COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2009

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

IN RE THE MATTER OF BRIAN DAVID SULLIVAN:

MALVERN SULLIVAN,

PETITIONER-APPELLANT,

V.

WAUKESHA COUNTY,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Malvern Sullivan (Sullivan) appeals from a circuit court order denying her petition under WIS. STAT. § 69.12(1) (1993 -94)[1] to amend the death certificate for her son, Brian David Sullivan, to delete suicide as the cause of death. Because Sullivan did not meet her burden to show that the actual facts of the death were other than suicide, we affirm.

¶2 The instant appeal results from a second evidentiary hearing on the question of amending the death certificate. The relevant facts of this case are set forth in an earlier appeal.

> In the early morning hours of August 25, 1990, Brian Sullivan died from injuries he suffered from being struck by a train. The record establishes that, on the night of his death, [Brian] returned home from a night of socializing with friends and made his way approximately 70 feet from his home to a set of railroad tracks—a location familiar to [Brian] as a place he occasionally went to smoke cigarettes and marijuana. According to the railroad company's official report, [Brian] was sitting on the railroad tracks and never looked up as the train approached. Although the train crew blew the train's whistle and began to brake, they could not stop the train before it struck [Brian]. The crew of the train explained that because of a blind spot in front of the locomotive, they could not see if [Brian] attempted to escape being hit by the train. A medical toxicology report revealed that at the time of his death, [Brian] had a blood alcohol concentration of .165% by weight.

Sullivan v. Waukesha County, 218 Wis. 2d 458, 461, 578 N.W.2d 596 (1998).

¶3 The Waukesha County Medical Examiner investigated and ruled that the manner of death was suicide. *See* ***id.*** at 462. Sullivan petitioned the circuit court pursuant to WIS. STAT. § 69.12[2] to find that the suicide determination did not

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[1] All references to the Wisconsin Statutes are to the 1993-94 version unless otherwise noted.

[2] The relevant portion of WIS. STAT. § 69.12(1) provides:

(continued)

reflect the actual facts at the time the certificate of death was filed. *See* ***Sullivan***, 218 Wis. 2d at 462-63. Among other things, Sullivan contended that Brian did not have a motive to commit suicide. *See* ***id.*** at 463. After a hearing, the circuit court denied Sullivan's petition. *See* ***id.*** at 464. Sullivan appealed and the supreme court reversed the circuit court.

¶4 In ***Sullivan***, the supreme court clarified that under WIS. STAT. § 69.12(1), "the circuit court's only role is to review the evidence presented by a petitioner and to determine whether the petitioner 'has established the actual facts of the event in effect when the [vital] record was filed.'" ***Sullivan***, 218 Wis. 2d at 466, citing WIS. STAT. § 69.12(1). The supreme court charged the circuit court with making a factual determination about the actual manner and cause of Brian's death. *See* ***id.*** at 467. In its capacity as the fact finder, the circuit court must independently review the evidence presented by the petitioner and determine whether the petitioner has met his or her burden of proof. *See* ***id.*** at 467-68. The supreme court set that burden as proof by the greater weight of the credible evidence of the actual facts existing at the time the death certificate was filed. *See* ***id.*** Information in the death certificate constitutes a rebuttable presumption which the petitioner must overcome by "showing by the greater weight of the credible evidence that the facts contained in the certificate of death do not represent the actual facts in effect at the time the certificate of death was filed." ***Id.*** at 468.

> If ... a person with a direct and tangible interest in the vital record alleges that information on the vital record does not represent the actual facts in effect at the time the record was filed, the person may petition the circuit court of the county in which the event which is the subject of vital record is alleged to have occurred.... If the court finds that the petitioner has established the actual facts of the event in effect when the record was filed, the clerk of court shall report the court's determination to the state registrar ....

With these holdings, the supreme court remanded to the circuit court for further proceedings.[3] *See* ***id.*** 472.

¶5 On remand, the circuit court took evidence on Sullivan's petition to establish the actual facts surrounding Brian's death. The court concluded that the preponderance of the evidence supported the medical examiner's original finding of suicide and denied Sullivan's petition.

