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STERILIZATION PETITIONS: DEVELOPING JUDICIAL GUIDELINES

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I. INTRODUCTION

In 1969, the Montana State Legislature replaced Montana's compulsory sterilization statute[1] with a statute providing safeguards for assuring that mentally retarded persons were not sterilized without giving voluntary, informed consent.[2] The 1969 statute provided for a "Board of Eugenics." The Board's duty was to hear applications for sterilizing persons whose ability to give voluntary, informed consent was questioned. If the Board found the person incapable of consenting, sterilization was prohibited.[3] The last known sterilization performed under this statute was in 1972.[4] The Montana legislature repealed this statute in October 1981, without providing a replacement.[5] The repeal has left Montana courts without guidelines for sterilization hearings concerning the mentally retarded. This comment examines how other courts have treated sterilization petitions in the absence of legislative guidance.

II. HISTORY

Sterilization laws generally passed as a result of pressure by a few influential individuals.[6] Harry Laughlin, an infamous eugenicist, was a strong force behind the eugenics movement in legal fields. Although most eugenicists at that time opposed eugenical sterilization, Harry Laughlin and his followers pursued implementation of sterilization laws with zeal. Laughlin has been portrayed as a strange and humorless man, who became obsessed with passing sterilization laws.[7] Laughlin even proposed a model eugenical sterilization law in 1922 which provided for sterilizing criminals and deaf, blind, mentally disabled and other handi-

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1. MONT. REV. CODES ANN. §§ 38-601 through -608 (1947).
2. MONT. CODE ANN. §§ 53-23-101 through -105 (1979).
3. *Id.*
4. C. Easter, Selected Montana Laws, Discrepancies, and Possible Effects on Population Growth 60 (1977) (unpublished Masters Thesis, available at University of Montana Library).
5. 1981 Mont. Laws ch. 286, § 1.
6. K. LUDMERER, GENETICS AND AMERICAN SOCIETY: A HISTORICAL PERSPECTIVE 94 (1972) [hereinafter cited as Ludmerer]; *see also* Ross, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions*, 9 FLA. ST. U. L. REV. 599 (1981) [hereinafter cited as Ross].
7. Ludmerer, *supra* note 6, at 149.

capped persons.[8]

In 1907, Indiana became the first state to pass a compulsory sterilization statute.[9] By 1935, 20,000 sterilizations had been performed in the United States; 10,000 were performed in California alone.[10] In the 1930's, the American Medical Association and other medical groups began to oppose eugenical sterilization of mentally retarded people.[11] Compulsory sterilizations, however, continued into the early 1960's. By 1966 one author estimated that 70,000 persons had been sterilized in the United States for eugenical purposes.[12] Records indicate that 207 sterilizations were performed at Boulder River School and Hospital in Montana between 1926 and 1954.[13]

In *Buck v. Bell*,[14] the United States Supreme Court sanctioned compulsory eugenical sterilization despite claims that it violated substantive and procedural due process as well as equal protection rights of the handicapped. The Court, with Justice Holmes writing the majority opinion, held that Carrie Buck, a mildly mentally retarded woman, must be sterilized because "three generations of imbeciles are enough."[15] The Court disposed of the constitutional objections by stating that some sacrifices must be made for the public welfare:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.[16]

Holmes likened sterilization to a vaccination and found that the state interest was great enough to justify denying a person the right to procreate.[17] Because the Virginia statute in question pro-

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8. *Id.* at 93; *see also* Comment, *Eugenic Sterilization Statutes: A Constitutional Reevaluation*, 14 J. FAM. L. 280, 283 (1975).

9. Ludmerer, *supra* note 6, at 92.

10. *Id.* at 95.

11. Burgdof & Burgdof, *The Wicked Witch Is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 895, 1007 (1977) [hereinafter cited as Burgdof].

12. Kindregan, *Sixty Years of Compulsory Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 CHI. [-] KENT L. REV. 123 (1966).

13. Interview with Kelly Moorse, Executive Secretary, Board of Visitors of Boulder River School and Hospital (June 1982).

14. 274 U.S. 200 (1977).

15. *Id.* at 207.

