

MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

ONE HUNDRED AND TENTH LEGISLATURE

Legislative Document

No. 1660

H. P. 1543

House of Representatives, May 26, 1981

Submitted by the Department of Mental Health and Corrections pursuant to Joint Rule 24.

Referred to the Committee on Judiciary. Sent up for concurrence and ordered printed.

EDWIN H. PERT, Clerk

Presented by Representative Connolly of Portland.

Cosponsor: Representative Benoit of South Portland.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED AND EIGHTY-ONE

AN ACT Relating to Informed Consent and Determination of Best Interest for those Unable to Give Informed Consent for Sterilization.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 34 MRSA c. 193, as amended by P&SL 1973, c. 53, is repealed.

Sec. 2. 34 MRSA c. 194 is enacted to read:

CHAPTER 194

DUE PROCESS IN STERILIZATION ACT OF 1980

§ 2471. Short title

This chapter may be known and may be cited as the "Due Process in Sterilization Act of 1980."

§ 2472. Legislative intent

The Legislature finds and declares that sterilization procedures are generally irreversible and represent permanent and highly significant consequences for the patient involved. The Legislature recognizes that certain legal safeguards are

necessary to prevent indiscriminate and unnecessary sterilization and to assure equal access to desired medical procedures for all Maine citizens.

§ 2473. Definitions

As used in this chapter, unless the context indicates otherwise, the following terms have the following meanings.

1. **Disinterested expert.** “Disinterested expert” means an appropriately licensed or certified professional not associated with an institution serving the person for whom sterilization is being sought and not personally related to the petitioner.

2. **Guardian.** “Guardian” means the legal guardian of a person as appointed by a court of competent jurisdiction.

3. **Informed consent.** “Informed consent” means consent that is:

A. Based upon the actual understanding by the person to be sterilized of the nature of sterilization, its permanent consequences, all alternative methods of contraception and all reasonably foreseeable risks and benefits; and

B. Wholly voluntary and free from express or implied coercion.

4. **Parent.** “Parent” means the natural or adoptive mother or father of a person.

5. **Physician.** “Physician” means any person licensed to practice medicine under Title 32, chapter 48, subchapter II.

6. **Psychologist.** “Psychologist” means any person licensed to practice psychology under Title 32, chapter 48, subchapter II.

7. **Sterilization.** “Sterilization” means a medical or surgical procedure, the purpose of which is to render an individual incapable of procreation. Sterilization does not refer to procedures which must be performed for distinct and urgent medical reasons and which have the unavoidable secondary effect of rendering the individual infertile.

§ 2474. Informed consent needed for sterilization

1. **Inform consent required.** Except as provided in this section, prior to initialing sterilization procedures on any individual, a physician shall obtain and record the informed consent of that individual.

2. **Persons presumed unable to give informed consent.** The following are presumed unable to give informed consent:

A. Persons under age 18 years and not married or otherwise emancipated;

B. Persons presently under public or private guardianship or conservatorship;
or

C. Persons residing in a state institution providing care, treatment or security.

§ 2475. Sterilization authorized by court

1. Court order required. A District Court order is required authorizing sterilization before the sterilization of any person who is:

- A. Unable to give informed consent;
- B. Under the age of 18 years and not married or otherwise emancipated;
- C. Presently under public or private guardianship or conservatorship; or
- D. Residing in a state institution providing care, treatment or security or otherwise in state custody.

2. Determinations prior to issuance of order. Before an order may be issued, the court shall determine whether the person to be sterilized is able to give informed consent and if so whether he has given informed consent to be sterilized. If the court determines under the provisions of this chapter that the individual to be sterilized is unable to give informed consent, the court shall permit sterilization only upon a determination that sterilization is in the best interest of the person to be sterilized as provided in this chapter. If the court determines that the person to be sterilized is able to give informed consent to sterilization but refuses to do so, the court shall issue an order forbidding sterilization, unless the person later makes a different choice and only after a rehearing under this section.

