

Who is Responsible for Rendering Health Care and  
Financial Decisions on Behalf of Residents?  
(Guardianships, Advanced Directives, POAs,  
Responsible Parties, and Family Members)

Presented by  
Jennifer E. Laratonda, Esquire  
John N. Kennedy, Esquire  
KENNEDY, PC  
Law Offices  
www.kennedypc.net

---

---

---

---

---

---

---

## Outline

1. Right to self-determination of one's own medical treatment.
2. Consent to Treatment.
3. Advance Directives/Living Wills.
4. Powers of Attorney.
5. Absence of Legal Documents.
6. Legal fallout after Terri Schiavo case.
7. New Jersey standards regarding substituted judgment.
8. Legal standard applied in determining a person is incapacitated.
9. Guardianships.

2

---

---

---

---

---

---

---

## Advance Directives

Federal Law: *Patient Self-Determination Act*

- Requires providers participating in Medicare to give information at admission regarding:
  - Patient's health care decision rights, and
  - Facility policies on health care decision making.

3

---

---

---

---

---

---

---

## Advance Directives

Federal Law requires providers to:

- Ask the patient if they have an advanced directive.
- Document existence of advance directive in medical record.
- Provide education to staff.
- Cannot discriminate based on advanced directives.

4

---

---

---

---

---

---

---

## Advance Directive

*New Jersey Advance Directive for Health Care Act ("Act")*

Recognizes the right of competent adults to plan ahead for health care decisions through the execution of advance directives.

5

---

---

---

---

---

---

---

## Advance Directive

*New Jersey Advance Directive for Health Care Act ("Act")*

Purpose:

To preserve the right to control decisions about one's own health care in the event a patient loses decision making capacity and is no longer able to participate actively in making his/her own health care decisions

6

---

---

---

---

---

---

---

## Advance Directive

*New Jersey Advance Directive for Health Care Act ("Act")*

"Advance directive" is a writing executed in accordance with the requirements of the Act. May include a proxy directive or an instruction directive, or both.

7

---

---

---

---

---

---

---

---

## Advance Directive

*New Jersey Advance Directive for Health Care Act ("Act")*

- "Instruction directive" - A writing providing instructions and direction regarding the declarant's wishes for health care in the event that the declarant subsequently lacks decision making capacity.
- "Proxy directive" - A writing which designates a health care representative in the event the declarant subsequently lacks decision making capacity.

8

---

---

---

---

---

---

---

---

## Advance Directive

*New Jersey Advance Directive for Health Care Act ("Act")*

- "Health care decision" is:
  - A decision to accept or to refuse any treatment, service or procedure used to diagnose, treat or care for a patient's physical or mental condition, including life-sustaining treatment.
  - A decision to accept or to refuse the services of a particular physician, nurse, other health care professional or health care institution, including a decision to accept or to refuse a transfer of care.

9

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

- No specific form or title of document required.
- Must be signed by two witnesses, or notarized by declarant, or sworn to under oath by declarant. A designated representative may not be a witness.
- May designate one or more alternate representatives, listed in order of priority.
- Providers have the responsibility to inquire about the existence of advance directives, and, if provider receives a copy, it must be made part of the medical record.

10

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

When does it become operative?

- Provided to the attending physician or healthcare institution, and
- It is determined the patient lacks capacity to make a particular health care decision.

11

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

Who makes the determination of incapacity to make healthcare decision?

The attending physician, in accordance with guidelines prescribed by the Act.

12

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

The determination shall:

- Be stated in writing,
- Include the attending physician's opinion concerning the nature, cause, extent, and probable duration of the patient's incapacity, and
- Be made a part of the patient's medical records.

13

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

- The determination must be confirmed by one or more physicians.
- The opinion of the confirming physician shall be stated in writing and made a part of the patient's medical records.
- Confirmation not required when lack of decision making capacity is clearly apparent, and attending physician and health care representative agree confirmation is unnecessary.

