

TIPPING THE SCALES: HOW GUARDIANSHIP OF BRANDON HAS UPSET MASSACHUSETTS' BALANCED SUBSTITUTED JUDGMENT DOCTRINE

INTRODUCTION

In November 1990, twelve-year-old Brandon was a student at the Judge Rotenberg Educational Center, Inc. ("JRC").¹ The JRC, located in Canton, Massachusetts, is a school that provides twenty-four-hour residential care and aversive therapy for children with behavioral disorders.² Brandon was profoundly mentally retarded and diagnosed with a seizure disorder, tuberous sclerosis, autism and a severe behavioral disorder.³ His behavior, which included vomiting and ruminating so extreme that hospitalization was required, had deteriorated to the point where it was life-threatening.⁴

In response, the JRC sought to treat Brandon with an electric shock device known as the Graduated Electronic Decelerator ("GED").⁵ Before it could begin this shock treatment, however, the JRC needed to secure the approval of the Bristol County Probate Court.⁶ The court authorized the use of the GED, reasoning that Brandon would have approved the treatment were he competent to do so.⁷ By employing this reasoning, the court utilized a legal fiction known as the substituted judgment doctrine.⁸

¹ See *Guardianship of Brandon*, 677 N.E.2d 114, 118 (Mass. 1997).

² See, e.g., *Brandon*, 677 N.E.2d at 117; Proposed Behavior Modification Treatment Plan at 3, *In re Elly*, No. 90P0353-MR (Bristol County Prob. Ct. Jan. 1, 1998) (unpublished treatment plan, on file with the author) [hereinafter *Elly Treatment Plan*].

³ See *Brandon*, 677 N.E.2d at 118.

⁴ See *id.* at 118 n.7.

⁵ See *id.* at 118. The GED, a device manufactured by the JRC, consists of a transmitter operated by the staff and a receiver worn by the student. *Elly Treatment Plan*, *supra* note 2, at 20. The receiver delivers a surface application of electric current to the student's skin upon command by the transmitter. See *id.* The GED device is adjustable with an average intensity of 15.25 milliamperes RMS, a duration range of .2 to 2 seconds, an average peak of 30.5 milliamperes and a duty cycle of 25%. See *id.* The GED device also has remote concentric electrodes. See *id.*

⁶ See *Judge Rotenberg Educ. Ctr. v. Commissioner of the Dep't of Mental Retardation*, 677 N.E.2d 127, 132 & n.5 (Mass. 1997) [hereinafter *JRC I*]. According to a settlement agreement, the JRC must seek authorization for the use of aversive treatment by means of a substituted judgment decision. See *id.* at 132 n.5.

⁷ See *Brandon*, 677 N.E.2d at 118; *JRC I*, 677 N.E.2d at 132 n.5.; *Superintendent of Belcher-town State Sch. v. Saikewicz*, 370 N.E.2d 417, 431 (Mass. 1977).

⁸ See, e.g., *Saikewicz*, 370 N.E.2d at 431; *Strunk v. Strunk*, 445 S.W.2d 145, 148 (Ky. 1969); *Ex Parte Whitbread*, 35 Eng. Rep. 878, 879 (Ch. 1816).

The substituted judgment doctrine is rooted in the English common law, where it was originally crafted over 180 years ago as a means of granting gifts from the estate of an incompetent person.⁹ In more recent times, however, the doctrine has been borrowed from the realm of property and applied to the realm of informed consent.¹⁰ Courts currently utilize the substituted judgment doctrine to authorize or deny medical treatment for individuals deemed incompetent to make treatment decisions for themselves.¹¹ In the last twenty years, courts have applied the doctrine to a broad spectrum of extraordinary medical care, including sterilization,¹² antipsychotic medication,¹³ organ removal¹⁴ and the type of aversive therapy the JRC used to treat Brandon.¹⁵

This Note will examine how a legal doctrine created in 1816 to resolve obscure property disputes has come to play a central role in some of today's most charged medical disputes.¹⁶ In Part I, this Note traces the history of the substituted judgment doctrine from its creation in the English Court of Chancery through its first implementations by American courts.¹⁷ Part II examines the doctrine's absorption into the law of informed consent,¹⁸ while Part III reviews its application in the Commonwealth of Massachusetts.¹⁹ Finally, Part IV argues that a 1997 Supreme Judicial Court decision addressing the treatment of Brandon has upset the equilibrium that had been struck in Massachusetts between the substituted judgment doctrine's utility and its danger for abuse.²⁰

I. ROOTS OF THE SUBSTITUTED JUDGMENT DOCTRINE

Current applications of the substituted judgment doctrine retain strong links to the doctrine's original implementation in the English common law of lunacy.²¹ English common law recognized two types of

⁹ See, e.g., *Saikewicz*, 370 N.E.2d at 419, 431; *Strunk*, 445 S.W.2d at 146, 148; *Whitbread*, 35 Eng. Rep. at 879.

¹⁰ See, e.g., *Saikewicz*, 370 N.E.2d at 419, 431; *Strunk*, 445 S.W.2d at 146, 148.

¹¹ See, e.g., *Saikewicz*, 370 N.E.2d at 419, 431; *Strunk*, 445 S.W.2d at 146, 148.

¹² See *In re Moe*, 432 N.E.2d 712, 719-20 (Mass. 1982).

¹³ See *Rogers v. Commissioner of Dep't of Mental Health*, 458 N.E.2d 308, 315 (Mass. 1983).

¹⁴ See *Strunk*, 445 S.W.2d at 146, 148.

¹⁵ See *Brandon*, 677 N.E.2d at 118 & n.6.

¹⁶ See *infra* notes 21-170 and accompanying text.

¹⁷ See *infra* notes 21-63 and accompanying text.

¹⁸ See *infra* notes 64-101 and accompanying text.

¹⁹ See *infra* notes 102-76 and accompanying text.

²⁰ See *infra* notes 177-280 and accompanying text.

²¹ See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 431 (Mass. 1977); *Strunk v. Strunk*, 445 S.W.2d 145, 148 (Ky. 1969).

mental disability: lunacy and idiocy.²² Unlike an idiot, who was born incapacitated with no prospect of recovery, a lunatic could hope to regain his lost mental faculties.²³ This distinction had important ramifications because the King's control over the property of lunatics and idiots differed.²⁴

The *Statute De Prerogativa Regis* granted the King custody over an idiot's land, including its profits, until the idiot's death, at which time the land descended to the idiot's heirs.²⁵ The *Prerogativa Regis*, however, did not give the King custody over a lunatic's land, nor did it permit the King to take a lunatic's profits for his own use.²⁶ Instead, the King was obligated to maintain a lunatic's land and to use any profits solely for the support of the lunatic and his household.²⁷ Moreover, if the lunatic recovered his sanity, the land and its profits were returned.²⁸ English law thus distinguished between the treatment of lunatics and idiots on the presumption that a lunatic might regain his sanity.²⁹

In 1816, in *Ex Parte Whitbread*, the substituted judgment doctrine became a part of lunacy law.³⁰ In *Whitbread*, the Lord Chancellor held that a court could substitute its judgment for that of a lunatic to authorize a gift from a lunatic's estate.³¹ *Whitbread* concerned the estate of a Mr. Hinde.³² The Lord Chancellor, Lord Eldon, delegated the task of establishing an annual allowance to support Hinde and his "immediate relations" to a Master.³³ Hinde's niece, however, took umbrage with the amount she was allocated and petitioned the Chancellor "to receive such other proportion of the said allowance."³⁴ In other words,

²² See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *303-05.

²³ See *id.*

²⁴ See Statute De Prerogativa Regis, 1324, 17 Edw. 2, chs. 9 & 10.

²⁵ See *id.* ch. 9. The authority of this document, which dates from the late thirteenth century, is debated. See THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 542 & n.2 (5th ed. 1956). It is not clear whether such a statute was ever passed, and it was characterized by Theodore Plucknett as an "unofficial tract." See *id.* Regardless of its authority, as Professor Harmon indicates, the *Prerogativa Regis* "described, if it did not in fact establish, the King's jurisdiction over the idiot and the lunatic." Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990).

²⁶ See Statute De Prerogativa Regis, 1324, 17 Edw. 2, ch. 10.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *id.* chs. 9 & 10.

³⁰ See *Ex Parte Whitbread*, 35 Eng. Rep. 878, 878-79 (Ch. 1816).

³¹ See *id.* at 879.

³² See *id.* at 878.

³³ *Id.* The Court of Chancery had equitable jurisdiction to discharge the King's duties regarding lunatics. See Harmon, *supra* note 25, at 17-19 (citations omitted).

