

THROUGH THE GUARDIANSHIP LOOKING GLASS: A PERSONAL PERSPECTIVE ON CONFLICTING COMMITMENTS

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The imposition of a guardianship exacts an extraordinary toll on both the life of the person subjected to the guardianship, curtailing fundamental freedoms and basic civil liberties, and the life of the guardian, redirecting to that guardian the overwhelming burden of taking on a decision-making role that should ordinarily belong to another human being. This Article will examine the legal framework governing the decision-making role of a guardian and suggest that, while many guardianship statutes propose to compel a guardian to make decisions in line with the known desires of a ward, few guardianship statutes are flexible enough to account for wishes of wards that fall outside societal norms. Thus, while recognizing the delicate balance of individual safety and well being with the innate human interest in self-determination, this Article posits that it is incumbent upon society to deeply examine the guardianship regime, its goals and the means by which it seeks to achieve them. It offers a discussion of guardianship law and suggests that states must offer greater support and guidance to guardians seeking to honor the desires of their wards while acting in compliance with decision-making standards.

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I. Introduction

Behind every story of guardianship is the rich life of an individual, whose very existence differentiates that person from any other who has ever or who will ever walk this Earth. One such individual is John G., the subject of a guardianship over his person and property. Currently residing in a nursing home along the western edge of the Atlantic Ocean, this former sailor who once made a solo voyage from New York to the Canary Islands now wakes each morning to a view of the waters upon which he once sailed. Yet struck as he is with Alzheimer's disease,¹ he does not know that. He spends his days shuffling along a fluorescent-lit hallway, shaking hands with the nursing staff, rarely speaking, meeting the eyes of loved ones who visit with a searching curiosity. It can be easy to forget that he was not always this one dimension, yet it is important to honor the life he lived and the view of himself that he once had. In fact, most guardianship statutes demand it.

John G. is a real person—my father and now, my ward. This Article will explore my experience as a guardian for someone I know very well and the central dilemma I confront, namely that the unconventional decisionmaking and eccentric lifestyle that was a well-documented and empirically validated hallmark of my father's existence throughout his lucid life, now fall outside of my powers as his surrogate decisionmaker. As a result, of the many costs of the imposition of

1. Vaughn E. James, *No Help for the Helpless: How the Law Has Failed to Serve and Protect Persons Suffering from Alzheimer's Disease*, 7 J. HEALTH & BIOMEDICAL L. 407, 410 (2012), available at <https://heinonlineorg.proxy2.library.illinois.edu/HOL/Page?handle=hein.journals/-jhbio7&div=24&id=&page=&collection=journals> [hereinafter James] (stating Alzheimer's disease, though widely studied since 1904, when Dr. Alois Alzheimer identified it, remains enigmatic); *Id.* at 410–11 (explaining doctors know that Alzheimer's disease is a physical attack on a patient's brain through the development of built-up plaques and tangles, but the course of the disease in an individual patient is unknowable as is the cause of the disease, though suspects include "genetics, aging, head injury, cardiovascular disease, and strokes"); *Id.* (stating perhaps most enigmatic of all, any diagnosis of Alzheimer's disease during the patient's life is merely tentative—only a "post mortem examination of a deceased person's brain" can provide a diagnosis with certainty); see also, *How Is Alzheimer's Disease Diagnosed?*, NAT'L INST. ON AGING, <https://www.nia.nih.gov/health/how-alzheimers-disease-diagnosed> (last updated Feb. 12, 2020); Betsy Grey, *Aging in the 21st Century: Using Neuroscience to Assess Competency in Guardianships*, 2018 WIS. L. REV. 735, 756 (2018), available at <https://repository.law.wisc.edu/s/uwlaw/media/82867> [hereinafter Grey] (stating "a diagnosis of [Alzheimer's] can only be verified accurately in autopsy," where "post-mortem [brains] are characterized by the presence of (1) amyloid plaques; (2) neurofibrillary tangles (NFTs); and (2) neurodegeneration").

a guardianship, the starkest is that guardianship has cost my father the most dearly-held aspect of humanity: his individuality.

Section II of this Article will discuss guardianship law generally, including theory, historical foundations, the fiduciary obligations that guide a guardian's decision-making role, and case law. Section III of this Article will offer a case study of my father, John G., contrasting the wide latitude he had to make unconventional decisions as an autonomous being with the relatively narrow decision-making freedom I have as his guardian, the result of which is that I am not able to fully step into my father's unconventional shoes. Section IV will offer suggestions to better account for the disconnect between the universe of options available to autonomous individuals and the narrowing of options when a guardian takes on the decision-making role.

II. Law-Based Controls and Directives for Guardians

A. Guardianship, Generally

Among a constellation of state powers is the power to protect the wellbeing of citizens who have been determined to be incapable of caring for themselves.² Upon making such a determination, the state may terminate such a citizen's "personhood" and supplant that citizen with a guardian who operates as a surrogate decisionmaker.³ It is a power "inherent in the supreme power of every state . . . exercised in the interest of humanity"⁴ and under the state's *parens patriae* power, or

2. Nicole M. Arsenault, *Start with a Presumption She Doesn't Want to Be Dead: Fatal Flaws in Guardianships of Individuals with Intellectual Disability*, 35 L. & INEQ. 23, 32 (2017), available at <https://pdfs.semanticscholar.org/b352/01f25d136fb3f44e62df9125088c51f47e75.pdf> [hereinafter Arsenault] ("There is no national procedure for appointment of a guardian; the practice belongs to the individual states to define."). Only a state court has the power to rule on guardianship applications. See, e.g., *In re Application of Joseph Meisels (Grand Rabbi Moses Teitelbaum)*, 10 Misc. 3d 659; 807 N.Y.S. 2d 268 (Sup. Ct. Kings Cty., 2005) (holding that a Bet Din religious tribunal, which is similar to arbitration, cannot rule on a guardianship matter because guardianship decisions involve "important civil liberties protected by due process" and requiring a hearing with rules of evidence).

3. Jennifer J. Monthie, *The Myth of Liberty and Justice for All: Guardianship in New York State*, 80 ALB. L. REV. 947, 949-50 (2016), available at http://www.albanylawreview.org/-Articles/vol80_3/947%20Monthie.pdf [hereinafter Monthie].

4. *Id.* at 950.

“parent of the country,” with the assumption that “the state will act as a loving and caring parent.”⁵

Perhaps because of its benevolent underpinning, the power to appoint a guardian is largely uncontroversial in American jurisprudence and in public opinion, particularly compared to the “strict procedural safeguards and . . . formal adversarial proceedings” that protect an individual from the state’s exercise of its police power.⁶ Born of a concern that the state might use its police power to the manifest detriment of an individual, potentially infringing arbitrarily upon the rights, property, and liberties of the individual, there is robust public, private, and judicial oversight of police powers.⁷ Yet the very deprivation of rights, property, and liberties that merits strict oversight of a state’s police power is the same deprivation that accompanies the imposition of a guardianship. In fact, a “typical ward has fewer rights than the typical convicted felon.”⁸ Indeed a convicted felon, unlike a typical ward, can, for example, choose whom he marries.⁹ Further, while a felon’s deprivation of liberty lasts, in most cases, for a discrete period of time, a ward’s deprivation of liberty most often lasts in perpetuity.¹⁰

5. PETER DANZIGER, REPRESENTING PEOPLE WITH DISABILITIES § 10.2 (3d ed. 2007) (In fact, when parents are appointed as guardians for a child, the parents no longer speak as “parents,” but “as the state.”) [hereinafter DANZIGER]; Arsenault, *supra* note 2, at 29.

6. Neil B. Posner, *The End of Parens Patriae in New York: Guardianship Under the New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603, 606 (1996), available at <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1540&context=mulr> [hereinafter Posner].

7. *Id.*

8. Kristin Booth Glen, *The Perils of Guardianship and the Promise of Supported Decision Making*, 48 CLEARINGHOUSE REV. 17, 17 (2014) (citing CHAIRMAN OF SUBCOMM. ON HEALTH AND LONG-TERM CARE OF H. SELECT COMM. AGING, 100TH CONG., ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE 4 (Comm. Print 1988)) [hereinafter Glen].

9. Joan L. O’Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 STETSON L. REV. 687, 694 (2002), available at http://www.supporteddecisionmaking.org/sites/default/files/role_of_the_attorney.pdf.

10. Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 507 (2016), available at <https://ir.lawnet.fordham.edu/ulj/vol43/iss3/2/> (“It is common for guardians to be appointed for an indefinite duration,” and once in place, guardianships are difficult to modify or terminate.); Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 85 (2015), available at <http://theelderlawjournal.com/wp-content/uploads/2015/08/Cassidy.pdf> (explaining only “one-fifth of states” require a guardian to work with a ward “to regain capacity or to terminate the protective arrangement”); Eleanor Crosby Lanier, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring*

Guardianship “is, in one short sentence, the most punitive . . . penalty that can be levied against an American citizen, with the exception, of course of the death penalty.”¹¹ Given the attendant deprivations to the ward, the vast responsibilities placed upon the guardian, and notwithstanding the most benevolent intentions, guardianship law merits close examination.

B. Historical Foundations

Guardianship has existed in the United States since the 18th century,¹² arriving most directly via the English law’s statute of *de praerogativa regis*, which recognizes a sovereign’s duty to protect the person and property of mentally incompetent citizens under its *parens patriae* power.¹³ But the origins of guardianship reach even farther back and thus (to what would be the great delight of John G., the subject of the next section of this Article), this section includes a brief discussion of Greco-Roman history.¹⁴

Ancient Greeks employed the earliest known version of guardianship, using the *potestas* power to appoint an incompetent individual’s family member as a surrogate decisionmaker of first resort and the government to act as a surrogate decisionmaker of last resort.¹⁵ The appointment was made automatically, without due process or a hearing.¹⁶

The earliest historical foundations of modern guardianship law, the process by which guardians are chosen, and the responsibilities they undertake, are found in Cicero’s ancient Rome.¹⁷ Roman law recognized two types of guardianship. The first was a *tutorship* or *tutela*, which was concerned with two classes of individuals over whom the

Adult Guardianship Orders, 36 BUFF. PUB. INTEREST L.J. 155, 166 (2017) [hereinafter Lanier].

11. See Glen, *supra* note 8.

12. See *id.*

13. Posner, *supra* note 6, at 604.

14. The subject of the case study in the next section, John G., was a Roman history enthusiast and the author’s father. The author remembers fondly one childhood visit with her parents to the double-arched Roman Aqueduct that still traverses the skies above Segovia, Spain. The author christened one such arch her “glove parlor” and, despite the supplications of her mother through a frigid January, would only put on her gloves under that arch. Upon the family’s return to New York, her father, John G., curated a stamp collection of Roman ruins throughout Europe and presented it to the author.

