STATE OF WISCONSIN
SUPREME COURT

In the Matter of the Guardianship and Protective Placement of M.S.

Waukesha County Department of Health and Human Services,

Petitioner-Respondent,

v. Appeal Case No. 2022AP2065
Circuit Court Case No. 2022GN197

M.S.,

Respondent-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

ZACHARY M. BOSCH
Assistant Corporation Counsel
State Bar No. 1097994
Attorney for Petitioner-Respondent

Waukesha County Corporation Counsel Office
515 W. Moreland Blvd., AC 330
Waukesha, WI 53188
262-548-7432
zbosch@waukeshacounty.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Wisconsin Statutes

STATEMENT OF THE FACTS

M.S., diagnosed with paranoid schizophrenia, has an extensive history of Chapter 51 mental health commitments dating back to 1991. R.119:2. During M.S.'s second commitment case that spanned from 1996 to January 2019, he required no inpatient hospitalization and remained living independently in the community. Id. Upon discharge from his second commitment, M.S. ceased taking his psychotropic medications and was committed again on October 15, 2019. Id.

In August 2019, M.S. was taken to the hospital due to a broken ankle. R.119:6. M.S. refused the recommended surgery to repair his ankle due to the belief a tracking device would be surgically implanted in his leg. Id. As such, a referral was made to the Waukesha County Adult Protective Services ("APS") unit in September 2019. Id. While APS was assisting M.S., he expressed a desire to apply for Title 19/Medicaid. R.119:7, 183:40–41. However, when presented with the paperwork for his signature, his paranoia would not allow him to sign his name. Id.

As such, temporary guardianship was sought and granted. Id.

Prior to the entry of permanent guardianship, M.S. was emergently detained under Chapter 51 from the hospital and committed for six months on October 15, 2019. R.119:7. Consequently, the temporary guardianship was allowed to expire. Id. Unfortunately, M.S. did not respond to his prior medications while inpatient at Winnebago Mental Health Institute and he required transfer to the inpatient unit at Trempealeau County Health Care Center ("Trempealeau") on January 31, 2020. Id. While at Trempealeau, a new oral medication, Zyprexa, was added to M.S.'s regimen. Id.; R.183:50–51. Eventually, M.S.'s condition improved enough that Trempealeau recommended he be transferred to a less restrictive setting such as a group home. R.119:7. From April 2020 through June 2020, M.S. remained in a more restrictive setting due to his refusal to transition to a less restrictive setting. Id. In July 2020, M.S. agreed to the transfer believing it would only be temporary and that he could return to his home. Id.

On September 1, 2020, M.S. transferred from Trempealeau to Cedar Ridge Adult Family Home. R.119:8, 183:52. However, upon admission, M.S. refused to sign the admission paperwork as he believed it to be fraudulent, filled with lies, and that his refusal would allow him to return home. R.119:8. In addition, M.S. was refusing to establish a bank account to enable him to cash checks and was refusing to schedule appointments with a medical provider to continue his prescribed medications. Id.

Based on these continued refusals, M.S. faced an eviction at Cedar Ridge. Id. As such, another APS referral was made in November 2020. Id. Temporary guardianship of the estate and person was granted on November 12, 2020, and permanent guardianship of the estate and person was granted on January 12, 2021. Id. As M.S. was subject to a mental health commitment, protective placement was not sought at the time. Id.

M.S.'s mental health commitment was extended a number of times with the final extension sought in April 2021. Id. During the preparation for

the extension hearing, an issue regarding M.S.'s dangerousness under Chapter 51 was discovered due to the Chapter 55 exclusion contained in Chapter 51. Id. Waukesha County stipulated to a four-month extension of the commitment on April 9, 2021, to allow APS to engage in a proper assessment of M.S. regarding the need for protective placement or protective services under Chapter 55. Id. Following that assessment, protective placement was petitioned for and ultimately ordered on August 31, 2021. Id. App. 3–5. Due to the request for protective placement, Waukesha County dismissed the Chapter 51 mental health commitment. R.183:67.

On May 27, 2022, M.S., through appellate counsel, filed a Motion for Postdisposition Relief requesting the circuit court vacate the protective placement order as M.S. was not a proper subject for protective placement because he is rehabilitative under Chapter 51. R.191, 192. After briefing, the circuit court denied the motion by written order. R.256; App. 6–11.

