COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2196 **Cir. Ct. No. 2015GN218**

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

IN THE MATTER OF THE GUARDIANSHIP OF E.C.:

E.C.,

APPELLANT,

G.C., POWER OF ATTORNEY AGENT FOR E.C.,

CO-APPELLANT,

V.

SUSAN KRUEGER,

RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: PEDRO A. COLON, Judge. *Affirmed.*

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 BRENNAN, P.J. E.C. jointly appeals with her son, G.C., (collectively, "the appellants") the trial court's order appointing a corporate guardian and suspending E.C.'s powers of attorney naming G.C. as her agent. At the hearing on the Petition for Permanent Guardianship Due to Incompetency, all parties stipulated to the admission of two doctors' reports confirming that E.C. was permanently incompetent due to degenerative brain disease. And all parties except E.C. stipulated to the appointment of a third person neutral guardian of the person and estate. Based in part on the stipulation, but also on the testimony of E.C., her husband, and Susan Krueger (the petitioner, who is E.C.'s daughter), and additionally based on the two doctors' reports, the trial court concluded that E.C. is incompetent as a result of degenerative brain disease and that the appointment of a guardian of the person and estate was in her best interest. The court determined that a neutral third party guardian was in her best interest as well. Finally, the court concluded that good cause was shown for suspension of E.C.'s powers of attorney. Accordingly, the court ordered the powers of attorney suspended and appointed Supportive Community Services, Inc. to serve as her guardian.

¶2 Because we conclude that the trial court properly exercised its discretion, we affirm the order.

BACKGROUND

¶3 At the time of the hearing, E.C. was eighty-nine, and Alzheimer's disease had greatly affected her cognitive function. She lived with her husband and G.C. Susan began taking responsibility for E.C.'s financial matters around the time E.C. was diagnosed with Alzheimer's in 2011 and began overseeing her medical care in 2012 or 2013. On April 30, 2015, Susan filed a petition for

permanent guardianship after conflicts developed between the family members concerning E.C.'s medical care. Susan was represented by Attorney Thomas G. Kreul.[1] E.C., through her own adversary counsel, Attorney Robert J. Welcenbach, objected to the guardianship petition on June 25, 2015. E.C.'s guardian *ad litem*, Attorney Patricia Foley, in her July 27, 2015 Guardian ad Litem Report, took the position that E.C. needed a guardian appointed and that the existing powers of attorney should be revoked in favor of a corporate guardian. E.C.'s son, G.C., through counsel (Attorney Sara L. Eberhardy), objected to the guardianship, arguing that E.C.'s existing powers of attorney naming him E.C.'s agent were sufficient. In the alternative, G.C. asked to be named the guardian.

¶4 The trial court held a hearing on the petition on July 28, 2015, at which all parties were present and represented by counsel. E.C. had both adversary counsel, Welcenbach, and a guardian *ad litem*, Foley. From the outset, on the question of E.C.'s competence, there was no dispute. All parties, including E.C.'s adversary counsel, Welcenbach, stipulated to the admission of the two doctors' reports, and adversary counsel explained to the court that both reports contained the doctors' opinions that E.C. was incompetent. But adversary counsel further stated that "the issue is who should be the guardian or if she needs a guardian[.]" Eberhardy explained that E.C. had "valid or at least asserted valid powers of attorney that may obviate the need for guardianship at all." Based on the stipulation as to their admissibility, without objection from the parties, the trial court accepted the reports of two doctors who had examined E.C. on separate

[1] Although we do not usually name attorneys, we do so here to avoid confusion given multiple attorneys representing E.C. and potential confusion with the use of initials for parties' names.

occasions and accepted their conclusions that she is severely cognitively impaired, is incapable of caring for herself, and requires 24-hour supervision. No party offered any testimony or objection to the doctors' conclusions as to E.C.'s incompetence.

¶5 The trial court then took testimony from E.C., her husband, and daughter Susan. On the question of the need for a guardianship, Susan and E.C.'s husband testified about conflicts between G.C. and others in the family, and G.C.'s interference with E.C.'s family relationships and medical care. The trial court took a brief recess and invited counsel to chambers for a discussion off the record. When the hearing resumed, E.C. testified that she did not wish to have any guardian appointed other than her son G.C. The trial court then asked the parties for their positions. Although Susan and E.C.'s GAL, Foley, had initially asked the court to appoint Susan as guardian, at this point both endorsed the appointment of a third party guardian. G.C. too changed his position and agreed to a neutral third party guardian.

