



---

Winter 1-1-1982

## The Sterilization Rights Of Mental Retardates

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Disability Law Commons](#)

---

### Recommended Citation

*The Sterilization Rights Of Mental Retardates*, 39 Wash. & Lee L. Rev. 207 (1982).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol39/iss1/12>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

## THE STERILIZATION RIGHTS OF MENTAL RETARDATES

The United States Constitution implicitly guarantees the right of privacy.<sup>1</sup> The right of privacy specifically includes the right not to procreate, or the right to sterilization procedures.<sup>2</sup> Ordinarily, only the individual may exercise his right to sterilization.<sup>3</sup> Whether a particular indi-

---

<sup>1</sup> See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (discussing history of Supreme Court's recognition of constitutional right of privacy). While the Constitution does not mention explicitly an individual's right of privacy, the Supreme Court originally inferred the existence of the right in *Boyd v. United States*, 116 U.S. 616, 630 (1886). The *Boyd* Court held that the fourth, fifth, and fourteenth amendments protected an individual's home and privacies of life as the essence of constitutional liberty and security. *Id.* *Boyd* began recognition of the individual right to freedom from unwarranted governmental intrusion, later known as the right of privacy. See 410 U.S. at 152-53.

Subsequent decisions reaffirmed and expanded the constitutional right of privacy. The Supreme Court held that the Constitution guaranteed an individual's right to procreate as an element of the right of privacy in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court held that the right of privacy encompassed the right to personal autonomy over procreation and contraception. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The right to contraception applies to individuals regardless of marital status or age. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (age); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (marital status). The Constitution, therefore, guarantees every individual's right to procreate and the corollary right not to procreate. Furthermore, the right is purely individual. See *Ponter v. Ponter*, 135 N.J. Super. 50, 55, 342 A.2d 574, 577 (Super. Ct. Ch. Div. 1975). The New Jersey Superior Court recognized Mr. Ponter's right to procreate, and realized that his opposition to his wife's proposed sterilization arose because of the effect of his spouse's sterilization on his right to procreate. *Id.* The *Ponter* court held, however, that an individual's right to procreate or not developed independently of any other person's similar right. *Id.* at 54, 342 A.2d at 576. The court granted Mrs. Ponter's right to be sterilized, even though her decision not to procreate indirectly determined her husband's right to procreate. *Id.*

<sup>2</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). In *Griswold*, the Supreme Court held that the right of privacy included personal autonomy over procreation and contraception. *Id.* *Griswold* concerned temporary contraception and not permanent sterilization. *Id.* In a later decision, however, the Supreme Court implied that personal autonomy over contraception protected an individual's right to sterilization. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 688 n.5 (1977). Invalidating New York's statutory limitation on minors' access to contraceptives, the Court stated that *Carey* applied to all forms of birth control, presumably including sterilization. *Id.* at 684-88.

The Constitution further protects an individual's right to both therapeutic and elective sterilizations. See *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 706 (1st Cir. 1973); note 45 *infra*.

<sup>3</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (recognition of personal autonomy over procreation and contraception); *cf.* Comment, *Sterilization, Retardation and Parental Authority*, 1978 B.Y.U. L. REV. 380, 382 nn.20 & 21 [hereinafter cited as *Sterilization*] (citing cases invalidating involuntary sterilization statutes on grounds of due process or equal protection). *But see* *Buck v. Bell*, 274 U.S. 200, 207 (1927). In *Buck*, the Supreme Court upheld an involuntary sterilization statute that allowed the state to require sterilization of certain mental defectives. *Id.* at 206-07. With the Court's expansion of the right of privacy to include the right to procreate, see note 2 *supra*, the Court effectively has over-

vidual may exercise the right to sterilization depends upon that person's capacity to consent.<sup>4</sup> Mental retardation generally deprives an individual of the capacity to make an informed decision about sterilization and thus exercise his sterilization rights.<sup>5</sup>

Although the majority of courts have declined to hear cases involving a mental retardate's right to be sterilized,<sup>6</sup> a few courts have ruled *Buck*.

The purpose and desirability of involuntary sterilizations continue to excite debate. See generally Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189, 191-94 [hereinafter cited as Vukowich] (supporting program of positive eugenics to upgrade world gene pool); Comment, *Sterilization: Who Says No?*, 29 MERCER L. REV. 821, 822-29 (1978) [hereinafter cited as *Who Says No?*] (discussion of society's and individuals' interests in having retardates sterilized). Scientific studies have failed to support the proposition that involuntary sterilization of retardates reduces the incidence of retardation in the general population. See Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 602-04 (1966) [hereinafter cited as Ferster]; Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DEN. L.J. 631, 646-47 (1969) [hereinafter cited as *Eugenic Sterilization*]. Eugenics, the process of encouraging reproduction of individuals with "good qualities" and prohibiting reproduction of "social defectives," has fallen into disrepute. *Eugenic Sterilization*, *supra*, at 646-47. Medical researchers now believe that only a very few types of mental retardation automatically pass to the retardate's offspring. Ferster, *supra*, at 602-04. *Contra*, Vukowich, *supra*, at 194. Further, studies have shown that mental retardation does not preclude one from being a "good parent." Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995, 1021 (1977) [hereinafter cited as Burgdorf] (citing authorities). These commentators have criticized *Buck* severely. See Burgdorf, *supra*, at 977, 1006 (comparing *Buck* to Hitler's theory of eugenics embodied in his concepts of master race and Aryan superiority); Ferster, *supra*, at 596 (stating that the Supreme Court would reverse *Buck* if reheard today); Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 921-24 (1974) [hereinafter cited as Murdock] (doubting validity of eugenics as a basis for sterilization).

<sup>4</sup> See Neuwirth, Heisler & Goldrich, *Capacity, Competence, Consent: Voluntary Sterilization of the Mentally Retarded*, 6 COLUM. HUMAN RIGHTS L. REV. 447, 447, 448 (1975) [hereinafter cited as Neuwirth].

<sup>5</sup> See *id.* at 448. At least two commentators suggest, however, that although lacking legal competence, over 90% of all mental retardates have the capacity to consent to sterilization. Murdock, *supra* note 3, at 933; Neuwirth, *supra* note 4, at 452. Courts often confuse legal competence and the capacity to consent. Neuwirth, *supra* note 4, at 448. Courts presume a person's legal competence unless that person is shown to be a minor or suffering from some mental disability. *Id.* Capacity to consent concerns whether one can comprehend the nature, quality, and effect of the sterilization procedure. *Id.*

<sup>6</sup> See *Hudson v. Hudson*, 373 So. 2d 310, 311-12 (Ala. 1979) (court had no power to authorize sterilization absent specific legislative grant of jurisdiction); *Guardianship of Tulley*, 83 Cal. App. 3d 698, 704-05, 146 Cal. Rptr. 266, 268 (1978), *cert. denied*, 440 U.S. 967 (1979) (court of general jurisdiction had no power to hear sterilization request); *Guardianship of Kemp*, 43 Cal. App. 3d 758, 762, 118 Cal. Rptr. 64, 67 (1974) (probate court had no jurisdiction to authorize sterilization); *In re S.C.E.*, 378 A.2d 144, 145 (Del. Ch. 1977) (judge feared liability for ordering sterilization and therefore held court had no jurisdiction); *A.L. v. G.R.H.*, 163 Ind. App. 636, \_\_\_, 325 N.E.2d 501, 502, *cert. denied*, 425 U.S. 936 (1975) (applicable juvenile statute insufficient to confer jurisdiction); *Homes v. Powers*, 439 S.W.2d 579, 580 (Ky. App. 1969) (neither statute nor common law conferred power to authorize sterilization); *In re M.K.R.*, 515 S.W.2d 467, 470 (Mo. 1974) (no Missouri court had jurisdiction); *Frazier v. Levi*, 440 S.W.2d 393, 394-95 (Tex. Civ. App. 1969) (no authority existed under Texas Constitution or statutes). *But see* note 7 *infra* (minority of courts stating that they have jurisdiction to authorize sterilization).

