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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP002026

In the matter of the condition of W.B.:

SAUK COUNTY,

Petitioner-Respondent,

v.

W.B.,

Respondent-Appellant-Petitioner.

RESPONSE OPPOSING PETITION FOR REVIEW

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TABLE OF CONTENTS

Sauk County respectfully submits this response to the Petition for Review filed by W.B. pursuant to Wis. Stat. § 809.62(3). The Petition for Review should be denied. It fails to satisfy the criteria, set forth in Wis. Stat. § 809.62(1r), that this Court consistently uses to guide its discretion in determining whether to grant review.

The issues presented are neither significant nor novel questions of law; there is no special or important reason for this Court's review. As such reviewing the appellate court's decision is not warranted. Accordingly, W.B.'s Petition for Review should be denied by this Court.

STATEMENT OF THE CASE

In its response to a Petition for Review, the County may include any perceived misstatements of facts or law set forth in a petition that have a bearing on the question of what issues properly would be before the Court if the petition were granted. As such, Sauk County raises the following issues.

First, W.B. erroneously claims after a health care power of attorney is activated, the agent can compel the principal to remain in a nursing home over the principal's objection. Second, W.B. incorrectly argues that his activated health care power of attorney should be considered advanced planning that renders guardianship and protective placement unnecessary. Both of W.B.'s above-mentioned contentions completely ignore the plain meaning of provisions within Wis. Stat. Chapter 155 and call for interpretations that simply do not fit with the statutory language.

CRITERIA FOR REVIEW

Pursuant to Wis. Stat. §809.62(3), the Petitioner-Respondent, Sauk County, submits this response to the Petition for Review filed by the Respondent-Appellant-Petitioner, W.B. The Petition for Review does not meet the criteria for review as outlined in Wis. Stat. §809.62(1r) and should therefore be denied. There is no real and significant question of either federal or state constitutional law at issue. The case does not involve any need to establish, implement, or change a policy within the authority of this Court. A decision is not needed to develop, clarify, or harmonize the law, as the issues presented involve unambiguous statutory law. The decision of the Court of Appeals is not contrary to prior opinions of this Court or the Court of Appeals, or with controlling opinions of the United States Supreme Court. It is evident upon reviewing the circuit court transcripts as well as the Court of Appeals' decision in this matter that this case concerns a plain meaning interpretation of the Wisconsin Statutes and the application of those statutes to a set of factual circumstances pertaining to the Respondent-Appellant.

ARGUMENT

I. Under the plain meaning of provisions in Wis. Stat. 155, after an individual's health care power of attorney is activated, the agent cannot force the principal to reside in a nursing home over the principal's objections; therefore, the Supreme Court should deny the Petition for Review as there is no need to develop and clarify the law.

This Court's function is to develop and clarify the law. *Blum v. 1st Auto & Cas. Ins. Co.,* 2010 WI 78, ¶ 49, 326 Wis. 2d 729, 786 N.W.2d 78. The Supreme Court does not grant review unless the case has an important legal issue that trial and appellate courts need clarification on. Wis. Stat. §809.62(1r). This case involves looking at the plain meaning of several provisions of Wis. Stat. Chapter 155. Since lower courts can easily interpret the unambiguous provisions of Wis. Stat. Chapter 155 without additional guidance, this case does not present a legal issue the Wisconsin Supreme Court needs to develop and clarify the law on.

W.B.'s main argument is that his guardianship and protective placement are unnecessary because his activated health care power of attorney allows his power of attorney (agent) to force him to reside in a nursing home over his objection. The statute dealing with health care power of attorney law, Wis. Stat. Chapter 155, allows an individual, the principal, to give an agent the power of attorney to make decisions for the principal's health care when the principal becomes incapacitated. Wis. Stat. §155.05. A health care power of attorney can be activated upon a finding of incapacity by two physicians. Wis. Stat. §155.05(2).

W.B.'s Petition for Review attempts to analyze the agent-principal relationship prior to the activation of a health care power of attorney. W.B. completely misinterprets Wis. Stat. §155.05(4), which deals with an agent and principal's relationship prior to a health care power of attorney being activated. W.B. argues that once a principal's power of attorney for health care is activated, the principal cannot revoke the power of attorney, object to health care decisions, or object to his admission to a nursing home. Wis. Stat. §155.05(4) reads as follows:

"[t]he desires of a principal who does not have incapacity supersede the effect of his or her power of attorney for health care *at all times*." Wis. Stat. §155.05(4). (emphasis added). W.B. construes this language to mean that the principal has no authority once the power of attorney is activated. The statute clearly states that when the principal is not incapacitated, the agent has no authority to make decisions for the principal. This makes perfect sense considering someone who is not incapacitated has no need for the agent to make decisions. The statute cited by W.B. does not deal with the agent-principal relationship under an activated health care power of attorney. It is wrong to interpret Wis. Stat. §155.05(4) to conclude that a principal cannot revoke an activated power of attorney, especially when other statutory provisions specifically address these matters.

