Notes

Exclusive Juvenile Jurisdiction to Authorize Sterilization of Incompetent Minors

I. Introduction

In the absence of judicial condonation, parents do not have the power to consent to sterilization procedures for their minor children in Indiana. This rule was first enunciated in the 1975 case of *A.L. v. G.R.H.*,[1] where a mother's request for declaratory judgment proclaiming her right to have her son sterilized under the common law attributes of the parent-child relationship was denied.[2] The Indiana Court of Appeals for the Second District recently reaffirmed this rule in *P.S. v. W.S.*,[3] where the court stated that "[a]ffirmative judicial authorization must be obtained for sterilization of an incompetent."[4] The Indiana Supreme Court subsequently vacated this court of appeals' opinion; however, the supreme court did not discuss whether parents have the authority to give substituted consent for the sterilization of their minor children in the absence of judicial action.[5]

P.S. v. W.S. arose when a child, by her next friend, petitioned the trial court for injunctive relief when her parents sought to have her sterilized. Because the parents insisted that they did not need judicial authorization in order to proceed with their daughter's sterilization, the court of appeals ruled that it was not presented with the issue of whether a court could grant such a sterilization petition.[6] Chief Judge Buchanan dissented, declaring that the majority's refusal to decide this issue was an exaltation of form over substance.[7] "As the trial court recognized, denial of P.S.'s request for injunctive relief *was in fact* an authorization. Implicit in the denial of injunctive relief by the trial court is the determination that the proposed action is justified and appropriate."[8] The state supreme court agreed with Chief Judge Buchanan.[9] Ruling that the trial court had the power to grant

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[1]163 Ind. App. 636, 325 N.E.2d 501 (1975).

[2]*Id.* at 638, 325 N.E.2d at 502.

[3]443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).

[4]443 N.E.2d at 73.

[5]452 N.E.2d 969 (Ind. 1983). By recognizing judicial power to authorize sterilization, however, the court implicitly acknowledged the absence of parental authority to act without court permission to procure sterilizations of their minor children.

[6]443 N.E.2d at 70-71.

[7]*Id.* at 73 (Buchanan, C.J., dissenting).

[8]*Id.*

[9]452 N.E.2d at 975.

P.S.'s parents permission to have their daughter sterilized,[10] the majority of the Indiana Supreme Court had no difficulty in holding that juvenile courts have jurisdiction over such sterilization matters.[11] However, the court split three to two on the appropriate basis for parental authority to have a child sterilized. The two concurring justices believed that "Indiana courts have no jurisdiction upon application of parents, relatives, legal representatives, doctors, hospitals, or others to authorize or order the sterilization of retarded or other incapacitated persons, in the absence of express enabling legislation."[12] The concurring justices stated that in this case, "it is the statute[13] and not the judgment denying the [child's] petition [for an injunction] which gives legal sanction to the decision of the parents and doctors."[14]

In light of this conflict among the members of Indiana's highest court, this Note will examine the bases for jurisdiction in the Indiana courts in order to determine which courts have the power to entertain petitions to sterilize incompetent minors.[15] Given the large number of disabled children alive today,[16] it is likely that sterilization may be medically indicated for numerous incompetent minors in Indiana. Thus, the question of which court should hear these petitions for sterilization needs to be resolved.

II. Sterilization: Urgent Need for a Special Population

In 1980, 3,234,337 children were enrolled in special education programs in public elementary and secondary schools in the United States; 658,082 were retarded, and 52,158 were multihandicapped.[17] These statistics do not encompass all disabled children—or even all of those with severe disabilities—but they do show that there is a sizable population of handicapped children with special needs that the law

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[10]*Id.*

[11]*Id.* at 976.

[12]*Id.* at 977 (DeBruler, J., concurring). Justice Prentice joined in both the majority opinion and Justice DeBruler's concurrence.

[13]Ind. Code §§ 16-8-3-1, 16-8-4-2 (1982), which authorize "medical or surgical treatment" of a minor upon consent of a parent.

[14]452 N.E.2d at 977 (DeBruler, J., concurring).

[15]The phrase "incompetent minor" is redundant because all minors are presumed to be incompetent. For the purpose of this Note, the phrase will be used to refer to minors who may never become competent because of a mental deficiency and/or mental illness.

[16]*See generally* Digest of Education Statistics (1982).

[17]*Id.* The disabilities of those children enrolled in public special education programs were broken down as follows: educable mentally retarded, 563,364; trainable mentally retarded, 94,718; hard of hearing, 28,740; deaf, 17,850; speech impaired, 908,241; visually handicapped, 17,330; seriously emotionally disturbed, 182,931; orthopedically impaired, 39,119; other health impaired, 66,381; specific learning disability, 1,262,535; deaf-blind, 960; and multihandicapped, 52,168. *Id.* at 42.

must find a way to meet. Some of these children with more severe problems need to be sexually sterilized for their own well being. The case of *P.S. v. W.S.*,[18] involving a child whose parents believed that sterilization was necessary for their daughter's own good, illustrates the intensity of this need for sterilization.

P.S. had IQ scores in the twenties and thirties[19] and had been diagnosed as suffering from retardation, autism,[20] and dyspraxia.[21] She was toilet trained but had frequent accidents.[22] "She has some self-care capabilities: she can dress herself, brush her hair and teeth, wash and bathe herself and regulate the bath water. However, . . . her performance of these tasks is not consistent."[23]

> P.S. is self-injurious, destructive, bangs her head on hard surfaces, picks at her fingers and arms until they bleed and plays with the blood. She has a fascination with blood and likes to play in it. She inflicts injury upon herself to draw blood and then picks at the injury to make it bleed so she can play with the blood. She seems impervious to pain.[24]

Testimony at trial indicated that the onset of menstruation would be dangerous for P.S. One of her physicians felt that

> due to the pattern that P.S. has shown so far it is very reasonable to feel that P.S. might try to induce bleeding by

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[18]443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).

[19]452 N.E.2d 969, 971 (Ind. 1983). The IQ (intelligence quotient) is generally arrived at by dividing the subject's mental age (test age) by his or her calendar age (chronological age) and multiplying the quotient by one hundred. HALLAS, THE CARE AND TRAINING OF THE MENTALLY SUBNORMAL 237 (4th ed. 1970). However, IQ can be measured in many ways and provides only an average of the abilities of the person being tested. Scores between 90 and 110 are considered average. *Id.* at 236-41; *see* E. FRENCH & J. SCOTT, HOW YOU CAN HELP YOUR RETARDED CHILD 66-79 (1967); J. NEISWORTH & R. SMITH, RETARDATION ISSUES, ASSESSMENT AND INTERVENTION 269-95 (1978).

[20]452 N.E.2d at 970. Autism has been defined as

> a severely incapacitating, lifelong developmental disability . . . caused by physical disorders of the brain. . . . The range of human emotions is not understood by the majority of autistic children. All social skills must be taught; autistic persons appear to have no understanding of social expectations . . . . [M]ost are hyperactive. . . . Due to the bizarre skills development pattern, an autistic child might be able to read a college textbook with some degree of understanding, yet not be toilet trained.

Autism is . . . , Riley Times, Vol. II No. II, 1981, at 2, col. 3.

