COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-1199 **Cir. Ct. No. 99GN000648**

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

IN THE MATTER OF THE GUARDIANSHIP OF MURIEL K.:

MURIEL K.,

APPELLANT,

V.

MILWAUKEE COUNTY, JOHN E. RAASCH, STEVEN C. UNDERWOOD, ROBERT B. PEREGRINE, AND PAMELA D. CRAWFORD,

RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

Before Fine, Curley and Brown, JJ.

¶1 FINE, J. Muriel K. appeals a circuit-court order approving various fees and expenses incurred in her guardianship proceedings. Now fully competent, she claims that she should not be forced to pay for nursing-home expenses and guardianship and attorneys' fees incurred as a consequence of her guardianship proceedings. We affirm.

I.

¶2 This is the third time this case has come to us, and its history has been recounted in three published opinions: ***Knight v. Milwaukee County***, 2001 WI App 147, 246 Wis. 2d 691, 633 N.W.2d 222, *rev'd*, 2002 WI 27, 251 Wis. 2d 10, 640 N.W.2d 773; and ***Knight v. Milwaukee County***, 2002 WI App 194, 256 Wis. 2d 1000, 651 N.W.2d 890. We reference all three in setting the background to this appeal.

> In early November of 1999, Chris Krizek, a case manager for the Milwaukee County Adult Services Division, filed a petition with the circuit court alleging that three days earlier she had checked on Muriel K. at Muriel K.'s home after the Division received what the petition describes as an "elder abuse referral" and found her to be "unresponsive" to either "verbal or physical stimuli." The petition related that Krizek returned the next day with a psychologist, and that they found Muriel K. "sitting up in a chair but was unable to keep her eyes open."

Knight, 2001 WI App 147, ¶2, 246 Wis. 2d at 694, 633 N.W.2d at 223. Krizek's petition also alleged:

> "As recently as this past June [Muriel K.] was reported in good condition by her relatives. Then her longtime groundskeeper, Jeff Knight, began to take over her affairs without consulting the family members. Shortly thereafter his mother and father, Jeanne and Norris Knight [address deleted] began to assume de facto decision-making power for [Muriel K.]."

Id., 2001 WI App 147, ¶2, 246 Wis. 2d at 695, 633 N.W.2d at 224 (brackets by ***Knight***). "[W]ith the assistance" of Robert Moodie, a lawyer, Muriel K. granted a Durable Power of Attorney to Jeffrey Knight in June of 1999, under WIS. STAT. § 243.07. ***Knight***, 2002 WI 27, ¶2, 251 Wis. 2d at 17, 640 N.W.2d at 775; ***Knight***, 2001 WI App 147, ¶2, 246 Wis. 2d at 695–696, 633 N.W.2d at 224. "In late September of 1999, Muriel K. granted to both Norris and Jeffrey Knight a power of attorney for health care, under WIS. STAT. ch. 155." ***Id.***, 2001 WI App 147, ¶4, 246 Wis. 2d at 696, 633 N.W.2d at 224.

¶3 According to Krizek's petition, the Knights were with Muriel K. when Krizek and the psychologist saw Muriel K. the day after Krizek's first visit. According to the petition, on this second visit:

> [Muriel K.] could say her name after several promptings, did not know where she was, and fell asleep. When asked by [the psychologist] why they had not sought medical intervention and taken her to the hospital, the response of the Knights was that they thought it was just her age. [Krizek] immediately summoned paramedics, who took her to Froedtert [hospital], where she remains.

Id., 2001 WI App 147, ¶2, 246 Wis. 2d at 694–695, 633 N.W.2d at 223–224 (brackets by ***Knight***). As the supreme court noted, Krizek's petition "alleged that the Knights were engaging in physical and financial abuse of Muriel K." ***Knight***, 2002 WI 27, ¶6, 251 Wis. 2d at 18, 640 N.W.2d at 775.

¶4 In response to Krizek's petition, the Milwaukee County "probate court commissioner appointed [Pamela D. Crawford, a lawyer, as] guardian ad litem for Muriel K., and issued an order for temporary guardianship that 'suspended' Muriel K.'s powers of attorney" grant to the Knights. ***Id.***, 2002 WI 27, ¶7, 251 Wis. 2d at 18, 640 N.W.2d at 775. Steven C. Underwood, a lawyer and Muriel K.'s relative, was appointed temporary guardian of Muriel K.'s

person, and John Raasch, a lawyer, was appointed as temporary guardian of Muriel K.'s estate. ***Id.***, 2002 WI 27, ¶7, 251 Wis. 2d at 18, 640 N.W.2d at 775–776.

> After the appointment of the temporary guardians, Attorney Moodie and the Knights filed appearances in the ongoing guardianship and protective placement proceedings. The Knights objected to, among other things, the suspension of Muriel K.'s powers of attorney. The circuit court extended the temporary guardianship and appointed [Robert B. Peregrine, a lawyer, as] adversary counsel for Muriel K.

Id., 2002 WI 27, ¶8, 251 Wis. 2d at 18–19, 640 N.W.2d at 776. Before she filed her November 4, 1999, petition, Krizek spoke to Moodie over the telephone on November 3, and the conversation was recounted in a letter from Moodie to Krizek dated that day, and filed with the trial court on November 5, 1999. Moodie sent to Krizek a copy of the General Durable Power of Attorney granted to Jeffrey Knight by Muriel K. on June 8, 1999, and the Health Care Power of Attorney granted to Norris Knight on September 28, 1999. Moodie wrote:

> You can see from Ms. [K.]'s signature how her physical condition had deteriorated from June to September.
>
> As I indicated to you, I have had considerable contact with Ms. [K.] since May of this year. If I can be of any help and assistance as it relates to the allegations of elder abuse, I would be happy to provide my thoughts and comments. I certainly do not believe there has been any elder abuse and I feel very strongly that, in fact, Ms. [K.] has received excellent care and assistance from her friends and the people entrusted with that care.
>
> It is my position that the allegations of elder abuse are unfounded and without merit.

