

FOR BETTER OR FOR WORSE: INCOMPETENT SPOUSE DIVORCE

*Robert S. Held

I. INTRODUCTION

Illinois allows a guardian to orchestrate his ward's divorce with no input or evidence from the ward's spouse. As such, for better or for worse, a guardian acting on his or her personal pique, can have a ward divorced. The ward's spouse – according to Illinois courts – has no say.¹ In fact, a spouse does not even have standing when a guardian petitions a probate court for a ward's divorce.² According to an Illinois appellate court, it is “illogical” to have a spouse participate in a hearing to determine if a ward's best interest is served by a divorce.³ The following provides some background on incompetency and divorce in Illinois law and argues that the prevailing interpretation of that law, as demonstrated in *Warga v. Warga* is wrong: spouses of incompetent wards should be allowed to participate when a court considers whether a divorce is in the ward's best interests.

II. BACKGROUND

A substantial body of law has developed for the reasonable accommodation of those with disabilities.⁴ In fact, accommodations and protections for those with *physical* disabilities are statutory.⁵ However, in the area of divorce law, the law is not well-developed as to either those with physical or mental disabilities. States have been particularly inconsistent in their approach to the issue of whether a guardian can initiate a divorce for his or her ward.⁶

* Robert S. Held is a partner at Harrison & Held, LLP, in Chicago, Illinois.

¹ *Warga v. Warga*, 2015 IL App (1st) 151182.

² *Id.*

³ *Id.* ¶ 23.

⁴ *See generally* Americans with Disabilities Act, 42 U.S.C. § 12101 (2018).

⁵ *Id.* Prior to the enactment of the Americans with Disabilities Act, there were generally no common law protections for those with disabilities.

⁶ *See* Robert Fleming, *Does a Guardian Have the Power to File a Divorce Petition? In Some States, Yes*, FLEMING & CURTI PLC, at 7 (Feb. 27, 2011), <https://elder-law.com/does-a-guardian-have-the-power-to-file-a-divorce-petition-in-some-states-yes/> (noting that only “[a] handful of states have” addressed whether a guardian has the ability to file for divorce and that, among the states, the answer to the question “is not clear”).

The majority view is that divorce is too personal a decision and may not be initiated by a guardian.⁷ Illinois, previously a majority state, recently reversed course.⁸ In *Karbin v. Karbin*, citing a general loosening of the strict construction of the Probate Act, the Illinois Supreme Court held that guardians could file for divorce on behalf of their wards.⁹ Noting the change in Illinois's divorce laws to a no-fault system, the Court reasoned that, while divorce is still personal, the decision to divorce was now equivalent to other decisions the guardian could already make and no longer needed the common law's protection.¹⁰ The Probate Act itself "provides the needed procedural and substantive safeguards to ensure that the best interests of the ward are achieved"¹¹ Two years after *Karbin*, the Probate Act was amended to include explicit revisions allowing guardians to initiate dissolutions when it is in the ward's best interest.¹²

After this amendment, section 11a-17(a-5) of the Probate Act requires the circuit court to find "by clear and convincing evidence" that a divorce is in the ward's best interest.¹³ Specifically:

Upon petition by the guardian of the ward's person or estate, the court may authorize and direct a guardian . . . to file a petition for dissolution of marriage . . . on behalf of the ward if the court finds by **clear and convincing evidence** that the relief sought is in the ward's **best interests**.¹⁴

To meet that standard of clear and convincing evidence, the Illinois Supreme Court directs the probate court to conduct a "best interests" evidentiary hearing.¹⁵ At such a hearing the guardian must "adduce clear and convincing evidence" that the ward's best interests would be served by dissolving a marriage.¹⁶

⁷ Matthew Branson, Comment, *Guardian-Initiated Divorces: A Survey*, 29 J. AM. ACAD. MATRIMONIAL L. 171, 172-73 (2016). States that adhere to this majority view include New York (see *Mallory v. Mallory*, 450 N.Y.S.2d 272, 274 (1980)).

⁸ See generally *Karbin v. Karbin*, 2012 IL 112815; *Warga v. Warga*, 2015 IL App (1st) 151182.

⁹ *Karbin*, 2012 IL 112815, ¶¶ 42, 46 (overruling *In re Marriage of Drews*, 115 Ill. 2d 201, 202, 503 N.E.2d 339, 340 (1986)).

¹⁰ *Id.* ¶ 49 ("We therefore find no compelling reason to treat a guardian's decision to seek court permission to institute a dissolution action on behalf of a ward any differently from the multitude of other innately personal decisions which may be made by guardians on behalf of their wards, including undergoing involuntary sterilization or ending life-support measures.").

