

**Sterilization—Incompetents—Jurisdictional Requirements to Order Sterilization of Incompetents on Social and Economic Grounds. *Frazier v. Levi*, 440 S.W.2d 393 (Tex. Civ. App.—Houston 1969, no writ).**

Daisy Levi, a 34-year-old woman with the mentality of a six-year-old, lived with her father and guardian mother. Her guardian, who was in poor health, cared for Miss Levi and her two illegitimate, mentally retarded children, and was physically, financially, and emotionally unable to care for any more children. Because Miss Levi was sexually promiscuous, her guardian requested that an operation to sterilize her be performed. Officials of the John Sealy Hospital in Galveston, Texas, refused to perform the operation without court approval because no medical reasons for it existed. The guardian applied in the county court for an order authorizing the operation. The county court appointed a guardian *ad litem* for Miss Levi and sustained his exceptions to the application for the order. The district court affirmed the dismissal. The court of civil appeals affirmed, holding that neither the Texas Constitution nor any state statute granted the court authority to authorize sterilization of an incompetent on a guardian's application when such application is based on social and economic grounds alone and that without this authority, an order authorizing the operation would be invalid.<sup>1</sup>

Courts in at least two states, Ohio and Maryland, have in recent years rendered decisions which conflict with the *Frazier* decision.<sup>2</sup> These jurisdictions represent the view that, even in the absence of specific statutory or constitutional authority, sterilization of incompetents on social and economic grounds should be allowed in some circumstances. Perhaps the best illustration is found in the Ohio decision of *In re Simpson*,<sup>3</sup> where the court ordered the sterilization of an eighteen-year-old girl who was feeble-minded, based on her guardian mother's request. The girl was unable to care for her one-year-old child and had been promiscuous with a number of men since the child's birth. The court

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1. In Texas, the crime of fornication is defined as "living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried." TEX. PEN. CODE ANN. art. 503 (1952). If Miss Levi had frequent intercourse with the same man, she might have been found guilty of fornication. But sterilization is not listed as one of the possible forms of punishment under the penal code. TEX. PEN. CODE ANN. art. 48 (1952). It is not listed as the penalty for fornication either. TEX. PEN. CODE ANN. art. 504 (1952). Therefore, criminal prosecution of Miss Levi would not make her sterilization a legally supported one.

2. *In re Simpson*, 180 N.E.2d 206 (Ohio P. Ct. 1962); *Ex parte Eaton*, Baltimore Daily Record, Nov. 12, 1954 (Balto. Cir. Ct., Nov. 10, 1954), cited in O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 39 (1956).

3. 180 N.E.2d 206 (Ohio P. Ct. 1962).

ordered the sterilization relying on two Ohio statutes. One general statute provided that the probate judge shall "make such order as he deems necessary . . . to provide for the detention, supervision, care, and maintenance of said feeble-minded person."<sup>4</sup> The other statute provided that "[t]he probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."<sup>5</sup>

The Houston Court of Civil Appeals in *Frazier* found no constitutional or statutory authority for sterilization of incompetents, although the guardian advanced three general statutes and one constitutional provision dealing with incompetents as adequate authority for the court to order the operation. The provision of the Texas Constitution gave the county courts general jurisdiction to appoint guardians of persons *non compos mentis* and to "transact all business appertaining to them."<sup>6</sup> Discussing the duties of the county court, one section of the probate code provided that the judge of each county court shall use reasonable diligence to see that guardians "perform the duties enjoined upon them by law."<sup>7</sup> Another section listed the duties of the guardian which included taking care of the person, treating him humanely, seeing that he was properly educated, and seeing that he was properly prepared for a useful profession.<sup>8</sup> A final section of the probate code stated that the duties and rights of guardians shall be governed by the principles of common law, when not in conflict with the statutes.<sup>9</sup>

The authority granted by the provision of the Texas Constitution and by the statutory provision concerning common law is very much analogous to that granted to the Ohio court in the *Simpson* case by the sections of the Ohio Revised Code. Had the Texas court rendered a decision in favor of sterilization, it might well have cited the *Simpson* case as authority. Instead the court of civil appeals held that the authority granted to it by the constitution and the sections of the probate code dealing with the duties of the court and the guardian was insufficient for the court to order the operation, and that even if sterilization could be said to have been authorized at common law or in equity, the *court* was not given equitable powers, but that the duties and powers of the *guardian*—and not the *court*—were to be governed by the common law and equity.

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4. OHIO REV. CODE ANN. § 5125.30 (Page Supp. 1962).

