COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1994 **Cir. Ct. No. 2017GN2**

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

IN THE MATTER OF THE PROTECTIVE PLACEMENT AND GUARDIANSHIP OF C. S. W.:

JACKSON COUNTY,

PETITIONER-RESPONDENT,

V.

C. S. W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Jackson County: J. DAVID RICE, Judge. *Affirmed*.

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

¶1 PER CURIAM. C.S.W. (who we will refer to as "Mr. W.") appeals orders of the Jackson County Circuit Court that granted guardianships of the person and estate and a protective placement as requested by Jackson County. Mr. W. contends that the circuit court erred because the County failed to prove each of the elements required for the guardianships and the protective placement. We disagree and affirm the orders of the circuit court.

BACKGROUND

¶2 The following facts are not disputed. Jackson County filed petitions regarding Mr. W. for guardianships of the person and estate, and a protective placement, pursuant to WIS. STAT. ch. 54 and ch. 55.[1] Mr. W. contested the petitions and a final hearing was held.

¶3 The only witness at the hearing was Dr. Leslie Taylor. Counsel stipulated to her credentials as a physician licensed to practice medicine with a specialty in psychiatry, and the circuit court found that Dr. Taylor is an expert in her field of practice. Dr. Taylor testified that she obtained information about Mr. W. by evaluating him in person at the Mendota Mental Health Institute, reviewing his medical records, and speaking to Mr. W.'s daughter, who provided information regarding Mr. W. and his behavior. Dr. Taylor stated her opinion that Mr. W. suffers from "a major neurocognitive disorder and an unspecified psychotic disorder" and offered other opinions we will discuss, below, in the context of specific elements.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Mr. W. did not testify[2] and called no witnesses. At the conclusion of the hearing, the circuit court made findings of fact and ordered guardianship of the person, guardianship of the estate, and protective placement. Mr. W. appeals.

DISCUSSION

¶5 Mr. W. argues that there was insufficient evidence to grant the orders for the guardianships and the protective placement. We will now discuss the standard of this court's review and each of the statutory elements for guardianships and a protective placement.

I. Standard of Review.

¶6 A circuit court's decisions on whether to appoint a guardian and order protective placement are determinations within the discretion of the circuit court. ***Robin K. v. Lamanda M.***, 2006 WI 68, ¶12, 291 Wis. 2d 333, 718 N.W.2d 38; ***Agnes T. v. Milwaukee Cty.***, 179 Wis. 2d 363, 372, 507 N.W.2d 373 (Ct. App. 1993). "We affirm discretionary decisions if the circuit court applies the proper legal standard to the relevant facts and uses a rational process to reach a reasonable result." ***Robin K.***, 291 Wis. 2d 333, ¶12 (quoting ***Anna S. v. Diana M.***, 2004 WI App 45, ¶7, 270 Wis. 2d 411, 678 N.W.2d 285). The proper exercise of discretion contemplates that the circuit court explains its reasoning but, when the circuit court does not do so, "we may search the record to determine if it supports the court's discretionary decision." ***Randall v. Randall***, 2000 WI App

[2] But, Mr. W. did blurt out several times, "that's a damn lie" and "that's a lie," in response to Dr. Taylor's testimony and the circuit court's findings.

98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737; ***Brezinski v. Barkholtz***, 71 Wis. 2d 317, 327, 237 N.W.2d 919 (1976).

¶7 In both guardianship and protective placement cases, we give deference to the circuit court's factual findings unless those findings are clearly erroneous. *See* WIS. STAT. § 805.01(2); ***Robin K.***, 291 Wis. 2d 333, ¶12; ***Walworth Cty. v. Therese B.***, 2003 WI App 223, ¶21, 267 Wis. 2d 310, 671 N.W.2d 377. Whether the evidence satisfies the legal standard for granting a guardianship or a protective placement is a question of law that this court reviews de novo. ***Cheryl F. v. Sheboygan Cty.***, 170 Wis. 2d 420, 425, 489 N.W.2d 636 (Ct. App. 1992); ***Walworth Cty.***, 267 Wis. 2d 310, ¶22.

II. Guardianship.

¶8 A circuit court may appoint guardians of the person and estate for an individual upon adjudication that the person is incompetent. *See* WIS. STAT. § 54.10(3). In order to grant such petitions, the court must find, by clear and convincing evidence, that the four elements of incompetency have been met. Sec. 54.10(3)(a). In this context, the four elements are:

(1) Mr. W. is at least seventeen years and nine months in age.

