COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2013

Diane M. Fremgen
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 Nos. 2011AP2387
2011AP2394

Cir. Ct. Nos. 2010GN22
2010GN23

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

2011AP2387:

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF ZEBULON K.:

WOOD COUNTY,

PETITIONER-RESPONDENT,

V.

ZEBULON K.,

RESPONDENT-APPELLANT.

2011AP2394:

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF FOREST K.:

WOOD COUNTY,

PETITIONER-RESPONDENT,

V.

FOREST K.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Reversed*.

¶1 SHERMAN, J.[1] Wood County successfully petitioned for the guardianship and protective placement of brothers Zebulon K. and Forest K. due to their incompetency. Zebulon and Forest appeal from the orders placing them under guardianship and requiring their protective placement, as well as the orders denying their motions for postjudgment relief.[2] Their appellate brief, however, is limited to a challenge of the orders requiring their protective placement, which they claim was not supported by sufficient evidence. I agree that the orders requiring protective placement were not supported by sufficient evidence and I therefore reverse.

BACKGROUND

¶2 In May 2010, Wood County filed separate petitions for permanent guardianship for Zebulon, who was nineteen at the time, and Forest, who was eighteen. The petitions alleged that Zebulon and Forest are developmentally disabled and that they are "unable effectively to receive and evaluate information or to make or communicate decisions to such extent that the individual is unable to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d)(2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] At the request of Zebulon and Forest, their separate cases were consolidated on appeal.

meet the essential requirements for the individual's physical health and safety." Wood County also filed separate petitions for protective placement for both Zebulon and Forest, who, at the time, were residing with their father, Peter K.

¶3 Zebulon and Forest were appointed the same guardian ad litem (GAL), who prepared separate reports for each. With respect to both Zebulon and Forest, the GAL recommended that the court appoint a permanent corporate guardian for each and over each of their estates, and that the court approve protective placement for each in a group home setting.

¶4 Zebulon and Forest were examined by a psychologist, Dr. Michael Galli, who prepared written psychological reports for each, which were filed with the court. Dr. Galli opined that both Zebulon and Forest are developmentally disabled and that both are incompetent and in need of a guardian. Dr. Galli further opined that due to their disabilities, Zebulon and Forest are unable meet the essential requirements for their physical health and safety, are unable to understand or appreciate the nature or consequences of their inability to meet the essential requirements for their physical health and safety, are unable to prevent financial exploitation, or meet the essential requirements for their physical health and safety.

¶5 Zebulon and Forest contested the petitions, and the issues of guardianship and protective placement were heard before the circuit court. Following the hearings, the circuit court determined that both Zebulon and Forest are incompetent and in need of a guardian of their person and estate. The court appointed a corporate guardian for both men. The court further determined that because of their developmental disabilities, both Zebulon and Forest are in need of

protective placement, and entered orders for protective placement for each. Zebulon and Forest appeal.

DISCUSSION

¶6 In these consolidated appeals, Zebulon and Forest challenge the circuit court's order for protective placement. They assert that the County failed to offer sufficient evidence to meet its burden of proving that they need to be protectively placed.

¶7 Our review of a circuit court's decision to issue a protective placement order presents a mixed question of fact and law. This court will uphold the circuit court's factual findings regarding the elements for protective placement unless the findings are clearly erroneous. WIS. STAT. § 805.17(2). However, whether that evidence supports the legal standard for protective placement is a question of law, which is reviewed de novo. ***Walworth Cnty. v. Therese B.***, 2003 WI App 223, ¶21, 267 Wis. 2d 310, 671 N.W.2d 377.

¶8 Before an individual may be protectively placed, the petitioner must prove the following, by clear and convincing evidence: (1) the individual has a primary need for residential care and custody; (2) the individual has been deemed incompetent by a circuit court; (3) as a result of his or her impairment, the individual is so totally incapable of providing for his or her own care and custody as to create a substantial risk of serious harm to himself or herself or others; and (4) the disability is permanent or likely to be permanent. *See* WIS. STAT. §§ 55.08(1) and 55.10(4)(d). Zebulon and Forest do not dispute that they are incompetent and that their incompetency is permanent. They claim, however, that the County failed to prove that they have a primary need for residential care and

custody, and that they pose a substantial risk of harm to themselves under the dangerousness standard.

1. Primary Need for Residential Care and Custody

¶9 We have interpreted the phrase "primary need for residential care and custody" in WIS. STAT. § 55.08(1)(a) to mean that the individual has a primary need: "(1) to have his or her daily needs provided for in a residential setting; and (2) to have someone else exercising control and supervision in that residential setting for the purpose of protecting the person from abuse, financial exploitation, neglect, and self-neglect." ***Jackson Cnty. DHHS v. Susan H.***, 2010 WI App 82, ¶16, 326 Wis. 2d 246, 785 N.W.2d 677. Zebulon and Forest suggest that this standard cannot be met when an individual is able to provide for his or her own daily needs. They argue that unlike the ward in ***Susan H.*** who "require[d] assistance with all her activities of daily living," ***id.,*** ¶6, the evidence here establishes that they possess basic living skills such as the ability to cook, complete chores and work on a farm.

¶10 ***Susan H.*** does not stand for the proposition that an individual must be incapable of providing for any of his or her daily needs to be protectively placed. *See* ***id.***, ¶2 (addressing when a person has a primary need for "residential … custody" under WIS. STAT. § 55.08(1)(a)). In fact, the supreme court has held that "[p]rotective placement may result from a mere inability to live independently in the community," ***Milwaukee Cnty. Prot. Servs. Mgmt. Team v. K.S.***, 137 Wis. 2d 570, 576, 405 N.W.2d 78 (1987), and this court is bound by that holding. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (the court of appeals may not overrule, modify or withdraw language from a previous supreme court case).

