STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP000533

In the matter of the mental commitment of M.A.C.:
WAUKESHA COUNTY,

Petitioner-Respondent,

v.

M.A.C.,

Respondent-Appellant-Petitioner.

Appeal from an Order of Recommitment and an Order for Involuntary Medication and Treatment, entered by the Waukesha County Circuit Court, the Honorable Laura F. Lau, Presiding

---

BRIEF OF RESPONDENT-APPELLANT-PETITIONER

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-3440
marionc@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ISSUES PRESENTED

The County filed a petition for recommitment and for an order authorizing involuntary medication and treatment. At the time, Melissa[1] was believed to be homeless. The County did not notify her of the proceedings, and the court-appointed examiners did not personally examine her. Having no notice of the hearing, Melissa did not appear at the hearing. The circuit court found Melissa in default, and entered a recommitment order and order authorizing involuntary medication and treatment.[2]

1. Whether Melissa was deprived of her right to notice of the recommitment and involuntary medication proceedings.

The circuit court determined that the County met its notice obligation by giving notice to the attorney appointed to represent Melissa.

The court of appeals affirmed based on *Waukesha Cty v. S.L.L.*, 2019 WI 66, 387 Wis. 2d 333,

[1] M.A.C. is referred to by the pseudonym "Melissa" in order to preserve confidentiality while promoting readability. *See* Wis. Stat. § 809.19(1)(g).

[2] The orders have expired; however, Melissa asserts that the appeal is not moot given collateral consequences, including a restriction on firearm ownership and liability for costs of care. *See Sauk Cty v. S.A.M.*, 2022 WI 46, ¶23, 402 Wis. 2d 379, 975 N.W.2d 162. The County did not argue the appeal was moot and the court of appeals did not find the appeal was moot.

929 N.W.2d 140. *See Waukesha Cty v. M.A.C.*, No. 2023AP533, unpublished slip op., ¶13 (Wis. App. Jul. 28, 2023). (App.9). *S.L.L.* held that indirect notice through an individual's attorney was sufficient. *S.L.L.*, 387 Wis. 2d 333, ¶¶27-28.

This Court should reverse and vacate the orders.

2. Whether the court erred by defaulting Melissa and entering a commitment order and involuntary medication and treatment order.

Based on her nonappearance at the final hearing, the circuit court found Melissa in default and entered the orders.

The court of appeals affirmed, based on *S.L.L. M.A.C.*, No. 2023AP533, unpublished slip op., ¶¶15-16. (App.10-11). *S.L.L.* upheld default judgment where the individual did not appear at the recommitment hearing. *S.L.L.*, 387 Wis. 2d 333, ¶43.

This Court should reverse and vacate the orders.

3. Whether the County could not prove that Melissa was incompetent to exercise informed consent where it could not prove that she received an explanation of the advantages, disadvantages, and alternatives to medication and treatment, as required by Wis. Stat. § 51.61(1)(g)4.

The circuit court determined that Melissa was not competent to make her own treatment decisions

and entered an order authorizing involuntary medication and treatment.

The court of appeals determined that Melissa forfeited her right to contest the order and affirmed.

This Court should reverse and vacate the order.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Publication of decisions is customary for this Court. Oral argument is scheduled for March 20, 2024 at 9:45 am.

SUMMARY OF ARGUMENT

At the time the County filed its petition to recommit and involuntarily treat Melissa, the County was not in communication with her, and she was believed to be homeless. The County did not serve Melissa with the petition. Notice of the hearing was later provided to the State Public Defender (SPD), who then appointed counsel for the recommitment hearing. Melissa did not appear at the hearing. Counsel stated that she had not been able to establish contact with Melissa. The circuit court defaulted Melissa on the order of recommitment and order for involuntary medication and treatment without requiring the County to prove its case. The consequence was that the County could subsequently detain and inject Melissa with unwanted medication without first giving her

notice or a meaningful opportunity to be heard through a judicial proceeding.

This Court is asked to issue three holdings:

First, Melissa was entitled to notice of the proceedings. She had a right to notice of the recommitment proceeding pursuant to Wis. Stat. § 51.20(10)(a). Separately, she had a right to notice of the involuntary medication and treatment proceeding pursuant to Wis. Stat. § 51.61(1)(g)3. Finally, her right to notice was ensured by the Fourteenth Amendment's Due Process Clause.

Second, default judgment is not available in commitment proceedings or involuntary medication and treatment proceedings. Sections 51.20 and 51.61 do not contain default provisions, and the civil default statute, Wis. Stat. § 806.02, does not apply.

Third, even if this Court finds that a court can default an individual in an involuntary medication and treatment proceeding, the County could still not obtain an order for involuntary medication and treatment in this case because Melissa did not receive an explanation of the advantages, disadvantages, and alternatives to medication and treatment, as required by Wis. Stat. § 51.61(1)(g)4. Absent this discussion, the County could not prove that Melissa was incompetent to exercise informed consent.

Melissa acknowledges that this Court is not writing on a blank slate. *S.L.L.* held that an individual was not entitled to personal notice of a recommitment

hearing and could be defaulted for nonappearance. *S.L.L.*, 387 Wis. 2d 333, ¶¶28, 43. However, the case was wrongly decided and results in grave injustice to individuals with mental illness who are being detained and involuntarily medicated in violation of their statutory rights and without due process of law.

STATEMENT OF THE CASE AND FACTS

On July 19, 2022, Waukesha County filed a combined Evaluation and Recommendation Regarding Recommitment and Petition for Recommitment. (R.69). In the Petition, the County asserted that Melissa was homeless, and the County requested that documents be sent to her case worker—a County employee. (R.69:1). Attached to the petition was a "Department Extension of Commitment[3] Report," by case worker Danielle Weber. (R.69:2-8). Ms. Weber's report stated that Melissa was diagnosed with schizoaffective disorder. (R.69:2). She was prescribed an intramuscular injection of Abilify Maintena, as well as Depakote and Gabapentin. (R.69:2).

On July 19, 2022, the circuit court entered an order appointing Dr. Cary Kohlenberg and Dr. Peter Piering to evaluate Melissa. (R.71:1). The order stated that Melissa was located at: "Homeless, please send documents to her Case Manager." (R.71:1). On the same date, the court also issued a Notice of Hearing,

[3] Chapter 51 indifferently uses "recommitment" and "extension of a commitment." *See Portage Cty. v. J.W.K.*, 2019 WI 54, ¶ 1 n.1, 386 Wis. 2d 672, 927 N.W.2d 509.

which listed Melissa as homeless. (R.71:1). The hearing notice provided the examiners' names and phone numbers. (R.71:1). The distribution list included corporation counsel, Melissa, and Ms. Weber. (R.71:1). The address section next to Melissa's name was left blank. (R.71:1).

The hearing notice stated that, "[a]n attorney will be appointed to represent you," and provided the local SPD phone number. (R.70:1). On July 21, 2022, the SPD entered an "Order Appointing Counsel," indicating that Attorney Maura McMahon had been appointed to represent Melissa for purposes of the recommitment proceeding. (R.72).

