Chicago Daily Law Bulletin®

Volume 162, No. 147 Serving Chicago's legal community for 161 years

High court leans toward giving guardians greater role in divorce

The state of marriage in this country is a hotly debated topic right now. Unlike past generations, where people generally married early in life and remained married to that one person — for better or worse — until death did them part, it has become more common and socially acceptable for people to marry later in life or multiple times.

In first marriages, couples often envision a happy and healthy life together and rarely consider what might happen if things change. In second marriages, the spouses have often had children with their former spouses, and there may be little or no relationship between the stepparents and the parent's adult children other than holiday gatherings.

Consider a situation when 13 years after a couple was married, the wife who has a daughter by a previous marriage, had a serious car accident where she suffers brain damage and becomes disabled, requiring full-time care.

Initially, the husband was appointed his wife's guardian and took care of her for seven years in their home. However, when he could no longer care for her, the husband transferred his guardianship of person and estate to his wife's daughter from a prior marriage.

Three years later, the husband filed for divorce and the guardian filed a counter-petition for divorce. When the husband asked the court to dismiss both his petition and the guardian's counter-petition, the court initially granted the husband's motion to dismiss the counter-petition, holding that the guardian had no standing to file for divorce on her mother's behalf. See *In re Marriage of Drews*, 115 Ill.2d 201 (1986). This is the fact pattern that was considered by the Illinois Supreme Court in the case of *Karbin v. Karbin*, 2012 IL 112815.

By way of background, the Probate Act allows for the appointment of guardians for disabled adults who are not fully able to manage their person or estate because of mental deterioration, physical incapacity, mental illness or developmental disability (750 ILCS 5/11a-2).

Under the act, a court may find that a person is "disabled" if such disability has been established by clear and convincing evidence (755 ILCS 5/11a-3(a)).

A guardian of the ward's person is appointed when the ward lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person, and a guardian of the estate is appointed when the ward cannot manage his estate or financial affairs.

A guardian of both the person and estate is appointed when the ward can manage neither personal nor financial matters. Regardless of which appointment is made, the act directs that a guardianship shall be utilized only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation or abuse and to encourage development of his maximum self-reliance and independence, while at all times the guardian is acting in the ward's best interest (755 ILCS 5/11a-17(e)).

MODERN FAMILY

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While a guardian has always had the authority to make personal decisions on behalf of his or her ward, one exception in Illinois was that a guardian lacked standing to institute a divorce on behalf of his ward — regardless of whether the guardian believed it was in the ward's best interest. *In re Marriage of Drews*, 115 Ill.2d 201 (1986).

When presented with the fact pattern described above, however, in the case of *Karbin v. Karbin*, 2012 IL 112815, the Illinois Supreme Court departed from its prior direction and ruled that a guardian has the authority to seek permission from the court to file a dissolution petition on behalf of the ward if such petition is found to be in the ward's best interests.

In its departure from *Drews*, the Supreme Court considered cases where the courts had been expanding the duties of guardians, relying on the notion of implied authority, rather than explicit authority, in determining the power of a guardian to act under the Probate Act such as deciding that a plenary guardian was authorized to decide whether to use life-sustaining measures for the ward. See *In re Estate of Longway*, 133 Ill.2d 33 (1989); and *In re Estate of Greenspan*, 137 Ill.2d 1 (1990).

Specifically, before filing in the divorce court, Karbin *dictates that a guardian must first seek permission from the probate court to file such a petition ...*

Moreover, the court considered current Illinois policy on divorce which removes the concept of "injury" and "fault" from divorce, concluding that *Drews*, which was decided by the appellate court prior to the no-fault law, was no longer consistent with current law. Moreover, the court found that there was no compelling reason to treat a guardian's decision regarding a divorce on behalf of a ward any differently than other personal decisions guardians make on behalf of their wards. See *Karbin*, 2012 IL 112815 at 11.

Now consider the situation where a 68-year-old woman and a 79-year-old man marry, each having adult children from prior marriages and the husband has accumulated a substantial estate.

Fourteen years later, when the husband is 93, he falls ill. His mental and physical health has deteriorated and although the couple have had a great marriage, the 82-year-old wife feels that she can no longer provide the care he requires.

When the wife proposes that her husband move into an assisted-living facility, the husband's adult children object and shortly thereafter, ask the court to appoint them as guardians of their father's person and estate. The very first action that one of the adult children, who is also a beneficiary of his father's estate and had never liked his stepmother, takes in his capacity as guardian is to file a petition for dissolution of marriage on behalf of his father.

Not surprisingly, this unexpected action by the guardian causes distress in the wife, who still cares deeply for her husband and questions the guardian's motives in pursuing the divorce.

Fortunately, when deciding that guardians should be allowed to file for divorce on behalf of their wards, the court in *Karbin* set up prerequisites to ensure that the divorce is being pursued on behalf of the ward for the right reasons, not for the guardian's financial benefit or because of the guardian's antipathy for the ward's spouse.

Specifically, before filing in the divorce court, *Karbin* dictates that a guardian must first seek permission from the probate court to file such a petition and the court shall first conduct a best interest hearing where the guardian must prove by clear and convincing evidence that such petition is in the ward's best interest. Only then may the guardian file the petition for dissolution in the domestic relations court.

In the end, the Supreme Court's determination that the personal decision to obtain a divorce should be treated no differently from the many other personal decisions made by guardians on behalf of their wards brings Illinois in line with many other states and is consistent with the policies set forth in our current statute.