16. *Id.*

17. *Id.*

vided for both notice to the patient and parents and for appellate hearings before a hospital board, Holmes found that the requirements of procedural due process had been met.[18] The equal protection claim rested on the fact that only institutionalized people, as opposed to all mentally retarded people, were subject to the sterilizations. Holmes responded that the law reaches all that it can and should not be faulted for not being applied to everyone in a class.[19]

The *Buck* decision has not been expressly overruled. Nonetheless, an Oklahoma compulsory sterilization statute came under attack in the Supreme Court fifteen years later, and the Court struck it down as unconstitutional. In *Skinner v. Oklahoma*,[20] Justice Douglas, writing for a unanimous court, found that sterilization violates a "basic liberty"[21] and requires "strict scrutiny of the classification which a state makes in a sterilization law."[22] The Oklahoma statute did not survive this strict scrutiny test because it required sterilization of some three-time felons but not others. Douglas found that this classification violated equal protection because the basis for discriminating between, for example, embezzlers and other robbers was insufficient to justify deprivation of the "basic liberty" to procreate.[23] The Court did not consider other contentions that the statute violated procedural and substantive due process.[24]

Although compulsory sterilization statutes still exist, procedural safeguards must be implemented before a compulsory sterilization may be performed.[25] Eight states still have non-consensual sterilization statutes: Arkansas, Delaware, Mississippi, North Carolina, Oklahoma, South Carolina, Utah and West Virginia.[26] The trend in the last two decades, however, has been either to repeal non-consensual sterilization statutes or to hold them unconstitutional.[27] Ten states repealed their compulsory sterilization statutes in the last decade.[28]

Repealing these statutes has left courts in many states without

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18. *Id.* at 206-07.
19. *Id.* at 208.
20. Skinner v. Oklahoma, 316 U.S. 535 (1942).
21. *Id.* at 541.
22. *Id.*
23. *Id.* at 541-42.
24. *Id.* at 538.
25. *See* Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973).
26. Ross, *supra* note 6, at 606.
27. Burgdof, *supra* note 11, at 1027.
28. Maine, Virginia, Arizona, California, Idaho, Iowa, Michigan, New Hampshire, North Dakota, and South Dakota repealed their statutes; *see* Ross, *supra* note 6, at 606.

legislative guidance in sterilization cases. Montana is now without such guidance following the repeal of its consensual sterilization statute in October 1981. It is possible, therefore, that Montana courts will be forced to develop guidelines for sterilization. In determining the judiciary's power to authorize a sterilization, two threshold issues are relevant: (1) whether the judiciary has jurisdiction over a sterilization petition without a specific legislative grant of jurisdiction; and (2) whether the judiciary can adequately protect the individual's fundamental rights without legislative guidance. Courts in other states have faced these questions, and Montana courts can benefit from their experience.

III. The Experience of Other States

A. *Jurisdiction*

In the 1960's through middle 1970's, courts generally refused to take jurisdiction over sterilization petitions in the absence of specific statutory authority.[29] The most prevalent reason for rejecting jurisdiction was that courts could not adequately protect individual rights without legislative guidance.[30] The decisions held that guardianship statutes were not an adequate statutory basis for jurisdiction.[31] In fact, one court stripped a judge of judicial immunity for acting on a sterilization petition without specific statutory authority.[32] That judge, Holland Gary, had toured the nation advocating sterilization of the mentally retarded.[33] He was one of a few judges who ordered sterilizations in early cases when other courts refused to take jurisdiction without specific statutory authority.[34]

Courts began to accept jurisdiction in 1978 when the United States Supreme Court rendered its decision in *Stump v. Sparkman*.[35] The *Sparkman* Court held that a judge who granted a sterilization petition had judicial immunity because his court had jurisdiction.[36] The plaintiff, Linda Sparkman, was sterilized in

29. Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968); In re M.K.R., 515 S.W.2d 467 (Mo. 1974); A.L. v. G.R.H., 165 Ind. App. 580, 325 N.E.2d 501 (1975); Frazier v. Levi, 440 S.W.2d 393 (Tex. 1969); *In re* Kemp, 43 Cal. App.2d 758, 118 Cal. Rptr. 64 (1974); Wade v. Betheseda Hosp., 337 F. Supp. 671 (1971); *In re* A.D., 90 Misc.2d 236, 294 N.Y.S.2d 139 (1977).

