

Appeal No. 2012AP665

Cir. Ct. No. 2003ME63

**WISCONSIN COURT OF APPEALS
DISTRICT II**

**IN THE MATTER OF THE MENTAL COMMITMENT OF
SAMUEL J. H.:**

MANITOWOC COUNTY,

FILED

PETITIONER-RESPONDENT,

SEP 05, 2012

V.

Diane M. Fremgen
Clerk of Supreme Court

SAMUEL J. H.,

RESPONDENT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Pursuant to WIS. STAT. RULE 809.61 (2009-10),¹ this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether our holding in *Fond du Lac County v. Elizabeth M.P.*, 2003 WI App 232, ¶¶26, 28, 267 Wis. 2d 739, 672 N.W.2d 88, that “WISCONSIN STAT.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. The chief judge of the court of appeals converted this from an appeal decided by one judge to a three-judge panel by order dated August 6, 2012. See WIS. STAT. RULE 809.41(3).

§ 51.35(1)(e) mandates that a patient transferred to a more restrictive environment receive a hearing within ten days of said transfer,” is contrary to the plain language of the statute. We certify to the supreme court for its determination as to whether § 51.35(1)(e) mandates a hearing within ten days for all transferred patients, including those transferred for medical reasons under § 51.35(1)(e)1., or whether the mandate applies only to those transferred due to a violation of the conditions of outpatient placement as set forth in § 51.35(1)(e)2.-5.

BACKGROUND

The facts relevant to the issue certified are brief and undisputed. On September 22, 2011, Samuel, who was subject to an involuntary commitment order under WIS. STAT. ch. 51, was transferred from an outpatient facility to inpatient care. Samuel was provided with a written notice of his rights under WIS. STAT. § 51.35(1)(e)1. After Samuel objected to the transfer, an attorney was appointed for Samuel and a petition for review of transfer was filed. Relying on this court’s holding in *Fond du Lac County v. Elizabeth M.P.*, 267 Wis. 2d 739, ¶¶26, 28, Samuel argued that, under WIS. STAT. § 51.35(1)(e), he was entitled to a hearing within ten days of transfer. Samuel requested that he be returned to outpatient status.

Following a hearing, the circuit court determined that Samuel was transferred for medical reasons under WIS. STAT. § 51.35(1)(e)1. and, therefore, was not entitled to the mandatory hearing under § 51.35(1)(e)2. In arriving at its decision, the circuit court acknowledged that while *Elizabeth M.P.* expressly addressed § 51.35(1)(e)2. when discussing a mandatory hearing within ten days, it then “thr[e]w the net over everything” in stating more broadly that a transfer under § 51.35(1)(e) requires a hearing within ten days. Ultimately, the circuit court

concluded that the broad statement in *Elizabeth M.P.* was not consistent with the statute.

DISCUSSION

Applicable Law. WISCONSIN STAT. § 51.35, governs patient transfers and discharges under WIS. STAT. § ch. 51. Section 51.35(1)(a) permits a department or county department to transfer any committed patient “between treatment facilities or from a treatment facility into the community if the transfer is consistent with reasonable medical and clinical judgment [and] consistent with [WIS. STAT. §] 51.22(5), and, if the transfer results in a greater restriction of personal freedom ..., in accordance with par. (e).” Section 51.35(1)(e) provides in relevant part:

(e) 1. Whenever any transfer between different treatment facilities results in a greater restriction of personal freedom for the patient and whenever the patient is transferred from outpatient to inpatient status, the department or the county department specified under par. (a) shall inform the patient both orally and in writing of his or her right to contact an attorney and a member of his or her immediate family, the right to have counsel provided at public expense, as provided under s. 51.60, and the right to petition a court in the county in which the patient is located or the committing court for a review of the transfer.

2. In addition to the rights and requirements specified in subd. 1., within 24 hours after any transfer which results in a greater restriction of personal freedom for the patient for a period of more than 5 days or any transfer from outpatient to inpatient status for a period of more than 5 days and if the transfer is due to an alleged violation of a condition of a transfer to less restrictive treatment, the department or the county department specified under par. (a) shall ensure that the patient is provided a written statement of the reasons for the transfer and the facts supporting the transfer and oral and written notice of all of the following:

- a. The requirements and rights under subds. 3. to 5.
- b. The patient’s right to counsel.

c. The patient's right to have counsel provided at public expense, as provided under s. 51.60.

d. The rights of the patient's counsel to investigate the facts specified in the written statement of reasons for the transfer, to consult with the patient prior to the patient's waiving a hearing under subd. 3., to represent the patient at all proceedings on issues relating to the transfer, and to take any legal steps necessary to challenge the transfer.

3. Within 10 days after the transfer specified in subd. 2., a hearing shall be held on whether the form of treatment resulting from the transfer is least restrictive of the patient's personal liberty, consistent with the treatment needs of the patient, and on whether the patient violated a condition of a transfer to less restrictive treatment that resulted in a transfer under subd. 2. The hearing shall be held before a hearing officer designated by the director of the facility to which the patient has been transferred. The hearing officer may not be a person who has had direct responsibility for making treatment decisions for or providing treatment to the subject individual. The patient may appear at the hearing, either personally or by counsel, and may present and cross-examine witnesses and present documentary evidence. The hearing may be waived by the patient only after consultation with counsel. Any waiver made shall be in writing and witnessed by the patient's counsel.

4. The department or the county department seeking the transfer has the burden of proving, by a preponderance of the evidence, that the form of treatment resulting from the transfer is least restrictive of the patient's personal liberty, consistent with the treatment needs of the patient, and that the patient violated a condition of a transfer to less restrictive treatment that resulted in a transfer under subd. 2. Hearsay evidence is admissible if the hearing officer makes a determination that the evidence is reliable. Hearsay evidence may not be the sole basis for the decision of the hearing officer.

