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NO. 63791-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON v. LENORA CARLSTROM

BRIEF OF APPELLANT

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I. INTRODUCTION

The Respondent, Lenora Carlstrom, is a former criminal defendant who was found not guilty by reason of insanity (NGRI) and committed to the care and custody of the Department of Social and Health Services (Department) in order to receive treatment for her mental illness. On June 17, 2009, doctors responsible for treating Ms. Carlstrom filed a petition in Superior Court seeking a court order to treat Ms. Carlstrom involuntarily with antipsychotic medication. The petition alleged that since Ms. Carlstrom stopped voluntarily taking antipsychotic medication, she became more assaultive and stopped eating solid food, and that without the medication, Ms. Carlstrom would remain committed for a substantially longer period of time. The trial court dismissed the petition on the basis that it did not have the statutory authority to authorize involuntary treatment with antipsychotic medication for patients found NGRI. The Department appealed the trial court's order by timely filing a notice of appeal.¹

II. ASSIGNMENTS OF ERROR

1. The King County Superior Court's Conclusion of Law No. 3.7 states:

¹ Since the filing of the Department's appeal, Ms. Carlstrom has resumed voluntarily taking her prescribed medication. This will be more fully addressed in the Department's mootness argument. *Infra* pp. 18-20.

There is no statute authorizing a Superior Court to order involuntary treatment with antipsychotic medication for patients found NGRI and subsequently committed to Western State Hospital pursuant to RCW 10.77.

The trial court erred in holding that there is no statutory authority for a Superior Court to authorize involuntary treatment for patients found NGRI.

2. Conclusion of Law 3.9 states:

This Court does not have the statutory authority to order involuntary treatment with antipsychotic medication for Ms. Carlstrom. This Court cannot grant the relief the Department seeks.

The trial court erred in holding it did not have the statutory authority to order involuntary treatment with antipsychotic medication. It also erred in holding it could not grant the relief the Department seeks.

The trial court's order is attached as Appendix A.

III. ISSUES PRESENTED

1. Does a Superior Court have the authority to hold a hearing and enter an order authorizing the Department to involuntarily treat Ms. Carlstrom with antipsychotic medication?
2. Does the Department have the right to appeal the trial court's order dismissing the Department's petition to involuntarily treat Ms. Carlstrom with antipsychotic medication?

3. Even though the Department's appeal may be considered moot, should this Court continue to hear this appeal because it involves issues of substantial public importance that are capable of repetition?

IV. STATEMENT OF THE CASE

The Defendant, Lenora Carlstrom, was found not guilty by reason of insanity (NGRI) on charges of Assault in the Second Degree. Clerk's Papers (CP) at 26. On March 8, 2001, she was committed by the King County Superior Court to the care and custody of the Department and admitted to Western State Hospital, where she remains today. CP at 26. Until there is a court order releasing Ms. Carlstrom from her commitment, the Department is responsible for providing her with "adequate care and treatment." RCW 10.77.120.

On June 17, 2009, Dr. Rolando Pasion, M.D. and Dr. Keri Waterland, Ph.D., both employees of the Hospital, filed a petition with the King County Superior Court seeking a court order authorizing them to involuntarily treat Ms. Carlstrom with antipsychotic medication. CP at 4-8. The facts supporting the petition were that Ms. Carlstrom recently attempted to cause serious harm to herself and others and that Ms. Carlstrom had stopped eating solid foods. CP at 5-6. The petition states that if Ms. Carlstrom was involuntarily treated with antipsychotic

medication, she would become calmer, less assaultive, and more willing to eat. CP at 6-7. It also states that if Ms. Carlstrom does not receive antipsychotic medication, her physical and mental health will be compromised and she will be detained for a substantially longer period of time at public expense. CP at 5-6. The petition further states that there are no available less restrictive alternatives to antipsychotic medication and that administration of these medications are in Ms. Carlstrom's best interest. CP at 7.

Concurrent with the petition, the Department also filed a motion to intervene for the limited purpose of bringing the petition along with a memorandum asking the trial court to hold a hearing on the petition utilizing the procedural and substantive protections listed in RCW 71.05.217(7).² CP at 1-3, 12-15.

On June 22, 2009, the trial court held a hearing to consider the Petition for Involuntary Treatment with Antipsychotic Medication and the Department's Motion for Limited Intervention. CP at 25. The trial court granted the Department's Motion for Limited Intervention but dismissed the petition on the ground that "there is no statute authorizing a Superior

² Some of those protections include: 1) a hearing before a judge or commissioner; 2) the right to representation by counsel; 3) the right to cross-examine witnesses; and 4) the right to present evidence. RCW 71.05.217(7)(a), (c). The court may also, in its discretion, appoint an expert on the patient's behalf. RCW 71.05.217(7)(c). Additionally, the Department bears the burden of proof by clear, cogent, and convincing evidence. RCW 71.05.217(a).

Court to order involuntary treatment with antipsychotic medication to patients found NGRI” and therefore, the trial court did “not have the statutory authority to order involuntary treatment with antipsychotic medication for Ms. Carlstrom.” CP at 27.

V. SUMMARY OF ARGUMENT

The trial court erred when it held it could not hold a hearing and enter an order authorizing involuntary treatment with antipsychotic medication for patients found NGRI. Superior courts have broad jurisdiction under Article IV, § 6 of the Washington Constitution and this jurisdiction has not been limited to exclude these types of hearings. Furthermore, the plain language of RCW 10.77.120 demands that patients found NGRI be treated “to the same extent” as patients civilly committed under RCW 71.05, thereby allowing the superior court to apply the same statutory procedures when either type of patient requires involuntary medication. Alternatively, even if it is found that there is no statutory authority that applies to patients found NGRI, Washington Supreme Court precedent permits borrowing procedural schemes from other statutes in order to furnish the mentally ill with due process. Finally, the Department has the right to appeal the trial court’s order dismissing its petition because it is a final judgment pursuant to RAP 2.2(a)(1).

VI. ARGUMENT

A. The Superior Court Had Jurisdiction Pursuant To Article IV, § 6 Of The Washington Constitution

Article IV, § 6 of the Washington Constitution states that “The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court.” Thus, superior courts have the “power to hear and determine all matters legal and equitable . . . except in so far as these powers have been expressly denied.” *In re the Marriage of Major*, 71 Wn. App. 531, 533, 859 P.2d 1262 (1993) (quoting *State ex rel. Martin v. Superior Court*, 101 Wn. 81, 94 P. 257 (1918)). Courts will only find a lack of subject matter jurisdiction under compelling circumstances, such as when that jurisdiction is specifically limited by the Constitution or statute. *Id.* at 534. Exceptions to this constitutionally broad grant of jurisdiction will be narrowly read. *Id.* If there is no indication the legislature intended to limit jurisdiction, then a superior court’s assertion of jurisdiction will stand. *Id.*

No statute or constitutional provision specifically denies a superior court jurisdiction to conduct a hearing to determine if a patient found NGRI ought to be involuntarily treated with antipsychotic medication. Therefore, the trial court had subject matter jurisdiction to hear the petition

seeking to involuntarily treat Ms. Carlstrom with antipsychotic medication. Thus, subject matter jurisdiction exists regardless of whether Ms. Carlstrom has some other defense or bar to the Department's petition. Those matters are distinct from the court's subject matter jurisdiction to resolve a dispute between the Department, who proposes involuntary medication, and a patient, who objects.

A clear analogy can be drawn to *In re the of Guardianship of Hayes*, 93 Wn.2d 228, 608 P.2d 635 (1980), Appendix B. In *Hayes*, the guardian of a severely mentally retarded teenager petitioned the court for an order authorizing the ward's sterilization. *Hayes* 93 Wn.2d at 229-30. The superior court dismissed the petition on the ground that there was "no authority to issue an order for sterilization of a retarded person." *Id.* at 229. The Washington Supreme Court reversed, citing to Article IV, § 6:

Under this broad grant of jurisdiction the superior court may entertain and act upon a petition for the parent or guardian of a mentally incompetent person for a medical procedure such as sterilization. No statutory authorization is required...In the absence of any limiting legislative enactment, the Superior Court has full power to take action to provide for the needs of a mentally incompetent person.

Hayes 93 Wn.2d at 232-33.³

This view of superior court jurisdiction is consistent with the historically broad scope of power given to the Executive and courts of equity to act *in parens patriae* to care for those who cannot care for themselves. In England, the King was charged with the care and protection of those who could not protect themselves, such as children or persons suffering from a mental illness. *Weber v. Doust*, 84 Wn. 330, 333, 146 P. 623 (1915); *In re Sall*, 59 Wn. 539, 542, 110 P. 32 (1910). This power was exercised through the Courts of Chancery, the forerunner to American courts of equity. *Weber*, 84 Wn. at 333. Similarly, American courts inherently possess the power to act *in parens patriae*, unless the power is taken away by statute. *Weber*, 84 Wn. at 333, *Sall*, 59 Wn. at 542-43. In other words, “the right of a state to [act *in parens patriae*] does not depend on a statute asserting that power. Such statutes are only declaratory of the power already and always possessed by courts of chancery.” *Weber*, 84 Wn. at 333-34.

