

Comment, The Intersectional History of Guardianship in American Divorces

I. Introduction

After the long and dangerous journey from the shores of England to the New World, the first American colonists reached the Atlantic beaches with their wares, religion, and the basis for what would become the American legal system: the common law of England.¹ While they would not enshrine the English law officially, its influence shaped the new country's laws from the earliest days of their occupation.² With their newly acquired religious freedom, the colonists, largely (but not exclusively) Puritan, established a system where their piety and strict values were the foundation on which the law would be built for all who would endeavor to establish these new people, the Americans: young and old, able-bodied and impaired alike.

The early colonizers were more similar than they were different, due to the journey to the New World intentionally excluding those with minds and bodies "undesirable or unlikely to survive the voyage," a determination made by communal definitions of race, class, wealth, and religion, in addition to beliefs about cognitive abilities.³ This homogeny meant that some challenges could not be avoided—namely, how the law, designed for the ideal new American, who was strong, independent, and eager, would apply to those who were *not* considered ideal: the incompetent, the impaired, the disabled. How would they fit into this New World, this Garden of Eden, an opportunity for perfection away from the suffocating rule of the British Monarchy? How were they to navigate this new land, with its challenging landscapes, strife with the indigenous tribes (and each other), and the already mountainous battle of living in a world not built for them? Who would advocate for

¹ SHEPHERD BRAITHWAITE KITCHIN, *A HISTORY OF DIVORCE* 211 (Chapman & Hall (London) 1912).

² *Id.*

³ KIM E. NIELSEN, *A DISABILITY HISTORY OF THE UNITED STATES* 20 (2012).

them, legally, so that they would be in all rights and respects citizens worthy of all benefits bestowed to Americans?

II. The First American Divorce and Guardianship

Under the guidance of the Geneva Bible, the early law of the land, at least colloquially, was that marriages were holy, permanent and a bond that “ought not to be broken.”⁴ During that time, it was not unheard of for a colonist to desert “unwanted or offending mates,”⁵ and the spouse left behind might even go so far as to publish offers of reward for the return of a runaway spouse in local newspapers.⁶ However, with marriage came divorce, an idea reluctantly but necessarily brought by the colonists to the Americas in the early 1600s.⁷ The idealization of past Americans has famously concluded that divorce was not present in the early days, but that is wholly untrue: the first couple to obtain a legal divorce decree did so in 1639 from “a Puritan court in Massachusetts.”⁸

In December of that year, James Luxford’s lawful wife, Elizabeth, who was already a mother to his daughter and pregnant with his second child, approached the Court of Assistants to plead her cause for divorce: Mr. Luxford was already married to at least one, and maybe two, other women.⁹ The court believed that Mr. Luxford had likely abandoned his wife or wives in England prior to making the journey across the Atlantic “for his country’s good.”¹⁰ Additionally, the court noted that “the pseudo-wife is innocent of the bigamy” and that its ruling “should stand on the ancient ways.”¹¹

⁴ *Matthew* 19:3 (Geneva Bible, 1599).

⁵ GLENDA RILEY, *DIVORCE - AN AMERICAN TRADITION* 3 (Oxford University Press 1991).

⁶ *Id.* at 9.

⁷ *Id.* at 4.

⁸ *Id.*

⁹ *The Puritan Divorce Allows Escape from the Chain of Matrimony*, NEW ENGLAND HISTORICAL SOCIETY (Sept. 10, 2024, 9:51 AM), <https://newenglandhistoricalsociety.com/puritan-divorce-allows-escape-from-the-chain-of-matrimony/>; Rybicka Law Office, *A (Brief) History of Divorce*, (Sept. 10, 2024, 8:11 AM), <https://www.rybickalawoffice.com/blog/2016/4/14/a-brief-history-of-divorce>.

¹⁰ CHARLES COWLEY, *OUR DIVORCE COURTS: THEIR ORIGIN AND HISTORY; WHY THEY ARE NEEDED; HOW THEY ARE ABUSED; AND HOW THEY MAY BE REFORMED* 17 (Penhallow Printing Co. 1879).

¹¹ *Id.*

The court records are fragmentary, but a court later found Mr. Luxford guilty of bigamy.¹² At the granting of divorce, the court ordered Mr. Luxford to release all of his property to the former Mrs. Luxford and her children, and to never be in her presence again; he was additionally fined one-hundred pounds (roughly £19,282¹³ or \$25,186 in U.S. dollars today¹⁴), ordered to serve an hour in the stocks on a market day, and banished from America back to England.¹⁵ Mrs. Luxford retook her maiden name, Albone, and remarried, enjoying “the beneficence of the church in Cambridge.”¹⁶ Mr. Luxford, however, was not immediately sent back to the motherland. The same court records indicate he later was found guilty of “forgery, lying, and other foul offenses,” resulting in a punishment of a public whipping and further banishment, only after having both of his ears cut off.¹⁷ Mr. Luxford fled to Plymouth Plantation and lived out the rest of his days a disfigured, disabled pauper.¹⁸

Puritans in colonial America held fast to the belief that a person with a disability, physical, mental, or otherwise, was the consequence of God’s anger, a belief socially prevalent in their former English homes.¹⁹ Because the early settlers brought the English common law with them, the undercurrents of classism and ableism followed as well. Like the English, colonial Americans held the views that indigents and the incapacitated were “deemed to fall outside the protection of laws that emphasized self-reliance and industry.”²⁰ These views, in congruence with the religious piety

¹² *Id.*

¹³ Bank of England Inflation Calculator, <https://www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator> (last visited Oct. 6, 2024) (input “£100” in year “1639” cost in “Aug 24”).

¹⁴ Travelex, <https://www.travelex.co.uk/currency/currency-pairs/gbp-to-usd> (last visited Oct. 6, 2024) (input “19,282” in GBP).

¹⁵ RILEY, *supra* note 5, at 12.

¹⁶ *Id.* at 8.

¹⁷ COWLEY, *supra* note 10, at 17, 18.

¹⁸ *The Puritan Divorce Allows Escape from the Chain of Matrimony*, *supra* note 8.

