Following the Supreme Court's 1967 landmark decision in *In re Gault*,<sup>60</sup> most commentators now agree that children benefit from independent representation in any proceeding adjudicating their personal interests.<sup>61</sup> The current debate among child advocates focuses on whether the individual appointed to represent the minor

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56. *Id.*

57. *See Bellotti v. Baird*, 443 U.S. 622, 635-39 (1979) (describing state and parental interests in limiting freedom of a minor to make significant life decisions independently because of a minor's typical lack of experience, judgment, or knowledge to perceive potentially harmful choices and because of a parent's right to direct a child's upbringing).

58. *See id.* at 642-43 (noting the "unique" character of the abortion decision and the potentially severe and irreversible consequences for the minor if she carries an unwanted pregnancy to term).

59. *Id.* at 643-44.

60. 387 U.S. 1, 27-28, 41 (1967) (extending due process rights under the Fourteenth Amendment, including the right to counsel, to minors in juvenile delinquency proceedings).

61. *See, e.g.,* Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341, 346-47 (1987) (stating that most commentators recognize the need for independent representation for minors in child protection proceedings); Brian G. Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian ad Litem*, 13 CAL. W. L. REV. 16, 31 (1976) (arguing that "in every case of child abuse which results in a juvenile court proceeding, . . . the child is entitled to and needs independent representation"); Linda L. Long, *When the Client Is a Child: Dilemmas in the Lawyer's Role*, 21 J. FAM. L. 607, 611 (1983) (stating that few commentators believe that legal representation of a minor should be left only to a guardian ad litem to determine the "best interests" of the minor and accept that lawyers will be involved); Wilber, *supra* note 13, at 350 (stating that modern commentators agree that children need independent legal counsel when they are the subject of legal proceedings).

in a civil proceeding should be a guardian ad litem or an attorney.<sup>62</sup> If an attorney is appointed as a guardian ad litem, which is permitted in some jurisdictions,<sup>63</sup> scholars disagree on what role the attorney should play.<sup>64</sup>

This debate exists because attorneys and guardians ad litem appointed for minors in civil proceedings assume very different roles in legal proceedings. Traditionally, an attorney is expected to represent his or her client's interests zealously and "to carry out all proper, legal, and ethical directives of the client."<sup>65</sup> This role derives from society's expectation that an attorney is a vehicle through which a litigant may protect his or her individual rights.<sup>66</sup> Unlike the relationship a guardian ad litem has with a minor client, the attorney-client relationship emphasizes personal autonomy and client control.<sup>67</sup>

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62. Buss, *supra* note 21, at 1700-01 (stating that the debate is generally divided into "two camps" between those favoring a guardian ad litem to represent the best interests of the minor and those favoring an attorney to represent the minor's expressed interests). Compare Eitzen, *supra* note 13, at 57-58 (advocating appointment of independent legal counsel on behalf of child in custody proceedings), and Wilber, *supra* note 13, at 350-53, 356 (discrediting use of guardian ad litem and arguing for appointment of separate attorney for child to advocate child's wishes), with Fraser, *supra* note 61, at 33-34 (advocating guardian ad litem model of representation), and Rebecca H. Hertz, *Guardians ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 FAM. L.Q. 327, 341-46 (1993) (same).

63. See HARALAMBIE, *supra* note 21, at 2-5 (reviewing a selection of state statutes governing appointment of attorney as guardian ad litem); see also JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS § 2-3(b) (2d ed. 2001) (reviewing state statutes that govern the role of lawyers in representing minors in child protective proceedings).

64. See HARALAMBIE, *supra* note 21, at 2-5 (noting confusion and lack of uniformity created by varying state statutory guidelines regarding role of the attorney appointed in capacity as guardian ad litem); Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 411-14 (1983) (noting lack of uniformity as to attorney responsibilities in guardian ad litem role among state statutes requiring appointment of counsel for minors); Long, *supra* note 61, at 611-12 (noting confusion created by statutes mandating that the guardian ad litem be an attorney and the conflict that this arrangement creates in professional and ethical obligations to the minor client); Shepherd & England, *supra* note 12, at 1933-34 (discussing confusion and inconsistency among state statutory guidelines for guardians ad litem and how the confusion is compounded by debate as to whether an attorney should serve as a guardian ad litem when representing a child client).

65. HARALAMBIE, *supra* note 21, at 12.

66. See Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76, 79 (1984) ("[T]he function of counsel in our legal system is to enable individual litigants to enforce, protect, and preserve their own legal rights."); Wilber, *supra* note 13, at 353 (stating that the attorney's function "is to enable litigants to pursue and protect their legal rights").

67. See Guggenheim, *supra* note 66, at 80-82 (discussing importance of client control in attorney-client relationship and how client control reflects American legal system's emphasis on individual autonomy).