(2) Because of an impairment, Mr. W. is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that he is unable to meet the essential requirements for his physical health and safety.

(3) Because of an impairment, Mr. W. is unable effectively to receive and evaluate information or to make or communicate decisions related to management of his property or financial affairs to the extent he has

property that will be dissipated, is unable to provide for his own support, or is unable to prevent financial exploitation.

(4) Mr. W.'s need for assistance in decision-making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assisted devices, or other means that he will accept.

See WIS. STAT. § 54.10(3)(a).

¶9 To meet its burden of proof, the County must present at least one witness who is a "licensed professional to testify" regarding his or her "independent opinions." ***Walworth Cty.***, 267 Wis. 2d 310, ¶8 n.3.

¶10 We now discuss whether there is sufficient evidence in the record to support the orders that granted the guardianships of Mr. W.'s person and his estate.

A. Mr. W. is at Least Seventeen Years and Nine Months in Age.

¶11 Mr. W. does not dispute that he is older than seventeen years and nine months in age.

B. Because of an Impairment, Mr. W. is Unable Effectively to Receive and Evaluate Information or Make or Communicate Decisions to Such an Extent that He is Unable to Meet the Essential Requirements for His Physical Health and Safety.

¶12 The second element is contained in WIS. STAT. § 54.10(3)(a)2, which reads:

> For purposes of appointment of a guardian of the person, *because of an impairment, the individual* is unable effectively to receive and evaluate information or to make

> or communicate decisions to such an extent that the individual *is unable to meet the essential requirements for his or her physical health and safety*.

(Emphasis added.) "Impairment" is defined as "a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities." WIS. STAT. § 54.01(14). "Meet the essential requirements for physical health or safety" means performing those "actions necessary to provide the health care, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur." Sec. 54.01(19). We conclude that the County met its burden to prove this element by clear and convincing evidence.

¶13 Dr. Taylor testified Mr. W. has a major neurocognitive disorder and an unspecified psychotic disorder. The circuit court found that, as Dr. Taylor testified, Mr. W. suffers from a "mental illness" and a "major neurocognitive disorder." We conclude that the circuit court's findings suffice to meet the legal standard for an "impairment." *See* WIS. STAT. § 54.01(14).

¶14 Dr. Taylor testified to the following regarding Mr. W.'s circumstances. Because of his condition, Mr. W. is unable to effectively receive and evaluate information, has "many paranoid ideas" and has difficulties with his memory. Mr. W. has exhibited "aggression towards his family," including threatening his son with a gun. Mr. W. also attempted to push his daughter-in-law while she was driving his truck. The daughter-in-law believed that she and Mr. W. were in danger because of those actions of Mr. W. He has diabetes and has not met his medical needs in that Mr. W. does not manage his blood sugar, does not control his diet, and does not "take care of his insulin." Further, Mr. W.

has difficulties with his hygiene and taking care of his home. As an example, he washes his bed sheets only once a year.

¶15 The circuit court found that Mr. W. "meet[s] the standards for incompetency." The circuit court implicitly accepted the opinion of Dr. Taylor that, because of his impairments, Mr. W. is not able to perceive and evaluate information. The circuit court also found that, because of his condition, Mr. W. is "totally incapable of caring" for himself and is a risk to others and to himself. One example mentioned by the court is the incident with his daughter-in-law in the truck that endangered Mr. W. and the daughter-in-law.[3] The circuit court also found that the fact that Mr. W. was not maintaining his blood sugar was a dangerous condition, and he was unable to manage his "daily hygiene needs."

¶16 We conclude that the circuit court's findings of fact are not clearly erroneous. We also conclude that those findings satisfy the County's burden on this element in that Mr. W.'s impairment has caused him to be unable to receive and evaluate information to the extent that he is unable to meet the essential requirements for his physical health and safety.

[3] Mr. W. asserts that we should ignore the gun incident involving Mr. W.'s son even though Mr. W.'s attorney at the hearing called it an "obvious" risk factor. The circuit court "guess[ed]" that the gun was out of the home by the time of the final hearing, but that was based solely on counsel's representation rather than any evidence in the record. We conclude that, regardless of whether the gun was in or out of the home by the time of the final hearing, the fact that Mr. W. threatened someone with a loaded gun is evidence that he cannot provide essential requirements for his own physical health, safety and care. It is a reasonable inference that such an episode can quickly escalate with risks to others, law enforcement, and Mr. W.

C. Because of Mr. W.'s Impairment, He is Unable to Effectively Receive and Evaluate Information Relating to His Financial Affairs.

