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HEALTH

Mentally Incompetent Persons: Sterilization

CODE SECTION:	O.C.G.A. § 31-10-3 (new)
BILL NUMBER:	SB 110
ACT NUMBER:	661
SUMMARY:	The Act changes the standard of proof for orders regarding sterilization of mentally incompetent persons from a preponderance of evidence to clear and convincing evidence. It provides for closed hearings and trials in connection with sterilization orders, the addition of a psychiatrist or psychologist on the examining team to determine whether a person is mentally incompetent, the requirement that the examining team consider the feasibility of alternate methods of birth control rather than sterilization and a deletion of governmental agencies from those authorized to file mental incompetency petitions.

History

On September 7, 1983, the Georgia Supreme Court handed down a decision in *Motes v. Hall County Department of Family and Children Services*[1] which invalidated the Georgia law regulating the procedures for sterilization of mentally incompetent persons. In *Motes*, the court held that "due process requires 'clear and convincing evidence' to authorize the sterilization of an individual."[2] The court found that "[t]he standard of a 'legal preponderance' set by O.C.G.A. § 31-20-3(c)(4) . . . does not meet constitutional requirements."[3] The court referred to *Skinner v. Oklahoma*[4] which held that procreation is a fundamental right and that the Oklahoma Habitual Criminal Sterilization Act was unconstitutional on equal protection grounds. In *Motes*, the Georgia Supreme Court

1. 251 Ga. 373, 306 S.E.2d 260 (1983). *See also* Note, *Involuntary Sterilization in Georgia: The Aftermath of Motes v. Hall County Department of Family and Children Services*, 1 GA. ST. U. L. REV. 75 (1984).
2. *Id.* at 374, 306 S.E.2d 260, 262.
3. *Id.*
4. 316 U.S. 535 (1942).

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shared the *Skinner* court's concern that "in sterilization proceedings the government seeks, not only to suspend a fundamental liberty interest, but to terminate it,"[5] and that this fundamental right was not adequately protected under the statute.

Once the statute was declared unconstitutional under *Motes*, the Georgia Legislature introduced several bills which simply changed the burden of proof required to authorize the sterilization of a mentally incompetent person from a "legal preponderance" to "clear and convincing" evidence. However, SB 110 incorporated additional changes in its reenactment of the statute. The Act was introduced not only in response to the *Motes* decision, but also to provide greater protection for the rights of the mentally incompetent. Recognizing the right to privacy, Georgia Legal Services requested that closed hearings and trials be provided, unless there was an overriding need for public hearings and trials. O.C.G.A. § 31-20-3(c)(4) adds such a provision.

SB 110

O.C.G.A. § 31-20-3 as amended, provides more safeguards for mentally incompetent persons than the former standard. It changes the provision establishing an examining team to include a psychologist or psychiatrist as well as a physician.[6] Georgia Legal Services wanted the examining team's report of investigation to be able to withstand legal challenge. The Act requires that the examining physicians include in their report the reasons and facts that led them to decide that a person was irreversibly mentally incompetent.[7]

Another area of concern raised by the plantiff in *Motes* was alternative methods of contraception. Under O.C.G.A. § 31-20-3(c)(2), the examining team is required to include in its report the feasibility of less permanent methods of preventing conception for the mentally incompetent. The report must be furnished to the applicant, his or her parents or guardian ad litem, and the applicant's attorney no later than five days prior to the probate court hearings under O.C.G.A. § 31-20-3(c)(3). Each member of the examining team is subject to cross-examination at the proceedings.

O.C.G.A. § 31-20-3(c)(1) reduces the number of persons who may file mental incompetency petitions, leaving only the parents, legal guardian, or next of kin as the persons legally authorized to file such petitions.

5. 251 Ga. 373, 374, 306 S.E.2d 260, 262 (1983).
6. O.C.G.A. § 31-20-3(c)(2) (Supp. 1985).
7. *Id.*

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