



Guardianships on Life-Support: How *In re D.L.H.* Impacts Surrogate Decision Making in Pennsylvania

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I. INTRODUCTION

At 2:47 A.M., Nancy's breathing stopped. Joe reached his hand to Nancy's face and pulled her eyelids closed. Uncle George looked back into the room and saw the end had come. He walked down to the nursing station and said, "I think it's over."¹

Although the final moments of Nancy Cruzan's life were calm, the prior seven years represented a difficult struggle for her husband, parents, and close friends.

An unfortunate car accident left Nancy Cruzan in a persistent vegetative state.² Nancy's parents requested that her feeding tube be removed after it became apparent that her condition would not improve; however, the hospital refused to comply with their request without first receiving court authorization.³ Ultimately, Nancy Cruzan's feeding tube was removed but not before the United States Supreme Court issued a landmark decision regarding the authority of surrogate decision makers in matters involving life-sustaining treatment.⁴

Now, assume that the parents of the incapacitated individual, acting as co-guardians, want to refuse medical treatment; yet, instead of being able to reference the statements made by the ward⁵ prior to his or her incompetency to support their decision, no such statements exist because the ward has been incompetent since birth.⁶ Such facts recently confronted the Pennsylvania Supreme Court in *In re D.L.H.*⁷

1. WILLIAM H. COLBY, LONG GOODBYE: THE DEATHS OF NANCY CRUZAN 389 (Jill Kramer ed. 2002).

2. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 266 (1990). A persistent vegetative state is distinguishable from a permanent vegetative state. See The Multi-Society Task Force on PVS, *Medical Aspects of the Persistent Vegetative State*, 330 NEW ENG. J. MED. 1499, 1501 (1994) (stating that "'persistent' refers only to a condition of past and continuing disability with an uncertain future, whereas 'permanent' implies irreversibility. Persistent vegetative state is a diagnosis; permanent vegetative state is a prognosis.").

3. See *Cruzan*, 497 U.S. at 267-68.

4. See generally John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139 (1991) (analyzing the Court's decision and constitutional limits to treatment decisions).

5. "Ward" is defined as the person "who is under a guardian's charge or protection." BLACK'S LAW DICTIONARY 1720 (9th ed. 2009). Pennsylvania's statutory chapter on the appointment of guardians uses the term "incapacitated person" in lieu of ward. See 20 PA. CONS. STAT. §§ 5501-5555 (2006). Consequently, this Comment will use the term "incapacitated person" rather than "ward."

6. In *Cruzan*, petitioners adduced evidence that Nancy would not want to be kept alive because of previous statements that she made. See *Cruzan v. Harmon*, 760 S.W.2d 408, 411 (Mo. 1988) ("The trial court found that Nancy expressed, in 'somewhat serious conversation' that if sick or injured she would not want to continue her life unless she could live 'halfway normally.' Based on this conversation, the trial court concluded that 'she would not wish to continue with nutrition and hydration.'").

7. *In re D.L.H.*, 2 A.3d 505 (Pa. 2010).

David L. Hockenberry (David) suffered from profound mental retardation since birth and had limited capacities of expression.⁸ He resided in the Ebensburg Center, one of six centers operated by Pennsylvania's Office of Mental Retardation, for over forty-five years.⁹ In 2002, the Orphans' Court appointed his parents, Myrl and Vada Hockenberry, as joint plenary guardians of the person and plenary guardians of the estate¹⁰ for David.¹¹

On December 21, 2007, David swallowed a hairpin and grew ill with aspiration pneumonia.¹² The Ebensburg Center transferred David to Memorial Hospital in Johnstown, Pennsylvania, for treatment, and the hospital placed David on a mechanical ventilator.¹³ David's parents attempted to refuse the ventilator treatment, but the hospital asserted that the parents, as plenary guardians of the person, did not have authority to refuse such treatment.¹⁴

David's parents filed a petition with the Orphans' Court to be appointed as David's health care agents.¹⁵ The Orphans' Court denied David's parents' petition.¹⁷ The Superior Court affirmed the Orphans'

8. See Joint Brief for Appellees David L. Hockenberry and Ebensburg Center at 3, *In re D.L.H.*, 2 A.3d 505 (Pa. 2010) (No. 98 MAP 2009) (on file with author) (stating that, if given the opportunity at trial, they would have produced evidence showing David "is ambulatory, can partially dress himself, selects his food at the Ebensburg Center cafeteria (his favorite dessert is rice pudding), can feed himself, expresses preferences for the company of some over others, and goes off the Ebensburg Center campus several times a month to visit shopping malls, eat at restaurants such as Wendy's and Dairy Queen, and go to the movies").

9. See *id.* at 2; Pennsylvania Auditor General, *Commonwealth of Pennsylvania Department of Public Welfare Ebensburg Center July 1, 2003 to July 7, 2006 Performance Audit*, 1 (April 11, 2007), <http://www.auditor.gen.state.pa.us/archives/Performance/SO/stoEbensburgCenter041107.pdf>.

10. For a discussion on the types of guardianship in Pennsylvania, see *infra* Part II.A.

11. See *In re D.L.H.*, Orphans' Ct. No. 21-02-293, slip op. at 1 (Cumberland Cnty. Ct. Jan. 24, 2008), available at http://records.ccpa.net/webink_judges/DocView.aspx?id=170410&dbid=3.

12. See *id.*

13. See *id.*

14. See *In re D.L.H.*, 2 A.3d 505, 507 (Pa. 2010).

15. See *id.*

16. In 2008, a third co-guardian, Bonnie Prevost, was also appointed by the Court. See *In re D.L.H.*, Orphans' Ct. No. 21-02-293 (Cumberland Cnty. Ct. Feb. 4, 2008). The parents petitioned for appointment of Ms. Prevost because she regularly visited David, assisted David's parents in caring for David, and David's parents desired "minimum disruption [of David's guardianship] in the event of their death, incapacity or infirmity." See Petition for Appointment of Additional Plenary Guardian of the Estate and Person in Accordance with 20 Pa. Cons. Stat. § 5511 at 2, *In re D.L.H.*, Orphans' Ct. No. 21-02-293 (Cumberland Cnty. Ct. Feb. 2, 2008). Ms. Prevost, however, did not join the parents' petition to be appointed as David's health care agent.

Court's decision, and the parents appealed to the Pennsylvania Supreme Court.¹⁸ The Pennsylvania Supreme Court upheld the decision using a plain language interpretation of the state's Health Care Agents and Representatives Act (the Act).¹⁹

The Pennsylvania Supreme Court explained that the Act allows a health care agent to be appointed only by a competent principal.²⁰ Because David never possessed the capacities to appoint a health care agent, the Court was unable to fashion a remedy.²¹ According to the Court, the Act controlled the Court's holding; the hospital had an affirmative duty to provide treatment.²² Therefore, the guardians had no authority to refuse treatment on David's behalf.²³

In this sad story, the Pennsylvania Supreme Court failed to answer the tough questions. Namely, because David has been incompetent his entire life, how would he ever be capable of executing an advance health care directive? If David's guardians are unable to make decisions regarding life-preserving medical treatment, who can make those decisions for someone like David? How far do the powers of plenary guardians of the person extend? Is the Pennsylvania Supreme Court's decision reconcilable with its previous jurisprudence, in particular *In re Fiori*?²⁴ Lastly, did the Pennsylvania Supreme Court effectuate the legislature's intent in passing the Health Care Agents and Representatives Act? This Comment will seek to address each of these questions in turn.

Part II of this Comment will provide a framework of the material concepts involved in David's case. This section will discuss guardianship law in Pennsylvania, the Act, and the reasoning applied by the Orphans' Court, the Superior Court, and the Pennsylvania Supreme Court.

Part III of this Comment will analyze the Pennsylvania Supreme Court's holding and identify implications of the *In re D.L.H.* decision. Specifically, this Comment will contend that the Pennsylvania Supreme Court did not incorporate the legislature's intent when the Court interpreted the statute. In the alternative, assuming the Pennsylvania

17. See *In re D.L.H.*, Orphans' Ct. No. 21-02-293, slip op. at 8 (Cumberland Cnty. Ct. Jan. 24, 2008), available at http://records.ccpa.net/weblink_judges/DocView.aspx?id=170410&dbid=3.