³⁴ *Whitbread*, 35 Eng. Rep. at 878.

she wanted more money—specifically, a portion of the surplus income generated by the estate.³⁵

Lord Eldon was inclined to grant the petition.³⁶ The *Prerogativa Regis*, however, did not give the King—nor his surrogate, Lord Eldon—the authority to give away the surplus income of a lunatic's estate before the lunatic's death.³⁷ On the contrary, Lord Eldon was charged with the duty of protecting Hinde's property so that it would still be there if he ever regained his sanity.³⁸ Lord Eldon was therefore forced to craft a legal fiction in order to authorize the petition while protecting the integrity of the Chancery.³⁹

Lord Eldon created this fiction by noting that the court, when making allowances, was limited to a consideration of only the lunatic's situation.⁴⁰ When examining Hinde's situation, Lord Eldon elected to determine "what it is likely the Lunatic himself would do, if he were in a capacity to act . . ."⁴¹ In this way, Lord Eldon resolved the primary problem facing the court—its lack of authority to grant the petition—by contriving the ability to read Hinde's mind.⁴² He thus abandoned judicial objectivity in favor of a legal fiction that relied upon subjective analysis.⁴³

³⁵ See *id.*; Harmon, *supra* note 25, at 20.

³⁶ See Whitbread, 35 Eng. Rep. at 879–80; Harmon, *supra* note 25, at 22.

³⁷ See Statute De Prerogativa Regis, 1324, 17 Edw. 2, ch. 10. (Eng.)

³⁸ See *id.*

³⁹ See Whitbread, 35 Eng. Rep. at 879; Harmon, *supra* note 25, at 22. A legal fiction is defined as an "[a]ssumption of fact made by court as basis for deciding a legal question. A situation contrived by the law to permit a court to dispose of a matter, though it need not be created improperly; e.g. fiction of lost grant as basis for title by adverse possession." BLACK'S LAW DICTIONARY 620 (6th ed. 1991) (emphasis added). Legal scholars have adopted diametrically opposite views of the legitimacy and usefulness of legal fictions. See Harmon, *supra* note 25, at 2–16. For example, Jeremy Bentham argued that "a fiction of law may be defined [as] a wil[l]ful falsehood, having for its objective the stealing [of] legislative power, by and for hands, which could not, or durst not, openly claim it,—and, but for the delusion thus produced, could not exercise it." JEREMY BENTHAM, *Preface Intended for the Second Edition of the FRAGMENT ON GOVERNMENT*, in COLLECTED WORKS OF JEREMY BENTHAM 509 (J.H. Burns & H.L.A. Hart, eds. 1977) (1823). Bentham thus viewed legal fictions as a tool in the judiciary's usurpation of the legislative process from Parliament. See *id.* Blackstone, on the other hand, took a benevolent view of legal fictions in line with his championship of the common law system. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *43. He wrote that legal fictions were "highly beneficial and u[s]eful" when used to "prevent a mi[s]chief, or remedy an inconvenience, that might re[s]ult from the general rule of law." *Id.* From the earliest stages, therefore, the debate on legal fictions has been divided between those enamored with their utility and those worried about their abuse. Compare *id.*, with BENTHAM, *supra*, at 509.

⁴⁰ See Whitbread, 35 Eng. Rep. at 879.

⁴¹ *Id.*

⁴² See *id.* By contriving a situation at law to dispose of a matter, Lord Eldon created a legal fiction. See *id.*; see generally BLACK'S LAW DICTIONARY 620 (6th ed. 1991).

⁴³ See Whitbread, 35 Eng. Rep. at 879.

Moreover, in determining what it is likely Hinde would have done, Lord Eldon did not consider evidence of Hinde's mental state during his earlier periods of lucidity.⁴⁴ Hinde, as a lunatic, had enjoyed periods of competency and Lord Eldon could have based his decision on preferences Hinde had demonstrated before losing his faculties.⁴⁵ Instead, Lord Eldon reasoned that no lunatic would want his family to be "sent into the world to disgrace him as beggars."⁴⁶ Therefore, the court in *Whitbread* grounded its decision on the preferences of a hypothetical reasonable lunatic rather than on the expressed preferences of Hinde himself.⁴⁷

After *Whitbread*, however, the Chancery focused on the fact that lunatics, unlike idiots, by definition had been lucid at one point.⁴⁸ From these periods of lucidity, Chancellors extrapolated how a lunatic might act if he regained competence.⁴⁹ Chancellors could thus use evidence of a lunatic's former donative intent to justify giving away a lunatic's property.⁵⁰

For instance, in 1870, in *In re Frost*, the Chancery Appeals Court based a substituted judgment decision on evidence of a lunatic's former intentions.⁵¹ As in *Whitbread*, *Frost* concerned a petition by a lunatic's poorer relatives for money from the lunatic's estate.⁵² In this case, however, the lunatic had expressed a desire to provide for the petitioners before becoming incompetent.⁵³ The court reasoned that these assertions provided concrete evidence that the lunatic would have granted the petition herself were she competent to do so.⁵⁴

⁴⁴ See *id.*

⁴⁵ See *id.*; BLACKSTONE, *supra* note 22, at *304-05.

⁴⁶ *Whitbread*, 35 Eng. Rep. at 879.

⁴⁷ See *id.*; Harmon, *supra* note 25, at 23.

⁴⁸ See, e.g., *In re Darling*, 39 Ch. D. 208, 208, 212-13 (Ch. 1888) (denying petition for support because of evidence of former donative intent); *In re Frost*, 5 L.R.-Ch. 699, 701, 702 (Ch. App. 1870) (granting petition for support because of evidence of former donative intent).

⁴⁹ See, e.g., *Darling*, 39 Ch. D. at 208, 212-13; *Frost*, 5 L.R.-Ch. at 701, 702.

⁵⁰ See *Frost*, 5 L.R.-Ch. at 701, 702.

⁵¹ See *id.*

⁵² See *id.* at 700; *Whitbread*, 35 Eng. Rep. at 878. The lunatic in *Frost* was a fifty-nine-year-old woman with real estate worth £70,000 and an annual income of £4,500. See 5 L.R.-Ch. at 700. Her relatives, on the other hand, all earned less than £104 a year. See *id.*

⁵³ See *Frost*, 5 L.R.-Ch. at 701.

⁵⁴ See *id.* at 702. Similarly, in 1888, in *Darling*, the court relied on evidence of a lunatic's former gift giving. See 39 Ch. D. at 208, 212-13. In *Darling*, a wealthy eighty-two-year-old bachelor had lost his mental faculties. See *id.* at 208-09. Before going insane, the lunatic had granted small allowances to three of his cousins. See *id.* at 208. After he went insane, these three cousins sought an increase in their allowance, and three other cousins sought financial support from *Darling's* estate as well. See *id.* at 209. The Chancery denied the request, however, reasoning that the lunatic's former gifts were evidence of the scope of his donative intent toward the petitioners. See *id.* at 212-13.

In 1884, in *In re Willoughby*, the New York Court of Chancery embraced this approach in the first American case to apply Lord Eldon's legal fiction.⁵⁵ In *Willoughby*, the court held that a lunatic would not have granted an allowance out of his estate were he of sound mind.⁵⁶ *Willoughby* addressed the petition of a lunatic's wife for an allowance out of the lunatic's estate for her daughter by a former husband.⁵⁷ At trial, a nephew opposing the petition offered evidence that Mr. Willoughby, before being declared a lunatic, did not consider the daughter an adopted child or entitled to his support.⁵⁸

The court held that it had the authority to grant the petition under the doctrine of substituted judgment, citing *Whitbread* and its English common law progeny as authority.⁵⁹ The Chancellor, however, in light of the nephew's evidence, was not convinced that Mr. Willoughby would have made the gift if competent.⁶⁰ The court in *Willoughby* focused on the preferences a particular lunatic expressed when lucid, rather than on conjecture of how a reasonable lunatic would act when competent.⁶¹ The first American court to apply the substituted judgment doctrine thus based its decision upon concrete evidence of a lunatic's intent.⁶² In doing so, the court rejected Lord Eldon's hypothetical reasonable lunatic, embracing instead the evidentiary requirements of the English Court of Chancery post-*Whitbread*.⁶³

II. EMERGENCE IN INFORMED CONSENT

After *Willoughby*, the substituted judgment doctrine remained quietly ensconced in the law of property until 1966.⁶⁴ Then, in *Strunk v. Strunk*, the Court of Appeals of Kentucky pushed the doctrine into the

⁵⁵ See 11 Paige Ch. 257, 260-61 (N.Y. Ch. 1844); Harmon, *supra* note 25, at 27.

⁵⁶ See 11 Paige Ch. at 260-61.

⁵⁷ See *id.* at 258.

⁵⁸ See *id.* at 258, 260-61.

⁵⁹ See *id.* at 259-60.

⁶⁰ See *id.* at 260-61.

