COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2347 **Cir. Ct. No. 2005CV64**

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

PORTAGE COUNTY,

PLAINTIFF-APPELLANT,

V.

JUNEAU COUNTY AND WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Portage County: JAMES M. MASON, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Portage County challenges the administrative agency decision that it had the responsibility under WIS. STAT. ch. 51 (2005-06)[1] to provide services for Diane Jacob because she was a resident of Portage County when she was detained on an emergency basis in Juneau County. Portage County asserts that Juneau County is responsible because Jacob was a resident of Juneau County at that time. The circuit court affirmed the decision of the administrative law judge (ALJ) affirming the decision of the Department of Health and Family Services. We affirm the circuit court's order.

BACKGROUND

¶2 At the time relevant to this appeal, Jacob was a chronically mentally ill individual, with a primary diagnosis of schizophrenia, paranoid type. She lived in Juneau County with Mary Ann Peavler from 1986 until May 1998, and during that time Juneau County provided no services to her. In May 1998, she voluntarily moved to Portage County to be closer to her family, living first with her sister and then in an apartment on her own. However, in August 1998 she was involuntarily committed for six months to Norwood Health Care Center in Portage County under WIS. STAT. ch. 51, with her care and custody committed to Portage County Health and Human Services Department. In February 1999, the commitment was extended for another year. While this one-year commitment order was in effect, Portage County arranged, at Jacob's request, for Jacob to live with Peavler in Juneau County. Portage County agreed to pay Peavler $600 per month, in

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

addition to the $600 Jacob received each month in supplemental security income, and to provide case management services and other services to Jacob.

¶3 Portage County extended Jacob's commitment for a second full year and then allowed it to expire in February 2001. After the expiration, Portage County continued to pay Peavler the $600 and provide the case management services. In December 2001, Portage County asked Juneau County to admit Jacob to its community services program and to assume responsibility for the $600 monthly payments to Peavler. Juneau County responded that, because Portage County had placed Jacob with Peavler and funded that placement, Jacob continued to be the responsibility of Portage County.

¶4 Portage County stopped paying Peavler and thereafter the placement deteriorated, as did Jacob's mental health. In April 2002, she was detained on an emergency basis under WIS. STAT. § 51.15 and transported to a hospital in La Crosse. Because Portage County refused to accept a transfer of venue for the commitment proceeding, it was heard in Juneau County Circuit Court. Jacob was involuntarily committed for six months and was placed in Winnebago Health Institute. Based on the stipulation of both counties, the court left open the issue of Jacob's residency so that they could seek a formal determination on her residency from the Department.

¶5 The Department issued a written opinion concluding that Jacob was a resident of Portage County. The Department ordered Portage County to immediately restore services and funding for her care and treatment, and to assume financial responsibility for her care from the date on which the Portage County commitment order expired in February 2001. Portage County requested a

hearing, which was conducted by an administrative law judge (ALJ) assigned by the Division of Hearings and Appeals.[2]

¶6 Because the parties agreed that the facts were not disputed, the ALJ conducting the hearing and decided the issue of Jacob's residency based on a stipulation of facts and the parties' briefs.[3]

¶7 The ALJ's analysis and conclusion essentially tracked that in the Department's decision. The ALJ framed the issue as whether Jacob was a resident of Portage County or Juneau County in April 2002 when she required emergency mental health services. The ALJ noted that under WIS. STAT. § 51.42(1)(b), emergency services are the responsibility of the county in which the individual is located at the time of detention, and, therefore, Juneau County was financially responsible for her care provided during the seventy-two hours, plus weekends and holidays, of the emergency detention. However, the ALJ stated, under § 51.42,

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[2] WISCONSIN STAT. § 227.43(1) provides:

> **(1)** The administrator of the division of hearings and appeals in the department of administration shall:
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> ….
>
> (bu) Assign a hearing examiner to preside over any hearing of a contested case that is required to be conducted by the department of health and family services and that is not conducted by the secretary of health and family services.