Moodie's letter to Krizek did not say that he was Muriel K.'s lawyer.

¶5 Peregrine's appointment as adversary counsel was triggered by Crawford's request, as guardian *ad litem* for Muriel K. Crawford's request was dated December 28, 1999, and told the trial court:

> Although Muriel [K.] has not at this time objected to these [guardianship] proceedings, there have been two objections filed [by the Knights and by Moodie] and this matter will be scheduled for contest.
>
> Therefore, the Guardian ad Litem believes it to be in Muriel [K.]'s best interest that Adversary Counsel be appointed to represent her throughout these proceedings.

We continue with the history from the supreme court's opinion.

> At the hearing for the permanent guardianship, the Knights appeared by counsel. Muriel K. was not present, and the Knights objected. They asserted that the circuit court lacked jurisdiction to proceed under ***Leinwander v. Simmons***, 236 Wis. 305, 294 N.W. 821 (1940), which requires that a proposed ward be present at the hearing, if possible. *See* ***Bryn v. Thompson***, 21 Wis. 2d 24, 30, 123 N.W.2d 505 (1963). The guardian ad litem argued, however, that it was not in Muriel K.'s best interest to attend because she became upset at the idea of coming to the hearing. Adversary counsel asserted that the Knights had no right to participate in the proceedings. The court agreed with the guardian ad litem and adversary counsel, and the hearing proceeded without Muriel K.'s presence and with limited participation by the Knights.
>
> After the hearing, the court adjudicated Muriel K. incompetent and issued an order for protective placement. In the order, the court appointed Underwood as permanent guardian of Muriel K.'s person and Attorney Raasch as permanent guardian of her estate. The order also declared all previous powers of attorney revoked and invalid.[1] The Knights appealed.

[1] The supreme court's footnote at this point reads:

(continued)

> The guardian ad litem and adversary counsel moved the court of appeals to dismiss the Knights' appeal, arguing that the Knights lacked standing to appeal. Although the court of appeals initially denied the motion, it ultimately agreed with the guardian ad litem and adversary counsel in its written decision.

Id., 2002 WI 27, ¶¶9–11, 251 Wis. 2d at 19–20, 640 N.W.2d at 776. The supreme court, three justices dissenting, held that the Knights had standing, reversed, and sent the case back so we could decide the merits of the appeal. ***Id.***, 2002 WI 27, ¶¶14–56, 251 Wis. 2d at 21–36, 640 N.W.2d at 777–784.

¶6 On remand from the supreme court, we held "that the trial court lacked competency to enter its orders because it did not comply with the statutory directive requiring that Muriel K. be present at the hearing." ***Knight***, 2002 WI App 194, ¶1, 256 Wis. 2d at 1002, 651 N.W.2d at 892. We vacated the orders entered by the circuit court at the guardianship hearing, remanded the case, and directed "that Muriel K. be produced at any hearing seeking to declare her to be incompetent if she is able to attend, in accordance with the procedures required by WIS. STAT. § 880.08(1)." ***Id.***, 2002 WI App 194, ¶6, 256 Wis. 2d at 1007, 651

> The exact procedure by which Muriel K.'s powers of attorney were revoked is not critical to our decision, but we explain the process in more detail for the sake of clarity and completeness. By operation of WIS. STAT. § 155.60(2), the order adjudicating Muriel K. incompetent and appointing guardians automatically revoked her power of attorney for health care because the circuit court did not make a finding that it should remain in effect. Similarly, under WIS. STAT. § 243.07(3)(a), a guardian of the estate is authorized to revoke a durable power of attorney unless the court finds that it should remain in effect. After Attorney Raasch was appointed temporary guardian, he sent a letter to Jeffrey Knight indicating that he was revoking Muriel K.'s durable power of attorney naming Jeffrey as her agent.

N.W.2d at 894. Our opinion was filed July 2, 2002. ***Id.***, 2002 WI App 194, 256 Wis. 2d at 1000, 651 N.W.2d at 890.

¶7 After our remand to the trial court, Muriel K.'s current lawyer was substituted for Peregrine as Muriel K.'s adversary counsel, and the new petition seeking a guardianship for Muriel K. filed on October 23, 2002, reflected that. Pursuant to an order entered by the trial court, a psychologist evaluated Muriel K. for competency on March 10, 2003, at the assisted-care facility where she lived and found her to be competent. On April 15, 2003, Milwaukee County filed a motion to withdraw the October 23, 2002, petition. The trial court granted the motion.

¶8 Muriel K. objected to paying the fees and expenses of the guardianship proceedings, and also sought disgorgement of moneys already disbursed:

> (a) all costs and fees paid to the Guardian ad litem, Pamela Crawford;
> (b) all fees, including attorney fees, and expenses paid to guardian of the person Steven Underwood and his attorneys;
> (c) all fees and expenses paid to Tikalsky, Raasch & Tikalsky [Raasch's law firm];
> (d) costs paid for copies and transcripts;
> (e) cost of care prior to July 3, 2002;
> (f) all costs and fees paid to Attorney Robert Peregrine.

