COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP795 **Cir. Ct. No. 2008GN29**

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

IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE PLACEMENT OF ANNA MAE Z.:

CONSTANCE N.,

PETITIONER-RESPONDENT,

V.

ANNA MAE Z.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Anna Mae Z. appeals orders placing her in a nursing home and appointing her daughter, Constance N., her permanent guardian.

Anna Mae argues the circuit court did not comply with the statutory requirements for granting Constance's placement and guardianship petitions. We affirm.

BACKGROUND

¶2 On July 3, 2008, Constance filed petitions seeking the permanent guardianship of Anna Mae and an order for her protective placement. The petitions alleged Anna Mae was incompetent due to a degenerative brain disorder, a diagnosis that stemmed from an incident in June 2008, when she was hospitalized after collapsing in her home. While in the hospital, Anna Mae was examined by Dr. Timothy Egan, who completed a report opining that she was mentally incompetent and in need of a guardian. One week later, Anna Mae was transferred to a nursing home to recuperate, where she has remained throughout these proceedings.

¶3 The court scheduled a hearing on the guardianship and placement petitions for August 7, 2008. At that hearing, Anna Mae informed the court she intended to obtain an independent evaluation from her own physician before proceeding. The parties agreed to schedule a contested hearing for September 17, 2008. At the September hearing, Anna Mae informed the court she had received a second evaluation, but did not yet have a copy of her doctor's report. She therefore asked the court for additional time to obtain the report. The court commenced the hearing as planned to permit Constance to present evidence, but agreed to defer its final decision to accommodate Anna Mae's request.

¶4 At the hearing, Dr. Egan testified that when he examined Anna Mae, "[I]t was my opinion … that she probably had some underlying dementia that was exacerbated by the declining physical condition." He also discussed a psychological report completed by Dr. Stanley Ferneyhough, which stated,

"Cognitively, [Anna Mae's] objective test results are consistent with the diagnosis of dementia." Egan further testified that based on his impressions of Anna Mae's cognitive abilities when he examined her, he did not believe she was able to make decisions about her care, manage her finances, or live independently. Constance also testified about Anna Mae's inability to care for herself, particularly her inability to manage her own finances and medication.

¶5 Anna Mae testified that she was capable of caring for herself. But she also told the court that if she could not return home, she would prefer to remain in the nursing home where she was making friends, rather than be placed in a less restrictive assisted living facility. The court granted Constance temporary guardianship over Anna Mae and ordered Anna Mae's temporary placement at the nursing home. It then scheduled a final hearing for October 13, 2008.

¶6 At the October hearing, Anna Mae's doctor did not testify. His report was entered into evidence, but only briefly mentioned during the hearing. Following the hearing, the circuit court found Anna Mae incompetent, primarily on the basis of Dr. Egan's and Constance's testimony, and appointed Constance as Anna Mae's permanent guardian. It also placed Anna Mae in the nursing home where she had been since her fall, citing her wishes to remain there. However, it also ordered Constance to continue looking for a less restrictive assisted living facility "provided the ward is willing."

DISCUSSION

¶7 On appeal, Anna Mae raises three issues. First, she argues the court lost competency to act on the petitions because it failed to comply with statutory time limits for holding hearings. This is a question of law that we review independently. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶7, 273

Wis. 2d 76, 681 N.W.2d 190. Second, she contends the court did not consider the statutory factors for appointing a guardian. Third, she argues the court did not comply with the statutory procedure for ordering protective placement. These issues require the interpretation and application of statutes to undisputed facts, questions of law also subject to our independent review. *See* ***WIREdata, Inc. v. Village of Sussex***, 2008 WI 69, ¶45, 310 Wis. 2d 397, 751 N.W.2d 736.

1. The Court's Competency

¶8 Anna Mae argues the court lost competence to act on the protective placement and guardianship petitions because it did not hold a hearing on them before September 1, 2008, sixty days from the date they were filed. We disagree.

a. The protective placement petition

¶9 Under WIS. STAT. § 55.10(1),[1] the circuit court must hold a hearing on a protective placement petition within sixty days after it is filed. However, the statute also permits the court to extend the time for a hearing by forty-five days upon the request of the petitioner, the individual sought to be protected, the individual's guardian ad litem, or the county department. ***Id.*** We conclude the court implicitly extended the time for a hearing here.

¶10 At the August 12, 2008 hearing—thirty-three days after the petition was filed—Anna Mae represented to the court she was not ready to proceed with the hearing, in part because she intended to seek a second opinion from her doctor. The court then rescheduled the hearing for September 17, well within the

[1] References to the Wisconsin Statutes are to the 2007-08 version.

forty-five-day extension period. Although none of the parties explicitly requested an extension of the sixty-day period, the record is clear that the court rescheduled the hearing to accommodate the parties and that they all agreed to the new date. The court's rescheduling was therefore a proper exercise of its authority to extend the deadline.

¶11 Further, at the September 17 hearing, Anna Mae specifically requested additional time to obtain her doctor's report. The court granted her request and held a final hearing on October 13, 2008—also within the forty-five-day extension period. *See* WIS. STAT. § 55.10(1). Because the court properly extended the time for a hearing, it did not lose its competency to act on the placement petition.

b. The guardianship petition

¶12 The guardianship statute also requires a court to hold a hearing within sixty days of the filing of "a petition for guardianship of an individual who was been admitted to a nursing home … under s. 50.06." WIS. STAT. § 54.44(1)(b). Unlike the protective placement statute, the guardianship statute does not provide for extensions. However, we conclude Anna Mae forfeited her objection to the court's competency to act on this petition.

