

C **HAPTER 55: APPLICATION OF WISCONSIN ADULT PROTECTIVE SERVICES LAW AND ADULTS-AT-RISK RELATED STATUTES**

This manual is a re-write of the Chapter 55 manual developed in 1994 and reflects changes due to the new legislation affecting adult protective services, guardianship and adult abuse reporting. The manual is not intended as legal advice or a guide for attorneys in court proceedings. It is, instead, intended to assist workers in the elder adults/ adults-at- risk and adult protective services systems and other professionals working in these systems.

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How To Use this Manual:

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Chapter 55:
Application of Wisconsin Adult Protective Services Law and
Adults-at-Risk Related Statutes

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CHAPTER I: INTRODUCTION: PURPOSE AND USE OF THIS MANUAL, STRUCTURE OF THE ELDER ADULTS-AT-RISK, ADULTS-AT-RISK AND ADULT PROTECTIVE SERVICES SYSTEMS, AND INDIVIDUAL RIGHTS

NOTE ON TERMINOLOGY: The statutes create two parallel reporting and response systems for abuse, financial exploitation and neglect of adults: one for adults at risk, under Ch. 55, and one specifically for elder adults at risk under § 46.90. (See definitions of adults at risk and elder adults at risk in *Ch. II, Part C.*) For the most part, in recognition of the generally parallel, but still separate, reporting and response systems for elder adults at risk and adults at risk, this manual refers to the two groups together as **elder adults/adults at risk**, and of the two reporting and response systems together as the **elder adults/adults-at-risk systems**. The statutes that deal with injunctive relief and criminal justice responses for abuse, exploitation and neglect of individuals age 18 or over refer to **adults at risk** and **elder adults at risk** collectively as **individuals at risk**. For brevity, this manual also uses the term **individuals at risk** to refer collectively to both adults at risk and elder adults at risk. The term as used in this manual does not refer to individuals under age 18.

A. OVERVIEW OF THIS MANUAL

1. *Who should read this manual, and why?*

This manual is primarily aimed at people who are working in the county elder adults/adults-at-risk reporting and response systems and/or the adult protective services system at the county level. The manual provides an understanding of county responsibility under those systems, and the tools that the reporting and response, guardianship and adult protective services statutes make available for the protection of the safety, personal integrity and rights of elder adults and other adults at risk of abuse, financial exploitation, neglect and self-neglect. It may also be useful for other people trying to understand the system, including people with disabilities, their families, and support service providers.

This manual is not intended as legal advice. It is intended to describe the elder adults/adults-at-risk, guardianship and protective services laws in Wisconsin in an understandable way, to emphasize parts of the statutes and issues that are important, and to organize the information in a useful and functional way for people responsible for implementing the laws. It often uses language that is more understandable than the statute. By its nature, it cannot cover every detail of every statute, or identify every place where an argument could be made about the meaning of the statutes. The footnotes direct the reader to the sources of the laws described, and where there is an issue of concern it is recommended that the reader go directly to the law, case or rule cited, and/or consult with the county corporation counsel or other legal counsel.

This manual is not intended as a guide for attorneys in court proceedings or as a guide for people proceeding in court without an attorney. Rather, it is intended to assist workers in the elder adults/adults-at-risk and adult protective services systems and others who are working with attorneys, to understand the process, to know what the law can (and cannot) potentially achieve, and to know what will be needed to obtain legal remedies.

This manual is not a statement of policy adopted by the Department of Health and Family Services, although it has been reviewed for accuracy by DHFS legal and program staff and is published by DHFS. The opinions and errors are those of the author.

COMMENT ON COMMENTS: Throughout this manual, you will find notes and comments introduced in shaded boxes (much like this one). These are **notes and comments of the author**, to help the reader understand the manual, draw attention to problems and issues that may not be obvious from the statutes, and to provide the author's opinion on how to resolve gaps, conflicts and competing goals in the laws.

2. *How can the reader find statutes, rules, policy and cases cited in the manual?*

This manual indicates, in the text or the footnotes, where issues are addressed in state law, administrative rules, administrative policy and court cases. As noted above, this manual is a substitute for reading the source materials. The following is information on the sources of law and policy, and where they can be found:

- **State Statutes and Laws.** The state statutes are laws passed by the legislature, signed by the governor, and codified into the state statutes by subject matter. (In some cases, Supreme Court rules on court procedures are also in the statutes.) New laws passed by the legislature in a particular year are called Acts, and may affect several statutes, and contain some material that is not codified into the statutes. Current versions of state statutes, statutes as they existed in prior years since 1969, an index to the statutes, and copies of acts passed in years since 1969 can all be found on the website of the state Revisor of Statutes, at: <http://www.legis.state.wi.us/rsb/stats.html>.
- **State Administrative Rules.** Administrative rules are rules made by administrative agencies, interpreting the statute or carrying out administrative authority delegated to the agency by the legislature. To be valid, a rule must be adopted under the state administrative rules process, be within the agency's authority, and not be in conflict with a statute. If a rule and a statute conflict, the statute controls. Administrative rules are codified in the Wisconsin Administrative Code, which is arranged in chapters, by the agency that created them. Rules created by the Department of Health and Family Services (DHFS) are designated by the letters HFS. State rules can be found on the website of the state Revisor of Statutes, at: <http://www.legis.state.wi.us/rsb/code.htm>.
- **State Administrative Policy.** Agency policy contains interpretations of statutes and rules and guidance on carrying out agency functions that have not been adopted and codified as rules. Policy can be issued in any form. Two forms cited in this manual are: administrative manuals, such as the *Medicaid Home and Community Based Waiver Manual*, best found by going to <http://www.dhfs.state.wi.us/> and using the search function; and numbered memos. Numbered memos are also on the DHFS website, by the division that issued them. For example, memos issued by the Division of Long Term Care can be found at: http://dhfs.wisconsin.gov/dsl_info/NumberedMemos/NMemos_index.htm.
- **Court cases.** Decisions by the courts interpret statutes and rules, and govern the law in areas where law is made by the courts, such as liability for negligence. A court may also strike down or limit a state statute because it violates the constitution or conflicts with federal law, or strike down or limit a rule because it is outside the authority of the agency or was not adopted through the full rule-making procedures. State Court of Appeals and Supreme Court decisions from 1995 to present can be found on the state court website at <http://www.wicourts.gov/casesearch.htm>. Earlier cases can be obtained at public libraries or law libraries. Cites are given in the manual for both the Wisconsin Reporter (Wis.) or Northwestern Reporter (N.W.).

3. *How can the reader find court forms, and why are they important?*

The state court system has adopted forms to be used in guardianship, protective services and protective placement proceedings, and in petitions for injunctions to prevent interference with investigations and delivery of services to elder adults/adults at risk and to prevent abuse, financial exploitation and neglect of elder adults/adults at risk. These are mandatory, and must be used in all court proceedings. The forms cannot be changed, but attachments can be added and incorporated by reference. The forms are more flexible than forms in the past, in that it is possible to type in a substantial amount of text, e.g., specifying limitations on the powers of a guardian, the relationship between co-guardians, and other issues that may need to be tailored to the individual case. Because the forms are designed to lead people through the information the

court needs in order to proceed on a matter and the decisions the court will need to make, the forms often provide a checklist for what information needs to be gathered, and for what will need to be proved in order for a petition to be successful.

The forms for use in circuit court are found at:

<http://www.wicourts.gov/forms1/circuit.htm#guard> . (Use the search function if browsing does not turn up the form you are looking for.)

B. CHANGES IN STATE LAW IN 2006

1. *What were the major pieces of legislation that passed in 2006 affecting elder adults/adults at risk, guardianship and adult protective services laws?*

In 2006, the state Legislature passed three major pieces of legislation affecting protection of elder adults/adults at risk from abuse, neglect and exploitation, and reforming the guardianship and adult protective services laws. These Acts, with their effective dates, are:

- 2005 Wisconsin Act 387 (2005 Senate Bill 391), revising the guardianship laws and renumbering the guardianship laws to put them in a new Ch. 54 of the statutes.
- 2005 Wisconsin Act 264 (2005 Assembly Bill 785), revising the laws on protective services and placement.
- 2005 Wisconsin Act 388 (2005 Assembly Bill 539), revising and expanding the laws on reporting and responding to abuse, financial exploitation, neglect and self-neglect of elder adults at risk and other adults at risk.

This manual is written to describe the law as it exists AFTER the effective dates of these changes. Sometimes it will note significant changes made by the new laws, but it is not meant to provide a complete description of the law before and after the new laws. Some excellent summaries of the new laws have been written and are available on the internet. Quick links to these Acts, excellent summaries of the changes contained in them, links to the law before and after the changes, and discussion papers can be found on the website of the Guardianship Support Center at: <http://www.cwag.org/legal/guardian-support/?Id=141>.

2005 Wisconsin Acts 264, 387 and 388 were developed and passed separately, rather than as a single package. As a result, some changes made by the three Acts overlap or conflict with each other. Most of these differences do not matter in practice. This manual identifies conflicts only if they create a significant issue about the meaning and application of the law.

2. *What are the effective dates of the new laws, and what impact do they have on existing guardianships and court order for protective services and protective placements?*

The general effective date of 2005 Wisconsin Acts 387 and 388 is December 1, 2006. The general effective date of 2005 Wisconsin Act 264 is November 1, 2006. Under all three laws, the following statements are generally true:

- Prior court orders under the old law remain valid.
- The old law applies to petitions and petitions for review or termination if the petition was filed before the effective date of the change.
- The new definitions of disability apply to diagnoses made before the effective date of the law.
- For annual reviews of protective placement, the new law applies if the review “is conducted” on or after the effective date.

- Guardians retain the powers they received in the original order, but the new laws on their duties and standard of conduct, and on when court permission is required for a guardian to act, apply after the effective date of the law.

A summary of the effective date provisions of the law is available on the Guardianship Support Center website at:

<http://www.cwag.org/uploads/Guardianship%20Support%20Center/Effective%20Dates.pdf>

C. PURPOSE, NATURE AND COMPONENTS OF THE ELDER ADULTS-AT-RISK, ADULTS-AT-RISK AND ADULT PROTECTIVE SERVICES SYSTEMS

1. *What is the purpose of the elder adults-at-risk, adults-at-risk and adult protective services systems?*

Wis. Stat. § 55.001 contains a declaration of the Legislature's intent in creating a protective services system. This section is essential to understanding what the protective services system is meant to achieve and how Ch. 55 should be applied in practice. It has been cited and followed by the courts in every major reported case interpreting Ch. 55, and has also been applied to courts in appointing and supervising guardians under the laws now contained in Ch. 54. Now that the adults-at-risk reporting and response system has been included in Ch. 55, it will be applied to that law and to the parallel provisions of the elder adults-at-risk reporting and response system under Wis. Stat. § 46.90 as well.

Under § 55.001, the declared policy of the state is to:

- Establish protective services and protective placements for people who need them because of serious and persistent mental illness, degenerative brain disorder, developmental disabilities, or other like incapacities.
- Assure the availability of protective services to all individuals when in need of them.
- Allow people in need of protective services and protective placement, to the maximum degree of feasibility, the same rights as other citizens, and at the same time protect them from financial exploitation, abuse, neglect and self-neglect.
- Place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, exploitation and neglect.

Throughout § 46.90, Ch. 54 and Ch. 55, the statutes require that placement, services and interventions occur in the least restrictive environment and the least restrictive manner consistent with the needs of the individual. “Least restrictive” is not defined in Ch. 55 itself, and neither is “consistent with needs.” However, “least restrictive” is defined in Ch. 54 and by court cases, and “needs” can be interpreted to include not only freedom from abuse, financial exploitation, neglect and self-neglect, but also the treatment and services to which the individual is entitled under the rights that apply to recipients of protective services. Factors that should be considered in evaluating least restrictiveness, are discussed in *Part D.2, below*, and the right to adequate treatment and services is discussed in *Part D.3, below*

The statute attempts to balance the goals of protecting the individual from abuse, exploitation and neglect with the need to respect the individual's right to self-determination. It will not always be possible to fully protect both interests. For example, competent individuals who are not harming other people, do not meet standards for commitment and are not committing crimes have a right to make their own choices and to refuse treatment and services, even if their choices put them at substantial risk of harm.

Under the 2006 changes to the law, the term *adult at risk* replaces the term *vulnerable adult*, not only in the reporting and response system under Ch. 55 (*see Ch. II*), but also in the restraining

order provisions under Ch. 813 and the criminal laws that relate to abuse, financial exploitation and neglect of individuals at risk (*see Ch. VII*). The new term is more accurate and less demeaning, but also covers a much broader population, in particular people who have disabilities but are mentally competent. In addition, the restraining order provisions and the criminal abuse and neglect laws have been extended to apply to elder adults at risk, whether or not they meet the former definition of vulnerable adults. This represents an expansion of some of these legal interventions to people who are legally competent, and to some extent an expansion of the ability of other people, the county, the criminal justice system or a court, to intervene in their lives with the goal of protecting them from abuse, exploitation and neglect.

Another legislative goal that must be considered in carrying out Ch. 55 is protection of counties from unlimited financial responsibility. The phrase “to the maximum degree of feasibility” in § 55.001 has, since 1995, been modified in the statute by the phrase “under programs, services and resources that the county board of supervisors is reasonably able to provide with the limits of available state and federal funds and of county funds required to be appropriate to match state funds.” Similar language is included in many parts of Ch. 55 when duties are imposed on counties. How this language applies to the balancing of interests under Ch. 55 is discussed in *Ch. V, Part D.3*.

2. *How do the elder adults-at-risk, adults-at-risk and adult protective services systems work together to form a flexible system, with multiple tools, to identify and respond to needs for protection?*

The elder adults/adults-at-risk and protective services systems established by § 46.90 and Ch. 55, Wis. Stat., do not, for the most part, create separate systems of service delivery or provide separate sources of service funding. Rather, they are mechanisms for receiving and responding to reports of abuse and neglect concerning individuals at risk; for organizing, planning and delivering services from existing public and private agencies; for delivering voluntary services to those who need them and request or accept them; for determining when services or placement can be provided without consent of the individual, either with consent of a guardian or under a court order; and for protecting citizens from unwarranted government intrusion in the name of protection.

When people think of "Chapter 55" they often think first (or only) of court-ordered protective placement for residential services. However, § 46.90 and Ch. 55 together set up at least eight major mechanisms by which protective services and placement may be provided. These are:

- Receipt and investigation of, or other response to, reports that an elder adult/adult at risk has been abused, exploited or neglected, or is at risk of abuse, exploitation or neglect. Investigation can take several forms, and response can include an offer of services to a person who is eligible for protective services, or for social and human services under other laws. These systems can respond to reports of abuse concerning a broad range of people at risk, who may or may not fall into one of the protected categorical disability groups used for purposes of coverage by the protective services and protective placement laws.
- Voluntary services to an individual who is an elder adult/adult at risk and/or a member of one of the protected categorical disability groups under Ch. 55, at the request of the person, the person's guardian, the person's agent under an activated power of attorney for health care, or any interested person. *See Ch. II, Part G, and Ch. IV, Parts C-F.*
- Emergency protective services. *See Ch. IV, Part G.*
- Court-ordered protective services, if the person has been found by a court to be mentally incompetent and there is a substantial risk of physical harm or deterioration of the person, or of physical harm to others, if services are not provided. *See Ch. IV, Part H.*

- A protective services order for involuntary administration of psychotropic medication. *See Ch. IV, Part I.*
- Admission (based on consent of the guardian) of a person who does not protest but does not have capacity to consent, based on the consent of the person’s guardian, to residential facilities with fewer than 16 beds and for short-term nursing home stays. *See Ch. V, Part B.*
- Emergency protective placement . *See Ch. V, Part C.5.*
- Court-ordered protective placement for a person who has been found by a court to be mentally incompetent, has a disability that is likely to be permanent, has a primary need for residential care and custody, and presents a substantial risk of serious harm to self or others due to inability to provide for their own care and custody. *See Ch. V, Parts C and D.*

3. *What county administrative structure is required for the elder adults/adults-at-risk and adult protective services systems?*

The county board of each county is required to name an agency as the “elder adults-at-risk agency” for the county, and also to name an agency as the “adults-at-risk agency” for the county.¹ A county may combine these functions in the same agency, or put them in separate agencies. A county may also subdivide responsibility further among multiple agencies, based on function, population served, service systems already involved with the individual, or other factors.

The county board is also required to designate one or more county departments to have responsibility for local planning to implement the adult protective services system, and for providing protective services and protective placement.² The county may designate one, or a combination of two or more, of the following agencies: a Human Services Department, Social Services Department, Community Programs Department established under § 51.42 or Developmental Disabilities Services Department established under § 51.437. Again, the statute is not about creating an agency or unit: it is about identifying and distributing protective services responsibilities at the county level so that all responsibilities are covered, and so that people inside and outside county government can know (or find out) who is responsible for a particular function. In a system using a combination of agencies, responsibility can be divided in any way. For example, one agency might be responsible for planning and monitoring of protective services and working with the courts and others for delivery of services to particular disability groups.

To avoid the implication that there is a single agency performing all the functions under the statute, this manual uses the terms ***elder adults-at-risk system*** and ***adults at-risk-system*** to refer to the agencies designated at the county level to carry out the county’s responsibilities under the elder adults/adults-at-risk reporting and response systems, and the term ***adult protective services (or APS) system*** to refer to the agency, or combination of agencies, designated by the county under §55.02 to have responsibility for protective services and protective placement. These are not statutory terms. Some counties may create units with “elder adults at risk,” “adults at risk” or “protective services” in the title, but this is not required, and the functions of units with these titles are not the uniform from one county to another.

The agencies assigned to implement the elder adults/adults-at-risk systems may be, but do not have to be, the same as the agencies assigned to implement the adult protective services system. There is overlap between the systems, and it will often make sense to assign overlapping functions to the same agency or unit. For example, outreach and identification of persons in need of services are central functions of the elder adults/adults-at-risk systems, but are included in the definition of protective services, and therefore are also functions of the APS system.

¹ Wis. Stat. §§ 46.90(2) and 55.043(1d)

² Wis. Stat. § 55.02

4. ***What are some of the common purposes and differences among and between the elder adults/ adults-at-risk reporting and response systems and the APS system?***

The elder adults/adults-at-risk reporting and response systems and the APS system are closely related, and the 2006 changes to the law try to make them compatible and complementary to each other. Overlapping and common elements include:

- **Identification of need.** “Identification of individuals in need of services” and “counseling and referral for services” continue to be included in the statutory list of protective services. The elder adults/adults-at-risk reporting and response systems will clearly play a major role in carrying out those two functions of the protective services system.
- **Least restrictiveness.** All three systems are governed by the same emphasis on respect for individual autonomy and use of the least restrictive alternative.
- **Common terms.** All three systems are concerned with prevention and amelioration of abuse, financial exploitation, neglect and self-neglect, and all use the same definitions for these terms. *See Ch. II, Part D.* These terms and definitions are now also used in the law that provides for restraining orders and injunctions to prevent abuse, exploitation and neglect of individuals at risk. *See Ch. VII, Part A.2.* The terms and definitions for abuse and neglect are also used in the criminal laws governing abuse of elder adults at risk and adults at risk, and governing abuse and neglect of residents and patients of a wide range of human service facilities and service agencies. *See Ch. VII, Part B.*

At the same time, important differences separate the adult protective services system from the elder adults/adults-at-risk reporting and response systems:

- **County option to have separate administrative agencies.** The provisions requiring the county to assign responsibility for protective services and protective placements to one or more agencies are separate from the provisions requiring the county to establish an adults-at-risk system and an elder adults-at-risk system. This allows (but does not require) a county to assign the functions of receiving and responding to complaints of abuse and neglect from the functions of administering protective services and placements.
- **Different definitions of populations served.** The population served by the APS system is defined by membership in one of four defined categorical disability groups (i.e., developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacities), each of which has a relatively stringent functional requirement that the person be unable to meet his or her own needs for care. *See Ch. IV, Part 5.* The definition of an “adult at risk” includes an adult (of any age) who has any physical or mental impairment that substantially impairs his or her ability to care for his or her needs, and who has experienced or is at risk of abuse or neglect. This definition is broader, in that it does not require membership in a categorical group, and does not require impairment in ability to provide for care or custody. *See Ch. II, Part C.2.* The definition of an “elder adult at risk” further broadens coverage for elders, as it is based on a combination of (1) being age 60 or older and (2) having an experience or risk of abuse, exploitation or neglect. No level of functional impairment of the individual is required. *See Ch. II, Part C.1.*
- **Separate confidentiality requirements.** Generally, access to treatment and service records under Ch. 55 is governed by Wis. Stat. § 51.30. However, the statutes governing the elder adults/adults-at-risk reporting and response systems contain separate provisions on confidentiality and access to records. *See Ch. II, Part H.*

D. RIGHTS OF INDIVIDUALS IN THE ELDER-ADULTS/ADULTS-AT-RISK SYSTEMS AND ADULT PROTECTIVE SERVICES SYSTEM

1. *What are “Patients Rights” under Ch. 55 and § 51.61, and who is considered a “patient”?*

Under the rights provisions of Ch. 55, **the rights and remedies under § 51.61 apply to all people receiving services under Ch. 55**, whether on a voluntary or involuntary basis.³ This expands application of the rights to individuals with degenerative brain disorder or with other like incapacities who are receiving protective services under Ch. 55, even if they would not ordinarily be covered by Ch. 51 because they have no diagnosis of mental illness, developmental disabilities alcoholism or other drug dependence. It also expands coverage of § 51.61 rights and remedies to people who are receiving services under Ch. 55 as adults at risk, and who may only have physical disabilities. The rights do not apply to a person receiving services under § 46.90 as an elder adult at risk, unless the services meet the definition of protective services under Ch. 55, or the person otherwise meets the § 51.61 definition of “patient,” discussed below

§ 51.61 uses the term *patients* for the people to whom it applies. This term, and the definition of “patient” in § 51.61(1), gives an overly narrow impression of people covered by § 51.61, and the settings in which it applies. The rights contained in § 51.61, the means of enforcing them and the rules created under them by Wis. Admin. Code HFS Ch. 94, apply to all of the following:

- Under § 51.61(1), the rights and remedies under § 51.61 apply to individuals receiving services for mental illness, developmental disabilities, alcoholism or drug dependence. The rules apply not only to people receiving treatment, but also to people receiving care and other kinds of services, and apply to people receiving services in their homes and community settings as well as in facilities.
- Under the rules adopted by DHFS in Wis. Admin. Code Ch. HFS 94, § 51.61 rights and remedies apply to people receiving treatment and services from private facilities and service providers, as well as state and county agencies and agencies under contract with the state and county.⁴

Among the rights discussed in this manual are:

- The right to least restrictive conditions consistent with individual needs and the purposes of admission to treatment or services. *See next section and Ch. V, Part D.5.*
- The right to prompt and adequate treatment and services appropriate to the person’s condition. *See Section 3, below*
- The right to refuse treatment and services, except in an emergency or under a court order that includes a finding of incapacity to refuse. *See Ch. III, Part B.7 and G.5, and Ch. IV, Part F.5. and I.*

2. *What factors should be considered in determining whether a service, placement or decision is “least restrictive” consistent with individual needs?*

The concept of least restrictiveness runs throughout the guardianship, protective services, and protective placement laws. Courts must create guardianships, and guardians must implement them, in the least restrictive way (see definition below). Elder adults/adults-at-risk services and adult protective services must be provided in the least restrictive manner necessary to achieve the objective of the services, and protective placements must be made to the least restrictive environment consistent with individual need.

³ Wis. Stat. § 55.23(1)

⁴ Wis. Admin. Code § HFS 94.01(2)(a)

The guardianship statute now contains a definition of least restrictive:⁵

Least restrictive means that which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into his or her community that is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect.

Note that **least restrictiveness is a balancing test, not an absolute**: people are not always entitled to total personal liberty, exercise of rights and community integration. Instead, they are entitled to the greatest level of freedom and integration that is consistent with all of the following:

- Meeting the habilitation, treatment or recovery purpose of the service or placement involved.
- Meeting essential requirements for health and safety.
- Protecting from abuse, financial exploitation, neglect and self-neglect.

See also *Ch. V, Part D.3.* for limitations on responsibility of county government related to funding.

In evaluating whether one service, decision-making support or placement option is less restrictive than another option, the statutes, rules and courts have identified the following factors:

- Placement and services are least restrictive if they place the **least possible restriction on personal liberty and constitutional rights**.⁶ This factor relates to freedom of movement, and also to other rights, such as freedom of association, freedom of religion, privacy rights, rights to hold property, and right to vote.
- Placement and services are less restrictive if they, to the maximum degree of feasibility, **allow the individual the same rights as other citizens**.⁷ If people are treated differently from other citizens, the difference should be based on some compelling and unavoidable need.
- Placement and services are least restrictive if they **least limit the person's freedom of choice**.⁸ This factor relates to the range of choices available and to the person's role in making those choices. **Development of effective means of communication** and choice are closely related: a person can exercise a much broader range of choice if he or she has an effective way to communicate, and is more likely to communicate if he or she has meaningful choices.
- Placement and services are least restrictive if they **least limit the person's mobility**.⁹ This factor relates not only to the use of physical restraints and locks, but also to programmatic restrictions on mobility, such as policies that limit freedom of movement and availability of opportunities and supports to be out and about in community settings.
- Placement and services are least restrictive if, to the maximum degree of feasibility, they **integrate the person into the community**.¹⁰ Use of residential, recreational, work or program settings that separate the person from the community must be justified by inability to provide needed support services in integrated settings.

⁵ Wis. Stat. § 54.01

⁶ Wis. Stat. § 55.001

⁷ Wis. Stat. § 55.001

⁸ Wis. Admin. Code. § HFS 94.02(17)

⁹ Wis. Admin. Code. § HFS 94.02(17)

¹⁰ *D.E.R. v. La Crosse County*, 155 Wis. 2d 240, 254, 455 N.W.2d239 (1990)

- Placement and services are least restrictive if they **minimize adverse social consequences** that may result from involuntary placement or services.¹¹ This may include the stigma that is associated with certain placement or proceedings, and should also take into account the discontinuity in personal relationships caused by removal from family and community.

3. *What rights do people have to adequate and appropriate treatment and services under Ch. 55?*

A central misconception about protective placements and services in the past has been that they are purely custodial. A person who is receiving protective services or is protectively placed has a **right to adequate treatment, rehabilitation and educational services appropriate to his or her condition.**¹² A court order for protective services or protective placement is not a license to fail to develop or maintain the person's potential for independence and productivity. Use of the word "educational" indicates that services must meet developmental needs as well as restorative or maintenance needs. *See Ch. V, Part D.3.* for limitations on responsibility of county government related to funding.

¹¹ *State ex rel Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 80, 362 N.W.2d 104 (1985)

¹² Wis. Stat. §51.61(1)(f)

CHAPTER II: ELDER ADULT-AT-RISK AND ADULT-AT-RISK REPORTING AND RESPONSE SYSTEMS

A. INTRODUCTION

1. *A brief history of reporting of abuse and neglect of adults in Wisconsin.*

The Wisconsin protective service system under Ch. 55 was created in 1974.¹³ As originally created, Wisconsin's protective service system was unusual in having no clear provisions for a system to receive and respond to reports of abuse and neglect, and no provisions to encourage and protect people reporting abuse and neglect of adults. "Identification of individuals in need of services" and "counseling and referral for services" were included in the list of protective services to be provided by counties, but implementation was left to local development. In the absence of a statewide reporting and response system that applied to all adults at risk, three less comprehensive systems developed:

- In 1984, the elder abuse reporting and response system was created under § 46.90,¹⁴ as a system separate from the protective service system under Ch. 55. The elder abuse system provided for voluntary reporting of abuse, a response system, and protection of reporters from liability and retaliation for reports made in good faith.
- In 1994, a system for reporting of and response to abuse of "vulnerable adults" (including adults who were not elders) was adopted¹⁵ as Wis. Stat. § 55.043, but was made applicable only to the adult protective service system in Milwaukee County.
- In 1997¹⁶ the caregiver registry and reporting system was created, providing for reports to DHFS of neglect, abuse or misappropriation of property by a person employed by or under contract with facilities and services licensed, certified or registered with DHFS to provide direct care to clients.

With the passage of 2005 Wis. Act 388, Wisconsin joined the majority of other states in having statewide reporting and response systems for adults of all ages who are at risk of abuse, exploitation or neglect. Under Act 388, the elder abuse reporting system was strengthened and expanded to become the elder adults-at-risk system, and the vulnerable adults reporting system under § 55.043 was strengthened and expanded to become the statewide reporting and response system for adults at risk, both of which are described in this chapter. Based in part on experience gained in the elder abuse and Milwaukee systems, the 2005 laws adopted parallel language, so that the systems are largely similar in terms of the definitions of abuse, neglect and financial exploitation, provisions governing reports and protections of reporters, and procedures for investigation and response. However, some important differences remain. *See Section 5, below*

A central achievement of the new law was to make clear that a person or agency may report suspected abuse or neglect to the adults-at-risk agency or elder adults-at-risk agency, despite confidentiality laws that might otherwise apply, and that reporters will be protected from civil and criminal liability, and from other forms of retaliation, for reports made in good faith.

Before that change, reporters of abuse or neglect of an adult under age 60 had neither clear authorization to report, nor clear protection from liability or retaliation.

¹³ 1973 Wis. Act 284

¹⁴ 1983 Wis. Act 398

¹⁵ 1993 Wis. Act 445

¹⁶ 1997 Wis. Act 27. The caregiver registry built on an earlier system related only to nursing assistants.

The caregiver abuse registry continues to be separate from the elder adults/adults-at-risk reporting and response systems, and continues to have its own definitions of “caregiver,” “abuse,” “neglect” and “misappropriation of property.” *See Part I.1, below.* The new laws try to coordinate activities between the systems, requiring an elder adults/adults-at-risk agency to refer reports to DHFS if they relate to employees of entities covered by the caregiver misconduct system. *See Part F.2, below.*

2. *What is the relationship of the elder adults-at-risk and adults-at-risk systems to each other, and to the protective services system?*

The relationship of the elder adults-at-risk and adults-at-risk systems to the adult protective services system is discussed briefly in *Ch. I, Part A.* The three systems are established separately, and are concerned with somewhat different populations, but they are closely related in their fundamental purpose and values: to provide protection from abuse, exploitation and neglect, while at the same time, to the extent possible, using the least restrictive interventions and preserving individual rights. Most importantly, despite remaining differences, the elder adults/adults-at-risk reporting and response systems together provide a mechanism for meeting two of the county’s adult protective services responsibilities: identification of individuals in need of services and counseling and referral for services.

3. *How are the elder adults/adults-at-risk reporting and response systems based on respect for individual best interests, professional judgment and local planning?*

The new elder adults/adults-at-risk reporting laws state that certain health care and social service professionals and employees of certain health and social service provider agencies “**shall**” report, under certain specific circumstances. This has been referred to as “mandatory” reporting, but the statute itself does not use that term, and it is not accurate. In fact, Wisconsin’s law is unusual in that it does not require that professionals and human service workers report when certain incidents or levels of risk occur. Instead, **the law requires covered professionals and human service workers to exercise professional judgment about whether it is in the particular individual’s best interests to report** (1) when an individual at risk asks them to report, (2) when there is an ongoing imminent risk of certain types of serious harm to the individual at risk, or (3) when there is a risk of certain types of serious harm to other adults at risk by a suspected perpetrator. The professional or human service worker is not required to report if he or she determines that doing so is not in the best interest of the individual at risk, and if he or she documents that conclusion.

The autonomy of the individual affects the decision about whether to report in two important ways. First, a request by the individual that a report be made triggers the requirement that the professional or human service worker make a judgment about whether to do so. Second, a request by the individual that the professional or human service worker **not** report (and the reasons for that request) would necessarily be part of a best interests determination about whether to report over the individual’s objection. Once a report is made, the elder adult/adult at risk does not have a veto over whether an investigation will occur or continue. The decision about whether to proceed over the objection of the individual at risk must be made by the agency in light of individual circumstances.

The new adults-at-risk system in Ch. 55 for adults-at-risk under age 60 does not require a response by the adults-at-risk agency to every report or other indication of abuse, exploitation and neglect. Except where certain referrals are mandated to be made, the adults-at-risk agency is responsible for making its own determination about whether to respond to a particular report or indication of abuse, exploitation or neglect. The elder adults-at-risk system requires investigation or referral of every report of abuse, exploitation or neglect. However, the extent of the investigation is at the discretion of the local agency.

For both the elder adults-at-risk agency and the adults-at-risk agency, the statutes give a menu of responses and investigative powers on which the agency can draw, but the social worker, response team or agency is responsible for deciding what response to make, and what tools to use, based on its professional judgment about what makes most sense under the particular circumstances. Local agencies are expected to set their own policies based on local conditions and needs. Individual social workers, or teams, must then decide within those policies whether to make a response, and how far to carry it. *See Part F, below.* Instead of mandating a particular investigation and response to all reports of abuse, exploitation or neglect, the statutes mandate a report to DHFS. The agency's response (or lack of response) to a report of abuse, exploitation or neglect is made to DHFS via a web-based reporting system. The data collected by DHFS will provide information on reports of abuse and responses, including differences among counties, and should assist in future system planning and state and local policy-making. *See Part H, below.*

4. *Why do the elder adults/adults-at-risk reporting and response systems allow for reporting of abuse, neglect or exploitation of people who may not be eligible for court-ordered protective services or placement?*

The definitions of “adult at risk” and “elder adult at risk” are both broader and simpler than the categorical and functional definitions that govern eligibility for court-ordered protective services and placement. This difference is deliberate, and serves to:

- Encourage reporting by creating broad definitions that are easier for professionals and laypersons to understand.
- Provide the protection of reporting, investigation and response to a broader population than is served through protective services and placement. While a county may not be able to serve all adults at risk through the adult protective service system, it may be able to provide protection for the broader population through the response and investigation process, referral to other agencies, or provision of other kinds of services.
- Avoid under-reporting by assigning the responsibility for determination of adult protective services eligibility to the responsible county agencies, rather than to the person considering a report of abuse, neglect or exploitation.

5. *Why are there separate reporting and response systems for “elder adults at risk” and other “adults at risk,” and how are they different?*

The elder adults-at-risk reporting and response system and the adults-at-risk reporting system were designed to be parallel systems, identifying and responding to the same types of abuse, exploitation and neglect, and providing the same kind of response under similar circumstances. So why are there two parallel systems, in different chapters of the state statutes? Some of the reasons are:

- The elder abuse reporting system has existed since 1984, and has developed a strong history and level of public awareness in many communities. This argued for keeping a separate identity for the elder adults-at-risk system.
- In some counties, the elder abuse reporting system was administered by an agency that only served elders, so merger would only have been possible by moving the function, or changing the mission of the parent agency.
- Some state and federal funding has been developed specifically targeted at identifying and responding to elder abuse.

The systems are different in some respects that reflect their different histories, and may reflect a desire of the adults-at-risk system to have more discretion over what triggers a response, and what response is made, than has been the case in the elder abuse reporting system:

- **Populations served.** The most important difference is the way the served populations are defined. The population covered by the elder adults-at-risk system is defined by age plus risk, without a functional-ability test, while the population covered by the adults-at-risk system is defined by a functional-ability test plus risk.
- **Authority to respond.** An elder adults-at-risk agency is authorized to respond only to reports made under the elder adults-at-risk reporting system. An adults-at-risk agency is authorized to investigate and respond if it has “reason to believe” that an adult at risk has been the subject of abuse, financial exploitation, neglect, or self-neglect.
- **Mandatory or optional response by the county.** The elder adults-at-risk system requires that the elder adults-at-risk agency make an investigation or referral in response to every report of abuse, neglect or exploitation. The adults-at-risk system in most cases gives the adults-at-risk agency discretion as to whether to respond to reports (or other evidence) of abuse, neglect or exploitation.

COMMENT: The last two differences may not be very important in practice. It will not be difficult for an elder adults-at-risk agency to treat any evidence of abuse, neglect or exploitation as a “report” on which it can follow up. The broad discretion over what must be included in a response to a report means that either system can effectively minimize its response where appropriate, and both must make a record of the response (or lack of it).

B. STATE AND COUNTY RESPONSIBILITY FOR IMPLEMENTING THE ELDER ADULTS/ADULTS-AT-RISK REPORTING AND RESPONSE SYSTEMS

1. What are the duties of the county elder adults/adults-at-risk agency?

The responsibility of the county board to assign responsibility for the functions of the elder adults/adults-at-risk systems to one or more agencies is discussed in *Ch. 1, Part C.3*. The elder adults/adults-at-risk systems at the county level are each then responsible for establishing a reporting and response system that carries out the purposes of the statutes. This responsibility includes:¹⁷

- **Planning and coordination.** At a minimum, the agency must:
 - Develop policies about when and how it will notify other investigative agencies, including law enforcement agencies, of suspected abuse, neglect and exploitation. This should include not only policy on referrals, but also policy on the handling of concurrent investigations that can best achieve the distinct purposes of each agency. *See Part F.5, below, and Ch. VII, Part B.1.*
 - Develop a memorandum of understanding with the county human services or social services department, and with any other public or private agency that is participating in the reporting and response system, so that it will be clear, when a report is received, which agency is responsible for investigating the report, and, if it is determined that services are needed, which agency is responsible for provision of those specific direct services.
- **Intake Point.** Each elder adults-at-risk agency must receive reports of abuse, neglect and exploitation of elder adults at risk, and each adults-at-risk agency must receive and accept reports of abuse, neglect and exploitation of adults at risk.
- **Publicity and Telephone Access.** Both the elder adults-at-risk reporting and response agency and the adults-at-risk reporting and response agency are required to publicize the existence of the reporting system and to have and publicize a telephone number to which

¹⁷ Wis. Stat. §§ 46.90(3)(c) and 55.043(1g)

reports can be made. The systems must also have a telephone number to which reports can be made after business hours. If desired, either or both of these numbers can be shared by the agencies. *There is no requirement that the after-hours number be staffed*, and it could be the same as the business-hours number, as long as there is some method for taking reports.

- **Response, including investigation, referral for investigation, and/or other response to reports.** *See Part F, below.*
- **Determination of service need and offer of services or referral for services.** *See Part G, below.*
- **Completion of individual-at-risk report and DHFS Report.** *See Part H, below.*

2. *What is the state's role in the elder adults/adults-at-risk reporting and response systems?*

In addition to its duties with respect to the adult protective services system (*See Ch. IV, Part B.3.*), the state Department of Health and Family Services (DHFS) has specific duties with respect to the elder adults/adults-at-risk reporting and response systems. DHFS is required to:

- Develop a plan to assist the elder adults/adults-at-risk systems in determining appropriate responses to reports of abuse, financial exploitation, neglect, or self-neglect.
- Prepare and distribute sample state report forms for use by elder adults/adults-at-risk agencies.
- Collect statistical information from each county pertaining to each reported case of abuse, financial exploitation, neglect, or self-neglect, and prepare and distribute DHFS report forms for this purpose. *See Part H, below.*
- Use statistical information collected to review the effectiveness of the abuse reporting systems, to plan program changes, and to make reports.
- Develop and disseminate information on abuse, neglect and exploitation of elder adults and adults at risk, and on the elder adults/adults-at-risk reporting systems.
- Develop informational materials to be used by elder adults/adults-at-risk agencies regarding abuse of elder adults/adults at risk and regarding the adults-at-risk abuse reporting system.
- Receive referrals of reports of abuse, neglect or exploitation involving certain facilities regulated by DHFS, and respond as the regulating agency. *See Part F.2, below.*

C. DEFINITIONS OF *ELDER ADULT AT RISK* AND *ADULT AT RISK*

1. *Who is an elder-adult-at-risk?*

An *elder adult at risk*¹⁸ is an individual who (1) is age 60 or older and (2) has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation.

For purposes of reporters of abuse, exploitation or neglect, this definition effectively includes any person age 60 or over, because by definition a report is only made if the reporter believes that the person either has experienced, or is at risk of, abuse, neglect, self-neglect, or financial exploitation. Unless the elder adults-at-risk or other investigating agency knows, from other information, that the report is unfounded, it should begin from the assumption that the report provides reason to believe that the elder is at risk.

¹⁸ Wis. Stat. § 46.90(1)(br)

2. *Who is an adult at risk?*

An *adult at risk*¹⁹ is an individual who (1) has a physical or mental condition that substantially impairs his or her ability to care for his or her needs and (2) has experienced, is currently experiencing, or is at risk of experiencing abuse, neglect, self-neglect, or financial exploitation. This definition requires the reporter and responder in the adults-at-risk reporting and response system to make a separate determination, before reporting or responding, concerning whether the reporter has a reasonable belief that the adult who is believed to have experienced abuse, exploitation or neglect also has a mental or physical condition that substantially impairs his or her ability to care for his or her needs. The adults-at-risk agency will need to collect information from the reporter as to both issues.

COMMENT: The statutory definition of an adult at risk contains no exclusion for people age 60 or over. The state reporting system requires that all reports and responses for individuals over age 60 will be reported as related to elder adults at risk. *See Part H, below.* This does not mean that the county must handle all reports concerning people over 60 through the same agency or process. For example, it may make sense to assign reports related to people with long-term mental illness or developmental disabilities to agencies with experience with those disabilities.

D. NATURE OF HARM (OR RISK OF HARM) COVERED BY THE ELDER ADULTS/ADULTS-AT RISK SYSTEMS

1. *What kind of occurrences or risks of abuse, financial exploitation, neglect or self-neglect support a report to, or response by, the elder adults/adults-at-risk reporting and response systems?*

The laws that create the elder adults/adults-at-risk reporting and response systems authorize reports, and authorize a county investigation and response, only when the reports relate to certain categories of harm (or risk) to an individual at risk. The categories are ***abuse, financial exploitation, neglect and self-neglect***. Each of these terms (*See Section 2 below*) is defined in Wis. Stat. § 46.90, and adopted by reference for purposes of Ch. 55 in § 55.01. This does not mean that a county cannot receive and handle reports relating to other kinds of harm (or risk of harm) under its authority under other laws, but §§ 46.90 and 55.043 will not apply. Services to prevent the harm could still be offered, e.g., as social services under Ch. 46 or as mental health, substance dependence or developmental disabilities services under Ch. 51. However:

- A reporter will not be protected from legal liability or retaliation under §§ 46.90 or 55.043 unless he or she believes in good faith that the type of harm or risk being reported is the type reportable under the law.
- The county agency will not have authority to use its investigation and response authority under §§ 46.90 or 55.043, unless it has reason to believe that an elder adult at risk or adult at risk has been subject to abuse, financial exploitation, neglect or self-neglect.
- Reports of, and responses to, other types of harm should not be reported on the state report forms for the elder adults/adults-at-risk reporting and response systems.

Abuse, financial exploitation, neglect and self-neglect do not have to result from a single act. They can include harm caused by a series of actions by a person that result in one of the defined types of harm.

NOTE: The same definitions of abuse, financial exploitation, and neglect apply to restraining order laws and criminal laws that address harm directed at individuals at risk. *See Ch. VII.*

¹⁹ Wis. Stat. § 55.01(1)(1e)

2. What is abuse?

The following behavior by an individual or agency towards a person is defined as **abuse** for purposes of the elder adults/adults-at-risk reporting and response systems:²⁰

- **Physical abuse**²¹ includes an action, or a failure to act, that causes bodily harm to an individual. The action or failure to act must be *intentional* or *reckless*, that is, the person must know that he or she is doing the action and that harm is a likely consequence, or must do it without paying attention to the harm that it might cause, even though the likelihood of harm should be obvious. *Bodily harm*²² includes physical pain or injury, illness, and any impairment of physical condition.
 - **Emotional abuse**²³ includes subjecting the individual to language or behavior that serves no legitimate purpose and that is intended to be intimidating, humiliating, threatening, frightening or otherwise harassing. **Specific exceptions:** In line with the general requirement of an intent to harass, language or behavior is not considered emotional abuse if it:
 - Serves a legitimate purpose. This is intended to protect people from charges of abuse where the conduct is necessary to keep the individual safe, or is part of a legitimate treatment program.
 - Could not reasonably have been expected to intimidate, humiliate, threaten, frighten or otherwise harass the individual, and does not in fact intimidate, humiliate, threaten, frighten or otherwise harass the individual. This recognizes that whether behavior is emotionally abusive can depend on the circumstances, the relationship between the individuals involved, and the level of vulnerability of the person alleged to have been abused. Behavior that does not result in emotional harm can still be considered abusive, if it was intended to do so and could reasonably have been expected to do so.
 - **Sexual abuse**²⁴ means subjecting an individual to sexual contact of a type that would be considered a sexual assault under the criminal law. It is a crime in Wisconsin to have sexual intercourse or sexual contact with another person without consent. (**Sexual contact** is intentional touching, and certain other conduct, done for the purpose of sexually degrading the victim or sexually gratifying the perpetrator.) In addition, two provisions have special relevance for individuals at risk:
 - Any sexual contact with a person who has a mental illness or deficiency that makes him or her incapable of appraising his or her conduct is a sexual assault, even if he or she appears to consent.
 - It is sexual assault for any licensee or employee of certain human services programs and facilities to have sexual contact with an individual who is a patient or resident of the program or facility, regardless of whether the individual consents.²⁵
- See Ch. VII, Part B.2. for more detail on these provisions of the sexual assault laws.
- **Treatment without consent**²⁶ occurs when a person administers medication to an individual, or performs psychosurgery, electroconvulsive therapy, or experimental research on an

²⁰ Wis. Stat. §§ 46.90(1)(a) and 55.01(1)

²¹ Wis. Stat. § 46.90(1)(fg)

²² Wis. Stat. § 46.90(1)(aj)

²³ Wis. Stat. § 46.90(1)(cm)

²⁴ Wis. Stat. §§ 46.90(1)(gd) and 940.225

²⁵ Wis. Stat. § 940.225(2)(g)

²⁶ Wis. Stat. § 46.90(1)(h)

individual, and does so both (1) without the informed consent of the individual, and (2) with the knowledge that no lawful authority exists for the medication or treatment. Under some circumstances, medication and the listed forms of treatment or research may be administered without informed consent of the individual, but with informed consent of a guardian. *See Ch. III, Part G.5.* Medication and treatment may also be administered without informed consent under a commitment order under Ch. 51, or under an order for involuntary administration of psychotropic medication under *Ch. 55 See Ch. IV, Part I.*

- **Unreasonable confinement or restraint**²⁷ occurs when a person intentionally and unreasonably does any of the following to an individual: (1) confines the individual in a locked room; (2) prevents the individual from having access to his or her living area; (3) uses a physical restraining device on the individual; or (4) provides unnecessary or excessive medication to the individual. **Exception:** Conduct is not considered to be unreasonable confinement or restraint if (1) it occurs in an entity regulated by DHFS **and** (2) the methods or devices are employed in conformance with state and federal standards governing confinement and restraint.

3. *What is neglect?*

*Neglect*²⁸ is a failure by a caregiver to try to maintain adequate care, services or supervision, including food, clothing, shelter or physical or mental health care. The failure can be the result of an action, a failure to act, or a course of conduct over time. To be neglect, the failure must:

- **Result from conduct of a caregiver.** Only a caregiver can engage in neglect. A *caregiver*²⁹ is a person who has taken responsibility for all or a portion of an individual's care voluntarily, by contract, or by agreement. A guardian (or a person claiming to be a guardian) is a caregiver. There is no requirement that the caregiver be paid: a person can engage in neglect by promising to do something as a friend or volunteer, and then failing to do it. A caregiver should only be considered to have engaged in neglect with regard to a care, service, need for supervision or personal need for which he or she has taken responsibility. For example, a person who agrees to provide meals does not thereby become responsible for identifying and trying to meet all of the individual's needs.

NOTE: This definition is different from the definition of *caregiver* used for purposes of the caregiver misconduct system, discussed in *Part I.1, below*, and is also different from the definition of *caregiver* used in domestic abuse injunctions.)

- **Create a significant risk to the individual's physical or mental health.**
- **Be unauthorized.** It is not neglect to not seek medical care for an individual if that decision is consistent with the individual's living will, with a do-not-resuscitate order issued by the attending physician under Ch. 154, or with the individual's directives under a power of attorney for health care (*See Ch. III, Part C.1.*), or is otherwise authorized by law. Note that do-not-resuscitate orders under Ch. 154 relate only to refusal of cardiopulmonary resuscitation for qualified patients. A broader refusal of life-sustaining treatment by a guardian (*See Ch. III, Part G.2.*) or other caregiver would have to meet another exception, even if it is labeled as a "do-not-resuscitate" order.

²⁷ Wis. Stat. § 46.90(1)(i)

²⁸ Wis. Stat. §§ 46.90(1)(f) and 55.01(4r)

²⁹ Wis. Stat. § 46.90(1)(an) and 55.01(1p)

4. *What is self-neglect?*

*Self-neglect*³⁰ is a failure by the individual himself or herself to obtain adequate care, including food, shelter, clothing, medical or dental care. As with neglect, the failure must result in a significant danger to the individual's physical or mental health. Self-neglect can only occur with regard to care or other needs for which the individual retains responsibility. A failure does not need to be intentional to be self-neglect.

5. *What is financial exploitation?*

*Financial exploitation*³¹ replaces the terms *material abuse* in the elder abuse reporting system, and the terms *exploitation* and *misappropriation of property* in Ch. 55. However, it has a far broader and more complex definition than any of those terms. The definition is broken down into seven categories. Some of these then refer to conduct prohibited under criminal laws, which themselves contain their own lists and definitions of prohibited behavior. This section provides a summary of the kinds of activity covered, but cannot provide a complete description of the criminal laws involved. The titles and words used here are intended to give a general idea of what is covered by the statutes. People applying the law will need to look at the statutes, and may need to consult with experts on criminal law, to see if particular conduct fits the definitions. *Financial exploitation* now includes any of the following acts:

- **Fraud, enticement or coercion.**³² It is financial exploitation to (1) obtain an individual's money or property by deceiving or enticing an individual, or (2) to force or coerce an individual to give something away against his or her will and without his or her informed consent. The word "enticing" is not defined, but might include the use of promises of friendship, or representations that the individual will come into a lot of money if he or she makes a requested transfer. This section does not require that any criminal law be broken.
- **Theft.** *Theft* has the same meaning as it does for purposes of the criminal law against theft.³³ To be theft, a taking of property must be intentional. *Theft* includes the usual meaning of taking a person's property without permission and with intent to keep it, but (among other things) also includes:
 - **Embezzlement.** This includes a person taking property for his or her own use that has been entrusted to the person, for example, as an employee or as a trustee.
 - **Theft by fraud.** This includes a person obtaining property by making a false representation, including a promise made with the intent not to perform it.
- **Misconduct by a fiscal agent.**³⁴ Financial exploitation includes "substantial failure or neglect of a fiscal agent to fulfill his or her responsibilities." The term *fiscal agent* includes a guardian of the estate or conservator, an agent under a financial power of attorney, a representative payee appointed for purposes of Supplemental Security Income benefits (but not, as it reads, Social Security retirement, survivors and disability benefits), and a conservatorship under the U.S. Department of Veterans Affairs.
- **Identity theft.**³⁵ It is financial exploitation for a person to intentionally use an individual's identifying documents or identifying information, without the individual's consent, to either

³⁰ Wis. Stat. § 46.90(1)(g) and 55.01(6u)

³¹ Wis. Stat. § 46.90(1)(ed) and 55.01(2s)

³² Wis. Stat. § § 46.90(1)(ed)1.

³³ Wis. Stat. § 943.20

³⁴ Wis. Stat. § § 46.90(1)(ed)3.

³⁵ Wis. Stat. § 943.201

get something of value or to harm the individual's reputation or property, by pretending to be the individual, or by pretending to be acting with the individual's authorization.

- **Unauthorized use of the identity of a company or agency.**³⁶ It is financial exploitation for a person to intentionally use the identifying information or documents, of an entity (such as a bank, business, or government agency) to get something of value from an individual by pretending that he or she is acting with authorization of the entity.
- **Forgery.**³⁷ It is financial exploitation to alter legal or official documents, such as a will or title, with the intent to defraud someone, or to show an altered document to someone and pretend it is genuine, knowing that the document is forged. Forgery also includes, for example, altering an object and falsely pretending it is an antique, or that it was created by a particular artist.
- **Unauthorized use of financial transaction cards.**³⁸ It is financial exploitation to take an individual's financial transaction card without permission, to then use it, and/ or to give it or sell it to someone else. Financial transaction cards include credit, debit, ATM and similar cards.

E. REPORTING OF ABUSE, EXPLOITATION AND NEGLECT

1. *When may a member of the general public report suspected abuse, exploitation or neglect of an individual at risk?*

Any person may make a report to an agency listed in *Section 5, below*, if he or she believes that abuse, financial exploitation, neglect, or self-neglect of an elder adult/adult at risk has occurred, but only if he or she is aware of facts or circumstances that would lead a reasonable person to have that belief.³⁹ The statute for reports by any person only covers a report of a belief that abuse, exploitation or neglect **has actually occurred**. It does not cover a belief that there is a risk of future abuse, exploitation or neglect, in the absence of a past occurrence. Certain health care and social work professionals and human service workers are authorized by a separate statute to report some types of risk of future harm (*See Section 2. and 3, below*). This does not mean that other people should not report risks of abuse and neglect, but if they do they may not be protected from liability or retaliation under the provisions described in *Section 7. and 8, below*.

The term "any person" includes any individual, agency or other entity. It specifically includes attorneys and law office staff. *See Section 10, below*. It also includes health care and social work professionals and human service workers covered by the more specific provision described in *Section 2. and 3, below*. This means that a covered professional or human service worker who decides that a report is not required or authorized under the special provisions for professionals can still report occurrences of abuse under the provisions that apply to "any person" and have protection from liability and retaliation.

2. *What professionals and human service workers are covered by the separate reporting law?*

In addition to the general reporting law that covers all persons and entities, the following individuals and entities are covered by the special reporting law for professionals and human service workers, and must make a decision about whether to report a risk of abuse, neglect or exploitation under the law, as described in *Section 3, below*:

³⁶ Wis. Stat. § 943.203

³⁷ Wis. Stat. § 943.38

³⁸ Wis. Stat. § 943.41

³⁹ Wis. Stat. §§ 46.90(4)(ar) and 55.043(1m)(br)

- **Employees of human service agencies.**⁴⁰ An employee of any entity that is licensed, certified, or approved by or registered with DHFS must make a decision about whether to report risk of abuse under the reporting law. (This should be read to include at least the direct-care entities covered by the caregiver misconduct system. *See Part I.1, below*)
- **Health care providers.** A *health care provider*⁴¹ is defined to include a nurse, a chiropractor, dentist, physician, physician assistant, perfusionist, podiatrist, physical therapist, physical therapist assistant, occupational therapist, or occupational therapy assistant, a person practicing Christian Science treatment, an optometrist, or a licensed psychologist. The term also includes partnerships, corporations or companies that provide health care services, certain cooperative sickness care plans, and home health agencies.
- **Social workers, professional counselors, and marriage and family therapists.**⁴² The statute covers individuals certified under Ch. 457.

3. *When is a covered professional or human service worker required to make a judgment about whether to report?*

Unless he or she makes a documented decision not to report based on the best interests of the individual (see below), a covered professional, agency or human service worker who has seen an individual at risk in the course of the person’s professional duties must file a report under either of the following circumstances:⁴³

- The individual at risk has asked the professional or human service worker to make the report. (The statutes do not specify the subject matter of the requested report, but presumably it must relate to past or potential future abuse, exploitation, neglect or self-neglect.)
- The professional or human service worker has reasonable cause to believe that either of the following situations exist:
 - **Incapacity of individual at imminent risk.**⁴⁴ The individual is unable to make an informed judgment about whether to report the risk and is at imminent risk of serious bodily harm, death, sexual assault, or significant property loss. This differs from the reporting law for the general public in that **no past occurrence of abuse, neglect, or exploitation is required** to trigger the authority to make a report, and the obligation to decide whether a report should be made. Conversely, this provision does not authorize a report of past abuse where there is no ongoing risk. A report of past abuse without ongoing risk would have to be authorized either (1) under the power to report of any member of the general public (*See Section 1, above*), or (2) by the request of the individual at risk.
 - **Risk to another individual (non-client) at risk.** An individual at risk (other than the individual that the professional has seen as part of his or her duties) is at risk of serious bodily harm, death, sexual assault, or significant property loss inflicted by a suspected perpetrator. (This would apply, for example, if the reporter’s client has reported abuse or threats, the reporter’s client is now safe, and the alleged perpetrator is a threat to other individuals at risk. However, the statute does not by its terms require that the client have

⁴⁰ Wis. Stat. §§ 46.90(4)(ab)1. and 55.043(1m)(a)1.

⁴¹ Wis. Stat. §§ 46.90(4)(ab)3, 55.043(1m)(a)3. and 155.01(7)

⁴² Wis. Stat. § 46.90(4)(ab)4.

⁴³ Wis. Stat. §§ 46.90(4)(ad) and 55.043(b)

⁴⁴ The statutes do not say that the risk of harm must arise from a risk of abuse, financial exploitation, neglect, or self-neglect. They could be interpreted to require a report of risk from some other event, although that was presumably not intended.

been abused or be at risk of abuse for this provision to apply. It might also apply if a client reports a threat of abuse towards another individual at risk.)

Exception 1: A covered professional or human service worker is not required to file a report if **he or she believes that filing a report would not be in the best interest of the elder adult/adult at risk.** The only requirement is that the professional document his or her reasons for the belief in the file of the individual at risk. In other words, the report is only mandatory if the professional or human service worker believes that it would be in the interests of the individual at risk whom he or she has seen in a professional capacity. There is no provision under which anyone else has power to review the belief as to best interests to determine whether it was reasonable or justified, although a professional might face civil liability for a judgment not to report that was outside the range of reasonable professional judgment. Grounds which might lead a professional or human service worker to decide that a report is not in the person's interest could include:

- The importance of maintaining the trust of the individual, and his or her contact with the human service system.
- The importance of respecting the individual's autonomy and expressed preferences.
- A decision that a report might be ineffective, increase risk, or produce emotional harm not justified by whatever increased protection might result.

A professional or human service worker *may* report the risk of abuse, neglect, self-neglect or exploitation, even if he or she believes that the report is against his or her client's best interests. Risk of liability for failure to report, if foreseeable harm occurs, may create an incentive to report, because reporters have immunity from liability, while non-reporters do not. (*See Section 7, below*)

Exception 2: A health care provider is not required to report if he or she provides **treatment by spiritual means** through prayer for healing in lieu of medical care in accordance with his or her religious tradition and his or her communications with patients are required by his or her religious denomination to be held confidential.

