Involuntary Sterilization of Mentally Retarded Minors in Nebraska

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I. INTRODUCTION

An unavoidable tension exists between protecting mentally re-
tarded minors\textsuperscript{1} from unwanted or unnecessary sterilization\textsuperscript{2} and al-

\textsuperscript{*} The author would like to thank Tim Shaw, Randy Brown, and the staff at Nebraska Advocacy Services for bringing this and other important issues to light and providing background information.

\textsuperscript{1} The American Association on Mental Deficiency has defined mental retardation as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period.” H. J. Grossman (Ed.), Manual on Terminology and Classification in

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lowing them to choose sterilization as a means of contraception. Despite this tension, several states have determined how the choice to sterilize a mentally retarded minor should be made, if at all. However, Nebraska has failed to make this determination, either judicially or legislatively. Without legal guidelines, several important questions are left unanswered in Nebraska: who can authorize the sterilization of a mentally retarded minor; whether consent of the mentally retarded minor is necessary to perform the sterilization; what procedure is to be followed if consent is not possible; whether a judge is liable for ordering the sterilization; and for whose benefit the sterilization is being performed.

These questions illustrate the scope of the problem that a void in state law has created. At stake are fundamental constitutional rights of a class of citizens whose history is that of vulnerability. Because of the nature of mental retardation, affected persons may not be capable of making procreative decisions. As a result, they are unable to exercise their constitutional right to choose sterilization as a contraceptive measure or resist others making the sterilization decision for them. The lack of a decisionmaking structure presents both ethical and legal dilemmas for all involved in the sterilization decision for a mentally retarded minor.

Several issues are involved in determining whether or not a mentally retarded minor should be sterilized. It should go without saying that any mentally retarded minor competent to make decisions should

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2. Sterilization is the process by which an individual is rendered incapable of procreation. In females, the most common methods are tying the fallopian tubes and hysterectomy. In males, vasectomy is the only proven method. BLACK'S LAW DICTIONARY 1268 (5th ed. 1979).

3. One federal safeguard is the Department of Health and Human Services regulations which prohibit the use of federal money, including Medicaid, to fund sterilization for any minor, institutionalized individual, or person declared incompetent by a court. 42 C.F.R. §§ 50.203, 50.206 (1988).

4. See infra notes 9-26 and accompanying text.

5. Although not reaching the status of "suspect class," it has been argued that both minors and the mentally retarded deserve such a status because of their respective histories. The argument that the mentally retarded should be considered a "suspect class" was recently unsuccessfully advanced in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). In the opinion, the Supreme Court reiterated its position that heightened review should not be extended to claims of differential treatment based on age. Id.

6. A common myth is that mental retardation renders persons incapable of making legal decisions of any kind.

7. Although this Comment focuses on minors, the discussion is equally applicable to mentally retarded adults. However, the problem is more acute with minors because, as a class, they are often seen as less competent. Thus, they are seen as "doubly incompetent," based on both their minor and mentally retarded status.
be allowed to make those decisions. The individual's decision may encompass not only procreative considerations, but also interests in maintaining harmony and stability in family relationships. For those minors found incompetent to make decisions, competing interests must be balanced. Sterilization can be beneficial because it provides contraception to someone unable or unwilling to use other methods. However, the power to sterilize can be misused as punishment, to solve hygiene problems associated with menstruation, or to make a decision that the mentally impaired individual is in fact qualified to make. Without a legal structure, the means for balancing competing interests are absent.

This Comment first provides a brief analysis of the Supreme Court cases recognizing procreative rights. Following that overview is a discussion of how these rights have been interpreted to apply to mentally retarded minors. This Comment then reviews the diverse judicial responses to the question of sterilization. An historical analysis is presented with special emphasis on issues of jurisdiction, liability, and the procedures courts have adopted to safeguard the procreative rights of mentally retarded minors. This Comment reviews state legislation regulating the sterilization of mentally retarded minors, and concludes with an analysis of the current state of law in Nebraska with some recommendations.

II. FUNDAMENTAL RIGHTS OF MENTALLY RETARDED MINORS TO MAKE PROCREATIVE CHOICES

The Supreme Court has often ruled on cases involving the fundamental right of procreative choice. In *Skinner v. Oklahoma,* the Court ruled that a state statute which required the involuntary sterilization of convicted larcenists, but not of convicted embezzlers, violated the equal protection clause. Writing for the majority, Justice Douglas recognized a fundamental right of procreation: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects."

The Supreme Court has since reaffirmed the fundamental nature

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8. Because the severity of mental retardation generally affects competent decision-making and most people diagnosed with mental retardation are only "mildly" retarded, there should be a presumption of competence. Similarly, there is evidence to suggest that minors are competent to consent in a wide variety of legal contexts. See G. Melton, G. Koocher & M. Saks, CHILDREN'S COMPETENCE TO CONSENT (1982).
10. *Id.* at 538.
11. *Id.* at 541.
of the right to procreate in the related contexts of contraception and abortion. These cases deal primarily with minors. Thus far, the Supreme Court has tackled issues of procreative choice for minors in a case involving the purchase of contraceptives,13 and in a series of cases involving abortion legislation.14 These decisions turn primarily on an analysis of the right to privacy.

