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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP2391-FT

In the matter of the mental commitment of D. P.;

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

D.P.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. What quantum of evidence must the County present to satisfy the requirement in Wis. Stat. § 51.20(1)(a)2.e of proof that the advantages and disadvantages of medication were explained to the respondent?

The circuit court granted the County's request for an involuntary medication order. D.P. appealed and the court of appeals affirmed, holding that the doctor's testimony sufficiently complied with the statutory requirement.

2. The Wisconsin Department of Health Services has generated a series of standardized informed consent forms for commonly-prescribed psychiatric medications. Can an explanation of the disadvantages of a medication be reasonable when it omits nearly all of the side-effects listed in the form?

This issue was raised for the first time in the court of appeals, which held that there was no requirement that the doctor discuss the side-effects identified by DHS.

CRITERIA FOR REVIEW

The issues presented by this case meet several of the criteria for review by this Court. First, under Wis. Stat. § 809.62(1r)(a), this case presents a "real

and significant question of federal or state constitutional law" as it involves the requirements that agents of the state must satisfy before overcoming a person's constitutionally protected right to refuse medication.

Second, the case presents a "question of law of the type that is likely to recur unless resolved by the supreme court." Wis. Stat. § 809.62(1r)(c)3. As will be demonstrated in this petition, numerous decisions of the court of appeals have addressed challenges to involuntary medication orders. Many of those decisions are incompatible with one another and with decisions of this Court. Clarifying what testimony is required at a hearing and what evidence must be in the record to affirm on appeal will benefit practitioners and judges. Review is necessary under Wis. Stat. § 809.62(1r)(d). Finally, review is necessary under Wis. Stat. § 809.62(1r)(d) because the decisions of the court of appeals conflict with each other and with this Court's decisions.

Essentially, there are two issues requiring resolution by this Court. The first deals with the threshold requirement for obtaining an involuntary medication order—proving that the committed person has received a "reasonable" explanation of the particular medication the County seeks to administer. As this Court held in *Outagamie County v. Melanie L.*, 2013 WI 67, ¶ 67, 349 Wis. 2d 148, 833 N.W.2d 607, the County must establish that the person received a "reasonable explanation" which includes "why a particular drug is being prescribed, what the

advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication."

However, despite the clarity of the statutory language and the unambiguous holding of this Court, lower courts have struggled to consistently apply those requirements in appeals of involuntary medication orders. Courts disagree as to how much explanation is required and what specific topics must be covered in the doctor's testimony. A review of the case law reveals a spectrum of disagreement as to how rigorously the court of appeals ought to review the evidence in assessing the County's compliance with the "reasonable explanation" requirement. As will be shown, there is virtually no consistency in how this requirement has been applied in the court of appeals. It is impossible for lawyers and judges reliably to discern what is actually required of a testifying doctor in a medication hearing.

Because uncertainty and confusion persist in the court of appeals, this Court should accept review to clarify and reaffirm its prior holdings and to harmonize the conflicting applications of those precedents in the court of appeals. Doing so will not only resolve a commonly-litigated appellate issue but also assist lower court actors in conducting medication hearings that are consistent with due process guarantees, statutory requirements, and case law.

In fact, this Court recently granted review of a case presenting this precise issue. *Winnebago County v. D.E.W.*, 2023AP215, petition for review of an unpublished court of appeals decision granted 12/11/23. However, the Court dismissed the petition for review as improvidently granted following oral argument. Dissenting from that order, Justice Rebecca Frank Dallet agreed with D.E.W. that review of the issues in that case "may help clear up potential uncertainty in circuit courts and the court of appeals about the interplay between [*Melanie L.*] and [*Christopher S.*]"[1]

D.P. is once again asking this Court to grant review to clarify the interplay between *Christopher S.* and *Melanie L.* and to address the quantum of evidence necessary to prove the person received a sufficient explanation of advantages, disadvantages, and alternatives to medication as required by Wis. Stat. § 51.20(1)(a)2.e.

