1Guardianship, Extraordinary Treatment and Substituted Judgement

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Introduction — Development of Guardianship Law in Massachusetts

Guardianship is a process by which a state, usually acting through its courts, assumes the responsibility to protect the assets and the "person" of an individual who cannot do so himself or herself. This is an extraordinary exercise of governmental authority. It allows the state, in effect, to strip individuals of their rights to make decisions about their own lives and their own property and to invest in another -- called a guardian -- the authority to do so for them. Because guardianship is a broad and very restrictive form of substitute decision making, guardianship proceeding should be approached with care and caution. Many people with disabilities, particularly mental disabilities, are likely to find themselves subject to petitions for guardianship.

First Century Romans may have been the first to formalize procedures to protect the property and estates of people who by reason of mental disability were unable care for it themselves. The Romans, and later the English and colonial Americans, were concerned primarily with insuring that individuals with mental disabilities did not become a public burden and with protecting assets for the individual's heirs. John H. Cross, Robert D. Fleischner, Jinanne S.J. Elder, Guardianship and Conservatorship in Massachusetts, (2000) 1 (hereafter Cross et al.)

Massachusetts first provided for statutory guardianships in 1694,requiring selectmen to care for those who could not care for themselves because they were "wanting of understanding" and for those who were found to be "non compos mentis." In 1783, the legislature added a clear

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* * Much of the material in this chapter appears in greatly expanded form in John H. Cross, Robert D. Fleischner, Jinanne S.J. Elder, Guardianship and Conservatorship in Massachusetts, 2d Edition (Lexis Law Publishers)(2000).

standard that guardianships could be imposed on people who were found to be incapable to care for themselves. Over time, courts of equity expanded the function of guardianship from merely financial to personal protection.

However, it was not until 1956 that the General Court required a clear nexus between the person's disability and their incapacity. The Supreme Judicial Court first interpreted that statute in Fazio v. Fazio, 375 Mass. 951 (1978), which, because it in effect raised the legal standards for guardianship, is the case that marks the beginning of several decades of significant changes in Massachusetts guardianship law. In Fazio, the Court held that for a petitioner to successfully pursue a guardianship, he must not only prove that the proposed ward has a mental illness or mental disability, but that the ward's "inability to think or act for himself as to matters concerning his personal health, safety, and general welfare, or to make informed decisions as to his property or financial interests," was directly caused by his mental illness. The history of guardianship law, through 1979, is traced in fascinating detail by the Supreme Judicial Court in Doe v. Doe, 377 Mass. 272 (1979).

Numerous cases subsequent to Fazio have expanded the Probate Court's equitable powers, increased the due process protections for proposed wards, and limited the authority of guardians.

> Practice Note:
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> Guardianship reform legislation, drafted by a joint committee of the Massachusetts and Boston Bar Associations, was introduced in the legislature in 1999 as past of an effort to enact a lengthy and comprehensive overhaul of the entire probate code. The complex legislation, based on the Uniform Probate Code, did not emerge from committee in its first year, but appears to have some chance of passing perhaps as early as 2001. If the bill does become law, most of its

provisions will become effective three years after its enactment. The portions of the bill addressing guardianship and conservatorship, which have broad support, will fundamentally alter and reform almost every aspect of the guardianship process.

This chapter will focus on the procedures for the appointment of guardians of people with disabilities -- that is, persons with mental illness, persons with mental retardation, and persons with a physical incapacity or illness. There is no neat chronology to guardianship cases. However, the materials reflect a typical sequence of pleadings and procedure in the Probate Court.

Guardianship Standards for Appointment

Guardianship of a Mentally Ill Person

If application is make for the guardianship of a person on the basis of the person's alleged mental illness, the petitioner must prove the proposed ward is:

- incapable to care for himself or herself, and
- that the incapability is by reason of mental illness.

G.L. c. 201 § 6. Mental illness is not defined in chapter 201.

Guardianship of a Person with a Physical Incapacity or Illness

The legislature added physical incapacity or illness as grounds for guardianship in 1990. G.L. c. 201 § 6B. To sustain a petition under § 6B, the petitioner must prove that the proposed ward is

- unable to make, or
- to communicate
- informed decisions, due to

- physical incapacity, or
- physical illness.

