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Family Law–Providing for Those Who Cannot Provide for Themselves: A Proposal for the Arkansas General Assembly to Follow in the Footsteps of an Already Expansive Guardianship Law and Grant Guardians the Right to File for Divorce on Behalf of a Ward

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FAMILY LAW–PROVIDING FOR THOSE WHO CANNOT PROVIDE FOR THEMSELVES: A PROPOSAL FOR THE ARKANSAS GENERAL ASSEMBLY TO FOLLOW IN THE FOOTSTEPS OF AN ALREADY EXPANSIVE GUARDIANSHIP LAW AND GRANT GUARDIANS THE RIGHT TO FILE FOR DIVORCE ON BEHALF OF A WARD

I. INTRODUCTION

An ambulance transports Isaac, an incapacitated person, to a nearby emergency room after he is involved in an accident that causes him severe injuries. An hour later, Isaac's guardian, Greg, arrives. The physician informs Greg that without conducting a certain operation Isaac might not live. Suppose that after the proposed procedure, although alive, Isaac's condition deteriorates. Greg reasons that Isaac would be better off if he passed away. Greg petitions the circuit court, and, upon its approval, informs the physician that he would like to withhold life-saving treatment.

In Arkansas, a guardian like Greg, upon court approval, is legally entitled to do just that—petition the circuit court and then give consent to withhold life-saving treatment for a ward like Isaac.[1] A guardian is also legally entitled to consent on behalf of an incapacitated person to abortion, sterilization, psychosurgery, or removal of a bodily organ.[2] In life or death situations, the guardian does not even need to seek court approval for these decisions.[3] Moreover, upon court approval, a guardian may authorize experimental medical procedures, authorize termination of parental rights, and prohibit the incapacitated person from voting.[4]

Notably absent from these statutory powers granted to the guardian is the right to bring a divorce suit on behalf of the ward.[5]

> In the absence of a statute so authorizing it, it is the general rule that an insane person cannot institute an action for divorce since the right to do so is regarded as strictly personal to the aggrieved spouse and no matrimonial offenses automatically effect a dissolution of the marriage.[6]

The sustainability of this defense—that marriage is "strictly personal"—invokes skepticism given the aforementioned powers that are now granted to the guardian. Moreover, in a society that has drastically transformed its ac-

1. ARK. CODE ANN. § 28-65-302(a)(1)(B) (Repl. 2012).
2. *Id.* § 28-65-302(a)(1)(A).
3. *Id.*
4. *Id.* § 28-65-302(a)(1)(C)–(E).
5. *See id.* § 28-65-302.
6. Jackson v. Bowman, 226 Ark. 753, 759, 294 S.W.2d 344, 347 (1956).

ceptance of divorce, as evidenced by the near fifty percent divorce rate across the country,[7] a strong case can be made for the need for legislation in Arkansas granting a guardian the right to file for divorce on behalf of a ward.

Historically, many states have struggled, and continue to struggle, with this question of guardianship power,[8] and, in Arkansas, this is an issue that no appellate court has directly addressed.[9] Thus, the interest of the state in providing clarity will be heightened when this issue presents itself in the future. The Arkansas legislature should be proactive in amending its current guardianship statute by enacting legislation that explicitly allows, upon court approval, for a guardian to file a divorce action on behalf of a ward. In light of the expansion of guardianship powers that presently provide for personal decisions that carry weight equal to or greater than the dissolution of marriage,[10] this legislation would not overstep the bounds of guardianship power.

Once the initial right to bring action has been established through legislation, and after both standing to bring the suit and prima facie grounds to hear the case have been satisfied, courts should strictly adhere to a substituted judgment standard in deciding whether to grant the divorce. Under this strict standard, a divorce would only be permissible when objective evidence of the ward's intent to dissolve the marriage is present.[11] By adhering to this standard, the court has the ability to curb any potential risks that guardians would file for divorce to promote his or her personal interests.[12]

Before reaching this conclusion, it is necessary to analyze both the rationale behind the different approaches to this problem as well as the historical context of the law in Arkansas.[13] In Part II.B and II.C, this note examines how other states have dealt with a guardian's right to file for divorce in the absence of statutory authority and discusses the policies behind the majority opinion that guardians are legally prohibited from filing for divorce, as well as the contrasting minority opinion that guardians are legally entitled to file for divorce. Part II.D then establishes that both Arkansas divorce law

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7. *See* Christopher Ingraham, *Divorce Is Actually on the Rise, and It's the Baby Boomers' Fault*, WASH. POST (Mar. 27, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault/.

8. *See infra* Parts II.B–C.

9. *See infra* Part II.D.2.

10. *See* ARK. CODE ANN. § 28-65-302.

11. Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 685 (Ariz. Ct. App. 1993) (Fidel, J., concurring).

12. *See* Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian-Initiated Divorces*, 10 NAELA J. 203, 218 (2014) (noting that courts have imposed heightened standards on guardians to safeguard against potential abuse of power).

13. *See infra* Parts II.B–D.

and guardianship law are silent on this issue and that Arkansas case law is void of a holding on which subsequent courts may stand.

Part III further analyzes the policy behind the minority approach as it relates to Arkansas and then proposes legislation that embodies the concerns of the minority by advocating for the guardian's right to bring suit.[14] Nevertheless, Part III.C recognizes the majority's concern for the sanctity of marriage and recommends that the court use a substituted judgment standard, where divorce will only be granted if it conforms to the ward's wishes.[15]

II. BACKGROUND

This section first addresses the responsibilities guardians have in providing for wards, both personally and legally.[16] These responsibilities, however, may not always extend to divorce suits on behalf of the ward. In addressing whether a guardian may petition the court for divorce on behalf of the ward in the absence of statutory authority specifying otherwise, state courts are divided on the issue.[17] The competing rationales of each approach will be discussed[18] before turning to the current state of the law in Arkansas.[19]

A. The Role of the Guardian Under Arkansas Statutory Law

In defining the role of the guardian, it should first be established to whom powers of guardianship extend. Arkansas Code Annotated section 28-65-101 defines both the ward and an incapacitated person.[20] A "ward" is "an incapacitated person for whom a guardian has been appointed."[21] An "incapacitated person" is:

> a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate.[22]

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14. *See infra* Parts III.A–B.
15. *See infra* Part III.C.2.
16. *See infra* Part II.A.
17. *See infra* Parts II.B.1, II.C.1.
18. *See infra* Parts II.B.2, II.C.2.
19. *See infra* Part II.D.
20. *See* ARK. CODE ANN. § 28-65-101(5)(A), (10) (Repl. 2012).
21. *Id.* § 28-65-101(10).
22. *Id.* § 28-65-101(5)(A). An "incapacitated person" also "includes an endangered or impaired adult as defined in the Adult Maltreatment Custody Act, [codified at ARK. CODE

Any person may file a petition to the court to appoint himself as guardian of another.[23] In that petition, he must state the reasons why appointment is sought and his interest in such appointment.[24] Before the court grants guardianship, the petitioner must satisfy all of the following: (1) the ward is either a minor or an incapacitated person; (2) guardianship is needed to protect the incapacitated person's interests; and (3) the person appointed as guardian is qualified.[25]

Once appointed by a court, the role of the guardian in caring for the ward is clear—the duty of the guardian is to care for and to maintain the ward.[26] Guardianship power, however, is subject to certain limits.[27] Guardianship shall be "[u]sed only as is necessary to promote and protect the well-being of the person and his or her property, [d]esigned to encourage the development of maximum self-reliance and independence of the person, and [o]rdered only to the extent necessitated by the person's actual mental, physical, and adoptive limitations."[28] Another important limitation is that the guardian may not promote his personal interests over those of the ward.[29]

As previously addressed, the guardian must obtain a court order to make certain decisions for the ward.[30] Yet, outside of these decisions, an incapacitated person "retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court."[31] And, because incompetents are considered to be under legal disability that renders them unable to sue or be sued, incompetent persons are required to appear in court through a legal

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ANN.] § 9-20-103, who is in the custody of the Department of Human Services." *Id.* § 28-65-101(5)(B).

23. *Id.* § 28-65-205(a) (Repl. 2012).

24. *Id.* § 28-65-205(b)(9).