14

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

- If the attending or confirming physician determines patient lacks decision making capacity due to mental or psychological impairment or developmental disability, and neither physician has specialized training or experience in diagnosing such conditions, the determination must be confirmed by one or more physicians with appropriate specialized training or experience.
- The opinion of the confirming physician must be stated in writing and made a part of the patient's medical records.

15

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

A physician designated by the patient's advance directive as a health care representative may not make or confirm the determination of a lack of decision making capacity.

16

---

---

---

---

---

---

---

## Advance Directive

NJ:

- The attending physician must inform the patient, if he/she has any ability to comprehend, and the health care representative that:
  - (1) the patient has been determined to lack decision making capacity to make a particular health care decision;
  - (2) each has the right to contest this determination; and
  - (3) each may have recourse to the dispute resolution process established by the health care institution pursuant to section 14 of this act.
- Notice to the patient and the health care representative must be documented in the patient's medical records.

17

---

---

---

---

---

---

---

## Advance Directive

NJ:

- A determination of lack of decision making capacity under the Act is solely for the purpose of implementing an advance directive in accordance with the provisions of this act.
- The determination cannot be construed as a determination of a patient's incapacity or incompetence for any other purpose.

18

---

---

---

---

---

---

---

## Advance Directive

NJ:

A determination that a patient lacks decision making capacity shall be based upon, but need not be limited to:

Evaluation of the patient's ability to understand and appreciate the nature and consequences of a particular health care decision, including the benefits and risks of, and alternatives to, the proposed health care, and to reach an informed decision.

19

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

Revocation:

A declarant may reaffirm or modify either a proxy directive, or an instruction directive, or both. The reaffirmation or modification shall be made in accordance with the requirements for execution of an advance directive pursuant to section 4 of this act.

20

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

A declarant may revoke an advance directive, including a proxy directive, or an instruction directive, or both, by the following means:

(1) Notification, orally or in writing, to the health care representative, physician, nurse or other health care professional, or other reliable witness, or by any other act evidencing an intent to revoke the document; or

(2) Execution of a subsequent proxy directive or instruction directive, or both.

21

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

Designation of the declarant's spouse or domestic partner as health care representative is considered revoked upon divorce or legal separation

22

---

---

---

---

---

---

---

## Advance Directive

NJ:

- An incapacitated patient may suspend an advance directive by any of the means by which it can be revoked.
- An incapacitated patient who has suspended an advance directive may reinstate that advance directive by oral or written notification to the health care representative, physician, nurse or other health care professional of an intent to reinstate the advance directive.

23

---

---

---

---

---

---

---

## Advance Directive

NJ:

Reaffirmation, modification, revocation or suspension of an advance directive is effective upon communication to:

Any person capable of transmitting the information including the health care representative, the attending physician, nurse or other health care professional responsible for the patient's care.

■

24

---

---

---

---

---

---

---



## Advance Directive

NJ:

### Liability for Following Declaration

A health care representative shall not be subject to criminal or civil liability for any actions performed:

- In *good faith*
- In *accordance with the provisions of the Act* to carry out the terms of an advance directive.

25

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

A health care professional shall not be subject to criminal or civil liability or to discipline for any actions performed :

- In *good faith*
- In *accordance with the provisions of the Act*, any rules and regulations established by the Department of Health pursuant to the Act, and
- *Accepted professional standards* to carry out the terms of an advance directive.

26

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

A health care institution shall not be subject to criminal or civil liability for any actions performed:

- In *good faith* and
- In *accordance with the provisions of the Act* to carry out the terms of an advance directive.

27

---

---

---

---

---

---

---

---

## Advance Directive

NJ:

The withholding or withdrawing of life-sustaining treatment, when performed in good faith, and in accordance with the terms of an advance directive and the provisions of the Act, shall not constitute homicide, suicide, assisted suicide, or active euthanasia.

