

## SUBSTITUTED JUDGMENT AND EXTRAORDINARY TREATMENT

### Substituted Judgment--Overview

An exception to the general approach to judicially-ordered alternative decision making concerns medical procedures and treatment modalities (usually referred to as "extraordinary") that are considered particularly intrusive, risky or restrictive of the incompetent person's liberty. Except in an emergency, only a court may authorize such a treatment or procedure to be administered or withheld. Such authorization typically is sought in the Probate and Family Court Department, but may, in limited circumstances, be sought in the District Court Department pursuant to G.L. c. 123, § 8B (see below).

After finding the person unable to competently decide whether to accept or refuse the proposed treatment or procedure, the court must determine what the person would decide if he or she were competent to do so. That is, the court must substitute its judgment for that of the incompetent person. *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977).

Such determination can be made only after a full hearing in which the putatively incompetent person is present and has the right to counsel, at the Commonwealth's expense if he or she is indigent.

### The Substituted Judgment Determination

The court may not authorize the administration of a proposed treatment merely upon a finding that the treatment is clinically desirable or likely to be efficacious (*i.e.*, that such treatment would be in the ward's "best interests"). See *In re Moe*, 385 Mass. 555 (1982) (sterilization); *Guardianship of Roe*, 383 Mass. 415 (1981) (antipsychotic medication); *Saikewicz* (chemotherapy). Rather, the court must determine, taking into account all of the factors and concerns that would likely serve to form the particular ward's subjective perspective, which, if any, treatment the ward would consent to if he or she were competent. See, *e.g.*, *Moe*; *In re Spring*, 380 Mass. 629 (1980); *Saikewicz*. Any such treatment, of course, must comport with accepted professional practice. *In re McKnight*, 406 Mass. 787 (1990).

### Applicability of Substituted Judgment Standard - Treatment Modalities

In determining whether the decision to accept or refuse to accept the administration of a particular treatment or procedure may be made by a guardian or, rather, may only be made by a court by means of a substituted judgment determination, the Probate and Family Court must take into account:

- the extent of impairment of the [person's] mental faculties;
- whether the [person] 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 [person's] level of understanding and probable reaction;
- the urgency of decision;

- the consent of the [person], 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

*In re Spring*, 380 Mass. 629 (1980).

To date, included treatments and procedures are:

- sterilization, *In re Moe*, 385 Mass. 555 (1982);
- initiation or removal of life-sustaining mechanisms, *Brophy v. New England Sinai Hosp.*, 398 Mass. 417 (1986)(nutrition and hydration); *Spring* (renal dialysis); *Saikewicz* (chemotherapy);
- abortion, *In re Moe*, 31 Mass. App. Ct. 473 (1991); and
- antipsychotic medication, *Rogers v. Commissioner of Dep't of Mental Health*, 390 Mass. 489 (1983); *Guardianship of Roe*, 383 Mass. 415 (1981).

While there have been no judicial rulings regarding the applicability of the substituted judgment standard where the authority to treat an incompetent person with electroconvulsive therapy (ECT) or psychosurgery is sought, DMH regulations define these modalities as being “highly intrusive or high risk interventions” (presumably requiring a substituted judgment determination). 104 C.M.R. § 27.10(1)(b). Similarly, the District Court Committee on Mental Health and Retardation has concluded that a substituted judgment determination should be made where treatment with ECT is sought.

The Appeals Court in *In re Dinnerstein*, 6 Mass. App. Ct. 466 (1978) held that judicial authorization for the entry of a "do not resuscitate" (DNR) order was unnecessary. However, this decision appears to be an aberration. Indeed, the several divisions of the Probate and Family Courts routinely apply the substituted judgment standard where authority to enter DNR orders are sought. *See, also, Custody of a Minor*, 385 Mass. 697 (1982) (entry of DNR order for minor requires judicial substituted judgment determination).

Applicability of Substituted Judgment Standard -

"Passive Acceptors"

The propriety of administering psychiatric treatment to a person who is not capable of providing informed consent, but who is not objecting thereto (*i.e.*, the so-called “passive acceptor”), while yet to be specifically considered by the courts, is highly doubtful. *See Rogers*, 390 Mass. at 500 n.14 (“a patient’s acceptance of antipsychotic drugs ordinarily does not require judicial proceedings. . . . [H]owever, because incompetent persons cannot meaningfully consent to medical treatment, a substituted judgment by a judge should be undertaken for the incompetent patient even if the patient accepts the medical treatment”).

Applicability of Substituted Judgment Standard - Exceptions (Antipsychotic Medication).

There are two circumstances in which antipsychotic medication may be administered to an incompetent person without first obtaining judicial authorization:

- "Police Power" Exception. Where a person's behavior places him- or herself or others at imminent risk of serious physical injury, restraint may be administered in accordance with applicable state law and regulations. *Rogers*, 390 Mass. at 509. The particular form of restraint utilized (*i.e.*, physical, mechanical or chemical) must be the option that is least restrictive of his or her liberty. 104 C.M.R. § 27.12(6)(b); *Rogers*, at 510. Thus, the mere fact that a person is acting "dangerously" does not justify the administration of antipsychotic medication; only where such "chemical restraint" is the least restrictive method available to effectively and safely control his or her behavior may it be used. See *Rogers*, at 507–11.
- "Parens Patriae" Exception. The other exception applies when a person's refusal to accept proposed treatment would result in the "immediate, substantial and irreversible deterioration of a serious mental illness." *Rogers*, at 511–12. The administration of treatment in this circumstance, however, may be short-term only; the person may be treated only in order to stabilize him or her while judicial authorization is pursued. *Rogers*, at 512.

