COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP319 **Cir. Ct. No. 2010GN12**

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

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF KIM J. I.:

WALWORTH COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,

PETITIONER-APPELLANT,

V.

KIM J. I.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Juneau County: PAUL S. CURRAN, Judge. *Affirmed.*

¶1 BLANCHARD, J.[1] Kim J.I. is an adult subject to a protective placement and guardianship who is currently placed at a facility in Whitewater, in or near Walworth County. The issue in this case is whether the circuit court in Juneau County erred in ordering a change in his "county of residence" from Juneau County to Walworth County, a change which formed the basis for changing the venue of this case as well. The Walworth County Department of Health and Human Services ("Walworth County") appeals the court's order, arguing primarily that the court misapplied the law based on a mistaken understanding that the law required the court to change Kim J.I.'s residence to Walworth County in order for Kim J.I. to remain placed in the Walworth County area. This court is not persuaded by Walworth County's argument that the court misunderstood the law, or by other arguments Walworth County makes. The order is therefore affirmed.

BACKGROUND

¶2 As an initial matter, a technical point is called for to avoid confusion regarding the terms "residence" or "county of residence" as used in this decision. When this decision uses either term, it means the county in which Kim J.I. is deemed to be a resident by law. *See* WIS. STAT. § 51.40(2). By statute, the "county of residence" has responsibility for the funding of care, treatment, or services for a person in Kim J.I.'s circumstances. *See* § 51.40(1)(e) and (2). The parties to this appeal, Walworth County and Juneau County, agree that the "county

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

of residence" need not necessarily be the county containing the facility in which Kim J.I. is placed and is physically residing.[2]

¶3 In October 2010, the circuit court in Juneau County issued an order for protective placement of Kim J.I. and appointed Kim J.I.'s daughter as the guardian of his person and estate. The court found that Kim J.I. suffered from a degenerative brain disorder, which the record indicates resulted from chronic alcohol abuse (a fact of relevance to arguments of the parties discussed below).

¶4 It is undisputed that Kim J.I.'s county of residence at the time of the protective placement order was Juneau County, where he owned property and lived for a period of time. However, pursuant to the protective placement order, Kim J.I. was placed in a nursing home in Walworth County, where his guardian and other relatives reside and where he had lived for an extensive period of time before moving to Juneau County.

¶5 As part of an annual review of Kim J.I.'s placement, it was proposed that Kim J.I. should be transferred from the Walworth County nursing home to a less restrictive community-based facility. Kim J.I.'s guardian ad litem (GAL) filed a report asserting that Walworth County would not facilitate a nearby community placement if venue for Kim J.I.'s case remained in Juneau County. The GAL report also suggested that it would be in Kim J.I.'s best interests that he remain placed close to family members residing in Walworth County.

[2] The respondent in this appeal is listed as Kim J.I., but a guardian ad litem for Kim J.I. in the circuit court filed a letter in this court indicating he would not be participating in this appeal, and the response brief was filed by Juneau County Corporation Counsel. Accordingly, this court refers to the parties as Walworth County and Juneau County.

¶6 In October 2011, Juneau County petitioned for a change of venue to Walworth County, based on an assertion that a change in Kim J.I.'s county of residence was merited. In support of the petition, Juneau County submitted a statement by Kim J.I.'s guardian requesting a change of Kim J.I.'s county of residence, and a corresponding change of case venue, from Juneau County to Walworth County.

¶7 For a ward such as Kim J.I., a guardian is authorized under WIS. STAT. § 51.40(2)(f)3. to declare the ward's county of residence, subject to court approval, under certain circumstances. As pertinent here, the statute provides as follows:

> *Guardian's authority to declare county of residence.* A guardian may declare any of the following, under any of the following conditions:
>
> ….
>
> 3. The ward is a resident of the county specified by the guardian, regardless if a previous determination of county of residence has been made, … if, in the ward's best interest, the guardian files with the probate court having jurisdiction of the guardianship and protective placement a written statement declaring the ward's domiciliary intent, subject to court approval ….

¶8 Kim J.I.'s guardian's statement provided several reasons why the guardian believed it was in Kim J.I.'s best interests for his placement to remain in the Walworth County area. Foremost among them was that the guardian and other family members lived in Walworth County and would have difficulty visiting Kim J.I. in Juneau County, a drive of approximately 140 miles.[3] The guardian's

[3] This court may take judicial notice of the approximate driving distance between Walworth County and Juneau County. *See* WIS. STAT. § 902.01(2)(b).

statement also alleged that Kim J.I. had long lived in Walworth County, but had only moved to Juneau County "because he was an alcoholic and he felt safe there, safe from people seeing what he was doing to himself[,] safe to drink himself to the point he is now."

