Sixteen and Pregnant:
Should Minors with Children be able to Make a Valid Last Will and Testament?

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Each year people seek out attorneys and online resources to prepare a Last Will and Testament. When a person visits an attorney to discuss the creation and implementation of an estate plan, to begin, the attorney will need to know if the individual is married, was previously married, has children (from what, if any, marriage), and for the case of attorneys in Arizona and other community property states, if the individual previously lived in a separate property state. Picturing this scenario, however, most attorneys (and law school students) will without pause picture a testator who is over the age of eighteen.

The main reasons for effectuating a Last Will and Testament are to transfer an individual's property upon death and to nominate a guardian and conservator for minor children of the testator.[1] But for parents who are minors,[2] creating a valid Will to nominate a guardian and conservator for their children is a virtual impossibility in most states. This paper will examine the age at which an individual can create a valid Last Will and Testament throughout the United States, the exceptions states have to the age requirement, other areas of the law in which age is a flexible requirement, and why states should permit individuals younger than eighteen years of age to create a Last Will and Testament. This paper will also discuss alternatives that will meet the needs of young parents without interfering with a state's substantive laws of Wills and Estates.

I. Why does this Matter?

The need for minors to create a valid Last Will and Testament has risen in recent years as the pregnancy and birth rate of minors in the United States has risen.[3] In 2005, about 725,000 teenage girls age fifteen to nineteen became pregnant and of those about 415,000 give birth.[4] In

2007, approximately 4 in 100 teenage girls gave birth.[5] In 2008, 440,522 girls under the age of eighteen gave birth in the United States.[6] Of those girls, 5,764 were under the age of fifteen, 135,664 were between the ages of fifteen and seventeen, and 299,094 were between the ages of eighteen and nineteen at the time of birth. [7] As nominating a guardian and conservator for one's minor children is one of the primary reasons to implement a Last Will and Testament, parents who are minors themselves should not be completely deprived of this opportunity. This issue is of particular concern to the people who reside in the several states with the highest birth rate among minors, mostly in the South and West regions.[8]

II. Requirements to Make a Valid Will.

In order for the Last Will and Testament to be valid, state statutory requirements must be met. In Arizona, for example, "a person who is eighteen years of age or older and who is of sound mind may make a will."[9] Most states have very similar requirements to Arizona. In addition to the age of the testator, the Will must be in writing,[10] the material portions must be in the handwriting of the testator[11] or signed by two individuals who witness the testator sign the Will (or sign an acknowledgement),[12] and signed by the testator.[13]

Under current law, forty-eight states and the District of Columbia prohibit an individual under the age of eighteen years from making a valid Will.[14] Georgia and Louisiana allow testators as young as ages fourteen and sixteen, respectively, to create a Will.[15] Of the forty-eight states that require a testator to be at least eighteen years of age to execute a valid Will, eleven states, namely California, Delaware, Florida, Idaho, Indiana, Kentucky, Missouri, New Hampshire, Oregon, Texas and Virginia, have narrow exceptions which allow a person under the age of eighteen to create a valid Will. Most often these exceptions apply to minors who are serving in the armed forces, legally married, or who have been adjudicated emancipated. [16]

Missouri is the only state that explicitly permits all three of the aforementioned exceptions. Kentucky is the only state whose law specifically provides that "a parent, though under 18 (eighteen) years of age, may by will appoint a guardian for his child."[17] Kentucky is also among the top ten states with the highest birth rate among minors.[18]

III. The Armed Forces Exception.

Indiana, Missouri, and Texas provide an exception for minors serving in the armed forces (commonly called "infant soldiers") to create a valid Last Will and Testament. This policy allows young people who chose to enlist the opportunity to create a plan of disposition for their property upon death. These laws recognize that an enlisted individual faces a greater chance of immediate death than do civilians.

There are no reported cases dealing with an infant soldier's Will in the three states that permit such an exception. However, there are two cases dealing with an infant soldier's Will in states that do not permit this exception. In *Goodell v. Pike*,[19] the Vermont Supreme Court decided in 1867 that a Will created by a seventeen year old soldier was not valid because "[w]e do not think the statute enables an infant to make a valid will under any circumstances."[20] Similarly, in the 1922 case *In re Evan's Will*,[21] the Iowa Supreme Court held that a nineteen year old soldier's Will that met all the applicable statutory requirements except the age requirement – Iowa required the testator be over the age of nineteen at the time– could not be probated because the statute created no exception for soldiers: "in the absence of legislative intent, a soldier in actual service is not relieved from said requirements."[22]

These two cases illustrate the policy followed in most states that a minor may not make a Will regardless of extenuating circumstances, such as serving in the military, which might justify an exception. Instead of recognizing exceptions, state courts generally hold that the right to

make a valid Last Will and Testament is created solely through state statute and absent an explicit statutory exception, a testator must comply with the requirements of the statute, including the age requirement.[23,24] With rulings such as these, the courts have left the policy choice to create and permit any exception to the age requirement in the exclusive province of the state legislatures. Without legislative action, there is no exception for minor soldiers.

There is, however, a strong policy reason to allow an enlisted minor to create a valid Will that deserves attention from state legislatures. When the mature decision to enlist has been made, it can fairly be said that these individuals would be able to exercise the requisite testamentary capacity of any state's law. After all, they are deemed to have the capacity to make the decision to risk their lives by enlisting. Wills created by infant soldiers could be challenged the same as any other validly executed Will. A Will contestant could be brought before the court challenging the presumption favoring a validly executed minor soldier's Will in which the complaining party would need to present evidence that it was executed with insufficient testamentary capacity, just as if it were a case in any other Will contest involving an adult testator. There is also a strong argument that infant soldiers should be treated as adults in all areas of the law after the decision to enlist has been made as they are treated as adults who are able to enter into a contract with the armed services.