On August 10, 2022, Dr. Cary Kohlenberg filed a report containing pre-printed text indicating that, "I have by personal examination and inquiry satisfied myself as to the mental condition of [Melissa] and the results of the examination are contained herein." (R.74:1). However, Dr. Kohlenberg acknowledged that he did not, in fact, personally examine Melissa. (R.74:1). Instead, he spoke with Ms. Weber and reviewed collateral information, including Ms. Weber's report and prior examiner evaluations from 2020 and 2021. (R.74:2). Dr. Kohlenberg asserted that Melissa had a mental health history dating back to 2005. (R.74:2). He stated that she was hospitalized in 2020 for delusional thoughts and suicidality, after having been off of medication for some time. (R.74:2). She was involuntarily committed, and discharged to outpatient care shortly thereafter. (R.74:2).

Subsequently, she had periods of treatment noncompliance and time spent inpatient. (R.74:2).

According to Dr. Kohlenberg, over the previous year of commitment, Melissa had struggled with mental health symptoms. (R.74:2). She was allegedly making inappropriate 911 calls. (R.74:2). On occasion, Melissa missed appointments, and sheriff's deputies detained her and brought her to the Department for medication injections. (R.74:2). Dr. Kohlenberg concluded that Melissa was mentally ill and dangerous under the Wis. Stat. § 51.20(1)(am) recommitment standard because if treatment were withdrawn, she would meet the "standards a. and e." of dangerousness. (R.74:4-5).[4]

In the section of the evaluation that questions, "what particular medication(s) or treatment(s)" were discussed with the individual, Dr. Kohlenberg wrote "N/A." (R.74:5). He also wrote "N/A" in response to the question about which advantages, disadvantages and alternatives to medication or treatment discussed with the individual. He wrote "N/A" regarding whether the individual held any false beliefs about medication and whether they were incapable of expressing an understanding of the advantages, disadvantages and alternatives to medication. (R.74:5). Despite the lack of personal examination, Dr. Kohlenberg opined that Melissa was substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to medication or treatment in order to

[4] *See* Wis. Stat. §§ 51.20(1)(a)2.a. & e.

make an informed choice about whether to accept or refuse medication. (R.74:5-6).

On August 12, 2022, Dr. Piering filed an examiner's report. (R.75). He stated Melissa "could not be contacted" for the examination. (R.75:1). He did not indicate what collateral information he consulted in order to complete his evaluation. Dr. Piering asserted that, during the past year, Melissa had been using 911 inappropriately and reporting "feelings of Waukesha County trying to control people through medications." (R.75:1). He stated that she had no-showed for medication on two occasions. (R.75:1). Dr. Piering also described more dated information, including that Melissa had been the victim of domestic violence in 2020, and was charged with disorderly conduct, bail jumping, and mail theft, also in 2020. (R.75:2). At some unspecified point in the past, she was hospitalized for suicidal behavior and unspecified homicidal statements. (R.75:2).

Dr. Piering concluded that Melissa was mentally ill and dangerous under the first through fourth and recommitment standards. *See* Wis. Stat. § 51.20(1)(a)2.a.-d.; Wis. Stat. § 51.20(1)(am). (R.75:3-4). He acknowledged that he had not discussed medication with Melissa (R.75:5). As to whether Melissa understood the advantages, disadvantages, and alternatives to medication, he wrote "N/A." (R.75:5). Despite not personally examining Melissa, he opined that she was substantially incapable of applying an understanding of the advantages, disadvantages and alternatives of medication in order

to make an informed choice about whether to accept or refuse medication. (R.75:5).

On August 16, 2022, the court held hearing on the recommitment petition. (R.104; App.21-28). Attorney McMahon appeared. Melissa did not. Counsel informed the court that she "appears on behalf of [Melissa]." (R.104:2; App.22). Counsel explained that she had not been able to reach Melissa and did not have an explanation for why she was not present. Counsel was aware, however, that Melissa had recently witnessed a highly traumatic event resulting in significant injury to and hospitalization of her significant other. She had been seen at the hospital visiting him. (R. 104:2; App.22). Counsel indicated that she believed Ms. Weber had also been trying to find Melissa, "and she seems to have been at various places and doing okay." (R. 104:2; App.22.).

The County suggested two options for how to proceed. One option would be to order Melissa into custody. (R.104:3; App.23). The other option, which the County endorsed, was to find Melissa in default. (R.104:3; App.23). The County stated that "the 5142 Board knows that Melissa is present in Waukesha County, and the 5142 Board has been able to provide services including her outpatient injection to Melissa." (R.104:3; App.23). The County stated, "I don't think it would be in her best interests regarding her treatment to take her into custody to an inpatient." (R.104:3; App.23).

The County acknowledged that, "by finding her in default, this Court is giving up the rights that she has," but stated because her attorney received notice of the hearing, Melissa had been properly noticed under "*S.L.L.*"[5] (R.104:3; App.23). The County asked the court to rely upon the examiner reports as grounds for a twelve-month recommitment order and involuntary medication order. (R. 104:3, 4-5; App.23, 24-25). Melissa's counsel responded that she had no direction from Melissa on how to proceed. She believed Melissa had cooperated with getting her shot and would not want to be in custody. (R.104:3-4; App.23-24). She stated that she was not in a position to object. (R.104:5; App.25).

The court stated that, "[Melissa] appeared today by counsel," but "[b]ased upon her having been properly noticed for the hearing, the court will find her in default." (R.104:4; App.24). The court concluded that, "[b]ased upon the doctors' reports and [Melissa]'s failure to appear today. . . there are grounds for extension of commitment." (R.104:5; App.25). The court found that there was, "[a] substantial probability of physical impairment or injury to herself due to impaired judgment. . . And this is manifested or shown by a substantial likelihood based on her treatment record that she would be a proper subject for commitment if treatment were withdrawn."[6] (R.104:5-6; App.25-26).

---

[5] *S.L.L.*, 387 Wis. 2d 333.

[6] *See* Wis. Stat. §§ 51.20(1)(am) & (1)(a)2.c.

The court also found grounds for an involuntary medication and treatment order. It found that, "[t]he advantages, disadvantages, and alternatives to medication have been explained to her, however, due to mental illness, she is not competent to refuse psychotropic medication or treatment," further finding that "she is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives of her condition in order to make an informed choice as to whether to accept or refuse psychotropic medication." (R.104:6-7; App.26-27).

Written orders of Extension of Commitment and Involuntary Medication and Treatment were entered accordingly. (R. 81; App.17-19) (R.82; App.20).

By decision and order dated July 28, 2023, the court of appeals affirmed. *M.A.C.*, No. 2023AP533, unpublished slip op. (App.3-16). The court of appeals rejected Melissa's argument that she was entitled to personal notice of the recommitment hearing pursuant to Wis. Stat. § 51.20(10)(a). *Id.*, ¶¶12-14. (App.8-10). The court of appeals held that it was "bound by *S.L.L.*," where "our supreme court determined that service of the recommitment hearing notice on the subject's lawyer complied with the statutes and that using indirect service methods did not violate due process . . ." *Id.*, ¶13. (App.9) (citing *S.L.L.*, 387 Wis. 2d 333, ¶¶26-30 & n.18).

