COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3051 **Cir. Ct. No. 1996GN172**

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

IN THE MATTER OF THE GUARDIANSHIP OF MARILYN M.:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

MARILYN M.,

RESPONDENT-APPELLANT.

APPEAL from order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Marilyn M. appeals an order continuing her protective placement under WIS. STAT. ch. 55. She contends the circuit court lost

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

competency to proceed with her annual ***Watts***[2] review because it occurred more than one year after the previous year's review. She also challenges the sufficiency of the evidence supporting the court's order. This court affirms the order.

¶2 Marilyn's protective placement began on June 4, 1998. Pursuant to our supreme court's holding in ***State ex rel. Watts v. Combined Cmty. Servs. Bd.***, 122 Wis. 2d 65, 362 N.W.2d 104 (1985), Marilyn's placement has been subject to annual court reviews. Her most recent review was held on July 21, 2005, nearly fourteen months after her last review on May 25, 2004.

¶3 Marilyn's first claim is that the circuit court lost competency to proceed when it failed to hold her ***Watts*** hearing within one year of the previous year's hearing. Brown County argues that the ***Watts*** requirement of annual court reviews was satisfied when the court made its initial determination, on May 18, 2005, to conduct a full due process hearing. The County also argues that Marilyn waived any right to challenge the circuit court's competency by failing to raise the issue before that court. Alternatively, the County argues that, if this court accepts Marilyn's arguments, releasing Marilyn from protective placement would not be an appropriate remedy. Because the waiver issue is dispositive of her first claim, this court addresses only whether Marilyn failed to preserve her claim for appeal by failing to raise it before the circuit court.

¶4 The County relies on our supreme court's decision in ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190. The ***Mikrut*** court concluded that the common law waiver rule applies to challenges to

[2] ***State ex rel. Watts v. Combined Cmty. Servs. Bd.***, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

a circuit court's competency, such that challenges to a circuit court's competency are waived if not raised in that court. ***Id.***, ¶27. However, the court expressly left untouched precedent holding that a competency challenge cannot be waived when premised upon a failure to comply with mandatory statutory time limits. ***Id.***, ¶3 n.1, ¶30.

¶5 Marilyn's argument relies on our supreme court's decision in ***Sheboygan County Dep't of Soc. Servs. v. Matthew S.***, 2005 WI 84, 282 Wis. 2d 150, 698 N.W.2d 631. The ***Matthew S.*** court held that the waiver rule of ***Mikrut*** did not extend to competency challenges based on the failure to comply with the Children's Code's mandatory statutory time limits. ***Matthew S.***, 282 Wis. 2d 150, ¶30. The court concluded that a circuit court's loss of competency, premised upon a failure to comply with the Children's Code's mandatory statutory time limits, could not be waived. ***Id.*** The question presented, therefore, is which of these rules regarding the waiver of competency challenges applies to a court's failure to hold a ***Watts*** hearing within one year of the previous hearing.[3]

¶6 In ***Watts***, our supreme court addressed an equal protection challenge alleging that persons protectively placed under WIS. STAT. ch. 55 were unconstitutionally denied certain procedural rights afforded to persons committed under WIS. STAT. ch. 51. ***Watts***, 122 Wis. 2d at 71-72, 74-75. Specifically, those committed under ch. 51 were entitled periodic court reviews before their commitment could be continued. ***Id.*** at 75. By contrast, ch. 55 placements were

[3] This assumes, of course, that a ***Watts*** review must be held within one year of the previous review. It is conceivable, though neither party addresses it, that the annual hearing should instead be held by the anniversary of the initial placement order or hearing.

permanent and only annual reviews by the department were mandated. ***Id.*** at 75-76. Court reviews could be obtained, but were not automatic. ***Id.*** at 76.

¶7 The ***Watts*** court concluded that there was no rational basis for requiring mandatory court reviews under WIS. STAT. ch. 51, but not for WIS. STAT. ch. 55. ***Id.*** at 77. When choosing among possible solutions for this inequity, the court rejected the suggestion that it adopt verbatim the procedures found in ch. 51, noting that the distinction between the two chapters was significant enough that equal protection did not require precise equivalence. ***Id.*** at 83-84. The court instead held only that persons protectively placed under ch. 55 were entitled to annual reviews by a judicial officer.[4] ***Id.*** at 84-85.