¶6 Counsel for Susan stated: "[T]his is an appropriate situation for guardianship of the person and of the estate and given the dynamics at play here … the appropriate guardian of the person and guardian of the estate would be an independent third party guardian[.]"

¶7 Eberhardy, counsel for G.C., stated first that G.C. believed that "the most recent powers of attorney," which named him as agent, represented what E.C. wanted and then added:

> That being said, he understands that the family dynamics are such that he, too, is concerned about how that would work out. *So he has indicated to me that he is agreeable to a neutral third party for both capacities, the guardian of the person and the guardian of the estate.* He still wants to

> be there every day, he still wants to do the things that his mother wants done. He wants to be there by her side to provide for her and he's hopeful that that will be able to continue even if a neutral third party is ultimately appointed by the court.

(Emphasis added.)

¶8 Foley, guardian *ad litem* for E.C., stated, "I do believe that an independent third party such as Supportive Community Services would be the most appropriate guardian of the person and of the estate for [E.C.] in this case."

¶9 The only party who did not stipulate to a third party neutral guardian was E.C. through her adversary counsel who informed the court that "[E.C.] clearly wants her son to be her guardian if one is appointed for her and she feels she doesn't need a guardianship. We understand the agreement of the other parties."

¶10 The trial court found E.C. incompetent and concluded that guardianship was appropriate. The trial court cited the doctors' reports, E.C.'s inability to take care of her daily needs, E.C.'s diagnosis of Alzheimer's, the family's "difficult dynamic," the family's conflict over E.C.'s medical care, and the need to "maintain the family unit as together as it can be." The trial court concluded that, even though E.C. does not want a guardian, "she needs a guardian."

¶11 Following the decision, counsel for G.C. asked, "[I]s the court taking a position on any of the POAs and whether they survive the guardianship or are suspended or revoked as a result of the guardianship?" The trial court answered, "I'm going to suspend them." There was no objection made on the record in response.

¶12 The trial court's order on the petition stated the following:

> Corporate guardian agreed to in open court by Petitioner, Interested Person [G.C.], and GAL, and court finds after Hearing that the proposed ward is in need of such corporate guardian and orders Supportive Community Services, Inc., … to serve as guardian of the person and guardian of the estate of the ward.

¶13 The order further stated that good cause exists to suspend the powers of attorney:

> *Good cause exists to revoke or limit the power of attorney for health care* because: suspension of any power of attorney for health care is in the best interests of the proposed ward due to family conflict.
>
> *Good cause exists to revoke or limit the durable financial power of attorney* because: suspension of any financial power of attorney is in the best interests of the proposed ward due to family conflict.
>
> *The appointment of the agent under the individual's power of attorney for health care as guardian of the person is not in the best interest of the individual* because: resulting family conflict is not in the best interests of the proposed ward.
>
> *The appointment of the agent under the individual's durable financial power of attorney as guardian of the estate is not in the best interest of the individual* because: resulting family conflict is not in the best interests of the proposed ward.

(Emphasis added.)

STANDARD OF REVIEW

¶14 Neither appellant E.C., nor her son, G.C., the co-appellant, challenge the trial court's finding that E.C. is incompetent.[2] They challenge two related orders of the trial court: (1) the trial court's order appointing a third party neutral guardian; and (2) its order suspending E.C.'s powers of attorney. They contend that both should be reviewed *de novo*, citing cases that only involved statutory construction, not discretionary trial court decisions.[3] Susan contends that the correct standard of review is for a proper exercise of discretion.

¶15 We conclude on both questions—the choice of guardian and the suspension of powers of attorney—that the correct standard of review is for a proper exercise of discretion using the well-established process set forth in ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). *See* WIS. STAT. ch. 54.

---

[2] E.C. raises this issue in her brief, but not as a basis for guardianship. Rather, she argues it in the context of the absence of "good cause" for suspension of the powers of attorney. We consider the argument in the context in which she raises it—an attack on the "good cause" finding and not a challenge to the trial court's finding and conclusion of incompetence for the guardianship determination. In the event E.C. meant it to be otherwise, we conclude she has failed to develop any appellate argument attacking the evidence on this issue. She did not raise that issue below, and she did not identify it as an issue on appeal in her brief.

[3] Appellant cited ***Coston v. Joseph P.***, 222 Wis. 2d 1, 10, 586 N.W.2d 52 (Ct. App. 1998), in support of her argument for *de novo* review. To the extent that she was arguing that ***Joseph P.*** applies a different standard of review than guardianship generally, we disagree. In ***Joseph P.***, the court of appeals decided a completely different issue—whether "interested persons" had a right to demand a guardianship trial—and concluded they did not. In reaching that conclusion, the court called the issue one of first impression requiring statutory interpretation of WIS. STAT. chs. 880 and 55, which delineate the rights of interested persons. The court described *that* as a question of law, requiring *de novo* review. ***Id.*** at 10, 20-21. Unlike the issue decided in ***Joseph P.***, the issues here are choice of guardian and suspension of powers of attorney, both discretionary decisions of the trial court. *See* WIS. STAT. ch. 54 (2013-14), ***Anna S. v. Diana M.***, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285. *See also* ***Brezinski v. Barkholtz***, 71 Wis. 2d 317, 327-28, 237 N.W.2d 919 (1976). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶16 On the question of choice of guardian, Wisconsin law is clear that we review the trial court's choice of a guardian for a proper exercise of discretion:

> The parties agree that the circuit court's decision on guardianship and placement involves a determination of [K's] best interests, and that this determination is committed to the trial court's discretion.

Anna S. v. Diana M., 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285.

¶17 In ***Anna S.***, we relied on a 1976 case of the Wisconsin Supreme Court, ***Brezinski v. Barkholtz***, 71 Wis. 2d 317, 237 N.W.2d 919 (1976), where the court said that a guardianship decision is subject to a discretionary review. ***Id.*** at 327.

¶18 Likewise as to the second issue on review, the trial court's suspension of the powers of attorney, we conclude that this issue is also reviewed for a proper exercise of discretion. While none of the parties cite any case law directly addressing this specific issue, we conclude that the interplay of powers of attorney and appointment of guardian is part of the factors to be considered in guardianship and as such, is part of the trial court's "best interest" of ward analysis. WISCONSIN STAT. § 54.10(3)(c)3. requires the trial court to "consider" whether the proposed ward had executed powers of attorney. And in WIS. STAT. § 54.46(1)(a)2., the trial court is given the authority to dismiss a guardianship if it determines that one is "unnecessary" due to the existence of powers of attorney. Likewise, in WIS. STAT. §§ 54.46(2)(b) and (c), the trial court is given the authority to revoke or limit powers of attorney for "good cause shown." Additionally, WIS. STAT. § 54.10(3)(c) specifically directs the trial court *to review* and *consider* sixteen factors including any powers of attorney and "other relevant evidence" *in determining* the proposed ward's best interest. This weighing of

factors, including the powers of attorney, before determining best interest, clearly calls upon the trial court to exercise its discretion and is part of the ultimate guardianship question that our Wisconsin jurisprudence has determined is reviewed for a proper exercise of discretion. *See* ***Anna S.***, 270 Wis. 2d 411, ¶7.

¶19 The proper method of review of discretionary decisions is well established. We affirm discretionary decisions if the trial court applies the proper legal standard to the relevant facts and uses a rational process to reach a reasonable result. *See* ***Loy***, 107 Wis. 2d at 414-15. We must affirm if the discretion is exercised in accordance with the relevant law and facts, and we will "search the record for reasons to sustain" that discretion. *See* ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388. Whether the trial court applied the correct legal standard in exercising its discretion presents a question of law, which we review *de novo*. ***Anna S.***, 270 Wis. 2d 411, ¶7.[4]

DISCUSSION

¶20 Although the appellant and co-appellant present their arguments in separate briefs, essentially they both argue that the trial court erred in appointing a corporate guardian because E.C. had valid powers of attorney naming G.C. as her agent. They present the same four arguments: (1) the trial court based its guardianship decision on an invalid stipulation; (2) the statutes preclude appointing a guardian when a principal has executed valid powers of attorney; (3) E.C.'s constitutional right to due process was violated by the trial court

[4] This step in the discretionary review process is perhaps what the appellants were referring to in their arguments for a *de novo* review. However, in their complete disregard of the other part of discretionary review—namely choice of guardian and suspension of powers of attorney—they fail to correctly state the standard of review.

denying her choice of agent; and, (4) the statutory requirement of good cause for limiting powers of attorney was not satisfied. We consider each argument in turn.