However, the likely reason only three states have chosen to enact such an exception is that there is little demand from the state's citizens for an exception. The dearth of reported cases on the matter of minor soldiers' Wills indicates there are probably few soldiers who enlist younger than eighteen, and even fewer who create a Will that subsequently reaches a probate court. While this exception is important for enlisted minors, the needs of minor parents are not therein addressed.

IV. The Emancipation Exception.

Five states, Idaho, Florida, Missouri, South Carolina, and Virginia, have explicit statutory exceptions that allow an emancipated minor to create a valid Will.[25] Idaho's emancipated minor exception defines an emancipated minor as "any male or female who has been married."[26] Therefore Idaho's exception actually operates as an exception for married minors, which is addressed, in section V below.

The emancipated minor exceptions in Florida, Missouri, South Carolina, and Virginia differ slightly. Although each state law differs in the details of becoming emancipated there are some commonalities. In these states, generally, the first step to becoming emancipated is for the minor to petition the state court. Furthermore, once emancipated, the minor is treated as if he or she is over eighteen years of age, in most legal respects. The minor is free to work and earn wages, live independently from his or her parents or guardians, enter into contracts, buy and sell property, and to generally be treated as if he or she were of the age of majority. In some states, however, the emancipated minor is still legally bound by statutory age restrictions relating to the right to marry, purchase or consume alcohol, and/or vote.[27]

Under Florida law, a court may, upon petition, remove the legal disabilities of non-age of a minor age sixteen years or older.[28] If approved by the Court, an order is issued that "giv[es] the minor the status of an adult for purposes of all criminal and civil laws of the state, and shall authorize the minor thereafter to exercise all the rights and responsibilities of persons who are age 18 or older."[29] Such an order is issued only after the Court has gathered information about the minor's economic and living situations, including whether the minor has any children, how the minor will provide for himself or herself and those in his or her care, and the Court has determined that emancipation is in the minor's best interest.[30]

Virginia's statutory scheme is similar to Florida's and requires the Court to find that the minor either has been married, even if the marriage has since ended, or that the minor lives apart from his parents with their consent or acquiescence, and that the minor is capable of providing for himself or herself and managing his or her own financial affairs.[31] No matter what state laws control the emancipation of the minor, the touchstone for granting the minor's emancipation petition is that the minor is able to provide for himself or herself and any in his or her care.

Although the emancipation exception creates an opportunity for minors to execute a valid Last Will and Testament, it is not a good fit for large numbers of minor parents. Many minor parents rely on their own parents (now, grandparents) for help raising the minor's child(ren), including housing assistance, financial support, and child care services that often are provided for free by the grandparents. The vast majority of young parents rely at least somewhat on their own families for assistance, and probably a large number of such young parents rely entirely on their families for support. Such a support structure is critically important to young parents in order to permit them to adequately support and care for their children. Furthermore, legislative policies should not encourage minor parents to pursue emancipation from their support system so that they can name a guardian and conservator for their young children. Additionally problematic is that most state laws permitting emancipation only provide for legal emancipation of minors who are sixteen years of age or older. Therefore, a fourteen or fifteen year old parent in many states is still unable to use the emancipation exception to nominate a guardian and conservator for his or her child.

Emancipated or not, the law is compelled to recognize underage parents as adults in some situations, because parents who do not affirmatively relinquish their rights as natural parents[32] have the de facto responsibility to care for their children. Young parents, regardless of their

underage status, are held to the same standards of care for their children as are adult parents. A state's interest in preventing child abuse and neglect applies with equal force to adult and teenage parents.[33] Teenage parents are not given any exceptions or leniency when it comes to deciding whether or not they are fit to retain custody of their children. Minors who are parents are still treated as adults when it comes to discharging parental obligations. Recognizing that young parents are held as responsible for caring for their children, the law should accord them the same right to plan for their children in the event of their untimely death, a right that all adult parents are given.

V. The Marriage Exception and Why It Does Not Go Far Enough.

Five states allow those who are validly married and under the age of majority to create a Will. For purposes of marriage, all states treat age eighteen as the age of majority,[34] except Mississippi, where the age of majority is twenty-one.[35] Many states, however, allow a minor under the age of eighteen to marry with parental consent.[36] A minor who has been validly married may create a Will in Iowa, New Hampshire, Oregon, South Carolina, and Texas.[37] Additionally, the Restatement of Property adopts the position that "[a] person who is legally married before attaining the specified age to make a will is generally regarded as having attained the age of majority for purposes of making a will."[38] Since children are often a product of marriage and sometimes the reason for individuals to marry, younger married parents in these five states are permitted, through this statutorily created exception, to create a valid Will which nominates guardians and conservators for their minor children. Some states that have not created statutory exceptions have adopted the Restatement of Property's position and therefore allow a married minor to create a valid Will, even though the state's statute defining who may make a Will is silent on the issue of married minors.[39]

The laws of these five states and the Restatement of Property evidence a legislative policy choice to treat married minors as adults for the purpose of making a Will. What is not clear is how many minors are served well by this exception as the vast majority of children born to underage parents are born out of wedlock.[40] Certainly it is important to preserve the married person's right to create a Last Will and Testament, but unmarried minor parents are left with no legal avenue to nominate a guardian and conservator for their children. Encouraging minors to marry in order to create a Will is not a sound policy. In addition, tying the ability to create a valid Will to marriage disregards the needs of single minor parents. While some minors consent to marry upon learning of pregnancy, many choose to remain single parents, either through breakups of the romantic relationships (in which case the mother usually parents alone) or the choice to parent jointly as an unmarried couple.

