

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2016

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. 2016AP596

Cir. Ct. No. 2012GN125

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF
M.G.-H.:**

MILWAUKEE COUNTY,

PETITIONER-RESPONDENT,

v.

M.G.-H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID L. BOROWSKI, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ M.G.-H. challenges the sufficiency of the evidence to support the trial court's order, following a *Watts*² review hearing, to continue

¹ This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(d) (2013-14).

his protective placement under WIS. STAT. ch. 55 (2013-14).³ M.G.-H. argues that the record does not contain evidence sufficient to support the trial court's conclusion that M.G.-H. "has a primary need for residential care and custody" and to prove that M.G.-H. "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." *See* WIS. STAT. §§ 55.08(1)(a) and (c). This court concludes that there is sufficient evidence in the record to support the circuit court's order for continued protective placement, and the order is affirmed.

BACKGROUND

¶2 On July 30, 2015, the trial court held a hearing to determine whether to continue M.G.-H.'s guardianship and protective placement orders.⁴ *See* WIS. STAT. § 55.18 and *State ex rel. Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985). At the time of the hearing, M.G.-H. was in custody, serving a revocation sentence, and was scheduled to be discharged from the House of Correction in October 2015.

¶3 The trial court heard testimony from Dr. Peder Piering, a clinical psychologist who conducted an evaluation of M.G.-H. prior to the hearing. Dr. Piering testified as an expert without objection. A report by Dr. Piering was also entered into the record. The report reflected that Dr. Piering had reviewed

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

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

⁴ Protective placement had been ordered for M.G.-H. in 2012 and was again ordered in 2014.

1989, 2008, and 2011 doctor's reports as well as the 2014 protective placement annual review. The report stated that "[M.G.-H.] denies any medical issues other than his back problems." It also stated, "He did not acknowledge *any functional deficits* except to admit some difficulty related to his back injury and ambulation." (Emphasis added.) Dr. Piering testified that M.G.-H. had two mental disorders: schizoaffective disorder, and dementia. Schizoaffective disorder, he testified, "substantially diminishes [M.G.-H.'s] level of functioning in the primary aspects of daily life." He testified that dementia, a degenerative brain disorder, could "substantially impair [M.G.-H.'s] ability to provide adequately for his own care or custody or to manage his property."

¶4 Dr. Piering gave his opinion that M.G.-H. would have a primary need for residential care and custody when released from custody and that M.G.-H. is so totally incapable of providing for his own care as to create a substantial risk of serious harm to himself or others. He was asked for the basis of that opinion and he answered:

[G]iven his extensive psychiatric history, history of suicide attempts, more recent history of suicidal ideation, there have been legal issues as well, such as domestic violence, and he has an AODA history as well that played a role here. At the time of the last review in September of 2014, he had reported that he continued to drink alcohol which exacerbates any issues.

...

I believe inability to care for self [would result], just due to lack of judgment. I don't believe he would follow through with any psychiatric treatment resulting in further decompensation. Given his history, there's also a serious concern for suicidal ideation and potential self-harm.

¶5 On cross-examination by M.G.-H.'s adversary counsel, Dr. Piering was asked for specifics about M.G.-H.'s ability to control his finances. Dr. Piering

answered, “I attempted to address those issues. He does not--he didn’t have the ability to address finances on his own. He essentially says that he can take care of himself, but he does not demonstrate that ability to do so.” When asked about testing related math skills, Dr. Piering answered,

I attempted to do so, and, again, given his difficulty with concentration for recall, those were issues to take into consideration. When attempting to address specifically issues of finance, problem solving, he refuses to really go into it. He just states that he can.

¶6 The trial court also heard testimony from Marcus Momon, who had served as M.G.-H.’s guardian of the person since April 2014. Momon testified that prior to M.G.-H.’s incarceration, Momon saw him “about monthly.” Momon testified that M.G.-H. was, “at one time his [own] payee, but because of problems, mismanaging his money and not doing very well at it, it went back to [a corporate guardian] as being his payee because of issues managing his money.” Momon testified that M.G.-H. “definitely needs a situation where he would have that 24 hour supervision.... I just can say the protective placement needs to be in place because of those services, and that’s where he would get the best care that he needs, the best supervision he would need”

¶7 M.G.-H. testified that he did not want the guardianship and protective placement to continue. He told the trial court, “I got a disability, but I’m very capable of handling my own money and paying my own bills.”