25. *Id.* § 28-65-210 (Repl. 2012).

26. ARK. CODE ANN. § 28-65-301(a)(1) (Repl. 2012); *see also* 39 C.J.S. *Guardian & Ward* § 97 (2014) (citing Jewish Home for the Elderly of Fairfield Cnty., Inc. v. Cantore, 778 A.2d 93, 100 (Conn. 2001)) (explaining that a guardian owes a duty of loyalty to the ward and is bound to protect the ward's interests).

27. *See* ARK. CODE ANN. § 28-65-105 (Repl. 2012).

28. *Id.* (citations omitted).

29. *See Guardian & Ward*, *supra* note 26, at § 97 (citing SunTrust Bank, Middle Ga. N.A. v. Harper, 551 S.E.2d 419, 426 (Ga. Ct. App. 2001)) (providing that a guardian may not place himself in a position in which his personal interests are in conflict with the ward's); Omohundro v. Erhart, 228 Ark. 910, 911, 311 S.W.2d 309, 311 (1958) ("[T]he sole purpose of this guardianship is to further the well-being of the afflicted ward.").

30. *See* ARK. CODE ANN. § 28-65-302 (Repl. 2012).

31. *Id.* § 28-65-106 (Repl. 2012).

guardian, a next friend, or a guardian ad litem.[32] Thus, generally, a guardian has the right and capacity to sue on behalf of the ward.[33]

Notwithstanding this general rule, states have faced, and will continue to face, the following issue: whether a guardian may bring a divorce action on behalf of the ward absent clear authority stating otherwise. This issue has led to two competing schools of thought.[34] On the one hand, a majority of courts deny a guardian this right,[35] while, on the other hand, some courts provide for such right.[36]

B. The Majority Approach and Policy Reasoning Behind This Approach

In the absence of express statutory authority, the majority rule is that a guardian may not file for divorce on behalf of a ward.[37] This rule is most prominently founded upon the personal nature of marriage and the notion that divorce is a decision that no one other than the aggrieved spouse should decide.[38] Pursuant to this rule, the mentally incompetent spouse lacks the legal capacity to make a decision concerning divorce, and a guardian cannot make that decision for her.[39] Furthermore, courts have reached this conclusion despite statutes granting a guardian authority to bring suit for civil actions on behalf of the incompetent ward.[40]

1. Case Law Articulating the Majority Rule

The following case law serves as support for the majority rule regarding guardians' authority to bring divorce suits on behalf of a ward. In *Murray v. Murray*,[41] which was a case of first impression in South Carolina,[42]

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32. *Guardian & Ward*, *supra* note 26, at § 255 (citing Carlos H. v. Lindsay M., 815 N.W.2d 168, 173 (Neb. 2012)) (deciding that the law grants another party the capacity to sue on a minor or incompetent's behalf because both lack legal authority to sue).

33. *Id.*

34. *See infra* Parts II.B–C.

35. *See infra* Part II.B.1.

36. *See infra* Part II.C.1.

37. Murray v. Murray, 426 S.E.2d 781, 783 (S.C. 1993) (citing cases from across the country where courts have recognized this as the majority rule).

38. 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).

39. Nelson v. Nelson, 878 P.2d 335, 338 (N.M. Ct. App. 1994).

40. Edward B. Borris, *Mentally Incompetent Spouses as Parties to Divorce Actions*, DIVORCE LITIG., March 1997, at 52, 52; *see Murray*, 426 S.E.2d at 783 ("Although there are statutes in practically every jurisdiction which give a guardian the general authority to maintain actions on behalf of an incompetent, it is generally held that these statutes do not apply to divorce actions unless the statute expressly so states.").

41. 426 S.E.2d 781 (S.C. 1993).

the Supreme Court of South Carolina adopted the majority rule and held that an incompetent spouse, if incompetent as to his person and his property, could not bring a divorce either on his own behalf or through a guardian.[43] The court declined to adopt an absolute rule, however, that barred the incompetent or guardian from bringing an action in all cases.[44] The court provided that a spouse may still bring suit on his own behalf or through a guardian if, although mentally incompetent as to the affairs of his estate, he is able to make reasonable decisions as to his person, to understand the nature of the action, and to express a desire to dissolve the marriage.[45] The court reasoned that it was for the judge to decide the ward's competency as to his ability to comprehend personal decisions and remanded this case so that decision could be made.[46]

Similarly, in *Scott v. Scott*,[47] which was another case of first impression,[48] the Supreme Court of Florida determined that the decision to divorce must remain personal to the aggrieved spouse.[49] The court reasoned that there are no marital offenses that result in the automatic dissolution of a marriage.[50] Rather, marriage may only be dissolved with the consent of and upon action by the injured spouse,[51] and these are two things an insane person cannot do.[52]

2. The Rationale and Policy Behind the Majority Approach

The rationale behind the majority approach is primarily focused on the nature of marriage and has been deemed a "lesser of two evils" approach.[53] Courts contend that divorce is strictly personal and volitional and cannot be maintained upon the will of the guardian,[54] even though that may lead to an indissoluble marriage on behalf of the ward.[55] In part, this reason is based on

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42. *Id.* at 783.
43. *Id.* at 784.
44. *Id.*
45. *Id.* The court directed that if the spouse can express a desire to obtain a divorce, he may obtain a divorce through his guardian ad litem. *Id.*
46. *Id.*
47. 45 So. 2d 878 (Fla. 1950).
48. *Id.* at 879.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. Mills, *supra* note 38, at 536.
54. Murray v. Murray, 426 S.E.2d 781, 784 (S.C. 1993).
55. *Id.*; *see* J.A. Connelly, 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, § 2 (1966) ("[T]he right of the injured party to regard the bond of marriage as indissoluble . . . is considered so

the fact that no marital offenses exist that result in a dissolution of the marital relation.[56]

This position has been considered the "lesser of two evils" approach, whereby the protection of a potential decision by the aggrieved spouse to stay married, even in light of marital offenses, outweighs the guardian's thought that the marriage should be dissolved based on those marital offenses.[57] The concern courts face is that a third party's interests will override the wishes of the incompetent spouse.[58] The conclusion is that any position other than the majority's "would destroy the effect of condonation," which "preserves to the injured spouse the right to forgive, excuse or pardon."[59] In the end, despite what a guardian may believe best, an aggrieved spouse may choose to stay in a marriage that could be deemed against her interests for personal, religious, moral, or economic reasons.[60] Notwithstanding this majority view, a contingency of courts holds otherwise and grants a guardian the legal right to file for divorce on behalf of an incompetent ward.

C. The Minority Approach and Policy Reasoning Behind This Approach

When statutory authority does not explicitly grant a guardian the right to file for divorce on behalf of an incompetent ward, the minority trend in courts addressing this issue is to allow a guardian to do so.[61] This trend stems from courts first recognizing both expansive guardianship rights as well as inequity principles[62] and then relying on state divorce, guardianship, or civil procedure statutes for authority to allow a guardian to bring such action.[63]

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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.").

56. Connelly, *supra* note 55, at § 2.

57. Mills, *supra* note 38, at 536.

58. Nelson v. Nelson, 878 P.2d 335, 338 (N.M. Ct. App. 1994).

59. Scott v. Scott, 45 So. 2d 878, 879 (Fla. 1950).

60. *Nelson*, 878 P.2d at 338.

61. *See id.* ("Jurisdictions allowing divorce suits brought or maintained by a guardian are in the minority.").

62. *See infra* Part II.C.2.

63. Mills, *supra* note 38, at 536. The New Mexico Court of Appeals in *Nelson* points out that most minority-rule courts that grant a guardian the right to bring an action for divorce do so by construing statutes that allow for guardians to pursue civil claims for the ward. 878 P.2d at 338 (citing Campbell v. Campbell, 5 So. 2d 401, 402 (Ala. 1941); Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 678 (Ariz. Ct. App. 1993); Kronberg v. Kronberg, 623 A.2d 806, 809–10 (N.J. Super. Ct. Ch. Div. 1993)).

