You Can't Fix Crazy . . . But Can You Divorce It?

By Vesselin Mitev

Wife sues husband for divorce; husband answers and counterclaims. At some point, husband becomes declared judicially incompetent and is appointed a guardian ad litem (GAL) under CPLR 1201, which provides for such an appointment, if the court finds that, *inter alia*, the party (husband) became an "adult incapable of adequately prosecuting or defending his rights" including, obviously, defending the current divorce proceeding against him.

What now. DRL 170 is explicit. An action for divorce may *only* be maintained "by a husband or wife." In 1943, long before the adoption of the "no-fault" (DRL 170.7) and currently most commonly used ground for divorce, the Court of Appeals held that an incompetent person could not maintain an action for divorce absent contrary statutory authority, see *Mohrmann v. Kob*, 291 NY 181, in refusing to extend the power to the committee of a man deemed insane against his wife, in the context of a separation agreement where a counterclaim for divorce was asserted.

Twelve years prior, in a case out of Seneca County, the court held expressly that such an action could not be maintained to its conclusion, but had to be dismissed without prejudice to renew should the incompetent party regain competency, because

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"The contract of marriage and the state of matrimony is a relationship so sacred and so intimate in its character that a special guardian cannot be called upon to exercise the judgment or choice which a normally minded spouse would have a right to exercise," see *Gould v Gould*, 141 Misc 766, 769 [Sup Ct 1931].

In 1964, in *McRae v. McRae*, 43 Misc.2d 252 (Sup. Ct. Queens County) a Queens Supreme Court judge declined to follow the Court of Appeals in *Mohrmann* and held in a (strained, dissent-citing) opinion relying heavily on that heavy yet threadbare cloak of the "interests of justice:" that the Legislature could never have intended to leave a mentally infirm spouse to the double whammy of either prosecuting or defending a divorce case while being unable to complete it, and linger in legal purgatorium instead. Notably, that case was limited to a divorce action brought on the grounds of adultery, and the *McRae* Court seemed expressly sympathetic to the fact-based circumstances before it.

MHL Article 81, enacted in 1992, and its progeny of subsequent case law have established a marriage where one of the parties lacked capacity can be void, voidable, and annulled even retroactively, with a disposition of the marital property subject to the strictures of DRL 236B. and, it is well settled that an action for a separation may be maintained by a personal representative or a guardian for a party.

But the question is far from settled on whether a divorce action can be commenced or maintained by a person judicially declared incompetent, even with the enactment of the no-fault divorce ground. The only Court of Appeals precedent on the issues seems to indicate that a guardian cannot maintain an action for divorce against the incompetent person's spouse. Given the *McRae* case, in fact, one could compellingly argue that since no-fault necessarily extracts "fault" from the issue of grounds, that is even more reason not to allow the commencement, continuation, or conclusion of a matrimonial matter.

In at least one case, the court denied the motion to dismiss (after one of the parties became incompetent) because it was not timely raised, nor asserted in the answer. Under CPLR 3211(a)(3), a motion to dismiss may be based on the ground that "the party asserting the cause of action has not legal capacity to sue" but that defense is waived if not preserved, see CPLR 3211(e), but reiterated that the *Mohrmann* decision remains controlling, *D.E. v. P.A.*, 52 Misc. 1220(A) (Sup. Ct. Westchester County).

Best practices, then? If you have any inkling that capacity may become an issue, assert lack of capacity to sue as an affirmative defense, or as a reply to a counterclaim, even in a divorce action. It may sound crazy . . . but then again, depending on who you represent, it just may be the basis between obtaining a dismissal or circling around in legal limbo, in perpetuity.

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