⁶¹ See *Willoughby*, 11 Paige Ch. at 260-61.

⁶² See *id.*

⁶³ See *id.*; *Whitbread*, 35 Eng. Rep. at 879; see also *Frost*, 5 L.R.-Ch. at 702 (predicating substituted judgment doctrine upon concrete evidence). Similarly, three years later, the same New York Chancellor relied on evidence of a lunatic's former generosity when authorizing gifts from his estate in *In re Heeney*. See 2 Barb. Ch. 326, 328-29 (N.Y. Ch. 1847). *Heeney* concerned Cornelius Heeney, an elderly bachelor with a significant estate. See *id.* at 327. The Chancellor noted that Heeney, when competent, supported a number of people and "was in the habit of spending the whole residue of his income in acts of benevolence, and charity, and piety." *Id.* This evidence justified the Chancellor's authorization of the continuance of support. See *id.* at 329.

⁶⁴ See, e.g., *In re Flagler*, 162 N.E. 471, 472 (N.Y. 1928) (granting petition for support of incompetent person's second cousin because of evidence of prior gifts); *In re Fleming*, 19 N.Y.S.2d

spotlight by using it to authorize an incompetent person's organ donation.⁶⁵ In *Strunk*, a mother petitioned for permission to remove a kidney from her son Jerry, who was twenty-seven years old and mentally incompetent.⁶⁶ The mother made this request because Jerry's older brother Tommy suffered from a fatal kidney disease and needed a transplant in order to survive.⁶⁷

A lower court concluded that the operation was in Jerry's best interest because the loss of a kidney would be less psychologically severe than the loss of his brother.⁶⁸ The lower court, however, questioned its authority to act on this determination and sought approval from the Court of Appeals of Kentucky.⁶⁹ The Court of Appeals reasoned that the substituted judgment doctrine constituted a right to act on behalf of an incompetent person, citing *Whitbread* and *Willoughby* as authority.⁷⁰ The Court of Appeals further held that the "doctrine of substituted judgment . . . is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward."⁷¹ The court thus significantly expanded the role of the substituted judgment doctrine, wresting Lord Eldon's legal fiction from the realm of property and into its modern role as a justification for the medical treatment of incompetent persons.⁷²

In addition, the doctrine as applied by the Court of Appeals of Kentucky was stripped of evidentiary requirements.⁷³ Jerry Strunk had been incompetent since birth and could not hope to become competent in the future.⁷⁴ From a common law perspective, he was considered an idiot rather than a lunatic.⁷⁵ The Kentucky Court of Appeals therefore had no period of competency upon which to base its substituted judgment decision, it consequently could not satisfy the evidentiary requirements that had been placed upon the doctrine post-*Whitbread*.⁷⁶

234, 236, 237 (App. Div. 1950) (granting petition for allowance to niece based on finding of incompetent person's support of niece when competent).

⁶⁵ See 445 S.W.2d 145, 148 (Ky. 1969).

⁶⁶ See *id.* at 146.

⁶⁷ See *id.* Jerry was the only donor in the family who was medically acceptable. See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.* at 145.

⁷⁰ See *Strunk*, 445 S.W.2d at 147.

⁷¹ *Id.*

⁷² See *id.* at 148.

⁷³ See *id.* at 146-47; see also *Willoughby*, 11 Paige Ch. at 260-61 (predicating substituted judgment doctrine upon concrete evidence); *Frost*, 5 L.R.-Ch. at 702 (same).

⁷⁴ See *Strunk*, 445 S.W.2d at 146.

⁷⁵ See *id.* at 146; BLACKSTONE, *supra* note 22, at *303-05.

⁷⁶ See *Strunk*, 445 S.W.2d at 146-49; see also *In re Darling*, 39 Ch. D. 208, 212-13 (Ch. 1888) (basing decision on evidence of donative intent from period of lucidity); *In re Willoughby*, 11 Paige Ch. 257, 260-61 (N.Y. Ch. 1844) (same).

Instead, the court concluded that a *reasonable person* in Jerry Strunk's situation would elect to donate his kidney, thereby embracing the legal fiction as it was originally formulated by Lord Eldon.⁷⁷

Courts considering substituted judgment treatment decisions after *Strunk*, however, adopted the evidentiary prerequisites of the post-*Whitbread* decisions.⁷⁸ For instance, in 1981, in *In re Storar*, the Court of Appeals of New York imposed strict evidentiary requirements on substituted judgment decisions.⁷⁹ In *Storar*, the court decided two cases, one concerning John Storar and the other addressing Brother Fox.⁸⁰ John Storar, a fifty-two-year-old man with a mental age of approximately eighteen months, had terminal bladder cancer.⁸¹ He required daily blood transfusions, which upset him, and was given only three to six months to live.⁸² His mother sought a court order to terminate the transfusions.⁸³

Brother Fox, on the other hand, was an eighty-three-year-old member of the Order of the Society of Mary.⁸⁴ During surgery to repair a hernia, Brother Fox suffered irreversible brain damage due to a cardiac arrest and was put on a respirator that maintained him in a vegetative state.⁸⁵ Before the operation, Brother Fox had been a regular participant in public discussions concerning the termination of life support.⁸⁶ In these discussions, he had stated that he would not want extraordinary means of treatment used to keep him alive.⁸⁷ A friend of Brother Fox consequently petitioned the court to be appointed his guardian with the authority to remove the respirator.⁸⁸

The Court of Appeals of New York granted the petition concerning Brother Fox but denied the one concerning John Storar.⁸⁹ The court reasoned that in Brother Fox's case, there was compelling proof that he would have elected to remove the respirator were he competent

⁷⁷ See *Strunk*, 445 S.W.2d at 146-49; *Ex Parte Whitbread*, 35 Eng. Rep. 878, 879 (Ch. 1816).

⁷⁸ See, e.g., *Cruzan v. Harmon*, 760 S.W.2d 408, 425-26 (Mo. 1988), *aff'd sub nom. Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Storar v. Storar*, 420 N.E.2d 64, 72-73 (N.Y. 1981).

⁷⁹ See 420 N.E.2d at 72-73. These requirements consist of evidence of a person's preferences when competent. See *id.*

⁸⁰ See *id.* at 66.

⁸¹ See *id.* at 68-69.

⁸² See *id.* at 69.

⁸³ See *id.*

⁸⁴ See *Storar*, 420 N.E.2d at 66.

⁸⁵ See *id.* at 67.

⁸⁶ See *id.* at 68.

⁸⁷ See *id.*

⁸⁸ See *id.* at 67.

⁸⁹ See *Storar*, 420 N.E.2d at 72-73.

to do so.⁹⁰ Storar, however, had never been competent at any point in his life.⁹¹ In that case, the court refused to infer how Storar would have elected to be treated if competent.⁹² The court therefore recognized the common law distinction between lunatics and idiots and balked at applying the substituted judgment doctrine to individuals in the latter category.⁹³ Moreover, the court rejected Lord Eldon's reasonable lunatic approach, relying instead on Brother Fox's assertions as evidence that he would remove the respirator if he were competent to do so.⁹⁴

Similarly, in 1988, the Supreme Court of Missouri applied strict evidentiary requirements to a request to terminate life support in *Cruzan v. Director, Missouri Department of Health*.⁹⁵ Nancy Cruzan, a car accident victim, was being maintained in a persistent vegetative state on a gastrostomy feeding and hydration tube.⁹⁶ After the hospital refused to remove the tube, Cruzan's parents sought judicial authorization for the termination of feeding and hydration.⁹⁷ A former housemate testified that Cruzan had expressed a desire to terminate life support if she was unable to live a normal life.⁹⁸ The Supreme Court of Missouri found this evidence to be "woefully inadequate" to establish Cruzan's intent if competent.⁹⁹ The court held that the choice to terminate life-sustaining treatment could not be made without clear proof of a patient's former intent.¹⁰⁰ Thus, the court also rejected Lord Eldon's approach, requiring instead concrete evidence of prior informed consent before life support could be removed.¹⁰¹

III. DEVELOPMENT OF SUBSTITUTED JUDGMENT IN MASSACHUSETTS

In 1977, in *Superintendent of Belchertown State School v. Saikewicz*, the Massachusetts Supreme Judicial Court adopted an approach to substituted judgment decisions that was free of the evidentiary require-

⁹⁰ See *id.* at 72.

⁹¹ See *id.*

⁹² See *id.* at 72-73.

⁹³ See *id.*; BLACKSTONE, *supra* note 22, at *303-05.

⁹⁴ See *Storar*, 420 N.E.2d at 72; *Whitbread*, 35 Eng. Rep. at 879.

⁹⁵ See 760 S.W.2d at 425-26.

⁹⁶ See *id.* at 410-11.