¶6 On appeal, Sullivan argues that she met her burden to establish that the actual facts at the time the death certificate was filed were other than suicide. Sullivan emphasizes that there was no motive for suicide. Brian was happy, his business was doing well, he had a great relationship with his family, and he had no reason to take his life. Sullivan essentially asks us to independently evaluate the facts and draw our own inferences from them.

¶7 We reject Sullivan's approach. The circuit court was the fact finder on Sullivan's petition. *See* ***id.*** at 466-67. The fact finder draws inferences from the facts, and it is not our role to disturb those findings if the inferences are reasonable ones. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980). The fact finder also determines the weight to be assigned to the evidence. *See* ***Micro-Managers, Inc. v. Gregory***, 147 Wis. 2d 500, 512, 434 N.W.2d 97 (Ct. App. 1988). We cannot perform those functions de novo, as Sullivan would have us do.

[3] The supreme court also held that a pamphlet published by the Department of Transportation and the Wisconsin State Patrol relating to the effects of alcohol concentration in the blood was admissible. *See* ***Sullivan v. Waukesha County***, 218 Wis. 2d 458, 472, 578 N.W.2d 596 (1998).

¶8 We conclude that the court's findings on remand are supported by the record. The court found that at the time of his death, Brian was a thirty-year-old, intelligent businessman who had a habit of sitting on the railroad tracks near his home. The court found that this habit supported a suicide determination and cited the testimony of Dr. Biedrzycki, the current Waukesha County Medical Examiner, and Captain Otto. The court found that Brian was experiencing stress in his business and in his long-term romantic relationship. The court also found that Brian's .165% blood alcohol concentration was not sufficiently high to render him incapable of functioning or confused, particularly in light of the fact that Brian had coherent conversations with a friend and drove his vehicle home that night even though he had been drinking. The court found that Brian was not in an alcohol-induced stupor or that he was an "amateur drinker" unaccustomed to the effects of alcohol.

¶9 The testimony of Captain Otto and Dr. Biedrzycki supports the court's findings. Captain Otto testified that his investigation revealed that Brian was experiencing stress in his business and in his romantic relationship. Brian's companion, Jennifer, told investigators that she and Brian had agreed that if they ever broke up they would sit on the tracks and wait for a train. When told that Brian was dead, Jennifer spontaneously uttered, "I bet you found him near the rail." Captain Otto also considered that Brian drove home and could have entered his residence where his friends were. Instead, he walked up to the tracks, put himself in harm's way and did nothing to avoid the train.

¶10 Dr. Biedrzycki testified that a death investigation involves looking at the evidence, including autopsy and toxicology results. The deceased's motive is not part of the analysis because motive cannot really be known. Dr. Biedrzycki commented that Brian's .165% blood alcohol concentration was a level found in

many arrested drivers in Waukesha county and could be expected in someone who had a tolerance to alcohol. She also testified that if she knew that an individual had a habit of frequenting the area where he or she was killed, that habit would point to a knowledge of the danger involved, as opposed to being in a strange place and not knowing what was likely to happen.

¶11 The court found that the absence of a suicide note or apparent depression did not mean that Brian had not committed suicide. In this regard, the court cited the testimony of Dr. Lemerond.

¶12 Dr. Lemerond, a psychologist who has studied suicide, testified that not all persons who end their lives are visibly depressed, have sought help for depression or have indicated an intention to commit suicide. Dr. Lemerond testified that suicide can be an impulsive act and younger people tend to be more impulsive than older people. He also noted that alcoholics quite frequently present in suicide situations.

¶13 The court remarked on the lethality of the manner of death, i.e., being struck by a train. The court noted the testimony of Captain Otto that Brian parked his car in the driveway of his residence and walked away from his residence, climbed up an embankment and intentionally placed himself on the railroad tracks. The court noted that while the train that struck Brian was unscheduled, the majority of trains using the track were unscheduled and Brian, as a long-time trackside resident, was aware that the tracks were frequently traveled. The court noted that although Brian used the tracks to smoke marijuana and walk his dog, he was not engaged in either of those activities at the time of his death.