By order entered January 27, 2004, the trial court rejected Muriel K.'s objections and demand for disgorgement, and approved the accounts of the guardian of the estate (Raasch) "for the period of November 8, 1999 through July 2, 2002," and directed that Muriel K. pay: "Attorney Pam Crawford, guardian ad litem fees in the amount of $20,529.31; Steven Underwood, guardian of the person as reimbursement for attorney's fees of $23,594.76; Attorney E. John Raasch, as

guardian of the estate fees of $6,017.48." The trial court's order recited that the fees "are specifically found to be reasonable and necessary." The issue presented by this appeal is whether Muriel K. is responsible for nursing-home expenses and guardianship and attorneys' fees incurred as a result of these proceedings.

II.

¶9 Whether Muriel K. is responsible for nursing-home expenses and guardianship and attorneys' fees presents issues of law that we decide *de novo*. *See* ***Ethelyn I.C. v. Waukesha County***, 221 Wis. 2d 109, 114–115, 584 N.W.2d 211, 214 (Ct. App. 1998). Muriel K. does not challenge either the reasonableness of the fees or expenses, or whether they were necessary, except insofar as she argues that she should not be forced to pay them because, in her view, the proceedings violated her right to due process, *see* ***Jankowski v. Milwaukee County***, 104 Wis. 2d 431, 436, 312 N.W.2d 45, 48 (1981); ***Ethelyn I.C.***, 221 Wis. 2d at 115–121, 584 N.W.2d at 214–216, and, also because she sees our most recent decision as wiping out whatever liability for the fees she might have otherwise had.

¶10 Muriel K. contends that she was denied due process because neither Moodie, the lawyer whose "assistance" she used to grant to Jeffrey Knight a Durable Power of Attorney, nor the Knights were given, as phrased by her brief-in-chief on this appeal, "timely notice" of the temporary guardianship proceeding. She also claims that the petition for temporary guardianship did not give her notice that Milwaukee County would, again as phrased by her brief-in-chief on this appeal, "seek to suspend the powers of attorney" granted to Jeffrey Knight. Further, she contends that "after depriving Muriel K. of her liberty prior to the hearing, Milwaukee County failed to conduct a prompt, mandatory, post

deprivation hearing." We examine these contentions in turn, as well as her assertion that her liability for the fees was wiped out by our decision that the circuit court lacked competency to conduct in her absence the hearing on whether a guardian should be appointed for her under WIS. STAT. § 880.33. First, we examine the statutory underpinnings to a ward's liability for fees expended in a guardianship proceeding.

A. *Ward's responsibility for the expenses of the guardianship.*

¶11 As we have seen, emergency detention and related proceedings are authorized by WIS. STAT. § 55.06(11). Section 55.06(6), with exceptions not relevant here, makes applicable WIS. STAT. § 880.33(2) "to all hearings under this chapter." As material here, § 880.33(2)(a)1 does two things. First, it says that "[t]he proposed ward has the right to counsel." Second, it provides:

> The court shall in all cases require the appointment of an attorney as guardian ad litem in accordance with s. 757.48 (1) and shall in addition require representation by full legal counsel whenever the petition contains the allegations under s. 880.07 (1m) or if, at least 72 hours before the hearing, the alleged incompetent requests; the guardian ad litem or any other person states that the alleged incompetent is opposed to the guardianship petition; or the court determines that the interests of justice require it.[2]

(Footnote added.) Section 880.33(2)(a)3 provides that if the proposed ward is an indigent adult, fees due the guardian *ad litem* and any appointed counsel shall be paid by the proposed ward's "county of legal settlement." Additionally, as

[2] WISCONSIN STAT. § 880.07(1m) deals with the involuntary administration of "psychotropic medication" and is not implicated in this case.

material here, WIS. STAT. § 880.331(8) provides: "On order of the court, the guardian ad litem appointed under this chapter shall be allowed reasonable compensation to be paid by the county of venue, unless the court otherwise directs." Section 55.06(6) also says that the "county of legal settlement" of an indigent adult "shall be liable for guardian ad litem fees." Neither § 880.33(2)(a)3 nor § 55.06(6) makes any provision for payment of the fees of those adults who, like Muriel K., are not indigent. WISCONSIN STAT. § 757.48(2) does, however. It provides: "If the statutes do not specify how the fee of the guardian ad litem is paid, the ward shall pay such fee."

¶12 WISCONSIN STAT. § 880.24(1) reads:

> Every guardian shall be allowed the amount of the guardian's reasonable expenses incurred in the execution of the guardian's trust including necessary compensation paid to attorneys, accountants, brokers and other agents and servants. The guardian shall also have such compensation for the guardian's services as the court, in which the guardian's accounts are settled, deems to be just and reasonable.

And WIS. STAT. § 880.22(1) provides:

> Every general guardian shall pay the just debts of the ward out of the ward's personal estate and the income of the ward's real estate, if sufficient, and if not, then out of the ward's real estate upon selling the same as provided by law. But a temporary guardian shall pay the debts of his or her ward only on order of the court.

Further, WIS. STAT. § 55.045 empowers a county to "require that a person who is protectively placed or receives protective services under this chapter provide reimbursement for services or care and custody received, based on the ability of the person to pay for such costs."

¶13 WISCONSIN STAT. § 880.15(1) authorizes the circuit court to appoint "a temporary guardian" of "the person or of the estate, or of both," if the court "finds that the welfare of … an alleged incompetent requires the immediate appointment." The section also provides: "All provisions of the statutes concerning the powers and duties of guardians shall apply to temporary guardians except as limited by the order of appointment." A "'[w]ard'" is someone "for whom a guardian has been appointed." WIS. STAT. § 880.01(10).