⁹⁷ See *id.* at 410.

⁹⁸ See *id.* at 424.

⁹⁹ *Id.*

¹⁰⁰ See *Cruzan*, 760 S.W.2d at 424, 426. The court did not indicate what would constitute informed consent, noting only that informally expressed reactions to the medical treatment of others is not clear proof of intent. See *id.* at 424 (citation omitted).

¹⁰¹ See *id.* at 424, 426; *Ex Parte Whitbread*, 35 Eng. Rep. 878, 879 (Ch. 1816).

ments embraced by New York and Missouri.¹⁰² *Saikewicz* involved the treatment of Joseph Saikewicz, a profoundly mentally retarded sixty-seven-year-old man residing at the Belchertown State School.¹⁰³ In 1976, Saikewicz was diagnosed with acute myeloblastic monocytic leukemia, a blood disease that is invariably fatal, and the school petitioned for the appointment of a guardian ad litem with the authority to make decisions regarding Saikewicz's care.¹⁰⁴

The Probate Court for Hampshire County appointed a guardian ad litem, who in turn filed a report indicating that chemotherapy was the medically recommended course of treatment for Saikewicz's illness.¹⁰⁵ The guardian ad litem noted, however, that Saikewicz would not understand the adverse side effects and discomfort caused by chemotherapy treatments.¹⁰⁶ The guardian ad litem therefore recommended that chemotherapy be withheld because the fear and pain that it would cause Saikewicz outweighed the uncertain and limited prospect of extending his life.¹⁰⁷ The probate court issued an order in agreement with the guardian's recommendation.¹⁰⁸

The Supreme Judicial Court upheld the order on appeal, holding that the substituted judgment doctrine was the proper legal standard to govern treatment decisions.¹⁰⁹ In reaching this conclusion, the court noted that the constitutional right to individual privacy encompasses a patient's right to preserve her privacy against unwanted infringements of bodily integrity.¹¹⁰ The court reasoned that this right to choose whether or not to succumb to medical treatment extends to both incompetent and competent persons because the value of human dignity extends to both.¹¹¹

When substituting judgment, the Supreme Judicial Court indicated that a judge should seek to ascertain an incompetent person's actual interests and preferences and should try to reach the decision that would be reached by that person if he or she were competent.¹¹²

¹⁰² See 370 N.E.2d 417, 431 (Mass. 1977); see also *Cruzan v. Harmon*, 760 S.W.2d 408, 425-26 (Mo. 1988) *aff'd sub nom. Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990); *Storar v. Storar*, 420 N.E.2d 64, 72-73 (N.Y. 1981).

¹⁰³ See *Saikewicz*, 370 N.E.2d at 419.

¹⁰⁴ See *id.* at 419-20.

¹⁰⁵ See *id.* at 419.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *Saikewicz*, 370 N.E.2d at 419.

¹⁰⁹ See *id.* at 419-20, 431.

¹¹⁰ See *id.* at 424.

¹¹¹ See *id.* at 427.

¹¹² See *id.* at 431.

Since Saikewicz had never been competent, however, the court was unable to rely on evidence of his preferences during a period of lucidity.¹¹³ As in *Strunk*, the Massachusetts Supreme Judicial Court therefore based its decision on how a reasonable person in Saikewicz's position would act instead of on concrete evidence of Saikewicz's preferences when competent.¹¹⁴

After *Saikewicz*, however, the court limited the trier of fact's discretion to determine how a reasonable person might act by imposing procedural requirements on the substituted judgment process.¹¹⁵ For instance, in 1980, in *In re Spring*, the Massachusetts Supreme Judicial Court held that a judge cannot delegate ultimate decision-making authority.¹¹⁶ In *Spring*, a probate judge found that a patient suffering from an end-stage kidney disease would refuse additional life-prolonging hemodialysis treatment if he were competent.¹¹⁷ The judge then delegated the decision of whether to continue or terminate the dialysis treatment to the patient's attending physician, wife and son.¹¹⁸ The Supreme Judicial Court reversed, however, reasoning that when properly presented with a legal question, the judge cannot delegate it.¹¹⁹ The court thus held that substituted judgment decisions can only be made by a judge.¹²⁰

In 1981, in *In re Guardianship of Roe*, the Massachusetts Supreme Judicial Court imposed additional procedural requirements on the substituted judgment process.¹²¹ In *Roe*, a father sought the authority to forcibly administer antipsychotic medication to his son.¹²² The request was rejected, as in *Spring*, on the grounds that the judiciary could not delegate substituted judgment decisions.¹²³ The Supreme Judicial Court then identified six factors that a judge must consider to make a proper substituted judgment analysis.¹²⁴ These factors included an incompetent person's expressed preferences, religious beliefs, the impact of a proposed treatment on the family, the probability of adverse

¹¹³ See *Saikewicz*, 370 N.E.2d at 420, 431-32.

¹¹⁴ See *id.* at 431-32; *Strunk*, 445 S.W.2d at 146-48.

¹¹⁵ See *infra* notes 116-58 and accompanying text.

¹¹⁶ See 415 N.E.2d 115, 120, 122 (Mass. 1980).

¹¹⁷ See *id.* at 117, 118.

¹¹⁸ See *id.* at 117.

¹¹⁹ See *id.* at 120, 122.

¹²⁰ See *id.*

¹²¹ See 421 N.E.2d 40, 50 (Mass. 1981).

¹²² See *id.* at 43-44.

¹²³ See *id.* at 51; *Spring*, 415 N.E.2d at 120, 122.

¹²⁴ See *Roe*, 421 N.E.2d at 56-57.

side effects, the consequences of refusing treatment and the prognosis with treatment.¹²⁵

In *Roe*, the Supreme Judicial Court further contributed to the procedural requirements of the substituted judgment doctrine by holding that a judge must indicate in written findings the reasons for and against treatment for each factor.¹²⁶ Because of the seriousness of substituted judgment decisions, the court reasoned implicitly that documentation requirements should be more stringent than in ordinary findings of fact.¹²⁷

Finally, in *Roe*, the Supreme Judicial Court added a new plank to the substituted judgment doctrine by introducing the concept of treatment plans.¹²⁸ The court noted that in the administration of a decision authorizing forcible medication, a "judge may appropriately authorize a treatment program which utilizes various specifically identified medications administered over a prolonged period of time."¹²⁹ Long-term treatment was thus sanctioned, obviating the need to secure judicial approval for every individual act necessary to implement a treatment decision.¹³⁰ The court reasoned implicitly that treatment plans would diminish the burdens placed on the medical community by the substituted judgment process.¹³¹

In 1983, in *Rogers v. Commissioner of Department of Mental Health*, the Supreme Judicial Court of Massachusetts again added to the procedural requirements for substituted judgment decisions.¹³² *Rogers* was a class action suit on behalf of all patients at the May and Austin Units of the Boston State Hospital who had been medicated without their

¹²⁵ See *id.* at 57.

¹²⁶ See *id.* at 59; see also *Guardianship of Doe*, 583 N.E.2d 1263, 1271 (Mass. 1992) (holding that "seriousness of the decision will be more forcefully impressed on judges if they are required to set forth their findings in 'meticulous detail'" (citation omitted); *In re R.H.*, 622 N.E.2d 1071, 1076 (Mass. App. Ct. 1993) (same). In *R.H.*, the Massachusetts Appeals Court held that a judge's findings be set forth in meticulous detail and reflect "a careful balancing and weighing of the various interests and factors involved, including within each factor those reasons both for and against treatment, as well as a logical nexus between the conclusion reached and the facts found." 622 N.E.2d at 1076. The court found that the probate judge did not consider the issue of the ward's expressed preferences regarding treatment, did not weigh the benefits of the proposed treatment against any disadvantages and did not relate the ultimate treatment decision to any medical evidence. See *id.* at 1077, 1079. The court concluded that against this background, the substituted judgment decision was conclusory and that it could not be accepted. See *id.* at 1079.

¹²⁷ See *Roe*, 421 N.E.2d at 59; see also *Doe*, 583 N.E.2d at 1271; *R.H.*, 622 N.E.2d at 1076.

¹²⁸ See 421 N.E.2d at 59 n.19.

