

Comment,  
**GUARDIAN-INITIATED DIVORCES:  
A SURVEY**

**Introduction**

Can a legal guardian initiate divorce proceedings on behalf of her ward? This is a question to which many elder law and family law practitioners should know the answer.<sup>1</sup> As medical science continues to advance, the average American lifespan continues to grow.<sup>2</sup> This boon of longevity inevitably highlights legal issues to the forefront of the family law field. With this influx of newly-minted seniors, society must be able to discuss the needs of the guardian/ward relationship because “[t]he need for guardians and other surrogate decision-makers will grow as the population ages, and as the prevalence of Alzheimer’s Disease and the number of individuals with mental disabilities increases.”<sup>3</sup>

When a guardian is granted charge of a ward, an extremely personal and powerful relationship is formed. Depending on the needs and capabilities of the ward, the guardian may be in charge of his or her finances, living conditions, or even marital state. The status of marriage has historically been a very personal issue. In many of the religious vows still heard in chapels today, many hear the repeated words of Christ, “What therefore God hath joined together, let not man put asunder.”<sup>4</sup> However, putting the marriage asunder may be exactly what is in the best interests of some wards. Where there is elder abuse, infidelity, or financial ruin, the question arises whether a guardian can step in and initiate a divorce on behalf of a ward. The legal community must

---

<sup>1</sup> The author, by this article, intends to give attorneys in each state relevant caselaw concerning this issue. However, he makes no assertions that the research of any particular state has been exhausted in its entirety.

<sup>2</sup> *CDC National Health Report: Leading Causes of Morbidity and Mortality and Associated Behavioral Risk and Protective Factors—United States, 2005–2013*, Centers for Disease Control & Prevention (Oct. 31, 2014), <http://www.cdc.gov/mmwr/preview/mmwrhtml/su6304a2.htm>

<sup>3</sup> Erica Woods, *The Paradox of Adult Guardianship: A Solution to—and a Source for—Elder Abuse*, 36 *GENERATIONS* 79 (Fall 2012).

<sup>4</sup> *Mark* 10: 9 (King James Version).

answer this question since it is sure to become increasingly relevant to an aging generation in need of assistance and protection.

## I. Common Approaches to the Issue

It should be obvious to the thoughtful observer why guardian-initiated divorces have been met with inconsistent treatment among the states. Marriage itself is a weighty issue about which people feel strongly. Divorce, historically, has been such a divisive concept that whole religions and nations have been caught in its wake.<sup>5</sup> Whether divorce was providence of the courts or the church, or whether fault must be shown, provisions regarding remarriage have been fiercely debated throughout history.<sup>6</sup> It is no wonder then that the debate over handing this power to another person has been slow to happen and fraught with disagreements.

As a thought experiment, consider what would be the greatest argument for a guardian to initiate a divorce in the case of a ward abused by a marital partner. Most rational and caring people would rally behind a guardian who is saving the ward from a cruel and abusive spouse. However, given the staggering and horrifying prevalence of intimate partner violence,<sup>7</sup> some spouses still choose to stay married in the face of abuse from their spouse. This may be religiously or culturally motivated, and underpinned by beliefs that spouses may hold dearer than their personal safety. While one may find abuse morally repugnant, a finding of abuse does not automatically or categorially nullify a marriage. Divorce is completely dependent on the will and wish of either partner in a married couple. While society may rightfully desire to legally and permanently separate all victims from their abusers, the law and the very concept of freedom prevent imposing that choice. This line of reasoning has held sway for quite some time in what represents a majority rule among the states, that divorce is simply too personal a decision and absent

---

<sup>5</sup> Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 *YALE J.L. & FEMINISM* 29, 32 (2014).

<sup>6</sup> *Id.*

<sup>7</sup> World Health Organization, *16 Days of Activism Against Gender Violence* (2016), [http://www.who.int/violence\\_injury\\_prevention/violence/global\\_campaign/16\\_days/en](http://www.who.int/violence_injury_prevention/violence/global_campaign/16_days/en) (Seventy percent of women experience physical and/or sexual violence by an intimate partner at some point in their lives).

the expressed desire from one of the spouses, it should not be required.<sup>8</sup>

However, as American society's attitudes towards divorce drastically changed in the 1960's and 70's,<sup>9</sup> the law has seen the emergence of a new and slowly spreading minority rule:

In the past 20 years, the convergence of three trends has led an increasing number of courts to reconsider the majority rule barring guardian-initiated divorces: 1) the liberalization of divorce statutes and the commonality of divorce in our society; 2) the expansion of guardian powers to include immensely personal decisions such as the refusal of medical care; and 3) an increasing societal focus on elder abuse and prevention. Based on these trends, a growing number of courts are now rejecting the majority rule.<sup>10</sup>

Several legislatures, such as Colorado, Florida, Missouri, Wisconsin, and most recently Illinois, have made this change from the norm by simply passing statutes which explicitly empower the guardian to initiate a divorce. Other states have addressed the issue by an examination of the already existing probate statutes, which typically grant broad authority to guardians.

## II. State by State Analysis of Guardian-Initiated Divorces

This section will provide a state-by-state analysis of approaches to guardian-initiated marital dissolutions. It should be noted that states omitted from this list lacked on point caselaw and most likely follow the majority rule.<sup>11</sup> In some jurisdictions, the prevailing caselaw following the majority rule is rather aged, which might suggest the possibility of a challenge given the gathering momentum of the minority approach.

---

<sup>8</sup> Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian-Initiated Divorces*, 10 NAELA J. 203, 209 (Fall 2014).

<sup>9</sup> Arland Thornton, *Changing Attitudes Toward Family Issues in the United States*, 51 J. MARRIAGE & FAM. 873, 888 (1989).

<sup>10</sup> Feinstein, *supra* note 8, at 211.

<sup>11</sup> Diane Snow Mills, Comment, "*But I Love What's-His-Name:*" *Inherent Dangers in the Changing Role of the Guardian in Divorce Actions on Behalf of Incompetents*, 16 J. AM. ACAD. MATRIM. LAW. 527, 536 (2000).

174 *Journal of the American Academy of Matrimonial Lawyers*

*Alabama*

The question was directly addressed in *Campbell v. Campbell*, where the Alabama Supreme Court held that courts lack proper jurisdiction to award dissolution in an action brought by a guardian.<sup>12</sup> The court reexamined this issue in *Hopson v. Hopson* a little over a decade later and came to the same conclusion.<sup>13</sup>

*Arizona*

Arizona provides the legal field with one of the best written and analyzed opinions in *Ruvalcaba v. Ruvalcaba*.<sup>14</sup> *Ruvalcaba* offers some compelling language that could be useful in bringing the minority rule to a majority state:

To deny incapacitated spouses the means to withdraw from abusive, or merely extinguished marriages, by leaving them captive to the representations of their competent spouses is, at best, to deprive them of their dignity and, at worst, to potentially condemn them to exploitation, physical injury and, possibly even death at the hands of the competent spouse. This is a result that a system of justice should not and cannot sanction.<sup>15</sup>

This case is a landmark because it was an early adopter of the minority rule and its language and clarity has made it an often-referenced opinion by other courts.

*Arkansas*

While not addressing the issue directly, in *Sutherland v. Sutherland*, the court mentions, in passing, that due to a mental handicap, a guardian filed a divorce on behalf of Mr. Sutherland.<sup>16</sup> While dicta, and thus not controlling, this case's mention

---

<sup>12</sup> 5 So. 2d 401, 401-02 (Ala. 1941) (this line of authorities holds that a decree of divorce procured on a bill filed by the next friend or guardian in the name of the lunatic is void for want of jurisdiction in the court to grant it.”).

<sup>13</sup> 57 So. 2d 505, 505 (Ala.1952) (“The exact question was passed on by this court in the case of *Campbell v. Campbell*, 242 Ala. 141, 5 So.2d 401. Upon a careful consideration we are not willing to depart from the holding of that case.”).

<sup>14</sup> 850 P.2d 674, 683-84 (Ariz. Ct. App. 1993).

<sup>15</sup> *Id.*

<sup>16</sup> 383 S.W.2d 663, 663 (Ark. 1964) (“In June 1962 John D. Sutherland, by his guardian, N. W. Sutherland, filed suit for divorce”).

should leave the door open to the possibility of the introduction of the minority approach.