Accordingly, an attorney is bound by the American Bar Association's *Model Rules of Professional Conduct* ("Model Rules"), a set of ethical and professional guidelines that are followed by most states.<sup>68</sup> The *Model Rules* operate under a paradigm of client-centered decisionmaking so that an attorney is bound to advocate a client's expressed wishes.<sup>69</sup> The most relevant Rule for a minor's attorney is Rule 1.14, which establishes ethical guidelines for representing clients "under a disability."<sup>70</sup> Rule 1.14 provides that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" if the client is unable, due to minority status, mental impairment, or another reason, to make an informed judgment.<sup>71</sup> An attorney representing a minor client "therefore owes the same duties of undivided loyalty, confidentiality, and zealous representation of the [minor's] expressed wishes as he or she would to an adult client," and is bound to advocate the minor's position and maintain client confidentiality.<sup>72</sup>

While an attorney is present to give a minor an independent voice in the proceedings, a guardian ad litem is an individual appointed to stand in the place of the minor in legal proceedings.<sup>73</sup> A

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68. See *supra* note 19; see also HARALAMBIE, *supra* note 21, at 24-25 (discussing code of ethics that attorneys must follow); Shepherd & England, *supra* note 12, at 1934-36 (discussing attorney's ethical obligations); Ventrell, *supra* note 12, at 269-70 (stating that all states model their ethical standards upon the *Model Code of Professional Responsibility* or the *Model Rules*).

69. MODEL RULES, *supra* note 19, R. 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation, . . . and shall consult with the client as to the means by which they are to be pursued.").

70. *Id.* R. 1.14.

71. *Id.* R. 1.14(a). Model Rule 1.14 also permits the attorney to request the appointment of a guardian ad litem for a client, but only when the attorney "reasonably believes that the client cannot adequately act in the client's own interest." *Id.* R. 1.14(b). Commentators have discussed the fact that, while the Rule attempts to provide guidance for attorneys who represent children, it still does not provide direction for attorneys who "lack the clear guidance of the client." PETERS, *supra* note 63, § 2-3(c); see also HARALAMBIE, *supra* note 21, at 25-26 (discussing lack of criteria in the *Model Rules* to help attorneys for minors determine when an "exceptional relationship" exists or what an attorney's special duties might be).

72. HARALAMBIE, *supra* note 21, at 12. As commentators generally suggest, this obligation on the part of an attorney may vary if the minor client is "not capable of understanding the matter or contributing to the advancement of his or her interests." See *id.* at 12-13 (recognizing that the traditional role of the attorney in representing a minor may be modified depending upon the minor client's maturity level); see also Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1420 (1996) (noting that attorneys should not permit their clients complete control when they do not have autonomy rights, such as in the case of young children).

73. HARALAMBIE, *supra* note 21, at 5 (defining a guardian ad litem as one "who in a litigated matter stands in the place of a party deemed legally incompetent"); Wilber, *supra* note 13, at 356 ("Traditionally, a guardian ad litem is appointed to make decisions for the client when the client is under a legal disability."). One commentator has expressed the view that the role of the guardian ad litem is in fact to stand in place of the parents, not of the child, because it is the

guardian ad litem is distinguished from a minor's legal guardian because a guardian ad litem's status as advocate for a minor exists only for that particular litigation.<sup>74</sup> At common law, a guardian ad litem was appointed by the court to advocate the best interests of a minor in a particular situation based on the government's authority to intervene under the doctrine of *parens patriae*.<sup>75</sup> Today, the role of a guardian ad litem is to protect a minor's welfare and to make decisions on behalf of the minor on the basis of what the guardian ad litem deems to be in the best interests of the minor.<sup>76</sup> A guardian ad litem is not bound by a minor's expressed preferences because a minor may not have "the cognitive ability or maturity of judgment

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inability of the parents to look out for their child's best interests that causes the state to intervene and appoint a guardian ad litem. Stuckey, *supra* note 15, at 1795.

74. HARALAMBIE, *supra* note 21, at 5 (distinguishing the role of a minor's legal guardian, who serves essentially as a parent, from that of a guardian ad litem, who only retains authority over the minor's interests for that specific legal matter); 1 KRAMER, *supra* note 15, § 12.05, at 542 ("The guardian ad litem's authority normally ceases at the conclusion of the litigation or upon entry of judgment . . ."); Ventrell, *supra* note 12, at 268-69 (stating that a guardian ad litem's status exists only for the particular litigation in which he or she is representing the minor).

75. See Long, *supra* note 61, at 612 (stating that a guardian ad litem at common law had the duty to determine what actions would be in the best interest of the minor and to advocate for that position); Stuckey, *supra* note 15, at 1794-95 (explaining that the state claimed authority to intervene in the life of the minor through a guardian ad litem because the state had the duty to protect the minor's welfare under the doctrine of *parens patriae*).

Under the doctrine of *parens patriae*, the state is considered the guardian of society's values and thus of minors when parents abuse their rights of care and control over their children. Fraser, *supra* note 61, at 26; see also Ventrell, *supra* note 12, at 262-64 (offering historical overview of state's *parens patriae* role); Lyon, *supra* note 12, at 683-84 (noting state's duty to protect children's safety and well-being).

