INHERENT PARENS PATRIAE AUTHORITY EMPOWERS COURT OF GENERAL JURISDICTION TO ORDER STERILIZATION OF INCOMPETENTS

In re C.D.M., 627 P.2d 607 (Alaska 1981)

In *In re C.D.M.*[1] the Alaska Supreme Court joined a growing minority of state courts[2] which have held that the inherent parens patriae[3] authority of a court with general jurisdiction[4] empowers that court to

1. 627 P.2d 607 (Alaska 1981).

2. *See In re* Grady, 170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd mem.*, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (Sup. Ct. 1976); *In re* Simpson, 180 N.E.2d 206 (Ohio P. Ct. 1962); Guardianship of Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980). *See infra* notes 55 & 95-96 and accompanying text.

3. Parens patriae means literally parent of the country. The term originated in English common law when the King acted as guardian to persons with legal disabilities such as infants, idiots, and lunatics. BLACKS LAW DICTIONARY 1003 (5th ed. 1979). The King delegated the crown's powers of administration over persons of unsound mind to the Chancellor's personal authority as keeper of the King's conscience. Tourson's Case, 77 Eng. Rep. 730 (1611); Beverly's Case, 76 Eng. Rep. 1118, 1126 (1603); 3 W. BLACKSTONE, COMMENTARIES *427-28. The King's delegation of authority to the Chancellor conferred no jurisdiction to the Chancery Court over persons non compos mentis or their estates. Beall v. Smith, 9 L.R.-Ch. 85, 92 (1873). "[T]he law always imagines that those . . . misfortunes may be removed." 1 W. BLACKSTONE, COMMENTARIES *304. Statutory enactments later vested jurisdiction over incompetents in the Chancery Courts. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 475-76 (3d ed. 1922); 2 H. MADDOCK, A TREATISE ON THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY 723 (1827); 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 481 (2d ed. 1909).

In the United States, parens patriae refers to the state, as a sovereign, in its role as guardian. West Virginia v. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971). *See, e.g.*, McIntosh v. Dill, 86 Okla. 1, 10, 205 P. 917, 925 (1922) (dictum) (federal government parens patriae to American Indians). In State *ex rel.* Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109 (1974), the court observed that "one can reasonably believe that the early doctrine of parens patriae was conceived in avarice and executed without charity." *Id.* at 427, 202 S.E.2d at 117-18. The court also noted that "[e]arly reported English law primarily adjudicated disputes among men of property, and the early development of parens patriae was more a state fiscal policy than a humanitarian doctrine." *Id.* at 427, 202 S.E.2d at 118. The court, as a department of the state, in exercising equity powers is acting in the capacity of parens patriae. Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950). *See, e.g.*, Lindsay v. People, 66 Colo., 348, 181 P. 531 (1919), *cert. denied*, 255 U.S. 560 (1920); Sangster v. Toledo Mfg. Co., 195 Ga. 685, 19 S.E.2d 723 (1942); Deal v. Wachovia Bank & Trust Co., 218 N.C. 483, 11 S.E.2d 464 (1940); Latta v. General Assembly of Presbyterian Church, 213 N.C. 462, 196 S.E. 862 (1938). *See also* Yeomans v. Williams, 117 Ga. 800, 800-01, 45 S.E. 73, 73 (1903); Howard v. Howard, 87 Ky. 616, 618-19, 9 S.W. 411, 412-13 (1888); *In re* Easton, 214 Md. 176, 183, 133 A.2d 441, 445-46 (1957); Bliss v. Bliss, 133 Md. 61, 71, 104 A. 467, 471 (1918); Hughes v. Jones, 116 N.Y. 67, 74-75, 22 N.E. 446, 448-49 (1889).

4. A court of general jurisdiction has the right and power to adjudicate all controversies at law and in equity within the legal bounds of rights and remedies. Conversely, the authority of a court of limited jurisdiction is wholly statutory, deriving no power from the common law, and as such, is strictly limited to the authority granted to it by statute. BLACK'S LAW DICTIONARY 616,

order the sterilization[5] of incompetents.[6]

Guardians of C.D.M.[7] petitioned the Alaska Superior Court for an order authorizing C.D.M.'s sterilization.[8] C.D.M., a physically mature young woman, was afflicted with Down's Syndrome[9] and classified

836 (5th ed. 1979). The distinction between a court of general and limited jurisdiction is found in the laws that establish the court. Sylvester's Adm'r. v. Willson's Adm'r., 2 Alaska 325 (1905). *See* Fine v. Commonwealth, 312 Mass. 252, 256, 44 N.E.2d 659, 661 (1942); Bryan v. Miller, 73 N.D. 487, 495-96, 16 N.W.2d 275, 281 (1944); Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., 109 Pa. Super. 571, 578, 167 A. 636, 638 (1933); Howe v. Lisbon Sav. Bank & Trust Co., 111 Vt. 201, 207-08, 14 A.2d 3, 5-6 (1940); *In re* Hudson, 13 Wash. 2d 673, 697-98, 126 P.2d 765, 777 (1942); Smith v. Smith, 81 W. Va. 761, 763, 95 S.E. 199, 200 (1918). *See also infra* note 16.

5. Sterilization is a surgical method rendering an individual incapable of procreation. The most common procedures for women are tubal ligation or salpingectomy and hysterectomy. For men the most common method is the vasectomy. *See generally* LANDMAN, HUMAN STERILIZATION 207-11 (1932); LaVeck & de la Cruz, *Contraception for the Mentally Retarded: Current Methods and Future Prospects,* in HUMAN SEXUALITY AND THE MENTALLY RETARDED 94-104 (F. de la Cruz & G. LaVeck eds. 1973); Shaman, *Persons Who Are Mentally Retarded—Their Right to Marry and Have Children,* 12 FAM. L.Q. 61, 76 (1978). Recent medical studies indicate that surgical restoration of continuity in vasectomies and, to a lesser extent in tubal ligations, is possible. These sterilization procedures, however, are generally regarded as permanent and irreversible. *See generally* G. JOHNSON & S. GOLDFINGER, THE HARVARD MEDICAL SCHOOL HEALTH LETTER BOOK 188 (1981); R. SHANE & C. POWERSTEIN, FERTILITY CONTROL, BIOLOGIC & BEHAVIORAL ASPECTS 115 (1980).

6. The term "incompetent" refers to individuals with impaired mental facilities. The American Association on Mental Deficiency defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." I. AMARY, THE RIGHTS OF THE MENTALLY RETARDED—DEVELOPMENTALLY DISABLED TO TREATMENT AND EDUCATION 11 (1980); P. FRIEDMAN, THE RIGHTS OF MENTALLY RETARDED PERSONS 13 (1976). The degree of a person's mental impairment is typically determined by intelligence tests scored on the Wechsler or Stanford-Binet scales. *See generally* Hecht, *Human Chromosome Aberrations: Correlations with Mental and Growth Retardation,* in THE GENETIC, METABOLIC AND DEVELOPMENTAL ASPECTS OF MENTAL RETARDATION 5-25 (1972); McCormack, Briglia & Coppola, *Age Trends in the Occurrence of Down's Syndrome,* in PREVENTION OF MENTAL RETARDATION AND OTHER DEVELOPMENTAL DISABILITIES 251-265 (M. McCormack ed. 1980); Murray, *Simple Mental Retardation,* in THE GENETIC, METABOLIC AND DEVELOPMENTAL ASPECTS OF MENTAL RETARDATION 159-160 (R. Murray & P. Lockhart-Rosser, ed. 1972); Sorgen, *The Classification Process and Its Consequences,* in PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 63-87 (1976); Note, *Eugenic Sterilization Statutes: A Constitutional Reevaluation,* 1975 J. FAM. L. 280, 295 n.75 (1975). *See also In re* C.D.M., 627 P.2d 607, 608 n.2 (Alaska 1981); *In re* Grady, 170 N.J. Super. 98, 105-06, 405 A.2d 851, 855 (1979), *aff'd mem.,* 85 N.J. 235, 426 A.2d 467 (1981).

7. C.D.M.'s guardians are her parents. 627 P.2d at 608. ALASKA STAT. § 13.26.145 (1973), provides in pertinent part: "Any competent person . . . may be appointed guardian of an incapacitated person . . . [including] a parent of the incapacitated person."

8. The court order of March 19, 1978, appointing C.D.M.'s legal guardian specifically required that the guardian obtain court authorization prior to sterilization. 627 P.2d at 609 n.3.

