

## Wisconsin Supreme Court Affirms Helen E. F. Decision

The Wisconsin Supreme Court affirmed the controversial decision of the Wisconsin Court of Appeals in *In re Helen E.F.*,<sup>1</sup> which stated that individuals with permanent disabilities that are likely not capable of rehabilitation are not to be committed under the procedures set forth in Chapter 51 of the Wisconsin Statutes (Chapter 51). This decision,<sup>2</sup> rendered by Justice Michael Gableman on May 18, 2012, eliminates one potentially useful tool for senior living facilities straining to manage the challenging behaviors of their residents.

The facts in the *Helen E.F.* case were undisputed. Helen is an 85 year old woman who was a resident in a Fond du Lac, Wisconsin nursing facility. She suffers from Alzheimer's dementia and exhibits challenging, often violent, behaviors. During a hospitalization in 2010, where Helen displayed such behaviors, she was placed in the hospital's behavioral health unit pursuant to an emergency detention under Chapter 51. At her probable cause hearing, Helen's Chapter 51 petition was converted to a protective placement under Chapter 55 of the Wisconsin Statutes (Chapter 55). Later, a new Chapter 51 petition was filed, and the circuit court found that Helen was a proper subject for involuntary commitment under Chapter 51, pursuant to which she was to be committed to a locked psychiatric unit for up to six months. Helen appealed the decision of the circuit court, and the Wisconsin Court of Appeals reversed, holding that Chapter 55, not Chapter 51, was the appropriate statutory framework to manage the conditions of individuals like Helen, as the purpose of Chapter 51 is to provide treatment, and Alzheimer's dementia typically does not respond to treatment.

In affirming the lower court's decision, the Court reviewed both Chapter 51 and Chapter 55, holding that "[Chapter 55] was specifically tailored by the legislature to provide for the long term care of individuals with incurable disorders, while [Chapter] 51 was designed to facilitate the treatment of mental illnesses suffered by those capable of rehabilitation." *Helen E.F.*, 2012 WI 50, ¶ 13. The Court reviewed the fact based test set forth in *In re C.J.*,<sup>3</sup> which held that if treatment will "maximize[e] the[ ] individual functioning and maintenance" of the person, "but not help[ ] in controlling or improving the disorder[ ]," then the person "does not have rehabilitative potential, and is not a proper subject for treatment." *Helen E.F.*, 2012 WI 50, ¶ 36 (*quoting In re C.J.*, 120 Wis. 2d at 362). If, however, the treatment goes beyond controlling an activity and goes "to controlling [the] disorder and its

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symptoms," the person "has rehabilitative potential and is a proper subject for treatment." *Id.* In applying this test to the facts at issue in the *Helen E.F.* case, the Court stated that "given the current state of medical science, Helen's Alzheimer's disease is incurable and untreatable; the only available medical remedy is maintenance—not treatment—of the disease as it progresses." *Id.* at ¶ 37. Finding that Helen cannot be rehabilitated, the Court held that Chapter 51 could not be used to care for her. Instead, the Court reasoned, Chapter 55 provides the proper means for managing Helen's behaviors due to its long term care focus and its requirement that a guardian ad litem be appointed to represent the subject individual. It is worth noting that the Court did not address whether an individual with Alzheimer's dementia in addition to a Chapter 51 qualifying illness may be committed under Chapter 51.

Prior to the publication of this decision, different Wisconsin counties had taken different approaches when managing individuals like Helen. While it is now clear that individuals with untreatable conditions are not properly addressed under Chapter 51, as noted by Chief Justice Shirley Abrahamson in a concurring opinion, it is not clear whether the holding in *Helen E.F.* "govern[s] all Alzheimer's patients or only *Helen E.F.* . . ." *Id.* ¶ 47. If a court was swayed by testimony from a medical expert that a given person's Alzheimer's could be appropriately and effectively treated, that court may possibly order a Chapter 51 commitment. Given the lack of clarity, the time appears to be ripe for legislative action on the subject.

Recently, the legislature established the Special Committee on Legal Interventions for Persons with Alzheimer's Disease and Related Dementias (Special Committee). Reinhart's [Bob Lightfoot](#), an attorney who represents nursing homes and assisted living providers, will serve on this committee, along with various providers, advocacy groups and legislators. We encourage all who wish to have input into the development of a legal framework for the appropriate care of individuals like Helen to contact your state legislators or a member of the Special Committee.

In the meantime, we counsel providers who are managing individuals with challenging behaviors attributable to Alzheimer's and related dementias to familiarize themselves with the protective placement provisions of Chapter 55, to develop the best possible relationship with their respective county law enforcement agency, and to consult their legal counsel early on when a resident begins to exhibit challenging behaviors. As emotions are often high in these matters, the best approach is often a collaborative one that incorporates the resident's family as well as county authorities. The state ombudsman program can also be a valuable resource. If you have any questions, please contact your



Reinhart attorney or your Long Term Care, Assisted Living, and Senior Housing practice attorney.

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1 2011 WI App. 72, 333 Wis. 2d 740, 798 N.W.2d 707.

2 *In re Helen E.F.*, 2012 WI 50, 2012 WL 1758636.

3 120 Wis. 2d 355, 354 N.W.2d 219 (Ct. App. 1984).

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