COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 4, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 96-1773

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

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF LAMOINE S.:

DUNN COUNTY DEPARTMENT OF HUMAN SERVICES,

Appellant,

v.

LAMOINE S.,

Respondent.

APPEAL from an order of the circuit court for Dunn County: DONNA J. MUZA, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Dunn County Department of Human Services (DCDHS) appeals an order continuing the protective placement of LaMoine S. at the Area Nursing Home in Colfax. DCDHS argues that the court had no jurisdiction to review the protective placement, the placement violated § 55.045,

STATS.,[1] there was insufficient credible evidence to support the continued nursing home placement, and the court's order for placement at a specific facility, as opposed to a maximum level of restrictiveness, violates Wisconsin law. In the alternative, DCDHS argues that if we do not reverse the order, we should remand for further evidentiary proceedings. We reject these arguments and affirm the order.

LaMoine is a sixty-four-year-old man who is mentally retarded and diabetic. In August 1989, the court decided that LaMoine was incompetent and in need of guardianship and protective placement. The court appointed a guardian and protectively placed LaMoine "at the residence of [his mother] or at another facility of equal or less restrictive environment." As a result of annual ***Watts***[2] reviews, LaMoine's protective placement at his mother's home was continued most recently in 1995.

On January 24, 1996, LaMoine was hospitalized for health problems. On January 30, 1996, he was discharged from the hospital into the Colfax Area Nursing Home. This was intended as a temporary placement for recuperative care and to stabilize LaMoine's medical condition.

On March 5, 1996, the State of Wisconsin Department of Health and Social Services conducted an annual resident review of LaMoine's circumstances at the nursing home and concluded that he could not stay there because he did not need nursing home services. Meanwhile, DCDHS was looking for a community placement for LaMoine because his medical condition had stabilized and it determined that he no longer needed the services of the nursing home.

Shortly thereafter, LaMoine's mother was found to be in need of guardianship and protective placement. She was protectively placed at the Colfax Area Nursing Home. On April 17, 1996, DCDHS notified LaMoine of its

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[1] The parties refer in their briefs instead to the funding provisions of 1995 Wis. Act 92. This Act has since been codified at § 55.045, STATS., 1995-96.

[2] ***State ex rel. Watts v. Combined Community Servs.***, 122 Wis.2d 65, 362 N.W.2d 104 (1985).

arrangements to transfer him on May 1 from the nursing home to an adult family home located ten to fifteen miles northwest of Colfax.

LaMoine and his GAL filed written objections to the transfer. The court scheduled a hearing for May 6, 1996, to address the proposed transfer, and on April 30 granted LaMoine's motion for a temporary restraining order and injunction, enjoining DCDHS from transferring LaMoine from the nursing home to the adult family home.

At the continued protective placement hearing on May 16, the court decided that the nursing home was the least restrictive placement consistent with LaMoine's physical and emotional needs, and denied the DCDHS request to move LaMoine to the adult family home. The court also ordered DCDHS to assist LaMoine by contacting state and federal authorities to obtain funding for the placement at the nursing home. DCDHS now appeals the order.

First, we consider whether the issue of LaMoine's placement was properly before the court. DCDHS asserts that neither the guardian ad litem nor LaMoine petitioned the court in accordance with § 55.06(9)(b), STATS. We disagree. The construction and interpretation of a statute and its application to the facts present a question of law, which we review de novo. ***State v. Keith***, 175 Wis.2d 75, 78, 498 N.W.2d 865, 866 (Ct. App. 1993).

By statute, any interested party may object to a proposed change in protective placement by filing with the trial court a petition specifying the objection to the transfer. Section 55.06(9)(b), STATS. In relevant part, § 55.06(9)(b) provides:

> Upon petition to a court by a guardian, ward, or attorney, or other interested person specifying objections to a transfer, the court shall order a hearing, within 96 hours after filing of the petition, to determine whether there is probable cause to believe that the transfer is consistent with the [least restrictive environment

> requirement] and is necessary for the best interests of the ward.

After DCDHS filed a notice of transfer indicating that LaMoine would be moved from the nursing home to the adult family home on May 1, LaMoine's GAL and his attorney filed the following written objections to the transfer:

> COMES NOW, LaMoine [S.], by his guardian ad litem and hereby objects to the transfer from the Area Nursing Home as the transfer is not consistent with the requirements of §55.06(9)(a), Stats[.] and not in the ward's best interest.
>
> COMES NOW, Lamoine [S.], by his attorney, and hereby objects to the proposed transfer from the Colfax Area Nursing Home; as the current placement is the preference if LaMoine [S.], and best provides for his needs.

