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## Involuntary Sterilization in Georgia: The Aftermath of *Motes v. Hall County Department of Family and Children Services*

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## NOTES

### INVOLUNTARY STERILIZATION IN GEORGIA: THE AFTERMATH OF *Motes v. Hall* *County Department of Family and Children* *Services*

#### I. INTRODUCTION

The involuntary sterilization of mentally incompetent persons has long spawned controversy. This issue involves balancing the right to be secure in one's liberty interests against the needs of the state to preserve the health and safety of society, of children born to the mentally incompetent person, and of the mentally incompetent individual. The Georgia Supreme Court recently held in *Motes v. Hall County Department of Family and Children Services*<sup>1</sup> that Georgia's statute authorizing the sterilization of mentally incompetent persons<sup>2</sup> was unconstitutional because the standard of proof required by the statute was inadequate.<sup>3</sup> Involuntary sterilization, however, does not appear to be a moot issue in Georgia. Bills proposed during the 1984 and 1985 Sessions of the General Assembly indicate that the statute may be amended to mirror its original form,<sup>4</sup> except that the standard of proof will conform to the mandate of the court.

The standard of proof is not the only provision of the statute that is constitutionally problematic. This Note will examine both the original statute and proposed amendment to explore whether mentally retarded and brain-damaged individuals are denied due

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1. 251 Ga. 373, 306 S.E.2d 260 (1983).

2. O.C.G.A. § 31-20-3 (1982).

3. *Motes v. Hall County Dep't of Family and Children Servs.*, 251 Ga. at 374, 306 S.E.2d at 262.

4. See H.B. 1085, General Assembly of Georgia, 1984 Session; H.B. 237, General Assembly of Georgia, 1985 Session. S.B. 110, which proposed changes other than in the statutory standard of proof, was passed by the Georgia Senate on Feb. 13, 1985. For further discussion of this proposed amendment, see *infra* note 129.

process of law or equal protection. Preliminary matters will be addressed, including the statutory procedures for sterilization and the Georgia Supreme Court's holding in *Motes*, which involved a broad constitutional challenge to the sterilization law. Further, the state's interest in enacting a sterilization law will be discerned. Finally, this Note will propose amendments to the statute which would assure that the rights of individuals subject to sterilization are accorded full protection.

## II. PRELIMINARY ISSUES

The Georgia Code provides two statutory paths to sterilization. The first is voluntary.<sup>5</sup> Any person may be sterilized upon request if such person satisfies a minimum age requirement and is fully informed of the ramifications of the procedure.<sup>6</sup> This voluntary procedure will not be discussed further in this Note. The second path is involuntary. A mentally incompetent person may be sterilized if, pursuant to a petition, the court finds that any child born to the person could not be adequately cared for.<sup>7</sup>

### A. Statutory History

Georgia Code section 31-20-3(b) defines a person who is subject to sterilization as:

a person who, because of mental retardation, brain damage, or both, is irreversibly and incurably mentally incompetent to the degree that such person, with or without economic aid (charitable or otherwise) from others, could not provide care and support for any children procreated by such person in such a way that such children could reasonably be expected to survive to the age of 18 years without suffering or sustaining serious mental or physical harm . . . .<sup>8</sup>

The statute emphasizes the mental and physical well-being of the incompetent's child as the paramount concern of the state, without discriminating between children who are genetically normal and those who are genetically abnormal. This represents a significant redefinition of the state's interest in having a sterilization statute.

Georgia's original statute, enacted in 1937, was based in eugenic

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5. O.C.G.A. § 31-20-2 (1982).

6. *Id.* The statute also generally requires that the person's spouse, if any, sign the request for sterilization. *Id.*

7. O.C.G.A. § 31-20-3 (1982).

8. O.C.G.A. § 31-20-3(b) (1982).

theory.<sup>9</sup> It established the State Board of Eugenics and provided for "the sterilization of selected persons from the inmates of the State Institutions and persons recommended by the . . . Board."<sup>10</sup> The Georgia statute was similar to other state statutes authorizing eugenic sterilization that were enacted after the United States Supreme Court's decision in *Buck v. Bell*.<sup>11</sup>

In 1970, the General Assembly enacted the present statute, repealing the 1937 law and abolishing the State Board of Eugenics.<sup>12</sup>

9. Act of Feb. 23, 1937, 1937 Ga. Laws 414 (repealed 1970). Eugenics concerns selective breeding that is aimed at improving the human race by promoting "superior genetic qualities" and eradicating "inferior genetic qualities." See generally Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977); Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591 (1966); Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189, 198-201. The advent of Social Darwinism in the late 19th and early 20th centuries fostered the belief that the prevalence of mental and physical disabilities was the source of most social problems and that these problems were multiplying in modern society. Burgdorf & Burgdorf, *supra*, at 997. Most eugenic statutes embraced "negative eugenics," i.e., restrictions on procreation in order to abate the problem posed by eliminating inferior genetic traits. See Ferster, *supra*, at 592.

10. 1937 Ga. Laws 414, 414. The statute referred to inmates of both state mental and penal institutions. An application for sterilization would be filed when it appeared that an inmate "would be likely to procreate a child . . . who would have a tendency to serious physical, mental, or nervous disease or deficiency." *Id.* at 415.

11. 274 U.S. 200 (1927). The Supreme Court held that a state could enact and enforce a statute which imposed involuntary sterilization on mentally incompetent persons in order to prevent the procreation of successive generations of the same. See *id.* at 207. The oft-quoted phrase "[t]hree generations of imbeciles are enough" reflected the Court's opinion that imbeciles were ineluctably destined for some tragic end and its attitude that the hereditary nature of mental incompetency, combined with the prospect that the country might be overburdened by this threat, represented a significant state interest that justified compulsory sterilization. See *id.* After *Buck*, some state statutes took the form of the Virginia statute which identified hereditarily transmitted traits including insanity, imbecility, idiocy, epilepsy, and criminal behavior as warranting sterilization. See Burgdorf & Burgdorf, *supra* note 9, at 1001 n.51 (quoting the 1924 Virginia statute, which has been repealed). The Georgia statute did not name any particular traits but left a wide margin for error by opening the classification to include all inmates of penal and hospital facilities who would be likely to procreate a child with "a tendency to serious physical, mental, or nervous disease or deficiency." 1937 Ga. Laws 414, 415. Such a categorization would at least include all of the classes in the Virginia statute, and it seems likely that for questions of interpretation, the framers anticipated reference to *Buck v. Bell*. The Court's decision and rationale in *Buck v. Bell* have been criticized often, and articles have called for the case to be overruled. See Burgdorf & Burgdorf, *supra* note 9, at 1033; cf. Ferster, *supra* note 9, at 618 (criticizing existing sterilization statutes as violating due process). *Buck*, however, has not been overruled, and eugenic theory still underlies some state sterilization statutes. See MISS. CODE ANN. §§ 41-45-1, -9 (1972); N.C. GEN. STAT. §§ 35-36, -39(3), -43 (1976); S.C. CODE ANN. §§ 44-47-10, -50 (Law. Co-op. 1976); W. VA. CODE § 27-16-1 (1980).