³ *Hayes* dramatically illustrates the broad scope of subject matter jurisdiction of Superior Courts. However, just because there is subject matter jurisdiction to entertain a petition for sterilization, does not mean there are not serious Constitutional issues that must be addressed, procedural safeguards that must be put in place, and heavy evidentiary burdens the petitioner must meet before a court may order sterilization. *Hayes*, 93 Wn.2d at 238-39. Likewise, the Department recognizes the serious Constitutional issues associated with involuntarily administering antipsychotic medication. That is why the Department asked the trial court to utilize the same procedural safeguards and heavy evidentiary burdens found in RCW 71.05.217(7). CP at 12-15.

Here, the Department brings its petition for involuntary administration of antipsychotic medication under its *parens patriae* power. Ms. Carlstrom suffers from a serious mental illness, which if not adequately treated, will continue to render her a danger to her own health and well-being. The Department brings its petition, not to punish Ms. Carlstrom, but to provide treatment to an individual who cannot care for herself.

The trial court thus erred when it decided it did not have the power to act because it could not find a specific statute authorizing jurisdiction. *See* CP at 27. A specific statute is not required—a court may act except when there is a specific statute limiting jurisdiction. *Hayes*, 93 Wn.2d at 232-33; *Sall*, 59 Wn. at 542-43. There is no statute or constitutional provision specifically forbidding a superior court from holding a hearing on the Department’s petition. Therefore, under Article IV, § 6, and the courts’ inherent power to act *in parens patriae*, Superior Courts have the authority to hold a hearing and authorize involuntary treatment with antipsychotic medication for patients found NGRI.

B. RCW 10.77.120 Authorizes Superior Courts To Order Involuntary Medication With Antipsychotic Medication For NGRI Defendants By Mandating That NGRI Defendants Be Treated “To The Same Extent” As Persons Civilly Committed

The trial court found that “the legislature authorized Superior Courts to order involuntary treatment with antipsychotic medication to persons civilly committed pursuant to RCW 71.05.” CP at 27. The trial court erred when it concluded the legislature did not extend that authority to order involuntary treatment with antipsychotic medication to criminal defendants found NGRI pursuant to RCW 10.77. CP at 27.

RCW 10.77.120 provides that criminal defendants found NGRI “shall be under the custody and control of the secretary *to the same extent* as are other persons who are committed to the secretary’s custody” (emphasis added), Appendix C. The plain meaning of the language demands that patients committed after a finding of NGRI ought to be treated similarly to other persons committed to the Department’s custody, including those civilly committed pursuant to RCW 71.05.

Persons civilly committed pursuant to RCW 71.05 have the statutory right “not to consent to the administration of antipsychotic medications.” RCW 71.05.217(7), Appendix D. This right to refuse medication is not absolute, and a patient may be involuntarily forced to receive antipsychotic medications when “ordered by a court of competent

jurisdiction pursuant to [certain] standards and procedures” RCW 71.05.217(7). RCW 71.05.217(7) then provides a detailed list of procedures that must be followed and evidentiary standards that must be met in order to override the patient’s refusal.

If defendants found NGRI and committed to the Hospital under RCW 10.77 are to be treated “to the same extent” as persons civilly committed under RCW 71.05, then they must similarly enjoy the right to refuse antipsychotic medications. Likewise, if patients committed after a finding of NGRI are to be treated “to the same extent” as persons civilly committed, then they too should be subject to a process that would allow the Hospital to involuntarily force them to receive antipsychotic medication. In order to treat both sets of patients “to the same extent,” that mechanism must be a court order pursuant to the protections, standards and procedures enumerated in RCW 71.05.217(7). Courts must give effect to the plain meaning of a statute. *State v. Riofta*, 166 Wn.2d 358, 365, 209 P.3d 467 (2009). Therefore, so that one may uphold the plain meaning of RCW 10.77.120, this Court should rule that the trial court has the statutory authority to hold a hearing on the Department’s petition to involuntarily treat Ms. Carlstrom with antipsychotic medication.

C. In The Absence Of Specific Legislation, Washington Supreme Court Precedent Permits Borrowing Procedural Schemes From Other Statutes In Order To Protect Constitutional Rights

Even if this Court holds that the express language in RCW 10.77.120 does not give superior court's statutory authority to apply RCW 71.05.217(7) to criminal defendants found NGRI, there is still no barrier to the superior courts borrowing RCW 71.05.217(7) anyway and applying them to this class of patients in order to provide a process by which a court can examine a Department's request for involuntary medication and a patient's constitutional rights to object.

Borrowing statutory schemes designed for one subgroup of the mentally ill and cross-applying them to other subgroups in order to fill in statutory gaps and provide mentally ill persons with due process is routinely condoned by appellate courts. For example, in *Pierce v. State, Dep't of Soc. & Health Servs.*, 97 Wn.2d 552, 646 P.2d 1382 (1982), the Washington Supreme Court confronted the issue of what due process rights ought to be afforded to a mentally incompetent parolee. At the time, there were neither statutes nor cases defining the due process rights of incompetent parolees in parole revocation proceedings. *Id.* at 557. The Court held that in such cases, due process requires an initial evaluation of the parolee's competency: "although incompetence is not a bar to

revocation proceedings, due process requires that it be considered in determining the appropriate disposition.” *Id.* at 559. To provide a process for the consideration of the parolees’ incompetence, the court then held: “The procedures set down by the legislature in RCW 10.77.060 are as appropriate to a parole revocation proceeding as to a criminal trial, and may therefore guide the Board in ordering such an evaluation.” *Pierce* Wn.2d at 560.

In *In re the Detention of Dydasco*, 135 Wn.2d 943, 959 P.2d 1111 (1998), the Court again “borrowed” a process from one statute and applied it to another to protect the rights of mentally ill persons. In *Dydasco*, the court was asked to construe the notification process that should be afforded to patients for 180-day civil commitment hearings. In 1987, the legislature amended RCW 71.05.300 to provide that notice of a petition for 90 days of civil commitment be given at least three days before the expiration of the 14-day commitment. However, the legislature did not provide a similar notice provision for 180-day petitions. *Dydasco*, 135 Wn.2d at 949. In resolving this issue, the court reasoned that since the statute states that a 90-day hearing is the same as that for a 180-day hearing, and because the legislature has consistently provided additional procedural rights for those facing longer periods of involuntary commitment, the same procedural rights should be granted to those facing

either 90 or 180 days of civil commitment. *Id.* at 950. The court then affirmed that three days notice, as required under 90-day commitment proceedings, also applies to 180-day commitment proceedings, even in the absence of express legislation to that effect. *Id.* at 952.

Likewise, if this Court disagrees with the Department's construction of RCW 10.77, it is appropriate and permissible for superior courts to utilize the procedures listed in RCW 71.05.217(7). Doing so balances the Department's duty to provide adequate care and treatment to patients committed to the Hospital with respect for the patients' right to due process when objecting to unwanted medication.

Once an individual who is found NGRI is committed, the Department is obligated to provide the patient adequate care and treatment. *See* RCW 10.77.120. These patients, by definition, suffer from serious mental illnesses which cause them to be a substantial danger to others or make them substantially likely to commit crimes that threaten public safety. *See* RCW 10.77.110(1). One of the best tools available for treating these types of patients is antipsychotic medication. *See Washington v. Harper*, 494 U.S. 210, 222, 225, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990) ("There is considerable debate over the potential side effects of anti-psychotic medications, but there is little dispute in the psychiatric profession that proper use of the drugs is one of the most

effective means of treating and controlling a mental illness likely to cause violent behavior.”) Hence, the Department often must administer antipsychotic medication in order to fulfill its statutory duty to provide mental health care and treatment to patients committed after being found not guilty of a crime by reason of insanity. *See* RCW 10.77.120.

Conversely, every person has a constitutional right to reject unwanted medical treatment, including treatment with antipsychotic medication. *Sell v. U.S.*, 539 U.S. 166, 178, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003), *State v. Hernandez-Ramirez*, 129 Wn. App. 504, 510, 119 P.3d 880 (2005). *In re Schuoler*, 106 Wn.2d 500, 506-07, 723 P.2d 1103 (1986) (holding same for involuntary treatment with electroconvulsive therapy).

RCW 71.05.217(7) gives patients civilly committed the right to a judicial hearing, at which they have the right to counsel, to cross-examine witnesses, and the right to present evidence. This statute provides greater due process protection than what is required under the United States Constitution. *See Harper*, 494 U.S. at 210 (upholding prison policy that authorized the involuntarily administration of antipsychotic medication to prisoners without providing the prisoners with a judicial hearing or the right to counsel). *See also Jurasek v. Utah State Hosp.*, 158 F.3d 506, 511 (10th Cir. 1998); (extending *Harper* to civilly committed patients);

Morgan v. Rabun, 128 F.3d 694, 697 (8th Cir. 1997) (extending *Harper* to criminal defendants found NGRI).