1. The trial court properly considered the stipulation.

¶21 We begin with the appellants' separate, but related, arguments on the stipulation. First we address E.C.'s argument. E.C. correctly points out that she did not agree to one part of the stipulation—namely, the choice of guardian. But the trial court was very aware of the fact that she was not stipulating to choice of guardian. It did not order the corporate guardian based on any perceived stipulation by E.C. Rather, the court properly exercised its discretion in reviewing the testimony of E.C., her husband, her daughter, and the doctors' reports, and concluded that based on the record, it believed a corporate guardianship was in the best interest of E.C. pursuant to WIS. STAT. §§ 54.15(2) and (3). The trial court gave its reason in the order: "resulting family conflict is not in the best interests of the proposed ward."

¶22 As to the second part of the stipulation however, E.C. *did agree* to the admissibility of the doctors' reports. Her adversary counsel clearly articulated the full stipulation on the record. His characterization of the reports was that they showed her to be incompetent. He told the trial court, "[W]e'll stipulate to both the doctors' reports which essentially indicate that she's incompetent and the issue is who should be the guardian or if she needs a guardian I guess." This was a proper evidentiary stipulation that the record shows E.C. entered into and on which the court could, and did, rely.

¶23 By contrast, G.C., agreed to *both parts* of the stipulation. In his presence, without any objection from G.C., his counsel, Eberhardy, stated G.C.'s clear agreement to the admissibility of the doctors' reports and the choice of a

corporate guardian. On appeal G.C. argues that the stipulation violates WIS. STAT. § 807.05 because it was not in writing and was not joined into by E.C. G.C.'s argument fails because the statute permits a stipulation on the record, which this was, and because G.C. was the party to be bound, in that he was giving up his right to challenge the choice of guardian by agreeing to the stipulation. Thus it is a proper stipulation.[5] And in agreeing to the stipulation at trial, G.C. bound himself to both prongs of the agreement.

¶24 Additionally, G.C. forfeited his argument on the stipulation in this appeal by failing to object at trial. "'The party alleging error has the burden of establishing, by reference to the record, that the error was raised before the trial court.'" ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶26, 322 Wis. 2d 189, 776 N.W.2d 838 (citation omitted). *See also* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177.

¶25 All other parties agreed to the stipulation. The reports were admitted, and both confirmed E.C.'s incompetence due to degenerative brain disease. Neither E.C., nor G.C., nor any other party presented any objection at trial or any rebutting evidence. Hence, an objection now is forfeited. *See* ***Shadley***, 322 Wis. 2d 189, ¶26.

¶26 To the extent that E.C. and G.C. are arguing that the trial court "based" its order *only* on the stipulation, they are mistaken. The record shows otherwise. Here, because not all parties joined in on both parts of the stipulation,

[5] To the extent that G.C. argues he was not bound by the stipulation because his attorney recited his agreement, we find that he has forfeited that argument on appeal by not raising any objection below.

the trial court properly considered the testimony of the parties as well as the stipulation in support of its findings on incompetence, choice of guardian and suspension of powers of attorney.

2. The relevant statutes do not preclude the appointment of a guardian even where the proposed ward has executed powers of attorney.

¶27 Next, E.C. and G.C. contend that the trial court failed to follow the correct law under the guardianship statute when it appointed a corporate guardian and suspended powers of attorney. As a preliminary matter, we must consider whether they forfeited this issue. As shown above, G.C. has forfeited any challenge to the appointment of a corporate guardian by joining the stipulation. However, because E.C. did not join the stipulation, we reach this issue as it pertains to E.C.

¶28 E.C. contends that where the proposed ward has executed powers of attorney naming an agent, "the guardianship statutes mandate that those advance planning documents be enforced." She argues that the best interest test does not apply, relying principally on dicta from ***Lenz v. L.E. Phillips Career Development Center***, 167 Wis. 2d 53, 83, 482 N.W.2d 60 (1992), and ***Spahn v. Eisenberg***, 210 Wis. 2d 557, 563 N.W.2d 485 (1997).

¶29 We disagree. No statute or case requires the trial court to disregard guardianship in favor of powers of attorney. All of the relevant guardianship and powers of attorney statutes, and case law, make clear that the trial court *must consider* all relevant evidence, including the existence of powers of attorney, but also many other factors, and then determine what is in the proposed ward's *best interest*. The statutes give the trial court the discretion to dismiss the guardianship petition if it is unnecessary due to validly executed powers of attorney, or to limit

or revoke the powers of attorney in favor of guardianship if good cause is shown. None of these statutory sections would be necessary if E.C.'s position was correct. The legislature could have easily said that the existence of powers of attorney trumps any guardianship. Not only did the legislature not do that, it did the opposite, creating explicit discretionary authority in the trial court to suspend the powers of attorney. We specifically examine the relevant statutes below.

