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DISTRICT II

July 17, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP1969-FT

In the matter of the guardianship of Elayne S. K.: Kevin K. v. Advocacy Programs (L.C. #2012GN16)

2013AP168

In the matter of the guardianship of Elayne S. K.: Ozaukee County DHS v. Elayne S. K. (L.C. #2012GN76)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

We decide two appeals arising out of attempts to create a WIS. STAT. ch. 54 (2011-12)¹ guardianship for Elayne K.² In *Kevin K. v. Advocacy Programs*, No. 2012AP1969-FT, we grant the motion of the Ozaukee County Department of Human Services (DHS) to dismiss the appeal because it is moot as a result of a subsequent circuit court order vacating the first guardianship order. In *Ozaukee County DHS v. Elayne S. K.*, No. 2013AP168, we have considered the briefs and the record. Based upon our review of the briefs and record, we conclude at conference that *Elayne S. K.* is appropriate for summary disposition. WIS. STAT. RULE 809.21. We affirm the circuit court's order dismissing the second guardianship petition.

Kevin K. is the appeal of Elayne's son from a July 19, 2012 circuit court order granting a WIS. STAT. ch. 54 petition for guardianship over Elayne due to her incompetency and appointing Advocacy Programs as the guardian of Elayne's person and estate.³ We granted the motions of DHS to intervene⁴ in the appeal and to supplement the record on appeal with a

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

² For convenience, we decide both appeals in this order. However, the appeals have not been consolidated under WIS. STAT. RULE 809.10(3).

³ In documents other than the notice of appeal, the appellant is described as Elayne K. However, the notice of appeal was filed by Kevin K., not Elayne. At the time the notice of appeal was filed, Advocacy Programs, not Kevin, was Elayne's guardian. We deem the appeal commenced by Kevin.

⁴ Ozaukee County Department of Human Services filed the guardianship petition in Ozaukee County circuit court case No. 2012GN16, the subject of *Kevin K. v. Advocacy Programs*, No. 2012AP1969-FT.

December 19, 2012 circuit court order vacating the July 19 order granting the first guardianship.⁵ DHS moves this court to dismiss *Kevin K.* as moot as a result of the December 19 order vacating the order from which Kevin appeals. Kevin objects and argues that the circuit court did not have authority under WIS. STAT. § 808.075(3) to enter the December 19 order after the record on appeal was transmitted to the clerk of this court. DHS replies that the circuit court had authority to vacate the July 19 order pursuant to WIS. STAT. § 806.07, an act the circuit court may undertake after the record on appeal has been transmitted to the clerk of this court. Sec. 808.075(3).

We need not resolve whether the circuit court had authority under WIS. STAT. § 808.075(3) to enter the December 19 order because neither party has filed a notice of appeal from the December 19 order. Because no party has appealed from the December 19 order and that order is not subject to our review, our decision would have no effect because the order on appeal has been vacated. This appeal “cannot have a practical effect on an existing controversy.” *DeLaMatter v. DeLamatter*, 151 Wis. 2d 576, 591, 445 N.W.2d 676 (Ct. App. 1989). Therefore, *Kevin K.* is moot and, for that reason, dismissed.

In his appellant’s brief, Kevin argues that if the guardianship petition is dismissed and a guardian is not appointed, fees should be awarded to the guardian ad litem and the proposed ward’s legal counsel pursuant to WIS. STAT. § 54.46(3)(c). DHS suggests that we remand *Kevin K.* to the circuit court to address fees under this statute. We agree that remand is appropriate. If

⁵ The circuit court vacated the July 19 guardianship after concluding that the proceedings did not comply with WIS. STAT. § 54.44(1)(a) because the petition was not heard within ninety days. Kevin makes this argument in his appellant’s brief challenging the first guardianship.

the circuit court receives a motion for fees under the statute, the circuit court may address that motion as it sees fit.⁶

We turn to the question of costs and fees on appeal. Under WIS. STAT. RULE 809.25(1)(a), costs and fees are allowed “unless otherwise ordered by the court.” Because we dismiss *Kevin K.* as moot due to the entry of a subsequent circuit court order, which did not exist at the time Kevin commenced his appeal, we conclude that RULE 809.25 costs will not be awarded in *Kevin K.*