RCW 71.05.217(7) also meets the requirements under Washington's Due Process Clause and constitutional right to privacy. *In re Schuoler*, 106 Wn.2d at 508-11. Therefore, utilizing the procedures in RCW 71.05.217(7) also protects the state constitutional rights of patients found NGRI.

Not utilizing the procedure listed in RCW 71.05.217(7) for patients committed after a finding of NGRI creates two possible outcomes. The first is that the Department does not involuntarily administer antipsychotic medication to this class of patients. In Ms. Carlstrom's case, this will mean she will remain a danger to herself and others, will continue not eating solid food, and will remain detained for a substantially long time at public expense. CP at 6-7. The second would allow the Department to involuntarily administer antipsychotic medication to this class of patients, but using a process that provides fewer substantive and procedural protections than a judicial hearing pursuant to RCW 71.05.217(7).

Both outcomes can be avoided by holding a court hearing utilizing the procedures in RCW 71.05.217(7). Holding such a hearing in order to fill in the statutory gaps and provide patients committed after a finding of

NGRI with due process is supported by both *Dydasco* and *Pierce*. The trial court erred by refusing to hold such a hearing.

D. The Superior Court's Order Dismissing The Department's Petition Is A Final Judgment Dismissing A Cause Of Action Independent Of The Underlying Commitment And Appealable As Of Right Under RAP 2.2(a)(1).

RAP 2.2(a)(1) provides parties a right to appeal "the final judgment entered in any action or proceeding."⁴ The trial court's order dismissing the Department's Petition for Involuntary Treatment with Antipsychotic Medication is such a final judgment.

"A final judgment is such a judgment as at once puts an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues." *Reif v. La Follette*, 19 Wn.2d 366, 370, 142 P.2d 1015 (1943) (quoting Henry Campbell Black, 1 *Black on Judgments*, 31, § 21 (2d Ed. 1902)). A judgment of dismissal is a final judgment, as it conclusively terminates the individual action. Henry Campbell Black, 1 *Black on Judgments*, 32, § 21 (2d Ed. 1902).

The trial court's dismissal of the Department's petition forecloses the Department from obtaining the relief it seeks, namely, a court order authorizing involuntary treatment with antipsychotic medication. There

⁴ The Washington Supreme Court has referred to the involuntary commitment of criminal defendants found NGRI as a "civil commitment." *State v. Reid*, 144 Wn.2d 621, 627, 30 P.3d 465 (2001). Therefore, the rules regarding appeals in criminal cases do not apply.

can be no further proceedings with regard to the Department's petition. Therefore, the trial court's order is a final judgment, which the Department may appeal as of right. *See State v. Gossage*, 138 Wn. App. 298, 302, 156 P.3d 951 (2007) *reversed on other grounds* 165 Wn.2d 1, 195 P.3d 525 (2008) (holding that a final judgment "leaves nothing else to be done to arrive at the ultimate disposition of the petition").

Ms. Carlstrom may argue that the superior court's order is interlocutory in nature because she remains committed to Western State Hospital pursuant to court order. However, the Department's petition is a legal proceeding independent and distinct from the proceedings governing the underlying commitment. In essence, there are two causes of action: the first is the underlying commitment maintained by the county prosecutor as part of its criminal case against Ms. Carlstrom; the second is the petition brought by the Department to have Ms. Carlstrom involuntarily treated with antipsychotic medication as part of its duty to provide treatment. A dismissal of one cause of action is a final judgment that is appealable as of right, even if a second cause of action remains. *Whitehead v. Stringer*, 106 Wn. 501, 501-03, 180 P. 486 (1919). Therefore, the Department has the right to appeal the dismissal of its cause of action.

E. This Appeal Concerns Issues Of Substantial Public Importance That Are Capable Of Repetition And Should Not Be Dismissed As Moot

Since the commencement of this appeal, Ms. Carlstrom has resumed voluntarily taking her medication and eating solid food, albeit as a result of strong encouragement from treating staff at the Hospital. This fact may give rise to the argument that this appeal is now moot. However, even if this appeal is moot, this Court should not dismiss it.

Appellate courts will decide a moot case if it involves “matters of continuing and substantial public interest.” *In re the Detention of Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983). There are three criteria used to measure whether a sufficient public interest exists: “(1) The public or private nature of the question presented; (2) the desirability of an authoritative determination which will provide future guidance to public officers; and (3) the likelihood the question will recur.” *Id.*

Usually, the need to clarify the law surrounding the involuntary treatment of persons with mental illness is a matter of continuing and substantial public interest. See *In re the Detention of C.M.*, 148 Wn. App. 111, 115, 197 P.3d 1233 (2009); *In re the Detention of W.*, 70 Wn. App. 279, 282-83, 852 P.2d 1134 (1993). This case is no exception.

The issues involved in this case are a public, not a private nature. The issues involved include the Constitutional rights of people with mental illness to refuse treatment, the treatment provided by the State to persons found not guilty by reason of insanity, and the extent of the jurisdiction of Superior Courts—all matters of public concern. Second, the Department needs an authoritative determination by this Court as to what procedures are available, if any, to involuntarily administer antipsychotic medication to patients found NGRI. Third, this issue is certain to recur. It is entirely foreseeable that not only may Ms. Carlstrom refuse her prescribed antipsychotic medication in the future, but other patients found NGRI will also refuse their antipsychotic medication. *See Catherine A. Blackburn, The “Therapeutic Orgy” and the “Right to Rot” Collide: The Right to Refuse Antipsychotic Drugs Under State Law*, 27 Hous. L. Rev. 447, 461 (1990) (indicating that as many as 15% of persons civilly committed stop taking their antipsychotic medications).

Looking at all of these factors, there is a sufficient public interest to warrant a decision on this appeal, even if it may be technically moot.

VII. CONCLUSION

For the foregoing reasons, the Department asks this Court to issue a decision holding: 1) Even if this appeal is moot, there is a substantial and continuing public interest in the issues involved to warrant deciding

the appeal; 2) the Department has the right to appeal the trial court's dismissal of its petition pursuant to RAP 2.2(a)(1); 3) Superior Courts have the authority under Article IV, § 6 and/or RCW 10.77.120 to hold a hearing and authorize involuntary treatment with antipsychotic medication for patients found NGRI. The Department then requests this Court to remand the case back to the trial court for proceedings consistent with these holdings.

RESPECTFULLY SUBMITTED this 13th day of October, 2009.

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CERTIFICATE OF SERVICE

Beverly Cox, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On October 13, 2009, I served a true and correct copy of this **BRIEF OF APPELLANT** on the following parties to this action, as indicated below:

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- By Legal Messenger**
- By Facsimile**

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13 day of October 2009, at Tumwater, Washington.

Beverly Cox

BEVERLY COX
Legal Assistant

APPENDIX A

1 Honorable Judge Greg Canova
2 Wednesday, July 1, 2009
3 Room – W817
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7 STATE OF WASHINGTON
8 KING COUNTY SUPERIOR COURT

9 State of Washington,

10 Plaintiff,

11 v.

12 Lenora Carlstrom,

13 Defendant.

NO. 00-1-04147-7 SEA

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER DISMISSING PETITION
FOR INVOLUNTARY
TREATMENT WITH
ANTIPSYCHOTIC MEDICATION

14 HEARING

15 1.1. Date – June 22, 2009

16 1.2. Judge – The Honorable Greg Canova

17 1.3. Appearances – The plaintiff by David Hackett, King County Deputy
18 Prosecuting Attorney; the defendant, in person and by counsel Mike De Felice; and
19 the Department of Social and Health Services (Department, DSHS), Western State
20 Hospital, by Scott E. Michael, Assistant Attorney General.

21 1.4. Purpose – To consider the Department’s motion to shorten time, a
22 motion for limited intervention by the Department, and a petition for involuntary
23 treatment with antipsychotic medication.
24

1 1.5. Evidence – The court considered the briefs and oral argument from
2 Mr. Hackett, Mr. De Felice, and Mr. Michael.

3 **FINDINGS OF FACT**

4 The Court finds the following undisputed facts:

5 2.1. The Defendant, Ms. Carlstrom, entered a plea of not guilty by reason of
6 insanity (NGRI) on the charge of assault in the second degree.

7 2.2. An order by the King County Superior Court entered March 8, 2001
8 committed Ms. Carlstrom to Western State Hospital in Pierce County under the
9 authority granted under RCW Chapter 10.77.

10 2.3. Ms. Carlstrom remains committed by court order to Western State
11 Hospital.

12 2.4. When criminal defendants found NGRI are committed to Western State
13 Hospital, the Department is legally responsible for providing care and treatment to
14 those defendants, including Ms. Carlstrom.