12. Voluntary Sterilization Act, 1970 Ga. Laws 683.

Apparently the legislature no longer relies on eugenics as the reason for having a sterilization statute. It focuses, rather, on the mentally incompetent person's inability to provide adequate care for any prospective child.<sup>13</sup>

### B. Procedure

Involuntary sterilization proceedings are initiated by filing a petition in the probate court of the county of residence of the person allegedly subject to the Code section.<sup>14</sup> The petition is filed by one or both parents, the legal guardian, or the next of kin of the alleged incompetent. The petition may also be filed by the commissioner of human resources, the director of any county board of health, or the director of any county department of family and children services.<sup>15</sup>

The petition must state why the person is subject to the Code section, and it must be signed by any parent who did not initiate the petition if such parent can be found within a reasonable period of time and is mentally competent. If the parent is either unavailable or incompetent, the probate court appoints a guardian ad litem to investigate whether the person is an appropriate candidate for sterilization. The guardian reports his findings to the probate court, and if the guardian concurs with the petition, he gives his written consent.<sup>16</sup>

The judge of the probate court next appoints two physicians to determine whether the person is mentally incompetent and whether the condition is irreversible and incurable.<sup>17</sup> In addition, a committee of the medical staff of the hospital where the sterilization is to take place conducts a similar investigation into the person's condition.<sup>18</sup> If the committee determines that the incompetent's condition is irreversible and incurable, it submits its approval of the procedure to the probate court.

If the probate judge finds that the alleged incompetent satisfies the statutory requirements, he enters an order authorizing sterili-

13. O.C.G.A. § 31-20-3(a) to (b) (1982).

14. O.C.G.A. § 31-20-3(c)(1) (1982).

15. *Id.*

16. *Id.* This section requires the guardian ad litem to be a duly qualified and licensed member of the State Bar of Georgia. *Id.*

17. O.C.G.A. § 31-20-3(c)(2) (1982). The physicians appointed by the court may neither perform the actual sterilization nor serve as members of the hospital committee which approves the sterilization. *Id.*

18. O.C.G.A. § 31-20-3(c)(3) (1982).

zation.<sup>19</sup> The decision of the probate court may be appealed to the superior court for a trial de novo before a jury<sup>20</sup> and may be appealed further to the state's higher courts.<sup>21</sup>

According to the statute, the probate judge must determine by a legal preponderance of all the evidence that the person is subject to the Code section and that the condition is irreversible and incurable.<sup>22</sup> It was this standard that the Georgia Supreme Court found unconstitutional.

### C. Case Law

In *Motes v. Hall County Department of Family and Children Services*, the Georgia Supreme Court reversed the superior court's order compelling appellant to undergo sterilization. The court held that the statutory standard of proof of a "legal preponderance of all the evidence" was constitutionally inadequate.<sup>23</sup>

In *Motes*, the Department of Family and Children Services (DFCS) petitioned the probate court to order the sterilization of Judy Diane Motes, a 21-year-old woman with an I.Q. of 24<sup>24</sup> as

19. O.C.G.A. § 31-20-3(c)(4) (1982).

20. O.C.G.A. § 31-20-3(c)(5) (1982).

21. *Id.* The alleged incompetent may file a petition in forma pauperis to defray court costs and costs of appeal. *Id.* The incompetent also has the right to counsel at all stages of the proceedings. O.C.G.A. § 31-20-3(c)(6) (1982).

22. O.C.G.A. § 31-20-3(c)(4) (1982).

23. *Motes*, 251 Ga. at 374, 306 S.E.2d at 262.

24. Intelligence is measured on a uniform scale, with 100 representing the mean I.Q. for each age group 2-18. The standard deviation (SD) is 16. Scores within one SD of the mean represent the normal distribution of intelligence for the population in each age group. Scores more than two SD's below the norm are categorized as evidencing some form of mental retardation. The American Association on Mental Deficiency classifies mental retardation into four categories:

| <u>Level of Mental Retardation</u> | <u>Range in SD's</u> | <u>Revised Stanford-Binet I.Q.</u> | <u>Classification (Old Terminology)</u> |
|------------------------------------|----------------------|------------------------------------|---|
| Mild                               | -2.01 to -3.00       | 67-52                              | Educable (Moron)                        |
| Moderate                           | -3.01 to -4.00       | 51-36                              | Trainable (Imbecile)                    |
| Severe                             | -4.01 to -5.00       | 35-20                              | Trainable/Dependent (Imbecile)          |
| Profound                           | less than -5.00      | less than 20                       | Custodial/Life Support (Idiot)          |

See J. SATTLER, *ASSESSMENT OF CHILDREN'S INTELLIGENCE AND SPECIAL ABILITIES* 425 (2d ed. 1982); Roos, *Basic Facts About Mental Retardation*, in 1 *LEGAL RIGHTS OF MENTALLY DISABLED PERSONS* 127, 131-32 (1979).

The ability of retarded individuals to support themselves ranges from the ability to support oneself at a vocation with the proper training in the case of a mildly retarded individual to total incapacitation and the need for continuous supervision in the case of profoundly retarded individuals. The percentage of the mentally retarded population with an I.Q. in the severe range is 0.1%. J. SATTLER, *supra*, at 425.

measured by the Stanford-Binet intelligence test.<sup>25</sup> The probate court denied DFCS's petition.<sup>26</sup> DFCS appealed the decision to the Superior Court of Hall County, which held a full evidentiary trial without a jury. The superior court granted the petition and ordered Judy Diane Motes to undergo sterilization.<sup>27</sup> On appeal to the Georgia Supreme Court, Motes argued that the statute was overbroad, lacked adequate guidelines and safeguards, and violated the due process and equal protection clauses of the United States Constitution by invading her right to privacy and violating her right to bear children.<sup>28</sup> The court held that the statute violated due process and could not be invoked to order involuntary sterilization.<sup>29</sup>

Consistent with holdings of the United States Supreme Court, the *Motes* court held that a sterilization statute must employ the

25. The Stanford-Binet test is used most often in cases of severe mental retardation because it has a lower floor than other tests which were not designed to assess the abilities of the mentally retarded. Because of the lower scoring floor, the Stanford-Binet test can more accurately assess the retarded individual's abilities. J. SATTLER, *supra* note 24, at 433.

26. The probate court found that the petitioner failed to show by competent evidence that:

1. the respondent was sexually active;
2. the operation would not expose respondent to a significant risk to her life and health;
3. respondent was fertile and capable of bearing children; and
4. other less restrictive and absolute forms of birth control would not be viable.

Record at 21, *Motes*.

27. *Id.* at 126.

