

ACT 81

S.B. NO. 2277-86

A Bill for an Act Relating to the Protection of Adult Wards.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that there is a need to protect incapacitated persons from past and current abuses of sterilization procedures. The legislature also finds that adult persons who are wards have an equal right to choose to be sterilized when informed assent is possible or, if informed assent is not possible, when sterilization is in the best interests of the ward, without consideration of how such sterilization would benefit others. Each ward under consideration, to the extent of the person's ability to comprehend, must be afforded the opportunity to discuss and agree or disagree to the sterilization procedure. However, adult persons who are wards have an equal right to be

protected against sterilization when it is done against the ward's will or when the procedure serves merely the interests of others. It is the intent of the legislature that because of the significance of this procedure, in no event shall wards be sterilized unless alternative contraceptive measures shall have been duly considered and deemed impractical or inappropriate. Therefore, it is the purpose of this Act to establish the procedures for sterilization of adult wards.

SECTION 2. Chapter 560, Hawaii Revised Statutes, is amended by adding a new part to article V to be appropriately designated and to read as follows:

**“PART . INCAPACITATED PERSONS
STERILIZATION RIGHTS**

§560:5- Definitions. As used in this part:

“Adult” means an individual who has attained the age of eighteen years.

“Court” means any duly constituted court.

“Incapacitated person” means a person as defined in section 560:5-101(2).

“Informed assent” means a process by which a ward who lacks the legal capacity to consent to sterilization is given a fair opportunity to acknowledge the nature, risks, and consequences of the procedure and, insofar as the ward is able to, indicates willingness and choice to undergo sterilization.

“Interested person” means an interested, responsible adult, including but not limited to a public official, the legal guardian, spouse, parent, legal counsel, adult child, or next of kin of a person allegedly mentally ill, mentally deficient, or as otherwise provided in this chapter.

“Judge” means any judge of the family court or per diem judge appointed by the chief justice as provided in section 604-1.¹

“Licensed physician” means any person who is licensed to practice medicine in Hawaii under chapter 453 or 460.

“Records” include, but is not limited to, all written clinical information, observations and reports, or fiscal documents relating to a ward who has undergone or is about to undergo sterilization and which is related to the sterilization.

“Sterilization” means any medical or surgical operation or procedure which can be expected to result in a patient's permanent inability to reproduce.

“Ward” means an incapacitated person for whom the family court has appointed, pursuant to sections 560:5-303 and 560:5-304, a guardian of the person of the incapacitated person and who, because of the terms of the family court's order of appointment of the guardian, lacks the legal power to consent to sterilization.

§560:5- Sterilization of wards. Persons who are wards and who have attained the age of eighteen years have the legal right to be sterilized when at least thirty days, but not more than one hundred eighty days, have passed following the entry of an order providing for sterilization. In no event, however, shall wards be sterilized without court approval in accordance with this part unless sterilization occurs as part of emergency medical treatment.

§560:5- Initiation of proceeding. The ward or any interested person may file a petition with the family court, in the circuit in which the ward resides, alleging that the ward meets the requirements for sterilization.

§560:5- Appointment of guardian ad litem. The court, upon receipt of the petition, shall appoint a guardian ad litem to represent the ward.

§560:5- Notice. The court shall order that the petition be served personally upon the ward, the guardian, and the guardian ad litem for the ward, and such other persons as the court may designate.

§560:5- Referral to reproductive rights committee. The court shall refer the petition to the reproductive rights committee for review and recommendation.

§560:5- Hearing. (a) The court shall set a hearing on the petition upon receipt of the recommendations of the reproductive rights committee and shall order that notice of the time and place of hearing be provided to the ward, the guardian, and the guardian ad litem for the ward and such other persons as the court may designate.

(b) The ward is entitled to be present at the hearing, and to see and hear all evidence bearing on the petition. The ward is entitled to be represented by an attorney, in addition to the court-appointed guardian ad litem, to present evidence, to cross examine witnesses including any person submitting a report, and members of the reproductive rights committee. The ward may be absent from the hearing if the ward is unwilling or is unable to participate.

§560:5- Criteria. (a) The ward may be sterilized if the court finds by clear and convincing evidence that the ward is functionally capable of giving and withholding informed assent to the proposed sterilization and has given informed assent to the proposed sterilization, or that the ward is functionally incapable of giving or withholding informed assent but sterilization is in the best interests of the ward.

(b) The ward assents to sterilization if the ward manifests an uncoerced willingness to undergo sterilization after being fully informed of the nature, risks, consequences, and alternatives to the procedure. A ward who lacks the capacity to understand the nature, risks, consequences, and alternatives to the procedure, or who lacks the capacity to manifest an uncoerced willingness or unwillingness to sterilization cannot assent to the procedure. To determine whether the ward is capable of giving informed assent, the court shall consider whether the ward understands and appreciates:

- (1) The causal relationship between sexual intercourse and pregnancy or parenthood;
- (2) The causal relationship between sterilization and the impossibility of pregnancy or parenthood;
- (3) The nature of the sterilization operation including the pain, discomfort, and risks of the procedure;
- (4) The probable permanency and irreversibility of the sterilization procedure;
- (5) All medically approved alternatives to sterilization;
- (6) The consequences of initiating pregnancy or becoming pregnant, mothering or fathering a child, and becoming a parent; and
- (7) The power to change one's mind about being sterilized at any time before the procedure is performed.

