



## WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

**2005 Wisconsin Act 264**  
[2005 Assembly Bill 785]

**Protective Placement and Services**

2005 Wisconsin Act 264 recodifies and makes numerous substantive changes to ch. 55 of the statutes, which governs protective placement and protective services for persons with disabilities. The Act also makes changes to provisions elsewhere in the statutes relating to guardianship and services for disabled persons.

The provision of 2005 Wisconsin Act 264 are as follows:

### ***Voluntary Admission of an Incompetent Person to an Inpatient Treatment Facility***

Prior to the effective date of the Act, an evaluation that a person is mentally ill, developmentally disabled, alcoholic, or drug dependent and has the potential to benefit from inpatient care, treatment, or therapy is a criterion for voluntary admission to an inpatient treatment facility. An adult who desires admission to an inpatient treatment facility and whose admission is made through the Department of Health and Family Services (DHFS) or through a county department of community programs or developmental disabilities services may be admitted after applying, if the treatment director of the facility (or, if appropriate, the director of a center for the developmentally disabled) and the county department approve. An adult who desires admission to a state inpatient treatment facility may be admitted with the approval of the treatment facility director and the director of the appropriate county department. If the admission is approved in either of these ways, an adult may also be admitted to an inpatient treatment facility if he or she applies in writing or if the facility physician advises the person of certain rights, responsibilities, benefits, and risks of admission. If an admitted person does not sign a voluntary admission application within 7 days after admission, a hearing is held to determine whether the patient must remain as a voluntary patient.

Prior to the effective date of the Act, an adult for whom a guardian of the person has been appointed after an adjudication of incompetence may be voluntarily admitted to an inpatient treatment facility only if the guardian and the ward consent.

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This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.state.wi.us/>.

The Act authorizes the voluntary admission to an inpatient treatment facility of an adult who has been adjudicated incompetent if his or her guardian consents to the admission and if the procedures requiring an explanation by a physician of the rights, responsibilities, risks, and benefits of admission and requiring a hearing after 7 days are followed. Further, the Act authorizes voluntary admission of any adult under the procedures described above without also requiring admission through DHFS or a county department or approval of the county department or the treatment facility director if the adult has an identified funding source.

**Involuntary Transfer of a Protectively Placed Individual to an Acute Psychiatric Treatment Facility**

Under mental health laws, an individual who meets one of a number of standards may be detained on an emergency basis and transported for detention of up to 72 hours in a detention facility, an approved public treatment facility, a center for the developmentally disabled, a state treatment facility, or an approved private treatment facility.

If a petition is brought before a court, an individual who is found to meet one of several standards may be involuntarily committed for up to 6 months and may be subject to subsequent successive orders of commitment of up to one year each. For the involuntary commitment, a detained individual may automatically be appointed an attorney; receives notice of hearings and a copy of the petition and detention order; receives a written statement of his or her right to an attorney, and, if requested more than 48 hours prior to the final hearing, a jury trial; receives written notice of the standard under which he or she may be committed; and receives written notice of the right to a probable cause hearing within 72 hours after arrival at the detaining facility. An individual who is not detained receives written service of the documents and an oral explanation of his or her rights.

Involuntary commitment may not be made unless the court finds, after a hearing, that there is clear and convincing evidence that the individual is mentally ill, a proper subject for treatment, and dangerous. Procedures under the hearing must include the right to an open hearing, the right to request a closed hearing, the right to counsel, the right to present and cross-examine witnesses, and the right to remain silent.

By contrast, under the protective placement law, prior to the effective date of the Act, an individual who has been adjudicated incompetent and has been protectively placed may be involuntarily transferred for up to 10 days, by his or her guardian or by court order, to a facility that provides acute psychiatric treatment for the purpose of psychiatric diagnostic procedures under s. 55.06 (9) (d) or may be temporarily transferred for up to 15 days to such a facility for emergency acute psychiatric inpatient treatment under s. 55.06 (9) (e). If the individual's guardian is not notified in advance of this transfer, the facility must provide written notice to the guardian immediately upon transfer and to the court, a county department, or a designated agency within 48 hours. If the guardian, ward, ward's attorney, or another interested person files a petition objecting to this emergency transfer, the court must order a hearing within 96 hours after the filing. The court must notify the ward, guardian, and petitioner of the time and place of the hearing, and a guardian ad litem must be appointed to represent the ward; the petitioner, ward, and guardian have the right to attend and to present and cross-examine witnesses. For both the involuntary and the temporary transfers, any hearing held must consider, among other factors, the best interests of the individual.

Under *State ex rel. Watts v. Combined Community Services*, 122 Wis. 2d 65 (1985), the court found that no rational basis existed for the difference between procedural protections that are afforded to persons who are involuntarily committed for mental health treatment under the mental health laws and the lack of any procedural protections (other than those that are self-requested) for involuntary transfers

for psychiatric diagnostic procedures or acute psychiatric inpatient treatment under the protective placement laws. The court held that the constitutional guarantee of equal protection requires that the procedural requirements for emergency detention and involuntary commitment under the mental health laws must be provided to a protectively placed individual for involuntary transfer of that individual to a mental health facility for treatment.

This Act amends ch. 55 to comply with the court's ruling in *Watts*. The Act eliminates provisions in ch. 55 concerning transfer or temporary transfer of an individual who is protectively placed to a facility providing acute psychiatric treatment and specifies that procedures currently applied to such a transfer are inapplicable. Instead, the Act authorizes applying the mental health laws concerning emergency detention and involuntary commitment to protectively placed persons in appropriate cases. The Act prohibits the involuntary transfer of protectively placed persons to a mental health treatment facility unless standards and procedures under the mental health laws concerning emergency detention or involuntary commitment are applied.

### **Definition and Terminology Changes**

Prior to the effective date of the Act, s. 55.01 (3), defines "infirmities of aging" as "organic brain damage caused by advanced age or other physical degeneration in connection therewith to the extent that the person so afflicted is substantially impaired in his or her ability to adequately provide for his or her care or custody". The Act replaces the definition of "infirmities of aging" with a definition of "degenerative brain disorder". This definition is considered to be a more accurate reference to types of organic brain disorders, such as Alzheimer's disease and Parkinson's disease, which are not necessarily caused by the aging process.

The Act creates definitions of "protective services" and "protective placement". The Act defines "protective services" as any of the following:

1. Outreach.
2. Identification of individuals in need of services.
3. Counseling and referral for services.
4. Coordination of services for individuals.
5. Tracking and follow-up.
6. Social services.
7. Case management.
8. Legal counseling or referral.
9. Guardianship referral.
10. Diagnostic evaluation.
11. Any services that, when provided to an individual with developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacity, keep the

individual safe from abuse, neglect or misappropriation of property or prevent the individual from experiencing deterioration or from inflicting harm on himself or herself or another person.

The Act defines “protective placement” as a placement that is made to provide for the care and custody of an individual.