¶30 The legal standards applicable to a guardianship action are found in Chapter 54 of the Wisconsin Statutes, "Guardianships and Conservatorships." In multiple places, the guardianship statutes address the considerations that are relevant when a trial court is presented with a guardianship petition for a ward who has previously executed a durable power of attorney or a power of attorney for health care. Under WIS. STAT. § 54.15, the "best interests of the proposed ward" is the standard for the trial court both when it appoints a guardian and when it determines whether an agent previously named by the proposed ward should be appointed guardian. Included in the list of what the court "shall consider" are the powers of attorney, the opinions of the proposed ward and her family, and the appointment of a corporate guardian. The statute reads as follows:

> **54.15. Selection of guardian; nominations; preferences; other criteria**.
>
> The court *shall consider* all of the following in determining who is appointed as guardian:
>
> **(1)** OPINIONS OF PROPOSED WARD AND FAMILY. The court shall take into consideration the opinions of the proposed ward and of the members of his or her family *as to what is in the best interests of the proposed ward.* However, the *best interests of the proposed ward shall control* in making the determination when the opinions of the family are in conflict with those best interests.
>
> ….

> **(2)** AGENT UNDER DURABLE POWER OF ATTORNEY. The court shall appoint as guardian of the estate an agent under a proposed ward's durable power of attorney, *unless the court finds that the appointment of an agent is not in the best interests of the proposed ward.*
>
> **(3)** AGENT UNDER A POWER OF ATTORNEY FOR HEALTH CARE. The court shall appoint as guardian of the person the agent under a proposed ward's power of attorney for health care, *unless the court finds that the appointment of the agent is not in the best interests of the proposed ward.*
>
> ….
>
> **(7)** PRIVATE NONPROFIT CORPORATION OR OTHER ENTITY. A private nonprofit corporation organized under ch. 181, 187, or 188 or an unincorporated association that is approved by the court may be appointed as guardian of the person or of the estate or both, of a proposed ward, if no suitable individual is available as guardian and the department, under rules promulgated under this chapter, finds the corporation or association to be a suitable agency to perform such duties.

(Emphasis added.)

¶31 And under WIS. STAT. § 54.10, one of the factors the court "shall consider" in appointing a guardian for a person found incompetent is "[w]hether the proposed ward has engaged in any advance planning for financial and health care decision making that would avoid guardianship, including by executing a durable power of attorney under ch. 244, [or] a power of attorney for health care[.]" WIS. STAT. § 54.10(3)(c).

¶32 Elsewhere in WIS. STAT. ch. 54, in Subchapter IV, entitled "Procedures," the same process is described, but the standard is stated in slightly different language. In this section, it states that where there has been a finding of a proposed ward's incompetence and appointment of a guardian, any pre-existing durable power of attorney or power of attorney for health care "remains in effect,"

but the court may, "only for good cause shown, revoke [powers of attorney] or limit the authority of the agent." WIS. STAT. §§ 54.46 (2)(b) and (2)(c).

¶33 Finally, in WIS. STAT. § 155.60(1), which concerns powers of attorney and is entitled "Safeguards," the legislature made clear that existing powers of attorney do not preclude guardianship: "*Nothing in this chapter prohibits* an individual from petitioning a court in this state for a *determination of incompetency and for appointment of a guardian* for an individual who is a principal under this chapter." (Emphasis added.)

¶34 E.C. argues, citing WIS. STAT. § 54.46(1)(a)2., that "[t]he court is required to dismiss the petition for guardianship if it finds advanced planning by the ward, which renders the guardianship unnecessary." That completely misstates the statute. It actually says that the trial court "shall dismiss the petition" under the following circumstances: "if the court finds … [a]dvance planning by the ward, as specified in s. 54.10(3)(c)3., renders guardianship unnecessary." § 54.46(1)(a)2. In other words, the statute grants the trial court the discretion to weigh all of the evidence and apply it to the best interest of the proposed ward to make a decision as to whether guardianship is necessary. It does not say, as E.C. argues, that if the court finds the ward has an advanced planning directive, guardianship is therefore automatically unnecessary. Such an interpretation is incompatible with the plain language of WIS. STAT. §§ 54.15(2) and (3) in the same chapter, which explain how to proceed when existing advance planning decisions have not rendered guardianship unnecessary. *See* ***Bruno v. Milwaukee Cty.***, 2003 WI 28, ¶24, 260 Wis. 2d 633, 660 N.W.2d 656 ("[W]e attempt to construe statutes and ordinances to avoid surplusages[.]"). In this case, the trial court did not find that E.C.'s advance planning rendered the guardianship unnecessary.

