STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP000021

In the matter of the guardianship and protective placement of T.R.Z.:

WASHINGTON COUNTY,

Petitioner-Respondent,

v.

T.R.Z.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. This is an appeal of an annual protective placement review. While the appeal was pending, another review hearing occurred resulting in a continued protective placement. As a result, the court of appeals concluded that T.R.Z.'s appeal was moot and that mootness exceptions did not justify a decision on the merits.

   Did the Court of Appeals correctly apply mootness case law in determining that T.R.Z.'s appeal did not satisfy exceptions to mootness?

2. Should this Court use its superintending authority to establish that appeals from annual protective placement reviews are never moot?

This issue is being presented for the first time on appeal.

3. If this Court accepts review and determines that mootness exceptions or other authority allows it to reach the merits, the Court should resolve the unaddressed issues presented in T.R.Z.'s briefing below:

   - Did T.R.Z.'s postidisposition motion entitled him to a hearing?

- Was the evidence sufficient to continue the protective placement?
- Did the County's failure to abide by the statutory time limits cause the circuit court to lose competency?

Following the circuit court's orders extending the protective placement and denying the motion for postdisposition relief, the appeal was dismissed as moot in the court of appeals.

CRITERIA FOR REVIEW

As this Court has previously acknowledged, the potentially life-long deprivation of liberty entailed by a protective placement order raises obvious due process concerns. *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 76-77, 362 N.W.2d 104 (1985). Accordingly, Wisconsin law requires meaningful annual judicial review of such orders. *Id.* at 83-84.

Individuals who believe that the circuit court erred in connection with that hearing also have a right to appeal. Wis. Stat. § 55.20. Here, Tim's postdisposition motion and appellate briefs raise substantial concerns for which he sought relief through the appellate process. However, given the complexity of the litigation, T.R.Z. was unable to receive a decision from the court of appeals before a new annual review hearing occurred. Accordingly, the court of appeals dismissed his appeal as moot and

refused to engage with his substantive legal issues. That outcome frustrates T.R.Z.'s right to an appeal and, equally as important, deprives Wisconsinites of guidance with respect to the important issues presented by his case.

Review is therefore warranted given the court of appeals' holding that mootness exceptions did not apply to this case. A careful review of its mootness analysis shows that it is in tension with prior holdings of both the court of appeals and this court. Review is therefore warranted under Wis. Stat. § 809.62(1r)(d). Moreover, inasmuch as this decision has the functional effect of depriving T.R.Z. of a meaningful appeal, review is also warranted under § 809.62(1r)(a). This Court needs to ensure that litigants like T.R.Z. are given a fair opportunity to litigate their appeals and must also ensure that an overly stringent application of the mootness doctrine does not chill the exercise of appellate rights by similarly situated individuals. Moreover, as T.R.Z.'s case does present interesting questions meriting review, all Wisconsinites would benefit from a decision on the merits.

However, even if this Court disagrees with T.R.Z. as to the application of mootness precedent in this case, there is still a need for this Court to exercise its superintending authority and ensure that future protective placement appeals are not moot, thereby guarantying that the right of appeal remains meaningful in such cases. Review is therefore warranted under Wis. Stat. § 809.62(1r)(b).

STATEMENT OF FACTS

This appeal arises from the first annual review hearing held in connection with "Tim's"[1] protective placement. (36). Tim told the writer of a memorandum filed in connection with the request for a continued protective placement that "he would like his protective placement dropped." (37:3). Accordingly, advocacy counsel was appointed to represent him. (46:1). Both counsel and Tim stated, on the record, that Tim was contesting the County's request for a continued protective placement. (78:2-3).

When the parties appeared for the contested hearing, however, counsel told the court he "guess[ed]" that the issue in dispute was "really the least restrictive placement." (76:3-4). Neither Tim nor his guardian ad litem addressed these comments and the matter preceded to the evidentiary phase.

The County called only one witness, a "supervisor" with Washington County Health and Human Services. (76:4-5). She testified about Tim's history and reiterated what she had learned about Tim's case by reviewing treatment records and documents prepared by other speakers. (76:6). On cross-examination, Tim's attorney elicited additional details about Tim's history, including Tim's history of "behavioral disturbances." (76:10).

