

NOTE
THE MARRIAGE TRAP: HOW GUARDIANSHIP DIVORCE
BANS ABET SPOUSAL ABUSE

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INTRODUCTION

Irva Nelson's son, Bobbie, received a call from an old friend of his mother.¹ Bobbie, who lived in Ohio, would need to check on his mother's deteriorating health, as Irva suffered from Alzheimer's disease.² Upon his arrival in New Mexico, Bobbie found his mother "unclothed, sleeping in an unmade bed stained with urine and fecal matter, and living in a cluttered, unkept house" where she lived with her husband, Claude.³ Irva weighed only sixty-nine pounds when Bobbie found her.⁴

Irva's friends testified at her competence hearing about Claude's mistreatment and neglect of Irva. They had heard Claude and Irva have a "physical altercation," and Irva admitted to them that Claude physically abused her.⁵ She was left at home alone for "long periods on a daily basis."⁶

Bobbie moved his mother out of Claude's house the day after becoming her guardian.⁷ As Irva's guardian, Bobbie sued to divorce her from Claude, seeking to prevent Claude's waste of their marital assets without regard to Irva's care and well-being. Bobbie alleged cruel and inhumane treatment and incompatibility as grounds for their divorce.⁸ Claude had provided no assistance toward Irva's care since Bobbie moved her out, though he and Irva were still married.⁹

The New Mexico court established and upheld Bobbie's right as his mother's guardian to file for her divorce, finding it to be in her best interests.¹⁰ Bobbie testified that prior to the onset of Alzheimer's, his mother had confided to him and other family members that her marriage to Claude "was a 'mistake,' but that she did not know what to do about it."¹¹ Once declared incompetent, though, Irva's

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¹ Nelson v. Nelson, 878 P.2d 335, 337 (N.M. Ct. App. 1994).

² *Id.* at 336-37.

³ *Id.* at 337. Claude is not Bobbie's father. *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Nelson, 878 P.2d at 337.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 340-41 (the best interests determination was supported by circumstances involving spousal abuse and neglect, as well as evidence of her intention to divorce when previously competent).

¹¹ *Id.* at 337.

only way to legally end her failed marriage was a claim made by her guardian. In a majority of states, Irva no longer had the right to sue for her own divorce, as her guardian had no power to bring that action for her.¹²

A growing minority of states allow a guardian to sue for divorce on behalf of a ward where not expressly barred or allowed by statute.¹³ If a ward is not lucky enough to live in one of those protective states, like Irva prior to her victory in the New Mexico Supreme Court, that person is helpless to change the situation if his or her competent spouse does not want a divorce. The incompetent, vulnerable spouse is trapped in an unwanted, potentially abusive, marriage.

In this Note, I propose that states dispense with the traditional majority rule. The likelihood of spousal abuse is far greater¹⁴ than the risk of divorce claims brought by delusional, but still volitionally competent, spouses. Additionally, court review of competence in divorce proceedings and in competence hearings provides multiple opportunities for the examination and protection of all parties' interests. The bright-line bar on guardian divorce actions under the majority view denies opportunities to adjudicate and ensure equity between spouses whose relationship and power has dramatically changed.

In Section I, I briefly frame how my proposal fits within the range of options already enacted and illuminate what is possible and what is at stake. Section II explains the evolution and erosion of the majority rule ban on guardian divorce powers. Section III outlines some important distinctions about competence and the interplay of statute and constitutional concerns for divorce actions by incompetent persons. This provides the context needed to understand how the law has adapted to modern views of divorce and mental health, as detailed in Section IV. I will then illustrate the modern minority rule methods of evaluating guardian claims in Section V via Arizona's solution, which combines the two analyses: "substituted judgment" and "best interests."

¹² David E. Rigney, Annotation, *Power of an Incompetent Spouse's Guardian or Representative to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make Compromise or Settlement in Such Suit*, 32 A.L.R.5TH 673, at *3b (2008).

¹³ See *Id.* at *3a, citing *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674 (Ariz. Ct. App. 1993); *In re Higgason*, 516 P.2d 289 (Cal. 1973); *In re Smith*, 335 N.W.2d 657 (Mich. Ct. App. 1983); *Nelson v. Nelson*, 878 P.2d 335, 337 (Ct. App. N.M. 1994); *Boyd v. Edwards*, 446 N.E.2d 1151 (Ohio Ct. App. 1982); *In re Ballard*, 762 P.2d 1051 (Or. Ct. App. 1988); *Syno v. Syno*, 594 A.2d 307 (Pa. Super. Ct. 1991); *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837 (Tex. Ct. App. 1988); *In re Gannon*, 702 P.2d 465 (Wash. 1985); and noting that New Jersey and New York each have split authority on this issue. See also *In re Parmer*, 755 S.W.2d 5 (Mo. Ct. App. 1988); and *Murray v. Murray*, 426 S.E.2d 781 (S.C. 1993).

