COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1755

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

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF BERMUDA H.:

SHAWANO COUNTY,

PETITIONER-RESPONDENT,

V.

BERMUDA A. H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Shawano County: EARL SCHMIDT, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Bermuda A.H., earlier adjudged incompetent under WIS. STAT. ch. 880, appeals the trial court's order denying her request to substitute her sister as her guardian. Bermuda contends that the trial court erroneously exercised its discretion by failing to properly take into consideration Bermuda's and her sister's opinions concerning who should be Bermuda's guardian. She asserts that the first two sentences of WIS. STAT. § 880.33(5) mandate such consideration. Bermuda also argues that the trial court's decision to continue Sally Ripley as guardian was based upon factual findings not supported by the evidence. This court concludes that the trial court properly exercised its discretion based upon the evidence when it denied Bermuda's request for a successor guardian. The order is therefore affirmed.

FACTS

¶2 Bermuda is the subject of a guardianship and protective placement, which were first ordered in 1996 when the trial court appointed a non-relative guardian. At a ***Watts***[2] hearing held in July of 1998, Bermuda and her sister, Lori M., requested that Lori be appointed Bermuda's guardian.[3] The trial court denied the request and appointed Sally Ripley, also a non-relative, as successor guardian.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] ***State ex rel. Watts v. Combined Comm. Servs. Bd.***, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

[3] Lori, a certified nursing assistant, also asked that the court place Bermuda in Lori's residence on a trial basis, which the court denied.

¶3 At the ***Watts*** hearing held in March 2000, Bermuda contested whether Ripley should continue as guardian, again urging the court to instead appoint Lori. The trial court found that there had been disputes among Bermuda's siblings in the past that resulted in problems for Bermuda. The court determined that Bermuda was improving in part because she had a neutral guardian, Ripley. The latter circumstance, the court found, insulated Bermuda from observing "infighting" among her siblings, thereby contributing to her well-being. On these findings, the court denied Bermuda's request. Bermuda appeals the order continuing Ripley as her guardian.

APPOINTMENT DISCRETION

¶4 WISCONSIN STAT. § 880.33(5) requires the trial court to consider the ward and the family's opinions as to whom would constitute an appropriate guardian. Bermuda acknowledges that § 880.33(5) does not provide an explicit statutory preference as to whom should be appointed guardian. Moreover, she concedes that the trial court's guardian selection is discretionary. Bermuda contends, however, that § 880.33(5) "is a clear legislative statement of the importance of the opinions of the proposed incompetent and his or her family …." The effect of this section, Bermuda argues, is to limit to a degree the trial court's discretion to appoint a guardian.

¶5 WISCONSIN STAT. § 880.33(5) provides in material part:

> In appointing a guardian, the court shall take into consideration the opinions of the alleged incompetent and of the members of the family as to what is in the best interests of the proposed incompetent. However, the best interests of the proposed incompetent shall control in making the determination when the opinions of the family are in conflict with the clearly appropriate decision. The court shall also consider potential conflicts of interest

> resulting from the prospective guardian's employment or other potential conflicts of interest.

¶6 Bermuda argues that WIS. STAT. § 880.33(5) is ambiguous. One interpretation that Bermuda deems reasonable is that the ward's and family's opinions are never controlling, but are merely factors the court must take into consideration in determining the ward's best interests. She resolves the ambiguity in favor of an interpretation that limits the trial court's discretion to deviate from the ward's and family members' wishes only when they are "in conflict with the clearly appropriate decision." *See* ***id.*** It is only then that the court may entertain a best interests analysis. In all other cases, the trial court could not make a decision that conflicted with the ward's and the family's wishes. Bermuda contends that her construction avoids both a conflict between the first two sentences and rendering the second sentence of § 880.33(5) meaningless and mere surplusage:[4]

> If a best interests analysis is always required and if the opinions and wishes of the incompetent and his or her family are never controlling, there is simply no need for a statute requiring a best interests analysis in the limited number of cases in which those opinions and wishes conflict with the clearly appropriate decision.[5]

¶7 Bermuda concedes that the trial court acknowledged her and Lori's opinion concerning Bermuda's best interests. Based on her construction of WIS.

[4] The "conflict" argument appears to be merely a substantively similar precursor to Bermuda's argument that her construction avoids rendering phrases in the statute meaningless or mere surplusage. To the extent that this court misperceives it as such, the argument is not sufficiently developed to meaningfully address. This court declines to consider arguments that are unexplained, undeveloped, or not supported by citation to authority. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

[5] In her reply brief, Bermuda further explains that while the controlling standard is the ward's best interests, "the legislature made a determination that selection of the guardian preferred by the ward is in the 'best interests' of the ward unless such a selection is 'in conflict with the clearly appropriate decision.'"