15. See DANZIGER, *supra* note 5, at § 10.4.

16. See *id.*

17. Posner, *supra* note 6, at 604; see also DANZIGER, *supra* note 5, at § 10.5.

state might impose a guardian or *tutor*: women and persons who had not yet undergone puberty.¹⁸ The second type of guardianship was a *curatorship* or *curatela*, which was concerned with individuals between the ages of fourteen and twenty-five.¹⁹ A *curatorship* could extend beyond the age of twenty-five to “insane persons, spendthrifts, and other naturally incapable persons.”²⁰ Remnants of both *tutorship*—though guardianship of women exclusively by virtue of their gender has long ceased to exist—and *curatorship* continue to exist as the foundations to guardianships over minors and the incompetent. Furthermore, these remnants arrived in American jurisprudence via the *parens patriae* power of the English King in the Court of Chancery and were adopted in the courts of equity in the United States, which took the place of the English King.²¹

Even today’s guardianship gold standard,²² New York’s Mental Health and Hygiene Law Article 81 (“Article 81”),²³ so considered for

18. Charles P. Sherman, *The Debt of the Modern Law of Guardianship to Roman Law*, 12 MICH. L. REV. 124, 128 (1913–14), available at https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5447&context=fss_papers [hereinafter Sherman] (explaining a *tutela* guardianship of women was originally perpetual; as the Roman jurist Gaius stated, “[w]hatever their age and notwithstanding their marriage, if they were females, according to our ancestors, even women who have reached their majority, on account of their levity of disposition, require to be kept in *tutela*.”) (Emphasis added).

19. *Id.* at 129.

20. *Id.* at 130.

21. *See id.* at 131.

22. Patricia C. McManus, *A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, 36 SETON HALL L. REV. 591, 605 (2005), available at <https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1171&context=shlr> [hereinafter McManus].

23. Article 81 was enacted in 1992, with the New York State legislature seeking to provide greater “flexibility” in meeting “the needs of persons with incapacities” through “the least restrictive form of intervention.” N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2017). Under Article 81, a court shall only appoint a guardian for personal needs or property management where there is clear and convincing evidence that a person is likely to suffer harm because “(1) the person is unable to provide for personal needs and/or property management; and (2) the person cannot adequately understand and appreciate the nature of such inability.” *Id.* § 81.02(b)(1-2). It is noteworthy that Article 81 does not require medical evidence or any diagnosis; rather, a court is to consider “the functional level and functional limitations of the person.” *Id.* § 81.02(c); *see also In re Guardianship of Kustka*, 163 Misc. 2d 694, 699 (Sup. Ct. Queens Cty., 1994) (emphasis in original) (“There is nothing in Article 81 . . . which mandates medical testimony in a guardianship proceeding. However, even when medical testimony might be necessary in certain cases under Article 81, an individual’s disease or underlying medical condition is only one factor to be considered by the Court since the focus of Article 81 is on one’s *functional* limitations. Functional limitations of an individual can sometimes be determined without the need for

its clear delineation of due process protections,²⁴ its concept of the “least restrictive alternative,” and its focus on the ward’s “functional level and decisional capacity,”²⁵ bears striking resemblance to the guardianship practices of ancient Rome.²⁶ Bringing the past straight into the modern day, Article 81 maintains the five core duties common to *tutors* and *curators* in ancient Rome. Those five duties, together with today’s corollaries are:

- (1) In ancient Rome, every guardian was required to “give security for the faithful performance of his duties.”²⁷ Likewise, under Article 81, before a guardian “enters upon the execution of his or her duties, the court may require or dispense with the filing of a bond.”²⁸
- (2) In ancient Rome, a guardian “must make an inventory of the property of his ward.”²⁹ Similarly, under Article 81, within ninety days of his or her appointment, a guardian must submit to the court a “verified and complete inventory of the property and financial resources over which the guardian has control.”³⁰
- (3) A guardian in ancient Rome was personally liable and subject to removal for “fraud, neglect, or waste of the ward’s property.”³¹ Likewise, a “guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person”³² and a guardian is liable for “improper use of a ward’s estate, waste committed or suffered by him or her, as well as for the conversion of the ward’s property to his or her own use.”³³
- (4) A guardian in ancient Rome had “charge of the person as well as the property of the ward.”³⁴ Similarly, under Article 81, a court will specify the powers necessary to provide for personal

medical testimony. It is often possible for a non-medical person to determine whether or not an individual is capable of dressing, shopping, cooking, managing their assets, and performing other similar activities.”)

24. Karen Andreasian et al., *Revisiting S.C.P.A. 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. REV. 287, 300 (2015), available at <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1383&context=clr> [hereinafter Andreasian et al.] (explaining Article 81 is “exemplary on paper” when viewed “under the due process lens”).

25. DANZIGER, *supra* note 5, at § 12.133.

26. See Sherman, *supra* note 18.

27. See *id.*

28. N.Y. MENTAL HYG. LAW § 81.25(a) (McKinney 2017).

29. Sherman, *supra* note 18, at 124.

30. N.Y. MENTAL HYG. LAW § 81.30(b) (McKinney 2017).

31. Sherman, *supra* note 18, at 124.

32. N.Y. MENTAL HYG. LAW § 81.20(a)(3) (McKinney 2017).

33. 39 C.J.S. *Guardian & Ward* § 102.

34. Sherman, *supra* note 18, at 124.

needs and/or property management of the incapacitated person.³⁵

- (5) A guardian in ancient Rome was obligated to “hand in a final account of his administration to the ward or his heirs upon the termination of his guardianship.”³⁶ Under Article 81, a “court shall order a final report” making an inventory of the ward’s property, upon the death or removal of a guardian.³⁷

The striking similarities in responsibilities of guardians in ancient Rome and modern-day guardians, the groups over whom they exercise control, and the theoretical underpinnings of the regimes in which they operate are not merely of academic interest. As others have rightly observed, the difficulty with guardianship tenets as holdovers from ancient Rome, both in theory and in practice, is that guardianship’s foundational framework existed long before the civil rights framework that guides American jurisprudence, predating the Americans with Disabilities Act, the Universal Declaration of Human Rights,³⁸ the Constitution, and even the Magna Carta.³⁹ Given that imposing a guardianship necessarily infringes on rights otherwise enshrined in our democracy, the decision-making powers of a guardian merit careful consideration.

C. The Fiduciary Role of a Guardian in Making Decisions on a Ward’s Behalf

In recognition of a family member’s inherent connection to a ward, courts give preference to guardianship applications by family members over those by non-family members.⁴⁰ And thus, a court-

35. N.Y. MENTAL HYG. LAW § 81.02(a)(2) (McKinney 2017).

36. Sherman, *supra* note 18, at 124.

37. N.Y. MENTAL HYG. LAW § 81.33(b) (McKinney 2017).

38. Andreasian et al., *supra* note 24, at 298 (“The fundamental principles of human rights law, as enunciated [in 1945 by the United Nations’ Universal Declaration of Human Rights], are ‘the equal and unalienable rights of all members of the human family,’ and ‘every person’s inherent dignity.’”).

39. Sheila E. Shea & Carol Pressman, *Guardianship: A Civil Rights Perspective*, N.Y. ST. B.J. ASS’N 19, 20 (2018), available at <http://www.courts.state.ny.us/ad3/mhls/GuardianshipACivilRightsPerspective.pdf> [hereinafter Shea & Pressman].

40. Meta S. David, Note, *Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?*, 45 SUFFOLK U. L. REV. 465, 475 (2012), available at http://supporteddecisionmaking.org/sites/default/files/legal_guardianship_of_individuals_mental_illness.pdf (claiming an individual who petitions to become a guardian is “typically a family member” of the allegedly incapacitated person); Grey, *supra* note 1, at 747 (claiming a guardian can also be a “professional guardian,” that is, a non-family member, though courts indicate a preference for family-member guardianships, subjecting family-member guardians to less stringent standards); Michael Habic, *The Impact of Estate of Howell: Guardianship, Heir Misbehavior, and the Modern Family Within Illinois*, 50 J. MARSHALL L. REV. 615, 639 (2017),

appointed guardian is often a ward's family member, thrust, by choice or necessity, into a role with ill-defined edges. Grappling with a shift from family member to guardian may be daunting, yet there is little time to flounder and then grow into the role. An effective guardian must swiftly become adept at a wide range of functions, running the gamut from advocacy on behalf of the ward, obtaining knowledge of community resources, public benefits, and long-term care options, assuming "case management functions," and protecting and preserving assets.⁴¹ Yet perhaps the most important role a guardian assumes is that of decisionmaker in a fiduciary capacity, with a fiduciary's associated obligations to the ward of loyalty, good faith, and care.⁴²

Black's Law Dictionary defines the role of fiduciary as an individual who is "required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure," as well as one "who must exercise a high standard of care in managing another's money or property."⁴³ Making faithful, loyal, careful major life decisions on behalf of oneself is a daunting task—having made many of them myself, I say this with the authority of experience. Making faithful, loyal, careful major life decisions on behalf of another, as a guardian must do regularly, can strike a thoughtful guardian with near paralysis. Loyalty, faithfulness, and care to what end? And through what means, among a multitude of options? What is the best thing for another person, whose inner life is unknowable to another? Black's Law Dictionary offers little assistance, the inconsistency with which jurisdictions approach the matter offers little comfort, and a full "twenty-eight [United States jurisdictions] have guardianships statutes [that offer] *no* general decision-making standard for guardians."⁴⁴ Further, while the effect of

available at <https://repository.jmls.edu/lawreview/vol50/iss3/7/> [hereinafter Habic]. The remainder of this article will focus on family-member guardians, not professional guardians.

41. Arsenault, *supra* note 2, at 38.

42. J. Eric Virgil & Stacy B. Rubel, *Is My Judgment In Your Best Interest? How Decisions Are Made in Guardianships and A Suggested Reform*, 93 FLA. BAR J. 46, 46 (2019), available at <https://www.floridabar.org/the-florida-bar-journal/is-my-judgment-in-your-best-interest-how-decisions-are-made-in-guardianships-and-a-suggested-reform/> [hereinafter Virgil & Rubel].

43. *Fiduciary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

44. Lanier, *supra* note 10, at 175 (emphasis added); see also Habic, *supra* note 40, at 632 ("Some jurisdictions leave discretion to the guardian to make decisions as if they were the [ward's] parent, others use an ordinary care . . . or non-specific wording to define a guardian's powers.").

the revocation of decision-making authority from a ward has been studied extensively, the emotional toll upon the guardian, in bearing complete decision-making responsibility for the life decisions of another, has not been studied as broadly.

