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DISTRICT II

August 14, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP954-FT In the matter of the guardianship and protective placement of Anne L. K.:
Winnebago County Department of Human Services v. Anne L. K.
(L.C. #2012GN198)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Anne L.K. appeals from orders for guardianship and protective placement, arguing that the county failed to establish by clear and convincing evidence that she is incompetent, has a primary need for residential care and treatment, and that her disability is likely to be permanent. Pursuant to a presubmission conference and this court's order of May 15, 2013, the parties

submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2011-12).¹ Upon review of those memoranda and the record, we affirm the circuit court.

Winnebago County filed guardianship and protective placement petitions alleging that Anne was incompetent due to “Alcohol Related cognitive impairments.” Both the guardian ad litem and the independent examiner, Dr. Sangita Patel, filed reports opining that Anne was a proper subject for a permanent guardianship of the person and estate, and for a protective placement.

At the final hearing, Dr. Patel, a licensed physician, opined to a reasonable degree of medical certainty that Anne was incompetent and in need of a guardian. Patel testified to the existence of the elements necessary for a permanent guardianship of the person and the estate, namely that: (1) due to Anne’s alcohol-related impairments, she is unable to effectively evaluate information or make decisions, and to meet the essential requirements for her health and safety; (2) due to her impairments, she lacks the evaluative and decision-making capacity to provide for her own support and prevent financial exploitation; and (3) there is no effective, less restrictive means by which to meet her need for assistance in decision making. With regard to the WIS. STAT. § 55.08 protective placement, Dr. Patel testified that Anne is incompetent, has a primary need for residential treatment and care, her incapacity renders her so incapable of providing for her own care as to create a substantial risk of harm to herself or others, and that her disability is likely to be permanent. The trial court found Anne to be a proper subject for guardianship and protective placement. Because Anne’s incompetence relates to alcoholism, the trial court

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

explicitly found and included in its written orders that pursuant to *Zander v. County of Eau Claire*, 87 Wis.2d 503, 513, 275 N.W.2d 143 (Ct. App. 1979),² Anne “is incapable of making a knowing and voluntary choice about drinking[,]” and that, “when sober, [Anne] does not possess the evaluative capacity to choose between continued drinking and various treatment and placement alternatives.”

Anne contends that in light of *Zander*, the trial court’s finding that she is incompetent is clearly erroneous.³ We disagree. There is ample evidence supporting the trial court’s finding that Anne is incapable of making a choice about her drinking, and that she therefore lacks “the evaluative capacity to choose between continued drinking and the various treatment and placement alternatives.” *Zander*, 87 Wis. 2d at 513. As the only testifying witness, Dr. Patel’s expert opinion was uncontroverted. Additionally, Dr. Patel supported her opinion with facts, such as Anne’s lack of insight into her alcoholism and its effects (the frequent welfare checks by police and her deteriorating condition), her sixty emergency room or hospital visits over the last five years, her serious alcohol-related injuries and self-discharge against medical advice, and her alcohol-related arrests. As stated by the trial court, Dr. Patel’s testimony concerning Anne’s continued drinking “takes this out of the realm of unwillingness and puts it squarely in the realm of inability” to make a knowing and voluntary choice.

² In *Zander v. County of Eau Claire*, 87 Wis. 2d 503, 512-13, 275 N.W.2d 143 (Ct. App. 1979), the court addressed the propriety of protectively placing a subject based primarily on his or her alcoholism, and cautioned that before finding a subject incompetent for purposes of Chapter 55, “[m]ore than a finding that a person is a drinking alcoholic is required The court must find that he is not capable of making a knowing and voluntary choice about his drinking.”

³ Anne argues that a WIS. STAT. § 51.45(13) involuntary alcohol commitment is more suitable given her circumstances.

Anne also argues that the trial court erroneously found that she has a primary need for residential care and that her disability is likely to be permanent based on Dr. Patel's testimony that "if she's kept in a setting where she has no access to drinking, I am thinking her condition may reverse gradually." Anne argues that this testimony indicates she is a "revolving door" as opposed to a "later-stage" alcoholic, and therefore, not a proper subject for protective placement. *Zander*, 87 Wis. 2d at 513-14. We disagree. The evidence establishes that Anne is physically and cognitively impaired due to her alcohol-related incapacity. Patel testified that Anne's severe alcohol dependence is a permanent condition and that absent a protective placement, her impairments would worsen. The trial court properly found that while some of Anne's functioning might improve with continued sobriety, "as far as the disability, the other like incapacities, the inability to knowingly make a decision to stop drinking, that's permanent." Anne is not the sort of revolving door alcoholic described in *Zander* who is able to care for herself when sober and who "can be treated under [WIS. STAT. § 51.45(13)], with a reasonable likelihood of success." *Zander*, 87 Wis. 2d at 515. The trial court properly found that Anne's "primary need is for protective placement rather than for active treatment or protective services." *Id.* at 514.

Upon the foregoing reasons,

IT IS ORDERED that the orders of the circuit court are affirmed.

Diane M. Fremgen
Clerk of Court of Appeals