IN THE DISTRICT COURT FOR RED WILLOW COUNTY, NEBRASKA

ALICE MARIE HOCKEMEIER, by and through her next friend, George Fritz,	)	Case No. 15093 Docket 45 Page 53
Petitioner,	)	
vs.	)	BRIEF IN SUPPORT OF RESPONDENT'S DEMURRER
HENRY HOCKEMEIER,	)	
Respondent.	)	

FACTUAL SUMMARY

The original Petition in this case was captioned "Alice Marie Hockemeier, by and through her attorney-in-fact, George Fritz." Upon Sally Rasmussen's motion, the caption has been changed to "Alice Marie Hockemeier, by and through her next friend, George Fritz." Therefore, it is clear that the Petitioner in this action is George Fritz, purporting to act on Alice Hockemeier's behalf.[1] There has been no allegation (nor evidence) that George Fritz has filed the present action at Alice Hockemeier's request or that any court has appointed him to proceed with this action.

The Petition contains the standard allegations for legal separation. It then adds, in Paragraph 6, that "Petitioner is

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[1] Attorney Sally Rasmussen signed the Petition in this case as "Attorney for Petitioner" and the Petition was verified by George Fritz. It is clear that the "Petitioner" is George Fritz purporting to act on behalf of Alice Hockemeier. Therefore, Ms. Rasmussen represents George Fritz. Subsequently, Ms. Rasmussen has been acting as guardian ad litem for Alice Hockemeier (as reflected on her Motion to Amend Case Caption). Additionally, Ms. Rasmussen still purports to be representing Alice Hockemeier as her attorney (as reflected on the latest proposed order submitted to the court prepared by Ms. Rasmussen "Attorney for Petitioner, Alice Hockemeier"). In light of the triple role played by Ms. Rasmussen in these proceedings, I will be referencing her by name as I am unsure what capacity she has been attempting to act in any particular pleading.

mentally incompetent", and, in Paragraph 10, that Petitioner gave George Fritz a power of attorney (which was attached as an exhibit to the Petition). The referenced power of attorney purports to authorize George Fritz to manage Alice Hockemeier's affairs and lists examples of financial and business transactions which he is authorized to do. There is no mention whatsoever, of any authority to file suit for divorce or any similar type of transaction. George Fritz is a son of Alice Hockemeier.

Respondent's Responsive Pleading in the above-captioned case contains a demurrer in Paragraph 6, alleging that Petitioner does not possess legal capacity to sue.

ISSUE

Whether George Fritz may maintain an action for legal separation as next friend of Alice Hockemeier whom he alleges to be mentally incompetent.

ARGUMENT

The Nebraska Supreme Court has clearly addressed the question of whether a self-appointed next friend may maintain an action for divorce on behalf of a mentally incompetent spouse. He may not. This is clearly supported by the the court's decision in *Kuta v. Kuta*, 154 Neb. 263, 47 N.W.2d 558 (1951). In the *Kuta* case, an action for divorce was filed by Stanley Kuta personally and by Anton Kuta, his next friend. At the time of filing the petition, Stanley Kuta was under guardianship (his guardian being someone

other than Anton Kuta). The defendant wife argued that neither Stanley nor Anton could maintain the action. The court held that Anton did not possess authorization to maintain the action.

> As regards the duty of a guardian, section 38-502, R. S. 1943, provides: "* * * He shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend." There is nothing in the record to indicate that Anton Kuta had been appointed as either guardian or next friend of plaintiff for the purpose of representing him in this action. Therefore under the terms of this statute the action was improperly instituted.

Id. at 265-66. (The wife, however, failed to raise the issue of lack of capacity to sue by means of a demurrer, and therefore was deemed to have waived the defect.)

The question of whether even a court-appointed guardian (who clearly has more authority than a self-appointed next friend) may initiate a divorce action had not been addressed by the Nebraska Supreme Court. However, it has been addressed by numerous other state courts and a majority of those states have determined that not only is a next friend precluded from instituting a divorce on behalf of an incompetent, but a guardian is precluded as well.