recognized the retardate's right to sterilization.<sup>7</sup> Two possible justifications exist for preserving a mental retardate's right to sterilization. Sterilization may be in the retardate's best interest.<sup>8</sup> Alternatively, others, such as society and the retardate's parents or guardian, may wish to prevent reproduction by the retardate.<sup>9</sup> Though the latter justification has received considerable criticism,<sup>10</sup> retardation itself should not preclude exercise of the right to sterilization, if sterilization best serves the retardate's interests.<sup>11</sup>

Mental retardation deprives the retardate himself of the ability to exercise the right to sterilization.<sup>12</sup> Presumably, mental retardation precludes the ability to understand the nature and quality of reproduction or sterilization, thereby negating any presumption of the capacity to consent. Although at least two commentators claim otherwise,<sup>13</sup> the

<sup>7</sup> See *In re C.D.M.*, 627 P.2d 607, 612 (Alaska 1981) (court of general jurisdiction has power to authorize sterilization of retardate as part of its *parens patriae* power); *In re A.W.*, No. 80-9A-175, slip op. at 25 (Colo. Sup. Ct. Nov. 30, 1981) (court has power to authorize sterilization of minor retardate in absence of limiting legislation); *In re Penny N.*, 120 N.H. 269, \_\_\_, 414 A.2d 541, 542 (1980) (per curiam) (jurisdiction conferred by broadly construed statute); *In re Grady*, 85 N.J. 235, 239, 426 A.2d 467, 479 (1981) (court of general jurisdiction had authority to hear case); *In re Sallmaier*, 85 Misc. 2d 295, 297, 378 N.Y.S.2d 989, 991 (Sup. Ct. 1976) (common law *parens patriae* jurisdiction gave court power to authorize sterilization); *In re Hayes*, 93 Wash. 2d 228, 233, 608 P.2d 635, 638 (1980) (court had jurisdiction absent limiting legislation); *In re Eberhardy*, 102 Wis. 2d 539, 548, 578, 307 N.W.2d 881, 885, 896 (1981) (court's jurisdiction plenary); note 59 *infra* (defining *parens patriae* power).

<sup>8</sup> See *In re Grady*, 170 N.J. Super. 98, 123, 405 A.2d 851, 864 (Super. Ct. Ch. Div. 1979), *vacated on other grounds*, 85 N.J. 235, 426 A.2d 467 (1981). The lower court recognized that, for the retardate, social interaction without fear of pregnancy and increased need for supervision might outweigh the right to procreate, and therefore, the retardate's best interests might dictate sterilization. *Id.* at 236, 405 A.2d at 866.

<sup>9</sup> See Vukowich, *supra* note 3, at 190-91 (calling for involuntary sterilizations to improve society's quality of life and chance of continued survival); *Who Says No?*, *supra* note 3, at 822-29 (discussing spousal and societal interests affected by sterilization). Involuntary sterilization by definition entails satisfying the interests of someone other than the person sterilized. See Vukowich, *supra* note 3, at 190-91. Vukowich argues that society's interest in healthy and intelligent offspring to carry on the human race dictates adoption of a sterilization program to reduce or eliminate the effect of "deficient genes" in the population. *Id.*

<sup>10</sup> See Burgdorf, *supra* note 3, at 997, 1006; Murdock, *supra* note 3, at 921-24; *Sterilization*, *supra* note 3, at 382 nn.20 & 21.

<sup>11</sup> See, e.g., *In re Grady*, 85 N.J. 235, 250, 426 A.2d 467, 474 (1981). The court favored preservation of retardates' rights to sterilization. *Id.* Inability to choose between sterilization and procreation should not result in the forfeit of the right to sterilization because the right to sterilization is a valuable part of the right of privacy. *Id.*

<sup>12</sup> *Holmes v. Power*, 439 S.W.2d 579, 580 (Ky. 1969) (mental incompetence or retardation negates legal capacity to consent).

<sup>13</sup> See note 5 *supra*. Over 90% of all retardates are at most only mildly retarded. Murdock, *supra* note 3, at 934. The classification of "mildly retarded" includes the Stanford-Binet Intelligence Quotient (I.Q.) range of 52-67, slightly below the "borderline normal" score of 80. *MANUAL ON TERMINOLOGY AND CLASSIFICATION IN MENTAL RETARDATION* 18 (H. Grossman ed. 1973 rev.). Mild retardation generally leaves the retardate educable. *Id.* Mildly retarded adults usually can maintain themselves independently or semi-independently in a community. *Id.* at 134. Arguably, if a retardate can function independently, he should have the capacity to make decisions about procreation and sterilization. See S. HAAVIK & K. MENNINGER, *SEXUALITY, LAW AND THE DEVELOPMENTALLY DISABLED PERSON* 138-42 (1981). The

courts generally hold that mental retardation bars effective legal consent.<sup>14</sup> Further, many courts hold that mere minority voids the ability to consent,<sup>15</sup> especially to elective surgery.<sup>16</sup> Consequently, mentally retarded minors face dual incompetence when attempting to consent to a sterilization procedure.<sup>17</sup>

Faced with personal incapacity to consent to sterilization the retardate's concern becomes whether someone else may consent in the retardate's behalf. Three possible alternative sources of consent to retardate sterilization exist.<sup>18</sup> Parents,<sup>19</sup> guardians ad litem,<sup>20</sup> and the

authors discuss the showing required to prove valid consent by a retardate, implying that some retardates can consent to sterilization. *Id.* But see note 14 *infra*.

<sup>14</sup> See *Ruby v. Massey*, 452 F. Supp. 361, 364 (D. Conn. 1978) (hospital required consent of retardate's parents for any surgical procedure, and court presumed the validity and necessity of consent requirement); *Relf v. Weinberger*, 372 F. Supp. 1196, 1202 (D.D.C. 1974), *final disposition*, 403 F. Supp. 1235 (D.D.C. 1975), *vacated as moot per curiam*, 565 F.2d 722 (D.C. Cir. 1977) (court referred to nearly universal common-law and statutory rule that mental incompetents or retardates cannot consent to medical operations); *Frazier v. Levi*, 440 S.W.2d 393, 394 (Tex. Civ. App. 1969) (court stated without support that retardate lacked capacity to consent). But see *Downs v. Sawtelle*, 574 F.2d 1, 11-12 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978) (emphasis placed on fact that retardate did not consent but rather expressed opposition to sterilization implying that retardate could consent).

<sup>15</sup> See *Neuwirth*, *supra* note 4, at 452. *Neuwirth* sets forth the majority rule that a minor does not have the ability to consent, but also discusses the minority view that, depending on the degree of independence, a minor may give effective consent to surgery in his best interests. *Id.*

<sup>16</sup> See *id.* Elective surgery does not meet the requirement of being in the best interests of the minor, *id.*, because by definition elective surgery does not include therapeutic surgery. See note 45 *infra*.

<sup>17</sup> *Neuwirth*, *supra* note 4, at 452.

<sup>18</sup> See Recent Developments, *Courts—Scope of Authority—Sterilization of Mental Incompetents*, 44 TENN. L. REV. 879, 882-86 (1977) [hereinafter cited as *Courts' Authority*] (discussing possible bases of court's power to authorize sterilization of retardates). Some states have specific statutes authorizing sterilization of retardates, but these statutes generally apply only to institutionalized retardates. See, e.g., *Ruby v. Massey*, 452 F. Supp. 361, 363 (D. Conn. 1978) (construing CONN. GEN. STAT. ANN. § 19-569g (West 1977) (repealed 1979)) (retardate's difficulty in obtaining admission to state institution violated equal protection principles by denying noninstitutionalized retardates the right to sterilization); MISS. CODE ANN. § 41-45-1 (1972); S.C. CODE § 44-47-10 (1976). At least one state has passed legislation allowing elective sterilization of any retardate, irrespective of whether the retardate resides in a state institution. See VA. CODE §§ 54-325.10 to -325.12 (Cum. Supp. 1981). See also COLO. REV. STAT. § 27-10.5-128 (Cum. Supp. 1980) (allowing sterilization of retardates after they reach the age of majority).

