Dissolution Proceedings By a Guardian On Behalf of a Ward

2000 Illinois Family Law Report 202

By Jay A. Frank

Can a person for whom a guardian has been appointed divorce his or her spouse. Situations frequently occur where for financial, emotional, or other reasons the family of a ward or the guardian, believes a divorce to be appropriate. Can a case be filed on behalf of the ward. What about a case filed prior to the guardianship – can it be continued by the guardian.

The answers to these questions are controlled by two cases, one decided fifteen years ago and the second just recently decided.

The first case is In Re The Marriage Of Drews, with opinions in the Appellate Court (139 Ill.App.3d 763, 94 Ill.Dec. 128, 487 N.E.2d 1005 (1st Dist. 1985)) and the Supreme Court (115 Ill.2d 201, 104 Ill.Dec. 782, 503 N.E.2d 339 (1986)). The second case is In Re The Marriage Of Burgess that likewise generated opinions in the Appellate Court (302 Ill.App.3d 807, 236 Ill.Dec. 280, 707 N.E.2d 125 (1st Dist. 1998) and in the Supreme Court (No. 86974 (Ill.S.Ct. February 17, 2000)).

The Drews Case

The Drews case was decided in the mid-1980s. A plenary guardian filed a petition for dissolution of marriage. The Respondent filed a motion to dismiss based upon the contention that the guardian lacked authority to file the petition for dissolution of marriage. The trial court sustained the motion and dismissed the dissolution petition.

The appellate court concluded that neither the Probate Act of 1975 nor the Illinois Marriage and Dissolution of Marriage Act contained provisions that either specifically allowed or precluded the filing of a dissolution petition by the guardian. The appellate court then turned to Illinois common law and found that there was no clear precedent that a guardian may never institute a dissolution action on behalf of the ward. In fact, the court found precedent empowering the guardian to act on related issues. Thus, a guardian has been allowed to: (1) institute an action to vacate a divorce decree entered during a period of disability, (2) institute an action to annul a marriage entered into by the disabled person during a period of disability, (3) represent the ward in defense of a dissolution petition where the ground occurred prior to the period of disability, and (4) institute an action for dissolution of marriage where the ward possesses sufficient mental capacity to determine intelligently that he or she desires a dissolution of marriage where the guardian is only of the estate. See Drews, 139 Ill.App.3d at 772-773, 94 Ill.Dec. at 134, 487 N.E.2d at 1011.

After looking to other jurisdictions, the court found that a guardian is generally without authority to commence dissolution proceedings on behalf of the ward where the ward is unable to make and communicate his personal decision to dissolve the marriage. The court predicated its ruling upon the conclusion that dissolution is a drastic step with wide-ranging consequences and the decision to dissolve the marriage is a personal right only to be exercised by the spouse. The court noted, however, that:

> Parenthetically, we recognize the possibility that there may be compelling instances where it could be clearly shown that dissolution of the ward's marriage 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.

139 Ill.App.3d at 776, 94 Ill.Dec. at 137, 487 N.E.2d at 1014.

No such circumstances were found in this case.

Justice Jiganti filed a strong dissent. He pointed out that other courts have allowed guardians to make decisions that were just as important and personal as the institution of a dissolution case. Specific examples include the ability of a guardian to consent to: an operation, the donation of a kidney, and the removal of life support systems causing the ward to die. Thus, Justice Jiganti reasoned that a guardian should be in a position to determine if the commencement of a dissolution case is in the best interests of the ward.

Justice Jiganti recommended that the issue of filing a dissolution case be referred to the trial court that established the guardianship. That court should determine whether it is in the best interests of the ward to commence the dissolution proceedings. To determine, as in the majority opinion, that as a matter of law the guardian has no authority to recommend suit and to apply for permission to file suit, is to strip the guardian of the discretion provided to him by statute and common law.

The Supreme Court affirmed the Appellate Court decision and held that Illinois follows the majority rule from other jurisdictions that a plenary guardian cannot initiate a dissolution case absent specific statutory authority. Again a strong dissent was registered, this time by Justice Simon. The dissent is similar in nature to the Appellate Court dissent offered by Justice Jiganti. Justice Simon stated that the trial court should make an initial decision as to whether the dissolution proceeding is beneficial to the ward. By dismissing the dissolution petition without allowing the trial court the opportunity to make such a ruling, the result is that the courts have failed to give any consideration to the best interests of the ward.

Justice Simon also noted that the two cases relied upon in the majority decision are antiquated, having been decided in 1897 and 1901. He observed that the two cases were decided at a time when divorces were rare and difficult to obtain. Justice Simon concluded,

> Denying a guardian standing based on these antiquated case precedents is, in my judgment, an overly narrow reading of the statute that is neither in the best interest of the ward nor the public. I would therefore hold that the court should entertain the guardian's petition and perform its statutory obligation to determine whether a dissolution of marriage is in the best interest of the ward.

115 Ill.2d at 208-209, 104 Ill.Dec. at 786, 503 N.E.2d at 343.

The Burgess Case

The case is recent, providing an appellate court decision in December 1998 and a Supreme Court decision in February 2000. The case involves the continuation of a dissolution petition by a plenary guardian where the petition was filed by the spouse prior to the appointment of the guardian. The appellate court observed that when Drews was decided, the majority rule in the country was that a guardian had no standing to initiate a dissolution petition on behalf of the ward. The court further observed that times have changed since the Drews decision and that a majority of the jurisdictions now allow a guardian to initiate or maintain a dissolution proceeding upon behalf of the ward. A review of the authorities from other states caused the court to conclude:

> We also note from a review of these decisions that sound legal and public policy considerations have been offered in support of this position.