VI. Is Age the Best Touchstone for Testamentary Capacity?

In making a Will, age matters. Georgia and Louisiana allow testators aged fourteen and sixteen, respectively, to create valid Wills.[41] Though these two states have chosen a lower minimum age for testamentary capacity, there are no reported cases in either state dealing directly with the probate of a Will of a decedent under the age of eighteen. This illustrates that the choice to allow young testators to create Wills has had little litigious effect, either because such Wills never reach probate because the minors outlive and later amend or revoke these Wills, or because such Wills are deemed statutorily valid and there is little argument over their validity when submitted to probate.

Although not a Will contest, there is one Georgia case dealing with beneficiary designations on an account by a minor and this case would likely be binding on any Georgia probate court presented with a Will validly executed by a testator who is at least fourteen years

of age. In *Bacon v. Smith*,[42] the issue was whether a fifteen year old could designate beneficiaries on an annuity owned by him. The Georgia Court of Appeals upheld the minor's beneficiary designation:

> The trial court merely drew an analogy between the right of a 15 year old to dispose of his property by will . . . and 15-year-old Christopher's right to determine the beneficiaries of his annuities. [Ga. Code Ann. § 53-2-22] provides that the minimum age for testamentary capacity is 14 years. The trial court correctly determined that Christopher had the ability to designate beneficiaries to his annuities.[43]

Although dicta, it is clear that Georgia courts will uphold the statutory scheme and allow the probate of an otherwise properly executed Will executed by a testator as young as age fourteen.

In Louisiana, however, age is a flexible continuum, not a stagnant requirement. The state has adopted a progressive scheme that presumes minors possess increased capacity to make donations as they age. In Louisiana, the devise or bequest of one's property upon death is termed a donation mortis causa, defined as: "an act to take effect at the death of the donor by which he disposes of the whole or a part of his property. A donation mortis causa is revocable during the lifetime of the donor."[44] Prior to the 1991 overhaul of the Louisiana Civil Code, minors under the age of sixteen were absolutely barred from making any donations, either mortis causa or inter vivos. Today, however, a minor under the age of sixteen is able to make both donations mortis causa and inter vivos, but only in favor of his spouse or children.[45] A minor over sixteen years of age but less than eighteen years of age is able to make donations mortis causa to anyone, but inter vivos donations only in favor of his spouse or children.[46] Once a person attains eighteen years of age, all restrictions on donations are lifted.[47]

This progressive structure blends the traditions of common law and French Civil law, which allows anyone over age sixteen to make a Will, on the "presumption that a sixteen-year-old is sufficiently mature to make a valid will."[48] Louisiana's system strikes a sensible balance

between the interests of minors and the interest of the State in protecting those minors from making unsound donations. As the official 1991 Revision Comment makes clear, the main concerns are to provide flexibility and protect minors from unwise choices:

> [T]here is a significant difference between execution of a will and the making of an inter vivos donation, in terms of the considerations that should govern a minor's ability to make such dispositions. The testament is subject to more strict formalities and does not dispose of the minor's property until a later date . . . in contrast with a donation inter vivos, by which the minor presently and irrevocably disposes of property. For that reason, a distinction between the ability to execute a will and the ability to make an inter vivos donation is recognized, but in each case for obvious policy reasons an exception is made in favor of a spouse and children.[49]

Both Louisiana's progressive capacity structure and Georgia's lower age limit deserve more attention and consideration from other state legislatures that are seeking to create a legislative policy that provides the option for underage parents to name a guardian for children. These two systems provide understandable and workable alternatives to the standard age eighteen requirement and do not appear to create needless or burdensome litigation.

Another alternative that should be considered by all state legislatures is Kentucky's law, which provides that "a minor parent, though under eighteen (18) years of age, may by will appoint a guardian for his child."[50] Though no reported cases in Kentucky deal with this exception, it has been enacted in its current form since 1974.[51] Such a clear and limited exception appears not to create gratuitous additional litigation while still providing minor parents with a way to plan for future contingencies.

As illustrated by the laws of Georgia, Louisiana, and Kentucky, minors may be capable of creating a Will that disposes of property and names a guardian for the minor's child(ren). For other states that wish to create a way for minor parents to accomplish this important aspect of estate planning, adopting statutory schemes similar to any of these would be a workable

alternative to requiring that all testators be at least eighteen years of age. These three states have chosen to make themselves laboratories to test whether minors can be trusted and have sufficient capacity to create a testamentary plan of disposition and appoint a guardian for minor children. While the dearth of reported cases might indicate that these laws are easily administered and do not create any additional litigation, it is not conclusive proof that any of these three alternative approaches provide the best solution. Without cases reaching the appellate level, it is difficult to say what issues would confront a court, making it doubly difficult to predict how a court would rule. The lack of case law on this particular topic may make attorneys advising young parents to create an estate plan uneasy, since they cannot offer guidance on whether the Will is likely to be viewed favorably or with hostility in the event of a contest.

Although the age of eighteen appears to be the touchstone in most states for creating a valid Last Will and Testament, eighteen years of age is not always the determinative age when a child becomes an adult in the eyes of the law.

