The Intersection of Guardianship and Matrimonial Law

By Elizabeth A. Adinolfi

Elizabeth Adinolfi

As our family structures become more complex, so do guardianship cases. By the mid 1970s, the divorce rate had reached 48%.[1] Forty years later, practitioners and the courts must grapple with cases involving family dysfunction with roots reaching back decades, while insuring that the rights and interests of the Alleged Incapacitated Person remain paramount. As multiple remarriages and "gray divorce"—divorcing after 30-40 years of marriage—become more common, advising both clients and the courts becomes more difficult and complex. In addition to the frequently dysfunctional family dynamics resulting from divorce that the guardianship practitioner must manage, issues implicating matrimonial law are becoming increasingly common in guardianship proceedings. Perhaps the most significant are issues relating to dissolving an existing marriage, or the AIP entering into a new marriage.

A practitioner may have as a potential client an adult child looking to retain counsel to bring an Article 81 proceeding to become her father's Guardian. One of her primary motivations for seeking to become Guardian is to bring divorce proceedings to dissolve the father's marriage to his second (or third or fourth) wife, who is perceived to be a gold digger only interested in her spouse's money, and not in caring for him as his health and mental acuity declines. This is perhaps the culmination of years, if not decades, of resentment toward the second spouse, whom the daughter blames for her parents' divorce. While she should be advised that a court would most likely be hesitant to appoint the daughter as Guardian in light of the hostility with her father's wife, even if that hurdle could be surmounted, the remedy the daughter seeks is not available.

Assuming the wife in this scenario is not amenable to the idea of a divorce, there is no way to procure a divorce through an Article 81 proceeding. This is one question where the law in New York State is clear: a Guardian may not prosecute an action for absolute divorce. *In re Cresap-Higbee*, 3 A.D. 3d 424 (1st Dep't 2004) (citing *Mohrmann v. Kob*, 291 N.Y. 181, 184 (1943) (construing Civ. Prac. Act § 1377)). Nor may a Guardian continue to prosecute an action for divorce once the plaintiff in the action is declared to be an Incapacitated Person. *See DE v. PA*, 2016 N.Y. Slip Op. 51230 (Westchester Co. June 22, 2016). The Court of Appeals has held that marriage is a unique status, one that "Legislature has guarded jealously by the enactment of those statutes which govern divorce." *Mohrmann*, 291 N.Y. at 187. Absent a revision to the Domestic Relations Law permitting an action for divorce to be brought on behalf of an Incapacitated Person, the Court of Appeals reasoned that the right to seek a divorce belongs solely to the individual. *Id.* at 190. Given that the Legislature did not explicitly provide for a Guardian to have the power to initiate divorce proceedings when it drafted Article 81, *Mohrmann* remains good law 70 years later.

However, Article 81 does not prevent an individual who has been declared an Incapacitated Person (IP) from being sued for divorce. *See Linda G. v. Norman G.*, 2006 N.Y. Misc. LEXIS 2631 at *5-6 (Sup. Ct. N.Y. Co. 2006); *Christopher C. v. Bonnie C.*, 40 Misc. 3d 859, 861 (Sup. Ct. Suffolk Co. 2013). In this instance, if the wife wishes to divorce, she is free to initiate divorce proceedings and the Guardian would defend against the action. The Guardian could also attempt to induce the wife to file for divorce in exchange for an adequate financial settlement. Another option available to a Guardian is to seek a legal separation as opposed to an absolute divorce. The Court of Appeals has held that a *guardian ad litem* may maintain an action for legal separation (*see Kaplan v. Kaplan*, 256 N.Y. 366, 371 (1931)), although a legal separation can provide only for an award of spousal maintenance and exclusive possession of the marital residence; it cannot provide for the equitable distribution of marital assets. DRL 236(B)(5)(a).