*California*

*In re Marriage of Higgason* establishes that if the ward can express a coherent and lucid desire for the dissolution of their marriage, then it is completely proper for a guardian ad litem to bring the action before the court.<sup>17</sup> The question presented was if the guardian was an improper party to the divorce, but the court held that the party was the spouse and that the guardian was merely and properly standing in her place.<sup>18</sup>

*Colorado*

Interestingly, while statute appointed guardians clearly have the power to petition the court for dissolution of a marriage, they do not have the power to appear on behalf of their wards as if it were a pro se action.<sup>19</sup> *In re Marriage of Kanefsky* establishes that a non-lawyer guardian must proceed in conjunction with a licensed attorney to avoid the unauthorized practice of law.<sup>20</sup>

*Connecticut*

The opinion in *Luster v. Luster* is a great example of a court finding a way to move forward toward the minority rule with a simple analysis of the language in the state's guardianship provisions of the probate code.<sup>21</sup> Like many states, Connecticut's guardian statute affords broad powers which could be seen as granting the authority to initiate a dissolution of marriage. As the court observed:

In reviewing our statutes and relevant case law, we find nothing that would prohibit the conservators in this case from maintaining an action for dissolution of marriage on behalf of the defendant, who also is a named party and who is represented by counsel. To the contrary, § 45a-650 (k) specifically grants a conserved person *all rights and authority* not expressly assigned, and our case law specifically provides that a conserved person, except in limited circumstances, may not

---

<sup>17</sup> 516 P.2d 289, 294 (Cal. 1973) .

<sup>18</sup> *Id.*

<sup>19</sup> COLO. REV. STAT. ANN. § 15-14-315.5 (2015).

<sup>20</sup> 260 P.3d 327, 331 (Colo. App. 2010).

<sup>21</sup> 17 A.3d 1068, 1079 (Conn. 2011).

176 *Journal of the American Academy of Matrimonial Lawyers*

bring a civil action in his or her own name but must do so only by a properly appointed representative who will protect the rights of the conserved.<sup>22</sup>

*Florida*

Florida gives its guardians the power by statute to initiate divorce proceedings on behalf of a ward; however, the statute requires that the dissolution be in the ward's best interest, which is a question that is ripe for litigation.<sup>23</sup> Indeed, in *Vaughan v. Guardianship of Vaughan* the court explicitly states the requirement for an adversarial hearing to establish what is in the best interest of the ward before dissolution can be initiated.<sup>24</sup>

*Georgia*

Georgia is a majority rule state, in which the controlling case goes back to the 1947 decision in *Phillips v. Phillips*.<sup>25</sup> It provides a very typical "personal decision" rationale behind the ruling:

[W]e are unable to regard the right to sue for a divorce in any other light than as strictly personal to the party aggrieved. It is solely under the control of the person injured by the infidelity of the other; it is at the [volition] of that party whether a suit shall be begun and prosecuted or not.<sup>26</sup>

*Illinois*

Illinois provides a great roadmap for litigators trying to bring the minority rule into their state. The majority rule had been clearly cemented as recently as 1986 in *In re Marriage of Drews*.<sup>27</sup> However, the court reexamined the issue in 2012 in *Karbin v. Karbin* and, citing a generally loosening of the strict construction on the state's probate code and policy considerations, overturned *Drews*.<sup>28</sup> The court stated that by allowing guardians to file for divorce, the state "provides the needed procedural and substantive safeguards to ensure that the best inter-

---

<sup>22</sup> *Id.*

<sup>23</sup> FLA. STAT. ANN. § 744.3215 (West) (2015).

<sup>24</sup> 648 So. 2d 193 (Fla. Dist. Ct. App. 1994).

<sup>25</sup> 45 S.E.2d 621, 622 (Ga. 1947).

<sup>26</sup> *Id.*

<sup>27</sup> 503 N.E.2d 339 (Ill. 1986).

<sup>28</sup> 977 N.E.2d 154, 155 (Ill. 2012).

ests of the ward are achieved.”<sup>29</sup> Interestingly, a mere two years later, in 2014, the legislature took up the call and amended the probate code to include explicit revisions allowing guardians to initiate dissolutions when it is in the ward’s best interest.<sup>30</sup> That is a significant legal turnaround in a two-year span.

