**DRAFTER'S NOTE**
**FROM THE**
**LEGISLATIVE REFERENCE BUREAU**

LRB−0026/P1dn
DAK:cjs:rs

December 6, 2004

To Laura Rose and Mary Matthias:

1. Please note that I interspersed ****NOTES throughout the text of the draft, to explain my treatment of a statute or to raise issues that need clarification. Please also note that I added and amended numerous statutes to account for the changed term "serious and persistent mental illness" and the renumbering of s. 51.01 (3g) to s. 51.01 (14t); to account for the changed term "degenerative brain disorder," the repeal of s. 55.01 (3), and the creation of s. 55.01 (1v); and to account for cross−reference changes for renumbered statutes.

2. I eliminated s. 55.02 (1) (b) 2., as proposed; it's unnecessary, because ch. 227 independently grants agencies these powers, and DHFS, thus, has authority to promulgate these rules.

3. In the proposal, s. 55.06, stats., is both repealed and recreated and partially renumbered. Because the section as a whole may be treated only once, please note that I changed the repeal and recreation to a renumber and amend. Sections 55.06 (1) (intro.) to (10) (a) 1., stats., are not specifically treated in the proposal; many of these provisions are reproduced under newly−created other sections. In order to make the statutory treatment of these provisions clear, our drafting policy is to amend them (or, if unused elsewhere, repeal them) and renumber them to the numbers that the proposal indicates. That unfortunately makes the draft hard to read (a major problem with chapter rewrites such as this one), but it retains the legislative history for the printed statutes, allows people to "track" what has happened, and makes amended provisions less vulnerable to partial veto.

4. In the proposal, s. 55.07, stats., is both renumbered s. 55.23 and repealed and recreated. Because the section may be treated only once, please note that I changed the repeal and recreation to a creation of s. 55.075.

5. Throughout the draft I replaced the phrase "county department or an agency designated by it" with "county department or an agency with which it contracts under s. 55.02 (2)," to conform to the actual language of s. 55.02, as affected by the bill. I also struck the term "designated under s. 55.02" in instances in which it modifies "county department;" it is unnecessary because of the way "county department" is defined under s. 55.01 (1r), stats. The term "county protective services agency," as defined in s. 55.01 (1t), stats., is the same as "county department," as defined in s. 55.01 (1r), stats.; the use of two terms to mean the same entity is confusing.

6. Also, throughout the draft I replaced "person" with "individual" when referring to the subject of a protective placement or recipient of protective services, in order to differentiate from other individuals and entities and phrases such as "guardian of the person." This raises another point, however; would it be helpful to define "guardian" for purposes of ch. 55 as "guardian of the person of an individual who has been determined incompetent under ch. 880"? A guardian of the estate does not have the powers accorded a "guardian" under ch. 55.

7. In the proposal, s. 880.33 (4m) and (4r) and 880.34 (6), stats., are repealed, and the definition of "not competent to refuse psychotropic medication" in s. 880.01 (7m) is amended and renumbered to s. 55.14 (1) (b). These provisions relate to appointment of a guardian to consent to or refuse psychotropic medication for an individual and court authorization for a guardian to consent to forcible administration of psychotropic medication. The proposal creates ss. 55.14 and 55.19, under which involuntary administration of psychotropic medication may be ordered and annually reviewed. However, the proposal does not address s. 880.33 (1), (2) (a) 1. and 2., (d), and (e), stats., which contain procedures for review of petitions alleging incompetence to refuse psychotropic medication. In addition, the proposal does not address s. 51.20 (7) (d) 1. (intro.), stats., which provides for court–ordered psychotropic medication. Please review these and determine how you want the provisions in ch. 55 and these provisions to intermesh.

8. Several different problems exist with respect to s. 55.075 (5):

a. There is no definition of "county of residence;" therefore, the exception to that term in s. 55.075 (5) (a) (renumbered and amended from s. 55.06 (3) (c), stats.) is unclear. Sections 49.001 (6) and (8), stats., define "residence" and "voluntary," respectively, and these definitions are used as the underpinning for the definitions of "residence," "legal residency," and "county of residence" in s. 51.01 (14), stats., and for provisions concerning determination of residence and determination of county of responsibility under s. 51.40 (2), stats. Ch. 55, stats., and this draft have no corresponding definitions.

b. In the draft, s. 55.075 (5) (b) appears to require a court to refer an issue of venue to DHFS for determination under s. 51.40 (2) (g), stats. But DHFS does not determine venue under that statute; it determines the county of responsibility, based on the county of residence, as specified in s. 51.40 (2) (intro.), stats.

c. The draft, in s. 55.075 (5) (b), states that a court in which a subsequent petition is filed shall, upon being satisfied of an earlier filing in another court, summarily dismiss the petition; which petition is the court dismissing, the first or the subsequent one? Also, what standard is the court using to make the determination of venue?

d. Section 51.40 (2) (intro.), stats., provides for the determination of responsibility for funding for the provision of services under chs. 46, 51, and 55 *only* for individuals aged 18 or older with developmental disability or chronic mental illness in state facilities or nursing homes. Does this cover all individuals for whom a petition of protective placement might be brought under s. 55.075 (1) (a) and filed under s. 55.075 (5) (a) for whom a dispute may arise about "county of responsibility"?

To address these problems, I have done the following:

a. Changed the title of s. 55.075 (5), because s. 55.075 (5) (a) is not just about venue, as such.

b. Defined, for ch. 55, "residence" in s. 55.01 (6t) to have the meaning under s. 49.001 (6), stats., and "voluntary" in s. 55.01 (6y) to have the meaning under s. 49.001 (8), stats.; these definitions are very slightly changed from those in ch. 49. The meaning of "county of residence" should "flow" from these definitions.

c. Clarified, in s. 55.075 (5) (b), that a court in which a subsequent petition is filed shall, upon being satisfied of an earlier filing in another court, summarily dismiss the *subsequent* petition.

d. Clarified, in s. 55.075 (5) (b), that if an objection to the court's finding of venue is made, the court shall refer the issue for a determination of county of responsibility under s. 51.40 (2) (g), stats., and that determination of county of responsibility shall be accepted by the court and the objecting county or party as a determination of venue.

e. In order to avoid a determination of venue from "ping–ponging" back and forth between counties, clarified in s. 55.075 (5) (b), that the court in which the petition is *first* filed shall determine venue.

f. Amended s. 51.40 (2) (g) 1., stats., to permit consideration by DHFS of an issue of county of responsibility referred to it by a court under s. 55.075 (5) (b). This, of course, does not resolve the problem with s. 51.40 (2) (intro.) that I noted above.

Please review all of this. There is a remaining problem; the definition of "residence" states that physical presence is prima facie evidence of intent to remain; this seems to be make the amendment to s. 55.075 (5) (a) unnecessary.

9. Please note that bill section numbers, as referred to in the Legislative Council notes, may now be inaccurate.

10. Because "protectively place" is not defined and "protective placement" is, I have changed the term "protectively place" to "provide protective placement" throughout. This term also parallels the term "provide protective services," which is currently frequently used.

11. There is no provision that addresses annual review of protective services orders, other than orders for psychotropic medication; is this your intent?

12. Please note that in several provisions in the draft which reference requirements under s. 55.12 (3), (4), and (5), I have removed language that requires a protective placement or protective services to be consistent with the individual's needs, that is because the language is redundant to s. 55.12 (3) and (4), which require that the individual's needs be considered.

13. "Treatment facility" is defined under s. 55.01 (6x) I cannot find where it is used in the draft.

Please don't hesitate to call with questions; if you need for me to meet with you on this complex draft, I'll be happy to.

Debora A. Kennedy
Managing Attorney
Phone: (608) 266–0137
E–mail: debora.kennedy@legis.state.wi.us