IN THE COURT OF APPEALS OF GEORGIA

CASE NO. A23A0924

RAJESHE SHINDE, Respondent-Appellant, vs. LUANNE BONNIE AND MALA PILLUTLA, Petitioner-Appellee.	On Appeal from the Probate Court of Fulton County Case No. PC-2018-000518 IN RE ESTATE OF VINIT SHINDE

BRIEF OF COMPASSION & CHOICES AS *AMICUS CURIAE*

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I. INTEREST OF AMICUS CURIAE

Compassion & Choices is the nation's oldest, largest, and most active 501(c)(3) nonprofit organization committed to improving care and expanding choice at the end of life. Compassion & Choices advocates for high quality end-of-life medical care and educates the public about available end-of-life options. The organization's stated vision is of a society that affirms life and accepts the inevitability of death, embraces expanded options for compassionate dying, and empowers everyone to choose end-of-life care that reflects their values, priorities, and beliefs. To support this vision, Compassion & Choices works to empower patients' voices and agency in end-of-life care, regardless of gender identity, age, sexuality, race, ethnicity, religion, national origin, wealth, marital status, or disability. Compassion & Choices therefore files this amicus brief to aid the Court in establishing sound, consistent principles when adjudicating medical care decisions by guardians, particularly when involving end-of-life care and withholding of medical treatment.

II. ARGUMENT AND CITATION OF AUTHORITY

This case involves guardian Rajesh Shinde's decision to withhold life-sustaining treatment from his brother and adult ward Vinit Shinde, who left no advance directive. As *Amicus Curiae*, Compassion & Choices

seeks to bring the Court's attention to three important issues that arise in this case:

- First, because the United States Constitution and Georgia case law each recognize a patient's fundamental right to refuse medical treatment, a guardian's choice to withhold treatment, when made in good faith, should be a neutral factor when considering a challenge to the guardianship, and no adverse inference should apply to the decision.
- Second, Georgia law is silent on the substantive and evidentiary standards that apply when considering a challenge to a decision to withhold life-sustaining treatment by a guardian on behalf of an incapacitated person without an advance directive. Georgia should adopt a clear standard that, to the extent possible, effectuates the wishes of the incapacitated person.
- Third, the trial court did not reach a conclusion on whether life-sustaining care should be withdrawn from the ward. Because the propriety of withholding care centers on factual consideration of the ward's wishes and remains unresolved, the Court should remand this case for an evidentiary hearing to determine the ward's wishes and decide whether life-sustaining care should be withdrawn from Vinit Shinde.

Amicus submits this brief as a neutral friend of the Court and does not support any particular party on appeal.

A. Without a determination that an attempt to withhold life-sustaining treatment was contrary to the ward's wishes, the decision to refuse treatment must be a neutral factor in guardianship proceedings as a matter of constitutional law.

The right to refuse medical treatment—including life-sustaining treatment—goes to the heart of an individual's right to privacy. It is a right expressly recognized by the United States Supreme Court as a fundamental right under the Due Process Clause of the Fourteenth Amendment. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 281 (1990) ("It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."). It also is a right expressly recognized by the Supreme Court of Georgia as one conferred by the Georgia Constitution. *See In re L.H.R.*, 253 Ga. 439, 446 (1984) (acknowledging the right to refuse medical treatment); *State v. McAfee*, 259 Ga. 579, 580 (1989) (citing Ga. Const. art. I, § 1, ¶ I as the source of the right to refuse medical treatment). And it is a right expressly recognized by the Georgia Legislature. O.C.G.A. § 31-9-7 ("Nothing contained in this chapter shall be construed to abridge any right of a person 18 years of age or over to refuse to consent to medical and surgical treatment as to his own person.").

