**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**April 18, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP2614** **Cir. Ct. No. 2015GN100**

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

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**IN THE MATTER OF THE GUARDIANSHIP OF A. M. Q.:**

**BROWN COUNTY,**

**PETITIONER-RESPONDENT,**

**V.**

**A. M. Q.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. A.M.Q. appeals an order appointing her daughter, Margaret, as the permanent guardian of A.M.Q.'s estate. A.M.Q. argues: (1) the circuit court failed to provide an adequate explanation for its decision to appoint a guardian of the estate; (2) the court erred by granting the guardian full authority; (3) the court improperly appointed Margaret as guardian; and (4) the court erred by voiding an amendment to a trust created by A.M.Q. and her late husband.

¶2 We conclude the circuit court properly exercised its discretion by appointing a guardian of A.M.Q.'s estate and granting that guardian full authority. We therefore affirm in part. However, we conclude the court erred by appointing Margaret as guardian, and we therefore reverse the relevant portion of the court's order and remand for the court to follow the procedure set forth in WIS. STAT. § 54.44(6) (2015-16)[1] in appointing a guardian of A.M.Q.'s estate. We also reverse that portion of the order voiding the amendment to the trust.

## BACKGROUND

¶3 A.M.Q. was born in 1929. She and her husband, Donald, had five children: Paul, Peter, Margaret, Mary, and Marsha. In 1999, A.M.Q. and Donald established a revocable trust, of which they were co-trustees. Donald died in early 2015. At that point, pursuant to the trust agreement, A.M.Q.'s brother, Daniel, became co-trustee with A.M.Q.

¶4 On April 6, 2015, the trust, A.M.Q., and Paul entered into a memorandum of understanding (MOU), which acknowledged that Paul, his wife,

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

and entities they owned had previously borrowed $230,807.71 from the trust. The MOU prohibited Paul and his wife, or any of their entities, from receiving additional loans, advances, or guarantees from the trust without the express written approval of all trustees. On May 6, 2015, Daniel resigned as co-trustee. As a result, in accordance with the trust agreement, Margaret became co-trustee with A.M.Q.

¶5 After the MOU was executed, A.M.Q., Paul, and Peter made several attempts to withdraw between $500,000 and $700,000 from the trust's accounts for Paul's business. As a result, Wells Fargo, the trust's bank, contacted Brown County on May 11, 2015, expressing concern that A.M.Q. was being financially exploited.[2] On May 13, 2015, Wells Fargo restricted all activity on the trust's accounts. On the same day, A.M.Q. signed an amendment to the trust agreement, naming Peter as co-trustee, rather than Margaret. Two days later, Wells Fargo filed a lawsuit in federal court asking the court, among other things, to identify "the proper trustee(s) of the Trust with the right to control the Accounts."

¶6 On June 8, 2015, the County filed a petition for temporary guardianship of A.M.Q.'s estate, and letters of temporary guardianship were issued on June 10. The circuit court appointed Corporate Guardians of Northeast Wisconsin, Inc., as temporary guardian. The County filed a petition for permanent guardianship of A.M.Q.'s estate on July 14. The court subsequently ordered an

[2] The County had previously received a phone call in March 2015 expressing concern that A.M.Q. was being financially exploited. In response to that call, social workers employed by the County visited A.M.Q. on two occasions in March and April 2015. The County closed its file on April 20, 2015, without taking any other action.

independent examination of A.M.Q. by Dawn Pflugradt, a licensed psychologist specializing in forensic and neuropsychology.

¶7 A contested guardianship hearing took place on August 27 and 28, 2015. During the hearing, Pflugradt testified she had examined A.M.Q. on August 17. She began the examination by performing a Mini Mental Status Exam, which is "a screener for … how alert and oriented" the subject is. Pflugradt reported that A.M.Q. performed "fairly well" on that exam.

¶8 Pflugradt then performed the Repeatable Battery for the Assessment of Neuropsychological Status (RBANS), which she described as "a neuropsychological screener used to screen for signs of problems and difficulties in cognitive functioning" that is used "specifically for screening dementia, traumatic brain injury, or other injuries to the brain." The RBANS tests several different areas of mental functioning. Pflugradt testified A.M.Q. performed "in the borderline range on attention" and displayed mild to moderate impairment "on delayed memory and … visuospatial/constructional, which means her ability to take in stimuli and reproduce what she's seen." A.M.Q.'s immediate memory was "low average." A.M.Q. displayed no difficulties in the area of language and communication. However, Pflugradt testified that finding was significant because it meant A.M.Q. "may be able to appear like she can function higher than she is actually capable of in some areas."