Florida has held that in the absence of a statute specifically authorizing a suit for divorce by a guardian on behalf of an insane ward, no such suit may be brought (*Scott v. Scott*, 45 So.2d 878 (Florida 1950)) or continued (*Wood v. Beard*, 107 So.2d 198 (Florida 1958).

> . . . the right to maintain the suit is of such a strictly personal and volitional nature that it must, of necessity, remain personal to the spouse aggrieved by the acts and conduct of the other.

Scott at 879.

> . . . divorce is the creature of and is governed by legislation. 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. [cites omitted] . . . The majority rule as enunciated is deeply embedded in the concept that a marriage relationship is exclusively personal in nature and that it may be dissolved only by the voluntary consent and the comprehending exercise of the will of an injured spouse.

Wood at 199 (emphasis added).

The Indiana Supreme Court has also held that a divorce cannot be maintained by a party other than a spouse absent specific statutory authority to do so.

> The right to divorce is not a common law right, but depends upon legislative enactments. [cites omitted] Marriage is not only a civil contract, but it creates a status or relation. 'With this status or relation courts can interfere only to the extent and in the manner prescribed by statute.' [cite omitted]

State ex rel. Quear v. Madison Circuit Court, 99 N.E.2d 254, 256 (Ind. 1951)

The Ohio Supreme Court has followed the same reasoning.

> At the outset, it must be kept in mind that marriage is a civil contract, a personal and human relationship, as well as an institution. It cannot be created except by the consent of the parties. It cannot be dissolved except by the consent and and intelligent exercise of the will of one of the parties. . . . For this reason, a valid petition for divorce cannot be filed for an insane or incompetent plaintiff by a next friend or guardian, for in such instance the will and decision exercised would be that of the next friend or guardian and not that of the real party in interest. Such next friend or guardian could not know the real will and decision of an insane or incompetent plaintiff in a divorce proceeding. Such a decision is entirely and exclusively personal.

Shenk v. Shenk, 135 N.E.2d 436, 438 (1954).

Numerous other states, in cases too numerous to set out more fully in this brief, have held to the majority rule that neither a guardian nor a next friend can maintain a divorce action on the behalf of an incompetent. *Cox v. Armstrong*, 221 P.2d 371 (Colo. 1950); *Worthy v. Worthy*, 36 Ga. 45 (1867); *Phillips v. Phillips*, 45 S.E.2d 621 (Ga. 1947); *Sternberg v. Sternberg*, 46 S.E.2d 349 (Ga. 1948); *Huguley v. Huguley*, 51 S.E.2d 445 (Ga. 1949); *Bradford v. Abend*, 89 Ill. 78 (1878); *Iago v. Iago*, 48 N.E. 30 (Ill. 1897); *Pyott v. Pyott*, 61 N.E. 88 (Ill. 1901); *In re Marriage of Drews*, 503 N.E.2d 339 (Ill. 1986), cert den and app dismd, 483 U.S. 1001, 107 S.Ct. 3222; *In re Marriage of Kutchins*, 482 N.E.2d 1005 (Ill. 1985); *Pape v. Byrd*, 555 N.E.2d 428 (Ill.App. 1990); *Mohler v. Shank's Estate*, 61 N.W. 981 (Ia. 1895); *Birdzell v. Birdzell*, 6 P. 561 (Kan. 1885); *Fourth Nat'l Bank v. Diver*, 289 P. 446 (Kan. 1930); *Johnson v. Johnson*, 170 S.W.2d 889 (1943); *Freeman v. Freeman*, 237 S.E.2d 857 (N.C. 1977); *Boyd v. Edwards*, 446 N.E.2d 1151 (Ohio 1982); *Jack v. Jack*, 75 N.E.2d 484 (Ohio App. 1947); *Prather v. Prather*, 1 Ohio Ops 188, 33 Ohio L. Abs. 336 (1934); *Scoufos v. Fuller*, 280 P.2d 720 (Okla. 1954); *State ex rel. Robedeaux v. Johnson*, 418 P.2d 337 (Okla. 1966); *Murray v. Murray*, 426 S.E.2d 781 (1993).

