

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP527-FT

Cir. Ct. No. 2002GN21P

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF THE GUARDIANSHIP AND PROTECTIVE
PLACEMENT OF BARBARA B.:**

NORTH CENTRAL COMMUNITY SERVICES PROGRAM,

PETITIONER-RESPONDENT,

v.

BARBARA B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
VINCENT K. HOWARD, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Barbara B. appeals an order continuing her protective placement. Barbara argues the trial court erroneously shifted to her the burden to prove by clear and convincing evidence that she was no longer incompetent. She argues North Central Community Services Program had the burden and did not meet its burden. Barbara also argues there was insufficient evidence to prove she needed protective placement. We agree that the trial court erroneously shifted the burden. In addition, North Central did not produce sufficient evidence to prove Barbara's incompetence because no medical professional testified. Therefore we reverse and remand.

BACKGROUND

¶2 On May 24, 2006, a Petition for Annual Review was filed requesting the court review Barbara's protective placement. On June 21, Barbara's guardian ad litem requested a full due process hearing rather than a summary proceeding.

¶3 On September 1, 2006, the trial court held a due process hearing. Brenda Christian, the protective services coordinator for North Central, testified that she had not seen any recent evaluations indicating Barbara was now competent. Further, she believed Barbara's disability was permanent or likely to be permanent. Christian expressed concern over Barbara's ability to manage major expenses and to acquire and dispose of property without being taken advantage of. Christian also stated that Barbara would sometimes go for periods of time without bathing, did not remember to take her daily medication without help, and had problems keeping her apartment clean and sanitary.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 North Central and Barbara’s GAL both recommended that the protective placement be continued. North Central argued:

[T]here has been no proof offered that she is competent. There is no certification of competency, and the Court has found her incompetent in the past based on two doctor[s’] evaluations, and I have not seen any proof offered today that would indicate that anything has changed in terms of her competency.

Barbara argued North Central misstated the standard and the party asserting mental incompetence had the burden to prove it by clear and convincing evidence. Barbara stated North Central failed to produce evidence that she presently had a developmental disability or was incompetent and, even if incompetence had been proven, North Central failed to prove the necessity of protective placement.

¶5 The court found that Barbara carried “the burden to show that [she] is no longer incompetent....” It arrived at this conclusion by noting that pursuant to WIS. STAT. § 880.34 (2003-04), guardianship “shall continue during the lifetime of the incompetent, or until terminated by the court.” The court reasoned that “the proponent here has the right to rely upon that, that unless there is evidence to the contrary, the person still remains incompetent.” The court then ordered Barbara’s placement be continued, stating:

[B]ased upon the testimony that’s been presented here today, that there does continue to be need for residential care and custody due to the developmental disability of [Barbara B.]; that based upon the testimony here, especially of hygiene difficulties and care for her health—health needs without some sort of supervision, that there is a significant risk of harm to herself; that condition is permanent or likely to remain permanent based upon the fact that it has continued for at least the last four years....

The court then ordered Barbara’s protective placement continued.

DISCUSSION

¶6 A person subject to a protective placement order is entitled to have the status automatically and periodically reviewed. *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 84, 362 N.W.2d 104 (1985). An annual *Watts* review may consist of either a summary or a full due process hearing. *Id.* at 85. Upon request by the ward, the court must hold a full due process hearing which satisfies the requirements of WIS. STAT. § 55.06(6). *County of Dunn v. Goldie H.*, 2001 WI 102, ¶25, 245 Wis. 2d 538, 629 N.W.2d 189.

¶7 At the time of Barbara's review, the statute did not specify who had the burden of proof at a full due process review hearing. Barbara argues the trial court erroneously shifted the burden of proof to her to prove that she was no longer incompetent. Which party bears the burden of proof is a question of law that we review without deference. *Long v. Ardestani*, 2001 WI App 46, ¶36, 241 Wis. 2d 498, 624 N.W.2d 405.

¶8 While the trial court's analysis was resourceful and reasonable, North Central concedes that if the proceeding was a full due process proceeding, then, under *Watts*, it bore the burden of proof. This concession is appropriate. In order to initially appoint a guardian, the petitioner must prove incompetence by "clear and convincing evidence." WIS. STAT. § 880.33(4) (2003-04). The *Watts* court held that because the individual's incompetence may change, they were entitled to an annual review. *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 84, 362 N.W.2d 104 (1985). While *Watts* does not specifically say that the petitioner bears the burden of proving incompetence by clear and convincing evidence, it does indicate that the purpose of the full due process

hearing is to determine if the individual continues to meet the requirements for protective placement. *Id.* at 84-85. Thus, it would seem the burden should stay with the petitioner in order to prove the individual still meets the standard for protective placement.