¹⁴ At least 14 percent of elder abuse is inflicted by a spouse, making spouses the second largest category of elder abusers. Toshio Tatara, *Trends in Elder Abuse in Domestic Settings*, NAT' CTR ON ELDER ABUSE (1997). Approximately 450,000 adults aged sixty and over were abused and/or neglected in domestic settings in 1996 (not including self-neglect). Nat'l Ctr. on Elder Abuse, *The National Elder Abuse Incidence Study*, at 1 (1998), available at http://www.aoa.gov/AoARoot/AoA_Programs/Elder_Rights/Elder_Abuse/docs/ABuseReport_Full.pdf. Cf. *infra* note 58 regarding the comparative rarity of delusional divorce actions.

Admittedly, my proposition encompasses wide-ranging changes. I do not advocate expanding guardian divorce power without simultaneous review and modification of standards of proof and evidence regarding competence, which I address throughout. The effects of these intertwined factors must be considered en masse to address current deficiencies while minimizing new problems.

However, the doctrinal shift I advocate is already under way, driven by a continuing legal examination of the intersection of disparate views of competence, individual rights and responsibilities, and the appropriate roles and powers of guardians. It is also now strongly shaped by a larger national conversation about the nature, purpose, and right to marriage in its many evolving forms.

I. AN INCOMPETENT SPOUSE'S RIGHT TO DIVORCE IS PROTECTED

Wyoming and Alabama expressly protect not only a guardian's power to sue for divorce, but also the power to marry their ward to a third party.¹⁵ These more unusual protection simpliciter acknowledge duties implicated by the transfer of a ward's fundamental constitutional rights, protections, and obligations. These two states respect the delicate, highly individual nature of "incompetence" by refusing to draw a bright-line rule against legal action where facts and interests conflict uniquely among each set of parties. They provide the *possibility* of full protection for incompetent persons' matrimonial right to leave *or* enter "the most important relation in life."¹⁶

The collision of this fundamental right with the increasingly frequent occurrence of mental illness and impaired agency that accompany our aging society¹⁷ demands these full efforts.¹⁸ Mental illness and disease do not universally

¹⁵ Diane Snow Mills, *"But I Love What's-His-Name": Inherent Dangers in the Changing Role of the Guardian in Divorce Actions on Behalf of Incompetents*, 16 J. AM. ACAD. MATRIM. L. 527, 551 (citing ALA. CODE § 26-2A-78(c)(5), and WYO. STAT. ANN. § 3-2-201(b)(vi) (amended 1998)).

¹⁶ *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978), (citing *Maynard v. Hill*, 125 U.S. 190, 205 (1888)).

¹⁷ "Between 1950 and 2006, the U.S. population roughly doubled, but the population over age sixty-five years tripled. By 2030—when all the 'baby boomers' will have reached age sixty-five years—the population age sixty-five to seventy-four years will have grown from six percent to ten percent of the total U.S. population. The susceptibility of elderly persons to mental problems is demonstrated by the finding that, in 2007, approximately four million persons aged sixty-five and over suffered from some type of mental disability." Douglas Mossman & Amanda E. Shoemaker, *Incompetence to Maintain a Divorce Action: When Breaking Up Is Odd to Do*, 84 ST. JOHN'S L. REV. 117, 127 (2010).

¹⁸ "The denial of access to the judicial forum . . . touche[s] directly . . . on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship. On many occasions we have recognized the fundamental importance of these interests under our Constitution." *Zablocki*, 434 U.S. at 385 (1978) (citing *United States v. Kras*, 409 U.S. 434, 444 (1973)).

negate an adult's full ability to determine the structure of their lives.¹⁹ Adults of wide-ranging mental capacity marry for a host of legally and morally valid reasons. Some do so out of deep monogamous love and in keeping with ancient religious traditions. Others marry to serve narrower but still crucial needs of companionship, care, and everyday survival.²⁰ Undoubtedly, many people marry for all these reasons and more. In light of our evolving and hotly contested conceptions of marriage and civil unions, the law owes us nothing less than the possibility of retaining our full scope of rights as we age and adapt.²¹

II. THE MAJORITY RULE BAN ON GUARDIAN DIVORCE POWER

A. *The Evolution of the Ban*

Traditionally, the legal intersection of competence and divorce was focused on competent spouses seeking to divorce incompetent spouses.²² Under common law, however, a spouse's "insanity" was not a ground for divorce. States universally required that acts providing proper grounds occur before the onset of insanity.²³ The typical rationale for this was derived from principles of equity:

To deny the law's justice to the sane one because of the other's insanity would be to cast in part on the former the burden which God had laid wholly on the latter. Divorce, where there is cause for it, is the plaintiff's

¹⁹ Nor do courts necessarily evaluate competency in toto; "[C]ourts now may make competence adjudications concerning specific incapacities—such as incompetence to make treatment decisions or to stand trial—rather than simple plenary adjudications about all legal capacities." Mossman & Shoemaker, *supra* note 17, at 125.

²⁰ See, e.g., Michael Farley, *When "I Do" Becomes "I Don't": Eliminating the Divorce Loophole to Medicaid Eligibility*, 9 ELDER L.J. 27 (2001) (disapproving of the relatively common use of divorce to qualify for Medicaid support).