The court of appeals also rejected Melissa's argument that, because she appeared by counsel, she could not be defaulted. *Id.*, ¶¶15-16 (App.10-11). It

again relied on *S.L.L.*, stating that, "[a]lthough M.A.C. presents the issue a bit differently because she claims that the presence of her lawyer on her behalf precludes granting default judgment against her, this does not eliminate the controlling determination in *S.L.L.*" *Id.*, ¶16. (App.10-11). The court of appeals also stated that "although M.A.C.'s lawyer 'appeared' in the sense that she attended the hearing (just as S.L.L.'s lawyer had), M.A.C.'s lawyer told the circuit court that she had not spoken with M.A.C. . . ." *Id.*

Next, the court of appeals rejected Melissa's argument that the evidence was insufficient to support the orders. *Id.*, ¶¶17-23. (App.11-15). It held that the circuit court properly relied on the doctors' reports because Melissa's attorney did not object. *Id.*, ¶¶20-21. (App.12-14). Therefore, the court of appeals found that Melissa forfeited the right to challenge the evidence on appeal. *Id.*, ¶22. (App.14).

Finally, in a footnote, the court of appeals rejected Melissa's argument that the County failed to prove that she was incompetent to refuse medication, and that she did not and could not forfeit her right to an explanation of the advantages, disadvantages, and alternatives to medication and treatment. *Id.*, ¶20 n.8. (App.13). The court of appeals found that Melissa forfeited her right to challenge the order because "M.A.C.'s appointed lawyer did not object, did not contest, and took no position on the recommitment petition or the request for the medications order." *Id.* It additionally faulted Melissa for having "failed to

provide her address, telephone number, or any other method to contact her." (*Id.*). Melissa appeals.

ARGUMENT

I. Melissa was denied her right to notice of the recommitment and involuntary medication proceedings.

A. Standards of review.

Factual findings by the circuit court will be upheld unless clearly erroneous. *Waukesha Cty. v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783.

Statutory construction is a question of law, subject to de novo review. *Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156.

Due process determinations are questions of law, subject to de novo review. *State v. Aufderhaar*, 2005 WI 108, ¶ 10, 283 Wis. 2d 336, 700 N.W.2d 4.

There must be special justification to overturn precedent. *State v. Johnson*, 2023 WI 39, ¶19, 407 Wis. 2d 195, 990 N.W.2d 174. This Court has identified five special justifications: (1) the law has changed in a way that undermines the prior decision's rationale; (2) there is a "need to make a decision correspond to newly ascertained facts;" (3) precedent "has become detrimental to coherence and consistency in the law;" (4) the decision is "unsound in principle;" or (5) the decision is "unworkable in practice." *Id.*, ¶20.

B. Principles of statutory construction.

Statutory interpretation begins with the language of the statute, and if the meaning of the statute is plain, the Court ordinarily stops the inquiry. *State ex rel. Kalal v. Circuit Court for Dane Cty*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id*.

"Context is important to meaning." *Id*., ¶46. "So, too, is the structure of the statute in which the operative language appears. Therefore, statutory 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*. "Statutes are read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* The purpose of the statute is relevant to a plain-meaning interpretation. *Id*., ¶48.

If this process reveals a plain statutory meaning, there is no ambiguity; the statue is applied according to its meaning. *Id*. There is no need to consult extrinsic sources such as legislative history. *Id*. If a statute is ambiguous, extrinsic sources may be consulted. *Id*. The test for ambiguity is where a statute "is capable of being understood by reasonably well-informed persons in two or more senses." *Id*., ¶47.

Courts make "every effort to construe a statute consistent with the constitution." *Vincent v. Voight*, 2000 WI 93, ¶54, 236 Wis. 2d 588, 614 N.W.2d 388.

C. Melissa had a right to notice of the recommitment proceeding, pursuant to Wis. Stat. § 51.20(10)(a).

The County was required to serve Melissa with notice of the recommitment proceeding pursuant to Wis. Stat. § 51.20(10)(a). As will be demonstrated, while *S.L.L.* reached a different conclusion, its discussion of this statute was unsound in principle, and should be overturned.[7]

Under Wis. Stat. § 51.20(10)(a):

> (a) *Within a reasonable time prior to the final hearing, the petitioner's counsel shall notify the subject individual and his or her counsel of the time and place of final hearing.* The court may designate additional persons to receive notice of the time and place of the final hearing. Within a reasonable time prior to the final hearing, each

[7] *S.L.L.* did not comprehensively apply the framework for statutory construction set forth in *Kalal*, 271 Wis. 2d 633, instead briefly citing the case in two footnotes. *See S.L.L.*, 387 Wis. 2d 33, ¶18 n9, ¶28 n17. A decision is unsound in principle if it engages in a flawed statutory interpretation. *See e.g. Manitowoc Company, Inc. v. Lanning*, 2018 WI 6, 379 Wis. 2d 189, 906 N.W.2d 130 (R.G. Bradley, J., concurring) (failure to apply *Kalal* framework resulted in unsound statutory interpretation). Most significantly, as will be shown, the decision did not consider the context of the provisions within the whole of section 51.20. *See Kalal*, 271 Wis. 2d 633, ¶46.

> party shall notify all other parties of all witnesses he or she intends to call at the hearing and of the substance of their proposed testimony. The provision of notice of potential witnesses shall not bar either party from presenting a witness at the final hearing whose name was not in the notice unless the presentation of the witness without notice is prejudicial to the opposing party.

Wis. Stat. § 51.20(10)(a)(emphasis added).

This provision expressly applies to recommitment hearings under Wis. Stat. § 51.20(13)(g)3., which states, "[u]pon application for extension of a commitment by the department or the county department having custody of the subject, the court shall proceed under subs. (10) to (13)."

When interpreted in relation to surrounding statutory provisions, Wis. Stat. § 51.20(10)(a) indicates that Melissa was entitled to actual notice of the recommitment proceeding. The language of the provision is unambiguous. Again, it states that "the petitioner's counsel shall notify the subject individual *and* his or her counsel of the time and place of final hearing." (emphasis added). If the Legislature had determined that notice to counsel was sufficient, it would have used the word "or" instead of "and." "Statutes are read where possible to give reasonable effect to every word. . . ." *Kalal*, 271 Wis. 2d 633, ¶44.

S.L.L. concluded that indirect notice through counsel is sufficient, but this conclusion was erroneously reached. *S.L.L.* involved very similar facts

to this case. The County sought to recommit S.L.L., who was believed to be homeless. *S.L.L.*, 387 Wis. 2d 33, ¶6. A hearing notice was mailed to a homeless shelter where S.L.L. had previously stayed but was no longer permitted to reside, and the letter came back as undeliverable. *Id.* S.L.L. did not appear at the commitment hearing. *Id.*, ¶7. The County asked the court to issue a "capias," which would toll the commitment. *Id. See* Wis. Stat. § 51.20(10)(d) (authorizing detention order). The court instead defaulted S.L.L., entering a commitment order and order for involuntary medication and treatment. *Id.*

On appeal, S.L.L. argued that the court lacked personal jurisdiction over her because she was not served with the petition or notice of hearing. *Id.*, ¶¶17-19. She asserted that she was entitled to personal service under Wis. Stat. § 51.20(2)(b), and because she was not served, the court improperly entered a default judgment when she did not appear. *Id.*, ¶26. [8]

[8] Subdivision 51.20(2)(b) states:

> If the subject individual is to be detained, a law enforcement officer *shall present the subject individual with a notice of hearing, a copy of the petition and detention order and a written statement of the individual's right to an attorney, a jury trial* if requested more than 48 hours prior to the final hearing, the standard upon which he or she may be committed under this section and the right to a hearing to determine probable cause for commitment within 72 hours after the individual is taken into custody under s. 51.15, excluding Saturdays, Sundays and legal holidays.

