COURT OF APPEALS
DECISION
DATED AND FILED

August 9, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP400-FT **Cir. Ct. No. 2011GN127**

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

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF DANIEL L. C.:

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

DANIEL L. C.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: PETER ANDERSON, Judge. *Order reversed; order affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Daniel L.C. appeals orders appointing a guardian and placing him under protective placement. The issue is whether the circuit court

lost competency to proceed because there was no proper waiver of Daniel's appearance at the hearing. We reverse the protective placement order because there was no proper waiver and the lack thereof caused the circuit court to lose competency. We affirm, however, the guardianship order because the applicable statute does not include the same requirements.

¶2 We first address the protective placement order. Daniel argues that the circuit court lacked competency because there was no proper waiver of his appearance at the hearing on the petition. His argument is based on WIS. STAT. § 55.10(2) (2009-10).[1] It provides in relevant part: "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 this case, the guardian ad litem made an oral statement to the court "asking the Court to waive" Daniel's appearance. In addition, Daniel's advocate counsel submitted a waiver of appearance signed by Daniel.

¶3 Daniel argues that this action by the guardian ad litem was insufficient to comply with the above statute because it was not a certification in writing and did not include specific reasons why Daniel was unable to attend. The county and guardian ad litem have filed a joint respondents' brief. They make several arguments.

¶4 The respondents do not appear to dispute that, on its face, the statutory language requires the attendance of the person to be protected unless

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

certain action is taken by the guardian ad litem. Nor do the respondents argue that the language is ambiguous in some respect. Nonetheless, they argue that Daniel's reading of the statute conflicts with legislative intent. They argue that the legislature intended only to make sure that a procedure exists for persons subject to petitions to attend the hearing if they choose to, and not to take away their right to decide whether to attend. The respondents argue that such individuals retain their rights as ordinary citizens, including, in this case, the right for Daniel to decide, with his advocate counsel, to waive the court appearance, regardless of whether the guardian ad litem agreed to waive it.

¶5 These arguments are not a sufficient basis to disregard the plain language of the statute. There is no reason to believe the legislature intended persons to be protected to have the final right to decide whether to attend the hearing. The respondents fail to recognize the inconsistency between their argument and the county's own petition. The petition alleges that Daniel is "incompetent" and "so totally incapable of providing for his … own care or custody as to create a substantial risk of serious harm to himself … or others." Even though the county alleges these grave incapacities, the respondents would have us interpret the statute in a way that assumes all persons to be protected, including Daniel, are competent when it comes time to decide whether to attend the hearing.

¶6 Instead, the statute assumes that the person to be protected might *not* be competent to decide whether to attend the hearing. Thus, the statute provides, as a default position, that the person must attend the hearing, but that the guardian ad litem can waive that appearance after considering specific factors set forth in the statute, and certifying that conclusion to the court in writing. This procedure results in a reasonable balance in which an expressed desire not to attend the

hearing will be heard and considered, and may be effectuated, but the final decision is not the person's.

¶7 The respondents next argue that a guardian ad litem's failure to certify the reasons for non-attendance by the person to be protected does not result in a loss of competency to proceed. This question has already been decided against the respondents in published case law that was cited by Daniel, but not addressed by the respondents. *See, e.g.,* ***Knight v. Milwaukee County***, 2002 WI App 194, ¶5, 256 Wis. 2d 1000, 651 N.W.2d 890 (under an earlier guardianship statute, trial court's failure to cause attendance of person deprived court of competency).

¶8 The respondents also argue that if the guardian ad litem's failure to certify the reasons for Daniel's non-attendance was error, it was harmless error. However, the respondents cite no authority holding that a circuit court's loss of competency to proceed can be held harmless.

¶9 The respondents next argue that Daniel's right to appeal on this issue was waived by his failure to raise the issue in circuit court. We agree with Daniel's reply that his failure to raise the issue at the hearing itself cannot be held a waiver. A conclusion contrary to the one we reach would have the effect of creating an additional means of waiving non-attendance, even though the statute provides only for waiver by the guardian ad litem.

¶10 Having said that, we question why Daniel did not first seek relief by filing a postdisposition motion in circuit court under WIS. STAT. RULE 809.30(2)(h). Postdisposition review of protective placement orders under WIS. STAT. ch. 55 proceeds under that rule, which also applies to criminal cases. RULE 809.30(1)(a). In criminal cases, a postconviction motion must be filed for all

issues other than sufficiency of the evidence or those previously raised. WIS. STAT. § 974.02(2). We are not aware of a similar statute or rule for non-criminal proceedings under RULE 809.30, but the general proposition still applies that issues should not be raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (superseded by statute on other grounds). Daniel is raising the circuit court's competency for the first time on appeal, but it appears he could have filed a postdisposition motion in circuit court raising that issue.

¶11 In this case, we have chosen to decide the issue rather than remand for a postdisposition motion. We do so because only questions of law are involved, and because the appeal has already been briefed, which means further proceedings in circuit court would only cause additional delay in the circuit court's ultimate determination of the petition. However, we do not want to leave the impression that we approve of this practice, or that we will not normally require the filing of a postdisposition motion to raise issues not previously raised.

¶12 Daniel also argues that the circuit court lost competency as to the guardianship proceeding under WIS. STAT. ch. 54. Unlike the protective placement statute, the parallel statute for guardianship cases does not include the requirement that the guardian ad litem waive the proposed ward's attendance in writing, with reasons. *See* WIS. STAT. § 54.44(4)(a). It states only that the petitioner shall ensure that the proposed ward attends the hearing "unless the attendance is waived by the guardian ad litem." That waiver occurred in this case.

¶13 Daniel further argues that the circumstances must show that the guardian ad litem's waiver is based on the proposed ward's inability to attend the hearing. However, the statute cannot reasonably be read to contain such a

requirement. Therefore, we affirm the guardianship order. However, the protective placement order is reversed due to loss of competency.

By the Court.—Order reversed; order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.