COMMONWEALTH OF MASSACHUSETTS

Norfolk, SS NORFOLK PROBATE & FAMILY COURT
DOCKET NO.:

)
In the Matter of:)
Guardianship of D.E.)
_____)

BRIEF OF RESPONDENT - APPELLANT

REPORTED QUESTIONS

1) Is either Do Not Resuscitate "DNR" or Do Not Intubate "DNI" an extraordinary decision deserving of a substitute judgment analysis;

2) In the case of an institutionalized or hospitalized non-terminally ill mentally incompetent person without involved family members and who never previously expressed nor has ever been capable of expressing a preference, should the Probate and Family Court apply the substitute judgment doctrine to determine that person's preference for either or both a DNR and DNI order to be placed in medical records, and;

3) How, if at all, does the presence of involved and caring family members affect the answer to either question 1 or 2?

4) Should the Probate and Family Court consider the best interests and present and predictable future quality of life of an institutionalized or hospitalized non-terminally ill mentally incompetent person who never previously expressed nor has ever been capable of expressing a preference about DNR or DNI?

STATEMENT OF THE CASE

This case arises out of a report of evidence and questions of law to the appeals court pursuant to G. L. c.215. The case began when the petitioner the Nursing Facility, filed a general petition requesting that the Probate and Family Court make a substituted judgment determination authorizing a Do Not Resuscitate ("DNR") and Do Not Intubate ("DNI") orders for the respondent, D.E.

D.E. was admitted to this facility on September 3. The nursing home sought the appointment of a guardian at that time and the court appointed a non-relative attorney to serve as D.E.'s guardian. D.E. remained under guardianship at the time this petition and continued to reside at the nursing home.

D.E. suffers from dementia, subdural hematoma, anxiety, dementia hypothyroidism, diabetes, hyperlipidemia, anemia, peripheral vascular disease, kidney disease, and dysphagia. The nursing home filed the petition because the doctors at the nursing home felt it was in was D.E.'s best interest to be allowed to die without the administration of extraordinary measures should he have a heart or respiratory failure. The petitioner alleged that D.E., if competent, would choose to forgo cardiac or respiratory interventions in such circumstances, knowing that the failure intervene would lead to his death. The petitioner thus requested the court to make a substitute judgment determination and permit the entry of a DNR or DNI order in D.E.'s medical chart.

The court did not conduct an evidentiary hearing on this matter. None was requested by any party. At a non-evidentiary hearing the court heard the arguments of the parties, and accepted into evidence, without objection, multiple documents. These documents included multiple affidavits signed by D.E.'s treating physician, a consulting psychiatrist and a nurse practitioner. Each of these medical providers was employed by the nursing home, either on staff or as a consultant. These affidavits described D.E.'s medical condition and treatment needs as they changed over time. The most recent affidavit was dated February 21. The court also accepted into evidence the medical certificate filed with the original guardianship petition in 2005, a medical certificate dated June 2010 and the guardian's care report dated August 2011.

The court heard oral argument from the parties. All parties agreed that a substitute judgment decision by the judge was the appropriate method for deciding the question regarding the DMR, DNI order for the respondent. It is unclear if D.E.'s court-appointed attorney opposed the entry of the substitute judgment order. The trial court made a specific finding that: "Respondents counsel neither explicitly opposed nor assented to the central underlying objective of the petition (entry of the DNR/DNI orders) but did oppose that such orders be allowed without substituted judgment by the court."