4. *When should the individual at risk, and/or his or her guardian, be consulted before a report is made?*

There is no legal requirement that a professional, human services worker or general citizen consult a client before a report is made. The reporter will have to make an individual decision about whether to do so. Factors to consider include:

- Victims of abuse and neglect have typically experienced a loss of dignity and a loss of power and control over their lives. Regaining dignity, power and control is an important part of healing and preventing future abuse. A report made without the victim's involvement may be experienced as another instance in which things happen without his or her involvement or control.
- The individual at risk is more likely to cooperate with investigation and services, and is less likely to protest a violation of confidentiality, if he or she at least received notice and an explanation before the report was made.
- Federal confidentiality laws (which are not affected by the release of liability in state statute) may encourage or require involvement of the individual. (*See Section 6, below*)
- Sometimes, it may unnecessarily increase the anxiety of the individual at risk to know that a report has been made. The meeting to discuss the report may put the person at increased risk.

It may also in some cases be safer for the individual, or help to preserve his or her long-term relationships, if the reporter can say that the individual had no role in the decision to report.

Consent of the guardian of an individual at risk is not required before a report is made, nor is there a requirement that the guardian be informed of a report. (**NOTE:** Other laws and rules governing providers may require that a guardian be informed of changes in the individual's condition or situation.) Ordinarily, a provider will want the guardian to be involved as early as possible, but this will not be the case if the guardian is the suspected abuser, or is a person under the control or influence of the suspected abuser.

5. *To what agencies may (or must) a report be made, what form must it take, and what information may be included?*

A report related to abuse, exploitation or neglect of an elder adult at risk may be made to an agency that is part of the county adult protective services system (*See Ch. I, Part C. and Ch. IV, Part B.*), the elder adults-at-risk agency, a state or local law enforcement agency, DHFS, or the board on aging and long-term care.⁴⁵ A report related to an adult at risk may be made to the county adult protective services agency, the adults-at-risk agency, a state or local law enforcement agency, DHFS, or the board on aging and long-term care. It is up to the receiving agency to make appropriate referrals. A reporter may decide to go to the agency he or she thinks will make the most appropriate response, depending on whether the priority is seen as immediate delivery of adult protective services, arrest or regulatory action, and on potential conflicts of interest.

NOTE AND COMMENT: DHFS policy instructs facilities of entities regulated by DHFS to submit incident reports to the Office of Quality Assurance at DHFS.⁴⁶ This does not preclude a simultaneous report to the county in an appropriate case, e.g., where the individual is protectively placed through the county, where the county can facilitate a needed change in placement or services, or where the abuse, exploitation or neglect is committed by a perpetrator who is not a resident or employee of the facility and delay might impede an appropriate response.

There is no requirement that a report take a particular form, although local agencies may want to adopt a form that will assist reporters, and provide the information the agencies will need to meet state reporting requirements (*See Part H, below*). The provisions for telephone access presumably mean that telephone reports will be accepted. Use of the word "file" in the statutes for reports of risk made by covered professionals and human service workers implies that the report is in writing, but this is not stated. The report must indicate the facts and circumstances of the situation. This presumably includes at least the identity of the individual at risk, the nature of the abuse, exploitation or neglect, the basis for the reporter's belief that abuse, exploitation or neglect has occurred (or that harm is imminent), and information that the reporter believes in good faith would be helpful to prevent or ameliorate harm. The reporting statute is not a blanket authorization, e.g., for a reporter to release confidential treatment information that has no relationship to the abuse (see next section). The statute does not require that the reporter be identified, but anonymous reports may be less useful and carry less weight.

6. *May a reporter release confidential health care and treatment information as part of a report?*

Confidential health care and treatment information may always be released with informed consent of a patient or client who has capacity to consent. No exception to confidentiality rules is required where the person has authorized the release. Federal HIPAA regulations, discussed below, encourage providers to seek consent whenever possible, and to inform patients or clients of releases made without consent except in very narrow circumstances. However, there will be

⁴⁵ Wis. Stat. §§ 46.90(4)(ad) and 46.90(4)(ar)

⁴⁶ DDES Info Memo 2006-20, dated 11/28/06

circumstances under which a provider will want to consider release of confidential information without consent, and in some cases without notice that the information has been released, e.g., because the person lacks capacity to give informed consent, or because prior notice of the report might increase the risk of harm.

Under the state laws governing confidentiality of records of health care and records of treatment and services for mental illness, developmental disabilities, alcoholism and other drug abuse, a provider may allow an elder adults/adults-at-risk agency to have access to confidential health care records without informed consent, for purposes of investigation, other response, or delivery of services under the elder adults/adults-at-risk systems.⁴⁷ This includes release to another agency that is conducting an investigation under the elder adults/adults-at-risk laws, e.g., if the primary agency has made a referral to another agency because of conflict of interest. A health care provider may initiate the release of information, and does not first have to receive a request for release from an elder adults/adults-at-risk agency. This allows a covered health care, service or treatment provider to release confidential information as part of a report of suspected abuse, neglect or exploitation.

The definition of *health care provider* includes the full range of health care and therapy providers and settings.⁴⁸ The term *treatment facility* means any publicly or privately operated facility providing treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons, including but not limited to inpatient and outpatient treatment programs, community support programs and rehabilitation programs. "Treatment" means psychological, educational, social, chemical, medical or somatic techniques designed to bring about rehabilitation of a mentally ill, alcoholic, drug dependent or developmentally disabled person. *See Ch. IV, Part E.* The confidentiality laws that apply to treatment facilities also apply to county program departments responsible for services to alcoholic, drug dependent, mentally ill or developmentally disabled persons, to agencies providing services under contract with county program departments, and to any treatment or services program providing services to a person under a court order for protective services or protective placement, or to a person about whom a protective service order or petition has been filed.⁴⁹

To be covered by the exception, information and records released must be for a purpose carried out by the elder adults/adults-at-risk systems. As part of a report initiated by a provider, providers should limit a release to information that is necessary to establish that the person is an elder adult at risk or adult at risk, the reason to believe that abuse has occurred and/or may occur, and information that may be helpful in protecting the person from further abuse. As long as information and records are included in the report in a good faith belief that they support a purpose of the elder adults/adults-at-risk laws, the release should be protected from allegations of improper release by the law exempting good-faith reporters from civil and criminal liability.

Federal Rules under HIPAA. The protection from liability in the state reporting law **does not by itself protect a person from liability for a violation of federal laws** that may cover particular records, including the health care confidentiality provision of the Health Insurance Portability and Accessibility Act (HIPAA). Federal regulations under HIPAA⁵⁰ permit disclosure of confidential health information without consent of the person, in order to report abuse or neglect of an adult, under either of two circumstances:

- **Disclosure required by law.** HIPAA permits disclosure if it is required by a law and the disclosure is limited to meeting the requirements of that law. This would allow disclosure by

⁴⁷ Wis. Stat. §§ 51.30(4)(b)17 and 146.82(2)(a)7

⁴⁸ Wis. Stat. § 146.81(1)

⁴⁹ Ch. HFS 92, Wis. Admin. Code, and Wis. Stat. § 55.22(3)

⁵⁰ 45 CFR 164.512(c)

a professional or human service worker who determined that he or she was required to report abuse, exploitation or neglect, but only of information required for the report. OR

- **Disclosure authorized, but not required, by law.** HIPAA permits disclosure if it is authorized by law and either:
 - The health care provider (or other person disclosing the record) believes that the disclosure is **necessary to prevent serious harm** to the individual. This exception would allow release related to an authorized voluntary report of abuse or neglect where there is an ongoing risk of abuse, but not if it simply related to past abuse with no ongoing risk. OR
 - If the elder adult/adult at risk is **unable to give consent due to incapacity**, and the agency to which the report is being made represents that the information is not intended to be used against the elder adult/adult at risk and that an immediate “enforcement” activity would be adversely affected by waiting until the elder adult/adult at risk is able to give consent to the disclosure. This provision would apply to voluntary disclosure of past abuse, but only where the elder adult/adult at risk is incapacitated and the investigating agency is requesting the information for an ongoing activity.

COMMENT: The HIPAA statute provides that a state law is not superseded by HIPAA regulations if the provision of state law is determined by the federal government to be necessary to prevent fraud or abuse.⁵¹ Given this intent to protect state abuse-prevention activities, “enforcement” activities under the second exception should be read to include an investigation for the purpose of action by an elder adults/adults-at-risk agency, DHFS or other investigating agency, as well as for some kind of criminal or disciplinary proceeding against the perpetrator.

HIPAA regulations further require that the covered entity must promptly inform the elder adult/adult at risk that the report is being made, unless he, she or it, in the exercise of professional judgment, believes either:

- That informing the individual would place the individual at risk of serious harm. OR
- That entity would be informing a personal representative (such as a guardian or agent under a health care power of attorney), and the entity reasonably believes the representative is responsible for the abuse, neglect, or other injury, and that informing the representative would not be in the best interests of the elder adult/adult at risk. (Responsibility, in this context, should include a failure to report abuse by another person, as well as abuse by the guardian.)

7. *What protection do reporters have from civil or criminal liability for reporting, and what risk of liability may exist for failure to report?*

No person may be held civilly or criminally liable or be found guilty of unprofessional conduct for reporting in good faith under the elder adults/adults-at-risk reporting laws.⁵² The protection from liability applies to members of the general public, professionals and human service workers, and individuals at risk who make reports.

The law creates protections from liability for alleged violations of **confidentiality of health and treatment records** under other state statutes, under standards for professional licensing and certification, and under other standards of professional conduct. However, because federal laws cannot be controlled by state laws, this may not provide protection from liability under federal laws that apply. (*See last section: Federal Rules under HIPAA*). It also may not provide protection from liability under rules of the state Supreme Court that govern professional conduct by attorneys. *See Section 10, below.*

⁵¹ 42 U.S.C. 1320d-7(a)(2)(A)(i)(I)

⁵² Wis. Stat. §§ 46.90(4)(c) and 55.043 (1m)(d)

The law also creates protection for reporters for **liability for reports that cause harm**. For example, if a professional reports and the perpetrator retaliates against the individual at risk or someone else, the reporter is protected from a lawsuit by the person who experienced the retaliation, as long as the report was made in good faith.

To be covered by the protections, the person making the report must believe in *good faith* that the report is one that is authorized by the reporting law. The statutes provide that a person making a report under the elder adults/adults-at-risk reporting laws is presumed to have reported in good faith. This means that a person challenging a reporter's good faith would have to overcome the presumption by bringing in proof of bad faith.

Proof of a mistake, such as an honest but mistaken belief that a person has the functional disabilities of an adult at risk or that the agency to which a report is made is authorized to receive reports, should not be enough to show bad faith. A report would not be in good faith if the reporter knows that it is not an authorized report, particularly if the reporter is abusing the process for some purpose not connected with protecting the individual.

A professional may be exposed to **liability for failing to make a report**, even if the decision is made in good faith, if that decision turns out to cause harm to someone, and to be negligent under professional standards of care. The Wisconsin Supreme Court has held that a professional can be held liable for failing to take reasonable action to prevent a foreseeable risk of harm.⁵³ This can include harm to the professional's client, and foreseeable harm to other people. Statutorily-authorized individual-at-risk reports fall into the category of "reasonable action," if they will help reduce the risk of harm, and will not do more harm than good. This potential liability may lead to a bias in favor of reporting, even where the professional does not feel that it is in his or her client's best interests: a professional who fails to report runs a risk of being liable for failing to act to prevent foreseeable harm (to his or her client or others), while a professional who makes a report is protected by the statutory protections against liability for harm that may be caused by the report.

It is a criminal violation for an employee of a wide range of human service and residential facilities to "knowingly permit" another person to abuse or neglect a client, patient or resident.⁵⁴ See *Ch. VII, Part B.2*. This would appear to create a duty to protect that may override confidentiality rights of victims of abuse and neglect, particularly where there is a risk of continuing abuse or neglect.

A professional who determines, as a matter of his or her professional judgment, that a report is not in the best interests of his or her client and that protection of the interests of his or her client outweigh the danger to others of failing to report, and who documents that determination, probably has a good defense to a lawsuit, if the determination is within the range of accepted practice for his or her profession. To improve decisions, and to document that the professional sought guidance on the standard of care, a professional may want to consult with other professionals, or with a peer review committee, about decisions not to report. A model for this is provided by protocols that have been developed for interdisciplinary teams in the elder abuse system, as it existed before Dec. 1, 2006.

Protections from releases of information that include the identity of the reporter is covered in *Part H, below*. However, it is not always possible to guarantee anonymity. The reality is that it will often be possible to identify the reporter from the nature of the report, and it is also likely that a

⁵³ *Schuster v. Altenberg*, 141 Wis. 2d 223, 424 N.W. 2d 159 (1988), where a therapist was found potentially liable for failing to take reasonable action (including warnings to third Parties and/or beginning commitment proceedings) to prevent a foreseeable risk of harm (to self or others) by a patient.

⁵⁴ Wis. Stat. § 940.295(3)

criminal prosecution of the alleged perpetrator will result in a court order that the identity of the reporter be disclosed.

8. *What protections do reporters and individuals at risk have from loss of employment and other retaliation?*

If a person makes a report in good faith, either under the general reporting provision or under the special provision for professionals and human service workers, concerning abuse, exploitation or neglect of an individual at risk, the following legal protections apply:

- No person may discharge from employment or otherwise retaliate or discriminate against the person who made the report.
- No person may discharge from employment or otherwise retaliate or discriminate against the individual at risk about whom the report was made.

If the reporter or individual at risk is fired or otherwise retaliated or discriminated against, within 120 days after the report is made, the law creates a rebuttable presumption that the action is a response to the report. *Rebuttable* means that the person who took the action has the opportunity to present evidence to show that he or she took the action for other reasons.

If an employer discharges or otherwise discriminates against an employee, the employee may file a complaint with the state Department of Workforce Development,⁵⁵ and the complaint should be handled in the way an employment discrimination complaint would be handled. A person who is retaliated or discriminated against by someone who is not his or her employer may bring a lawsuit for damages that have resulted from the retaliation or discrimination.

9. *When may financial institutions and other holders of financial records report suspected abuse, neglect or exploitation of an individual at risk?*

While not specifically mentioned as a reporter, a financial institution (*see Glossary*) and its employees, like any other person, may report reason to believe that abuse, exploitation or neglect has occurred, and be protected by the protections for good-faith reporters. *See Part E.7, above.* Under the elder adults/adults-at-risk reporting statutes,⁵⁶ a financial record holder may release financial record information by initiating contact with an elder adults/adults-at-risk agency without first receiving a request for release of the information from the agency. (The reporting statutes do not appear to cover a report by a financial institution of a future risk of abuse, exploitation and neglect not connected to a past occurrence.)

The statute states that the holder of the financial records must release them without informed consent for purposes of a review of financial records that is part of an elder adults/adults-at-risk system investigation of abuse, exploitation, neglect or self-neglect, and also must release them under a lawful order of a court of record.⁵⁷

The state provisions on protection from liability do not control over federal privacy laws, and institutions covered by those laws will need to determine under what conditions they permit release of financial records and information. Federal laws governing financial institutions concerning nonpublic personal information allow disclosure, without notice to the individual and an opportunity by the individual to opt out of the release, under the following circumstances:

⁵⁵ Wis. Stat. §§ 46.90(4)(b), 55.043(1m)(c) and 106.54 (5)

⁵⁶ Wis. Stat. §§ 46.90(5)(b)6. and 55.043(1r)(b)6. This authorization is in the part of the statute that relates to investigation by the agency, but is not limited to release for purposes of an investigation.

⁵⁷ Wis. Stat. §§ 46.90(5)(b)6. and 55.043(1r)(b)(6)

- The disclosure is needed to protect against or prevent actual or potential fraud, unauthorized transactions, claims or other liability.⁵⁸
- To the extent specifically permitted under other provisions of law for an investigation on a matter related to public safety.⁵⁹
- To comply with a properly authorized civil, criminal or regulatory investigation.⁶⁰

These provisions are sufficient to authorize a covered financial institution to disclose information either as part of a report of abuse, exploitation or neglect initiated by the institution, or at the request of an agency conducting an investigation under the elder adults/adults-at-risk reporting and response laws.⁶¹

10. *When may lawyers report, and what is the impact of the reporting laws on guarantees of confidentiality in the rules governing professional responsibility?*

The statutes authorizing reports of occurrences of abuse, neglect and exploitation specifically say that an attorney or a person working under the supervision of an attorney is authorized to report. This language was probably included to create an exception to rules governing attorney-client confidentiality. However, the rules on professional responsibility for attorneys are made by the state Supreme Court as part of its oversight of the legal profession. Because of constitutional separation of powers between the legislature and the courts, the state Supreme Court has held that it is not bound by a legislative exception to court-made rules about professional conduct of lawyers, whether in or out of court.⁶² A lawyer still might face disciplinary action if he or she were found to have violated the court-created confidentiality rules, even if the disclosure was a report made in good faith under the elder adults/adults-at-risk reporting statutes.

The rules on attorney-client regarding disclosure of confidential information obtained in representing a client, without the client's consent:⁶³

- *Permit* a lawyer to disclose information, to the extent the lawyer “reasonably believes necessary to prevent reasonably likely death or substantial bodily harm.” This clearly authorizes reports, regardless of the client's wishes, where there is a *future risk* of death or substantial bodily harm to the client or someone else, and regardless of who the perpetrator is, but would not justify a report of past abuse without ongoing risk.
- *Require* a lawyer to disclose information reasonably necessary to prevent *the client* from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death, substantial bodily harm, or substantial injury to the property interests of another person. This would apply where the client is the potential perpetrator. Again, this exception relates to future risk, not past acts alone.
- *Permit* a lawyer to reveal information to prevent or reduce substantial damage to the financial interests of another resulting from commission of a crime or fraud, if the client has used the

⁵⁸ § 502(e)(3)(B) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802(e)(3)(B)

⁵⁹ § 502(e)(5) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802(e)(5)

⁶⁰ § 502(e)(8) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6802(e)(8)

⁶¹ A more detailed legal analysis is contained in the letter of June 3, 2005 from Julie L. Williams, Comptroller of the Currency, et al., to Sen. Russ Feingold, available from the Elder Financial Exploitation Prevention Project of the Coalition of Wisconsin Aging Groups at <http://cwag.org/uploads/GLBA2007Wis.pdf>.

⁶² *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961)

⁶³ SCR 20:1.6.

lawyer's services to assist in the crime or fraud. This would apply where the client is either the past or potential future perpetrator.

- *Permit* a lawyer to make disclosures impliedly authorized to carry out the representation of the client.

Among disclosures that may be considered “impliedly authorized” are those that the rules allow an attorney to make where his or her client has diminished capacity. The rules⁶⁴ provide that, when a client's ability to make adequately considered decisions is diminished because of mental disability or for some other reason, and is at risk of substantial physical, financial or other harm, *and* cannot adequately act in his or her interests, a lawyer may take reasonably necessary protective action. Protective action may include “consulting” with an agency that can take action *to protect the client*, and seeking appointment of a guardian ad litem, conservator, or guardian. It seems clear that a lawyer could make a judgment that a good-faith report under the elder adults/adults-at-risk reporting laws is reasonably necessary in a particular case.

This authority could not be used if the client is able to act adequately in his or her interests, but decides not to report. A difficult question would be presented by a client who is an individual at risk and who the lawyer believes (1) is at risk of harm (but not death or substantial bodily harm), (2) is mentally capable of considered decisions, but (3) is not reporting because he or she is in a situation where he or she is under the control of the perpetrator, and at risk of retaliation. Another difficult case is presented where the report of diminished capacity and risk of harm could result in action the client opposes, such as commitment or protective placement.

F. INVESTIGATION AND OTHER RESPONSE BY THE ELDER ADULTS/ADULTS-AT-RISK AGENCY

1. *What circumstances authorize an adults-at-risk agency to respond to and investigate suspected abuse, exploitation, neglect or self-neglect?*

This is one of the few areas in which the statute governing an adults-at-risk agency is different from the statute governing an elder adults-at-risk agency:

- An adults-at-risk agency may investigate and respond if it “has reason to believe that an adult at risk has been the subject of abuse, financial exploitation, neglect, or self-neglect.”⁶⁵ This authority of the adults-at-risk agency to respond exists regardless of whether the “reason to believe” is based on a report or on some other source of information, such as information provided to the agency in another form, or direct observation by an agency employee.
- An elder adults-at-risk agency is required to either respond to or refer “every” report of “alleged abuse, financial exploitation, neglect, or self-neglect.”⁶⁶ There is no reference to “reason to believe.” While a response appears mandatory, there is no requirement that a “response” include any particular action, and an investigation is only required as part of the response “if necessary.” It appears from this that an elder adults-at-risk agency could limit its response to a determination that an investigation is not warranted, e.g., if a report is duplicative of previously investigated reports, or the person's situation is already being followed by another county agency or caregiver agency.

Despite this discretion, three parts of a response by the elder adults/adults-at-risk systems appear to be **mandatory in all cases**. These are:

⁶⁴ SCR 20:1.14.

⁶⁵ Wis. Stat. § 55.043(1r)

⁶⁶ Wis. Stat. § 46.90(5)(a)

- **Mandatory response in high-risk cases.**⁶⁷ If the elder adults/adults-at-risk agency, other investigative agency, or worker has reason to believe that substantial physical harm, irreparable injury, or death may occur to an elder adult/adult at risk, it must either:
 - Initiate a protective services action (or request assistance to do so, presumably from the county adult protective service agency).
 - Contact law enforcement or another public agency, as appropriate.

Irreparable injury to property interests is probably covered by this provision.

- **Determination of need for services.** This must be done “upon response,” and regardless of whether a determination has been made about the existence or risk of abuse, neglect or exploitation. *See Part G.1, below.*
- **Report to DHFS.** *See Part H, below.*

There is no requirement that the agency have probable cause before responding to a report or initiating an investigation. It is not necessary for the agency to believe that it is more likely than not that abuse occurred. For example, a report of abuse may justify an investigation and response without further verification, unless the report is so obviously unreliable that it does not give the agency “reason to believe” that an adult at risk has been the subject of abuse, exploitation, neglect or self-neglect. The investigation is for the purpose of protecting the individual at risk, not for determining whether a perpetrator has committed a crime. *See Section 5, below.*

A potential problem is that the laws do not say that the elder adults/adults-at-risk agency may respond to a reasonable belief or report that there is a *risk* of abuse, exploitation or neglect, but no past abuse, exploitation or neglect. This could occur, for example, if someone has stated an intention to do something, but has not yet done it. If the individual at risk does not know about the threat, it is not a case of emotional abuse or self-neglect. This is not to say that the county does not have authority to respond, e.g., under the authority of its protective services agency to identify and respond to abuse, neglect and exploitation. However, the investigative tools and the protections from liability provided to the elder adults/adults-at-risk systems and its employees are arguably not available in this situation.

Mandatory referrals. An elder adults/adults-at-risk agency is required to refer a matter to DHFS for investigation if it has reason to believe that caregiver misconduct has occurred in an entity covered by the caregiver reporting requirements. In addition, the elder adults/adults-at-risk agency must make a referral where it has a potential conflict of interest in handling a report or other evidence of abuse, neglect or exploitation. The agency does not have the discretion to decide not to make these referrals, even if the report is one the agency ordinarily would not respond to under its policies. *See next section.*

2. **Mandatory referrals: caregiver misconduct in regulated entities, and conflict of interest situations.**

If an elder adults-at-risk agency receives a report or an adults-at-risk agency has reason to believe that there is abuse, financial exploitation, neglect or self-neglect of an individual at risk who is a client of an entity that is covered by the caregiver misconduct reporting requirements and if the person suspected of perpetrating the abuse, exploitation or neglect is a caregiver or non-client resident of the entity, the elder adults/adults-at-risk agency is required to refer the report to DHFS for investigation. The referral must be made within 24 hours after the report is received. Note that the words *client*, *entity*, *caregiver*, and *non-client resident* are all terms defined separately in the caregiver misconduct reporting statutes. *See Part I.1, below.* *Caregiver* in this section refers

⁶⁷ Wis. Stat. §§ 46.90(5)(f) and 55.043(2)(b)

to employees of covered entities, and not to any person who has taken on responsibility for care. (For example, abuse by a guardian would not be subject to the referral requirement, because a guardian is not a “caregiver” for purposes of the caregiver misconduct laws.)

The nature and purpose of the DHFS regulatory investigation and response, and the concurrent responsibilities of the county agency, is discussed in DDES Info Memo 2006-20, *Adult-at-Risk, Including Elder-Adult-at-Risk, Reporting Requirements*. The question of whether the referral to DHFS of a report regarding a regulated entity ends the responsibility of the elder adults/adults-at-risk agency to investigate and respond will have to be decided on a case-by-case basis. If the only issues are whether misconduct occurred, and what regulatory action needs to be taken to ensure that the regulated entity will act to prevent a repetition, DHFS is in the best position to take action. However, in many cases there may be an ongoing need for a county investigation or response. These could include, for example, situations where (1) people other than entity employees were involved in the abuse, neglect or exploitation, (2) the problem extends to the person’s involvement in other settings not regulated by DHFS, (3) other protective service or protective placement action is needed to ensure the person’s safety and access to appropriate services (such as offer of a change of providers or change of placement), or (4) the county contracts with the entity, and needs to make a decision about continuing to do so. *See Section 5, below.*

An elder adults/adults-at-risk agency is also required to make a referral to DHFS if either:⁶⁸

- The report alleges abuse, exploitation or neglect by an agent or employee of the elder adults/adults-at-risk agency; OR
- The relationship between the elder adults/adults-at-risk agency and an agency under contract with the county adult protective services department would not allow for an unbiased response by the elder adults/adults-at-risk agency.

DHFS must then make an investigation, or refer the report to another county department for investigation. DHFS or the county department *must* conduct an independent investigation. The investigating agency has the same powers to respond and duties that an elder adults/adults-at-risk agency would have in investigating and in responding to the report and its findings after investigation. DHFS may release the report of its response and/or investigation back to a county agency for purposes of offering services and referral.⁶⁹

3. *What actions can be taken as part of an agency response and/or investigation?*

Response to or investigation of a report of abuse, neglect or exploitation by the elder adults/adults-at-risk agency or other investigating agency, may include one or more of following:⁷⁰

- **A visit to the residence of the individual at risk.**
- **Observation of the individual at risk.** This can be done with or without consent of the individual’s guardian or agent under an activated power of attorney for health care, if any.
- **An interview with the individual at risk.** The interview may be held in private to the extent practicable, and with or without the consent of the individual’s guardian or agent under an activated power of attorney for health care, if any.
- **Other interviews,** including interviews with the guardian, an agent under an activated power of attorney for health care, if any, and any caregiver of the individual at risk.

⁶⁸ Wis. Stat. §§ 46.90(5)(a)2. and 55.043(1r)(a)(2)

⁶⁹ Wis. Stat. §§ 46.90(6)(b)6. and 55.043(6)(b)(6)

⁷⁰ Wis. Stat. §§ 46.90(5)(b) and 55.043(1r)(b)

- **Review of the treatment and patient health care records of the individual at risk.** While there is no cross-reference, this presumably means *treatment records* as defined under § 51.30(1)(b), and *patient health care records* as defined under § 146.81(4). *See Glossary.* The statute does not say that the agency is restricted to review of records related to the suspected or imminent abuse, neglect or exploitation but if the release is without informed consent HIPAA probably limits release to documents relevant to prevention of harm or the agency’s investigation. *See Part E.6, above.* Entities covered by HIPAA therefore may not be permitted to simply allow the agency to review the entire health care record.
- **Review of financial records.** A review of any financial records of the individual at risk that are maintained by a financial institution; by an entity covered by the caregiver misconduct system (*See Part I.1, below*); by any caregiver of the individual at risk; or by a member of the immediate family of the individual at risk or caregiver. The statute states that the holder of the financial records “**shall**” release them without informed consent for purposes of the agency review, and also must release them under a lawful order of a court of record. (*See Part E.9, above, concerning application of federal privacy laws.*)
- **Transport for medical examination.** The investigating agency may transport the individual at risk for performance of a medical examination by a physician if any of the following applies:
 - The individual at risk or his or her guardian or agent under an activated power of attorney for health care, if any, consents to the examination.
 - The individual at risk is incapable of consenting to the examination and one of the following applies:
 - ◆ The individual at risk has no guardian or agent under an activated power of attorney for health care.
 - ◆ The individual at risk has a guardian or an agent under an activated power of attorney for health care, but that guardian or agent is the person suspected of abusing, neglecting, or financially exploiting the individual at risk.
 - ◆ The examination is authorized by order of a court.

Difficulty in getting valid and timely consent for medical examinations, particularly where a guardian was unavailable or uncooperative, has been a barrier to abuse investigations. The purpose of the examination is presumably to assist both in determining whether abuse or neglect has occurred, and in deciding on appropriate services. The second exception only applies if the individual is “incapable of consenting.” In the absence of a guardianship or activated power of attorney, the physician will have to determine that this applies in order to determine whether this section authorizes an examination.

COMMENT 1: While the statute refers only to examination by a physician, this should be read to include examination by other professionals at the direction or under supervision of a physician.

COMMENT 2: These provisions do not address the problem of a guardian who is simply unavailable. A health care provider may provide emergency treatment without informed consent. Where this does not apply, it may be necessary to seek a court order for an examination.

4. *Is cooperation with an agency’s investigation mandatory? What remedies are available if access is refused?*

The statute provides that certain holders of financial records must produce those records, but other sections do not have similar mandatory language. This leaves a question as to the extent to

which individuals, service providers and other persons are obligated to cooperate with an investigation. For example:

- Is an individual at risk, or family member, obligated to allow the investigating agency to come into the person's residence, and/or obligated to answer questions as part of an interview? Constitutional restrictions against unreasonable searches by people acting under state law might restrict access to private financial records, if sought without a court order based on probable cause.
- Is a treatment or health care provider obligated to open its records to the investigating agency, or only allowed to do so? To avoid this question, and if time allows, the agency may want to seek a court order for release of records under § 51.30(4)(b)4. or § 146.82(2)(a)4, that says "shall" rather than "may."

If an individual or entity **interferes with an investigation**, the agency may apply for an injunction or restraining order to prohibit the interference under § 813.123 (*See Ch. VII, Part A.*).

The investigating agency may ask a sheriff or police officer to accompany an investigator or other agency worker during a visit to the residence of the individual at risk, or to provide other assistance as needed.⁷¹ The statute states that, if a request is made, a sheriff or police officer must accompany the agency investigator or worker, or provide other assistance as requested or necessary. If there is probable cause to believe that a crime has been committed, the fastest and most effective way to get access to a home and/or needed records may be for the law enforcement agency to seek a warrant. (*See Section 5, next.*)

5. *What is the purpose of the elder adults/adults-at-risk agency investigation, and what is its relationship to law enforcement, adult protective services, and DHFS regulation?*

As noted above, a reporter has a choice of whether to report to an elder adults/adults-at-risk agency, adult protective service agency, DHFS or a law enforcement agency. Similarly, when a report is made, these agencies will need to decide which of them is going to be involved in an investigation and/or other response. In any situation where more than one agency is involved, the agencies will need to work together so that, to the extent possible, the missions of all involved agencies can be carried out.

Elder adults/adults-at-risk agencies are required to have policies on when referrals to law enforcement agencies will be made. (*See Part B.1, above*) In many cases, there will be overlap between an elder adults/adults-at-risk agency investigation and an investigation by a law enforcement agency. The elder adults/adults-at-risk statutes do not require that an elder adults/adults-at-risk agency report all suspected crimes to law enforcement agencies. However, as discussed above (*Part F.1*), if the elder adults/adults-at-risk agency or worker has reason to believe that substantial physical harm, irreparable injury, or death may occur to an individual at risk, and it does not initiate action for protective services (or request assistance to do so), it must contact law enforcement or another public agency, as appropriate.

The elder adults/adults-at-risk agency or other investigating agency is primarily concerned with taking action that will most effectively prevent *future* abuse, neglect and exploitation of the alleged victim and of other individuals at risk. In the short term, this means getting the individual(s) at risk out of harm's way, and in the longer term ensuring protection from future abuse, neglect and exploitation in the least restrictive way. A law enforcement investigation's primary purpose is to determine whether a crime has been committed *in the past*, and to gather and preserve evidence of a kind that can be effectively used in a potential criminal prosecution. However, these purposes overlap. Prosecution (or the threat of prosecution) may be part of

⁷¹ Wis. Stat. §§ 46.90(5)(c) and 55.043(2)

keeping an individual at risk safe. Protection of victims and prevention of future crimes are also law enforcement roles.

The statute reads as if the elder adults/adults-at-risk agency first responds to a report, and then determines whether a referral to law enforcement should be made, either because of the risk of serious harm, or because of a determination that it has reason to believe that a crime has been committed. However, given the discretion as to what constitutes a “response,” there is sufficient discretion in the system for the agency to determine that it should make a referral to law enforcement based on the report alone, on the grounds that the particular situation calls for the first intervention to be by a law enforcement agency, or for action by the elder adults/adults-at-risk agency and the law enforcement agency to be concurrent.

The more agencies communicate and understand their respective roles and strengths as part of the planning process for the elder adults/adults-at-risk reporting system, the more likely that they can quickly determine the best balance in an individual case. Considerations about when, and whether, to involve law enforcement include:

- Where there is risk of harm to the individual at risk, or to the investigator or other agency worker, or a risk of interference, the agency may want to use its authority to ask a sheriff or police officer to accompany the worker during a visit to the residence of the individual at risk, or to provide other assistance as needed.⁷² If a request is made, a sheriff or police officer must accompany the agency investigator or worker, or provide other assistance as requested or necessary.
- Where criminal investigation is an ultimate goal, early involvement of law enforcement may be important. Law enforcement agencies will have greater skills in investigating certain kinds of crimes. A law enforcement investigation is likely to be most effective if it can be made while evidence is still fresh, before suspected perpetrators have been alerted to the fact that a report has been made, and before potential witnesses have received possibly suggestive information that may reduce the credibility of their independent reports. For example, questioning by a human service worker that names a suspect may undermine a witness’s credibility in later identifying the suspect as a perpetrator.
- Law enforcement agencies have greater resources and more experience in quickly getting court orders for warrants to enter a residence or to seize evidence. Where there is probably cause that would justify a warrant, that may be the best way to ensure that evidence is seized and preserved before it can be destroyed or hidden, and that there is no confusion about authority to obtain access to records.
- Quick arrest of a suspected perpetrator may be the fastest way of preventing further harm, and of getting the individual at risk out of the perpetrator’s control.
- The individual at risk may be more willing to cooperate with an investigation aimed at provision of protective services than with an investigation that may result in prosecution of an alleged perpetrator.
- The individual at risk may perceive involvement of law enforcement as a loss of control and privacy. Law enforcement agencies do not necessarily follow requests of victims as to whether to prosecute. Records of law enforcement agencies may not be subject to the same privacy protections as records of an elder adults/adults-at-risk agency. Certainly, criminal prosecution is likely to put evidence of the crime, and the individual’s condition and situation, before the public, especially if the victim must testify.

⁷² Wis. Stat. §§ 46.90(5)(c) and 55.043(2)

- Criminal prosecution may put the person through a traumatic but ultimately futile process, especially if the victim is not committed to it. However, this is difficult to judge when a report is first made, but may be a reason to involve the victim and those who know the victim well in the decision of whether to involve law enforcement.

Regulatory agencies have multiple concerns: ensuring safety of individuals in regulated settings, imposing consequences for past violations of rules, ensuring future compliance with rules, and keeping the caregiver misconduct registry. They are likely to have faster access and greater familiarity with regulated settings, particularly those that are not county contract providers, such as nursing homes and some CBRFs, and may have greater ability to get changes in provider conduct. Greater overlap will occur if the setting is state-licensed but is county-funded, either through a county contract or through individualized funding under a county-managed long-term support program, or if the person is placed in the program by an adult protective services or protective placement order. In that case, the county may have leverage through its contract, or may simply be working to move the person, but in either case has an independent interest in the investigation and response that may not be served by a simple referral.

Where a referral for investigation and response is made to DHFS or another agency under §46.90(5)(a)2. or § 55.043(1r)(a)(2) because of a conflict of interest of the elder adults/adults-at-risk agency, the agency accepting the referral takes on the powers and responsibilities of the elder adults/adults-at-risk agency as the investigative agency. That means more than the traditional role of determining whether a violation of licensing rules has occurred, and extends to a determination of need for services, and an offer or referral for services. *See Part G, below.*

The county adult protective services and the elder adults/adults-at-risk agencies (where they involve different agencies at the local level) are likely to have similar concerns. Where the individual is under a protective placement or protective service order already, or where an action for a protective court order is likely, the county may want to have the investigation handled by the adult protective services system from an early stage. The role and powers of the adult protective services system are discussed in *Chapters I, IV and V.*

6. *What protections do elder adults/adults-at-risk agency workers, investigators, and persons cooperating with investigations, have from civil or criminal liability?*

Both the elder adults-at-risk and adults-at-risk reporting laws contain the following provision:⁷³

No person may be held civilly or criminally liable or be found guilty of unprofessional conduct for responding to a report or for participating in or conducting an investigation under this subsection, including the taking of photographs or conducting of a medical examination, if the response or investigation was performed in good faith and within the scope of his or her authority.

This protects responders from liability for honest mistakes where there is a good-faith belief that the response is authorized under the elder adults/adults-at-risk reporting laws. It is not a protection for other investigations that a county may undertake, or for offers of services under *Part G, below*, which fall under subsections of the statute not covered by the protection-from-liability provision. However, previously-existing law gives a high degree of immunity to public employees engaged in discretionary activity such as protective service work involves.⁷⁴

⁷³ Wis. Stat. §§ 46.90(5)(h) and 55.043(1r)(d)

⁷⁴ See *Kara B. v. Dane County*, 198 Wis.2d 24, 54, 542 N.W.2d 777, 790 (Ct. App. 1995), *aff'd*, 205 Wis.2d 140, 555 N.W.2d 630 (1996)

G. OFFER OF SERVICES AND REFERRAL OF CASES

1. *What is the obligation of the elder adults/adults-at-risk agency to make a determination of need for services when it responds to a report of abuse, neglect or exploitation?*

The statutes require that “upon responding to a report” the elders adults/adults-at-risk agency or other investigative agency *shall* determine whether an individual at risk involved in the alleged abuse, exploitation or neglect is in need of services, including: vocational rehabilitation services, social services, long-term support services (such as home and community-based waiver or family care services), services from the county aging unit, Medical Assistance services, mental health, developmental disabilities, or substance abuse services, protective services or placement, or guardianship.⁷⁵ This determination is mandatory, and is not dependent on a finding that abuse, neglect or exploitation actually occurred. The determination of whether services are needed can and should be made at the same time as, or before, the investigation of whether abuse, neglect or exploitation exists is performed. The elder adults/adults-at-risk statutes do not mandate provision of needed services; whether services are mandatory in a particular situation will depend on other laws. If services are provided, they must be provided under the least restrictive conditions necessary to achieve their objective.

2. *What actions can the elder adults/adults-at-risk agency take if it finds that abuse, neglect or exploitation has occurred?*

If, after responding to a report, the elder adults/adults-at-risk system has reason to believe that abuse, neglect or exploitation has occurred, it may take one of several actions, as appropriate. The authority to act rests on the same basis as the original authority to investigate: reason to believe that abuse, exploitation or neglect has occurred. Authority to act does not depend on a finding that abuse, exploitation or neglect has in fact occurred. The county in most cases has authority under other laws to take similar actions, and may act in other ways for which it has separate authority, as appropriate. Options that the county has under the listed actions include:⁷⁶

- Initiate a protective service action, or request assistance from the appropriate county agency to do so. *See Ch. IV.*
- Refer the case to law enforcement officials, for further investigation or to the district attorney, if the agency has reason to believe that a crime has been committed. (A similar referral should be made if a future crime is threatened.) (*See Part F.5, above, and Ch. VII, Part B.*)
- Refer the case to the Department of Regulation and Licensing if the financial exploitation, neglect, self-neglect, or abuse involves an individual who is required to hold a license or other credential that is issued by that department.⁷⁷
- Contact an investigative agency (e.g., an agency concerned with animal protection, public health, building code enforcement, consumer protection, or insurance or financial institution regulation).
- Refer the case to the licensing permitting, registration, or certification authorities of the department or to other regulatory bodies if the residence, facility, or program for the individual at risk is or should be licensed, permitted, registered, or certified or is otherwise regulated.
- Take appropriate emergency action (or refer the case to the appropriate adult protective service agency for emergency action), including provision of emergency protective services under §

⁷⁵ Wis. Stat. §§ 46.90(5m)(a) and 55.043(4)(am)

⁷⁶ Wis. Stat. §§ 46.90(5m)(br) and 55.043(4)(b)

⁷⁷ Wis. Stat. §§ 440.01 (2) (a)

55.13 or emergency protective placement under § 55.135, if the agency considers that the emergency action is in the best interests of the individual at risk and the emergency action is the least restrictive appropriate intervention. *See Ch. IV, Part G. and Ch. V, Part C.5.*

- Bring (or refer the case to the appropriate county agency to bring) a petition for guardianship, protective services, protective placement, or review of existing guardianship, if necessary to prevent abuse, financial exploitation, neglect or self-neglect. (The statute states that this option is available only if the individual at risk would otherwise be at risk of serious harm because of an inability to arrange for necessary food, clothing, shelter, or services. However, the county has broader authority to act in its protective service capacity, e.g., if the source of harm is from an outside threat of violence, and this restriction should not prevent an otherwise appropriate referral.)

3. *Does an individual have a right to refuse services?*

Under the elder adults/adults-at-risk laws, an individual has a right to refuse to accept services “unless a guardian authorizes services.”⁷⁸ The implication of this is that an individual who has not been found incapacitated to make decisions regarding the service involved has a right to refuse the service.

Authorization of a service by a guardian does not mean that the individual can be compelled to accept the service without a court order for commitment or protective services. The power of a guardian to authorize involuntary treatment and services is discussed in *Ch. III, Part G.1. and 5. and Ch. IV, Part F*, and the impact of court-ordered protective service on the right to refuse is discussed in *Ch. V, Part D.5.*

H. STATE REPORTS AND RECORD-KEEPING

NOTE: This part discusses two kinds of “report”:

- The report of abuse, financial exploitation, neglect or self-neglect made **TO** the elder adults/adults-at-risk agency by a professional, humans service worker or other person. This will be referred to as the “**individual-at-risk report.**” (This is not a statutory term.)
- The report that must be made **BY** the elder adults/adults-at-risk agency to DHFS concerning each abuse, neglect and exploitation report that it receives. This will be referred to as the “**DHFS report.**” (In the statutes, this is referred to as the departmental *report form.*)

1. *When must an elder adults/adults-at-risk agency complete a DHFS Report, and what must it include?*

An elder adults/adults-at-risk agency must prepare a report summarizing each abuse, neglect or exploitation report it receives and the response it makes, regardless of the extent of the response made or of whether the report is considered substantiated.⁷⁹ DHFS has authority to create the DHFS report form, to require that the form be submitted to DHFS, and to use the information for reports and system improvement.⁸⁰ DHFS has created an on-line reporting system, which can be found at: <http://dhfs.wisconsin.gov/aps/index.htm>.

The on-line reporting system provides a format which the elder adults/adults-at-risk agency can use to collect and summarize information about an individual-at-risk report, including information that identifies individuals, and this can be used for local case-control and planning purposes. The on-line system also generates the DHFS Report, with names and identifying

⁷⁸ Wis. Stat. §§ 46.90(5m)(c) and 55.043(5g)

⁷⁹ Wis. Stat. §§ 46.90(6)(am) and 55.043(6)(am)

⁸⁰ Wis. Stat. §§ 46.90(8) and 55.043(8)

information removed. **The DHFS report must be entered on the DHFS report form, and may not name or otherwise identify individuals**⁸¹ (including individuals at risk, reporters or suspected perpetrators). The DHFS report covers the individual-at-risk referral received, a summary of the response including the investigative findings and the offer of services or referral for court or other action, as described in *Parts F. and G, above*. If an investigative agency other than the elder adults/adults-at-risk agency carries out the investigation or other response because of a conflict of interest, that agency must advise the elder adults/adults-at-risk agency of its response. The elder adults/adults-at-risk system is then responsible for completing the DHFS report form.

If the elder adults/adults-at-risk agency has referred a matter for investigation to DHFS or to law enforcement, it remains responsible for reporting its own response, i.e., the referral and any other protective services response by the local agency. It is not responsible for reporting on the response made by DHFS or law enforcement to the referral.

2. *What are the standards governing confidentiality and release of DHFS report forms?*

DHFS report forms are confidential, and have a separate set of statutory provisions restricting release.⁸² Except as prohibited below, the elder adults/adults-at-risk agency or other investigative agency may release the report forms only under the following circumstances:

- To the individual at risk, any person named in a departmental (DHFS) report form who is suspected of abusing, neglecting, or financially exploiting an individual at risk, and the suspect's attorney. These persons may inspect the departmental report form, except that information identifying the person who initially reported the suspected abuse, financial exploitation, neglect, or self-neglect, or any other person whose safety might be endangered through disclosure, may not be released.
- To a law enforcement agency, protective service agency or other entity contacted because there is reason to believe that substantial physical harm, irreparable injury, or death may occur. The statutes state that information obtained under this provision remains confidential in the hands of the receiving agency, but this should be read in light of the general provision (see below) that information can be re-disclosed for the purpose for which it was disclosed, e.g., to bring a protective service action.
- To an individual, organization, or agency designated by the department or as required by law for the purposes of management audits or program monitoring and evaluation. Information obtained under this subdivision shall remain confidential and may not be used in any way that discloses the names of or other identifying information about the individuals involved.
- For purposes of research, if the research project has been approved by the department or the elder adults/adults-at-risk agency and the researcher has provided assurances that the information will be used only for the purposes for which it was provided to the researcher, the information will not be released to a person not connected with the study under consideration, and the final product of the research will not reveal information that may serve to identify the individuals involved. The information shall remain confidential. In approving the use of information under this subdivision, the department shall impose any additional safeguards needed to prevent unwarranted disclosure of information.
- Under lawful order of a court of record.

⁸¹ Wis. Stat. §§ 46.90(8)(c) and 55.043(8)

⁸² Wis. Stat. §§ 46.90(6)(b) and 55.043(6)(b)

- To any agency or individual that provides direct services under an offer of services or case referral (*See Part F.1, above*), including an attending physician for purposes of diagnosis, examination, and treatment, and within the department to coordinate treatment for mental illness, developmental disabilities, alcoholism, or drug abuse of individuals committed to or under the supervision of the department. Information obtained under this subdivision shall remain confidential.
- To the guardian of the individual at risk or the guardian of any person named in a report who is suspected of abusing, neglecting, or financially exploiting an individual at risk. These persons may inspect the departmental report form (and presumably get a copy), except that information identifying the person who initially reported the suspected abuse, financial exploitation, neglect, or self-neglect, or any other person whose safety might be endangered through disclosure, may not be released.
- To law enforcement officials in accordance with the local policy on referrals to law enforcement. *See Part F.5, above, and Ch. VII, Part B.1.*
- To a federal agency or to a state or local government agency (including an agency in another state) if the agency needs the DHFS report in order to carry out its responsibility to protect individuals at risk from abuse, financial exploitation, neglect, or self-neglect.
- To the reporter who made a report in his or her professional capacity, regarding action taken to protect or provide services to the alleged victim of abuse, financial exploitation, neglect, or self-neglect.

The identity of a person making a report of alleged abuse, neglect, self-neglect, or financial exploitation must be deleted from any report prior to its release. A person to whom a DHFS report form is disclosed may not further disclose it, except to the persons and for the purposes listed above.

If a person requesting a departmental report form is not one of the persons or entities listed in the exception, the elder adults/adults-at-risk agency may release information indicating only whether or not a report was received and whether or not statutory responsibility was fulfilled.

Conditions where release is prohibited. An elder adults/adults-at-risk agency or an investigative agency may not release departmental report forms under any of the above confidentiality exceptions, if any of the following applies:

- The elder adults/adults-at-risk agency determines that release would be contrary to the best interests of the individual at risk who is the subject of the departmental report form or of a minor residing with the subject of the departmental report form, or the release is likely to cause mental, emotional, or physical harm to the subject of the departmental report form or to any other individual.
- The district attorney determines that disclosure of the information would jeopardize any ongoing or future criminal investigation or prosecution or would jeopardize a defendant's right to a fair trial.
- The elder adults/adults-at-risk agency determines that disclosure would jeopardize ongoing or future civil investigations or proceedings or would jeopardize the fairness of such a legal proceeding.

COMMENT 1: For purposes of the confidentiality provisions described above, “departmental [DHFS] report form” is defined as the information required to be submitted to DHFS. This

information **may not name or otherwise identify individuals.**⁸³ However, the provisions described above seem to assume a record that **does** have identifying information, which in some cases will be deleted. (It is hard to see how a report with no identifying information could be of any use, e.g., to a law enforcement agency.) These provisions may have been intended to allow release of the summary report form created on the DHFS on-line reporting forms, with identifying information included in some cases, but it is not clear that the language achieves that result. Where identifying information is being released, it may be safer to proceed under the provisions described in the next section. Note also that, if someone requests the report “about Mrs. Jones,” the release by itself will identify Mrs. Jones, whether or not her name is in the report, and may also disclose that she is receiving services that would otherwise be confidential.

COMMENT 2: A DHFS report form may also contain information governed by the confidentiality provisions of Wis. Stat. §§ 51.30 (treatment and service records under Ch. 51) or 146.82 (patient health care records).

3. *What are the standards governing confidentiality and release of individual-at-risk reports and records of the response to the report?*

The elder adults/adults-at-risk agency is required to maintain a record of each individual-at-risk report, and of the response, investigation, assessment and disposition of the report. These records are subject to special statutory rules on confidentiality,⁸⁴ separate from the rules that apply to protective service and protective placement records in general, and from the rules that apply to disclosure of DHFS report forms (*See Last Section, Section 2.*). They may be released, upon request, only under the following circumstances:

- To the individual at risk who is the alleged victim named in the record.
- To the legal guardian, conservator, or other legal representative of the individual at risk who is the alleged victim, unless the legal guardian, conservator, or other legal representative of the alleged victim is the alleged perpetrator of the abuse, financial exploitation, or neglect.
- To law enforcement officials and agencies in accordance with the local policy on referral to law enforcement (*See Part F.5, above, and Ch. VII, Part B.1.*), for the purpose of involvement of law enforcement in investigations, or to a district attorney, for purposes of investigation or prosecution.
- To DHFS for investigations of deaths in facilities under Wis. Stat. § 51.64.
- To DHFS or to law enforcement officials, for investigations of deaths in treatment facilities, community-based residential facilities and nursing homes that are required to report deaths related to the use of physical restraint or psychotropic medications. (*See Part I.2, below.*)
- To an employee of the county department under § 51.42 or § 51.437 that is providing services to an individual at risk who is the alleged victim named in the record, or to the alleged perpetrator of abuse, to determine whether the alleged victim should be transferred to a less restrictive or more appropriate treatment modality or facility.
- To a court, tribal court, or state governmental agency for a proceeding relating to the licensure or regulation of an individual or entity regulated or licensed by the state governmental agency, that was an alleged perpetrator of abuse, financial exploitation, or neglect.

⁸³ Wis. Stat. § 46.90(6)(ac)1. and (8)(c) and § 55.043(6)(a)1. and (8)(c)

⁸⁴ Wis. Stat. § 46.90(6)(ac)2. and (bt) and § 55.043(6)(a)2. and (bt)

- To the department, for management, audit, program monitoring, evaluation, billing, or collection purposes.
- To the attorney or guardian ad litem for the individual at risk who is the alleged victim named in the record, to assist in preparing for any proceeding under Ch. 48, 51, 54, 55, 813, 971, or 975 pertaining to the alleged victim.
- To a coroner, medical examiner, pathologist, or other physician investigating the cause of death of an individual at risk that is unexplained or unusual or is associated with unexplained or suspicious circumstances.
- To staff members of the state protection and advocacy agency (Disability Rights Wisconsin), or of the board on aging and long-term care. *See Part I.3, below.*
- To an agency, including a probation or parole agency, that is legally responsible for the supervision of an alleged perpetrator of abuse, neglect, or financial exploitation of an individual at risk.
- To a grand jury, if it determines that access to specified records is necessary for the conduct of its official business.
- Under a lawful order of a court of record.

A person to whom a record is disclosed under these provisions may not further disclose it, unless the re-disclosure is itself a permitted release.

4. *Is the identity of person making an individual-at-risk report protected from release as part of a record?*

Yes. The identity of a person making a report of alleged abuse, neglect, self-neglect, or financial exploitation must be deleted from any individual-at-risk record or DHFS report form prior to its release.⁸⁵ The identity of any reporter may only be released with the written consent of the reporter or under a lawful order of a court of record, e.g., as part of a court guardianship or protective service proceeding, or a criminal prosecution. (In practice, however, it will often be possible for the victim or perpetrator to guess at the identity of the reporter from the nature of the facts reported.)

5. *Is the custodian of reports and records protected from liability for releasing or not releasing reports and records?*

Yes. A custodian of individual-at-risk report records and DHFS report forms is protected from civil or criminal liability and may not be found guilty of unprofessional conduct for the for releasing or not releasing the records or report forms if he or she is acting in good faith and within the scope of his or her authority.

I. OTHER REPORTING LAWS

1. *What is the caregiver misconduct reporting system for employees of health and human service providers licensed by, certified by or registered with DHFS?*

The caregiver misconduct reporting system is a system under which DHFS receives and investigates reports of abuse by caregivers in facilities and services that are regulated by DHFS, and also maintains a registry of caregivers about whom reports have been made.⁸⁶ The system only applies to *abuse, neglect or misappropriation of property* by *caregivers* people employed by or under

⁸⁵ Wis. Stat. §§ 46.90(6)(bv) and 55.043(6)(bv)

⁸⁶ Wis. Stat. § 146.40(4r) and Ch. HFS 13, Wis. Admin. Code.

contract with covered *entities*, and who abuse, neglect or exploit *clients* of those entities. Reports, and findings after investigation, are then kept on the department's caregiver misconduct registry, and may also lead to other regulatory action by DHFS or the Department of Regulation and Licensing. The caretaker may ask for a hearing to show that there is no reasonable cause to believe that the alleged conduct occurred.

Abuse, neglect and misappropriation of property are defined by rule in Ch. HFS 13.03, Wis. Admin. Code. They have meanings similar (but not identical) to the meanings of abuse, neglect, and financial exploitation for purposes of the elder adults/adults-at-risk systems, discussed in *Part D, above*. See *Glossary*.

Covered *entities* are facilities, organizations or services that are licensed or certified by or registered with DHFS to provide direct care or treatment services to clients. The list of covered entities include hospitals, personal care worker agencies, supportive home care service agencies, and the state board on aging and long-term care. "Entity" also includes a temporary employment agency that provides staff to a regulated entity. For a list of entities, and much more information on the caregiver misconduct reporting system, see the Caregiver Program Manual, available on-line at: <http://dhfs.wisconsin.gov/caregiver/publications/CgvrProgMan.htm>

A covered entity is required to report any allegation of abuse, neglect or misappropriation of property of a client of the entity by a *caregiver*, defined in HFS 13.03(3) as any person who (1) has either received regulatory approval from an agency or is employed by or under contract with an *entity*; (2) has access to the entity's clients; and (3) is under the entity's control. Some exceptions apply, for people not expected to have regular client contact. In addition, any individual may report to DHFS if he or she believes that a person employed by or under contract with the entity has abused, neglected or misappropriated property of a client of the entity.

Although the caregiver misconduct law states that an individual may report, it does not contain the protections from civil and criminal liability, or the protections from loss of employment and other retaliation, that are provided by the elder adults/adults-at-risk reporting laws. (See *Part E.7. and 8, above*.) An individual may accordingly prefer to report abuse, neglect or exploitation of an individual at risk through the elder adults/adults-at-risk systems, in order to get the protections that the systems provide to reporters, rather than to make the report directly to DHFS. Note, however, that covered entities under the caregiver misconduct system are required to report to DHFS, although they may in addition report through the elder adults/adults-at-risk systems.

2. *When are reports of deaths in facilities that are related to physical restraint or psychotropic medication required?*

Deaths in community-based residential facilities, nursing homes and treatment facilities must be reported to DHFS within 24 hours if there is reasonable cause to believe that the death was related to the use of physical restraint or psychotropic medication, or was a suicide.⁸⁷ If the death is in a treatment facility, DHFS must investigate within 14 days after the date of death.⁸⁸ "Treatment facility" means "any publicly or privately operated facility or unit ... providing treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons, including but not limited to inpatient and outpatient treatment programs, community support programs and rehabilitation programs."⁸⁹

⁸⁷ Wis. Stat. §§ 50.035(5)(b), 50.04(2)(b), and 51.64(2)

⁸⁸ Wis. Stat. § 51.03(2)

⁸⁹ Wis. Stat. § 51.01(19)

3. *When can treatment and service information be released to the state protection and advocacy agency or to the Board on Aging and Long-Term Care?*

Confidential treatment and service information concerning a person with developmental disabilities or mental illness may be provided to Disability Rights Wisconsin (DRW), as the state protection and advocacy agency, for the purpose of advocating for or protecting the individual's rights.⁹⁰ A person or entity may initiate the release, without waiting for a request from DRW. If the individual at risk is not under legal guardianship, there is no restriction on release of information. If the person is under guardianship and there is no authorization for release of information from the guardian, release is limited to the nature of the rights violation, the name, birth date and county of residence of the person, admission status, and the name, address and telephone number of the guardian. However, the restriction on information to be released if the person is under guardianship does not apply in some circumstances, most importantly where DRW has made a good faith effort to contact the guardian, but has been unable to do so; where DRW has offered assistance but the guardian has refused or failed to act on the ward's behalf; or where probable cause to believe that the ward has been subject to abuse, neglect or exploitation by the guardian.