The legal authority for a guardian to make decisions on behalf of a ward “derives solely from state law,”⁴⁵ thus, a guardian must consider the decision-making standard set by the jurisdiction within which the guardian was appointed. There are at least seven standards that could govern a guardian acting as a fiduciary in his or her decision-making capacity on behalf of a ward,⁴⁶ though most jurisdictions that set decision-making standards employ either: (1) the *substituted judgment* standard, requiring that a guardian make the decision the ward would have made “if still able to make decisions,”⁴⁷ “even if it is not what a reasonable person would do”;⁴⁸ or (2) the *best interest* standard, obligating the guardian to make decisions as a reasonable person would⁴⁹ and choosing “the alternative that produces the greatest good for the incapacitated person.”⁵⁰ At least fourteen jurisdictions contain statutory directions that guardians use *both* substituted judgment⁵¹ and best interest in either: (1) a dual mandate; (2) a hierarchy to use substituted judgment first, where possible; or (3) no priority or guidance in the

45. Kim Dayton, *Symposium: Third National Guardianship Summit: Standards of Excellence: Standards for Healthcare Decision-Making: Legal and Practical Considerations*, 2012 UTAH L. REV. 1329, 1345 (2012), available at https://www.guardianship.org/wp-content/uploads/2017/08/Standards_Health_Care_Decision_Making.pdf.

46. “(1) Do what the ward would have done; 2) do what is in the ward’s best interests; 3) do what is not contrary to the ward’s best interests; 4) do what is best for society; 5) do what is best for those dependent upon the ward or those in closest relationship with the ward, such as a spouse; 6) do what the guardian believes is best based on the guardian’s experience and values; and 7) do what the judge believes is best based on the experience and values of the judge.” See Virgil & Rubel, *supra* note 42, at 46.

47. Linda S. Whitton & Lawrence A. Frolik, *Symposium: Third National Guardianship Summit: Standards of Excellence: Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491, 1492 (2012), available at https://www.guardianship.org/wp-content/uploads/2017/08/Surrogate_Decision_Making_for_Guardians.pdf [hereinafter Whitton & Frolik].

48. Virgil & Rubel, *supra* note 42, at 46; see also Arsenault, *supra* note 2, at 38 (“A guardian must understand the standard on which to make a decision, mainly substituted judgment and best interest.”).

49. See Habic, *supra* note 40, at 635 (explaining at least six jurisdictions employ this standard—the reasonable person standard).

50. Whitton & Frolik, *supra* note 47, at 1492.

51. *Id.* at 1502 (explaining New York’s Article 81 guardianship statute, by contrast, directs a guardian to use substituted judgment, but makes “no express mention of best interest”).

application of either standard,⁵² though, in practice, the interrelation of the concepts is unclear.⁵³

The “room for tension” between the consideration of what a ward would do and what would protect the ward’s best interest is apparent,⁵⁴ although currently, “[n]o statute provides guidance for when best interest and substituted judgment interests are in conflict, or if following one or the other leads to an unreasonable result.”⁵⁵ Further, “even the most conscientious guardian” would have difficulty making decisions that do not, at least in part, “derive from his or her own morals and values.”⁵⁶ Perhaps as a result, “guardians act with little uniformity”⁵⁷ and, by some estimates, “only 65% of decisions made on behalf of a [ward] accurately depict what the [ward] would likely desire.”⁵⁸

New York’s Article 81, for example, directs guardians to use substituted judgment in making decisions on a ward’s behalf.⁵⁹ The commentary thereto recognizes Article 81’s emphasis on “the guardian’s unique relationship to the” ward and the fact that decision making in a fiduciary capacity is a “fundamental part of the guardian’s role.”⁶⁰ “The guardian has the obligation to make well-reasoned decisions that

52. Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard For Guardian Decisions: A Proposal For Reform*, 45 U. MICH. J.L. REFORM 739, 744 (2012), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?referer=https://www.-google.com/&httpsredir=1&article=1014&context=mjlr> [hereinafter *A Proposal for Reform*]; see also Habic, *supra* note 40, at 622 (explaining Illinois and the District of Columbia use “a hierarchical substituted judgment and best interest hybrid standard, which requires that the guardian follow a [ward’s] wish where the person would have wanted the same if they were competent. If the person’s wish is not ascertainable, ‘then the least restrictive best interests . . . shall be implemented.’”).

53. Whitton & Frolik, *supra* note 47, at 1500, 1502 (suggesting that “whenever possible, a guardian should give more weight to substituted judgment than best interest.”).

54. Arsenault, *supra* note 2, at 39.

55. *A Proposal for Reform*, *supra* note 52, at 747.

56. Sydney J. Sell, *A Potential Civil Death: Guardianship of Persons with Disabilities in Utah*, 2019 UTAH L. REV. 215, 222 (2019), available at <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1202&context=ulr>.

57. A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1546 (2012), available at <https://pdfs.semanticscholar.org/7b4e/d342a-26103908025637193677b9895fec9e2.pdf>.

58. Habic, *supra* note 40, at 638.

59. Whitton & Frolik, *supra* note 47, at 1502.

60. N.Y. MENTAL HYG. LAW § 81.20 (McKinney 2017), Law Revision Commission Comments.

protect personal and pecuniary interests of the" ward.⁶¹ In carrying out this responsibility, the guardian

should develop a personal relationship to the ward . . . so that the guardian can understand the decision's impact from the incapacitated person's perspective and involve the incapacitated person in the decisions to the greatest extent possible. . . . In situations where there is no indication of the incapacitated person's prior competent preferences, the guardian must make decisions in accordance with the best interests of the ward.⁶²

While this standard sounds ideal for its forward-thinking recognition that a ward should participate in the decision making process and its suggestion of a fail-safe measure for instances in which a guardian cannot ascertain prior competent wishes, Article 81 may again prove, as one commentator observed, "more progressive on paper than . . . in practice."⁶³ Minimal guidance exists for guardians facing a situation where a ward's expressed preferences during a time of competence is directly at odds with the safety of his person and his property, and while the commentary to Article 81 alludes to a best interest standard, that standard seems to apply only where the ward's prior, competent wishes are unknown, with little further guidance as to its appropriate application.⁶⁴

For those jurisdictions that do set clear standards for guardians' decision-making on behalf of wards, often either the best interest or substituted judgment standard, multiple studies indicate that scarce resources make post-adjudication monitoring of guardians and their decisions minimal and, perhaps as a result, dramatic inconsistencies persist.⁶⁵ After all, merely setting a standard does not guarantee compliance therewith nor does it dispel confusion about its application. Decisions made under a best interest standard, for example, tend to overemphasize safety.⁶⁶ And the potential for coercive, undue influence

61. *Id.*

62. *Id.*

63. Shea & Pressman, *supra* note 39, at 21; see also Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 115 n.102 (2012), available at <https://heinonline-org.proxy2.library.illinois.edu/HOL/Page?handle=hein.journals/colhr44&div=7&id=&page=&collection=journals> [hereinafter Booth Glen].

64. See N.Y. MENTAL HYG. LAW § 81.20 (McKinney 2017), Law Revision Commission Comments; Booth Glenn, *supra* note 63, at 117–18.

65. Arsenault, *supra* note 2, at 36–37.

66. Sean Burke, *Person-Centered Guardianship: How the Rise of Supported Decision-Making and Person-Centered Services Can Help Olmstead's Promise Get Here Faster*, 42 MITCHELL HAMLIN L. REV. 873, 879 (2016), available at <https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1030&context=mhrlr>.

in the substituted judgment context is a primary concern, given that “older adults tend to prefer trusting a surrogate decisionmaker rather than expressing a . . . preference themselves.”⁶⁷

D. Judge-Made Law

Case law offers limited clarity to the standards by which guardians should make decisions. In New York, for example, Article 81 appears to provide for substituted judgment where competent wishes are known and, *perhaps* the use of the best interest standard in cases where the competent wishes are unknown, at least according to the commentary.⁶⁸ This leaves any number of questions about the applicability of and relationship between these standards and, “[s]urprisingly, there is little case law on the subject of the [Article 81] guardian’s duties to the incapacitated person.”⁶⁹

And the case law that does exist offers little clarity in already muddy waters. In *Matter of Shapiro*, for example, the court voided a \$680,000 transfer from an incapacitated person to that individual’s neighbor, where the amount represented all of the assets of the incapacitated person.⁷⁰ The court reasoned that, while it must consider an incapacitated person’s wishes and desires, “those wishes and desires should be competent ones consistent with what the Court can determine is in her best interest.”⁷¹ Similarly, in *Matter of Willie C.*, a trial court cited its obligation to protect the *best interest* of an incapacitated individual in its refusal to accept a stipulation that it deemed inadequate to protect the interest of an incapacitated person.⁷² In light of Article 81’s substituted judgment directive, a guardian may struggle to make a decision on a ward’s behalf where a reviewing court may, nevertheless, implement a best judgment standard. The issue is particularly problematic in instances where a reasonable person would make a different decision than a ward would have made because in such a case,

67. Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative To Guardianship?*, 117 PA. ST. L. REV. 1111, 1138 (2013), available at [http://www.pennstatelawreview.org/117/4%20Final/4Kohn%20et%20al.%20\(final\)%20\(rev2\).pdf](http://www.pennstatelawreview.org/117/4%20Final/4Kohn%20et%20al.%20(final)%20(rev2).pdf).

68. See *supra* Section I(B).

69. N.Y. MENTAL HYG. LAW § 81.20 (McKinney 2017), Practice Commentary, Rose Mary Bailly.

70. *In re Shapiro*, 2001 N.Y. Misc. LEXIS 1359, at *1 (N.Y. Sup. Ct. Apr. 19, 2001).

71. *Id.* at *15 (emphasis added).

72. See *In re Willie L.C.*, 884 N.Y.S.2d 468 (N.Y. App. Div. 2009).

the outcome under a best interest standard would yield a different result than an outcome under a substituted judgment standard.

In extreme cases of a guardian's misbehavior, a court may remove that guardian. In New York, removal is appropriate where "the guardian fails to comply with an order, is guilty of misconduct, or for any other cause which to the court shall appear just."⁷³ Presumably, dereliction of a guardian's duty to make careful, thoughtful decisions on behalf of the ward would fall within the ambit of "any other cause,"⁷⁴ yet removal of a guardian is exceedingly rare and no reported New York State case indicates that a guardian has ever been removed for a failure to meet the primary decision-making standard of substituted judgment. Rather, in New York, reported cases indicate that guardians have been removed in cases of extreme neglect of the ward,⁷⁵ financial misconduct,⁷⁶ or where the ward him or herself expresses a competent desire that the guardian be removed.⁷⁷

Case law across jurisdictions in the United States suggests a similar approach to that of New York.⁷⁸ There are few reported cases of the removal of non-professional guardians in the United States and, of those, in no case does a court specifically discuss a guardian's failure to make appropriate decisions on behalf of the ward according to the

73. *In re Helen S. (Falero)*, 13 N.Y.S.3d 516, 517 (N.Y. App. Div. 2015) (quoting N.Y. MENTAL HYG. LAW § 81.35).

74. N.Y. MENTAL HYG. LAW § 81.35.

75. *In re Michael J.N.*, 94 N.Y.S.3d 539, 539 (Sur. Ct. Erie Co. 2017) (referring to an earlier decision to remove guardians where they neglected the ward's "health issues (including teeth and feet)" and kept the ward in "dilapidated . . . and, unsanitary conditions," without electricity or water, where toilets overflowed, and where all of the food was spoiled).

76. *In re Joshua H.*, 880 N.Y.S.2d 645, 645–46 (N.Y. App. Div. 2009) (explaining where the guardian was removed for "improperly remov[ing] funds from the incapacitated person's supplemental needs trust account . . .").

77. *In re Francis M.*, 870 N.Y.S.2d 596, 597–98 (N.Y. App. Div. 2009) (stating where the ward "was [able to express his concerns and desires . . . [and repeatedly indicated that the guardian] treated him in ways that were demeaning and condescending"); *In re Helen S. (Falero)*, 13 N.Y.S.3d 516, 517 (N.Y. App. Div. 2015) (stating where the ward "unequivocally" wanted the guardian removed).

78. See, e.g., *In re A.R.R.*, No. 18AP-995, 2019 Ohio App. LEXIS 3157 (July 30, 2019) (claiming where the guardian "fails to act in [the ward's] best interest when she interferes and obstructs physicians from proceeding with recommended courses of care . . . [leading to] malnutrition and hospitalization."). *Estate of Schneider v. Schneider*, 570 S.W.3d 647, 656–57 (Mo. Ct. App. 2019) (stating in Missouri, where a "probate court may remove a guardian if the guardian is not discharging his responsibilities and duties as required . . . or has not acted in the best interests of his ward," the court found that the guardian "failed to assure the ward received medical care.").

appropriate, statutory decision-making standard.⁷⁹ Given the lack of clarity in statutory decision-making standards and the modest case law on that subject, guardians are left with precious little guidance in discharging the most important fiduciary obligations of their role.

The next section will consider the case of John G. and, specifically, the ways in which the expanse of options open to him as he exercised his own decision-making liberties was far broader than the expanse of options open to his guardian in her decision-making role on his behalf.

III. The Experience of One Adult Guardian: John G., a Case Study

If the implicit underpinning of decision-making directives to guardians is an assumption that a ward would make the same decisions as a reasonable person would make, that assumption of normalcy simply does not apply to John G., who took great delight in his unconventional life and eccentric decision making. The night before my wedding, well over a decade ago and long before guardianship was familiar to me as anything more than a vague concept, I sat in a diner in New York City's West Village with my soon-to-be husband and my father. My father had ordered a plate of tomatoes for dinner, ate them quickly and greedily, and then looked mournfully at the overflowing plates across the table from him. "Order something else, Dad," I begged. "No, there's plenty of food right on this table," observing the obvious and periodically spearing a morsel from the bounty around him. When he turned his attention to the bread basket and began spreading a pat of butter with the handle of a knife while holding the sharp edge in his palm, I looked at him with frustration and said, "Oh Dad, I'm getting married tomorrow, why can't you just be normal?" He tilted his head down in mock shame and then looked up at me with an ironic glare of his hazel eyes. Peering through bushy, black eyebrows, he said, "Because I'm not normal, Susan."

79. Various courts have, however, removed guardians for failure to provide care that is in the best interest of the ward. *See, e.g., In re A.R.R.*, No. 18AP-995, 2019 Ohio App. LEXIS 3157 (July 30, 2019) (stating the guardian "fails to act in [the ward's] best interest when she interferes and obstructs physicians from proceeding with recommended courses of care . . . [leading to] malnutrition and hospitalization."). *Estate of Schneider v. Schneider*, 570 S.W.3d 647, 656–57 (Mo. Ct. App. 2019) (stating in Missouri, where a "probate court may remove a guardian if the guardian is not discharging his responsibilities as required . . . or has not acted in the best interests of his ward," the court found that the guardian "failed to assure the ward received medical care.").

“Not normal” may have been an understatement for those who knew John G. well. Like any other unique individual, John G. had layers. At first glance, he was a brilliant, educated physician, a nautically-inclined history enthusiast, a hispanophile, a runner, and a philatelist. But with a more complete picture of John G., a more complex reality emerges. John G. was also homeless, he rejected modern medicine, he invested his money pursuant to various doomsday scenarios, and he made firm plans to die at sea. Though these realities were, perhaps, troubling to those of us who knew and loved John G., they were the result of principled decisions that John G. made according to deeply held philosophies that guided his competent, adult life. These decisions were lawful exercises of John G.’s liberty, which the Supreme Court has defined broadly, and “extends to the full range of conduct which the individual is free to pursue.”⁸⁰ Indeed, as the Supreme Court has recognized, “liberty” as a constitutionally-protected right, is one that is

not merely freedom from bodily restraint[,] but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁸¹

In my current role of guardian over John G., there is overwhelming sadness, discomfort, and irony as I carry out my sanctioned role of stripping the decision-making independence that he so cherished and in the extent to which the decisions that I have made on his behalf have thrust upon him much of the normalcy he spent his life eschewing. Part of being an individual with self-awareness is recognizing our own rich, inner existence and all the things that make us different from others. With that understanding, we are in the best position to make our own decisions, uniquely suited to who we are and our one opportunity to be alive. John G. understood his principles and lived according to them, in so doing, living the vibrant, creative, unusual life he was meant to live. And while I seek to honor his known wishes as I make decisions on his behalf, I find again and again that I am unable to balance my duties as John G.’s guardian with the principles by which he made his own decisions while competent.

80. Monthie, *supra* note 3, at 961 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954)).

81. *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

This next section will explore the decision-making freedom that John G. enjoyed as an autonomous individual who could live according to his own philosophies, even though they may have been outside the ambit of what society might accept as “normal” or “reasonable.” While many guardianship statutes, Article 81 included, instruct guardians to make decisions according to the competently-expressed wishes of the ward, this section will suggest that this directive may be little more than lip service to a lofty ideal because its view of acceptable outcomes is insufficiently expansive to account for the wishes of an individual as outside the norm as John G.

A. John G.’s Autonomous Decision Making

John G. had an enduring fascination with Miguel de Cervantes’s *Don Quixote*, leading him to find endless parallels between the novel and his own life and often recognizing that he, too, saw giants where others saw windmills. John G. considered himself a “descendent of Alonzo,”⁸² a character from *Don Quixote* whom John G. described as follows:

Among [] many citizens, . . . one stood apart. Unlike the others, he had done nothing to change the course of human history nor did he carry out heroic deeds inspiring others. Most people he met during his lifetime considered him a pathetic fool. He lived in 16th century Spain and his name was Alonzo Quijano. As a citizen of his nameless community, Alonzo would have died and been forgotten had he not become a citizen of the second community, one filled with heroic knights and beautiful maidens. His community was a lot like my magical kingdom.⁸³

John G. fully embraced his role as a “descendent of Alonzo,” imagining Alonzo himself encouraging him to leave behind his world of material comfort and relative security, with the following message: “If you don’t go and don’t do what you’ve dreamed of, life won’t be worth living. You’ll be better off dead.”

In John G.’s case, what he dreamed of was to live free from the restraints of the real world and to enter the magical world of adventure. In so doing, he embraced core philosophies that had always percolated in his head, but that his conventional lifestyle had restricted him from exploring:

82. John G., In Alonzo’s Footsteps (unpublished manuscript) [hereinafter In Alonzo’s Footsteps].

83. *Id.*

- (1) John G. was strongly opposed to Western medicine, drawing on his unique qualification as a physician to make such a judgment;
- (2) John G. felt that perpetual motion was the key to health, wellness, and life—he did not believe in being tethered to a permanent dwelling or bearing financial responsibility for a home, preferring a nomadic existence on land and on sea;
- (3) John G. rejected the conventional wisdom of diversifying his assets, instead preparing for doomsday scenarios by acquiring things he could touch (gold coins and stamps), natural resources (oil and more gold), and resources that facilitated his belief in mobility (more oil); and
- (4) John G. made a firm plan to perish at sea.

1. REJECTION OF WESTERN MEDICINE

To bring his life into alignment with these principles, John G. began by rejecting the medical profession, retiring from the practice of medicine, and embracing his disillusionment with Western medicine by refusing any type of medical intervention in his body. As a battle-weary, retired physician, he was uniquely suited to decide to do so. Well-versed as he was in the difficulties with modern, Western medicine—the questionable relationships between medical professionals and pharmaceutical companies, the unnecessary and costly treatments, the over-prescription of drugs to combat any ailment and the over-prescription of drugs to combat the side effects from the initial over-prescription, the general reluctance to give the body time and dignity to heal itself or to allow an aging body to take leave with grace—he avoided doctors like the plague.

John G. never carried medical insurance because he did not have any medical expenses. To the utter confusion of his current nursing home medical practitioners, John G.'s personal medical record ended around the time that he graduated from medical school and did not resume until the onset of the disease that triggered his current institutionalization. Of perhaps even greater interest—for consideration another day—is the extent to which John G.'s gamble against Western medicine and on his own health paid off. John G. enjoyed remarkable health over the arc of his life, with the (albeit glaring) exception of the amyloid plaques and neurofibrillary tangles now waging a relentless

attack on his brain (an attack that even a lifetime of the best medical care could not have prevented).⁸⁴

This is not to say that John G. took no interest in his personal health—quite the opposite. He vigilantly monitored his blood pressure and his cholesterol. In the 1980s, long before today’s paleo-diet rage, he wrote and self-published a diet book entitled the “Caveman Diet.”⁸⁵ Most importantly, he believed in the power of the novel experience for the brain—pursuing three advanced degrees in subject matters of interest to him and pushing himself to speak a foreign language, Spanish, to anybody who would engage with him—and ongoing motion for the body by a daily running regimen, regular bicycling, and a general refusal to sit still. John G. believed firmly in the superiority of his philosophy of care and, judging his philosophies by today’s standards, he was well ahead of his time. Indeed, studies now tell us that novel experiences and a non-sedentary lifestyle are among the most protective measures one can take in support of a healthy lifestyle. But for John G., it went one step further. If he was not able to have novel experiences, if he was not able to live a non-sedentary lifestyle, he would rather be dead than be the subject of Western medicine’s intervention.

