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SUPREME COURT

STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2022AP292
Circuit Court Case No. 2021ME167

In the Matter of the Mental Commitment of L.J.E.

WAUKESHA COUNTY,
Petitioner-Respondent,

v.

L.J.E.,
Respondent-Appellant-Petitioner.

Response to Petition for Review

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ISSUE

1. Did Waukesha County present clear and convincing evidence that Evans¹ is dangerous as defined in Wis. Stat. § 51.20(1)(a)2.e.²?

The circuit court answered yes. (R.31:61-67) (App.77-83). The court of appeals affirmed. *Waukesha Cnty. v. L.J.E.*, No. 2022AP292, ¶ 26, unpublished (WI App October 5, 2022). (App.15).

CRITERIA FOR REVIEW

Evans seeks to clarify the petitioner's burden, under the ch. 55 exclusion, when a subject is merely eligible for protective placement or services. Evans was not eligible for protective placement or services. Under well-settled caselaw set forth in *Helen E.F.* and *J.W.J.*, her condition required a ch. 51 commitment. Evans further required court ordered treatment at a locked psychiatric facility—whether it be protective placement or services, neither permit an involuntary order to a locked psychiatric facility. Therefore, this case does not implicate important due process concerns or questions of statutory interpretation. Rather, well-settled caselaw and unambiguous statutes decide the issue effectively.

¹ A pseudonym for the subject, L.J.E.

² This standard of dangerousness is commonly referred to as the “fifth standard”.

This court should decline review under those circumstances.

STATEMENT OF THE CASE AND FACTS

Waukesha County filed a Petition for Examination³ against Evans on April 4, 2021. (R.2). At that time, Evans did not have a guardian. (R.2:3). On April 15, 2021, Deputy Steven Robakowski detained Evans. Court Commissioner Linda Saafir held a contested probable cause hearing on April 20, 2021. (R.10;30). The court found probable cause to believe Evans is mentally ill, a proper subject for treatment, and dangerous under the fifth standard. (R.10;30). The court ordered continued detention at a locked psychiatric facility and set a final hearing on April 27, 2021, in front of the Honorable Maria S. Lazar. (R.10;30).

At the final hearing, the County called four witnesses. First, the County called Anthony Zitzelsberger, a close friend of Evans. (R.31:5) (App.21). Zitzelsberger said Evans lived with him for a “couple of years” at his residence. (R.31:6)(App.22). He said Evans could no longer live with him and “need[ed] psychiatric help”. (R.31:9)(App.25). He said Evans became almost completely financially dependent on him. (R.31:6-10)(App.22-26). 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)(App.22-

³ This pleading is commonly referred to as a “Three-Party Petition”.

23,27). Ziztelsberger said he tried to help Evans renew the card, or get a P.O. box for her mail, but she refused help because of “the way her mind work[ed].” (31:7-8)(App.23-24). He also said Evans had nowhere else to live, but he agreed she could keep living with him if she got help. (R.31:9)(App.25).

Second, Maryam Faterioun, a licensed clinical social worker with Waukesha County, testified that she assessed Evans on March 23, 2021. (R.31:16) (App.32). Evans “present[ed] with paranoia, some delusions, thought blocking, which is a symptom of thought disorder, and [was] unable to provide an explanation of how to meet her needs in the community.” (R.31:18)(App.34). Faterioun said Evans did not want psychiatric treatment. (R.31:24) (App.40). She opined:

1. Evans was “unable to gain access to her finances due to her mental health symptoms.” (R.31:18)(App.34).
2. Without psychiatric treatment, Evans’ mental health would decline further, and she would lack services necessary for her health or safety and would suffer severe mental, emotional, or physical harm. (R.31:19-21)(App.35-37).
3. Evans “need[s] medications on an inpatient unit with the hope that she will [be] able to transition to outpatient

services". (R.31:19-20)(App.35-36).

Faterioun also reviewed treatment records dating back to 2005. (R.31:17)(App.33). In the past, Evans had "been diagnosed with bipolar disorder with psychotic features." (R.31:17)(App.33). Evans previously required "four to five" inpatient hospitalizations. (R.31:18)(App.34).

Third, Dr. Cary Kohlenberg, a licensed psychiatrist, testified and provided opinions "to a reasonable degree of medical certainty". (R.31:30-31)(App.46-47). Kohlenberg met with Evans telephonically on April 22, 2021. (R.31:31)(App.47). He diagnosed Evans with a treatable mental illness, namely bipolar disorder. (R.31:31)(App.47). He opined Evans "has experienced impairments in her thought process, as well as paranoia and persecutory thoughts, as well as mood symptoms, depression, mood lability, and anxiety." (R.31:32)(App.48). He opined medications will "reduce anxiety ... help with mood stability and also improve thought process and decrease psychosis to allow her to, again, be functional and independent out of the hospital setting." (R.31:33)(App.49). He said Evans did not agree to take antipsychotic medications until April 20, 2021, and only did so after court order. (R.31:33)(App.49). Kohlenberg opined that Evans requires a locked psychiatric facility to "get her medications going and monitor her safety, and also because of the severity of her mood and thought symptoms." (R.31:34)(App.50).

Fourth, Dr. Rada Malinovic, Evans' treating psychiatrist, testified and provided opinions "to a reasonable degree of medical certainty". (R.31:41,44) (App.57,60). Malinovic met with Evans at the Waukesha County Mental Health Center⁴ on:

1. April 19, 2021
2. April 20, 2021
3. April 22, 2021
4. April 26, 2021
5. April 27, 2021

(R.24;31:45)(App.61,95). She diagnosed Evans with a treatable mental illness, namely bipolar disorder with psychotic features. (R.31:43)(App.59). She opined that while Evans' symptoms improved since she began inpatient psychiatric treatment:

"The least restrictive environment for her currently is a locked inpatient unit. She requires further medication stabilization and further time for the medications to reach a therapeutic effect."

(R.31:43,47)(App.59,63).

Following arguments from both parties, the circuit court held that Evans suffers from a treatable mental illness. (R.31:64)(App.80). It found Evans suffered from "bipolar disorder with mood and

⁴ The Waukesha County Mental Health Center is a locked psychiatric facility for acute treatment.

thought impairment, paranoia, persecutory thoughts, and depression or anxiety.” (R.31:64)(App.80). It held that Evans “was treatable because ... there has been a response to the medication”. (R.31:64) (App.80). The circuit court further held that Evans is dangerous under the fifth standard, using testimony from all four witnesses in its factual findings. (R.31:61-67)(App.77-83). It then held the least restrictive level of care was a locked psychiatric facility “so that [the treatment team] could stabilize medication, reach therapeutic effects of that medication, and allow for adjustments that are going on.” (R.31:64)(App.80).

On appeal, Evans argued that the County failed to prove, under the ch. 55 exclusion, “that protective services ... could not reduce the probability of harm to less than a substantial probability.” Br. of Resp’t-Appellant at 14. The County limited its response to her narrow quarrel, but also addressed the strictures of protective placement in the process. The court of appeals affirmed:

“Here, the record shows that Evans was not eligible for protective placement or services at the time she was found to be dangerous because she had not previously been found incompetent and because her condition was treatable and required only a short-term commitment.”

L.J.E, No. 2022AP292, ¶ 26, unpublished. (App.15).

ARGUMENT

I. Evans fails to present special and important reasons for this court to accept review pursuant to Wis. Stat. § 809.62.

A petition for review is governed by Wis. Stat. § 809.62. Review is not warranted in this case. Evans seeks to clarify the petitioner's burden, under the ch. 55 exclusion, when a subject is merely eligible for protective placement or services. Evans was not eligible for protective placement or services. Under well-settled caselaw set forth in *Helen E.F.* and *J.W.J.*, her condition required a ch. 51 commitment. Evans further required court ordered treatment at a locked psychiatric facility—whether it be protective placement or services, neither permit an involuntary order to a locked psychiatric facility. Therefore, this case does not implicate important due process concerns or questions of statutory interpretation. Rather, well-settled caselaw and unambiguous statutes decide the issue effectively. This court should decline review under those circumstances.

Involuntary civil commitments require the County to prove: (1) mental illness; (2) proper subject for treatment; and (3) dangerousness. *Langlade Cnty. v. D.J.W.*, 2020 WI 41, ¶ 29, 391 Wis. 2d 231, 942 N.W.2d 277. The County must prove each element by clear and convincing evidence. *Id.* This court reviews a circuit court's findings of fact for clear error, but independently determines whether the facts satisfy the legal standard. *Id.*, ¶¶ 24-25.

In the court of appeals, Evans argued the County failed to prove she was dangerous under the fifth standard. Specifically, she argued that the County failed to prove “protective services ... could not reduce the probability of harm to less than a substantial probability.” Br. of Resp’t-Appellant at 14. The fifth standard applies when, among other things, there is:

“a substantial probability that [the subject] 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 [subject’s] ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions.”

Wis. Stat. § 51.20(1)(a)2.e. Within the fifth standard is the ch. 55 exclusion:

The probability of suffering severe mental, emotional, or physical harm is not substantial if

1. the subject may be provided protective placement or protective services under ch. 55.

Wis. Stat. § 51.20(1)(a)2.e. The evident purpose of the ch. 55 exclusion is to avoid commitment if protective

placement or services will provide the needed treatment. *Dane Cnty. v. Kelly M.*, 2011 WI App 69, ¶ 21, 333 Wis. 2d 719, 798 N.W.2d 697. This exclusion may apply to a subject who is not yet ordered to protective placement or services but who is otherwise eligible for either. *Id.*, ¶ 32.

**A. Evans' condition required a ch. 51
commitment under *Helen E.F.***

Evans continues to argue a subject is “eligible for protective placement or services under ch. 55 when diagnosed with a ‘serious and persistent mental illness.’” Pet. for Review at 13. The County disagrees. Wis. Stat. §§ 55.08(1) and (2) require several additional findings. First, a subject is eligible for protective placement if all the following are met:

1. The subject has a primary need for residential care and custody.
2. The subject is an adult who has been determined to be incompetent by a circuit court.
3. As a result of a serious and persistent mental illness, the subject 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.
4. The subject has a disability that is permanent or likely to be permanent.

Wis. Stat. § 55.08(1). Second, a subject is eligible for protective services if all the following are met:

1. The subject has been determined to be incompetent by a circuit court.
2. As a result of serious and persistent mental illness, the subject will incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others if protective services are not provided.

Wis. Stat. § 55.08(2).

The court of appeals correctly held Evans was not eligible for protective placement or services. Evans opposes its reasoning. She argues that eligibility for protective placement or services cannot be solely decided by whether the subject had previously been found incompetent. Pet. for Review at 12. In doing so, she accuses the court of appeals of deciding Evans' eligibility solely on whether she had previously been found incompetent. *Id.* While Evans had not previously been found incompetent⁵, her accusation misstates the decision. Evans continues to overlook *Fond du Lac Cnty. v. Helen E.F.*, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179, which cripples her quarrel since the court of appeals gave it

⁵ "The record contains nothing to suggest that Evans had already been determined to be incompetent." *L.J.E.*, No. 2022AP292, ¶ 22, unpublished. (App.13).

considerable review, and for good reason. *L.J.E.*, No. 2022AP292, ¶¶ 23-24, unpublished. (App.14).

In *Helen E.F.*, the subject resided in a nursing home for six years prior to her ch. 51 commitment, 2012 WI 50, ¶ 3, had been violent and striking out at caregivers, *id.*, ¶ 4, and had been diagnosed with Alzheimer's Disease, a form of dementia, *id.*, ¶ 7. At her final hearing, the doctor testified she was a proper subject for treatment under ch. 51 since medications controlled her behavioral disturbances despite lacking a treatable mental disorder. *Id.*

In its decision, this court clarified that chs. 51 and 55 “serve substantially different purposes.” *Id.*, ¶ 21. While ch. 51 is designed to accommodate short-term commitment and treatment of mentally ill individuals, ch. 55 provides for long-term care for individuals with disabilities that are permanent or likely to be permanent. *Id.* In further explanation, this court said:

“Conversely, the goal of ch. 51 is to treat and rehabilitate the subject individual, which ideally ends by returning her to society. By contrast, ch. 55 is designed for long-term management of disorders that cannot be treated, and therefore are unlikely to subside, meaning that the individual in need of protection is unlikely to return to society.”

Id., ¶ 25. The *Helen E.F.* court further relied on *Milwaukee Cnty. Combined Cmty. Servs. Bd. v. Athans*, 107 Wis. 2d 331, 320 N.W.2d 30 (Ct. App.