We turn to the second guardianship proceeding. In *Elayne S. K.*, DHS appeals from circuit court orders dismissing a second guardianship petition filed in November 2012 (Ozaukee County circuit court case No. 2012GN76). DHS wanted a new guardianship ready to take effect in case we reverse the first guardianship on appeal. The circuit court dismissed because there was a current, valid order for guardianship in the first guardianship case, Ozaukee County circuit court case No. 2012GN16 (*Kevin K.*, now dismissed as moot). The court concluded that only one guardianship could exist at a time, and DHS could seek an emergency guardianship if this court reversed in *Kevin K.*

Citing WIS. STAT. § 54.46(3)(c), Elayne requested fees for the guardian ad litem and the proposed ward’s legal counsel for the second guardianship proceeding because no guardian was appointed in the second guardianship proceeding. The circuit court awarded fees of \$350 to the

⁶ Even though we remand, we make no comment on the substance of the fees question or whether the statute applies in this case.

guardian ad litem and \$500 to Elayne's counsel. The circuit court denied DHS' motion to reconsider. DHS appeals.

On appeal, DHS argues that the circuit court had authority to hear the second guardianship petition while the first guardianship order was on appeal. DHS argues that it sought what amounts to a provisional guardianship order that would take effect upon the likely dissolution of the first guardianship. DHS also argues that WIS. STAT. ch. 54 does not preclude a second guardianship petition. Elayne argues that the circuit court lacked statutory authority to establish a second guardianship.

We may affirm the circuit court on a theory or reasoning not presented to that court. *Liberty Trucking Co. v. DILHR*, 57 Wis. 2d 331, 342, 204 N.W.2d 457 (1973). We conclude that dismissal of the second guardianship proceeding was appropriate because another action, the first guardianship, was "pending between the same parties for the same cause." WIS. STAT. § 802.06(2)(a)10. DHS commenced both guardianship proceedings. Advocacy Programs, Elayne and Kevin were involved in both proceedings. The circuit court did not misuse its discretion in dismissing the second guardianship proceeding. *See Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.*, 2011 WI App 162, ¶5, 338 Wis. 2d 144, 807 N.W.2d 697.

We also observe that WIS. STAT. § 808.075(4)(f) governs the actions of a circuit court while a WIS. STAT. ch. 54 appeal is pending. Among the authorized activities, we do not find the power to establish a second guardianship when a first guardianship is already in place.

DHS argues that the circuit court erroneously awarded fees under WIS. STAT. § 54.46. We disagree. Section 54.46(3)(c) requires the guardianship petitioner to pay fees to the guardian

ad litem and the proposed ward's legal counsel if a guardian is not appointed. The circuit court held a WIS. STAT. § 54.44(1) hearing and denied the second guardianship petition. Section 54.46 applies after a § 54.44 hearing. Sec. 54.46. Fees were appropriate under § 54.46(3)(c).⁷

We dismiss *Kevin K.* as moot and remand to the circuit court for further proceedings on any motion seeking fees under WIS. STAT. § 54.46(3)(c). In *Elayne S. K.*, we summarily affirm the circuit court's orders dismissing the second guardianship, denying reconsideration, and awarding fees.

Upon the foregoing reasons,

IT IS ORDERED that the motion to dismiss *Kevin K. v. Advocacy Programs*, No. 2012AP1969-FT, is granted because the appeal is moot.

IT IS FURTHER ORDERED that *Kevin K.* is remanded to the circuit court to address, upon motion, fees under WIS. STAT. § 54.46(3)(c).

IT IS FURTHER ORDERED that WIS. STAT. RULE 809.25 costs are not available in *Kevin K.*

IT IS FURTHER ORDERED that in *Ozaukee County DHS v. Elayne S. K.*, No. 2013AP168, the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

⁷ In light of our holding, we need not address DHS' final argument relating to its motion for reconsideration of the circuit court's order dismissing the second guardianship petition.