OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

January 16, 2025

To:

Hon. Lyndsey A. B. Brunette
Circuit Court Judge
Electronic Notice

Kim Bredlau
Register in Probate
Clark County Courthouse
Electronic Notice

Ashley M. Schmitt
Electronic Notice

Lucas Swank
Electronic Notice

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

2024AP1826-FT In the matter of the condition of J.R.: Clark County v. J.R. (L.C. # 2022GN21P)

Before Nashold, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

J.R. appeals an order continuing her protective placement under WIS. STAT. § 55.18(3)(e)1. Upon the motion for summary reversal filed by J.R., and with Clark County informing the court that it will not be filing a respondent's brief or response to the motion, this

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

appeal is disposed of summarily pursuant to WIS. STAT. RULE 809.21(1), and the circuit court order is reversed.[2]

To order that an individual be protectively placed, a court must find that the individual meets all of the following standards:

> (a) The individual has a primary need for residential care and custody.
>
> (b) The individual is a minor who is not alleged to have a developmental disability and on whose behalf a petition for guardianship has been submitted, or is an adult who has been determined to be incompetent by a circuit court.
>
> (c) As a result of developmental disability, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, the individual is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to himself or herself or others. Serious harm may be evidenced by overt acts or acts of omission.
>
> (d) The individual has a disability that is permanent or likely to be permanent.

WIS. STAT. § 55.08(1).

Protective placements are subject to annual review pursuant to WIS. STAT. § 55.18. *See also* ***State ex rel. Watts v. Combined Cmty. Servs. Bd. of Milwaukee Cnty.***, 122 Wis. 2d 65, 362 N.W.2d 104 (1985) (declaring unconstitutional the lack of periodic, automatic review of protective placements). When the individual contests the protective placement, a full due process hearing is required. Sec. 55.18(3)(d); ***Watts***, 122 Wis. 2d at 85. To order the continuation of a protective placement, a circuit court must conclude, based on clear and

[2] WISCONSIN RULE 809.21(1) provides that, "upon its own motion or upon the motion of a party," this court "may dispose of an appeal summarily."

convincing evidence, that the individual continues to meet the standards under WIS. STAT. § 55.08(1). WIS. STAT. §§ 55.18(3)(d), (e), 55.10(4)(d).

J.R. was originally placed under guardianship and protective placement in February 2023 after being diagnosed with dementia. In January 2024, the County filed a protective placement status review pursuant to WIS. STAT. § 55.18(1)(a)1. A guardian ad litem (GAL) was appointed and also filed a report. Counsel was appointed for J.R., and a full due process hearing was held on April 22, 2024, at which two witnesses testified for the County: the protective services manager who authored the County's annual review report, and J.R.'s corporate guardian. Relevant here, the protective services manager testified that J.R. has a diagnosis of dementia and that, in his experience working with dementia patients, dementia is a condition that is not reversible and that gets progressively worse.

At the close of evidence, J.R. argued that the County failed to meet its burden to prove that J.R. had a qualifying mental condition or that such a condition was permanent or likely to be permanent because there was no testimony by a medical expert qualified to give such opinions. The GAL countered that J.R. was under a guardianship, which requires that J.R. have a qualifying impairment. *See* WIS. STAT. § 54.10(3)(a)2. (court may appoint a guardian for an individual only upon a finding that "because of an impairment, the individual is unable effectively to receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health and safety"); WIS. STAT. § 54.01 (defining "impairment" to include, as pertinent here, a degenerative brain disorder). The GAL argued that there was no requirement that the County "recertify" the qualifying impairment and that "you don't need [an] expert opinion to know that dementia is irreversible and gets progressively worse."

The circuit court continued the protective placement. The court agreed that the County was required to show that J.R. suffers from an impairment that is permanent or likely to be permanent. However, the court concluded that J.R.'s diagnosis was "established in the record"; that the court could rely on the previous adjudication in the guardianship and initial protective placement that J.R. is incompetent; that "here there's nothing refuting the previous findings that [J.R.] is suffering from a degenerative brain disorder"; and that testimony from a psychologist or psychiatric professional was not required.