B. *Notice*.

¶14 Notice of a potential deprivation and an "opportunity for hearing appropriate to the nature of the case" is a *sine qua non* of due process. ***Mullane v. Central Hanover Bank & Trust Co.***, 339 U.S. 306, 313 (1950). As material here, WIS. STAT. § 55.06(11)(a) authorizes emergency detention of a person about whom "it appears probable that [he or she] will suffer irreparable injury or death … as a result of developmental disabilities, infirmities of aging, chronic mental illness or other like incapacities if not immediately placed" in custody. The petition authorizing such immediate emergency detention must be based on the "personal observation of," among others listed, an "authorized representative of a board designated under s. 55.02 or an agency designated by it." ***Ibid.*** As we have seen, the petition in this case was executed by Chris Krizek, described by the petition as "case manager, Milwaukee County Elder Abuse Agency," and as "a case manager for the Milwaukee County Adult Services Division, [who] is interested in the welfare of [Muriel K.] by statute." Muriel K. does not dispute that Krizek was an authorized person to file an emergency-detention petition, or that, unlike the situation in ***Ethelyn I.C.***, 221 Wis. 2d at 115–116, 584 N.W.2d at 214, Krizek had the requisite knowledge about Muriel K.'s condition based on Krizek's personal observation.

¶15 Krizek's petition was dated November 4, 1999, and was filed in the circuit court on November 5, 1999. It alleged the following as material to our discussion of notice:

> - Muriel K. "is mentally incompetent following recently being found in an unexplained stuporous, possibly comatose, condition, leaving her mentally disabled."
>
> - The psychologist who went with Krizek on the second day, "has seen the subject and states that she is mentally incompetent as to person and estate matters."

As noted earlier, on that second day, November 3, 1999, Krizek immediately summoned paramedics, who took Muriel K. to the hospital. Krizek's petition also alleged:

> [Muriel K.'s] mental condition is believed to be permanent in nature. The subject has a primary need for residential care and custody and there would be severe danger to herself if she were not protectively placed. In addition, it appears probable that she will suffer irreparable injury or death as a result of other like incapacities, to wit, neurological damage of presently unknown origin, if not immediately placed.

The petition also recounts what Krizek learned about Muriel K.'s life that is pertinent to our analysis of whether Muriel K. was denied due process by Milwaukee County's alleged failure to give "timely notice" of the petition to Jeffrey and Norris Knight and Moodie. It needs to be quoted at length, with some necessary repetition of what we have already recounted, so the averments can be seen in their context:

> 3. The subject was hospitalized on November 3, 1999, in a stuporous condition possibly brought on by an overdose of liquor and valium taken in combination while under the care of persons [hereafter collectively referred to as the Knights] who are not her relatives, but who purport to have a valid power of attorney for her health care and

finances. As recently as this past June the subject was reported in good condition by her relatives. Then her longtime groundskeeper, Jeff Knight, began to take over her affairs without consulting the family members. Shortly thereafter his mother and father, Jeanne and Norris Knight, [address, [omitted]] began to assume de facto decision-making power for the subject.

The subject had previously told her nephew, Attorney Steve Underwood, that Jeff Knight was her boyfriend, and that he had told her she was the only woman in her [*sic*] life. Jeff Knight is 38, the subject 80. In a letter dated July 28, 1999, [attached] Attorney Underwood informed Attorney Moody [*sic* should be "Moodie"], drafter of the two powers of attorney described below, of his concern over the possibility of undue influence being exercised over his aunt by Jeff Knight.

These Knights are unrelated to the subject. It is reported that Jeanne Knight is a registered nurse, but this could not be verified. Norris Knight may be a dentist. Both are believed to be persons with substantial medical training. Recently on September 22 or 24, several days before she executed a power of attorney for health care discussed below, the Knights took the subject for a medical appointment to [a] physician they selected, a Dr. Michael White, who had never before met or treated the subject. After conferring with the Knights, Dr. White prescribed the valium in question. It is believed that Dr. White was never consulted thereafter about her deteriorating condition. She had begun drinking heavily in June, about the time the Knights' daily involvement in her decision-making began. It is not clear if Dr. White warned the subject or her caregivers of the danger of mixing valium and alcohol, or whether the Knights informed him of her heavy drinking.

On November 2nd, following receipt of the elder abuse referral, petitioner saw the subject at her home. She appeared to be unresponsive and was in bed at 10:30 AM. She did not respond to verbal or physical stimuli. The Knights stated she was often like that for the past month. Petitioner returned on November 3rd at 3:00 PM with Dr. Kenneth Sherry. The subject was sitting up in a chair but was unable to keep her eyes open. She could say her name after several promptings, did not know where she was, and fell asleep. When asked by the examining psychologist, Dr. Kenneth Sherry, why they had not sought medical intervention and taken her to the hospital, the response of the Knights was that they thought it was just her age.

Petitioner immediately summoned paramedics, who took her to Froedtert, where she remains.

Dr. Timothy Jahn, nephew of the subject, had visited her in the late summer and found numerous cups of orange juice mixed with brandy placed in the refrigerator where the subject could easily get them. Bottles of brandy were seen about the house. This was after the time the Knights obtained their power of attorney for health care but before they obtained the financial power of attorney. The subject told Dr. Jahn that Jeff and Norris Knight set up the brandy-orange juice cocktails for her. Dr. Jahn urged her to stop drinking the mixture because it was making her ill.