¶9 Following the RBANS, Pflugradt administered the Trails A and B, "a screener for executive functioning." Pflugradt explained that executive functioning is "like a good secretary …. [I]f you have good executive functioning, you are able to stay on task, you are able to keep appointments, you are able to manage complex tasks." Pflugradt testified that, as a person's

executive functioning begins to fail, "[y]ou start to get easily confused. You start to not remember things that you ordinarily would." She further testified executive functioning is "one of the most important functions" when handling large amounts of money because "as tasks become more complex, if you have a faulty executive functioning system, you are not able to do that adequately." Based on A.M.Q.'s performance on the Trails A and B, Pflugradt testified A.M.Q.'s executive functioning was "severely impaired."

¶10 Ultimately, Pflugradt opined that A.M.Q. suffers from "unspecified major neurocognitive disorder," which Pflugradt explained was formerly called dementia. Given A.M.Q.'s poor executive functioning, Pflugradt testified she believed it would be appropriate to appoint a guardian of A.M.Q.'s estate. Pflugradt specifically testified that A.M.Q. is unable to effectively receive and evaluate information, such that there is a risk her property will be dissipated, she will be unable to provide for her own financial support, and she will be unable to prevent financial exploitation. Pflugradt further opined the incapacity from which A.M.Q. suffers is likely to be permanent. When asked whether there was "any less restrictive option or possibility, given the severe deficits in … the executive functioning, … than a guardian of [the] estate," Pflugradt responded, "Given the information I have at this time, no, I don't think so."

¶11 On cross-examination, Pflugradt conceded it was her understanding that, absent any issues regarding the trust, A.M.Q. was capable of managing her own day-to-day financial affairs. Pflugradt also acknowledged she would not be concerned about A.M.Q. "if [A.M.Q.] had a thousand dollars in a checkbook right now." Pflugradt explained, "[W]ithout administering Trails A and B to see how severe [A.M.Q.'s] executive functioning was, I would have said she could have

managed her estate. [The results of Trails A and B] really showed me that as demands and as things get more complicated, she is going to struggle."

¶12 Ursula Bertrand, a licensed psychologist, testified she examined A.M.Q. in May 2015. During the examination, Bertrand interviewed A.M.Q., conducted a mental status evaluation, and administered the Montreal Cognitive Assessment. Following the examination, Bertrand diagnosed A.M.Q. with "unspecified neurocognitive disorder."

¶13 Bertrand elaborated that A.M.Q. has a good long-term memory, but her short-term memory shows some impairment. Like Pflugradt, Bertrand testified her "biggest concern" regarding A.M.Q. was A.M.Q.'s executive functioning. Because of deficits in A.M.Q.'s executive functioning, Bertrand opined A.M.Q. would likely have difficulty performing complex tasks. Bertrand further testified that, because of her incapacities, A.M.Q. was unable to prevent financial exploitation and was at risk of being unable to handle her finances, such that they would dissipate and she would be unable to provide for her own support. Bertrand therefore recommended that the court appoint a guardian of A.M.Q.'s estate to "assist [A.M.Q.] in terms of finances."

¶14 Stephen Asma, A.M.Q.'s family practice physician, testified A.M.Q. asked him to test her memory at an appointment in May 2015 after some of her family members expressed concerns regarding her cognitive functioning. Asma therefore performed a Mini Mental Status Exam, on which A.M.Q. received a perfect score. Asma testified he had "no concerns" about A.M.Q.'s ability to care for herself and manage her daily financial affairs.

¶15 Tracy Sherman, a family practice physician with additional qualifications in geriatrics, testified Asma referred A.M.Q. to her for further

evaluation. Sherman examined A.M.Q. on August 18, 2015, one day after Pflugradt's examination. She began by administering the St. Louis University Mental Status Exam (SLUMS). A.M.Q. "had some difficulty" on that test "in the area of short-term memory" but "otherwise scored quite well."

¶16 Because A.M.Q.'s score on the SLUMS fell into the range of "mild cognitive impairment," Sherman performed a second test, the RBANS. Sherman testified A.M.Q. "improved on the memory portion" of the RBANS and "scored in the normal average range for her age on short-term memory." Because A.M.Q. performed well on the RBANS, Sherman decided not to administer the Trails A and B. Sherman further testified she had seen no evidence indicating that A.M.Q. was incapable of handling her own daily financial affairs.