VII. Minors and Criminal Law.

In the criminal system, an individual under the age of majority can be tried as an adult. In some states there is no age requirement to try a minor as an adult if the minor is transferred to criminal court by a judicial waiver.[52] Indiana, Texas, and Vermont permit minors ten years of age and older to be tried as adults.[53] Colorado, Missouri, and Montana allow minors as young as twelve years of age to be tried as adults.[54] Illinois, Mississippi, and North Carolina permit minors of thirteen years of age to be tried as adults.[55] Most states permit minors age fourteen and older to be tried as an adult in the criminal system.[56]

In many states the age of the perpetrator and the type of crime matter in determining what type of charges to bring against a minor. In Illinois, a child as young as thirteen years can be

tried as an adult if he or she "is charged with 1st degree murder committed during the course of [] aggravated criminal sexual assault, criminal sexual assault or aggravated kidnapping."[57] "Florida, Nevada, New York, and Pennsylvania, automatically transfer any minor who commits certain enumerated offenses."[58] However, most states only automatically transfer a minor accused of a crime to the criminal system and out of the juvenile system if a certain age threshold has been met.[59] Arizona and a few other states have a higher age threshold and do not allow a minor under the age of fifteen to be tried as an adult.[60]

In deciding to try a minor as an adult, courts in Illinois take into account the following factors: (1) age of the accused; (2) previous criminal history and delinquent behavior of the accused; (3) abuse or neglect of the accused; (4) mental health of the accused; (5) the accused's education; and (6) the type of crime involved.[61] In *Kent v. U.S.*, the United States Supreme Court in the appendix of its decision listed eight factors that should be considered in determining if a minor should be tried as an adult under the code of the District of Columbia.[62] The factors to be considered are as follows: (1) the seriousness of the offense to the community and need for protection of the community; (2) if the offense was committed in an aggressive, violent, premeditated, or willful manner; (3) if the offense was against a person instead of property – greater weight being given to offenses against persons especially if personal injury resulted; (4) the weight of the evidence; (5) if the associates in the offense are adults who will be charged with a crime; (6) the sophistication and maturity of the minor which can be accomplished by considering his/her home, environmental situation, emotional attitude, and pattern of living; (7) the record and previous history of the law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions; and (8) the likelihood of reasonable rehabilitation of the minor.[63]

If criminal actions perpetrated by minors cause them to be seen as adults in the eyes of the law, why should the decision to bear a child as a minor not have the same effect? At a minimum, minors who are themselves parents should be, regardless of age, able to nominate a guardian and conservator for their children upon their own death. Depending on the minor's situation and the specific state's laws of intestacy, it may also be beneficial for the minor parent to have the capacity to make a valid Last Will and Testament to dispose of his or her property in the event of his or her death.

VIII. Minors Have a Say in Who Will be Their Guardian.

In Arizona, at age twelve, a minor's wish as to who he or she will reside with is given great deference by the court. Arizona law requires the court to "appoint a person nominated by the child if the child is at least twelve years of age, unless the court finds that the appointment would not be in the child's best interests. The court shall [also] consider the child's objection to the appointment of the person nominated as permanent guardian."[64] Pursuant to Alaska statute, "the court shall appoint a person nominated by the minor, if the minor is 14 years of age or older, unless the court finds the appointment contrary to the best interests of the minor."[65] Georgia, Hawaii, and New Mexico law also require the minor to be fourteen years of age in order to give input into the appointment of his or her guardian.[66] In Colorado, "a minor who is the subject of an appointment by a parent or guardian and who has attained twelve years of age has the right to consent or refuse to consent to an appointment of a guardian... If the minor does not consent to the appointment of a guardian, then the court shall appoint [another] guardian."[67] In these and most other states, the minor's decision is subject only the judge's determination of the guardian's fitness and that the placement is in the best interests of the minor.[68] Therefore, the minor has the ability to select his/her guardian if he/she is of the age specified in the state's statutes.

As states already allow a minor child of a certain age to have a say in the appointment of his or her guardian, a minor of that same age should be able to nominate a guardian and conservator for his or her child. The appointment of the guardian for the minor's child would be subject to the same requirements as the appointment of a guardian for the any minor, a judicial determination that the guardian is fit and that the appointment is in the best interests of the minor. As states already have such a system in place, allowing a minor parent to nominate a guardian for his or her child would require no additional court time than what is already required. In fact, because family courts and probate courts already have experience in dealing with appointment of primary guardians when adult parents divorce or die leaving minor children, very little judicial stretching is required for those same judges to make a determination that the guardian chosen by the minor parent is fit and in the child's best interest.

IX. Minors Obtaining Abortions.

A minor female, once pregnant, is able to decide if she would like to keep her child or have an abortion. Some states require notification of a minor's parents before she is able to obtain an abortion.[69] However, the Supreme Court has said that this notification cannot equate to a complete veto power and those minors who are mature enough to make the decision must have an alternative avenue for doing so.[70] As a result of this court decision, states offer a judicial bypass as an alternative to parental notification.[71]

A judicial bypass, to be constitutional, must give an independent decision-maker the ability to grant the bypass.[72] This procedure must "provide the minor with the opportunity to establish that she is sufficiently mature and well informed to make the abortion decision on her own."[73]