Although the statute refers to "hearing examiner," the Division of Hearings and Appeals uses the term administrative law judge (ALJ). We therefore use this latter term.

[3] Portage County refers to facts that are not contained in the stipulation of facts. We do not consider these because, according to the "preliminary recitals" in the ALJ's decision, the parties agreed in a prehearing conference that the facts were not disputed and they would submit a stipulation of facts, which they did. The ALJ decided the case based solely on that stipulation and the parties' briefs.

the county of residence was responsible for providing and paying for Jacob's care and services other than those emergency services.

¶8 The ALJ concluded that Jacob's county of residence in April 2002 was Portage County. In reaching this conclusion, the ALJ applied the statutory definitions of "residence" in WIS. STAT. § 49.001(6) and (8):

> **(6)** "Residence" means the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence is prima facie evidence of intent to remain.
>
> ….
>
> **(8)** "Voluntary" means according to an individual's free choice, if competent, or by choice of his or her guardian if the individual is adjudicated incompetent.

The ALJ also applied WIS. STAT. § 51.22(4) and the provision of the Division of Community Services Residency Manual[4] referencing that section. Section 51.22(4) provides:

> **(4)** If a patient is placed in a facility authorized by a county department under s. 51.42 or 51.437 and the placement is outside the jurisdiction of that county department under s. 51.42 or 51.437, the placement does not transfer the patient's residence to the county of the facility's location while such patient is under commitment or placement.

The Residency Manual provides:

> Per s. 51.22(4), when a resident of one county is sent to another county to receive services, the referring county remains liable for the cost of authorized services stipulated in an intercounty agreement. Per s. 51.22(4), the placement does not transfer the person's legal residence to the county

[4] This Residency Manual was issued with Memo Series DSL-95.28, dated May 31, 1995.

> where the facility is located. The placement may be voluntary or as part of a commitment order.

¶9 The ALJ reasoned that it was undisputed that Jacob was a resident of Portage County in August 1998 when she was first placed under an involuntary commitment order by Portage County; she was placed in the Peavler home in Juneau County by Portage County under that order; and remaining in Juneau County was not evidence that she had established residency in Juneau County. The ALJ agreed with Juneau County that it was not reasonable to permit counties to change the residency of their mentally ill residents under commitment orders by placing them in another county, initially providing and paying for services, and then terminating the payments and services whether or not they were still needed.

¶10 After the ALJ denied Portage County's request for a rehearing, Portage County sought judicial review in the circuit court under WIS. STAT. ch. 227. The circuit court affirmed.

DISCUSSION

¶11 On an appeal from a circuit court order affirming or reversing the decision of an administrative agency, we review the decision of the agency, not that of the circuit court. ***Bunker v. LIRC***, 2002 WI App 216, ¶13, 257 Wis. 2d 255, 650 N.W.2d 864. We therefore focus on Portage County's challenge to the ALJ's decision rather than on its challenge to the circuit court's order affirming that decision. Portage County contends the ALJ erroneously construed and applied the statutes by placing the burden on Portage County to prove that Jacob did not have residency in the county in which she was physically present. With the burden properly placed on Juneau County to rebut the statutory presumption

that Jacob resided in Juneau County, Portage County alleges, the only correct conclusion is that Juneau County presented no evidence to rebut that presumption.

¶12 The proper construction of a statute and its application to undisputed facts presents a question of law, which we generally review de novo. ***Tannler v. DHSS***, 211 Wis. 2d 179, 183, 564 N.W.2d 735 (1997). However, we may give varying degrees of deference to an agency's conclusions of law. ***Id.*** at 184. Portage County argues that we should give the ALJ's decision no deference in this case and review it de novo because it is erroneous. Juneau County and the Department contend that we should give the decision due deference, as did the circuit court. None of the parties distinguish between the ALJ and the Department, but treat the ALJ's decision as that of the Department. In the absence of any argument to the contrary, we do the same.