9. Down's Syndrome, or Trisomy 21, is a genetic defect characterized by three 21 chromo-

under a state statute as an "incapacited person."[10] On the merits,[11] the superior court found that sterilization[12] was in C.D.M.'s best interest.[13]

---

somes instead of the usual pair. 627 P.2d at 608 n.1. According to modern medical theory, the extra chromosome is transmitted by a dominate defective gene, which is usually a mutation of the mother's genes caused by advancing age. Although scientists have not isolated either the cause of or the cure for the defect, a stricken individual's average life expectancy is fifty or more years. *See generally* R. ALLEN, A. CORTAZZO & R. TOISTER, THE ROLE OF GENETICS IN MENTAL RETARDATION (1971); M. MCCORMACK, PREVENTION OF MENTAL RETARDATION AND OTHER DEVELOPMENTAL DISABILITIES (1980); R. MURRAY & P. ROSSER, THE GENETIC, METABOLIC AND DEVELOPMENTAL ASPECTS OF MENTAL RETARDATION (1972); PUESCHEL, DOWN'S SYNDROME: GROWING AND LEARNING (1978) *cited in In re* C.D.M., 627 P.2d at 608 n.1; H. ROBINSON & N. ROBINSON, THE MENTALLY RETARDED CHILD (1965); LaVeck & de la Cruz, *supra* note 5; Smith, *Clinical Aspects of Genetics in Mental Retardation,* in THE ROLE OF GENETICS IN MENTAL RETARDATION (1971).

10. 627 P.2d at 608. ALASKA STAT. § 13.26.005(1) (1973) provides in part:

> (1) "incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person . . . ."

C.D.M. was educably mentally handicapped with an I.Q. in the fifties. *See supra* note 6. When the court heard the case, C.D.M. was receiving vocational training and was a part time employee at a fast food restaurant.

11. The superior court considered the following factors to determine whether sterilization was in the best interest of C.D.M.: C.D.M.'s inability to prevent pregnancy and independently raise a child, the possibility that her child would have Down's Syndrome, and her own need of custodial supervision. 627 P.2d at 608-09. *See also infra* note 33.

The guidelines the Alaska Supreme Court set forth for consideration on remand required a showing by clear and convincing evidence that sterilization was in C.D.M.'s best interest. The grounds for determining of best interests include: (1) capacity to reproduce, (2) inability to provide for offspring, (3) physical and psychological inability to cope with pregnancy, (4) unavailability of less restrictive alternatives, (5) desire to be sterilized, and (6) genuine concern motivating the petitioner. 627 P.2d at 612-13. *See infra* note 84.

12. The superior court specifically found that a tubal ligation was the safest procedure. 627 P.2d at 609.

13. As guardian of all "infants, idiots, and lunatics" under parens patriae, the King had a duty to promote their best interests. *See, e.g.*, Rebecca Owings' Case, 1 Bland's Ch. 290, 294 (Md. 1827); *In re* Mason, 1 Barb. 436, 441-43 (N.Y. 1847). *See also infra* note 3.

The best interests test theoretically applies both subjective and objective standards to determine what is best for the legal incompetent. Applying the test, a court balances "the individual's right to be free from interference against the individual's need to be treated." *In re* Weberlist, 79 Misc. 2d 753, 756, 360 N.Y.S.2d 783, 786 (1974). Under this test, the incompetent's articulated desires are subsumed within objective considerations such as the incompetent's overall welfare and psychological benefit. Note, *Of Love and Laetrile: Medical Decision Making in a Child's Best Interests,* 5 AM. J.L. & MED. 271, 289-91 (1979). The courts entertain a presumption that parents act in their child's interest. Parham v. J.R., 442 U.S. 584, 604-605 (1979).

Courts, alternatively or in combination with the best interests test, apply the subjective equity doctrine of substituted judgment, first articulated in the English case of *Ex parte* Whitbread, 35 Eng. Rep. 878 (Ch. 1816), in which the court acted for the incompetent in property matters. *See, e.g., In re* Whitaker, 42 Ch. D. 119 (1889); *In re* Strickland, 6 L.R.-Ch. 226 (1871); *In re* Carysfort,

The court nevertheless denied the petition and held that without specific statutory authorization the court lacked jurisdiction to issue the order.[14] On appeal, the Alaska Supreme Court *held*: An Alaska superior court, through its inherent parens patriae authority as a court of general jurisdiction, has jurisdiction to entertain and act upon a petition requesting court-ordered sterilization of a mental incompetent.[15]

A court's power to exercise jurisdiction over a particular matter is contingent upon its possession of the authority to grant the type of relief requested.[16] A court's jurisdictional authority consequently determines the validity of that court's order of sterilization as a remedy.

---

41 Eng. Rep. 418 (1840); *In re* Blaire, 40 Eng. Rep. 390 (Ch. 1836). The leading American case of *In re* Willoughby, 11 Paige Ch. 257 (N.Y. Ch. 1844), applied the doctrine to act for the incompetent "as it supposes he would act were he of sound mind" to provide allowances out of the incompetent's estate for support of relatives. As in England, the doctrine originally applied to property matters. *See, e.g., In re* Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505 (1967); *In re* Du-Pont, 41 Del. Ch. 300, 194 A.2d 309 (1963); *In re* Carson, 39 Misc. 2d 544, 241 N.Y.S.2d 288 (Sup. Ct. 1962); Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964). *See generally* Comment, *The Development of the "Substituted Judgment" Rule and Its Application in New York as a Vehicle for Estate Planning for Incompetents,* 33 ALB. L. REV. 597 (1969); Note, *Courts—Scope of Authority—Sterilization of Mental Incompetents,* 44 TENN. L. REV. 879 (1977). The doctrine now extends to cover purely personal affairs of the incompetent. Strunk v. Strunk, 445 S.W.2d 145 (Ky. App. 1969). In *Strunk*, the Kentucky Court of Appeals extended substituted judgment under its inherent equity power to authorize a kidney transplant from an incompetent to his brother. The decision was met with the same kinds of concerns and criticisms expressed today as courts continue expanding the reach of equity jurisdiction into purely personal affairs. *See id.* at 151 (Steinfeld, J., dissenting) (could establish a dangerous legal precedent); Note, *Equity—Transplants—Power of Court to Authorize Removal of Kidney From Mental Incompetent for Transplantation into Brother,* 16 WAYNE L. REV. 1460, 1474 (1970) (substituted judgment doctrine fails to provide sufficient safeguards). Although two kidney transplant cases decided subsequent to *Strunk* were expressly limited to their facts, *see* Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386, 391 (Conn. Super. Ct. 1972); Little v. Little, 576 S.W.2d 493 (Tex. Civ. App. 1979), courts have cited them as support for intrusion into the personal affairs of incompetents. *See infra* note 79.

14. 627 P.2d at 609.

15. *Id.* at 612.

16. The right of a court to exercise jurisdiction in a particular case is contingent not only upon the court's power over the parties, the subject-matter, and the *res*, but also upon "the authority of the court to render the judgment or decree which it assumes to make . . . [which] depends upon the nature and extent of the authority vested in it by law." Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 316-17 (1870). A court acts in excess of its jurisdiction if it acts in a manner that deprives an individual of a constitutional right. Wuest v. Wuest, 53 Cal. App.2d 339, 127 P.2d 934 (1942); McClatchy v. Superior Court, 119 Cal. 413, 418, 51 P. 696, 698 (1897).

The jurisdictional reach of a court of limited jurisdiction, such as a juvenile court, is bound by those powers expressly conferred by statute or by the state constitution. *In re* M.K.R., 515 S.W.2d 467, 470 (Mo. 1974); *In re* D.D., 64 A.D.2d 898, 899, 408 N.Y.S.2d 104, 105 (1978); Frazier v. Levi, 440 S.W.2d 393, 395 (Tex. Civ. App. 1969). A court of general jurisdiction sitting in probate or under a special statutory power is a court of limited jurisdiction. It is constrained in the exercise of its authority to that granted by statute. Guardianship of Kemp, 43 Cal. App. 3d 758, 761, 118

Courts in twenty states have specific grants of authority through compulsory sterilization statutes.[17] The statutes in only five of those states have provisions applicable to noninstitutional incompetents.[18] In states without sterilization statutes, a court's permission is necessary to sterilize an incompetent.[19] Courts have split over whether, in the absence of specific statutory authorization,[20] they have the authority to order sterilization.[21]

Cal. Rptr. 64, 66 (1974); State v. Taylor, 323 S.W.2d 534, 537 (Mo. Ct. App. 1959). *See also supra* note 4.

17. *See* ALA. CODE §§ 22-8-1 to -8 (1971); ARK. STAT. ANN. § 59-501 (1972); CAL. WELF. & INST. CODE § 7254 (West Cum. Supp. 1977); CONN. GEN. STAT. ANN. § 19-569(g) (West Cum. Supp. 1977); DEL. CODE ANN. tit. 16, §§ 5701-5705 (1974); GA. CODE ANN. §§ 84-931 to -936 (1975); IDAHO CODE §§ 39-3901 to -3910 (1977); ME. REV. STAT. ANN. tit. 34, §§ 2461-2468 (1973); MINN. STAT. ANN. § 252A.13 (West Cum. Supp. 1977); MISS. CODE ANN. §§ 41-45-1 to -19 (1972); N.C. GEN. STAT. §§ 35-36 to -50 (1976); N.D. CENT. CODE §§ 25-04.1-01 to -04.1-08 (1970); OKLA. STAT. ANN. tit. 43a, §§ 341-346 (West 1954); OR. REV. STAT. §§ 436.010 to .150 (1973); S.C. CODE ANN. §§ 44-47-10 to -47-100 (Law. Co-op 1977); UTAH CODE ANN. §§ 64-10-1 to -10-13 (Supp. 1975); VT. STAT. ANN. tit. 18, §§ 8701-8704 (1977); VA. CODE § 37.1-171.1 (1976 & Cum. Supp. 1977); WASH. REV. CODE ANN. § 9.92-100 (1961); WIS. STAT. ANN. § 46.12 (West 1975).