1. Case Law Articulating the Minority Trend

Arizona and New Mexico are at the forefront of minority-rule jurisdictions.[64] In *Ruvalcaba v. Ruvalcaba*,[65] the Court of Appeals of Arizona held that pursuant to Arizona's guardianship provisions the guardian was not prohibited from bringing suit on behalf of an incapacitated ward.[66] The court reasoned that guardians have broad authority.[67] Further, the court found nothing in either Arizona Revised Statutes section 14-5312(A) or Rule 17(g) of the Arizona Rules of Civil Procedure that precluded a guardian from maintaining an action for dissolution[68] and concluded that if the legislature wanted to prohibit third parties from bringing suit then it would have done so.[69] The counter argument—if the legislature had wanted guardians to have authority, it would have included that power in the statute—was explicitly rejected.[70]

Similarly, the decision made by the Court of Appeals of New Mexico in *Nelson v. Nelson*[71] put New Mexico in the category of states that views the rights of the incompetent as equally important to those of the competent spouse.[72] At the time the court decided this case, the issue was one of first impression in New Mexico.[73] Finding *Ruvalcaba* instructive,[74] the court also noted that New Mexico's guardianship statutes grant guardians broad powers.[75] The court determined that the New Mexico legislature granted guardians authority to interfere in intimately personal concerns of an individual's

64. *See Ruvalcaba*, 850 P.2d at 678; *Nelson*, 878 P.2d at 339–40.

65. 850 P.2d 674.

66. *Id.* at 678. The court allowed the guardian to proceed after concluding that was what the ward would want, based on what the guardian knew of the ward's preferences and general values regarding marriage, divorce, and manner of living. *Id.* at 681.

67. *Id.* at 678. Citing Arizona Revised Statutes section 14-5312, the court determined that the language in the statute that equates guardians' authority over the ward to parents' authority over their children was meant to illustrate the breadth of guardians' powers. *Id.* Further, the court provided that Rule 17(g) of the Arizona Rules of Civil Procedure states that a guardian "may sue or defend on behalf of . . . the incompetent person" without regard for the type of case. *Id.*

68. *Id.*

69. *Id.* at 678–79.

70. *Id.* at 678.

71. 878 P.2d 335 (N.M. Ct. App. 1994).

72. Vincent E. Martinez, *Family Law—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, 295 (1995).

73. *Nelson*, 878 P.2d at 337.

74. *Id.* at 339.

75. *Id.* at 339–40. Under New Mexico's guardianship statute, the guardian has powers and duties related to the following: custody, care, training, education, personal effects, medical and professional care, and removing or withholding medical treatment. *See* N.M. STAT. ANN. § 45-5-312(B) (West 2009).

life[76] and held that the mere condition of being under guardianship does not preclude divorce action.[77]

Other cases also help illustrate the decision-making process used by courts in finding a legal basis for guardians to petition the court for divorce on behalf of a ward. In *Cohn v. Carlisle*,[78] a Massachusetts court relied on the Massachusetts General Code and stated, "[p]roceedings at law and in equity in [sic] behalf of a person incapable of bringing an action or a suit may be brought in his name by his guardian, conservator, or next friend."[79] Similarly, in *Campbell v. Campbell*,[80] an Alabama court granted a guardian the right to bring divorce after construing a statute authorizing guardians to pursue and defend claims in the interest of the ward as well as a statute granting the circuit court the right to divorce persons.[81] Finally, in *Luster v. Luster*,[82] a Connecticut court stated:

> Given that a conserved person, except in limited circumstances, may bring a civil action only through a properly appointed representative, such as a conservator, and that an action for dissolution of marriage is a civil action, combined with the conserved person's retention of all rights and authority not specifically assigned, we conclude that a conservator may bring a civil action for dissolution of marriage on behalf of a conserved person.[83]

In *Luster*, the court relied on a Connecticut statute that provides for an incompetent's interests to be adequately represented, not deprived of access to the courts.[84] The court reasoned that the law attempts to ensure that a conserved person's interests are not undermined by his disability[85] and that the legislature could have restricted a conserved person's ability to file action through his conservator.[86] In accordance with the reasoning provided by the

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76. *Nelson*, 878 P.2d at 340 (citing N.M. STAT. ANN. § 45-5-312(B)). The court determined that these powers are listed without qualification and "should be read as illustrative of the nature of the guardian's power." *Id.*

77. *Id.*

78. 37 N.E.2d 260 (Mass. 1941).

79. *Id.* at 262 (citing MASS. GEN. LAWS ANN. ch. 201, §§ 20, 37 (West 2008) (repealed 2008)); *see also* McGrew v. McGrew, 9 Haw. 475, 479 (1894) (relying on a guardianship statute that provided the duty to "appear for and represent his ward in all legal suits and proceedings" and reasoning that divorce is a civil proceeding).

80. 5 So. 2d 401 (Ala. 1941).

81. *Id.* at 402.

82. 17 A.3d 1068 (Conn. App. Ct. 2011).

83. *Id.* at 1080.

84. *Id.* at 1078–79. Section 45a–650(k) states, "[a] conserved person shall retain *all rights and authority* not expressly assigned to the conservator." CONN. GEN. STAT. ANN. § 45a-650(k) (West 2014) (emphasis added).

85. *Luster*, 17 A.3d at 1079.

86. *Id.* at 1080.

court in *Luster*, finding such legal authority for a guardian to bring an action for divorce on behalf of a ward also stems from the following policy implications.

2. The Rationale and Policy Behind the Minority Approach

Minority-rule jurisdiction courts base their decisions on the expansion of guardian rights and inequity principles.[87] First, courts have reasoned that the majority rule is no longer valid because guardians are now able to make personal decisions in other areas for the ward.[88] This notion is exemplified by the court in *Ruvalcaba*, where the court determined that in modern times, when a guardian may refuse medical care on behalf of the ward, maintaining the same "personal" justification cannot stand.[89] There, the court continued, "[i]f an incompetent's right to refuse medical treatment is not expunged by physical or mental impairment, surely an incompetent's right to petition for dissolution of marriage is similarly not destroyed by physical or mental incapacity."[90]

Another primary policy reason of the minority is based on an inequity principle—the idea that the incompetent is subject to the absolute control of the competent spouse if the guardian may not bring suit.[91] In essence, without any ability to dissolve the marriage, the incompetent spouse is left "captive" to the competent spouse.[92] In such case, the incompetent could be exploited, physically injured, or even perish at the will of the competent spouse.[93] Consequently, courts refuse to establish an absolute bar to divorce that would leave an incompetent spouse at the mercy of the competent

87. *See, e.g.*, Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 681 (Ariz. Ct. App. 1993) (noting that a guardian now has the ability to refuse medical care); *In re* Gannon, 702 P.2d 465, 467 (Wash. 1985) (providing that an incompetent spouse is subject to the control of the competent spouse).

88. *See In re Gannon*, 702 P.2d at 467 ("[I]n 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."); Nelson v. Nelson, 878 P.2d 335, 340 (N.M. Ct. App. 1994) (citing the following areas of guardianship power: charge of care, comfort, maintenance, education, personal effects, withholding consent to medical treatment, and consent to physician's termination of maintenance medical treatment).

89. *Ruvalcaba*, 850 P.2d at 681.

90. *Id.*

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

92. *Ruvalcaba*, 850 P.2d at 681.

93. *Id.* at 683–84. A guardian's ability to file for divorce is an important protection measure against exploitation or abuse by the competent spouse. *Id.* at 685 (McGregor, J., concurring).

spouse.[94] As surmised in *Eichner v. Dillon*,[95] "the terminally ill should be treated equally, whether competent or incompetent" for the "value of human dignity extends to both."[96]

Relatedly, in *Ruvalcaba*, the court also addressed and countered the majority's concern that the guardian's motives would supersede those of the ward.[97] The court noted that ulterior motives apply equally to guardians as well as the competent spouse.[98] In those hypothetical situations, a competent spouse may seek, for example, financial advantage or may keep the marriage intact to maintain immigration status.[99] Thus, a competent spouse's testimony contains just as much risk as a third party's testimony.[100] As such, the "ulterior motive" precaution is not a sufficient reason to bar either the guardian or the spouse's testimony.[101] Rather, deference should be given to the trial court to view the evidence, determine its credibility, and assign a weight to the testimony.[102]

3. Competing Standards of Review Once a Guardian Petitions the Court for Divorce

If a court finds that a guardian has the legal right to petition the court for divorce on behalf of the ward, the court must then determine whether it should grant the divorce. Because the ward's wishes cannot be ascertained at the time of the proceedings, two prominent standards exist in guiding a court's decision: (1) a substituted judgment standard and (2) a best interests standard.[103] Under either standard, the guardian bears the burden of proof in establishing the ward's wishes.[104]

Under a substituted judgment standard, the guardian tries to conclude what the ward would have decided if he or she were competent,[105] and the

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94. Nelson v. Nelson, 878 P.2d 335, 339 (N.M. Ct. App. 1994); *see In re Gannon*, 702 P.2d at 467 (explaining that, generally, a guardian should not determine this decision to bring dissolution on behalf of the ward, but some circumstances may warrant it).