<sup>19</sup> See *Stump v. Sparkman*, 435 U.S. 349, 351 (1978) (parent presented petition in an earlier court proceeding to have sterilization authorized); *Ruby v. Massey*, 452 F. Supp. 361, 364 (D. Conn. 1978) (parents claimed that parent-child relationship empowered the parents to consent); *A.L. v. G.R.H.*, 163 Ind. App. 636, \_\_\_\_\_, 325 N.E.2d 501, 502, *cert. denied*, 425 U.S. 936 (1975) (parental consent acceptable for medically necessary surgery only); *In re Sallmaier*, 85 Misc. 2d 295, 296, 378 N.Y.S.2d 989, 990 (Sup. Ct. 1976) (parent applied for order authorizing parental consent for sterilization).

<sup>20</sup> See *Downs v. Sawtelle*, 574 F.2d 1, 5 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978) (spendthrift guardian's consent not sufficient for sterilization); *Guardianship of Tulley*, 83 Cal. App. 3d 698, 700, 146 Cal. Rptr. 266, 267 (1978), *cert. denied*, 440 U.S. 967 (1979) (general

courts<sup>21</sup> may attempt to consent in the retardate's behalf. Although two recent state supreme court cases cast considerable doubt in the the area,<sup>22</sup> the majority of courts have held that absent express statutory authority the courts lack jurisdiction to authorize sterilization.<sup>23</sup> The majority position effectively precludes the exercise of the retardate's constitutional right to sterilization, because without valid personal consent or court authorization, an increasing number of doctors and hospitals refuse to permit sterilizations.<sup>24</sup>

guardian applied for court authorization of sterilization); Guardianship of Kemp, 43 Cal. App. 3d 758, 760, 118 Cal. Rptr. 64, 65 (Cal. App. 1974) (parent sought appointment as general guardian and then attempted to consent to ward's sterilization); *In re Grady*, 85 N.J. 235, 243, 426 A.2d 467, 470 (1981) (guardian ad litem represented retardate); *Frazier v. Levi*, 440 S.W.2d 393, 393 (Tex. Civ. App. 1969) (application by general guardian); *In re Hayes*, 93 Wash. 2d 228, 229, 608 P.2d 635, 636 (1980) (mother of retardate sought appointment as guardian ad litem to consent to sterilization).

A guardian ad litem is a special guardian appointed by the court solely to represent a party in a particular case. *Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir. 1955) (Boltd, J., concurring). Ad litem guardianship terminates at the close of litigation. *Blackwell v. Vance Trucking Co.*, 139 F. Supp. 103, 106-07 (E.D.S.C. 1956). A general guardianship, however, lasts as long as the ward's disability continues. *Id.* at 106.

<sup>21</sup> See *Hudson v. Hudson*, 373 So. 2d 310, 310 (Ala. 1979) (petitioner sought to invoke court's equity power to authorize sterilization); *In re S.C.E.*, 378 A.2d 144, 144 (Del. Ch. 1977) (court sympathized with petitioner but ruled that the court had no power to authorize sterilization); *In re M.K.R.*, 515 S.W.2d 467, 468 (Mo. 1974) (petitioner sought court approval of sterilization); see also cases cited in notes 19-20 *supra* (on application of parent or guardian for authorization to consent to sterilization, court usually considers whether the court itself has power to authorize consent independent of parent's or guardian's consent).

<sup>22</sup> See text accompanying notes 63-73 *infra* (discussing *In re C.D.M.*, 627 P.2d 607 (Alaska 1981), which found jurisdiction to authorize sterilization of a retardate); text accompanying notes 74-95 *infra* (discussing *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981), which similarly found jurisdiction to authorize sterilization). The issue of sterilization of retardates has grown considerably in importance for four reasons. First, medical advances prolong the life expectancies of mental retardates, thereby lengthening the retardate's period of fertility, and increasing the perceived need for sterilization. *In re Grady*, 170 N.J. Super. 98, 103, 405 A.2d 851, 854 (Super. Ct. Ch. Div. 1979), *vacated on other grounds*, 85 N.J. 235, 426 A.2d 467 (1981). Second, the recent trend towards deinstitutionalization of retardates results in decreased supervision and increased parental concern over pregnancy. See *In re Grady*, 85 N.J. 235, 242, 426 A.2d 467, 469-70 (1981). In *Grady*, the parents of the retardate never institutionalized her. *Id.* The parents petitioned the court for authorization to sterilize the retardate because of their fear of the retardate becoming pregnant upon her placement in a group home for retarded adults. *Id.* See also Note, *Stump v. Sparkman: The Scope of Judicial and Derivative Immunities under 42 U.S.C. § 1983*, 6 WOMEN'S RIGHTS L. REP. 107, 119 n.114 (1980) [hereinafter cited as *Immunities*]. Third, many states have repealed involuntary sterilization statutes, thereby presumably increasing demand for so-called voluntary sterilizations. *Id.* at 119 n.112. Last, a number of recent cases and articles suggest that doctors and others face liability for involuntary and nonconsensual sterilizations, thereby increasing requests for court authorization. See *Wade v. Bethesda Hospital*, 356 F. Supp. 380, 383 (S.D. Ohio 1973); *In re Grady*, 85 N.J. 235, 242, 426 A.2d 467, 470 (1981); Holder, *Voluntary Sterilization*, 225 J.A.M.A. 1743, 1743-44 (1973); Note, *Elective Sterilization*, 113 U. PA. L. REV. 415, 425-39 (1965).

<sup>23</sup> See note 6 *supra*.

<sup>24</sup> See, e.g., *In re Penny N.*, 120 N.H. 269, \_\_\_\_ , 414 A.2d 541, 542 (1980) (doctors refused to operate without court approval); *In re Grady*, 85 N.J. 235, 242, 426 A.2d 467, 470 (1981)

Speculation remains whether a doctor's reluctance to perform sterilizations solely at the retardate's request stems from concern for preservation of the retardate's right to procreate, fear of civil or criminal liability for deprivation of the constitutional right to procreate, or other legal uncertainties.<sup>25</sup> Because the Constitution protects the right to procreate as a fundamental civil right,<sup>26</sup> a sterilized retardate may later bring an action against the operating physician and hospital under sections 1981,<sup>27</sup> 1983,<sup>28</sup> or 1985(3)<sup>29</sup> of the Civil Rights Acts, which provide private causes of action for deprivation of civil rights.<sup>30</sup> The majority of actions against doctors and hospitals arise under section 1983.<sup>31</sup> Although section 1983 proscribes deprivation of civil rights only under color of state law,<sup>32</sup> the courts may reach private parties through the parties' association with state actors.<sup>33</sup> In *Stump v. Spark-*

---

(hospital refused to allow doctors to perform sterilization without court authorization); *Frazier v. Levi*, 440 S.W.2d 393, 394 (Tex. Civ. App. 1969) (hospital officials required court approval of the sterilization requested).

<sup>25</sup> See *Ferster*, *supra* note 3, at 620 (suggesting that physicians refuse to perform sterilizations because of legal uncertainties).

<sup>26</sup> See note 1 *supra*.

