

HOW DOES THE
GUARDIAN DECIDE?

BEST INTEREST STANDARD

V.

SUBSTITUTED JUDGMENT STANDARD

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I. Introduction

This outline will discuss the two main decision-making standards¹ guardians should use in exercising their authority on behalf of a ward. The standards are the *best interest* standard and the *substituted judgment* standard. The choice between these standards becomes relevant when a guardian has to make a choice between various alternatives on behalf of a ward since the ward has been determined to lack the capacity to choose for herself. The best interest standard requires the guardian to choose the alternative that produces the greatest good or benefit for the ward. The substituted judgment standard requires the guardian to choose the alternative that the ward would have chosen if still able to make decisions.

Florida statutory and case law applies both of these standards to decision-making on behalf of a ward, but which standard is applicable depends on the nature of the decision in question. In addition to statutory and case law, the recent proposed adoption of Rule 58M-2.009 Standards of Practice, by the Department of Elder Affairs, Office of the Public and Professional Guardians (the “OPPG”) adds further complexity to this issue. My goal in this outline is to give an explanation of the application of each decision-making standard under current Florida law.

To begin, it is important to note that a guardian is a unique kind of fiduciary. That a guardian is a fiduciary, with a duty of care to the ward, is clear. *See, e.g.*, §§ 744.102, 744.361, 744.446, 744.604, Fla. Stat. (2016); *see also*, *Capital Bank v. MVB, Inc.*, 644 So. 2d 515 (Fla. 3d DCA 1994). However, a guardian is different from a trustee, who acts pursuant to a private written trust document without mandatory court supervision. A guardian is also different from a personal representative, who is supervised by a court like a guardian but who acts pursuant to a written will or under intestacy statutes. A guardian is similar to a personal representative with regard to the court supervision that pertains to both, but a personal representative is charged with administering the property of a decedent while a guardian owes a duty of care to a living person with his or her own desires and constitutional rights. Finally, a guardian is like an agent under a power of attorney in that a guardian is expected in many cases to act according to the desires of the ward, but is unlike an agent in that a guardian’s authority comes solely from its court-appointed powers and not from the ward directly. *See* § 744.361(1),

¹ In addition to the two main standards, discussed above, there is a corollary standard, “contrary to the best interests of the ward,” that appears in § 744.312(4), Fla. Stat. (2016) and is discussed in detail in the case of *Koshenina v. Buvens*, 130 So. 3d 276 (Fla. 1st DCA 2014).

Fla. Stat. (2016)(“The guardian of an incapacitated person is a fiduciary and may exercise only those rights that have been removed from the ward and delegated to the guardian.”).

II. What Potential Decision-Making Standards Apply?

Once a guardian is appointed to exercise rights removed from a ward, decisions on behalf of the ward will inevitably arise that will require the guardian to make a choice between alternatives. Some of these alternatives are life and death decisions and others are more routine but in each of these choices between alternatives the issue arises of what standard should the guardian use to make its choice on behalf of the ward. Potentially, there are at least seven possible standards:

- (1) Do what the ward would have done.
- (2) Do what is in the ward’s best interests.
- (3) Do what is not contrary to the ward’s best interests.
- (4) Do what is best for society.
- (5) Do what is best for those dependent upon the ward or those in closest relationship with the ward, such as a spouse.
- (6) Do what the guardian believes is best based on the guardian’s experience and values.
- (7) Do what the judge believes is best based on the experience and values of the judge.²

The first two standards are those that are regularly set forth in Chapter 744 of the Florida Statutes and in case law. The third standard arises in the context of whom to appoint as guardian, particularly when there is a preneed designation, but will not be discussed further herein since this outline will concentrate on decisions to be made during the pendency of the guardianship itself.³ The fourth and fifth standards have

² See Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON LAW REVIEW 53, 61 (2007).