Certain persons with chronic mental illness may be eligible for protective placement or services under ch. 55. The term “chronic mental illness” is defined in s. 51.01 (3g) as a mental illness which is severe in degree and persistent in duration, which 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, which may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support and which may be of lifelong duration. “Chronic mental illness” includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include infirmities of aging or a primary diagnosis of mental retardation or of alcohol or drug dependence. Prior to the effective date of the Act, the term is not defined in ch. 55, although it is used in that chapter.

This Act changes the term “chronic mental illness” in ch. 51 to “serious and persistent mental illness” to reflect updated terminology. It also creates a definition of that term in ch. 55 by cross-referencing the definition in s. 51.01 (3g).

Prior to the effective date of the Act, s. 55.001, the declaration of policy in ch. 55, refers to persons with “infirmities of aging, chronic mental illness, mental retardation, other developmental disabilities, or like incapacities incurred at any age” who are in need of protective services.

This Act revises some of the terminology in s. 55.001 by doing the following:

1. Deleting the term “infirmities of aging” and replacing it with the newly created term “degenerative brain disorders”.
2. Deleting the outdated term “mental retardation”. Persons who have cognitive disabilities are encompassed in the term “developmental disabilities”.
3. Inserting references to protective placement, in addition to the current references to protective services.
4. Deleting the term “chronic mental illness” and replacing it with “serious and persistent mental illness”.

#### **DHFS and County Responsibilities in Ch. 55 System**

Prior to the effective date of the Act, s. 55.02, Stats., requires the DHFS to establish a statewide system of protective services, in accordance with rules promulgated by the department. This statutory section refers to the department cooperating with the various types of county departments to develop a coordinated system of services.

Prior to the effective date of the Act, s. 55.04, Stats., also requires the DHFS to administer specifically enumerated protective services, as well as evaluate, monitor, and provide protective placements.

This Act repeals and recreates s. 55.02 and repeals most of s. 55.04. The newly created s. 55.02 revises and combines the 2 statutes, ss. 55.02 and 55.04, to more accurately portray the department's role in cooperating with county departments in operating the protective services and placement system and the department's role in monitoring and supervising the system. This new section also more accurately portrays the county departments' primary role in providing protective services and protective placement in Wisconsin. The Act also repeals the specific listing of types of protective services and creates a new definition of "protective services".

### **Admissions Without Court Involvement**

The law prior to the effective date of the Act provides for admissions of persons who are under guardianship to certain facilities without court involvement under certain circumstances. One type of admission without court involvement that is currently permitted is the admission of a person to a nursing home, if the person is admitted directly from a hospital inpatient unit for recuperative care for a period not to exceed 3 months, unless the hospital admission was for psychiatric care. Prior to providing consent to the admission, the guardian of the person to be admitted must review the ward's right to the least restrictive residential environment and consent only to admission to a nursing home that implements those rights. Following the 3-month period, a placement proceeding under s. 55.06 is required.

This Act does the following:

1. Amends the law to permit a guardian to consent to a ward's admission to a nursing home, or other facility for which protective placement is required, for a period not to exceed 60 days. This change permits a ward to be admitted for a short-term nursing home stay without having to be admitted from a hospital setting. However, the ward must be in need of recuperative care or be unable to provide for his or her own care or safety so as to create a serious risk of substantial harm to himself or herself or others. The placement may be extended for an additional 60 days if a placement proceeding under ch. 55 has been commenced, or for an additional 30 days for the purpose of allowing the initiation of discharge planning for the person if no placement proceeding under ch. 55 has been commenced. Admission is not permitted under this provision if the primary purpose of the admission is for treatment or services related to the ward's mental illness or developmental disability.

2. Creates a new provision that allows the guardian of a ward whose guardianship was imposed in another state to consent to admission of the ward to a foster home, group home, or community-based residential facility if the home or facility is licensed for fewer than 16 beds, or to a facility described in item 1., above, if the ward is currently a resident of Wisconsin, and if a petition to transfer the foreign guardianship and, if applicable, a petition for protective placement, is filed in Wisconsin within 60 days of the ward's admission.

3. Creates a new provision that allows the Wisconsin resident guardian of a ward who was found incompetent in, and resides in, another state, to consent to admission of the ward to a foster home, group home, or community-based residential facility in Wisconsin if the home or facility is licensed for fewer than 16 beds, or to a facility described in item 1., above, if the guardian intends to move the ward to Wisconsin within 30 days of the consent to the admission. A petition to transfer the foreign guardianship and, if applicable, a petition for protective placement must be filed in Wisconsin within 60 days of the ward's admission to the Wisconsin facility.

Section 50.06 of the statutes creates a procedure for a short-term admission of an incapacitated person to a nursing home from a hospital without having a guardianship or protective placement in

place. Admissions are authorized based on the consent of a statutorily specified person, for a time period not to exceed 60 days. The admission may be extended once for up to 30 days for the purpose of allowing discharge planning for the person to take place.

The Act creates a new provision in s. 50.06 that addresses the situation in which the incapacitated person admitted to the nursing home protests the admission. In that situation, the person in charge of the facility must immediately notify the designated protective placement agency for the county in which the person is living. Representatives of that agency must visit the person as soon as possible, but not later than 72 hours after notification, and do the following:

1. Determine whether the protest persists or has been voluntarily withdrawn and consult with the individual who consented to the admission regarding the reasons for the admission.
2. Attempt to have the person released within 72 hours if the protest is not withdrawn and necessary elements of s. 55.06 (2) or (11) (renumbered, respectively, to s. 55.08 and s. 55.135 in the Act) are not present and provide assistance in identifying appropriate alternative living arrangements.
3. Comply with s. 55.06 (11) (renumbered to s. 55.135), relating to emergency protective placement, if all required elements are present and emergency placement in that facility or another facility is necessary, or file a petition for protective placement under s. 55.06 (1) (a) (renumbered to s. 55.075 (1)). The court, with the permission of the facility, may order the person to remain in the facility pending the outcome of the protective placement proceedings.

#### **Protective Placement Petition Required When Guardianship Petition Filed for Resident of a Nursing Home**

The Act codifies the decision of the Wisconsin Supreme Court in *Agnes T. v. Milwaukee County*, 189 Wis. 2d 520, 525 N.W.2d 268 (1995). In that case, the court stated that a guardian may not consent to the continued residence of a person in a nursing home licensed for 16 or more beds without a protective placement order and that upon appointing a guardian for an incompetent person in a nursing home licensed for 16 or more beds, the court must hold a protective placement hearing. The court specified that, when making a placement determination for such a person, a court may consider whether moving the person would create a serious risk of harm to that person.

This Act codifies the *Agnes T.* decision by:

1. Requiring, in newly created s. 880.07 (2m), that whenever a petition for guardianship on the ground of incompetency is filed with respect to a person residing in a facility licensed for 16 or more beds, a petition for protective placement of the person must also be filed.
2. Specifying that the person may continue to reside in the facility until the court issues a decision on the petition for protective placement of the person.
3. Authorizing a court, when protectively placing a person residing in a facility licensed for 16 or more beds, to consider whether moving the person would create a serious risk of harm to that person.