1982) and *C.J. v. State*, 120 Wis. 2d 355, 354 N.W.2d 219 (Ct. App. 1984). *Id.*, ¶ 31. In *Athans*, the subject was diagnosed with chronic paranoid schizophrenia. *Helen E.F.*, 2012 WI 50, ¶ 32. The doctor testified that treatment of the subject's underlying condition would "have as much effect on her as water on a duck's back." *Id.* The court of appeals held the subject was not a proper subject for treatment as the evidence showed the treatment was only managing the schizophrenia and providing the individual long-term stabilization. *Id.*, ¶ 32-33.

In *C.J.*, the subject was also diagnosed with chronic paranoid schizophrenia. *Id.*, ¶ 34. The court of appeals reviewed *Athans* and focused on the effect treatment had on the individual's condition, not the name of the condition. *Id.*, ¶ 34-35. It held the individual was a proper subject for treatment because the subject was capable of rehabilitation as the treatment could control or improve the disorder and its symptoms. *Id.*, ¶ 35-36.

The *Helen E.F.* court adopted the test created by *C.J.* to determine whether a subject is capable of rehabilitation and thus, requiring a ch. 51 commitment:

"If treatment will maximize the individual functioning and maintenance of the subject, but not help in controlling or improving their disorder, then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will go beyond controlling activity and will

go to controlling the disorder and its symptoms, then the subject has rehabilitative potential and is a proper subject for treatment.”

Id., ¶ 36 (citing *C.J. v. State*, 120 Wis. 2d at 362) (citations and quotations omitted).

The issue of rehabilitative versus habilitative once again came before this court in *Waukesha Cnty. v. J.W.J.*, 2017 WI 57, 375 Wis. 2d 542, 895 N.W.2d 783. There, the subject was diagnosed with paranoid schizophrenia, but was able to live independently in the community, attended appointments, and took his medications. *Id.*, ¶¶ 1-3. At the recommitment hearing to extend the subject’s commitment, the doctor testified “to the extent that when treated with medications ... his behavior is improved and he can survive in the community.” *Id.*, ¶ 8.

In comparing *J.W.J.* with *Helen E.F.*, this court noted that Helen E.F.’s treated symptoms were secondary to her primary, untreatable symptoms: progressive dementia, memory loss, an inability to learn new information, and limited verbal communication. *Id.*, ¶ 38. In contrast, this court found that J.W.J.’s treatment effectively ameliorated his symptoms to where he was able to live in society and engage in outpatient treatment. *Id.*, ¶ 40. As such, this court found he was rehabilitative. *Id.*

Under the test set forth by this court in *Helen E.F.*, the County provided ample evidence for both lower courts to find that Evans required a ch. 51 commitment. Kohlenberg opined Evans suffered from bipolar disorder and experienced mood and thought symptoms. (R.31:31-32)(App.47-48). He went on to

detail “paranoia and persecutory thoughts, as well as mood symptoms, depression, mood lability and anxiety.” (R.31:32)(App.48) However, he further opined that medications should help:

“It should help reduce anxiety. It should help with mood stability and also improve thought process and decrease psychosis to allow her to, again, be functional and independent out of the hospital setting.”

(R.31:33)(App.49). He then noted that Evans has “historically” “respond[ed] to and does well with treatment”. (R.31:34)(App.50). On cross-examination, Kohlenberg further delved into Evans’ historical response:

“When I review her treatment records over the last, you know, approximately 15 years she does appear to respond to treatment, but then there’s not ongoing treatment resulting in an exacerbation of symptoms. So when she is under treatment she appears to have a modest response.

(R.31:38)(App.54). Malinovic also opined Evans’ bipolar symptoms were treatable. (R.31:43)(App.59). Malinovic said that Evans presented with “a lot of thought blocking” on April 19, 2021. (R.31:46-47)(App.62-63). Malinovic said Evans’ thought

blocking was “much better” on April 27, 2021. (R.31:47)(App.63). Therefore, Evans’ rehabilitative potential made her ineligible for ch. 55.

