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VOLUNTARY STERILIZATION IN NEW MEXICO: WHO MUST CONSENT?

It is estimated that one million people in the United States undergo voluntary sterilizations each year and that the method is rapidly gaining popularity as a means of permanent contraception.[1] Yet, in New Mexico, many married women and men are effectively barred from this method of contraception because some doctors and hospitals require not only the consent of the patient for the operation, but the consent of the patient's spouse as well.[2] When spousal consent is required, it is usually because some doctors and hospitals think that New Mexico law requires it.[3]

1. C. & L. Westoff, *Sterilization: Why Six Million Have Deliberately Chosen an Ultimate Form of Contraception,* New York Times Magazine, Sept. 29, 1974 at 31.

See also J. McKenzie, *Contraceptive Sterilization: The Doctor, the Patient and the United States Constitution,* 25 Fla. L. Rev. 327 (1973). Some of the reasons many seek voluntary sterilization are the failure rates of other methods of contraception, recent medical disclosures of harmful side effects of other more reliable methods, changing sex roles and concerns about overpopulation and the economy.

See generally M. Shepard, *Female Contraceptive Sterilization,* 29 Ob-Gyn Survey 739 (1974); R. Campanella & J. Wolf, *Emotional Reaction to Sterilization,* 45 Ob-Gyn 331 (1975).

2. An informal survey by the author (April, 1976) of 10 Albuquerque urologists and 40 Albuquerque gynecologists indicated that 100% of the urologists require spousal consent before they will perform a vasectomy, while 50% of the gynecologists require spousal consent for tubal ligations.

According to Nancy Ellefson, President of Zero Population Growth of Albuquerque, the requirement of spousal consent has been recently relaxed in Albuquerque hospitals. In other parts of the state, however, spousal consent for voluntary sterilization is a strict requirement.

3. N.M. Stat. Ann. § 12-3-43 (Repl. 1976). McKenzie, *supra* note 1. Some physicians and hospitals may require the consent of the non-patient spouse because they fear that without it suits may be brought against them for mayhem, assault and battery or loss of consortium.

See generally J. Mears, *Spousal Consent for Voluntary Sterilization,* American Civil Liberties Union Publication (1974) and S. Bloom, *A Woman's Right to Voluntary Sterilization,* 22 Buffalo L. Rev. 291, 296 (1972).

See note 10 *infra.* In spite of these fears, no doctor in the United States has ever been convicted or had a judgment against him for performing a voluntary sterilization without the consent of the patient's spouse. This is due to the fact that the consent of a competent adult patient has always been considered sufficient at common law. *See* Murray v. Vandevander, 522 P.2d 302 (Okla. Ct. App. 1974). No cause of action has been found for loss of consortium (via voluntary sterilization) or loss of a fertile spouse.

Although it is clear that no liability will result if no spousal consent is required, there is a possibility that patients who claim that the requirement is a violation of their constitutional rights will win damages against doctors and hospitals who require spousal consent. McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971).

In this article I will first examine the two confusing New Mexico statutes in light of the public policy expressed in the Family Planning Act.[4] Secondly, I will discuss the probable unconstitutionality of a spousal consent requirement for voluntary sterilization as a logical extension of the right to privacy outlined in *Roe v. Wade*[5] and in some of the cases that have interpreted the decision, primarily *Planned Parenthood v. Danforth.*[6]

THE NEW MEXICO STATUTES:

Section 12-3-43 of the New Mexico Statutes Annotated states that:

> Any person, otherwise capable of consenting to medical treatment, need not obtain the consent of his spouse for his voluntary sterilization *if such person has been abandoned by his spouse.*[7] (Emphasis added.)

On the other hand, another New Mexico statute, § 12-34-14, New. Mexico Statutes Annotated, prohibits any "special qualifications" for voluntary sterilizations, i.e., any qualifications not required for other surgical procedures, to wit:

> No hospital which permits any operation that results in sterilization to be performed therein or medical staff of such hospital shall require *any person* upon whom a sterilization operation is to be performed to meet *any* special qualifications which are not imposed on individuals seeking other types of operations in the hospital.[8] (Emphasis added.)