The apparent purpose of the new grounds was to provide standards for guardianship of people who, for example, are in a coma, without, as was previously the practice, alleging mental illness.

Guardianship of a Mentally Retarded Person

If guardianship is sought for a person with mental retardation, the court must find that the person is

- mentally retarded to a degree that she or he is incapable to make informed decisions with respect to the conduct of his or her financial or personal affairs, and that
- failure to appoint a guardian would create an unreasonable risk to his of her health, welfare, and property, and that
- appointment of a conservator would not eliminate such risk.

A "mentally retarded person" is defined in the first section of the guardianship statute, G.L. c. 201 § 1, as

> ... as person who, as a result of inadequately developed or impaired intelligence, is substantially limited in his ability to learn or adapt, as determined in accordance with established standards for the evaluation of a person's ability to function in society.

It is worth noting that the sections setting forth the standards for appointment of a guardian for a person with mental retardation are the only ones in chapter 201 which require the court to consider alternatives to guardianship.

Guardianship Practice and Procedure

In Massachusetts, the Probate and Family Court has jurisdiction of most guardianships of adults. The Juvenile Court, which follows its own procedural rules, may order guardianship of a minor. The District Court has limited authority in guardianship-like matters involving involuntary administration of mental health treatment for person who have been committed to mental health facilities. See Chapter 21, infra.

Pleadings

Like most Probate Court proceeding, guardianships proceed, at least at the beginning, using pre-printed forms. A motion for temporary guardianship may only be filed if it is accompanied by a petition for permanent guardianship. Samples of completed petitions may be found at Cross, et al. pp. 79-91. Guardianship forms may also be found on the computer disk "Forms on Disk" which accompanies Christopher G. Mehne, et al, Massachusetts Guardianship and Conservatorship Practice (MCLE)(2000)(hereafter Mehne et al. et al.).

The Petitioner

Sections 6 and 6A of chapter 201 list those individuals or agencies which may act as petitioner(s) in guardianship matters:

- a parent of a mentally ill or mentally retarded person;
- two or more relatives or friends of a mentally ill or mentally retarded person;
- a nonprofit corporation organized under the laws of the Commonwealth whose corporate charter authorizes the corporation to act as a guardian of a mentally ill person; or
- any agency within the executive office of human services or educational affairs.

The language of § 6B regarding appropriate petitioners for persons unable to make or communicate informed decisions due to physical incapacity or illness refers back to those persons who may file a petition under §6.

Medical Certificate

If a guardianship is sought for a person with mental illness or a person with a physical incapacity or illness, the guardianship petition must be accompanied by a medical certificate, signed by a physician, who need not be a psychiatrist. Probate Court Uniform Practice XXII. The examination on which the conclusions in the certificate are based must have taken place within thirty days prior to the entry of each guardianship decree, whether temporary or permanent. This often means that an updated physician's certificate needs to be filed prior to the hearing on the merits of the petition.

The Probate Court's medical certificate form requires a detailed narrative, setting forth the diagnosis which is the basis for the physician's opinion that the proposed ward is incompetent in cases of mental illness or unable to make or communicate informed decisions in cases of physical incapacity. Also, the doctor must describe "the types of decisions which the proposed ward has sufficient mental ability to make."

Clinical Team Report

A petition for guardianship of a person with mental retardation must be accompanied by a clinical team report (CTR). G.L. c. 201 § 6A. The "clinical team," for which the petitioner is responsible to arrange and to reimburse, must include a physician, a licensed psychologist, and a social worker, each of whom must be experienced in the evaluation of people with mental retardation. The team members' examinations must take place within one hundred and eighty days prior to the filing of each petition, temporary or permanent, unless the court for cause shown waives this requirement. Uniform Practice XXII(A).

Competency

As noted, the statutory standard for appointment of a guardian for a person with mental illness is that the individual is "incapable of taking care of himself by reason of mental illness." G.L. c. 201 § 6. A guardian may be appointed for a person with mental retardation if the individual is mentally retarded "to the degree that he is incapable of making informed decisions with respect to the conduct of his personal affairs." G.L. c. 201 § 6A. A court may also appoint a guardian for "a person who is unable to make or communicate informed decisions due to physical incapacity or illness." G.L. c. 201 § 6B. These three standards emphasize slightly different concepts or measures of capacity.

