COURT OF APPEALS
DECISION
DATED AND FILED

October 12, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal Nos. 2009AP2450
2010AP1588

Cir. Ct. No. 2006GN501

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF AARON B.:

MARGARET B.,

PETITIONER-APPELLANT,

V.

MILWAUKEE COUNTY,

RESPONDENT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. This appeal arises from two related cases which we have consolidated for purposes of disposition.[1] In appeal no. 2009AP2450, Margaret B. appeals an order of the circuit court removing her, on Milwaukee County's petition, as guardian for her disabled adult son, Aaron B., after finding that Margaret failed to act in her ward's best interest. Adversary counsel has filed an amicus brief on Aaron's behalf seeking Margaret's reinstatement as guardian. Aaron's guardian ad litem (GAL) has filed a brief requesting that the circuit court order be affirmed. In appeal no. 2010AP1588, Margaret appeals the order denying her petitions to remove the successor guardian and to reinstate her. These decisions lie within the circuit court's discretion and, here, the court's exercise of discretion was unassailable. We affirm the orders.

¶2 This is Margaret's second appearance in this court. For background, see ***Margaret B. v. Milwaukee County***, No. 2008AP2653, unpublished slip op. (WI App Sept. 15, 2009). Briefly, Aaron was diagnosed at age three with a benign but inoperable brain tumor. He is moderately retarded and prone to frequent seizures and unpredictable outbursts of violence and aggression. It is undisputed that he is a danger to himself and others. He has been found incompetent and a proper subject for a guardianship.

¶3 Margaret was named Aaron's guardian in 2007 after he turned eighteen and the County ceased paying for the residential treatment facility he had been at since 2000. The court placed Aaron in Margaret's home and ordered twenty-four-hour supervision provided at the discretion of the County.

[1] This court, on its own motion, consolidated these appeals by order dated October 3, 2011. *See* WIS. STAT. RULE 809.10(3).

¶4 In January 2009, Margaret moved to enforce the order, asserting that both she and Aaron were unsafe under the current level of care. Margaret asked the court to "force [the County] to pay for 24-hour care for [Aaron] in his home with the current level of qualified staff making $15-$17 per hour" and to strip the County of any discretion in how the care would be provided. The court ruled:

> If the guardian, Margaret B[.], refuses to have the ward placed in her home with 24-hour supervision provided at the discretion of Milwaukee County, Milwaukee County is authorized to transfer the ward into a more-restrictive placement in an Intermediate Care Facility for the Mentally Retarded (ICF-MR) over the objection of the guardian.

¶5 The County then petitioned for Review of Conduct of Guardian, recommended Margaret's removal as guardian and proposed a successor. The petition alleged that Margaret was not acting in her ward's best interest by failing to cooperate with offered services, failing to allow services in her home, and blocking efforts at having Aaron assessed for placement at an ICF-MR.

¶6 On September 10, 2009, after over fifteen hours of testimony spanning six hearings, the court rendered a written decision. Its eight pages of findings include that Aaron's frequent episodes of violent and aggressive behavior have led to calls to police, injury to Margaret, his grandmother, caretakers and school personnel, and threats or attempts to harm himself; that Margaret reports living under "stressful, dangerous, life[-]threatening conditions"; that Aaron is without an over-arching treatment plan or close supervision by any treatment provider; that the County has been unsuccessful in finding providers to supervise home care; that Margaret, as guardian, refuses to approve of other care options; that her relationship with the County and potential care providers has grown adversarial; that the current home placement was not addressing Aaron's behavior

and treatment needs; and that Aaron had "lost a great deal of ground" since leaving the residential treatment facility so that it was "urgent" to stop the trend "immediately." The court concluded:

> Aaron B. urgently needs a clear[-]headed, objective Guardian … who will work closely and cooperatively with the County and care providers to develop a plan to help [him] better control and lessen the frequency of his violent behavior as well as help prepare him for a future life in the community.
>
> Although her intentions may be good, [Margaret] has not acted in the best interest of her son. She has been unable to objectively review all options available to Aaron with a clear and open mind. She has become so embroiled in the fight that she has lost sight of her responsibilities as Guardian.

