

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 26, 2017

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. 2017AP956

Cir. Ct. No. 2016GN33

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE PROTECTIVE PLACEMENT OF B. G.:

WAUSHARA COUNTY,

PETITIONER-RESPONDENT,

v.

B. G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waushara County:
GUY D. DUTCHER, Judge. *Reversed and cause remanded.*

¶1 FITZPATRICK, J.¹ B.G. appeals an order of the circuit court that granted a protective placement requested by Waushara County. B.G. contends

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

that the County failed to comply with the statutory requirements of WIS. STAT. ch. 55 and, as a result, the circuit court lacked authority to order the protective placement. For the reasons discussed below, I agree with B.G. and reverse.

¶2 The County placed the conscientious circuit judge in an unenviable position by failing to comply with the procedures set forth in WIS. STAT. ch. 55. But, the statutory requirements that protect the due process rights of B.G. cannot be overlooked. “Although protecting people from harm is important, so is due process.” *Dodge Cty. v. Ryan E.M.*, 2002 WI App 71, ¶11, 252 Wis. 2d 490, 642 N.W.2d 592.

BACKGROUND

¶3 The following facts are not disputed. On May 24, 2016, Waushara County filed a petition for protective placement of B.G., and a petition for permanent guardianship of B.G. and his estate due to incompetency.

¶4 A hearing on the petitions was held on June 21, 2016. At that hearing, the circuit court authorized guardianship of both B.G.’s person and estate.² The circuit court also concluded that the County did not meet its burden to prove the need for protective placement of B.G. The circuit court, instead, granted a protective services order for B.G. so services would be provided in his home.³

¶5 The order entered by the circuit court from the June 21, 2016 hearing contained no conditions and was not labeled “temporary” or “conditional.”

² Neither guardianship order is a subject of this appeal.

³ Pursuant to WIS. STAT. § 55.12(8), a circuit court may order protective services to an individual as an alternative to protective placement.

Rather, the order stated that B.G. “**does not meet the standards** for protective placement or need protective placement” and B.G. “needs protective services and **meets the standards** for protective services ...” (emphasis in original).

¶6 The first attempt to provide protective services to B.G. was on June 27, 2016. The next day an Adult Protective Services worker, a non-attorney County employee, filed with the circuit court a “Notice of Transfer of Protective Placement” with an attached letter. The County employee contended therein that B.G. was, among other things, uncooperative and refused to let care workers into his residence for the purpose of providing protective services. The Notice requested that the circuit court order that B.G. be “removed from his residence and placed in a facility.” No hearing was requested in the Notice. No other pleading was filed or served before the next hearing except counsel for B.G. filed and served an objection to the proposed protective placement.

¶7 On July 25, 2016, the circuit court held a hearing on the requested protective placement. The County’s Corporation Counsel argued that the circuit court could “convert” its protective services order into a protective placement order. B.G.’s counsel contended the circuit court did not have that authority. The circuit court held a contested evidentiary hearing on July 25, 2016. The circuit court found that the County had proved, as of that date, that B.G. required protective placement and ordered B.G. moved to protective placement. B.G. now appeals.

¶8 Other uncontested facts will be mentioned in the Discussion section of this opinion.

DISCUSSION

¶9 This appeal concerns the construction and application of WIS. STAT. ch. 55 which governs the state’s protective system for adults at risk. Chapter 55 authorizes protective placements, in which an individual is placed into a residential facility for care, and protective services, in which an individual may receive services in his or her home. WIS. STAT. § 55.01(6), (6m), (6r). Questions of statutory construction and application are subject to de novo review. *Jackson Cty. v. Susan H.*, 2010 WI App 82, ¶10, 326 Wis. 2d 246, 785 N.W. 677; *Kind Care, Inc. v. Judith G.*, 2002 WI App 36, ¶9, 250 Wis. 2d 817, 640 N.W.2d 839.

¶10 B.G. argues as follows. At the June 2016 hearing, the circuit court denied the County’s petition for protective placement and, instead, granted an order for protective services only. If the County wanted to later obtain a protective placement of B.G., the County was required to initiate a new petition for protective placement consistent with the requirements of, among other statutes, WIS. STAT. §§ 55.09, 55.10, and 55.135. As asserted by B.G., there is no statutory provision in ch. 55 to amend a protective services order to a protective placement order as the County requested. So, the circuit court had no authority to grant the protective placement request in July 2016.