28. Appellant enumerated two points of error before the Supreme Court of Georgia. She argued that the sterilization statute was constitutionally inadequate, containing insufficient safeguards and guidelines to protect the rights of the "mentally retarded person." Appellant stated that since procreation, a fundamental right, was threatened, the state must demonstrate a compelling state interest sufficient to warrant the termination of that right. Appellant further stated that the statute must be narrowly drawn to express that interest without unduly infringing on the fundamental right. If less intrusive methods are available to accomplish the state's objective, the statute must fall. Appellant claimed that the statute was defective because:

1. it failed to require findings that less drastic methods of contraception were unworkable;
2. no findings were required to show that the sterilization procedure was safe;
3. it was overbroad and without adequate judicial standards;
4. the preponderance standard called for by the statute was insufficient; and
5. no independent psychological evaluation by a psychiatrist, psychologist, or other mental health expert was required.

Brief of Appellant at 4-8, *Motes*.

29. *Motes*, 251 Ga. at 374, 306 S.E.2d at 262.

intermediate standard of "clear and convincing" evidence with respect to findings supporting the termination of the fundamental right of procreation.<sup>30</sup> The Georgia Supreme Court looked to *Addington v. Texas*<sup>31</sup> and *Santosky v. Kramer*,<sup>32</sup> both of which dealt with the loss of fundamental rights.<sup>33</sup> These cases recognized the "legal preponderance" standard as being applicable in civil litigation where losses of money or property rights are at stake; however, when fundamental liberties are threatened, this standard affords inadequate protection.<sup>34</sup>

The Georgia Supreme Court compared the threat posed by sterilization to the threat posed by civil commitment proceedings.<sup>35</sup> In *Addington*, the United States Supreme Court held that the significant deprivation of liberty<sup>36</sup> and the stigma which attached to a person who is adjudicated mentally incompetent<sup>37</sup> mandated the imposition of the intermediate "clear and convincing" standard.<sup>38</sup> Any advantage to the state in using a preponderance standard to achieve its goals of providing treatment for and protecting society from the mentally ill did not outweigh the significant risk that a person might be erroneously committed under this standard.<sup>39</sup>

The *Motes* court also looked to *Santosky*, in which the United States Supreme Court held that clear and convincing evidence was the requisite standard when a state sought to terminate parental rights for the permanent neglect of a child.<sup>40</sup> The Georgia Supreme Court found the termination of parental rights in *Santosky* analogous to involuntary sterilization under Georgia law, both effecting a permanent deprivation of a fundamental liberty interest.<sup>41</sup>

Although involuntary commitment and the termination of pa-

30. *See id.*

31. 441 U.S. 418 (1979).

32. 455 U.S. 745 (1982).

33. *Motes*, 251 Ga. at 374, 306 S.E.2d at 262.

34. *See Addington v. Texas*, 441 U.S. at 423-25; *Santosky v. Kramer*, 455 U.S. at 755-56.

35. *See Motes*, 251 Ga. at 374, 306 S.E.2d at 262.

36. *Addington*, 441 U.S. at 425.

37. *Id.* at 425-26.

38. *Id.* at 431-33.

39. *Id.* at 426-27.

40. *Motes*, 251 Ga. at 374, 306 S.E.2d at 262. *Santosky*, 455 U.S. at 747-48. The New York statute in *Santosky* permitted the court's finding to be based on a preponderance of the evidence. The Supreme Court held that the preponderance standard violated due process. *Id.* at 747.

41. *Motes*, 251 Ga. at 374, 306 S.E.2d at 262. Termination of parental rights under the statute in *Santosky* denied the parents "physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child." 455 U.S. at 749.



rental rights both require the "clear and convincing" standard, the court contrasted the deprivation suffered under involuntary commitment as being reversible, operating to suspend one's rights, not terminate them.<sup>42</sup> A person committed to an institution may have the commitment order overturned and be set free, but once sterilization is performed, the effects are, generally, permanent. Considering the permanency of the procedure and the threat posed by it to the fundamental right to procreate, the *Motes* court concluded that due process required the "clear and convincing" standard to be used.<sup>43</sup>

In focusing on the defective standard of proof, the Georgia Supreme Court failed to address highly sensitive, substantive issues surrounding involuntary sterilization. In her brief, appellant raised several issues relating to the existence and implementation of a sterilization statute, including whether the state had a compelling interest justifying a sterilization statute<sup>44</sup> and whether the statute was drawn narrowly enough to serve the state's compelling interest without unnecessarily depriving her of the fundamental right to procreate. Appellant also argued that procedural guidelines under the statute were inadequate to insure that only the class specifically defined by the statute would be sterilized.<sup>45</sup>

Appellant's arguments retain their importance despite the holding of the court. A bill introduced during the 1984 Session of the General Assembly<sup>46</sup> proposed to amend the sterilization statute. The amendment narrowly complied with the court's ruling on the applicable standard of proof but left the statute unchanged in all other respects.<sup>47</sup> The bill was not enacted during the 1984 Session,<sup>48</sup> but the prospect that it may be passed without any other changes warrants an examination of the statute to determine whether its substantive and procedural provisions satisfy applicable equal protection and due process standards.

42. *Motes*, 251 Ga. at 374, 306 S.E.2d at 262.

43. *Id.*

44. Appellant argued that Georgia's interest in sterilizing mental incompetents could not be compelling because the statute did not require all persons in the defined statutory class to be sterilized. Brief of Appellant at 9-12, *Motes*.

45. *Id.* at 4-8.

46. H.B. 1085, General Assembly of Georgia, 1984 Session.

47. *Id.* The bill merely substituted the clear and convincing standard for the defective preponderance standard.

48. The second reading of the bill was on January 17, 1984. No further action was taken on it.

## III. STATUTORY ANALYSIS

A. *The State's Compelling Interest.*

The United States Supreme Court recognized procreation to be a right "fundamental to the very existence and survival of the race" in *Skinner v. Oklahoma*.<sup>49</sup> A state that enacts a sterilization statute imposes an "irreparable injury" on the sterilized person, who is "forever deprived of a basic liberty."<sup>50</sup>

In *Griswold v. Connecticut*,<sup>51</sup> the Court stated: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy."<sup>52</sup> The Court elaborated on this right to privacy in *Eisenstadt v. Baird*:<sup>53</sup> "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>54</sup>

The Supreme Court has never found in these individual liberties an absolute right to be free from all governmental intrusion in all matters concerning personal choices.<sup>55</sup> The Court has stated that a state may impose reasonable restrictions on individuals in order to secure the public health and safety.<sup>56</sup>

The *Skinner* Court indicated, however, that any statutory classification which threatened to terminate a fundamental right must withstand strict scrutiny.<sup>57</sup> Further, the Supreme Court has held that a state must demonstrate a "compelling interest" to justify the enactment of regulations that limit certain fundamental rights.<sup>58</sup>

49. 316 U.S. 535, 541 (1942).

50. *Id.*

51. 381 U.S. 479 (1965).

52. *Id.* at 484.

