NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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COUNTY OF FAIRFAX CITY OF FAIRFAX



January 8, 2021

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**Re: *Howard C. Heu vs. Jeoung Ok Kim***
**Case No. CL-2020-0005312**

Dear Counsel:

The question before the Court is whether a power of attorney agent may maintain a divorce proceeding on behalf of his incapacitated principal, or must the incapacitated person obtain a guardian to maintain the divorce?

Howard Heu ("Husband") is maintaining his divorce case through the support of his brother acting as his agent under a power of attorney. His wife, Jeoung Kim ("Wife"), pleads in bar that he must first obtain a guardian since he is incapacitated.

Wife also pleads in bar that she did not desert her husband as alleged in the Amended Complaint because, as with Husband, she is also incapacitated and, thus, unable to form an intent

**OPINION LETTER**

to desert. Thus, she asks the Court, in the alternative, to at least dismiss Husband's fault-based desertion claim.

There is no specific controlling or persuasive authority in Virginia permitting or proscribing a power of attorney agent from maintaining a divorce on behalf of an incapacitated principal. However, Virginia identifies three relevant classes of persons charged with guiding the incapacitated—guardians, guardians *ad litem*, and power of attorney agents. Of the three, guardians are the only custodial category with express power to change a ward's marital status. The Court holds power of attorney agents may not maintain divorce litigation on behalf of their principals where the document establishing the power of attorney does not expressly grant the authority to do so.[1] It sustains Wife's Plea in Bar to the Amended Complaint.

The Court finds Wife lacked capacity to form an intent to desert her Husband. It sustains Wife's alternate grounds for dismissing the fault-based count of the Amended Complaint.

The Court will dismiss the Amended Complaint without prejudice. It declines Wife's request for attorney fees as her Plea in Bar raised an issue of first impression in the Commonwealth.

## I. BACKGROUND.

The parties married September 28, 1993. (Am. Compl. ¶ 4.) Sadly, they now agree Husband currently lacks mental decision-making capacity. (Am. Compl. ¶ 3; Def. PIB 3.) He suffered a stroke in 2012, affecting his abilities to walk, speak, and complete daily tasks. (Am. Compl. ¶ 9; Def. PIB ¶ 4.) He moved to a nursing home on February 25, 2020, after suffering a serious fall. (Am. Compl. ¶ 9.)

Husband executed a power of attorney appointing his brother, Simon Heu ("Mr. Heu"), as his attorney-in-fact on February 26, 2020. (Am. Compl. ¶ 10(D); Def. PIB ¶ 6.) Husband filed his Complaint for Divorce April 7, 2020. He filed an Amended Complaint for Divorce August 7, 2020, in his own name. In his Amended Complaint, he alleges he had capacity at the time he filed the original Complaint, but lost capacity thereafter. (Am. Compl. ¶ 3.)

Husband asserts in his Amended Complaint that Wife relocated to California on February 25, 2020, deserting him. (Am. Compl. ¶ 13.) Wife's daughter, Min Kim ("Ms. Kim"), and Ms. Kim's husband traveled from California to Virginia to assist with Husband's move to the nursing home. (Def. PIB ¶ 13.) Once she arrived, Ms. Kim determined Wife could not live independently

[1] Neither party offered into evidence Husband's power of attorney. So, the Court cannot conclude the power of attorney includes the power to divorce. At the plea in bar hearing, counsel represented the language of the power of attorney was only general. Therefore, the Court does not reach the question of whether an agent with a power of attorney that expressly grants him power to maintain a divorce for the principal may do so. *Commonwealth v. Swann*, 290 Va. 194, 196 (2015) (cases should be decided on the best and narrowest grounds available).

and required medical care. (*Id.*) Ms. Kim and her husband took Wife with them to California on February 26, 2020.[2] (*Id.* ¶ 14.)

Husband believes Wife had capacity to desert when she moved to California. However, Dr. Gary H. Oberlander ("Dr. Oberlander") performed an evaluation of Wife on July 8, 2020. (*Id.* ¶ 10; Def. Ex. 9C.) His evaluation encompassed "his review of recently performed medical evaluations including an Emergency Department assessment at UCLA Medical Center, reports from a consulting neurologist and gero-psychiatrist, and associated lab and imaging studies." (Def. PIB ¶ 10.) Dr. Oberlander determined Wife lacked capacity, including lacking "sufficient cognitive capacity to have formed intent to abandon her husband Howard Hu (sic), both at the present time and for at least the past 2 years." (*Id.* ¶ 11; Def. Ex. 9C at 4.)