#### **Fees and Costs of Petition Under Ch. 55**

Prior to the effective date of the Act, ch. 55 does not specify who is responsible for the attorney fees and costs incurred by a person who files a petition for protective services or placement under s. 55.06 (2). However, s. 880.24 (3) specifies that under certain circumstances, the court must award

payment of reasonable attorney fees and costs to a person who petitions for appointment of a guardian and protective placement of the ward if a guardian is appointed.

The Act adds to ch. 55 similar provisions requiring the court to award payment of reasonable attorney fees and costs to a person who petitions for protective services or placement. These provisions apply when a petition for protective placement or services is brought independently of or at the same time as a petition for guardianship.

The Act creates a new provision which specifies that the court must award, from the estate of the person sought to be placed, the reasonable attorney fees and costs of a person who petitions for protective placement of the person unless the court finds it would be inequitable to do so. In determining whether it would be inequitable to award payment of costs and fees, the court must consider all of the following:

1. The petitioner's interest in the matter, including any conflict of interest that the petitioner may have had in pursuing the guardianship or protective placement.
2. The ability of the ward's estate to pay the petitioner's reasonable attorney fees and costs.
3. Whether the petition was contested and, if so, the nature of the contest.
4. Whether the person sought to be protectively placed had executed a durable power of attorney under s. 243.07 or a power of attorney for health care under s. 155.05 or had provided advance consent to nursing home placement or engaged in other advance planning to avoid protective placement.
5. Any other factors that the court considers to be relevant.

With respect to guardianships under ch. 880, current law provides that if the court finds that a ward had executed a durable power of attorney or a power of attorney for health care or engaged in other advance planning to avoid guardianship, the court may not award payment of the petitioner's attorney fees and costs from the ward's estate. The Act provides, instead, that the court may consider these items as factors in determining whether to award the payment.

#### **Time Limit for Protective Placement Hearing**

The Act specifies that a court must hold a hearing on any petition for protective placement within 60 days after it is filed. The Act provides that the court may extend the date for the hearing by up to 45 days if an extension of time is requested by the petitioner, individual sought to be placed or his or her guardian ad litem, or the county department.

#### **Attendance at Hearing of Person Sought to be Protected**

Prior to the effective date of the Act, s. 55.06 (5) provides that a person sought to be protectively placed is presumed able to attend the hearing on protective placement unless, after a personal interview, the guardian ad litem certifies to the court that the person is unable to attend. The court is not required to hold the hearing in the presence of the person sought to be placed if that person is unable to attend the hearing, as is required in ch. 880 for hearings on guardianship.

The Act deletes language stating that the person sought to be protectively placed is presumed to be able to attend the hearing. The Act provides that the person sought to be protected shall be present at the hearing unless, after a personal interview, the guardian ad litem waives the attendance and certifies

in writing to the court specific reasons why the person is unable to attend. In determining whether to waive attendance by the individual, the guardian ad litem shall consider the ability of the individual to understand and meaningfully participate, the effect of the individual's attendance on his or her physical or psychological health in relation to the importance of the proceeding and the individual's expressed desires. The Act also provides that, if the person is unable to attend a hearing because of physical inaccessibility or lack of transportation, the court must hold the hearing in a place where the person may attend, if requested by the person sought to be placed, guardian ad litem, or adversary counsel.

The Act also amends s. 880.08 (1) relating to the appointment of a guardian in the same way.

### **Procedural Rights in Ch. 55 Proceedings**

Prior to the effective date of the Act, s. 55.06 (6), Stats., requires the appointment of a guardian ad litem for a person sought to be protectively placed and states that s. 880.33 (2), Stats., which sets forth certain procedural rights and the right to counsel in a guardianship hearing, applies to all hearings under ch. 55 except hearings regarding certain transfers of placement. The Act deletes that cross-reference and instead inserts the language to which it refers to into appropriate sections of ch. 55. The Act makes minor changes to that language necessary to reflect that the rights apply to ch. 55 proceedings rather than guardianship hearings. The Act also replaces the term "county of legal settlement" with the term "county in which the hearing is held."

The provisions in current s. 880.33 (2) that are inserted into ch. 55 by the Act are the following:

1. The right to counsel.
2. The right to a jury trial.
3. The right of the person sought to be placed, his or her attorney and guardian ad litem to present and cross-examine witnesses.
4. The right to a copy of any medical, psychological, social, vocational, or educational evaluation of the person sought to be placed.
5. Provisions requiring the county in which the hearing is held to pay guardian ad litem and attorney fees of the person sought to be placed if the person is indigent.
6. The right of the person sought to be protected to request that the hearing be closed.

The Act retains the requirements in s. 55.06 (6), relating to the appointment of a guardian ad litem for a person sought to be placed.

### **Right to an Independent Evaluation in Ch. 55 Proceedings**

Section 880.33 (2) (b), Stats., provides that the individual who is the subject of a guardianship petition, or anyone on the individual's behalf, has the right, at the individual's own expense, or if indigent at the expense of the county where the petition is filed, to secure an independent medical or psychological examination relevant to the issue involved at the hearing on the petition, and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing.

The Act provides the same right to an independent evaluation to an individual who is the subject of a protective placement proceeding, if such an evaluation has not already been made.



### **Duties of Guardian ad Litem in Ch. 55 Proceedings**

This Act specifies that the duties of a guardian ad litem in a guardianship proceeding in s. 880.331 also apply to a guardian ad litem in a protective placement proceeding. This Act also creates additional duties of a guardian ad litem in guardianship and protective placement proceedings. The new duties are: to interview the proposed guardian; to make a recommendation to the court regarding the fitness of the proposed guardian; to interview the guardian, if one has already been appointed, of a subject of a petition for protective placement or court-ordered protective services; to inform the court and the petitioner or the petitioner's counsel, if any, if the proposed ward requests representation by counsel; to attend all court proceedings related to the guardianship; and to notify any guardian of an individual who is the subject of a protective placement proceeding about the hearing on the petition, as well as the right to be present at the hearing, the right to present and cross-examine witnesses, and the right to receive a copy of the evaluations.

### **Role of Power of Attorney for Health Care in Ch. 55 Proceedings**

The Act clarifies the role of the power of attorney for health care in ch. 55 proceedings. It provides that, if a court has made a determination under s. 880.33 (8) (b) that a power of attorney for health care under ch. 155 should remain in effect, and the court limits the power of the guardian to make health care decisions, the provisions of ch. 55 that confer upon the guardian the rights to notice and participation, and the authority to act, in a proceeding under ch. 55 shall also apply to the health care agent.

### **Rights of "Interested Persons" in Ch. 55 Proceedings**

Under s. 55.01 (4), an "interested person" is defined as "any adult relative or friend of a person to be protected under this subchapter; or any official or representative of a public or private agency, corporation or association concerned with the person's welfare".

