

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 26, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**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.

**Appeal No. 2009AP2619**

**Cir. Ct. No. 1997GN1**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**IN THE MATTER OF THE GUARDIANSHIP OF EMILY B.:**

**ALBERT B.,**

**APPELLANT,**

**V.**

**DOOR COUNTY AND MARY BERNE,**

**RESPONDENTS.**

---

APPEAL from an order of the circuit court for Door County:  
JAMES T. BAYORGEON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Albert B., pro se, appeals an order denying his petition to remove Mary Berne as guardian for Emily B.<sup>1</sup> Because the circuit court's factual findings are not clearly erroneous and support the discretionary decision to deny the petition, we affirm.

## BACKGROUND

¶2 Emily B. is the adult daughter of Albert B. She is developmentally disabled, and has been under a guardianship and protective placement for many years. Albert B. was the guardian for several years. Mary B. was appointed standby guardian in 2003. In 2004, at Albert B.'s request, Emily B. moved from Albert B.'s home to Berne's home. On the evening of February 14, 2006, Emily fell and broke her hip. Emergency surgery was required, and Albert B. did not learn of the fall and surgery until the next morning. In April, 2006, Albert B. stipulated that Berne should be appointed guardian, and the circuit court found the change in guardian to be in Emily B.'s best interests.

¶3 After Emily B. spent some time in a sub-acute facility for rehabilitation, she returned to live with Berne. In August 2006, police were called after Emily B.'s behavior got "out of control."<sup>2</sup> After some short-term placements to stabilize her emotionally, Emily B. moved to Empowerment Options Adult Family Home, an adult group home operated by Michael Melotte. Emily B.

---

<sup>1</sup> Albert B. testified that he is a licensed, but inactive, attorney. Albert B. is not licensed to practice law in Wisconsin. Supreme court records show Albert B.'s license is suspended for disciplinary reasons, nonpayment of dues and noncompliance with continuing legal education requirements. Because Albert B. is not eligible for active membership, he is not an inactive member of the State Bar. *See* SCR 10.03(3)(a).

<sup>2</sup> This description of Emily B.'s behavior is taken from Berne's testimony.

continues to live at the Melotte home. Although the protective placement documents are not part of this guardianship file, it is undisputed that annual reviews under WIS. STAT. § 55.18 (2009-10)<sup>3</sup> have occurred, and that all of Emily B.'s placements have been approved by the circuit court, including at a May 2009 review.

¶4 In April 2009, Albert B. filed a petition to discharge Berne as guardian and to re-appoint him. The petition itself did not identify any grounds for removal. Albert B. filed a trial brief, however, identifying two grounds: (1) Berne's "fail[ure] to account for the real estate ... owned by [B.] Management Corporation;" and (2) Berne's conduct "on or about February 14, 2006 when she caused [Emily B.] to be pushed down the front stairs of her home fracturing her right hip and [Berne]'s actions thereafter in covering up the incident by denying [Albert B.] access to [Emily B.] ... including placement at the Melotte Adult Family Home." After an evidentiary hearing at which Albert B.; Berne; Jodi Alsteen, Emily B.'s case manager; Dr. Ashraf Amed, Albert B.'s psychiatrist; and a City of Green Bay police officer testified, the circuit court denied Albert B.'s petition. The circuit court found "no basis" for Albert B.'s assertion that Berne had a duty to account for the real estate and "no evidence ... that [Berne] has in any way ... mismanaged any of [Emily B.'s] assets or income."

¶5 As to the February 2006 incident, the circuit court stated Emily B.'s fall was an "accident" and it "cannot find, quite frankly, by any stretch of the imagination, that [Berne] deliberately pushed [Emily B.] down the steps." The

---

<sup>3</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

circuit court also found Berne “acted appropriately” after the fall. The circuit court stated the delay in notifying Albert B. was “unfortunate,” but “no harm” was caused by the delay.

¶6 The circuit court also considered whether Emily B.’s current placement in the Melotte home warranted Berne’s discharge as guardian. The circuit court acknowledged that “two violations ... involving the electrical code” at the home had been found by Albert B., but both had been corrected. Rejecting Albert B.’s testimony, the circuit court found “no evidence” that Emily B. or other residents had been mistreated by staff. The circuit court also noted that Albert B.’s complaints “were addressed” in the annual protective placement review and that “[Emily B.’s] present placement was [found to be] appropriate and the least restrictive.” The circuit court held that it had “no authority to review” Emily B.’s placement in the context of Albert B.’s petition to discharge Berne as guardian. The circuit court concluded there was no evidence “to justify or make a finding that [Berne] in any way [has] failed to act in the best interests” of Emily B., and denied the petition.

