

# **GUARDIANSHIPS DURING DIVORCE**

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# GUARDIANSHIPS DURING A DIVORCE

## I. INTRODUCTION

In the 2011 novel, *The Postmortal*, by Drew Magary, scientists have discovered a cure for aging. People who take the “cure” can still die from accidents or diseases, but will otherwise live forever. The main character is an attorney who transitions his practice from estate planning to family law after the “cure” completely changes humanity’s concepts of both death and marriage.<sup>1</sup> With far fewer people dying, demand for wills plummets, while the need for divorces skyrockets.

In the real world, estate planners are still very much in demand. However, people in the United States are generally living longer than ever before.<sup>2</sup> The average life expectancy in some Texas counties now exceeds 85 years at birth.<sup>3</sup> Longer life expectancies and better quality of life for older adults mean that some married couples are facing difficult choices about whether to continue their marriages later in life, similar to the “postmortals” of Magary’s novel. When faced with the prospect of many additional years in an unhappy marriage at 65 or 70, more couples in such situations are opting for divorce. The authors have seen this play out in our practices, but this anecdotal observation is also backed up by data.

Since the 1990s, the national divorces rate among adults 50 years or older has risen.<sup>4</sup> According to an article published by the United States Census Bureau in 2021, the percentage of adults age 55 to 74 who have been divorced is higher compared to other age groups.<sup>5</sup> A Bowling Green State University study published in 2019 found that divorces in adults over 50 increased more than twofold between 1990 and 2008, despite the

overall divorce rate in the U.S. declining during the same period.<sup>6</sup> The so-called “gray divorce rate” in Texas is amongst the highest in the nation.<sup>7</sup> More recent data suggests that the trend toward more divorces later in life is accelerating, driven in large part by the aging of the Baby Boomer generation.<sup>8</sup>

Unlike the divorcees in *The Postmortals*, older couples divorcing in the real world are not shielded from the ravages of old age by any miracle cure.<sup>9</sup> Questions of capacity, whether due to cognitive or physical impairment, can impact every facet of a divorce case and are more likely to be present in divorces involving older married couples. More than ever before, family law attorneys are looking to partner with lawyers who practice guardianship law in cases that involve these complicated issues. Additionally, attorneys who regularly serve as counsel for guardians could find themselves in the middle of a contested divorce without warning.

This paper is intended to assist guardianship attorneys who become involved in divorce cases. The three authors have brought different perspectives to this article based on the focuses of their respective practices. It is our hope that the information provided in this paper can be used as a starting point for further research and that it will stimulate more discussion between guardianship and family law bars on this topic.

## II. REPRESENTING THE WARD’S INTERESTS IN DIVORCE PROCEEDINGS

### A. Differing Roles for the Guardian of the Estate and Guardian of the Person

It is generally accepted that a guardian of the ward’s estate is the correct party to pursue or defend a divorce action on behalf of a ward in Texas.<sup>10</sup> Except as

<sup>1</sup> When the main character decides to take the cure, the doctor handling the procedure says: “Another lawyer? I should put a moratorium on you folks. Last thing we need are a bunch of godforsaken lawyers hanging around forever.”

<sup>2</sup> A significant exception being the last two years during the pandemic. See [https://www.cdc.gov/nchs/pressroom/nchs\\_press\\_releases/2022/20220831.htm](https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2022/20220831.htm) (last visited October 12, 2022).

<sup>3</sup> <https://www.cdc.gov/nchs/data-visualization/life-expectancy/> (last visited October 12, 2022).

<sup>4</sup> Benjamin Gurrentz and Yeris Mayol-Garcia, *Marriage, Divorce, Widowhood Remain Prevalent Among Older Populations*, United States Census Bureau – America Counts: Stories Behind the Numbers (April 22, 2021), available at <https://www.census.gov/library/stories/2021/04/love-and-loss-among-older-adults.html> (last visited October 13, 2022).

<sup>5</sup> *Id.*

<sup>6</sup> Colette Allred, *Gray Divorce Rate in the U.S.: Geographic Variation*, National Center for Family & Marriage Research at Bowling Green State University (2019).

<sup>7</sup> *Id.* at 2, Figure 2 (Texas has the 8th highest gray divorce rate out of the 50 states).

<sup>8</sup> Renee Stepler, *Led by Baby Boomers, Divorce Rates Climb for America’s 50+ Population*, Pew Research Center (March 9, 2017), available at <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population/> (last visited October 13, 2022).

<sup>9</sup> The Centers for Disease Control and Prevention estimates that over 61 million adults in the United States live with a disability and that roughly 10.8% of disabled adults in the United States are disabled due to a cognitive deficit. Centers for Disease Control and Prevention, *Disability Impacts All of Us*, National Center on Birth Defects and Developmental Disabilities (September 16, 2020), available at <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html> (last visited September 26, 2022).