This Act codifies the Wisconsin Court of Appeals' decision in *Coston v. Joseph P.*, 586 N.W.2d 52 (Ct. App. 1998), by providing that an interested person may participate in a hearing on the guardianship and protective placement petition at the court's discretion. In that case, 2 interested persons, who were relatives of the subject of the petition, asserted that they had a right to participate in the hearing. The court disagreed, saying that the rights of interested persons to participate in guardianship and protective placement hearings are specific and limited. However, the court also stated that a circuit court is not foreclosed from allowing for the participation of interested persons, if the court decides to exercise its discretion to allow interested persons to participate to the extent it deems appropriate.

### **Procedures for Protective Services Order**

A court may order protective services for an individual for whom a determination of incompetency is made if the individual entitled to the protective services will otherwise incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others. Prior to the effective date of the Act, no procedures are specified in statute for obtaining a court order for protective services.

This Act establishes procedures for court-ordered protective services that are the same as the revised procedures for protective placement.

### **Procedures for Emergency Protective Services**

Section 55.05 (4) provides that emergency protective services may be provided for not more than 72 hours when there is reason to believe that if the services are not provided, the person entitled to the services or others will incur a substantial risk of serious physical harm. However, prior to the effective date of the Act, no procedures are specified in the statute for obtaining a court order for emergency protective services.

This Act establishes procedures for obtaining emergency protective services. Under the Act, if the provider of the emergency protective services has reason to believe that protective services must continue to be provided beyond the 72-hour period, a petition for court-ordered protective services may be filed. If a petition is filed, a preliminary hearing must be held within 72 hours, excluding Saturdays, Sundays, and holidays, to establish probable cause to believe that the grounds for court-ordered protective services are present. If probable cause is found, the court may order protective services for up to 60 days, pending a hearing on the petition for court-ordered protective services.

### **Emergency Protective Placements**

This Act makes several changes to the law governing emergency protective placements.

Prior to the effective date of the Act, a sheriff, police officer, fire fighter, guardian, or authorized representative of a county board or an agency designated by a county board may make an emergency protective placement of an individual if, based on their personal observation, it appears probable that the individual meets the criteria for emergency placement. The Act provides that emergency placement may be made by the persons listed above based on a reliable report made to them by a person who identifies himself or herself as well as based on their personal observation.

Prior to the effective date of the Act, an individual may be protectively placed on an emergency basis if it appears probable that the individual *will suffer irreparable injury or death or will present a substantial risk of serious physical harm to others* as a result of developmental disabilities, infirmities of aging, chronic mental illness, or other like incapacities. The Act amends this language to provide that an individual described above may be protectively placed on an emergency basis if it appears probable that the individual *is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious physical harm to himself or herself or others* as a result of developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacities if not immediately placed.

The statutes provide that a person may be protectively placed on an emergency basis in an appropriate medical or protective placement facility. The Act requires each county department to designate at least one appropriate medical facility or protective placement facility as an intake facility for the purpose of emergency protective placements.

### **Voluntary Administration of Medication, Including Psychotropic Medication, to an Incompetent Person**

Under the law relating to guardianship, a petition for guardianship of a person who is alleged to be incompetent may further allege that the person is not competent to refuse psychotropic medication and that the psychotropic medication is, under several criteria, necessary. If the petition contains these allegations, and if, at hearing, the court finds that the person is not competent to refuse psychotropic medication and that the medication is necessary, the court must appoint a guardian to consent to or

refuse the medication on behalf of the person and order development of a treatment plan, including psychotropic medication, for the person. If the person substantially fails to comply with the treatment plan and if certain conditions are met, the court may authorize the person's guardian to consent to the forcible administration of psychotropic medication to the person.

This Act defines "psychotropic medication" and authorizes the guardian of a nonprotesting ward with whom the guardian has discussed the receipt of medication, including psychotropic medication, to give an informed consent to the voluntary receipt by the ward of the medication, without the necessity of court procedures for approval.

### **Involuntary Administration of Psychotropic Medication**

The Act provides that a guardian may be authorized to consent to involuntary administration of psychotropic medication to a ward and involuntary administration of psychotropic medication as a protective service if certain requirements are met. The Act also specifies that psychotropic medication may not be involuntarily administered to a person who has been protectively placed except by the procedure created in the Act.

In the Act, "psychotropic medication" is defined as a prescription drug that is used to treat or manage a psychiatric symptom or challenging behavior. "Involuntary administration of psychotropic medication" is defined to include all of the following: placing psychotropic medication in a person's food or drink with knowledge that the person protests receipt of the psychotropic medication; forcibly restraining a person to enable administration of psychotropic medication; and requiring a person to take psychotropic medication as a condition to receiving privileges or benefits.

### ***Petition***

The Act requires a petition for involuntary administration of psychotropic medication to a person as a protective service to meet all requirements for a protective services petition under ch. 55 and, in addition, requires the petition to allege all of the following:

1. A physician has prescribed psychotropic medication for the person.
2. The person is not competent to refuse psychotropic medication. "Not competent to refuse psychotropic medication" means that as a result of developmental disabilities, degenerative brain disorder, serious and persistent mental illness, or other like incapacities, and after the advantages and disadvantages of and alternatives to accepting the particular psychotropic medication have been explained to the individual, the individual is incapable of expressing an understanding of the advantages and disadvantages of accepting treatment and the alternatives to accepting treatment or the individual is substantially incapable of applying an understanding of the advantages, disadvantages, and alternatives to treatment to his or her medical or psychiatric condition in order to make an informed choice as to whether to accept or refuse psychotropic medication.
3. The person has refused to take psychotropic medication voluntarily or attempting to administer psychotropic medications to the person voluntarily is not feasible or is not in the person's best interests. If the petition alleges that the person has refused to take psychotropic medication voluntarily, the petition must identify the reasons for the person's refusal. The petition must also contain evidence showing that a reasonable number of documented attempts to administer psychotropic medication voluntarily using appropriate interventions that could reasonably be expected to increase the person's willingness to take the medication voluntarily, have been made and have been unsuccessful. If

the petition alleges that attempting to administer psychotropic medications to the person voluntarily is not feasible or is not in the best interests of the person, the petition must identify specific reasons supporting that allegation.

4. The person's condition for which psychotropic medication has been prescribed is likely to be improved by psychotropic medication and the person is likely to respond positively to psychotropic medication.

5. That unless psychotropic medication is administered involuntarily, the person will incur an immediate or imminent substantial probability of physical harm, impairment, injury, or debilitation or will present a substantial probability of physical harm to others. The substantial probability of physical harm, impairment, injury, or debilitation may be shown either by evidence that the person has a history of at least 2 episodes, one of which has occurred within the previous 24 months, that indicate a pattern of overt activity, attempts, threats to act, or omissions that resulted from the person's failure to participate in treatment, including psychotropic medication, and that resulted in a finding of probable cause for commitment under s. 51.20 (7), a settlement agreement approved by a court under s. 51.20 (8) (bg) or commitment ordered under s. 51.20 (13), or by evidence that the subject individual meets one of the dangerousness criteria set forth in the mental health law, in s. 51.20 (1) (a) 2. a. through e.

The Act requires a petition for involuntary administration of psychotropic medication to include a written statement signed by a physician who has personal knowledge of the person that provides general clinical information regarding the appropriate use of psychotropic medication for the person's condition and specific data that indicates the person's current symptoms necessitate the use of the psychotropic medication.

