

BEYOND THE BRADY BUNCH: Blended and Complex Families, Joint and Separate Property, Divorce, and Guardianship

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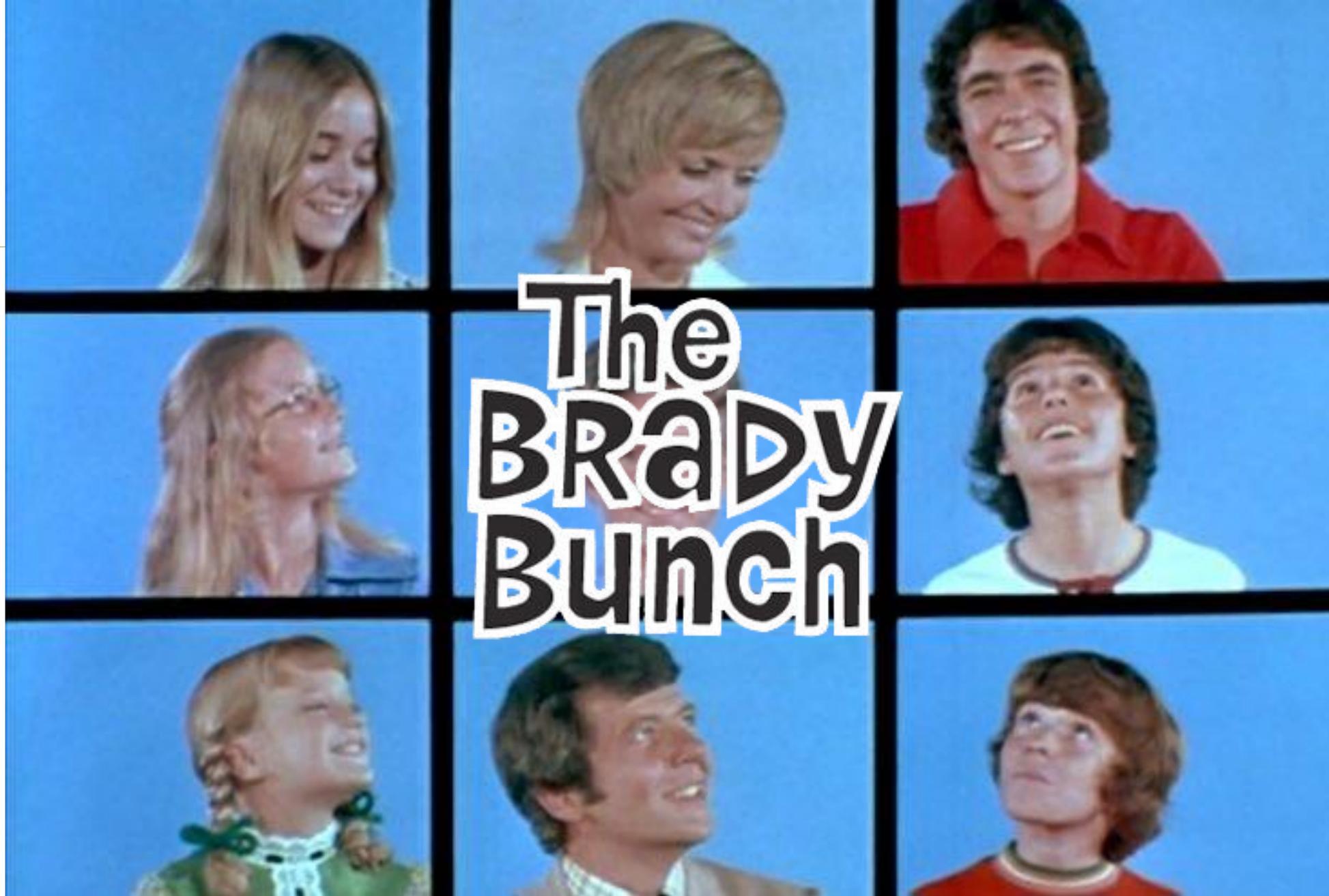
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From The Cleaver's

TO...



