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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000372-MR

ELMER RIEHLE — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE LINDA RAE BRAMLAGE, JUDGE
ACTION NO. 13-CI-01335

CAROLYN MOLLOY RIEHLE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: Elmer Riehle appeals from a Boone Circuit Court order dismissing his petition for dissolution of marriage. The issue is whether Elmer, who has been adjudicated to be disabled and incompetent, may divorce his wife, Carolyn, who is also his guardian and conservator.

Elmer and Carolyn were married in 1983. Elmer, who is eighty-seven years of age, is currently retired and receives a monthly Social Security pension of approximately $200. Carolyn, who is seventy-one, is employed as a nurse, earning approximately $50,000 per year. At the time he filed the petition, Elmer was eighty-five years of age and Carolyn was sixty-nine.

In 2008, Carolyn filed a guardianship petition in Boone District Court, seeking to have Elmer declared incompetent. Carolyn alleged that Elmer had squandered thousands of dollars of marital funds on internet overseas pyramid schemes. Following a jury trial, the Boone District Court deemed Elmer to be disabled and appointed Carolyn as his guardian and conservator.

Apparently resentful of the financial controls placed upon him, Elmer unsuccessfully sought to have the disability determination and Carolyn's guardianship dissolved on two subsequent occasions, including a second jury trial in 2010. Following this second trial, Carolyn was confirmed and re-appointed as his guardian and conservator, without limitation and without an expiration date.

Elmer then filed a petition for dissolution of marriage in August of 2013, naming Carolyn in her individual capacity as respondent. The trial court entered an order dismissing Elmer's petition, on the grounds that under the present state of the law in Kentucky, an incompetent person cannot bring or maintain an action for dissolution of marriage. This appeal by Elmer followed.

Our standard of review for dismissals pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f) and CR 12.03 is as follows:

> The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determinations; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883–84 (Ky. App. 2002) (internal quotations and footnote omitted).

In ruling against Elmer, the trial court relied on *Johnson v. Johnson*, 294 Ky. 77, 170 S.W.2d 889 (1943), which addressed whether the committee of an incompetent person could bring an action for divorce on the latter's behalf. The *Johnson* court concluded that it would only be possible if authorized by statute, and that no such authorizing statute existed in Kentucky:

> In some jurisdictions it is held that a committee may maintain an action for divorce in behalf of his ward. *Garnett v. Garnett*, 114 Mass. 379; *Campbell v. Campbell*, 242 Ala. 141, 5 So.2d 401. This is also the English rule. But it seems that in these jurisdictions the right of the committee is gathered from legislative authority. The weight of authority is that in the absence of a governing statutory provision the committee has no such power. *Worthy v. Worthy*, 36 Ga. 45, 91 Am.Dec. 758; *Bradford v. Abend*, 89 Ill. 78, 31 Am.Rep. 67; *Mohler v. Shank's Estate*, 93 Iowa 273, 61 N.W. 981, 34 L.R.A. 161, 57 Am.St.Rep. 274; *Birdzell v. Birdzell*, 33 Kan. 433, 6 P. 561, 52 Am.Rep. 539; *Dillion v. Dillion*, Tex.Civ.App., 274 S.W. 217. The theory underlying the majority view is that a divorce action is so strictly personal and volitional that it cannot be maintained at the pleasure of a committee, even though the result is to render the marriage indissoluble on behalf of the incompetent. 17 A.J. 290. In *Birdzell v. Birdzell*, *supra* [3 Kan. 433, 6 P. 562, 52 Am.Rep. 539], the court said:

> "Whether a party who is entitled to a divorce shall commence proceedings to procure the same or not is a personal matter resting solely with the injured party, and it requires an intelligent election on the part of such party to commence the proceedings, and such an election cannot be had from an insane person." In that case, as well as in others, comment is made on the possibility that the incompetent spouse, if capable of exercising volition or if restored to mental soundness, might be desirous of condoning the wrong or of continuing the marriage relation. We are in accord with the majority view and the reasons supporting it.
>
> It is argued by appellant, however, that since section 35 of the Civil Code of Practice requires the action of a person under disability to be brought by a guardian, curator, or committee and since no action is excepted the committee is necessarily empowered to bring a divorce action for his ward. But we do not think the Legislature, in conferring this general authority, intended to vest a committee with power over the strictly personal and volitional affairs of his ward to the extent of controlling his marital status. In all jurisdictions, as far as we are advised, the action of an incompetent must be brought by a committee or other representative either by virtue of statute or substantive law, nevertheless the right to file a divorce action by a representative on behalf of his ward is generally denied. We regard section 35 of the Code as intending to restrict the right of an incompetent to maintain an action in his own name rather than to enlarge the powers of a committee.

