

THE GUARDIAN AS SURROGATE DECISION-MAKER

Introduction

A fundamental responsibility of the guardian is to make decisions about the ward's personal and financial affairs. The responsibility of making decisions for another individual on a daily basis both characterizes and sets apart the role of the guardian from that of any other service provider. As a surrogate decision maker, the guardian must exercise the utmost care and diligence, always with the idea of protecting the autonomy, independence, and rights of the ward. Two important principles, often embodied in guardianship legislation, act as guidelines in the decision-making process: "Substituted Judgment" and "Best Interest."

Substituted Judgment

"Substituted Judgment" is the principle of decision making that requires implementation of the course of action which comports with the ward's wishes expressed prior to the appointment of the guardian, provided the ward was capable of expressing his or her wishes relevant to the matter at issue and reliable evidence of these wishes remains. The ward's current opinions and desires shall be considered and may be relevant to a determination of the ward's views prior to the appointment of the guardian.

The principle of "Substituted Judgment" is considered to be the manner in which the autonomy, values, beliefs and preferences of the ward are best protected.

Utilizing this principle, the guardian attempts to learn as much as possible about the lifestyle, behaviors, preferences, and decisions made by the ward prior to his or her incapacity. Taking these factors into careful consideration, the guardian makes a decision that would as closely as possible reflect what the ward would have decided if he or she were capable of making the decision.

To do this properly, the guardian must become a detective – carefully unraveling the ward's personal life history by consulting anyone, including the ward, his/her relatives, friends, caretakers, or clergy, who may be able to provide information on the ward's preferences and past history of decision making.

In some instances, the guardian may not be able to determine what the ward would have done or chosen on a particular issue. There may be no history of decision making because the ward has never been competent, perhaps, due to severe developmental disabilities or because the ward might not be able to communicate his or her wishes and the guardian has been unsuccessful in locating anyone with information on the ward's previous decisions. In these situations, the guardian must make decisions based on what is believed to be in the "Best Interest" of the ward.

Best Interest

This "Best Interest" principle of decision-making is not based upon the ward's wishes, but on what a reasonable person would do after considering all the options and alternatives and their potential risks, side effects and dangers. When making a decision under the "Best Interest" principle, the guardian must consider whether the option chosen is the least intrusive and least restrictive, and offers the ward the best opportunity for a "normal" life. It may be necessary for the guardian to obtain formal evaluations of the ward and/or seek expert advice from medical and financial professionals or from special ethics committees.

It is NGA's position that the "Best Interest" principle of decision-making should *only* be used when the guardian cannot utilize the principle of "Substituted Judgment."

Least Restrictive Alternative

The principle of the “Least Restrictive Alternative” means that the guardian will carefully evaluate the options that are available, and choose the one that most fully meets the needs of the ward while placing the least restriction on his/her freedom, rights, and ability to control his/her environment. The object is to look at the whole picture and with as much input from the ward as possible, weigh the advantages against the disadvantages, the risks versus the benefits, and develop a balance between maximizing the ward’s growth potential while maintaining the ward’s safety and security.

Conclusion

When making decisions on behalf of the ward, the guardian must:

- Determine the ward’s current wishes and desires, if ascertainable.
- Consider how the ward would have decided the questions by considering the ward’s religious, moral, and ethical beliefs as well as previous decisions.
- Diligently seek the opinion of people close to the ward.
- Consider the opinion of the court, the ward’s attorney and/or guardian *ad litem* if available.