[21]452 N.E.2d at 971. Dyspraxia involves "difficulty in carrying out tasks which require precise, fine movements of a complex nature such as writing and drawing." T.E. OPPE, NEUROLOGICAL EXAMINATION IN PEDIATRIC NEUROLOGY 1, 11 (F. Clifford Rose ed. 1956). *See also* K. SWAIMAN & F. WRIGHT, THE PRACTICE OF PEDIATRIC NEUROLOGY 266 (2d ed. 1982).

[22]452 N.E.2d at 971.

[23]443 N.E.2d at 69.

[24]452 N.E.2d at 971.

> poking into her vagina or abdomen in an attempt to keep the blood flowing. This, of course, would result in hemorrhaging and infection, and possibly death.[25]

P.S.'s parents thought sterilization might be proper for their daughter and consulted many physicians and the staff members at P.S.'s day treatment center regarding their belief. All agreed "that P.S. would be unable to handle the onset of menses . . . and would be unable to care for a child should she bear one."[26]

A partial hysterectomy that would remove P.S.'s uterus and prevent her from menstruating was scheduled, but the child, by her next friend, brought suit to enjoin the operation. The complaint alleged that sterilization was unnecessary because the residential treatment institution which P.S. would be attending had considerable experience in this area and was prepared to teach P.S. to care for her own hygienic needs during menstruation. The trial court denied the child's request for injunctive and declaratory relief, finding that the parents were acting in their daughter's best interest and were the proper persons to act on her behalf. The Indiana Court of Appeals for the Second District reversed because the burden of proof had been improperly placed upon the child.[27] The Indiana Supreme Court vacated the court of appeals' opinion, stating that misplacement of the burden of proof was harmless error in light of the overwhelming evidence showing that sterilization was in the child's best interest.[28]

Other cases have documented the sad circumstances that call forth a desire to sterilize incompetent adolescents.[29] The medical profession has recognized the beneficial results which sterilization can create in proper cases,[30] but frequently physicians want a court order before

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[25]*Id.* at 972.

[26]*Id.*

[27]443 N.E.2d at 72-73.

[28]452 N.E.2d at 976.

[29]*See, e.g.*, Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978); *In re* A.W., 637 P.2d 366 (Colo. 1981); *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974); *In re* Penny N., 120 N.H. 269, 414 A.2d 541 (1980).

[30]A case history reported by Jane C. Perrin, M.D., will serve to illustrate the successes which the medical profession has found to result from sterilization of incompetent minors:

> A 14-year-old girl, the youngest of ten children, was a premature baby with trisomy 21 Down syndrome . . . and severe myopia. She . . . showed an I.Q. of 30 with minimal speech development.
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> At . . . age 10 1/2 menarch [was observed] with heavy flow. During menses she became frightened and withdrawn, refusing to eat and going to bed or crawling under the bed. She did not understand repeated explanation of menses by her mother, could not cope with menstrual hygiene, and had to be kept home from school during menstrual periods.
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> The patient had total abdominal hysterectomy under general anesthesia without difficulty at age 11. . . . In three years after surgery, she was reported

going ahead with a desirable sterilization operation upon an incompetent.[31] The focus of the remainder of this Note will be on which courts in Indiana have jurisdiction to issue such orders.

III. Jurisdictional Foundations

A. Procreative Choice: A Fundamental Right

Because there is a fundamental right to choice in matters of procreation,[32] one might question whether any court has the power to rule on sterilization petitions. Constitutional mandates require, however, that the power lie in at least one court so that the rights of incompetents are not rendered null and void. The fundamental right to procreation was initially recognized in *Skinner v. Oklahoma*.[33] That case involved a compulsory sterilization statute which required sterilization for certain classes of convicted criminals, but not for others. The United States Supreme Court found a denial of equal protection in the eugenic statute.[34] Under Oklahoma's legislative scheme, a person convicted of stealing twenty-one dollars worth of chickens would be subject to sterilization, but an embezzler who took hundreds of dollars from his employer would not. The Court could see no more likelihood of "bad genes" being passed along to offspring in one class than in the other and declared that there was a fundamental right to procreation.

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[35]

Later decisions by the Supreme Court have made it clear that the right to procreate also implies the right *not* to procreate—that the fundamental right is actually the "right of decision in matters of

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to have a happier personality at home with no episodes of withdrawal, and she did not miss school. There was no history of sexual activity or molestation. Perrin, *A Considered Approach to Sterilization of Mentally Retarded Youth*, 130 Am. J. of Diseases of Children 288, 289 (1976).

[31] *Id.* at 290.

[32] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[33] *Id.*

[34] Eugenic theories involve the elimination of "undesirable" traits (e.g., criminality, insanity, and retardation) by rendering persons with undesirable characteristics incapable of reproduction. *See* Note, *Eugenic Sterilization in Indiana*, 38 Ind. L.J. 275 (1963).

[35] 316 U.S. at 541.

childbearing."[36] Where there is a fundamental right to choose, the right to select the most appropriate or desirable alternative must be made available, to the greatest extent practically possible, to every person regardless of disability. In cases of incompetents with no hope of attaining competency, the right to choose should be placed in the hands of guardians with court supervision and intervention to ensure that the best interests of the incompetent are considered foremost.

In *In re Grady*,[37] the New Jersey Superior Court explained that there is a constitutional requirement that some court have jurisdiction to hear sterilization petitions.

> [T]he critical question [is] whether the *parens patriae* jurisdiction of the Chancery Court may be invoked to permit the court to consider the parents' request to give substituted consent on behalf of their incompetent child. Were substituted consent impermissible, the very incompetence which entitles one to special protection would become the obstacle to the exercise of those constitutional privileges necessary for enjoyment of that special protection. Refusal to provide a technique for vindication of a basic constitutional right is itself an unconstitutional deprivation.[38]

Therefore, the United States Constitution requires the states to establish at least one court with jurisdiction to hear sterilization petitions.

B. Indiana Jurisdictional Bases

In Indiana, the structure of the court system is a product of the state constitution and the Indiana General Assembly.[39] These sources determine which court has the power to hear any particular case. The Indiana Constitution vests the state's judicial power in "one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."[40] Because the state constitution declares that all judicial power belongs in the courts, the *total* jurisdiction of Indiana's courts remains constant and is not subject to reduction by the General Assembly. The legislature may pass jurisdictional statutes that delegate various portions of the total

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[36]Carey v. Population Servs. Int'l, 431 U.S. 678, 688-89 (1977) (explaining Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).

[37]170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd*, 85 N.J. 235, 426 A.2d 467 (1981).

[38]170 N.J. Super. at 120, 405 A.2d at 862. *But see In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977) (holding that incompetents should be permitted a choice in procreation matters).

[39]9 W. HARVEY, A. GOLDSTEIN & R. LEHMAN, INDIANA PRACTICE § 1.2, at 2 (1972).

[40]IND. CONST. art. VII, § 1.

judicial power to different courts by statutorily moving the jurisdiction from one court to another. However, jurisdiction may not be eliminated because that would amount to removing the judicial power from the courts, a result forbidden under the state constitution.[41] The Indiana Constitution gives the circuit courts "such civil and criminal jurisdiction as may be prescribed by law,"[42] and courts have recognized that there are several sources of law in Indiana in addition to the Indiana Code.[43]

These provisions demonstrate that the Indiana Constitution delegates jurisdiction to the courts only in general terms, leaving to the legislature the assignment of original jurisdiction in particular types of cases. The legislative response has been to create three types of courts of original jurisdiction: those with general jurisdiction, those with limited jurisdiction, and those with special jurisdiction.