S.L.L. held that jurisdiction was established when the original commitment petition was personally served, as required by Wis. Stat. § 51.20(2)(b). *Id*., ¶21. It further held that Wis. Stat. § 51.20(2)(b)'s personal service requirement only applies to original commitments, not recommitments. *Id*., ¶27. Instead of Wis. Stat. § 51.20(2)(b), the court determined that civil statute Wis. Stat. § 801.14 applied, which directs service on the attorney when a party is represented by

---

> The officer shall orally inform the individual that he or she is being detained as the result of a petition and detention order issued under this chapter. If the individual is not to be detained, the law enforcement officer *shall serve these documents on the subject individual and shall also orally inform the individual of these rights*. *The individual who is the subject of the petition, his or her counsel and, if the individual is a minor, his or her parent or guardian, if known, shall receive notice of all proceedings under this section*. The court may also designate other persons to receive notices of hearings and rights under this chapter. Any such notice may be given by telephone. The person giving telephone notice shall place in the case file a signed statement of the time notice was given and the person to whom he or she spoke. *The notice of time and place of a hearing shall be served personally on the subject of the petition*, and his or her attorney, within a reasonable time prior to the hearing to determine probable cause for commitment.

Wis. Stat. § 51.20(2)(b) (emphasis added).

counsel. Wis. Stat. § 801.14(2).[9] Finally, *S.L.L.* held that default judgment was permitted under Wis. Stat. § 806.02(5), as discussed in additional detail below. *S.L.L.*, 387 Wis. 2d 333, ¶43.

When considering Wis. Stat. § 51.20(10)(a), *S.L.L.* acknowledged that the statute says "the petitioner's counsel shall notify the subject individual *and* his or her counsel of the time and place of the final hearing." *S.L.L.*, 387 Wis. 2d 33, ¶ 27 n18 (emphasis added). However, the court concluded that "there are many ways one may provide notice" and the statute did not require "personal service of a document"—pointing to the notice provisions in Wis. Stat. § 801.14(2). *Id*. Yet, even if there are "many ways one may provide notice" in a general civil case, *here*, the Legislature designated a *specific* way to provide notice—to "the subject individual *and* his or her counsel" Wis. Stat. § 51.20(10)(a) (emphasis added).

In context, "notice" under Wis. Stat. § 51.20(10)(a) is personal service. Subdivision 51.20(10)(a) uses the term "notice" without further specificity. However, consultation of other provisions in the section reveals that notice means service. *See Kalal*, 271 Wis. 2d 633, ¶46 (statutory language is interpreted in in relation to surrounding statutes). What constitutes "notice" to the individual is defined

[9] The Court relied on Wis. Stat. § 51.20(10)(c), which states, "[e]xcept as otherwise provided in this chapter, the rules of evidence in civil actions and s. 801.01(2) apply to any judicial proceeding or hearing under this chapter."

in Wis. Stat. § 51.20(2)(b). The subdivision permits notice to certain other parties to be made by phone. Wis. Stat. § 51.20(2)(b). But as to the individual it is clear: notice must be "served personally on the subject." *See* Wis. Stat. § 51.20(2)(b).

Melissa acknowledges that *S.L.L.* concluded that Wis. Stat. § 51.20(2)(b) only applies to original commitment proceedings, not recommitment proceedings. *S.L.L.*, 387 Wis. 2d 33, ¶27. As discussed next, this conclusion was unsound. However, even if it is accepted that Wis. Stat. § 51.20(2)(b) does not directly apply to recommitments, it is still relevant to defining the form of notice of Wis. Stat. § 51.20(10)(a) because it is a closely-related provision located in the same section. *See Kalal*, 271 Wis. 2d 633, ¶46 (statutes are interpreted "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes").

Alternatively, *S.L.L.* was wrong in its conclusion that Wis. Stat. § 51.20(2)(b) does not apply to recommitments, for the reasons set forth persuasively in the dissent. *S.L.L.*, 387 Wis. 2d 33, ¶56 (A.W. Bradley, J dissenting). *S.L.L.* concluded that Wis. Stat. § 51.20(2)(b) does not apply to recommitment proceedings due to Wis. Stat. § 51.20(13)(g)3., which provides: Upon application for extension of a commitment by the department or the county department having custody of the subject, the *court shall proceed under subs. (10) to (13)*…." (emphasis added).

S.L.L. implied that this means *only* subs. (10)-(13) apply. *Id.*, ¶27. Yet, this language is just a clarification that the hearing rights apply to the recommitment hearing. In fact, Wis. Stat. § 51.20(13)(g)3 itself references other subsections, including Wis. Stat. § 51.20(1)(am) (the recommitment standard). More generally, other provisions of Wis. Stat. § 51.20 unambiguously apply. For example, Wis. Stat. § 51.20(1) sets forth the substantive criteria for commitment, including the recommitment standard. In addition, Wis. Stat. § 51.20(5) sets forth the "hearing requirements" that are "required to be held *under this chapter* …". (emphasis added). Subsection 51.20(3) contains the process for appointment of counsel.

Indirect notice through counsel of a recommitment proceeding is not only an incorrect interpretation of the law, it is also unworkable in practice. *See Johnson*, 407 Wis. 2d 195, ¶¶19-20 (one special justification for overturning precedent is when the rule is "unworkable in practice"). When a petition is filed, the court refers the individual to the SPD for appointment of counsel.[10] *See* Wis. Stat. § 51.20(3).[11] The SPD is directed to appoint counsel without doing an eligibility determination. Wis. Stat. § 51.20(3).

[10] It is not clear how the court can refer an individual who has not been notified of the proceeding.

[11] Here, the County filed the petition for recommitment on July 19, 2022 (R.69); the hearing notice went out the same day (R.71); and counsel was not appointed until July 21, 2022. (R.70).

Given that an eligibility determination is not required, appointment of counsel will occur even if the SPD does not have contact with the individual. Yet the individual still has the right to self-representation or counsel of choice.[12] It is untenable to permit indirect service through an attorney with whom the individual has never consulted.[13]

The County did not serve Melissa with the proceedings. This violated Wis. Stat. § 51.20(10)(a). Having had no notice, Melissa was not at the recommitment and hearing and lost her fundamental constitutional rights without notice or an opportunity to be heard.

D. Melissa had a right to notice of the involuntary medication and treatment proceeding, pursuant to Wis. Stat. § 51.61(1)(g)3.

---

[12] *See* Wis. Stat. § 51.60(3) ("an individual subject to proceedings under this chapter is entitled to retain counsel of his or her own choosing at his or her own expense"); *Eau Claire Cty v. S.Y.*, 162 Wis. 2d 320, 329, 469 N.W.2d 836 (1991) (individual has constitutional right to self-representation in 51.20).