5. TEX. CONST. art. V, § 16.

6. OHIO REV. CODE ANN. § 2101.24 (Page Supp. 1962).

7. TEX. PROB. CODE ANN. § 36 (1956).

8. TEX. PROB. CODE ANN. § 229 (1956).

9. TEX. PROB. CODE ANN. § 32 (1956).

The Ohio court, on the other hand, claimed that the authority granted to it by the analogous portions of the Ohio Code was extremely broad.<sup>10</sup> The fact that the court interpreted these statutes very broadly is not disputed, but the interpretation has been severely criticized<sup>11</sup> as a case where the court "simply conjured up a novel power without historical or statutory basis,"<sup>12</sup> or as a decision that "is the best example of 'perversion of the law.'"<sup>13</sup>

One of the most criticized aspects of the Ohio court's decision is its reliance on "the plenary power at law and in equity." Ohio is not the only state whose courts have relied on this power to order sterilization. A city court in Baltimore, Maryland, ordered sterilization despite the lack of any specific statute, relying on its "general equity jurisdiction over affairs of incompetents."<sup>14</sup> The reliance on equity in these two states has been criticized by several authorities who contend that the courts of equity never had jurisdiction over mental incompetents.<sup>15</sup> The inference which has been drawn from the *Simpson* case is that the Ohio court believed that the common law supports the right of the state to sterilize the mentally incompetent, if sterilization is in the best interest of both the incompetent and society.<sup>16</sup> There is authority which suggests that the common law never authorized sterilization of the feeble-minded.<sup>17</sup> In fact, a Michigan Supreme Court Justice's statement in a 1925 opinion reflects a conviction that the common law contemplated no such operation:

We have found no case in the books holding that in a Christian civilization it is neither cruel nor unusual to emasculate the feeble-minded. It has remained for the civilization of the twentieth century to write such a law upon the statute book. Even savages have had more consideration for idiots.<sup>18</sup>

The majority of state jurisdictions adhere to the view that, although

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10. *In re Simpson*, 180 N.E.2d 206, 208 (Ohio P. Ct. 1962).

11. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 608 (1966).

12. 61 MICH. L. REV. 1359, 1364 (1963).

13. 15 SYRACUSE L. REV. 738, 753 (1964).

14. *Ex parte Eaton*, Baltimore Daily Record, Nov. 12, 1954 (Balto. Cir. Ct., Nov. 10, 1954), cited in O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 39 (1956).

15. *E.g.*, *Beall v. Smith*, L.R. 9 Ch. 85 (1873); 61 MICH. L. REV. 1359, 1361 (1963). Despite the criticism, Ohio courts have continued to order sterilization under such circumstances. Ferster, *supra* note 11, at 607.

16. See 61 MICH. L. REV. 1359 (1963).

17. *Smith v. Command*, 231 Mich. 409, 204 N.W. 140 (1925), pointed out that the only use of sterilization at common law was as punishment for crimes.

18. *Id.* at 149.

sterilization may be authorized by a specific statute, in the absence of a specific statute dealing with the problem, sterilization of the feeble-minded on social and economic grounds should not be allowed.<sup>19</sup> In these jurisdictions, it is essential that there be substantial compliance with the jurisdictional requirements of the statute, for the order to be valid.<sup>20</sup>

Texas is one of twenty-four states which have not provided by specific statute for sterilization of incompetents on social and economic grounds.<sup>21</sup> In its strict construction of those statutes on the books dealing with incompetents, Texas has joined the majority of states which hold that before an incompetent may be sterilized, especially on social and economic grounds, there must be a very specific statute authorizing the operation.<sup>22</sup> In reaching this decision, the court has followed the legislative intent evidenced by the civil statute which gives the Board for Texas State Hospitals authority to perform necessary operations without the consent of the guardian, but specifically states that this "authority shall not allow the performance of any operation involving sexual sterilization or frontal lobotomies."<sup>23</sup>

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19. O'Hara & Sanks, *supra* note 14, at 40. See also *Buck v. Bell*, 143 Va. 310, 130 S.E. 516, 520 (1925) *aff'd*, 274 U.S. 200 (1927), where the court held that an order for sterilization may be issued "provided it be exercised through a statute which affords due process of law and equal protection of the laws to those affected by it."

20. *Smith v. Command*, 231 Mich. 409, 204 N.W. 140 (1925); O'Hara & Sanks, *supra* note 14.

21. See *Ferster*, *supra* note 11, at 596, 605.

22. The Texas court's refusal to allow the operation would seem wise if the primary economic or social ground for the sterilization order were the prevention of the birth of additional mentally retarded children. Recent scholarly articles dealing with sterilization of mental incompetents indicate that only eleven percent of the mentally retarded children born are children of mentally deficient parents. Comment, *The Individual and the Involuntary Sterilization Laws*, 31 ALBANY L. REV. 97, 107 (1967). Partly for this reason, the number of involuntary sterilization operations performed per year in the United States has steadily declined in the past fifteen years. See O'Hara & Sanks, *supra* note 14.

23. TEX. REV. CIV. STAT. ANN. art. 3174b-2 (1968).