IS A GUARDIAN THE ALTER EGO OF THE WARD?

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I. IS A GUARDIAN ONLY A FIDUCIARY?

I want to ask a simple question. Just what is the relation of a guardian to the ward?[1] Certainly, it is a fiduciary relationship, with the guardian having a duty of care and loyalty to the ward,[2] but that does not quite capture it. A guardian is a particular type of fiduciary; one different in authority and accountability from, say, a trustee acting under a trust instrument or a corporate director whose authority derives from the shareholders and who is accountable to them.[3] The fiduciary duties of both a trustee and corporate director are created by private arrangements.[4] Courts become involved, if at all, only when the private arrangement breaks down—when those to whom the fiduciary owes a relationship, the shareholder or the beneficiary of the trust, do not receive satisfaction from the fiduciary.[5]

In contrast, a guardian and a guardianship are creatures of the court; created by it and answerable to it.[6] The guardian is appointed by the probate court to guard the interests of the ward and use the ward's assets and income to support and maintain the ward.[7] This relationship sounds very much like a parent's duties to a minor child, except that the parent uses the parent's money rather than the child's money. Yet the relationship is not quite parallel because a parent has a protected sphere of action that gives the parent some degree of nonrenewable discretion over the life of the child.[8] This is not so with a guardian. Consider the following language of the Illinois Supreme Court:

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1. All references to "wards" refer to adult wards. The relationship of a guardian to a juvenile ward differs in fundamental ways.

2. 39 C.J.S. *Guardian & Ward* § 1 (2003).

3. *Id.* (noting that guardians derive their authority from the court).

4. To be sure, courts are frequently involved in the establishment of trusts; however, someone other than the court can create a trust. 76 Am. Jur. 2d *Trusts* § 17 (2007). As for judicial monitoring of trusts, such as requiring reports from the trustees of testamentary trusts, this is a result of some of the beneficiaries or potential beneficiaries being minors, unborn, or indeterminate, any of which requires the court to protect their interests. *E.g. Bixby v. Security-First Natl. Bank of L.A.*, 60 P.2d 862 (Cal. 1936) (demonstrating the courts' responsibility of protecting minors' interest in testamentary trusts).

5. A trust, for example, is not a legal entity but only a fiduciary relationship between the trustee and beneficiaries. 76 Am. Jur. 2d *Trusts* § 3 (2007).

6. 39 C.J.S. *Guardian & Ward* § 5.

7. *Id.* at § 2.

8. Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401, 2401–2402 (1995).

> The appointment of a guardian creates the relation of trustee and beneficiary between the guardian and the ward. The estate becomes a trust fund for the ward's support. The guardian only acts as the hand of the court and is at all times subject to the court's direction in the manner in which the guardian provides for the care and support of the disabled person. . . . The trial court protects the disabled person as its ward, vigilantly guarding the ward's property and viewing the ward as a favored person in the eyes of the law. The court functions in a central role, which permits it to oversee and control all aspects of the management and protection of the disabled person's estate. The court controls the ward's person and estate, and directs the guardian's care, management, and investment of the estate.[9]

Here, the Court reminds us that a guardian is not an independent actor, but a fiduciary appointed by and answerable to the court. But to repeat, what does it mean to label a guardian as a fiduciary?

Perhaps not very much. Indeed, some scholars claim that "the fiduciary principle is fundamentally a standard term in a contract."[10] Identifying a fiduciary as merely someone acting under strict and demanding contract terms does not capture the sense of the relationship—at least not that of a guardian and a ward.

Others have realized that a fiduciary relationship has a different quality than a contract, for example the following:

> [I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and "inflexible" rule of fidelity . . . requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty. . . . [A] fiduciary . . . is bound to single-mindedly pursue the interests of those to whom a duty of loyalty is owed.[11]

Although these duties the court describes could be stated in a contract, they are not. To plant the term contract on a fiduciary

9. *In re Est. of Wellman*, 673 N.E.2d 272, 278 (Ill. 1996) (citations omitted).

10. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 Yale L.J. 698, 702 (1982).

11. *Birnbaum v. Birnbaum*, 539 N.E.2d 574, 576 (N.Y. 1989).

relationship seems a bit like Columbus "discovering America." It may have been new to Christopher, but the existence of America was old news to its millions of inhabitants. Similarly, fiduciary relationships did not need to be "discovered" by the good ship Contract. If contracts had never been conceived of, fiduciary relationships could still exist. In fact, fiduciary relationships are usually not created by formal or even informal contracts.[12] Rather, the fiduciary relationship arises from that old "antithesis" of contract law, a status relationship.[13] As one commentator stated, a "[c]ontract is viewed as displacing older, less democratic ways of understanding relationships, such as status and hierarchy, which impose structured relationships that are usually beyond individual alteration."[14] Even today, guardianship and fiduciary doctrine find support in both caselaw[15] and in state statutes.[16] A guardianship, therefore, is a noncontractual, statutorily authorized relationship that imposes fiduciary duties upon the guardian. The guardianship statute as interpreted by caselaw defines the authority and responsibilities of the guardian.[17] Moreover, the judicial definition of the duties and obligations of the guardian is an on-going process as the court reacts to the realities of the ward's life and the choices presented to the guardian.

II. THE GUARDIAN HAS OBLIGATIONS TO . . . ?

Although not quite an agent of the court, a guardian is ultimately under the court's supervision and control.[18] Consequently, because all the powers of the guardian come from the court,[19] a

12. *See* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 21–22 (2001) (noting that courts often find fiduciary relationships where the case involves "a close relationship, an entrusting and acceptance of power, and a superiority of position").

13. For a discussion as to the basis of fiduciary doctrine, see *id.* at 15–35.

14. Martha Albertson Fineman, *The Social Foundations of Law*, 54 Emory L.J. 201, 203 (2005).

15. *E.g. In re Cyr*, 873 A.2d 355 (Me. 2005); *In re Est. of Rosengarten*, 871 A.2d 1249 (Pa. 2005).

16. *E.g.* Ala. Code. § 26-2-2A-1 (West 1992); N.Y. Mental Hyg. L. § 79.01 (McKinney 2006).

17. *E.g.* Ala. Code. §§ 26-2A-78, 26-2A-108.

18. *E.g.* Cal. Prob. Code Ann. § 1514 (West 2002); N.Y. Surrog. Ct. Proc. Act § 1758 (McKinney 2004); 20 Pa. Consol. Stat. Ann. §§ 5512.1–5512.2 (2005); Tex. Prob. Code Ann. §§ 671–672 (2003).

19. *Supra* n. 6 and accompanying text.

guardian can have no greater authority than the court. Of course, a court can delegate less authority to the guardian than the court has. A court can either absolutely bar the guardian from engaging in certain activity[20] or require the guardian to seek specific court approval before making a particular decision or approving a particular act.[21]

That the guardian's authority derives from the court's appointment does not make the guardian an agent of the court. Unlike an agent, the guardian is not merely an extension of the court; rather, the guardian acts "for" the ward.[22] The dictionary tells us that "fiduciary duty" requires acting "in the best interests of the other person."[23] Other terms that come to mind when attempting to define "fiduciary duty" are loyalty, good faith, and trust. In short, a fiduciary guardian acts in the best interests of the ward, rather than in the best interests of the guardian, the court, or any third party, such as society.[24]

A guardian, then, has duties running to both the court and the ward. Visually we might display the guardian as situated:

$$\text{Court} \Leftarrow \text{Guardian} \Rightarrow \text{Ward}$$

Note that the duties run only from the guardian to the court or the guardian to the ward with no reciprocal obligations running to the guardian.

Though the guardian is not the agent of the court, neither is the guardian merely an agent of the ward.[25] That is, the guardian cannot be seen merely as a legal actor whose authority comes from the ward.[26] Rather, the guardian has powers delegated to him or her by the court, but is expected to act according to the

20. *Supra* n. 6 and accompanying text (noting that court-appointed guardians are always under the court's control and supervision).

21. *Id.*

22. *See id.* at § 2 (providing that the purpose of a guardian is to further the ward's well-being).

23. *Black's Law Dictionary* 545 (Bryan A. Garner ed., 8th ed., West 2004).

24. *See* Michael D. Casasanto, Mitchell Simon & Judith Roman, *A Model Code of Ethics for Guardians*, 11 Whittier L. Rev. 543, 547 (1989); Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 823 (1983); Kevin P. Quinn, *The Best Interests of Incompetent Patients: The Capacity for Interpersonal Relationships as a Standard for Decisionmaking*, 76 Cal. L. Rev. 897, 916 n. 114 (1988).

25. *See* 39 C.J.S. *Guardian & Ward* § 1 (noting that guardians derive their authority from the court).