This constitutional and statutory right to refuse treatment extends to incompetent and incapacitated individuals. *In re L.H.R.*, 253 Ga. at 446–47 (citing *In re Quinlan*, 355 A.2d 647 (N.J. 1976) as the "seminal case" in the area of refusing or withdrawing life-sustaining treatment for incompetent persons and applying its reasoning). This right, though not absolute, is broad: Georgia law does not require that the incapacitated individual be diagnosed with a terminal condition, be in a chronic vegetative state, or be imminently close to death. *In re Doe*, 262 Ga. 389, 392 (1992). And Georgia's courts have been clear that there is no "single, static formula for deciding when deescalation of medical treatment may be appropriate." *Id.*; *see also Ussery v. Children's Healthcare of Atlanta, Inc.*, 289 Ga. App. 255, 262 (2008) (holding that the decision to withdraw life support is not premised on a finding of terminal illness or imminent death); *McAfee*, 259 Ga. at 580–81 (holding that a quadriplegic, who depended on a ventilator to breathe but was not terminal or without cognitive abilities, had the right to end life support). Instead, Georgia adopts the view accepted by several other states that "medical decision-making for incompetent patients is most often best left to the patient's family (or other designated proxy) and the medical community." *In re*

Doe, 262 Ga. at 392 (collecting cases). Thus, when an incompetent individual cannot exercise his own right to reject or end life-sustaining treatment, that right is properly facilitated by an incompetent person's guardian. *Id.*

As a general matter, "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963). While courts have not directly applied this principle to the right to refuse medical treatment, they have done so with respect to several other constitutional rights, including due process. *See, e.g.*, U*nited States v. Jackson,* 390 U.S. 570, 581 (1968) (Fifth Amendment right not to plead guilty and Sixth Amendment right to jury trial); *Griffin v. California*, 380 U.S. 609, 614 (1965) (Fifth Amendment right against self-incrimination); *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950), abrogated by *Ford v. Wainwright*, 477 U.S. 399 (1986)[1] (Fourteenth Amendment Due Process Clause) ("In enforcing [rights granted by the Due Process Clause] this Court does not translate

[1] *Ford v. Wainwright* abrogated *Solesbee* insofar as the latter "did not consider the possible existence of a right under the Eighth Amendment, which had not yet been applied to the States." *Ford*, 477 U.S. at 405. *Ford* left untouched *Solesbee*'s broader premise that personal views should not affect the enforcement of constitutional rights.

personal views into constitutional limitations."); *Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 252 (6th Cir. 2015) (First Amendment right to free speech); *Langford v. City of Texarkana, Ark.*, 478 F.2d 262, 267 (8th Cir. 1973) (Fourteenth Amendment Equal Protection Clause) ("[T]his Court and the Supreme Court have rejected the proposition that interference with constitutional rights can be justified on the grounds that the community is hostile to their exercise and vigorously displays its feelings."); *New Jersey v. Rice*, 597 A.2d 555, 559 (N.J. App. Div. 1991) (Fourth Amendment right against unreasonable searches and seizures) ("The exercise of a constitutional right may not be the basis of an adverse inference."); *Washington v. Rupe*, 683 P.2d 571, 595 (Wash. 1984) (Second Amendment right to bear arms) ("The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right."). As a result, a court conducting guardianship and conservatorship proceedings should not draw adverse inferences when the constitutional right to refuse medical treatment is exercised.

But the record suggests that the probate court likely drew an adverse inference against Rajesh based on his decision to remove Vinit

from life support. The recitation of facts in the probate court's Final Order—and comments made by the probate court during trial—suggest that Rajesh's choice played a significant, if not determinative, role in the court's decision to remove Rajesh as Vinit's guardian and conservator. And although *Amicus* takes no position on whether Rajesh's decision to initiate hospice care accurately reflected what Vinit would have wanted in this situation, *Amicus* urges this Court to instruct all Georgia Probate Courts that such an adverse inference is inconsistent with Georgia's constitution.

Two elements of the trial suggest potential bias: First, the probate court's Final Order teems with references to (1) Rajesh's decisions to transfer Vinit to hospice; (2) Rajesh's decision to remove Vinit's feeding tube; and (3) Vinit's health, including whether he is in a vegetative state, is within six months of death, is diagnosed with dementia, is terminally ill, and is minimally conscious.[2] Reading the summary of testimony, one would think the proceedings in the probate court were to determine the

[2] V2–18-30 at ¶¶ 2, 3.ii, 3.v, 3.i [sic], 3.ii [sic], 3.iii [sic], 3.iv [sic], 3.vi [sic], 4.i, 4.ii, 6, 7, 8.i, 8.ii, 8.iii, 9.i, 9.ii, 10, 11.i, 11.ii. The Final Order erroneously includes two paragraph threes. References to the second "paragraph 3" are indicated by "[sic]."