95. 426 N.Y.S.2d 517 (N.Y. App. Div. 1980).

96. *Id.* at 542.

97. *See Ruvalcaba*, 850 P.2d at 682–83.

98. *Id.* at 683.

99. *Id.*

100. *See id.* at 682–83 (citing *In re* Ballard, 762 P.2d 1051, 1053 (Or. Ct. App. 1988)) (recognizing the risk is just as great that the competent spouse is biased).

101. *Id.* at 683.

102. *Id.* (citing *In re Ballard*, 762 P.2d at 1053).

103. *Ruvalcaba*, 850 P.2d at 682.

104. *Id.*

105. *See* Norman L. Cantor, *Discarding Substituted Judgment and Best Interests: Toward a Constructive Preference Standard for Dying, Previously Competent Patients Without Advance Instructions*, 48 RUTGERS L. REV. 1193, 1201–02 (1996) (explaining that substituted judgment attempts to replicate the decision the incompetent would make if competent in the

court acts on behalf of the incompetent.[106] The court determines the ward's intent using objective evidence,[107] such as written documents, evidence of oral statements while competent, or the ward's general disposition.[108] Therefore, this standard serves as a type of "surrogate decision-making" that may be used only when evidence exists of the ward's values and wishes while competent.[109] In contrast, when no evidence exists as to the ward's prior or present disposition or intent, the court will determine this issue based on what is in the best interests of the ward.[110]

Under the best interests standard, a guardian attempts to determine what the ward's best interests are at the present time,[111] and the court holds a hearing to obtain evidence as to the best course of action for the ward.[112] The court decides whether divorce would "further the ward's immediate and long-term interests" and considers "the ward's values, lifestyle and goals in making that determination."[113] Moreover, during this hearing, the court also considers the interests of the competent spouse.[114]

Having reviewed the majority and minority approaches as well as the standards of review employed by courts when a guardian has the legal right to file for divorce on behalf of an incompetent ward, this note now turns toward the current state of the law in Arkansas.

D. Current State of the Law in Arkansas

Stare decisis, which involves a court's choice to stand by precedent,[115] serves as a foundation of law. Additionally, it is well known that courts will

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current situation); 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, 956 (1995) (explaining that the guardian attempts to determine the choice of a hypothetically competent ward).

106. Walter M. Weber, *Substituted Judgment Doctrine: A Critical Analysis*, ISSUES L. & MED. 131, 135 (1985).

107. *See* Brockman *ex rel.* Jennings v. Young, 2011 WL 5419713, at *4 (Ky. Ct. App. 2011) (citing Metzmeier, *supra* note 105, at 958) (explaining that in determining whether it is proper to allow a divorce proceeding brought on behalf of a ward, courts may use evidence of the ward's intent and then substitute its judgment for the ward's).

108. Metzmeier, *supra* note 105, at 956.

109. Mills, *supra* note 38, at 544.

110. *Brockman*, 2011 WL 5419713, at *4.

111. Metzmeier, *supra* note 105, at 957.

112. *In re* Gannon, 702 P.2d 465, 467 (Wash. 1985). Cases that involve abuse, neglect, or possible exploitation of the ward are cases in which this standard is most aptly applied. Mills, *supra* note 38, at 544.

113. Feinstein, *supra* note 12, at 218.

114. *In re Gannon*, 702 P.2d at 467. The court will put great emphasis not only on the interests of the ward but also the necessities and interests of the competent spouse. *Id.*

115. Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412 (2010).

follow unambiguous statutes or attempt to interpret those that are ambiguous.[116] Accordingly, it is necessary to review both Arkansas case law and statutory law to determine whether this issue has been previously addressed or whether it is an issue of first impression.

1. Arkansas Lacks Explicit Statutory Authority That Grants or Denies a Guardian the Right to File for Divorce on Behalf of the Ward

Arkansas divorce law does not explicitly state whether a guardian has the authority to petition a court for divorce on behalf of a ward.[117] The Arkansas legislature has addressed the legal right for the competent spouse to bring action against the incompetent ward, but not vice-versa.[118] Arkansas Code Annotated section 9-12-301 provides the following:

> *The circuit court shall have power to dissolve and set aside a marriage contract*, not only from bed and board, but from the bonds of matrimony, for the following causes: In all cases in which a husband and wife have lived separate and apart for three (3) consecutive years without cohabitation by reason of the incurable insanity of one (1) of them, the court shall grant a decree of absolute divorce *upon the petition of the sane spouse* if the proof shows that the insane spouse has been committed to an institution for the care and treatment of the insane for three (3) or more years prior to the filing of the suit, has been adjudged to be of unsound mind by a court of competent jurisdiction, and has not been discharged from such adjudication by the court and the proof of insanity is supported by the evidence of two (2) reputable physicians familiar with the mental condition of the spouse, one (1) of whom shall be a regularly practicing physician in the community wherein the spouse resided, and when the insane spouse has been confined in an institution for the care and treatment of the insane, that the proof in the case is supported by the evidence of the superintendent or one (1) of the physicians of the institution wherein the insane spouse has been confined.[119]

The code further provides that "[s]ervice of process upon an insane spouse shall be had by service of process upon the duly appointed, qualified, and

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116. *See, e.g.*, Faulkner v. Ark. Children's Hosp., 347 Ark. 941, 952, 69 S.W.3d 393, 400 (2002) ("When the language of a statute is plain and unambiguous, there is no need to resort to rules of statutory construction. Where the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject.").

117. *See* ARK. CODE ANN. § 9-12-301 (Repl. 2009).

118. *See id.* § 9-12-301(b)(6)(A).

119. *Id.* (emphasis added).

acting guardian of the insane spouse or upon a duly appointed guardian ad litem for the insane spouse . . . ."[120]

In sum, the statute does not mention whether the incompetent ward has the ability to petition the court for divorce; rather, it suggests that the court will only grant a divorce when the competent spouse brings an action for divorce.[121] Also, the only role the guardian appears to play is to accept service of process if the sane spouse files a petition.[122]

Similarly, Arkansas guardianship law does not address whether a guardian has the authority to petition a court for divorce on behalf of a ward, as the statutory provision listing the actions for which a guardian can petition the court does not provide for the court to consider this issue.[123] Arkansas Code Annotated section 28-65-302 states as follows:

> No guardian appointed prior to October 1, 2001, shall make any of the following decisions without filing a petition and receiving express court approval: (A) Consent on behalf of the incapacitated person to abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary in a situation threatening the life of the incapacitated; (B) Consent to withholding life-saving treatment; (C) Authorize experimental medical procedures; (D) Authorize termination of parental rights; (E) Prohibit the incapacitated person from voting; (F) Prohibit the incapacitated person from obtaining a driver's license; or (G) Consent to a settlement or compromise of any claim by or against the incapacitated person or his or her estate.[124]

Noticeably absent from that list is whether a guardian may petition the court for divorce on behalf of the ward. Because the provisions in neither the divorce nor guardianship code explicitly grant or deny the guardian such authority,[125] these sections, in turn, do not necessarily aid courts faced with determining whether a guardian may bring a divorce action on behalf of an incompetent ward.

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120. *Id.* § 9-12-301(b)(6)(C)(i).

121. *See id.* § 9-12-301(b)(6)(A).

122. *See id.* § 9-12-301(b)(6)(C)(i).

123. *See* ARK. CODE ANN. § 28-65-302 (Repl. 2012).