¶9 At a hearing on Juneau County's petition for change of venue, Walworth County appeared and opposed the petition and the guardian's request. Walworth County argued that there was no reason to change Kim J.I.'s county of residence because there is no legal requirement that Kim J.I. be a resident of Walworth County in order to remain placed in the Walworth County area. Walworth County expressed concern regarding potential costs to Walworth County if Kim J.I.'s county of residence was changed. Juneau County agreed that there was no legal requirement that a ward be a resident of a county in order to be placed in that county. However, Juneau County called attention to the implications of a program called "Family Care," stating:

> The way it works, if venue were to remain in Juneau County, that would mean that our Family Care system for this area pays for that and administers that.
>
> They are under strict mandates from the State for cost-cutting measures and deficient actions that would put great pressure on Juneau County to have to say … "We can't have you be so far away.… [W]e've got to place him closer to us."

¶10 Applying the declaration of residence provision in WIS. STAT. § 51.40(2)(f)3., the circuit court stated that the statute's overriding goal, as well as the goal of a guardianship more generally, is to advance the best interests of the ward, not the best interests of any particular county or the taxpayers of any particular county. The court concluded that the guardian's statement in support of the venue change petition "explained things very well." The court found that

Kim J.I. had moved to Juneau County primarily to "drink himself into oblivion in a place where he was far enough away from his family that they couldn't attend to him and care for him." The court then explained:

> To now place him or keep him under the jurisdiction of Juneau County, knowing full well that … it is quite likely that, at some point in time in the future, Juneau County is going to have little choice but to move him back here or back close to here[,] [t]hus, once again, taking him away from the family and friends that can help him. That seems to me to be unwise.
>
> … I think [the guardian] is correct when she talks about what's in her father's best interests.

¶11 In short, the court found that it was "quite likely" that Kim J.I. would eventually be relocated to the Juneau County area, which was not in his best interests, if his county of residence continued to be Juneau County, and that the proposed change to Walworth County would help ensure that Kim J.I. would remain placed in the Walworth County area. The court additionally stated that, although the funding concerns identified by Walworth County are important, at least to Walworth County taxpayers, such concerns come second to Kim J.I.'s best interests. The court therefore granted Juneau County's petition for a change of venue, based on the court's approval of the guardian's declaration of Walworth County as Kim J.I.'s county of residence. As previously indicated, Walworth County appeals.[4]

[4] While Juneau County's petition was pending, Kim J.I.'s placement was transferred from the Walworth County nursing home to a facility in the City of Whitewater, which straddles the line between Walworth and Jefferson Counties. Walworth County characterizes this facility as being a Jefferson County facility, apparently because, although the facility office is in Walworth County, Kim J.I.'s "bed" is located in a building across the street in Jefferson County. As will become clear from discussion below, it does not matter for purposes of this court's decision whether either the facility or Kim J.I. himself is deemed to be located in Jefferson County, in Walworth County, or partly in each. There is no dispute that the Whitewater facility is (continued)

DISCUSSION

A. "Venue" versus "Residence"

¶12 Walworth County's arguments often refer to a change of *venue* instead of, or in addition to, a change in Kim J.I.'s *residence*. However, it is clear for the following reasons that the dispositive issue in this case is residence. The applicable venue statute, WIS. STAT. § 54.30(3)(b), states that, assuming proper procedure is followed, "[i]f a ward changes *residence* from one county to another county within the state, venue may be transferred to the ward's new county of residence." (Emphasis added.) Thus, a change in Kim J.I.'s residence, as declared by his guardian and approved by the court, is a necessary condition for the court's proper change of venue under § 54.30(3)(b). Indeed, Walworth County summarizes the sole issue in this case as follows: "Was the *residency* of Kim J.I. properly transferred from Juneau County to Walworth County?" (Emphasis added.) Similarly, Walworth County asserts that "[t]he issue with a petition to transfer venue under [§ 54.30(3)(b)] is that it relates to the transfer of the *residence* of the ward." (Emphasis in original.) Accordingly, the only issue in this case pertains to Kim J.I.'s residence, even though some of the parties' arguments are phrased in terms of venue.