The right to privacy was first recognized in Griswold v. Connecticut,15 where the Supreme Court invalidated a Connecticut statute making possession and use of contraceptives by married couples a criminal offense.16 In Griswold, the marital relationship was held to be within the "zone of privacy created by several fundamental constitutional guarantees."17 The Court found the constitutional basis for a right to privacy to be within the "pnumbras" of the Bill of Rights and the fourteenth amendment.18

Procreative rights also have been found to fall within this "zone of privacy." In Eisenstadt v. Baird,19 the Supreme Court was called upon to judge the constitutionality of a statute which prohibited the distribution of contraceptives to single adults by unauthorized persons. Writing for the Court, Justice Brennan stated: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."20

Subsequent cases have continued to address procreative rights within the framework of the right to privacy.21 This fundamental right of privacy in procreative choice has also been extended to minors. In Carey v. Population Services International,22 the Supreme Court struck down a New York statute prohibiting the sale of contraceptives to minors. Writing for the majority, Justice Brennan found that the "right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."23

Although the Supreme Court has yet to find a specific right to sterilization within the right to privacy context, several lower courts have

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12. See infra notes 13-23 and accompanying text.
15. 381 U.S. 479 (1965).
16. Id. at 485.
17. Id.
18. Id. at 484-85.
20. Id. at 453.
23. Id. at 693.
since recognized the right to be sterilized. These courts have based their holdings on the Supreme Court's recognition of a protected privacy interest in both obtaining contraceptives and choosing to terminate a pregnancy. The right to be sterilized (as a matter of procreative choice), or to resist sterilization has been discussed in cases involving mentally retarded minors. This issue becomes problematic when a mentally retarded minor is believed incompetent to exercise either of these rights. The tough question is, who, if anybody, should make the choice to sterilize a mentally retarded minor? If that choice is to be made, under what conditions should it be made?

III. REVIEW OF COURT DECISIONS

A. Cases Denying Authorization

The issue of sterilization of mentally retarded minors typically reaches the court by way of petition. Often a parent, guardian, or the superintendent of an institution will petition a court to authorize the sterilization of a mentally retarded minor. Courts have denied such petitions for one or more of the following reasons: (1) lack of jurisdiction (either statutory or common law); (2) no applicable common-law family relationship that would allow the parent to have the child sterilized; and (3) fear of judicial liability. The central controversy is whether, pursuant to their general authority but without statutory authority, courts with jurisdiction over incompetent persons may order sterilization.

1. Lack of Jurisdiction

Most of the early cases held that, absent specific legislative authority, the court was not the proper forum for authorizing sterilization.
Although a court of general jurisdiction has the power to adjudicate all controversies at law and equity within the legal bounds of rights and remedies, this was held not to include authorizing sterilization. In addition, courts of limited jurisdiction such as probate, surrogate, and juvenile courts were also found to lack the necessary jurisdiction, and thus authority, to provide the relief requested. Therefore, in states where no specific statutory authority is granted to courts, no forum exists for authorizing the sterilization of a mentally retarded minor.

While some state statutes grant courts such authority, this legislation often applies only to residents of state institutions for the mentally retarded. The existence of these statutes has been interpreted by courts as indicating that the legislature is the proper forum for ordering sterilization.

Equal protection issues have been raised when statutes limit the availability of sterilization to residents of institutions. If a state allows the sterilization of an institutionalized mentally retarded resident, then not allowing similar procedures for noninstitutionalized residents violates their rights based on the equal protection clause of the fourteenth amendment. This argument has had limited impact.

28. In re Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) (probate court has no other powers other than those given by statute).
30. In re M.K.R., 515 S.W.2d 467 (Mo. 1974) (jurisdiction of juvenile court to order or authorize sterilization of a child may be conferred only by specific statute).
31. See infra notes 81-89 and accompanying text.
34. Such an argument was advanced in Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1981). The court, although declining to rewrite the law, enjoined the defendants "from refusing to provide the plaintiffs with services identical to those provided to inmates of [other institutions] to enable them to obtain consent of a probate court to the sterilization operations upon them." Id. at 371-72.
2. No "Family Relationship" Justification

In addition to denying requests for sterilization based on lack of jurisdiction, courts have also found unpersuasive "family relationship" arguments grounded in common law. In A.L. v. G.R.H., a mother filed a complaint seeking a declaration of her right under the common-law attributes of the parent-child relationship to have her mentally retarded son sterilized. The district court denied her request. The appellate court affirmed, declaring its belief that "the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom."