## II. A GENERAL POWER OF ATTORNEY DOES NOT PERMIT AN AGENT TO MAINTAIN A DIVORCE ACTION FOR AN INCAPACITATED PERSON.

The Uniform Power of Attorney Act ("POAA") governs an agent's authority under a principal's executed power of attorney. VA. CODE ANN. 64.2-1600, *et. seq*. A power of attorney "means a writing or other record that grants authority to an agent to act in the place of the principal[.]" VA. CODE ANN. 64.2-1600. The agent's statutory duties include acting in the best interest of a principal and acting in good faith, among other responsibilities. VA. CODE ANN. § 64.2-1612.

The POAA directly addresses issues of "personal and family maintenance" where one would expect to see the power of an agent to maintain a principal's divorce. VA. CODE ANN. § 64.2-1634(A). However, while the POAA authorizes a myriad of family-related powers, such as "[p]erform[ing] the acts necessary to maintain the customary standard of living of the principal, the principal's spouse" and other enumerated individuals, and paying health care expenses and child support, it is silent on an agent's authorization relative to divorce.[3] *See id.*

In contrast to the POAA, Virginia's guardianship statutes expressly grant guardians the power to seek a divorce for their wards—albeit with court approval. "A guardian shall be required to seek prior court authorization . . . *to initiate a change in the person's marital status*." VA. CODE ANN. § 64.2-2019(D) (emphasis supplied). Given the POAA's silence as to divorce in § 64.2-1634, versus the express power for guardianships granted by § 64.2-2019(D), the Court infers the General Assembly intended for guardians to have the power to change an incapacitated person's marital status, but not POAA agents.

The General Assembly's policy is logical. Before a Court grants a guardianship petition, it follows important conditions precedent. First, the Court must appoint a guardian *ad litem* to

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[2] The exact date appears to be in dispute. However, whether Wife went to California on February 25 or February 26 does not affect the outcome of this case.

[3] The POAA does mention termination of an agent upon the filing of a divorce action between the agent and the principal. However, that is not applicable to the facts of this case.

represent the respondent. VA. CODE ANN. § 64.2-2003(A).[4] The duties of the guardian *ad litem* are to visit the respondent, advise the respondent of his or her rights, recommend if they need legal counsel, investigate "the petition and evidence," and appear at proceedings. VA. CODE ANN. § 64.2-2003(B). The guardian *ad litem* also provides a report including their findings and recommendations, such as addressing whether the respondent even needs a guardian and the "propriety and suitability of the person selected as guardian or conservator" after considering various factors. VA. CODE ANN. § 64.2-2003(C). The guardian *ad litem* acts to protect the interests of the respondent and ensure that whoever is appointed to act as guardian will carry out the duties and responsibilities. *See* VA. CODE ANN. § 64.2-2003.

Second, the Court will actually adjudicate the competency of the respondent. VA. CODE ANN. § 64.2-2004(A). The respondent can demand a jury on the issue of competency, Va. Code Ann. § 64.2-2007(A), something foreign to a divorce trial.

Third, the Court will require the guardian to file annual reports concerning the respondent with the department of social services for review. VA. CODE ANN. § 64.2-2020. It is illogical to conclude one may easily bypass these protections by using the POAA.

In the present case, Husband has no guardian. Instead, he conferred authority on Mr. Heu to act as his attorney-in-fact. However, a power of attorney agent lacks specific statutory authority to maintain a change in Husband's marital status. Only a guardian has the express statutory authority to make a change in the marital status of an incapacitated person. VA. CODE ANN. § 64.2-2019(D). And even then, the court must authorize the guardian to seek the divorce. Because Husband has no guardian, there has been no investigation and report by a guardian *ad litem* to assess his capacity and need for a guardian, which is a prerequisite to the guardianship appointment. While the parties agree Husband is incapacitated, there has been no judicial finding on the matter. For Husband to maintain an action for divorce, the Court holds he may do so through a guardian but may not do so through his attorney-in-fact acting under a general power of attorney.