## DISCUSSION

### A. Standard of Review

¶7 Albert B. asserts that our review is de novo. We disagree. Pursuant to WIS. STAT. § 54.68(4), the circuit court may remove a guardian if it finds that the guardian has committed any of the acts set forth in § 54.68(2). We construe the use of “may” in the statute “as allowing for the exercise of discretion.” *Linda L. v. Collis*, 2006 WI App 105, ¶72, 294 Wis. 2d 637, 718 N.W.2d 205 (construing WIS. STAT. § 880.16, a predecessor statute to § 54.68). “A circuit court’s discretionary determination will be affirmed if the court makes a rational, reasoned

decision and applies the correct legal standard to the facts of record. We accept all findings of fact made by the circuit court unless they are clearly erroneous.” *Id.* (citations omitted). Applying those standards to this case, we affirm the denial of Albert B.’s petition.

## B. The Real Estate

¶8 In his testimony, Albert B. acknowledged the real estate was titled to [B.] Management Corporation. Berne testified she did not believe that Emily B. had any ownership interest in the real estate. Berne further testified that she had no relation to or control over [B.] Management Corporation. The circuit court’s finding that Berne had no duty to account for the real estate is not clearly erroneous.

¶9 On appeal, Albert B. relies on a 1997 agreement between [B.] Management Corporation and the Door County Department of Community Programs addressing Emily B.’s care, and he argues that the county’s “failure to act” under that agreement “constitutes cause for removal” of Berne as guardian. Grounds for removal of a guardian are enumerated in WIS. STAT. § 54.68(2)(a) through (j). None of those statutory grounds are implicated by the county’s alleged “failure to act” under a 1997 agreement. We further note that the agreement contemplates Emily B. residing in Albert B.’s home, a scenario that last occurred in 2004, and that was ended at Albert B.’s request. Emily B.’s placements outside of Albert B.’s home have been approved by the protective placement court. The 1997 agreement is no longer material to Emily B.’s care.

### C. The February 2006 incident

¶10 Albert B. spends many pages of his appellate brief detailing his view of events, both before and after Emily B.'s fall. The circuit court, however, rejected Albert B.'s view, and expressly found Emily B.'s fall to be an accident and that Berne "acted appropriately." The circuit court's findings are supported by testimony of Alsteen and Berne. Therefore, they are not clearly erroneous, and they are binding on this court. See *Linda L.*, 294 Wis. 2d 637, ¶72.

### D. Other Arguments

¶11 Albert B. argues that Emily B.'s current placement violates the Americans with Disabilities Act, 42 U.S.C. § 12101 through 42 U.S.C. § 12213 (1994). He also argues that Emily B.'s inappropriate placement at the Melotte home is cause to remove Berne as guardian.

¶12 We agree with the circuit court that the propriety of Emily B.'s current placement was not before the court. Approximately four months before the hearing on Albert B.'s petition, Emily B.'s placement at the Melotte home was approved as the least restrictive and most appropriate placement for Emily B. in the annual *Watts*<sup>4</sup> review. The incidents that Albert B. relied on as evidence of the poor quality of the Melotte home occurred in February 2008. Emily B.'s placement has since been approved by the protective placement court. Therefore, Albert B.'s reliance on the placement as cause for removal under WIS. STAT. § 54.68(2) necessarily fails.

---

<sup>4</sup> *State ex rel. Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

¶13 Albert B. argues that Dr. Amed’s testimony was “unchallenged” and compels the conclusion that Albert B. should be Emily B.’s guardian. Dr. Amed was Albert B.’s personal psychiatrist. At Albert B.’s request, he had reviewed many documents, but the most recent document dated from mid-2007. Dr. Amed questioned the propriety of Berne’s guardianship and Emily B.’s placement outside of Albert B.’s home. However, he admitted he never met or examined Emily B. He also conceded that he could not render an opinion regarding whether Emily B.’s current placement was the least restrictive.

¶14 Albert B.’s petition sought the removal of Berne as guardian. Whether Albert B. was qualified to serve as guardian was not the threshold issue before the court. The issue before the court was whether there was cause, under WIS. STAT. § 54.68(2), to remove Berne. Dr. Amed’s testimony was of little, if any, relevance to that question. The circuit court was the sole judge of the weight to be given the testimony, and we defer to its implicit decision to give no weight to Dr. Amed’s testimony.<sup>5</sup>

¶15 Albert B. also argues that the circuit court’s finding that he should be allowed to visit Emily B. is cause to remove Berne. We disagree. The circuit court chose to not remove Berne as guardian, even though it disagreed with the limitation on visitation that had been in place since February 2008. The circuit court’s belief that, going forward, Albert B. should be afforded visitation does not

---

<sup>5</sup> The circuit court did not discuss Dr. Amed’s testimony in its oral ruling.

transform its decision to not remove Berne as guardian into an erroneous exercise of discretion.<sup>6</sup>

*By the Court.*—Order affirmed.

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

---

<sup>6</sup> The circuit court directed Emily B.'s guardian ad litem to make a recommendation on the visitation issue. The implementation of any visitation plan is not part of this appeal.