¶9 This is supported by the current version of the statute. The recodification of Wisconsin's protective placement system was intended to codify *Watts*. 2005 Wis. Act 264, *Prefatory Note*, 1008-09. The new WIS. STAT. § 55.18(3)(d), which governs annual reviews, states that a due process hearing must meet the requirements of WIS. STAT. § 55.10(4). WISCONSIN STAT. § 55.10(4)(d) states the court must find by clear and convincing evidence all of the elements enumerated in WIS. STAT. § 55.08(1) including incompetence. *See* WIS. STAT. § 55.10(4)(d).

¶10 However, North Central attempts to circumvent the *Watts* requirements by casting Barbara's review hearing as a termination proceeding under WIS. STAT. § 880.34(1) (2003-04). There is no support for North Central's contention. It is clear from the record that the proceeding at issue was commenced via the annual review process, and that Barbara did in fact request a full due process hearing. Therefore, North Central had the burden of proof.

¶11 Because the proceeding was a full due process proceeding, we must determine whether North Central proved Barbara's incompetence and the other elements necessary to find Barbara needed protective placement by clear and convincing evidence. The elements of protective placement are questions of fact which we will not overturn unless clearly erroneous. *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). Whether North Central met

its burden of proof is a question of law we review without deference. See *Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1998).

¶12 In order to prove a need for protective placement, North Central had to prove (1) that Barbara had a “primary need for residential care and custody,” (2) had been “determined to be incompetent by a circuit court,”² (3) as a result of her incapacity, she was “so totally incapable of providing for [her] own care or custody as to create a substantial risk of serious harm to [herself] or others” and (4) she had a disability which was permanent or likely to be permanent. WIS. STAT. § 55.06(2) (2003-04).

¶13 Christian and Diane Korzinek, the residential coordinator of Barbara’s apartment complex, both testified to Barbara’s need for assistance to maintain her apartment, health, and hygiene. Christian testified that Barbara does not have the ability to manage her money to the extent that she would be able to independently find a place to live and pay her bills. Barbara also required assistance to keep her apartment clean and take her daily medication. Therefore, North Central proved that she had a primary need for protective placement.

¶14 However, North Central did not produce sufficient evidence to prove Barbara’s incompetence. Barbara’s competency had been evaluated by a doctor in 2002 and re-evaluated in 2004 during the course of an earlier *Watts* proceeding. At the proceeding at issue, Christian testified that Barbara’s condition had not

² The language of the statute is somewhat confusing; it suggests that it is sufficient to prove that the individual was at some time proven incompetent. This is inconsistent with the purpose of a *Watts* review, to determine whether the individual continues to meet the requirements for protective placement. *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 85, 362 N.W.2d 104 (1985). The trial court must therefore find the ward continues to be incompetent at a *Watts* review.

changed. However, no medical professional testified regarding Barbara's alleged disability or incompetence. In a contested guardianship proceeding, the county cannot rely on a written report to prove incompetence. *See R.S. v. Milwaukee County*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991).³ Because Barbara had a right to cross-examine witnesses, North Central could not carry its burden of proof without in-person testimony from someone qualified to speak to Barbara's incompetence. *Id.* at 199-200. Incompetence implies a medical component, therefore the witness would have to be qualified to give a psychological or medical opinion regarding Barbara's diagnosis. *Id.* at 210, n.10. There is no indication Christian was qualified to do so. Therefore, North Central failed to prove Barbara's incompetence.

¶15 Barbara also argues North Central did not produce sufficient evidence to show she posed a risk of harm to herself. However, Christian testified that Barbara had a history of abusive relationships with men which posed an ongoing risk of physical and mental harm. Christian further testified that Barbara required help to ensure that she attended to her personal hygiene, took her medication on a daily basis and maintained a clean and sanitary place to live. This is sufficient to prove that Barbara was unable to care for herself to the extent where she created a substantial risk of serious harm to herself.

³ *R.S. v. Milwaukee County*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991), involves an original determination of incompetence. However, as noted above, the purpose of the full due process hearing is to determine if the individual continues to meet the requirements for protective placement. *Watts*, 122 Wis. 2d at 85.

Barbara contended that *R.S.* required contemporary medical testimony at the due process hearing. North Central did not address this argument and thus it is deemed conceded. *See Charolais Breeding Ranches, Ltd. v. PFC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶16 Finally, Barbara argues North Central did not produce sufficient evidence to show Barbara's disability was permanent or likely to be permanent. Christian testified that based on her observations, Barbara's disability appeared permanent, and she had not seen any evaluations that led her to believe Barbara's condition had changed or improved. However, no medical professional testified regarding what if any disability Barbara actually has. Thus, Christian's testimony is not sufficient and we must reverse the order for continued placement under WIS. STAT. ch. 55.

By the Court.—Order reversed and cause remanded with directions.

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