Information and records may be released to the Board on Aging and Long Term Care, which investigates complaints and mediates concerns in long-term care settings and programs, if the individual or guardian consents, or the individual has no guardian and is unable to consent.⁹¹

4. *When is reporting of sexual exploitation by a therapist required?*

If a therapist has reasonable cause to suspect that a client has been subject to sexual contact by another therapist, he or she must ask the client whether the client wants the therapist to report the contact, and must report the contact if consent is given⁹². The client's identity will not be reported unless the client consents. Where the therapist is licensed, the report is made to the state Department of Regulation and Licensing. Otherwise, the report is made to the district attorney. Information reported must be kept confidential. The purpose of this law appears to be to uncover patterns of sexual exploitation by a therapist by gathering information at a central point. There are provisions for informing reporters and alleged victims where multiple reports occur. Individual victims may be more likely to come forward to testify, and prosecution may be more effective, where a pattern of abuse is identified. The law contains protections for reporters from civil and criminal liability.

5. *What protections from liability exist for reporting violations of rights under the mental health act by licensed or certified professionals?*

No person who, in good faith, files a report with the appropriate examining board concerning the violation of rights under § 51.61, by a wide range of licensed, certified, registered or permitted professionals, or who participates in an investigation of an allegation by the appropriate examining board, is liable for civil damages for the filing or participation.⁹³ § 51.61 provides rights for individuals receiving treatment or services for mental illness, developmental disabilities and alcohol or other substance abuse, and also applies to anyone receiving court-ordered protective services or protective placement. *See Ch. I, Part D.* This provision appears to provide immunity for release of confidential information, but there is no corresponding exception in the confidentiality statutes.

⁹⁰ Wis. Stat. §§ 51.30(4)(b)18 and 146.82(2)(a)9

⁹¹ Wis. Stat. §§ 16.009(4)(b)1.c, 51.30(4)(b)22, and 146.82(2)(a)14.

⁹² Wis. Stat. § 940.22(3)

⁹³ Wis. Stat. §51.61(10), as created by 1993 Wis. Act 445.

6. *What other provisions require reporting of abuse, neglect and misappropriation of property in nursing homes and other facilities?*

There are a number of provisions that appear to permit--or require--reporting of abuse, neglect or misappropriation of property that occurs in nursing homes and other facilities. These include:

- Nursing homes, facilities for the developmentally disabled (FDDs) and community-based residential facilities (CBRFs) must report allegations of violations of residents' rights by licensed, certified or registered professionals to the appropriate licensing or examining agency.⁹⁴
- Federally-certified nursing homes must report allegations involving possible staff mistreatment, abuse or neglect of residents to the state Bureau of Quality Compliance within five days of the occurrence.⁹⁵
- State law provides a general exception to confidentiality for release of information by health care providers (including nursing homes and FDDs) to state agencies for purposes of program monitoring, evaluation and licensure, where there is a "written request" from the state agency.⁹⁶
- Nursing homes, FDDs and CBRFs must summarize rights violations in a statement to DHFS, including names of persons involved.⁹⁷
- Apparent crimes committed on the premises of a nursing home or inpatient treatment facility can be reported to a law enforcement agency.⁹⁸

⁹⁴ Wis. Stat. §50.09(6)(b) and (c); HFS 132.31(6)(c) and 134.31(7)(c), Wis. Admin. Code.

⁹⁵ 42 CFR §483.13; DHSS Memo Series BQC 93-034.

⁹⁶ Wis. Stat. §146.82(2)(a)5.

⁹⁷ Wis. Stat. §50.09(6)(d)

⁹⁸ Wis. Stat. §51.30(4)(b)19

CHAPTER III: GUARDIANSHIP BASED ON A FINDING OF INCOMPETENCE

A. INTRODUCTION

1. *Scope of this chapter: guardianship of an adult on the basis of a determination that he or she is incompetent.*

An individual may be subject to guardianship based on being in one of three categories: a minor (a person under age 18); a person determined by a court to be a spendthrift; or an adult determined by a court to be incompetent. When this chapter refers to a guardian it is referring to a guardian appointed for an individual who is over 17 years and 9 months old, and who has been determined by a court to be incompetent. Guardianship based on status as a minor or status as a spendthrift is outside the scope of this manual.

The primary focus of this chapter is on guardianship of the person (as opposed to guardianship of the estate), because that is most relevant to protective placement and protective services. Only a guardian of the person appointed on the grounds of incompetence has authority to consent to protective placement or services on behalf of an adult, and only a guardianship based on a court determination that an adult is incompetent can be the basis for court-ordered protective services or protective placement. Guardianship of the estate is also discussed because it may be an important tool in preventing financial exploitation, neglect and self-neglect. Generally in this chapter and in this book (and in Ch. 55 of the statutes) when a reference is made to a “guardian” it is to a guardian of the person who has authority over at least decisions concerning health care and long-term support.

2. *How are protective services and protective placement related to guardianship of adults based on a court finding that an individual is incompetent?*

Protective services and guardianship for adults are different forms of protection and support for people who are at risk of harm due to impairment in the ability to make or communicate decisions. They are closely interrelated in many ways, including the following:

- **Guardianship itself may be a protective mechanism and an alternative to other services.** Referral for guardianship, assisting with a petition for guardianship, and/or recruiting, assisting and paying a guardian can themselves be protective services, where provision of these services by the county is needed to keep the individual safe from abuse, neglect or exploitation or to prevent deterioration, or harm to self or others. Having a person authorized to make needed decisions and to act as a monitor and advocate for the person's rights can be important parts of protecting both individual safety and individual rights. *See Part 6, below.*
- **A guardian can request and/or provide consent to protective services.**⁹⁹ A guardian may request voluntary protective services for an individual, and a guardian of the person who has appropriate authority under the court order creating the guardianship may consent to protective services on the individual's behalf. *See Ch. IV, Part F.*
- **Guardianship is required for delivery of involuntary services.** An adult may be subject to a court order for protective services or protective placement only if there is a court determination that the person is incompetent. This determination can only be made in the

⁹⁹ Wis. Stat. § 55.05(2)(b)

context of appointment of a guardian by a court based on a finding that the individual is incompetent.¹⁰⁰ See Ch. IV, Part H.1. and Ch. V, Part C.2.

3. *What is a guardian for an adult?*

Any person over age 18 is an adult, and is presumed to be able to exercise his or her own legal rights until a court finds otherwise. This presumption does not change because a person has impaired decision-making ability, even if the impairment is severe and longstanding. This is often a surprise to family members and service providers. For example, family members may expect to receive information about services and treatment. However, that information often can only be released with the person's informed consent. If he or she is incapable of giving consent, has not delegated authority through a power of attorney for health care, and has not been found legally incompetent, the provider may have no authority to discuss services and needs with family members.

A *guardian*¹⁰¹ is a person appointed by a court to act for the person in exercising rights the person is unable to exercise, to make decisions and give consents the person is unable to make and to be an advocate for the person's best interests. Guardians get their power from the statutes that authorize guardianship, and the court order that appoints the guardian. No person in Wisconsin is a guardian unless appointed by a court, and no guardian has any powers except those given by the court order. Because a guardian gets his or her powers from the state, a guardian is subject to the same constitutional limits that control a state's power to interfere in the lives of its citizens. Decisions by a guardian must always be made in the best interests of the person, and are always subject to court review.

4. *What are “incapacity” and “incompetence” and what role do these concepts play in determinations of rights and powers of individuals and guardians of the person under the guardianship law after December 1, 2006?*

Guardianship is a form of support in the functional areas of exercise of rights and decision-making. It is a relatively intrusive form of support: the guardian has the ultimate authority to exercise rights that the person is unable to exercise for him or herself, and to make decisions for the individual in areas where the individual is unable to make decisions. The person's opinions are important, but not controlling, in the guardian's decision-making process concerning rights and powers assigned to the guardian. The changes to the guardianship law effective December 1, 2006 recognize exercise of rights and decision-making as functional skills. The new law provides a way to tailor guardianship so that substitute decision-making is imposed only concerning rights and decision-making powers that the individual is unable to exercise effectively and safely for himself or herself.

Key to the decision of what rights and powers the guardian will exercise is a determination that the individual's ability to make decisions is impaired to the extent that he or she is functionally unable to exercise the right or make decisions related to specific rights and powers. The level of functional impairment in decision-making that can be the basis for loss of a right by the individual or exercise of a right or power by a guardian is referred to under the statutes after Dec. 1, 2006, as *incapacity*, which is defined as **the inability of an individual to effectively receive and evaluate information or to make or communicate a decision with respect to the exercise of a right or power.**¹⁰² Incapacity, in the guardianship statute, is determined and has meaning only with respect to a specific right or power. It is not a general determination of overall ability to exercise rights or make decisions, and is not by itself grounds for a person to have a guardian.

¹⁰⁰ Wis. Stat. § 54.01(16) and 54.10(3)

¹⁰¹ Wis. Stat. § 54.01(10)

¹⁰² Wis. Stat. § 54.01(14)

In order for a court to appoint a guardian of the person for an individual on the basis of ***incompetence***, the individual must be incapacitated due to developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities, **to such an extent that he or she is unable to meet his or her essential requirements for health and safety.**¹⁰³ Once this threshold determination of risk to health and safety is made and the court has decided that the individual needs a guardian based on incompetence, the court decides which rights the individual can no longer exercise himself or herself, and which rights and powers the guardian should exercise, based on findings of incapacity to exercise particular rights and powers. There does not have to be a risk to health and safety with regard to each right and power that the individual is found to be unable to exercise.

5. ***What are the different kinds of guardians?***

There are two basic kinds of guardians, a guardian of the estate and a guardian of the person. One person may be both financial and personal guardian or the responsibilities may be divided. The two types of guardians are now defined by statute:

- A *guardian of the person* is a guardian appointed by a court to make decisions related to decisions related to the person's physical well-being, such as health care, support services, and living arrangements, and to advocate for the person's civil rights and access to needed services.¹⁰⁴ The appointment is based on the individual's inability to meet his or her essential needs for personal health and safety.
- A *guardian of the estate* is a guardian appointed by a court to exercise certain powers related to the person's property and finances.¹⁰⁵ The appointment is based on risks of harm to the person's property and ability to financially support him or herself.

A *standby guardian*¹⁰⁶ is a person appointed by the court to become guardian upon the death, incapacity or resignation of a guardian, or to temporarily become guardian when a guardian is temporarily unable to fulfill his or her duties. The standby guardian must inform the court when he or she begins to exercise the powers of a guardian, and the court will issue letters of guardianship that indicate whether the standby guardian has become permanent guardian, or the period during which he or she is acting temporarily.

A *temporary guardian*¹⁰⁷ is appointed only for a limited period of time, and his or her powers must be limited in the order to authority over specific property or specific acts. A temporary guardian may be appointed in an emergency, where a guardian is needed immediately while the petition for a permanent guardian is being considered. A temporary guardianship may also be appropriate if substitute decision-making is only needed for a single issue in the person's life that is not likely to recur regularly, or because of temporary period of incapacity. *See Part I, below.*

6. ***What is the status of guardianships based on petitions filed before Dec. 1, 2006?***

Guardianships that are based on petitions filed before Dec. 1, 2006, and that have not been revised since Dec. 1, 2006, are classified as either *full* or *limited* guardianships. Under a *full guardianship*, the guardian has all the possible powers of a guardian, and the individual retains only rights and powers that were specifically listed in the court order. Under *limited guardianship*, the court made specific findings as to the rights and powers the person was not

¹⁰³ Wis. Stat. §§ 54.01(19) and 54.10(3)(a)2.

¹⁰⁴ Wis. Stat. § 54.01(11)

¹⁰⁵ Wis. Stat. § 54.01(12)

¹⁰⁶ Wis. Stat. § 54.01(12) and .52(2)

¹⁰⁷ Wis. Stat. § 54.50.

competent to exercise, and the individual retains all other rights and powers. Most guardianships based on petitions filed before Dec. 1, 2006 were full guardianships. Rights reserved to the individual, if any, came from a relatively narrow list included on the standard petition, including rights to vote, marry, and obtain licenses.

Guardians appointed based on petitions filed before Dec. 1, 2006 continue to retain all the powers that were assigned to them in the original order. Individuals retain the rights reserved to them under the original orders, but also have the rights that are retained by all individuals who have guardians of person, regardless of when the guardianship was established. *See Part D, below.*

Any court review of the conduct of the guardian, of whether the individual needs a guardian on the basis of incompetence, and on what rights and powers he or she is incapacitated to exercise, will be made under the standards and procedures in the new law. *See Part E.2, below, and Ch. VI, Part K.* The guardian is subject to the new law on how he or she must exercise his or her powers, including the duty to seek and give weight to the preferences and opinions of the individual. *See Part E, below.*

7. *What are the advantages and disadvantages of guardianship?*

The process of establishing a guardianship is often a painful one for the individual and his or her friends and family. The person is forced to see himself labeled in court as unable to take or retain the responsibilities of an adult; friends and family may be in a position of having to confront the person with his or her incapacities. If a guardianship is established, the person loses control over at least some aspects of his or her life that most adults take for granted. He or she is likely to feel a loss of dignity, and in fact to be perceived as a second-class citizen by others. Other people may perceive a person under guardianship as totally incapable, even when this is not accurate.

Like any functional skill, decision-making needs to be practiced to be learned or maintained. If others make decisions for the person, he or she may lose the opportunity and motivation to develop or retain decision-making and communication skills; a finding of incompetence can in fact promote incompetence. At worst, a person who has come to learn that he or she has no voice in what happens to him or her may become an ideal victim for abuse and exploitation.

For these reasons, a guardianship should be sought only if it is clearly needed to protect the person's interests, and not for the convenience of others. Any guardianship should be tailored to deprive the person of rights and powers only where there is a functional reason.

On the positive side, guardianship can protect not only the person's safety and property, but rights that he or she might otherwise lose. For a person who cannot understand or assert a right, a guardian may be necessary to make that right more meaningful. Examples where a guardian may be needed include:

- A person in a residential facility may be given psychotropic medication for the convenience of staff without awareness of his or her right to refuse and to be free of excessive medication, or of potential side-effects.
- A person who is unable to understand or consider the long-term consequences of not paying rent may end up homeless or institutionalized, and experience a great loss of personal freedom.
- A physician may refuse to perform a beneficial procedure to reduce discomfort or increase mobility because the person cannot give informed consent.

8. *How does the requirement of least restrictiveness apply to guardianship?*

Under the law in effect before December 1, 2006, the courts had held that the principle of least restrictive alternative applied to courts in ordering guardianship and determining guardian powers, and guardians were responsible for assessing whether individuals were being supported

in the least restrictive way, and for advocating for rights to least restrictive placement and services.¹⁰⁸ The 2006 law, effective December 1, 2006, places greater emphasis on the principle of the least restrictive alternative in guardianships, in several ways:

- It puts into statute the obligation of the courts, in acting on petitions filed after December 1, 2006, not to order or continue a guardianship where there is a less restrictive alternatives (*See Part B.5, below*), and only to confer powers on guardians that are necessary to achieve the protective purposes of the guardianship and that are the least restrictive form of intervention (*See Part D 1, 4. and 5.*).
- It requires guardians to implement guardianships in the least restrictive way, and to identify and honor preferences of the individual, where practicable, especially with regard to basic constitutional rights. This applies to all guardians, regardless of when the guardianship was created.
- It identifies certain rights that are retained by all individuals under guardianship. Again, this applies to all individuals, regardless of when the guardianship was created. *See Part D.2, below.*
- It for the first time provides a statutory definition of *least restrictive*. The least restrictive alternative is defined to be the alternative “which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into his or her community that is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect.”¹⁰⁹

This definition protects three interests that the individual has that can be considered basic civil rights: personal freedom and autonomy; exercise of constitutional and other rights; and integration in the community. These interests must be balanced against the individual’s (and state’s) interest in ensuring that the person’s needs are met and the person is protected from abuse, exploitation and neglect. See discussion of least restrictive alternative in *Ch. I, Part D.2*, and the definitions of abuse, exploitation, neglect and self-neglect discussed in *Ch. II, Part D*. The needs that go into the balancing test include not only health and safety, but also the need for services to help the person gain or regain skills, abilities and life opportunities. For example, it may be “least restrictive” to overrule a refusal to participate in a developmental program that may in the longer term have the effect of expanding the individual’s choices and his or her understanding of the nature and consequences of those choices. This is closely related to the balancing test that applies to guardians of the person in determining when it is in the person’s best interests to overrule individual preferences. *See Part E.5, below.*

In referring and petitioning for guardianship, or in providing assistance to a court in a guardianship proceeding, county agencies are also bound by their duty to provide protective services in the least restrictive manner.

B. DETERMINING NEED FOR AND APPROPRIATENESS OF GUARDIANSHIP

1. *What categorical impairments can be the basis for a guardianship based on a finding of incompetence?*

Guardianship of adults based on a finding of incompetence may be ordered only for a person whose decision-making incapacity arises from an *impairment* which meets the definition of a

¹⁰⁸ *Guardianship and Protective Placement of Shaw*, 87 Wis. 2d 503 at 513 (Ct. App. 1978); Wis. Stat. § 51.61(1)(e)

¹⁰⁹ Wis. Stat. § 54.01(18)

developmental disability, serious and persistent mental illness, degenerative brain disorder or other like incapacity.¹¹⁰ (This restriction does not apply to guardianship based on a finding that the person is a spendthrift.) These are the same categorical disability groups that are eligible for protective services and placement, and the same definitions are used for guardianship as are used for protective services and placement. The definitions of these impairments are in *Ch. IV, Part C*.

COMMENT: All the impairment definitions appear to require that the condition be long-term in nature and have a functional effect on the ability of the individual to meet his or her own needs. This means that guardianship (except for temporary guardianship, *See Part I, below*) is not available, e.g., for a person with a severe but temporary mental illness, or for a person temporarily incapacitated by trauma to the brain that is not expected to result in long-term incapacity.

The impairment must affect the ability to make or communicate decisions. A person with an impairment that is only physical in nature is subject to guardianship only if he or she is unable to communicate decisions effectively in any way.¹¹¹

2. *What is evaluative capacity, and how does it relate to an order for guardianship based on a finding of incompetence?*

Incompetence addresses not the quality of decisions a person makes, but whether the person has the evaluative capacity to make a decision. For initial petitions or petitions for review filed after December 1, 2006, a court may appoint or continue a guardianship of the person or estate of an individual only if it finds that the person, because of his or her impairment, is unable either (1) to effectively receive and evaluate information or (2) to effectively make or communicate decisions.¹¹²

Under the functional test for evaluative capacity, a person may be incompetent either because of a deficit in the ability to receive information, or because of a deficit in the ability to evaluate that information. For example, a person who can state the nature and consequences of decisions may still be incapacitated if he or she then makes those decisions on irrational grounds, not connected to that information, such as direction from hallucinatory voices, a compulsion related to his or her impairment, or a lack of impulse control related to brain injury.

This functional test of evaluative capacity makes it clear that guardianship is intended to provide for individuals who require supported or substituted decision-making due to impairment of evaluative capacity, and not for people who are at risk for other reasons, such as poverty, external threats, self-care deficits or simple poor life choices. Old age, eccentricity and poor judgment, by themselves, are not grounds for guardianship if the individual remains able to effectively receive and evaluate information.¹¹³

A person may be incapacitated and at risk of harm because of a condition that is likely to respond to treatment, such as an acute mental illness, but may be refusing or otherwise resisting treatment. In that case, commitment for treatment under Ch. 51 may be a more appropriate form of intervention to overrule the individual's decision than guardianship. *See Section 7, below*.

Evaluative capacity is not an issue of knowledge: the question is not whether the person knows the information needed to make a decision, but whether he or she has the capacity to receive the

¹¹⁰ Wis. Stat. § 54.01(14) and § 54.10(3)(a)2. and 3.

¹¹¹ Wis. Stat. § 54.10(3)(b)

¹¹² Wis. Stat. § 54.10(3)(a) Prior to the 2006 changes in the law, the courts applied a similar test. *See, Guardianship and Protective Placement of Shaw*, 87 Wis. 2d 503 at 513 (Ct. App. 1978).

¹¹³ Wis. Stat. § 54.10(3)(b)

information if it were given in a form he or she is most likely to understand. For initial petitions or petitions for review of guardianship filed on or after December 1, 2006, the court must make a specific finding that the individual's need for decision-making support could not be met through training or education that is reasonably available and that the person would accept. *See Section 5, below.* In the areas of consent to treatment and services, the concept of evaluative capacity is closely related to the concept of informed consent. A person is competent to give ***informed consent*** in an area of decision-making if he or she is **substantially able to understand the nature and consequences of the decision if the significant information is presented to him or her in a form and language most likely to be understood.**¹¹⁴

Incapacity is not an all-or-nothing concept. A person may have evaluative capacity to make some decisions but not others, and the 2006 changes to the guardianship law now require an individualized determination of which decisions the individual retains capacity to make, and which decisions a guardian should be authorized to make. The level of evaluative capacity required to have legal capacity to make a decision is different for different kinds of decisions. *See Part D.3, below.* For example, a person who is incapable of giving informed consent to a complicated medical procedure may well be capable of making a valid will, appointing an agent under a power of attorney or consenting to sexual contact.

3. ***What level of incapacity to meet needs for health and safety must result from an individual's impairment, in order to support an order for guardianship of the person based on a finding of incompetence?***

For initial petitions or petitions for review of guardianship of the person filed on or after December 1, 2006, a court may appoint or continue a guardian of the person or estate of an individual only if finds that the person, because of his or her inability to evaluate information or communicate decisions, is **unable to meet the essential requirements for his or her physical health and safety.**¹¹⁵ This is a strict standard. *Meet the essential requirements for physical health or safety* is defined in statute to mean "perform those actions necessary to provide the health care, food, shelter, clothes, personal hygiene, and other care without which serious physical injury or illness will likely occur." In other words, it is necessary to tie the incapacity to make one or more decisions to an inability to meet the listed health and personal care needs, and then to tie that inability to a likely risk of serious physical injury or illness to the individual. A risk solely to the health and safety of another person is not a basis for guardianship. Once a decision has been made to order guardianship, it is not necessary for the court to find a risk of serious physical injury in connection with each right or power assigned to the guardian on grounds of incapacity to exercise a particular right or make a particular type of decision. *See Part D.4, below.*

COMMENT: It is not clear from the statute whether the risk of harm must be something that is likely to occur in the near future, as long as it is likely to occur. It is necessary that the harm be "likely." For example, if the individual is unable to make routine medical decisions, guardianship is probably justified because is it likely that every person will need health care to protect his or her health and safety, even if he or she does not have a current illness or injury requiring treatment. On the other hand, if the person is able to make routine medical decisions but not complex ones, and is not currently facing any complex medical issues, it may make sense not to impose permanent guardianship, and instead rely on use of temporary guardianship for decision-making, if and when a complex medical issue arises. Guardianship should not be imposed to protect the person from some risk of harm which is remote, or which, under his or her particular life circumstances, the individual is not likely to experience. *See Section 5. and 6, below.*

¹¹⁴ Wis. Admin. Code § HFS 94.03(2)

¹¹⁵ Wis. Stat. §§ 54.01(19) and 54.10(3)(a)2.

4. *What level of incapacity to protect property or use property to meet support needs must result from an individual's impairment, in order to support an order for guardianship of the estate based on a finding of incompetence?*

For initial petitions or petitions for review of guardianship of the estate filed on or after December 1, 2006, a court may appoint or continue a guardianship of estate only if it finds that the individual, because of his or her inability to evaluate information or communicate decisions related to management of his or her property or financial affairs, meets one or more of the following tests:¹¹⁶

- The individual has property that will be “dissipated in whole or in part.” This applies to an individual who owns property and who is making decisions or failing to exercise management so that, for example, all or part of the funds will be wasted, spent on things of little or no value, or spent or given away in a way that will leave the individual without means of support.
- The individual is unable to provide for his or her support. This would apply if the person were spending or giving away available income or resources without first paying for his or her basic support needs.
- The individual is unable to prevent financial exploitation by someone else. *See Ch. II, Part D.5*, for the definition of financial exploitation.

As noted in *Section 2, above*, eccentricity and/or poor judgment are not the issue. The individual must not only be wasting, spending or giving away the property with one of these results, but doing so without the ability to effectively evaluate the decisions he or she is making, or without the ability to communicate a decision.

5. *May a court order guardianship of person or estate, if there are alternative forms of decision-making support that would meet the person's needs in a less restrictive way?*

No. Use of guardianship, like any other functional support, must be considered among the full range of possible decision-making supports. For initial petitions or petitions for review of guardianship filed on or after December 1, 2006, a court may appoint or continue a guardian of the person or estate of an individual, or give a guardian authority over a particular decision, only if it finds that the individual's need for assistance in decision making or communication could not be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept.¹¹⁷ For example, a person who has never been educated on the nature of sexuality (but who is capable of understanding it) may be unable to make judgments about sexual activity, but training would be more appropriate than a guardianship. A person should not be found unable to communicate if an assistive device would enable communication of decisions.

The law requires that guardianship not be ordered if reasonably available alternatives would be less restrictive, i.e., allow the person more personal liberty, more exercise of rights and/or a higher level of community integration, but still be consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect. The law does not require that guardianship be denied (and the person placed at risk) when the alternative is not available, or the person would not accept it. In addition, the law allows for the possibility that some alternatives might be more restrictive than guardianship. This could happen, for example, if training would need to be so intensive that the person would have to give up other opportunities for normal life activities and social contacts.

¹¹⁶ Wis. Stat. § 54.10(3)(a)3.

¹¹⁷ Wis. Stat. § 54.10(3)(a)4,

6. *How should the individual's circumstances and preferences be considered in the court's decision as to whether the individual needs a guardian, and what powers the guardian should have?*

Whether a person needs a guardian depends not only on the person's abilities but also on his or her personal situation. Some people who could meet the standards for guardianship may be functioning well without one, or may have needs for decision-making support that can be better met in other ways. The statute now contains a list of things that a court must consider before ordering that a guardianship be initiated or be continued, and in deciding who should be guardian, what rights the individual should retain, and what powers the guardian should have.¹¹⁸ Not every item on the statutory list is relevant, or needs to be looked at in detail, for every individual. However, where an issue is important, the list provides an opportunity to bring it to the court's attention and request that it be considered.

See § 54.10(3)(c) for the list of considerations as it appears in the statute. The following list does not track statutory language, and the comments are those of the author. In addition to the consideration of potentially less restrictive alternatives discussed in the last section, the statutory list includes:

- **Advance planning for financial and health care decision making.** Examples of advance planning include a durable power of attorney for management of property, a power of attorney for health care, a trust to provide property management, or joint (or dual signature) accounts or investments. Advance planning can eliminate or reduce the need for a guardian, and a guardianship can also be limited to avoid interfering with the individual's plans. If guardianship is ordered, the court must appoint as guardian the agent appointed by the individual for finances (guardianship of estate) or health care (guardianship of person), unless the court finds that doing so would not be in the individual's best interests. *See Part C, below.*
- **Other reliable resources (informal and paid supports).** The court must consider whether other reliable resources are available to provide for the individual's personal needs or property management, and whether this would be less restrictive. For example, if the person has family, friends or a volunteer or paid advocate willing to play an active role in helping him or her make decisions, and support service providers respectful of his or her rights and preferences, he or she may be able to function well without a guardian. An important issue is whether there are checks and balances in the person's life: if the person is isolated and relies on a single individual or agency for support, the balance of a guardian or court oversight may be important. If the person has multiple sources of support, protection and advice, guardianship may not be as important.
- **Understanding of needs, and willingness to accept help.** Informal resources and services received on a voluntary basis are more likely to meet needs without a guardian if the person understands the nature of his or her disability and the risks it may create, and is able and willing to seek help when risks arise.
- **Risk of abuse, exploitation, neglect, or violation of rights.** As just noted, a person may be at higher risk because he or she is isolated, or dependent on a single individual or agency for support, especially if he or she has a high level of support needs. On the other hand, a person may be at greater risk if he or she has a high degree of mobility, or receives no support services. A person may also be at risk if he or she cannot meet (or arrange for other people to meet) his or her needs for an adequate diet, personal care and a safe and healthy place to live.

¹¹⁸ Wis. Stat. § 54.10(3)(c)

- **Intensity of support and treatment needs.** A higher level of dependency on other people for supports may bring with it a greater need for assistance with the decision-making involved in choosing providers and planning services. Support providers can have a lot of power in the person's life, and a guardian may be a means to provide outside monitoring of how that power is used, and an outside voice to assert the person's rights. This is particularly true of services, such as institutions, that are isolated from the larger society and/or have the potential to control every aspect of a person's life. While family caregivers are often also the most appropriate guardians, consideration should be given to whether appointing a caregiver as guardian may have the effect of over-concentrating power in a single individual.
- **Nature and extent of person's property and financial affairs.** Greater wealth and complexity of affairs will require more skill in management. On the other hand, it may also mean that the person can afford some risk of loss, so that he or she can continue to manage at least part of his or her finances.
- **Personal preferences, desires and values.** The goals of a guardianship, or whether one is needed, should be those of the individual, consistent with protecting the individual from abuse, exploitation and neglect, and not the goals imposed by society or family. The way a person has lived and used his or her property before becoming incapacitated provide a guide for how he or she most likely wishes to continue to live.
- **Physical illness and prognosis.** It is important to consider whether the individual's incapacity is a result of a temporary or treatable physical illness, as this may mean that no guardian, or only a temporary guardian, is needed. It is important to look for and treat physical health conditions before assuming that someone is permanently in need of guardianship, especially if the onset of incapacity was rapid and otherwise unexplained. Some physical health conditions, including common illnesses like flu and urinary tract infections, can produce temporary incapacity, especially in a person who is already debilitated by an underlying impairment. On the other hand, the risk created by a decision-making impairment may be a much greater for someone with a complex and life-threatening illness, an illness that requires careful monitoring, or an illness that requires that the person follow a strict treatment regimen.
- **Mental illness, alcoholism, or other drug dependence and prognosis.** These conditions are often treatable, and may be better dealt with through a Ch. 51 commitment instead of, or in addition to, guardianship. *See Section 7, below.* In some cases, substance abuse may result in permanent brain damage and need for guardianship.
- **Effects of medication.** A person's actual evaluative capacity may be masked (or enhanced) by the effects of medication. Need for guardianship may be increased if taking medication is essential to health or safety, or if the medications themselves, if taken inappropriately or abused, create a risk to health and safety.
- **Whether the impairment is temporary or treatable.** See the paragraphs on physical illness and mental illness, alcoholism or other drug dependence, and medication, above, and *Section 7, below*

7. *When should commitment under Ch. 51 be considered as an alternative or additional form of intervention to guardianship?*

Commitment is another way that the state uses its power to impose decisions on an individual. In commitment, those decisions relate to acceptance of inpatient and/or outpatient treatment for mental illness, developmental disabilities, alcoholism and other substance abuse. *See Ch. IV, Part E.* for discussion of the meaning of *treatment*. Where the individual's primary need is for treatment, commitment may be a more appropriate way to require him or her to accept treatment. Commitment is more strictly time-limited, and does not affect the individual's other civil rights in the way that guardianship often does. While it carries its own stigma, it does not label the individual as someone who is permanently incapacitated.

Commitment is also in many cases a more effective way to get the individual to accept treatment for mental illness, developmental disabilities, alcoholism and other substance abuse. A guardian can consent to treatment, but does not have the authority to compel treatment over the individual's objection. *See Part G.5, below.* Protective services and placement orders, also, are not primarily aimed at forcing treatment over an individual's objection, and their usefulness for that purpose is limited. *See Ch. IV, Part I and Ch. V, Part D.5.* Even where the individual needs a guardian in other respects, such as exercise of informed consent, commitment may be necessary as a means to compel treatment, in addition to guardianship and/or protective services/placement orders. Multiple failures to cooperate with treatment, due to the person's impairment, may mean that guardianship and protective services or placement are more appropriate than commitment. *See Ch. V, Part C.3. and 4.*

Another limitation on guardianship is that the risk that justifies imposition of guardianship must be to the individual's own health and safety. Where the individual's conduct creates a risk to health and safety of others, and does not create a substantial risk to himself or herself, guardianship is inappropriate, and court orders for protective services/placement (which depend first on finding of a need for guardianship based on incompetence) are also unavailable.

C. ADVANCE PLANNING FOR INCAPACITY, AND OTHER ALTERNATIVES TO GUARDIANSHIP

1. *What is a power of attorney for health care?*

A power of attorney for health care¹¹⁹ allows an adult, called the "principal", to appoint an individual, called the "health care agent", to make health care decisions for the person if the principal later becomes incapacitated, defined as unable to manage his or her health care decisions due to inability to receive and evaluate information effectively or to communicate decisions. Appointment of a health care agent can eliminate or reduce the need for guardianship by providing a substitute decision-maker authorized to make health care decisions. However, a guardian may still be needed for health care decisions that need to be made but are outside the authority of the health care agent.

The principal **must have capacity to understand what he or she is doing when he or she signs the document**; it cannot be created after the individual is incapacitated. A power of attorney for health care (POAHC) must be in writing, must be dated, and must be signed by the principal (or an adult acting at the principal's direction) in the presence of two witnesses. Neither witness can be a relative, a beneficiary under the principal's estate plan, a health care provider of the principal, an employee of a health care provider (other than a chaplain or social worker), or a person appointed as agent. A POAHC can always be revoked by a principal with capacity to do so.

¹¹⁹ Wis. Stat. Ch. 155

An agent under a POAHC has powers to get health care information and make health care decisions only if the principal has been declared incapacitated for purposes of making health care decisions. Unless the POAHC has different provisions, this requires a statement signed by two physicians, or one physician and one psychologist, both of whom have examined the principal. If the principal wants the health care agent to be involved in health care decisions before he or she is incapacitated, this should be specified in a release of medical records and information that specifies that it applies both before and after he or she is incapacitated.

A power of attorney for health care is the most effective way for a person to give clear instructions on how he or she wants medical decisions to be made if he or she becomes incapacitated, and to ensure that there is someone authorized to carry out his or her wishes. A guardian, acting without clear direction, must act in the person's "best interests." *See Part G, below.* A health care agent, on the other hand, must follow the person's stated wishes, which may in some cases include refusing treatment that a guardian would not have authority to refuse. It is therefore extremely important for the principal to be as detailed as he or she can be about what he or she would want under a variety of possible circumstances, in the power of attorney document itself and through written and spoken directions to the health care agent.

A health care agent will not be able to direct withholding of a **feeding tube**¹²⁰ without a specific authorization in the power of attorney. Even with that authority, a feeding tube may not be withheld if the physician advises that the result would be pain or reduction in comfort.

The standard form requires a positive statement if the principal wants the health care agent to have authority to make decisions if she is **pregnant**. Important issues for women of child-bearing age, not dealt with on the form, are the situations under which the health care agent may or may not authorize sterilization, birth control or an abortion.

There are limits on the powers that can be given to a health care agent in the area of **treatment for mental disabilities**¹²¹, similar to the limits on the powers of guardians. A health care agent cannot consent to: experimental mental health research; psychosurgery; electroconvulsive treatment or drastic mental health treatment procedures; or inpatient treatment at an institution for mental diseases, intermediate care facility for mental retardation, or state or private facility providing treatment for mental illness, developmental disabilities or substance dependence.

Unless the power of attorney specifically provides other authority, a health care agent may consent to **admission of the principal to a nursing home or community-based residential facility**¹²² only for short-term recuperative and respite care. The power of attorney may give the health care agent broader authority, which can avoid the need for guardianship and protective placement, at least if the individual does not protest the admission. *See Ch. V, Part B. 10.* However, this broader authority remains subject to the restriction that the agent cannot consent to admission to a treatment facility for mental illness, developmental disabilities or substance dependence. For these individuals, and others without specific directives, admissions must follow the provisions of Ch. 55.

If broader authority to make nursing home and CBRF admissions is given, separately executed pages should be added if the person wants to add any limitations on type of facility or the circumstances in which the authority may be used. Important questions, not explicitly asked on the standard form, are whether the agent may authorize admission if the person protests, or may authorize locked wards or physical, chemical or social restraints.

COMMENT: Using a power of attorney as the way to provide for health care decision-making

¹²⁰ Wis. Stat. § 155.20(4)

¹²¹ Wis. Stat. § 155.20(2) and (3)

¹²² Wis. Stat. § 155.20(2)(c)

in case of incapacity carries some risks. There is no court determination of incapacity, no guardian ad litem, and no court oversight of the actions of the agent. In addition, there is a risk that the agent will follow his or her own opinions rather than those of the principal. Choice of an agent the person trusts, detailed written instructions and detailed discussion of the principal's views, are the best safeguards. At worst, the POAHC may be used by a person engaged in abuse, neglect or exploitation of the individual, as a way to get further power over the individual and to further isolate the individual from persons or agencies that might provide protection. See next section for use of a guardianship petition to review whether a POAHC is in the individual's best interests.

The optional statutory form for a POAHC is available on the DHFS website, at <http://dhfs.wisconsin.gov/forms/AdvDirectives/index.htm> . The Coalition of Wisconsin Aging Groups has guidance on things to think about in completing a POAHC in *Planning for Future Health Care Decision-Making: A Do-It-Yourself Packet*, available on-line at <http://www.cwag.org/uploads/Guardianship%20Support%20Center/POA-HC%20Entire%20Packet%20April%202005.pdf>

If a person creates a POAHC, the original should be given to the agent, or kept where it is readily accessible to the agent. The principal may want to give copies to his or her health care providers, so that they are part of the health care record and to reduce any issues about validity of the document. The individual should also keep a copy at home. If the individual revokes the POAHC, he or she should remember to give a copy of the revocation to everyone who has a copy of the revoked declaration, and to ask that the copies be returned or destroyed.

2. *What happens if a petition is brought for guardianship of a person who has a POAHC?*

The existence of a POAHC does not prevent filing of a guardianship petition, either as a way to appoint a guardian to make decisions the agent is not authorized to make, or as a way of getting court review of whether the POAHC, as it is being carried out, is in the individual's best interests. If guardianship proceedings are begun, the agent under a POAHC is an interested person, with rights to notice of the proceedings. See *Ch. VI, Part E.1*. In deciding whether to appoint a guardian, the court must consider whether the individual has done advance planning that reduces or eliminates the need for guardianship.

If the court does appoint a guardian of person for an individual with a POAHC, the court must appoint the agent as guardian of the person, unless the court finds that that would not be in the individual's best interests."¹²³ In addition, the POAHC itself remains in effect, unless the court specifically holds that it should be revoked.¹²⁴ The court may also limit the authority that the agent would otherwise have under the POAHC, and give that authority to the guardian. If the POAHC is in effect for a particular type of health care decision, the agent under the POAHC, and not the guardian, has authority to make that decision, even if the agent is not also guardian.

COMMENT: Note that, even if a POAHC is revoked, the statements that the individual has made about his or her wishes, to his or her agent or others, remain relevant to determining what decisions should be considered to be in his or her best interests. See *Part G, below*

3. *What is an advance declaration to physicians ("living will")?*

A competent adult may execute a declaration to physicians,¹²⁵ commonly called a living will, directing whether life sustaining procedures, including feeding tubes, should be used if the person is either in a **terminal condition** that would cause death imminently or a **persistent vegetative**

¹²³ Wis. Stat. § 54.15(3)

¹²⁴ Wis. Stat. § 54.46(2)(b)

¹²⁵ Wis. Stat. Ch. 154

state and is unable to give direction himself or herself. The statutory form is available on the DHFS website (*See Section 1, above*). The declaration must be witnessed, in the same way as a power of attorney for health care.

The living will is narrower in its purpose than the power of attorney for health care. It can only apply when the person is in a terminal condition or persistent vegetative state, and there is no agent to remind health care providers that it exists. On the other hand, within its limits it provides definite direction that cannot be overruled by someone else.

4. *What financial management alternatives can be used to reduce need for guardianship?*

Financial management alternatives can be used to protect essential resources and to ensure that funds are available and payment is made for basic needs for food, clothing and shelter. In some cases, that can be enough to eliminate the need not only for guardianship of estate, but also for guardianship of the person.

Whether an alternative is more or less restrictive than guardianship depends on individual circumstances and how it is used. Alternatives to guardianship of estate may provide less protection from neglect or exploitation: there are often fewer procedural protections in the way they are established, and there may be little or no oversight of how property is used. Control of the property may also be abused by using it to influence personal decisions; for example, the person's right to refuse treatment may be circumvented by withholding funds to force consent.

Financial management alternatives include:

- **Dual signature accounts.** These accounts allow the person to make out his or her own checks or initiate withdrawals, but require another person's signature to complete the transaction. This can be a very useful way of letting the person retain responsibility and/or learn the consequences of decisions while preventing loss of essential funds. It can also be used in combination with guardianship or representative payment to allow the person to participate in decision-making.
- **Representative payment.** The Social Security Administration can appoint a representative payee for Social Security and Supplemental Security Income benefits if it determines that this would be in the person's interest, due to legal or actual incompetence, physical incapacity, or (where SSI benefits are based on disability) substance dependence.¹²⁶ The person gets notice, but there is no hearing on the need for a payee or the choice of person to act as payee unless the person asks for one.¹²⁷ No legal representation is provided if the person cannot arrange it for himself or herself. Potential advantages are that the person is not declared incapacitated for other purposes and can retain control of other funds, such as earnings from work. The representative payee is required to use funds for the person's benefit, with first priority to support and maintenance.¹²⁸ Representative payees are supposed to keep accounts; Social Security may or may not ask to see them.
- **Durable financial power of attorney.** If the person is competent to understand his or her action at the time, he or she can give another person "power of attorney" as his or her agent to manage all or part of his or her finances. **A power of attorney gives only the powers it specifies and can be time-limited.** A power of attorney can usually be revoked at any time by the person who created it, and an ordinary power of attorney automatically ends when the person dies or becomes incapacitated. Under Wisconsin law, it is now possible to establish a "durable power of attorney" which continues if (or can begin when) the person later becomes

¹²⁶ 20 CFR §§ 404.2010 and 416.610

¹²⁷ 20 CFR §§ 404.2030 and 416.630

¹²⁸ 20 CFR §§404.2040 and 416.640.

incapacitated.¹²⁹ A durable power of attorney must be in writing and contain language that shows an intent that the power of attorney can be exercised after the person becomes incapacitated. A court-appointed guardian can revoke a durable power of attorney. A statutory form for a durable power of attorney form is available on the DHFS website at <http://dhfs.wisconsin.gov/forms/AdvDirectives/index.htm>. Note that certain powers, such as the power to make gifts, must be specifically spelled out. This can be very important, e.g., if the individual wants the agent to have authority to continue a pattern of gifts to a church or charity, or to have the power to provide assistance to a family member, e.g., an adult son or daughter with a disability. As with a power of attorney for health care, a durable power of attorney remains in effect if a guardian is appointed, unless the court revokes it or limits the authority that the agent would otherwise have under the power of attorney.¹³⁰

- **Conservator.** A person may voluntarily request a court to appoint a conservator to hold and manage his or her resources.¹³¹ A conservator has the same powers and responsibilities as a guardian of the estate, and these powers may be limited in the court order, e.g., to management only of the person's major assets. A conservatorship is based on need for assistance with financial management, but involves no finding of incapacity. A conservatorship ends on the person's request, unless the court holds a hearing and finds the person incompetent.
- **Trusts.** Under a trust, resources are given directly (or by will) to another person (the trustee) who may only use them as the trust document directs. A person who wants to give property to a person with a disability who cannot manage it could create a trust with the person as primary beneficiary, so that the funds are held for the person's benefit but not subject to his or her ownership, control, or creditors.¹³² It is important that the trustee be someone who will actively work to identify and meet the individual's needs. A court-appointed guardian has no authority over funds held in trust, but could, on behalf of the individual, seek to enforce the terms of the trust. An individual may also choose to place his or her own assets into a trust, which may be revocable or irrevocable, as a way of obtaining management for property, either now or in the event of future incapacity. (A self-funded trust does not protect funds from creditors, but does prevent the individual from using trust property as security for loans.)

D. DETERMINING WHAT RIGHTS AND POWERS THE INDIVIDUAL WILL EXERCISE AND WHAT POWERS THE GUARDIAN WILL EXERCISE

1. *How are the rights kept by individuals and the powers of the guardian of the person defined by court orders?*

A guardian of the person has only the powers given to the guardian by the court order and by statute. Not all guardians have power to make all decisions. Powers not given to the guardian are kept by the individual (although the individual may not have actual capacity to exercise a power).

It is important for anyone following a guardian's decision or accepting a guardian's consent to services to find out whether the guardian has authority to make the decision involved.

Guardianship orders created or modified based on petitions filed on or after December 1, 2006 ("post-11/30/06 petitions") will look quite different from those based on earlier petitions ("pre-12/1/06 petitions").

¹²⁹ Wis. Stat. § 243.07

¹³⁰ Wis. Stat. § 54.46(2)(c)

¹³¹ Wis. Stat. § 54.76

¹³² Trusts may also provide a way to benefit people who rely on Medical Assistance and SSI without having assets of the trust count as resources. See Ch. VIII in R. Froemming, *One Step Ahead* (1995), available on-line at <http://wcdd.org/>.

Rights and powers of individuals and guardians can be divided into three categories.

- **Rights always retained by all individuals.** The statute effective on December 1, 2006, lists the rights retained by all individuals under guardianship, and this list applies regardless of when the guardianship was created. Some of these rights may overlap with powers of the guardian. For example, both the individual and the guardian share the authority to make complaints concerning violations of the individual’s rights. *See Section 2, below.*
- **Personal rights that cannot be transferred to a guardian.** Some rights, like the right to vote and marry, are personal, and can only be exercised by an individual who has the capacity to do so himself or herself. For orders based on pre-12/1/06 petitions, some of these rights were retained only by a specific provision in the order, and some (like the right to make a will) were usually not addressed by the order, and were retained if the person had actual capacity to exercise them. In some limited guardianship orders, the individual retained rights not listed as lost. In orders based on post-11/30/06 petitions, these personal rights will be kept by the individual unless there is a specific finding in the order that the individual lacks capacity to exercise the right. *See Section 3, below.*
- **Powers that can be either retained by the individual or assigned to the guardian.** Most orders based on pre-12/1/06 petitions gave guardians full powers. Only if a limited guardianship was specifically sought were some powers retained by the individual. In orders based on post-11/30/06 petitions, guardians of the person will have only the powers specifically listed in the order. Individual powers granted to the guardian may be full, or may be further limited, for example if the person is capable of decision-making in some circumstances, but not all. Certain listed individual rights will be lost by the individual only if there is a specific finding in the order related to that right, and the civil rights that will be retained by all individuals under guardianship are now specifically listed in the statute. This means, for example, that a guardian’s consent to protective services will be valid only if the guardian has authority under the order to consent to the type of service involved. Guardians of the estate may also be limited to exercise only of the powers needed to provide protection of the person’s interests. *See Section 4, below.*

2. *What constitutional and other rights are retained by all individuals who have guardians of the person based on a finding of incompetence?*

An individual who has a guardian of the person based on a finding of incompetence retains the power to exercise certain rights. These rights are the same regardless of whether the guardianship was created before or after December 1, 2006. The individual does not need to inform the guardian, or get the guardian’s consent, before exercising them. The retained rights include:¹³³

- **Communication with government officials and courts.** An individual under guardianship has a right to “have access to and communicate privately with the court and with governmental representatives, including the right to have input into plans for support services, the right to initiate grievances, including under state and federal law regarding resident or patient rights, and the right to participate in administrative hearings and court proceedings.” This includes the right “to petition for court review of guardianship, protective services, protective placement, or commitment orders.” (Guardianship also does not prevent a person from being a witness; the judge and jury in particular cases must decide if the testimony is relevant and useful.¹³⁴)
- **Communication with legal counsel.** An individual under guardianship has a right to “have access to, communicate privately with, and retain legal counsel.” This is not a right to free legal services. Any fees are to be paid from the income and assets of the ward, but are subject to court

¹³³ Wis. Stat. § 54.25(2)(b)

¹³⁴ Wis. Stat. §906.01,

approval. Court approval of fees provides some protection against an attorney who, e.g., overcharges, or runs up a fee based on a request for legal services that clearly has no chance of success.

- **Communication with rights advocacy agencies.** An individual under guardianship has a right to have access to and communicate privately with representatives of the state protection and advocacy agency under s. 51.62 (Disability Rights Wisconsin) and the Board on Aging and Long-Term Care.
- **Protest of residential placement.** An individual under guardianship has a right to protest a residential placement, and to be discharged unless there is an emergency placement or a proceeding resulting in court-ordered protective placement. *See Ch. V, Part B.8.*
- **Withhold certain consents and refuse treatment.** Consent of the individual under guardianship is required in addition to the consent of the guardian, for certain types of admissions and treatment for mental illness, developmental disabilities, alcoholism and drug dependence. With limited exceptions, informed consent of the individual is required for administration of treatment that is experimental research under Wis. Stat. § 51.61(1)(j), and for administration of drastic treatment under Wis. Stat. § 51.61(1)(k). *See Part G.5, below.* Consent of the individual, or at least lack of protest, is required for voluntary admission to a treatment facility.¹³⁵ *See Ch. V, Part B.11.* Individuals also have the right to refuse medication and treatment under § 51.61(1)(g) and (h), unless medication or treatment is necessary to prevent serious physical harm to the individual or others or the individual is found not competent to refuse (*See Part G.5, below*).
- **Other statutory and constitutional rights.** An individual under guardianship has a right to exercise any other rights specifically reserved to the individual by statute or the constitutions of the state or the United States, including the rights to free speech, freedom of association, and the free exercise of religious expression. Rights reserved to individuals include rights of individuals in residential facilities under § 50.09, and rights under § 51.61 for individuals who are receiving services for developmental disabilities, mental illness, alcoholism or other substance dependence, or who are under court orders for protective services or protective placement.

The last section makes clear that this list is not exclusive, and that individuals retain constitutional rights as citizens. However, it should probably not be read to mean that a guardian or court can never take an action that overrules an individual's expressed choice regarding a constitutional right. Exercise of constitutional rights may be limited by the state where there is a compelling state interest, such as a serious threat to health and safety. In addition, the weight to be given to an individual's choice in an area of protected rights will depend on his or her understanding of the nature of the right and the risks and consequences of the choice he or she is making. It is likely that courts will treat constitutional rights under a balancing test similar to the one used for a guardian's decision that restricts rights, described in *Part E.5, below*.

An area of protected individual rights that is not explicitly addressed are the rights to freedom from state intervention in decision-making related to private sexual activity and procreation, protected by the constitutional right to privacy. This is discussed in *Part H, below*.

The rights retained by the individual clearly overlap with powers and duties that a guardian of the person may have, such as the responsibility to take action to protect the individual's rights, and to act as an advocate in court and administrative processes. It appears that these rights are shared, e.g., either the guardian or the individual can file a grievance alleging violation of a right under § 50.09 or § 51.61.

¹³⁵ Wis. Stat. § 51.10(8)

3. ***What personal rights can be lost by the person, because is or she lacks capacity to exercise them, but cannot be exercised by the guardian on the individual's behalf?***

The statutes now contain a list of rights that can only be exercised by an individual who has capacity to do so, and that cannot be exercised by a guardian. In orders based on post-11/30/06 petitions, these rights are retained by the individual unless the court finds that the person does not have the capacity to exercise the right. The measure of capacity is different, depending on the right involved. The law recognizes that some individuals may have capacity to exercise some personal rights in some circumstances but not in others. In those cases, the court may order that the individual may exercise the right only with consent of the guardian.¹³⁶ The listed rights, and the likely standard of capacity, are:

- **Right to consent to marriage.** Marriage is a contract, and both parties must be capable of consent for a marriage to be valid.¹³⁷ The test of capacity should be whether the person understands the nature and consequences of marriage. If the right to marry is retained, exercise of the right can be made conditional on consent of the guardian.
- **Right to execute a will.** Courts have held that a person making a will must have the mental capacity to understand what he or she owns, his or her relationship to people he or she might give things to, and the effect of the will he or she is signing.¹³⁸ The courts have recognized that people under guardianship may have capacity to sign a will, either in general or during “lucid intervals.”¹³⁹
- **The right to serve on a jury.** A juror must be able to understand the English language, and a person may be excused from serving if he or she “cannot fulfill the responsibilities of a juror.”¹⁴⁰
- **The right to apply for licenses,** including a driver's license, hunting or fishing license, or a job-related license or permit. This right may be taken away if the person is incapable of understanding the nature and risks of the licensed or credentialed activity, to the extent that engaging in the activity would pose a substantial risk of physical harm to the individual or others. (A person who is found capable of applying may, of course, still fail to qualify for the license itself.)
- **Right to consent to sterilization.** Under Wisconsin law, neither a guardian nor a court has authority to consent to a procedure for the purpose of sterilization.¹⁴¹ Accordingly, the sole route to consent to a procedure that is for the primary purpose of sterilization is for the individual to retain or regain authority to consent. This right may be removed if the court finds that the individual is incapable of understanding the nature, risk, and benefits of sterilization, after the nature, risk, and benefits have been presented in a form that the individual is most likely to understand. (This is the standard definition of informed consent for treatment.) If the right is retained, exercise of the right can be made conditional on consent of the guardian. For discussion of consent to **birth control** and **abortion**, See Part H.2, below
- **The right to consent to organ, tissue, or bone marrow donation.** No standard of capacity is in the statute. The Wisconsin Supreme Court, in a case involving a request for approval of

¹³⁶ Wis. Stat. § 54.25(2)(c)3.

¹³⁷ Wis. Stat. § 765.01,

¹³⁸ *In re Estate of Persha*, 2002 WI App 113, at 18, 255 Wis. 2d 767, 649 N.W.2d 661.

¹³⁹ *Sorensen v. Ziemke (Estate of Sorensen)*, 87 Wis. 2d 339, 345-46, 274 N.W.2d 694 (1979).

¹⁴⁰ Wis. Stat. §§ 756.02 and .03(1),

¹⁴¹ *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981). This does not prevent consent to an otherwise medically necessary procedure that results in sterilization. The case did not involve a situation where pregnancy was likely to result in serious physical harm to the individual.

donation of a kidney to a sister by a man who lacked capacity to consent, stated that consent could not be given by a guardian or court in the absence of any evidence that the procedure would serve the interests of the ward.¹⁴² While the court implied that a strong personal relationship to the recipient might have affected its decision, this is not stated as an issue in the statute. The standard of capacity is likely to be the ability to give informed consent, perhaps modified to allow a person with more limited capacity to give consent where he or she at least understands that the purpose is to save the life of a loved one, and can indicate a desire to do so. If the right is retained, exercise of the right can be made conditional on consent of the guardian. It is not clear, under the statute, whether a prior expressed wish to be a donor by a person who is now incapacitated can be honored. For pre-planning, it is best to include such a wish in a power of attorney for health care.

- **Right to vote.** The standard for incapacity to vote is that the person must be incapable of understanding the objective of the elective process. No person may be denied the right to vote on grounds of incapacity unless a prior court determination of incapacity has been made.

Except for the right to vote, the lack of a court finding of incapacity does not necessarily mean that the person's actual exercise of a retained right will be legally valid. A person must be actually capable of exercising any of the other rights *at the time he or she exercises it* or the exercise will be invalid. For some of the rights, it is difficult to assess capacity outside of the context of an actual decision: many people will be able to express an opinion about marriage, sterilization, or transplant surgery in the context of a real decision, who could not discuss these issues theoretically. If a right is retained, it will be important to document the person's capacity at the time of exercise, e.g., by having the person spend time with a health professional, mental health counselor, or legal professional, who can then confirm that the exercise of the right was voluntary, knowing and made with the necessary capacity. In some cases, it may be most appropriate to return to the court for a specific finding of capacity in the context of the actual decision.

A right which is not directly addressed in the statutory list of rights retained is the **right to consent to private sexual activity**. See discussion in *Part H.1, below*.

4. *What powers may be lost by the individual because he or she lacks capacity to exercise them, but can be assigned by the court to the guardian of person to exercise?*

In orders based on post-11/30/06 petitions, a court may authorize a guardian of the person to exercise all or part of any of these powers only if it finds, by clear and convincing evidence, that the individual lacks *evaluative capacity* to exercise the power.¹⁴³ See *Part B.2, above*. The court may authorize the guardian of the person to exercise only those powers that are necessary to provide for the individual's personal needs, safety, and rights. If a guardian is given authority to exercise a power, the court may limit the authority of the guardian over that power to allow the individual to retain power to make decisions that he or she retains evaluative capacity to make. For example, an order might allow an individual to make routine health care decisions, but authorize the guardian to make decisions about major surgery or high-risk medications.

For some of the powers, even if a guardian is given general authority, he or she will need specific authority to exercise the power under specific circumstances. For those powers, it may make sense to assign them to the guardian, where the individual does not have evaluative capacity to exercise them, but then to limit the power to require approval by the court of actual exercise of the power.

Powers the guardian of the person can be authorized to exercise include:

¹⁴²*In re Guardianship of Pescinski*, 67 Wis. 2d 4, 226 N.W.2d 180 (1975).

¹⁴³ Wis. Stat. § 54.25(2)(d)

- **The power to give informed consent to medical examination, treatment and medication.** *See Part G, below.*
- **The power to authorize participation in research.** *See Part G.3, 4. and 5, below.*
- **The power to consent to experimental treatment.** *See Part G. 4. and 5, below*
- **The power to give informed consent to social and supported living services.** This includes the power to consent to voluntary protective services, but not authority to compel the person to accept services, absent a court protective service order. *See Ch. IV, Part 4. and 5.* It also includes authority to consent to long-term support services, such as Community Options, Community Integration and Family Care services.
- **The power to make decisions about educational and vocational placement and support services or employment.** This seems to say that the guardian of person can decide where the individual will work, although financial agreements and payment would need to be made through the guardian of estate. Again, this does not include authority to compel the person to attend programming, absent a court protective service order.
- **The power to choose providers of medical, social and/or supported living services.** While generally authority over medical decisions will include choice of providers, some individuals who may not be able to give a valid consent to complex medical procedures may still have capacity to choose their own providers.
- **The power to give informed consent to the release of confidential records** other than court, treatment, and patient health care records and to disclosure as appropriate. It is not clear why the statute has an exception for court treatment and health care records, unless it is assumed that a guardian always has authority to consent to release of those records. Clearly, a guardian with authority to consent to a type of care must at least have access to records concerning that care. It is also essential that the guardian at least have authority to authorize sharing of the records with other providers in his or her areas of authority.
- **The power to make decisions related to mobility and travel.** Except in an emergency, a guardian does not have authority to force the person to live somewhere over his/her objection. A guardian with authority in this area in some circumstances may change the person's state or county of residence, unless that right is reserved to the individual. *See Ch. IV, Part D.*
- **The power to petition for divorce, annulment or legal separation.** Unlike marriage, which requires the individual's own consent, a guardian with this power has authority to begin an action to legally end a marriage, if in the person's best interests. The court may then appoint a guardian ad litem to represent the person's best interests in the proceeding.
- **The power to receive all notices on behalf of the ward.** If there is a guardian of the estate, notice concerning claims for money, legal proceedings involving property and public benefits issues that affect property should go to the guardian of estate as well as to the guardian of person, in order for the guardian of estate to carry out his or her duties.
- **The power to act as an advocate in proceedings.** This does not include the power to enter into a contract that binds the individual or his or her property or to represent the ward in legal proceedings about the individual's property, as those powers belong to the guardian of the estate.
- **The power to petition for protective placement or commitment.** It is not clear why this power is listed. A guardian, as an interested person, always has authority to bring a petition for protective services, placement or commitment.