Although a few states have declined to follow the majority rule, it has been for reasons inapplicable to the case at hand, including specific statutory authorization (which does not exist in Nebraska). For example, in Massachusetts, suit for divorce on behalf of an insane person by his guardian or next friend appointed

by the court for such purpose was expressly authorized by statute. *Garnett v. Garnett*, 114 Mass. 379 (1874). Arizona and New Mexico have held that a guardian of an incompetent could petition for dissolution of marriage of their ward because of the broad powers granted to guardians by statute. *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674 (Az.App. 1993); *Nelson v. Nelson*, 878 P.2d 335 (N.M. 1994). These holdings, however, are clearly inapplicable to a next friend petitioning for dissolution as there is no statutory nor rule authority for such. Furthermore, in both cases, the court placed special emphasis on concern for the incompetent's values regarding the permanence of marriage vows, and the *Nelson* court noted that the authority of a guardian should not be used to further the inheritance interests of potential heirs (unless the spouse would want that) or be affected by the guardian's personal antipathy toward the other spouse. California has allowed a guardian to bring a dissolution action if it is established that the spouse is capable of exercising judgment and expressing the wish that the marriage be dissolved on account of irreconcilable differences, and that the spouse expressed such a wish. *In re Marriage of Higgason*, 110 Cal.Rptr. 897, 516 P.2d 289 (1973). Again, this holding is clearly inapplicable to the case at hand.

It is abundantly clear that even a court-appointed guardian cannot file a divorce action except in a limited number of states under limited circumstances not applicable to the case before the court. It would require an incomprehensible leap of logic to find that George Fritz, a self-appointed next friend, (and incidently,

a potential heir of Alice Hockemeier, an 87-year-old incompetent spouse) has the right to file an action for legal separation "on Alice's behalf".

Respondent does not dispute that generally, in civil actions, a next friend may maintain an action on behalf of a mental incompetent. Ms. Rasmussen's brief contains references to cases supporting this general rule. Ms. Rasmussen misses the issue, however. An action for divorce or legal separation is a distinctly different matter than other civil cases. It is far too personal to be pursued by a person who is not a party to the marriage itself, especially a person that has not been appointed by the court for that purpose.

Existing Nebraska statutory law supports the position that actions relating to the marital state are different in nature than other civil cases insofar as capacity to sue is concerned. Specifically, *Neb. Rev. Stat.* § 42-375 allows an annulment action to be brought "on behalf of persons under a disability . . . by a parent or adult next friend." No parallel provision for actions for divorce or legal separation are contained within Nebraska statutory law. It is apparent that the legislature deemed it necessary to provide specific statutory authority for a parent or next friend to interfere in the marriage relationship for purposes of an annulment, but for no other purpose, and that the general rule regarding capacity to sue by next friend advanced by Ms. Rasmussen is not applicable to the marriage relationship.

Where lack of capacity to sue appears on the face of the petition, advantage must be taken thereof by the opposing party by demurrer. *Kuta*, supra, at 266; *Neb. Rev. Stat.* § 25-806(2).

CONCLUSION

The petition in this case has been brought by George Fritz as next friend of Alice Hockemeier. The Nebraska Supreme Court, as set forth in the *Kuta* case, has held that a next friend lacks capacity to sue for divorce. This holding has not been overturned by either direct holding or implication, and is in fact supported by a wealth of caselaw in other jurisdictions. There is also no indication that the reasoning applied in the *Kuta* case would not be equally applicable to an action for legal separation. Therefore, the Court has no alternative but to dismiss this case for the reason that the Petitioner, George Fritz, does not possess legal capacity to sue.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief was delivered by FAX and by first-class U.S. Mail, postage prepaid, this ___ day of June, 1996, to:

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IN THE DISTRICT COURT FOR RED WILLOW COUNTY, NEBRASKA

ALICE MARIE HOCKEMEIER, by and through her next friend, George Fritz,	)	Case No. 15093 Docket 45 Page 53
Petitioner,	)	
vs.	)	BRIEF IN SUPPORT OF MOTION TO VACATE ORDER
HENRY HOCKEMEIER,	)	
Respondent.	)	

