

# MAINE STATE LEGISLATURE

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1 (New Draft of H.P. 1543 L.D. 1660)  
2 SECOND REGULAR SESSION  
3

4 ONE HUNDRED AND TENTH LEGISLATURE  
5

6 **Legislative Document**

**No. 2065**

7  
8  
9 H. P. 2179 House of Representatives, March 12, 1982  
Reported by The Majority from the Committee on Judiciary and  
printed under Joint Rules No. 2.

EDWIN H. PERT, Clerk

10  
11 **STATE OF MAINE**  
12

13 IN THE YEAR OF OUR LORD  
14 NINETEEN HUNDRED AND EIGHTY-TWO  
15

16 **AN ACT Relating to Informed Consent and**  
17 **Determination of Best Interest for those**  
18 **Unable to Give Informed Consent for**  
19 **Sterilization.**  
20

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

22 **Sec. 1. 34 MRSA c. 193, as amended by P&SL 1973, c.**  
23 **53, is repealed.**

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

25 **CHAPTER 194**

26 **DUE PROCESS IN STERILIZATION ACT OF 1982**

27 **§2471. Short title**

28 **This chapter may be known and may be cited as the "Due**  
29 **Process in Sterilization Act of 1982."**

1     §2472. Legislative intent

2             The Legislature finds and declares that sterilization  
3 procedures are generally irreversible and represent poten-  
4 tially permanent and highly significant consequences for the  
5 patient involved. The Legislature recognizes that certain  
6 legal safeguards are necessary to prevent indiscriminate and  
7 unnecessary sterilization and to assure equal access to  
8 desired medical procedures for all Maine citizens.

9     §2473. Definitions

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

12            1. Disinterested expert. "Disinterested expert" means  
13 an appropriately licensed or certified professional not  
14 associated with an institution serving the person for whom  
15 sterilization is being sought and not personally related to  
16 the petitioner.

17            2. Guardian. "Guardian" means the legal guardian of a  
18 person as appointed by a court of competent jurisdiction.

19            3. Informed consent. "Informed consent" means consent  
20 that is:

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

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

28            4. Parent. "Parent" means a natural or adoptive  
29 mother or father of a person.

30            5. Physician. "Physician" means any person licensed  
31 to practice medicine under Title 32, chapter 48, subchapter  
32 II.

33            6. Psychiatrist. "Psychiatrist" means a physician li-  
34 censed to practice medicine under Title 32, chapter 48, sub-  
35 chapter II who specializes in the diagnosis and treatment of  
36 mental disorders.

37            7. Psychologist. "Psychologist" means any person li-  
38 censed to practice psychology under Title 32, chapter 48,  
39 subchapter II.

1           8. Sterilization. "Sterilization" means a medical or  
2 surgical procedure, the purpose of which is to render an  
3 individual permanently incapable of procreation. Steriliza-  
4 tion does not refer to procedures which must be performed  
5 for distinct and urgent medical reasons and which have the  
6 unavoidable secondary effect of rendering the individual  
7 infertile.

8   §2474. Informed consent required for sterilization

9           1. Informed consent required. Except as provided in  
10 this chapter, prior to initiating sterilization procedures  
11 on any individual, a physician shall obtain and record the  
12 informed consent of that individual.

13          2. Hearing required to determine ability to give  
14 informed consent for sterilization. A hearing to determine  
15 ability to give informed consent for sterilization is re-  
16 quired when sterilization is sought for:

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

19           B. Persons presently under public or private guardian-  
20 ship or conservatorship;

21           C. Persons residing in a state institution providing  
22 care, treatment or security, or otherwise in state cus-  
23 tody; or

24           D. Persons from whom a physician could not obtain  
25 informed consent.

26   §2475. Sterilization authorized by court

27          1. Court order required. A District Court order  
28 authorizing sterilization is required before the steriliza-  
29 tion of any person described in section 2474, subsection 2.

