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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001354-MR

ISABELLE BROCKMAN,
BY AND THROUGH HER CO-GUARDIANS,
LEANDER JENNINGS AND GWEN PYLE — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, JUDGE
ACTION NO. 09-CI-00056

BOBBY YOUNG — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Isabelle Brockman by and through her co-guardians Leander Jennings and Gwen Pyle, appeals from an order of the Taylor Circuit

Court dismissing her guardians' petition for dissolution of her marriage to Appellee, Bobby Young. For the reasons set forth herein, we must affirm.

Brockman and Young were married on July 15, 2005. At the time of the marriage, Brockman was seventy-five years old and suffered from Alzheimer's disease. Young was seventy years old. In June 2006, the Cabinet for Health and Family Services opened an investigation regarding the possible financial exploitation of Brockman by Young. The Cabinet documented that in the eleven months the parties had been married, Young had had a deed prepared that transferred a one-half interest in all of Brockman's real property to him; had assisted Brockman in changing her power of attorney from her daughters to Young; and had attempted to cash a $100,000 certificate of deposit belonging to Brockman. Following an interview wherein it was determined that Brockman was not aware of or competent to understand the financial decisions she had agreed to, the Cabinet sought an emergency appointment of a fiduciary for Brockman.

Immediately thereafter, Leander Jennings and Gwen Pyle, Brockman's daughters, filed a petition in the Taylor District Court to determine whether a guardian should be appointed for Brockman. In August 2006, the court found that due to her advanced Alzheimer's, Brockman was totally disabled with respect to her personal and financial affairs. Pursuant to an agreed order, Young was designated as Brockman's guardian. However, as part of the agreement, Young not only executed a quitclaim deed transferring Brockman's real property back to her, but the power of attorney in his favor was revoked. Young was given

authority to manage Brockman's daily financial affairs, but was prohibited from disposing of any assets belonging to Brockman without prior court approval. At that time, Brockman became a resident of Grandview Nursing Facility in Campbellsville, Kentucky, where she remains today.

In 2008, Jennings and Pyle filed a motion to remove Young as guardian after it was discovered that he was not making the required payments to Grandview Nursing Facility. Following a hearing, Young voluntarily relinquished his guardianship and the trial court appointed Jennings and Pyle as co-guardians. Young thereafter moved to Florida, where he currently resides.

Subsequently, on February 11, 2009, Brockman, by and through Jennings and Pyle, filed a petition in the Taylor Circuit Court for dissolution of marriage. In response, Young filed a motion to dismiss on the grounds that Jennings and Pyle, as guardians, lacked the legal authority to file such action on behalf of Brockman. On June 2, 2010, the trial court entered an order dismissing the petition, finding, in pertinent part:

> The sole question before this Court is whether a guardian appointed pursuant to Kentucky statute can institute divorce proceedings on behalf of the ward. There appears to be no authority for such an action in the guardian statutes, or elsewhere in Kentucky law. To the contrary, the case of *Johnson v. Johnson*, 294 Ky. 77, 170 S.W.2d 889, 890 [(1943)], provides that the right to file a divorce action is personal and such decision cannot be made by the representative on behalf of his ward. The Court therefore concludes, as a matter of law, that the within action cannot stand as the guardians for Isabelle Brockman are without legal authority to institute same.

Following the denial of a motion to alter, amend or vacate, Brockman appealed to this Court as a matter of right.

Brockman argues in this Court that KRS 404.060, as well as Kentucky's applicable guardianship statutes contained in KRS 387.010 et seq., provide a guardian the authority to prosecute a ward's civil actions, which would necessarily include a petition for dissolution. Further, Brockman contends that the creation of no-fault divorce and the expansion of powers granted to guardians have expanded a mentally or physically disabled person's right to obtain a divorce and that said changes in the law warrant a reversal of the *Johnson* decision.

