RECEIVED
11-02-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP292

In the matter of the mental commitment of L.J.E.:

WAUKESHA COUNTY,

Petitioner-Respondent,

v.

L.J.E.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

TABLE OF CONTENTS

ISSUES PRESENTED

1. A person cannot be involuntarily committed under the fifth standard of dangerousness "if the individual may be provided protective placement or protective services under ch. 55." Wis. Stat. § 51.20(1)(a)2.e. When must a petitioner rebut this "ch. 55 exclusion," and what evidence is necessary for the petitioner to meet its burden?

The circuit court ordered the involuntary commitment.

The court of appeals affirmed the commitment.

CRITERIA FOR REVIEW

This court should grant review to clarify the petitioner's burden to refute the ch. 55 exclusion when seeking an involuntary commitment under the fifth standard of dangerousness. This is an important issue implicating the due process rights of individuals subject to a petition for involuntary commitment. It also presents an important question of statutory interpretation, and will clarify application of the "ch. 55 exclusion," which is at issue in every involuntary commitment under the fifth standard.

STATEMENT OF FACTS

The County initiated involuntary commitment proceedings against Evans[1] when the family friend she was living with, Anthony Zitzelsberger, decided that she could no longer live with him. (31:9-10.) He testified at the final hearing that Evans had been living with him for a few years, but that he believed she needed psychiatric help. (*Id.*) He testified that Evans, who was 60 years old, had become almost completely financially dependent on him. (31:6, 39.) She received $700 per month on a debit card as part of a divorce settlement, but the debit card had expired, and Evans had not renewed it. (31:6-7, 11.) Zitzelsberger testified that he tried to help Evans update the card, or get a P.O. box for her mail, but she refused his help because of "the way her mind work[ed]." (31:7-8.) He did not testify that she had engaged in any dangerous behavior, only that he did not believe she had a place to live if she were unable to live with him. (31:9.) He agreed that she could keep living with him if she got help for her mental health issues. (31:9.)

A licensed clinical social worker with Waukesha County, Maryam Faterioun, testified that Zitzelsberger had initiated the commitment petition. (31:17.) She testified that Evans had previously been diagnosed with bipolar disorder (31:17), and that Evans could not meet her own needs in the community because of her reliance on Zitzelsberger. (31:18.) She testified that paranoia and thought blocking were

[1] A pseudonym for the respondent, L.J.E.

preventing Evans from obtaining necessary treatment. (31:18.)

Faterioun acknowledged that Evans had not had any medical emergencies, and that her most recent inpatient hospitalization for mental health services was in 2014–15. (31:18-19.) Nevertheless, she testified that if Zitzelsberger withdrew his support, Evans would not obtain treatment, and that would create a risk of severe mental, emotional, and physical harm. (31:20-21.) She testified that Evans did not want mental health treatment because she did not believe she had a mental illness. And although Evans had previously admitted medication helped clear her thoughts, Faterioun concluded Evans did not understand the benefits of her medication because she also did not believe they were helpful, and had noted certain negative side effects. (31:23.)

Psychiatrist Cary Kohlenberg also testified. He testified that Evans had bipolar disorder with mood and thought symptoms, and that the condition grossly impaired Evans' ability to meet her life's needs. (31:31-32.) He testified that Evans was a proper subject for treatment and needed medications to decrease psychosis in order to function outside the hospital. (31:32-33.) Kohlenberg testified that treatment without medications would not work, but that Evans insisted she did not need medications. (31:34-35.) He testified that Evans had successfully taken medications in the past, but presently had false beliefs about the medications, which Kohlenberg believed made her incapable of applying an understanding about her medications. (31:36-37.) He testified that Evans was treatable because she had responded well

to medications in the past. (31:38.) Kohlenberg also testified that he believed Evans was dangerous under the fifth standard. (31:34.)

Another psychiatrist, Rada Malinovic, testified that Evans needed inpatient treatment until her medication stabilized in about 1-2 weeks. (31:43-44.) She agreed that Evans had bipolar disorder, which was treatable. (31:43.) Malinovic testified that Evans did not want to take her medication, but had willingly done so with a lot of encouragement and patience. (31:45-46.) She testified that Evans was still a little paranoid, but had improved significantly since her admission to the hospital when the commitment petition was filed. (31:47.)

The County argued that Evans was mentally ill and a proper subject for treatment based on her diagnosis with bipolar disorder. (31:49.) The County argued that Evans was dangerous under the fifth standard, allowing for predictive commitment of individuals who have not yet done anything dangerous. Wis. Stat. § 51.20 (1)(a)2.e.; (31:50). The County argued Evans needed to be committed because she did not understand the advantages and disadvantages for treatment, and that there was a substantial probability that without treatment, she would suffer severe mental, emotional, and physical harm. (31:50-57.) In particular, the County relied on Zitzelsberger's testimony that he would only let Evans live with him if she sought treatment. (31:52, 53.)