28

---

---

---

---

---

---

---

## Do Not Resuscitate/Do Not Hospitalize

NJ:

• Do not resuscitate order

- Physician's written order not to attempt cardiopulmonary resuscitation in the event the patient suffers a cardiac or respiratory arrest.
- Can also include wishes not to be hospitalized.
- Advanced directive not necessary for DNR/DNH to be valid.

29

---

---

---

---

---

---

---

## Do Not Resuscitate/Do Not Hospitalize

NJ:

- Only the physician, or nurse under physician's supervision, may issue a do not resuscitate order.
- Must be entered in writing in the patient's medical records prior to implementation of the order.
- Can be revoked at any time by patient by oral expression or destruction of the DNR Form; or by attending physician; or at the direction of the surrogate decision-maker.

30

---

---

---

---

---

---

---

## Powers of Attorney

NJ:

What is a Power of Attorney?

Written instrument by which the principal authorizes another individual or individuals to perform specified acts on behalf of the principal as the principal's agent.

31

---

---

---

---

---

---

---

## Powers of Attorney

NJ:

Types:

- Springing-From a specific time or event, such as disability or incapacity.
- Durable-Immediately exercisable and survives the principal's subsequent disability or incapacity.

32

---

---

---

---

---

---

---

## Powers of Attorney

NJ Durable Power of Attorney:

Contains words showing the intent that the agent's authority shall be exercisable notwithstanding the principal's subsequent disability or incapacity; and unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

33

---

---

---

---

---

---

---

## Powers of Attorney

NJ:

- A power of attorney must be:
  - In writing,
  - Signed in front of a notary or under oath.
- The agent must sign an Acknowledgement, unless it provides only for health care decision making.

34

---

---

---

---

---

---

---

## Powers of Attorney

Disability under NJ's Power of Attorney Statute:

- A principal shall be under a disability if he/she is unable to manage his/her property and affairs effectively
- An attorney-in-fact shall be under a disability if the attorney-in-fact is unable to exercise the authority conferred by the power of attorney effectively.

35

---

---

---

---

---

---

---

## Powers of Attorney

NJ:

The agent has no duty or obligation to affirmatively perform the powers specified, they just have the authority to exercise those powers.

36

---

---

---

---

---

---

---

## Powers of Attorney

NJ:

- Although the agent has no duty to act, once he/she does act, or if he/she signs an Acknowledgement, the agent has a fiduciary obligation to the principal:
  - Must exercise the powers to the benefit of the principal.
  - Must keep principal's assets separate from those of the agent.
  - Must keep records of all actions.

37

---

---

---

---

---

---

---

## Powers of Attorney

The document will identify the financial powers delegated to the agent. For example:

- To engage in real property transactions.
- To engage in personal property transactions.
- To engage in banking and financial transactions.
- To borrow money.

38

---

---

---

---

---

---

---

## Powers of Attorney

- Can have more than one agent and can have successor agents.
- Need to read what the POA documents states regarding powers delineated.
- Need to read what the POA documents states regarding the number and responsibilities of multiple agents.

39

---

---

---

---

---

---

---

## Powers of Attorney

NJ:

Relation of Agent to Court Appointed Guardian

- Court Orders for guardianship typically revoke Power of Attorney.
- May be exceptions if "limited" guardian appointed.

40

---

---

---

---

---

---

---

## Powers of Attorney

NJ POA Liability:

- No liability for a person acting:
  - In good faith
  - In reliance on the terms of the POA

41

---

---

---

---

---

---

---

## Conservatorships

NJ Specific:

- Court-ordered substituted decision-making on behalf of an individual who, by reason of advanced age, illness or physical infirmity, is unable to care for or manage his property or, is unable to provide for himself or others dependent upon him for support.
- "Conservatee" - A person who has not been judicially declared incompetent but who by reason of advanced age, illness or physical infirmity, is unable to care for or manage his property or has become unable to provide for himself or others dependent upon him for support;
- "Conservator" - A person appointed by the court to manage the estate of a conservatee.