18. See *In re D.L.H.*, 967 A.2d 971 (Pa. Super. Ct. 2009); *D.L.H.*, 2 A.3d 505.

19. See Health Care Agents and Representatives Act, 2006 Pa. Laws 1484 (codified at 20 PA. CONS. STAT. §§ 5421-5488 (2006)); *D.L.H.*, 2 A.3d at 514-15.

20. See *D.L.H.*, 2 A.3d at 514.

21. See *id.* at 514-15.

22. See *id.* at 515.

23. See *id.*

24. *In re Fiori*, 673 A.2d 905 (Pa. 1996).

Supreme Court reached the decision intended by the General Assembly, this Comment will discuss implications of the Court's decision. Additionally, this Comment will propose how to avoid existing confusion regarding the rights of life-long, incapacitated individuals and the role of guardians in decisions involving life-preserving and life-sustaining treatment.

In Part IV, this Comment will conclude by advocating for the recommended changes and urging the General Assembly to produce clearer guidelines for surrogate health care decision making.

II. BACKGROUND

A. *Pennsylvania Guardianship Law*

The guardianship system seeks to enhance the lives of incapacitated individuals by appointing another individual—a guardian—to assist with essential functions that the incapacitated individual is unable to properly perform.²⁵ As a result, a guardian is merely the “fiduciary who has the care and management of the estate or person of a minor or an incapacitated person.”²⁶

Upon a petition to the court, a guardian is appointed after clear and convincing evidence demonstrates that an individual is incompetent and requires assistance with an aspect related to their welfare.²⁷ In making a decision, the court must consider the nature of any condition that impairs the individual's capacity, the individual's ability to make and communicate decisions, and the availability of friends and family to provide support in lieu of guardianship services.²⁸ Based on such assessments, the court will determine the type of guardianship required—limited or plenary *and* of the person or of the estate—as well as the duration of the guardianship.²⁹ Because the guardian is appointed, the guardian operates as a bailiff of the court who protects the incapacitated person.³⁰

The first significant guardianship distinction is between guardians of the person and guardians of the estate. Guardians of the person are responsible for the incapacitated person's care and custody.³¹ A guardian

25. See 20 PA. CONS. STAT. § 5502 (2006).

26. *Id.* § 102 (2006).

27. See *id.* § 5511 (2006); see also *In re Peery*, 727 A.2d 539, 541 (Pa. 1999) (stating that, regardless of incapacity, the critical inquiry is “whether or not the alleged incapacitated person needs a guardian”).

28. See 20 PA. CONS. STAT. § 5512.1(a) (2006).

29. See *id.*

30. See *Harvey Appeal*, 85 A.2d 669, 670 (Pa. Super. Ct. 1952).

31. See *In re Stapas*, 820 A.2d 850, 857 (Pa. Commw. Ct. 2003).

of the person must assert the best interests of the incapacitated person.³² In doing so, the guardian must respect the preferences of the incapacitated person and encourage the incapacitated person to participate in decisions to the greatest extent possible.³³ Moreover, a guardian of the person must receive court approval before consenting on behalf of the incapacitated person to marriage or divorce, experimental medical procedures, sterilization, abortion, or removal of a healthy bodily organ.³⁴

In contrast to a guardian of the person, a guardian of the estate manages the incapacitated person's assets and property.³⁵ A guardian of the estate may expend the incapacitated person's assets on care and maintenance for the incapacitated person without receiving court approval.³⁶ However, the guardian must file an annual report with the court detailing the incapacitated person's income, investments, expenditures, and needs.³⁷

The second guardianship distinction rests in plenary versus limited guardianship. The statutory presumption is for a limited guardianship.³⁸ A limited guardianship is entered for those incapacitated persons who are "partially incapacitated" and require the services of a guardian.³⁹ Plenary guardianship, on the other hand, requires more; both plenary guardians of the person and plenary guardians of the estate are appointed by the court "only upon a finding that the [incapacitated person] is *totally* incapacitated and in need of plenary guardianship services."⁴⁰

B. The Health Care Agents And Representatives Act

In 2006, the Pennsylvania General Assembly unanimously passed the Health Care Agents and Representatives Act.⁴¹ Governor Edward Rendell signed the legislation into law on November 29, 2006.⁴² Upon

32. See 20 PA. CONS. STAT. § 5521(a) (2006).

33. See *id.*

34. See *id.* § 5521(d) (2006).

35. See *In re Stapas*, 820 A.2d at 857.

36. See 20 PA. CONS. STAT. § 5536(a) (2006).

37. See *id.* § 5521(c)(1) (2006).

38. See *id.* § 5512.1(a)(6) (2006) (stating "[t]he court shall prefer limited guardianship").

39. *Id.* § 5512.1(b) (2006); *id.* § 5512.1(d) (2006).

40. *Id.* § 5512.1(c) (2006) (emphasis added); *id.* § 5512.1(e) (2006) (emphasis added).

41. See General Assembly, *Bill Information: Regular Session 2005-2006, Senate Bill 628*, http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2005&sind=0&body=S&type=B&bn=628 (last visited Feb. 4, 2011).

42. See *id.*; Governor Edward G. Rendell, *Governor Rendell Signs Bills* (Nov. 29, 2006), <http://www.governor.state.pa.us/portal/server.pt?open=18&objID=668934&mode=2>.

passage by the General Assembly, Senator Stewart Greenleaf, the bill's sponsor in the Senate, indicated that the Act would assist physicians and their patients in making difficult end-of-life decisions.⁴³ Senator Greenleaf described the framework of the Act as follows:

Senate Bill 628 amends the Probate Code to further provide a statutory means for competent adults to control their health care either directly through instructions written in advance (living wills) or indirectly through a health care agent (health care powers of attorney) or, when there is no advance directive, through a health care representative (usually a member of the patient's family).⁴⁴

As the name suggests, the Act permits health care agents and representatives to make surrogate health care decisions.⁴⁵ Health care agents, however, retain more authority to make health care decisions than health care representatives.⁴⁶ The Act defines a health care agent as “[a]n individual designated by a principal in an advance health care directive.”⁴⁷ An advance health care directive includes a health care power of attorney,⁴⁸ living will,⁴⁹ or a combination thereof.⁵⁰ An individual who executes an advance health care directive must be of sound mind and either 18 years of age or older, a high school graduate, married, or an emancipated minor.⁵¹

A health care agent has the authority to make all decisions regarding health care treatment that the principal himself or herself could have made prior to incapacity.⁵² However, the health care agent's authority is not absolute; the agent remains accountable to the principal and, if appointed, the principal's guardian of the person.⁵³ Furthermore, the

43. See State Senator Stewart J. Greenleaf, *Greenleaf Health Care Decision Making Bill Passes House* (Nov. 21, 2006), <http://www.senatorgreenleaf.com/press/2006/112106.htm>.

44. *Id.*

45. See 20 PA. CONS. STAT. § 5451 (2006) (stating that the “subchapter shall be known and may be cited as the Health Care Agents and Representatives Act”).

46. See 20 PA. CONS. STAT. § 5461(c) (2006); see also *infra* pp. 14-15.

47. 20 PA. CONS. STAT. § 5422 (2006).