¶35 E.C. also argues that WIS. STAT. § 155.60—outside of the guardianship chapter—compels the conclusion that there is a presumption in favor of the powers of attorney. Again, E.C. ignores the plain language of the statute. In fact, § 155.60(2) specifically authorizes the trial court to revoke or limit the power of attorney, provided it has *good cause*. It states that:

> "[T]he court may under s. 54.46(2)(b) for good cause shown, revoke the power of attorney for health care and invalidate the power of attorney for health care instrument, or limit the authority of the agent under the terms of the power of the power of attorney for health care instrument."

¶36 Contrary to E.C.'s view, the mere existence of valid powers of attorney is not, in itself, a bar to a guardianship proceeding.

3. The Trial Court did not deprive E.C. of her Constitutional Right to Due Process.

¶37 Next, E.C. makes an undeveloped argument that the trial court violated her constitutional right to due process by appointing a corporate guardian and suspending her powers of attorney. Co-appellant, G.C., joins her in this argument, but as noted above we conclude that G.C. has forfeited this issue by stipulating to the corporate guardian and failing to object to the suspension of powers of attorney below. E.C. does not identify what due process E.C. was denied, but it appears that her argument is that suspension of the powers of attorney automatically constituted a due process violation. She presents no controlling authority for this proposition and relies merely on dicta from two cases, ***Lenz***, 167 Wis. 2d at 83, and ***Spahn***, 210 Wis. 2d at 565.

¶38 E.C. cites to ***Lenz*** for the proposition that a person has a fundamental right to decide whether to accept medical care, which she equates, without authority, to a fundamental right to have a person's choice of an agent

under powers of attorney take precedence over appointment of a guardian.[6] E.C. argues that the court effectively took that constitutional right away from her without due process by suspending her choice of a health care agent. There are several problems with this argument.

¶39 First, and most importantly, the case E.C. principally relies on, ***Lenz***, establishes the opposite proposition. In ***Lenz***, the proposed ward was in a persistent vegetative state, and the narrow question[7] was whether the guardian had the power to terminate life support, including artificial hydration and nutrition. ***Lenz***, 167 Wis. 2d at 94. Significantly in ***Lenz***, unlike here, there was no living will or power of attorney for health care. The Wisconsin Supreme Court in ***Lenz*** clearly stated that the test to be applied is the best interest test and that the guardianship statutes themselves afforded the proposed ward due process. ***Id.*** The court held in ***Lenz*** that the guardian *did* have the authority to consent to withdrawal of life-sustaining support *where it has determined in good faith that doing so is in the ward's best interest*. ***Id.*** at 93. The court reasoned that the statutory guardianship procedures provided due process: "due process … is accorded *through the guardianship appointment procedures*." ***Id.*** at 83 (emphasis added). The court noted that the guardianship statutes "set[] forth extensive procedures for the determination of incompetency and appointment of a guardian, and … require[] that a disinterested attorney be appointed as guardian *ad litem* to

[6] E.C. mentions ***Cruzan v. Director, Missouri Dep't of Health***, 497 U.S. 261 (1990), also but does not develop any summary of it or analysis of its applicability to the case at hand.

[7] The court specifically stated that its holding was limited in scope to persons in a persistent vegetative state. ***Lenz v. L.E. Phillips Career Development Center***, 167 Wis. 2d 53, 94, 482 N.W.2d 60 (1992). That statement alone indicates the inapplicability of E.C. and G.C.'s reliance on ***Lenz***.

protect the individual's interests in the appointment procedure." ***Id.*** The same due process that the Wisconsin Supreme Court approved of in ***Lenz*** was accorded E.C. here, and therefore, ***Lenz*** is not authority for E.C. and G.C.'s argument here. In fact, it supports the contrary conclusion.