His refusal of Western medical treatment was one that he made both with a full understanding of the risks and consequences of that refusal, he himself was, after all, a physician, and one that he made as an exercise of a constitutional right. Indeed, the Supreme Court has been unequivocal that “a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment.”⁸⁶ New York courts similarly recognize that “a patient’s right to determine the course of his medical treatment [is] paramount to what might otherwise be the doctor’s obligation to provide medical care and,” further, “that the right of a competent adult to refuse medical treatment must be honored, even though the recommended treatment may be beneficial or even necessary to preserve the patient’s life.”⁸⁷ This right is “coextensive with the patient’s liberty interest protected by the due process

84. *Alzheimer’s Disease Prevention*, HEALTHLINE, <https://www.healthline.com/health/alzheimers-disease-prevention> (last updated Feb. 12, 2020) (“There is no known way to prevent Alzheimer’s Disease.”).

85. Interview with John G.

86. Monthie, *supra* note 3, at 962 n.94 (quoting *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990) and citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990)).

87. *Rivers v. Katz*, 495 N.E.2d 337, 343 (N.Y. 1986) (citing *In re Storar*, 420 N.E.2d 64 (N.Y. 1981)).

clause of [the New York] State Constitution.”⁸⁸ New York courts uphold these rights faithfully, even where the right implicates the refusal of antipsychotic medication and even where the patient has already been involuntarily committed to a psychiatric institution, rejecting “any argument that the mere fact that [a patient is] mentally ill reduces in any manner their fundamental liberty interest to reject antipsychotic medication [and rejecting] any argument that involuntarily committed patients lose their liberty interest in avoiding the unwanted administration of . . . medication.”⁸⁹

John G.’s decision to reject medicine was consistent with his core beliefs and, beyond merely lawful, deciding to do so was a recognized, fundamental freedom.

2. EMBRACE OF A NOMADIC LIFESTYLE AND HOMELESSNESS

John G. needed to be in perpetual motion. Long a fitful sleeper, by night, he paced. By day, he ran with a regularity that persisted nearly every day of his life. Running represented freedom, and nothing was more precious to John G. than his freedom. One day, when John G. was in his mid-sixties, he called me with enthusiasm and invited me to run one mile with him in New York’s Central Park the following week—one mile, lovingly dubbed the “Miracle Mile.” John G. had run an average of 1.5 miles every day of his life since he had turned twenty-one. By his calculation, by the following week, he would have amassed 24,900 miles, meaning that running the Miracle Mile would complete one full circuit of the equatorial circumference of the Earth.⁹⁰ John G.’s excitement over the significance of that Miracle Mile was infectious; as we jogged it the following week, winding through the lush, wooded Ramble in Central Park, it was impossible not to share his joy over his sense that his freedom and motion had led him to conquer the Earth.

If there was a day in which John G. did not run during his adult life, it was because he was declaring his freedom and mobility another way—by traversing an ocean. In 2005, after a lifetime of nautical endeavors, John G. extensively prepared for and completed a round-trip, solo voyage in a twenty-three-foot sailboat, the *Annie Rose*, across the Atlantic Ocean. I bid him farewell both from his departure point in New

88. *Id.*

89. *Id.* at 341–43.

90. Tim Sharp, *How Big Is Earth?*, SPACE.COM (Sept. 15, 2017), <https://www.space.com/17638-how-big-is-earth.html>.

York and then again from his departure point in Spain, both times with somber hugs and goodbyes that recognized the likelihood that he would not survive the journey—after all, he had stripped the Annie Rose clean of any and all safety equipment, in part to simplify the vessel, but perhaps more because he saw safety equipment as a crutch that might prevent him from being, in his words, “as brave as any man who ever lived.”⁹¹ This adaptation rendered his vessel, technically, non-compliant with Coast Guard standards, but John G. was adamant about risking a life that was valueless to him without the sense of adventure and freedom that this journey afforded him. Not for the first time, on each of those occasions, he whispered to me, “Susan, believe me, I’m never going to be the father that you visit in a nursing home.”

Running and sailing were not John G.’s only declarations of freedom and perpetual motion. John G.’s car was his ultimate expression of freedom. Over the years, he would deploy it in the service of cross-country deliveries, once driving from New York to California to deliver a stamp to his son and another time, from New York to Florida to deliver a sweater to an old college friend. “Anybody can mail things,” he would respond when pressed as to the logic of his delivery methods. And eventually, in his mid-sixties, John G. fully embraced his need for freedom and boundless mobility by leaving his home, packing up his white Toyota Corolla, and driving, stopping only to sleep at arbitrary intervals in highway rest areas. Beginning at that point, John G. fell within Congress’s definition of a homeless man, as he “lack[ed] a fixed, regular, and adequate night-time residence,” regularly sleeping in his car, which is “not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.”⁹² With various months-long exceptions, during which he stayed with family members or traveled abroad, John G. lived in and drove his car for the next decade and a half, until I became his legal guardian.

Despite many local and federal initiatives to reduce homelessness, few would have captured John G. As a financially secure, retired physician who simply chose to live a nomadic existence, the cause of John G.’s homelessness bore little resemblance to the many well-

91. See In Alonzo’s Footsteps, *supra* note 82.

92. Lorne Sossin, *The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement*, 22 N.Y.U. REV. L. & SOC. CHANGE 623, 634 (1996), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911400 (citing Steward B. McKinney Homeless Act, 42 U.S.C. § 11302 (1988 & Supp. IV 1992)).

documented causes of homelessness, including “enduring poverty, declining opportunities for unskilled labor, insufficient public assistance, [and] the dramatic reduction of low-cost, single resident occupancy buildings (SROs).”⁹³ Further, as a homeless man, John G. differed from the significant segment of homeless men who suffer from alcohol addiction (40%), drug use (80%), and unemployment (84%).⁹⁴ Though he may have been among the one third who suffer from “untreated or under-treated mental illness,”⁹⁵ he led a relatively productive life from his car, while enjoying the mobility he always sought. He read prolifically and called me each morning to provide highlights from and insights into what he gleaned from that morning’s *New York Times*. He managed his investments with meticulous care. He wrote a memoir about his recent experiences making his solo voyage across the Atlantic Ocean in a sailboat. He ran a leisurely mile and a half each morning and then settled over a McDonald’s coffee to read and dispense advice to fellow patrons.

Choosing to be homeless, as John G. did, is neither illegal nor is it grounds to establish the need for a guardianship. In *Matter of Seidner*, the court considered a guardianship petition that arose as a companion to a matrimonial action in which the wife sought to dissolve her thirty-nine-year marriage.⁹⁶ The husband, unable to afford a permanent shelter after he vacated the marital home and the majority of his income had been temporarily assigned to his wife for maintenance of that home, began to reside in his car, in motels, and with family.⁹⁷ His wife brought an action for the appointment of a guardian on behalf of her husband under New York’s Article 81, requiring the court to consider whether, “based on clear and convincing evidence,” the husband lacked capacity.⁹⁸ In making its determination, the court considered whether he was “likely to suffer harm because he [was] unable to provide for himself and [could] not adequately understand and appreciate the nature of such inability.”⁹⁹

The *Seidner* court, conceding that the husband “presently sleeps in his car . . . does not tend to his personal hygiene and has memory

93. *Id.* at 637.

94. *Id.* at 635–36.

95. *Id.* at 635.

96. *In re Seidner* 1997, N.Y. Misc. LEXIS 762 at *1 (N.Y. Sup. Ct. Oct. 8, 1997).

97. *Id.* at *2.

98. *Id.* at *1,*3.

99. *Id.* at *3.

lapses,” found that the “proffered evidence fell far short of a preponderance, let alone clearly and convincingly,” that the husband lacked capacity.¹⁰⁰ The court further found that the husband’s reasons for choosing to reside in his car were “not necessarily relevant” to the court’s decision, rather the court observed that the husband “has and continues to make conscious and rational decisions as to the manner in which he chooses . . . to live.”¹⁰¹ Furthermore, the court observed that, if the husband’s situation merited the imposition of a guardianship, “then, indeed, every homeless person would require such an appointment.”¹⁰² While her husband “may not be as ‘normal’ as his wife would want,” the imposition of a guardianship was simply too drastic, involving “not only . . . an invasion of [her husband’s] freedom and liberty but also a judicial deprivation of his most basic constitutional rights.”¹⁰³

A New York appeals court recently ruled similarly, reversing the trial court’s appointment of a mother as guardian over her adult son, where he “lived on the street and did not take care of himself,” owing to his non-compliance with his medications for schizophrenia and bipolar disorder.¹⁰⁴ The trial court erred in failing to consider less restrictive options than a guardianship, because “a guardian should be appointed only as a last resort, where no available resources or other alternative will adequately protect the alleged incapacitated person.”¹⁰⁵ Conceding that the son was clearly “in need of assistance,” the court noted that the mother’s “failure to establish . . . the necessity of Mental Hygiene Law [A]rticle 81 guardianship did not preclude her from seeking appropriate assistance for [her son].”¹⁰⁶

In *Matter of Anonymous*,¹⁰⁷ the New York State Court of Appeals considered an appeal regarding the involuntary institutionalization of and proposed forced medication of anti-psychotic drugs to a homeless

100. *Id.*

101. *Id.* at *3–4.

102. *Id.* at *4.

103. *Id.*

104. *In re Fritz G.*, 77 N.Y.S.3d 872, 873 (N.Y. App. Div. 2018).

105. *Id.*

106. *Id.*

107. See *In re Anonymous v. N.Y.C. Health & Hosps. Corp.*, 520 N.E.2d 515, 515 (N.Y. 1988) (containing a complete discussion of the case by an attorney who represented the subject); Norman Siegel, *Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions*, 36 VILL. L. REV. 1063, 1069 (1991), available at <https://digital-commons.law.villanova.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2756&context=vlr>.

woman.¹⁰⁸ The Court of Appeals dismissed the case as moot after her release from a psychiatric hospital.¹⁰⁹ The trial court, however, issued a sensitive, thoughtful opinion noting the difficulty inherent in an individual “living in security and comfort [to] even begin to imagine what is required to survive on the street.”¹¹⁰ The trial court further noted that it cannot be reasoned that, simply by virtue of being homeless, one is mentally ill; rather, noted the court, the question is whether one is incapable of providing oneself with food, clothing, and shelter.¹¹¹ Though homeless, one may cope, be fit, and survive.¹¹²

As one scholar observed, “The place where one lives is profoundly connected to who one is and how one expresses this sense of self.”¹¹³ In choosing to live in his car, John G. acted consistently with the core belief that drove him to seek mobility and freedom. Beyond merely lawful, choosing this lifestyle was a recognized, fundamental freedom.