¹¹ *Id.* ¶ 53.

¹² 755 ILL. COMP. STAT. § 5/11a-17 (effective July 27, 2015).

¹³ *Id.*

¹⁴ *Id.* (emphasis supplied).

¹⁵ *Karbin*, 2012 IL 112815, ¶ 52.

¹⁶ *Id.* ¶ 53. For example, the guardian could assert that a divorce is in the ward's best interests because the ward has been a victim of domestic violence. Clear and convincing evidence to support that assertion could include medical reports, police reports, testimony from neighbors, etc.

This heightened standard of proof is required because, while it is important to ensure “fundamental fairness” and “equal protection” for wards, the right to marry is a fundamental, personal right.¹⁷ Additionally, as the Supreme Court noted:

We believe a heightened burden is appropriate because cases involving the dissolution of an incompetent spouse's marriage present issues involving personal interests more complex and important than those typically presented in a civil lawsuit.¹⁸

However, with that green light, the Illinois Supreme Court also issued a warning. The high court was concerned about the motivation, power, and risk of foul play from guardians whose ability to affect such a fundamental aspect of a ward's life is enormous.¹⁹ Vigilance is required in order to prevent a guardian from pursuing a divorce for a ward based on a guardian's *personal animus* toward the ward's spouse.²⁰ The *Karbin* court opined that the trial court should make a rational analysis of the ward's alternatives by obtaining all of the relevant information that a wise decision-maker, rendering a sober decision, would consider.²¹ Thus:

In determining the ward's best interests, the guardian shall weigh 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, consequences and benefits, and shall take into account any other information, including the views of family and friends, that the guardian believes the ward would have considered if able to act for herself or himself.²²

A ward's best interests will not be determined by a divorce court in a proceeding for dissolution of marriage; a divorce court is not charged with any such determination.²³ Accordingly, once a *probate* court approves the filing for divorce by a guardian, the *domestic relations* court will look only at the no-fault provisions applicable to a divorce. A domestic relations court need only find an irretrievable breakdown and separation for two years.²⁴

¹⁷ *Id.* ¶¶ 50, 53.

¹⁸ *Id.* ¶ 53 (internal citations and quotations omitted).

¹⁹ *Id.*

²⁰ *Id.* (“[S]ection 11a-17(e) provides the needed procedural and substantive safeguards . . . prevent[] a guardian from pursuing a dissolution of marriage . . . because of the guardian's personal antipathy toward the ward's spouse.”).

²¹ *See id.*

²² 755 ILL. COMP. STAT § 5/11a-17(e) (effective July 27, 2015).

²³ *Id.*; *id.* § 11a-17(a-5).

²⁴ 750 ILL. COMP. STAT § 5/401 (effective Jan. 1, 2016).

Accordingly, in the first and only instance, the probate division must determine whether a divorce is or is not in the ward's best interests.²⁵

Not only do the statute (11a-17(a-5)) and *Karbin* place the duty to conduct such a best interests hearing squarely on the guardianship court, but a divorce court is *not* statutorily authorized to determine such issues.²⁶ Under the Illinois Marriage and Dissolution of Marriage Act, whether dissolution is or is not in the best interests of a petitioner (the ward) is not a relevant consideration.²⁷

Section 11a-17(a-5) & (e) of the Probate Act and *Karbin* require the probate court to consider all relevant evidence in determining what the ward, if competent, would do or desire to do under the circumstances.²⁸ That should include evidence to be presented in an evidentiary hearing following a verified petition. Such evidence is relevant not only to the question of the ward's best interests and the ward's desire or intent, but also, to the question of whether the guardian is acting out of "personal antipathy" to the ward's spouse, an issue which the *Karbin* court specifically held to be a matter to be determined relevant to the "best interests" hearing.²⁹

III. WARGA V. WARGA

Despite the warning and instructions from the Supreme Court in *Karbin*, the First District held that a spouse does not have *standing* to participate in a best interests hearing following a guardian's petition to authorize the retention of divorce counsel.³⁰ Thus, although *Karbin* requires the finder of fact to take into account other information, *including the views of family* and friends, the appellate court has ruled that a spouse does not have standing to participate.³¹ Specifically, in *Warga v. Warga* the court actually stated: "[I]n divorce proceedings involving two competent spouses, one spouse cannot contest the other's mere filing of the case through counsel. It would thus be wholly illogical to permit it in this instance."³²

Warga ignores the very real problem identified in *Karbin* – guardians sometimes have a personal axe to grind or financial motives.³³ Sometimes, guardians act based on a personal animus to their ward's spouse.³⁴ Guardians

²⁵ 755 ILL. COMP. STAT § 5/11a-17(a-5).