The
BRADY
Bunch

Change from the Cleaver's to the Brady Bunch

In the past century, the concept of family and family composition has changed significantly in the United States.

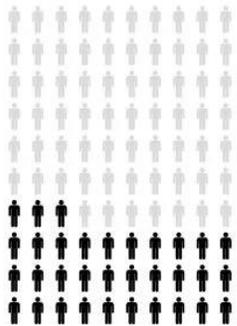
For decades the model family, also known as the “nuclear family,” was the traditional and socially accepted type of family in American Society.

The nuclear family consisted of two biological parents (mother and father), and one or more biological children that all shared a household.

However, changes in family composition, particularly through the acts of divorce and cohabitation, have forever changed the family unit and the concept of the nuclear family and have contributed to what are now commonly known as blended and step-families.



1 in 3 Americans is a Step-parent, Step-child, Step-sibling, or a Member of a Step-family



33%

In the United States, about 40-50% of married couples divorce, and the divorce rate increases for second and third marriages (American Psychological Association [APA], 2018).

The resulting blended family is a complex family arrangement that multiplies the challenges and demands typical of non-blended family systems.

With multiple remarriages, and correspondingly complicated family dynamics, dealing with incapacity and guardianship cases becomes more complex.

Guardians, conservators, legal practitioners and the courts grapple with cases involving family dysfunction with roots reaching back decades, while trying to protect the rights and interests of the AIP.

Assets Titling in Blended Families

In blended family conservatorship cases, conservator duties can be fraught with legal issues regarding ownership of assets, responsibility for debts, estate plans and titling of assets. For assets owned by the AIP who is married, a conservator needs to identify:

- When and where was the property acquired;
- How is the property titled (such as in an individual name, joint tenancy or tenancy in common, marital property, community property)
- Are there Designated Beneficiaries? Assets can also have unique title designations that go beyond simply naming beneficiaries. The most common are Transfer on Death (TOD), and Payable on Death (POD)

Property Ownership: Separate/Joint Property Considerations



Property ownership when the AIP is married matters and will affect what assets are available for debts and expenses and how assets are held.

There are essentially two different systems for classifying marital property in the United States:

- the common law property system and
- the community property system.

Whether property is classified as community or as common law property affects rights of ownership, rights to income from property, rights and duties of management and control, rights to make lifetime gifts, property rights in the event of divorce, and rights to dispose of property at death.

General Community Property Rules:

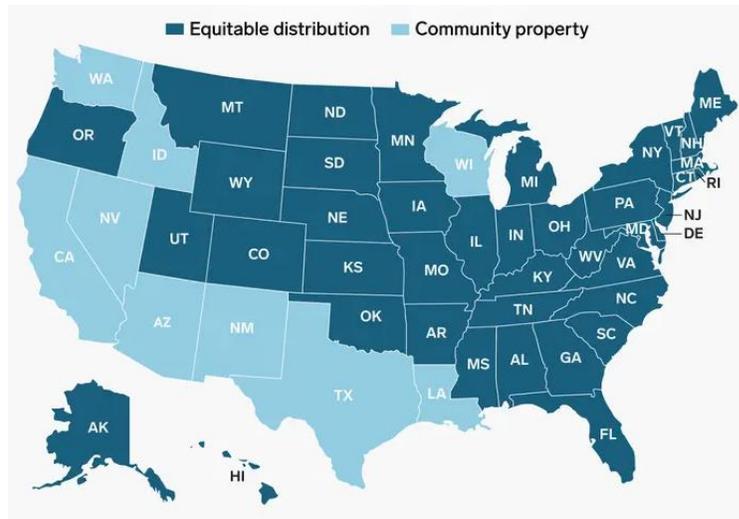
There are slight variances in the laws from state to state.