As the trial court noted, the only Kentucky authority on this issue is the decision in *Johnson v. Johnson*, 294 Ky. 77, 170 S.W.2d 889, 889-90 (1943), wherein our then-highest court squarely addressed the issue, holding:

> In some jurisdictions it is held that a committee may maintain an action for divorce in behalf of his ward. . . . This is also the English rule. But it seems that in these jurisdictions the right of the committee is gathered from legislative authority. The weight of authority is that in the absence of a governing statutory provision the committee has no such power. . . . The theory underlying the majority view is that a divorce action is so strictly personal and volitional that it cannot be maintained at the pleasure of a committee, even though the result is to render the marriage indissoluble on behalf of the incompetent. In *Birdzell v. Birdzell*, supra [3 Kan. 433, 6 P. 562, 52 Am.Rep. 539], the court said: "Whether a party who is entitled to a divorce shall commence proceedings to procure the same or not is a personal matter resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings, and such an election cannot be had from an insane person." In that case, as

> well as in others, comment is made on the possibility that the incompetent spouse, if capable of exercising volition or if restored to mental soundness, might be desirous of condoning the wrong or of continuing the marriage relation. We are in accord with the majority view and the reasons supporting it.
>
> It may be that in some cases a hardship will be worked by the conclusion we have reached-such may be the case here-but stability of the marriage relation is a matter of public concern and, in the absence of specific legislative declaration to the contrary, its continuance or dissolution should not be dependent on the pleasure or discretion of a legal representative.

As noted in *Johnson*, under early common law, the settled majority rule barred an incompetent adult from initiating a divorce action through a guardian, committee or next friend, unless explicitly authorized to do so by statute. And until the early-1980's, only two jurisdictions – Massachusetts and Alabama – allowed such actions by statute. *See Garnett v. Garnett*, 114 Mass. 379 (1874) and *Campbell v. Campbell*, 5 So.2d 401 (Ala. 1941). Further, until relatively recently, the overwhelming majority of jurisdictions without express statutory authority granting guardians the right to file a petition for dissolution on behalf of an incompetent have held that the decision of whether or not to bring such action was highly personal and could not be made by anyone other than the aggrieved spouse. "This is seen as the 'lesser of two evils' approach, which errs on the side of protection of the possible decision of the incompetent spouse to remain married in spite of whatever marital rift may cause the guardian to feel that dissolution is necessary." Diane Snow Mills, Comment, "*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. Law 527, 536 (2000) (Footnotes omitted).

Brockman contends that KRS 404.060 in conjunction with KRS 387.660 provide the necessary statutory framework for a guardian to file a petition for dissolution on behalf of an incompetent ward.

KRS 404.060 provides:

> (1) A married woman may sue, and be sued, as a single woman.
>
> (2) She may defend an action against her and her husband for herself, and for him also if he fail to defend.
>
> (3) If a husband desert his wife, she may bring or defend for him any action which he might bring or defend, and shall have the powers and rights with reference thereto which he would have had but for such desertion.
>
> (4) If a female party to an action marry, her husband may be made a party by a motion, causing the fact to be stated upon the record; and the action shall not be delayed by reason of the marriage.
>
> (5) But if a wife be adjudged mentally disabled, or imprisoned, the actions mentioned in subsections (1), (2) and (3), of this section must be prosecuted or defended by her guardian, conservator, or curator, if she have one, and if she have none, must be prosecuted by her next friend, or defended by her guardian ad litem.

Further, pursuant to KRS 387.660, a guardian of a disabled person has the power to: (1) take custody of the ward and establish a place of residence; (2) make "provision for the ward's care, comfort, and maintenance and arrange for such

educational, social, vocational, and rehabilitation services as are appropriate and as will assist the ward in the development of maximum self-reliance and independence"; (3) give any necessary consent or approval to enable the ward to receive medical or other professional care; (4) act with respect to the ward in a manner which "limits the deprivation of civil rights and restricts his personal freedom only to the extent necessary to provide needed care and services to him"; and (5) expend sums from the financial resources of the ward reasonable and necessary to carry out the powers and duties assigned by the court. Finally, KRS 387.125(6) authorizes a guardian to institute or defend actions, claims or proceedings in any jurisdiction for the protection of the ward's estate.

Clearly, Kentucky has no statutory provision explicitly authorizing a guardian's power to file a petition for dissolution of marriage. Furthermore, *Johnson* still reflects the majority rule that absent explicit statutory language authorizing a guardian to initiate a divorce action on behalf of a person under guardianship, general guardianship statutes do not give a guardian such authority. *Murray by Murray v. Murray*, 426 S.E.2d 781, 783-74 (S.C. 1993).