42

---

---

---

---

---

---

---

## Conservatorships

According to NJ Statute:

- Limited to financial matters.
- Can be sought by the individual needing assistance.
- Cannot be established if that individual objects to the appointment.
- Conservatee can later petition the court to have the conservator removed.

43

---

---

---

---

---

---

---

## Conservatorships

According to Statute, action may also be brought by:

- Spouse;
- Adult children (If none, then the person or persons closest in degree of kinship to the conservatee);
- Any person having concern for the financial well-being of the conservatee;
- A public agency or a social services official of the State or of the county in which the conservatee resides;
- Chief administrator of a State licensed hospital, school or institution in which the conservatee is a patient ;
- Chief administrator of a non-profit charitable institution in which the conservatee is a patient.

44

---

---

---

---

---

---

---

## Conservatorships

Hearing:

- Court appoints counsel for conservatee .
- Conservatee is present in Court if able to attend.

45

---

---

---

---

---

---

---

## Conservatorships

According to NJ Statute:

- If the court appoints a conservator, it shall do so in the following order of priority:
  - Person or financial institution nominated or designated by the conservatee;
  - Spouse;
  - Conservatee's adult children, or if none, the person or persons closest in degree of kinship
  - Some other proper person or financial institution as the court shall determine.
- The court may, in its discretion, deviate from this order of priority if a potential conservator is unable or unwilling to serve or for some other good cause.

46

---

---

---

---

---

---

---

---

## Conservatorships

- Bond can required depending on needs of estate and judge's discretion.
- Conservator must file annual accounting with Court.
- Conservator can maintain status once guardian is appointed, depending upon type of guardianship, purposes for which guardian was appointed to serve, language in Order appointing guardian.

47

---

---

---

---

---

---

---

---

## Conservatorships

Liability:

- Contract:  
A conservator is individually liable if he fails to reveal his representative capacity and identify the estate in the contract.
- A conservator is individually liable for obligations arising from control of property for any act or omission committed in the course of administration of the estate only if he is personally at fault.
- If the exercise of power concerning the estate is improper, the conservator is liable to the conservatee or interested persons for damage or loss resulting from breach of his fiduciary duty.

48

---

---

---

---

---

---

---

---



## Conservatorships

### NJ Power of Attorney v. NJ Conservatorship

- Power of Attorney's roles and responsibilities are specifically spelled out in POA document. They make decisions in these specific areas according to the best interests of the principal.
- Conservators have more general decision-making power over estate and financial matters, and they make substituted judgments on behalf of the Conservatee.
- Powers of Attorney are voluntary and initiated and executed by the principal
- Conservatorships can be initiated by the Conservatee or others, and must be appointed by the Court.

49

---

---

---

---

---

---

---

---

## Conservatorships

### NJ Conservatorship v. NJ Guardianship

- For guardianship, the ward must be incapacitated. For conservatorship, no incapacity is necessary.
- Guardians can be appointed to make substituted decisions for the wards financial, personal, and medical affairs. Conservatorships deal with financial issues only.
- The spectrum of a conservator's power is not as broad as that of a guardian. (i.e., title transfer from incapacitated to guardian of incapacitated.)

50

---

---

---

---

---

---

---

---

## Absence of Legal Documents

### Constitutional Rights:

- Federal Due Process liberty interest in refusing unwanted medical treatment.
- U.S. and New Jersey Constitutional right to privacy in making important personal decisions.

51

---

---

---

---

---

---

---

---

## Absence of Legal Documents

### Common Law

- Patient is free to accept or reject treatment.
- Other than in an emergency, medical treatment may not be given without the informed consent of the patient.
- Provision of medical treatment that exceeds the scope of the patient's consent may be actionable in tort.

52

---

---

---

---

---

---

---

## Absence of Legal Documents

### Common Law

- No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person.

53

---

---

---

---

---

---

---

## Absence of Legal Documents

### Rights Not Absolute:

- Right to self-determination as to one's own medical treatment is not absolute.
- A compelling state interest will override the individual's rights, such as the interest in prevention of suicide, protection of third parties, and the integrity of the medical profession.