¶13 Generally, "challenges to the circuit court's competency are waived if not raised in the circuit court …." ***Mikrut***, 273 Wis. 2d 76, ¶30. Here, not only did Anna Mae not raise her competency challenge in the circuit court, she contributed to the delay on which her challenge is based by representing to the court she could not proceed without more time to obtain her doctor's report. Nevertheless, Anna Mae argues that competency challenges based on the court's

failure to act within mandatory time limits cannot be waived, and her contribution to the delay is therefore immaterial. Again we disagree.

¶14 Anna Mae's argument relies on ***Sheboygan County Department of Social Services v. Matthew S.***, 2005 WI 84, 282 Wis. 2d 150, 698 N.W.2d 631, which held that a violation of the mandatory time limits for holding a hearing on a termination of parental rights petition could not be waived even though the issue was not raised in the circuit court. ***Id.***, ¶37. ***Matthew S.*** concluded that ***Mikrut***'s waiver rule did not extend to the violation of time limits in termination of parental rights proceedings, in part because the purpose of these deadlines is to protect the rights of children and parents. ***Id.***, ¶17. Because the child is not a party in a termination of rights proceeding, it makes sense to require strict adherence to time limits over which the child has no control.

¶15 That is not the case here. Unlike in ***Matthew S.***, it was solely Anna Mae's rights—not those of another person—that were affected by extending the deadline. Not only did she consent to the extensions, she indicated they were necessary for her to properly contest the petitions. As Constance points out, this presented the circuit court with the option to either grant Anna Mae extra time so that she could fully contest her petitions, or require her to proceed regardless of her ability to obtain her doctor's report. Because the court's time extensions were, in part, to accommodate Anna Mae's expressed needs, we conclude she may not now argue that these extensions deprived the court of its competency. *See* ***Shawn B. N. v. State***, 173 Wis. 2d 343, 372, 497 N.W.2d 141 (Ct. App. 1992) (we generally will not review invited error).

2. Statutory Factors

¶16 Anna Mae next argues the court did not consider the factors enumerated in WIS. STAT. § 54.10(3) for appointing a guardian. The record belies this assertion.

¶17 WISCONSIN STAT. § 54.10(3) permits the court to appoint a guardian only if it finds, among other things, the person is incompetent and cannot make essential health, safety and financial decisions. The statute then enumerates sixteen factors the court must consider. Here, the court specifically made these findings on a standard form GN-3170 (revised 04/08), entitled Determination and Order on Petition for Guardianship Due to Incompetency. This is a detailed form, adopted by the Judicial Conference pursuant to WIS. STAT. § 758.18, that includes the findings a court must make and the factors it must consider when appointing a guardian. The court's thorough completion of the standard guardianship form satisfies us that it properly considered the appropriate statutory factors for appointing a guardian.

¶18 Nevertheless, Anna Mae argues the evidence was insufficient to prove she was unable to care for herself. In particular, she contends the circuit court should have discounted Dr. Egan's testimony because he had not examined her since she was first admitted to the hospital. However, Egan's testimony was not the only evidence of Anna Mae's dementia and inability to care for herself. The court also relied on Dr. Ferneyhough's evaluation of Anna Mae—completed just nine days before the hearing—diagnosing her with dementia. In addition, Constance testified that Anna Mae had lost a significant amount of weight prior to her hospitalization and regularly failed to pay her bills and take her medication. A social worker at the nursing home likewise testified Anna Mae sometimes forgets

what she has just been doing. Finally, the court noted Anna Mae's own testimony "underscores her lack of insight and knowledge with respect to the medications, what they are and why she needs them." This evidence amply supports the court's conclusion that Anna Mae cannot make essential health, safety and financial decisions for herself.

3. Protective Placement

¶19 Finally, Anna Mae argues that the court did not comply with the statutory procedure for ordering protective placement. In particular, she contends the court failed to conduct the comprehensive evaluation required by WIS. STAT. § 55.11(1), and that the court erred because the nursing home in which it placed her was not the least restrictive option for her.

¶20 WISCONSIN STAT. § 55.11(1) specifies that a court must require "a comprehensive evaluation of the individual sought to be protected, if such an evaluation has not already been made." Here, after the court found Anna Mae met the criteria for placement under WIS. STAT. § 55.08, it was required to order a comprehensive evaluation to determine the appropriate conditions for her placement. However, the court did not order a comprehensive evaluation. Instead, it granted Anna Mae's request to stay at the nursing home. Anna Mae claims this was error because the court was required to place her "in the least restrictive manner consistent with the needs of the individual …." *See* WIS. STAT. § 55.12.

¶21 We conclude Anna Mae is judicially estopped from making this argument. Judicial estoppel is appropriate where (1) a party assumes a position that is clearly inconsistent with a position it took in an earlier proceeding; (2) the facts are the same in both cases; and (3) the party to be estopped convinced the

court to adopt its earlier position. ***Harrison v. LIRC***, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994). Here, the court did exactly what Anna Mae asked it to do when it placed her in the nursing home. She is therefore estopped from arguing now that this placement was improper.

By the Court.—Orders affirmed.

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