53. 405 U.S. 438 (1972).

54. *Id.* at 453.

55. "[T]he liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905).

56. *Id.* at 29.

57. *See Skinner v. Oklahoma*, 316 U.S. at 541.

58. *Roe v. Wade*, 410 U.S. 113, 155 (1973). *See also* *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (freedom of association); *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (freedom of association); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (freedom to travel).

The Georgia General Assembly's justification for involuntary sterilization, as contained in the statute's "Declaration of Policy,"<sup>59</sup> may be refined to identify two potential state interests. First is the state's concern with its own fiscal welfare. The intent of the statute may be to insure that the state will not be saddled with the financial burden of supporting a class of children who inevitably will be inadequately cared for by their mentally incompetent parents. The statute calls for the sterilization of people who, despite receiving financial assistance from the state or any other source, are unable to provide minimum care for their offspring.<sup>60</sup> This suggests that in the normal course of business the state is willing to provide minimal support for children through welfare and other social service payments, but it is not willing to assume the incremental financial costs associated with providing for a class of children whom the state can predict are likely to present an additional burden.

An illustrative example of this is the case of a child born to an unmarried woman who is confined to a state mental institution. Assuming that the parents or guardian of the woman are either unwilling or unable to care for the child, the state would likely bear the financial responsibility for raising it. The state might remove the child from the custody of the mentally incompetent parent<sup>61</sup> and place the child in a foster home or an institution.<sup>62</sup> In either case, the state's financial burden would increase. If, however, the state could compel mentally incompetent people to undergo sterilization, the state could eliminate this threat to its coffers.

A state's interest in its own financial integrity has been held not sufficiently compelling under strict scrutiny. In *Shapiro v. Thompson*,<sup>63</sup> the Supreme Court held that a state's interest in securing the sound fiscal posture of its welfare system did not warrant creating classifications that infringed the right to travel.<sup>64</sup> By analogy,

59. O.C.G.A. § 31-20-3(a) (1982).

60. *See id.*

61. The state may terminate parental rights under O.C.G.A. § 15-11-51 (1982). The grounds for termination include abandonment and deprivation. In the case of a deprived child, the court may remove the child from the home upon findings by the court that the conditions of deprivation are likely to continue and that the child either suffers or is likely to suffer serious physical, mental, moral, or emotional harm. O.C.G.A. § 15-11-51(a)(2) (1982).

62. O.C.G.A. § 15-11-34(a)(2) (1982).

63. 394 U.S. 618 (1969).

64. *Id.* at 633.

this same interest should not justify classifications that threaten to terminate the right to procreate.

The second state interest may be articulated as follows: a state has an interest in preserving the health and welfare of its citizens. Given that certain mentally incompetent people are manifestly incapable of caring for children, a state may enact a sterilization statute to prevent this class from procreating children for whom they will never be able to provide adequate care or support. In *In re Moore*,<sup>65</sup> the North Carolina Supreme Court elaborated on this compelling interest:

The state's concern for the welfare of its citizenry extends to future generations and when there is overwhelming evidence . . . that a potential parent will be unable to provide a proper environment for a child because of his own mental illness or mental retardation, the state has sufficient interest to order sterilization.<sup>66</sup>

A child born to such a mentally incompetent parent might suffer severe mental, physical, or emotional harm from abuse by the parent, or the child might suffer from neglect. In the latter instance, the mentally incompetent parent might be unable to attend to the child's basic needs, such as hunger or thirst. Similarly, an incompetent might be unable to provide adequate prenatal care.<sup>67</sup>

In *North Carolina Association for Retarded Children v. North Carolina*,<sup>68</sup> a federal district court concluded that although the state had a compelling interest in sterilizing certain mental incompetents who were unable to care for a child, that interest extended only to those who also were sexually active and unwilling or unable to use other means of contraception.<sup>69</sup> If, for the purpose of analyzing Georgia's statute, one accepts that the sterilization of those mentally incompetent people who are manifestly incapable of raising children serves a compelling interest, then laws enacted pursuant to this interest must be narrowly drawn to assure that the end

65. 289 N.C. 95, 221 S.E.2d 307 (1976). In *Moore*, respondent challenged the constitutionality of North Carolina's sterilization statute. The North Carolina Supreme Court upheld the statute as evincing a compelling state interest and providing adequate procedural guidelines. *Id.* at 104, 108, 221 S.E.2d at 311, 313.

66. *Id.* at 103, 221 S.E.2d at 312 (quoting, with ellipsis, *Cook v. State*, 9 Or. App. 224, 230, 495 P.2d 768, 771-72 (1972)).

67. *Cf. Ruby v. Massey*, 452 F. Supp. 361, 363 (D. Conn. 1978) (discussing "grave risks" during pregnancy of an incompetent woman unable to communicate with her physician).

68. 420 F. Supp. 451 (M.D.N.C. 1976).

69. *See id.* at 457.

is accomplished without denying due process or equal protection.<sup>70</sup>

### B. *Equal Protection*

When a statute enacted pursuant to a state's compelling interest impinges on a fundamental right, that law must be subjected to strict scrutiny in order to assure that it does not deny equal protection.<sup>71</sup> Ideally, a legislature narrowly defines a class in terms of characteristics or activities which perpetuate an evil that the state is trying to remedy.<sup>72</sup> Since practical difficulties exist in defining a class with absolute precision, courts normally tolerate some degree of "underinclusiveness"<sup>73</sup> or "overinclusiveness"<sup>74</sup> in classifications.<sup>75</sup> When a fundamental right is threatened, the courts are less willing to tolerate imprecise classifications. The relationship between the evil identified and the remedy imposed will be scrutinized by the court.<sup>76</sup> "Underinclusive" classifications that burden the fundamental rights of one class but not of another which contributes to the same evil and "overinclusive" categorizations that threaten the fundamental rights of individuals who do not contribute to the evil may violate equal protection.

Georgia's statute is underinclusive because it seeks to sterilize only a segment of the larger class of people who cannot provide adequate support for their children. For example, the statute singles out only those who are mentally retarded or suffer from brain damage.<sup>77</sup> There are other classes of brain disorders, such as schizophrenic disorders,<sup>78</sup> which leave a person equally incompe-

70. See *Griswold*, 381 U.S. at 485; *Roe*, 410 U.S. at 155.

71. See *Skinner*, 316 U.S. at 541.

72. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346-47 (1949).

73. An underinclusive classification includes all people who possess a defining characteristic, but it does not include others who are similarly situated; i.e., there are others who contribute to the "mischief" but are not included in the class. *Id.* at 348.

74. An overinclusive classification "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." *Id.* at 351. Overinclusive categorizations are more closely scrutinized because they "reach out to the innocent bystander, the hapless victim of circumstance or association." *Id.*

75. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); Tussman & tenBroek, *supra* note 72, at 348-49.

76. See *Roe*, 410 U.S. at 155.

77. O.C.G.A. § 31-20-3(a) (1982).

78. Severe forms of schizophrenic disorders may leave a person wholly incapable of caring for himself or others. Examples of this type of disorder are catatonic stupor, in which the person appears to be unaware of what is going on around him, and catatonic excitement, in which the person makes wild and uncontrolled movements. In the latter

tent to raise a child. Despite this similar incapacity, a person affected by such a disorder would not be subject to sterilization under the Georgia statute.

The statute also fails to consider the larger class of mentally sound individuals who, because of the lack of parenting ability, lack of concern, or any other reason, are wholly incapable of caring for a child. The harm that would befall the children of such individuals may be the same as that addressed by the statute, but there is no provision for sterilizing these people. To illustrate this difference in treatment, compare involuntary sterilization to the termination of parental rights for inadequate parenting. Certain parental conduct justifying termination of parental rights<sup>79</sup> is criminal under the Georgia Code.<sup>80</sup> Conviction for these criminal offenses, however, requires a showing that the defendant has willfully caused the child to be deprived.<sup>81</sup> Further, an offending parent is not prevented from conceiving additional children. The sterilization statute, however, denies parental rights upon a showing that an individual is likely in the future to contribute to the detriment of the child.<sup>82</sup> In terms of the harm suffered by the child, the "offenses" are intrinsically the same, but the law imposes a harsher penalty on the alleged incompetents than on the criminally cruel or neglectful.

In *Skinner*, the Supreme Court held unconstitutional a statute which required the sterilization of certain "habitual criminals," stating: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."<sup>83</sup> By imposing the harsher burden on mentally retarded and brain-damaged individuals, the Georgia statute implic-

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case, the person often has to be physically restrained to prevent him from hurting himself or others. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 190-91 (3d ed. 1980) [hereinafter cited as DSM III]. Other mental disorders may also leave a person incapable of caring for himself or others. *See generally* DSM III, *supra*.

79. O.C.G.A. § 15-11-51 (1982).

80. *See* O.C.G.A. §§ 16-5-70(a), 16-12-1(b)(3) (1982).

81. The offense of cruelty to children includes willfully depriving a child of "necessary sustenance." O.C.G.A. § 16-5-70(a) (1982). The offense of contributing to the deprivation of a minor includes willfully acting or failing to act "when such act or omission would cause a minor to be found to be a deprived child." O.C.G.A. § 16-12-1(b)(3) (1982).

82. O.C.G.A. § 31-20-3(b), (c)(4) (1982).

83. *Skinner*, 316 U.S. at 541.

itly singles out that group for unequal treatment.

The sterilization statute is overinclusive because in its present form, it would permit surgical sterilization to be performed on an incompetent, regardless of whether that person is capable of procreation. The statute focuses on the alleged incompetent's potential for rearing a child, but it does not appear to consider whether that person is actually capable of producing a child.

Within the class of mentally incompetent people who are incapable of caring for a child is a subclass which consists of mentally incompetent people who, for genetic or other reasons, are incapable of procreation.<sup>84</sup> The statute does not discriminate between the two classes. Inconsistent with the goal of burdening only those who contribute to the harm, it permits the surgical procedure to be performed on the entire class of mentally retarded and brain-damaged individuals. As a result, the statute permits unwarranted government intrusion on a class that is incapable of contributing to the harm that the state is trying to eradicate.

Although the Supreme Court has indicated that laws may make distinctions by class when experience shows that the class merits special treatment,<sup>85</sup> which may be the case with the mentally incompetent, the Court has also stated that when a fundamental right is affected, "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."<sup>86</sup> In application Georgia's sterilization statute may neither affect the class of all people who are incapable of adequately caring for their children nor distinguish those mentally incompetent who actually contribute to the harm; therefore it should be held violative of equal protection.

### C. Due Process

A state may enact laws that infringe upon or terminate a fundamental right only if the law provides adequate procedural safeguards. The basic requirements of due process, notice and an opportunity to be heard,<sup>87</sup> are not static.<sup>88</sup> The procedures must be

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84. See Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. REV. 943, 968 (1982). See also Stearns, Droulard, & Sahhar, *Studies Bearing on Fertility of Male and Female Mongoloids*, 65 AM. J. MENTAL DEFICIENCY 37 (1960).

85. *Skinner*, 316 U.S. at 540.

86. *Roe*, 410 U.S. at 155.

87. See *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

88. See *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895

flexible so that the individual whose fundamental right is threatened is afforded the opportunity to have determined in each instance whether or not the law is applicable.<sup>89</sup>

The United States Supreme Court has not decided what specific procedures are necessary for involuntary sterilization. In *Mathews v. Eldridge*,<sup>90</sup> however, the Supreme Court announced a balancing test to be used in determining what process is due. This test considers:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>91</sup>

Thus, procedural due process requires balancing the right affected and the increased protection afforded by the additional procedure against its cost to the state.<sup>92</sup>

Two federal district court cases, *North Carolina Association for Retarded Children v. North Carolina*<sup>93</sup> and *Wyatt v. Aderholt*,<sup>94</sup> have considered the issue of involuntary sterilization and have indicated that specific procedural safeguards are necessary to satisfy due process.<sup>95</sup> State courts considering this question have concurred with the district courts' holdings.<sup>96</sup>

Georgia's statute provides some procedural safeguards,<sup>97</sup> but in

(1961).

89. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-13, at 539 (1978); cf. *Cafeteria & Restaurant Workers*, 367 U.S. at 895 (stating that the procedures required by due process are determined in part by the nature of the private interest involved); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that a hearing resembling a full evidentiary trial was required prior to termination of welfare benefits). The Supreme Court has held in subsequent decisions that not all of the *Goldberg* protections are necessary in every instance where government action threatens an individual right.

90. 424 U.S. 319 (1976).

91. *Id.* at 335.

92. L. TRIBE, *supra* note 89, § 10-13, at 540.

93. 420 F. Supp. 451 (M.D.N.C. 1976).

94. 368 F. Supp. 1383 (M.D. Ala. 1974).

95. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 456-59; *Wyatt*, 368 F. Supp. at 1384-86.

96. See *In re Moe*, 385 Mass. 555, 567-73, 432 N.E.2d 712, 721-24 (1982); *In re Grady*, 85 N.J. 235, 262-67, 426 A.2d 467, 481-83 (1981); *In re Guardianship of Hayes*, 93 Wash. 2d 223, 234-39, 608 P.2d 635, 640-41 (1980); *In re Truesdell*, 63 N.C. App. 258, 279-80, 304 S.E.2d 793, 806 (1983).

97. O.C.G.A. § 31-20-3(c) (1982). See *supra* text, section II(B).



light of the balancing test in *Mathews* and the decisions of these other courts, the procedures appear insufficient to protect the alleged incompetent's fundamental rights.

### 1. *Petition for Sterilization*

According to the Georgia statute, the petition must contain a statement of the reasons why the respondent is alleged to be subject to sterilization.<sup>98</sup> It does not require the petition to include I.Q. scores, psychological assessments, or any other analytical statement of the person's mental condition. As was the case in *Motes*,<sup>99</sup> the petition need only state that the respondent is subject to sterilization under the Code, without any supporting factual data, in order to initiate the proceedings. The practical effect of failing to require an assessment of the incompetent's mental condition in the petition is to heighten the possibility that a person might be erroneously sterilized.

In *North Carolina Association for Retarded Children*, the district court held that granting a legal guardian or next of kin discretionary power to initiate sterilization proceedings was unconstitutional "as an arbitrary and capricious delegation of unbridled power":<sup>100</sup>

[Such delegation] grants to the retarded person's next of kin or legal guardian the power of a tyrant: for any reason, or for no reason at all, he may *require* an otherwise responsible public servant to initiate the procedure. This he may do without reference to any standard and without regard to the public interest or the interest of the retarded person. We think such confidence in *all* next of kin and *all* legal guardians is misplaced, and that the unstated premises of competency to decide to force initiation of the proceeding and never failing fidelity to the interest of the retarded person are invalid.<sup>101</sup>

The Georgia statute acts in the same manner as the North Carolina statute. It vests in certain individuals the power to initiate

98. O.C.G.A. § 31-20-3(c)(1) (1982).

99. The petition for sterilization alleged that appellant was incompetent, quoting the statutory standards of O.C.G.A. § 31-20-3(b) (1982), but it provided no detailed information relating to appellant's condition. No reference to psychological tests or evaluations was made. Record at 8, *Motes*. A letter written by appellant's mother stated that appellant had suffered from a serious health problem since childhood and that sterilization would be in her best interest. *Id.* at 11.

100. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 456.

101. *Id.*

proceedings at their discretion against persons who may or may not be within the class contemplated by the statute. In its present form,<sup>102</sup> the statutory standard for filing a petition increases the risk that the procedure might be used erroneously to sterilize a person who is not a proper candidate. For example, it might be used in a remote area to sterilize a class of people for reasons wholly unrelated to their capacity to raise children, or it might be used by the parents of moderately retarded children because the parents wish to avoid the problems attendant to the children's sexual maturation.

A court applying the balancing test of *Mathews v. Eldridge* would consider that failing to require specific findings in the petition presents a significant threat that a person might be erroneously sterilized. This risk could be reduced by requiring the petition to contain the results of psychological tests and examinations. Such a requirement would be consistent with the state's legitimate interest in sterilizing only a narrowly defined class. Further, the state's financial and administrative interests may be served by this additional requirement. The requirement could reduce the number of petitions that are filed, helping to insure that only those people contemplated by the statute would appear before the court.

## 2. *Mental Examination*

The statute requires two physicians to make an evaluation of the person's mental condition and its permanency,<sup>103</sup> but it does not require the examination to be performed by a psychiatrist, a psychologist, or anyone specifically trained or experienced in the diagnosis and treatment of mental disorders. The statute assumes that all physicians are qualified to evaluate a person's fitness to be a parent, while a licensed psychologist, who is considered by the state to be an expert in diagnosing and treating mental disorders, is prohibited from making the same evaluation.<sup>104</sup>

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102. See O.C.G.A. § 31-20-3(c)(1) (1982).

103. O.C.G.A. § 31-20-3(c)(2) (1982).

104. O.C.G.A. § 31-20-1(2) defines a "physician," in part, as "a person duly licensed to practice medicine . . . pursuant to Chapter 34 of Title 43." "To practice medicine" is defined therein, in part, as

to hold one's self out to the public as being engaged in the diagnosis or treatment of disease, defects, or injuries of human beings; or the suggestion, recommendation, or prescribing of any form of treatment for the intended palliation, relief, or cure of any physical, mental, or functional ailment or defect of any person . . . .

O.C.G.A. § 43-34-20(3) (1984).

The nonpsychiatric physician who does not regularly treat mental illness has limited exposure to the diagnosis and treatment of mental disorders; yet for the purposes of assessing a mentally retarded or brain-damaged individual's capability as a parent, the state considers him as competent as a psychiatrist and more competent than a psychologist.

The statute's reliance on any physician seems misplaced. The diagnosis of mental retardation requires the consideration of more than just I.Q. scores.<sup>105</sup> The psychiatrist or psychologist can utilize specialized training and experience to make professional assessments of the alleged incompetent's mental condition and corresponding fitness to be a parent.<sup>106</sup> Although a physician may in some instances be able to make an accurate assessment, it seems likely that because of his lack of training and experience in the diagnosis of mental disorders, he would be more prone to misinterpret the nature or extent of the person's mental incapacity than would a psychiatrist or psychologist.<sup>107</sup>

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"To practice applied psychology" is defined, in part, as to render or offer to render . . . any service involving the application of recognized principles, methods, and procedures of the science and profession of psychology, such as, but not limited to, diagnosing and treating mental and nervous disorders, interviewing, administering, and interpreting tests of mental abilities, aptitudes, interest, and personality characteristics for such purposes as psychological classification or evaluation, or for education or vocational placement, or for such purposes as psychological counseling, guidance, or readjustment.

O.C.G.A. § 43-39-1(2) (1984). Although it would appear that the Code considers a psychologist competent to assess a person's mental abilities and aptitude to be a parent, the psychologist is prohibited from doing so for purposes of sterilization under the Code.

105. Diagnoses of mental disorders are made utilizing a multi-axial system that categorizes clinical syndromes and disorders. These are based on specific criteria set forth in the diagnostic manual which call upon the psychiatrist or psychologist to make a clinical assessment based on his skills and judgment. An assessment of mental retardation, for example, considers adaptive behavior and age of onset in addition to the person's intelligence scores. *See* DSM III, *supra* note 78, at 21-32, 36-40.

106. A nonpsychiatric physician's exposure to the diagnosis of mental disorders may be limited to the coursework required by medical school. He would be considered competent by the Code, however, to assess a person's mental condition for the purposes of sterilization, when in reality, his experience in this area may be quite limited. In contrast, a psychiatrist must complete a 3- to 4-year post-doctorate program in psychiatry and an internship, in addition to medical school. An applied psychologist must complete, *inter alia*, the degree of doctor of philosophy in psychology or a doctorate degree in a closely allied field and at least one year of experience in applied psychology to become licensed. O.C.G.A. § 43-39-8(b)(2) to (3) (1984). In the case of both psychiatrists and psychologists, the training is focused on the diagnosis and treatment of mental disorders.

107. In *Motes*, Dr. C. Neil Kelley, a practitioner of internal medicine, examined

The balancing test of *Mathews* requires consideration of "the risk of an erroneous deprivation" of the individual's interest and of "the fiscal and administrative burdens" associated with a new procedural requirement.<sup>108</sup> The likelihood seems greater that an "erroneous deprivation" caused by incorrect diagnosis would occur under the current statute than if it specifically required a psychiatrist or psychologist to make the determination. The state's administrative burden would not significantly increase if such a mental health professional were required to make the diagnosis, as a psychiatrist is included in the statutory definition of one who practices medicine.<sup>109</sup> Also, in certain instances such as involuntary commitment, the legislature has acknowledged that a psychologist is fully competent to make the same evaluations as a physician.<sup>110</sup> This rationale could be extended for the purposes of sterilization.

The state's burden may be increased by this additional requirement because of the relative scarcity of psychiatrists and psychologists in proportion to the number of nonpsychiatric physicians. This may be especially true in rural areas where there may be no psychiatrists or psychologists. However, when one considers the fundamental right at stake and the relative infrequency with which the procedure should be used, this burden does not seem great.

The requirement that an examination be made by a mental health professional has additional support. In *Wentzel v. Montgomery General Hospital*,<sup>111</sup> the Maryland court set forth procedural standards for the sterilization of an incompetent minor, including the requirement that an independent psychological evaluation be made by a competent professional.<sup>112</sup> Similarly, other state courts have required psychological evaluations by qualified professionals.<sup>113</sup>

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Judy Diane Motes pursuant to O.C.G.A. § 31-20-3(c)(2) (1982). He testified that his decision about her mental condition was based primarily on his conversation with her during the physical examination. Transcript at 14-15, File No. K-82-24,664, Hall County Dep't of Family and Children Servs. v. Motes (Hall County Super. Ct. 1983). He further testified that his diagnosis of her mental age level was "an estimate of [his] own, not based on anything . . ." *Id.* at 16.

108. *Mathews*, 424 U.S. at 335.

109. See O.C.G.A. § 43-34-20(3) (1984).

110. See O.C.G.A. § 37-3-41(d) (1982).

111. 293 Md. 685, 447 A.2d 1244 (1982).

112. *Id.* at 703, 447 A.2d at 1253.

113. See *In re A.W.*, 637 P.2d 366, 375 (Colo. 1981); *In re Grady*, 85 N.J. 235, 264, 426 A.2d 467, 482 (1981); *In re Terwilliger*, 304 Pa. Super. 553, 565, 450 A.2d 1376, 1383 (1982); *In re Guardianship of Hayes*, 93 Wash. 2d 228, 238, 608 P.2d 635, 641 (1980).

### 3. *Findings of Fact*

Georgia's statute requires findings of fact that "the person alleged to be subject to this Code section is a person subject to this Code section and that the condition of such person is irreversible and incurable . . . ."<sup>114</sup> The statute contains insufficient criteria to assist the fact finder in deciding whether a person should be sterilized. Its present effect is to allow the fact finder great discretion as to what factors he will consider in deciding whether the person should be sterilized. Further, it fails to provide notice of the elements that constitute mental retardation or brain damage justifying sterilization. The danger is that in the absence of more specific findings, the fact finder may base his decision on factors that are impermissible or inappropriate to the determination.

In *Wyatt*, a federal district court struck down a sterilization statute that permitted "unfettered discretion" in deciding who would be sterilized<sup>115</sup> and ordered specific procedural safeguards in order to comply with due process.<sup>116</sup> In *North Carolina Association for Retarded Children*, the court read the state's sterilization statute to require specific findings of fact "that the subject is likely to engage in sexual activity without utilizing contraceptive devices and is therefore likely to impregnate or become impregnated."<sup>117</sup>

The North Carolina Court of Appeals elaborated on the district court's opinion in *In re Truesdell*,<sup>118</sup> requiring clear and convincing evidence in support of specific findings, including findings that

the disease or mental deficiency is not likely to materially improve, . . . [t]he respondent is physically capable of procreation . . . , [t]here is a substantial likelihood that the respondent will voluntarily or otherwise engage in sexual activity that is likely to cause impregnation . . . , [t]he respondent is unable or unwilling to control procreation by alternative . . . methods, . . . [and] . . . the proposed method of sterilization . . . is the least intrusive and least burdensome . . . .<sup>119</sup>

In articulating these standards, the North Carolina court noted that sterilization was a last resort, to be used when all other methods of contraception were ineffective.<sup>120</sup>

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114. O.C.G.A. § 31-20-3(c)(4) (1982).

115. *Wyatt v. Aderholt*, 368 F. Supp. 1382, 1383 (M.D. Ala. 1973).

116. *Wyatt v. Aderholt*, 368 F. Supp. 1383, 1384-86 (M.D. Ala. 1974).

117. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 456.

118. 63 N.C. App. 258, 304 S.E.2d 793 (1983).

119. *Id.* at 279-80, 304 S.E.2d at 806.

120. *Id.* at 281, 304 S.E.2d at 807.

Requiring such findings of fact may actually reduce the state's fiscal and administrative burdens. Instead of allowing an open-ended decision by the fact finder, findings such as in *Truesdell* would narrow his focus to specific, cogent issues relating directly to the individual's capacity to raise a child. This would help reduce the number of tangential issues to be considered by the fact finder and the time of deliberation. In further support of such findings, a substantial number of states that permit involuntary sterilization require findings similar to those in *Truesdell*.<sup>121</sup>

As a result of the preceding analysis, it is this writer's opinion that Georgia's involuntary sterilization statute denies the mentally retarded or brain-damaged individual equal protection and due process of law. The failure of the Georgia Supreme Court to address these issues in *Motes* enhances the likelihood that the General Assembly will amend the statute narrowly to reflect only the change mandated by the court. The amendment proposed during the 1984 Session further supports this contention.

#### IV. PROPOSED STATUTORY AMENDMENTS

Sterilization may be a desirable procedure in certain rare instances. This would be true when due to a mental disability the incompetent person is so severely affected as to be wholly incapable of providing adequate prenatal or postnatal care for a child and the incompetent is either unwilling or unable to utilize some alternative means of contraception. The following proposed amendments are suggested as an attempt to reconcile the state's interest in sterilizing these people with the constitutional rights of the mentally incompetent.<sup>122</sup>

- A. *Statement of Policy*: The General Assembly recognizes that mental retardation and other mental illnesses, disorders, and defects are complex phenomena which are not easily the subject of generalization. In some cases, however, it is possible to predict that a mentally ill or re-

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121. See, e.g., UTAH CODE ANN. § 64-10-8 (Supp. 1983); VT. STAT. ANN. tit. 18, § 8711 (Supp. 1984); VA. CODE § 54-325.12 (1982). See also *In re Moe*, 385 Mass. 555, 567-73, 432 N.E.2d 712, 721-24 (1982); *In re Grady*, 85 N.J. 235, 262-67, 426 A.2d 467, 481-83 (1981); *In re Guardianship of Hayes*, 93 Wash. 2d 228, 234-39, 608 P.2d 635, 640-41 (1980).

