

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 30, 2015

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. 2014AP2987

Cir. Ct. No. 2014ME11

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE MENTAL COMMITMENT OF F. E. K.:

WAUSHARA COUNTY,

PETITIONER-RESPONDENT,

V.

F. E. K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County:
GUY D. DUTCHER, Judge. *Affirmed.*

¶1 KLOPPENBURG, J.¹ F.E.K. appeals from an order for continuation of involuntary medication and treatment.² F.E.K. argues that the County did not meet its burden of proving him incompetent to refuse medication or treatment under WIS. STAT. § 51.61(1)(g)4. because the County did not “explain the alternatives to [F.E.K.’s] medication and treatment.” For the reasons set forth below, I reject F.E.K.’s argument and affirm the order.

BACKGROUND

¶2 Waushara County petitioned for an order extending F.E.K.’s mental health commitment and for involuntary medication and treatment.

¶3 At the final hearing, the psychologist who evaluated F.E.K. testified for the County, and F.E.K. testified on his own behalf.

¶4 The circuit court held that the County met its burden of proving by clear and convincing evidence that F.E.K. is not competent to refuse medication or treatment and, therefore, the court continued the involuntary medication and treatment order during the period of commitment.

DISCUSSION

¶5 The only question on appeal is whether the County fulfilled its obligation under the governing statute to prove that F.E.K. was “provided ... with any information about the alternatives to his medication and treatment.” I first

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² The circuit court also ordered an extension of F.E.K.’s mental health commitment. F.E.K. appeals only the involuntary medication and treatment order.

review the law that establishes this obligation and then apply that law to the facts here, and I conclude that the circuit court correctly answered that question in the affirmative.

¶6 The County bears the burden of proving by clear and convincing evidence that F.E.K. is incompetent to refuse medication and therefore requires an order for involuntary medication and treatment. *See* WIS. STAT. § 51.20(13)(e); *Outagamie Cnty. v. Melanie L.*, 2013 WI 67, ¶37, 349 Wis. 2d 148, 833 N.W.2d 607.

¶7 WISCONSIN STAT. § 51.61(1)(g)4. sets forth the standard for determining whether a person is incompetent to make such a decision:

4. ... [A]n individual is not competent to refuse medication or treatment if, because of mental illness, ... and after the *advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual*, one of the following is true:

a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

(Emphasis added.) As shown by the statutory language above, § 51.61(1)(g)4. sets forth two ways that a person may be found incompetent to refuse medication, but a prerequisite to this determination is that the person must have received an “explanation of the advantages and disadvantages of and alternatives to” proposed medication or treatment. *Melanie L.*, 349 Wis. 2d 148, ¶54.

¶8 In *Melanie L.*, our supreme court explained that this prerequisite means that:

A person subject to a possible mental commitment or a possible involuntary medication order is entitled to receive from one or more medical professionals a reasonable explanation of proposed medication. The explanation should include why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and *whether there are reasonable alternatives* to the prescribed medication.

349 Wis. 2d 148, ¶67 (emphasis added). As pertinent here, the obligation is to discuss “reasonable” alternatives to the medication proposed. “[M]ental health professionals are not required to explore medically unaccepted and unrecognized alternatives.” *K.S. v. Winnebago Cnty.*, 147 Wis. 2d 575, 579, 433 N.W.2d 291 (Ct. App. 1988); *see* WIS. STAT. § 51.61(1)(g)4.

¶9 F.E.K. argues that the County did not meet its burden of proving him incompetent to refuse medication or treatment under WIS. STAT. § 51.61(1)(g)4. because the psychologist who evaluated F.E.K. did not “explain the alternatives to [F.E.K.’s] medication and treatment.” Whether the County met its burden of proving F.E.K. incompetent to refuse medication is a mixed question of law and fact. *See K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). But whether F.E.K. was informed as required by § 51.61(1)(g)4. is an evidentiary matter. *See K.S.*, 147 Wis. 2d at 578. “We will not disturb a circuit court’s factual findings unless they are clearly erroneous. We accept reasonable inferences from the facts available to the circuit court.” *Melanie L.*, 349 Wis. 2d 148, ¶38 (citations omitted).

¶10 Here, the psychologist testified that F.E.K. was diagnosed with schizophrenia. The psychologist testified that she discussed with F.E.K. his

current treatment, that in her professional opinion medications are “appropriate and necessary” to treat F.E.K.’s condition, and that without the medications F.E.K. would likely “return to the state he was prior to being hospitalized.” She testified that she discussed with F.E.K. the advantages and disadvantages of “various medications and treatment,” that she “discussed the potential benefits and potential negatives of the medication with” F.E.K., that he was able “to repeat back to [her] the advantages and the side effects of different medications,” and that F.E.K. understood her explanation but “did not believe the medications are helpful; and [F.E.K.] still has a desire to be off the medications.” The psychologist also testified that she talked with F.E.K. about the Community Support Program, and that “[F.E.K.] could see that those are things that would be helpful, but he didn’t necessarily express any interest in pursuing them.” F.E.K. testified that he did not believe he has schizophrenia, that the medications “did nothing,” and that “the spirits [he has] are real.”

¶11 F.E.K. did not dispute that he had a discussion with the psychologist and that the discussion included the advantages and disadvantages of various medications and treatment as well as the Community Support Program. From the testimony described above, it can be reasonably inferred that the discussion of “various medications and treatment” included a discussion of alternative “appropriate and necessary” medications and treatment for F.E.K., including the Community Support Program, and that the “appropriate” option is taking the proposed medications because those medications are “necessary” to treat F.E.K.’s condition.

¶12 As noted above, “mental health professionals are not required to explore medically unaccepted and unrecognized alternatives.” *K.S.*, 147 Wis. 2d at 579. Here, where the testimony established that the psychologist discussed

“various medications and treatment” with F.E.K. and that medications are “necessary,” it is unreasonable to require that F.E.K. be informed of unacceptable alternatives that do not exist. *See id.* Thus, we reject F.E.K.’s argument that the County did not meet its burden of proving him incompetent to refuse medication or treatment under WIS. STAT. § 51.61(1)(g)4. because the psychologist did not “explain the alternatives to [F.E.K.’s] medication and treatment.”

CONCLUSION

¶13 For the reasons set forth above, I affirm the circuit court’s order for continuation of involuntary medication and treatment during the period of commitment.

By the Court.—Order affirmed.

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