propriety of end-of-life decisionmaking by a guardian for an incapacitated ward. But the Findings of Fact and Conclusions of Law in the Final Order state that Rajesh was removed as guardian and conservator because he "breached his fiduciary duty."[3] *Amicus* has located no case in Georgia that would extend a guardian's fiduciary duty to oversight of health care, so the probate court's order likely referred to Rajesh's fiduciary duty to Vinit in the financial context. But in the order revoking guardianship for breach of fiduciary duty, the court's references to Rajesh's decision to end life-sustaining treatment vastly outnumber references to Rajesh's handling of Vinit's finances.[4] The amount of dicta in the probate court's final order dedicated to Rajesh's decision to initiate end-of-life care on his brother's behalf, when this issue was not even probative of Rajesh's compliance with his fiduciary duty, makes clear that the end-of-life issue weighed heavily in the court's decision-making process.

Second, the hearing officer's comments during the probate court trial suggest that the hearing officer may have been biased against any

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[3] V2–28.

[4] *Compare* V2–18-30 at ¶¶ 2, 3.ii, 3.v, 3.i [sic], 3.ii [sic], 3.iii [sic], 3.iv [sic], 3.vi [sic], 4.i, 4.ii, 6, 7, 8.i, 8.ii, 8.iii, 9.i, 9.ii, 10, 11.i, 11.ii *with* V2–18-30 at ¶¶ 3.vii [sic], 12.i, 12.ii.

decision to withdraw life-sustaining treatment. For example, the hearing officer took time on the record to share her belief in supernatural healing with Brenda Cruse, a witness in the trial and a former nurse at the William Breman Jewish Home:

> THE COURT: All right. And we got to say a prayer and wish God's blessings on supernatural healing. How about that? … Touching and breathing it. Okay? … That's something I believe in, and I think you believe in that too. All right? … Well, personally. All right?[5]

Whether Vinit's condition or quality of life could be improved was a point of contention during the trial.[6] Moreover, Appellee/Petitioner Mala Pillutla testified that, unlike Rajesh, who decided to withdraw life-sustaining care, she would "never give up" on Vinit and would "try everything possible, even on any clinical trial that can give him the smallest improvement in life" if appointed Vinit's guardian.[7] In the probate court's final order, the hearing officer even acknowledged that

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5 V5–10:16-25. Ms. Cruse was in the hospital recovering from surgery at the time of trial.

6 *Compare* V6–12:8-14, 19:22-20:3, and 41:3-6 (Dr. Ramsey Elliot Jackson, Medical Director at William Breman Jewish Home, testifying that he believes Vinit's condition will never improve) *with* V5–146:5-14, 166:7-24 (Appellee/Petitioner Mala Pillutla testifying that she believes Vinit has improved since she took over as temporary guardian).

7 V5–169:12-22.

Ms. Pillutla would "never give up" on Vinit.[8] Given the hearing officer's stated belief in supernatural healing, it is hard to see how she could have been impartial toward Rajesh's decision to withdraw life-sustaining care when the alternative is Ms. Pillutla's claim that she would "never give up" on Vinit and would aggressively pursue clinical trials and "more aggressive neurological rehab" for Vinit.[9]

The potential for bias against the withdrawal of life support—coupled with the extensive discussion of Rajesh's decision to move Vinit to hospice—suggest the hearing officer may have counted Rajesh's decision against him in deciding to remove him as Vinit's guardian and conservator *without actually deciding whether Rajesh's decision was improper*. If hospice care was what Vinit would have wanted in this circumstance, Rajesh—as Vinit's guardian—had the obligation to act on Vinit's behalf and exercise Vinit's constitutional and statutory right to end life-sustaining treatment. *In re Doe*, 262 Ga. at 392.

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8 V2–20 at ¶ 3.v.

9 V5–169:23-170:10.

Amicus takes no position on whether Vinit was an appropriate candidate for hospice or whether Rajesh's decision was appropriate.[10] But absent a finding by the probate court that hospice was not in Vinit's best interests based on what Vinit would have wanted, the probate court should not have considered the termination of life-sustaining treatment in deciding to remove Rajesh as Vinit's guardian and conservator. This Court should clarify the law in this area by instructing the lower court that such an adverse inference for exercising the constitutional right to refuse or end life-sustaining treatment conflicts with the U.S. and Georgia constitutions.

