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DISTRICT I

March 5, 2015

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Cynthia L.-K.

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

2014AP1380-NM In the matter of the guardianship and protective placement of Cynthia L.-K.: Carolyn Schuman v. Cynthia L.-K. (L.C. #2013GN11)

Before Curley, P.J., Kessler and Brennan, JJ.

Cynthia L.-K. appeals a circuit court order for protective placement and an order appointing a guardian of her person and her estate. She also appeals a circuit court order denying her post-disposition motion alleging ineffective assistance of trial counsel. Appellate counsel for Cynthia L.-K., Hannah Blair Schieber, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14).¹ Cynthia L.-K. filed a response to the no-merit report, disagreeing with

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

counsel's conclusion that an appeal would lack arguable merit. After considering the no-merit report and the response, and after conducting an independent review of the record, we agree with counsel's conclusion that there would be no arguable merit to any issues that could be raised on appeal. Therefore, we summarily affirm the circuit court's orders.

The no-merit report first addresses whether there would be arguable merit to a claim that the circuit court erred in appointing a guardian for Cynthia L.-K.'s person and estate. The circuit court may impose a guardianship of the person when the court finds that, "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." WIS. STAT. § 54.10(3)(a)2. The circuit court may impose a guardianship of the estate when the court finds that, "because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions related to the management of his or her property or financial affairs, to the extent that ... [t]he individual has property that will be dissipated ... [or] [t]he individual is unable to provide for his or her support [or] [t]he individual is unable to prevent financial exploitation." *See* WIS. STAT. § 54.10(3)(a)3. For the appointment of a guardian of both person and estate, the court must find that "[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." WIS. STAT. § 54.10(3)(a)4.

Dr. Michael Kula, a psychologist, evaluated Cynthia L.-K. and submitted a report, which was admitted into evidence at trial. Dr. Kula stated that Cynthia L.-K. suffers from a degenerative brain disorder, dementia, although she believes she has no impairments. Dr. Kula

opined that Cynthia L.-K. requires twenty-four hour supervision at a facility that provides skilled nursing care because her severe neurocognitive impairment impedes her attention and concentration, her motor functioning, which places her at risk for falling, her reasoning, her executive functioning, and her ability to manage complex tasks of daily living like properly overseeing her finances and medication. Dr. Kula also stated that Cynthia L.-K.'s judgment is distorted and "she demonstrates some odd and sometimes magical thinking and beliefs, such as when she states that she won the lottery when she has not."

Social Worker Karen Schuman testified that Cynthia L.-K. was not capable of preparing her own meals and managing her many medications. She testified that staff at Chai Point, where Cynthia L.-K. lives, prepare three meals a day for her and organize her medications. Schuman testified that she did not believe Cynthia L.-K. was able to live independently because her cognitive functioning was impaired to the extent that she was unable to make decisions about her health and welfare. Schuman also testified that Cynthia L.-K. was gambling and spending money on lotteries even though she had not been paying her rent and had debts of approximately \$30,000, even though she is receiving a pension and Social Security. Schuman testified that Cynthia L.-K.'s son had been appointed to be her health care power of attorney in 2006 but she did not believe he was willing to continue to serve in that capacity.

Cynthia L.-K. testified on her own behalf and stated that she was not in any way impaired. When asked whether she needed assistance with the tasks of daily living, she said that she did not, but then explained that she was not wearing stockings because she was unable to put them on because her hands were too weak, and she could not remember the names of any of her medications or what conditions the medications were being used to treat. When asked why she was not paying her housing and medical bills with her income, Cynthia L.-K. explained that she

was waiting to pay her bills until she received her lottery winnings, which had been delayed by several months but would be arriving soon. During her testimony, Cynthia L.-K. had extreme difficulty remembering common words and completing her sentences.

Dr. Kula's report, Schuman's testimony and Cynthia L.-K.'s testimony provided clear and convincing evidence that Cynthia L.-K. meets the standards for appointment of a guardian of her person and her estate because her brain impairment prevents her from evaluating information to make the decisions necessary to meet the essential requirements for her physical health and safety. The testimony and evidence also showed that Cynthia L.-K. is unable to manage her financial affairs to provide for her support and prevent financial exploitation. There would be no arguable merit to a claim that the circuit court erred in appointing Cynthia L.-K. a guardian of her person and her estate.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erred in issuing an order for protective placement. WISCONSIN STAT. § 55.08(1) provides that a court may order a protective placement for an individual who meets all of the following standards:

- (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.

These standards must be established by clear and convincing evidence. *See* WIS. STAT. § 55.10(4)(d). Our review of the circuit court’s decision presents a mixed question of fact and law. We will uphold the circuit court’s findings of fact unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether protective placement is warranted based on the facts is a question of law that we review *de novo*. ***Walworth Cnty. v. Therese B.***, 2003 WI App 223, ¶21, 267 Wis. 2d 310, 671 N.W.2d 377.

We agree with the no-merit report that the evidence presented at the hearing, recounted above, shows by clear and convincing evidence that Cynthia L.-K. meets the standards for protective placement. She requires residential care because she suffers from a degenerative brain disorder and lacks the cognitive capacity to provide for her own medical care and take the steps necessary to prevent harming herself by falling. There would be no arguable merit to a claim that the circuit court erred in ordering protective placement.

The no-merit report next addresses whether there would be arguable merit to a claim that Cynthia L.-K. was denied the effective assistance of trial counsel because her lawyer failed to call as a witness Dr. Kenneth Sherry, who had conducted an independent evaluation of Cynthia L.-K. This claim served as the basis for a post-disposition motion, which was denied. In order to establish a claim of ineffective assistance of counsel, Cynthia L.-K. must show both that her trial lawyer’s performance was deficient and that the deficient performance prejudiced her. ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To establish prejudice, Cynthia L.-K. must show that “there is a reasonably probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” ***Id.*** at 694.

Dr. Sherry's report, which was attached to the post-disposition motion, stated that he did not believe that a protective placement order was necessary *only because* Cynthia L.-K. is currently living at Chai Point, where she is provided with adequate supervision and support to complete the tasks of daily living. In light of the extensive evidence supporting the protective placement order, Cynthia L.-K. cannot show that the result of the proceeding would have been different but for her lawyer's failure to proffer Dr. Sherry's opinion that a protective placement order was not necessary in light of the circumstances. There would be no arguable merit to a claim of ineffective assistance of trial counsel.

In her response, Cynthia L.-K. contends that she was advised that she received "an inheritance of considerable value coming from M. Messidor in the Netherlands" but that Easter Seals of Southeast Wisconsin, her guardian, refused to accept the packages that contained the inheritance, which has caused her terrible mental and emotional distress. Cynthia L.-K.'s complaints do not provide grounds for appellate reversal of the circuit court's decision. Based on our independent review of the record, we conclude that there is no basis to challenge the circuit court's orders. Any further proceedings would be without arguable merit.

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

IT IS FURTHER ORDERED that Attorney Hannah B. Schieber is relieved of any further representation of Cynthia L.-K. on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals