



The Guardian is a quarterly newsletter published by the Greater Wisconsin Agency on Aging Resources' (GWAAR) Wisconsin Guardianship Support Center (GSC).

The GSC provides information and assistance on issues related to guardianship, protective placement, advance directives, and more.

To contact the GSC:

Call:
(855) 409-9410

E-mail:
guardian@gwaar.org

Website:
<http://gwaar.org/guardianship-resources>

Subscriptions to *The Guardian* are free. To subscribe, fill out our newsletter contact form.

In This Issue:

Points of Interest.....	2
<ul style="list-style-type: none"> • AARP Podcast—The Perfect Scam • Minimizing the Risk of Scams for People Living with Dementia • NCLER Webinar Series: Closing the Justice Gap for Older Adults • Save the Date—University of Wisconsin Institute on Aging’s Annual Colloquium • NCVS Webinar—Serving Victims of Financial Fraud: Exploitation and Abuse of Tribal Communities 	
News.....	3-6
<ul style="list-style-type: none"> • If You See Something, Say Something: A Caregiver’s Role in Keeping Older Adults Safe • AARP Publishes Medication Management Fact Sheet • Heat Awareness for Older Adults • ACL Seeking Input on Older Americans Act Program Regulations • DHS Seeking Input on the Next Five Years of the Family Care and Family Care Partnership Programs • DHS Announces Pilot Program for Independent Living Support • Museums for All • DHS Awards Funding to 14 Nonprofit Dental Clinics 	
Helpline Highlights.....	7
<ul style="list-style-type: none"> • What is a guardian’s responsibility when a ward dies? • What are the power of attorney agent’s responsibilities when the principal dies? • A guardian was appointed for an adult ward who has a minor child. Does the guardian appointed for the parent automatically become the guardian of the minor child? 	
Case Law.....	8-16
<ul style="list-style-type: none"> • <i>Outagamie County v. L.X.D.-O.</i>—evidentiary requirements for initial commitments/medication orders • <i>Dane County v. D.F.B.</i>—oral testimony about emails that weren’t provided • <i>Winnebago County v. L.J.F.G.</i>—involuntary medication orders for individuals under guardianship • <i>Marathon County v. T.R.H.</i>—sufficiency of evidence necessary for recommitment 	



AARP Podcast – “The Perfect Scam”

AARP’s weekly podcast [The Perfect Scam](#) tells the stories of people who find themselves the target of a scam. Host Bob Sullivan introduces listeners to those who have experienced scams firsthand, as well as professional con artists and leading experts who pull back the curtain on how scammers operate.

Minimizing the Risk of Scams for People Living with Dementia

Social Security recently hosted a [guest blog article](#) from the Alzheimer’s Association on reducing the risk of scams for people living with dementia. The article discusses common scams and signs of financial exploitation or abuse and ways in which caregivers can help their loved ones avoid scams.

NCLER Webinar Series: Closing the Justice Gap for Older Adults – Final Session August 23

The National Center on Law & Elder Rights is hosting a new training series presented by the Administration for Community Living and the Legal Services Corporation, Closing the Justice Gap for Older Adults. The most recent LSC Justice Gap Report shared that 70% of low-income older adult households had at least 1 civil legal problem in the past year, but older adults did not receive any or enough legal help for 91% of substantial problems. This training series is designed for legal aid attorneys, staff, and partners to build capacity, expertise, and skills to provide counsel to older adults, with a person-directed and trauma-informed approach.

The first three sessions have already taken place, but the recording and materials are still available to view. One additional session is scheduled for August 23, on defending against or terminating guardianship.

More information on the content and presenters for each session (including the recording for February’s session) and links to register are available [through NCLER](#).

Save the Date – University of Wisconsin Institute on Aging’s Annual Colloquium, September 27, 2023

Since 1988, the IOA has hosted an annual event known as the Institute on Aging Colloquium. It is free and open to the public, and now attracts a full-capacity crowd each year from the campus and community. Local researchers showcase cutting-edge science in diverse aspects of aging through talks and poster exhibits, while many organizations from the community provide a Health and Resource Fair. The program additionally includes a Keynote Address by an internationally recognized leader on current and critical topics of aging as well as presentation of New Investigator Awards to junior scholars. Registration will open on August 7, 2023. For more information, visit the [Save the Date](#) website.

NCVC Webinar – Serving Victims of Financial Fraud: Exploitation and Abuse of Tribal Communities, July 27, 11 am CDT

The National Center for Victims of Crime is presenting a webinar on July 27, 2023 about how to serve AI/AN victims of financial fraud. According to the Federal Trade Commission, tribal members are more likely to be the victims of scams and are less likely to report scams than any other group. The webinar will offer service providers who work in or support individuals in tribal communities more information on the risk factors for victims, how risk can be mitigated, and culturally appropriate responses to working with victims of financial fraud, exploitation and abuse.

Note: “live” viewing of the webinar is limited to the first 1,000 registrants; however, all registrants will be able to view a recording as well as any relevant materials. Registration is available via the [NCVC website](#). ☐





If You See Something, Say Something: A Caregiver's Role in Keeping Older Adults Safe

[This article](#) from Next Avenue, part of their “Caregiving in America: the 24/7 Caregiver” series, discusses the role of family caregivers in speaking up, asking questions, and advocating for the rights of their loved ones.