²¹ Though some do not agree with this broader conception of marital purpose and rights; see, e.g., *id.*

²² *E.g.*, *Steed v. Steed*, 181 P. 445 (Utah 1919). Most statutes and case law prior to the 1950s cordoned off marital and divorce rights in this manner and applied to persons termed "insane" or "morons," as well as those suffering epilepsy; see, e.g., UTAH CODE ANN. § 30-1-2.1, (1963) ("Validation of marriage to a person subject to chronic epileptic fits who had not been sterilized."). A notable exception is Massachusetts, which has protected the right of an incompetent person to sue for divorce since at least the nineteenth century; see, e.g., *Garnett v. Garnett*, 114 Mass. 379, 380 (1874) (citing statute allowing "a libel for divorce [to] be filed and prosecuted in behalf of an insane person").

²³ "While it is true that neither a wife nor a husband may obtain a divorce from the other on the ground of insanity, or for acts committed during such insanity . . . , it is . . . the well-settled law of this state that a divorce may be obtained for acts occurring prior to the insanity and constituting cause for divorce, and that the mere subsequent insanity of the defendant will not defeat plaintiff's right to a divorce, if it existed when the defendant became insane." *Steed*, 181 P. at 446, (internal cite omitted) (citing *Huston v. Huston*, 150 S.W. 386 (Ky. 1912)).

right. If the defendant were sane, he could not prevent it; he has no election. Therefore it is not otherwise when he is insane.²⁴

To circumvent that doctrinal obstacle, plaintiffs invoked spousal cruelty, the most popular claim in divorces until the mid-twentieth century.²⁵

B. *The Erosion of the Ban*

Judges and lawyers eventually recoiled from divorce proceedings that had become more farce than fact, with scholars fearing for the respectability of the judicial system.²⁶ This push for legal realism was also driven by a broad social destigmatization of divorce from the 1960s onward.²⁷

Reflecting, in part, the reassessment of women's rights and roles in American society generally, the divorce rate increased sharply in the 1960s²⁸ as the power relationship within marriages changed and social taboos against divorce lessened.²⁹ Divorce statutes, case law, and court rules of procedure and evidence adapted in kind. California passed the first no-fault divorce statute in 1970, and by the mid-1980s, the majority of states had adopted no-fault statutes and/or vastly broader grounds for divorce.³⁰

American views toward mental illness, incompetence, and insanity also evolved over that period, though certainly not in lockstep with changes in divorce law. Institutionalization of the mentally ill dropped sharply from the mid-1950s to the mid-1970s, and continues to drop to the present date.³¹ That shift partially reflects advances in, and acceptance of, more widespread use of pharmacological

²⁴ *Steed*, 181 P. at 447.

²⁵ Mossman & Shoemaker, *supra* note 17, at 130.

²⁶ Kurt X. Metzmeier, *The Power of an Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend*, 33 U. LOUISVILLE J. FAM. L. 949, 952–53 (1994).

²⁷ “During the last third of the twentieth century, divorce became more common and much more socially acceptable. Between 1960 and 1981, the U.S. divorce rate increased from 2.2 to 5.3 per 1,000 persons. Rates have decreased steadily since, and in 2006, the divorce rate was 3.6 per 1,000 persons. However, this rate is still well above the 1960 rate, and the drop in divorce rates has been accompanied by a much lower marriage rate. Thus, over the last half-century, the probability that a marriage will end in divorce has doubled.” Mossman & Shoemaker, *supra* note 17, at 126 (internal cites omitted).

²⁸ Between 1960 and 1981, the U.S. divorce rate increased from 2.2 to 5.3 per 1,000 persons. *Id.*

²⁹ *Id.*

³⁰ *Id.* at 135.

³¹ “In 1955, when the total U.S. population stood at 166 million, approximately 550,000 persons were confined in public psychiatric institutions, often termed ‘state hospitals.’ Two decades later, this number had fallen to under 200,000, and today, fewer than 50,000 persons are committed to state and county psychiatric hospitals despite a near-doubling of the U.S. population over the same period.” *Id.* at 123–24 (internal cites omitted).

and outpatient treatment of mentally ill and injured persons.³² These changes have lead to the widespread expectation that illness of nearly every sort is to be managed and lived with, rather than fundamentally derailing one's life.³³ These changes in medicine and expectations also helped fuel the right-to-die and health-care surrogacy movements, which in turn have led legislatures and courts to broaden the power of guardians, including the divorce action power.³⁴

III. THE MURKY LEGAL BOUNDS OF INCOMPETENCE AND DIVORCE

These vast shifts in societal expectations regarding both divorce and competence demand that the relationship between the rights of those found incompetent and the powers vested in their guardians adapt in kind. To better understand and determine the structure of those relationships, however, we must briefly review where and how the law draws the boundaries of competence.

A. Statutory Definitions of Incompetence

Thirty-six states use probate codes to define adult incompetence that justify guardianship.³⁵ These definitions of incompetence frequently use subjective and undefined conditions, requiring courts to find a person unable to "properly" manage one's self or property,³⁶ or exhibit "unusually bad judgment."³⁷

These subjective definitions encourage a very risky disconnect of the expert testimony confirming the presence of mental illness or disease from any evidence that shows actual harm caused to a potential ward by such conditions. While expert diagnoses are probative, they are insufficient to show causation or likelihood of harm. Even accurate diagnoses do not preclude a ward's functional control or competent agency, which are often maintained by effective compensating services, skills, or medications.³⁸ Statutes using these vague terms thus create significant risk of improper loss of basic rights to a guardian.³⁹

Only a handful of states have passed statutes expressly ruling out factors including "age, eccentricity, poverty, or medical diagnosis *alone*" as sufficient to

³² *Id.*

³³ *Id.* at 125.