As a general rule:

- Community property consists of property acquired by either or both spouses during marriage which is not separate property.
- Separate property consists of property acquired by either spouse before marriage or after divorce; property named as separate property in a legal separation or other court order; property received by gift or inheritance; and property named as separate in a written agreement between the spouses



There Are 9+ Community Property States (2022)



- .Arizona
- .California
- .Idaho
- .Louisiana
- .Nevada
- .New Mexico
- .Texas
- .Washington
- .Wisconsin
- .AND
- .Alaska (which is something of a hybrid—you can elect to treat your assets and debts as community property in this state by signing a joint agreement to do so.)



Case Study Mike (Part 1)

Mike Brady has moderate to severe frontal lobe dementia and keeps accusing Carol of sleeping with Greg.

Mike is also acting inappropriately, appearing selfish or unsympathetic, neglecting his personal hygiene and overeating.

Mike is now speaking slowly, struggling to make the right sounds when saying a word, getting words in the wrong order, or using words incorrectly

Sadly, Mike and Carol never got their affairs in order. Mike and Carol have been married for 5 seasons. Until 2 years ago, Mike was a busy architect and Carol was a stay-at-home mom. Mike and Carol survive off Mike's income, which is dwindling fast.

Case Study Mike (Part 2)

- Mike owns property in New York that he inherited
- Carol has an investment account that is payable on death to Marcia, Jan and Cindy
- Mike and Carol established a joint checking, savings and investment account at Bank of the Stars. Both are signatories.
- The house is in Carol's name alone
- Mike and Carol each have retirement accounts naming each other and then their respective children

Case Study Mike (Part 3)

Greg Peter and Bobby contact you because they believe that:

- Carol is spending all of Mike's money and that she can live less extravagantly, if they sell the Brady house on 4222 Clinton Way in Los Angeles.
- You are told that Carol, Marcia, Jan and Cindy think that Mike has been giving his sons too much money during the marriage and that the New York property should be sold to provide for Mike's care. Carol, Marcia, Jan and Cindy plan to move him to Mike to Memory Care with the Stars facility as his accusation against Carol and his personal hygiene issues make their continued cohabitation difficult.
- Greg and Peter are angry that Carol, Marcia, Jan and Cindy did not consult with them about the move and filed a petition for guardian and conservatorship.
- Bobby does not want to take opposition because he does not want to miss out on Alice the housekeeper's wonderful dinners

Case Study Mike (Part 4)

The Court determined that no Brady should serve as Mike's Conservator and appointed you

1. From the assets above, what is community property?
2. What is separate property?
3. Does your answer change in a common law state?
4. What assets require further investigation and why?
5. Can you close the joint checking, savings and investment account at Bank of the Stars?
6. Can you sell the Brady house on 4222 Clinton Way in Los Angeles?
7. Can the Conservator force Carol to pay for Mike's care?
8. How can the Conservator segregate joint assets?

Case Study Mike and Carol (Part 5)

Carol Does NOT want to Support Mike:

- Who has responsibility for managing jointly owned or community property assets?
- What assets can be used to pay for Mike's care?
- What assets can be used to honor Mike's prior history of making gifts to his sons?
- Can Carol be forced to support Mike?
- What steps should a conservator take to avoid issues regarding the control, management, or disposition of assets in a Common law and community property state?



**PLOT
TWIST
AHEAD**

Case Study Mike and Carol (Part 6)

CAROL SUFFERS A STROKE



Greg Peter and Bobby inform you that Carol suffered a stroke and has been diagnosed with Vascular dementia.

Greg Peter and Bobby tell you that it would be a great idea to move Carol into a room with Mike, in the Memory Care with the Stars facility to save money and so that Mike and Carol can be together.

Marcia, Jan and Cindy think it would be a good time to move Carol to facility closer to Marcia in NYC.

The facility staff advise that it would not be a good idea for Mike and Carol to be in the same room, but there is a perfect space for Carol in the stroke/vascular memory care wing.

What issues should affect the decision on where Mike and Carol live?