15 2.5. Dr. Pasion, M.D., and Dr. Waterland, Ph.D. are both employees of
16 Western State Hospital. They filed a petition seeking a court order authorizing
17 involuntary treatment with antipsychotic medication to Ms. Carlstrom.

18 2.6. The motion to shorten time was not opposed.

19 **CONCLUSIONS OF LAW**

20 On the basis of the foregoing Findings of Fact and the record herein, the Court
21 makes the following Conclusions of Law:

22 3.1. There is good cause to shorten time for the motions.

23 3.2. Under RCW Chapter 10.77, this Court retains personal jurisdiction over
24 Ms. Carlstrom. The Court also has personal jurisdiction over the other parties.

1 3.3. Venue is proper in King County.

2 3.4. When the Criminal Rules of Procedure are silent, a court may look to
3 the Civil Rules of Procedure for guidance. There is no Criminal Rule of Procedure
4 governing intervention in a criminal case by a third party. This Court turned to Civil
5 Rule of Procedure 24 for guidance.

6 3.5. Because the Department is responsible for providing care and treatment
7 to Ms. Carlstrom, it has an interest in this case. This interest will be impaired or
8 impeded unless the Department is permitted to intervene in order to bring the petition
9 for involuntary treatment with antipsychotic medication. The Department's interests
10 are not adequately represented by existing parties.

11 3.6. The Department may intervene as of right pursuant to CR 24(a)(2).

12 3.7. There is no statute authorizing a Superior Court to order involuntary
13 treatment with antipsychotic medication for patients found NGRI and subsequently
14 committed to Western State Hospital pursuant to RCW 10.77.

15 3.8. The legislature has authorized Superior Courts to order involuntary
16 treatment with antipsychotic medication to persons civilly committed pursuant to
17 RCW 71.05. The legislature has had ample opportunity to extend this authority to
18 persons found NGRI but has chosen not to do so.

19 3.9. This Court does not have the statutory authority to order involuntary
20 treatment with antipsychotic medication for Ms. Carlstrom. This Court cannot grant
21 the relief the Department seeks.

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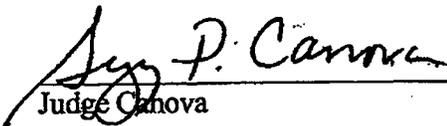
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ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED:

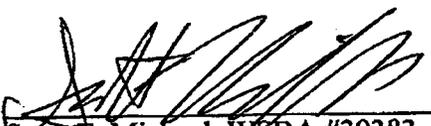
- 4.1. The motion to shorten time is granted.
- 4.2. The Department's motion for limited intervention is granted.
- 4.3. The Petition for Involuntary Treatment with Antipsychotic Medication is dismissed.

DONE IN COURT this 1st day of July 2009.



Judge Canova

Presented by:



Scott E. Michael, WSBA #39383
Assistant Attorney General

APPENDIX B

[No. 45612. En Banc. March 27, 1980.]

In the Matter of the Guardianship of
EDITH MELISSA MARIA HAYES.

- [1] **Civil Rights — Mental Health — Sterilization of Incompetent — Judicial Authority.** Under the grant of judicial power in Const. art. 4, § 6, superior courts have jurisdiction to entertain and act upon a petition for an order authorizing sterilization of a mentally incompetent person.
- [2] **Mental Health — Sterilization of Incompetent — Guardian Ad Litem — Necessity.** A disinterested guardian ad litem must be appointed to represent a mentally incompetent person in a proceeding to determine whether such person should be sterilized.
- [3] **Mental Health — Sterilization of Incompetent — Standards — Degree of Proof.** A court may authorize the sterilization of a mentally incompetent person only if it determines, after considering independent medical, psychological, and social evidence and the view of the incompetent person, in a proceeding in which the incompetent individual is represented by a guardian ad litem, that sterilization is in the person's best interest. There must be clear, cogent, and convincing evidence that the person is incapable of deciding for himself about sterilization at that time and in the foreseeable future; that contraception is needed, as determined by considering the likelihood that the person would engage in sexual activity resulting in pregnancy and the person's potential as a parent; that there exists no less drastic method of contraception or less intrusive method of sterilization; and that there is no likelihood of scientific progress in achieving a reversible sterilization procedure or a new means of treating the person's disability.

STAFFORD and HICKS, JJ., dissent in part by separate opinion; ROSELLINI, WRIGHT, and BRACHTENBACH, JJ., dissent by separate opinion.

Nature of Action: A mother sought a court order authorizing sterilization of her mentally retarded daughter. Although 16 years old and capable of bearing children, the daughter functioned at the level of a 4- or 5-year-old child.

Superior Court: The Superior Court for Grant County, No. 7768, Fred Van Sickle, J., dismissed the petition on July 1, 1977.

Supreme Court: Six Justices hold that the trial court has jurisdiction over the petition for sterilization of a mentally retarded person, and the dismissal for lack of jurisdiction is *reversed*. Only four Justices, however, hold that the trial court should proceed with the matter prior to legislative action declaring public policy or establishing procedures.

Ries & Kenison, by Darrell E. Ries and Larry W. Larson, for appellant.

Collins & Hansen, by Howard W. Hansen and Nels A. Hansen, for respondent.

Karen Marie Thompson and *Catherine C. Morrow* on behalf of Legal Advocates for the Disabled and *Linda Potter*, *Judith E. Cohn*, *Michael S. Lottman*, and *Norman S. Rosenburg* on behalf of Mental Health Law Project, amici curiae.

HOROWITZ, J.—This appeal raises the question whether the Superior Court for Grant County has authority to grant a petition for sterilization of a severely mentally retarded person.

Petitioner Sharon Hayes is the mother of Edith Melissa Maria Hayes, who was born severely mentally retarded on December 17, 1963. She petitioned the Superior Court for an order appointing her as the guardian of Edith's person and specifically authorizing a sterilization procedure on Edith. The court dismissed the petition on a motion for summary judgment on the ground it had no authority to issue an order for sterilization of a retarded person. Petitioner appeals the court's conclusion it cannot authorize sterilization of a mentally incompetent person. She does not raise the question whether the court properly denied her petition to be appointed guardian of Edith's person.

We hold that the Superior Court has jurisdiction to entertain and act upon a request for an order authorizing sterilization of a mentally incompetent person under the

broad grant of judicial power in Const. art. 4, § 6. We further hold that, in the absence of controlling legislation, the court may grant such a petition in the rare and unusual case that sterilization is in the best interest of the retarded person. We therefore reverse the order granting summary judgment and remand for further proceedings consistent with this opinion.

Edith Hayes is severely mentally retarded as a result of a birth defect. Now 16 years old, she functions at the level of a 4- or 5-year-old. Her physical development, though, has been commensurate with her age. She is thus capable of conceiving and bearing children, while being unable at present to understand her own reproductive functions or exercise independent judgment in her relationship with males. Her mother and doctors believe she is sexually active and quite likely to become pregnant. Her parents are understandably concerned that Edith is engaging in these sexual activities. Furthermore, her parents and doctors feel the long term effects of conventional birth control methods are potentially harmful, and that sterilization is the most desirable method to ensure that Edith does not conceive an unwanted child.

Edith's parents are sensitive to her special needs and concerned about her physical and emotional health, both now and in the future. They have sought appropriate medical care and education for her, and provided her with responsible and adequate supervision. During the year or so that Edith has been capable of becoming pregnant, though, they have become frustrated, depressed and emotionally drained by the stress of seeking an effective and safe method of contraception. They believe it is impossible to supervise her activities closely enough to prevent her from becoming involved in sexual relations. Thus, with the consent of Edith's father, Sharon Hayes petitioned for an order appointing her guardian and authorizing a sterilization procedure for Edith.

I JURISDICTION

Edith's court appointed guardian ad litem contended below, and now maintains on appeal, that a superior court has no power to authorize a sterilization absent specific statutory authority. He cites in support of that view cases from other jurisdictions in which courts have concluded that specific statutory authority is required. *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971); *In re Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64, 74 A.L.R.3d 1202 (1974); *A.L. v. G.R.H.*, 163 Ind. App. 636, 325 N.E.2d 501, 74 A.L.R.3d 1220 (1975), *cert. denied*, 425 U.S. 936, 48 L. Ed. 2d 178, 96 S. Ct. 1669 (1976); *In Interest of M.K.R.*, 515 S.W.2d 467 (Mo. 1974); *Frazier v. Levi*, 440 S.W.2d 393 (Tex. Civ. App. 1969); *Holmes v. Powers*, 439 S.W.2d 579 (Ky. App. 1968).

These cases are not controlling. Their results are conclusory, as none of them demonstrates any controlling legal principle prohibiting a court of general jurisdiction from acting upon a petition for sterilization. They suggest instead a preference that the difficult decisions regarding sterilization be made by a legislative body. This is not simply a denial of jurisdiction, but an abdication of the judicial function. We are mindful that a court "cannot escape the demands of judging or of making . . . difficult appraisals." *Haynes v. Washington*, 373 U.S. 503, 515, 10 L. Ed. 2d 513, 83 S. Ct. 1336 (1973).