The Act specifies that the corporation counsel shall be provided notice of any petition for involuntary administration of psychotropic medication and may assist in the proceedings on any such petition.

### ***Guardian ad Litem Report***

The Act requires the guardian ad litem appointed for a person who is the subject of a petition for involuntary administration of psychotropic medication as a protective service to report to the court his or her conclusion as to whether the person is competent to refuse psychotropic medication, whether the allegations in the petition pertaining to the person's dangerousness are true, whether the person refuses to take the psychotropic medication voluntarily, and whether the involuntary administration of the psychotropic medication is in the best interest of the person.

### ***Appointment of Legal Counsel***

The Act requires the court to appoint legal counsel on behalf of a person who is the subject of a petition for involuntary administration of psychotropic medication as a protective service.

### ***Independent Evaluation***

The Act provides that if requested by the person who is the subject of the petition, or anyone on his or her behalf, the person has the right to an independent medical or psychological evaluation relevant to the issues of whether the allegations in the petition are true and whether involuntary administration of psychotropic medication is in the best interest of the person. The person has the right to present a report of the independent evaluation or the evaluator's personal testimony as evidence at the hearing. The

evaluation shall be performed at the expense of the person who is the subject of the petition unless the person is indigent. If the person is indigent, the evaluation shall be performed at the expense of the county where the petition is filed.

### ***Court Order***

The Act provides that the court may authorize a guardian to consent to involuntary administration of psychotropic medication to a ward and may order involuntary administration of psychotropic medication to the person as a protective service, with the guardian's consent, if the court or jury finds by clear and convincing evidence that the requirements for involuntary administration of psychotropic medication established in the Act have been met, psychotropic medication is necessary for treating the specific condition outlined in the physician's statement and all other requirements for ordering protective services under ch. 55 have been met.

The Act specifies that if the court issues an order authorizing a guardian to consent to involuntary administration of psychotropic medications, the order must specify the methods of involuntary administration of psychotropic medication to which the guardian may consent. An order authorizing the forcible restraint of a person must require a registered nurse, a licensed practical nurse, a physician or a physician's assistant to be present at all times that psychotropic medication is administered in this manner. An order must require the person or facility administering psychotropic medication to maintain records of each instance of involuntary administration of psychotropic medication that identify the methods of administration utilized.

The court must also order development of a treatment plan for the person subject to the order that includes a plan for involuntary administration of psychotropic medication to the person with consent of the guardian. If the person resides in a hospital or nursing home, the hospital or nursing home must develop the plan; otherwise the county department or an agency designated by it must develop the plan. The court must review the plan and approve or disapprove the plan. The court must order the county department or an agency designated by it to ensure that psychotropic medication is administered in accordance with the treatment plan.

### ***Enforcement***

The Act specifies that if a person who is subject to an order for involuntary administration of psychotropic medication refuses to take the medication and it is necessary for the person to be transported to an appropriate facility so that the person may be forcibly restrained for administration, the corporation counsel may file a statement of noncompliance with the court. The statement must be signed by the guardian and the director (or designee) of the county department or the agency designated by it to develop and administer the treatment plan. Upon receipt of the statement, the court may issue an order authorizing the sheriff or other law enforcement agency to take the person into custody and transport the person to an appropriate facility for administration of psychotropic medication using forcible restraint, with consent of the guardian.

### ***Annual Review of Order Authorizing Involuntary Administration of Psychotropic Medication***

The Act specifies an order authorizing a guardian to consent to involuntary administration of psychotropic medication as a protective service must be reviewed by the court annually under generally the same procedure that protective placements are reviewed ("Watts" reviews).

### ***County Department Review and Report***

The Act requires the county department of the county of residence of any individual who is subject to an order authorizing involuntary administration of psychotropic medication as a protective service to annually review the status of the individual. If, in an annual review, the individual or his or her guardian or guardian ad litem request termination of the order and the court provides a full due process hearing or a full due process hearing is provided pursuant to a petition for termination of the order, the county is not required to review the status of the individual until one year after the court issues a final order after the full due process hearing.

If the individual is, or subsequently becomes, subject to an order for protective placement, the annual review shall be conducted simultaneously with the annual review of the individual's protective placement.

The county of residence of an individual who is subject to an order authorizing involuntary administration of psychotropic medication and whose placement is in a different county may enter into an agreement under which the county of placement performs all or a part of the county duties specified in the Act.

The county review must include a written evaluation of the physical, mental, and social condition of the individual that are relevant to the continued need for the order for involuntary administration of psychotropic medication. The review must be made part of the individual's permanent record. The county department must inform the individual's guardian of the review and invite the individual and his or her guardian to submit comments concerning the individual's need for protective placement or protective services. In performing the review, the county department or contractual agency staff member performing the review must visit the individual and must contact the individual's guardian. The review may not be conducted by a person who is an employee of a facility in which the individual resides or from which the individual receives services.

By the first day of the 11th month after the initial order is made, and annually thereafter, the county must do all of the following:

1. File a report of the review with the court that issued the order.
2. File with the court a petition for annual review of the order.
3. Provide the report to the individual and the individual's guardian.

The report must contain information on all of the following:

1. Whether the individual continues to meet the standards for protective services.
2. Whether the individual is not competent to refuse psychotropic medication as set forth in s. 55.14 (1) (b).
3. Whether the individual continues to refuse to take psychotropic medication voluntarily or attempting to administer psychotropic medication to the individual voluntarily is not in the best interests of the individual as set forth in s. 55.14 (3) (c).

4. Whether the individual's condition for which psychotropic medication has been prescribed has been improved by psychotropic medication and the person has responded positively to psychotropic medication.

5. Whether the individual continues to meet the dangerousness criteria set forth in s. 51.20 (1) (a) 2. a. to e.

6. A summary of the comments of the individual and the individual's guardian and the county's response to those comments.

7. The comments, if any, of any staff member at any facility at which the individual is placed or receives services or at which psychotropic medication is administered to the individual which are relevant to the continued need for the order.

### ***Responsibilities of the Guardian Ad Litem***

The court is required to appoint a guardian ad litem after it receives the report from the county described above. The guardian ad litem is required to do all of the following:

1. Review the report filed by the county, the annual report of the guardian, and any other reports on the individual's condition that are relevant to the continued need for involuntary administration of psychotropic medication.

2. Meet with the individual and contact the individual's guardian and orally explain to the individual and guardian all of the following:

a. The procedure for review of the order for involuntary administration of psychotropic medication.

b. The right to appointment of legal counsel.

c. The right to request performance of an independent evaluation.

d. The contents of the report submitted to the court by the county.

e. That a termination or modification of the order may be ordered by the court.

f. The right to a hearing and an explanation that the individual or the individual's guardian may request a full due process hearing.

The guardian ad litem must provide all of the information described above to the individual and the individual's guardian in writing.

3. Review the individual's condition and rights with the individual's guardian.

4. Ascertain whether the individual wishes to exercise any of his or her rights (the right to appointment of legal counsel, to request an independent evaluation, and to a full due process hearing).

