

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 3, 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. 98-1658

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN THE MATTER OF BONNIE L. K.:

COUNTY OF BUFFALO,

PETITIONER-RESPONDENT,

v.

BONNIE L. K.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Buffalo County:
DANE F. MOREY, Judge. *Affirmed.*

CANE, C.J. Bonnie L.K., d.o.b. May 10, 1934, appeals from an order continuing her protective placement. Bonnie has been in some form of protective placement since 1942. She was transferred to the Dunn County Health

Center in 1980 and has remained there since. After a *Watts* due process hearing¹ on Bonnie's request for a different placement with less restrictive settings, the trial court continued her current placement at the health center, concluding that it was the least restrictive placement consistent with her needs. On appeal, Bonnie does not challenge the trial court's finding that she continues to need protective placement. Rather, she claims that the trial court erred when it: (1) found that the current placement was the least restrictive placement suitable with her needs; and (2) placed the burden on her to show that an appropriate less restrictive placement was available. This court rejects her contentions and affirms the order.

This court first turns to whether the trial court erred by concluding that Bonnie's current protective placement is the least restrictive environment under § 55.06(9)(a), STATS. This court will search the record for evidence to support the trial court's findings of fact, *In re J.G.S., Jr.*, 159 Wis.2d 685, 687, 465 N.W.2d 227, 228-29 (Ct. App. 1990), and those findings will not be set aside unless they are clearly erroneous, that is, if no credible evidence supports the findings. See § 805.17(2), STATS.; see also *Krueger v. Mitchell*, 112 Wis.2d 88, 104-05, 332 N.W.2d 733, 741-42 (1983). Because there is credible evidence supporting the court's findings that the health center is the least restrictive environment for Bonnie, these findings are not clearly erroneous.

¹ Pursuant to *State ex rel. Watts v. Combined Community Servs. Bd.*, 122 Wis.2d 65, 85, 362 N.W.2d 104, 114 (1985), Bonnie, at her guardian ad litem's request, received a due process hearing regarding whether she continued to meet the requirements for protective placement and whether her current placement at the Dunn County Health Center was the least restrictive environment suitable for her needs.

Section 55.06(9)(a), STATS.,² requires that Bonnie be placed in the least restrictive environment consistent with her needs and the placement board's resources. Each person in protective placement has the right to the least restrictive conditions necessary to achieve the purpose of the placement. *See In re D.E.R.*, 155 Wis.2d 240, 248-49, 455 N.W.2d 239, 243 (1990). The nonexistence of a facility alone is immaterial to whether the person is entitled to be placed in the least restrictive setting the evidence posits. *See J.G.S.*, 159 Wis.2d at 692, 465 N.W.2d at 230. Rather, as this court has pointed out, each case stands or falls on its own facts. *See id.* at 692, 465 N.W.2d at 231.

To support the assertion that the least restrictive environment is a well-supervised group community based residential facility (CBRF) with two to four residents, Bonnie argues that all witnesses at the *Watts* hearing testified that she could be in a group home if it was well supervised. Only Dr. Steven Rosas offered such an opinion,³ and the trial court determined that as a general practitioner, Rosas was not qualified to render an opinion in this regard. Contrary to Bonnie's assertion, neither Dr. Thomas Johnston (a court-appointed psychologist) nor Michael Stein (Bonnie's social worker) testified that a such a CBRF is the least restrictive environment. Although there was discussion about a

² Section § 55.06(9)(a), STATS., sets forth the following factors to consider in placing Bonnie in protective placement: (1) her needs to be protected for health, social, or rehabilitative services; (2) the level of supervision she needs; (3) the reasonableness of the placement given the cost and actual benefits in the level of function she has realized; (4) limits of available state and federal funds and of county funds required to be appropriated to match state funds; and (5) the reasonableness of the placement given the number or projected number of individuals who will need protective placement and given the limited funds available.

³ Rosas offered the opinion that Bonnie "does not and never has required 24 hour care" and that he would not be concerned for her safety if she was well supervised in a group home.

CBRF, both Johnston and Stein testified that her current placement was "appropriate" in terms of the least restrictive environment based on her needs.