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close to Kim J.I.'s family in Walworth County and, therefore, his Whitewater placement is consistent with what the circuit court found to be in Kim J.I.'s best interests. Further, Walworth County does not argue that current placement that is at least close to, but perhaps not technically within, Walworth County would be a fact that undermines the court's best interests determination, or its decision to order a change in the county of residence.

B. Standard of Review

¶13 The parties agree that the circuit court's decision to approve a change in Kim J.I.'s residence is a discretionary one. This court will affirm a discretionary decision "if the circuit court applies the proper legal standard to the relevant facts and uses a rational process to reach a reasonable result." ***Anna S. v. Diana M.***, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285. Walworth County's argument, stated broadly, is that the circuit court erroneously exercised its discretion because it misapplied the law. This court addresses Walworth County's more detailed arguments in the remainder of this decision.

C. Analysis

¶14 Walworth County does not dispute the circuit court's conclusion that it is in Kim J.I.'s best interests to remain placed in the Walworth County area. Instead, Walworth County's primary argument is that the circuit court misapplied the law in changing Kim J.I.'s residence to Walworth County because the court operated under the following misunderstanding: there is a legal requirement that Kim J.I.'s county of residence must be Walworth County in order for him to be placed in the Walworth County area. Walworth County asserts that a number of authorities show that an individual may be placed in a county that is not his or her county of residence.[5]

[5] Walworth County sometimes frames its argument in terms of whether the circuit court erred in finding "good cause" to change residence under WIS. STAT. § 51.40(2)(f)3. However, it is apparent that this good cause argument is based solely on Walworth County's argument that the court misapplied the law. Walworth County does not develop any separate argument that, even if the court properly applied the law, good cause was lacking for some other reason. For example, Walworth County does not argue that the record was insufficient for the court to conclude that changing Kim J.I.'s county of residence would reduce the chances that Juneau (continued)

¶15 Walworth County's primary argument is not persuasive because nothing in the circuit court's decision suggests that the court based the decision on a misunderstanding that there is a legal requirement that Kim J.I. be a resident of Walworth County in order to be placed in the Walworth County area. Rather, the court's decision shows that the court was concerned that funding-related issues or other pragmatic considerations might well result in movement of Kim J.I.'s placement to Juneau County—away from his guardian and other family in Walworth County—if Kim J.I.'s county of residence continued to be Juneau County. That is, the court made the practical observation that a continued designation of Juneau County residency, requiring costs to be borne by Juneau County, made it "quite likely that, at some point in time in the future, Juneau County is going to have little choice but to move him back" to Juneau County. Walworth County develops no argument, and points to no authority, showing that this concern was unfounded or that the court's consideration of this concern was contrary to any law.

¶16 In arguing that the circuit court misapplied the law, Walworth County relies heavily on Kim J.I.'s guardian's statement requesting a change in residence, and on some of the GAL's and Juneau County's assertions in the circuit court. Walworth County argues that the statement and assertions reflect a misunderstanding that Kim J.I. needed to be a resident of Walworth County in order to be placed in Walworth County. Assuming, without deciding, that this is true of the statement and certain assertions, Walworth County does not explain how that shows that the *court* was misled or misunderstood the law. Of particular

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County human services officials would move Kim J.I.'s placement from the Walworth County area to the Juneau County area.

note, it is clear from the record that, when the court concluded that the guardian's statement "explained things very well," the court was expressing its agreement with the guardian that it would be in Kim J.I.'s best interests to remain placed in the Walworth County area, not that the court was adopting any belief the guardian might have held that Kim J.I. needed to be a resident of Walworth County to be placed in Walworth County.

¶17 Having rejected Walworth County's primary argument, this court turns to address the other arguments it discerns from Walworth County's briefing. There appear to be five, each of which is rejected for the reasons that follow.[6]

¶18 First, Walworth County seems to argue that the circuit court misapplied the law of residence under WIS. STAT. § 49.001(6) because there is no evidence that Kim J.I. lacked competency and, as a result, lacked domiciliary intent when he moved to Juneau County, before the protective placement and guardianship. *See* § 49.001(6) ("'Residence' means the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation."). If this is Walworth County's argument, it is beside the point. There is no dispute that Kim J.I.'s county of residence was Juneau County at the time he moved and lived there. The question is whether, after the guardianship and protective placement, his residence was properly changed under WIS. STAT. § 51.40(2)(f)3. In this context, § 51.40(2)(f)3. is plainly the more specific statute, and Walworth County provides no good reason why it should not therefore control. *See* ***Gottsacker Real***

[6] These five do not include arguments that Walworth County makes that appear to be based on facts that are not part of the record before the circuit court. Such arguments will not be considered. *See* ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313, 311 N.W.2d 600 (1981) (disregarding factual materials not in the record).

