STATE OF MICHIGAN

COURT OF APPEALS

In re JAMES YANG.

OAKLAND COUNTY PROSECUTOR'S OFFICE,

Petitioner-Appellee,

v

JAMES YANG,

Respondent-Appellant.

UNPUBLISHED
December 28, 2021

No. 356970
Oakland Probate Court
LC No. 2001-037176-MI

Before: CAVANAGH, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Respondent appeals by leave granted[1] the probate court's continuing order for mental health treatment at Hope Network Grandview or the Caro Center for up to 365 days. We affirm. We hold that the probate court did not abuse its discretion when it found that a preponderance of the evidence did not support respondent's transition to an independent, community-based setting with support from an Assertive Community Treatment Services team.

I. FACTUAL BACKGROUND

Respondent murdered his mother in a particularly brutal manner and the prosecution charged him with open murder, MCL 750.316. Respondent killed his mother while experiencing paranoid delusions. In 2001, respondent was found not guilty by reason of insanity (NGRI). Between 2001 and 2016, respondent received mental health treatment at the Center for Forensic

[1] Respondent actually filed the instant appeal as by right pursuant to MCR 5.801(A)(4); however, the probate court's order from which respondent appeals did not constitute a final order permitting an appeal of right and required him to seek leave to appeal to this Court. MCL 600.308(2)(c). Therefore, in the interest of judicial economy we consider respondent's claim of appeal as an application for leave granted.

Psychiatry and the Caro Center. In May 2016, respondent began receiving mental health treatment at Hope Network Harbor Point, a facility that provided intensive residential mental health treatment. Between 2016 and 2021, respondent continued to receive mental health treatment in intensive residential treatment facilities at multiple Hope Network locations including most recently at Hope Network Grandview.

In March 2021, a representative on behalf of Hope Network petitioned seeking the continuation of the probate court's mental health treatment order. The petition alleged that respondent continued to be a person requiring treatment and that respondent needed combined hospitalization and assisted outpatient treatment for a period of one year. The petition provided that no modifications in respondent's treatment were planned for the next treatment period. The petition specified that respondent resided and received treatment at the Hope Network Grandview facility staffed 24 hours a day that provided respondent staff administration of his medication, resident monitoring for safety and support, on-site case management, nursing, peer support, clinical psychoeducational groups, and treatment.

The probate court held a hearing regarding the petition during which respondent's psychiatrist, Dr. Gary Ralph, testified that respondent resided in a specialized adult foster care home that provided supervision at all hours of the day. According to Dr. Ralph, respondent could leave the foster care home without supervision during the day but had to return by curfew. Although the petition provided that there were no treatment modifications planned for the next treatment period, Dr. Ralph opined that respondent could transition to a community-based treatment setting where he would receive treatment from an Assertive Community Treatment Services team. Natalie Baum, a member of the Assertive Community Treatment Services team, testified that, if respondent transitioned to a community-based treatment setting, he would be treated by a psychiatrist and an on-call nurse, and he would also receive support from a case manager, a peer support specialist, and other providers that respondent may need.

At the conclusion of the April 1, 2021 hearing, the probate court summarized:

> Counsel, based upon the testimony that has been offered as well as a review of the petition, we do have a stipulation from Mr. Yang that he is a person requiring treatment, and in looking through the initial petition, it indicates that the present treatment is adequate and appropriate to the individual's condition. The individual is motivated to participate in the treatment program. It indicates that the estimate for the time necessary for treatment is one year, and the request is combined hospitalization and [assisted outpatient treatment] for not more than one year.
>
> I share the prosecutor's concern in this matter. I understand all of the treatment team is focused on Mr. Yang's recovery, and it appears that he has made very good progress over the years with this kind of structured treatment. But I believe the doctor, in his initial testimony, indicated that he has been in an extremely structured situation for all of this time, and of course, no one can predict what should occur in the future. I don't expect the doctor to be able to do that, and certainly the Court is not able to do that.