However, there is a significant restraint on the Guardian's ability to procure a divorce or a legal separation: the wishes of the IP. MHL 81.20 (3) commands that "a guardian shall exhibit the utmost degree of trust, loyalty and fidelity in relation to the incapacitated person", and MHL 81.20 (7) commands that a Guardian "shall afford the incapacitated person the greatest amount of independence and self-determination with respect to personal needs in light of that person's functional level, understanding and appreciation of that person's functional limitations, and personal wishes, preferences and desires with regard to managing the activities of daily living." Attempting to procure a divorce where the IP has not expressed a desire to dissolve the marriage could constitute a breach of the Guardian's fiduciary duties, and form a basis for the Guardian's removal. There are numerous mechanisms for protecting the IP without the expensive and drastic step of a divorce or legal separation. For example, once a Guardian is appointed, he or she must act to ensure that assets are not being dissipated to the IP's detriment (which is frequently the motivation for family to want the Incapacitated Person divorced), arrange for adequate home care services if the IP needs assistance with activities of daily living, and monitor the IP to ensure that there is no physical or emotional abuse.

A different scenario practitioners may encounter is a prospective client seeking to be appointed Guardian of a parent or relative whom they believe is being financially

exploited by a new spouse, often a person the family may have just learned about. In these cases, there is a strong chance that the Court can grant relief. Guardianship courts in New York have addressed cases involving, *inter alia*, an elderly woman who, after a period of prolonged illness, married a high school acquaintance who came back into her life; *In re Dot E.W.*, 172 Misc.2d 684 (Sup. Ct. Suffolk Co. 1997); an elderly man who married his nurse, who was 43 years his junior; *In re Joseph S.*, 25 A.D.3d 804 (2d Dep't 2006); an elderly man who married a woman 37 years his junior, and with whom he never resided or had a romantic relationship, *In re H.R.*, 2008 NY Slip Op. 52404(U), ¶ 1, 21 Misc. 3d 1136(A), 1136A (Sup. Ct. Nassau Co. 2008); and an elderly man who married his live-in home care attendant, *In re Dandridge*, 120 A.D.3d 1411 (2d Dep't 2014). In all of these cases, the courts found that while divorce is not an option, an annulment is an available remedy in an Article 81 proceeding, *see* MHL § 81.29(d). MHL § 81.29(d) provides:

> If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1601, or 5-1602 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated.

In 1997, four years after the adoption of Article 81, Justice A. Gail Prudenti was the first judge to address how MHL § 81.29(d) applied to marriage. Justice Prudenti reasoned that, for purposes of entering into a marriage, marriage is treated no differently than a civil contract and hence, "[c]onsent of parties capable in law of contracting being essential," "[a]ny lack [therein] makes the marriage void (Dom. Rel. Law, §§ 5 and 6) or voidable (L PI ... and an action may be maintained to annul it." *In re Dot E. W.*, 172 Misc. 2d at 693 *quoting Shonfeld v. Shonfeld*, 260 N.Y. 477, 479 (1933); *Kober v. Kober*, 16 N.Y.2d 191 (1965). Where the evidence demonstrates that the party was "incapable of understanding the nature, effect, and consequences of the marriage" at the time of the marriage, then the court has the power to annul it in the course of an Article 81 proceeding. *In re Joseph S.*, 25 A.D.3d 804 (2d Dep't 2006) (*quoting Levine v. Dumbra*, 198 A.D.2d 477, 477-478 (2d Dep't 1993)).

In re Dandridge, *supra*, presents a cautionary tale for unwary practitioners. In *Dandridge*, the Appellate Division, Second Department, reversed the judgment of annulment and remanded the case for further proceedings because the Article 81 petition had not included annulling the marriage as part of the relief requested, nor had the petition been amended to include such relief. The court found that this deprived the wife of proper notice and an opportunity to be heard, necessitating the remand. There are other procedural issues which practitioners should be aware of. Under MHL § 81.07(3), a spouse is ordinarily not served with the petition, just the order to show cause and notice of proceeding. However, in order to obtain jurisdiction over the spouse, proper service of the petition according to Domestic Relations Law § 232 must be made, and the Order to Show Cause and petition should be drafted to provide for proper service upon the spouse. Under Domestic Relations Law § 236B(2)(b), there are specific automatic orders that must be served in connection with all matrimonial actions, which include annulments, that restrain the spouses' ability to "sell, transfer, encumber, conceal, assign, remove or in any way dispose of" property, regardless of how the property is titled. Particularly where a Temporary Guardian is not appointed in the Order to Show Cause, the automatic orders provide a safeguard to preserve the AIP's assets.