3. NON-TRADITIONAL INVESTMENT STRATEGY

A further reflection of John G.’s philosophy was his investment strategy. Savings gave John G. a sense of security and spending any of that savings gave him anxiety—rare was the expenditure whose relative value offset the anxiety that accompanied his depletion of assets. His assets provided even more security when he discharged them in the service of another core philosophy. John G. was a believer in a variety of doomsday scenarios, fearing an economic collapse as he watched an economy increasingly and unstably built on investment-bank created ideas instead of physical resources. As a result, he kept 90% of his assets in three investments that felt timeless and intrinsically valuable to him: gold coins, stamps, and oil. John G. liked the feel of gold coins, the cool metal and the weight in his hands, bounty fit for an adventurer or a character from *Don Quixote*.¹¹⁴ Gold was currency he could carry to a store to buy milk, instead of a parading through the

108. *In re Anonymous*, 520 N.E.2d at 515.

109. *Id.*

110. *In re Boggs*, 522 N.Y.S.2d 407, 412 (N.Y. Sup. Ct. 1987), *overturned by Boggs v. N.Y.C. Health & Hosps. Corp.*, 523 N.Y.S.2d 71 (N.Y. App. Div. 1987), *appeal dismissed as moot*, *In re Anonymous*, 520 N.E.2d at 515.

111. *Id.* at 412.

112. *Id.*

113. *In re St. Luke’s-Roosevelt Hosp. Ctr.*, 607 N.Y.S.2d 574, 578 n.7 (N.Y. Sup. Ct. 1993) (quoting George J. Alexander, *Remaining Responsible: On Control of One’s Health Needs in Aging*, 20 SANTA CLARA L. REV. 13, 27 (1980)).

114. *See generally* MIGUEL DE CERVANTES SAAVEDRA, *THE HISTORY OF THE RENOWNED DON QUIXOTE DE LA MANCHA* (1605).

streets with a wheelbarrow of \$100 bills after the economy collapsed. John G. also curated a stamp collection, operating both as an investment he could touch and feel and as a means to recognize the adventures he had lived.

John G. kept the majority of his remaining funds in oil. Despite years of pleading from friends and family members to diversify at least to other types of stocks, let alone bonds, John G. refused. Oil was a logical investment for John G. for whom, after all, the commodity quite literally fueled his freedom and satisfied his need to invest pursuant to a doomsday scenario. He must have been pleased to invest in companies that provided fuel to allow others the mobility he cherished and, as such, his investment matched his vision of a world full of others who, like him, would always need to keep moving—even in his post-apocalyptic doomsday scenario. And John G., who likely extrapolated his own massive fuel expenditures on his cross-country drives to the rest of the U.S. population, must have believed that oil revenues were massive. He enjoyed his morning ritual of checking oil stock prices in the New York Times. If I called him and asked him how he was too early in the morning, he would respond wryly, “I don’t know yet. Let me check the stock section.” If we were watching television and the stock ticker meandered across the bottom of the screen, he would chant “Go XOM!”¹¹⁵ The thread that united these three investments was their accessibility and comprehensibility. A more traditional, diversified strategy with an investment manager would have devalued the assets, at least in John G.’s estimation, by adding a layer between himself and his assets.

Courts are loath to find incompetence based on financial imprudence far more extreme than John G.’s non-diversified investment strategy. One court held that a homeless woman’s regular destruction of paper currency was not an indication of incompetence.¹¹⁶ Observing that, while her behavior “may not satisfy a society increasingly oriented to profit-making and bottom-line pragmatism,” it was, nevertheless, “consonant with safe conduct [and] consistent with the independence and pride she vehemently insists on asserting.”¹¹⁷

115. *Exxon Mobil Corporation (XOM)*, YAHOO!, <https://finance.yahoo.com/quote/XOM/> (last visited Feb. 24, 2020).

116. *In re Boggs*, 136 Misc.2d 1082, 1089 (N.Y. Sup. Ct. 1987), *overturned on other grounds by Boggs v. N.Y.C. Health & Hosps. Corp.*, 132 A.D.2d 340 (N.Y. App. Div. 1987), *appeal dismissed as moot, In re Anonymous*, 520 N.E.2d at 515 (1988).

117. *Id.*

An investment strategy falls well within the Supreme Court's definition of liberty, which "extends to the full range of conduct which the individual is free to pursue."¹¹⁸ Even further, it is behavior that is regarded as private, falling "within the penumbra of constitutional rights into which the government may not intrude absent a showing of compelling need and that the intrusion is not overly broad."¹¹⁹ Thus, John G.'s decision to invest his money in non-conservative financial instruments was consistent with his core beliefs and, beyond merely lawful, deciding to do so was a recognized, fundamental freedom.

4. PLAN TO PERISH AT SEA

John G. may have had an inkling of the neurodegenerative catastrophe on the horizon and likely already set in motion when he sat with me in my dining room a few years ago. He was still lucid and, by any legal measure, competent. He expressed to me, with absolute certainty and clarity, that, should any progressive degenerative disease befall him, he would set sail. Period. He sought to face the end of his life in much the same way he had lived it—in perpetual motion. He would have one final adventure, feeling the salt air on his face, the immense freedom to traverse an ocean of unknowable depths and the unthinkable vulnerability in being a mere speck set precariously atop those depths. John G. would sail until the ocean prevailed, as it always does, with a perpetual rhythm of motion and a fierce independence rivaling his own.

John G.'s unique exercise of rights in living his life—the lack of medical care, the unconventional investment strategy, the homelessness and plans for death in particular—was deeply unsettling to those around him, the author included. Fear for his safety percolated through me relentlessly, yet conversations spent trying to convince him to adopt a more conventional lifestyle were fruitless. "This is who I am, Susan. I can't be any other way." And, in truth, he was right. He had avoided years of costly and unnecessary medical interventions, enjoying relative health. His investment strategy had not failed him. Though his stamp collection suffered irreparable mold damage from its exposure to the elements in the trunk of his car, his oil and gold coins had

118. Monthie, *supra* note 3, at 961 (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954)).

119. *Evans v. Carey*, 53 A.D.2d 109, 116 (N.Y. App. Div. 1976) (quoting *City of Carmel-by-the-Sea v. Young*, 466 P.2d 225, 232 (Cal. 1970)); *Id.*

together far outperformed the S&P 500. His homelessness gave him a sense of freedom for which he had always searched and he had lived safely. These would not have been my decisions, but they were his decisions and he was well within his right to live this way. Indeed,

[t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.¹²⁰

B. John G.'s Transition to Ward and His Guardian's Decision-Making Dilemmas Under Murky Standards

For John G., 2017 began like any other year, as he continued to live in much the same way as he had for the decade and a half prior. Neither I nor the rest of our family detected any discernable shift in John G.'s behavior until February, when I received a late-night phone call from the police at a local transportation hub, expressing concern that John G. did not appear to have a safe place to spend the night. The police officers reported to me that he did not exhibit any signs of disorientation or confusion and, as he appeared to be neither an imminent threat to himself nor to others, these police officers could not force him to seek treatment or shelter. Instead, these police officers, as other well-meaning police officers had before them, acted pursuant to their obligation to "encourage any person . . . in need of care and treatment for mental illness to apply for admission as a voluntary or informal patient."¹²¹ Perhaps because these police officers were particularly persuasive, perhaps because these police officers were particularly kind, or perhaps because he was simply cold and tired, John G. agreed to be loaded onto an ambulance and taken to a nearby hospital. In short order, John G.'s giants turned to windmills.

John G. argued vociferously for his release from the hospital, but the hospital social worker insisted that, though there was nothing medically wrong with him, as a homeless man, there was no possibility of a safe discharge and, hence, no possibility of any discharge. My father spent several weeks in limbo, during which time I wrestled fitfully with my recognition that any permanent institutionalization would kill my

120. Posner, *supra* note 6, at 603.

121. N.Y. MENTAL HYG. LAW § 9.21 (McKinney 2017).

father's spirit, my fear that a resumption of homelessness in the dead of winter would actually kill him, and my general relief that the overwhelming weight of the decision between the two was not mine to carry. Yet the relief was short-lived, as, after a precipitous decline in my father's mental state seeming to correlate with advanced Alzheimer's disease¹²² and at the behest of healthcare workers and family, I instituted a legal proceeding under New York's Article 81 to become his guardian. From a thicket of paperwork, a ten-minute hearing, and a judge's flick of a pen, the complicated, multi-faceted, multi-dimensional figure driven by a cantankerous, near mania to live outside of societal norms became my ward.

Article 81 petitions begin their journey in the Supreme Court of the State of New York, which is the trial-level court of general jurisdiction.¹²³ Thus, any guardianship petition will represent a small fraction of the mix of cases before a judge in a system already plagued by scarce resources.¹²⁴ Perhaps as a result, petitioners seeking guardianship over an allegedly incapacitated individual who "suffers, or appears to suffer, from a progressive dementia, [often request]—and courts often

122. See James, *supra* note 1, at 410–11 (stating Alzheimer's disease, though widely studied since 1904, when Dr. Alois Alzheimer identified it, remains enigmatic. Doctors know that Alzheimer's disease is a physical attack on a patient's brain through the development of built-up plaques and tangles, but the course of the disease in an individual patient is unknowable as is the cause of the disease, though suspects include "genetics, aging, head injury, cardiovascular disease, and strokes." Perhaps most enigmatic of all, any diagnosis of Alzheimer's disease during the patient's life is merely tentative—only a "post mortem examination of a deceased person's brain" can provide a diagnosis with certainty.); see also, *How is Alzheimer's Disease Diagnosed?*, NAT'L INST. ON AGING, <https://www.nia.nih.gov/health/how-alzheimers-disease-diagnosed> (last updated Feb. 12, 2020) (explaining "a diagnosis of [Alzheimer's] can only be verified accurately in autopsy," where "post-mortem [brains] are characterized by the presence of (1) amyloid plaques; (2) neurofibrillary tangles (NFTs); and (2) neurodegeneration."); see also Grey, *supra* note 1, at 756 (explaining that as with many Alzheimer's-related questions, there is no consensus on the number of stages through which Alzheimer's disease progresses. Some medical professionals divide the disease into three stages—"mild, moderate, and severe"—others divide the disease into seven stages—"no impairment, very mild cognitive decline, mild cognitive decline, moderate cognitive decline, moderately severe cognitive decline, severe cognitive decline, and very severe cognitive decline.").