¶17 During her earlier testimony, Pflugradt had explained that the developer of the RBANS specified that test should not be repeated "within at least six months to a year from when the person first had it." Pflugradt further explained the results of a repeated test are deemed unreliable because the subject "becomes familiar with the concepts, familiar with the test. There is some amount of teaching that goes on with how you administer [the test], so performing it back to back would usually end up in an increased performance on the second test." Sherman conceded during her subsequent testimony that she learned while administering the RBANS to A.M.Q. that A.M.Q. had completed the same test the previous day. Sherman nevertheless proceeded with the test because she did not believe A.M.Q.'s recent completion of the RBANS would significantly alter the test's results. Sherman acknowledged she was not aware the creators of the RBANS had specified the test should not be repeated less than six months after a previous administration.

¶18 In their closing arguments, the County, A.M.Q.'s guardian ad litem (GAL), and counsel for A.M.Q.'s three daughters asked the circuit court to find A.M.Q. incompetent and in need of a guardian of the estate. They agreed the temporary guardian—Corporate Guardians of Northeast Wisconsin—should be appointed as permanent guardian. Counsel for the daughters also asked the circuit court to name Corporate Guardians of Northeast Wisconsin as trustee of the trust. In response, A.M.Q. argued the County had failed to meet its burden of proving she was incompetent and in need of a guardian of the estate. A.M.Q. further argued the guardianship proceedings were not an appropriate venue for determining the validity of the May 13, 2015 trust amendment, which purported to name Peter as co-trustee with A.M.Q.

¶19 The circuit court subsequently issued a written decision indicating that, after "carefully consider[ing] the qualifications and credibility of the experts as well as the facts supporting their opinions," the court found Pflugradt "provided the most persuasive testimony." The court explained:

> Dr. Pflugradt directly answered all her questions. She clearly and concisely provided sound reasons for her opinions. Dr. P[f]lugradt expressed the best understanding of the various tests and their limitations. Dr. Pflugradt testified that her diagnosis is an unspecified major neurocognitive disorder which affects executive functioning. Executive functioning is critical in administering the estate at issue.

¶20 Based on Pflugradt's testimony, the circuit court determined it was appropriate to appoint a permanent guardian of A.M.Q's estate. However, the court declined to appoint Corporate Guardians of Northeast Wisconsin, noting Corporate Guardians of Northeast Wisconsin had not handled many estates exceeding $1 million, and A.M.Q.'s estate had an estimated value of $2.3 million. The court then reasoned:

> [A.M.Q.] and her deceased husband … respect the judgment of their daughter [Margaret]. The terms of the Revocable Trust appoint [Margaret] as Successor Sole Trustee upon the death, resignation, and incapacitation of [A.M.Q.'s husband], [A.M.Q.], and [Daniel]. [A.M.Q.'s husband] has sadly passed. [A.M.Q.] is unable to act due to incapacity and [Daniel] has resigned. I find the most appropriate person to be named Guardian is Margaret.

¶21 Finally, the circuit court found that A.M.Q. was incapacitated when she executed the May 13, 2015 amendment to the trust agreement naming Peter as co-trustee. As a result, the court concluded that amendment was void. The court therefore held that, pursuant to the original trust agreement, Margaret was the sole trustee of the trust.

¶22 On the same day it issued its written decision, the circuit court completed and filed standard form GN-3170, entitled "Determination and Order on Petition for Guardianship Due to Incompetency." A.M.Q. now appeals from that order.

## DISCUSSION

### I. The circuit court adequately explained its decision to appoint a guardian.

¶23 WISCONSIN STAT. § 54.10(3)(a) provides that a court may appoint a guardian of the estate for an individual based on a finding the individual is incompetent only if the court finds the following by clear and convincing evidence:

> 1. The individual is aged at least 17 years and 9 months.
>
> ….
>
> 3. For purposes of appointment of a guardian of the estate, because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management

> of his or her property or financial affairs, to the extent that any of the following applies:
>
> a. The individual has property that will be dissipated in whole or in part.
>
> b. The individual is unable to provide for his or her support.
>
> c. The individual is unable to prevent financial exploitation.

The court must also find, by clear and convincing evidence, that "[t]he individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept." Subd. 54.10(3)(a)4.