48. A health care power of attorney is the “writing made by a principal designating an individual to make health care decisions for the principal.” *Id.*

49. A living will is the “writing . . . that expresses a principal's wishes and instructions for health care and health care directions when the principal is determined to be incompetent and has an end-stage medical condition or is permanently unconscious.” *Id.*

50. See *id.*

51. See *id.* § 5442(a) (2006); *id.* § 5452(a) (2006).

52. See *id.* 5456(a) (2006).

53. See *id.*; *id.* § 5460(a) (2006).

health care agent's appointment can be revoked or amended by either the principal or the guardian.⁵⁴

In contrast, a health care representative may be appointed only to make health care decisions under limited circumstances.⁵⁵ An individual is able to designate a health care representative either in writing or by personally informing the physician or provider.⁵⁶ If there is no prior designation, the following individuals, in descending order of priority, can serve as a health care representative upon a determination by the physician that the individual is incompetent: spouse, adult child, parent, adult brother or sister, adult grandchild, or any adult with knowledge of the principal's wishes.⁵⁷ However, if a guardian of the person is already appointed for the principal, a health care representative may not be designated.⁵⁸

When life-preserving treatment is necessary and the individual to receive treatment is neither in an end-stage medical condition nor permanently unconscious, a health care agent retains refusal authority.⁵⁹ Conversely, a health care representative will never have the authority to make a life-preserving treatment decision for a principal who is neither permanently unconscious nor diagnosed with an end-stage medical condition.⁶⁰ Absent this distinction and the limited circumstances under which a health care representative may be appointed, the scope of authority for a health care representative and a health care agent is similar.⁶¹

C. *In re D.L.H.: Identical Dispositions, But Different Reasoning*

1. Cumberland County Orphans' Court

After David's parents filed their petition for appointment as David's health care agents, the hospital discontinued use of the mechanical ventilator because David's health improved.⁶² Thus, by the time the Cumberland County Orphans' Court heard the case, David's parents'

54. See *id.* § 5460(a); *id.* § 5454(d) (2006).

55. See *id.* § 5461 (2006).

56. See *id.* § 5461(d) (2006).

57. See *id.*; *id.* § 5461(a) (2006) (stating that “[a] health care representative may make a health care decision for an individual whose attending physician has determined that the individual is incompetent”).

58. See *id.* § 5461(a)(3) (2006).

59. See *id.* § 5462(c)(1) (2006).

60. See *id.*; *id.* § 5461(c) (2006).

61. See *id.* § 5461(c).

62. See *In re D.L.H.*, Orphans' Ct. No. 21-02-293, slip op. at 2 (Cumberland Cnty. Ct. Jan. 24, 2008), available at http://records.ccpa.net/webblink_judges/Doc_View.aspx?id=170410&dbid=3.

request to be appointed health care agents was technically moot because use of the mechanical ventilator was no longer at issue.⁶³ The Orphans' Court concluded that, even though the underlying factual circumstances changed, the legal question remained because the parents still sought to become David's health care agents.⁶⁴

On the merits, the Orphans' Court determined that the parents' petition failed because the court had no authority to appoint health care agents under the Act.⁶⁵ By definition under the Act, health care agents may be appointed only by the principal pursuant to an advance health care directive.⁶⁶ David was never at any point in his life competent to execute such a directive; as a result, the Act stripped the court of any authority to appoint health care agents.⁶⁷ The court held that the Act allowed refusal of life-preserving treatment only if the competent individual or an appointed health care agent objects to the treatment, absent the principal being permanently unconscious or in an end-stage medical condition.⁶⁸ Thus, the Orphans' Court denied the parents' petition.⁶⁹

2. Superior Court

David's parents appealed the decision, and the Superior Court affirmed the trial court's disposition but provided a more expansive holding.⁷⁰ Before addressing the issue on the merits, the court concluded that although the issue was technically moot, the questions presented were of public importance and capable of repetition and evading review.⁷¹

In reaching its legal conclusion, the Superior Court referenced the differences between the powers of a guardian and those of an agent at common law.⁷² The court recognized a fundamental distinction between the two entities and found that "the authority granted to a health care agent in [Section] 5456 is much more consistent with the creation of an agency relationship and the duty of the agent 'to comply with all lawful

63. *See id.*

64. *See id.*

65. *See id.* at 7-8.

66. *See id.*; 20 PA. CONS. STAT. § 5422 (2006).

67. *See In re D.L.H.*, Orphans' Ct. No. 21-02-293, slip op. at 8 (Cumberland Cnty. Ct. Jan. 24, 2008), available at http://records.ccpa.net/weblink_judges/DocView.aspx?id=170410&dbid=3.

68. *See id.* at 5.

69. *See id.* at 8.

70. *See In re D.L.H.*, 967 A.2d 971 (Pa. Super. Ct. 2009).

71. *See id.* at 976.

72. *See id.* at 980.

instructions received from the principal.”⁷³ The common law distinction between guardians and agents, coupled with the court’s interpretation of the Act, led the court to conclude that the parents’ position as plenary guardians of David did not vest them with the unfettered authority to make decisions regarding life-preserving treatment.⁷⁴

Still, the Superior Court considered whether a plenary guardian of the person could ever be awarded such decision-making authority by an Orphans’ Court.⁷⁵ For the purpose of considering that question, the court assumed—without actually deciding—that an Orphans’ Court could grant a guardian’s request to refuse medical treatment under its inherent authority as *parens patriae*.⁷⁶ The court noted that procedurally a guardian would be required to petition the court before refusing medical treatment.⁷⁷ Then, the guardian must prove by clear and convincing evidence that refusal of medical treatment would be in the best interest of the incompetent individual.⁷⁸

The Superior Court recognized the “extraordinary burden” for a petitioner attempting to prove, “by clear and convincing evidence, that death is in the best interest of a life-long incompetent.”⁷⁹ In addition to the high evidentiary burden, the court mandated that a petitioner present testimony from a reliable medical expert that demonstrates the “incompetent’s severe, permanent medical condition (or severe, permanent medical condition with progressive features) and current state of physical/psychological deterioration and pain.”⁸⁰

To grant a petitioner’s request to refuse life-preserving treatment, the Superior Court held that the medical evidence must demonstrate that the benefits of prolonged treatment would be inhumane and contrary to basic notions of decency.⁸¹ Therefore, the Orphans’ Court should never consider the convenience for or interests of parents, guardians, or society in general; rather, the court should consider only the best interests of the

73. *Id.* (citing RESTATEMENT (THIRD) AGENCY § 809(2) (2006)).

74. *See id.* at 982.

75. *See id.*

76. *See id.*; *see also In re Terwilliger*, 450 A.2d 1376, 1381 (Pa. 1982) (“[t]he *parens patriae* power of our courts derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of a legal disability. . . . Consistent therewith, it is acknowledged that a court’s authority is at its widest reach when acting as an equity court to protect the person or property of an incompetent . . . and has been described as ‘plenary and potent to afford whatever relief may be necessary to protect his interests’”) (citations omitted).

77. *See D.L.H.*, 967 A.2d at 982.

78. *See id.*

79. *Id.* at 983.

80. *Id.* at 984 (citing *Rasmussen v. Fleming*, 741 P.2d 674, 689 (Ariz. 1987)).

81. *See id.*

incompetent.⁸² In addition, the Orphans' Court should give no weight to any mental disabilities from which the incapacitated person may suffer.⁸³

Turning to the matter *sub judice*, the Superior Court found no medical testimony in the record to satisfy the best interest standard.⁸⁴ Thus, even assuming the Orphans' Court could grant the parents' request to refuse medical treatment, the parents failed to prove it was in David's best interest.⁸⁵ Ultimately, the Superior Court held that:

[W]here a life-long incompetent adult has neither an end-stage medical illness nor is in a [permanent vegetative state], and a plenary guardian seeks to decline life-preserving medical treatment on behalf of the incompetent, if the plenary guardian fails to establish that death is in the incompetent's best interests, by clear and convincing proof, then the guardian does not have the legal authority to decline life preserving treatment on behalf of the incompetent.⁸⁶

3. Pennsylvania Supreme Court

Not persuaded by the Superior Court's reasoning, the Pennsylvania Supreme Court began its statutory interpretation by recognizing that Section 5462(c)(1) of the Act expressly limits the individuals who can refuse life-preserving treatment.⁸⁷ The Court acknowledged that the Act reflects the "[l]egislature's assertion of a policy position of greater state involvement to preserve life in such circumstances."⁸⁸ Given that the legislature acted within its prerogative as policymakers, the Court offered no criticism of the Act.⁸⁹ Instead, the Court held that it was simply bound to enforce the policy of the legislature.⁹⁰

Much like the Orphans' Court, the Pennsylvania Supreme Court opted for a plain language interpretation of the Act and found that the Act left the Court with no power to appoint a health care agent.⁹¹ The Court further held that "where, as here, life-preserving treatment is at issue for an incompetent person who is not suffering from an end-stage

82. *See id.* at 983-84.

