

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

No. 00-2754

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF: CHARLES R. H. v. MARY E. H.:

IN THE INTEREST OF: JASON M. H.:

**IN THE INTEREST OF THE GUARDIANSHIP AND MENTAL
COMMITMENT OF JASON M. H.:**

WAUKESHA COUNTY,

APPELLANT,

V.

DODGE COUNTY,

RESPONDENT.

APPEAL from an order of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Reversed and cause remanded.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 LUNDSTEN, J. Waukesha County appeals a circuit court order concluding that Jason H., an incompetent with a guardian, is a resident of Waukesha County for purposes of determining which county is responsible for funding Jason H.'s protective placement care. Waukesha County seeks reimbursement from Dodge County for all protective placement costs paid by Waukesha County.

¶2 The central dispute in this case regards the proper residency test applicable to Jason H. We are not able to resolve this issue because of an inadequately developed factual record. Accordingly, we remand for further proceedings.

Background

¶3 Jason H. was born March 4, 1980, to Charles and Mary Ellen H. (now Mary Ellen S.). At the age of eighteen months, Jason H. was diagnosed with a seizure disorder that halted his development in some areas and reversed it in others. Jason H.'s condition is such that he requires a very high degree of supervision and services at all times.

¶4 In 1982, Jason H.'s parents divorced in Dodge County. His mother was granted sole legal custody and primary physical placement. At that time, both parents were residents of Dodge County. On February 3, 1987, Jason H.'s mother placed him at Mendota Mental Health Center on a voluntary basis. He remained there until February of 1988. Just prior to that time, on January 27, 1988, Jason H.'s mother filed a petition in Dodge County, case number 88 JV 13, alleging that Jason H. was a child in need of protection and services. The circuit court agreed and ordered that Jason H. be placed under supervision at a foster home in Clyman, Wisconsin. Jason H. has remained in court-ordered out-of-home placements since

that time. These placements were both within and outside of Dodge County, and included foster homes, group homes, child care institutions, and mental health centers.

¶5 In August of 1989, when Jason H. was nine years old, his mother moved from Dodge County to Waukesha County, where she has remained a resident. Jason H.'s father had moved to Waukesha County in 1987.

¶6 On February 10, 1998, just prior to Jason H.'s eighteenth birthday on March 4, his mother filed a petition for permanent guardianship and for protective placement in the Dodge County Circuit Court, case number 98 GN 13.¹ Waukesha County was not served with a copy of this petition. In Jason H.'s separate ongoing juvenile action, case number 88 JV 13, Dodge County filed a motion for a change of venue to Waukesha County on the basis that Jason H.'s county of residence had changed to Waukesha County by virtue of his mother's residence there for more than six months. A hearing was held on that motion on March 3, 1998. Waukesha County did not appear at the hearing.

¶7 At the time Jason H.'s mother filed the petition, and at the time of the hearing on Dodge County's motion to change venue, Jason H. was living in a facility operated by Creative Community Living Services in Dodge County. As discussed below, there is very little information in the record concerning the nature of this facility.

¹ Though not clear from the petition itself, the guardianship and protective placement were presumably sought pursuant to WIS. STAT. §§ 880.38 and 55.06 (1995-96).

¶8 On March 24, 1998, twenty days after Jason H.'s eighteenth birthday, the circuit court issued an order in case number 98 GN 13, concluding that Jason H. was a proper subject for both guardianship and protective placement. The court also determined that venue should be changed to Waukesha County because Jason H. was a Waukesha County resident and, therefore, Waukesha County was responsible for funding Jason H.'s protective placement care.

¶9 On April 9, 1998, a statement of emergency detention was filed in the probate court of Dodge County, case number 98 ME 45, seeking emergency detention of Jason H. in the Winnebago Mental Health Institute in Winnebago, Wisconsin. Thereafter, the circuit court ordered Jason H. temporarily detained, and again held that Jason H. was a resident of Waukesha County. On April 22, 1998, the court ordered that Jason H. be committed to the Waukesha County § 51.42 Board,² with initial placement at the Winnebago Mental Health Institute. The court also ordered that venue be changed from Dodge County to Waukesha County.

