

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 25, 2015**

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. 2014AP2489**

**Cir. Ct. No. 1999GN37A**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**IN THE MATTER OF THE PROTECTIVE PLACEMENT OF CHRISTOPHER A. G.:**

**SHEBOYGAN COUNTY,**

**PETITIONER-RESPONDENT,**

**v.**

**CHRISTOPHER A. G.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Sheboygan County:  
L. EDWARD STENGEL, Judge. *Reversed and cause remanded with directions.*

¶1 REILLY, J.<sup>1</sup> Christopher A. G. appeals an order continuing his protective placement. Christopher argues, and Sheboygan County concedes, that the circuit court erred in holding a due process hearing on Christopher’s protective placement without Christopher’s physical presence and without the guardian ad litem (GAL) waiving his attendance in writing prior to the hearing. This case is controlled by *Jefferson County v. Joseph S.*, 2010 WI App 160, 330 Wis. 2d 737, 795 N.W.2d 450. We reverse and remand for a hearing that complies with WIS. STAT. § 55.10.

## BACKGROUND

¶2 Christopher is a developmentally disabled young man who requires round-the-clock care and supervision. He is “basically nonverbal” and communicates with staff at his community-based residential facility through sounds and actions. Christopher was first placed under guardianship and protective placement in 1999.

¶3 The County petitioned for annual review of Christopher’s protective placement on April 1, 2014. The court-appointed GAL requested that Christopher be appointed counsel and that a full due process hearing be held. Prior to the hearing, Christopher’s counsel wrote a letter to the court, the County, and the GAL that raised concerns that the County and the GAL had not previously complied with WIS. STAT. § 55.10(2), which requires Christopher’s attendance at due process hearings or a valid waiver by the GAL of Christopher’s attendance submitted prior to such hearings.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 The court held the due process hearing on May 22, 2014. It appears the County and the GAL ignored the warning to comply with WIS. STAT. § 55.10(2) as Christopher was not in attendance and the GAL had not waived Christopher's attendance in writing prior to the hearing. As a result, Christopher's counsel objected to the court's competency:

[W]ith all due respect, your Honor, I don't think we can proceed without either Christopher being physically present in the courtroom or the guardian ad litem submitting a letter to the Court explaining why he feels it's not wise or necessary for Christopher to be here.

....

I tried to alert everyone to those issues when I sent that letter to the Court a little while ago. Frankly, after doing my inspection, I don't feel the need to really actively resist this guardianship and protective placement, but I think we need to do it in accordance with the law.

....

My concern is if we are going to do this, let's do it right. I don't think that's an extreme or ridiculous position to take.

....

[T]he whole purpose of me sending a letter out ahead of time is so that steps could be taken to remedy the problem, because I don't want to see us blowing Christopher out of placement that frankly he seems to, to the best of his ability, enjoy. I've been there. I've looked at it. I don't want to upset the apple cart here. I just want to see things done right.

¶5 The County argued in response that "if it's such a big deal," Christopher could attend by telephone. After arranging for the GAL to "send the Court a letter indicating your concerns about Christopher's appearance" and setting up a teleconference with Christopher, the court held the hearing and ordered the continuation of Christopher's protective placement. Five days after

the hearing, the court received a letter from the GAL waiving Christopher's attendance. Christopher appeals.

## DISCUSSION

¶6 In an annual review of a protective placement, the circuit court “shall” hold a hearing that complies with the requirements of WIS. STAT. § 55.10(2)-(4) when requested by an appropriate party. WIS. STAT. § 55.18(3)(d)1. Section 55.10(2) requires that the petitioner (here, the County) ensure the attendance of the subject at the hearing “unless, after a personal interview, the guardian ad litem waives the attendance and so certifies in writing to the court the specific reasons why the individual is unable to attend.” The GAL is limited to considering “the ability of the individual to understand and meaningfully participate, the effect of the individual’s attendance on his or her physical or psychological health in relation to the importance of the proceeding, and the individual’s expressed desires” in determining whether to waive the subject’s attendance at the hearing. *Id.* A circuit court’s interpretation of WIS. STAT. ch. 55 is a legal determination that we review de novo. *Joseph S.*, 330 Wis. 2d 737, ¶4.

¶7 In *Joseph S.*, we held that failure to ensure the attendance of the subject at a WIS. STAT. § 55.10 hearing absent a valid waiver by the GAL causes the circuit court to lose competency to proceed. *Joseph S.*, 330 Wis. 2d 737, ¶5. This attendance requirement reflects the legislative judgment that the restrictions on an individual’s liberty may not be made without input from the subject. *Id.*, ¶9. Because protective placement is indefinite in duration—tantamount to a life sentence to a nursing home or other custodial setting—we recognized the enormous liberty interest presented in a protective placement hearing. *Id.*, ¶13.

Christopher's counsel directed the parties and the court to *Joseph S.* in his letter prior to the due process hearing and brought a copy to the due process hearing. It appears *Joseph S.* was either ignored or fell upon deaf ears.

¶8 The circuit court lost competency to proceed on the petition when the County failed to ensure Christopher's physical attendance at the hearing and the GAL failed to file a valid written waiver. As the County concedes, the language of WIS. STAT. § 55.10(2) does not contemplate that a telephone appearance constitutes attendance at a due process hearing. The County was required by § 55.10(2) to ensure Christopher's physical attendance at the hearing, and the GAL's written waiver of Christopher's attendance at the due process hearing is required by § 55.10(2) to be filed with the court prior to the hearing. The County's failure to ensure Christopher's attendance and the GAL's failure to comply with the requirements of § 55.10(2) caused the circuit court to lose competency to proceed on the petition and enter a valid order. *See Joseph S.*, 330 Wis. 2d 737, ¶14.<sup>2</sup>

¶9 We cannot help but believe that this case reflects the unfortunate reality that easy cases result in sloppy actions. No one questions and all agree that Christopher is in continued need of protective placement. Christopher's trial counsel attempted to make all aware of the statutory requirements and applicable

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<sup>2</sup> Christopher also argues that the order on appeal was invalid as the 2013 order continuing his protective placement was entered without Christopher's physical presence and without the GAL following the requirements of WIS. STAT. § 55.10(2). We do not address this issue as no substantial public interest is advanced by ignoring Christopher's waiver of review regarding the prior continued protective placement order when there has been an intervening annual review hearing regarding the propriety of protective placement. *Cf. Jefferson Cnty. v. Joseph S.*, 2010 WI App 160, ¶8, 330 Wis. 2d 737, 795 N.W.2d 450; *see also Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶29, 273 Wis. 2d 76, 681 N.W.2d 190.

case law so as to ensure that Christopher remained in a facility that he enjoys. Despite these diligent efforts,<sup>3</sup> we feel the need to remind the other parties that statutes need to be complied with. It was the County's responsibility to ensure Christopher's physical attendance at the due process hearing, and it was the GAL's responsibility to submit a written waiver to the court in advance of the hearing if he found Christopher was unable to attend. *See* WIS. STAT. § 55.10(2). Both the County and the GAL failed in their responsibilities to Christopher.

¶10 We reverse and remand for a new hearing that complies with WIS. STAT. § 55.10(2)-(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.

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<sup>3</sup> The record reflects that not only did Christopher's trial counsel bring a copy of the *Joseph S.* case to the hearing, he also brought drafting notes for 2005 Wis. Act 264, § 160, which created WIS. STAT. § 55.10(2).