After hearing from the parties and reviewing the extensive documentary record the court made the following detailed findings:

- Respondent is an incompetent person within the meaning of M.G.L. ch. 190B sec. 5-101(9). He cannot give or express informed consent or preference.
- Respondent expressed a preference about chest compressions and intubation at a time when he was incompetent and suffering from dementia, paranoid disorder with delusions and his cognitive impairment was severe. His preference cannot be credited as the genesis of informed thought.
- Thus Respondent has not expressed preferences which can be accorded any weight.
- There is, to the best of my knowledge and belief, no evidence that D.E. subscribes to any religious beliefs or convictions which would contribute to the patient's decisions regarding directives, specifically Do Not Resuscitate (DNR), Do Not Intubate (ONI) and Comfort Measures Only (CMO)
- If D.E. has cardiac or respiratory arrest he will most likely die without the pain and suffering caused by resuscitation efforts.
- If a Do Not Resuscitate (DNR), Do Not Intubate (DNI) is not entered and Cardiopulmonary resuscitation is initiated, the patient may or may not survive, but will experience adverse effects. [1]
- Respondent is not in State custody.

[1] Chest compressions are initiated or a defibrillator is used to apply electric shock to the heart, it may cause rib fractures, internal bleeding, bruising, and/or other painful damage to D.E. In addition, resuscitation efforts may include highly intrusive measures such as insertion of an endotracheal tube into the lung, insertion of other tubes for intravenous medication and possibly the implantation of an electronic pacemaker, none of which will improve the Respondent's underlying condition, causing pain and discomfort and could possibly disable him/her even further.)

- Respondent has no known family.

- There is no evidence that Donald's death is imminent or can be predicted in terms of any span of time. In a temporal sense, Donald *is* not "terminally" ill.

- Donald's current health conditions are not curable and there is no evidence of a medical breakthrough on the horizon to cure Respondent's various ailments and enhance his quality of life.

- There is no emergency warranting any exception to informed consent or substituted judgment.

- Cardiopulmonary resuscitation may save and prolong Respondent's life.

- Respondent's quality of life, given the conditions described by Dr. O., are most benignly described as poor.

- There is no legitimate or cognizable state interest in resuscitating Respondent or prolonging his wretchedly unhealthful life.

- Given the absence of any reliable evidence as to past expressed preference, the exercise of this specific substitute judgment factor in these circumstances requires a degree of clairvoyance that this Court neither possesses nor should be in the business of conjuring.

- The application of substituted judgment analysis using a substituted expressed preference under these circumstances would be inappropriate given the lack of reliably expressed preference but is appropriate and necessary given the potential end of life, finality of the results, considering that D.E. is not in danger of imminent death.

- Under the circumstances of a non-imminently dying incompetent where there is neither reliable previously expressed preference nor family who care, the substituted judgment analysis must necessarily include an objective best interests prong as a substitute for the expressed preference factor.

- Considering self-examination of his quality of life, D.E. would decide against any interventions specifically resuscitation and intubation.

After making these detailed findings of fact and after considering additional factors not included in this list the court entered what it referred to as a "Substituted Judgment (Interlocutory)". The judgment stated:

> Given the above findings of fact and were he able to appreciate his circumstances and specifically able to appreciate the degree of his incompetence into his decision making, the Court finds that the substituted judgment of D.E. would be to order as an expression of his preferences the entry of Do Not Resuscitate ("DNR") and Do Not Intubate ("DNI") in his medical records. So Ordered.

The court reported the three questions described above and entered an order expressly refusing to stay its order. "Because a stay would not preserve the rights of the Respondent, given this Court's findings."

ARGUMENT

I IS EITHER DO NOT RESUSCITATE "DNR" OR DO NOT INTUBATE "DNI" AN EXTRAORDINARY DECISION DESERVING OF A SUBSTITUTED JUDGMENT ANALYSIS?

ANSWER: Yes, the decision to refuse or consent to a recommended DNR and DNI involves an extraordinary medical decision.

DISCUSSION

D.E. has the same right that all Massachusetts citizens have to refuse life saving medical treatment. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728 (1977). D.E. is not competent to make this decision because of his dementia. There is no dispute about D.E.'s lack of competence to make medical decisions. He has not been competent to make his own medical decisions for a number of years; the court appointed a guardian for him eight years ago. The attorney who was appointed guardian had no involvement in D.E.'s life before his appointment.