Estate Co. v. DOT, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984) ("the general rule of statutory construction in Wisconsin where two statutes relate to the same subject matter is that the specific statute controls over the general statute").

¶19 Second, Walworth County argues that the circuit court erred in disregarding a Wisconsin Department of Health Services "memorandum," entitled "Policy and Procedure for Assignment of Responsibility with Regard to Residency for People Participating in Adult Long Term Care Programs in Wisconsin." The court considered the memorandum but concluded that the memorandum should be given little if any weight because it was not focused on the best interests of wards, but instead on tax implications and funding mechanisms. This court need not address whether the circuit court was required to follow, or even consider, the memorandum because Walworth County fails to point to any provision in the memorandum that conflicts with the circuit court's decision. On the contrary, a version of the memorandum that appears in the record contains provisions that support the court's decision. For example, the memorandum states at page seven that, if a guardian makes a request under WIS. STAT. § 51.40(2)(f), "[t]he court may approve or deny the guardian's request based upon [the court's] own rules for evaluating the merits of cases."

¶20 Third, Walworth County argues that the circuit court failed to make a record showing that the court considered several other statutes that Walworth County asserts were relevant to the residency determination. However, as with its memorandum-related argument, Walworth County points to nothing in those statutes that conflicts with the court's decision.

¶21 Fourth, Walworth County argues that there must be "new facts" to change a ward's residence or venue under WIS. STAT. § 51.40(2). It relies for this

argument on ***Waukesha County v. Dodge County***, 229 Wis. 2d 766, 601 N.W.2d 296 (Ct. App. 1999) ("***Dodge County***"), and ***Waukesha County v. B.D.***, 163 Wis. 2d 779, 472 N.W.2d 563 (Ct. App. 1991) ("***B.D.***"). Neither case applies here. In ***Dodge County***, the "new facts" issue was not addressed by the court because the case was decided on a different ground. *See* ***Dodge County***, 229 Wis. 2d at 767, 773-77. It is true that in ***B.D.***, the court appeared to hold that, once a ward's residence is determined by a court, one or more "new facts" are necessary for a guardian to change the ward's residence, because the issue would otherwise be claim precluded (res judicata). *See* ***B.D.***, 163 Wis. 2d at 785, 788. However, the version of WIS. STAT. § 51.40(2)(f) (1987-88) cited in ***B.D.*** lacked the provision that the court applied here, § 51.40(2)(f)3. Section § 51.40(2)(f)3. expressly provides that the guardian may declare the ward's county of residence, subject to court approval, "regardless if a previous determination of county of residence has been made." Walworth County fails to address this change in the statute, and this court sees no reason that it should not construe the new provision as authority that applies here regardless of ***B.D.***

¶22 Fifth and finally, Walworth County asserts that the circuit court should be reversed because there is "nothing in the record to indicate whether or not Kim J.I." was given notice of or opportunity to participate in the hearing at which the court decided the change in residence issue, as required by WIS. STAT. § 51.40(2)(f)3. This court declines to reverse on this ground because Walworth County does not explain why it would have standing to assert this alleged error on Kim J.I.'s behalf. Walworth County's interests are not necessarily aligned with Kim J.I.'s. Moreover, Walworth County has not claimed that Kim J.I.'s guardian was acting contrary to Kim J.I.'s best interests by requesting the change of residence. So far as can be discerned from the record and briefing, it appears that

Walworth County is the only interested party that ever opposed Kim J.I.'s change in county of residence or case venue, and that Walworth County's objections are based on its interests of cost and convenience, unrelated to any interest personal to Kim J.I. Walworth County fails to point to any actual or even potential interest of Kim J.I. that appears to have been slighted or overlooked by the guardian or by the court.

CONCLUSION

¶23 For the reasons stated above, the court's order changing venue based on a change in Kim J.I.'s residence is affirmed.

By the Court.—Order affirmed.

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