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[10] Appellee's brief suggests that Georgia law "would not allow" Rajesh to remove Vinit's feeding tube because Rajesh did not have a properly executed Physician Order for Life-Sustaining Treatment (POLST) form. Br. of Appellee at 24. *Amicus* takes no position on whether the POLST forms were properly executed by Rajesh under O.C.G.A. § 31-1-1. *Amicus* takes issue, however, with Appellee's assertion that an ineffective POLST form blocks Rajesh from withdrawing life-sustaining treatment under Georgia law. *Amicus* believes that a POLST is one of the best ways to document end-of-life wishes, but it is by no means the exclusive means by which to do so. Nothing in O.C.G.A. § 31-1-14 suggests a POLST is the exclusive means by which to effectuate end-of-life decision making, only that it comes with certain benefits such as offering immunity to those who follow it in good faith. *See* O.C.G.A. § 31-1-14. *Amicus* urges this Court to not adopt Appellee's view that a POLST is the exclusive means by which to withdraw life-sustaining treatment.

B. The Court should adopt a "substituted judgment" substantive standard and an evidentiary standard of proof that, to the extent possible, effectuates the wishes of the incapacitated person when adjudicating a decision to terminate life-sustaining treatment.

Amicus respectfully submits that Georgia's lower courts need appellate-court guidance on the substantive and evidentiary standards that apply when adjudicating a guardian-removal petition that implicates the propriety of a guardian's decision to terminate life-sustaining care. Georgia courts have not clearly addressed these issues, even though life-or-death surrogate decisionmaking happens with remarkable frequency. *See* Alexia M. Torke, M.D. et al., American Medical Association, *Scope and Outcomes of Surrogate Decision Making Among Hospitalized Older Adults*, (2014) (finding that nearly half (48%) of hospitalized older adults required surrogate involvement in decision making, with over half (57.2%) requiring decisions about life-sustaining care within the first 48 hours of hospital admission). Because of the irreversible nature and paramount importance of the issues involved, it is essential to articulate clear standards for when the maintenance or withdrawal of life-sustaining care is contested to avoid decisionmaking

that could infringe on patient autonomy and the right of an individual to request or refuse life-sustaining treatment.

The standard for judicial consideration of the decision by a guardian to withdraw or refuse life-sustaining treatment on behalf of a ward includes two factors: (i) a substantive standard that the decision depends on and (ii) the evidentiary burden of proof by which the proponent of withdrawing care must meet the substantive standard. As an organization with longstanding experience in end-of-life planning and care, *Amicus* asks the Court to set clear standards on both issues.

i. The "substituted judgment" standard of surrogate decisionmaking incorporates, if possible, the patient's wishes.

For incapacitated patients incapable of informed consent who left no advance directive, courts have typically followed one of two primary substantive decisionmaking standards: the "substituted judgment" standard or the "best interests" standard. New York State Task Force on Life and the Law, *When Others Must Choose: Deciding for Patients without Capacity* (1992). These standards determine what information the surrogate decisionmaker must use to guide the decision to withhold life-sustaining care:

1. under the **substituted judgment standard** the guardian implements the patient's wishes as inferred from the patient's statements, conduct, and beliefs; and

2. under the **best interests standard** the guardian prioritizes patient welfare over individual autonomy, allowing the surrogate or even the state to determine what is best for the patient, often (though not always) regardless of the patient's beliefs or wishes.

In re Estate of Longeway, 549 N.E.2d 292, 299–300 (Ill. 1989).

Amicus respectfully suggests that in Georgia, the substituted judgment standard should apply to a guardian's decision to withdraw life-sustaining treatment from an incapacitated patient incapable of informed consent. First, the Supreme Court of Georgia has suggested that the substituted judgment standard is "useful" in determining the propriety of ending life-sustaining treatment for incapacitated adults. In analyzing a decision from a Florida court regarding the substituted judgment standard, the Court noted:

> The [Florida] appellate court found that the doctrine of substituted judgment as developed in order to afford incompetent persons the same right as competent individuals to refuse medical treatment. Under the doctrine of substituted judgment the decisionmaker bases the decision on what he believes the patient, if competent, would have done. While this analysis is useful in the case of adults, it is difficult to apply in the case of young children.

In re L.H.R., 253 Ga. at 440–41. *Amicus* asks this Court to make explicit what the Supreme Court of Georgia suggested: a substituted judgment standard best protects an adult individual's constitutional and statutory right to refuse life-sustaining treatment should that adult become incapacitated.