¶8 The trial court then ruled, concluding that “the [C]ounty has met their burden,” and that the four requirements in WIS. STAT. § 55.18(3)(e) had been satisfied.

DISCUSSION

¶9 Protective placement can be ordered or continued only if four requirements are met:

- (a) The individual has a primary need for residential care and custody.
- (b) The individual is ... an adult who has been determined to be incompetent by a circuit court.
- (c) 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.
- (d) The individual has a disability that is permanent or likely to be permanent.

WIS. STAT. §§ 55.08(1), 55.18(3)(e).

¶10 M.G.-H. challenges the sufficiency of the evidence to support the trial court's determinations on only the first and third requirements: that he has a primary need for residential care and custody, and that he is so totally incapable of providing for his own care or custody that he creates a serious risk of harm to himself or others.

¶11 Milwaukee County (the County) argues that if the trial court's findings are insufficient, this court should nevertheless conclude that the record

establishes that all four standards were met sufficiently to continue M.G.-H.'s protective placement.⁵

¶12 In *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987), this court stated the standard of review when there is a challenge to the sufficiency of the evidence in a protective placement proceeding:

We view the elements of protective placement set out in sec. 55.06(2), Stats., as questions of fact. *See* sec. 55.06(7) (trier of fact “must find by clear and convincing evidence” the elements of sec. 55.06(2)); sec. 880.33, Stats. (referring to “findings” of incompetency). We will not overturn the circuit court’s findings of fact unless clearly erroneous.

Id.

¶13 The determination of the need for protective placement is a question of law reviewed independently. *Id.* Even if the necessary findings were not preserved in the record, this court will affirm if there is evidence in the record to support the trial court’s conclusion that M.G.-H. requires protective placement. *Kolpin v. Pioneer Power & Light Co. Inc.*, 162 Wis. 2d 1, 30, 469 N.W.2d 595 (1991) (appellate court will uphold discretionary ruling on a reason not advanced by trial court when “there are facts of record which could support” it).

⁵ The County also argues that the issue raised in this appeal is moot in light of subsequent proceedings where a new protective placement order was entered on the next *Watts* review, on May 5, 2016. The County relies on an unpublished slip opinion as direct authority for the mootness argument. There is no clear precedent, and we are concerned about the County’s ability to process *Watts* reviews fast enough to obviate the concern that this question will evade review. *See G.S., Jr. v. State*, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984). We therefore chose to exercise our authority to decline to dismiss on mootness grounds.

1. Primary need for residential care.

¶14 Protective placement is intended to “protect the individual from financial exploitation, abuse, neglect, and self-neglect[.]” WIS. STAT. § 55.001. A court may order protective placement for an individual who “has a primary need for residential care and custody.” *See* WIS. STAT. § 55.08(1)(a). This court, in a case construing WIS. STAT. § 55.08, concluded as follows:

A person has a primary need for “residential ... custody” in § 55.08(1)(a) when the person has a primary need to have someone else exercising control and supervision of the person in the person’s place of residence for the purpose of protecting the person from abuse, financial exploitation, neglect, and self-neglect.

Jackson Cnty. Dept. of Health and Human Svc. v. Susan H., 2010 WI App 82, ¶2, 326 Wis. 2d 246, 258, 785 N.W.2d 677. “‘Residential care’ is ... the provision of a person’s daily needs in the place where the person resides.”” *Id.*, ¶13. “‘Residential custody’ ... means that the control and supervision is exercised by persons present in the place where the person who needs protection resides.”” *Id.*, ¶15.

¶15 M.G.-H. argues, as to the primary need for residential care and custody, that “the record wholly lacks information relating to [M.G.-H.’s] ability to perform activities of daily living. Certainly, there was no testimony that, for example, [M.G.-H.] was known to let food go rancid, forget to pay his bills, or wandered outside when unattended.”

¶16 The County argues that the evidence showed that despite being fairly independent in some respects, M.G.-H. is unable to perform activities of daily living related to managing his daily treatment needs for schizoaffective disorder

and his finances. The County notes that a less restrictive option has already been attempted, unsuccessfully, for his problem with money management.