Following A.L. v. G.R.H., an Indiana court of appeals held that the district trial court erred when it denied a child's petition for an injunction not to be sterilized. The appellate court then granted the injunction. Although not on appeal, the appellate court noted that the trial court had subsequently denied the parent's petition for authority to sterilize on the grounds that the denial of the injunction was res judicata to that issue. The appellate court found this reasoning to be flawed:

Determination of the child's right to an injunction in the absence of prior judicial authorization does not of itself preclude a future determination that sterilization is in the best interest of the child. In such instance and upon proper petition, a court of competent jurisdiction might authorize sterilization. That the parties and the trial court may have assumed that denial of the injunction carried with it an affirmative judicial authorization of the sterilization is irrelevant.

On appeal, the Indiana Supreme Court vacated the judgment, affirmed the judgment of the trial court, and held that juvenile courts have jurisdiction over such sterilization matters. The court noted that in denying the parents a forum to raise the question of sterilization, the trial court had, in effect, made the constitutional choice for sterilization.

35. 163 Ind. App. 636, 325 N.E.2d 501 (1975), cert. denied, 425 U.S. 936 (1976). See also Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979) (parents cannot be authorized to act on behalf of their mentally incompetent minor child absent a finding that failure to authorize sterilization will endanger the incompetent's life or health).
37. Id. at 638, 325 N.E.2d at 502.
39. Id.
40. Id. at 69 n.1.
41. Id. at 73 n.4.
the minor (that the minor should not be sterilized).43

3. Judicial Liability

Because of the lack of specific statutory or common-law authority, fear of liability also may have influenced courts not to grant orders authorizing sterilization. In Wade v. Bethesda Hospital,44 the United States District Court explicitly held that a state probate judge who had ordered a sterilization was not protected by the doctrine of judicial immunity as "there was no set of circumstances or conditions under Ohio law which would permit defendant Gary to order plaintiff to submit to sterilization."45

The issue of liability arose again in Sparkman v. McFarlin,46 where the Seventh Circuit ruled that a judge who had ordered the sterilization of a fifteen-year-old woman was not immune from liability for damages resulting from his action. The court held that "[t]here are actions of purported judicial character that a judge, even when exercising general jurisdiction, is not empowered to take."47 The court noted that there was no statutory or common-law authority to support the sterilization order.48 The court also relied on the fact that the Indiana Legislature had enacted a statute outlining the procedures whereby an institutionalized mentally retarded person could be sterilized as evidence negating the judge's right to assert jurisdiction over a petition to authorize sterilization of a noninstitutionalized person.49 This decision set some precedent and influenced at least one judge to deny a petition to authorize sterilization on the explicit ground of fear of liability.50

With this background, the Supreme Court heard Sparkman on appeal.51 In a 5-3 decision,52 the Court held that: (1) there was not a clear absence of all jurisdiction in the circuit court to consider the ster-

45. Id. at 674. For a related case finding that immunity did not apply to a guardian, but may have applied to state social workers, see Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978). See also Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1981) (hospital refused to sterilize because of fear of future liability); In re Penny N., 414 A.2d 541 (N.H. 1980) (doctor refused to operate without court approval).
47. Id. at 176.
48. Id. at 175.
49. Id. The statute provided for the right to notice and an opportunity to defend, as well as the right to appeal. Id.
52. Id. White delivered the opinion. Burger, Blackmun, Rehnquist, and Stevens joined. Stewart dissented, in which Marshall and Powell joined. Powell also filed a dissenting opinion. Brennan took no part in the decision.
ilization petition; and (2) the judge had immunity. The Court reasoned that neither the lack of precedent nor the absence of specific statutory authority excluded the possibility of granting relief.

[In our view, it is more significant that there was no Indiana statute and no case law in 1971 prohibiting a circuit court, a court of general jurisdiction, from considering a petition of the type presented to [the judge]. The statutory authority for the sterilization of institutionalized persons in the custody of the State does not warrant the inference that a court of general jurisdiction has no power to act on a petition for sterilization of a minor in the custody of her parents, particularly where the parents have authority under the Indiana statutes to "consent to and contract for medical or hospital care or treatment of [the minor] including surgery."]

**B. Cases Granting Authority**

After the Supreme Court decision in *Stump*, the threshold question of jurisdiction no longer prevented courts from deciding the issue of authorizing orders to sterilize mentally retarded minors. Indeed, *Stump* has been interpreted to stand directly for the proposition that state courts now have the power to issue orders authorizing sterilization. Along with the precedential authority of *Stump*, courts have also based jurisdiction to authorize sterilization on the power of

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53. *Id.* at 358.
54. *Id.* at 364.
56. "Persuasive authority for the principle that courts of general jurisdiction do have jurisdiction over a petition by a parent or guardian for an order authorizing sterilization is found in the United States Supreme Court opinion in *Stump v. Sparkman.*" *In re Hayes*, 93 Wash. 228, 230, 608 P.2d 635, 637 (1980).