There is no single test of competency in Massachusetts law. However, there are some helpful practical guides in the case law. For example:

- Neither institutionalization nor a clinical determination of mental illness or mental retardation is in itself enough for a finding of legal incompetency. Fazio v. Fazio, 375 Mass. 394 (1978).

- That a person does not act rationally in his or her own best interest, without more, is not enough to establish incompetence. Lane v. Candura, 6 Mass. App. Ct. 377 (1978).

- An individual may be competent for one purpose but not for another. Guardianship of Bassett, 7 Mass. App. Ct. 56 (1979).

- A person with severe mental retardation, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977), senility, Matter of Dinnerstein, 6 Mass. App. Ct. 466 (1978),or who is unconscious, in a coma or in a persistent vegetative state, Brophy v. New England Sinai Hospital, Inc., 398 Mass. 489 (1983), may be incompetent.

Massachusetts courts and the legislature appear to be moving in the direction of understanding legal concepts of competency as a functional assessment of the person's ability

- to understand the information conveyed,
- to evaluate the options, and
- to communicate a decision.

Comprehensive research conducted by the Research Network on Mental Health and Law may provide the clinical basis for appellate courts to sharpen the legal definition of incompetency. See, Paul S. Appelbaum & Thomas Grisso, The MacArthur Treatment Competence Study: I. Mental Illness and Competence to Consent to Treatment, 19 Law & Hum. Behav. 105 (1995). For a discussion of competency and a summary of some scholarly proposals for reform, see Cross, et al, pp. 32-41, 432-435. See also Mehne et al., p. 5-9 - 5-10.

Notice

Upon the filing of a permanent guardianship petition, the Probate Registry will issue a "citation." The citation will instruct the petitioner how to provide notice of the petition to the proposed ward and to other individuals entitled to notice. The proposed ward must be served a copy of the citation in-hand by a sheriff or other disinterested person. Publication in the legal notices section of a newspaper of general circulation may be required in cases in which all interested persons (i.e., heirs at law, including the proposed ward's spouse) have not received "actual notice." G.L. c. 201 § 7, Probate Court Rule 6.

The purpose of the notice is inform the individual and the interested parties that a petition for guardianship has been filed, the statutory grounds for the petition, and the date by which an appearance must be filed if the individual or interested party wants to contest the petition.

The petitioner must certify on the citation that proper notice has been given and return the citation to the Registry on or before the "return day" which is noted on the face of the citation. Once notice has been given, the petitioner may move forward on the merits of the case.

Appointment of a Guardian Ad Litem or Counsel for the Ward

A proposed ward may be represented by counsel in a guardianship proceeding. However, the individual is entitled to appointed counsel only if he or she is indigent and only in the cases of petitions which include requests for authority to admit or commit the individual to a mental health or mental retardation facility or for authorization of extraordinary medical treatment. Therefore, most proposed wards are not represented.

Nevertheless, a few Probate Court judges routinely appoint a guardian ad litem (GAL) for the proposed ward in all guardianship matters, both temporary and permanent. Other judges appoint a GAL, or occasionally counsel, if it appears that a the petition is contested or if any difficult question is raised. For example, in a case seeking guardianship for the purpose of signing the ward in to a nursing home, a judge may appoint a GAL to investigate the suitability of nursing home placement. A GAL or counsel may also be appointed at the court's discretion upon the motion of any party. If a GAL is appointed, the case will usually not go forward until a written report is filed. For an extensive discussion of the different roles of GAL and counsel see Cross, et al, pp. 59-62, 616-624. See also, Mehne et al., p. 5-17.

Contested Petitions

All that is initially required to raise a contest to a guardianship petition is that the objecting person file an appearance on or before the date noted on the citations. The objecting party may also file an answer along with his or her written appearance. An answer might deny, for example, that the respondent is mentally ill or incompetent.

If the petition is opposed, most courts will require a pretrial conference, where issues are further defined prior to trial. Probate Court Standing Order 2-88.