### *Indiana*

If Illinois offers a model of how to revisit and change the majority rule, Indiana is a blueprint for how to maintain the majority rule. The state’s stance was originally set down in 1951 in *State ex rel. Quear v. Madison Circuit Court* and followed the majority reasoning of requiring a statute to expressly empower the guardian.<sup>31</sup> This caselaw was challenged and revisited in 2013 in *Marriage of Tillman v. Tillman*.<sup>32</sup> However, the court upheld the rule, observing that:

We acknowledge that *Quear* was decided more than sixty years ago, in 1951. Some might argue that the intervening decades of higher and higher divorce rates and the creation of federal and state programs to assist the elderly have radically changed civil society’s notions concerning what the vows of “for better and for worse” mean. Therefore, for some, this might seem an appropriate time to revisit *Quear*. But *Quear* relied on the public policy pronouncements of the General Assembly within Indiana’s divorce and guardianship statutes, and those statutes have not changed appreciably regarding the issue before us since *Quear*.<sup>33</sup>

### *Kansas*

While 130 year-old caselaw in *Birdzell v. Birdzell*<sup>34</sup> makes it clear that Kansas is among the majority rule states, interestingly Kansas statutes<sup>35</sup> do allow a guardian to file for dissolution of a

---

<sup>29</sup> *Id.*

<sup>30</sup> 755 ILL. COMP. STAT. ANN. 5/11a-17 (2015).

<sup>31</sup> 99 N.E.2d 254, 256 (Ind. 1951).

<sup>32</sup> 2013 WL 3376920, at \*3 (Ind. Ct. App. July 3, 2013).

<sup>33</sup> *Id.*

<sup>34</sup> 6 P. 561, 562 (Kan. 1885) (“How could a guardian conduct the mind of his insane ward through the ceremony that would make him or her a husband or wife, or how could he conduct such mind through a litigation that would undo the marriage relation?”).

<sup>35</sup> KAN. STAT. ANN. § 23-2701 (2015) (“If both spouses are confined to institutions because of mental illness or mental incapacity, the guardian of either spouse may file a petition for divorce and the court may grant the divorce

marriage if the other spouse is incapacitated with a guardian as well. There may be an argument to be made that this opens the majority rule to a possible policy argument. However, the statute does make reference to “asylums,” so the policy argument and the statute’s relevance may be seen as a bit thin.<sup>36</sup>

### *Kentucky*

Kentucky is another instance of a simple majority rule state. The 1943 decision in *Johnson v. Johnson* relied on the general approach of the other states that had addressed this issue.<sup>37</sup> Observing that, “In all jurisdictions, as far as we are advised, the action of an incompetent must be brought by a committee or other representative either by virtue of statute or substantive law, nevertheless the right to file a divorce action by a representative on behalf of his ward is generally denied.”<sup>38</sup> If the issue was revisited and Kentucky was to follow the same logic and re-examine current trends and caselaw, the outcome might be different.

### *Maine*

While the caselaw lacks a direct answer to the issue of a divorce filing, the court in *Knight v. Radomski* found that a guardian had the power to bring an annulment action where the ward had been married without the guardian’s consent.<sup>39</sup> Further, the court found that the probate court held jurisdiction over the matter because marriage comes with a substantial financial involvement.<sup>40</sup> Following the same line of logic could lead to the introduction of the minority rule.

---

on the ground of incompatibility by reason of mental illness or mental incapacity.”).

<sup>36</sup> *Id.*

<sup>37</sup> 170 S.W.2d 889, 890 (Ky. 1943)

<sup>38</sup> *Id.*

<sup>39</sup> 414 A.2d 1211, 1215 (Me. 1980).

<sup>40</sup> *Id.*



### *Maryland*

Where the caselaw is scant, this is generally an indication that the state is following the majority rule.<sup>41</sup> Maryland seems to be the exception to this norm.<sup>42</sup>

There is no published authority on the subject in Maryland, but court practices generally permit the guardian to represent a ward in a divorce proceeding, even if he or she may not file the divorce complaint. An agent appointed under a Maryland statutory form power of attorney likely has the same authority.<sup>43</sup>

### *Michigan*

Michigan is a great example of how to push for the minority rule absent statutory authority granting the guardian dissolution capabilities.<sup>44</sup> The court in *Houghton ex rel. Johnson v. Keller* noted that “[n]othing in the language of [the statute] expressly prohibits guardians from filing a complaint for divorce on behalf of a party to the marriage.”<sup>45</sup> The state ruling on the issue was advanced further in *In re Burnett Estate*, where the court observed that

had the Legislature intended to prohibit an action by a guardian on behalf of a spouse, it could have expressly said so in the language of MCL 552.11. Nothing within the language of MCL 552.11 expressly prohibits a guardian or conservator from filing a complaint for divorce on behalf of an incompetent spouse.<sup>46</sup>

### *Mississippi*

While no cases seem to address this issue directly, it should be noted that one court observed the practice in passing and seemed to assume that this was a common and proper occurrence.<sup>47</sup> If the issue were to be explicitly brought up in this jurisdiction it seems likely that the minority rule would prevail.