IV. Courts of General Jurisdiction

The Indiana Code provides for the operation of several courts of original jurisdiction[44] in addition to the constitutionally mandated circuit courts.[45] The jurisdictional bases of each of these courts will be examined in order to determine which is the most appropriate to hear sterilization petitions.

A. Circuit Courts

The circuit courts have "original exclusive jurisdiction in all cases at law and in equity whatsoever . . . of all . . . causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."[46] Because this language

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[41]This argument was found persuasive in *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981), where the court held that constitutional language granting circuit courts original jurisdiction over all matters civil and criminal "only allows for a legislative reallocation of jurisdiction from the circuit court to another court. It does not permit the legislature to divest the constitutional grant of jurisdiction from the unified court system." *Id.* at 545, 307 N.W.2d at 886. Professor Harvey has described the limits on legislative power over the courts in Indiana: "The General Assembly can pass laws affecting them only so long as the legislation does not conflict with specific provisions or the spirit of the Constitution." 9 W. Harvey, A. Goldstein & R. Lehman, *supra* note 39, § 1.3, at 2-3.

[42]Ind. Const. art. VII, § 8.

[43]*See, e.g.*, Monteith Bros. Co. v. United States, 48 F. Supp. 210, 211 (N.D. Ind. 1942) (judgment); Bills v. City of Goshen, 117 Ind. 221, 225, 20 N.E. 115, 117 (1889) (ordinance); Paul v. Davis, 100 Ind. 422, 426 (1884) (case law unless there is an unsettled condition).

[44]Ind. Code §§ 31-6-2-1, -1.5 (1982) (juvenile courts); *id.* §§ 33-4-3-1, 33-4-4-3 (circuit courts); *id.* tit. 33, art. 5 *passim* (superior courts); *id.* § 33-6-1-2 (municipal courts); *id.* §§ 33-10.1-2-2 to -7 (city and town courts); *id.* §§ 33-10.5-3-1 to -3, -5 (county courts).

[45]Ind. Const. art. VII, §§ 7, 8, 9.

[46]Ind. Code § 33-4-4-3 (1982).

is so broad, it would appear that sterilization petitions should fall within the general jurisdiction of the circuit courts unless some other statute specifically grants exclusive jurisdiction to another court, board, or officer.[47] Although no court has ever held that such a statute exists, the jurisdiction of the circuit court has been challenged in a case involving a petition to sterilize a minor.

In *Stump v. Sparkman*,[48] a mother presented a petition for the sterilization of her fifteen-year-old daughter to Judge Harold D. Stump of the Circuit Court of DeKalb County. The petition contained an affidavit by the mother stating that her daughter, Linda, was "somewhat retarded,"[49] although she attended public school and had been passed on to the next grade each year along with other children her age. The affidavit stated that Linda associated with older youth and young men and had stayed out overnight with them. The mother claimed that she could not watch over Linda each and every minute and therefore wanted to have a tubal ligation performed in order to prevent "unfortunate circumstances."[50]

Judge Stump approved the petition on the same day it was presented in an ex parte proceeding without a hearing, notice to the daughter, or appointment of a guardian ad litem. Soon afterwards, Linda was taken to the hospital and told that she was about to have her appendix removed; a tubal ligation was performed during that hospital stay. Two years later, Linda married. When she could not become pregnant, she learned the true nature of the earlier surgery. She brought a civil rights action in federal court against her mother, her mother's attorney, the judge, the physicians who performed and assisted in the operation, and the hospital. The trial court sustained a motion to dismiss as to all defendants on the basis of judicial immunity.

The Court of Appeals for the Seventh Circuit reversed.[51] The appellate court stated that judicial immunity only attaches in the presence of jurisdiction, and that there was no jurisdiction to authorize this sterilization. The court of appeals essentially rejected the argument that the general grant of original jurisdiction to "all cases in law and in equity"[52] was broad enough to cover this situation.

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[47]This section of the Note will deal only with circuit courts qua circuit courts. Some circuit courts also have power as juvenile and/or probate courts. Their jurisdiction in these capacities will be discussed separately in later sections of this Note. *See infra* notes 88-152 and accompanying text.

[48]435 U.S. 349 (1978).

[49]*Id.* at 352 n.1 (the full text of the Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement is reprinted in footnote 1 of the Court's opinion).

[50]*Id.*

[51]Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

[52]IND. CODE § 33-4-4-3 (1982).

> [W]e cannot accept the assertion that [the jurisdictional grant] cloaks an Indiana circuit judge with blanket immunity. He may not arbitrarily order or approve anything presented to him in the form of an affidavit or petition. A claim must be characterized as a case in law or [in] equity in order to come within the statute. In short, it must have a statutory or common law basis.[53]

This negation of the district court's claim of jurisdiction had three bases. First, the court looked to the state's statutes to determine if there was legislative authorization to order sterilizations. Indiana Code section 16-13-13-1,[54] which was in effect at the time, permitted sterilization of institutionalized persons following specified procedures, but made no provision for sterilization of noninstitutionalized persons. The court claimed that in omitting noninstitutionalized persons from the language of the statute, the Indiana legislature must have intended to exclude that particular class from the statute's coverage. Secondly, the court said that even if this statute had not foreclosed jurisdiction in this case, the judge's action surpassed his common law powers. Looking to existing case law, the court said it could find no authority to support a sterilization order.[55] The court held that the judge's order was not within the power of courts to fashion new common law because judges "may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate."[56] Finally, the court of appeals said that Judge Stump's action was an "illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process."[57]

The United States Supreme Court disagreed with this reasoning and reversed,[58] asserting that the scope of a judge's jurisdiction should

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[53]552 F.2d at 174.

[54]This section read as follows:

> Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feeble-minded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness: Provided, That such superintendent shall have first complied with the requirements of this act.

IND. CODE § 16-13-13-1 (1971) (repealed 1974).

[55]552 F.2d at 175.

[56]*Id.* at 176.

[57]*Id.*

[58]Stump v. Sparkman, 435 U.S. 349, 355 (1978).

be construed broadly where it is being determined for the purpose of judicial immunity.[59] The Court then examined the broad jurisdictional grant, which reads in relevant part:

> Said court shall have original exclusive jurisdiction in all cases in law and in equity whatsoever. . . . It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships . . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.[60]

Because the jurisdictional statute did not itemize all types of cases that could be heard, the failure to mention sterilization was not fatal. The Court found that the inference which the court of appeals drew from the statute on sterilization of institutionalized persons was unwarranted, particularly because parents had authority under Indiana statutes to "consent to and contract for medical or hospital care or treatment of [the minor] including surgery."[61] The total absence of case law and statutory law in 1971 prohibiting circuit court judges from acting upon sterilization petitions was found significant.[62] The Court found that Indiana law had vested Judge Stump with the power to entertain and act upon the petition.[63]

Because the Court in *Stump* was faced with a judicial immunity question, it construed the jurisdictional grant more broadly than it might have done in other procedural circumstances.[64] Therefore, its holding is persuasive, but not conclusive, authority on the jurisdictional question in sterilization cases where there is an absence of specific statutory language granting or denying jurisdiction.[65] Nonetheless, *Stump* did open the door for judicial consideration of

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[59]*Id.* at 356.

[60]435 U.S. at 357 n.8 (quoting IND. CODE § 33-4-4-3 (1975)).

[61]435 U.S. at 358 (quoting IND. CODE § 16-8-4-2 (1973)).