> In evaluating this, we not only have to look to what is in Mr. Yang's interests but also in the community interest. The reason the Court is reviewing these cases is to balance those things.
>
> So, I am not uncomfortable with the current setting that Mr. Yang is in at the group home, but I would not authorize any further step down at this point in time. So, I will grant the petition, allow him to remain at the group home setting that he is presently in and managed there for the one-year treatment period.

The probate court entered a continuing order for mental health treatment on April 1, 2021, based upon its finding by clear and convincing evidence that respondent continued to be an individual having a mental illness requiring treatment because, as a result of his mental illness, he could be expected to intentionally or unintentionally seriously physically injure himself or others. The probate court's order specified that no treatment program alternative to hospitalization was available to adequately meet respondent's needs. The court ordered that respondent be hospitalized for treatment at Hope Network Grandview, the Caro Center, or another department of community health hospital, for up to 365 days. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews for an abuse of discretion a probate court's dispositional rulings and reviews for clear error the factual findings underlying a probate court's decision." *In re Portus*, 325 Mich App 374, 381; 926 NW2d 33 (2018) (quotation marks and citation omitted). "An abuse of discretion occurs when the probate court 'chooses an outcome outside the range of reasonable and principled outcomes.' " *Id*. (quotation marks and citation omitted). "A probate court's finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id*. (quotation marks and citation omitted). "The probate court necessarily abuses its discretion when it makes an error of law." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

A. COMMUNITY-BASED TREATMENT

Respondent argues that the probate court abused its discretion by ruling that the evidence did not support respondent's transition to an independent, community-based, alternative outpatient treatment setting with support from a community services treatment team. We disagree.

As a preliminary matter, petitioner argues that respondent has waived any challenge to the probate court's order for mental health treatment providing that respondent shall continue to receive treatment at Hope Network Grandview. We disagree. "Waiver is the voluntary and intentional relinquishment of a known right." *Varran v Granneman (On Remand)*, 312 Mich App 591, 623; 880 NW2d 242 (2015) (citation omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id*. (quotation marks and citation omitted). Further, "a party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute." *In re Conservatorship of Brody*, 321 Mich App 332, 347; 909 NW2d 849 (2017) (quotation marks, brackets, and citation omitted).

During the initial hearing regarding the petition seeking the continuation of the probate court's mental health treatment order, respondent's attorney argued that respondent had earned the right to transition to an independent, community-based treatment setting, and community-based treatment would be appropriate given respondent's treatment needs. Immediately after doing so, respondent's attorney stated, "I'm asking that you adopt the plan as proposed, your honor." According to petitioner, this exchange constituted a waiver of any challenge to the probate court's order for mental health treatment providing that respondent shall continue to receive treatment at Hope Network Grandview. Petitioner's assertion lacks merit. Although the petition sought the continuation of the probate court's mental health treatment order, Dr. Ralph had previously testified regarding a "plan" concerning the treatment respondent would receive upon his transition to a community-based setting. Considering that respondent's attorney maintained throughout the hearings that a transition to a community-based setting would appropriately meet respondent's needs, respondent's attorney's reference to the "plan" meant the plan about which Dr. Ralph testified, and respondent, thereby did not waive his right to challenge the probate court's dispositional ruling.

Respecting respondent's contention, however, the record reflects that the probate court did not abuse its discretion by finding that the evidence did not support respondent's transition to an independent, community-based setting with support from the Assertive Community Treatment Services team. "The specific procedures for obtaining continuing orders of hospitalization or other forms of treatment based on a person's mental illness are contained in various provisions of Chapter 4 of the Mental Health Code, MCL 330.1400 *et seq*." *In re Portus*, 325 Mich App at 382. Under the Mental Health Code provisions, "the issuance of a continuing order for involuntary mental health treatment essentially requires the probate court to follow a two-step process." *Id*. at 385. First, the probate court must find by clear and convincing evidence that the respondent is a person requiring treatment.[2] *Id*. "Second, after the probate court finds that an individual is a person requiring treatment, the probate court 'shall issue another continuing order for involuntary mental health treatment as provided in [MCL 330.1472a(3)] for a period not to exceed 1 year.' " *Id*. at 386, citing MCL 330.1472a(4). The potential treatment options include "hospitalization, alternative treatment, assisted outpatient treatment, a combination of hospitalization and alternative treatment, or a combination of hospitalization and assisted outpatient treatment." *Id*. "[T]he probate court does not have unfettered discretion to choose a form of treatment and placement for an individual found to be a person requiring treatment." *Id*. at 390. This Court explained:

> The probate court is required to order the preparation of a report on the availability and appropriateness of alternatives to hospitalization for the individual and, after reviewing that report, make particular determinations related to potential alternatives to hospitalization. MCL 330.1453a; MCL 330.1469a(1). Specifically, the probate court must determine (1) whether an alternative treatment program is "adequate to meet the individual's treatment needs," (2) whether an alternative treatment program is "sufficient to prevent harm that the individual may inflict

[2] The parties do not dispute that respondent is a person requiring treatment. Thus, the first step is not at issue.

> upon himself or herself or upon others within the near future," and (3) whether an agency or mental health professional is "available to supervise the individual's alternative treatment program." MCL 330.1469a(1)(a) and (b). The probate court must also inquire about the "individual's desires regarding alternatives to hospitalization." MCL 330.1469a(1)(c). If the probate court finds that the requirements in MCL 330.1469a(1)(a) and (b) are met with respect to a treatment program that is an alternative to hospitalization, then "the court *shall* issue an order for alternative treatment or combined hospitalization and alternative treatment in accordance with section 472a." MCL 330.1469a(2) (emphasis added). [*Id*. at 390-391.]

"Next, given that the probate court is statutorily required to make specific determinations before ordering a course of treatment, a court cannot make these determinations in a vacuum or without referring to evidence." *Id*. at 392. "MCL 330.1469a requires that a preponderance of the evidence support the probate court's findings with respect to its determinations regarding an individual's treatment and placement." *Id*. at 394.

In this case, the probate court's findings respecting its determinations regarding respondent's treatment and placement were supported by a preponderance of the evidence. During the hearings regarding the petition seeking the continuation of the probate court's mental health treatment order, Dr. Ralph testified that respondent suffered from schizoaffective disorder. Although schizoaffective disorder could not be cured, respondent's symptoms were well-managed and stable. Dr. Ralph opined that respondent's act of killing his mother constituted an isolated event that occurred when respondent had not been treated with antipsychotic medication. Respondent currently is treated with antipsychotic medication, and Dr. Ralph expressed the belief that respondent would not act in a violent manner in the future. The record evidence also indicated that respondent had some independence in the community. Stephanie Leone, the individual that managed respondent's care at Hope Network Grandview, testified that respondent resided in an unsecured facility from which he could leave during the day for as long as he wished, provided that respondent returned by the 10:00 p.m. curfew. Respondent had a job at a retail store near the facility and had never missed his curfew.

Despite the evidence concerning respondent's progress, Dr. Ralph acknowledged that respondent's prior acts indicated that respondent could decompensate at some point in the future. According to Dr. Ralph, if that occurred, respondent could pose a risk of harm to himself and others. Dr. Ralph further testified that respondent had resided in a structured environment for many years such that one could not predict whether respondent could adapt to an independent, community-based setting. Notably, Dr. Ralph stated that "there is a hypothetical risk that if [respondent] does struggle and for some reason becomes noncompliant with his medication when he has less oversight that he certainly could reach the same state of delusional functioning that led him to commit his NGRI offense." The record reflects that Baum concurred with Dr. Ralph concerning respondent's treatment if he transitioned to an independent, community-based setting. According to Baum, respondent would see a psychiatrist on a weekly basis and a case manager would check in on respondent each week. Although respondent would have access to an on-call nurse and could communicate with his case manager more frequently if necessary, respondent would bear the responsibility of utilizing such resources.