18. *See* ARK. STAT. ANN. §§ 59-502 (1972); DEL CODE tit. 16, § 5702 (1974); ME. REV. STAT. ANN. tit. 34, §§ 2461 (1973); UTAH CODE ANN. §§ 64-10-1 to -10-13 (Supp. 1975); VT. STAT. ANN. tit. 18, § 8701 (Supp. 1977). In California, pending Assembly Bill 603 would authorize a court to grant an incompetent's guardian the power to consent to the sterilization. 5 MENTAL DISABILITY L. REV. 199, 199 (1981).

The question of whether the existence of statutory procedure for the sterilization of institutionalized incompetents presents an equal protection violation of the rights of noninstitutionalized incompetents is beyond the scope of this Comment.

19. Physicians generally will not perform sterilization on incompetents without court authorization. Physicians fear potential tort liability which arises in the absence of effective legal consent. For a discussion of the consent issue, see *infra* note 66. *See* Note, *A Woman's Right to Voluntary Sterilization,* 22 BUFFALO L. REV. 291, 293-96 (1973). *Contra* Down v. Sawtelle, 574 F.2d 1 (1st Cir.), *cert. denied,* 439 U.S. 910 (1978); Relf v. Weinberger, 372 F. Supp. 1198 (D.D.C. 1974); Beck v. Lovell, 361 So. 2d 245 (La. Ct. App. 1978). *But see* Narot, *The Moral and Ethical Implications of Human Sexuality as They Relate to the Retarded,* in HUMAN SEXUALITY AND THE MENTALLY RETARDED 195, 204 (F. de la Cruz & G. LaVeck eds. 1973). *See also* Winters v. Miller, 446 F.2d 65 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971); Dunham v. Wright, 423 F.2d 940 (3d Cir. 1970); Banks v. Wittenberg, 82 Mich. App. 274, 266 N.W.2d 788 (1978); Shulman v. Lerner, 2 Mich. App. 705, 141 N.W.2d 348 (1966); Abril v. Syntex Laboratories, Inc., 81 Misc. 2d 112, 364 N.Y.S.2d 281 (Sup. Ct. 1975); Barnette v. Polewza, 79 Misc. 2d 51, 359 N.Y.S.2d 432 (Sup. Ct. 1974).

20. For an example of a state statute that specifically authorizes a probate court to order sterilizations of incompetents upon petition by a parent or guardian, see ARK. STAT. ANN. § 59-501(A)-(M) (1972). *See generally* Note, *Sexual Sterilization: A New Rationale?,* 26 ARK. L. REV. & B. ASS'N J. 353, 356-57 (1972). *See also infra* notes 23 & 25.

21. The United States Supreme Court recently denied certiorari to a California Court of Appeals decision that proscribed any California court from ordering sterilizations until the legisla-

Although the United States Supreme Court has not addressed a court's jurisdictional authority to order sterilization, it has in several cases ruled on the constitutionality of state statutes authorizing sterilization of institutionalized persons.[22] In *Buck v. Bell*,[23] for example, the

ture explicitly confers that power upon the courts. Guardianship of Tulley, 83 Cal. App. 3d 698, 705, 146 Cal. Rptr. 266, 270 (1978), *cert. denied,* 440 U.S. 967 (1979).

Compare Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom. on other grounds,* Stump v. Sparkman, 435 U.S. 349 (1978) (no authority to order sterilizations absent statutory authorization); Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971) (same); Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979) (same); Guardianship of Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 226 (1978), *cert. denied,* 440 U.S. 967 (1979) (same); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) (same); *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977) (same); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968) (same); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974) (same); *In re* A.D., 90 Misc. 2d 236, 394 N.Y.S.2d 139 (N.Y. Surr. Ct. 1977), *aff'd sub nom. on other grounds, In re* D.D., 64 A.D.2d 898, 408 N.Y.S.2d 104 (1978) (same); *In re* Lambert, No. 61-156 (Tenn. Ct. App. Oct. 29, 1976) (same); *In re* Gonzalez, No. 150-158 (Tex. P. Ct. April 30, 1980) (same); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969) (same) *and In re* Eberhardy, 97 Wis. 2d 654, 294 N.W.2d 540 (1980) (same) *with In re* C.D.M., 627 P.2d 607 (Alaska 1981) (court has parens patriae authority to order sterilizations); *In re* Grady, 170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd mem.,* 85 N.J. 235, 426 A.2d 467 (1981) (same); *In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 898 (Sup. Ct. 1976) (same); *In re* Simpson, 180 N.E.2d 206 (Ohio P. Ct. 1962) (same) *and* Guardianship of Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (same).

22. The Supreme Court noted probable jurisdiction over an appeal challenging a Nebraska compulsory nontherapeutic sterilization statute. *See* Sterilization of Inmates of Beatrice State Home, NEB. REV. STAT. § 83-501 to -508 (1943) (repealed 1969). The Nebraska legislature repealed the statute in question, prior to counsel's arguments and consequently the Supreme Court dismissed the appeal as moot. *In re* Cavitt, 182 Neb. 712, 157 N.W.2d 171, *aff'd on rehearing,* 183 Neb. 243, 159 N.W.2d 566 (1968), *prob. juris. noted sub nom.* Cavitt v. Nebraska, 393 U.S. 1078, *vacated as moot,* 396 U.S. 996 (1970). If the Supreme Court had heard *Cavitt* it would have reexamined the ruling in Buck v. Bell, 274 U.S. 200 (1927). For a discussion of *Cavitt* and its implications, see Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons,* 50 TEMP. L.Q. 995, 1016-1020 (1977).

23. 274 U.S. 200 (1927). In *Buck*, an eighteen year old institutionalized incompetent challenged the Virginia sterilization statute as violative of the due process and equal protection clauses of the fourteenth amendment. Buck argued that the statute denied her liberty from mutilation of body organs. Buck also argued that the statute violated the equal protection clause because it divided a "natural class of persons" into two groups and arbitrarily governed them pursuant to an objective of ridding society of those persons deemed undesirable. *Id.* at 202. Justice Holmes, delivering the opinion of the Court, held that the statute's procedural safeguards—proper notice, hearing, and appeal to state court—afforded adequate due process of law. *Id.* at 206-07. Justice Holmes' discussion of the state's interest in preventing the strength of the state from being sapped by incompetents reproducing included his infamous statement "[t]hree generations of imbeciles are enough." *Id.* at 207.

In 1974, the Virginia legislature repealed the statute upheld in *Buck*. Act of April 2, 1974, Ch. 296, 1974 Va. Acts 445 (repealing Act of March 20, 1924, Ch. 394, 1924 Va. Acts 569). While the statute was in effect, the state allegedly sterilized individuals without their knowledge. Suit is currently pending against certain named Virginia state institutions to require the state to locate, notify and assist those persons. Poe v. Lynchburg Training School and Hosp., No. 80-0172(L) (W.D. Va., filed April 10, 1981). For a discussion of *Buck* and its progeny, see Burgdorf &

Court upheld a compulsory eugenic sterilization statute.[24] In *Skinner v. Oklahoma*,[25] however, the Court held that a penal sterilization statute violated the equal protection clause of the fourteenth amendment.[26]

Burgdorf, *supra* note 22, at 995; Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States,* 43 CHI.-KENT L. REV. 123 (1966).

24. Compulsory eugenic sterilization statutes were designed to eliminate the "root of almost all social problems," by authorizing sterialization of persons with mental and physical disabilities, and thus ridding society of a broad range of defects. Burgdorf & Burgdorf, *supra* note 22, at 997, 1000. The term "eugenics" was coined by Sir Francis Galton from the Greek term "eugenes," meaning "well born." F. GALTON, INQUIRIES INTO HUMAN FACULTY 17 (1908), *cited in* Bligh, *Sterilization and Mental Retardation,* 51 A.B.A.J. 1059, 1960 n.4 (1968).

Galton's theories in combination with the principles of social Darwinism and Mendelian genetics spurred the belief that heredity was responsible for incompetence, and is considered primarily responsible for the passage of eugenic sterilization laws in the 1900's. A. DEUTSCH, THE MENTALLY ILL IN AMERICA 357-58 (2d ed. 1949). *See* Bligh, *supra,* at 1960; Burgdorf & Burgdorf, *supra* note 22, at 997-1000; Vukowick, *The Dawning of the Brave New World—Legal, Ethical and Social Issues of Eugenics,* 1971 U. ILL. L.F. 189, 189-192; Note, *supra* note 6, at 281-84. Scientific and medical evidence no longer support the theory that heredity and incompetence are causally connected. *See* PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, MENTAL RETARDATION PAST AND PRESENT 137 (1977) (5% or less of retardation has its foundation in genetics); Matoush, *Eugenic Sterilization—A Scientific Analysis,* 46 DEN. L.J. 631, 637-44 (1969) (analysis of technical data concluding that "sterilization of expressed defectives reaches only a minute fraction of the defects circulating in the gene pool"); Wallin, *Mental Deficiency,* 1956 J. CLINICAL PSYCH. 153 *cited in* Bligh, *supra,* at 1962 n.27 (at least 10% of the normal population are carriers of defectiveness).

