

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2014

Diane M. Fremgen
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. 2014AP90
STATE OF WISCONSIN**

Cir. Ct. No. 2004ME461

**IN COURT OF APPEALS
DISTRICT II**

IN THE MATTER OF THE MENTAL COMMITMENT OF KATHLEEN H.:

WAUKESHA COUNTY,

PETITIONER-RESPONDENT,

v.

KATHLEEN H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
WILLIAM J. DOMINA, Judge. *Reversed and cause remanded with directions.*

¶1 Neubauer, P.J.¹ Kathleen H. appeals from an order for involuntary medication and treatment. Kathleen maintains that the County did not show that she is incompetent to refuse medication or treatment because it did not show that the advantages, disadvantages, and alternatives to her medication were explained to her, as required by WIS. STAT. § 51.61(1)(g)4. In light of *Outagamie Cnty. v. Melanie L.*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607, we must conclude that the County did not show by clear and convincing evidence that Kathleen was incompetent to refuse medication or treatment, and we therefore reverse and remand for further proceedings not inconsistent with this opinion.

Background

¶2 In 2004, Waukesha County petitioned the court for a mental health commitment of and involuntary medication order for Kathleen. The court subsequently extended the commitment and entered a new order for involuntary medication several times. After the February 2013 extension of commitment and order for involuntary medication, Kathleen wrote to the court requesting cancellation of her recommitment order, indicating that she “can’t take anymore psychotropics.” The court ordered a hearing, for which Dr. Cahill was directed to examine Kathleen.

¶3 At the hearing, Cahill testified that Kathleen has a long list of objections to various medications. He testified that she was incapable of expressing and applying an understanding of the advantages, disadvantages, and alternatives to treatment with psychotropic medication. In response to the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version.

question whether he had explained to Kathleen the advantages, disadvantages, and alternatives to the particular medications, Cahill testified as follows:

Well, all I can tell her was that clearly these medications are being used for a purpose, the doctor I'm sure feels it's helpful, and that when I—when I do that or when I've done that in the past she goes on really a diatribe about how difficult, terrible, and how incompetent her doctor is.

¶4 Cahill also submitted a standard form Report of Examination. Cahill responded to template questions as follows:

21. What particular medication(s) or treatment(s) did you discuss with the individual?

MANY DIFFERENT MEDS

....

24. What advantages did you discuss with the individual concerning the administration of this/these particular medication(s) or treatment(s)?

REDUCE DISTRESS

25. What disadvantages did you discuss with the individual concerning the administration of this/these particular medication(s) and treatment(s)?

SIDE EFFECTS ARE POSSIBLE

26. What alternatives, if any, to this/these particular medication(s) or treatment(s) did you discuss with the individual?

NONE

¶5 The circuit court concluded that Kathleen is “incapable of expressing an understanding of the advantages and disadvantages as well as the alternatives” and that “she’s substantially incapable of applying the advantages and disadvantages and alternatives in order to make an informed choice as to whether to accept or refuse medication.” The circuit court entered an order for involuntary

medication or treatment and an order for extension of commitment. On appeal, Kathleen only challenges the order for involuntary medication or treatment.

Discussion

¶6 WISCONSIN STAT. § 51.61, entitled “Patients rights,” grants to a person receiving services for mental illness the right to refuse medication and treatment. Sec. 51.61(1)(g). Under that same para. (g), the court may order medication or treatment to be administered to the individual, regardless of consent, if it finds that the individual is not competent to refuse medication or treatment. Sec. 51.61(1)(g)3. The court starts with the presumption that the person is competent to make a decision regarding medication or treatment. *Melanie L.*, 349 Wis. 2d 148, ¶45. To prove an individual is not competent to refuse medication or treatment, the county must show:

[B]ecause of mental illness ... and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:

a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness ... in order to make an informed choice as to whether to accept or refuse medication or treatment.

Sec. 51.61(1)(g)4. Whether this statutory standard has been met is a mixed question of fact and law. *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). The circuit court’s findings of fact will be upheld unless clearly erroneous; whether those facts meet the statutory requirement is a question

of law we review de novo. *Id.* The County must prove the statutory elements by clear and convincing evidence. *Melanie L.*, 349 Wis. 2d 148, ¶83.