¹⁹ See David L. Braddock & Susan L. Parish, *An Institutional History of Disability*, in *HANDBOOK OF DISABILITY STUDIES* 11, 25 (Gary L. Albrecht, et al., eds., 2001).

²⁰ Jonathan Mattloff, *Idiocy, Lunacy, and Matrimony: Exploring Constitutional Challenges to State Restrictions on Marriages of Persons with Mental Disabilities*, 17 AM. U. J. GENDER SOC. POL’Y & L. 497 (2009).

of the Puritans, resulted in the early American cobbling-together of regulations for the lesser-loved colonists: indigents and the incapacitated were usually thrown under the same umbrella of laws intended to manage them, regardless of how related (and usually unrelated) their circumstances and abilities were. A prominent connection, however, was that the indigent and the incapacitated person were most commonly deemed to be in the class of those designated as poor and idle, a liability to their village, and ultimately of the lowest caste.

Under Queen Elizabeth's Poor Law of 1601, designed to provide work and housing for indigents and the incapacitated, a community was ultimately responsible for the care of its impoverished, abandoned, and disabled. Early American communities, to avoid taking responsibility, "warned out" indigents and incompetents from their townships, demanding they leave immediately; otherwise, they would be subject to public whippings as penalty for their stay.²¹ It is here that the colonists began implementation of guardianships.

Under the guise of observing the law, and in service to the Crown, a colonist could take on the charity of guardianship for these poor and idle. This charity, however, was not often seen as such, since a guardian could request payment for his services rendered: in 1637, Ambrose Harmer, guardian of Benomi Buck, an intellectually disabled man, successfully petitioned King Charles I for "secure payment for the guardianship."²² Mr. Buck was deemed incapacitated from birth, and thus "in no way able to governe himself, or to manage that small estate left him" by his father at death.²³ Little is known about what is arguably the first recorded guardianship in colonial America, but it is important to note that Harmer was a landowner and politician in early Virginia, in a time where regulation of the guardian-ward relationship was minimal, if it existed at all.²⁴ Mr. Buck's guardians, of which there would be many, ultimately were found to have "had much inriched [themselves] from the stocks" intended to provide for him.²⁵ The

²¹ Braddock & Parish, *supra* note 19, at 26.

²² *Id.* at 25.

²³ NIELSEN, *supra* note 3, at 24.

²⁴ JON KUKLA SPEAKERS AND CLERKS OF THE VIRGINIA HOUSE OF BURGESSES, 1643-1776 43, 44 (1981).

²⁵ NIELSEN, *supra* note 3, at 24.

assumption is that Mr. Buck, deemed socially “poor and idle,” was useful to Mr. Harmer specifically only for the guardianship fee; the limited record is silent.

Divorce in America has only become more prevalent in the centuries since the Luxfords’ landmark dissolution. It is incredibly common: in 2022 alone, there were approximately 673,989 divorces and annulments in the United States.²⁶ The 2022 divorce rate among first marriages was as high as 43%, with second and third marriages resulting in dissolution at substantially higher rates.²⁷ The rise of cohabitation and the waning of religious rule have no doubt greatly impacted the once-taboo act of divorce.

Adult guardianships in America have also been increasingly prevalent, but the statistics are not nearly as simple to compile: Jim Berchtold cites “insufficient funding and resources, non-unified court systems that are locally governed, outdated technology or lack of technology, varying case management systems within a state and from state to state, and lack of standardized methodology to label and count cases” as just a few of the countless hurdles to accurate reporting of guardianship data.²⁸ In short, guardianship simply does not have the oversight that marriage and divorce does in the United States. Nonetheless, the use of guardians for incapacitated adults is also experiencing an increase in social acceptance, at least anecdotally. Scientific advances, like fetal DNA screens, improved amniocenteses, and biochemical marker tests in the blood of the mother, are leading to early detection of many disabilities.²⁹ And as the general life span of Americans increases, so does the need for caretaking for adults who are in some way incapacitated for short periods or lifetimes.³⁰ In short, like divorce,

²⁶ Centers for Disease Control and Prevention, *Provisional Number of Divorces and Annulments and Rate: United States, 2000-2022*, <https://www.cdc.gov/nchs/data/dvs/marriage-divorce/national-marriage-divorce-rates-00-22.pdf>

²⁷ Christy Bieber, *Revealing Divorce Statistics in 2024*, FORBES (Oct. 14, 2024, 6:31 PM), https://www.forbes.com/advisor/legal/divorce/divorce-statistics/#sources_section.

²⁸ Jim Berchtold, *Guardianship Data Reform*, JUSTICE IN AGING REFORM (June 12, 2024, 11:19 PM), <https://justiceinaging.org/guardianship-data-reform/>.

²⁹ Chris Kaposy, *From Baby Doe to Selective Termination for Down Syndrome*, in *INTELLECTUAL DISABILITIES AND AUTISM: ETHICS AND PRACTICE* 56 (Andria Bianchi & Janet A. Vogt eds., 2024).

³⁰ Kenneth D. Kochanek, et. al., *Mortality in the United States, 2022*, NCHS DATA BRIEF No. 492 (Mar. 2024), <https://dx.doi.org/10.15620/cdc:135850>.

guardianships for the disabled will continue to be part of the American story, despite their being an often-forgotten but integral part of her history.

Marriage has always been a hallmark in American traditions, religious practices, and common law. From the first colonial divorce of the Luxfords in 1639, divorce has been inextricably tied to the idea of marital unions, however taboo and unpopular it was at various times throughout American history. Likewise, caretaking for incapacitated individuals, in addition to the care of widows and orphans, has also been ever present in the American story, though it has rarely been highlighted, because it also has been considered an unsavory but necessary burden. These two ideas, divorce and adult guardianship, make an exceptional juncture in American law and society today: when an incapacitated adult is the subject of a divorce proceeding, only her guardian can loyally speak on her behalf. While this is not uncommon today, there is a lesser known, but rich history of guardians representing their wards in divorce proceedings, built on the precedents created in Mrs. Luxford and Mr. Buck's lifetimes and culminating in the first formal representations in the Civil War Era.