Second, a substituted judgment standard is superior from a policy standpoint. In the context of the life-or-death decision to withhold treatment, preserving and honoring patient autonomy is key. When a surrogate's choice to forgo a ward's life-sustaining care is challenged, the proponent of withdrawing life-sustaining care should have to prove that the ward would have wished to forgo ongoing treatment and care. Adopting such a standard would help to ensure as much as possible that the patient's wishes are carried out, without the surrogate or the state stepping in to supplant them. Furthermore, the substituted judgment standard is the predominant standard for end-of-life decisionmaking applied by courts across the United States. *Mack v. Mack*, 618 A.2d 744, 754 (Md. 1993) ("[T]he overwhelming majority of cases involving requests to withdraw sustenance from a[n incapacitated] person … required the proponent of withholding or withdrawing life support to bear the burden

of proving by clear and convincing evidence that the ward's decision would have been to forego life support."); *see also* Meisel, et al., RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING § 4.02 (3d ed. 2022-2 Supp.) [hereinafter RIGHT TO DIE].

Moreover, adopting an objective "best interests" standard would significantly impair Georgia citizens' fundamental right to refuse life-sustaining care and would subject Georgians to overtreatment of illnesses that they otherwise would not have wanted. As Justice Brennan noted in *Cruzan*, decisions about life-sustaining care are central to the patient:

> [F]rom the point of view of the patient, an erroneous decision in either direction is irrevocable. An erroneous decision to terminate artificial nutrition and hydration, to be sure, will lead to failure of that last remnant of physiological life, the brain stem, and result in complete brain death. An erroneous decision not to terminate life-support, however, robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted.

497 U.S. at 320 (Brennan, J., dissenting); *but see id.* at 350 (Stevens, J., dissenting) (supporting standard that incorporates patient's best interests).

Amicus therefore submits that Georgia courts should apply a substantive decisionmaking standard more protective of the patient's subjective autonomy than the best interests standard. Or should the Court adopt a best interests standard, *Amicus* asks the Court to recognize that any action taken in the best interest of an incapacitated person is an action that honors the patient's wishes. *See Woods v. Kentucky*, 142 S.W.3d 24, 31, 43–45, 50–51 (Kent. 2020) (applying a "best interests" statutory standard but incorporating elements of substituted judgment, including considering patient's beliefs and expressions of intent when determining best interests); *Conservatorship of Drabick*, 245 Cal. Rptr. 840, 857 (Cal. Ct. App. 1988) (noting that a patient's preferences are relevant to the best interests test and citing Cal. Prob. Code § 2355 for same premise).

ii. Requiring proof of the patient's wishes helps safeguard the patient's interests.

The Court must next consider what evidentiary burden of proof the proponent of withholding care must bear when the surrogate's decision is challenged.[11] *Amicus* respectfully suggests that the Court apply the

[11] The burden of proof is independent of the substantive standard to which it applies. *See Martin v. Martin (In re Martin)*, 538 N.W.2d 399, 406 n.12 (Mich.

standard it believes best effectuates the incapacitated person's wishes in situations like the one currently faced by Vinit Shinde.

Clear and convincing evidence is a higher evidentiary burden than the preponderance of the evidence standard typical in civil litigation. *See Rhoden v. Rhoden*, 359 Ga. App. 353, 355 (2021) (noting that preponderance of evidence standard is common in civil cases) (noting that preponderance of evidence standard is common in civil cases). A heightened clear-and-convincing evidentiary burden can be useful in the context of life-or-death decisions about sustaining medical care, and the standard impresses on the factfinder the importance of the decisions at issue. RIGHT TO DIE § 3.27 (collecting cases).

In most states, courts considering contested withdrawals of life-sustaining care from incapacitated wards require the proponent of withdrawal to meet its evidentiary burden by clear and convincing evidence. *Mack*, 618 A.2d at 754 (collecting cases). Thus adopting a clear-

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1995) (quoting Gorby, Admissibility and Weighting Evidence of Intent in Right to Die Cases, 6 Issues in L. & Med. 33, 43 (1990)) ("In right to die cases, if [the patient's] intent to withdraw life prolonging medical procedures is determinative of the case, then there must be 'clear and convincing evidence' of that intent. If 'best interests' of the patient is determinative of the case, then there must be 'clear and convincing evidence' that discontinuance of medical procedures best serves the interests of the patient.").

