

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 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. 2015AP793

Cir. Ct. No. 2014GN37P

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF
S. A. G.:**

CLARK COUNTY,

PETITIONER-RESPONDENT,

V.

S. A. G.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Clark County:
JON M. COUNSELL, Judge. *Reversed.*

¶1 SHERMAN, J.¹ S.A.G. appeals an order for protective placement under WIS. STAT. § 55.08, and an order for the involuntary administration of psychotropic medication. For the reasons explained below, I reverse.

BACKGROUND

¶2 In September 2014, Clark County petitioned the circuit court for guardianship of S.A.G.'s person and estate, protective placement, and the involuntary administration of psychotropic medication. S.A.G., who was seventy-one at the time the petitions were filed and has a history of depression with one documented suicide attempt, was alleged to be suffering from “major depressive disorder” and to be suicidal. She was also alleged to be suffering from psychosis, which was marked by delusions that the staff members at the residential facility where she was living were “monitoring her, talking about her, or trying to harm her.” The petitions were granted following hearings before the circuit court. S.A.G. appeals. Additional facts are discussed below.

DISCUSSION

1. Protective Placement

¶3 S.A.G. contends that the order requiring her protective placement was not supported by sufficient evidence.

¶4 This court's review of a circuit court's decision to issue a protective placement order presents a mixed question of fact and law. This court will uphold the circuit court's factual findings regarding the elements for protective placement

¹ 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.

unless the findings are clearly erroneous. WIS. STAT. § 805.17(2). However, whether that evidence supports the legal standard for protective placement is a question of law, which this court reviews de novo. *Walworth Cty. v. Therese B.*, 2003 WI App 223, ¶21, 267 Wis. 2d 310, 671 N.W.2d 377.

¶5 Before an individual may be protectively placed, the petitioner must prove, by clear and convincing evidence, each of the following: (1) the individual has a primary need for residential care and custody; (2) the individual has been deemed incompetent by a circuit court; (3) as a result of his or her impairment, the individual is so totally incapable of providing for his or her own care and custody as to create a substantial risk of serious harm to himself or herself or others; and (4) the disability is permanent or likely to be permanent. See WIS. STAT. §§ 55.08(1) and 55.10(4)(d). In order to meet its burden of proof, the petitioner “must present a witness who is qualified by experience, training and independent knowledge of [the individual’s] mental health to give a medical or psychological opinion on each of these elements.” *Therese B.*, 267 Wis. 2d 310, ¶13.

¶6 S.A.G. challenges only the sufficiency of the evidence supporting the circuit court’s determination that she suffers from a disability that is permanent or likely to be permanent, the fourth element.

¶7 To establish that an individuals’ disability is permanent or likely to be permanent, the petitioner must show that the “individual is not treatable by presently known methods.” *Zander v. County of Eau Claire*, 87 Wis. 2d 503, 515, 275 N.W.2d 143 (1979). The supreme court explained in *Zander*:

The mere fact that an individual has failed to respond to treatment in the past does not necessarily indicate untreatability or permanence. Unsuccessful treatment is commonplace While the failure to respond to past treatment is not dispositive of the question, it is a

relevant factor in determining permanency. Except in the most unusual cases, a court should not find his condition permanent unless he [or she] has failed to respond to all available treatment procedures and, in the opinion of competent medical authorities, is not reasonably likely to respond in the future.

Id.

¶8 S.A.G. argues that the County failed to present expert testimony that she suffers from a permanent or likely to be permanent disability. I agree.

¶9 At the hearing, the County's sole witness was Dr. Starr. Dr. Starr testified that S.A.G. suffers from a major depressive condition with an element of psychosis, and slight emerging Alzheimer's disease. Dr. Starr testified that symptoms of S.A.G.'s depression included depressed moods and suicidal thinking, and that symptoms of her psychosis included delusions, including thoughts that the staff at the facility where she is being cared for are attempting to poison her, are talking about her, and are recording her. Dr. Starr testified that S.A.G.'s underlying depression is permanent, but that the symptoms of her depression may be treated and that over time her depression may improve. Dr. Starr further testified that in his opinion, it is S.A.G.'s *psychosis* that renders her incompetent. When asked whether S.A.G.'s delusions were "likely to be permanent," Dr. Starr did not testify that they are. Instead, he responded: "They usually are treated at some point with medications. There usually is some level of response."

¶10 The County bore the burden of presenting a medical or psychological opinion that S.A.G. suffers from a disability that is permanent or likely to be permanent, or, stated another way, that S.A.G. "is not treatable by presently known methods." ***Id.*** The County failed to satisfy this burden.

¶11 Dr. Starr’s testimony established that S.A.G. suffers from major depression and psychosis. Although Dr. Starr testified that S.A.G.’s underlying depression is likely permanent, he testified that the symptoms of her depression are treatable and may improve with time. As to S.A.G.’s psychosis, which Dr. Starr opined was the cause of S.A.G.’s incompetence, Dr. Starr did not testify that S.A.G.’s psychosis is permanent or likely to be permanent, but instead testified that psychosis is “usually” treatable with medication.

¶12 Dr. Starr, the County’s expert witness at the hearing, failed to offer testimony that S.A.G.’s depression and psychosis are not treatable, and thus permanent or likely to be permanent. Accordingly, I conclude that the County failed to prove by clear and convincing evidence that S.A.G. suffers from a permanent, or likely to be permanent, disability, and reverse the circuit court’s order of protective placement.

2. Involuntary Administration of Psychotropic Medication

¶13 S.A.G. also challenges the circuit court’s order for the involuntary administration of psychotropic medication. She contends the circuit court lacked competency to enter the order because the court failed to hear the petition within thirty days of the petition’s filing, as required by WIS. STAT. § 55.14(7). S.A.G. also contends that the evidence was insufficient to support the circuit court’s finding that the “advantages and disadvantages of [the] alternatives to accepting the particular psychotropic medication have been explained” to S.A.G.

¶14 Following a request by this court for supplemental briefing on these issues, the County conceded that the circuit court lacked competency to enter the order for involuntary administration of psychotropic medication because the hearing on that petition was heard more than thirty days after the petition had been

filed, and “abandon[ed] and conceded[ed]” these issues. Accordingly, I reverse the order for the involuntary administration of psychotropic medication.

CONCLUSION

¶15 For the reasons discussed above, I reverse the orders for protective placement and the involuntary administration of psychotropic medication.

By the Court.—Orders reversed.

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