³ See *Koshenina v. Buvens*, 130 So. 3d 276 (Fla. 1st DCA 2014)(designated preneed guardian must be appointed by the court unless the appointment would be contrary to the ward’s best interest). The *Koshenina* court takes pains to explain that this standard is different from a generalized best interest standard and that this standard protects the ward’s personal preferences as to the choice of guardian.

arisen by implication in cases⁴ that will be discussed later in this outline. Finally, the sixth and seventh standards seem relevant but are not supported by Florida law. See *In re Guardianship of Schiavo (Schiavo IV)*, 851 So. 2d 182, 186 (Fla. 2d DCA 2003)(role of the court is not to substitute its judgment for that of the ward with regard to healthcare decisions); *In re Guardianship of Sherry*, 668 So. 2d 659 (Fla. 4th DCA 1996)(guardian not authorized to create a trust that changes the ultimate beneficiary of the ward’s property).

III. Duty of Loyalty to the Ward

The guardian owes fiduciary duties to the ward. See *Saadeh v. Connors*, 166 So. 3d 959 (Fla. 4th DCA 2014). The Court noted that “we find that [the ward] and everything associated with his well-being is the very essence, i.e. the exact point, of our guardianship statutes. As a matter of law, the ward ... is both the primary and intended beneficiary of his estate. To tolerate anything less would be nonsensical and would strip the ward of the dignity to which the ward is wholly entitled.” *Id.* at 964. One of the duties owed by a fiduciary to a beneficiary or a person under the fiduciary’s care is the duty of loyalty. *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 520 (Fla. 3d DCA 1994). In a guardianship context, though, what does that mean? Must the guardian attempt to determine the desires of the ward and follow those desires, even if they are not in the ward’s best interests? How should a guardian even determine a ward’s desires, given that the ward has at least some degree of incapacity? Can the guardian disregard the ward’s desires if those desires are unwise or even harmful to the ward? Where does “loyalty” lie with regard to these questions?

As we will see, the guardian is expected to be loyal to the ward and many times that means determining the ward’s desires and then doing what the ward would have wanted, even if that is not what the guardian would do or what a “reasonable person” would do in the same situation. This determination of the ward’s desires and then making a decision as the ward would have made it is applying the substituted judgment standard. However, there are also many decisions in which the guardian and the court will be charged not with determining what the ward desired and would have wanted but rather what is in the best interests of the ward. This is, of course, the application of the best interest standard

⁴ For example, *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990)(State’s interest in preserving life versus and individual’s right of privacy) and *Rainey v. Guardianship of Mackey*, 773 So. 2d 118 (Fla. 4th DCA 2000)(State’s interest in reserving Medicaid benefits to certain beneficiaries and protecting wards from impoverishment versus individual’s right to engage in Medicaid planning to gain eligibility to benefits).

and here the guardian is acting similarly to a parent on behalf of a child. Under this standard, the guardian is to make an independent decision on behalf of the ward rather than acting as the guardian believes the ward would have acted.

Florida statutory and case law apply both standards⁵, depending upon the situation, so how can a guardian know which standard to apply?

IV. Where to Look for the Appropriate Standard

In order to know which standard should apply, the first place to look is in the Florida Statutes, Chapter 744. The case of *Lefebvre v. North Broward Hosp. Dist.*, 566 So. 2d 568 (Fla. 4th DCA 1990), is instructive. In *Lefebvre*, Ms. Lefebvre was committed to the hospital under the Baker Act and while involuntarily placed there the issue arose of whether to terminate her pregnancy. During the trial court proceedings there was a dispute as to which standard should be used for surrogate decision-making on behalf of Ms. Lefebvre. On appeal, the Fourth District held that normally when a patient is incapacitated or when the court is unable to determine mental capacity, the surrogate decision-maker must make a decision for the patient based not on a best interest or objective test, but pursuant to a substituted judgment or subjective test; that is, on the basis of what choice the patient would make if he or she were competent to do so. *Lefebvre*, at 571. However, the Court then went on to note that there were four applicable statutes relevant to the decision (§§ 390.001(4), 744.331, 744.3215(4)(e), and 744.3725) and that therefore the common law application of substituted judgment had been superseded by the statutory standard. In this case that standard was the best interest of the incapacitated person. *Id.* Therefore, a good practice would be to look to see if a statutory decision-making standard is applicable to the decision in question. In many cases, there is a statutory standard.