¶11 The County sees things differently and argues that the circuit court did not “modify” the June 2016 protective services order. Instead, the June 2016 protective services order was only “temporary” or “conditional.” According to the County, the temporary or conditional nature of the June 2016 order allowed the circuit court to retain jurisdiction, and the July 2016 hearing was another chance for the circuit court to consider the County’s petition for protective placement that was filed in May 2016. The County also appears to argue, in the alternative, that

the circuit court order “converted” the protective services order to a protective placement order.

¶12 I conclude that: (1) the record, and WIS. STAT. ch. 55, establish that the June 2016 order was not “temporary” or “conditional”; and (2) once granted, a final protective services order may not be amended to a protective placement order. Therefore, the County failed to comply with the statutory requirements of ch. 55, and the circuit court lacked the authority to order protective placement of B.G. in July 2016.

A. Chapter 55.

¶13 A review of the material substantive and procedural provisions of WIS. STAT. ch. 55, along with that chapter’s due process requirements, gives context to the analysis.

¶14 A circuit court may order protective services for an individual who meets the following two standards: (1) a circuit court has determined him or her to be incompetent; and (2) due to a “developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others if protective services are not provided.” WIS. STAT. § 55.08(2)(a-b).

¶15 WISCONSIN STAT. § 55.08(1) requires a circuit court to determine that four standards are met before ordering a protective placement. The individual to be placed in protective placement must: (1) have “a primary need for residential care and custody”; (2) be “an adult who has been determined to be incompetent by a circuit court”; (3) 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” because of “a developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities”; and (4) have “a disability that is permanent or likely to be permanent.” Sec. 55.08(1)(a-d).

¶16 Protective placement orders and protective services orders are subject to many of the same procedural requirements, including the following. First, a petition for protective services or placement must be filed. WIS. STAT. § 55.075. The subject of the petition must be served “at least 10 days before the time set for a hearing.” WIS. STAT. § 55.09(1). A hearing on the petition must be held within sixty days of its filing, unless the circuit court extends that deadline by up to forty-five days. WIS. STAT. § 55.10(1). The subject of the petition is ordinarily required to attend the hearing and has the right to both a jury trial and legal representation. Sec. 55.10(2), (4)(a), (4)(c). The petitioner must prove through clear and convincing evidence that the subject of the petition meets all the standards set forth in WIS. STAT. § 55.08 before a petition for protective placement or protective services is granted. Sec. 55.10(4)(d). In addition, before ordering protective placement or protective services, “the court shall require a comprehensive evaluation” of the subject of the petition and the subject of the petition may secure an independent comprehensive evaluation. WIS. STAT. § 55.11(1)-(2).

¶17 A “huge liberty interest” is at risk in a protective placement proceeding because it is “indefinite in duration and thereby [is] tantamount to a life sentence to a nursing home or other custodial setting.” *Jefferson Cty. v. Joseph S.*, 2010 WI App 160, ¶13, 330 Wis. 2d 737, 795 N.W.2d 450 (quoting *Walworth Cty. v. Terese B.*, 2003 WI App 223, ¶12, 267 Wis. 2d 310, 671 N.W.2d 377). Those liberty interests, and an individual’s due process rights, are

recognized in the Declaration of policy in WIS. STAT. § 55.001 which states in part:

This chapter is designed to establish those protective services and protective placements, to assure their availability to all individuals when in need of them, and to place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, financial exploitation, neglect, and self-neglect.

Sec. 55.001(emphasis added).

¶18 Because of the liberty interest a person has in living where and under what conditions they choose, the legislature has required procedural protections enunciated in WIS. STAT. ch. 55 to protect due process rights of persons potentially subject to a protective placement or the provision of protective services. *Jefferson Cty.*, 330 Wis. 2d 737, ¶13; *Kind Care, Inc.*, 250 Wis. 2d 817, ¶12. Accordingly, the parties do not have the option of avoiding the requirements of ch. 55 on the ground of efficiency. *See Dane Cty. v. Kelly M.*, 2011 WI App 69, ¶30, 333 Wis. 2d 719, 798 N.W.2d 697.

¶19 With those standards and protections in mind, the arguments of the parties will be discussed.

B. The June 2016 order was neither “temporary” nor “conditional.”

¶20 The County contends that the June 2016 order, which called for only protective services, was either “temporary” or “conditional.” So, according to the County, it was not required to file and serve a new protective placement petition and comply with the requirements of WIS. STAT. §§ 55.08-55.11. Instead, because the June 2016 order was “temporary” or “conditional,” the circuit court retained jurisdiction to once again litigate the May 2016 petition for protective placement

the County had just lost. I reject the County's arguments and conclude that the June 2016 order was neither "temporary" nor "conditional" because the record, and the applicable sections of ch. 55, show otherwise.