26. *Id.*

preferences and desires of the ward—that is, as might an agent of the ward.[27] Unlike an agent, however, the guardian's authority comes not from the ward but from the court.[28]

Because the guardian serves two masters,[29] conflicts arise when the ward's interests and the court's interests do not coincide.[30] At a minimum, the guardian must consider the desires of the court, meaning society's concerns, as well as those of the ward. In 1977, to pick a noteworthy example, the Massachusetts Supreme Court was asked to approve a guardian's decision not to approve chemotherapy for an older retarded man with incurable cancer.[31] The guardian argued that it was not in the ward's best interests to be subjected to chemotherapy, which would have severe and painful side effects, merely to prolong the ward's life.[32] The Court ultimately agreed, but only after also considering what it referred to as the "[s]tate interests," which included the prevention of suicide, the protection of third parties, and the maintenance of the ethics of the medical profession.[33] The guardian's decision as to the ward, therefore, could not be based solely upon a judgment of the ward's desires as revealed by the "actual interests and preferences" of the ward.[34] Instead, the guardian had to also balance the imputed decision of the ward against the putative "interests and preferences" of society.[35]

The guardian's dual obligations to the court and the ward indicate that, based on these divided loyalties, the guardian is not a "pure" fiduciary.[36] If the cardinal precept of a fiduciary is loyalty, then a guardian is a distinct breed of fiduciary because the loyalty of the guardian runs not only to the ward, but also to society and perhaps to other identifiable individuals. Still, in the main, the

27. *Id.* at §§ 1–2.

28. *Id.* at § 1.

29. Which, according to the Bible, is not a wise idea. *Matthew* 6:24.

30. *See* 39 C.J.S. *Guardian & Ward* § 141 (providing that where a court order to sell a ward's property is not in the ward's best interests, refusing the court order may be proper).

31. *Superintendent of Belchertown St. Sch. v. Saikewicz*, 370 N.E.2d 417, 417 (Mass. 1977).

32. *Id.* at 419.

33. *Id.* at 425.

34. *Id.* at 431.

35. *Id.* at 435. Note, however, that the court ultimately found that the State's interests, in those particular circumstances, did not outweigh the ward's preferences. *Id.*

36. *See* Boxx, *supra* n. 12, at 17 (asserting that the "basic duty of a fiduciary is the duty of loyalty").

guardian is expected to be loyal to the ward, and that loyalty means, among other things, doing what the ward would have wanted.

III. DO WE REALLY KNOW WHAT THE WARD WOULD DO?

The practice of looking to the probable desire of the ward to determine how the guardian should act has a long history, stretching back to 1816. In the English case of *Ex parte Whitbread*,[37] the court permitted a guardian to give the ward's surplus income to the ward's needy relatives based upon the belief that, had the ward been of sound mind, the ward would have done so himself.[38]

Fair enough. A guardianship is perceived as a means of carrying out the ward's desires even if that means giving away the ward's assets and even if the ward, because of his or her mental condition, is unable to appreciate or gain pleasure from the gift.[39] The gift, therefore, does not benefit the ward. Imagine, for example, that the ward is terminally ill and unconscious. The ward is certain to die without ever being aware of the gift. All the benefits of the gift flow to the recipient with vicarious pleasure redounding to the guardian and the court.

How exactly is that being "loyal" to the ward? If the ward is defined as the once cognitively aware individual, once cognition is lost,[40] we are no longer concerned with benefiting the ward as all benefits of the gift flow to the recipient of the gift. Instead, requiring the guardian to act in a manner consistent with what the ward would have done is akin to carrying out the wishes of a decedent, such as disposing of the body by cremation. We do so not to "please" the decedent, who is unaware of how his or her body is disposed, but to assure ourselves that when we die our wishes will be followed.[41] Similarly, the guardian is commanded to act accord-

37. *See In re Guardianship of Christiansen*, 248 Cal. App. 2d 398, 407 (Cal. App. 1st Dist. 1967) (discussing *Ex parte Whitbread*, 2 Merivale 99 (1816)).

38. *Id.*

39. *See id.* (describing the doctrine of substituted judgment as applied in the gift-giving context).

40. Assume that it is unlikely or impossible to ever return, such as in the case of a severely demented older person.

41. Susan Kerr, *Post-Mortem Sperm Procurement: Is it Legal?* 3 DePaul J. Health

ing to the wishes of the ward because any one of us could some day become a ward.[42]

But how should the guardian determine what the ward would have wanted, particularly if the ward has been mentally incapacitated for a number of years? Courts have resolved this issue by concluding that the guardian should "act as a reasonable and prudent man would act under the same circumstances . . . ."[43] This reasoning would later justify a guardian making gifts of the ward's property in order to avoid estate taxes.[44]

IV. WHERE DOES A GUARDIAN LOOK FOR GUIDANCE?

The idea that the guardian should act in accord with what the ward would want, is believed to want, or could be expected to want deserves more examination. Begin with why guardians are appointed: to provide a legal decisionmaker, and thus protection, for those who are unable to care for themselves or their property.[45] Note that the fundamental reason for a guardian is the inability of the ward to participate in the world created by law.[46] In modern parlance, the ward is mentally incapacitated.[47] The legal concept of mental capacity governs "when a state legitimately may take action to limit an individual's rights to make decisions about his or her own person or property."[48] Capacity is a legal construct that incorporates a medical or cognitive diagnosis

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Care L. 39, 60 (1999).

42. Of course, this begs the question of why, absent religious concerns, we should care what happens to our bodies after we die or what happens to our wealth not needed for our support if we become mentally incapacitated. In both instances, we will not be aware of what transpired.

43. *In re Guardianship of Christiansen*, 248 Cal. App. 2d at 422–423. This rule applies only when there is no evidence of the incompetent's intent formed while competent. *Id.*

44. *E.g. McGorty v. Appeal from Probate*, 1992 WL 139773 at *1 (Conn. Super. June 16, 1992); *In re Keri*, 853 A.2d 909, 913–914 (N.J. 2004).

45. *See* Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique, and a Proposal for Reform*, 23 Ariz. L. Rev. 599, 601 (1981) (discussing guardians as part of Anglo-Norman legal tradition).

46. *Id.*

47. *See id.* at 602 (explaining that an incompetent person for whom a guardian cares is known as a ward).

48. Charles P. Sabatino, *Competency: Refining Our Legal Fictions*, in *Older Adults' Decision-Making and the Law* 3 (Michael Smyer, K. Warner Schaie & Marshall B. Kapp eds., Springer 1996).

of an individual's mental capacity with the conclusion that as to a particular act, the ward lacks the necessary mental capacity to engage in the act in question.[49] Different actions require different levels of mental capacity.[50]

Let us assume that a guardian has been appointed and that the ward lacks the capacity to undertake a particular act. Further assume that the guardian is presented with doing A, B, or C.[51] How should the guardian choose between acts A, B, and C? Permit me to suggest that only four alternatives merit serious consideration. For example, once random selection and other nonsensical choices are ruled out, the viable choices include the following:

(1) Do what is best for society.

(2) Do what is in the ward's best interests.

(3) Do what is best for a third party who has a relationship with or is dependent upon the ward.

(4) Do what the ward would have done.

Two other notable choices are not present: doing what the court might think is best based on the values held by the judge and doing what the guardian might think is best based upon the values of the guardian. These can be eliminated as lacking any foundation in law.[52]

Using the previous example of making gifts of the ward's assets in order to avoid estate taxes, what are the possible justifications for the above list of choices? Begin by examining what is best for society. Given that the court who appoints the guardian represents the state and society, it is not a far stretch to imagine that when individuals can no longer make decisions, they forfeit to the state their right to make the decisions, not unlike property that escheats to the state upon intestacy. Just as the failure to write a will can result in the loss of control of the post-mortem

49. *Id.* at 12–13.

50. *Id.* at 13.

51. Assume that choice C is to do nothing, i.e., preserve the status quo.

52. *See Saikewicz*, 370 N.E.2d at 425, 432 (considering the interests of society, third parties, and the ward, but not the judge's or guardian's values).

distribution of property,[53] the failure to appoint an agent under a durable power of appointment could result in the forfeit of the right to make that decision to society acting through a guardian. Using this example, if the guardian had to decide whether to make gifts of the ward's estate in order to lower federal estate taxes, the guardian would decline to do so because society is better served by collecting the estate tax.

Second, consider what is best for the ward. Here the guardian acts according to what a reasonable person would believe is best for the ward.[54] Applying the same example, a reasonable person would make the gifts because the reasonable person would prefer to favor heirs over the government. Note, however, that under the best-interests rule, the wishes of the ward are irrelevant because the guardian acts according to how an idealized reasonable person would act.[55] The best-interests standard thereby avoids trying to construct what the ward would actually have done[56]—an impossible task given that all decisions reflect the particular facts and circumstances of the situation. However, while we can surmise or guess what the ward might have done, we can never be sure. But we may be fairly certain that we can choose a course of action that is best for the ward.

