Guardian Decision-Making Standards:

Theory, Reality & A Proposal for Reform
The Theory:
Four Decision Making Standards

• *Strict Substituted Judgment*
• *Expanded Substituted Judgment*
• *Expanded Best Interest*
• *Strict Best Interest*
Strict Substituted Judgment

Decisions should be based on the incapacitated person’s prior specific directions, expressed desires and current competent opinions.
Expanded Substituted Judgment

Decisions may be based on the incapacitated person’s prior general statements, actions, values and preferences.
Expanded Best Interest

Decisions may be based on the benefits and burdens for the incapacitated person as discerned from available information, including the views of professionals and others with sufficient interest in the incapacitated person’s welfare, and may include consideration of consequences for others that a reasonable person in the incapacitated person’s circumstances would consider.
Strict Best Interest

Decisions should be based on the benefits and the burdens solely for the incapacitated person as discerned from available information, including the views of professionals.
The Reality: Statutory Standards and How Guardians Make Decisions
State Statutory Decision-Making Standards

• 28: Silent (14 state that a guardian has the powers, rights, and duties of a parent)
• 6: Mention best Interest but do not use substituted judgment-type language
• 4: Use substituted judgment-type language but do not mention best interest
• 14: Use both substituted judgment-type language and mention best interest
Except as otherwise limited by the court, a guardian shall make decisions regarding the ward’s support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward’s limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward’s own behalf, and develop or regain the capacity to manage the ward’s personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward’s best interest and exercise reasonable care, diligence, and prudence.
US Jurisdictions with SJ/BI Standards

UGPPA Language  Hierarchy Language  No Priority Language

Plus:
US Virgin Islands
DC
Does the Statutory Standard Make a Difference?

Surveys distributed to:
• one B.I. jurisdiction (IN—60 participants)
• three S.J./B.I. jurisdictions (GA, MA, SD—19 participants)
Guardian Survey Questions

Guardians were asked to rank how much these factors influenced their decisions:

• What the guardian thinks is in the IP’s B.I.
• What family members think is in the IP’s B.I.
• What professionals say is in the IP’s B.I.
• What will create family harmony or consensus
• What the guardian would want in the IP’s circumstances
• What the guardian thinks the IP would want
Guardians were also asked how they knew what the IP would want:

Factors:
• Conversations before loss of capacity
• Current conversations with the IP
• Written directions before loss of capacity
• What the guardian knows about the IP’s values and preferences
• What others told guardian about the IP’s values and preferences
Influence of Factors on Financial and Property Decisions
Factors that Helped the Guardian Know What the Incapacitated Person Would Want (Financial & Property Decisions)
Influence of Factors on Health Care and Personal Decisions

- What I think is in IP BI
- What family think is in IP BI
- What professionals say
- What will create harmony
- What I would want
- What I think the IP would want

BI (Mean) vs SJ/BI (Mean)
Factors that Helped the Guardian Know What the Incapacitated Person Would Want (Health Care Decisions)
Influence of Factors on Decision-Making by Jurisdiction

- What I think is in IP's best interest
- What I think the IP would want

- FIN BI (Mean)
- FIN SJ/BI (Mean)
- HC BI (Mean)
- HC SJ/BI (Mean)
Influence of Factors on Decision-Making by Jurisdiction

- Views of family members
- Family harmony and consensus
- What guardian would want in IP's circumstances
A Proposal for Reform
S.J./B.I. Heirarchy

Strict Substituted Judgment
(if impossible or unreasonable)

Expanded Substituted Judgment
(if impossible or unreasonable)

Expanded Best Interest
(if impossible or unreasonable)

Strict Best Interest
(last resort)
PROPOSED REVISED SECTION 314 (a)

Except as otherwise limited by the court, a guardian shall make decisions regarding the ward’s support, care, education, health, and welfare. A guardian shall promote the self-determination of the ward and exercise authority only as necessitated by the ward’s limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward’s own behalf, and develop or regain the capacity to manage the ward’s personal affairs. A guardian shall at all times exercise reasonable care, diligence, and prudence and, in making decisions:
Proposed Revision Cont.

(1) act in accordance with the ward’s reasonable current or prior directions, expressed desires, and opinions to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,

(2) act in accordance with the ward’s reasonable prior general statements, actions, values and preferences to the extent actually known or ascertainable by the guardian; or, if unknown and unascertainable,

(3) act in accordance with the ward’s best interest as determined from reasonable information received from professionals and persons who demonstrate sufficient interest in the ward’s welfare, which determination may include consideration of consequences for others that a reasonable person in the ward’s circumstances would consider.