III. The Ever-Changing Definitions of “Disabled”

The journey to the New World was an arduous one for early European settlers, and allowed only the most able-bodied of journeymen to embark.³¹ Excluded from the adventure were individuals “with bodies or minds deemed undesirable or unlikely to survive.”³² Subsequently, European colonists arrived on the beaches of America without their weak and “undesirables” so that they could establish robust settlements free from those that might have hindered their success.

In those times, a person was considered able-bodied if he could still perform labor.³³ If a settler could still contribute to work, even if he was partly-blind or an amputee, he was not socially considered disabled. Those with mental disabilities, however, were labeled unable to work and subsequently subject to

³¹ NIELSEN, *supra* note 3, at 19.

³² *Id.* at 12.

³³ *Id.* at 20.

early legislation during the creation of the New World.³⁴ The Body of Liberties, the first legal code of sorts, was established in 1641, intended to protect mentally incapacitated individuals from making unsound financial decisions and guarantee that no one be required to perform “public service” if they had a “defect in mind.”³⁵ Though the Puritan social ethic required caring for the disabled, their language was not always so charitable: typically, incompetents were labeled “idiots” and “lunatics.”³⁶ These terms pervaded society’s attempt to classify individuals with varying disabilities and persisted well-beyond Colonial America and into the twenty-first century.

Early attempts to categorize a person’s level of incompetency drew largely on the believed source of defect. English statutes in the Middle Ages titled the mentally ill the aforementioned “lunatics” who may be able to restore their capacity, as opposed to “idiots” who were born “natural fools” and unlikely to ever reach capacity.³⁷ Though the language is harsh, it establishes the distinction between mental illness and intellectual disability. John Locke, in *An Essay Concerning Human Understanding*, further defined the differences between these two populations, stating that “mad men put wrong ideas together, and so make wrong propositions, but argue and reason right from them: but idiots make very few or no propositions, but argue and reason scarce at all.”³⁸ While the terms themselves are outdated, offensive, and ableist in these modern times, their general ideas are not: the “madman” or “lunatic,” presumably, represents a person suffering from mental illness who was likely once functioning and competent, while the “idiot” is incapacitated from birth via defect, or later debilitating trauma, resulting in a stunted level of understanding. At the time of Locke’s writing in 1690, this was the common view of incapacitated individuals and was the general understanding of disabilities for colonial Americans.

³⁴ *Id.*

³⁵ *Id.* at 21.

³⁶ *Id.* at 22.

³⁷ SAMUEL JAN BREKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 10-11 (3d ed. 1985).

³⁸ JOHN LOCKE, *I AN ESSAY CONCERNING HUMAN UNDERSTANDING* 134 (Oxford at the Clarendon Press 1689).

In the late colonial period between 1700 to 1776, the societal view of incapacity retained its derogatory terms but broadened the characteristics that would classify a person as mentally disabled: he may show signs of “despair, sordidness, and viciousness,” as Samuel Coolidge, a 1738 Harvard graduate, schoolteacher and preacher, was described after slipping into a lifelong insanity.³⁹ Mr. Coolidge, formerly a brilliant intellectual, was an early beneficiary of the public charity required under common law: town officials compensated fellow villagers to house, clothe, and feed him; however, as his condition reached its peak, he was ultimately refused care and spent his last year of life locked in a room until his death in 1764.⁴⁰ With the formation of early institutions (commonly referred to as “almshouses” by people of the time), Mr. Coolidge’s experience became more commonplace, as a new “dumping ground” housed “persons under distraction and unfit to go at large, whose friends do not take care for their safe confinement” and “ideots, lunatics, and other persons of unsound minds.”⁴¹

The American Revolution’s patriots, newly freed from the patriarchal oversight of England, made freedom to vote a national priority; with that voting power, however, a potential voter must be deemed competent: the new republic would not survive unless “the minds of its citizens were capable.”⁴² Legislators had to differentiate a person “worthy of full citizenship,” and thus a competent voter, from “idiots, lunatics, women of all races, people of indigenous nations, and African Americans.”⁴³ As with laws limiting the votes of enslaved and freed African Americans, women, and indigenous people, legislation sought and succeeded to exclude from the voting rolls disabled individuals, who were considered “deficient and defective.”⁴⁴ This idea, along with rising institutionalization for incompetents, remained the norm all the way through to the mid-nineteenth century, when abolitionist and former slave Frederick Douglass stated that “the true basis of rights was the capacity of individuals.”⁴⁵

³⁹ NIELSEN, *supra* note 3, at 31.

⁴⁰ *Id.* at 32.

⁴¹ *Id.* at 37.

⁴² *Id.* at 50.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 52.

The American Reconstruction and industrialization, in the wake of the Civil War, made disability “heroic,” but only for male soldiers with “physical, and visibly exhibited” disabilities.⁴⁶ The vital support needed for veterans only slightly redefined disability as being “increasingly reliant on medical determinations” and as previous generations had stated, an “incapacity to perform manual labor.”⁴⁷ Later, in the 1880s, an incapacitated person fell within seven narrowly-construed categories of “insanity”: mania, melancholia, monomania, paresis, dementia, dipsomania, and epilepsy.⁴⁸

The Progressive Era shifted society’s views of the disabled from the Puritan caretaking charity and the so-called “ugly laws”⁴⁹ of the Reconstruction, into a morbid curiosity about “deviant bodies,”⁵⁰ from the commercial sideshows of the time to the footstool of modern medical research.⁵¹ Subsequently, America experienced a significant rise in institutionalization, often targeting freed African American slaves, who were believed to have gone “insane” from freedom.⁵² Similarly, immigrants coming to America were also unfairly marginalized as incompetent: upon examination, an immigrant was labeled disabled for facial expressions, “oddity of dress,” being chatty, “witticism,” “unnatural actions, mannerisms, and other eccentricities,” and even if they appeared to have same-sex attraction (considered evidence of insanity and proof they were not able-bodied).⁵³

Eugenics became an unlikely, but widespread argument in the sphere of disability, as it was popularized in the American scientific research fields. Dr. Henry Clay Sharp created a sterilization program to prevent “the spread of hereditary defects” of the “degenerate class,” consisting of “the insane, the epileptic, the

⁴⁶ *Id.* at 87.

