4-6-1977

Bridges v. Probate Court in and for the City and County of Denver

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27663

DAMITA JO BRIDGES, Petitioner, vs. THE PROBATE COURT IN AND FOR THE CITY AND COUNTY OF DENVER and ROGER D. BORLAND, a Routt County Judge, assigned to said Court, Respondents.	)	ORIGINAL PROCEEDING

BRIEF IN SUPPORT OF
PETITION FOR RELIEF IN THE NATURE OF PROHIBITION AND ORDER

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Petitioner respectfully tenders this brief in support of Petition for Relief in the Nature of Prohibition and Order.

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II. DID THE PROBATE COURT OF THE CITY AND COUNTY OF DENVER EXCEED ITS JURISDICTION AND ABUSE ITS DISCRETION IN GRANTING A MOTION FOR ABORTION ABSENT THE CONSENT OF PETITIONER BRIDGES?

II. STATEMENT OF THE CASE

The allegations upon which the Petitioner relies, in invoking the extraordinary authority of this Honorable Court pursuant to Rule 21(a), Colorado Appellate Rules, are set forth, generally in chronological order, in the Petition for Relief in the Nature of Prohibition and Order filed simultaneously herewith.

To summarize the situation at the present time, the Colorado Psychiatric Hospital has in its custody the Petitioner pursuant to Colo. Rev. Stat. §27-10-101 et seq. (1973 as amended) entitled the "Care and Treatment of the Mentally Ill" (hereinafter, the "Mental Health Statute"). Petitioner has been certified for short-term treatment pursuant to Colo. Rev. Stat. §27-10-107 (1973 as amended) and is being held involuntarily for care and treatment. Petitioner became mentally ill suddenly in December, 1976. The Colorado Psychiatric Hospital has yet been unable to ascertain the exact cause of her malady. Pursuant to her Certification, Petitioner has been subjected to multivarious tests such as the Cath Scan and other x-ray procedures. None of these diagnostic tests has yet conclusively established the cause of her present mental condition. Petitioner is pregnant with a fetus of approximately fourteen (14) weeks at the time of hearing. The Regents of the University of Colorado, in behalf of Colorado Psychiatric Hospital, requested authority to perform an abortion on Petitioner in order to administer certain diagnostic tests alleging as a basis therefore that the

pregnancy was impeding the diagnosis. Petitioner has not granted consent to such abortion and maintains that without such consent such an act constitutes an unwarranted infringement of her constitutional right to terminate or not to terminate her pregnancy.

The Probate Court in and for the City and County of Denver,Roger D. Borland, Routt County Judge assigned to the Probate Court, granted, using a simple best interests standard, authorization for performance of the abortion.

Petitioner challenges the jurisdiction and authority of the Respondents to enter such order.

III. SUMMARY OF ARGUMENT

I. The Probate Court acted in excess of the jurisdiction granted to it by 1973 C.R.S. §27-10-101 et seq. and in excess of the inherent power of a probate court in ordering an abortion be performed on Petitioner Bridges without her consent.

II. The Probate Court is without jurisdiction as it failed to comply with the procedural requirements of C.R.S. §27-10-101 et seq. (1973 as amended).

III. The Colorado Abortion Statute, 1973 C.R.S. §18-6-101, prescribes the sole procedure for the lawful termination of pregnancy in Colorado and the Probate Court, acting in disregard of this statute, has acted without jurisdiction in ordering an abortion for Petitioner Bridges.

IV. The Probate Court has jurisdiction over matters relating to the fundamental rights of privacy and procreation solely by specific legislative grant; there being no particular authorization for granting an abortion without the consent of Damita Jo Bridges, the Probate Court has acted in excess of its jurisdiction.

V. The original jurisdiction of the Supreme Court of Colorado maybe invoked to consider an abuse of discretion on behalf of a Probate Court which used an incorrect legal standard to decide the issue at bar.

VI. The Trial Court adopted and was persuaded in its holding by the substituted judgment standard but incorrectly applies this standard to the Petitioner's case resulting in an abuse of discretion.

VII. The Probate Court abused its discretion by not holding the Regents of the University of Colorado to a compelling state interest test before ordering the intrusion of an involuntary abortion upon the body of Petitioner Bridges.

IV. ARGUMENT

A. The provisions of 1973 C.R.S. §27-10-101 et seq. do not grant jurisdiction to the Probate Court to authorize a termination of pregnancy against the will of the Respondent.

THIS MATTER came before the Probate Court on a Motion for Order Authorizing Abortion. The threshold question is whether a Denver Probate Court has the power to authorize such an intrusion upon the body of Damita Jo Bridges. The Petitioner maintains that the Probate Court clearly lacks the power to force the termination of her pregnancy.

The Probate Court is a tribunal of limited jurisdiction. Authority can be conferred upon it only by specific statutory provision. Colorado Revised Statutes, §13-9-102 entitled "Jurisdiction", states that:

> (1) The probate court of the city and county of Denver has original and exclusive jurisdiction in said city and county of:
>
> (g) Proceedings under articles 10 to 16 and 23 of title 27, C.R.S. 1973.

Article 10 of the Colorado Revised Statutes, the Care and Treatment of the Mentally Ill article, is the exclusive provision dealing with the powers of the State over those found mentally ill in Colorado.

Petitioner Bridges was certified pursuant to a mental health statute designed to insure humane treatment for problems of the mind. 1973 C.R.S. §27-10-101(1), the Legislative declaration, states that the purposes of Article 10 are to provide a person with individual care and treatment on a voluntary basis whenever possible, in the least restrictive environment, assuring at all times "the fullest possible measure of privacy, dignity, and other rights" while the individual undergoes care and treatment for mental illness (emphasis added). Subsection (2) states that "[t]o carry out these purposes, the provisions of this article shall be liberally construed".

This article was enacted in 1973 by the Colorado Legislature to ensure that the mentally ill in Colorado would be liberated from the dark ages of abuse so common to patients of psychiatric facilities. The provisions this article replaces, 1963 C.R.S. §27-9-101 et seq., deny to those involuntarily committed all their civil rights and debased

their normal legal status (1963 C.R.S. §27-9-121). In contrast, Article 10 insures that a psychiatric patient by the status of his or her mental illness shall not forfeit any legal right or suffer legal disability. Thus, the constitutional rights and personal dignity of the mentally ill are intended by the Colorado Legislature to be jealously guarded. Within this context is individual psychiatric care to suit individual mental needs to be afforded to all psychiatric patients.