Third, analyze what is best for a third party, such as an heir. Again, in the case of the gift of property to avoid taxes, the answer is to make the gift because it would advantage an heir who, thanks to the relationship with the ward, has a right to have his or her interests given consideration.[57] That is, since the ward will neither know of the decision nor appreciate its consequences, benefiting someone who has the mental capacity to appreciate the act makes sense.

Finally, examine what the ward would have done. If the ward stated an opinion as to the matter in question—"I want to avoid estate taxes"—or behaved in a manner indicating what he or she

53. ABA, *Guide to Wills & Estates* 5 (Random House 2004).

54. *Supra* n. 24 and accompanying text (introducing the best-interests test).

55. *See* Casasanto et al., *supra* n. 24, at 547 (describing the best-interests standard as based on objective criteria and societal norms).

56. *See id.* (clarifying that the best-interests standard is appropriate only where the ward lacked previous competency or where the ward did not indicate a preference that could guide the guardian).

57. *See* ABA, *supra* n. 53, at 9 (explaining that, in many states, relatives of an intestate decedent already have statutory rights to the decedent's property).

might have done—a pattern of typically arranging his or her affairs to avoid or minimize taxes—the guardian can feel confident that the gift mirrors what the ward would have done.[58] Otherwise, the guardian can only attempt to interpolate the probable decision of the ward.[59]

It is not giving anything away to disclose that the law favors the fourth analysis, doing what the ward would have done.[60] But why? Given that the ward is mentally incapacitated, the ward derives no pleasure from knowing that the guardian has acted as the ward would have acted. In fairness to the common law, doing what the ward would have wanted found favor, in part, because of a desire to act in a manner, that is, create a "world" acceptable to the ward in the event that the ward should regain capacity.[61] Of course, that "world" typically consisted of the property rather than the person of the ward.[62] For example, a court might be reluctant to permit a guardian to encumber the ward's property with a long-term lease for fear that if the ward regained capacity, he or she would have lost the right to choose how the property should be used.[63]

Of course, the concern with "[w]hat if the ward recovers?" has meaning only if the ward has any possibility of recovering capacity. For an older individual, recovery is an unlikely event in light of the irreversible and progressive nature of most causes for the loss of capacity.[64] Further, that concern may have little importance as to decisions about the ward's person. For example, if the guardian moves the ward into an assisted-living facility, would any ward seriously object if he or she were to later regain capacity? If the ward objects to being placed in an assisted-living facil-

58. Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 Yale L.J. 1, 26 (1990).

59. *Id*.

60. *Id*. at 26–29 (discussing the legal fiction of substituted judgment and its evolution in American courts).

61. In thirteenth-century England, the king had a "duty to provide that the land of the lunatic was safely kept without waste and destruction . . . on the off chance that [the lunatic] might return to his senses." *Id.* at 17.

62. *Id*.

63. *E.g. Roach v. Matanuska Valley Farmers Cooperating Assn.*, 87 F. Supp. 641, 642–645 (D. Alaska 1949).

64. *In re Elsie B.*, 265 A.D.2d 146, 149 (N.Y. App. Div. 3d Dept. 2000).

ity and has the ability to live independently, nothing prevents the ward from moving.

If the third analysis—doing what benefits a third party—were the standard, at least the guardian's actions would make someone happy. But the question arises as to which third party should receive the benefit: the spouse, a life partner, one or more adult children or grandchildren? Are siblings or nieces and nephews too distant to qualify? Indeed, the lack of standards available to determine who benefits and how benefits are apportioned among third parties seriously undermines any sense that the concerns of third parties should influence the guardian's choices. Still, third-party concerns do play a role in determining what a guardian should do.[65] When faced with a guardian's request to undertake a course of action, courts have considered, among other things, the concerns of the ward's dependents,[66] takers under the will or heirs of the ward,[67] and the spouse.[68]

Similarly, requiring the guardian to act according to the first analysis—doing what is best for society—places the guardian in the impossible position of being required to identify just what element of society to benefit or just what societal values to promote.[69] Perhaps that is why this option does not seem to be a serious contender.[70]

The reality, of course, is that the current standard for a guardian is to carry out the wishes of the ward even if those "wishes" are known only through the ward's lifestyle.[71] If nothing is known of the ward's wishes, then the guardian should do what

65. Bruce Jennings, *Freedom Fading: On Dementia, Best Interests, and Public Safety*, 35 Ga. L. Rev. 593, 606 (2001) (highlighting public safety concerns as a type of third-party concern).

66. *In re Guardianship of Pruitt*, 842 P.2d 771, 772–773 (Okla. Civ. App. 1992) (holding that a guardian may expend funds of the ward's estate to support a dependent family member upon a showing that the family member is in need and unable to support herself).

67. *Lesnick v. Lesnick*, 557 So. 2d 856, 857 (Ala. 1991); *Est. of Christiansen*, 56 Cal. Rptr. 505, 507 (Cal. App. 2d Dist. 1967).

68. *In re Est. of Nelson*, 657 P.2d 427, 429 (Ariz. App. Div. 1982); *In re Marriage of Drews*, 503 N.E.2d 339, 340 (Ill. 1986).

69. Norman L. Cantor, *The Bane of Surrogate Decision-Making Defining the Best Interests of Never-Competent Persons*, 26 J. Leg. Med. 155, 193–195 (June 2005).

70. *Saikewicz*, 370 N.E.2d 417 at 428.

71. *In re Fiori*, 673 A.2d 905, 912 (Pa. 1996).

is best for the ward—that is, behave according to the best-interests test.[72]

This little thought exercise leads to the observation that if the guardian is expected to act as the ward would have acted but for the incapacity, then the guardian is essentially the agent of the ward and perhaps even more closely bound to the preferences of the ward than an agent is to the principal.[73] The essence of doing what the ward would have done is known as the substituted-judgment doctrine.[74] Under this theory, the guardian is obligated to suppress his or her own judgment in favor of "channeling" what the ward would have done.[75]

V. IS SUBSTITUTED JUDGMENT ACTUALLY AGENCY IN ALL BUT NAME?

The role of the guardian can be contrasted to that of an agent.[76] The agency relationship rests on fiduciary obligations of trust, loyalty, and promotion of the best interests of the principal.[77] The propriety of the acts of the agent, however, are not tested by asking the question, "[W]hat would the principal have done?", but rather by questioning, "Did the acts of the agent promote the interests of the principal and demonstrate a commitment of loyalty and a lack of self-promotion?"[78] For example, suppose the principal, Pearl, hires an investment advisor, Ida, to manage her account. Pearl is going on a month-long trek in Nepal and instructs Ida to manage her substantial stock portfolio during that period. When Ida decides to sell stock X and buy bond Y, Ida does not ask herself whether Pearl would make that exact decision. Rather, Ida considers whether the sale of stock X and the purchase of bond Y is consistent with her authority as an agent.

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72. Alan Meisel & Kathy L. Cerminara, *The Right to Die: The Law of End-of-Life Decision Making* 4.01(C)(3)–4.03 (3d ed., 2004).

73. Agents follow the instructions of the principal but do not claim to "be" the principal.

74. *In re Fiori*, 673 A.2d at 651. The term is used almost exclusively in matters of healthcare decisions.

75. *Id.* at 652.

76. *Seaboard Sur. Co. v. Boney*, 761 A.2d 985, 992 (Md. 2000) (discussing how a principal has the right to control his agents, while a ward "may not select, instruct, terminate, or otherwise control his guardian").

77. *Arthur v. Brick*, 565 N.W.2d 623, 625 (Iowa App. 1997).

78. *Restatement (Second) of Agency* § 387 (1958).

A guardian faced with the same decision and operating under the doctrine of substituted judgment, however, would do what Pearl would have done.[79] If Pearl, for example, had rarely purchased bonds, the guardian should not buy bond Y even if the guardian believed it to be a sound investment. This is not to say that the guardian would be liable if she sold stock to buy bonds; the doctrine is not so rigid as to preclude some amount of discretionary judgment by the guardian.[80] However, if the guardian were to approach the court for advice, the court might advise the guardian to follow the investment pattern that Pearl established.[81]

The doctrine of substituted judgment, which has its genesis in healthcare decisionmaking, has not yet completely triumphed in regards to property-management decisions.[82] The caselaw dealing with the ward's assets that uses the ward's wishes as guidance is usually about spending or giving away the ward's assets rather than investment decisions.[83] When faced with how a guardian should act when investing the ward's assets, courts appear to expect the guardian to act as a trustee would—that is, follow the fiduciary precepts of loyalty, prudence, and acting solely in the best interests of the ward.[84]

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79. *In re Fiori*, 673 A.2d at 651.