¶7 The court granted the County's petition and appointed corporate guardian, RG Linhart, Inc., as successor guardian. Aaron remained placed in Margaret's home.

¶8 Margaret petitioned for review of Linhart's conduct as guardian. After testimony at two hearings and written submissions by Margaret, the GAL and the County, the court denied the petition. Margaret appeals

Appeal No. 2009AP2450 – Order Removing Margaret as Guardian

¶9 Guardianship status is not a legal right but a privilege conferred upon the guardian by the circuit court in the exercise of its discretion. ***Winnebago County DSS v. Harold W.***, 215 Wis. 2d 523, 528-29, 573 N.W.2d 207 (Ct. App. 1997). A discretionary determination will be affirmed "if the court makes a rational, reasoned decision and applies the correct legal standard to the facts of record. We accept all findings of fact made by the circuit court unless they are

clearly erroneous." ***Linda L. v. Collis***, 2006 WI App 105, ¶72, 294 Wis. 2d 637, 718 N.W.2d 205 (citations omitted).

¶10 Margaret contends that the circuit court wrongly removed her as guardian because it lost competency to act in several ways—first, that the court "misapplied" statutory law by denying Aaron the "rights and protections" set forth in WIS. STAT. § 51.61 (2009-10),[2] "WIS. STAT. § 54.25(2)(3)," "§ 54.25(2)(3)(a)" and "§ 54.25(2)(3)(b)," and WIS. STAT. § 55.001. This claim has no merit.

¶11 Margaret does not explain how the court "misapplied" the patient's rights section of the mental health act, WIS. STAT. § 51.61, or the protective service system chapter's declaration of policy, WIS. STAT. § 55.001. In fact, § 55.001 permits the order allowing Aaron's care to be at the discretion of the County. *See* ***id.*** (stating that the individual is entitled to programs, services and resources that the County is reasonably able to provide within the limits of available funds). We need not further address these undeveloped claims. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶12 As to WIS. STAT. § 54.25, that statute defines the duties of a guardian. Margaret asserts that safety is inherent in the duties described in "§ 54.25(2)(3)," "§ 54.25(2)(3)(a)" and "§ 54.25(2)(3)(b)."[3] If we understand her argument, Margaret believes she was faulted for not keeping Aaron safe in line with her statutory duty, but was thwarted in her efforts to do so by the court's

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

[3] We gather that Margaret means WIS. STAT. §§ 54.25(2)(d)3.a. and 54.25(2)(d)3.b. because there is no WIS. STAT. § 54.25(2)(3) or § 54.25(3).

failure to order the County to furnish the care Aaron needs. This court already has addressed Margaret's claim that the court's actions have made Aaron "unsafe." In her first appeal, we determined that the circuit court's placement orders in fact were designed to provide safe care for Aaron. ***Margaret B.***, No. 2008AP2653, unpublished slip op. at ¶31. The court is not bound to order the care Margaret deems necessary to keep Aaron in her home, and the County is not bound to provide it, unmindful of the cost.

¶13 Margaret next contends that the court lost competency when it "overrule[d] federal law," first, by forcing her to work without pay as a second caregiver contrary to the Thirteenth Amendment prohibiting involuntary servitude and, second, by denying Aaron the rights and protections listed in the federal Medicaid Waiver Manual. We will not address this patently baseless claim.

¶14 The court also lost competency, Margaret claims, by demonstrating prejudice. She asserts that it did so by refusing to order the County to provide the level of care Aaron needed, by giving the County ample time to present evidence yet "repeatedly rush[ing]" her, and by refusing to recuse itself. We again disagree.