Consequently, it appears that neither by statute nor case law has the jurisdiction granted to the courts of common pleas, in particular the orphans' court division, been circumscribed to foreclose consideration of a petition seeking authorization for guardian to consent to an incompetent's sterilization.


*But see In re Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981). In contrast, the court recognized jurisdiction but refused to exercise it, forbidding lower courts from also exercising jurisdiction. Restraint was most appropriate because the state's interest was in affording the most protection to the mentally retarded. *Id.* at 575, 307 N.W.2d at 897. The proper forum for making policy was the legislature. They are better able to give an in-depth study to the entire problem and to seek expert testimony. *Id.* at 570, 307 N.W.2d at 895. Incompetents must "be considered, for the purpose of sterilization, a distinct class to whom the state owes a special concern." *Id.* at 574, 307 N.W.2d at 897. In *In re Matejski*, 419 N.W.2d 576 (Iowa 1988), the court concluded "that district courts possess subject matter jurisdiction over, and accordingly may hear and determine, applications seeking authorization for sterilization of a mentally incapacitated ward, such as that involved here." *Id.* at 580. The court noted that consideration of the constitutional rights at stake was not relevant to the question of jurisdiction. "Our law is
parens patriae. Other bases for jurisdiction include precedent requiring judicial approval for extraordinary medical treatment and the jurisdictional authority contained in some state constitutions.

1. Parens Patriae

An influential post-Stump case involved Lee Ann Grady, a nineteen-year-old with Downs Syndrome who had no significant understanding of her sexuality and would not be able to take care of a baby alone. Her parents believed that contraception through sterilization was an appropriate precaution, given the circumstances of their daughter's life. The hospital refused to perform the sterilization and the parents requested authorization from the Superior Court, Chancery Division of New Jersey.

After first identifying the opposing constitutional rights at stake (the right to obtain sterilization and the right to be free from involuntary sterilization), and finding no applicable state statutes, the judge held that the power to authorize substituted consent for sterilization was inherent in the parens patriae jurisdiction of the chancery court.

On appeal, the Supreme Court of New Jersey affirmed the lower court's reliance on parens patriae. The Grady court noted that "[t]he parens patriae power of our courts derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of an innate legal disability." The court then analogized other instances in which the power of parens patriae has been invoked: to protect personal rights, to protect the best interests of children in custody disputes, and in cases involving substituted consent for medical proceedings. Subsequent cases have primarily relied on the power of parens patriae as jurisdictional grounds for authorizing sterilization.

clear that the issue of subject matter jurisdiction is an abstract inquiry unrelated and precedent to the rights of the parties to a particular case." Id. at 579.

57. Parens patriae literally means parent of the country. The term refers to the state, as sovereign, in its role as guardian. Parens patriae originated in English common law when the King acted as guardian to persons with legal disabilities such as infants, idiots, and lunatics. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). For a discussion of the origin and nature of parens patriae, see Note, Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190, 1207-10 (1974).


59. Id. at 122, 405 A.2d at 883.


61. Id. at 259, 426 A.2d at 479.

62. See, e.g., In re Moe, 385 Mass. 555, 432 N.E.2d 712 (1982). The Supreme Judicial Court of Massachusetts was specifically called upon to answer the question of whether "the probate and family court, absent specific statutory authority, could order the sterilization of an adult mentally retarded female." Id. at 556-57, 432 N.E.2d at 715. The court recognized that, absent any limiting legislation, the pro-
2. Jurisdictional Authority Under the State Constitution

Another early post-Stump case to impact later decisions was decided by the Washington Supreme Court in In re Hayes.63 The court claimed authority under their state constitution to act on a petition for an order to authorize sterilization of a severely retarded minor:

Original jurisdiction is granted to superior courts over all cases and proceedings in which jurisdiction is not vested exclusively in some other court by Washington Const. art. 4, Sec. 6. Under this broad grant of jurisdiction the superior court may entertain and act upon a petition from the parent or guardian of a mentally incompetent person for a medical procedure as sterilization.

No statutory authorization is required.64

3. Judicial Approval Requirement

A third line of reasoning used by the Massachusetts Supreme Judicial Court to support a finding of jurisdiction was based on earlier cases involving the approval of medical decisions made on behalf of wards by guardians. In In re Moe,65 the court relied on previous cases which had established that judicial approval was required before a guardian could consent to administering or withholding proposed extraordinary medical treatment: "Since sterilization is an extraordinary and highly intrusive form of medical treatment that irreversibly extinguishes the ward's fundamental right of procreative choice, we conclude that a guardian must obtain a proper judicial order."66

C. Standards

Having resolved the thorny problem of jurisdiction, the next step...
was to determine the conditions under which an order would be granted. The result is best understood as a two-step process. First, the court articulates the legal underpinnings which necessitate the standards. The two rationales forwarded thus far include a "best interests" approach and reliance on the doctrine of "substituted judgment." Although some commentators prefer the "substituted judgment standard" over the "best interests standard," there is little difference in the procedures courts ultimately adopt to safeguard the constitutional rights at issue. In both instances, the court makes the final decision as to whether sterilization is to take place.