¶10 Shortly thereafter, Waukesha County filed a motion to re-open the residency issue on the basis of lack of notice of Dodge County's motion to change venue in case number 88 JV 13. Waukesha County also sought to consolidate case numbers 98 GN 13 (relating to the guardianship and protective placement), 98 ME 45 (relating to the emergency detention), and 88 JV 13 (relating to Jason

² WISCONSIN STAT. § 51.42(1)(b) (1995-96) provides that the county board of supervisors "has the primary responsibility for the well-being, treatment and care of the mentally ill, developmentally disabled, alcoholic and other drug dependent citizens residing within its county and for ensuring that those individuals in need of such emergency services found within its county receive immediate emergency services."

H.'s protective placement during his minority).³ A hearing was conducted on the motion on July 8, 1998.

¶11 At that hearing, Jason H.'s mother was asked what her wishes were for Jason H.'s domicile. She stated the following: "Being that Jason has been in Dodge County all these years, I would like to keep it at Dodge County." Additionally, Jason H.'s mother testified: "Dodge County knows his case from beginning to end. And I feel that I'd be more comfortable if they continued to keep Jason."

¶12 On September 4, 1998, the circuit court issued an order finding that Waukesha County was properly notified of the hearing on Dodge County's motion to change venue. Applying WIS. STAT. § 51.40(2)(a) (1995-96),⁴ the court also determined that Jason H. was a resident of Waukesha County immediately prior to his commitment and, therefore, he remained a Waukesha County resident for the purposes of his guardianship and protective placement.

¶13 Waukesha County appealed that decision to this court and we reversed, finding that Waukesha County had not been given sufficient notice of the hearing on Dodge County's motion to change venue. We remanded the case to the circuit court to make a *de novo* determination of Jason H.'s residency, based upon the parties' stipulation of facts and other testimony heard by the court at the

³ Case number 82 FA 9 is also part of the record on appeal, ostensibly for historical purposes only. That case relates to Charles' and Mary Ellen's dissolution of marriage proceedings.

⁴ All references to the Wisconsin Statutes are to the 1995-96 version unless otherwise noted.

July 8, 1998, hearing. Both parties submitted briefs to the circuit court on the residency issue.

¶14 On July 6, 2000, the Dodge County Circuit Court issued a written order, concluding that Jason H. is a Waukesha County resident. More specifically, the court found that the parties did not dispute that because minor children are generally domiciled where their parents are domiciled, Jason H. resided in Waukesha County just prior to his eighteenth birthday. The parties also did not dispute that a guardian, under some circumstances, may change a ward's domicile.

¶15 The circuit court disagreed, however, with Waukesha County's argument that Jason H.'s physical presence in Dodge County at the time of the protective placement, along with his guardian's desire that he become a Dodge County resident, effectively changed Jason H.'s county of residence from Waukesha County to Dodge County. The circuit court held that there was nothing in the case law giving guardians the sort of unbridled authority argued for by Waukesha County. The court concluded that nothing occurred after Jason H.'s eighteenth birthday that altered his county of residence.

Discussion

¶16 The issue we address on appeal is whether the circuit court properly concluded that Jason H.'s county of residence is Waukesha County.

¶17 Under the Mental Health Act, the county board of supervisors has the primary responsibility for the well-being, treatment, and care of the developmentally disabled citizens residing within its county. WIS. STAT. § 51.42(1)(b). The parties agree that county liability for the cost of care and services purchased through or provided by a county department of community

programs established under § 51.42 is based upon the client's county of residence. *See* § 51.42(1)(b). Thus, the determination of whether Waukesha County or Dodge County is responsible for funding Jason H.'s protective placement care turns on Jason H.'s county of residence.