¹²⁹ *Id.*

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See 458 N.E.2d 308, 314, 318 (Mass. 1983).

consent.¹³³ The hospital argued that the plaintiffs could not refuse forced treatment with antipsychotic drugs because each had been committed to the hospital after a judicial finding of mental illness.¹³⁴ The court held, however, that the hospital had to submit a distinct finding of incompetence before it could override a patient's right to make treatment decisions.¹³⁵

After making this initial holding, the Supreme Judicial Court outlined the scope of the judicial procedure to be followed in making substituted judgment decisions.¹³⁶ The court held that a judge may conduct a hearing on the appropriate treatment after a person is adjudicated incompetent.¹³⁷ At the hearing, the parties must be given an adequate opportunity to be heard.¹³⁸ To this end, the court reasoned that it should appoint a guardian ad litem and gather the opinions of experts so that all views would be available to the judge.¹³⁹ Finally, the court held that a judge should approve a treatment plan after making the original substituted judgment decision.¹⁴⁰ Treatment plans were introduced in *Roe*, where the Supreme Judicial Court indicated that every treatment plan should provide for periodic review to determine if a ward's condition and circumstances have substantially changed.¹⁴¹ In *Rogers*, the Supreme Judicial Court added further checks to the process, implicitly recognizing the danger of abuse posed by treatment plans.¹⁴² The court thus held that treatment plans must be monitored by a guardian or by the judge if no guardian is readily available.¹⁴³

The concept of periodic review, however, was not thoroughly developed until the Supreme Judicial Court readdressed the issue in 1991, in *Guardianship of Weedon*.¹⁴⁴ In *Weedon*, the court held that

¹³³ See *id.* at 311.

¹³⁴ See *id.* at 313.

¹³⁵ See *id.* at 314.

¹³⁶ See *id.* at 318.

¹³⁷ See *Rogers*, 458 N.E.2d at 318.

¹³⁸ See *id.*; see also *In re Moe*, 432 N.E.2d 712, 721 (Mass. 1982) (holding that "[i]n all cases, the parties must be given adequate notice of the proceedings, an opportunity to be heard in the trial court, and to pursue an appeal.>").

¹³⁹ See *Rogers*, 458 N.E.2d at 318. In *Moe*, the guardian ad litem was charged with the responsibility of representing the ward and presenting all reasonable arguments in favor of denying the petition. See 432 N.E.2d at 721. The Supreme Judicial Court reasoned that this adversary posture ensures that both sides of each issue will be thoroughly aired before a decision is rendered. See *id.*

¹⁴⁰ See *Rogers*, 458 N.E.2d at 318.

¹⁴¹ See *Roe*, 421 N.E.2d at 59 n.19.

¹⁴² See *Rogers*, 458 N.E.2d at 318 & n.20.

¹⁴³ See *id.*

¹⁴⁴ See 565 N.E.2d 432, 435 (Mass. 1991).

substituted judgment treatment orders cannot remain effective indefinitely.¹⁴⁵ *Weedon* addressed an attempt by physicians to invoke a treatment plan, authorized five years earlier, to forcibly administer antipsychotic drugs to a patient.¹⁴⁶ The Supreme Judicial Court reasoned that a treatment plan's validity is based on a patient's current circumstances and that the factors weighed when authorizing a treatment plan could change significantly with the passage of time.¹⁴⁷ The court thus held that treatment plans must provide for periodic review to ensure that a patient is not treated against her will according to a plan that no longer accurately reflects her preferences.¹⁴⁸

Finally, in 1997, in *Guardianship of Brandon*, the Massachusetts Supreme Judicial Court added the last procedural requirement to the substituted judgment process.¹⁴⁹ In *Brandon*, the court held that a "substantial change in circumstances" standard should apply to periodic reviews of treatment plans.¹⁵⁰ Until this decision, the Supreme Judicial Court had provided little guidance on the issue of how a court should handle the review process.¹⁵¹

In 1994, the JRC was treating Brandon subject to a treatment plan authorized in 1992.¹⁵² A probate judge conducted a treatment plan review and determined that there had been no substantial change in Brandon's condition and circumstances.¹⁵³ The judge thus entered an order authorizing a treatment plan proposed by the JRC that permitted the continued use of aversive therapies, such as the GED.¹⁵⁴ On appeal,

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 434.

¹⁴⁷ See *id.* at 435; see also *Guardianship of Linda*, 519 N.E.2d 1296, 1297-98 (Mass. 1988) (denying request for prospective order allowing treatment with antipsychotic drugs if contingency arose because substituted judgment decisions must be based upon current rather than future circumstances).

¹⁴⁸ See *Weedon*, 565 N.E.2d at 435. Moreover, the Supreme Judicial Court noted that periodic review alone may not adequately suffice in all cases to protect patients' rights. See *id.* As a result, the court concluded that with extraordinary medical procedures such as the forcible administration of antipsychotic drugs, a termination date must also be included in a substituted judgment plan. See *id.*

¹⁴⁹ See 677 N.E.2d 114, 120 (Mass. 1997).

¹⁵⁰ *Id.*

¹⁵¹ See JOHN H. CROSS ET AL., *GUARDIANSHIP AND CONSERVATORSHIP IN MASSACHUSETTS* 6-23.1 (1997). Some courts had adopted a *de novo* review of the order, retrying the case and placing the burden to go forward and the burden of proof on the party seeking to extend the order. See *id.* In other courts, the practice was to handle reviews without trials or hearings. See *id.* Instead, the parties would stipulate to the entry of an order extending or amending a treatment authorization. See *id.*

¹⁵² See *Brandon*, 677 N.E.2d at 118.

¹⁵³ See *id.* at 118, 119.

¹⁵⁴ See *id.*

counsel for Brandon argued that the "substantial change in circumstances" standard was not appropriate in substituted judgment proceedings and that a de novo review of treatment plans was warranted instead.¹⁵⁵

The Supreme Judicial Court disagreed and held that periodic reviews of substituted judgment orders should be used to determine if a patient's condition and circumstances have *substantially changed* since the time a substituted judgment order was first entered.¹⁵⁶ The court reasoned that "a patient's current circumstances can be adequately evaluated through an examination of any substantial changes that have occurred since the original substituted judgment hearing."¹⁵⁷ As a result, the court concluded that there was no reason to adopt a de novo standard of review.¹⁵⁸

The treatment plan review process post-*Brandon* is exemplified by two recent JRC cases.¹⁵⁹ In 1997, in *In re Andrew*, a master of the Probate Court of Bristol County held that the JRC's proposed treatment plan was the best means of treating an incompetent student.¹⁶⁰ Andrew, a twenty-five-year-old man, had been admitted to the JRC in May 1984.¹⁶¹ The JRC had proposed a plan that was essentially identical to the plan under which it previously had been authorized to treat Andrew.¹⁶²

The master found that Andrew's behavior and lifestyle had improved dramatically during his thirteen-year tenure at the JRC.¹⁶³ The master determined that Andrew was safe and happy and that his interaction with his parents was significantly improved.¹⁶⁴ This condition stood in contrast to Andrew's behavior before admission to the JRC, which was characterized in his treatment plan as highly disruptive, destructive and non-compliant.¹⁶⁵ Although noting the improvements

¹⁵⁵ See *id.* at 120.

¹⁵⁶ See *id.* (emphasis added).

¹⁵⁷ *Brandon*, 677 N.E.2d at 120.

¹⁵⁸ See *id.*

¹⁵⁹ See Master's Findings of Fact on Treatment Plan Review at 1-6, *In re Elly*, No. 70P0353-MR (Bristol County Prob. Ct. Sept. 23, 1998) (unpublished findings of fact, on file with the author) [hereinafter *Elly Findings of Fact*]; Master's Findings of Fact on Treatment Plan Review at 1-3, *In re Andrew*, No. 87P1411-GI (Bristol County Prob. Ct. Sept. 17, 1997) (unpublished findings of fact, on file with author) [hereinafter *Andrew Findings of Fact*].

¹⁶⁰ See *Andrew Findings of Fact*, *supra* note 159, at 3.

¹⁶¹ See *id.* at 1.

¹⁶² See *id.* at 2-3. The JRC neither added treatments nor proposed the elimination of any treatments that were being utilized to treat Brandon. See *id.*

¹⁶³ See *id.* at 2.

¹⁶⁴ See *id.*

¹⁶⁵ See Proposed Behavior Modification Treatment Plan at 1, *In re Andrew*, No. 87P1411-GI

in Andrew's condition, the court did not consider whether Andrew's substantially changed condition might impact his decision to submit to continued aversive therapy.¹⁶⁶

Likewise, in 1998, in *In re Elly*, a master of the Bristol County Probate Court found that Elly's condition had changed significantly during his seven-and-a-half years of treatment at the JRC.¹⁶⁷ Upon admission to the JRC, Elly was confined by helmet, leg and waist restraints, but at the time of the treatment plan review, he no longer required mechanical restraints.¹⁶⁸ Moreover, the court found that Elly, who had received regular shock applications via the GED during the beginning of his treatment, was being faded off the GED.¹⁶⁹ In approving the JRC's proposed treatment plan, however, the master did not consider how these changes in Elly's circumstances might impact his decision to submit to continued aversive therapy.¹⁷⁰

As the decisions from *Saikewicz* through *Brandon* demonstrate, substituted judgment treatment decisions in Massachusetts are governed by process rather than evidence.¹⁷¹ According to this procedure, only a judge can make a substituted judgment decision,¹⁷² and a hearing may be conducted to facilitate the decision-making process.¹⁷³ Judges must consider the six factors identified in *Roe*¹⁷⁴ and justify their decisions in detailed findings of fact.¹⁷⁵ Finally, if a treatment plan is implemented, the plan must be reviewed periodically to ensure that a patient's circumstances have not changed substantially.¹⁷⁶

IV. THE MASSACHUSETTS COMPROMISE

In adopting the approach presented above, the Massachusetts Supreme Judicial Court has struck a balance between the substituted judgment doctrine's dangers and benefits.¹⁷⁷ The court has protected against the profound potential for the doctrine's abuse by instituting

(Bristol County Prob. Ct. Sept. 17, 1997) (unpublished treatment plan, on file with the author) [hereinafter Andrew Treatment Plan].

