COURT OF APPEALS DECISION DATED AND FILED

January 31, 2012

A. John Voelker
Acting 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. 2011AP1978

Cir. Ct. No. 2011GN7

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF GREGORY M.:

OUTAGAMIE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

GREGORY M.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed.*

¶1 MANGERSON, J.[1] Gregory M. appeals an order for protective placement. He contends the evidence in support of the protective placement order was insufficient. We disagree and affirm.

BACKGROUND

¶2 In January 2011, Outagamie County petitioned the circuit court for guardianship of Gregory's person and estate, as well as protective placement. At the hearing on the petition, the County called two witnesses: Dr. Thomas Altepeter, a clinical psychologist, and Steve Schotten, a clinical therapist.

¶3 Altepeter testified he administered cognitive tests to Gregory and each test placed him at a range consistent with mild to moderate dementia. On one test of mathematical skills, Gregory, who at the time was fifty-one years old, scored at the level of a seven and one-half year old. Altepeter explained that Gregory's dementia was a permanent condition caused by his chronic substance abuse and prior head injuries. Gregory's head injuries had occurred within the last two to three years. Specifically, Gregory fell down a flight of stairs and, while riding his bicycle, was struck on two separate occasions by a vehicle. Each incident involved alcohol. His most recent injury caused brain bleeding and resulted in a two-week hospital stay. Although Altepeter conceded he did not know when Gregory last consumed alcohol or drugs, Altepeter explained Gregory "has a long history of alcohol and drug dependence" and "if he's not using at this point, it's probably got more to do with the controlled environment he's in."

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Altepeter opined that Gregory was incompetent and in need of both a guardian of his person and estate. As to protective placement, Altepeter opined that Gregory was not capable of adequately providing for his own care and custody, and has a primary need for residential care and custody in a supervised setting. When asked what type of setting would be appropriate to maintain Gregory's safety, Altepeter responded that Gregory needed "a structured environment that would … provide him with regular food … care and supervision." He explained that Gregory needed twenty-four-hour supervision because of his dementia and cognitive limitations as well as his substance abuse. Altepeter elaborated:

> [Gregory is] not able to handle problem-solv[ing] situations. He might be able to handle some of the routine daily things of life, but handling emergencies or situations that might come up if he were independent, he would be at risk to either be taken advantage of or perhaps not exercise resources that are available to him.

He recommended placement at a community based residential facility or group home.

¶5 Schotten testified the County became involved with Gregory, who is homeless, after the warming shelter reported concerns with Gregory's functioning. Specifically, the shelter reported Gregory was calling with questions ten to twelve times a day. Schotten explained the emergency shelter had rented Gregory a motel room; however, the motel wanted Gregory to leave after he "started [a fire] in his microwave drying tobacco."

¶6 Schotten opined that, although Gregory is independent with most daily living activities—he can eat, walk, bathe, dress himself, and use the

telephone unassisted—protective placement was necessary due to deficits in Gregory's short-term memory. Schotten explained:

> [F]rom my contact with [Gregory], again, I'd see a deficit in more the short-term memory just from day to day. I've had to repeat certain stories and the reason for actually guardianship and protective placement. Those concern me just, again, because of, you know, again, his own apartment, emergencies coming up, leaving, you know. Things on that type of thing would be … obviously a dangerous situation for him.

¶7 When asked on cross-examination for an example of a situation where Gregory had placed himself in danger, Schotten gave the example of Gregory's microwave fire. He conceded, however, that he lacked personal knowledge of the fire. Schotten later testified that Gregory's head injuries, which were caused by Gregory's "judgments" were other examples of his dangerous behavior.

¶8 Gregory's guardian ad litem recommended the court order a guardian of the person and estate, but order protective services instead of protective placement. Specifically, the GAL argued the County had not shown that, without the protective placement, Gregory "would suffer irreparable harm, injury, or possibly even death." She stated that Gregory "is very high functioning in his activities of daily living and that with a guardian being appointed for the person and the estate, I believe that he will be able to function and be able to live independently and with some protective services."

¶9 The court determined Gregory was incompetent and in need of a guardian of his person and estate. As for placement, the court determined:

> In this case what the Court sees is a dangerousness that has been documented over the last few months, last couple of years. We have an individual that's a chronic alcoholic and drug abuser who's homeless, who does not have the

> cognitive ability to really care for himself in any meaningful way other than the bare minimums of life. If … this Court was just to say there's been no recent showing of dangerousness to the level of permanent injury, irreparable harm or death, it's likely that history would repeat itself and [Gregory] will find himself intoxicated or drugged up and will risk being injured again like he has in the past. The doctor indicated that if there are further instances of alcohol and drug use, that will cause further damage to his cognitive functioning. If there are head injuries that are sustained, there'll be further cognitive functioning delays, an increase of dementia. And given [Gregory's] history, it is likely that he will become a danger to himself again. The only reason he hasn't become a significant danger to himself recently is it appears that he's been in controlled settings, emergency shelter, warming shelter, and they require sobriety. If we do not keep [Gregory] in a situation where he is supervised, he's likely to relapse and continue to drink. …
>
> I would find that based on his history of drug and alcohol abuse and his injuries related to that abuse and the relative recent past that he is at this time a danger to himself and he is in need of protective placement.