An abortion forced upon the Petitioner, Damita Jo Bridges, is totally contrary to the legislative intent of Article 10 and inherently outside the scope of power authorized by such Article. The Care and Treatment of the Mentally Ill Article does provide for involuntary psychiatric care of those mentally ill persons unable or unwilling to consent to treatment. The State finds a duty to treat the psychiatric problems of the mentally ill who are also a danger to themselves or others, or who are unable to provide for their daily needs. Such State power was never intended to provide an umbrella for pervasive control over the bodies of those labeled mentally ill. The power expressly granted by Article 10 nowhere extends to forced medical treatment not directly related to and necessary for psychiatric treatment. In particular, no provision of Article 10 authorizes an abortion to be forced upon an involuntarily held individual. The Probate Court, acting to authorize such a procedure, is acting in excess of its authority.

The powers of a court of limited jurisdiction must be construed narrowly. The general law is that inferior courts created by statute have only such jurisdiction as is conferred upon them by statute. Hartman v. Marshall, 79 P.2d 683, 684 (1955).

> It is the duty of this Court to rule strictly with regard to matters of jurisdiction of statutory courts to the end that said courts are kept within the limits of their jurisdiction. Where statutes creating courts fail to confer jurisdiction over certain matters, no intendments may be indulged in favor of such jurisdiction. (emphasis added). Swanson v. Prout, 127 Colo. 550, 259 P.2d 280 (1953).

The Probate Court has decided that its inherent common law powers are sufficiently broad to provide substituted judgment authorizing the abortion. (Exhibit C , page 4). The Probate Judge here used the reasoning of Strunk v. Strunk, 445 S.W. 2d 145 (Ky. 1969), to rationalize the assumption of jurisdiction in this matter. Yet the Strunk, supra, court held that the County Court, the tribunal of first impression, could not subject an incompetent to "the serious surgical techniques here under consideration unless the life of [the incompetent] be in jeopardy", Strunk, supra at 149. Only the Circuit Court could have sufficient inherent power to authorize a transplant and then only after complying with strict standards (see Brief, section F), Strunk, supra, at 149. In the present action, the Probate Court, another tribunal of limited jurisdiction, in granting the order to authorize an abortion, is also acting in excess of its authority.

The Probate Court specifically holds that 1973 C.R.S. §27-10-101 et seq. combined with regulations adopted by the Department of Institutions pursuant to 1973 C.R.S. §27-10-116 (2)(a) are insufficient authority for such an order entered here. (Exhibit , page 3 and 4). The Probate Court bottoms its jurisdictional claims on the view that it has inherent authority to make an abortion order. In other words, the Probate Court, not finding specific statutory authorization for its proposed action, broadens its jurisdictional base through the doctrine of inherent powers. Yet,

> the inherent powers of a court do not increase its jurisdiction; they are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction. 20 Am. Jur. 2d §78 p. 440. See also Courts CJS §29, p. 40 State v. Superior Court of Muricopa County, 39 Ariz. 242, 5 P.2d 192 (1931). In re Integration of State Board of Oklahoma, 185 Okla, 505, 95 P.2d 113 (1939).

Inherent powers are only those which are necessary for the administration of justice within the original scope of a court's jurisdiction. Such powers have included providing for adequate court facilities, appointing counel for indigent

defendants, compelling court appearance of witnesses, administering oaths, and generally compelling the expenditure of funds for judicial purposes. 20 Am. Jur. 2d §79, p. 23.

Such inherent powers, then, cannot give to the Probate Court jurisdiction it does not already possess. The Supreme Court of Wisconsin, in the matter of Lausier v. Pescinski, 226 N.W. 2d 180 (S.C. 1975), upholds this reasoning. A petition was brought in a guardianship proceeding to permit removal of a kidney from a mentally incompetent ward for the purpose of transferring it to the ward's sister who was in dire need of such a transplant. The Supreme Court held that the lower court had no inherent power to grant the transplant. There was simply no specific statutory authority given the court to authorize a kidney transplant "or any other surgical procedure on a living person." Lausier, surpa at 181. The same situation is presented here. An abortion absent the consent of the Petitioner is ordered by a court having no statutory or constitutional authority to so order. Such action is in excess of the court's jurisdiction.

B. The Probate Court is without jurisdiction as it failed to comply with the procedural requirements of C.R.S. §27-10-101 et seq. (1973 as amended).

It is clear that the procedures for imposition of a legal disability or deprivation of a legal right of one who is certified as mentally ill under the Mental Health Statute are prescribed with certainty by statutory provision. C.R.S. §27-10-125 (1973 as amended). It is a basic rule of statutory construction that such statutory language must be construed with reference to the purpose of the statute as a whole. Massey v. District Court In and For Tenth Judicial District, 506 P.2d 128, 180 Colo. 359 (1973). In light of the Mental Health Statute as a whole and specifically in light of the legislative declarations (C.R.S. §27-10-101(1973 as amended)) and Section 104 which affirmatively preserves the legal rights of one certified (C.R.S. §27-10-104(1973 as amended)), it is clear that Section 125 is the only provision for imposing any legal disability and must be particularly and specifically complied with prior to a find of incompetence. Mere certification

does not diminish one's legal and constitutional rights. Although the Probate Court has jurisdiction of Petitioner Bridges pursuant to her certification under the Mental Health Statute, that jurisdiction may be exercised only within the limits prescribed by the statute. Here, the Probate Court was clearly without those limits as no action has ever been initiated pursuant to C.R.S. §27-10-125 (1973 as amended).

In its consideration of predecessor statutes to the current Mental Health Statute, this Court clearly and unequivocally enunciated the necessity of strict compliance with the procedures in mental health matters. Hultquist v. The People, 77 Colo. 310, 236 P.2d 995 (1925); Kendall v. The People, 126 Colo. 573, 252 P.2d 91 (1952); Rickey v. The People, 129 Colo. 174, 267 P.2d 1021 (1954). In Rickey v. The People, supra, this Court noted "...there must be a strict compliance with procedures in lunacy matters. And further, that the statutory provisions are the measure of the power of the tribunal whose jurisdiction is questioned; further that in the absence of a strict compliance therewith the court is without jurisdiction to act", at 177. In Kendall v. The People, supra, the court also noted that "provisions of a lunacy statute, being in derogation of the common law, are to be scrupulously adhered to", at 577. And, in Hultiquist v. The People, supra, this Court mandated that compliance with a condition of the statute is as essential as if commanded by the Constitution, at 316.