³⁴ Metzmeier, *supra* note 26, at 959.

³⁵ Mills, *supra* note 15, at 529.

³⁶ *Id.* at 530 (citing DEL. CODE ANN. § 12-3901(A)(2) (1975-1996)).

³⁷ *Id.* (citing UTAH CODE ANN. § 75-1-201 (18) (1953-1997)).

³⁸ Eleanor Crosby & Rose Nathan, *Adult Guardianship in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?*, 16 QUINNIPIAC PROB. L. J. 249, 270 (2003). "Diagnostic procedures and medical opinions are relevant only to the extent they highlight the proposed ward's functional abilities or limitations. If a medical diagnosis reveals a mental or physical disability and accompanying limitations, but the proposed ward's basic needs and safety nonetheless are provided for, the ward's adaptive functioning should preclude the need for a guardianship." *Id.* (internal citations omitted).

³⁹ Mills, *supra* note 15, at 532.

find incompetence.⁴⁰ For example, Virginia and West Virginia statutes explicitly state that evidence of poor judgment alone does not suffice.⁴¹ Similarly, Arkansas and Kansas specify that a person may not be declared incompetent solely for relying on prayer for healing or coping, rather than using medical treatment.⁴²

B. Constitutional Concerns Affecting Incompetence and Divorce

Of course, case-specific adjudication of incompetence is not the sole determinant of a party's rights and obligations. Federal and state constitutions, and corresponding case law and doctrine, also shape this analysis. For example, in *Wahlenmeier v. Wahlenmeier*, the Texas courts recognized the guardian divorce power as a necessary safeguard of the fundamental civil rights of a ward, which are expressly protected by the Texas Mental Health Code.⁴³

Similarly, divorce is part and parcel of the right to determine marriage in all its aspects, which itself is a fundamental right protected by the United States Constitution.⁴⁴ As such, procedural due process protections guaranteed by the Constitution are required when invoking such a right. These include “the right to a hearing, the right to legal representation, the right to participate in the hearing, the right to confront and cross-examine witnesses, and the right to an adjudication by clear and convincing evidence.”⁴⁵ At least one state code expressly states that these rights are not abridged where a person is adjudicated incompetent.⁴⁶

The transition from the majority ban to the minority protection of guardian divorce power often rests on the need to conform statutes to these interwoven

⁴⁰ *Id.* at 530 (emphasis added) (citing WASH. REV. CODE ANN. § 11.88.010(1)(c) (West 1965–1990)).

⁴¹ *Id.* at 531–32.

⁴² *Id.*

⁴³ *Wahlenmeier v. Wahlenmeier*, 750 S.W.2d 837,839 (Tex. App. 1988), *aff'd*, 762 S.W.2d 575 (Tex. 1988). The TEX. MENTAL HEALTH CODE ANN. § 5547-80(a), forming the basis of protection, reads: “. . . every mentally ill person in this state shall have the rights, benefits, responsibilities, and privileges guaranteed by the constitution and laws of the United States and the constitution and laws of the State of Texas.” The court continued, “That provision concludes by providing that absent specific provisions of law to the contrary presented under special procedures, every person shall have, among other things, rights concerning domestic relations.” *Wahlenmeier*, 750 S.W.2d at 839.

⁴⁴ Of course, the rights and definition of marriage are determined by the states, so long as the states do not infringe on the minimum protections accorded by the United States Constitution. This federalist marriage interplay has been in flux since *Loving v. Virginia*, 388 U.S. 1 (1967), which abrogated a state restriction on interracial marriage as violative of equal protection.

⁴⁵ *Crosby & Nathan*, *supra* note 38, at 274 (citing *Addington v. Texas*, 441 U.S. 418 (1979) and *Greene v. McElroy*, 360 U.S. 474, 496–97 (1959)).

⁴⁶ *E.g.*, Persons alleged or determined to be incapacitated “shall not be deprived of any civil, political, personal or property rights without due process of law.” *Id.* at 252, (citing GA. CODE ANN. § 29-5-7(a) (2001) (later recodified as GA. CODE ANN. § 37-3-140 (2010))).

constitutional and statutory protections of right and procedure. While most courts reviewing these combined issues have adopted the minority view since 1970,⁴⁷ such reviews depend on claims being brought. The court review process has taken forty years to play out in less than twenty states, as statutory silence and express bars against these actions create strong disincentives to litigate.