- **The power to have custody of the individual.** “Custody” of an adult is distinguished from “care, custody and control” of a minor, but is not defined. It may imply a higher degree of control over choice of home, freedom of movement and personal decisions than the guardian would otherwise have. However, if the guardian is concerned about authority in an area, it is probably more useful to specify the needed powers, rather than to rely on this general and undefined term.
- **Any other power** the court may specifically identify, but this may not include a power that may not be given to a guardian. *See Section 3, above.*

5. *What are the powers and duties of a guardian of estate?*

Unlike guardianship of the person, an order for guardianship of the estate gives the guardian full duties and powers available under the statute, except as expressly limited in the order.¹⁴⁴ At the same time, the court may grant only powers that (1) are necessary to provide for financial management and (2) are the least restrictive form of intervention.¹⁴⁵

Unless otherwise specified in the order, a guardian of estate for an individual has the following powers and duties, but as noted some powers may require individual, case-by-case court approval:

- **Possession of property and income.**¹⁴⁶ The guardian has a duty to take possession of the property over which he or she has guardianship (the “guardianship estate”), and of any income that is earned on the property (such as rent, interest or dividends). The individual continues to be the owner, but the guardian has possession and control.

COMMENT: This duty does not prevent a guardian from deciding that the individual can and should directly possess and manage some part of the property, e.g., personal possessions or a checking account for daily needs. This can be an important way to enable the individual to maintain as much control as possible, or to learn skills in using and managing money. However, the guardian should remain aware of his or her potential liability if he or she takes imprudent risks that result in inability to meet the person’s support needs, or in dissipation of substantial portions of his or her property.

- **Inventory.** The guardian has a duty to make an inventory of the individual’s property.¹⁴⁷ The statute says that this must include any interest in property and marital property interest, no matter how titled. If the guardian has control over only part of the estate, or if an interest in property is clearly not under control of the guardian (e.g., an interest as beneficiary of a trust), it may be a good idea to seek a specific order limiting the inventory to property in the guardianship estate.
- **Provision of maintenance and support for the individual and his or her dependents.**¹⁴⁸ Use of property to ensure that the individual’s basic support needs are met is clearly a primary protective purpose of guardianship. The guardian does not need court permission to provide support to people the individual is legally obligated to support, but would need prior written court permission to provide support to other dependents, e.g., grandchildren who have lived with the individual, or adult children with disabilities. The guardian should also be aware of potential impact on public benefits of voluntary gifts of this kind. See discussion of power to make gifts, below.

¹⁴⁴ Wis. Stat. § 54.19(intro.)

¹⁴⁵ Wis. Stat. § 54.18(1)

¹⁴⁶ Wis. Stat. § 54.19(1)

¹⁴⁷ Wis. Stat. §§ 54.19(1) and 54.60

¹⁴⁸ Wis. Stat. §§ 54.19(4) and 54.20(2)(i) and (3)(a)

- **Power to enter into contracts.**¹⁴⁹ Court permission is required for some kinds of contracts. See below.
- **Payment of debts, claims and taxes,**¹⁵⁰ including authority to settle claims and represent the individual in legal actions on debts and claims (unless another representative is appointed).
- **Retention, sale, investment or reinvestment of funds and personal property.**¹⁵¹ Investments are subject to Ch. 786, related to real estate, and may be restricted or subject to special notice requirements if they do not comply with Ch. 881, the Prudent Investor Act.
- **Powers and duties respecting real estate.**¹⁵² The guardian must take possession of real property, provide for its management and collect rent. Purchase, mortgage and sale of real property require court permission under Ch. 786. The guardian must also file notice of the guardianship with the register of deeds, giving a legal description of the real property.
- **Provision of annual and final accounting.**¹⁵³
- **Authorization of access to confidential financial records.**¹⁵⁴
- **Application for public and private benefits, and duty to act as representative payee.**¹⁵⁵ The guardian of estate may have a duty to apply for available benefits, if that is necessary or advisable to conserve the estate. If representative payment is appropriate and no other payee is appointed, the guardian is obligated to act as payee.
- **Making gifts and disclaiming or releasing interests.**¹⁵⁶ These actions require prior written approval of the court. Criteria for gifts and a petition process are created by § 54.21. The guardian should be aware of the impact of any transfer of property rights for less than market value on public benefits.
- **Purchases and surrenders of annuities and insurance, and changes of beneficiaries.**¹⁵⁷ These actions require prior written approval of the court.
- **Management of marital property, exercise of marital property rights and powers, and making of marital property agreements.**¹⁵⁸ These actions require prior written approval of the court.
- **Transfer remaining property at termination of guardianship.**¹⁵⁹
- **Determine location of any will and notify appropriate persons if the individual dies.**¹⁶⁰

¹⁴⁹ Wis. Stat. § 54.20(3)(b)

¹⁵⁰ Wis. Stat. §§ 54.19(7) and 54.20(3)(j)

¹⁵¹ Wis. Stat. §§ 54.19(2) and 54.20(3)(f), (h) and (i)

¹⁵² Wis. Stat. §§ 54.19(1)(2) and (8), 54.20(3)(f) and (g), and Ch. 786.

¹⁵³ Wis. Stat. §§ 54.19(5), 54.62 and 54.66.

¹⁵⁴ Wis. Stat. § 54.20(3)(d)

¹⁵⁵ Wis. Stat. §§ 54.19(9) and 54.20(3)(e)

¹⁵⁶ Wis. Stat. §§ 54.20(2)(a), (g), (i) and (j) and 54.21

¹⁵⁷ Wis. Stat. § 54.19(6) and 54.66

¹⁵⁸ Wis. Stat. § 54.19(6) and 54.66

¹⁵⁹ Wis. Stat. § 54.19(6) and 54.66

¹⁶⁰ Wis. Stat. § 54.19(3)

6. *What is the relationship between powers of the guardian of person and powers of the guardian of estate?*

The powers of the guardian of the person and the guardian of estate will overlap in the areas of receipt of notices, providing advocacy in legal proceedings, and applying and advocating for public benefits. It is not easy to draw a line: advocacy for appropriate services under Medical Assistance implicates both the individual's personal interest in receiving appropriate health care and financial interest in having that care covered by public benefits.

Another area of overlap is created by potential conflict between decisions of the two types of guardians. For example, a guardian of person may choose a place for the person to live, but the guardian of estate may then refuse to sign the lease. Where the refusal is based on the need to conserve the estate for other needs of the individual, that is an appropriate exercise of the guardian of estate's power. If it is an attempt to use power over funding to control personal decisions or behavior of the individual, not connected to affordability or financial risk, the decision is more properly left to the guardian of person. Guardianship of the estate may by itself provide adequate assurance that support needs will be met, so that guardianship of the person is not needed. However, guardianship of the estate should not be used if the real intent is to control personal decisions.

A guardian of the person is required to consider cost among other factors in making best interests decisions. *See Part E.3, below.* Whenever arrangements for non-emergency needs and wants involves contracting, or a commitment to pay, the guardian of person must remember that signing contracts is a power of the guardian of estate.

7. *What role can family and support team members play in assessment of decision-making support needs?*

The 2006 statutes break down decision-making into functional areas, and requires a separate evaluation of need for limitation of rights, and/or establishment of guardian authority, in each area. For each area, there are then three questions:

- Does the person have evaluative capacity to exercise the power?
- Is assignment of the power to the guardian (if allowed) necessary to provide for the individual's personal needs, safety, and rights? Put another way, what decisions is this particular person likely to face, and what are the likely consequences if he or she retains all of part of the decision-making power?
- Within the area, should the guardian's power be limited so that the person retains authority over some decisions, which he or she has the evaluative capacity to make?

In these determinations, knowledge of the person's day to day functioning skills and of the practical issues he or she is likely to face are at least as important as diagnostic skills. Findings of incompetence are often based solely on medical or psychological opinions from professionals who have often met the person only in a clinical setting. It may be useful for people who know the person well to develop information and recommendations about the person's functional abilities and needs for decision-making support, and to provide that to the physician or psychologist completing the formal evaluation, so that the evaluation is informed by this information as well as by medical or psychological diagnosis and evaluation.

E. DUTIES AND STANDARD OF PERFORMANCE OF THE GUARDIAN; RESPECT FOR RIGHTS AND EXPRESSED WISHES

1. *What is the standard of performance and standard of civil liability for guardians?*

Both guardians of person and guardians of estate are held to very high standards. In carrying out the powers that have been delegated to the guardian, the guardian must:¹⁶¹

- Exercise the degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person exercises in his or her own affairs.
- Advocate for the ward's best interests, including applicable rights under Wis. Stats. §§ 50.09 and 51.61.
- Exhibit the utmost degree of trustworthiness, loyalty and fidelity in relation to the ward.
- Exercise powers in a manner that is appropriate to the individual and that constitutes the least restrictive form of intervention.¹⁶²

At the same time, a guardian of person or estate is immune from *personal civil liability* if he or she acts in good faith, in the ward's best interests, and with the degree of diligence and prudence that an ordinarily prudent person exercises in his or her own affairs.¹⁶³ The effect is to set two standards: one for civil liability, and one for court oversight of the guardian. While a guardian can only be sued for damages under the liability standard, a court can remove a guardian or subject a guardian to a supervisory order under the procedure in Wis. Stats. § 54.68 for a list of acts or failures, including any failure to act in the person's best interests or to exhibit "utmost loyalty," whether or not the guardian acted in good faith. This is consistent with case law that removal of a guardian is based on best interests of the ward, that a guardian owes a fiduciary duty and "absolute fidelity" to the ward, and that guardianship status is a privilege, not a legal right.¹⁶⁴

2. *What are the duties of a guardian of the person?*

These statutes make clear that guardianship is not a one-size-fits-all remedy, or simply a means by which required consents get signed. They assume a guardian who is willing to take time to know the person, keep up-to date on his or her situation, needs and preferences, and act as an active advocate. A guardian of the person is obligated to:

- **Advocate for the ward's best interests**, including, if they apply, the rights in § 51.61 for individuals receiving services for mental illness, developmental disabilities and substance abuse, or for individuals who are under protective service or protective placement orders, and the rights under § 50.09 for residents of covered residential facilities.¹⁶⁵
- **Make an annual report** to the court and designated county protective services department, covering the location of the ward, the health condition of the ward, any recommendations regarding the ward, and whether the ward is living in the least restrictive environment consistent with the needs of the ward.¹⁶⁶ There is a standard form at: <http://www.wicourts.gov/forms/GN-3480.DOC>.

¹⁶¹ Wis. Stat. § 54.18

¹⁶² Wis. Stat. §§ 54.20(1) and .25(2)(d)

¹⁶³ Wis. Stat. § 54.18(4)

¹⁶⁴ *Winnebago County v. Harold W. (In re Guardianship of Tina Marie W.)* 215 Wis. 2d 523, at 528-29, 573 N.W.2d 207 (Ct. App. 1997)

¹⁶⁵ Wis. Stat. § 54.18(2)(b)

¹⁶⁶ Wis. Stat. § 54.25(1)(a)

- **Endeavor to secure any necessary care or services** for the ward that are in the ward's best interests, based on all of the following:¹⁶⁷
 - **Regular inspection, in person**, of the ward's condition, surroundings, and treatment. This requirement may be difficult to meet if the guardian does not live near the ward. Courts will have to determine what is meant by “regular” and “in-person” inspection, and balance frequency of personal contact against the benefit of a guardian who may not be physically present but may know the person well and have other effective ways of staying informed about the person’s situation and being involved in planning treatment and care, e.g., through attendance at meetings by telephone or other electronic means.
 - **Examination of the ward's patient health care records and treatment records** and authorization for disclosure as appropriate.
 - **Attendance and participation in staff meetings** of any facility in which the ward resides or is a patient, if the meeting includes a discussion of the ward's treatment and care.
 - **Inquiry into the risks and benefits of, and alternatives to, treatment** for the ward, particularly if drastic or restrictive treatment is proposed.
 - **Specific consultation with providers of health care and social services** in making all necessary treatment decisions.

COMMENT: As a rule of thumb, if the guardian does not expect to be able to personally visit the individual **at least once every 3 months**, this should be brought to the attention of the court and court approval for alternative methods of involvement should be sought.

3. *What duties does the guardian have to act in a way that is least restrictive and respectful of the individual's preferences?*

In exercising powers and duties delegated to the guardian of the person under the court order, the guardian of the person is obligated to act in a manner that is appropriate to the individual and that is the least restrictive form of intervention.¹⁶⁸ In doing so, the guardian must; consistent with meeting the individual's essential requirements for health and safety and protecting the individual from abuse, exploitation, and neglect; do all of the following:¹⁶⁹

- **Least restrictiveness.** Place the least possible restriction on the individual's personal liberty and exercise of constitutional and statutory rights, and promote the greatest possible integration of the individual into his or her community. See discussion of least restrictiveness in *Section 4, below, and Ch. I, Part D.2.*
- **Identify and honor preferences.** Make diligent efforts to identify and honor the individual's preferences with respect to choice of place of living, personal liberty and mobility, choice of associates, communication with others, personal privacy, and choices related to sexual expression and procreation. A guardian may overrule the person’s wishes under certain circumstances, discussed in *Part E.5, below*, but may not do so without first making the effort to identify and honor the person’s preferences.
- **Consider cost.** Consider whether the ward's estate is sufficient to pay for the needed services.

¹⁶⁷ Wis. Stat. § 54.25(1)(b)

¹⁶⁸ § 54.25(2)(d)

¹⁶⁹ § 54.25(2)(d)3.

These provisions provide a good place to start in any analysis of the individual's best interests, where the individual has an expressed interest. They recognize that a person may have preferences, even if he or she does not understand all of the consequences of a choice. It recognizes the importance of involving the person in decisions, even in areas where the individual has been found not to have capacity to make decisions, and the importance of respecting choice. The choices the person is permitted to make may carry some risk, provided that essential requirements of health and safety are still met and the person is protected from abuse, neglect and exploitation. A person is most likely to develop or regain communication skills if the things he or she communicates have a real impact on meaningful decisions in his or her life. A person is most likely to develop decision-making skills if he or she can make decisions and experience the consequences. *See Part H, below*, for discussion of choice and protection in the areas of sexual expression and procreation.

4. *What is the definition of "least restrictive"?*

The term least restrictive is defined specifically for purposes of the guardianship statute:¹⁷⁰

"Least restrictive" means that which places the least possible restriction on personal liberty and the exercise of rights and that promotes the greatest possible integration of an individual into his or her community that is consistent with meeting his or her essential requirements for health, safety, habilitation, treatment, and recovery and protecting him or her from abuse, exploitation, and neglect.

This, again, is a balancing test, requiring the guardian to weigh and strike a balance between the person's interests in health and safety, freedom from abuse, neglect and exploitation, personal liberty, legal rights, community integration, personal autonomy and choice, appropriate treatment and habilitation, and personal experience and growth. See discussion of elements of least restrictiveness in *Ch. I, Part D. 2*.

5. *Under what conditions does a guardian have authority to make a decision that is contrary to the individual's expressed wishes regarding personal liberty, choice of friends, procreation and sexual expression?*

§ 54.25(2)(b)7, states that all individuals under guardianship retain "rights specifically reserved to the individual by statute or the constitutions of the state or the United States, including the [right] to...freedom of association..." However, under § 54.25(2)(d)3, a guardian may act contrary to the individual's express wishes with regard to a range of decisions, including decisions related to "choice of place of living, personal liberty and mobility, choice of associates, communication with others, personal privacy, and choices related to sexual expression and procreation." The conditions under which a guardian may act contrary to the individual's express wishes in these areas include all of the following:

- **Authorized by court order.** Power over the area of decision-making has been given to the guardian in the court order. *See Part D.4, above*. This implies that some powers over choice of associates, personal privacy, sexual expression and procreation can be given to the guardian as part of the court's catch-all authority to grant other specifically-identified powers to the guardian, where necessary to provide for the individual's personal needs, safety and rights. *See Part D.2, above*.
- **Consistent with health, safety and protection from abuse.** The decision must be "consistent with meeting the individual's essential requirements for health and safety and protecting the individual from abuse, exploitation and neglect."

¹⁷⁰ Wis. Stat. § 54.01(18)

- **Respect for individual’s preferences and opportunity to develop decision-making skills.** The decision is made only after making diligent efforts to identify and honor the individual’s preferences. In making a decision contrary to the individual’s expressed wishes, the guardian must take several factors into account:
 - **Individual’s level of understanding.** The greater the individual's understanding of the nature and consequences of the decision, the more weight should be given to his or her preferences.
 - **Level of risk.** Where there is low risk, it may be better to permit the person to make the decision and experience the consequences. On the other hand, even constitutionally protected rights can be restricted where there is a compelling state interest, such as a substantial threat to health and safety. *Example.* In exploring relationships, it may be necessary for the person to experience embarrassment and rejection in the process of learning what choices of associates and approaches will and will not work. On the other hand, if the person seeks dangerous relationships (e.g., with known drug dealers) protective intervention is probably justified.
 - **Opportunity to develop decision-making skills,** by making decisions and experiencing consequences, where the risk is acceptable.
 - **Need for wider experience.** This recognizes that, if an individual is permitted to refuse new experiences and developmental or rehabilitative activities, the effect may be to limit rather than promote choice.

6. *What are the responsibilities of the guardian of estate to file an inventory, accountings and final accounting?*

The guardian of estate is required to file a detailed inventory listing all of the interests in property owned by the ward, regardless of how titled, including how the asset is held, the names of any co-owners, and, if the individual is married, the marital property classification of the property.¹⁷¹

The guardian of estate must also file an annual accounting, unless the accounting is waived by the court.¹⁷² (Ordinarily, accounting is waived for estates of under \$50,000.) The accounting must include the income and assets held or received by the guardian, the nature and manner of investments, and receipts and expenditures during the last year. (Accounting can be required either on a calendar year, or annually from the date of appointment.) The guardian must also produce evidence of the accounts and investments shown in the inventory. In addition to the annual accounting, the court can require an accounting at any time. A final accounting is required prior to discharge of the guardian. For smaller estates, this may consist only of a listing of assets that the individual owns at the time the guardian is discharged or the guardianship is terminated.

COMMENT: The term *interests in property* is not defined, and it is not clear what is intended. If the guardian lists interests in property that the person does not have title to, and/or property which will not be subject to administration by the guardian, the guardian should list it separately so that he or she is not required to account for property he or she does not control. Examples include property in a discretionary trust of which the individual is a beneficiary and property not subject to administration because the guardianship is limited. A good argument can be made that the filing fee should be based only on property subject to administration and protected by the guardianship order.

¹⁷¹ Wis. Stat. § 54.60

¹⁷² Wis. Stat. §54.62

7. What are the standards for an order by the court overruling the guardian, directing the guardian on how to act, or removing the guardian?

A court has continuing jurisdiction to issue orders governing a guardian's conduct, or to remove a guardian of person or estate, for a wide variety of acts by the guardian, including:

- Failing to file an inventory or accounting that is on time, accurate and complete. *See Section 6, above.*
- Committing fraud, waste, or mismanagement.
- Abusing or neglecting the ward or knowingly permitting others to do so.
- Engaging in self-dealing.
- Failing to provide adequately for the personal needs of the ward from the ward's available assets and income, including any available public benefits.
- Failing to exercise due diligence and reasonable care in assuring that the ward's personal needs are being met in the least restrictive environment consistent with the ward's needs and incapacities.
- Failing to act in the best interests of the ward.
- Failing to provide accurate information on the Statement of Acts, concerning convictions and placement on the caregiver abuse registry. (It is not clear if there is also a duty to disclose convictions or placement on the caregiver abuse registry after appointment as guardian.)
- Failing to perform any other duties of a guardian, or doing anything a guardian is prohibited from doing. This is extremely broad, and includes failing to act with the utmost degree of trustworthiness, loyalty and fidelity under Wis. Stat. § 54.18(2).

A guardian may be removed if he or she fails to perform the duties of a guardian or performs acts prohibited to a guardian, including failing to act in the best interests of the individual.¹⁷³ *See Ch. VI, Part K.3*, for a description of the review process. The Court of Appeals has held that the overriding concern in a proceeding concerning removal of a guardian is the best interests of the individual, and that service as a guardian is a privilege and not a legal right.¹⁷⁴

F. CHOICE OF GUARDIAN AND REMOVAL OF GUARDIAN

In all cases, the choice of guardian by the court is governed by the court's determination of the individual's best interests.¹⁷⁵ The statute provides for several preferences, but the court does not have to follow a preference if not in the person's best interests.

The court must consider conflicts of interest (such as employment of the proposed guardian by a service provider), but the court may appoint a person who has a conflict of interest if the appointment remains in the person's best interests despite the conflict. No person or agency who is a provider of protective services or protective placement to the individual may act as guardian.¹⁷⁶

¹⁷³ Wis. Stat. § 54.68(2) and (4)

¹⁷⁴ *Winnebago County Dept. of Social Services v. Harold W.*, 215 Wis. 2d 523, 573 N.W.2d 207 (Ct. App., 1997)

¹⁷⁵ Wis. Stat. § 54.15

¹⁷⁶ Wis. Stat. § 55.03(1)

Proposed guardians must sign a statement concerning whether he or she is currently charged with a crime, had been convicted of a crime, has filed for bankruptcy or gone through bankruptcy, has had a professional license or permit revoked, or is listed in the caregiver registry (*See Ch. II, Part I.1.*)

Statutory preferences include:

- Appointment of an **agent under a durable power of attorney** as guardian of estate.
- Appointment of an **agent under a power of attorney for health care** as guardian of person.
- Appointment of a person **nominated by the individual**, if the person has sufficient capacity to form a reasonable and informed preference. This allows an individual to nominate a guardian, even at a point when he or she may otherwise meet the standard for guardianship. The nomination must be in writing and must be signed in front of two witnesses, in the same way that a will is signed.
- Appointment of the **parent of the individual**, if the individual has a developmental disability or serious and persistent mental illness.
- Appointment of a person **nominated in the will of the parent of the individual**, if the individual has a developmental disability or serious and persistent mental illness.

Certain nonprofit corporations and associations may be appointed by the court, if they have been found by DHFS to be a suitable agency and to meet DHFS rules.¹⁷⁷ The statute states that the court should appoint a corporation or association only if no “suitable” individual is available. “Suitable” is not defined, but probably will be interpreted to mean a person who would serve the individual’s best interests.

There can be a separate guardian of the person and guardian of the estate, and there can be more than one guardian of the estate. This allows appointment of people with financial management skills where appropriate, while leaving guardianship of the person to someone with more personal connections. The law allows appointment of co-guardians of person and/or estate. The requirement that co-guardians of the person must be married to each other was repealed effective Dec. 1, 2006, so it is now possible, e.g., for divorced parents to be guardian of person for their adult child.

A concentration of power and conflict of interest is created when the person lives with the guardian, especially if the guardian is a paid provider or relies on the person's income for household expenses. This does not mean that all such situations should be avoided: often the person lives with someone because he or she has the closest personal connection. However, to avoid problems of conflict of interest, landlords and paid residential providers should not be appointed as guardians unless there is a strong, preexisting personal relationship and a demonstrated record of positive concern.¹⁷⁸

A barrier to appointment of effective guardians in many places is the lack of a pool of suitable, trained individuals to act as guardian. The protective service system in a county can make an important contribution by recruiting volunteers and providing ongoing training and support.

A guardian may be removed if he or she fails to perform the duties of a guardian or performs acts prohibited to a guardian, including failing to act in the best interests of the individual.¹⁷⁹ *See Ch. VI, Part K.3.* for a description of the review process. The Court of Appeals has held that the overriding

¹⁷⁷ The rules are in HFS 85, Wis. Admin. Code.

¹⁷⁸ Before accepting the role of guardian, paid providers should check funding sources and contracting agencies to find out whether they discourage or prohibit paid providers from acting as guardians,

¹⁷⁹ Wis. Stat. § 54.68(2) and (4)

concern in a proceeding concerning removal of a guardian is the best interests of the individual, and that service as a guardian is a privilege and not a legal right.¹⁸⁰

G. GUARDIANSHIP AND DECISIONS CONCERNING PHYSICAL AND MENTAL HEALTH TREATMENT AND CARE

1. *What power can be given to a guardian to consent to voluntary and involuntary treatment, medication and care for physical health?*

Except for research and experimental care (*See Section 3. and 4, below*), the court may give the guardian the power to give informed consent, if in the ward's best interests, to both voluntary or involuntary medical examination and treatment, including medication, for physical health conditions.¹⁸¹ *See Section 5, below*, for discussion of consent to mental health treatment and services. While not stated in the statute, this appears to include authority to compel the individual to receive treatment, or to consent to sedation or temporary restraint of the individual so that essential physical health treatment can be given safely, if the individual is physically resistant. (Sedation and restraint for purposes of control of challenging behavior, or as a treatment for mental illness, developmental disabilities, alcoholism or other substance dependence are governed by Wis. Stat. § 51.61(1)(h) and (i), the rules in HFS 94, Wis. Admin. Code, and the laws on consent to treatment discussed in *Section 5, below*)

In determining whether medication or medical treatment, other than psychotropic medication, is in the ward's best interest, the guardian is required to consider the invasiveness of the medication or treatment and the likely benefits and side effects of the medication or treatment. The necessity for sedation or restraint and the traumatic effects of treatment the individual does not understand are considerations in deciding how invasive a procedure will be.

The guardian's authority to make physical health decisions is subject to the general duty to exercise authority in a way that is appropriate to the individual and to use the least restrictive form of intervention, discussed in *Part E.3.-5, above*. For example, a protest by an individual who understands a procedure and its purpose is entitled to greater weight, especially if the procedure is not essential to prevent or ameliorate serious physical harm. If the person has had capacity to make health decisions in the past, expressions of personal preferences when the individual was competent are entitled to great weight in determining the individual's best interests.¹⁸²

See Ch. IV, Part F.3.-5, for discussion of the guardian's authority to consent to voluntary and involuntary protective services.

2. *What power can be given to a guardian of person to refuse life-sustaining treatment, or to consent to withdrawal of life-sustaining treatment?*

In the case of *In the Matter of the Guardianship of L.W.*,¹⁸³ the Wisconsin Supreme Court held that an individual who is not incapacitated has the right to refuse life-sustaining treatment, including artificial ways of giving the person food and water. This right arises out of the common law right to self-determination, and out of liberty interests protected by the Fourteenth

¹⁸⁰ *Winnebago County Dept. of Social Services v. Harold W.*, 215 Wis. 2d 523, 573 N.W.2d 207 (Ct. App., 1997)

¹⁸¹ Wis. Stat. § 54.25(2)(d)2.a.

¹⁸² *Lenz v. L.E. Phillips Career Dev. Ctr. (In re Guardianship of L.W.)*, 167 Wis. 2d 53, 75-76, 482 N.W.2d 60 (1992)

¹⁸³ *Supra*, footnote 183

Amendment to the United States Constitution and Article I, section 1 of the Wisconsin Constitution.¹⁸⁴

This right to refuse extends to people who do not have evaluative capacity to exercise it, although this may mean that it is exercised by an agent acting in the person's best interests, or by the guardian. In the *L.W.* case the Wisconsin Supreme Court held that, to the extent possible, both competent and incompetent people must be assured the benefit of the same constitutional right of choice.¹⁸⁵

The court in *L.W.* held that, where the person's wishes as to what he or she would want done in a particular situation are known, it is **in the best interests of the person that his or her wishes be followed**. Ideally, these wishes are expressed in a living will or power of attorney for health care document, or in the instructions the individual has given to his or her agent under a power of attorney for health care. However, a guardian also has authority to follow wishes expressed by the individual when he or she had capacity, where those wishes are clear.¹⁸⁶

In *L.W.*, the court held that a guardian had the authority to refuse life-sustaining medical treatment, including artificial ways of giving the person food and water, for a person in a chronic vegetative state. *L.W.* was a man with schizophrenia who apparently had never been competent to express an opinion as to whether he would want such treatment; he was allegedly in a chronic vegetative state due to a cardiac arrest.

Where, as for *L.W.*, there is no way to know what the person would have wanted, a guardian may consent to withholding or withdrawal of life-sustaining treatment when:

- The person's physician, and two independent physicians, determine with reasonable medical certainty that the person is in a *chronic vegetative state*, defined as a complete and irreversible cessation of all cognitive functioning, consciousness and behavioral responses, **and**
- The guardian determines in good faith that withholding treatment is in the person's best interests.

In determining best interests, the guardian is required to begin with the **presumption that it is in the best interests of the person to continue to live**. This presumption can be overcome by "objective factors", including:

- The degree of humiliation, dependence and loss of dignity the person will experience.
- The life expectancy and prognosis for recovery with and without treatment
- The various treatment options and the risks, side effects and benefits of each of those options.

The guardian should, if possible, request review by a facility or hospital bioethics committee, if one exists, and consider its opinion. In addition, the guardian must give notice of the decision to withhold treatment to any spouse, next of kin or close friend of the person and consider the opinion of those persons.

The guardian must not substitute his or her own view of the quality of life of the person. In other words, the guardian is instructed to make a judgment of best interests from the point of view of the patient, and not based on the value that the guardian or others find in the person's life.

¹⁸⁴ *Guardianship of L.W.*, 167 Wis. 2d at 68–69.

¹⁸⁵ *Guardianship of L.W.*, 167 Wis. 2d at 73–77.

¹⁸⁶ *Guardianship of L.W.*, 167 Wis. 2d at 79.

In a 1997 case, *Spahn v. Eisenberg (In re Guardianship & Protective Placement of Edna M.F.)*,¹⁸⁷ the court refused to authorize withdrawal of artificial nutrition by a guardian when the individual was in the advanced stages of Alzheimer's disease, there was not clear and convincing evidence of what the ward would have wanted under the circumstances, and the individual was not in a persistent vegetative state. This appears to mean that the authority in the *L.W.* case to consent to withdrawal of artificial nutrition and hydration is limited to situations where the individual is in a persistent vegetative state.

A guardian need not get court approval of a decision to withhold treatment from a person in a persistent vegetative state. However, the guardian must, where feasible, notify all interested parties of the decision and give them an opportunity to respond. This need not be a formal legal notice. *Interested parties* include the patient, physician, health care facility, agency responsible for treatment, guardian ad litem, any attorney in fact under a power of attorney for health care and any spouse, next of kin or close friend or associate, if the close friend or associate has a long-term relationship with the person, seeks to speak on his or her behalf, and is known to the guardian.¹⁸⁸

Where the person is under an order for protective services or protective placement, the guardian should treat the county protective service agency through which services or placement are ordered as an interested party entitled to notice. For other service recipients, notice should probably go to any county agency that is providing funding, residential service providers and other agencies playing a significant role in the person's treatment and care.

Any interested party who objects to the guardian's decision to withdraw treatment can request court review.¹⁸⁹ If a review is requested, the presumption is that continued life is in the best interests of the ward. The guardian, therefore, has the burden of showing that the decision meets the tests set out in *L.W.* and that he or she acted in good faith.

It is not clear what the guardian's authority is in cases involving refusal or consent to withdrawal of treatment other than artificial nutrition or hydration. It is likely that guardians continue to have authority to consent to refuse treatment or consent to withdrawal of treatment where an individual has a terminal illness, the treatment will only prolong the process of dying (without providing other benefits in terms of restored health, restored functioning, or comfort), and the treatment itself is painful or highly intrusive.

The *L.W.* case provides a precedent for a guardian to seek court guidance concerning consent to withdraw life-sustaining treatment. Whenever a guardian feels unsure of his or her authority, or whenever there is a conflict with medical providers, family or other interested people, the guardian can petition the court for a declaratory judgment to define his or her authority. As in *L.W.*, the court should then appoint a guardian ad litem to represent the person's best interests and hold a hearing.

It is clear that a decision to withdraw treatment should not be based on a determination that life for a person with a disability has a lower quality or is somehow less worth living than life for other people. A guardian may not substitute his or her own view of the quality of life of the ward.¹⁹⁰

It is not uncommon, in reviewing records of health care and residential facilities, to encounter general "do not treat" or "do not resuscitate" orders signed by guardians for people who are not in a persistent vegetative state and do not have conditions that will result in imminent death. Unless these reflect known wishes of the individual expressed when competent, or meet the limited

¹⁸⁷ 210 Wis. 2d 557, 563 N.W.2d 485 (1997).

¹⁸⁸ *Guardianship of L.W.*, 167 Wis. 2d at 92-93.

¹⁸⁹ *Guardianship of L.W.*, 167 Wis. 2d at 92-93.

¹⁹⁰ *Guardianship of L.W.*, 167 Wis. 2d at 88.

provisions for a do-not-resuscitate order under Ch. 154, they probably exceed the guardian's authority, especially if treatment would be standard for most people of the same age and physical health status.¹⁹¹ (See discussion of the definition of neglect, *Ch. II, Part D.3.*)

Under Ch. 154, a "do not resuscitate" order may be applied only to withhold cardiopulmonary resuscitation from a adult who: (1) has a terminal condition, defined as an incurable condition caused by injury or illness that reasonable medical judgment finds would cause death imminently, so that the application of life-sustaining procedures serves only to postpone the moment of death); (2) has a medical condition such that resuscitation would be unsuccessful in restoring cardiac or respiratory function or the person would experience repeated cardiac or pulmonary failure within a short period before death occurs; or (3) has a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation of that person would cause significant physical pain or harm that would outweigh the possibility that resuscitation would successfully restore cardiac or respiratory function for an indefinite period of time.

In Wisconsin, the limits on the authority of family members to make medical decisions for people unable to make those decisions for themselves, where no guardian has been appointed, is still undefined. The court in *L.W.* expressly left open the question of whether a family member or other person, in the absence of a guardian or an advance directive, could make a decision to refuse life-sustaining treatment. In a footnote, the court notes that in practice patients, families and physicians are working together to make these decisions and states:

It is obvious that there is a generalized society sanctioned practice that most of these... medical treatment decisions are made without a guardian or any court intervention.... [W]e do not in any way evaluate that familial authority.¹⁹²

3. *What power can be given to a guardian to consent to participation by the individual in research?*

Unless a showing is made, by clear and convincing evidence, of a general objection by the ward to research, the guardian may be given power to consent to participation by the ward in research that might help the ward, or to research that might help others, and involves no more than minimal risk to the ward.¹⁹³ This power could be granted as part of the general powers of a guardian, even if no specific research project is being considered.

The guardian may be given power to consent to participation by the ward in research that might *not* help the ward, might help others, but involves more than minimal risk to the ward, only if the guardian can establish by clear and convincing evidence that the person would have elected to participate in it, and the statute's requirements for review of the research by a human rights committee have been met.¹⁹⁴ This determination is fact-specific, and requires a determination by the court of each actual occurrence of consent to participation in research. If this power is assigned to the guardian, the need for court approval should be noted in the limitations section.

NOTE: See Section 5, below, for discussion of consent to experimental research and treatment

¹⁹¹ Federal law on child abuse, 42 U.S.C. §5102(3) provides that it is medical neglect to fail to provide life-sustaining treatment to children with long-term disabilities unless: (A) the infant is chronically and irreversibly comatose; (B) the provision of such treatment would (i) merely prolong dying, (ii) not be effective in ameliorating or correcting all of the infant's life-threatening conditions or (iii) otherwise be futile in terms of the survival of the infant; or (c) the provision of the treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

¹⁹² *Guardianship of L.W.*, 167 Wis. 2d at 85-86.

¹⁹³ Wis. Stat. § 54.25(2)(d)2.b.

¹⁹⁴ Wis. Stat. § 54.25(2)(d)2.c.

for mental illness, developmental disabilities, alcoholism and other substance dependence.

4. What power can be given to a guardian of person to consent to experimental treatment?

Unless a showing is made, by clear and convincing evidence, of a general objection by the ward to experimental treatment, the guardian may be given power to consent to experimental treatment, but only if there is a court finding that (1) the treatment may be life-saving, (2) other reasonable traditional alternatives have been exhausted, (3) two physicians recommend it, and (4) it is in the ward's best interests.¹⁹⁵ As with some types of research, this requires a determination by the court of each actual occurrence of consent to an experimental course of treatment. If this power is assigned to the guardian, the need for court approval should be noted in the limitations section.

NOTE: See Section 5, below, for discussion of consent to experimental research and treatment for mental illness, developmental disabilities, alcoholism and other substance dependence.

5. What power can be given to a guardian to consent to treatment for mental illness, developmental disabilities, alcoholism and other substance dependence, and to administration of psychotropic medication?

The provision of Ch. 54 governing consent to medical treatment, § 54.25(2)(d)2.a, specifically provides that consent to psychiatric treatment and medication are governed by Ch. 51. *Treatment*, as defined under Ch. 51, means “psychological, educational, social, chemical, medical or somatic techniques designed to bring about rehabilitation of a mentally ill, alcoholic, drug dependent or developmentally disabled person.” See Ch. IV, Part E, on distinguishing treatment, as defined under Ch. 51, from other services.

Under Ch. 51, a guardian has authority to give informed consent to treatment on behalf of an individual under guardianship.¹⁹⁶ However, except in a situation where medication is necessary to prevent serious physical harm to the individual or others, an individual retains a right to refuse treatment (including psychotropic medication) unless a court finds that he or she is incompetent to refuse treatment and medication, or he or she is committed under a special standard that relates to ability to consent to medication and treatment.¹⁹⁷ This right arises from court cases finding a constitutional right to refuse mind-altering medication and treatment unless the individual is incompetent to make a reasoned choice or there is a serious risk of physical harm.¹⁹⁸

In the case of *State ex rel Roberta A.S. v. Waukesha County Human Services Department*¹⁹⁹ the Court of Appeals held that a guardian appointed under Ch. 880 for a person with chronic mental illness who had been found not to be competent to refuse psychotropic medication had power to consent on behalf of the person but not to force the person to take medication. The court held that the purpose of the guardian's consent was protective: to ensure that the individual was not unnecessarily or improperly medicated, and did not include authority to use force. This was subsequently interpreted by the Attorney General to mean that a guardian could not consent to psychotropic medication even for a person who was non-protesting, unless procedures equivalent to those under Ch. 51 were followed. A process existed in Ch. 55 for a protective service order for involuntary administration of psychotropic medication, but this by its terms applied only to people with serious and persistent mental illness.

The changes to the guardianship law effective Dec. 1, 2006 clarify that a guardian may consent to administration of psychotropic medication on behalf of the individual, if the individual does not

¹⁹⁵ Wis. Stat. § 54.25(2)(d)2.d.

¹⁹⁶ Wis. Stat. § 51.61(6) and (8)

¹⁹⁷ Wis. Stat. § 51.61(1)(g)

¹⁹⁸ *State ex rel. Jones v. Gerhardstein*, 141 Wis 2d 710,723-24, 416 NW2d 883, 888-89 (1987)

¹⁹⁹ 171 Wis. 2d 266, 491 N.W. 2d 114 (Ct. App. 1992)

protest. Wis. Stat. § 54.25(2)(d)2.a. provides that, before giving consent to receipt of psychotropic medication by the ward, the guardian must make a good-faith attempt to discuss voluntary receipt of the medication with the ward. (If the guardian lives at a distance from the ward, it may be important for the court to clarify whether the “discussion” can occur by telephone, or through a surrogate.) The guardian may then give consent only if the ward does not “protest,” defined as making more than one discernible negative response to receipt of the medication. If the person does protest, non-emergency psychotropic medication may be administered only under a commitment order under Ch. 51 or a court order for involuntary administration under Ch. 55, under the provisions now contained in § 55.14. *See Ch. IV, Part I.* Those provisions differ from the pre-December, 2006 procedure, in that it applies to people with developmental disabilities, degenerative brain disorder, and other like incapacities, as well as to people with serious and persistent mental illness.

COMMENT: The requirement that the guardian must discuss psychotropic medication with the individual means that the guardian does not have authority to consent to administration of medication through deception, often referred to as the “put it in the applesauce” approach.

Experimental research and drastic treatment. Under Wis. Stat. § 51.61(1)(j) and (k), the informed consent of the individual is required for administration of drastic treatment, such as psychosurgery or electroconvulsive therapy, and for treatment that can be considered experimental research. If the individual is under guardianship, **informed consent of both the individual and guardian is required.** For both experimental and drastic treatment, consent of the individual is valid only after consultation with his or her legal counsel and the guardian. For experimental treatment, consultation with independent specialists is also required. **Exception:** In the case of *Professional Guardianships, Inc. v. Ruth E.J.*,²⁰⁰ the Court of Appeals held that it was an unconstitutional denial of equal protection and right to life-preserving treatment to deny access to treatment to an individual who is unable to give informed consent, in a situation where it is shown that the individual has a life-threatening condition that it is likely to be improved by experimental treatment, and that other alternatives had been exhausted. While the *Ruth E.J.* case involved a form of drastic treatment governed by § 51.61(1)(k), it is likely that similar logic would apply to experimental treatment under § 51.61(1)(j) for a person unable to consent in a life-threatening situation.

H. GUARDIANSHIP AND SEXUAL AND REPRODUCTIVE DECISION-MAKING

1. *How do court cases, constitutional law and the statutes address decisions related to procreation and sexual expression?*

The guardianship statute effective December 1, 2006, classifies the decision to be sterilized as a right that a person can lose, if a court finds that he or she lacks capacity to exercise it, but also as a power that cannot be given to the guardian to exercise.²⁰¹ *See Part D.3, above.* This follows a Wisconsin Supreme Court case, *In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W.2d 881 (1981), which held that neither a guardian nor a court in Wisconsin has authority to consent to sterilization on behalf of an individual who lacks capacity to consent.

The court in the *Eberhardy* case held that the choice by a competent person to procreate or to prevent procreation is a constitutionally protected, fundamental personal decisional choice.²⁰² However, it rejected the argument that the constitution requires some alternative means of making

²⁰⁰ 196 Wis.2d 794, 801, 540 N.W.2d 213 (Ct. App. 1995)

²⁰¹ Wis. Stat. § 54.25(2)(c)

²⁰² 102 Wis. 2d 539, at 561-3. *See also Eisenstadt v. Baird*, 405 U. S. 438 (1972), holding that the right to make decisions related to procreation is protected as *Part* of the constitutional right to privacy

that choice for people who lack capacity to do so themselves.²⁰³ The court held that, in the absence of any legislative direction on how to make a decision about sterilization, it would not create a process by which guardians or courts could make the decision. However, part of the court's holding was based on the permanence of sterilization, and the existence of other forms of birth control that are less drastic and permanent. The court's holding does not necessarily extend to other kinds of decisions relating to procreation.

The right of a competent adult to consent to knowing and voluntary sexual activity is constitutionally protected, both as a liberty interest and as part of privacy rights.²⁰⁴ On the other hand, sexual contact with a person who lacks capacity to consent to the contact is abuse and, if the perpetrator knows of the person's incapacity, is a criminal sexual assault. *See Ch. VII, Part B.2.*

No reported Wisconsin cases deal directly with authority of a guardian or court to consent to use of birth control or to an abortion on behalf of a person who lacks capacity to do so, or to regulate sexual expression by a person under guardianship. The *Eberhardy* case, combined with the legislative changes effective December 1, 2006, provide a place to start in predicting how courts may act on these issues in the future.

§ 54.25(2)(d)3, states that all individuals under guardianship retain "rights specifically reserved to the individual by statute or the constitutions of the state or the United States, including the [right] to...freedom of association..." However, under § 54.25(2)(d)3, a guardian, in exercising powers given to the guardian under § 54.25(2)(d), may act contrary to the individual's express wishes with regard to a range of decisions, including decisions related to "choice of associates, communication with others, personal privacy, and choices related to sexual expression and procreation." The circumstances under which a guardian may act contrary to the individual's wishes are discussed in *Part E.3.-5, above*. The implication is that a guardian can be given powers in these areas, where the individual lacks capacity to exercise his or her constitutional rights.

2. *When does a guardian have power to make decisions about whether an individual should or should not use birth control devices or have an abortion?*

In *Eberhardy*, the Supreme Court seems to assume that a guardian has authority to consent on behalf of a person who does not object to the use of birth control pills or devices, and this is generally accepted in practice. For many people, the decision to use or not use birth control does not involve a high degree of complexity. Where the individual has capacity to consent to use of birth control pills, control over that choice could be reserved to the individual as a limitation on the guardian's authority to consent to health-related decisions. Where the individual does not have capacity to make a decision about use of birth control, but expresses an opinion concerning use of birth control or devices, his or her opinion is entitled to respect under the provisions of §54.25(2)(d)3.b, discussed in *Part E.5, above*. Every decision to overrule the individual's wishes (either by giving the individual birth control pills without consent or by withholding consent to use of birth control pills) would need to be analyzed under the factors that a guardian is required to consider under that section.

There is no specific provision that a guardian must inform the individual that birth control pills or devices are being administered. However, any decision by the guardian must be made consistent with the duty to make diligent efforts to identify and honor the individual's preferences regarding choices related to procreation.

²⁰³ *Id.*, at 566. See *In re Grady*, 85 N.J. 235, 426 A.2d 467 (1981), for a state court taking the opposite approach.

²⁰⁴ *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)

It is difficult to predict how a Wisconsin court may deal with the question of consent to an abortion, and the decisions of courts are likely to be very fact-specific. Among the alternatives:

- If the individual retains capacity to consent to an abortion, a court could make a specific finding that she is able to consent. This could be in the form of a limitation on the guardian's general authority over medical decisions, and is most likely in the context of an actual decision to have an abortion. It will probably be helpful for the court if the individual has had counseling, and the counselor can report that the individual understands the nature of the decision and its risks and consequences, and has a consistent opinion.
- If the person lacks capacity to make a decision, and an abortion is necessary to protect her health or life, it is likely that a court would find that consent to an abortion is included in a guardian's power to make other health related decisions (if the guardian has that power). This kind of case is likely to reach the courts only if the individual or some other interested person objects to the guardian's actions.
- In a case where the individual lacks capacity, is expressing no opinion, and there is no serious health or safety risk, it seems likely that Wisconsin courts would follow the logic of the *Eberhardy* decision and find that neither a court nor a guardian has authority to consent to a procedure for the primary purpose of terminating pregnancy, for a person who is unable to express an opinion as to whether she wants it.²⁰⁵ While this could be seen as "imposing" a decision to bear the child, it arguably involves the least intrusion by the state into personal decision-making. A pregnancy resulting from sexual assault might be treated differently, either because it is more likely that an individual would choose abortion, if able to choose, or because abortion might be seen as a way of ameliorating the effects of abuse.
- Where the person lacks capacity to give informed consent, but is expressing a clear opinion that she wants an abortion, it is likely that the individual's opinion would carry great weight, if it can be shown that she understands the basic nature of the decision. In a Massachusetts case, the court held that even where the person is incompetent to decide, her expressed wishes are an important part of any decision by a court or guardian.²⁰⁶ This is consistent with the respect to be afforded to expressed wishes related to procreation in § 54.25(2)(d)3.b. *See Part E.3.-5, above.*

Given the lack of court decisions in this area, a guardian should consider seeking court direction before making a decision to:

- Consent to an abortion over the person's expressed objection.
- Consent to an abortion for a person unable to express an opinion, where the abortion is not related to meeting the person's essential requirements for health and safety.

3. *What rights does an individual with a guardian of the person retain over decisions related to sexual expression and sexual contact, and what decisions can be made by a guardian or court?*

The fact that a person has a guardian of the person does not by itself answer the question of whether he or she can consent to sexual contact, unless the court order specifically indicates that he or she does not have capacity to consent. In practice, there are many people under guardianship experiencing consensual, positive, sexual relationships. There are also many people who have guardians and lack capacity to consent to sexual contact, and/or are at high risk of sexual abuse.

²⁰⁵ See, for example, *In the Matter of Jane A.*, 629 N.E. 2d 1337 (Mass. App. Ct. 1994)

²⁰⁶ *In the Matter of Mary Moe*, 579 N.E.2d 682, 31 Mass. App. Ct. 473 (1991).

The stakes in the area of consent to sexual contact are high. The right of an adult to consent to knowing and voluntary sexual activity is constitutionally protected, both as a liberty interest and as part of privacy rights.²⁰⁷ On the other hand, sexual contact with a person who has a mental illness or deficiency which makes him or her "incapable of appraising his or her conduct" is abuse, and, if the other person making the contact knows about the incapacity, is a criminal sexual assault.²⁰⁸

A guardian cannot consent to sexual contact on behalf of a person who cannot consent for himself or herself. Unless consent comes from the person, and he or she has capacity to give the consent, any sexual contact is abuse. It appears under the statute, however, that the guardian has a role to play in at least three ways: (1) in the case of a person who lacks capacity to consent to any sexual contact, the guardian has a duty to protect the person from sexual contact; (2) in the case of a person who lacks capacity to consent to any sexual contact, the guardian may be called on to make decisions about forms of sexual expression that do not involve sexual contact; and, most difficult, (3) for a person who has capacity to consent to sexual contact under at least some circumstances, a guardian may need to determine whether a particular instance of sexual expression is abusive, beyond the person's capacity to consent, and/or inconsistent with the individual's essential requirements for health and safety.

An individual who has capacity to consent to sexual contact has a strong interest in having his or her right to do so clearly stated, and, in cases where there is conflict, the guardian will benefit from clarification of his or her authority and duties in this area. Similarly, an individual who cannot consent has a strong interest in protection, and his or her guardian will benefit if his or her authority to provide protection is clear. The issue is further complicated by the fact that an individual may be capable of consenting to sexual contact in some contexts but not in others. A court determination that the individual is not incapacitated for purposes of consent to sexual contact, if included in the court order, will not mean that any specific alleged consent given by the person after the order will be knowing and voluntary at the time given.

Because the statutes do not mention sexual consent specifically as a right the person can retain, the standard court form used to appoint a guardian contains no clear way of reserving this area of decision-making to the individual. The issue would have to be dealt with by a separate attachment to the order form, reserving all or part of the right to the individual, and/or by defining the individual's rights in the context of the court's authority to give the guardian full or limited powers in areas not listed in the statute. A court could potentially take an indirect approach, e.g., by giving the guardian authority to decide when the person may or may not choose to be alone with another person.

Courts have addressed the test for evaluative capacity to consent to sexual assault primarily after the fact, in the context of criminal prosecution of people who have had sexual contact with people with cognitive disabilities.²⁰⁹ The test for evaluative capacity is whether the individual is able to understand the nature and consequences of the sexual contact involved. Elements of what the individual must be capable of understanding have not been precisely defined by Wisconsin courts, but may include:

- The physical nature of the sexual contact involved, and that it holds a special status as "sexual."²¹⁰

²⁰⁷ *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003)

²⁰⁸ Wis. Stat. § 940.225(2)(c)

²⁰⁹ *State v. Smith*, 215 Wis. 2d 84, 572 N.W.2d 496 (Ct. App. 1997)

²¹⁰ *State v. Olivio*, 123 N.J. 597, 589 A.2d 597 (1991).

- That the individual’s body is private and that he or she has the right to refuse to engage in sexual activity.²¹¹
- That sexual contact of some types may result in pregnancy, and the health risks of sexual contact, both in regard to sexually transmitted diseases and pregnancy.²¹²
- That there are social standards and potential social consequences that apply to the sexual contact.²¹³

Assuming the guardian has been given some authority in the area of decisions regarding sexual expression or contact, decisions by the guardian will be subject to § 54.25(2)(d)3, requiring the guardian to “identify and honor” the individual’s preferences with respect to choices related to sexual expression, where consistent with the individual’s essential requirements for health and safety, and with protecting the individual from abuse. *See Part D.3.-5, above.* A decision to overrule the individual’s expressed wishes must take into account the individual’s understanding of the choice, the level of risk, the value of the opportunity to develop decision-making skills, and the value to the individual of wider experience.

I. STANDARDS FOR AND USES OF TEMPORARY GUARDIANSHIP

A temporary guardian²¹⁴ is a guardian appointed for a specific period of time, not longer than 60 days. The court can extend the period for another 60 days, but only once. The court may not create another temporary guardian for a period of 90 days after a previous temporary guardianship expires. The powers of a temporary guardian are limited to power over the specific property or specific acts stated in the order of appointment.

The court may appoint a temporary guardian if it is demonstrated to the court that the ward’s **particular situation, including the needs of his or her dependents, require immediate appointment of a temporary guardian.** Any person can petition for temporary guardianship. The petition must contain the same information required in a petition for full guardianship. *See Part B, above, and Ch. VI, Part D.1.* The petition must also specify the reasons why a temporary guardian is needed and the particular powers that are being requested for the temporary guardian. If a permanent guardianship is not sought, the petition must explain why not.

Before ordering appointment of a temporary guardian, the court must appoint a guardian ad litem, and must hold an initial hearing. The court may hold the hearing no earlier than 48 hours after the petition is filed, except that if good cause is shown the hearing may be held sooner than that. A written report or testimony from a physician or psychologist must be presented at the hearing, indicating that the proposed ward is “incompetent.” The court can hold the hearing and issue an order for temporary guardianship before the guardian ad litem has met with the individual.

The guardian ad litem must report to the court on the advisability of the temporary guardianship within 10 days after the hearing. If a temporary guardian is appointed, a rehearing on the need for temporary guardianship must be held with 10 days of a request for rehearing by the individual, his or her attorney, the guardian ad litem, or any interested person. If a rehearing is requested, court approval must be obtained for expenditures of the ward’s assets before the hearing is held.

²¹¹ *Id.* The New Jersey court required only the first two, tests, saying that an overly-protective interpretation would risk depriving people with mental disabilities of legitimate sexual expression, and noting that people with cognitive disabilities, like other citizens, have the right to pursue happiness and fundamental privacy rights regarding procreation and contraception.

²¹² *People v. Easley*, 42 N.Y.2d 50, 396 N.Y.S.2d 635, 364 N.E.2d 1328, 1332 (1977)

²¹³ *Id.*

²¹⁴ Wis. Stat. § 54.50

Temporary guardianship can be used in urgent situations where decisions cannot wait for appointment of a full guardian, or as part of proceedings for emergency protective services or emergency protective placement. It can also be useful for a person who does not generally need a guardian but faces an isolated, complex decision that he or she lacks capacity to make. For example, a decision may be needed on whether to undergo a complex elective medical procedure, or assistance may be needed to handle a specific property transaction. If these events are rare in the person's life, there may be no need for a permanent guardian.

COMMENT 1: The statute does not say that the guardian ad litem must be present at the initial hearing, in order for the court to appoint a temporary guardian. Presence of a guardian ad litem would be good practice, where possible, but may not be required if immediate action by the court is needed.

COMMENT 2: The statute requires a statement that there is a reasonable likelihood that the individual is "incompetent," but that term is no longer defined in statute. In the context of temporary guardianship, it makes most sense to read "incompetence" to mean incapacity due to a mental or physical impairment which results in inability to meet essential requirements of health and safety, inability to apply property to meet basic needs, or a risk that property will be dissipated. It should not be necessary to show that the incapacity arises from a developmental disability, degenerative brain disorder, severe and persistent mental illness, or other like incapacity that is likely to be long-term in duration. *See Part A.4. and Part B, 2.-3, above*, for discussion of the standards for incapacity and incompetence.

CHAPTER IV: PROTECTIVE SERVICES

NOTE: This book covers protective services in this chapter, and protective placement in Ch. V. However, the standards and procedures for protective services/placement overlap greatly. Some issues that apply to both protective services and protective placement are covered in this chapter. Issues on content and implementation of court orders are discussed briefly in Part H of this chapter, but are discussed in more detail in Ch. V. Court procedures for both protective services and protective placement orders are covered in Ch. VI.

A. WHAT ARE PROTECTIVE SERVICES AND PROTECTIVE PLACEMENTS?

The protective service system is largely a mechanism for coordinating services authorized and funded under other statutes or programs. For that reason, a protective service is defined by its purpose, not by the type of service or source of funds. A service becomes "protective" when it protects a member of one of the protected groups (*See Part C, below*) from abuse, neglect, self-neglect, financial exploitation, deterioration or harm, or when it protects other people from harm by a member of one of the protected groups. The term *protective services* includes a broad range of services:²¹⁵

- Outreach.
- Identification of individuals in need of services.
- Counseling and referral for services.
- Coordination of services for individuals.
- Tracking and follow-up.
- Social services.
- Case management.
- Legal counseling or referral.
- Guardianship referral.
- Diagnostic evaluation.
- Any service, when provided to a member of one of the protected groups, that helps to keep the individual safe from abuse, neglect, or financial exploitation, prevent deterioration in the individual's condition, or prevent the self-harm or harm to others.

The final broad catch-all provision makes clear that there is no intent to limit protective services to a narrow list. If a service makes sense as a way to protect an individual, it can potentially be provided (or ordered) as a protective service. The services of outreach and identification are obviously not limited to people who meet the criteria for receipt of protective services: only through gathering information and screening can the adult protective services system determine whether an individual is in need of services.

The term *protective services* is not limited to services that are ordered by a court as part of a protective service order for a person who has been found to be incompetent, and can include services that are voluntary or involuntary, and services for people who are both able and not able to consent. The term *protective placement* is defined to mean a placement that is made to provide for the care and custody of an individual, but is almost always used only to refer to court-ordered placements. *See Ch. V, Part A.* Protective placements are themselves a type of protective service. They must meet all the requirements for protective services, and in addition must meet separate standards and procedural protections that apply only to residential placements. The term *protective services* is sometimes used as an umbrella term for both protective placement and other kinds of protective services (Ch. 55 itself is titled "Protective Service System.") This chapter covers the general requirements for all protective services, and Ch. V focuses on special requirements for residential placements, with and without court orders.

²¹⁵ Wis. Stat. § 55.01(6r)

B. STRUCTURE AND RESPONSIBILITY FOR IMPLEMENTING THE PROTECTIVE SERVICE SYSTEM

1. *What are the county's responsibilities in organizing and administering the protective service system?*

County responsibility for assigning responsibility for an adult protective service system is described in *Ch. I, Part A.2*. As stated there, the term *adult protective service (APS) system* does not exist in the statutes, and may not exist at the county level. It is used in this book to refer to the agency or combination of agencies that the county has chosen to carry out APS system functions. (In *Ch. 55*, the responsible county agency for protective service functions is referred to as “*the county department*.”) In many cases, for purposes of outreach and identification of persons in need of services, the agency responsible for a function under the APS system will be the same as the agency responsible under the elder-adult-/adult-at-risk system.