[62]435 U.S. at 358.

[63]The Court stated that judicial immunity would fail to attach only in the "clear absence of all jurisdiction." *Id.* at 357 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)). The Court distinguished acts done in the absence of jurisdiction from those done in excess of jurisdiction.

> [I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

435 U.S. at 357 n.7 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1872)). This distinction is irrelevant to the holding, however, because the Court found that Judge Stump did in fact have jurisdiction. 435 U.S. at 364.

[64]*See In re* C.D.M., 627 P.2d 607, 612 (Alaska 1981).

[65]*See id.* (*Stump* is instructive though not conclusive on the jurisdictional issue).

sterilization petitions. Prior to that case, judges in some state courts may have been reluctant to grant sterilization petitions for fear that subsequent civil liability would be imposed when a reviewing court determined that such petition was granted without jurisdiction.[66] Possibly to protect themselves, courts showed a tendency to find no jurisdiction over sterilization cases.[67] Actually, these findings of no jurisdiction were, for the most part, mistaken.

> [T]hese decisions confuse the question of a court's authority to hear and decide such matters with the question of whether, in exercising that authority, the court can order a particular individual sterilized without violating his or her constitutional rights. As a result, these courts have held that they lacked *jurisdiction* when their concern should have been whether or not an order sanctioning the sterilization of a particular incompetent would have been *constitutional.*[68]

In the post-*Stump* era, other states considering the question have shown a decided trend in favor of acting upon such petitions.[69] Given the broad interpretation other states have given to jurisdictional grants when considering sterilization matters and the Indiana legislature's failure to take action to avoid a similar interpretation here,[70] it appears that the jurisdictional grant given to the circuit courts does, indeed, give these courts power to hear such petitions unless one of the statutory courts has exclusive jurisdiction in this area.

B. Superior Courts

Superior courts have the broadest jurisdictional grant[71] among Indiana's statutory courts. Their jurisdiction generally parallels and is

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[66]The cause of such fear was not unfounded. *See* Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971), *motion denied*, 365 F. Supp. 380 (S.D. Ohio 1973) (applying Ohio law, judicial immunity denied in action against judge who ordered a person to submit to sterilization).

[67]*See, e.g.*, Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971), *motion denied*, 365 F. Supp. 380 (S.D. Ohio 1973) (applying Ohio law); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

[68]*In re* C.D.M., 627 P.2d 607, 610 (Alaska 1981) (emphasis in original).

[69]*See id.*; *In re* A.W., 637 P.2d 366 (Colo. 1981); *In re* Penny N., 120 N.H. 269, 414 A.2d 541 (1980); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981). *But see* Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979).

[70]This does not mean that the state legislature cannot pass legislation forbidding sterilization of minors as a matter of policy; such legislation would address the merits of the issue, not the jurisdictional question.

[71]*See* IND. CODE tit. 33, art. 5 *passim* (1982).

concurrent with that of the circuit courts. Each superior court has its own jurisdictional statute[72] granting jurisdiction over criminal cases and civil cases in law and in equity. As far as probate and juvenile jurisdiction are concerned,[73] in some counties, these powers lie exclusively in either the circuit or superior court; in others, they are concurrent in both the circuit and superior courts. Under this general concurrent scheme, the superior courts should also have jurisdiction over sterilization of incompetent minors unless another court has exclusive jurisdiction by statute.[74]

The power of the superior courts in this area was tested in the pre-*Stump* case of *A.L. v. G.R.H.*[75] The mother of a fifteen-year-old boy filed a complaint for declaratory judgment in Vanderburgh Superior Court seeking permission to have a vasectomy performed upon her son, G.R.H. She brought the action under the "common law attributes of the parent-child relationship."[76] Two years before the action, G.R.H.'s IQ was tested at sixty-three, but by the time of trial it measured eighty-three, which placed him in the borderline area.[77] G.R.H. was interested in girls, liked to kiss, and wanted to date. His mother feared that he might become sexually active and impregnate one of the retarded or handicapped children in his special education classes. The trial court denied the mother's petition and she appealed. The Indiana Court of Appeals for the Third District affirmed the denial, stating, "[W]e 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."[78]

This case has been cited for the proposition that Indiana courts do not have jurisdiction to permit sterilization in the absence of informed consent or specific legislative authority.[79] The Court of Appeals for the Third District seemed to endorse this interpretation by relying on cases from Missouri[80] and California[81] which held that "their respective juvenile statutes making general provision for the welfare of children were insufficient to confer jurisdiction to authorize the

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[72]*E.g.*, IND. CODE § 33-5-5.1-4 (1982) (Allen Superior Court); *id.* § 33-5-8-5 (Bartholomew Superior Court); *id.* § 33-5-9-5 (Boone Superior Court); *id.* § 33-5-10-2.5(b) (Clark Superior Court); *id.* § 33-5-11-4 (Delaware and Grant Superior Court); *id.* § 33-5-12-3 (Delaware Superior Court No.2); *id.* § 33-5-13-2 (Elkhart Superior Court).

[73]*See infra* note 100.

[74]*See supra* note 47 and accompanying text.

[75]163 Ind. App. 636, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976).

[76]*Id.* at 636-37, 325 N.E.2d at 501.

[77]"Borderline area" is a medical classification of intelligence for mildly retarded persons on the borderline of normal intelligence. *See supra* note 15.

[78]163 Ind. App. at 638, 325 N.E.2d at 502.

[79]Annot., 74 A.L.R.3d 1224, 1228-29 (1976).

[80]*See In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

[81]*See In re* Kemp's Estate, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

sterilization of retarded girls in the absence of specific sterilization legislation."[82] However, as the United States Supreme Court in *Stump v. Sparkman* indicated, the holding in *A.L. v. G.R.H.* does not go to the jurisdictional issue, but rather speaks only to the merits.

> The opinion . . . speaks only of the rights of the parents to consent to the sterilization of their child and does not question the *jurisdiction* of a . . . judge who is presented with such a petition from a parent. Although under that case a . . . judge would err as a matter of law if he were to approve a parent's petition seeking the sterilization of a child, the opinion in *A.L. v. G.R.H.* does not indicate that a . . . judge is without jurisdiction to entertain the petition. Indeed, the clear implication of the opinion is that, when presented with such a petition, the . . . judge should deny it on its merits rather than dismiss it for lack of jurisdiction.[83]

The case's precedential value for mentally incompetent minors is questionable because G.R.H., while legally incompetent, was "sufficiently intelligent to understand what was involved in sterilization and to participate in the decision making process."[84] There was no showing that G.R.H. would benefit from sterilization or that he was incapable of exercising his own right of choice in procreation matters. The case discussed the mother's belief that G.R.H.'s adulthood would benefit from the surgery, but made no mention of testimony showing that her belief had any basis in fact. Rather, the emphasis seemed to be upon protecting the women with whom he might come into contact. The precedential value given the case should be strictly limited to this fact situation.[85] The sole purpose for sterilizing G.R.H.

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[82]163 Ind. App. at 638-39, 325 N.E.2d at 502. The Seventh Circuit Court of Appeals made the same interpretation of these cases in Sparkman v. McFarlin, 552 F.2d 172, 175 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

[83]435 U.S. at 358-59.

[84]163 Ind. App. at 637, 325 N.E.2d at 502.