Independent Examinations

Sections 6 and 6A of chapter 201 authorize the court, either sua sponte or upon the motion of a party, to order the proposed ward to submit to a examination by an independent medical or other expert. The report of such an examination is provided to the court by the examiner and is available to all the parties.

Expert assistance may also be available to an indigent respondent to assist in the preparation of his or her case pursuant to G.L. c. 261, § 27C(4), the indigent court costs law. An appropriate motion should be filed with the court requesting such assistance. Without an expert, the proposed ward is at a disadvantage in countering medical evidence introduced by the petitioner. Unlike reports of examinations under § 6 or § 6A, introduction of independent evaluations is at the discretion of the respondent. Guardianship of a Mentally Ill Person with the Authority to Administer Anti-psychotic Medication, Single Justice, Appeals Court, No. 85-0018 Civ. (January 25, 1985), reprinted in Cross, et al, pp. 111-112.

Hearings

Hearings in guardianship matters can range from routine, uncontested proceedings handled upon representation by counsel to contested evidentiary trials.

In uncontested cases, some judges will proceed by allowing the petitioner's counsel to make representations that at least the following elements are present and the following procedure have been followed:

- proper notice has ben given and return of the citation has been made,
- there is a timely medical certificate or clinical team report,
- the guardian ad litem, if any, consents to the petition,
- an adequate bond with appropriate penal sum and sureties has or will be filed,
- the proposed guardian is suitable, understands her role and is willing to serve.

Some judges require testimony sufficient to establish the elements of the petition even in cases where there is no contest or objection. These judges may particulalry want to hear from the proposed guardian.

Contested proceedings, on the other hand, are similar to other civil trials. The burden of going forward is with the petitioner, and, depending upon the nature of the contest, witnesses may include medical or other clinical experts, the proposed ward, family members or other persons familiar with the proposed ward's day-to-day level of functioning.

Standard of Proof

The standard of proof in a guardianship case is the civil preponderance of the evidence standard. The only exceptions are in cases in which the petitioner seeks authority to admit or commit the ward to a mental health facility or which involve the "extended substituted judgment" analysis required in certain cases seeking authorization to administer antipsychotic medication to persons living in the community. In both instances proof must be beyond a reasonable doubt. Guardianship of Roe, 383 Mass. 415 (1981).

Appointment of Guardian; Equity-Style Decrees

If the judge finds that the statutory elements have been established, the court may appoint a guardian of the proposed ward's person and estate. A pre-printed form is usually used for this purpose. However, some judges are entering so-called "equity-style" decrees, requiring the guardian to periodically report to the court. The decree may also require the filing of a guardianship plan, "which would prepare a program of specific action to assure the protection of the ward's health, welfare, and property by securing for him all necessary and desirable social, rehabilitative, and other services." Guardianship of Bassett, 7 Mass. App. Ct. 56, 61 (1979).

Temporary guardianship

The rather deliberate processes for the appointment of a permanent guardian do not lend themselves to emergency situations. Therefore, the statute makes provision for the appointment of a temporary guardian when the welfare of the proposed ward requires immediate imposition of guardianship. G.L. c. 201 § 14.

A court should find there is an emergency warranting appointment before temporary guardianship is decreed. The Appeals Court vacated a temporary guardianship order in a case in which the trial judge made no findings and the medical certificate and the GAL report contained no indication,

that "an emergency was at hand." New England Merchants National Bank v. Spillane, 14 Mass. App. Ct. 685, 690 (1982).

A motion for temporary guardianship may be filed with a petition for permanent guardianship. The motion should describe the nature of the urgent situation, the harm sought to be avoided, and the specific authority requested by the temporary guardian. If the emergency involves medical treatment, the petitioner should file a medical affidavit.

Probate Court Rule 29B requires three days notice to the proposed ward before a hearing on a temporary guardianship motion. The Court may waive the notice requirement, however, and allow the petitioner to proceed ex parte. In such cases, the ward must be notified within three days that he or she may file a motion to vacate or to amend. Probate Court Rule 29B.

The temporary guardian's authority is valid for only ninety days unless extended upon a motion by the petitioner. Many, but not all, judges limit the authority of a temporary guardian to "the particular harm sought to be avoided."