25. 316 U.S. 535 (1942). The statute in *Skinner* provided for compulsory sterilization of persons thrice convicted of "felonies involving moral turpitude," exempting from its provisions "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses." *Id.* at 536-37. Holding that procreation and marriage are fundamental rights, the Supreme Court applied strict scrutiny. The Court found that the classification, which lead to sterilization for the perpetrator of grand larceny and immunity for the embezzler, wrought invidious discrimination in violation of the equal protection clause of the fourteenth amendment. *Id.* at 541.

Skinner was the first in a line of Supreme Court holdings that have firmly established that a decision whether or not to procreate is a fundamental right. *See* Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (restrictions on access to means of contraception held unduly burdensome on right to choose whether to bear children); Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976) (state cannot proscribe minors from exercising the decisional choice to terminate a pregnancy); Roe v. Wade, 410 U.S. 113 (1973) (woman's right to terminate pregnancy is fundamental); Eisenstadt v. Baird, 405 U.S. 438 (1972) (Court extended right to use contraceptives to all individuals, finding that decision to have children is a fundamental right); Griswold v. Connecticut, 381 U.S. 479 (1965) (marital privacy held fundamental right). *See* H.L. v. Matheson, 450 U.S. 398 (1981) (state may require notification of minor's parents in certain circumstances); Bellotti v. Baird, 443 U.S. 622 (1979) (state may limitedly circumscribe minors' rights to exercise the decision to choose abortion without parental involvement). *See generally Developments in the Law—The Constitution and the Family,* 93 HARV. L. REV. 1156 (1980).

26. 316 U.S. 535, 538 (1942). The Court described the statute as penal in character and presumably violative of the fourteenth amendment's prohibition of cruel and unusual punish-

The *Skinner* Court established that an individual has a fundamental right to procreate.[27]

In *In re Simpson*[28] Judge Gary, presiding over the probate court,[29] found authority to order a nontherapeutic[30] sterilization from a statu-

---

ment. The Court chose not to discuss this issue. The equal protection clause of the fourteenth amendment instead was the basis of the Court's decision. *See supra* note 25.

27. *See supra* note 25.

28. 180 N.E.2d 206 (Ohio P. Ct. 1962).

29. OHIO REV. CODE ANN. § 2101.01 (Page 1957) states that " 'Probate court' means the probate division of the court of common pleas, and 'probate judge' means the judge of the court of common pleas who is judge of the probate division." The jurisdiction of the probate court is delineated in OHIO REV. CODE ANN. § 2101.24(A)-(P) (Page 1957). The term "probate" historically referred to wills. General usage of the term today includes matters pertaining to guardianships. BLACK'S LAW DICTIONARY 1081 (5th ed. 1979). For further explanation of limited jurisdiction of courts, see *supra* notes 4 & 16.

30. Two authors describe nontherapeutic as being "for socio-economic reasons." Price & Burt, *Sterilization, State Action, and the Concept of Consent,* 1 L. & PSYCH. REV. 57, 80 (1975). Social and economic justifications are replacing eugenic arguments as the questioning of the scientific validity of sterilization for eugenic purposes increases. Bligh, *supra* note 24, at 1062. *See* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 207-25 (rev. ed. 1971).

One social justification posited as serving a state interest is the alleged inability of incompetents to adequately care for their children. *See, e.g., In re* Grady, 85 N.J. 235, 241-42, 426 A.2d 467, 470. This rationalization is of questionable validity. *See* Fester, *Eliminating the Unfit—Is Sterilization the Answer,* 27 OHIO ST. L.J. 591, 624-32 (1966) (incompetence and inadequacy as a parent not necessarily co-extensive); Murdock, *Sterilization of the Retarded: A Problem or a Solution?,* 62 CALIF. L. REV. 917, 931 (1974) (lack of fitness for parenthood not exclusively limited to incompetents—i.e. underinclusive); *id.* at 930 (parenthood within abilities of mildly retarded persons); Robinson & Robinson, *supra* note 9, at 541-56 (capacity of retarded adults to relate and adapt underestimated); Note, *Sterilization, Retardation, and Parental Authority,* 1978 B.Y.U. L. REV. 380, 401 (1978) (90% of incompetents able to function as parents); *Developments in the Law, supra* note 25, at 1302-03 (tenuous link between incompetency and unfitness for parenthood). *Cf.* Ertel v. Ertel, 313 Ill. App. 326, 335, 40 N.E.2d 85, 89 (1942) (common knowledge that incompetents can maintain a satisfactory marital status).

The most significant economic justification for sterilization of incompetents is the prevention of additional financial burdens on the county, state, and national welfare departments. *See, e.g.,* Downs v. Sawtelle, 574 F.2d 1, 4-5 (1st Cir.) (low economic earning power of "dull" mother demonstrated "irresponsibility"), *cert. denied,* 439 U.S. 910 (1978); Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974) (federally funded sterilization of black children after illiterate mother signed consent form with *X*), *on remand,* 403 F. Supp. 1235 (D.D.C. 1975), *appeal dismissed as moot,* 565 F.2d 722 (D.D.C. 1977); *In re* Simpson, 180 N.E.2d 206 (Ohio P. Ct. 1962) (further illegitimate children would burden the county and state welfare roles). *Cf.* Walker v. Pierce, 560 F.2d 609, 611 (4th Cir. 1977) (physician's stated policy that low income mothers submit to sterilization after third child or find another physician); Cox v. Stanton, 529 F.2d 47, 49 (4th Cir. 1975) (social worker threatened to strike family from the welfare rolls unless mother consented to sterilization because mother was black, poor, receiving welfare payments and an unwed mother).

The Supreme Court recognized the potential for abuse of involuntary sterilization in *Skinner*. "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither

tory grant of plenary power[31] in equity.[32] Relying on an implied exercise of its inherent parens patriae authority, the *Simpson* court held that sterilization would best serve the welfare of the incompetent and society.[33] Judge Gary continued authorizing sterilizations for nearly ten years,[34] until the United States District Court in *Wade v. Bethesda Hospital*[35] challenged the basis of jurisdictional authority in sterilization cases. Finding that neither the plenary power of the probate court,[36] nor any statute[37] or judicial precedent[38] other than his own[39] provided

---

and disappear. There is no redemption for the individual whom the law touches." 316 U.S. at 541.

Statistics compiled by the Department of Health, Education and Welfare reveal that: "17.8% of white married women; 19.7% of Black married women; 29.9% of white unmarried women; 30.4% of Black unmarried women" have been sterilized for contraceptive and noncontraceptive reasons as of 1976. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, ADVANCED DATA #36 (Aug. 18, 1978), #40 (Sept. 22, 1978). The Indian Health Service has allegedly sterilized as many as 25% of Native American Indian women of childbearing age. Family planning programs in Puerto Rico have sterilized 35.3% of Puerto Rican women of childbearing age. ELEVENTH NATIONAL CONFERENCE ON WOMEN AND THE LAW SOURCEBOOK, 121 (1980).

The rationale behind the Department of Health, Education and Welfare ban on the use of federal funds for sterilizations of persons under 21, mentally incompetent, or institutionalized was that "permitting federal funded sterilizations of such individuals could lead to abuse . . . ." 43 Fed. Reg. 52, 155 (1978). *See also* Isaacs, *The Law of Fertility Regulation in the United States: A 1980 Review*, 19 J. FAM. L. 65, 77-81 (1980-81).

31. OHIO REV. CODE ANN. § 2101.24 (Page 1957) provides as follows: "The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."

32. 180 N.E.2d at 207. *Contra* Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971).

33. 180 N.E.2d at 208. Judge Gary ordered the sterilization because the incompetent was sexually promiscuious, her illegitimate child needed welfare aid, state institutions had no room due to overcrowding, and the burden additional children would place on the county and state welfare departments. In support of his findings, Judge Gary cited and quoted from *Buck v. Bell*. *See supra* note 23 and accompanying text. *But cf. In re* Gonzales, No. 150-158 (Tex. P. Ct. April 30, 1980) (sterilization would accrue no present substantial psychological benefit to the ward); 5 MENTAL DISABILITY L.R. 189, 189 (1981). *Accord* Note, *Courts—Scope of Authority—Sterilization of Mental Defectives*, 61 MICH. L. REV. 1359, 1364 (1963); Note, *Involuntary Sterilization of the Mentally Retarded: Blessing or Burden?*, 25 S.D.L. REV. 55, 67 (1980). For criticisms of the economic rationale used by Judge Gary, see Burgdorf & Burgdorf, *supra* note 22, at 1014-16; Fester, *supra* note 30, at 608; Note, *Compulsory Sterilization of Criminals—Perversion in the Law*, 15 SYRACUSE L. REV. 738, 753-54 (1964).