[1] Persuasive authority for the principle that courts of general jurisdiction do have jurisdiction over a petition by a parent or guardian for an order authorizing sterilization is found in the United States Supreme Court opinion in *Stump v. Sparkman*, 435 U.S. 349, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978). In that case a woman sterilized pursuant to court order when she was a child later brought a civil rights action against the judge who issued the order. The question was whether the judge lacked judicial immunity for the act. The court determined the judge's conduct in entertaining and approving the petition for sterilization constituted a

judicial act, and that he had not acted in the clear absence of all jurisdiction. With regard to the jurisdiction issue, the court noted the judge was a member of a court which had broad jurisdiction at law and in equity, and which was not prohibited from considering a petition for sterilization by either statute or controlling case law. It concluded the judge had "the power to entertain and act upon the petition for sterilization" and was entitled to judicial immunity in the suit. *Stump v. Sparkman, supra* at 364. See generally Note, *Judicial Immunity*, 11 Ind. L. Rev. 489 (1978).

The courts of this state have long recognized the inherent power of the superior court "to hear and determine all matters legal and equitable in all proceedings known to the common law". (Italics ours.) *In re Hudson*, 13 Wn.2d 673, 697-98, 126 P.2d 765 (1942). Original jurisdiction is granted to superior courts over all cases and proceedings in which jurisdiction is not vested exclusively in some other court by Const. art. 4, § 6. Under this broad grant of jurisdiction the superior court may entertain and act upon a petition from the parent or guardian of a mentally incompetent person for a medical procedure such as sterilization. No statutory authorization is required. The rule stated in *In re Hudson* regarding the jurisdiction of the court over infants is equally applicable to those in need of guardianship because of severe mental retardation:

We agree . . . that the superior courts of this state are courts of general jurisdiction and have power to hear and determine all matters legal and equitable in all proceedings known to the common law, except in so far as those have been expressly denied; that the jurisdiction of a court of equity over the persons, as well as the property, of infants has long been recognized; and that the right of the state to exercise guardianship over a child does not depend on a statute asserting that power. *Weber v. Doust*, 84 Wash. 330, 146 Pac. 623 . . .

In re Hudson, supra at 697-98.

Nor is a statute required to empower a superior court to exercise its jurisdiction by granting a petition for sterilization. We recognize the power of the legislature, subject to

the state and federal constitutions, to enact statutes regulating sterilization of mentally incompetent persons in the custody of a parent or guardian. It has not done so, however. The relevant guardianship statute, RCW 11.92, defines the duties of a guardian to care for, maintain, and provide education for an incompetent person. The statute neither provides nor prohibits sterilization procedures at a guardian's request. It does not in any event derogate from the judicial power of the court which includes the power to authorize such a procedure where it is necessary. In the absence of any limiting legislative enactment, the superior court has full power to take action to provide for the needs of a mentally incompetent person, just as it has authority to do so to protect the interests of a child. See *In re Hudson, supra*. We hold the superior court of the State of Washington has authority under the state constitution to entertain and act upon a petition for an order authorizing sterilization of a mentally incompetent person, and in the absence of legislation restricting the exercise of that power, the court has authority to grant such a petition.

We note that courts in at least four other states have reached the same conclusion with regard to the authority of their own courts of general jurisdiction. In *In re Sallmaier*, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (1976) the Supreme Court of the State of New York held it had power to grant a petition for sterilization under its common-law jurisdiction to act as *parens patriae* with respect to incompetents. Similar analysis was used by the Chancery Division of New Jersey's Superior Court in *In re L.G.*, No. C-1917-78E (N.J. Super., July 12, 1979). The Ohio probate court found authority in the plenary power, granted to the court by statute to dispose of all matters at law and in equity which are properly before the court. *In re Simpson*, 180 N.E.2d 206 (Ohio P. Ct. 1962). In *Ex Parte Eaton* (Baltimore Cir. Ct. 1954), the Circuit Court of Baltimore, Maryland, held it could issue an order for sterilization under its general equity powers. Furthermore, the power of a state court to order sterilization without specific statutory authorization

was impliedly recognized by a federal district court in *Wyatt v. Aderholt*, 368 F. Supp. 1383 (M.D. Ala. 1974).

We therefore hold that Const. art. 4, § 6 gives the superior courts of this state the jurisdiction to entertain and act upon a request for an order authorizing sterilization of a mentally incompetent person.

II

STANDARDS FOR STERILIZATION

Our conclusion that superior courts have the power to grant a petition for sterilization does not mean that power must be exercised. Sterilization touches upon the individual's right of privacy and the fundamental right to procreate. *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 458 (M.D.N.C. 1976), citing *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 31 L. Ed. 2d 349, 92 S. Ct. 1029, (1972); *Skinner v. Oklahoma*, 316 U.S. 535, 86 L. Ed. 1655, 62 S. Ct. 1110 (1942). See also P. Friedman, *The Rights of Mentally Retarded Persons* 117-19 (1976) (hereinafter cited as *Mentally Retarded Persons*). It is an unalterable procedure with serious effects on the lives of the mentally retarded person and those upon whom he or she may depend. Therefore, it should be undertaken only after careful consideration of all relevant factors. We conclude this opinion with a set of guidelines setting out the questions which must be asked and answered before an order authorizing sterilization of a mentally incompetent person could be issued. First, however, the considerations which are important to this determination can be best illuminated by discussing briefly the historical context from which they arise.

Sterilization of the mentally ill, mentally retarded, criminals, and sufferers from certain debilitating diseases became popular in this country in the early 20th century. The theory of "eugenic sterilization" was that the above named traits and diseases, widely believed at that time to

be hereditary, could be eliminated to the benefit of all society by simply preventing procreation.

More than 20 states passed statutes authorizing eugenic sterilizations. Washington passed a punitive sterilization law aimed at habitual criminals and certain sex offenders in 1909. The law exists today as RCW 9.92.100. Another statute, also enacted early in the century, denied certain persons, including the mentally retarded, the right to marry unless it is established that procreation by the couple is impossible. RCW 26.04.030, repealed by Laws of 1979, 1st Ex. Sess., ch. 128, § 4. While this statute did not authorize sterilizations, it was clearly based on eugenic principles.

In 1921 the Washington legislature enacted a law providing for sterilization of certain mentally retarded, mentally ill and habitually criminal persons restrained in a state institution. Laws of 1921, ch. 53, p. 162. This statute was held unconstitutional because of its failure to provide adequate procedural safeguards in *In re Hendrickson*, 12 Wn.2d 600, 123 P.2d 322 (1942).

The United States Supreme Court upheld the constitutionality of a eugenic sterilization law which provided adequate procedural safeguards, however, in *Buck v. Bell*, 274 U.S. 200, 71 L. Ed. 1000, 47 S. Ct. 584 (1927). Since that time it has generally been believed that eugenic sterilization statutes are constitutional although, as noted above, more recent Supreme Court decisions suggest the importance of respecting the individual's constitutional rights of privacy and procreation. See generally S. Brakel & R. Rock, *American Bar Foundation Study, the Mentally Disabled and the Law* (rev. ed. 1971) (hereinafter referred to as *A.B. Foundation Study*) and J. Robitscher, *Eugenic Sterilization* (1973) (hereinafter referred to as *Eugenic Sterilization*).

More recently scientific evidence has demonstrated little or no relationship between genetic inheritance and such conditions as mental retardation, criminal behavior, and diseases such as epilepsy. Geneticists have discovered, for example, that some forms of mental retardation appear to

have no hereditary component at all, while in some others the element of heredity is only one of a number of factors which may contribute to the condition. See *A.B. Foundation Study*, *supra* at 211; *Eugenic Sterilization*, *supra* at 113-16; *Mentally Retarded Persons*, *supra* at 115-17. In short, the theoretical foundation for eugenic sterilization as a method of improving society has been disproved.

At the same time other previously unchallenged assumptions about mentally retarded persons have been shown to be unreliable. It has been found, for example, that far from being an insignificant event for the retarded person, sterilization can have long-lasting detrimental emotional effects. *Eugenic Sterilization*, *supra* at 21-22; *Mentally Retarded Persons*, *supra* at 116. Furthermore, while retarded persons, especially children, are often highly suggestible, there is evidence they are also capable of learning and adhering to strict rules of social behavior. *Eugenic Sterilization*, *supra* at 19. Many retarded persons are capable of having normal children and being good parents. *Eugenic Sterilization*, *supra* at 20; *Mentally Retarded Persons*, *supra* at 116.