¶18 The test of residency for persons protectively placed "in state facilities or nursing homes" is set forth in WIS. STAT. § 51.40(2). While there is no express agreement, it is clear that Jason H. was not in a "state facility" at the time of his protective placement. Still, if Jason H. was in a "nursing home" at that time, then this case can be resolved by applying the language of § 51.40(2).

¶19 WISCONSIN STAT. § 51.40(2)(a) contains a general rule that persons remain residents of the county in which they reside "at the time the commitment or protective placement is made." Additional residency rules governing specific situations are set forth in § 51.40(2)(a) and (b).⁵ The parties agree that because both of Jason H.'s parents resided in Waukesha County prior to Jason's eighteenth birthday, Waukesha County was Jason H.'s residence prior to his eighteenth

⁵ WISCONSIN STAT. § 51.40(2)(a) provides, in part, as follows:

(2) DETERMINATION OF RESIDENCE. For purposes of determining responsibility for funding the provision of services under chs. 46, 51 and 55, the county of residence of individuals aged 18 or older with developmental disability or chronic mental illness in state facilities or nursing homes shall be determined as follows:

(a) *Directed placement.* 1. Commitment or protection placement. If an individual is under a court order of commitment under this chapter or protective placement under s. 55.06, the individual remains a resident of the county in which he or she has residence at the time the commitment or protective placement is made. If the court makes no specific finding of a county of residence, the individual is a resident of the county in which the court is located.

birthday. This agreement appears appropriate. We find no statute or circumstance that would override the general rule that a minor child's domicile is that of his or her parent or parents. *State v. Corey J.G.*, 215 Wis. 2d 395, 418, 572 N.W.2d 845 (1998).

¶20 Applying the plain language of WIS. STAT. § 51.40(2) then, if the facility where Jason H. was placed at the time of his protective placement order was a nursing home, he remained a resident of Waukesha County. See *Turner v. Gene Dencker Buick-Pontiac, Inc.*, 2001 WI App 28, ¶14, 240 Wis. 2d 385, 623 N.W.2d 151 (when statutory language is clear and unambiguous, we may apply it to the facts without further analysis). However, we cannot determine from the undisputed facts whether the facility was or was not a nursing home.

¶21 WISCONSIN STAT. § 51.40(1)(h) refers to WIS. STAT. § 50.01(3) for the definition of a nursing home. At the time of Jason H.'s protective placement, § 50.01(3) defined a nursing home as “a place which provides 24-hour services including board and room to 3 or more unrelated residents who because of their mental or physical condition require nursing care or personal care in excess of 7 hours a week.”⁶

¶22 There is nothing in the stipulation of facts or, for that matter, in the statements of counsel during the hearing of record that address the nature of the

⁶ On June 17, 1998, several months after Jason H.'s protective placement, WIS. STAT. § 50.01(3), defining the term “nursing home,” and § 50.01(1g), defining the term “community-based residential facility” (CBRF), were revised. Our decision in *Juneau County*, wherein we noted that the definitions of a CBRF and a nursing home were mutually exclusive, predated the revision. See *Juneau County v. Sauk County*, 217 Wis. 2d 705, 712, 580 N.W.2d 694 (Ct. App. 1998). After the 1998 revision, some placement facilities may qualify as both a CBRF and a nursing home.

facility where Jason H. resided. In its brief on appeal, Waukesha County argues that WIS. STAT. § 51.40(2) does not apply because Jason H. was not living in a state facility or nursing home at the time of his protective placement. However, Waukesha County does not elaborate on why the facility operated by Creative Community Living Services, in which Jason H. was residing, does not meet the criteria of a nursing home. Similarly, Dodge County does not discuss whether the facility in which Jason H. resided does or does not qualify as a nursing home.

¶23 At times, the circuit court seemed to assume that Jason H. was in a facility covered by WIS. STAT. § 51.40(2)(a). In a previous decision in this matter, the circuit court applied the residency test in § 51.40(2)(a). As noted above, this test applies only if the placement is in a state facility or a nursing home.

