

February 2021

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Recommended Citation

Julie Marcus, In re Romero: Sterilization and Competency, 68 Denv. U. L. Rev. 105 (1991).

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IN RE ROMERO:¹ STERILIZATION AND COMPETENCY

I. INTRODUCTION

What circumstances justify forcing a mentally disabled adult to be sterilized? The once acceptable practice of sterilizing retarded individuals is no longer presumptively acceptable. Mentally impaired people are entitled to the same protection of fundamental procreation rights as other individuals. Courts have required satisfaction of a high burden of proof before ordering sterilization. A multitude of tests have been developed to ensure protection of these protective rights.

The Colorado Supreme Court recently confronted forced sterilization of a mentally disabled adult in *In re Romero*, overturning the lower court order granting sterilization, and effectively preserving Romero's liberty interest. The means used by the court, however, were untraditional and incomplete as a guideline for future cases. The court's decision focused upon the competency of Romero in making her own decision regarding sterilization. First, the court defined a test for determining competency. Applying this test, the court found Romero competent to make her own decision; however, the court did not strictly follow their own definition when they applied the competency test.

Traditionally, appellate courts regard a competency test as the preliminary question before ordering sterilization. Appellate courts usually establish the test and remand to the trial court to determine facts according to the test. In contrast, the Colorado Supreme Court determined the competency test and applied the test without remanding, in essence serving as fact finder. Though the court found Romero competent, their opinion provided no guidance for the appropriate sterilization test in cases of mental incompetency.

This Comment provides the evolution of attitudes toward sterilization resulting in the Colorado Supreme Court's position today. An overview of different tests courts have used in determining sterilization provides a comparison to aid in understanding the Colorado Supreme Court's approach. This Comment focuses on the development and application of the competency test as part of a sterilization decision, as well as the implications of *Romero* to future forced sterilization cases.

II. BACKGROUND: UNDERSTANDING STERILIZATION

Sterilization of retarded or mentally defective individuals was widely accepted in the early twentieth century under the theory of eugenics.²

1. *In re Romero*, 790 P.2d 819 (Colo. 1990).

2. See *In re A. W.*, 637 P.2d 366, 368 (Colo. 1981). The Colorado Supreme Court defines eugenics as "the science of improving the qualities of the human race by the careful selection of parents." *Id.* at 368 n.2. "Positive eugenics would accomplish this by encouraging reproduction of those with favorable traits; negative eugenics, such as sterili-

Justice Holmes captured the general attitude toward eugenic sterilization of institutional patients when he proclaimed "three generations of imbeciles are enough" in *Buck v. Bell*.³ *Buck* stands as the high water mark for eugenic sterilization as an appropriate expression of governmental authority.⁴ After *Buck*, thirty states enacted statutes authorizing compulsory eugenic sterilization.⁵

Near the middle of the century, eugenics faced constitutional challenges because of the development of scientific evidence which discredited many premises of eugenic sterilization.⁶

Skinner v. Oklahoma established procreation as a fundamental constitutional right,⁷ marking the demise of court-enforced eugenic sterilizations. In *Skinner*, the Supreme Court overturned a statute providing for sterilization of thrice convicted felons for crimes involving moral turpitude because it invidiously discriminated against certain types of individuals in the exercise of a fundamental right.⁸ Although *Skinner* did not explicitly overrule *Buck v. Bell*, courts and commentators have often stated that *Buck* would not hold up under the strict tests applied to steril-

zation, would discourage or prohibit the reproduction of those with unfavorable traits.' " (*Id.* quoting Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DENVER L.J. 631 (1969)).

3. 274 U.S. 200, 207 (1927). *Buck* upheld a statute authorizing sterilization of institutionalized mental patients. The Court decided that Carrie Buck, mentally impaired and the daughter of a mentally deficient woman, was the probable "potential parent of socially inadequate offspring," and that preventing a third generation of imbeciles sufficiently outweighed due process and equal protection claims against the statute. *Id.* But see O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 31 (1956). A sociologist who reviewed the evidence used by the Court in *Buck* found both Carrie Buck and her mother to be morons, not imbeciles. Carrie's daughter was reportedly very bright.

4. *Eugenic Sterilization—A Scientific Analysis*, *supra* note 2, at 633.

5. *Romero*, 790 P.2d at 821 (citing Sherlock & Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. Rev. 943, 945 (1982)). Sterilization may either be voluntary or compulsory. Sterilization is compulsory when the state imposes sterilization despite the objections of the individual or of one who represents her interests. *In re Grady*, 85 N.J. 235, 426 A.2d 467, 473 (1981). *Romero* involves a non-consensual or compulsory sterilization. The court in *Romero* also notes that Colorado has never enacted a compulsory sterilization statute. *Romero*, 790 P.2d at 821 n.7 (citing *In re A.W.*, 637 P.2d at 368 n.3).

6. See Stefan, *Whose Egg Is It Anyway?: Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L.REV. 405, 415 (1989). The campaign to sterilize the mentally retarded slowed down partly because the eugenics movement, responsible for much of the sterilization activity, became discredited by association with Hitler. Hitler modeled his programs upon a law developed by an American eugenicist. *Id.* Three factors have stimulated the reform of sterilization law: (1) the discrediting of the eugenic theory; (2) the development of the constitutional doctrine of reproductive privacy; and (3) the changing conception of mental retardation. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, DUKE L.J. 806, 809 (1986).