¶8 Marilyn acknowledges that the ***Watts*** ruling was never codified in WIS. STAT. ch. 55. She nevertheless argues that the ***Watts*** decision articulates a mandatory statutory time limit, and therefore her competency challenge could not be waived, pursuant to ***Matthew S.*** She relies on the fact that the ***Watts*** court, when discussing the procedures to follow for the annual review hearings, made reference to WIS. STAT. § 55.06(6), which begins by stating that "[WIS. STAT. s]ection 880.33(2) applies to all hearings under this chapter …." *See* ***Watts***, 122 Wis. 2d at 85. She construes this reference as making the annual review requirement of ***Watts*** statutory, apparently because it suggests that the annual review hearing is a "hearing[] under [WIS. STAT. ch. 55]."

¶9 This court resolves the question of whether ***Mikrut*** or ***Matthew S.*** applies by acknowledging the simple fact that the annual review requirement of

[4] The court noted that a court commissioner could preside over the annual review hearings. ***Watts***, 122 Wis. 2d at 85.

Watts is not a *statutory* time limit. As Marilyn herself acknowledges, the ***Watts*** decision was never codified. No weight of polemic can make a supreme court ruling into a legislative enactment.

¶10 Aside from a failure to comply with mandatory statutory time limits, Marilyn is unable to point to any other context where the common law waiver rule has been avoided. Because the ***Watts*** rule is not a mandatory statutory time limit, this court applies the common law waiver rule articulated in ***Mikrut***. Therefore, Marilyn waived her right to challenge the circuit court's competency to proceed with her ***Watts*** review when she failed to raise the issue before that court. As a result, she has not preserved that claim for appeal.

¶11 Marilyn's second claim is that there was insufficient evidence to support continuing her protective placement. Specifically, she contends the County failed to prove the "dangerousness" element required by WIS. STAT. § 55.06(2)(c):

> As a result of developmental disabilities, infirmities of aging, chronic mental illness or other like incapacities, is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to oneself or others. Serious harm may be occasioned by overt acts or acts of omission ….

This court will uphold a circuit court's findings of fact unless unsupported by any credible evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998).

¶12 Marilyn is seventy years old and has significant mental health problems. Her thyroid gland has also been removed, requiring her to take daily thyroid medication. Although she walks with a cane and has been diagnosed with multiple sclerosis, she is able to move around without help.

¶13 The County's expert witness testified mostly about Marilyn's mental health problems. Marilyn has been diagnosed with paranoid schizophrenia and chronic paranoid personality disorder. She also exhibits the "inevitable deterioration of aging." Since being moved to a less restrictive setting known as Anna's House and taking a drug called Abilify, Marilyn's condition has improved. However, Marilyn denies the existence of her mental health problems. The expert witness testified that Marilyn "has not been able to get along on any independent basis whatsoever in recent years" and "she is not substantially capable of caring for herself." He also commented that Marilyn had short- and long-term memory problems, concentration and comprehension problems, and judgment problems. Marilyn did not contradict this expert's testimony with any expert testimony of her own.

¶14 Marilyn's guardian testified that Marilyn had refused to take medications in the past, before moving to Anna's House and being put on Abilify. Marilyn testified that, if she lived independently, she would take her thyroid medication, but she gave no indication that she would continue taking medication for schizophrenia.

¶15 The court could ultimately conclude that Marilyn was so totally incapable of caring for herself as to substantially risk self-harm. Her inability to self-medicate creates a substantial risk of harm to herself because it creates a substantial risk that, if Marilyn were living independently: she would stop taking her schizophrenia medication; her mental health would again worsen; and she would stop taking her thyroid medication. This risk of harm was further supported by the expert witness's uncontradicted conclusion that Marilyn was incapable of caring for herself.

By the Court.—Order affirmed.

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