The circuit court ultimately concluded that Tim continued to meet the criteria for a protective

[1] Pseudonym.

placement and that his current placement was the least restrictive. (76:30); (App. 17). It signed a proposed order to that effect. (62); (App. 12).

Tim filed a postdisposition motion arguing that his lawyer was ineffective. He argued that counsel had failed to object to inadmissible hearsay and "stealth" hearsay during the supervisor's testimony and had compounded that error by continuing to elicit inadmissible and unhelpful testimony during his cross-examination. (79). In addition, Tim argued that his lawyer also erred when he failed to object to the current guardian giving unsworn testimony about Tim's need for a protective placement and for not objecting to a violation of the statutory time limits. (79).

The circuit court denied the motion in a written order. (87); (App. 14). In the circuit court's view, Tim was not contesting his suitability for a continued protective placement. (87:2); (App. 14). Accordingly, the circuit court concluded the alleged deficiencies were irrelevant. (87:2): (App. 14).

On appeal, Tim asked the court of appeals to hold that his motion entitled him to an evidentiary hearing on these issues. *Washington County v. T.R.Z.*, No. 2024AP21, ¶ 1, unpublished slip op., (Wis. Ct. App. June 19, 2024). (App. 4). He also asked the court of appeals to assess the sufficiency of the County's evidence. *Id.* Finally, he argued that the County violated the statutory time limits by failing to timely initiate the annual review—a recurring issue

presented in at least two other recent unpublished decisions—and, therefore, that the circuit court lost competency to hold the hearing. *Id.*

The court of appeals did not reach the merits. Instead, it concluded that Tim's appeal was moot, as another annual review had occurred while this appeal was pending. *Id.,* ¶ 9. (App. 7). Although Tim argued that the logic of this Court's decision in *Sauk County v. S.A.M.*, 2022 WI 46, ¶ 19, 402 Wis. 2d 379, 975 N.W.2d 162 means that his appeal is not moot, the court of appeals was not persuaded by that argument. *Id.*, ¶ 12. (App. 8).

Moreover, it rejected his argument that the appeal, even if moot, satisfied exceptions to mootness. *Id.*, ¶ 17. (App. 9). It offered two justifications for that holding. First, because many of Tim's claims involved a request for an evidentiary hearing on his postconviction motion, it concluded that "granting such relief does not serve the purpose of the mootness exceptions." *Id.* Second, the court concluded that because Tim did not appeal from the new protective placement review, then the errors complained of in this appeal likely did not recur. *Id.*

Tim filed a motion for reconsideration, which was denied. (App. 11). This petition follows.

ARGUMENT

I. This Court should accept review and hold that the court of appeals erroneously concluded that exceptions to mootness did not apply.

A. The court of appeals misapplied case law governing mootness exceptions.

"Mootness is a doctrine of judicial restraint." *Marathon County v. D.K.,* 2020 WI 8, ¶ 19, 390 Wis. 2d 50, 937 N.W.2d 901. Thus, while this Court has a stated policy of not addressing issues when doing so will have "no practical effect" on an underlying controversy, *id.,* Wisconsin courts are empowered to overlook mootness and reach the merits of a case "if the issue falls within one of five exceptions: (1) the issue is of great public importance; (2) the issue involves the constitutionality of a statute; (3) the issue arises often and a decision from this court is essential; (4) the issue is likely to recur and must be resolved to avoid uncertainty; or (5) the issue is likely of repetition and evades review." *Id.*

Here, however, the court of appeals failed to substantively engage with these mootness exceptions. Instead, it held that this appeal did not satisfy a mootness exception for reasons that do not cleanly track this court's formulation of the exceptions at issue. Review is warranted to correct this mistaken application of the law, which threatens to discourage future appeals of contested annual review hearings

and functionally deprives vulnerable individuals of necessary appellate review.

Here, the court of appeals gave two reasons as to why Tim's appeal did not satisfy mootness exceptions.