This requirement of strict compliance with the procedural prescription of the current Mental Health Statute remains applicable and in force. Indeed, the statutory preservation of the rights of those who are brought within the Mental Health Statute mandates the necessity of strict compliance with statutory procedures to ensure the protection of those rights as well as the protection of the dignity of the person. C.R.S. §27-10-104 (1973 as amended).

Therefore, without the invocation of the legal disabilities provision (C.R.S. §27-10-125 (1973 as amended)), the Probate Court is without jurisdiction and can issue no order premised on a legal disability.

C. Compliance with the Colorado Abortion Statute 1973 C.R.S. 18-6-101 is the sole manner by which an abortion can be obtained in Colorado and the Probate Court order for an abortion, absent compliance with said statute, is made without jurisdiction.

The Regents of the University of Colorado requested the Probate Court to authorize an abortion under the power granted to it through 1973 C.R.S. §27-10-101 et seq. Yet the Regents failed to note that Colorado has a complete and specific abortion statute (1973 C.R.S. §18-6-101).

> It is a cardinal rule of law that statutes complete in themselves, relating to a specific thing, take precedence over general statutes or other statutes which deal only incidently with the same question; or which might be construed to relate to it. Where there is a conflict between a statute dealing generally with the subject, and another dealing specifically with a certain phase of it, the specific legislation controls in a proper case.

State v. Throckmorton, 219 P.2d 413, See also 50 Am. Jur. 371, Section 366, 367; State v. Mechem, 273 P.2d 361 (N.W. 1954); Sutherland Statutory Construction (3rd Ed. 1943), Section 2021.

The Colorado abortion statute is a criminal provision setting forth the exact conditions under which an abortion can be conducted. The right to an abortion is strictly statutory. 7 Suffolk Law Review 1157, 1158. Contravention of these conditions gives rise to criminal prosecution. The relevant provision of the statute that remains in the wake of Roe v. Wade, 410 U.S. 113 (1973), the case ensuring that the right to privacy encompasses a woman's decision whether or not to terminate a pregnancy, consists of:

> (1) Medical termination means the intentional ending of the pregnancy of a woman at the request of said woman. (emphasis added)(1973 C.R.S. §18-6-101).

The Court in Doe v. Dunbar, 320 F.Supp. 1297 (D.C. Colo. 1970), held that Colorado's Therapeutic Abortion Act provides "a single procedure for the legal termination of pregnancies in Colorado. (emphasis added). Id. at 1298, 40 U. Colo. L. Rev. 297, 299 (1968).

The single relevant criteria that remains in order to obtain an abortion is that it be at the request of the woman. The matter of one's right to bear or not to bear children is one too precious to be the subject of compulsion. There are no exceptions to this mandate; the Colorado legislature did not provide for third party consent. The one court confronted with a contemplated abortion absent the consent of the woman was In Re Smith, 295 A.2d 238 (Maryland 1972). In that case, the Appellate Court held that the juvenile court, another judicial body of limited jurisdiction, could not authorize an abortion when there existed a specific abortion statute in the state.

> Clearly such a mandate [that the juvenile court direct an abortion be performed] would be beyond the power of the court; termination of a human pregnancy can be authorized only by [compliance with the abortion statute]. In Re Smith at 245.

The Maryland Juvenile Causes Act gave to that court broad powers "to provide for the care, protection and wholesome mental and physical development"of children coming within its provisions. Maryland Code, Article 26, §70(1), In Re Smith at 241. And the court proceedings (under Maryland Code, Article 26, §70-19(a)) in which the issue of an abortion absent the minor's consent arose, "authorizes the court to make such disposition of a child found in need of supervision as most suited to the physical, mental and moral welfare of a child". In Re Smith at 241 to 2. Surely this broad grant of power is no more extensive than that given to the Probate Court in civil commitment proceedings.

The Maryland Juvenile Court held that, in ordering the abortion, the judge was "merely supporting the mother...in her plans to deal with her child in a manner which she deems is in the "best interest" of her child and really of the unborn child, and I support her 100%. "In Re Smith at 244. Yet the Appellate Court clearly rules, in light of the abortion statute, as well as the limit of the juvenile court's powers, that the juvenile court was without authority to order an abortion in the absence of the minor's consent. In Re Smith at 246, 7

Suffolk University Law Review at 1156.

A similar situation is presented in the case before you. Colorado's Abortion Act prescribes the only procedure by which an abortion may be procured. The Probate Court, in contravention of the abortion statute, as well as in excess of its powers as a court of limited jurisdiction, has ordered an abortion because it would be in the "best interest" of Petitioner Bridges. The Probate Court has acted in excess of its specifically granted authority.

D. The Probate Court obtains jurisdiction to act in matters relating to the fundamental rights of privacy and procreation only by a specific legislative grant not present in this instance.

The right to procreate is undoubtedly a fundamental constitutional guarantee. Griswold v. Conneticut, 381 U.S. 479 (1965). Courts have been extremely cautious in exercising their powers to interfere with such a right. In particular, on may occasions courts have held a lack of jurisdiction to order a sterilization be performed on a mental incompetent even if such a procedure is found to be in the best interests of the incompetent person.

The Appellate Court in Frazier v. Levi, 440 S.W. 2d 393 (Tex. C. A. 1969) held that Texas Courts lacked the jurisdiction without specific statutory or constitutional authority, to grant a motion for sterilization. Frazier, supra 394. This decision was made even though the mentally ill woman in question was unable either to oppose the operation or to prevent it and her mother testified that the proposed sterilization would be in the incompetent's best interest. Testimony indicated that the incompetent woman was sexually promiscuous, was unable to consistently take contraceptives (she had previously given birth to illegitimate children), and could not take care of her daily needs. Fraizer, supra at 393. In denying jurisdiction, the Appellate tribunal emphasized the need for the judiciary to "carefully protect" the privacy and other legal rights of the incompetent woman . Fraizer, supra at 394.

In Wade v. Bethesda Naval Hospital, 337 F.Supp. 671 (S.D. Ohio, 1971), the Appellate Court held that a probate judge was wholly without jurisdiction to order sterilization of a mentally retarded minor. Wade, supra at 673. For complete authority to act, there must be personal and subject matter jurisdiction as well as power of the court to render the particular decision at hand. Wade, supra at 673. The statute prescribing the probate court's powers had authorized any action deemed necessary for the care of mentally retarded persons; the probate court shall have power "fully to dispose of any manner properly before [it]" Ohio Rev. Code §5125.30 and §210.124.