Notably however, it is also true that in more recent years some jurisdictions have digressed from that view, increasingly permitting the pursuit of dissolution by the guardian of an incompetent adult ward. In fact, numerous states that have examined the issue in the last twenty-five years have rejected the majority rule. *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674 (Ariz. Ct. App. 1993); *Knight v. Radomski*, 414 A.2d 1211 (Me. 1980) (concerns annulment, but court indicates that its

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). Courts have taken four identifiable approaches in their reevaluation of this issue:

> The first approach involves the interpretation or reinterpretation of divorce and guardianship statutes in light of changes made since the per se rule emerged in the late 19th century. The second approach is to uphold the bar, but also to create an exception to allow a divorce, if evidence of the ward's prior or present intent to dissolve the marriage exists. The third approach also looks at the ward's intent, but rather than carving an exception into the rule, a court uses evidence of the ward's intent to assist it in substituting its judgment for that of the ward. The fourth approach to this issue is to decide whether a court should allow divorce proceedings without any indication of the ward's prior or present disposition, guided only by that court's determination of what is in the best interest of the ward.
>
> In many cases, a court uses more than one of these approaches to reach a decision.

Kurt X. Metzmeier, Note, *The Power of an Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend,* 33 U. Louisville J. Fam. L. 949, 958 (1995) (Footnotes omitted).

Recently, in *Luster v. Luster*, 17 A.3d 1068 (Conn. Ct. App. 2011),[1] a Connecticut appeals court held that a conservator could bring a civil action for dissolution of marriage for a conserved person. The court reasoned that under common law, a conserved person, like a minor, does not have the legal capacity to bring a civil action in his or her own name, but must do so through a properly appointed representative, except in limited circumstances. Since an action for a divorce or legal separation is a civil action, the court found nothing that would bar the conservators from maintaining an action for dissolution of marriage on behalf of the conserved person.

While we must conclude that the trial court properly found that *Johnson* controls the matter herein, we agree with Brockman that modern developments in the law have begun to erode the underpinnings of this rule. We believe that the liberalization of divorce law with the creation of no-fault divorce as well as the expansion of guardianship powers certainly call in to question the viability of the holding in *Johnson*.

Indeed, in *Degrella by Parrent v. Elston*, 858 S.W.2d 698 (Ky. 1993), our Supreme Court recognized that the right of withdrawal of further medical treatment can be exercised by an incompetent person through the process of surrogate decision-making by the guardian under certain circumstances. In so doing, the Court stated, "[w]e view the statutes related to 'Guardianship and Conservatorship for Disabled Persons,' KRS 387.500 et seq., as remedial rather than exclusive.

[1] We would note that on July 13, 2011, the Connecticut Supreme Court granted a petition for certification to consider the issue. *Luster v. Luster*, 23 A.3d 1243 (Conn. 2011).

These statutes intend to provide services for incompetent persons not only as specifically articulated but also as reasonably inferable from the nature of the powers of a guardian." *Id.* at 704. *See also Strunk v. Strunk*, 445 S.W.2d 145,148 (Ky. 1969) ("The right to act for the incompetent in all cases has become recognized in this country as the doctrine of substituted judgment and is broad enough not only to cover property but also to cover all matters touching on the well-being of the ward."). With courts allowing a guardian to make life and death decisions regarding a ward, to deny that same guardian the right to initiate a divorce action on behalf of the ward is arguably absurd.

As noted by the Washington Supreme Court over twenty-five years ago:

> The vast majority of courts hold that a guardian has no authority to seek divorce or dissolution. The cases rely upon the truism that a decision to dissolve a marriage is so personal that a guardian should not be empowered to make such a choice for the incompetent. As a general proposition that rationale is valid. However, 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. . . .

In re Gannon, 702 P.2d at 467.

This Court is without the authority to overrule the *Johnson* decision and, as such, must affirm the trial court's dismissal of the petition for dissolution filed by Brockman's guardians. Nevertheless, we would urge our Supreme Court to reconsider such, as the views expressed therein may no longer be viable in light of the precepts of modern divorce and guardianship law.

For the reasons stated here, we affirm the order of the Taylor Circuit Court.

MOORE, JUDGE, CONCURS IN RESULT ONLY.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTING: Respectfully, I must dissent. I do so because our current statutory law and public policy have drastically changed since the 1943 opinion, *Johnson v. Johnson*, 294 Ky. 77, 170 S.W.2d 889 (1943).

Johnson has never been cited as authority in this jurisdiction and, therefore, the Court's legal reasoning has not been challenged. However, in its well-written and researched opinion, the majority opinion recognizes the modern trend to abandon the ancient common law and, under certain circumstances, permit a guardian to pursue a dissolution of marriage action on behalf of an incompetent adult ward. Despite its reluctance, the majority reaffirms *Johnson* based on this Court's duty to follow Supreme Court precedent.

It is a fundamental principle of our law that we are bound to follow the law established by the Supreme Court. However, we are not restrained when the Supreme Court's opinion has been abrogated by subsequent legislative action. I believe this is the present situation.

