

When a Client Lacks Legal Competency, Who Files for the Divorce?

BY KEITH BRADOC GALLANT & REBECCA A. IANNANTUONI

Was it Shakespeare's King Henry IV or the mindful lawyer concerned about a client's competency who said, "Uneasy lies the head that wears the crown"?

The heft of such weighty concerns about client competence riddles lawyers and courts alike because competency is a veritable (and subjective) moving target. A client may be completely *incapable* of balancing a checkbook while simultaneously being fully *competent* to express how his or her bounty should be managed or distributed.

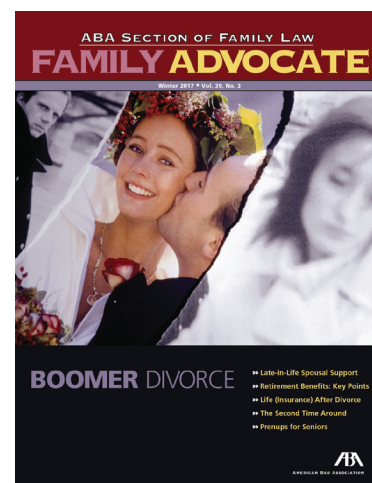
Competence versus Capacity

Lest there be confusion, "competence" and "capacity" are often used interchangeably. However, these terms do not express exactly the same concept or even, necessarily, a consistent one. *Competence* is a generic legal term. Individuals are presumed competent unless and until a court has determined otherwise. Judicial declarations are often tailored to fit the scope of the particular facts and circumstances surrounding an individual in the least restrictive manner possible (e.g., lacking the ability to make financial decisions while retaining the ability to give medical consent.) *Capacity*, on the other hand, is a more specific, clinical term that is usually task-specific. For example, a physician may determine that a patient lacks the capacity to give "informed consent" for surgery but retains the capacity to decide if she or he wants to take medication for pain.

An Incapacitated Person Cannot File for Divorce without a Court-Appointed Fiduciary

The impact of capacity determinations differs according to the legal acts at issue. For example, testamentary capacity typically requires a fairly low level of understanding, requiring only that a testator know the general nature and extent of his or her property and the natural objects of his or her bounty and be able to express his or her wishes regarding disposition of the estate. Testamentary capacity can be fleeting (the "lucid moment" is not nearly as rare an event as sometimes has been suggested) as long as the capacity exists at the time of execution of the will or, more often, the third or fourth codicil thereto. The impact of capacity on marriage or divorce is not entirely different. The standard of capacity required to marry also is fairly low. However, surprisingly perhaps, the standard for capacity to divorce is different: an incapacitated person *cannot* file for divorce himself or herself.

Consequently, having a court-appointed fiduciary file a petition for divorce becomes the only option for an incapacitated spouse to end a marriage. This requirement flows apparently from the public policy doctrine of *parens patriae* whereby the state may intervene in private lives to act as the "parent" for individuals in need of protection. The resulting statutory mandates and legal processes and the



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The early rule prohibiting the fiduciary from filing applied even if the incapacitated spouse was suffering abuse.

duties of the court-appointed fiduciary are fairly consistent among U.S. jurisdictions. (Notwithstanding the differing terminology among the states, for the purposes of this article, all court-appointed fiduciaries are referred to as “guardians.”) The duties are:

- (1) to provide incapacitated persons with procedural due process protection at all times; and
- (2) to preserve autonomy of incapacitated (persons) to the fullest extent possible and in the least restrictive manner.

RALPH C. BRASHIER, *MASTERING ELDER LAW 33* (Russell Weaver, series ed., Carolina Academic Press 2010).

The Early Rule: A Court-Appointed Fiduciary Could Not File

Interestingly, however, the early common law majority rule did not allow a court-appointed fiduciary to initiate a divorce on behalf of the ward. *In re Marriage of Kutchins*, 482 N. E.2d 1005, 1007 (Ill. App. Ct. 1985). Those early decisions reasoned that the right to divorce is not a common law right, but, rather, a right dependent on legislative enactments and, in the absence of a specific statute granting authority to initiate a divorce, the fiduciary lacked the power to do so. A more compelling rationale would have relied upon the very personal nature of divorce, and some early common law opinions indeed reasoned that the decision to divorce is so deeply personal that it cannot possibly be initiated by someone acting in a representative capacity. *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674, 676 (Ariz. Ct. App. 1993). In other words, the relationship with one spouse is the consequence of a unique series of life experiences and desires, religious beliefs, and socio-economic considerations. A fiduciary would not be able to evaluate and weigh these considerations on behalf of the ward. As a result, the incapacitated spouse with a court-appointed fiduciary was, potentially and terminally, caught in an unwanted marriage unless and until the spouse initiated the divorce or the incapacitated spouse was restored to capacity. This common law rule applied even if the incapacitated spouse was suffering abuse.