STAT. § 880.33(5), however, she asserts that the court's refusal to follow Bermuda and Lori's wishes violated the statute, resulting in an erroneous exercise of its discretion.

¶8 Statutory construction presents a question of law that this court reviews de novo. *See* ***Wisconsin Fin. Corp. v. Garlock***, 140 Wis. 2d 506, 515, 410 N.W.2d 649 (Ct. App. 1987). The purpose of statutory interpretation is to ascertain and give effect to the legislature's intent. *See* ***County of Columbia v. Bylewski***, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (1980). In determining legislative intent, first resort must be to the language of the statute itself. *See* ***id.*** If the meaning of the statute is clear on its face, this court will not look outside the statute in applying it. *See* ***WEPCO v. PSC***, 110 Wis. 2d 530, 534, 329 N.W.2d 178 (1983).

¶9 This court does not agree that WIS. STAT. § 880.33(5) is ambiguous. Taken as a whole, it states factors that the trial court should take "into consideration" in determining a guardian appointment that would be consistent with the ward's best interests.[6] That the court must avoid any conflict with a "clearly appropriate decision" further demonstrates the legislative intent that the trial court retain discretion to protect the ward's best interests. Moreover, there is no inherent conflict in a statute that sets forth a standard—best interests—and factors that the court should consider in applying the standard—the ward's and family's opinions and potential conflicts of interest. Similarly, the statement of factors in § 880.33(5) does not render the best interests standard meaningless or

[6] Moreover, even if the statute was ambiguous, the construction Bermuda advances would be unworkable in situations when the family or the family and the ward lack accord. *See* ***State v. Walczak***, 157 Wis. 2d 661, 667, 460 N.W.2d 797 (Ct. App. 1990) (statutes should not be construed to lead to absurd or unworkable results).

surplusage because the factors are relevant rather than offensive to the standard. Finally, Bermuda's contention appears irreconcilable with her earlier concession that "a court in a guardianship case has some discretion in selecting the guardian." This court holds that the trial court was not required under § 880.33(5) to follow Bermuda and Lori's wishes, but rather, had discretion to appoint a non-relative guardian consistent with Bermuda's best interests.

SUFFICIENCY OF THE EVIDENCE

¶10 Bermuda claims that there was no evidence to support the trial court's findings upon which it concluded that it was in her best interests to continue a non-relative as guardian.[7] Specifically, she claims that there was a "complete absence of evidence of any current or even recent infighting between family members concerning [Bermuda]." This court disagrees.

¶11 A trial court's discretionary decision will not be reversed unless the court erroneously exercised its discretion. *See* ***State v. Bunch***, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." ***Id.*** at 506-07. An exercise of discretion must be based on the facts appearing in the record. *See* ***Dowd v. Dowd***, 167 Wis. 2d 409, 416, 481 N.W.2d 504 (Ct. App. 1992). Findings of fact will not be upset on appeal unless clearly erroneous. *See* WIS. STAT. § 805.17(2). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are patently incredible, or in

[7] Before Bermuda addresses her contention, however, she refers at length to evidence that would have supported a decision to appoint Lori as guardian. This approach does not comport with the applicable standard of review, which Bermuda fails to address.

conflict with the uniform course of nature or with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶12 Bermuda's assertion notwithstanding, the County correctly contends that there is considerable evidence in the record to support the trial court's findings. It is unnecessary to recount it at length, however, because Bermuda's reply brief does not attempt to refute the County's characterization of the evidence and, indeed, does not even reply to the County's contention. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted.) That said, Bermuda's caseworker testified that the neutral guardian's restrictions were partly responsible for Bermuda's success in her current placement and that he believed certain family members would object to Lori being appointed guardian. Ripley testified as to continued strife within the family. As implied above, Bermuda makes no attempt to show why the trial court's finding was clearly erroneous in light of this testimony. This court is satisfied that the evidence was sufficient to support the trial court's discretionary decision to continue a non-relative as Bermuda's guardian.

FRIVOLOUS APPEAL

¶13 The County argues that Bermuda's appeal is frivolous and requests this court to remand to the trial court to assess costs. Application for frivolous costs is made by motion. *See* WIS. STAT. RULE 809.25(3)(a). Upon a review of the appellate record, this court determines that the County failed to file such a motion. Moreover, although Bermuda did not prevail on her interpretation of WIS. STAT. § 880.33(5), this court cannot conclude that her argument was without any

reasonable basis in law. *See* WIS. STAT. RULE 809.25(3)(c)2. Therefore relief is denied.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)4.