Any decision regarding D.E.'s refusal or acceptance of life saving medical treatment must "… determine as accurately as possible [D.E.'s] wants and desires." Saikewicz, 373 Mass. at 750. The guardian cannot simply decide what a reasonable person in D.E.'s condition would want. Furthermore, the guardian cannot decide what treatment he would want if he were in a similar situation. His personal values cannot come into play.

The Massachusetts courts since Saikewicz have often considered the limits of a court appointed guardian's authority to make medical decisions on behalf of the incapacitated person in his or her care. Our courts have shown a very strong preference for judicial decision making for medical procedures that may have serious consequences for the incapacitated person.

The Supreme Judicial Court stated that certain "extraordinary medical decisions" cannot be delegated to court appointed guardians. These difficult decisions require "… the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created." Saikewicz, 373 Mass. at 759. Furthermore, the courts have frequently described the factors that courts and guardians must consider when deciding the limits of the guardian's authority, and when circumstances require judicial decision making.[2]

Cases involving DNR orders are not uncommon in the substituted judgment jurisprudence. The first case involving a medical request to enter a DNR order was In the Matter of Shirley Dinnerstein, 6 Mass.App.Ct. 466 (1978). This case involved an elderly nursing home resident with Alzheimer's disease. At the time of the requested DNR order she had lapsed into a vegetative state. Ms. Dinnerstein had an involved family consisting of her son, a physician, and a daughter with whom Ms. Dinnerstein lived prior to her admission to the

[2] We have recently identified the factors to be taken into account in deciding when there must be a court order with respect to medical treatment of an incompetent patient. "Among them are at least 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." *Matter of Spring, 380 Mass. 629 at 637. Guardianship of Richard Roe ,Third, 383 Mass. 415, 435 (1981)*

nursing home. Both family members concurred with the treating physician's recommendation of the entry of a DNR order. This case was not filed in court as a guardianship matter. The parties never sought the appointment of a guardian and one was never appointed. The case was an action for declaratory relief seeking judicial approval of the family's decision to follow the treating physician's advice regarding the entry of the DNR order. Ms. Dinnerstein had no guardian to act on her behalf,.

The Appeals Court treated this question as a simple medical decision, stating,

> [t]hat question is not one for judicial decision, but one for the attending physician, in keeping with the highest traditions of his profession, and subject to court review only to the extent that it may be contended that he has failed to exercise "the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. In the Matter of Dinnerstein, 6 Mass.App.Ct. 466 (1978).

The Supreme Judicial Court addressed the Dinnerstein ruling in 1980 in Matter of Spring, 383 Mass.629. This case, filed as a guardianship, involved a family's desire to terminate life-prolonging hemodialysis for a family member. The trial judge, using the substituted judgment standard, decided that the medical treatment should be terminated but delegated the ultimate decision to the ward's attending physician and family. After a review by the Appeals Court that upheld

the trial court's decision, the SJC concluded that the trial court erred when it delegated the decision to the ward's wife, son and doctors. In its opinion, in dicta, the Court commented on the Appeals Court decision in Dinnerstein.

The court agreed that the result in Dinnerstein was consistent with its holding in Saikewicz. The court concluded that the appeals court decision "was not contrary to law" Matter of Spring at 635. The SJC declared that it approved the appeals court's consideration of the findings of the treating doctors and other medical experts, thus it appears that the court felt that the ward's substitute judgment was the controlling factor in the trial court's decision. There is no other way to interpret the courts conclusion that the decision was not "contrary to law". However, the SJC clearly did not support all of the Appeals Court's reasoning in its delegation of the decision making to the family and physicians stating: "without approving all that was said in the opinion of the Appeals Court, we think the result reached on the facts shown was consistent with our holding in Saikewicz." In the Matter of Earl N. Spring, 380 Mass. 629, 635 (1980). It is apparent from the Court's analysis that it felt that a petition seeking a judicial decision for the request for a DNR order was one that required a

substitute judgment decision by a judicial decision maker or the loving family. It is not clear that the court felt that a substitute judgment medical decision made by a loving family, without objection from any party, required a judicial decision.

