



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

October 20, 1975

ATTORNEY GENERAL OPINION NO. 75-399

The Honorable John L. White
Probate and Juvenile Judge
Leavenworth County Courthouse
Leavenworth, Kansas 66048

Re: Probate Court--Jurisdiction--Sterilization

Synopsis: A probate judge may not approve the sterilization of a mentally retarded child absent legislative action.

Dear Judge White:

You inquire whether you may authorize parents to approve the sterilization of their mentally retarded child. It appears from the facts that you have given me that an operation is necessary to protect the health of a retarded child; in that, the family physician has stated that the girl can not cope with the rigors of menstruation. The parents and physician have contacted you for guidance with the legal aspects of this problem.

As you point out in your request, there is a minimum of relevant Kansas law. K.S.A. 65-446 and 447 allow medical personnel or facilities to refuse to perform such operations or to set up special procedures. However, those statutes give no guidance in this particular situation. There is no case law in Kansas which deals with sterilization of children.

However, other jurisdictions have dealt with this problem and there is general agreement that a probate court must have specific statutory authority to approve or order an involuntary sterilization.

The Supreme Court of Missouri considered a case with a similar fact situation. In In the Interest of M.K.R., a child, 515 S.W.2d 467 (1974), the parents of a child, applied to a probate judge in St. Louis for permission to have their mentally retarded daughter sterilized. A three day hearing was held in which a plethora of medical evidence indicating the necessity of the operation was received by the Court. At the conclusion, the Judge gave his permission. The child's guardian ad litem appealed. The Supreme Court held that the Missouri Probate Code did not grant a probate court jurisdiction in such matters. The Court went to further state that the rights involved were so fundamental that it would be necessary to have specific legislative authority. The Court summarized their opinion thus:

"The courts are not faced in this case with a prayer for a judgment authorizing ordinary medical treatment, or radical surgery necessary to preserve the life of a child; we are faced with a request for sanction by the state of what no doubt is a routine operation which would irreversibly deny to a human being a fundamental right, the right to bear or beget a child. Jurisdiction of the juvenile court to exercise the awesome power of denying that right may not be inferred from the general language of the sections of the code to which we have referred. Such jurisdiction may be conferred only by specific statute.

Whatever might be the merits of permanently depriving this child of this right, the juvenile court may not do so without statutory authority-- authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people."

In the Interest of M.K.R.,
a child, 515 S.W.2d at 470
and 471.

A number of states and federal jurisdictions agree that absent specific legislative authority, a court may not order or consent

to the involuntary sterilization of an individual.¹ [See, Holmes v. Powers, 439 S.W.2d 579, 580 (Ky. 1969), Frazier v. Levi, 440 S.W.2d 393 (Tex.Civ.App. 1969), Wade v. Bethesda Hospital, 337 F.Supp. 671 (S.D. of Ohio 1971), Wyatt v. Aderholt, 368 F.Supp. 1383 (M.D. Ala. 1974), Guardianship of Kemp, 118 Cal.Reptr. 64 (1974).]

The only case to be found in support of the proposition that a probate court has jurisdiction absent specific legislative authority is In re Simpson, 108 N.E.2d 206 (Ohio 1962). However, the value of this case is lessened by the impact of Wade v. Bethesda Hospital, *supra*. In the Wade case, the Simpson Judge was sued for damages for giving his consent to a sterilization. The federal court did not allow the use of judicial immunity to bar suit because the Judge was without jurisdiction. Thus, the probate judge could conceivably be liable in tort for giving consent to a sterilization.

Nowhere in the Kansas Probate Code is there specific authorization for involuntary sterilization of mentally retarded children. Therefore, it is my conclusion that absent any such authority, a probate judge is without jurisdiction to act in such matters.

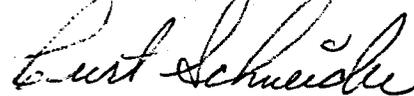
¹The following states presently authorize involuntary sterilization: Ala.Code, Tit. 45, Sec. 243 (1923); Ariz.Rev.Stat. Ann., Sec. 36-531 to 36-540 (1956); Ark.Stat. Ann., 59-501 to 59-502 (1971); Cal. Welfare & Institutions Code, Sec. 7254 (Supp. 1971); Conn.Gen.Stat.Rev., Sec. 17-19 (1969); Del.Code Ann., Tit. 16, Sec. 5701-5705 (1953); Ga.Code, Sec. 84-931 to 84-936 (1970); Ind. Ann.Stat., Sec. 22-1601 to 22-1618 (1937); Iowa Code Ann., Sec. 145.1 to 145.22 (1965); Maine Rev.Stat. Ann., Tit. 34, Sec. 2461-2468 (1964); Mich.Stat. Ann., Sec. 14.381-14.390, M.C.L.A. 720.301-720.310 (1948); Minn.Stat. Ann., Sec. 256.07-256.10 (1953); Miss.Code Ann., Sec. 6957-6964 (1942); N.H.Rev.Stat. Ann., Sec. 174:1 to 174:14 (1964); N.C.Gen.Stat., Sec. 35-36 to 35-37 (1963); N.D.Century Code Ann., Sec. 25-04.1-01 to 25-04.1-01 to 25.04.1-08 (1967); Okla.Stat. Ann., Tit. 43A, Sec. 341-346 (1933); Ore.Rev.Stat., Sec. 436.010 to 436.150 (1971); S.C.Code Ann., Sec. 32-671 to 32.680 (1962); S.D.Comp.Laws Ann., 1-36-12, 27-11-1 to 27-11-6, 27-12-1.1, 27-17-1 to 27-17-34 (1967); Tex.Civ.Stat. Ann., Art. 3174b-2 (1955); Utah Code, Sec. 64-10-1 to 64-10-14 (1961); Vt. Stat. Ann., Tit. 18-8701 to 18-8704 (1968); Va.Code Ann., Sec. 37.1-156 to 37.1-170 (1972); Wash.Rev.Code Ann., Sec. 9.92.100 (1909); W.Va.Code Ann., Sec. 16-10-1 to 16-10-7 (1967); and Wisc. Stat. Ann., Sec. 46.12 (1955).

Judge White
Page Four
October 20, 1975

Whether the parents may unilaterally decide to go forth and have the operation performed is a different question. I believe that it would be inappropriate for me to give my opinion on what is essentially a private matter. Therefore, I believe these parents should consult their own attorney and follow his advice.

I hope my opinion will be of assistance and guidance to you. If I can be of further assistance to you in the future, please let me know.

Yours very truly,

A handwritten signature in cursive script that reads "Curt Schneider". The signature is written in dark ink and is positioned above the typed name.

CURT T. SCHNEIDER
Attorney General

CTS/PAH/ksn