AARP Publishes Medication Management Fact Sheet

The AARP has published a new fact sheet that explores the range of formal medication management programs that are available for older adults, as well as the challenges older adults may face in trying to manage their medications. More information and a link to download the fact sheet are available from the AARP [here](#).

Heat Awareness for Older Adults

Although Heat Awareness Day (June 7) has already passed, there's a lot of summer left. In [an article outlining the dangers of overheating](#), ReadyWisconsin and the Department of Health Services outlined the following safety tips during heat waves:

- Stay informed – Pay attention to local weather forecasts and extreme heat alerts.
- Find cool spaces – Remain inside air-conditioned buildings as much as possible during the hottest parts of the day. Call 2-1-1 to find an accessible

cool place near you such as libraries or community centers.

- Stay cool at home – If you don't have air conditioning or a basement, take a cool shower, soak your feet in cold water, or place a cool, wet cloth on your forehead. Keep your windows covered to avoid direct sunlight.
- Stay hydrated – Drink plenty of fluids and avoid alcohol, caffeinated and high-sugar drinks. Don't wait until you're thirsty to drink. Don't take salt tablets unless directed by a medical professional.
- Avoid hot cars – Never leave a child or pet unattended inside a parked car. On an 80-degree Fahrenheit day, temperatures in a vehicle parked in direct sunlight can climb almost 20 degrees in just 10 minutes.
- Keep pets safe – Limit their time outdoors and make sure they have access to fresh drinking water.
- Stay aware – Watch for early signs of heat-related illnesses such as dizziness, headache, fatigue, and muscle cramps. Seek medical attention right away if symptoms worsen or you develop symptoms of heat stroke.
- Check in with loved ones and neighbors during heat waves, especially if they last a few days.

More information and tips are available from [DHS](#).

Interested in Receiving *The Guardian*?

Do you want more information about guardianship, POAs and related issues?

Signing up is easy with a link on our website: [Guardian Newsletter Sign-Up](#).

You can also subscribe by emailing your name, email address, and organization to guardian@gwaar.org.





ACL Seeking Input on Older Americans Act Program Regulations – Deadline August 15

The Administration for Community Living is seeking input on proposed updates to the regulations for its Older Americans Act (OAA) programs. The last substantial updates were made in 1988. ACL notes that updates are needed to align regulations to the current statute and reflect the needs of today's older adults. The proposed rule addresses issues that have emerged since the last update and clarifies a number of requirements. It aims to better support the national aging network that delivers OAA services and improve program implementation, with the ultimate goal of better serving older adults. Comments are due by 11:59 pm (Eastern Daylight Time) on August 15. For more information on the proposed update and instructions to submit comments, please visit the ACL's [press release](#).

DHS Seeking Input on the Next Five Years of the Family Care and Family Care Partnership Programs – Deadline August 1

The Wisconsin Department of Health Services is renewing the Family Care and Family Care Partnership waivers. A waiver is a special set of rules that allows Wisconsin to have Medicaid programs like these. These waivers allow DHS to fund more services and supports to help Family Care and Family Care Partnership members stay in their homes and communities. The renewals must be completed every five years.

DHS is looking for feedback from members, families, caregivers, providers, managed care organizations, advocates, and other partners on these programs. If you would like to share your thoughts, please complete [the DHS survey](#) by August 1. The survey is estimated to take about 10 minutes and is available in English, Spanish, and Hmong.

DHS Announces Pilot Program for Independent Living Support

This summer, the Department of Health Services is beginning a pilot program in select areas of the state to offer short-term, flexible, and limited services and supports for people at risk of entering Medicaid long-term care programs. The program will help improve people's ability to stay in their own homes, as well as providing insight to the state in how people seek information about and access services and supports. Enrollment is expected to begin in July 2023. More information on the program is available from [DHS](#). The following counties have been approved to participate in the pilot; residents of these counties should contact their local Aging & Disability Resource Center:

- [Adams, Green Lake, and Waushara Counties](#)
- [Brown County](#)
- [Chippewa County](#)
- [Columbia County](#)
- [Dane County](#)
- [Dodge County](#)
- [Dunn County](#)
- [Eau Claire County](#)
- [Kenosha County](#)
- [Milwaukee County](#)
- [Sauk County](#)
- [St. Croix County](#)
- [Walworth County](#)
- [Washington County](#)

Museums for All

By the GWAAR Legal Services Team (for reprint)

Anyone with a FoodShare or SNAP EBT card can gain free or reduced cost admission to participating museums, zoos, art museums, children's museums, aquariums, nature centers, and other adventures. Museums for All is a national access program that encourages individuals of all backgrounds to visit museums regularly and build lifelong museum habits.

