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# NEW ILLINOIS LEGISLATION REGULATING STERILIZATION OF WARDS: DOES IT PROVIDE ADEQUATE PROTECTION?

*Miranda K. Pollak\**

## INTRODUCTION

Prior to January 1, 2010, attorneys and doctors in Illinois were faced with a difficult situation when approached by the guardian of a ward, adjudicated as mentally disabled by the Illinois Probate Act, who was seeking sterilization for the ward. No statutes or case law existed to guide an attorney through the legal process of seeking the sterilization and to estimate the outcome of such a request. Doctors, without legal regulations to guide them, could base their decisions upon the risks and benefits to the ward and the family, but they had no legal indicator on how to proceed. Because no standards were set out either through legislation or prior cases, attorneys argued their client's position before the court and hoped for a favorable result.

All of this changed though on January 1, 2010, when a new law became effective in Illinois regulating the sterilization of a ward.<sup>1</sup> The uncertainty of how to proceed with such a case is now replaced with a detailed law which lays out specific instructions on how to seek court authorization granting sterilization.<sup>2</sup> Additionally, the law specifies what factors the court will consider when making its decision based upon the best interest of the ward.<sup>3</sup>

This new law came into fruition in part because of the *K.E.J.* case which had been in litigation since January 2003 and came to a final ruling in April 2008.<sup>4</sup> In *K.E.J.*, the guardian of a ward, a mentally disabled woman, requested court authorization for her to consent to the ward's sterilization; the sterilization was not in accordance with the ward's desire and

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1. 755 Ill. Comp. Stat. 5/11a-17.1 (2010).

2. *Id.*

3. *Id.*

4. In re *K.E.J. v. K.E.J.*, 887 N.E.2d 704 (Ill. App. Ct. 2008).

litigation ensued.<sup>5</sup> Once litigation concluded, Equip for Equality pushed the Illinois Congress for legislation which would set a standard for sterilization of a ward.<sup>6</sup> On August 11, 2009, Illinois Governor Pat Quinn signed the sought after legislation, giving all those involved in this process a set procedure and standard to be used in evaluating and deciding upon these cases.<sup>7</sup> Although the law does not follow the exact standard set out in *the K.E.J.* case, it certainly influenced the language of the law.

## BACKGROUND

### History of sterilizing the mentally incompetent and “unfit” – Eugenics background

Evidence of sterilizing mentally ill and disabled persons dates back to 1884, when one of Germany’s leading gynecologists, Alfred Hunger, proposed the idea as a method of preventing the inheritance of mental disability.<sup>8</sup> Then in the late 19<sup>th</sup> century and early 20<sup>th</sup> century, Francis Galton, the founder of modern genetics,<sup>9</sup> proposed the idea of sterilizing mentally disabled persons to prevent future generations from inheriting mental illnesses.<sup>10</sup> Galton made the proposition when in 1883<sup>11</sup> he invented the idea and term “eugenics”, which he defined as “the science of improving inherited stock, not only by judicious matings, but by all influences which give more suitable strains a better chance.”<sup>12</sup>

Relying heavily on Charles Darwin’s theories of evolution and natural selection, Galton believed that we could control and improve the population by artificial methods.<sup>13</sup> He designed a “eugenics register” which tracked the inherited characteristics of certain individuals and the suitability of those characteristics to the rest of the population.<sup>14</sup> Galton decided upon the favorability of these characteristics and wanted to classify people

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5. *Id.*

6. Equip for Equality, <http://www.equipforequality.org> (last visited Jan. 11, 2010). Equip for Equality is an Illinois organization dedicated to advancing the rights of disabled individuals.

7. Amanda Robert, *New law prohibits involuntary sterilization*, ILL. TIMES, (Sept. 10, 2010), available at: <http://www.illinoistimes.com/Springfield/print-article-6332-print.html>

8. Susan Bachrach, *Deadly Medicine*, 29 THE PUB. HISTORIAN 19, 24 (2007).

9. David J. Galton & Clare J. Galton, *Francis Galton: And Eugenics Today*, 24 J. OF MED. ETHICS 99, 99 (1998).

10. *Id.* at 101.

11. Chloe S. Burke & Christopher J. Castaneda, *The Public and Private History of Eugenics: An Introduction*, 29 THE PUB. HISTORIAN 5, 6 (2007).