The circuit court generally credited all of the witnesses that testified, and made findings relevant to the statutory standards for commitment. The court

found that Evans had been diagnosed with bipolar disorder, so she was mentally ill and a proper subject for treatment. (31:64, 65; App. 19, 20.) The court then proceeded through the fifth standard of dangerousness, Wis. Stat. § 51.20(1)(a)2.e., discussing its applicability to Evans. The court found that Evans' mental illness prevented her from understanding the advantages and disadvantages of medication, and that she could not make an informed choice about whether to refuse medication. (31:65-66.) The court further found that there was a substantial probability that, if left untreated, Evans would lack necessary services, and would suffer severe mental, emotional, or physical harm as a result. (31:66.)

The court, reading the statute, noted an exception in the fifth standard: "[t]he probability of suffering a severe mental, emotional, or physical harm is not substantial under the section if there is a reasonable provision for care or treatment available in the community and a reasonable probability that she would avail herself of those services." (31:66-67; App. 21-22.) The court concluded this exception did not apply, so ordered Evans committed. (31:67; App. 22.) The court did not, however, address the second clause in the quoted portion of the statute, which also prohibits commitment "if the individual may be provided protective placement or protective services under ch. 55." Wis. Stat. § 51.20(1)(a)2.e.

Evans appealed, arguing that the County failed to prove by clear and convincing evidence that her needs could not be met through protective placement or protective services. The court of appeals affirmed, holding that the evidence showed Evans was not

suitable for protective placement or protective services. *Waukesha Cnty. v. L.J.E.*, No. 2022AP292, unpublished (WI App Oct. 5, 2022); (App. 3).

ARGUMENT

I. This court should grant review and hold that a county seeking an involuntary commitment under the fifth standard of dangerousness must prove by clear and convincing evidence that the individual's needs cannot be met through protective placement or protective services.

There is no dispute about the ordinary standards applicable in ch. 51 commitments. To obtain a commitment, the County must prove by clear and convincing evidence that a person is (1) mentally ill, (2) a proper subject for treatment, and (3) dangerous. *Marathon Cnty. v. D.K.*, 2020 WI 8, 390 Wis. 2d 50, 937 N.W.2d 901; *see also* Wis. Stat. § 51.20(13)(e). These statutory standards are buttressed by constitutional due process protections, requiring the County to prove "by clear and convincing evidence that the individual subject to commitment is mentally ill and dangerous." *Langlade County v. D.J.W.*, 2020 WI 41, ¶42, 391 Wis. 2d 231, 942 N.W.2d 277 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

At issue in this case is the statutory standard of dangerousness that the County sought to prove. The County argued that Evans was dangerous under the "fifth standard," which allows for a commitment in the absence of any actual acts of dangerousness by the person. Wis. Stat. § 51.20(1)(a)2.e.; (2; 31:50). Under

this standard, the County may predictively commit individuals who are not presently dangerous, but who are believed to become dangerous to themselves if left untreated. *Dane County v. Kelly M.*, 2011 WI App 69, ¶12, 333 Wis. 2d 719, 798 N.W.2d 697.

The fifth standard imposes a complex burden on the County:

> For an individual, other than an individual who is alleged to be drug dependent or developmentally disabled, after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions. The probability of suffering severe mental, emotional, or physical harm is not substantial under this subd. 2. e. if reasonable provision for the individual's care or

> treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services or if the individual may be provided protective placement or protective services under ch. 55. Food, shelter, or other care that is provided to an individual who is substantially incapable of obtaining food, shelter, or other care for himself or herself by any person other than a treatment facility does not constitute reasonable provision for the individual's care or treatment in the community under this subd. 2. e. The individual's status as a minor does not automatically establish a substantial probability of suffering severe mental, emotional, or physical harm under this subd. 2. e.

Wis. Stat. § 51.20(1)(a)2.e.

Relevant here is the "ch. 55 exclusion," which precludes a finding of dangerousness if the substantial risk of severe harm can be effectively addressed by providing protective placement or protective services under ch. 55: "The probability of suffering severe mental, emotional, or physical harm is not substantial under this subd. 2.e. . . . . if the individual may be provided protective placement or protective services under ch. 55." In other words, a showing of dangerousness under the fifth standard cannot be made unless the county proves that protective services under ch. 55 could not reduce the probability of harm to less than a substantial probability. *Kelly M.*, 2011 WI App 69, ¶32.

The court of appeals, in *Kelly M.*, held that the county must rebut the ch. 55 exclusion when the individual subject to the commitment petition is "already subject to an order for protective placement

or services," or if the person "is not yet subject to a ch. 55 order but . . . is eligible for one." *Id.*

This court's review is warranted to clarify when a person is "eligible" for ch. 55 services, such that the ch. 55 exclusion must be rebutted. The court of appeals has reversed numerous commitments under the fifth standard based on the county's failure to rebut the ch. 55 exclusion. *Kelly M.*, 2011 WI App 69, ¶4; *Fond du Lac Cnty. v. J.L.H.*, No. 2020AP2049-FT, unpublished slip op., ¶15, (WI App Mar. 24, 2021); *Outagamie Cnty. v. X.Z.B.*, No. 2020AP2058, unpublished slip op., ¶3 (WI App June 22, 2021). But those cases all involved a person already subject to protective placement or services. This court's review is necessary to clarify when the ch. 55 exclusion must be rebutted for a person not yet subject to protective placement or services.