⁴⁷ *Id.* at 86.

⁴⁸ MICHAEL REMBIS, *DISABILITY : A REFERENCE HANDBOOK* 6 (ABC-CLIO 2019).

⁴⁹ NIELSEN, *supra* note 3, at 89. During the 1860s, as veterans returned home from war and industrialization-generated disabled workers became widely prevalent, several major cities passed “ugly laws,” *id.*, with the intent of banning a person who is “diseased, maimed, mutilated, or in any way deformed so as to be an unsightly or disgusting object” from public streets. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 91.

⁵² *Id.*

⁵³ *Id.* at 104-05.

imbecile, the idiotic, the sexual perverts; many of the confirmed inebriates, prostitutes, tramps, and criminals . . . the habitual pauper . . . [and] children in our orphan homes.”⁵⁴ This is the time in American history that the umbrella of incapacity was arguably at its broadest. American educator and eugenicist Harry Laughlin testified in support of the Immigration Act of 1924, citing that forced sterilization for the “socially inadequate” and “degenerates” (which included, according to him: European immigrants indiscriminately deemed insane and Jews born “feeble-minded,” along with the otherwise incapacitated) would lessen the burden of over-crowded asylums.⁵⁵ His model became widely popular, eventually being championed by Adolf Hitler in his pursuit for racial purity.⁵⁶

As time progressed, these definitions changed, due in large part to the growing reign of the American governmental systems, advances in society and sciences, and the incredible need for more specific understanding of the disabled community. In the age of modernity, the definitions have been altered largely depending on the arena in which the term is being used. In the late 1950s, the Committee on the Rating of Mental and Physical Impairment of the American Medical Association produced a guide that defined disability and impairments for the medical field as not just a medical condition, but when the disabled individual can no longer participate in productive activities.⁵⁷ In the early 1990s, the U.S. Social Security Administration defined a person as disabled if he could no longer “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” that could cause him death or incapacitate him “for a continuous period of not less than 12 months,” for the pragmatic purpose of supplying him with government aid.⁵⁸

The modern-day definition of disabled is an assortment of terms and ideas: a person is classified as disabled if he has a “physical or mental impairment that substantially limits . . . major

⁵⁴ *Id.* at 102.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Barbara M. Altman, *Disability Definitions, Models, Classification Schemes, and Applications*, in *HANDBOOK OF DISABILITY STUDIES*, *supra* note 19, at 97, 100.

⁵⁸ *Id.* at 98.

life activities”; however, he may also be judged disabled if he “has a history or record” of the impairment or if he is simply “perceived by others” as being impaired, according to the Americans with Disabilities Act.⁵⁹ On its face, the ADA requirement maintains the gray area of subjective interpretation that for centuries has plagued the attempts to define incompetency. But considering the incredible advances in science, medicine, and social understanding, this gray area may be necessary to provide those individuals who do *not* fit into a black letter definition of disabled an opportunity to safely and equitably participate in American life.

IV. Cornerstone Cases of Guardianships and Divorce, from the Civil War to the Twenty-First Century

Having the undercurrents of English common law as the foundation for rules in the New World, the early colonists were familiar with the doctrine of *parens patriae*, which established that the British King was essentially the “political father and guardian of his kingdom.”⁶⁰ This divine right, modeled foremost by King James I as the first colonies were established, gave the Crown the authority that a father has over his family, an unquestionable and God-given right.⁶¹ In the first “royal colonies” the King bore the responsibility for “the custody of any idiot.”⁶² From this cornerstone was built the ideals regarding guardianship in the New World, and successively, the American legal concept of guardianships would thus evolve.

Unfortunately, while cases of guardianship and divorce were well-established in colonial America, the limited records and the

⁵⁹ U.S. Department of Justice Civil Rights Division, *Guide to Disability Rights Laws*, ADA.gov, <https://www.ada.gov/resources/disability-rights-guide/#:~:text=An%20individual%20with%20a%20disability%20is%20defined%20by%20the%20ADA,as%20having%20such%20an%20impairment> (last visited Aug. 19, 2024).

⁶⁰ Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgement*, 100 YALE L.J. 1, 18 (1990) (discussing the historical definition and idea of *parens patriae*).

⁶¹ *Divine Right of Kings*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/divine-right-of-kings> (June 14, 2024).

⁶² Larry D. Eldridge, “Crazy Brained”: *Mental Illness in Colonial America*, 70 BULL. HIST. MED. 361 (1996).

then-rarity of a guardian-defended or -initiated divorce has left little for modern historians to recollect. It is for that reason that the earliest divorce involving an adult guardian to review presently (with court records and historical accuracy, and not *just* anecdotes) is from Vermont in 1858, during the Civil War Era.

A. *The Civil War Era*

The case of *Nichols v. Nichols* was brought to the Supreme Court of Vermont by Mr. Nichols, who stated that his wife had committed the grave sin of adultery, and he should thus be freed of their marriage.⁶³ The lower court had deduced that Mrs. Nichols was insane and promptly assigned her a guardian ad litem⁶⁴ (this assignment occurred in a time where “idiocy” was added to the list of legal reasons for divorce in some jurisdictions).⁶⁵ Her unnamed guardian argued that Mrs. Nichols’ act of infidelity, not done “in a lucid interval,” removed her from liability.⁶⁶ Mr. Nichols presented the holding of an earlier case, *Matchin v. Matchin*, as his chief argument: that “insanity is no bar to a petition for divorce for adultery.”⁶⁷ The court, however, turned the ruling on its head and greatly reprimanded Mr. Nichols for even presenting it; the court held that Mr. Nichols, “having sworn to love, comfort, honor and keep, in sickness and in health, till death” Mrs. Nichols, had decided to renege his sacred vows with her “in the hour of her utmost necessity.”⁶⁸ The Vermont Supreme Court also publicly chastised Chief Justice Gibson’s opinion in *Matchin*, calling the ruling “truly revolting to all just sense of propriety and decency.”⁶⁹ The court further stated that by knowing Mrs. Nichols was insane, a fact never contested by either party, it was Mr. Nichols’ duty to “guard against” her propensities, and he was thus equally as guilty as if he had encouraged her successfully to

⁶³ *Nichols v. Nichols*, 31 Vt. 328 (Vt. Nov. 1858).