7. 316 U.S. 535 (1942). The *Skinner* court stated:

We are dealing here with legislation which involves one of the basic civil rights of man. 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.

Id. at 541.

8. *Id.*

ization statutes today.⁹ The 1960's and 1970's marked a wave of challenges to eugenic sterilization statutes, resulting in the repeal of many.¹⁰

In contrast to the compulsory, eugenics-based statutes, consensual sterilization statutes permit sterilization under certain circumstances. Colorado, and many other states, currently have consensual sterilization statutes.¹¹ In addition to sterilizing by statutory authority, courts rely on their *parens patriae*¹² authority to consider sterilization orders.¹³

Sterilization laws must withstand constitutional challenge as an intrusion on an individual's fundamental right to procreate and to prevent procreation.¹⁴ The decision whether to beget or bear a child is at the very heart of constitutionally protected choices.¹⁵ Courts apply strict scrutiny to statutes that interfere with fundamental rights.¹⁶ A statute will survive strict scrutiny only if the state can show a compelling interest in enforcement of the statute and nonexistence of any less intrusive means to accomplish the same goal.¹⁷

9. See *In re A. W.*, 637 P.2d at 368; *In re Grady*, 426 A.2d at 472; *Eugenic Sterilization Statutes: A Constitutional Re-Evaluation*, 14 J. FAM. L. 280, 297 (1975); Ferster, *Eliminating the Unfit - Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 602-04 (1966); *Eugenic Sterilization - A Scientific Analysis*, *supra* note 2, at 633.

10. Stefan, *supra* note 6, at 417. Colorado enacted a statute limiting consensual sterilization and prohibiting forced sterilization. COLO. REV. STAT. sec. 27-10.5-128 (1989).

Sterilization — limitations:

1) Any person with developmental disabilities who is over eighteen years of age who has given consent may be sterilized, subject to the following . . .

(2) No person with developmental disabilities who has not given consent shall be sterilized. (emphasis added).

The Colorado Supreme Court circumvented this law. See *In re A.W.*, 637 P.2d at 373 (en banc)(Lohr, J., specially concurring). The court decided that the statutes regulating sterilization applied to adults and the statutory exclusion of minors did not prohibit the court from acting to sterilize a minor.

11. See COLO. REV. STAT. sec. 27-10.5-128 (1989).

12. *Parens patriae* power comes from the inherent equitable authority of the sovereign to protect persons within the state who cannot protect themselves because of a legal disability. *In re Terwilliger*, 304 Pa. Super. 553, 561, 450 A.2d 1376, 1381 (1982). For a general discussion, see 88 C.J.S. *Parens Patriae* at 159 (1978).

13. *In re Romero*, 790 P.2d at 821; *In re A. W.*, 637 P.2d at 374; *In re Grady*, 426 A.2d at 479-80; *In re Sallmaier*, 85 Misc. 2d 295, 297, 378 N.Y.S.2d 989, 991 (Sup. Ct. 1976); *In re Hayes*, 93 Wash. 2d 228, 608 P.2d 635, 637-39 (1980). *But Cf.* *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971) (judge not immune for granting sterilization order where this was outside his jurisdiction).

14. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (fundamental right to procreate). The right to prevent procreation was first confronted in *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the "penumbral" right of privacy in marriage was created, barring state intervention in decisions of contraception. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extended *Griswold's* logic to unmarried persons. See also *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977)(right to privacy of procreation extends to minors as well as adults); *Roe v. Wade*, 410 U.S. 113 (1973)(woman's qualified right to terminate pregnancy).

15. *Carey*, 431 U.S. at 685.

16. *Skinner*, 316 U.S. at 541.

17. See *Skinner*, 316 U.S. at 541. When fundamental rights or personal liberties are involved, constitutional standards require an overriding, compelling state interest and strict scrutiny of the legislation serving that interest. The legislation must be both necessary and the least intrusive measure in method or implementation. The Supreme Court has established procreative rights as fundamentally encompassed by a recognized zone of privacy protected by the Fourteenth Amendment. Note, *Sterilization of the Developmentally Disabled: Shedding Some Myth Conceptions*, 9 FLA. ST. U.L. REV. 599, 611-12 (1981).

Courts apply various tests to weigh the competing interests in sterilization cases. Their analysis generally includes a two-step process to determine whether sterilization is appropriate. First, the individual must be proven incompetent to make her own sterilization decision before the court will make this decision for her.¹⁸ Determining competency is a crucial step in the analysis. If the person is capable of making her own decision, the state's interests must yield to her autonomy. To prove someone incompetent to make a sterilization decision, courts require clear and convincing evidence of incompetency.¹⁹

Once incompetency is determined, courts then decide whether to grant the sterilization petition by examining the interests of the incompetent. Courts have generally applied three tests to determine whether to grant a sterilization petition: (1) substituted judgment,²⁰ (2) best interest,²¹ and (3) medically essential.²² Courts using the substituted judgment²³ test consider such factors as: (1) physical capability to procreate; (2) existence of less intrusive means of birth control (before ordering sterilization the court must find all other means unworkable and inquire if sterilization reversal might soon become available); (3) medical necessity for the procedure; (4) the nature and extent of the disability (considering spousal help and prognosis for treatment of the mental disability); (5) likelihood of sex resulting in pregnancy; and (6) risks of sterilization weighed against risks of pregnancy. The court may also take the ward's desires and religion into consideration before ordering sterilization.²⁴

The "best interest" test is similar to the substituted judgment test. The goal of the best interest test is to do what is in the best interest of

18. See *In re C.D.M.*, 627 P.2d 607 (Alaska 1981); *In re Romero*, 790 P.2d 819; *In re A.W.*, 637 P.2d 366; *In re Moe*, 385 Mass. 555, 432 N.E.2d 712 (1982); *In re Grady*, 85 N.J. 235, 426 A.2d 467.