¶24 WISCONSIN STAT. § 54.10(3)(c), in turn, lists sixteen factors a court "shall consider" when appointing a guardian and determining what powers the guardian may exercise. The statute further provides that, before appointing a guardian and determining the guardian's powers, a court "shall determine if additional medical, psychological, social, vocational, or educational evaluation is necessary for the court to make an informed decision respecting the individual's competency to exercise legal rights." Para. 54.10(3)(d).

¶25 The circuit court's factual findings will not be overturned on appeal unless clearly erroneous. WIS. STAT. § 805.17(2); *see also* ***Coston v. Joseph P.***, 222 Wis. 2d 1, 22, 586 N.W.2d 52 (Ct. App. 1998). Whether the evidence meets the legal standard for incompetency presents a question of law that we review independently. ***Cheryl F. v. Sheboygan Cty.***, 170 Wis. 2d 420, 425, 489 N.W.2d 636 (Ct. App. 1992). Once the need for a guardian has been established, the overriding concern is the best interest of the ward. *See* ***Anna S. v. Diana M.***, 2004

WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285. That determination is within the circuit court's discretion. ***Id.*** We affirm a discretionary decision if the circuit court applied the proper legal standard to the relevant facts and used a rational process to reach a reasonable result. ***Id.*** (citing ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982)).

¶26 A.M.Q. argues the circuit court erroneously exercised its discretion in this case by "fail[ing] to make any of the required statutory findings or offer any explanation as to how it reached its decision." She asserts the only findings the court made were that Pflugradt was the most credible expert; that Pflugradt had diagnosed A.M.Q. with unspecified major neurocognitive disorder affecting her executive functioning; and that executive functioning is critical to administering A.M.Q.'s estate. A.M.Q. contends the court did not find the County had proved the elements set forth in WIS. STAT. § 54.10(3)(a)3. by clear and convincing evidence. A.M.Q. further argues the court failed to find that A.M.Q.'s needs could not be met effectively and less restrictively through other means. *See* subd. 54.10(3)(a)4. Because the court failed to make these findings, A.M.Q. argues the guardianship order is "effectively unreviewable," and we have "no real choice but to remand for further findings and conclusions."

¶27 We disagree. Following a two-day hearing, the circuit court issued a written decision granting the County's guardianship petition, and it also completed standard form GN-3170. By completing that form, the court made specific findings by clear and convincing evidence, including finding that A.M.Q. is at least seventeen years and nine months old. *See* WIS. STAT. § 54.10(3)(a)1. The court further found that, because of an impairment, A.M.Q. is unable effectively to receive and evaluate information or to make or communicate decisions related to management of her property or financial affairs, to the extent that at least one of

the following applies: (1) her property will be dissipated in whole or in part; (2) she is unable to provide for her own support; or (3) she is unable to prevent financial exploitation. *See* subd. 54.10(3)(a)3. The court also found that no additional testing was required in order for it to make a determination on the County's guardianship petition. *See* para. 54.10(3)(d).

¶28 Ample evidence supports these findings. A.M.Q.'s age is undisputed. During the guardianship hearing, Pflugradt testified A.M.Q. suffers from "unspecified major neurocognitive disorder" and her executive functioning is severely impaired. Bertrand similarly testified A.M.Q. suffers from "unspecified neurocognitive disorder" and her executive functioning is moderately to severely impaired. Both Pflugradt and Bertrand testified A.M.Q. met the standard for incompetency set forth in WIS. STAT. § 54.10(3)(a)3. While A.M.Q. relies on contrary testimony provided by Asma and Sherman, the circuit court expressly found, after considering the various experts' qualifications and credibility, that Pflugradt "provided the most persuasive testimony," and the court therefore gave her testimony the greatest weight. "When the [circuit] court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness's testimony." ***Lessor v. Wangelin***, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998).

¶29 As A.M.Q. notes, the circuit court failed to make an express finding, pursuant to WIS. STAT. § 54.10(3)(a)4., that A.M.Q.'s need for decision making or communication was unable to be met effectively and less restrictively through other means, such as training, education, support services, health care, or assistive devices. However, when the circuit court fails to make an explicit factual finding, we assume the court made the finding in a manner that supports its final decision. *See* ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568,

*overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. Moreover, "[a]lthough the proper exercise of discretion contemplates that the circuit court explain its reasoning, when the court does not do so, we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

¶30 Here, the record supports a finding that a guardianship of the estate is the least restrictive means of meeting A.M.Q.'s needs. Again, both Pflugradt and Bertrand testified A.M.Q. suffers from an incapacity, which is likely to be permanent and which puts her at risk for dissipation of her property, inability to provide for her own support, and financial exploitation. When asked whether there was any less restrictive option than appointing a guardian of the estate, Pflugradt responded, "Given the information I have at this time, no, I don't think so."

