COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2458 **Cir. Ct. No. 2013GN24**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF G. B. B.:

JACKSON COUNTY,

PETITIONER-RESPONDENT,

V.

G. B. AND G. O.,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Jackson County: ANNA L. BECKER, Judge. *Affirmed*.

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. G.B. and G.O. (collectively, the sisters) appeal an order that removed both of them as guardians of the person for their brother G.B.B. The sisters argue, first, that the evidence was insufficient to support the

circuit court's determination that they had failed to act in their brother's best interests, and second, that the remedy of removal was unwarranted. For the reasons we set forth below, we reject both arguments and affirm the order of removal.

BACKGROUND

¶2 G.B.B. is an adult military veteran with a long history of mental health issues and hospitalizations. On December 10, 2013, the Jackson County Circuit Court, Judge Thomas Lister presiding, entered both a protective placement order under Chapter 55 and an order under Chapter 54 naming G.O. and G.B. as guardians of the person for their brother G.B.B. The protective placement has since been extended several times following annual reviews.

¶3 On April 13, 2015, the Jackson County Department of Health and Human Services filed a Petition for Review of Conduct of Guardian[s] (the first removal petition) seeking to remove G.O. and G.B. as G.B.B.'s guardians, alleging that they were refusing medication and treatments that were being recommended by staff at the veterans' hospitals in Tomah and Madison. Dr. Naheed Akhtar, G.B.B.'s treating psychiatrist at the Madison VA, filed a document in support of the first removal petition advising the circuit court that she wanted to administer electroconvulsive therapy and clozapine because G.B.B. was suffering severe symptoms from schizoaffective disorder and catatonia that had not responded to multiple medication changes. Akhtar asserted that G.B.B. was experiencing auditory hallucinations, religious delusions of being tortured by God, the sensation of being in a meat grinder, intense guilt over being responsible for the deaths of people, and worry about being poisoned; that G.B.B. would at times

become mute and lie on the floor for extended periods; and that at other times he would defecate on the floor or urinate in waste baskets.

¶4 The parties reached a stipulation on the first removal petition on May 8, 2015, wherein G.O. and G.B. consented to the use of clozapine and agreed to file an overdue annual inventory of G.B.B.'s assets and the county withdrew its request for consent to electroconvulsive therapy. However, on September 1, 2015, the county filed a second Petition for Review of Conduct of Guardian[s]—which is the subject of the instant appeal—again seeking removal of G.O. and G.B. on the grounds that they were not acting in G.B.B.'s best interests, and had hindered his social worker's ability to place G.B.B. in a less restrictive environment.

¶5 Social worker Michelle Schoolcraft testified about an incident that had occurred after the stipulation was entered on the first removal petition but before the second removal petition had been filed. Schoolcraft stated that in June 2015, while under the care of Dr. Akhtar at the Madison VA, G.B.B. had stabilized to the point where he was deemed to no longer require acute psychiatric inpatient care. Akhtar reported to Schoolcraft that she was recommending an adult family home or community-based residential facility (CBRF) as G.B.B.'s next care facility. Schoolcraft then attempted to have G.B.B. placed into a CBRF called Abilities in the Madison area. Abilities assessed G.B.B. and initially agreed to accept him. G.O. then contacted Abilities and asked them numerous questions about what care they provided, what the neighborhood was like, and what the cost would be. Although G.O. did not view the conversation as "unpleasant," Abilities withdrew its acceptance of G.B.B. after speaking with G.O., and Schoolcraft was unable to find any other CBRF that was willing to take G.B.B. As a result, on June 29, 2015, G.B.B. was returned to the psychiatric nursing care unit in the locked hospital setting of the Tomah VA hospital, which was less restrictive than

the acute psychiatric ward at the Madison VA, but more restrictive than placement in a CBRF would have been.

¶6 Psychiatrist Dr. Narinder Saini testified that he began treating G.B.B. on a daily basis at the Tomah VA hospital at the end of June 2015, after G.B.B. had returned from his stay at the acute psychiatric ward at the Madison VA. Saini concurred with prior diagnoses that G.B.B. suffered from schizoaffective disorder, bipolar type, but Saini added an additional possible diagnosis of post-traumatic brain injury based upon self-reporting by G.B.B., which Saini believed could help explain why some of G.B.B.'s symptoms were resistant to several of the standard medications for schizophrenia. Following his initial assessment, Saini decreased the dosage on one of G.B.B.'s primary medications, and sought to decrease the total number of medications that G.B.B. was taking. Saini also wanted to adjust which medications G.B.B. was taking to reflect that there were multiple causes for G.B.B.'s symptoms, and to have a separate drug targeting each of G.B.B's primary symptoms of anxiety, agitation, aggression, depression, memory, and psychosis. Saini stated that his goal was to be able to transition G.B.B. into a less restrictive community living placement.

