

How dementia can complicate divorce cases in Maryland



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You've likely already heard the term "gray divorce," which refers to the rising rate of divorces among spouses age 50 and older. As the average age continues to increase, a growing segment of these cases involves one spouse suffering from capacity issues.

Health-related personality and behavior changes can cause serious emotional and mental strain on a marriage. The spouse suffering from these ailments may no longer recognize or even remember their partner. Take, for example, Sandra Day O'Connor's husband who, as a result of his Alzheimer's, no longer recalled her and struck up a romance with another patient at his assisted living.

Other symptoms can cause the partner to become paranoid, irritable, and even physically and verbally aggressive. Furthermore, caring for an ailing partner often carries a hefty financial burden which places further strain on the relationship.

Such changes may lead one or both spouses to want to dissolve the marriage. In some cases, a party's adult child or other close family member or

acquaintance may push for the cessation of the marriage.

How courts treat a case involving a spouse with dementia or capacity issues depends largely on which spouse initiates the divorce and the overall capacity of the other spouse. In short, divorcing someone with capacity issues can be a complicated process and involves a number of special considerations.

If the other party's capacity is at issue, they may not be capable of signing legal documents or even participating in legal proceedings. This leaves the spouse with two main avenues: (1) seek judicial appointment of another (i.e., not them) guardian on behalf of the spouse that can employ counsel to defend the divorce, or (2) consider divorce alternatives, such as living separate and apart, and comprehensive estate planning for the nondisabled spouse.

If your client chooses to pursue dissolution, you can still resolve the issue through negotiated settlement with the guardian/appointed counsel. This is particularly effective where the disabled person is high functioning and can exercise reasonable judgment regarding personal decisions and understand the nature of the divorce.

Because the court really is the ultimate guardian of the ward, it will consider the ward's best interests, including how needs will be supported and costs paid. This may mean that your client should be ready to pay support or a hefty marital award.

But what does one do when the party with dementia and/or capacity issues is the one who wants to the divorce?

While "insanity" is a ground for divorce in Maryland and the Code permits a guardian to commence proceedings to compel support for a disabled person, our statutes and case law do not specifically address the rights of an incapacitated person to petition for divorce. However, that does not mean

that an incapacitated person has to remain in an unwanted marriage.

The court is empowered with the ability to order a guardian to take any act necessary to protect the best interests of the disabled person. Therefore, on petition by a guardian or other interested party, the court may consider whether to permit the guardian to pursue a dissolution of the marriage on behalf of the ward.

Other jurisdictions have held that it is in the ward's best interests to pursue a divorce, where, among other things, the ward has requested it and has sufficient capacity to understand the concept of divorce and its effects, it is in the ward's best interests, there has been a showing of abuse, or other good cause exists.

The court may appoint an independent investigator to determine whether the disabled spouse is being influenced to pursue the divorce by an immediate family member or other third-party for their own gain, such as an alteration to the ward's estate plan in their favor.

Capacity issues arising in family law matters are only expected to increase over the next years as the baby boomers and Gen Xers march on.

As noted in my earlier discussion on guardianships and reproductive freedoms, having a disability in and of itself should not prevent a person from the right to determine their family structure. This would include the right to be – or not to be – married.

Prior to the anticipated influx, we need to develop appropriate statutory authorization for guardians and courts to respond to these matters and empower guardians to pursue these divorces.

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