30. *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

31. A.L. v. G.R.H., 165 Ind. App. 580, 325 N.E.2d 501 (1975).

32. Wade v. Bethesda Hosp., 337 F. Supp. 671 (1971).

33. Burgdof, *supra* note 11, at 1015.

34. *Id.*

35. 435 U.S. 347 (1978).

36. *Id.*

1971.[37] The sterilization was performed after Judge Stump signed a petition without a hearing on the same day Linda's mother presented it to him.[38] The petition released the hospital and all concerned individuals from liability.[39] The sterilization was performed under the guise of an appendectomy.[40] Two years later, after marrying Leo Sparkman, Linda learned that the appendectomy was really a tubal ligation.[41] She sued the judge, the hospital, and all concerned under section 1983.[42] The Supreme Court held that the judge was immune from suit because he was acting under a broad statutory jurisdiction to hear cases in equity.[43]

After the *Sparkman* decision, courts throughout the nation began taking jurisdiction over sterilization petitions for two reasons: (1) the *Sparkman* decision reversed *Wade v. Bethesda Hospital*,[44] which held that judges do not have judicial immunity in sterilization cases; and (2) *Sparkman* implied that courts have jurisdiction over sterilization petitions, even though the state has no specific sterilization statute. By holding Judge Stump immune from suit, the Supreme Court resolved any uncertainty over judicial immunity and left judges with greater freedom to hear sterilization petitions on their merits.

In Washington,[45] New Jersey,[46] Alaska,[47] Colorado,[48] and Wisconsin,[49] state courts of ultimate authority have found that they have jurisdiction over sterilization petitions in the absence of specific statutory authority. All these cases were decided after *Stump v. Sparkman*. Since the *Sparkman* decision, no court has refused jurisdiction for lack of specific statutory authority.

In treating sterilization petitions, courts have invoked three bases of jurisdiction in the absence of specific statutory authority: (1) *parens patriae* authority; (2) substituted judgment authority; and (3) the statutory authority to hear all cases in law and equity.[50] In contrast to its police power employed for the public wel-

37. *Id.* at 351.
38. *Id.* at 352.
39. *Id.* at 351-52.
40. *Id.* at 353.
41. *Id.*
42. *Id.* at 353-54; 42 U.S.C. § 1983 (1976).
43. *Sparkman*, 435 U.S. at 358.
44. Wade v. Bethesda Hosp., 337 F. Supp. 671 (1971).
45. *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980).
46. *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981).
47. C.D.M. v. State, 627 P.2d 607 (Alaska 1981).
48. *In re* A.W., _ Colo. _, 637 P.2d 366 (1981).
49. Eberhardy v. Circuit Court, 102 Wis. 2d 539, 307 N.W.2d 881 (1981).
50. Note, *Involuntary Sterilization of the Mentally Retarded: Blessing Or Burden*, 25

fare, a state and its courts have the power of *parens patriae* to look after the welfare of individual citizens. *Parens patriae* jurisdiction is used to place people who are dangerous to themselves in state mental institutions. Most states also give their courts a broad jurisdiction over cases in law and equity. Courts have based jurisdiction over sterilization petitions on this broad statutory grant.[51] The New Jersey Supreme Court founded its jurisdiction on "substituted judgment" jurisdiction used in conjunction with *parens patriae* jurisdiction.[52] In *In re Grady*,[53] the New Jersey court found that all persons have a constitutional right to choose sterilization, and those who cannot competently choose should not be denied the choice. The New Jersey court took jurisdiction under its *parens patriae* power to provide a method for "substituted judgment."[54] These three bases for jurisdiction are interwoven, and some courts will express a number of them when taking jurisdiction.[55]

B. *Guidelines*

The courts recognizing jurisdiction had to confront a second problem in exercising jurisdiction: whether the judiciary can adequately protect the individual's fundamental rights without legislative guidance. To provide adequate protection of the mentally retarded person's constitutional rights, all the courts proposed guidelines in their decisions. Under the guidelines, any petition for sterilization would have a hearing where the court could determine if all the other guidelines were met. In essence, the high courts constructed guidelines for trial courts in their states.