The second issue presented here involves the source and scope of information that constitutes a reasonable explanation. Conveniently, the Wisconsin Department of Health Services (DHS) has already prepared guidance as to what information should be provided to patients in order to obtain informed

[1] *D.E.W.* and other decisions cited in this petition involved the interpretation of the language of Wis. Stat. § 51.61(1)(g)4.b. The language at issue here—that of Wis. Stat. § 51.20(1)(a)2.e—is identical, as this Court acknowledged in *Melanie L.* 2013 WI 67, ¶ 63.

consent with respect to such medications. Notably, the information conveyed in the forms prepared by DHS far exceeds the typically cursory and limited explanation given to a Chapter 51 committee. D.P. therefore asks this Court to accept review and hold that examiners should be guided by the DHS forms in providing explanations under Chapter 51 and that courts should use those forms as benchmarks for evaluating the reasonableness of the explanations that examiners provide. This rule would promote clarity in this contested area and ensure that explanations are uniform and consistent. Wis. Stat. § 809.62(1r)(b).

STATEMENT OF FACTS

The County petitioned for recommitment of D.P. under Wis. Stat. § 51.20(1)(am). (133). A contested hearing was held on April 30, 2024. (162). The County presented the testimony of Dr. David Zerrien.

Dr. Zerrien testified that he had been treating D.P. since 2018 and had last examined him on April 10, 2024. (162:5). He testified that D.P. was diagnosed with schizophrenia. (162: 6). Dr. Zerrien described D.P.'s delusional thoughts and auditory hallucinations. (162: 7). However, Dr. Zerrien said that D.P. lacked insight into the reason for his initial commitment in 2018 or incidents in the past when he became "agitated or adverse.". He said D.P. did not believe that he had a mental illness. (162: 7-8). He described D.P. becoming agitated when he tried to educate him about his mental illness. (162: 8). D.P. indicated that he did not believe he needed

medication, that he would like to move to a different area, and that he resented the commitment because it prevented that. (162: 8).

Dr. Zerrien testified that D.P. had multiple episodes of not taking medication, which caused him to "worsen" and led to two hospitalizations in the past year. (162: 9). Dr. Zerrien opined that D.P.'s condition was treatable with medications and that he had some improvement but still had "residual symptoms." (162: 9). Dr. Zerrien was concerned that D.P. would decompensate if treatment were discontinued. (162: 10).

Dr. Zerrien listed D.P.'s current medications as Fanapt and Fluphenazine (antipsychotics); Trihexyphenidyl (for side effects), and Lorazapam (sleep aid). 162: 11).

When asked whether he had reviewed the advantages, disadvantages, and alternatives to these medications, Dr. Zerrien responded "I did. And I reviewed the side-effects with him." (162: 11). He added that D.P. became agitated and hostile when discussing alternatives, which caused Dr. Zerrien to terminate the visit. (162: 11). Dr. Zerrien opined that D.P. was incapable of expressing an understanding of the advantages, disadvantages, and alternatives to medication "because he doesn't think he has a mental health problem." (162: 11). When asked whether D.P. was able to repeat back to him any of the advantages and disadvantages, Dr. Zerrien said:

> This last time he became argumentative and thought I was giving him medicine to, quote, hype him up and I should be giving medicine to calm him down. So that was his main feedback to me after reviewing medication information at the last visit.

(162: 11). Dr. Zerrien said the medication he prescribed would not "hype someone up." (162: 12). When asked if D.P. was capable of applying an understanding of the advantages, disadvantages, and alternatives to medication in order to make an informed choice about medication, Dr. Zerrien further responded: "I think given his lack of insight and acceptance of having a mental health problem, he's incapable of applying such an understanding to decisions about treatment." (162: 12). He said D.P. told him that if he were not required to take medication, he would stop taking it and move to Chicago. (162: 13).