In response to the objections, the court notified the parties of a May 6 protective placement hearing.

We are satisfied that the procedures outlined in § 55.06(9)(b), STATS., were sufficiently complied with in this case.[3] Although they did not cite to the statute or request a hearing, LaMoine and his GAL objected to the transfer in written petitions that specified the reasons for their objections. The court properly responded by scheduling a hearing, as required by statute, to review the protective placement. The court held the hearing, took testimony from witnesses for both parties, and decided that the transfer was not appropriate.

Next, we consider DCDHS's argument that § 55.045, STATS., prohibits the court from ordering a placement that will require county funding

[3] Because we conclude that LaMoine and his GAL complied with § 55.06(9)(b), STATS., we do not address DCDHS's argument regarding modification of placement pursuant to § 55.06(10)(b).

in excess of state and federal funds and county matching funds. This presents a question of law that we review de novo. *See* ***Keith***, 175 Wis.2d at 78, 498 N.W.2d at 866. Section 55.045 limits the "least restrictive" options for protective placements to those "within the limits of available state and federal funds and of county funds required to be appropriated to match state funds."

However, according to its legislative history, the statute applies only to causes of action arising on or after December 16, 1995. A "cause of action" arises when "there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." ***Pritzlaff v. Archdiocese of Milwaukee***, 194 Wis.2d 302, 315, 533 N.W.2d 780, 785 (1995). The cause of action in a protective placement case arises when the individual meets the standards set forth in § 55.06(2), STATS., for a protective placement.

It is undisputed that the court ordered protective placement for LaMoine in August 1989. The placement was then enforceable by court order, LaMoine was the party against whom the order was enforced, and DCDHS exercised its right to enforce the protective placement. Therefore, the cause of action arose prior to December 16, 1995, and the statute does not apply.

The dispositive issue on appeal is whether LaMoine's protective placement at the nursing home is the least restrictive placement, consistent with § 55.06(9)(a), STATS. This is a question of fact. ***Fond du Lac County v. J.G.S., Jr.***, 159 Wis.2d 685, 687, 465 N.W.2d 227, 228-29 (Ct. App. 1990). We will search the record for evidence to support the court's findings of fact, and will not overturn the court's findings of fact unless they are clearly erroneous. *See* ***id.***; § 805.17(2), STATS. Although a persuasive argument is made to the contrary that this is a question of law because it involves the application of the facts to the statutory concept of "least restrictive environment,"[4] we are bound by precedent, and our review is restricted by the standards set forth in ***J.G.S.*** because the issue in that case is identical to the issue presented to us here. *See* ***State v. Solles***, 169 Wis.2d 566, 570, 485 N.W.2d 457, 459 (Ct. App. 1992) (court of appeals believes itself bound by its published precedents).

[4] *See* ***In re K.N.K.***, 139 Wis.2d 190, 197-98, 407 N.W.2d 281, 285 (Ct. App. 1987).

Wisconsin's protective placement statutes are found in ch. 55, STATS. The legislative policy behind the protective placement statutes is the following:

> The legislature recognizes that many citizens of the state, because of the infirmities of aging, chronic mental illness, mental retardation, other developmental disabilities or like incapacities incurred at any age, are in need of protective services. These services should ... allow the individual the same rights as other citizens, and at the same time protect the individual from exploitation, abuse and degrading treatment. This chapter is designed to establish those services and assure their availability to all persons 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, exploitation and neglect.

Section 55.001, STATS.

Section 55.06(9)(a), STATS., states in pertinent part:

> Placement ... shall be made in the least restrictive environment consistent with the needs of the person to be placed and with the placement resources of the appropriate board .... Factors to be considered in making protective placement shall include the needs of the person to be protected for health, social or rehabilitative services; the level of supervision needed; the reasonableness of the placement given the cost and the actual benefits in the level of functioning to be realized by the individual; the limits of available state and federal funds and of county funds required to be appropriated to match state funds; and the reasonableness of the placement given the number or projected number of individuals

> who will need protective placement and given the limited funds available.

The Wisconsin protective placement statutes show the legislature's intent to protect incompetent individuals like LaMoine "whose decisions about where and how to live are not their own." ***In re Agnes T. v. Milwaukee County***, 189 Wis.2d 520, 528, 525 N.W.2d 268, 270-71 (1995). As stated by our supreme court, ch. 55, STATS., "seeks to guarantee an incompetent individual's right to the least restrictive living environment by ensuring that the individual does not remain institutionalized if a less restrictive alternative is available. The statute accomplishes this goal by requiring an annual review of each incompetent individual's living arrangement." ***Id.*** (citation omitted).