IV. EMERGING MODERN PROTECTIONS FOR GUARDIAN DIVORCE POWER

The majority of state statutory codes are silent on the right of divorce action by guardians, or by persons suffering mental impairment whose competence at the time of filing is not yet adjudicated. Currently, only eleven states have statutes expressly protecting the right of adult wards to bring divorce actions via their guardian.⁴⁸

Amongst states with codes silent on this issue, at least thirteen states⁴⁹ courts have disallowed any guardian's right to sue for a ward's divorce, with twenty-four having neither statutory protection nor relevant case law.⁵⁰ Some of those states likely view this restriction as being in harmony with statutes limiting a guardian's rights to those expressly stated within the guardianship agreement.⁵¹

Utah, for example, statutorily prefers limited guardianships,⁵² putatively preventing abuse of custodianship by guardians by preventing any power to act not

⁴⁷ Metzmeier, *supra* note 26, at 949. For example, twelve of fifteen states that reviewed the issue between 1970 and 1994 adopted the minority view. *See* Ruvalcaba v. Ruvalcaba, 850 P.2d 674 (Ariz. Ct. App. 1993); *In re Higgason*, 516 P.2d 289 (Cal. 1973); *Knight v. Radomski*, 414 A.2d 1211 (Me. 1980) (concerning annulment, but court indicates that the holding extends to divorce); *In re Smith*, 335 N.W.2d 657 (Mich. Ct. App. 1983); *In re Parmer*, 755 S.W.2d 5 (Mo. Ct. App. 1988); *Kronberg v. Kronberg*, 623 A.2d 806 (N.J. Super. Ct. Ch. Div. 1993); *Boyd v. Edwards*, 446 N.E.2d 1151 (Ohio Ct. App. 1982); *In re Ballard*, 762 P.2d 1051 (Or. Ct. App. 1988); *Syno v. Syno*, 594 A.2d 307 (Pa. Super. Ct. 1991); *Murray v. Murray*, 426 S.E.2d 781 (S.C. 1993); *Wahlenmaier v. Wahlenmaier*, 750 S.W.2d 837 (Tex. Ct. App. 1988); *In re Gannon*, 702 P.2d 465 (Wash. 1985).

⁴⁸ Rigney, *supra* note 12, at *3a and *4 (2008).

⁴⁹ *Id.* at *3b, *citing* *Cox v. Armstrong*, 221 P.2d 371 (Colo. 1950); *Huguley v. Huguley*, 51 S.E.2d 445 (Ga. 1949); *Pape v. Byrd*, 555 N.E.2d 428 (Ct. App. Ill. 1990); *State ex rel. Quear v. Madison Cir. Ct.*, 99 N.E.2d 254 (Ind. 1951); *Mohler v. Shank's Estate*, 61 N.W. 981 (Ia. 1895); *Fourth Nat'l Bank v. Diver*, 289 P. 446 (Kan. 1930); *Kuta v. Kuta*, 47 N.W.2d 558 (Neb. 1951); *Freeman v. Freeman*, 237 S.E.2d 857 (Ct. App. N.C. 1977); *Boyd v. Edwards*, 446 N.E.2d 1151 (Ct. App. Ohio 1982); *State ex rel. Robedeaux v. Johnson*, 418 P.2d 337 (Okla. 1966); *Murray v. Murray*, 426 S.E.2d 781 (S.C. 1993)).

⁵⁰ *See* Rigney, *supra* note 12, at *3c-d. New York and New Jersey have case authority both acknowledging and disallowing guardian divorce power.

⁵¹ *See, e.g.*, UTAH CODE ANN. § 75-5-312(1): "A guardian of an incapacitated person has only the powers, rights, and duties respecting the ward granted in the order of appointment under Section 75-5-304."

⁵² *See* UTAH CODE ANN. § 75-5-304(2): "Limited Guardianship Preferred: The court shall prefer a limited guardianship and may only grant a full guardianship if no other

expressly granted, including divorce actions. The burden of these restrictive limits, of course, is borne by wards needing unavailable protection from abuse and neglect.

Risk of custodial abuse can manifest where the guardian is related to his or her ward.⁵³ A spouse, child, or other relative serving as guardian often has a vested interest in the ongoing use or ultimate dispersal of their ward's assets.

Non-familial professionals also pose risks of guardianship abuse. Some scholars and practicing attorneys assert that these "arms-length" guardians often do not understand the values of their wards, and hence do not understand the choices the ward would have made while competent.⁵⁴ There are also allegations of "frequent" antipathy to spouses (though the frequency is not concrete), creating a risk of inappropriate, or even spiteful, guardian divorce actions.⁵⁵

Solutions advocated to prevent guardian abuses vary. One suggestion is to set the evidentiary standard for incompetence at the preponderance level.⁵⁶ Lowering the standard of proof would place more persons within the scope of guardianship than would a clear and convincing threshold.⁵⁷ Those primarily concerned with

alternative exists. If the court does not grant a limited guardianship, a specific finding shall be made that nothing less than a full guardianship is adequate."

