

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 99-0169

STATE OF WISCONSIN

**COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE GUARDIANSHIP OF THOMAS C.:

GRANT COUNTY,

APPELLANT,

V.

THOMAS C.,

RESPONDENT.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Modified and, as modified, affirmed.*

Before Eich, Vergeront and Deininger, JJ.

DEININGER, J. Grant County appeals an order appointing a successor guardian for Thomas C. The County claims that the trial court

erroneously exercised its discretion, and exceeded its authority, when it ordered Thomas's successor guardian to apply to become Thomas's representative payee for social security benefits. The County also cites as error a provision in the order directing the guardian to remove Thomas "from any caretaker facility which is a creditor of the ward..." We conclude that the circuit court acted within its authority and discretion in ordering the guardian to seek to become representative payee, but that the remaining provisions in the order regarding removal of Thomas from his current or future placements are ambiguous and unnecessary. Accordingly, we modify the order by vacating its last three sentences, and as modified, we affirm.

BACKGROUND

The circuit court appointed a guardian for Thomas and ordered him protectively placed in 1989. He has resided at Orchard Manor Nursing Home ever since. In 1998, his guardian asked to resign her duties due to health reasons, and Grant County petitioned for the appointment of a successor guardian. During the hearing on the petition, a social worker testified that Orchard Manor was serving as "protective" payee for Thomas with respect to his social security benefits. The court appointed a successor guardian of Thomas's person and his estate, and then directed as follows:

The Court will order that the guardian of the estate apply to be the protective payee, that he should become the protective payee. If he doesn't, he is to instruct the protective payee to account to him for the assets, and the protective payee cannot be the same place as where the guardian [sic] and the ward resides. So Orchard Manor if they are the protective payee, the guardian of the estate will have to move [Thomas] to another institution.

The County objected to these provisions, informing the court that “it’s solely Social Security that decides who the protective payee is.” The court declined to modify its order, stating that it was concerned about the “natural” conflict of interest inherent in having “the person handling the money also is the person watching [Thomas].” The court subsequently entered a written order, which included the following provisions:

[The successor guardian] is to apply to become the representative payee of Thomas[’s] Social Security monies. [The guardian] is to instruct the representative payee to account to him for the assets in this matter if he is not appointed the representative payee. The guardian is solely in control of all the ward’s assets and person and he shall be the sole person in charge of the ward and shall be responsible for all of the ward’s assets. An inventory shall be filed within 20 days. *The guardian shall remove the ward from any caretaker facility which is a creditor of the ward, since this is an inherent conflict of interest with a creditor being a fiduciary of the ward. Orchard Manor may be such an institution. Thus, the guardian should move the ward from any institution if he determines such an inherent conflict of interest exists.*

(Emphasis added.) Grant County appeals the order.

ANALYSIS

The County first argues that the appointment of a representative payee to receive and administer social security benefits on behalf of a benefit recipient is controlled by federal laws and regulations, and that the circuit court was thus without authority “to decide who is to be the representative payee of a ward’s Social Security monies.” This may be so, but the court’s order did not attempt to supplant the Social Security Administration’s (SSA) role in determining who should act as a representative payee for benefits it disburses. The court simply directed the guardian to apply to the SSA to become the payee for his

ward, and failing this, to require whomever was acting as representative payee to account for the handling of those benefits.

In so doing, the court acted within its authority. A guardian's administration of a ward's estate is subject to supervision and direction from the appointing court. Section 880.19(1), STATS., provides that a guardian of the estate "shall take possession of all of the ward's real and personal property...." The guardian, however, must annually file with the court an accounting of his or her handling of the ward's assets and income, and the account is to be "examined under the court's direction" to see that it is satisfactory. *See* § 880.25, STATS. The circuit court's direction to Thomas's guardian that he seek to become the payee for Thomas's social security benefits is not unreasonable in light of the guardian's statutory duties to (1) manage his ward's affairs, and (2) account to the court for his administration of the ward's estate. We thus conclude that the court did not erroneously exercise its discretion in entering this part of the order. *Cf. Winnebago County v. Harold W.*, 215 Wis.2d 523, 528, 573 N.W.2d 207, 209 (Ct. App. 1997) (noting that "the trial court must be vigilant in assuring that a guardian properly protects the ward's interests").

