

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 2, 2009

David R. Schanker
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. 2008AP674

Cir. Ct. No. 2001GN271

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

IN THE MATTER OF THE GUARDIANSHIP OF ARLEE C. A/K/A OLLIE C.:

SUPPORTIVE COMMUNITY SERVICES INC. AND NORTH CENTRAL TRUST CO.,

RESPONDENTS-RESPONDENTS,

v.

JAN RIORDAN AND TIMOTHY RIORDAN,

PETITIONERS-APPELLANTS.

APPEAL from orders of the circuit court for Milwaukee County:
MICHAEL J. DWYER, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Jan and Timothy Riordan appeal from orders denying a series of petitions they filed seeking guardianship of Arlee C., the

termination of Supportive Community Services (SCS) as Arlee's guardian, and related matters. We affirm the orders for the reasons discussed below.

BACKGROUND

¶2 Arlee is an elderly man with severe dementia. The Riordans are a college-educated couple with a history of caring for the mentally ill and disabled, and a philosophical commitment to helping people stay deinstitutionalized. Although they are not licensed or professionally trained health-care providers, the Riordans provided one-on-one paid care to Arlee in their own home beginning in 2001,¹ at which time Kindcare was appointed as the guardian of Arlee's person and North Central Trust was appointed as the guardian of his estate. From that time on, payments for Arlee's care were the only steady source of income for the Riordans. In 2007, the Riordans filed a petition seeking to retroactively increase their payments for Arlee's care and to take over guardianship of Arlee's person from Kindcare due to multiple disputes.

¶3 The court characterized the medical care, hygiene, and socialization that the Riordans provided for Arlee as "top notch." It also acknowledged that the Riordans attempted to honor Arlee's wishes and give him whatever he wanted. It pointed out, however, that their efforts to do so did not take into account that Arlee was incompetent with a compromised capacity to make decisions, and that the Riordans did not exercise any independent judgment to deny unreasonable requests and act in Arlee's best interests.

¹ The Riordans inform us in their brief that Arlee had roomed with them since 1985, before he became incompetent.

¶4 With respect to the emotional impact of changing care providers, the court noted that Arlee was going to have to move anyway due to foreclosure proceedings on the Riordans' house; that he did not appear to have been traumatized by a prior move; and that he had been highly cooperative with everyone he had dealt with during the pendency of this case.

¶5 The court deemed the Riordans' reliance on Arlee's income to be a serious conflict of interest, which the Riordans were unable to see. The court was further troubled by what appeared to be an "extraordinary level of control" that Jan sought to exercise over Arlee. The court found that the Riordans were unable to get along with SCS, who had been appointed temporary guardian, and consistently distorted and misconstrued SCS's actions and motivations. Similarly, the Riordans' mistrust of institutions led them to resist consideration of some Veterans Administration benefits such as respite day care. The court further found that, due to the Riordans' mistrust, distorted views, and need to control Arlee's life, they would be unlikely to get along with any other neutral guardian.

¶6 Taking all of these factors into account, the court concluded that the Riordans were not appropriate persons to serve as guardians and instead awarded guardianship to SCS. The court issued a written order to that effect on February 15, 2008. The Riordans subsequently filed an additional petition in the nature of reconsideration seeking to terminate SCS's guardianship, along with a recusal motion. They filed a notice of appeal, citing the original decision and the denial of their subsequent termination petition and recusal request after the trial court had orally denied the latter requests but before the written order had been entered.