The second phase is to identify the specific procedures used in determining whether sterilization is to occur. The procedures adopted by courts vary in both the factors to be considered and how the standard of proof is applied. Two post-\textit{Stump} cases have been influential in resolving the dilemma of how to best serve a mentally retarded minor who cannot exercise the constitutional right either to obtain or resist sterilization.

The \textit{Hayes} court adopted the "best interest" standard. The court deemed necessary the appointment of a guardian ad litem to present the person to be sterilized because "the interests of the parents of a retarded person cannot be presumed to be identical to those of the child." The court further declared that the standard "will be to show by clear, cogent and convincing evidence that such a procedure is in the best interest of the retarded person." The court then identified the factors to be considered while making an assessment that sterilization is in the best interest of the mentally retarded person. The factors include:

1. the age and educability of the individual;
2. the individual's potential as a parent;
3. whether the individual is incapable of making a decision regarding his or her sterilization;
4. whether the individual is physically capable of procreation;
5. the likelihood that the individual will engage in sexual activity now or in the future;
6. whether less drastic means of contraception have proven unworkable; and
7. whether, in the near future, scientific and medical knowledge is likely to produce either a less drastic method of contraception, or an advance in the treatment of the individual's disability.

By setting up strict guidelines, the majority intended to protect the rights of those faced with potential sterilization, particularly children.

68. See notes 63-70 and accompanying text.
70. \textit{Id.} at 237, 608 P.2d at 640.
This burden will be even harder to overcome in the case of an incompetent minor, whose youth may make it difficult or impossible to prove by clear, cogent and convincing evidence that he or she will never be capable of making an informed judgment about sterilization or of caring for a child.72

“Impossible” may well be the most apt description of this standard. Proponents for the sterilization are challenged to prove that the minor will never be capable of making an informed judgment, a feat that may prove philosophically impossible. In addition, it is unclear how effective independent evaluators may be in determining these factors.73 Nevertheless, the rigorous procedures necessary to prove that it is in the best interest of a person to be sterilized provides a barrier for those who may be seeking the sterilization with improper motives.

In contrast, the underlying rationale for the standards outlined in Grady was based on the doctrine of “substitute judgment.” The court reasoned:

We believe that having the choice made in her behalf produces a more just and compassionate result than leaving Lee Ann with no way of exercising a constitutional right. Our Court should accept the responsibility of providing her with a choice to compensate for her inability to exercise personally an important constitutional right.74

This “substitute judgment” was borrowed from the famous Karen Ann Quinlan case.75 The court, in substituting its judgment for that of an incompetent, allows a constitutional choice to be made, in this case, the choice to become sterilized. The standards and procedures pronounced in Grady relied heavily on those set out in Hayes, albeit with some differences. The Grady standards are as follows:

(1) the individual is incapable of making a decision;
(2) the individual is unlikely to develop the capacity to make an informed judgment in the foreseeable future;
(3) the individual is likely to be sexually active or exposed to situations where she is forced to submit to sexual intercourse;
(4) she is likely to be permanently unable to understand reproduction or contraception;
(5) less drastic methods of birth control are not feasible;
(6) sterilization is advisable at this time, as opposed to a future date;
(7) a scientific breakthrough may occur to improve the disability or the nature of the sterilization;
(8) the individual lacks the ability to care for a child or the possibility of a spouse caring for a child; and

72. Id. at 239, 608 P.2d at 641.
73. Melton & Scott, Evaluation of Mentally Retarded Persons for Sterilization: Contributions and Limits of Psychological Consultation, 15 PROF. PSYCHOLOGY: RES. AND PRAC. 34 (1984). Professionals who make these assessments are advised to be cognizant of the limitations of their expertise in assisting the fact finder. “Particularly in view of the gaps in knowledge described here, psychologists should be careful not to cross from ‘specialized knowledge’ into common sense judgments within the purview of the legal fact finder.” Id.
(9) those requesting the operation are not seeking it for their own or the public's convenience.  

There are some practical differences in how these two procedures compare. In *Hayes*, the proponent must prove by clear and convincing evidence each of the factors identified. In *Grady*, the standard of proof (clear and convincing evidence) is applied to the issue of whether sterilization is in the best interests of the incompetent, not to the specific factors used in that determination.  

Subsequent cases have followed both the rationale for jurisdiction and the procedures for authorizing a petition for sterilization set down in *Grady*.  

