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I. Introduction

When a guardian is appointed to exercise rights removed from an adult subject to guardianship, i.e., a ward, decisions on behalf of the ward will inevitably arise that will require the guardian to make a choice between several alternatives. Some of these decisions relate to life and death situations while others are routine decisions on behalf of the ward, but in each scenario, the question arises: "How does a guardian make decisions on behalf of the ward?" There are two primary decision-making standards in guardianship law: the *best interest* standard and the *substituted judgment* standard. The *best interest* standard asks, "what would a reasonable person do" while *substituted judgment* seeks to determine "what would the ward do if she had capacity?"[1] This article will discuss *substituted judgment* decision-making and how to prove what an incapacitated person would want.

Substituted judgment decision-making has been recognized in American courts since 1844.[2] The *substituted judgment* standard arose in healthcare decision-making on behalf of wards, although it has advanced into certain property-management decisions as well.[3] The standard is important since it is the majority decision-making standard for guardianships in those states that have an express statutory standard.[4] The standard is also the default decision-making standard in the 2017

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1 Put another way, the standards ask whether the guardian should act as the ward's alter ego or the ward's mother. These concepts are thoughtfully explored in the article by Lawrence A. Frolik, *Is the Guardian the Alter Ego of the Ward?*, 37 Stetson L. Rev. 53, 62 (2007).

2 Strunk v. Strunk, 445 S.W.2d 145, 148 (Ky. 1969); *see* Annotation, *Power of Court or Guardian to Make Noncharitable Gifts or Allowances out of Funds of Incompetent Ward*, 24 A.L.R.3d 863, 873 (1969) (evidencing historical use of substituted judgement).

3 Frolik, *supra* note 1, at 66. Frolik notes the property cases have mainly addressed estate planning and gifting as opposed to investment decisions.

4 *See* Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform,* 45 U. Mich. J. L. Reform 739, 743 (2012).

Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (the "Act").[5]

II. *Substituted Judgment* Decision-Making Standard Defined

The Act sets forth the standard as follows, "In making a decision for an adult subject to guardianship, the guardian shall make the decision the guardian reasonably believes the adult would make if the adult were able unless doing so would unreasonably harm or endanger the welfare or personal or financial interests of the adult."[6] The standard seeks to make the guardian's focus broader than mere protection of the ward and to recognize the ward's autonomy, dignity, and self-determination.[7]

III. The Guardian as a Fiduciary

A guardian is a fiduciary and owes fiduciary duties to the ward.[8] Guardians, though, are fiduciaries appointed by the court and are under the court's supervision and control.[9] A court can bar a guardian from making a decision or require prior court approval before authorizing certain decisions.[10]

IV. How Do You Prove What the Ward Would Have Wanted?

A. Health Care Decisions

The 1976 New Jersey case of *In re Quinlan* recognized the legal right to decline to continue life support on behalf of an incapacitated person.[11] That court held that Ms. Quinlan's parents, as her guardians, were proper parties to make the decision on her behalf.[12] In 1990, the U.S. Supreme Court affirmed that incapacitated persons, through a surrogate, retain the right to make health care decisions, including the refusal of medical treatment.[13] The *substituted judgment* standard was applied to this decision in that the Court ruled that a surrogate is able to

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5 Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act § 313(d) (Unif. L. Comm'n 2017).

6 *Id.*

7 Frolik & Whitton, *supra* note 4, at 740.

8 39 C.J.S. *Guardian & Ward* § 1 (2003); *see* Unif. Guardianship, Conservatorship, and Other Protective Arrangements Act § 313(a).

9 39 C.J.S. *Guardian & Ward* § 8.

10 Frolik, *supra* note 1, at 57.

11 *In re* Quinlan, 355 A.2d 647, 647 (N.J. 1976).

12 *Id.* at 664.