302 Ill.App.3d at 810, 236 Ill.Dec. at 282, 707 N.E.2d at 127.

Notwithstanding all of this, the appellate court found that it was compelled to follow the decision in Drews. Factual differences between the two cases were not sufficient to require a different result. Drews dealt with a situation where the guardian initiated the dissolution petition while Burgess involved a dissolution petition initiated by the ward and continued by the guardian. The Burgess court was not persuaded by the distinction and held that the plenary guardian may not continue the dissolution action filed by the ward.

Once more, an extremely strong dissent was filed. Justice Tully, specially concurring, states:

> "I would echo the dissent in Drews, which argued that such guardians should be allowed to initiate, let alone maintain, a dissolution of marriage action on the disabled adult's behalf."

302 Ill.App.3d at 812, 236 Ill.Dec. at 284, 707 N.E.2d at 129.

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> In addition, I agree with the Drews dissent that maintaining a dissolution action is no more personal than making medical decisions. 'In these days of termination of life support, tax consequences of virtually all economic decisions, no-fault dissolutions and the other vagaries of a vastly changing society, we think an absolute rule denying authority is not justified nor in the public interest.' As Petitioner pointed out in his appellee's brief, the Probate Act specifically authorizes a guardian to act as a surrogate decision maker under the Health Care Surrogate Act. The Health Care Surrogate Act allows the surrogate to authorize the withdrawal of medical treatment. Thus, I would find the argument that initiating or maintaining a dissolution action on a ward's behalf is too personal to fall within the guardian statute to be unpersuasive.

302 Ill.App.3d at 813, 236 Ill.Dec. at 284, 707 N.E.2d at 129 (citations omitted).

Justice Tully dismissed Drews as it no longer reflected the majority view. He suggested, as in the Drews dissent, that the trial court should hold a hearing and exercise its discretion in determining if the initiation or maintenance of the dissolution suit is in the best interests of the ward.

The Supreme Court allowed a Petition for Leave to Appeal in the Burgess case (183 Ill.2d 565, 238 Ill.Dec. 712, 712 N.E.2d 816). During the pendency of the appeal, the legislature amended the Probate Act to permit a plenary guardian to continue a dissolution petition filed prior to the guardianship.

Section 5/11a-17(a-5) of the Probate Act now provides:

> If the ward filed a petition for dissolution of marriage under the Illinois Marriage and Dissolution of Marriage Act before the ward was adjudicated a disabled person under this Article, the guardian of the ward's person and estate may maintain that action for dissolution of marriage on behalf of the ward.

755 ILCS 5/11a-17 (a-5).

Many commentators urged the Supreme Court to issue an opinion in Burgess that went further than the amendment to the Probate Act and that would allow the guardian to initiate a dissolution petition. Joseph Gitlin, a well-respected practitioner, frequent lecturer, and prolific writer in the area of matrimonial law, commented on the Burgess case and the amendment to the Probate Act and observed:

> One specific question raised in Burgess and addressed by P.A. 91-139 [the amendment to the Probate Act] is a guardian's standing to maintain a ward's divorce action initiated before the ward was adjudicated disabled under the Probate Act. P.A. 91-139 does not go far enough because the Probate Act still does not specifically allow a guardian to initiate a divorce action for a ward. The high court is urged to still review Burgess, overturn the previous rulings from Drews and Burgess, and rule on a guardian's ability to initiate divorce actions.

Gitlin on Divorce Reports, August, 1999, 99-70.

The Supreme Court issued its opinion in Burgess in February of this year. The decision reversed the Appellate Court and held that the guardian may maintain and continue a dissolution petition filed by the ward prior to the guardianship.

The Supreme Court found that Drews was not controlling. First, the holding in Drews was limited to a situation where the guardian (and not the ward) commenced the dissolution case. Secondly, the concern that the guardian may be acting contrary to the ward's wishes by initiating the petition is not present where the ward expresses his personal desire to terminate the marriage by commencing the case himself. In this situation, there is no need to protect the ward by requiring specific authority in the Probate Act for the guardian to continue the case. It is sufficient if such authority can be implied.

The court held that the power of the guardian to continue the case can be implied from the provisions of the Probate Act. The court found the authority in Section 11a-17, which empowers the guardian to provide for the "support, care, comfort, health, education and maintenance" of the ward and to "assist the ward in the development of maximum self-reliance and independence." 755 ILCS 5/11a-17(a).

Significantly, the decision does not address the other issue - - - whether the guardian should be allowed to initiate a dissolution action on behalf of the ward. Accordingly, although possibly out of sync with modern thinking and the weight of legal authority, the Drews decision is still the law in Illinois and precludes a dissolution filing by the guardian.

Conclusion

It is clear that the guardian's power to initiate a dissolution upon behalf of the ward will have to come, if at all, from the legislature. The arguments against such power center on the theory that the ward and only the ward should have the ability to start a dissolution case as the rights involved are so very personal and the ramifications so wide-ranging. Those in favor of empowering the guardian point out that there is no other effective remedy to protect a disabled spouse and to obtain for her much of the relief available under the Illinois Dissolution Act.

The solution suggested in both the Drews and Burgess dissents seems workable and efficient. The guardian should be allowed to present a petition for the commencement of a dissolution action to the trial court that originally ordered the guardianship. The trial would take evidence and determine if commencement of the case would be in the best interests of the ward. This would afford ample protection against capricious action by the guardian. The trial court would be in a position to determine if the need for the dissolution case and the benefits to be derived therefrom for the ward were sufficiently compelling in light of the ward's inability to express her wishes. The bar for this "best interests" test should be set high, requiring clear and convincing evidence.

The current state of the law in Illinois renders a disabled spouse a second-class citizen. She has no effective dissolution remedy. The Probate Act should be amended to bring Illinois in line with the majority of jurisdictions that have established procedures to consider dissolution relief for a disabled spouse.

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