²⁶ *Id.*; *Karbin v. Karbin*, 2012 IL 112815, ¶¶ 52, 53 (emphasis added).

²⁷ 750 ILL. COMP. STAT § 5/401(a).

²⁸ 755 ILL. COMP. STAT § 5/11a-17(a-5); 755 ILL. COMP. STAT § 5/11a-17(e); *see also* *Warga v. Warga*, 2015 IL App (1st) 151182, ¶ 18.

²⁹ *See id.*

³⁰ *Warga*, 2015 IL App (1st) 151182, ¶ 20.

³¹ *Id.* (emphasis added).

³² *Id.* ¶ 23.

³³ *Id.* ¶¶ 24-25.

³⁴ *Karbin v. Karbin*, 2012 IL 112815, ¶ 53.

may also act in their own perceived best interest – or out of spite -- rather than in the disinterested pursuit of what is right for the ward. In particular, “[w]hen a ward has money, the system has built-in incentives for guardians and attorneys to pay themselves more than they otherwise might.”³⁵ Financial exploitation of wards is an unfortunately common occurrence.³⁶ Even if a guardian is not directly misappropriating money from the ward’s accounts, the guardian still may have the ability to charge unreasonable fees for the “work” the guardian claims to do on the ward’s behalf.³⁷ As jokes sometimes suggest, there is money to be made in divorces such that a guardian’s decision to initiate a divorce for the ward should not be presumed to be made in good faith.³⁸

A decision to terminate an incompetent ward’s marriage necessarily requires the court to substitute its wisdom for the incompetent ward’s judgment.³⁹ “[C]ourt proceedings can . . . reveal those abusive guardians for what they are.”⁴⁰ Without “[a] thorough examination of all parties’ behaviors, statements, and interests as provided through a robust adversarial process” a court will not have all the evidence needed to properly make that substitution.⁴¹ Allowing the spouse’s testimony is more likely to help the court “detect guardian abuses than is a proceeding disallowing the testimony of other parties concerned with, and knowledgeable of, a ward that is otherwise totally dependent on their guardian’s . . . beneficence.”⁴² Thus, a spouse’s testimony can only aid the court in discharging its solemn responsibility.⁴³

The *Warga* Court also believes a ward’s spouse lacks *standing* to participate in a hearing to determine the ward’s best interests.⁴⁴ The *Warga* Court is wrong about standing for at least two reasons. First, the Illinois legislature determined that a probate court must take into account the views

³⁵ Barbara Peters Smith, *Courtroom Trauma: Amicable Divorce Turned into Guardianship Nightmare*, DAYTONA BEACH NEWS-JOURNAL (Aug. 22, 2016, 10:48 AM), <https://www.news-journalonline.com/news/20160820/courtroom-trauma-amicable-divorce-turned-into-guardianship-nightmare>.

³⁶ See *id.*; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS (2010).

³⁷ Emily Gurnon, *Guardianship in the U.S.: Protection or Exploitation?* NEXT AVENUE (May 23, 2016), <https://www.nextavenue.org/guardianship-u-s-protection-exploitation/> (describing “[a] [p]arade of [a]trocities” where guardians charged outrageous fees to do things like open the ward’s or clearly worked against the ward’s best interests by both keeping the ward in a hospital against the hospital’s medical advice and charging a fee of \$1,827 per month).

³⁸ See generally 755 ILL. COMP. STAT § 5/11a-17(e) (effective July 27, 2015).

³⁹ *Id.*

⁴⁰ Mark Schwarz, *The Marriage Trap: How Guardianship Divorce Bans Abet Spousal Abuse*, 13 J.L. & FAM. STUD. 187, 200 (2011).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Warga v. Warga*, 2015 IL App (1st) 151182, ¶¶ 20, 22-23, 25.

of family at a best interests hearing.⁴⁵ A court cannot comply with the plain and ordinary meaning of the Probate Act without the active participation of a critical family member: the ward's spouse.⁴⁶ Second, to have standing, a party must simply show that said party has or will suffer an injury in fact for which a judicial decision may provide a redress or remedy.⁴⁷ Clearly, a spouse (and the ward) could be injured by a divorce orchestrated by their spouse's guardian. Yet, *Warga* strips a trial court of the ability to consider the views of a spouse – a party with relevant information – who would in fact be injured if a petition to seek a divorce were allowed.⁴⁸

