COURT OF APPEALS
DECISION
DATED AND FILED

August 21, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2715 **Cir. Ct. No. 2010GN29**

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

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

SHAWANO COUNTY,

PETITIONER-RESPONDENT,

V.

VELMA M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Velma M. appeals orders appointing a guardian over her person and her estate, and directing her protective placement in an

unlocked residential facility. Velma argues the evidence was insufficient to establish that she was incompetent and in need of permanent guardianship and protective placement. Velma alternatively seeks a new guardianship and protective placement hearing in the interests of justice. We reject Velma's arguments and affirm the orders.

BACKGROUND

¶2 On December 3, 2010, Shawano County filed petitions seeking an order for the permanent guardianship of Velma's person and estate, and an order for protective placement. Doctor Konstantin Bukov, an examining physician, prepared and submitted a report opining, to a reasonable degree of medical certainty, that Velma, then seventy-six years old, was incompetent and needed a guardian. Both the guardian ad litem ("GAL") and the Shawano County Department of Social Services likewise submitted reports recommending guardianship and protective placement. After an evidentiary hearing, the court found Velma incompetent, ordered the appointment of a guardian over her person and estate, and ordered her protective placement in an unlocked residential facility. This appeal follows.

DISCUSSION

¶3 Velma challenges the sufficiency of the evidence to support the orders on appeal. Specifically, she asserts that the County failed to prove she was legally incompetent, which is a prerequisite to an order for protective placement. *See* WIS. STAT. § 55.08(1).[1] Whether the evidence satisfies the legal standard for

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

incompetency and supports protective placement are questions of law that we review independently. *See* ***Cheryl F. v. Sheboygan County***, 170 Wis. 2d 420, 425, 489 N.W.2d 636, 637-38 (Ct. App. 1992). The circuit court's factual findings, however, will not be overturned unless clearly erroneous. WIS. STAT. § 805.17(2). At a hearing on a petition for guardianship, the petitioner bears the burden of proving, by clear and convincing evidence, that the proposed ward is incompetent. *See* WIS. STAT. § 54.44(2).

¶4 Pursuant to WIS. STAT. § 54.10(3)(a), an individual is incompetent only if the court finds by clear and convincing evidence that all of the following are true:

> 1. The individual is aged at least 17 years and 9 months.
>
> 2. For purposes of appointment of a guardian of the person, because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety.
>
> 3. For purposes of appointment of a guardian of the estate, because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs, to the extent that any of the following applies:
>
>   a. The individual has property that will be dissipated in whole or in part.
>
>   b. The individual is unable to provide for his or her support.
>
>   c. The individual is unable to prevent financial exploitation.
>
> 4. The individual's need for assistance in decision making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health

> care, assistive devices, or other means that the individual will accept.

"Impairment" is defined as "a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities." WIS. STAT. § 54.01(16).

¶5 A court may order protective placement under WIS. STAT. ch. 55 if it finds by clear and convincing evidence all of the following: (1) the individual has a primary need for residential care and custody; (2) the individual has been deemed incompetent by a circuit court; (3) as a result of his or her impairment, 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; and (4) the disability is permanent or likely to be permanent. *See* WIS. STAT. §§ 55.08(1) and 55.10(4)(d).

¶6 At the hearing, Velma's daughter, Amber Strassburg, testified that Velma has been "very forgetful," and recounted four or five instances where Velma called from her room and said she did not know where she was. According to Amber, Velma has also called and said she had been walking for days and had lost Amber's sister, who then had to call and reassure Velma that she is fine.

¶7 Bukov, the examining physician, testified at the hearing and opined to a reasonable degree of medical certainty that Velma suffered from "severe dementia," rendering her incompetent. Bukov opined that Velma's dementia is "most likely permanent" and likely "to be getting worse." Bukov confirmed his opinion that Velma is a danger to herself and in primary need of residential care, and also opined that Velma is at risk of being exploited either personally or

financially "if people don't help her out." Bukov thought Velma's placement at "Pine Manor" would meet her needs.