12. Galton, *supra* note 9, at 101.

13. *Id.*

14. *Id.* at 100.

into the following groups: “(a) Gifted, (b) Capable, (c) Average, or (d) Degenerate.”<sup>15</sup> For women with favorable characteristics, he proposed the idea of encouraging early marriage and providing grants based upon the number of children the women bore.<sup>16</sup>

For those individuals with less favorable characteristics, specifically those with mental disabilities, habitual criminals, and those deemed insane, Galton suggested those individuals be prevented from reproducing.<sup>17</sup> Following Galton’s suggestion, twenty-seven states in the union passed sterilization laws by 1931<sup>18</sup> and some proponents of eugenics even suggested euthanasia of those deemed “less favorable.”<sup>19</sup> The laws provided for both the voluntary and compulsory sterilization of criminals and those “thought to be insane, feeble-minded or epileptic.”<sup>20</sup> By 1935 California had sterilized 9,931 people based on Galton’s eugenics beliefs and although not all twenty-seven states sterilized as many individuals<sup>21</sup>, the ideology did not go unnoticed.

Eugenics spread to various other countries including to Germany whose scientists shared and exchanged their findings on hereditary with other scientists and proponents of eugenics in the United States, the Soviet Union, Great Britain, Switzerland, and Scandinavia.<sup>22</sup> The idea of artificially creating a better population through eugenics was exploited by the Nazis in Germany who implemented a mass sterilization program meant “to raise the birthrate of ‘fit Aryans’.”<sup>23</sup> Estimates indicate that 400,000 Germans were compelled into sterilization because of this “program.”<sup>24</sup>

After the Second World War the number those supporting eugenics diminished and the principles became objectionable.<sup>25</sup> Some attribute the disappearance of the eugenics movement to the atrocities of the Nazis, while others believe that it fell because it lacked factual support of its effectiveness and was replaced by advancing science.<sup>26</sup>

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15. *Id.* at 100-01.

16. *Id.* at 101.

17. *Id.*

18. *Id.*

19. Burke, *supra* note 11, at 7.

20. Galton, *supra* note 9, at 101.

21. *Id.*

22. Bachrach, *supra* note 8, at 25.

23. *Id.*

24. *Id.*

25. Galton, *supra* note 9 at 101.

26. Daniel Wikler, *Can we learn from eugenics?*, 25 J. OF MED. ETHICS 183, 186 (1999).

### **Constitutional Issue: Right to procreation and control one's own body**

Although the ideology of eugenics disappeared after the Second World War, forced and coerced sterilizations in the United States continued well in the 1960s and 1970s.<sup>27</sup> Women specifically targeted for coerced sterilization included poor white women, "welfare queens," and Mexican women crossing the United States border to give birth to their children in America so they could receive welfare benefits.<sup>28</sup>

These coerced and forced sterilizations eventually resulted in lawsuits. For example, in 1973 the Southern Poverty Law Center brought a lawsuit alleging that public clinics and hospitals were violating the reproductive rights of women by forcing sterilization.<sup>29</sup> This, however, was not the first time the United States' courts dealt with the issue of sterilization and the right of individuals to exercise control over their own bodies.

In 1942 the United States Supreme Court, in *Skinner*, reviewed a decision by the Oklahoma Supreme Court addressing an individual's right to procreation and the constitutionality of forced sterilization.<sup>30</sup> Oklahoma created legislation that called for the sterilization of habitual criminals, who were defined as persons "convicted two or more times for crimes 'amounting to felonies involving moral turpitude.'"<sup>31</sup> The criminal was subject to sterilization so long as the procedure was not detrimental to the general health of the prisoner.<sup>32</sup>

The Court was concerned that this law, which created the power to sterilize, could have "subtle, far-reaching and devastating effects" as was seen with the eugenics movement.<sup>33</sup> "In evil or reckless hands it [could] cause races or types . . . to wither and disappear,"<sup>34</sup> which occurred during the Second World War with the Nazis' mass sterilization program. Because sterilization is irreversible, the Court was particularly troubled that the sterilized individual had no recourse if a mistake in judgment was made; he would suffer "irreparable injury".<sup>35</sup>

While *Skinner* set forth the rule that individuals have a right to procreate and that sterilization programs are subject to careful scrutiny be-

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27. Rebecca M. Kluchin, *Locating the Voices of the Sterilize*, 29 THE PUB. HISTORIAN 131, 133 (2007).

28. *Id.*

29. *Id.* at 136.

30. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

31. *Id.*

32. *Id.*

33. *Id.* at 541.

34. *Id.*

35. *Id.*

cause they touch “a sensitive and important area of human rights”<sup>36</sup>, the Court found in *Union Pacific Railroad Co.* that every person has the right to control his own body.<sup>37</sup> In *Union*, a plaintiff appealed an order that required she submit to a surgical examination in a personal injury case.<sup>38</sup> The Court ruled that “no right is . . . more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others.”<sup>39</sup> It further stated that a person has the “right of complete immunity; to be let alone” from unwanted touching.<sup>40</sup> This ruling further emphasizes the importance courts have placed on self-autonomy and the movement away from laws that allow for unwanted bodily interference such as sterilization.