¶15 Some of Margaret's examples of "prejudice" reflect her own misunderstandings—her misconception of what the "five-day rule" means in terms of submitting a proposed order, for example, or what the court meant when it said it did not have jurisdiction to provide specifically demanded relief. Others reflect evidentiary decisions that were within the court's broad discretion to make. *See* ***State v. Weed***, 2003 WI 85, ¶9, 263 Wis. 2d 434, 666 N.W.2d 485. Still others are, again, baseless. The six hearings were thorough and lengthy, and Margaret actively participated in them. We see no judicial bias.

¶16 Margaret's recusal argument also fails. Recusal is not required because *a party* thinks the judge could not be impartial. *See* ***State v. Harrell***, 199 Wis. 2d 654, 663, 546 N.W.2d 115 (1996). Rather, recusal is necessary only if *the judge* determines that, in fact or in appearance, he or she could not act in an impartial manner. *See* ***id.*** Judge Flanagan stated that she was "very confident" she could "be fair and even-handed." The record supports that assessment.

¶17 Margaret next claims that the circuit court's use of the "best interests of the ward" standard was error because Wisconsin recognizes a parent's liberty interest, thereby "set[ting] a higher bar" for one seeking to prove that a guardian/parent failed to act in the ward's best interests. We disagree.

¶18 Margaret misinterprets the cases she cites in support of her position. ***Troxel v. Granville***, 530 U.S. 57 (2000), spoke of a parent's liberty interest, but in the context of a fit mother deciding, after her nonmarital, minor daughters' father died, to limit visitation between the girls and their paternal grandparents. ***Id.*** at 60-61, 65, 68. It is not a guardianship case. While ***Harold W.***, 215 Wis. 2d 523, is a guardianship case, it also is to no avail. There, the parents were co-guardians of their twenty-one-year-old disabled daughter. ***Id.*** at 526. The father was removed for engaging in sexual improprieties with the daughter but the court determined that it was in the daughter's best interests that the mother continue as guardian. ***Id.*** at 527.

¶19 Margaret asserts that the fact that the mother was not removed as guardian "demonstrates the liberty interest a parent has, and establishes precedent in Wisconsin for the higher standard of review in ***Troxel***." The ***Harold W.*** decision was not rooted in the concept of "liberty," however, but in the ward's best interests. *See* ***Harold W.***, 215 Wis. 2d at 528 n.1 (where, construing WIS. STAT.

§ 880.09(2), the predecessor to WIS. STAT. § 54.15(5), the court expressly observed that even the statutory preference for a parent to serve as the child's guardian always is subject to the guardian/parent serving the ward's best interests).

¶20 In sum, there is no "higher standard." The court properly removed Margaret as guardian once it determined that she failed to act in the best interest of her ward. *See* WIS. STAT. § 54.68(2)(g).

¶21 Next, Margaret argues that the court erred in removing her as guardian because its decision did not reflect proper reasoning. Margaret and adversary counsel both argue that the court erred in removing her as guardian because, by excluding certain of Margaret's witnesses and ignoring the testimony of others, it did not thoroughly examine the facts.[4] The court's thorough written decision refutes these claims.

¶22 Again, evidentiary decisions lie within the court's discretion, *see* ***Weed***, 263 Wis. 2d 434, ¶9, as do the credibility of witnesses and the weight to be attached to their testimony, *see* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Margaret highlights evidence she believes supports findings contrary to those the court made. As it does not constitute the great weight and clear preponderance of the evidence, it therefore is insufficient to allow us to reject the court's findings as clearly erroneous. *See* ***Rohde-Giovanni v. Baumgart***, 2003 WI App 136, ¶18, 266

[4] Margaret and adversary counsel both give examples of assertedly favorable testimony from a transcript of May 29, 2009, day two of a hearing begun the day before. That transcript is not in the appellate record. We must assume that it supports the circuit court's ruling. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

Wis. 2d 339, 667 N.W.2d 718. The court's decision was amply supported by the facts, and was well-reasoned and based upon the proper legal standard.