The effects of the *Warga* decision could be profound because of the infringement on the spouse's constitutional rights.⁴⁹ Marriage itself is an important institution.⁵⁰ “[T]he annals of human history reveal the transcendent importance of marriage.”⁵¹ History shows our “decisions concerning marriage are among the most intimate that an individual can make.”⁵² This is why a spouse's fundamental right to association with his spouse, a right created by a constitutional right to marry, lies within a zone of privacy.⁵³ Additionally:

Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law” . . . [T]hese liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.⁵⁴

Importantly, this result was never intended.⁵⁵ The Illinois Supreme Court did not step away from the majority rule to take away the constitutional

⁴⁵ 755 ILL. COMP. STAT § 5/11a-17(e) (effective July 27, 2015).

⁴⁶ *See id.*

⁴⁷ P&S Grain, Ltd. Liab. Co. v. Cty. of Williamson, 399 Ill. App. 3d 836, 842, 926 N.E.2d 466, 473 (2010).

⁴⁸ *See generally* *Warga v. Warga*, 2015 IL App (1st) 151182.

⁴⁹ In *Warga*, the First District seemed primarily concerned with the rights of the ward. Accordingly, the court thought the interests of the ward's spouse would be protected in divorce court. *See id.* ¶¶ 24-25.

⁵⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (stating that “marriage is an esteemed institution”).

⁵¹ *Id.* at 2593-94.

⁵² *Id.* at 2599.

⁵³ *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

⁵⁴ *Obergefell*, 135 S. Ct. at 2597 (citation omitted).

⁵⁵ *See generally* *Karbin v. Karbin*, 2012 IL 112815.

rights of the ward's spouse in favor of the ward.⁵⁶ Instead, *Karbin* intended to put both parties on a more equal footing.⁵⁷

Warga paves the way for an incompetent's divorce without any evidence whatsoever from the ward's spouse.⁵⁸ *Warga* should be reversed or limited to its facts⁵⁹ because where, as in many marriages, a long term, loving marriage is at stake, a spouse should participate in an evidentiary hearing to determine the ward's best interest.⁶⁰ No other person is likely to have more direct evidence and no person is more likely to aid the trier of fact more than a ward's spouse where the marriage is long term, close, and each partner is passionate, faithful and dedicated to the other for life.

IV. CONCLUSION

Decades ago, the US Supreme Court touched on the sanctity and importance of marriage.

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁶¹

Courts risk harming that institution and the rights of the people in that union when they fail to consider rights and interests of both the people involved or when they put the rights of one person above the other.⁶² This is what the best interests standard, adopted by the Illinois Supreme Court in *Karbin* and subsequently adopted by the Illinois legislature, sought to prevent.⁶³ Somehow, in *Warga v. Warga*, the First District missed this point and, if the decision is followed by the trial courts, it will lead to results that neither the Illinois legislature nor the Supreme Court ever intended.⁶⁴ A probate court should embrace the opportunity to consider and evaluate

⁵⁶ *Id.* ¶ 45 (“[I]f we were to . . . reaffirm *Drews*, we would be allowing the law to unfairly treat incompetent spouses, leaving them at the complete mercy of the competent spouse without consideration of their best interests.”).

⁵⁷ *Id.* ¶¶ 45-46 (“Principles of equity demand equal treatment and equal access to the courts for all individuals, not just those who are sane.”).

⁵⁸ *Warga v. Warga*, 2015 IL App (1st) 151182, ¶¶ 20, 25.

⁵⁹ In *Warga*, there was testimony that the marriage was merely a “business” relationship. There was, apparently, no evidence that the marriage was based on love and affection. *Id.* ¶ 7.

⁶⁰ See 755 ILL. COMP. STAT § 5/11a-17(e) (effective July 27, 2015).

⁶¹ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

⁶² See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *Karbin v. Karbin*, 2012 IL 112815, ¶¶ 44-45.

⁶³ See 755 ILL. COMP. STAT § 5/11a-17(e); *Karbin*, 2012 IL 112815, ¶¶ 44-45, 52-53.

⁶⁴ See 755 ILL. COMP. STAT § 5/11a-17(e); *Karbin*, 2012 IL 112815, ¶¶ 44-45, 52-53; *Warga v. Warga*, 2015 IL App (1st) 151182.

testimony from a ward's spouse and such a spouse should have the right to provide evidence concerning what is and is not in his spouse's best interest.⁶⁵

⁶⁵ See 755 ILL. COMP. STAT § 5/11a-17(e).