5. The hearing officer shall, as soon as possible after the hearing, issue a written statement setting forth his or her decision, the reasons for the decision and the facts upon which the decision is based. Within 30 days after the date on which the statement is issued, the patient or the department or the county department seeking the transfer may appeal the decision to a court in the county in which the facility to which the patient has been transferred is located or to the committing court....

The application of WIS. STAT. § 51.35(1)(e) was addressed by this court in *Elizabeth M.P.*, 267 Wis. 2d 739. There, the issue was whether the circuit court had jurisdiction to transfer the subject to inpatient status when judicial review of the county's decision to transfer her was not held within ten days as required under § 51.35(1)(e)3. *Elizabeth M.P.*, 267 Wis. 2d 739, ¶10. First, this court considered whether the patient was transferred for medical reasons under § 51.35(1)(e)1. or whether she was transferred due to a violation of the conditions for the patient's less restrictive placement under § 51.35(1)(e)2. *See Elizabeth M.P.*, 267 Wis. 2d 739, ¶12-20. After determining that the patient was transferred under subd. 2., we considered whether a patient transferred from outpatient to inpatient treatment for violations of the conditions of placement was entitled to a hearing within ten days of transfer under § 51.35(1)(e)2.-5. *See Elizabeth M.P.*, 267 Wis. 2d 739, ¶20.

In concluding the patient was entitled to such a hearing, the *Elizabeth M.P.* court recognized that § 51.35(1)(e) indicated different forms of transfer: (1) those based on medical decisions, § 51.35(1)(e)1., and (2) those based on violations of conditions of outpatient treatment, § 51.35(1)(e)2.-5. *Elizabeth M.P.*, 267 Wis. 2d 739, ¶17. The court reasoned:

On its face, WIS. STAT. § 51.35(1)(e) does not differentiate between transfers made pursuant to subdivisions 1 and 3. In fact, § 51.35(1)(e)3 clearly references subdivision (1)(e)2, which in turn references subdivision (1)(e)1. However, § 51.35(1)(e)1 and (1)(e)2 seem to indicate different forms of transfers. The provisions suggest that while only one transfer provision and its various subdivisions all serve to protect the rights of patients, subdivision 2 exists to further protect the rights of those whose transfer "results in a greater restriction of personal freedom for the patient for a period of more than 5 days or any transfer from outpatient to inpatient status for a period of more than 5 days" where the transfer "is due to an alleged violation of a condition of a transfer to less restrictive treatment." Sec. 51.35(1)(e)2.

Elizabeth M.P., 267 Wis. 2d 739, ¶17 (footnote omitted).² Thus, while any patient transferred to a more restrictive environment can petition for judicial review under § 51.35(1)(e)1., only those patients transferred for a violation of conditions are afforded the additional procedure of an automatic hearing before a hearing officer within ten days of transfer, followed by the right to petition for judicial review of that determination. However, the *Elizabeth M.P.* court then went on to blur the distinction between the two types of transfer, stating:

We therefore reverse the order of the circuit court insofar as it found: (1) that the transfer to inpatient status was made pursuant to WIS. STAT. § 51.35(1)(e)1, not § 51.35(1)(e)3; and (2) that a transfer under § 51.35(1)(e)1 does not require a hearing within ten days of the transfer. Transfers pursuant to § 51.35(1)(e) require a hearing within ten days.

Elizabeth M.P., 267 Wis. 2d 739, ¶26. The court reiterated this holding in its conclusion, “WISCONSIN STAT. § 51.35(1)(e) mandates that a patient transferred to

² The court’s reasoning is supported by the legislative council note to the 1987 Wis. Act 366, § 14 repealing and recreating WIS. STAT. § 51.35(1)(e). Prior to its repeal and recreation, WIS. STAT. § 51.35(1)(e) consisted of only what is now subd. 1. *See* § 51.35(1)(e) (1985-86). Explaining the addition of subds. 2.-5., the legislative council note states:

NOTE: The repeal and recreation of s. 51.35(1)(e) by this bill creates procedural rights in addition to those in current law for persons who are transferred between facilities or from outpatient to inpatient status and applies these rights to patients who, due to an alleged violation of a condition of a transfer to less restrictive treatment: (1) are transferred to a more restrictive facility for longer than 5 days; or (2) are transferred from outpatient to inpatient status for more than 5 days....

While the legislative history and statutory language supports the more specific reasoning in *Elizabeth M.P.* identifying two categories of transfer, we note that Samuel raises due process concerns as to any interpretation providing for a review process for those transferred for medical or treatment reasons that does not require an automatic hearing. In addition, Samuel advocates for a uniform process in order to avoid potential difficulties arising from categorizing transfers as medical-based or violation-based.

a more restrictive environment receive a hearing within ten days of said transfer.” *Elizabeth M.P.*, 267 Wis. 2d 739, ¶28.

Despite the more specific reasoning in *Elizabeth M.P.*, Samuel understandably relies on these final broad statements in support of his argument that he has a right to a hearing within ten days under WIS. STAT. § 51.35(1)(e)1. While the State distinguishes *Elizabeth M.P.* on its facts and contends that Samuel’s argument ignores the statute and specific reasoning in *Elizabeth M.P.*, this court’s broader statement remains. The inconsistency in *Elizabeth M.P.* was noted in this case by both the circuit court and the County and, while apparent to us too, we are powerless to address it. *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W. 2d 246 (1997) (the court of appeals may not overrule, modify or withdraw language from its prior published decisions). In light of the confusion surrounding the application of *Elizabeth M.P.* to transfers made pursuant to WIS. STAT. § 51.35(1)(e)1., we respectfully request that the supreme court accept certification in order to provide needed guidance on the issue.