Section 12-3-43 affirms the common law consent requirement for medical treatment, i.e., that the consent of the patient is sufficient,[9]

4. N.M. Stat. Ann. § 12-30-1 to -8 (Repl. 1976).

5. 410 U.S. 113 (1973).

6. U.S. , 96 S. Ct. , 49 L.Ed. 2d 288 (1976). *See also* Hathaway v. Worcester City Hospital, 475 F.2d 701 (1st Cir. 1973); Noe v. True, 507 F.2d 9 (6th Cir. 1974) (discussing only the question of mootness); State v. Koome, 84 Wash.2d 901, 530 P.2d 260 (1975); Jones v. Smith, 278 So.2d 339 (Fla. Ct. App. 1973), *cert. denied,* 415 U.S. 958 (1974).

7. N.M. Stat. Ann. § 12-3-43 (Repl. 1976).

8. N.M. Stat. Ann. § 12-34-14 (Repl. 1976).

9. Woods v. Brumlop, 71 N.M. 221, 227, 377 P.2d 520, 524 (1962): "An adult person, if he be of sound mind, is considered to have the right to determine for himself whether a recommended treatment or surgery shall be performed upon him. . . ." *See* Kritzer v. Citron, 101 Cal. 2d 33, 224 P.2d 808 (Cal. App. 1950): a husband brought an action for assault and battery against a hospital for a physician's performing a sterilization on his wife without his consent. The case supports the contention that a wife's consent alone is sufficient for her sterilization. Rosenberg v. Feigin, 119 Cal.2d 783, 260 P.2d 143 (Cal. App. 1953), in a battery action by a husband to recover for sterilization of his wife without his consent, it

but does so only when the patient has been abandoned by his or her spouse.[10] This section is in conflict with § 12-34-14 which states that no hospital or any staff member of any hospital can require any person seeking a voluntary sterilization in that hospital to meet *any* special qualifications that are not required for any other operation.

Section 12-34-14 reflects the public policy expressed by the legislature in the Family Planning Act.[11] In that Act the legislature recognized family planning as a "universal human right" and abolished all unnecessary prerequisites for family planning services.[12] Section 12-3-43 has been interpreted by some doctors and hospitals as a spousal consent requirement in spite of the language of § 12-34-14 and the policy expressed in the Family Planning Act. It is this interpretation of the two statutes in question that denies some married people in New Mexico access to voluntary sterilization as a method of birth control.

THE COURTS AND DECISIONS RELATED TO FERTILITY CONTROL: A "PRIVATE" CHOICE?

If the question is presented to the New Mexico courts, it is likely that they would be guided by the recent decisions of the United States Supreme Court as well as some lower federal and state courts and hold both that decisions related to fertility control fall within a constitutionally protected right of privacy,[13] and that states must

was held that the consent of the patient alone is sufficient. Rytkonen v. Lojacono, 269 Mich. 270, 257 N.W. 703 (1934) and Baker v. Heaney, 82 S.W.2d 417 (Tex. Civ. App. 1935), the wife's consent was not required for husband's operation. Herko v. Uviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup. Ct. 1952), where husband sought damages for deprivation of further offspring and loss of consortium and society because of an abortion allegedly performed by defendant, it was held that a wife's participation in the transaction would preclude her, and consequently her husband, from maintaining the action. *See generally* 4 A.L.R. 1531 (1919); 61 Am. Jur.2d *Physicians and Surgeons* § 111, § 152 (1972); 70 C.J.S. *Physicians and Surgeons,* § 48(g) (1951); K. Proctor, *Consent to Operative Procedures,* 22 Md. L. Rev. 190 (1962).