<sup>10</sup> *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837, 838 (Tex.App.—El Paso 1998, writ denied); *Stubbs v. Ortega*, 977 S.W.2d 718, 724 (Tex.App.—Fort Worth 1998, writ denied) (“Texas public policy does not prohibit authorizing a guardian to petition for divorce on behalf of her mentally

otherwise provided in certain provisions of Title 3 of the Texas Estates Code, a guardian of the estate is under a duty to take care of and manage the ward's estate as a prudent person would manage his own property.<sup>11</sup> Additionally, a guardian of the estate may bring suit to collect claims or debts owed to the ward, including damages, and to recover title to or possession of property to which the ward has claim or title.<sup>12</sup> Texas Estates Code Section 1151.104 allows a guardian to pursue such claims without first seeking permission from the Court to do so.<sup>13</sup> However, this does not mean that a guardian of the estate should unilaterally make decisions relating to a divorce, especially when deciding whether to initiate a divorce proceeding on behalf of the ward and/or when a separate person or entity is serving as guardian of the ward's person.

Though the guardian of the person may not have authority to deal with financial matters or legal claims on behalf of a ward, the guardian of the person will likely have more detailed information than the guardian of the estate regarding the ward's living situation and any potential issues involving the ward's marriage. Additionally, the guardian of the person is entitled to take charge of the ward's person, which includes the right to have physical possession of the ward and the right to establish the ward's legal domicile.<sup>14</sup> This might provide the means of quickly removing a ward from a hostile home environment during divorce proceedings without court intervention. However, a guardian of the person is required to give notice to the court, and third-parties who have requested notice, prior to moving a ward to a more restrictive care facility (except in cases of emergency).<sup>15</sup> Guardians of the person should be sure to determine whether the estranged or separated spouse is on the list of people entitled to such notice when deciding whether to move the ward to a more restrictive setting. A guardian of the estate would not necessarily have the power to take these actions without appealing to the court for authority.<sup>16</sup> As such, it can be very helpful to the ward, and critical from a strategic standpoint, for the guardian of the estate to work closely with the guardian of the ward's person at every stage of a divorce proceeding.

When different people or entities are serving as guardian of the estate and person, conflict may arise between the guardians as to how the divorce should

proceed and/or whether a divorce should be filed at all. In such situations, a guardian of the estate always has the option of seeking court approval prior to the exercise of the power to initiate a divorce action.<sup>17</sup> Likewise, a guardian of the person could seek protection for the ward from the Court if the guardian of the estate was taking any action the guardian of the person deemed to be adverse to the ward's best interests.

## B. Court Approval

Guardianship practitioners should be sure to inform their family law co-counsel of the necessity of court approval in the guardianship case for actions that are often addressed by agreement of the parties in normal divorces. For instance, a guardian of the estate must seek court approval before compromising or settling disputes or litigation related to the ward's property.<sup>18</sup> Guardians of the estate must also seek court approval to hire and pay attorneys, including family law counsel. Additionally, a guardian of the estate cannot expend funds for the education and maintenance of the ward's spouse or dependents without first obtaining court approval.<sup>19</sup> Again, court approval for such actions must come from the court overseeing the guardianship. If the divorce is being pursued in a different forum, the court handling the divorce does not have the authority to authorize a guardian to take any action.<sup>20</sup>

## C. Community Property Issues in the Guardianship Case

When representing the ward's interest in a divorce action, guardians of the estate and their attorneys should be aware that community property questions do not necessarily stay neatly within the confines of the divorce case. If the estate of a married ward includes community property, Texas Estates Code Section 1353.002 provides that the ward's spouse is entitled to serve as community administrator and has the authority to administer all community property, including community property that would otherwise be subject to the sole management, control, and disposition of the incapacitated spouse. This is true even if a guardian of the ward's separate property estate is appointed by the court.<sup>21</sup>

In situations where the competent spouse cannot serve as community administrator, Texas Estates Code

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incapacitated ward"). For a good description of the evolution of the law on this issue, see Bruce D. Bain, *Guardianship Issues for the Impaired Divorce Client*, The University of Texas School of Law Estate Planning, Guardianship, and Elder Law Conference (2015).

<sup>11</sup> Texas Estates Code § 1151.151(a).

<sup>12</sup> Texas Estates Code § 1151.104.

<sup>13</sup> *Id.*

<sup>14</sup> Texas Estates Code § 1151.051(a), (b), & (c)(1).

<sup>15</sup> Texas Estates Code § 1151.051(e).

<sup>16</sup> Monica A. Benson & George H. Golightly, III, *Guardianship and Divorce*, The University of Texas School of Law Estate Planning, Guardianship, and Elder Law Conference (2019).

<sup>17</sup> Texas Estates Code § 1151.103(b).

<sup>18</sup> Texas Estates Code § 1151.102(c).

<sup>19</sup> Texas Estates Code § 1156.052.

<sup>20</sup> See Section III *infra*.

<sup>21</sup> Texas Estates Code § 1353.003(a).

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