<sup>27</sup> 42 U.S.C. § 1981 (1976). Section 1981 guarantees all citizens equal rights under the laws of each state. *Id.*

<sup>28</sup> 42 U.S.C. § 1983 (1976 & Supp. III 1979). Section 1983 establishes a private right of action for violation of civil rights under color of state law. *Id.*; see *Stump v. Sparkman*, 435 U.S. 349, 351 (1978); *Downs v. Sawtelle*, 574 F.2d 1, 3 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978); *Wade v. Bethesda Hosp.*, 356 F. Supp. 380, 382 (S.D. Ohio 1973).

<sup>29</sup> 42 U.S.C. § 1985(3) (Supp. III 1979). Section 1985(3) establishes a private right of action for conspiracy to deprive a citizen of civil rights or equal protection. *Id.*; see, e.g., *Downs v. Sawtelle*, 574 F.2d 1, 16 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978) (court considered and dismissed plaintiff's § 1985(3) conspiracy claim for deprivation of the right to procreate).

<sup>30</sup> See *Monroe v. Pape*, 365 U.S. 167, 185 (1961), *overruled on other grounds*, 436 U.S. 658, 663 (1978) (recognizing private cause of action under § 1983); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1101 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) (private cause of action under § 1981).

<sup>31</sup> See, e.g., note 28 *supra*. One reason that plaintiffs sue under 42 U.S.C. § 1983 more often than either § 1981 or § 1985(3) in suits against doctors and hospitals could center on the elements of a violation under each of the three sections. Section 1981 requires that the racial discrimination be purposeful and against a certain class of people. *Lee v. Washington County Bd. of Educ.*, 625 F.2d 1235, 1237 (5th Cir. 1980). Section 1985(3) also requires racially based class discrimination, and "all mental retardates" does not constitute a class for § 1985(3) purposes. *Wade v. Bethesda Hosp.*, 356 F. Supp. 380, 384 n.4 (S.D. Ohio 1973). *But see Sims v. Jefferson Downs, Inc.*, 611 F.2d 609, 614 (5th Cir. 1980) (implying that a common interest may be enough to show a § 1985(3) class). Section 1983 does not require discrimination against a class, but only deprivation of an individual's civil rights under color of state law. See *generally Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) (setting forth requirements for § 1983 claim).

<sup>32</sup> 42 U.S.C. § 1983 (1976 & Supp. III 1979).

<sup>33</sup> See *Downs v. Sawtelle*, 574 F.2d 1, 9-10 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978) (doctor liable under 42 U.S.C. § 1983 because of pervasive association with state-operated hospital); *Wade v. Bethesda Hosp.*, 356 F. Supp. 380, 383 (S.D. Ohio 1973) (hospital and doctor acted together giving rise to joint liability under § 1983). Some courts have gone to

man,<sup>34</sup> for example, plaintiff sought judgment against a doctor and hospital under section 1983 based on the defendants' involvement in a court authorized sterilization.<sup>35</sup> Plaintiff alleged that conspiracy between a state judge who authorized sterilization under state statutes and the doctor and hospital constituted a sufficient basis for liability under section 1983.<sup>36</sup> Although the Supreme Court in *Stump* held that judicial immunity protected the judge,<sup>37</sup> and implied that the protection derivatively covered the doctor and hospital,<sup>38</sup> future defendants may find such derivative immunity unavailable, because *Stump* put future plaintiffs on notice of the particularized pleading requirements for conspiracy under section 1983.<sup>39</sup> In part because of these continuing legal uncertainties, some doctors refuse to rely on a retardate's attempted "consent" to perform a sterilization.<sup>40</sup>

For similar reasons, doctors refuse to sterilize the retardate if the parent attempts to consent to the operation.<sup>41</sup> The parent generally attempts to authorize the operation based on the principles of common law and the parent-child relationship.<sup>42</sup> Because parents usually cannot show

---

great lengths to find that the state operated the hospital involved in the sterilization. See, e.g., *Downs v. Sawtelle*, 574 F.2d 1, 6-9 (1st Cir.), cert. denied, 439 U.S. 910 (1978) (court concluded that because hospital received 30% of funds from Medicare, and community substantially controlled hospital, hospital satisfied § 1983 state actor requirement); cf. *Pennsylvania v. Board of Trustees*, 353 U.S. 230, 231 (1957) (state appointed board to operate college, subjecting board's discriminatory act to fourteenth amendment prohibition); *Jackson v. Statler Foundation*, 496 F.2d 623, 635 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975) (substantial indirect governmental participation by appointment of several trustees of charitable foundation sufficient to constitute "state action" under § 1983).

<sup>34</sup> 435 U.S. 349 (1978). See generally *Immunities*, supra note 22 (detailed analysis of *Stump*).

<sup>35</sup> *Stump v. Sparkman*, 435 U.S. 349, 353 (1978).

<sup>36</sup> See *id.* at 364 n.13.

<sup>37</sup> *Id.* at 364. The *Stump* Court limited itself to consideration of whether to hold the judge liable for his part in authorizing the plaintiff's prior sterilization. *Id.* On remand, the Seventh Circuit affirmed dismissal, without leave to amend, of the § 1983 claim against the doctor and hospital for failure to particularize the allegation of conspiracy between the doctor, the hospital, and the immune judge. *Sparkman v. McFarlin*, 601 F.2d 261, 269 (7th Cir. 1979).

<sup>38</sup> See *Stump v. Sparkman*, 435 U.S. 349, 364 n.13 (1978); *Immunities*, supra note 22, at 129-31 (discussing derivative immunity).

<sup>39</sup> See *Immunities*, supra note 22, at 131-32. Although *Stump* expanded judicial and derivative immunity in § 1983 actions, proper pleadings may avoid dismissal under *Stump*. *Id.*; see note 37 supra.

<sup>40</sup> Ferster, supra note 3, at 620.

<sup>41</sup> See *Ruby v. Massey*, 452 F. Supp. 361, 364 (D. Conn. 1978) (hospital refused to accept parental consent because no Connecticut statute authorized parental consent for sterilizations); *In re Penny N.*, 120 N.H. 269, —, 414 A.2d 541, 542 (1980) (doctors refused to perform sterilization without court approval); *In re Grady*, 85 N.J. 235, 242, 426 A.2d 467, 470 (1981) (hospital refused to accept parental consent and required court approval).

<sup>42</sup> See note 19 supra (parents attempting to consent). The common law vests a duty of care for minors in the minors' parents. *Ruby v. Massey*, 452 F. Supp. 361, 365 (D. Conn. 1978). This duty, arising out of the parent-child relationship, gives the parent some rights as well as obligations. *Id.* Among the rights is the power to consent to medical treatment necessary or advisable for the child's health. *Id.*



any medical necessity for sterilization, courts generally have held that neither parental authority nor the parent-child relationship enables the parents to have the retardate sterilized.<sup>43</sup> Parents have a common-law duty to care for and protect their child, including a limited ability to make medical and surgical decisions for the child without state interference.<sup>44</sup> This duty, however, does not extend to authorizing elective sterilizations.<sup>45</sup> Case law supports the conclusion that the child's con-

---

<sup>43</sup> See note 19 *supra*. Although ostensibly allowing parental consent, the *Grady* court reserved a right of judicial review. See *In re Grady*, 85 N.J. 235, 251, 426 A.2d 467, 475 (1981). In effect, the court denied the parents' right to consent and substituted the court's judgment. See note 86 *infra*.

<sup>44</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972) (parents may make decisions, subject to state intervention if child's health or safety jeopardized); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Ruby v. Massey*, 452 F. Supp. 361, 365 (D. Conn. 1978).