Regardless of such a broad mandate, sterilization absent the consent of the incompetent is not within the general equity power of the court; such power needed to be specifically authorized by the legislature. Wade, supra at 674. The Appellate Court held that the probate judge was not immune from suit stemming from the sterilization which was ordered wholly without jurisdiction. This case involved a judge who had earlier ordered the only forced sterilization based upon the discretionary powers of the probate court absent express statutory authorization. In Re Simpson, 180 N.E. 2d, 206 (Ohio Prob. 1962).

In the Interest of MKR, 515 S.W. 2d 467 (Mo. 1974), is an appeal to an order authorizing the sterlization of a mentally deficient child. The Supreme Court of Missouri held that a juvenile code authorizing courts to provide such care as is necessary to the child's welfare "may not be utilized to give the juvenile court jurisdiction and powers not conferred upon it by statute". MKR, supra at 470. The court so held despite the fact that the minor was unable to care for herself, that a pregnancy was likely, and there was a strong chance that any child born to her would be abnormal. MKR, supra at 469. The issue of intrusion in the matter of procreation was simply too delicate to be left to any court's discretion absent a specific empowering statutory or constitutional provision. MKR, supra at 470.

Finally, a California Appellate Court has ruled that a probate court, being a tribunal of limited jurisdiction, has no power to order the involuntary sterilization of an adult incompetent. The Guardianship of Kemp, 118 Cal. Rptr. 64 (Cal. App. 1974). The probate court has "only those powers which are granted by statute and such incidential powers, legal and equitable, as enable it to exercise the powers granted." Kemp, supra at 67. Citing Estate of Muhammed, 94 Cal. Rptr. 856, 859 (Cal. App. 1971). The Appellate Court found no jurisdiction to act because of lack of compliance with the California Abortion Statute. There was no case law in California to support the proposition that a probate court may order the sterilization of a mentally incompetent person. Kemp, supra at 67. The probate court acted in excess of it s jurisdiction in authorizing a sterilization absent strict compliance with that statute. Kemp, supra at 69.

> In view of the fact that the legislature has prescribed a comprehensive scheme... it may be concluded that the legislature did not intend that sterilization of the mentally retarded was to be carried out without meeting the requirements imposed by this statute. Kemp, supra at 67.

The Probate Judge's order in the case before you infringes on these constitutional rights without proper authority to so act.

E. The original jurisdiction of the Supreme Court of Colorado may be invoked to consider an abuse of discretion on behalf of the trial court in using an incorrect legal standard to decide the issue at bar.

Authority for the Supreme Court to grant relief to Petitioner in the nature of prohibition is expressly conferred by the Colorado Constitution (Colorado Constitution, Article 6, Section 6), Shore v. Dist. Ct., 127 Colo. 487, 258 P.2d 485 (1953). The Constitution also impliedly gives to the Supreme Court the duty to keep inferior tribunals within their jurisdiction. (Colorado Constitution, Article 6, §2(1)), Kellner v. District Court, 127 Colo. 320, 256 P.2d 887 (1953). The original jurisdiction of the Supreme Court is to be invoked to insure protection of the sovereignty of the State and the liberties of its citizens. Wheeler v. Northern Colorado

Irrigation Co., 9 Colo. 248, 11 P.103 (1886).

In particular, Colorado Appellate Rule 21 outlines the procedures to be employed for the submission of a writ in the nature of prohibition. Colorado State Board of Examiners of Architects v. District Court, 126 Colo. 340, 249 P.2d 146 (1953). And Rule 106 of the Colorado Rules of Civil Procedure is to be construed together with Colorado Appellate Rule 21. Solliday v. District Court, 135 Colo. 489, 313 P.2d 1000 (1957); and Kellner, supra. Said Rule of Civil Procedure states, in part, that the court may properly consider a writ of prohibition

> "[w]here an inferior tribunal...exercising judicial...functions, has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy". (emphasis added). C.R.C.P. 106 (a)(4).

This Court has granted a writ in the nature of prohibition on prior occasions on the stated grounds of a lower tribunal's abuse of discretion. Such standard has been held to be an integral component of the writ of prohibition's jurisdictional requirements. City of Colo. Spgs. v. District Court, 184 Colo. 177, 519 P.2d 325 (1974); and the City of Aurora v. Congregation Beth Medrosh Hagodol, 140 Colo. 462, 345 P.2d 385 (1959). In Janeson v. District Court, 115 Colo. 298, 172 P.2d 449 (1946), the original jurisdiction of this court was invoked solely because the defendant's motion for change of venue was denied by the trial court in abuse of its powers. In McCoy v. District Court, 126 Colo. 32, 246 P.2d 619 (1952), the writ was granted which questioned the court's discretion to issue an order compelling certain pretrial discovery. In Shore, supra, the trial court was found to have abused its discretion in consolidating certain matters for trial. It was held, in City of Aurora, supra, that the district court had abused its discretion in granting the City immediate possession of certain property in a comdemnation proceeding. The court entertained the writ of prohibition in People ex rel Orcutt v. District Court, 167 Colo. 162, 445 P.2d 887 (1968) which claimed that the district court had abused its discretionary powers in

staying the Commission of Agriculture's scheduled hearings concerning milk marketing. In City of Colorado Springs, supra, an original writ was filed by the City to prohibit a lower court from enforcing an order directed to City Council members regarding discovery of facts relating to the denial of a rezoning application. And in CF & I Corp. v. Robb, 188 Colo. 155, 533 P.2d 491 (1975), the Supreme Court found an abuse of discretion by a trial court which had directed a default order be entered. See also People ex rel Heckers v. District Court, 170 Colo. 533, 463 P.2d 310 (1970); Banking Board v. District Court in and for the City and County of Denver, 177 Colo. 77, 492 P.2d 837 (1972); McInerny v. City of Denver, 17 Colo. 302, 29 P. 516 (1892); and People ex rel Smith v.District Court, 21 Colo. 251, 40 P. 460 (1895).

Suffice it to say, there are numerous cases which have granted a writ of prohibition on the ground that a lower court had abused its discretion in making the particular order in question. The writ must not, of course, emcompass consideration of the merits of a cause. City of Aurora, supra at 388. And there must be an absence of other plain, speedy, or adequate remedy to the Petitioner. People ex rel Orcutt, supra, at 888. There are no other firm guidelines relating to the acceptance of a writ of prohibition. The facts and circumstances of each case must be closely scrutinized to determine the propriety of a writ of prohibition without reference to the reasons assigned for granting or refusing the writ under facts and circumstances which were different from those under consideration. Shore, supra at 486.

