

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 31, 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 No. 2013AP80
STATE OF WISCONSIN**

Cir. Ct. No. 2009GN220

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE ORDER FOR PROTECTIVE SERVICES FOR DONNA H.:

WINNEBAGO COUNTY,

PETITIONER-RESPONDENT,

v.

DONNA H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
THOMAS J. GRITTON, Judge. *Reversed.*

¶1 REILLY, J.¹ Donna H. appeals an order for involuntary administration of psychotropic medication with an order for protective services. Donna argues that Winnebago County failed to show that she is not competent to refuse medication, that administering medication voluntarily is not feasible, and that she will incur a substantial probability of harm without an involuntary medication order. In light of the supreme court’s recent decision in *Outagamie County v. Melanie L.*, 2013 WI 67, ___ Wis. 2d ___, ___ N.W.2d ___, we must conclude that the County failed to show that Donna is not competent to refuse medication. Accordingly, we reverse.

BACKGROUND

¶2 During a hearing to evaluate the need for an involuntary medication order, Dr. Sangita Patel testified about her psychological examination of Donna. Patel testified that Donna has schizophrenia, which is a permanent condition causing significant impairment in functioning. Patel testified that Donna had lobbied for lower doses of medication and had “off and on” dismissed the need for medication altogether. Patel opined that Donna is not competent to refuse to take psychotropic medication and that attempting to administer the medication voluntarily is not feasible. Patel testified that, without involuntary administration of medication, Donna would incur a substantial probability of harm to herself.

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.

¶3 Donna testified that she never said that she would be fine if she went off medication and admitted that she will “probably be on medication the rest of [her] life.” Donna testified that she would prefer taking pills over receiving injectable medicine but also explained that it is “degrading and humiliating” to have people watch her swallow the pills and expressed her willingness to continue receiving injectable medicine. No other witnesses testified at the hearing.

¶4 The court ordered involuntary medication with an order for protective services. The court acknowledged that Patel did not “use the words advantages or disadvantages” to establish that she had explained the advantages and disadvantages of medication with Donna before Patel reached her conclusion that Donna was not competent to refuse psychotropic medication. The court nevertheless found that Patel “clearly had the discussion with [Donna] about her use of the medication and her taking of the medication.” Donna appeals.

DISCUSSION

¶5 Before a court can order involuntary medication for an individual as a protective service, the court must find that the statutory requirements of WIS. STAT. § 55.14 have been met by clear and convincing evidence. On appeal, deciding whether the requirements have been met presents a mixed question of law and fact. *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). The circuit court’s findings of fact will not be overturned unless they are clearly erroneous. *Id.* We review independently whether those facts meet the statutory requirements. *Id.*

¶6 Donna contends that the County failed to prove the statutory requirements of WIS. STAT. § 55.14 had been met. In light of the supreme court’s

decision in *Melanie L.*, we agree with Donna that the County failed to establish the required element that Donna is not competent to refuse medication.

¶7 To establish that an individual is not competent to refuse psychotropic medication, the County must show that the advantages and disadvantages of accepting medication have been explained to the individual and that the individual is either incapable of expressing or substantially incapable of applying an understanding of the advantages and disadvantages. WIS. STAT. § 55.14(1)(b). In *Melanie L.*, the court explained the meaning of this statutory requirement.² An individual subject to a possible involuntary medication order is entitled to receive from a medical professional a reasonable explanation of the proposed medication. *Melanie L.*, 2013 WI 67, ¶67. To establish that this explanation occurred, *Melanie L.* requires that counsel elicit testimony from medical experts in the statutory terms. *Id.*, ¶91. When counsel does not receive an answer in the statutory terms, he or she should require the medical expert to expound upon the answer, so that the circuit court and a reviewing court do not have to speculate on the meaning. *Id.*

¶8 Testimony during the hearing regarding Donna's need for an involuntary medication order does not explicitly establish that the advantages and disadvantages of medication were explained to Donna. Neither Patel nor Donna testified that a discussion of the advantages and disadvantages of medication took place. In explaining its ruling, the circuit court found that Patel never used the

² The court in *Melanie L.* interpreted the language of WIS. STAT. § 51.61(1)(g)4.b., which also defines when an individual is not competent to refuse medication. *Outagamie Cnty. v. Melanie L.*, 2013 WI 67, ¶40, ___ Wis. 2d ___, ___ N.W.2d ___. Because the language used in this statute is practically identical to WIS. STAT. § 55.14(1)(b), *Melanie L.* clearly controls.

words “advantages or disadvantages” but inferred from the testimony that Patel explained them to Donna. Under *Melanie L.*, such an inference is no longer permissible. *Id.* Testimony must now track the particular statutory language to establish the statutory requirements, and medical experts must now apply and enunciate the standards set out in the competency statutes. *Id.*, ¶¶91, 97. In this case, the County failed to elicit testimony tracking the particular statutory language necessary to establish that Patel explained to Donna the advantages and disadvantages of medication. Although Patel testified that she believes Donna is not competent to refuse medication, this bare conclusion does not comply with *Melanie L.*³

¶9 As the County failed to meet its burden and did not establish that Donna is not competent to refuse medication, we need not address Donna’s other arguments. See *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶2 n.3, 302 Wis. 2d 358, 735 N.W.2d 30.

By the Court.—Order reversed.

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

³ We acknowledge that the circuit court could not factor *Melanie L.* into its findings. We were prepared to affirm the circuit court’s order prior to the release of *Melanie L.*, but we are bound by that decision. See *Cook v. Cook*, 208 Wis. 2d 166, 188-90, 560 N.W.2d 246 (1997).