30          2. Determination prior to issuance of order. Before  
31 an order may be issued, the court shall determine whether  
32 the person seeking sterilization or for whom sterilization  
33 is sought is able to give informed consent for sterilization  
34 and if so whether he has given informed consent for steril-  
35 ization.

36   §2476. Contents of petition for determination of ability to  
37 give informed consent for sterilization

1       The petition for determination of ability to give  
2 informed consent for sterilization shall be executed under  
3 oath and shall set forth:

4       1. Person seeking sterilization or for whom steriliza-  
5 tion is sought. Name, age and residence of the person  
6 seeking sterilization or for whom sterilization is sought;

7       2. Parent, guardian or spouse. Names and residences  
8 of any parents, spouse or legal guardian of the person  
9 seeking sterilization or for whom sterilization is sought;

10       3. Basis of petition. A statement of the factors,  
11 including any listed in section 2474, subsection 2, and  
12 mental condition, when appropriate, which necessitate a  
13 determination of the ability of the person seeking steril-  
14 ization or for whom sterilization is sought to give informed  
15 consent for sterilization;

16       4. Reasons for sterilization. A statement of the  
17 reasons for which sterilization is sought; and

18       5. Person initiating petition. The name, address,  
19 position and statement of interest of the person initiating  
20 the petition or any person assisting with a self-initiated  
21 petition.

22       §2477. Submitting petition to determine informed consent;  
23 notice of hearing

24       1. Petition submission. The petition for a determina-  
25 tion of ability to give informed consent shall be submitted  
26 to the District Court in the division of residence of the  
27 person seeking sterilization or for whom sterilization is  
28 sought.

29       2. Notice of hearing. Upon the receipt of a petition  
30 to determine informed consent, the District Court shall  
31 assign a time, not later than 30 days thereafter, and a  
32 place for hearing the petition. The court may, at its dis-  
33 cretion, hold the hearing on the petition at a place within  
34 the division other than the usual courtroom if it would  
35 facilitate the presence of the person seeking sterilization  
36 or for whom sterilization is sought.

37       3. Service of notice. The court shall cause a copy of  
38 the petition and notice of hearing to be served on the  
39 person seeking sterilization or for whom sterilization is  
40 sought and his legal guardian or custodian, if any, at least  
41 7 days prior to the hearing date. If a legal guardian or

1 custodian of the person seeking sterilization or for whom  
2 sterilization is sought is not a resident of this State,  
3 notice may be served by registered mail. If the residence  
4 of a legal guardian or custodian is unknown, an affidavit so  
5 stating shall be filed in lieu of service.

6 §2478. Hearing upon a petition to determine informed con-  
7 sent for sterilization

8 1. Counsel. If the person seeking sterilization or  
9 for whom sterilization is sought requests counsel and cannot  
10 afford counsel, the court shall appoint counsel to represent  
11 that person at public expense. If the person is not repre-  
12 sented by counsel and appears to the court unable to request  
13 counsel, the court shall order that counsel be retained or  
14 shall appoint counsel to represent the person at public  
15 expense if the person cannot afford counsel. A reasonable  
16 fee shall be set for appointed counsel by the District  
17 Court. Counsel, or the person seeking sterilization or for  
18 whom sterilization is sought, may present evidence, call  
19 witnesses and cross-examine witnesses who testify or present  
20 evidence at any hearing on the petition.

21 2. Appointment of disinterested experts. For the pur-  
22 pose of determining a person's ability to give informed  
23 consent, the court shall appoint not less than 2 disinter-  
24 ested experts experienced in the field of developmental dis-  
25 abilities or mental health, including at least one licensed  
26 psychologist or psychiatrist, to examine the person, to  
27 report on that examination and to testify at the hearing as  
28 to his competency. Other evidence regarding the person's  
29 capabilities may be introduced at the hearing by any party.