¶31 In addition, significant evidence was presented at the guardianship hearing to suggest that A.M.Q. was being financially exploited by her sons, Peter and Paul. Wells Fargo's call log, which was introduced into evidence at the hearing, showed multiple attempts by A.M.Q., Peter, and Paul to withdraw up to $700,000 for Paul's business from the trust's accounts, in contravention of the MOU. The evidence further showed that, after receiving approximately $142,000 in life insurance benefits following her husband's death, A.M.Q. transferred $100,000 of that money to Paul's business.[3] Other evidence indicated A.M.Q. and

[3] Paul asserted, without supporting evidence, that both he and A.M.Q. were listed as beneficiaries on the life insurance policy in question. However, he conceded the insurer paid the entire policy amount to A.M.Q.

her husband had personally guaranteed approximately $400,000 in loans to Paul's business. In addition, the MOU reflected that Paul had previously borrowed $230,807.71 from the trust.

¶32 Based on this evidence, the circuit court could reasonably find that A.M.Q. was at a high risk of financial exploitation by her sons, and it was possible her financial resources would be dissipated to such an extent she would be unable to provide for her own support. Based on those findings, the court could reasonably find that less restrictive alternatives to a guardianship of the estate would not adequately protect A.M.Q.'s interests.

¶33 A.M.Q. also asserts the circuit court "failed to articulate whether it considered any of the mandatory factors under WIS. STAT. § 54.10(3)(c)." However, the statute merely requires a court to "consider" the sixteen listed factors. *See* para. 54.10(3)(c). It does not require the court to memorialize its analysis of each factor in an oral or written decision. Moreover, A.M.Q. did not cite para. 54.10(3)(c) in the circuit court, and her arguments in the circuit court touched on, at most, three of the sixteen statutory factors.[4] Although it is advisable for a circuit court to expressly address each of the factors listed in para. 54.10(3)(c) in its decision in a guardianship action, a court's failure to do so is understandable where the parties have failed to affirmatively put a particular factor or factors at issue. In addition, while A.M.Q. cites para. 54.10(3)(c) on appeal, she again fails to provide an analysis of the factors listed in that paragraph or an explanation of why they support her position.

[4] *See* WIS. STAT. § 54.10(3)(c)2. (medical or psychological reports received by the court), (3)(c)5. (the individual's preferences, desires, and values with regard to personal needs or property management), (3)(c)9. (the individual's management of the activities of daily living).

¶34 On the whole, the record shows that, following a two-day guardianship hearing—at which two psychologists, two medical doctors, and five other witnesses testified—the circuit court issued a written decision granting the County's guardianship petition, and it completed form GN-3170. Those documents demonstrate the court expressly or impliedly found the County satisfied its burden to establish the necessary elements for the appointment of a guardian of A.M.Q.'s entire estate. We therefore reject A.M.Q.'s argument that the court erroneously exercised its discretion by failing to adequately explain its decision to appoint a guardian.

**II. The circuit court properly transferred full authority to the guardian.**

¶35 In the alternative, A.M.Q. argues the circuit court erred by transferring full authority to the guardian of her estate. WISCONSIN STAT. § 54.10(3)(e) provides that, when appointing a guardian, a court

> shall authorize the guardian to exercise only those powers under ss. 54.18, 54.20, and 54.25 (2)(d) that are necessary to provide for the individual's personal needs and property management and to exercise the powers in a manner that is appropriate to the individual and that constitutes the least restrictive form of intervention.

WISCONSIN STAT. § 54.18(1) similarly provides that a guardian "may be granted only those powers necessary to provide for the personal needs or property management of the ward in a manner that is appropriate to the ward and that constitutes the least restrictive form of intervention."

¶36 A.M.Q. asserts the circuit court erroneously exercised its discretion by transferring full authority to the guardian "because nothing in the record shows discretion was in fact exercised." Specifically, A.M.Q. faults the circuit court for failing to address alternatives to full guardianship in its written decision. She

asserts the court failed to make findings of fact regarding the authority granted to the guardian and did not articulate or apply any legal standard.