The Illinois Supreme Court also addressed the right of an individual to exercise control over his body in *Pratt v. Davis*.<sup>41</sup> In *Pratt*, a physician operated on a woman and removed her reproductive organs without first obtaining her full consent.<sup>42</sup> The physician admitted to “deliberatively and systematically deceiving the woman” because he believed that her mental state did not allow for her to make a cognitive and informed decision regarding her physical condition and the procedure.<sup>43</sup> The court ruled that when a patient is mentally sound and no emergency condition exists, a physician must obtain informed consent from the patient prior to beginning a medical procedure.<sup>44</sup> If the patient cannot consent for himself, then a person lawfully authorized to act on behalf of the patient must first give informed consent for the procedure to take place.<sup>45</sup>

The ruling in *Pratt* is extended to medical care and procedures performed upon minors. Courts have found that medical professionals can be liable for assault if they perform a surgical procedure upon a minor without a parent’s consent.<sup>46</sup> Exceptions to this exist for emergency conditions, or if the child is emancipated, or if the court has found the child to be a mature minor.<sup>47</sup>

Illinois law also recognizes the importance of obtaining parental con-

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36. *Id.* at 536.

37. *Union Pac. R.R. Co. v. Botsford*, 141 U.S. 250, 251-52 (1891).

38. *Id.* at 251.

39. *Id.* at 251-52.

40. *Id.* at 252.

41. *Pratt v. Davis*, 79 N.E. 562 (Ill. 1906).

42. *Id.* at 563-64.

43. *Id.* at 564.

44. *Id.*

45. *Id.*

46. 61 AM. JUR. PHYSICIANS §160 (2010).

47. *Id.*

sent for medical procedures performed upon minors because of the minor's inherent immaturity. The Illinois legislature allows for a parent to step in and give binding consent for a medical procedure.<sup>48</sup> Just as minors need consent from a parent for a medical procedure because of their diminished mental capacity, patients that are or become mentally incompetent generally require consent from a guardian or conservator for a medical procedure.<sup>49</sup> Although mentally disabled patients can sometimes make decisions regarding their medical care, "if a patient's cognitive impairments call into question his ability to make treatment decisions, medical treatment may not be administered without adequate and judicially supervised protection."<sup>50</sup> Although Illinois courts made decisions regarding the medical treatment of individuals with impaired mental capabilities prior to January 1, 2010, it is on that date that Illinois' Congress formally put into place a law guiding the review of such cases.<sup>51</sup>

### SAMPLING OF OTHER STATES' APPROACH TO THIS ISSUE

Other courts throughout the country have been faced with the same issue of what to do when a guardian is seeking sterilization of her ward. While some states have statutes addressing the rights of wards in these situations, other courts look to probate laws and the best interests of the ward. For a brief look at what other states have done in such situations the following cases from California, Alaska, and New Jersey are presented.

In 1999, a California Court Appeals addressed the issue of whether to authorize co-conservators of their ward, a mentally disabled nineteen year old woman, to consent to the ward's sterilization.<sup>52</sup> The autistic ward in *Angela D.* since birth had a severe developmental disability and suffered from epileptic seizures and diabetes.<sup>53</sup> She was unable to read or write, and her speaking abilities were limited to simple statements of "hello" and "goodbye."<sup>54</sup> Her co-conservators, which were her parents, requested the authorization for sterilization because the ward's doctors found that if she were to become pregnant it could adversely affect her health.<sup>55</sup> Specifically, the ward's doctors believed that if she were to become pregnant this could trigger further epileptic seizures which could result in both the

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48. *Id.*

49. 61 AM. JUR. PHYSICIANS §160 (2010).

50. *Id.*

51. 755 Ill. Comp. Stat. 5/11a-17.1 (2010).

52. *Estate of Angela D. v. Angela D.*, 83 Cal. Rptr.2d 411, 413 (Cal. Ct. App. 1999).

53. *Id.*

54. *Id.*

55. *Id.*

ward's and the fetus' death.<sup>56</sup> According to the ward's psychological reports it was likely that the ward would engage in sexual activity.<sup>57</sup>

Sterilization was requested because it was the only feasible method of birth control for this ward.<sup>58</sup> In analyzing the request for authorization, the California Appellate Court applied the statutory scheme applicable to this issue.<sup>59</sup> The statute requires that its elements be proved beyond a reasonable doubt before the court could authorize the conservator to consent to the sterilization of the ward.<sup>60</sup>