10. Since the statute does not define "abandonment," the determination of whether or not abandonment has taken place is another difficult question. The only definition of abandonment in the New Mexico statutes is found in N.M. Stat. Ann. § 40A-6-2 (Supp. 1975). That statute refers to the crime of abandonment of dependents. The crime is committed by a person, who, having the ability and means to provide for his/her spouse and minor children's support, fails to do so and leaves them dependent upon public support. It is clear that this definition of abandonment would restrict voluntary sterilization to only those married persons dependent on public support because of criminal abandonment and to those who have secured the consent of their spouses.

11. N.M. Stat. Ann. § 12-30-1 (Repl. 1976); N.M. Stat. Ann. § 12-30-3 (Repl. 1976).

12. N.M. Stat. Ann. § 12-30-3(1) (Repl. 1976) and N.M. Stat. Ann. § 12-30-5 (Repl. 1976) state that there shall be no prerequisites to family planning except referral by a physician, any requirement imposed by law, or payment for the service.

13. Roe v. Wade, 410 U.S. at 153. *Accord,* Planned Parenthood v. Danford, U.S. , 96 S. Ct. , 49 L. Ed. 2d 788 (1976). *Cf.* Hathaway v. Worcester City Hosp., 475

show a "compelling" interest before they may legislatively invade that zone of privacy.[14] Thus, § 12-3-43, if read as a requirement of spousal consent for voluntary sterilization, would be stricken as an unconstitutional exercise of state power unless the state could show a "compelling" interest.

The Supreme Court has been called upon to decide whether and when the state, the individual or the family unit should have the ultimate authority to make decisions that may affect all three.[15] The decision making role has been allocated by balancing the interests of the state, the family, and the individual against the constitutional guarantee of freedom from unwarranted governmental intervention.[16] In deciding who should make the sterilization decision and under what circumstances, it is necessary to determine what interests the individual, the spouse, and the state have in the outcome, and whose interests should dominate.

The Interests of the Individual

The Supreme Court has held that the Due Process clause of the Constitution protects individual rights "implicit in the concept of ordered liberty."[17] One such right is the right to privacy.[18] The protection of the Due Process Clause has been extended to marital activities,[19] procreation,[20] contraception,[21] family relationships,[22] child rearing and education,[23] and the abortion decision,[24] all of which are sufficiently similar to the right of privacy to be deemed "fundamental" rights.

The Court has held that when a fundamental right is involved the

F.2d 701 (1st Cir. 1973); State v. Koome, 84 Wash.2d 901, 530 P.2d 260 (1975); McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971).

14. 410 U.S. at 155-156.

15. *See* note 6 *supra* and notes 20 and 25 *infra.*

16. 410 U.S. at 155. *See also* L. Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law,* 87 Harv. L. Rev. 1, 10 (1973).

17. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

18. Roe v. Wade, 410 U.S. at 152. The Court found that the right to privacy is rooted in the First Amendment (Stanley v. Georgia, 394 U.S. 557, 564 (1959)); the Fourth and Fifth Amendments (Terry v. Ohio, 392 U.S. 1, 8-9); the Penumbras of the Bill of Rights (Griswold v. Connecticut, 381 U.S. at 484-485 (1965)); the Ninth Amendment, *id.* at 486 (Goldberg, J. concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment (Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

19. Loving v. Virginia, 388 U.S. 1, 12 (1967).

20. Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942).

21. Griswold v. Connecticut, 381 U.S. 479 (1965) (*Griswold* does not expressly describe privacy as a "fundamental" right); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

22. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

23. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

24. Roe v. Wade, 410 U.S. at 153; *see* Doe v. Bolton, 410 U.S. 179 (1973).

state must have a "compelling" interest before that right can be legislatively diminished.[25] In *Roe v. Wade*, the Court found that the right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[26] But that right was not absolute,[27] for the state has a legitimate interest in protecting the woman's life and health and in the "potentiality of human life" of the fetus.[28] The Court concluded that these interests were separate and that each grew in substantiality as the woman approached term and that at certain points during pregnancy each became compelling.[29] Since no "compelling point" is reached until the end of the first trimester of pregnancy, the abortion decision during that time is left to the woman in consultation with her physician.[30] With respect to the second and third trimester, the Court held that legislative enactments "must be narrowly drawn to express only the legitimate state interests at stake."[31] The interests of the individual in the sterilization decision would seem to be similar to those related to the abortion decision, namely, the interest in preventing the conception, as opposed to the birth, of an unwanted child.