Husband raises the point that he had capacity when he first filed for divorce and lost capacity only prior to filing his Amended Complaint for Divorce. It is true the statutory provision mandating a guardian to seek Court permission to initiate a divorce is silent as to the role of a court when a litigant loses capacity after initiation. VA. CODE ANN. § 64.2-2019(D) ("A guardian shall be required to seek prior court authorization to . . . *initiate* a change in the person's marital

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[4] Unlike petitions for guardianships, guardians *ad litem* are not required for all suits involving the incapacitated. "[I]n any suit wherein a person under a disability is a party and is represented by an attorney-at-law duly licensed to practice in this Commonwealth, who shall have entered of record an appearance for such person, no guardian ad litem need be appointed for such person unless the court determines that the interests of justice require such appointment; *or unless a statute applicable to such suit expressly requires that the person under a disability be represented by a guardian* ad litem." VA. CODE ANN. § 8.01-9(B) (emphasis supplied). A petition for a guardianship is such a suit that requires representation by a guardian *ad litem*. "On the filing of every petition for guardianship or conservatorship, the court shall appoint a guardian ad litem to represent the interests of the respondent." VA. CODE ANN. § 64.2-2003(A).

status.") (emphasis supplied). However, Virginia has a long-standing public policy favoring marriage in the absence of fault. This is exemplified in Title 20 of the Virginia Code whereby parties seeking a divorce on application must "have lived separate and apart without any cohabitation and without interruption for one year," or when couples with no minor children and a separation agreement "have lived separately and apart without cohabitation and without interruption for six months." VA. CODE ANN. § 20-91(A)(9)(a). In both instances, whether the parties have minor children or not, the couple seeking a divorce on application after living separate and apart must necessarily undergo a waiting period before the Court can grant the divorce. It seems obvious the purpose of the waiting period is to enable the couple to reflect and potentially reconcile before terminating their marriage. An incapacitated person cannot meaningfully participate in this "cooling off period." It is for this reason the Court concludes a guardian is needed to both initiate and maintain a divorce. This ruling does not bar a person who becomes incapacitated from divorcing. If that person would benefit from a divorce it is reasonable to expect a petitioner acting on his behalf to seek the appointment of a court-approved guardian who, in turn, may seek authorization from a court to initiate a divorce for his ward. In the face of this policy, it seems ridiculous to conclude an incapacitated person can maintain a divorce that he could not have initiated with his then-present state of incapacity.

Other than looking to the Virginia Code, the parties did not offer, and the Court did not find, controlling or persuasive Virginia authority on the issue of whether a power of attorney agent may maintain a divorce action for his principal. Rather, both argue their interpretations of the Virginia statutes governing powers of attorney and guardianships to fill any express statutory silence. So, the Court looked to other states for guidance. At least two do not permit a power of attorney agent to seek a divorce on behalf of a principal. One permits it in a very narrow circumstance, but the case is distinguishable.

In South Carolina, a wife by her attorney in fact sought legal separation. *Brewington v. Brewington*, 280 S.C. 502, 503 (S.C. Ct. App. 1984). The husband objected to an attorney in fact bringing the separation action. *Id.* at 505. He compared separation to divorce and asserted that divorce "cannot be prosecuted by a guardian or next friend in the name of an insane spouse." *Id.* The Court held "an agent possessed of a valid and durable power of attorney may institute in the name of a principal an action for a legal *separation* and related equitable relief." *Id.* at 506 (emphasis supplied). However, the Court also noted, "We deem inappropriate the analogy which the husband draws to an action for *divorce*. An action for a legal separation is distinguishable from an action for divorce in that a legal separation does not terminate the marriage relation but merely suspends it and modifies marital duties and obligations." *Id.* (emphasis supplied). Even though the Court held that the attorney in fact could maintain the action for separation, the Court specifically qualified how the legal separation was different than an action for divorce would be. An attorney in fact cannot prosecute the divorce in that state.

In New Jersey, a court pointed out practical difficulties of a power of attorney agent prosecuting a divorce on behalf of his principal—such as to who testifies. *Marisco v. Marisco*, 436 N.J. Super. 483, 495 (N.J. Super. Ct. Ch. Div. 2013). It then distinguished such a case from one prosecuted by a court-approved guardian, clearly identifying the latter as the better practice.

*See Kronberg v. Kronberg*, 263 N.J.Super. 632 (N.J. Super. Ct. Ch. Div. 1993). *Marisco* pointed favorably to key protections of a guardian identified by *Kronberg*: (1) a judicial finding of incompetence; and (2) the Court appointing the guardian rather than the party himself. *Marisco*, 436 N.J. Super. at 492. Read together, these cases show a preference for divorce prosecution on behalf of incapacitated persons by a guardian over a power of attorney agent.