¶21 The County's argument that the June 2016 order was "temporary" fails for two reasons.

¶22 First, there is nothing in the record of the June 2016 hearing that leads to the conclusion that the order was temporary. The record establishes that the June 2016 hearing was a final hearing, not a temporary order hearing. The Notice of Hearing for the June 2016 hearing, and the Notice of Rights, sent to B.G. by the court before that hearing stated that the June 2016 hearing would "determine the need for permanent guardianship and protective placement." Those Notices also required a "comprehensive evaluation" of B.G. before the June 2016 hearing, allowed B.G. to request an "independent medical or psychological" examiner at County expense to testify at the June 2016 hearing, and informed B.G. he had the right to a jury trial on the issue of the protective placement. Each of those procedural protections are available to an individual for a final hearing only, and not for a temporary order hearing. WIS. STAT. §§ 55.09-55.11, 55.13, 55.135.

¶23 The circuit court made no statement at the June 2016 hearing declaring the order temporary. The written order from the June 2016 hearing stated that it was "final" and resolved the allegations of the petition in what was obviously a permanent fashion. The circuit court denied the County's petition for protective placement of B.G. and, instead, ordered protective services only.

¶24 Second, the legislature created, in WIS. STAT. ch. 55, a comprehensive scheme to assist adults at risk through the provision of protective services or protective placement. If the County is to prevail on its argument that

the June 2016 order was “temporary,” it must establish that the legislature authorized in ch. 55 a “temporary protective services order” that can be extended for five weeks before a final hearing.

¶25 The County cites no section of WIS. STAT. ch. 55 in support of its assertion that the June 2016 order for protective services was “temporary.”⁴ A review of ch. 55 confirms that a “temporary protective services order” is not mentioned or authorized in that chapter.

¶26 WISCONSIN STAT. ch. 55 does allow for protective services and protective placement before a final hearing. But, those statutes do not support the County’s argument. “Emergency” protective services may be provided if a “preliminary hearing” is held to establish probable cause within seventy-two hours (excluding Saturdays, Sundays, and legal holidays) of the filing of a petition. That order can be extended up to sixty days, but only after a finding of probable cause. WIS. STAT. § 55.13(1)-(3). Also, there is a provision for “temporary protective placement” after an individual is taken into custody through an “emergency protective placement” if a probable cause hearing is held within seventy-two hours (excluding, Saturdays, Sundays, and legal holidays) of the placement and the filing of a petition. WIS. STAT. § 55.135(1), (4), (5).

¶27 The procedural requirements for an “emergency” protective services order or a “temporary protective placement” order have no resemblance to the procedures used for the June 2016 hearing regarding B.G. The June 2016 hearing happened weeks, not days, after the filing of the petition. Further, the written

⁴ In fact, the County cites no statute or case law as authority for any of its arguments.

order from the June 2016 hearing did not mention a finding of probable cause. The procedural requirements set forth in WIS. STAT. ch. 55 establish that the June 2016 order cannot be considered “temporary.”

¶28 Accordingly, I conclude that the record, and the procedural requirements in WIS. STAT. ch. 55, show that the June 2016 protective services order was not “temporary.”

¶29 The County next argues that the June 2016 order was “conditional.” This argument fares no better. For the County to prevail, it must establish that the legislature in WIS. STAT. ch. 55 authorized a “conditional protective services order.” The County cites to no such statute because there is no provision for a “conditional protective placement order” in ch. 55.

¶30 In addition, the transcript from the June 2016 hearing, and the written order which followed, do not lead to the conclusion that the circuit court’s order was “conditional.” The circuit court expressed some reservation near the end of the June 2016 hearing about whether the protective services order for B.G. would be feasible. The circuit court also stated that, if protective services were not sufficient, a future protective placement might be needed for B.G. However, as discussed, the record of, and the order from, the June 2016 hearing do not support the County’s contention that the protective services were granted on a “conditional” basis.