76. HARALAMBIE, *supra* note 21, at 6 (stating that the guardian ad litem "makes decisions in the case based on [his or her] view of what is in the best interests of the child client" and "need not be bound procedurally or substantively by the child's expressed desires"); Fraser, *supra* note 61, at 33; Stuckey, *supra* note 15, at 1787-88 (explaining that the guardian ad litem determines a minor's options based upon what he or she believes to be in the minor's best interests); see, e.g., ME. REV. STAT. ANN. tit. 22, § 4005(1)(B) (West 1992 & Supp. 2001) ("The guardian ad litem shall act in pursuit of the best interests of the child."); N.C. GEN. STAT. § 7B-601A (1999) (requiring guardian ad litem "to protect and promote the best interests of the juvenile"); 42 PA. CONS. STAT. ANN. § 6311(b) (West Supp. 2001) ("The guardian ad litem shall be charged with representation of the . . . best interests of the child . . ."); S.C. CODE ANN. § 20-7-124(A) (West Supp. 2000) ("The guardian ad litem is charged in general with the duty of representation of the child's best interests."); WIS. STAT. ANN. § 48.235(3)(a) (West 1997 & Supp. 2001) ("The guardian ad litem shall be an advocate for the best interests of the [minor] . . ."). In describing the role of the guardian ad litem, Fraser stated that the guardian ad litem assumes four functions: that of an investigator who "ferret[s] out all of the relevant facts" in a situation, that of an advocate who ensures that the court reviews all of the facts, that of a counsel who ensures that the court is aware of all of the child's possible options, and that of a guardian who ensures that "the child's interests are fully protected." Fraser, *supra* note 61, at 33-34.



to make wise choices or to appreciate the consequences of decisions."<sup>77</sup>

States have enacted various models for the appointment of guardians ad litem.<sup>78</sup> Depending upon the state, a guardian ad litem can either be an attorney, a lay volunteer,<sup>79</sup> or, in some juris-

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77. HARALAMBIE, *supra* note 21, at 6; 1 KRAMER, *supra* note 15, § 12.05, at 542-43 (stating that, in some jurisdictions, a minor's wishes are not controlling when they conflict with a minor's best interests); PETERS, *supra* note 63, § 2-3(b), at 37 ("[C]lose attention to the statements and wishes of the child runs a distant third behind the[ ] more primary duties of the guardian ad litem assessment of best interests and [the guardian's duties] to the Court."); *see, e.g.*, WIS. STAT. ANN. § 48.235(3)(a) ("The guardian ad litem . . . shall consider, but *shall not be bound by*, the wishes of [the minor] or the positions of others as to the best interests of [the minor].") (emphasis added); Colorado Guardian ad Litem Mission Statement, *reprinted in* ANN M. HARALAMBIE, THE CHILD'S ATTORNEY app. B at 245 (1993) ("The [guardian ad litem] *does not necessarily adopt or advocate for the child's desires* unless it would serve the child's best interests." (emphasis added)); New Hampshire Guidelines for Guardians ad Litem, *reprinted in* ANN M. HARALAMBIE, THE CHILD'S ATTORNEY app. B at 248 (1993) ("The Guardian ad Litem should consider the preferences of the minor(s) but the preferences *shall not be binding* upon the Guardian ad Litem *nor should they create a presumption as to any issue.*" (emphasis added)). In some jurisdictions, however, a guardian ad litem may take the minor's preferences into consideration and inform the court of those wishes, if they differ from what the guardian ad litem is advocating. HARALAMBIE, *supra* note 21, at 6; 1 KRAMER, *supra* note 15, § 12.05, at 543; *see, e.g.*, HAW. REV. STAT. ANN. § 587-34(c) (Lexis 1999) ("A guardian ad litem shall inform the court of the [minor's] perceived interests if they differ from those being advocated by the [minor's] guardian ad litem."); WIS. STAT. ANN. § 48.235(3)(a) ("If the guardian ad litem determines that the best interests of the [minor] are substantially inconsistent with the wishes of [the minor], the guardian ad litem shall so inform the court . . .").

78. Hartz, *supra* note 62, at 332; *see also* PETERS, *supra* note 63, § 2-3(b), at 38 n.10 ("The statutory language alone [in state laws governing the appointment of guardians ad litem in child protective proceedings] demonstrates that different states believe that the essence of the guardian ad litem role varies widely."). The following discussion of guardian ad litem appointments is largely specific to child abuse and neglect proceedings because guardian ad litem appointments are most consistent in the area of child protective proceedings as a result of the 1974 passage of the federal Child Abuse Prevention and Treatment Act ("CAPTA"), which required states to appoint a guardian ad litem for minors in child protective proceedings in exchange for federal aid to fund abuse prevention programs. *See* Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5107 (1994)); 1 KRAMER, *supra* note 15, § 12.02, at 532 (noting that "appointment of guardians in child abuse and neglect cases is widespread" due to the passage of CAPTA); Shepherd & England, *supra* note 12, at 1922 (reviewing varying levels of independent representation for minors in proceedings outside the child abuse and neglect context).