The probate court considered the record evidence and found that a preponderance of the evidence did not support respondent's transition to an independent, community-based setting with support from an Assertive Community Treatment Services team. Although evidence indicated that respondent had made progress, evidence supported the probate court's finding that it could not be predicted whether respondent would engage in violent behavior in the future. Based on a review of the entire record, we conclude that the decision of the trial court was correct. As a result, we also conclude that the probate court did not abuse its discretion when making its dispositional decision based upon a preponderance of evidence in the record.

B. TREATMENT AT HOPE NETWORK GRANDVIEW

Respondent argues that the probate court's continuing order requires respondent's involuntarily hospitalization for up to 365 days, but also contradictorily requires him to remain residing at and receive treatment at the Hope Network Grandview facility which is not a hospital but an unsecured facility from which he may leave daily, work a job in the community, and return to sleep. He asserts that the order is internally inconsistent. Respondent does not argue that he no longer needs involuntary mental health treatment, but challenges the level of treatment ordered. He contends that, insofar as the probate court's order requires him to be hospitalized, the probate court abused its discretion, and the order should be reversed so that he may participate in a stepped-down, even less restrictive alternative outpatient treatment program.

The record reflects that respondent obtained authorized leave status (ALS) from Caro Center and placement at the Harbor Point Facility for structure and supervision to prevent relapse and symptom mitigation.[3] Later respondent moved to the Hope Network Grandview facility, an adult foster care facility that provides respondent the structure, supervision, and treatment he needs. Analysis of the probate court's explanation of its reasoning and review of its continuing order indicates that, based upon respondent's ongoing mental illness and potential for relapse, the court found that his current placement at Hope Network Grandview remained adequate and appropriate for his condition. The probate court ordered that respondent continue his treatment at Hope Network Grandview for up to one year. The record establishes that the probate court simply continued respondent's current placement under a previous continuing order. The record indicates that the probate court understood and acknowledged that Hope Network Grandview permitted respondent to interact in the community with some restrictions and otherwise met respondent's needs. Respondent's continuing ALS placement at Hope Network Grandview provides respondent a structured mental health treatment program alternative to a more restrictive in-patient

[3] The record reflects that, since 2017, the Center for Forensic Psychiatry's NGRI Committee, after consultation with the Caro Center treatment staff, recommended entry of a continuing hospitalization order that included ALS for placement in a community-based facility. In respondent's previous appeal, this Court observed that the record reflected that respondent "began an authorized leave status (ALS) contract, apparently with the approval of the NGRI Committee," which permitted him to reside at the Harbor Point Facility, a secured facility in the community where he received intensive residential treatment. See *In re Yang*, unpublished per curiam opinion of the Court of Appeals issued March 9, 2017 (Docket No. 330179), p. 2.

hospitalization. The probate court's explanation on the record at the hearing made clear that the court concluded that the evidence established that respondent lacked readiness to transition to residing in a stepped-down less restrictive residential setting or treatment that put the onus on respondent to seek help if needed. The probate court merely ruled that the *status quo ante* should be maintained and not changed. The probate court did not abuse its discretion by continuing respondent's current placement.[4]

Affirmed.

/s/ Mark J. Cavanagh
/s/ James Robert Redford

[4] The prosecution suggests that remand might be appropriate for the probate court to determine on the record whether Hope Network Grandview constitutes a hospital and respondent's placement constitutes hospitalization. We disagree because the record indicates that respondent's leave from psychiatric hospitalization continues under his ALS and his placement at Hope Network Grandview under that status provides respondent the necessary 24-hour supervision, case management, individual therapy, treatment groups, and psychiatric services.

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K. F. KELLY, J. (*concurring in part and dissenting in part*).