5. File a written report with the court within 30 days after appointment that includes a discussion of whether the individual appears to continue to meet the standards for the order. The report must also state whether any of the following applies:

- a. The guardian ad litem, the individual, or the individual's guardian request an independent evaluation.
  - b. The individual or the individual's guardian requests termination of the order.
  - c. The individual or the individual's guardian requests, or the guardian ad litem recommends, that legal counsel be appointed for the individual.
  - d. The individual or his or her guardian or guardian ad litem requests a full due process hearing.
6. Certify to the court that he or she has complied with the requirements described under items 1., 2., 3., and 4., above.

### ***Court Review of Reports, Hearing, and Order***

The Act requires the court that issues an order for involuntary administration of psychotropic medication to review, not more than 12 months after the initial order and annually thereafter, the reports of the county and the guardian ad litem, described above, and the annual report filed by the guardian under s. 880.38 (3), stats. In its review, the court must determine whether any of the following is necessary:

1. Performance of an independent evaluation of the physical, mental, and social condition of the individual that are relevant to the issue of the continued need for the order. If the court determines that an independent evaluation is necessary, the evaluation shall be performed at the expense of the individual unless the individual is indigent. If the individual is indigent, the evaluation is performed at the expense of the responsible county department. The court must order the performance of an independent evaluation if any of the following applies:

- a. The report submitted by the county is not timely filed or the court determines that the report fails to meet the statutory requirements.
- b. Following review of the guardian ad litem's report, the court determines that independent evaluation is necessary.
- c. The individual or the individual's guardian or guardian ad litem requests an independent evaluation.

2. Obtaining any other information with respect to the individual.

3. Appointment of legal counsel. If the court appoints legal counsel and it appears that the individual is indigent, the court shall refer the individual to the authority for indigency determinations under s. 977.07 (1). The court must order legal counsel for an individual if any of the following applies:

- a. Following review of the guardian ad litem's report, the court determines that legal counsel for the individual is necessary.
- b. The individual or the individual's guardian or guardian ad litem requests appointment of legal counsel.

4. Holding of a full due process hearing.



Upon completion of its review, the court must order either a summary hearing or a full due process hearing. A summary hearing may be held in court or may be held by other means such as by telephone or by a videoconference. The court must hold a full due process hearing if any of the following applies:

- a. The individual or the individual's guardian or guardian ad litem requests a full due process hearing.
- b. The report of the guardian ad litem indicates that the individual no longer meets standards for the order.
- c. The report of the guardian ad litem indicates that the individual objects to the order.

Following the summary hearing or the full due process hearing, the court must do one of the following:

1. Order the continuation of the order. The court shall make this order if it finds that the individual continues to meet the standards for involuntary administration of psychotropic medication. The court must include the information relied upon as a basis for the order and make findings based on the factors set forth in s. 55.14 (3) in support of the need for continuation of the order.

2. Terminate the order. The court shall make this order if it determines that the individual no longer meets the standards for involuntary administration of psychotropic medication. If the court terminates an order, it must review the needs of the individual with respect to protective services and order protective services if it determines the individual meets the standards for protective services that are not currently being provided.

The Act requires the court to provide a copy of its order to the individual, the individual's guardian, guardian ad litem and legal counsel, the residential facility in which the individual is protectively placed, if any, and the county department.

### **Other Provisions**

The Act repeals the following statutory provisions in ch. 880, relating to a guardian's authority to consent to administration, including forcible administration, of psychotropic medication to a ward: (1) s. 880.01 (7m), which defines "not competent to refuse psychotropic medication" for purposes of ch. 880; (2) s. 880.07 (1m), which sets forth required contents of a petition alleging that a person for whom guardianship is sought is not competent to refuse psychotropic medication; and (3) s. 880.33 (4m) and (4r), which set forth procedures under which the guardian may consent to or refuse psychotropic medication on behalf of the ward, including consent to forcible administration of psychotropic medication.

The Act specifies that any orders issued under those provisions remain in effect until modified or terminated by the court. The Act also specifies that orders authorizing involuntary administration of psychotropic medication originally issued under s. 880.33 (4r), which is repealed by the Act, are subject to annual review as described above.

These provisions are replaced by the procedures created by the Act.

The Act specifies that involuntary administration of psychotropic medication may be ordered as an emergency protective service.

The Act requires counties to provide to the department a copy of any order for involuntary administration of psychotropic medications to any protectively placed person in the county.

The Act requires the DHFS to annually submit to the legislature a report regarding orders for involuntary administration of psychotropic medication.

**Involuntary Administration of Medication and Involuntary Medical Treatment Other Than Psychotropic Medication**

The Act authorizes a guardian to consent, without further court involvement, to involuntary administration of medication, other than psychotropic medication, and involuntary medical treatment that is in the ward's best interest. In determining whether medication or medical treatment is in the ward's best interest, the guardian shall consider the invasiveness of the medication or treatment and the likely benefits and side effects of the medication or treatment. A guardian may not consent to involuntary administration of psychotropic medication unless the guardian has been authorized to do so under s. 55.14.

**Transfers of Protectively Placed Persons**

Prior to the effective date of the Act, a person who is protectively placed in a facility may be transferred between placement units or from a placement unit to a medical facility (other than a locked unit or a facility providing acute psychiatric treatment) by a guardian or placement facility without approval by a court. When a transfer is made by a placement facility, 24 hours' prior written notice of the transfer shall be provided to the guardian, when feasible. If it is not feasible to notify the guardian in advance, written notice must be provided immediately upon transfer, and notice must also be provided to the court and the board under s. 55.02, or the board's designated agency, within a reasonable period of time not to exceed 48 hours from the time of transfer.

If a guardian, ward or attorney, or other interested person objects to the transfer by petition, the court must order a hearing within 96 hours after filing of the petition, to determine whether the transfer is consistent with the requirements in s. 55.06 (9) (a) and is necessary for the best interests of the ward.

The Act creates definitions of "protective placement facility" and "protective placement unit". A "protective placement facility" is defined as a facility to which a court may order a person to be protectively placed under s. 55.12 for the primary purpose of residential care and custody. A "protective placement unit" is defined as a ward, wing, or other designated part of a placement facility.

The Act provides that transfers between placement units, between placement facilities, or from a placement facility to a medical facility (provided that the medical facility is not a psychiatric facility), may be made by a county department that placed the individual or the DHFS, in addition to a guardian or placement facility. However, if such a transfer is made, 10 days' prior written notice must be given by the transferring entity to the guardian, the county department, the department, and the placement facility.

Further, the Act requires that the county department, the department, or a placement facility making such a transfer must obtain the prior written consent of the guardian. If an emergency precludes providing the required prior written notice, or precludes obtaining the guardian's prior written consent, written notice must be provided immediately upon transfer.

Also, the Act requires an entity who seeks a transfer of a protective placement to obtain the prior written consent of the county department if the transfer is to a facility that is more costly to the county. This requirement does not apply in the case of an emergency transfer.