As a final note on *Lefebvre*, I think this case gave short-shrift to the substituted judgment standard and that the statutes in question with regard to the health-care decision here would require the guardian and court to first determine what the ward would have chosen to do in

⁵ In fact, § 744.361, Fla. Stat. (2016), titled “Powers and Duties of Guardian,” contains language from both standards in different subsections. Subsection (4) states “a guardian may not act in a manner that is contrary to the ward’s best interests under the circumstances. Subsection 13(a) requires a guardian to “consider the expressed desires of the ward as known by the guardian when making decisions that affect the ward.

this situation and then allowed recourse to a decision based on the best interest of the ward only if substituted judgment was inapplicable due to lack of information about the ward's desires. This is the current statutory law with regard to healthcare surrogate decision-making under § 765.205, Fla. Stat. (2016). There are also potential constitutional infirmities with the decision in light of the case of *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990), discussed below.

V. Application of the Substituted Judgment Standard

A. Health Care Decisions

The substituted judgment standard arose in healthcare decision-making on behalf of wards, although it has advanced into property-management decisions as well. Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON LAW REVIEW at 66. A person with capacity has the constitutional right to choose or refuse medical treatment, and that right extends to all relevant decisions concerning one's health. *In re Guardianship of Browning*, 568 So. 2d 4, 11 (Fla. 1990). An incapacitated person has the same right to refuse medical treatment as a person with full capacity. *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984). A guardian, in making these health-care decisions for a ward, is to use the substituted judgment standard where there is no contrary statutory standard. The *Browning* court described the standard as follows: "...when the patient has left instructions regarding life-sustaining treatment, the surrogate must make the medical choice that the patient, if competent, would have made, and not one that the surrogate might make for himself or herself, or that the surrogate might think is in the patient's best interests. *Browning* at 13. *Browning* then goes on to state as follows that:

"[i]n this state, we have adopted a concept of "substituted judgment." *In re Guardianship of Barry*, 445 So.2d 365, 370-71 (Fla. 2d DCA 1984)]. One does not exercise another's right of self-determination or fulfill that person's right of privacy by making a decision which the state, the family, or public opinion would prefer. The surrogate decision maker must be confident that he or she can and is voicing the patient's decision." *Id.*

In my opinion, the court in *Browning* was not intending to hold that the concept of substituted judgment had been adopted for all guardianship decisions but rather was reiterating and confirming that it was the applicable standard for health-care decision-making.

B. Gifts of the Ward's Property and Estate Planning

In the case of *In re Guardianship of Bohac*, 380 So. 2d 550 (Fla. 2d DCA 1980), the Second District considered the authority of a guardian to make gifts of a ward's property. Prior to *Bohac* there were no reported Florida decisions on the issue. The Court first noted that even without specific statutory authorization, a number of states have recognized the inherent power of the court to permit a guardian to make applications of funds of a ward for the benefit of the ward's relatives. Where the ward had a legal obligation of support, the question was easy. However, in those cases in which there was no legal obligation of support, the courts generally have based their power or that of the guardian upon findings with respect to what provision the ward herself would have made if she had capacity. The *Bohac* court noted that this principle has been called the "doctrine of substituted judgment." *Id.* at 552. The Court then noted that Florida has a specific statute addressing gifts by guardians of the ward's property, Florida has adopted a specific statute to deal with gifts for tax purposes, § 744.441(17), Fla. Stat. The pertinent portion of that statute reads:

744.441 Powers of guardian upon court approval. — After obtaining approval of the court in accordance with s. 744.447, a guardian of the property may:

.....

(17) Make gifts of the ward's property to members of the ward's family in estate and income tax planning procedures.