First, it held that an appeal arising from an order denying a postdisposition motion without a hearing is categorically incapable of satisfying a mootness exception, as a remand for a hearing "does not serve the purpose of the mootness exceptions." *T.R.Z.*, No. 2024AP21, ¶ 17. (App. 9). The court of appeals, however, did not explain why this was so. Logically, the holding is problematic as Wisconsin law requires most issues—even interesting and potentially important ones of statewide importance—to be first raised via a postconviction or postdisposition motion. Wis. Stat. § 809.30(2)(h). Just because an issue will need to be litigated in context of an ineffectiveness claim does not mean the case is incapable of satisfying mootness exceptions. In fact, given the paucity of case law interpreting the ineffectiveness doctrine in context of a Chapter 55 annual review hearing, further litigation and development of these issues will provide guidance and clarity to litigators in this specialized practice area.

More problematically, the court of appeals did not acknowledge that, with respect to Tim's competency challenge, no remand was required; instead, the court of appeals was in a position to decide that issue on the merits. The same goes for Tim's sufficiency challenge.

Second, the court of appeals appeared to hold that the fifth exception—whether Tim has a reasonable basis to believe that these issues will recur for him at future protective placement reviews, *See Outagamie County v. L.X.D.-O.,* 2023 WI App 17, ¶ 17, 407 Wis. 2d 441, 991 N.W.2d 518—was inapplicable here. In the court of appeals' view, the fact that Tim did not appeal the most recent protective placement order means that the issues have *not* recurred and, therefore, that an exception to mootness is not entailed. *T.R.Z.*, No. 2024AP21, ¶ 17. (App. 9).

The reasoning is fallacious, as the exception focuses on whether the issues *can* reasonably be excepted to recur. As Tim's appeal involves questions of sufficiency of the evidence and the testimony of institutional actors, it is reasonably likely—in fact, nearly certain—that the testimony at future annual reviews will continue to mirror the controverted testimony in this case. Because the court of appeals failed to recognize this reality—and instead reasoned, from the fact that an incompetent person *did not* appeal that such issues not could have possibly recurred—then the court of appeals misapplied the mootness exception at issue and this Court must reverse.

Setting aside the court of appeals' proffered justifications for not overlooking mootness, another neglected consideration in this case is that Tim's appeal presents a battery of important legal questions meriting resolution. As a threshold matter, for example, he asked the court of appeals to address the

circuit court's stated reason for denying the postdisposition motion—its reasoning that Tim had stipulated away his ability to challenge whether he continued to satisfy the criteria for a protective placement. (87:2); (App. 15). Tim's brief urged the court of appeals to reject the circuit court's apparent belief that it was not required to address Tim's continued suitability for a protective placement given the ambiguous comment of his appointed lawyer. (Brief at 41).

As Tim argued in his brief, plain statutory language, binding precedent, and Tim's constitutional right to due process of law all disfavor such a reading. As this Court recently concluded in *Waukesha County v. M.A.C.*, 2024 WI 30, ¶ 48, __Wis. 2d __, __N.W.2d__, the legislative command to hold a hearing is meant to be taken at face value; procedures which relieve the County of a burden of proof are disapproved. The circuit court's conclusion that Tim's suitability for a protective placement was not in dispute is therefore legally erroneous, and that legal error should have been analyzed by the court of appeals.

Setting aside this quasi-procedural issue that necessarily impacts every potential yearly review under Chapter 55, Tim's appeal also touched on a number of important and recurring legal issues. For example, Tim straightforwardly asked the court of appeals to address his competency challenge arising from what he viewed as a blown deadline and alerted the court of appeals that the issue had been raised in at least two other recent appeals, arising from

different counties and decided by different districts, without resolution. (Brief at 59). These legal issues, however, were simply ignored in the court of appeals' analysis.

B. This Court needs to ensure that mootness exceptions are carefully scrutinized in such cases to ensure that the right of appeal in protective placement cases does not become an empty promise.