[85]The Supreme Court's interpretation of *A.L. v. G.R.H.*, in Stump v. Sparkman, 435 U.S. 349 (1978), may be read as so limiting that case, although the Indiana Supreme Court appears to have read that interpretation differently. Referring to *A.L. v. G.R.H.*, the United States Supreme Court stated that "*under that case* a . . . judge would err as a matter of law if he were to approve" the parent's sterilization petition. *Id.* at 359 (emphasis added). The use of the language "under that case" seems to limit the Court's interpretation to the facts of the *A.L.* case.

Later in the same discussion, however, the Court stated that the "clear implication" of *A.L. v. G.R.H.* is that, "when presented with *such a petition*, the . . . judge should deny it on its merits rather than dismiss it for lack of jurisdiction." *Id.* (emphasis added). It is plausible to read the emphasized language as meaning a sterilization petition so clearly unmeritorious as that presented in *A.L. v. G.R.H.*

On the other hand, the Indiana Supreme Court in P.S. v. W.S., 452 N.E.2d 969 (Ind. 1983), appears to have read the language of the Court to mean *any* sterilization

was to prevent him from fathering children. The court's decision did not limit jurisdiction in sterilization petition cases. The holding was limited so that it concerned only the issue of parental consent to the sterilization of minor children as part of the general parental consent to the performance of medical and hospital services. Consequently, superior courts, like circuit courts, have the power to hear petitions to authorize the sterilization of incompetent minors unless there is another court which has exclusive jurisdiction in this area.

V. Courts of Limited Jurisdiction: Municipal, City, and County Courts

Municipal, city, and county courts have very limited jurisdiction in Indiana. Their enabling statutes outline in specific detail the types of cases they may hear.[86] Generally, their power is limited to violations of local ordinances and traffic laws and to civil cases where the amount in controversy does not exceed a jurisdictional limit.[87] Because of the limited nature of the jurisdiction granted to these statutory courts, they do not have power to hear petitions to authorize sterilization of incompetent minors.

VI. Courts of Special Jurisdiction

A. Probate Courts

Responsibility for guardianships of incompetent persons is placed

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petition. Thus, the Indiana court seems offended at what it takes to be the Supreme Court's suggestion that any and all sterilzation petitions should be dismissed on the merits.

> It goes without saying, of course, that if a court of general jurisdicition has the jurisdiction to entertain a particular issue, it has the juridiction to decide the issue on the merits and to make a decision by either granting or denying the petition. It would be unthinkable to presume that a court has jurisdiction to entertain an issue and then require it to decide that issue in only one way, that being to deny it.

Id. at 976. It is submitted that the United States Supreme Court was not indulging in any "unthinkable presumption," but rather interpreting the facts of *A.L. v. G.R.H.* to present a case where denial of a petition for sterilization would be appropriate as a matter of law.

[86]*See* Ind. Code §§ 33-6-1-2, 33-10.1-2-3.1 to -5, 33-10.5-3-1 (1982).

[87]For example, the Municipal Court of Marion County has jurisdiction in civil cases only where the action is founded in contract or tort and the value sought to be recovered is no more than $12,500. *Id.* § 33-6-1-2. A city court has civil jurisdiction only if the amount in controversy does not exceed $500, with the proviso that the court does not have the power to hear "actions for slander, libel, foreclosure of mortgage on real estate, where the title to real estate is in issue, matters relating to a decedent's estate, appointment of guardians and all related matters, and actions in equity." *Id.* § 33-10.1-2-3.1. The county courts' jurisdiction in civil matters is limited to

primarily with the probate courts in Indiana.[88] Thus, it may appear that these courts are the proper forum to consider requests for sterilization, but sterilization is sufficiently different from the matters normally considered by these courts[89] to make the placement of jurisdiction with them less than ideal.

The probate courts have authority to appoint guardians to take responsibility for the estates of incompetent persons and to appoint guardians over the person of the incompetent under Indiana Code section 29-1-18-4.[90]

1. Guardianships over the Estate of Incompetents.—The concerns involved in control of the estate of a person are sufficiently different from those involved in the control of an individual's personal rights to warrant a conclusion that this jurisdiction does not confer the power to authorize sterilization. Guardianship over the estate of an incompetent concerns fiduciary and financial matters. The emphasis is upon property rights rather than upon civil rights.[91] The care and wise investment of property obviously has little to do with the protection of personal rights that must be considered in determining whether an incompetent should be sterilized.

2. Guardianships over the Person of Incompetents.—The considerations involved in guardianships over the person closely parallel those involved in sterilization petitions. A guardian over the person is responsible for seeing that the incompetent entrusted to his care and supervision is properly educated and maintained.[92] These duties have

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actions founded in contract or tort where the amount in controversy does not exceed $3,000, to possessory actions between a landlord and tenant where the rent reserved does not exceed $500 per month, to actions for possession of property not exceeding $3,000 in value, and to cases involving a request for a surety of the peace. *Id.* § 33-10.5-3-1.

[88]*Id.* § 29-1-1-20.

[89]*See generally* IND. CODE tit. 29 (1982).

[90]IND. CODE § 29-1-18-4 (1982). This section gives the probate court authority over forms of guardianship expressly provided for in article 1 of title 29 of the Indiana Code. IND. CODE § 29-1-18-6 (1982) provides for the appointment of a guardian for the estate of any incompetent and the appointment of a guardian over the person of any incompetent except a minor who has a natural guardian who is properly performing his duties as guardian. *Id.*

[91]"It is the duty of the guardian of the estate to protect and preserve it, to invest it, . . . to account for it faithfully, . . . and, at the termination of the guardianship, to deliver the assets of the ward to the persons entitled thereto." *Id.* § 29-1-18-28(b).

[92]The guardian of the person has the duty

> to care for and maintain the ward and, if the ward is a person under eighteen (18) years of age to see that the ward is properly trained and educated and that he has the opportunity to learn a trade, occupation or profession. . . . The guardian of the person may be required to report the condition of his ward to the court. . . . The guardian of the person . . . shall not have power to bind the ward or his property.

Id. § 29-1-18-28(a).

"social overtones" and are tied to the personal rights of incompetents.[93] However, the probate court's authority to appoint guardians over the person of incompetents does not extend to minors where there exists a person with parental rights.[94] This indicates that the probate court, while accustomed to determining what may be in the best interest of incompetents in a nonadversary setting, is not regularly faced with the tasks of balancing the interests of parent and child in cases where those interests conflict. In sterilization petitions, it is especially likely that parents may try to advance their own interests instead of those of their children. This tendency was demonstrated in *Frazier v. Levi*,[95] where the parents of a thirty-four-year-old retarded woman attempted to have their daughter sterilized for social and economic reasons.[96] The undesirability of simply permitting parents or guardians to decide whether sterilization is proper was pointed out in *In re A.W.*[97] where the Colorado Supreme Court stated:

> Consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights.[98]

The courts in some states have placed the power to hear such petitions in their probate courts because of probate courts' historical

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[93]2B G. HENRY, THE PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA 602-03 (7th ed. 1979).

[94]IND. CODE § 29-1-18-6 (1982) provides:

> A guardian of the estate may be appointed for any incompetent. A guardian of the person may be appointed for any incompetent except a minor having a natural guardian in this state who is properly performing his duties as natural guardian or a married minor who is incompetent solely by reason of his minority.

Id.

[95]440 S.W.2d 393 (Tex. Civ. App. 1969).