⁶⁴ *Id.*

⁶⁵ RILEY, *supra* note 5, at 41.

⁶⁶ *Nichols*, 31 Vt. at 331.

⁶⁷ *Id.* It should be noted that the *Matchin* case is cited incorrectly by the record as *Matchin v. Matchin*, 6 Barr 332; the accurate citation is 6 Pa. 332 and was decided in July of 1847 by the Supreme Court of Pennsylvania.

⁶⁸ *Nichols*, 31 Vt. at 330.

⁶⁹ *Id.* at 332.

commit a murder.⁷⁰ The Vermont court held fast to the Puritan religious view that marriage was sacred and ought to be protected at all costs from divorce, and Mr. Nichols' petition for divorce was unsurprisingly dismissed.⁷¹

During the early years of the American Reconstruction and industrialization period stands a rarity among the already rare cases presented here. In 1874, the Supreme Court of Massachusetts decided the case of *Garnett v. Garnett*, in which *both* parties appeared under the representation of a guardian appointed by the probate court.⁷² This case, notably, is one of the first under Massachusetts law that allowed a divorce to be "filed and prosecuted [o]n behalf of an insane person," a legal unicorn rarely before recorded.⁷³

Mr. Garnett had previously filed and was granted "a divorce from the bond of matrimony" and subsequently had surrendered most of his personal property as alimony to Mrs. Garnett, who was deemed insane. However, since Mr. Garnett was then made a pauper whose only support was the charity of a local almshouse, he sought restoration of a share of his property to aid his living expenses.⁷⁴ On appeal, the court noted that the divorce previously granted was not total, and thus did not dissolve the marriage contract between Mr. and Mrs. Garnett, a fact complicated by Mr. Garnett joining Mrs. Garnett in being deemed incapacitated by reason of insanity.⁷⁵ For Mr. and Mrs. Garnett to receive a final decree of divorce, the court weighed the difficulty of the facts, considering that neither party could provide "intelligent consent" to counsel, despite the agreement of both of their guardians.⁷⁶ Ultimately, the court refused to be relieved from the "responsibility of considering what course [of] public policy," along with the interests of the parties, should be pursued, and ordered a further hearing. The subsequent hearing never occurred, was not formally recorded, or has simply been lost to history.

⁷⁰ *Id.* at 330.

⁷¹ *Id.* at 332.

⁷² *Garnett v. Garnett*, 114 Mass. 379, 380 (D. Mass. Jan. 1874).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 379.

⁷⁶ *Id.* at 381.

B. *The Progressive Era*

Only a short time later in 1899, the Progressive Era, another notable marital dispute took place, this time in the Illinois Court of Appeals. On its face, the case was a plea for alimony in a short-lived union. However, the case of *Pyott v. Pyott* made a longstanding spectacle of the brief Pyott marriage: Mrs. Pyott admitted to being induced to marry Mr. Pyott only for his “much valuable real estate” in Chicago, which Mr. Pyott, a widower, had secretly deeded to his adult children from his prior marriage before his consummation with the new missus (equaling \$230,000: approximately \$8,723,262 in 2024).⁷⁷

Mr. Pyott was deemed to have been suffering from “senile dementia,” a “form of insanity in the aged.”⁷⁸ After it was determined that Mr. Pyott was “not of sound mind and memory, but was insane,” the court appointed him a guardian ad litem, Mr. Pyott’s son and beneficiary, James M. Pyott, Jr. as next of friend to represent him in the hotly contested proceedings for support and maintenance.⁷⁹ The court reviewed a list of symptoms of Mr. Pyott’s insanity: he refused to attend church or pray before meals; he began reading French novels; he “told indecent stories”; he began using “profane and vulgar language,” even if a woman was present; and finally, he once entertained guests “in his bare feet.”⁸⁰

The junior Pyott argued that his father, at age seventy-two, was “so impaired as to render him incapable of entering into any contract of marriage” and thus the marriage should be voided entirely; the couple were married only a year before the filing of the action,⁸¹ and had cohabitated for a single month before Mr. Pyott’s alleged desertion.⁸² The junior Pyott, no

⁷⁷ CPI Inflation Calculator, <https://www.officialdata.org/us/inflation/1898?amount=230000> (last visited Oct. 7, 2024 (input “230000” in start year of “1891” to end year of “2024”). *Pyott v. Pyott*, 1900 U.S. Dist. LEXIS 215 (Ill. App. Ct. July 5, 1900). Mr. James M. Pyott, the incapacitated individual in this case, had been a co-owner (with his brother) of a prestigious ironworking factory in Chicago, Illinois. For more information on his historic business, see *Holmes, Pyott & Co., VINTAGE MACHINERY* (Jan. 20, 2011, 1:54 PM), <http://vintagemachinery.org/mfgindex/detail.aspx?id=2353&tab=0>.

⁷⁸ *Pyott v. Pyott*, 191 Ill. 280, at 283 (Ill. June 19, 1901).

⁷⁹ *Pyott v. Pyott*, 90 Ill. App. 210, at 216 (Ill. July 5, 1900).

⁸⁰ *Pyott*, 191 Ill. at 284.

⁸¹ *Pyott*, 90 Ill. at 216.