⁵³ *E.g.*, Familial guardians are favored by Utah even above a testamentary guardian chosen by the ward, including where a specific, nonfamilial guardian was chosen while still competent. *See* UTAH CODE ANN. § 75-5-311(4)(2010):

"Priorities:. . . [P]ersons . . . have priority for appointment as guardian in the following order: (a) a person who has been nominated by the incapacitated person, by any means [not written in specified form and signed], if the incapacitated person was 14 years of age or older when . . . executed and, in the opinion of the court, that person acted with sufficient mental capacity to make the nomination; (b) the spouse of the incapacitated person; (c) an adult child of the incapacitated person; (d) a parent of the incapacitated person, including a person nominated by will, written instrument, or other writing signed by a deceased parent; (e) any relative . . . with whom he has resided for more than six months prior to the filing of the petition; (f) a person nominated by the person who is caring for him or paying benefits to him. . . ."

⁵⁴ Mills, *supra* note 15, at 555–57.

⁵⁵ *Id.* at 555.

⁵⁶ *See, e.g.*, Mossman & Shoemaker, *supra* note 17, at 188 (suggesting the use of a preponderance standard in a model statute for determination of competence to maintain a divorce action).

⁵⁷ Some courts "have found that the liberty interests at stake in guardianship are sufficiently similar to those in civil commitment, requiring comparable constitutional protections." Crosby & Nathan, *supra* note 38, at 252, *citing In re Guardianship of Reyes*, 731 P.2d 130 (Ariz. Ct. App. 1986); *Hedin v. Gonzales*, 528 N.W.2d 567, 575 (Iowa 1995); *In re Boyer*, 636 P.2d 1085, 1092 (Utah 1981) (recognizing that although the deprivation of personal freedoms is greater in commitment cases and that differences exist in the extent of the curtailment of personal freedoms, the interests at stake in guardianship are not so different as to require a different standard of proof).

persons bringing inappropriate divorce actions due to mental illness short of the extent required to be found incompetent (i.e. delusional but still volitional) find a preponderance standard appropriate to address such a problem. This scenario, however, is quite rare.⁵⁸ Placing more of these persons within the reach of guardianship, without the option of divorce brought by their guardians, would effectively strip that “preponderantly incompetent” ward’s rights, rather than transferring them to a competent guardian. The ward’s rights simply disappear.

Conversely and unsurprisingly, requiring a higher standard of proof to find incompetence lowers the number of adults declared incompetent. This might improve control of life (and litigation) decisions for those who have mental limitations but are still legally and functionally competent. By leaving more potential plaintiffs in the competent category via a clear and convincing standard of proof for incompetence, unnecessary delegation of rights to appointed, non-familial guardians is prevented, as is the “disappearance” of rights described above.⁵⁹

Neither of these evidentiary standards, however, would protect spouses once declared incompetent from the sorts of spousal abuse, neglect, abandonment, and “waste” of marital assets Irva Nelson suffered after the majority rule makes the right to a divorce disappear. At least 14 percent of all elder abuse comes from a spouse, making spouses the second largest category of elder abusers.⁶⁰ While the minority rule will not guarantee protection in practice, only that further step of removing a bright-line bar to guardianship divorce will make real protection possible in all combinations of competence, incompetence, and guardianship. Moving more persons into guardianship by using a preponderance standard, without corresponding changes to guardian powers, only increases the number of vulnerable spouses locked within the marriage trap. By first removing the incompetent spouse’s right to file divorce on their own behalf, and then removing that ability from the recipient of a ward’s other rights—their guardian—spouses are left unassisted in their hostile or abusive marital relationship.

I support many changes that are commonly included in model statutes proposed to reform the determination of incompetence.⁶¹ However, establishing a clear and convincing standard for incompetence, rather than simple preponderance, is essential to comply with constitutional protections of substantive and procedural due process.⁶² The clear and convincing standard also favors the interest of equity

⁵⁸ Mossman & Shoemaker, *supra* note 17, at 155. Despite a thorough search, only seven such cases were found to fit this narrow area of concern.

⁵⁹ This includes due process rights, as discussed *supra* note 58.

⁶⁰ Toshio Tatara & Lisa M. Kuzmeskus, *Trends in Elder Abuse in Domestic Settings*, NAT’L CTR. ON ELDER ABUSE (updated Nov. 1997), http://www.ncea.aoa.gov/ncearoot/main_site/pdf/basics/fact2.pdf.

⁶¹ Though not all such suggestions; for example, Mossman’s model statute includes provision for the arrest of a party if he or she refuses an evaluation ordered after the issue of competence is raised in a hearing (§ 3.2.3 pursuant to § 3.1), rather than simply dismissing the action (per § 3.2.2). Mossman & Shoemaker, *supra* note 17, at 189–90.

⁶² See Crosby & Nathan, *supra* note 46; Mossman & Shoemaker, *supra* note 58.

between spouses by leaving in place the power to divorce absent a clear showing of need for such an intervenor guardian.⁶³ The full protection accorded by adopting this evidentiary standard is contingent, however, on the inclusion of express protection of guardian power to sue for a ward's divorce, whether guardian powers are construed restrictively or liberally.⁶⁴

Reforming incompetence determination in isolation will not address the problem of "disappearing" rights. Nor would it provide a means to adjudicate the propriety of a guardian's action for divorce on behalf of a ward. Fortunately, there is a viable system already in place that can help protect against spousal abuse, neglect, abandonment, or waste of assets; that can address concerns about the delicate balance of mental illness or disease and volitional capacity; and can also help prevent abuse by non-spousal guardians.