79. Lay volunteers are typically court-appointed special advocates ("CASA"). PETERS, *supra* note 63, § 2-3(b), at 35 n.6 (discussing genesis of CASA movement); Hartz, *supra* note 62, at 336-37 (discussing inception and use of CASA program); *see also* Laurie K. Adams, *CASA: A Child's Voice in Court*, 29 CREIGHTON L. REV. 1467, 1467-72 (1996) (providing background on national CASA program and on program as conceived in one Nebraska county); Duquette & Ramsey, *supra* note 61, at 348-49 (discussing inception and use of CASA program). A CASA volunteer can be paired with an attorney, act as an independent advocate for the minor, or act as an assistant to the caseworkers. Duquette & Ramsey, *supra* note 61, at 349. Similar to those in other capacities who serve as guardians ad litem, most CASA volunteers serve as investigators of their clients' cases. Hartz, *supra* note 62, at 338. They provide written reports to the court with recommendations on the case and are usually required to appear at all hearings and to monitor

dictions, a social worker, probation officer, or court counselor.<sup>80</sup> While specific guidelines for guardians ad litem vary by state, individuals serving as guardians ad litem are generally expected to conduct an independent investigation of their clients' cases.<sup>81</sup> Guardians ad litem may be permitted to subpoena client records and witnesses,<sup>82</sup> may present evidence to the court, including examining and cross-examining witnesses,<sup>83</sup> and may also offer testimony to the court.<sup>84</sup> A guardian ad litem may also be expected to

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the court's orders until the case is dismissed after final resolution. *Id.* Some jurisdictions also permit CASA volunteers to cross-examine witnesses and file petitions in legal proceedings through their own attorneys. *See, e.g., Adams, supra*, at 1469 (noting that CASA volunteers can cross-examine witnesses through their attorneys); H. Lila Hubert, *In the Child's Best Interests: The Role of the Guardian ad Litem in Termination of Parental Rights Proceedings*, 49 U. MIAMI L. REV. 531, 562-63 (1994) (stating that guardians ad litem, who are CASA volunteers in Florida, often file petitions in termination of parental rights proceedings through their attorneys).

80. Hartz, *supra* note 62, at 332.

81. HARALAMBIE, *supra* note 21, at 8 ("The central feature of all of the guidelines for guardians ad litem is that [he or she] must make a thorough investigation of the case."); *see, e.g., CAL. WELF. & INST. CODE* § 317(e) (West 1998 & Supp. 2002) ("[C]ounsel [for the minor] shall make or cause to have made any further investigations that he or she deems in good faith to be reasonably necessary to ascertain the facts . . ."); HAW. REV. STAT. ANN. § 587-34(c) (Lexis 1999) (permitting guardian ad litem to make independent investigation of minor's situation); ME. REV. STAT. ANN. tit. 22, § 4005(1)(B) (requiring guardian ad litem to conduct independent investigation); N.C. GEN. STAT. § 7B-601(a) (1999) ("The duties of the guardian ad litem . . . shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs . . ."); 42 PA. CONS. STAT. ANN. § 6311(b) (requiring guardian ad litem to conduct independent investigation); S.C. CODE ANN. § 20-7-122(3) (West Supp. 2000) (same); Colorado Guardian ad Litem Mission Statement, *supra* note 77, at 243-44 (requiring guardian ad litem to "conduct a thorough and independent investigation").

82. *See, e.g., HAW. REV. STAT. ANN.* § 587-34(b)(2) (authorizing guardian ad litem "to inspect and receive copies of" any relevant client documents); IND. CODE ANN. § 31-17-6-6 (Michie 1997) (permitting guardian ad litem to subpoena witnesses in domestic relations proceedings); ME. REV. STAT. ANN. tit. 22, § 4005(1)(B) (granting guardian ad litem "access to all reports and records relevant to the [minor's] case"), 4005(1)(C) (permitting guardian ad litem to subpoena witnesses); 42 PA. CONS. STAT. ANN. § 6311(b)(2) (granting guardian ad litem access to all reports and documents concerning the minor client); S.C. CODE ANN. § 20-7-125 (West Supp. 2000) (same).

83. 1 KRAMER, *supra* note 15, § 12.05, at 544 ("The guardian may present evidence and witnesses, and may cross-examine witnesses at all evidentiary hearings . . ."); *see, e.g., CAL. WELF. & INST. CODE* § 317(e) ("[Counsel for the minor] shall examine and cross-examine witnesses in . . . hearings . . . [and] may also introduce and examine his or her own witnesses . . ."); IND. CODE ANN. § 31-17-6-6 (permitting guardian ad litem to present evidence to the court in domestic relations proceedings); ME. REV. STAT. ANN. tit. 22, § 4005(1)(C) (authorizing guardian ad litem to "examine and cross-examine witnesses"); NEB. REV. STAT. § 43-272.01(2)(e) (1998) (authorizing guardian ad litem to "present evidence and witnesses and [to] cross-examine witnesses at all evidentiary hearings"); 42 PA. CONS. STAT. ANN. § 6311(b)(5) (permitting guardian ad litem to "examine and cross-examine witnesses"); S.C. CODE ANN. § 20-7-124(C) (West Supp. 2000) ("The guardian ad litem is authorized through counsel to introduce, examine, and cross-examine witnesses in any proceeding involving the [minor] . . .").