The statutory elements require: a) the person to be sterilized is incapable of consenting to the procedure and is unlikely to become capable of consenting in the future; b) the person is fertile and capable of reproducing; c) the person is capable of engaging in sexual activity, and it is likely that the person is already engaging in or will soon engage in such activity which is likely to result in pregnancy; d) Either of the following: (1) even with proper training, the individual will be unable to care for a child because of the nature and extent of the person's disability (2) because of the individual's medical condition, pregnancy or childbirth "would pose a substantially elevated risk to the life of the individual to such a degree that, in the absence of other appropriate methods of contraception, sterilization would be deemed medically necessary for an otherwise nondisabled woman under similar circumstances."; e) all less invasive contraceptive methods are not feasible; f) the proposed method of sterilization is the least invasive as possible to the individual's body; g) the current and emerging medical science either 1) does not indicate that a less intrusive and reversible method of sterilization is forthcoming, or 2) does not indicate an advancement in the treatment of the individual's disability; h) the ward has not knowingly objected to the sterilization.<sup>61</sup>

After evaluating the facts of the case and the condition of the ward, the California Appellate Court found that the co-conservators had met the statutory requirements; thus it affirmed the trial court's grant of authorization for the co-conservators to consent to their ward's sterilization.<sup>62</sup>

Alaska, unlike California, does not have a set statute laying out a test to determine whether or not the court should authorize a guardian's consent to sterilize a ward. Instead, Alaskan courts place the burden on the

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56. *Id.*

57. *Id.* at 414.

58. *Id.* at 417.

59. *Id.* at 416.

60. *Id.*

61. *Id.*

62. *Id.* at 422.



guardian to prove by clear and convincing evidence that sterilization is in the best interest of the ward.<sup>63</sup> In *K.C.M.*, the nineteen year old ward was diagnosed with Down's Syndrome at birth.<sup>64</sup> Her I.Q. ranged in the fifties which indicated she was moderately to mildly retarded.<sup>65</sup> Although she was considered educable and attended vocational training and worked two hours a day at a fast food restaurant, she would always require some kind of parental or custodial supervision.<sup>66</sup> Upon reaching the age of majority, her parents were appointed as her legal guardians because she was adjudicated as an "incapacitated person."<sup>67</sup>

In evaluating this case, the court required a full judicial hearing with the presentation of medical evidence before it would rule on the issue of whether authorization should be granted for the sterilization.<sup>68</sup> However, the court first needed to determine if the ward was competent to make her own decision whether or not she wanted to be sterilized.<sup>69</sup> Additionally, the court looked at whether the mental incompetency was likely to be permanent.<sup>70</sup> After establishing the ward's level of competency, the court next required an establishment of whether or not the individual was capable of reproducing.<sup>71</sup> If she was able to reproduce, then the court evaluated whether she would be adequately capable of caring and providing for the child despite her disability.<sup>72</sup> Additionally, the court required expert testimony regarding the ward's physical and psychological ability to deal with a pregnancy, or in the alternative, the detrimental emotional effects of sterilization.<sup>73</sup>

The court further required proof that sterilization was "the only practicable means of contraception."<sup>74</sup> To prove this, the guardian would need to show detailed medical evidence as to what alternative methods of contraception were available, along with an explanation of why one of these less drastic methods could not be implemented.<sup>75</sup> Whichever method was chosen for contraception the court required a showing that it was as least

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63. *K.C.M. & B.L.M. v. State*, 627 P.2d 607, 612 (Ala. 1981).

64. *Id.* at 608.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 612.

69. *Id.* at 613.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

intrusive as possible.<sup>76</sup>

Although the ward may not have had the mental capacity to decide upon the sterilization, the court required testimony from the ward regarding her understanding and desire for the proposed sterilization.<sup>77</sup> The ward's testimony would be weighed against her ability to understand the consequences of the sterilization.<sup>78</sup> Finally, the court closely scrutinized the motivating factors for the sterilization because it wanted to ensure that the procedure was pursued in the best interest of the ward as opposed to the guardian's own convenience.<sup>79</sup>

In *K.C.M.* the court found that although the petitioners had met some of the requirements to be granted authorization to consent on behalf of the ward for the sterilization, they did not adequately prove why less intrusive methods of birth control could not be used.<sup>80</sup> Thus, the case was remanded for another hearing on the matter of alternative forms of birth control and for a better understanding of the ward's preferences.<sup>81</sup>

New Jersey, like Alaska, does not use a statutory based method to evaluate whether sterilization of a ward should be authorized.<sup>82</sup> The court in *Grady* evaluated the case of a nineteen year old woman who had severe Down's Syndrome.<sup>83</sup> The woman at lived at home with her siblings and parents and had attended special education classes at the public school; however, she was unable to read, form complete sentences, or count beyond low numbers.<sup>84</sup> At home she could perform simple tasks such as dusting and folding laundry, playing simple games and taking short walks.<sup>85</sup> Additionally, she could dress herself, but could not choose clothing appropriate for the season, she could bathe herself but was unable to regulate the water temperature, and she could open a can of soup but was unable to adequately control the stove temperature.<sup>86</sup> Because her abilities to care for herself were limited, she would always require a degree of supervision, thus her family sought to have her placed in a group home for adults with similar disabilities.<sup>87</sup>

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *In Re Lee Ann Grady*, 426 A.2d 467, 481 (New Jer. 1980).