¶37 However, A.M.Q. overlooks the fact that, in section 5 of form GN-3170, the circuit court selected the following option:

> Full authority transferred to guardian:
>
> Individual lacks evaluative capacity in full. Guardian of the estate is requested to perform the duties of a guardian of the estate under § 54.19, Wis. Stats., and exercise the powers that do not require court approval under § 54.20(3), Wis. Stats.

The court thus expressly found it was necessary to transfer full authority to the guardian because A.M.Q. lacked evaluative capacity "in full." Notably, form GN-3170 includes two other options—transferring limited authority to the guardian, and transferring most, but not all, authority to the guardian—which the circuit court did not select.

¶38 A.M.Q. also argues the circuit court erroneously exercised its discretion by failing to include in its written decision a discussion of the factors listed in WIS. STAT. § 54.10(3)(c). *See* para. 54.10(3)(c) (directing a court to consider the listed factors when appointing a guardian *or* "determining what powers are appropriate for the guardian to exercise"). Again, though, the statute merely required the circuit court to "consider" the listed factors. *See* ***id.*** It did not require the court to include an analysis of each factor in its written decision. Furthermore, as noted above, A.M.Q. failed to cite para. 54.10(3)(c) in the circuit court or make any argument regarding the majority of the statutory factors. Under these circumstances, the circuit court's failure to expressly address the statutory

factors in its written decision was not unreasonable and does not constitute an erroneous exercise of discretion.[5]

¶39 A.M.Q. next argues that, even if the circuit court adequately explained its decision to transfer full authority to the guardian of her estate, no reasonable view of the evidence supports that decision. A.M.Q. points out that Pflugradt and Bertrand were primarily concerned about her ability to administer the trust, given its complexity and the large amounts of money involved. She asserts there was no evidence she needed a guardian of the estate with respect to other financial decision making.

¶40 We reject this argument, based on the evidence summarized above at ¶¶31-32. Again, substantial evidence was admitted at the guardianship hearing that A.M.Q. had been subject to financial exploitation, or attempted financial exploitation, by Paul and Peter. Based on that evidence, the circuit court could reasonably find that limiting the guardian's authority to trust account transactions would be insufficient to protect A.M.Q.'s interests. Accordingly, the court did not err in transferring full authority to the guardian of A.M.Q.'s estate.

**III. The circuit court erred by appointing Margaret as guardian.**

¶41 A.M.Q. next argues the circuit court erred by appointing Margaret as guardian of A.M.Q.'s estate because: (1) the court failed to follow the procedure

[5] A.M.Q. also argues the circuit court erroneously exercised its discretion by granting the guardian full authority because the court did not make "[t]he required finding pursuant to WIS. STAT. § 54.10(3)(a)4." However, we have already concluded that the court implicitly made the finding required by that subdivision and that the record supports the court's implied finding. *See supra* ¶¶30-32.

set forth in WIS. STAT. § 54.44(6); and (2) the court's decision to appoint Margaret as guardian is not supported by the record. We agree on both points.

¶42 WISCONSIN STAT. § 54.44 sets forth certain procedural requirements for hearings on guardianship petitions. As relevant here, subsec. 54.44(6) provides:

> If the court finds that the proposed guardian is unsuitable, the court shall request that a petition proposing a suitable guardian be filed, shall set a date for a hearing to be held within 30 days, and shall require the guardian ad litem to investigate the suitability of a new proposed guardian.

¶43 In this case, the proposed permanent guardian of A.M.Q.'s estate was Corporate Guardians of Northeast Wisconsin. During the guardianship hearing, Karen Degeneffe, a social worker employed by the County, explained that A.M.Q.'s daughters were asked whether they would be willing to act as guardian of A.M.Q.'s estate, and they declined. Degeneffe further explained that, in a situation involving multiple siblings who cannot agree on a guardian, it is generally best to appoint a neutral party. Consequently, the County argued there was no appropriate family member available to act as guardian.

¶44 The GAL agreed that none of A.M.Q.'s family members were "fit and suitable" to act as guardian, and she therefore joined the County's recommendation that the court appoint Corporate Guardians of Northeast Wisconsin. Counsel for A.M.Q.'s daughters similarly indicated his clients "approve[d]" the appointment of Corporate Guardians of Northeast Wisconsin and "just felt it was better to have a third party be the guardian … given the dispute." While A.M.Q. opposed the appointment of any guardian, she did not specifically object to the appointment of Corporate Guardians of Northeast Wisconsin, in the event the court granted the County's guardianship petition.