19. See *In re Penny N.*, 120 N.H. 269, 414 A.2d 541, 543 (1980); *In re Grady*, 426 A.2d at 483; *In re Hayes*, 93 Wash. 2d 228, 608 P.2d 635, 640. Cf. *Addington v. Texas*, 441 U.S. 418 (1979) (clear and convincing standard of proof for institutional commitments). The court in *Romero* also adopted this standard. *In re Romero*, 790 P.2d at 822. Many non-consensual sterilization petitions involve minors whose competency to make sterilization determinations is not an issue. Minors are considered "protected persons" and require either parental consent for many things or a guardian if there is no parent. See Colo. Rev. Stat. 15-14-101(2) and 15-14-204 (1987). But see *In re C.D.M.*, 627 P.2d 607 (Alaska 1981) (where court used statute determining incapacitated person to presume incompetence to make own sterilization determination).

20. See *In re Moe*, 432 N.E.2d at 720-21.

21. *In re Debra B.*, 495 A.2d 781, 782-83 (Me. 1985).

22. *In re A. W.*, 637 P.2d at 375-76.

23. "Substituted judgment" means deciding for the person as if she were deciding for herself.

[W]e have to compare very carefully and very honestly the value of being spared the consequences of "wrong" decisions with the value of being left free to make one's own decisions. Do we not all make "wrong" decisions from time to time — even very costly and harmful ones? And yet, on balance, I don't think very many of us would be prepared to sacrifice our personal autonomy for the still somewhat uncertain security of having someone else, presumably brighter than us and presumably well-intentioned, make all our critical decisions for us.

Endicott, *Decision-Making Time on Guardianship*, 3 ENTOURAGE 17, (1988).

24. *In re Moe*, 432 N.E.2d at 723.

the retarded person.²⁵ This test adds a good faith requirement and requires a clear and convincing burden of proof.²⁶

The "medically essential" test requires a determination by medical expert witnesses that sterilization is clearly necessary, to preserve the life or health of the person to be sterilized.²⁷

III. INSTANT CASE: *IN RE ROMERO*

A. *Factual Background*

In *Romero* the Colorado Supreme Court reversed the trial court's order to sterilize Romero.²⁸ At the age of thirty-three, LaVista Romero suffered oxygen deprivation from complications associated with diabetes. Brain damage resulted.²⁹ Romero is the mother of two children, who were not in her custody.³⁰ Ms. Harvey, Romero's mother, had Romero declared an incapacitated person³¹ and had herself appointed guardian³² when Romero was thirty-seven years old.

In 1988, Harvey petitioned the district court to order Romero's sterilization.³³ A guardian *ad litem* was appointed for Romero.³⁴ After

25. *Id.* at 720.

26. *In re Grady*, 85 N.J. 235, 426 A.2d 467, 486 (1981).

27. *In re A. W.* 637 P.2d 366, 375 (Colo. 1981).

28. *In re Romero*, 790 P.2d 819, 820 (Colo. 1990).

29. *Id.*

30. *In re Romero*, No. 89SA248, slip op. at 1-2 (D. Colo. Sept. 9, 1988).

31. *In re Romero*, 790 P.2d at 820 n.1. An incapacitated person is defined as: Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

COLO. REV. STAT. § 15-14-101(1) (1987).

32. *In re Romero*, 790 P.2d at 820. See COLO. REV. STAT. §§ 15-14-301 to 314 (1987) (provisions for appointment of guardians for incapacitated persons).

33. The statute mandates the proceedings that must be followed in a sterilization consideration. The statute requires a petition be filed with the court. The petition must set forth the logistics of the hearing. Furthermore, the person with the disability must be present at the hearing and if the person is indigent, counsel must be appointed to the person for whom sterilization is being considered. COLO. REV. STAT. § 27-10.5-129 (1989).

34. Brief for Appellant at 2-3, *In re Romero*, 790 P.2d 819 (Colo. 1990), *rev'd* 790 P.2d 819 (Colo. 1990) (Appellant argued that Colo. Rev. Stat. §§ 27-10.5-129(3), (4) requires counsel be appointed for the developmentally disabled person whose sterilization is in dispute. The trial court, however, did not appoint counsel, and instead appointed a guardian *ad litem*, as in *In re A. W.*, 637 P.2d 366 (Colo. 1981). Appellants argued that a guardian *ad litem* paternalistically acts only in the best interest of a person, which may mean ignoring the person's desires. Counsel, however, acts on behalf of the person's desires, not paternalistically.). See COLO. REV. STAT. § 15-14-314 (1987) (guardian *ad litem* is appointed to:

(1) A special fiduciary appointed by the court to represent and protect in the proceedings, the interest of the minor. . . .