STANDARD OF REVIEW

¶7 A circuit court’s decision on guardianship and placement involves a discretionary determination as to the ward’s best interest. *Anna S. v. Diana M.*, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285. We sustain a discretionary decision as long as the trial court rationally applied a proper standard of law to the facts of record. *Id.* We independently determine whether the correct standard of law was applied, but uphold the circuit court’s findings of fact unless they are clearly erroneous. *Id.*; WIS. STAT. § 805.17(2) (2007-08).²

DISCUSSION

¶8 As a threshold matter, the respondents contend that this court lacks jurisdiction over the reconsideration and recusal order because it had not yet been reduced to writing when the notice of appeal was filed. It is true that this court’s jurisdiction is limited to final written orders under WIS. STAT. RULE 809.10(4). However, the respondents overlook WIS. STAT. § 808.04(8), which explicitly provides: “If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.” Because the notice of appeal here plainly identified an oral ruling disposing of all matters then pending, and that ruling was reduced to writing before the record was transmitted to this court, we have jurisdiction to review all of the decisions which have been challenged on appeal.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶9 The respondents also question whether the Riordans qualify as “aggrieved parties” with standing to bring this appeal under WIS. STAT. § 879.27(1). The Riordans point out that WIS. STAT. § 54.64(2) permits “any person acting on the ward’s behalf” to petition for review or termination of a guardianship. For purposes of this appeal, we will assume without deciding that the statute is broad enough to provide standing to a ward’s former paid caregivers.

¶10 We next turn to the merits of the trial court’s guardianship decision. Under WIS. STAT. § 54.15(1), the controlling criteria is the best interest of the ward, taking into account various factors including the opinion of the ward. The court must also consider any conflicts of interest, and may appoint a nonprofit corporation “if no suitable individual is available as guardian.” Section 54.15(1m) and (7). Here, the trial court plainly followed the correct legal standard when it noted Arlee was no longer competent to make reasoned decisions and explained why the Riordans were not suitable persons to have guardianship, due to their financial conflict of interest and distorted views.

¶11 The Riordans vigorously contend that the trial court was also required to determine the least restrictive environment consistent with the ward’s needs. However, that is not the legal standard for determining guardianship in the first instance. Considerations of the least restrictive form of intervention or placement go to the question of the guardian’s exercise of the guardian’s duties once appointed. *See, e.g.*, WIS. STAT. §§ 54.25(2)(d) and 55.055(1)(a).

¶12 It is true that a guardian’s failure to assure “that the ward’s personal needs are being met in the least restrictive environment consistent with the ward’s needs and incapacities” may provide grounds for the guardian’s removal under WIS. STAT. § 54.68(2)(f). However, that does not mean that a guardian can never

place a ward in institutional care. Here, the court made explicit findings detailing Arlee's incapacity, noting that he had no close family members and explaining why placement with the Riordans was not workable. Therefore, the court could reasonably determine that an institutional placement was the least restrictive environment available given Arlee's needs and incapacities and the unavailability of any suitable individual to care for him. In sum, we see no misuse of the trial court's discretion in appointing SCS as Arlee's guardian or in refusing to terminate the guardianship just a few weeks later.

¶13 Finally, we address the Riordans' contention that the trial judge should have recused himself on reconsideration pursuant to WIS. STAT. § 757.19(2), which provides in relevant part:

Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

....

(f) When a judge has a significant financial or personal interest in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

The Riordans argue that the trial judge had a "personal interest" in the outcome of their case because he has a special needs child who knew the Riordans' own special needs child. They also contend that the judge's decision shows he was not capable of acting in an impartial manner because he held different views than their own regarding home health care.

¶14 We agree with the respondents that the Riordans should have raised any issue of potential bias as soon as they were aware of the alleged basis for disqualification. A litigant cannot wait until an adverse decision has been reached, and then claim the judge must have been partial to have reached that decision. Here, the Riordans knew about the judge's son from the beginning of the case. Their assumption that the judge would be favorable to them because of his own son's situation, and subsequent surprise that he ruled adversely to them, actually shows that the court was not biased by personal considerations. In short, the Riordans' claims of bias really boil down to nothing more than disagreement with the court's view of the case. A mere difference in views does not indicate any personal interest in the outcome of the case. The recusal motion was properly denied.

By the Court.—Orders affirmed.

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