#### Factors for Determining Substituted Judgment

In order to determine a ward's substituted judgment (*i.e.*, determine what decision the ward would make if competent to do so), the court must take evidence on each of the following factors and enter "specific and detailed findings demonstrating that close attention has been given [thereto]." *Guardianship of Roe*, 383 Mass. 415, 425 (1981). Again, this determination must be made from the ward's perspective, taking into account all of the factors that would be of significance, even if only to the ward himself or herself. *Roe*, at 444:

- Expressed preference—"Great weight" must be given to any preference expressed by the ward regarding the proposed (or similar) treatment, both currently and in the past. *Roe*, at 444–45. If the ward expressed a preference when he or she was competent, that preference, though not dispositive, should be accorded great deference. *Guardianship of Linda*, 401 Mass. 783 (1988) (preferences change over time; court must consider likely effect of new information or circumstances on previously expressed choice).
- Religious convictions—the court must consider whether the ward adheres to (and, if so, the strength of) any religious tenets that may influence his or her decision regarding the proposed treatment. *Roe*, at 445–46; see, e.g., *Norwood Hosp. v. Munoz*, 409 Mass. 116 (1991) (blood transfusion of Christian Scientist).
- Familial relationship—the court must consider the ward's relationship with his or her family and the impact that the decision on the treatment may have on this relationship. *Roe*, at 446–47. It is the ward's perspective on such matters, and not the family's, that must be considered; the wishes of the family are relevant only to the extent that the ward himself or herself would take their wishes into account in making his or her choice. See, e.g., *In re R.H.*, 35 Mass. App. Ct. 478, 488–89 (1993).
- Side effects and alternative treatment modalities—the court must consider the possible adverse side effects, if any; how likely it is that these side effects will

occur; and, if they do occur, their likely severity. *Roe*, at 447. The court should also consider any alternative treatments, their risks and their benefits. *Cf. In re Moe*, 385 Mass. 555 (1982); *Saikewicz*, 373 Mass. 728, 757 (1977).

- Consequences if treatment refused—It is fair to assume that as a person's prognosis without treatment worsens, the more likely it is that he or she will accept such treatment. However, the court must determine whether this assumption holds in light of the ward's unique perspective. *Roe*, at 447; *see, e.g., In re Boyd*, 403 A.2d 744, 752 (D.C. App. 1979) (even in life-or-death situation, one's religion may dictate a "best interests" antithetical to getting well).
- Prognosis with treatment—as a general rule, as the probability increases that a proposed treatment will improve a person's condition, so too will the likelihood that he or she will accept such treatment, even treatment that is intrusive or likely to cause adverse side effects. However, it is not at all unusual for clinicians to disagree about "the probability of specific benefits being received by a specific individual upon administration of a specific treatment. [Therefore, b]oth of these factors[,] the benefits sought and the degree of assurance that they actually will be received[,] are entitled to consideration." *Roe*, at 447–48.
- Other relevant factors—In addition to the foregoing, the court must consider any other factors that the ward would be likely to take into account if he or she were competent to make the decision at issue. *Guardianship of Brandon*, 424 Mass. 482, 487 (1997); *Roe*, at 448. For example, in a criminal proceeding, a defendant asserting his or her lack of criminal responsibility has the right to appear before the factfinder in an unmedicated or natural condition. *Commonwealth v. Louraine*, 390 Mass. 28 (1983). Therefore, a court hearing a petition seeking authority to administer antipsychotic medication to a criminal defendant should take into account the impact of that decision upon the criminal proceeding from the defendant's perspective.

### Standard of Proof

The applicable standard of proof as to both competency and substituted judgment is preponderance of the evidence. However, because a finding of incompetency seriously impinges upon a ward's rights, and because substantial liberty interests are implicated in the administration of highly intrusive treatments such as antipsychotic medication, the court must carefully consider the evidence and enter specific written findings on the ward's decision-making ability and the substituted judgment factors described above. *Guardianship of Doe*, 411 Mass. 512, 524 (1992); *Roe*, at 425. This process is often referred to as the "heightened preponderance of the evidence" standard.

### The Treatment Plan

After the court has found a person to be incompetent and has determined that he or she would accept the proposed treatment if competent, it must approve a specific, written treatment plan. *Rogers*; *Roe*. The plan should clearly describe the authorized treatment and dosage ranges, any procedures or treatments that may be used to counteract potential side effects, and reasonably foreseeable alternative treatments.

## Monitoring the Treatment

The court also must establish a process by which the implementation of the approved treatment plan is to be monitored. *Rogers; Roe* (antipsychotic medication). See *Probate and Family Court Form CJ-P 115, Appointment of Rogers Monitor, Guardianship of Brandon*, 424 Mass. 482 (1997).

Where a guardian has been previously appointed to make other decisions for the ward, the court often will request that he or she also serve as the monitor for the treatment order. A guardian who also serves in this capacity is often referred to as a "Rogers guardian," a term that has resulted in much confusion and should be avoided. As a monitor, the guardian has no decision-making authority whatever. Rather, it is the court and the court alone that may authorize the administration of antipsychotic medication and other extraordinary treatments.

## Expiration of the Order and Periodic Review

Since a person's treatment needs (and, perhaps, competency), are likely to change over time, particularly where treatment has had its intended therapeutic effect, substituted judgment orders and treatment plans are not to be effective indefinitely. Rather, the court must periodically review the implementation of the approved treatment plan and set an expiration date. *Guardianship of Weedon*, 409 Mass. 196 (1991). The purpose of a periodic review is to determine whether the person's condition and circumstances have substantially changed since the order was issued, such that, if the client were competent, he or she would no longer consent to the previously authorized treatment. *Guardianship of Brandon*, 424 Mass. 482 (1997).