**Some courts
apply a
“best interest”
standard.**

Why Would an Incapacitated Person Divorce?

Take, for example, Mick and Gigi, whose current marriage is the second for both of them. Mick has a grown daughter, Maggie. Gigi has no children. Mick is repeatedly found by family members and neighbors left alone, soaked in urine and feces, for extended periods of time in a wheelchair. Gigi is seen out and about town with friends. Mick is in the mid-stage of dementia and suffers repeated urinary tract infections from poor hygiene. Their house is cluttered and unkempt. Mick reports numerous incidents of mistreatment and neglect by Gigi to his daughter but he refuses to leave the home. Maggie has tried to bring care into the home and to involve social service agencies. Gigi, however, always manages to undermine Maggie’s efforts.

Maggie, after exhausting all nonjudicial avenues, successfully petitions the probate court to become guardian of her father. She quickly moves Mick to a beautiful (and expensive) assisted-living facility. Gigi provides no direct care for Mick but shows up at the facility and berates Mick for being “selfish” and “needy” and tells him (loudly enough for others to hear), “Our marriage is a farce—I never loved you. I was only ever in it for your money!” The facility staff promptly lets Maggie know of these incidents. Maggie speaks to her father, whose health has markedly improved now that he is receiving consistent care and good hygiene. They discuss his divorcing Gigi and agree that this is the appropriate course of action. However, having been declared incompetent, Mick no longer has the right to sue for a divorce, and under

the majority common law rule, Maggie, as his guardian, has no power to bring the action for him. Mick, seemingly, is trapped in this unhappy marriage.

The Ban on Fiduciary-Initiated Divorces Is Eroding

Over the last two decades or so, the majority rule has been eroded, with several states reconsidering the bar on fiduciary-initiated divorces. With a growing societal tolerance for divorce, along with courts' more expansive grants of authority to fiduciaries to make complex and immensely personal decisions on behalf of wards (such as, for example, withdrawal of life-sustaining medical treatment and consent to experimental medical treatment), resistance to involvement of guardians in divorce has declined.

Generally, the courts now agree that a bright-line rule barring guardians from initiating divorce petitions on behalf of wards is antiquated and misguided. Courts across the country have invoked different approaches to reach this conclusion.

Several courts have actually adopted the reverse logic of the majority rule and allowed court-appointed fiduciaries to initiate divorce actions, reasoning that the guardianship statutes in their jurisdictions are broad enough to encompass the power to initiate a divorce and that, in the absence of a statute that expressly *bars* a guardian from initiating the action, a guardian has the power to do so. *Shenk v. Shenk*, 135 N.E.2d 436, 438 (Ohio Ct. App. 1954).

Several courts have upheld the ban against guardian-initiated divorces but have created a narrow exception for "high functioning wards." Under this approach, Maggie could, as a guardian, file for divorce on behalf of Mick as long as he is capable of (1) exercising reasonable judgment regarding personal decisions; (2) expressing a desire to be divorced; (3) understanding the nature of a divorce action; and (4) testifying at the divorce proceedings. *Syno v. Syno*, 594 A.2d 307, 311 (Pa. Super. Ct. 1991).

Several other courts have rejected the majority rule outright and created a new rule whereby a guardian may initiate the divorce petition on behalf of the ward if there is evidence that clearly suggests that the ward desires a divorce (documented by, for example, journal entries, letters or emails, or oral statements the ward made to third parties prior to incapacitation.) Of course, the spouse would have an opportunity to rebut the claims through evidence of the other spouse's intent to remain married. Ultimately, the court would determine whether the ward, if competent, would want a divorce; it would then make a substituted judgment as to what it believes the ward would want to do under the circumstances. *Ruvalcaba* at 682–83. This is a remarkable development given that the traditional majority rule was based on the opposite presumption (i.e., in light of the extremely personal nature of divorce, a fiduciary could not effectively make such a determination.) *Kronberg v. Kronberg*, 623 A.2d. 806, 811 (N.J. Super. Ct. Ch. Div. 1993).