¶45 The circuit court rejected the proposed guardian, explaining it was "not satisfied [Corporate Guardians of Northeast Wisconsin] would be appropriate for this size estate." However, upon finding the proposed guardian unsuitable, the court did not, as required by WIS. STAT. § 54.44(6), request the filing of a petition proposing a suitable guardian, set a date for a hearing on that petition, and direct the GAL to investigate the new proposed guardian's suitability. Instead, the court appointed Margaret guardian, based solely on the court's findings that A.M.Q. and her late husband respected Margaret's judgment and had named her sole successor trustee of the trust.

¶46 Because the circuit court failed to follow the procedure set forth in WIS. STAT. § 54.44(6), we agree with A.M.Q. that the court lacked statutory authority to appoint Margaret as guardian. While the GAL and A.M.Q.'s daughters argue Margaret's appointment was permissible under WIS. STAT. § 54.15(1), (1m), or (2), that statute addresses who may serve as guardian and the factors a court should take into account when selecting a guardian. Subsection 54.44(6), in contrast, mandates the procedure the court "shall" follow when it determines the proposed guardian is unsuitable. Here, the court failed to follow the required procedure.

¶47 In the alternative, we agree with A.M.Q. that, even if the court had statutory authority to appoint Margaret as guardian, the court erroneously exercised its discretion by doing so because the record contains no evidence regarding Margaret's qualifications. The record simply shows that: (1) Margaret expressed an unwillingness to serve as guardian; and (2) neither the County, the GAL, nor any of A.M.Q.'s daughters believed Margaret should be appointed. This is an insufficient basis for the court's decision to appoint Margaret as guardian.

¶48 Because the circuit court failed to follow the appropriate procedure in appointing Margaret as permanent guardian of A.M.Q.'s estate, and because the court's decision to do so is, in any event, not supported by the record, we reverse that portion of the guardianship order appointing Margaret as guardian. We remand for the circuit court to follow the procedure set forth in WIS. STAT. § 54.44(6)—namely, to request the filing of a petition proposing a suitable guardian, to set a hearing on that petition within thirty days, and to require the GAL to investigate the new proposed guardian's suitability.

## IV. The circuit court erred by voiding the May 13, 2015 amendment to the trust agreement.

¶49 Finally, A.M.Q. argues the circuit court erred by voiding the May 13, 2015 amendment to the trust agreement, which named Peter as co-trustee with A.M.Q.[6] For two primary reasons, we agree with A.M.Q. that the court erred by voiding the amendment.

¶50 First, we agree with A.M.Q. that the circuit court lacked legal authority to void the May 13, 2015 amendment. As A.M.Q. observes, WIS. STAT. ch. 701 governs the creation, modification, and administration of trusts. A court may intervene in the administration of a trust "to the extent its jurisdiction is invoked by an interested person or as provided by law." Subsec. 701.0201(1). Chapter 701 contemplates that, in order for a court to modify a trust, a specific

[6] A.M.Q. actually argues the circuit court erred by voiding the May 13, 2015 trust amendment *and* naming a trustee. The court did not, however, independently name a trustee. Rather, after concluding the May 13, 2015 amendment was void, the court simply determined Margaret was the sole successor trustee under the terms of the original trust agreement. We therefore limit our analysis to whether the court erred by voiding the May 13, 2015 amendment. We further note that, given the circuit court's finding that A.M.Q. is incompetent, the effect of the May 13, 2015 amendment, if valid, is to make Peter the sole trustee.

action must be brought under ch. 701 by a trustee, beneficiary, settlor, trust protector, or directing party.[7] *See* WIS. STAT. §§ 701.0203(1), 701.0410(2). The instant case, however, is a guardianship action filed by the County, which is neither a trustee, beneficiary, trust protector, nor directing party. Moreover, ch. 701 expressly states it "does not apply to any of the following: … (2) A guardianship." WIS. STAT. § 701.0102(2).