Here, the court of appeals denied relief, finding Evans was not eligible for protective placement or protective services. This conclusion was based on a determination that Evans did not have a guardian. *L.J.E.*, No. 2022AP292, unpublished slip op., ¶22. But guardianships and protective placements are often sought in a single proceeding;[2] therefore, by limiting the ch. 55 exclusion to persons already subject to a guardianship, the court of appeals' decision has

[2] *See, e.g., In re Guardianship of Jane E.P.*, 2005 WI 106, ¶4, 283 Wis. 2d 258, 700 N.W.2d 863; *In re Guardianship of Therese B.*, 2003 WI App 223, ¶2, 267 Wis. 2d 310, 671 N.W.2d 377; *Matter of Guardianship & Conservatorship of Joseph P.*, 222 Wis. 2d 1, 5, 586 N.W.2d 52 (Ct. App. 1998); *Matter of W.B.*, No. 2021AP322, unpublished slip op., ¶4 (WI App Sept. 9, 2022); (App. 55).

essentially undone *Kelly M.* If the ch. 55 exclusion only applies to a person who already has a guardian, it will likely never apply to a person who is merely eligible for protective placement or services. The exclusion will only arise in cases where the person is already subject to protective placement or services.

The court of appeals' decision in this case conflicts with *Kelly M.* by relieving the County of its burden to rebut the ch. 55 exclusion. The court of appeals held that Evans had not been found incompetent, so she could not be "potentially eligible" for protective placement or services. *Id.* But the court of appeals misstates the county's burden. That Evans was not under a guardianship was irrelevant; the county could have obtained that guardianship in the same proceeding that it subjected her to protective placement or services. Thus, under *Kelly M.*, the question wasn't whether Evans was presently under a guardianship, but whether she was potentially eligible for guardianship and protective placement.

This court should grant review to clarify *Kelly M.*, and to provide guidance to litigants and lower courts handling fifth-standard commitments. This court should also give the statutory text its full meaning and hold that to satisfy its statutory burden, the County must rebut the ch. 55 exclusion in any case where it seeks to commit an individual under the fifth standard, either by showing the person is not eligible for ch. 55 services, or that ch. 55 could not satisfy the persons needs. Wis. Stat. § 51.20(1)(a)2.e. The statute provides that commitment is inappropriate "if the individual may be provided protective placement or protective services under ch. 55"; there is no basis for

a petitioner to avoid this statutory burden in any case where it seeks a commitment under the fifth standard.

Here, the County did not offer any evidence showing that Evans' needs could not be met through less restrictive ch. 55 services, specifically a medication order under Wis. Stat. § 55.14. And the circuit court neglected to make any findings on this subject, despite explicitly considering the other exception embedded in the fifth standard. Therefore, the County failed to prove by clear and convincing evidence that the ch. 55 exclusion could not apply to Evans, and this court should reverse.

Evans was eligible for protective placement or protective services, so rebutting the ch. 55 exclusion was especially important. A person is eligible for protective placement or services under ch. 55 when diagnosed with a "serious and persistent mental illness." Wis. Stat. §§ 55.01(6v), 55.08(1)(c), (2)(b). That phrase is defined to mean a mental illness that "causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support, and that may be of lifelong duration." Wis. Stat. § 55.01(6v). This is exactly what the County claims is the case for Evans.

The County explicitly sought to prove that Evans' illness prevented her from coping with the ordinary demands of life. (31:32, 64; App. 19.) Kohlenberg and Malinovic both diagnosed Evans with bipolar disorder. (31:31, 43.) Bipolar disorder is a

"lifelong condition,"[3] and the County's experts testified that Evans required ongoing treatment with medications, and observed that her bipolar disorder had been a long-term issue. (31:18-19, 20, 35.) Kohlenberg also testified that Evans had a history of medication use for the past 17-18 years, including "a pattern" of not taking medications, further suggesting her condition could require "long-term treatment and support." Wis. Stat. § 55.01(6v); (31:36). All of this testimony supported a case that Evans had a serious and persistent mental illness warranting protective placement or services under ch. 55.

The fifth standard of dangerousness requires a petitioner to prove that necessary services could not be obtained through protective placement or services. The court of appeals has offered guidance for analyzing this requirement in cases where a person is already subject to protective placement or services. This court should grant review to clarify a petitioner's burden in cases where the person is merely eligible for placement or services.

[3]Living Well with Bipolar Disorder, Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/serious-mental-illness/bi-polar, last visited November 2, 2022.

CONCLUSION

For the reasons stated above, this Court should grant review of the court of appeals' decision.

Dated this 2nd day of November, 2022.

Respectfully submitted,

DUSTIN C. HASKELL
Assistant State Public Defender
State Bar No. 1071804

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
haskelld@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,933 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 2nd day of November, 2022.

Signed:

_____

DUSTIN C. HASKELL
Assistant State Public Defender