Stepping back from the court of appeals' specific application of the mootness exceptions, it is worth noting the burden placed on appellants in these cases. After an annual review hearing, the person has roughly a year to complete the entire appellate process before the appeal is technically moot. This is a very difficult task to accomplish and delays having nothing to do with the litigant are usually the culprit. For example, the statute contemplates the appointment of appellate counsel within 30 days of the clerk transmitting the notice of intent. Wis. Stat. § 809.30(2)(e). This assumes, however, that the State Public Defender is able to timely appoint appellate counsel; the number of motions seeking extension of time to do so in the court of appeals would suggest that this 30-day deadline is aspirational, at best. Likewise, Wisconsin is also experiencing a court reporter shortage and assigned court reporters are frequently the cause of (understandable) delays.

Even if no postdisposition motion is filed (a necessity in many cases) and the case goes straight to

a notice of appeal, the statute builds in roughly 175 days in which the necessary pre-appeal actions (filing of the notice of intent, appointment of counsel, preparation of transcripts, filing of notice of appeal, etcetera) must occur. From that point forward, the case will take at least another 200 days for a decision to be issued. In fact, depending on the district in which the protective placement appeal is assigned, litigants may be waiting up to 446 days to receive a decision.[2]

Given the extreme caseloads faced by our court of appeals, it is therefore inevitable that many appeals will fail to resolve before a new order is issued. If the court of appeals is too stingy in finding exceptions to mootness, this means that many individuals will find their alleged right to appeal rendered meaningless by the mere passage of time. As the court of appeals recognized in *L.X.D.-O.,* such considerations should be factored into the mootness calculus. *Id.*, ¶ 18.

Accordingly, it is vitally important that the court of appeals take the possibility of mootness exceptions seriously. If the court of appeals fails to do so, these cases become functionally unreviewable and, even in situations where litigants have their protective placement repeatedly extended in the face of insufficient evidence, those persons will have no avenue toward relief.

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[2] See the most recent edition of the Court of Appeals Annual Report available online at https://www.wicourts.gov/ca/DisplayDocument.pdf?content=pdf&seqNo=830877.

Accordingly, this Court should accept review, hold that Tim's case satisfies mootness exceptions, and address the issues presented in the appeal on the merits.

C. There is a lack of guidance regarding protective placement appeals generally, so the entire system benefits from more citable decisions on the merits.

Finally, it is worth pointing out that, when it comes to protective placement appeals, there is not a large body of citable case law. Despite the complexity of the statute and the panoply of legal issues presented in such cases, the practical reality is that many litigants—when confronting novel legal questions—may find themselves operating in a concerningly "law free" zone of uncertainty.

It doesn't have to be this way. When interesting issues are presented in otherwise moot appeals, our case law recognizes that the court of appeals can overlook the mootness doctrine—which is not a jurisdictional bar—and provide legal actors with guidance. When interesting issues are buried by a dismissal order motivated by a finding of mootness, however, the legal system suffers. Time is wasted. Legal actors must simply sit on their hands until the same error recurs and *hope* that a decision on the merits can be obtained.

Accordingly, this Court should ensure that the court of appeals is cognizant of these concerns in applying mootness precedent. Because Tim's case

presents such interesting issues, the Court must accept review and reverse.

II. This Court should accept review and use its superintending authority to hold that an appeal of an annual protective placement appeal is never moot.

"Article VII, Section 3 of the Wisconsin Constitution expressly confers upon this [C]ourt superintending and administrative authority over all state courts." *State v. Jerrell C.J.*, 2005 WI 105, ¶ 40, 283 Wis. 2d 145, 699 N.W.2d 110. This constitutional provision authorizes this Court to exercise a power "unlimited in extent" when "promot[ing] the efficient and effective operation of the state's court system." *State v. Jennings*, 2002 WI 44, ¶¶ 13-14, 252 Wis. 2d 228, 647 N.W.2d 142.

As noted above, Wisconsin law mandates annual judicial review of protective placements precisely because of a concern that such indefinite orders, if not carefully subject to judicial scrutiny, threaten individual liberty. *Watts*, 122 Wis. 2d at 76-77. Notably, persons subject to such orders are also given an additional layer of protection if they believe that the circuit court has failed to honor those due process guarantees—they can ask the Wisconsin Court of Appeals to review their case. Wis. Stat. § 55.20.