123. See McManus, *supra* note 22, at 619 (discussing that such a designation is desirable due to the "'specialized nature of cases involving incapacitated persons,' and suggesting the judge's 'need to be familiar with the complexities of case management and surrogate decision-making.'").

124. Shea & Pressman, *supra* note 39, at 21 (quoting Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 115 n.102 (2012)).

grant—full plenary powers to avoid the necessity of repeated future hearings as the individual’s capacity (inevitably) deteriorates.”¹²⁵ Like many petitioners before me, I sought and was granted plenary powers over my father’s person and property.¹²⁶ By nearly any standard, this was the appropriate outcome: (1) the proceeding itself was non-adversarial—a court-appointed evaluator of John G. supported my application, as did each member of John G.’s (and, thus, my own) family,¹²⁷ and John G. was not present at the hearing,¹²⁸ because the presiding judge found that he could not meaningfully participate in the proceeding; (2) it was clear that John G. was no longer able to care for himself or make decisions on behalf of himself; (3) I was physically proximate to the hospital and, later, the nursing home at which he received care; and (4) while I did not agree with many of the choices John G. made over the years, it would be impossible to find another individual with a greater understanding of John G. than that which I had developed over my lifetime.

Thus, while it seems that the guardianship imposed on John G. was appropriately a “last resort,” as required for the deprivation of John G.’s personhood,¹²⁹ it brings to light the paradox that arises when a guardian must make “careful and diligent” decisions, acting “above reproach,”¹³⁰ and with an understanding of the ward’s wishes. After all,

125. *Id.* at 22 (quoting Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 115 n.102 (2012)).

126. Andreasian et al., *supra* note 24, at 312 (“‘The reality on the ground,’ at least anecdotally, indicates that ‘the vast majority of adult guardianships imposed are plenary; a 2007 national survey found that in 90% of cases, persons found to be incapacitated were deprived of all of their liberty and property rights.’”).

127. It may be worthy to note here that John G. is a much-loved father of four and grandfather of eight. He enjoyed a strong relationship with and the unwavering support of his ex-wife, my mother. I, too, am grateful for the love and support of these family members and, thus, I leave for another scholar the tremendous legal and ethical questions that arise when family members quarrel over the many thorny guardianship issues that arise. I am fortunate to have no personal experience with such matters.

128. *Id.* at 304 (quoting N.Y. MENTAL HYG. LAW § 81.11(2), (c)(1)-(2)) (“[P]rovides that the person for whom guardianship is sought must presumptively be present at the hearing, even if that requires the judge to travel to a place, outside the courthouse, where the person resides, “so as to permit the court to obtain its own impression of the person’s capacity,” but exceptions are made where, “by clear evidence, the person ‘is completely unable to participate’ or ‘no meaningful participation will result from the person’s presen[ce].’”).

129. *Matter of Fritz G.*, 164 A.D.3d 503, 504 (N.Y. App. Div. 2018).

130. N.Y. MENTAL HYG. LAW § 81.20 (McKinney 2017), Law Review Commission Comments.

if a guardianship is truly imposed as a very last resort, many wards, John G. included, have likely already reached a point at which their ability to express clear wishes might be questionable. And so, while I assumed the role of guardian with confidence that the guardianship itself was appropriate, I assumed the role of decisionmaker with overwhelming anxiety about how best to respect my father's wishes but still discharge my fiduciary obligations on his behalf. And John G., who had recently tried to unlock a door using his finger as a key before informing me that he was a medical student in need of legal help because he had been wrongly charged with three murders, would be of little help.

Article 81's decision-making standard of substituted judgment wherever possible and best interest, perhaps, when a ward's competent wishes are not known,¹³¹ seems, again, "more progressive on paper than . . . in practice."¹³² It fails to account for the situation within which I found myself as guardian—John G. was unequivocal about his wishes while he was competent. He would rather be dead than live confined *anywhere*, let alone in a nursing home. In fact, not unlike the folkloric Eskimo tradition of setting the elderly adrift on an ice floe, John G. repeatedly expressed through his entire competent, lucid lifespan, that if ever he was beset with a degenerative ailment, such as Alzheimer's disease, he would set sail upon the Atlantic and allow fate to take its course. Of course, John G.'s Alzheimer's disease progressed with such extreme speed that no period of competence overlapped with any knowledge by John G. of the onset of Alzheimer's. So I, as his guardian, was left with the clear knowledge that, if he were the decisionmaker, he would march to the nearest dock, rig a sail, and chart an Easterly course. This competent, lucid wish was well within his fundamental rights as an autonomous being, yet carrying out that wish on his behalf exceeded my rights as I stand in his shoes and substitute my judgment for his own. Thus, the guardianship imposed on John G. has done more than curtail his decision-making freedom, as other scholars have observed the effect of a guardianship to be.¹³³ It has actually narrowed the menu of life choices available to him. Even more broadly than his unrealized wish to perish at sea, the three other core philosophies that guided John G.'s life up to the point of the imposition of a guardianship—(1) the extreme avoidance of Western medicine; (2) the rejection

131. Posner, *supra* note 6.

132. Shea & Pressman, *supra* note 39, at 21.

133. See, e.g., Posner, *supra* note 6, at 603; Shea & Pressman, *supra* note 39, at 20.

of a permanent dwelling; and (3) the refusal to make conservative, diversified financial investments—are philosophies by which his guardian cannot be guided in making decisions on his behalf. Thus, for purposes of decision making, I cannot fully step into John G.’s shoes and make substituted judgments on his behalf, as he would have made them.¹³⁴

1. MEDICAL TREATMENT

John G.’s principled rejection of medical intervention in his body was an exercise of well-established rights. Indeed, a “competent adult . . . has the right to make health care decisions, including the right to refuse life-sustaining treatment” and that “right must be respected ‘even when a [person] becomes incompetent, if while competent, the [person] stated that he or she did not want certain procedures to be employed under specified circumstances.’”¹³⁵ That right is widely recognized as a “substantial right deserving of government protection.”¹³⁶

But where Article 81 demands that a guardian employ a substituted judgment standard by making decisions in line with the known, competent wishes of the ward, courts considering whether a guardian’s refusal to provide health care is appropriate will *only* permit the “cessation of treatment if [the guardian] can prove—by clear and convincing evidence” that the ward would have refused the treatment¹³⁷ by, for example, a formal writing¹³⁸ produced by the ward while competent. And while most case law on the subject deals with the cessation of life-saving treatment¹³⁹ or a neglectful failure to provide needed care to the ward,¹⁴⁰ no reported cases contend with the issue I faced as a guardian of a ward who starkly rejected any medical intervention, small or large,

134. See, e.g., Whitton & Frolik, *supra* note 47, at 1534–35 (“[D]ecision-making factors related to substituted judgment . . . [include] the incapacitated person’s values and preferences.”).

135. *In re* Article 81, 132 A.D.3d 1344, 1345 (N.Y. App. Div. 2015) (quoting *Matter of M.B.*, 846 N.E.2d 794 (N.Y. 2006) and *Matter of Westchester County Med. Ctr. (O’Connor)*, 531 N.E.2d 607 (N.Y. 1988)).

136. Application of St. Luke’s-Roosevelt Hosp. Ctr., 607 N.Y.S.2d 574, 579 n.8 (1993) (citing N.Y. ST. TASK FORCE ON LIFE AND THE LAW, LIFE-SUSTAINING TREATMENT—MAKING DECISIONS AND APPOINTING A HEALTH CARE AGENT, (1987); *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261 (1990)).

137. *In re* M.B., 846 N.E.2d 794, 795 (2006).

138. *In re* Article 81, 132 A.D.3d at 1345 (N.Y. App. Div. 2015).

139. See, e.g., *id.* at 1344.

140. See e.g., *In re* A.R.R., No. 18AP-995, 2019 Ohio App. LEXIS 3157 (July 30, 2019).

band-aid or open-heart surgery, but never memorialized that wish by any evidence that might qualify as clear and convincing to a reviewing court. Neither is there any reported case of a reviewing court considering whether a guardian is making medical decisions that are consistent with the decision-making standard of substituted judgment.

The irony is not lost on this guardian that John G., a man who once crossed the Atlantic Ocean without any safety equipment on his twenty-three-foot vessel, now sports hip and derriere shields to prevent him from injuring himself from an accidental fall and visits the emergency room on a near-regular basis when medical professionals at the nursing home in which he resides worry that he appears lightheaded. In my capacity as a decision-maker on his behalf, with associated fiduciary obligations and with minimal outside direction, it seems only prudent to err on the side of providing more care, and not less. But there is an emotional toll in my recognition that every day of my father's sedentary, monotonous, round-the-clock medically-monitored life is a repudiation of my father's principles and that, as the decision-maker, I bear full responsibility for that. Yet again, with a directive to honor the wishes of the ward, Article 81 leaves me unguided in discharging my responsibility to the unusual wishes of a man who would rather die than live the life I have thrust upon him.

2. INSTITUTIONALIZATION

The decision to place any individual in a nursing home is a difficult one. As one court observed, an involuntary transfer to a nursing home is a deprivation far greater than an involuntary transfer to a state mental hospital because "persons involuntarily committed to mental hospitals are subject to periodic review of their commitment," whereas, once transferred to a nursing home, there is "no additional court review unless such review is instigated by the patient herself[, and, for] obvious reasons, the ability to instigate procedures for judicial review is probably well beyond the capacity of most nursing home residents."¹⁴¹ Additionally, multiple studies indicate that placement in a nursing home "carries a substantially increased risk of morbidity and mortality over remaining in the community."¹⁴² As guardian, the bleak reality I

141. Application of St. Luke's-Roosevelt Hosp. Ctr., 607 N.Y.S.2d 574, 577 n.4 (1993).

142. *Id.* at 574 n.10 (1993) (citing Margaret Blankner et al., *Protective Services for Old People: Findings From the Benjamin Rose Institute Study*, 52 SOCIAL CASEWORK 483 (1971)).

faced in making the decision to place John G. in a nursing home was that, as a homeless, transient man, he did not have a community in which he could remain.

While the decision to place a loved one in a nursing home is an agonizing one in the best of cases, my decision, as guardian, to place John G. in a nursing home has forced me to confront the stark reality that I am imposing upon my father a life that repudiates every core philosophy by which he stood. John G. now lives out his days in a locked dementia unit of a nursing home, a ghostly apparition of a man whose ideology drove him to reject any permanent dwelling, let alone as restrictive a dwelling as the one within which he now finds himself. I do not doubt that a locked dementia unit of a nursing home is the appropriate place for John G., bereft as I may be. I lack an imagination expansive enough to conjure an alternative.