¹⁶⁶ See Andrew Findings of Fact, *supra* note 159, at 1-3.

¹⁶⁷ See Elly Findings of Fact, *supra* note 159, at 3-4.

¹⁶⁸ See *id.* at 3.

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 1-6.

¹⁷¹ See *supra* notes 115-70 and accompanying text.

¹⁷² See *supra* notes 116-20 and accompanying text.

¹⁷³ See *supra* notes 136-39 and accompanying text.

¹⁷⁴ See *supra* notes 124-25 and accompanying text.

¹⁷⁵ See *supra* notes 126-27 and accompanying text.

¹⁷⁶ See *supra* notes 141-58 and accompanying text.

¹⁷⁷ See *infra* notes 181-223 and accompanying text.

procedural safeguards.¹⁷⁸ At the same time, the court has freed the doctrine from the strict evidentiary requirements that limit its utility in other states.¹⁷⁹ Moreover, in striking this balance, the Supreme Judicial Court has rectified the problems created by the carelessness of its legal borrowing in *Saikewicz*.¹⁸⁰

In *Saikewicz*, the Massachusetts Supreme Judicial Court ignored the common law history of the doctrine it borrowed.¹⁸¹ After *Whitbread*, Chancery courts in both England and America were uncomfortable with Lord Eldon's reasonable lunatic approach to substituted judgment decisions.¹⁸² Indeed, they balked at navigating an incompetent person's mind without the benefit of evidentiary signposts to guide them in the right direction.¹⁸³

As a result, post-*Whitbread* courts emphasized the distinction between "idiots" and "lunatics" when substituting judgment.¹⁸⁴ At common law, an idiot was not of sound mind and never could be.¹⁸⁵ A lunatic, on the other hand, at one time possessed a sound mind but lost it.¹⁸⁶ By focusing on a lunatic's period of lucidity, post-*Whitbread* courts based substituted judgment decisions on evidence of a person's mental state when competent.¹⁸⁷ Hence, there was no need to speculate about a reasonable lunatic's preferences, and Lord Eldon's legal fiction became tolerable to jurists reluctant to give away property without ample justification.¹⁸⁸

The Massachusetts Supreme Judicial Court, however, had no evidentiary signposts to consider in its seminal substituted judgment decision.¹⁸⁹ Joseph Saikewicz had never been competent and there was consequently no period of lucidity on which to base a treatment decision.¹⁹⁰ Instead, the court was forced to hypothesize how a reasonable

¹⁷⁸ See *infra* notes 194–217 and accompanying text.

¹⁷⁹ See *infra* notes 218–23 and accompanying text.

¹⁸⁰ See *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 431 (Mass. 1977); Harmon, *supra* note 25, at 63–64.

¹⁸¹ Compare *Saikewicz*, 370 N.E.2d at 432 (applying substituted judgment doctrine without evidentiary requirements), with *In re Willoughby*, 11 Paige Ch. 257, 260–61 (N.Y. Ch. 1844) (basing substituted judgment decision on evidence of former donative intent).

¹⁸² See *supra* notes 48–63 and accompanying text.

¹⁸³ See *supra* notes 48–63 and accompanying text.

¹⁸⁴ See *supra* notes 48–63 and accompanying text; see generally BLACKSTONE, *supra* note 22, at *303–05.

¹⁸⁵ See *supra* notes 22–23 and accompanying text.

¹⁸⁶ See *supra* notes 22–23 and accompanying text.

¹⁸⁷ See *supra* notes 48–63 and accompanying text.

¹⁸⁸ See *supra* notes 48–63 and accompanying text; see also Harmon, *supra* note 25, at 24, 58,

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¹⁸⁹ See *Saikewicz*, 370 N.E.2d at 431–32.

¹⁹⁰ See *id.* at 420, 432.

person in Saikewicz's situation would act, thereby embracing the approach rejected by both American and English courts post-*Whitbread*.¹⁹¹ The Massachusetts substituted judgment doctrine is thus a compounded legal fiction.¹⁹² Not only must Massachusetts judges make the impossible trip into the mind of an incompetent person, but they also must invent what they find once they get there.¹⁹³

The discomfort of post-*Whitbread* jurists with the substituted judgment doctrine, however, has not been completely ignored by the Massachusetts Supreme Judicial Court.¹⁹⁴ Indeed, the court has been quite reluctant to give the presiding judge unfettered power to render substituted judgment treatment decisions.¹⁹⁵ Instead of requiring concrete evidence of a person's preferences when competent, the court has grounded substituted judgment decisions with procedural requirements.¹⁹⁶ In some ways, these procedural hurdles are more onerous than the evidentiary limitations adopted by other states.¹⁹⁷

For example, a substituted judgment decision in Massachusetts cannot be delegated to an incompetent person's guardian or doctor.¹⁹⁸ Unlike New York, which granted a guardian the authority to remove Brother Fox's respirator, the Massachusetts Supreme Judicial Court has reasoned that the issues raised in substituted judgment decisions "require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch was created."¹⁹⁹ In addition, the fact that substituted judgment decisions can only be made by the judiciary ensures that the Supreme Judicial Court's procedural safeguards will have an impact.²⁰⁰

One such safeguard is the stringent documentation requirement introduced by the court in *Roe*.²⁰¹ By demanding meticulous detail, "careful balancing" and "a logical nexus between the conclusion reached and the facts found[,] the Supreme Judicial Court has at-

¹⁹¹ See *id.* at 431-32; *In re Darling*, 39 Ch. D. 208, 208, 212-13 (Ch. 1888); *Willoughby*, 11 Paige Ch. at 260-61.

¹⁹² See *Saikewicz*, 370 N.E.2d at 431-32; Harmon, *supra* note 25, at 59.

¹⁹³ See *Saikewicz*, 370 N.E.2d at 431-32; Harmon, *supra* note 25, at 59.

¹⁹⁴ See *supra* notes 115-58 and accompanying text.

¹⁹⁵ See *supra* notes 115-58 and accompanying text.

¹⁹⁶ See *supra* notes 115-58 and accompanying text.

¹⁹⁷ Compare *Storar v. Storar*, 420 N.E.2d 64, 72-73 (N.Y. 1981), with *In re Spring*, 415 N.E.2d 115, 120 (Mass. 1980).

¹⁹⁸ See, e.g., *Spring*, 415 N.E.2d at 120; *Guardianship of Roe*, 421 N.E.2d 40, 51 (Mass. 1981).

¹⁹⁹ Compare *Roe*, 421 N.E.2d at 51, with *Storar*, 420 N.E.2d at 72.

²⁰⁰ See, e.g., *Roe*, 421 N.E.2d at 51; *Spring*, 415 N.E.2d at 120.

²⁰¹ See *Roe*, 421 N.E.2d at 59; see also *In re R.H.*, 622 N.E.2d 1071, 1076 (Mass. 1993) (remanding case due to insufficient documentation).

tempted to ensure that judges will not render substituted judgments that are unsubstantiated.²⁰² Moreover, by requiring judges to commit their reasoning to paper in such detail, the Supreme Judicial Court has facilitated appellate review of the process, thereby ensuring consistency in the application of the doctrine.²⁰³

In addition, the court has tried to ensure that substituted judgment decisions will be properly informed by requiring a hearing on the appropriate treatment to be administered in cases where a person's competence has been contested.²⁰⁴ In order to allow the parties a full opportunity to be heard, the court strongly recommends the appointment of a guardian ad litem and the solicitation of expert testimony.²⁰⁵ The court therefore recommends an adversarial proceeding to guarantee that "all viewpoints and alternatives will be aggressively pursued."²⁰⁶

Most important, however, is the Supreme Judicial Court's requirement that judges base substituted judgment decisions upon a consideration of an incompetent person's current circumstances.²⁰⁷ The greatest danger of Lord Eldon's legal fiction is that a judge will impose, rather than substitute, judgment.²⁰⁸ Indeed, evidentiary requirements were placed on the doctrine post-*Whitbread* out of concern for judicial abuse.²⁰⁹ In Massachusetts, the Supreme Judicial Court's emphasis on an incompetent person's current circumstances serves as a similar, though less blunt, check on the natural tendency to filter decisions through one's personal value system.²¹⁰

There is no way of guaranteeing that the biases of the presiding judge will not find their way into substituted judgment decisions.²¹¹ By requiring a consideration of an incompetent person's current circumstances, however, judges are obligated to justify substituted judgment

²⁰² See *R.H.*, 622 N.E.2d at 1076.

