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Karbin steps in to meet needs of aging population, dying marriage

May is designated as Older Americans Month. The most recent census — conducted in 2010 — clearly shows that our population is rapidly aging. Not only are there now more Americans over age 65 than at any other time in U.S. history, but this age group also grew at a faster pace during the prior decade than the total population.

Looking to the future, the number of us over 65 is expected to increase even more rapidly in the next decade as more baby boomers reach and pass that milestone, and as new medical advances continue to increase life expectancy.

As the age of the population increases, the likelihood that more people will experience competency issues also rises. These issues are often rooted in the development of dementia, which is hallmarked by a decline in memory, language, problem-solving and other similar skills that affect a person's ability to perform everyday activities, such as paying bills, preparing meals, bathing and dressing.

One study predicts that by 2025, the number of those 65 and older with Alzheimer's disease — the most severe form of dementia — is estimated to reach 7.1 million, which is a nearly 40 percent increase from the 5.2 million in this age bracket currently affected.

Therefore, it is not surprising that a correlation exists between trends showing increased population-wide cognitive decline due to aging and a growing demand for adult guardianships in jurisdictions across the country.

In Illinois, when a person can no longer care for himself, the Probate Act provides for the appointment of a guardian for a "person with a disability," who is defined as anyone over the age of 18 "not fully able to manage his person and or estate" because of "mental deterioration," "physical incapacity," "mental illness" or "developmental disability." 755 ILCS 5/11a-2.

The guardian is required to always "promote the well-being of the person with a disability, to protect him from neglect, exploitation or abuse and to encourage development of his maximum self-reliance and independence." 755 ILCS 5/11a-3(b).

This broad language has been construed to vest guardians with expansive authority to make innately personal decisions on behalf of an incompetent ward, including the provision of life-sustaining measures.

It would seem to follow, therefore, that a guardian would also possess the power to file a petition for dissolution of marriage on behalf of an incompetent ward if it was in the ward's best interests to do so.

However, it was only a few years ago that the Illinois Supreme Court, in its landmark decision in *Karbin v. Karbin*, 2012 IL 112815, overruled case law that had controlled for nearly three decades and which had prohibited a guardian from filing a petition for dissolution of marriage on behalf of an incompetent ward, even where the guardian believed that the filing of such petition would protect the ward from physical or emotional abuse, financial exploitation and/or neglect by the ward's competent spouse.

In changing course, the Illinois Supreme Court surveyed prior decisions which revealed an inconsistent interpretation of the Probate Act regarding the scope of powers possessed by a guardian. In addition, the court held that the policy foundation for the traditional rule barring a guardian from bringing a dissolution petition on behalf of the ward — i.e., the sanctity of marriage on both religious and moral grounds — became inconsistent with later public policy reflected in the enactment of no-fault divorce.

Finally, the court found that continued application of the traditional rule resulted in inequity to the disabled spouse: Although a competent spouse could seek to dissolve the marriage at any time, the incompetent spouse was prevented from filing a similar action, thereby trapping that person in the marriage with no recourse and potentially endangering him or her in cases of abuse or neglect by the other spouse.

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Bringing Illinois in line with a growing number of states, *Karbin* clearly held that a guardian "may seek court permission to bring a dissolution action on behalf of a ward where not expressly barred or allowed by statute."

To that end, *Karbin* established the general procedure to be followed when a guardian makes such a request. Soon thereafter, the General Assembly codified the *Karbin* decision by amending Section 11a-17 of the Probate Act (755 ILCS 5/11a-17), thereby clarifying the procedures and standards to be employed by the circuit court where a guardian requests that the court allow the filing of a petition for dissolution on a ward's behalf.

Specifically, Section 11a-17(a-5) establishes the standing of a guardian to request that the circuit court "authorize and direct" the guardian to file on behalf of the ward a petition for dissolution of marriage, a petition for legal separation or a declaration of invalidity of marriage (755 ILCS 5/11a-17(a-5)).

In making this request, the guardian must establish, under a heightened clear and convincing evidence standard, that the filing of a dissolution petition is in the best interests of the ward.

In determining whether the guardian has met the required burden of proof to support the granting of such a request, the circuit court must consider the factors set forth in Subsection (e) of Section 11a-17. (755 ILCS 5/11a-17(e)).

These factors inform the standard for the guardian's decision-making and include taking actions that conform as closely as possible to what the ward, if competent, would have done under the circumstances and considering actions that are in the ward's best interests in light of the reason for and nature of the proposed action, the benefit or necessity of the action, the possible risks and other consequences of the proposed action and any available alternatives and their risks.

In sum, as adult guardianships increase as a result of cognitive impairments experienced by an aging population, *Karbin* has opened the door for guardians to seek permission from the circuit court to file petitions for dissolution of marriage on behalf of their wards where clear and convincing evidence shows that pursuing dissolution of the ward's marriage promotes the ward's well-being.

MODERN FAMILY

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