> Thus it will be seen that this court is to be governed, in the issuance of this extraordinary writ, by the circumstances and conditions of each particular case. No inflexible rule can be made to fit every emergency. Each case must rest upon its own peculiar facts, and the court should be guided, in the exercise of its discretion, by the needs and deserts of the case in hand. People ex rel Elbert v. District Court, 46 Colo. 1, 101 P. 777, 779.

There is a compelling need for consideration of the abuse of discretion issue in the case before you. The Petitioner is pregnant and an abortion has been ordered to be performed without her consent in a matter of days. The Petitioner has admitted and has been denied a motion for a new trial. There exists no other plain, speedy, or adequate relief for Petitioner.

Original proceedings are often granted in order to prevent the delay and expense of a re-trial which necessarily would follow in the event of a reversal on writ of error. Shore, supra, at 486. Time is the cruel enemy of Damita Jo Bridges. There will be no occasion for re-trial should this writ be dismissed. The Petitioner is on the verge of suffering a bodily intrusion with irreparable and permanent effects. She asks not that the merits of her cause be heard, but that the issue of the trial court's misuse of the persuading legal doctrine in this matter be reviewed with care.

Whether or not to grant such a writ must be guided, in the final analysis, by consideration of the promotion of substantial justice. Shore, supra; and CF & I, supra. Given the immediacy and importance of the matter before you, the only decision which will further the cause of justice is the consideration of the trial court's abuse of discretion in ordering an abortion without the Petitioner's consent. The Court is presented with an emergency; we ask that appropriate emergency action be taken. The Supreme Court has wisely considered cases where a refusal to do so would amount to a denial of justice. In Re Rogers, 14 Colo. 18, 22 P.1053 (1890). This is such a case.

F. The Trial Court, adopting and persuaded by the substituted judgment standard of Strunk v. Strunk, 445 S.W. 2d 145 (Ky. 1969), incorrectly applied that standard to the case at bar.

The trial judge is persuaded to order an abortion for Damita Jo Bridges absent her request by the substituted judgment standard explicated in Strunk, supra. (Exhibit C, p. 4).

The Probate Court has determined that in its "substituted judgment" the abortion would be in the best interests of Petitioner Bridges (Exhibit C, p. 5). The Trial Court has incorrectly applied the substituted judgment standard to the present case.

The doctrine of substituted judgment originated in Great Britain. It was utilized by the courts to decide questions concerning distribution of monies from an incompetent's estate. 33 Albany L. Rev. 577 (1969).

The case which established the doctrine was Ex parte Whitebread, 35 Eng. Rep. 878 (Ch. 1816), 74 Dickenson L. Rev. 530, 534 (1970). In that matter, the court authorized the use of funds from an incompetent's considerable estate for his spouse and childrens' education and support. The equity court reasoned that it had inherent power to make decisions involving the incompetent's estate which the incompetent, had he full use of his faculties, would certainly authorize, 35 Eng. Rep. 878, 27 Baylor L. Rev. at 190. In Re Willoughby, 11 Paige 257 (N.Y. 1844), was the first and leading American case to affirm this English doctrine (33 Albany L. Rev. at 600). The chancery court declined to order an allowance from the income of an incompetent's estate to his stepdaughter. The court established two important guidelines for the substituted judgment cases to come: the court must first be "perfectly certain" how the incompetent would act given the totality of the circumstances surrounding the proposed distribution, 11 Paige at 260. The court must also receive "substantial evidence" of both the need of the potential recipient and the wishes of the incompetent. Id. at 261, 74 Dickenson L. Rev. at 534.

The New York judiciary was well aware of the abuses which could arise from the power to administer the estate of an incompetent person. The courts ensured safeguards to the misuse of this authority. In Re Heeney, 2 Barb. Ch. 326 (N.Y. 1847), held that gifts from an incompetent's estate could only be made where it appeared beyond all reasonable doubt that, were the incompetent in good health, he would have made such gifts. Id. at 328. And a New York court later held

that where proposed gifts were to be made from the principal of an estate evidence that the incompetent would make such gifts must be "even more clearly and convincingly" presented than where surplus income was available. In Re Flager, 162 N.E. 471 (N.Y. 1928).

The case of Strunk v. Strunk, supra, involved a novel application of the substituted judment doctrine. The court was no longer considering the distribution of funds from an estate, but the donation of an organ from the body. Jerry Strunk was 27 years of age. He was retarded and had an I.Q. of a 6 year old. His brother, Tommy, was one year older and suffered from a fatal kidney disease. Tommy could not be kept alive for long on a dialysis machine and no suitable donor could be found for a transplant. As a last resort, Jerry was tested and found to be highly acceptable. The mother petitioned the county court for authority to proceed with the transplant from Jerry to Tommy.

The court allowed the petition. The reviewing court, in a 4-3 decision, upheld the lower tribunal's ruling after analyzing the case from Willoughby, supra, perspective. The Appellate Court ruled first that were the incompetent fully in possession of his powers, he would undoubtedly have elected to donate the kidney. The court, secondly, was convinced by substantial evidence both of the need of the recipient and of the wishes of the donor:

The recipient's need	
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Tommy must have a transplant to survive	at 146
There are no compatible donors besides Jerry	at 146
Tom has a much better chance of survival if the kidney transplant from Jerry takes place	at 147
The donor's wishes	
Jerry's benefit from the transplant arises because he was emotionally and physically dependent upon Tommy	at 146
Jerry's well-being will be jeopardized more severly by the loss of his brother than by the removal of a kidney	at 146

Testimony indicated that the death of Tommy would have "an extremely traumatic effect" upon Jerry and testimony indicated that Tom's life was vital to the continuity of Jerry's improvement at 146

Jerry would be subject to guilt feelings if Tom were to die at 147
Jerry's parents are elderly and should they die, "Jerry will have no concerned, intimate communication so necessary to his stability and optimal functioning at 147
The operation presents minimal danger to both the donor and donee at 148
Jerry testified that he would like to give his kidney to his sick brother at 148

The decision to authorize the transplant was made to further Jerry's best interests. But only after the two components of the substituted judgment doctrine were fulfilled. Namely, that there was no doubt whatsoever that Jerry would have wanted his kidney removed, and secondly, that the absolute necessity for such a transplant from the particular donor to the particular donee and the wishes of the donor be proven by substantial evidence.

These standards to be fulfilled by the court before reaching the threshold of best intersts are necessarily strict. Only in the instance of absolute necessity of intrusion coupled with absolute certainty that the incompetent would want the operation performed was the Strunk, supra case decided using the substituted judgment standard as it applied to personal, as opposed to property rights.