124. *Id.* § 28-65-302(a)(1)(A)–(G). The only difference under subsection (a)(2), which involves the rights of a guardian appointed *after* October 1, 2001, is that no guardian shall make a decision that involves authorizing an incapacitated person to vote without filing, petitioning, and receiving court approval. *See id.* § 28-65-302(a)(2)(E).

125. *See id.* § 9-12-301 (divorce); *id.* § 28-65-302 (guardianship).

2. *Arkansas Lacks Case Law Addressing Whether a Guardian May File for Divorce on Behalf of a Ward*

Appellate courts in Arkansas have yet to provide a holding on the merits, on which subsequent circuit courts may stand, as to whether a guardian may file for divorce on behalf of a ward absent statutory authority. In *Jackson v. Bowman*,[126] the Supreme Court of Arkansas reviewed a suit by an insane widow to set aside a previously granted divorce decree to her deceased husband.[127] The court ultimately held that the suit to set aside the divorce decree was proper because the property interests of the insane widow were vitally affected by the default divorce decree entered against her.[128] Additionally, service upon the husband's executor as well as the husband's attorney of record constituted sufficient and proper notice to allow the trial court to act on the petition to vacate.[129]

In *Jackson*, the court further opined that, because her husband was mentally incompetent when he filed suit, the widow proved a meritorious defense to the divorce action.[130] The court cited the general rule for support—when a statute that authorizes suit is absent, an insane person cannot bring an action for divorce because the right is strictly personal to the aggrieved spouse and no matrimonial offense automatically dissolves the marriage.[131] However, the court never addressed the guardian's right to file for divorce, and the court's mention of the general rule serves as dicta specific to the incompetent spouse's ability to petition for divorce.

Lovett v. Lovett[132] followed almost twenty years later. Here, William Lovett, by his father and next friend, filed a petition for divorce.[133] The Supreme Court of Arkansas found no evidence that William was ever under guardianship *as to his person* nor did he presently or recently need a personal guardian.[134] Rather, guardianship *over his estate* was predicated on the need to manage his business affairs.[135] Therefore, the court determined that the chancellor erred in not granting the petition for divorce.[136]

In *Lovett*, the court cited to 19 American Law Reports section 20 and *Jackson* for recitation of the rule that, in the absence of a statute authorizing

126. 226 Ark. 753, 294 S.W.2d 344 (1956).
127. *Id.* at 754, 294 S.W.2d at 344.
128. *Id.* at 757, 294 S.W.2d at 346.
129. *Id.* at 757–58, 294 S.W.2d at 346.
130. *Id.* at 759, 294 S.W.2d at 347.
131. *Id.*, 294 S.W.2d at 347.
132. 254 Ark. 349, 493 S.W.2d 435 (1973).
133. *Id.* at 350, 493 S.W.2d at 435.
134. *Id.* at 353, 493 S.W.2d at 437.
135. *Id.*, 493 S.W.2d at 437.
136. *Id.* at 352, 493 S.W.2d at 437.

so, an insane person cannot institute an action for divorce.[137] The court then noted, however, that in the same annotation it stated that, absent a legal adjudication of insanity, a person is presumed to have capacity to bring a divorce action as long as the plaintiff can understand the nature of the action.[138] Thus, like *Jackson*, the court based its decision around the incompetent's right to file for divorce and did not determine the rights of a guardian.

Most recently, the Arkansas Court of Appeals in *Alexander v. Alexander*[139] was presented with the issue of whether the lower court erred in granting a divorce decree to a spouse who was later declared to be incompetent.[140] Nevertheless, the court held on other grounds.[141] Determining that there was no evidence that corroborated either party's residence in Arkansas for the statutory period,[142] the court held that the trial court lacked jurisdiction to enter the divorce decree because statutory law precludes a grant of divorce without such corroboration of residency.[143]

Having reached its holding on a jurisdictional ground, the court in *Alexander* decided that other issues need not be addressed.[144] One of these issues was the Appellant's contention that the trial court erred in granting a divorce decree to the Appellee because she was incompetent at the time the complaint was filed.[145] Therefore, courts were, yet again, left void of a holding on which this issue—whether a *guardian* is legally entitled to bring an action for divorce on behalf of a ward—could be resolved.

III. ARGUMENT

Absent clear statutory authority that expressly grants or denies a guardian the right to file for divorce on behalf of a ward, lower courts are faced with choosing either the majority or minority approach. Because circuit courts in Arkansas lack an appellate court holding that addresses whether a guardian may petition the court on behalf of a ward and because statutory authority does not explicitly grant or deny such authority, uncertainty pervades this issue. Arkansas legislators can be proactive, however, in proposing legislation to explicitly grant a guardian the right to file for divorce on behalf of a ward. In doing so, this authority will avoid the inevitable result—

137. *See id.* at 353–54, 493 S.W.2d at 437–38.
138. *Lovett*, 254 Ark. at 354, 493 S.W.2d at 438.
139. No. CA01-1246, 2002 WL 1204416 (Ark. Ct. App. June 5, 2002).
140. *Id.* at *1.
141. *See id.*
142. *Id.* at *2; *see* ARK. CODE ANN. § 9-12-307 (Repl. 2009) (stating that residence in the state for sixty days by either party prior to commencement of the action must be proven).
143. *Alexander*, 2002 WL 1204416, at *2.
144. *Id.*
145. *Id.* at *1.

courts legislating from the bench. Alternatively, if no such legislation is enacted, Arkansas courts should still follow the minority approach and then use a substituted judgment standard in determining whether to grant a divorce action brought by a guardian.

A. Due to the Current State of the Law in Arkansas, a Circuit Court Faced with Determining Whether a Guardian May File Suit on Behalf of a Ward Could Hold with Either the Majority or Minority

When a court is presented with this issue, the role the majority rule would play in Arkansas is straightforward: absent statutory authority providing a guardian the right to file for divorce on behalf of a ward, a guardian may not do so.[146] As previously provided, a court's reasoning behind following the majority approach lies in the personal and volitional nature of marriage and the "lesser of two evils" notion.[147] The application of this rule is not so straightforward, however, when courts consider the competing interests advocated by the minority.[148] As illustrated in Part II, courts may construe other statutes, individually or in totality, and grant a guardian the legal right to file for divorce.[149] Consequently, unpredictability exists in cases of first impression.

In Arkansas, language apt to result in statutory interpretation that would grant the guardian authority to bring a suit may be found under Arkansas Code Annotated section 28-65-106. This section states that "[a]n incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and *retains all legal and civil rights* except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court."[150] Like *Ruvalcaba* and *Nelson*, an Arkansas court could construe this language broadly and reason that the statute explicitly states that an incapacitated person retains all legal and civil rights, which would include divorce because divorce is a civil proceeding.

Of course, under this section, the court cannot turn to the latter part of this statute for clarity. A ward's legal right to file for divorce has not been expressly limited by court order nor has a guardian's right to bring action

146. Wood v. Beard, 107 So. 2d 198, 199 (Fla. Dist. Ct. App. 1958) ("The rule is well established in the United States by the overwhelming weight of authority that a guardian of a mentally incompetent person cannot bring and maintain an action for divorce on behalf of his insane ward unless there has been legislative enactment to authorize such procedure.").

147. *See supra* Part II.B.2.

148. *See supra* Part II.C.2.

149. *See supra* Part II.C.1.

150. ARK. CODE ANN. § 28-65-106 (Repl. 2012) (emphasis added).

been expressly granted.[151] Subsequently, this language leaves the court in a dilemma when determining whether a guardian has authority to file for divorce on behalf of the ward.

Additionally, like *Luster*, the court could read Arkansas Code Annotated section 28-65-106 in tandem with another statute, such as Arkansas Code Annotated section 28-65-301, in granting the guardian the right to file action on behalf of the ward. Section 28-65-301 states that "[i]t shall be the duty of the guardian of the person, consistent with and out of the resources of the ward's estate, to *care for and maintain the ward* . . . ."[152] Arguably, caring for and maintaining the ward would include deciding whether it best for the ward to remain in his or her marriage.