Yet, as also noted above, such appeals must be completed within a very tight timeframe that places extreme pressures on all system actors, including the judges of the court of appeals. If the court of appeals is

allowed to label appeals as "moot" if the appeal fails to be decided before an intervening annual review—due to events wholly outside the control of the incompetent individual subject to a protective placement order—then, practically, the right to appeal fails to meaningfully exist for this class of individuals.

Tim acknowledges that this Court does not invoke its superintending authority "lightly." *Jerrell C.J.,* 2005 WI 105, ¶ 41. Yet, this case demonstrates the need for action—a complex case presenting numerous meritorious and important legal issues disposed of summarily without substantive analysis.

If the legislatively guaranteed right of appeal is to be meaningful, the artificial roadblock created by the doctrine of mootness must be removed.

III. If this Court grants review and holds that it can reach the merits, it should reverse.

Finally, if this Court accepts review, it should address the following three issues on the merits.

First, Tim's case involves concerning allegations of attorney ineffectiveness. As Tim argued in his motion and in his briefs, "advocacy" counsel was actually anything but. Counsel repeatedly failed to object to inadmissible testimony during the County's case-in-chief. He then doubled down on that failure by eliciting, from the same witness, even more inadmissible and patently unhelpful testimony on cross-examination. Counsel also failed to object to the unsworn testimony of Tim's guardian and did not

object to the County's violation of statutory time limits.

Here, Tim's motion makes clear that counsel's performance failed to fulfill the promise of an adversarial system of justice. Moreover, his egregious conduct resulted in reams of problematic evidence being admitted against his client. This Court should therefore reverse and, in so doing, make clear that counsel at a protective placement hearing owes the same duty of zealous advocacy as lawyers in criminal or other proceedings; such callous disregard for Tim's interests should not be tolerated by our system. As Tim's motion clearly satisfies the standard set forth in *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis. 2d 568, 682 N.W.2d, this Court should therefore reverse and remand for the evidentiary hearing Tim requested.

Second, Tim attacked the sufficiency of the evidence. He argued that the testimony did not establish that he posed the specific harm contemplated in Wis. Stat. § 55.08(1)(c) and that the County had failed to prove his current placement was the least restrictive. Here, the County's proof of dangerousness was especially thin and was largely based on generic averments of incapacity which did specifically prove that Tim was dangerous, as required by statute. Unpublished, but citable, decisions of the court of appeals suggest that this dangerousness criterion is meant to be especially stringent. *Wood County v. Zebulon K.,* Nos. 2011AP2387, 2011AP2394, unpublished slip op. (Wis. Ct. App. Feb. 7, 2013); *Outagamie County D.H.S. v. L.C.E.,* No. 2023AP929,

unpublished slip op., (Wis. Ct. App. June 4, 2024).[3] This case therefore presents an opportunity for this Court to adopt those holdings and emphasize the importance of proving dangerousness in the protective placement context. Because the County's evidence did not satisfy this standard, the Court must reverse.

Finally, Tim's appeal also presents an important and unresolved issue regarding the timing of the annual review. As Tim argued below, the County failed to abide by the requirements of Wis. Stat. § 55.18(1)(a) by filing the required paperwork to initiate that appeal one day late. (36; 37). Accordingly, Tim argued that the failure to abide by that statutory deadline deprived the circuit court of competency—an issue that continues to recur in the court of appeals. *Department on Aging v. R.B.L.*, No. 2022AP1431, unpublished slip op., (Wis. Ct. App. June 27, 2023); *Douglas County v. M.L.*, No. 2022AP141, unpublished slip op., (Wis. Ct. App. Dec. 28, 2023).[4] This Court should therefore accept review, confront this recurring issue head-on, and reverse.

[3] The two unpublished decisions are included in the appendix at pages 49 and 38, respectively.

[4] The two unpublished decisions are included in the appendix at pages 18 and 24, respectively.

CONCLUSION

For the reasons set forth herein, Tim asks this Court to accept review and reverse the court of appeals.

Dated this 31st day of July, 2024.

Respectfully submitted,

Electronically signed by Christopher P. August

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,762 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions 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 31st day of July, 2024.

Signed:
Electronically signed by
Christopher P. August
CHRISTOPHER P. AUGUST
Assistant State Public Defender