GUARDIANSHIP AND DIVORCE

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This paper attempts to set forth how a guardian might obtain a divorce on behalf of a ward and when such an action might be appropriate. It examines the Texas case law basis for divorce initiated and prosecuted by a guardian and looks at statutes from states where a guardian has the statutory right to do so. It also examines the ability to file for an annulment, and whether a person is prohibited from entering into a marriage simply because of a guardianship order.

I. TERMINOLOGY

First, let's get a handle on terminology. The Estates Code defines an incapacitated person in Section 22.016 as a person who:

> Texas Estates Code Section 22.016. INCAPACITATED PERSON.
>
> A person is incapacitated if the person:
> (1) is a minor;
> (2) is an adult who, because of a physical or mental condition, is substantially unable to
> (A) provide food, clothing, or shelter for himself or herself;
> (B) care for the person's own physical health; or
> (C) manage the person's own financial affairs…[1]

The threshold for guardianship requires that there be a finding that a person is "incapacitated" in order to be eligible for a guardianship.

The Family Code, however, does not contain a definition of an "incapacitated person." Instead, it relies on the Estates Code definition. Several Family Code sections refer to an "incapacitated person," but no definition is to be found.

A person is presumed to be mentally competent until there is a judicial finding to the contrary:

> Sec. 576.002. PRESUMPTION OF COMPETENCY.
>
> (a) The provision of court-ordered, emergency, or voluntary mental health services to a person is not a determination or adjudication of mental incompetency and does not limit the person's rights as a citizen, or the person's property rights or legal capacity.
> (b) There is a rebuttable presumption that a person is mentally competent unless a judicial finding to the contrary is made under the Estates Code.[2]

Any proceeding where a party is under suspicion of incapacity must be tolled until a finding of incapacity is entered; otherwise the presumption of competency persists.

[1] TEX. ESTATES CODE ANN. §22.016 (West 2018).
[2] TEX. FAMILY CODE ANN. §576.002 (West 2018).

II. WHY DIVORCE?

A. Why Should a Guardian Want a Ward to Get Divorced?

For persons with capacity, the reasons to end a marriage are limitless. It can be something as simple as regret – Britney Spears, looking at you – or something as serious as leaving a violent relationship, with many shades of gray in between. What would make a guardian, however, want to file for divorce? Why might a Ward desire to get divorced?

The guardian may be carrying out the wishes of the ward. Many wards have enough capacity to be able to express opinions about their living situations, including marital situations. In fact, one of the early reasons courts would not allow a guardian to file for divorce on behalf of a ward is that the court saw the "decision to dissolve a marriage was so strictly personal that only the parties to the marriage should decide" to divorce.[3] Where the ward is driving that decision, however, it seems this (now outdated) standard is easily upheld. What could be more "strictly personal" than an individual deciding they wish to terminate their marriage?

The choice to dissolve a marriage is indeed unique to each individual. What some spouses see as normal would be intolerable to others. In that case, the ward, if able, should be able to have their wishes heard. Should a ward be incapable of voicing that opinion, the guardian, as the person who is charged with protection of the ward, should be able to form and voice that opinion on behalf of the ward. For many years, the spouse of a ward could initiate a divorce, which places the ward still at the mercy of a potentially abusive or exploitative spouse. However, courts routinely awarded guardians the ability to make other personal decisions on behalf of a ward. For example, a guardian could petition a court on behalf of a ward to marry, so why not divorce? The court authorizes other actions that are inherently personal.

Not all wards will be able to decide whether dissolution of marriage is appropriate or desirable, however. A guardian should be positioned to be able to obtain a divorce as a protection of the ward from the ward's spouse. Where the ward is a subject of abuse, exploitation, neglect or harassment by their spouse, arguably the guardian has a duty to obtain a divorce to protect the ward. A divorce is often an escape for financial exploitation from the guardian, as well – a ward is doubly vulnerable if the very person charged with protecting them, their guardian, is also their spouse.

A guardian may be put in the position of defending against a divorce. If the ward's spouse files for divorce, the guardian does not have much choice but to cooperate with the proceedings, regardless of the ward's wishes. The popularization of no-fault divorces, beginning in the 1970s, reflected a new public policy that "dead marriages should be terminated."[4] The ward may not have much choice about the divorce process, and the guardian should be prepared and authorized to advocate for the ward through the divorce process.

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[3] *Hart v. Hart,* 705 S.W.2d 332, 333 (Tex. App. 1986—Austin 1986, Writ ref'd n.r.e.).

[4] Bella Feinstein, Esq., *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian-Initiated Divorces, in* 10 NAELA JOURNAL NO. 2, page 203, Fall 2014.

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