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Substituted Judgment: Limits to a Guardian's Powers

Every day judges in the Probate and Family Courts appoint guardians of minor children if their parents are deemed unfit, unavailable or deceased. Once appointed, a guardian has almost the same powers and responsibilities of a parent regarding a child's support, care, education, health and welfare. The guardian can make many routine decisions about the child's daily life, without requiring further intervention by the probate court.

A guardian lacks the authority to consent to certain kinds of intrusive, serious, experimental or extraordinary medical care. A guardian can only make "extraordinary medical decisions" upon an explicit court order authorizing the specific treatment at issue. The Massachusetts Supreme Judicial Court has determined that decisions involving highly intrusive medical procedures and treatment of minor children and disabled or incompetent adults under a guardianship must be made by a probate court applying a "substituted judgment" doctrine. The doctrine originated over thirty years ago with a series of cases involving who had the authority to make medical treatment decisions for incompetent institutionalized adults. The Court began with the premise that all citizens, regardless of competency, have a constitutional right to make a decision to accept or reject treatment by their doctors and then examined how to make that right meaningful for someone who lacked the capacity to exercise it.

In a substituted judgment proceeding, the court attempts to "stand in the shoes" of the incompetent person and determines what he/she would choose to do if competent. Some of the factors that the court must consider include the prognosis with or without the proposed treatment, the complexity, risk and novelty of the proposed treatment, side effects, consent of the guardian and the standards of good medical practice. Since minor children are deemed by virtue of their age to be incompetent, the substituted judgment doctrine applies to children under a guardianship.

There is no list of extraordinary procedures mandated by statute, allowing for flexibility as medical treatments and technologies evolve. However, the most common treatment that requires a substituted judgment is the administration of antipsychotic medication. Other procedures include the provision or withdrawal of life prolonging treatment, sterilization, abortion, electroshock therapy, psychosurgery and other invasive procedures such as a stem cell transplant.

To initiate the substituted judgment process, a guardian must petition the probate court through the substituted judgment process, asking the court to authorize (or decline) a specific treatment or procedure. An attorney is appointed by the court to represent the child's interests and report to the court after conducting an investigation, after which a hearing is held. The court is not concerned with what is in the child's "best interest" nor is the court obligated to support the position of the parties involved, namely the guardian, the child's attorney or the medical professionals. Instead, the court must render an independent determination, substituting its judgment on behalf of the child. With the exception of the most urgent extreme cases, a substituted judgment proceeding can take months to complete and the guardian is bound by the court's decision.

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THE BRIEF

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The Birds and the Bees ...and the Egg Donor and the Agency?

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With the advent of emerging technologies come new ways to start a family. Infertile couples and individuals now have a variety of options to become parents, from egg and sperm donation to surrogacy and embryo preservation. Such technologies are a dream come true for those who want children but cannot conceive. The law, however, is struggling to keep up with the changing times. A legal system built on the idea that a child has a mother and a father must now reconcile the roles and responsibilities of a child's intended mother, intended father, sperm donor, egg donor, gestational carrier, donor agency, and hospital.

Egg donation, in particular, poses unique challenges due to the involvement required on the part of the donor. The egg donation process involves several key players: (1) the donor – who agrees to undergo medical procedures to remove her eggs and donate them to the intended mother, (2) the intended mother – who likewise undergoes medical procedures to prepare her body for implantation of the donated eggs, (3) an agency – which, in some cases, connects intended parents with a donor and preserves donor anonymity by coordinating payment to the donor and communication between the intended parents and the donor, and (4) an in vitro fertilization (IVF) clinic – which manages treatment of the intended mother and the donor. The duties of each of these key players can be set out in a contract. For instance, the intended parents may enter into an agreement with an agency and, as is the trend, enter into a separate agreement with the donor they select. But what happens when something goes wrong? What happens if the donor does not follow medical advice? What if, as a result of her failure to follow medical advice, the donor cannot donate her eggs to the intended mother? Traditionally, the law would enter at this juncture to right the wrongs; but is it ready to in this uncharted territory?

