COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1493 **Cir. Ct. No. 2009GN75**

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

IN THE MATTER OF THE PROTECTIVE PLACEMENT OF JIM D.B.:

SHEBOYGAN COUNTY,

PETITIONER-RESPONDENT,

V.

JIM D. B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: GARY J. LANGHOFF, Judge. *Reversed and cause remanded with directions.*

Before Neubauer, P.J., Anderson and Reilly, JJ.[1]

¶1 PER CURIAM. Sheboygan County successfully petitioned for the guardianship and protective placement of Jim D.B. due to his incompetency. Jim appeals from the order requiring his protective placement on the basis that the evidence was insufficient to support the order. Because the protective placement order does not reflect the record of the hearing, the circuit court's findings are inadequate to allow us to review the sufficiency of the evidence. We therefore reverse and remand for further findings.

¶2 Jim has a history of depression, anxiety, labile moods, substance abuse, opioid addiction secondary to chronic pain, and has experienced delirium with misuse of his prescription medications. Still, he lived in his own apartment for several years. In November 2009 police found him disoriented, dehydrated and unkempt. A medication overdose was suspected. Initially hospitalized for medical and psychiatric treatment, Jim was transferred to a locked unit at Rocky Knoll Health Care Center. The County filed two petitions. One sought a determination and order that, due to his incompetence, Jim was a proper subject for a permanent guardianship of the person and of the estate. The second sought an order for protective placement.

¶3 Psychiatrist Clint Norris, M.D., evaluated Jim before the hearing on the petitions. Dr. Norris' report concluded that Jim had "impaired insight [and] judgment with pain/psychotropic medications[.] High risk of delirium."

[1] A three-judge panel is deciding this case because both WIS. STAT. chs. 54 and 55 are implicated. *See* ***Waukesha County v. Genevieve M.***, 2009 WI App 173, ¶¶3-5, 322 Wis. 2d 131, 776 N.W.2d 640 (per curiam).

Dr. Norris recommended protective placement but opined that a locked unit was not needed. Christine Freund, a county Health and Human Services (HHS) protective placement specialist, likewise concluded that Jim's cognitive impairment, lack of insight into his needs and inability to care for himself made him an appropriate candidate for protective placement.

¶4 At the hearing on the petitions, Dr. Norris testified that Jim has a serious or persistent mental illness that he believes to be permanent. Dr. Norris also testified that, if not protectively placed, there was a substantial risk that Jim would harm himself or be dangerous if he resumed inappropriately taking medications as he had in the past. Dr. Norris again opined that while Jim needed a "supervised" or "some type of structured" setting, a locked facility was not necessary.

¶5 Freund agreed that Jim needed protective placement. She testified that Jim was confused when she first met him while detained at the hospital and that his apartment was very dirty. Freund testified that Jim originally was placed in a locked unit due to behavioral reasons and the staff's "grave concern" about his elopement. When she performed her review two weeks before the hearing, Jim had shown some cognitive improvement but still lacked insight because he thought he was "fine." Freund said that if Jim's condition stabilized, and if ordered, HHS would look at transfer to an unlocked facility, such as community placement in a group home.

¶6 Jim's guardian ad litem testified that Jim did not appear to oppose a guardianship but "I know he is against the protective placement." The GAL recommended a guardian of the person and estate and, as he felt it was necessary

for Jim's protection, protective placement in "some sort of supervised setting." Jim's advocacy counsel offered no position. The court did not address Jim.

¶7 The court granted both of the petitions. Jim appeals the order granting the protective placement petition.

¶8 To prove a need for protective placement, the County had to prove that Jim: (1) had a "primary need for residential care and custody," (2) had been "determined to be incompetent by a circuit court," (3) as a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, was "so totally incapable of providing for his … own care or custody as to create a substantial risk of serious harm to himself … or others," and (4) had a disability which was permanent or likely to be permanent. *See* WIS. STAT. § 55.08(1).

¶9 These elements present questions of fact. *See* WIS. STAT. § 55.10(4)(d); *see also* ***K.N.K. v. Buhler***, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). We review the circuit court's findings under the clearly erroneous standard. WIS. STAT. § 805.17(2). The question of the necessity for protective placement, however, is one of law which we review independent of the circuit court's conclusions. ***K.N.K.***, 139 Wis. 2d at 198.

¶10 As to the protective placement petition, the court found only:

> The court finds that the standards for protective placement have been met and the court will order a protective placement pursuant to Chapter 55 of the Wisconsin statutes. We will continue the protective placement where he is right now with the expectation, as [the GAL] indicated, that he can transition into a community setting.

¶11 The written protective placement order found that Jim needs protective placement because: (1) he has a primary need for residential care and custody; (2) he was adjudicated incompetent on the date of the hearing; (3) as a result of degenerative brain disorder, he is so totally incapable of self-care that he poses a risk of harm to self or others; and (4) his disability is permanent or likely to be so. It also found that the least restrictive placement consistent with Jim's needs is placement in a locked unit because he poses a risk of elopement.

¶12 There can be little dispute that Jim suffers from a mental illness. He contends, however, that the order requiring his protective placement is not supported by sufficient evidence of all of the statutory criteria. We agree because it does not accurately reflect what transpired at the hearing.

¶13 To find that Jim had a primary need for residential care and custody "dictates a finding that his primary need is for protective placement rather than for active treatment or protective services." *See* ***Zander v. County of Eau Claire***, 87 Wis. 2d 503, 514, 275 N.W.2d 143 (Ct. App. 1979). At the hearing, the court stated only that it "finds that the standards for protective placement have been met."

