COURT OF APPEALS
DECISION
DATED AND RELEASED

July 5, 1995

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 94-2655 and 94-3038

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

No. 94-2655

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF ANNA B., INCOMPETENT:

MILWAUKEE COUNTY,

Petitioner-Appellant,

v.

ANNA B.,

Respondent-Respondent.

No. 94-3038

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF EARLIE W.:

MILWAUKEE COUNTY,

Petitioner-Appellant,

v.

EARLIE W.,

Respondent-Respondent.

APPEAL from orders of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge and DAVID V. JENNINGS, JR., Reserve Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Milwaukee County appeals from orders directing that Anna B. and Earlie W. have guardians appointed and that each be placed under protective placement in their own homes.[1] Milwaukee County claims that: (1) the trial courts[2] erred in ordering protective placement because the facts of each case do not support such an order; and (2) the trial courts lacked jurisdiction to order protective placement because proper notice was not given to Anna B. and Earlie W. The Legal Aid Society of Milwaukee, as court-appointed guardian ad litem for Anna B. and Earlie W., asserts that Milwaukee County's appeal is frivolous and seeks an award of appeal costs and sanctions.

Because the trial courts did not err in ordering protective placement, and because Milwaukee County waived the jurisdictional argument by not raising it prior to this appeal, we affirm the orders. Further, because Milwaukee County's argument on appeal is frivolous, we remand these cases to the respective trial courts to determine the appropriate amount of appeal costs and sanctions to be imposed.

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[1] Although Milwaukee County appeals from the orders in their entirety, the only issue on appeal is protective placement. Neither party disputes that both individuals require an appointed guardian.

[2] The Honorable John F. Foley presided over Anna B.'s case. All references to "trial court" regarding Anna B. refer to Judge Foley. The Honorable David V. Jennings, Jr. presided over the Earlie W. case. All references to "trial court" regarding Earlie W. are to Judge Jennings.

I. BACKGROUND

The cases of Anna B. and Earlie W. were consolidated for the purposes of appeal. In the case of Anna B., Milwaukee County filed a petition for guardianship of her and her estate. The trial court appointed a Legal Aid guardian ad litem for Anna B. Legal Aid objected to the petition for guardianship because it was not accompanied by a request for protective placement. The matter was set for trial on September 1, 1994.

Both parties stipulated to the admission of two psychological reports, one performed on behalf of Milwaukee County by Dr. Joseph L. Collins. The second report resulted from an independent psychological evaluation performed by Dr. James L. Paquette. Both reports recommended guardianship and protective placement for Anna B. Both doctors concluded that Anna B.'s current residential site (Anna B.'s home), with the current level of service, which included medical care, weekly nursing service and twenty-four hour one-to-one care by a live-in aid, was the least restrictive level of care to meet Anna B.'s needs. The parties also stipulated to the fact that Anna B. was incompetent and in need of twenty-four hour care. It was undisputed that Anna B.'s condition resulted from aging and dementia and was permanent.

The trial court found Anna B. to be incompetent and incapable of providing for her own care and custody, and in need of twenty-four hour care. The trial court ordered protective placement to Anna B.'s home with the level of services she was currently receiving.

In the case of Earlie W., Milwaukee County filed a petition for successor guardianship of her and her estate. The trial court appointed a Legal Aid guardian ad litem for Earlie W. Legal Aid filed an objection to the petition because it did not include a request for a protective placement order. Trial was scheduled for November 15, 1994.

Milwaukee County filed a motion to dismiss Legal Aid's request for protective placement. At the motion hearing, counsel for Milwaukee County informed the court that the facts were essentially undisputed. Both parties agreed that Earlie W. needed twenty-four hour care and was unable to

care for herself. Both expert psychological reports, one prepared on behalf of the County and the other as a result of an independent psychological evaluation, recommended guardianship and protective placement to Earlie W.'s home. Both experts concluded that home placement with the twenty-four hour one-to-one care that she was receiving was the least restrictive environment consistent with her needs. Further, both experts concluded that Earlie W.'s condition was attributed to aging and dementia and that her condition was permanent.

The trial court found that Earlie W. met the standards for protective placement. Accordingly, it denied Milwaukee County's motion to dismiss and ordered protective placement in Earlie W.'s home.

Milwaukee County now appeals both orders.