---

<sup>41</sup> Jack K. Beckett & Phyllis J. Erlich, *Medicaid Planning for Maryland Family Lawyers*, 49 MD. B.J. 26, 35 (Apr. 2016).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 662 N.W.2d 854, 856 (Mich. 2003).

<sup>45</sup> *Id.*

<sup>46</sup> 834 N.W.2d 93, 97 (Mich. 2013).

<sup>47</sup> *See Nickles v. Nickles*, 247 So. 2d 836, 837 (Miss. 1971) (“guardian, having been authorized by the Chancery Court of Lowndes County to do so,

### *Missouri*

Missouri is one of the five states with statutory authority giving guardians a specific power to initiate dissolutions.<sup>48</sup> The state may have been leaning this way previously, since in *Matter of Parmer* the court had previously established that a guardian had authority to, “protect, preserve and manage” the wellbeing of the ward and upheld a guardian’s authority to maintain an action of divorce that had been initiated before the ward came under the care of the guardian.<sup>49</sup> Missouri’s statute also allows for legal separation if the ward had a history of religious objections to divorce and has language that specifically addresses the issue of abusive marriages.<sup>50</sup>

### *Montana*

*In re Marriage of Denowh ex rel. Deck* establishes the majority rule in Montana and makes some interesting claims in the process.<sup>51</sup> First the court claims that a divorce offers “no obvious benefit to an incapacitated ward, [so] there exists no basis for determining whether the dissolution is in the ward’s best interests.”<sup>52</sup> This may be subject to some opposition from the community focused on guardian-initiated dissolutions as a way to protect against elder abuse.<sup>53</sup> However, the court also notes that “the dissolution of an incapacitated ward’s marriage involves not only the ward’s interests, but those of the ward’s spouse as well. Thus, the interests of a third party who is *not* subject to a guardianship are adversely affected by such a decision.”<sup>54</sup> This observation is often left out of the equation: what rights of the other spouse are at play in these situations?

---

filed a bill for divorce on behalf of his ward against Eloise Goodman Nickles.”); See also *Klumb v. Klumb*, 194 So. 2d 221, 223 (Miss. 1967).

<sup>48</sup> MO. ANN. STAT. § 452.314 (West 2012).

<sup>49</sup> 755 S.W.2d 5, 6 (Mo. Ct. App. 1988).

<sup>50</sup> MO. ANN. STAT. § 452.314 (West 2012).

<sup>51</sup> 78 P.3d 63, 66 (2003)

<sup>52</sup> *Id.*

<sup>53</sup> See generally Mark Schwarz, *The Marriage Trap: How Guardianship Divorce Bans Abet Spousal Abuse*, 13 J. L. & FAM. STUD. 187 (2011).

<sup>54</sup> *Id.*

### *New Hampshire*

The New Hampshire Supreme Court in *In re Salesky* found a way to adopt the minority approach by observing the guardian's "catchall" provision found in the state's probate code.<sup>55</sup> This provision says simply that any power or rights that the ward had enjoyed before the appointment of the guardian, should remain at the ward's disposal through the powers given to the guardian.<sup>56</sup> The court observed that to strip the right to a divorce away from the ward and then to deny the empowerment to the guardian would mean to deprive the ward of enumerated rights and "would lead to absurd results."<sup>57</sup> *In re Salesky* is a great case to underline diminished rights of a ward in a majority rule state.

### *New Jersey*

In *Kronberg v. Kronberg*, a New Jersey court tackled head on the assertion made in majority rule states that divorce is simply too personal a decision to be given to a guardian.<sup>58</sup> Even though this line of logic had been established as a backbone of the majority rule for decades, the court simply observed that "[e]veryone agrees that a decision to obtain a divorce is a personal one, but the Supreme Court has authorized guardians to make decisions that are even more personal in nature."<sup>59</sup> Indeed, the guardian in every state has broad discretionary authority to make many decisions in the ward's daily life and activities. *Kronberg* should be considered a foundational case for the minority approach.