(2) A guardian *ad litem* shall diligently take such steps as he deems necessary under the circumstances to represent and protect the interests of the person for whom he was appointed. . . .

(3) The guardian *ad litem*, may, but need not be, an attorney. . . .

In re Grady stated that a guardian *ad litem* should represent "zealously the interests of his ward" in appropriate ways. *In re Grady*, 85 N. J. 235, 426 A.2d 467. The *Grady* standard indicates that a guardian *ad litem* acts paternalistically. The court in *Romero* was not bound by the requirements of Colo. Rev. Stat. § 15-14-314 (1987) because Romero's develop-

hearing the testimony of Harvey, Romero, three doctors, and a social worker on the staff of the nursing home where Romero resided, the trial court ordered Romero sterilized.³⁵ The three expert witnesses agreed that sterilization was medically necessary.³⁶ The trial court found that Romero lacked the mental capacity to consent knowingly to sterilization and the ability to judge matters requiring forethought.³⁷ The court also found Romero's competency to make decisions unlikely to improve in the future.³⁸ Though Romero was capable of reproduction, the trial court found that alternative forms of birth control were not available.³⁹

On appeal, Romero challenged the constitutionality of the Colorado statute⁴⁰ regarding sterilization and argued that less intrusive forms of birth control were available.⁴¹ The Colorado Supreme Court, however, reversed the decision without addressing the statute's constitutionality and without determining the availability of less intrusive alternatives. The court reversed the sterilization order on the threshold issue of competency. Reviewing the trial court record, the court held that Romero was not proven incompetent by "clear and convincing" evidence.⁴² Consequently, the court never reached other issues.

B. *Majority Opinion*

The *Romero* majority determined that Colorado had no statute that applied to Romero's situation. Because she was brain damaged after the age of twenty-two, Romero did not fit under the definition of "developmentally disabled."⁴³ The court relied on its *parens patriae* authority for

mental disability occurred at age 33, and the statute applies to persons whose disability manifested before age 22. The court, however, should have considered the purpose served by counsel and appointed counsel though not statutorily required. Doing so would have best protected the desires, as well as the interests, of Romero.

35. *In re Romero*, No. 89SA248, slip op. at 2 (At the guardian's request, the trial court ordered Romero sterilized by tubal ligation). Tubal ligation entails tying the fallopian tubes. *In re Romero*, 790 P.2d at 820 n.2 (citing *The Sloane-Dorland Annotated Medical-Legal Dictionary* 416 (1987)).

36. *In re Romero*, No. 89SA248, slip op. at 2.

37. *Id.* at 4.

38. *Id.*

39. *Id.* Birth control alternatives were not practical because Romero was too unreliable to use them, and they risked being improperly implemented. A vasectomy of her partner was not appropriate, and constant supervision was not a solution because Romero's right to privacy, more fundamental than her right of procreation, would be violated.

40. COLO. REV. STAT. §§ 27-10.5-128, 130 (1989).

41. *In re Romero*, 790 P.2d at 824 n.15.

42. *Id.* at 824.

43. See COLO. REV. STAT. §§ 27-10.5-128 to 130 (1989), which provide for sterilization of developmentally disabled persons. COLO. REV. STAT. § 27-10.5-102(10)(a) (1989). (10)(a) "Developmental disability" means a disability that is manifested before the person reaches twenty-two years of age; constitutes a substantial handicap to the affected individual; and is attributable to mental retardation or related conditions which include cerebral palsy, epilepsy, autism or other neurological conditions when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of mentally retarded persons.

The Court rejected appellant's argument that the statute controlled this case. Appellants argued that COLO. REV. STAT. § 27-10.5-130(2) provides that a person proven incompetent to consent should not be ordered sterilized. Brief for Appellant at 3, *In re Romero*, 790 P.2d 819. See COLO. REV. STAT. § 27-10.5-130(2) (1989). "If the court deter-

jurisdiction,⁴⁴ and noted that Colorado has never enacted a compulsory sterilization statute.⁴⁵

In its opinion, the court explained the development of fundamental procreative rights, recognized the seriousness of sterilization, and set forth criteria for a decision to sterilize. The threshold question was whether the person was competent to make a sterilization determination for herself.⁴⁶ The court required proof by clear and convincing evidence before the individual would be deemed incompetent to make this decision.⁴⁷ Additionally, competency must be unlikely to improve in the future.⁴⁸ The court pointed out that retardation in itself does not necessitate a conclusion of incompetency.⁴⁹ Instead, a person should understand what sterilization is as well as the responsibilities of parenthood.⁵⁰

The court set forth a test for competency that must be satisfied before an individual may consent to sterilization. The individual must understand (1) the nature of the district court proceeding; (2) the link between sexual activity and reproduction; and (3) the consequences of sterilization.⁵¹ In addition, the court rejected the notion that the lack of

mines that a person is incompetent to give consent to sterilization . . . or such consent has not been given, the court shall order that no sterilization . . . be performed." COLO. REV. STAT. § 27-10.5-130 *et seq.*, revised in 1985, changed the language from "mentally retarded" to "developmentally disabled." Appellants argued that the change was unintentional and made for no apparent reason other than to include persons not residing in a facility.

"What changes were made to the rights and sterilization sections?"