<sup>45</sup> *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978). The *Ruby* court held that parents may neither veto nor give valid consent to the sterilization of their children. *Id.*

In the context of this article, "therapeutic sterilization" refers to those sterilizations medically necessary because pregnancy would endanger the woman's life and alternative forms of contraception would not provide the necessary degree of protection. For example, in *Hathaway*, the plaintiff suffered high blood pressure and an umbilical hernia which rendered further pregnancies unsafe. *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 702 (1st Cir. 1973). Mrs. Hathaway's high blood pressure and irregular menstrual flow rendered less drastic contraceptives ineffective or dangerous. *Id.* Therefore, her physician recommended sterilization as the only suitable means of contraception. *Id.* In this instance, protection of Mrs. Hathaway's life necessitated elimination of the risk of pregnancy, and therapeutic sterilization was the only suitable means of contraception. *Id.*

Nontherapeutic, or elective, sterilizations include those undertaken as a family planning device, or for economic, social, eugenic, and hygienic reasons. Eugenic and social sterilizations might result from a concern over the number of retardates coupled with a belief in the inheritability of the specific affliction. See note 3 *supra* (discussion of eugenics as a basis for involuntary sterilization). Parents may request sterilization of a dependent retardate to stop menstrual flow with its attendant hygienic problems. See, e.g., *Guardianship of Tulley*, 83 Cal. App. 3d 698, 700, 146 Cal. Rptr. 266, 267 (1978), *cert. denied*, 440 U.S. 967 (1979).

The *Hathaway* court impliedly recognized the constitutional right of elective sterilization under the right of privacy, protected by the constitutional guarantee of equal protection. See 475 F.2d at 706. The court held that a hospital may not arbitrarily deny its facilities to individuals seeking sterilization if doctors perform elective surgery with similar risks at the hospital. *Id.* But see *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1307 n.92 (1980). The validity of *Hathaway* is doubtful after *Maier v. Roe*, 432 U.S. 464 (1977). The *Maier v. Roe* Court held that denial of state Medicaid benefits to pay for nontherapeutic abortions did not violate the equal protection clause of the Constitution. *Id.* at 474. Therefore, under *Maier v. Roe*, the retardate's ability to pay for sterilization may determine his right to such surgery. See *id.*; 93 HARV. L. REV. at 1307 n.92. Presumably states may deny funding of sterilizations as well as abortions and relegate the retardate to the use of contraceptives as an alternative means of exercising the right not to procreate. See 93 HARV. L. REV. at 1307 n.92. But see *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-88 (1977). The *Carey* Court held state limitations on the distribution of contraceptives to minors unconstitutional as violative of the fundamental right to prevent conception. *Id.* Four justices concurred in the reasoning that since a state could not interfere with a minor's decision to terminate her pregnancy in the first trimester, a fortiori the state could not interfere in the prevention of pregnancy. *Id.* at 694 (Brennan, J., concurring).

stitutional right to procreate outweighs the parent's rights implicit in the parent-child relationship, because courts refuse to authorize sterilization of the retardate.<sup>46</sup> A minority of cases and authorities suggest that the parent may consent,<sup>47</sup> but the majority deny the parent's right to do so.<sup>48</sup>

The main argument against parental consent centers on the possible conflict of interest between parent and child.<sup>49</sup> While some courts imply improper motives in the parent's petition to authorize sterilization, no court has grounded a refusal or authorization on the basis of motive alone.<sup>50</sup> Instead, the court usually appoints a guardian ad litem to repre-

<sup>46</sup> See note 6 *supra* (majority of cases deny sterilization authorization, thereby perpetuating retardate's right to procreate).

<sup>47</sup> See *Wade v. Bethesda Hosp.*, 356 F. Supp. 380, 383 (S.D. Ohio 1973) (court found no evidence that retardate's parents consented to retardate's sterilization, implying that parents could consent); *Holmes v. Powers*, 439 S.W.2d 579, 580 (Ky. 1968) (court held that at retardate's age, 35 years old, her parents could not consent for her, implying that parents could have consented if retardate had been minor); *In re Quinlan*, 70 N.J. 10, 42, 355 A.2d 647, 661, *cert. denied*, 429 U.S. 922 (1976) (father may assert his daughter's constitutional right of privacy if she cannot exercise that right).

<sup>48</sup> See *Ruby v. Massey*, 452 F. Supp. 361, 366 (D. Conn. 1978) (parents may neither veto nor give valid consent to the sterilization of their children); *A.L. v. G.R.H.*, 163 Ind. App. 636, \_\_\_, 325 N.E.2d 501, 502, *cert. denied*, 425 U.S. 936 (1975) (common law does not invest parents with power to consent to sterilization of their child); *cf.* *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 456 (M.D.N.C. 1976) (holding unconstitutional a North Carolina statute investing power to start sterilization proceedings against retardate in next of kin); *Relf v. Weinberger*, 372 F. Supp. 1196, 1200 (D.D.C. 1974), *final disposition*, 403 F. Supp. 1235 (D.D.C. 1975), *vacated as moot per curiam*, 565 F.2d 722 (D.C. Cir. 1977) (allowing retardate's "representative," which may be parent, to consent could result in illegal involuntary sterilizations).

<sup>49</sup> See *Neuwirth*, *supra* note 4, at 455 (recommending court authorization to consent only after adversary proceeding because parent's interest may be directly opposite minor's interest).

<sup>50</sup> See *Hudson v. Hudson*, 373 So. 2d 310, 311 (Ala. 1979) (sterilization in society's best interests as opposed to retardate's interest because of 50% chance that retardate's child would be retarded); *In re C.D.M.*, 627 P.2d 607, 608 (Alaska 1981) (sterilization in society's best interests because of 50% chance that retardate's issue would have Downs Syndrome); *Guardianship of Tulley*, 83 Cal. App. 3d 698, 700, 146 Cal. Rptr. 266, 267 (Cal. App. 1978), *cert. denied*, 440 U.S. 967 (1979) (parent disliked having to cope with retarded daughter's menstrual cycle); *Guardianship of Kemp*, 43 Cal. App. 3d 758, 760, 118 Cal. Rptr. 64, 65-66 (Cal. App. 1974) (proper motive for sterilization because health of retardate would be impaired severely if she became pregnant, and improper financial motive that retardate's family and/or the general public would be charged with the cost of supporting and maintaining retardate's offspring); *A.L. v. G.R.H.*, 163 Ind. App. 636, \_\_\_, 325 N.E.2d 501, 502, *cert. denied*, 425 U.S. 936 (1975) (sterilization to prevent impregnation of fellow retardates); *In re Flanary*, 6 Fam. L. Rep. 2345, 2345 (Md. Cir. Ct. 1980) (hysterectomy requested solely to stop menstrual flow); *In re M.K.R.*, 515 S.W.2d 467, 469 (Mo. 1974) (retardate would be unable mentally and physically to care for child); *In re Sallmaier*, 85 Misc. 2d 295, 297, 378 N.Y.S.2d 989, 990 (Sup. Ct. 1976) (retardate's personal hygiene and menstrual cycle must be handled by her mother); *Frazier v. Levi*, 440 S.W.2d 393, 393 (Tex. Civ. App. 1969) (application for order authorizing sterilization based on social and economic grounds only); *In re Hayes*, 93 Wash. 2d 228, 230, 608 P.2d 635, 637 (1980) (proper motive for sterilization because contraceptives potentially harmful in the long term).

sent the retardate,<sup>51</sup> effectively eliminating the potential danger of the parent's selfish reasons influencing the decision.<sup>52</sup> The presence of a guardian ad litem affords some additional procedural safeguards<sup>53</sup> and usually results in an adversary proceeding.<sup>54</sup> Because the majority of courts later dismiss the sterilization request for lack of subject matter jurisdiction absent an express legislative grant of power to authorize sterilizations,<sup>55</sup> appointment of the guardian to assure an adequate hearing seems pointless.