The county APS system has responsibilities in the following areas:²¹⁶

- **Planning** for provision of protective services and protective placement in the county.
- **Provision and funding of protective services and protective placements.** The county may provide services directly, and/or may contract with one or more responsible agencies to provide services. The county must provide funding for protective services and placement, within certain funding limits. *See Ch. VI, Part D.3, below.*
- **Monitoring and evaluation** of protective services and protective placements.
- **Preparation of comprehensive evaluations and other reports to the courts.** The APS system must:
 - Prepare and submit any reports that may be required by a court that has ordered protective services or protective placement.²¹⁷
 - Cooperate with the court in securing available resources for comprehensive evaluations in guardianship, protective placement and protective service cases.²¹⁸ *See Ch. VI, Part F.*
 - Complete an annual review and report concerning all court-ordered protective placements.²¹⁹ *See Ch. VI, Part J.2.*
- **Preparation of reports to DHFS.** *See Section 3. and Part H, below.*
- **Annual report requirements for guardians.** The county APS system must develop requirements governing the annual reports that guardians of the person are required to submit to the court and the county APS system under Wis. Stat. § 54.25 (1) (a) (including telling guardians where to send the copy of the report that goes to the county). *See Ch. III Part E.2.* There is a standard form at: <http://www.wicourts.gov/forms/GN-3480.DOC>.
- **Designate intake facility for emergency protective placement.** The APS system must designate at least one appropriate medical facility or protective placement facility as an intake facility for the purpose of emergency protective placements under s. 55.135. *See Ch. V, Part C.5.*

²¹⁶ Wis. Stat. § 55.02 sets out the general responsibilities of the APS system. Statutes that create additional specific responsibilities are separately noted below.

²¹⁷ Wis. Stat. §55.02(2)(b)2.

²¹⁸ Wis. Stat. § 55.11

²¹⁹ Wis. Stat. § 55.18(1)

- **Corporation counsel.** The corporation counsel of the county in which the petition is brought may assist in legal proceedings concerning protective services or placement. If requested by the court, the corporation counsel must assist in the proceedings.
- **Respond to objections by individuals to placements in residential facilities made without court orders.** *See Ch V, Part B.3, 6. and 8.*
- **Petition the courts for guardianship, protective placement and protective services, or assist the court where the county is not the petitioner.**²²⁰ The county may be a petitioner in any action to begin or review a guardianship, protective placement or protective services. It may also bring or refer a situation for an initial action or review in response to a report of abuse, neglect or exploitation through the elder-adult/adult-at-risk systems. Even where it is not petitioner, the APS system is responsible for assisting the court to access resources for comprehensive evaluations, in guardianship as well as protective services/placement cases. *See Ch. VI, Part F.3.*
- **Establish county policy on annual reviews of protective placements.**²²¹ Policies must ensure that the statutory requirements for annual reviews are carried out, and must be available for public inspection. *See Ch. VI, Part J.*

2. ***What is the relationship between protective services and service needs identified under the elder adults/adults-at-risk reporting and response systems?***

The reporting and response systems established for elder adults/adults at risk described in Ch. II is intended to fulfill functions of the APS system including outreach, identification of individuals in need of services, initial response, and identification of service needs and the three systems should be seen as parts of a single system. It makes sense to merge these functions in the same agency or combination of agencies, and to treat any referral for services to the APS system that is made by an elder adults/adults-at-risk agency for services as a request for protective services under Wis Stat. § 55.05. *See Part F.2, below.* Similarly, the right to refuse services contained in the elder adults/adults-at-risk statutes should be treated as applying to any protective service. *See Part F.4, below.* The elder adults/adults-at-risk laws authorize offers of services to people who may not meet the criteria for protective services, e.g., an elder adult at risk who does not have degenerative brain disorder or other like incapacities. *See Ch. II, Part G.1.* For this reason, the question of whether a person is in one of the disability groups listed in *Part C, below*, may no longer be of great significance for purposes of offers of voluntary services.

Some intake and service need identification for protective services may still occur in ways that do not involve the elder adults/adults-at-risk system. These may include court evaluation requests and service orders, rights grievances filed under Wis. Stat. § 51.61, and new needs identified for people who are already in the service system.

3. ***What is the responsibility of DHFS in the protective services system?***

The 2006 revisions to Ch. 55 revised the authority and responsibility of the state Department of Health and Family Services (DHFS) to more accurately reflect the fact that primary responsibility for service planning and delivery rests at the county level. DHFS now has the following duties under Ch. 55:²²²

- Cooperate with county APS systems to develop and operate a coordinated, statewide system for protective services and protective placement.

²²⁰ Wis. Stat. §§ 54.34, 54.68, 55.043(4)6, 55.075(1), 55.16(2)

²²¹ Wis. Stat. §55.18(4)

²²² Wis. Stat. § 55.02(1)

- Monitor and supervise the implementation and operation of the protective services and protective placement system.
- Provide technical assistance to county departments providing protective services and protective placement.
- Evaluate the protective services and protective placement system.

To carry out these responsibilities, DHFS has authority to require reports from county adult protective service agencies.

In addition to its other roles, DHFS may act as a provider of protective services and protective placement, directly or by contract. DHFS takes this role, for example, in the operation of the state Centers for people with developmental disabilities. DHFS can also use this authority to develop and provide or contract for less restrictive and/or more appropriate placements where a county has failed to do so.

C. ELIGIBILITY: DISABILITY GROUPS COVERED BY PROTECTIVE SERVICES AND PROTECTIVE PLACEMENT

1. *What are the categorical disability groups, and must a person have one of the defined disabilities in order to be eligible for protective services or protective placement?*

The stated purpose of the protective services system under § 55.001 is to provide protective services or placement to people who fall into one of three categorical disability groups, or into a catch-all group of people with similar needs. Having a condition that falls into one of the four categorical disability groups is clearly required for court-ordered services or placement. However, there is no clear provision limiting voluntary protective services to people who belong to one of the four defined disability groups. The question is no longer of great practical significance, because it is clear under the elder adults/adults-at-risk response provisions that services can be provided to an elder adult/adult at risk who does not belong to one of the four groups. In any case, other individuals in need of voluntary services can usually be served under other authority, e.g., the general authority to provide social services under Ch. 46, or more specific programs, like the Community Options and Community Integration Programs.

The covered groups are:

- People with developmental disabilities.
- People with degenerative brain disorder.
- People with serious and persistent mental illness.
- People with other like incapacities.

The result of the inclusion of people with "other like incapacities" is that the first three categorical disability definitions serve more as examples of the type of people the statute seeks to protect, rather than as exclusive definitions of who may be served. Ch. 55 has its own definitions of these terms, described below. These definitions are the same as those now used for purposes of guardianship under Ch. 54. However, the definitions of developmental disability and mental illness are not exactly the same as those in Ch. 51, which governs commitment and community program responsibilities.

Each of the definitions has three elements:

- **Categorical diagnosis.** Each definition requires a diagnosis of some mental or neurological disability. This would typically be provided by a physician or psychologist, but may be made by other qualified professionals.

- **Long-term duration.** Protective services or placement under Ch. 55 are not intended for people primarily in need of short-term treatment. A developmental disability must be one that can be expected to continue indefinitely. A mental illness must be “persistent in duration.” A degenerative brain disorder must result from loss or dysfunction of brain cells, which necessarily implies an expectation of permanence.
- **Functional inability to provide for care and custody.** The definitions of degenerative brain disorder, developmental disability and other like incapacity all contain a functional requirement that the condition be one that substantially impairs the individual from adequately providing for his or her own care and custody. (The definition of mental illness has a somewhat different functional requirement. *See Section 4, below*) The terms *care* and *custody* are not defined. Taken together, they should be read to include basic needs, such as food clothing, shelter, physical hygiene, personal care, health care, and self-protection from physical danger and from abuse, neglect and exploitation.²²³ It is likely that the word “custody” includes the need for services to protect the welfare of others. In other words, a person able to care for himself or herself can probably meet the functional requirement based on inability, due to the impairment, to control behavior that puts other people at risk. (In most cases, behavior that puts other people at risk will also put the individual at risk.)

Having a condition that meets the criteria for one of the four groups is necessary for a person to be subject to a court order for involuntary protective services, involuntary protective placement or involuntary administration of psychiatric medication. In addition, the individual must meet other criteria, including mental incompetence and risk of serious harm. *See Parts H.1. and I.3, below, and Ch. V, Part C.2.*

2. *Who is a person with a developmental disability?*

A person has a developmental disability if he or she has a disability which meets all of the following criteria:²²⁴

- It is caused by mental retardation, cerebral palsy, epilepsy, autism or another neurological condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals. (**Note:** degenerative brain disorder (*See Section 3, below*) is not a developmental disability, even if it meets this definition.)
- It substantially impairs the person from adequately providing for his or her own care and custody. (*See Section 1, above.*)
- It is expected to continue indefinitely.

This definition is different from the definition in Ch. 51,²²⁵ which defines individuals potentially eligible for services under county community program responsibility. The definition in Ch. 51 includes people with brain injury and people with Prader-Willi syndrome, regardless of whether the condition is related to mental retardation or requires similar treatment as mental retardation. The Ch. 51 definition requires that the disability be substantial, but does not require that the person's ability to meet his or her need for care and custody be substantially impaired. This means that, for example, a person with mental retardation who is able to meet his or her basic needs and protect himself or herself from abuse, neglect and exploitation might not be eligible for services under Ch. 55, but might be eligible for developmental disability services if substantially impaired in other ways, e.g., learning or self-support.

²²³ Compare the list of “essential requirements for physical health and safety” in § 54.01(19), Wis. Stat., for purposes of determination of incompetence. See Ch. III, Part B.3.

²²⁴ Wis. Stat. §55.01(2)

²²⁵ Wis. Stat. § 51.01(5)

Brain injury, Prader-Willi or another neurological condition may meet the Ch. 55 definition of a developmental disability if the condition results in characteristics similar to those of a person with mental retardation, or requires treatment similar to that required for a person with mental retardation. The condition also may be an “other like incapacity.” (*See Sec 5, below*).

3. *Who is a person with degenerative brain disorder?*

Degenerative brain disorder means the loss or dysfunction of an individual's brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody.²²⁶ This term replaces the former term “infirmities of aging,” and eliminates the implication that dementia and aging are necessarily tied together. Use of the word “degenerative” presumably means that the person must have lost pre-existing capacity over time, and thus excludes conditions with which a person is born (which can be developmental disabilities) and traumatic brain injuries (which can be other like incapacities).

4. *Who is a person with serious and persistent mental illness?*

Ch. 55 does not have a definition of *serious and persistent mental illness*. Ch. 55 does define *mental illness*. Under that definition, a person has mental illness if he or she has a mental disease that is severe enough so that the person requires care, treatment or custody for his or her welfare, the welfare of others, or the welfare of the community.

§ 51.01(14t) and § 54.01(30) provide a definition of *serious and persistent mental illness*, which courts will probably apply to Ch. 55. Under that definition, the term means a mental illness that: (1) is severe in degree and persistent in duration; (2) causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life; (3) may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support; and (4) may be of lifelong duration. The term specifically excludes degenerative brain disorder, and also excludes a person who has a primary diagnosis of a developmental disability or alcohol or drug dependence.

For a person with mental illness to be eligible for involuntary protective services or placement under Ch. 55, the person must have a condition that may be life-long in duration, and must have a primary need for long-term support. A person with mental illness who has more short-term needs, or a primary need for treatment, should be served under Ch. 51 either voluntarily or under a commitment order. *See Part E, below*

5. *Who is a person with other like incapacities?*

A person has "other like incapacities" if he or she has a condition which:²²⁷

- Was incurred at any age as the result of accident, organic brain damage, mental or physical disability or continued absorption of substances; and
- Substantially impairs him or her from adequately providing for his or her care or custody.
See Section 1, above.

The inclusion of this broad category reduces the importance of fitting a person into one of the categorical labels described *above*. While the definition does not include a duration test, a short-term disability would not be a “like” incapacity, and in any case could not be the basis for a court order for protective services or placement.

²²⁶ Wis. Stat. § 55.01(1v)

²²⁷ Wis. Stat. § 55.01(5)

6. *Are people with brain injuries eligible for protective services?*

The Ch. 51 definition of developmental disability specifically includes brain injury. While Ch. 54 and Ch. 55 do not include this language, some individuals with brain injury will be included under the definition of persons with developmental disability in Ch. 55 on the grounds that their conditions result in characteristics similar to those of a person with mental retardation, or require similar treatment. Other people with brain injuries will have conditions that fit under the definition of "other like incapacities." If the person has a condition resulting in a long-term inability to provide for his or her care or custody, he or she should be eligible for protective services and placement under one definition or the other.

7. *Are people with alcoholism or other drug dependence eligible for protective services?*

A person with alcoholism or other drug dependence can qualify as having "other like incapacities" on the basis of a condition that results from "continued consumption or absorption of substances". The clearest cases are those where long-term substance abuse has resulted in brain damage. The disability must be severe enough to substantially impair the person's ability to provide for his or her own care and custody. It is not clear that Ch. 55 could be used to provide involuntary services to someone who is impaired due to current use of alcohol or drugs, has not yet incurred severe, permanent brain damage and does not have an additional diagnosis of developmental disability, mental illness or degenerative brain disorder; such individuals may be better treated and supported under Ch. 51 treatment provisions.²²⁸

8. *Can a person be eligible for protective services based on a physical disability alone?*

The definition of developmental disability can include a person with cerebral palsy who does not have a cognitive disability. Similarly, *other like incapacities* can include a purely physical condition. The issue is whether the condition substantially impairs the person from adequately providing for his or her care or custody. *See Section I, above.* This may depend in part on the person's situation. For example, a person with ready access to good communication devices or assistance may be able to arrange services, while a person who is isolated or dependent on others may not.

A person is only subject to an order for involuntary protective services or placement if the person is in need of guardianship based on a finding of incompetence. This can include a communication impairment, but only if the person, with appropriate assistance, is unable to communicate essential decisions in any way. *See Ch. III, Part B.1.*

D. ELIGIBILITY FOR NON-EMERGENCY SERVICES: COUNTY OF RESIDENCE

There is no general provision in Ch. 55 expressly saying that the county of residence of an individual is responsible for provision of protective services to an individual. However, this appears to be the intent of the statute, based on the following:

- The Wisconsin Court of Appeals has held, based on "the statutory scheme as a whole," that the county of residence has the primary responsibility for implementation of protective placements.²²⁹ This probably also applies to protective services.

²²⁸ *In the Matter of the Guardianship and Protective Placement of Shaw*, 87 Wis. 2d 503, 275 NW 2d 143 (Ct. App, 1979)

²²⁹ *In the Matter of the Protective Placement of J.S.*, 144 Wis. 2nd 670, 425 N.W. 2d 15 (Ct. App. 1988). the creation of §51.40, Wis. Stats., which governs residence for purposes of service funding under chs. 46, 51 and 55 for people with developmental disabilities or mental illness in state facilities and nursing homes. There would be no point in defining residence for purposes of service funding unless funding responsibility were based on residence.

- Wis. Stat. § 51.40 states that, for residents of certain facilities, the county of residence, as determined under that section, is the county responsible for funding the provision of care, treatment, or services under Ch. 46 (including social services, community long-term support programs (Community Options, Community Integration, Family Care, etc., and elder adults-at-risk services); Ch. 51 (mental health, developmental disabilities and AODA service); and chapter 55 (adults-at-risk, protective services, and protective placement). Although this provision is located in Ch. 51, by its own terms it applies to people with degenerative brain disorder and other like incapacities, as well as to people with developmental disabilities and people with mental illness.
- For purposes of court-ordered protective services/placements, the county determined by the court to be the county of residence is designated as the county of responsibility.²³⁰
- Responsibility for services that are often provided as protective services are tied to residence, see, e.g., Wis. Stat. §§ 46.27(1)(d) and (6g)(c) and 51.42(1)(b).

For people not in facilities, or otherwise not governed by § 51.40 (see below), residence for purposes of Ch. 55 has the same meaning as it does for purposes of public benefits under Ch. 49, long-term support programs under Ch. 46, and mental health and developmental disabilities services under Ch. 51. Under the definition,²³¹ a person has *residence* in a county if he or she is **voluntarily physically present in the county and intends to remain there in a place of fixed habitation**. If a person is competent, he or she can express the intent to remain. If the person is not competent to make this decision, a guardian can exercise the intent to remain in a current residence or to move and become a resident of a new county, and this decision by the guardian is still considered *voluntary*. There is no requirement under this definition that the individual remain for any length of time before establishing residence. The fact that a person is physically present in a county is evidence that he or she intends to remain there as a resident. In other words, if a person is present and there is no evidence that he or she does not intend to remain there, he or she must be treated as a resident. This would apply, for example, to a person who had no guardian and was unable to state an intention to stay. The requirement of intent to stay in a place of fixed habitation has been interpreted by DHFS to mean that the person must already have some kind of housing in which he or she intends to stay for the foreseeable future in order to be considered a resident. This excludes people who are homeless, people in emergency shelters, and people in other settings not considered permanent, such as hotels and motels.

COMMENT 1: The requirement that the person must already have housing (rather than intent to find housing) is arguable.

COMMENT 2: There is no cross-reference between this definition of residence and the determination of county of residence by § 51.40. Both statutes appear to define *residence* for purposes of Ch. 55. This book assumes that, for people in the facilities and situations where it applies, § 51.40 controls the determination of residence for purposes of Ch. 46, 51 and 55, both where it conflicts with § 55.01(14), and where it conflicts with the residence test for particular funding programs, such as the provisions on residence for long-term support services (for people in and out of facilities) in Wis. Stat. § 46.27(1)(d) and (6g)(c).

Emergency Services. Wis. Stat. §§ 51.42 and 51.437, Wis. Stats., provide that the county where the individual is found is responsible for emergency care and services for individuals with mental illness, developmental disabilities, alcoholism or other substance dependence.²³² This applies to protective

²³⁰ Wis. Stat. § 55.075(5)

²³¹ Wis. Stat. §§ 46.27(1)(d), 49.001(6), 51.01(14), and 55.01(6t) and (6y).

²³² Wis. Stat. § 51.42(1)(b) and 51.437(4)(c), Wis. Stats.

services for those populations.²³³ There is no similar provision in either Ch. 46 or Ch. 55 indicating responsibility for emergency services for people with degenerative brain disorders or other like incapacities. Under § 51.40, a county may provide emergency protective services and emergency protective placement without thereby becoming the county of responsibility, but it does not say that a county is responsible for doing so. *See Part G, below, and Ch. V. Part C.5.* for the standards for emergency protective services and placements.

People in facilities. Wis. Stat. § 51.40 has special provisions for determination of county of residence for individuals in “facilities.” As noted above, this applies to any adult with a disability of the type that would qualify the individual for protective services or placement, including developmental disabilities, serious and persistent mental illness, degenerative brain disorder, or other like incapacities. *Facility* has a very broad definition, including any place, other than a hospital, that is licensed, registered, certified, or approved by DHFS or by a county. This could include not only licensed facilities, but certified adult family homes and any kind of residential setting that has been approved under some process established by statute or administrative rule. It should not be read to include a person’s own home (rented or owned) where the person receives services from an approved agency, because in that case it is the services, not the home, that are “approved.”

§ 51.40 is interpreted in detail in DLTC/DMHSAS Numbered Memo Series 2007-01, on the DHFS website at http://dhfs.wisconsin.gov/dsl_info/NumberedMemos/DDES/CY2007/NMemo2007-01.htm, and this information will not be repeated in detail in this book. In general:

- **Court orders for commitment or protective services/placement.** A person under a court order for commitment or protective services/placement remains a resident of the county determined by the court to be the county of residence at the time of the initial order. If there is no finding in the court order, this is presumed to be the county where the court is located. However, the court may reopen the question and determine county of residence, unless there is an objection by a party or a county that might be affected by the order. If there is an objection, residence must be determined by DHFS.²³⁴
- **Placement by a county agency.** Except for emergency placement or services, if a county agency places a person in a facility, **the county making the placement is the county of residence**, and the county to which the person is placed does not become the county of residence only because the person is placed there. *A county that approves admission of a person with developmental disabilities or mental illness, where county approval of an admission is required, will be considered to have “placed” the individual. See Ch. V, Part E.* A county may provide for **immediate care or service needs** of a person present in the county without becoming the county of residence. The reference to meeting “immediate” needs appears to allow a county to meet needs that are immediate but do not rise to the level of an emergency, without becoming the county of residence.
- **People in state facilities.** For people in state facilities who are not under court orders or placed by counties, § 51.40(b)1. has provisions generally designed to preserve previous county of residence, and to protect counties where state facilities are located from becoming counties of residence for people placed from or by other counties. See DLTC/DMHSAS Numbered Memo Series 2007-01, Part II.B.3.

²³³ DHFS policy states that, in emergency cases, fiscal liability is limited to 72 hours (plus intervening weekends and legal holidays) of care and services. DSL Memo Series 2002-19, *Emergency Detention Services for Non-Wisconsin Residents and Procedures for Reimbursement Authorization*

²³⁴ Wis. Stat. § 51.40(2)(a)2. Mandatory referral should apply only to people already under court orders. Initial cases are governed by Wis. Stat. § 55.075(5)(bm), which makes referral of the case to DHFS optional.

- **People in nursing homes.** For people in nursing homes who are not under court orders or placed by counties, § 51.40(b)2. creates a series of presumptions about county of residence, although these can be overcome by evidence that clearly establishes another county of residence. Unfortunately, it is not clear how conflicts between the presumptions are to be resolved, or what definition of residence will be used to show that residence in another county is clearly established. See DLTC/DMHSAS Numbered Memo Series 2007-01, Part II.B.4.

Determination of residence by guardian. § 51.40(2)(5) contains provisions that give a guardian authority to declare a county of residence for an individual who is incapable of indicating intent. Under limited circumstances, these provisions allow a guardian to declare that the person is a resident of the county in which the guardian resides, or where the person has established a home, even if the person was not previously a resident of that county. See DLTC/DMHSAS Numbered Memo Series 2007-01, Part II.B.5. Even if none of the specific exceptions apply, **the guardian under any and all circumstances may file a declaration of county of residence with the court that has jurisdiction of the guardianship and protective placement stating good cause, in the best interests of the person, why the county of residence should be as declared by the guardian.** Notice of the declaration must be provided to all affected counties and parties, and is subject to court approval. This provision allows the guardian and court to determine a county based on individual best interests under the individual circumstances. This might apply, for example, if the individual’s family had moved to a county otherwise not the county of residence, or if the individual had close, longstanding ties to a county otherwise not the county of residence.

E. DISTINGUISHING TREATMENT FROM OTHER CARE AND SERVICES

1. *What is the difference between “services” and “treatment”?*

The word *treatment* is not defined in Ch. 55, but where it is used it appears to have the same meaning as it has in Ch. 51. (The term *treatment facility* is defined in Ch. 55, and has the same meaning as in Ch. 51. (See *Ch. V, Part D.1, below*) **Treatment** for purposes of Ch. 51 is defined in § 51.01(17) as “psychological, educational, social, chemical, medical or somatic techniques **designed to bring about rehabilitation” of a person with mental illness, developmental disabilities, alcoholism, or other drug dependence.** (Note: in Ch. 51, the definition of developmental disabilities includes brain injuries and Prader-Willi syndrome, so treatment for those conditions may also fall under the definition.) While the definition of treatment is very broad, it excludes some important categories of services:

- Services which are protective or custodial in nature, i.e., are primarily intended to keep the person healthy and safe from harm, rather than to improve the person’s functional abilities.
- Services which are directed at a physical health condition, rather than a condition arising from mental illness, developmental disability, alcoholism or drug dependence.
- Rehabilitation services for people whose need for services arises from a degenerative brain disorder or from a stroke that occurred after age 22.
- Services which are for the purpose of “habilitation” rather than “rehabilitation.” The Wisconsin Court of Appeals has held that the failure to include the word “habilitation” in the definition of treatment means that habilitation is not treatment.²³⁵

The court cited and adopted the following definitions of *rehabilitation* (which is treatment) and *habilitation* (which is not treatment):

²³⁵ *In Matter of Athans*, 107 Wis. 2d 331, 336, 320 N.W.2d 30 (Ct. App. 1982)

Services which are rehabilitative are those “which ameliorate impairments and facilitate an individual’s capability to function,” and habilitative services are those “which assist an impaired person’s ability to live in the community.”²³⁶

While the line between habilitation and rehabilitation is not precise, one way of looking at the difference is whether the service is intended to change the individual’s underlying functional ability, e.g., through psychotropic medication or behavioral treatment, or is primarily intended to support the person to live and work in community settings. It seems clear that habilitation can include some level of training and skills development without becoming “treatment,” but again the precise line is not clear.

2. *Why is the difference between “treatment” and other services important?*

Whether or not a service is defined as *treatment* under the Ch. 51 definition is important under Ch. 55 for three main reasons:

- The laws on whether informed consent for a service is required, and on the right of the individual to refuse a service, are different depending on whether the service is or is not treatment under Ch. 51. *See Part F, below*
- Court orders for protective services and protective placement should not be used where the primary purpose is to impose involuntary treatment for mental illness, developmental disabilities, alcoholism, or other drug dependence. Such cases should be handled under the involuntary detention and commitment procedures of Ch. 51. (An exception is an order for involuntary administration of psychotropic medication under § 55.14. *See Part I, below*)
- A court may order protective placement only for a person who has a primary need for residential care and custody due to a condition that is likely to be permanent. *See Ch. V, Part C.* This means that protective placement is inappropriate if either: (1) the individual’s **primary** need is for treatment; or (2) the individual’s functional abilities could be expected to be improved through treatment to the point where he or she would no longer meet the standard for protective placement (and therefore the condition is not likely to be permanent).

F. REQUEST, CONSENT AND RIGHT TO REFUSE ISSUES

1. *When are protective services considered “voluntary”?*

The term *voluntary protective services* is used to mean services that are not provided as emergency services or provided under a court order.²³⁷ They may include services provided to someone who asks for them, consents to them, or passively accepts them. They may also include services for which consent has been provided by a guardian or health care agent, even over the objection of the individual, but only if the services are not treatment under the Ch. 51 definition described in *Part E.1, above*.

2. *Does the law require that there be a specific request for protective services, if there is a report to the county of abuse, neglect or exploitation?*

No. Wis Stat. § 55.05(2) states that a county *may* provide or arrange for protective services for an individual if the individual requests them, or if any interested person²³⁸ requests them on the person’s behalf. The title of § 55.05(2) (“Conditions Required”) is inaccurate: it does not say that

²³⁶ *Id.*, citing U.S. Dept. of HEW, *Health Planning and Taxonomy* 4 (1979)

²³⁷ Wis Stat. §§ 55.01(6y) and 55.05

²³⁸ Under Wis Stat. § 55.01(4) an *interested person* can include an adult relative or friend, a representative of a public or private agency concerned with the person’s welfare (including the county itself), or an agent under the person’s health care power of attorney.

a request for services is required before a county can provide protective services, and it is clear that services can be provided based on a report of abuse, neglect or exploitation to the elder adults/adults-at-risk reporting and response systems, or based on the county's own identification of a need for services.

The elder adults/adults-at-risk reporting and response systems require a determination of need for protective or other services as part of every response. *See Ch. II, Part G.* Most initial referrals for protective services will come through that system, without a separate outside request for services. There is no requirement that a person reporting abuse, neglect, self-neglect or exploitation under the elder adults/adults-at-risk reporting systems be an "interested person." Where there is a direct request for protective services by an interested person, it will make sense in many cases to treat it as a report under the elder adults/adults-at-risk reporting systems.

3. Does the law require informed consent to voluntary protective services that are "treatment"?

Except in an emergency, if protective service meets the definition of *treatment* under Ch. 51 (*See Section I, above*), informed consent to treatment is required under Wis. Stat. § 51.61(6) and Wis. Admin. Code § HFS 94.09(4). Any person receiving any service under Ch. 55, voluntarily or involuntarily, is covered by the rights in § 51.61 and Ch. HFS 94. *See Ch. I, Part D.*

Informed consent to treatment for an adult could be provided by: the individual, if he or she has capacity to do so; by a guardian of the person with appropriate authority under the court order creating the guardianship; or by an agent under an activated health care power of attorney, with appropriate authority under the power of attorney document.²³⁹ *See Ch. III, Part G.5,* for discussion of guardian authority to consent to treatment and psychotropic medication, and Ch. III, Part C.1, for limitations on authority that can be delegated to an agent under a health care power of attorney. Unless specifically found incapable of doing so by a court, an individual under guardianship or with an activated power of attorney for health care may still have a right to refuse treatment, despite consent of the guardian or agent. *See Section 4, below.*

If the guardian is not physically present, an informed consent for treatment from a guardian may be temporarily obtained by telephone under procedures in Wis. Admin. Code § HFS 94.03 (2m). A more serious problem exists in cases where the guardian is alleged to have engaged in abuse, neglect, or exploitation, or is protective of an alleged abuser, and the guardian is refusing consent to services. In an emergency, provisions for emergency services or placement can be used (*See Part G, below*), together with a petition for ongoing protective services or placement and/or a petition for removal of the guardian for failure to act in the person's best interests. *See Ch III, Part E.7. and Ch. VI, Part K.3.*

There is no requirement in Ch. 55 that the individual be able to give informed consent, or in fact give consent, in order to receive protective services that are not treatment (as defined for Ch. 51) or psychotropic medication. For many support services, such as home-delivered meals, personal care, vocational support or assistance with household chores, passive acceptance of the service by the individual is probably sufficient, if the individual has been informed of his or her right to refuse. *See next section.*

Where the individual is incapacitated and has a guardian of the person, the guardian of the person may consent to protective services on the person's behalf, unless the guardianship is limited to reserve this right to the individual.²⁴⁰ If the person is incapacitated and has an activated health

²³⁹ Wis. Stat. § 51.61(6) and Wis. Admin. Code HFS 94.09(4) do not refer to consent by a health care agent, but the power to consent to treatment on the individual's behalf can be delegated to an agent under Wis. Stat. § 155.20, except that an agent cannot be given power to consent to inpatient admission either: (1) to an intermediate care facility for persons with mental retardation or (2) to a treatment facility.

²⁴⁰ Wis Stat. § 55.05(2)

care power of attorney, the agent may also give consent to services, again assuming that this is within his or her authority under the power of attorney document. Where the services do not meet the definition of treatment under Ch. 51, and there is consent by a guardian or health care agent, it appears that the individual does not have a right to refuse the services. *See next section.*

4. *Does the individual have a right to refuse voluntary protective services that are not “treatment”?*

Under the elder adults/adults-at-risk laws, an individual has a right to refuse to accept services “unless a guardian authorizes services.”²⁴¹ The elder adults/adults-at-risk agency must inform the individual of that right before providing services. Given the close relationship between the county’s elder adults/adults-at-risk and protective service responsibilities, it is probably the legislative intent:

- That a competent individual has the right to refuse any protective service, regardless of whether it is provided through the elder adults/adults-at-risk systems, APS system or another part of the service system.
- That an individual who is incapacitated does not have a right to refuse services that are authorized by a guardian, if the guardian has authority over consent to the services under the guardianship order, and the services are not treatment under the Ch. 51 definition. However, if any kind of force is needed to deliver the services, a court order for protective services should be obtained. *See Ch. III, Part G.1,* for discussion of the guardian’s authority to consent to medical services over the individual’s objection.

If an individual is incapacitated, and refuses services in an emergency, emergency protective services can be provided under § 55.13 while temporary guardianship and/or a protective service order is/are sought. *See Part G, below, and Ch. III, Part I.* If an individual is incapacitated, and has no guardian, it is probably necessary to pursue a guardianship to overcome a refusal of services, even if the individual has an agent under an activated power of attorney, as the right to refuse does not have an exception for consent by an agent who is not a guardian.

5. *Does the individual have a right to refuse voluntary protective services that are “treatment”?*

Unless services are needed to prevent serious physical harm to the individual or other people, an individual receiving services under Ch. 55 has a right under § 51.61 to refuse psychotropic medication and treatment, even if the person has a guardian and the guardian gives consent, unless there is an emergency or a court finding of incapacity to refuse and a court order for commitment or involuntary administration of psychotropic medication.²⁴² The power of a guardian to consent to treatment and psychotropic medication is discussed in *Ch. III, Part G.5.* Court protective service orders for involuntary administration of psychotropic medication are discussed in *Part I, below*

6. *How can the APS system respond to refusal, by a person with capacity to refuse, of services needed to protect the individual from abuse, neglect or exploitation?*

The right of a competent individual to refuse treatment and services (and the right of even an incapacitated person to refuse psychotropic medication unless a very high standard of proof is met) can be frustrating for protective services workers, especially if the person chooses to remain in a potentially abusive or neglectful situation. A partial solution is sometimes to make available those services the person can and will accept, even where the worker believes those services do not provide fully adequate protection. Continued counseling on decision-making may help the person learn from productive and unproductive decisions he/she makes. Keeping the person in

²⁴¹ Wis. Stat. §§ 46.90(5m)(c) and 55.043(5g)

²⁴² Wis. Stat. § 51.61(1)(g) and (6)

some kind of day activity or in-home support program at least provides an opportunity to observe and talk to him or her. Isolation will almost always put the person at greater risk. The system may have to accept that incomplete services are better than leaving the person in total isolation.

G. EMERGENCY PROTECTIVE SERVICES, FORCIBLE ENTRY, AND INTERFERENCE WITH SERVICES

1. *When can emergency protective services be provided, and what can they include?*

The protective services system can provide protective services to an individual on an emergency basis if it has reason to believe that, **if the protective services are not provided, the individual or other people will be at substantial risk of serious physical harm.**²⁴³ Use of the term *emergency* indicates that the risk must be immediate enough so that it could not be safely dealt with through the regular process of seeking a court protective services order. The level of risk required to authorize provision of emergency protective services is stricter than the standard for court-ordered protective services in general, in that the risk must be of serious physical harm.

2. *Can emergency protective services include treatment as defined under Ch. 51?*

Yes. § 51.61(1)(g), which provides that the individual does not have a right to refuse medication or treatment necessary to prevent serious physical harm to the individual or others. The statute specifically states that emergency protective services can include involuntary administration of psychotropic medication.²⁴⁴

3. *Does provision of protective services require a certainty that harm will occur if services are not provided?*

No. There is no requirement that there be a reason to believe that harm *will occur* without services, only that a *substantial risk* would exist without the services.

4. *Does provision of protective services require that the APS worker have directly witnessed the conditions which create the risk?*

No. Staff of the APS system can proceed based on reports from other people if, in their professional judgment, the reports give them reasonable cause to believe that there is a substantial risk of serious physical harm.

5. *Can emergency protective services be provided to an incapacitated person over his or her objection, and without consent of a guardian or health care agent?*

Yes. Emergency protective services can be provided when provision of voluntary protective services is not a viable option.²⁴⁵ Services could be provided to an incapacitated person over the individual's objection and without consent of a guardian or health care agent, if there is reason to believe that the individual is at serious risk of physical harm, and any of the following are true:

²⁴³ Wis. Stat. § 55.13

²⁴⁴ Wis. Stat. § 55.14(10)

²⁴⁵ Wis. Stat. § 55.05(3)

- The individual has no guardian or health care agent.
- The guardian or agent is unavailable.
- The guardian or agent is the suspected perpetrator, or is otherwise not acting in the individual's best interests.

6. *Can involuntary emergency protective services be provided to an individual in the absence of reasonable cause to believe that the individual is incapacitated?*

The statute does not address this question directly, but emergency protective services cannot be provided to a person beyond the initial 72 hours unless there is reason to believe that he or she meets the standards for court-ordered protective services, which include a need for guardianship based on a finding of incompetence. *See Section 3, below.* This indicates that emergency protective services are not intended to overcome the general right of a competent person to refuse services. If a competent individual is in need of psychotropic medication or other services that meet the definition of treatment under Ch. 51, the county should follow the emergency detention and treatment provisions of Ch. 51, rather than the emergency protective services provisions.

7. *Can emergency protective services be provided to an individual without a court order and before a petition is filed?*

Yes, but only for a period of up to 72 hours. If there is no need for ongoing services beyond the 72 hours, or if services beyond the 72 hours can be provided on a voluntary basis, there is no need to file anything with the court, before or after the services are provided.

8. *What if long-term, involuntary services are needed?*

If the APS system has reason to believe that the individual meets the standards for court-ordered protective services (*See Section 3, below*), it can bring a petition for court-ordered protective services and ask the court for an order for continuation of emergency protective services. The court may issue the order if it finds probable cause that the standards for court-ordered protective services are met. The court is required to hold a hearing within 72 hours after the petition is filed, not counting week-ends and legal holidays. Emergency protective services under the court order can be provided for up to 60 days, pending the hearing on an order for longer-term protective services. There is no provision for renewing an emergency protective services order.

COMMENT: There may be a gap between the initial 72 hours of service and the time that a court order can be obtained, e.g., because the petition is filed after services begin, or because of week-end days and holidays. The APS system may want to delay initiating services until a petition is filed and a court order is likely within 72 hours, if the risk created by a gap in services would be greater than the risk created by a delay in initiating services.

9. *What if the individual, or a third person, denies access to the home, or interferes with investigation of need for protective services or delivery of protective services?*

There are three legal tools that can be used if there is interference with investigation of need for protective services or with delivery of protective services: (1) immediate forcible entry by law enforcement personnel; (2) forcible entry by APS system staff under a court order; and (3) use of a temporary restraining order and/or injunction under Wis. Stat. § Wis. Stat. § 813.123.

If the individual, or someone else, refuses to let protective services staff into the place where the individual lives or is located, or if the door is locked, staff of the county APS system may obtain a court order to enter the premises “forcibly.”²⁴⁶ The standard for getting the court order is that

²⁴⁶ Wis. Stat. § 55.13(4)

forcible entry is necessary either to provide or investigate the need for emergency protective services. If the court order is granted, APS system staff must make the entry accompanied by a sheriff, police officer or member of a fire department.

If it is probable that substantial physical harm, irreparable injury, or death may occur, and if the delay in entry required to get a court order would result in a greater risk of physical harm to the individual, then a police officer, fire fighter, or sheriff may enter the premises without a court order. It is not stated in the statute that APS system staff can accompany them to provide needed protective services, but *see Ch. II, Part F.4.* for discussion of provisions requiring a sheriff or police officer, upon request, to accompany staff of the elder adults/adults-at-risk systems, or to provide other assistance.

Although this provision is in the same section as the provisions on emergency protective services, it is not limited to emergency situations, and could be used in non-emergency situations to investigate need for services or to assist in delivery of ongoing voluntary or court-ordered services. The statute does not require a showing of immediate risk of harm, but presumably the APS system staff would at least need to have reason to believe that there is a need for protective services, and that the individual, if refusing services, is not competent to do so. § 813.123, described below, includes a right of competent individuals to prevent a request for restraining order or injunction from going forward. While there is no right in Ch. 55 for an individual to require that an investigation of abuse, neglect or exploitation not take place, and it is not clear whether there is a right to refuse emergency protective services (see last section), the likelihood that the person is competent, will refuse ongoing services, and will not be subject to an ongoing protective service order should clearly be considered in deciding whether to seek an order for a forcible entry.

Whether with or without a court order, if a forcible entry is made, the person who made the entry must, within 14 days, send a report to the court of the “exact circumstances,” including the date, time, place, facts showing the need to make the entry.²⁴⁷ (This may indicate that the court order for entry can be issued first and justified later. Judges are likely to tolerate this process only if it is not abused.)

Instead of, or in addition to, seeking a court order for forcible entry, an elder adults/adults-at-risk agency may seek a temporary restraining order and/or a permanent injunction under Wis. Stat. § 813.123, against a person who interferes with the investigation of a need for protective services or provision of protective services or who, based on prior conduct, may interfere with investigation or provision of services. The order may prohibit the conduct that interferes with the investigation or provision of services, prohibit the person from contact with the individual who is in need of services, prohibit the person from going to the individual’s home, or provide some other remedy. *See Ch. VII, Part A.* A temporary restraining order can be issued without notice to the person who is interfering. The person who is interfering must receive notice of a hearing on a request for a permanent injunction, which must be held within 7 days after a temporary restraining order has been issued, with the possibility of one additional 7 day extension.

If an individual at risk who has not been adjudicated incompetent and placed under guardianship objects to a petition under § 813.123, the court cannot issue a restraining order or injunction. The court can enter a restraining order or injunction over the objection of an individual who has a guardian, and/or over the objection of the individual’s guardian.

The use of injunctive relief under § 813.123 has the advantage of a statute with clearer standards and procedures, an order that can provide more specific and individualized relief than simply an order for forcible entry, and an order that can more clearly be ongoing. For those reasons, it is

²⁴⁷ Wis. Stat. § 55.13(5)

likely to get more use than the forcible-entry orders under § 55.13. However, § 55.13 is an appropriate remedy if the need is for quick forcible entry, and may be the only remedy if the person who is refusing entry is the individual in need (or allegedly in need) of protective services himself or herself.

H. COURT-ORDERED PROTECTIVE SERVICES

1. *What are the standards for court-ordered protective services?*

A court may order protective services for an individual who meets **all** of the following standards:²⁴⁸

- Has been **determined to be incompetent** through a guardianship proceeding. A petition for guardianship can be brought and considered at the same time as a petition for protective services. The order for guardianship should be made before or at the same time as the order for protective services.
- Has an impairment or combination of impairments that meets the diagnostic, durational and severity tests described in *Part C, above*, for a person with developmental disabilities, degenerative brain disorder, serious and persistent mental illness or other like incapacities.
- As a result of his or her impairment, will be at **substantial risk of physical harm or deterioration** or will present a **substantial risk of physical harm to others** if the protective services are not ordered.

See Ch. VI for procedural requirements involved in getting a court order for protective services.

2. *What are the contents of a court order, and what are the responsibilities of the county APS system to implement the order?*

The standard for a court order for protective services simply directs the county to provide services in the least restrictive manner consistent with the needs of the individual and resources of the county. As discussed in *Ch. V, Part D.1*, the court has authority to make a more prescriptive order, e.g., detailing services which must be provided, conduct of the individual which may result in an increase or decrease in the level of services and supervision, directions to the guardian, and future reevaluations and/or reports to the court.

Detail in the order may be helpful in ensuring that everyone understands what is being ordered, reducing ongoing disputes about implementation, and reducing the need to return to the court for direction. The simple fact that something is in a court order (and has been read from the bench by a judge) is often enough to ensure compliance. A specific order may result in less opposition from the individual than an open-ended order, because he or she knows what is being imposed. A detailed order can include a provision giving the county flexibility to change services as needs change, e.g., with consent of the guardian and/or a report to the court, so that a return to court is not mandated every time a service change is made. An important question at the time the order is entered is whether the guardian ad litem's appointment will be extended for any purpose. *See Ch. VI, Part G.6.*

Often, further evaluation is needed to determine what services are appropriate, or it is expected that the person's situation or needs will change over time. In those circumstances, it is appropriate for the court to direct further evaluation, to direct one or more report(s) to the court on services provided and on the person's status over time, and/or to set a specific date for a rehearing on the need for protective services or the nature of services to be provided.

²⁴⁸ Wis. Stat. §55.08(2)

The statutory provisions on county responsibility for implementation of court orders for protective services are combined with the provisions on protective placements. Because issues regarding county responsibility have primarily arisen in the context of protective placements, these issues are dealt with in *Ch. V, Part D.3*.

I. PROTECTIVE SERVICES ORDER FOR INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION

1. *When is administration of psychotropic medication to a person who is under guardianship considered to be “involuntary”?*

A guardian may give informed consent to the voluntary administration of psychotropic medication if the guardian has first made a good-faith attempt to discuss the medication with the ward and the ward does not protest.²⁴⁹ If the person is protesting, a guardian may provide informed consent to involuntary administration of psychotropic medication only if a court has issued a protective services order for involuntary administration of psychotropic medication under Wis. Stat. § 55.14.²⁵⁰

NOTE: Psychotropic medication may also be administered despite the individual’s refusal:

- In an **emergency**, where necessary to prevent serious physical harm to the patient or others.²⁵¹ This includes administration of psychotropic medications as an **emergency protective service**.²⁵²
- In addition, a court may order administration of psychotropic medication over the refusal or protest of an individual **as part of a commitment order** under § 51.20.²⁵³

An individual is considered to have made a **protest** under § 55.14 if, when someone offers the medication or discusses its use with the person, the individual indicates in some way that he or she does not want to take it. If the individual simply remains silent, that is not a protest. The individual does not have to speak in order to protest: a facial expression or gesture can also indicate that he or she does not want to take the medication. The indication is considered a protest only if it is an objection to taking the medication in any way, and not just an objection to the form in which it is being offered. If a person does protest, he or she can later withdraw the protest, as long as the withdrawal was not coerced, and continuing efforts to persuade the person to accept the medication voluntarily are appropriate.

For purposes of a protective services order under § 55.14, **involuntary administration of psychotropic medication** (abbreviated as IAPM below) includes any administration of medication to a person where the individual is known to be protesting, and specifically includes not only physical force and threats, but also using any of the following methods to get the person to take the medication:²⁵⁴

- Placing the medication in the person’s food or drink.
- Forcibly restraining the person in order to give the medication.
- Requiring the person to take the medication as a condition of receiving privileges or benefits.

²⁴⁹ Wis. Stat. § 54.25(2)(d)2.a

²⁵⁰ Wis. Stat. § 54.25(2)(d)2.a.

²⁵¹ Wis. Stat. § 51.61(1)(g)1.

²⁵² Wis. Stat. § 55.13 and 55.14(10)

²⁵³ Wis. Stat. § 51.61(1)(g)

²⁵⁴ Wis. Stat. § 55.14(1)(a)

COMMENT: An “offer” of the medication will be meaningful only if the person is **informed, as effectively as possible, of what is being offered.** It is not legitimate to try to avoid an objection by failing to inform the individual that he or she is taking a medication, and what it is.

2. Do the standard requirements for court-ordered protective services orders also apply to protective services orders for involuntary administration of psychotropic medication?

Yes. In order to be subject to a protective services order for involuntary administration of psychotropic medication, the individual must meet the standard requirements for a court order for protective services: (1) have developmental disabilities, serious and persistent mental illness, degenerative brain disorder, or other like incapacities; (2) have a guardian of the person appointed on the basis of a finding of incompetence; and (3) either be at risk of serious physical harm or deterioration, or present a danger of serious physical harm to others, if the services are not provided. *See Part I.1, above.*

3. What special standards must be met to be subject to a protective services order for involuntary administration of psychotropic medication?

In addition to the standards required for any court order for protective services, **all of the following requirements** must be met in order for a person to be subject to a protective services order for IAPM:²⁵⁵

- A physician has **prescribed** the medication for the individual.
- The individual is **not competent to refuse the medication**, defined to mean that, after the advantages and disadvantages of taking the medication, and the alternatives to accepting the medication, have been explained to the individual, the individual is **either**:
 - **Incapable of expressing an understanding** of the advantages, disadvantages and alternatives.
 - **Incapable of applying an understanding** of the advantages, disadvantages and alternatives to his or her condition in order to make an informed choice about whether to accept the medication. This would apply, for example, if the person could state the advantages, disadvantages and alternatives but, because of mental illness or cognitive impairment, could not actually use the information in decision-making.
- **Either** of the following is true:
 - The individual **has refused to take the medication**, after a reasonable number of documented attempts to offer the medication in different ways that might reasonably be expected to increase the person’s willingness to accept the medication.
 - Voluntary **administration of the medication is not feasible or not in the individual’s best interests**, for specific reasons identified in the petition.

COMMENT: The second option does not allow administration of medication without ever discussing voluntary acceptance of the medication with the individual. Informed consent of the guardian is still required for medication under a protective services order, and the guardian is obligated to discuss voluntary receipt of the medication before giving consent. *See Ch. III, Part G.5.*

- The individual’s condition is **likely to improve** with the medication and the individual is **likely to respond positively to psychotropic medication.** The petition must include a **written statement from a physician** with personal knowledge of the individual that

²⁵⁵ Wis. Stat. § 55.14(2)(a)

indicates that there is general clinical information showing that the medication is appropriate for use to treat the individual's condition, and specific data related to the individual that shows that his or her current condition requires the use of psychotropic medication.²⁵⁶

- The person will incur a **substantial probability of physical harm, impairment, injury or debilitation or will present a substantial probability of physical harm to others** unless psychotropic medication is administered involuntarily. This requires a showing of **either**:²⁵⁷
 - That the individual has had two episodes, including at least one in the previous 24 months, of dangerous or threatening behavior that resulted in a finding of probable cause that he or she met the standard for commitment, a settlement agreement as part of a commitment proceeding that resulted in a court order, or a final commitment order.
 - That, based on other evidence, the individual meets one of the dangerousness standards required for commitment.

COMMENT: These provisions essentially require that the individual be (or have been) a person who meets the standards for commitment. Some of the dangerousness standards only apply if the dangerous behavior results from mental illness. This may limit the usefulness of orders for IAPM where dangerous behavior arises from a cognitive impairment that is not considered mental illness.

4. *Are procedures for a protective service order for IAPM different from those for other protective service orders?*

Yes. The procedures for a court protective service order for IAPM are different in several respects from those in other proceedings for protective services orders. Among the differences:

- The **guardian ad litem** is required to report to the court not only on the best interests of the individual, but also as to whether the allegations of the petition are true.²⁵⁸

COMMENT: Guardians ad litem will need to be careful to limit their opinion on “truth” to what they can say based on the information available to them. A summary of the basis of the opinion may be necessary, to make clear when they are relying on statements of other people.

- The **individual** has a right to an **independent medical or psychological evaluation** related to any of the allegations in the petition, and as to whether IAPM is in his or her best interests.
- In every case, the person **must have an attorney** appointed as his or her independent counsel, to represent what he or she wants.²⁵⁹ No request by the individual is required.
- The **hearing must be held within 30 days** after it is filed, instead of the usual 60 days.
- Protective services orders for IAPM are subject to **annual judicial review**. See Section 6, below

5. *What is included in a court order for IAPM, and how is the order enforced?*

If the court finds after the hearing that the person meets the standards for a protective services order for IAPM, it may issue an order that must include **all** of the following components:²⁶⁰

²⁵⁶ Wis. Stat. § 55.14(4)

²⁵⁷ A description of the dangerousness standards for commitment under Wis. Stat. § 51.20(1)(a)2.a to e. is beyond the scope of this book. See Dianne Greenley, Ch. 51: *The Wisconsin Mental Health Act (4th ed., 1999)*

²⁵⁸ Wis. Stat. § 55.14(5)

²⁵⁹ Wis. Stat. § 55.14(7)

- An order authorizing **the guardian to consent to IAPM**, and to IAPM as a protective service. Note that informed consent by the guardian is still required, in addition to the court order. The guardian must still exercise independent judgment in the best interests of the person; he or she is not obligated to consent to all medication recommended, or to every proposal to administer medication involuntarily, and can advocate for other kinds of treatment and services as appropriate.
- An order directing **development of a treatment plan** specifying the protective services the person should receive, including but not limited to the prescribed psychotropic medication and a plan for the IAPM. The plan is developed by an agency of the county APS system, except that, if the individual is in a nursing home or hospital, the plan is developed by the facility. The plan is subject to approval by the guardian and review and approval by the court.
- If the court approves the plan, an **order that the protective services be administered in accordance with the plan.**

COMMENT: The effect of this is that IAPM as a protective service must be included as part of a package of needed protective services, and that it is a violation of the order to provide IAPM as a protective service in the absence of other services that are part of the plan.

- An **order that the individual comply with the treatment plan, and specifying the methods of IAPM that may be used if the individual does not comply.** In many cases, a court order by itself will be enough to get the individual to comply. Where it is not, the guardian can consent to IAPM under one of the methods approved in the order. Where forcible restraint is used as a method of delivering IAPM, a licensed professional must be present and a record kept of the date, medication, and method of restraint used.

If the person substantially fails to comply with the court order, the court can authorize the sheriff or another law enforcement agency to take the individual into custody and transport the individual to an appropriate facility for administration of the medication using forcible restraint. Again, consent of the guardian is required for administration of the medication.²⁶¹

6. *Are protective services orders for IAPM subject to annual judicial review?*

Yes. Unlike other protective services orders, protective services orders for IAPM must be reviewed annually by the APS system and by the court.²⁶² If the individual is protectively placed, the reviews may be combined with the annual review of the protective placement. *See Ch. VI, Part J.* As with annual reviews of protective placement, the county APS system must visit the person and provide a written evaluation of the individual's condition, as it relates to the continued need for the order for IAPM. The review may not be performed by a facility that provides services to the individual. The report must include information about:²⁶³

- Whether the individual still meets the standards for a protective services order for IAPM.
- Whether the individual's condition has been improved by the medication, and whether the individual has responded positively to it.
- The comments, if any, of the individual, the individual's guardian, and any response from the APS system.

²⁶⁰ Wis. Stat. § 55.14(8)

²⁶¹ Wis. Stat. § 55.14(9)

²⁶² Wis. Stat. § 55.19

²⁶³ Wis. Stat. § 55.19(1)(a)1. and (c)

- The comments of staff of any facility at which the person is placed or receives services, or at which psychotropic medications are administered.

COMMENT: The requirement that the individual continue to meet the standards for an order should not be interpreted to mean that there must have been new incidents of dangerous or threatening behavior in the previous 24 months. If the person has been under and IAPM for an extended period and the order has been effective in preventing risks to health and safety of the person or others, it is likely that a court can order continuation of the order based on a finding that a risk to health and safety would exist absent continued IAPM.

Not later than the 11th month after the most recent order for IAPM, the APS system's report must be given to the individual and his or her guardian, and filed with the court along with a petition for the annual judicial review. Elements of the annual court review include:

- Appointment of a **guardian ad litem**, whose responsibilities are essentially the same as in an annual review of protective placement (*See Ch. VI, Part J.*), but with a focus on the order for IAPM.²⁶⁴
- An order for an **evaluation** that is independent of the evaluation carried out by the APS system, if the APS system report is late, the court determines that individual evaluation is necessary, or the individual, guardian or guardian ad litem requests. The court may also order the APS system to provide more information to supplement its report.
- Appointment of **legal counsel** for the individual, if the court determines that legal counsel is necessary, or the individual, guardian or guardian ad litem requests.
- A summary hearing or full due process hearing. A full hearing is required if the individual, guardian or guardian ad litem requests, the guardian ad litem report indicates that the standards for the order are no longer met, or the individual objects to continuation of the order.

After the hearing, the court may continue the order, modify the order or treatment plan, or, if the standards for the order are no longer met, terminate the order.

7. *Why would the procedure for a court order for involuntary administration of psychotropic medication be used instead of a commitment proceeding under Ch. 51?*

The standards for a protective services order for IAPM effectively require that the individual meet one of the dangerousness standards for commitment, or at least that he or she have been involved in commitment proceedings that involved at least a finding of probable cause or a settlement order. This leads to the question of whether the protective services order for IAPM can be obtained for anyone who would not already meet the standards for commitment. Even if the individual could be subject to a commitment order, a protective services order for IAPM may be more appropriate in some cases:

- If the individual is under an order for protective services or protective placement, the protective services order for IAPM can avoid the need for two separate court proceedings.
- A protective services order for IAPM, unlike a commitment order, continues unless it is terminated. (A first commitment order under § 51.20 expires after six months, and a subsequent order expires after one year.) This may make a Ch. 55 order for IAPM more appropriate than a Ch. 51 commitment order for people with conditions that are not expected to change with time or treatment.

²⁶⁴ Wis. Stat. § 55.19(2)

Chapter V: RESIDENTIAL AND PROTECTIVE PLACEMENT

NOTE: *The standards for protective services and protective placement overlap greatly, and reading Ch. IV on Protective Services is essential to an understanding of protective placement. This chapter covers admissions for residential placement that do not require court orders, the special substantive requirements that apply to court-ordered protective placements, and the content and impact of protective services/placement orders. Court procedures for both protective services and protective placement orders are covered in Ch. VI.*

A. WHAT IS A PROTECTIVE PLACEMENT?

The term *protective placement* is defined to mean a placement that is made for the primary purpose of providing for the care and custody of an individual.²⁶⁵ This distinguishes it from an admission to a facility for the primary purpose of providing treatment to the individual for mental illness, developmental disabilities, alcoholism or other substance dependence. *See Ch. IV, Part E.* for the definition of treatment. Emergency detentions and commitments to inpatient facilities for the primary purpose of treatment, and/or to units for people with acute mental illness, must be made under the provisions of Ch. 51. In some cases, an order for involuntary treatment may need to be sought under Ch. 51 in addition to an order for protective services and placement under Ch. 55. *See Part C.4. and D.1, below.*

A protective placement is a type of protective service, but is different in that it determines where the person will live, as well as what services he or she will receive. Many of the definitions and requirements that apply to voluntary and court-ordered protective services also apply to protective placement, and it is useful to be familiar with the material in Ch. IV on Protective Services before reading the more specific materials in this chapter on residential placements.

Although the definition of *protective placement* can be read to include voluntary residential placements that have a protective function, the term *protective placement* in practice is almost always used to mean court-ordered residential placement under Ch. 55. For example, residential placements made without court involvement are referred to in Wis. Stat. § 55.055 as *admissions*. In this book, unless otherwise noted, the term *protective placement* will only be used to refer to a court-order residential placement for a person who meets the placement standards in § 55.08(1).

It is important to note that use of the words *protective* and *custody* do not mean that a person receiving protective services and/or protective placement loses his or her right to prompt and adequate treatment, rehabilitation and educational services under Wis. Stat. § 51.61(1)(5). This right applies to all recipients of protective placement and services, although it may be subject to limitations based on funding. *See Ch. I, Part D.3. and Ch. V, Part D.3.*

B. ADMISSIONS OF INCAPACITATED INDIVIDUALS BY SUBSTITUTE DECISION-MAKERS TO RESIDENTIAL FACILITIES AND INPATIENT TREATMENT FACILITIES

NOTE: The fact that effective consent to admission has been given by the individual or by a substitute decision-maker does not necessarily mean that the admission can occur. Many admissions require some kind of prior or periodic governmental review and approval in addition to the person's consent (*See Part E, below*), and consent by the individual or substitute decision-maker is not the same as approval by his or her funding source.