80. *Gordon v. Brunson*, 253 So. 2d 183, 188 (Ala. 1971).

81. *But see* Ala. Code § 26-2A-152 (stating that conservators may invest and reinvest funds of the estate as would a trustee).

82. *Strunk v. Strunk*, 445 S.W.2d 145, 148 (Ky. 1969).

83. *In re Guardianship of Christiansen*, 248 Cal. App. 2d at 399.

84. *In re Est. of Swiecicki*, 477 N.E.2d 488, 490 (Ill. 1985). In this case, the Court stated the following:

> Illinois law is clear that: (1) a fiduciary relationship exists between a guardian and a ward as a matter of law and (2) the relationship between a guardian and a ward is equivalent to the relationship between a trustee and a beneficiary. Therefore, the fiduciary duties owed a beneficiary by a trustee and a ward by a guardian are similar. One such duty is the duty of loyalty. This duty prohibits a guardian from dealing with a ward's property for the guardian's own benefit.

Id. (internal citations omitted); *Dowdy v. Jordan*, 196 S.E.2d 160, 164 (Ga. App. 1973). The court stated here that

> [a] guardian or other trustee must act, not only for the benefit of the trust estate, but also in such a way as not to gain any advantage, directly or indirectly, except such as the law specifically gives him; and he owes an undivided duty to the beneficiary, and must not place himself in a position where his personal interest will conflict with the interest of the beneficiary. . . . The purpose of this rule is to require a trustee to maintain a position where his every act is above suspicion, and the trust estate, and it alone, can receive, not only his best services, but his unbiased and uninfluenced judgment.

Resorting to fiduciary standards for investment is understandable since the goal of investing is to maximize returns commensurate with appropriate risk.[85] And what the ward would have done, that is, how the ward might have invested his or her assets, is largely unknowable and, frankly, not very relevant.[86] Because what is a proper investment always depends on the particular facts and circumstances that the guardian faced at the time of the investment,[87] the wishes of the ward are unknowable; no one can say with any certainty which investment path the ward might have chosen. For example, even the fact that the ward historically invested in bonds is not proof that the ward would have refused to invest in stocks if he or she were investing the funds under the exact conditions faced by the guardian. Given that the ward's wishes are essentially unfathomable and because the ward's goal of proper balance of investment reward and risk is the same as the guardian's goal, it is not surprising that when investing the ward's assets a guardian is held to fiduciary standards rather than strictly applying the doctrine of substituted judgment.[88]

In matters of the health of the ward, however, the substituted-judgment doctrine is the overwhelming choice for several reasons.[89] Most fundamentally, the substituted-judgment doctrine has no other serious doctrinal challenger. As discussed, when given a choice between the interests of society, a third party, or the ward, there is no persuasive argument not to do what the ward would want.[90] The test of doing what is in the best interests

Id. (internal quotations omitted); *Bryan v. Holzer*, 589 So. 2d 648, 657 (Miss. 1991). Here, the court stated that

> [a] conservator stands in the position of a trustee, has a fiduciary relationship with the ward and is charged with a duty of loyalty toward the ward. The duty of loyalty . . . [means] [t]he trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary [and] [t]he trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.

Id.

85. *In re Glenn*, 363 N.W.2d 348 (Minn. App. 1985).

86. *Id*. at 350.

87. *Id*. (noting that "[t]he funds must be guarded carefully and invested cautiously").

88. *Id*. at 350–351.

89. Eric C. Miller, *Listening to the Disabled: End-of-Life Medical Decision Making and the Never Competent*, 74 Fordham L. Rev. 2889, 2898 (2006).

90. *In re Quinlan*, 355 A.2d 647, 671 (N.J. 1976).

of the ward does have some force, but it falters on how to determine just what is in the best interests of the ward. This test is difficult to apply because there are no objective best interests; healthcare choices are normative decisions that require identification of the values to be served before any decision can be reached.[91]

The substituted-judgment test rests on the assumption that the guardian knows what the ward would have done.[92] But what if the wishes of the ward are unknown, or what if the ward never expressed an opinion on the choice to be made? At that point, the guardian is set free from the duty to carry out the wishes of the ward and turns instead to the best-interests test.[93] This raises, in turn, the question of how the guardian should determine what acts promote the best interests of the ward.

VI. IS THE BEST-INTERESTS TEST ACTUALLY THE REASONABLE PERSON TEST IN ALL BUT NAME?

If the values of the ward are not primary, the guardian must turn to some other values. But which values? The following list suggests some options:

- Life is sacred;
- Use scarce healthcare resources in an efficient manner;
- Favor the emotional needs of the living over those of the dying, mentally incapacitated ward;
- Provide death with dignity;
- Prolong life whenever possible;
- Let the ward find the sanctuary of death.[94]

91. Jennifer L. Sabo, *Limiting a Surrogate's Authority to Terminate Life-Support for an Incompetent Adult*, 79 N.C. L. Rev. 1815, 1822–1825 (2001).

92. *Id*. at 1822.

93. Glen Cohen, *Therapeutic Orphans, Pediatric Victims? The Best Pharmaceuticals for Children Act and Existing Pediatric Human Subject Protection*, 58 Food & Drug L.J. 661, 687–688 (2003).

94. Joan L. O'Sullivan & Andrea I. Saah, *Less Restrictive Alternatives to Guardianship*, Md. Guardianship Bench BK.-CLE 63 7–8 (2001).

The list could continue, but this is sufficient to indicate that it may not be all that easy to determine which acts are in the best interests of the ward. One answer is that old favorite of the law, the reasonable person standard.[95] That is, the guardian should assume the ward is a reasonable person and act accordingly. Of course, that standard only shifts the question to what would be best for a reasonable person. For example, consider an eighty-year-old ward with severe dementia who is diagnosed with cancer. The ward only occasionally recognizes her sole living relative, her fifty-year-old niece who is her guardian. The physician suggests a procedure that offers a survival rate of about forty percent but entails a fair amount of pain. The alternative is not to treat but only aggressively manage the pain. The ward never expressed a view as to end-of-life treatment. In this case, would death be in the best interests of the ward or would avoidance of pain be primary? The answer, of course, depends on the values of the ward—an individual presumed to be a reasonable person.

When a guardian makes a critical decision for the ward based on the best-interests standard, the guardian necessarily refers to values.[96] Furthermore, it would be folly to assume that guardians totally divorce themselves from their personal values. In the above example of the demented ward with cancer, suppose the niece is very religious and believes that the sanctity of life compels her to approve the painful treatment procedure. In another scenario, suppose the niece approves the treatment because she cannot bear the thought of the guilt she might feel if she denies her aunt the chance of survival. In contrast, the niece might withhold consent to the procedure because she believes that only a cognitively aware life is a life worth attempting to save. Or, she may firmly believe that costly, problematic medical treatments should be approved only in narrow circumstances and certainly not for an aged, demented patient. No matter which way the guardian turns, she necessarily incorporates her values into the determination of what is in the ward's best interests. If the guard-

95. *Acuna v. Turkish*, 930 A.2d 416, 425 (N.J. 2007) (applying the reasonable patient standard in the context of informed consent).

96. *See also* Loretta M. Kopelman, *The Best Interests Standard for Incompetent or Incapacitated Persons of All Ages*, 35 J. L. Med. & Ethics 187, 188–189 (2007) (supporting the Author's proposition that a guardian relies on values when making decisions).

ian turns to the court for direction, she is only asking that the court inject its values into the decision.

But suppose the niece, in her capacity as guardian, attempts to avoid including her "values" by resorting to the reasonable person standard. She might even believe that the "correct" answer is to do what a "reasonable person" would do. If so, she must then determine who the reasonable person is and what values that person would hold. Even if the guardian successfully ignores her own values and preferences, she is necessarily applying someone's value under the guise of the reasonable person, or more likely, the guardian is merely doing what "most folks" would do; unless, of course, the guardian believes that what the reasonable person would do is the minority position, and therefore, most patients are not reasonable. In that case, the guardian has little choice but to assume that when faced with the ward's situation, the reasonable choice is to do what the majority of patients would do.

