



DISABILITY RIGHTS OREGON

THIRD EDITION

Sterilization of Individuals:
A Handbook for Parents, Guardians & Advocates



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NOTICE: This Handbook contains general information about legal issues and legal rights; however, it is not a substitute for legal advice. For specific information about sterilization, contact Disability Rights Oregon or your attorney.

Purpose of this Handbook

The purpose of this Handbook is to provide general information about the rights and protections of individuals regarding sterilization under the law.

On December 2, 2002, the scene in the Governor's ceremonial office at the Capitol was both somber and hopeful. Gov. John Kitzhaber appeared before a large group of disability advocates, to apologize on behalf of the state to the more than 2,600 Oregonians who underwent forced sterilizations during the 60 years in which the practice was permitted.

Kitzhaber noted that between 1900 and 1925, Oregon was one of 33 states that enacted laws to provide forced sterilization. Most of those sterilized in Oregon were patients in state-run institutions, including people with mental and developmental disabilities, criminals and sexual minorities. Some were children. Oregon's eugenics policy called for the forced sterilization of those considered "unfit," in an effort to breed better humans. It ended in 1983 with the abolishment of the Board of Social Protection.

Despite the national publicity that accompanied this event, many citizens remain unaware that Oregon has a law governing involuntary sterilization. It was enacted in 1983 to assure that adults with disabilities are not unnecessarily sterilized. It also prohibits the sterilization of children younger than 15, and mandates that a parent, guardian or conservator may not give consent for sterilization of a minor child or protected person. The law allows a person who is 15 or older to consent to be sterilized. But if a person is not capable of giving "informed consent," sterilization cannot proceed until age 18, and then only in limited circumstances as determined by court order.

Throughout this Handbook, we use the term individual to refer to the individual whose sterilization is being considered.

This Handbook summarizes Oregon Revised Statutes (ORS) 436.205 to 436.335. It is not a substitute for legal advice. Federal and state law can change at any time. Contact Disability Rights Oregon or consult with an attorney in your community if you require further information.

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What is sterilization?

Sterilization is any medical procedure, treatment or operation that makes an individual permanently unable to produce children. (ORS 436.205 to 436.335).

Why does Oregon have a sterilization law?

Sterilization is a very serious matter. It requires a medical operation, usually cannot be reversed, and keeps an individual from ever producing children.

Legal safeguards were set up to prevent the unnecessary sterilization of individuals who may not be capable of deciding whether to be sterilized.

Before 1983, a State Board of Social Protection decided whether individuals were able to make a sterilization decision for themselves.

In 1983, lawmakers set up a court procedure for deciding whether individuals are able to make their own sterilization decisions, and, if not, whether sterilization is the right thing to do.

What sterilizations are covered by the law?

Oregon state law requires that the least intrusive sterilization method consistent with standard medical practices be used. Examples include tubal ligation and vasectomy.

Hysterectomies are prohibited if intended to prevent reproduction or to stop a woman's monthly periods for hygiene purposes.

Surgical procedures that are necessary for other medical reasons but may cause sterilization are not governed by this law.

Does an individual have to agree to sterilization?

Yes. The right to produce children is protected by the United States Constitution. This right may not be taken away.

What does informed consent mean?

An individual must agree to give up the right to produce children and must be able to do so knowingly, voluntarily and intelligently. This is called informed consent.

Knowingly means that the individual has been given all the information necessary to make an informed decision. A physician has the responsibility to inform the individual of the following, orally:

- Advise that withholding or withdrawing consent before sterilization will not affect future care and treatment rights
- Provide information about family planning and birth control methods
- Advise that sterilization is considered to be irreversible
- Explain, in detail, the specific sterilization method to be used
- Go over the discomforts and risks involved, including the type and possible effects of anesthetics
- Review the possible benefits or advantages

The physician must also offer to answer any questions the individual has about sterilization.

Voluntarily means without excessive influence or unnecessary pressure. Informed consent is not possible while the individual is in labor or childbirth, trying to get or getting an abortion, or under the influence of alcohol and/or drugs.

Intelligently means that the individual understands the right being waived and probable consequences. The law requires that the individual completely understands the information given by the physician, and is competent to make a decision about sterilization.

Competency may be determined based on the individual's age, specific situations (in this case, agreeing to sterilization), and physical or mental capacity as determined in another court proceeding.

However, an individual with a guardian or conservator may be found to be capable of consenting or withholding consent to sterilization.

Who can agree to be sterilized?

Before any individual can give consent to be sterilized, s/he must be at least 15 years old and capable of giving informed consent. Sterilization is illegal for individuals who are not yet 15 years old.