There has been a small number of subsequent substituted judgment cases to further define the doctrine. The Superior Court of Conneticut, in Hart v. Brown, 289 A.2 386 (Conn. 1972), complied with the mandates of the substituted judgment doctrine when it authorized a transfer of a kidney between identical twins eight years old. The court was convinced by substantial evidence that there was no reasonable alternative to the transplant:

The recipient's need
If a kidney transplant does not occur soon she will die at 387, 388

A successful transplant can be performed	at 387,388
A transplant from anyone other than the recipient's twin would have a much reduced chance of success and much increased occurence of painful side effects	at 389
This type of procedure is a "perfect" transplant-the prognosis for good health and long life is excellent as a result of the transplant	at 389, 391
The donor's wishes	
Testimony indicated that the risk to the donor of a transplant is negligible	at 389
The donor would be able "to engage in all of the normal life activities of an active young girl"	at 389
The donor has a strong identification with her twin sister	at 389
The loss of the twin sister would be of grave emotional impact to the donor and would have a traumatic effect on the family	at 389, 390
The donor specifically stated that she desires to donate her kidney	at 390
There is no known opposition to having the operation performed	at 391

The court in Hart, supra, approached the intended transplant with great care to avoid an unnecessary intrusion on the body and the rights of the intended donor:

> The equity powers of a court must be cautiously and sparingly exercised and only in rare instances should they be exercised. The need must be urgent, the probabilities of success should be most favorable, and the duty must be clear. If it were otherwise, a court of equity, in a case such as this, might assume omnipotent powers; to do so is not the function of the court and must be avoided. Hart, supra at 387.

Yet the choice for the court, utilizing the entirety of the circumstances approach to ensure its proper substituted judgment, was clear:

> A...question before this court is whether it should abandon the donee to a brief medically complicated life and eventual death or permit the natural parents to take some action based on reason and medical probability in order to keep both children alive. The court will choose the latter course, being of the opinion that the kidney transplant procedure contemplated herein...has progressed at this time to the point of being a medically proven fact of life. Testimony was offered that this type of procedure is not clinical experimentation but rather medically accepted therapy. Hart, supra at 387.

The court concluded that through its exhaustive analysis and its duty to fully protect the intended donor, "[j]ustice will

be accomplished in this case." Hart, supra at 391.

The final case in which the substituted judgment doctrine is applied to transplants is In Re Richardson, 284 S.2d 185 (La. App. 1973). In this matter, the parents' petition requesting their minor mental retardate son's kidney be transplanted to his older sister was denied. The court held that the evidence presented was insufficient to trigger the best interst benefit of the donor. In particular,

Need of the recipient	
Death will occur in a matter of months in the absence of a transplant or other, similar relief	at 186
The potential donor was the most medically acceptable person in the family	at 187
The transplant would be more beneficial to the recipient than any other known remedy	at 187
Neither a kidney transplant, nor particularly a transplanted kidney from the intended incompetent donor is an absolute immediate necessity in order to preserve the recipient's life	at 187
Benefit to donor	
That the recipient would take care of the intended donor after the death of their parents was highly speculative and highly unlikely	at 187
The donor would not verbalize his understanding of the intended procedure, nor his desire to help	
35 La. L. Rev. 551, 556,	
There was no accurate prediction of possible psychological detriment to the donor	at 553

The court held that surgical intrusion and loss of a kidney clearly would be against the intended donor's best interest. Richardson, supra at 187. The concurring opinion agreed that the intended operation was not in thedonor's best interest and decided that before the best interest threshold is met, there must be substantial evidence that the surgical intrusion is urgent, there are no reasonable alternatives to the operation, and that the risks to the donor are minimal. Richardson, supra at 188. It is clear from the majority opinion, in addition, that the lack of proof of the sure benefits of the donor of the intended operation was sufficient evidence to tip the scales against the operation. Possible benefit is not sufficient; actual, substantial benefit must be shown. Richardson, supra at 187.

The trial court in the case before you, clearly disregarded the substance of the substituted judgment test. In particular, there were insufficient facts presented or cited by the court to compel the conclusion that Damita Jo Bridges would want the abortion to be performed were she capable of making that decision. In fact, the probate judge never even articulated the need for such a finding; an inherent prerequisite to a bodily intrusion based on the substituted judgment standard.

The substituted judgment test also requires substantial evidence to be shown of the absolute necessity for the intended operation to take place with the intended parties. A speculative benefit or a probable result has been held to be insufficient to meet the requirements of this standard. Only irrefutable, immediate need can suffice to meet this burden. The probate judge did not consider either of these prerequisites to a best interest finding in his order of March 21st and abused his discretion is so doing.

G. The Probate Court abused its discretion in being persuaded by the substituted judgment standard and incorrectly applying the compelling state interest test in violation of the Petitioner's Constitutional rights to privacy.

The substituted judgment standard was devised originally to enable a court to determine the ongoing, appropriate distribution of an incompetent's property in harmony with what the incompetent would have wanted. (See Brief, Section F). The doctrine originated to authorize a court of equity to speak for one who cannot speak for himself. Strunk, supra at 149. Further safeguards (mandating substantial evidence to indicate the necessity of the operation and the absolute certainty of the wishes of the donor, for example, In Re Willoughby, supra), were engrafted on this doctrine to protect the incompetent person's statutory and constitutional rights.

In 1969, a Kentucky court extended this substituted judgment doctrine to the instance of kidney transplants from an incompetent to his brother. Strunk v. Strunk, supra. Two

courts adopted this standard when similar cases of kidney transplants arose in their jurisdiction. Hart v. Brown, supra; In Re Richardson, supra. The Supreme Court of Wisconsin most recently rejected the doctrine in Lausier, supra.

The Lausier, supra, court decided that the substituted judgment doctrine was inappropriate to the case of a guardianship proceeding to permit removal of a kidney from the incompetent ward for the purpose of transferring it to the ward's sister who was in dire need of said transplant. The court stated:

> Historically, the substituted judgment doctrine was used to allow gifts of the property of an incompetent. If applied literally, it would allow a trial court, or this court, to change the designation of a life insurance policy or make an election for an incompetent widow, without the requirement of a statute authorizing these acts in contrary to prior decisions of this court. Lausier, supra at 182.

The Lausier, supra court wisely feared the awesome power granted to courts even under the strict components of the substituted judgment doctrine. If unchecked, such power could lead to abuses of individual liberty. Savage, Organ Transplantation with an Incompetent Donor: Kentucky Resolves that the dilema of Strunk v. Strunk, 58 Ky. L. J. 129, 155 (1970).