34. For a description of the activities Judge Gary undertook to elicit community support for his sterilization orders, see Burgdorf & Burgdorf, *supra* note 22, at 1015, 1015 n.146.

35. 337 F. Supp. 671 (S.D. Ohio 1971).

36. *Id.* at 673. *See supra* note 31.

37. 337 F. Supp. at 673.

38. *Id.* at 674. *See* Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968) (no statute or common law authority); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969) (jurisdiction is in excess of

the court with such awesome power,[40] the *Wade* court held that Judge Gary was not entitled to judicial immunity[41] because he acted "wholly without jurisdiction."[42]

Faced with the prospect of civil liability, judges thereafter denied jurisdictional authority over requests for court-authorized sterilization.[43] Courts consistently held that they could neither infer jurisdiction from broad grants of general jurisdiction[44] nor invoke parens patriae juris-

---

powers delegated by statute). *But see Ex parte* Eaton, (unpublished Maryland opinion cited in *In re* Simpson, 180 N.E.2d 206, 208 (Ohio P. Ct. 1962)).

39. "[T]his plaintiff is not the first individual whom defendant Gary has ordered to submit to sterilization." 337 F. Supp. at 674. Note, *Involuntary Sterilization of the Mentally Retarded: Blessing or Burden?, supra* note 33. "[A]llowing the judiciary discretion subjects mentally incompetent individuals to the prejudices of those decisionmakers who may share the bias against the mentally retarded." *Id.* at 67. *See also supra* note 30.

40. 337 F. Supp. at 674. *Cf. In re* Gault, 387 U.S. 1, 16-21 (1967) (unlimited judicial discretion is a poor substitute for procedural safeguards); Kent v. United States, 383 U.S. 541, 555 (1966) (parens patriae authority is not an "invitation to procedural arbitrariness"). *See also* Dixon v. Attorney Gen., 325 F. Supp. 966, 972 (M.D. Pa. 1971); *In re* Levias, 83 Wash. 2d 253, 258, 517 P.2d 588, 591 (1973); State *ex rel.* Hawks v. Lazaro, 157 W. Va. 417, 437, 202 S.E.2d 109, 123 (1974); *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1210 (1974).

41. 337 F. Supp. at 674. *But see infra* notes 49-55. The common law doctrine of judicial immunity shields judicial officers from damage suits for acts done in the exercise of their judicial capacity. In Scott v. Stansfield, 3 L.R.-Ex. 220 (1868) (Kelly, C.B.), the court stated: "[A] series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general propositions that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice." *Id.* at 223. *Accord* Grove v. Dan Duyn, 44 N.J.L. 654, 656 (1882). "[A]n action will not lie against a judge for a wrongful commitment, or for an erroneous judgment, or for any other act made or done by him in his judicial capacity . . . ."

A judge is liable, however, for acts taken totally without jurisdiction. Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

> Where there is clearly no jurisdiction over the subject matter any authority exercised is a usurped authority. . . . But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally . . . questions for his determination . . . .

Id. at 351-52. *See generally* Block, Stump v. Sparkman *and the History of Judicial Immunity,* 1980 DUKE L.J. 879 (1980); Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?,* 27 CASE W. RES. L. REV. 727, 741-43 (1977).

42. 337 F. Supp. at 674.

43. A notable exception to the majority view was *In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (Sup. Ct. 1976). In *Sallmaier,* the New York Supreme Court expressly invoked the inherent parens patriae jurisdiction of the court to authorize sterilization on behalf of an incompetent. *Id.* at 297, 378 N.Y.S.2d at 991. The following year, the court in *In re* A.D., 90 Misc. 2d 236, 394 N.Y.S.2d 139 (Sup. Ct. 1977), *aff'd sub nom. In re* D.D., 64 A.D.2d 898, 408 N.Y.S.2d 104 (1978), held that the *Sallmaier* court's use of parens patriae was unsound. *Id.* at 237, 394 N.Y.S.2d at 140.

44. *See, e.g.,* Guardianship of Kemp, 43 Cal. App. 3d 758, 761, 118 Cal. Rptr. 64, 66 (1974); *In re* S.C.E., 378 A.2d 144, 145 (Del. Ch. 1977); *In re* A.D., 90 Misc. 2d 236, 237, 394 N.Y.S.2d

diction[45] to grant relief that impinged upon an individual's fundamental rights.[46] Only a specific grant of statutory authority could empower a court to exercise jurisdiction over sterilization petitions.[47]

The *Wade* decision[48] remained influential until 1978 when the United States Supreme Court decided *Stump v. Sparkman*.[49] The *Stump* Court held that a broad grant of general jurisdiction[50] is sufficient to vest judicial immunity in a judge who issues a sterilization order.[51] When immunity is at issue, jurisdiction is construed broadly.[52] The Court held that a judge receives immunity even when acting in

---

139, 140 (Sup. Ct. 1977), *aff'd sub nom. In re* D.D., 64 A.D.2d 898, 408 N.Y.S.2d 104 (1978). *Cf. In re* M.K.R., 515 S.W.2d 467, 470 (Mo. 1974) (limited jurisdiction).

45. *See* Guardianship of Kemp, 43 Cal. App. 3d 758, 761-62, 118 Cal. Rptr. 64, 66 (1974); *In re* S.C.E., 378 A.2d 144, 145; (Del. Ch. 1977); *In re* M.K.R., 515 S.W.2d 467, 470 (Mo. 1974) (dictum); *In re* A.D., 90 Misc. 2d 236, 237, 394 N.Y.S.2d 139, 140 (Sup. Ct. 1977), *aff'd sub nom. In re* D.D., 64 A.D.2d 898, 408 N.Y.S.2d 104 (1978).

46. *See In re* S.C.E., 378 A.2d 144, 145 (Del. Ch. 1974); *In re* M.K.R., 515 S.W.2d 467, 470-71 (Mo. 1974); *In re* A.D., 90 Misc. 2d 236, 237, 394 N.Y.S.2d 139, 140 (Sup. Ct. 1977), *aff'd sub nom. In re* D.D., 64 A.D.2d 898, 408 N.Y.S.2d 104 (1978). *Accord* Hudson v. Hudson, 373 So.2d 310, 311 (Ala. 1979); Guardianship of Tulley, 83 Cal. App. 3d 698, 704, 146 Cal. Rptr. 266, 270 (1978), *cert. denied,* 440 U.S. 967 (1979); *In re* Eberhardy, 97 Wis. 2d 654, 662, 294 N.W.2d 540, 544 (1980), *aff'd,* 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

47. Wade v. Bethesda Hosp., 337 F. Supp. at 674 (no legislative authorization reported out of committee since 1925); Guardianship of Kemp, 43 Cal. App. 3d 758, 762, 118 Cal. Rptr. 64, 67 (1974) (authorizing statute repealed in 1937); *In re* S.C.E., 378 A.2d 144, 145 (Del. Ch. 1977) (act of the General Assembly necessary); *In re* M.K.R., 515 S.W.2d 467, 471 (Mo. 1974) (elected representatives must first establish guidelines); *In re* A.D., 90 Misc. 2d 236, 238, 394 N.Y.S.2d 139, 141 (Sup. Ct. 1977) (restrictions must be delineated by the legislature); *aff'd sub nom. In re* D.D., 64 A.D.2d 894, 408 N.Y.S.2d 104 (1978); *In re* Lambert, No. 61-156 (Tenn. Ct. App. Oct. 29, 1976). *Cf. In re* Eberhardy, 102 Wis. 2d 539, 577, 307 N.W.2d 881, 899 (1981) (prudence counsels caution until the legislature codifies state policy).

48. *See supra* notes 35-42 and accompanying text.

49. 435 U.S. 349 (1978) (5-3 decision; Brennan, J., took no part).

50. *Id.* at 357. The statute construed in *Stump*, IND. CODE § 33-4-4-3 (1976), provides in relevant part: "Said court shall have original exclusive jurisdiction in all cases at law and in equity whatsoever . . . and . . . of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."

51. 435 U.S. at 359-60, 364. Judge Stump, presiding over the Circuit Court of DeKalb county, Indiana, approved a petition presented to him by respondent's mother authorizing sterilization of her "somewhat retarded" fifteen year old daughter. Respondent, Linda Kay Spitler Sparkman, at that time attended public school and was promoted with her class each year. Respondent's mother alleged Linda was promiscuous, and sought the sterilization "to prevent unfortunate circumstances." In granting the petition, Judge Stump committed egregious procedural errors resulting in a secret, ex parte proceeding ordering the sterilization of a nonappearing party. Neither the petition nor the order was ever filed with the court, nor was Linda Sparkman ever afforded an opportunity to contest the validity of her mother's allegations. Linda Sparkman was told she was having an appendectomy. She did not know the true nature of the operation until several years later when her inability to bear children resulted in discovery of the sterilization.

excess of his jurisdiction.[53] According to *Stump*, a judge is open to civil liability only when acting in the "clear absence of all jurisdiction."[54]

With the threat of liability lifted by the Supreme Court, state courts again split over the jurisdictional authority necessary to order sterilization.[55] Three recent cases from Wisconsin, New Jersey, and Alaska illustrate the existence of varying approaches to the jurisdictional question. In *In re Eberhardy*[56] the state court of appeals held that the Wisconsin courts had no statutory[57] or parens patriae[58] jurisdictional authority to order sterilization. The court held that *Stump* was inappli-

---

Sparkman v. McFarlin, 552 F.2d 172, 173-76 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349, 351-53 (1978).