Under the Act, if an individual under protective placement, the individual's guardian or attorney, or other interested person files a petition specifying objections to a transfer, the court must order a hearing within 10 days after filing the petition.

For transfers, the purpose of the hearing is to determine whether the proposed placement meets the standards of s. 55.12; is in the least restrictive environment consistent with the person's needs and with the factors in s. 55.12 (3), (4), and (5) or, if the transfer is to an intermediate facility or nursing facility, is in the most integrated setting; and is in the best interests of the ward.

The Act also sets forth the options for a court order on a transfer petition.

### **Modification and Termination of Protective Placements**

Prior to the effective date of the Act, s. 55.06 (10) (b), sets forth limited procedures for modification and termination of a protective placement. That statute allows the department, an agency, a guardian or ward, or any other interested person to petition the court for modification or termination of a protective placement at any time. The petition must be heard if a hearing has not been held within the previous 6 months but a hearing may be held at any time in the discretion of the court. The petition must be heard within 21 days of its receipt by the court.

This Act provides more detailed procedures for modification or termination of a protective placement or an order for protective services as described below.

#### ***Modification of Protective Placement***

1. A petition for modification of an order for protective placement may be filed by an individual subject to a protective placement; the individual's guardian or guardian ad litem; the DHFS; the county department that placed the individual; a contractual agency; or any interested person.
2. The petition must be served on the individual; the individual's guardian; the individual's legal counsel and guardian ad litem, if any; and the county department.
3. The petition must contain specific allegations, depending on whether the individual is under a protective placement order or court-ordered protective services.
4. A hearing on the petition must be held within 21 days after the filing of the petition, if a hearing on a protective placement petition or transfer has not been held within the previous 6 months.
5. The hearing must comply with the requirements of s. 55.10 (4), which sets forth rights in a protective placement proceeding.
6. The order must contain specific findings regarding whether the person currently meets the standard for protective placement or court-ordered protective services.
7. If the person continues to meet the standard for protective placement or court-ordered protective services, the court must either continue the order or modify the order so that the placement or services are consistent with the person's needs if the person's needs have changed.

8. Orders for continuation or modification of protective services must be consistent with the factors in s. 55.12 (3), (4), and (5).

9. If the person does not meet the standard for protective placement or protective services, the order must require termination of the protective placement or court-ordered protective services.

10. Notice of the order must be provided to the individual; the individual's guardian, guardian ad litem, and legal counsel, if any; and the residential facility, if the person receives services in such a facility.

11. The transfer provisions may be used if the modification sought is a transfer of an individual between placement units, between placement facilities, or from a placement unit to a medical facility, and if the petitioner is an entity authorized to initiate such a transfer under s. 55.15.

### ***Termination of Protective Placement or Court-Ordered Protective Services***

The provisions described above pertaining to who may petition, the contents of the petition, service of the petition, and requirement for conducting the hearing for modification of protective placement or court-ordered protective services apply to petitions for termination of placement or services.

The court may make one of the following orders after a hearing on a petition for termination of protective placement or services:

1. If the individual continues to meet the standards under s. 55.08 (1) and the placement is in the least restrictive environment consistent with the person's needs and with the factors under s. 55.12 (3), (4), and (5), order continuation of the person's protective placement in the same facility.

2. If the individual continues to meet the standards under s. 55.08 (1) but the placement is not in an environment consistent with the person's needs and with the factors under s. 55.12 (3), (4), and (5), the court shall transfer the person to a facility that is in the least restrictive environment consistent with the person's needs and with the factors in current s. 55.12 (3), (4), and (5). In addition to this option, the court may also order protective services.

3. If the individual no longer meets the standard in current s. 55.06 (2), the court shall terminate the protective placement. If the placement is terminated, the court must either order protective services or ensure the development of a proper living arrangement for the person if the individual is being transferred or discharged from his or her current residential facility.

If the person who is the subject of the petition is under an order for protective services, the court may order continuation of the protective services order if the person continues to meet the standard under s. 55.08 (2); order that the protective services be provided in a manner more consistent with the person's needs; or terminate the order for protective services if the person no longer meets the standard under s. 55.08 (2).

### **Annual Reviews of Protective Placements**

The Act establishes the requirements and procedures for annual reviews of protective placements as required by *State ex rel. Watts v. Combined Community Services*, 122 Wis. 2d 65, 365 N.W.2d 104 (1985) and *County of Dunn v. Goldie H.*, 245 Wis. 2d 538, 629 N.W.2d 189 (2001).

### ***County Department Review and Report***

The Act requires the county department of the county of residence of any individual who is protectively placed to annually review the status of the individual. If, in an annual review, the individual or his or her guardian or guardian ad litem request modification or termination of the placement and the court provides a full due process hearing, or a full due process hearing is provided pursuant to a petition for modification or termination of the protective placement, the county is not required to review the status of the individual until one year after the court issues a final order after the full due process hearing.

The county of residence of an individual whose placement is in a different county may enter into an agreement under which the county of placement performs all or a part of the county duties specified in the Act.

The county review must include a written evaluation of the physical, mental, and social condition of the individual and the service needs of the individual. The review must be made part of the individual's permanent record. The county department must inform the individual's guardian of the review and invite the individual and his or her guardian to submit comments concerning the individual's need for protective placement or protective services. In performing the review, the county department or contractual agency staff member performing the review must visit the individual and must contact the individual's guardian. The review may not be conducted by a person who is an employee of the facility in which the individual resides.

By the first day of the 11th month after the initial order is made for protective placement for an individual, and annually thereafter, the county must do all of the following:

1. File a report of the review with the court that ordered the protective placement.
2. File with the court a petition for annual review of the protective placement.
3. Provide the report to the individual and the individual's guardian.

The report must contain information on all of the following:

1. 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.
2. The ability of community services to provide adequate support for the individual's needs.
3. The ability of the individual to live in a less restrictive setting.
4. 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 such services, including the use of county funds.
5. Whether the protective placement order should be terminated or the individual should be placed in another residential 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, including any recommendation that is made during the reporting period by the

department with respect to termination of the protective placement or placement of the individual in another residential facility.

6. A summary of the comments of the individual and the individual's guardian and the county's response to those comments.

7. The comments, if any, of any staff member at the facility in which the individual is placed which are relevant to the review of the individual's placement.

### ***Responsibilities of the Guardian Ad Litem***

The court is required to appoint a guardian ad litem after it receives the report from the county described above. The guardian ad litem is required to do all of the following:

1. Review the report filed by the county, the annual report of the guardian, and any other relevant reports on the individual's condition and placement.

2. Meet with the individual and contact the individual's guardian and orally explain to the individual and guardian all of the following:

a. The procedure for review of protective placement.

b. The right to appointment of legal counsel.

c. The right to request performance of an independent evaluation.

d. The contents of the report submitted to the court by the county.

e. That a change in or termination of protective placement may be ordered by the court.

f. The right to a hearing and an explanation that the individual or the individual's guardian may request a full due process hearing.

The guardian ad litem must provide all of the information described above to the individual and the individual's guardian in writing.