To assure the adequacy of the ward's informed assent, evidence shall be presented showing that the ward received appropriate counseling from the physician who will perform the sterilization and at least one other qualified independent counselor such as a social worker with a master's degree, a clinical nurse specialist, or a licensed psychologist or psychiatrist. The counseling shall cover the benefits or advantages to sterilization and conversely the losses and disadvantages of sterilization including the feelings, values, and life-style changes attendant with sterilization.

Persons who attest in court as to the soundness of informed assent shall comment on and assess the ward's understanding of each issue and shall comment on and assess the degree to which the prospective patient expresses an uncoerced willingness to accept each risk and consequence. Any reservations or resistance expressed or otherwise evidenced by the prospective patient shall be disclosed to the court.

(c) The ward may be sterilized if the court finds by clear and convincing evidence that:

- (1) The ward is functionally incapable of giving or withholding informed assent and that the incapacity is not likely to change in the foreseeable future; and
- (2) Sterilization is in the best interest of the ward.

(d) To determine whether sterilization is in the best interest of the ward the court shall consider:

- (1) Whether the ward is likely to be fertile. Fertility may be presumed if the medical evidence indicates normal development of the sexual organs, and the evidence does not otherwise raise doubts about fertility;
- (2) Whether the ward will suffer severe physical or psychological harm if the ward were to parent a child and, conversely, whether the ward will suffer severe physical or psychological harm from the sterilization;
- (3) The likelihood that the ward will engage in sexual intercourse;
- (4) The feasibility and medical advisability of less restrictive alternatives to sterilization both at the present time and under foreseeable future circumstances;
- (5) Whether scientific or medical advances may occur within the foreseeable future which will make possible the improvement of the ward's condition or result in less drastic contraceptive measures; and
- (6) Whether the petitioners are seeking sterilization in good faith, their primary concern being for the best interest of the ward rather than their own or the public's convenience.

§560:5- Appeals. Upon entry of the decree the court shall stay the effect of a decision allowing sterilization until the expiration of time within which to file an appeal pursuant to the Hawaii Rules of Civil Procedure.

§560:5- Reproductive rights committee. (a) To carry out the purposes of this part, the reproductive rights committee is created. The committee shall consist of not less than five nor more than seven persons appointed by the governor. The state planning council for developmental disabilities shall provide the governor with a list of nominees. The governor shall not be limited to the nominees provided in appointing the members of the committee. The committee shall include persons from at least the following disciplines:

- (1) Law;
- (2) Medicine;
- (3) Theological or philosophical ethics;
- (4) Social work; and
- (5) Psychology.

(b) The committee shall review and make recommendations to the court on all petitions for sterilization. In making its recommendation to the court the committee shall investigate and determine whether the ward is capable of giving informed assent and, if not, whether sterilization is in the best interests of the

ward. The committee shall consider the criteria set forth in sections 560:5- 560:5- , in determining whether the ward is capable of providing informed assent or whether sterilization is in the best interest of the ward.

(c) The committee or designated members of the committee may interview or request written statements from the ward, physicians, relatives, concerned individuals, and others who, in their judgment, possess relevant information concerning the petition for sterilization. Conversely, the ward, the guardian ad litem, the petitioner, or any other person may request to speak to the committee or submit a written statement to the committee concerning the proposed sterilization.

(d) The committee shall submit a report in writing to the court containing its recommendation together with supporting documentation. Committee members who do not concur with the majority recommendation shall also submit a report in writing to the court detailing the basis for their dissent.

§560:5- Confidentiality of and access to records. (a) All wards affected by this part shall be informed of their right to and be entitled to copies of all portions of any records relating to the sterilization or proposed sterilization.

(b) All records relating to sterilization or proposed sterilization of the ward shall be confidential and shall not be released to third parties except in the following circumstances:

- (1) When the ward or guardian of the ward has signed a written release for the specific information; or
- (2) When the ward or guardian designates a third party as either a payer or copayer for the sterilization and consents to release information which is necessary to establish reimbursement eligibility.

(c) A charge, not to exceed the actual cost of duplication, may be assessed for copies of any records that need to be reproduced.

(d) When records are released to a third party, it shall be unlawful for the party to disclose any part of the record that contains personally identifiable information without the written consent of the person who is the subject of the record. The release of the record to the third party shall be accompanied by the following statement: "This information has been disclosed to you from records whose confidentiality is protected by the state law which limits disclosure of personally identifiable information to additional parties without the express written consent of the subject of the record".

(e) Violations of this section shall be subject to action under section 571-81.

§560:5- No liability arising from sterilization; exception. No physician, hospital, members of the reproductive rights committee, the State of Hawaii or its agents, nor any other person acting in accordance with this part shall be liable to anyone, either civilly or criminally, for having performed or authorized the performance of the individual sterilization, except for liability of the hospital or physician caused by the negligent performance of the sterilization, in accordance with laws covering such negligence."

SECTION 3. Section 560:5-304, Hawaii Revised Statutes, is amended to read as follows:

"§560:5-304 Finding; order of appointment. The family court may appoint any competent person, whose appointment would be in the best interest of the alleged incapacitated person, as a guardian of the person as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and

that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person[.], except that unless otherwise specified in the court order, guardians shall not have the power to consent to the sterilization of their wards. The order of appointment may limit or otherwise modify the power of the guardian of the person or may specify areas in which the ward shall retain the power to make and carry out decisions concerning his person. Alternatively, the family court may dismiss the proceeding or enter any other appropriate order.”

SECTION 4. The reproductive rights committee shall develop and implement appropriate procedures to carry out the intent of the Act.

SECTION 5. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

(Approved April 22, 1986.)

Note

1. Should read “604-2”.