¶17 The next element concerns the guardianship of the estate requested by the County. It reads:

> 3. For purposes of appointment of a guardian of the estate, because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs, to the extent that any of the following applies:
>
> a. The individual has property that will be dissipated in whole or in part.
>
> b. The individual is unable to provide for his or her support.
>
> c. The individual is unable to prevent financial exploitation.

WIS. STAT. § 54.10(3)(a)3.

¶18 As mentioned, the circuit court found that Mr. W. has a major neurocognitive disorder and an unspecified psychotic disorder. He is also not able to effectively receive and evaluate information because of those impairments. Specific to this element, Dr. Taylor opined: "I just don't think he can manage his affairs any more. He can't manage his own needs." The circuit court found that this element was met because Mr. W.'s condition is such "that if you are not able to receive and evaluate information, there is a significant probability that you're unable to manage your finances and any assistance with managing your finances."

¶19 The circuit court's findings relied on a reasonable inference that, if Mr. W. was having all the problems in his daily life because of his incapacities previously discussed, then he was having similar problems managing his financial affairs. Also, the circuit court's finding that Mr. W. cannot manage his finances or

assist with managing his finances is sufficient to support the conclusion that his property will be dissipated or he will be unable to prevent financial exploitation.

¶20 For those reasons, we conclude that the circuit court's findings of fact are not clearly erroneous, and those findings support the conclusion that the County has met its burden to prove this element by clear and convincing evidence.

D. Mr. W.'s Need for Assistance in Decision Making or Communication is Unable to Be Met Effectively and Less Restrictively Through Appropriate and Reasonably Available Training, Education, Support Services, Health Care, Assistive Devices, or Other Means that Mr. W. Will Accept.

¶21 WISCONSIN STAT. § 54.10(3)(a)4. concerns the final element and reads:

> The individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices … or other means that the individual will accept.

We conclude that the County met its burden of proof on this element.

¶22 The circuit court made the findings already mentioned regarding Mr. W.'s inability to care for himself because of his impairments. In addition, Dr. Taylor testified that Mr. W. has many paranoid ideas and is aggressive toward his family. Dr. Taylor also testified that Mr. W. engages in sexually inappropriate behaviors, including at the Mendota Mental Health Institute, by making inappropriate comments to staff and touching them. Further, Dr. Taylor was asked this question: "Doctor, do you have an opinion as to what the least restrictive location for Mr. W. is where he would be able to receive the care that he needs?" She answered:

> When I met with him on January 29, I thought he needed to be at a facility like the Mendota Mental Health Institute. I'm guessing he has now reached his base line and he would be ready to be stepped down, you know, out of a locked in-patient unit into some sort of a residential setting.

The circuit court found that Mr. W. needed "residential care and custody."

¶23 We conclude that the testimony, and the findings of the circuit court, support the conclusion that this element was met. First, the circuit court's findings and the evidence lead to the reasonable inference that Mr. W. needs more than "assistance" that can be met "effectively and less restrictively through appropriate and reasonable" services in the community such as "support services." The circuit court found, and the finding is not clearly erroneous, that Mr. W. needs to be in a residential care and custody setting. Dr. Taylor's opinion confirms that finding. Based on the information she had at the time she evaluated Mr. W. in person, she believed that Mr. W. needed to be in a locked inpatient unit in a facility like the Mendota Mental Health Institute and not in the community. At best, based on certain assumptions in Mr. W.'s favor, she opined that he might have improved enough by the time of the hearing to be able to be in "some sort" of a "residential setting." Second, one requirement of WIS. STAT. § 54.10(3)(a)4. is that the assistance must be "accept[ed]" by Mr. W. The evidence, and the findings of the circuit court, lead to the conclusion that Mr. W. will not accept any such assistance. His "many paranoid delusions," inappropriate sexual behavior, and dangerous actions lead reasonably to the conclusion that, even if offered assistance in the community, he will not accept that assistance.

¶24 In sum, we conclude that the County met its burden of proof on each of the elements regarding the guardianships of the person and the estate.

III. Protective Placement.

¶25 We now consider whether the circuit court properly ordered protective placement for Mr. W.

¶26 A circuit court may order a protective placement if the court finds by clear and convincing evidence that all four elements of WIS. STAT. § 55.08(1) are met. Sec. 55.08(1); *see also* WIS. STAT. § 55.10(4)(d). The four elements of § 55.08(1) are:

(1) "The individual is … an adult who has been determined to be incompetent by a circuit court."

(2) "The individual has a disability that is permanent or likely to be permanent."