30 3. Preference of person seeking sterilization or for  
31 whom sterilization is sought. If the person seeking steril-  
32 ization or for whom sterilization is sought has any prefer-  
33 ence as to a disinterested expert by whom he would prefer to  
34 be examined, the court shall make a reasonable effort to ac-  
35 commodate that preference.

36 4. Person's presence at hearing. The person seeking  
37 sterilization or for whom sterilization is sought shall be  
38 present at any hearing regarding his ability to give  
39 informed consent for sterilization, unless that right is  
40 waived by the person, personally or through his attorney,  
41 and that waiver is approved by the court. The court shall  
42 inquire at the time of the hearing as to the types and  
43 effects of any medications being administered to or taken by  
44 the person.

1           5. Determination that person is able to give informed  
2 consent for sterilization. If the court determines by clear  
3 and convincing evidence that the person is able to give  
4 informed consent for sterilization and that the person does  
5 consent to sterilization, it shall issue an order so stating  
6 and permitting the sterilization to be performed. Prior to  
7 the performance of the sterilization the physician and  
8 hospital involved shall also obtain the written consent of  
9 the person for sterilization.

10 If the court determines by clear and convincing evidence  
11 that the person is able to give informed consent for steril-  
12 ization but determines that the person does not consent to  
13 sterilization, it shall issue an order so stating and for-  
14 bidding sterilization of the person, unless that person  
15 later makes a different choice and only after a rehearing  
16 under this section.

17           6. Determination that person is not able to give  
18 informed consent for sterilization. If the court determines  
19 that the person is not able to give informed consent for  
20 sterilization, it shall issue an order so stating and for-  
21 bidding sterilization of the person, unless a determination  
22 is made under section 2483 that sterilization is in the  
23 best interest of the person.

24 §2479. Limitations

25           1. Consent not to be a condition for exercise of any  
26 right, privilege or freedom. Consent to sterilization shall  
27 not be made a condition for release from or confinement in  
28 any institution nor shall it be made a condition for the  
29 exercise of any right, privilege or freedom, nor shall it be  
30 made a condition for receiving any form of public assis-  
31 tance, nor as a prerequisite for any other service. The  
32 consent must be free from express or implied inducements or  
33 constraints.

34           2. Guarantees and limitations to be given to person to  
35 be sterilized. The guarantees and limitations provided in  
36 this section shall be communicated to the person seeking  
37 sterilization or for whom sterilization is sought by the  
38 court prior to issuing an order under section 2478. These  
39 guarantees and limitations shall also appear prominently at  
40 the top of the consent document used by a physician or  
41 hospital to obtain written consent for sterilization.

42 §2480. Determination of the best interests of a person  
43 unable to give informed consent for sterilization

1       The parent, spouse, legal guardian or custodian of any  
2 person found unable to give informed consent for steriliza-  
3 tion may petition the District Court, in the county of resi-  
4 dence of the person being considered for sterilization to  
5 determine if sterilization is in the best interest of that  
6 person. The court shall have sole jurisdiction and author-  
7 ity to order that a sterilization procedure may be performed  
8 when a person is incapable of giving informed consent, as  
9 determined by the hearing required in section 2478.

10 §2481. Contents of petition for consideration of steriliza-  
11 tion of a person based upon a determination of best  
12 interest

13       The petition for determination if sterilization is in  
14 the best interest of a person shall be executed under oath  
15 and shall set forth:

16       1. Person being considered for sterilization. The  
17 name, age and residence of the person being considered for  
18 sterilization;

19       2. Parents, spouse, custodian or guardian of person  
20 being considered for sterilization. The names and resi-  
21 dences of any parents, spouse or legal guardian of the  
22 person being considered for sterilization;

23       3. Mental condition. The mental condition of and  
24 effects of any medications being administered to or taken by  
25 the person being considered for sterilization;

26       4. Reasons sterilization is sought. A statement, in  
27 terms of the best interest of the person, of the reasons for  
28 which sterilization is sought;