84. *See HARALAMBIE, supra* note 21, at 10-11; Hartz, *supra* note 62, at 336; *see, e.g., MO. REV. STAT.* § 452.423(2)(1) (2000) (permitting guardian ad litem to offer testimony to court);

make recommendations to the court regarding a client's case.<sup>85</sup> Because a guardian ad litem is generally expected to conduct an independent assessment of a minor's situation, and take a position to the court as to the disposition of the minor's case, the guardian is effectively allowed to substitute his or her judgment for that of the minor.<sup>86</sup> Accordingly, a guardian ad litem is generally not ethically bound, as is an attorney, to maintain a minor client's confidentiality because a guardian's independent investigative duties permit a guardian to discuss a minor's situation with third parties and because, in making a recommendation to the court, a guardian may be permitted to reveal client confidences.<sup>87</sup> Despite varying state guidelines concerning precise client responsibilities, as a general rule, guardians ad litem are expected to abide by the "best interests" standard and advocate for the minor's best interests, as perceived by the guardian ad litem.<sup>88</sup>

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Colorado Guardian ad Litem Mission Statement, *supra* note 77, at 245-46 (permitting guardian ad litem to present evidence through his or her own testimony in the case).

85. HARALAMBIE, *supra* note 21, at 10; *see, e.g.*, CAL. WELF. & INST. CODE § 317(e) (permitting guardian ad litem to "make recommendations to the court concerning the [minor's] welfare"); HAW. REV. STAT. ANN. § 587-34(c) ("A guardian ad litem . . . shall report to the court . . . regarding such guardian ad litem's activities on behalf of the [minor] and recommendations concerning the manner in which the court should proceed in the best interests of the [minor] . . ."); ME. REV. STAT. ANN. tit. 22, § 4005(1)(C) (requiring guardian ad litem to "make a recommendation to the court"); NEB. REV. STAT. § 43-272.01(2)(f) (requiring guardian ad litem to "be responsible for making recommendations to the court regarding the temporary and permanent placement of the protected juvenile"); 42 PA. CONS. STAT. ANN. § 6311(b)(7) (requiring guardian ad litem to "[m]ake specific recommendations to the court"); S.C. CODE ANN. § 20-7-122(5) (requiring guardian ad litem to "provide the family court with a written report . . . , which includes without limitation evaluation and assessment of the issues brought before the court and recommendations for the case plan, the wishes of the child, if appropriate, and subsequent disposition of the case"); Colorado Guardian ad Litem Mission Statement, *supra* note 77, at 245-46; New Hampshire Guidelines for Guardians ad Litem, *supra* note 77, at 249.

86. HARALAMBIE, *supra* note 21, at 6.

87. *See id.* at 10, 35; Heartz, *supra* note 62, at 336; *see, e.g.*, ME. REV. STAT. ANN. tit. 22, § 4005(1)(B)(5) (requiring guardian ad litem to interview, where possible and appropriate, third parties (e.g., parents, teachers, case workers) as part of independent investigation); 42 PA. CONS. STAT. ANN. § 6311(b)(5) (requiring guardian ad litem to interview witnesses); S.C. CODE ANN. § 20-7-124(B)(3) (authorizing guardian ad litem to "interview persons involved in the case"). *But see* N.H. REV. STAT. ANN. § 458:17-a(II) (Supp. 2001) ("Guardians ad litem shall respect communications between themselves and the child and shall disclose such information only in accordance with applicable rules and, as required by the court, in rendering a report with the guardian ad litem's recommendations . . .").

88. HARALAMBIE, *supra* note 21, at 6, 29; *see also supra* notes 76-77 and accompanying text (discussing "best interests" standard).

IV. ANALYSIS: WHY APPOINTMENT OF A GUARDIAN AD LITEM  
ON BEHALF OF A MINOR IN THE ABORTION CONTEXT IS  
PROBLEMATIC

*A. Appointment of a Guardian ad Litem Constitutes an Undue  
Burden*

Since a guardian ad litem is generally neither ethically bound to advocate a minor's expressed preferences nor obligated to preserve a minor's confidentiality,<sup>89</sup> appointment of a guardian ad litem may pose a threat to and place an obstacle in the path of a minor seeking to exercise her right under *Bellotti v. Baird*<sup>90</sup> to obtain a waiver of parental involvement. Such interference imposes an undue burden on a minor's exercise of that right under *Planned Parenthood v. Casey*.<sup>91</sup>

1. No Ethical Duty to Advocate a Minor's Expressed Wishes

In a judicial bypass proceeding, if a guardian ad litem elects to substitute his or her judgment for that of a minor because he or she differs in view as to a minor's decision, a guardian ad litem is subverting a minor's desire to obtain an abortion without parental involvement. For instance, a guardian ad litem might advocate that a minor obtain parental consent or carry her pregnancy to term because the guardian ad litem has a different view regarding the minor's level of maturity or emotional development or, in a more extreme case, opposes abortion on ideological grounds. By recommending a different outcome than the minor desires to the court and by substituting his or her judgment for that of the minor, the guardian ad litem is hindering the minor's ability to exercise her constitutionally protected right to petition a court for a waiver of parental involvement.<sup>92</sup> As such, the guardian ad litem is directly interfering with the minor's decision to seek a waiver of parental involvement, and thus, her decision to make the choice on her own.

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89. See *supra* notes 76-77, 86-87 and accompanying text.

90. 443 U.S. 622, 643-44 (1979) (holding that a pregnant minor is entitled to appear before a judge to show either that she is sufficiently mature or that it is in her best interests to obtain an abortion without parental involvement).

91. The Court first established the "undue burden" standard in *Casey* when it replaced the trimester framework under *Roe*, under which a regulation restricting abortion would be invalidated if the court determined that the regulation placed "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. 833, 876-77 (1992); see *supra* Part II.B.