¶14 The court also relied upon the testimony of the train's engineer who testified that the train's light was visible for approximately one-quarter mile. He

saw a man sitting on the tracks with his elbows on his knees, his head in his hands. He immediately applied the brakes and sounded the warning whistle. The engineer saw the man look up at the train, noticed that the man's eyes were open and watched the man return his head to his hands. The court acknowledged that just before the train struck Brian, the engineer lost sight of him. Brian was sitting before the impact, although the engineer conceded that if Brian had moved in the last moment before the train hit him, the engineer would not have seen him over the front of the train.

¶15 The court also gave weight to the testimony of Dr. Conrad, who performed the autopsy. Dr. Conrad opined that Brian's death was due to suicide because he had placed himself in a position to be killed and did not get out of the way when he was warned of the danger. Dr. Conrad testified that Brian's right leg was fractured while it was bearing weight. The court noted that evidence that Brian's right leg bore weight at the time it was broken did not necessarily mean that he was standing up and was attempting to flee the tracks when he was hit. The court observed that Dr. Conrad was unable to state to a reasonable degree of medical certainty whether the fractures to the weight-bearing leg occurred while Brian was standing or crouching, as opposed to sitting.

¶16 The sister of Brian's companion testified that Jennifer and Brian were close in 1990. However, the relationship reached a difficult spot after Brian declined Jennifer's request to share an apartment. In the period before Brian died, Jennifer wanted to punish Brian for rejecting her request to live together. However, the week before he died, Brian helped Jennifer move and she gave him flowers. According to Jennifer's sister, Brian drank a lot.

¶17 The court found that even if Brian had intended to commit suicide, changed his mind and attempted to flee the tracks at the last minute, he had nevertheless put himself in harm's way by sitting on the tracks. The court concluded that the evidence supported the medical examiner's original finding of suicide and denied Sullivan's petition. We conclude that the record supports the circuit court's factual findings and inferences.

¶18 Sullivan argues that Brian's .165% blood alcohol concentration meant that he was impaired and his death was accidental. The circuit court found otherwise. The court's findings have a basis in the record, and we will not disturb them on appeal. We will not reweigh the evidence or independently evaluate the credibility of the witnesses.

¶19 Sullivan complains that the circuit court substituted its own judgment and knowledge when it found that a .165% blood alcohol concentration did not mean that Brian was impaired and incapable of understanding what he was doing on the night he died. We disagree with Sullivan. The law permits a fact finder to draw upon his or her experience in assessing the evidence. *See* ***State ex rel. Cholka v. Johnson***, 96 Wis. 2d 704, 713, 292 N.W.2d 835 (1980).[4]

¶20 Sullivan points to the autopsy finding that Brian's right leg was fractured while it was bearing weight as evidence that Brian's death was accidental because he had become aware of the danger and was trying to avoid it. The court found that it did not have a witness who had rendered an opinion to a

[4] Furthermore, Captain Otto testified that in his experience as a police officer arresting drivers in Waukesha county, drivers often were able to operate their motor vehicles with that level of blood alcohol concentration or greater. Dr. Biedrzycki gave similar testimony about the effects of a .165% blood alcohol concentration.

reasonable degree of medical certainty that Brian was attempting to evade the train in the moments before it struck him. This finding is supported by the record.

¶21 Sullivan argues that Jennifer's remark about sitting on the train tracks was an insignificant comment which was made in jest. However, the circuit court was entitled to place whatever weight it deemed appropriate on it. We cannot weigh the evidence de novo as Sullivan would have us do.

¶22 Sullivan had the burden to establish the actual facts in existence at the time the death certificate was filed. *See* ***Sullivan***, 218 Wis. 2d at 467. She had to rebut the presumption that suicide was the actual fact at the time the certificate was filed. *See* ***id.*** at 468. She did not present sufficient evidence to rebut that presumption.

By the Court.—Order affirmed.

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