13 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 262-63, 287 (1990).

refuse life-prolonging treatment if there is clear and convincing evidence that the surrogate's decision conforms with the patient's wishes.[14] When a patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made, and not one that the surrogate might make for himself or that the surrogate might think is in the patient's best interests.[15]

The surrogate decision maker, thus, must be confident that he or she can and is voicing the patient's decision.[16] In making *substituted judgment* decisions, the guardian should first determine whether the ward, while competent, explicitly stated his intent regarding the type of decision in question.[17] The best evidence of the intent of the ward is a written instruction, such as a living will executed by the ward.[18] Where there is no explicit evidence regarding what the ward would choose to do, the guardian may still make a decision on the basis of evidence of the ward's "value system."[19] The guardian should determine the ward's "value system" through an assessment of the ward's behavior during the time he was competent "including his or her philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes toward sickness, medical procedures, suffering and death . . . ."[20] This might include a review of the ward's social media postings and digital footprint.[21]

As noted above, a guardian is supervised by the court so the guardian is typically presenting the potential decision in question to the court for approval by a judge. In the context of health care decisions, especially end of life decisions, this will require an evidentiary hearing where the evidentiary standard is clear and convincing evidence.[22] The clear

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14 *Id.* at 284-85.

15 *In re* Guardianship of Browning, 568 So. 2d 4, 13 (Fla. 1990).

16 *Id.* (citing *In re* Guardianship of Barry, 445 So. 2d 365, 370-71 (Fla. Dist. Ct. App. 1984)).

17 *In re* Westchester Cnty. Med. Ctr., 531 N.E.2d 607, 613 (N.Y. 1988).

18 John F. Kennedy Hosp. v. Bludworth, 452 So. 2d 921, 923 (Fla. 1984).

19 *See In re* Estate of Longeway, 549 N.E.2d 292, 306 (Ill. 1989).

20 *See In re* Jobes, 529 A.2d 434, 445 (N.J. 1987). Where a ward's wishes are not clearly expressed, the guardian is to consider the ward's personal value system for guidance. This includes a consideration of the ward's prior statements about and reactions to medical issues, and all the facets of the ward's personality that the guardian is familiar with particular reference to his or her relevant philosophical, theological, and ethical values in order to determine what course of medical treatment the ward would choose. *In re* Fiori, 652 A.2d 1350, 1356 (Pa. 1995).

21 Jake Greenblum & Ryan K. Hubbard, *On Surrogates' Moral Authority: A Reply to Berger*, 20 Am. J. Bioethics 64, 65 (2020), https://www.tandfonline.com/doi/full/10.1080/15265161.2019.1701739 [https://perma.cc/4LUU-DG6V].

22 *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 261-63 (1990); *In re* Guardianship of Schiavo, 780 So. 2d 176, 179 (Fla. Dist. Ct. App. 2001); *In re* Martin, 538 N.W.2d 399, 399-401 (Mich. 1995).

and convincing standard of proof, while very high, permits a decision in the face of inconsistent or conflicting evidence.[23]

In the Florida *Schiavo* case, the trial court held an evidentiary hearing regarding withdrawal of life-prolonging treatment from a young incapacitated woman.[24] At trial, the court heard evidence from six witnesses. The evidence showed that Ms. Schiavo had not executed any advance directives or designated a surrogate decision maker. Her statements to her friends and family about end of life issues were few, were oral, and were in conflict. The trial court did appear to rely on at least four statements testified to by the three witnesses testifying in favor of termination of life support.[25] The court found that those statements, along with other evidence about the ward, were a sufficient basis to make a decision allowing termination of life support under *substituted judgment*. The court did not appoint a guardian ad litem and this decision was affirmed by the appellate court, which held that a guardian ad litem would duplicate the function of the trial judge.[26]

The 1980 Ohio case of *Leach v. Akron General Medical Center* involved an evidentiary hearing held over two days that included seventeen witnesses.[27] Here the trial court appointed a guardian ad litem to make an independent investigation and report regarding the ward's wishes and the underlying facts in addition to the presentation of evidence by the guardian and interested parties.[28] The testimony centered around two issues: Mrs. Leach's desires in reference to being placed on a life support system, and the prognosis for Mrs. Leach's survival.[29] Also addressed was whether petitioners were motivated by personal gain as opposed to the interests of the ward.[30] The court held there was clear and convincing evidence to terminate life support.