The Knights have undertaken to have the subject execute two powers of attorney in their favor, [attached] one for finance, June 8, 1999, and one for health, September 28, 1999. They were both prepared by an attorney selected by the Knights, Attorney Robert Moody [*sic*], a friend of theirs. At this time, her attorney for many years had been Attorney John Raasch. He was not consulted about this although the Knights are believed to have known of his long-term representation of the subject. The subject had had no prior dealings of any kind with attorney Moody [*sic*] until she was introduce [*sic*] to him by the Knights.

4. Petitioner believes the facts support their conclusion that this is a well founded case of physical and financial abuse of a vulnerable person. A referral has been made to the Milwaukee County Sheriffs Department. The Milwaukee County Elder Abuse Agency became involved when it received a report that the Knights had been attempting to take over the handling of the subject's substantial estate, and were providing valium and liquor to the subject; that she had deteriorated severely and that the Knights were ignoring or neglecting her medical needs. The Knights have failed to timely seek medical treatment for the subject when it became apparent that she was deteriorating, eventually resulting in the present comatose condition; that they had the subject sign a power of attorney for health care and a financial power of attorney at a point where the subject's competence to do so may have been compromised; that they attempted thereafter to transfer $100,000 from one of the subject's brokerage accounts at Dain Rausher brokerage to an account under the control of

> the Knights acting under the financial POA.[3] She also has an account at B. C. Ziegler Co. The subject formerly owned the establishment known as the Grenadiers in Milwaukee.
>
> 5. The subject owns the home she lives in at the address given above, believed to be valued at in excess of $175,000. Her personal property, in the form of bank accounts and brokerage accounts, is valued at $1.5 million. Her income in 1998 was in excess of $85,000 in the form of interest, dividends and capital gains and social security in the annual sum of $21,142. She receives an annual pension [source unknown] of $10,104.
>
> 6. The subject has no guardian of the estate or person. It is reported that the subject has executed powers of attorney for health and finances to the Knights, as well as a power of attorney for finances to Attorney John Raasch.

(Footnote added.) Krizek's petition listed as "interested adult persons" Mary Jahn and Steve Underwood, described as Muriel K.'s cousins, and John Raasch, described as Muriel K.'s attorney. It recited that Muriel K. was then currently "hospitalized at Froedtert Memorial Lutheran Hospital." Krizek nominated Raasch to be "temporary and permanent guardian of [Muriel K.'s] estate and Attorney Steve Underwood as temporary and permanent guardian of [Muriel

[3] Although not mentioned in Krizek's petition, there is in the record, attached to a memorandum filed with the trial court by Milwaukee County on October 6, 2003, a photocopy of a check dated August 9, 1999, for $12,200 made out to the Internal Revenue Service by Muriel K. The check notes on its face that it is "for Jeffrey Knight" and gives a reference Social Security number under Knight's name. The Milwaukee County memorandum describes the check as evidencing that: "Soon after Jeffrey Knight became Power of Attorney, substantial sums of Muriel K.'s money was spent on delinquent taxes owed by Jeffrey and Norris Knight." The check is numbered "2244." The County's submission has two other checks also signed by Muriel K.—one numbered 2242, bearing the date of either August 7 or 9, 1999, for $10,600 and also made out to the Internal Revenue Service, with a Social Security number on the memorandum line that is different than the one of check number 2244, and one numbered 2243 dated August 9, 1999, for $14,204.21 made out to the Wisconsin Department of Revenue with the legend on the memorandum line reading: "[illegible] for taxes" followed by the same Social Security number that is on check number 2242.

K.'s] person." Krizek sought to have the court hold a hearing on the petition "within 72 hours of [Muriel K.]'s detention at Froedtert Memorial Lutheran Hospital," and asked that the court appoint a guardian *ad litem* for Muriel K.

1. *Notice to Moodie and Jeffrey Knight.*

¶16 As we have seen, Muriel K. contends that her due-process rights were violated because Milwaukee County did not give "timely notice" to Moodie and Jeffrey Knight of the November 4, 1999, petition for temporary guardianship. WISCONSIN STAT. § 55.06(11)(a) prescribes how notice is given to the subject of an emergency-detention petition:

> At the time of placement the individual shall be informed by the director of the facility or the director's designee, both orally and in writing, of his or her right to contact an attorney and a member of his or her immediate family and the right to have an attorney provided at public expense, as provided under s. 967.06 and ch. 977, if the individual is a child or is indigent. The director or designee shall also provide the individual with a copy of the statement by the person making emergency placement.

Additionally, WIS. STAT. § 880.08(1) provides:

> Upon the filing of a petition for guardianship, and the court being satisfied as to compliance with s. 880.07, the court shall order notice of the time and place of hearing as follows:
>
> **(1)** INCOMPETENTS. A petitioner shall have notice served of a petition for appointment or change of a guardian upon the proposed incompetent and existing guardian, if any, by personal service at least 10 days before the time set for hearing. If such proposed incompetent is in custody or confinement, a petitioner shall have notice served by registered or certified mail on the proposed incompetent's custodian, who shall immediately serve it on the proposed incompetent. The custodian shall inform the proposed incompetent of the complete contents of the notice and certify thereon that the custodian served and informed the proposed incompetent and returned the certificate and notice to the circuit judge. The notice shall include the names of all persons who are petitioning for guardianship. A copy of the petition shall be attached to

> the notice. The court shall cause the proposed incompetent, if able to attend, to be produced at the hearing. The proposed incompetent is presumed able to attend unless, after a personal interview, the guardian ad litem certifies in writing to the court the specific reasons why the person is unable to attend. If the person is unable to attend a hearing because of physical inaccessibility or lack of transportation, the court shall hold the hearing in a place where the person may attend if requested by the proposed ward, guardian ad litem, adversary counsel or other interested person. Such notice shall also be given personally or by mail at least 10 days before the hearing to the proposed incompetent's counsel, if any, guardian ad litem, presumptive adult heirs or other persons who have legal or physical custody of the proposed incompetent whose names and addresses are known to the petitioner or can with reasonable diligence be ascertained, to any governmental or private agency, charity or foundation from which the proposed incompetent is receiving aid and to such other persons or entities as the court may require. The court shall then proceed under s. 880.33.