Some courts, in the absence of evidence of a ward's desire to obtain a divorce prior to incapacity, apply a "best interest" standard. Under this standard, the court determines whether the divorce would further the ward's immediate and long-term interests. The court takes into consideration the ward's values, lifestyle, and goals in making this determination and allows the guardian to initiate the divorce once it has concluded that a divorce is in the ward's best interest.

Guarding Against the Self-Interested Guardian

In the Mick and Gigi scenario, the facts are fairly egregious and suggest that a divorce is appropriate. Maggie's apparent motive is clear: protection of her father. But what if Maggie's true motives are disingenuous or insidious? Assume, for instance, that facts

**“Don’t worry,
I will take care
of you” will not
be enough.**

are slightly different. Maggie and Gigi have never gotten along. Maggie blames Gigi for Mick divorcing her mother. Although Mick has been known to be home alone for periods of time (while Gigi goes to church or volunteers at the local senior center), Mick has a “call button” and neighbors make frequent “well-check” visits. Mick reports to Maggie that Gigi verbally mistreats him, but no other family member or neighbor has been witness to any significant evidence of mistreatment. Maggie sees an opportunity. She is angry that her father plans to leave most of his multimillion dollar estate to Gigi. Maggie decides that if she can petition the court to become guardian based on Mick’s dementia diagnosis and the allegations of mistreatment, she can then initiate a divorce. If Mick and Gigi are divorced at the time of Mick’s death, under Mick’s estate plan and the couple’s prenuptial agreement, Maggie would take his entire estate.

Some courts have sought to thwart divorces initiated by self-interested guardians by requiring guardians to obtain court approval prior to initiating legal action. After all, guardians in most jurisdictions are “agents of the court.” Many fiduciary actions,

Some Useful Trust and Estates Practices for the Family Law Lawyer

BY REBECCA A. IANNANTUONI

The vexing issue of how to assess, represent, and manage a client when the lawyer is uneasy about capacity turns on *timing* and *time*.

Consider the Timing of the Problem

- If capacity questions arise during the intake interview with the client, consider whether the individual has the capacity to execute a contract—that is, does the individual understand the nature and effect of the act and the business being transacted. Without such capacity, an engagement letter should not be signed.
- When a case is in active litigation, mediation, or negotiation and capacity concerns emerge, determine whether an emergency decision must be made and whether that decision might result in a significant loss to the client. If action must be taken, the lawyer can, relying on and complying with the Model Rule of Professional Conduct 1.14, take protective action so long as the lawyer considers:
 - The client’s wishes;
 - The impact of taking such protective action;
 - The ability to maintain the client’s confidential information;
 - The client’s right to privacy and physical mental and emotional wellbeing; and
 - A far as possible, preservation of the status of “client” and the maintenance of as many of the tenets of the client-attorney relationship as reasonable under the circumstances.

- When a case is not in a critical phase and no emergency decisions need to be made, talk to the client about the perception of capacity concerns and consider whether obtaining a medical evaluation makes sense under the circumstances.

Take Time to Observe, Question, and Evaluate

- Meet with the client alone to avoid opportunities for well-intentioned family members to answer for the client.
- Ask open-ended questions that require more than a yes or no reply. Most importantly, ask the client to articulate the reasons for the meeting.
- Contemplate whether any medical or situational conditions are possibly skewing perception (e.g., is the client taking a new medication with side effects that may affect capacity?).
- Consider whether a recent, significantly stressful life event may be distracting from or temporarily impacting the ability to process information (e.g., a car accident, death of close friend or relative or even a beloved pet).
- Take practical steps to enhance communication. For example, face the client and speak slowly, reduce outside noise, and illustrate difficult concepts on paper.

such as spending large amounts of a ward's money and moving a ward to a more restrictive environment, typically require prior approval of the court. This requirement ensures that a court can exercise its discretionary authority in determining whether the action is appropriate under the circumstances, which is particularly helpful when a guardian with questionable motives is proposing to take extraordinary actions. As an additional safeguard, some courts have appointed a guardian ad litem to conduct an independent evaluation and assist the court in making its determination that the divorce is in the ward's best interest. *Luster v. Luster*, 128 Conn. App. 259 (2011).