122. For an example of a complete model sterilization act, see Burnett, *Voluntary Sterilization for Persons with Mental Disabilities: The Need for Legislation*, 32 SYRACUSE L. REV. 913, 945 (1981). See also Sherlock & Sherlock, *supra* note 84, at 981.

tarded person may be unable to raise a child without that child suffering serious mental or physical harm or neglect. Sterilization is a drastic procedure which is intended to be permanent and is difficult, if not impossible, to reverse. In some rare instances it may be determined that sterilization is recommended for a mentally incompetent individual who, because of his inability to understand the nature and consequences of sexual activity and his unwillingness or inability to utilize methods of birth control, would be likely to procreate a child for whom he would be unable to provide adequate care.

This amendment reflects the findings of the district court in *North Carolina Association for Retarded Children v. North Carolina*<sup>123</sup> with respect to the nature of mental incompetency. Recognizing that other mental disorders can render a person incompetent to raise a child, this amendment would include all mental disorders instead of being limited to mental retardation and brain damage. The proposed amendment also stresses the finality of sterilization and the intent that it should be used only as a last resort, when all other methods of contraception would be unworkable.

- B. *Petition for Sterilization*: A petition for sterilization shall be filed in the probate court of the county of residence of the alleged incompetent by the parent or legal guardian of the person allegedly subject to sterilization, or by the commissioner of human resources, the director of any county board of health, or the director of any county department of family and children services. The petition shall set out facts establishing that the person is a proper candidate for sterilization. The petition shall contain the results of psychological or psychiatric tests and examinations,<sup>124</sup> and it shall contain the results of any examination administered by a physician in conjunction with the filing of the petition. A

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123. 420 F. Supp. 451, 455 (1976).

124. See *supra* text, section III(C)(2).

copy shall be delivered to the person allegedly subject to sterilization or his legal representative. A record of all petitions and orders for sterilization shall be filed with the office of the attorney general.

This proposed amendment would eliminate next of kin from the list of those entitled to file the petition. This should decrease the likelihood that a person would improperly initiate the proceedings by limiting the right to file to a parent or guardian, who is legally responsible for the alleged incompetent's welfare, and government officials, who are subject to an external oversight system. The court's belief in *North Carolina Association for Retarded Children*, that confidence in all legal guardians is misplaced,<sup>125</sup> is valid; however, the specific findings required by the proposed petition should reduce the threat of wrongful filing. Further, the requirement that a record be sent to the office of the attorney general would act as an additional safeguard against improper use by providing the public with ready access to all records pertaining to involuntary sterilization.

- C. *Court Ordered Examination*: The judge shall appoint one physician and one psychiatrist or psychologist to examine and evaluate the person allegedly subject to sterilization and to report their findings to the court. Each evaluation shall include the examiner's estimation of the person's mental and physical condition. Each evaluation shall also include the examiner's opinion as to whether the person's condition is likely ever to improve; whether the person could provide a child adequate care and support; and whether the person is likely to suffer any adverse psychological consequences as a result of sterilization.

This proposed amendment seeks to assure that a determination of the alleged incompetent's mental condition is made by a qualified specialist in the diagnosis and treatment of mental disorders.<sup>126</sup> It not only requires that the specialist make findings about the person's competency to be a parent, but it also necessitates inquiry as

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125. *North Carolina Ass'n for Retarded Children*, 420 F. Supp. at 456.

126. *See supra* text, section III(C)(2).



to the permanency of the disorder and the attendant psychological effects, if any, of involuntary sterilization.

- D. *Findings of Fact:* The finder of fact shall determine by clear and convincing evidence that:
1. The person allegedly subject to sterilization is mentally retarded or suffers from another mental illness, disorder, or defect; the condition is not likely to improve; and the person would be unable to provide adequate care or support to any child or children.
  2. The person has the physical capacity to procreate.
  3. The person is likely to engage in sexual activity that could result in impregnation.
  4. The person is either unwilling or unable to utilize other methods of birth control or contraception.
  5. The method of sterilization proposed will be the least intrusive method under the circumstances of the case.<sup>127</sup>

This amendment incorporates the higher "clear and convincing" standard mandated by the court,<sup>128</sup> and it provides the finder of fact with specific guidelines to follow when making his determination. It also provides notice of the specific factors that constitute a finding that a person is subject to involuntary sterilization under Georgia law.

## V. CONCLUSION

Georgia's compelling interest in the welfare of the children of mental incompetents is served by sterilizing a limited class of mentally incompetent people, but the state must not act to deprive the individual of his fundamental right without providing equal protection and due process of law. Should the legislature adopt the amendments proposed in this Note or ones similar, the mentally incompetent individual would be more fully protected from the

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127. See *supra* text, section III(C)(3).

128. *Motes*, 251 Ga. at 374, 306 S.E.2d at 262.

threat of erroneous deprivation of his right to procreate.<sup>129</sup> If, however, the legislature amends the statute only to reflect the higher standard of proof required by *Motes*, then mentally retarded and brain-damaged individuals will likely be deprived of equal protection and due process. In this instance, a reviewing court should either hold the statute unconstitutional or read the statute as requiring such protections as have been previously discussed.

*Sidney P. Wright*

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129. S.B. 110, General Assembly of Georgia, 1985 Session, and the substitute version passed by the Georgia House of Representatives on March 1, 1985, like the amendments proposed in this Note, would require an assessment of the alleged incompetent's condition by "a psychologist or psychiatrist qualified in the area of mental retardation and brain damage." Under the provisions of S.B. 110, if an examining team composed of two physicians and a psychologist or psychiatrist finds a person subject to sterilization, the examining team must report on "some of the less permanent methods of preventing conception" and on the feasibility of those methods for the person subject to sterilization. However, it appears that the judge, upon finding by clear and convincing evidence that the person "is a person subject to this Code section," must enter an order authorizing sterilization regardless of the fact that other methods of contraception might be feasible. Unlike the amendments proposed in this Note, S.B. 110 does not require specific findings by the court regarding the need for contraception and the feasibility of alternative means of contraception.

The definition of "a person subject to this Code section" would be unchanged under the provisions of S.B. 110. Georgia's sterilization statute would still be limited in application to persons rendered incompetent by mental retardation or brain damage. Persons rendered incompetent by other mental diseases or disorders would remain outside the statutory definition.

Another change proposed by S.B. 110 is that the person allegedly subject to sterilization could request that the probate court or superior court hearing be closed to the public. The right to request a closed hearing could presumably be exercised on behalf of the alleged incompetent by his parent, guardian, or attorney, and the judge would be required to close the hearing unless there were "an overriding or compelling reason" to hold a public hearing. It seems that routinely conducting sterilization proceedings out of the public eye might increase the risk of erroneous deprivation of the alleged incompetent's fundamental rights.

In contrast to the amendments proposed by this Note, S.B. 110 would withdraw the power to initiate sterilization proceedings from state and county health officials, yet the bill would continue to allow initiation of the proceedings by the alleged incompetent's next of kin, who might be more likely to file the petition for improper purposes. See *supra* text, section III(C)(1).