83. *Id.* at 469.

84. *Id.* at 470.

85. *Id.*

86. *Id.*

87. *Id.*

Although the ward had physically developed at the same progression of other teenagers her age, her social and emotional development was impaired.<sup>88</sup> She had “no significant understanding of sexual relationships or marriage [and] if she became pregnant, she would neither understand her condition nor be able to make decisions about it.”<sup>89</sup> Her parents did not notice any signs that she was engaged in sexual activity or that she was likely to begin engaging in such activity; however, they provided birth control pills for her believing it was a necessary precaution.<sup>90</sup> With the impending likelihood that the ward would be placed in a group home, her parents sought a permanent method of birth control because of its dependability, and thus went to the hospital requesting sterilization for their daughter.<sup>91</sup> The hospital refused to perform the procedure, and litigation ensued.<sup>92</sup>

Recognizing the gravity of their decision, the court noted it “must take particular care to protect the rights of the mentally impaired when considering the prospect of sterilization.”<sup>93</sup> While admitting that parents have the duty to care, nurture, and shelter their child, it is the court’s decision to determine whether sterilization is necessary for the ward.<sup>94</sup> Therefore, it used the “best interests” standards and procedures when it determined whether to authorize sterilization of the ward.<sup>95</sup> Under this standard, the court required that an independent guardian ad litem (GAL) be appointed for the case who must fully advocate on behalf of the ward.<sup>96</sup> Then, the trial judge must find that the ward’s incapacity prevents her from making an informed decision regarding sterilization, and the ward’s condition is not likely to improve in the future.<sup>97</sup> Next, by clear and convincing proof, the court must be persuaded that sterilization is in the best interest of the ward, and the following factors should be considered when making this determination:<sup>98</sup>

The possibility that the incompetent person can become pregnant . . .  
(2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, con-

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88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 472.

94. *Id.* at 482.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 483.

versely, the possibility of trauma or psychological damage from the sterilization operation. (3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her. (4) The inability of the incompetent person to understand reproduction or contraception and the likely permanence of that inability. (5) The feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances. (6) The advisability of sterilization at the time of the application rather than in the future. While sterilization should not be postponed until unwanted pregnancy occurs, the court should be cautious not to authorize sterilization before it clearly has become an advisable procedure. (7) The ability of the incompetent person to care for a child, or the possibility that the incompetent may at some future date be able to marry and, with a spouse, care for a child. (8) Evidence that scientific or medical advances may occur within the foreseeable future which will make possible either improvement of the individual's condition or alternative and less drastic sterilization procedures. (9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interest of the incompetent person rather than their own or the public's convenience.<sup>99</sup>

These factors are not exclusive and they should be weighed according to the circumstances of each particular case.<sup>100</sup> Ultimately, the court will authorize whatever it believes is in the best interest of the ward. After considering all of the evidence provided in this case, the court in *Grady* remanded the case back to the lower court for further proceedings in accordance with their opinion that sterilization was in the best interest of this ward.<sup>101</sup>

This small sampling of presented cases were the ones the court in *K.E.J.* relied upon when it was made its decision whether to grant authorization for the sterilization of K.E.J. Ultimately the case caused a push for legislation in Illinois which resulted in the enactment of a statute which courts are to rely upon from now on.

## THE K.E.J. CASE

### TRIAL COURT DECISION

Although the *K.E.J.* case began in January 2003, K.E.J.'s life first

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99. *Id.*

100. *Id.*

101. *Id.* at 486.

drastically changed on May 28, 1986.<sup>102</sup> On that day, at the age of eight, K.E.J. was in a car accident that left her with severe head trauma and resulted in permanent brain damage.<sup>103</sup> Following a personal injury lawsuit, K.E.J. received a substantial settlement annuity that would provide for her care for the remainder of her life.<sup>104</sup> Then, because of the brain damage K.E.J. suffered she was adjudicated as a disabled person.<sup>105</sup> Her maternal aunt, V.H. became her guardian and currently K.E.J. lives with her.<sup>106</sup>

