ILLINOIS GUARDIANSHIP ASSOCIATION CONFERENCE

Divorce and Guardianship: Issues, Due Process and Evolution of the Law

Charles Perez Golbert
Deputy Public Guardian
Adult Guardianship Division
Office of the Cook County Public Guardian
69 W. Washington, Ste. 700
Chicago, IL 60602

Kass A. Plain
Supervisor, Appeals Unit
Office of the Cook County Public Guardian
2245 W. Ogden, 4th Floor
Chicago, IL 60612

May 20, 2015

OUTLINE

- Background
- Case Law and Statutes
- Public Policy Issues
Background to the Problem

PUBLIC POLICY: Old View

- Guardian-initiated divorce not allowed because:
- Divorce was too intimate and personal.
- Divorce was taboo and uncommon.
- Implicates moral and religious values.
- Hard to allege fault such as adultery or abandonment.
- Potential for abuse.
PUBLIC POLICY: Evolving Thinking about Divorce and Guardianship

- No longer taboo.
- Half of marriages end in divorce.
- By 1985, all 50 states had no-fault statutes. IL in 1984. CA in 1970.
- and at the same time . . .
GUARDIANSHIP

- Guardianship evolved to give increased decision-making authority to guardians over highly personal matters, including end of life decisions, abortion, and sterilization.
- Growing awareness of spousal abuse, elder abuse, and financial exploitation of the elderly.
- Need for protection.
- Guardians appointed in cases with a pending divorce action. “Till Alzheimer’s do us part.”
- More cases seen. Gradual liberalization.

GUARDIANSHIP/Evolution of the Law

- Annulments.
  Case study. Our elderly ward with dementia married to much younger woman. Court hearing. Obtained annulment for our ward.

- Defending/prosecuting previously filed divorce actions.
In Illinois, until 2012, a guardian could not initiate a divorce proceeding for a ward.

*IRMO Drews*, 115 Ill. 2d 201 (1986), *overruled by Karbin v. Karbin*, 2012 IL 112815. *Drews* held that under the Illinois Probate Act, a guardian did not have the authority to initiate a divorce proceeding on behalf of a ward. Divorce is a personal, not a financial proceeding.

*IRMO Burgess*, 189 Ill. 2d 270 (2000). A guardian may continue a divorce action initiated prior to the ward’s incapacity.
The Way Things Are

- Wife became disabled after car accident and husband was appointed her guardian. Large personal injury settlement.
- Husband became ill and couple’s daughter became guardian. Wife and daughter moved to Ohio.
- Non-disabled husband filed for divorce, and guardian of disabled wife (daughter) filed counter-petition for divorce. Discovery ensues.
- Husband moved to voluntarily dismiss divorce petition. Probate court found guardian had no authority to prosecute divorce petition and divorce court dismissed wife’s dissolution action.
- Appellate Court affirmed trial court based on *IRMO Drews*.

Karbin v. Karbin, continued

- Public Guardian filed a friend of the court brief. Our wards’ stories.
- Illinois Supreme Court reversed and overruled *IRMO Drews*.
- Since 1984, Illinois has no-fault divorce.
- There is no reason why a guardian should not be allowed to use the substituted judgment provisions in the Probate Act to make uniquely personal decisions in the ward’s best interest including filing a divorce action.
- To rule otherwise would treat disabled spouses differently from competent spouses in violation of the U.S. and Illinois Equal Protection clauses.
Karbin v. Karbin, continued

- “Either the guardian can act in the best interests of the ward for all personal matters, or for none at all.”
- Remanded for a hearing to determine, by clear and convincing evidence, if divorce is in wife’s best interest.

ILLINOIS STATUTE

- 755 ILCS 5/11a-17 (2014). Illinois Public Act 98-1107 amended the Probate Act to allow guardian-initiated divorce after a finding, by clear and convincing evidence, that divorce is in the ward’s best interest.
- SB 2954 passed both the House and Senate on May 30, 2014.
- Effective date: Aug. 26, 2014.
Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian of the ward's person or estate to file a petition for dissolution of marriage or to file a petition for legal separation or declaration of invalidity of marriage under the Illinois Marriage and Dissolution of Marriage Act on behalf of the ward if the court finds by clear and convincing evidence that the relief sought is in the ward's best interests. In making its determination, the court shall consider the standards set forth in subsection (e) of this Section.

Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian of the ward's person or estate to consent, on behalf of the ward, to the ward's marriage pursuant to Part II of the Illinois Marriage and Dissolution of Marriage Act if the court finds by clear and convincing evidence that the marriage is in the ward's best interests. In making its determination, the court shall consider the standards set forth in subsection (e) of this Section. Upon presentation of a court order authorizing and directing a guardian of the ward's person and estate to consent to the ward's marriage, the county clerk shall accept the guardian's application, appearance, and signature on behalf of the ward for purposes of issuing a license to marry under Section 203 of the Illinois Marriage and Dissolution of Marriage Act.
Other Jurisdictions


*The majority rule.* A guardian could not initiate a divorce proceeding because 1) no common law right to divorce, and 2) divorce is a strictly personal decision that cannot be made by a guardian.

- States including: IL, TX, OH, FL, SC, NY, NJ, OK, IN, NE, CO, KY; MI, KS, IA, and GA followed the majority rule.

- *In re Jennings*, 453 A.2d 572 (N.J. Super. 1981). The decision to divorce is so intensely personal it cannot be made by someone other than the spouse.

Other Jurisdictions, continued

- *Erosion of the Majority View.* In the last 20 years: 1) no-fault divorce statutes; 2) expansion of guardian’s powers; and 3) increased recognition of elder abuse including financial exploitation.

- Since 1970, 18 states have rejected the majority rule based on the above three trends.


- Five states rely on lack of prohibition in probate act to authorize guardian to file for divorce. OH, MI, OR, NY and NJ.

- Three states allow guardian-initiated divorce for high-functioning wards. PA, DE, and CA.
Other Jurisdictions, continued

- Several states require proof of ward’s previous desire for divorce. AZ and OH.
- Where no evidence of ward’s wishes, best interest standard applies. FL, NM, NJ (*Kronberg*), WA.
- Heightened burden of proof to show divorce is in the ward’s best interest. IL (*Karbin*).

Non-Illinois Statutes

- Florida enacted a statute which authorizes guardian-initiated divorce. FLA. STAT. ANN. § 744.3215(4)(c) (1989). Need: 1) court permission; 2) independent attorney for ward; 3) evaluations; 4) in-person meeting with ward. Finding divorce is in ward’s best interest. **BUT non-disabled spouse must consent.** FLA. STAT. ANN. § 744.3725.
Other States’ Statutes, continued

- Missouri’s Reasonable Cause Standard. MO. ANN. STAT. § 452.314 (1990). Most lenient statute: guardian can file if she has reasonable cause to believe ward is the victim of abuse. No heightened evidentiary standard. No court approval needed to file divorce petition.
- All four statutes (including IL) permit a guardian of the person or guardian of the estate to file.

CONCLUSION

- WHERE DO WE GO FROM HERE?
- Tempting: Bonnie T.
- Public Policy Issues.
- But “never say never.”
- Karbin and similar cases as a tool for guardians.
Questions?