¶7 Saini further testified that he had an initial brief telephone discussion with G.O. on August 6, 2015, in which G.O. told Saini that she did not believe in psychotropic medications because another brother had died from complications from one. Saini then met with G.O. in person on August 13, 2015, to discuss his diagnoses and proposed treatment plan. Saini said that G.O. demonstrated difficulty concentrating and lack of insight about the diagnoses that Saini was presenting during that meeting, and that she became agitated and rude during the meeting, using profanities, to the point where Saini eventually asked her to leave.

¶8 Over the next few weeks, there were a number of episodes in which hospital staff reported that G.B.B. became severely agitated and very aggressive, on one occasion threatening to cut a nurse into pieces and to kill Saini. G.B.B. was also wandering at night, urinating and defecating in other veteran's bedrooms. On September 8, 2015, in response to these episodes, Saini began giving G.B.B. oral doses of the antipsychotic drug Invega in addition to a monthly intramuscular shot of Invega that G.B.B. was already receiving. G.B.B. improved in response to the treatment.

¶9 However, in a telephone conversation on or about September 17, 2015, G.O. objected to the oral Invega, because she did not believe G.B.B. had responded well to it in the past. During that conversation, Saini proposed several treatment alternatives, such as replacing the sleep medication Ambien that G.B.B. had been taking with Remeron; replacing the antidepressant Zoloft that G.B.B. had been taking with Effexor; and adding the memory drug Memantine, which is used with Alzheimer's patients and can in some cases help with psychosis. G.O. indicated that she wanted to do her own research on the newly proposed medications before agreeing to them. Saini asked G.O. to respond back to him quickly because "time was running short" to address G.B.B.'s acute symptoms.

¶10 Following that telephone conversation, Saini discontinued the oral Invega per G.O.'s request. G.B.B. then exhibited aggression on five straight days.

¶11 Saini contacted G.O. by telephone on September 24, 2015, to discuss G.B.B.'s renewed aggression and to seek consent to transfer G.B.B. back to the acute psychiatric care ward in Madison. Saini again believed that G.O. was not processing what he was telling her about G.B.B.'s aggressive, unstable, and disorganized behavior. Saini noted that G.O. would not consent to the transfer,

and instead wanted him to discontinue the psychotropic medication Prolixin that G.B.B. had been on for years because G.O. was concerned that the Prolixin could be adversely reacting with the Invega. Saini agreed to wean G.B.B. off of the Prolixin at G.O.'s request.

¶12 G.O. never got back to Saini about the other proposed changes in G.B.B.'s treatment. Saini therefore never started G.B.B. on the Memantine. However, Saini relied upon a separate Chapter 51 order for involuntary medication to replace the Ambien with Remeron without the sisters' approval.[1] The next day, G.B.B. was able to sleep for seven or eight hours and he stopped wandering. Saini also began G.B.B. on a very low dose of Effexor, which decreased G.B.B.'s anxiety and depression levels, and led to G.B.B. wanting to talk with Saini.

¶13 Saini explained that, notwithstanding the Chapter 51 order authorizing involuntary medication, it was the VA hospital's policy to first attempt to obtain a guardian's permission for any treatment, absent an emergency detention situation. Ultimately, Saini stated that there were three medication changes that he still wanted to make that G.O. had not agreed to. In addition to trying the Memantine, Saini wanted to use Valium instead of Ativan as a muscle relaxant, and to be able to use a low dose of Abilify on a situational basis if needed in response to aggression.

¶14 G.O. testified that she believed that decisions about G.B.B.'s care should be a group effort, rather than being made by an ultimate decision-maker,

[1] The Chapter 51 order for involuntary medication is not in the record for this case, presumably because it was entered in a separate proceeding, and the testimony does not establish when the order was entered. For the purposes of this appeal, we will accept the sisters' unrebutted assertion in their brief that the order was entered on March 3, 2015.

and that decisions should be made from the perspective of accommodating what G.B.B. would like to do, to the largest extent possible. For instance, G.O. stated that she had initially withheld consent to use clozapine because G.B.B. did not want to take it, but subsequently agreed to the stipulation to resolve the first removal petition when G.B.B. changed his mind and indicated he was willing to take the medication. When asked what she would do to resolve an impasse in the future regarding differing opinions on G.B.B.'s care, she indicated that she would get a lawyer and go to court if she believed based upon her own research that a particular medication was dangerous. She acknowledged that she had never sought a second opinion from an independent psychologist regarding any of her objections to the medications G.B.B. was receiving or that Saini or other treatment providers wanted to try.

¶15 G.B. testified that she had attempted to contact G.B.B.'s treatment providers directly on several occasions, but that they had never returned her calls. She said she maintained involvement as a guardian by speaking with G.O. about G.B.B.'s care "pretty much at least once a week if not more depending on the situation," and that the two of them were "both always in total agreement" as to what questions to ask or concerns to relay to treatment providers. G.B. said that she and G.O. also regularly conferred with their other siblings about G.B.B.'s care, and that the sisters were acting with the full support of the family in expressing concerns to G.B.B.'s treatment providers, but she also acknowledged that she had never sought a second expert opinion regarding withholding consent for clozapine. Rather, her concerns were based upon her own research indicating that clozapine was a particularly dangerous "black box medicine," and the experience of another brother who had died after taking clozapine.