Current statutes pertain only to residents of facilities . . . We have expanded the definition of resident and facility to be all inclusive, and conformed the language to assure that the rights and sterilization sections are applicable to all persons served under Title 27, Article 10.5.

Developmental Disabilities Act of 1985 *Questions and Answers* sec. 12 at 6.

Appellants argued that the statute clearly forbade involuntary sterilization in 1975 and an unintended change should not affect the original legislative intent. Brief for Appellant at 4, *In re Romero*, 790 P.2d 819. The trial court addressed this issue, stating that the 1975 statute applied in the case *In re A. W.*, but neither the majority nor concurring opinions recognized that the statute defeated the "trial court's jurisdiction to consider sterilization with respect to persons deemed to be outside the purview of the statutory scheme itself." *In re Romero*, No. 89SA248, slip op. at 5.

44. *In re Romero*, 790 P.2d at 821. See *In re A. W.*, 637 P.2d at 374-75 (involving a minor wherein the court used its *parens patriae* authority because no statute applied). The *parens patriae* authority has been used by several courts in sterilization cases. *In re Moe*, 385 Mass. 555, 432 N.E.2d 712; *In re Grady*, 85 N.J. 235, 426 A.2d 467; *In re Hayes*, 93 Wash. 2d 228, 608 P.2d 635 (1980).

45. *In re Romero*, 790 P.2d at 821 n.7 (citing *In re A. W.*, 637 P.2d at 368 n.3).

46. *In re Romero*, 790 P.2d at 822. See also *In re A. W.*, 637 P.2d at 375; *In re Moe*, 432 N.E.2d at 721; *In re Grady*, 426 A.2d at 482; *In re Hayes*, 608 P.2d at 641.

47. *In re Romero*, 790 P.2d at 822.

48. *Id.* See also *In re A. W.*, 637 P.2d at 375; *Wentzel v. Montgomery Gen. Hosp., Inc.*, 293 Md. 685, , 447 A.2d 1244, 1253 (1982), *cert. denied*, 459 U.S. 1147 (1983); *In re Grady*, 426 A.2d at 483; *In re Terwilliger*, 304 Pa. Super. 553, 565, 450 A.2d 1376, 1383 (1982); *In re Hayes*, 608 P.2d at 641.

49. *Romero*, 790 P.2d at 822-23.

50. *Id.* at 822 n.11 (referring to *Murdock, Sterilization of the Retarded: A Problem or Solution?*, 62 Calif. L. Rev. 917, 933-34 (1974) (Most mentally retarded are competent to appreciate the responsibilities and the implications of parenthood.) See also *In re Grady*, 85 N.J. at , 426 A.2d at 482-83.

51. *In re Romero*, 790 P.2d at 823; See also *In re Moe*, 385 Mass 555, , 432 N.E.2d 712, 721-22 n.8; *In re Grady*, 405 A.2d 851, 865 (N.J. Super. 1979), *aff'd*, 426 A.2d 467 (N.J.1981). Compare *In re C.D.M.*, 627 P.2d 607 (Alaska 1981) (holding individual incom-

a technical understanding of bodily functions and a complete understanding of the risks of both pregnancy and sterilization was not determinative of incompetency.⁵² The Court also refused a paternalistic approach to sterilization. Instead, it chose to extend to the mentally deficient the same rights enjoyed by competent persons. If a person otherwise incompetent has the understanding required by the competency test, the court must accept her sterilization decision, no matter how unreasonable.⁵³

Commenting on the evidence, the court explained that Romero's I.Q. indicated mild brain damage at worst.⁵⁴ Romero's testimony was articulate and demonstrated that she understood the nature of the district court's proceedings. She understood further the relationship between pregnancy and sexual conduct and the consequences of sterilization.⁵⁵ Only one expert testified about Romero's competency, and the expert deemed Romero incompetent to consent to sterilization because of her inability to look at things "in terms of future consequences."⁵⁶ This testimony, however, was insufficient to meet the burden of clear and convincing evidence.

The Colorado Supreme Court criticized the district court for focusing on reasonableness rather than competency.⁵⁷ The court also decided that Romero understood the risks of pregnancy.⁵⁸ The court, however, did not include an understanding of the risk of pregnancy as part of its competency test because it refused to judge the wisdom of Romero's decision.⁵⁹ Finding that the threshold issue of competency was not met by clear and convincing evidence,⁶⁰ the court did not reach issues regarding the constitutionality of the Colorado statutes, or the availability of less-intrusive contraceptive alternatives.⁶¹

C. Dissent

The dissent argued that the decision in *In re A.W.*⁶² should control. In *A.W.*, the court directed the district judge to interview the individual and to consider her desires. The individual's desires, although relevant,

petent according to statute determining incapacity; whereas Colorado court distinguishes incapacity from incompetency, without presuming incompetency from incapacity).

52. *In re Romero*, 790 P.2d at 823. See also *In re Moe*, 385 Mass at — n.8, 432 N.E.2d at 721-22 n.8.

53. *In re Romero*, 790 P.2d 819, 823; See also Scott, *supra* note 6, at 840.

54. *In re Romero*, 790 P.2d at 823. Mild brain damage was described as "educable; can live independently or in group homes." *Id.* at 823 n.13 (although the classifications were based on impairments manifested prior to age eighteen, the *Romero* court relied on the classifications) (citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 32-33 rev.3d.ed. (1987)).