[13] Then, SPD becomes responsible for notifying the individual, when the Legislature explicitly placed that responsibility on the petitioner. *See* Wis. Stat. § 51.20(10)(a) ("petitioner's counsel shall notify the subject individual and his or her counsel of the time and place of final hearing"). In general, the County should be in a better position to serve the individual as they should have an ongoing treatment relationship with the individual, whereas appointed counsel will be new to the case.

Melissa had a separate statutory right to notice of the involuntary medication and treatment proceeding. Following a final commitment hearing, the County may move for an involuntary medication order. Wis. Stat. § 51.61(1)(g)3. Involuntary commitment and medication petitions are commonly heard at the same hearing. Yet, while Wis. Stat. § 51.20 governs the commitment proceeding, Wis. Stat. § 51.61 governs the involuntary medication and treatment proceeding. Section 51.61 is titled "Patients rights."

Subdivision 51.61(1)(g)3. sets forth the procedure for filing a motion for involuntary medication and treatment. This provision indicates that the court may enter the order only after giving notice to three parties: the individual's counsel (if any); the individual; and corporation counsel:

> Following a final commitment order, other than for a subject individual who is determined to meet the commitment standard under s. 51.20 (1) (a) 2. e., have the right to exercise informed consent with regard to all medication and treatment unless the committing court or the court in the county in which the individual is located, within 10 days after the filing of the motion of any interested person *and with notice of the motion to the individual's counsel, if any, the individual and the applicable counsel under s. 51.20 (4)*,[14] makes a determination, following a hearing, that the individual is not competent to refuse medication

[14] This statute assigns public representation to corporation counsel.

> or treatment or … the medication or treatment is necessary to prevent serious physical harm to the individual or others...

Wis. Stat. § 51.61(1)(g)3. (emphasis added).

Under the plain language of this statute, notice was required to be given to Melissa *and* her attorney, if any. It is undisputed that the County did not notify Melissa of the involuntary medication and treatment proceeding. This violated Wis. Stat. § 51.61(1)(g)3.[15]

E. Melissa had a due process right to notice of the proceedings.

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" under the Fourteenth Amendment. *Addington v. Texas*, 441 U.S. 418, 425 (1979). Individuals also have a Fourteenth Amendment right to refuse unwanted medical treatment. *Outagamie Cty v. Melanie L.,* 2013 WI 67, ¶89, 349 Wis. 2d 148, 833 N.W.2d 607. All commitment and involuntary medication hearings must conform to "the essentials of due process and fair treatment." Wis. Stat. § 51.20(5); Wis. Stat. § 51.61(1)(g)2. (cross-referencing Wis. Stat. § 51.20(5)).

[15] The arguments made infra Argument I.C. regarding the inappropriateness of indirect service through counsel also apply here. Wis. Stat. § 51.61(1)(g)3. refers back to Wis. Stat. § 51.20, and as already demonstrated, notice to an individual in section 51.20 is personal service, not indirect service.

"The fundamental requisite of due process of law is the opportunity to be heard," which requires timely and adequate notice detailing the reasons for a claim, and an effective opportunity to defend oneself by confronting adverse witnesses and presenting one's own evidence. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (citation omitted).

In an involuntary commitment proceeding, due process requires personal service of the proceedings. In *Vitek v. Jones*, 445 U.S. 480, 494-495 (1980), the Supreme Court held that, before an incarcerated person can be transferred to a mental institution for involuntary treatment, there must be "*written notice to the prisoner*." *Id*., at 494 (emphasis added). The court further held that the person was entitled to "effective and timely notice" of the right to present witnesses, to confront and cross-examine adverse witnesses, and the right to counsel. *Id.* The court emphasized that, "notice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him." *Id*., at 496 (citing *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974)).

At minimum, in any context, due process requires the government to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co*., 339 U.S. 306, 314 (1950).

Here, the County did not demonstrate to the court meaningful attempts to serve Melissa with the proceedings. Instead, the County's petition asserted that Melissa was homeless, and requested that documents be sent to her case worker—herself a County employee. (*See* R.69:8). The court did not attempt to serve Melissa either. Instead, the order appointing examiners stated that Melissa was located at: "[h]omeless, please send documents to her Case Manager." (R.71). The distribution list on the Notice of Hearing included corporation counsel, Melissa, and the case manager, but the address section next to Melissa's name was left blank. (R.71). In *S.L.L.* a notice was at least sent to S.L.L.'s last known address. *S.L.L.*, 387 Wis. 2d 333, ¶6.

It has been argued that Melissa is at fault for losing her rights because she did not keep in contact with her case manager.[16] (*See* Response to Petition for review, at 27) (alleging that Melissa did "not care" about these proceedings). *See also*, *S.L.L.* 387 Wis. 2d 336, ¶30 (alleging that Ms. L. "absconded" from treatment and "Ms. L. may not excuse herself from these proceedings through neglect of her duties").

Melissa was previously deemed mentally ill and incompetent to refuse medication. She faced housing

[16] The *S.L.L.* majority discussed an individual's ability to forfeit the right to be present at a hearing. *S.L.L.*, 387 Wis. 2d 333, ¶34. Yet, the right to be present is a procedural right. The issue of whether a person can forfeit their substantive rights to freedom from restraint and compelled medical treatment is a different question.

instability. In addition, her partner had just been severely injured and hospitalized. There is no evidence that she thwarted treatment with malintent. Loss of fundamental constitutional rights cannot be used as a penalty for not consistently contacting a case manager or adhering to all conditions of a commitment order. The government had a constitutional obligation to provide Melissa notice—not the other way around.

Without notice, Melissa was denied her fundamental liberty rights to freedom from bodily restraint and freedom from compelled medical treatment in the absence of statutory protections and due process of law. [17]

II. The circuit court could not lawfully default Melissa for not being present at the hearing

A. Standard of review.

"Default judgment is the ultimate sanction" and "[t]he law prefers, whenever reasonably possible, to afford litigants a day in court and a trial on the issues."

[17] When confronted with a situation where an individual under commitment was not personally notified and did not appear at a recommitment hearing, the Colorado Supreme Court determined that it was unconstitutional to extend the commitment. *Gilford v. People*, 2 P.3d 120, 128 (Colo. 2000). Failure to provide notice "is not merely a technical violation of the statute: it diminishes significantly the substantial due process rights of individuals who are threatened with a protracted period of involuntary confinement." *Id.* at 128.

Split Rock Hardwoods v. Lumber Liquidators, 2002 WI 66, ¶64, 253 Wis. 2d 238, 646 N.W.2d 19. As such, "default judgments are regarded with particular disfavor." *Id*.

A circuit court's grant of default judgment is reviewed for an erroneous exercise of discretion. *Shirk v. Bowling, Inc*., 2001 WI 36, ¶15, 242 Wis. 2d 153, 624 N.W.2d 375. "An erroneous exercise of discretion may arise from an error of law or from the failure of the circuit court to base its decisions on the facts in the record." *State v. Ford*, 2007 WI 138, ¶28, 306 Wis. 2d 1, 742 N.W.2d 61.

Statutory construction is a question of law, subject to de novo review. *Noffke*, 315 Wis. 2d 350, ¶9.

B. Default is not statutorily authorized in commitment proceedings or involuntary medication and treatment proceedings, and Wis. Stat. § 806.02 does not apply.

