

# Even More Gray Area: The Impact of Cognitive Dysfunction in Older Divorce Clients

By Kathleen M. Newman

In recent years, statistics have shown that while the overall divorce rate is falling, divorces for people over 50 are rising. The *gray divorce* phenomenon has many issues particular to that age group, including spousal maintenance for a homemaker spouse or when there has been significant disparity in incomes; the tracing of inherited assets; and the division and use of retirement assets to meet post-retirement expenses. One issue that has not received a lot of attention, however, is the impact that cognitive dysfunction due to aging, dementia or Alzheimer's has on a divorce. An area of concern for the practitioner is what can be done when a client exhibits cognitive dysfunction that may impact their ability to make sound financial decisions. First of all, the attorney should discuss his or her concerns with the client based upon personal observations and recent interactions with the client. It is possible that a change in behavior could be due to a depression, anxiety or a change in medications. If that is not the case, however, ethically the attorney should provide options in order to continue representation. Of course, this assumes the client also realizes there is impairment and is willing to seek the help necessary for the practitioner to continue as the client's counsel. Having this discussion with your client may mean that the client will terminate your services and seek other counsel.

Rule 17.00 of the Minnesota Rules of Civil Procedure provides for the appointment of a guardian ad litem for an incompetent person. Rule 17.02 states that any person may apply for the appointment of a guardian ad litem in a civil case, including an adverse party or a party's attorney. The rule specifically notes that a guardian appointed pursuant to Rule 17 is not a guardian within the rules of guardian ad litem procedure in Juvenile and Family Court, and is, therefore, not governed by those rules.

What can a guardian ad litem do for your client? The scope of a guardian ad litem's appointment is set forth in Rule 905 of the General Rules of Practice, which provides a guardian ad litem shall:

A. Conduct an independent investigation to determine the facts relevant to the situation of the incompetent adult

which must include, unless specifically excluded by the court: reviewing relevant documents; meeting with and considering the incompetent adult's wishes, as appropriate; and interviewing parents, caregivers, and others relevant to the case.

- B. Advocate for the best interests of the incompetent adult by participating in appropriate aspects of the case and advocating for appropriate community services when necessary.
- C. Maintain the confidentiality of information related to a case, with the exception of sharing information as permitted by law to promote cooperative solutions that are in the best interests of the incompetent adult.
- D. Monitor the best interests of the incompetent adult throughout the judicial proceeding.
- E. Present written reports on the best interests of the incompetent adult that include conclusions and recommendations, and the facts upon which they are based.

There is very limited case law in this area. In the case of *Puetz v. Puetz*, No. A06-1319 (Minn. Ct. App. Sept. 11, 2007), the husband suffered from severe mental health issues and a guardian ad litem was appointed. However, the husband was not represented by an attorney. When appointing the guardian ad litem, the court ordered the guardian to represent the best interests of the husband in any financial matter.

Throughout the proceeding, the court continued to advise the husband that the guardian wasn't his attorney, but was there solely to protect his financial interests. This also meant that the guardian did not have to follow the husband's wishes if it was determined by the guardian that the decision was not financially in the husband's best interests.

The case was tried and the husband appealed, claiming he was denied the right to due process because he was not represented by an attorney and he was confused as to the role of the guardian ad litem. In a decision affirming the trial court, the appellate court noted that Minnesota has no statutory or constitutional right to counsel in a dissolution proceeding, and that the record clearly demonstrated husband was made aware of the role of the guardian, which was to ad-

vocate for his financial best interests, and that did not include legal representation. A careful practitioner must watch for signs of cognitive impairment in older clients and be ready to address any concerns within the scope of Rule 17. It is a very sensitive area, and should be addressed as such.



Kathleen M. Newman has experience in all aspects of marital dissolutions, and has represented individuals on complex matters involving business ownership, valuing professional practices and financial analysis. Kathy sets herself apart through her strong advocacy of custody, support and parenting agreements. A board-certified trial advocate in family law, a skilled mediator and a certified life coach, Kathy is also a fellow in the American Academy of Matrimonial Lawyers. Among her accolades, she has been consistently named a Top 40 Super Lawyer for family law and one of the Best Lawyers in America in family law. For more information, please visit [www.kathynewmanlaw.com](http://www.kathynewmanlaw.com).