55. *In re Romero*, 790 P.2d at 823-24.

56. *Id.* at 824.

57. *Id.*

58. She stated she would like to have a child, "when and if her diabetes was cured."

Id.

59. *In re Romero*, 790 P.2d at 824.

60. *Id.*

61. *Id.* at 824 n.15.

62. 637 P.2d 366 (Colo. 1981).

would not be conclusive.⁶³ The preliminary test is that the person must be proven incapable of making her own decision, by clear and convincing evidence, and her competency should be unlikely to improve in the future. She must also be proven capable of reproduction.⁶⁴ Before ordering sterilization, the court must find by clear and convincing evidence that sterilization is medically necessary.⁶⁵

The dissent disagreed with majority's competency test. Although the court addressed Romero's understanding of the risks of pregnancy and childbirth as part of its test, the majority rejected these as part of the competency test.⁶⁶ The dissent, on the other hand, strongly argued that to prove competency the individual must understand the risks of childbirth and pregnancy.⁶⁷ The dissent then concluded that Romero was unable to understand the risks of pregnancy.⁶⁸ Romero's view of her disease and its implications, the dissent concluded, appeared illusory, and her hopes of an improved condition wishful and unrealistic.⁶⁹ The dissent also emphasized Romero's understanding of the risks in the future, as opposed to her understanding in the courtroom, because during the trial she was being reminded of the implications.⁷⁰

The dissent also argued that this presented a case of first impression and the majority had developed a test which was not available to the trial court.⁷¹ They criticized the majority for not remanding.⁷²

IV. ANALYSIS

In *Romero*, the Colorado Supreme Court preserves a competent adult's right to decide her own procreative destiny. Disagreeing with the trial court's conclusion, the court explicitly provides the test to determine a person's competency to decide whether to be sterilized. The court then goes on to apply this test based on the trial court's findings of fact. This approach differs from the traditional remand that other courts

63. *In re Romero*, 790 P.2d at 825 (Mullarkey, J., dissenting).

64. *Id.*

65. *Id.* See also *In re A. W.*, 637 P.2d 366, 375 (Colo. 1981).

66. The majority concluded that Romero understood the risks of pregnancy and childbirth. *In re Romero*, 790 P.2d at 825 (Mullarkey, J., dissenting).

67. *Id.* at 826.

68. Q. Do you understand if you got pregnant that it might be risky for your health?

A. No.

Q. Because you've got diabetes it might make it unsafe for you to be pregnant?

A. It didn't hurt me the first time. I mean the second time is what I should say.

Q. Even if there was a risk would you want to get pregnant and have another baby? A. Not at the nursing home, no.

Q. What about if you are out of the nursing home? What if you were married to Dean?

A. Yes, I would want a baby then.

Q. Even though it would be risky for you?

A. Yes. I'll take that chance.

Id. at 825-26.

69. *In re Romero*, 790 P.2d at 826 (Mullarkey, J., dissenting).

70. *Id.*

71. *Id.*

72. *In re Romero*, 790 P.2d at 826-27 (Mullarkey, J., dissenting).

have commonly used.⁷³ Also, the court does not provide a complete test to be used to determine whether to order sterilization. The court spoke only to competency and provided no guidance on which test should be utilized to evaluate the interests of the incompetent.

In many sterilization cases, competency is not an issue because it is either undisputed or involves a minor. Where incompetency is presumed, courts focus on which test to apply to determine whether the incompetent person should be sterilized. *Romero* differs because it concentrates only on the threshold test of competency.

Sterilization affects a fundamental right, whether it is the right to procreate or the right to prevent procreation.⁷⁴ Incompetents enjoy the same constitutional protections as all other people, and their rights should be carefully guarded. The courts, therefore, must take all steps to prevent abuses of these rights.⁷⁵ The Colorado Supreme Court does so by delaying consideration of the sterilization issue until after incompetency is proven by clear and convincing evidence.⁷⁶ A more lenient standard would indicate the procreative rights at stake are less than fundamental, contradicting *Skinner* and its progeny⁷⁷ and compromising these rights more often. The higher burden of proof is necessary to prevent the court from acting where the person is competent to act for themselves.

The competency criteria used in *Romero* differ from those used in *In re A. W.*, on which the district court relied, because *A. W.* involved the sterilization of a minor. These criteria do not include an understanding of the risks of pregnancy.⁷⁸ The dissent strongly argued, however, that the risk requirement was essential to the competency determination. Should people be able to decide their own procreative destiny if they are not even able to understand how pregnancy is likely to affect them?

Whether an understanding of pregnancy risks should be an element

73. See *In re A.W.*, 637 P.2d 336, 376; *In re Truesdell*, 304 S.E.2d 793, 813 (N.C. App. 1983); *In re Grady*, 426 A.2d 467, 486; *In re Terwilliger*, 450 A.2d 1376, 1383 (Pa. Super. 1982).

74. *In re Romero*, 790 P.2d at 821-22.

75. See, e.g., *Stump v. Sparkman*, 435 U.S. 349 (1978) (court ordered, *ex parte* and without notice and hearing, sterilization of somewhat retarded woman, who was told she was having her appendix removed and who discovered her sterility two years later when she married and tried to conceive).