Within section 51.20, the Legislature enacted a lengthy and detailed statute comprised of fourteen subsections covering all aspects of involuntary commitment proceedings. Nowhere in this lengthy statute did the Legislature grant authority to the court to default an individual into an involuntary commitment. Instead, the Legislature determined that courts "shall hold a hearing," at which the "essentials of due process and fair treatment" apply. *See* Wis. Stat. § 51.20(10)(c); Wis. Stat. § 51.20(5).

S.L.L. incorrectly held that the default provision from civil statute, Wis. Stat. § 806.02, applies to commitment cases.[18] *See S.L.L.*, 387 Wis. 2d 333, ¶43. The civil rules of procedure are applicable to Wis. Stat. § 51.20 proceedings, but only to the extent that chapter 51 does not provide a different procedure. *See* Wis. Stat. § 51.20(10)(c) *("[e]xcept as otherwise provided in this chapter*, the rules of evidence in civil actions and s. 801.01(2) apply to any judicial proceeding or hearing under this chapter") (emphasis added).[19] In turn, Wis. Stat. § 801.01(2) states that its scope governs procedure and practice "except where a different procedure is prescribed by statute or rule."

Section 51.20 has its own different and detailed procedure, which requires hearings at which a panoply of due process rights apply. The section also indicates the outer limit on what the court may do if the individual fails to appear. The court may issue a detention order: "[i]n the event that the subject individual is not detained and fails to appear for the final hearing the court may issue an order for the subject individual's detention and shall hold the final

[18] Subsection 806.02 is located in the civil procedure statute. Subdivision 806.02(1) provides options for when a party does not appear after the filing of a "complaint, counterclaim, or cross claim." Wis. Stat. § 806.02(2).

[19] *S.L.L.* summarized the statute as "circuit court may not grant default judgment if doing so conflicts with a procedure prescribed by Chapter 51." *S.L.L.,* 387 Wis. 2d 333, ¶35. Melissa disagrees that there must be a head-on conflict; instead, the Court should consider whether the procedures "otherwise provided" in chapter 51 apply.

commitment hearing within 7 days from the time of detention." Wis. Stat. § 51.20(10)(d).[20] For this reason, the Court should determine that "a different procedure is prescribed by statutory or rule" in Wis. Stat. § 51.20, and therefore, Wis. Stat. § 806.02 does not apply.

Statutory history also contraindicates a conclusion that a default procedure was incorporated by Chapter 51 notwithstanding its complete silence on the matter of default.[21] Chapter 51 was created as a result of the landmark federal decision in *Lessard v. Schmidt,* 349 F. Supp. 1078, 1084 (E.D. Wis. 1972) (vacated and remanded on other grounds, 421 U.S. 957, 95 S.Ct. 1943, 44 L.Ed.2d 445 (1975), reinstated, 413 F. Supp. 1318 (E.D. Wis. 1976)). *See* Ch. 430, Laws of 1975.[22] In *Lessard*, Wisconsin's existing commitment law was deemed woefully inadequate to protect due process rights—including inadequate notice of the proceedings, failure to afford a prompt probable cause hearing, inability to invoke the right against self-incrimination, inability to object to hearsay, lack of right to counsel, and insufficiently low burden of proof. *Lessard*, 349 F.Supp., at 1090-1103.

---

[20] *See Cty of Walworth v. Spalding*, 111 Wis. 2d 25, 329 N.W.2d 925 (1983) (circuit court had no authority to enter a default judgment where the statute provided a specific procedure for handling a person's failure to appear for a hearing).

[21] Statutory history is an intrinsic source to interpreting a statute. *Brey v. State Farm Mut. Auto. Ins. Co.*, 2022 WI 7, ¶21, 400 Wis. 2d 417, 970 N.W.2d 1.

[22] *See Outagamie Cty v. Michael H.*, 2014 WI 127, ¶25, 359 Wis. 2d 272, 856 N.W.2d 603 (describing history of *Lessard*).

It should not be presumed that the Legislature intended to permit default judgment of fundamental liberty rights in section 51.20 and chose not to specify the procedure and standards that apply. An involuntary commitment proceeding is no ordinary civil suit. It involves serious curtailments of personal liberty, including restriction on where a person can live and even what substances can be forcibly injected into their bodies—which is why individuals are afforded heightened procedural protections, for example, the right to have the government prove its case by clear and convincing evidence. *Addington*, 441 U.S., at 432-433.

There is even less justification for allowing default of an involuntary medication and treatment order because Wis. Stat. § 51.61(1) does not have a corollary to Wis. Stat. § 51.20(10)(c) incorporating the rules of civil procedure. Instead, the individual is entitled to a hearing and the "hearing under this subdivision shall meet the requirements of s. 51.20 (5), except for the right to a jury trial." Wis. Stat. § 51.61(1)(g)3.

Owing to the significant liberty interests at stake, summary judgment is not available in commitment cases. *Shirley J.C. v. Walworth Cty*, 172 Wis. 2d 371, 373, 493 N.W.2d 382 (Ct. App. 1992). The rationale in *Shirley J.C.* was two-fold: "summary judgment is inappropriate in such situations because an individual creates material issues of fact by contesting the need for treatment, and because summary judgment would violate due process." *S.L.L.*

distinguished *Shirley J.C.* because the respondent contested the commitment, whereas in the majority's opinion, S.L.L. did not contest. *See S.L.L.*, 387 Wis. 2d 333, ¶34 n.24. First, it is inaccurate to say that S.L.L. or Melissa did not contest the allegations in the petition. They did not have the opportunity to be heard on the petitions.

Moreover, *S.L.L.* does not address the second rationale in *Shirley J.C.*, which is that summary judgment violates due process by undermining the individual's right to a hearing. *Shirley J.C.*, 172 Wis. 2d, at 378. The *Shirley J.C.* court analogized these proceedings to a criminal case, given the significant liberty interest at stake. Although the due process standard "need not be as strictly construed as that applied in criminal proceedings…" allowing summary judgment would render meaningless the right to a hearing under Wis. Stat. § 51.20(10)(c). *Id.* If a person fails to appear at a hearing in a criminal case, the court may reschedule the hearing or issue a bench warrant. But it may not enter a conviction.

The court's options when an individual does not attend a commitment hearing are to adjourn the hearing or, at most, issue a detention order. *See* Wis. Stat. § 51.20(10)(d). A detention order tolls the time to hold a recommitment hearing for up to seven days after the individual is detained. *Marathon Cty v. R.J.O.*, 392 Wis. 2d 157, ¶25, 392 Wis. 2d 157, 943 N.W.2d 898 (overruled on other grounds). *S.L.L.* concluded that a court is not required to order detention as its only tool in the court's "toolbox."

S.L.L., 387 Wis. 2d at ¶37. Melissa agrees. The court may accept evidence regarding the County's efforts to attempt to notify the individual.[23] Depending on the circumstances, the court could decide that a detention order is not warranted and adjourn the hearing. If the adjournment resulted in the commitment order expiring prior to recommitment, the individual could be evaluated for commitment when contact was re-established.

What the court could *not* do is hold a proceeding in absentia and default Melissa's fundamental liberty rights.