83. *See id.* at 984.

84. *See id.* at 985.

85. *See id.*

86. *Id.* at 987.

87. *See In re D.L.H.*, 2 A.3d 505, 513-14 (Pa. 2010).

88. *Id.* at 514.

89. *See id.* at 515 (stating "[w]e find only that the salient policy decision has been made by the Legislature, in Section 5462(c)(1) of the Act as is its prerogative as the policy-setting branch").

90. *See id.*

91. *See id.* at 514-15.

condition or permanent unconsciousness, and that person has no health care agent, the Act mandates that the care must be provided.”⁹²

III. ANALYSIS

A. *The Pennsylvania Supreme Court’s Interpretation Rendered the Legislative Intent Section of the Health Care Agents and Representatives Act Meaningless*

1. Pennsylvania’s Statutory Construction Act

In considering David’s case, the Pennsylvania Supreme Court invoked a plain language interpretation of the Health Care Agents and Representatives Act.⁹³ Based on the text of Section 5462(c), the Court held that a hospital has an affirmative duty to provide life-preserving treatment unless one of four conditions exist: (1) the principal is in an end-stage medical condition; (2) the principal is permanently unconscious; (3) the principal is competent and objects; or, (4) the principal has previously appointed a health care agent who objects and is authorized to do so by a power of attorney or living will.⁹⁴ The Court, however, applied Section 5462(c) in a vacuum: by using a plain language reading of Section 5462(c) alone, the Court created a result that was manifestly inconsistent with the legislature’s intent.⁹⁵

Pennsylvania’s Statutory Construction Act is a legislative chapter dealing with interpretation of statutes.⁹⁶ The Statutory Construction Act provides that each statute is to be construed in such a manner as “to ascertain and effectuate the intention of the General Assembly” and “give effect to all [the statute’s] provisions.”⁹⁷ The rules of interpretation are to be observed “unless the application of such rules would result in a construction inconsistent with the manifest intent of the General Assembly.”⁹⁸ The Pennsylvania Supreme Court has previously looked to the Statutory Construction Act for guidance in construing statutes and acknowledged that the Act controls the Court’s jurisprudence.⁹⁹

92. *Id.* at 515.

93. *See* 20 PA. CONS. STAT. § 5462(c) (2006).

94. *See id.* § 5462(c); *D.L.H.*, 2 A.3d at 514-15.

95. *See infra* Part III.A.2.

96. *See* 1 PA. CONS. STAT. §§ 1901-1991 (2006).

97. *Id.* § 1921(a).

98. *Id.* § 1901.

99. *See* *Commonwealth v. Hoke*, 962 A.2d 664, 667 (Pa. 2009) (citing 1 PA. CONS. STAT. § 1921(a) (2006)) (“[o]ur task in interpreting a statute is to ascertain and effectuate the intention of the General Assembly”); *see also* Aaron D. Martin, Comment, *Liberty Finds No Refuge in a Jurisprudence of Doubt: The Unconstitutional Use of Legislative History in Construing Pennsylvania Statutes*, 99 DICK. L. REV. 1043, 1048 (1995)

In David's case, the Court recognized that the primary indicator of legislative intent is the plain language of the statute.¹⁰⁰ The Court stated that the plain language of the Health Care Agents and Representatives Act limits the category of persons who are able to make decisions involving life-preserving treatment.¹⁰¹ While some sections of the Act discuss guardians and health care representatives, the Court noted that Section 5462(c) does not authorize either surrogate to make a decision regarding life-preserving treatment.¹⁰² The Court then cited the Statutory Construction Act: "Exceptions expressed in a statute shall be construed to exclude all others."¹⁰³ As a result, the Court stated that "the plain-meaning interpretation of . . . the [Health Care Agents and Representatives] Act simply does not allow for the refusal of life-preserving care to one who has never had the ability to appoint a health care agent and does not suffer from an end-stage condition or permanent unconsciousness."¹⁰⁴

While the Pennsylvania Supreme Court referenced the Statutory Construction Act, the Court failed to acknowledge its most material provisions. As referenced earlier, the Statutory Construction Act provides an escape valve from a plain language interpretation of a clearly-worded statute when the result is inconsistent with the expressed intent of the legislature; the Statutory Construction Act pursues a careful balance in this regard.¹⁰⁵ As the later provisions make clear, statutory words free from ambiguity should not be "disregarded under the pretext of pursuing its spirit."¹⁰⁶ Thus, the Statutory Construction Act provides that a court should abandon a plain language reading *only* when the result is unmistakably contrary to the expressed intent of the legislature.¹⁰⁷

2. Application of the Statutory Construction Act to the Health Care Agents and Representatives Act

Section 5462(c) limits both the conditions when life-preserving treatment can be refused and the individuals who have the authority to

(stating that "[t]he [Pennsylvania] Supreme Court itself has acknowledged that it looks to the [Statutory Construction] Act for guidance and has even expressed its subservience to it") (footnotes omitted).

100. See *In re D.L.H.*, 2 A.3d 505, 513 (Pa. 2010).

101. See *id.* at 513-14.

102. See *id.* at 514.

103. *Id.* (citing 1 PA. CONS. STAT. § 1924 (2006)); see also *supra* pp. 21-22 (discussing the four exceptions in Section 5462(c) that were identified by the Court).

104. *D.L.H.*, 2 A.3d at 515.

105. See 1 PA. CONS. STAT. § 1901 (2006).

106. *Id.* § 1921(b) (2006).

107. See *id.* § 1901; *id.* § 1921(b).

make such refusals.¹⁰⁸ When applied to an individual like David, however, a plain language interpretation of the Health Care Agents and Representatives Act produces a result that is inconsistent with the manifest intent of the General Assembly. The Act contains a section on legislative findings and intent, which states:

This chapter provides a statutory means for *competent adults* to control their health care through instructions written in advance or by health care agents or health care representatives and requested orders. Nothing in this chapter is intended to:

- (1) affect or supersede the holdings of *In re Fiori* 543 Pa. 592, 673 A.2d 905 (1996);
- (2) condone, authorize or approve mercy killing, euthanasia or aided suicide; or
- (3) permit any affirmative or deliberate act or omission to end life other than as defined in this chapter.¹⁰⁹

On its face, the legislative intent section indicates that the Act was never meant to apply to someone like David. Specifically, the phrase “*competent adults*” modifies application of the Health Care Agents and Representatives Act to only competent individuals.¹¹⁰ David’s case was notable because it involved an individual who has been incompetent his entire life.¹¹¹ The Court acknowledged this complication but argued that Section 5462(c) listed only four possible exceptions for the hospital’s affirmative duty to provide treatment, none of which pertained to a life-long incompetent.¹¹² The Court stated that the legislative intent section failed to modify application of the Health Care Agents and Representatives Act because Section 5461 of the Act prioritizes individuals who may make health care decisions on behalf of an incompetent individual without an advance health care directive.¹¹³ Therefore, the Court concluded the Act applies to incompetent and competent individuals alike.¹¹⁴

However, the discussion of health care representatives in Section 5461 corresponds with an application of the Act for only competent

108. See 20 PA. CONS. STAT. § 5462(c) (2006).

109. *Id.* § 5423(a) (emphasis added).

110. *Id.* (emphasis added).

111. See *supra* note 8 and accompanying text.

112. See *In re D.L.H.*, 2 A.3d 505, 515 (Pa. 2010).

113. See *id.* at 515 (stating that “[w]hile the Act clearly reflects the express policy of empowering competent adults to effectuate advance health care directives, the provision for health care representation even in the absence of such directives . . . clearly conveys that the statute advances other purposes as well”) (citations omitted).