Limited Guardianship

Even when appointing a permanent guardian, the court need not assign the guardian plenary authority. Rather, the decree may limit the guardian's authority to specific areas in which the court determines the ward in not competent and needs protection. Guardianship of Bassett, 7 Mass. App. Ct. 56, 61 (1979).

For example, a guardianship may be limited to the person only, keeping the ward's finances within his or her own control. Or, a guardianship may apply only to serious medical treatment decisions. As a practical matter, it is easier to limit a guardianship at the outset rather than after the entry of the court's decree appointing a guardian of both the person and estate.

Consequently, if there is a GAL, it would be appropriate for the court to specifically request that his or her report address those areas of daily life in which the proposed ward can exercise independent authority. Unfortunately, limited guardianships appear to be far more the exception than the rule in Massachusetts.

Conservatorship is really a kind of limited guardianship, since a conservator has authority only of the ward's property, finances and estate and not of the ward's person. G.L. c. 201 § 16. Cross, et al. pp. 497 - 598.

Voting

Although Massachusetts law makes persons "under guardianship" ineligible to vote in all elections, G.L. c. 51 §§ 1, 36, there is substantial doubt about the constitutionality of those provisions. Guardianship of Hurley, 394 Mass. 554 (1985). The Secretary of State's Elections Division has concluded that "under guardianship" should be interpreted to refer only to those guardianship orders which contain a specific finding prohibiting voting. Opinion of the Election Division, reported in 41 The Public Recorder 5 (January 1991) reprinted in Cross, et al, p. 149. Nevertheless, until an appellate court holds otherwise, it may still be advisable to seek specific rulings regarding the ward's ability to vote.

Bond

A guardian is required to file a bond with the court. G.L. c. 205 § 1. The bond is a guarantee that the guardian will file an initial inventory and annual account of the ward's assets, will turn over the estate to the appropriate person when the guardianship terminates and will act in the ward's best interest. Although the requirement for a bond may not be waived, some judges will consider waiving sureties on the bond if the guardian's authority is limited to the ward's person only. The penal sum of the bond is based upon the value of the ward's personal estate. If personal sureties are used, the penal sum is usually set at one and one-half times the amount of the personal estate. If a corporate surety is used, the penal sum may be equal to the amount of the personal estate. Cross, et al. p. 67, Mehne et al., p. 6-2.

If personal sureties are used, the individuals acting as sureties stand bound and may be potentially liable, individually and jointly, for the amount of the penal sum on the bond.

Fiduciary Responsibilities

The guardian's responsibility to the ward is one of a fiduciary, acting under the supervision of the Probate Court. Generally speaking, the guardian must act as a substitute decision maker, in the ward's best interest, to "protect the ward's estate, manag[e] it frugally and without waste, and apply[] the ward's

property for the comfortable and suitable maintenance of te ward ... in a manner consistent [at least] with the ward's standard of living prior to the appointment." David Aptaker and Matthew J. Marcus, Obligations, Duties and Powers of Guardians and Conservators, in Mehne et al., p. 6-1.

The guardian's traditional duties as a fiduciary include the preparation and filing in the court of an initial inventory and annual accounts. G.L. c. 205 § 1. Inventory and accounting responsibilities are described at length in Cross, et al, pp. 509-513. See also Mehne et al., pp. 6-16 - 6-19.

Additional duties may include:

- Petitioning for authority to establish an estate plan, G.L. c. 201 § 38,
- Obtaining a license from the court to sell, mortgage or lease real estate, G.L. c. 202 § 5, 28, 31,
- Obtaining authorization to compromise or adjust any claim in favor of or against the ward's estate, G.L. c. 204 § 13,

In addition to estate management responsibilities, guardians are increasingly called upon to make personal decisions on the ward's behalf. Examples might include determining the ward's place of residence or consenting to routine (but not extraordinary) medical care or other individual programs or social services. Indeed, chapter 201 specifically exhorts a guardian of a person with mental retardation to:

> ...act to protect the welfare of such person and may utilize the services of agencies and individuals to provide necessary and desirable social and protective services of different types appropriate to such person including, but not limited to, counseling services, advocacy services, legal services, and other aid as he deems to be in the interest of such person.

G.L. c. 201 § 6A.