76. The trial court relied extensively on *In re A. W.* *In re Romero*, No. 89SA248, slip op. (D. Colo. Sept. 9, 1988). See Legal Center Amicus Curiae Brief for Appellant at 7, *In re Romero*, 790 P.2d 819. *In re A. W.* involved a minor, presumed incompetent to make decisions. *Romero*, however, involved an adult with a disability. Since a presumption of incompetence would be clearly erroneous, *Romero* is consistent with other decisions.

77. Appellees argued in their brief that the court should not go beyond the standards adopted in *In re A. W.* by applying the clear and convincing test of *Grady*, though *A. W.* involved a presumptively incompetent minor. Brief for Appellee at 8, *In re Romero*, 790 P.2d 819.

78. The court, which had to determine by clear and convincing evidence if the youth would ever be capable of making an informed decision, did not list any criteria for making this determination. *In re A. W.*, 637 P.2d 366, 375 (Colo. 1981). The court in *A. W.* acknowledged the difficulty of proving the minor's future competence. In contrast, adults make independent decisions for themselves; thus a test of present competency is crucial to proceedings which potentially strip adults of their decision-making power.

of the court's test depends on what role the court wishes to act. If the court wants to adjudge a person's decision-making wisdom, then the risk analysis should be included. On the other hand, if the court prefers objectivity, understanding of pregnancy risks should be excluded from the test.

The majority found that Romero's testimony indicated an understanding of pregnancy risks. Nevertheless, the court deemed her understanding not a necessary factor to their competency test. The risk factor requires forethought.⁷⁹ To require demonstration of ability to perceive things in the future would be a difficult standard to meet, and would require inquiry into the person's wisdom. The risk understanding and decision wisdom that follows from it would result in a narrower definition of competency, thus rendering less protection to fundamental procreative rights. Rejecting a risk understanding, and requiring merely that the person understand the proceedings, creates a broader definition of competency and offers greater protection to individual rights. In *Romero*, the court opted for the more limited inquiry, rejected a risk understanding, and protected fundamental rights by broadly defining competency in the sterilization context.

The Colorado Supreme Court further preserved procreative liberties by resorting to an activist form of appellate review, departing from the practices of other courts as well as from its own.⁸⁰ Appellate courts predominantly defer to trial courts for fact finding.⁸¹ Trial judges, present at hearings, gain first-hand impressions of the evidence and an opportunity to consider the relative credibility of facts.⁸² For example, where testimony of the parties is contradictory, the trial court is the best fact finder.⁸³ Particularly in cases involving mentally retarded individuals, appellate courts usually set the standards to be used and remand to the trial court to apply these standards.⁸⁴

Determining competency is difficult. Many courts have recommended or required that the judge personally interview the individual as a means of getting a sense of the person's demeanor.⁸⁵ The person's

79. *In re Romero*, No. 89SA248, slip op. at 4-5 (D. Colo. Sept 9, 1988), *rev'd*, 790 P.2d 819 (Colo. 1990).

80. See generally *In re A.W.*, 637 P.2d 366, 376; *In re Truesdell*, 304 S.E.2d 793, 813 (N.C. App. 1983); *In re Grady*, 426 A.2d 467, 486 (1981); *In re Terwilliger*, 450 A.2d 1376, 1383 (Pa. Super. 1982).

81. See *In re A. W.*, 637 P.2d at 376; *In re Truesdell*, 304 S.E.2d at 813; *In re Grady*, 85 N.J. at —, 426 A.2d at 486; *In re Terwilliger*, 450 A.2d at 1383.

82. "The sanctity of trial court findings is derived from the recognition that the trial judge's presence during the presentation of testimonial evidence provides an unparalleled opportunity to determine the credibility of the witnesses and the weight to be afforded the evidence which is before the court." *Page v. Clark*, 197 Colo. 306, 313, 592 P.2d 792, 796 (1979). See *Baumgartner v. Tweedy*, 143 Colo. 556, 354 P.2d 586 (1960).

83. *Page v. Clark*, 592 P.2d at 796. Contradictory testimony made it impossible to determine from the record whose testimony should be given credit. "In such cases, the difficult task of finding those facts is best left to the trial court." *Id.*

84. *In re A. W.*, 637 P.2d 366, 376 (Colo. 1981); *In re Truesdell*, 63 N.C. App. 258, 292, 304 S.E.2d 793, 813 (1983); *In re Grady*, 85 N.J. 235, 272-73, 426 A.2d 467, 486 (1981).

85. See, e.g., *In re A. W.*, 637 P.2d at 375; *Wentzel v. Montgomery Gen. Hosp., Inc.*,

desires are considered but not taken as conclusive. This is important because her desires are given some weight and she is given a chance to be heard.⁸⁶ The individual is often put on the witness stand in the trial court's sterilization proceeding.⁸⁷ An appellate court has access to the trial court's record, but they have no means of observing the demeanor of the individual whose liberty is at stake. An appellate court must rely on the trial court as the fact finder for these impressions.

In *Romero*, however, the appellate court usurped the trial court's fact-finding function. The appellate court's actions were unusual because appellate courts usually only make independent decisions on undisputed facts⁸⁸ and the facts in *Romero* are not undisputed.