(Continued on page 5)





(Museums for All, continued from page 4)

The website [Museums4All.org](https://museums4all.org) has a list of participating locations in every state with more than 1,000 museums throughout the United States. Wisconsin has 20 participating locations including:

- Above & Beyond Children's Museum in Sheboygan
- Atlas Science Center in Appleton
- Betty Brinn Children's Museum in Milwaukee
- The Building for Kids Children's Museum in Appleton
- Central Wisconsin Children's Museum in Stevens Point
- Charles Allis Art Museum in Milwaukee
- Children's Museum of Eau Claire in Eau Claire
- Children's Museum of Fond du Lac, Fond du Lac
- Children's Museum of La Crosse, La Crosse
- Door County Maritime Museum—Death's Door Maritime Museum, Ellison Bay
- Door County Maritime Museum—Sturgeon Bay Museum, Sturgeon Bay
- Ephraim Historical Foundation, Ephraim
- Explore Children's Museum of Sun Prairie, Sun Prairie
- Madison Children's Museum, Madison
- Manitowoc County Historical Society, Manitowoc
- Milwaukee Public Museum, Milwaukee
- The Mining & Rollo Jamison Museums, Platteville
- Northwoods Children's Museum, Eagle River
- Wausau Children's Museum, Wausau
- Wisconsin Maritime Museum, Manitowoc

There are also many great participating museums in Chicago, Illinois, including the Shedd Aquarium, Chicago Botanic Garden, the Museum of Contemporary Art, Chicago History Museum, Adler Planetarium, Abraham Lincoln Presidential Library and Museum, Lincoln Park Zoo, the National Veterans Art Museum, and many more.

Pre-registration is not required, and there is no limit to how many participating museums families can visit at the discounted admission rate. Simply show the EBT card and a photo identification upon admission and the museum will grant the discounted rate for up to four people per EBT card.

The Museums for All initiative was launched in 2015 by the Institute of Museum and Library Services, a federal agency based in Washington, D.C. Since 2015, more than five million visitors nationwide have been served through the program, allowing people of all income levels to feel welcome at cultural institutions.

DHS Awards Funding to 14 Nonprofit Dental Clinics

\$5.1 million to increase access to dental care for Wisconsinites in need

DHS News Release Dated: June 12, 2023

***Contact: Elizabeth Goodsitt/Jennifer Miller
608-266-1683***

The Wisconsin Department of Health Services (DHS) has awarded \$5.1 million in grants to 14 nonprofit dental clinics to increase access to dental care in our state. Grant awards range from \$59,000 to \$150,000 per clinic over three years and will enable the selected clinics to serve more children and families in need, including Medicaid members, people who have low income, people with disabilities, and people who are uninsured.

"This funding creates more access to important oral health services," said Dr. Russell Dunkel, Wisconsin State Dental Director. "In 2021, only one in three Wisconsin Medicaid members ages 3 to 20 received a preventive dental service and, in that same year, seven out of 10 Medicaid members didn't receive dental care. By making it easier for dental health providers to serve more Medicaid and uninsured patients, we aim to address a critical disparity."

(Continued on page 6)





(Dental Clinics, continued from page 5)

Lack of access to dental health services impacts people throughout their life. In Wisconsin, one in five children and nearly one in three adults with low income have untreated tooth decay. Untreated decay can lead to pain and infection, which impacts a child's ability to speak, eat, and learn. [Research shows](#) children with a poor oral health are three times more likely to miss school due to dental pain and, on average, it is estimated that unplanned dental care results in [34 million school hours lost](#) each year in the United States.

As a result of this funding, nonprofit dental clinics will be able to serve 7,000 more patients over the three-year period. This increase includes more than 4,700 Medicaid and BadgerCare Plus patients and more than 2,700 patients who have low income or are uninsured. That amounts to a nearly 17.5% increase.

In addition to the \$5.1 million in funding, Wisconsin is helping dental clinics increase the number of Medicaid patients they serve by providing enhanced reimbursement to oral health providers for each service they provide. Huge strides could be made in addressing dental health issues in our state if every dentist license in Wisconsin took on one Medicaid patient per week, or even per month.

"This funding won't address the dental disparity in Wisconsin alone, but increasing access to services is key," said Paula Tran, State Health Officer for Wisconsin. "Efforts to increase access to dental care and increase reimbursement for dental services go a long way to helping ensure more Wisconsinites have the opportunity to not only have brighter smiles, but better health today and in the future."

A [full list of the funded clinics](#) is on the DHS website, as is [information about free or low-cost dental care providers](#) across the state. □

What is the Guardianship Support Center able to help with?

The GSC is a neutral statewide informational helpline for anyone throughout the state. We can provide information on topics such as Powers of Attorney, Guardianship, and Protective Placement. The GSC is unable to provide information on minor guardianships, wills, trusts, property division or family law. The GSC is also unable to give legal advice or specific direction on completing court forms such as the inventory and annual accounting. The GSC does not have direct involvement in cases nor are we able to provide legal representation.

What are some other free or low-cost legal resources?

Other resources include the American Bar Association's Free Legal Answers [website](#) where members of the public can ask volunteer attorneys legal questions. The State Bar of Wisconsin also offers a Modest Means Program for people with lower income levels. The legal services are not free but are offered at a reduced rate. Income qualifications must be met to qualify. For more information, visit the state bar's [website](#) or call **800-362-9082**.



What is a guardian's responsibility when a ward dies?

Guardian of the Person: The authority of a guardian of the person ends at the death of the ward. The guardian is required to notify the court of the ward's death, but any other duties are fairly limited. A guardian is on the list of individuals who may have authority to control the final disposition of the ward's remains; however, the guardian of the person is near the bottom of the priority list.