29       5. Petitioner. The name and relationship of the peti-  
30 tioner to the person being considered for sterilization;

31       6. Alternatives. Less drastic alternative contracep-  
32 tive methods which have been tried or the reason those  
33 methods are believed to be unworkable or inappropriate for  
34 the person being considered for sterilization;

35       7. Physiological capability to procreate. A medical  
36 statement assessing the physiological capability of the  
37 person to procreate;

38       8. Risk to life or health. A medical statement  
39 regarding the potential risk to the life or health of the  
40 person which could be caused by procreation or child  
41 rearing;



1        9. Person's attitudes or desires regarding steriliza-  
2 tion. Any attitudes or desires expressed by the person  
3 regarding sterilization; and

4        10. Informed consent order. The date and contents of  
5 the order issued under section 2478 concerning the ability  
6 to give informed consent for sterilization of the person  
7 being considered for sterilization.

8        §2482. Notice of hearing upon the petition to determine the  
9 best interest of a person being considered for  
10 sterilization

11        Upon the receipt of a petition, the court shall assign  
12 a time, not later than 30 days thereafter, and a place for a  
13 hearing on the petition. The court may, at its discretion,  
14 hold the hearing on the petition at a place within the  
15 county other than the usual courtroom, if it would facili-  
16 tate the presence of the person being considered for steril-  
17 ization. The court shall cause the petition and notice of  
18 the hearing to be served on the person being considered for  
19 sterilization and his legal guardian or custodian at least  
20 20 days prior to the hearing date. The court shall direct  
21 that personal service be made upon the person being consid-  
22 ered for sterilization and his legal guardian or custodian.  
23 If the legal guardian or custodian of the person being con-  
24 sidered for sterilization is not a resident of this State,  
25 notice may be served by registered mail. If the residence  
26 of the guardian or custodian of the person being considered  
27 for sterilization is unknown, as affidavit so stating shall  
28 be filed in lieu of service.

29        §2483. Hearing upon a petition to determine the best inter-  
30 est of a person being considered for sterilization

31        1. Ability to give or withhold-informed consent. In  
32 all instances where the issue of whether sterilization is in  
33 the best interest of a person is to be considered, a prior  
34 determination, as required by section 2478, that the person  
35 cannot give or withhold informed consent shall be required.

36        2. Presence of person; counsel; findings. The person  
37 being considered for sterilization shall be physically  
38 present throughout the entire best interest hearing, unless  
39 that right is waived by the person, personally or through  
40 his attorney, and that waiver is approved by the court. The  
41 person being considered for sterilization shall be repre-  
42 sented by counsel and provided the right and opportunity to  
43 be confronted with and to cross-examine all witnesses. The  
44 right to counsel may not be waived. If the person cannot

1 afford counsel, the court shall appoint an attorney, not  
2 less than 20 days before the scheduled hearing, to represent  
3 the person at public expense. A reasonable fee shall be set  
4 for appointed counsel by the District Court. Counsel shall  
5 represent the person being considered for sterilization in  
6 assuring that information and evidence in opposition to  
7 sterilization without informed consent is fully represented.  
8 All stages of the hearing shall be recorded by a tape  
9 recorder or a court reporter, as the court may direct. In  
10 all cases, the court shall issue written findings to support  
11 its decision.

12 3. Disinterested experts; evidence. The court shall  
13 hear the petition to determine whether sterilization is in  
14 the best interest of the person being considered for steril-  
15 ization. The court shall appoint not less than 3 disinter-  
16 ested experts with experience related to the condition of  
17 the person as alleged in the petition, including at least  
18 one licensed physician and one licensed psychologist or psy-  
19 chiatrist, to examine the person and to testify at the hear-  
20 ing. The court shall hear and consider evidence on the fol-  
21 lowing:

22 A. All issues raised by the petition executed under  
23 section 2481; and

24 B. The beneficial or detrimental psychological and  
25 physiological effects of sterilization on the person  
26 being considered for sterilization.