Both the Department of Mental Health and the Department of Mental Retardation have detailed service or support planning regulations, which govern the delivery of program services to clients of those agencies. 104 C.M.R. 29.00 (Department of Mental Health), 115 C.M.R. 6.00 (Department of Mental Retardation). Under the regulations, a guardian is entitled to participate in the development of an

individual service plan on behalf of his or her ward and may pursue administrative and court appeals if dissatisfied.

Determining Place of Residence

The extent of a guardian's authority to decide where her or his ward will live has not been faced squarely in Massachusetts in well over a century and a half. Holyoke v. Haskins, 22 Mass. 20, 5 Pick. 20 (1827). The issue has implications for people with mental disabilities who disagree with their guardians about where they should live, and for elders who oppose nursing home placement.

Discharge and Removal

A guardian may resign his or her trust with permission of the court. G.L. c. 201 § 33. The court may condition such resignation upon the filing of a final account. If a guardian is incapable of performing his or her trust or is unsuitable, the court, after notice and a hearing, may remove him or her. Id.

A guardianship may also be terminated upon petition of the ward or other interested person, "when it appears that the guardianship is no longer necessary." G.L. c. 201 § 13. The ward has the burden of proof to demonstrate that he or she in currently capable and no longer in need of a guardian. Sullivan v. Quinlivan, 308 Mass. 339 (1941).

Inasmuch as the statute allows a ward to seek removal of his or her guardian, there should be at least a presumption that the ward has the capability to retain counsel for that purpose. Courts should be skeptical of challenges by a guardian to the authority of ward's counsel to appear and prosecute a petition to discharge.

Alternative to guardianship

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Medical Treatment & Substituted Judgment

The Supreme Judicial Court's landmark 1977 opinion in Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977), set the stage for significant and wide ranging changes in guardianship, indeed in the delivery of health care, in Massachusetts.

The issue in the case was who had the authority to decide whether chemotherapy should be administered to an institutionalized person with leukemia, who was incapable, due profound mental retardation, of making a medical treatment decision.

The Court began with the premise that all citizens have a constitutional right to make decision to accept or to reject treatments recommended by their doctors. This right extends to incompetent as well as competent people, because the value of human dignity extends to both. The issue for the Court, then, was how to make that right meaningful for someone who lacked the capacity to exercise it. The SJC's opinion rejected arguments that the authority to make the decision could be delegated to Mr. Saikewicz's doctors, or to his family if he had any, or, for that matter, to his guardian.

Instead, the Court imported into guardianship law the probate law concept of "substituted judgment." After determining that an individual is incompetent, the Court held, the trial judge is responsible to determine what it is that the individual would do if the individual were capable to decide. The trial judge is to determine this by substituting himself or herself for the ward -- donning the mental mantle of the ward -- and attempting to ascertain the ward's actual interests and preferences. The judge's duty is not to decide what is in the ward's "best interest." The substituted judgment process is intended to be exercised in a manner that acknowledges that individuals have the right to, and sometime do, make "bad" decisions or decisions that other, even most others, would not make.

The process for the judge is obviously a subjective one. Nevertheless, the SJC set out factors on which the judge should take evidence and which he or she should consider in determining what decision the ward would make if he or she were capable to make it. Those factors are:

- the ward's expressed preferences,
- the prognosis with the proposed treatment,
- the prognosis without the proposed treatment,
- the possible side effects of the proposed treatment,
- the ward's religious beliefs, if any,
- the impact of the treatment (or the failure to treat) on the ward's family, and

- any other relevant factor.

The parties to the petition are to assist the trial judge by ensuring a complete presentation, in the adversary format of a trial, of all the facts and arguments in favor of and in opposition to the proposed treatment. To facilitate this presentation, the Court required that a GAL, to serve as an attorney/advocate, be appointed for the ward.

Based on the evidence, learning as much as he or she can about the ward, the judge is to decide what the ward would do if the ward could decide. If the judge decides that the ward would forgo the proposed treatment, there is yet one more analysis to be undertaken. The Court must balance the substituted judgment decision against potentially countervailing state interests, including the following:

- the preservation of life,
- the protection of the interests of innocent third parties,
- the prevention of suicide, and
- maintaining the ethical integrity of the medical profession.