The SJC reiterated the strong Massachusetts preference for judicial decision making in cases involving difficult medical decisions for mentally incompetent individuals. The court restated the obvious conclusion that such decision making requires an individual determination of the incompetent person's values and desires. This determination may require medical information and advice from the attending physician and other medical experts, but the decision cannot be delegated to medical professionals. The court stated "…[a]gain we disapprove shifting the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction." Spring, 380 Mass. at 636.

The Spring opinion is critical to any analysis of whether a judicial substituted decision is necessary. The court described the factors that should be considered in deciding the need for judicial approval of a desired medical treatment. These factors include at least 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.

Spring, 380 Mass. at 637. See also, In the Matter of Guardianship of Richard Roe III, 383 Mass. 415, 444 (1981). Custody of a Minor, 385Mass. 697,708 (1982)

The SJC again addressed a judicial decision to approve a DNR order in Custody of a Minor, 385Mass. 697 (1982). This case involved a baby in the custody of the Massachusetts Department of Social Services (DSS). The baby suffered from an inoperable heart defect and the treating physicians recommended a DNR order. DSS refused to consent to the DNR and the physicians sought judicial authority for the entry of the DNR order. The physicians changed their mind about the need for the DNR while the case was pending and sought to terminate the judicial involvement. The trial judge refused to remove himself from the matter and the SJC concluded that he was correct. The SJC stated that the decision to remove the DNR or continue it in effect must be made by a judicial decision-maker. The SJC distinguished the Appeals Court decision in Dinnerstein, writing

> In the Matter of Dinnerstein, 380 N.E.2d 134 (1978), the Appeals Court held that the decision to enter a "no code" order on the medical chart of an irreversibly terminally ill patient, in consultation with the family or the patient's guardian, did not require prior judicial review. In In the Matter of Spring, 405 N.E.2d 115 (1980) we approved in dictum of the result in Dinnerstein as consistent with our holding in the Saikewicz case. We note that there are, however, relevant distinctions between the Dinnerstein and Saikewicz cases.

> Saikewicz was a ward of the State and had no family members willing to be involved in decisions regarding his medical treatment. Saikewicz, supra, 370 N.E.2d 417. Dinnerstein, however, was not a ward of the State and had a son and daughter who, in consultation with her attending physician, agreed to a particular course of medical treatment. Dinnerstein, supra, 380 N.E.2d 134.

Custody of a Minor, 434 N.E. 2nd 601,607 (1982).

The SJC also reiterated the factors it first articulated in Spring, described above, that affect the question of when a court order is required it. The court applied these factors to the facts of the case noting several factors that distinguished the case from Dinnerstein. Those distinguishing factors apply in the instant case.

The court noted that the child was a ward of the state in the custody of DSS. D.E. is not a ward of the state as he is chronologically an adult and his guardian is not a state agency. However, the guardian is a non-relative who was selected by the state (the trial court) and the Commonwealth pays his fees. D.E. is under the care of a state funded nursing home (Medicaid), and he has relied upon such care for many years. The nursing home is the petitioner in the present guardianship matter, and the nursing home is seeking the authority to enter the DNR order.

Another distinguishing factor was that the child's mental faculties never developed to the point that he was competent to make a decision. This factor is important because the decision-maker is required to consider any statements

regarding the proposed medical treatments the incompetent person might have made while competent. D.E. is not capable of expressing his own opinions regarding the proposed medical decisions. In addition, no one involved in this case knew D.E. when he was competent to indicate his opinions regarding any proposed medical decisions.

In addition the court noted that questions regarding the child's medical care were properly before the court prior to the hospital's decision to drop its request. Thus the parties were not required to initiate a new judicial proceeding to obtain judicial authority to act. D.E.'s guardianship was filed in the Probate and Family Court. The court has regularly reviewed various aspects of his guardianship since that date. D.E.'s case is properly before the court.