27 Any other relevant evidence concerning the mental and phys-  
28 ical condition of the person being considered for steriliza-  
29 tion may be introduced at the hearing.

30 4. Burden of proof. The burden of proof by clear and  
31 convincing evidence that sterilization is in the best inter-  
32 est of the person being considered shall rest with the party  
33 seeking to establish that sterilization is the appropriate  
34 course of action.

35 5. Finding that sterilization is in person's best  
36 interest. The court shall find that sterilization is in the  
37 best interest of the person being considered for steriliza-  
38 tion if it is shown by clear and convincing evidence that:

39 A. Methods of contraception less drastic than steril-  
40 ization have proven to be unworkable or inappropriate  
41 for the person; and

42 B. Sterilization is necessary to preserve the physical  
43 or mental health of the person.

1           6. Court order. If the court finds that sterilization  
2 is in the best interest of the person being considered for  
3 sterilization, the court shall order that sterilization may  
4 be performed. The sterilization procedure used shall be the  
5 most reversible procedure available at the time when, in the  
6 judgment of the physician performing the sterilization, that  
7 procedure is not inconsistent with the health or safety of  
8 his patient. If the court finds that sterilization is not  
9 in the best interest of the person being considered for  
10 sterilization, the court shall order that sterilization may  
11 not be performed unless the order is amended by a District  
12 Court to permit sterilization.

13           7. Appeal. Appeal of a final order of a District  
14 Court shall be by right in accordance with the Maine Rules  
15 of Civil Procedure, except that upon a finding of inability  
16 to pay the required fees for an appeal, those fees shall be  
17 waived. Pendency of an appeal of an order under this  
18 section shall stay any order allowing sterilization.

19 §2484. Confidentiality; court costs

20           1. Confidentiality of proceedings and records. All  
21 court proceedings occurring under this chapter shall be con-  
22 fidential and closed to the public, unless the person  
23 seeking sterilization or being considered for sterilization,  
24 personally or through his attorney, requests that the pro-  
25 ceedings be open to the public. Records of the court pro-  
26 ceedings shall not be open to inspection by the public,  
27 except under section 2487, without the consent, personally  
28 or through his attorney, of the person seeking steriliza-  
29 tion or for whom sterilization is being considered.

30           2. Costs and fees. The court, after considering the  
31 financial resources of the parties concerned and the source  
32 of a petition under this chapter, shall assess court costs  
33 and attorneys' fees.

34 §2485. Penalties

35           1. Violations. Anyone knowingly or willfully violat-  
36 ing section 2479, subsection 1, is guilty of a Class D  
37 crime.

38           2. Falsification of petition; aiding or procuring  
39 unlawful sterilization. Anyone knowingly or willfully  
40 falsifying a petition under this chapter or otherwise aiding  
41 or procuring the performance of a sterilization without a  
42 court order in a situation covered by this chapter is guilty  
43 of a Class D crime.

1     §2486. Liability

2             1. Participation in sterilization. Nothing in this  
3 chapter requires any hospital or any person to participate  
4 in performing any sterilization procedure, nor may any  
5 hospital or any person be civilly or criminally liable for  
6 refusing to participate in performing any sterilization  
7 procedure.

8             2. Immunity. A physician, psychiatrist or psychol-  
9 ogist acting nonnegligently and in good faith in his profes-  
10 sional capacity under this chapter is immune from any civil  
11 liability that might otherwise result from his actions. In  
12 a proceeding regarding immunity from liability, there shall  
13 be a rebuttable presumption of good faith.