114. See *id.*

adults. The Health Care Agents and Representatives Act repealed the Advance Directive for Health Care Act.¹¹⁵ The Advance Directive for Health Care Act failed to address treatment decisions for individuals who left no advance directives.¹¹⁶ Section 5461 of the Health Care Agents and Representatives Act addresses that previous omission; Section 5461 serves as the default health care directive for those individuals who are of sound mind and reach maturity, but fail to execute an advance health care directive.¹¹⁷ All of the requisite conditions for selection of a health care representative demand a previously competent adult.¹¹⁸ Section 5461 appoints a de facto surrogate decision maker—a health care representative—for these individuals in a descending order of priority.¹¹⁹ Thus, the Court’s reading of the Act runs contrary to the Statutory Construction Act for two primary reasons.

First, the Court’s consideration of Section 5462(c) alone failed to give effect to all the provisions of the Health Care Agents and Representatives Act. The Court’s interpretation ignored the legislative intent in Section 5423, which provided the competency exception encompassing David’s circumstances.¹²⁰ Without invoking the legislative intent section, the logic employed by the Court amounts to an infinite loop which can never be satisfied by an individual like David: competency is required to execute an advance health care directive;¹²¹ an advance health care directive is required to refuse life-preserving treatment when not in an end-stage medical condition or permanently unconscious;¹²² David has been incompetent since birth;¹²³ therefore,

115. See Health Care Agents and Representatives Act, 2006 Pa. Laws 1484 (codified at 20 PA. CONS. STAT. §§ 5421-5488 (2006)); 20 PA. CONS. STAT. §§ 5401-5416 (repealed 2006).

116. See *In re Fiori*, 673 A.2d 905, 911 (Pa. 1996) (stating that “the [Advance Directive for Health Care] Act does not address the situation where no advance directives were left as to treatment”); see also 20 PA. CONS. STAT. § 5407(b) (repealed 2006) (stating that “the absence of a declaration by a patient shall not give rise to any presumption as to the intent of the patient to consent to or to refuse the initiation, continuation, or termination of life-sustaining treatment”).

117. See 20 PA. CONS. STAT. § 5461 (2006); see also *id.* § 5442(a); *id.* § 5452(a).

118. The physician must determine the individual is incompetent. See *id.* § 5461(a). In addition, the individual must be over 18 years of age, not have a health care power of attorney or a health care agent who is reasonably available, and not have a guardian appointed. See *id.* Because guardians are appointed for incapacitated individuals, the requirement that no guardian be appointed ensures that the individual previously possessed capacity. See *supra* Part II.A. Thus, a health care representative is available only to an individual who could have properly designated their health care wishes in advance of incompetency but failed to do so.

119. See 20 PA. CONS. STAT. § 5461(d) (2006).

120. See *id.* § 5423(a).

121. See *id.* § 5442(a); *id.* § 5452(a).

122. See *id.* § 5462(c); *id.* § 5422.

123. See *supra* note 8 and accompanying text.

David cannot execute a health care directive or refuse life-preserving treatment.

Arguably, the legislature did not expect such an illogical result given the section on legislative intent that was included in the Act.¹²⁴ A reading of Section 5462 without reference to the legislative intent section harshly places David within the constraints of the Act even though he could never execute an advance health care directive.¹²⁵ The legislative intent section suggests that the Act was meant to apply only to individuals of sound mind who reached the age of maturity and executed or failed to execute an advance health care directive.¹²⁶ Thus, a reading of Section 5462(c) that incorporates the General Assembly's expressed intent produces a result that is consistent with the intent of the legislature.¹²⁷ In addition, such an interpretation gives effect to all the material provisions of the Act.¹²⁸

Second, the Court's determination that the Act was never intended to allow a surrogate to make decisions regarding life-preserving treatment for a life-long incompetent violates the Statutory Construction Act because it demands an interpretation that is absurd, impossible of execution, and unreasonable.¹²⁹ The Health Care Agents and Representatives Act expressly states that "[i]ndividuals have a qualified right to make decisions relating to their own health care."¹³⁰ Such a right is not uniquely bestowed to competent individuals, but to incompetent ones as well.¹³¹ Therefore, David retains a right to make decisions, even if he himself cannot articulate them.

If the Court's interpretation of the Act is correct, no one could ever refuse life-preserving treatment on David's behalf: David could never have a health care representative;¹³² David could never execute an

124. See 20 PA. CONS. STAT. § 5423(a) (2006).

125. See *In re D.L.H.*, 2 A.3d 505, 515 (Pa. 2010).

126. See 20 PA. CONS. STAT. § 5423(a).

127. See 1 PA. CONS. STAT. § 1901 (2006).

128. See *id.* § 1921(a).

129. The Statutory Construction Act states "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." *Id.* § 1922(1).

130. 20 PA. CONS. STAT. § 5423(c)(1) (2006).

131. See Michael P. Allen, *The Constitution at the Threshold of Life and Death: A Suggested Approach to Accommodate an Interest in Life and a Right to Die*, 53 AM. U. L. REV. 971, 982-83 (2004) (stating that "[t]he [Cruzan] Court further assumes that the right to refuse medical treatment is not restricted to competent adults . . . [and] accepts, for purposes of the decision, that an incompetent person retains the assumed constitutional right to refuse medical treatment").

132. While a health care representative may not refuse life-preserving treatment under the Act, a health care representative may not be appointed when there is a guardian already appointed. See 20 PA. CONS. STAT. § 5461(a)(3) (2006).

advance health care directive;¹³³ the guardian of the person could never make a decision regarding life-preserving treatment;¹³⁴ and, because David himself lacked competency,¹³⁵ he could not object to the treatment on his own behalf.¹³⁶ By refusing David's parents' petition and holding the Act applies, the Court effectively dismissed David's right to make a decision about his care.¹³⁷ As a result, the Court's decision creates a result that is not only absurd but also unreasonable and impossible to execute.¹³⁸

3. Summary

In reaching its conclusion, the Pennsylvania Supreme Court stated that it was "unable to disregard the limitations inherent in Section 5462(c)(1)'s clearly-worded exception to the general requirement for treatment for life-threatening but curable medical conditions."¹³⁹ As previously discussed, clear wording of a statute alone fails to carry the day when interpretation of the statute is contrary to the expressed intent of the legislature.¹⁴⁰ Given the stated intent of the General Assembly in the Act and the inherent authority provided to guardians, a more reasonable interpretation existed for the Court: the Court could have held that Section 5462(c) did not apply to David because he was a life-long incompetent.¹⁴¹ Moreover, the Court could have utilized the legislative intent section and denied the guardian's request to refuse life-preserving

133. See *id.* § 5442(a) (2006) (executing a living will requires an "individual of sound mind"); 20 PA. CONS. STAT. § 5452(a) (2006) (executing a health care power of attorney requires an "individual of sound mind").

134. See *In re D.L.H.*, 2 A.3d 505, 514 (Pa. 2010) (stating that "[a]lthough the Act provides certain powers to guardians and health care representatives, see, e.g., *id.* §§ 5460(b), 5461(c), it does not explicitly authorize either surrogate to object to life-preserving care under Section 5462(c)(1) in the noted circumstances").

135. Competent is defined as a:

condition in which an individual, when provided appropriate medical information, communication supports and technical assistance, is documented by a health care provider to do all of the following:

- (1) Understand the potential material benefits, risks and alternatives involved in a specific proposed health care decision.
- (2) Make that health care decision on his own behalf.
- (3) Communicate that health care decision to any other person.

This term is intended to permit individuals to be found competent to make some health care decisions, but incompetent to make others.

20 PA. CONS. STAT. § 5422 (2006).

136. See *id.* § 5462(c) (specifying exception "if the individual is competent and objects to such care").

137. See *id.* § 5423(c)(1); *D.L.H.*, 2 A.3d at 515.

138. See 1 PA. CONS. STAT. § 1922(1) (2006).

139. *D.L.H.*, 2 A.3d at 514.

140. See *supra* Part III.A.1.

141. See *supra* Part III.A.2.

treatment on other grounds. For instance, the court could have characterized David's guardians' request as euthanasia or a mercy kill—both of which are prohibited under the Act.¹⁴² Such an interpretation would provide the same result in a manner less destructive to the Statutory Construction Act.