Muriel K. does not argue that these notice-mechanisms are constitutionally deficient. Rather, she seeks to engraft onto what the legislature has required an additional requirement that is fact-specific to this case; namely, that because Milwaukee County knew of the Knights' relationship with Muriel K., and also of Moodie's involvement, the County should have treated them as surrogate recipients of the statutorily mandated notice even though, as far as Krizek knew, Raasch was Muriel K.'s lawyer when Krizek filed the November 4 petition. Significantly, Muriel K.'s briefs on this appeal do not point to anything in the record that contradicts *any* of the facts averred in Krizek's November 4 petition, including that Raasch was Muriel K.'s lawyer at the time. Thus, for the purposes of this appeal, those facts are conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979)

(matter not refuted deemed admitted).[4] Further, based on what Krizek believed at the time, and Muriel K. does not point to any evidence in the record that Krizek's belief was unreasonable, Moodie's involvement was at least tinctured with self-interest, as evidenced by his November 2, 1999, letter to Dain Rauscher seeking to close Muriel K.'s account and transfer the funds in that account (as we have seen, Krizek's petition averred that $100,000 was involved) to his trust account. In light of this, whatever Muriel K.'s current views may be, and whether as a presently competent adult she wishes to bestow her largesse on the Knights or anyone else, Milwaukee County's alleged failure to give to Moodie and Jeffrey Knight "timely notice," did not deprive her of due process. This aspect of her attempt to avoid responsibility for the expenses and fees thus fails.

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[4] Muriel K.'s reply brief asserts, without citation to the record, that her "condition four years ago is very vigorously disputed." Additionally, her reply brief decries what it calls the respondents' "rehash" of "the various scurrilous accusations," presumably against the Knights and Moodie. Again, however, she does not point to anything in the record that contradicts any of the averments in Krizek's November 4, 1999, petition, or, for that matter, Milwaukee County's assertion that Muriel K. helped at least Jeffrey Knight resolve delinquent-tax issues with the Internal Revenue Service by paying some of his back taxes. She does, however, point to a brief excerpt in the record from a preliminary-examination finding by a court commissioner determining that the State had not established the requisite probable cause to bind Norris Knight for trial on the charge of "abuse of a vulnerable adult." *See* WIS. STAT. §§ 970.03(1) ("A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant."); 940.285 ("Abuse of vulnerable adults."). This is what the court commissioner said:

> I think you look at the totality of this, and while, you know, it is the drafting of the will and writing of checks in proximity to the creation of the power of attorney causes me to hold my nose while I'm doing this, I don't think the state has demonstrated a prima facie case of, by clear and convincing evidence, that there's at least probable cause to believe a felony has been committed in this jurisdiction.

Hardly a ringing endorsement. *See* ALEXANDER POPE, *Epistle to Dr. Arbuthnot*, *in* THE TOP 500 POEMS 279, 284 (William Harmon ed., Columbia University Press 1992) ("Damn with faint praise.").

2. *Contents of the November 4, 1999, petition.*

¶17 WISCONSIN STAT. § 880.07(1) sets out what a petition for the appointment of a guardian must have. It reads in full:

> **(1)** Any relative, public official or other person, may petition for the appointment of a guardian of a person subject to guardianship. Such petition shall state, so far as may be known:
>
> (a) The name, date of birth, residence and post-office address of the proposed ward.
>
> (b) The nature of the proposed ward's incapacity with specification of the incompetency or spendthrift habits.
>
> (c) The approximate value of the proposed ward's property and a general description of its nature.
>
> (d) Any assets previously derived from or benefits now due and payable from the U.S. department of veterans affairs.
>
> (e) Any other claim, income, compensation, pension, insurance or allowance to which the proposed ward may be entitled.
>
> (f) Whether the proposed ward has any guardian presently.
>
> (g) The name and post-office address of any person nominated as guardian by the petitioner.
>
> (h) The names and post-office addresses of the spouse and presumptive or apparent adult heirs of the proposed ward, and all other persons believed by the petitioner to be interested.
>
> (i) The name and post-office address of the person or institution having the care and custody of the proposed ward.
>
> (j) The interest of the petitioner, and if a public official or creditor is the petitioner, then the fact of indebtedness or continuing liability for maintenance or continuing breach of the public peace as well as the authority of the petitioner to act.

Additionally, § 880.07(2) says that "[a] petition for guardianship may also include an application for protective placement or protective services or both under ch. 55." The statute does not require that the petition have what Muriel K. now says Krizek's November 4 petition should have had—an alert that the County would seek to have the powers of attorney given by Muriel K. to the Knights revoked. Indeed, as we have seen and as the supreme court noted:

> By operation of WIS. STAT. § 155.60(2), the order adjudicating Muriel K. incompetent and appointing guardians automatically revoked her power of attorney for health care because the circuit court did not make a finding that it should remain in effect. Similarly, under WIS. STAT. § 243.07(3)(a), a guardian of the estate is authorized to revoke a durable power of attorney unless the court finds that it should remain in effect.

