

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 11, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**Nos. 94-1470
94-2426**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE GUARDIANSHIP
AND PROTECTIVE PLACEMENT OF
JIMMIE L., AN ADULT:**

TERESA L.,

Petitioner-Respondent,

v.

SAUK COUNTY,

Respondent-Appellant.

APPEALS from an order of the circuit court for Sauk County:
JAMES EVENSON, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM.

"Home is the place where, when you have to go there,/They have to take you in."

--ROBERT FROST, "The Death of the Hired Man."

At issue in this appeal is where in Wisconsin Jimmie L. can be said to have made his home before his brain injury in Florida. On previous appeal, and on subsequent remand, this court and the circuit court held that his place of residence is Sauk County.

Sauk County now appeals from an order entered by the circuit court establishing a Wisconsin guardianship and protective placement for Jimmie L. Sauk County argues that the circuit court erred by denying its motion for relief from judgment, §§ 805.15(3) and 806.07, STATS., and that the circuit court failed to follow our directions on remand. We conclude that the circuit court properly exercised its discretion on remand. We therefore affirm.¹

¹ Dade County, Florida, Jimmie L.'s former guardian, has filed a non-party brief, and asks us to sanction Sauk County for filing this appeal. Respondent Teresa L. has not requested such sanction. We decline to order a sanction on motion of a non-party.

BACKGROUND

This is the second appellate proceeding concerning Jimmie L.

As a result of a 1993 accident in Florida, Jimmie L. became brain-damaged and was adjudged incompetent. A guardian was appointed for him in Florida. His ex-wife, Teresa L., commenced an action in Sauk County Circuit Court for a Sauk County based guardianship and protective placement. The circuit court denied Teresa L.'s petition by deferring, on full faith and credit grounds, to the Florida adjudication which the Sauk County circuit court read as establishing that Jimmie L. was domiciled in Florida at the time of the accident. This court reversed the circuit court on the grounds that it had failed to independently exercise its discretion, and that the full faith and credit clause did not require the circuit court to acquiesce to the Florida determination. *Teresa L. v. Sauk County*, No. 93-2826, unpublished slip op. (Wis. Ct. App. Dec. 30, 1993).

In our opinion, we noted that "[t]he record supports the circuit court's implied conclusion that just before he went to Florida, *Jimmie L. was a resident of Sauk County.*" (Emphasis added.) Our opinion goes on to recite that Jimmie L. had announced a plan to reside in Sauk County, and had taken certain steps towards fulfilling that plan, such as residing for a time in Baraboo in the same apartment complex as Teresa L. and their children, and making a child support payment through the Sauk County clerk of court.

We noted that Jimmie L. had left Sauk County for Florida in the fall of 1992, with the intent to secure employment in hurricane relief, and intended to return to Sauk County in the spring of 1993 to be near Teresa and their children. We concluded that "the only reasonable inference ... is that he intended to return to Wisconsin when the work was done.... We conclude on the basis of the record before us that the presumption that Jimmie L. intended to continue his *Sauk County residence* has not been overcome." (Emphasis added.)

We remanded the matter to the circuit court with directions to hear Teresa L.'s petition for guardianship and protective placement, and to

dispose certain corollary matters. On remand, Sauk County moved for relief from the original judgment and for a new hearing on jurisdiction and venue. The circuit court denied the motions.

Before the circuit court, and again before this court, Sauk County argues that in the fall of 1992, just before he moved to Florida, Jimmie L. was actually a resident of Rock County, Wisconsin. Sauk County argues that it only recently discovered Jimmie L.'s Rock County connection and therefore could not have presented this evidence to the circuit court during the prior proceedings. Sauk County argues that the circuit court erred in denying its motion. We disagree.

Citing *Combs v. Peters*, 23 Wis.2d 629, 635, 127 N.W.2d 750, 753-54 (1964), the circuit court held that the following five criteria determine whether to grant a new trial on the basis of newly discovered evidence. First, the evidence must have come to the moving party's attention after trial; second, the moving party must not have been negligent in seeking to discover it; third, the evidence must be material to the issue; fourth, the testimony must not be merely cumulative to the testimony introduced at trial; and fifth, it must be reasonably probable that a different result would be reached upon a new trial.

The circuit court denied Sauk County's motion mainly on the fifth ground. As stated above, we concluded that the presumption that Jimmie L. had intended his Sauk County residence to continue had not been overcome. The circuit court correctly noted that Sauk County's affidavit about Jimmie L.'s alleged Rock County residency does not relate to the period just before Jimmie L. left for work in Florida.

The circuit court correctly interpreted our decision. Our previous decision established that the critical period for establishing Jimmie L.'s residency was just before he left Sauk County for temporary hurricane relief work in Florida, and the other critical fact was his clearly stated intent to reside in Sauk County. The circuit court correctly concluded that a different result would not probably result from a new trial at which Sauk County could present evidence of Jimmie L.'s purported Rock County residency at a time previous to

his Sauk County residency. *Combs v. Peters*, 23 Wis.2d at 635, 127 N.W.2d at 753-54.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.