However, if the guardian believes that what the majority would do is unreasonable or morally wrong, the guardian will find it very difficult to choose a course of action that violates her own values. It can be done, of course. Presumably, judges often find themselves compelled to rule in a way that is inconsistent with their personal values. But guardians are not judges and are not held to judicial standards of behavior.[97] Guardians are merely average people who sometimes find themselves required to make extraordinary decisions.[98] When guardians are asked to make life or death decisions, we can hardly expect them to ignore their own values, morality, and ethics in favor of what some mythical "reasonable person" would do. If we assume that the guardian will usually believe that he or she is "reasonable," the guardian will in effect be projecting his or her values into the determination of what is in the ward's best interests. Furthermore, the guardian may conceivably act in ways quite contrary to what the ward might have wanted.[99] For example, if most people would terminate life support in light of the health condition of the ward, that

97. *In re Roche*, 687 A.2d 349, 354 (N.J. Super. Ch. Div. 1996) (explaining how the "[c]ourt intended the guardian of an incompetent to consider a wide variety of types of information in ascertaining the subjective intent of the ward with respect to a particular medical decision").

98. *Id.* (discussing how a guardian will likely face difficult medical decisions).

99. *Witt v. Ward*, 573 N.E.2d 201, 206–207 (Ohio App. 12th Dist. 1989).

tells nothing as to whether *this* ward would have chosen to do so.[100]

Yet in most cases, the guardian's values will be consistent with what the reasonable person would do—that is, what the majority would do—and so the guardian will apply the best-interests test, interpreted as doing what is "reasonable."[101] By doing so, the guardian has the high probability of doing what the ward would have done.[102] For example, if ninety percent of reasonable persons in the ward's condition would terminate life support, the guardian's decision to terminate life support is statistically likely to comport with what the ward would have done. Since "knowing" what the ward would want is literally impossible, it may be more sensible to rely on the likely behavior of a reasonable person, even a reasonable person as defined by the values of the guardian, and abandon the search for the illusive "desires" of the ward.

The best-interests standard can also be justified because we can never be confident as to what the ward might do, so it makes sense to choose another value as the basis for the decision.[103] In the case of the best-interests or the more common reasonable-choice standard, society might be signaling what it believes to be the "correct" choice.[104] For example, since the best-interests test has been invoked to justify the termination of life support for terminally ill patients,[105] that choice could be read as a societal pronouncement that at some point healthcare should be terminated for a dying patient.[106]

The best-interests standard is in effect a signal of "best practices." If the values of the guardian are not in alignment with

100. Even an advance directive such as a living will cannot be trusted. Rebecca Dresser, *Precommitment Theory in Bioethics and Constitutional Law: Bioethics: Precommitment: A Misguided Strategy for Securing Death with Dignity*, 81 Tex. L. Rev. 1823, 1842 (2003). What an individual will state as a preference in the abstract may be quite different than what that individual might do when faced with the actual decision. *Id.*

101. Casasanto et al., *supra* n. 24, at 547–548; William L.E. Dussault, *Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens*, 13 Gonz. L. Rev. 585, 595–598 (1978).

102. *Id*.

103. *Id*.

104. Dussault, *supra* n. 101, at 595–598, 612–615 (reviewing changes that have been made in guardianship law that tend to favor the best-interests approach).

105. *Id*.

106. *Id*. at 612–615 (noting the problems that arise at the point where a dying patient should no longer be given healthcare).

those of a "reasonable person" and if the guardian disagrees with what a reasonable person would do, the guardian must either subsume his or her values or resign the position.[107] It is unknown what guardians actually do when faced with a conflict between what they would do and what a reasonable person would do. Probably the more serious the decision, the more likely the guardian will follow his or her own precepts. For example, it is difficult to imagine a guardian terminating life support despite a belief that to do so is morally or ethically wrong. On the other hand, a guardian who distrusts investing in stocks might be willing to invest the ward's assets in a diversified mutual fund even though the guardian would not invest his or her own assets in that manner.

VII. IS A GUARDIAN ACTUALLY AN ATTORNEY-IN-FACT IN ALL BUT NAME?

If a guardian is obligated to carry out the wishes of the ward, the guardian seems to be little more than a court-appointed attorney-in-fact because an attorney-in-fact has a fiduciary obligation to loyally carry out the expressed and implied wishes of the principal.[108] If there is no evidence of the principal's desires, the attorney-in-fact is expected to act in the best interests of the principal, which presumably means the same for the attorney-in-fact as it does for the guardian—that is, act as would a reasonable person.[109]

If guardians are to act very much as if they were attorneys-in-fact, then the only difference between a guardian and an attorney-in-fact is the degree of judicial supervision.[110] A guardian is directly accountable to the appointing court, while an attorney-in-fact is accountable only if someone files a complaint with the court.[111] However, this description does not quite capture the reality as few courts effectively monitor the acts of a guardian.[112] Ad-

107. Casasanto et al., *supra* n. 24, at 547, 566–567.

108. Robert C. Waters, *Florida Durable Power of Attorney Law: The Need for Reform*, 17 Fla. St. U. L. Rev. 519, 522–524 (1989).

109. *Id*. at 544–545.

110. *Id*. at 545–546.

111. Boxx, *supra* n. 12, at 41–47.

112. Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 Stan. L. & Policy Rev. 347, 348–350 (1998).

ditionally, as with an attorney-in-fact, most judicial supervision of the guardian occurs after someone files a complaint or alerts the court.[113]

The conceptual similarity between guardianship and a durable power of attorney is further demonstrated by the refusal of courts to appoint a guardian if the potential ward has appointed a durable power of attorney with adequate authority.[114] Proof of incapacity alone is not enough to justify a guardianship.[115] Even if an individual is mentally incapacitated to the degree that a guardian might be warranted, many courts have refused to appoint a guardian if the needs of the incapacitated person are otherwise being adequately met by an attorney-in-fact or other surrogate decisionmaker.[116] Before appointing a guardian, some courts demand that the petitioner prove that the incapacitated person is being ill-served by the durable power of attorney.[117] Guardianship is the public backstop when the incapacitated individual has failed to appoint an attorney-in-fact for property management and a surrogate for healthcare decisionmaking.[118] The state, in other words, will not override a private arrangement created by the incapacitated person absent a showing that the individual has unmet needs or is being exploited or abused.[119]

The right of an individual to appoint an attorney-in-fact and thereby preclude the appointment of a guardian is not surprising given that the guardian, like an attorney-in-fact, is expected to implement the wishes of the ward.[120] Since the attorney-in-fact represents the choice of the incapacitated person and appears to be carrying out the wishes of the incapacitated person, there is no reason to duplicate an arrangement that is already meeting the needs of the incapacitated person.[121] Of course, if guardianship

113. *Id*. at 351–353.

114. *McCallie v. McCallie*, 660 So. 2d 584, 586 (Ala. 1995); *Smith v. Lynch*, 821 So. 2d 1197, 1198 (Fla. 4th Dist. App. 2002); *Guardianship of Smith*, 684 N.E.2d 613, 616–619 (Mass. App. 1997).

115. *McCallie*, 660 So. 2d at 586–587.

116. *See In re Isadora*, 773 N.Y.S.2d 96, 97–98 (N.Y. App. Div. 2d Dept. 2004); *In re Peery*, 727 A.2d 539, 539–541 (Pa. 1999); *but see In re Guardianship Blare*, 589 N.W.2d 211, 213–215 (S.D. 1999).

117. *In re Isadora*, 773 N.Y.S.2d at 97–98; *In re Peery*, 727 A.2d at 539–541.

118. Casasanto et al., *supra* n. 24, at 616–624.

119. *Id*.

120. *Id*. at 548–549.

121. *Id*.

were intended to inject societal values into the guardian's decisionmaking, then the presence of an attorney-in-fact would not act as a veto on guardianship because only a court-appointed guardian could be expected to make decisions with an eye toward societal values and concerns.[122] However, since that situation is not the case, an agent acting under a durable power of attorney can serve as a complete defense to the imposition of a guardianship.[123]

VIII. WHAT DO SURROGATE-DEFAULT-DECISION-MAKER STATUTES SIGNIFY?

The ability or desire of society to interject its values into the life of the ward is also undercut by the newest form of proxy decisionmaking: state surrogate-healthcare-decisionmaking statutes.[124] Designed to provide a surrogate decisionmaker for patients whose diminished capacity does not allow them to give informed consent, these statutes represent a revolutionary approach and a sharp rebuke to traditional guardianship law.

Although the statutes vary in detail, all are premised on the need for informed consent for medical care by the patient or the patient's proxy.[125] Absent informed consent, the medical provider cannot act because touching the patient's body would be a battery.[126] The traditional sources of consent are the patient, the patient's duly appointed surrogate, or a court-appointed guardian.[127] If the patient is mentally incapacitated, however, the patient will not be able to consent.[128] Consequently, states permit an individual to appoint a surrogate healthcare decisionmaker either through a durable power of attorney or a healthcare power of at-

122. *Id*. at 555–558.

123. *In re Peery*, 727 A.2d at 539–541.