¶14 The court also was to make a finding as to what type of incapacity led to Jim's inability to care for himself. *See* WIS. STAT. § 55.08(1)(c). At the hearing the court found in connection with the guardianship petition that Jim suffers from a "persistent mental illness." The guardianship and protective placement orders, however, both indicate that Jim's incompetence was due to a "degenerative brain disorder." A "serious and persistent mental illness" does not include degenerative brain disorder. WIS. STAT. § 55.01(6v). Dr. Norris expressly testified that Jim does not have a degenerative brain disorder. The only evidence

shedding light on this discrepancy between the finding and the orders is the testimony of Freund, the HHS worker. She acknowledged that she indicated on the guardianship petition that Jim has a degenerative brain disorder because "[t]hat's what [she] thought at the time."

¶15 We note another discrepancy. As the hearing opened, Jim's advocacy counsel stated that he appeared with "Mr. [B.]." The transcript face page also indicates that Jim was present in person. Indeed, a proposed incompetent's physical presence in the courtroom during the proceedings generally is required. ***Knight v. Milwaukee County***, 2002 WI App 194, ¶¶1, 3, 256 Wis. 2d 1000, 651 N.W.2d 890. Oddly, however, both of the orders indicate that Jim was not present because the GAL waived his attendance. If that were the case, the GAL would have had to certify in writing to the court the specific reasons why Jim was unable to attend. *See* WIS. STAT. § 55.10(2). No written certification appears in the record.

¶16 Also of concern is the finding that the least restrictive placement consistent with Jim's needs is a locked unit because he poses a risk of elopement. Freund testified that Jim initially was deemed to be an elopement risk. No evidence was elicited that he remains so. Dr. Norris testified that he did not believe Jim needed to be in a locked unit.

¶17 This exchange followed the court's oral order that Jim be protectively placed:

> THE COURT: I don't think he should remain at [Rocky Knoll] for an extended period of time.
>
> [ADVOCACY COUNSEL]: Do you mean in a locked unit?

> THE COURT: He may not be in a locked unit—is he in a locked unit?
>
> [ADVOCACY COUNSEL]: I was there this morning, it is locked.
>
> THE COURT: Okay. What do you think, [Rocky Knoll social worker]?
>
> [SOCIAL WORKER]: I would think that they were working on transitioning him to the locked unit to giving him passes during the day. I would feel most comfortable doing that. So the open unit and then to the community.
>
> THE COURT: We will start that way and the expectation is that he will work his way back into the community. That's the hope and expectation of the court. That's it.

¶18 The clear legislative intent of WIS. STAT. ch. 55 is to place the least possible restriction on one's personal liberty and exercise of constitutional rights consistent with due process and protection from harm. *See* WIS. STAT. § 55.001. Neither the above exchange nor the court's conclusory remark that the standards for protective placement were met constitutes the required "specific finding" as to the need for Jim's placement in a locked unit. *See* WIS. STAT. § 55.12(2).

¶19 These incongruities between record and order are troubling. They lead to the inference that the court is being presented with already-completed documents, "findings" already found, such that disposition becomes a perfunctory exercise. The statute requires specific findings. ***Zander***, 87 Wis. 2d at 518. The court here did not separately state its findings of fact and conclusions of law and did not indicate how the evidence supported its conclusions.

¶20 When confronted with inadequate findings, we may affirm if the circuit court's conclusions are supported by the great weight and clear preponderance of the evidence; reverse if they are not so supported; or remand the

cause for the purpose of making appropriate findings of fact and conclusions of law. ***Id.*** at 518. Because of the discrepancies described and lacking specific findings of fact, we cannot conclude that the evidence supports the elements required for protective placement. We therefore must reverse and remand for findings by the circuit court and, if deemed necessary by the court, an additional evidentiary hearing.

¶21 The court should specifically find whether Jim is incapable of caring for himself, or merely unwilling to do so; which rights he is incompetent to exercise and under what circumstances; whether, when stabilized, Jim is capable of making a knowing and voluntary choice about taking his medications as prescribed; what specific needs make protective placement in a locked unit the least restrictive alternative; what substantial risk of serious harm Jim presents; and whether Jim's disability is permanent or likely to be so. *See* ***id.*** at 517. These findings must be made on the evidence presented at the hearing, and not from sources outside the record. ***Id.***

¶22 A court should make the specific findings described in ***Zander***, 87 Wis. 2d at 517, and must make those set forth in WIS. STAT. § 55.08(1) before ordering a protective placement. The standard Order on Petition for Protective Placement or Protective Services provides a checklist of sorts to assure that findings on each of the statutory elements are at least minimally made. Protective placement hearing procedure also is set forth in the guardianship section of the judicial benchbook. *See* WISCONSIN JUDICIAL BENCHBOOK GA 3-15 (2010).

¶23 We recognize that hearings on guardianships and protective placements, especially if uncontested, often are informal. *See* ***Coston v. Joseph P.***, 222 Wis. 2d 1, 20, 586 N.W.2d 52 (Ct. App. 1998). They cannot become

mechanical exercises, however, that lose sight of the fact that individuals have a significant liberty interest in living where and under what conditions they choose. *See* ***Kindcare, Inc. v. Judith G.***, 2002 WI App 36, ¶12, 250 Wis. 2d 817, 640 N.W.2d 839. For the above-stated reasons, we reverse the protective placement order and remand for proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

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