I join in the majority's holding that the probate court did not abuse its discretion when it concluded that respondent's requested transition to an independent, community-based setting with team support was unsupported by a preponderance of the evidence. However, I respectfully dissent from the majority's conclusion that respondent may not pursue the appeal as a claim of right.

The issue of whether this Court has jurisdiction to hear an appeal is within the scope of our review. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Under the court rules, the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule.[.]" MCR 7.203(A)(2). MCR 5.801 addresses appeals from the probate court to the Court of Appeals. The court rule provides, in relevant part:

> (A) Appeal of Right. A party or an interested person aggrieved by a final order of the probate court may appeal as a matter of right as provided by this rule.
>
> * * *
>
> (4) a final order affecting the rights or interests of a person under the Mental Health Code[.]

When examining which probate court orders are final to determine the appellate jurisdiction of this Court, the evaluation is made on a case-by-case basis. *In re Rottenberg Trust*, 300 Mich App 339, 353; 833 NW2d 384 (2013). "The test of finality of a probate court order is whether it affects with finality the rights of the parties in the subject matter." *Id*. at 354 quoting *In re Miller Estate*, 106 Mich App 222, 224; 307 NW2d 450 (1981). The interpretation and application of a court rule presents a question of law that the appellate court reviews de novo. *In re Leete Estate*, 290 Mich App 647, 656; 803 NW2d 889 (2010). The goal when interpreting a court rule is to give effect to the intent of the drafters by examining the language used. *Id*. We must give effect to the language plainly expressed. *Id*. If the language is plain and unambiguous, the language must be applied as written without judicial construction. *Id*.

I would conclude that the continuing order for mental health treatment is a final order under MCR 5.801(A)(4) appealable as a matter of right because it is "affecting the rights or interests of a person under the Mental Health Code." Specifically, this order determined respondent's rights or interests under the Mental Health Code because it set forth respondent's involuntary mental health treatment for the following year as provided in MCL 330.1472a(3). When the nature of the order is examined on a case-by-case basis, it is apparent that it constitutes a final order because it affects with finality respondent's rights regarding his placement. *In re Rottenberg Trust*, 300 Mich App at 353-354. Indeed, it determined respondent's degree of confinement and supervision for the next year.

In its appellate brief, petitioner asserts that "it is questionable whether" the April 1, 2021 continuing order for mental health treatment is a final order under MCR 5.801(A)(4), MCR 5.801(A)(5), or MCR 7.202(6)(a)(*i*), and notes that with yearly reviews, respondent would be entitled to a yearly appeal as of right. Under the plain language of the court rule, there is no indication that an order subject to yearly renewal may not be deemed a final order under MCR 5.801. Moreover, the failure to permit an appeal of right would prevent individuals subject to the Mental Health Code from challenging decisions addressing confinement, placement, and supervision.

We recently decided in *In re Tchakarova*, 328 Mich App 172, 178-181; 936 NW2d 863 (2019), that the expiration of an order for involuntary hospitalization after 90 days did not moot the claim brought by the respondent challenging such confinement, even though the claim could not be fully adjudicated within that time period. As part of our analysis, we remarked in a footnote that "[u]nder the Michigan Court Rules, respondent was entitled to an appeal of right from a final order affecting her rights under the Mental Health Code." *Id*. at 180 n 3, citing MCR 5.801(A)(4). Although the mootness doctrine is not before us in this case, I agree with that statement of law from *In re Tchakarova*, and I adopt it.

I would not impose such a limitation in light of the absence of any such restriction in the court rule. Petitioner's concern regarding the frequency of appeals when balanced against the rights of mentally incapacitated individuals should be directed to the Legislature. "It is axiomatic that an individual subjected to involuntary mental health treatment will be significantly affected by the order [of confinement] because treatment decisions will be made for the individual and, if inpatient treatment is ordered, his or her freedom of movement will be limited." *In re Tchakarova*, 328 Mich App at 181. I would hold that the order of the probate court is appealable as of right.

/s/ Kirsten Frank Kelly