¶11 In his written report,[3] Dr. Galli opined that because of their disabilities, Zebulon and Forest are unable to effectively receive and evaluate information or make or communicate decisions to the extent that they are unable to meet the essential requirements for their physical health or safety. Dr. Galli noted with respect to both young men that their "cognitive limits prevent [them] from effectively accomplishing these tasks." Dr. Galli opined that neither Zebulon nor Forest "has an understanding and appreciation of the nature and consequences of any inability [he] may have to meet the essential requirements for his [] physical health or safety." With respect to Zebulon, Dr. Galli explained that Zebulon "doesn't understand the extent [and] implications" of his disability. With respect to Forest, Dr. Galli explained: "He knows he has limits, but doesn't understand how they influence his life." Dr. Galli also opined that Zebulon's and Forest's "cognitive limits prevent[]" them from "understanding and appreciat[ing] [] the nature and consequences of any inability [they] may have to manage [their] finances and property."

¶12 At the hearing, a social worker for Wood County testified that neither Zebulon nor Forest have the skills to live on their own, that they are in need of 24-hour supervision because of their needs, and that concerns have been raised regarding their personal hygiene, including concerns that they do not bathe

[3] Zebulon and Forest do not argue that they raised an objection before the circuit court to the admissibility of Dr. Galli's written report as evidence in light of the fact that Dr. Galli did not testify in court, nor do they challenge the admissibility of the report on appeal. Accordingly, I do not address that issue. *But see* ***R.S. v. Milwaukee County***, 162 Wis. 2d 197, 207-208, 470 N.W.2d 260 (1991) (holding that when an objection to a psychologist's written report is made during a contested guardianship proceeding, the objection must be sustained if the report is offered without the in-court testimony of the professional who prepared the report.)

frequently. This evidence supports the court's determination that Zebulon and Forest have a primary need for residential care and custody.

2. Substantial Risk of Harm

¶13 Zebulon and Forest contend that the evidence was insufficient to prove that they are "so totally incapable of providing for [their] own care or custody as to create a substantial risk of serious harm to [themselves]." WIS. STAT. § 55.08(1)(c).

¶14 WISCONSIN STAT. § 55.08(1)(c) requires that the individual must, by reason of developmental disabilities or other like incapacities, be "so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to himself or herself or others." The supreme court has interpreted "care" in § 55.08(1)(c) to mean "that the person's incapacity to provide for his or her daily needs creates a substantial risk of serious harm to the person or others." ***Susan H.***, 326 Wis. 2d 246, ¶17. The court interpreted "custody" in § 55.08(1)(c) to mean that "the person cannot provide for himself or herself the protection from abuse, financial exploitation, neglect, and self-neglect that the control and supervision by others can provide." ***Id.*** In addition, we have held that "[t]he harm envisioned may not be based on mere speculation but must be directly foreseeable from the overt acts or omissions of the individual." ***K.N.K. v. Buhler***, 139 Wis. 2d 190, 202, 407 N.W.2d 281 (Ct. App. 1987).

¶15 In his written report, Dr. Galli opined that neither Zebulon nor Forest "has an understanding and appreciation of the nature and consequences of any inability [they] may have to meet the essential requirements for [their] physical health or safety." With respect to Zebulon, Dr. Galli noted that "[h]e senses he's somewhat slow, but doesn't understand the extent and implications." With respect

to Forest, Dr. Galli noted that "[h]e knows he has limits, but doesn't understand how they influence his life." Dr. Galli also opined that as a result of their impairments, Zebulon and Forest are "unable to prevent financial exploitation." In the comprehensive evaluation prepared for the Chapter 55 proceeding, the social worker stated that the disability of each "limits his ability to care for himself. He would require 24 [hour] care and supervision to ensure that he is safe and not being exploited/manipulated." The social worker also testified that Zebulon's and Forest's father had informed her that they are easy to manipulate. The social worker further testified that the boys had expressed concerns to her that they were afraid of their father, both emotionally and physically, and that they did not wish to reside with him, but later changed their minds. In addition, testimony was offered by the assistant special education director at the school Zebulon and Forest attended that there were "a lot" of concerns regarding their hygiene, in particular, concerns regarding the cleanliness of their person and clothing.

¶16 Nothing in the record establishes that their incapacity creates a "substantial risk of serious harm" to others or themselves within the meaning of WIS. STAT. § 55.08(1)(c). The record establishes that neither Zebulon nor Forest has a full appreciation of the extent of their disability and it raises concerns regarding their ability to provide for their care and custody. However, nothing in the record establishes that they are *incapable* of providing for their own care or custody and nothing in the record establishes that their incapacities create a "substantial risk of serious harm" to themselves or others.

¶17 Because the County failed to prove by clear and convincing evidence that because of their impairments, Zebulon and Forest are so totally incapable of providing for their own care and custody as to create a substantial risk

of harm to themselves or others, I reverse the circuit court's orders of protective placement.[4]

CONCLUSION

¶18 For the reasons discussed above, I reverse.

By the Court.—Orders reversed.

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

[4] Zebulon and Forest also argue that the record is insufficient to establish that 24-hour protective placement is the least restrictive option to meet their needs. I observe that the record before this court does not contain a discussion of resources available to Zebulon and Forest that would assist them in providing for their needs while living in a less restrictive environment. However, because I conclude that the record was insufficient to support the court's determination that they are in need of protective placement, I do not address this argument. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).