With respect to egg donation, Massachusetts, like many states, is the "wild west." There is currently no statutory or case law in Massachusetts governing egg donation. While the dominating concern of practitioners in this area is parental rights and responsibility for the ultimately born child, little attention has been paid to the scenario presented above. In the absence of any egg donation law, we must make use of the laws we have. This may mean applying traditional contract law to this unique and novel predicament. Agencies often present contracts to intended parents that hold the agency harmless if anything goes wrong. As agencies are often unwilling to change these contracts, the intended parents must choose to either accept what the agency gives them or look elsewhere for help starting their family. High pressure, one-sided contract negotiation is nothing new. The law allows parties harmed by such contracts to recover even when the language of the contract eliminates the dominant party's liability. Massachusetts provides additional protection in Massachusetts General Laws Chapter 93A, which prohibits unfair and deceptive practices in business. Using these laws, intended parents may be able to get what they deserve from an egg donation agency when the agreed-to procedures are not followed. Unless and until Massachusetts adopts laws protecting egg donation, we must rely on our traditional legal tools to solve legal problems arising in these unchartered waters.

MEET OUR NEW ATTORNEY
STEPHANIE L. CURTIN

A 2015 Cum Laude graduate of Boston College Law School, and Executive Articles Editor of the Journal of Law and Social Justice, Stephanie focused her studies and work experience on family law, handling divorce cases in Boston College Law School's Civil Litigation Clinic and interning for judges in the Norfolk and Suffolk Probate and Family Courts. Joining Konowitz & Greenberg in September, Stephanie is already an active member of the Domestic Relations Department and heads the Legal Research Department overseeing complex research projects in a variety of practice areas. To learn more about Stephanie, check out her biography at kongreen.com.

November is National Adoption Month

November is National Adoption Month. In the past, I have written about the probate courts opening their doors, judges clearing their dockets and making adoption a priority in the month of November. This process quickens the pace to allow children who have been waiting for permanency their day in court.

However, I am troubled by other methods which purport to be a waiting child's best interests, namely, Wednesday's Child, publications in the newspaper and events such as Fenway Park Parades.

Shame on all of us who smiled politely without a thought as to the true nature of the scene: parading children around a ball park; at a playground picnic; advertising their availability in the Boston Globe. Admittedly, our world is not at a loss for children who need forever families. Understood. But to offer the child up? Insanity. Such tactics, seemingly, but thoughtlessly, from the good of the heart, serve to feed the pain and uncertainty of the world of a waiting child.

Put yourself into those battle worn sneakers. This is your week to be the Wednesday's Child. Your childhood thus far has not come close to being a fairy tale, and yet we set you up for a happily ever after, when there is no such thing. You stare at your face on the newsprint, looking the best you can possibly be for your debut. Your strengths are stressed, your challenges glossed over. Thanks a lot.

Next day, Thursday, a school day. You beg to not go, feign a fever, to no avail. You get on the bus, glance up quickly to find a seat, averting eye contact, hopeful no one will notice you. You know what they are thinking, what everyone who looks at you from now until forever will remember: you were a Wednesday's Child. EVERYONE knows your secret that you feared to tell anyone at school: you are a foster kid. A FOSTER KID!!!

The world, your world, knows you do not live with your parents. There must be a reason that you do not live with even ONE of your parents. Sadly, you are just another casualty caught in the cross fires of misplaced efforts and funds.

One only need look at the front page of the Boston Globe, Thursday, August 27, 2015: Court Stresses Rights of Adoptees. The article stemmed from a judge approving the placement of a child with his father, whom he barely knew with no inquiry into the ability or capacity of this father to parent his son and rejecting the grandmother's petition for adoption. Last known the little boy was in a coma because of his father's cruel abuse.

The rights of children poised for adoption are pushed aside, with little care for the child's actual needs or desires. How is it possible that a child who is at least three to four years old, with sufficient understanding is denied his voice as to her existence or well-being?

And, regrettably, that is what is done day after day in the world of children needing permanent placement and forever families, not only with children who are in the custody of the state, but children who are the subject of private adoptions, stepparent adoptions, and guardianships, unifications with a relative or reunifications with a parent.

In 2012, the Massachusetts Supreme Judicial Court recognized the rights of a child to have independent counsel when the subject of a disputed adoption case.