Many people, including attorneys, believe that an annulment eliminates a spouse's rights to maintenance and equitable distribution of marital property. However, this understanding is incorrect, and both equitable distribution and spousal maintenance are available in an annulment proceeding and must be addressed by the Court when annulling a marriage. *In re Dot E. W.*, 172 Misc. 2d at 694-95; *see also Matter of Joseph S.*, 25 A.D.3d at 804 (remanding Article 81 case back to the trial court where court annulled marriage but did not determine equitable distribution). Usually in these cases, the marriage is of such short duration that no marital property has been acquired, and there is only a very weak claim to spousal maintenance. However, these are still issues a practitioner must be prepared to address when seeking to annul a marriage in an Article 81 proceeding.

While many people are shocked to learn that equitable distribution is available when a marriage is annulled, this can work to the IP's benefit. The Equitable Distribution Law can be used to recoup assets that have been taken from the incapacitated spouse, making a turn-over proceeding unnecessary. Under New York Law, gifts from one spouse to the other are marital property subject to equitable distribution. *See Chase v. Chase*, 208 A.D.2d 883, 884 (2d Dep't 1994). Accordingly, any property that the spouse claims the incapacitated spouse gifted to him or her—jewelry, automobiles, even cash—is marital property which the Court can, after weighing the factors set forth in the Equitable Distribution Law,[2] award back to the incapacitated spouse. Given the exploitative, if not outright fraudulent, nature of these marriages, the Court has broad powers to fashion an equitable distribution

award that restores the incapacitated person to his or her premarital financial condition as much as is possible.

As multiple remarriages, and correspondingly complicated family dynamics, become more common, guardianship cases present a minefield of matrimonial issues for practitioners who lack familiarity with New York Domestic Relations Law. To best serve our clients, guardianship practitioners should endeavor to develop a basic understanding of the Domestic Relations Law, and its available remedies. In highly conflicted cases, especially those involving significant financial assets, consultation with an experienced matrimonial attorney, or even bringing someone on as co-counsel, may be necessary. However, practitioners should possess sufficient knowledge of matrimonial law to recognize when such consultation is warranted and to avoid the types of procedural errors that can leave an AIP's assets vulnerable to dissipation, lead to reversal on appeal and wasteful additional proceedings, and leave counsel vulnerable to a claim of malpractice.

Endnotes

1. Statistical Abstract of the United States: 2011, available at https://www.census.gov/prod/2011pubs/11statab/vitstat.pdf.
2. In New York, property is not automatically divided in half and distributed equally to each spouse. Instead, the court must consider 14 specific factors in determining the equitable distribution of property:
    - the income and property of each party at the time of marriage, and at the time of the commencement of the action;
    - the duration of the marriage and the age and health of both parties;
    - the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
    - the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
    - the loss of health insurance benefits upon dissolution of the marriage;
    - any award of maintenance under subdivision six of this part;
    - any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
    - the liquid or non-liquid character of all marital property;
    - the probable future financial circumstances of each party;
    - the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
    - the tax consequences to each party;
    - the wasteful dissipation of assets by either spouse;
    - any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and
    - any other factor which the court shall expressly find to be just and proper.
    - DRL § 236(B)(5)(d).

Elizabeth Adinolfi, Esq., is a partner in Phillips Nizer LLP's Litigation and Matrimonial Law Practices, and the Chair of the Firm's Guardianship Practice. Ms. Adinolfi has served as Court Evaluator, guardian; and counsel to guardians, high-net-worth individuals alleged to be incapacitated, and family members in complex guardianship proceedings. She is often is appointed to represent AIPs in cases that involve issues of matrimonial law. She is a member of the Guardianship Committee of the Elder & Special Needs Law Section and a member of the Family Law Section of the New York State Bar Association.