Prior court approval is also helpful when incapacity arises after the divorce has been initiated. For example, Jim and Suzy have been married for ten years. They have two young boys ages three and five. Suzy begins behaving strangely, not getting out of bed in time to get the boys ready for school, acting impulsively (stealing cigarettes), making random, inappropriate outbursts in crowds, and stumbling and falling with increasing frequency. After multiple attempts to get Suzy help and Suzy's failure to follow through, Jim, at his wit's end, files for divorce. With the understanding that Suzy will retain physical custody of the children, the settlement agreement provides that Suzy will keep the family home and that the boys will reside with her provided a live-in nanny is with them at all times. Jim agrees to provide significant monthly alimony to Suzy. Soon after the divorce is finalized, Suzy has a major setback. She is involved in a serious car accident. She rolls her car over a barrier and flees the scene of the accident. It is later determined that she was traveling over 100 miles per hour on a back road. She is hospitalized for a full psychiatric evaluation and neurological testing. The result, to every one's surprise, is a diagnosis of frontotemporal dementia. In the light of the divorce, Suzy's father steps in to petition the court to be appointed her guardian.

Constitutional Considerations

BY KEITH BRADOC GALLANT

The constitutional defects inherent in the denial of access to the courts to an individual under guardianship is obvious. The equal protection of the law does not evaporate as a constitutional requirement simply because of an intellectual disability. Historically only a few groups have suffered more than those once classified under English law as "lunatics" or "idiots." See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (in which a woman labeled "feeble-minded" was sterilized against her will); *Gould v. Gould*, 61 A. 604 (1905) (in which a man was forbidden to marry a woman who was under forty-five years of age who was "... epileptic, imbecile or feeble-minded"); see also DAVID PFEIFFER,

EUGENICS AND DISABILITY DISCRIMINATION (1994) (discussing how the civil rights of persons with disabilities have been violated through state and municipal laws in the United States).

However, in the last seventy-five or so years, most courts have recognized the human and legal rights of individuals with disabilities. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (in which Oklahoma's Habitual Criminal Sterilization Act of 1935 was challenged on the grounds that it constituted "cruel and unusual punishment" and did not provide "equal protection"); also see *Cottrell v. Connecticut Bank & Trust Co.*, 175 Conn. 257 (1978);

Newman v. Newman, 35 Conn. App. 449 (1994). Thus in modern jurisprudence, the trend is to view decisions such as *In re Wechsler*, 3 A.D.3d 424 (N.Y. App. Div. 2004), as aberrations.

The limited exception for "high functioning wards" goes some way towards addressing the constitutional infirmity of the underlying denial of equal protection, but it is hardly an adequate response, especially for those individuals who become severely disabled during the course of a divorce action.

While the reluctance of some courts to expand a guardian's powers without statutory authority is understandable, practitioners in jurisdictions that deny guardian-initiated (or pursued) divorces should consider the constitutional claims of these clients that may be available in the circumstances.

During Suzy's hospitalization, Jim had moved back into the family home and assumed all parental responsibilities for their boys. However, the settlement agreement clearly needed to be modified to respond to the new circumstances. After the terms of the modification have been negotiated, Suzy's father returns to the probate court and seeks an order to execute the modification in family court. The probate court appoints a guardian ad litem for the purposes of determining whether the modification is reasonable and in Suzy's best interest. This added protection facilitates the court's discretionary determination that the guardian's actions are appropriate under the circumstances and, ultimately, that the modification is fair and in Suzy's best interest. This court order might prove particularly helpful years later when Suzy has exhausted all of the divorce settlement funds on her own care and she applies for public assistance benefits. The state agency administering those public benefits most likely will accept the court's prior determination.

Conclusion: Statutory Solutions Will Be Beneficial

As the courts respond to societal developments, the outdated majority rule is likely to be further eroded. Even without uniformity in statutory authorization of guardian-initiated divorces, individuals will continue to be incapacitated for a multitude of reasons and divorces will continue to be necessary to address the personal consequences of irreconcilably broken marital relations. In the longer term, the codification of fiduciary authority to pursue these divorces will be necessary for easing the burdens of "the head that wears the crown." **FA**

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