### *New York*

New York, a majority rule state, makes an interesting observation in *Mallory v. Mallory*, where the guardian was seeking a divorce on behalf of a ward due to possible abuse and mistreatment.<sup>60</sup> While holding that the guardian was powerless to initiate a divorce on behalf of the ward, it did not render the guardian

---

<sup>55</sup> *In re Salesky*, 958 A.2d 948, 954 (N.H. 2008).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> 623 A.2d 806, 810 (N.J. Super. Ct. Ch. Div. 1993).

<sup>59</sup> *Id.*

<sup>60</sup> 450 N.Y.S.2d 272, 274 (N.Y. Sup. Ct. 1982).

182 *Journal of the American Academy of Matrimonial Lawyers*

helpless to effect positive change for the ward.<sup>61</sup> Instead, it was observed that the ward's

rights can adequately be protected by any one of a number of remedies, including reporting the alleged kidnapping to the local police, a writ of habeas corpus, or an application for the appointment of a guardian ad litem. It does not require, nor should this court participate in, the obtaining of a divorce.<sup>62</sup>

While this does not solve all potential concerns of guardian, it does give an end run around the established majority rule by other means.

### *Ohio*

In *Broach v. Broach*, an Ohio court found the minority rule imbedded in the state's enumerated Rules of Civil Procedure, observing:

[W]e look first to Civ.R. 17(B), which states that a guardian "may sue or defend" on behalf of an incompetent. In turn, Civ.R. 75(A) specifically provides that "[t]he Rules of Civil Procedure shall apply in actions for divorce, annulment, legal separation, and related proceedings, with the modifications or exceptions set forth in this rule." The parties have not cited, and we have not found, any Ohio case law discussing the impact of these rules on a guardian's ability to file for divorce on behalf of an incompetent ward.<sup>63</sup>

This could be an extremely useful case since the civil procedure rules in most other states should follow the same schema, and thus this argument should be available in almost all jurisdictions to make a case for the minority rule.

### *Pennsylvania*

Pennsylvania walks a middle ground between the majority and minority rule. Recognizing that a ward may wish and be capable of communicating that wish to divorce, the court in *Syno v. Syno* allowed a guardian to file for a divorce, but "*provided* the incompetent is capable of exercising reasonable judgment as to personal decisions, understands the nature of the action and is able to express unequivocally a desire to dissolve the mar-

---

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 895 N.E.2d 640, 642 (Ohio Ct. App. 2008).

riage.”<sup>64</sup> While this approach gives some flexibility to non-incompetent wards, it still offers little aid to non-responsive or severely disabled wards. It does, however, address the “personal decision” concern that is often voiced in majority rule states.<sup>65</sup>

### *South Carolina*

*Murray by Murray v. Murray* makes an excellent point that there are different reasons and different capabilities found within the ward/guardian relationship.<sup>66</sup> The court then tries to find a logical compromise between the two major rules.

We adopt the majority rule in the case of a spouse who is mentally incompetent as to his property *and* his person, and hold that he may not bring an action for divorce either on his own behalf or through a guardian. However, we decline to impose an absolute rule denying the right to seek a divorce if the spouse, although mentally incompetent with respect to the management of his estate, is capable of exercising reasonable judgment as to his personal decisions, is able to understand the nature of the action and is able to express unequivocally a desire to dissolve the marriage.<sup>67</sup>

### *Tennessee*

While not explicitly sanctioning or denying the minority rule, the court in *In re Conservatorship of Carnahan* upheld the denial of a motion requesting that a divorce be overturned because it was brought by a guardian.<sup>68</sup> The district probate court said that a family court should address the legitimacy of the grounds for the divorce, and the appellate court agreed with sidestepping the issue.<sup>69</sup> This could be an implicit endorsement of the minority rule, but no case has challenged the issue directly.

### *Texas*

Never a state to sidestep any issue, Texas simply took a firm stand on the subject and squarely established the minority rule in

---

<sup>64</sup> 594 A.2d 307, 311 (Pa. Super. Ct. 1991) (emphasis in original).

<sup>65</sup> *Id.*

<sup>66</sup> 426 S.E.2d 781, 784 (S.C. 1993).

<sup>67</sup> *Id.* (internal citation omitted)

<sup>68</sup> 2011 WL 809458, at \*5 (Tenn. Ct. App. Mar. 9, 2011).