After rejecting requests by the retardate, parents, and guardians ad litem, the majority of courts have held that they themselves have no jurisdiction to authorize sterilization of a mentally retarded minor.<sup>56</sup> Generally courts first consider whether any state statute expressly confers jurisdiction to hear a request for sterilization authorization.<sup>57</sup> Absent express legislative authority, judges consider alternative bases of jurisdiction.<sup>58</sup> The courts may have authority under the *parens patriae* power of the court,<sup>59</sup> the doctrine of substituted judgment,<sup>60</sup> or a broad

<sup>51</sup> See *In re Grady*, 85 N.J. 235, 243, 426 A.2d 467, 470-71 (1981); *In re Hayes*, 93 Wash. 2d 228, 231, 608 P.2d 635, 637 (1980); *In re Eberhardy*, 102 Wis. 2d 539, 543, 307 N.W.2d 881, 883 (1981). These recent cases did not follow the majority rule of finding no jurisdiction, but instead ruled "against" the guardian ad litem by authorizing sterilization.

<sup>52</sup> See Neuwirth, *supra* note 4, at 455. Guardians ad litem generally will consider only the retardate's interests. *Id.* Freedom from the responsibility for the retardate, even if the courts deny authorization for sterilization, assures that fear of the consequences of such denial will not motivate the guardian's prayer for relief. *Id.*

<sup>53</sup> See, e.g., *In re Grady*, 85 N.J. 235, 264, 426 A.2d 467, 482 (1981). Additional procedural safeguards necessary to insure due process include the authorization of the guardian ad litem to meet with the retardate to assure adequate representation. *Id.* Also, the guardian may present evidence and cross-examine witnesses to provide the court with all the facts. *Id.*

<sup>54</sup> See, e.g., *id.* at 243, 426 A.2d at 471 (because guardian ad litem advocated sterilization, full adversary proceeding did not result until court allowed public advocate and attorney general to intervene and act as putative guardians ad litem).

<sup>55</sup> See note 6 *supra*.

<sup>56</sup> See *In re Grady*, 85 N.J. 235, 260-61, 426 A.2d 467, 480 (1981) (recognizing, but not following, majority rule of no jurisdiction to authorize sterilization); note 6 *supra*.

<sup>57</sup> See *Guardianship of Kemp*, 43 Cal. App. 3d 758, 761, 118 Cal. Rptr. 64, 66 (Cal. App. 1974).

<sup>58</sup> See *id.* (judge considered *parens patriae* power and the probate court's general equity power); *In re Sallmaier*, 85 Misc. 2d 295, 297, 378 N.Y.S.2d 989, 990-91 (Sup. Ct. 1976) (court invoked *parens patriae* power); *In re Hayes*, 93 Wash. 2d 228, 232-33, 608 P.2d 635, 638 (1980) (statutory authorization unnecessary because general jurisdiction sufficed to authorize sterilization); note 59 *infra* (defining *parens patriae* power).

<sup>59</sup> See generally *Courts' Authority*, *supra* note 18, at 882-83. *Parens patriae* power refers to the court's general guardianship powers over those persons suffering from legal disabilities, such as incompetents. *Id.* The court may invoke the power whenever necessary to protect the interests of an incompetent. *Id.* at 882.

<sup>60</sup> See generally *id.* at 883-84. Substituted judgment, or substituted consent, allows a court to do what the retardate would have done if he had had the legal capacity. *Id.* In sterilization cases, substituted judgment would provide a broader range of options than the court's *parens patriae* power. See, e.g., *In re Grady*, 85 N.J. 235, 260, 426 A.2d 467, 480 (1981) (substituted judgment allowed court to authorize sterilization whereas *parens patriae*

interpretation of general statutory authority in light of the court's traditional equity powers.<sup>61</sup> The majority of courts hold, however, that none of these alternative bases for jurisdiction over the retardate allow the court to authorize sterilization.<sup>62</sup>

Against this background of reluctance to authorize sterilizations of mental retardates, two state supreme courts found jurisdiction to approve a sterilization operation without express statutory authority.<sup>63</sup> In *In re C.D.M.*,<sup>64</sup> the Alaska Supreme Court reversed a lower court finding of no jurisdiction, and remanded the case with instructions to reconsider the holding in light of judicially created standards for sterilization of incompetents.<sup>65</sup>

The court recognized that the majority of cases held against granting sterilization petitions because of a lack of jurisdiction absent express statutory authority.<sup>66</sup> The Alaska Supreme Court criticized the majority approach, however, for confusing the issues of jurisdiction and the constitutionality of any authorization to sterilize the retardate.<sup>67</sup> Characterizing the finding of no jurisdiction as an abdication of judicial responsibility,<sup>68</sup> the *C.D.M.* court defined the lower court's general jurisdiction as encompassing the power to hear all controversies, except those expressly and unequivocally denied by the Alaska Constitution or statutes.<sup>69</sup>

---

power would not have). Under *parens patriae* power the court only may authorize therapeutic sterilizations, while substituted judgment allows the court to authorize elective sterilizations as well. Cf. *Strunk v. Strunk*, 445 S.W.2d 145, 147-49 (Ky. App. 1969) (court authorized elective and medically unnecessary kidney transplant to save the life of the retardate's brother). The courts largely have ignored the substituted judgment doctrine in deciding sterilization cases. *But see* note 86 *infra* (*Grady* court may have invoked substituted judgment while calling its authority by another name).

<sup>61</sup> See, e.g., *In re Penny N.*, 120 N.H. 269, \_\_\_, 414 A.2d 541, 542 (1980); *In re Simpson*, 180 N.E.2d 206, 208 (Ohio P. Ct. 1962). See generally *Courts' Authority*, *supra* note 18, at 884-85. In *Simpson*, the judge read a general statute granting the court the power to provide for care and maintenance of noninstitutionalized retardates as encompassing the power to authorize sterilization. 180 N.E.2d at 208. *Simpson* has received much criticism. See, e.g., Burgdorf, *supra* note 3, at 1006; Ferster, *supra* note 3, at 608.

<sup>62</sup> See, e.g., *In re Grady*, 85 N.J. 235, 260-62, 426 A.2d 467, 480 (1981) (recognizing, but not following, majority rule of no jurisdiction or power to authorize sterilization); note 6 *supra*. One commentator speculates that the courts' reluctance to authorize sterilization could arise from the threat of civil liability for the judge under *Wade v. Bethesda Hosp.*, 356 F. Supp. 380, 382-83 (S.D. Ohio 1973), a sensitivity to the rights of retardates, or an unwillingness to usurp legislative power. See *Courts' Authority*, *supra* note 18, at 887 n.53.

<sup>63</sup> *In re C.D.M.*, 627 P.2d 607, 612 (Alaska 1981); *In re Grady*, 85 N.J. 235, 261-62, 426 A.2d 467, 481 (1981).

<sup>64</sup> 627 P.2d 607 (Alaska 1981).

<sup>65</sup> *Id.* at 613-14.

<sup>66</sup> *Id.* at 609-10.

<sup>67</sup> *Id.* at 610.

<sup>68</sup> *Id.* at 611.

<sup>69</sup> *Id.* at 610. At least one other court explicitly held that general jurisdiction encompasses all controversies except matters specifically forbidden by statute. *In re Eberhardy*, 102 Wis. 2d 539, 548-51, 307 N.W.2d 881, 885-86 (1981).

