COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2006

Cornelia G. Clark
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. 2006AP1891 **Cir. Ct. No. 2002ME835**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF ROBERT C.B.:

WAUKESHA COUNTY,

PETITIONER-RESPONDENT,

V.

ROBERT C. B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed.*

¶1 BROWN, J.[1] This is an appeal by Robert C.B. He wants to live with his mother but Waukesha County, by virtue of its authority over those committed under WIS. STAT. ch. 51, insists that he live in an independent living setting in the community instead. Robert asked the circuit court to order Waukesha County to allow him to reside with his mother on the grounds that it was the "least restrictive alternative." The trial court held, inter alia, that its authority was limited to determining "the least restrictive placement of an individual; whether that is inpatient or outpatient treatment." The court reasoned that once that decision has been made, the conditions of outpatient treatment or inpatient treatment, as the case may be, is one for the treatment experts to make. Robert vigorously argues that the trial court has misread the law. We disagree and hold that the trial court is correct.

¶2 It is unnecessary to get into the minutiae inherent in Robert's arguments to this court. Suffice it to say, he hoists the flag of the Patients Bill of Rights, WIS. STAT. § 51.61(1)(e) which gives him a right, as a patient, to the least restrictive conditions necessary to achieve the purposes of his commitment. He also cites article 1, section 9 of our state constitution which guarantees a remedy for every wrong. He equates "least restrictive condition" with the idea that a person has a right to fundamental freedom and civil liberty which may only be restricted in a WIS. STAT. ch. 51 setting if there is a treatment need that necessitates some curtailment of this freedom. He further argues that the issue of whether the curtailment of his freedom is appropriately tied to treatment is a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

question that the courts have authority to review. Hence, he argues, the trial court must have the authority to review the decision not to let him live with his mother.

¶3 His construction of the term "least restrictive alternative" is too broad. Robert would have us equate the term simply with the notion of "freedom" in the general sense and would also have us hold that any curtailment of any freedom is subject to court review. But the concept of "least restrictive alternative" does not mean the freedom to do every little thing without governmental interference unless there is some legitimate reason shown to curtail it in any degree. Rather, the term "least restrictive alternative" is a concept tied peculiarly to a person's liberty interests. By liberty interests, we mean the freedom to move about freely rather than being locked up.[2] This is really nothing more than a codification of the famous ***Lessard*** case which sought to insure that an individual not remain institutionalized if a less restrictive alternative is available.[3] Thus, the court's duty is to set the maximum level of restriction upon a person's freedom of movement. Once the court sets the maximum level of restriction on

[2] Robert writes: "it must be noted that Robert is not suggesting that the circuit court must micro-manage every treatment decision made during a Ch. 51 commitment. Far from it. All Robert is asserting is that a person committed under Ch. 51 has the right to a court review of a particular condition that the person believes is unlawfully restrictive to his or her civil rights or freedom." The logic of this statement escapes us. What Robert is actually arguing is that the court must micro-manage if the WIS. STAT. ch. 51 committee requests the court to do so. That cannot be the law.

[3] ***Lessard v. Schmidt***, 349 F. Supp. 1078 (E.D. 1972), was a class action on behalf of all persons over eighteen years of age who had been held involuntarily pursuant to the Wisconsin involuntary commitment statute in effect at that time. The case dealt with the deprivation of liberty in the form of civil commitment to inpatient care. The court held that "even if the standards of adjudication of mental illness and potential dangerousness are satisfied, a court should order full-time involuntary hospitalization only as a last resort…. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." ***Id***. at 1095. Thus, when the ***Lessard*** court was speaking of fundamental rights, it was speaking to the freedom from the restraint of involuntary commitment without due process.

freedom of movement, the *place* of treatment within the level of restriction is for the county's experts to make. It is not a decision that the trial court makes.

¶4 We arrive at this decision by construing the pertinent statutes. Construction of a statute is a question of law, reviewed without deference to the trial court's conclusion. ***J.R.R. v. State***, 145 Wis. 2d 431, 435, 427 N.W. 2d 137 (Ct. App. 1988). Where language is clear and unambiguous, the statute must be given its plain meaning. ***Id***. We are required to read subsections of a statute in pari materia. ***Id***. at 435-36.

¶5 The ***J.R.R.*** court previously spelled out the responsibilities of the trial court. In that case, J.R.R. contended that the trial court had authority to order placement in the open unit within a designated facility. The ***J.R.R.*** court rejected the argument and ruled that the trial court was not authorized to impose treatment conditions as part of a commitment order. ***Id***. at 433. It reasoned that due process requires a commitment determination to consider those alternatives which would have a less drastic effect on the curtailment of the individual's freedom and civil liberties. ***Id.*** at 437. The requirement is satisfied by WIS. STAT. § 51.20(13)(c)2., requiring the court to designate the maximum level of *inpatient facility* in which treatment can occur. ***J.R.R.***, 145 Wis. 2d at 437. Treatment decisions beyond this due process consideration are properly reserved for medical authorities. ***Id***. The ***J.R.R.*** court then wrote: "Recognizing this, the statutes require and permit the [WIS. STAT. §] 51.42 community board, through its treatment facilities and personnel, to make these medical judgments." ***Id***.[4]

[4] Robert asserts that if we hold that ***J.R.R.*** "is applicable it is wrongly decided, internally inconsistent, contrary to statutory and constitutional law, and just plain wrong." Robert's argument is better directed to our supreme court.

¶6 Thus, the law is that the trial court's duty is to fulfill the due process requirement of determining the least restrictive curtailment of a person's freedom of movement. Once the court completes its duty, then it is for the county to measure the treatment needs consistent with the liberty interests. ***Id***. The trial court is not authorized to set the place of treatment. To do so would be tantamount to imposing treatment conditions as part of the committing order, the very thing ***J.R.R.*** rejected.

¶7 Here, Robert's freedom to move about is not curtailed in any way. He is in a community independent living arrangement, not a locked ward. He is allowed to come and go as he pleases. He is allowed to visit his mother daily. Nothing prohibits his freedom of movement. The present maximum level of inpatient facility is zero.

¶8 There is good reason why, having established his freedom to move about at one hundred percent, Waukesha County has nonetheless sought to treat Robert at the Madison House Transitional Living rather than his mother's house. Dr. Koch, a psychologist, testified that Robert has three prior battery offenses against his mother since 1985, the most recent being in August 2002 when he "beat her head against the wall [and] stopped her from calling the authorities." Dr. Koch also testified that, in terms of treatment, it would not be in Robert's best interests to reside with his mother who has an aortic aneurism, making her a serious candidate for grave physical injury in the event of another assault. Robert's assaults occurred when he was residing with her and he has not assaulted her since he has been living elsewhere. Dr. Koch testified that residing where Robert was not forced to deal with the stresses of interaction with his mother was beneficial to him. Thus, there is good reason for not wanting Robert to live with his mother.

¶9 We have one final comment. Robert complains that he should have a remedy if the treatment providers have made a choice that he believes to be wrong. He has a forum to dispute any treatment decision by utilizing the grievance procedures mandated by WIS. STAT. § 51.61(5) and (7). It appears that this procedure applies to county departments and includes "service providers" and "programs." WIS. ADMIN. CODE § HFS 94.01(2) (Dec. 2004). Certainly this community placement qualifies as a program.

By the Court.—Order affirmed.

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