52. 435 U.S. at 356. Justice Stewart stated in dissent:

> Underlying the *Bradley* immunity, then, is the notion that private rights can be sacrificed in some degree to the achievement of the greater public good deriving from a completely independent judiciary, because there exist alternative forums and methods for vindicating those rights.
>
> But where a judicial officer acts in a manner that precludes all resort to appellate or other judicial remedies that otherwise would be available, the underlying assumption of the *Bradley* doctrine is inoperative.

Id. at 370.

53. *Id.* at 356 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)). The Court further stated that despite the "tragic consequences of [the circuit court judge's] actions . . . [d]isagreement with the action taken by the judge . . . does not justify depriving that judge of his immunity." *Id.* at 363.

54. *Id.* at 357 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)). *See supra* note 41. *But see* Rosenberg, Stump v. Sparkman: *The Doctrine of Judicial Immunity,* 64 VA. L. REV. 833, 836 (1978) ("*Stump* is a possible invitation to judicial lawlessness in the case of the very judges who might be deterred from misconduct if the doctrine were only slightly less than all-embracing").

55. *Compare* Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979) (court has jurisdiction to entertain request but has no common law or equity power to grant the relief requested); Guardianship of Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (court cannot infer from common law or deduce from equity canons the power to deny a fundamental right), *cert. denied,* 440 U.S. 967 (1978); *In re* Gonzalez, No. 150-158 (Tex. P. Ct. April 30, 1980) (existing legal authority of *Frazier v. Levi* denies court's jurisdiction to authorize the procedure) *and In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (court has jurisdiction to consider and decide the petition but will not exercise that authority) *with In re* Grady, 170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd mem.,* 85 N.J. 235, 426 A.2d 467 (1981) (authority exists under parens patriae jurisdiction to substitute the court's judgment on behalf of incompetent) *and* Guardianship of Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980) (jurisdiction to entertain and act under state constitution grant of general jurisdiction).

56. 97 Wis. 2d 654, 294 N.W.2d 540 (1980). The Wisconsin Supreme Court, in *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981), affirmed the appellate court decision subsequent to the Alaska Supreme Court decision in *C.D.M.*. *See infra* notes 59 & 67.

57. 97 Wis. 2d at 658, 294 N.W.2d at 542. WIS. STAT. § 753.03 (1981) provides in pertinent part:

> The circuit courts have the general jurisdiction . . . to issue all writs . . . which may be necessary . . . [And] have power to hear and determine . . . all civil . . . actions and proceedings . . . and they have all the powers, according to the usages of courts of law

cable[59] because statutory interpretations rendered in the context of judicial immunity are not determinative of a court's power to order sterilization.[60] The *Eberhardy* court stated that courts may not make irreversable decisions that affect an individual's fundamental rights,[61] unless that power is conferred expressly by statute.[62]

In *In re Grady*,[63] the New Jersey Supreme Court adopted a unique approach in finding the power to order sterilizations. The court stated

---

and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice . . . .

Compare WIS. STAT. § 753.03 (1981) *with* IND. CODE § 33-4-4-3 (1976).

58. 97 Wis. 2d at 664, 294 N.W.2d at 545. The court reaffirmed and relied on the earlier Wisconsin decision in *In re* Pescinski, 67 Wis. 2d 4, 226 N.W.2d 180 (1975). In *Pescinski*, the court refused to adopt the parens patriae authority of substitute judgment in a kidney transplant case. The court stated that without consent from the individual, or statutory authority to substitute consent, there was no question that the court lacked power to approve the operation. *Id.* at 7, 226 N.W.2d at 181.

Justice Coffey, concurring in the Wisconsin Supreme Court decision, agreed with the court of appeals' reading of *Pescinski*. 102 Wis. 2d at 580, 294 N.W.2d at 900. The majority, emphasizing the lack of consent issue, stated that *Pescinski* represented an exercise of judicial restraint rather than want of jurisdiction. *Id.* at 565 n.13, 294 N.W.2d at 893 n.13.

For an explanation of the substituted judgment doctrine, see *supra* note 13. For a discussion of the consent issue, see *infra* note 66.

59. 97 Wis. 2d at 667, 294 N.W.2d at 546. The court stated that even if *Stump* was applicable, it "would not control the interpretation of Wisconsin law by Wisconsin courts." *Id.*

The Wisconsin Supreme Court observed in *Eberhardy* that because of the different issues and state laws involved, *Stump* was not controlling. The court found, however, the United States Supreme Court's reasoning persuasive. 102 Wis. 2d at 554, 307 N.W.2d at 888. The Wisconsin court noted that "the Supreme Court's decision clearly stands for the proposition that a state trial court which is vested with statutory jurisdiction 'in all cases at law and in equity' acts within its jurisdiction when it orders the sterilization." *Id.* at 553-54, 307 N.W.2d at 887.

60. 97 Wis. 2d at 667, 294 N.W.2d at 546. *Accord* Guardianship of Tulley, 83 Cal. App. 3d 698, 701, 146 Cal. Rptr. 266, 268 (1978) (*Stump* did not affect the case law position that, absent specific statutory authorization, courts may not order sterilization), *cert. denied,* 440 U.S. 967 (1979). Guardianship of Hayes, 93 Wash. 2d 228, 248, 608 P.2d at 646 (1980) (Rosellini, J., dissenting) (*Stump* decision not endorsement of sterilization, but assertion of immunity). *See* Note, In re Grady: *The Mentally Retarded Individual's Right to Choose Sterilization,* 6 AM. J.L. & MED. 559, 576-77 (1981); Note, *supra* note 30, at 385-86.

61. 97 Wis. 2d at 665, 294 N.W.2d at 544. *Accord,* Hudson v. Hudson, 373 So. 2d 310, 312 (Ala. 1979); Guardianship of Tulley, 83 Cal. App. 3d 698, 704, 146 Cal. Rptr. 266, 270 (1978), *cert. denied,* 440 U.S. 967 (1979). *See* cases cited *supra* note 46.

62. 97 Wis. 2d at 668, 294 N.W.2d at 547. The Wisconsin Supreme Court affirmed the court of appeals decision because of the inappropriateness of permitting court-ordered sterilizations when the legislature has not expressed the state's public policy. 102 Wis. 2d at 576, 307 N.W.2d at 898-99. *See supra* note 47; Guardianship of Hayes, 93 Wash. 2d 228, 241, 608 P.2d 635, 642 (1980) (Stafford, J., dissenting) (court should defer to the legislature). *See also* Note, *Involuntary Sterilization of the Mentally Retarded: Blessing or Burden?, supra* note 33, at 66-68; 44 TENN. L. REV. 879, 888 (1977); 78 W. VA. L. REV. 131 (1975).

63. 170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd mem.,* 85 N.J. 235, 426 A.2d 467 (1981).

that a fundamental right to sterilization is implicit in the fundamental right to procreate.[64] Persons non sui juris[65] cannot exercise those rights because they lack capacity to give effective legal consent.[66] The *Grady* court noted that the state as parens parentis consequently has a duty to protect and ensure the exercise of those rights.[67] A court therefore has inherent power under its parens patriae jurisdiction to authorize sterilizations and substitute its consent[68] on behalf of incompetents.[69] The

64. 85 N.J. at 248, 426 A.2d at 471-74. *Cf.* Hathaway v. Worcester City Hosp., 475 F.2d 701, 706 (1st Cir. 1973) (policy of refusing use of hospital facilities for consensual sterilization violates the equal protection clause); Ruby v. Massey, 452 F. Supp. 361, 368-71 (D. Conn. 1978) (statute providing procedural process for the sterilization of institutionalized incompetents caused invidious discrimination in violation of the equal protection of the laws). *But cf.* Voe v. Califano, 434 F. Supp. 1058 (D. Conn. 1977) (HEW regulation proscribing use of federal monies for sterilizations of persons under 21 years of age upheld). The Supreme Court has never ruled that voluntary sterilization is a fundamental right. Some commentators have suggested that this is a natural implication of the right to contraception affirmed in Eisenstadt v. Baird, 405 U.S. 438 (1972), and the right to abortions established in Roe v. Wade, 410 U.S. 113 (1973). *See generally* Note, In re Grady: *The Mentally Retarded Individual's Right to Choose Sterilization, supra* note 60; 1976 UTAH. L. REV. 115.