The Court then noted that while the statute authorizes the court to approve gifts for the purpose of income and estate tax planning, such approval is necessarily predicated upon the court's determination that this is what the ward would want to do if she had capacity. The analysis suggested by the court was to consider the ward's donative intent and prior pattern of giving, the permanency of the ward's condition, the size and nature of the ward's estate, the needs of the ward and the proposed recipients, the extent to which the recipients of the gifts may vary from those who would inherit in the natural course of events, the affinity or intimacy between the ward and the recipients, and whether they are dependent upon the ward for support. *Bohac*, 380 So. 2d at 553 n. 7.

The case of *Goeke v. Goeke*, 613 So. 2d 1345 (Fla. 2d DCA 1993), concluded that a guardian with court approval could designate the estate of the ward as the primary beneficiary of an IRA account in order for the retirement account assets to be distributed pursuant to the ward's

existing will. This seems like a further application of the substituted judgment but the court used both substituted judgment language and best interest language in the opinion and never articulated the guardian's standard for decision-making. The mixed discussion of standards likely comes from the fact that using the ward's will as the basis for the beneficiary designation was a substituted judgment decision while part of the statutory authority to grant the approval for the designation arose from § 744.441(21), which allows the guardian to enter into contracts that "are appropriate for, and in the best interest of, the ward."

This principle does not extend to authorizing a guardian to make gifts of the ward's property that are not supported by evidence of the ward's donative intent or that are contrary to the ward's intent. See *In re Guardianship of Sherry*, 668 So. 2d 659 (Fla. 4th DCA 1996)(guardian not authorized to create a trust that changes the ultimate beneficiary of the ward's property).

C. Medicaid Planning

The issue of Medicaid planning for a ward was addressed in *Rainey v. Guardianship of Mackey*, 773 So. 2d 118 (Fla. 4th DCA 2000). Many people likely will not specifically make known their intent regarding such planning prior to incapacity and the decision then raises tricky issues. On one hand, the same sort of donative intent issues discussed above potentially come into play since part of the goal of Medicaid planning is to allow for the ward's heirs to receive some inheritance rather than having the ward's funds depleted by nursing home costs. On the other hand, it can be argued the planning is really for the benefit of the ward's heirs, rather than the ward, and how does one determine whether the ward would have wanted to be impoverished to obtain government benefits. These issues arose in the *Rainey* case and the court there determined that the issue required an evidentiary hearing where the substituted judgment standard would be applied with regard to the guardian's decision on behalf of the ward. *Rainey*, at 122.

D. Suspension of a Power of Attorney During Incapacity Proceedings

At any time during proceedings to determine incapacity but before the entry of an order determining incapacity, the authority granted under an alleged incapacitated person's power of attorney to a parent, spouse, child, or grandchild may be suspended, among other reasons, if the agent's decisions are not in accord with the alleged incapacitated person's known desires. See § 744.3203, Fla. Stat. (2016).

E. Summary

The cases and statutes above are those areas under Florida law where the substituted judgment standard clearly applies. It is most readily applicable to healthcare decisions but its application to many property-related decisions is also well established. However, in cases where it is not possible to determine what decision a ward would have desired to make if the ward had capacity, then the best interest standard will apply. See § 744.361(4), Fla. Stat. (2016). The best interest standard will also apply where mandated by case law or statute, as we will see next.

VI. Application of the Best Interest Standard

A. Requests for Extraordinary Authority

Before the court may grant authority to a guardian to exercise any of the rights specified in § 744.3215(4), Fla. Stat., such as seek a divorce from the ward's spouse, consent to certain medical procedures, or terminate parental rights, the court must follow the procedure for extraordinary authority set forth in § 744.3725. This procedure is a blend of substituted judgment and best interest decision making, as the court is directed to see if the ward can express his views and desires with regard to the decision at hand and then directed to determine if the authority sought is in the best interest of the ward. See *Vaughan v. Guardianship of Vaughan*, 648 So. 2d 193 (Fla. 5th DCA 1994)(divorce); *Lefebvre v. North Broward Hosp. Dist.*, 566 So. 2d 568 (Fla. 4th DCA 1990)(termination of pregnancy). The statutory language seems limited to seeking the ward's views currently (i.e., after incapacity) but arguably should be applied to allow for evidence of the ward's views prior to incapacity. The statute could be read as unconstitutional otherwise, at least with regard to healthcare decisions.