In her appellant's brief filed on October 17, 2024, J.R. renews the arguments she raised in the circuit court. When the County failed to timely file its respondent's brief or seek an extension of its filing deadline, J.R. filed a motion for summary disposition on November 19, 2024, requesting that this court summarily reverse the order continuing protective placement. In her motion, J.R. recognized this court's practice of first issuing a delinquent brief notice, but asked that the court decline to do so and instead summarily reverse for two reasons. First, J.R. noted that this appeal had been expedited by order of this court on September 18, 2024, and that by consenting to expedited review, the County "should be held to those requirements." Second, J.R. argued that on the same day that J.R. filed her motion for summary disposition, the County filed in the circuit court an additional petition for annual review of protective placement, even though "J.R.'s current protective placement is not set to expire until April 22, 2025." According to J.R., this raises "serious concerns that the County is seeking to avoid an adverse ruling and dismissal of the protective placement by both delaying this Court's decision by not filing its brief and getting a new order for protective placement earlier than it has done in the past."

In response, the County filed a letter on November 21, 2024, stating that it "waives the filing of any [response] brief" and "further does not intend to submit any position statement or

reply to [J.R.]'s motion for summary disposition." The letter also states that the County has "no objection to deferring a protective placement review hearing for J.R. … pending the outcome of this proceeding." The County noted that the annual review was in the process of being scheduled, and was tentatively set for the week of March 24, 2025. The County did not respond in any way to the substance of J.R.'s appellate arguments.

On November 25, 2024, this court issued an order acknowledging the parties' filings and ordering that this appeal be taken under submission based on J.R.'s brief, the motion for summary reversal, and the record.

On appeal, J.R. argues that there is insufficient evidence to support a finding that she has a qualifying incapacity that is permanent or likely to be permanent because the County failed to present a medical doctor or psychologist to establish these facts. J.R. relies primarily on the following language from ***Walworth County v. Therese B.***, 2003 WI App 223, ¶13, 267 Wis. 2d 310, 671 N.W.2d 377: "To meet [its] burden of proof the government must present a witness who is qualified by experience, training and independent knowledge of [J.R.]'s mental health to give a medical or psychological opinion on each of these elements."

In response, the County has informed this court that it will not file a brief, nor will it respond to J.R.'s motion for summary reversal. The County's deliberate failure to respond to J.R.'s arguments or motion constitutes a concession that J.R.'s arguments and motion are meritorious. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded); ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (explaining that "[t]his court has held that respondents cannot complain if propositions of appellants are taken as confessed which

respondents do not undertake to refute"); ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 ("[W]e will not abandon our neutrality to develop arguments" on behalf of a party.).[3]

Accordingly,

IT IS ORDERED that the order of the circuit court is summarily reversed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals

[3] Although not discussed by the parties, there is nonbinding authority addressing the issue in this case: whether a medical professional must testify at a review hearing in order for a circuit court to continue a protective placement. The cases appear to reach divergent results. For example, in ***Ozaukee County v. S.S.***, No. 2024AP759-FT, unpublished slip op. (WI App Sept. 11, 2024), and ***Douglas County v. J.M.***, No. 2022AP2035, unpublished slip op. (WI App Nov. 28, 2023), the court determined that although a medical opinion is required for the appointment of a guardian, there is no such corresponding requirement for an order continuing protective placement and that the court may instead rely on reports, documents, and testimony admitted into evidence in the initial protective placement and earlier annual reviews. *See* ***S.S.***, No. 2024AP759-FT, ¶¶7-9, 31; ***J.M.***, No. 2022AP2035, ¶¶2, 20, 23-24. In so concluding, the ***S.S.*** and ***J.M.*** courts distinguished ***Walworth County v. Therese B.***, 2003 WI App 223, 267 Wis. 2d 310, 671 N.W.2d 377, on the basis that ***Therese B.*** concerned an initial protective placement and guardianship rather than a continued protective placement. ***S.S.***, No. 2024AP759-FT, ¶31; ***J.M.***, No. 2022AP2035, ¶23. However, a different conclusion was reached in ***Wood County v. James D.***, No. 2013AP1378, unpublished slip op. (WI App Nov. 7, 2013). In ***James D.***, the court reversed an order continuing protective placement, relying on ***Therese B.*** to conclude that "the burden lay with the County to present a qualified witness to provide a medical or psychological opinion as to the permanency of any disability." ***James D.***, No. 2013AP1378, ¶14-15. The ***James D.*** court further concluded that, although the appellant "was previously diagnosed with alcohol-induced dementia, no medical or psychological opinion was offered at trial … that [he] continues to suffer from that ailment." ***Id.***, ¶15. Because the parties do not address ***S.S.***, ***J.M.***, or ***James D.***, I do not discuss these cases further. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.