When an appellate court becomes a fact-finder as well as a lawmaker, its burden increases immensely. In addition, the process of going through the trial court becomes merely an exercise. An appellate court that attempts to make factual determinations should grant the individuals involved the same rights as trial courts must. Due process is violated when a litigant does not have an opportunity to argue a case to a fact finder.⁸⁹ While appellate courts can make findings of law, to preserve the judicial process and the due process rights of litigants, they should leave the fact finding to the trial courts because trial courts have access to the people. To preserve fundamental rights so carefully by law, but to ignore them in application, makes the law meaningless.

Conversely, an appellate court's determination of factual issues would be judicially efficient where the facts are not in dispute. But in *Romero*, the facts of *Romero's* competency were disputed, yet the court concluded from the record that *Romero* was competent, without the critical first-hand perspective unique to the trial court. Also, the court created a test for competency, but did not allow the parties to challenge its specific requirements.

Had the court defined the competency test and remanded the case to the trial court to determine competency, *Romero* would stand as stronger precedent. The competency test would have been subjected to rigorous and fair challenge, and would emerge as better guidance for future cases. By circumventing the trial process, it remains unclear

293 Md. 685, 703, 447 A.2d 1244, 1253 (1982), cert. denied, 459 U.S. 1147 (1983); *In re Grady*, 85 N.J. at 265, 426 A.2d at 482; *In re Terwilliger*, 304 Pa. Super. 553, 565-66, 450 A.2d 1376, 1383 (1982).

86. See *In re A. W.*, 637 P.2d at 375; *In re Grady*, 85 N.J. at 265, 426 A.2d at 482; *In re Hayes*, 608 P.2d 635, 641 (1980).

87. The trial court put Ms. *Romero* on the stand. *In re Romero*, 790 P.2d 819, 823 (Colo. 1990).

88. An appellate court should refrain from retrying a case or reweighing conflicting evidence. The appellate court's concern should be whether reasonable inferences have been drawn in favor of the verdict on appeal and whether there is substantial competent evidence to support the verdict and judgment. "Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal." *Tibbs v. State*, 397 So.2d 1120, 1123 (Fla. 1981), aff'd, 457 U.S. 31 (1982).

89. The Colorado Supreme Court previously remanded a sterilization case after specifying which standards the trial court should use. *In re A. W.*, 637 P.2d 366, 376 (Colo. 1981). Yet in *Romero*, the court did not remand.

whether the test will survive future appeals. Though the court may have had concerns over judicial efficiency, efficiency should yield to fairness, particularly when fundamental rights are at stake.

Romero also provides little guidance on the issue of which sterilization test should be applied were *Romero* deemed incompetent. A Colorado case involving a sterilization petition for an incompetent adult will be a case of first impression because *Romero* is limited to determining competency. The court mentions the medically essential test used in *In re A. W.* and the best interest test without embracing or delineating criteria for either. The Colorado Supreme Court would probably adopt the medically essential test used in *In re A. W.*⁹⁰ Though the medically essential test was applied to a minor in *A. W.*, this fact would likely not distinguish *A. W.*'s test from application to persons incompetent for reasons other than status as a minor. The medically essential test is the more objective and less paternalistic of the three established sterilization tests. The substituted judgment and best interests tests would require consideration of reasonableness, an inquiry specifically criticized in *Romero*. Given that the court applied the least-paternalistic test to a minor in *A. W.*, and that a strong policy against paternalism pervades its opinion in *Romero*, the court would likely apply the medically essential test to an incompetent adult.

Reliance on *Romero* as precedent is further limited. The court circumvented addressing two important issues to sterilization: the constitutionality of the Colorado statute and the availability of less-intrusive alternatives. Both of these issues are central to forced sterilization, yet *Romero* offers no guidance. Less intrusive alternatives, as an amicus brief points out,⁹¹ are presently available, and more are expected to be technologically and practically feasible in the near future.

IV. CONCLUSION

In *Romero*, the Colorado Supreme Court assured the right to determine procreational destiny for legally-competent adults. *Romero* established a test for competency as the threshold inquiry in forced sterilization. A person need only understand sex, pregnancy, and the nature of the sterilization proceedings to be competent. A risk understanding is not required. An adult deemed competent under this test will not be forced to undergo sterilization. An adult deemed incompetent under this test will or may not be subjected to sterilization. The *Romero* court did not address the test that would be applied to determine whether to sterilize an incompetent adult. Though an open question, the medically essential test for sterilization likely would be applied.

Romero presents a further anomaly in that the court did not remand, but instead determined *Romero* competent, thus acting as fact-finder.

90. 637 P.2d at 376.

91. Amicus Curiae A.C.L.U. Brief for Appellant at 7-8, *In re Romero*, 790 P.2d 819 (Colo. 1990) (No. 89SA248).

Even more unusual, the facts in the trial record do not necessarily satisfy a finding of competency under the competency test that *Romero* itself established. The Colorado Supreme Court encroached on the trial court's fact-finding function and risked an imprecise application of its competency test in future sterilization cases. The fundamental procreative rights at issue in sterilization deserve the protection afforded by accurate and fair application of tests designed to prevent intrusion on those rights.

Future sterilization cases in Colorado have a plethora of tests with which to contend. These tests are designed to cautiously guard fundamental rights involving procreation. Future Colorado litigants have a clearer standard by which they can determine competency in sterilization cases, but they still face uncertainty in the final sterilization decision.

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