and-convincing evidentiary standard would bring Georgia in line with most other states:

State	Case	Holding
Alabama	*Knight v. Beverly Health Care Bay Manor Health Care Ctr.*, 820 So. 2d 92, 101–02 (Ala. 2001).	Requiring clear and convincing proof that ward was in persistent vegetative state and noting that "states could require clear and convincing evidence as the standard for proving a person's intent not to receive life-sustaining treatments, and several states have required clear and convincing evidence in a variety of situations involving the removal of life-support systems and artificially provided hydration and nutrition."
Arizona	*Rasmussen v. Fleming*, 741 P.2d 674, 691 (Ariz. 1987).	Holding that when considering "disputes questioning the 'substituted judgment' or the 'best interests' of the incompetent patient, then evidence necessary to resolve the dispute must be 'clear and convincing.'"
Connecticut	*McConnell v. Beverly Enterprises-Connecticut, Inc.*, 553 A.2d 596, 605 (Conn. 1989).	"We therefore conclude that the record sustains those findings of fact by the trial court that are required by the act to be shown as a condition for the withdrawal of life support systems. The trial court applied the correct standard of proof determining that there was

State	Case	Holding
		clear and convincing evidence to support these findings."
Florida	*In re Guardianship of Browning*, 543 So.2d 258, 261 (Fla. Dist. Ct. App. 1989), *aff'd*, 568 So.2d 4 (Fla. 1990)	"The surrogate decisionmaker's function is to make the decision which clear and convincing evidence establishes that the patient, if competent, would make."
Illinois	*In re Estate of Greenspan*, 558 N.E.2d 1194, 1202 (Ill. 1990).	"[T]his court [has] approved application of the substituted-judgment theory, which requires a surrogate decisionmaker to establish, as accurately as possible, what the patient would decide if competent. Ascertainment of what the patient would decide must be based on clear and convincing evidence of the patient's intent, derived either from a patient's explicit expressions of intent or from knowledge of the patient's personal value system." (citations removed).
Illinois	*In re Estate of Longeway*, 549 N.E.2d at 300.	"[S]ince the key element in deciding to refuse or withdraw artificial sustenance is determining the patient's intent, we require proof of this element by clear and convincing evidence."
Kentucky	*Woods*, 142 S.W.3d at 31, 43–45.	Holding "that the withdrawal of artificial life support from a patient is prohibited absent clear and convincing evidence that the patient is permanently

State	Case	Holding
		unconscious or in a persistent vegetative state and that withdrawing life support is in the patient's best interest." Applying a "best interests" statutory standard but incorporating elements of substituted judgment, including considering patient's beliefs and expressions of intent when determining best interests.
Maine	*In re Swan*, 569 A.2d 1202, 1206 (Me. 1990).	Upholding court's refusal to order life-sustaining care to be resumed when the court "determined by clear and convincing evidence that [the patient] made a pre-accident decision with regard to his medical treatment in his present condition."
Maryland	*Mack*, 618 A.2d at 754.	"[T]he overwhelming majority of cases involving requests to withdraw sustenance from a[n incapacitated] person . . . required the proponent of withholding or withdrawing life support to bear the burden of proving by clear and convincing evidence that the ward's decision would have been to forego life support. And we so hold as well."
Michigan	*Martin*, 538 N.W.2d at 410.	"We agree that the clear and convincing evidence standard, the most demanding standard applied in civil cases, is the

State	Case	Holding
		proper evidentiary standard for assessing whether a patient's statements, made while competent, indicate a desire to have treatment withheld."
Missouri	*Cruzan v. Harmon*, 760 S.W.2d 408, 425 (Mo. 1988), *aff'd sub nom.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).	Noting the "risk of arbitrary decision making and grave consequences … when [a] party seeks to cause the death of an incompetent." And holding that "no person can assume th[e] choice [to forgo care] for an incompetent in the absence of the formalities required under Missouri's … statutes or … clear and convincing, inherently reliable evidence."
New Jersey	*In re Jobes*, 529 A.2d 434, 443 (N.J. 1987).	Holding that "trustworthy" evidence that patient would want treatment withdrawn was "not sufficiently 'clear and convincing' … proof of her attitude toward such treatment."
New Jersey	*In re Peter*, 529 A.2d 419, 425 (N.J. 1987).	"[L]ife-sustaining treatment may be withdrawn or withheld whenever there is clear and convincing proof that if the patient were competent, he or she would decline the treatment."
New York	*In re Westchester Cnty. Med. Ctr.*, 531 N.E.2d 607, 613 (N.Y. 1988).	"[T]he 'clear and convincing' evidence standard requires proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination

State	Case	Holding
		of life supports under the circumstances like those presented."
Ohio	*Leach v. Akron Gen. Med. Ctr.*, 426 N.E.2d 809, 815 (Ohio Com. Pl. 1980).	Finding that because of the seriousness of the decision to remove life-sustaining care, "this court would be remiss if it did not adopt the highest possible civil standard of clear and convincing."
Washington	*In re Colyer*, 660 P.2d 738, 745 (Wash. 1983).	"A judicial standard of clear and convincing proof of the patient's desire to refuse treatment has usually been required."

The clear-and-convincing standard also has the advantage of tracking Georgia law in other similarly important guardianship decisions. For example, Georgia requires clear and convincing evidence in guardianship determinations in the juvenile context, including guardianship termination. *See Interest of B. M. R.*, 363 Ga. App. 819, 822 (2022) (explaining that when deciding to terminate a temporary guardianship, a juvenile court must consider if there is clear and convincing evidence that termination would cause the child harm, and the party opposing termination must provide such evidence); *see also* O.C.G.A. § 15-11-180 (requiring the state to prove allegations of a juvenile dependency petition by clear and convincing evidence).

That said, courts have not uniformly agreed that the clear-and-convincing standard is appropriate. As Justice Brennan argued, through its adoption of a clear and convincing evidentiary standard, Missouri "fashioned a rule that lessens the likelihood of accurate determinations." *Cruzan*, 497 U.S. at 326 (Brennan, J., dissenting). And that clear and convincing evidence standard is "a rule that transforms human beings into passive subjects of medical technology." *Id.* at 325. At least one state, Massachusetts, has upheld the use of a standard that requires a "preponderance of the evidence with an extra measure of evidentiary protection by reason of specific findings of fact after a careful review of the evidence." *In re Guardianship of Doe*, 583 N.E.2d 1263, 1271 (Mass. 1992) (cleaned up). The Massachusetts high court was "firmly convinced that the seriousness of the decision will be more forcefully impressed on judges if they are required to set forth their findings in 'meticulous detail' than if they merely label their findings as meeting a particular standard." *Id.* *Amicus* requests that these countervailing viewpoints not be discounted as the Court wrestles with this weighty issue.

Amicus therefore asks the Court to clarify that the evidentiary burden for challenging a guardian, conservator, or surrogate's decision to

withhold or end life-sustaining treatment and hold that the proponent of withholding such care must prove the applicable substantive standard according to the evidentiary standard that the Court believes best effectuates the wishes of the incapacitated person.

C. The probate court should conduct an evidentiary proceeding to determine the ward's wishes.

Although the probate court focused on Rajesh's choice to withdraw life-sustaining care, the court's order never addressed the issue when justifying its removal of Rajesh as guardian. There is a stark contrast between the court's findings of fact (which addressed that choice) and its order (which did not).[12] The probate court simply removed Rajesh based on a "good cause" standard without specifying what evidentiary burden was applied.[13] The probate court then used the best interests substantive standard to appoint Mala Pillutla, Vinit's former wife, as successor-guardian.[14]

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12 *Compare* V2–18-27 (entering various findings of fact related to Rajesh's decision to withdraw life-sustaining care) *with* V2–28 (failing to address the decision).

13 V2–28.

14 V2–29; *see also* O.C.G.A. §§ 29-4-52; 29-5-92.

The inconsistencies in the probate court's order leave confusion as to the appropriate standard by which to judge withdrawal decisions. The substantive good cause standard for removing a guardian differs from an evidentiary finding by that the ward would have wanted (or not wanted) care to be withdrawn. Even when supported by clear and convincing evidence, the good cause standard is "flexible" and left largely up to judicial discretion. *Matter of Lindsay*, 311 Ga. 734, 736 (2021) (noting that standard for attorney eligibility of "good cause shown by clear and convincing evidence" incorporates a "good cause" standard, which "is flexible and judged according to the circumstances of the individual case"). Based on the mere inclusion of good cause, it is unclear how the evidentiary burden was allocated or what "cause" the probate court considered when removing Rajesh as Vinit's guardian. Did the court consider the ward's wishes? Did the court inject its own judgment of what was in the ward's best interest? Or was the court opposed to other elements of the guardian's conduct unrelated to the withdrawal of care?