B. Powers of a Guardian with Court Approval

The omnibus § 744.441, Fla. Stat., which is a long list of actions or decisions a guardian may make for the ward, upon court approval, uses the best interest standard in several subsections and does not mention substituted judgment or use substituted judgment language such as references to the ward's views, wishes, or desires. See § 744.441(2), (11), and (21), Fla. Stat. (2016). The statute was recently applied in *Hancock v. Share*, 67 So. 3d 1075 (Fla. 5th DCA 2011), which authorized the guardian to enter into a proposed annuity contract as part of a

settlement on behalf of the ward after finding the contract was in the best interest of the ward.

C. Settlement of Claims

Under § 744.387, Fla. Stat., settlement by the guardian of claims related to the ward is governed by the best interest standard. *Buncayo v. Dribin*, 533 So. 2d 935 (Fla. 3d DCA 1988).

D. Amending the Ward's Trust

In *In re Guardianship of Muller*, 650 So.2d 698 (Fla. 4th DCA 1995), the court allowed a guardian to amend a trust pursuant to § 744.441(2). The guardian showed that the current trustee had a conflict of interest, and it was in the ward's best interest to amend the trust and remove the trustee. Then in *Reddick v. SunTrust Bank*, 718 So. 2d 950 (Fla. 5th DCA 1998), the court refused to allow a spouse who was a guardian to replace a corporate fiduciary trustee with herself as trustee on the grounds the change was not in the ward's best interest.

E. Petition for Interim Review

An interested person, including the ward, may petition the court for review of the guardian's decisions and allege, among other things, that the guardian is not acting in the best interest of the ward. § 744.3715, Fla. Stat. (2016). The petition for review must state the nature of the objection to the guardian's action or proposed action and the petitioner can be liable for fees and costs if the petition is without merit.

F. Changing the Residence of the Ward

At least one reported case appears to treat the decision to change the ward's residence as one governed by the best interest standard. See *Montejo v. Martin Mem'l Med. Center, Inc.*, 935 So. 2d 1266 (Fla. 4th DCA 2006)(moving ward to foreign country was improper as it was not in ward's best interest).

G. Termination of a Guardianship

Florida law authorizes termination of a guardianship under a variety of circumstances. One such circumstance is when the ward no longer resides in Florida. In a case where the ward moved from Florida to Wales without court authority and then a petition was later filed to terminate the guardianship of the property, the court held that the best interest standard applied with

regard to the decision whether to terminate the guardianship. See *In re Guardianship of Walpole*, 639 So. 2d 60 (Fla. 4th DCA 1994).

H. Summary

The best interest standard applies where directly applicable under the statutes and case law set forth above and applies as the default standard for decision-making when the guardian is unable to determine what decision a ward would have made under substituted judgment. Its most common application is with regard to contract and legal transactions on behalf of the ward.

VII. Conclusion

Florida has not settled on any one decision-making standard for all guardianship decisions. There is support in the case law and statutes for both the substituted judgment and best interest standards. The ward's health care and many estate planning matters are governed by the substituted judgment standard where the ward's wishes can be determined, while most contractual and legal matters on the ward's behalf are governed by the best interest standard. The best approach to determine the appropriate standard is to first review the Florida Statutes to see if the action in question is governed by a particular standard. If not, then the guardian should review OPPG Rule 58M-2.009 Standards of Practice, which likely will be final by the time this outline is published. Finally, the Florida case law cited above gives guidance regarding the appropriate standard in a number of contexts.