Guardian of the Estate: The guardian of estate's authority to make decisions about the ward's money and property typically ends when the ward passes away. The guardian is required to turn over assets to the person appointed as personal representative for the ward's estate or those entitled to them. If there is a will, the guardian is responsible for making sure that the necessary people are notified of the will and notified of the ward's death. The guardian of estate is also required to complete a final account to be provided to the court and the deceased ward's personal representative or person appointed to administer the estate. The personal representative or administrator is responsible for providing notice of the termination of guardianship and filing of the final account to all persons/entities with an interest in the ward's estate. If the guardian is the personal representative or is appointed special administrator, this duty will fall to the guardian.

For an estate under \$50,000, there may be other procedures a guardian may follow to settle an estate if there is no personal representative or other person willing to handle the matter. The Wisconsin courts have a [guide](#) on the various methods of estate administration. If a guardian wishes to take on this responsibility, they may want to consult a probate attorney for advice on the most appropriate process to follow in their ward's situation and next steps.

What are the power of attorney agent's responsibilities when the principal dies?

A power of attorney document only gives the power of attorney agent (whether financial or health care) authority to act on behalf of the principal while the principal is living. However, a health care power of attorney may authorize an anatomical gift/organ donation when the principal is near death or has died, unless prohibited in the POA document or by some other record. *See Wis. Stat. §§ 155.20(8); 157.06(4)(b) and (9)(a)1.*

A guardian was appointed for an adult ward who has a minor child. Does the guardian appointed for the parent automatically become the guardian of the minor child?

No. The guardian of an adult found to be incompetent does not automatically become the guardian for the ward's minor children. The guardian of an adult only has the authority that is identified within the guardianship order and letters of guardianship. The adult ward also only loses the decision-making rights specifically identified within the guardianship orders. This means that the parent remains the decision-maker for their minor child, unless a court determines that they are unable or unwilling to provide for their child's needs. A separate court case must be filed to name a guardian for the minor child.



Title: *Outagamie County v. L.X.D.-O.*

Court: Court of Appeals, District III

Date: March 7, 2023

Citation: [2023 WI App 17](#)

Case Summary

In June of 2020, Larry stipulated to a Ch. 51 mental commitment order and was voluntarily committed. The circuit court also entered an order for involuntary administration of medication. On appeal, Larry challenged the validity of the medication order, arguing that the circuit court had improperly relied on an examiner's report which had not been admitted into evidence. Although the medication order was moot upon appeal, the appellate court took the case in order to decide whether an examiner's report prepared pursuant to Wis. Stat. § 51.20(9)(a)(5) must be admitted into evidence for the circuit court to consider the report during initial commitment proceedings. The appellate court concluded that the statute does not require the report to be admitted into evidence, thus affirming the circuit court's decision.

Case Details

On May 26, 2020, law enforcement performed a welfare check at a Kwik Trip convenience store where they found Larry to be under medical duress and transferred him to the hospital, where he was placed under emergency detention. At the circuit court hearing Larry did not contest the initial commitment order. However, he did challenge the medication order because he was concerned that he was being overmedicated with psychotropic medications. Testimony by Larry's long-term psychiatrist revealed a prior commitment in which Larry had been physically ill from high doses of psychiatric medication.

Prior to the final circuit court hearing, Larry was examined by three psychiatrists: Dr. Marshall Bales,

Dr. Gale Tasch, and Dr. Michele Andrade. Each psychiatrist prepared a report which was then filed with the circuit court. Dr. Tasch's report was the only report admitted into evidence. At trial, Dr. Tasch testified that Larry was competent to make an informed choice as to whether to accept or refuse the recommended medication and treatment. This testimony mirrored the essence of her report. Dr. Bales also provided testimony, though his report was not admitted into evidence. Bales testified that Larry was not competent to refuse medication because Larry's schizoaffective disorder, complicated by substance abuse, requires "inpatient care to get him more regulated." The circuit court based its decision on Dr. Bales' testimony and report, concluding that Larry would not be statutorily competent to make decisions about his medication. Larry appealed.

The appellate court first addressed the issue of mootness. Outagamie County argued that Larry's appeal is moot and thus should not be considered by the appellate court. Under Wisconsin law, a commitment order cannot be moot due to continuing collateral consequences of the firearms ban required under a commitment order, as well as liability for the cost of care. *Sauk County v. S.A.M.*, 2022 WI 46, ¶¶21-27, 402 Wis. 2d 379, 975 N.W.2d 162 (see [GSC summary, July 2022 edition of The Guardian](#)). Although Larry did not challenge the commitment order, the county argued that any collateral consequences used to render Larry's case not moot would still exist despite the medication order. The appellate court agreed, concluding that the appeal is moot because no causal relationship exists between the medication order and the collateral consequences stemming from the commitment order. However, the court found that two exceptions to the mootness doctrine apply to the appeal which permits review.

(Continued on page 9)





(Larry, continued from page 8)

The appellate court addressed whether the county met its burden to prove Larry incompetent to refuse medication. Larry argued that Bales' report could not be relied on because it was not admitted into evidence and Bales' testimony alone was insufficient to prove him incompetent. The appellate court agreed that Bales' testimony alone was insufficient because it was unclear and failed to utilize the required legal standards.