¶8 Velma challenges Bukov's testimony, arguing that as a family practitioner, he was "not an experienced, qualified evaluator with a broad frame of reference from which to determine Velma's legal incompetence or evaluative capacities." However, the statute requires an examination of the proposed ward by a physician *or* psychologist, *see* WIS. STAT. § 54.36, and it is undisputed that Bukov is a physician under the statute's terms. *See* WIS. STAT. § 54.01(24). Further, Velma concedes that Bukov completed two or three competency evaluations prior to this case. We therefore reject her claim that Bukov did not have the experience necessary to evaluate Velma in this matter.

¶9 Citing ***R.S. v. Milwaukee County***, 162 Wis. 2d 197, 470 N.W.2d 260 (1991), Velma nevertheless contends that Bukov's testimony alone was insufficient to establish her incompetence, and the court would not have been permitted to consider only his report. In ***R.S.***, our supreme court held that an examiner's written report, without the examiner's testimony, is inadmissible hearsay at a contested guardianship proceeding. ***Id.*** at 199-200. The examining physician or psychologist must testify at a contested guardianship hearing. ***Id.*** at 200. Here, Bukov submitted a state-mandated report *and* testified at the hearing.

¶10 To the extent Velma argues that a poor telephone system impeded her ability to cross-examine Bukov, she forfeited this objection to his testimony by failing to raise an objection at the hearing. *See e.,g.,* ***State v. Saunders***, 2011 WI App 156, ¶30, 338 Wis. 2d 160, 807 N.W.2d 679. Moreover, although the telephone system presented a challenge, nothing in the record suggests that counsel was foreclosed from asking all the questions he sought to ask. Further, it

appears from the record that any difficulty presented by the telephone system was overcome by repeating the questions and answers.

¶11 After considering the various reports and witness testimony, the court adjudicated Velma incompetent, appointed Amber the guardian of Velma's person and estate, and ordered her protective placement. Based on our review of the record, we conclude the evidence satisfies the legal standard for incompetency and justifies the circuit court's orders.

¶12 Alternatively, Velma seeks a new hearing under WIS. STAT. § 752.35, which permits us to grant relief if we are convinced "that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." Velma invokes the first basis for relief, that the real controversy was not fully tried. In order to establish that the real controversy has not been fully tried, Velma must convince us that the fact finder was precluded from considering important testimony that bore on an important issue or that certain evidence which was improperly received clouded a crucial issue in the case. ***State v. Darcy N.K.***, 218 Wis. 2d 640, 667, 581 N.W.2d 567 (Ct. App. 1998). An appellate court will exercise its discretion to grant a new trial in the interest of justice "only in exceptional cases." ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983).

¶13 Velma argues that the central controversy—whether she was legally incompetent—was not fully or fairly tried. Velma complains generally about "irregularities" during various stages of the proceedings that "implicate[d] either procedural or due process concerns and affect[ed] Velma's fundamental rights." Specifically, Velma notes that she was deprived of an independent medical examination.

¶14 WISCONSIN STAT. § 54.42 delineates the proposed ward's rights and provides, in relevant part, the right to independent examination. If requested by the ward, the ward "has the right at his or her own expense, or if indigent at the expense of the county where the petition is heard on the merits, to secure an independent medical or psychological examination." WIS. STAT. § 54.42(3). Here, the GAL's report asserted that Velma requested an independent medical examination. Although Velma complains she was deprived of this right, it is unclear from the record why the examination did not occur. It is Velma's obligation to present us with a record that contains a factual predicate for her legal argument. *See* ***Duhame v. Duhame***, 154 Wis. 2d 258, 269, 453 N.W.2d 149 (Ct. App. 1989). Because Velma has not established why the examination did not occur, we cannot conclude she was actually deprived of her right to an independent medical examination.

¶15 Velma also reiterates that the poor quality of the telephone system compromised her ability to cross-examine Bukov. As noted above, however, any difficulty presented by the telephone system was overcome by the repetition of questions and answers. Based on our review of the record, we conclude the real controversy was fully and fairly tried. Accordingly, there is no reason to exercise our discretionary authority under WIS. STAT. § 752.35 to grant Velma a new hearing.

By the Court.—Orders affirmed.

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