92. *Bellotti*, 443 U.S. at 643-44.

In this situation, the guardian ad litem's personal convictions on the highly charged topic of abortion would be permitted to influence the outcome that he or she advocates to the court because the "best interests" standard permits the guardian ad litem to inject personal opinion into his or her arguments to the court.<sup>93</sup> In this way, the opinion of the guardian ad litem could potentially serve as an arbitrary third-party veto—precisely the result that the Supreme Court found impermissible in *Danforth* and *Bellotti*.<sup>94</sup> By exercising a potentially arbitrary third-party veto, the guardian ad litem places a substantial obstacle in the path of the minor that hinders her from seeking an abortion and is sufficient to constitute an undue burden under *Casey*.<sup>95</sup>

By contrast, representation of a minor by an attorney would not have the same effect on a minor's choice to seek a waiver of parental involvement. An attorney appointed to represent a minor is ethically and professionally bound to advocate the expressed wishes of a minor client<sup>96</sup> and must act as a minor's independent voice in the process.<sup>97</sup> Accordingly, unlike a guardian ad litem, an attorney is prohibited by the *Model Rules* from expressing personal opinions to the court as to his or her client's case<sup>98</sup> and from testifying as a witness in his or her client's case.<sup>99</sup> A minor, therefore, would be free to exercise her right as she sees fit, provided that the judge rules that she is mature or that an abortion would be in her best interests. If, however, there is no one acting in the role of zealous advocate on behalf of the minor, then the minor's voice most likely will not be adequately heard. By having an attorney who is ethically bound to represent the minor's interests at the judicial bypass

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93. See *supra* note 76 and accompanying text.

94. *Bellotti*, 443 U.S. at 644 (reiterating the *Danforth* holding, which disallowed parental consent provision to serve as unilateral third-party veto over minor's decision); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (holding that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto" over a minor's decision to have an abortion).

95. See 505 U.S. at 877 ("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.").

96. See *supra* notes 68-72 and accompanying text.

97. HARALAMBIE, *supra* note 21, at 12 (stating that "if the child's attorney does not advocate the child's position as the child sees it, the child really has no independent voice").

98. MODEL RULES, *supra* note 19, R. 3.4(e); HARALAMBIE, *supra* note 21, at 10.

99. MODEL RULES, *supra* note 19, R. 3.7(a); HARALAMBIE, *supra* note 21, at 10. Rule 3.7 provides a few exceptions to the prohibition against serving as a witness: when "testimony relates to an uncontested issue," when testimony relates to legal services and fees, and when "disqualification of the lawyer would work substantial hardship on the client." MODEL RULES, *supra* note 19, R. 3.7(a)(1)-(3). None of these exceptions, however, applies in the judicial bypass context.

hearing, a minor is assured that her position will be heard by the judge and assured of an ally who will seek to protect her interests.

## 2. No Ethical Duty to Preserve a Minor's Confidentiality

In addition, since a guardian ad litem is expected to conduct an independent investigation of a minor's case and report those findings to the court, a guardian ad litem is generally not bound by any ethical obligations to maintain a minor's confidentiality.<sup>100</sup> The lack of confidentiality in the relationship between a guardian ad litem and a minor could prove to be troublesome in the context of a judicial bypass proceeding.

*Bellotti* requires the proceeding to be completed anonymously.<sup>101</sup> If a guardian ad litem is not obligated to preserve a minor's confidentiality, then a guardian ad litem would not be obligated to maintain in confidence any sensitive information relayed by a minor during the representation. This could be problematic in a situation, for instance, in a small community, where a guardian ad litem personally knows the parents of a minor and may feel morally obligated to inform the parents of their daughter's actions. Such a breach of confidence by a guardian ad litem would violate the requirement of confidentiality under *Bellotti*<sup>102</sup> and subject a minor to the involvement of her parents in her decision—the precise result that the minor wished to avoid. By breaching a minor's confidence, a guardian ad litem permits a third party, such as a minor's parents, to interfere with a minor's choice to seek a waiver to decide on her own, particularly if the disclosure is made prior to the bypass hearing. This breach of confidence places a potentially substantial obstacle in the way of a minor and imposes an undue burden under *Casey* on her choice not to involve her parents.

An attorney, however, is obligated under the *Model Rules* to maintain client confidentiality, and is therefore prohibited from making any kind of disclosure regarding the proceeding or the representation to a third party.<sup>103</sup> In this way, a minor's confidentiality is preserved, and the *Bellotti* requirement of confidentiality in the

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100. HARALAMBIE, *supra* note 21, at 10.

101. 443 U.S. 622, 644 (1979) (requiring that a judicial bypass proceeding "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained").

102. *Id.*

103. MODEL RULES, *supra* note 19, R. 1.6. The *Model Rules*, however, do not unconditionally prohibit an attorney from making disclosures to third parties, and permit an attorney discretion in disclosing client information in situations where the attorney reasonably believes that the client will cause injury to herself or others. *See id.* R. 1.6(b)(1) & cmt. 13.

judicial bypass proceeding is satisfied. A minor is thus protected from potential unwanted intervention by a third party attempting to prevent her from seeking a waiver to make the decision on her own, as she is constitutionally entitled to do.