§ 2476. Contents of petition for determination of ability to give informed consent

The petition shall be excuted under oath and shall set forth:

- 1. Person to be sterilized. Name, age and residence of the person to be sterilized;
- 2. Parent, guardian or spouse of person to be sterilized. Names and residences of any parents, spouse or legal guardian of the person to be sterilized;
- 3. Mental condition. The mental condition, if appropriate, of the person to be sterilized;
- 4. Reasons for sterilization sought. A statement of the reasons for which sterilization is sought; and
- 5. Person initiating petition. The name, address, position and statement of interest of the person initiating the petition.

§ 2477. Notice of hearing upon the petition to determine informed consent

Upon the receipt of the petition, the District Court shall assign a time, not later than 30 days thereafter, and a place for hearing the petition. The court may, at its discretion, hold the hearing on the petition at a place within the State other than

the usual courtroom if it would facilitate the presence of the person to be sterilized. The court shall cause a copy of the petition and notice of hearing to be served on the person to be sterilized and his legal guardian or custodian at least 7 days prior to the hearing date. If the legal guardian or custodian of the person to be sterilized is not a resident of this State, notice may be served by registered mail.

If the residence of the legal guardian or custodian is unknown, an affidavit to that effect shall be filed in lieu of service.

§ 2478. Hearing upon the petition to determine informed consent

1. **Appointment of disinterested experts.** For the purpose of determining an individual's ability to give informed consent, the court shall appoint not less than 2 disinterested experts experienced in the field of developmental disabilities or mental health, including at least one licensed psychologist or psychiatrist, to examine the person, to report on that examination and to testify at the hearing as to his competency. Other evidence regarding the person's capabilities may be introduced at the hearing by any party.

2. **Preference of person to be sterilized.** If the individual to be sterilized has any preference as to a disinterested expert of whom he would prefer to be examined, the court shall make a reasonable effort to accommodate the preference.

3. **Person's presence at hearing.** The person to be sterilized shall be present at any hearing regarding his ability to give informed consent to sterilization. The court shall inquire at the time of the hearing as to the types and effects of any medications being administered to or taken by the person to be sterilized.

4. **Determination that person is able to give informed consent.** If the court determines by clear and convincing evidence that the person is able to give informed consent, the court shall so state and sterilization may be performed on that person, if he consents orally or in writing in the presence of a disinterested person competent to give testimony in a judicial proceeding who documents this consent.

5. **Determination that person is not able to give informed consent.** If the court determines that the person to be sterilized is not able to give informed consent for sterilization, sterilization shall not be performed, except pursuant to section 2481.

6. **Counsel.** If the person to be sterilized requests counsel and cannot afford counsel, the court may appoint counsel, to represent that person at public expense. A reasonable fee shall be set by the judge of the District Court for appointed counsel. Counsel, appointed counsel or the person to be sterilized may present evidence and cross-examine witnesses who testify or present evidence at any hearing on the petition.

§ 2479. Limitations

1. **Consent not to be a condition for exercise of any right, privilege or**

freedom. Consent to sterilization shall not be made a condition for release from any institution nor shall it be made a condition for the exercise of any right, privilege or freedom, nor shall it be made a condition for receiving any form of public assistance, nor as a prerequisite for any other service. The consent must be free from express or implied inducements or constraints.

2. Failure to be sterilized not to be grounds for confinement in institution. The fact that a person of any age has not been sterilized or has not sought sterilization shall not be grounds for confinement in any institution.

3. Participation in sterilization. Nothing in this chapter may require any hospital or any person to participate in any sterilization, nor may any hospital or any person be civilly or criminally liable for refusing to participate in any sterilization.

4. Guarantees and limitations to be given to individual to be sterilized. The guarantees and limitations provided in this section shall be given orally to individuals seeking sterilization. These guarantees and limitations must also appear prominently at the top of the consent document.

§ 2480. Penalties

1. Violations. Anyone knowingly or willfully violating section 2479, subsection 1, is guilty of a Class D crime, punishable as provided in Title 17-A, sections 1252 and 1301.

2. Falsification of petition; aiding or procuring unlawful sterilization. Anyone knowingly or willfully falsifying a petition for sterilization or otherwise aiding or procuring the performance of an unlawful sterilization is guilty of a Class D crime, punishable as provided in Title 17-A, sections 1252 and 1301.