[96]In *Frazier*, the plaintiff alleged

> that she is the aged mother of the ward, is in poor health and is unable to stand the physical, financial or emotional strain of caring for any more children of the ward. She and her husband are already providing for the ward and the ward's two children, both of whom are mentally retarded. The ward, age 34, has the mentality of about a six year old, is sexually promiscuous, unable to support or take care of herself or her children, but is in good physical health. No medical reason for her sexual sterilization exists . . . .

Id. at 393-94.

[97]637 P.2d 366 (Colo. 1981).

[98]*Id.* at 370, *quoted in* P.S. v. W.S., 443 N.E.2d 67, 70 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).

responsibility to care for the needs of incompetents.[99] However, where the needs of incompetent *minors*, rather than the needs of incompetents generally, are concerned, it is more logical to place sterilization hearings in the juvenile court, with its traditional concern for the interests of children.

B. Juvenile Courts

Juvenile courts generally operate within circuit courts, although in some counties they are part of the superior courts.[100] However, they do not enjoy the broad jurisdictional grant given to circuit and superior courts because their jurisdictional limits are carefully spelled out in the Indiana Code.[101] In those areas where they do have jurisdiction, the jurisdiction is exclusive and original.[102]

1. Goals of the Juvenile Law System.—The Indiana General Assembly has placed the responsibility for ensuring that the needs of children are met in the juvenile courts.[103] The Juvenile Code[104] begins with a list of six goals outlining the policy and purpose of the court. Those goals pertinent to juvenile court jurisdiction over sterilization petitions are:

> (2) To provide a judicial procedure that insures fair hearings and recognizes and enforces the constitutional and other legal rights of children and their parents;
> (3) To insure that children within the juvenile justice system are treated as persons in need of care, treatment, rehabilitation, or protection;
> . . .
> (5) To strengthen family life by assisting parents to fulfill their parental obligations.[105]

a. Parens patriae.—The legislature has placed the primary responsibility for executing the parens patriae[106] doctrine for the state with the juvenile courts. One commentator explained that the goal stated in Indiana Code section 31-6-1-1(2) was inserted into the Code "to em-

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[99]*See In re* Grady, 170 N.J. Super. 908, 405 A.2d 851 (1979).

[100]*See* IND. CODE § 33-12-3-1, -2 (1982) (circuit courts generally have juvenile jurisdiction); *id.* § 33-4-6-2 (superior court has exclusive juvenile jurisdiction in Shelby County). It is common practice to assign the juvenile court jurisdiction to a particular judge or division in counties where there is more than one judge sitting at the court. This enables the juvenile judges to acquire expertise in this area.

[101]IND. CODE § 31-6-2-1 (1982).

[102]*Id.* § 31-6-2-1(a).

[103]*See generally* IND. CODE tit. 31, art. 6 (1982).

[104]IND. CODE tit. 31, art. 6 (1982).

[105]*Id.* § 31-6-1-1.

[106]" 'Parens patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

phasize that *parens patriae* and due process are not incompatible."[107] Case history also shows that the parens patriae doctrine was the main force behind the development of Indiana's juvenile court system.[108] This placing of primary responsibility for the parens patriae doctrine, as it regards children, in the juvenile court supports the proposition that the juvenile divisions of circuit and superior courts are the proper forum for sterilization petitions for incompetent minors.

b. Children in need of care, treatment, and protection.— Sterilization petitions present sensitive and conflicting issues of human rights[109]—the right to procreation and the right to privacy accorded the decision not to procreate which a child would normally be able to exercise upon reaching adulthood. These rights can only be made fully available to incompetent children who need sterilization for their own protection by following a judicial procedure similar to that contemplated by the Juvenile Code. Such children should be "treated as persons in need of care, treatment . . . or protection"[110] because they need sterilization for their own physical or mental health.

Such a procedure does not call for mass sterilization of mentally disabled or retarded persons. On the contrary, most disabled persons are entitled to be free from such state interference,[111] but there are rare cases where intervention is necessary. This was pointed out by Dr. Jane C. Perrin, who conducted a three-year sterilization program for mentally retarded youth using numerous criteria to determine whether sterilization was indicated.[112] Dr. Perrin, who approached decisions to sterilize with extreme caution, found tremendous success in

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[107]IND. CODE ANN. § 31-6-1-1 commentary at 15 (West 1979).

[108]This was explained in State *ex rel.* Johnson v. White, 225 Ind. 602, 77 N.E.2d 298 (1948):

> The history of juvenile jurisdiction reveals that the state assumed this authority as *parens patriae* for the welfare of all infants.
>
> "Under the ancient common law, the king, as *parens patria,* [sic] was deemed to have charge of all persons who, by reason of their youth and inexperience, were unable to care for themselves, or to protect their estates. In the exercise of this supervision, the chancellor, who was orginally an ecclesiastic, and the keeper of the king's conscience, was the guardian of all infants. . . ."
>
> The State of Indiana acting by its General Assembly, has continued and extended this jurisdiction under the various juvenile acts.

Id. at 608, 77 N.E.2d at 301 (citations omitted) (quoting Butterick v. Richardson, 39 Ore. 246, 247, 64 P. 390, 391 (1901)).

[109]Regarding state authority to sterilize, the United States Supreme Court in Skinner v. Oklahoma, 316 U.S. 535 (1942), stated that "[t]his case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring." *Id.* at 536.

[110]IND. CODE § 31-6-1-1(3) (1982).

[111]For a discussion of the reasons why court interference in this area may be frowned upon, see Comment, *Sterilization, Retardation, and Parental Authority,* 1978 B.Y.U. L. REV. 380, 396-97.

[112]Perrin, *supra* note 30, at 288.

the cases where physicians and families agreed that sterilization was appropriate. In Dr. Perrin's program nineteen females and one male were sterilized, and ten requests for sterilization were denied.[113] At the end of the program, Dr. Perrin concluded that sterilization services were medically beneficial in cases of "persons with an IQ below 50, or whose retardation is complicated by severe emotional or physical handicaps."[114] She proposed that the following guidelines be used to determine if sterilization is medically indicated:

> 1. Parental request and informed consent for sterilization of mentally retarded offspring could be evaluated by a professional and lay group for generation of medical, psychological, social, behavioral, and genetic data on the patient, and determination that the interests of the consenting parent or guardian coincide with those of the retarded person.
>
> 2. Criteria for consideration of sterilization could be set, including level of IQ and type and severity of the complicating conditions of marked physical disability, substantial emotional-behavioral disturbance, and high-risk, untreatable genetic disease.
>
> 3. A prompt court hearing could be held with legal counsel for the retarded person and for the parent, the court having authority to grant or withhold permission for sterilization.[115]

Such a sensitive approach to the problem of sterilization of incompetent minors would promote the goal of the juvenile court system of providing children in need with proper care, treatment, and protection.

c. Strengthening family life.—The final goal of the juvenile statute pertinent to sterilization issues—strengthening family life[116]—could also be met by permitting the juvenile courts to hear petitions for sterilization. Prior court decisions have precluded families with children who suffer from conditions that render them proper candidates for sterilization from consenting to sterilization of their children without court intervention.[117] The parents may feel helpless to improve the lives of their children because they cannot do what they think is best. The Juvenile Code's goal of strengthening "family life by assisting parents to fulfill their parental obligations"[118] would be met by giving the parents a method by which they could obtain authorization to have

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[113] *Id.* at 288.

[114] *Id.* at 290.

[115] *Id.*

[116] IND. CODE § 31-6-1-1(5) (1982).