In contrast is *In re Martin*[31] from Michigan in 1995. *Martin* also involved the appointment of a guardian ad litem and an extensive evidentiary hearing process.[32] The trial court approved a petition to terminate life-sustaining treatment. The Michigan Supreme Court overturned

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23 *In re Schiavo*, 780 So. 2d at 179.

24 The appellate opinion regarding the original *Schiavo* evidentiary hearing does not set forth the evidence considered by the trial court in detail. You need to review the trial transcript to see details of that evidentiary presentation. *See In re* Guardianship of Schiavo, No. 90-2908-GD-003, 2005 Fla. Cir. LEXIS 1009, at *3 (Fla. Cir. Ct. Mar. 28, 2005).

25 *See id.* at *2, *5-6.

26 *In re* Schiavo, 780 So. 2d at 179.

27 Leach v. Akron Gen. Med. Ctr., 426 N.E.2d 809, 811 (Ohio 1980).

28 *Id.*

29 *Id.*

30 *See id.* at 812.

31 *In re* Martin, 538 N.W.2d 399 (Mich. 1995).

32 *See id.* at 405.

that decision and held that the ward's prior statements about end-of-life preferences that are "remote, general, spontaneous, and made in casual circumstances"[33] are routinely held to be unreliable by courts applying the clear and convincing standard.[34] It also held that a prior statement that a person would not "want to be a burden" should not be regarded as clear and convincing evidence of a desire to decline life-sustaining measures.[35] Finally, the Court further noted that general statements made in the past that one would not want "to be sustained on anything artificial" or on "life supporting machinery," do not necessarily constitute clear and convincing evidence to discontinue life-sustaining measures.[36]

The Florida case of *In re Guardianship of Barry* involved granting of termination of life support for a ward who was an infant.[37] The court held that "[i]t is proper for the court to exercise its *substituted judgment* even absent evidence of intention of the incompetent person."[38] After appointment of a guardian ad litem the court held an evidentiary hearing under a clear and convincing evidence standard. At hearing the court took evidence regarding the medical condition of the ward being terminally ill with irreversible condition; the religious background of the ward and family and the parents' discussion with priests; the lack of financial conflict of interest between parents and child; and privacy rights of child to be free of the state requiring life-prolonging medical care.[39]

B. Gifting

Many states authorize the court to permit a guardian to gift the ward's funds for the benefit of relatives and others.[40] The Florida *Bohac* case involved such proposed gifting. The court appointed a guardian ad litem to review the requested gifting and held an evidentiary hearing. The court took evidence regarding the ward's donative intent both during her lifetime and through her estate planning documents, the permanency of the ward's condition, the size and nature of the ward's estate, the needs of the ward and the proposed recipients, the extent to which the recipients of the gifts may vary from those who would inherit in the natural course of events, the affinity or intimacy between the ward and

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33 *In re* Jobes, 529 A.2d 434, 443 (N.J. 1987).

34 *See In re Martin*, 538 N.W.2d at 410-11.

35 *Id.* at 404.

36 *Id.* at 404-05.

37 *In re* Guardianship of Barry, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984).

38 *Id.* at 371 (emphasis added).

39 *Id.* at 370-72.

40 *See In re* Guardianship of Bohac, 380 So. 2d 550, 552 (Fla. Dist. Ct. App. 1980).

the recipients, and whether they were dependent upon the ward for support.[41]

The Arkansas Supreme Court examined decision-making related to charitable (and non-charitable) donations of a ward's property in *Stautzenberger v. Stautzenberger*.[42] In *Stautzenberger*, the ward's guardian and son testified that the son as guardian was continuing the ward's prior pattern of giving, both to individuals and to charity (her church). This evidence appears to have been undisputed. The Court upheld the gifts and donations and overturned a trial court surcharge of the guardian, noting that a guardian can use the ward's funds to continue the ward's standard of living.[43] This includes maintaining her "routines and habits as much as possible" so long as the ward can be supported and maintained.[44]