²⁶⁵ Wis. Stat. § 55.01(6m)

1. *What is the authority of a competent person to consent to admission and discharge from a residential or inpatient treatment facility?*

An adult who is legally and actually capable of consent may give consent to enter any kind of residential or inpatient treatment facility. Once in a facility, an individual who is not incapacitated also has a right to be discharged,²⁶⁶ unless action is initiated to convert the placement into a placement made with consent of a substitute decision-maker, an emergency detention or placement, or a court-ordered placement.

2. *When is an individual considered incapacitated, for purposes of consent to admission to residential facilities and inpatient treatment facilities?*

The words *incapacity* and *incapacitated* are defined separately for purposes of the various laws on substitute decision making described in this part. Fortunately, the definitions are consistent. For consent by a nonguardian under Wis. Stat. §§ 50.06 and 50.094 and for consent by a health care agent under a power of attorney for health care under Ch. 155, a person is *incapacitated* if he or she is “unable to receive and evaluate information effectively or to communicate decisions to such an extent that the individual lacks the capacity to manage his or her health care decisions.”²⁶⁷ No particular diagnosis is required, but “mere old age, eccentricity or physical disability” cannot be the basis for a finding of incapacity.²⁶⁸

For purposes of guardianship, incapacity to exercise any power means the inability of the individual to receive and evaluate information or to make or communicate a decision with respect to the exercise of that power.²⁶⁹ As it relates to admission to facilities, this could be established by a general finding of incapacity with relation to health care decisions and choice of health care provider, or a more specific decision with relation to consent to admission to a particular facility or class of facilities.

3. *When can a family or friend consent to temporary admission of an adult who is incapacitated to a nursing home or community-based residential facility?*

Generally, consent of a guardian or health care agent under a power of attorney for health care is required for admission of an incapacitated adult to a nursing home or community-based residential facility (CBRF).²⁷⁰ Wis. Stat. § 50.06(2) creates an exception to this general rule for temporary admissions of individuals who are not diagnosed as having a developmental disability or mental illness at the time of the admission.

§ 50.06 allows for relatives and close friends to provide consent for temporary admission to a CBRF or nursing home, directly from a hospital, of a person who is incapacitated. People authorized to consent are in seven categories, in the following order of priority: (1) spouse; (2) adult child; (3) parent; (4) adult brother or sister; (5) grandparent; (6) adult grandchild; and (7) close friend. The facility must decide who is or is not a “close” friend. (See next section for tests that apply in the context of consent to hospice care.) The term could include a domestic partner who is not a spouse and a more distant relative who has a close relationship with the individual.

Consent by a qualifying relative or close friend may only be given if all the following conditions are met.

²⁶⁶ See, e.g., Wis. Stat. §§ 50.09(1)(i) and 51.10(5)(c)

²⁶⁷ Wis. Stat. §§ 50.06(1), 50.94(1)(b) and 155.01(8)

²⁶⁸ Wis. Stat. §§ 50.06(4), 50.94(8) and 155.05(2)

²⁶⁹ Wis. Stat. § 54.01(15)

²⁷⁰ 77 Atty. Gen. 156, 158 (1988)

- **Incapacity.** The finding of incapacity (*See Section 2, above*) must be contained in a signed statement from each of two physicians, or of one physician and one licensed psychologist, who have personally examined the individuals. The examiners may not be related to the individual and may not have any claim to the individual's estate. If the individual is **restored to capacity** after the admission, his or her right to be discharged and his or her right to make his or her own health care decisions are also restored.
- **No guardian or health care agent.** The individual must not have a valid power of attorney for health care and must not have been found to be incompetent by a Wisconsin court.
- **No diagnosis of developmental disability or mental illness.** This prohibition applies to any condition that exists at the time of the admission, even if it not the person's primary disability.
- **No controlling objection.** If a relative or close friend who has the same or higher priority disagrees with the admission, the admission cannot occur. If the objection is made by a relative or close friend who has a lower priority but also lives with the individual, the admission can only occur if the person giving the consent is the individual's spouse, or also lives with the individual.
- **A petition for guardianship and protective placement has been filed prior to the admission.**

If there is a **verbal objection or other protest by the individual being admitted**, the individual may be admitted to the facility on the consent of the relative or friend, but the facility must immediately notify the county APS system, which must follow the same procedures and take the same actions that are required when an individual under guardianship protests a placement made by a guardian. *See Section 8, below.* (While not noted in the statute, the process will be different because a protective placement will have been filed prior to the admission under § 50.06.)

The person who gave consent to admission has the powers of a guardian to make health care decisions and authorize health care expenditures, unless authority over expenditures conflicts with a durable financial power of attorney. These powers end after 60 days (to allow the guardianship and protective placement petition to be heard) if the person is discharged or if a guardian is appointed. Where there is an allegation that health care decisions are being made that are not in the person's best interest or if the person is protesting placement, the court is supposed to expedite scheduling of the hearing. *See Ch. VI, Part H.1.* If the individual is in the facility after 60 days and no guardian has been appointed, the powers may last an additional 30 days to allow for discharge planning.

Wis Stat. § 50.06 was created to avoid delays in discharges from hospitals to nursing homes and CBRFs, and interruptions in continuity of care, caused by the need to petition for guardianship and protective placement. Where the incapacity is expected to be permanent, it should be possible to obtain an order for temporary guardianship and emergency protective placement before or shortly after the transfer. (*See Part C.5, below, and Ch. III, Part I.*) This provides a less stringent time-line, clearer procedural protections, and court approval of the admission and subsequent substitute decision-making.

Consent to admission for hospice care, or to admission to a hospice that provides inpatient care, must follow special procedures under Wis. Stat. § 50.94. See next section.

COMMENT 1: The power to consent to care is conferred on the relative or friend without authorization of either the individual or a court, and with no court finding of incapacity. It should be used only to facilitate access to needed treatment while the petition for guardianship is being heard. A facility or other health care provider should be extremely cautious about accepting a consent from a relative or friend that goes beyond this limited purpose before a temporary or

permanent guardian with appropriate authority from a court is appointed, e.g., a consent to non-emergency experimental treatment, or a decision that may be irreversible, such as refusal of, or a consent to withdraw, life-prolonging treatment.

COMMENT 2: The statute does not require notice to other people who are on the priority list, who might object to the placement or assert a higher priority to make the admission and health care decisions. While notice of the protective placement petition must be given to interested persons, this may not happen until 10 days before the hearing. If the facility has any question about what it is being asked to do under this section, it should, for protection of the individual and its own protection, at least contact close family members to see if there is a consensus. Similarly, if the person protests, the APS system or facility should contact family members both to get their perspective and to identify potential alternatives to the placement.

4. *When can a family or friend consent to admission to a hospice facility of an adult who is incapacitated?*

Wis. Stat. § 50.94 allows certain relatives and close friends to provide consent for admission to hospice care of an individual who is incapacitated, terminally ill, does not have a valid power of attorney for health care or living will, and has not been found to be incompetent by a Wisconsin court. This appears to include admission to a hospice that provides inpatient care, as well as to admission to hospice care of an individual who has been admitted to a facility under § 50.06. The following conditions must be met:

People authorized to consent are in five categories, in the following order of priority: (1) spouse; (2) adult child; (3) parent; (4) adult brother or sister; and (5) close friend. Consent may only be accepted from a “close friend” if he or she has had enough regular contact with the person to be familiar with the person's activities, health and beliefs, and if he or she has exhibited special care and concern for the person.

Consent by a qualifying relative or close friend may only be given if all the following conditions are met.

- **Incapacity.** The requirements for a finding of incapacity are the same as those under § 50.06 (see last section).
- **Terminal illness.** A physician must certify that the person who is incapacitated has a terminal condition, defined as a condition that is reasonably expected to result in death within 6 months, even if available life-sustaining care were provided.
- **Certification by relative or friend and physician as to individual's preference.** The friend or relative must also sign a statement certifying that he or she believes that the individual would have selected hospice care. The physician certifying the existence of the terminal illness must also certify that he believes that the friend or relative is acting in accordance with the individual's wishes.
- **No objection by the individual.** This section does not authorize consent over the objection of the individual, either at the time of admission or at any time after admission.

The relative or friend must give notice to other individuals on the priority list if practicable, including notice of the right to bring a petition for temporary guardianship. If prior notice is not possible, the notice must be given within 48 hours after admission, if that can be done with reasonable diligence.

Any person who objects to the admission (including a person not on the priority list) may file a petition for temporary guardianship. As part of obtaining temporary guardianship, the person objecting has the burden of proving that the individual would not have consented to admission to

hospice care. (It is not clear if inability to prove this stops the guardianship proceeding, or only means that the admission can go forward.)

The person who gave consent to admission has the power to make all health care decisions related to receipt of hospice care by the individual. There is no time limit on this power, and no requirement that a guardianship be sought if no one objects.

5. *Does a guardian have authority to require the individual to live in the guardian's home or in another home setting if the individual is protesting or trying to leave?*

The statutes do not clearly address whether a guardian can require the person to remain in the guardian's home or in a home setting that is not a licensed or certified facility. If the primary purpose of the placement is "care and custody," and the other standards for protective placement are met, a court order for protective placement is at least available. *See Part D.1, below.* On the other hand, it can be argued that a guardianship order that gives the guardian of the person custody of the individual, and power to make decisions related to mobility, includes authority to determine where the person will live, unless the placement is to a residential facility (see next two sections).

The decision about choice of place of living is one that is specifically mentioned in the section of the statutes that requires the guardian to identify and honor the individual's preferences, and sets out considerations in overruling those preferences. *See Ch. III, Part E.5.* That section provides useful guidelines for negotiating disputes between guardians and individuals.

In practice, many people under guardianship are not (and cannot safely be) allowed to leave their homes without supervision. On the other hand, many people under guardianship are capable of choosing between available, safe places to live, and should not be deprived of that choice. Where the individual is making ongoing objections or attempts to leave, the situation is best dealt with either by reporting to APS and asking for the investigation and determination described in *Section 8, below*, or by directly seeking clarification from the court of the guardian's authority, either in the guardianship order or through a protective placement petition.

Comment: Unfortunately, not all guardians have the best interests of the individual as their first priority. Unreasonable confinement may be a form of abuse (*See Ch. II, Part D.2.*), and may be a warning sign of other forms of abuse, neglect or exploitation, especially if it is *Part* of a pattern of isolation of the individual. An individual's attempt to leave, or seek a different residence, should not be ignored or discounted, without further investigation, simply because he or she is under guardianship.

6. *When can a guardian of an incapacitated adult authorize admission to a home or residential facility with fewer than 16 beds?*

A guardian of the person has authority to consent to admission of an individual to a "foster home, group home or community-based residential facility,"²⁷¹ but only if **all** of the following conditions are met:

- The powers of the guardian order are not limited in a way that reserves the power to consent to the individual. (A temporary guardianship should be sufficient, if the proper powers are included in the order.)
- The facility is licensed for 16 or fewer beds.
- The placement implements the person's right to the least restrictive residential environment. The guardian must review whether the placement is least restrictive prior to providing

²⁷¹ Wis. Stat. § 55.055(1)(a)

consent for the initial admission and annually after that, and may consent (or continue consent) only if the right to least restrictive environment is implemented. *See Ch. I, Part D.2.* The funding limitation now included in §51.61(1)(e) on the right must also apply to the guardian, i.e., the guardian may consent to an admission if a less restrictive alternative does exist, but the county cannot be required to fund it and there is no other source of funding.

- The person him or herself does not indicate an objection. *See Section 8*, below, if the person does indicate an objection.

COMMENT: This provision was written before adult family homes were defined separately from CBRFs. The terms *foster home* and *group home* are not defined for adults, but were used for residential services for adults at the time Ch. 55 was originally enacted. In this context, they should be read to include certified and licensed adult family homes and other unlicensed settings, such as supported apartments. (Note that a residential care apartment complex (RCAC) is not included, because under the licensing rules an RCAC may not admit a person who has a guardian based on a finding of incompetence, or has an activated health care power of attorney.)²⁷²

7. *When can a guardian authorize temporary admission to a larger residential facility, nursing home or facility for the developmentally disabled?*

A guardian of the person has authority to give consent to temporary admission to a nursing home (including a facility for the developmentally disabled (FDD)), or to a residential facility that is not covered by § 55.055(1)(a) (such as a large CBRF; see last section) only if **all** of the following conditions are met:²⁷³

- The powers of the guardian under the court order are not limited in a way that reserves the decision to the individual. (A temporary guardianship should be sufficient, if the proper powers are included in the order.)
- The individual is either (1) in need of recuperative care, **or** (2) so unable to provide for his or her own care or safety as to create a serious risk of substantial harm to the individual or others. It is **not** required that the individual have had a hospital stay prior to the admission.
- The primary purpose of the admission is not for treatment or services related to mental illness or developmental disability. This prohibits admission where the primary purpose is support services for mental illness or developmental disability, even if treatment is not involved, but would allow admission of a person with a developmental disability or mental illness, e.g., that was primarily for treatment of a physical injury or for therapy following a stroke. *See Section 9*, below, for respite care admissions.
- The person him or herself does not indicate an objection. *See Section 8*, below, if the person does indicate an objection.
- The placement implements the person's right to the least restrictive residential environment. The guardian must review whether the placement is least restrictive prior to providing consent for the initial admission, and may consent (or continue consent) only if the right to least restrictive environment is implemented. This should be read to include the funding limitation on the right now included in §51.61(e), so that the guardian may consent to an admission if a less restrictive alternative does exist, but the county cannot be required to fund it and there is no other source of funding. *See Part D.3, below.*

An admission under this provision can last for 60 days, if the above conditions continue to be met. If a petition for protective placement is brought, the admission can be extended for another

²⁷² Wis. Admin. Code § HFS 89.29(1)(a)

²⁷³ Wis. Stat. § 55.055(1)(b)

60 days. (The filing of a petition by itself allows this extension. No finding of reasonable cause by the court is required for this extension, but it would be an abuse of process to file a petition unjustified by the facts simply to get an extension of the time period.) If a petition for protective placement is not brought, the admission can be extended for 30 days beyond the original 60, in order for discharge planning to be carried out. Note: the 30 days may **not** be added to an admission that has been extended beyond 60 days by the filing of a protective placement petition.

8. *What if the person objects to a nursing home or residential placement made on the basis of guardian consent?*

If a person admitted on the consent of a guardian to nursing home or FDD under § 55.055(1)(a) or to a small residential facility under § 55.055(1)(b) (*See Section 6. and 7, above*) **verbally objects or otherwise actively protests** the admission, the person in charge of the home or facility must immediately notify the APS system for the county in which the person is living.²⁷⁴ A person can "protest" under this section even if he or she is both incapacitated and nonverbal, e.g., by efforts to leave the facility, by reluctance to return there, or by other behavior indicating dissatisfaction. APS system staff must do all of the following:

- Visit the person as soon as possible, but in any case within the next 72 hours after being notified of the protest.
- Determine whether the individual is persisting in his or her protest, or has voluntarily withdrawn the protest. (This implies that a protest involuntarily withdrawn must still be considered active.)
- Consult with the guardian regarding the reasons for the admission.
- If the protest is not voluntarily withdrawn, and the person does not meet the criteria for protective placement (*See Part C.2, below*), attempt to have the person released within 72 hours and provide assistance in identifying appropriate alternative living arrangements. (Of course, an alternative living arrangement acceptable to the individual may also be found for a person who *does* meet the standards for protective placement, as a way of resolving the protest.)
- If the individual meets the criteria for emergency protective placement, and the APS system finds that emergency placement in the facility is necessary, the APS system must follow the procedures for emergency protective placement. *See Part C.5, below*
- If the individual meets the criteria for protective placement, the statute allows the APS system to bring a petition for a permanent protective placement, apparently without following procedures for emergency placement, and states that the court "may order that the individual remain in the facility pending the outcome of the protective placement proceedings."

COMMENT: The provision for continued placement of a protesting individual without an emergency protective placement provides no standard for the court's decision and no time-line and procedure for the court to follow in making the decision about whether the person may remain pending the decision on the petition. Where continued placement is necessary, and the criteria of § 55.135 are met, emergency protective placement procedures should be used.

9. *When can a guardian make a temporary placement for respite purposes of an individual who lives with the guardian?*

If the individual lives with his or her guardian, the guardian may make a "temporary protective placement" of the individual, to provide the guardian with a vacation or to allow the guardian to

²⁷⁴ Wis. Stat. § 55.055(3)

deal with a family emergency.²⁷⁵ The placement can last for up to 30 days, but the court that established the guardianship can extend the placement for a total of no more than 60 days, presumably based on a finding that there is a continued need for respite or a continued family emergency, and that the placement continues to be in the individual's best interests and to be the least restrictive way to meet his or her needs. The request to the court is made by "application" and the court can direct what information is required in the application.

The guardian must be a guardian of the person, with authority under the guardianship order to make decisions related to care and services. Logically, the guardian must also be an essential caretaker for the individual.

The term "protective placement" means any placement to provide "care and custody," so that placement under this provision is not limited to small community settings. It would be an abuse of this section to use it: for a placement for a primary purpose other than respite, such as a placement for treatment; as a way to initiate a permanent protective placement; or to make a placement to a unit for people with acute mental illness. The right of the individual to least restrictive environment consistent with needs, the duty of the guardian to act in the least restrictive way, and the duty of the guardian to honor the individual's preferences²⁷⁶ all apply to placements under this section, and should be followed both by the guardian in making the placement and a court in approving an extended placement.

COMMENT. The statute does not say whether a guardian can make a respite-care placement to a facility over the objection of the individual. Allowing any placement over the protest of the individual without a court order is inconsistent with the other provisions of Ch. 55. On the other hand, the legislature may have intended this difference, based on the temporary duration and limited purpose of a respite care admission.

10. *When can a health care agent under a health care power of attorney consent to admission to a residential facility, nursing home, or inpatient treatment facility?*

The authority of a health care agent under a power of attorney for health care (POAHC) to admit an individual to a nursing home or residential facility depends on the authority granted in the POAHC. However, some powers cannot be granted under a POAHC no matter what the document provides. A health care agent never has authority:

- To consent to an inpatient admission to a facility that primarily provides treatment for people with mental illness, a facility for the developmentally disabled (ICF-MR, including a state Center for the developmentally disabled), a state Mental Health Institute, or any other inpatient treatment facility for mental illness, developmental disability or substance abuse.²⁷⁷ Placement to these facilities of an incapacitated person must be made under the provisions of either Ch. 51 or Ch. 55 for commitment or protective placement, or with consent of a guardian where permitted.
- To consent to admission to a nursing home or CBRF of a person with developmental disabilities or mental illness, except for temporary post-hospital and respite stays as discussed below. Where admission would be possible on the consent of a guardian (*See Section 6. and 7, above*) a health care agent can be appointed guardian for purposes of making the admission, while preserving other powers under the power of attorney for health care.

Unless limited or expanded under the POAHC document, a health care agent has authority to admit a person to a CBRF or nursing home under the following conditions:

²⁷⁵ Wis. Stat. § 55.055(5)

²⁷⁶ Wis. Stat. §§ Wis. Stat. §§ 51.61(1)(e) and 54.25(d)1. and 3.

²⁷⁷ Wis. Stat. § 155.20(2)(a) and (b)

- **Post-hospital nursing home stay.** An agent may admit the individual to a nursing home for recuperative care for a period of no more than 3 months, if the person is admitted from a hospital inpatient unit, but not if the hospital stay was for psychiatric care. The admission must be needed to provide recuperative care, presumably for the condition for which the person was hospitalized. This provision could be used for placement of a person with a developmental disability or mental illness, if the purpose is recuperative care.
- **Respite stay.** If the person lives with the health care agent, an agent may admit the individual to a nursing home or community-based residential facility for a stay of up to 30 days, in order to provide the agent with a vacation or opportunity to deal with a family emergency. This should be read to include power to admit to an adult family home or residential care apartment complex.

The health care power of attorney document may specifically give the health care agent broader powers to admit the person to a nursing home or residential facility, e.g., for other purposes, or for longer stays, but an agent cannot use these broader powers if the person is diagnosed as mentally ill or developmentally disabled at the time of the proposed admission.

COMMENT: The statute does not say whether a health care agent can make a respite-care placement over the objection of the individual. Placement over the protest of the individual would be inconsistent with the other provisions of Ch. 55 for placements made without a court order and court oversight. On the other hand, the legislature may have intended this difference, based on the temporary duration and limited purpose of a respite care admission.

11. *Who can authorize inpatient psychiatric treatment for an adult who is not actually capable of giving informed consent?*

Guardians do not have authority to consent to hospitalization for psychiatric care of individuals who do not also consent to the hospitalization.²⁷⁸ (Consent may be indicated by a failure to object, as described below) Protective placement may not be used to make a placement of an individual to a unit for persons who are acutely mentally ill, regardless of whether the individual is or is not objecting to the placement.²⁷⁹ An individual who is under a protective placement order cannot be involuntarily placed (over his or her objection) in any inpatient treatment facility, except by following commitment or emergency detention procedures under Ch. 51.²⁸⁰

An agent under a power of attorney for health care cannot be given authority to consent to admission to a unit that provides acute psychiatric care, or any other kind of inpatient treatment facility.²⁸¹ This applies regardless of whether the individual is objecting to the admission. For these types of admissions, guardianship of an incapacitated person must be sought in order to follow the voluntary admission procedure, described below, or commitment and emergency detention procedures must be followed.

Under Wis. Stat. § 51.10(8), an adult individual who has a guardian of the person appointed based on a finding of incompetence may be voluntarily admitted to an inpatient treatment facility if both the guardian and the individual consent, or if the guardian consents and the following

²⁷⁸*State ex rel. Watts v. Combined Community Services Board*, 122 Wis. 2d 65, 91, 362 N.W.2d 104 (1985). In the *Watts* case, the Wisconsin Supreme Court struck down as a denial of equal protection statutes giving authority to a guardian to authorize admission of a person under protective placement for inpatient acute psychiatric diagnosis or treatment.

²⁷⁹ Wis. Stat. § 55.12(2).

²⁸⁰ Wis. Stat. § 55.12(2)

²⁸¹ Wis. Stat. § 155.20(2)

procedure is followed to ensure that the admission is appropriate and the individual has been informed of his or her right to leave:²⁸²

- A physician of the facility makes a signed request for admission of the individual, and certifies in writing, before two witnesses (who presumably should also sign the certification):
 - That the physician has informed the individual (1) that the individual has a right to leave the facility upon giving a written request to leave to the staff of the facility, unless the facility files a statement of emergency detention by the end of the next day on which the court is conducting business; (2) that the individual has a right to the least restrictive form of treatment appropriate to his or her needs; and (3) that the facility is responsible for providing treatment that implements that right.
 - That the physician gave the advice to the individual and/or their guardian both orally and in writing, with the two witnesses present.

COMMENT 1: Nursing homes, facilities for people with developmental disabilities (including the state Centers for the Developmentally Disabled and other ICF-MRs), and community based residential facilities may all meet the definition of inpatient treatment facilities. However, ongoing placements of incapacitated individuals under guardianship to these facilities must be made through protective placement or commitment. *See Part C.1, below.* The option of admission or retention of “non-protesting” incapacitated individuals under § 51.10 is not available for these facilities.

COMMENT 2: It is not clear what level of understanding the person must have to give a valid consent, where admission is based on the consent of both the individual and the guardian. At a minimum, it should be established that he or she at least understands the nature of what he or she is agreeing to. While ensuring that the person understands what is happening is beneficial, it may be easier to follow the physician-request-with-notice-of-rights procedure for a non-protesting individual, than to document that capacity of the individual to consent was established.

COMMENT 3: The law requires that writing materials must be available at all times to the individual. To avoid discrimination due to a disability, this should include an obligation to assist the person in putting a protest to continued stay into writing, if the individual is unable due to disability to make a written request.

Wis. Stat. § 51.10(4m) provides a mechanism for temporary "voluntary" admission of a person who is incapacitated and does not have a guardian, based on the signed request for admission and certification of the physician, as described above, and on the individual not indicating a desire to leave the facility. The probate court must be informed within 24 hours (not counting holidays and week-ends), a guardian ad litem must be appointed and must visit within 48 hours to inform the person of his or her rights and determine if he or she wants less restrictive treatment, and a hearing must be held within 7 days to determine if the person wants to leave the facility.

COMMENT: The usefulness of this process is limited, because it does not provide a means for obtaining needed informed consents to treatment, once the person is admitted. It is probably better in most cases to seek temporary guardianship, and use the procedures for consent by the guardian for a non-protesting individual described above.

²⁸² Wis. Stat. § 51.10(8),

C. STANDARDS FOR EMERGENCY AND COURT-ORDERED PROTECTIVE PLACEMENT

1. *Is emergency or court-ordered protective placement required for an incapacitated individual to be admitted to, or remain in, a nursing home or large residential facility?*

Yes. Unless admission to, or continued residence in, a facility is permitted by consent of a substitute decision-maker in one of the options described in *Part B*, above, new or continued placement of a permanently incapacitated person in a nursing home or large residential facility (over 15 beds) must be made through a protective placement. In the case of *Agnes T. v. Milwaukee County*,²⁸³ the Wisconsin Supreme held that an illegal situation was created by having a person who was incapacitated in a nursing home or CBRF with more than 15 beds, even though she had consented to admission when competent, and was not objecting to continued placement. The court held that to have an incapacitated person in a facility without a protective placement would deprive the individual of the statutory protections in Ch. 55 of the right to the least restrictive alternative and of annual county and court review of the placement.

If an individual in a nursing home or large CBRF becomes incapacitated and does not have a power of attorney for health care that provides for consent by an agent of long-term admission, petitions for both guardianship of the person and protective placement must be filed in order to continue the placement.²⁸⁴ The individual may remain in the facility until the court reaches a decision on the petitions, without an emergency protective placement.

Comment: The statute does not say whether a person who is objecting to the placement or trying to leave the facility can be held in the facility without an emergency protective placement or court determination that the person may be held pending the decision on the protective placement petition. The procedure that most clearly covers continued placement in that situation, and provides clear standards and time-lines, is the procedure for emergency protective placement under § 55.135. See *Section 5, below*

2. *What are the standards for court-ordered protective placement?*

To be subject to protective placement, a person must meet all of the following criteria:

- **Be at least 18 years old, or be a person with a developmental disability who is at least 14 years old.**²⁸⁵ (The petition for protective placement may be filed six months prior to the birthday on which the individual meets the age limit, but the protective placement order cannot take effect until the age limit is reached.)
- **Be found incompetent by a court in a guardianship proceeding under Ch. 54,**²⁸⁶ unless the person has a developmental disability and is between the ages of 14 and 18. Because protective placement relates to personal rather than financial decision-making, the determination must be for incompetence as it relates to appointment of a guardian of the person. See *Ch. III, Part B.3*. A finding of limited incompetence and appointment of a limited guardian could meet this requirement.²⁸⁷ If the person does not have a guardian of the person, a petition for guardianship can be filed at the same time as the petition for protective placement, and the determination of incompetence can be made at the same hearing as (but prior to) the determination of need for protective placement. The order for guardianship and the order for protective placement can be combined in a single order.

²⁸³ 189 Wis. 2d 520, at 528-9, 525 N.W. 2d 268 (1995)

²⁸⁴ Wis. Stat. § 55.055(2)(b)

²⁸⁵ Wis. Stat. § 55.06

²⁸⁶ Wis. Stat. §§ 55.06

²⁸⁷ *K.N.K v. Buhler*, 139 Wis. 2d 190, 407 N.W. 2d 281 (Ct. App. 1987)

- Have an impairment or combination of impairments that meets the definition of **developmental disability, degenerative brain disorder, serious and persistent mental illness or other like incapacity**. *See Ch. IV, Part C.*
- As a result of **developmental disabilities, degenerative brain disorder, serious and persistent mental illness or other like incapacities**, be so totally incapable of providing for his or her own care and custody as to create a **substantial risk of serious harm** to his or herself or others, either because of the person's actions or because of his or her failure to act.
- Have a disability that is **permanent or likely to be permanent**. *See Section 3, below*
- Have a **primary need for residential care and custody**. *See Section 4, below*

3. *When does a person have a disability that is permanent or likely to be permanent?*

An order for protective placement, unlike an order for guardianship or protective services, requires a separate finding that the person has a disability that is “permanent or likely to be permanent.” The Wisconsin Supreme Court stated in the *Watts* case:²⁸⁸

The acceptance of a condition only “likely to be permanent” allows the possibility of protective placement for impermanent disability. Thus, the individual’s competence, need for residential care and custody or risk of harm may change with time.

It is clear from this that, while the person’s underlying impairment must be permanent or likely to be permanent, it is not necessary to prove that the person’s support needs will never change, or that the person will never benefit from treatment to the point of no longer needing protective placement. It seems likely that even a short-term need for residential care can justify a protective placement. For example, if a person under guardianship protests a short-term placement for recuperative care for a medical condition under § 55.055(b), § 55.055(3)(c) allows for protective placement as an appropriate response. The Court of Appeals in the 1987 *K.N.K.* case, discussed in *Section 4, below*, held that a disability (mental illness) could be considered permanent, even though the condition improved with medication, based on a pattern of repeated noncompliance with treatment that resulted in inability to care for self.²⁸⁹

4. *When does a person have a "primary need residential for care and custody" rather than a need for "treatment"?*

This requirement that the individual have a primary need for residential care and custody makes two important distinctions:²⁹⁰

- First, the primary need must be for care and custody rather than for treatment for mental illness, developmental disabilities or substance dependence. *See Ch. IV, Part E*, for the definition of *treatment* under Ch. 51. If the primary purpose of a placement is treatment as defined under Ch. 51, admission, detention or commitment under Ch. 51 are the appropriate procedures.
- Second, the care and custody needed must be of a kind that requires residential placement. Protective placement is inappropriate if an order for protective services would meet the

²⁸⁸ *Watts, supra*, footnote 279, 122 Wis. 2d at 83

²⁸⁹ *K.N.K. v. Buhler, supra*, footnote 288.

²⁹⁰ *Guardianship and Protective Placement of Shaw*, 87 Wis. 2d 503 at 514, 275 N.W. 2d 143 (Ct. App. 1979).

person's needs. A court may order protective services as an alternative to placement, even if the petition is for protective placement.²⁹¹

Protective placement does not require that the person be unable to benefit from treatment. On the contrary, each person who is protectively placed has a right to adequate treatment and services appropriate to his or her needs.²⁹² It is common for people to be protectively placed to facilities where active treatment is mandated by state and federal law.²⁹³ People who have developmental disabilities, chronic mental illness or degenerative brain disorders are capable of benefiting from active habilitation and rehabilitation services. For example, it is recognized that virtually all people with mental retardation are capable of learning and that degenerative brain disorders can be treated or managed in ways that will slow further degeneration.

In the case of *K.N.K v. Buhler*,²⁹⁴ the court looked at the issue of whether the fact that a person could benefit from treatment precluded protective placement. K.N.K. was a woman with chronic mental illness who showed a pattern of repeated Ch. 51 commitments, improvement on medication, release, noncompliance with prescribed medication, and return to a delusional condition. K.N.K. argued that her primary need was for medication, a form of treatment. The court, however, concluded that the ongoing pattern of noncompliance with treatment justified a finding of primary need for care and custody. The court held that K.N.K.'s "ongoing refusal to take her medication which results in her inability to care for herself" provided a basis for finding that her **primary need was for protective placement rather than active treatment**. *K.N.K.* can be read to say that a person can be protectively placed, even though he or she can benefit from treatment, if there is no known treatment that will eliminate his or her need for long-term care and custody in the foreseeable future. Treatment and services must still be provided to increase the person's ability to meet his or her own needs and control his or her own life.

The following considerations may be useful in deciding whether the person has a primary need for treatment rather than care and custody:

- Do treatments exist that are reasonably likely to allow the person to meet his or her own needs for care and custody? If so, those treatments must be attempted.
- If treatment has been tried and failed, was the treatment of a quality and quantity that was adequate and appropriate to the person's needs? If not, appropriate treatment should be attempted.
- If adequate and appropriate treatment has been tried and failed, is it reasonably likely that it might succeed if tried again, or that there are other approaches to treatment that are reasonably likely to succeed? If so, treatment should be tried again.

A person under protective placement may still be committed for acute treatment.²⁹⁵ For example, a person with chronic mental illness may need treatment for an acute episode or a person with developmental disabilities may need evaluation and treatment of a suspected psychotic illness.

D. STANDARDS AND PROCEDURAL REQUIREMENTS FOR EMERGENCY AND TEMPORARY PROTECTIVE PLACEMENT

1. What is an emergency protective placement, and what is a temporary protective placement?

²⁹¹ Wis. Stat. § 55.12(8)

²⁹² § 51.61(1)(f), Wis. Stats.

²⁹³ E.g., *intermediate* care facilities for people with mental retardation must meet active treatment requirements under 42 CFR part 483 and Ch. HSS 134, Wis. Admin. Code.

²⁹⁴ *K.N.K. v. Buhler*, *supra*, footnote 288

²⁹⁵ Wis. Stat. § 55.12(2)

An emergency protective placement is an involuntary placement to a medical or protective placement facility that is made without a court order for placement, for emergency reasons. It can last no more than 72 hours, excluding Saturdays, Sundays and holidays. A **temporary protective placement** is an extension of the protective placement, pending hearing, based on a finding that there is probable cause to believe that the individual meets the standards for protective placement.

2. Who can make an emergency protective placement?

An emergency protective placement may only be made by a **sheriff, a police officer, a fire fighter, an authorized representative of the county APS system, or the guardian of the individual.**²⁹⁶

3. What are the grounds for emergency protective placement?

An authorized person may make an emergency protective placement only if he or she finds, based either on his or her own personal observation, or based on a reliable report of another person, that it is probable that the individual meets the standards for emergency protective placement. Placement may be based on a report from another person only if the person making the placement determines that the report is reliable, and the person making the report has identified himself or herself. An individual may be subject to emergency protective placement only if it is probable that the individual:

- Has an impairment or combination of impairments that meets the definition of **developmental disability, degenerative brain disorder, serious and persistent mental illness or other like incapacity.** *See Ch. IV, Part C.*
- As a result of the impairment, is so totally incapable of providing for his or her own care or custody as to create a **substantial risk of serious physical harm if the protective placement is not immediately made.**
- **Meets the standards for protective placement, including need for full or limited guardianship of the person based on incompetence.** The statute requires that a petition for protective services or placement be filed by the person making the placement (see below), so it follows that emergency protective placement can only be made if the person meets the standards for long-term protective placement.

4. How is the standard for emergency protective placement different from the standard for long-term protective placement?

The standard differs from the standard for long-term protective placement, in that: (1) there is no requirement of a prior court finding of incompetence and need for guardianship; (2) the risk created by the individual's inability to care for himself or herself must be of **serious physical harm**; and (3) there must be a substantial risk that the harm will happen if the placement is not made immediately.

5. To what facilities can placements be made?

The person making a protective placement may take the individual into custody and transport him or her to an appropriate medical facility, or to a home or facility of the type to which a court could make a long-term protective placement. *See Part D.1, below.* (Presumably, the person

²⁹⁶ Wis. Stat. § 55.135

could also be required to remain in a home or facility where he or she was already present.) Use of the term medical facility implies that placement could be made for short-term medical treatment. One duty of the APS system is to designate a facility to be the intake facility for emergency protective placements. As with court-ordered protective placements, emergency protective placement may not be made to a unit for people with acute mental illness. If the person's primary need is for short-term treatment for mental illness, developmental disabilities, alcoholism or other drug dependence, emergency detention procedures under Ch. 51 should be used.

6. What are the procedures for emergency protective placement?

The person making the placement must prepare a written statement at the time of the detention stating the basis for the protective placement. The statement must include specific factual information concerning his or her observations, and/or reports made to him or her by others. The statement must be "filed" with the facility director and filed with the court with the petition for protective placement (see below). (This assumes a facility of the type that has a "director"; use of the term "filed" implies that it can be left in the office of the director, with a staff person who will give it to the director.)

The facility director must give the individual oral and written notice that he or she has a right to contact an attorney or immediate family member, and that he or she has a right to have an attorney provided at public expense through the public defender, if he or she is indigent.²⁹⁷ The facility director must also give the individual a copy of the statement made by the person who made the placement, concerning the basis for the placement.

COMMENT: It is not clear who is responsible for getting the individual an attorney at public expense, if he or she requests one. The facility director should communicate any request for an attorney to the county adult protective services system and court, and, if the person is indigent, the facility or APS system should assist the person to contact the probate court or office of public defender for an indigency determination and appointment of counsel. (Whether the attorney is provided through the public defender or court appointment will probably vary from county to county.)

The statute requires that the person taking the individual into custody must file a petition for long-term protective placement or protective services under Wis. Stat. § 55.075, including a petition for guardianship, if that is required. *See Section 2, above.* The statute says that this must be done "when the person is detained," but presumably this must allow time to seek assistance from the county corporation counsel or another attorney, and for the courts to open. A preliminary hearing must be held **within 72 hours of the time the person is taken into custody** (excluding Saturdays, Sundays and holidays), to determine whether there is probable cause to believe that the person meets the standards for protective placement. This **time limit is mandatory**; if the hearing is not held within 72 hours, the court loses power to hear the petition, and the 72-hour time period for pre-hearing detention does not start over because a new petition is filed.²⁹⁸ (This may not apply if the delay is caused by the individual.)

If the hearing on probable cause is not held, or if the court finds that probable cause that protective placement standards are met has not been shown, the person may not be held further on an involuntary basis. If appropriate, the court may elect to treat the petition for protective placement as a petition for commitment under Ch. 51, in which case the detention could be

²⁹⁷ Wis. Stat. § 55.135(1). There is no provision in Wis. Stat. § 977.08(2) saying that the public defender has an obligation to provide counsel in these cases, but these should be treated as cases in which counsel is required by the constitution, covered by Wis. Stat. § 967.06.

²⁹⁸ *Kindcare v. Judith G.*, 2002 WI App 36, 250 Wis. 2d 817, 649 N.W.2d 839, 00-3450

extended if probable cause exists under Wis. Stat. §§ 51.20 or 51.45.

7. What happens if a hearing is not held within 30 days after the probable cause hearing?

If the court finds probable cause to believe that the person meets the standards for protective placement, the court may order temporary protective placement for up to 30 days pending the hearing on full protective placement. **The 30-day time limit is mandatory:** if the hearing has not been held within 30 days, and the delay has not been caused by the individual, the court must dismiss the petition and the person may no longer be held based on the original probable cause hearing and petition.²⁹⁹ To begin proceedings again, a new protective placement petition must be filed. If repeated delays occur, resulting in extended involuntary placement without a hearing, the case may be dismissed, and the petitioner may lose the ability to rely on the original evidence of need for protective placement, and may be required to base any new petition on new evidence.³⁰⁰

COMMENT: Oddly, the statute does not seem to allow for temporary placement except following an emergency placement. There may be cases in which an APS system would not want to take a person into custody until after a finding of probable cause. It should be possible to minimize the pre-hearing detention by having all preparations for the petition and hearing completed before the detention occurs. This can also be a way of avoiding the risk that the time limit on detention will be missed.

8. Is a person making an emergency protective placement protected from liability?

A person who makes an emergency protective placement is not liable for any actions performed in good faith. However, fines or imprisonment can be imposed for an emergency placement based on a false statement.

E. DISPOSITION: NATURE AND EFFECT OF COURT ORDERS FOR PROTECTIVE SERVICES AND PLACEMENT

1. To what types of residential settings can court-ordered protective placements be made?

Protective placement can be made to a very wide range of settings, including home placements, adult family homes, CBRFs, nursing homes and state centers for the developmentally disabled.³⁰¹ Protective placement need not be to a "facility" and does not have to be to a place that exists or is specifically identified at the time of the placement order. For example, the court may order placement to a designated type of facility, and order the county to plan and develop the needed placement:

Where appropriate, a court may order a plan of individual support services that are not tied to a particular place but allow placement to a typical home or apartment; availability of this option has been recognized as necessary to allow for the accepted practice of designing residential services around individual support needs³⁰².

Placement to a **locked unit** may not be made without a specific finding by the court that it is needed.

Section 55.12(2) provides that protective placement **may not be used to make a placement to a unit for persons who are acutely mentally ill**. In *State ex rel. Watts v. Combined Cmty. Servs. Bd.*³⁰³ the Wisconsin Supreme Court held that it is an unconstitutional denial of equal protection

²⁹⁹ *N.N. v. County of Dane*, 140 Wis. 2d 64, 69, 409 N.W.2d 388, 390-391 (Ct. App. 1987)

³⁰⁰ *State ex rel Sandra D., v. Getto*, 175 Wis. 2d 490, 498 N.W. 2d 892 (Ct. App. 1993).

³⁰¹ Wis. Stat. § 55.12(2)

³⁰² *In Matter of J.G.S.*, 159 Wis. 2d 685, 693, 465 N.W.2d 227 (Ct. App. 1990)

³⁰³ 122 Wis.2d 65, 91, 362 N.W.2d 104 (1985)

to make even a temporary involuntary admission of a person under guardianship to a unit that provides acute psychiatric diagnosis and treatment, based on guardian consent, without meeting the standards and procedures required by §§ 51.15 and 51.20 for emergency detention and/or commitment.

Wisconsin makes a distinction between court-ordered protective services and protective placements under Ch. 55, which have a primarily protective and custodial function, and court-ordered commitment for treatment under § 51.20. If placement is to a unit that primarily serves people who are acutely mentally ill, or if the purpose of court-ordered services or placement is involuntary treatment over the objection of the individual, the matter should be handled as an emergency detention or commitment under Ch. 51, not a protective placement. *See Ch. IV, Part E*, for the distinction between treatment and other services. An exception is that a protective service order for involuntary administration of psychotropic medication can be obtained under § 55.14. *See Ch. IV, Part I*. If the individual has a guardian, and does not object to admission for treatment, admission may be possible on the consent of the guardian. *See Part B.11, above*.

Protective services/placement orders under Ch. 55 and commitment orders under Ch. 51 are not mutually exclusive. A person who is under a court order for protective placement or services may be subject to emergency detention under § 51.15, and may be committed for treatment on either an outpatient or inpatient basis under § 51.20.³⁰⁴ It is important for workers in the protective service system to recognize that commitment remains a viable, and in some cases essential, option for getting needed treatment on an involuntary basis for an individual whose primary need is for long-term support services.

§ 55.12(2) also states that **an order for protective placement or protective services may not be used to authorize involuntary admission to a treatment facility**, whether on an inpatient or outpatient basis, and that involuntary admission to a treatment facility must be accomplished through emergency detention and/or commitment under §§ 51.15 and 51.20. A *treatment facility*, under both Ch. 51 and Ch. 55, is a public or private facility or program that provides treatment for mental illness, developmental disabilities, alcoholism or other drug dependence to people with those conditions.³⁰⁵ This definition is very broad, and could include facilities and programs to which involuntary protective service and protective placements have frequently been made, such as a nursing home that provides rehabilitation for brain injury, an intermediate care facility for people with mental retardation and related conditions that provides active treatment, or a community program that provides behavioral treatment in community settings.

The provision in § 55.12(2) prohibiting protective service and placement orders to treatment facilities was created by 2005 Wis. Act 264, § 135. It is inconsistent with the first sentence of the same section, which authorizes protective placement to nursing homes (presumably including ICF-MRs) and centers for people with developmental disabilities, and with other provisions of Ch. 55, which specifically refer to placements to state centers for the developmentally disabled, ICF-MRs and other nursing homes.³⁰⁶ The Legislative Council, in its description of 2005 Wis. Act 264, states that the Act “amends Ch. 55 to comply with the court ruling in *Watts*, and that it prohibits involuntary transfer to a “*mental health treatment facility*” unless the laws on emergency detention and involuntary commitment are applied. [Emphasis supplied.] It seems clear from this that 2005 Wis. Act 264 was **not intended to prohibit protective service and placement orders to the full range of programs that can be considered treatment facilities**,

³⁰⁴ Wis. Stat. § 55.12(2). Information on Ch. 51 detention and commitment standards and procedures can be found in Dianne Greenley, *Chapter 51: The Mental Health Act* (1999), available from the Bureau of Mental Health and Substance Abuse Services at DHFS.

³⁰⁵ Wis. Stat. § 51.01(19) and 55.01(6x)

³⁰⁶ See, e.g., Wis. Stat. § 55.11 (5) and (6), and .12(6)

and that **the prohibition should be applied to placements to facilities that provide acute treatment of mental illness and substance dependence**, for which commitment has been traditionally required.

2. *Can (and should) the court order specify the type of placement or specific placement facility in a protective placement order?*

When ordering protective placement and/or protective services, the court orders the responsible county agency to provide protective placement and/or services.³⁰⁷ This should not be read to mean that the court lacks authority to set limits on county discretion to ensure that placement and service standards are met, either by prescribing the type of placement that will be made, or by specifying a particular placement. In *Dunn County v. Judy K.*³⁰⁸ the Wisconsin Supreme Court made clear that a county's choice of placement can be overruled by the court, and this is also clear from the court's authority to review and modify orders for protective placement and protective services under § 55.16. See *Ch. VI, Part I.2. and 3, below*

The Court of Appeals, in the case of *Fond du Lac County v. J.G.S.*,³⁰⁹ upheld a court order that the county place the person in a community living arrangement with necessary individual support services, even though that required planning and development of a placement and set of individualized services that did not exist at the time of the order. Where the person's needs are complex, where the person may be at risk without specific services, or where the county has failed to develop needed services, this kind of specificity may be needed. An interim placement that is more restrictive, with a timeline for development of an alternative or for further evaluation and reports to the court, may also be appropriate. (See *Ch. VI, Part I.3.* for the court's similar discretion on a motion to modify a protective placement.)

The standard order form requires the court to designate the type of placement, but not a specific facility. However, the "other" category and use of attachments allow for greater specificity. The fact that a specific placement is made by the court does not prevent transfer of the individual to a different placement under Wis. Stat. § 55.15, so a specific order does not overly limit future flexibility to respond to changed needs.

NOTE: Content of protective services orders is covered in *Ch. IV, Part H.2.*

3. *What is the authority and responsibility of the county to which a protective services or placement order is directed, and what standards must the county follow in making placement or designing protective services?*

The county agency has the primary responsibility for determining the amount and nature of placement and services, and for providing them in the least restrictive manner consistent with the person's needs and its resources.³¹⁰

Under section § 55.12, the county agency must provide placement or services in the **least restrictive environment and the least restrictive manner consistent with the needs of the person to be placed, and the resources of the responsible county agency**. The factors that go into an analysis of whether a placement or service is least restrictive and consistent with needs are discussed in *Ch. I, Parts D.2. and 3.* § 55.12(4) **creates a balancing test in which reasonableness of cost and funding availability are factors**. That section requires the county to consider the following factors:

³⁰⁷ Wis. Stat. § 55.12(1)

³⁰⁸ 2002 WI 87, 254 Wis. 2d 383, 647 N.W.2d 799

³⁰⁹ 159 Wis.2d 685, 687, 465 N.W.2d 227 (Ct. App. 1990)

³¹⁰ Wis. Stat. § 55.12(1) and (3); *J.S. v. State (In re Protective Placement of J.S.)*, 144 Wis. 2d 670, 678, 425 N.W.2d 15, 18-19 (Ct. App. 1988).

- The needs of the person to be protected for health, social or rehabilitative services;
- The level of supervision needed;
- The limits of available state and federal funds and the reasonableness of the placement given the number or projected number of individuals who will need protected placements and given the limited funds available;
- The reasonableness of the placement given the cost and the actual benefits in the level of functioning to be realized by the individual.

In contrast with this balancing test, § 55.12(5) contains what appears to be a flat limit on judicial power: the **county may not be required to provide funds for a protective placement beyond available state and federal funds and required county matching funds**, except for the county's obligation under § 49.45(30m) to fund its share of the cost of services for people with developmental disabilities protectively placed in intermediate care facilities. *See Section 4, below.* The test in § 55.12(5), if applied literally, is based not on reasonableness of cost but on source of funds: a more appropriate and less expensive placement could be denied under this test if required county funds (beyond required matching funds) would be required to implement it.

§ 55.045, in defining the county's funding obligation for protective services and placements, provides that the responsible agency must provide for reasonable program needs within the limits of state, federal and required county matching funds. Again, there is an exception for the funding requirement of section 49.45(30m). Less absolute language on county funding responsibility is included in the legislative purpose statement in § 55.001, and the guarantee of rights to least restrictive conditions and adequate and appropriate services under section 51.61(1)(e) and (f). These provisions limit county responsibility to what the county board is reasonably able to provide with available federal, state, and required county matching funds.

In the case of *Dunn County v. Judy K. (In re Guardianship of Judy K.)*,³¹¹ the county refused to provide county matching funds needed for an otherwise feasible community placement through the Community Integration Program. The county argued that § 55.12(5) left a court with no authority to order a placement that required county funding other than the county match required to obtain Community Aids funding. The Wisconsin Supreme Court held that the county's interpretation would leave no room for a court to consider the statutory factors listed in section 55.12(4). The court held that, **in order to rely on lack of funding to deny a placement, a county must first make an affirmative showing of a good faith, reasonable effort to find an appropriate placement and to secure funding to pay for an appropriate placement.** The court did not specify the precise legal grounds for its decision. Factors that may have influenced the court include:

- **Procedural due process.** The court in the *Watts* case held that annual review of protective placements by the county was an inadequate safeguard for individual rights, and that a judicial review was required. This decision was based in part on a finding that counties had a significant financial conflict of interest in making placement decisions.³¹² Giving the county absolute authority to deny a placement based on funding would, in many cases, remove the court from any effective review of county placement decisions, specifically in cases where the county has a financial conflict of interest.
- **Substantive due process.** The principles of a right to treatment and of the least restrictive alternative have their roots in constitutional challenges to institutional placements and

³¹¹ 2002 WI 87, 254 Wis. 2d 383, 647 N.W.2d 799.

³¹² *Watts*, 122 Wis. 2d at 77–78.

conditions.³¹³ While these issues have not been squarely faced by the United States Supreme Court, the court in *Youngberg v. Romeo*³¹⁴ held that mentally retarded residents of state institutions have constitutional due process rights to reasonably safe conditions of confinement, freedom from unreasonable restraint, and minimally adequate training.³¹⁵ At a minimum *Youngberg* provides a basis for saying that a county may not, on the basis of funding source, deny placement and services to a person under a protective placement or protective service order, where its own professionals agree that those services are necessary for safety, freedom from unreasonable restraint, or to provide minimally adequate training. This is because a court order for protective placement or services restricts the individual's liberty, and may well be held to create the kind of special relationship³¹⁶ between the county and an individual that gives rise to an affirmative duty to ensure protection of the individual's health safety and freedom from unreasonable restraint.

- **Americans with Disabilities Act.** Title II of the Americans with Disabilities Act (ADA),³¹⁷ prohibits discrimination on the basis of disability by state and local governments. In *Olmstead v. L.C.*,³¹⁸ two individuals argued that their confinement in a state institution violated the ADA when the state's own treatment professionals had stated that they could be appropriately served in a community-based program. The Court held that, in the ADA, "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'form of discrimination.'"³¹⁹ The Court went on to hold that it is discrimination under the ADA for the state to require that a person live in an institution in order to receive needed services if the state's own professionals have determined that the person meets the essential requirements to be served in a community setting. Both cost and the needs of states and counties to administer their overall systems can be taken into account in determining who is qualified for placement. However, a system that unnecessarily keeps people in institutions based on funding alone, and offers no plan for eventual movement, would very likely violate the ADA under the *Olmstead* decision.³²⁰

4. *Special Provisions for People with Developmental Disabilities Placed in or at Risk of Placement in Intermediate Care Facilities and Nursing Homes*

Special requirements under both Ch. 55 and Ch. 46 apply to admissions and continued placements of people with developmental disabilities to facilities that are certified under federal Medicaid law as intermediate care facilities for the mentally retarded (ICF-MRs) and to other nursing homes. (The state centers for people with developmental disabilities are excluded from the definition of intermediate facility for purposes of these provisions.³²¹) These in turn fit into special funding provisions that provide counties with incentives to serve people in community placements, in settings less restrictive and consistent with needs. These provisions apply only to

³¹³ See *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Al. 1972); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).

³¹⁴ 457 U.S. 307 (1982).

³¹⁵ *Id.* at 319.

³¹⁶ See *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1988) and *Kara B. v. Dane County*, 198 Wis.2d 24, 54, 542 N.W.2d 777, 790 (Ct. App. 1995), *aff'd*, 205 Wis.2d 140, 555 N.W.2d 630 (1996)

³¹⁷ 42 U.S.C. §§ 12131–12134.

³¹⁸ 527 U.S. 581 (1999), *aff'g* 138 F.3d 893 (11th Cir. 1998).

³¹⁹ 527 U.S. at 600.

³²⁰ A summary of litigation around the country based on the *Olmstead* decision can be found in Gary A. Smith, *Status Report: Litigation Concerning Home and Community Services for People with Disabilities*, available at <http://www.hsri.org/index.asp?id=news>

³²¹ Wis. Stat. §§ 46.279(1)(b) and 55.01(4g)

a person with developmental disabilities, but this includes a person who has both developmental disabilities and other impairments. The provisions include:

- A requirement that the county develop a plan for community-based care under any of the following circumstances: (1) whenever the county is considering initial protective placement or transfer to an ICF-MR or nursing home, or receives notice that an application for admission of a person to an ICF-MR has been made;³²² (2) after notice of a finding that a person who needs active treatment for a developmental disability who is placed in a nursing facility could be served in an ICF-MR or in the community;³²³ and (3) as part of the annual review of a protective placement of a person with a developmental disability who is placed in an ICF-MR or nursing home.³²⁴
- A prohibition on new admissions to ICF-MRs (other than emergency and temporary placements), and on continuing protective placements in annual reviews, unless a court, after considering the plan for community-based care, finds that the ICF-MR is the most integrated setting appropriate to the needs of the individual, or that the county cannot reasonably provide community-based care with available state and federal funds and required county matching funds.³²⁵
- A prohibition on admissions and protective placements to nursing homes (other than emergency and temporary placements), and on continuing protective placements in annual reviews, of individuals who need active treatment for developmental disability, unless the responsible screening agency finds that the individual's needs could not be fully met in an ICF-MR, or under a plan for community-based care, or that the county cannot reasonably provide community-based care with available state and federal funds and required county matching funds.³²⁶
- A requirement that the county pay the non-federal share of the cost of placement of a person with a developmental disability in an ICF-MR or nursing home.³²⁷ This requirement is specifically exempted from the general rule that a court may require a county to make a placement only if the placement can be made within the limits of federal, state, and required county matching funds.³²⁸

The effect of these provisions is that there will be a plan for community-based care prepared before every hearing on permanent protective placement and before every annual review of protective placement where placement or continued placement of a person with a developmental disability to a nursing home or ICF-MR is involved, and that any fiscal incentive to place an individual in an ICF-MR or nursing home will be mitigated by the obligation to pay the state share of the cost in the institution.

5. *What is the effect of a court order for protective services/placement on requirements for informed consent and on the right to refuse services and treatment?*

A court order for protective services or placement appears to remove the individual's right to refuse services that are not treatment, as long as there is guardian consent. Services that are not treatment include: long-term support services; treatment for health care conditions that are not rehabilitative treatment for mental health, developmental disabilities or other substance abuse;

³²² Wis. Stat. § 46.279(4)(b), (c) and 55.12(6)

³²³ Wis. Stat. §§ 46.279(4)(b) and 55.01(4g)

³²⁴ Wis. Stat. §§ 46.279(4)(d), 55.12(6) and .18(1)(ar)

³²⁵ Wis. Stat. §§ 46.279(2), 55.12(6) and .18(1)(ar)

³²⁶ Wis. Stat. §§ 46.279(3), 55.12(6) and .18(1)(ar)

³²⁷ Wis. Stat. § 49.45(30m)

³²⁸ Wis. Stat. §§ 55.045, .12(5)

and treatment for a degenerative brain disorder that does not meet the definition of mental illness or brain injury. *See Ch IV, Part E.*

Presumably, guardian consent is not needed for services that are specifically ordered by the court.³²⁹ Usually, however, services are not specifically listed in the order, and informed consent by the guardian is needed to implement the order. If the guardian refuses consent to services that would be in the individual's best interests, the court could enter an order further specifying court-ordered protective services, or enter an order under Wis. Stat. § 54.68 either ordering the guardian to act in the best interests of the individual or removing the guardian. *See Ch. III, Part E.7.*

An individual subject to a protective services or placement order retains a right to refuse rehabilitative treatment for mental illness, developmental disabilities, alcoholism and other drug dependence, even if the guardian has given consent. Except for an order for administration of psychotropic medications under § 55.14, an order for compulsory treatment over the individual's objections must be obtained under Ch. 51.

COMMENT: A still-open question is the extent to which protective service and placement orders authorize forcible delivery of services over the person's objections. It is now clear that protective service orders can be used for forcible administration of psychotropic medications, but only under the standards and procedures of § 55.14. *See Ch. IV, Part I.* There is no other mechanism in Ch. 55 for forcing acceptance of services (although the individual can be protectively placed to a locked unit). An order for forcible entry (*See Ch. IV, Part G.2.*) can enable the APS system to correct unsafe or unhygienic conditions in the person's physical environment and can get the personal care worker or the home-delivered meal in the door, but cannot force the person to cooperate with care or eat his or her lunch. Specific court authority should be obtained for any use of physical force outside of an emergency situation. Fortunately, getting in the door is often enough. People will often respect and obey court orders just because they are court orders, or because they recognize that the next step could be a more restrictive court order.

F. ADMINISTRATIVE REQUIREMENTS FOR ADMISSIONS TO RESIDENTIAL AND INPATIENT FACILITIES

Wis. Stat. § 50.04(2r)

The law requires approval of certain admissions by specified agencies. This approval is a requirement in addition to consent of the individual or guardian or a court order for admission. Agency approval requirements include:

- Approval of the facility director (or designee) and the approval of the county department with responsibility for developmental disability, mental health, alcoholism and other substance abuse programs under §§ 51.42/.437 (“51.42/51.437 department”) for any **voluntary admission of an adult to a state inpatient treatment facility or to any inpatient treatment facility through a county 51.42/.437 department.**³³⁰ This applies to admission of a non-protesting individual based on consent of a guardian.
- **Preadmission screening** is required for any individual **diagnosed as developmentally disabled or mentally ill** prior to **admission to a nursing facility** that is certified to receive Medical Assistance funding.³³¹ A **nursing facility** is a nursing home that is not an intermediate care facility for the mentally retarded (ICF-MR). The nursing facility must refer a person for

³²⁹ See, e.g., Wis. Stat. § 46.275(4)(b)1., which provides that CIP services can be provided based on a court order for protective placement or protective services, without guardian consent.

