

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-2966
STATE OF WISCONSIN**

Cir. Ct. No. 00-GN-136

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF THE GUARDIANSHIP AND
PROTECTIVE PLACEMENT OF KAREN C.:**

OUTAGAMIE COUNTY,

PETITIONER-RESPONDENT,

v.

KAREN C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
JOHN A. DES JARDINS, Judge. Affirmed.

¶1 PETERSON, J.¹ Karen C. appeals a protective placement order. She argues that the evidence presented at trial was insufficient to support a finding

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f).

that it was necessary to remove her from her home and place her in a community based residential facility (CBRF). Because the evidence is sufficient to support the trial court's decision, the order is affirmed.

BACKGROUND

¶2 On November 21, 2000, Outagamie County filed a petition for the appointment of a temporary guardian for Karen. Following a court ordered competency evaluation, an amended petition for guardianship and protective placement was filed on December 18, 2000. Karen did not contest the need for the appointment of a guardian and protective services. However, she disputed whether it was necessary to place her outside her home.

¶3 A bench trial was conducted on March 14 and 20, 2001. A considerable portion of the trial involved testimony addressing possible misconduct by Karen's daughter, Tina M., and her grandson, Spencer C. The County's purpose in presenting this evidence was to prevent these family members from being named as Karen's guardian and to show the nature of the danger these family members posed to Karen if she continued to reside in her home.

¶4 Doctor Michael Sayers, a clinical psychologist, testified that he had conducted a psychological evaluation of Karen. Sayers testified that Karen functioned in the "severely impaired or mentally deficient range" in both verbal and nonverbal abilities, scoring "at or below the third percentile." Sayers also stated that Karen reads at a second grade level and that her math skills are similarly limited.

¶5 According to Sayers, Karen appeared confused by simple questions, had difficulty providing much historical information, and processed information

slowly. Her memory was also “within the severely impaired range.” With regard to her ability to handle spatial relation tasks, she scored in the “low/average range” on one test and in the “severely impaired range” on another test.

¶6 Based on his assessment of Karen’s language function and capabilities, Sayer concluded that Karen “has impaired receptive and expressive language function and of such a magnitude that it would place her at risk for independent decision-making.”² Sayer testified that he anticipated that Karen would have difficulty in unexpected, nonroutine situations that would require novel decision-making. He also thought Karen would be at risk of being taken advantage.

¶7 Sayer concluded that Karen needed a guardian. He also concluded that it would be preferable if support services could be provided to Karen in her home because Karen would prefer to remain in familiar surroundings. Sayer anticipated that Karen would be able to handle routine chores and tasks. However, he stated that if in-home services could not be provided, it was important that she receive them in an alternative setting. Sayers supported an alternative placement if Karen “could not stay in her own living situation safely,” explaining: “By that I mean if she weren’t able to get adequate food, clothing, bathing, if it wasn’t possible to safeguard her financial interests, then I would see those concerns as overriding remaining in her own trailer.”

¶8 Dennis Ann Nichols, the court appointed temporary guardian, testified that she had reviewed Karen’s financial affairs. She discovered that

² Sayer diagnosed Karen’s condition due to cerebral vascular disease, namely a stroke. He considered the condition permanent.

Karen had not been paying her utility bills and that she did not have the money in her account to pay outstanding bills. Nichols also discovered that Tina and Spencer both had power of attorney over Karen's bank accounts. Nichols testified that Karen's saving account was depleted in January 2001 through ATM withdrawals at the Oneida Bingo and Casino. Nichols also noted that Spencer was living in Karen's home, but was not helping to pay the bills.

¶9 Carrie Lindsay, a social worker employed in the Community Options Program (COP), testified that she became involved with Karen's care in June 1998. At that time, Tina was Karen's paid home-care provider. Tina had originally provided services for twenty hours a week, but was increased to forty hours per week.

¶10 In 2000, Tina was deemed ineligible to be an in-home provider because of a criminal charge of battery and disorderly conduct. Services were then provided by an in-home care provider through COP commencing in April 2000. However, the in-home care worker was fired by Tina's daughter for not performing extra services.³ As a result, the agency refused to provide any more workers.

¶11 In August 2000, COP retained a private care worker to provide in-home services from twenty to twenty-five hours a week. However, in September, this person quit because of allegedly inappropriate and intimidating behavior by Spencer. Lindsey testified that it was not safe to place another individual in Karen's home due to Spencer's behavior and could not rely on Karen to keep

³ Tina's daughter requested that the in-home care provider shampoo the carpets and paint and scrub screen doors and windows.

Spencer out of the home. Lindsey testified that in October 2000, Karen told Lindsey that she wanted to move out and get everybody out of her home because she couldn't afford it. Karen told her that Tina was taking her social security money. Despite this conversation, Spencer continued to live in the home.

¶12 Lindsey concluded that Karen needed services, particularly given her medical needs. She stated that she would be unable to find or fund a caregiver to monitor Karen in her home during the evening or night-time hours to ensure that Karen was complying not only with her dietary and medication needs, but also to ensure that no family members were living there and taking advantage of Karen as they had in the past. Further, she did not believe Karen would contact anyone if Spencer showed up.