The County focuses on the circuit court’s factual findings regarding treatability since appellate courts must give them deference. *D.J.W.*, 2020 WI 41, ¶ 24. The circuit court concluded the County presented clear and convincing evidence that Evans suffered from a treatable condition capable of rehabilitation. (R.31:64)(App.80). It found Evans suffered from “bipolar disorder with mood and thought impairment, paranoia, persecutory thoughts, and depression or anxiety.” (R.31:64)(App.80). It found Evans was treatable because there has been a response to the medication. (R.31:64)(App.80). And it specifically noted that the testimony showed Evans would only spend another week or two at a locked psychiatric facility based on the ongoing response to her medication. (R.31:64-67)(App.80-83). The court of appeals affirmed:

“Kohlenberg and Malinovic testified that Evans’ bipolar disorder was treatable through medication and that she only needed to be committed for a short time to ensure that she continued to take it and to allow it to reach therapeutic effect. When asked directly if “there [were] any concerns that [Evans] is perhaps not treatable,” Kohlenberg answered, “No.” No testimony or other evidence was presented suggesting that Evans’ condition

was untreatable or that she required long-term care. Absent such evidence, we see no reason why the circuit court could have found the Wis. Stat. ch. 55 exclusion applicable to Evans.”

L.J.E, No. 2022AP292, ¶ 24, unpublished. (App.15). Therefore, Evans’ rehabilitative potential made her ineligible for ch. 55.

B. Evans’ condition required court ordered treatment at a locked psychiatric facility, which is not permissible under a ch. 55 order.

Evans also continues to overlook that the circuit court correctly found that her treatment required an involuntary order to a locked psychiatric facility. (R.31:64)(App.80). Importantly, the legislature unequivocally decided that a subject cannot be involuntarily ordered to a locked psychiatric facility through either protective placement or services:

1. No individual who is subject to an order for protective placement or services may be involuntarily transferred to, detained in, or committed to a treatment facility for care except under s. 51.15 or 51.20. Wis. Stat. § 55.12(2).
2. Protective placement under this section does not replace commitment of an individual in

need of acute psychiatric treatment under s. 51.20 or 51.45(13). Wis. Stat. § 55.12(5).

Here, the circuit court ordered “the maximum level of treatment shall be a locked inpatient facility” and the “reception facility shall be Waukesha County MHC”. (R.19:1-2;31:67)(App.83,87-88). It reasoned that “the least restrictive level of care would be inpatient so that [the treatment team] could stabilize the medication, reach therapeutic effects of that medication, and allow for adjustments that are going on.” (R.31:64)(App.80). Further, when the circuit court addressed whether Evans would avail herself to services in the community, it found “[t]hat is not the case here at all.” (R.31:66-67)(App.82-83). The circuit court’s factual findings are not clearly erroneous and made commitment necessary.

The county provided ample evidence in support. In fact, three witnesses opined that Evans required treatment at a locked psychiatric facility after the final hearing. First, Faterioun opined Evans “need[s] medications on an inpatient unit”. (R.31:16,19-20)(App.32,35-36). Second, Kohlenberg opined “to a reasonable degree of medical certainty” that Evans needs continued inpatient psychiatric treatment to “get her medications going and monitor her safety”. (R.31:30-31,34)(App.46-47,50). Third, Malinovic opined “to a reasonable degree of medical certainty” that “the least restrictive environment for [Evans] currently is a locked inpatient unit. She requires further medication stabilization and further time for the medications to reach a therapeutic effect.”

(R.31:43-44)(App.59-60). All three witnesses assessed Evans, including five assessments by Malinovic, and all three witnesses reviewed Evans' treatment records prior to providing their opinions. (R.31:16-17,31,42,45)(App.32-33,47,58,61).

Thus, the County proved by clear and convincing evidence, and the circuit court correctly held, Evans is dangerous under the fifth standard.

CONCLUSION

Evans' condition: (1) made her ineligible for protective placement or services based on well-settled caselaw regarding rehabilitation; and (2) required court ordered treatment at an inpatient psychiatric facility, which—unambiguously—is not permitted under protective placement or services pursuant to statute. This case does not implicate important due process concerns or questions of statutory interpretation. Therefore, the County respectfully requests, based upon the record from the circuit court, the decision of the court of appeals, and the reasons set forth above in the arguments and legal authorities cited in this response, that this court deny the Petition for Review filed by Evans as it does not warrant review under Wis. Stat. § 809.62.

Dated this 14th day of November, 2022.

Respectfully submitted,



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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief and appendix with a proportional serif font. The length of this brief is 3,563 words.

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, which complies with Wis. Stat. § 809.19(12).

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 14th day of November, 2022.



Jonathan James Martin