Johnson, 170 S.W.2d at 889-90.

This opinion appears to dispose of this appeal. Elmer nonetheless argues that he has standing to bring the dissolution action, and that his right to do so should not be limited by the finding of disability and incompetence. First, he contends that the "lucid interval" doctrine, which creates a rebuttable presumption that a testator suffering from a mental illness may execute a valid will, should be

extended to enable an incompetent individual to dissolve his or her marriage. Second, he argues that Kentucky Revised Statute (KRS) 403.150 contemplates a dissolution petition being filed by someone other than a member of a married couple. Third and finally, he argues that public policy and equity call for Kentucky to adopt the majority view and permit a ward to divorce his guardian.

The "lucid interval" doctrine is applied solely when testamentary capacity is questioned:

> When a testator is suffering from a mental illness which ebbs and flows in terms of its effect on the testator's mental competence, it is presumed that the testator was mentally fit when the will was executed. This is commonly referred to as the lucid interval doctrine. . . . By employing this doctrine, citizens of the Commonwealth who suffer from a debilitating mental condition are still able to dispose of their property.
>
> The lucid interval doctrine is only implicated when there is evidence that a testator is suffering from a mental illness; otherwise the normal presumption in favor of testamentary capacity is operating. The burden is placed upon those who seek to overturn the will to demonstrate the lack of capacity. . . . The presumption created is a rebuttable one, so that evidence which demonstrates conclusively that the testator lacked testamentary capacity at the time of the execution of the will results in nullifying that will.

Bye v. Mattingly, 975 S.W.2d 451, 456-57 (Ky. 1998) (internal citations and quotations omitted).

The "lucid interval" doctrine is applied exclusively in the context of determining the validity of a will. We are unaware of any precedent that would permit us to extend the doctrine to dissolution proceedings, which in any event

certainly would require more than a single "lucid interval" on the part of the petitioner.

Elmer next argues that plain language of KRS 403.150, the statute which governs the procedure in dissolution of marriage cases, permits an individual other than one of the parties to the marriage to file a dissolution action. KRS 403.150 states in relevant part:

> (3) Either or both parties to the marriage may initiate the [dissolution or separation] proceeding.
>
> (4) If a proceeding is commenced by one (1) of the parties, the other party must be served in the manner provided by the Rules of Civil Procedure and may file a verified response.

Elmer argues that the word "if" at the beginning of subsection (4) implies that someone other than one of the parties to the marriage may also commence the dissolution action. He contends that this interpretation is supported by KRS 403.150(6) which allows the court to "join additional parties proper for the exercise of its authority to implement this chapter." He contends that a "disinterested guardian" could bring the dissolution action on his behalf, and that the statute thereby abrogates the *Johnson* opinion.

We are required to construe all statutory words and phrases "according to the common and approved usage of language[.]" KRS 446.080(4). "'[T]he intent of the Legislature must be deduced from the language it used, when it is plain and unambiguous[.]' Therefore, when a statute is unambiguous, we need not consider extrinsic evidence of legislative intent and public policy." *Pearce v.*

University of Louisville, 448 S.W.3d 746, 749 (Ky. 2014) (citations omitted). When construed in this manner, the word "if" which commences subsection (4), unmistakably refers back to subsection (3), and simply indicates that when one party to the marriage files a dissolution or separation action, the other party to the marriage must be served in accordance with the Rules of Civil Procedure. This interpretation is affirmed by the use of the words "either" or "both" in subsection (3) which unambiguously indicate that only the actual parties to the marriage may commence the dissolution action.

Finally, Elmer argues that for public policy and equitable reasons, Kentucky should adopt the recent approach of many other jurisdictions which allow a ward to divorce his or her guardian. This argument was previously addressed in an unpublished opinion of this Court, *Brockman ex rel. Jennings v. Young*, 2011 WL 5419713, 2010-CA-001354 (Ky. App. 2011), in which the guardians of an elderly woman suffering from Alzheimer's disease sought to file a petition on her behalf to dissolve her marriage from a husband who appeared to have been financially exploiting her. After performing a lengthy analysis of the public policy implications of such an action, a majority of the panel nonetheless concluded that this Court was bound by the *Johnson* precedent. We can only follow suit. "[A]s an intermediate appellate court, this Court is bound by established precedents of the Kentucky Supreme Court. SCR 1.030(8)(a). The Court of Appeals cannot overrule the established precedent set by the Supreme

Court or its predecessor court." *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky. App. 2000).

The order dismissing the petition for dissolution of marriage is therefore affirmed.

COMBS, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Steven J. Megerle Covington, Kentucky	Michael T. McKinney Larissa Helmer Somers Burlington, Kentucky