⁸² *Pyott*, 191 Ill. at 281.

doubt motivated by his ward's valuable property being recently deeded to him, requested the court consider a cross-bill for a "decree annulling the marriage" to overcome a tricky Illinois legal obstacle.⁸³

For the younger Pyott to maintain ownership of the deeded property, he had to establish that the marriage of Mr. and Mrs. Pyott was not proper in the first place but that his appointment as guardian ad litem was proper. However, in Illinois, even then, divorce was "a personal right" that required "the *intelligent* action of the injured party," meaning that an action for absolute divorce could *not* be brought by a guardian ad litem when the party seeking divorce was incompetent.⁸⁴ In addition to his former burdens, the junior Pyott had to also request that the court recognize the marriage as not absolute, but a void marriage; if the court deemed the marriage a void marriage, only then could a guardian bring an action for dissolution. These hurdles could only be approached when a jury found that Mr. Pyott was indeed insane (a requirement under the Illinois statute at the time of the trial).⁸⁵

The younger Pyott first argued that because both parties had previously agreed that Mr. Pyott was inarguably insane, the court need not require fact-finding by a jury, and the court agreed.⁸⁶ Because Mr. Pyott was then legally recognized as incompetent at the time of the marriage inducement, the court recognized that he could not have entered an absolute marriage and was thus automatically in a void marriage. Finally, the Junior Pyott could petition the court for a nullification of a void marriage.⁸⁷ The Illinois Court of Appeals found that the marriage was void *ab initio*, and subsequently dismissed Mrs. Pyott's petitions for alimony.⁸⁸ The landmark case for divorce of an incompetent in the Progressive Era had been resolved, and the *Pyott* precedent would stand for decades to come.

⁸³ *Id.* at 290.

⁸⁴ *Id.* at 288 (emphasis added).

⁸⁵ *Id.* at 289.

⁸⁶ *Id.* at 290.

⁸⁷ *Id.* at 289-90.

⁸⁸ *Id.*

C. *World War I and the Roaring Twenties*

During World War I, America was plagued with Hitler's popularized notion of eugenics. Disabled Americans had never before been viewed in such an unsavory light: the belief that "social engineering through controlled or selective reproduction could help purify the human race" prejudiced the incapacitated, to the point of increasingly restrictive laws being passed that unfairly and openly targeted those with disabilities, often resulting in mass and unethical institutionalization.⁸⁹ In July of 1919, the Supreme Court of New York's Appellate Division decided *Laudo v. Laudo*, a stereotypical case involving the banishment of a disabled citizen into an institution as a means of cure for adultery.⁹⁰

The marriage of Mr. and Mrs. Laudo was largely uneventful: they wed in New York City in May of 1912 and continued to live together in marital bliss until six years later. In June of 1918, Mrs. Laudo was out-of-town visiting family when she was alleged to have committed adultery with three different men.⁹¹ Three days later, by order of the Supreme Court, Mrs. Laudo was "committed as an insane person" for the sudden onslaught of hallucinations, emotional disturbances, and mental deterioration.⁹² Mr. Laudo demanded divorce on the grounds of his wife's adultery.

Testimony from a physician at the institution had observed that Mrs. Laudo was "mentally incapable of understanding the nature, quality, effect and consequences" of her extramarital actions and that she suffered from "*dementia praecox*," a mental disease considered to be permanent.⁹³ Her court-appointed guardian ad litem, along with Mr. Laudo's counsel, did not contest Mrs. Laudo's insanity as complete grounds for divorce.⁹⁴ Despite the parties' agreement, the court, however, had to determine if insanity was an appropriate ground for divorce in the State of New York.⁹⁵

The only case the court considered in its analysis was the aforementioned *Matchin* case, at this point, over seventy years

⁸⁹ Mattloff, *supra* note 20, at 501.

⁹⁰ *Laudo v. Laudo*, 1919 U.S. Dist. LEXIS 699 (N.Y. App. Div. July 3, 1919).

⁹¹ *Id.*

⁹² *Id.* at 700.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

old.⁹⁶ The court cited the case's reasoning that the goal of divorce is "undoubtedly to keep the sources of generation pure," and further included the *Matchin* court's passage that divorce for adultery is "less grievous" for a husband because he comes home empty-handed, while a woman will bring home an unwanted child.⁹⁷

The guardian was extensively involved in this case, and acted, presumably, as defense counsel for Mrs. Laudo: he called witnesses, cross-examined Mr. Laudo's witnesses, and made inquiries with the court. The judge pointed out that though the ad litem bore the burden of proving insanity, he was swayed by testimony (including that from Mr. Laudo), that had effectively established that her insanity at the time of her adultery was uncontested, for the most part.⁹⁸ The judge ruled that while it was not presented as a defense explicitly, he considered the matter of insanity presented via testimony and ruled that it was an allowed defense to adultery; however, insanity was not proper grounds for divorce in the State of New York in the early 1900s, and Mr. Laudo's petition was dismissed with costs.⁹⁹ Only a few short years later, state lawmakers began introducing legislation that added incurable insanity to the growing list of grounds for divorce, having the mutual benefit of cleanly cutting ties with an incapacitated party, while also supporting the conservative religious belief that uniform divorce law was the only thing keeping the collapse of the American family at bay.¹⁰⁰ Though times were changing, the deep-rooted ideals of conservative Christianity's early influence on the fledgling country's legal system were still somehow permeating into the twentieth century.

D. *The Great Depression*

In 1934 the Supreme Court of Michigan decided the landmark case of *Stevens v. Stevens*, where Mr. Charles Stevens, through his probate court-appointed guardian ad litem, petitioned for divorce on the grounds of his wife's "extreme cruelty"; it was a case of

⁹⁶ *Id.*

⁹⁷ *Id.* at 701.

⁹⁸ *Id.* at 706.

⁹⁹ *Id.* at 707.