The appellate court addressed the issue of whether the circuit court properly relied on Bales' report, which had not been admitted into evidence. The court ruled in favor of the county and concluded that the circuit court properly relied on both Bales' testimony and his report. To support this conclusion, the appellate court first pointed to the plain meaning of Wis. Stat. § 51.20(9)(a)(5). In accordance with the plain meaning of the statute, the appellate court reasoned that in an initial commitment hearing in which probable cause exists, the court must then appoint two doctors to examine the subject individual. Per statute, "[A] written report shall be made of all such examinations and filed with the court." *Id.* The appellate court interpreted the plain meaning of this statutory language and concluded that, "the reports are not created for the parties' benefit such that the parties must then seek to admit the evidence into the record." Additionally, the court reasoned that § 51.20(9)(a)(5) distinguishes the examiner's report from the examiner's testimony. Here, the court ascertained the report to be a requirement, whereas testimony is not required of an examiner. From this reasoning the court concluded that, "If, as the statute clearly states, testimony from the examiners is not required to support an initial commitment, then the court must be able to review the examiners' reports regardless of any testimony or foundation ordinarily necessary to admit this type of evidence."

The appellate court differentiated this case from other case law requiring that an examiner's report be submitted into evidence during a recommitment hearing (*see, e.g., Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277). Initial commitments are governed by Wis. Stat. § 51.20(9), while the procedure for a recommitment hearing differs, as outlined by Wis. Stats. §§ 51.20 (10-13). In support of this conclusion, the court pointed to Wis. Stat. § 51.20(10)(c) as lacking a "alternative statutory procedure for the court to review and consider the examiner's report apart from admission of the report into the record under the ruled of evidence in civil actions." Wis. Stat. § 51.20(9), however, differentiates between the report and testimony, as discussed above.

After determining that the circuit court properly considered Bales' testimony and report, the appellate court concluded that Outagamie County met its burden to show that Larry was not competent to refuse the medication order. The court supported this conclusion by applying Wis. Stat. § 51.61(1)(g) (4), noting that Larry's mental illness and extensive history of abuse of street drugs made him unable and unwilling to discuss the pros and cons of psychotropic medications.

The court further concluded that Bales' explanation of proposed medication was satisfactory under the law because Bales' report listed the specific advantages, disadvantages, and alternatives to accepting the medication order. Additionally, Bales testified that he did his best to explain those specifics to Larry, but Larry was oppositional. Larry argued that the statutory requirements were not satisfied because Bales admitted that "he did not have a complete discussion of the advantages and disadvantages of, and alternatives to, the specific psychotropic medications prescribed."

(Continued on page 10)



(*Larry*, continued from page 9)

The appellate court rejected Larry's argument, reasoning that any ignorance was the result of Larry's own efforts to avoid the medication discussion and such efforts should not preclude an otherwise sufficient discussion.

The appellate court affirmed the circuit court's decision, finding both that the circuit court's reliance on Bales' report was both proper and sufficient to show that Larry was not competent to refuse the medication order. □

Title: *Dane County v. D.F.B.*

Court: Court of Appeals, District IV

Date: May 11, 2023

Citation: [2022AP1852](#)

Case Summary

In this case, the appellate court considered the circuit court's use of oral testimony about the contents of emails which had not been provided. The circuit court decision to place a commitment order on the appellant was greatly influenced by the testimony. The appellate court ruled in favor of D.F.B. and concluded that the court could not consider the testimony without providing the emails, thus violating Wis. Stat. § 910.02, Wisconsin's rules of evidence on hearsay.

Case Details

In March of 2022, D.F.B. was placed under ch.51 emergency detention. The circuit court found probable cause existed for the detention. Upon D.F.B.'s request, a jury trial was held. D.F.B. filed a pretrial motion *in limine* which sought to prohibit expert witnesses from offering hearsay testimony as to the contents of some threatening emails D.F.B. has allegedly sent to an employee of the University of Wisconsin- Madison. The motion also sought a jury

instruction to disregard such hearsay evidence offered in support of expert testimony. D.F.B. argued that an expert could not explain how they came to their conclusion without violating the hearsay rule of evidence.

At trial, the County called four witnesses. The first witness, a campus police officer, testified that she had discussed the emails with D.F.B. in which he acknowledged having written an email that contained offensive language to describe the recipient and included a violent threat. Counsel for D.F.B. objected on the grounds that this testimony was hearsay and prejudicial because the officer was not directed to an evidentiary exhibit such as a copy of the email. The circuit court overruled the objection, reasoning that the content of the email was not being offered to prove that the description of the recipient was accurate. Counsel further objected that the officer's testimony was not the "best evidence" of the email's contents and that they had not received any notice that the email would be admitted into evidence. The circuit court overruled this objection without explanation.

A mental health crisis worker also testified regarding her contact with D.F.B. following his detention at the Dane County Jail. She testified about her discussion with D.F.B. in which they discussed the email containing the threat to the university employee. Psychiatrist Tal Herbsman treated D.F.B. on an inpatient basis during his emergency detention. Herbsman testified that D.F.B. made numerous references to violence during treatment. Finally, the County called psychiatrist Leslie Taylor, who acted as an independent examiner to evaluate D.F.B. following his emergency detention. Taylor testified that D.F.B. was a danger to others because he could act on his delusion that it would be legal for him to kill someone.

The jury found D.F.B. to be mentally ill, a proper subject for treatment, and a danger to himself or others under Wis. Stat. § 51.20(1)(a)2. b.

(Continued on page 11)



(D.F.B., continued from page 10)

Thus, the circuit court entered an order for involuntary commitment of D.F.B. The court further ordered that D.F.B. be subject to an involuntary medication and treatment order. D.F.B. appealed both orders.

