

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**September 9, 2009**

David R. Schanker  
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. 2009AP985-FT**

**Cir. Ct. No. 2007GN174**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF  
STANLEY W. F.:**

**WAUKESHA COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**STANLEY W. F.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
DONALD J. HASSIN, JR., Judge. *Affirmed.*

¶1 ANDERSON, J.<sup>1</sup> Stanley W. F. contends that the circuit court erred in determining the evidence presented at the *Watts*<sup>2</sup> review hearing justified his continued protective placement. We disagree with the reliance on *Zander v. County of Eau Claire*, 87 Wis. 2d 503, 275 N.W.2d 143 (Ct. App. 1979), by Stanley, the State, and the circuit court. We hold that the diagnosis of Stanley's degenerative brain disorder was improperly overlooked by the court. We do not affirm the circuit court on the grounds it relied upon for its ruling, nonetheless, because the diagnosis of Stanley's degenerative brain disorder is still on record and presently unchallenged, we are ultimately able to affirm that Stanley is in need of continued protective placement. See *Linda L. v. Collis*, 2006 WI App 105, ¶63, 294 Wis. 2d 637, 718 N.W.2d 205 (court may affirm on grounds different than those relied on by the circuit court).

¶2 Protective placement began for Stanley on November 9, 2007, when the Waukesha county circuit court granted the contested petition for protective placement. The finding by the circuit court of a degenerative brain disorder was the underlying basis for the protective placement. Waukesha County Department of Health & Human Services filed a petition for the required annual review on September 12, 2008. The circuit court, at the protective placement review hearing on December 12, 2008, found Stanley continued to meet the criteria for protective placement pursuant to WIS. STAT. § 55.08(1) and ordered the continuation of Stanley's protective placement. Stanley appeals.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

<sup>2</sup> *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 84, 362 N.W.2d 104 (1985).

¶3 On appeal, Stanley contends his primary need is for active treatment, rather than protective placement. Stanley also challenges the finding that he has a disability that is permanent or likely to be permanent, as he asserts the disability from his alcoholism is not permanent and may be treated. The premise of Stanley's appeal is *Zander*, 87 Wis. 2d at 514. As Stanley's incompetency and disability stem from his degenerative brain disorder, we find *Zander* inapplicable to Stanley's situation. *See id.*

¶4 WISCONSIN STAT. § 55.08(1) requires the following elements to be found in order to warrant continued protective placement:

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

(b) The individual is a minor who is not alleged to have a developmental disability and on whose behalf a petition for guardianship has been submitted, or 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.

¶5 The elements of protective placement set out in WIS. STAT. § 55.08(1) are questions of fact. *See* WIS. STAT. § 55.10(4)(d). We review the circuit court's findings under the clearly erroneous standard. WIS. STAT. § 805.17(2). "[T]he higher question regarding the necessity for protective placement [is] one of law because it involves the application of the facts as found by the court to a statutory concept." *K.N.K v. Buhler*, 139 Wis. 2d 190, 198, 407

N.W.2d 281 (Ct. App. 1987) (citing *Nottelson v. DILHR*, 94 Wis. 2d 106, 115-16, 287 N.W.2d 763 (1980)). Questions of law are reviewed independently from a circuit court's conclusions. *Ball v. District No. 4, Area Bd.*, 117 Wis. 2d 529, 537, 345 N.W.2d 389 (1984).

¶6 At the 2007 hearing establishing protective placement and a permanent guardianship, the State introduced a report by Dr. Pamela McMurray diagnosing Stanley with a degenerative brain disorder, possibly alcohol induced dementia or Alzheimer's type dementia. The circuit court at the aforementioned hearing stated, "I'm satisfied it's not limited to an alcohol issue, but we are dealing with a question as it relates to a brain disorder." The parties failed to introduce this report into evidence at the 2008 review hearing and the circuit court did not take judicial notice of the report sua sponte. As the report is the underlying basis for Stanley's protective placement, it should have been addressed at the review hearing.

¶7 The circuit court, as well as an appellate court, properly takes judicial notice of prior proceedings and determinations insofar as they are germane to a determination of the issues. *See Swan Boulevard Dev. Corp. v. Cybulski*, 14 Wis. 2d 169, 171, 109 N.W.2d 671 (1961). Accordingly, we take judicial notice of the 2007 hearing and the evidence therein establishing Stanley's degenerative brain disorder. *See id.* Stanley declined to contest the diagnosis at his 2008 review hearing. Indeed, the pertinent issue appeared to shift from Stanley's degenerative brain disorder diagnosis at the 2007 hearing to addressing Stanley's alcoholism and what category of alcoholic he falls into under *Zander*. *See Zander*, 87 Wis. 2d at 514.

¶8 The following factors must be met for a continuation of protective placement for an individual in Stanley's situation: the individual has a primary need for residential custody and care; the individual has been determined to be incompetent by a circuit court; 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; the individual has a disability that is permanent or likely to be permanent. *See* WIS. STAT. § 55.08(1).

¶9 The circuit court determined Stanley's primary need to be residential care and custody. Dr. Arun Parikh testified that the objective of Stanley's care is to be "keep[ing] him in a place where he cannot have access to alcohol. It would ... have to be a locked facility, and it can be either [sic] treatment program or a living situation." Dr. Parikh anticipates the results of Stanley's use of alcohol to be "[death] or a diabetic coma."

¶10 The circuit court has determined Stanley to be incompetent as a result of a degenerative brain disorder and appointed a guardian. At present, Stanley does not assert competency. Dr. Parikh testified Stanley is not capable of handling "his current freedom, his treatment level, and his medical decision[-]making." Furthermore, Dr. Parikh testified that Stanley is unable to make a knowing and voluntary choice about his alcohol use. This incompetency causes Stanley to contribute to situations with risks of substantial harm.

¶11 Testimony from the expert witnesses at the 2008 hearing raised examples of harmful behavior exhibited by Stanley: inviting prostitutes back to his apartment, threatening behavior to other residents and staff at his facility, and

taking his electric scooter out and about to purchase alcohol. The predicted consequences associated with alcohol use for Stanley include a probability of death or a comatose state. The substantial risk of serious harm exists in the consequences for Stanley of alcohol consumption, let alone the risk to other residents from his threatening behavior.

¶12 Stanley's disability stems from his degenerative brain disorder. Stanley did not contest this diagnosis at the 2008 hearing and there is nothing in the record to indicate the disorder is anything but permanent. Indeed, the 2007 comprehensive evaluation established a progressive cognitive impairment diagnosed by neuropsychologist Dr. McMurray.

¶13 We are satisfied Stanley's circumstances and unchallenged diagnosis of degenerative brain disorder necessitate protective placement. In so concluding, we affirm on different grounds than the circuit court's decision that Stanley's alcoholism merits his protective placement. See *Linda L.*, 294 Wis. 2d 637, ¶63. Stanley's diagnosis of a degenerative brain disorder, relied upon in 2007 by the court for its initial protective placement order, still stands. The 2008 proceeding provided evidence that the consequences of such a diagnosis continue to be present. The order of Stanley's continued protective placement is affirmed.

*By the Court.*—Order affirmed.

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