Oklahoma recently took a different view, holding a power of attorney agent could execute a consent divorce decree on behalf of his principal. *In re Marriage of Mahoney*, 412 P.3d 115 (Okla. Civ. App. 2017). In that case, the agent had a broad power under the power of attorney. He proved to the court his principal directed the agent to sign the divorce decree while the principal had capacity. *Id.* at 118. The Court distinguishes *Mahoney* in three ways. First, the *Mahoney* parties originally consented to the divorce decree.[5] *Id.* at 117. Here, the parties do not. Second, the parties here are both incapacitated.[6] In *Mahoney* that did not appear to be the case—the former wife had capacity. This distinction is important. With both parties incapacitated, extra protection for the parties is important to protect them. Third, in *Mahoney* the evidence showed the principal directed the agent to sign the consent decree, his former wife endorsed it, and the Oklahoma court entered it. This all happened while the former husband had capacity. *Id.* at 118. Here, the divorce is not final, and the Court did not receive credible evidence that Husband wanted to *maintain* his divorce. Even if the facts in this case were more like *Mahoney*, the Court is unpersuaded that one may bypass the protection of Virginia's detailed guardianship procedures by using a power of attorney to secure a divorce for the reasons discussed *supra*.

Husband may not proceed with his divorce case by using his brother as an agent under a general power of attorney. Based on the evidence before the Court, he must first obtain a guardian.

## III. WIFE IS INCAPACITATED AND COULD NOT FORM THE INTENT TO DESERT HUSBAND.

Husband seeks a fault-based divorce based on Wife's alleged desertion of him. (Am. Compl. 4.) Wife maintains that she is and was incapacitated and therefore was unable to form the intent to desert Husband on September 25, 2020. (Def. PIB ¶ 9-11.) The Court finds, based on the report of Dr. Oberlander, that Wife was incapacitated at the time of the alleged desertion. Therefore, she could not and did not form the requisite intent to desert Husband, and the fault-based cause of action must be dismissed.

Dr. Oberlander's report notes his consideration of an assessment from UCLA Medical Center, reports from a neurologist and gero-psychiatrist, labs, imaging studies, and a Skype

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[5] The former wife clearly changed her mind about the decree after the court entered it. She brought a motion to vacate the decree when she learned that her former husband's power of attorney agent signed it instead of her former husband. However, unlike in the present case, she initially asked the court to enter the decree.

[6] The Court accepts both parties' agreement that Husband currently lacks capacity for the purposes of this opinion. It finds Wife lacked capacity, *infra* § III.

interview of Wife. (Def. Ex. 9C.) Dr. Oberlander concluded, "to a reasonable degree of medical probability," that Wife has cognitive deficits and she "lacks sufficient cognitive capacity to have formed intent to abandon her husband Howard Hu (sic), both at the time and for at least the past 2 years." (*Id.* at 4.) The Court finds Dr. Oberlander's report and testimony[7] to be reliable. The Court finds Wife is incapacitated and lacked the intent to desert her Husband on or about September 25, 2020. The Court sustains Wife's Plea in Bar as to Wife's lack of capacity.

## IV. ATTORNEY FEES.

Wife asks the Court to order Husband to reimburse her for the attorney fees necessary for her to have brought her successful Plea in Bar. However, considering the relevant issues presented in her Plea in Bar are matters of first impression in the Commonwealth, and seeing no evidence of financial hardship by either party, the request will be denied. Each party shall pay their own attorney fees.

## V. CONCLUSION.

An incapacitated person may typically divorce in Virginia once a court ordered guardian represents his interests and obtains court permission to divorce. An agent holding a general power of attorney cannot effectively bypass the guardianship provisions. The Court sustains Wife's Plea in Bar as to Husband's inability to maintain the action through a power of attorney, and as to Wife lacking capacity to abandon Husband. The Amended Complaint for Divorce will be dismissed. The Court declines Wife's request for attorney fees.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

[7] The witness did not testify live in Court. The parties presented his deposition as evidence. (Def. Ex. 9A.)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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| Howard C. Heu<br>Plaintiff, | ) | |
| v. | ) | CL-2020-0005312 |
| Jeoung Ok Kim<br>Defendant. | ) | |

**FINAL ORDER**

This matter came before the Court December 2, 2020, upon Defendant Jeoung Kim's Plea in Bar. And, for the reasons stated in the Court's Opinion Letter dated January 8, 2021, which is incorporated herein by reference, it is

**ORDERED** Defendant's Plea in Bar is SUSTAINED as to Plaintiff's inability to maintain this action through a power of attorney;

**ORDERED** Defendant's Plea in Bar is SUSTAINED as to Defendant lacking capacity to abandon Plaintiff;

**ORDERED** Defendant's request for attorney fees is DENIED; and

**ORDERED** the Amended Complaint for Divorce is DISMISSED WITHOUT PREJUDICE.

This Order is final.

Entered this 8th day of January 2021.

[redacted]

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD OF THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA. ANY ENDORSEMENT OBJECTIONS ARE DUE WITHIN 10 DAYS.