C. Even if Wis. Stat. § 806.02 applies, the court could not lawfully apply it in Melissa's case.

1. Melissa did not fail to attend the hearing after having previously appeared in the proceeding, as required for default under Wis. Stat. § 806.02(5).

Even if the Court finds that Wis. Stat. § 806.02(5) applies to recommitment proceedings, it did not apply here because Melissa did not fail to attend the hearing after having previously appeared in the proceeding. A party can be defaulted for failing to appear at a trial under Wis. Stat. § 806.02(5), which

[23] Here, the only assertion about the County's efforts was that its case manager had "been trying hard" without any details. (R. 104:2; App.22).

provides, "[a] default judgment may be rendered against any party who has appeared in the action but who fails to appear at trial."

The *S.L.L.* court concluded that S.L.L. had appeared in the action previously because she was present at the original commitment hearing. *S.L.L.*, 387 Wis. 2d 333, ¶38. Central to this conclusion was a finding that a recommitment is a continuation of the original commitment proceeding: it "does not comprise a new and separate proceeding." *Id.*, ¶19. The court acknowledged that the County must file an "application for extension," but asserted that one "cannot extend what does not already exist." *Id.*

Considering the context of surrounding provisions demonstrates that *S.L.L.* was incorrect. Under Wis. Stat. § 51.20(13)(g)1. the legislature discusses "subsequent consecutive orders of commitment." In *J.W.K.*, 386 Wis. 2d 673, ¶20, this Court clarified that each extension hearing requires the county to prove the same elements with the same quantum of proof required for the initial commitment, including proof of "current dangerousness." *Id.* (emphasis in original).[24] Recommitment proceedings are separate proceedings initiated by separate petitions, heard at separate hearings, requiring new

[24] The individual in *J.W.K.* argued that because his original commitment order was invalid the recommitment order was also invalid, under a "domino theory." *Id.*, ¶26. The Court rejected that claim, finding that each commitment requires proof of the same elements, and invalidity of one order does not invalidate the subsequent order. *Id.*, ¶28.

proof of the elements of commitment, which result in separate consecutive orders.[25] Melissa did not previously appear in the recommitment proceeding, and therefore could not be defaulted under Wis. Stat. § 806.02(5) for not being present at the final hearing.[26]

Likewise, given that this was a new proceeding, *S.L.L.* was also incorrect in finding that personal service was not necessary in order to give the court personal jurisdiction over *S.L.L.* As the majority conceded, if personal service was required and not given, then the court did not have jurisdiction to enter the orders. *S.L.L.*, 387 Wis. 2d 33, ¶13 ("if Ms. L. is right about having not received proper notice, the Extension Order was void from the beginning").

The court could not lawfully default Melissa under Wis. Stat. § 806.02(5).

---

[25] The *S.L.L.* majority also discussed *State ex rel. Serocki v. Circuit Court for Clark Cty*, 163 Wis. 2d 152, 471 N.W.2d 49 (1991), involving the right to substitute a judge, where the Court stated that "*in the context of a request for substitution*, a continuation of the original commitment proceeding and previous recommitment hearings. recommitment proceedings are procedurally part of the original commitment action…". *S.L.L.*, 387 Wis. 2d 33, ¶20 (emphasis added). *Serocki* should not be read to negate the statutory notice provisions.

[26] Relatedly, Melissa could not be defaulted as a sanction for not abiding by a court's order to appear, under Wis. Stat. § 805.03*; Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768 (default may be ordered as a contempt sanction for a parent's egregious violation of a court order to attend a termination of parental rights hearing).

2. The County did not present evidence to meet its burden of proof, as required for default under Wis. Stat. § 806.02(5)

Again, Melissa asks the Court to find that default is not available in involuntary commitment or medication proceedings. However, if this Court finds that default is permissible by virtue of Wis. Stat. § 806.02, the default here was still improper.

First, the County did not introduce evidence to meet the elements of the involuntary commitment and involuntary medication and treatment orders. In these proceedings, the County bears the burden of proof by clear and convincing evidence. Wis. Stat. § 51.20(13)(e); *Melanie L*, 349 Wis. 2d 148, ¶8.

A request for default judgment does not relieve a party of its obligation to present evidence. *See* Wis. Stat. § 806.02(5) ("[i]f proof of any fact is necessary for the court to render judgment, the court shall receive the proof"). In Melissa's case, the County did not present evidence at the recommitment hearing. Instead, it asked the court to rely on the examiners' reports, which were not authenticated nor received into evidence.[27]

[27] Examiner reports in recommitment proceedings must be received into evidence in order for the court to rely on them. *Outagamie Cty v. L.X.D.-O.*, 2023 WI App 17, ¶¶30, 33, 407 Wis. 2d 441, 991 N.W.2d 518 (citing *Langlade Cty v. D.J.W.*, 2020 WI 41, ¶7 n.4, 391 Wis. 2d 231, 942 N.W.2d 277).

The court of appeals held that Melissa could not challenge the County's evidence because her attorney did not object at the recommitment hearing. The court of appeals analogized this to a "no contest" proceeding. *M.A.C.*, No. 2023AP533, unpublished slip op., ¶20. (App.12-13). This was not a "no contest" proceeding. It was a default proceeding. Melissa did not stipulate to the County's proof.[28] Counsel was not in a position to assert Melissa's position, not having consulted with her.[29]

And the County did not prove its case. It is difficult to imagine how it could, because neither examiner met with Melissa near in time to the commitment hearing, and proof of the commitment petition requires that the individual *currently* meets all of the criteria for commitment. *See J.W.K.*, 386 Wis. 2d 672, ¶21 ("each order must independently be based upon current, dual findings of mental illness and dangerousness").

---

[28] Moreover, in a criminal "no-contest" plea, the defendant must personally ratify the plea and stipulate to a factual basis. *State v. Cain*, 2012 WI 68, ¶28, 342 Wis. 2d 1, 816 N.W.2d 177.

[29] Supreme Court Rule 20:1.2 provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation, and as required by SCR 20:1.4, shall consult with the client as to the means by which they are pursued." SCR 20:1.4(a)(1) and (2) in turn require a lawyer to inform the client of any decision that requires the client's informed consent and to reasonably consult with the client about the means by which her objectives will be accomplished.

3. The court found that Melissa appeared by counsel, precluding default under Wis. Stat. § 806.02(5).

Finally, if the Court finds that default judgment is available in involuntary commitment and involuntary medication and treatment proceedings, it should determine that default was improper because the circuit court determined that Melissa appeared by counsel at the recommitment hearing. Individuals may appear by counsel in civil proceedings. Supreme Court Rule 11.02(1), states: "[e]very person of full age and sound mind may appear by attorney in every action or proceeding by or against the person in any court except felony actions…" Section 51.20(10)(c), incorporates the rules of civil procedure to the extent chapter 51 does not provide otherwise. *S.L.L.*, 387 Wis. 2d 333, ¶27. *See* Wis. Stat. § 51.20(10)(c). There are no provisions in Chapter 51 that provide that an individual may not appear by counsel.

