

## **The *Judy K.* Decision: Wisconsin Supreme Court Rules In Favor Of People With Disabilities Who Are Protectively Placed And Creates A New “Find and Fund” Rule**

**By Mitchell Hagopian, Staff Attorney**

In a major victory for protectively placed individuals seeking community placement, the Wisconsin Supreme Court has ruled that the so called “county shield law” does not allow counties to refuse to place protectively placed people in the least restrictive environment simply because the county might have to expend county funds to do so. The ruling came on July 3, 2002 in *In the matter of the Guardianship and Protective Placement of Judy K.* The Court, in an opinion authored by Justice Ann Walsh Bradley, held that Dunn County’s decision to avoid spending county funds on Judy K.’s community placement was based on an interpretation of §55.06(9)(a) that would leave no room for the consideration by a court of the other statutory factors that must be considered in ordering a particular placement—including the “needs of the person to be protected” and “the level of supervision needed.” The Court also noted that the County’s interpretation failed to shield the protectively placed person’s substantial liberty interests from counties’ incentives to make financial considerations the sole factor in placement decisions.

The Court, by a 4-3 margin, held that counties “must make an affirmative showing of a good faith, reasonable effort to find an appropriate placement and to secure funding to pay for an appropriate placement.” Justice Bradley’s shorthand phrase for this requirement is to “**find and fund an appropriate placement.**” Only after making this showing can counties rely on the language in §55.06(9)(a) that requires counties to expend only funds that “are required to be appropriated to match state funds.”

It is clear from the opinion that the required showing by the county is substantial. In placing the “find and fund” burden on counties the Court stated that it was doing so because counties were in the best position to know what funding sources might be available. The Court recognized that individuals and courts do not know whether appropriate placements “may be located, created, or funded through a good faith reasonable effort.” This statement is particularly significant because it confirms that the “find and fund” obligation includes a county obligation to look beyond placements that currently exist. Counties must also show that they have attempted to create placements that could be funded with existing financial resources. This statement is an implicit affirmation of the 1990 Court of Appeals decision in *In re Protective Placement of J.G.S.*—a case litigated by then WCA attorney Roy Froemming—in which the court found that the mere nonexistence of a particular setting was immaterial to whether a person is entitled to be placed in the least restrictive setting.

In applying the “find and fund” requirement to Judy K.’s case the Court found that the county had failed to meet this substantial burden. The Court quoted several passages from the trial testimony that indicated Dunn County had done nothing beyond examining the traditional long term support funding sources (CIP, COP and Community Aids) in determining that the non-county funding for Judy K. was insufficient to pay for the available placement. It further noted that once the court had ordered Dunn County to pay for Judy’s placement Dunn County was able to find a placement that cost the county almost nothing. At the time of the Watts review the annual cost to Dunn County of her placement was estimated to be approximately \$16,760. At oral argument before the Court it was

disclosed that the county's annual obligation had been reduced to \$600 through use of Medicaid card services.

As important as what the decision accomplished, was what it left unanswered. The Court declined to specifically identify what sources of funds the legislature had in mind when it used the phrase "funds required to be appropriated to match state funds." Judy K. had argued that any program which had available matching funds from the Medical Assistance program was a program from which county funds were "required to be appropriated to match state funds." The Court was apparently satisfied that Dunn County's failure to meet its burden at any level made it unnecessary to address that question. The Court did, however, reject Dunn County's interpretation of the phrase, which was that it referred only to community aids funding. The Court also indicated that it appeared that matching "requirement" of the Medical Assistance waiver programs appeared to be identical to the Community Aids matching requirement. The Court also declined to address the constitutionality of the shield law or whether it conflicted with the Americans with Disabilities Act. Thus, all these potentially fatal problems with the shield law remain unresolved and can be raised in future challenges to the law.

Justice Bradley's majority opinion was joined by Justices Crooks and Bablitch and Chief Justice Abrahamson.

Justice David Prosser wrote a dissenting opinion in which he argued that the legislative history of the shield law clearly revealed that the legislature had intended the law to absolutely limit a county's financial exposure in funding protective placements. Justice Prosser's dissent is somewhat perplexing given that only last term he wrote the Court's opinion in *County of Dunn v. Goldie H.*, in which he vigorously reaffirmed the Court's landmark decision in the *Watts* case. In *Goldie H.* Justice Prosser called the annual review "a commitment that no person will be warehoused and forgotten by the legal system." Under the version of the shield law advocated in his dissent many *Watts* hearings would be reduced to meaningless exercises because courts would have no authority to review placements that cost counties any county money.

Justices Wilcox and Sykes joined Justice Prosser's dissent.

Judy K. was represented by WCA Attorneys Mitchell Hagopian and Roy Froemming and James Parent of Burgfechtel and Parent in Menominee. *Amicus curiae* briefs were filed in support of Judy K. by Rock Pledl for the Wisconsin Coalition of Independent Living Centers and Ellen Henningsen for the Elder Law Center of the Coalition of Wisconsin Aging Groups.

Dunn County was represented by Assistant Corporation Counsel Nicholas Lange. The Wisconsin Counties Association filed an *amicus curiae* brief in support of Dunn County.

If you have questions about this decision, contact WCA Attorney Mitch Hagopian at 608-267-0214