Complex & Blended Families Issues

- Need for professional fiduciaries potentially heightened
- Prioritizing need for joint care or visitation in long-term care planning
- Are prenuptial agreements being manipulated via titling/purchasing of assets
- Does Court-approved estate planning have a role in making peace
- Emotional/relationship consequences of family guardians

Case Studies

Husband's dementia caused suspicion of Wife, potentially bolstered by communication from his children. Wife filed for divorce and eventually guardianship when Husband's divorce attorney would not consent to an evaluation in the divorce case and court required it. Husband's children requested to serve as guardian/conservator. Wife requested neutral professional to avoid divorcing her husband's grown children who dislike her. Children felt that Wife was trying to "pick her opponent" in the divorce.

Husband's children initiated guardianship proceedings for Wife based on exploitation/abuse by Wife's daughter who lived with the parties. Husband and Wife had long supported Wife's daughter. Allegations by both sets of children against each other. Separate corporate conservators appointed for both parties to manage separate/joint assets while prioritizing spouse's continued living situation.

Marriage and Guardianship/Conservatorship



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- Can an adult under guardianship/conservatorship marry?
- Can an adult under guardianship/conservatorship be prohibited from marrying?
- Evaluating predatory marriages
- Could a marriage/commitment ceremony be sufficient?
- Prenuptial/Postnuptial Agreements
- Estate planning, asset titling



Can a Guardian/Conservator Initiate a Divorce Case?

It depends!

- Abuse/exploitation
- General disapproval of the choice of the AIP
- The self-interested guardian
- What if the case was initiated by the AIP?
- Is annulment an option?

A background image showing two hands holding a white sign with the word 'GUARDIANSHIP' written on it in blue capital letters. The hands are positioned on the left and right sides of the sign, with fingers pointing upwards. The background is a light blue gradient.

Is Guardianship Necessary For A Divorce Action?

Is Guardianship necessary for a divorce action if there are less restrictive means for providing for the protected person's care otherwise?

Maybe not! Here are some example case studies and pleadings

Case Study Marcia and Bobby

Marcia and Bobby married in 1980. When Bobby became incapacitated Marcia moved out of state and Bobby Jr. (Bobby's son from another relationship) began caring for him using a Power of Attorney

Bobby Jr. did not like Marcia, initiated divorce proceedings to separate their assets

Bobby passed away during pendency of divorce before court could determine if POA would work or if guardianship would be required

New Mexico statutes require that a divorce be finished as part of the probate process, thereby ending community/joint property interest surviving spouse would have had

Examples of Pleadings

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT COURT

FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
9/20/2021 4:50 PM
CLERK OF THE COURT
Valerie Begay

██████████,

Petitioner,

vs.

No. ██████████

██████████,

Respondent.

MOTION TO DECLARE DURABLE POWER OF ATTORNEY VALID

COMES NOW ██████████ by and through his attorneys, Leigh & Dougherty, P.C. (Tiffany Oliver Leigh) and for his Motion states:

1. The Court has jurisdiction over the subject matter herein and the parties hereto.
2. On July 23, 2021, ██████████ filed a *Verified Petition for Dissolution of Marriage* on behalf of his father, ██████████.
3. ██████████ has been empowered to act on behalf of ██████████ with respect to “claims and litigation” via a validly executed Durable Power of Attorney dated February 25, 2014.
4. Pursuant to NMSA 1978, Section 46B-1-212(A), language in a power of attorney granting general authority with respect to “claims and litigation” authorizes the agent to “assert and maintain before a court [] a claim, claim for relief, [or] cause of action” which would include a divorce action.
5. ██████████ was personally served in Hampshire County, West Virginia on August 7, 2021 as evidenced by the Return of Service filed with this Court on August 12, 2021.