W.B. claims that there is no statutory support for the Court of Appeals' holding that a health care agent cannot require continued placement in a nursing home. He is wrong. There is clear statutory support in Wis. Stat. Chapter 155. The language in Wis. Stat. §155.30(1) indicates that health care may not be given to the principal over the principal's objection. Wis. Stat. §155.30(1). W.B.'s interpretation goes against the unambiguous statutory language. When statutory language is unambiguous, courts interpret the statute strictly: "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 664, 681 N.W.2d 110, 124. The first sentence of Wis. Stat. 155.30(1), which is a mandatory notice to individuals making a health care power of attorney, contains the following language in an entirely capitalized

font: "YOU HAVE THE RIGHT TO MAKE DECISIONS ABOUT YOUR HEALTH CARE. NO HEALTH CARE MAY BE GIVEN TO YOU OVER YOUR OBJECTION, AND NECESSARY HEALTH CARE MAY NOT BE STOPPED OR WITHHELD IF YOU OBJECT." Wis. Stat. §155.30(1). Wis. Stat. §155.30(1) does not contain any language saying W.B. may not exercise his right to make health care decisions upon a finding of incapacity when he disagrees with his agent. Further, a latter portion of Wis. Stat. §155.30, specifically addresses nursing homes; thus, admitting the principal to a nursing home falls under health care that the principal can object to. Wis. Stat. §155.30(3). Lastly, the power of attorney executed by W.B. does not contain any language saying his agent can force him to reside in a nursing home over his objection. By reading the plain and unambiguous language of these provisions, health care clearly cannot be given to a principal over the principal's objection.

In addition to not allowing the agent to consent to health care when the principal objects, the principal can simply revoke the power of attorney at any time. Wis. Stat. §155.30(1). The first statutory provision to look at is Wis. Stat. §155.30(1):

> If you wish to change your power of attorney for health care, you may revoke this document *at any time* by destroying it, by directing another person to destroy it in your presence, by signing a written and dated statement or by stating that it is revoked in the presence of two witnesses. *Id.* (emphasis added).

W.B.'s position that the principal has complete control once the power of attorney is activated is also contradicted by the fact that under Wis. Stat. 155.30(1), even when the principal is incapacitated, the agent has a duty to ascertain the principal's wishes. *Id.* Another statutory

provision, Wis. Stat. §155.40(1), provides that "[a] principal may revoke his or her power of attorney for health care and invalidate the power of attorney for health care instrument *at any time*," and indicates methods of revoking a health care power of attorney. Wis. Stat. §155.40(1). (emphasis added). Given the principal can revoke all the agent's authority "at any time," including after the power of attorney is activated, the agent cannot compel the principal to live in a nursing home. Once the principal becomes dissatisfied with the facility the agent placed him in, the principal can simply revoke the health care power of attorney and the agent's authority to make placement decisions is null and void. The Court of Appeals agreed with the County's interpretation of "at any time," noting that:

> The plain meaning of the phrase "at any time" is clearly not "at any time prior to becoming incapacitated." Rather, the plain meaning of "at any time" is "at any time." If the legislature intended this provision to mean what W.B. says it does, the legislature could have included the limiting language that W.B. advances.
> (Court of Appeals' Decision ¶ 22)

W.B.'s statutory interpretation is nonsensical when you look at the actual affect it would have on an agent-principal relationship when the power of attorney is activated. W.B. argues that advanced planning, such as executing a health care power of attorney, prevent restrictions on one's liberty associated with guardianship and protective placement. W.B. then claims that after a health care power of attorney is activated, the agent can compel the principal to reside in a nursing home over the principal's objections. Under this interpretation, the principal with an activated attorney cannot revoke the health care power of attorney "at any time." Thus, it is disingenuous for W.B. to argue that this is less of