On cross-examination, Dr. Zerrien provided more information about D.P.'s agitation when discussing medication alternatives. He explained:

> Actually, [D.P.] has been through multiple treatments with some treatment failures, unfortunately. There's not a long list of things that are yet to be tried to try to help him so that's a very limited list for him. And so those are the ones that I talked to him about viable alternatives currently in the past. This time he was very--very upset when I started talking about that.

(162: 16).

Dr. Zerrien said D.P. had expressed concerns about dry-mouth as a side-effect of his medication. He said D.P.'s main concern, though was hyperprolactinemia—a rise in his prolactin level while taking some medications, which can cause "breast tissue development." (162: 20). Dr. Zerrien expressed that "we have not unfortunately been able to get fully away from that treatment or reduce it without him worsening psychiatrically." (162: 20).

Dr. Zerrien's report was admitted into evidence. (162: 14; 135). Where the report form called for a list of the disadvantages that were explained to the subject, Dr. Zerrien provided the following:

> I did talk to the patient about hyperprolactinemia, and he was frankly angry about that, which is a problem for him on his current treatment unfortunately. He has a risk of sedation, tremulousness, dry mouth, amongst other side-effects that were reviewed. We did talk about sedation related to lorazepam as he is requesting an increase in that dose.

(135: 5).

Where the report form asked whether the subject individual was incapable of expressing an understanding of the advantages, disadvantages and alternatives to accepting the recommended medication or treatment, Dr. Zerrien checked the "yes" box and, by way of explanation, supplied: "The patient does not feel he has a mental health problem and does not see any active need for medication." (135: 5). Where the

form asked whether the subject was substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his/her condition in order to make an informed choice as to whether to accept or refuse the recommended medication or treatment, Dr. Zerrien again checked the "yes" box and added: "He lacks insight into the need for treatment and the ongoing need for it." (135: 5).

The report asserted that D.P. was dangerous and a proper subject for commitment under the "fifth standard." (135: 4).

The circuit court found that the County demonstrated by clear and convincing evidence that the elements of the "fifth or E standard"[2] were met. (162: 44). As relevant here, the court found that the advantages, disadvantages, and alternatives to his medications were explained to D.P. and that D.P. was incapable of expressing an understanding of that information or applying that understanding in order to make an informed choice about whether to accept medication. (162: 48).

D.P. appealed. He argued that D. Zerrien's testimony about the explanation he provided to D.P. regarding the disadvantages of the prescribed medications—which was limited to a few side effects D.P, was experiencing and omitted other serious potential side-effects—was inadequate to satisfy Wis.

[2] This refers to the standard of Wis. Sat. §51.20(1)(a)2.e.

Stat. §51.20(1)(a)2.e and *Melanie L.* (Brief of Respondent-Appellant at 8-10). D.P. also argued that informed consent forms promulgated by the Department of Health and Human Services and available on line, listed side effects of commonly prescribed psychotropic medications, including those prescribed to D.P. (Brief of Respondent-Appellant at 10-12). D.P. argued that these forms were evidence of what information would be required in any reasonable explanation of the disadvantages of the medications, since they were the kind of information any reasonable patient would expect to receive. (*Id.*).

The court of appeals affirmed, relying on this Court's decision in *Winnebago County v. Christopher S.*, 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109, which the court believed altered the quantum of testimony that is necessary regarding the explanation of the advantages and disadvantages of medication—allowing orders to be affirmed based on bare-bones testimony by the doctor that he or she gave an explanation, and essentially overruling *Melanie L.* (Slip Op. ¶¶ 9-10). Regarding the DHS forms, the court said that D.P. had offered "no legal support for his contention that a doctor must discuss every possible side effect identified by DHS or any other organization." (Slip Op. ¶¶ 8).

ARGUMENT

I. This Court should accept review to determine what testimony the County must elicit at a medication hearing to comply with the "reasonable explanation" requirement of Wis. Stat. § 51.20(1)(a)2.e.