Moreover, the court could also read Arkansas Code Annotated sections 28-65-106 and 28-65-305 together. Section 28-65-305 provides the following:

> When there is a guardian of the estate, all actions between the ward or the guardian and third persons in which it is sought to charge or to benefit the estate of the ward *shall be prosecuted by or against the guardian* of the estate as guardian, and the guardian shall represent the interests of the ward in the action.[153]

It is important to note that this provision concerns the guardian's power over the estate, not the ward's person. Nevertheless, it is possible that a court may construe whatever statute it may find useful to determine this issue. Therein lies the need for clarity—the need to explicitly give the court guidance.

B. The Arkansas General Assembly Should Propose Legislation That Grants a Guardian the Right to Bring Divorce Proceedings on Behalf of a Ward

Though this note proposes that the rationale behind the minority approach is ultimately more applicable than the majority approach and should be adopted by the court in the event it is presented with this issue absent statutory authority, this matter can be addressed prior to reaching an appellate court. Specifically, the Arkansas General Assembly can address this issue now by enacting a statute that gives the guardian a definitive legal right to bring a divorce action on behalf of a ward.

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151. *See id.* § 28-65-302 (Repl. 2012).
152. *Id.* § 28-65-301(a)(1) (Repl. 2012) (emphasis added).
153. *Id.* § 28-65-305(a) (Repl. 2012) (emphasis added).

1. Other States' Approaches That Provide Guidance

In Indiana, specific statutory authority addresses the legal right of the guardian to bring dissolution proceedings.[154] Section 29-3-9-12.2 states in relevant part that "[i]f a guardian of an incapacitated person determines that a dissolution of the incapacitated person's marriage is in the best interests of the incapacitated person, the guardian shall petition the court to request the authority to petition for a dissolution of marriage on behalf of the incapacitated person."[155]

In comparison, Missouri's statutory code section 475.091 provides the following:

> Upon finding that the transaction was or is beneficial to the protectee, the court may approve, ratify, confirm and validate any transaction entered into by a conservator of the estate, without court authorization which it has power under this section to authorize the conservator to conduct. The power of the court to approve, ratify, confirm and validate transactions entered into by a conservator of the estate without court authorization includes, without limitation, . . . the power to make, ratify and undertake proceedings for, and agreements incident to, dissolution of the marriage of the protectee.[156]

In *Parmer v. Michaels*,[157] a Missouri court turned to this statute, specifically, in addressing and refuting appellant's argument that "no specific statute authorizes a guardian to proceed in a dissolution action for an incapacitated person . . . ."[158]

In drafting legislation, the Arkansas General Assembly could also look to the court rules cited by the Michigan Court of Appeals in *Smith v. Smith*.[159] For example, when deciding whether a mentally incompetent spouse could bring a divorce action through her guardian, the court in *Smith* turned to two General Court Rules that existed at the time this case was decided and concluded that the guardian may do so.[160] First, the court looked at

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154. *See* IND. CODE § 29-3-9-12.2 (West 2014).

155. *Id.* § 29-3-9-12.2(a)(1), (3) (citations omitted). This section subsequently includes the role of the court in granting the guardian's petition. *See id.* § 29-3-9-12.2(d)–(g).

156. MO. ANN. STAT. § 475.091 (West 2009).

157. 755 S.W.2d 5 (Mo. Ct. App. 1988).

158. *Id.* at 6. The court, citing Missouri Annotated Statute section 475.110, also added that the language in that section reveals that the legislature "contemplate[d] that incapacitated persons may be parties to divorce action." *Id.* at 6–7. That section provides that "[w]hen the spouse of an incapacitated or disabled person is appointed his guardian or conservator, such spouse shall be removed as guardian or conservator upon dissolution of his marriage with the incapacitated or disabled person." MO. ANN. STAT. § 475.110 (West 2009).

159. 335 N.W.2d 657 (Mich. Ct. App. 1983).

160. *See id.* at 658.

General Court Rule 1963, 722.2.[161] This rule provided that "[a]ctions for divorce and separate maintenance by or against incompetent persons shall be brought as provided in sub-rule 201.5."[162] Then, the court examined sub-rule 201.5, which provided that "[w]henever an infant or incompetent person has a guardian of his estate, actions may be brought and shall be defended by such guardian in [sic] behalf of the infant or incompetent person."[163]

Finally, Florida provides further illustration.[164] Florida Statutes Annotated section 61.052 states that "[n]o judgment of dissolution of marriage shall be granted unless one of the following facts appears, which shall be pleaded generally: . . . Mental incapacity of one of the parties."[165] Additionally, section 744.3215 states that "[w]ithout first obtaining specific authority from the court . . . a guardian may not [i]nitiate a petition for dissolution of marriage for the ward."[166] In *Vaughan v. Vaughan*,[167] a Florida court relied on these sections and concluded that section 61.052 gives the guardian authority to initiate dissolution.[168] Given this backdrop of statutory code from numerous states, the Arkansas General Assembly has an adequate amount of guidance from which to draw upon in drafting legislation.

2. The Arkansas General Assembly Should Enact a New Subsection to Its Guardianship Law or Follow Either Indiana's or Florida's Approach

The Arkansas General Assembly has the opportunity to grant a guardian the legal right to file for divorce on behalf of a ward in multiple sections of the Arkansas Code. Under guardianship law, the following proposed legislation could fit into section 28-65-302, which currently grants certain powers to guardians upon petition to the court.[169] Subsection (a)(1) to section 28-65-302 states that "[n]o guardian . . . shall make any of the following decisions without filing a petition and receiving express court approval" and

161. *See id.*
162. *Id.*
163. *See id.*
164. This is not an exhaustive list of states to which the Arkansas General Assembly can turn. The listed states merely provide good examples.
165. FLA. STAT. ANN. § 61.052(1)(b) (West 2006).
166. *Id.* § 744.3215(4)(c) (West 2010) (citations omitted).
167. 648 So. 2d 193 (Fla. Dist. Ct. App. 1994).
168. *Id.* at 195. The court also determined that section 744.3215 was enacted when "the legislature clearly envisioned circumstances which would justify authorizing a guardian to undertake the admittedly very personal act of seeking a dissolution on behalf of an incapacitated ward." *Id.*
169. *See* ARK. CODE ANN. § 28-65-302 (Repl. 2012).

then lists those subsequent decisions.[170] Thus, for example, the following could be added to the current list:

> (H) Dissolution of marriage on behalf of the incapacitated person.

In the alternative, Arkansas legislators could replicate Indiana's statute and create an entirely new section that directly addresses petition by the guardian for the dissolution of marriage.[171] In either case, both provisions would be superior to the court rules in Michigan, where cross-references were necessary for the court in *Smith* to ultimately grant a guardian authority.[172]

Another option the Arkansas General Assembly could take would be to follow Florida's lead and amend its current divorce statute. Arkansas Code Annotated section 9-12-301 currently states the following:

> The circuit court shall have power to dissolve and set aside a marriage contract, not only from bed and board, but from the bonds of matrimony, for the following causes: In all cases in which a husband and wife have lived separate and apart for three (3) consecutive years without cohabitation by reason of the incurable insanity of one (1) of them, the court shall grant a decree of absolute divorce *upon the petition of the sane spouse* if the proof shows . . . .[173]

As indicated by the language used in the statute—"upon the petition of the *sane* spouse"—the *insane* spouse lacks legal authority.[174] Admittedly, a party could make the argument that if the legislature had intended to grant the insane spouse the authority to do so, then it would have included that right expressly. Nevertheless, as exemplified in *Ruvalcaba*, this argument can be, and has been, rejected in favor of the alternative—the notion that had the legislature wanted to deny the insane spouse the right, it would have expressly done that too.[175]

If the Arkansas General Assembly followed Florida's approach, one option would be to state that the "[m]ental incapacity of one of the parties" is one of the causes for which the circuit court can dissolve and set aside a marriage,[176] without limiting such action to "the petition of the sane spouse" as it currently does.[177] As held in *Vaughan*, this provision could give the

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170. *See id.*
171. *See* IND. CODE § 29-3-9-12.2 (West 2014); *supra* Part III.B.1.
172. *See* Smith v. Smith, 335 N.W.2d 657, 658 (Mich. Ct. App. 1983); *supra* Part III.B.1.
173. ARK. CODE ANN. § 9-12-301(b)(6)(A) (Repl. 2009) (emphasis added).
174. *See id.*
175. *See* Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 678 (Ariz. Ct. App. 1993); *supra* Part II.C.1.
176. *See* FLA. STAT. ANN. § 61.052(1)(b) (West 2006); *supra* Part III.B.1.
177. *See* ARK. CODE ANN. § 9-12-301(b)(6)(A).

guardian the "authority to initiate dissolution."[178] A second option would be for the Arkansas General Assembly to add the following bracketed language to the currently existing form:

> . . . the court shall grant a decree of absolute divorce upon the petition of the sane spouse [or insane spouse, through his or her guardian,] if the proof shows . . . .[179]

Though the former proposal has sufficed in granting a guardian the legal right to file for divorce on behalf of a ward, implementing language similar to the latter proposal would be the most direct method in resolving the issue at hand because it unambiguously grants the guardian express authority.