The following general guidelines were proposed by all the courts exercising jurisdiction without specific statutory authority:[56]

(1) There must be a full judicial hearing, with a guardian ad litem to represent the individual.
(2) The court must receive independent medical advice by experts on the individual's retardation.
(3) The judge must meet with the individual to elicit the indi-

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S.D.L. REV. 55, 63-66 (1980).

51. *In re* Hayes, 93 Wash. 2d 228, 231-34, 608 P.2d 635, 637-39 (1980).

52. *See generally In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981).

53. *Id.* at 262, 426 A.2d at 481.

54. *Id.* at 261-62, 426 A.2d at 481.

55. *Id.* (substituted judgment and *parens patriae*); C.D.M. v. State, 627 P.2d 607, 610-12 (Alaska 1981) (*parens patriae* and statutory authority for law and equity).

56. *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); C.D.M. v. State, 627 P.2d 607 (Alaska 1981); *In re* A.W., _ Colo. _, 637 P.2d 366 (1981).

vidual's views on the sterilization procedure.
(4) The individual must be incapable of consenting to the sterilization now or in the future.
(5) The individual must be physically able to procreate and likely to engage in sexual activity.
(6) The individual's ability to care for a child must be examined.[57]
(7) The individual's possible psychological and physical reactions to sterilization must be weighed.
(8) There must not be less restrictive or less intrusive contraception methods available now or in the future.[58]

Although various courts state the guidelines differently, all the decisions incorporate them with the general purpose of protecting the mentally retarded individual's "best interests."

The various courts differ in one respect: some require that sterilization must be medically necessary before substituted consent can be given, while others do not.[59] The majority opinion in *In re Grady* found that sterilization does not have to be absolutely necessary.[60] The concurring opinion in *Grady*[61] and the Colorado court in *In re A.W.*,[62] however, agree that sterilization must be necessary—medically essential—to constitutionally support a court-ordered sterilization. The *Grady* court's theory was that the individual would consent, if capable, when sterilization is not absolutely necessary.

The differing views on necessity reflect only one of the many problems the guidelines present. A general problem raised by the guidelines is that all the courts proposing them ultimately denied the sterilization petitions because the guidelines were not met.[63] This may imply that the guidelines are too rigid or that the courts cannot apply the guidelines to the particular facts of a case.

Each of the guidelines also has a number of more specific problems. Securing a guardian ad litem and defining the guardian's role may present problems. A guardian ad litem may be reluctant

57. *In re* A.W., _ Colo. _, 637 P.2d 366 (1981) (not a relevant factor).
58. *Id.* (not required).
59. *See In re* Grady, 85 N.J. 235, 262-63, 426 A.2d 464, 479 (1981). *See also* Note, *Incompetents—Sterilization—Court of Equity Has Inherent Power to Exercise Mentally Retarded Individual's Right to Sterilization*—In Re Grady, 17 SETON HALL L. REV. 96, 112-13 (1981).
60. 85 N.J. at 262-63, 426 A.2d at 479.
61. *Id.* at 273, 426 A.2d at 486.
62. *In re* A.W., _ Colo. _, 637 P.2d 366, 375 (1981).
63. *See In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); C.D.M. v. State, 627 P.2d 607 (Alaska 1981); *In re* A.W., _ Colo. _, 637 P.2d 366 (1981).

to fight a sterilization if he perceives it to be in the individual's best interest. On the other hand, the guardian ad litem may find an ethical duty to oppose the sterilization zealously, even though the individual wants to be sterilized. The guardian ad litem also will be subject to pressures from the individual's parents.[64]

Requiring that the judge meet the individual is another difficulty with the guidelines. When a judge sees that an individual is very severely retarded it could cause extreme passion and prejudice in the judge.

It is difficult to prove, as is required by guideline four, that the individual will not develop the capacity to consent in the future. The prospects for training, rehabilitation, education and medical advances are all relatively intangible factors bearing on capacity to consent in the retarded individual. That the guideline requires proof of a negative further complicates the issue.