¶23 In a related vein, Margaret complains that she was denied due process and a fair hearing when the court denied her request to depose Dr. Kristine Mooney, a psychologist the court appointed to independently evaluate Aaron. Dr. Mooney submitted her report and testified about it at a hearing about a week later. Margaret moved to adjourn the hearing so as to schedule a deposition and secure the appearance of two rebuttal witnesses she had failed to subpoena. The GAL opined that adjournment was not in Aaron's best interests. The court denied the motion on grounds that the report contained "highly historical" material available to everyone for months, the case had been "dragging on torturously" for a year and "[t]he thought of adjournment is just appalling, given this record."

¶24 "[A] continuance is not a matter of right." ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496 (citation omitted). The court properly exercised its discretion because it considered proper factors and gave a reasonable basis for its decision to deny the continuance. *See* ***id.*** In addition, Margaret was able to cross-examine Dr. Mooney at length. There was no curtailment of Margaret's right to due process and a fair hearing.

¶25 Margaret next asserts that the County's attorney "knowingly filed false claims" against her which the court condoned and thus allowed the "fraudulent, malicious prosecution" to proceed. She also contends that the County attorney violated various ethical rules, including withholding the name of a key witness. Even if the latter is true, Margaret did not object when that witness testified. We need not address undeveloped claims, *see* ***M.C.I., Inc.***, 146 Wis. 2d

at 244-45, or issues not properly raised in the circuit court, *see* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

¶26 Margaret next asks this court to terminate the GAL's appointment and to discipline her for misconduct, specifically, making repeated misrepresentations to the court. We would describe those "misrepresentations" more accurately as opinions that differ from Margaret's. Further, the record satisfies us that the GAL complied with her duties under WIS. STAT. §§ 54.40(4) and 55.18(2) and, importantly, advocated for Aaron's best interests. In so doing, she was permitted to point to evidence in the record that supported the position she believed to be in his best interests, regardless of whether Margaret or Aaron agreed. *See* § 54.40(3).

¶27 The thrust of adversary counsel's brief is that the circuit court failed to sufficiently explore Margaret's interactions with potential care providers and the County and whether the County made a good-faith effort to secure the funding for a proper placement. We disagree. The issues were exhaustively aired over many hearings. Numerous witnesses testified. Aaron's neuropsychologist produced a comprehensive report, as did Dr. Mooney. While some of the evidence and opinions diverged, it was for the court to resolve any conflicts. *See* ***Fuller v. Riedel***, 159 Wis. 2d 323, 332, 464 N.W.2d 97 (Ct. App. 1990). The court's conclusions were not uninformed.

Appeal No. 2010AP1588 – Denial of Petition to Remove Successor Guardian

¶28 We turn to Margaret's second of these two appeals. Pursuant to WIS. STAT. § 54.68(4), the circuit court may remove a guardian if it finds that the

guardian has committed any of the acts set forth in § 54.68(2). We construe the use of "may" as permitting the exercise of discretion. ***Linda L.***, 294 Wis. 2d 637, ¶72 (construing WIS. STAT. § 880.16). Applying that standard to this case, we affirm the denial of Margaret's petition.

¶29 Margaret's petition alleged that Linhart abused or neglected Aaron or knowingly permitted others to do so, failed to exercise due diligence and reasonable care to ensure that Aaron's needs were being met in the least restrictive environment consistent with his needs and incapacities, and failed to act in Aaron's best interests. *See* WIS. STAT. § 54.68(2)(c), (f), (g). Margaret contends that she presented ample credible evidence warranting Linhart's removal.

¶30 The court heard testimony over two days of hearings. Witnesses included a social service consultant, school, hospital and advocacy agency representatives, and one of Aaron's doctors. Margaret and Linhart also testified. Margaret characterizes Linhart's explanations of her complaints as "lies."

¶31 The court found that the evidence established that Linhart is working with the County and with a new state program for disabled adults to develop programming and services suitable for Aaron; that, while communication between Linhart and Margaret is "strained," others report that Linhart is available and responsive to questions; and that Margaret's testimony did not support a conclusion that Linhart's actions were unreasonable, neglectful or not in Aaron's best interest. Contrary to Margaret's assertion, the court concluded there was "simply no credible evidence" that Linhart did not act in Aaron's best interest.