124. Mark S. Bishop, *Crossing the Decisional Abyss: An Evaluation of Surrogate Decision-Making Statutes as a Means of Bridging the Gap between Post-*Quinlan *Red Tape and the Realization of an Incompetent Patient's Right to Refuse Life-Sustaining Medical Treatment*, 7 Elder L.J. 153, 157–161 (1999).

125. *Id*.

126. While the legal requirement of informed consent is often ignored, as the provider obtains informal consent from a spouse or family member, the law is quite clear that only the patient or an authorized surrogate can provide consent.

127. Bishop, *supra* n. 124, at 176–177.

128. *Id*. at 160, 170–173.

torney.[129] Although the powers that the patient can grant to the surrogate vary from state to state,[130] the right of an individual to delegate as much authority to the surrogate as the patient has personally may be a constitutionally protected right.[131] In the past, if the patient failed to appoint a surrogate, the only recourse was for someone to file a petition requesting that a guardian be appointed for the patient[132]—an expensive, time-consuming, and very public undertaking.[133]

Medical providers needed a better solution to the problem of acquiring informed consent. The answer was the statutory appointment of surrogate healthcare decisionmakers without any need for court approval.[134] Once the physician decides that the patient lacks the mental capacity to provide informed consent, a designated surrogate automatically has the authority to decide the course of the patient's treatment.[135] Only if someone objects to the determination of incapacity or to the statutorily determined surrogate default decisionmaker does a court become involved.[136]

The automatic creation of a surrogate healthcare decisionmaker is a dramatic shift in the societal approach to dealing with incapacitated persons as it represents a recognition that identifying an individual to provide informed consent is not a task that requires judicial intervention.[137] Rather, it is a commonplace act that the physician and the family or friends of the patient can handle routinely.[138] Resort to the courts is available but only

129. *In re Peery*, 727 A.2d at 539–541.

130. Bishop, *supra* n. 124, at 168–178.

131. *Rasmussen v. Fleming*, 741 P.2d 674, 686 (Ariz. 1987); *In re Guardianship of Browning*, 568 So. 2d 4, 13 (Fla. 1990); Ronald F. Berestka, *To Live or Let Die: May Surrogates Exercise an Incompetent's Right to Refuse "Life-Sustaining" Treatment?*—Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841 (1990), 25 Suffolk U. L. Rev. 201, 207–208 (1991).

132. Berestka, *supra* n. 131, at 204–205.

133. Naomi Karp & Erica Wood, *Incapacitated and Alone: Healthcare Decision Making for Unbefriended Older People*, 31 Human Rights 20, 21–23 (2004).

134. Ala. Code § 22-8A-11 (West 2006); Fla. Stat. § 765.202 (2007); Tenn. Code. Ann. § 68-11-1806 (Lexis 2006); W. Va. Code § 16-30-8 (2007).

135. Ala. Code § 22-8A-11; Fla. Stat. § 765.202; Tenn. Code. Ann. § 68-11-1806; W. Va. Code § 16-30-8.

136. Ala. Code § 22-8-11(j); Tenn. Code Ann. § 68-11-1806(b)(6); Tex. Health & Safety Code Ann. § 597.041 (2006); W. Va. Code § 16-30-8(e).

137. Ala. Code § 22-8-11(j); Tenn. Code Ann. § 68-11-1806(b)(6); Tex. Health & Safety Code Ann. § 597.041; W. Va. Code § 16-30-8(e).

138. Ala. Code § 22-8-11(j); Tenn. Code Ann. § 68-11-1806(b)(6); Tex. Health & Safety

when informal arrangements break down.[139] Just as intestacy laws are the legislature's attempt to distribute property to those most likely to have been heirs under a will,[140] so is the appointment of a statutory surrogate healthcare decisionmaker an attempt to appoint the individual that the patient most likely would have appointed by an advance healthcare directive.[141] Because the appointment of a statutory surrogate corrects the patient's oversight in not appointing an agent, the surrogate should be guided by the same principles as an agent acting under an advance healthcare directive or power of attorney.

And they are. Surrogate decisionmakers, whether appointed by the patient or created under a state statute, adhere to the substituted-judgment standard and direct the patient's medical care according to the wishes and values of the patient.[142] Texas law, for example, requires the surrogate to make decisions based on knowledge of what the patient would desire, if known.[143] New Mexico law states that the surrogate shall make healthcare decision in accordance with the patient's instructions or wishes.[144] The statute next states the following:

> Otherwise, the surrogate shall make the decision in accordance with the surrogate's determination of the patient's best interest[s]. In determining the patient's best interest[s], the surrogate shall consider the patient's personal values to the extent know, to the surrogate.[145]

West Virginia's law requires a surrogate to make "decisions in accordance with the person's wishes, including religious and moral beliefs."[146] When the statutes are silent, courts addressing the issue have almost always adopted the doctrine of substituted

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Code Ann. § 597.041; W. Va. Code § 16-30-8(e).

139. Ala. Code § 22-8-11(j); Tenn. Code Ann. § 68-11-1806(b)(6); Tex. Health & Safety Code Ann. § 597.041; W. Va. Code § 16-30-8(e).

140. Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. Chi. L. Rev. 241, 241–242 (1962).

141. See *infra* notes 146–147 and accompanying text for a discussion of the substituted-judgment doctrine.

142. Casasanto et al., *supra* n. 24, at 548–549.

143. Tex. Health & Safety Code Ann. § 597.049.

144. N.M. Stat. § 24-7A-5(f) (2006).

145. *Id.*

146. W. Va. Code § 16-30-9.

judgment with its emphasis on implementing the patient's values and wishes.[147]

So strong is the preference for the doctrine of substituted judgment that even public guardians appointed to assist the "unbefriended" are urged to respect "individual values to the greatest extent possible."[148] That seems very difficult given that the guardian has not had any contact with the ward prior to the onset of incapacity and given that the ward is a lonely, unbefriended individual.[149] Yet the cultural bias or the societal concern that the guardian do what the ward would have done mandates that the guardian respect and adhere to values of the ward that are unknown and probably unknowable.[150]

IX. IS CASELAW OBLITERATING THE DIFFERENCES BETWEEN GUARDIANS, SURROGATES, AND AGENTS?

As indicated, guardians, when making healthcare decisions, are expected to follow the substituted-judgment doctrine.[151] Consequently, guardians and surrogates are held to the same standard when making healthcare decisions.[152] Further, guardianship law is increasingly applying the concept to property decisions—particularly to Medicaid planning.[153] Courts are beginning to judge the propriety of a guardian's acts as if the guardian were to behave like an attorney-in-fact.[154]

In 2000, the New York Court of Appeals was asked to adjudicate whether the guardian of a ward who had lapsed into a coma in his mid-forties could properly give away the ward's assets in order to qualify him for Medicaid in *In re Shah*.[155] Specifically, the guardian, the wife of the ward, wanted to transfer the couple's

147. Meisel, *supra* n. 72, at 263.
148. Karp & Wood, *supra* n. 133, at 23.
149. *Id*. at 21–23.
150. *Id*. at 22–23.
151. *See supra* pt. V (discussing substituted judgment).
152. Casasanto et al., *supra* n. 24, at 548–549.
153. *In re Shah*, 733 N.E.2d 1093, 1194–1198 (N.Y. 2000).
154. *Id*.
155. *Id*. at 1094–1096 (considering the residency requirements for certain Medicaid benefits).

assets into her name.[156] She then refused to make the assets available for her husband's care, invoking "spousal refusal," which in New York would make the ward eligible for Medicaid.[157] The issue before the court was whether a guardian was permitted to make the gift to the spouse (herself), knowing that she would not make the assets available for the support of the ward.[158]

The New York court began by citing New York statutory law that permits a guardian to make gifts of the assets of the ward.[159] The relevant statutory language permits a guardian to make gifts "on the ground that the incapacitated person would have made the transfer if he or she had the capacity to act."[160] In determining whether to approve a gift, courts are expected to consider whether the donees are "natural objects of the bounty of the incapacitated person and whether the proposed disposition is consistent with any known testamentary plan or pattern of gifts."[161] The statute also required that the court determine whether the ward, if competent, would "likely" have performed the act.[162] In this case, 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.[163] Consequently, the court approved the gift.[164]

Several aspects of the case are worth noting. First, the court chose to interpret the statute as not requiring actual evidence that the ward would have undertaken the gift.[165] Instead, it held that the evidence was clear and convincing that anyone in the ward's position would have given away his assets to his spouse had he been competent to do so.[166] This analysis is not the application of substituted judgment or even the typical application of

156. *Id.* at 1095 (considering the steps taken by the ward's wife to qualify her husband for Medicaid under the New York residency requirements).

157. *Id.* (mentioning that not all states will recognize a Medicaid applicant as being eligible when the spouse has retained assets beyond the maximum permitted by state and federal law).