*B. The Traditional Role of a Guardian ad Litem Is Not Suited to Representation in the Judicial Bypass Context*

A guardian ad litem is traditionally appointed to represent the independent interests of a child in a proceeding in which the state is intervening to protect a child's welfare under the doctrine of *parens patriae*.<sup>104</sup> Traditionally, a guardian ad litem represents the interests of a child in situations where a young child lacks the maturity to reason through the consequences of a significant life decision or the verbal skills to articulate his or her desires adequately.<sup>105</sup> As a child grows older, the law accords a minor certain privileges.<sup>106</sup> Likewise, commentators suggest that a minor has the cognitive ability at an older age, particularly as a teenager, to assess independently the consequences of a significant life decision, to articulate her own desires when making life decisions, and to make choices among available alternatives.<sup>107</sup> As a result, while an older

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104. Fraser, *supra* note 61, at 26-27, 29; Stuckey, *supra* note 15, at 1794.

105. See HARALAMBIE, *supra* note 21, at 9 ("The purest example of appointment as a child's guardian *ad litem* occurs when the attorney is appointed to represent an infant who is cognitively and linguistically incapable of providing express direction to the attorney. . . . As a general rule of thumb, the younger the child, the more likely that the court's appointment of the attorney was intended to be in the role of guardian *ad litem*.").

106. For instance, many jurisdictions permit minors after a certain age (often the age of fourteen or sixteen) to obtain many types of outside employment without parental authorization. See, e.g., ALA. CODE §§ 25-8-33, 25-8-48 (2000); DEL. CODE ANN. tit. 19, §§ 505-507 (1995); IDAHO CODE §§ 44-1301, -1302, -1304 (1997); MD. CODE ANN., LAB. & EMPL. §§ 3-209, -211, -213 (1999); MASS. GEN. LAWS ANN. ch. 149, §§ 60-62 (West 1996 & Supp. 2001); MINN. STAT. ANN. § 181A.04 (West Supp. 2002).

107. Bruce Ambuel & Julian Rappaport, *Developmental Trends in Adolescents' Psychological and Legal Competence to Consent to Abortion*, 16 LAW & HUM. BEHAV. 129, 144-45, 147-48 (1992) (concluding that, in study of females aged thirteen to twenty-one to examine competence to consent to abortion, minors aged sixteen to seventeen did not differ from adult women aged eighteen to twenty-one in legal competence to consent to abortion); Catherine C. Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84, 86-87 (1987) (suggesting that older minors and adults are equally competent to reason through decisions regarding pregnancy and contraception); Gary B. Melton & Anita J. Pliner, *Adolescent Abortion: A Psycholegal Analysis*, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 1, 18-19 (Gary B. Melton ed., 1986) (suggesting that "there is no reason to believe that adolescents will be less competent than adult women in decision making about abortion"); Anita J. Pliner & Suzanne Yates, *Psychological and Legal Issues in Minors' Rights to Abortion*, 48 J. SOC. ISSUES 203, 205 (1992) (stating that studies regarding the competence of minors to give informed consent to medical treatment generally have concluded that older minors are able to make these judgments independently in a similar manner to adults).

minor may still need independent representation, she does not need the assistance of a guardian ad litem because she is capable of determining her best interests independently.<sup>108</sup>

In addition to the fact that a minor seeking a judicial waiver is likely to be older, the circumstances surrounding a minor's unwanted pregnancy are particularly unique and unsuited to a guardian ad litem appointment when the guardian ad litem may substitute his or her judgment for that of the minor. The Supreme Court recognized in *Bellotti* that "[t]he abortion decision differs in important ways from other decisions that may be made during minority."<sup>109</sup> The Court observed that the time frame for having an abortion is circumscribed<sup>110</sup> and that a pregnant minor faces a "potentially severe detriment" in carrying an unwanted pregnancy to term.<sup>111</sup> Given a minor's probable lack of "education, employment skills, financial resources, and emotional maturity," the Court concluded that "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."<sup>112</sup> Therefore, unlike other situations facing a minor in which the independent judgment of a guardian ad litem might be appropriate, appointment of a guardian ad litem in a judicial bypass hearing is improper. If a guardian ad litem chooses to substitute his or her own judgment when the guardian opposes a minor's choice, the guardian is interfering with the minor's right to seek a judicial waiver in a way that denies the minor "an effective opportunity" to obtain an abortion as required under *Bellotti*.<sup>113</sup> By denying the minor the right to make an important personal decision, the guardian is imposing upon the minor the potentially severe consequences the Court recognized in *Bellotti*.<sup>114</sup>

Furthermore, when the Supreme Court required in *Bellotti* that the state provide a pregnant minor with the opportunity to seek a judicial waiver of parental consent,<sup>115</sup> the Court envisioned a judicial proceeding in which a minor would be able to offer evidence to prove her maturity or show that an abortion is in her best interests.<sup>116</sup> In establishing such a proceeding, the Court did not envi-

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108. See *supra* note 107.

109. 443 U.S. 622, 642 (1979).

110. *Id.* ("A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.").

111. *Id.*

112. *Id.*

113. *Id.* at 644.

114. *Id.* at 642.

115. *Id.* at 643-44.