¶13 Captain Ray Johnson testified regarding Tina's and Spencer's criminal arrest records. He stated that between May 2000 and December 2000, Spencer was arrested once for underage drinking and twice for disorderly conduct. He stated that Spencer is also a registered sex offender and had been in custody for juvenile violations. Regarding Tina, Johnson noted arrests dating back to 1992 for disorderly conduct.

¶14 Karen testified in her own behalf and stated that she had asked Spencer to move in and help keep an eye on her. Karen indicated that she preferred to live in her own house even if Spencer moved out.

¶15 In addition, both Tina and Spencer testified that Spencer was "not really living" with Karen and that there was no need for Spencer to live with Karen. Tina also acknowledged being responsible for the cash withdrawals in January and indicated that she used the money to pay for transportation, the lot

payment for Karen's trailer and for groceries. Spencer admitted to having had parties at Karen's trailer.

¶16 Mary Dorn, a registered nurse, testified that Karen takes medication three times day and receives dialysis. She needs assistance bathing to help keep her dialysis lines free from infection. Dorn testified that due to Karen's diabetic condition, she needs a restricted diet and limited fluid intake. Dorn also noted that the groceries Tina purchased for Karen included inappropriate sugared beverages, high sodium foods and an unreasonable volume of food.

¶17 Dorn also testified that Karen had complained that her family had been taking her money. Dorn stated that the family had been taking advantage of Karen and that Karen would not call the police if they moved back in. Dorn testified that Karen needed supervision of her diet and medications and that if those services were provided, it would be possible for Karen to stay in her home.

¶18 The trial court found that Karen was incompetent and in need of a permanent legal guardian and protective placement. The court stated:

As far as placement is concerned, again, I think ... there are health issues involved and safety issues as far as diet. They all point to the conclusion that [Karen], I think, although as much as she wants to stay in her home, does present a danger to herself if she remains there. I think the least restrictive place for her would be a group home.

The court ordered that Karen be protectively placed at a CBRF.⁴

⁴ The court added that Karen could be placed at a nursing home until a CBRF could be found.

STANDARD OF REVIEW

¶19 A trial court's discretionary decision will not be reversed unless the court erroneously exercised its discretion. *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). "A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law, and engaged in a rational decision-making process." *Id.* at 506-07. An exercise of discretion must be based on the facts appearing in the record. *Dowd v. Dowd*, 167 Wis. 2d 409, 416, 481 N.W.2d 504 (Ct. App. 1992). Findings of fact will not be upset on appeal unless clearly erroneous. *See* WIS. STAT. § 805.17(2). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. *Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

DISCUSSION

¶20 Karen does not contest that she is in need of a guardian and protective services. However, she argues that the evidence was insufficient to support the trial court's decision to place her outside of her home. Karen contends that the services necessary for her to remain in her home are available through COP.

¶21 Karen has significant health issues. She is a diabetic and requires dialysis and a restrictive diet and fluid intake along with multiple medications. It is undisputed that Karen would be happier in her home. However, the court found that she would present a danger to herself if she remained in her home because of her medical and dietary needs.

¶22 Both Lindsey and Dorn testified about Karen's daily health concerns if she continued to live alone. Both were concerned about Karen's ability to bathe herself and keep her dialysis lines free from infection. Lindsey and Dorn also testified about their concerns that Karen does not follow her restricted diet and fluid intake. Lindsey stated that COP would not be able to provide a caregiver to monitor Karen in her home during the evening or night-time hours and on weekends to ensure that Karen was complying with her diet. Because of this limitation, Lindsey concluded that placement in a CBRF would be the least restrictive setting.

¶23 It is a reasonable inference that due to her health and dietary requirements, Karen needs care and supervision twenty-four hours a day. COP would be able to provide up to forty hours a week supervision, but the remaining time alone would put Karen at risk. Admittedly, there was testimony that the COP services at forty hours per week would be sufficient to meet Karen's needs. However, the court inferred that Karen also needed supervision during the hours when COP could not provide a caregiver. We conclude this inference is reasonable and is supported by the facts in the record. There is sufficient evidence to infer that Karen is incapable of providing for her own care or custody so as to create a substantial risk of serious harm to herself. *See* WIS. STAT. § 55.06(2)(c).

¶24 Karen also argues that it is pure speculation whether she would continue to allow Tina and Spencer to stay in her home and whether Tina and Spencer would still try to live with Karen. Karen contends that she could reside safely at her home with proper services and nursing care provided to her. She concludes that her right to remain in her own home cannot be nullified simply because Tina and Spencer have prior arrest records because there is no evidence that they ever physically harmed her.

¶25 However, Karen's arguments are based on a false premise. The trial court did not base its order for placement on the danger posed by Karen's family. That evidence was only used by the court to decide who to appoint as Karen's guardian. Rather, the court ordered placement due to Karen's health and dietary issues.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