At the age of twenty-four, K.E.J. was sexually active despite her guardian's efforts to deter her.<sup>107</sup> V.H. asked the court to authorize sterilization of K.E.J. because she felt this was the most effective method of preventing pregnancy.<sup>108</sup> Although K.E.J. was receiving Depo Provera injections as a means of birth control, V.H. stated that they caused K.E.J. significant weight gain, elevated blood pressure, and other adverse side effects.<sup>109</sup> K.E.J.'s doctors agreed with V.H.'s assessment that tubal ligation was the best method to prevent K.E.J. from becoming pregnant, and their written statements were attached to V.H.'s petition to the court to authorize sterilization.<sup>110</sup>

K.E.J.'s GAL met with K.E.J. to discuss the potential procedure and found that K.E.J. understood the consequences of the procedure and its permanency.<sup>111</sup> Also, the GAL noted that "there is no doubt in [her] mind that [K.E.J.] does not want the tubal ligation procedure" because K.E.J. expressed her desire to eventually have a baby.<sup>112</sup> At the time of K.E.J.'s meeting with her GAL she was in a relationship with a man she called her fiancée and expressed her wishes to marry him.<sup>113</sup> Although, prior to K.E.J.'s conversation with her GAL she agreed to the sterilization, she later stated that she had agreed because she was in V.H.'s presence and knew V.H. wanted the procedure performed.<sup>114</sup>

When making its final order, the lower court first found that K.E.J. lacked the mental capacity to make an informed decision regarding the

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102. *K.E.J.*, 887 N.E.2d at 709.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

sterilization and it was not likely that her condition would improve in the near future.<sup>115</sup> Next, the court found that K.E.J. was capable of reproducing as her mental incapacity did not affect her physical maturation.<sup>116</sup> Also, she was sexually active at the time of the hearing.<sup>117</sup> Finally, there was uncontested evidence that K.E.J. “‘could never conceivably carry out parenting duties,’ and that having a child taken away from her would result in ‘irreparable psychological damage.’”<sup>118</sup> While all of these factors would point towards a ruling for sterilization, the court rejected V.H.’s petition for sterilization because there was no evidence that a less intrusive method of birth control could not be utilized.<sup>119</sup> The court did make a note that although V.H. was looking out for K.E.J.’s best interest, at that time there was not a need for a permanent form of birth control.<sup>120</sup>

### APPELLATE COURT DECISION

V.H. appealed the lower court’s decision citing that the court erred in denying her petition since she had presented clear and convincing evidence that a tubal ligation was in the best of interest of K.E.J.<sup>121</sup> The Illinois Appellate Court noted this was a case of first impression in the state<sup>122</sup> and because there is no governing statute, it would “look to the basic rights and interests that ha[d] to be considered and balanced in determining the standard which must govern [its] disposition.”<sup>123</sup>

In analyzing the case, the court first looked to the fundamental privacy rights that would be affected in sterilizing an adult ward, which were: “(1) the right to bear children, and (2) the right of personal inviolability.”<sup>124</sup> These rights were examined under the *Skinner* decision<sup>125</sup> and the *K.E.J.* court addressed concerns that state-sanctioned involuntary sterilization could be extended to revitalize the eugenics movement.<sup>126</sup> However, in *K.E.J.*’s case, the ward’s mental incapacity stemmed from the severe head trauma she suffered as a child,<sup>127</sup> thus the fear that ruling in favor of

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115. *Id.* at 713.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 714.

121. *Id.*

122. *Id.*

123. *Id.* at 715.

124. *Id.*

125. *Skinner*, 316 U.S. at 536.

126. *K.E.J.*, 887 N.E.2d at 709.

127. *Id.*

sterilization could promote the ideology of eugenics was unfounded. In cases where the ward is adjudicated as incompetent, the right to bear children and the right of personal inviolability are not absolute.<sup>128</sup> Previous courts have ruled that “parents may constitutionally exercise control over [their child’s] decision about whether or not to bear a child,” and this court analogized that ruling to the guardian-ward relationship; the court found that the guardian can make the same decision for the ward so long as it is in the ward’s best interest.<sup>129</sup>

While courts have ruled in favor of parents’ rights to exercise control over their child’s decision, courts must protect minors and wards to ensure that parents and guardians are not abusing their powers.<sup>130</sup> Therefore, “courts can override the will of parents and guardians to assert fundamental rights of children and wards which cannot be preempted.”<sup>131</sup> Because of this necessity to safeguard wards’ and minors’ rights, the court sought to “implement strong procedural and substantive safeguards for all cases” involving requests to authorize sterilization of a minor or a ward.<sup>132</sup>