Nevertheless, these children stemming out of the foster care system, private adoptions, guardianships and stepparent adoptions remain overlooked and given short shrift. There must be a better way to determine what is in the best interests of a child. Abuse and neglect do not come to light until damage has been done.

I recognize the need for all caretakers to be subject to the highest standards of scrutiny. How is that accomplished? Our focus should move away from the current parent centered choice to a child centered choice. Not an easy task, but doable. If and when possible, the child should review the pictures and self-descriptions submitted by the waiting families. Allow the child to decide which family he or she would like to interview, spend time with and get to know better.

As to children subject to guardianships, ensure the child's voice is heard and given due consideration rather than summarily determining a placement grounded in the say-so of the petitioners and interested parties.

THINK ABOUT IT!!!!

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So, What Makes a Good Client? Revisited

In the summer of 2011, I wrote an article about what makes a good client. Since then, I have noticed that there are more specific qualities that I feel need to be present.

So, what makes a "good client?" The glib answer, for many attorneys, continues to be simply: a client who pays their bills! But the fact that someone is willing to give you their money in exchange for your legal services, while a good thing, does not automatically make them a good client. A good client, for Konowitz & Greenberg, knows the difference between a relationship and a transaction, and acknowledges that a good relationship is a partnership.

First, the attorney and client must value the partnership in the same way. The difference between a relationship attorney and a transaction attorney is similar to the difference between the Minute Out-Patient Clinics versus the Primary Care Physician. One is interest in the moment; the other is interest in your long term goals, especially if you are not sure what they might be.

If one of your goals has price as the major determinate, then a transaction attorney might be a better choice. Similar to a suit off the rack, or one cut to fit; one size does not fit all. They both ultimately serve the same purpose; however, which one will look better and last longer?

If you, as the client, feel you know more about your situation and what is best for you without the benefit of true collaboration with your attorney, then a transaction attorney would be a better choice. While you may be an expert in your field, however, a relationship attorney has probably dealt with your situation many times and can facilitate with guidance to make the proper choices. By taking the time to understand both the client's reason for asking for a course of action as well as the ability to deliver on that course is a hallmark of a relationship attorney. A relationship attorney will not automatically say yes just because "the client is always right."

If you are looking for an attorney you can trust who will have your interest ahead of his own pecuniary interest, then a relationship attorney is the better choice. When more questions are asked it fosters a better understanding of the situation. Making the time to ask hard questions and letting the client share their observations will enable a relationship attorney who is a trusted advisor to offer advice and expertise that not only has your back, but also your future as well.

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The End of Fishing Expeditions

– Proportional Discovery Comes to the Federal Courts

The concept of relevance and how it impacts discovery can be strange for clients. Under Rule 26 of the Massachusetts Rules of Civil Procedure, a litigant is entitled to seek discovery regarding anything that is relevant to the case. For something to be discoverable it does not need to be admissible itself, but rather reasonably calculated to lead to the discovery of admissible evidence. For a small matter this is not usually a problem. But for larger matters, in particular, those involving large corporate parties, this language opens the door to vast and unending discovery. A good lawyer can come up with a reason as to why almost any discovery request or document could reasonably lead to the discovery of admissible evidence. The costs associated with discovery can quickly skyrocket in relation to the amount in controversy in the actual litigation.

The Massachusetts rules do allow for a party to seek a protective order that includes an order that the discovery may be "had only on specified terms and conditions, including a designation of the time, place, or manner, or the sharing of costs." But seeking a protective order puts a litigant on the defensive, requiring them to explain why the burdens of the discovery outweigh what the other side will always claim is the hugely important piece of admissible evidence that discovery will lead to.

In September 2014, the Judicial Conference of the United States, recognizing this problem, approved amendments to Federal Rules of Civil Procedure, Rule 26. The new Federal Rule 26, effective on December 1, 2015, no longer includes the phrase "reasonably calculated to lead to the discovery of admissible evidence." Instead, the Rule states that parties may obtain discovery only if the discovery is both relevant and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. This new language limits the scope of discovery up front, forcing litigants to consider proportionality before they serve discovery. While it remains to be seen how much impact this new language will have, and whether Massachusetts will adopt similar language, the new Federal Rule 26 is a step in the right direction towards a more manageable discovery process.

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