The Supreme Judicial Court clearly stated the requirement of a judicial decision maker in these cases in the Custody of a Minor, supra, case.

> Accordingly, we conclude that, although this case appears similar to Dinnerstein because the entry of a "no code" order is in issue and the child is terminally ill, the principles enunciated in Saikewicz are applicable. Absent a loving family with whom physicians may consult regarding the entry of a "no code" order, this issue is best resolved by requiring a judicial determination in accordance with the substituted judgment doctrine enunciated in Saikewicz. Custody of a Minor, 434 N.E. 2nd 601,608 (1982)

The decision to forsake medical treatments that may extend D.E.'s life must be made by a court applying the substitute judgment factors. D.E. does not have any family with whom his physicians or even his guardian can consult. D.E. is an adult orphan. He is much closer to the child described by the Supreme Judicial Court in the Custody of a Minor case than he is to the Ms. Dinnerstein described by the Appeals Court.

II IN THE CASE OF AN INSTITUTIONALIZED OR HOSPITALIZED NON-TERMINALLY ILL MENTALLY INCOMPETENT PERSON WITHOUT INVOLVED FAMILY MEMBERS AND WHO NEVER PREVIOUSLY EXPRESSED NOR HAS EVER BEEN CAPABLE OF EXPRESSING A PREFERENCE, SHOULD THE PROBATE AND FAMILY COURT APPLY THE SUBSTITUTE JUDGMENT DOCTRINE TO DETERMINE THAT PERSON'S PREFERENCE FOR EITHER OR BOTH A DNR AND DNI ORDER TO BE PLACED IN MEDICAL RECORDS?

ANSWER: Yes, the decision to refuse or consent to a recommended DNR and DNI order on behalf of an institutionalized or hospitalized non-terminally ill mentally incompetent person, who is without involved family members and who neither previously expressed nor has ever been capable of expressing a preference, requires the application of the substituted judgment doctrine by the Probate and Family Court.

DISCUSSION

See discussion above in section I.

III HOW, IF AT ALL, DOES THE PRESENCE OF INVOLVED AND CARING FAMILY MEMBERS AFFECT THE ANSWER TO EITHER QUESTION 1 OR 2

ANSWER: This issue is not specifically raised in the instant case. The answer to this question is not required to address the issues presented to the court in this matter. However, because the issues raised by this question arise in many similar cases I have provided the following analysis.

In some circumstances the presence of involved and caring family members may determine the need for a judicial decision maker. In all cases the decision maker must apply the substitute judgment doctrine when making the decision.

DISCUSSION

This question raises the issue of the need for judicial decision making in extraordinary medical treatment cases when the incapacitated person is fortunate

to be surrounded by caring and loving family members. The Supreme Judicial Court has never expressly required judicial decision making in such cases.

The Supreme Judicial Court has examined the question of the appropriate decision maker in cases that involve extraordinary medical decisions where there is no involved family member to act as the decision maker. The Court clearly stated that a judicial decision maker is required in those situations.

In addition, the Court has considered two cases that involved family members as decision makers, but each of those cases was brought to court by the family member seeking a judicial decision or approval. In both Dinnerstein and Spring, the SJC approved the trial court's conclusion that the substituted judgment of the incapacitated person was consistent with the outcome of the case, but it did not approve of the trial court's delegation of the decision making authority to the family and doctors.

It appears that the SJC felt that a judge should not delegate the substitute judgment decision to a family member after the family member sought judicial approval. However it is not clear that the Court believes that the family member was required to seek prior judicial approval for the medical decision. The Court stated:

> The need for a court order. Neither the present case nor the Saikewicz case involved the legality of action taken without judicial authority, and our opinions should not be taken to establish any requirement of prior judicial

> approval that would not otherwise exist. The cases and other materials we have cited suggest a variety of circumstances to be taken into account in deciding whether there should be an application for a prior court order with respect to medical treatment of an incompetent patient. In the Matter of Earl Spring, supra at 636.