§ 2481. Determination of the best interests of an individual unable to give informed consent for sterilization

The parent, spouse or legal guardian of any person found unable to give informed consent may petition the District Court, in the district of residence of the person for whom sterilization is sought, to determine if sterilization is in the best interest of the person for whom it is proposed. That court shall have sole jurisdiction and authority to order that a sterilization procedure may or may not be performed when a person is incapable of giving informed consent as determined by the hearing required in section 2478.

§ 2482. Contents of petition for sterilization of an individual based upon a determination of the best interest of that individual

The petition shall be executed under oath and shall set forth:

1. Person to be sterilized. The name, age and residence of the person to be sterilized;

2. Parents, spouse or guardian of person to be sterilized. The names and residences of any parents, spouse or legal guardian of the person to be sterilized;

3. Mental condition. The mental condition of and effects of any medications being administered to or taken by the individual to be sterilized;

4. Reasons sterilization is sought. A statement, in terms of the best interest of the individual, of the reasons for which sterilization is sought;

5. Petitioner. The name and relationship of the petitioner to the person to be sterilized;

6. Alternatives. Less drastic alternative contraceptive methods which have been tried or the reason those methods are believed to be unworkable or inappropriate;

7. Person's physiological capability to procreate. A statement as to the physiological capability of the person to be sterilized to procreate;

8. Risk to life or health caused by procreation. A statement regarding the risk to life or health which could be caused by procreation; and

9. Person's attitudes or desires regarding sterilization. Any personal attitudes or desires expressed by the person to be sterilized regarding sterilization.

§ 2483. Notice of hearing upon the petition to determine the best interest of an individual

Upon the receipt of the petition, the court shall assign a time, not later than 30 days thereafter, and a place for hearing the petition. The court may, at its discretion, hold the hearing on the petition at a place within the State other than the usual courtroom, if it would facilitate the presence of the person to be sterilized. The court shall cause petition and notice to be served on the person to be sterilized and his legal guardian or custodian at least 20 days prior to the hearing date. The court shall direct that personal service be made upon the person to be sterilized and his legal guardian or custodian. If the legal guardian or custodian of the individual to be sterilized is not a resident of this State, notice may be served by registered mail. If the residence of the guardian or custodian of the person to be sterilized is unknown, an affidavit to that effect shall be filed in lieu of service.

§ 2484. Hearing upon a petition to determine the best interest of an individual

1. Ability to give or withhold informed consent. No person maybe sterilized against his will. In all instances where the issue of best interest of an individual is to be considered, a prerequisite determination, as determined by section 2478, that the individual cannot give or withhold informed consent shall be required. When an individual capable of giving informed consent indicates that he does not wish to be sterilized, that desire shall be honored.

2. **Disinterested experts; evidence.** The court shall hear the petition to determine whether sterilization is in the best interest of the person to be sterilized. The court shall appoint not less than 3 disinterested experts with experience related to the condition of the person as alleged in the petition, including at least one licensed physician and one licensed psychologist or psychiatrist, to examine the person and to testify at the hearing as to the person's mental and physical condition. The court shall hear and consider evidence as to the positive or negative psychological and physiological effects of sterilization. Any other evidence regarding the person's mental and physical condition may be introduced at the hearing.

3. **Presence of person; counsel; findings.** The person for whom a sterilization is sought shall be physically present throughout the entire proceeding, unless such right is waived by the person for whom a sterilization is sought or by his attorney. The person for whom a sterilization is sought shall be represented by counsel and provided the right and opportunity to be confronted with and to cross-examine all witnesses. The right to counsel may not be waived. In the event that the person cannot afford counsel, the court shall appoint an attorney not less than 20 days before the scheduled hearing, at public expense. A reasonable fee shall be set by the judge of the District Court for appointed counsel. The court-appointed or otherwise provided attorney shall represent the person to be sterilized in assuring that information and evidence in opposition to sterilization without informed consent is fully represented. All stages of the hearing shall be recorded by a tape recorder or a court reporter, as the court may direct. In all cases, the court shall issue written findings to support its decision and the basis for such findings.