Three other courts have modified the *Grady* and *Hayes* procedures in determining when and how the decision to sterilize should be made.  

One major difference in subsequent decisions has been the requirement of showing that sterilization is medically necessary.

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77. While *Hayes* demands that the proponent prove by clear and convincing evidence that "the current state of scientific and medical knowledge does not suggest either: (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advance in the treatment of the individual's disability," *In re Hayes*, 93 Wash. 228, 239, 608 P.2d 635, 641 (1980), the *Grady* court considers the latter as only a factor to be considered. Thus, the necessity of proving a negative is overcome.

78. See supra note 32.

79. The Alaska Supreme Court held that the best interests of the incompetent had to be proved by clear and convincing evidence. The court set criteria that the individual: (1) cannot make a decision about sterilization; (2) is capable of reproduction; (3) could not adequately care for a child; (4) cannot use other methods of contraception; and (5) there is no less restrictive alternative. Finally, the court must determine whether the request reflects interests other than those of the mentally retarded individual.  

The Colorado Supreme Court held that a court must first determine whether the individual is capable of reproduction and unlikely to improve in ability to make an informed decision. Without specifically mandating the clear and convincing evidence standard for these factors, the court did reiterate the concern of the *Hayes* court that the mentally retarded youth might never be able to prove incapacity to consent using the clear and convincing evidence standard. The major difference, however, was that the court must find by clear and convincing evidence that sterilization is medically essential.  

The Maryland Supreme Court also used the clear and convincing standard to show that sterilization was in the best interests of the incompetent. The factors included a determination that the individual is capable of reproduction. The court must examine the availability of alternative and less intrusive methods of birth control or sterilization procedures. The age of the individual and the possibility of future scientific advances that would improve the mental condition also must be considered. Again, the court must find by clear and convincing evidence that sterilization is medically necessary to preserve the life or physical or mental health of the incompetent.  

80. See supra note 79.
IV. REVIEW OF STATE LEGISLATION

Because procreative decisions implicate fundamental rights, any limitation on the right to make such decisions must be narrowly drawn and further a compelling state interest. Previous state justifications for sterilization are no longer valid. The notion that sterilization is necessary for mentally retarded persons so that they will not be able to reproduce offspring with similar characteristics has been thoroughly discredited. Similarly, sterilization as a means of punishment is no longer condoned. The most common current rationale for legislation governing sterilization legislation parallels the “best interest” standard found in case law.

The American Bar Foundation recently undertook a search of state statutes governing the sterilization of the mentally retarded. Twenty-six states were found to have laws which authorize sterilization of mentally disabled persons, the majority of which also apply to the developmentally disabled. The statutes vary widely in their protection of mentally retarded minors’ rights. Some statutes contain provisions which entirely exclude minors.

The most important feature of many of the statutes is the procedural protections afforded those confronted with the prospect of sterilization. Many statutes contain provisions for both prehearing and posthearing procedures. The majority of statutes require that notice of the application of sterilization be given to concerned parties. The purpose served by the notice requirement is weakened, however, when not followed by a mandatory hearing. Several states additionally require either the appointment of an attorney or guardian ad litem to assist in the proceedings.

In reviewing the statutory legislation designed to regulate the conditions upon which sterilization is to occur, the following recommendations are proposed. These suggestions are taken from provisions of several statutes and include both a prehearing and posthearing phase.

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84. See id.
85. *Id.* at 523-24.
86. *Id.*
87. *Id.*
88. *Id.* at 525.
89. *Id.*
The specific provisions listed below comprise the most stringent of the current provisions.

A. Prehearing Procedures

The statute should cover as many people as is practical to eliminate possible confusion and insure an available forum for those who choose sterilization. Both institutionalized and noninstitutionalized, as well as physically and mentally disabled persons should be covered. No age requirement is recommended because the necessity of the sterilization will be determined on a case-by-case basis. Naturally, it would be very difficult to argue for the sterilization of an eight-year-old child.

The application for sterilization should be allowed to be made by any interested party. This would include specifically authorizing the superintendent of an institution, a parent, guardian, or the individual desiring sterilization to make application for sterilization. A broad provision allows an opportunity for the person to be sterilized as well as makes explicit those responsible for initiating procedures if they want a person sterilized. A determination must first be made that the person is incapable of consent. If this is found, then a requirement of notice must be given to the relevant parties twenty days before a hearing date is set.

B. Hearing and Posthearing Procedures

Counsel should be required at all stages of the proceedings. The presence of the person to be sterilized should be mandatory at the hearing. The rationale for sterilization should be that it is in the best interests of the individual. The factors to be used in that determination should be those elaborated in *Hayes*, including the clear and convincing standard of proof. Finally, there should be a waiting period of thirty days in case of appeal.