A parent, guardian or conservator may not give consent for sterilization of his or her minor child (under 18) or protected person.

How is an individual's ability to give informed consent decided?

A petition may be filed in state court asking for a determination of the individual's ability to consent.

The individual, the individual's doctor, or anyone concerned with the individual's health and well-being may file the petition. The petition must be filed in the circuit court of the county in which the individual lives.

What information must be in the petition?

The petition must include the following information:

- Name, age and address of the individual
- Names and addresses of the individual's parent, spouse, guardian and/or conservator
- Facts describing whether or not the individual is capable of giving informed consent
- For an individual who is believed to be incapable of giving informed consent, facts describing his/her chances of being able to give consent in the near future
- Reason(s) for sterilization
- Name, position and interest of the person filing the petition

What happens after the petition is filed?

The court schedules a hearing within 30 days. The court may hold the hearing someplace else if the individual is unable to attend a hearing at the courthouse. At least 14 days before the hearing date, the court must serve a copy of the petition and hearing notice to:

- The individual
- The individual's parents, guardian and/or conservator, or spouse
- The individual's sibling(s), if there are no living parents
- Disability Rights Oregon
- Others the court determines have an interest in the individual

Is the individual entitled to a court appointed attorney?

Yes. The court must appoint an attorney at the individual's request, or if the individual does not have an attorney and seems incapable of asking for one.

If the court appoints an attorney and the individual cannot afford one, the court will pay for the attorney. The court will also pay for an attorney to conduct an appeal. The court only has authority to appoint an attorney for the individual whose sterilization is being considered.

Does the individual have to attend the hearing?

Yes. However, the right to be at the hearing may be waived by the individual or on behalf of the individual by his or her attorney, but only if the individual's presence would greatly interrupt the hearing, or is medically inadvisable.

What happens at the hearing?

The hearing has two steps. The first step is to decide whether the individual is capable of giving informed consent for sterilization. The second step is to determine whether sterilization is in the individual's best interest.

What happens in step one of the hearing?

In step one of the hearing, the person filing the petition must present evidence that includes reports by a team of at least three professionals with at least two different areas of expertise.

All three professionals must have experience with people who have disabilities similar to the disability of the individual. Examples include:

- Teachers
- Doctors
- Social workers
- Mental health workers
- Other health professionals

Their reports must contain information about the individual's ability or lack of ability to give consent and the reasons for their opinions. The individual must testify (unless doing so would be unsafe) and may present evidence and cross-examine witnesses or have these things done by his or her attorney.

Witnesses may be subpoenaed, if necessary. Also, the court must ask about the types and effects of any medication taken by the individual.

How does the judge decide whether the individual is capable of giving informed consent?

The judge must find it highly probable from the evidence that the individual lacks the ability to give informed consent; otherwise, the individual will be found capable of giving informed consent.

What happens if the judge decides that the individual is capable of giving informed consent?

If the individual consents to sterilization, the court issues an order permitting it. The hospital and doctor must still get written consent before the sterilization.

If the individual refuses sterilization, the court issues an order forbidding it, and sterilization is not allowed without a rehearing.

What happens during step two of the hearing?

For individuals 18 or older, the second step of the hearing is to determine whether sterilization is in the individual's best interest. Sterilization may not be performed on individuals under 18 and determined by a judge to be incapable of giving informed consent.

How does a judge decide an individual's best interest?

After hearing evidence from everyone involved, including a doctor, a psychologist and a social worker, the judge must find that there is clear and convincing evidence that each of the following five factors is true:

1. The individual is physically capable of producing children;
2. The individual is likely to have sex now or in the near future that will likely to result in pregnancy;
3. All less drastic contraceptive methods, including supervision, education and training, have not worked, are not applicable, or are medically contraindicated;
4. The sterilization method to be used is consistent with standard medical practice, is the least intrusive method available, is appropriate, and does not create an unreasonable risk to the individual's life and health; and
5. Due to the nature and extent of disability, the individual is permanently incapable of taking care of a child, even with reasonable assistance. (The nature and extent of a disability must be demonstrated through experience, experiment or observation, not just an IQ test.)

What happens if the judge finds that sterilization is not in the individual's best interest?

The judge will issue an order prohibiting sterilization and give reasons for that decision.

Can the decision be appealed?

The judge's decision may be appealed to the Oregon Court of Appeals. The judge must appoint an attorney for financially eligible individuals. If sterilization has been permitted by the judge, the individual may ask that the order be delayed until the appeal process is complete.



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