The default provision under Wis. Stat. § 806.02(5) does not apply in circumstances where an individual appears by counsel. *Sherman v. Heiser*, 85 Wis. 2d 246, 254, 270 N.W.2d 397 (1978). Although *S.L.L.* discussed Wis. Stat. § 806.02(5), *see* 387 Wis. 2d 333, ¶¶35, 38, it did not acknowledge that Wis. Stat. § 806.02(5) may not be used to default a person who appears by counsel. Here, the court found, "[Melissa] appeared today by counsel." (R.104:4; App.24). Given

that Melissa's attorney appeared at the final hearing, default was precluded under Wis. Stat. § 806.02(5).[30]

III. Without the examiners having provided Melissa an explanation of the advantages, disadvantages, and alternatives to medication, the County could not meet its burden of proof on the involuntary medication and treatment order.

A. Incompetency standard.

"The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 221 (1990). Before entering an order authorizing involuntary medication and treatment under Wis. Stat. § 51.61(1)(g)3., the circuit court must determine that the individual is not competent to give informed consent to medication or treatment. Wis. Stat. § 51.61(1)(g)3. The competency standard is set forth in Wis. Stat. §§ 51.61(1)(g)4.a. & b. Part of this standard is providing the individual with an explanation of the advantages, disadvantages, and alternatives to medication so that the court can then determine whether the individual is able to express and apply an understanding of this

[30] Even absent these legal infirmities, the court would still be required to exercise discretion to determine whether default was appropriate. *See Shirk,* 242 Wis. 2d 153, ¶ 15. An exercise of discretion requires the court to explain its reasons for its decision. *State v. Scott*, 2018 WI 74, ¶38, 382 Wis. 2d 476, 914 N.W.2d 141.

information to their own situation. Wis. Stat. § 51.61(1)(g) 4.a. & b. The statute provides:

> For purposes of a determination under subd. 2. or 3., an individual is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, *and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual*, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

Wis. Stat. § 51.61(1)(g)4. a. & b. (emphasis added).

B. Without proving that Melissa received an explanation of the advantages, disadvantages, and alternatives to medication and treatment the County could not prove that she was incompetent.

As shown above, the court could not lawfully default Melissa on the involuntary medication and treatment order based on her nonappearance. *Infra* Argument I.D. Yet, even if this Court finds that default is permissible in these proceedings, the County could still not obtain an involuntary medication and treatment order because it could not prove that Melissa was provided an explanation of the advantages, disadvantages, and alternatives to medication and treatment, as required by Wis. Stat. § 51.61(1)(g)4.

Neither Dr. Kohlenberg nor Dr. Piering met with Melissa to explain the information required by Wis. Stat. § 51.61(1)(g)4. Melissa's hearing notice provided the examiners' phone numbers and instructed Melissa to call them, but the hearing notice was not provided to Melissa. There is no evidence that any attempt was made by the County or examiners to contact Melissa.[31]

A medication explanation is a required element of Wis. Stat. § 51.61(1)(g)4. Without evidence of a

[31] In the court of appeals, the County relied on the case manager's (Ms. Weber) report, which asserted that Melissa had discussed one of prescriptions with an advanced nurse prescriber. (Response Brief at 38-39). Melissa argued in her reply brief that reliance on the report was improper because it was not entered into evidence, and regardless, that the discussions were legally insufficient because: the nurse prescriber was not a licensed physician; the medication explanation only involved one of the medications; and the medication explanation was untimely. (Reply Brief at 14-16).

medication explanation, the County did not prove that Melissa was incompetent. As such, Melissa retained her constitutional right to exercise informed consent to medication and treatment.

C. Melissa did not waive or forfeit her right to an explanation of the advantages, disadvantages, and alternatives to medication and treatment.

The court of appeals noted that Melissa's attorney did not object to the medication order, and concluded that Melissa therefore "forfeited" her challenge to the medication order. *M.A.C.*, No. 2023AP533, unpublished slip op., ¶20 n8. (App.13). It then implied that Melissa forfeited her right to an examination by having "failed to provide her address, telephone number, or any other method to contact her." *Id.* Melissa's attorney stated she was "not in a position to object" not having spoken with Melissa (R.104:5; App.25).

Acquiescence by counsel in the absence of Melissa's direction did not constitute a forfeiture or waiver of Melissa's right to challenge the order. In addition, Melissa did not forfeit her right to an explanation of the advantages, disadvantages, and alternatives to medication and treatment by not keeping her case manager updated with her contact information.[32]

[32] It is not clear how she could do so, given that everyone believed she was currently homeless.

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not assume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 465-466 (1938). Some rights can be forfeited, but others can only be waived. A mere failure to object may constitute a forfeiture of the right. *State v. Ndina*, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. Alternatively, waiver is an intentional relinquishment of a known right. "[W]aiver is shown 'by affirmative acts unambiguously demonstrating that [the party's] conduct is intentionally undertaken and meant to give up the right.'" *Id.*, ¶25 (quoted source omitted). Rights that can only be waived include fundamental constitutional rights. *Ndina*, 315 Wis. 2d 653, ¶31.

Although courts will not assume acquiescence in the loss of fundamental rights, there are limited circumstances where a person can waive or forfeit their rights by willful conduct that is incompatible with the exercise of their rights. *E.g. State v. Washington*, 2018 WI 3, ¶¶40, 51, 379 Wis. 2d 58, 905 N.W.2d 380 (describing waiver by conduct and finding that by declining to participate in proceedings after being offered the opportunity, the defendant waived his right to be present).

The concept of waiver by conduct was alluded to *L.X.D.-O.*, 407 Wis. 2d 441, ¶40. In that case, the individual met with the court-appointed examiner but refused to engage in full medication discussion with the examiner. The court of appeals concluded that the individual could not "assert that his efforts to avoid the

medication discussion should defeat the medication order." *Id*. Yet, *L.X.D.-O.* fell short by failing to apply a doctrine of waiver or forfeiture.

The right to a medication examination can at most be waived by express words or willful action, but never forfeited. At minimum, before an individual can lose their right to an examination, they must be warned of consequences of not participating in an examination. *See Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (a defendant in a criminal trial could only be deemed to have forfeited his right to be present at trial by disrupting the trial if he was first warned of the consequence of his disruptive behavior).

Not participating in an examination in and of itself does not waive or forfeit the right to the examination. In *L.X.D.-O.*, the individual was aware of the examiner's attempt to discuss treatment with him, and made a willful choice not to participate. *L.X.D.-O.*, 2023 WI App 17, ¶40. But Melissa, because she was not notified of the proceeding, did not and could not waive or forfeit her right to a competency examination.

Upon establishing contact with Melissa, if the County believed a medication order was warranted, the County could file a motion and the court could enter an order upon complying with the dictates of Wis. Stat. §§ 51.61(1)(g)3. and 4. *See* Wis. Stat. § 51.61(1)(g)3. (an involuntary medication and treatment order may be entered at any time during the commitment period).

The in absentia proceeding in this case was an egregious violation of Melissa's statutory and constitutional rights. The orders must be reversed.

CONCLUSION

For the reasons stated above, M.A.C. asks the Court to reverse the order of "Extension of Commitment" and order for "Involuntary Medication and Treatment."

Dated this 11th day of January, 2024.

Respectfully submitted,

Electronically signed by Colleen Marion
COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 9780 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 11th day of January, 2024.

Signed:

Electronically signed by
Colleen Marion
COLLEEN MARION
Assistant State Public Defender