65. Non sui juris means lacking in legal capacity. BLACK'S LAW DICTIONARY 954 (5th ed. 1979).

66. The legal effectiveness of consent depends on its voluntariness and the consenting individual's having the information necessary to make the decision and the mental capacity to appreciate its significance. Minors and mentally incapacitated persons are generally unable to give effective legal consent. *See, e.g.,* Relf v. Weinberger, 372 F. Supp. 1196, 1202 (D.D.C. 1974) (minors); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968) (incompetents). Parents and guardians are also generally unable to give effective substituted consent in procedures that impinge upon an individual's fundamental right. *See, e.g.,* Wade v. Bethesda Hosp., 356 F. Supp. 380, 383 (S.D. Ohio 1973) (no custodial substitute consent); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501, 502 (no parental substituted consent), *cert. denied,* 425 U.S. 936 (1975). *See generally* Neuwirth, Heisler, & Goldrich, *Capacity, Competence, Consent—Voluntary Sterilization of the Mentally Retarded,* 6 COLUM. HUM. RTS. L. REV. 447 (1974); Kindred, *Guardianship and Limitations Upon Capacity,* PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 63 (1976); Note, *Sterilization, Retardation, and Parental Authority, supra* note 33. *See also* W. PROSSER, THE LAW OF TORTS § 18, at 102-06 (4th ed. 1971) (lack of informed consent makes doctor's surgery tortious); *supra note* 19.

67. 85 N.J. at 252, 426 A.2d at 475. The Wisconsin Supreme Court in *Eberhardy* challenged the rationale and logic of the New Jersey court.

> [The fault [lies] in first concluding . . . that the right to sterilization is a personal choice, but then equating a decision made by others with the choice of the person to be sterilized. It is clearly not a personal choice and no amount of legal legerdemain can make it so. . . . [Such procedure] must be denominated for what it is, that is, the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate.

102 Wis. 2d at 566, 307 N.W.2d at 893.

68. The court stated that "[i]t must be the court's judgment, and not just the parents' good faith decision, that substitutes for the incompetent's consent." 85 N.J. at 251, 426 A.2d at 475. *See generally* S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 207-25 (rev. ed. 1971);

court in *Grady* reached this holding without discussion of statutory or constitutional grants of jurisdiction.[70]

In *In re C.D.M.*[71] the Alaska Supreme Court held that an Alaska superior court possesses sufficient jurisdictional authority and power to act upon a petition requesting court-ordered sterilization through its inherent parens patriae power.[72] The majority asserted that statutory grants of general jurisdiction[73] traditionally provide a court with power to hear all controversies except those unequivocally denied by statute.[74] Drawing support from the Supreme Court decision in *Stump*,[75] the court found no express state prohibition of the court's authority to hear a sterilization petition.[76]

Kindregan, *supra* note 23, at 140-42 (1966); Note, *The Law of Fertility Regulations in the United States: A 1980 Review,* 19 J. FAM. L. 65, 81-84 (1980-81).

69. 85 N.J. at 259, 426 A.2d at 479. The New Jersey Supreme Court's analysis overlooks an important distinction between its decision in *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied,* 429 U.S. 922 (1976) and the *Grady* decision. In *Quinlan*, the court upheld the incompetent's privacy right over governmental intrusion, holding that the patient's "constitutional right of privacy outweighed the public interest in preserving her life . . . ." 85 N.J. at 260, 426 A.2d at 480. A comparison of the two cases raises the question that if governmental intrusion is unwarranted in preserving life, how then can governmental intrusion be warranted in the individual's right to bear children? *See supra* note 67.

70. The *Grady* court did not address *Stump* but stated that it was "in full agreement with Judge Polow's analysis of this issue . . .." 85 N.J. at 259, 426 A.2d at 479. In the superior court decision, *In re* Grady, 170 N.J. Super. 98, 117-22, 405 A.2d 851, 861-63 (1979), *aff'd mem.,* 85 N.J. 235, 426 A.2d 467 (1981), the issue facing Judge Polow was the effect of a statute providing for the sterilization of institutionalized incompetents on the jurisdiction of the court. Rather than finding the statute inapplicable, thereby creating equal protection problems, or extending the statute's coverage by judicial fiat by implying that the court lacked inherent jurisdiction, the court found that *Stump* dispelled the argument that the presence of such a statute limited a court's authority to act to the provisions of the statute. Arguing for its inherent jurisdictional authority, the court stated that if parens patriae authority did not permit the court to invoke the substituted judgment doctrine, then "the very competence which entitles one to special protection would become the obstacle to the exercise of those constitutional privileges . . . ." 107 N.J. Super. at 118, 405 A.2d at 862. *But see supra* notes 59-60.

71. 627 P.2d 607 (Alaska 1981) (3-2 decision).

72. *Id.* at 612.

73. ALASKA STAT. § 22.10.020(a) (1976) provides in relevant part: "The superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including but not limited to probate and guardianship of minors and incompetents. . . . The superior court . . . may issue . . . all other writs necessary or proper to the complete exercise of its jurisdiction."

74. 627 P.2d at 610. *See supra* notes 4 & 16.

75. *Id.* at 611-12. The majority placed particular emphasis on the *Stump* court's language, affording significance to the lack of state statutory or case law circumscribing the broad grants of jurisdiction. *See Stump*, 425 U.S. at 358.

76. 627 P.2d at 612. The majority recognized that *Stump* is not conclusive on the question of

The *C.D.M.* court found that authority to order sterilization rests upon the use of parens patriae jurisdiction to authorize medical treatment and surgery.[77] The majority asserted that courts invoke parens patriae jurisdiction and apply the substituted judgment doctrine,[78] not only for medically necessary and life preserving surgery, but also when the court finds that elective nontherapeutic surgery is in the individual's best interests.[79] The majority found no reason why a court should not apply the substituted judgment doctrine in sterilization matters.[80] The

---

the parameters of a court's jurisdiction over sterilization of incompetents because the issue before the Supreme Court was the scope of judicial immunity. The majority did, however, consider *Stump* instructive.

77. *Id.* at 611.

78. For an explanation of the substituted judgment doctrine, see *supra* notes 11 & 13.

79. Surgery that is not medically necessary is considered nontherapeutic. *See supra* note 31. Surgery or medical care that is necessary or life preserving is therapeutic. The particular cases cited in *C.D.M.* in support of its conclusion reveal the court's underlying analysis. The seminal case applying parens patriae jurisdiction and substituted judgment in medical matters relating to incompetents is Strunk v. Strunk, 445 S.W.2d 145 (Ky. App. 1969) (court consented to incompetent donating a kidney to his brother; elective nontherapeutic surgery). *See supra* note 13. *Compare* Hart v. Brown, 29 Conn. Supp. 368, 289 A.2d 386 (1972) (substituted consent for minor to donate kidney to identical twin; elective nontherapeutic surgery); *In re* Boyd, 403 A.2d 744 (D.C. App. 1979) (court must use substituted judgment and best interests test to determine whether to authorize administration of psychotropic drugs to institutionalized incompetent Christian Scientist; nontherapeutic treatment); Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976) (substituted judgment for administration of electroshock treatments to institutionalized schizophrenic incompetent; nontherapeutic treatment) *and* Little v. Little, 576 S.W.2d 493 (Tex. Civ. App. 1979) (substituted consent for incompetent minor to donate kidney to brother; elective nontherapeutic surgery) *with* Superintendent of Belchertown State School v. Sackewitz, 370 N.E.2d 417 (Mass. 1977) (substituted judgment to refuse chemotherapy treatment because of incompetent's inability to understand the reason for the pain, his immediate suffering and adverse effects of treatment; therapeutic treatment); *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (1977) (substituted consent by court appointed special guardian for amputation of gangrenous foot; therapeutic surgery); *In re* Quinlan, 70 N.J. 10, 335 A.2d 647, *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976) (substituted judgment to discontinue artificial life-support; therapeutic treatment) *and In re* Long Island Jewish-Hillside Med. Center, 73 Misc. 2d 395, 342 N.Y.S.2d 356 (Sup. Ct. 1973) (court appointed—through conference telephone call—special guardian to substitute consent for immediate amputation of leg; emergency therapeutic surgery).

For further discussion of *Strunk*, see generally 58 CAL. L. REV. 754 (1970); 35 MO. L. REV. 538 (1970); 10 WASHBURN L.J. 157 (1970); 16 WAYNE L. REV. 1460 (1970).

80. 627 P.2d at 611. The Texas cases, however, evidence disagreement with this analysis. The Texas Court of Appeals in Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969), applied strict statutory construction and denied the existence of any statutory or constitutional authority for the probate court to order sterilizations of incompetents. Five months after *Frazier*, the Kentucky court decided *Strunk*, which the Texas Court of Appeals followed in Little v. Little, 576 S.W.2d 493 (Tex. Civ. App. 1979). In *Little*, the court of appeals upheld the probate court's exercise of the equity doctrine of substituted judgment to authorize an incompetent's donation of a kidney to her brother. The court found evidence of substantial psychological benefits accruing to

court reasoned that refusal to exercise the court's inherent equity powers would equal an abdication of judicial responsibility.[81]

Observing that the involvement of a fundamental right to procreate[82] necessitated establishing procedural guidelines,[83] the majority set forth standards for balancing the competing interests.[84] Those standards included a required showing by the petitioner that sterilization constitutes the least restrictive alternative available.[85]

Two judges dissented from the majority's conclusion that a court's parens patriae authority extends to irreversible nontherapeutic surgery which permanently deprives an individual of a constitutionally protected fundamental right.[86] The dissent argued that such important policy determinations require input from the public[87] and should not be made by a court upon one set of facts in a nonadversarial party

---

the donor. Despite the recognition and exercise of equity powers in that situation, the Texas Probate Court in *In re* Gonzales, No. 150-518 (Tex. P. Ct. April 30, 1980) denied any authority to authorize sterilizations.