[117] P.S. v. W.S., 443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976).

[118] IND. CODE § 31-6-1-1(5) (1982).

their children sterilized in proper cases. Allowing parents to participate in decisions affecting their children would strengthen the family unit. Clearly defining the court with authority to hear sterilization petitions involving minors would make the appropriate procedure readily available to parents and give them a much-needed feeling of responsibility. In addition, the proceedings of the juvenile court are especially designed to deal sensitively with possible parent-child conflicts, further giving mothers and fathers positive feelings about their parental roles.

2. Jurisdictional Requirements.—The jurisdictional statute for juvenile courts provides eight possible bases for exclusive original jurisdiction.[119] Four of these might provide the necessary jurisdictional grant for sterilization petitions:

> (2) Proceedings in which a child, including a child of divorced parents, is alleged to be a child in need of services (IC 31-6-4).
>
> . . . .
>
> (5) Proceedings governing the participation of a parent, guardian, or custodian in a program of care, treatment, or rehabilitation for a child (IC 31-6-4-17).
>
> . . . .
>
> (7) Proceedings to issue a protective order (IC 31-6-7-14).
>
> (8) Other proceedings specified by law.[120]

Because these jurisdictional bases are alternative rather than conjunctive, children needing sterilization need to meet only one of these jurisdictional bases in order for the juvenile court to have exclusive power to hear their petitions.

a. Children in need of services.—Children who ought to be sterilized appear to fall under subsection two of the jurisdictional section[121] in that they are children in need of services (CHINS). The Indiana CHINS statute[122] supports this view. The statute declares that a minor is a child in need of services if:

> (1) his physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of his parent, guardian or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision;
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> . . .

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[119] *Id.* § 31-6-2-1(a).
[120] *Id.*
[121] *Id.* § 31-6-2-1(a)(2).
[122] *Id.* § 31-6-4-1 to -19.

(6) he substantially endangers his own health or the health of another;

and needs care, treatment, or rehabilitation that he is not receiving, and that is unlikely to be provided or accepted without the coercive intervention of the court.[123]

Some children need sterilization to prevent their physical and/or mental health from being seriously endangered or impaired. Indiana, it appears, has ruled that parents may not have sterilization procedures performed upon their children without a court order,[124] thus making parents legally unable to provide their offspring with this type of treatment. Consequently, the physical or mental condition of such children is seriously endangered *as a result* of the parents' inability to supply needed medical procedures. The causative inability is legal rather than financial in nature, but it is a very real obstacle and makes it unlikely that the necessary treatment will be provided without court intervention. The statute requires that court intervention be "coercive" before a child can qualify for classification as a CHINS.[125] Admittedly, most parents of children needing sterilization would not need to be coerced into permitting the proper surgical procedures; however, in the wake of *P.S. v. W.S.*, it is likely that medical personnel would require the coercion of a court order before they would perform sterilization procedures upon an incompetent minor. Therefore, disabled children who are proper candidates for sterilization could be classified as CHINS.

In order to determine whether an effort should be made to have such children declared CHINS, the remedies available under the CHINS statute should be examined to see if a sterilization could be ordered. The statute provides that the court may "order the child to receive out-patient treatment at a social service agency, psychological, psychiatric, medical, or educational facility, or from an individual practitioner."[126] This suggests that the court can order sterilization only if it can be done on an outpatient basis because "[t]he express mention of one person or thing is the exclusion of another. . . . What is expressed makes what is silent to cease."[127] However, the statute does not define "outpatient." In Webster's New Collegiate Dictionary the term is defined as "a patient who is not an inmate

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[123]*Id.* § 31-6-4-3.

[124]*See* P.S. v. W.S., 452 N.E.2d 969 (Ind. 1983); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976). *See infra* note 151.

[125]IND. CODE § 31-6-4-3(a) (1982).

[126]*Id.* § 31-6-4-15.4(1) (Supp. 1983).

[127]Shupe v. Bell, 127 Ind. App. 292, 298, 141 N.E.2d 351, 354 (1957) (quoting WHARTON'S LEGAL MAXIMS 11 and Woodford v. Hamilton, 139 Ind. 481, 39 N.E. 47 (1894), respectively).

of a hopsital but who visits a clinic or dispensary connected with it for diagnosis or treatment."[128] To date, there are no Indiana cases interpreting what "outpatient basis" means, but cross references in the statute[129] indicate that the legislature inserted this term because it did not want the juvenile court to have responsibility for commitment proceedings. The power to commit mentally ill children to institutions lies in the probate courts, not the juvenile courts.[130] Provided that long-term hospital placement is not required, a sterilization procedure may be ordered under the CHINS statute. A hospital stay of a few days would be more traumatic to these children than a stay of a few hours, but it could still be classified as a visit rather than a residency; therefore, it should not be precluded by the "outpatient" requirement of the CHINS statute.

The procedural steps that a parent would have to utilize in order to have his child declared a CHINS for the sole purpose of authorizing a sterilization operation are cumbersome, but not unworkable. The statute does not permit the parents to file a petition themselves in order to achieve this purpose; it requires the filing to be done by either the prosecutor or the attorney for the county department.[131] It might be argued that because the statute provides that the prosecutor or county attorney may file a request for authorization to file a petition alleging that a child is a CHINS,[132] others are not precluded from this act; otherwise the legislature would have said *only* the prosecutor or the county attorney. However, this reasoning would not pass muster because the statute later provides that the petition "must be signed and filed by the person representing the interests of the state."[133] This might indicate that the legislature did not contemplate use of this mechanism in cases where parents wish to make specific services available to their children. However, that does not mean that the General Assembly wished to refuse use of the CHINS statute under such circumstances; more likely, it was something that was never considered. The statute does not preclude parents from asking the juvenile authorities to secure authorization to have their incompetent child sterilized; this requirement merely provides additional safeguards to ensure that sterilization petitions are not granted lightly. The procedure could be compared to the requirement that criminal victims who want to see their attackers prosecuted must rely upon county authorities to pursue the matter in criminal courts.

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[128]WEBSTER'S NEW COLLEGIATE DICTIONARY 815 (1976).

[129]IND. CODE § 31-6-4-16(c) (1982) directs the court to refer a child needing commitment proceedings under sections 16-14-9.1-1 to -18 to the probate courts.

[130]*See supra* note 129.

[131]IND. CODE § 31-6-4-10 (1982).

[132]*Id.* § 31-6-4-10(a).

[133]*Id.* § 31-6-4-10(c).