As for Mr. Saikewicz, the SJC affirmed the trial judge's finding that if he were competent, Mr. Saikewicz would decline the chemotherapy, preferring a painless death to a painful, life prolonging but not life saving, course of treatment which he would not understand.

After Saikewicz, therefore, a guardian lacks the authority to consent to some kinds of intrusive, serious, experimental or extraordinary medical care. In those cases, the guardian must petition the Probate Court, asking the judge, through the application of the substituted judgement process, to authorize the treatment or to decline to authorize it. Subsequent cases have shed some light on just what kinds of medical treatment and interventions fall outside a guardian's authority.

Cases Following Saikewicz

The Saikewicz case set the stage for a series of cases defining the parameters of the medical decision making for people who are incompetent. Three important themes run throughout all the cases.

First, a substituted judgment decision is distinct from a decision by doctors as to what is medically in the "best interests" of the patient. Second, medical advice and opinion are to be used for the same purposes and to the same extent that the incompetent individual would, if he or she were competent. The SJC has consistently said that the role of the physician is not diminished in this process, unless one perceives such role as including ultimate decision-making responsibility for incompetent persons. Third, the Court has repeatedly rejected any delegation of decision making responsibility away from the court in medical treatment situations which require the application of the substituted judgment process.

Just what cases require an application of the substituted judgement is not entirely clear. In Matter of Spring,380 Mass. 629 (1980), the Supreme Judicial Court suggested a number of factors to be considered in determining whether a prior court order is needed with respect to highly intrusive forms of medical treatment for incompetent patients. These factors include the following: the extent of impairment of the patient's mental faculties; whether the patient is in the custody of a state institution; the prognosis without the proposed treatment; the prognosis with the proposed treatment; the complexity, risk, and novelty of the proposed treatment; its possible side effects; the patient's level of understanding and probable reaction; the urgency of decision; the consent of the patient, spouse, or guardian; the good faith of those who participate in the decision; the clarity of professional opinion as to what is good medical practice; the interests of third persons; and the administrative requirements of any institution involved.

To the extent that the parameters of the substituted judgment process are know, it is because the state's appellate courts have required its application in holdings or dicta particular cases. Some, but not all, of the most noteworthy examples are described in the following paragraphs.

"No Code" or DNR Orders — In Matter of Dinnerstein, Care and Protection of Beth

The Appeals Court carved out an exception to Saikewicz in its decision in In Matter of Dinnerstein, 6 Mass. App. Ct. 466 (1978), when it held that judicial authorization is not necessary prior to a physician's entry of a "no-code" or "do not resuscitate" (DNR)order when a patient is in the terminal stages of an incurable illness and where no lifesaving or life-prolonging treatment alternative exists.

However, a different rule may apply if the order is to be entered on the medical chart of some minors, who, of course, are incompetent because of their age. In Care and Protection of Beth,412 Mass. 188 (1992), the SJC held that a judicial determination of substituted judgment was appropriate when a nursing home was seeking to enter a "no code" order for a five-year-old girl in a persistent vegetative state who was in the custody of the Department of Social Services and whose parents were also minors. The Court reiterated that "no code" orders usually do not require court approval. The distinguishing factors appear to be that the child was in the custody of a state agency and that she was already under the protection of the court. Compare Custody of a Minor, 385 Mass. 697 (1982)(substituted judgment may not be necessary when a DNR order is recommended for a child who has an involved "loving family").

Sterilization -- Matter of Moe

In Matter of Moe, 385 Mass. 555 (1982), the Supreme Judicial Court held that a substituted judgment determination is required if a guardian is seeking the sterilization of a ward with a mental disability. The factors the judge must consider include whether the ward, despite being mentally disabled, is able to make an informed choice regarding sterilization, the physical ability of the ward to procreate, the possibility of less intrusive means of birth control, the ability of a ward to care for a child, even with reasonable assistance, and the possibility that the ward may marry and, with the involvement of a spouse, be able to care for a child. The court must also consider the ward's religious beliefs and, to the extent possible, must seek to ascertain the ward's preference.