As this was a case of first impression in Illinois, the court had no statutory guidelines by which to abide, so it looked to cases in other states including the *Grady* case for guidance.<sup>133</sup> As previous courts had required, here the petitioner needed to prove by clear and convincing evidence that sterilization was in the best interest of the incompetent ward.<sup>134</sup> When assessing the best interest of the ward, the court relied upon and then adopted the six-factor test set forth in *Grady*, subject to the requirements of the Illinois Probate Act.<sup>135</sup> The six-factors taken from *Grady* were requirements number two, three, four, seven, eight, and nine.<sup>136</sup>

The *Grady* six factors needed to be reconciled with the Illinois Probate Act which defines the duties of guardians for disabled adults.<sup>137</sup> The Illinois Probate Act creates a “dual standard”<sup>138</sup> that guardians must follow when making decisions for their wards. The “dual standard” requires that a guardian use the substituted judgment standard, which means the guardian must attempt to fulfill the ward’s wishes as if the ward were competent

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128. *Id.*

129. *Id.*

130. *Id.* at 717.

131. *Id.*

132. *Id.*

133. *Id.* at 718.

134. *Id.*

135. *Id.*

136. *Grady*, 426 A.2d at 482-83.

137. *K.E.J.*, 887 N.E.2d at 720.

138. *Id.*

to make the decision.<sup>139</sup> Then the guardian must substitute that ward's judgment for their own.<sup>140</sup> If the guardian cannot determine what the ward's wishes would have been in the situation, then the guardian must act in the ward's best interest; then this the best interest analysis should be used and evaluated under the *Grady* six factor test.<sup>141</sup>

In the case at hand, because K.E.J. sustained her brain injury which rendered her incapacitated at a young age it is impossible to determine what she would have wanted in this situation.<sup>142</sup> Thus, the substituted judgment standard is not possible because no one can determine what the ward would have wanted to occur.<sup>143</sup> The court, therefore, turned to the best interest analysis and used the *Grady* six-factor test.<sup>144</sup>

After considering all of the factors, the court found "that the trial court did not err in concluding that K.E.J. would have a constant need for contraception due to her inability to raise a child and the emotional pain she would suffer were a child of her to be taken away by the state."<sup>145</sup> K.E.J.'s need, however, could be satisfied by other means of contraception that are less intrusive and less emotionally distressing, thus the denial of the petition was affirmed.<sup>146</sup>

### ILLINOIS LEGISLATION & WHAT IT MEANS

After the conclusion of the K.E.J. case Equip for Equality, an Illinois organization aimed at furthering the rights of disabled individuals, made a significant push for legislation to be passed in Illinois addressing the reproductive rights of disabled individuals.<sup>147</sup> On August 11, 2009, Illinois Governor Pat Quinn signed the public law that took effect on January 1, 2010, which now requires a guardian to go before the court to petition for sterilization of their ward, as opposed to making the decision on their own.<sup>148</sup> Prior to this legislation, Illinois was one of only sixteen states without a law on the books regarding involuntary sterilization.<sup>149</sup> Zena

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139. 755 Ill. Comp. Stat. 5/11a-17(e) (2010).

140. *Id.*

141. *Id.*

142. *Id.* at 721.

143. *Id.*

144. *Id.*

145. *Id.* at 723.

146. *Id.*

147. Illinois Legal Advocate, *Governor Quinn Signs Law Banning Sterilization of Adults With Disabilities Without Court Order*, (Aug. 12, 2009), available at: <http://www.illinoislegaladvocate.org/index.cfm?fuseaction=news.newsDetails&newsID=940>

148. Robert, *supra* note 7.

149. *Id.*



Naiditch, founder and CEO of Equip for Equality spoke of the new legislation and stated, “This step in the right direction is critical to the protection of the fundamental rights of people with disabilities.”<sup>150</sup>

The Illinois law calls for a different analysis than that which was laid out in the *K.E.J.* case. First, the law requires that a guardian of a ward initially obtain an order from the court granting the guardian authority to consent to the sterilization.<sup>151</sup> When seeking the order, the guardian must file a verified motion which alleges the facts that demonstrate the need for sterilization.<sup>152</sup> After the verified motion is filed, the court will appoint a GAL to report to the court on issues relevant to the case that require independent investigation.<sup>153</sup> If the ward requests counsel, objects to the sterilization, or her position is different than that of the GAL the court may appoint counsel to the ward.<sup>154</sup> Next, a medical and psychological evaluation of the ward is required.<sup>155</sup> Also, the court must “determine . . . whether the ward has capacity to consent or withhold consent to the proposed sterilization and, if the ward lacks such capacity, whether the ward is likely to regain such capacity.”<sup>156</sup>

If the ward does not have the capacity to consent and is unlikely to regain the capacity, then the court looks to whether the ward clearly desires the sterilization or not.<sup>157</sup> If so, then the sterilization can go forward after a medical and psychological evaluation is made.<sup>158</sup> If the ward does not have the capacity to consent and does not want the sterilization to occur, then the court will look to the medical and psychological evaluation before making a decision.<sup>159</sup> Prior to authorizing a guardian to consent to sterilization the court must first find, by clear and convincing evidence, that all of the following factors are met:

The ward lacks decisional capacity regarding the proposed sterilization.