We recognize that this is an unusual protective placement case because LaMoine requests continued placement in the more restrictive of two potential placement settings. Nevertheless, it was the role of the court to determine whether placement was in the least restrictive environment consistent with LaMoine's needs and whether the transfer was necessary for his best interests. *See* § 55.06(9)(b), STATS.

At the May 16, 1996, hearing, the court heard testimony from several witnesses, including Dr. Paul Caillier, a psychologist who conducted an independent examination of LaMoine at LaMoine's request. Caillier recommended that LaMoine remain in the nursing home because of his mental retardation, his "strong and unusual attachment" to his mother, and the fact that he was "doing extremely well from a social [and] emotional point of view in the nursing home."

Caillier testified that the nursing home placement was the "least restrictive setting consistent with his mental health and emotional needs." He described LaMoine's attachment as "much the way a prepubescent child would be bonded to a mother." He testified that LaMoine had adequate social contacts in the nursing home, was in the town where he grew up, and remained in contact with the local coffee shop, local businesses, and lifelong friends because of the convenient location of the nursing home.

Despite the evidence presented by DCDHS to contradict Caillier's testimony, the trial court, relying on Caillier's testimony, decided that LaMoine's nursing home placement was the least restrictive environment consistent with his physical and emotional needs, and ordered that LaMoine continue to be placed there. Caillier's testimony was credible evidence to support the court's conclusion and order. Although we may disagree with the court's conclusion and may not have made the same factual finding, we cannot say the trial court's finding was clearly erroneous. It is the function of the trial court, and not the appellate court, to choose between conflicting reasonable inferences. *See* ***State v. Poellinger***, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757 (1990). We must therefore affirm.

Finally, DCDHS argues that the court's order for a specific location for placement, as opposed to a maximum level of restrictiveness, violates Wisconsin law. DCDHS relies on ***In re J.R.R.***, 145 Wis.2d 431, 427 N.W.2d 137 (Ct. App. 1988), to support its argument. Because the facts and statutes involved in ***J.R.R.*** are distinguishable from this case, we disagree with DCDHS.

J.R.R. was an appeal from a mental recommitment order in a ch. 51, STATS., proceeding. The issue was whether § 51.20(13)(c)2, STATS., allowed the court ordering the recommitment to specify the treatment method to be used by the treating facility. The relevant statutes directed the committing court to "order commitment to the care and custody of the appropriate county department under s. 51.42 or 51.437 ... [which] ... shall arrange for treatment in the least restrictive manner consistent with the requirements of the subject individual *in accordance with a court order designating the maximum level of inpatient facility* ...." ***Id.*** at 435, 427 N.W.2d at 139 (citing §§ 51.20(13)(a)3 and 51.20(13)(c)2, STATS.) (emphasis in original). The court decided that the plain and unambiguous statutory language obligated the court to designate the maximum level of inpatient facility consistent with the individual's needs. ***Id.*** at 436, 427 N.W.2d at 139.

Unlike ch. 51, STATS., ch. 55 does not direct the court to issue an order designating the maximum level of restrictiveness for a transfer of protective placement. Instead, § 55.06(9)(a), STATS., provides the following:

When ordering placement, the court, on the basis of the evaluation and other relevant evidence shall order the appropriate board specified under s. 55.02 or an agency designated by it to protectively place the individual. Placement by the appropriate board or designated agency shall be made in the least restrictive environment ....

According to § 55.06(9)(b), "Upon petition to a court ... specifying objections to a transfer, the court shall order a hearing ... to determine whether there is probable cause to believe that the transfer is consistent with the requirements specified in par. (a) and is necessary for the best interests of the ward."

The statute contains no language regarding the order a court may make after it conducts, as here, a § 55.06(9)(b), STATS., hearing to determine whether a transfer is appropriate. It is the role of the legislature, and not the courts, to legislate. ***American Motors Corp. v. DILHR***, 101 Wis.2d 337, 350, 305 N.W.2d 62, 68 (1981). We will not "change the wording of a statute to mean something which was not intended by the legislature or by the plain language used." *See* ***id.*** at 350, 305 N.W.2d at 68 (quoting ***Lukaszewicz v. Concrete Research, Inc.***, 43 Wis.2d 335, 342, 168 N.W.2d 581, 585 (1969)).

In the absence of statutory guidance regarding its order, it was the duty of the court to review the evidence and determine whether the transfer was appropriate pursuant to the standards set forth in § 55.06(9), STATS. Because the court reviewed the evidence and determined that LaMoine's transfer to the adult family home was neither the least restrictive environment consistent with his needs nor in his best interests, we conclude that it properly exercised its authority to deny the transfer, and reject the DCDHS argument to remand for further proceedings.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.