1978 S.C. Op. Atty. Gen. 37 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-24, 1978 WL 27413

Office of the Attorney General

State of South Carolina
Opinion No. 78-24
February 9, 1978

***1** A physician need not obtain the consent of the individual's spouse before performing a sterilization procedure upon an individual.

Medical Doctor

QUESTION:

In performing a sterilization procedure upon an individual, is it legally necessary for a physician to obtain the consent of that individual's spouse?

AUTHORITIES:

Hathaway v. Worchester City Hospital, 475 F.2d 701 (1st Cir.1971);

Herko v. Ulmiller, 203 Misc. 108, 114 N.Y.S.2d 618 (Sup.Ct.1952);

Kritzer v. Citron, 101 Cal.2d 33, 224 P.2d 808 (Cal.App.1950);

Murray v. Vandevander, 527 P.2d 302 (Okla.Ct.App.1974);

Planned Parenthood v. Danforth, 49 L.Ed.2d 788 (1976);

Roe v. Wade, 410 U.S. 113 (1973);

Rytkonen v. Lojacano, 269 Mich. 270, 257 N.W. 703 (1934);

Woods v. Brumlop, 71 N.M. 221, 377 P.2d 520 (1962);

4 A.L.R. 1531 (1919);

61 Am.Jur.2d, Physicians and Surgeons, Section 11, Section 152 (1972);

K. Lebeck, Voluntary Sterilization in New Mexico: Whom Must Consent, 7 N.M.L.Rev. 212 (1976);

K. Proctor, Consent to Operative Procedures, 22 Md.L.Rev. 190 (1962).

DISCUSSION:

The issue as to whether in performing a sterilization procedure upon an individual it is necessary for a physician to obtain the consent of that individual's spouse is a novel one in South Carolina for which there is no statutory or case

law on point; however, appellate courts in other jurisdictions as well as the United States Supreme Court have in recent years dealt with the issues parallel to the issue being discussed, thus providing legal guidelines as to what the law is in South Carolina.

It is apparent that the trend of the law calls for the conclusion that a physician is probably on sound legal ground in performing a sterilization procedure upon an individual without the consent of that individual's spouse; however, the fact that South Carolina has no statute relevant to the sterilization issue and that the United States Supreme Court has not specifically ruled on the issue of sterilization and spousal consent, dictates that the conclusion not be read as an absolute, for no binding precedent has been established in this jurisdiction.

The court in Woods v. Brumlop, 71 N.M. 221, 227, 377, P.2d 520, 524 (1962), concisely delineated an old legal concept when it stated: "An adult person, if he be of sound mind, is considered to have the right to determine for himself whether a recommended treatment or surgery shall be performed upon him ..." This statement of the law has been the underlying rationale in several cases. In Pritzer v. Citron, 101 Cal.2d 33, 224 P.2d 808 (Cal.App.1950), a husband's cause of action for assault and battery based upon a sterilization procedure performed on his wife without his consent was denied recovery, thus supporting the contention that a wife's consent alone is sufficient for her sterilization. On essentially the same facts, Michigan courts similarly held that the consent of the patient alone is sufficient in sterilization procedures, Rytkonen v. Lojacono, 269 Mich., 270, 257 N.W. 703 (1934). Further application of this doctrine can be found in a decision by a New York court which held that a wife's willing participation in an abortion would preclude her, and consequently her husband, from bringing an action seeking damages for deprivation of future offspring and loss of consortium, Herks v. Ulviller, 203 Misc. 108, 114 N.Y.S.2d 618 (Supp.Ct.1952). See generally 4 A.L.R. 1531 (1919); 71 Am.Jur.2d Physicians and Surgeons, Section 111, Section 152 (1972); K. Proctor, Consent to Operative Procedures, 22 Md.L.Rev. 190 (1962). In Murray v. Vandevander, 522 P.2d 302 (Okla.Ct.App.1974) the Court stated: "We find that the right of a person who is capable of competent consent to control his own body is paramount." Under common law the consent of a spouse when the person upon whom the procedure is to be performed voluntarily consents to the procedure would probably not be required.

***2** In an abortion decision, the Supreme Court found that the state's goal of mutual decision making on the family was not significant enough state interest to support a requirement of spousal consent, and that in all likelihood the state's goal would not be realized by giving the husband a veto power over his wife's decision to have an abortion. Planned Parenthood v. Danforth, 49 L.Ed.2d 788 (1976). This decision was a logical extension of the Court's decision in Roe v. Wade, 410 U.S. 113 (1973), which held that a woman's decision whether or not to terminate pregnancy was encompassed by the right to privacy, and thus could not be legislatively diminished without a compelling state interest. Clearly, "Mutual decision making" is not a compelling interest. The Court's rationale on the above abortion cases was extended by the First Circuit to sterilization procedures in Hathaway v. Worchester City Hospital, 475 F.2d 701 (1st Cir.1973), where it found no compelling state interests which would allow a ban on access to voluntary sterilizations. In addition, the Hathaway court noted that the issues involved in sterilization were nearly the same as those involved in abortion:

... [I]t seems clear, after Roe and Doe, that a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning another involving no greater risk or demand on staff or facilities. While Roe and Doe dealt with a woman's decision whether or not to terminate a particular pregnancy, a decision to terminate the possibility of any future pregnancies would seem to embrace all the factors deemed important by the court in Roe ...

The decision to terminate the possibility of future pregnancies clearly is as much an individual decision as the decision to terminate a pregnancy. Considering the similarity between abortion and sterilization as noted by the Hathaway court, the holding on Dunforth that a state is constitutionally forbidden to require the consent of the husband for his wife's abortion could easily be applied to the issue of spousal consent in sterilization procedures. If a spouse has no right to veto

a decision to terminate a pregnancy, it follows that a spouse should have no right to veto the prevention of a pregnancy, no matter what method is chosen to insure that prevention—including voluntary sterilization.

CONCLUSION:

There is no South Carolina statute or case law which requires that a physician obtain the consent of an individual's spouse before he performs a sterilization procedure upon that individual. The common law and recent United States Supreme Court decisions, while not being exactly on point, provide support for the proposition that it would be unconstitutional for a state to require spousal consent for sterilization procedures.

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