[2] Of great significance for the problem faced here is the fact that, unlike the situation of a normal and necessary medical procedure, in the question of sterilization the interests of the parents of a retarded person cannot be presumed to be identical to those of the child. The problem of parental consent to sterilization is of great concern to professionals in the field of mental health, and the overwhelming weight of opinion of those who have studied the problem appears to be that consent of a parent or guardian is a questionable or inadequate basis for sterilization. See *A.B. Foundation Study*, *supra* at 216; *Mentally Retarded Persons*, *supra* at 121; 2 *P.L.I. Mental Health Project*, at 1024 (1973); President's Committee on Mental Retardation, *The Mentally Retarded Citizen and the Law*, at 101-05 (1976); *Eugenic Sterilization*, *supra* at 121; Comment, *Sterilization, Retardation and Parental Authority*, 1978 B.Y.L. Rev. 380 (1978); Murdock, *Sterilization of the*

Retarded: A Problem or a Solution?, 62 Cal. L. Rev. 917, 932-34 (1974). See also *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 456 (M.D.N.C. 1976). It is thus clear that in any proceedings to determine whether an order for sterilization should issue, the retarded person must be represented, as here, by a disinterested guardian ad litem.

[3] Despite all that has been said thus far, in the rare case sterilization may indeed be in the best interests of the retarded person. This was recognized in *North Carolina Ass'n for Retarded Children v. North Carolina*, *supra* at 454-55. However, the court must exercise care to protect the individual's right of privacy, and thereby not unnecessarily invade that right. Substantial medical evidence must be adduced, and the burden on the proponent of sterilization will be to show by clear, cogent and convincing evidence that such a procedure is in the best interest of the retarded person.

Among the factors to be considered are the age and educability of the individual. For example, a child in her early teens may be incapable at present of understanding the consequences of sexual activity, or exercising judgment in relations with the opposite sex, but may also have the potential to develop the required understanding and judgment through continued education and developmental programs.

A related consideration is the potential of the individual as a parent. As noted above, many retarded persons are capable of becoming good parents, and in only a fraction of cases is it likely that offspring would inherit a genetic form of mental retardation that would make parenting more difficult.

Another group of relevant factors involves the degree to which sterilization is medically indicated as the last and best resort for the individual. Can it be shown by clear, cogent and convincing evidence, for example, that other methods of birth control are inapplicable or unworkable?

In considering these factors, several courts have developed sterilization guidelines. See, e.g., *North Carolina Ass'n for Retarded Citizens, supra* at 456-57; *Wyatt v. Aderholt, supra* at 1384-86; *In re L.G., supra* at 34-35. With the assistance of the brief of amicus Mental Health Law Project, a careful review of these considerations allows us to provide the superior court with standards to be followed in exercising its jurisdiction to issue an order authorizing sterilization of a mentally incompetent individual.

The decision can only be made in a superior court proceeding in which (1) the incompetent individual is represented by a disinterested guardian ad litem, (2) the court has received independent advice based upon a comprehensive medical, psychological, and social evaluation of the individual, and (3) to the greatest extent possible, the court has elicited and taken into account the view of the incompetent individual.

Within this framework, the judge must first find by clear, cogent and convincing evidence that the individual is (1) incapable of making his or her own decision about sterilization, and (2) unlikely to develop sufficiently to make an informed judgment about sterilization in the foreseeable future.

Next, it must be proved by clear, cogent and convincing evidence that there is a need for contraception. The judge must find that the individual is (1) physically capable of procreation, and (2) likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy, and must find in addition that (3) the nature and extent of the individual's disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders him or her permanently incapable of caring for a child, even with reasonable assistance.

Finally, there must be no alternatives to sterilization. The judge must find that by clear, cogent and convincing evidence (1) all less drastic contraceptive methods, including supervision, education and training, have been proved

unworkable or inapplicable, and (2) the proposed method of sterilization entails the least invasion of the body of the individual. In addition, it must be shown by clear, cogent and convincing evidence that (3) the current state of scientific and medical knowledge does not suggest either (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advance in the treatment of the individual's disability.

There is a heavy presumption against sterilization of an individual incapable of informed consent that must be overcome by the person or entity requesting sterilization. This burden will be even harder to overcome in the case of a minor incompetent, whose youth may make it difficult or impossible to prove by clear, cogent and convincing evidence that he or she will never be capable of making an informed judgment about sterilization or of caring for a child.

Review of the facts in this case in light of these standards makes it clear that the burden has not yet been met. It cannot be said that Edith Hayes will be unable to understand sexual activity or control her behavior in the future. The medical testimony and report of the mental health board are not detailed enough to provide clear, cogent and convincing evidence in this regard. Edith's youth is of particular concern, since she has many years of education before her. Furthermore, although there is evidence that some methods of birth control have already been tried, there is insufficient proof that no conventional form of contraception is a reasonable and medically acceptable alternative to sterilization. Nor is there any evidence such a procedure would not have detrimental effects on Edith's future emotional or physical health. Finally, there is no evidence that a pregnancy would be physically or emotionally hazardous to Edith, and insufficient evidence that she would never be capable of being a good parent.

Additional fact finding at the trial level will help the superior court judge answer the questions set out in this

opinion. Therefore, the case is reversed and remanded for further proceedings consistent with this opinion.

UTTER, C.J., and DOLLIVER and WILLIAMS, JJ., concur.

STAFFORD, J. (concurring specially in part in the majority and dissenting in part)—I have studied the majority and dissenting opinions with care. Both express great concern for basic personal rights and the possible impact of social policy upon those rights. Yet, in resolving those complicated, and often conflicting, issues in terms of constitutional jurisdiction, the majority and dissent are in fundamental opposition. The majority declares that constitutional jurisdiction over the person and subject matter clearly gives the judiciary power to determine the ultimate conflict. The dissent asserts with equal fervor that no jurisdiction exists, constitutional or otherwise, to resolve an issue of public policy which strikes so near the underpinnings of the right of privacy. My view of the appropriate resolution lies between the two competing theories, although it is more closely allied with the majority.

I agree with the majority that the judiciary has constitutional jurisdiction over both the subject matter and the persons involved. Having jurisdiction the courts possess inherent power to define the limits of the conflict between personal rights and the asserted needs of society and thus the power to resolve the instant dispute. The majority has proceeded into this thicket with caution. While declaring the power of the judiciary to act, it has imposed upon those who stress the social need for sterilization a strong burden of proof as a condition precedent to any implementation of the claimed need. By so doing, the majority has recognized the necessity of protecting the fundamental personal rights involved.

Nevertheless, despite the cautious approach employed, I am compelled to depart from the majority. I acknowledge existence of the judicial power to act. Possession of such power, however, neither requires that it be exercised nor

necessarily supports the wisdom of its exercise under all circumstances.

In this case we are concerned with the permanent and irreversible loss of a fundamental personal right. Those who seek to invade this right do so in the name of "social need", "social good" and even "personal well-being". Society, doubtless well intentioned, desires to "do what is best" for the person here involved. In my view, however, there are not only deep-seated medical, sociological, personal and legal issues, but a fundamental issue of public policy involved. What power, then, should society have in this regard; what personal rights should be protected from society; to what extent should they be protected; and in what manner?

It seems to me that having clearly declared the judiciary's power to act, wisdom dictates we should defer articulation of this complex public policy to the legislature. Such deferral, done with a clear declaration of judicial power, is not an abdication of that power. Rather, it is a recognition that the declared power can be rationally coupled with a conscious choice not to exercise it.

There will be sufficient time, after a legislative declaration of public policy, for this court to determine whether the declaration and implementation of that policy has been accomplished in a constitutional manner. There will be a sufficient opportunity, for example, for us to review and properly decide the most basic question of all—whether compulsory sterilization of mentally retarded persons should or should not be permitted and if so under what limitations, if any. We have not faced this most basic issue and have been unable to do so because of the limited nature of the briefs and limited facts in this case. By deferring the exercise of our power and permitting the legislature to declare the public policy, we will be able to meet these problems in a more acceptable and knowledgeable manner.

Since, contrary to my views, the judiciary plans to exercise its power to act in cases of this nature, it should do so

only under strict protective standards. Most of the standards enunciated by the majority fulfill this objective.

Without question those who seek intervention of the judiciary on "behalf" of an alleged mentally incompetent person usually will do so with the best of intentions. If the judiciary is willing to furnish the means of resolving such a critical issue, it should not on the one hand make the forum available and on the other hand make the burden of proof so impossible of accomplishment that the forum cannot be used. Unfortunately, the final standard proposed by the majority does just that.

The moving party is required to prove by clear, cogent and convincing evidence that "(3) *the current state of scientific and medical knowledge does not suggest* (a) that a reversible sterilization procedure or other less drastic contraceptive method *will shortly be available*, or (b) *that science is on the threshold of an advance in the treatment of the individual's disability.*" First, the standard requires the moving party to prove a negative. Second, it involves the judiciary in a questionable contest at three levels: (a) whether the movant has done sufficient research to establish that *no* medical breakthrough is possible in the foreseeable future; (b) whether a medical procedure possible in the next few years will become an actuality; and (c) whether the alleged mentally incompetent person will be able to take advantage of the nebulous scientific advance for physical or emotional reasons.