On appeal, D.F.B. argued that the detailed testimony about what the witnesses recalled of the contents of the emails should not have been allowed as evidence because such testimony is hearsay and violates the best evidence rule. The hearsay rule is governed by Wis. Stat. § 910.02, which provides, “to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required.” Applied to the case, a copy of the email (writing) would need to be entered into evidence itself before witnesses can testify to its contents.

The County argued that the witness testimony was not provided to “prove the contents of a writing.” *Id.* Rather, the County argued that the testimony was offered to provide the witnesses’ “recollection of the statements that D.F.B. admitted to.” In reply, D.F.B. argued that this distinction is without merit.

The appellate court concluded that the counsel for D.F.B. made a valid objection based on Wis. Stat. § 910.02, as the original email had not been entered into evidence. The court opined that the County had treated the testimony of the officer and mental health crisis worker as proof that D.F.B. had made the threats. In support of this opinion, the appellate court reasoned that the County failed to show why the emails’ contents were relevant if the jury was not shown the original email. Thus, the appellate court concluded, the testimony was relevant as proof that D.F.B. had made the threats and violated Wis. Stat. § 910.02 without the actual emails. In sum, the objection was valid, and the circuit court erred in failing to hold the County to the requirements of the rule.

The County also argued that any error was harmless and would not have altered the outcome of the proceedings. Under the harmless error analysis, a harmless error is one in which an erroneous exercise of discretion does not contribute to the outcome of the proceeding at issue. A harmful error occurs when erroneous discretion (here the overruled but valid objection) substantially affects a party’s rights by altering the outcome of a proceeding in which it is reasonable to believe the outcome could have been different but for the erroneous use of discretion. Here, the County had to show that the admission of testimony regarding the contents of the email did not substantially alter the circuit court’s conclusion: D.F.B. was dangerous under the second standard.

The appellate court ruled in favor of D.F.B., rejecting the County’s assertion of harmless error. The court reasoned that the County had not developed their argument because the County presented supportive reasoning which was not relevant to the error at issue. Additionally, the court reasoned that even a developed argument would likely fail to establish harmless error due to the likelihood of an alternative outcome. The appellate court pointed to trial court records, discerning that the emails’ contents played a critical role in the County’s case and related to the central issue of dangerousness. Additionally, the contents were central to D.F.B.’s argument; without evidence of D.F.B.’s actual threats, the County had not met its burden to prove dangerousness. The harmless error test fails due to the great role of the evidence, the court concluded. Furthermore, the court concludes that there is a reasonable possibility that the impermissible introduction of the contents of emails contributed to the outcome of the trial.

In sum, the appellate court reversed the circuit court’s commitment and medication orders due to the violation of a well-established evidence rule and the County’s failure to assert a sufficient defense. □





Title: *Winnebago County v. L.J.F.G.*

Court: Court of Appeals, District II

Date: April 12, 2023

Citation: [2022AP1589](#)

Case Summary

This case involves an involuntary medication order under Wis. Stat. § 55.14 for a person who is under guardianship who does not have a current mental commitment order. L.J.F.G. (referred to by the pseudonym “Emily”) has a history of commitment orders, but her last extension was reversed by the court of appeals in September 2021. Winnebago County subsequently sought an involuntary medication order as a protective service, which the court granted. Emily appealed, arguing that the County failed to present evidence that was sufficient to satisfy the statutory requirements for the order. The appellate court rejected Emily’s argument and found that there was evidence of correlation between her past commitment orders and her more recent “episodes,” as required by statute, sufficient to prove the necessity of medication.

Case Details

Emily has been under commitment orders off and on since at least 2013. Following the 2021 Court of Appeals decision reversing her extension, the County sought an involuntary medication order as a protective service under Wis. Stat. § 55.14(3)(e). Under the statute, the County must show by clear and convincing evidence that “unless psychotropic medication is administered involuntarily, the individual will incur a substantial probability of physical harm, impairment, injury, or debilitation” or “present a substantial probability of physical harm to others.” *Id.* The standard of evidence required the County to show that, “the individual’s history of at least two episodes, one of which had occurred within 24 months, that indicate a pattern of overt activity, attempts, threats to act, or omissions that resulted from failure to receive treatment and provide probable cause.” Wis. Stat. § 55.14(3)(e)1. In accordance

with the provisions, the appeals court concluded, the County had presented sufficient evidence to prove the occurrence of two episodes.

At a two-day evidentiary hearing, multiple psychiatrists and lay witnesses testified as to Emily’s history of “episodes” and commitments. Emily’s sister testified that on September 19, 2020, Emily had been off her meds, became delusional, and had gone missing one afternoon. Emily was found the next morning at a car dealership and refused to leave at first. Upon leaving, the sister testified, Emily was brought to the hospital. The sister said that she hoped a doctor would put Emily under a 72-hour hold because she was afraid Emily was going to take off again.