¶13 We review an agency's conclusion of law de novo when the issue is one of first impression or the agency's position has been so inconsistent as to provide no real guidance. ***Gould v. DHSS***, 216 Wis. 2d 356, 371, 576 N.W.2d 292 (Ct. App. 1998). On the other hand, due weight is appropriate when an agency has some experience in the area, but has not developed the expertise that necessarily places it in a better position than the court to make judgments regarding the interpretation of statutes.[5] ***Id.*** The basis for this degree of deference is typically the fact that the agency has been charged by statute with enforcing the statute in question. *See* ***UFE Inc. v. LIRC***, 201 Wis. 2d 274, 286, 548 N.W.2d 57 (1996). In addition, due weight is appropriate if the agency has developed a

[5] Great weight is a higher level of deference. *See* ***Tannler v. DHSS***, 211 Wis. 2d 179, 184, 564 N.W.2d 735 (1997). However, because no party argues this is applicable and because we reach an affirm applying due weight, we do not discuss great weight.

manual to implement a statue it is charged with administering. ***Tannler***, 211 Wis. 2d at 184-85.

¶14 We conclude that due weight is appropriate. WISCONSIN STAT. § 51.42(1)(b) establishes the responsibility of counties to provide programs, services, and resources for the "well-being, treatment and care of the mentally ill … residing within its county" and the liability for this "shall be based upon the client's county of residence except for emergency services." "County of residence" means the county that is determined under WIS. STAT. § 51.40 to be the county of residence. WIS. STAT. § 51.01(4). Section 51.40(2)(g) establishes a procedure for the Department to determine the county of responsibility for an individual when there is a dispute or uncertainty. This statutory duty of the Department, coupled with the manual the Department has developed to provide consistency and uniformity in carrying out this duty, makes due weight appropriate. Portage County offers no persuasive reason against applying due weight deference. The asserted incorrectness of the decision is not a basis for according it no deference.

¶15 When we give an agency's construction of a statute due weight, we affirm if the construction is reasonable and there is not a more reasonable construction. *See* ***Tannler***, 211 Wis. 2d at 185.

¶16 The ALJ here concluded that Jacob's presence in Juneau County in April 2002 was not voluntary within the meaning of WIS. STAT. § 49.001(6) and (8) and thus it did not treat her physical presence as prima facie evidence of intent to remain. We examine separately each of the legal conclusions the ALJ arrived at, consider whether each is reasonable, and then consider whether there is a more reasonable interpretation of the statutes.

¶17 The ALJ first construed "voluntary concurrence of physical presence with intent to remain in a place of fixed habitation" as meaning that the physical presence had to be voluntary. We conclude that this is the only reasonable construction of the statute. Although "voluntary" directly precedes and modifies "concurrence," it does not make sense to have a voluntary concurrence of physical presence with intent to remain unless the physical presence itself is voluntary. We do not understand Portage County to be arguing against this construction.

¶18 The next legal conclusion made by the ALJ is that physical presence in a county that results from a transfer there under an involuntary commitment order does not fulfill the statutory standard of "voluntary physical presence." We do not understand Portage County to be challenging this legal conclusion, although it may be that Portage County is contending that, because Jacob asked to be placed in Juneau County, her physical presence there met the statutory standard of "voluntary … physical presence" even while she was under the commitment order. If this is Portage County's contention, we conclude it is not more reasonable than the ALJ's conclusion. The committing county controls the choices the person is given and makes the decision whether to honor the person's preferences. Regardless of whether Jacob asked to be placed in Juneau County, she was not subsequently free to live somewhere else while under the order of involuntary commitment.

