COURT OF APPEALS
DECISION
DATED AND FILED

May 8, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1641 **Cir. Ct. No. 1989GN176**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF MICHAEL L.:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

MICHAEL L.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Reversed.*

¶1 HIGGINBOTHAM, P.J.[1] Michael L. appeals an order of guardianship and protective placement. He argues that the circuit court lost competency when it heard the petition for guardianship and protective placement without his attendance in court as required by WIS. STAT. §§ 55.10(2) (2005-06) (effective November 1, 2006)[2] and 880.08(1) (2003-04).[3] We agree and therefore reverse.

BACKGROUND

¶2 From 1989 to 2006, Michael L. lived in the community under an order for limited guardianship and protective services. On November 6, 2006, the Dane County Department of Human Services (Department) filed a petition for permanent guardianship under WIS. STAT. § 55.10 and protective placement under WIS. STAT. § 880.08(1) (2003-04). Michael's guardian ad litem informed the court that Michael wished to contest the petition. Michael was appointed counsel.

¶3 A hearing on the petition was scheduled for December 22, 2006, then postponed to January 10, 2007. Michael appeared in person at the January 10, 2007 hearing and requested an independent examination pursuant to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2005-06).

[2] All citations to WIS. STAT. § 55.10 hereafter refer to the version of the statute that took effect November 1, 2006.

[3] The guardianship and protective placement statutes were recently revised and recodified. *See* 2005 Wisconsin Act 264. An anomaly in the effective dates of the revisions means that the guardianship issues raised by the petition are governed by the old guardianship statute, WIS. STAT. § 880.08(1) (2003-04), and protective placement issues are under the new statute, WIS. STAT. § 55.10 (2005-06), which took effect on November 1, 2006, before the county's petition was filed in this case. The renumbered guardianship statutes did not take effect until December 1, 2006, after the instant petition was filed. *See* 2005 Wisconsin Act 264. The text of the relevant provisions is set forth in the discussion section.

WIS. STAT. §§ 55.11(2) and 880.33(2)(b) (2003-04). The court granted the request and assigned Dr. Kent Berney to perform the evaluation.

¶4 The next hearing was set for January 29, 2007. On the morning of January 29, Michael was examined by Dr. Berney as scheduled, but left abruptly after thirty minutes.[4] As a result, Dr. Berney was unable to complete the evaluation. Michael failed to show up in court later that day.[5]

¶5 Despite Michael's absence at the hearing, the Department asked the court to proceed because Michael was given notice of the hearing and had previously demonstrated that he was capable of attending court. The Department told the court that the statutory period within which the court was required to hear the protective placement petition was running short.[6] Michael's attorney and the GAL requested a continuance. The court decided to proceed and allowed the county to present its case in Michael's absence. The case was then continued until February 19, 2007, the last day on which the case could be heard under the statutory time limits.

¶6 Michael appeared at the February 19, 2007 hearing. At the conclusion of the hearing, the court issued an order granting the petition for protective placement. Michael appeals.

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[4] For reasons not apparent from the record, Michael missed a prior appointment with Dr. Berney on January 22, 2007.

[5] The Department implies that Michael was capable of transporting himself to court but chose not to attend. We find nothing in the record that establishes the reason for Michael's nonattendance at the hearing.

[6] WISCONSIN STAT. § 55.10(1) requires that the petition be heard within sixty days. By request of the parties or the GAL, the court may extend the sixty-day deadline for up to an additional forty-five days.

DISCUSSION

¶7 The sole issue presented in this case is whether the circuit court lost competency to proceed on the petition for protective placement and guardianship when it commenced the hearing on the petition in Michael's absence. This requires us to interpret the relevant language of the protective placement statute, WIS. STAT. § 55.10, and the guardianship statute, WIS. STAT. § 880.08 (2003-04). Statutory interpretation presents a question of law that an appellate court reviews de novo. ***State v. Waushara County Bd. of Adjustment***, 2004 WI 56, ¶14, 271 Wis. 2d 547, 679 N.W.2d 514.

¶8 The goal of statutory interpretation is to give effect to the intent of the legislature, which we assume to be expressed in the statutory language. ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, to ascertain a statute's meaning, we start with its plain language. *See* ***id.***, ¶45. If the statute's meaning is plain, we ordinarily stop the inquiry. ***Id.*** "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46. **.**

¶9 Both WIS. STAT. § 55.10(2) and WIS. STAT. § 880.08(1) (2003-04) require that the respondent to a petition for protective placement be present at the hearing on the petition unless the guardian ad litem waives the attendance requirement and certifies in writing to the court the specific reasons why the respondent is unable to attend. Section 55.10(2) states as follows: "The petitioner shall ensure that the individual sought to be protected attends the hearing on the petition unless, after a personal interview, the guardian ad litem waives the

attendance and so certifies in writing to the court the specific reasons why the individual is unable to attend."[7] Section 880.08(1) (2003-04) provides that "[t]he court shall cause the proposed incompetent, if able to attend, to be produced at the hearing. The proposed incompetent is presumed able to attend unless, after a personal interview, the guardian ad litem certifies in writing to the court the specific reasons why the person is unable to attend."