The court analogized the use of a court of general jurisdiction's inherent *parens patriae* power to authorize sterilization to other decisions authorizing elective surgery or medical treatment.<sup>70</sup> The court declared that in some instances, sterilization presently may be in the minor retardate's best interests.<sup>71</sup> Therefore, a court of general jurisdiction had the ability, under its *parens patriae* power, to authorize a sterilization procedure.<sup>72</sup> The Alaska Supreme Court then remanded the case for reconsideration of the petition in light of newly created judicial standards governing a grant of authority for such an operation.<sup>73</sup>

In a recent New Jersey Supreme Court case, *In re Grady*,<sup>74</sup> the court similarly found jurisdiction to authorize sterilization of a mental retardate in some situations.<sup>75</sup> The court reviewed the individual right of privacy afforded by both the United States and New Jersey Constitutions, and concluded that every person has both the right to procreate and the right not to procreate.<sup>76</sup> Finding that mental retardation precluded exercise of either right by the retardate,<sup>77</sup> the *Grady* court sought some other basis for consent.<sup>78</sup>

The *Grady* court focused on the question of who should exercise that right for the retardate. The court held that under a substituted judgment theory,<sup>79</sup> parents may assert the retardate's right not to procreate subject to a final determination by a court.<sup>80</sup> The court reserved the "power to review" in an adversary proceeding the parental decision to sterilize the retardate.<sup>81</sup> This power to review gives the court considerable control over sterilization of retardates.<sup>82</sup> After *Grady*, the retard-

---

<sup>70</sup> *In re C.D.M.*, 627 P.2d 607, 611 nn.10-14 (Alaska 1981) (citing case support).

<sup>71</sup> *Id.* at 611. The Alaska court confused therapeutic and elective sterilizations, citing support that would allow elective sterilizations, but invoking the best interest requirement of *parens patriae* power, under which the court may authorize only therapeutic operations. *Id.*; see note 45 *supra* (difference between the therapeutic and elective sterilizations detailed).

<sup>72</sup> 627 P.2d at 611.

<sup>73</sup> *Id.* at 612-14. The *C.D.M.* sterilization standards substantially follow the standards enumerated in *In re Grady*, 85 N.J. 235, 264-67, 426 A.2d 467, 482-83 (1981), see note 91 *infra*, but vary to some extent. One difference concerns the time frame for consideration of whether sterilization is the only practicable means of contraception. Compare *In re C.D.M.*, 627 P.2d 607, 613 (Alaska), with *In re Grady*, 85 N.J. 235, 266, 426 A.2d 467, 483 (1981). *C.D.M.* requires only that sterilization be the best alternative at the time of the judicial proceeding. *In re C.D.M.*, 627 P.2d 607, 613 (Alaska 1981). *Grady*, however, looks to future medical breakthroughs as well. *In re Grady*, 85 N.J. 235, 266, 426 A.2d 467, 483 (1981).

<sup>74</sup> 85 N.J. 235, 426 A.2d 467 (1981).

<sup>75</sup> *Id.* at 259, 426 A.2d at 479.

<sup>76</sup> *Id.* at 247-50, 426 A.2d at 473-75; see note 1 *supra* (origin of right to privacy).

<sup>77</sup> *In re Grady*, 85 N.J. 235, 247-50, 426 A.2d 467, 473-75 (1981). The retardate in *Grady* could not exercise her right to sterilization because she could neither comprehend pregnancy nor the effects of sterilization. *Id.* at 247, 426 A.2d at 473. See text accompanying notes 5, 12-14 *supra*.

<sup>78</sup> 85 N.J. at 251, 426 A.2d at 475.

<sup>79</sup> See note 60 *supra*.

<sup>80</sup> *In re Grady*, 85 N.J. 235, 251, 426 A.2d 467, 475 (1981).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 251 n.5, 426 A.2d at 475 n.5.

ate's parents' may initiate sterilization proceedings but only the court may give final approval.<sup>83</sup> The *Grady* court effectively held that only a court may exercise a retardate's right not to procreate.<sup>84</sup>

In a thorough discussion of possible bases of jurisdiction, similar to the analysis employed in *In re C.D.M.*,<sup>85</sup> the *Grady* court found the power to authorize sterilizations ostensibly under its *parens patriae* jurisdiction.<sup>86</sup> The court found jurisdiction<sup>87</sup> even while recognizing that the majority of courts had held otherwise.<sup>88</sup> Criticizing those cases for failing to protect the constitutional rights of incompetents,<sup>89</sup> the court took on the responsibility of providing the retardate with a choice by exercising that choice in the retardate's behalf.<sup>90</sup>

As in *In re C.D.M.*, the *Grady* court set forth explicit standards to determine whether to authorize sterilization of the retardate.<sup>91</sup> These

<sup>83</sup> See *id.* at 251, 426 A.2d at 475.

<sup>84</sup> See *id.*

<sup>85</sup> 627 P.2d 607, 611 (Alaska 1981).

<sup>86</sup> *In re Grady*, 85 N.J. 235, 259-62, 426 A.2d 467, 479-81 (1981). The *Grady* court misclassified the source of its jurisdiction. Although justifying jurisdiction as an exercise of its *parens patriae* power, *id.*, the court cited two substituted judgment cases for authority. *Id.* at 260, 426 A.2d at 480 (citing *Hart v. Brown*, 29 Conn. Supp. 368, \_\_\_, 289 A.2d 386, 388 (Super. Ct. 1972); *Strunk v. Strunk*, 445 S.W.2d 145, 148-49 (Ky. App. 1969)). The doctrine of substituted judgment derives from the court's *parens patriae* power but allows the court greater latitude in substituting its judgment for that of its ward. See note 60 *supra*. Under the traditional view of *parens patriae* power, the court may authorize only that action which is in the ward's best interests. See *Ferster, supra* note 3, at 608 (calling use of *parens patriae* power to authorize sterilization a novel power without historical basis). Substituted judgment, however, allows the court to authorize what the ward would have done had he the capacity to do so, enabling the court to recognize motivations other than medical necessity. See *Strunk v. Strunk*, 445 S.W.2d 145, 148-49 (Ky. App. 1969). *Strunk* involved a request to authorize a kidney transplant from a retardate to his brother. *Id.* at 146. From the retardate's viewpoint, the operation entailed some risk with no possible benefit. *Id.* The only benefit to the retardate concerned the indirect psychological gain of having a live brother. *Id.* The kidney transplant, though clearly what the retardate would have wanted had he the competence to consent, could not be authorized utilizing the court's *parens patriae* power. See generally *Courts' Authority, supra* note 18.

<sup>87</sup> *In re Grady*, 85 N.J. 235, 259-62, 426 A.2d 467, 479-81 (1981). The *Grady* court relied heavily on *In re Quinlan*, 70 N.J. 10, 355 A.2d 657, *cert. denied*, 429 U.S. 922 (1976). *Quinlan* involved the right of a person to refuse treatment on behalf of an incompetent ward. *Id.* at 22, 355 A.2d at 651. Detaching the respirator keeping the ward breathing presumably would have caused the ward's death. See *id.* at 26, 355 A.2d at 655. The court allowed the ward's parents to detach the respirator, utilizing the court's *parens patriae* power to authorize what the ward would have desired had she been competent. *Id.* at 54, 355 A.2d at 664. The *Quinlan* court did not address specifically the issue of jurisdiction, instead merely stating that New Jersey courts commonly grant declaratory relief. *Id.* at 34-35, 355 A.2d at 660.

<sup>88</sup> *In re Grady*, 85 N.J. 235, 260-62, 426 A.2d 467, 480 (1981); see note 6 *supra*.

<sup>89</sup> *In re Grady*, 85 N.J. 235, 261, 426 A.2d 467, 480 (1981).

<sup>90</sup> *Id.* at 261, 426 A.2d at 481.