Case Study Jan and Peter

Husband Peter filed for divorce after Jan institutionalized as a result of dementia/anorexia/alcoholism

Both parties in need of long-term elder care support

POA in place from years ago appointing Jan's sister Cindy and daughter Janette as alternative agents after Peter

Counsel for Cindy/Janette and counsel for Peter worked together to filed joint motion/orders in divorce case to avoid guardianship

Arranged for QHCP Report to be filed under seal in divorce matter

Special challenges for fiduciaries in that role

Examples of Pleadings

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
2/9/2022 3:44 PM
CLERK OF THE COURT
Miguel Duran

██████████,
Petitioner,

v.

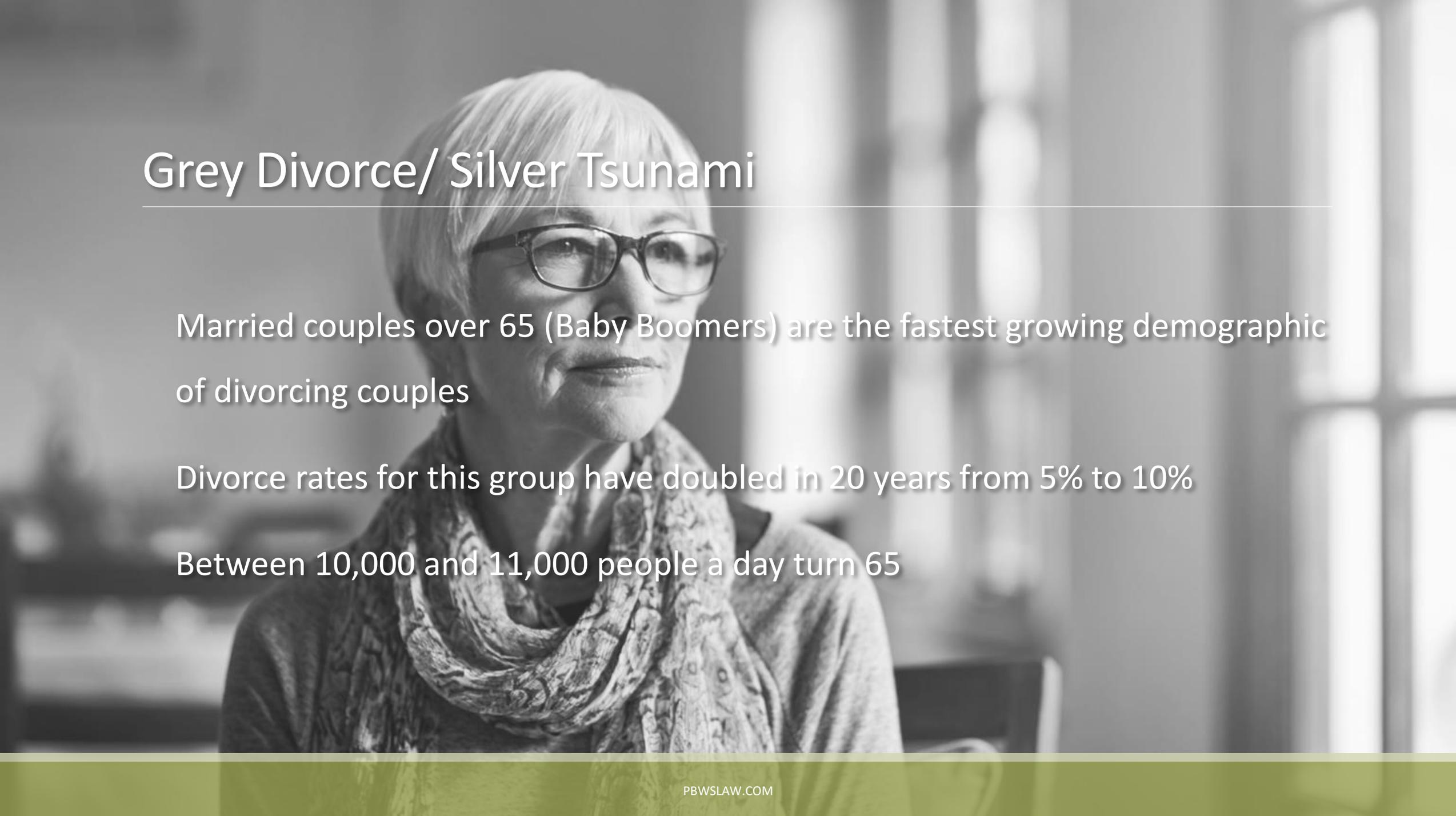
No. ██████████
HON. GERARD J. LAVELLE

██████████,
Respondent.