It is too much to ask the moving party, the alleged mentally incompetent person or the judiciary to litigate such nebulous eventualities of science.

HICKS, J., concurs with STAFFORD, J.

ROSELLINI, J. (dissenting)—In the exercise of the police power, the legislature has provided for sterilization of certain criminals, evidently upon the mistaken belief that the tendencies exhibited by such criminals are inheritable

(RCW 9.92.100). Today, the court has enacted its own statute, providing for the sterilization of children upon the petition of parents.

The majority recognizes that it has no real statutory authority to act in this area. It cites no authority supporting the proposition that the ordering of sterilization of human beings is among the inherent powers reserved to the courts. As stated in 20 Am. Jur. 2d *Courts* § 78 (1965), the inherent powers of a court do not increase its jurisdiction; they are limited to such powers as are essential to the existence of the court and the orderly and efficient exercise of its jurisdiction. As is made clear in section 79 of that encyclopedia, the powers pertain to matters procedural rather than substantive. They do not include the power to determine what laws will best serve the public welfare.

The majority's position, as I read it, is simply that the court has power to grant relief in any case that comes before it, whether or not that relief is authorized by constitution, statute, or principle of common law. If a complaint is filed, the majority indicates, the court can give a remedy. The need to state a claim "upon which relief can be granted" is eliminated from the requirements for maintaining an action.

Recognizing, fortunately, that the area in which it legislates today is a complex one, the majority has found it necessary to promulgate a number of rules regarding the burden of proof, assuring that when an action is brought under this law, the trial may be lengthy and expensive.

Not only because the courts lack inherent power to order such invasions of human privacy, but because the undertaking is of such grave consequence and error so irreversible, wise courts have acknowledged that only the people's representatives can rightly determine whether and under what circumstances such measures are desirable and necessary.

The majority of courts in the United States which have considered the question have held that, in the absence of specific statutory authorization, courts are not empowered

to order sterilization of incompetents. In an annotation entitled *Jurisdiction of court to permit sterilization of mentally defective person in absence of specific statutory authority*, 74 A.L.R.3d 1210, 1213 (1976), Thomas R. Trenkner says:

Rejecting contentions that the jurisdiction to permit such sterilizations was impliedly conferred by general statutes empowering the courts to act on the behalf of infants, mental defectives, and other incompetent persons, or by statutes investing courts with general equitable powers, these courts seem to have generally taken the view, explicitly stated in one case, that an order for the compulsory sterilization of a mental defective, whatever may be the merits of the particular case, irreversibly denies to that human being the fundamental right to bear or beget children and thus is too awesome a power to be inferred from general statutory provisions, but rather should only be conferred by specific statutory authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people.

(Footnotes omitted.) The public policy of the State of Washington supports this view.

The legislature at one time provided for sterilization of certain mentally deficient persons. Laws of 1921, ch. 53, p. 162. In *In re Hendrickson*, 12 Wn.2d 600, 123 P.2d 322 (1942), this court, while recognizing that the enactment of a sterilization statute was within the police power of the legislature, held the act unconstitutional because of procedural defects. Since that time the legislature has not seen fit to enact another law authorizing such sterilizations, even though it has provided for sterilization of certain other types of individuals. This means that the legislature has not seen fit to vest the judiciary with the jurisdiction to order sterilization. The lack of legislative action indicates that sterilization of mentally deficient persons has not found sufficient public support to convince the legislative body of its efficacy.

Obviously, since such legislation lies in the sphere of the police power, it is not within the inherent power of the courts, and the legislature, until today, had every right to assume that the courts would not presume to write their own law upon the subject.

The majority apparently assumes that sterilization is a matter of indifference to the person upon whom it is performed, provided, of course, he is in fact retarded. Upon this subject, Kindregan, in *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 Chi.-Kent L. Rev. 123, 139-40 (1966), says:

The third basic principle of CES [compulsory eugenic sterilization] is that sterilization is not usually felt to be a detriment by the defective person. Mr. Justice Holmes expressed this belief when he wrote that the loss of reproductive power is "...often not felt to be [a sacrifice] ... by those concerned." This may be true in the case of many imbeciles, idiots and persons prone to sexual perversion. But it can hardly be generalized of those suffering from feeble-mindedness and epilepsy. One recent study indicated that many mental defectives who were forcibly sterilized by the state of California feel resentment. Others are aware that eugenic sterilization is contrary to the teaching of their religion. Some women who are capable of caring for the children of others, but have been forced to undergo CES, can only be described as bitter. The state has precluded their becoming mothers on the basis of "...a knowledge of the laws of heredity far beyond the reaches yet attained by humble scientists."

Any analysis of CES must ultimately reach this fundamental question: is the basis for this state action so apparent and reasonable that the legislature can authorize a substantial intrusion into the body of a human being? Mr. Justice Douglas has stated the seriousness of the answer to that question:

....We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the existence and survival of the race. There is no redemption for the individual

whom the law touches . . . he is forever deprived of a basic liberty.

(Footnotes omitted.)

The majority's reliance on *In re Hudson*, 13 Wn.2d 673, 126 P.2d 765 (1942) is misplaced. In that case, the Superior Court had ordered the amputation of a child's enormously enlarged arm. In a much criticized decision, this court reversed, finding the lower court lacked jurisdiction because the parents were not shown to have neglected the child within the meaning of the statute giving the courts power to take custody of dependent children. This decision was reached in spite of the fact that it was established by competent medical testimony that the operation was imperative for the child's physical and mental health.

Thus, what this court had to say in that case about the powers of the Superior Court under the then juvenile court act (Rem. Rev. Stat. § 1987) was dictum. However, I have no quarrel with it, since it merely recognized the court's power to order medical care for a dependent child. That is not the question here. This action was not brought under that statute, and had it been, the question before us would be, Did the legislature, when it authorized the court to make "any order, which in the judgment of the court, would promote the child's health and welfare" (Rem. Rev. Stat. § 1987-10), intend to give it power to order sterilization? I rather doubt that even the majority here would be inclined to give the language such a liberal interpretation. Observing the recitation of relevant facts in the majority opinion, it would appear that the focal point of concern is the welfare of the parents more than the health and welfare of the child. Their welfare may indeed be a legitimate social concern, but it is for the legislature to determine whether the public interest warrants the protection of parents from the anxieties, stresses and responsibilities thrust upon them in those circumstances, as well as whether the adverse effect of pregnancies on retarded or mentally deficient children is a problem which warrants a court intervention.

An annotation at 74 A.L.R.3d 1224 (1976) reveals that to date no court has held that a parent has the power to order sterilization of his child, whether a minor or adult.

Denying a declaratory judgment that a parent had such right, the Indiana Court of Appeals said, in *A.L. v. G.R.H.*, 163 Ind. App. 636, 638, 325 N.E.2d 501, 74 A.L.R.3d 1220 (1975), *cert. denied*, 425 U.S. 936, 48 L. Ed. 2d 178, 96 S. Ct. 1669 (1976):

In considering the facts at hand, it should be first noted that we are not dealing with a legislative enactment permitting sterilizations without consent where certain conditions exist.

Secondly, the facts do not bring the case within the framework of those decisions holding either that the parents may consent on behalf of the child to medical services necessary for the child, or where the state may intervene over the parents' wishes to rescue the child from parental neglect or to save its life.

Permanent sterilization as here proposed is a different matter. Its desirability emanates not from any life saving necessities. Rather, its sole purpose is to prevent the capability of fathering children.

We believe the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom. This result has been reached most recently in *In Interest of M.K.R.* (Mo. 1974), 515 S.W.2d 467, and *In re Kemp's Estate* (1974) 43 Cal. App. 3d 758, 118 Cal. Rptr. 64, where the courts of Missouri and California held that their respective juvenile statutes making general provision for the welfare of children were insufficient to confer jurisdiction to authorize the sterilization of retarded girls in the absence of specific sterilization legislation.

(Footnotes and citations omitted.)

The United States Supreme Court has not held that a state court has inherent power to order sterilization. In *Stump v. Sparkman*, 435 U.S. 349, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978), cited by the majority, the issue was whether a judge who had ordered a minor girl sterilized was

immune from liability to that girl when she reached majority, married, and discovered the author of her inability to have children. The court held that judges of the courts of superior or general jurisdiction are not liable in a civil action for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly and even though grave procedural errors occur.

The Supreme Court majority was obviously intent upon protecting the judge's immunity. The opinion certainly does not stand as an endorsement of judicially ordered sterilizations but rather as an uncompromising assertion of such immunity. I would say that it also stands as an ominous warning of how easily the asserted power to order sterilization can be mistakenly exercised.