(3) "As a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual is 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. Serious harm may be evidenced by overt acts or acts of omission."

(4) "The individual has a primary need for residential care and custody."

We conclude that the County produced sufficient evidence to prove each of those elements.

A. Mr. W. is an Adult Who Has Been Determined to be Incompetent by a Circuit Court.

¶27 Mr. W. does not dispute that, with the granting of the guardianship by the circuit court, Mr. W. has been determined to be "incompetent" for purposes of this element.

B. Mr. W.'s Disability is Permanent or Likely to be Permanent.

¶28 This element requires the County to prove that Mr. W. has a "disability that is permanent or likely to be permanent." WIS. STAT. § 55.08(1)(d). Dr. Taylor, a physician with a specialty in psychiatry, testified that she diagnosed Mr. W. with a "major neurocognitive disorder and an unspecified psychotic disorder," and that condition is permanent or likely to be permanent. The circuit court found that the conditions are "permanent." Mr. W. presented no testimony to contradict Dr. Taylor's opinion on this topic.

¶29 Mr. W. raises two arguments. First, he contends that Dr. Taylor's opinion that there are "medications to try to treat some of the behavioral [sic] of a major neurocognitive disorder" negates a finding that his disability is permanent or likely to be permanent. We disagree. That there are medications to treat some of the behaviors that a person with that condition might exhibit does not undercut the circuit court's finding that the disability itself is permanent. None of the medications mentioned by Dr. Taylor will cure Mr. W.'s disabilities.

¶30 Second, Mr. W. argues that Dr. Taylor did not convey in her testimony that the "unspecified psychotic disorder" is permanent or likely to be permanent. Again, we disagree. While the question presented to Dr. Taylor considered both diagnoses in one question, the only reasonable reading of Dr. Taylor's answer is that both conditions are permanent or likely to be

permanent. At any rate, and more importantly, Wisconsin law does not require that there be more than one "disability that is permanent or likely to be permanent." Instead, the requirement is that Mr. W. "has *a* disability that is permanent or likely to be permanent." WIS. STAT. § 55.08(1)(d) (emphasis added). So, even if the unspecified psychotic disorder is not permanent or likely to be permanent, the record leads to the conclusion that the major neurocognitive disorder is permanent.

¶31 For those reasons, we conclude that the County met its burden to prove that Mr. W. is a person who has a disability that is permanent or likely to be permanent.

C. As a Result of a Degenerative Disorder, Serious and Persistent Mental Illness, or Other Like Incapacity, Mr. W. Is So Totally Incapable of Providing for His Own Care or Custody as to Create a Substantial Risk of Serious Harm to Himself or Others.

¶32 The next element the County must prove is stated in WIS. STAT. § 55.08(1)(c) and reads:

> As a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, *the individual is 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. Serious harm may be evidenced by overt acts or acts of omission.

(Emphasis added.) "Care," in this context, "means that person's incapacity to provide for his or her daily needs creates a substantial risk of serious harm to the person or others." ***Jackson Cty. DHHS v. Susan H.***, 2010 WI App 82, ¶17, 326 Wis. 2d 246, 785 N.W.2d 677. "Custody," as used in that element, means 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.***

¶33 We conclude that the findings of the circuit court, and the conclusions which may be reasonably drawn from those findings within the elements of the guardianship, answer this question. Those findings and facts may be summarized as follows. Mr. W. has a major neurocognitive brain disorder and a psychotic disorder and, as a result of those conditions, he cannot effectively receive and evaluation information which, in turn, causes him to be unable to care for daily health and hygiene needs. Moreover, we have already discussed Mr. W.'s dangerous behaviors. Those facts show that, if there is no protective placement, there is a substantial risk of serious harm to Mr. W.

¶34 For those reasons, we conclude that the County has proved this element by clear and convincing evidence.

D. Mr. W. Has a Primary Need for Residential Care and Custody.

¶35 The final element regarding protective placement is whether Mr. W. "has a primary need for residential care and custody." WIS. STAT. § 55.08(1)(a). This element requires that "the person must have 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 Cty.***, 326 Wis. 2d 246, ¶16. In this context, it is not necessary that an individual be completely dependent on others for all aspects of daily living in order for the individual to be protectively placed. *See, e.g.*, ***Milwaukee Cty. Protective Servs. Mgmt. Team v. K.S.***, 137 Wis. 2d 570, 576, 405 N.W.2d 78 (1987) ("Protective placement may result from the mere inability to live

independently in the community."). We conclude that the County met its burden of proof on this element.