¶7 Before the circuit court can consider whether an individual can apply an understanding of the advantages and disadvantages of and alternatives to the particular medication or treatment, it must ensure that he or she has received “the requisite explanation” in order to make an informed choice. *Id.*, ¶54.

“Informed choice” means a choice based on an informed understanding of the viable options with respect to medication or treatment. The key word in the statutory phrase is “choice,” which means the “power, right or liberty to choose,” or an “option.” The paragraph seeks to evaluate a person’s ability to rationally choose an option.

Id., ¶76 (citation omitted). To enable the person to make an informed choice, the advantages, disadvantages, and alternatives must be adequately explained.

A person subject to a possible mental commitment or a possible involuntary medication order is entitled to receive from one or more medical professionals a reasonable explanation of proposed medication. The explanation 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. The explanation should be timely, and, ideally, it should be periodically repeated and reinforced. Medical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court.

Id., ¶67. *Melanie L.* requires strict adherence to the specific terms of the statute. *See id.*, ¶91. To establish that such an explanation occurred, counsel must elicit testimony from the medical professional that closely follows the statutory terms, so that the circuit court and a reviewing court do not need to speculate about the reasonableness of the explanation. *See id.*, ¶¶91, 97.

¶8 Cahill’s testimony and report do not show by clear and convincing evidence that he gave a reasonable explanation to Kathleen about the advantages, disadvantages, and alternatives to the proposed medications.² In his written report, Cahill did not provide any detail of any discussion about the particular medications other than that they could “reduce distress” and that “side effects [are] possible.” There is no indication that he discussed why the particular drugs were prescribed, what the benefits were, or what specific side effects were possible. Regarding alternatives, Cahill only indicated “none.” There was no account of any discussion regarding possible reasonable alternatives, if any.

¶9 Cahill’s testimony seemed to suggest that he did not enter into a detailed discussion with Kathleen about the medications because he knew she would protest their administration. Cahill included Kathleen’s rambling discussion of the effects of psychotropic drugs on her health. But Kathleen’s thoughts on why she does not want to take medications tell us nothing about what explanation she received regarding the proposed medications’ advantages, disadvantages, and alternatives. Furthermore, no one testified that it was impossible to have a discussion with Kathleen. Cahill’s conclusory report and testimony that he discussed many medications with Kathleen does not establish by clear and convincing evidence that he gave Kathleen a reasonable explanation of the proposed medications.

¶10 An explanation of the advantages, disadvantages, and alternatives may seem fruitless in cases where the individual appears incapable of expressing

² Cahill’s report does not tell us if one or more medications were proposed, and it does not tell us the names of the proposed medications. We refer to medications in the plural because Cahill indicated, in his report, that he discussed “many different meds” with Kathleen.

or substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives of a proposed medication or treatment. But the statute and *Melanie L.* require an explanation. *Id.*, ¶54; see *Eau Claire Cnty. v. Mary S.*, No. 2013AP2098, unpublished slip op. (WI App Jan. 28, 2014) (reversing commitment and involuntary medication orders under *Melanie L.* due to inadequate showing of explanation of advantages, disadvantages of, and alternatives to medication or treatment); *Winnebago Cnty. v. Donna S.*, No. 2013AP80, unpublished slip op. (WI App July 31, 2013) (reversing involuntary medication order under *Melanie L.* due to inadequate showing of explanation of advantages, disadvantages of, and alternatives to medication or treatment).

Whatever the circumstances may be, the County bears the burden of proof on the issue of competency in a hearing on an involuntary medication order. These hearings cannot be perfunctory under the law. Attention to detail is important. A county cannot expect that a judge concerned about a person with mental illness will automatically approve an involuntary medication order, even though the person before the court has chosen a course of action that the county disapproves. The county, under WIS. STAT. § 51.61(1)(g)4.b., must prove that the person is substantially incapable of applying an understanding of the advantages and disadvantages of particular medication to [his or] her own mental illness. In our view, the County did not satisfy its burden by clear and convincing evidence here. This court does not have the option of revising the statute to make the County work or burden easier.

Melanie L., 349 Wis. 2d 148, ¶94. Our supreme court has instructed us that the statutory guidelines are to be strictly adhered to in this context. We cannot say that the County complied with the requirements of § 51.61(1)(g)4.

By the Court.—Order reversed and cause remanded with directions.

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