158. *Id.* at 1094–1097.

159. *Id.* at 1094–1100.

160. N.Y. Mental Hygiene Law § 81.21(a).

161. *Id.* at § 81.21(d)(4).

162. *Id.* at § 81.21(e)(2).

163. *In re Shah*, 733 N.E.2d at 1099 (considering who the ward would have wanted to bear the burden of his medical costs).

164. *Id.*

165. *Id.*

166. *Id.*

the best-interests test.[167] Rather the court assumed that the statute permits courts to approve gifts whenever the gift would have certainly been made by a rational person. Working backwards, the court first saw the gift as rational and then assumed that the ward would have been motivated as any rational person would have and therefore would have made the gift.[168] The court never inquired as to the personal idiosyncrasies of the ward that might have led the ward to refuse to make the gift.[169] Rather, the court imposed a rational behavior standard upon the ward.[170] And it did so without once suggesting that the gift in any way promoted the best interests of the ward because it did not. Only the spouse benefited, and only the state and federal governments, by virtue of being made to pay more for the care of the ward, were burdened.[171]

Courts have not always been willing to assume that the ward would have approved of the rational course of action. A 2004 New York case also considered whether a guardian should be permitted to make gifts of the ward's assets to his nieces and nephews in order to make the ward Medicaid eligible.[172] In that case, the court found no clear and convincing evidence that a competent and reasonable person in the same position as the ward, Carl, would be likely to engage in Medicaid planning.[173] Nothing indicated that Carl ever intended to impoverish himself for the benefit of his nieces and his nephew with whom he had little contact for many years.[174] As a result, the court concluded that though they were his legal heirs, the nieces and nephews were not the natural objects of Carl's bounty.[175] The court also pointed out that Carl had not previously made any gifts to these relatives, a fact inconsistent with any desire to engage in Medicaid planning.[176]

167. *Supra* pts. V–VI (discussing substituted judgment and best interests).

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

169. Substituted judgment requires the guardian to consider the ward's personal wishes, preferences, and desires. *Id.* at 1099–1100.

170. *Id*. at 1099 (considering the ward's likely rational desires in the situation).

171. *Id*. at 1098.

172. *In re Application of Forrester*, 2004 WL 224557 *2 (N.Y. Sup. Ct. Jan. 29, 2004).

173. *Id*. at **3, 5 (stating that although it is permissible for guardians to plan for Medicaid, there was no evidence that the ward either intended to plan for Medicaid or give gifts to his nephew and nieces).

174. *Id*. at *6.

175. *Id*. (noting that there was no evidence of an intent to donate).

176. *Id*.

Moreover, Carl had stated that he wanted his assets to provide for his own care.[177] When presented with the assertion that a rational person would give away assets rather than spend them on the cost of a nursing home, the court replied as follows:

> This appears to be the position advocated by Petitioner's counsel: every one would rather have his or her money go to family, regardless of who that family member is and what degree of relationship, rather than be used for their own personal care. There is no such presumption in existing law. Nor is one appropriate.[178]

The court's assumption that the ward would have wanted his assets used for his personal care, however, does not consider that if the ward qualified for Medicaid, he would receive the same level of care in a nursing home as if he were a private-pay resident.[179] Given that reality, it is difficult to imagine why the ward would not have preferred making gifts to his nieces and nephews even if he was not close to them unless the ward disliked his nieces and nephews or was a very spiteful person who would have resented any of his assets being given away. Had the court adopted the rational person standard, it would have approved the gift because the burden to show that the ward would not have approved the rational course of action would have been on those opposing the gift.[180]

In 2000, a Florida appellate court, when asked to permit a guardian to engage in Medicaid planning, explicitly endorsed the use of the substituted-judgment standard and rejected the use of the best-interests test.[181] The court cited with approval a 1997 New York case that, like the *Shah* case,[182] held that the determination of what the ward would have done could be based upon what any competent, reasonable person would have done.[183] The

177. *Id.* at *5 (pointing out that the ward intended to take care of himself with his own assets, contrary to any intent to plan for Medicaid to take care of him).

178. *Id.*

179. Private-pay residents pay for their care with their own income rather than with Medicaid.

180. In New York there is a presumption in favor of granting the gifts; therefore, those opposing the gifts have the burden. *In re Keri*, 853 A.2d 909, 916 (N.J. 2004).

181. *Rainey v. Guardianship of Mackey*, 773 So. 2d 118, 122 (Fla. 4th Dist. App. 2000).

182. *In re Shah*, 733 N.E.2d 1093, 1099.

183. *Rainey*, 773 So. 2d at 120–121 (citing *Matter of John XX*, 652 N.Y.S.2d 329, 331

Florida appeals court rejected the determination of the trial judge that Medicaid planning would not contribute to the well-being of the ward because, according to the appellate court, that reasoning was erroneously based upon a best-interests standard.[184]

Perhaps the most publicized of the recent Medicaid-planning-by-the-guardian cases was decided in New Jersey in 2004.[185] A guardian proposed selling the ward's house and giving the proceeds in equal shares to himself and his brother with the expectation that after the Medicaid period of ineligibility passed, the ward, the guardian's ninety-year-old mother, would qualify for Medicaid reimbursement of her nursing-home costs.[186] The guardian maintained that his mother would have approved this gifting strategy.[187] The trial court denied permission to give away assets because to do so was an attempt to pauperize the ward and make her dependent on the taxpayers.[188] On appeal, the denial of Medicaid planning was upheld on the basis that the ward had never indicated a preference for such planning before the onset of the incompetency.[189]

The New Jersey Supreme Court reversed.[190] Citing the state statute that permitted courts to approve gifts by a guardian, the Court noted that the statute required that a court reconcile the best-interests standard with "the common law equitable doctrine of substituted judgment."[191] That is, the guardian may make gifts as the ward would have done as long as the estate is left with enough assets necessary for the best interests of the ward.[192] The Court concluded that making gifts to effectuate Medicaid planning in the absence of an expressed opposition made by the ward when competent both provides for the best interests of the ward

(1996)).

184. *Id.* at 122.

185. *In re Keri*, 853 A.2d at 909.

186. *Id.* at 911 (noting that this point was argued by the petitioner as a means of "spending down" the ward's assets to accelerate her Medicaid eligibility).

187. *Id.* at 912.

188. *Id.* (mentioning that pauperizing effectively makes the ward the ward of the taxpayers, and as such, these methods will not be approved).

189. *Id.*

190. *Id.* (noting that this case was heard on petition for certification).

191. *Id.* at 913.

192. *Id.* (reasoning that gifts may be made, but only if there are enough resources to first satisfy the ward's own best interests).

and also satisfies the desire to do what the ward would have done—that is, satisfy the substituted-judgment standard.[193]

The case presents an interesting line of reasoning. The Court's reliance on the best-interests test seems sensible enough. If the ward is going to live in a nursing home in any event, creating Medicaid eligibility while preserving as many assets as possible serves the interests of the ward, which are presumed to be helping the donees (something that would please the ward if competent) and maintaining the quality of life of the ward. The application of the substituted-judgment doctrine is less obvious. The New Jersey Supreme Court defined substituted judgment as doing what the ward would have done had the ward been competent[194]—an expansion of the more narrow concept that the guardian can do what he or she knows that the ward would have wanted.[195] Instead, the Court appears to be assuming that the ward's desire would have been that of any rational person.[196]

These cases have subtly modified the meaning of substituted judgment. Originally, it required learning what the ward would have done based upon prior expressions, goals, values, or even the ward's personality.[197] The guardian was instructed to "don the mental mantle of the incompetent"[198] and "to act upon the same motives and considerations as would have moved [the incompetent]."[199] The guardian would thus either undertake to effect the desires of the ward or at least fulfill the goals of the ward.

The Medicaid-planning cases have redefined substituted judgment to mean what the ward could naturally or reasonably be expected to have wanted.[200] Substituted judgment is not so much the implementation of the wishes of the ward, but the assumption as to the probable wishes of a ward when no evidence exists of

193. *Id*. at 917–918.

194. *Id*. at 914.

195. *See In re Shah*, 733 N.E.2d at 1099–1100 (defining substituted judgment as taking into account the personal wishes, preferences, and desires of the ward).

196. *Supra* n. 183 and accompanying text (holding that the determination of what a ward would have done could be based on what a competent, reasonable person would have done).

197. *In re Fiori*, 673 A.2d at 911.

198. *In re Carson*, 241 N.Y.S.2d 288, 289 (N.Y. 1962).

199. *City Bank Farmers Trust Co. v. McGowan*, 323 U.S. 594, 599 (1945).