Knight, 2002 WI 27, ¶10 n.3, 251 Wis. 2d at 19–20 n.3, 640 N.W.2d at 776 n.3. We reject Muriel K.'s contention that absence of the notice she says the petition should have given made the petition constitutionally deficient.

3. *Post-deprivation hearing*.

¶18 WISCONSIN STAT. § 55.06(11)(b) requires that following an "emergency placement" a "preliminary hearing shall be held within 72 hours, excluding Saturdays, Sundays and legal holidays, to establish probable cause to believe the grounds for protective placement under sub. (2)." WISCONSIN STAT. § 55.05(2)(d) permits the circuit court to "order protective services for an individual for whom a determination of incompetency is made under s. 880.33 if the individual entitled to the protective services will otherwise incur a substantial risk of physical harm or deterioration." As noted, Krizek's November 4, 1999, petition was filed on November 5, 1999. November 5 was a Friday. The preliminary hearing mandated by § 55.06(11)(b) was held on Monday, November

8, 1999. It was timely. Muriel K.'s contention to the contrary is premised on her assertion that the hearing was a nullity because neither Jeffrey Knight nor Moodie was served with formal notice of the hearing. This contention piggybacks on her previously discussed claim that her due-process rights were violated because formal notice of the guardianship procedures was not given to the Knights or to Moodie. It is similarly without merit. The preliminary hearing required by the statute was timely.

4. *Effect of our July 2, 2002, decision.*

¶19 As we have seen, our July 2, 2002, decision reversed the circuit court's order of guardianship because Muriel K. was not produced at the guardianship hearing *and* her non-appearance was not predicated on the guardian *ad litem*'s certification "in writing" detailing "the specific reasons why [she was] unable to attend," as required by WIS. STAT. § 880.08(1). ***Knight***, 2002 WI App 194, ¶¶3–5, 256 Wis. 2d at 1004–1006, 651 N.W.2d at 892–894. We vacated the orders entered as a result of that hearing and remanded with the direction that "Muriel K. be produced at any hearing seeking to declare her to be incompetent if she is able to attend, in accordance with the procedures required by WIS. STAT. § 880.08(1)." ***Knight***, 2002 WI App 194, ¶6, 256 Wis. 2d at 1007, 651 N.W.2d at 894. We did not, and there was no reason to, nullify the entire guardianship proceedings. Moreover, the circuit court found, at least implicitly in the order appealed from, *see* ***Schneller v. St. Mary's Hospital Medical Center***, 162 Wis. 2d 296, 311–312, 470 N.W.2d 873, 878–879 (1991) (a trial court's finding of fact may be implicit from its ruling), and its oral comments at the hearing preceding issuance of its order, that all the persons seeking compensation for their services were acting in good faith for the best interests of Muriel K. This was a factual determination within the circuit court's province. *See* ***Bryn v.***

Thompson, 21 Wis. 2d 24, 32, 123 N.W.2d 505, 509 (1963). Muriel K. has not shown how these findings are clearly erroneous. *See* WIS. STAT. RULE 805.17(2).

¶20 Further, unlike the situations where reimbursement was not allowed from those persons whose detentions were constitutionally deficient, ***Jankowski*** and ***Ethelyn I.C.***, the circuit court's failure to get a written certification from the guardian *ad litem* as to why Muriel K. was not able to attend the hearing, *see* WIS. STAT. § 880.08(1), did not violate Muriel K.'s constitutional rights. *See* ***Jankowski***, 104 Wis. 2d at 432–434, 441, 312 N.W.2d at 46–47, 50 (procedures violated the constitutional rights of those who were committed); ***Ethelyn I.C.***, 221 Wis. 2d at 115–116, 584 N.W.2d at 214 (The officer attesting to the personal-knowledge aspect of a petition filed under WIS. STAT. § 55.06(11) *lied*—claiming to have concluded, as the statute requires, from his "personal observation" that "it appears probable that" the person subject of the emergency detention "will suffer irreparable injury or death" unless taken into custody by "the person making the observation."). Although ***Ethelyn I.C.*** did not discuss specifically the constitutional infirmity of basing a detention decision on a government agent's false statement, it specifically disagreed with the trial court's ruling in that case that there was "no violation of constitutional rights here." ***Id.***, 221 Wis. 2d at 124–125, 584 N.W.2d at 218 (emphasis omitted). It is now established that either depriving someone of liberty or subjecting him or her to the strictures of the criminal law, cannot be triggered by the deliberate falsehoods of a government agent. *See* ***Franks v. Delaware***, 438 U.S. 154, 164–165, 171–172 (1978) (materially false statement by government agent on search-warrant application makes search warrant subject to Fourth-Amendment attack).