3. Review the individual's condition, placement, and rights with the individual's guardian.

4. Ascertain whether the individual wishes to exercise any of his or her rights (the right to appointment of legal counsel, to request an independent evaluation, and to a full due process hearing).

5. File a written report with the court within 30 days after appointment that includes a discussion of whether the individual appears to continue to meet the standards for protective placement and whether the protective placement is in the least restrictive environment that is consistent with the individual's needs. The report must also state whether any of the following applies:

a. The guardian ad litem, the individual, or the individual's guardian request an independent evaluation.

b. The individual or the individual's guardian requests modification or termination of the protective placement.

c. The individual or the individual's guardian requests, or the guardian ad litem recommends, that legal counsel be appointed for the individual.

d. The individual or his or her guardian or guardian ad litem requests a full due process hearing.

6. Certify to the court that he or she has complied with the requirements described under items 1., 2., 3., and 4., above.

### ***Court Review of Reports, Hearing, and Order***

The Act requires the court that orders protective placement for an individual to review, not more than 12 months after the initial order for protective placement and annually thereafter, the reports of the county and the guardian ad litem, described above, and the annual report filed by the guardian under s. 880.38 (3). In its review, the court must determine whether any of the following is necessary:

1. Performance of an independent evaluation of the physical, mental, and social condition of the individual, and the individual's service needs. If the court determines that an independent evaluation is necessary, the evaluation shall be performed at the expense of the individual unless the individual is indigent. If the individual is indigent, the evaluation is performed at the expense of the responsible county department. The court must order the performance of an independent evaluation if any of the following applies:

a. The report submitted by the county is not timely filed or the court determines that the report fails to meet the statutory requirements.

b. Following review of the guardian ad litem's report, the court determines that independent evaluation is necessary.

c. The individual or the individual's guardian or guardian ad litem requests an independent evaluation.

2. Obtaining any other information with respect to the individual.

3. Appointment of legal counsel. If the court appoints legal counsel and it appears that the individual is indigent, the court shall refer the individual to the authority for indigency determinations under s. 977.07 (1). The court must order legal counsel for an individual if any of the following applies:

a. Following review of the guardian ad litem's report, the court determines that legal counsel for the individual is necessary.

b. The individual or the individual's guardian or guardian ad litem requests appointment of legal counsel.

4. Holding of a full due process hearing.

Upon completion of its review, the court must order either a summary hearing or a full due process hearing. A summary hearing may be held in court or may be held by other means such as by telephone or by a videoconference. The court must hold a full due process hearing if any of the following applies:

- a. The individual or the individual's guardian or guardian ad litem requests a full due process hearing.
- b. The report of the guardian ad litem indicates that the individual no longer meets standards for protective placement.
- c. The report of the guardian ad litem indicates that the current placement is not in the least restrictive environment consistent with the individual's needs.
- d. The report of the guardian ad litem indicates that the individual objects to the current placement.

Following the summary hearing or the full due process hearing, the court must do one of the following:

1. Order the continuation of the individual's protective placement in the facility in which he or she resides at the time of the hearing. The court shall make this order if it finds that the individual continues to meet the standards for protective placement, and the individual's protective placement is in the least restrictive environment that is consistent with his or her needs and with factors under current s. 55.06 (9) (a). The court must include the information relied upon as a basis for the order and make findings based on the factors set forth in s. 55.06 (2) in support of the need for continuation of protective placement.
2. Order transfer of protective placement to a less restrictive residential facility or order the county department of residency to develop or recommend a less restrictive protective placement. If the court makes such an order, it shall order the county department of residency to arrange for the individual's transfer to the new protective placement within 60 days after the court's order unless the court extends the period to permit development of a protective placement. The court shall make this order if it finds that the individual continues to meet the standards for protective placement and the protective placement of the individual is not in the least restrictive environment that is consistent with the individual's needs and with the factors under current s. 55.06 (9) (a). The court may order protective services along with transfer of placement.
3. Terminate the protective placement. The court shall make this order if it determines that the individual no longer meets the standards for protective placement. If the court terminates a protective placement, it must review the needs of the individual with respect to protective services and order protective services if it determines the individual meets the standards for protective services. If the court determines that the individual does not meet the standards for protective services, and the individual is being transferred or discharged from his or her current residential facility, the county department must assist the residential facility with discharge planning for the individual, including planning for a proper residential living arrangement and the necessary support services for the individual.

The Act provides that any individual whose protective placement is terminated pursuant to an annual review may reside in his or her current residential facility for up to 60 days after the termination in order to arrange for alternative living. If the residential facility has fewer than 16 beds, the individual may remain in the residential facility as long as the requirements of current s. 55.05 (5) are met. The Act specifies that admission of the individual, if an adult, to another residential facility, must be under s. 55.05 (5).



The Act requires the court to provide a copy of its order to the individual, the individual's guardian, guardian ad litem and legal counsel, the residential facility in which the individual is protectively placed, and the county department.

### ***Establishment of County Policy***

This Act requires each county protective services agency to ensure that no later than 180 days after the Act's effective date, the county establishes a written policy that specifies procedures to be followed in the county which are designed to ensure that reviews of all protectively placed persons residing in the county are conducted annually. The county protective services agency must maintain a copy of the written policy and must make the policy available for public inspection.

### ***Statement Required***

The Act also requires the register in probate to file with the chief judge of the judicial administrative district a statement indicating whether the county has filed a petition and a report for each annual review required to be undertaken for protectively placed persons in the county that year. The statement must include an explanation of the reasons that any required report or petition has not been filed.

### **Appointment of Legal Counsel in Protective Placement Proceedings**

Prior to the effective date of the Act, s. 55.06 (6), relating to procedures in protective placement proceedings, provides that s. 880.33 (2) applies to all hearings under ch. 55 except for transfers of protective placements. Section 880.33 (2) (a) 1. provides that the proposed ward has the right to counsel in incompetency proceedings. Section 880.33 (2) (a) 2. further provides that if the person requests, but is unable to obtain legal counsel, the court shall appoint legal counsel. The statutes also provide that if the person is represented by counsel appointed under s. 977.08 in a proceeding for a protective placement under s. 55.06, the court shall order the counsel appointed under s. 977.08 to represent the person.

Although ch. 55 does not explicitly provide for counsel appointed under s. 977.08 in case of an indigent subject, the language in s. 880.33 (2) (a) 2. implies that counsel should be appointed. Further, s. 55.06 (11), relating to emergency protective placements, clearly provides for counsel appointed under s. 977.08 in the case of an indigent subject. Finally, it is the practice in this state to appoint counsel under s. 977.08 in the case of an indigent subject of a ch. 55 petition.

This Act amends the public defender statute that sets forth to whom the state public defender must provide legal services by clearly setting forth the requirement that the state public defender provide legal services in cases involving persons who are subject to petitions for protective placement under ch. 55. This codifies current practice.

***Effective Date:*** The Act takes effect on November 1, 2006.

***Prepared by:*** Mary Matthias, Senior Staff Attorney

May 18, 2006

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