V. THE STATE OF LAW IN NEBRASKA

A. Legislation in Nebraska

There is currently no legislation in Nebraska governing the sterilization of mentally retarded minors. The most recent applicable statutes were repealed in 1969. In the previous fifty-four years, however, Nebraska had statutes governing sterilization. As early as 1915, the first legislation addressing the sterilization of the “feeble-minded” and “insane” was drafted.90 The first statutes provided that “no feeble-minded or insane inmate of a state institution shall be discharged capable of bearing offspring.”91 A board of examiners was required to

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90. NEB. COMP. STAT., ch. 66, art. XV, §§ 7059-7062 (1922).
91. Id. at § 7059.
examine all inmates for the appropriateness of the procedure.\textsuperscript{92} As a measure of concern, the operation was to be explained to the "inmate and to the husband, wife, parent, guardian or nearest kin of such inmate."\textsuperscript{93} Further, "no such operation shall be performed without the written consent of such husband, wife, parent, guardian, or nearest kin, as the case may be, and assent of such inmate so far as said inmate is capable of assenting thereto."\textsuperscript{94}

The sterilization statutes were altered in 1929.\textsuperscript{95} Procedural safeguards were implemented to include the requirement of notice, a hearing, and a specific finding of necessity for the procedure as well as the opportunity for appeal.\textsuperscript{96} Additionally, upon order of the court (considering board recommendations), any inmate convicted of rape, incest, or any crime against nature, was to be castrated. As consideration for the ordeal, the inmate became eligible to apply for a commutation of sentence within one year of the castration.\textsuperscript{97}

The final changes in Nebraska sterilization legislation took place in 1957.\textsuperscript{98} The statutes were changed to apply only to inmates of Beatrice State Hospital. The castration provision was repealed and the specific procedural guidelines were modified slightly. An appeal from the board could be taken to the district court and later to the Nebraska Supreme Court. The entire statutory scheme covering sterilization was repealed in 1969.\textsuperscript{99}

\subsection*{B. Nebraska Case Law}

The Nebraska Supreme Court's involvement with sterilization issues has been relatively limited. The only significant cases to come before the court concerned the constitutionality of Nebraska's now repealed sterilization statutes. The first case to reach the supreme court questioned the constitutionality of the Nebraska statute which conditioned the release from a state institution upon sterilization.\textsuperscript{100} Reflecting the sanctioned views of the time, Judge Dean wrote:

\begin{quote}
[T]he legislative act before us is in the interest of the public welfare in that its prime objective is to prevent the procreation of mentally and physically abnormal human beings. We think it is within the police power of the state to provide for the sterilization of feeble-minded persons as a condition prerequi-
\end{quote}

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92. \textit{Id.} at §§ 7060-7061. \\
93. \textit{Id.} at § 7062. \\
94. \textit{Id.} \\
95. \textit{NEB. COMP. STAT.}, ch. 83, art. XV, §§ 83-1501 to -1510 (1929). \\
96. \textit{Id.} at § 1505. \\
97. \textit{Id.} at § 1504. \\
99. 1969 Neb. Laws 574. \\
100. \textit{In re Clayton}, 120 Neb. 680, 234 N.W. 630 (1931). \textit{See supra} text accompanying note 87 for a discussion of this statute.
\end{tabular}
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Involuntary Sterilization

Site to release from a state institution.101

In *State v. Cavitt*,102 the Nebraska Supreme Court was again called upon to determine the constitutionality of a statute making sterilization a condition of parole or discharge.103 In a 5-2 decision, the statute was held constitutional. In summing up the opposing arguments, Judge Carter stated:

The opposition to such a statute as we have before us is largely based on the assumption that the operation is inhuman, unreasonable, and oppressive. The surgical operation of vasectomy on mentally defective males and salpingectomy on mentally defective females is a simple operation without pain or discomfort to the patient. It does not reduce his sex impulses nor limit his capacity to engage in sexual relations. It does no harm to the patient other than to eliminate the capacity to procreate.104

Although the Nebraska Supreme Court has not decided a case directly recognizing the right to be sterilized or the right to resist sterilization, *In re Burbanks and Rima* gives an indication as to how the court might rule.105 *Burbanks* involved the termination of parental rights of an allegedly mentally retarded couple. The court noted in dicta that the director of Multi-County Social Service Unit 122 had assisted in processing legal instruments executed by the allegedly mentally retarded parents authorizing the mother to have an abortion and be sterilized.106 The court concluded:

The abortion did take place. The director testified that the sterilization did not. However, there is other evidence in the record that it may have taken place. At what time and on whose initiative does not appear. The director testified that [the mother] understood what she was signing.