²⁰³ See *id.*

²⁰⁴ See *Rogers v. Commissioner of Dep't of Mental Health*, 458 N.E.2d 308, 318 (Mass. 1983); CROSS ET AL., *supra* note 151, at 6-22 to -23.

²⁰⁵ See *Rogers*, 458 N.E.2d at 318. Whereas an adversary proceeding is recommended rather than required, procedures where no testimony is taken are exceptional in the extraordinary medical treatment context. See CROSS ET AL., *supra* note 151, at 6-23.

²⁰⁶ *Saikewicz*, 370 N.E.2d at 433.

²⁰⁷ See, e.g., *Weedon*, 565 N.E.2d at 435; *Roe*, 421 N.E.2d at 59 n.19.

²⁰⁸ See *Willoughby*, 11 Paige Ch. at 260-61 (requiring strict evidence of intent to offset concerns regarding substitution of judgment); BENTHAM, *supra* note 39, at 509 (warning about judicial abuse of legal fictions).

• ²⁰⁹ See, e.g., *Darling*, 39 Ch. D. at 212-13; *Willoughby*, 11 Paige Ch. at 260-61.

²¹⁰ See *Weedon*, 565 N.E.2d at 435; *Roe*, 421 N.E.2d at 59 n.19.

²¹¹ See *id.*

decisions from an incompetent person's perspective.²¹² The process is guided by the six factors outlined in *Roe*.²¹³ These non-exhaustive factors constitute a threshold consideration for every trier of fact.²¹⁴ They therefore ensure that each substituted judgment decision is informed by at least a minimal consideration of an incompetent person's current circumstances.²¹⁵ In addition, the court has limited the level of permissible judicial conjecture by forbidding substituted judgments based on speculation of what future circumstances might be.²¹⁶ The court's focus on current circumstances therefore grounds the process, removing it from the completely speculative analysis introduced by Lord Eldon in *Whitbread*.²¹⁷

Moreover, by rejecting evidentiary limitations, the Massachusetts Supreme Judicial Court has maximized the benefits of the substituted judgment doctrine.²¹⁸ States such as New York and Missouri that constrain substituted judgment decisions with evidentiary requirements endorse the common law's discrimination against idiots.²¹⁹ As a result, an entire class is denied the benefits of the substituted judgment process simply because they never enjoyed a period of mental competency.²²⁰

The Massachusetts Supreme Judicial Court, on the other hand, has recognized that individuals who fit the common law definition of idiot enjoy rights comparable to the rest of society.²²¹ The court reasoned in *Saikewicz* that the right to choose whether or not to succumb to medical treatment extends to both incompetent and competent persons because the value of human dignity extends to both.²²² If the court were to employ the same evidentiary restrictions as New York or

²¹² See *id.*

²¹³ See *Roe*, 421 N.E.2d at 57.

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ *Weedon*, 565 N.E.2d at 435.

²¹⁷ Compare *Roe*, 421 N.E.2d at 57 (forcing trier of fact to consider certain criterion), with *Ex Parte Whitbread*, 35 Eng. Rep. 878, 879 (Ch. 1816) (basing decision on conjecture about wishes of hypothetical reasonable lunatic).

²¹⁸ See *Saikewicz*, 370 N.E.2d at 431-32 (applying substituted judgment doctrine to common law idiot).

²¹⁹ See *Cruzan v. Harmon*, 760 S.W.2d 408, 425-26 (Mo. 1988), *aff'd sub nom* *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Storar*, 420 N.E.2d at 72-73; BLACKSTONE, *supra* note 22, at *303-05.

²²⁰ Compare *Storar*, 420 N.E.2d at 72-73 (holding substituted judgment inapplicable in case concerning never-competent individual), with *Saikewicz*, 370 N.E.2d at 431-32 (applying substituted judgment to never-competent individual).

²²¹ See *Saikewicz*, 370 N.E.2d at 427.

²²² See *id.*

Missouri, however, it would be put in the difficult position of extending the value of human dignity to some incompetent persons while denying it to others.²²³

This maximization of utility is not only fairer, it creates a more palatable legal fiction.²²⁴ One of the main justifications for legal fictions is their utility.²²⁵ As Blackstone pointed out, legal fictions could be "highly beneficial" when used to "remedy an inconvenience, that might result from the general rule of law."²²⁶ Any attempt to "remedy . . . the general rule of law" invariably leads to the question of who should be enacting the remedy, the judiciary or the legislature.²²⁷ But, without descending into a debate on the merits of judicial activism, Blackstone's justification can be taken at face value: legal fictions are judicial tools for the resolution of inconsistencies in the law.²²⁸

Legal fictions are therefore justified not by their proximity to reality, but by the scope of their utility.²²⁹ In this light, the Massachusetts Supreme Judicial Court has adopted a superior version of the substituted judgment doctrine by stressing utility over evidentiary restrictions.²³⁰ Moreover, the court has addressed concerns about judicial abuse of legal fictions by imposing procedural safeguards.²³¹ The balance struck between the doctrine's utility and its potential for abuse, however, is precarious and can be upset easily if the Supreme Judicial Court does not carefully guard against favoring one side over the other.²³²

In *Brandon*, the scales have been tipped too far.²³³ The Massachusetts Supreme Judicial Court held in *Brandon* that substituted judgment treatment plans should be reviewed under a "substantial change in circumstances" standard.²³⁴ The *Brandon* decision, however, fails to offer sufficient guidance as to how to determine whether an incompetent person's circumstances have substantially changed, thereby upsetting the balance against procedural protections.²³⁵

²²³ See *Cruzan* 760 S.W.2d at 425-26; *Storar*, 420 N.E.2d at 72-73; *Saikevicz*, 370 N.E.2d at 427, 431.

²²⁴ See BLACKSTONE, *supra* note 39, at 43.

²²⁵ See *id.*

²²⁶ *Id.*

²²⁷ *Id.*; see BENTHAM, *supra* note 39, at 509.

²²⁸ See *Saikevicz*, 370 N.E.2d at 431; BLACKSTONE, *supra* note 39, at 43.

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See BENTHAM, *supra* note 39, at 509; *supra* notes 115-57 and accompanying text.

²³² See *Guardianship of Brandon*, 677 N.E.2d 114, 120 (Mass. 1997).

²³³ See *id.*

²³⁴ *Id.*

²³⁵ See *id.* at 120-22.

The Supreme Judicial Court offered only one clue in *Brandon* as to how a trier of fact should determine whether an incompetent person's circumstances had changed substantially.²³⁶ The court held that "in the instant case, in determining whether Brandon's condition had substantially changed, the judge appropriately weighed the factors considered at the original substituted judgment hearing"²³⁷ This indicates that it may be acceptable to determine whether substantial changes have occurred by reconsidering the factors weighed at the original substituted judgment hearing.²³⁸ The court, however, never explicitly endorsed this approach.²³⁹

Moreover, the court did not indicate how a reconsideration of the factors weighed at Brandon's original substituted judgment hearing had informed the trial court's analysis of Brandon's current circumstances.²⁴⁰ For instance, one of the factors that the Supreme Judicial Court held to be "appropriately weighed" by the trial court was Brandon's prognosis with continued treatment.²⁴¹ In analyzing this factor, the trial court found that Brandon was no longer in any form of restraint, he had advanced significantly in his communication and self-care skills and his aggression had decreased dramatically.²⁴² These findings suggested that a substantial change in circumstances had occurred because Brandon's condition was significantly different than when the original substituted judgment was made.²⁴³ The Supreme Judicial Court, however, did not consider these changes in Brandon's circumstances.²⁴⁴

Instead, the court found that Brandon would likely choose to proceed with treatment because his prognosis was for a continuation of these improvements.²⁴⁵ This finding is problematic because it ignores underlying evidence of a significant change in Brandon's circumstances.²⁴⁶ The issue is not whether the trial court correctly analyzed Brandon's likely decision based upon his prognosis with continued

²³⁶ See *id.* at 120.

²³⁷ *Brandon*, 677 N.E.2d at 120.

²³⁸ See *id.*

²³⁹ See *id.*

²⁴⁰ See *id.* at 120-22.