The Probate Court should never have used such a standard in deciding whether or not to order an abortion be performed on Damita Jo Bridges absent her consent. Clearly, no concensus exists as to the appropriatness of this standard in regards to the extension in its application from the estate to bodily matters. Lausier, surpa and the three judge dissent in Strunk, 445 S.W. at 149. Application of the doctrine to abortions represents an even more radical extension. Transplants would appear to fit into the basic framework of the standard: gifts from an incompetent to a needy recipient. The doctrine evolved to ensure that the transplant from the donor was absolutely necessary for the recipient and that the donor unquestionably would agree to such an operation. See Strunk, supra; Hart, supra; In Re Richardson, supra.

The Probate Court in the case at bar was confronted with a situation of no third party recipient. The basic theory behind the substituted judgment doctrine, the advisability of gifts to another, fails.

Certainly, the fundamental Constitutional rights to privacy and to procreate are affected by the decision in this matter. Griswold v. Connecticut, supra. If the right of privacy means anything, it is the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Griswold, supra. Before the state may authorize a non-consented intrusion of the body of Petitioner Bridges its interest must rise to a compelling point. Roe v. Wade, supra; Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The judge was clearly incorrect when he stated that there is no controversy in which a compelling state interest is weighed against the right to be free from invasion of fundamental personal privacy. (Exhibit C, see page 5).

The Court maintains that it has ordered the abortion in the interest of maternal health. For authority, the Court cites Roe v. Wade, supra; and Doe v. Bolton, supra. (Exhibit C at 5). Clearly, however, the Wade and Bolton courts intended that State regulations during the second trimester be supportive of the woman's decision to have an abortion by simply regulating the abortion procedure in ways "reasonably related to the mother's health", Roe v. Wade, supra. These abortion decisions were not intended to stand as authority for ordering such a procedure absent the woman's consent.

The Probate judge has relied in its use of the right of privacy to intrude on the body of Petitioner Bridges upon the reasoning in the Matter of Quinlan, 355 A.2d 647 (1976). Yet the Quinlan, supra case is,by the New Jersey Supreme Court's own admission,one of "peculiar circumstances" and the right of the guardian to assert her privacy guarantee in her behalf is

only sanction "under the particular circumstances presented by this record" (Quinlan, supra, at 664). In fact, the Supreme Court of New Jersey affirmed the decision of Karen Ann Quinlan, herself, to permit her permanent, noncognitive, vegetative existence to terminate by natural forces with the concurrence of her guardian, her family, the attending physician, and the hospital ethics committee. The Court has "no doubt" if Ms. Quinlan herself were lucid and understanding of her condition, she would desire natural death in contrast to mechanically maintained, vegetative life. Quinlan, supra,at 663. Quinlan, supra, court used the compelling state interest test to show that the state interest in preserving human life and in defense of the right of a physician to administer medical treatment according to his best judgment could not out weigh Quinlan's right to avoid enduring the unendurable. Quinlan, supra at 663.

The right of privacy, in the case at bar, can only be asserted on behalf of Damita Jo Bridges' right to be free from intrusion. The Petitioner, through her attorney, objects to the intended abortion, there is insufficient evidence to indicate that Ms. Bridges would grant the abortion were she able to do so, there exist diagnostic and treatment alternatives far less intrusive than an abortion, the Petitioner is being treated at this time for her alleged mental disorder, and there is no immediate threat to her life or health should she carry her pregnancy to term which would warrant such a gross intrusion on her body be sanctioned by the Court. There are far less intrusive acts than taking a second trimester fetes away from a woman without her consent. The Probate judge's application of Damita Jo Bridges' right to privacy in contravention of her right to maintain her body free from unwarranted intrusion is an abuse of discretion.

V. CONCLUSION

It is clear, therefore, that the Court was without jurisdiction and acted in abuse of its discretion in entering the order authorizing abortion on Petitioner Damita Jo Bridges

in this matter, and, in any event, the order is unlawful and should be dissolved.

WHEREFORE, Damita Jo Bridges respectfully prays that this Court issue the writ in the nature of prohibition and an order dissolving and setting aside the order of the Probate Court entered in Civil Action No. P-73503-C.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I have sent a true and correct copy of the foregoing Brief In Support Of Petition For Relief In The Nature Of Prohibition And Order, by depositing the same in the United States Mail, postage prepaid on the 5th day of April, 1977, properly addressed to:

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The Honorable Roger D. Borland
Acting Probate Judge
Routt County Court
P.O. Box K
Steamboat Springs, Colorado 80477

EXHIBIT 2

27669

IN THE PROBATE COURT

IN AND FOR THE CITY AND COUNTY OF DENVER

STATE OF COLORADO

Civil Action No. P-73503C

In The Matter Of	)	
	)	
DAMITA JO BRIDGES,	)	MOTION FOR NEW TRIAL
	)	
Respondent.	)	

COMES NOW the Respondent, by and through her attorney, Robert W. Wheeler, and states in support of her Motion for New Trial as follows:

1. That errors in law have been made by the Trial Court in its order of the 21st day of March, 1977.

A. In particular, the Trial Court lacked jurisdiction, to-wit the authority, to enter the Order requested and granted;

B. In particular, the Trial Court applied the inappropriate standard in reaching its decision. The Constitutional mandate of Roe v. Wade, 93 S. Ct. 705, 410 U.S. 113, 35 L.Ed. 2d 147 (1973), requires the finding of a compelling state interest. The Trial Court specifically did not apply this standard and erred in applying a "best interests" standard;

C. In particular, the Trial Court erred in its application of the substituted judgment doctrine.

2. That errors were committed by the Trial Court in that specific findings of fact were based on insufficient evidence.

A. In particular, the Trial Court's finding that because the need for further diagnostic testing involved the use of X-rays and introduction of chemicals into the mother's body, the presence of the fetus represents an obstacle to successful diagnostic methods is without sufficient basis in the evidence;

B. In particular, the Trial Court's finding that because of the presence of the fetus, certain chemical therapies

are unavailable to Ms. Bridges and her treatment program has been inhibited is without sufficient basis in the evidence;

C. In particular, the Trial Court's finding that an abortion would be in the best medical interests of Ms. Bridges is without sufficient basis in the evidence;

D. In particular, the Trial Court's finding that each day of delay in diagnosis and treatment of Ms. Bridges increases the probability of her condition becoming permanent and diminishes her chances for recovery is without sufficient basis in the evidence.