4. **Finding that sterilization is in person's best interest.** The court shall find that sterilization is in the best interest of the person if the evidence demonstrates the operation is clearly necessary to preserve his physical and mental health.

5. **Burden of proof.** The burden of proof by clear and convincing evidence that sterilization is on the best interest of the person for whom sterilization is sought shall rest with the party seeking to establish that sterilization is in the best interest of the person for whom the petition was filed.

6. **Order for sterilization; dismissal of petition.** If the court determines that sterilization is in the best interest of the person petitioned for and that less drastic alternative methods of contraception have proven to be unworkable or inappropriate, the court shall order that sterilization may be performed. If the court determines that sterilization is not in the best interest of the person, the petition for sterilization shall be dismissed with an order that the proposed sterilization shall not be performed, unless the order is amended or dissolved by a court of competent jurisdiction.

7. **Appeal.** Appeal of a final order of a District Court shall be by right in accordance with the Maine Rules of Civil Procedure, except that upon a finding of inability to pay the required fees for such appeal those fees shall be waived. Pendency of an appeal pursuant to this chapter shall stay any order to sterilize.

8. Confidentiality of proceedings and records. All court proceedings as provided under this chapter shall be confidential and closed to the public, unless requested to be open to the public by the person to be sterilized or his attorney. Records of such court proceedings may not be open to inspection by the public, unless so requested by the person for whom sterilization is sought or his attorney.

§ 2485. Court costs

The court, after considering the financial resources of the parties concerned and the source of the petition, shall assess court costs.

STATEMENT OF FACT

This bill mandates a hearing to determine whether a person who is mentally retarded, mentally ill or housed involuntarily in a state institution is capable of giving informed consent for sterilization and provides for an adversary hearing to determine if sterilization is in the best interest of a person for whom sterilization is proposed and from whom informed consent cannot be obtained.

The present laws regarding sterilization of the mentally handicapped are inadequate, vague and ill-defined and, if recent litigation both in other states and in Maine is any indication, their validity is constitutionally questionable. Present sterilization laws neither serve the general public nor the specific individuals to whom they are intended to apply in an adequate and useful manner.

At the present time, there are 7 pending sterilization petitions from Pineland Center and 2 community mentally retarded clients are under review presently by the Bureau of Mental Retardation for consideration for sterilization. Over the past year, the Department of Mental Health and Corrections has been contacted regarding information about sterilization for approximately 16 individuals for whom sterilization is being considered. In addition to these contacts, the department has had 10 to 15 contacts by doctors and hospitals in the State requesting information regarding the procedure for sterilization and have had contacts from a number of mentally retarded individuals with complaints regarding the denial of their request for sterilization. This is, upon investigation, usually the result of physicians feeling uncomfortable acting under the sterilization law which is generally agreed to be inadequate.

The major outstanding issues which can only be dealt with through the process of a change in legislation are the pending sterilization petitions from Pineland Center. These petitions have been pending now for over 2 years. Originally 8 petitions were pending, but in the past 2 years one of the clients petitioned for died as a result of a blood clot in the lung which, according to the clinical staff at Pineland Center, was exacerbated by the continued need to utilize birth control pills on that client while the pending petitions were being considered. It is unlikely that under the present sterilization laws the Attorney General's office will authorize action on any of the pending petitions; therefore, Pineland Center is forced by the inaction on these petitions to provide what clinicians there characterize as inadequate medical care.

Because of the vagueness and lack of clear definition in the current sterilization laws, people who were obviously intended to benefit by the sterilization law are often denied the opportunity to utilize sterilization as a legitimate and certain form of birth control. Because of their questionable ability to give informed consent and because of the fear on the part of the medical community that questions regarding their activities under the current sterilization law may arise at some future date, mentally retarded individuals are denied sterilization. On the other hand, persons who have given questionable consent or no consent at all and who were not intended to be sterilized under the present statute are, it is believed, being sterilized under the provisions of the present law regarding sterilization. Any individual undergoing a procedure as intrusive and irreversible as eliminating the capability to reproduce has a right to expect the highest level of care and due process protection of law that can be made available.