²⁴¹ *Id.* at 120, 121.

²⁴² See *Brandon*, 677 N.E.2d at 121.

²⁴³ See *id.*

²⁴⁴ See *id.*

²⁴⁵ See *id.* at 120-21.

²⁴⁶ See *id.* at 121.

treatment, but rather what a reconsideration of this factor illustrates about Brandon's current situation.²⁴⁷

As a result of this lack of guidance, the application of the "substantial change in circumstances" standard has been left to the individual trier of fact.²⁴⁸ Moreover, if the judge determines what constitutes a substantial change in circumstances, there is no protection from individual bias.²⁴⁹ Unlike the original substituted judgment decision, which must be justified against the six *Roe* factors,²⁵⁰ each judge can establish his or her own criterion for what constitutes a substantial change in circumstances.²⁵¹ As a result, the treatment plan review process provides fewer safeguards than those constraining the original substituted judgment decision.²⁵² Indeed, it suggests that the review process is ripe for the type of abuse that worried courts post-*Whitbread*: that judges will impose, rather than substitute, judgment.²⁵³

Ironically, the treatment plan review process was instituted to address the possibility that incompetent persons might be treated in a manner inconsistent with their current circumstances.²⁵⁴ But rather than a protection, the review process seems to be one layer of procedure too many.²⁵⁵ The post-*Brandon* implementations of the review process on the probate level indicate a tendency toward unconsidered, rubber-stamp approval of severe medical treatments.²⁵⁶

For instance, *Andrew* and *Elly* do not demonstrate a careful weighing of the current circumstances influencing treatment decisions.²⁵⁷ A master found that both Andrew and Elly had made significant improvements while at the JRC.²⁵⁸ These improvements would raise a flag to even a casual observer that the situation surrounding the treatment of both Andrew and Elly had changed significantly.²⁵⁹ In both cases, however, the master failed to justify the continuation of treatment from either Andrew or Elly's current point of view.²⁶⁰ This failure to consider

²⁴⁷ See *Brandon*, 677 N.E.2d at 120-21.

²⁴⁸ See *id.* at 120; CROSS ET AL., *supra* note 151, at 6-23.1.

²⁴⁹ See *Roe*, 421 N.E.2d at 57 (defining minimum scope of substituted judgment analysis as requiring consideration of six factors).

²⁵⁰ See *id.*

²⁵¹ See *Brandon*, 677 N.E.2d at 120; CROSS ET AL., *supra* note 151, at 6-23.1.

²⁵² See *Brandon*, 677 N.E.2d at 120; *Roe*, 421 N.E.2d at 57.

²⁵³ See, e.g., *Darling*, 39 Ch. D. at 212-13; *Willoughby*, 11 Paige Ch. at 60-61.

²⁵⁴ *Weedon*, 565 N.E.2d at 435.

²⁵⁵ See *Brandon*, 677 N.E.2d at 120-22; *Weedon*, 565 N.E.2d at 435.

²⁵⁶ See *supra* notes 159-70 and accompanying text.

²⁵⁷ See *supra* notes 159-70 and accompanying text.

²⁵⁸ See *supra* notes 163-65, 167-69 and accompanying text.

²⁵⁹ See *supra* notes 163-65, 167-69 and accompanying text.

²⁶⁰ See *supra* notes 158-70 and accompanying text.

distinct changes in the circumstances surrounding treatment decisions is the very eventuality that the Supreme Judicial Court sought to avoid in *Weedon*.²⁶¹

If the review process is to protect against the implementation of treatment plans that do not accurately reflect a patient's current situation, the Supreme Judicial Court will need to clarify *Brandon's* "substantial change in circumstances" standard.²⁶² The problem with the *Brandon* standard is that it may be impossible to quantify exactly what is meant by a "substantial change."²⁶³ At a minimum, however, the court should stress that a proper analysis requires the trier of fact to make a comparison.²⁶⁴ Indeed, common sense dictates that it is impossible to determine whether circumstances have changed without some juxtaposition of a patient's previous position relative to his or her current position.²⁶⁵

Moreover, the court should establish a procedural protocol to guide the decision-making of the lower courts.²⁶⁶ The purpose of the review process is to ensure that changes in a patient's circumstances have not made a treatment plan obsolete.²⁶⁷ As a result, the issue of whether or not a patient's circumstances have changed substantially should be a threshold question of every treatment plan review.²⁶⁸

Rather than making a patient's current situation an issue in every review, however, it may be more efficient to delegate the decision via a rebuttable-presumption, burden-shifting mechanism.²⁶⁹ A proposed treatment plan could be presumed to be an accurate reflection of a patient's current circumstances unless it is challenged by the patient.²⁷⁰ If challenged, the patient would bear the burden of proving that his or her circumstances had significantly changed.²⁷¹ If a judge was satisfied that a patient's situation had changed significantly, the burden would then shift to the treating party to prove that the proposed plan was an accurate reflection of a patient's current circumstances.²⁷²

²⁶¹ See *Weedon*, 565 N.E.2d at 435 (holding that treatment plan review process necessary so that patient would not be treated against her will according to a plan that no longer accurately reflected her preferences); *supra* notes 159-70 and accompanying text.

²⁶² See *Brandon*, 677 N.E.2d at 120; *Weedon*, 565 N.E.2d at 435.

²⁶³ See *Brandon*, 677 N.E.2d at 120.

²⁶⁴ See *id.*

²⁶⁵ See *id.*

²⁶⁶ See *Roe*, 421 N.E.2d at 51, 56-57, 59 & n.19 (adding procedural safeguards).

²⁶⁷ See *Weedon*, 565 N.E.2d at 435.

²⁶⁸ See *id.*

²⁶⁹ See CROSS ET AL., *supra* note 151, at 6-23.1 to -24.

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² See *id.*

Regardless of the procedural system implemented, however, the trier of fact should be required to record findings concerning a patient's current situation in meticulous detail.²⁷³ The Supreme Judicial Court has reasoned that, because of the seriousness of substituted judgment decisions, documentation requirements should be more stringent than in ordinary findings of fact.²⁷⁴ Whereas the master may have determined in *Andrew* and *Elly* that the students' improvements did not rise to the level of a substantial change in circumstances, his conclusions and reasoning were not recorded in either decision.²⁷⁵ This result is inexcusable in light of the fact that the analysis of a patient's current situation is the core issue of the review process.²⁷⁶ The court should thus ensure that triers of fact explicitly justify their conclusions concerning changes in circumstances.²⁷⁷

The ultimate goal of a review of *Brandon's* "substantial change in circumstances" standard should be to decrease the discretion of the fact finder.²⁷⁸ The court needs to restrike a balance between the utility of the substituted judgment doctrine and protection from its abuse.²⁷⁹ As long as the scale remains tipped against procedural protections, the Massachusetts substituted judgment doctrine will be no better for 180 years of common law development than it was the day after Lord Eldon first crafted the legal fiction.²⁸⁰

CONCLUSION

The Supreme Judicial Court needs to restrike a balance between the substituted judgment doctrine's dangers and benefits. The doctrine originated as a legal fiction whereby a court could make gifts of a lunatic's property before the lunatic's death. To check the potential for abuse of the doctrine, however, judges based their decisions on evidence of a lunatic's preferences when lucid. After the doctrine was borrowed from the law of property and applied to the law of informed consent, jurisdictions disagreed about whether or not substituted judgment treatment decisions should be predicated upon evidence of an incompetent person's preferences when competent.

²⁷³ See *supra* notes 126-27 and accompanying text.

²⁷⁴ See *supra* notes 126-27 and accompanying text.

²⁷⁵ See *supra* notes 159-70 and accompanying text.

²⁷⁶ See *Weedon*, 565 N.E.2d at 435.

²⁷⁷ See *supra* notes 126-27 and accompanying text.

²⁷⁸ See *Willoughby*, 11 Paige Ch. at 260-61; BENTHAM, *supra* note 39, at 509.

²⁷⁹ See *supra* notes 181-223 and accompanying text.

²⁸⁰ See *supra* notes 233-61 and accompanying text.

Massachusetts adopted an approach that is not restricted by strict evidentiary requirements. The benefit of this approach is that it does not discriminate against incompetent persons who have never experienced a period of competency. Moreover, the doctrine's potential for abuse has been checked by procedural safeguards and the requirement that an incompetent person's current circumstances be considered when rendering substituted judgment decisions. In addition, a review process was instituted in recognition of the likelihood of a change in these circumstances over time. At the review stage, however, the determination of what constitutes a substantial change in circumstances has been left solely to the trier of fact. This provides insufficient protection from the potential for judicial abuse. The Supreme Judicial Court should consequently readjust the balance by providing guidance as to what constitutes a substantial change in circumstances.

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