FACTUAL SUMMARY

Respondent was served with a summons and petition in this case on April 24, 1996. The following day, Sally Rasmussen mailed copies of a Motion to Appoint Guardian Ad Litem and Notice of Hearing, and Motion for Temporary Support and Fees and Notice of Hearing, directly to Respondent, even though she already had personal knowledge that Respondent was represented by Donald H. Bowman. Obviously, on April 25th, Respondent's attorney had not had an opportunity to enter a formal appearance in the matter. The first time Mr. Bowman became aware that a hearing had been held on May 9, 1996 was on May 22, 1996 when he received a copy of the signed Order with a cover letter from Sally Rasmussen.

The Order entered on May 9, 1996 had the following components: (1) appointment of Petitioner's attorney, Sally Rasmussen, as guardian ad litem for Alice Hockemeier; (2) appointment of a guardian ad litem for Respondent; and (3) order to Respondent's guardian ad litem to produce certain financial records to Sally Rasmussen by May 28, 1996 at 4:00 p.m.

It would be proper at this juncture to correct a factual misstatement in "Petitioner's Brief".[1] On page 2, paragraph 2, the brief states ". . . in his [Respondent's] Responsive Pleading denied his need for a guardian ad litem." No allegation has been made within the petition or any subsequent pleading that Respondent is mentally incompetent or mentally ill, nor has any motion been filed with the court to appoint a guardian ad litem for the Respondent. Respondent did not "den[y] his need for a guardian ad litem" in his responsive pleading because such issue was never raised.

Respondent's Responsive Pleading contained a demurrer alleging that Petitioner does not have the capacity to sue. For the reasons set forth in Respondent's Brief in Support of Respondent's Demurrer, Respondent contends that the present action be dismissed for lack of subject matter jurisdiction. Upon ordering dismissal of the action, the May 9th order would automatically be vacated and further argument on its merits would be moot. However, even if the Court would overrule Respondent's Demurrer, it is Respondent's contention that the May 9th order is improper in several respects and must be vacated.

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[1] As previously noted in Respondent's Brief in Support of Respondent's Demurrer, Attorney Sally Rasmussen is attempting to play a triple role in the present proceedings (attorney for George Fritz, attorney for Alice Hockemeier, and guardian ad litem for Alice Hockemeier), yet references all of her motions and arguments in terms of the "Petitioner." It is obviously unclear whose interests she is representing at any given time, therefore, throughout this Brief, her actions will be referenced by name or in quotations as she has phrased it.

Even absent the notice problem set forth in Mr. Bowman's affidavit, the Court was without authority to enter the May 9th order in the following respects. First, the court was without authority under the circumstances to appoint a guardian ad litem for either Henry Hockemeier or Alice Hockemeier. Second, even if the court properly appointed a guardian ad litem for Alice, it improperly appointed George Fritz' attorney as Petitioner's guardian ad litem. Third, the court abused its discretion in ordering production of documents by Respondent's guardian ad litem without compliance with applicable discovery rules.

ARGUMENT

I.

THE COURT IS WITHOUT AUTHORITY TO APPOINT A GUARDIAN AD LITEM FOR EITHER PARTY TO A DIVORCE ACTION WHEN NO ALLEGATION HAS BEEN MADE, NOR PROOF GIVEN, THAT THE SPOUSE IS MENTALLY ILL.

The Nebraska legislature has set forth the circumstances under which a guardian ad litem should be appointed to a party to a divorce action in *Neb. Rev. Stat.* § 42-362:

> When the pleadings or evidence in any action pursuant to sections 42-347 to 42-379 indicate that either spouse is mentally ill, a guardian ad litem shall be appointed to represent his interests . . .

The purpose of § 42-362, and the provision for appointment of a guardian ad litem in a divorce or separation case, is for someone to represent the mentally ill spouse's interests and to ensure the support and maintenance of a mentally ill spouse, <u>if</u> such support is in that spouse's best interest.