<sup>91</sup> *Id.* at 264-67, 426 A.2d at 482-83; see *In re C.D.M.*, 627 P.2d 607, 612-13 (Alaska 1981). The *Grady* standards set forth a detailed analysis of whether sterilization is presently in the retardate's best interests. See *In re Grady*, 85 N.J. 235, 264-67, 426 A.2d 467, 482-83 (1981). Under *Grady*, the court should appoint a guardian ad litem to represent the retardate in a full adversary proceeding. *Id.* Besides hearing evidence from both the petitioner and the guardian ad litem, the court should obtain independent medical and psychological profiles of

standards include procedural safeguards to insure adequate representation of the retardate<sup>92</sup> and full consideration of the retardate's interests and need for sterilization.<sup>93</sup> The *Grady* court declared that the retardate's interests controlled whether the lower court should authorize sterilization.<sup>94</sup> The court recognized a court of general jurisdiction's power to authorize sterilization of a mental retardate, but only if the petitioners clearly and convincingly prove that sterilization furthers the retardate's best interests.<sup>95</sup>

*In re C.D.M.* and *In re Grady* did not appreciably advance the cause of the mental retardate seeking sterilization because those courts' standards are prohibitive.<sup>96</sup> Although the *Grady* and *C.D.M.* courts decided that a court of general jurisdiction could authorize sterilization,<sup>97</sup> the circumstances under which a court could find such authorization appropriate have proved stringent. On remand, the lower court in *Grady* denied authorization for sterilization of the retardate.<sup>98</sup> The *Grady* stand-

---

the retardate. *Id.* The judge should meet with the retardate to elicit his or her views on procreation and sterilization, and to judge first hand the retardate's degree of incompetency. *Id.*

To authorize sterilization, the *Grady* court required a finding by clear and convincing evidence that the retardate lacks the capacity to consent to sterilization now and forever, and that sterilization is in the retardate's best interests. *Id.* When making the best interest determination, the court should consider a number of factors. *Id.* The court should weigh the possibility of pregnancy, a fact which may be presumed given normal sexual development. *Id.* The court should determine the likelihood of sexual intercourse, the present and future inability of the retardate to understand reproduction or contraception, present and future alternative means of contraception, and the present versus future advisability of sterilization. *Id.* In addition, the trial court should consider the present and future ability of the retardate to care for a child, either alone or with a spouse's help, and the possibility of scientific advances in the treatment of retardation or in sterilization procedures. *Id.* Finally, the court should be reasonably certain of the good faith of the petitioners seeking the sterilization authorization. *Id.*

<sup>92</sup> See note 91 *supra*. Because of the open and adversary nature of the sterilization hearing, deception such as that revealed in *Stump v. Sparkman*, 435 U.S. 349 (1978), in which the retardate's mother and doctor told the retardate that she was to have an appendectomy, will be reduced. *Id.* at 353.

<sup>93</sup> See note 91 *supra*.

<sup>94</sup> *In re Grady*, 85 N.J. 235, 264, 426 A.2d 467, 482 (1981).

<sup>95</sup> *Id.* at 266, 426 A.2d at 483.

<sup>96</sup> As interpreted by the trial court on remand, under the standards mandated by the New Jersey Supreme Court, see note 91 *supra*, the petitioner must show the likelihood of sexual activity in the near future. *In re Grady*, No. C-1917-78E, slip op. at 6 (N.J. Super. Ct. App. Div., August 3, 1981). Unless the retardate faces a risk of pregnancy, sterilization should not take place. *Id.* One questions whether sterilization would occur too late to prevent pregnancy. Because sterilization is meant to prevent pregnancy, the more appropriate method would be to sterilize the retardate before the risk of pregnancy arises. See *In re Eberhardy*, 102 Wis. 2d 539, 609, 307 N.W.2d 881, 913 (1981) (Callow, J., dissenting) (speculating whether previously having denied sterilization requests, court could authorize abortions for pregnant mental retardates).

<sup>97</sup> *In re C.D.M.*, 627 P.2d 607, 612 (Alaska 1981), *In re Grady*, 85 N.J. 235, 261-62, 426 A.2d 467, 481 (1981).

<sup>98</sup> See *In re Grady*, No. C-1917-78E, slip op. at 6 (N.J. Super. Ct. App. Div., August 3, 1981). On remand, the trial court in *Grady* recognized that the issue involved the interplay

ards require a difficult showing before anyone may exercise the retardate's elective sterilization rights.<sup>99</sup> Although a court acknowledging jurisdiction seems better than no forum at all, if the court imposes a heavy burden of persuasion before a retardate's parents or guardian may obtain authorization to proceed with sterilization, such a court affords little real relief.

Cases and commentators have offered suggested standards for determining when sterilization is appropriate.<sup>100</sup> Such proffered standards generally detail who may consent to the sterilization, the showing required for sterilization authorization, and the procedural safeguards necessary to counter abuse of the sterilization process.<sup>101</sup> Retardate sterilization standards are best left to individual state legislatures,<sup>102</sup> which may consider the problems and solutions in an unemotional and unhurried manner. *In re Grady* and *In re C.D.M.* represent a courageous step forward, but they are in the minority of jurisdictions appropriately addressing the need for standards defining when retardates may elect sterilization.

ALAN B. MUNRO

---

of two aspects of the right of privacy. *Id.* at 5-6. The court must weigh the right to procreate against the right to freedom from the intense supervision required to protect an unsterilized retardate from pregnancy. *Id.* The court found that sterilization would infringe less on the retardate's right of privacy than supervision in the long run, but that presently supervision was in the retardate's best interest. *Id.* Therefore, the court refused to authorize sterilization. *Id.* at 6.

<sup>99</sup> See *In re Grady*, 85 N.J. 235, 276, 426 A.2d 467, 488 (1981) (Handler, J., concurring). Judge Handler called the showing required before the court could authorize sterilization "stringent" and possibly too difficult for any retardate to meet. *Id.* at 275, 426 A.2d at 487.

<sup>100</sup> *Wyatt v. Anderholt*, 368 F. Supp. 1383, 1384-86 (M.D. Ala. 1974) (court took judicial notice that even though illegal, doctors continued to perform involuntary sterilizations, so court set up standards for those sterilizations); *In re C.D.M.*, 627 P.2d 607, 612-13 (Alaska 1981); *In re Grady*, 85 N.J. 235, 262-67, 426 A.2d 467, 481-83 (1981); *In re Hayes*, 93 Wash. 2d 228, 237-39, 608 P.2d 635, 639-41 (1980); *Neuwirth*, *supra* note 4, at 464-71; *Sterilization*, *supra* note 2, at 405-07.

<sup>101</sup> Compare *Neuwirth*, *supra* note 4, at 464-71, with *Sterilization*, *supra* note 2, at 405-07, with *In re Grady*, 85 N.J. 235, 264-67, 426 A.2d 467, 482-83 (1981); with VA. CODE §§ 54-325.10 to -325.12 (Cum. Supp. 1981).

<sup>102</sup> *In re Eberhardy*, 102 Wis. 2d 539, 578, 307 N.W.2d 881, 895 (1981). See Note, *Rights of Mentally Ill—Involuntary Sterilization—Analysis of Recent Statutes*, 78 W. VA. L. REV. 131, 144 (1976). A number of courts inferentially support legislative solutions to the sterilization of retardates issue by sympathizing with the petitioner before denying the requested relief. See *Hudson v. Hudson*, 373 So. 2d 310, 311 (Ala. 1979) (court reluctantly denied petition); *Guardianship of Tulley*, 83 Cal. App. 3d 698, 705-06, 146 Cal. Rptr. 266, 271 (Cal. App. 1978), *cert. denied*, 440 U.S. 967 (1979) (court sympathized with petitioner's cause but declined to encroach upon province of legislature by granting authorization absent enabling legislation); *In re S.C.E.*, 378 A.2d 144, 145 (Del. Ch. 1977) (judge convinced that sterilization was in best interests of retardate but refused to grant authorization without express legislative authority because of lack of judicial immunity). Some states recently have enacted statutes prescribing standards for the voluntary sterilization of retardates. See, e.g., COLO. REV. STAT. § 27-10.5-128 (Cum. Supp. 1980) (addressing sterilization of adult retardates); VA. CODE §§ 54-325.10 to -325.12 (Cum. Supp. 1981).