200. *Supra* nn. 179–180 and accompanying text.

what the ward might have wanted.[201] This definition was not always so. In a 1992 case involving whether to permit the withholding of nutrition and hydration to a patient in a persistent vegetative state, a Maryland court noted that resorting to what a reasonable person would do represents an abandonment of the substituted-judgment test and the application of a best-interests test.[202]

In the years since the Maryland court concluded that the use of a reasonable person standard represented a best-interests test, courts have increasingly characterized the claim that assuming the ward to be a reasonable person is the application of the substituted-judgment standard.[203] Why?

Apparently, because courts are now conflating the role of a guardian with that of an agent acting under a durable power of attorney. While an agent has a fiduciary obligation to carry out the wishes of the principal,[204] a guardian, in theory, is under no such obligation.[205] The guardian is answerable only to the court, and the court's responsibility is to protect the person and property of the ward by insuring that the actions of the guardian are in the ward's best interests.[206] The textbook example of when courts rely on the best-interests test even if it conflicts with what the ward would have wanted—i.e., the substituted-judgment test—is the now mostly discredited, court-approved blood transfusions for Jehovah's Witnesses.[207] Despite knowledge of the wards' religious

201. *See In re Trott*, 288 A.2d 303, 306 (N.J. Super. Ch. Div. 1972) (adopting the principle that the guardian should be authorized to act unless there is evidence of any settled intention of the incompetent to the contrary).

202. *Mack v. Mack*, 618 A.2d 744 (Md. 1993).

203. *See e.g. In re Shah*, 773 N.E.2d at 1099 (considering whether a "reasonable individual" would be likely to perform the act); *Forrester*, 2004 WL 224557 at *4 (deciding whether a "reasonable person" in the ward's position would engage in the transfers as a method for Medicaid planning).

204. *U.S. Abatement Corp. v. Mobil Exploration & Producing U.S.*, 39 F.3d 556, 561 n. 5 (5th Cir. 1994); *Restatement (Second) of Agency* § 13 (1958).

205. *Supra* nn. 9–10 and accompanying text.

206. *See* Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 Elder L.J. 75, 109–110 (1997) (discussing Florida's and Illinois' statutes that guide the court's supervision); Norman Fell, *Guardianship and the Elderly: Oversight, Not Overlooked*, 25 U. Toledo L. Rev. 189, 196–197 (1994) (discussing the court's role in continuing vigilance to safeguard the ward).

207. *See e.g. In re E.G.*, 549 N.E.2d 322 (Ill. 1989) (respecting the patient's decision); *Norwood Hosp. v. Munoz*, 564 N.E.2d 1017, 1025 (Mass. 1991) (respecting the patient's decision); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A.2d 537, 538

objections to receiving blood transfusions, courts nevertheless authorized the transfusions.[208]

Colorado statutory law also demonstrates the doctrinal creep of substituted judgment into the world of state-appointed substitute decisionmakers. Colorado, like many states, has a statutorily created healthcare decisionmaker.[209] The statute provides a substitute for guardianship by identifying and empowering a proxy decisionmaker, who, without any court appointment or oversight, makes healthcare decisions for a patient who lacks decisional capacity.[210] The statute requires the proxy to adhere to the statutory requirements applicable to an agent acting under a durable power of attorney.[211] An agent, and therefore a proxy, is required to act "in conformance with the principal's wishes that are known to the agent."[212] Lacking any knowledge of the principal's wishes, the agent and the proxy must "act in accordance with the best interests of the principal . . . ."[213]

Today when asked to determine what a guardian can do, courts often begin by asking what the ward would want the guardian to do.[214] This question is not new. In older cases dealing with issues of gifts, courts required evidence that the ward would have made the gift, for example, by showing a pattern of gift giving.[215] The difference today is an extension of "what would the ward have done" to include what a reasonable person would have done. In short, courts believe that a guardian should act like an agent under a durable power of attorney: do as the ward would

(N.J. 1964) (allowing a blood transfusion against the patient's wishes); *In re Jamaica Hosp.*, 491 N.Y.S.2d 898, 900 (N.Y. 1985) (allowing a blood transfusion against the patient's wishes).

208. *See In re Est. of Dorone*, 534 A.2d 452, 455 (Pa. 1987) (holding that in an emergency situation, "nothing less than a fully conscious contemporaneous decision by the patient will be sufficient to override evidence of a medical necessity"). This decision was later distinguished and essentially repudiated in *In re Duran*, 769 A.2d 497, 505 (Pa. Super. 2001), by a court that was willing to accede to statements by the ward made prior to the onset of incapacity.

209. *Infra* nn. 210–211 and accompanying text.

210. Colo. Rev. Stat. §§ 15-18.5-101, 15-18.5-103 (Lexis 2005).

211. *Id.* at § 15-18.5-102.

212. *Id.* at § 15-14-506(2).

213. *Id.*

214. That is, the substituted-judgment doctrine. *Supra* pt. V.

215. *Ex parte Whitbread*, 35 Eng. Rep. 878 (1816); *In re Trott*, 288 A.2d at 306.

have done based on the assumption that the ward was a reasonable person.

X. DOES IT MATTER IF A GUARDIAN = SURROGATE = AGENT?

The convergence of the responsibility of a guardian, statutory surrogate, or an agent acting under a durable power of attorney or advance healthcare directive reflects the growing judicial and statutory acceptance that the decisions of these actors should be made with reference to an amalgamation of the substituted-judgment doctrine, the best-interests test, and the reasonable person standard. As we better understand what should govern the decisions of a proxy decisionmaker,[216] there is no defensible reason to apply different requirements to proxies whose authority arises from judicial appointment, statutory designation, or having been named by the principal. In regard to healthcare decisions, the result is that we have three ways to the same end: a proxy decisionmaker. The route taken to identify that proxy should have no affect on the authority of the proxy or the standard by which we measure his or her decisions.

The similarity of proxies can be traced to the statutory creation of the durable power of attorney.[217] Once it was possible for an individual to name an agent whose power continued despite the incapacity of the principal, guardianship became only a backstop to the private solution, something to be used only if the durable power of attorney failed or was never created.[218] And, once guardianship became secondary to the right to create a durable power of attorney, there was no reason for there to be any difference between the powers and responsibilities of an agent acting under a durable power of attorney and those of a guardian.[219]

216. The term used here collectively refers to guardians, statutory surrogates, or agents acting under a durable power of attorney or an advance healthcare directive.

217. Boxx, *supra* n. 12, at n. 1. One scholar points out the following:

> Virginia, by a statute enacted in 1954, was the first state to allow a power of attorney to continue beyond the principal's incapacity, but the concept did not become widely accepted in other states until the Uniform Law Commissioners enacted the Uniform Probate Code in 1969, which included durable power-of-attorney sections.

Id.

218. *Id.* at 5 (discussing how the principal's incapacity terminated the agency because the essential elements of the relationship were removed).

219. *Supra* nn. 114–116 and accompanying text.

Statutorily designated healthcare decisionmakers were another backstop, this time to advance healthcare directives.[220] Since the statutory designee only came into being in the absence of a named surrogate, the powers of the designee were defined as essentially the same as those of a surrogate named by the patient.[221]

In both instances, the law created the right to execute a durable power of attorney and an advance healthcare directive because of the growing need for proxy decisionmakers for older persons.[222] Absent the right of individuals to name a surrogate or for the law to automatically designate one, the courts would have been overwhelmed by guardianship petitions.[223] The need for informed consent in healthcare decisions meant that *someone* had to be able to speak for an incapacitated patient. Imbedded in the doctrine of informed consent was the need for efficient, timely ways of identifying the proxy decisionmaker. The ultimate result was not only the creation of advance healthcare directives and statutorily designated proxies, but a redefining of the proper role of a guardian—from being a representative of the court to being more akin to a judicially appointed agent of the ward.

The need for property management of the assets of incapacitated persons, while not as dramatic a need as healthcare decisionmaking, was compelling enough to justify the creation of the durable power of attorney.[224] Once courts recognized the right of agents to act solely in the best interests of the principal, it was only a short step to permitting guardians to act as if they were agents, especially as the need for a guardian merely represented a failure to use a durable power of attorney. The result has been a subtle, but significant, change in the role of guardians from agent of the court to representative of the interests of the ward. To answer the question posed by the title of this Article, yes, a guardian is now apparently the alter ego of the ward.

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220. *Supra* pt. VIII (discussing state surrogate healthcare decisionmakers).

221. *Id.*

222. Karp & Wood, *supra* n. 133, at 21 (referencing demographic data that shows how the elder population is increasing).

223. *Id.* (discussing four pathways for surrogate decisions, two of which include (1) the right to delegate decisionmaking authority and (2) laws that automatically authorize specific people to make decisions).

224. Boxx, *supra* n. 12, at 5 (stating the common law power of attorney was a useless tool for planning for the incapacitated).