The ward is fertile and capable of procreation.

The benefits to the ward of the proposed sterilization outweigh the harm.

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150. Illinois Legal Advocate, *supra* note 147.

151. 755 Ill. Comp. Stat. 5/11a-17.1(a) (2010).

152. 755 Ill. Comp. Stat. 5/11a-17.1(b) (2010).

153. 755 Ill. Comp. Stat. 5/11a-17.1(c) (2010).

154. 755 Ill. Comp. Stat. 5/11a-17.1(d) (2010).

155. 755 Ill. Comp. Stat. 5/11a-17.1(e) (2010).

156. 755 Ill. Comp. Stat. 5/11a-17.1(f) (2010).

157. 755 Ill. Comp. Stat. 5/11a-17.1(g) (2010).

158. *Id.*

159. 755 Ill. Comp. Stat. 5/11a-17.1(h) (2010).

The court has considered less intrusive alternatives and found them to be inadequate in this case.

The proposed sterilization is in the best interest of the ward. In considering the ward's best interest, the court shall consider the following factors:

The possibility that the ward will experience trauma or psychological damage if he or she has a child and, conversely, the possibility of trauma or psychological damage from the proposed sterilization.

The ward is or is likely to become sexually active.

The inability of the ward to understand reproduction or contraception and the likely permanence of that inability.

Any other factors that assist the court in determining the best interest of the ward relative to the proposed sterilization.<sup>160</sup>

Three significant differences are seen between the new Illinois legislation and the decisional standard set out by the *K.E.J.* court. First, under the new Illinois law, the court neither evaluates the ward's ability to care for a child nor the possibility that the ward may marry in the future and with a spouse will be able to care for a child. Second, the new law does not require a court for look at evidence that scientific or medical advances may occur within the foreseeable future which could improve the ward's mental capacity or provide less drastic methods of sterilization. Finally, the new law does not require a showing by the petitioner that the sterilization is sought in good faith and for the benefit of the ward rather than for the simple convenience of the petitioner.

The first difference is significant because a ward may certainly marry in the future and that spouse could potentially be able to care for a child. A court cannot be all-knowing and with certainty state that if the ward marries she will marry someone who is incapable of caring for a child. Perhaps if the ward and her spouse were to care for a child together they would be considered capable parents as opposed to if the ward were to solely care for the child. The legislation, by failing to include this factor in the assessment, potentially deprives an incapacitated person of having a child for which she could care for in the future.

Today, the potential for new medicines, cures, and treatments is ever evolving. With the constant flow of information through the internet one can easily find out if new medical advances are on the horizon, and the

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160. 755 Ill. Comp. Stat. 5/11a-17.1(h) (2010).

Illinois legislation fails to take this into account. If a medical procedure or treatment were to come on the market which could improve the ward's mental capacity, the court should be required to hold off on authorizing consent for the sterilization because of the ward's potential for eventually expressing her clear desires. Additionally, if a new contraceptive method were to come into existence in the near future, the court should at least evaluate whether this new method could be less intrusive, less drastic, and as effective for the ward. Without this requirement, the court can miss an opportunity to provide a better solution for the ward rather than ordering sterilization.

Because the new law does not require a showing by the petitioner that she is seeking the authorization for the sterilization in good faith, there is a risk that a court will grant a sterilization sought out for the petitioner's convenience and not in the best interest of the ward. Although the court requires clear and convincing evidence of the named best interest factors, it leaves room for potential abuses of guardianship powers.

### CONCLUSION

Illinois has taken a significant step in protecting the rights of wards by legislating a standard that courts are to utilize when evaluating petitions by guardians to sterilize wards. Today a guardian can no longer go to a doctor and request that her ward be sterilized; the guardian must first address the issue with the court. The court then has an opportunity to protect the rights of the ward and it takes a genuine look at the best interest of that ward. The *K.E.J.* case brought this issue to light in Illinois and the result was a law that is meant to protect all future wards who may face this issue. However, the law differs in three significant ways from the standard laid out in *K.E.J.* Although the law appears extensive and takes significant precautions to safeguard the ward's right to exercise control over her body and her right to bear children, it misses key factors which could be detrimental to the ward. Illinois took a large step in the right direction when it enacted this law, however, if a court were to also examine the three missing factors from *K.E.J.* it could offer wards even more protection.