The sixth guideline, concerning the ability to care for a child, presents potential fourteenth amendment equal protection problems. Bad parents come from all groups of people, and it may violate equal protection to single out the mentally retarded when no other group is subject to sterilization for being a bad parent.[65]

Finally, the requirement that the court determine if there is a less intrusive contraception method now or in the future is nearly impossible to meet. There will probably be differing expert opinion on whether there is a less intrusive method. Further, it is impossible for the court to deterime if there will be a scientific breakthrough in the future that would make a less intrusive method possible. In fact, in *In re Eberhardy* the Wisconsin court stated that less intrusive methods may soon be discovered and deferred the problem to the legislature.[66]

The Wisconsin Supreme Court recognized the inadequacy of these judicially constructed guidelines. In *In re Eberhardy* the Wisconsin Supreme Court found that Wisconsin courts have jurisdiction over sterilization petitions but refused to exercise jurisdiction without legislative guidance for hearing a petition.[67] The court found jurisdiction under the general constitutional and statutory grants to hear cases in law and equity.[68] In refusing to exercise jurisdiction until the legislature provides a sterilization statute with

64. *See* Wolf & Zarfas, *Parents' Attitudes toward Sterilization of Their Mentally Retarded Children*, 87 AM. J. OF MENTAL DEFICIENCY 122 (1982).

65. *See generally* Skinner v. Oklahoma, 316 U.S. 535 (1942).

66. Eberhardy v. Circuit Court, 102 Wis. 2d 539, 569, 307 N.W.2d 881, 895 (1981).

67. *Id.* at 578-79, 307 N.W.2d at 889.

68. *Id.* at 549-54, 307 N.W.2d at 885-88.

guidelines, the *Eberhardy* decision is unique. Throughout its opinion, the court reiterates that the judiciary should yield to the legislature. The court stated that a "properly thought out public policy on sterilization or alternative contraceptive methods could well facilitate the entry of these persons into a more nearly normal relationship with society. But, again this is a problem for the legislature on the basis of factfinding and the opinions of experts."[69] The court went on to state that "[t]his case demonstrates that a court is not an appropriate forum for making policy in such a sensitive area . . . the legislature is far better able, by the hearing process, to consider a broad range of possible factual situations."[70] Clearly, the court recognized the problems of judicially created guidelines when it concluded "that it would be inappropriate . . . to attempt to set forth guidelines when we know that a court is not the preferred branch of government to enumerate general rules of public policy."[71]

The *Eberhardy* court also rejected the entire theory of substituted consent. The court stated that it could not equate a choice made by others to a choice made by the mentally disabled individual:[72]

> We conclude that the question is not choice because it is sophistry to refer to it as such, but rather the question is whether there is a method by which others, acting in behalf of the person's best interests, such as they may be, of the state, can exercise the decision. Any governmentally sanctioned (ordered) procedure to sterilize a person who is incapable of giving consent must be demonstrated for what it is, that is, the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate.[73]

Rejecting substituted consent, the court held that sterilization could only be ordered when it is in the individual's best interests.[74] The guidelines for determining "best interests" were to be determined by the legislature not the judiciary.[75]

IV. CONCLUSION

Since Montana's eugenical sterilization statute was repealed

69. *Id.* at 569, 307 N.W.2d at 895.
70. *Id.* at 570, 307 N.W.2d at 895.
71. *Id.* at 576, 307 N.W.2d at 898.
72. *Id.* at 566, 307 N.W.2d at 893.
73. *Id.*
74. *Id.*
75. *Id.* at 578-79, 307 N.W.2d at 899.

without a replacement, Montana courts have no statutory guidance for considering a petition for sterilization. Given the modern national trend of accepting jurisdiction in the absence of specific statutory authority, the Montana courts would have jurisdiction over a sterilization petition. The judiciary, however, lacks the resources to secure data for constructing guidelines to insure that sterilization is in the mentally retarded person's best interests. The judiciary should yield to the legislature in constructing such guidelines. The decision of the Wisconsin Supreme Court in *In re Eberhardy* should be followed in Montana.