> [*Neb. Rev. Stat.* § 42-362] empowers the court to order payment of such support and maintenance to a mentally ill spouse 'as it may deem necessary and proper, giving due consideration to the property and income of the parties.' To that extent § 42-362 parallels the alimony contemplated by § 42-365 but provides an additional specific ground to be considered, the mental illness of a spouse.

Black v. Black, 223 Neb. 203 (1986).

There has been no allegation, much less evidence, that Henry Hockemeier is mentally ill. Even though a court may have inherent powers to appoint a guardian ad litem to represent an incapacitated person appearing before the court (*In re Interest of A.M.K.*, 227 Neb. 888 (1988); *In re Guardianship of Jonas*, 211 Neb. 397 (1982)), it cannot do so upon a mere whim. No allegation nor evidence was before the court to indicate that Henry Hockemeier is in any manner mentally deficient.

It is instructive to note a comparison statute, *Neb. Rev. Stat.* § 30-2222(4), which specifically allows a court, in a formal trust or estate proceeding, to appoint a guardian ad litem to represent an incapacitated person if the court determines that representation of his or her interest would otherwise be inadequate. That statute requires the court to "set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding." It is fair to require the same factual findings as part of the record for appointing a guardian ad litem in a divorce case.

In any event, Ms. Rasmussen's Motion to Appoint Guardian Ad Litem invokes the authority of *Neb. Rev. Stat.* § 42-362. The attached affidavit, the only evidence presented in support of the

motion, contains no allegation that Alice Hockemeier is mentally ill. On that fact alone, the court is without authority to appoint a guardian ad litem. Furthermore, it is evident from the contents of the affidavit that a guardian ad litem was not sought for the purpose set forth in § 42-362--to represent her interests. A guardian ad litem is requested to "conduct discovery to determine whether Henry Hockemeier has the financial means to assist Alice Hockemeier in obtaining and maintaining the necessaries of life". An attorney for a party to a divorce action is certainly entitled to pursue discovery of relevant records through appropriate discovery methods. No guardian ad litem is required for that purpose. If in fact the court decides that Alice Hockemeier needs a guardian ad litem, it must not predetermine the actions that the guardian ad litem must take. Alice Hockemeier's guardian ad litem must be free to pursue that course of conduct which he independently determines to be in Alice's best interest.

Because no allegation nor proof of mental illness has been presented to the court, the court must vacate that portion of its May 9th order which appoints a guardian ad litem for Henry Hockemeier and a guardian ad litem for Alice Hockemeier.

II.

THE DUTIES AND RESPONSIBILITIES OF A GUARDIAN AD LITEM ARE NOT COEXTENSIVE WITH THOSE OF AN ATTORNEY AND THEREFORE THE SAME PERSON CANNOT CANNOT ACT AS BOTH PETITIONER'S ATTORNEY AND PETITIONER'S GUARDIAN AD LITEM.

Assuming, for the sake of argument, that a guardian ad litem should be appointed for Alice Hockemeier, Ms. Rasmussen should not have been appointed to serve in that capacity.

The Nebraska Supreme Court has discussed the duties and responsibilities of a guardian ad litem of a minor in *Orr v. Knowles*, 215 Neb. 49 (1983). The court acknowledged that Nebraska law does not contain a definitive statement of the duties or role of a guardian ad litem, and referred to statutes setting forth the circumstances for appointing a guardian ad litem, and explanations from secondary legal sources.

> It seems from these statutes and this general discussion that the role of a guardian ad litem is something akin to the role of an attorney acting as legal counsel, but it is somewhat different. The Code of Professional Responsibility establishes that an attorney must zealously represent the wishes of his or her client. See Canon 7. It is not the role of an attorney acting as counsel to independently determine what is best of his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law. EC 7-7.

Id. at 53. The court went on to state that the duties and responsibilities of a guardian ad litem were not coextensive with those of an attorney.