3. That Respondent has filed a Memorandum Brief in support of her Motion for New Trial in compliance with the requirement of Colo. Rules Civil Procedure, Rule 59(a).

WHEREFORE, for the foregoing reasons, Respondent prays that her Motion for New Trial be granted and further hearing held pursuant thereto.

Respectfully submitted,

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DATED: March 28, 1977

CERTIFICATE OF MAILING

I hereby certify that I have sent a true and correct copy of the foregoing Motion For New Trial by depositing same in the United States Mail, postage prepaid, this _____ day of March, 1977, properly addressed to:

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Exhibit F

IN THE PROBATE COURT

IN AND FOR THE CITY AND COUNTY OF DENVER

STATE OF COLORADO

Civil Action No. P-73503C

In The Matter Of DAMITA JO BRIDGES, Respondent.	)) RESPONDENT'S MEMORANDUM BRIEF) IN SUPPORT OF MOTION FOR NEW) TRIAL)

The Respondent, in support of her Motion For New Trial, submits the following memorandum of points and authorities of law:

I. THAT THE PROBATE COURT IN AND FOR THE CITY AND COUNTY OF DENVER IS A COURT LIMITED IN JURISDICTION AND WITHOUT INHERENT AUTHORITY TO AUTHORIZE AN ABORTION TO BE PERFORMED UPON DAMITA JO BRIDGES.

The Probate Court is a tribunal of limited jurisdiction. Its power over subject matter extends only as far as that conferred upon it by specific constitutional or statutory provision. The Probate Court has exclusive original jurisdiction in all matters involving the adjudication of the mentally ill. (Colorado Constitution, Article VI, Section 9(3)). Its powers are further defined by Article 10, the Care and Treatment of the Mentally Ill Article (1973 C.R.S. §27-10-101(a)) and the regulations promulgated by the Department of Institutions pursuant to C.R.S. §27-10-116(2)(a). The authority prescribed for the Probate Court in the above-named provisions give insufficient power to the Probate Court to grant an abortion be performed upon a non-consenting person.

The inherent authority of the Probate Court to make appropriate orders in mental health matters before it does not extend to the power of this court to order an abortion. An abortion may only be conducted in Colorado consistent with the provisions of 1973 C.R.S. §18-6-101. Such statute provides that an abortion must only be authorized at the specific request of the woman (1973 C.R.S. §18-6-101(1)). The abortion statute does not indicate that any other person may have the awesome power to consent for such a procedure. It is a

cardinal rule of law that complete statutes dealing with a specific subject matter must take precedence over statutes which might be construed to relate to the same subject. State v. Throckmorton, 219 P.2 413, see also 50 Am. Jur. 371, §§366, 367; State v. Mechem, 273 P.2 361 (N.M. 1954); Sutherland Statutory Construction (3rd Ed. 1943), §2021.

Such a non-emergency medical procedure cannot be authorized by the Probate Court. Persuasive reasoning is found in In re Smith, 295 A.2d 238 (Md. App. 1972). In that case, a juvenile court, another tribunal of limited jurisdiction, ordered a pregnant minor to undergo an abortion. The juvenile court held that such a procedure would be in the best interests of the minor. The Appellate Court reversed the order because inherent authority of the juvenile court was not sufficiently broad to order an abortion.

II. THE TRIAL COURT APPLIED THE INAPPROPRIATE STANDARD IN REACHING ITS DECISION.

The Right of Privacy, a fundamental constitutional right, unequivocally encompasses a woman's decision whether or not to terminate her pregnancy. Roe v. Wade, 410 U.S. 113, 153. To invade, infringe, or in any way limit this fundamental right, there must be established a compelling state interest. Ibid, 155. The Court erred in its failure to apply this constitutional standard in reaching its decision. The "best interests" standard is an inappropriate standard when fundamental constitutional rights are at stake. To shun the constitutional analysis is to effectively infringe upon and derrogate the constutional right of one whose civil rights are specifically safeguarded pursuant to C.R.S. §27-10-104 (1973 as amended). The authorization of the involuntary abortion can in no way be construed in furtherance of this right of privacy.

III. THAT THE TRIAL COURT WAS PERSUADED BY AN INACCURATE ANALYSIS OF THE "SUBSTITUTED JUDGMENT" DOCTRINE.

This court is persuaded in its judgment by the reasoning of Strunk v. Strunk, 445 S.W. 2d 145 (Ky. 1969), a case utilizing the doctirne of substituted judgment. The probate

court has determined that in its "substituted judgment", an abortion would be in the best interests of Damita Jo Bridges. The substituted judgment doctrine originated in England and was first applied in the United States through In re Willoughby, 11 Paige 257 (N.Y. 1844). The standard set forth for the doctrine was that the court substituting its judgment must be "perfectly certain" that the person unable to make the decision at issue would agree with it were he or she fully capable of deciding. In re Willoughby, supra, and 27 Baylor L. Rev. 175, 191 (1975).

The Strunk, supra, decision used a similar wording for the same standard. In that case, the court was "absolutely convinced" that the incompetent ward would have granted the request. No facts were cited by the court in the present matter to indicate "its perfect certainty" or "its absolute conviction" that Damita Jo Bridges would have wanted the abortion to be performed upon her.

IV. THAT THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE FINDINGS OF FACT OUTLINED IN PARAGRAPH 11 OF THE COURT'S MARCH 21st ORDER IN THIS CASE.

There was insufficient evidence presented at the hearing to the court of March 8th, 1977, to warrant the finding that each day the abortion is delayed increases the probability of Damita Jo Bridges' condition becoming permanent and diminishes her chances for recovery. Ms. Bridges has been diagnosed as suffering from a type of mental illness. Her treatment, in the form of anti-psychotic medication and therapy, began on or about the date of her Certification for involuntary hospitalization and continues. Testimony indicated that diagnostic tests had already been conducted on Damita Jo Bridges. There was simply insufficient evidence presented to indicate that further tests would be able to more successfully direct the orientation of Ms. Bridges' ongoing treatment. Such findings of fact as are indicated in paragraph 11 of the Order entered in this matter are erroneous.

V. CONCLUSION.

For the reasons stated in paragraphs I-IV, Respondent asks that her Motion For a New Trial be granted.

Respectfully submitted,

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DATED: March 28, 1977

CERTIFICATE OF MAILING

I hereby certify that I have sent a true and correct copy of the foregoing Respondent's Memorandum Brief In Support Of Motion For New Trial by depositing same in the United States Mail, postage prepaid, this _____ day of March, 1977, properly addressed to:

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