> With regard to the determination whether a particular minor has sufficient maturity to be entitled to a bypass of parental consent or notification under state statutes, several courts have broadly acknowledged that maturity is not solely a matter of social skills, level of intelligence, or verbal skills, but calls for experience, perspective, and judgment, although adult–level experience is not the criterion, nor is it necessary that the minor be near the age of majority or no longer supported by her family. The courts have variously defined such maturity in terms of the intellectual capacity, experience, and knowledge necessary to substantially understand the situation at hand and the consequences of the choices that can be made, or the capacity to understand and evaluate the type of procedure that the physician intends to use to perform the abortion and the possible complications associated with the use of the procedure and with the performance of the abortion itself. Courts have repeatedly acknowledged that the very decision of a pregnant minor to request the advice of counsel and to seek a judicial bypass is, in itself, an indication that she has sufficient maturity to be granted a waiver of the state's statutory requirement of parental consent to an abortion.[74]

Furthermore, if the minor is determined to be sufficiently mature and well informed then the state statute governing the bypass must prohibit the court from denying the bypass.[75] Even if the minor cannot prove her maturity, she is permitted to show that the abortion is in her best interests and therefore she should be given the judicial bypass.[76] The burden of proof in many states is on the minor to prove her maturity and that she is informed or that the abortion is in her best interests by clear and convincing evidence.[77] The judicial bypass alternative is based on the right to privacy and the idea that even a minor has the right to privacy to have an abortion because constitutional rights do not come into existence at a certain age but are granted to all, including minors.[78]

In *State v. Koome*, the state of Washington's parental notification requirement to obtain an abortion for unmarried minors was challenged.[79] The state's asserted reasons for the requirement were inducing informed decisions of the minor and support of the family unit and parental authority.[80] The Washington Supreme Court, in determining the statute was unconstitutional, stated "the decision to continue or terminate her pregnancy is, in effect, her first 'parental' decision. It should not arbitrarily be subordinated to her parents' last."[81] The court also

recognized that "the ability to competently make an important decision, such as that to have an abortion, develops slowly and at different rates in different individuals" and that "law and science [both] have realized that children below voting age are capable of making many important decisions."[82] The court recognized that although setting age requirements may be necessary in some areas of the law, in terms of obtaining an abortion a legal age requirement is not necessary because the age of fertility provides a more practical age minimum.[83] The court also determined the minors would still be required to be informed under medical laws that require informed consent for any procedure to be performed.[84]

The court's reference to "parental decision" is a similar right to what we advocate, namely, the right to make the "parental decision" to nominate a conservator and guardian for a minor's own minor child. If a minor has the ability to decide to have or not have the child, the minor is making a parenting decision, her personal decision of whether or not she can parent. The minor again makes that decision if she chooses to have the child and then give it up for adoption. If the minor can decide alternately to have an abortion, bear the child and then give it up for adoption, or raise the children herself and responsible for its care, that minor should also be able to decide who will care for her child upon her death.

X. Solutions

With state laws of intestacy designed to transfer property as most individuals would desire, it seems that the transfer of property from a minor to that minor's child is not the problem. A minor parent will still be able to transfer his or her property to his or her minor child, even without preparing a Last Will and Testament, via the laws of intestacy. Though some important estate planning tools, such as the creation of an testamentary trust to avoid many of the rigors of the probate process, are unavailable to minor parents, probably few minors have

sufficient property to be especially concerned with this aspect of estate planning. The real issue that arises in denying minors the ability to create a valid Last Will and Testament is that the underage parent with a young child is not able to designate a guardian and conservator for his or her child upon his or her death.

State legislatures could choose from several different policies in order to provide minor parents with more opportunity to plan for the future of their own young children. First, more states could amend their statutes to provide a scheme similar to Georgia's or Louisiana's, where the minimum age to create a Will is below the age of eighteen and is therefore closer to the age at which most females become physically capable of bearing children. The lower age requirement would also bring the law of Wills and Estates into accord with the laws permitting abortion through a judicial bypass, appointment of guardian for a minor, and the trial of a minor as an adult in the criminal system, all of which have an age threshold below eighteen.

Second, states could implement a statute similar to Louisiana's that permits minors increasing rights to transfer property as they mature and grow older. States already regulate a minor's ability to own and transfer property. Under a scheme similar to Louisiana's the legislature could determine various ages at which it believes a minor is competent to own and transfer property yet still provide limitations on the ability to transfer property and to whom that property can be transferred. These limits on transfer would give the legislature the ability to protect minors from unwise choices while allowing minors to transfer property to their children or other family members, a policy choice the Louisiana legislature deemed "obvious".[85]

Third, states could enact a statutory exception to the age requirement for minor parents, as a few states do now for married minors, emancipated minors, and infant soldiers. States could mimic the law already enacted in Kentucky, which has been in force in its current form since

1974. As Kentucky has had this law in place for almost forty years, it would have been amended or repealed if the state was facing an influx of problematic cases regarding the validity of these Wills or other problems. Kentucky has already experimented with this type of a law with no issues and other states could, and should, take advantage of that knowledge. A Kentucky-style statute is probably the simplest choice to allow minors the opportunity to create a valid Will.

However, many states may not be willing to change their statutory scheme governing Wills and Estates. Another solution which would not interfere much with the current statutory scheme is to create a form of judicial bypass. States could permit a minor parent to go to court with a Last Will and Testament in order to prove that he or she has the capacity to validly execute a Will. The minor would have the burden of proving to the judge that he or she has of the testamentary capacity required to create a valid Last Will and Testament, similar to minor females seeking a judicial bypass for an abortion. In making its determination, the judge could take into consideration the minor's age, intelligence, education, maturity, sophistication, home environment, emotional attitude, pattern of living, perspective, judgment, and job as a parent when determining if the minor demonstrates the requisite capacity. The judge could also question the minor about the document itself to insure the minor understands the purpose of the document and its attendant effects and consequences.