¶16 On another topic, a legal instruments examiner from the Department of Veteran's Affairs provided undisputed testimony that G.O. had never provided a surety bond as required by the VA.

¶17 After the close of evidence, the guardian ad litem recommended that the court remove G.O. and G.B. as guardians because they lacked the ability to make good decisions, resulting in multiple instances in which they had not acted in G.B.B.'s best interests, despite their good intentions. The guardian ad litem noted that the sisters had a history and pattern of poor communication and lack of direction as to G.B.B.'s care, no matter who the treatment providers were. In particular, the guardian ad litem expressed concern that the sisters would continue to express concerns in a manner that created a "trail of drama and chaos" that delayed G.B.B.'s treatment, no matter what explanations were provided to them, with "no end in sight." The guardian ad litem believed that it would be in G.B.B.'s best interests to have a guardian with whom treatment options could be rationally discussed, so that decisions could be made in a timely manner.

¶18 The circuit court removed the sisters as guardians, largely following the rationale of the guardian ad litem. The court emphasized that the sisters had every right to ask questions about what each medication was intended to do, what side effects it might have, and how it could interact with other medications that G.B.B. was taking, and to obtain second opinions if they were concerned about a particular course of treatment. The problem, in the court's view, was that the sisters could not "see the forest [for] the trees" in terms of evaluating the options for G.B.B.'s care in a "rational, methodical [way, as] a reasonable person would," and did not appreciate that their failure to grant approval of recommended treatments or alternatives in a timely manner was significantly delaying G.B.B.'s

care and adversely affecting his mental health. The court also found that G.O.'s failure to obtain a bond was contrary to G.B.B.'s best interests.

STANDARD OF REVIEW

¶19 The removal of a guardian is a discretionary determination. ***Winnebago County v. Harold W.***, 215 Wis. 2d 523, 528-29, 573 N.W.2d 207 (Ct. App. 1997). We will not disturb discretionary determinations so long as the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Ladwig v. Ladwig***, 2010 WI App 78, ¶15, 325 Wis. 2d 497, 785 N.W.2d 664 (quoted source omitted).

¶20 Under this standard, it is often necessary for this court to review disputed factual findings or legal propositions upon which the circuit court relied before determining whether the circuit court's application of the law to the facts was reasonable. We will accept a circuit court's factual findings unless they are clearly erroneous—meaning that the great weight and clear preponderance of the evidence support a contrary determination. WIS. STAT. § 805.17(2); ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

¶21 Furthermore, because the circuit court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the "ultimate arbiter" for credibility determinations when acting as a fact-finder, and we will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2) ("due regard shall be given to the opportunity of the [circuit] court to judge the credibility of the witnesses"). This means that we will not overturn credibility

determinations on appeal unless the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts. ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

DISCUSSION

¶22 The sisters first argue that the county failed to prove that they did not act in the best interests of their brother because the evidence showed that G.O. never "ordered" Saini or the VA to take G.B.B. off any particular medication, but merely questioned the treatment options being recommended based on the sisters' own research. As a corollary to this argument, the sisters assert that they "did not have the ability to hinder any medication changes with G.B.B. due to the Order for Involuntary Medication and Treatment filed on March 3, 2015." This argument ignores the factual findings and credibility determinations made by the circuit court. Specifically, the circuit court accepted Saini's testimony that G.O. was very insistent about taking G.B.B. off certain medications, and that it was VA hospital policy to attempt to obtain a guardian's consent to treatment, notwithstanding having an order to treat.

¶23 The sisters next argue that the circuit court should have admitted a recording they made of one of the telephone conversations between Saini and G.O. As the court noted, however, the recorded conversation was *not* from the date that Saini testified about G.O.'s rude and profane behavior. Therefore, the court was within its discretion to determine that the recorded conversation was not relevant to resolve any dispute as to G.O.'s demeanor.

¶24 The sisters next argue that the circuit court erred in finding that G.B. had failed to act in G.B.B.'s best interests, since there was no evidence that she

had ever had any interaction, much less a negative one, with Saini. However, the court could reasonably determine based upon G.B.'s own testimony that she fully shared her sister's poor decision-making ability.

¶25 The sisters next argue that the failure to obtain a bond was reasonable under the circumstances, because they were concerned that the cost of the bond would deplete G.B.B.'s estate and had taken steps to investigate ways to reduce the bond amount by placing some of G.B.B.'s assets in trust. However, the sisters had over two years to obtain a bond for G.O., and they could have investigated ways to reduce the bond going forward while the bond was in place. It is irrelevant whether the removal as a guardian is a specified statutory sanction for failing to file a bond, because the circuit court reasonably incorporated the sisters' failure to obtain a bond as only one element in its analysis of whether they had been acting in G.B.B.'s best interests.

¶26 Finally, the sisters object to the circuit court having chosen the "most egregious" remedy of removing them and appointing a corporate guardian, instead of adopting some unspecified measure that would have been tailored to improving communication between the sisters and G.B.B.'s treatment providers, or appointing another family member. However, they have provided no legal authority that would suggest the court acted outside the scope of its discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).