DISCUSSION

¶10 On appeal, Gregory contests only the order for protective placement. He asserts the County failed to offer sufficient evidence to meet its burden of proving he needed to be protectively placed. Before an individual may be protectively placed, the County must prove, by clear and convincing evidence, all of the following:

> (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.

See WIS. STAT. §§ 55.08(1)(a)-(d), 55.10(4)(d).

¶11 Gregory concedes he is incompetent and his dementia is a permanent condition. He asserts, however, the County failed to prove he has a primary need for residential care and custody, or that he poses a substantial risk of serious harm to himself under the dangerousness standard.

¶12 When we review a protective placement order, the circuit court's factual findings will not be overturned unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). However, whether the evidence supports protective placement is a question of law that we review independently. ***Walworth Cnty. v. Therese B.***, 2003 WI App 223, ¶6, 267 Wis. 2d 310, 671 N.W.2d 377.

I. Residential Care and Custody

¶13 Gregory first asserts the County failed to prove he has a "primary need for residential care and custody." *See* WIS. STAT. § 55.08(1)(a). We have interpreted that phrase to mean an individual has a primary need: "(1) to have his or her daily needs provided for in a residential setting; and (2) to have someone else exercising control and supervision in that residential setting for the purpose of protecting the person from abuse, financial exploitation, neglect, and self-neglect." ***Jackson Cnty. DHHS v. Susan H.***, 2010 WI App 82, ¶16, 326 Wis. 2d 246, 785 N.W.2d 677.

¶14 Gregory argues the evidence does not support a determination that he has a primary need for residential care and custody because, unlike the ward in

Susan H., who "require[d] assistance with all her activities of daily living," *see **id.***, ¶¶4, 6, Gregory is ambulatory and able to perform most activities of daily living with little or no assistance. He also asserts that the evidence shows he is able to provide for his daily needs by relying, in part, on services available to the homeless.

¶15 While we agree the evidence shows Gregory is able to perform most daily living activities with little or no assistance, ***Susan H.*** does not stand for the proposition that an individual needs to be completely dependent on others for all aspects of daily living in order for the individual to be protectively placed. *See, e.g.*, ***Milwaukee Cnty. Prot. Servs. Mgmt. Team v. K.S.***, 137 Wis. 2d 570, 576, 405 N.W.2d 78 (1987) ("Protective placement may result from a mere inability to live independently in the community.").

¶16 Here, Altepeter specifically opined that, in his expert opinion, Gregory has a primary need for residential care and custody. Altepeter explained that he was concerned with Gregory's memory deficits and cognitive limitations. To maintain Gregory's safety, Altepeter opined Gregory needed twenty-four-hour supervision in a facility that provides him with food and care, and would monitor his substance abuse. Altepeter expressed concern that if Gregory lived independently, he would be unable to handle emergency situations and risked being exploited. The evidence supports the court's determination that Gregory has a primary need for residential care and custody.

II. Substantial Risk of Serious Harm

¶17 Gregory next asserts the County failed to prove Gregory "is so totally incapable of providing for his … own care or custody as to create a substantial risk of serious harm to himself ...." *See* WIS. STAT. § 55.08(1)(c). He argues that Altepeter failed to specifically opine Gregory was "so totally incapable of providing for his own care or custody as to create a substantial risk of serious harm to himself." *See* ***Therese B.***, 267 Wis. 2d 310, ¶13 (medical or psychological opinion needed on each element). He also contends that Altepeter lacked current information about whether Gregory was using alcohol or drugs and there was no evidence that Gregory's microwave fire posed a danger to anyone.

¶18 We conclude that, although Altepeter never explicitly opined Gregory "was so totally incapable of providing for his own care or custody as to create a substantial risk of serious harm to himself," his testimony nevertheless supports that determination. Specifically, Altepeter testified that to maintain Gregory's safety he needed to be under twenty-four-hour supervision. Altepeter explained Gregory was not capable of adequately providing for his own care and custody because of his substance abuse, cognitive limitations, memory deficits, and lack of problem-solving skills. Gregory has suffered three significant head injuries in the past two to three years, and the resulting trauma, as well as substance abuse, caused his current dementia. On appeal, Gregory concedes "there [is] no dispute … his accidents related to the use of alcohol." Altepeter expressed concern that because of Gregory's "substantial history of alcohol and drug abuse and probably dependence," there was a "risk [he] would … try to seek those substances." He warned that further substance abuse or head trauma would worsen Gregory's dementia.

¶19 The record adequately supports the conclusion that Gregory is so totally incapable of providing for his own care or custody as to create a substantial risk of serious harm to himself. Although Altepeter did not know whether Gregory was using alcohol or drugs at the time he was detained, "the [protective placement] statute does *not* require that dangerousness be proven by *recent* acts or omissions." *See* ***K.N.K. v. Buhler***, 139 Wis. 2d 190, 203, 407 N.W.2d 281 (Ct. App. 1987). We agree with the circuit court that "his history of drug and alcohol abuse and his injuries related to that abuse and the relative recent past [show] that he is at this time a danger to himself."

By the Court.—Order affirmed.

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