¶10 Michael contends that WIS. STAT. § 55.10(2) and WIS. STAT. § 880.08(1) (2003-04) plainly require that the respondent to the petition be present at the hearing, absent a written certification from the guardian ad litem. He notes that both statutes impose the requirement by using the word "shall," which is presumed mandatory. *See* ***State ex rel. Marberry v. Macht***, 2003 WI 79, ¶16, 262 Wis. 2d 720, 665 N.W.2d 155 (citations omitted) (as a general rule of statutory interpretation, "shall" is presumed mandatory). He argues that because he was not present at the hearing, and the guardian ad litem did not provide a written

[7] WISCONSIN STAT. § 55.10(2) provides in full:

> **(2)** ATTENDANCE. The petitioner shall ensure that the individual sought to be protected attends the hearing on the petition unless, after a personal interview, the guardian ad litem waives the attendance and so certifies in writing to the court the specific reasons why the individual is unable to attend. In determining whether to waive attendance by the individual, the guardian ad litem shall consider the ability of the individual to understand and meaningfully participate, the effect of the individual's attendance on his or her physical or psychological health in relation to the importance of the proceeding, and the individual's expressed desires. If the individual is unable to attend a hearing only because of residency in a nursing home or other facility, physical inaccessibility, or lack of transportation, the court shall, if requested by the individual, the individual's guardian ad litem, the individual's counsel, or other interested person, hold the hearing in a place where the individual is able to attend.

certification explaining the reasons for his absence, the court lost competency when it heard the petition in his absence. We agree.

¶11 We conclude that the plain meaning of WIS. STAT. § 55.10(2) and WIS. STAT. § 880.08(1) (2003-04) as expressed in the language of these provisions permits only one reasonable interpretation: A respondent to a petition under §§ 55.10(2) and 880.08(1) (2003-04) must attend the hearing on the petition absent written certification from the guardian ad litem giving reasons for the respondent's absence. The statutes provide that the respondent "shall" attend, and sets forth the condition (written certification from the guardian ad litem) that must be met for either the court (under WIS. STAT. § 880.08(1) (2003-04)) or the petitioner (under WIS. STAT. § 55.10(2)) to be excused of the responsibility of ensuring the respondent's attendance. Because the requirement that the respondent attend the hearing is unambiguous under these statutes, and the statutes do not provide a remedy that would save the petition when a court proceeds without the respondent present, we must conclude that the circuit court lost competency when it heard the petition in Michael's case without Michael in attendance.

¶12 The Department makes a number of arguments in support of its view that the circuit court did not lose competency. First, it argues that the presumptively mandatory "shall" should be read to be directory in this case in light of the statutory time limits contained in WIS. STAT. § 55.10(1) and the express purposes of Chapter 55 stated in WIS. STAT. § 55.001. It argues that allowing a respondent to defeat a petition simply by failing to attend the hearing would be contrary to the purpose of Chapter 55 to protect persons "from abuse, financial exploitation, neglect and self-neglect," and would therefore be an absurd result. Sec. 55.001. The Department notes that this strategy to defeat a petition is aided by the short time limit provided in § 55.10(1), which requires that a court

hear a petition within sixty days (with up to a forty-five day extension). It asserts that the purpose of the attendance requirements of WIS. STAT. §§ 55.10(2) and 880.08(1) (2003-04) is to provide the respondent with the opportunity for meaningful participation in guardianship proceedings, not to permit respondents who are able to attend court to defeat the petition by declining to do so. Additionally, it argues that if the legislature had intended to deprive the court of jurisdiction when the respondent fails to attend, it would have done so expressly, as it did in WIS. STAT. § 54.38(1), which provides that a court loses jurisdiction when all interested persons in a guardianship are not provided notice. We reject the Department's arguments.

¶13 The Department offers no reason for us to stray from the plain language of both statutes. As noted, the word "shall" in a statute "is presumed to be mandatory … unless a different construction is necessary to carry out the legislature's clear intent." ***C.A.K. v. State***, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990). The Department has failed to show that a mandatory reading of "shall" is contrary to the legislature's clear intent. It is reasonable to conclude that the legislature intended to require that a respondent be present at a guardianship or protective placement hearing because an order of a guardianship or protective placement represents a severe limitation on a person's liberty for an indefinite period of time. As we explained in ***Knight v. Milwaukee Co.***, 2002 WI App 194, 256 Wis. 2d 1000, 651 N.W.2d 890, in addressing the guardianship statute:

> The statute … reflects a legislative judgment that what the supreme court has declared to be as difficult a judgment as a judge is called upon to make, that is, a declaration of incompetency and the attendant restrictions on a proposed ward's liberty, not be made without whatever input the proposed ward is able to give.

Id., ¶3 (citation omitted).

¶14 ***Knight*** supports our conclusion. There, the guardian ad litem orally waived the respondent's appearance and did not provide written certification to the court stating the reasons for the respondent's failure to attend. ***Id.***, ¶2. The circuit court held a hearing in the respondent's absence and ordered guardianship. ***Id.*** We reversed, concluding that the circuit court lost competency when it heard the petition in the respondent's absence based on a waiver of the attendance requirement that failed to certify the reasons for nonattendance in writing as required by WIS. STAT. § 880.08(1) (2001-02). *See* ***id.***, ¶3. Likewise, the result in this case is compelled by the failure of the circuit court to follow the same unambiguous requirements of WIS. STAT. §§ 55.10(2) and 880.08(1) (2003-04) mandating the respondent's presence at the hearing.

¶15 With regard to the Department's concerns about the statutory time limits on a petition for protective placement, we note that the circuit court has control over its calendar and may bump other, less pressing matters to comply with statutory deadlines. While we are sympathetic to the problem of burgeoning circuit court calendars, the legislature has expressed its intent that these cases be addressed within prescribed time limits.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.