D.P. was re-committed under Wis. Stat. § 51.20(1)(a)2.e—the so-called "fifth standard." A prerequisite to commitment or recommitment under that standard is that the individual is incompetent to make medication or treatment decisions. *In re Commitment of Dennis H.,* 2002 WI 104, ¶ 21, 255 Wis. 2d 359, 647 N.W.2d 851. Specifically, the person must be unable, "because of mental illness," to make "an informed choice as to whether to accept or refuse medication or treatment." Wis. Stat. § 51.20(1)(a)2.e. This must be evidenced either by an "incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives," or by a "substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness." *Id.*

Notably, this must occur "after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her." *Id.*

If the court finds that the subject individual meets the commitment standard of § 51.20(1)(a)2.e, then the court the court "shall issue an order

permitting medication or treatment to be administered to the individual regardless of his or her consent." Wis. Stat. § 51.61(1)(g)3m.

Before D.P. could be recommitted under Wis. Stat. §51.20(1)(a)2.e, he had to be found incompetent to refuse medication. Before he could be found incompetent, the County was required to establish that the advantages, disadvantages, and alternatives to the medication he was being asked to consent to were explained to him. As this Court has twice held, there is an intentionally stringent burden on the County to prove that the person in fact received an "adequate" or "reasonable" explanation. *Virgil D. v. Rock County*, 189 Wis.2d 1, 5, 524 N.W.2d 894 (1994); *Melanie L.*, 2013 WI 67, ¶ 67. A "reasonable explanation of the proposed medication" should include "why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication." *Melanie L.,* 2013 WI 67, ¶ 67.[3]

Under *Melanie L.*, the requirements for a petitioner seeking an involuntary medication order are clear. As a result, the court of appeals should reverse when the petitioner has failed to demonstrate compliance with those requirements. However, that

[3] *Melanie L.* and other decisions cited in this petition involved the interpretation of the language of Wis. Stat. § 51.61(1)(g)4.b. The language at issue here—that of Wis. Stat. § 51.20(1)(a)2.e—is identical, as this Court acknowledged in *Melanie L.* 2013 WI 67, ¶ 63.

has not been the case. Instead, the court of appeals has struggled to consistently apply these precedents. In fact, arrant disagreement has persisted in the court's decisions as to what the legal requirements are.

For example, at one end of the spectrum is *Milwaukee County v. D.H.*, Appeal No. 2022AP1402, unpublished slip op., (Wis. Ct. App. March 7, 2023); (App. 62), wherein the court of appeals applied a stringent "reasonable explanation" requirement to reverse a challenged medication order. It scrutinized the doctor's testimony—testimony similar to that presented in this case—and identified specific weaknesses with respect to the explanation as a basis for reversal. *Id.*, ¶¶ 17-19. (App. 65). The court noted that the "doctor's testimony regarding side effects appeared to minimize this issue." *Id.*, ¶ 19. The court faulted the doctor for failing to mention any serious potential side-effects to the prescribed medications while mentioning only mood, weight gain and sedation. *Id.* The testimony in D.P.'s case is very similarly flawed. Under the standard applied by the Court in *D.H.*, D.P. would have prevailed.

The other end of the spectrum is occupied by *Marquette County v. T.F.W.*, Appeal No. 2015AP2603-FT, ¶ 12, unpublished slip op., (Wis. Ct. App. March 24, 2016); (App. 69). There, the court of appeals rejected an argument "that *Melanie L.* requires detailed testimony about what the patient was told." Also sitting on this end of the spectrum is the decision in this case, in which the court rejected the *Melanie L.* standard. (Slip Op., ¶¶ 9-10; App. 9). In between these

two poles lie numerous unpublished, yet citable, decisions of the court of appeals. This inconsistency cannot be maintained; under the current state of the law, there is no way to predict how the court of appeals will treat a medication appeal and what standard it will apply when interpreting this Court's "reasonable explanation" requirement.