A review of the Court's decisions regarding medical decisions may provide guidance regarding the Court's views in cases where the decision makers are involved and caring family members. In Custody of a Minor, the trial court made a substitute judgment decision to enter a DNR on the chart of an infant in the care and custody of the Department of Social Services. The SJC upheld the trial court's decision. Nevertheless, the Court stated:

> Absent a loving family with whom physicians may consult regarding the entry of a ″no code″ order, this issue is best resolved by requiring a judicial determination in accordance with the substituted judgment doctrine enunciated in Saikewicz. Custody of a Minor, 385 Mass. at, 710.

The Court revisited this issue in Care & Protection of Beth, 412 Mass. 188 (1992), which also involved a child in DSS custody. The Court applied the factors it described in Spring and decided that this was another case that required a judicial substituted judgment determination. However, the Court stated:

> Generally, "no code" orders do not require judicial oversight. See *Matter of Dinnerstein*, 6 Mass. App. Ct.

> 466, 474-475 (1978). Cf. *Brophy* v. *New England Sinai Hosp., Inc.*, 398 Mass. 417, 423 (1986) (unlike substituted judgment to discontinue artificial nutrition and hydration, DNR order entered on Brophy's chart at wife's request not reviewed by court). Care & Protection of Beth, 412 Mass. at 193.

The decision to discontinue artificial nutrition and hydration in the Brophy case required a judicial decision maker only because the treating physician and hospital refused to honor the family's request to remove a feeding tube. As a result, Mr. Brophy's wife, who was the court appointed guardian, was forced to initiate the court action.

In the Saikewicz case the SJC recognized the difference between a substitute decision maker who was a loving family member, and a decision maker who was selected by the court and who had no prior relationship with the incapacitated person. The court distinguished the father of Karen Quinlan from Mr. Saikewicz' guardians:

> The problems of arriving at an accurate substituted judgment in matters of life and death vary greatly in degree, if not in kind, in different circumstances. For example, the responsibility of Karen Quinlan's father to act as she would have wanted could be discharged by drawing on many years of what was apparently an affectionate and close relationship. In contrast, Joseph Saikewicz was profoundly retarded and

> noncommunicative his entire life, which was spent largely in the highly restrictive atmosphere of an institution. Superintendent of Belchertown State School v. Saikewicz, supra, at 751.

In the case of Guardianship of Richard Roe III, the Court was asked to decide if the guardian of a mentally ill person had the inherent authority to consent to the forcible administration of antipsychotic medication to the incompetent person who was actively opposed to taking the medication. The guardian was the incompetent person's father. Guardianship of Richard Roe, Third, 383 Mass 415 (1981).

In Roe, the Court decided that a judicial decision maker was required because the incapacitated person was actively opposing the treatment, the guardian could not be assigned the authority to override the incapacitated person's objections. The Court stated: "We feel that if an incompetent individual refuses antipsychotic drugs, those charged with his protection must seek a judicial determination of the substituted judgment." Guardianship of Richard Roe, Third, supra at 434.

Questions regarding the role of the family as the surrogate decision maker for an incompetent family member are the subject of many commentators. Many

support the idea that family members are the most appropriate surrogate decision makers. One such commentator, Robert M Veatch, has written:

> The family unit's right to autonomy should not only support a presumption in favor of family guardianship, but also create a presumption in favor of the family guardian's decision. The values of society as a whole have no claim of moral superiority to justify displacing the role of the family in applying its own values. … Under the substituted judgment standard, … the family guardian has an intimate understanding of the beliefs and values upon which the patient would make the decision were he still competent, and therefore can best interpret the probable desires of the patient. Limits of Guardian Treatment Refusal: A Reasonableness Standard, 9 Am. J. L. and Med. 427, 447.