¹⁰⁰ RILEY, *supra* note 5, at 134, 135.

first impression in the state.¹⁰¹ Upon learning of the guardian's appointment, the defendant wife filed a motion to dismiss Mr. Stevens' petition because he was an incompetent and therefore "could not obtain a divorce either in his own name or in the name of his guardian."¹⁰² Interestingly, it was Mrs. Stevens who had petitioned the court two years prior to have Mr. Stevens "committed to an institution for the insane"; the results of that petition are unknown.¹⁰³

The judge allowed Mr. Stevens to resubmit his request after removal of mention of the guardian and with his sole signature as seal.¹⁰⁴ On those revisions and upon hearing arguments from the parties, the trial court judge granted Mr. Stevens' request for divorce and division of marital assets.¹⁰⁵ Mrs. Stevens appealed. Like the *Pyott* case, legal technicalities plagued Mr. Stevens' path to marital dissolution: a state statute flatly prohibited a guardian bringing a divorce action on behalf of her ward,¹⁰⁶ but Mr. Stevens was not formally adjudicated insane when Mrs. Stevens had requested it two years prior.¹⁰⁷ Further, the judge reasoned that the action before the court was not an action for divorce brought by an incapacitated person because the probate court had improperly granted Mr. Stevens an ad litem: probate's assignment of the guardian, while within the court's power, was purely statutory and had to be observed as such.¹⁰⁸ Improper service had rendered the probate court without jurisdiction for the guardian's appointment.¹⁰⁹

The court upheld the trial judge's granting of divorce, because Mr. Stevens "was presumed to have mental capacity to comprehend the nature and effect" of the trial court proceedings, and because the presumption of competency also applied when "evidence was taken" during oral argument.¹¹⁰ Though this case was mired with technicalities, it stands as one of the first cases

¹⁰¹ *Stevens v. Stevens*, 1934 U.S. Dist. LEXIS 446, 448 (Mich. Apr. 3, 1934).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 449.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 450.

where a guardian attempted to advocate divorce on behalf of an incapacitated ward, despite the challenging social views of disabled Americans at the time.

E. *The Modern Era*

In the coming decades, legislatures across the country unsuccessfully drafted bills that further complicated divorce actions with antiquated and anti-egalitarian ideas of marriage; these proposed statutes also ignored the situations of disabled people seeking marital dissolution.¹¹¹ Much to the chagrin of the conservatively religious, however, the sexual revolution in the 1960s and 70s would permeate the legal system with the gradual but powerful introduction and implementation of no-fault divorce statutes. California was the first state to enact no-fault divorces via the Family Law Act of 1969, signed into law by the then-governor Ronald Reagan.¹¹² The new act effectively removed the state's seven grounds for divorce and replaced them with only two: "irremediable breakdown of a marriage and incurable insanity."¹¹³ California's new law proved to be the beginning of a landslide for much needed divorce reform, with only three states – Illinois, Pennsylvania, and South Dakota – keeping the former adversarial system in place by 1977.¹¹⁴ Though imperfect, the introduction of no-fault divorce was and remains a highly favored mechanism for dissolution throughout the United States and is currently vehemently challenged by the Republican party to this day.¹¹⁵

The Court of Appeals for the Western District of Missouri decided the case of Ms. Lavon C. Parmer and her request for divorce in July of 1988.¹¹⁶ *In re Parmer* was a difficult case: Ms. Parmer, who had been diagnosed with brain cancer, was deemed incapacitated, since she was struggling with the secondary effects of the cancer (including chronic confusion and seizures).¹¹⁷ Prior to her diagno-

¹¹¹ RILEY, *supra* note 5, at 135, 136.

¹¹² *Id.* at 163.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Betsy Reed, *Conservative US Lawmakers Are Pushing for an End to No-Fault Divorce*, GUARDIAN (June 25, 2024), <https://www.theguardian.com/us-news/article/2024/jun/25/republicans-no-fault-divorce>.

¹¹⁶ *In re Parmer*, 755 S.W. 2d 5 (Mo. Ct. App. 1988).

¹¹⁷ *Id.* at 6.

sis, however, Ms. Parmer had initiated an action for divorce against her husband, Mr. Harold B. Parmer.¹¹⁸ Two months later Mr. Parmer petitioned the probate court for guardianship and conservatorship over his wife, but was challenged with a competing petition by Mrs. Winnie Michaels, Ms. Parmer's mother.¹¹⁹ The court granted the guardianship and conservatorship to Mrs. Michaels, and Mr. Parmer did not appeal this decision.¹²⁰

In short order, Mrs. Michaels petitioned the probate court for authorization to continue the action for divorce on behalf of her daughter.¹²¹ She argued that because the action was initiated prior to Ms. Parmer's incapacity, it was in Ms. Parmer's best interest, and that but for the incapacity the action would be pursued by Ms. Parmer herself.¹²² Mr. Parmer then entered as an interested party and contested the petition, requesting a change of judge and Mrs. Michaels' removal as guardian; his requests were denied and the court took the case under advisement.¹²³

After testimony from Ms. Parmer's doctor and oral argument, the court reasoned that Mrs. Michaels had a duty to act in Ms. Parmer's best interests, and that as her guardian and conservator, Mrs. Michaels was "specifically authorized to prosecute and defend all actions instituted in behalf of or against" her daughter.¹²⁴ Ms. Parmer had demonstrated her desire for divorce while mentally able and had solidified that desire by filing the action; it was Mrs. Michaels' duty to continue that action, and the court deemed this course of action in her daughter's best interest. Mr. Parmer appealed that decision, but his efforts were ultimately unsuccessful.

Some thirty years later in Ohio, the court of appeals decided *McMillan v. McMillan*, in which the court was tasked with finding evidence that the incapacitated party *opposed* the divorce proceedings.¹²⁵ After thirteen years of marriage, Mr. James B.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.*

¹²¹ *Id.* at 5, 6.

¹²² *Id.* at 6.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *McMillan v. McMillan*, No. 109048, 2021 Ohio App. LEXIS 701 (Ohio Ct. App.), at *33.