These are all similar factors considered by judges who determine whether a minor should be tried criminally as an adult, if the minor should be emancipated, and if the minor is entitled to a judicial bypass to obtain an abortion. The focus in these several inquires is on the maturity of the minor. The development of the law in these areas has demonstrated that judges are capable of making such determinations. If the judge finds the minor has the capacity to execute the Last

Will and Testament, the court could certify the document, thus making it a valid Last Will and Testament.

Our final solution is for states to create a new document under new statutes which would allow a minor parent to prepare a form listing those whom the minor nominates as the guardians and conservators for his or her minor child. This new "guardianship appointment" form would be completely separate from the Last Will and Testament and its attendant requirements yet it would still provide a means for minor parents to state their wishes regarding guardianship of their children. If required, such a form could easily be recorded or filed with the proper municipal authority after its proper execution. This appointment would also remain subject to the state procedures that govern the appointment of a guardian. The court would retain the authority to determine whether the nominated guardian is fit to serve in that role and if the appointment of that individual as guardian is in the best interests of the child.

For those state legislatures wishing not to interfere with or change the state's substantive law of Wills and Estates, this option provides a targeted solution to the problem facing minor parents. A state legislature could specify exactly the language that such a form should incorporate, or alternately, state broadly the requirements and basic purpose of the form, and allow attorneys and other legal document preparers to flesh out the details. The "guardianship appointment" option should particularly appeal to states that wish not to create any exceptions to their law regarding who can create a Will. Because the laws of intestacy, and the relative poverty of most minor parents, obviate the need for many minors to create Wills specifically to direct property to minor children, a "guardianship appointment" form provides a distinct alternative that is perfectly congruent with the problem it seeks to resolve.

Additionally, determining the language that this form should incorporate should be a relatively easy task for any legislature. The language could simply mirror the "guardian and conservator" recital commonly found in many attorney-drafted Wills, with the proper modifications to limit the language to appointment of a guardian and conservator, as applicable by state law, for minor children. For illustration purposes, the pertinent statutory language, and hence the form, could follow this general format:[86]

"I, (*minor parent's name*), a resident of (*County, State*), make this Appointment of Guardian, hereby revoking all prior Appointments of Guardian.

I am (*married to spouse / not married*) and have (*number of children*) now living, namely (*child's name*), born (*child's date of birth*).

Upon my death, I appoint (*nominated guardian's name*), currently of (*first nominated guardian's city and state*), as Guardian. If (*first nominated guardian*) is unable or unwilling to act, I appoint (*second nominated guardian*), currently of (*second nominated guardian's city and state*).

If it is necessary to appoint a Conservator for any child of mine, I appoint (*first nominated conservator*), currently of (*first nominated conservator's city and state*) as Conservator. If (*first nominated conservator*) is unable or unwilling to act, I appoint (*second nominated conservator*), currently of (*second nominator conservator's address*) as successor Conservator."

We believe that a statute either adopting this language, or creating a form that substantially incorporates its intent, would be an excellent solution for any state wishing to equalize the minor parent's ability to plan for death. Adopting statutory schemes that create exceptions for minor parents to make Wills is an adequate though imperfect alternative, because

a Will is primarily intended to effectuate a plan of disposition for property, but most minor parents urgently need only to appoint a guardian for children. The creation of a new "guardianship appointment" form is the best fit for this particular problem facing young parents.