³³⁰ Wis. Stat. §§ 51.10(1) and (2) and 51.13(1)(e) and (f), Wis. Stats.

³³¹ Wis. Stat. § 49.45(6c) and 42 CFR §§483.100 and following

screening if a preliminary screen indicates the person may have a developmental disability or mental illness. The screening is then done by an agency under contract with DHFS. The purpose of the screening is to ensure that an individuals who has a mental illness or developmental disability is not admitted to a nursing facility if **either**:

- His or her needs could be met in an appropriate community placement; **or**
- He or she requires the specialized care and treatment of an inpatient psychiatric hospital or ICF/MR placement.

The screening is also intended to ensure that, if a person whose independent functioning is limited by a mental illness or developmental disability is admitted to a nursing facility, he or she will receive appropriate specialized services.

Exceptions. Preadmission screening is not required for certain short-term admissions, including: admission from a hospital for a medically-prescribed recovery period of up to 30 days; pre-placement admission of 30 days or less periods; 7-day placements to provide respite to caregivers; and provisional admissions for 7 days or less in an emergency situation. For more detail, and contact information, see DDES Memo Series 2004-16, February 9, 2005, available on-line at: http://dhfs.wisconsin.gov/dsl_info/NumberedMemos/DDES/CY_2004/2004-16-PASARRreq.pdf .

- **Recommendation of admission by the county 51.42/.437 department** of the person's county of residence is required for any non-emergency admission of **a person who has developmental disabilities or a person who is under 65 and has mental illness** to a **nursing home or ICF-MR**.³³²
- *See Part D.4. above* for provisions requiring planning for community-based care for people with developmental disabilities admitted to nursing homes and ICF-MRs.
- Medical Assistance funding will always be subject to whether the service meets conditions for coverage and is medically necessary. Coverage of nursing home care or care in an ICF-MR requires a determination that the person requires a level of care for which Medical Assistance reimbursement is available.
- If funding through a county is expected or desired for non-emergency placement in a community living arrangement, there must be a determination of eligibility by the county for the funding source, a decision that funding is available, and approval of the admission by the appropriate county agency as part of the individual's service plan. Special restrictions apply to funding of admissions to community-based residential facilities under some community-based service programs.

³³² Wis. Stat. §50.04(2r), 51.42(3)(as) and 51.437(4m)(L); Wis. Admin. Code §§ HFS 132.51(2)(d) and (e) and HFS 134.52(2)(b). Documentation requirements are summarized in DDES Memo Series 2004-16, February 9, 2005; Memo # BQC-96-019, April 16, 1996.

CHAPTER VI: PROCEDURES FOR COURT ORDERS FOR GUARDIANSHIP, PROTECTIVE SERVICES AND PROTECTIVE PLACEMENT

NOTE: This chapter is not intended as a guide for attorneys in court proceedings, or for people proceeding in court without an attorney. It is intended to assist APS system workers and others who are working with attorneys to understand the process and to know what will be needed to facilitate a proceeding.

A. WHY ARE PROCEDURAL REQUIREMENTS STRICTLY ENFORCED?

Family members and human service workers often ask why due process protections are insisted on in every case, even where they apparently serve no useful purpose, and some rules are enforced so strictly that the ability to use important evidence that the person is at risk of harm may be lost because a time-line is missed or a the individual is not present at the hearing. The answer to this question has two parts. First, the liberty interests at stake in a guardianship or protective services/placement proceeding are as important and fundamental as any about which courts are called upon to determine, and the determinations have effects that in many cases are life-long. Second, while incapacity and risk may be obvious to those who know an individual, the court has no way to know until the case is properly presented whether the individual opposes the petition, has capacity to exercise his or her rights, meets the standard for legal intervention, or needs the level of protection being proposed.

Art. 1, Section 1 of the Wisconsin Constitution provides that “[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness ...”. The Wisconsin Supreme Court has held that there is a “common law right to self-determination,” under which “no right is held more sacred, or is more carefully guarded..., than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”³³³

Put another way, our society values the right of each individual to make his or her own decisions for its own sake, apart from the results of those decisions. Decisions imposed by others are denials of this basic value, even if those decisions may be “better” in other ways. Guardianship and protective service orders take away a person’s control over his or he own life in the name of protection. Whether this is justified in a particular case can only be known after the case is presented to the court.

The risks to individual liberty interests in protective placement cases is even greater, and these are the cases in which procedural rights have been most strictly applied. The Wisconsin courts have held that there is a “huge liberty interest” at stake in protective placement cases³³⁴ because “[p]rotective placements ... are the only involuntary commitments under Wisconsin law that are indefinite in duration and thereby are tantamount to a life sentence to a nursing home or other custodial setting.” *State ex rel. Watts v. Combined Cmty. Servs. Bd.*, 122 Wis. 2d 65, 80, 362 N.W.2d 104 (1985). In *Watts*, the supreme court quoted with approval from *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (citation omitted):

The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital “can engender adverse social consequences to the individual” and that “[w]hether we label this phenomena ‘stigma’ or choose to call it something else ... we recognize that it can occur and that it can have a very significant impact on the individual.”

³³³ In the Matter of the Guardianship of L.W., 167 Wis. 2d 53 (1992)

³³⁴ Walworth County v. Therese B., 2003 WI App 223, 267 Wis. 2d 310, 671 N.W.2d 377

B. RELATIONSHIPS BETWEEN PROCEDURES FOR GUARDIANSHIP, COURT-ORDERED PROTECTIVE SERVICES, PROTECTIVE PLACEMENT AND COMMITMENT

1. *What is the relationship between the petition and procedures for guardianship, protective services and protective placement?*

2005 Wis. Act 264, effective November 1, 2006, applied most of the procedural requirements and due process protections for protective placement proceedings to protective service proceedings. At the same time, it made the procedures for protective placement largely independent of procedures for guardianship, instead of depending on cross-references to the guardianship procedures. Act 264 also clarified the procedures that must be followed for transfers between protective placements and, for the first time, put the requirements for an annual court review of protective placements into statute.

Because there is so much overlap between the procedures for protective placement and protective services, the discussion of procedures for both is combined in this chapter. However some important differences remain. Procedures for emergency protective services and emergency protective placement remain different, and are discussed in *Ch. IV, Part G.1, and Ch. V, Part C.5, respectively*. The requirement for an annual review by a court applies only to protective placement, and not to orders for protective services, and is discussed in *Part J, below*.

Despite the creation of largely separate procedures in Ch. 55, procedures for protective services/placement and procedures for guardianship remain closely related. Any adult who is subject to a court order for protective services or placement (other than emergency services or emergency or temporary protective placement) must have a full or limited guardian of the person appointed based on a finding by a court that the person is incompetent. If the person at the time of the initial petition for protective services or placement does not yet have a guardian, a petition for guardianship must be filed before or at the same time as the petition for protective services/placement, and all of the procedures required for guardianship of the person based on incompetence must be followed for that petition.

The forms for petitions and orders for guardianship and petition for protective placement/services are now separate, but this does not prevent the two matters from being considered at the same hearing. The determination of incompetence for guardianship purposes must be made before the protective placement or services order can be issued.

Although procedures under Ch. 54 and Ch. 55 are largely parallel, petitioners must be careful to follow the appropriate procedures for each of the separate petitions. For example, the provisions on persons entitled to notice are not identical, so that family members entitled to notice of a guardianship petition may not be entitled to notice of a protective services/placement petition. *See Part E. below*. One area in which Ch. 55 continues to rely on Ch. 54 is for the provisions on the responsibilities and duties of the guardian ad litem in initial proceedings.

2. *How are procedures for guardianship and protective services/placement different if the person has been the subject of an emergency protective services/placement, or if the person has been admitted to a facility on their own consent, or on the consent of a guardian, agent, relative or friend?*

Special procedures and time-lines apply to proceedings where emergency protective services have been provided prior to a court order, or where the individual has been taken into an emergency protective placement. These time-lines are designed to protect individuals from involuntary services and placement without court review. Failure to follow them may result not only in delay in a particular proceeding and a need to re-file the case, but in the loss of ability to pursue a case that is based on the facts that were relied on for the original petition. This can have serious effects on the ability to protect an individual unable to protect himself or herself.

Procedures for emergency protective services and placements are covered in *Ch. IV, Part G, and Ch. V, Part C.5, respectively*, along with the substantive requirements for those proceedings.

If the person is in a facility with 16 or more beds, a petition for protective placement must be filed at the same time as the petition for guardianship. This reflects the fact that a guardian does not have authority to consent to continued stay of the individual in the facility. *See Ch. V, Part B.7.*

COMMENT: This should not apply if the petition is only for financial guardianship, if the right to consent to continued stay will be reserved to the individual, or if the intent is that the person will not remain in the facility after the guardianship is ordered. However, it may be necessary to file the petition for protective placement, even if it will not ultimately be needed.

3. *Can a petition for commitment be converted to a petition for protective placement or services?*

Sometimes, it is unclear at the time a person is detained or a petition is filed whether the individual can be best served through commitment under Ch. 51 or protective services/placement under Ch. 55. If the matter is first initiated as a commitment, there are two stages at which a court can convert a commitment petition into one for guardianship and protective placement or services. The provisions are different, depending on the stage in the commitment proceeding:

- If a petition for a Ch. 51 commitment has been filed and the person is being detained, the court must hold a probable cause hearing within 72 hours. After that hearing, the court may determine that there is probable cause to believe that the individual meets the standards for guardianship and a court order for protective placement or services (and that this would be a better way to handle the situation than proceeding with commitment).³³⁵ If it does so, the court may, without further notice, appoint a temporary guardian (if there is no permanent guardian) and order temporary protective placement or services for a period of up to 30 days. The court may then proceed as if a protective placement petition had been filed. While the statute does not say that a new petition is required, a guardianship petition will be needed if there is no permanent guardian. In addition, protective services/placement proceedings have requirements for notice to third parties that are different from those for commitment. *See Part E, below.* It is hard to see how these can be met without filing a petition specific to protective placement. Requirements for a medical/psychological report and comprehensive evaluation would also have to be met. *See Part F, below.*
- If the court holds a full hearing on a petition for commitment and finds that the person does not meet standards for commitment but does meet standards for guardianship and protective placement or services, the court may, without further notice, appoint a temporary guardian and order temporary protective placement or services under Ch. 55 for a period of up to 30 days.³³⁶ A new petition for guardianship and/or protective placement or services must be filed before permanent protective placement or services can be ordered. If the person is in a treatment facility, the person may remain in the facility during the period of temporary placement if no other facility is available. (It is not clear whether this exception extends to continued placement to an inpatient unit for people with acute mental illness.) The court may order psychotropic medication as a temporary protective service if it finds that there is probable cause to believe the individual is not competent to refuse psychotropic medication and that the medication ordered will have therapeutic value and will not unreasonably impair the ability of the individual to prepare for and participate in the legal proceedings.

COMMENT 1: If this provision is used to involuntarily detain a person who does not meet commitment standards on an inpatient psychiatric unit, it may violate equal protection guarantees. A commitment petition should not be used as a mechanism to get inpatient

³³⁵ § 51.20(7)(d)1., Wis. Stats.

³³⁶ §§51.20(13)(a)2 and 51.67, Wis. Stats.

evaluation or treatment for a person, unless there is a good faith belief that commitment is appropriate.

COMMENT 2: The APS system (or other petitioner) may want to compare the process and interim placement and service options under this section to the process, timelines and options available if the APS system or guardian were to start a new process by initiating emergency protective services or emergency protective placement. *See Ch. IV, Part G. and Ch. V, Part C.5.*

C. VENUE: IN WHAT COUNTY SHOULD PETITIONS FOR GUARDIANSHIP, PROTECTIVE SERVICES AND PROTECTIVE PLACEMENT BE FILED AND HEARD?

1. *In what county should petitions for guardianship of the person be filed and heard?*

Guardianships are assigned to the circuit court handling probate matters, and petitions are filed with the register in probate for the county. A circuit court in any county has power to order guardianship of the person for a Wisconsin resident,³³⁷ but if a case is brought in a court that is not the proper *venue*, that court can send the case to the court that does have proper venue. For purpose of venue, a petition for guardianship should be brought and heard in the circuit court of the county of residence of the proposed ward, but it can also be heard in the county where the person is physically present, if he or she is there under extraordinary circumstances.³³⁸ The court in which a petition is first filed determines venue, after notice and opportunity to be heard is provided to any potentially affected county.

The statute reads as if the court must hold a hearing on the residence issue in order to determine venue. However, if the person is physically present in the county under extraordinary circumstances (such as a need for immediate medical care or another immediate risk to health and safety), the court may accept venue and order protective placement or services prior to a determination of residence. Presumably, if and when the extraordinary circumstances end, and if the individual at that point is found to have residence in another county, venue can be transferred to the county of residence.

Residence is not defined in Ch. 54. However, the venue provisions in Ch. 54 say that, in disputed cases, the court may refer determination of residence to DHFS under Wis. Stat. § 51.40(2)(g). See next section, and discussion of determination of county of residence in *Ch. IV, Part D*. This strongly implies that the definition of residence is the same for Ch. 54 as it is for Ch. 51, including the provisions of § 51.40 for certain individuals in facilities.

2. *Which county circuit court handles petitions for court-ordered protective placement/services, and how is county of residence determined?*

Protective placements are assigned to the circuit court handling probate matters. Petitions are filed with the register in probate for the county. For purposes of venue, a petition for protective placement of a Wisconsin resident³³⁹ should be filed either:³⁴⁰

³³⁷ Procedures for petitions for guardianship related to out-of-state residents are beyond the scope of this book. See Wis. Stat. § 54.30(2) venue for a petition related to a nonresident. See § 54.34(3) for procedures for a petition to transfer a foreign guardianship. A court can create a guardianship over property of a nonresident of the state if the property is in the county.

³³⁸ § 54.30(2), Wis. Stats.

³³⁹ Procedures for petitions related to out-of-state residents are beyond the scope of this book. See Wis. Stat. § 55.055(1)(c) and (d) for authority of a guardian appointed in another state to consent to admission of an individual into a Wisconsin facility, and to then bring a petition for protective placement in Wisconsin. For further discussion, see DDES Numbered Memo Series 2007-01, Part III.F, available on

- In the county of residence of the individual to be protected (*See Ch. IV, Part D*, for a discussion of determining county of residence); OR
- In the county where the individual is physically present.³⁴¹

COMMENT: The version of this provision contained in 2005 Wis. Act 264 would have provided that extraordinary circumstances must be shown if the case is heard in the county of physical presence. Without that language, if a petition is brought in the county of physical presence, it is not clear that a court has any authority to refuse to accept the case, even if the court (or DHFS) determines that the individual is a resident of another county. Generally, it is good practice to have court determinations and oversight of protective orders by the court in the county responsible for implementing the orders.

Venue is determined by the court in which a petition is first filed.³⁴² The court may determine venue only after notice to all potentially affected counties and parties. The court may determine venue on its own or, if a potentially responsible county objects to the determination of venue, the court *may* refer the matter to DHFS for a determination of residence under Wis. Stat. §51.40 before it makes a decision on a motion to change venue. Doing so does not deprive the court of the power to order placement or services while the motion on change of venue is being considered, or to make a determination of residence if there is no current administrative decision as to residence. (See discussion and comment, below)

While the determination of residence does not necessarily dictate where the case must be brought, **the decision as to county of residence does determine the county of responsibility for purposes of implementing and funding protective placement.** Many responsibilities in the court process are assigned to the county of residence. Accordingly, even if the court decides that venue is appropriate because of the person's physical presence, it will be essential for the court to determine county of residence in order to enter an order directing the appropriate county agency to implement the order.

A court may determine county of residence (and responsibility) if the individual either has never received social services under Ch. 46 (social services), Ch. 51 (mental health, developmental disabilities, alcoholism and other drug dependence services) or Ch. 55, or if the person did receive such services, they have been terminated, and the person has established a new county of residence.³⁴³ This appears to allow the court to determine residence where there is no current applicable administrative determination of residence.

COMMENT: The ability of a party or potentially responsible county to object to determination of residence by the court and to force referral to DHFS should not be read to apply to initial petitions for protective services or placements, but only to ongoing cases in which the court did not initially determine county of residence. The DHFS determination process under § 51.40 may take up to 70 days. If a case had to be referred to DHFS, it is not clear what county would be responsible for services while residence is being determined, whether the court would have any authority to order interim services, or what would happen to the time limits during which the court process is required to be completed. Meeting time limits if an emergency protective placement had been made would be impossible. Moreover, a determination by DHFS under §51.40 can itself be taken to court for review. This would potentially create the strange situation

the DHFS website at:

http://dhfs.wisconsin.gov/dsl_info/NumberedMemos/DDES/CY2007/NMemo2007-01.htm .

³⁴⁰ Wis. Stat. §55.075(5)

³⁴¹ Wis. Stat. §55.075(5)(a).

³⁴² Wis. Stat. §55.075(5)(bm)

³⁴³ Wis. Stat. §55.075(5)(a)

of one court reviewing a decision by DHFS, made after referral by another court that is handling the protective services/placement matter.

D. REQUIREMENTS FOR PETITIONS

1. *Who may sign a petition for guardianship, and what must the petition say?*

Any person, including an individual, corporation or government agency, may petition a court to appoint a guardian for an individual.³⁴⁴ This could include the individual who is the proposed guardian, and the individual who is the proposed subject of the guardianship, if he or she has capacity to understand the purpose of the petition.

The petition must use the standard court-created form, available at <http://www.wicourts.gov/forms/GN-3100.DOC>. The statute requires that the petitioner provide a long list of information, but only “if known to the petitioner.” Personal knowledge of the individual by the petitioner is not required. This appears to mean that the petitioner can rely entirely on reliable information received from others, and that information can be left out or provided to the best of the petitioner’s ability, as long as the petition states that the essential requirements for a finding that guardianship is needed are present. *See Ch. III, Part B.*

Note that requirements for petitions for protective placement or services are stricter, both in terms of who may petition and what knowledge he or she must have. (See next section.)

2. *Who may sign a petition for protective services or protective placement, and what must the petition say?*

A petition for protective services or placement may be filed by DHFS, a county or contract agency that is part of the county APS system, a guardian, an agent under a power of attorney for health care, an adult relative or friend, or an official or representative of a public or private agency concerned with the individual’s welfare.³⁴⁵ While this is broad, **a petition must be based on personal knowledge by the petitioner** of the individual alleged to need protective placement.³⁴⁶ This appears to mean that the petitioner must personally know the individual, not that he or she must have direct personal knowledge of everything that is in the petition.

The petition must use the standard court-created form, available at <http://www.wicourts.gov/forms/GN-4040.DOC>. The petition must **state with particularity the factual basis for believing that the person meets the standards for protective services placement.**³⁴⁷ However, attachments can be included, either of existing documents that show all or part of the factual basis, or of a statement of the factual basis created for the petition.

E. NOTICE REQUIREMENTS

1. *How is notice given of a petition for guardianship?*

The petitioner is responsible for ensuring proper notice. The order for notice and hearing and a copy of the petition must be given to the individual in person at least 10 business days before the hearing.³⁴⁸ The person who gives notice to the individual must inform the individual of the “complete contents” of both the notice and the petition. If the person is in “custody or

³⁴⁴ Wis. Stat. § 54.34(1)

³⁴⁵ Wis. Stat. §55.01(4) and .075(1)

³⁴⁶ Wis. Stat. §55.075(2)(b)

³⁴⁷ Wis. Stat. §55.075(2)(a). While this section refers only to § 55.08, it presumably also requires a statement that the requirements of § 55.06 are met.

³⁴⁸ Wis.Stat. § 54.38(2)(a)

confinement", service can be by certified mail to the custodian, who is then required to give the notice and petition to the individual. The custodian must certify to the court that he or she gave the person notice of the petition and informed him or her of what it said. "Custody or confinement" is not defined, but probably includes being in a residential facility, nursing home or jail, or being in a facility under emergency detention, emergency protective placement, or commitment.

Notice must also be given personally or by mail at least ten days before the hearing to:³⁴⁹

- The guardian ad litem, and the individual's attorney, if any.
- The proposed guardian.
- Any agent under a durable power of attorney for health care or finances.
- People who would inherit if the person died, under the laws that apply to people who die without a will. (This is usually the spouse, children if there is no spouse or the children are from a previous marriage, or other next-of-kin if there is no spouse or child.)
- Any person having legal or physical custody of the individual.
- Any government or private agency from which the person gets aid or assistance.

COMMENT: "Aid or assistance" is not defined. Some common sense should be exercised in trying to determine whether an agency is likely to ever look at a notice or be involved. The Social Security Administration, for example, does not involve itself in state proceedings. Notice should be given at least to any agency that provides case management.

- Other interested persons, as listed in Wis. Stat. § 54.01(17), unless specifically waived by the court. This could include: an adult child or a parent of a minor who is not an heir at law; the county department of human services or social services, if the person receives long-term support services from the county; the county corporation counsel of the county of residence and the county where the petition is filed; a state or federal department of veteran affairs, if the person is eligible for veteran benefits; and, if the individual is still under age 18, the person who has had custody of the individual, and a person nominated by a parent to act as fiduciary for the child.

This list is not intended to be a substitute for reviewing the statute on service of process in each case. It is intended to describe the kind of information that will need to be gathered to assist an attorney who is bringing a petition for guardianship. If a person entitled to notice does not receive it, he or she may be able to challenge the guardianship later based on the lack of notice.

COMMENT: The changes effective Dec. 1, 2006 made the list of people entitled to notice longer, and appear to have reduced the ability of the court to waive notice, or to excuse it based on inability to identify or locate a person with due diligence. If a person entitled to notice cannot be identified or located with a reasonable effort to do so, the court should be informed of the lack of notice. This should not mean that the court loses power to make a decision about guardianship, but it may mean that the person who was entitled to notice may later be able to reopen the proceedings.

2. *How is notice given of a petition for protective services/placement?*

The requirements for notice³⁵⁰ are similar to those for a guardianship petition (see last section), but are not identical. If guardianship and protective service/placement petitions are being brought

³⁴⁹ Wis.Stat. § 54.38(2)(b)

³⁵⁰ Wis. Stat. § 55.09

together, the requirements of both Ch. 54 and Ch. 55 need to be carefully checked and met. Among the differences:

- In a protective service/placement case, notice must always be given to the county department designated as the APS agency by the county under § 55.02.
- Special provisions apply if the individual has developmental disabilities and may be placed in a state center for people with developmental disabilities, ICF-MR or nursing home. *See Ch. V, Part D.4.*
- There is no separate list of “interested persons” entitled to notice. One resulting difference is that an adult child would not be entitled to notice if the individual has a surviving spouse.
- There is no specific provision for service of the notice and petition through the custodian of a person in care and custody, although it should be permissible to complete service in this way if the custodian is cooperative.

COMMENT: Some people entitled to notice of a guardianship petition may not be entitled to notice of a protective services/placement petition. For example, relatives who are not heirs at law and the Department of Veteran Affairs may be entitled to notice of guardianship but not of protective services/placement. Because court records of these proceedings are confidential, they notice and petition should not be sent to people not specifically entitled to notice.

F. REQUIRED REPORTS AND EVALUATIONS

1. *What must (and may) be included in the evaluation and report by a physician or psychologist in a guardianship proceeding?*

In every case in which a petition for guardianship is based on incapacity of the individual, there must be a written report in the record from a licensed physician or licensed psychologist, giving a professional opinion as to whether the individual has a mental or physical condition that can be a basis for a finding of incompetence, and as to whether the individual is incapacitated by the condition. The courts have adopted a standard form, which must be used for this report.³⁵¹ The form is available at: <http://www.wicourts.gov/forms/GN-3130.DOC>. (The form does not prevent a physician from attaching a separate report to the standard form, and referring to it in answers on the standard form.)

The statute says that the physician or psychologist must “examine” the person, and must tell the person prior to the examination that his or her statements may be used as a basis for a finding of incompetence, that he or she has a right to refuse to participate, unless there is a court order, and that he or she has a right not to speak to the physician or psychologist, but that the physician or psychologist will write a report whether the person speaks or not. The statute also says that nothing prohibits use of a report that is based on an examination that took place before the petition was filed, but the court will consider how much time has passed since the examination, and whether the person’s condition is likely to have changed.

COMMENT: Courts differ as to whether or not they require that in all cases there be an examination at which the person has been told about his or her rights. Some courts accept an examination by a treating physician who has not separately examined the person specifically for purposes of the guardianship, and who therefore has never had a reason to give the notice of rights. A treating physician will often have all the information he or she needs without a separate examination, and far better information than could be obtained by a separate examination. At least in uncontested cases, there seems no reason to require the expense, delay and potential stress

³⁵¹ Wis. Stat. § 54.36(1)

of a separate examination, when the physician or psychologist does not feel it is necessary in order to provide a professional opinion on the issues in the report.

The usual right of a person under state law to prevent a physician or psychologist from providing confidential information to a court does not apply to this statement and any supporting records provided with it.³⁵² However, federal confidentiality rules do not have a clear exception, apart from the exceptions that allow for release as part of court proceedings.³⁵³ It is easier to request a court order authorizing (or ordering) the evaluation and completion of the report, and ordering release of the report and supporting records to counsel for petitioner, than it is to argue with the medical records custodian. If the subject of the petition is still a minor, a parent can sign a consent for release. If the individual has capacity to do so and agrees to the release, the individual can sign a consent for release. The HFS-9 Form provides a format for a release compliant with confidentiality rules, and is available on-line at: <http://dhfs.wisconsin.gov/forms/HFS/hfs0009.doc> .

The new report form for the medical/psychological evaluation now requires the physician to address capacity to exercise rights and powers individually, and also to address the question of whether the individual's need for support in decision-making could be addressed in a way that is less restrictive than guardianship. This is information that cannot easily be obtained in a clinical treatment setting, let alone from a single evaluation. It may be helpful to provide the physician/psychologist with information from others (such as family, teachers, and/or support service providers) about the individual's day-to-day functioning in home and community settings, about the opportunities the person has or has not had to learn and use decision-making skills, and about risks of harm the person may face in the absence of guardianship. If a **comprehensive evaluation** has been prepared (see next two sections), it may be helpful to provide all or part of it to the physician or psychologist. Alternatively, it may be helpful to provide other forms of evaluation directly to the court (see next section).

The petitioner or guardian ad litem may ask the court for an order requiring the individual to participate and ordering that the evaluator have access to health care and treatment records, without informed consent.³⁵⁴ This may be a way not only to get the individual's cooperation, but also to ensure the evaluator's access to needed information from other sources, such as former treating professionals and residential and other service providers.

An order that the individual participate does not mean that the individual has to speak to the examining professional. If the person does not speak, the professional may give an opinion based on other sources which he or she would typically use in arriving at a professional opinion. The professional may not simply repeat findings of others, but may state an independent opinion that is based upon the observations and findings of others, if he or she has independently verified the observation and findings, e.g., by relying on multiple sources, and combining them with whatever observations he or she is able to make directly.³⁵⁵

The report of the physician or psychologist must be provided to the guardian ad litem and to the individual's attorney (if he or she has one) at least 96 hours before the hearing³⁵⁶ (week-end days and holidays cannot be counted towards the 96 hours). (The statute does not say whether the report must be made available to the individual, if he or she has no attorney. As a matter of due

³⁵² Wis. Stat. §§ 54.36(1) and 905.04. § 51.30(4) provides that the exceptions to § 905.04 also apply to the right of confidentiality of treatment records under § 51.30.

³⁵³ 45 CFR § 164.512(e). Exceptions that may apply in the context of reporting abuse and neglect are discussed in Ch. II, part.

³⁵⁴ Wis. Stat. § 54.36(2) and (3)

³⁵⁵ *Walworth County v. Therese B.*, 2003 WI App 223, 267 Wis. 2d 310, 671 N.W.2d 377

³⁵⁶ Wis. Stat. § 54.44(1)

process, the individual if not represented by counsel has a right to see anything that is submitted to the court.)

2. ***What other kinds of evaluations can be received or ordered by the court in a guardianship proceeding, and what is the role of the APS system in obtaining evaluations?***

Evaluations from sources other than a physician or psychologist may be helpful in establishing capacity, and can be received or ordered by the court. In every guardianship proceeding, the court is required to decide if additional medical, psychological, social, vocational, or educational evaluation is necessary for the court to make an informed decision respecting the individual's capacity. The court has the same powers to obtain the needed evaluation, and to obtain assistance from the APS system, as it does in ordering a comprehensive evaluation for protective services/placement (*See Part F.3, below*), even if there is no proceeding for protective services or placement involved.³⁵⁷ This does not require that the court order a full comprehensive evaluation. For example, the court could ask for an evaluation of the individual's capacity to make decisions (or learn to make decisions) in a particular functional area, if evidence on other functional areas is clear.

3. ***What is required for a comprehensive evaluation in a protective services/placement proceeding, and what is the responsibility of the APS system?***

Before it may order protective services or placement, the court must direct that a comprehensive evaluation of the person be completed.³⁵⁸ A comprehensive evaluation may be completed ahead of time and filed with the petition. This is a good way to ensure that there is evidence that the standards will be met, and to reduce the time between petition and final decision. The court may use available multidisciplinary resources in the community to assist in its determination. The APS system must cooperate with the court in securing available resources. The comprehensive evaluation process is central to the process both of determining whether the person needs protective services and/or placement and, if so, the type of services and/or placement that is appropriate. No protective service/placement should proceed without a thorough examination of the person's service history and current needs.

Which experts should be included in preparing the **multidisciplinary** evaluation should depend on the needs of the person. The team should include people with expertise in the person's disability and in the service areas in which he or she has support needs.

The evaluation must include the following:

- **Identification of where the person lives and of any people or agencies presently providing services.** This information is more than technical. First, people who live with or support the person are valuable sources of information on his or her abilities and support needs. Second, if current services are inadequate it raises the issue of whether it may be desirable and possible to preserve the least restrictive placement with appropriate services.
- **History of past treatment and services.** The law requires a summary of professional treatment and services provided to the person in connection with the problem creating the need for services/placement. This information is essential to determining whether treatment and services short of protective services/placement have been adequately explored and implemented, and to determining the nature of services and/or placement that should be ordered if they are necessary. In other words, the evaluation must not only be of the person's abilities and needs, but of the support services that have been made available to meet those needs.

³⁵⁷ Wis.Stat. § 54.10(3)(d)

³⁵⁸ Wis.Stat. § 55.11

- **Medical, psychological, social, vocational and educational evaluation and review, where necessary.** The evaluation must look at the full range of the person's history, needs and abilities, including relationships and social needs, needs for productive activities, and developmental needs. It is not enough to focus simply on health needs or the nature of mental disabilities. Again, the person's past and current status should be evaluated in the context of whether appropriate support services and treatment have been provided.
- **Recommendation for or against maintenance of legal rights.** The evaluation must address whether there are legal rights or powers which the person should retain, if a guardianship of the person is ordered or continued. *See Ch. III, Part D.*
- **Recommendation for least restrictive placement or services consistent with the person's needs and available resources.** The APS system must make a recommendation that is consistent with the placement responsibilities of the court and county under Wis. Stat. §55.12(3), (4) and (5). *See Ch. V, Part D.* This should be made by the agency (or agencies) in the APS system of the person's county of residence that has responsibility for people with his or her disability (or disabilities, if the person has multiple disabilities).³⁵⁹
- **Statement where placement of an individual with a developmental disability may be made to a state center, ICR-MR or nursing home.** If the court is considering placement to a state center, the court must request a statement from DHFS as to whether the placement is appropriate and consistent with the Center's purpose. If the court is considering placement to an ICF-MR or nursing home, the court must request a statement from the county agency responsible for the CIP-1 and Brain Injury Waiver programs in the person's county of residence, as to whether the person's needs could be met in a non-institutional setting. *See Ch. V, Part D.4.*

Often, existing evaluations cover all or part of the need for comprehensive evaluation. For example, the evaluation needed for placement and service issues is similar in purpose to evaluation under the Community Options, Community Integration or Family Care Programs. Integrating the two processes can provide a useful format for that portion of the evaluation and avoid duplication of effort. The preadmission screening process for admissions to nursing homes of people with mental illness or developmental disabilities may also cover relevant issues. *See Ch. V, Part E.*

If the comprehensive evaluation fails to adequately address an issue area, the court may utilize its authority to draw on multidisciplinary resources to fill in the gap. Part of the guardian ad litem's responsibility is to recommend necessary medical, psychological or other evaluation. The order could include an order to the protective service agency to carry out further evaluation or an order for evaluation by another appropriate person or agency with the needed expertise. The court can order the county to complete Community Options or Community Integration Program assessments as a way of developing more information on placement alternatives, or to carry out service trials to determine if certain services might be effective.

Copies of the evaluation must be provided to the person's guardian, the individual's agent under a power of attorney, the guardian ad litem, an agent under any activated power of attorney for health care, and the individual or his/her attorney at least 96 hours before the hearing to determine protective services or placement.³⁶⁰ (The statute does not say who is responsible for distributing the evaluation; this may be done by the court, APS system or petitioner's attorney.) Where the county is not the petitioner, the evaluation should also be given to the petitioner's attorney. Where a guardian has not yet been appointed, and the proposed guardian is not the petitioner, it

³⁵⁹ Wis. Stat. § 55.11(4)

³⁶⁰ Wis. Stat. § 55.11(3)

should be provided to the proposed guardian. If there is a concern about confidentiality, and distribution is not by the court, a court order can be obtained authorizing the release.

4. *What right does the individual or guardian have to request independent evaluation in a guardianship proceeding?*

At the request of the individual, or by anyone on his or her behalf, the individual has a right to obtain and put into evidence an independent medical or psychological examination relevant to any issue involved in any hearing that is related to guardianship.³⁶¹ (This would include a protective services proceeding where need for guardianship was also at issue.) For example, the petitioner could request and submit an independent evaluation of his or her competence in general, of his or her capacity to exercise a particular right or to make decisions about a particular power that would otherwise be transferred to the guardian, or about whether there are less restrictive means to protect his or her health and safety.

In some cases, medical or psychological expertise is not what is needed. For example, if the issue is safety on the streets, a mobility trainer may have more useful expertise than a physician. In those cases, the person can request the court to use its authority to order further evaluation, and can also ask the guardian ad litem to recommend further evaluation (*See Section 2, above*). The court must consider a request of this kind, but can refuse to grant it.

In any hearing under Ch. 55, at the request of the individual, or by anyone on his or her behalf, the individual has a right to obtain an independent comprehensive evaluation, equivalent to the comprehensive evaluation described in *Section 3, above*, and to present it in evidence at the hearing.³⁶² It is important to remember that **the right to independent evaluation in Ch. 55 is not limited to evaluation by a physician or psychologist**. In practice, it will make most sense to ask for independent evaluation only as to specific issues that are contested. For example, the individual or guardian may want an independent expert on residential services to do an evaluation of whether supports could be delivered in a less restrictive way than the county proposes, or as to whether a proposed setting will meet his or her needs for habilitation or rehabilitation services.

If the individual does not have the resources to pay for the medical or psychological evaluation regarding a guardianship issue, or for the independent comprehensive evaluation, the county where the court is located must pay for it. If the person requesting an evaluation wants the county to pay for it, he or she should get a court order or approval prior to the evaluation.

The right of the individual, attorney or guardian ad litem to call witnesses is not limited to court-appointed experts. Where there are other resources to obtain an evaluation, there may be no need for a court order. For example, the person may have a trial stay with a service provider, who can then appear as an expert witness, or may be able to obtain an evaluation funded by Medical Assistance or other public or private funding.

COMMENT 1: A difficult issue not resolved by the statutes is the question of who chooses the independent evaluator. The word *independent* can be read to mean simply an individual who is different from the original evaluator, or it can be read to mean someone who is completely independent of the APS system and chosen by the individual. Sometimes, counties have contract agencies or individuals to whom they prefer to assign independent evaluations. Cost is an important issue: a request for an expert chosen by the individual's attorney is more likely to be granted if there is full or partial outside funding, or may be conditioned on accepting the level of reimbursement paid by the court.

³⁶¹ Wis. Stat. § 54.42

³⁶² Wis. Stat. §§ 55.10(1)(e) and 55.11(2)

COMMENT 2: An important question is whether an independent evaluation obtained by the individual's attorney must be shared with other parties or placed into evidence.

5. *Who pays the costs of evaluations?*

There is no provision in statute for payment for the medical or psychological evaluation required for guardianship. Medical Assistance or private insurance may pay the cost of a visit to the evaluator, but will generally not pay the cost of time spent filling out the report form. If there is a charge by the physician, it probably must be paid by the petitioner, and can be billed to the subject of the petition if the court allows. *See Part G.8, below.*

If the comprehensive evaluation can be combined with other evaluation for long-term support services, reimbursement may be available for the portion that doubles as home and community-based waiver program, Family Care or partnership assessment. Some evaluations may be done by potential providers as part of evaluation for service intake, or prior authorization processes.

Case management services under Medical Assistance can include a comprehensive assessment and case planning that covers much the same ground as must be covered in a comprehensive evaluation for protective placement. This can be done on an annual basis for people who are not receiving other services or are in institutional settings. While the county must pay the state match (about 43% of the rate) and rates are below actual cost, using MA-qualified case management staff for evaluations can cover a significant part of the costs. The case management rules provide a good structure for the evaluation process. Cost of independent evaluations is discussed in *Part F.4, above.*

G. APPOINTMENT AND ROLE OF THE GUARDIAN AD LITEM³⁶³ AND THE ATTORNEY FOR THE INDIVIDUAL

1. *When is a guardian ad litem appointed in guardianship and protective placement proceedings?*

The court must appoint an attorney to act as guardian ad litem for any kind of guardianship or protective services/placement proceeding that may affect the rights of the individual or his or her services or placement, including:³⁶⁴

- Initial proceedings for guardianship or protective services/placement.
- Reviews of whether the individual continues to need a guardian, and/or what rights and powers the individual has capacity to exercise, and what rights and powers are assigned to the guardian.
- Reviews of the conduct of a guardian.
- Any court proceeding regarding protective services or placement, including any annual or other review of services or placement.
- Any other times the court determines that a guardian ad litem is needed.

It is always appropriate to bring to the court's attention any threat to the individual's rights or interests and to request appointment of a guardian ad litem to investigate and report to the court whether further proceedings are needed.

³⁶³ For detailed information on the role of the guardian ad litem, see *Guardian ad Litem Handbook* (2007), published by the State Bar of Wisconsin.

³⁶⁴ Wis. Stat. § 54.40(1) and 55.10

2. Who can act as a guardian ad litem for an adult who is alleged to be incapacitated?

The guardian ad litem must be an attorney who is not involved in the proceeding and does not have a conflict of interest from current or past work.³⁶⁵ Any history of representing the individual in any kind of proceeding is considered a conflict of interest. Supreme Court Rules now require that the attorney take continuing legal education courses related to work as a guardian ad litem and set out the ethical responsibilities of a guardian ad litem.³⁶⁶

The guardian ad litem is ethically responsible for carrying out these functions and for advocating zealously for his or her client's best interests. If guardians ad litem are not carrying out their duties, it is appropriate for the county or other interested persons to bring this to the attention of the appointing court and to request that a new guardian ad litem be appointed. A complaint concerning ethical violations can also be made to the Office of Lawyer Regulation, which is part of the state court system.

Link: <http://www.wicourts.gov/services/public/lawyerreg/process.htm>

3. What is the general role of a guardian ad litem in proceedings related to guardianship and protective services and placement?

The guardian ad litem acts as an advocate for the best interests of the person.³⁶⁷ He or she acts independently and has all the rights of an attorney for a party in the proceeding, including the power to call and question witnesses and present evidence. The guardian ad litem must consider the person's wishes and the positions of others in determining best interests, but does not have to follow them. Although the guardian makes recommendations as to best interests based on investigation of the facts, he or she is not a witness, and ordinarily, as an attorney in the case, is ethically prohibited from being a witness. He or she makes sure that the person understands and has an opportunity to exercise his or her procedural rights, and makes sure that the court has information needed to make both procedural and substantive decisions. He or she has no authority to make decisions for the person outside the legal proceeding. A guardian ad litem has the following general duties at all stages in all guardianship and protective service/placement cases:³⁶⁸

- Interview the person, explain the particular hearing procedure involved, and advise the person orally and in writing of the following rights:
 - The right to be present at the hearing. *See Part H.2, below.*
 - The right to his or her own attorney, at county expense if he or she is indigent. *See Part G.7, below.*
 - The right to an independent medical or psychological examination on the issue of whether he or she is competent, at county expense if he or she is indigent. *See Part F.4, below.*
 - The right to request limited guardianship. *See Ch. III, Part D.*
 - The right to a jury trial, if an issue of competence or of whether there is a need for protective placement is at issue. *See Part H.3, below.*
 - The right to appeal a decision of the trial court to a higher court.

³⁶⁵ Wis. Stat. §§ 54.40(2) and 757.48. See also SCR 20:4.5 on ethical obligations of a guardian ad litem.

³⁶⁶ SCR § 20:4.5 and Ch. 36

³⁶⁷ Wis. Stat. § 54.40(3)

³⁶⁸ Wis. Stat. § 54.40(4)

Note: The court system has issued a mandatory form that guardians ad litem must use as part of informing people of their rights. The form is available at: <http://www.wicourts.gov/forms/GN-3150.DOC> . While this form must be used, the guardian ad litem may use his or her own words in explaining the rights, and may provide other written materials.

COMMENT: In almost all cases, the guardian ad litem will be able to do his or her job effectively only by doing an in-person interview with the individual in order to get to know his or her client, to be able to determine how to best to assist the person in understanding his or her rights, and to be able to make the best determination about whether the individual wants to exercise rights and/or has a position on the guardianship, services or placement.

- Interview the guardian (if any) concerning the subject matter of the proceeding or, if no guardian has yet been appointed, interview the proposed guardian, and any other person who is seeking appointment as guardian. Inform the guardian of his or her rights to be present at and participate in the hearing, to present and cross-examine witnesses, to receive a copy of the medical or psychological evaluation, and of the comprehensive evaluation for protective placement or services, if applicable, and to secure and present a report on an independent medical or psychological evaluation.
- Review any power of attorney for health care and any durable financial power of attorney signed by the individual, and any other advance planning for financial or health care decision-making done by the individual, and any agent appointed under any advance planning document. The guardian ad litem must report to the court as to whether the advance planning makes guardianship wholly or partly unnecessary. *See Ch. III, Part C.*

COMMENT: It is not clear whether this is limited to advance planning identified in the petition. The guardian ad litem should ask the individual and proposed guardian about other advanced planning, but can only be responsible for reviewing documents he or she knows about. In subsequent proceedings, it should not be necessary to talk to agents under plans that have been made inoperative by the guardianship orders.

- Request that the court order additional medical, psychological or other evaluation, if necessary. This could relate to recommendations as to the report of the physician or psychologist, other evaluation a court can order in a guardianship proceeding, or any aspect of the comprehensive evaluation. (This may be based on the recommendation of the guardian ad litem, or the request of the individual or his or her guardian.) *See Part F, above.*
- Inform the court and petitioner's attorney (or petitioner):
 - If the individual either objects to or has an ambiguous position as to: a proposed finding that he or she is incompetent; his/her current placement; a proposed placement; or the guardian ad litem's recommendation as to his or her best interests.
 - If the individual asks to have his or her own attorney. *See Section 7, below*
- Attend all proceedings related to guardianship. A different rule applies to protective services/placement proceedings, but only if not related to the guardianship. *See Section 5, below.*
- Present evidence as to the best interests of the individual, if necessary.

COMMENT: The guardian ad litem is asked to take a position on several issues before the hearing, and on the basis of whatever he or she has been able to find out from interviews and record reviews. It may often be appropriate (1) to hold a recommendation until after a hearing; (2) to reserve the right to modify a recommendation in light of further evidence; and

(3) to describe the sources of information, and to say that opinions and recommendations are based only on the available information.

The court system has created mandatory forms that guardians ad litem must use in making their reports to the court. The form for use in initial guardianships and protective service/placement proceedings is at: <http://www.wicourts.gov/forms/GN-3160.DOC>. The form for annual reviews of protective placements is at <http://www.wicourts.gov/forms/GN-3160.DOC>.

4. *What is the role of the guardian ad litem in guardianship proceedings?*

All of the duties of the guardian ad litem described in the last section apply in initial guardianships. Special duties that a guardian ad litem has in proceedings that specifically related to guardianship include:

- Interviewing all proposed guardians or people who are otherwise seeking to be appointed as guardian, and making a report and recommendation to the court concerning the fitness and suitability of each potential guardian to serve as guardian, including persons nominated as standby guardian. *See Ch. III, Parts E, and F.* (This is an example of a report that may have to be based on limited information, such as a single interview. The guardian ad litem may want to indicate the opinion is based only on that limited information.)
- Informing the individual of his or her right to limited guardianship. In the context of the current guardianship law, this means making the person aware that he can keep (or have restored) any rights or powers he or she has the capacity to exercise.
- Making an independent judgment about what rights and powers the individual has the capacity to exercise and, where he or she does not have capacity, whether there is a less restrictive way to receive decision-making support or to develop capacity.
- Making an independent judgment about whether the individual's advance planning is adequate to make guardianship unnecessary or, if guardianship is needed, to what extent the authority of agents under the advanced planning documents should remain in effect.

The guardian ad litem is required to attend all proceedings related to the guardianship. However, the statute on protective services/placement proceedings allows the guardian ad litem to be excused under some circumstances. (See next section.) One way of reading this conflict is that the guardian ad litem may only be excused if no issue has been raised concerning competence, the extent of the guardianship or the conduct of the guardian.

5. *What is the role of the guardian ad litem in proceedings for protective services or placement?*

In addition to the general duties described in *Section 3, above*,³⁶⁹ the guardian ad litem must make a recommendation as to whether the individual meets the standards for protective services or placement (*See Ch. IV, Part H.1. and Ch. V, Part C.2.*) and as to how the order for services and placement will carry out the individual's rights to services and/or placement that are both least restrictive and consistent with the person's needs for care, services and treatment. *See Ch. I, Part D.*

If no guardianship issue is presented, the court may excuse the guardian ad litem from appearing personally at a hearing on protective placement/services if the individual has his or her own attorney and the court considers the written report of the guardian ad litem sufficient. (This could be appropriate, e.g., where the guardian ad litem's position will be represented by one of the parties, and he or she feels that the person's best interests will therefore be adequately represented.)

³⁶⁹ Wis. Stat. § 55.10(4)(b), which also provides that the duties and role of the guardian ad litem under the guardianship statute apply to protective services/placement proceedings.

6. *When does the role of the guardian ad litem end?*

Unless the court makes a special order extending them, the powers and duties of the guardian ad litem end when a final order is issued in the proceedings for which he or she was appointed (or at the end of an appeal, if someone appeals the order.) This means that, without a special order, the guardian ad litem loses all authority to be involved when the order is entered (except authority to ask for reappointment.) The order extending an appointment (or reappointing the guardian ad litem) should specify the responsibilities of the guardian ad litem. Where an order specifies a future plan for services or placement, or a risk of abuse, neglect or exploitation requiring ongoing monitoring by the guardian ad litem, it is important that his or her powers to have access to the individual and information be extended.

7. *What right does the individual have to his or her own attorney, and what is the role of the individual's attorney?*

The person has a right to have an attorney to act as his or her own legal counsel. Legal counsel (sometimes referred to as an *adversary* or *defense* attorney or counsel) is different from a guardian ad litem in that counsel represents the expressed wishes of the individual rather than making his or her own judgment of the person's best interests.

In both guardianship and protective services/placement cases, counsel for the individual is appointed in any case where:³⁷⁰

- The individual asks for counsel (except that under Ch. 55 this must be done at least 72 hours before the hearing).
- The guardian ad litem or anyone else informs the court that the individual is opposed to the guardianship or protective placement petition. Any reasonably understandable and consistent protest by the individual about the need for guardianship or protective services/placement order, extent of guardianship, choice of guardian or nature of proposed services or placement should be enough to trigger appointment of counsel.
- The court decides that counsel is needed in the interests of justice.

The court must appoint legal counsel if the person is unable to find an attorney on his or her own.

In addition, in protective services/placement proceedings, the court must require that the individual have legal counsel if the petition seeks an order for involuntary administration of psychotropic medication under § 55.14. *See Ch. IV, Part I.*

In some cases, the individual may not be able to give clear direction as to what he or she wants or how the case should be conducted. Under the rules governing attorney professional responsibility, the attorney must, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.³⁷¹ That is, the attorney must do his or her best to find out what the client wants, and advocate for that position. Where the client's position is not knowable, legal counsel typically advocates for the position that is least restrictive of the person's liberty. In guardianship proceedings, this means advocating against the guardianship and/or advocating for retention of maximum rights under limited guardianship. In protective placement services cases, it means advocating against the court order, or for the least restrictive form of service or placement.

COMMENT: When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately

³⁷⁰ Wis. Stat. §§ 54.42(1)(a) and 55.10

³⁷¹ SCR 20:1.14

act in the client's own interest, the lawyer may take reasonably necessary action to protect the client. However, in these proceedings, protective action is already being sought by the petitioner, and the guardian ad litem has the role of advocating for the individual's best interests. Legal counsel therefore best serves the process by advocating for the person's liberty interests. This does not require that an attorney advocate for a position for which there is no legal or factual support.

8. *Who pays the fees of the guardian ad litem and attorney?*

Unless a statute specifically provides otherwise, fees of a guardian ad litem are paid by the individual whose interests he or she represents.³⁷² Similarly, if the person hires an attorney, or if the court appoints an attorney for him or her, he or she is responsible for the fee, unless he or she is indigent. (In a guardianship case where a guardian is appointed, payment of the costs of legal counsel and litigation costs has priority over guardian ad litem and other attorney fees.³⁷³) If the individual is indigent, fees for both guardians ad litem and defense attorneys must be paid by the county of the court that is the proper venue.³⁷⁴ **EXCEPTION:** If a guardian is not appointed by the court in response to an initial petition for guardianship, the petitioner is liable for fees due to both the guardian ad litem and the attorney for the individual. There is no similar provision in Ch. 55, but this would apparently apply if a petition for protective placement was denied because the individual was found not to need a guardian.

COMMENT: The statute creates a problem for guardians ad litem and attorneys, if they are made directly responsible for collection of their fees from a petitioner with whom they have no contractual relationship, and who may be angry at the guardian ad litem or attorney for advocating against the guardianship. Where the case is contested, the court should order that funds for the guardian ad litem and attorney fees be paid prior to hearing by the petitioner to be held by the court, or, if the individual is indigent, payment should be made by the county and then recovered from the petitioner by court order.

H. HEARINGS

1. *How soon after the petition is filed must the hearing be held?*

A petition for initial guardianship that is not combined with a petition for protective services or placement must be heard within 90 days after it is filed.³⁷⁵ There is no exception to this time limit. If the time limit goes by, it is probably necessary to re-file and re-serve the petition. If the time limit will be difficult to meet, it is better to delay the petition, for example, until it can be ensured that a medical examination (if needed) and report will be completed and available in time to be properly served prior to the date of the hearing.

A petition for protective services or placement must be heard within 60 days after it is filed, but the court may extend the date by up to 45 days if the individual, guardian ad litem or county requests the extension.³⁷⁶ However, faster time-lines apply in specific circumstances:

- **Placement by a relative or friend under § 50.06.** If a placement has been made by a relative or friend under § 50.06 (*See Ch. V, Part B.3.*), and it is alleged that the person making the placement is making a health care decision that is not in the individual's best

³⁷² Wis. Stat. § 757.48

³⁷³ Wis. Stat. § 54.46(4)

³⁷⁴ Wis. Stat. §§ 54.46(3)(c) and 55.10(b).

³⁷⁵ Wis. Stat. § 54.44(1)

³⁷⁶ Wis. Stat. § 55.10(1)

interests, or that the individual protests the placement, the hearing must be held within 60 days, and the court is required to schedule it “as soon as possible” within the 60 days.³⁷⁷

- **Emergency protective placement.** A probable cause hearing must be held with within 72 hours, excluding Saturdays, Sundays and holidays, and, if the court orders temporary protective placement at the probable cause hearing, the hearing on permanent placement must be held with 30 days after the probable cause hearing,. This time limit is strictly enforced, and missing it may result in permanent damage to the ability to adequately protect the individual. *See Ch. V, Part C.5.*
- **Emergency protective services.** A probable cause hearing must be held with 72 hours, excluding Saturdays, Sundays and holidays. If the court orders continuation of emergency protective services at the probable cause hearing, the hearing on a permanent order for services must be held within 60 days after the probable cause hearing. *See Ch. IV, Part G.1.*

2. *What right does the individual have to be present (or not be present) at the hearing?*

An individual subject to guardianship or proposed guardianship has a right to be present at any hearing regarding the guardianship.³⁷⁸ What is somewhat less clear is attendance where the individual expresses no opinion about coming, or actually objects to coming.

In both guardianship and protective services/placement proceedings, the petitioner is required to ensure that the individual to be protected attends the hearing unless the guardian ad litem waives attendance.³⁷⁹ The waiver of the guardian ad litem must be in writing and must certify specific reasons why the individual is **unable to attend**. Failing to have the person at the hearing, without a waiver, will make any resulting court order invalid.³⁸⁰

In deciding whether to waive attendance by the individual, the guardian ad litem must consider the person’s ability to understand and meaningfully participate, the effect of attendance on his or her physical or psychological health in relation to the importance of the proceeding, and the person's expressed desires. If person is unable to attend because of residence in a nursing home or other facility, physical inaccessibility, or a lack of transportation, and if the proposed ward, guardian ad litem, advocate counsel, or other interested person requests, the court shall hold the hearing in a place where the proposed ward may attend. Failure to accommodate the person's access needs could constitute discrimination under the Americans with Disabilities Act.³⁸¹

COMMENT: Unfortunately, it is not clear HOW the petitioner can ensure the individual’s presence, if he or she is able to come but cannot be located or resists coming. It is not a good idea for a private party to try to bring a protesting person to the courthouse. If the petitioner knows where the person is, it may be possible to get an order from the court that the sheriff bring the person to court, but there is no provision in statute for the order. If the person cannot be found, it is not clear that the case can proceed. If there is an immediate threat of harm, emergency protective services or placement may be an appropriate way to obtain control of the person for the hearing.

³⁷⁷ Wis. Stat. §§ 54.44(1)(b) and 55.10(1)

³⁷⁸ Wis. Stat. § 54.42(5)

³⁷⁹ Wis. Stat. §§ 54.44(4) and 55.10(2)

³⁸⁰ *Knight v. Milwaukee County*, 2002 WI App 194, 256 Wis. 2d 1000, 651 N.W.2d 890

³⁸¹ 42 U.S.C §12132

3. *What rights does the person have to a jury trial?*

The individual has a right to trial by jury if requested by the person, guardian ad litem or legal counsel.³⁸² In guardianship cases, the request must be made at least 48 hours before the hearing. (Questions for the jury include whether the person meets the standards for guardianship, protective services and protective placement, and has capacity to exercise a particular right or power. Choice of guardian, rulings on the conduct of guardians, and decisions about the nature of services or placement to be ordered are all decisions that will be made by the judge, not the jury.)

4. *Who can present evidence and cross-examine witnesses, and what status do medical and comprehensive evaluations have as evidence?*

The individual, his or her attorney, and the guardian ad litem have a right to cross-examine witnesses and to present evidence in support of their positions.³⁸³ This can include both expert witnesses and others who know the person and can testify to his or her abilities.

The fact that another person is classified as an interested person and receives notice of the proceedings does not, by itself, give that person a right to demand that a hearing be held, or to present and cross-examine witnesses at the hearing. The court has discretion to allow an interested person to participate in a hearing to the extent it considers appropriate.³⁸⁴

The required medical and psychological evaluation and (if applicable) the comprehensive evaluation are required to be in every court file in which guardianship and protective services/placement are ordered. However, they are not admitted into evidence in a contested hearing unless the parties agree to have them admitted, or the petitioner calls the experts who prepared the evaluation reports as witnesses. This ensures that they are sworn in and gives the person the opportunity to cross-examine the experts.³⁸⁵ Telephone testimony can be used if the parties and court agree.

5. *What right does the individual have to findings based on clear and convincing evidence?*

All findings that the person needs a guardian based on incompetence, has incapacity to exercise a right or power, or meets the standards for a court order for protective services or placement must be made **by clear and convincing evidence**.³⁸⁶ This is a higher standard of proof than in most civil legal proceedings, which require only a "preponderance" of the evidence. For a finding to be based on clear and convincing evidence, there must be evidence in the record to support it, and the evidence must be both (1) clearly related to the finding and (2) convincing. It is not up to the person to prove that he or she should retain a particular right; it is up to the petitioner to prove both incompetence and incapacity as to each right that is lost or power that is transferred to the guardian.

6. *What role does a guardian, proposed guardian, agent under a power of attorney, or other interested person play in a guardianship or protective placement hearing?*

As noted in *Section 4, above*, an interested person does not, without special court permission, have a right to participate in a hearing. However, a person who is an agent under a power of attorney may have authority to act for the individual, and therefore in some circumstances may be able to exercise the rights of the individual, such as the right to appeal a court decision on the

³⁸² Wis. Stat. §§ 54.42(2) and 55.10(c)

³⁸³ Wis. Stat. §§ 54.42(2) and 55.10(4)(c)

³⁸⁴ *Coston v. Joseph P.*, 222 Wis. 2d 1, 586 N.W.2d 52 (Ct. App. 1998)

³⁸⁵ *In Matter of Guardianship of R.S.*, 162 Wis. 2d 197, 470 N.W. 2d 260(1991).

³⁸⁶ Wis. Stat. §§ 54.10(3)(a), 54.25(2)(c)2., 54.25(2)(d), and 55.10(4)(d)

individual's behalf.³⁸⁷ Presumably, a guardian would have the same powers. Generally, guardians and other interested persons are expected to make their views known through the guardian ad litem or through the individual's attorney. They may be called as witnesses, and may be asked to give an opinion as to the person's best interests. However, a guardian or agent who feels that the best interests of the individual are not being represented by the guardian ad litem or counsel may ask the court for the opportunity to participate in the hearing.

A guardian also can safeguard the individual's rights, for example, by requesting adversary counsel, independent evaluation or a full due process hearing and by advocating for good legal representation by the guardian ad litem and adversary counsel. However, a guardian should not control the choice or actions of legal counsel or guardian ad litem for the individual who is under guardianship, as there may be a conflict between the person's wishes and the goals of the guardian.