Johnston testified that Bonnie is diagnosed with moderate mental retardation and chronic somatization disorder. At the health center, Bonnie is in a private room in an unlocked unit and receives music therapy and vocational programming. In Johnston's opinion, the health care facility is an appropriate environment for Bonnie due to her attention seeking self-destructive behaviors, which included picking her thumb until it bled and tearing off part of her thumb nail.⁴ Johnston did consider a CBRF, but merely commented that if there was a CBRF with the type of trained staff and type of services in terms of mental health and behavioral health within its program, "that could certainly be considered." Additionally, he stated that a CBRF with two to four clients and an adequate and reasonably trained staff would be "within the realm of possibility." However, Johnston explained that the staff of a traditional CBRF "might be somewhat overwhelmed" and that it would be difficult for a CBRF to compete with the resources the health center provides. In contrast to Rosas, Johnston offered the opinion that Bonnie needs twenty-four-hour-per-day supervision by trained personnel.

Stein, Bonnie's social worker and the director of social services and coordinator of the facility for the developmentally disabled at the health center, also testified at the *Watts* hearing. When specifically asked if Bonnie was in the least restrictive level of care consistent with her best interests, Stein replied, "Just as the psychologist, I have trouble with this phrase 'least restrictive.' But I feel she

⁴ Johnston also told the trial court that on another occasion, Bonnie had a fairly sharp screw in her hand and that there was an additional episode of self-abuse.

is in a very appropriate care situation and her needs are most adequately met at this time."

The trial court believed Johnston and Stein, and it is the trial court's function, not this court's, to choose between conflicting inferences. See *State v. Poellinger*, 153 Wis.2d 493, 506-07, 451 N.W.2d 752, 757 (1990). Because credible evidence supports the trial court's finding that the health center is the least restrictive environment, we need not address Bonnie's argument that the County build a CBRF with supervision adequate for her needs.

Bonnie also argues that the trial court's finding is clearly erroneous because it switched the burden of proof to show that she was not in the least restrictive environment from the County to her.⁵ The parties agree, as does this court, that due process requires the County to show the need for continued protective placement and that she in is the least restrictive environment. Because she does not dispute that she continues to need placement, this court's review is confined to whether the trial court switched the burden of proof regarding the least restrictive environment.

At the *Watts* due process hearing, the trial court found, as a matter of fact, that she was in the least restrictive environment:

⁵ Citing *State ex rel. Lockman v. Gerhardstein*, 107 Wis.2d 325, 327, 320 N.W.2d 27, 29 (Ct. App. 1982), Bonnie argues that because the trial court misapplied the current law to the facts here, this court's review is de novo. Pursuant to *In re J.G.S., Jr.*, 159 Wis.2d 685, 687-88, 465 N.W.2d 227, 228-29 (Ct. App. 1990), however, whether her current placement is the least restrictive environment is a question of fact this court will not overturn unless it is clearly erroneous. In any event, *Lockman* is distinguishable because it dealt with the construction of a statute, whether the 14-day time limit in § 51.20(7)(c), STATS., referred to calendar or business days.

The court leaves placement right where it is as the least restrictive placement consistent with her needs. It's the Court's opinion Dr. Rosas is a general practitioner ... not a psychiatrist, psychologist, [and] he is not qualified to make the decision you are trying to have him make. It's a clear delineation between the need for nursing care, which is medical care, and need for ongoing supervision every day. And there has been nothing presented to this Court that shows that there is a CRBF that has that capability.

....

That was a complete waste of time, this hearing, because of no evidence presented concerning her need for care in a less restrictive setting. There just wasn't any proof.

Reviewed out of context, the trial court's findings appear to reflect an inappropriate allocation of the burden of proof and an erroneous view that a least restrictive environment must actually exist before the court can find that a person is not in the least restrictive environment. When read in context, however, the statements demonstrate that the court's factual findings were based on the evidence before it about her needs. It did not place the burden on Bonnie to show that a less restrictive facility existed or should be available to meet her needs. Without Rosas' testimony, which the court expressly rejected, there was no evidence presented concerning her need for a less restrictive setting. To the contrary, the evidence demonstrated that her current placement is appropriate and the least restrictive for her needs.

By the Court.—Order affirmed.

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