In sum, if the Arkansas General Assembly decides to take action, it would not be the first legislative body to do so.[180] Other states have codified this right, and courts that have adjudicated this issue have relied on that codification in determining the rights of the guardian.[181] By giving courts statutory authority on which to stand, the Arkansas General Assembly can adequately and proactively address this issue and, by doing so, prevent the possibility that courts will be forced to legislate from the bench.

C. In the Absence of Legislation, Arkansas Appellate Courts Should Still Employ the Minority Approach in Granting a Guardian the Legal Right to Petition the Court for Divorce

Notwithstanding that the best option would be for the Arkansas General Assembly to propose legislation that explicitly grants a guardian the right to file for divorce on behalf of a ward, courts should, in the alternative, hold with the minority. Once a guardian has the legal authority to petition the court for divorce on behalf of a ward, provided for either under statute or by court authority, the court must next decide whether to grant the divorce. In the absence of present evidence showing the ward's desire to divorce, the court should grant the divorce based on a substituted judgment standard as opposed to a best interests standard.

1. The Minority Approach Is the More Applicable Approach Given Societal Changes and an Already Expansive Guardianship Law

In light of the reasons previously set out above, an appellate court could read that either guardianship or divorce statutes, or their effect in tan-

178. *See* Vaughan v. Vaughan, 648 So. 2d 193, 195 (Fla. Dist. Ct. App. 1994); *supra* Part III.B.1.

179. *See* ARK. CODE ANN. § 9-12-301(b)(6)(A).

180. *See supra* Part III.B.1.

181. *See supra* Part III.B.1.

dem, grants a guardian the legal right to bring a suit for divorce on behalf of the ward.[182] Moreover, it is reasonable to assume that if the court is persuaded by the principles of the minority position, then the court would be even more likely to construe a statute as broadly as possible to grant that right. In declining to impose a per se ban on the guardian's right to bring a divorce suit, courts should be heavily persuaded not only by the minority's foundational inequity argument[183] but also by the broad power granted to guardians in Arkansas specifically,[184] as well as changing societal notions concerning divorce.[185]

Currently, statutory authority in Arkansas grants guardians the authority to petition the court and potentially make decisions on behalf of the ward that concern the following:

> (A) Consent on behalf of the incapacitated person to *abortion, sterilization, psychosurgery, or removal of bodily organs* except when necessary in a situation threatening the life of the incapacitated; (B) Consent to withholding *life-saving treatment*; (C) Authorize *experimental medical procedures*; (D) Authorize termination of *parental rights*; (E) Prohibit the incapacitated person from *voting*; (F) Prohibit the incapacitated person from obtaining a *driver's license*; or (G) Consent to a *settlement or compromise of any claim* by or against the incapacitated person or his or her estate.[186]

It would stand to reason that divorce is no more volitional or personal in nature than some of the decisions in this statute. As the court in *Ruvalcaba* aptly surmises, "in this day and age, when guardians are permitted to refuse medical care on behalf of their incompetent wards—surely a decision that is extremely 'personal' to that individual—prohibiting that same guardian from maintaining an action for dissolution on behalf of the ward cannot be justified."[187] For example, if physical or mental impairment does not destroy the ward's right to refuse medical treatment, impairment would also not extinguish the incompetent's right to petition for divorce.[188] Effectively, the majority's primary policy rationale loses ground when it is compared to the expansive guardianship provisions currently employed in this state.

Moreover, societal pressure and no-fault divorce laws further advance the argument that guardians should be able to file for divorce on behalf of

182. *See supra* Part III.A.
183. *See supra* Part II.C.2.
184. *See* ARK. CODE ANN. § 28-65-302 (Repl. 2012).
185. Mills, *supra* note 38, at 528.
186. ARK. CODE ANN. § 28-65-302 (emphasis added).
187. Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 681 (Ariz. Ct. App. 1993).
188. *Id.*

the ward.[189] As opposed to narrowing no-fault divorce laws, the tendency has been toward liberalizing them.[190] During the 1960s, a uniform no-fault divorce system began to replace fault-based divorce laws,[191] and every state in the union recognized no-fault divorce by 1985.[192] Essentially, no-fault divorce reform gave autonomy to the individual[193] and allowed for marriage to be "freely and unilaterally terminable."[194] Thus, the consent of both parties was no longer a requisite for divorce.

The result of this legislation and, ultimately, the ability of one spouse to unilaterally dissolve the marriage was that the institution of marriage was forever tarnished moving forward.[195] Today, the divorce rate has reached an estimated fifty percent.[196] The correlation between the two cannot go unnoticed for the rate of divorce post no-fault divorce legislation is staggering. After no-fault divorce laws were introduced in the 1960s, the divorce rate nearly doubled over the next ten years.[197]

Importantly, with the adoption of no-fault divorce laws, "[s]ociety [had] entered a new era."[198] These laws illustrated, to some extent, that society no longer condemned divorce.[199] Additionally, since the enactment of these laws, "society has continued in its acceptance and accommodation of the life changes it has brought."[200] Specifically, because this accommodation extends to the courts, the court's role transformed from one designed to protect marriage to one designed to administer the dissolution of marriage in a fair manner for the parties.[201] In sum, "in [the] days of . . . no-fault dissolutions and the other vagaries of a vastly changing society, . . . an absolute rule

189. Mills, *supra* note 38, at 528.

190. Nelson v. Nelson, 878 P.2d 335, 340 (N.M. Ct. App. 1994) (citing Garner v. Garner, 512 P.2d 84, 87 (N.M. 1973)).

191. Metzmeier, *supra* note 105, at 952.

192. *Id.* at 953.

193. Catherine Shaw Spaht, *Why Covenant Marriage?*, 46 LA. B. J. 116, 118 (1998).

194. Susan Reach Winters & Thomas D. Baldwin, *Cultural Changes—1970–2000: The "Divorce Revolution"*, 10 N.J. PRAC., FAM. L. & PRAC. § 1A.2 (Database updated November 2015).

195. Austin Caster, Article, *Why Same-Sex Marriage Will Not Repeat the Errors of No-Fault Divorce*, 38 W. ST. U. L. REV. 43, 50 (2010).

196. *Id.* at 46; *see* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 118 (1991) (citing analysts who have estimated that half of all marriages today will end in divorce).

197. Caster, *supra* note 195, at 46. This period during the 1970s became known as the "divorce boom." *Id.* at 48; *see* Wardle, *supra* note 196, at 117 (citing statistical research that demonstrates a causal relationship between no-fault divorce laws and divorce rates).

198. Winters & Baldwin, *supra* note 194, at § 1A.2.

199. Spaht, *supra* note 193, at 118.

200. Winters & Baldwin, *supra* note 194, at § 1A.2.

201. Metzmeier, *supra* note 105, at 953; *see* Mills, *supra* note 38, at 528 (providing that no-fault divorce laws led to judicial administration of divorce on the basis of fairness as opposed to a legally recognized offense).

[that guardians have no authority to seek a divorce or dissolution] is not justified nor in the public interest."[202]

2. *Courts Should Employ a Substituted Judgment Standard over a Best Interests Standard to Grant a Divorce*

The mere authority for a guardian to bring action does not suggest that courts should proceed without caution in granting a divorce action brought by the guardian,[203] and the guardian should bear the burden in proving a factual basis that supports divorce.[204] Once the "courthouse door[s]" are opened to allow a guardian to bring a divorce suit, however, the court should then follow the substituted judgment standard in granting divorce when the ward cannot express his or her wishes.[205]

Either standard protects against abuse by the guardian,[206] but the substituted judgment standard is the more appropriate standard for the trial court to apply for two reasons: (1) this standard involves the trial court considering evidence of "the ward's prior or present acts, beliefs and disposition toward the proposed divorce" in determining what choice the ward would have made if competent,[207] and (2) a best interests standard is inadequate for determining the interests of the ward because it is applied only when no evidence of the ward's intent exists.[208] It follows that by employing a best interests standard the court would be adding yet another layer of decision making on behalf of a ward.