Where the guardian is not appointed until the hearing at which the protective service or placement order will be considered, the prospective guardian may be deprived of the opportunity to participate in the proceeding. Possible solutions to this problem are (1) to seek appointment of the prospective guardian as temporary guardian, before the hearing, for the purpose of participating in the protective placement proceeding, or (2) to otherwise ensure that the proposed guardian has access to needed information so that he or she will be able to take a position on the protective services/placement petition.

I. TRANSFERS OF INDIVIDUALS UNDER PROTECTIVE PLACEMENT AND MODIFICATIONS AND TERMINATION OF PROTECTIVE SERVICES AND PLACEMENT ORDERS BY THE COURT

NOTE ON TERMINOLOGY IN PARTS I. AND J.: The term *interested person* has much broader meaning in Ch. 55 than it does in Ch. 54, and is used to define a person who may initiate a request for services or court review. Under Wis. Stat. § 55.01(4), the term includes any adult relative or friend, any representative of an agency concerned with the individual's welfare (including the county itself), and/or an agent under the person's health care power of attorney.

1. *Who may initiate a transfer, and what are the requirements for notice and consent?*

A guardian, an agency that is part of the county APS system, or a facility to which the individual is placed may initiate a transfer to a different home or facility placement,³⁸⁸ as long as it is the type of home or facility to which an initial placement could have been made. *See Ch. V, Part D.I.* Transfer can be made without automatic return to the court, even if the original court order specifies a specific placement. Notice and an opportunity for a hearing must be provided, but no hearing has to be held unless someone requests it.

Except in an emergency (see below), **written consent of the guardian of the person is required for any transfer.**³⁸⁹ This makes the guardian the primary decision-maker as to whether a transfer can occur without a return to the court. If the guardian refuses consent, the person or agency that supports the transfer can request modification of the court order to overrule the guardian. *See Section 3, below*

Except in an emergency (see below), **written consent of the responsible agency in the county APS system** is also required, if the transfer is to a facility that is more costly to the county.³⁹⁰ This is not just a question of daily rate: a less expensive placement may be more costly to the

³⁸⁷ *Knight v. Milwaukee County*, 2002 WI 27, 251 Wis. 2d 10, 640 N.W.2d 773

³⁸⁸ Wis. Stat. § 55.15

³⁸⁹ Wis. Stat. § 55.15(3)

³⁹⁰ Wis. Stat. § 54.15(4)

county because it is not covered by an outside funding source, usually Medical Assistance funding.

The guardian, facility or responsible APS agency that initiates the transfer must give notice of a transfer to the court, guardian, individual under protective placement, placement facility and responsible APS agency. In a non-emergency, the notice must be given at least 10 days before the hearing, and must include notice of the right to petition the court for a hearing (see below). (Saturdays, Sundays and holidays cannot be counted towards the 10 days, and, if the notice is mailed, at least 3 additional days must be allowed for mailing time.) For many individuals, notice by mail will not be meaningful, and oral notice of a planned transfer and of the person's rights should be given. (Nothing in Ch. 55 relieves a person or agency making a transfer from responsibility to properly prepare the individual for the transfer, to comply with other notice and planning requirements and to make it as non-traumatic as possible.)

In an emergency that makes it "impossible" to give prior notice or to get guardian consent, transfer may be made and notice given immediately at the time of the transfer. "Emergency" is not defined, but probably has the same meaning as for emergency protective placement, i.e., a substantial risk of serious physical harm to the individual or others if placement is delayed to allow for notice and consent. The word "impossible" sets a high standard: it implies that if the risk can be managed in other ways, so that prior notice can be given, then that should be done.

The individual, his or her guardian, his or her attorney or any interested person may file a petition with the court objecting to the transfer. The court will send out notice of the hearing, which must be held within 10 days, and will appoint a guardian ad litem, and the individual has the same rights to counsel as in an original proceeding. *See Ch. VI, Part G.* The rights at hearing are similar to those in an original proceeding, except that the guardian is identified as a party with a right to present and cross-examine witnesses. The court, in determining whether to approve or disapprove a transfer must consider whether the new placement carries out the standards for placement in § 55.12, and whether the transfer is in the best interests of the individual.

COMMENT: While not explicit in the statute, the disruption and potential trauma caused by the transfer itself should be a factor considered by the court, as well as the question of whether the new placement is consistent with placement standards.

2. *How are court orders for protective services reviewed, modified, and terminated?*

There are no provisions for automatic annual review of orders for protective services by either the county APS system or the court, as there are for protective placements. An annual report must be made by the guardian of the person to the court and the county APS system (*See Ch. III, Part 2.*); it may be appropriate to have additional content for reports regarding people under court protective service orders, and/or to ensure that they get special review when filed.

A county cannot fulfill its responsibilities under a protective services order without regular review of whether the services continue to meet the purposes of the order and the requirements for implementation of the order. *See Ch. V, Part D.1.* It will be essential to ensure that the responsible agency within the county APS system receives information on changes in the person's support needs, and receives regular updates on the person's situation, conditions and needs. If the APS system relies on reviews of services mandated by the funding source for the services (such as reviews of individual service plans for Medicaid waiver programs), it is important that copies of these reviews be shared with the responsible agency in the APS system.

Any interested person or agency can at any time file a petition with the court for modification of a protective services order, on the grounds that it does not implement county responsibility to provide services that are least restrictive or that it otherwise does not meet requirements for court-

ordered protective services.³⁹¹ *See Ch. IV, Part H.* An interested person or agency may also file a petition of termination of protective placement. Procedures for petitions for modification or termination of protective services are similar to those for modification or termination of protective placement. (*See Section 3, next*). After hearing on either kind of petition, the court has authority to order services that implement statutory requirements, or to terminate the order entirely, as appropriate.

3. *How are court orders for protective placement reviewed, modified, and terminated?*

The annual county and court review of protective placements is covered in the *Part I, below*.

In addition, any interested person or agency can at any time file a petition with the court for either:

- Modification of a protective placement order, on the grounds that it is not the least restrictive placement consistent with needs, or otherwise does not meet the standards for court-ordered protective placement.³⁹² *See Part I.3, above.*
- Termination of protective placement, on the grounds that the individual no longer meets the standards for being subject to an order for protective placement.³⁹³ *See Ch. V, Part C.2, above.* A protective placement order continues in effect until terminated by the court (although the person may be transferred to an unrestrictive home setting). If the APS system believes that the person no longer meets the standards for protective placement, it should file a petition for termination. If agreed to by the person, guardian and guardian ad litem, this can probably be done by stipulation.

In either case, the notice must be served on the individual, guardian, legal counsel (if any), the guardian ad litem, and the county department with primary responsibility for the APS system. A guardian ad litem should always be appointed, and the right to legal counsel applies. *See Part G, above.* The court must hold a hearing within 21 days (but this can be extended on request of the individual, guardian ad litem or individual's attorney.) The court can refuse to hold a hearing if it is within 6 months of a previous hearing. After hearing under either kind of petition, the court has authority to order a change in placement to implement statutory requirements or, if it finds that the person no longer meets the standards to be subject to protective placement at all, the court may terminate the protective placement order.

Instead of ordering transfer of the individual to a specific facility, the court may order the responsible agency in the county APS system to develop or recommend a protective placement that is in the least restrictive environment consistent with the requirements of § 55.12, and arrange for the individual's transfer to that protective placement within 60 days after the court's order. The court may extend this time period to permit development of a protective placement, and may order protective services along with transfer of protective placement.

COMMENT: If the county, guardian or facility wants to make a change in placement, it will have to decide whether this is better achieved through the transfer process described in the last section, or through a petition for modification of the order. If there is disagreement, or if planning is needed to find or design the new placement, the modification procedure allows these issues to be worked out before transfer arrangements are made.

If protective placement is terminated, and the person is incapacitated and in a facility to which he or she could only be admitted under a protective placement (such as a large CBRF or nursing

³⁹¹ Wis. Stat. § 55.16(2) and (5).

³⁹² Wis. Stat. § 55.16(2)(a) and (c) and (4).

³⁹³ Wis. Stat. § 55.17

home), he or she may remain in the facility for 60 days in order to provide time to arrange an alternative living arrangement.

Prior to discharge from a protective placement, the APS system must review the need for continued protective services and full or limited guardianship, and shall recommend action to the court, if needed.³⁹⁴

J. ANNUAL GUARDIAN REPORT AND ANNUAL COUNTY AND COURT REVIEW OF PROTECTIVE PLACEMENT ORDERS

NOTE ON TERMINOLOGY: See note at the beginning of *Part I* regarding the term *interested person*.

1. *What must be included in the annual review and report by the guardian of the person?*

The guardian of person is responsible for making an annual report to the court and the county APS system, covering the location of the ward, the health condition of the ward, any recommendations regarding the ward, and whether the ward is living in the least restrictive environment consistent with the needs of the ward.³⁹⁵ This report is required regardless of whether the individual is under a court order for protective placement or services, but becomes part of the annual review process for individuals who are under court orders. The county APS system is responsible for developing reporting requirements for guardians, as well as designating an agency to receive the reports. The court system provides a standard form, GN-3480, for guardians to use in making annual reports. The form is available on-line at: <http://www.wicourts.gov/forms/GN-3480.DOC>, and should be used for the report to the court. Additional information can be included as an attachment to the report.

2. *What must be included in the annual APS system review of an individual subject to a protective placement order?*

The county APS system must **review the status of each person under a protective placement order annually**.³⁹⁶ The APS system's annual review is the first step in the overall annual review, which includes review by a guardian ad litem and court, to ensure that the person's placement continues to be consistent with rights to least restrictive conditions and to appropriate care and services. The APS system's review must include a personal visit to the individual, notice to the guardian that the review is going on, and an invitation to the individual and the guardian to submit comments or information for use in the review. The review must include a written evaluation of the physical, mental and social condition and service needs of the person. The review may be assigned to staff of an agency that is part of the APS system or has a contract with the APS system, including staff of the county where the person is physically located, if that is not the county of residence, but the review may not be carried out by a staff person of the placement facility.³⁹⁷

The review should be timed so that, not later than 11 months after the initial placement order, its last review, or the completion of the last judicial review, if a hearing was held,³⁹⁸ the APS county system files its report with the court, including information on all of the following:

³⁹⁴ Wis. Stat. § 55.175

³⁹⁵ Wis. Stat. § 54.25(1)(a)

³⁹⁶ Wis. Stat. §55.18(1)

³⁹⁷ Wis. Stat. §55.18(1)(c) and (1m)

³⁹⁸ Wis. Stat. §55.18(1)(b)

- The functional abilities and disabilities of the individual at the time the review is made, including the needs of the individual for health, social, or rehabilitation services, and the level of supervision needed.
- The ability of community services to provide adequate support for the individual's needs.
- The ability of the individual to live in a less restrictive setting.
- Whether sufficient services are available to support the individual and meet the individual's needs in the community and, if so, an estimate of the cost of the services, including the use of county funds.
- Recommendations as to whether: (1) the protective placement order should be terminated or (2) the individual should be placed in another facility with adequate support services that places fewer restrictions on the individual's personal freedom, is closer to the individual's home community, or more adequately meets the individual's needs.
- A summary of any comments made by the individual and the individual's guardian during the review, and the response of the county APS system.
- Any comments of placement facility staff member that are relevant to the review.

It is important; both to conserve resources and to produce an accurate evaluation; that the annual review pulls together other evaluations that may have been completed during the review period, such as annual reviews by the facility or county long-term support case manager, PASARR reviews, etc. The special provisions for review of placements of people with developmental disabilities placed in or at risk of placement in intermediate care facilities and nursing homes apply to annual reviews. *See Ch. V, Part D.4.*

Also by the end of the 11th month after the initial placement or its last review (or of the completion of the last judicial review, if a hearing was held), the APS system is required to give its report to the individual, the guardian, and any agent under an activated power of attorney for health care, and is required to file the petition that begins the process of annual judicial review.

3. *What is the legal history of the requirement for an annual court review?*

Before 1985, there was no automatic periodic court review of protective placements. In its 1985 decision in *State ex rel Watts v. Combined Community Services Board*³⁹⁹, the Wisconsin Supreme Court held that it was an unconstitutional denial of equal protection to provide automatic periodic review for people under commitment but not for people under protective placements. The court held that:

- Commitment and protective placement involve similar losses of freedom and adverse social consequences. Differences between the purposes of the two statutes did not provide a reasonable basis for the challenged differences in procedural rights.⁴⁰⁰
- Provisions for annual review by the county and for review if initiated by an interested party were not comparable to the protections of an annual court review; under the statute a protective placement could continue for life and never be reviewed by a court.⁴⁰¹
- Court review would be beneficial because counties in making their reviews may be influenced by the differing sources of funding for different types of placements.⁴⁰²

³⁹⁹122 Wis. 2d 65, 362 N.W. 2d 104 (1985).

⁴⁰⁰122 Wis. 2d at 79-81.

⁴⁰¹122 Wis. 2d at 76.

- Court review is needed both because the person's condition or needs may change and because of the positive effects of new medical and social attitudes and developments.⁴⁰³ (For example, society's concept of the types of disabilities that can successfully be accommodated through support services in community settings has changed dramatically since creation of Ch. 55.)

Form 1985 to 2006, annual reviews were conducted under the requirements of court cases and court rules for guardians ad litem, without statutory provisions. The changes to Ch. 55 in 2005 Wis. Act 264, effective November 1, 2006, created statutory provisions to implement the requirements of the *Watts* decision for annual judicial review.

4. *How is annual review initiated, and what must be included in the report of the guardian ad litem?*

As noted in the last section, the county APS system files the petition to begin the annual court review process. The court must then appoint a guardian ad litem, who, in addition to his or her general duties that apply (*See Part G.3, above*), is required to do all of the following:⁴⁰⁴

- **Personally meet with the individual**, and explain to the individual, both orally and in writing: how the review process works; what rights the individual has to legal counsel (*See Part G.7, above*), independent evaluation (*See Part F.4, above*), and to request a hearing; what the county APS system's report says; and that the court review process can lead to a court order changing the placement or terminating the order for placement. As part of the process, the guardian ad litem must find out whether the individual wants to exercise any of his or her rights, has an objection to continued protective placement, or to where he or she is placed. The guardian should also identify any concerns about quality or adequacy of support services and treatment.
- **Contact the guardian**, and provide the guardian with the same information, orally and in writing, as was provided to the individual. As part of the process, the guardian ad litem must find out whether the guardian wants to exercise any of the individual's rights on behalf of the individual, or has an objection to continued protective placement, or to where the individual is placed. The guardian should also identify any concerns about quality or adequacy of support services and treatment. (The requirement for oral communication means that at least a phone call is apparently now needed.)
- **File a report with the court** within 30 days after he or she is appointed, based on the interviews with the individual and guardian, the county APS system report, and any other evaluations and records. The report must discuss whether the individual continues to meet the standards for protective placement, whether the placement is the least restrictive consistent with the person's needs, and whether the individual or guardian requests independent evaluation, appointment of legal counsel, modification or termination of the protective placement, or a full due process hearing.

COMMENT: The proper completion of the guardian ad litem's job is absolutely essential to the effectiveness of the annual review. For a person with incapacity, the meeting with the guardian ad litem is a unique accommodation: an opportunity to both be informed of rights and at the same point in time be able to exercise rights simply by being able in some way to communicate an objection to what is happening to him or her. However, the person may not always be able and willing to communicate, and the guardian may or may not know what is

⁴⁰² 122 Wis. 2d at 78.

⁴⁰³ 122 Wis. 2d 83.

⁴⁰⁴ Wis. Stat. §55.18(2)

happening in the person's life, or be doing his or her job as an advocate for the person's best interests. To ensure a genuinely independent review, the guardian ad litem should:

- Make a good faith judgment in each case about what he or she needs to do to get adequate information about the person's needs, to determine if those needs are being met, and to evaluate whether those needs can be met in a less restrictive setting.
- Consider the need to make contacts and review records in addition to minimal statutory requirements. This could include talking to the case manager or facility staff and reviewing the individual service plan or facility records. Additional contacts and reviews will often be needed in order for the guardian ad litem to discuss the individual's placement and services, identify problems, and make an independent judgment as to best interests.
- Make his or her own recommendation as to need for further evaluation.

Wherever a guardian ad litem has neglected a portion of his or her duties, this should be brought to the attention of the court with a request that the annual review be redone.

5. *What must be included in the annual review and hearing by the court?*

The court in the annual review has the following duties:

- The court must, in every case, review the annual reports of the guardian, guardian ad litem and county APS system.⁴⁰⁵
- The court must order the county APS system to obtain necessary information that has not been provided.⁴⁰⁶
- If the report by the county APS system has not been filed in time, the court finds that the review does not meet statutory requirements, or there is a request by the individual, guardian, or guardian ad litem, the court must order an independent evaluation by a person who is not an employee of a county agency that is part of the APS system.⁴⁰⁷ The cost of the independent evaluation must be paid by the individual, or by the county, if the individual is indigent.

COMMENT: It is clearly unfair to charge the individual if the county APS system's report is late or inadequate. The court always has the alternative of ordering the county APS system to do its job, either directly or through other resources. *See Part F.3, above.*

- The court must appoint legal counsel for the individual, if requested by the individual, guardian, or guardian ad litem, or if the court otherwise decides it is necessary based on the report of the guardian ad litem.
- Hold a summary hearing, unless a full due process hearing is required.⁴⁰⁸
- Hold a full due process hearing if the individual, guardian or guardian ad litem requests one, or if the report of the guardian ad litem indicates either that (1) the person no longer meets the standards for protective placement, or (2) the current placement is not the least restrictive

⁴⁰⁵ Wis. Stat. §55.18(3)

⁴⁰⁶ Wis. Stat. §55.18(3)(br)

⁴⁰⁷ Wis. Stat. §55.18(3)(b) and (bm)

⁴⁰⁸ The Supreme Court in *County of Dunn v. Goldie H.*, 2001 WI 102, 245 Wis.2d 538, 629 N.W.2d 189, held that the periodic judicial review must in every case include a hearing and findings of fact demonstrating the need for continued placement.

environment or the individual objects to the current placement. *See Part H, above*, for the requirements of a full hearing.

- Following the summary or due process hearing, the court must enter an order that indicates what information was relied on for the court’s findings. The court must always make a finding as to whether the individual continues to meet the standard to be under a court order for protective placement (*See Ch. V, Part C.2.*), and, if so, whether the current placement meets statutory protective placement standards (*See Ch. V, Part D.3.*). If the court finds that the placement is not in compliance with protective placement standards, the court may order transfer to another protective placement, and/or provision of protective services in addition to placement, or the court may order the county to develop or recommend a placement and services that meets protective placement standards, and to implement a transfer to that placement within 60 days (or a longer period set by the court to allow development of the placement and services).

COMMENT: In many cases, an appropriate, well-planned placement is more desirable than a fast transfer. An order for planning, with adequate time for good planning to be done, will often serve the individual better than an immediate transfer to whatever happens to be available. Planning in the context of a court order for transfer is likely to be more realistic and effective than planning done as part of the review prior to transfer.

K. REVIEWS OF GUARDIANSHIP: CHANGES TO POWERS OF GUARDIAN; TERMINATION OF GUARDIANSHIP; REVIEWS OF CONDUCT OF GUARDIAN; REMOVAL OF GUARDIANS

1. *What is the procedure to fill a vacancy in the guardianship?*

If a **standby guardian** has been appointed, the standby guardian becomes guardian “immediately” upon the death, unwillingness or inability to act, resignation or removal by the court of the prior guardian.⁴⁰⁹ The standby guardian is required to inform the court, and the court is required to issue letters of guardianship. If the current guardian is only temporarily unable to act, the letters must indicate the time period during which the standby guardian is acting as guardian.

COMMENT 1: It has been common practice for courts to **review the guardianship** when the standby guardian takes over, e.g., by requesting a new medical or psychological evaluation, and/or by appointing a guardian ad litem to make a report on the person’s status. Nothing prevents a court from following this procedure, but it may need to be followed after, rather than before, issuance of letters of guardianship to the standby guardian.

COMMENT 2: The statute does not say what must happen if the **court does not accept the resignation** of the current guardian. It appears that the standby guardian must be appointed based on the current guardians unwillingness to act, and the current guardian presumably is from that point deprived of authority. The court, however, may choose not to discharge the guardian until he or she has fully discharged his or her responsibilities.

If a guardian dies, is removed by the court, or submits a resignation that is accepted by the court, the court may appoint a **successor guardian**. The court may do this in two ways:

- **Without a hearing.** The court may appoint a successor, acting either on its own motion or on the petition of any interested person. Notice (personal or by mail) must be given to the individual and all interested persons within 10 days after the appointment, and must include notice that the individual has a right to counsel and that there is a right to petition for

⁴⁰⁹ Wis. Stat. §§ 54.52(2)

reconsideration of the appointment of the successor guardian. (Logically, the right to petition for review should extend to anyone who could ask for a review of the guardianship under § 54.64. See next section).

- **With a hearing.** The court may, on its own motion or at the request of any interested person, direct that a petition for appointment of a successor guardian be filed and heard under the requirements that apply to an initial petition for guardianship. (It is not clear if this means that there must always be a re-determination of whether the individual meets the standard for appointment of a guardian based on a finding of incompetence.)

NOTE: Under Wis. Stat. § 54.01(17)(b) **the term *interested person* has a different meaning in review proceedings** than it does when an initial petition is brought. It always includes a spouse or adult child, the county of venue, and an agent under a durable financial power of attorney, but it can also include any other individual, as ordered by the court, so any individual can seek an order permitting him or her to act as an interested person.

COMMENT: The procedure for appointment of a successor guardian without a hearing will often offer too little protection, because the individual will receive only written notice, there is no guardian ad litem, and the definition of interested persons is restricted. At the same time, a full replay of the initial hearing procedures will often be overkill. The court has powers to appoint a guardian ad litem, require additional notice requirements, and/or require additional evaluations, and should use those powers when appropriate to determine whether to proceed without a full hearing.

2. ***How can the rights of the individual and the powers of the guardian be modified, to reflect changes in the capacity of the individual to make decisions?***

A guardianship continues during the lifetime of the individual, until terminated by the court. No periodic review by the court is required, but the court does have continuing power to review and modify the guardianship if review is requested. This reflects the fact that, over time, the individual may gain or lose decision-making skills, e.g., because his or her mental condition improves, or because he or she learns from training and experience. As skills change, the guardianship as previously ordered may become inappropriate, either because it gives the person rights and powers he or she no longer has capacity to exercise, or because it takes away rights and powers which the person now has capacity to exercise. The court must also review the need for guardianship if the individual **marries**.⁴¹⁰

The court has power to:

- **Remove rights that are reserved to the individual, or increase the powers assigned to the guardian.**⁴¹¹ A guardian or any interested person (see Note at end of last section) may submit a statement with “accompanying support” requesting removal of rights or transfer of powers to the guardian. No formal petition or physician’s statement is required, and there is no restriction on how often a request may be filed. The court must appoint a guardian ad litem and order that notice of the petition be given to the ward, guardian, agent under any health care power of attorney or durable power of attorney, the county department of social services or human services (if the ward is protectively placed or receives long-term support services) and other persons determined by a court. If no one objects to the change within 10 days (or a shorter period set by the court), the court can order the change without a hearing. If there is an objection within 10 days of the notice, the court must hold a hearing.

⁴¹⁰ Wis. Stat. § 54.64(2)(d)

⁴¹¹ Wis. Stat. § 54.63

- **Restore rights that were removed from the individual, reduce the powers assigned to the guardian, or terminate the guardianship.**⁴¹² The guardian, the individual, or any person acting for the individual, may petition for a review incapacity or incompetence. The petitioner does not have to be an “interested person.” The court may also **initiate review on the court’s own motion**,⁴¹³ e.g., in response to a report from the guardian, a report from the guardian ad litem in an annual review of protective placement, or other information that comes to the attention of the court. The review can be of:
 - Whether the individual is **incapacitated** for purposes of exercising a right or power, so that his or her **authority to exercise the right or power should be restored**; and/or
 - Whether the individual no longer meets the standards for appointment of a guardian based on incompetence (*See Ch. III, Part B.*), so that the **guardianship must be terminated**. If a finding is made that the individual does not have capacity to exercise the right or power, he or she will lose the legal right to exercise the right, or the power will be transferred to the guardian.

If there has not been a hearing on the issue of capacity or need for guardianship within the past 180 days (or if the court decides a review is required), the court must appoint a guardian ad litem, set a time for hearing, and decide to whom the petitioner must give notice. The individual has a right to an independent evaluation (*See Part F.4, above*) and to have his or her own attorney (*See Part G.7, above*), but if he or she hires his or her own attorney, the selection is subject to court approval.

COMMENT: The **duties of the guardian ad litem** are not spelled out, but the general duties of a guardian ad litem always include: interviewing the individual; informing him or her of the nature of the request, the rights to counsel, independent evaluation and a hearing, and the opportunity to object; informing the court of any objection or request for independent evaluation or counsel; requesting additional evaluation, if necessary; and reporting to the court on the individual’s best interests (*See Part F.3, above*). Given the limited notice requirements, the guardian ad litem should try to identify people who are involved in the person’s life, and ensure that they receive notice of the proposed change and have an opportunity for input. The guardian ad litem’s role is especially important under the procedure for loss of rights and powers, under which the court may make a decision without benefit of a medical re-evaluation or a hearing.

3. *What is the process for getting an order (1) requiring the guardian to carry out his or her responsibilities or act in the person’s best interests or (2) removing the guardian?*

The grounds of an order supervising the conduct of the guardian, or removing the guardian, are set out in *Ch. III, Parts E.7. and F.* The court, on the motion of any “party,” or on its own motion, may take any of the following actions if it finds that grounds exist:⁴¹⁴

- Order the guardian to file an inventory, accounting or other report as required by law.
- Order the guardian to reimburse the individual for losses caused by the guardian’s breach of duty.
- Order the guardian to act in the best interests of the ward, or to otherwise carry out his or her duties.
- Deny compensation to the guardian, and/or order the guardian to pay a forfeiture of up to \$10,000.

⁴¹² Wis. Stat. § 54.64

⁴¹³ Wis. Stat. § 54.64(2)(c)

⁴¹⁴ Wis. Stat. § 54.68

- Remove the guardian.
- Require the guardian to pay the costs of the proceeding.

If the ward is bringing the petition, he or she may hire a lawyer, regardless of any claim that he or she does not have capacity to do so, but the choice of lawyer, and fees, are subject to court approval.

COMMENT: It is not clear who a “party” is, other than the individual and the guardian. However, if anyone brings an issue to the attention of the court, it has authority to act on its own motion. There is no standard for when an action is serious enough to warrant a forfeiture or removal: the result is tremendous discretion for the court, e.g., to take drastic action for relatively minor failures by the guardian.

CHAPTER VII: INDIVIDUAL-AT-RISK RESTRAINING ORDERS AND CRIMINAL LAWS RELATED TO INDIVIDUALS AT RISK

NOTE: *The statutes on temporary restraining orders and injunctions and criminal prosecutions for abuse, neglect and exploitation, use the term **individual at risk** to mean both an **elder adult at risk** or an **adult at risk**. This chapter uses the term in the same way.*

A. TEMPORARY RESTRAINING ORDERS AND INJUNCTIONS

1. What are “restraining orders,” “injunctions” and “temporary restraining orders”?

In most civil actions in court, the remedy is payment of damages for harm done. The court tries to compensate the person harmed with money, for harm done by another person who is found to have been at fault in a way that the law says requires compensation. **Restraining orders** and **injunctions** are different: they try to stop people from acting in ways that cause harm (or to stop people from failing to act in ways that would prevent or reduce harm), in order to prevent or reduce the harm to other people or to the property interests of other people.

Most often, a restraining order or injunction orders a person to stop doing something that is causing harm or threatening harm to another person, that is harassing another person, or that is doing damage to the property interests of another person. A restraining order or injunction can also order a person to stop **failing** to do something that is necessary to prevent harm to another person or to property. The effect is an affirmative order to do something.

An **injunction** is a final order, which is issued only after there has been notice and an opportunity for a full hearing. A **temporary restraining order** (referred to below as a **TRO**) refers to a temporary order that can be issued quickly prior to a full hearing, in order to prevent imminent harm. The term **restraining order** is sometimes used to refer only to temporary restraining order, and sometimes as a collective term to refer to both temporary restraining orders and injunctions.

Wis. Stats. Ch. 813 creates special procedures for TROs and injunctions designed to prevent or reduce abuse, exploitation, neglect and harassment. These procedures are designed to be usable by someone who may not have an attorney, and to provide a fast and effective remedy designed to prevent harm and threats of harm. These procedures are started by a **petition**, instead of by the summons and complaint that would usually start a civil lawsuit. The person who asks for the TRO and/or injunction is called the **petitioner** and the person who may be subjected to the order is called the **respondent**. These procedures add special remedies. For example, if a person is found to be a likely abuser of another person, he or she may be ordered not only to stop the abuse, but also to stay away from the potential victim, and from the places to which the potential victim typically goes. These special procedures include:

- Actions for TROs and restraining orders related to **abuse, neglect, financial exploitation and harassment of an individual at risk**, or interference with investigations and services under the elder adults/adults-at-risk reporting and response systems and/or the protective services system. This action is covered in detail in *Section 2.-6, below*
- Actions for TROs and injunctions related to **domestic abuse**, which can include not only abuse by a household member, family member or person in a dating relationship, but also abuse by certain types of caregivers. *See Section 7, below*
- Actions for TROs and injunctions related to **harassment**. *See Section 8, below*

2. ***What types of behavior may provide grounds for a TRO to prevent abuse, neglect and exploitation of an individual at risk, or to facilitate investigation and other response to abuse, neglect or exploitation of individuals at risk?***

NOTE: The restraining order statute for individuals at risk⁴¹⁵ is designed to work in conjunction with the elder adults/adults-at-risk reporting and response systems discussed in Ch. II, and uses many of the same terms. *See Ch. II, Part C.* for the definitions of *elder adult at risk* and *adult at risk*. The term is much broader than the former term *vulnerable adult*, and includes people who have no mental impairment. *See Ch. II, Part D.* for the definitions of *abuse, neglect and financial exploitation*. These definitions are complex and very broad, and cover a wide range of conduct. For example, the definition of abuse covers a much broader range of conduct than is covered by the domestic abuse restraining order law, including, e.g., any form of sexual assault; harassment; intimidation; and other forms of emotional abuse.

The restraining order statute provides a separate set of remedies that can be used to prevent abuse, neglect and exploitation of individuals at risk, and to facilitate investigation and other responses to abuse, neglect or exploitation of individuals at risk. The petition must allege that the respondent (the person who will be subject to the TRO or injunction) has engaged in any of the following conduct with relation to an individual at risk:⁴¹⁶

- The respondent has interfered with or, based on his or her prior conduct, may interfere with, an investigation of a report of abuse, neglect, self-neglect or financial exploitation concerning the individual at risk under the elder adults/adults-at-risk reporting and response systems.
- The respondent has interfered with or, based on his or her prior conduct, may interfere, with any of the following: delivery of services to an elder adult at risk under the elder adults-at-risk statute; delivery of protective services to an individual at risk under Ch. 55; or provision of a protective placement for an individual at risk.
- The respondent engaged in, or threatened to engage in, abuse, neglect, financial exploitation, stalking, harassment of an individual at risk, and/or mistreatment of an animal. This provision adds three descriptions of conduct that are not used in the elder adults/adults-at-risk reporting and response statutes (although the behaviors are probably covered under those statutes as forms of physical or emotional abuse):
 - ***Stalking*** is a crime, and has the same definition under the restraining order statute as it does under the criminal statute.⁴¹⁷ Stalking is conduct that involves repeatedly going to places where the victim goes, contacting the victim, or his or her employer or coworkers, taking pictures of the victim or spying on the victim in other ways, sending things to the victim, and/or getting other people to do these things.
 - ***Harassment*** is conduct that can be the subject of a TRO or injunction if it is done to any individual, whether or not he or she is an individual at risk, and whether or not there is a relationship that would be the basis for a domestic abuse TRO or injunction. *See Section 8, below.*
 - ***Mistreatment of an animal*** includes cruel treatment of an animal that is owned by or in service to an individual at risk.

⁴¹⁵ Wis. Stat. § 813.123

⁴¹⁶ Wis. Stat. § 813.123(6)

⁴¹⁷ Wis. Stat. § 940.32

3. *What can be included in a court order granting an individual at risk TRO or injunction?*

A court may include any of the following in an individual at risk TRO or injunction:⁴¹⁸

- An order that the respondent stop engaging in, or threatening to engage in, abuse, neglect, financial exploitation, harassment, or stalking of an individual at risk, or in mistreatment of an animal belonging to or in service to an individual at risk.
- An order that the respondent avoid doing anything that interferes with an elder adults/adults-at-risk investigation, delivery of protective services under Ch. 55, with provision of a protective placement, or with the delivery of services under the elder adults/adults-at-risk reporting and response statutes.
- An order that the respondent stay away from the residence of the individual at risk or any other location temporarily occupied by the individual at risk, or both.
- An order that the respondent must not contact the individual at risk, and must not try to get any other person, other than an attorney involved in the case or a law enforcement officer, to contact the individual at risk.
- An order that the respondent do other things, as long as those things are not inconsistent with the remedies asked for in the petition.

NOTE: An individual at risk injunction cannot be used to order an individual at risk to stop engaging in self-neglect. The appropriate order in self-neglect cases is an order for protective services or placement under Ch. 55, or for commitment under Ch. 51.

4. *Who may bring a petition for an individual at risk TRO or injunction?*

Petitions can be brought by any of the following:⁴¹⁹

- The individual at risk. An individual at risk can file a petition even if he or she has a guardian.
- Any person on behalf of the individual at risk.
- An agency that is part of the county elder adults-at-risk system or adults-at-risk system.

If a person other than the individual at risk files the petition, he or she must serve a copy on the individual at risk. This presumably also includes notice on the person's guardian, if he or she has one, at least if the guardian is authorized to receive notices under the guardianship order.

Note that the range of people who can bring individuals-at-risk TRO and injunction petitions is much broader than the range of people who can bring domestic abuse and harassment petitions. *See Section 7. and 8, below.* This recognizes that individuals at risk may not be in a position to bring petitions, due to cognitive, mental or communication impairments, dependence on the abuser, and/or greater vulnerability to retribution. However, this means that a petition may be brought on behalf of a person who objects to the petition and, given the broad definitions of elder adults/adults-at-risk, may be fully competent to make a judgment about his or her best interests.

If a petition is brought by another person on behalf of an individual who has been found incompetent by a court, the matter can proceed even if the individual at risk, or his or her guardian, objects to the proceedings.⁴²⁰ Although not stated clearly, this implies that the matter

⁴¹⁸ Wis. Stat. § 813.123(4)(ar) and (5)(ar)

⁴¹⁹ Wis. Stat. § 813.123(2)(a)

⁴²⁰ Wis. Stat. § 813.123(2)(b)

cannot proceed over the objection of an individual at risk who has not been found incompetent by a court in a guardianship proceeding.

COMMENT: Individuals at risk have the same interest in keeping or regaining control over their own lives as other people who have experienced abuse. Where it can be done safely, the individual at risk should be consulted before a petition is filed on his or her behalf, and his or her opinion as to whether a petition should be filed should carry great weight, particularly where the individual at risk has capacity to make the decision, or retains sufficient capacity to understand the decision being made and to have an opinion. A petition filed for a competent person who then objects to the petition is likely to be dismissed, and may do more harm than good. On the other hand, a petition may sometimes be the only way to put the person in a position where he or she can express his or her wishes without fear of retaliation.

5. *What are the procedures for obtaining an individual-at-risk TRO or injunction?*

The petition is filed on a prescribed form,⁴²¹ and must state the behavior by the respondent that provides grounds for the TRO and/or injunction (*See Section 2, above*) and the things that the petitioner wants in the order (*See Section 3, above*). The court then holds a two- part procedure, one part for the TRO and one part for the injunction:

- **Procedure for TRO.**⁴²² The court may issue a TRO without a hearing, and before notice has been provided to the respondent,⁴²³ if the court finds reasonable grounds to believe that the respondent has engaged in behavior that provides grounds for the TRO. (The statute does not say whether a TRO can be issued before service has been made on the individual at risk, in cases where someone else brings the petition.) The TRO remains in effect until a hearing is held on the request for an injunction.
- **Procedure for injunction.**⁴²⁴ An injunction can only be issued if the respondent has received a notice of the time of the hearing, and a hearing has been held. The hearing on the injunction must be held within 7 days after the TRO is issued. This may be extended by another 7 days if the petitioner is unable to serve the TRO on the respondent, and may also be extended if the petitioner and respondent agree.

The court may order appointment of a **guardian ad litem** for the individual at risk if the court believes this is needed, or anyone asks.⁴²⁵ The court must appoint a guardian ad litem if someone other than the individual brings the petition.

COMMENT: Because of the broad definitions of elder adults/adults-at-risk, this means that a fully competent individual may find himself or herself with a guardian ad litem, because someone else has filed the petition for a restraining order, or has asked for a guardian ad litem. In that case, the individual's views as to his or her best interests should control, and the guardian ad litem's role should be limited. There is no provision for payment of the guardian ad litem, so it is likely that the cost will be charged to the individual at risk. In the absence of any other provision for payment, the general statute on guardians ad litem says that guardian ad litem fees are paid by the individual whose interests the guardian ad litem is appointed to represent.⁴²⁶

⁴²¹ CV-428, available at <http://www.wicourts.gov/forms/CV-428.DOC>. The form should also be available through the county clerk of courts.

⁴²² Wis. Stat. § 813.123(4)

⁴²³ Wis. Stat. § 813.123(4)(b)

⁴²⁴ Wis. Stat. § 813.123(5)

⁴²⁵ Wis. Stat. § 813.123(3)(b)

⁴²⁶ Wis.Stat. § 757.48(2)

6. *How are individual-at-risk TROs and injunctions served and enforced?*

Provisions for enforcement of the TRO or injunction include:⁴²⁷

- **Service by sheriff.** If a TRO or injunction is ordered by the court, and the petitioner requests, the court must order the sheriff to assist in serving the order on the respondent. If the order is a TRO, the sheriff should be able to serve notice of the petition and the time for the hearing on the injunction at the same time as the TRO is served.
- **Availability of information to local law enforcement.** No later than the next business day after a TRO or injunction is issued, extended, modified, or terminated, the clerk of court must send a copy of the order to the sheriff and to any other local law enforcement agency that is responsible for acting as a central repository for orders. No later than 24 hours after this is done, the information must be entered into a computerized database, and information on the existence and status of the order must be made available to other law enforcement agencies.
- **Mandatory arrest.** A law enforcement officer who is presented with a copy of the order, and confirms that it exists, must arrest the respondent and take him or her into custody if he or she has probably cause to believe that the respondent has violated the order.

Violation of an order is punishable by a fine of up to \$1000, and imprisonment for up to 9 months.

7. *What are domestic abuse TROs and injunctions, and why might they be used instead of individual-at-risk TROs and injunctions?*

Domestic abuse TROs and injunctions⁴²⁸ are used to restrain or enjoin abusive behavior by any of the following:

- An **adult family member** or adult household member against another adult family member or adult household member.
- An **adult caregiver** against an adult who is under the caregiver's care. **NOTE:** The definition of *caregiver* is limited to a provider of in-home or community care through regular and direct contact.
- An adult against his or her **adult former spouse**.
- An adult against an adult with whom the individual has or had a **dating relationship**.
- An adult against an adult with whom the person has a **child in common**.

Because of the broad definitions of abuse, neglect and exploitation, an individual at risk restraining order can extend to a much wider range of abusive behavior than can be reached under a domestic abuse restraining order. A major difference in procedure is that only the person who is alleged to be abused, or his or her guardian, may bring the petition for a domestic abuse restraining order.

Despite the broader reach of an individual at risk order, an individual at risk might prefer to use the procedure for a domestic abuse restraining order for the following reasons:

- The individual may **prefer not to identify himself or herself as an individual at risk**, and may prefer to use the procedure used by other people in domestic relationships. The

⁴²⁷ Wis. Stat. § 813.123(8) and (9)

⁴²⁸ Wis. Stat. § 813.12

domestic abuse procedures are also likely to be more familiar to the courts and to organizations that advocate against domestic violence.

- A domestic abuse injunction results in **restrictions on firearm possession**, which are not explicitly provided for under an individual at risk injunction.
- If the petitioner lives in a home owned by the respondent, a domestic abuse restraining order can provide for a temporary period when the respondent must stay away from the home, to give the petitioner time to find another residence.⁴²⁹
- The definition of domestic abuse includes **intentional damage to property**, which may not be covered under the definition of abuse or financial exploitation (although it may be a form of emotional abuse).

8. *What are harassment restraining orders, and why might they be used instead of individual-at-risk TROs and injunctions?*

A harassment TRO or injunction enjoins any person from engaging in harassment of any other person.⁴³⁰ There is no requirement that the victim be an individual at risk, or that there be any relationship between the respondent and the petitioner. The petitioner must be the person against whom the harassment is directed. Harassment includes: striking, shoving, kicking or otherwise having physical contact with the other person; sexually assaulting the other person; stalking the person; attempting or threatening to do any of these things; or otherwise engaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and serve no legitimate purpose.

Any behavior that meets the definition of harassment also meets the definition of conduct that can be restrained or enjoined under an individual-at-risk restraining order or injunction, if directed at an individual at risk. An individual at risk might choose to use the procedure for a harassment TRO and injunction because he or she prefers not to identify himself or herself as an individual at risk, and/or because the court can impose **restrictions on possession of firearms** if it is shown that the respondent may use a firearm to cause physical harm to another person or to endanger public safety.

B. CRIMINAL LAWS PROHIBITING ABUSE, NEGLECT AND EXPLOITATION OF ADULTS AT RISK

1. *How should an agency in the elder adults/adults-at-risk/APS systems decide whether to make a referral to law enforcement for investigation or prosecution?*

Often, actions which constitute abuse, neglect or financial exploitation will also violate criminal laws against assault, battery, theft, etc. In those cases, it will be necessary to make a decision about whether to involve law enforcement agencies and the special investigative expertise they may bring, and about whether to seek criminal penalties against the alleged abuser, either as a way of deterring further abuse, or as a way of removing him or her from the community. Elder adults/adults-at-risk agencies are required to have local policies on referrals of reports of abuse to law enforcement agencies. Issues to consider in whether to make a referral to law enforcement are discussed in *Ch. II, Part F.5*.

It is useful for human service and law enforcement agencies to meet regularly and share information and resources. Law enforcement agencies can provide insight into investigation methods and the gathering and preservation of evidence in ways that will make prosecution more

⁴²⁹ Wis. Stat. § 813.12(4)(am)

⁴³⁰ Wis. Stat. § 813.125(1)

effective. Human service agencies can provide law enforcement agencies with information about the nature and effect of disabilities and aging, effective means of communicating with people with disabilities, sources of expert evaluation and help in facilitating interviews. While there are very real barriers to criminal prosecution, inaccurate stereotypes and lack of experience with people with disabilities and elderly people can also play a part in unwillingness of law enforcement agencies to pursue abuse cases. Cooperative planning is also needed to coordinate shared responsibilities for emergency placement and services.

2. *What criminal laws are particularly aimed at prevention of abuse, neglect or financial exploitation of individuals at risk?*

While almost any crime may have an individual at risk as the victim, there are some laws which are particularly aimed at prevention of abuse, neglect or exploitation of individuals at risk, or have specific provisions based on the status of the victim as an individual at risk or as a person with a particular type of impairment. These include”

- **Abuse of an individual at risk.**⁴³¹ It is a crime to intentionally, recklessly or negligently subject an individual at risk to abuse. (The statute does not apply to operators or staff of facilities covered by Wis. Stat. § 940.29, discussed below) *See Ch. II, Part D.2.* for the definition of *abuse*. The effect of this is to make any act of abuse into a crime, and, to potentially add another charge where the victim of an act that is a crime under other laws is an individual at risk. The statute does not include neglect, although neglect could also be abuse, e.g., if it is the reckless infliction of bodily harm, or is intended to intimidate or humiliate the individual at risk.

COMMENT: This statute is unusual in appearing to extend criminal liability to negligent acts. However, the definitions of the various forms of abuse in § 46.90(a) appear to include only behavior that is intentional, reckless or knowing, so it is not clear how abuse can be perpetrated “negligently.”

- **Abuse or neglect of a patient or resident.**⁴³² It is a crime for any person in charge of or employed in certain facilities and programs to intentionally, recklessly or negligently abuse a resident or patient of the facility or program, or to neglect a resident or patient. Covered facilities and programs are: adult day care centers; adult family homes; community-based residential facilities; home health agencies; hospices; inpatient health care facilities (such as hospitals and nursing homes); community mental health, developmental disabilities and substance abuse programs; state schools; state treatment facilities; other treatment facilities; and any other public or private health facility or care-related facility or home. *See Ch. II, Part D.2. and 3.* for the definitions of *abuse* and *neglect*. *Negligence* has a separate definition in the statute, but see the comment above this bullet for the issue of whether “abuse” can be performed “negligently.” The alleged victim need not be an individual at risk, but most adult patients and residents subject to abuse or neglect will meet the definitions of elder adults at risk or adults at risk.
- **Sexual assault.** Any sexual assault is criminal, regardless of who the victim is.⁴³³ However, the sexual assault statute contains provisions that make sexual contact criminal if the person

⁴³¹ Wis. Stat. § 940.285

⁴³² Wis. Stat. § 940.295

⁴³³ Wis. Stats. § 940.225. For more information on preventing and responding to sexual assault of individuals at risk, see publications of the Wisconsin Coalition Against Sexual Assault, including *Widening the Circle: Sexual Assault/Abuse and People with Disabilities and the Elderly*; *Sexual Assault Legal Advocacy Manual*; *Creating a Balance: Promoting Healthy Relationships and Preventing Sexual Assault of People with Cognitive Disabilities*; and *Sexual Assault and Sexuality Issues for People with*

subject to the contact fits certain categories. People who fit these categories are likely to also be individuals at risk. The provisions include:

- It is sexual assault to have sexual contact with another person, if the victim has a **mental illness or cognitive disability which causes the victim to be “incapable of appraising” his or her conduct**, if the perpetrator knows about the victim’s mental condition.⁴³⁴ Under this provision, the prosecution does not have to show lack of consent. Sexual contact is criminal because of the victim’s mental status, even if the victim gives an apparent agreement to the sexual contact. A consent given prior to the time the victim became mentally disabled or unconscious does not change the result: the person must be capable of consenting at the time of the sexual contact.

COMMENT: It is not automatically criminal to have sexual contact with any person who has a mental disability. Many people with mental disabilities are able to give valid consent to sexual contact or sexual intercourse. The phrase *incapable of appraising conduct* is not defined in the statute. The meaning given to the phrase by the courts is discussed in *Ch. III, Part H.1.*

- It is criminal sexual assault for an **employee of certain residential facilities to have sexual contact with a person who is a patient or resident of the facility**.⁴³⁵ The contact is criminal, even if the resident is capable of consenting and does consent. The assumption that underlies the law is that the potential for abuse and misuse of power in these situations is so great that all sexual contact should be prohibited.
- It is a crime for a person who is or pretends to be a **psychotherapist to intentionally have sexual contact with a client**.⁴³⁶ The law applies to physicians, psychologists, social workers, counselors, nurses, members of the clergy or other people who perform or claim to perform psychotherapy. The contact is criminal, even if the resident is capable of consenting and does consent.

The **penalty for theft**⁴³⁷ is greater, if the theft is from an elder adult at risk or adult at risk, or from individuals protected from abuse as patient or residents of facilities and programs (See above).

Alzheimer's Disease or Related Dementias

⁴³⁴ Wis. Stat. § 940.225(2)(c)

⁴³⁵ Wis. Stat. § 940.225(2)(g)

⁴³⁶ Wis. Stat. § 940.22

⁴³⁷ Wis. Stat. § 943.20(3)(d)6.

GLOSSARY

Abuse has more than one definition as it relates to abuse of adults who may be individuals at risk:

- **Abuse, physical abuse, emotional abuse and sexual abuse** are defined in Wis. Stat. § 46.90(1) for purposes of the elder-adult-/adult-at-risk reporting and response systems, the protective services system, individuals-at-risk restraining orders, the criminal statute on abuse of individuals at risk and the criminal statute on neglect in facilities. These definitions are discussed in *Ch. II, Part D.2*.
- **Abuse is defined in HFS 13.03(1)(a)1.** for purposes of the caregiver misconduct reporting laws. The definition for the most part includes the same behavior as the definition under the elder-adult-/adult-at-risk laws, and is referred to in *Ch. II, Part I.1*. One difference are that abuse under the caregiver misconduct laws includes an act that substantially disregards a client's rights under ch. 50 or 51, Stats., or a caregiver's duties and obligations to a client.

Abuse, neglect and exploitation. This phrase is used in the manual to refer to *abuse, neglect, self-neglect* and *financial exploitation*, and is intended to be inclusive of behavior included under those terms.

Adult at risk is defined in Wis. Stat. § 55.01(1)(1e) for purposes of the adult-at-risk reporting and response system, the protective services system, individuals-at-risk restraining orders, and the criminal statute on abuse of individuals at risk. The definition is discussed in *Ch. II, Part C.2*.

Adult family homes for 3-4 persons are defined in § 50.01, and are either certified under Wis. Admin. Code Ch. HFS 84 or licensed under Wis. Admin. Code Ch. HFS 88. The term is also used for 1-2 person homes certified by counties to receive long-term support funding.

Adult protective services (APS) agency and adult protective services (APS) system. These terms are used in this manual to refer to the agency or agencies to which the county has assigned responsibility under Wis. Stat. § 55.02 for planning and carrying out the county's protective services responsibility. *See Ch. I, Part A.2. and Ch. IV, Part B.1*. This is not a statutory term, but is equivalent to the term *county department* in Ch. 55.

Caregiver. This word has three quite different meanings, as it relates to abuse and neglect of adults who may be individuals at risk:

- For purposes of the meaning of *neglect* in the elder-adult-/adult-at-risk reporting and response systems, the protective services system, individuals-at-risk restraining orders, and the criminal statute on neglect in facilities, it refers to a person who has taken on some part of the care of an individual, voluntarily or otherwise. Wis. Stat. § 46.90(1)(an)
- For purposes of the caregiver abuse registry, it is defined in Wis. Admin. Code § HFS 13.03(3) to mean (with some exceptions) any person who (1) has either received regulatory approval from an agency or is employed by or under contract with an *entity*; (2) has access to the entity's clients; and (3) is under the entity's control. *See Ch. II, Part I.1*.
- For purposes of a caretaker subject to an injunction under the domestic abuse statute "Caregiver" means an individual who is a provider of in-home or community care to an individual through regular and direct contact. Wis. Stat. § 813.12(1)(ad). *See Ch. VII, Part B.7*.

Community-based residential facility (CBRF) is defined in § 50.01. Rules for licensing are in Wis. Admin. Code Ch. HFS 83.

County Department. The phrase *county department* in Ch. 55 refers to the agency in the county designated under § 55.02 to have responsibility for planning and provision of the protective services system. *See Ch. I, Part A.2. and Ch. IV, Part B.1*. Because this may not be a single agency, this manual uses the term "adult protective services (APS)" system rather than "county department."

Department of Health and Family Services (DHFS). The Wisconsin Department of Health and Family Services is the agency responsible for state-level administration of the elder-adult-/adult-at-risk and protective services systems. These are described in *Ch. II, Part B.2. and Ch. IV, Part B.3.* The general authority and responsibilities of DHFS are set out in Wis. Stat. §§ 46.14-46.02. When the word department is used in Wis. Stats. Ch. 46, 51, 54, and 55, it refers to DHFS. Wis. Stats. 46.011(1).

Entity is defined in Wis. Stat. § 146.40(1)(as) for purposes of the caregiver misconduct reporting system as having the meaning given in Wis. Stat. § 50.065 (1) (c). This meaning is discussed in *Ch. II, Part I.1.*

Financial institution, for purpose of access to records as part of an investigation by an elder-adult-/adult-at-risk system, has the definition given in Wis. Stat. § 705.01(3).

Developmental disability and developmentally disabled person. The term *developmentally disabled person* is defined for purposes of guardianship and protective services/placement in §§ 54.01(8) and 55.01(2). The term *developmental disability*, with a somewhat different meaning, is defined in § 51.01(5). The definitions are discussed in *Ch. IV, Part C.2.*

Elder adult at risk is defined in Wis. Stat. § 46.90(1)(br) for purposes of the elder-adult-at-risk reporting and response system, the protective services system, individuals-at-risk restraining orders, and the criminal statute on abuse of individuals at risk. The definition is discussed in *Ch. II, Part C.1.*

Emergency protective placement. See *Ch. V, Part C.5.*

Financial exploitation is defined in Wis. Stat. § 46.90(1) for purposes of the elder-adult-/adult-at-risk reporting and response systems, the protective services system, individuals-at-risk restraining orders, the criminal statute on abuse of individuals at risk and the criminal statute on neglect in facilities. These definitions are discussed in *Ch. II, Part D.5.*

Financial institution, for purposes of access to records as *Part* of investigation by an elder-adult-/adult-at-risk system (discussed in *Ch. II, Part E.9. and F.4.*), has the meaning given in Wis. Stat. § 705.01(3), and means “any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan associations and credit unions.”

Health care provider is defined for purposes of confidentiality of health care records in Wis. Stats. §146.81(1). It is defined for purposes of a power of attorney for health care in Wis. Stat. § 155.01(7).

Home and community-based service waiver

Individual at risk is used in the manual to mean a person who is either an elder adult at risk or an adult at risk. It does not include an individual under age 18.

Interested person has very different meanings in Ch. 54 and Ch. 55, and is used for quite different purposes. (In Ch. 54 it primarily defines a class of persons entitled to notice. In Ch. 55, it primarily defines persons who can request services and initiate court reviews. The phrase is defined for purposes of Ch. 54 in Wis. Stat. § 54.01(17). The Ch. 54 definition is discussed in *Ch. VI, Part E.1.* The phrase is defined for purposes of Ch. 55 in Wis. Stat. § 55.01(4). The Ch. 55 definition is discussed in a note at the beginning of *Ch. VI, Part I.*

Intermediate care facility for the mentally retarded (ICF-MR) is a nursing home that is licensed as a facility for the developmentally disabled under Wis. Admin. Code Ch. HFS 134 and certified under the Medical Assistance Program to receive funding as an ICF-MR.

Mental illness is defined by statute in 51.01(13) and 55.01(4m). The definitions are not the same (Ch. 55 includes a need for custody as part of its definition. Ch. 51 has a separate definition for mental illness that is a basis for commitment.) There is no definition of *mental illness* in Ch. 54. The Ch. 55 definition is discussed in *Ch. IV, Part C.4.*

Neglect has more than one definition as it relates to abuse of adults who may be individuals at risk.

- **Neglect and self-neglect** are defined in Wis. Stat. § 46.90(1) for purposes of the elder-adult-/adult-at-risk reporting and response systems, the protective services system, individuals-at-risk restraining orders, the criminal statute on abuse of individuals at risk and the criminal statute on neglect in facilities. These definitions are discussed in *Ch. II, Part D.3 and 4*.
- **Neglect** is defined for purposes of the caregiver misconduct reporting and registry system under Wis. Admin. Code § HFS 13.03(14), and this definition is referred to in *Ch. II, Part I.1*. The meaning is quite different from the meaning of the term in the elder-adult-/adult-at-risk reporting and response systems, as it requires that an act or omission be intentional, and also in that it overlaps greatly with the definition of *abuse*.

Nursing facility is defined for purposes of preadmission screening in Wis. Stat. § 49.45(6c) as a nursing home that is not an intermediate care facility for the mentally retarded (ICF-MR).

Nursing home is defined in Wis. Stat. § 50.01(3), and includes both a nursing facility and a facility for the developmentally disabled (FDD). Nursing homes that are not FDDs are licensed under Wis. Admin. Code Ch. HFS 132. FDDs are licensed under Wis. Admin. Code Ch. HFS 134.

Other like incapacities are defined by statute in §§ 54.01(22) and 55.01(5). The definition is discussed in *Ch. IV, Part C.5*.

Patient health care records is defined for purposes of confidentiality of health care records in Wis. Stats. § 146.81(4)

Residential care apartment complex (RCAC) is defined in Wis. Stat. § 50.01. Rules for licensing are in Wis. Admin. Code Ch. HFS 89.

Serious and persistent mental illness is defined in Wis. Stats. §§ 51.01(14t) and 54.01(30). The definition is discussed in *Ch. IV, Part C.4*. There is no definition in Ch. 55. See entry for *mental illness*.

Temporary protective placement. See *Ch. V, Part C.5*.

Treatment is defined in Wis. Stats. § 51.01(17) to mean “those psychological, educational, social, chemical, medical or somatic techniques designed to bring about rehabilitation of a mentally ill, alcoholic, drug dependent or developmentally disabled person.” This meaning, and its importance in Ch. 55, is discussed in *Ch. IV, Part E. and Ch. V, Part D.1*. This meaning does not apply to treatment for other health care needs.

Treatment facility is defined in Wis. Stats. § 51.01(19) to mean “any publicly or privately operated facility or unit thereof providing treatment of alcoholic, drug dependent, mentally ill or developmentally disabled persons, including but not limited to inpatient and outpatient treatment programs, community support programs and rehabilitation programs.” See above for meaning of *treatment*. This definition and its importance in Ch. 55 is discussed in *Ch. IV, Part D.1*.

Treatment records is defined for purposes of confidentiality of records in Wis. Stat. § 51.30(1)(b),

Voluntary is defined in Wis. Stat. §§ 46.90(5m)(c) and 55.05(2) to mean “according to an individual's free choice, if the person has capacity to make the choice, or by choice of a guardian, if the person has a guardian appointed on the basis of a finding of incompetence, and the guardian has authority over service decisions.

CHAPTER 55: APPLICATION OF WISCONSIN ADULT PROTECTIVE SERVICES LAW AND ADULTS-AT-RISK RELATED STATUTES

This manual is a re-write of the Chapter 55 manual developed in 1994 and reflects changes due to the new legislation affecting adult protective services, guardianship and adult abuse reporting. The manual is not intended as legal advice or a guide for attorneys in court proceedings. It is, instead, intended to assist workers in the elder adults/adults-at-risk and adult protective services systems and other professionals working in these systems.

Authored by Roy Froemming for the Department of Health and Family Services.

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