V. MINORITY RULE PROTECTIONS

Guardians are not simply empowered, but are *required* by every state to act in the best interests of their wards. They can be required to defend their wards from civil suits, from criminal prosecution, and to enter and sever contracts and agreements on their ward's behalf to provide for the ward's well-being.⁶⁵ States adopting the minority view, such as New Mexico in *Nelson v. Nelson*,⁶⁶ and Arizona in *Ruvalcaba v. Ruvalcaba*,⁶⁷ often interpret statutory powers of guardians as broadly illustrative, rather than exclusive or limiting.⁶⁸ Indeed, guardian powers

⁶³ "To provide a mentally competent spouse with [divorce] power in the absence of a corresponding power to the incompetent. . . (through a guardian) is to grant the competent spouse 'absolute, final control over the marriage,' leaving 'an incompetent spouse completely at the mercy of the competent spouse. . . . Principles of equity demand equal treatment and equal access to the courts for all individuals, not just those who are sane (or who might be mentally incapacitated but simply have not been subjected to a competency hearing)." Mills, *supra* note 15, at 549.

⁶⁴ If, for example, Mossman's model statute was adopted with my proposed changes to burden of proof and express guardian divorce power, I would then strongly favor restrictive guardian power interpretations. See UTAH CODE ANN. § 75-5-311(3), *supra* note 53. While I view the balance of interests as requiring the option of guardianship divorce claims, I share the more general concern about too easily stripping wards of most rights under general/liberally construed guardianships.

⁶⁵ See, e.g., VA. CODE ANN. § 37.2-1026 (2010) (delineating guardian relationship to ward as fiduciary: "All actions or suits to which the incapacitated person is a party at the time . . . [or] . . . subsequently instituted shall . . . be prosecuted or defended . . . by the fiduciary. . . ."); ARIZ. R. CIV. PROC. 17(g) (2010) (a general guardian "may sue or defend on behalf of the . . . incompetent").

⁶⁶ 878 P.2d 335, 341 (N.M. Ct. App.1994).

⁶⁷ 850 P.2d 674, 683-84 (Ariz. Ct. App.1993).

⁶⁸ *Nelson*, 878 P.2d at 340.

in such states form a comprehensive proxy for their ward, limited only by the mandate to place primacy on the ward's values.⁶⁹

The Arizona court's rule of assessing a guardian's proxy acts in light of that comprehensive duty is a combination of the two main doctrines used by different states: "substituted judgment," and the "best interests" of the ward. Each view, of course, has critics and supporters. Arizona's solution provides the best balance achievable by requiring substituted judgment where ascertainable by the court, and a determination of best interests where the ward's firm desires are not clear.⁷⁰

A. Substituted Judgment

Arizona's substituted judgment view requires that clear and convincing evidence of a ward's desire to divorce or remain married determine the court's decision.⁷¹ Testimony from various parties, including the guardian, the competent spouse, other family members, and friends or other concerned third-parties may be entered.⁷² Allowing this testimony can be problematic, as it can require hearsay exceptions carrying attendant questions of probative value, verifiability, and vulnerability to conflicts of interest. Some critics would simply bar such testimony,⁷³ broadly presupposing both that any probative value of such testimony is substantially outweighed by self-serving character, and that this testimony is assuredly contrary to the incompetent spouse's "true" intent and interests.⁷⁴ This strict anti-hearsay view, however, is premised on judge's inability to properly assess the credibility, reliability, or real interests and intents of parties and witnesses.

These tasks are, however, the very stuff of judging, particularly in competence or divorce hearings where the judge is also the trier of fact. Again, the anti-hearsay view displays its own bias: it assumes that the party to be wary of is

⁶⁹ See, e.g., Vincent E. Martinez, *New Mexico Expands the Power of a Guardian to Include the Right to Initiate and Maintain a Divorce Action on Behalf of the Guardian's Incompetent Ward: Nelson v. Nelson*, 25 N.M. L. REV. 295, 300 (1995) (citing *Nelson*, 878 P.2d at 340).

⁷⁰ *Id.* at 300-01.

⁷¹ *Ruvalcaba*, 850 P.2d at 683. This "two-tiered" approach, applied in combination with a higher evidentiary requirement, is used in similar contexts elsewhere. See, e.g., FLA. STAT. § 765.401(h)(3) (addresses withholding life-prolonging treatment absent an advance directive: "Before exercising the incapacitated patient's rights to select or decline health care, . . . a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent or, if there is no indication of what the patient would have chosen, that the decision is in the patient's best interest.").

⁷² *Ruvalcaba*, 850 P.2d at 682-83.

⁷³ See Mills, *supra* note 15, at 554.

⁷⁴ See generally *id.* at 553-55. Mills also assumes that an adult ward had a discernable, consistent intent while previously competent (let alone while losing competence partially or totally).

the non-spouse guardian, rather than the competent spouse.⁷⁵ By restricting such probative evidence, the anti-hearsay proposition actually reduces the likelihood of confirming a ward's previously competent beliefs and intent where they were not memorialized in writing or through prior deposition while competent.⁷⁶ The advocated bar on probative hearsay, which could confirm previously expressed wishes and beliefs, would often defeat the goals of protecting a ward's choice to divorce or remain married, and of individualized adjudication of competence.