¶24 Our review of the record shows the following. At the time of his protective placement, Jason H. was in a facility run by Creative Community Living Services. The record indicates that Jason H. was living in a three-bedroom apartment with one other developmentally disabled adult and one staff member from Creative Community Living Services. The record also suggests that Jason H. requires supervision all of the time and needs twenty-four-hour access to nursing services to administer medication and to help him perform basic tasks like eating, dressing and bathing.

¶25 If Jason H.'s facility supplies constant supervision and access to nursing care, these facts suggest that the facility may qualify as a nursing home. At the same time, WIS. STAT. § 50.01(3) defines a nursing home, in part, as a place where three or more persons reside who require nursing care. Although a report in the record says that just two persons in Jason H.'s apartment require nursing care, it may be that this low occupancy was temporary. Furthermore, it is

unclear whether Jason H.’s apartment is part of a larger complex run by Creative Community Living Services, serving more adults with a variety of physical or mental disabilities. Section 50.01(3) defines a nursing home as “a place” meeting certain criteria. It may be that Jason H.’s apartment is part of a larger “place” that meets the statutory criteria. The record refers to Creative Community homes where Jason H. spent significant time, offering a variety of social and recreational activities, which may or may not house three or more individuals.

¶26 If, on the other hand, Jason H.’s facility was not a nursing home, then WIS. STAT. § 51.40(2) does not apply and a different residency test must be identified. The test for residency for protectively placed persons who are not in a state facility or nursing home appears to be an open question.

¶27 The circuit court held that there was nothing in *Town of Carlton v. State Department of Public Welfare*, 271 Wis. 465, 74 N.W.2d 340 (1956); *Juneau County v. Sauk County*, 217 Wis. 2d 705, 580 N.W.2d 694 (Ct. App. 1998); and *Waukesha County v. B.D.*, 163 Wis. 2d 779, 472 N.W.2d 563 (Ct. App. 1991), giving guardians the unbridled authority to change the residency of a ward by simply sending the ward to any new county along with the guardian’s stated desire that the ward reside in that new county, regardless of the guardian’s residence. We agree. But at the same time, none of these three cases appear to provide a test for residency for protectively placed persons who are not in a state facility or nursing home.

¶28 *Town of Carlton* involved the construction of a statute that is no longer in effect. The court in that case determined how residency was obtained for purposes of receiving public aid under former WIS. STAT. § 49.10. *See Town of Carlton*, 271 Wis. at 468-71. *Juneau County* addressed the general topic of

residency, but remanded to the trial court for a hearing on residency without specifying the applicable test. *Waukesha County* involved a ward in a state facility, and, therefore, the residency rules of WIS. STAT. § 51.40(2) were applicable.

¶29 Waukesha County asks this court to hold that Jason H. resides in Dodge County by applying WIS. STAT. § 49.001(6) and (8), or by finding that a guardian has broad implicit powers to change the residency of a ward pursuant to WIS. STAT. ch. 880. We will not grapple with these arguments, however, in the absence of a record showing that Creative Community Living Services is not a nursing home as that term was defined in WIS. STAT. § 50.01(3) at the time of Jason H.'s placement. Moreover, we agree with the circuit court's observation that the sort of unbridled authority advocated by Waukesha County would permit a guardian to change a ward's residency by an act as slight as sending the ward to a new county by bus with the intention that the ward remain in the new county. It appears that the counties of this state have an incentive to urge the legislature to consider and resolve the apparent ambiguity in the law regarding the residency test applied to incompetents who do not reside in a state facility or nursing home at the time of their protective placement.

¶30 Accordingly, we remand for further fact finding by the circuit court. If the court concludes that the facility run by Creative Community Living Services qualifies as a nursing home, then the court's decision that Jason H. is a Waukesha County resident was proper. If the court concludes the facility does not qualify as a nursing home, the court should set forth on the record what type of facility it is and attempt to resolve the difficult question of the applicable residency test.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