Psychiatrist Marshall Bales testified that he had examined Emily many times and most recently in 2022 at a group home. He indicated that Emily had been angry and threatened his safety during the examination, causing him to end the session early. He also testified that on the day of the examination, Emily was refusing to take her medication. Bales added, “this is well documented by me and countless others, countless times that she has a pattern of a very severe and persistent mental illness for which she will not get help voluntarily.” Bales also spoke about the examination he performed on September 26, 2020, following the incident mentioned by Emily’s sister. He testified that after the incident, as a result of her state of psychosis, Emily demonstrated an inability to take care of herself and was neglecting her own basic needs. Bales also referred to 5-6 other examinations in which Emily had been verbally abusive. To further illustrate, Bales referenced an incident in 2013, in which Emily was at her home in a manic, psychotic state, was very aggressive with her husband and nurses, and per law enforcement, was very close to fighting medical responders. He concluded that Emily demonstrates a pattern of verbal threats, refusal of voluntary treatment, and a tendency to blame her mental illness on medication. Bales testified that he believed Emily to be a danger to herself and others when untreated.

(Continued on page 13)





(L.J.F.G., continued from page 12)

The County also submitted, to the circuit court records from a probable cause hearing that had been held on September 23, 2020 regarding the incident to which Emily's sister testified. Although the extension of this commitment was ultimately reversed, the records indicated a valid finding of probable cause to believe that Emily is a danger to herself, or others and she was subsequently committed under Ch. 51. In this case, the appeals court found that the probable cause finding satisfies the requirement of a "finding of probable cause for commitment" for one of the two episodes necessary to evidence "the substantial probability of physical harm, impairment, injury, or debilitation" under Wis. Stat. § 55.14(3)€1.

On appeal, Emily argued that the County "had offered no clear and convincing evidence linking any episode of Emily's dangerous behavior to the 2020 and 2013 orders." The appellate court rejected this argument, finding a sufficient link between the events.

In support of this finding, the court pointed to Bales' testimony about the examination he performed following the 2020 incident at the car dealership. Specifically, the court noted Bales testimony about Emily's unmedicated status and inability to take care of herself in relation to the incident. The court also pointed to the related probable cause hearing, which found sufficient probable cause to detain Emily at Thedacare Regional Medical Center for treatment. Such similarities indicated a link between Emily's episode and the order in this case. Additionally, the appellate court utilized Emily's sister's testimony to support their conclusion. Emily's sister testified that the 2020 incident, during which Emily was off her medication, Emily had become delusional on a Friday afternoon, went missing that night, and was found the next day. The court stated, "As it turns out, September 19, 2020—the date noted by Bales in connection with his September 26, 2020, engage-

ment with Emily— was a Saturday, which corresponds to Emily having gone missing on a Friday afternoon and being found the next day 'unable to care for herself.'" Furthermore, the court noted, when Emily was found on that Saturday after she had gone missing, she was taken to Thedacare Regional Medical Center.

Based on these findings, the court concluded that Bales and Emily's sister are referencing the same September episode that led to the probable cause hearing on September 23, 2020. Thus, the court found this evidence to be sufficient proof of an episode. The court then turned to the 2013 incident as the second episode.

Regarding the 2013 incident, Bales testified that Emily was in a state of mania and psychosis. Bales further testified that Emily was a danger to others at this time because she was aggressive and wanted to hurt her husband, first responders, police, and her neighbor. Bales and other doctors also testified that Emily's refusal of medication causes her to be in such a state.

The appellate court found this testimony to be significant because it made a specific reference to the 2013 episode and contributed to the circuit court's determination that the County sufficiently presented a pattern of concerning conduct, prompted by Emily's refusal of medication. The court then turned to records submitted by the County. The records recounted a hearing held in May 2013, at which Emily was found to be dangerous and an involuntary commitment was ordered. After considering both the testimony and the records, the appellate court ruled that the circuit court did not err in drawing the implicit inference that the 2013 episode to which Bales testified led to the 2013 commitment order.

Overall, the appellate court concluded that the evidence presented was sufficient to satisfy the applicable statutory standard, thus affirming the circuit court's decision. □





Title: *Marathon County v. T.R.H.*

Court: Court of Appeals, District III

Date: March 14, 2023

Citation: [2022AP1394](#)

Case Summary

This case examined the sufficiency standards of evidence necessary for recommitment. Thomas argued that Marathon County failed to meet its burden of proof at his January 2022 recommitment hearing and that the circuit court failed to reference a specific statutory subsection paragraph in Wis. Stat § 51.20(1)(a)2. and failed to make the required factual findings as mandated by *Langlade County v. D.J.W.* The appellate court agreed with Thomas and reversed the orders, concluding that the circuit court had not presented sufficient evidence to find Thomas dangerous and failed to make the required factual finding.

Case Details

Thomas has been under commitment orders since 2015. In January 2022, the County filed a petition for an extension of Thomas' commitment. At this time, Thomas was 71 years old, living independently, taking care of his daily needs without assistance, and receiving outpatient services. At the circuit court hearing, the County called Dr. John Coates and Dr. Courtney Derus to testify. Neither doctor had met with Thomas recently. Neither the reports nor treatment records were entered into evidence.

Dr. Coates stated that he had last met with Thomas in August 2021. Coates diagnosed Thomas with schizophrenia, paranoid type, and explained that the condition qualified as a substantial disorder of mood that is treatable with medication. Coates also testified that he believed Thomas had a history of treatment noncompliance but had been stable and on medication for "a couple of years." Coates also explained that when treatment had been withdrawn

in the past, Thomas became a danger to himself. Coates concluded that if Thomas were not under a commitment order, he would likely stop taking his medication because he is not competent to understand the advantages and disadvantages of medication.