This returns us to married wards relying solely on their guardian to bring an action for divorce in their best interest or via substituted judgment. Adult wards facing spousal abuse, neglect, abandonment, and waste of assets will sometimes be better off once divorced from a legally competent spouse who no longer loves, cares for, or provides for their vulnerable partner. For those persons, allowing the *possibility* of their guardian's action for divorce where shown to reflect a ward's previously competent beliefs and intent is equitable and humane.

B. Best Interest of the Ward

The "best interest" evaluation is the other rubric applied by states to evaluate guardian acts. Arizona case law and procedure illustrates the tiered use of both the substituted judgment and best interest evaluations under its minority view of permissible guardian divorce actions.

Acting in a ward's best interest is the charge of guardians generally, upon which guardians are evaluated. While it is certainly possible that a guardian could

⁷⁵ This view is driven by a corresponding distrust of commonly vague statutes, rules, and methods of determining incompetence.

The clear message sent by many of the states' guardianship laws is that a determination of incompetency is often a matter of subjective judgment, that the individual is at the mercy of testimony by potentially interested persons, unscrupulous heirs, detached medical professionals, even the potential guardian himself/herself. . . . [S]tates imposing strict limitations on the type of evidence presented . . . and the types of behavior not constituting incompetency inspire greater confidence that an individual will not be divested of all personal and legal autonomy merely because of religious beliefs, isolated incidences of bad judgment, or old age.

Mills, *supra* note 15, at 532. Unfortunately, the prevalence of spousal abuse, suffered by both incompetent and competent persons, is not acknowledged by anti-hearsay advocates. See Mills, *supra* note 15. Competent spouses must certainly be considered as "potentially interested" and possibly "unscrupulous" persons in divorce proceedings in the same manner as heirs, medical professionals, and guardians.

⁷⁶ The permutation of moving the bar of competence to a clear and convincing standard, while also barring probative hearsay evidence, would leave persons who are merely "preponderantly incompetent" unprotected in practice. Persons in this bracket, while retaining the right to seek a divorce, are far less likely to litigate that claim without guardian assistance or advocacy, due to their preponderant-level incompetence.

use a ward's divorce proceeding to further selfish goals,⁷⁷ court proceedings can also reveal those abusive guardians for what they are. A thorough examination of all parties' behaviors, statements, and interests as provided through a robust, adversarial process is more likely to prevent and detect guardian abuses than is a proceeding disallowing the testimony of other parties concerned with, and knowledgeable of, a ward that is otherwisetotally dependent on their guardian's (and their spouse's) beneficence.

Arizona's two-tiered search for substituted judgment, followed by an evaluation of best interest if no such judgment is found, is not perfect. By respecting an incompetent ward's previously competent desire to remain married, is it still possible that a court will mistakenly condone spousal abuse, indifference or neglect, and provide reconciliation not in the ward's best interest. Had the ward been able to foresee his or her own previously unimaginable serious neglect or abuse once consigned to a dependent state, strong past declarations to remain married may have changed. Conversely, it may also be true that though a judge might find that divorce is clearly in an abused and neglected ward's best interest, that particular ward might never wish to divorce, regardless of need or suffering. The bonds of marriage, faith, and love are often that strong.

These difficult determinations regarding guardianships are not limited to the question of divorce. For decades, courts and legislatures have grappled with and granted guardians power over wards that are more personal and fundamental than the divorce power. For example, a guardian in Maine may withhold lifesaving treatment without court supervision, if in accordance with instructions from the ward when still competent.⁷⁸ A New Mexico guardian may withhold lifesaving treatment if it can be justified as in the ward's best interests.⁷⁹ Additionally, with court approval, guardians in some states may consent to abortion, sterilization, psychosurgery, and removal of bodily organs; terminate parental rights; authorize experimental medical procedures; or deviate from a ward's living will, medical power of attorney, or durable power of attorney.⁸⁰ Florida grants guardians all the powers a ward could exercise had he or she not been adjudicated incompetent.⁸¹

VI. CONCLUSION

A perfect system, one that discerns and ensures that a ward's wishes are always acted upon and that a ward's best interests are always met, is impossible. These two laudable goals are not universally commensurable. Taking the option of divorce off the table altogether, however, where legislatures have abdicated on the issue, is far worse than the minority view applied with an Arizona-style two-tier court evaluation. A ban encourages any and all parties that might consider abusing

⁷⁷ For example, out of spite for the competent spouse. Mills, *supra* note 15, at 555.

⁷⁸ *Id.* at 551–52 (*citing* ME. REV. STAT. ANN. § 18-A, 5-312(A)(2)).

⁷⁹ *Id.* (*citing* N.M. STAT. ANN. § 45-5-312(3)).

⁸⁰ *Id.*

⁸¹ *Id.*

their power over a ward to do so with license, and where this claim of relief is barred by the majority rule, to do so with impunity. The very least we owe those whose rights have been partly or wholly transferred to someone else, through no fault of their own, is the *chance* to live in dignity and safety when those who swore to care for them no longer do so.