In contrast with the best interests standard, a substituted judgment standard allows the incompetent ward to retain his choice, which promotes human dignity and self-determination.[209] In essence, this standard attempts to treat the incompetent "as an individual with free choice and moral dignity, and not as someone whose preferences no longer matter[]."[210] This autonomy is achieved because the guardian either has actual knowledge of what the ward would have done in the present circumstances or, based on the ward's prior general statements, actions, values, or preferences, the guardian may understand what the ward would have done in the circum-

202. *In re* Gannon, 702 P.2d 465, 467 (Wash. 1985).

203. Nelson v. Nelson, 878 P.2d 335, 340 (N.M. Ct. App. 1994).

204. *Id.*; Pentecost v. Hudson, 252 P.2d 511, 512 (N.M. 1953) (explaining that the party asserting action bears the burden of proving the factual basis that supports divorce).

205. Metzmeier, *supra* note 105, at 967.

206. *Id.* at 968.

207. *Id.* at 967.

208. *Id.* at 957.

209. Cantor, *supra* note 105, at 1204. The rationale is based on the preservation of rights. Weber, *supra* note 106, at 136.

210. Cantor, *supra* note 105, at 1204 (quoting John A. Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine*, 76 COLUM. L. REV. 48, 63 (1976)).

stances.[211] Thus, the decision stands as that of the ward's, and the court simply acts as a "mouthpiece."[212] In contrast, the best interests standard results in the court taking responsibility for the decision[213] and acting like the parent of an infant with reduced rights.[214]

In support of why the substituted judgment standard is more appropriate, Arkansas courts may turn to prior case law. For example, *Ruvalcaba* provides guidance in applying the substituted judgment standard.[215] The *Ruvalcaba* court, having determined that a guardian could initiate divorce proceedings, addressed the evidentiary standard for deciding whether this particular guardian-initiated divorce was proper.[216]

In *Ruvalcaba*, evidence existed of the incompetent ward's desires concerning divorce at a time when she was competent.[217] The court determined that a trial court could consider any admissible evidence of the ward's desires while competent, which may include written manifestations or statements made to third parties.[218] Notably, the court allowed third-party testimonial evidence out of necessity and under hearsay exceptions.[219] Regarding this testimony, the court provided that the trial court has deference in assessing the truthfulness of third parties' testimony and determining the appropriate weight to give this testimony.[220] Ultimately, a trial court could proceed in granting a divorce if dissolution was what the ward would want[221] after concluding the ward's preferences and general values regarding marriage, divorce, and manner of living.[222]

Likewise, in *Nelson*, the court determined that the guardian may testify about conversations where the ward expressed his or her desires prior to

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211. Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739, 753–54 (2012). Under the latter, although the guardian does not have definitive information as to what the ward wants, the guardian effectively best estimates what the ward would have done by making reasonable inferences. *Id.* at 754.

212. Weber, *supra* note 106, at 137.

213. *Id.*

214. *Id.* at 138.

215. *See* Ruvalcaba v. Ruvalcaba, 850 P.2d 674, 682 (Ariz. Ct. App. 1993).

216. *See id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 683.

221. *Ruvalcaba*, 850 P.2d at 681–82.

222. *Id.* This court even heightened the burden of proof to a clear and convincing standard. *Id.* at 683. Though preponderance of evidence is all that is required in civil cases, the court reasoned that an elevated standard was necessary because the dissolution of marriage involved personal interests that were more complex and important than those of a typical civil suit. *Id.*

becoming incompetent.[223] The court opined that the values of the ward should be primary in determining whether the guardian should file for divorce.[224] Thus, when the court is convinced by testimony from friends, family members, clergy, or other sources with knowledge that the ward would not have wanted divorce under any circumstances, the court should uphold the ward's wishes.[225] However, when there is evidence of an expressed desire to end the marriage prior to becoming incapacitated, the court should not prohibit a guardian from bringing action.[226] In such case, the trial court may consider the evidence in granting or denying a divorce.[227]

In contrast with *Ruvalcaba* and *Nelson*, the court in *Kronberg v. Kronberg*[228] addressed a case in which evidence of intent was lacking.[229] After determining that statutory authority granted a guardian the right to initiate divorce on behalf of a ward,[230] the court next determined what was in the best interest of the ward.[231] Even with no evidence of the ward's intent, the court ultimately upheld the guardian's ability to obtain a divorce on behalf of the ward,[232] basing its holding on the ward's interest in the estate and equitable property rights.[233]

Whereas a substituted judgment standard provides a court with objective evidence of the ward's intent to dissolve the marriage,[234] the same is not always true with a best interests standard.[235] It is one thing to claim that a per se rule denying guardians the legal authority to bring divorce is improper and to then advocate for proposed legislation that would at least grant a guardian this legal right. It is quite another to suggest that a court can make a subsequent judgment on behalf of the ward without any objective evidence of the ward's desires.

In bringing suit, the guardian is a third party making a decision for the ward. Equally, under a best interests standard, the court would also be a third party making a decision for the ward. However, this ensuing extension of power to the court under a best interests standard would go too far be-

223. Nelson v. Nelson, 878 P.2d 335, 339 (N.M. Ct. App. 1994).
224. *Id.* at 340.
225. *Id.* at 341.
226. *Id.*
227. *See id.*
228. 623 A.2d 806 (N.J. Super. Ct. Ch. Div. 1993).
229. *See id.* at 809.
230. *See id.* at 809–10.
231. *See id.* at 811.
232. *Id.*
233. *Id.* at 813. The court reasoned that it was a court of equity, where a result that was fair for both spouses was ideal. *Id*.
234. Frolik & Whitton, *supra* note 211, at 753–54.
235. Metzmeier, *supra* note 105, at 957 (explaining that the best interests standard applies when no evidence of the ward's intent exists).

cause it adds another layer of decision making on behalf of a ward. Ideally, a substituted judgment standard is able to prevent that additional third-party decision by the court and allow the ward, to an extent, to retain his volition in the marriage.

IV. CONCLUSION

An Arkansas appellate court will inevitably face the issue of determining a guardian's right to file for divorce on behalf of a ward, just as other state courts have in the past[236] and especially given the growth of the elderly population[237] and high rates of divorce in this country.[238] In the absence of explicit statutory authority either granting a guardian the right to file for divorce on behalf of a ward or denying the guardian such right, an appellate court would be forced to consider the rationale behind the majority and minority rules in reaching a conclusion. The unpredictability of a court's decision is pause for concern—concern that merits attention.

Because appellate courts have yet to hold on the merits of this issue[239] and because divorce law and guardianship law fail to explicitly provide guidance,[240] Arkansas courts are left without a clear answer. Therefore, the time is ripe for action, and the most obvious answer to prevent courts from being put in this position is legislation. By being proactive, the Arkansas General Assembly can prevent this issue from rearing its head in court and, thereby, prevent courts from being forced to legislate from the bench.

The proposed legislation encapsulates the trending aims of guardianship power by permitting a guardian to bring an action for the dissolution of marriage on behalf of a ward.[241] Then, once the action reaches the court, the court should follow a substituted judgment standard in granting or denying the divorce.[242] To that end, the ward will still play a role in the ultimate dissolution of his or her marriage and, therefore, address the concerns of the majority opinion amongst the states.[243]

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236. *See supra* Parts II.B–C.

237. *See* Feinstein, *supra* note 12, at 208 (claiming that the population of persons age sixty-five and older will double by 2030, and, currently, half of those persons over eighty-five have some form of dementia).

238. *See supra* Part III.C.1.

239. *See supra* Part II.D.2.

240. *See supra* Part II.D.1.

241. *See supra* Parts II.C, III.B.2.

242. *See supra* Part III.C.2.

243. *See supra* Part II.B.

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