Abortion -- In the Matter of Moe

The Appeals Court applied the substituted judgment analysis in a case involving a guardian's petition for authorization to consent to an abortion for a mentally retarded adult ward. In the Matter of Moe, 31 Mass. App. Ct. 473 (1991). The Court actually reversed the trial judge's determination that the ward was incompetent, citing the ward's clearly stated preference to undergo the abortion. However, the Court also concluded that even if the ward were incompetent, in light of her clearly expressed preference, it would be her substituted judgment to assent to an abortion.

Nutrition and Hydration — Brophy v. New England Sinai Hospital, Inc.

A court may authorize the withholding of nutrition and hydration from an incompetent individual who is in a persistent vegetative state, but is not terminally ill, if the court determines, after a substituted judgment analysis, that the person, if competent, would decline food and water. Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417 (1986). The state's interests in the preservation of life, prevention of suicide and maintenance of the integrity of medical profession were held to lack sufficient strength to overcome Mr. Brophy's right to "preserve his humanity, even if [that] means to allow the natural processes of disease or affliction to bring about a death with dignity." Id at 434.

Antipsychotic Medication -- Guardianship of Roe and Rogers v. Commissioner of Department of Mental Health

In Guardianship of Roe, 383 Mass. 415 (1981), the Supreme Judicial Court extended the holding in Saikewicz to an individual with mental illness who lived in the community and to whom his parents sought to involuntarily administer antipsychotic medication. Addressing whether the treatment proposed for Mr. Roe was of the nature requiring such judicial resolution, the court recognized that "few legitimate medical procedures . . . are more intrusive than the forcible injection of antipsychotic medication." The Court held that, absent an "emergency," a judicial determination of incompetence must precede any effort to override a mental patient's objection to treatment with antipsychotic drugs. Therefore, before Mr. Roe could be involuntarily treated with antipsychotic medications, his parents would have to seek guardianship and specifically ask the court to authorize the treatment. The court's decision would, of course, be made on the basis of a substituted judgment analysis.

The Roe decision was limited to noninstitutionalized people with mental illness. But in Rogers v. Commissioner of the Department of Mental Health, 390 Mass. 489 (1983), the

Supreme Judicial Court extended the rules to institutionalized persons as well. The court concluded that the right to make treatment decisions derives from individuals' rights to manage their own affairs, rights which may be limited only after a judicial determination of incompetency.

This is in part what the Supreme Judicial Court held in Rogers v. Commissioner and Guardianship of Roe:

- Institutionalized and noninstitutionalized persons with mental illness or mental retardation have a qualified right to refuse treatment with antipsychotic medications.

- The right may be overridden in certain emergency situations.

- In rare circumstances when even the slightest delay could result in the immediate, substantial and irreversible deterioration of a serious mental illness, a person whom a physician, in the exercise of professional judgment, believes to be incompetent may be treated over his or her objections on an interim basis. An appropriate petition to a court should follow forthwith.

- Otherwise, if a doctor believes that an individual who is not accepting treatment is incompetent, there must be a judicial determination of incompetence and substitute judgment before the person may be treated with antipsychotic medications.

- If the individual is competent, his or her refusal must be respected, except in an emergency.

- If the individual is found to be incompetent to consent to treatment, a determination of substitute judgment must be made, using the factrs set forth in Saikewicz.

- If the person's substituted judgment is to accept the treatment, the court should consider the treatment plan offered by the petitioner and approve it or an alternative plan.

- If the individual's substitute judgment is to refuse the treatment, that refusal must be respected except in an emergency.

- If the incompetent person is not institutionalized, and if the state interest is the prevention of physical harm to the individual or others, the court must determine, by means of substituted judgment whether the individual would, if competent, choose involuntary hospitalization or forced medication. This "extended substituted judgment" decision must be based on proof beyond a reasonable doubt.

- The guardian or, in the absence of a guardian, the court should monitor compliance with the approved plan.

- Substituted judgment orders must provide for periodic review and must have a termination date.

Cross, et al. pp. 401-402. For a complete explanation of the substituted judgment process in mental health treatment cases, see Cross, et al. pp. 395 - 495. See also Stan Goldman, Substituted Judgment and Admission to Psychiatric Facilities, in Mehne et al., pp. 7-1 - 7-14.