M.S. then appealed the Order on Petition for Protective Placement. R.257. The Court of Appeals, District II, rejected the arguments made by M.S. and affirmed the findings and order of the circuit court in a written decision on September 6, 2023. App. 12–30. M.S. filed a Motion for Reconsideration with the Court of Appeals on September 27, 2023, that was subsequently denied on September 29, 2023. App. 31. M.S. now petitions this Court for review.

ARGUMENT

This court should deny M.S.'s Petition for Review as M.S. misstates the well-settled law applicable to Chapter 55 cases and this case does not warrant review under Wis. Stat. §809.62(1r).

I. THIS COURT SHOULD DENY THE PETITION FOR REVIEW AS M.S. GROSSLY MISSTATES THE LAW APPLICABLE TO THIS CASE.

M.S. conflates and confuses the well-settled law in an effort to convince this Court to grant review and legislate new statutory requirements not found in Chapter 55. The actual law is well-settled, clear, and

concise and does not necessitate or require review by this Court.

The State Legislature has clearly stated an individual must meet the following standards to be subject to a protective placement order under Chapter 55:

> (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 and custody as to create a substantial risk of serious harm to himself or herself or others.
>
> (d) The individual has a disability that is permanent or likely to be permanent.

Wis. Stat. § 55.08(1)(a)–(d)[1]. These are the only standards that must be proven by clear and convincing evidence. Importantly, M.S. does not

[1] As this appeal stems from proceedings in August 2021, all references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

argue Waukesha County failed to meet its burden in proving these four requirements.

Once the circuit court orders protective placement, the "protective placement . . . shall be provided 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." Wis. Stat. § 55.12(3). M.S. does not allege he is placed in a more restrictive setting than his needs require.

Instead of alleging Waukesha County failed to meet its burden proving the four statutory standards, M.S. argues there is another standard that must be proven that is not found in statute. M.S. argues this Court's *Fond du Lac County v. Helen E.F.*[2] decision enacted a new standard that requires circuit courts to make a determination regarding an individual's ability to be rehabilitated, but M.S. ignores the actual findings and holdings this Court made in *Helen E.F.* In reviewing whether Helen was a "proper subject for treatment" as required for a mental health

[2] 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179.

commitment under Chapter 51, this Court held "an individual must be capable of rehabilitation." *Fond du Lac Cnty. v. Helen E.F.*, 2012 WI 50, ¶30, 340 Wis. 2d 500, 814 N.W.2d 179. Moreover, this Court specifically noted, "Wis. Stat. § 55.08 requires that a circuit court determine that four elements are met before ordering a protective placement under ch. 55." *Id.*, ¶14.

Ultimately, this Court held, "ch. 55 has the exact opposite objective: long-term care of people who will likely never be cured. Explaining that objective, the legislature noted in § 55.08(1)(d) that individuals in need of protective services are those who have 'a disability that is permanent or likely to be permanent.'" *Id.*, ¶39. This Court additionally concluded, "[b]ecause Helen's disability is likely to be permanent, she is a proper subject for protective placement and services under ch. 55, which allows for her care in a facility more narrowly tailored to her needs, and which provides her necessary additional process and protections." *Id.*, ¶42. Importantly, this Court's holding regarding the appropriateness of protective placement does not include any

requirement that she be habilitative; rather, this Court's focus was on the four statutory standards under Wis. Stat. § 55.08(1) and in particular, whether the disability was permanent.

The *Helen E.F.* decision certainly engaged in an analysis of rehabilitative versus habilitative, but it was done in the context of what a "proper subject for treatment" means under Chapter 51. The fact an individual is not rehabilitative under Chapter 51 does not mean an individual is appropriate for protective placement: it means the individual is not a proper subject for treatment under Chapter 51. Only Chapter 51 requires an analysis of whether an individual is rehabilitative in order to determine whether the individual is a proper subject for treatment. Consequently, this Court noted, "Wis. Stat. ch. 55 contains no such requirement and thus imposes no such bar on Helen's care." *Id.*, ¶39.

In addition, the fact an individual is rehabilitative does not mean they are appropriate for a Chapter 51 mental health commitment as Wis. Stat. § 51.20 includes a number of standards that

must be proven by clear and convincing evidence. M.S.'s argument would require circuit courts to not only review whether the standards of Wis. Stat. § 55.08 have been met but also whether the standards of Wis. Stat. § 51.20 have been met. The statutes are devoid of any such requirement.