Involved family members may have known the incapacitated person from birth; they were likely raised in the same family environment where they were exposed to the family's religious and moral teachings and beliefs. Family members generally develop a common set of values that form the foundation of major life decisions. Family members are in a better position than a judge to evaluate and understand the incapacitated person's personal values as they relate to the medical decision at hand.

The Court should accept the concept that "involved and loving family members" are capable of making substitute judgment decisions that involve the administration or withholding of extraordinary medical treatment without the need for a judicial decision maker. This rule should only apply to members of the incapacitated person's immediate family. Immediate family includes the person's parents, spouse, siblings and children. There must be some evidence that the family member has a sustained relationship with the incapacitated person that predates the required medical decision. Any member of the immediate family, or any other interested party, including the treating physician or facility is free to disagree with the medical decision, and seek judicial review of the family member's decision. In addition, the treating physician or facility cannot be forced to withhold or provide extraordinary medical treatment that he feels is unnecessary, inappropriate, or unethical.

IV SHOULD THE PROBATE AND FAMILY COURT CONSIDER THE BEST INTERESTS AND PRESENT AND PREDICTABLE FUTURE QUALITY OF LIFE OF AN INSTITUTIONALIZED OR HOSPITALIZED NON-TERMINALLY ILL MENTALLY INCOMPETENT PERSON WHO NEVER PREVIOUSLY EXPRESSED NOR HAS EVER BEEN CAPABLE OF EXPRESSING A PREFERENCE ABOUT DNR OR

DNI?

ANSWER: No. The SJC has addressed this issue many times.

DISCUSSION

The SJC clearly stated its preference for using a substitute judgment decision in the case of a mentally retarded woman whose guardian was seeking a substitute judgment decision seeking an order to permit sterilization of the incompetent person. The Court clearly rejected the best interest standard when it concluded:

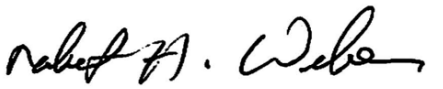
> We are aware of the difficulties of utilizing the substituted judgment doctrine in a case where the incompetent has been mentally retarded since birth. The inability, however, of an incompetent to choose, should not result in a loss of the person's constitutional interests. *Matter of A.W., supra* at (*supra* at 375). To speak solely in terms of the "best interests" of the ward, or of the State's interest, is to obscure the fundamental issue: Is the State to impose a solution on an incompetent based on external criteria, or is it to seek to protect and implement the individual's personal rights and integrity? We reject the former possibility. Each approach has its own difficulties, but the use of the doctrine of substituted judgment promotes best the interests of the individual, no matter how difficult the task involved may be. We admit that in this case we are unable to draw upon prior stated preferences the individual may have expressed. An expression of intent by an incompetent person while competent, however, is not essential. *Matter of Spring, supra* at 640. "While it may thus be necessary to rely to a greater degree on

> objective criteria . . . the effort to bring the substituted judgment into step with the values and desires of the affected individual must not, and need not, be abandoned." *Saikewicz, supra* at 751. Cf. *Matter of Storar*, 52 N.Y.2d 363, 380 (1981) (unrealistic to attempt substituted judgment where person incompetent since birth). The courts thus must endeavor, as accurately as possible, to determine the wants and needs of this ward as they relate to the sterilization procedure. See *Saikewicz, supra* at 750 n.15. In the Matter of Mary Moe, 385 Mass. 555, 5655 (1982)

Consideration of an institutionalized incompetent person's quality of life cannot be a controlling factor in the medical decision. The SJC has repeatedly rejected any decision that "… equates the value of life with any measure of the quality of life…", *Saikewicz, supra* at 754. However, questions regarding the quality of life that respect the interests and preferences of the incompetent individual may be considered as part of a substitute judgment decision if it is "… understood as a reference to the continuing state of pain and disorientation precipitated by the … treatment." *Saikewicz, supra* at 754.

Respectfully Submitted,

D.E.
By his attorney



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