C. Medicaid Planning

Several cases have used a broad application of *substituted judgment* to authorize a guardian to engage in the particular type of gifting involved in Medicaid planning. Examples of these cases are the New York case of *Matter of Shah*,[45] and the New Jersey case of *In re Keri*.[46] These cases apply *substitute judgment* to authorize the guardian to engage in Medicaid planning where there is no direct evidence that the ward would consent to Medicaid planning transfers. In *Shah*, for example, the court reasoned that common sense dictated that the ward would have preferred that the state, rather than his family, pay for the cost of his care.[47] The decision does not reference any evidence as to Shah's desires with regard to gifting or Medicaid planning. The *Keri* case used similar reasoning and it appears that at least in New Jersey and New York there is a presumption in favor of gifting by a guardian to accomplish Medicaid planning.[48]

D. Support to Others Where No Duty Exists

In the Michigan case of *Buckley's Estate*, the ward's next of kin requested support from a ward who had no duty to support them.[49] The

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41 *See id.* at 553.

42 427 S.W.3d 17 (Ark. 2013).

43 *Id.* at 22.

44 *Id.* at 21.

45 *In re* Shah, 733 N.E.2d 1093, 1099-100 (N.Y. 2000).

46 *In re* Keri, 853 A.2d 909, 916 (N.J. 2004).

47 *In re Shah*, 733 N.E.2d at 1099.

48 *In re Keri*, 853 A.2d at 916. The Court noted that with regard to Medicaid planning the law required substantial evidence that the ward would, if competent, not make the gifts proposed. *Id.* at 917.

49 *In re* Estate of Buckley, 47 N.W.2d 33 (Mich. 1951).

court held an evidentiary hearing and reviewed affidavits that showed the ward had a comfortable financial surplus where her assets could be used to make payments in support of others without imperiling her own support.[50] Evidence was presented that the ward would, if competent, make provision for her next of kin in poor financial circumstances even though she was under no duty to do so.[51] The court authorized the support payments.

D. Guardian's Authority to Bring Divorce Action

The Arizona case of *Ruvalcaba by Stubblefield v. Ruvalcaba* authorizes a guardian to seek dissolution of the ward's marriage.[52] The case notes that admissible evidence in a hearing on the matter may include written manifestations of the ward's intent (such as a petition for dissolution signed by the ward prior to incapacity), as well as any statements made to third parties while competent.[53] The case also discusses how the hearsay evidence that is typically involved in proving *substituted judgment* was admitted into evidence under the present sense impression exception to the hearsay rule.[54]

E. Undue Influence

Finally, determining what the ward would have done assumes that the individual's preferences were freely acquired. *Substituted judgment* is not appropriate if the individual's preferences were the result of undue influence.[55] Therefore, undue influence facts and arguments may potentially become relevant in an evidentiary hearing related to *substituted judgment* decisions.[56]

V. Conclusion

The cases and discussion above contain some common elements. Significant *substituted judgment* decisions are typically governed by the evidentiary standard of clear and convincing evidence. In addition, evidentiary hearings are normally required and many decisions will necessitate the appointment of a guardian ad litem on behalf of the ward even

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50 *Id.* at 35, 41.

51 *Id.* at 35.

52 Ruvalcaba *ex rel.* Stubblefield v. Ruvalcaba, 850 P.2d 674, 684 (Ariz. Ct. App. 1993).

53 *Id.* at 682.

54 *Id.* Arizona evidence law has been updated since *Ruvalcaba* and the present sense impression hearsay exception has been incorporated into Arizona Rules of Evidence, Rule 807 (Residual Exception).

55 *See* Kelly v. McNeel, 250 P.3d 1105, 1114 (Wyo. 2011).

56 *Id.*

where there is a court-appointed guardian involved. The types of decisions highlighted above contain many common fact patterns that practitioners can review when a *substituted judgment* issue arises in a guardianship.