COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1238 **Cir. Ct. No. 2014GN10**

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

IN THE MATTER OF THE GUARDIANSHIP OF JOSEPHINE L.:

FRANK L.,

PETITIONER-RESPONDENT,

V.

JOSEPHINE L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Josephine L. appeals an order granting the petition of her son, Frank L., for the guardianship of her person and estate. We conclude

that the guardian ad litem (GAL) entered a proper waiver of Josephine's appearance at the guardianship hearing and that the circuit court had competency to hear and decide the petition. We affirm.

¶2 The WIS. STAT. § 54.34 (2013-14)[1] petition, filed January 17, 2014, alleged that eighty-four-year-old Josephine suffered from a degenerative brain disorder, could be the subject of financial exploitation, required the appointment of a guardian of her person and estate, and previously had not been the subject of a guardianship action.

¶3 Josephine appeared with her advocate counsel at the March 3 guardianship hearing. When the court-appointed Italian interpreter failed to appear, the hearing was adjourned until the next day.

¶4 On March 4, Josephine's advocate counsel, the GAL, Frank, Frank's counsel, and the interpreter appeared. Advocate counsel informed the court that he had spoken to Josephine that morning and she had told him she was ill, needed to see a doctor, and did not want to come to court, and that he advised her her nonappearance would result in the court granting the petition in her absence. GAL Attorney Krislyn Holaday waived Josephine's appearance at the beginning of the hearing, citing her earlier written waiver.

¶5 The court proceeded without Josephine present. It admitted into evidence the written report of psychologist Dr. Peder Piering, who had examined Josephine two weeks earlier. The report detailed Josephine's degenerative brain disorder, cognitive deficits, and inability to make health and financial decisions.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless noted.

Dr. Piering opined that without a guardian of her person and estate, Josephine would deteriorate, and suffer harm or even death.

¶6 GAL Holaday filed a report created pursuant to WIS. STAT. § 54.40(4) dated February 27, 2014, detailing the information and explanations she had given to Josephine and the materials Holaday reviewed before making her recommendation. The report indicated that Holaday was waiving Josephine's appearance after considering Josephine's ability to understand and meaningfully participate, the effect of attendance on Josephine's physical and/or psychological health in relationship to the importance of the proceeding, and Josephine's expressed desires. *See* WIS. STAT. § 54.44(4)(a). Holaday left blank the space for her to specify her reasons for her recommendation but explained in the accompanying cover letter that "attendance at hearings is causing [Josephine] a great deal of anxiety." The letter acknowledged that the final decision whether to attend was Josephine's and her advocate counsel's.

¶7 Advocate counsel stated that in his conversation with Josephine that morning, she was the "least lucid" and had "the least understanding of what was going on" of all the times he had met with her, and opined that it was related to the stress of going to court. He did not object to proceeding without Josephine's presence. The court ordered the guardianship letters.

¶8 Pursuant to WIS. STAT. § 806.07, successor advocate counsel Attorney John Osinga moved for relief from the guardianship order. He argued that the circuit court's acceptance of the waiver of Josephine's attendance violated her due process right to be at the guardianship hearing, thus invalidating the guardianship because the court lacked competence to proceed without her.

¶9 Josephine and Osinga, Frank and his attorneys, and successor GAL appeared at the hearing on the motion. The court found that the GAL had waived Josephine's presence; none of the parties requested an adjournment; the guardianship order was supported by Dr. Piering's report, recommended by the GAL, and stipulated to by advocate counsel; Osinga presented no witnesses to rebut Dr. Piering's findings and conclusions; no new facts were adduced to show that the court acted contrary to statute; and Josephine had not been defaulted. It concluded, therefore, that Josephine failed to show that its prior orders were entered in error. The court denied the motion.

¶10 On appeal, Josephine argues the circuit court lost competency to act on the guardianship petition. She contends that, although the March 4 hearing was timely, it was based on a waiver of her presence that did not comply with WIS. STAT. § 54.44(4)(a), as Holaday's report said only that she considered the § 54.44(4)(a) factors but did not specify her reasons for the waiver. Accordingly, she asserts, a proper hearing was not held within the statutorily mandated ninety-day period. *See* § 54.44(1).

¶11 A court's competency is implicated "when the failure to abide by a statutory mandate is 'central to the statutory scheme.'" ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶10, 273 Wis. 2d 76, 681 N.W.2d 190 (citation omitted). The question of the circuit court's competency to proceed is a question of law that we review de novo. ***Id.***, ¶7.

¶12 In guardianship matters, a proposed ward has a right to be present at any hearing regarding the guardianship. WIS. STAT. § 54.42(5). Absent a valid waiver by the GAL, the petitioner's failure to ensure the proposed ward's attendance at a guardianship hearing causes the circuit court to lose competency to

proceed on the guardianship petition. ***Jefferson Cnty. v. Joseph S.***, 2010 WI App 160, ¶5, 330 Wis. 2d 737, 795 N.W.2d 450; *see also* WIS. STAT. § 54.44(4)(a). Before deciding whether to waive the proposed ward's appearance, factors the GAL must consider include the person's ability to understand and appreciate the proceedings, the impact of the proceedings on the person's mental health, and the person's wishes. Sec. 54.44(4)(a).

¶13 We decline to apply to WIS. STAT. ch. 54 guardianship proceedings requirements mandated under the former guardianship statute, WIS. STAT. ch. 880 (2003-04), or, as Josephine urges, the more stringent waiver requirements for WIS. STAT. ch. 55 protective placements. *See* WIS. STAT. § 55.10(2). The general presumption is that when the legislature chooses different terms, it intends the distinction. *See* ***Johnson v. City of Edgerton***, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996).

¶14 Holaday fully executed her statutory responsibilities and general duties. *See* WIS. STAT. § 54.40(3), (4)(a), (b), (f), (i). Her rationale for waiving Josephine's presence was set forth in the cover letter to the report. The guardianship hearing was held within ninety days. WIS. STAT. § 54.44(1)(a). The statute requires nothing more of the GAL or of the circuit court. Both did everything right.

¶15 Josephine next asserts that even if the GAL's waiver fully comported with all statutory requirements, the circuit court still was not competent to proceed with the hearing because it failed to establish that she made a "conscious and voluntary decision" not to exercise her right to attend the hearing.

¶16 WISCONSIN STAT. ch. 54 imposes no such requirement. Indeed, "[t]he guardian ad litem shall function independently … and shall consider, but is

not bound by, the wishes of the proposed ward … or the positions of others as to the best interests of the proposed ward." WIS. STAT. § 54.40(3). We agree with Frank about the incongruence of Josephine's argument that a person for whom a guardianship is sought due to mental incompetence must make a "conscious and voluntary decision" to not attend the hearing deciding the guardianship.

By the Court.—Order affirmed.

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