At least some of this confusion stems from this Court's intervening decision in *Winnebago County v. Christopher S.*, 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109, a decision whose primary focus was a facial challenge to the constitutionality of Wis. Stat. § 51.20(1)(ar). *Id.*, at ¶ 24. As a tagalong issue, the Court also assessed the sufficiency of the evidence supporting the involuntary medication order. *Id.*, ¶ 48. In upholding the medication order, this Court did not delve deeply into the "reasonable explanation" requirement. Instead, the Court explained that, because the doctor's testimony was "not disputed" it was "not necessary" for the doctor to give a more detailed explanation of what she told the respondent. *Id.*, ¶ 56.

Justice Abrahamson, in a partial concurrence, explained that she did not understand the majority opinion to be departing from the usual rule requiring proof that the doctor sufficiently explained the advantages, disadvantages, and alternatives to the patient. *Id.*, ¶ 96 (Abrahamson, J., dissenting in part; concurring in part). Instead, she understood the majority opinion to be affirming because of the unique record "in this case" where the sufficiency of the

doctor's explanation was not disputed in the lower court. *Id.*

At no point did this Court claim to be overruling *Virgil D.* or *Melanie L.* Yet, lower courts have read the decision as creating some change in the law relating to the reasonable explanation requirement. Thus, for example, its language directly led the court of appeals—in the above-cited T.F.W. case—to resist arguments citing the *Melanie L.*, given the intervening decision in *Christopher S. T.F.W.*, Appeal No. 2015AP2603-FT, ¶ 15. (App. 71). The same pattern is demonstrated in another recent unpublished medication appeal—*Winnebago County v. P.D.G.* ("PDG II"), Appeal No. 2022AP2005, unpublished slip op., (Wis. Ct. App. August 16, 2023). (App. 73). Similarly, the court of appeals in this case interpreted *Christopher S.* as altering the requirement for testimony to establish an adequate explanation—allowing a perfunctory statement to suffice and essentially overruling *Melanie L.* (Slip Op., ¶ 9-10; App. 8-9).

Accordingly, given the uncertainty that exists in lower courts as to what effect, if any, *Christopher S.* had on the holding in *Melanie L.* and what testimony is necessary to satisfy the statutory explanation requirement, this Court should accept review and provide clarity.

II. This Court should accept review and hold that the explanation requirement under § 51.20(1)(a)2.e should track DHS guidance.

While there has been ample litigation as to what a reasonable explanation of the disadvantages of medication should look like, another unit of our government has already expended time and effort answering that very question. Accordingly, DHS provides an exhaustive library of informed consent forms for all commonly-prescribed medications which are easily accessible online.[4] Those forms describe side effects, benefits and alternatives—the very topics that an examiner must convey under § 51.20(1)(a)2.e.

The forms were expressly created for the purpose of ensuring informed consent. Because Chapter 51 recognizes that committees have a right to informed consent—and those persons are often under DHS care—there is no sensible reason why the forms promulgated by DHS should not be used as guidance in evaluating the reasonableness of the explanation the individual has received before being asked to submit to psychotropic medication. These forms clearly set forth the requisite information. It makes little sense to continue to allow the reasonableness of explanations to be subject to *ad hoc* litigation on a case-by-case basis.

Accordingly, this Court should accept review and hold that the DHS guidance is a lodestar for

[4] https://www.dhs.wisconsin.gov/forms/medbrandname.htm.

assessing the sufficiency of an underlying explanation. Because all parties would benefit from the clarity and uniformity the DHS forms provide, this Court should exercise its authority to mandate that examining physicians be guided by those forms in advising committees and that reviewing courts be guided by them in assessing the reasonableness of the explanations given to committees. Moreover, because the explanation in this case was woefully insufficient, this Court should accept review and reverse.

CONCLUSION

D.P. requests that this Court grant review and reverse the orders for commitment and involuntary medication.

Dated this18th day of April, 2025.

Respectfully submitted,

Electronically signed by Pamela Moorshead

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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 3,624 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 18th day of April, 2025.

Signed:
Electronically signed by
Pamela Moorshead
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Assistant State Public Defender