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[1] Colleen Chinlund, A Look at Complex Issues in the Trusts and Estate Arena. Leading Lawyers on Managing Client Expectations, Handling Complex Cases, and Navigating Recent Legal Developments 6-7 (Aspatore 2010).
[2] In this paper, the term minor will refer to a person who is under 18 years of age.
[3] March of Dimes, http://www.marchofdimes.com/medicalresources_teenpregnancy.html. (last visited May 6, 2011).
[4] *Id.*
[5] *Id.*
[6] The National Campaign to Prevent Teen and Unplanned Pregnancy, http://www.thenationalcampaign.org/state-data/state-comparisions.asp?id=4&sID=30. (last visited May 6, 2011).
[7] *Id.*
[8] The National Campaign to Prevent Teen and Unplanned Pregnancy, http://www.thenationalcampaign.org/state-data/state-comparisions.asp?ID=4&sID=44&sort=rank#table (last visited May 6, 2011). (Texas, New Mexico, Mississippi, Oklahoma and Arkansas have the highest overall teen birth rates).
[9] Ariz. Rev. Stat. Ann. § 14-2501 (2010).
[10] Ariz. Rev. Stat. Ann. § 14-2503 (2010).
[11] Ariz. Rev. Stat. Ann. § 14-2503 (2010).
[12] Ariz. Rev. Stat. Ann. § 14-2502 (2010).
[13] Ariz. Rev. Stat. Ann. § 14-2502 (2010).
[14] Ala. Code § 43-8-130 (2011), Alaska Stat. § 13.12.501 (2011), Ariz. Rev. Stat. Ann. § 14-2501 (2010), Ark. Code Ann. § 28-25-101 (2010), Cal. Prob. Code § 6100 (2010), Colo. Rev. Stat. § 15-11-501 (2010), Conn. Gen. Stat. § 45a-250 (2010), Del. Code Ann. tit. 12, § 201 (2011), D.C. Code § 18-102 (2011), Fla. Stat. §732.501 (2011), Haw. Rev. Stat. § 560:2-501 (2011), Idaho Code Ann. § 15-2-501 (2011), 755 Ill. Comp. Stat. Ann. 5/4-1 (2010), Ind. Code § 29-1-5-1 (2011), Iowa Code Ann. § 633.264 (2011), Kan. Stat. Ann. § 59-601 (2010), Ky. Rev. Stat. Ann. § 394.020 (2011), Me. Rev. Stat. Ann. tit. 18-A, § 2-501 (2010), Md. Code Ann. Est. & Trusts § 4-101 (2010), Mass. Gen. Laws Ann. ch. 191, § 1 (2011), Mich. Comp. Laws Ann. § 700.2501 (2011), Minn. Stat. Ann. § 524.2-501 (2011), Miss. Code Ann. § 91-5-1 (2011), Mo. Rev. Stat. § 474.310 (2011), Mont. Code Ann. § 72-2-521 (2010), Neb. Rev. Stat. § 30-2326 (2010), Nev. Rev. Stat. §§ 133.020, 133.085 (2011), N.H. Rev. Stat. Ann. § 551:1 (2011), N.J. Stat. Ann. § 3B:3-1 (2011), N.M. Stat. Ann. § 45-2-501 (2010), N.Y. Est. Powers & Trusts Law § 3-1.1 (2011), N.C. Gen. Stat. Ann. § 31-1 (2010), N.D. Cent. Code § 30.1-08-01 (2011), Ohio Rev. Code Ann. § 2107.02 (2011), Okla. Stat. Ann. tit. 84 § 41 (2011), Or. Rev. Stat. Ann. § 112.225 (2011), 20 Pa. Cons. Stat. Ann. § 2501 (2011), R. I. Gen. Laws §33-5-2 (2010), S.C. Code Ann. § 62-2-501 (2010), S.D. Codified Laws § 29A-2-501 (2011), Tenn. Code Ann. § 32-1-102 (2011), Tex. Prob. Code Ann. § 57 (2011), Utah Code Ann. § 75-2-501 (2011), Vt. Stat. Ann. tit.

14 § 1 (2011), Va. Code Ann. § 64.1-46 (2011), Wash. Rev. Code Ann. § 11.12.010 (2011), W. Va. Code Ann. § 41-1-1 (2011), Wis. Stat. § 853.01 (2011), Wyo. Stat. Ann. § 2-6-101 (2011).
[15] Ga. Code Ann. § 53-4-10 (2010), La. Civ. Code Ann. art. 1476, et. al. (2011).
[16] Cal. Prob. Code § 6100 (2010), Del. Code Ann. tit. 12, § 201 (2011), Fla. Stat. §732.501 (2011), Idaho Code Ann. § 15-2-501 (2011), Ind. Code § 29-1-5-1 (2011), Ky. Rev. Stat. Ann. § 394.020 (2011), Mo. Rev. Stat. § 474.310 (2011), N.H. Rev. Stat. Ann. § 551:1 (2011), Or. Rev. Stat. Ann. § 112.225 (2011), Tex. Prob. Code Ann. § 57 (2011), Va. Code Ann. § 64.1-46 (2011).
[17] Ky. Rev. Stat. Ann. § 394.030 (2011).
[18] The National Campaign to Prevent Teen and Unplanned Pregnancy, *supra* note 8.
[19] 40 Vt. 319 (Vt. 1867) (unreported decision).
[20] *Id.*
[21] 188 N.W. 774 (Iowa 1922).
[22] *Id.* at 775.
[23] *See e.g.*, *Robertson v. Jones*, 136 S.W. 2d 278 (Mo. 1940), ("The legislature has given us a code governing wills. If it is to be expanded or changed it is for the legislature to do so. We must administer it as we find it"), *In re Tyrell's Estate*, 153 P. 767, at 768 (Ariz. 1915) ("In the law governing wills it is elementary that the right to make a testamentary disposition of one's property is purely of statutory creation, and is available only on compliance with the requirements of the statute.")
[24] But see *In re Knight's Estate*, 93 A.2d 359, 362 (N.J. 1953) (holding that letter written by 20 year old soldier served as a valid Will: "[w]e have concluded that when the Legislature enacted [the Wills Act] it contemplated that soldiers and sailors in actual military service would be exempt from the full age requirement of our Wills Act as well as its formal requisites [sic], and that consequently their wills of personalty would be subject to early common law principles.")
[25] Idaho Code Ann. § 15-2-501 (2011), Fla. Stat. §732.501 (2011), Mo. Rev. Stat. § 474.310 (2011), S.C. Code Ann. § 62-2-501 (2010), Va. Code Ann. § 41-1-1 (2011).
[26] Idaho Code Ann. § 15-1-201 (2011). Several other states treat married minors as emancipated as well, *see e.g.* Cal. Fam. Code § 7002 (2011), Haw. Rev. Stat. § 577-25 (2011), S.D. Codified Laws § 25-5-42(1), Utah Code Ann. § 15-21-1 (2011).
[27] *See* Alaska Stat. §9.55.590 (2011), Nev. Rev. Stat. § 129.120(5)(a)-(e), Or. Rev. Stat. § 419B.552(2).
[28] Fla. Stat. Ann. § 743.015(6) (2011).
[29] *Id.*
[30] *Id.*
[31] Va. Code Ann. § 16.1-333 (2011).
[32] Relinquishment occurs, for example, by consenting to adoption of the child; in the case of fathers who are never informed about the existence of a pregnancy and child, such fathers never knowingly possess or exercise parental rights.
[33] *See* Ariz. Rev. Stat. Ann. § 8-533(B) (2011) (grounds for judicial termination of parent-child relationship).
[34] Richard A. Leiter, *Marriage Age Requirements*, 50 State Statutory Surveys (West 2007).
[35] Miss. Code Ann. § 93-1-5(b) (2011) provides: "If either of the applying parties appears from the evidence to be under twenty-one (21) years of age, the circuit clerk shall . . . cause notice of the filing to be sent by prepaid certified mail to the father, mother, guardian or next of kin of

both applying parties. . .". *See also* Miss. Code Ann. § 1-3-27 (2011) (defining minor as "any person, male or female, under twenty-one years of age.")