14     §2487. Sterilization procedures review committee

15             A committee shall be established whose purpose shall be  
16 to review annually the authorization of sterilizations  
17 under this chapter for the purpose of assessing the need for  
18 any changes in the procedures or standards set forth in this  
19 chapter. The committee shall consist of not less than 6  
20 members, including representatives of the Maine court sys-  
21 tem, the medical community, a designee from the Department  
22 of Mental Health and Mental Retardation, a designee from the  
23 Department of Human Services, a member of the joint standing  
24 committee of the Legislature having jurisdiction over health  
25 and institutional services, and a member of the joint stand-  
26 ing committee of the Legislature having jurisdiction over  
27 the judiciary. The representatives of the 2 joint standing  
28 legislative committees shall be appointed by the chairmen of  
29 those legislative committees. Other members of the review  
30 committee shall be appointed annually by the Governor who  
31 shall also designate the chairman of the committee.

32   STATEMENT OF FACT

33             This new draft mandates a hearing to determine whether  
34 a person who is mentally retarded, mentally ill, housed  
35 involuntarily in a state institution or questionably able to  
36 give informed consent is capable of giving informed consent  
37 for sterilization and provides for an adversary hearing to  
38 determine if sterilization is in the best interest of a  
39 person for whom sterilization is proposed but who cannot  
40 give informed consent.

41             The present law regarding sterilization of the mentally  
42 handicapped is inadequate, vague and ill-defined and, if

1 recent litigation both in other states and in Maine is any  
2 indication, constitutionally questionable. Present steril-  
3 ization laws neither serve in an adequate and useful manner  
4 the general public nor the specific individuals to whom they  
5 are intended to apply.

6 At the present time, there are 7 pending sterilization  
7 petitions from Pineland Center and 2 community mentally  
8 retarded clients who are under review by the Department of  
9 Mental Health and Mental Retardation for consideration for  
10 sterilization. Over the past year, the department has been  
11 contacted regarding information about sterilization for  
12 approximately 16 individuals for whom sterilization is being  
13 considered. In addition to these contacts, the department  
14 has had 10 to 15 contacts by doctors and hospitals in the  
15 State requesting information regarding the procedure for  
16 sterilization and has had contacts from a number of mentally  
17 retarded individuals with complaints regarding the denial of  
18 their request for sterilization. This is, upon investiga-  
19 tion, usually the result of physicians feeling uncomfortable  
20 acting under the present sterilization law which is gener-  
21 ally recognized to be inadequate.

22 The major outstanding issues which can only be dealt  
23 with through the process of a change in legislation are the  
24 pending sterilization petitions from Pineland Center. These  
25 petitions have been pending now for over 3 years. Orig-  
26 inally, 8 petitions were pending, but in the past 3 years  
27 one of the clients petitioned for has died as a result of a  
28 blood clot in the lung which, according to the clinical  
29 staff at Pineland Center, was exacerbated by the continued  
30 need to utilize birth control pills while the pending peti-  
31 tions were being considered. It is unlikely that under the  
32 present sterilization laws the Attorney General's office  
33 will authorize action on any of the pending petitions;  
34 therefore, Pineland Center is forced by the inaction of  
35 these petitions to provide what clinicians there  
36 characterize as inadequate medical care.

37 Because of the vagueness and lack of clear understand-  
38 ing of the current sterilization laws, people who were obvi-  
39 ously intended to benefit by the sterilization law are often  
40 denied the opportunity to utilize sterilization as a legiti-  
41 mate and certain form of birth control. Because of ques-  
42 tionable ability to give informed consent and because of the  
43 fear on the part of the medical community that questions  
44 regarding activities under the current sterilization law may  
45 arise at some future date, mentally handicapped individuals  
46 are denied sterilization. On the other hand, persons who  
47 have given questionable consent or no consent at all and who

1 were not intended to be sterilized under the present statute  
2 are, it is believed, being sterilized under the provisions  
3 of the present law. Any individual undergoing a procedure  
4 as intrusive and generally irreversible as eliminating the  
5 capability to reproduce has a right to expect the highest  
6 level of care and due process protection of law that can be  
7 made available.

8

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