The final three sentences of the order, emphasized in the quotation above, are problematic, however. The direction that Thomas be removed "from any caretaker facility which is a creditor of the ward" seems overly broad and incapable of performance, in that any caretaker facility in which Thomas is placed would become his creditor, unless payment for his care is made in advance, an unlikely occurrence given his modest estate. Even if the language is construed more narrowly to mean that the guardian must remove Thomas from any facility which is acting as his representative payee for social security benefits, problems may arise. Another facility, if one were readily available to meet Thomas's needs,

might be reluctant to accept Thomas for placement if his present facility were still acting as representative payee. If the SSA elected to appoint the successor facility, instead of Thomas's guardian, as representative payee, would an unending series of removals be triggered?

Thomas's adversary counsel and guardian ad litem argue that we should interpret the apparently mandatory language in the order to mean that the guardian, in his discretion, should move Thomas if the guardian concludes a conflict of interest exists as a result of Thomas's placement in a facility that is acting as representative payee. The last sentence of the order, indeed, suggests this interpretation. We decline to do so, however, inasmuch as the guardian does not need a court order authorizing him to exercise his discretion in arranging for a placement that is in Thomas's best interests. That is precisely a guardian's statutory and common-law obligation. *See, e.g.*, § 880.38(2), STATS. (directing that a guardian "shall endeavor to secure necessary care, services or appropriate protective placement on behalf of the ward"); § 55.06(15), STATS. (placing duty on a guardian "to take reasonable steps to assure that the ward is well treated, properly cared for, and is provided with the opportunity to exercise legal rights"); *Winnebago County v. Harold W.*, 215 Wis.2d at 528, 573 N.W.2d at 209 (noting that a guardian "owes a fiduciary duty to the ward" and that the ward's best interests are "the overriding concern" of guardianship proceedings).

Accordingly, we conclude that the appealed order should be modified by vacating its last three sentences, and we direct that on remand these sentences be stricken from the order. The record indicates that the guardian has applied to become Thomas's representative payee for social security benefits, but does not indicate whether the guardian has been appointed in that capacity. If he has been, the final three sentences of the order are unnecessary. If not, Thomas's

guardian must determine whether the facility's accounting to him for the handling of these benefits is sufficient to ensure proper application of the benefits, or if transfer to another facility, if one is available and suitable for Thomas's placement, is required in order to further the ward's best interests.

The County also argues that the trial court "abused the due process rights of the ward and ... of Orchard Manor" because it ordered the guardian to apply to become representative payee, and possibly to change Thomas's placement, without proper notice to the parties, and without a hearing on the issue. We have concluded that the court acted within its authority, and with proper discretion, in directing the guardian to apply to become Thomas's representative payee. In modifying the order, we have removed other parts of the order which the County finds objectionable. We fail to see how Thomas's interests are adversely affected by the order as modified,¹ or how Orchard Manor, a nonparty, could claim that any of its legally protected interests were affected by it. We thus reject the County's argument.

Finally, the County argued in its opening brief that the trial court erred in appointing adversary counsel for Thomas for purposes of this appeal. In its reply brief, however, the County seems to acknowledge that we have previously determined that no issue regarding the trial court's appointment of appellate counsel for Thomas, which occurred after the entry of the appealed order, was properly before this court. Accordingly, we do not further address this issue.

¹ Both Thomas's guardian ad litem and his adversary counsel responded to the County's brief, and both have asked us to affirm the trial court's order in its entirety.

CONCLUSION

For the reasons discussed above, we modify the appealed order by vacating its last three sentences, and as modified, affirm it.

By the Court.—Order modified and, as modified, affirmed.

Not recommended for publication in the official reports.