[36] *See* Ariz. Rev. Stat. Ann. § 25-102(B) (2011) (requiring parental consent for minor age 16 or 17 to marry, requiring parental consent plus judicial approval for minor under age 16 to marry). *See also* Ohio Rev. Code Ann. § 3101.05 (2011) ("if either applicant is under the age of 18 years, the judge shall require the applicants to state that they received marriage counseling satisfactory to the court.")

[37] Iowa Code Ann. § 633.264 (2011), N.H. Rev. Stat. Ann. § 551:1 (2011), Or. Rev. Stat. Ann. § 112.225 (2011), S.C. Code Ann. § 62-2-501 (2010), Tex. Prob. Code Ann. § 57 (2011).

[38] Restatement (Second) of Property § 34.4 cmt. a (2010).

[39] *See* notes 25 and 37, *supra.*

[40] "The birth rate for teenagers declined 1 percent in 2004 to 41.1 births per 1,000 women aged 15–19 years. The rate has dropped one-third since its recent peak in 1991. The rates for teenage subgroups 15–17 and 18–19 years each fell 1 percent, to 22.1 and 70.0, respectively." Joyce A. Martin, et al., *Births: Final Data for 2004*, 55 Nat'l Vital Stat. Rep., No.1, at 2 (2006).

[41] *See* note 15, *supra.*

[42] 474 S.E. 2d 728, 730. The annuity was purchased for the minor by his appointed guardians, namely his mother and stepfather, with proceeds of a personal injury settlement. The minor was later killed in an accident before turning eighteen.

[43] *Id.*

[44] La. Civ. Code Ann. Art. 1469 (2011).

[45] La. Civ. Code Ann. Art. 1476 (2011).

[46] *Id.*

[47] La. Civ. Code Ann. Art. 1470, 1471 (2011).

[48] Laurie Dearman Clark, Comment, *Louisiana's New Law on Capacity to Make and Receive Donations: "Unduly Influenced" by the Common Law?*, 67 Tul. L. Rev. 183, 187 n. 17 (1992).

[49] La. Civ. Code. Ann. Art. 1476 (2011).

[50] Ky. Rev. Stat. § 394.030 (2011).

[51] James R. Merritt and Norvie L. Lay, 1 *Ky. Prac. Prob. Prac. & Proc.* § 362 (2d ed.) (2011) (Prior to 1974, Kentucky's law allowed minor fathers, but not mothers, to appoint a guardian by will).

[52] Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles can be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment the Age at which a Child Should be Held Responsible for his or her Actions has been Debated for Centuries*, 37 San Diego L. Rev. 783, 800 (Summer 2000).

[53] *Id* at 800 -801.

[54] *Id* at 801.

[55] *Id.*

[56] *Id.*

[57] Linda S. Pieczynski, *Excluded Jurisdiction—Mandatory Prosecution of Minors as Adults, 6A Ill. Prac.*, Crim. Prac. & Proc. § 35:31 (2d ed.) (2010).

[58] Beresford, *supra* note 51, at 809.

[59] *Id.* at 810.

[60] Ariz. Rev. Stat. § 13-501 (2010). See also Beresford, *supra* note 51 at 810.

[61] Pieczynksi, *supra* note 56.

[62] 383 U.S. 541, 566-67 (1966).
[63] *Id.*
[64] Ariz. Rev. Stat. § 8-871 (2010).
[65] Alaska Stat. § 13.26.055 (2010).
[66] Ga. Code Ann. § 29-2-16 (2005). Haw. Rev. Stat.§ 560:5-204 (2009). N. M. Stat. § 45-5-206 (2010).
[67] Colo. Rev. Stat. § 15-14-203 (2001).
[68] John Bourdeau, John R. Kennel, Thomas Muskus, & Carrie A. Wood, *Appointment, Qualification, and Tenure of Guardian: Appointment and Qualification: Method of Selection and Appointment: Selection by Minor*, 39 C.J.S. Guardian & Ward § 19 (2011).
[69] William H. Danne, Jr., *Validity, Construction, and Application of Statutes Requiring Parental Notification of or Consent to Minor's Abortion*, 77 A.L.R.5th 1 (2000).
[70] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992).
[71] *Supra*, note 69.
[72] *Id.*
[73] *Id.* See also John A. Borron, Jr., *Medical Treatment – Informed Consent and The Right to Refuse Treatment: Surrogate Consent*, 5D Mo. Prac., Prob. Law & Prac. § 2304 (3d ed.) (2011).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).
[79] 530 P.2d 260, 262 (1975).
[80] *Id.* at 264.
[81] *Id.* at 265.
[82] *Id.* at 266.
[83] *Id.* at 267.
[84] *Id.*
[85] See note 49, *supra*.
[86] The information to be supplied by the creator is italicized.