¶40 Ignoring that holding in ***Lenz***, E.C. points to language in the opinion—dicta—that she argues establishes her constitutional right to her own choice of an agent taking preeminence over a court-appointed guardian:

> If the [patient's] wishes are clear, it is invariable as a matter of law, both common and statutory, that it is in the best interests of the patient to have those wishes honored, for the patient has made the pre-choice of what he or she considers to be the best interests under the circumstances that arise.

Lenz, 167 Wis. 2d at 79-80. First we repeat that there was no power of attorney for health care in ***Lenz***. Thus, the language is dicta and does not provide a helpful basis for analysis. It does not begin to address any conflict between the trial court's mandate to determine best interest and the ward's choice of agent. *See* WIS. STAT. §§ 54.10(3) and 54.46.

¶41 Notwithstanding that dicta, the later case of ***Knight v. Milwaukee County***, 2002 WI 27, ¶53, 251 Wis. 2d 10, 640 N.W.2d 773, explicitly holds that that is not the way the best interests standard works. It acknowledges that in *some* cases, "[t]he best interests of a ward and the ward's wishes expressed while competent *may overlap*." ***Id.*** "Ultimately, however, 'best interests' is a standard that *is not necessarily coextensive with what an individual has chosen* or would choose were she competent to do so." ***Id.*** (Emphasis added.) The ***Knight*** court therefore did not consider the ***Lenz*** language to create a new best interests standard. Even though ***Knight*** cites to ***Lenz*** several times, ***Knight*** holds clearly

that the best interests standard is *not* the equivalent of "what an individual has chosen or would choose were she competent to do so." ***Id.***

¶42 E.C. also cites to language in ***Spahn***, 210 Wis. 2d at 565, for the proposition that a ward's expressed wishes are controlling. It is likewise distinguishable as it concerns determinations of when a guardian can make decisions in the absence of expressed wishes by a ward as to continuation of or withdrawal of life-sustaining medical care. ***Spahn***, 210 Wis. 2d at 560.

¶43 Additionally, *after* ***Lenz***, ***Spahn***, and ***Knight*** were decided, the legislature created the present WIS. STAT. ch. 54, which explicitly gives the trial court the authority to revoke or limit the powers of attorney. *See* WIS. STAT. § 54.46(2). "We assume that the legislature's intent is expressed in the statutory language." ***Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.

¶44 Accordingly E.C. has failed to demonstrate any constitutional right to choice of health care agent over guardian and similarly failed to show any due process violation.

4. The requirement of good cause for limiting powers of attorney was satisfied.

¶45 The fourth issue raised by both appellants is whether the record supports the trial court's legal conclusion that *good cause* supported suspending the powers of attorney. E.C. argues, without authority, that a finding of good cause is only permissible if the trial court determines that the powers of attorney is invalid or that the named agent is no longer able to act. She contends that because the record fails to support either factual conclusion, the trial court lacked good

cause for suspension of the powers of attorney. Again, G.C. has forfeited this issue on appeal.

¶46 WISCONSIN STAT. §§ 54.46(2)(b) and (c) state that the trial court may revoke or limit the powers of attorney "only for good cause shown." This is technically but not substantively different from the directive elsewhere in the chapter that a trial court will appoint the agent as guardian of the person or of the estate "unless the court finds that the appointment of the agent is not in the best interests of the proposed ward." WIS. STAT. §§ 54.15(2) and (3). Regardless of how it is phrased, it is clear that the decision is a discretionary one.

¶47 Here the record supports the trial court's discretionary decision that good cause existed. Although E.C. focuses narrowly on the "family conflict" evidence, there was other evidence presented as well. There was evidence that G.C. had twice arranged a loan from E.C. to a friend of his in the amount of $50,000 without the knowledge of other family members. There was evidence of physical altercations between G.C. and his father at the home. There was evidence that G.C. had cancelled at least one doctor's appointment for E.C., had rejected the diagnosis of Alzheimer's, and had had some conflicts with E.C.'s doctors. There was evidence that G.C. had repeatedly attempted to withdraw funds from an account of E.C.'s that had approximately $750,000 in it. There was evidence that an elder abuse investigator had been assigned to investigate E.C.'s family. We search the record for reasons to affirm a trial court's discretionary decision, *see* ***Thiel***, 227 Wis. 2d 698, ¶26, and here there is sufficient evidence from which a court could reasonably conclude that there was good cause and it is in E.C.'s best interest to suspend her powers of attorney.

¶48 For the above reasons, we affirm.

By the Court.—Order affirmed.

This opinion is not recommended for publication.