¶19 Finally, the ALJ concluded that a person who is placed in another county under a commitment order does not meet the standard of voluntary physical presence simply because the commitment order terminates, if the person continues to need the services which the committing county was providing or paying for. This is a reasonable interpretation because it is consistent with WIS. STAT. § 51.22(4) and the provision in the Residency Manual that "when a resident

of one county is sent to another county to receive services, the referring county remains liable for the cost of authorized services" and "the placement does not transfer the person's legal residence to the county where the facility is located." Given that voluntary physical presence is prima facie evidence of intent to remain, if termination of the commitment order even though services are still needed results in voluntary physical presence, then the effect is to permit the placing county to transfer legal residence and, thus, the financial responsibility for the services the person still needs.

¶20 Portage County's position is that, once a commitment order expires, if the person remains in the county in which he or she was placed under the order, then physical presence in that county is voluntary even if the person continues to need the services the committing county was providing or paying for.[6] As already noted, given that voluntary physical presence is prima facie evidence of intent to remain, the likely effect of this is to shift the county of residence. This is not a more reasonable construction of the term "voluntary" than that employed by the ALJ because it undermines rather than furthers important statutory policies.

¶21 Read together, WIS. STAT. §§ 51.22, 51.35, 51.40 and 51.42 express a policy of providing on a continuing basis the necessary care, treatment, and services for persons with a mental illness and other prescribed persons. These sections also express a policy of fixing the responsibility for providing and paying for those things in an orderly and equitable manner. Persons committed under the

[6] Portage County also asserts that WIS. STAT. § 51.22(4) does not apply because Jacob was not placed in a "facility." However, beyond making this assertion, Portage County does not develop an argument to support it with reference to principles of statutory construction. We therefore do not address it further.

chapter are committed by the person's county of residence, and that county is responsible for providing "movement through all appropriate and necessary treatment components to assure continuity of care." Subsections 51.22 (1) and (5). When the committing county grants a discharge from commitment because it determines that a person no longer meets the criteria for recommitment, it "shall ensure that a proper residential living arrangement and the necessary transitionary services are available and provided…." Subsections 51.35(4) and (5). Responsibility for providing and paying for treatment and services, in general, is determined according to the county of residence, *see* §§ 51.40 and 51.42(1)(b); and there is an orderly procedure for determining which is the county of residence in a manner that does not disrupt the provision of necessary services to the individual. *See* § 51.40(2)(g). For example, subd. (2)(g)3. provides that, pending a determination by the Department, the county "providing services to the individual shall continue to provide services if necessary to meet the individual's needs."

¶22 Portage County's construction of the term "voluntary" has the potential to disrupt the continuity of care for the individual and the orderly method of determining the responsible county, thus undermining both policies. The committing county can terminate the commitment order and stop paying for services even though the person still needs them, and either the person goes without them or the county in which the individual is placed must begin to pay for them, even though that county was not consulted on the placement.[7] In contrast,

[7] The Residency Manual requires an intercounty agreement when the county of residence places an individual in another county that specifically anticipates "the potential for the individual to remain in the receiving county after the specified contract services are no longer needed as determined by the sending county." Apparently there was no such agreement in this case.

the ALJ's construction furthers the statutory policies because the responsibility to pay for the services remains with the placing county as long as the person needs them.

¶23 Because we conclude the ALJ's construction of "voluntary" better furthers the policies of the statutes, we uphold it. Jacob's physical presence in Juneau County was not voluntary even after the commitment order expired if she continued to need the services Portage County had been paying for. There is no dispute that Jacob continued to need the care and services provided by Peavler after the expiration of the commitment order and after Portage County stopped paying for them. Thus, we affirm the ALJ's conclusion that Jacob's physical presence in Juneau County in April 2002 was not "voluntary" within the meaning of WIS. STAT. § 49.001(6) and (8). Because her physical presence was not voluntary, it was not prima facie evidence of intent to remain. *See* § 49.001(6). We therefore reject Portage County's argument that the ALJ erred by not placing the burden on Juneau County to rebut the presumption of intent to remain.

CONCLUSION

¶24 The ALJ's construction of the relevant statutes and application to the undisputed facts are reasonable and the construction proposed by Portage County is not more reasonable. We therefore affirm the circuit court's decision and order affirming the decision of the ALJ.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.