Dr. Derus testified to having last seen Thomas in August 2021. Derus also diagnosed Thomas with schizophrenia. Derus testified that Thomas's treatment records indicated that, in the past, he had "demonstrated a lack of treatment compliance due to a lack of insight about his mental illness and some paranoia" regarding his treatment providers who he thought were "retaliating or threatening him." Derus opined that if treatment were withdrawn, Thomas would likely become impaired based on his treatment history. She also stated that she believed Thomas was not competent to accept or refuse medication due to his mental illness.

Thomas also testified on his own behalf, noting that he lived independently in a rental unit that he paid for on his own. He was able to state the amount of income he received monthly from Social Security and testified that he managed his own bank account and credit card. He explained that he had not fallen recently but knew how to get to the hospital if he became ill or injured. He also testified that he owned a car, which he operated to drive himself to court for the hearing, and that he was able to complete his own shopping and activities of daily living without assistance. He testified that he had had no recent thoughts of harming himself or others and that he likely would continue with medication voluntarily, as it helps him focus and become more stable.

(Continued on page 15)





(*T.R.H.*, continued from page 14)

Relying on the testimony of the two doctors, the circuit court found that the County had presented clear and convincing evidence in support of Thomas's recommitment. The court ruled that, without a recommitment order, Thomas would likely refuse treatment which could threaten the safety of himself and others. The circuit court ultimately ordered a twelve-month extension of Thomas's commitment. Thomas appealed.

On appeal, Thomas challenged the circuit court's conclusion that he is dangerous. Thomas argued that the County did not present facts sufficient to satisfy the statutory standard of dangerousness. Specifically, Thomas argued that the County did not make a reference to any subsection paragraph of Wis. Stat. § 51.20(1)(a)2. Such subsection paragraph reference is required because it provides an explanation of how a person may be dangerous.

The County admitted that they had not made a specific reference to a subsection. However, the County argued that the circuit court satisfied the reference requirement by restating the language of Wis. Stat. § 51.20(1)(a)2. C. in its oral ruling, and the final written order contained language that mirrored Wis. Stat. § 51.20(1)(a)2. c.

The appellate court agreed with the County on the first point, concluding that the circuit court found Thomas dangerous under Wis. Stat. § 51.20(1)(a)2. c. This section states that an individual can be found dangerous if they "evidence such impaired judgment...that there is a substantial probability of physical impairment or injury to himself or others." The appellate court pointed to the circuit court's final written order for which the circuit court had checked a box that stated Thomas presented "a substantial probability of physical impairment or injury to himself...or other individuals due to impaired judgment." They also pointed to very similar lan-

guage used by the doctors in their testimony. The appellate court reasoned that the language used in the final written order and the doctor's testimony does closely mirror the language of Wis. Stat. § 51.20(1)(a)2. c.

However, the appellate court also found that the circuit court failed to make a specific factual finding in support of the reference, as required by case law. The appellate court restated the applicable rule from *Langdale County. v. D.J.W.*: "Circuit courts in recommitment hearings are to make specific factual findings with reference to the [subsection] paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment is based." *Langlade County v. D.J.W.*, 2020 WI 41, ¶13, 391 Wis. 2d 231, 942 N.W.2d 277.

The County argued that the circuit court's implicit adoption of the doctor's testimony ought to fulfill the factual finding requirement. However, the appellate court rejected this argument. The doctor's testimony failed to provide any evidence as to *how* Thomas would become dangerous if treatment were withdrawn, and the court did not cite any evidence which would have established that factor in the written order or oral ruling. Thus, the appellate court concluded that the doctor's testimony was insufficient for the court to have made the necessary factual finding. Furthermore, the appellate court explained that the circuit court simply repeated the statutory language without relying on any facts in the record, which cannot satisfy the requirement set by *D.J.W.*

In addition to the County's failure to make a factual finding, the appellate court concluded that even if the circuit court had made a specific factual finding with reference to the subsection paragraph of Wis. Stat. § 51.20(1)(a)2. c. on which recommitment was based, such findings would have been erroneous.

(Continued on page 16)





(T.R.H., continued from page 15)

The appellate court agreed with Thomas’s argument in that a prior commitment order is not grounds for dangerousness because a current recommitment order must be based on a current finding of mental illness and dangerousness. Furthermore, the County had not provided evidence of current dangerous acts that meet the statutory standard.

The County asserted that recommitment is appropriate under Wis. Stat. § 51.20(1) (am). This section provides an exception to Wis. Stat. § 51.20(1)(a)2 in that dangerousness can be shown by evidence of past acts or omissions. In support, the County cited the doctor’s testimony about Thomas’s history of mental illness and his behaviors resulting from treatment withdrawal. The County further argued that dangerousness, in an extension hearing, is often based on the individual’s precommitment behavior. The appellate court rejected this argument, reasoning that “[a]t most, the evidence showed Thomas had previously failed to maintain his self-care, had exhibited paranoia and had delusions, and may have not interacted in a socially appropriate manner.” However, the appellate court concluded that without evidence of a specific incident in which these behaviors demonstrated dangerousness, such general behaviors do not clearly and convincingly show that Thomas was dangerous at the time of the recommitment hearing.

Accordingly, the appellate court ruled that the County failed to present sufficient evidence that Thomas was dangerous under Wis. Stat. § 51.20(1)(a)2.c and (1) (am) and reversed the recommitment and associated involuntary medication orders. □



Have a
great
summer!