116. *Id.* at 643-44, 643 n.22, 647-48.



sion a process in which a minor's desire to decide whether to terminate her pregnancy without parental involvement could be countermanded by her representative at the hearing.<sup>117</sup> Indeed, permitting a minor's representative to take a contrary position and thus effectively remove a minor's voice from the hearing would vitiate the entire purpose of the bypass proceeding, and would contradict the Court's holdings in *Bellotti* and *Danforth* that "an absolute, and possibly arbitrary," third-party veto over a minor's decision to have an abortion is constitutionally impermissible.<sup>118</sup>

Under the Court's requirement that a state establish a judicial bypass mechanism, it is the *juvenile judge* before whom a minor appears, and *not* a minor's representative, who is authorized to decide whether or not a minor is capable of making the decision on her own, or whether it is in her best interests to have an abortion.<sup>119</sup> In addition, the purpose of a judicial bypass hearing is to offer a minor the opportunity to convince a court, *not* her representative, of her maturity or best interests to have an abortion without parental involvement.<sup>120</sup> If a minor's representative asserts a contrary position, that opportunity is taken away from the minor because she will effectively not have a voice in the outcome of the proceeding. Moreover, in asserting a contrary position and electing to substitute his or her judgment for that of the minor, the guardian ad litem is serving as the adjudicator of the minor's interests when that role should be properly left in the judicial bypass context to the juvenile judge hearing the minor's petition.<sup>121</sup>

## V. CONCLUSION

Attorneys and guardians ad litem have very different ethical and professional standards that govern their relationships with their clients. The ethical guidelines to which an attorney is bound

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117. *See id.* at 644 (holding that the judicial bypass "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*").

118. *See id.* at 643 (concluding that "the unique nature and consequences of the abortion decision make it inappropriate 'to give a third party an absolute, and possibly arbitrary, veto' " over the minor's decision to terminate her pregnancy) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (holding that a state does not have the constitutional power to authorize "an absolute, and possibly arbitrary, veto" over the minor's decision to have an abortion).

119. *See Bellotti*, 443 U.S. at 643 & n.22.

120. *See id.* at 643-44 & 643 n.22.

121. *See id.*; HARALAMBIE, *supra* note 21, at 6 ("Legitimate questions have been raised . . . about whether the guardian *ad litem* is in reality a pretrial judge.").

provide superior protection for a minor's interests in a judicial bypass hearing. By contrast, a guardian ad litem is not bound to the same standards of zealous representation to which an attorney is bound. A guardian is therefore permitted to substitute his or her judgment for that of a minor and is not ethically bound to maintain a minor client's confidentiality.<sup>122</sup> Permitting representation of a minor by a guardian ad litem in a judicial bypass proceeding invites the possibility that a minor's desire to obtain an abortion could be subverted by a guardian ad litem who advocates that a minor should consult with her parents, or that an abortion is not in her best interests. In such a situation, the state is imposing an undue burden under *Casey* on a minor seeking a judicial bypass. First, a guardian ad litem is effectively exercising the third-party veto found unconstitutional in *Danforth* and *Bellotti*.<sup>123</sup> Second, a guardian ad litem is permitted to breach a minor's confidence, in violation of the requirement under *Bellotti* that judicial bypass proceedings be conducted in a confidential manner.<sup>124</sup> In *Bellotti*, the Supreme Court did not envision a judicial bypass process in which a minor's representative could object to the very purpose for which the minor comes before the court. Accordingly, the guardian ad litem model of representation, as it is traditionally applied, is not appropriate within the judicial bypass framework as originally established by the Court, and thus, should be not used in the bypass context.<sup>125</sup>

In a situation where a minor's decision to terminate her pregnancy is at stake, a minor should not have her right to seek a judicial waiver left to the discretion of a representative who is permitted to assess a pregnant minor's options in light of his or her own personal beliefs or wishes. This situation does not permit a meaningful exercise of a minor's rights and does not allow for "an effective opportunity" to obtain an abortion as mandated under *Bellotti*.<sup>126</sup> As the Supreme Court has acknowledged, minors and adults alike are protected under the Constitution,<sup>127</sup> and states are not permitted to interfere with a minor's right to seek permission through the courts to make the abortion decision on her own when she chooses not to involve her parents.<sup>128</sup> By offering a minor's rep-

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122. See *supra* notes 73-88 and accompanying text.

123. See *supra* Part IV.A.1.

124. See *supra* Part IV.A.2.

125. See *supra* Part IV.B.

126. 443 U.S. 622, 644 (1979).

127. See *supra* note 36 and accompanying text.

128. *Bellotti*, 443 U.S. at 643-44.

representative the opportunity to countermand a minor's desire to exercise her right, the state is effectively allowing a third party discretion over her decision, a circumstance that the Supreme Court has specifically prohibited in its jurisprudence concerning a minor's right to choose.

When the state allows a guardian ad litem to represent a minor in a judicial bypass proceeding, the state faces serious constitutional problems on the part of a minor. If the state grants a right to counsel for a minor in a judicial bypass proceeding, the state should provide her with the assistance of an attorney only, not a guardian ad litem. States that permit appointment of a guardian ad litem in a judicial bypass hearing should therefore change the counsel provisions in their parental involvement statutes and permit only an attorney to represent a minor.

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