II. DISCUSSION

A. Ordering Protective Placement.

Milwaukee County's initial brief claims that the trial courts erroneously exercised their discretion in ordering protective placement because there was no evidence to show either ward needed to be placed in a residential facility with fifteen or more beds. This was identical to the argument Milwaukee County made to the trial courts. Legal Aid responded that § 55.06(9)(a), STATS., specifically provides that a trial court can order protective placement to an individual's home. Milwaukee County's reply brief retreats from its initial stance, claiming that it does not take the position that in-home protective placement is forbidden. Rather, it claims that the trial courts erroneously exercised their discretion in these two cases because the facts in each case do not require any type of protective placement.

Because § 55.06, STATS., provides discretion to a trial court under these circumstances, we review its decision only to determine whether the trial court erroneously exercised its discretion in ordering protective placement. We will not conclude that the trial court erred if it applied the pertinent law to the

relevant facts and reached a rational conclusion. ***Village of Shorewood v. Steinberg***, 174 Wis.2d 191, 204, 496 N.W.2d 57, 62 (1993).

Section 55.06(2), STATS., sets forth four prerequisites governing protective placement decisions. The four factors that need to be present before a protective placement order is appropriate are as follows:

(1) the ward has a primary need for residential care and custody;

(2) the ward has been deemed incompetent by a circuit court;

(3) "[a]s a result of developmental disabilities, infirmities of aging, chronic mental illness or other like incapacities, is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to oneself or others"; and

(4) the ward has "a disability which is permanent or likely to be permanent."

Section 55.06(2), STATS.

As noted above, the facts in each case were essentially undisputed. Both individuals were deemed incompetent; both were assessed by experts as being totally incapable of providing for their own care as a result of infirmities of aging; and both have a disability which is permanent.

Hence, three of the four statutory factors were undisputedly satisfied. The final factor, whether the ward has a primary need for residential care, was initially in dispute. At the trial court level and in its initial brief, the County argued that "residential care" did not contemplate placement in an individual's home. The County, however, properly recants this position in its reply brief to this court. The statute and case law clearly dictate that placement in an individual's home falls within the meaning of the term "residential care." *See* § 55.06(9)(a), STATS. (home placements are one option); *see also* ***Milwaukee County Protective Servs. Management Team v. K.S.***, 137 Wis.2d 570, 576-77, 405

N.W.2d 78, 81 (1987) (subject's home may be proper location for protective placement). Based on this law and the undisputed facts, the trial courts reasoned that a protective placement order for each woman was appropriate. This conclusion was a rational one. We conclude, therefore, that the trial courts did not err in ordering protective placement for Anna B. and Earlie W.

Milwaukee County's reply brief essentially concedes that the trial court considered the four statutory factors in reaching its determination, but argues that the trial court did not engage in the additionally required step of considering public policy. The County contends that even if the four factors delineated within the statute are satisfied, the trial court must also consider the policy issue of whether protective placement is necessary and only order protective placement when it is *absolutely necessary* for the safety and protection of the individual.

We are perplexed by Milwaukee County's contention. The facts in both Anna B.'s and Earlie W.'s cases clearly show that both women are at substantial risk if left unsupported. Both women are not only incompetent, but also totally dependent on others to care for them. The record demonstrates that neither woman can eat, bathe, use the toilet, get out of bed or attend to any of their own needs independently. The ineluctable inference from the undisputed facts reveals that these women are in need of protection to ensure that their residential and custodial needs will be met.

Although the trial courts may not have utilized the magic words—"policy requires absolute necessity"—the record upon which each court relied in ordering placement clearly demonstrates sufficient evidence to satisfy the standard required for such an order. Accordingly, we reject the County's argument.

B. Jurisdiction.

The County waived its jurisdictional argument by failing to raise this issue with the trial court. *See* § 805.11(1), STATS.

C. Frivolous Costs.

Finally, Legal Aid has moved this court for frivolous appeal costs and sanctions pursuant to § 809.25(3), STATS. No response was received from the County. Section 809.25(3)(c)2. states that this court can conclude an appeal is frivolous if "the party's attorney knew, or should have known, that the appeal ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." We find this standard has been met.

Milwaukee County's main brief asserted that protective placement required a finding that residential care to a facility with more than fifteen beds was required. Milwaukee County argued that protective placement could not be ordered in an individual's own residence. These arguments were proffered despite the clear language of § 55.06(9)(a), STATS., and case law interpreting that statute. ***K.S.***, 137 Wis.2d at 576-77, 405 N.W.2d at 81. We conclude that in light of the controlling authority, Milwaukee County's attorney should have known that this appeal was without any reasonable basis and could not be supported by a good faith argument for a change in the current law.

Accordingly, we deem Milwaukee County's appeal to be frivolous. We remand these cases to the respective trial courts for a determination as to appropriate costs and sanctions.

By the Court.—Orders affirmed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.