

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2004

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. 04-0438
STATE OF WISCONSIN**

Cir. Ct. No. 88-GN-23P

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF THE GUARDIANSHIP AND
PROTECTIVE PLACEMENT OF PEGGY R.:**

DUNN COUNTY,

PETITIONER-RESPONDENT,

v.

PEGGY R.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Peggy R. appeals an order of the circuit court extending her protective placement for one year and determining Dunn County

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

had shown a good faith effort to find and fund a new, less restrictive, placement for her. Peggy argues the evidence is insufficient to support this determination. This court disagrees and affirms the order.

Background

¶2 Peggy has been subject to guardianship and protective placement under WIS. STAT. ch. 55 since 1988 and is currently placed at the Trempealeau County Health Care Center. After her 2003 annual *Watts* review,² Peggy's case manager did not recommend a change in her placement. The report noted that a change to a community placement "may be appropriate; however the cost would exceed the available funds and is not reasonable given the cost and actual benefits and level of functioning to be realized by the person and/or the number or projected number of individuals who will need protective placement."

¶3 Peggy requested an adversarial hearing on the placement issue. She and the County stipulated that she could be properly supervised in a community placement; that her health, social, and rehabilitative needs could be met; and that it would be reasonable to place her at a cost of approximately \$7,800 considering the benefits she would receive from the placement. It was also agreed that the Health Care Center was not the least restrictive placement for Peggy.

¶4 The court ultimately determined that the County had made a good faith effort to find and fund a new placement for Peggy even though budget

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

constraints meant there would be no change, and it continued her placement for one year. Peggy appeals.

Discussion

¶5 In protective placements made pursuant to WIS. STAT. § 55.06, the county must make a “good faith, reasonable effort to find and fund an appropriate placement” for the ward. *Dunn County v. Judy K.*, 2002 WI 87, ¶28, 254 Wis. 2d 383, 647 N.W.2d 799. Peggy’s sole argument on appeal is that the County failed to meet this burden of proof. Whether a party has met its burden is normally a question of law that this court reviews de novo. *Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988). When, however, the burden is to prove reasonableness, the circuit court’s legal conclusion is intertwined with its factual determinations. *Figliuzzi v. Carcajou Shooting Club*, 184 Wis. 2d 572, 590, 516 N.W.2d 410 (1994). When legal issues are intertwined with the underlying facts, the circuit court’s legal conclusions are entitled to substantial weight. *Kashishian v. Al-Bitar*, 194 Wis. 2d 722, 731, 535 N.W.2d 105 (Ct. App. 1995). The court’s factual findings are not disturbed unless clearly erroneous. *Judy K.*, 254 Wis. 2d 383, ¶38.

¶6 The determination of what constitutes an appropriate placement depends on the application of all the factors in WIS. STAT. § 55.06(9)(a):

Placement by the appropriate board or designated agency 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 [1] the needs of the person to be protected for health, social or rehabilitative services; [2] the level of supervision needed; [3] the reasonableness of the placement given the cost and the actual benefits in the level of functioning to be realized by the individual; [4] the limits of available state and federal funds and of county funds required to be

appropriated to match state funds; and [5] the reasonableness of the placement given the number or projected number of individuals who will need protective placement and given the limited funds available.

¶7 Peggy complains “there had been no specific request made to the county board to fund Peggy’s needs” and even if this specific request is not required, the County “is nonetheless required to show that with its available resources it could not fund a specified placement” Here, Peggy argues the County could not meet this burden because it was using only an estimate of the cost of a placement, not a specific placement proposal. County workers, however, testified that there were no funds available for a community placement and that it is the county’s practice not to seek a specific placement unless it is certain the placement can be made.

¶8 Peggy complains this runs afoul of *Judy K.*’s “find and fund” standard because the County has failed to first find a specific placement. *Judy K.* does not establish such a hierarchy simply because it says “find and fund” as opposed to “fund and find,” and Peggy does not cite to any portion of *Judy K.* to support her contention. While the social worker testified the County does not investigate specific potential placements when no funding for any such placement is available, this policy is not contrary to the holding in *Judy K.* Nothing in that case requires the County to engage in the hollow gesture of finding a specific placement when it is known that under no circumstances will the County be able to fund it.

¶9 This does not excuse the County from evaluating individuals, from seeking access to matching federal and state funding, or from paying for a placement if funds are available. Indeed, the issue in *Judy K.* was whether the County had to incur any cost at all in placing an individual. *Judy K.*, 254 Wis. 2d

383, ¶1. Here, however, after the County had appropriated funds for the department of human services budget, received matching funds from federal and state sources, and allocated the money among the various wards, nothing remained in the budget to finance Peggy's transfer to any location and no additional federal or state funds were available. In this situation, identifying a specific placement would be futile.

¶10 Peggy also complains that the County's policy "fails to account for the multi-factor approach to placement" under WIS. STAT. § 55.06(9)(a). Even if this is generally true, it is not the case here. The parties stipulated to at least four components of § 55.06(9)(a). First, they stipulated that a community placement would be the least restrictive placement for Peggy. Then, the parties stipulated to three of the specific factors to be considered. They agreed that a community placement (1) would meet Peggy's health, social, and rehabilitative needs; (2) would provide an adequate level of supervision; and (3) would be reasonable given the cost and benefits Peggy was likely to realize.

¶11 The remaining two statutory factors for consideration are the limits of funding available and the reasonableness of placement given other individuals who will need placement and given funding limitations. The County offered evidence that no additional funding was available under any scenario. It also argued that Peggy's otherwise reasonable community placement becomes unreasonable because funding it effectively eliminates funds for placing other individuals on the County's waiting list.

¶12 The court concluded the County met its burden of a good faith effort, and this court agrees. The County determined that the least restrictive environment for Peggy based on her needs would ordinarily be a community based

setting. Rather than find a specific placement for her, the County realized that all of its resources were expended elsewhere and under no circumstances could it appropriate any additional funding for Peggy. As a result, although it could “find” Peggy should be placed in the community, the County realized it could not “fund” that placement.

¶13 “[T]he find and fund standard recognizes that resources are not limitless and that counties carry a substantial burden in meeting the needs of individuals subject to protect placements.” *Judy K.*, 254 Wis. 2d 383, ¶32. In other words, county budget constraints will sometimes require a ward to continue in a placement that may not be the least restrictive. Given the competition between “the needs of the person to be placed” and “the placement resources of the appropriate board,” the resources factor sometimes prevails. That does not constitute failure of the County to show a good faith effort to find and fund placement for the individual.³

By the Court.—Order affirmed.

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

³ The court ordered the County to internally reevaluate Peggy’s case within six months to determine whether placement could be effectuated. It stated “to make sure that we’re consistent with the efforts that need to be done, that that effort be individualized with regard to [Peggy] within the next six months so that we can have a record that’s presented to the court that meets all the requirements of the statutes.”

Peggy argues this conclusively shows that the County did *not* meet its burden in the trial court. However, the court noted that “to date, and with regard to this hearing, I’m satisfied.” This court is also satisfied that the record as a whole demonstrates an “individualized determination of placement.” *See Dunn County v. Judy K.*, 2002 WI 87, ¶41, 254 Wis. 2d 383, 647 N.W.2d 799.