In *Johnson*, our Supreme Court aligned itself with the jurisdictions that held divorce was a strictly personal matter resting solely with the injured party. *Id*. at 889. The accepted view at that time was expressed in Annotation,

Power of Incompetent Spouse's Guardian, Committee, or Next Friend to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to make a Compromise or Settlement in Such Suit, 6 A.L.R. 3d 681 (1966):

> The basis for the rule appears to be the belief that there are no marital offenses which of themselves work a dissolution of the marital relation, and the right of the injured party to regard the bond of marriage as indissoluble because of religious affiliation or for other reasons is considered so strictly personal that such relation should not be dissolved except with the personal consent of the injured spouse, which cannot be given where he or she is insane.

Following the existing common law, the *Johnson* Court held that the "stability of the marriage relation is a matter of public concern and, in the absence of specific legislative declaration to the contrary, its continuance or dissolution should not be dependent on the pleasure or discretion of a legal representative." *Id*. at 890.

The majority correctly points out that in the almost seven decades since *Johnson*, much of the Court's reasoning is no longer supported by our statutory law. Kentucky is now a no-fault divorce jurisdiction permitting a marriage to be dissolved upon petition by only one party on the basis that it is irretrievably broken. Certainly, in this case, where there is overwhelming evidence that Young financially exploited his incompetent wife, that standard is met. Moreover, as the majority notes, a guardian now has the power to authorize withdrawal of medical treatment under certain circumstances. *Degrella By and Through Parrent v. Elston*, 858 S.W.2d 698 (Ky. 1993). If the power to seek a termination of medical treatment can be inferred from the broad powers conferred by our guardian

statutes, then the authority to seek a dissolution of marriage on behalf of the ward must be included.

At least one court has acknowledged that the common law can no longer be justified by the view that a decision to dissolve a marriage is so personal that a guardian should not be empowered to seek a dissolution on the ward's behalf. In *In re Marriage of Gannon*, 104 Wash.2d 121, 702 P.2d 465, 467 (1985), the court astutely recognized that "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, . . . an absolute rule denying authority is not justified nor in the public interest."

In this particular case, I add another compelling reason for allowing the guardian to petition for dissolution of the ward's marriage is found in our criminal statutory law enacted after the *Johnson* decision. KRS 209.990 now criminalizes the financial exploitation of adults. Specifically, KRS 209.990 provides in part:

> (6) Any person who wantonly or recklessly exploits an adult, resulting in a total loss to the adult of more than three hundred dollars ($300) in financial or other resources, or both, is guilty of a Class D felony.
>
> (7) Any person who knowingly, wantonly, or recklessly exploits an adult, resulting in a total loss to the adult of three hundred dollars ($300) or less in financial or other resources, or both, is guilty of a Class A misdemeanor.

It is unfathomable that the General Assembly would not have intended to permit a guardian to seek a dissolution of marriage from a spouse who has committed a crime against a ward.

The present case exemplifies the immediate need for this Court to recognize the abrogation of the holding in *Johnson* and to join the jurisdictions that permit a guardian to request a dissolution of the ward's marriage. There is overwhelming evidence that Young has financially exploited Brockman who will presumably never recover from Alzheimer's disease. Tragically, if Brockman does not obtain a dissolution of the marriage and Young survives her, he will receive that which the guardians and the Cabinet fought vehemently to prevent. In accordance with our laws of descent and distribution, as Brockman's legal husband, Young would be entitled to his interest in Brockman's realty and personalty as provided for in KRS 392.020. Thus, what the law forbids Young while Brockman is alive, it will entitle him after her death.

I reserve comment on the proper procedure to be followed when the guardian seeks a dissolution of the ward's marriage and write only in regard to the threshold question regarding whether such an action is possible. However, as always, the guardian's actions on behalf of the ward would be subject to judicial supervision.

I conclude with a restatement of the reason for my dissent. Although the majority suggests its agreement with my reasoning, it declines to reverse the circuit court based on *Johnson* and, instead, urges the Supreme Court to reconsider the issue. I believe the statutory law and case law have abrogated *Johnson.* Today, this Court has the authority to join the modern trend and hold that a guardian has

the authority to seek a dissolution of marriage on the ward's behalf. I would reverse.

BRIEF FOR APPELLANT, ISABELLE BROCKMAN, BY AND THROUGH HER CO-GUARDIANS LEANDER JENNINGS AND GWEN PYLE:

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