The differing roles of an attorney and guardian ad litem were also addressed in J. Caporale's dissent in *In re Interest of A.M.K.*, 227 Neb. 888 (1988). The case was in the context of a parental termination proceeding where mentally deficient parents were represented by the same person as both attorney and GAL. He

refers to the *Knowles* case and compares the reasoning to the case at hand:

> Just as an independent investigation might reveal a minor's wish to have an abortion [the *Orr* case] not to be in her best interests, so, too, might an independent investigation reveal a mentally ill or deficient parent's wish to preserve his or her status as a parent not to be in his or her best interests. The question of such a parent's best interests is different than what is in the best interest of his or her child, the only interest which the juvenile court may adjudicate.

A.M.K. at 893.

It is clear that the attorney and guardian ad litem of a spouse who is party to a dissolution action have distinctly different roles to play. If this were not the case, there would be no reason whatsoever for *Neb. Rev. Stat.* § 42-362 to provide for the appointment of a guardian ad litem. The guardian ad litem's purpose is to substitute his or her judgment for that of the mentally ill spouse, determining what course of action is in the spouse's best interest. The attorney, on the other hand, is to act strictly on his or her client's wishes, regardless of the consequences the attorney may foresee for the client.
An attorney is not allowed to make independent determinations of "best interest" for his or her client.

Ms. Rasmussen already represents George Fritz, and pursuant to the order entered on May 9, 1996, Ms. Rasmussen was appointed to also serve as guardian ad litem for Alice. The purpose of having a guardian ad litem for Alice is to ensure that an independent person to determine what course of action is in Alice's best interest. Ms. Rasmussen represents George Fritz and is already aligned with his position in this matter which may or may not be

Alice's position. Ms. Rasmussen is therefore unable to make an objective determination of whether this action for legal separation in its entirety, or any specific action in the course of the proceeding, is in Alice's best interest. George Fritz, as Alice's son, clearly has a financial interest in these proceedings independent of Alice's wishes. It is clear that George Fritz' interest in this action is not necessarily the same as Alice's. Therefore, Ms. Rasmussen's representation of George Fritz precludes her from acting as guardian ad litem for Alice due to a conflict of interest (see Disciplinary Rules 5-101, 5-102, 5-105, and 5-107). The portion of the May 29th order must be vacated insofar as it appoints Ms. Rasmussen to act as Alice Hockemeier's guardian ad litem.

III.

THE COURT IS WITHOUT AUTHORITY TO REQUIRE A GUARDIAN AD LITEM FOR RESPONDENT TO PROVIDE PETITIONER WITH DOCUMENTS WITHOUT A REQUEST FOR PRODUCTION OF DOCUMENTS.

The Nebraska Supreme Court has promulgated discovery rules applicable to all civil cases. Rule 26(a) sets forth certain enumerated methods for obtaining discovery:

> **Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission.

Nebraska Discovery Rules for All Civil Cases, Rule 26(a).

In order to obtain documents from an opposing party, the rules require that a request be made upon the opposing party and the party upon whom the request is made shall have 30 days after service of the request, or 45 days after service of summons upon that party. See Discovery Rule 34.

Respondent has not been served with a Request for Production of Documents, nor any other discovery requests, in accordance with applicable discovery rules. Although the court may allow a shorter time for production of discovery materials, it cannot do so with the proper formalities being adhered to.

Ms. Rasmussen has not complied with the applicable discovery rules. Furthermore, she has attempted to dictate the actions of the guardian ad litem appointed for Respondent. Even if the court could properly determine that Henry Hockemeier is in need of a guardian ad litem, it may not predetermine that guardian's actions. Therefore, the court should vacate that portion of the Order directing production of financial records to Sally Rasmussen by May 28, 1996.

WHEREFORE, Respondent respectfully requests the Court to vacate its Order entered on May 9, 1996 for the reasons stated above.

RESPECTFULLY SUBMITTED,

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The undersigned hereby certifies that a copy of the foregoing Brief was delivered by FAX and by first-class U.S. Mail, postage prepaid, this ___ day of June, 1996, to:

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