a restriction on one's liberty. When a ward is under a guardianship and protective placement, the ward has recourse through the court to ascertain whether he/she is in the least restrictive setting and object to continued protective placement. For example, when a ward is under a protective placement, the ward has yearly reviews to see if the protective placement is still necessary. Wis. Stat. §55.18. Also, under Wis. Stat. Chapter 54, a ward can petition the court for an evaluation to see if the guardianship is still necessary. Wis. Stat. §54.64. Further, when the court finds an individual needs guardianship of the person, which deals with health care, the ward can retain some rights, and, depending on the case, only certain powers are transferred to the guardian. Wis. Stat. §54.25(2)(d)1. On the other hand, under W.B.'s all-or-nothing interpretation of power of attorney for health care law, the principal could only petition the court to see if the agent is acting in accordance with the health care power of attorney document. Wis. Stat. §155.60(4). In cases where the health care power of attorney document granted the agent authority to place the principal in a nursing home, the principal would have no recourse to object to continued placement in the facility.

Both the trial and appellate court correctly decided this case due to the ease of interpreting the provisions of Wis. Stat. Chapter 155. The Court of Appeals had no issues applying the plain meaning of Wis. Stat. Chapter 155's provisions to W.B.'s case, so there is no law for the Wisconsin Supreme Court to clarify or develop.

II. W.B.'s advanced planning did not make guardianship and protective placement unnecessary; therefore, the Wisconsin Supreme Court should deny W.B.'s Petition for Review.

W.B.'s incorrect interpretations of the unambiguous language in Chapter 155 leads him to believe that his advanced planning made guardianship and protective placement unnecessary. Under Wis. Stat. §54.46(1)(a)2, when an individual has engaged in advance planning that renders a guardianship unnecessary, the court shall dismiss the petition. Wis. Stat. §54.46(1)(a)2. The key word here is unnecessary. W.B.'s advanced planning clearly did not render guardianship and protective placement unnecessary for many of the reasons in argument section one of this brief: 1) W.B.'s health care power of attorney does not allow his agent to compel him to reside in a nursing home against his wishes; 2) W.B.'s health care power of attorney could be revoked at any time; and 3) W.B.'s agent could not consent to health care when W.B. objected.

One reason W.B. claims that his advanced planning rendered guardianship unnecessary is that his guardian, J.B., had been his power of attorney for years, had satisfactorily performed his duties as power of attorney, and had originally placed W.B. in the facility he ended up being protectively placed in through his power as agent for W.B. (79:14). This position looks at events in the past, which was not the concern the circuit court had with W.B. Unlike in the past, W.B. began protesting his placement in the nursing home in 2020. (79:20-21). The circuit court's decision hinged on W.B. no longer wanting to reside in the facility, objecting to his placement there, and the fact that no legal impediment existed to make W.B. remain there. (79:28; App. 142). Since W.B.'s power of attorney document could not compel him to stay in the nursing home, he did not engage in advanced planning that rendered his guardianship and protective placement unnecessary.

While it is possible that a health care power of attorney could render a guardianship and protective placement unnecessary, the instant case is not one of those situations. When the agent is fulfilling the agent's duties and the principal is satisfied with the decisions of the agent related to health care and placement, it would be unnecessary to petition for a guardianship and/or protective placement. This is exactly what happened in W.B.'s case for years prior to Sauk County petitioning for guardianship and protective placement. During that time, W.B. remained satisfied with his placement and his agent's decisions. (79:14). However, in 2020, W.B. changed his mind and started to have the delusion he could reside in northern Wisconsin with a nonexistent nurse to take care of him. (5:1) At this point, W.B. could simply protest his placement in the nursing home, revoke his agent's authority to make health care decisions for him, and leave the nursing home. In fact, the legislature anticipated situations like W.B.'s by enacting Wis. Stat. §155.60(1), allowing for individuals to petition for guardianship even when the individual has a power of attorney for health care: "Nothing in this chapter prohibits an individual from petitioning a court in this state for a determination of incompetency and for appointment of a guardian for an individual who is a principal under this chapter." Wis. Stat. §155.60(1). Although W.B. seems to erroneously construe Wis. Stat. §54.46(1)(a)2 to mean that any advanced planning renders guardianship and protective placement unnecessary, W.B.'s advanced planning did not render guardianship and protective placement unnecessary due to changing circumstances in 2020. (5:1) The unambiguous statutory language related to health

care power of attorney law leaves nothing for the Supreme Court to clarify or interpret.

CONCLUSION

Considering the arguments above, the Court should not grant W.B.'s Petition for Review.

Dated this 11th day of October, 2022.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief using proportional serif font. The length of this brief is 13 pages and 2875 words.

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, including appendix, if any, which complies with the requirements of 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 11th day of October, 2022.

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