54

---

---

---

---

---

---

---

## Absence of Legal Documents

Competent Resident/Patient:

- The state's interest in the preservation of life does not outweigh a competent individual's right to self-determination.
- Competent persons generally are permitted to refuse medical treatment, even at the risk of death.

55

---

---

---

---

---

---

---

## Absence of Legal Documents

Right to Self-Determination and an Incompetent Patient:

- Rights survive incompetency.
- Withdrawal of life-sustaining treatment of a person in a persistent vegetative state: Courts have held if it can be definitively determined by clear and convincing evidence that it would have been the patient's desire not to receive the treatment, then the patient's right to self-determination outweighs any state interest and the treatment may be withdrawn.

56

---

---

---

---

---

---

---

## Absence of Legal Documents

Where an incapacitated person's wishes are not clearly expressed, it is a more difficult question.

In NJ:

- "Substituted Judgment" of family/decision-maker.
- If not known or cannot be predicted, then "Best Interests" standard

57

---

---

---

---

---

---

---

## Absence of Legal Documents

NJ:

Substituted Judgment is used to extrapolate what course of medical treatment the patient would choose, considering:

- The patient's personal value system for guidance,
- The patient's prior statements about and reactions to medical issues,
- All the facets of the patient's personality that the decision-maker is familiar with - with particular reference to his or her relevant philosophical, ethical, and religious values.

58

---

---

---

---

---

---

---

---

## Absence of Legal Documents

NJ:

Best Interests Standard:

Decision-maker required to make a decision in the best interests of the patient, considering the totality of the circumstances.

- Medical evidence
- Age
- Life-expectancy
- Prognosis
- Subsequent quality of life

59

---

---

---

---

---

---

---

---

## Absence of Legal Documents

NJ:

- No order of priority of decision makers in NJ for end-of-life decisions.
- Limited to consent for medical research, there is an established order of priority for decision-makers:
  - Spouse or civil union partner
  - Adult child
  - Custodial parent
  - Adult sibling
  - Nearest adult relative

60

---

---

---

---

---

---

---

---

## Absence of Legal Documents

The order of priority for decision-makers has not been established by statute or regulation in NJ. Courts have references it in their opinions, but there has been no particular precedent set.

61

---

---

---

---

---

---

---

## Absence of Legal Documents

So how do the Courts decide in NJ?

- If there are close family members, decisions are left to the family members. Normally those family members close enough to make a substituted judgment would be a spouse, parents, adult children, or siblings.
- If family members do not agree, there are ethics committees and mediation processes available in hospitals for such issues.
- If family members still cannot agree, a guardianship is required.
- If the family members contest the guardianship or the decision the guardian is making, litigation ensues.

62

---

---

---

---

---

---

---

## Terry Schiavo: The History Leading up to the Debate

- 11/1984: Terri Schindler and Michael Schiavo marry.
- 2/1990: At the age of 27, Terri Schiavo suffers cardiac arrest and falls into a coma for two and a half months.
- 5/1990: Terri Schiavo out of coma and in persistent vegetative state.
- 6/1990: Michael Schiavo appointed guardian.

63

---

---

---

---

---

---

---

### How did Michael Schiavo become Terri's Guardian?

- No advance directive.
- No living will.
- Michael Schiavo filed for guardianship.
- The Schindlers did not contest Michael Schiavo's petition.
- Court appointed Michael Schiavo as guardian of Terri's person and estate.

64

---

---

---

---

---

---

---

### What if the Schindlers had Contested Michael Schiavo's Petition for Guardianship?

#### IN FLORIDA:

- Court appoints a surrogate decision-maker to make decisions based on how the incapacitated person would have decided were she able to do so.
- Court favors spouses, the theory being a person chooses a spouse to care for her and with whom to share her most intimate beliefs.
- Court makes a determination regarding spouse's fitness to make decisions for the incapacitated person.
- Court decided Michael Schiavo was fit.

65

---

---

---

---

---

---

---

- 7/1990: Michael Schiavo moves in with Schindlers and Terri in Schindlers' home. Soon thereafter, Terri is admitted into a nursing facility given her extraordinary need for care.
- 8/1992-11/1992: Two years after the cardiac arrest, Terri receives \$1 million in damages in several lawsuits for medical malpractice.

66

---

---

---

---

---

---

---

- 2/1993: Schindlers request a portion of Terri's malpractice damages to be used for rigorous testing of Terri's condition. Michael Schiavo accuses Schindlers of ulterior motives.
- 7/1993: Michael Schiavo blocks Schindlers' access to Terri's funds and any of Terri's medical information. Michael suggests the removal of Terri's feeding tube. Schindlers object and petition Court to remove Michael Schiavo as guardian. Court dismisses lawsuit after appointing guardian ad litem, who reports Schiavo has acted appropriately as guardian.

67

---

---

---

---

---

---

---

---

### Removal of Life-sustaining Treatment

- 1/2000: Michael Schiavo petitions Court to remove feeding tube. At trial for removal of the tube, Michael Schiavo testifies Terri expressed a wish not to be kept alive on life support.

Schindlers testify Terri was a devout Catholic who would never desire to act contrary to her religious beliefs.

68

---

---

---

---

---

---

---

---

### What was the Effect of Terri's Alleged Expressed Wishes?

IN FLORIDA:

Court will err on the side of life, unless:

- Clear and convincing evidence of a desire not to be sustained.
- After testimony from both parties, Court found clear and convincing evidence of Terri's wish not to be sustained.

69

---

---

---

---

---

---

---

---

- 4/2001: Schindlers file suit against Michael Schiavo alleging Schiavo committed perjury regarding Terri's wish not to be sustained. Schindlers accuse Michael Schiavo of abusing Terri and allege Michael Schiavo wants to discontinue Terri's life support to inherit Terri's estate.

70

---

---

---

---

---

---

---

---

### June 2001 – March 2005

- Judge Greer hears the case at least 7 more times at the trial level.
- U.S. District Court for the 2<sup>nd</sup> District hears the case at least 10 more times.
- The parties go to mediation once.
- Florida Supreme Court hears the case 3 times.
- United States Court of Appeals for the 11<sup>th</sup> Circuit hears the case at least 4 times.
- United States Supreme Court hears the case 3 times.
- Terri's feeding tube is removed and reinserted 3 times.

71

---

---

---

---

---

---

---

---

### Governor Jeb Bush

- 10/7/03: Gov. Jeb Bush files federal court brief supporting Schindlers' effort to prohibit the removal of Terri's feeding tube.
- 10/20/03: Florida House of Representatives passes "Terri's Law," which would allow the Governor to issue a one-time stay in certain cases.
- 10/2003: Michael Schiavo files suit in the Florida Supreme Court to have Terri's Law declared unconstitutional.
- 9/2004: Florida Supreme Court finds Terri's Law unconstitutional.

72

---

---

---

---

---

---

---

---



## Individual State Senators

- 11/2003: Two Florida Senators introduce legislation requiring persons in a persistent vegetative state and without a living will to be administered a feeding tube regardless of testimony about the patient's beliefs and desires.
- 4/2004: The legislation is withdrawn.

73

---

---

---

---

---

---

---

## Florida Senate

- 3/2005: Florida Senate Judiciary Committee passes a bill providing:

A feeding tube cannot be removed if:

- 1) Solely to end the life of a person in a persistent vegetative state.
- 2) A conflict exists between those who could be adjudicated proxy decision-makers.
- 3) No advance directive.

3/2005: The bill is voted down by the Senate.

74

---

---

---

---

---

---

---

## United States Congress

- 3/2005: U.S. Congress passes a bill allowing specific individuals to request relief through private legislation if and when all legal remedies are exhausted.
  - The President signs the bill.
  - Congress subpoenas Michael Schiavo for an adjudication.
  - A Federal District Court judge denies the Senate's decision that the tube should be reinserted.