¶32 Likewise, we are not swayed by Margaret's assertion here that the contrary evidence she presented proves either "clear error" or that Linhart

committed "a felony … for perjury." The circuit court was in the best position to make decisions that required weighing conflicting evidence. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 223, 558 N.W.2d 626 (1997). Even assuming Margaret's evidence was credible and allowed the drawing of reasonable inferences, we still must accept the reasonable inferences the fact finder drew. *See* ***Landrey v. United Servs. Auto. Ass'n***, 49 Wis. 2d 150, 157, 181 N.W.2d 407 (1970). Margaret's evidence did not constitute the great weight and clear preponderance of the evidence. *See* ***Rohde-Giovanni***, 266 Wis. 2d 339, ¶18.

¶33 Margaret next contends that the circuit court failed to consider Aaron's best interests. She is wrong. The record is replete with examples of the court's ongoing consideration of Aaron's best interests, and the written decision expressly references it. Margaret may disagree with the court as to what serves Aaron's best interests, but it is a matter properly within the court's discretion. *See* ***Anna S. v. Diana M.***, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285.

¶34 Margaret next asserts that the circuit court did not apply the proper fiduciary standard in regard to the adequacy of Linhart's performance as guardian. WISCONSIN STAT. § 54.18(2) requires that a guardian "[e]xercise the degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person exercises in his or her own affairs."[5] Margaret offers nothing showing that the court failed to apply this standard or looked to any other. Again, it appears she simply disagrees with the circuit court's analysis and conclusions.

[5] Margaret cites WIS. STAT. § 54.18(4) which, despite its similar language, addresses a guardian's immunity from civil liability.

¶35 Next, Margaret contends that Aaron was denied adversary counsel,[6] despite the court's duty to require representation because Aaron is incompetent. WISCONSIN STAT. § 55.10(4), the statute she cites in support, does not assist her because it applies to a hearing on protective services or protective placement. This was not such a hearing.

¶36 Here, the court was not required to appoint counsel for the hearing on the petition to have Linhart removed, and Aaron did not request counsel. *See* WIS. STAT. §§ 54.68 and 54.42(1)(a)1. Also, Aaron did not oppose Margaret's petitions to remove Linhart and to be reappointed. To the extent he understood the concept, the record reflects that Aaron had expressed his desire that Margaret be his guardian. It is unclear to us why Margaret believes adversary counsel would be necessary if her and Aaron's interests were aligned.

¶37 Margaret's last issue alleges that Judge Flanagan and the GAL engaged in such misconduct as to "support a conspiracy that harms all disabled in Milwaukee County." She then goes on for five pages, and refers back to her six-page statement of "facts," cataloging innumerable persistent "lies" that were overlooked by the GAL and condoned by Judge Flanagan. As in her brief in appeal no. 2009AP2450, Margaret spares no one in her accusations of perjury, misrepresentation, conspiracy, ethical violations and judicial misconduct.

[6] Margaret complains that despite what this court said in its opinion on her first appeal, Aaron actually did not have adversary counsel at the January 2009 hearing. *See* ***Margaret B. v. Milwaukee County***, No. 2008AP2653, unpublished slip op. ¶15 (WI App Sept. 15, 2009). That matter is not before us on this appeal from the denial of her petitions.

¶38 We will leave it at this. As his mother, Margaret's deep and emotional investment in Aaron's welfare is understandable. Her fierce advocacy, however, while admirable to a point, now has crossed the line. We caution her that she must stop these scurrilous, unfounded allegations. Nothing in the record supports her claims and—mother or not, pro se or not—nothing excuses such invective and disrespect to the court, its officers and the other targets of her attacks. Beyond that, Margaret now is a lawyer herself. She would do well to acquaint herself with Supreme Court Rule 62 on the standards of courtesy and decorum that is expected of her.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.