JOINT MOTION TO PROCEED WITH CASE USING POWER OF ATTORNEY

COMES NOW ██████████ and ██████████, acting as agents for Respondent, ██████████, by PREGENZER BAYSINGER WIDEMAN & SALE, P.C. (Bridget L. Mullins), and Petitioner, ██████████ (“Husband”), by and through his attorneys of record, NM Divorce & Custody Law, LLC (Mary Ann R. Burmester), and for their joint motion, STATE:

1. This Court has jurisdiction over the parties hereto and the subject matter herein.
2. A Petition for Dissolution of Marriage (“Petition”) was filed on July 19, 2021.
3. Respondent, ██████████ (“Wife”) has not been served with the Petition as of the date of filing this motion due to the circumstances described herein.
4. On August 26, 1999, Wife signed a Durable Power of Attorney which appointed Wife’s brother, ██████████, and Wife’s daughter, ██████████ (who goes by ██████████), to serve as Wife’s successor agents after her husband, the Petitioner. Given the pending divorce, it is not appropriate for Husband to serve as Wife’s agent. The Durable Power of Attorney grants the agents the power to “commence, prosecute, defend and oppose all actions, suits or legal proceedings to which the PRINCIPAL is now or may hereafter become a party, and to compromise and settle claims, whether



Grey Divorce/ Silver Tsunami

Married couples over 65 (Baby Boomers) are the fastest growing demographic of divorcing couples

Divorce rates for this group have doubled in 20 years from 5% to 10%

Between 10,000 and 11,000 people a day turn 65

Divorce Considerations/Complications

- What happens when one of the parties to a divorce is suspected of losing capacity?
- Who should bring a petition for the appointment of a guardian/conservator?
- Will the divorce court require guardianship/conservatorship?
- Should the protective proceeding be brought as part of the divorce proceeding or as a separate proceeding?
- What kinds of conflicts exist when the children of the divorcing couple become involved in the divorce and the protective proceeding?
- How are these conflicts resolved to protect both parties to the divorce while ensuring that the interests of the incapacitated party are being addressed?
- Who pays for the proceedings?



Guardianship and Related Divorce Proceeding

- Can the reports of the QHCP, GAL and CV be used by a party in a divorce alleging that her/his spouse is incapacitated?
- Should these reports become evidence in the divorce?
- What happens if one party in a divorce files a motion in the protective proceeding asking that the reports be released?
- Can the QHCP, GAL and CV refuse to testify in the divorce proceeding?
- Can they be subpoenaed to provide evidence of incapacity?

Alternatives to Dual Guardianship/Divorce Proceedings



- Using POAs in the divorce
- Appointing a GAL for AIP in the divorce case
- Hearing the G&C case as part of the divorce
- Appointing the QHCP as an 11-706 Expert in the divorce- immunity for evaluator
- GAL as decision-maker in divorce proceeding and family members can take over after divorce is completed
- Alternative method to dividing assets besides divorce

Mediation Pre and Post

- Carol, aged 87, now a widow living in the land of Enchantment.
- She is about to be discharged from a New Mexico hospital following a ten-day stay for congestive heart failure.
- Her daughter, Marcia, who lives in New York, and her stepson Bobby, 50, who lives in Denver, have been active in planning Carol's discharge.
- Cindy believes that her mother needs 24-hour skilled nursing care while Bobby believes that a live-in aide may be a possibility. Both are concerned about her declining mental status.
- Carol is intent on returning to independent living in the home she has lived in for the past 10 years since her husband Mike died.
- Cindy's lawyer has advised her that her only option is to file a petition for guardianship to resolve these issues. Is there any other option?