McMillan left his marital home and begin a years-long stay at the home of Ms. Arizinna Hood, his biological daughter from a previous marriage.¹²⁶ Ms. Hood promptly filed for guardianship over her father, only days before he filed an action for divorce against his spouse, Mrs. Tonya McMillan, alleging “gross neglect of duty and incompatibility.” Mrs. McMillan denied both allegations and assert that Mr. McMillan was incapacitated and could not, therefore, file an action for divorce.¹²⁷ Despite this, Mrs. McMillan petitioned unsuccessfully to be her husband’s guardian.¹²⁸ The court granted Ms. Hood’s motion, noting discrepancies in many of Mrs. McMillan’s filings and testimony after finding that Mr. McMillan was diagnosed with “vascular and Alzheimer’s dementia after suffering a stroke” and suffered from “cognitive deficits in language and memory, and was incompetent.”¹²⁹ A year later, after Mr. McMillan had been moved to an assisted living facility, Mrs. McMillan requested the probate court determine that Mr. McMillan was “competent to divorce or competent to voluntarily dismiss the divorce proceedings,” but the court refused, and the determination of incapacity stood.¹³⁰

The domestic relations court heard testimony from Ms. Hood and Mrs. McMillan regarding Mr. McMillan’s desires regarding his marriage. The testimony offered polar views: Ms. Hood testified that her father had filed for divorce multiple times, and his most recent filing was of his own volition and without her input; Mrs. McMillan testified that he had only filed once before and that it was not his desire to continue with the divorce proceedings currently.¹³¹ Neither party called Mr. McMillan to testify.¹³²

The court found no evidence of gross neglect of duty or incompatibility, but because Mr. McMillan had been absent from the marital home for longer than a year (under an Ohio statute¹³³), there were grounds for divorce.¹³⁴ The court granted a decree

¹²⁶ *Id.* at *3.

¹²⁷ *Id.*

¹²⁸ *Id.* at *4.

¹²⁹ *Id.* at *4, *10.

¹³⁰ *Id.* at *6.

¹³¹ *Id.* at *6, *7.

¹³² *Id.* at *8.

¹³³ OHIO REV. CODE. ANN. § 3105.01(J).

¹³⁴ *McMillan*, 2021 Ohio App. LEXIS 701, at *9.

of divorce in August of 2019, which Mrs. McMillan unsuccessfully appealed. In her appeal, Mrs. McMillan alleged the court erred by disallowing Mr. McMillan to testify and by allowing the testimony of his guardian, Ms. Hood, to be the basis for granting the divorce.¹³⁵ While the previous cases hinged on whether an incapacitated party could *consent* to divorce, Mrs. McMillan asked the court to determine if Mr. McMillan could *oppose* the divorce proceedings. The court found that Mr. McMillan lacked capacity to oppose and that there was no evidence presented at trial indicating as much.¹³⁶ The court of appeals affirmed the judgment granting the divorce.¹³⁷

Conclusion: Where the States Stand Today

To address the growing need for assistance, many states have created offices of public guardians or their equivalent, where a court may assign an ad litem to a person who, for various reasons, has been deemed in need of guardianship. The first of these states was, predictably, California: in 1945, Los Angeles County opened the Office of the Public Guardian, designed to initially aid those who were deemed incapable of managing their own finances due to incapacity.¹³⁸ Soon, other counties in California would model their guardianship programs after Los Angeles', broadening the guardianship duties, and eventually the idea would spread across the country.

Today, thirty-nine states have some form of a public guardian, operating at the county- or state-level for the indigent, incapacitated, and abandoned. Among those, only a select few—New York, California, Michigan, Minnesota, and Oregon—have statutes or case law that allow for a guardian to initiate, defend, or continue a divorce proceeding, with notable caveats (usually, that the guardian bears the burden of proving that the divorce is in the ward's

¹³⁵ *Id.* at *13, *17.

¹³⁶ *Id.* at *32.

¹³⁷ *Id.* at *33.

¹³⁸ *Public Guardian*, LOS ANGELES COUNTY DEPARTMENT OF MENTAL HEALTH, <https://dmh.lacounty.gov/our-services/public-guardian/#:~:text=The%20Los%20Angeles%20County%20Office,civilly%20committed%20to%20psychiatric%20facilities> (last visited Oct. 7, 2024).

best interest).¹³⁹ Two states, Florida and Texas, allow a guardian to defend or continue a divorce action, but bar a guardian from initiating one.¹⁴⁰

The remaining eleven states, Arkansas, Connecticut, Delaware, Idaho, Iowa, Kansas, Maryland, Mississippi, New Jersey, Oklahoma, and South Dakota, either lack formal state-wide programs, have limited services available, or must rely on local courts, private organizations, family members, and other private individuals to provide guardianship services for incapacitated adults. This gap in coverage typically leaves vulnerable adults without legal, medical, and financial protection and opens up those adults to varying forms of abuse, including domestic abuse within the confines of marriage.

The *Luxford* and *Buck* cases in colonial America set important legal precedents that would form the foundation of divorce and guardianship law in the United States for centuries to come. And the law only continues to change today: as recently as January 2024, North Carolina enacted legislation requiring public guardianship be considered only after exploring other less restrictive alternatives, such as a power of attorney or family support systems, which may be regarded as ineffective or intrusive, in order to protect and encourage autonomy in individuals whose incapacity is limited and not complete.¹⁴¹ The work to advocate for individuals who are disabled and require counsel for divorces, annulments, and other types of dissolutions continues.

Divorce and disability have been and will be a part of the American story for as long as America has a story. Both are legal, personal, and public issues that have permeated the country's history and culture since the very beginning and continue to this day. Compared to those first cases, the United States has made substantial progress to restore dignity to those Americans who were once considered lesser-than. Though imperfect and requiring the work to continue, legal advocacy for disabled Americans has never been better: a guardian, in any of the varying definitions, has the power

¹³⁹ CAL. FAM. CODE § 2332; MINN. STAT. § 524.5-313(10); N.Y. Surr. Ct. Proc. Act (§§ 1750 – 1761 (A Guardians of Persons Who are Intellectually Disabled and Developmentally Disabled)); OR. REV. STAT. § 125.315(1)(h); *Burgess v. Burgess*, No. 348068, 2020 Mich. App. LEXIS 2233 (Mich. Ct. App. Mar. 24, 2020).

¹⁴⁰ FLA. STAT. § 744.361; TEXAS ESTATE CODE § 1151.

¹⁴¹ N.C. Sess. L. 2023-124.

to enact the necessary mechanisms to ensure that a disabled citizen receives and retains all rights, respects, and benefits bestowed on all Americans. The country owes no small debt of gratitude to the lengthy and hard-fought battles of the disabled Americans that first stepped foot upon the shores of Virginia over four hundred years ago.

Kirsten Houtz