B. Guardians Can Influence Life-Preserving Treatment Decisions

A corollary to the Pennsylvania Supreme Court's holding regarding an affirmative duty of treatment is that guardians of the person lack standing under the Health Care Agents and Representatives Act to make decisions related to life-preserving treatment.¹⁴³ The Pennsylvania Supreme Court was not persuaded by arguments that the legislature expected the guardian to have a role involving life-preserving treatment.¹⁴⁴ First, the Court noted that guardians were not authorized surrogate decision makers under Section 5462(c).¹⁴⁵ Second, even though certain provisions in the guardianship statute provide a list of items the guardian cannot consent to, that list is not exhaustive.¹⁴⁶ The guardianship statute states that the court cannot grant to guardians the authority controlled by other statutes.¹⁴⁷ Third, although the Act allows guardians to amend or revoke the appointment of a health care agent, the Act does not allow guardians the authority to appoint a health care agent.¹⁴⁸ Thus, the guardian only has an oversight role that provides an extra layer of protection for incompetent persons.¹⁴⁹

The Court reasoned that the Health Care Agents and Representatives Act prohibited a court from granting a guardian the power to make decisions concerning life-preserving treatment.¹⁵⁰ Yet, this is not the only possible interpretation, and the two statutory provisions can be reconciled. If the Health Care Agents and Representatives Act's legislative intent section is given meaning, the Act—and its ensuing discussion on parties authorized to refuse life-preserving treatment—applies to only *competent* adults.¹⁵¹ Therefore, the Act does not invade a guardian's sovereignty for decisions of life-

142. See 20 PA. CONS. STAT. § 5423(a)(2) (2006).

143. See *D.L.H.*, 2 A.3d at 514-15.

144. See *id.* at 514.

145. See *id.* at 514; 20 PA. CONS. STAT. § 5462(c) (2006).

146. See *D.L.H.*, 2 A.3d at 514; 20 PA. CONS. STAT. § 5521(d) (2006); *id.* § 5521(f).

147. See *D.L.H.*, 2 A.3d at 514; 20 PA. CONS. STAT. § 5521(f).

148. See *D.L.H.*, 2 A.3d at 515; 20 PA. CONS. STAT. § 5460(a) (2006).

149. See *D.L.H.*, 2 A.3d at 515.

150. See *id.*; 20 PA. CONS. STAT. § 5462(c) (2006); see also *id.* § 5521(f) (stating that “[t]he court may not grant to a guardian powers controlled by other statute”).

151. See *id.* § 5423(a).

preserving treatment because guardianships, by their very nature, concern individuals who are adjudicated to be incompetent.¹⁵²

Moreover, any limitation on the court's authority to grant a guardian such powers does not mean a guardian lacks the ability to influence such decisions. The Act recognizes that the authority of a health care agent is not limitless, and guardians pose as one statutory check on health care agents.¹⁵³ While the Court chose to view this as an extra layer of protection for incompetent individuals,¹⁵⁴ guardians are explicitly referenced in the section of the Act discussing the extent of a health care agent's authority.¹⁵⁵ The relevant passage states:

Except as expressly provided otherwise in a health care power of attorney and subject to subsection (b) *and section 5460 (relating to relation of health care agent to court-appointed guardian and other agents)*, a health care agent shall have the authority to make any health care decision and to exercise any right and power regarding the principal's care, custody and health care treatment that the principal could have made and exercised.¹⁵⁶

Furthermore, Section 5460 states that if a court-appointed guardian is involved, then the "the health care agent is accountable to the guardian as well as to the principal" and "[t]he guardian shall have the same power to revoke or amend the appointment of a health care agent that the principal would have if the principal were not incapacitated but may not revoke or amend other instructions in an advance health directive absent judicial authorization."¹⁵⁷

The Court's focus on the guardian's ability to amend or revoke the appointment of a health care agent but not appoint that agent misconstrues the inherent authority that the Act vests in guardians.¹⁵⁸ The accountability of a health care agent to a guardian suggests that the guardian is in the superior position of authority.¹⁵⁹ For instance, a health care agent, when considering all the requisites for making a health care decision, could attempt to refuse life-preserving treatment.¹⁶⁰ However, the guardian, in asserting the best interests of the incapacitated person,¹⁶¹ could become concerned by the health care agent's decision and attempt

152. See *id.* § 5511; see also *supra* Part II.A.

153. See 20 PA. CONS. STAT. § 5456(a) (2006).

154. See *In re D.L.H.*, 2 A.3d 505, 515 (Pa. 2010).

155. See 20 PA. CONS. STAT. § 5456(a).

156. *Id.* (emphasis added).

157. *Id.* § 5460(a).

158. See *D.L.H.*, 2 A.3d at 515.

159. See 20 PA. CONS. STAT. § 5460(a).

160. See *id.* § 5456(c); *id.* § 5462(c).

161. See *id.* § 5521(a).

to revoke the agent's fiduciary relationship with the incapacitated person.¹⁶² If the health care agent contested the attempted removal and argued it was initiated in bad faith, then the court would have to make a decision regarding life-preserving treatment in order to resolve the contest.

In a suit such as this, the guardians undoubtedly would assert that life-preserving treatment was in the incapacitated person's best interest and removal of the agent was sought because of the agent's decision. Conversely, the health care agent would point to evidence that indicates the principal would have refused such treatment. By the very nature of the dispute, the court, even though not established as a party capable of making such decisions under Section 5462(c) of the Act, would ultimately determine whether life-preserving treatment is provided through its determination of whether the agent's decision stands.

This example illustrates that guardians are not powerless in decisions involving life-preserving treatment and can assert a point-of-view on life-preserving treatment when there is a health care agent involved. Moreover, the example suggests that guardians have just as much authority, if not more, in influencing decisions regarding life-preserving treatment.

C. *Variations of David's Circumstances Produce Unanswered Questions*

Regardless of whether the Pennsylvania Supreme Court properly applied the Health Care Agents and Representatives Act to David's circumstances, the legal implications from the Court's holding remain, and the holding must be scrupulously examined.

In David's case, the Pennsylvania Supreme Court refused to grant the parents' petition because the Act foreclosed a judicial remedy. The Court recognized that David may "face additional medical interventions which . . . [are] painful and intrusive," yet, without "arguments grounded in the Constitution, the courts are bound to enforce the statutory qualifications on David's right to control his treatment as exercised by his guardians."¹⁶³ Thus, the Court acknowledged that the Act

162. *See id.* § 5460(a).

163. *D.L.H.*, 2 A.3d at 515. For discussion purposes in this Comment, the constitutionality of the Health Care Agents and Representatives Act will not be questioned because of the Supreme Court's holding in *Cruzan* that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990).

contemplates all circumstances for a court to consider when life-preserving treatment is at issue.

However, the Court's reasoning becomes less persuasive when factual variations of David's case are discussed. For instance, if David was a previously competent adult who later became incompetent and developed an end-stage medical condition, the Act no longer imposes an affirmative duty to provide treatment.¹⁶⁴ But who is able to make that decision regarding the continuation or refusal of life-preserving treatment?

The Health Care Agents and Representatives Act states that the affirmative duty to provide treatment does not apply to an individual with an end-stage medical condition.¹⁶⁵ Accordingly, the end-stage medical condition provides an exception to the affirmative duty to provide life-preserving treatment that incorporates the second-half of Section 5462(c)(1):

In every other case, subject to any limitation specified in the health care power of attorney, an attending physician or health care provider shall comply with a health care decision made by a health care agent or health care representative to the same extent as if the decision had been made by the principal.¹⁶⁶

The statutory progression in Section 5462(c)(1) represents a policy judgment made by the Pennsylvania legislature about life-preserving treatment as it relates to quality of life.¹⁶⁷ Absent objections by the patient or patient's health care agent, Section 5462 mandates that life-preserving treatment be provided in all situations unless the individual is in an end-stage medical condition or is permanently unconscious.¹⁶⁸ In such situations, the Pennsylvania General Assembly recognized that preserving life is less of a priority either because the quality of life offers no hope of improvement—a permanent vegetative state—or the treatment would prolong a more enduring prognosis—an end-stage medical condition.¹⁶⁹

Even if David was once competent and is currently in an end-stage medical condition, he is still without someone to make decisions on his

164. See 20 PA. CONS. STAT. § 5462(c)(1) (2006) (stating “[h]ealth care necessary to preserve life shall be provided to an individual who has neither an end-stage medical condition nor is permanently unconscious, except if the individual is competent and objects to such care or a health care agent objects on behalf of the principal if authorized to do so by the health care power of attorney or living will”).