¶36 Dr. Taylor testified that, because of his impairments, Mr. W. has a primary need for residential care and custody. Also of importance is that, as we have discussed, when asked about the least restrictive location for Mr. W. where he would be able to receive "the care that he needs," Dr. Taylor opined that, based on her assumptions about Mr. W.'s progress to the time of the hearing, Mr. W. needed to be in a residential care facility. However, based on Dr. Taylor's earlier in-person evaluation, Mr. W. needed to be in a "locked inpatient unit" in a facility like the Mendota Mental Health Institute.

¶37 The circuit court found that Mr. W. has "a primary need for residential care and custody." The circuit court also found that, because of Mr. W.'s mental illness and other "like incapacities," he is "totally incapable of caring" for himself and he presents a risk to himself and particularly to others. Moreover, the circuit court found that Mr. W. needs to reside in a skilled nursing facility and have 24-hour care because of his "medical condition as well as [his] other conditions."

¶38 We conclude that this finding is not clearly erroneous. The testimony and the factual findings of the circuit court we have already considered support the circuit court's finding that Mr. W. presents a risk to himself because of dangerous behavior. He is not managing his daily hygiene or medical needs. Mr. W. cannot manage his finances. A reasonable inference from those, and other, findings of the circuit court is that Mr. W. needs those problems addressed in a residential setting.

¶39 For those reasons, we conclude that the County met its burden of proof on this element.

¶40 In sum, we conclude that the circuit court's findings of fact were not clearly erroneous and those findings support the protective placement order.[4]

E. Least Restrictive Protective Placement.

¶41 Once all the elements of WIS. STAT. § 55.08(1) have been satisfied, as we have explained is the case here, the circuit court then must order protective placement in "the least restrictive manner consistent with the needs of the individual to be protected and with the resources of the county department." WIS. STAT. §§ 55.12(1) and (3). That statutory requirement is not an element of a protective placement petition, and no party takes the position that the circuit court's decision on where to protectively place Mr. W. requires clear and convincing evidence.

¶42 Near the end of the hearing, after making its findings, the circuit court asked where Mr. W. was living at the time. The court was informed by the social worker for Mr. W. that he was still at the Mendota Mental Health Institute. The circuit court was then informed that the County had a placement set up for Mr. W. at the Clark County Health Care Center, which was "much closer to his home and his children." In answer to the circuit court's question, the social

[4] Mr. W. contends that the County's brief in this court relies on a report by a County employee, not received in evidence, to support its claim that there is sufficient evidence in the record regarding the protective placement elements. We need not address this argument because we do not rely on the report, and we see nothing in the record indicating that the circuit court relied on the report regarding its decision on any of the elements of the guardianship or protective placement.

worker informed the court that it is a skilled nursing facility and there would be 24-hour care. The court then found: "That's necessary given your medical condition as well as your other conditions. And I will find that that's the least restrictive placement consistent with your needs and with your available resources." Mr. W. challenges the order for this specific placement on two grounds.

¶43 First, Mr. W. argues that Dr. Taylor was "guessing" when she said that Mr. W. should go into a "residential setting." However, as already discussed, the opinion of Dr. Taylor that Mr. W. needed to be in a locked unit at the Mendota Mental Health Institute was based on the most recent information she had. Dr. Taylor was "guessing" that Mr. W. may have improved and could go into a residential facility. The fact that Dr. Taylor may have been less than exact about what she knew at the hearing about any improvement in Mr. W.'s conditions inured to Mr. W.'s benefit because she assumed the least restrictive setting for his placement was a facility such as the Clark County Health Care Center and not a locked unit at the Mendota Mental Health Institute.

¶44 Second, Mr. W. asserts that the information given to the circuit court by the social worker near the end of the hearing was "after the close of evidence" and should not have been considered by the court. However, as noted, exactly where Mr. W. should be placed and what was the least restrictive setting are not elements that must be proved by clear and convincing evidence. As well, the placement must be "consistent … with the resources of the county department." WIS. STAT. § 55.12(3). To get that information, the circuit court needed input from someone who had considered the details of the facility needed for the protective placement. Under the circumstances, and even if the social worker was not under oath, we see no harm to Mr. W. in that the circuit court received the

information with the social worker not under oath. Of importance is that Mr. W. did not at the time, and does not now, dispute that any of the information given to the court by the social worker on the record at the end of the hearing was incorrect.

¶45 We conclude that the order placing Mr. W. at the Clark County Health Care Center was appropriate.

CONCLUSION

¶46 For those reasons, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.