75

---

---

---

---

---

---

---

### March 31

- 3/31/2005: Terri Schiavo dies after several attempts by the Schindlers to have the last Order to remove the tube reversed.
- 3/31/1976: New Jersey Supreme Court allows for coma patient Karen Quinlan to be disconnected from her respirator. Karen lived until 1985 in a persistent vegetative state.

76

---

---

---

---

---

---

---

### April 2005

- Michael Schiavo cremates Terri's body against the wishes of the Schindlers.
- Despite Michael Schiavo's promise to bury Terri in Pennsylvania, the home of Terri's family, Michael Schiavo buries Terri's remains in Clearwater, Florida.

77

---

---

---

---

---

---

---

### Terri's Grave Marker in Clearwater, Florida Reads:

SCHIAVO  
Theresa Marie  
Beloved Wife  
  
Born  
December 3, 1963  
  
Departed This  
Earth  
February 25, 1990  
  
At Peace  
March 31, 2005  
  
I Kept My Promise

78

---

---

---

---

---

---

---

### Post Schiavo in New Jersey

- There is much discussion among attorneys and lawmakers, but there is no pending legislation.
- Common law (Still based on *Quinlan* decision):
  - Court makes determination regarding whether to consent to or deny the treatment in question based on evidentiary evidence and testimony regarding;
    - Substituted Judgment
    - Best Interests of patient
  - Court appoints a guardian for the specific purpose of the medical decision, through an Order directing the guardian to consent to or deny the treatment in question (Guardian *ad litem*).

79

---

---

---

---

---

---

---

---

### Post Schiavo in New Jersey

- In 2006 and 2009, there were bills introduced into the NJ legislature requesting there be language added to the advanced directives statute requiring a health care representative make decisions based on:
  - Substituted Judgment, and if insufficient evidence, then
  - Best Interest of the patient, and specifically in accordance with the patient's religious beliefs.
- This change in the statute has not been adopted.

80

---

---

---

---

---

---

---

---

### Guardianships

#### Standard of Incapacity in NJ:

- An individual is incapacitated if he/she is impaired by reason of mental illness or mental deficiency to the extent that he or she lacks sufficient capacity to govern him/herself and manage his/her affairs.
- A person may be unable to govern him/herself and manage his/her personal and financial affairs, yet retain capacity to make decisions in limited situations.

81

---

---

---

---

---

---

---

---

## Guardianships

Who acts as guardian in NJ?

- Office of Public Guardian (OPG)
- Guardianship association/Private Guardian.
- Family member.
- Other Court-appointed individual.

Depends on aspects such as purpose, available parties, who is willing, and type.

82

---

---

---

---

---

---

---

---

## Guardianships

Types of Guardianships in NJ:

- Plenary Guardian of the Person and/or Estate
- Limited Guardian of the Person and/or Estate
- Temporary Guardian
- Special Medical Guardian

83

---

---

---

---

---

---

---

---

## Guardianship Type Depends on Purpose:

For example:

- Authority to establish Medicaid eligibility
- Protection of resident's resources due to suspected misappropriation
- Emergency action needed to prevent harm to patient
- Medical decision-maker

84

---

---

---

---

---

---

---

---

## Guardianships

Plenary Guardian of the Person and/or Estate -  
Permanent guardian for fully incapacitated individual to handle all aspects and decision regarding estate and person.

- Office of the Public Guardian appointed for elderly adults over the age of 60.
- Competent, capable family member or friend can be appointed.
- Private guardian or association can be appointed for those under the age of 60.

85

---

---

---

---

---

---

---

## Guardianships

Procedure to Obtain Plenary Guardianship:

- Signed certifications from two (2) doctors (or one doctor and one psychologist)
- Complaint
- Court-appointed counsel for alleged incapacitated
- Notice to interested parties
- Hearing

86

---

---

---

---

---

---

---

## Guardianships

Contents of the Complaint for Plenary Guardianship:

- Alleged incapacitated identified.
- Condition of alleged incapacitated, allegation of incapacity.
- Financial assets and income of alleged incapacitated.
- The need for the guardian.
- Family members and other interested parties identified.
- Request for proposed guardian.