In 1922, a great number of states adopted sterilization laws based upon the eugenic theory that human defectives could be eliminated and this would result in the improvement of the human race. The fallacy of this assumption has been demonstrated by geneticists. See Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 Chi.-Kent L. Rev. 123 (1966). According to his article, the overwhelming weight of scientific opinion is that defects such as retardation are not demonstrably inheritable in the case of an individual defective person. He further points out that 89 percent of all feebleminded children are born to normal parents.

The majority assumes that it is established that sterilization may be beneficial to society. And yet scientific studies cast grave doubts upon the correctness of this assumption. In a Note, *Eugenic Sterilization—A Scientific Analysis*, 46 Denver L.J. 631, 633-34 (1969), the author says:

[T]he fact that some sterilizations continue to be performed and that, in any event, the threat remains of possible sterilization being imposed, even though there is questionable scientific value in such procedures, makes this a topic of continuing timeliness and interest.

Numerous legal, medical, and sociological reviews have been published on the subject, most of them unfavorable in their appraisal. The basic criticisms have been that eugenic sterilization does not accomplish its stated objective of "human betterment," and, at the same time, it interferes with important freedoms either expressly guaranteed by the *United States Constitution* or brought within its ambit by judicial construction.

(Footnotes omitted.)

My great concern is that the courts do not become "an imperial judiciary," a phrase coined, I believe, by Nathan Glaser. In his book *Power*, written late in his career, Adolph Berle spoke of the United States Supreme Court as a benevolent dictatorship. And Phillip Kurland has often traced the Supreme Court's wandering in the political thicket with no compass for a guide, save its own subjective fancies.

The rule of law is not well served by handing unrestricted policy-making power to a shifting majority of as few as five whose judgment, as Justice Jackson would say, is not final because it is infallible, but infallible because it is final.

I would affirm the judgment of dismissal.

WRIGHT and BRACHTENBACH, JJ., concur with ROSELLINI, J.

[No. 46104. En Banc. March 27, 1980.]

STUART D. HEATON, *Respondent*, v. KEN IMUS,
ET AL, *Petitioners*.

- [1] **Contracts — Quasi Contract — Lost Profits — Quantum Meruit.** A quasi contract is a contract implied in law and arises out of an implied duty of the parties rather than an agreement or meeting of the minds. When the remedy of quantum meruit is applied to

APPENDIX C

RCW 10.77.120: Confinement of committed person — Custody — Hearings — Release.

RCWs > Title 10 > Chapter 10.77 > Section 10.77.120

10.77.110 << 10.77.120 >> 10.77.140

RCW 10.77.120

Confinement of committed person — Custody — Hearings — Release.

The secretary shall forthwith provide adequate care and individualized treatment at one or several of the state institutions or facilities under his or her direction and control wherein persons committed as criminally insane may be confined. Such persons shall be under the custody and control of the secretary to the same extent as are other persons who are committed to the secretary's custody, but such provision shall be made for their control, care, and treatment as is proper in view of their condition. In order that the secretary may adequately determine the nature of the mental illness or developmental disability of the person committed to him or her as criminally insane, and in order for the secretary to place such individuals in a proper facility, all persons who are committed to the secretary as criminally insane shall be promptly examined by qualified personnel in such a manner as to provide a proper evaluation and diagnosis of such individual. The examinations of all developmentally disabled persons committed under this chapter shall be performed by developmental disabilities professionals. Any person so committed shall not be released from the control of the secretary save upon the order of a court of competent jurisdiction made after a hearing and judgment of release.

Whenever there is a hearing which the committed person is entitled to attend, the secretary shall send him or her in the custody of one or more department employees to the county where the hearing is to be held at the time the case is called for trial. During the time the person is absent from the facility, he or she shall be confined in a facility designated by and arranged for by the department, and shall at all times be deemed to be in the custody of the department employee and provided necessary treatment. If the decision of the hearing remits the person to custody, the department employee shall forthwith return the person to such institution or facility designated by the secretary. If the state appeals an order of release, such appeal shall operate as a stay, and the person in custody shall so remain and be forthwith returned to the institution or facility designated by the secretary until a final decision has been rendered in the cause.

[2000 c 94 § 15; 1989 c 420 § 7; 1974 ex.s. c 198 § 11; 1973 1st ex.s. c 117 § 12.]

APPENDIX D

RCW 71.05.217: Rights — Posting of list.

RCWs > Title 71 > Chapter 71.05 > Section 71.05.217

71.05.215 << 71.05.217 >> 71.05.220

RCW 71.05.217

Rights — Posting of list.

Insofar as danger to the individual or others is not created, each person involuntarily detained, treated in a less restrictive alternative course of treatment, or committed for treatment and evaluation pursuant to this chapter shall have, in addition to other rights not specifically withheld by law, the following rights, a list of which shall be prominently posted in all facilities, institutions, and hospitals providing such services:

- (1) To wear his or her own clothes and to keep and use his or her own personal possessions, except when deprivation of same is essential to protect the safety of the resident or other persons;
- (2) To keep and be allowed to spend a reasonable sum of his or her own money for canteen expenses and small purchases;
- (3) To have access to individual storage space for his or her private use;
- (4) To have visitors at reasonable times;
- (5) To have reasonable access to a telephone, both to make and receive confidential calls;
- (6) To have ready access to letter writing materials, including stamps, and to send and receive uncensored correspondence through the mails;
- (7) Not to consent to the administration of antipsychotic medications beyond the hearing conducted pursuant to RCW 71.05.320(3) or the performance of electroconvulsant therapy or surgery, except emergency life-saving surgery, unless ordered by a court of competent jurisdiction pursuant to the following standards and procedures:
 - (a) The administration of antipsychotic medication or electroconvulsant therapy shall not be ordered unless the petitioning party proves by clear, cogent, and convincing evidence that there exists a compelling state interest that justifies overriding the patient's lack of consent to the administration of antipsychotic medications or electroconvulsant therapy, that the proposed treatment is necessary and effective, and that medically acceptable alternative forms of treatment are not available, have not been successful, or are not likely to be effective.
 - (b) The court shall make specific findings of fact concerning: (i) The existence of one or more compelling state interests; (ii) the necessity and effectiveness of the treatment; and (iii) the person's desires regarding the proposed treatment. If the patient is unable to make a rational and informed decision about consenting to or refusing the proposed treatment, the court shall make a substituted judgment for the patient as if he or she were competent to make such a determination.
 - (c) The person shall be present at any hearing on a request to administer antipsychotic medication or electroconvulsant therapy filed pursuant to this subsection. The person has the right: (i) To be represented by an attorney; (ii) to present evidence; (iii) to cross-examine witnesses; (iv) to have the rules of evidence enforced; (v) to remain silent; (vi) to view and copy all petitions and reports in the court file; and (vii) to be given reasonable notice and an opportunity to prepare for the hearing. The court may appoint a psychiatrist, psychiatric advanced registered nurse practitioner, psychologist within their scope of practice, or physician to examine and testify on behalf of such person. The court shall appoint a psychiatrist, psychiatric advanced registered nurse practitioner, psychologist within their scope of practice, or physician designated by such person or the person's counsel to testify on behalf of the person in cases where an order for electroconvulsant therapy is sought.
 - (d) An order for the administration of antipsychotic medications entered following a hearing conducted pursuant to this section shall be effective for the period of the current involuntary treatment order, and any interim period during which the person is awaiting trial or hearing on a new petition for involuntary treatment or involuntary medication.
 - (e) Any person detained pursuant to RCW 71.05.320(3), who subsequently refuses antipsychotic medication, shall be entitled to the procedures set forth in this subsection.
 - (f) Antipsychotic medication may be administered to a nonconsenting person detained or committed pursuant to this chapter without a court order pursuant to RCW 71.05.215(2) or under the following circumstances:
 - (i) A person presents an imminent likelihood of serious harm;

RCW 71.05.217: Rights — Posting of list.

(ii) Medically acceptable alternatives to administration of antipsychotic medications are not available, have not been successful, or are not likely to be effective; and

(iii) In the opinion of the physician or psychiatric advanced registered nurse practitioner with responsibility for treatment of the person, or his or her designee, the person's condition constitutes an emergency requiring the treatment be instituted before a judicial hearing as authorized pursuant to this section can be held.

If antipsychotic medications are administered over a person's lack of consent pursuant to this subsection, a petition for an order authorizing the administration of antipsychotic medications shall be filed on the next judicial day. The hearing shall be held within two judicial days. If deemed necessary by the physician or psychiatric advanced registered nurse practitioner with responsibility for the treatment of the person, administration of antipsychotic medications may continue until the hearing is held;

(8) To dispose of property and sign contracts unless such person has been adjudicated an incompetent in a court proceeding directed to that particular issue;

(9) Not to have psychosurgery performed on him or her under any circumstances.

[2008 c 156 § 3; 1997 c 112 § 31; 1991 c 105 § 5; 1989 c 120 § 8; 1974 ex.s. c 145 § 26; 1973 1st ex.s. c 142 § 42. Formerly RCW 71.05.370.]

Notes:

Severability – 1991 c 105: See note following RCW 71.05.215.