

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-0824

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF THE
GUARDIANSHIP OF ROBERT O.O.:**

COUNTY OF PEPIN,

PETITIONER-RESPONDENT,

V.

ROBERT O.O.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Pepin County:
DANE F. MOREY, Judge. *Affirmed in part; reversed in part.*

CANE, C.J. Robert O.O. appeals a guardianship and protective placement order, contending that he was denied his right to a twelve-person jury, and that the trial court erred by concluding he was not competent to refuse psychotropic medication and not competent to exercise the right to vote. This court rejects Robert's first contention, but agrees that because the petition for

guardianship did not contain the requisite allegation of incompetency to refuse medication, the trial court exceeded its authority with respect to this finding. Finally, because the parties agree the record is insufficient to support the trial court's conclusions that Robert O. is not competent to exercise his right to vote, that part of the order is also reversed.

Pepin County commenced this action for guardianship and protective placement alleging in its petition that Robert was in need of a guardian because of poor decision-making ability, irrational thoughts and other behaviors suggesting age-related dementia. The petition also requested protective placement under § 55.06, STATS., alleging that due to infirmities of aging, Robert needed supervision because his irrational behavior and inability to meet his needs created the risk of serious harm to himself. Notably, the form petition failed to allege that Robert was not competent to refuse psychotropic medications.¹ A six-person jury found that Robert was incompetent and in need of a guardian and protective placement.

On appeal, Robert does not challenge the jury's findings. However, he does challenge the trial court's finding that he is not competent to refuse psychotropic medications, contending that this was never alleged in the petition or, alternatively, the evidence is insufficient to support this finding. He also contends that although his guardian ad litem advised him of his right to a six-person jury, the guardian neglected to advise him of his right to a twelve-person jury and, therefore, the order must be vacated and a new trial ordered.

¹ The County used a form petition which made certain allegations by checking the appropriate box. However, in neither the original nor amended petition did the County check the box which would allege that Robert was not competent to refuse psychotropic medications.

Twelve-person Jury

Pursuant to § 880.33(2)(a)1, STATS., a proposed ward in a guardianship proceeding has the right to a jury trial as determined under § 756.06(2)(b), STATS., which provides that "a jury in a civil case shall consist of 6 persons unless a party requests a greater number, not to exceed 12." After the County filed its petition for guardianship and protective placement, the court appointed a guardian ad litem who by statute was required to advise Robert of his rights, including a right to adversary counsel and a jury trial. In a letter to Robert, the guardian specifically advised him of his "right to a jury trial, composed of six persons" For some reason the guardian neglected to inform Robert of his statutory right to a twelve-person jury. Thus, Robert reasons that the guardian's deficient advice effectively deprived him of the opportunity to exercise his right to a twelve-person jury. This court is not persuaded.

After the guardian's letter, the trial court appointed adversary counsel to represent Robert. When adversary counsel represents a ward, that representation satisfies any statutory or constitutional right that the ward has to representation. See *In re Tamara L. P.*, 177 Wis.2d 770, 778, 503 N.W.2d 333, 335-36 (Ct. App. 1993). Effective assistance of counsel for the ward does not include the right that the guardian ad litem appointed to represent the ward's best interests also provide effective legal assistance. *Id.* Thus, the decision on the number of jurors was left to Robert and his adversary counsel. An adversary counsel represents the ward's interest and has the same function, duties and responsibilities as if counsel were obtained by the ward as his or her own attorney. The duties and responsibilities of a lawyer to a client in Wisconsin are set forth in the code of professional responsibility promulgated by the Wisconsin Supreme Court. Among the duties and responsibilities, adversary counsel must preserve the

confidences and secrets of the ward and exercise independent professional judgment on his or her behalf. See *In re T. L.*, 151 Wis.2d 725, 736, 445 N.W.2d 729, 734 (Ct. App. 1989).

Here, Robert's counsel filed a demand for a jury with ample time to decide whether to demand a twelve-person jury. However, because there was no request for a greater number than six jurors, the default provision of the statute took effect and a six-person jury was granted. The decision by adversary counsel to proceed to trial with six jurors was not the result of any deficient advice by the guardian ad litem.

Psychotropic Medication

Neither the original nor the amended petition for guardianship and protective placement alleged that Robert was incompetent to refuse psychotropic medication. Nor did the County move to amend the pleadings after presenting its evidence. Notwithstanding the absence of any notice of this allegation, the trial court, without any discussion from the parties, found that Robert was not competent to refuse medication. Obviously, the trial court made this finding in good faith after a portion of the medical evidence indicated Robert refused to take needed medication. The trial court explained that it made this finding because of its concern for Robert's health.

However, § 880.07, STATS., sets forth the essential requirements of a petition for guardianship. This section makes it clear that if a petitioning party seeks a determination that a person is not competent to refuse psychotropic medication, the allegation must be set forth in the petition. Section 880.07(1m), STATS., declares: "If the petition under sub. (1) alleges that the person is not competent to refuse psychotropic medication, the petition shall allege all the

following." The statute then proceeds to list five claims that must be set forth in the petition to support a finding that the proposed ward is not competent to refuse medication.²

Generally, courts have only such jurisdiction as is conferred upon them by statute, and conditions precedent set forth in such statutes must be complied with to gain and exercise such jurisdiction. *See In re Bose*, 39 Wis.2d 80, 86, 158 N.W.2d 337, 340 (1968). Inasmuch as neither the original nor amended petition filed in this action against Robert contained the statutorily mandated allegations, the trial court lacked authority to enter a finding that Robert

² Section 880.07(1m), STATS., provides:

(1m) If the petition under sub. (1) alleges that the person is not competent to refuse psychotropic medication, the petition shall allege all of the following:

(a) That the person is likely to respond positively to psychotropic medication.

(b) That as a result of the person's failure to take medication the person is unable to provide for his or her care in the community. The person's past history is relevant to determining his or her current inability to provide for his or her care in the community under this paragraph.

(c) That unless protective services, including psychotropic medication, are provided the person will incur a substantial probability of physical harm, impairment, injury or debilitation or will present a substantial probability of physical harm to others.

(cm) That the substantial probability of physical harm, impairment, injury or debilitation is evidenced by the person's history of at least 2 episodes, one of which has occurred within the previous 24 months, that indicate a pattern of overt activity, attempts, threats to act or omissions that resulted from the person's failure to participate in treatment, including psychotropic medication, and that resulted in a finding of probable cause for commitment under s. 51.20 (7), a settlement agreement approved by a court under s. 51.20 (8) (bg) or commitment ordered under s. 51.20 (13).

(d) That the person has attained the age of 18 years.

was not competent to refuse psychotropic medication.³ Also, as a matter of fundamental due process, Robert was never notified that the County sought an order determining that he was not competent to refuse psychotropic medication. Therefore, that part of the order must be reversed.

Because the parties agree that the evidence is insufficient to support the trial court's finding that Robert is not competent to exercise the right to vote, that part of the order is also reversed without discussion.

The order finding Robert incompetent and in need of a guardian and protective placement is affirmed. However, those portions of the order finding Robert incompetent to refuse psychotropic medication and to exercise the right to vote are reversed.

By the Court.—Order affirmed in part; reversed in part.

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

³ Because of this holding, it is unnecessary to address Robert's other arguments contending that the evidence is insufficient to support a finding that Robert is not competent to refuse psychotropic medication or that the hearing on this issue was not timely.