81. 627 P.2d at 611. *But see* Guardianship of Hayes, 93 Wash. 228, 608 P.2d 635 (1980) (Stafford, J., dissenting in part).

> It seems to me that having clearly declared the judiciary's power to act, wisdom dictates we should defer articulation of this complex public policy to the legislature. Such deferral, done with a clear declaration of judicial power, is not an abdication of that power. Rather, it is a recognition that the declared power can be rationally coupled with a conscious choice not to exercise it.

Id. at 241, 608 P.2d at 642; *supra* notes 47, 62 & 67.

82. 627 P.2d at 610. The majority acknowledged the involvement of a fundamental right early in their opinion, but stated that the question before the court was whether the superior court had "authority to hear and decide such matters . . . [not] whether, in exercising that authority, the court can order a particular individual sterilized without violating his or her constitutional rights." *Id.*

83. *Id.* at 612. *See supra* notes 40 & 51.

84. *Id.* at 612-14. *See supra* note 11. Compare the differing minimal standards established in North Carolina Ass'n. for Retarded Children v. North Carolina, 420 F. Supp. 451, 456-47 (M.D.N.C. 1976); Wyatt v. Aderholt, 368 F. Supp. 1383, 1384-86 (N.D. Ala. 1974); *In re* Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); *In re* Grady, 170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd mem.*, 85 N.J. 235, 426 A.2d 467 (1981); Guardianship of Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980). *See generally* Burgdorf & Burgdorf, *supra* note 22, at 1025-32; Dodge, *Sterilization, Retardation and Parental Authority, supra* note 30, at 404-07. *See also* Ruby v. Masey, 452 F. Supp. 361 (D. Conn. 1978) (statute held invalid as denial of equal protection); *In re* Opinion of Justices, 230 Ala. 543, 162 So. 123 (1935) (statute held invalid as denial of due process); *In re* Henderson, 12 Wash. 2d 600, 123 P.2d 322 (1942) (statute held unconstitutional due to inadequate procedural safeguards).

85. 627 P.2d at 613.

86. *Id.* at 614 (Mathews, J. dissenting) ("Sterilization is an extreme remedy which . . . courts lack inherent power to sanction"). *See supra* note 61 and accompanying text.

87. *Id.* at 615. The *C.D.M.* court heard no testimony on the ability, fitness, or capability of incompetents to function as parents, *see supra* notes 5 & 30, on the prospects of new forms of birth

setting.[88] Rather, the dissent argued that only the legislature may delineate restrictions on the right to bear children.[89] The proper role of the court is to determine the constitutionality of such restrictions.[90]

The dissent objected to the majority's reliance on *Stump* as determinative of the jurisdictional parameters of a court's authority to order sterilizations.[91] The dissent warned that previous cases[92] vividly illustrated the potential for abuse of court-ordered sterilizations.[93]

Without consideration of the role judicial immunity has played in court decisions on petitions for sterilization of incompetent wards, the weight of authority is clearly against application of parens patriae jurisdiction.[94] With *C.D.M.* in the balance, however, the post-*Stump* published decisions[95] are split on the issue.[96]

When the Alaska Supreme Court granted the relief requested, the court acted in excess of its jurisdiction[97] because the order deprived an

---

control, advances in the reversibility of sterilization, or on the later psychological impact of sterilization at a young age.

88. *Id.* at 614-15. When the superior court heard *C.D.M.*, the guardian ad litem "reluctantly argued that jurisdiction did not exist." *Id.* at 609 n.4. On appeal, both the guardian ad litem and C.D.M.'s parents argued that jurisdiction existed and in favor of sterilization. *Id.* at 615 n.4. The State of Alaska, although not a real party in interest, filed a brief supporting the holding of the superior court.

89. *Id.* at 616. *See supra* notes 47 & 61-62 and accompanying text..

90. *Id.* at 612.

91. *Id. See supra* notes 59-60. *See generally* Note, In re Grady: *The Mentally Retarded Individual's Right to Choose Sterilization, supra* note 60, at 576 n.92 (1981); Note, *Sterilization, Retardation, and Parental Authority, supra* note 33, at 385-86.

92. *See supra* note 51.

93. 627 P.2d at 616. *See supra* notes 30 & 53-54. *See also* S. BRAKEL & R. ROCK, *supra* note 30. In 1963, the Human Betterment Association, presently known as the Association for Voluntary Sterilization, presented statistics on voluntary sterilizations showing that out of a total of 467, North Carolina accounting for 240, all claimed to have been "voluntary." *Id.* at 209. Indeed, "[t]here is no redemption for the individual whom the law touches." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

94. *See supra* note 21 and accompanying text.

95. Many court decisions on this issue are unpublished, given only a docket number, or never filed with the clerk of the court. *E.g., Ex parte* Eaton, *supra* note 38; *In re* Lambert, No. 61-156 (Tenn. Ct. App. Oct. 29, 1976); *In re* Gonzalez, No. 150-518 (Tex. P. Ct. April 30, 1980). The Tennessee Court of Appeals declined to publish its opinion in *In re* Lambert even after requests for publication were made. *See* 44 TENN. L. REV. 879, 880 n.5 (1977).

96. *Compare* Hudson v. Hudson, 343 So. 2d 310 (Ala. 1979); Guardianship of Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978), *cert. denied,* 440 U.S. 967 (1979) *and In re* Eberhardy, 97 Wis. 2d 654, 294 N.W.2d 540 (1980) *with In re* C.D.M., 627 P.2d 607 (Alaska 1981); *In re* Grady, 170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd mem.,* 85 N.J. 235, 426 A.2d 467 (1981) *and* Guardianship of Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980).

97. *See supra* notes 16 & 52.

individual of a fundamental right.[98] The majority in *C.D.M.* should not have extended the parens patriae jurisdiction for elective, nontherapeutic surgery to elective nontherapeutic sterilizations.[99] A fundamental distinction between those situations, overlooked by the *C.D.M.* majority, is that none of the nontherapeutic situations cited for support involved the denial of a recognized fundamental right.[100]

The *C.D.M.* dissent properly dismissed reliance upon *Stump* as authority for assertions of jurisdiction.[101] The responsibility of a court when exercising parens patriae authority for a person non sui juris[102] is to act as guardian of the individual's estate and person, and not to fulfill others' wishes or guard the state fisc.[103] Courts should not use that power to order extreme remedies.[104]

The holding in *C.D.M.* does not open the floodgate to sterilization abuse[105] because the court set forth procedural guidelines which should govern future sterilization requests. The *C.D.M.* decision provides no assurance, however, that courts in other states will do the same, especially in light of *Stump*'s guarantee of judicial immunity to judges who do order sterilizations.

Judges cannot realistically assume that the days of eugenics are behind us,[106] or that they as individuals are completely free from bias

98. *See supra* notes 22, 46 & 67-69; *infra* note 100.

99. *See supra* notes 3, 13, 67-69 & 79-80 and accompanying text.

100. Sterilization, for persons of sound mind, is a voluntary, nontherapeutic operation, as distinguished from a medically necessary life-preserving procedure. Sterilization impinges upon a fundamental right of privacy. *See supra* text accompanying note 98. Making a kidney donation is also a voluntary nontherapeutic procedure. Courts have invoked parens patriae jurisdiction to allow incompetents to undergo kidney donation procedures. *See supra* note 79. Kidney donation cases are distinguishable in that they do not involve a fundamental right. Chemotherapy and artificial life-support mechanisms are therapeutic medical procedures that involve a fundamental right. Courts have invoked parens patriae jurisdiction to uphold an individual's privacy right to forego these medical procedures. *See supra* note 69. Because an individual's privacy right to be free from unwarranted governmental intrusion outweighs the governmental interest in invoking parens patriae jurisdiction to preserve life, the privacy right must necessarily outweigh the governmental interest in invoking parens patriae jurisdiction to order incompetent persons to undergo nontherapeutic sterilization procedures.

101. *See supra* note 91 and accompanying text.

102. *See supra* notes 16 & 65.

103. *See supra* notes 3, 13 & 30.

104. Sparkman v. McFarlin, 552 F.2d 172, 176 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

105. *See supra* notes 19, 30, 33, 39 & 93.

106. *See generally supra* notes 24 & 30.

against persons of unsound mind.[107] When courts issue an unappealable order, they should follow procedural due process guidelines in each individual situation. The best possible guarantee against abuse of judicial discretion is through specific statutory authority and guidelines.[108]

R.L.D.

---

107. *See supra* note 39.

108. *See supra* notes 47, 61-62 & 67 and accompanying text.