<sup>69</sup> *Id.*

184 *Journal of the American Academy of Matrimonial Lawyers*

*Wahlenmaier v. Wahlenmaier*.<sup>70</sup> With direct language the court declared:

We approve of the court of appeals holding that a guardian ad litem or next friend can exercise the right of a mentally ill person to obtain a divorce. Those cases in which the courts of appeal have held that a guardian or next friend may not exercise the right of a mentally ill person to obtain a divorce are hereby disapproved.<sup>71</sup>

*Stubbs v. Ortega* clarifies Texas's stance a bit further and suggests that the adherence to the minority view originates in Texas's recognition of "domestic rights of the mentally ill" and that allowing guardian initiated divorces is within the public policy of the state.<sup>72</sup>

*Vermont*

The issue was examined with some detail in *Samis v. Samis* where the court denied that it possessed the authority to establish the minority approach.<sup>73</sup> Indeed, the court observed, "If we were to imply this power, we would encroach on an area that the Legislature has seen fit to address by statute, and without any airing of the multiple issues of public policy that might be relevant to the question."<sup>74</sup> While the court seemed open to the idea of minority rule, it was clearly waiting on a legislative solution.

*Washington*

*In re Marriage of Gannon* established that the guardian does have authority to seek a divorce, however this authority is not automatically vested at the time the guardianship is formed.<sup>75</sup> Rather, the "authority must be sought specifically by a special petition for that purpose"<sup>76</sup> The court places importance on the trial court to "test these matters, again with great emphasis upon the interests of the ward and the necessities and interests of the competent spouse."<sup>77</sup>

---

<sup>70</sup> 762 S.W.2d 575, 575 (Tex. 1988).

<sup>71</sup> *Id.*

<sup>72</sup> 977 S.W.2d 718 (Tex. App. 1998).

<sup>73</sup> 22 A.3d 444, 448 (Vt. 2011).

<sup>74</sup> *Id.* at 450.

<sup>75</sup> 702 P.2d 465, 467 (Wash. 1985).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

*Wisconsin*

Wisconsin's probate code empowers the state's guardians to initiate "a petition for the termination of marriage."<sup>78</sup> *Kittelson v. Kittelson* further clarifies the state's position by explaining that, "the court may only authorize the guardian to initiate divorce proceedings if that power is 'necessary to provide for the [ward's] personal needs, safety, and rights.'"<sup>79</sup>

### III. Right to Defend?

What if the ward is on the other end of the divorce? When the competent spouse files for a divorce, can the guardian file to have the divorce decree set aside or can the guardian settle the action? If a divorce is filed against a ward with a court established guardian, then that guardian should be informed and a party to such an action.<sup>80</sup> Indeed, if during divorce proceedings, competency to proceed is at all in question, it may very well be appropriate to appoint a guardian ad litem to insure that the rights and interest of the party in question are protected. However, under the same line of reasoning that denies guardians the power to initiate dissolutions because it is too personal an issue for a guardian to have power over, some litigants may seek to bar the guardian from zealously defending the divorce actions.<sup>81</sup>

However, given the rise of the minority rule, it is likely that courts will be more receptive to the expanded role of the guardian to act on behalf of the ward. Indeed, states have already started to use the some of the same logic to empower their guardians to make such a move.<sup>82</sup>

---

<sup>78</sup> WIS. STAT. ANN. § 54.25 (West).

<sup>79</sup> 816 N.W.2d 352 (Wis. 2012).

<sup>80</sup> See 32 A.L.R.5th 673 (originally published in 1995)

<sup>81</sup> See *Scoufos v. Fuller*, 280 P.2d 720 (Okla. 1954); See also David E. Rigney, *Power of Incompetent Spouse's Guardian or Representative to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or To Make Compromise or Settlement in Such Suit*, 32 A.L.R.5th 673 (originally published in 1995).

<sup>82</sup> *Iago v. Iago*, 48 N.E. 30, 31 (Ill. 1897); *Newman v. Newman*, 191 N.E.2d 614 (Ill. App. Ct. 1963); *Merneigh v. Merneigh*, 119 N.E.2d 492 (Ill. App. Ct. 1954).

#### **IV. Conclusion**

Society's attitudes towards marriage and divorce have changed, as has the average lifespan. Increasingly, situations arise that cause the need for guardians to have the power to file for divorce. States that currently follow the majority rule may be ripe for litigation by finding the authority in broad guardian powers or simply arguing for a change from a pure policy perspective. Wards' wellbeing nationwide may hang in the balance.

Matthew Branson