Pre and Post Adjudication – Is it worth a try?

Mediation is often helpful because:

- A. it gives the participants more responsibility for control over the issues;
- B. allows parties to address and resolve underlying problems rather than just the particular issue that led to litigation;
- C. allows parties to hear and discuss each other's side of the story;
- D. provides a more personal and less intimidating environment than some court hearings;
- E. reduces cost to the parties;
- F. improves the likelihood of compliance, because the result is consensual;
- G. provides options for solutions outside the powers of the court to impose; and,
- H. in successful mediations, legal incompetence may be irrelevant.

Pre-Adjudication

Guardianship cases often involve disputes among family members or caregivers, or between the person alleged to need a guardian and the person petitioning for the guardianship because of changes in health, financial or marital status.

- For example, parents whose children seek guardianship over them may feel demeaned;
- Siblings may battle over who should be guardian or what is the best plan for the parent;
- The real issue may be long-standing sibling rivalries.

An adversarial proceeding resulting in the granting or denial of a guardianship is not equipped to ameliorate these types of situations.

Families lose control in the formal court setting, and court hearings can be traumatic for them.

Disputes raised after a guardian has been appointed can also take a great emotional and financial toll on families

The challenging question for those who advocate mediation at the pre-petition stage is not whether it will be effective, but rather whether the parties will know to use it.

Post Adjudication

The appointment of a guardian rarely resolves the conflicts that surround the AIP.

While the judges who handle guardianship cases are generally sensitive to the human drama involved in these proceedings, the courtroom leaves little space for creative decision-making or for protecting against the shattering of relationships within the emotional context in which a guardianship proceeding takes place.

Questions may be raised by family members and others as to the conduct of the guardian, including why certain investments were made or a certain nursing home was chosen, or even whether the guardian is being appropriately diligent about meeting the adult's needs.

Post Adjudications Issues

The AIP's condition may worsen, and the limited guardianship that was initially granted may need to be expanded.

The AIP may remain opposed to the concept of guardianship and its ensuing loss of freedom.

Changing circumstances may force unforeseen decisions, such as a move out of state by the guardian who wants to take the AIP with him or her.

The guardian may be rendered unable to serve by an accident or illness, and a successor guardian will need to be appointed.

As the AIP nears death, often painful decisions must be made as to whether to continue life-prolonging but non-curative medical procedures.

Post Adjudication Mediation Case Study

Cindy is the conservator for Greg, who wants to engage in daily activities, such as grocery shopping, buying new clothing, or eating at a restaurant.

Cindy believes that her role is to maintain a tight rein over Greg's finances since it must last for the rest of his life.

Greg finds it demeaning to have to Cindy for money before every shopping trip, while Cindy fear that Greg's susceptibility to aggressive marketing will cause him to engage in frivolous spending.

Marcia is concerned that Cindy's tightfistedness is causing Greg to lose his autonomy and to become depressed. She think she could be a better conservator but previously the judge disagreed.

What alternatives would you recommend to Greg, Cindy and Marcia?

Post Adjudication Mediation Case Study

- Cindy is the conservator for Greg, who wants to engage in daily activities, such as grocery shopping, buying new clothing, or eating at a restaurant. Cindy believes that her role is to maintain a tight rein over Greg's finances since it has to last for the rest of his life. Greg finds it demeaning to have to ask Cindy for money before every shopping trip, while Cindy fears that Greg's susceptibility to aggressive marketing will cause him to engage in frivolous spending.
- Mediation could help Greg and Cindy reach a compromise without court intervention - weekly allowance, True Link card, budget?
- Involving Marcia may defuse her stirring the pot
- Additional advantage the AIP and the conservator will now have an avenue for facilitated communication between them
- May avoid more formalized complaints by the AIP or more unnecessarily restrictive measures by the conservator.

thanks for
joining us!

QUESTIONS???

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