Nor does the record contain fully developed facts on the question of whether Vinit would have wanted to withdraw life-sustaining care. For instance, the record reveals an in-chambers discussion that suggests that

the probate court limited testimony about the decision to withdraw life-sustaining treatment from Vinit.[15] Moreover, Petitioner/Appellee admitted in the probate court that the basis for Rajesh's removal had nothing to do with what Vinit would have wanted regarding end-of-life care.[16] Thus a finding of what Vinit would have wanted is exceedingly difficult—if not impossible—based on the record as it exists.

By not reaching a conclusion on whether Vinit would have wanted to stop life-sustaining treatment, the probate court did not address the most consequential issue for the future: what type of care should Vinit receive going forward? While *Amicus* takes no position on what Vinit

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15 V5–196:12-16 [Objection of Petitioner/Appellee:] "I mean we had a meeting back here in the back. And maybe I misunderstood but it was we were told that we were not going to go down the road of the end of life stuff. This was a case about a guardianship, if the Guardian did what was right, or did was wrong." *See also* V4–21:22-22:2 [Opening Statement of Petitioner/Appellee:] "Good afternoon, Your Honor. The obvious thing is, I think that the evidence is going to show that, and I think it's what the court has pretty well said, this case is not about, okay, what Mr. Shinde wanted, okay? This case is about the guardian and the conservator violate their duty."

16 V5–206:6-14 [Testimony of Malla Pillutla, Question of Respondent/Appellant:] "You've not brought to court any friends of Vinit that corroborate or buttress what you think the right course of, course of kind of is here. And you -- I mean, you've brought people that you know from William Breman, and maybe they are friends to you now. But you've not Vinit's friends, have you? [Answer of Malla Pillutla:] It's not relevant to this case. This case is about did the guardian do their job? So, it's not relevant to this case."

would have wanted in this situation and whether Rajesh is an appropriate guardian, several potentialities remain in this matter that if left unaddressed could seriously infringe on Vinit's fundamental rights. For example, it is possible (a) that Rajesh is not an appropriate guardian for Vinit based on issues unrelated to Vinit's end-of-life care (*i.e.*, breach of fiduciary obligation) *and* (b) that Rajesh can establish that Vinit would have wanted to withdraw life-sustaining treatment. This Court's ruling should foreclose the possibility that a ward who would have wanted to withdraw life-sustaining treatment is placed or remains in the care of a guardian who has expressly stated that she fundamentally opposes that result.

Amicus hopes that the Court's decision in this appeal will help clarify these important issues by remanding the matter for an assessment of whether Rajesh can establish that Vinit would have wanted life-sustaining treatment withdrawn. Without such an order, *Amicus* hopes that the Court clarifies that the proceedings at the probate court do not have a preclusive effect on any future actions trying to establish what type of medical care Vinit would have wanted.

III. CONCLUSION

This Court should take this opportunity to guide the way contested end-of-life decisions by guardians are adjudicated. As the United States Supreme Court has recognized, "[t]he choice between life and death is a deeply personal decision of obvious and overwhelming finality." *Cruzan*, 497 U.S. at 281. Unambiguous evidentiary standards and clear substantive standards are thus appropriate to ensure that the ward's autonomy and individual wishes are not overwhelmed by either a surrogate, the state, or an interloper. *See id.* The right of a person to decide to end life-sustaining care is also a fundamental right, a right exercised on Vinit's behalf by Rajesh. By removing Rajesh as guardian and conservator, the probate court implied—without following any procedure directed at the finding—that the choice to withdraw life-sustaining care was not proper. While the implication may ultimately be vindicated, the way it was reached was error because it failed to protect the ward's constitutional right to refuse care.

Because the probate court did not enter a finding on whether Vinit's life-sustaining care should be withdrawn, this case should be remanded

for further proceedings. The decision to withhold life-sustaining care—once challenged—must be determined based on clear judicial standards.

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This submission does not exceed the word limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of this brief, contemporaneous with its electronic filing, upon counsel of record for each party by depositing a copy in the United States Mail, addressed as follows:

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