Yet there is a logical disconnect in the Article 81 scheme of substituted judgment in decision-making. Substituted judgment, which requires me to “substitute the decision the [ward] would have made when the [ward] had capacity as the guiding force in any surrogate decision the guardian makes”¹⁴³ does not support any decision that I made with respect to John G.’s institutionalization. To apply the substituted judgment standard would be to throw the doors of the nursing home open and to send John G. to sea. I doubt any reviewing court would look favorably on such a decision, though no court has yet confronted it. The greater problem is that the Article 81 directive of substituted judgment feels almost a cruel taunt of my failure to respect my father’s wishes because there seems to be no other alternative.

3. INVESTMENTS

John G.’s investment strategy, in which he concentrated his assets in instruments that fit his sense of adventure—gold coins and stamps—and his ongoing search for mobility—oil—and his general belief in doomsday scenarios of the collapse of an economy based on the intangible, is not an investment strategy that this guardian may pursue. And so, again, the appointment of a guardian does not merely supplant the decisionmaker, but it actually narrows the menu of options available to any decisionmaker.

143. Monthie, *supra* note 3, at 985 (citing N.Y. MENTAL HYG. LAW § 81.21 (McKinney 2017)).

In managing a ward's assets, a guardian appears to be bound by two seemingly conflicting standards. First, New York's Article 81 offers a broad directive to guardians to employ substituted judgment in making all decisions on behalf of a ward—that is, to “substitute the decision the [ward] would have made when the [ward] had capacity as the guiding force in any surrogate decision the guardian makes.”¹⁴⁴ Under this standard, John G.'s competent wishes regarding his investments were self-evident, one need merely look at the asset allocations that John G. maintained throughout his adult life—gold coins, stamps, and oil.

But when guardians appointed under New York's Article 81 make investment decisions, those decisions are governed by a standard under the Prudent Investor Act,¹⁴⁵ a standard that very closely resembles the “best interest standard” that Article 81 flatly rejected.¹⁴⁶ Under the Prudent Investor Act, investment decisions that guardians make on a ward's behalf¹⁴⁷ must be “exercise[d with] *reasonable care*, skill and caution to make and implement investment and management decisions *as a prudent investor would*,”¹⁴⁸ and not, necessarily, as the ward himself would have made. Indeed, none who knew John G. would have described any of his decisions as “reasonable” or “prudent.” Yet nowhere within the range of considerations that the Prudent Investor Act mandates a guardian to take into account when making investment decisions, for example, “the size of the portfolio, the nature and estimated duration of the fiduciary relationship, [and] the liquidity and distribution requirements,” is any discussion of the wishes of the ward.¹⁴⁹ Thus,

144. *Id.*

145. N.Y. EST. POWERS & TRUSTS § 11-2.3 (McKinney 2018) (emphasis added); see also Application of Hammons, 625 N.Y.S.2d 408, 412 (1995) (stating that a guardian shall “invest funds with the same authority as a trustee pursuant to EPTL Sec. 11-2.3, the Prudent Investor Rule.”).

146. Monthie, *supra* note 3, at 985 (“By contrast, Article 81 adopted the ‘substitute judgment’ alternative to the best interest standard.”).

147. The statutory language issues its directives to “trustees” of “trusts” and “governing instruments,” but these terms are defined broadly—trustee is defined to include, *inter alia*, any “guardian under article eighty-one of the mental hygiene law;” trust is defined to include “any fiduciary entity with property owned by a trustee;” and portfolio is defined to include “all property of every kind and character held by a trustee.” N.Y. EST. POWERS & TRUSTS § 11-2.3(e) (McKinney 2018); *In re Cruz*, No. 6000001, 2001 WL 940206, at *8, (July 16, 2001) (“The language of the statute refers to “trustee,” but the definition of “trustee” at E.P.T.L. §11-2.3 (e)(1) makes it clear that this standard applies to all guardians, specifically including guardians appointed under M.H.L. Article 81.”).

148. N.Y. EST. POWERS & TRUSTS §11-2.3(b)(2) (McKinney 2018).

149. N.Y. EST. POWERS & TRUSTS § 11-2.3(b)(3)(B) (McKinney 2018); see also N.Y. EST. POWERS & TRUSTS § 11-2.3(b)(5)(B)(i) (McKinney 2018) (“[T]he intent of the

as John G.'s guardian, not only was I to disregard his investment philosophy and competent wishes, but I was to consider a mix of factors that John G. never considered in his competent investment decision making.

Further, among my first obligations as guardian over John G.'s property was to diversify the assets that he had so flatly rejected diversifying, despite years of pleading from those around him during his competent years. Indeed, under the Prudent Investment Act, a guardian "is required to diversify assets unless the [guardian] reasonably determines that it is in the best interest of the beneficiaries not to diversify,"¹⁵⁰ and failure to diversify is a factor courts consider when determining whether a guardian has invested with prudence.¹⁵¹ John G.'s investment portfolio with his concentration of oil stocks would have failed the Prudent Investor Standard and may have occasioned my removal as guardian under one court's reasoning in its removal of a guardian who "demonstrated poor financial judgment" by maintaining "a portfolio concentrate[d] almost exclusively with high tech stocks."¹⁵² But it was through tears that I issued the sell orders to a banker. John G. had spent his entire adult lifetime amassing these investments with the expectation that, one day, his children would inherit them and gain the benefit of the philosophies he held so dearly.

Thus, yet again, while I may have taken over the decision-making role that John G. once enjoyed, the near-unfettered freedom available to him in making decisions is no longer available to me.

IV. Toward Better Guidance for Adult Guardians

The decision-making powers of a guardian are potent. Even under the most progressive guardianship laws, guardians are left with little guidance as they wield these powers. It seems an unintended consequence of the best intentions that a number of guardianship regimes seeking to preserve a ward's ability to participate meaningfully in decision-making processes neglect to guide guardians whose wards are

[ward], as expressed in the governing instrument" is, however, relevant for the limited purpose of a guardian adjusting between principal and income to allow for distributions to beneficiaries.).

150. N.Y. EST. POWERS & TRUSTS § 11-2.3-A(b)(3)(C) (McKinney 2018).

151. *In re Jones*, 31 Misc. 3d 1239(A) at *6 (Sup. Ct. N.Y. Cty. 2011).

152. *Id.*

unable to participate or where previously-expressed wishes are entirely at odds with a ward's safety.

A possible solution for individuals with dementia may arise due to recent medical advances. Alzheimer's Disease and other types of dementia pose unique challenges and distinct opportunities in the guardianship context.¹⁵³ The great challenge is the nature of these diseases. Once they take hold of a ward, their permanent and degenerative nature renders toothless guardianship law directives that mandate a guardian to involve the ward, to the greatest degree possible, in all decisions. Indeed, participation in decision making is generally incompatible with the cognitive functioning of a patient with advanced dementia. Yet these neurodegenerative diseases also present distinct opportunities. Recent medical advances have allowed doctors to identify dangerous plaque build-up in the brain, the kind that may lead to Alzheimer's Disease and dementia, years before symptoms arise, thus identifying key periods of time before the onset of the most debilitating aspects of these diseases.¹⁵⁴ While the public has met these advances with some questioning as to their benefits, for the possible over prescription of only mildly effective medication and for the possibly dangerous effects of patients learning of a frightening, future diagnosis with an unknown prognosis,¹⁵⁵ these early tests provide a valuable opportunity for families to plan for the future and to collaborate prospectively with the individual. If fully realized, these are opportunities for a future guardian to better recognize the ward as a unique being, rather than a passive object of care.

Of course, the utility of this time period is limited by an important constraint. The individual identified as one who is likely to suffer from Alzheimer's Disease or dementia in the future must first have sought some medical testing and then must be a willing participant in some process by which he or she delineates clear goals and decision-making

153. *State Government Alzheimer's Disease Plans*, ALZHEIMER'S ASS'N, <https://act.alz.org/site/PageServer?pagename=statelegislationwesupport> (last visited Feb. 24, 2020) [hereinafter ALZHEIMER'S ASS'N].

154. See Paula Span, *A Brain Scan May Predict Alzheimer's. Should You Get One?*, N.Y. TIMES (Aug. 2, 2019), <https://www.nytimes.com/2019/08/02/health/alzheimers-brain-scan.html>. (explaining how evidence is "mount[ing] that brain damage from Alzheimer's begins years before people develop symptoms" and medical advances allow doctors to predict Alzheimer's by using a brain scan).

155. Gina Kolata, *Alzheimer's Tests Soon May Be Common. Should You Get One?*, N.Y. TIMES (Dec. 24, 2019), <https://www.nytimes.com/2019/12/20/health/alzheimers-disease-diagnosis.html>.

parameters for a future guardian—a quasi-guardianship proceeding.¹⁵⁶ No current guardianship regime would capture an individual who is not displaying symptoms of dementia or cognitive impairment. Nor should any regime capture such a person. And thus, the utility of this period of time is unlikely to have had any benefit for John G., as he is unlikely to have agreed to the medical testing in the first instance. Further, he would have been more likely to have met his fate at sea than to have meaningfully participated in any quasi-guardianship proceeding. Still, for its broader utility, and despite its obvious constraints, time during which an individual may recognize a future onset of dementia is worth exploring for its potential to aid guardians in future decision-making with the guidance of the ward.

For individuals who have been alerted to a possible upcoming onset of Alzheimer's Disease or dementia, "Therapeutic Jurisprudence" may provide a needed forum. Therapeutic Jurisprudence is "the study of the use of the law to achieve therapeutic objectives" and it has been applied in a variety of criminal and civil contexts, including "domestic violence, juvenile delinquency, and most notably, substance abuse."¹⁵⁷ Using Therapeutic Jurisprudence principles creates "cooperative and primarily non-adversarial" courts in which all parties "collaborate to create a positive, long-term result."¹⁵⁸ In the context suggested here, it may provide an opportunity for individuals who have been alerted to a likely, future diagnosis of Alzheimer's Disease or dementia to make their wishes known to a court and to a prospective guardian. It may also provide a forum for all parties to engage in an open exchange about a ward's wishes, including any "outside-the-norm" wishes that may otherwise subject a guardian to heightened scrutiny in making "outside-the-norm" decisions on behalf of the ward.

156. ALZHEIMER'S ASS'N, *supra* note 153.

157. McManus, *supra* note 22, at 594, 596.

158. *Id.* at 597–98.