87

---

---

---

---

---

---

---

## Guardianships

Hearing for Plenary Guardianship:

- Generally a short proceeding consisting of :
  - 1) Counsel for facility
  - 2) Court-appointed counsel
  - 3) Proposed guardian, if other than OPG
  - 4) Family members or other interested party contesting guardianship, if any
- Alleged incapacitated typically excused by physician statement.

88

---

---

---

---

---

---

---

## Guardianships

Plenary Guardianship:

- Guardian required to post bond unless waived by the court.
- The facility and counsel for the facility are NOT the proposed guardians.

89

---

---

---

---

---

---

---

## Guardianships

Limited Guardian of the Person and/or Estate  
- Guardian for incapacitated person with the ability to handle certain aspects and activities of life or daily living, but who needs a person with authority to handle certain financial or personal aspects.

- Family member or friend can be appointed.
- Private guardian or guardianship association can be appointed.

90

---

---

---

---

---

---

---

## Guardianships

Limited Guardian:

- Infrequently used due to vague understanding of intent, purpose, standards for incapacity with limited abilities.
- Judges, surrogates, and attorneys discussing solutions for delineating clearer details regarding evidentiary submissions, language in physicians certifications, specific purposes for which guardian is being requested.

91

---

---

---

---

---

---

---

## Guardianships

Temporary Guardian - Guardian appointed for a specific time-limited purpose or decision, or for decisions or affairs needing be addressed prior to hearing for plenary guardianship.

- Family member, friend can be appointed, private guardian or guardianship association are frequently appointed.

92

---

---

---

---

---

---

---

## Guardianships

Examples for need for temporary guardian:

- Suspected financial misappropriation by relative or friend pending permanent guardianship proceedings, requiring management of funds/assets.
- Protection of resident engaging in dangerous activities such as elopement from facility, requiring transfer to dementia unit.
- One-time decision to be made regarding health issue or treatment.

93

---

---

---

---

---

---

---

## Guardianships

Special Medical Guardian - Emergency guardian appointed for the purpose of making emergency decision specifically for the purpose of preventing irreparable medical harm to the incapacitated. Some procedural rules may be relaxed to allow for expeditious appointment.

- Family member, friend can be appointed, private guardian or guardianship association are frequently appointed.

94

---

---

---

---

---

---

---

## Guardianships

Special Medical Guardianship procedure differs from others:

- Complaint filed in Chancery Division/Equity Part (Other guardianship complaints filed in Probate Part).
- No need for inclusion financial information in complaint.
- Some procedural and evidentiary rules are relaxed, i.e.:
  - Timelines are significantly decreased. Can be in front of judge within several hours to several days.
  - Time required for notice to interested parties and court-appointed counsel can be shortened.
  - Court may accept only one (1) physician's certification instead of the typically required two (2).

95

---

---

---

---

---

---

---

## Guardianships

Examples of need for Special Medical Guardian:

- Feeding tube must be inserted within days.
- Cancerous mass must be removed within days/weeks.
- Regular dialysis must be started within days/weeks to save patient's life.
- Decision must be made to undergo immediate life-saving treatment or place patient on hospice.

96

---

---

---

---

---

---

---



KENNEDY, PC  
Law Offices  
P.O. Box 5100  
Harrisburg, PA 17110-0100  
Phone: (717) 233-7100  
(877) 833-7100  
Fax: (717) 233-7050  
[jlratonda@kennedypc.net](mailto:jlratonda@kennedypc.net)  
[jkennedy@kennedypc.net](mailto:jkennedy@kennedypc.net)  
[www.kennedypc.net](http://www.kennedypc.net)

---

---

---

---

---

---

---

---