The Interests of the State

The interests of the state in the sterilization decision may be similar to the state's interest in the abortion decision, i.e., the life and health of the man or woman who seeks the operative procedure, the "potentiality of human life"[32] or the capacity to produce new members of the society, without which the state would cease to exist. The state may claim that by requiring the consent of the nonpatient spouse, it seeks to strengthen the family relationship, although it is not clear that the requirement would aid in achieving that goal or that the goal is permissible.[33]

25. Roe v. Wade, 410 U.S. at 155.
26. 410 U.S. at 153.
27. 410 U.S. at 155.
28. 410 U.S. at 162.
29. 410 U.S. at 163.
30. *Id.*
31. 410 U.S. at 155.
32. 410 U.S. at 162.
33. *See* Planned Parenthood v. Danforth, U.S. , 96 S.Ct. , 49 L. Ed. 2d 788 (1976). The state claimed that one of its goals was to support mutual decision making within the family. The Court held that this goal was not a significant enough interest and that it would not be realized by giving the husband what was essentially a veto power over his wife's decision to have an abortion. *Id.* at 806.

Cf. Murray v. Vandevander, 522 P.2d 302 (Okla. Ct. App. 1974): "We are neither prepared to create a right in a husband to have a fertile wife nor to allow recovery for damage to such a right. We find that the right of a person who is capable of competent consent to control his own body is paramount." *Id.* at 304. Eisenstadt v. Barid, 405 U.S. 438, 477

The First Circuit applied the *Roe* rationale to sterilization in *Hathaway v. Worcester City Hospital*[34] and did not find a "compelling" state interest that would allow a ban on access to voluntary sterilization. In striking the hospital's ban on sterilization operations, the court noted that the issues involved in sterilization were nearly the same as those involved in abortion:

> . . . [I]t seems, clear, after *Roe* and *Doe*, that a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning another involving no greater risk or demand on staff and facilities. While *Roe* and *Doe* dealt with a woman's decision whether or not to terminate a particular pregnancy, a decision to terminate the possibility of any future pregnancy would seem to embrace all of the factors deemed important by the Court in *Roe*. . . .[35]

Thus, the decision to terminate the *possibility* of any future pregnancy was considered by the court in *Hathaway* to be as much an individual decision as the decision to terminate a pregnancy.

The Interest of the Spouse

The rights of the individual to make the sterilization decision must also be examined in the context of whatever rights, if any, the spouse may have to join in the decision. Although in *Roe* the question was left open as to whose will prevails when there is disagreement within the family,[36] the Court recently resolved that problem in *Planned Parenthood v. Danforth.*[37]

In *Danforth* the Court held that a state is constitutionally forbidden to require the consent of the husband for his wife's abortion.[38] The Court held that the state could not delegate to the spouse a veto power over the abortion decision since the state itself is absolutely prohibited from interfering with that decision during the first trimester.[39]

The Court went on to note that ideally the decision to terminate a

(1972): "Yet the marital couple is not an independent entity . . . but an association of two individuals each with a separate intellectual and emotional makeup. 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." *Id.* at 453.

34. 475 F.2d 701 (1st Cir. 1973). *See generally* Olshin, *Hathaway v. Worcester City Hospital: The Right to be Sterilized,* 47 Temp. L.Q. 403 (1974).

35. 475 F.2d at 705.

36. 410 U.S. at 165, n. 67.

37. U.S. , 96 S.Ct. , 49 L.Ed.2d 788 (1976).

38. 49 L. Ed. 2d at 805.