165. See *id.* § 5462(c)(1).

166. *Id.*

167. See *D.L.H.*, 2 A.3d at 514.

168. See 20 PA. CONS. STAT. § 5462(c)(1).

169. See *id.*

behalf. David's guardian inhibits a health care representative from being appointed.¹⁷⁰ Additionally, no health care agent exists because David failed to execute an advance health care directive.¹⁷¹ The absence of a health care agent or representative leaves David without a statutorily recognized party who is capable of making decisions regarding life-preserving treatment "in every other case" under Section 5462(c)(1).¹⁷² Thus, a plain language interpretation of the Act, as utilized by the Court in the *D.L.H.* case, demonstrates that the statute is incapable of allowing anyone to refuse treatment on David's behalf.

Furthermore, the problems with the Act become more apparent when the facts are changed to reflect a previous case decided by the Pennsylvania Supreme Court. Assume that David is a competent individual who is involved in an accident and becomes permanently unconscious. As a result, David's guardian requests that his feeding tube be removed. Such facts closely resemble the case of *In re Fiori*; a case that is difficult to reconcile with the *In re D.L.H.* decision.¹⁷³

Much like *In re D.L.H.*, the *Fiori* court rendered a decision on a technically moot appeal because of the important public policy at stake.¹⁷⁴ However, the *Fiori* court did not extend itself beyond those circumstances, and instead issued a narrow holding.¹⁷⁵ The Court held that where a once-competent adult becomes permanently unconscious and provides no advance instructions regarding life-sustaining treatment, a close family member may substitute his or her judgment to render a decision on the individual's behalf.¹⁷⁶ In reaching its decision, the *Fiori* court recognized the well-established and sacred common law right to refuse medical treatment.¹⁷⁷ The Court held that the right to refuse medical treatment is not terminated when an individual becomes incompetent; however, this individual right is not absolute, as it must be balanced against the state's interest in preserving life.¹⁷⁸ After determining that the state's interest in preserving life was outweighed by Fiori's right of self-determination, the Court concluded that the individual's right was best manifested through the substituted judgment

170. See *id.* § 5461(a)(3); see also *supra* note 58 and accompanying text.

171. See 20 PA. CONS. STAT. § 5455(a) (2006).

172. *Id.* § 5462(c)(1).

173. See *In re Fiori*, 673 A.2d 905 (Pa. 1996).

174. See *id.* at 909 (stating that "[w]ith the death of Fiori, this appeal is technically moot. Nonetheless, because this case raises an issue of important public interest, an issue which is capable of repetition yet is apt to elude review, we have decided to hear this appeal").

175. See *id.* at 912-13.

176. See *id.*

177. See *id.* at 909.

178. See *id.* at 910 (listing the four state interests recognized by courts as protection of third-parties, prevention of suicide, protection of medical ethics, and preserving life).

of a close family member because, at the time, there was no statute addressing medical treatment for a once-competent adult without an advance directive.¹⁷⁹

Fiori predated the Health Care Agents and Representatives Act, and a different holding would likely emerge from the Court if the case was decided following the Act's ratification. The Act makes clear that the *Fiori* holding is not disturbed; yet, it is conceptually difficult to see how *Fiori*'s holding remains good law.¹⁸⁰ If David had been like *Fiori*—permanently unconscious after previously being competent—the Health Care Agents and Representatives Act would still preclude David's mother—a guardian—from refusing ventilator treatment. The permanent unconsciousness provides an exception to the hospital's affirmative duty.¹⁸¹ However, the Act stipulates that “in every other case,” where there is no affirmative duty related to treatment necessary to preserve life, only a health care agent or representative may decide treatment.¹⁸² Given the guardian involved, a health care representative could not be appointed, and the health care agent was not selected in advance of incompetency.¹⁸³ Therefore, a *Fiori*-like David would also be left without a statutorily recognized party to refuse life-preserving treatment on his behalf.

Ironically, the Act states that it does not intend to “affect or supersede the holdings of *In re Fiori*.”¹⁸⁴ However, the *D.L.H.* holding directly impacts a *Fiori* scenario. In a footnote, the *D.L.H.* court noted the distinction between life-preserving treatment and life-sustaining treatment.¹⁸⁵ Life-sustaining treatment only serves “to prolong the process of dying or maintain the individual in a state of permanent unconsciousness.”¹⁸⁶ In contrast, life-preserving treatment or “[h]ealth care necessary to preserve life” is not statutorily defined.¹⁸⁷

While lacking statutory clarity, the definition of life-preserving treatment is significant because such treatment corresponds to an affirmative duty of dispensation unless certain exceptions apply.¹⁸⁸ Surrogate decision makers become more involved with all other

179. *See id.* at 910-11.

180. *See* 20 PA. CONS. STAT. § 5423(a)(1) (2006). *Fiori* may remain good law if the distinction between life-preserving treatment and life-sustaining treatment is strictly adhered to by the Court.

181. *See id.* § 5462(c)(1).

182. *Id.*

183. *See id.* § 5461(a)(3).

184. *Id.* § 5423(a)(1).

185. *See In re D.L.H.*, 2 A.3d 505, 515 (Pa. 2010) (stating that a “life-sustaining treatment” situation has never been before the courts in this case”).

186. 20 PA. CONS. STAT. § 5422 (2006).

187. *Id.* § 5462(c)(1).

188. *See id.*

treatment decisions, including life-sustaining treatment.¹⁸⁹ Thus, providers must be sure to identify the type of treatment being administered and consult with the appropriate parties before proceeding with treatment.

D. Statement Of Policy By Department of Public Welfare

The Department of Public Welfare (Department) issued a statement of policy that became effective January 15, 2011.¹⁹⁰ Recognizing that surrogate health care decision making remained uncertain, the Department attempted to reconcile the *D.L.H.* case and the Health Care Agents and Representatives Act with other existing areas of the law.¹⁹¹

Initially, the Department recognized that the Act disposed of many issues relating to surrogate health care decision making but did not supersede all applicable statutes.¹⁹² Consequently, the Department established a decision making hierarchy for several medical conditions.¹⁹³

The Department discussed incompetent individuals who neither have an end-stage medical condition nor are permanently unconscious.¹⁹⁴ The Department provided that, in the absence of a health care agent, the guardian of the individual's person makes the decisions.¹⁹⁵ If no guardian of the person is appointed, the decision then falls to the health care representative and then to the facility director as the decider of last resort.¹⁹⁶ However, in a separate section of the statement, the *D.L.H.* decision is referenced as providing a limitation on the authority of surrogate decision makers.¹⁹⁷ The Department notes that of the above-referenced surrogates, only a health care agent is capable of making life-preserving treatment decisions for an individual who is neither in an end-stage medical condition nor permanently unconscious.¹⁹⁸

189. *See id.*

190. *See Procedures for Surrogate Health Care Decision Making*, DEPARTMENT OF PUBLIC WELFARE (Jan. 15, 2011), <http://www.pabulletin.com/secure/data/vol41/41-3/78.html>.

191. *See id.*

192. *See id.* (stating that the unaffected "statutes include the following: 18 Pa.C.S. § 2713 (relating to neglect of care-dependent persons); 20 Pa.C.S. Chapter 55 (relating to incapacitated persons); the Medical Care Availability and Reduction of Error (MCARE) Act (MCARE Act) (40 P. S. §§ 1303.101—1303.910); and section 417(c) of the Mental Health and Mental Retardation Act of 1966 (MH/MR Act) (50 P. S. § 4417(c)), regarding powers and duties of directors").