¶31 In June 2016, the circuit court granted a final order which denied the County’s request for protective placement and ordered protective services only. I conclude that the June 2016 protective services order was not “temporary” or

“conditional.” As a result, the circuit court did not retain jurisdiction to amend the June 2016 protective services order for those reasons.⁵

C. A protective services order cannot be amended to a protective placement order.

¶32 In the circuit court, the County argued that the June 2016 protective services order for B.G., even if it was a “final” order, could be “converted” to a protective placement order at the July 2016 hearing. Wisconsin Statutes provide strict procedural guidelines that must be followed when there is involuntary detention of an individual. *Milwaukee Cty. v. Louise M.*, 205 Wis. 2d 162, 171, 555 N.W.2d 807 (1996). I conclude that, whether the County refers to the protective placement ordered at the July 2016 hearing as a conversion, modification, termination, or transfer, the result is the same because the County failed to follow the strict procedural guidelines contemplated by WIS. STAT. ch. 55. So, the circuit court lacked the authority to amend the June 2016 protective services order to a protective placement order in July 2016.⁶

⁵ Though not raised by the parties, there may be another reason to reverse the July 2016 order for protective placement. The petition for protective placement was filed on May 24, 2016. The hearing at which B.G. was ordered into protective placement took place on July 25, 2016. That was a stretch of over sixty days. WISCONSIN STAT. § 55.10(1) requires that the hearing on a petition for protective placement must occur within sixty days after the filing of the petition, unless an extension of up to forty-five days is granted by the circuit court. Sec. 55.10(1). The record establishes that no extension was granted. Therefore, it appears the circuit court lost competency to proceed before the July 25, 2016 hearing took place even if the June 2016 order was “temporary” or “conditional.” See *Dodge Cty. v. Ryan E.M.*, 2002 WI App 71, ¶5, 252 Wis. 2d 490, 642 N.W.2d 592.

⁶ The County also asserts that the July 2016 hearing was nothing more than a “continuation” of the June 2016 hearing. The County cites no legal or factual basis for that argument. Undeveloped arguments need not be considered. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App.1992); *Herder Hallmark Consultants, Inc. v. Regnier Consulting Group, Inc.*, 2004 WI App 134, ¶16, 275 Wis. 2d 349, 685 N.W.2d 564. As a result, I will not consider that undeveloped argument.

¶33 In the subject matter area of protective placement, there are circumstances in which a petition or order is said to be “converted.”⁷ As an example, after a finding of probable cause in a WIS. STAT. ch. 51 mental commitment proceeding, the mental commitment petition may be converted to a petition for protective placement under WIS. STAT. ch. 55. *See* WIS. STAT. § 51.20(7)(d). Also, one of the options available when a petition for termination of protective placement has been filed is to convert the protective placement order into a protective services order. WIS. STAT. § 55.17(3)(c)1. But, the opposite cannot be done. In other words, a protective services order cannot be amended to a protective placement order pursuant to the procedures delineated in ch. 55.

¶34 WISCONSIN STAT. § 55.16(5) requires that the circuit court, when considering a petition to modify a protective services order, may only leave the order unchanged, alter the order, or terminate the order. Nowhere does that section allow an amendment of a protective services order into a protective placement order. A circuit court is similarly limited when considering a petition to terminate a protective services order. WISCONSIN STAT. § 55.17(4) states that, when a circuit court considers a petition to terminate a protective services order, the court may only leave the order unchanged, alter the order, or terminate the order.

¶35 Additionally, the circuit court had no authority to “transfer” B.G. from protective services into protective placement. After the June 2016 protective services order was entered, the County filed, pursuant to WIS. STAT. § 55.15, a “Notice of Transfer of Protective Placement.” However, § 55.15 establishes a process for transferring an individual already subject to a protective placement

⁷ The words “convert” or “converted” are not used in the applicable statutes, but that is the parlance of counsel who practice regularly in this subject matter area.

order from one facility to another. The statute does not authorize transfer of an individual from protective services into protective placement.⁸

¶36 Had the legislature intended to allow the amendment of a protective services order to a protective placement order, it would have explicitly outlined that process in WIS. STAT. ch. 55. Because it did not do so, and since B.G. was subject to a protective services order and not in protective placement, the circuit court did not have the authority to amend its protective services order of June 2016 to the July 2016 protective placement order.

CONCLUSION

¶37 For those reasons, the circuit court's order for protective placement of July 25, 2016 is reversed and this cause is remanded.⁹

By the Court.—Order reversed and cause remanded.

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

⁸ The County's Notice of Transfer of Protective Placement fails on another level. WISCONSIN STAT. § 55.15(3) requires written consent of the individual's guardian for such a transfer except in the case of an emergency transfer under § 55.15(5)(b). There is nothing in the record to support a need for an "emergency transfer" for B.G., or to show that the guardian of B.G. gave written consent to the transfer.

⁹ Nothing in this opinion curtails Waushara County from filing another petition for protective placement for B.G. under WIS. STAT. ch. 55 with a request for temporary protective placement pursuant to WIS. STAT. § 55.135.