¶21 ***Ethelyn I.C.*** is instructive here beyond its determination that the fee-shifting statute in that case could not be used to make Ethelyn I.C. pay for the

costs of her illegal emergency detention, because even though the guardianship proceedings in that case were commenced by the illegal emergency detention, that did not mean that Ethelyn I.C. was not liable for the costs of the "separate guardianship proceedings instituted by the County after the emergency protective placement petition was dismissed." ***Id.***, 221 Wis. 2d at 122, 584 N.W.2d at 217. Rather, ***Ethelyn I.C.*** remanded the case to the trial court for the exercise of its discretion in connection with those costs. ***Id.***, 221 Wis. 2d at 123–125, 584 N.W.2d at 217–218. This is consistent with the general principle in Wisconsin that circuit courts have jurisdiction to resolve disputes presented to them even though under certain circumstances they may lack the competency to take certain actions. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶¶2, 8–14, 273 Wis. 2d 76, 82, 86–89, 681 N.W.2d 190, 193, 194–196. Thus, ***Bryn*** applied a statute that, like WIS. STAT. § 880.08(1), required that the "'court shall cause the proposed incompetent, if able to attend, to be produced at the hearing,'" and held that "[f]ailure to take such affirmative steps will deprive the court of a jurisdiction to make a determination of incompetency." ***Bryn***, 21 Wis. 2d at 28, 123 N.W.2d at 507–508 (footnote and quoted source omitted). Nevertheless, ***Bryn*** refused to permit a collateral attack on the finding of incompetency. ***Bryn***, 21 Wis. 2d at 28–29, 123 N.W.2d at 507–508. If a trial court's lack of "jurisdiction," as that word was used in ***Bryn*** (now, lack of competency), meant that its orders were a total nullity so as to vitiate the entire proceedings *ab initio*, the attempted collateral attack in ***Bryn*** should have been permitted. *See* ***Werner v. Riemer***, 255 Wis. 386, 403, 39 N.W.2d 457, 466 (1949) (judgments entered by courts without jurisdiction are subject to collateral attack).

¶22 Here, the circuit court erred by holding the guardianship hearing in Muriel K.'s absence without following the procedures required by WIS. STAT.

§ 880.08(1). That meant that if Milwaukee County believed that Muriel K. was still incompetent, the circuit court could hold a new hearing. Indeed, that is what our decision said: "[W]e vacate the orders of the trial court, remand this matter and direct that Muriel K. be produced at any hearing seeking to declare her to be incompetent if she is able to attend, in accordance with the procedures required by WIS. STAT. § 880.08(1)." ***Knight***, 2002 WI App 194, ¶6, 256 Wis. 2d at 1007, 651 N.W.2d at 894. It did not mean that every other order in the proceeding was a nullity.

¶23 In sum, the circuit court's failure to comply with the written-certification requirement imposed by WIS. STAT. § 880.08(1) did not deprive Muriel K. of her due-process rights. Further, as ***Ethelyn I.C.*** recognizes, partial infirmity does not wipe out all related proceedings. ***Ethelyn I.C.***, 221 Wis. 2d at 122–125, 584 N.W.2d at 217–218. Additionally, based on the determination by the circuit court in this case that everyone whose fees and expenses it ordered be paid was acting for—not against—Muriel K.'s interests, ***Community Care Organization of Milwaukee County, Inc. v. Evelyn O.***, 214 Wis. 2d 434, 571 N.W.2d 700 (Ct. App. 1997), relied on by Muriel K., is inapposite. Based on the circuit court's findings here, Muriel K. is merely being asked to pay for services rendered for her, not to, as in ***Evelyn O.***, "supply bullets to [her] adversaries." ***Id.***, 214 Wis. 2d at 441, 571 N.W.2d at 704.

5. *Muriel K.'s contention that she had a right to avoid guardianship.*

¶24 Finally, a recurring underlying theme of Muriel K.'s briefs on appeal is her contention that she had a right to designate mechanisms other than guardianship should her physical or mental conditions degenerate so that she could no longer care for herself, and, therefore, because she made that designation by executing a power of attorney and a power of attorney for health care she should

not be forced to pay the fees and expenses of the guardianship proceedings. Her syllogism, however fails for two reasons. First, as we have seen, the legislative scheme permits the trumping by a guardianship of those alternative mechanisms. WIS. STAT. §§ 155.60(2) (lapse of power of attorney for health care); 243.07(3)(a) (unless circuit court demurs, guardian of the estate may revoke a durable power of attorney).

¶25 Second, although after our decision in ***Evelyn O.*** the legislature made the execution of the powers of attorney under either WIS. STAT. § 155.60(2) or WIS. STAT. § 243.07 a bar to a ward's liability for the expenses of the *petitioner* in a guardianship proceeding, WIS. STAT. § 880.24(3)(b), the legislature has not done the same thing in connection with the expenses of the guardian, the guardian *ad litem*, the adversary counsel, or the expenses of any palliative placement.[5]

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[5] WISCONSIN STAT. § 880.24(3), created by 1999 Wis. Act 183, effective to petitions "under section 880.07(1) of the statutes that are pending on" June 2, 2000, ***id.***, § 2, provides:

> **(3)** FEES AND COSTS OF PETITIONER. (a) Except as provided in par. (b), when a guardian is appointed, the court shall award from the ward's estate payment of the petitioner's reasonable attorney fees and costs, including those fees and costs, if any, related to protective placement of the ward, unless the court finds, after considering all of the following, that it would be inequitable to do so:
>
> 1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship.
>
> 2. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.
>
> 3. Whether the guardianship was contested and, if so, the nature of the contest.
>
> 4. Any other factors that the court considers to be relevant.

(continued)

Thus, it has made a public-policy judgment that non-indigent wards, rather than taxpayers, should at least have the potential of being responsible for the costs of their guardianship, even though they have executed the powers of attorney. Muriel K. has not shown why we are not bound by the legislature's public-policy decision.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.

(b) If the court finds that the ward had executed a durable power of attorney under s. 243.07 or a power of attorney for health care under s. 155.05 or had engaged in other advance planning to avoid guardianship, the court may not make the award specified in par. (a).