Indiana has declared that if the procedural requirements under the juvenile statute are not properly followed, there is no jurisdiction.[134] Therefore, in order to request the court to order sterilization under the CHINS statute, the parents must approach an intake officer and explain why their child needs to be sterilized.[135] The intake officer would decide whether the child is a CHINS and prepare a report containing his finding. This report would be given to the prosecutor or the county attorney who may then ask the court for authorization to file a petition alleging that the child is a CHINS. If either decides not to petition the court, the parents may still plead their case before the other. Thus, there are five requirements before jurisdiction attaches in a CHINS case:

1. written intake information signed by the person giving the information or by the intake officer; . . .
2. the report of preliminary inquiry;
3. request from prosecutor or attorney for the department of public welfare for authorization to file a petition;
4. the order of the juvenile court authorizing the filing of the petition; and
5. petition alleging the child is a child in need of services.[136]

If the above procedures are followed, a petition to authorize sterilization of an incompetent minor could be considered by a juvenile court.

b. Parental participation proceedings.—The second possible basis of juvenile court jurisdiction for sterilization orders—"proceedings governing the participation of a parent, guardian or custodian in a

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[134]Several cases decided under the predecessor to Indiana's CHINS statute held that preliminary procedural steps required by statute are jurisdictional. "[T]he exclusive original jurisdiction may only be obtained by the juvenile court as set forth above and unless such . . . procedural steps are taken there is no jurisdiction established." Summers v. State, 248 Ind. 551, 556-57, 230 N.E.2d 320, 323 (1967). *Accord* Shupe v. Bell, 127 Ind. App. 292, 300-01, 141 N.E.2d 351, 355 (1957) ("[T]he Juvenile Court cannot acquire jurisdiction . . . unless the petition . . . is filed by the Probation Officer of the Court under an order of the court authorizing the same."); *In re* Rosenbarger, 127 Ind. App. 497, 153 N.E.2d 619 (1957) (no jurisdiction where the petition was not signed by the probation officer as required by statute). *Contra* Hogg v. Peterson, 245 Ind. 515, 198 N.E.2d 767 (1964):

> We do not believe that a statute authorizing the filing of a petition in such informal proceedings by the probation officer should necessarily be construed to be jurisdictional and to forbid the filing of a petition by anyone else. It is more logical to consider such requirements as merely directory and that errors with reference to such matters are waived unless seasonably brought to the attention of the trial court.

Id. at 518-19, 198 N.E.2d at 769.

[135]*See* IND. CODE § 31-6-4-8 (1982).

[136]BENCHBOOK COMMITTEE OF THE INDIANA COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE JUSTICE BENCHBOOK FOR INDIANA JUDGES C-2.01 (2d ed. 1980).

program of care, treatment, or rehabilitation"[137]—does not confer the independent jurisdiction sought because the statute provides that this jurisdiction only attaches in proceedings for CHINS or delinquent children.[138] In addition, the jurisdiction is aimed at parents who must be forced or coerced into participating in programs for their children, which would seldom be the situation in sterilization cases. The provision creating this type of jurisdiction points out the juvenile division's competence in balancing competing interests between parent and child, but it does not confer jurisdiction in sterilization cases.

c. Protective order proceedings.—The third possible basis of juvenile court jurisdiction for sterilization orders—"proceedings to issue a protective order"[139]—presents a more expedient procedure for parents than use of the CHINS statute, but does not provide children with as many inherent procedural protections. The statute provides:

> Upon its own motion or upon the motion of the child, the child's parent, guardian, custodian, or guardian ad litem . . . the juvenile court may, for good cause shown upon the record issue an injunction:
> (1) to control the conduct of any person in relation to the child;
> (2) to provide a child with an examination or treatment under IC 31-6-7-12.[140]

The court could "control the conduct of" specified medical and hospital personnel by requiring them to perform the requested sterilization since to control a person's conduct is to "exercise restraining *or directing* influence over"[141] that person's conduct. The supreme court in *P.S. v. W.S.*[142] did not list a statutory section of the juvenile code to support its finding of jurisdiction; however, the court of appeals[143] found that the trial court's authority to hear the child's request for an injunction against a sterilization procedure lay in this provision.[144] The court of appeals did not state that this subsection also covered parents' petitions to authorize sterilizations, but its result leads to that conclusion. As the supreme court stated:

> It goes without saying, of course, that if a court of general jurisdiction has the jurisdiction to entertain a particular issue, it has the jurisdiction to decide the issue on the merits and

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[137]IND. CODE § 31-6-2-1(a)(5) (1982).
[138]*Id.* § 31-6-4-17.
[139]*Id.* § 31-6-2-1(a)(7).
[140]*Id.* § 31-6-7-14(a).
[141]WEBSTER'S NEW COLLEGIATE DICTIONARY 247 (1976).
[142]452 N.E.2d 969 (Ind. 1983).
[143]443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).
[144]443 N.E.2d at 71.

> to make a decision by either granting or denying the petition. It would be unthinkable to presume that a court has jurisdiction to entertain an issue and then require it to decide that issue in only one way, that being to deny it.[145]

If the power to stop sterilization lies in this clause, then the power to permit sterilizations must also be present. Injunctive relief has both negative and positive meanings, and jurisdiction cannot be made to depend upon whether the petitioning party wants to proceed with a particular action or to stop it.

This portion of the juvenile code also specifically addresses the medical treatment issue by providing for an injunction "to provide a child with an examination or treatment under IC 31-6-7-12."[146] Indiana Code section 31-6-7-12, however, carefully limits use of the injunction to the following situations: 1) where a petition has been filed seeking to have a child declared a CHINS; 2) where a petition has been filed seeking to have a child declared a delinquent child; or 3) where an emergency exists.[147] Consequently, in the absence of a CHINS petition, a court would only have jurisdiction to authorize a sterilization if the need were so severe that it could be categorized as an emergency. Given P.S.'s self-destructive habits, her need for sterilization could have been considered an emergency, but obviously such a classification would not be available in all situations where sterilization is medically called for. Therefore, this basis of jurisdiction could be used in especially severe cases, but not in all cases where a court order for sterilization would be proper.

d. Other proceedings provided by law.—Finally, the Juvenile Code gives the juvenile court exclusive original jurisdiction over "other proceedings specified by law."[148] As indicated earlier, Indiana recognizes that "law" may stem from many different sources;[149] one of those sources is case law, which would encompass the holding of *P.S. v. W.S.*[150] Sterilization petitions could be brought before the juvenile court under this jurisdictional grant because *P.S. v. W.S.* implicitly acknowledged a common law requirement of judicial authorization before sterilization can be performed upon incompetents.[151] Therefore, proceedings to consider petitions to sterilize incompetent minors constitute "other proceedings provided by law."[152]

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[145]452 N.E.2d at 976.

[146]IND. CODE § 31-6-7-14(a)(2) (1982).

[147]*See id.* § 31-6-7-12(a).

[148]*Id.* § 31-6-2-1(a)(8).

[149]*See supra* note 43 and accompanying text.

[150]452 N.E.2d 969 (Ind. 1983).

[151]*Id.* In holding that juvenile courts may authorize sterilizations of incompetent minors, the court by implication held that judicial authorization is a prerequisite to sterilization procedures upon such minors.

[152]IND. CODE § 31-6-2-1(a)(8) (1982).

VII. Conclusion

In order to protect all of the constitutional rights of incompetent minors, at least one court must be able to authorize their sterilization when it is shown evidence that such a procedure would be in the child's best interests. The power to hear such petitions should be vested exclusively in the juvenile courts in Indiana because these courts are accustomed to balancing the interests of parents and children in areas where their interests may conflict. The Juvenile Code has three alternative jurisdictional bases which should be interpreted to give the juvenile courts the exclusive authority to hear petitions for the sterilization of incompetent minors: 1) the CHINS statute, which gives the juvenile court power to order appropriate medical care for a child in need of services, 2) the injunction power to issue protective orders for children under emergency situtations or where a petition has been filed to declare a child a CHINS, and 3) the grant of jurisdiction over any other proceeding specified by law. Therefore, the circuit and superior courts, sitting in their capacity as circuit and superior courts and exercising their general jurisdiction powers, should not have the authority to hear sterilization petitions involving minors. Such authority should rest exclusively in the juvenile courts.

Donna J. Bays-Beinart