39. *Id.*

pregnancy should be made jointly by both spouses, but that if agreement between the spouses is lacking:

> . . . it is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all. Even if the State had the ability to delegate to the husband a power it itself could not exercise, it is not at all likely that such action would further, as the District Court majority phrased it, the "interest of the state in protecting the mutuality of decisions vital to the marriage relationship." 392 F.Supp. at 1370.[40]

The Court further recognized that its decision could be said to sanction unilateral decision making on the wife's part, but stated that it is obvious that when a husband and wife disagree, the view of only one can prevail and that that one should be the wife's because it is "the woman who physically bears the child and who is the more directly and immediately affected by pregnancy, [and that] as between the two, the balance weighs in her favor."[41]

Although a spouse may have a legitimate interest in the fertility or nonfertility of his or her marriage partner, it is likely that that interest will remain an individual or familial interest as distinct from a state enforced interest.[42]

If a husband has no right to give or withhold consent for his wife to have an abortion, it is difficult to imagine a court that would allow a spouse to determine whether or not his/her spouse would be allowed to utilize any particular type of constraceptive method. Since abortion involves the termination of an already existing pregnancy, it is obviously a much more drastic form of fertility control than any of the existing methods of contraception. If a spouse has no right to veto a decision to terminate a pregnancy, it follows that a spouse should have no right to veto the prevention of a pregnancy, no matter what method is chosen to insure that prevention—including voluntary sterilization.

Foreshadowing the demise of spousal consent requirements for voluntary sterilization, a Florida state court stated that the right of privacy should extend from the first trimester of pregnancy into the

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40. 49 L. Ed. 2d at 806.

41. *Id.*

42. Murray v. Vandevander, 522 P.2d 302, 304 (Okla. Ct. App. 1974); *see also* note 45 *infra:* The Court relied on People v. Belous, 71 Cal.2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969) and reiterated that the fundamental right to privacy includes a woman's decision whether or not to bear children and refused to create a right for a husband to have a child-bearing wife.

entire preconception period and that the same standards should apply to pre-conception decisions that apply to post-conception ones.[43]

Finally, if the state *could* delegate to a spouse the right to veto a specific form of contraception, it would in a sense be enforcing the physical and psychological domination of one group of the society upon another.[44]

CONCLUSION

A carefully drawn statute would provide the appropriate remedy to the confusion created by § 12-3-43 and § 12-43-14 by explicitly releasing physicians and hospitals from civil liability for the performance of voluntary sterilizations without spousal consent. At a minimum, the legislature should repeal the phrase "if such person has been abandoned by his spouse" from § 12-3-43.

If no legislative action is taken, it is likely that the courts of New Mexico would follow recent decisions that bar the state's intrusion into this consitutionally protected area. The scope of privacy as derived from *Roe* and *Doe* and *Danforth* should be sufficient to encompass the voluntary sterilization decision. It should follow that spousal consent requirements for voluntary sterilization, like those for abortion, would be judicially abolished.

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43. Jones v. Smith, 278 So. 2d 339 (Fla. App. 1973): "If we were to conclude that a putative father has the standing to *prevent* the natural mother from terminating the pregnancy would the putative father have the corresponding standing to *compel* the termination of the pregnancy notwithstanding the mother-physician relationship or the considerations imposed by the state? Could a potential putative father (or for that matter a husband) seek an injunction to restrain the woman from using contraceptives or compel the woman to bear children? Such circumstances would seem ludicrous. It is unquestioned that a woman has a fundamental right to determine whether or not *to bear a child* . . . it would be beyond the province of logic and reason to suggest that she could be *compelled* to procreate." *Id.* at 344.

44. Tribe, *supra* note 16: "It would, of course, be farfetched to suggest that the thirteenth amendment's prohibition of 'slavery' and 'involuntary servitude' confers upon women a right to abortion so as to avoid compelled motherhood. But it would be equally insensitive to the deepest meaning of that charter of emancipation completely to deny its relevance as a source of guidance in assessing an allocation of roles that embodies the coercive domination of one group by another." *Id.* at 40. This argument could be applied to sterilization.