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November 5, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP76-NM

Milwaukee County Family Care v. Ella J. (L.C. # 2011GN397)

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

Counsel for Ella J. has filed a no-merit report concluding there is no basis to challenge orders for guardianship and protective placement. Ella has filed responses claiming she is not a proper subject for guardianship or protective placement. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no

arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the orders. *See* WIS. STAT. RULE 809.21 (2011-12).¹

Milwaukee County filed petitions seeking temporary and permanent guardianship and protective placement of Ella. An examining psychologist, Dr. James Freiburger, submitted a report noting Ella's multiple medical conditions and mental health diagnoses, including diabetes and dementia. Although Ella disputed her mental health diagnoses, she acknowledged suffering from diabetes. She could not, however, describe to Freiburger how to orchestrate, administer medicine or check blood sugar. Freiburger opined that many of Ella's independent living skills are deficient and "[w]ith her progressing dementia, her controls are weakening and lessening" and her "ability to process and utilize judgment and insight is diminishing." Freiburger ultimately opined to a reasonable degree of psychological certainty that Ella's "conditions contribute to her lack of evaluative capacity to make and communicate informed decisions, and she is an appropriate subject for the court to appoint a guardian."

The circuit court appointed Easter Seals Kindcare as temporary guardian of Ella's person and ordered a comprehensive evaluation by the County under WIS. STAT. § 55.11. The evaluator, a clinical social worker, recommended protective placement based on Ella's dementia. The evaluator opined that Ella's dementia is a permanent condition rendering her incapable of providing for her own care, such that there was a substantial risk of serious harm to herself or others.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

After a hearing on the petitions for permanent guardianship and protective placement, the court found Ella to be incompetent as a result of her dementia. The court further found that Ella was “unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that [she was] unable to meet the essential requirements for [her] physical health and safety.” The court consequently ordered the appointment of Easter Seals Kindcare as permanent guardian of Ella’s person.² The court also found that Ella had a primary need for residential care and custody and, as a result of her permanent degenerative brain disorder, was “totally incapable of providing for [her] own care and custody as to create a substantial risk of serious harm to [herself].” The court ordered Ella’s protective placement in an unlocked unit “in the least restrictive environment and in the least restrictive manner consistent with the needs of the individual to be protected and with the resources of the county department.”

The no-merit report addresses whether the circuit court erroneously denied Ella’s request for successor counsel or, alternatively, to discharge her counsel and represent herself. At the outset of the contested hearing, Ella informed the court she did not want her appointed counsel to continue representing her, insisting that counsel had been hostile and impossible to work with. While subject to the order for temporary guardianship, the court had previously allowed Ella to discharge her first appointed attorney, necessitating an extension of the temporary guardianship to allow new counsel to prepare for the contested hearing on the petitions for permanent guardianship and protective placement.

² Because Ella’s funds constitute a small estate, the appointment of a guardian over her estate was deemed unnecessary.

Pursuant to WIS. STAT. § 54.50(2):

The court may appoint a temporary guardian for a period not to exceed 60 days, except that the court may extend this period for good cause shown *for one additional 60-day period*. The court may impose no further temporary guardianship on the ward for at least 90 days after the expiration of the temporary guardianship and any extension. [Emphasis added].

In denying Ella's request for successor counsel, the court explained that because the temporary guardianship could not legally be extended again, the hearing on the petition for permanent guardianship needed to be held. Because further delay would have necessitated removal of the temporary guardian under the statute, there is no arguable merit to a claim that the circuit court erroneously exercised its discretion when it denied Ella's second change of counsel request.

Ella then requested that counsel be allowed to withdraw so she could represent herself. Both the county and the guardian ad litem indicated their belief that it would be in Ella's best interest to be represented by counsel and suggested, at a minimum, that her attorney act as standby counsel. The court noted that Ella's competence was the very issue in question at the hearing and engaged Ella in a colloquy, inquiring about her education. Ella responded that she had a college degree and some work toward a master's degree, but then diverged into a discussion of her diabetes and efforts to fire her attorney. Rather than compelling counsel to withdraw, the court ultimately resolved Ella's request by allowing Ella the opportunity to question the witnesses and participate in the case to the extent she desired. Any challenge to this resolution would lack arguable merit.

There is likewise no arguable merit to challenge the sufficiency of the evidence supporting the circuit court's finding of incompetence, and the elements necessary for permanent guardianship and protective placement. Under WIS. STAT. § 54.10(3)(c), a court may appoint a

“guardian of the person” for an individual based on a finding that the individual is incompetent, if the court finds by clear and convincing evidence that: (1) the individual is at least seventeen years and nine months old; (2) “because of an impairment, the individual is unable to effectively receive and evaluate information or to make or communicate decisions to such extent that the individual is unable to meet the essential requirements for the individual’s physical health and safety;” and (3) “[t]he 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.”

A court may order protective placement of an adult individual pursuant to WIS. STAT. § 55.08(1), if it finds: (1) the individual has been determined to be incompetent; (2) the “individual has a primary need for residential care and custody;” (3) “[a]s 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;” and (4) the “individual has a disability that is permanent or likely to be permanent.” See *K.N.K. v. Buhler*, 139 Wis. 2d 190, 197, 407 N.W.2d 281 (Ct. App. 1987).

At the hearing, Freiburger testified that Ella had been diagnosed with dementia, insulin-dependent diabetes, renal insufficiency, gastroesophageal reflux disease, esophagitis and hypertension. Freiburger opined that Ella’s “dementia prohibits her from being able to understand and remember her impairments.” Ella could not identify her medical issues and denied taking medications. Freiburger further testified that Ella’s dementia was permanent and, as a result of the disease, Ella was unable to effectively receive and evaluate information and

make decisions such that she would be unable to meet and manage her health and safety needs. In Freiburger's opinion, no education or training would eliminate the need for assistance, and Ella's continuing inability and unwillingness to comprehend or address her medical needs necessitated having someone else care for those needs. Freiburger also opined that Ella posed a serious risk of harm to herself if she were not protectively placed.

Sara Bunke, a registered nurse with Milwaukee County Family Care, testified that Ella was managing her diabetes when "cued" by meals that are prepared for her and medication cards reminding her to test her blood and take her insulin. Bunke, however, questioned Ella's ability to prepare meals, take medications, test her blood sugar, bathe and manage her money in the absence of these and other environmental cues. Ella testified that she did not have dementia, that she could care for herself and that she could manage the medications on her own.

The circuit court reasonably relied upon the evidence and properly considered statutory factors in concluding that Ella required permanent guardianship and protective placement. Although Ella challenged the petitions and denied that she suffered from a permanent degenerative brain disorder, the circuit court, as fact-finder, is the sole arbiter of the credibility of witnesses, including expert witnesses. *See State v. Kienitz*, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dustin C. Haskell is relieved of further representing Ella J. in this matter.

Diane M. Fremgen
Clerk of Court of Appeals