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. *See id.*

As with all statements of policy, the Department's statement is an announcement regarding "the agency's tentative intentions for the future" and does not "establish[] a standard of conduct which has the force of law."¹⁹⁹ If the agency applies the statement of policy, the agency must defend its decision as if the policy statement did not exist.²⁰⁰ Furthermore, a reviewing court is free to reject the agency's statement of policy if the statement reflects an inaccurate interpretation.²⁰¹

The Pennsylvania Supreme Court, invoking a similar plain language interpretation of the Act, would likely view the Department's policy statement as inaccurate. The Court's reading of Section 5462(c)(1)'s first sentence dismissed any suggestion that guardians or health care representatives could be involved in a life-preserving treatment decision for an individual not in an end-stage medical condition or permanently unconscious.²⁰² The Court arrived at this conclusion after failing to be persuaded that other sections of the Act modified application of this sentence.²⁰³

Following the sentence scrutinized in *D.L.H.*, Section 5462(c)(1) continues on to state that "[i]n every other case . . . an attending physician or health care provider shall comply with a health care decision made by a health care agent or health care representative to the same extent as if the decision had been made by the principal."²⁰⁴ Guardians are noticeably absent from the list of surrogates delegated authority.²⁰⁵ Rather, only health care agents and representatives may assert health care decision on behalf of the incompetent individual.²⁰⁶

The above-suggested reading of Section 5462(c)(1), which excludes guardians, directly contradicts the Department's statement of policy. However, such a reading is a natural continuation of the Court's *D.L.H.* holding.²⁰⁷ Moreover, the reading contemplates "every other case" where life-preserving treatment to a principal who is neither in an end-stage medical condition, permanently unconscious, competent and objects, or has previously appointed a health care agent who objects and is authorized to do so by a power of attorney or living will.²⁰⁸ Therefore,

199. Pa. Human Relations Comm'n v. Norristown Area Sch. Dist., 374 A.2d 671, 679 (Pa. 1977) (citations omitted).

200. See *id.*

201. See Central Dauphin Sch. Dist. v. Commonwealth, 608 A.2d 576, 581 (Pa. Commw. Ct. 1992).

202. See *In re D.L.H.*, 2 A.3d 505, 514-15 (Pa. 2010).

203. See *id.*

204. 20 PA. CONS. STAT. § 5462(c)(1) (2006).

205. See *id.*

206. See *id.*

207. See *D.L.H.*, 2 A.3d at 515.

208. See 20 PA. CONS. STAT. § 5462(c)(1).

while creative, the Department's creation of a surrogate hierarchy will likely be unpersuasive to a reviewing court.

E. Statutory Remedies

Considering all of the scenarios discussed above, in conjunction with David's own case, two legislative changes to the Health Care Agents and Representatives Act are necessary.

First, Section 5462(c)(1) should expressly exempt individuals who have been incompetent their entire lives. The legislative intent section of the Act implies this exemption, but the Pennsylvania Supreme Court was reluctant to make it law.²⁰⁹ Therefore, the General Assembly should expressly exempt lifelong incompetent individuals from the purview of the Act and allow guardianship proceedings to handle life-preserving treatment decisions. The Pennsylvania Superior Court outlined a workable model for considering such circumstances.²¹⁰ The clear and convincing evidentiary burden for refusing life-preserving treatment would be difficult, if not impossible, for a moving party to satisfy; yet, the process respects an incompetent individual's right to refuse medical treatment because this right is incorporated through the best interests standard.²¹¹

Second, in lieu of the above statutory addition, the prohibition against appointment of a health care representative when there is already an appointed guardian must be removed from Section 5461.²¹² The guardian restriction contemplates that a close family member will not be needed to make a health care decision—by use of a health care representative—where there is a guardian involved.²¹³ *In re D.L.H.* makes clear that guardians and health care representatives will never be involved in life-preserving treatment decisions.²¹⁴ However, Section 5462(c) states that “in every other case” a health care agent or health care representative will decide.²¹⁵ As demonstrated by the previous factual scenarios, the existence of a guardian should not inhibit an individual's right to determine treatment decisions through a health care representative or otherwise.²¹⁶ The current guardian restriction causes

209. See *D.L.H.*, 2 A.3d 505.

210. See *supra* Part II.C.2.

211. See *supra* Part II.C.2.

212. See 20 PA. CONS. STAT. § 5461(a)(3) (2006).

213. See *id.* § 5461(d).

214. See *In re D.L.H.*, 2 A.3d 505, 514 (Pa. 2010) (stating that the Act “does not explicitly authorize either surrogate to object to life-preserving care under Section 5462(c)(1)”).

215. 20 PA. CONS. STAT. § 5462(c)(1) (2006).

216. See *supra* Part III.C.

damage to the overall scheme of the Act by forbidding a third-party from making treatment decisions. Therefore, the restriction should be removed.

IV. CONCLUSION

Upon first impression, the *In re D.L.H.* decision presents an interpretation of a narrow area of the law: a specific statute applied to unique circumstances. The *D.L.H.* case pertained to an individual who was incompetent his entire life and never possessed the capacity to execute an advance health care directive. For such facts, the Court made clear that the Health Care Agents and Representatives Act precluded a judicial remedy from being fashioned.²¹⁷

In isolation, the *D.L.H.* holding appears to be innocuous. However, as the Pennsylvania Supreme Court's logic is extrapolated onto other facts, the results become less reconcilable with prior jurisprudence and other legal institutions, such as guardianships.

As suggested, the General Assembly never intended for the Act to control David's health care outcome. Instead, the Act was enacted to manage advance health care directives and establish a default, statutory directive for competent adults who failed to plan in advance of incompetency. This intention was clearly expressed within the Act and espoused by its legislative sponsor in the Senate.²¹⁸ Consequently, an interpretation of the Act using Pennsylvania's statutory interpretation guidelines produces a result that properly effectuates the expressed intent of the General Assembly.

Despite the flawed reasoning, the Court's interpretation remains good law that controls health care decision making. While the Act was intended to clarify surrogate health care decision making, the legal landscape remains murky in wake of the *D.L.H.* decision.²¹⁹ The Department of Public Welfare has already recognized the potential confusion as evidenced by their need for public comment.²²⁰ Therefore, the General Assembly should resolve the existing uncertainty by amending the Act.

The General Assembly should exempt individuals who were never capable of executing an advance health care directive and incorporate guardians as the surrogate tasked with handling health care decisions.

217. See *supra* Part II.C.3.

218. See 20 PA. CONS. STAT. § 5423(a) (2006); see also *supra* notes 43-44 and accompanying text.

219. See State Senator Stewart J. Greenleaf, *Greenleaf Health Care Decision Making Bill Passes House* (Nov. 21, 2006), <http://www.senatorgreenleaf.com/press/2006/112106.htm>.

220. See *supra* Part III.D.

Undoubtedly, the Court's decision in *D.L.H.* was the morally correct determination as it emphasized the preservation of life. However, the decision ignored a life-long incompetent's right to refuse treatment: a right that is recognized under the Act and at common law.²²¹ Furthermore, there are judicial mechanisms to foster the preservation of life that still afford respect to a life-long incompetent's rights. As suggested by the Superior Court, a life-long incompetent would never have the opportunity to express health care preferences.²²² However, the guardian could still seek to refuse treatment by providing clear and convincing evidence that it is in the incapacitated person's best interests.²²³ Such a model accommodates the rights of those who are unable to articulate health-care preferences.

If a less ambitious reform is desired, the General Assembly should, at the very least, remove the restriction that inhibits appointment of both a guardian and health care representative. Hypothetical variations on David's circumstances pose questions as to who is able to decide routine health care matters for an incompetent who is permanently unconscious or at an end-stage medical condition. Moreover, the results suggested by such variations are inconsistent with prior jurisprudence from the Court. As a result, removing the guardian-health care representative restriction and prioritizing these two surrogate decision makers would add substantial clarity to the Act.

Health care decisions involving the most extreme outcomes are not only difficult for the individual affected but also for his or her family and friends. The decisions become even more difficult when a surrogate is making them on behalf of the principal. Because of the nature of these decisions, the General Assembly must ensure this area of the law is free from unnecessary frustrations.

221. See *supra* notes 130-31 and accompanying text.

222. See *In re D.L.H.*, 967 A.2d 971 (Pa. Super. Ct. 2009).

223. See *id.* at 987.