Moreover, if a circuit court finds that commitment is not warranted under Chapter 51, the State Legislature has prescribed a mechanism under Wis. Stat. § 51.67 that would allow the circuit court to enter a temporary guardianship and temporary protective placement order. However, the statute is clear that circuit courts may only engage in this conversion process if commitment is not warranted: "If, after a hearing under s. 51.13(4) or 51.20, the court finds that commitment under this chapter is not warranted . . . the court may . . . appoint a temporary guardian . . . and order temporary protective placement . . . ." Wis. Stat. § 51.67. Significantly, the circuit court cannot convert a Chapter 51 case to a Chapter 55 case simply because it finds one to be more appropriate than the other. In addition, Chapter 55 is devoid of any provision

allowing a circuit court to convert a protective placement to a Chapter 51 matter at a final hearing.

Furthermore, M.S.'s statements regarding the applicable law directly contradicts the Chapter 55 exclusion provisions found in Chapter 51. Three of the five dangerousness standards specifically note the probability of suffering harm "is not substantial under this [subdivision] . . . if the individual may be provided protective placement or protective services under ch. 55." Wis. Stat. § 51.20(1)(a)2.c. & e.; see also Wis. Stat. § 51.20(1)(a)2.d. In other words, the State Legislature contemplated an individual capable of rehabilitation could also qualify for protective placement or services under Chapter 55. Under M.S.'s "hypothesis," the circuit court would never reach the issue of dangerousness as the individual would never be a proper subject for treatment, rendering the Chapter 55 exclusion meaningless.

M.S. refers to his argument regarding the law as a "hypothesis." Pet. for Rev. 21. Given the fact it directly conflicts with the State Legislature's prescribed requirements under Wis. Stat. §§ 55.08

and 51.20 and this Court's decision in *Helen E.F.*, it can be nothing more than a "hypothesis." Reviews by this Court should not be granted based on "hypotheses;" rather, this Court's resources and time should be devoted to those cases that legitimately meet the criteria prescribed by Wis. Stat. § 809.62(1r) and present real conflicts within the actual law.

II. THE PETITION FOR REVIEW SHOULD BE DENIED AS REVIEW IS NOT WARRANTED UNDER THE CRITERIA OF WIS. STAT. § 809.62(1r).

This case is nothing more than a sufficiency of the evidence case. In an attempt to catch this Court's attention, M.S. has created a "hypothesis" about the relevant law in hopes this Court, unlike the Court of Appeals, will go "fishing for this red herring." App. 14.

In reality, this case does not present a real and significant question of federal or state constitutional law; it does not require this Court to consider establishing, implementing, or changing policy within its authority; it will not help to develop, clarify, or harmonize the law; and the Court of Appeals'

decision was made in accordance, not in opposition, to prior decisions of this Court and the Court of Appeals. Notably, M.S. does not suggest this case warrants review under any of these standards.

To some extent, M.S. requests this Court to "clarify" *Helen E.F.*'s "crucial role" in Chapter 55 proceedings. However, as noted previously, no clarification by this Court is necessary as statutory requirements for protective placement under Chapter 55 are well-settled and *Helen E.F.*'s application remains in Chapter 51 cases. M.S.'s need for clarification is related to his "hypothesis," not the actual law. The law is clear, the Court of Appeals applied it appropriately, and such application was consistent with past decisions. As such, review by this Court is not warranted.

CONCLUSION

Based on the record and aforementioned arguments, Waukesha County respectfully requests this Court deny M.S.'s petition for review.

Dated this 15th day of November, 2023.

Respectfully submitted,

Electronically signed by Zachary M. Bosch
Attorney for Petitioner-Respondent
Waukesha County
State Bar No. 1097994
Waukesha County Corporation Counsel
515 W. Moreland Blvd.
Waukesha, WI 53188
262-548-7432

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. RULE 809.62(4) AS TO FORM AND LENGTH

I hereby certify that this Petition for Review meets the form and length requirements of Wis. Stat. Rules 809.19(8)(b), (bm), and 809.19(8g), and 809.62(4). Proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point quotes and footnotes. The length of this brief is 2,213 words.

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. RULE 809.19(8g)(b) AS TO APPENDIX

I hereby certify that separately filed with this Petition for Review is an appendix that complies with Wis. Stat. Rules 809.19(2)(a) and 809.62(2)(f) and (4), that contains:

(1) A table of contents;

(2) The decision and order of the Court of Appeals;

(3) Other portions of the record necessary for an understanding of the petition;

(4) A copy of any unpublished opinion cited under Wis. Stat. §809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusion of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of November, 2023.

Electronically signed by Zachary M. Bosch
Zachary M. Bosch
Assistant Corporation Counsel