¶17 Contrary to M.G.-H.'s argument, the evidence in the record supports the fact that M.G.-H. needs someone else's control and supervision to protect him from financial exploitation and self-neglect. It is true, as M.G.-H. argues, that this record does not show that he lacks the ability to dress, shower, or feed himself. But proof of those inabilities is not required. Applying the statute to his situation, the test is whether he needs control and supervision to avoid financial exploitation and decompensation from not taking medications, and the record shows he is particularly vulnerable to both.

¶18 The record shows that Dr. Piering's diagnosis was two-fold—schizophrenia and dementia. While schizophrenia may be managed with a regular medication regimen (assuming the patient understands the need), dementia cannot. M.G.-H. lacks that understanding according to Dr. Piering. Dr. Piering's report stated that during the April 2015 evaluation M.G.-H. did not acknowledge his diagnosis and denied the need for his medications.

¶19 M.G.-H. counters that he acknowledged having a disability. But in context, M.G.-H.'s testimony shows his lack of understanding and insight into his dual diagnosis. He testified to having a disability, did not identify it, and continued to simply insist he could manage on his own. His testimony shows his lack of understanding and acceptance. Given the second part of his diagnosis, dementia, the record shows that his ability to understand is compromised. Dr. Piering testified that M.G.-H. was at risk of decompensating from failing to maintain his treatment. Daily treatment is, for M.G.-H., a *daily* need, and because he is incapable of managing that need, it is necessary to have it provided in a

residential setting. This is specific evidence in the record that supports the trial court's conclusion that M.G.-H. has a primary need for protective placement.

¶20 Additionally, M.G.-H.'s guardian of the person, Momon, testified to M.G.-H.'s previous mismanagement of his money and Momon's opinion that M.G.-H. needs someone to manage it and pay his bills. Momon testified that M.G.-H. had been given the management of his own finances at one recent point, and when he showed that he was incapable of doing so, the responsibility had been transferred back to a payee.

¶21 Relatedly, Dr. Piering administered tests in the mental status exam which Dr. Piering testified M.G.-H. could not complete, confirming Dr. Piering's diagnosis of dementia. The test was to have M.G.-H. state serial 3s, three of three recall, and also animal naming. In the evaluation with Dr. Piering, M.G.-H. refused to engage on the tests that related to his ability to handle his finances. As well as supporting the dementia diagnosis, M.G.-H.'s inability to perform these tests and his refusal to do others adds support for Dr. Piering's and the trial court's conclusions that M.G.-H. lacked the ability to handle his finances and meds.

¶22 Finally, we note that the record shows that Dr. Piering specifically observed M.G.-H.'s ongoing inability to avoid alcohol, which made his mental health problems worse. This added factor further supports the sufficiency of the record.

¶23 The evidence about ongoing alcohol use, M.G.-H.'s inability to recognize his medical needs and manage his treatment, and M.G.-H.'s demonstrated inability to manage his finances support the finding that he had "a primary need to have someone else exercising control and supervision of the person in the person's place of residence for the purpose of protecting the person

from abuse, financial exploitation, neglect, and self-neglect.” *See Jackson Cnty.*, 326 Wis. 2d at 258.

2. Substantial risk of harm to others or self.

¶24 The above facts in the record support the second conclusion—that M.G.-H. is so totally incapable of providing for his own care and custody that he creates a substantial risk of harm to others or himself—as well. Dr. Piering considered this history an indication that he was likely to create a substantial risk of harm to himself. M.G.-H. had harmed another in a domestic violence incident and had violated a restraining order, which was evidence that his incapability of providing for his own care does create a risk of harm to others. The record includes a report filed by M.G.-H.’s guardian on Feb. 11, 2014, which stated that M.G.-H. was “violent towards people and property.” M.G.-H. had a recent history of suicidal ideation—he had been hospitalized for it as recently as September 2014—and a long history of suicide attempts, including a jump from a building that required extensive back surgery. This is direct evidence of substantial risk to himself, especially in light of his incapacity to manage his mental health treatment.

¶25 M.G.-H. argues that the County fails to meet its burden of showing that protective placement is the least restrictive option for him. But in so arguing, he ignores his track record, past and recent, and his diagnosis of dementia, as well as schizophrenia.

¶26 Because the record contains evidence that supports the continued protective placement of M.G.-H., the order is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* Wis. Stat.
Rule 809.23(1)(b)4.