¶51 The County and A.M.Q.'s daughters nevertheless assert the circuit court had legal authority to appoint Margaret as trustee under WIS. STAT. § 701.0704(4), which provides, "Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee … whenever the court considers the appointment necessary for the administration of the trust." This argument is unavailing. The County and A.M.Q.'s daughters cite no authority in support of the proposition that § 701.0704(4) grants a court in a *guardianship action* authority to appoint an additional trustee of the ward's trust. More importantly, the circuit court in this case did not appoint an additional trustee pursuant to § 701.0704(4). Instead, the court voided the May 13, 2015 trust amendment naming Peter as A.M.Q.'s co-trustee and then found that, under the terms of the original trust agreement, Margaret was sole trustee. Thus, even assuming § 701.0704(4) granted the circuit court authority in the present

[7] The GAL argues the circuit court's actions "did not involve any modification or termination of A.M.Q.'s trust, [and] therefore there was no requirement for a proceeding to be commenced by a trustee or beneficiary or by the settlor." We disagree. By executing the May 13, 2015 amendment to the trust agreement, A.M.Q. clearly modified the trust's terms. By voiding that amendment, the circuit court again modified the terms of the trust.

guardianship action to appoint Margaret as an additional trustee, that is not what the court did.[8]

¶52 Second, we agree with A.M.Q. that the record does not show the circuit court made the proper findings or applied the correct legal standard when it determined the May 13, 2015 amendment was void because A.M.Q. was incapacitated at the time she executed it. The capacity required to amend a revocable trust is the same as that required to make a will. WIS. STAT. § 701.0601. Notably, the standard for testamentary capacity is different from the incompetency standard set forth in WIS. STAT. § 54.10(3)(a)3.

¶53 The test for testamentary capacity has three elements. ***O'Brien v. Lumphrey***, 50 Wis. 2d 143, 146, 183 N.W.2d 133 (1971). First, the testator "must have mental capacity to comprehend the nature, the extent, and the state of affairs of his property." ***Id.*** Second, the testator must "know and understand his relationship to persons who are or who might naturally or reasonably be expected to become the objects of his bounty from which he must be able to make a rational selection of his beneficiaries." ***Id.*** Third, the testator must be able "to contemplate these elements together for a sufficient length of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the" testamentary instrument. ***Id.*** at 146-47.

[8] We also observe that before the guardianship proceedings in the instant case were commenced, Wells Fargo had filed a lawsuit in federal court asking that court to identify "the proper trustee(s) of the Trust with the right to control the Accounts." "It is well-established in Wisconsin that when two courts possess jurisdiction over a particular subject matter and one of the courts has assumed jurisdiction, it is reversible error for the other to also assume jurisdiction." ***Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians***, 2000 WI 79, ¶29, 236 Wis. 2d 384, 612 N.W.2d 709. We therefore agree with A.M.Q. that, even if the circuit court otherwise had legal authority to rule on the validity of the May 13, 2015 amendment or appoint a trustee, the court should have refrained from doing so "as a matter of judicial comity."

¶54 Whether a person possessed testamentary capacity at the time he or she executed a will is a question of fact. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 353-54, 302 N.W.2d 508 (Ct. App. 1981). A testator is presumed to have the capacity to make a will, and it is the opponent's burden to prove the testator lacked testamentary capacity. ***Mueller v. Gaudynski***, 46 Wis. 2d 393, 398, 175 N.W.2d 272 (1970). Notably, the focus is on the testator's capacity at the specific time he or she executed the document in question. *See* ***O'Brien***, 50 Wis. 2d at 147. "[T]he general mental condition of one who executes a will is only peripherally relevant, for a person may have a general or usual condition of inability to comprehend and yet have lucid intervals, during which time there is demonstrated testamentary capacity and a will may be appropriately executed." ***Becker v. Zoschke***, 76 Wis. 2d 336, 345, 251 N.W.2d 431 (1977). Thus, evidence that a testator has been adjudicated incompetent and is subject to a guardianship does not compel a finding that he or she lacked capacity to execute a specific testamentary document. *See* ***Sorensen v. Ziemke***, 87 Wis. 2d 339, 345, 274 N.W.2d 694 (1979).

¶55 The circuit court's written decision does not reveal whether the court applied the proper standard when it found that A.M.Q. lacked capacity to execute the May 13, 2015 amendment to the trust agreement. The court simply stated, without elaboration or explanation, that A.M.Q. lacked capacity. A.M.Q. argues the court's failure to acknowledge or apply the correct standard for testamentary capacity requires reversal of the court's decision to void the May 13, 2015 amendment. We agree. Moreover, we observe that neither the County, the GAL, nor A.M.Q.'s daughters respond to this argument. We therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109,

279 N.W.2d 493 (Ct. App. 1979). Accordingly, we reverse that portion of the court's order voiding the trust amendment.

¶56 Neither party shall receive appellate costs. *See* WIS. STAT. RULE 809.25(1).

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

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