We have searched the statutes to determine whether any welfare agency in Nebraska is authorized to engage in such activities. We find none. The Supreme Court of the United States has held that a woman does have a consti-

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101. *Id.* at 684, 234 N.W. at 632.
103. Specifically, the provision called into question concerned a statute which read in pertinent part:
    It shall be the duty of the board of examiners to make a psychiatric and physical examination of these patients and, if after a careful examination, such board of examiners finds that such patient is mentally deficient, in the opinion of the board of examiners, is apparently capable of bearing and begetting offspring and, based on their psychiatric and medical findings as a result of this examination, it is the opinion of the board of examiners that such patient be made sterilized, as a condition prerequisite to the parole or discharge, then such patient shall not be paroled or discharged, as the case may be, unless said patient be made sterile, and that such operation be performed for the prevention of procreation as in the judgment of the board of examiners would be most appropriate to each individual case.
    *Id.* at 714, 157 N.W.2d at 174.
104. *Id.* at 721, 157 N.W.2d at 178.
106. *Id.* at 702, 310 N.W.2d at 151.
tutional right to an abortion. It would seem to follow that a woman also has a concomitant right not to have the above-described procedures performed. 107

VI. CONCLUSION

Because of the repealed legislation on sterilization in Nebraska, an argument could be made that the legislature is the proper forum for outlining the procedures to determine the sterilization rights of mentally retarded minors. Even with legislation, however, it is ultimately the courts that make the final determination of whether the sterilization will actually take place.108 Additionally, courts are called upon to determine whether the statutes authorizing the procedures are constitutional.109

Several advantages inhere in pushing for a judicial response. The most obvious advantage is that of speed. A petition could either be granted or denied far sooner than legislation could be enacted. Of the courts in Nebraska, the proper court to petition for authorization of sterilization would be the district court.110 The Nebraska court could arguably rest its authority to consider sterilization petitions upon the jurisdictional basis of parens patriae.111 Nebraska could further adopt

108. Many of the statutes directly refer the matter to the court. See e.g., In re Penny N., 120 N.H. 269, 414 A.2d 541 (1980) (a New Hampshire statute provided that the guardians, in this case the parents of incapacitated persons, “may give any necessary consent or approval to enable the ward to receive medical... care,” but “no guardian may give consent for sterilization... unless the procedure is first approved by order of the probate court.” N.H. REV. STAT. ANN. § 464-A:25 I(c) (1983)).
109. In In re Valerie N., 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985), the California Supreme Court held that a statutory scheme denying developmentally disabled persons the right to be sterilized was overbroad and violative of state and federal guarantees of privacy and liberty. The statutes did not provide for the option of choosing sterilization as a means of contraception. The court eventually adopted the standards enunciated in Hayes. Id.
110. The district court in Nebraska has authority to “exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except when otherwise provided.” Neb. Rev. Stat. § 24-302 (1985). It has been judicially recognized that district courts are courts of equity. Rhoades v. Rhoades, 78 Neb. 495, 111 N.W. 122 (1907). The Nebraska Supreme Court has no original jurisdiction in equity. Neb. Rev. Stat. § 24-204 (1985). The Nebraska Supreme Court can, of course, hear matters of equity upon review.

The county court has jurisdiction pursuant to Neb. Rev. Stat. § 24-517 (Cum. Supp. 1986). This court has “exclusive original jurisdiction of all matters relating to guardianship or conservatorship of any person... [and] exclusive original jurisdiction in all juvenile matters, except in counties which have established separate juvenile courts. ...” Id. The preference of the district court stems from their specifically recognized authority in equity. Similarly, juvenile courts retain jurisdiction over juveniles only when they fall within one of eight categories. Neb. Rev. Stat. § 43-247 (Cum. Supp. 1986) The possibility of a mentally retarded minor falling within one of these required categories is remote.
111. Thus far, the Nebraska Supreme Court has relied primarily on the doctrine of
the standards outlined in *Hayes* in determining whether to grant the parent or guardian of an incompetent minor the authority to consent to the minor’s sterilization. These standards are the most rigorous to be proposed, insuring that the best interest of the minor is considered. If the petition is denied, and subsequent appeals fail, then legislative action is still an option. The strategy would then be to go before the legislature with the judicial refusal to authorize a petition.

The ultimate question is which branch should formulate the rules under which the determination to sterilize is made. The lack of a structure to authorize sterilizations currently denies mentally retarded minors the opportunity to exercise their constitutional rights. Without either judicial or statutory guidelines, there is confusion as to the conditions under which sterilization should occur. The result is that mentally retarded minors are being sterilized for better or for worse depending on the benevolence of their parents or guardians. Constitutional rights should not hang on such fortuitous circumstances. It is time for a decision to be made in Nebraska about the conditions under which sterilization should take place. Not deciding, of course, is a decision in itself. This is currently the Nebraska decision and it must not be allowed to stand.

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*pars patriae* in cases involving child custody. Such an extension would be appropriate in the case of mentally retarded minors. See Copple v. Copple, 186 Neb. 696, 185 N.W.2d 846 (1971); *In re Reed*, 152 Neb. 819, 43 N.W.2d 161 (1950).