



# Chapter 55: Protective Services and Placement

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## Introduction

In addition to the procedures for voluntary treatment services and civil commitment which are described in another chapter, Wisconsin has procedures which apply to persons with long-term care needs. These procedures, found in Chapter 55 of the Wisconsin statutes, provide for a range of services which can be voluntary or ordered by a court. Chapter 55 is not limited to one kind of service or placement. It can be used to place someone in a nursing home, but it can also be used to provide supportive services to someone living in their own home. In general, Chapter 55 is used for long-term placement or services while Chapter 51 is used for more time-limited treatment.

### Comparison of Chapter 51 and 55

This is a helpful way to separate the two statutes, but there will be many situations where they overlap. For example, a person with a permanent disability like mental retardation would ordinarily receive services under Chapter 55, but could also have a mental health crisis which would be handled under Chapter 51 with either voluntary or involuntary treatment. Persons with chronic mental illness who are incompetent and have a guardian can probably be served under either Chapter 51 or 55. Some younger persons with severe mental health needs who live in group homes or in their own apartments with intensive services such as Community Support Programs (CSP) may be under Chapter 55 orders. Others in exactly the same situation are under Chapter 51 commitments which are renewed year after year. This varies by county.



*One should not make a snap judgment based on age or diagnosis as to whether to use Chapter 51 or 55. It is best to look at what services the person wants, what services are needed, and then look at which chapter can best provide those services. Both Chapter 51 and Chapter 55 contain a provision to convert the proceeding to the other chapter if necessary.*

## The Least Restrictive Principle

Every aspect of Chapter 55 is controlled by the principle that people should get the services they need in the most normal and natural setting. The preamble to Chapter 55 says:

Sec. 55.001, Wis.Stats.

“The legislature recognizes that many citizens of the state, because of the infirmities of aging, chronic mental illness, mental retardation, other developmental disabilities or other like incapacities incurred at

any age, are in need of protective services. These services should, to the maximum degree of feasibility under programs, services and resources that the county board of supervisors is reasonably able to provide within the limits of available state and federal funds and of county funds required to be appropriated to match state funds, allow the individual the same rights as other citizens, and at the same time protect the individual from exploitation, abuse and degrading treatment. This chapter is designed to establish those services and assure their availability to all persons when in need of them, and to place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, exploitation and neglect.”

### Balancing safety and risk

Applying the least restrictive principle can be difficult in some situations. Family, friends and professionals may want the maximum amount of supervision and services so that the person is absolutely safe, but we all have some risk in our lives. Competent people with serious medical conditions may choose to live in their own home even though there is some risk. They balance that risk against the quality of life they would lose by moving into a facility. The process is no different for persons with mental disabilities who are covered by Chapter 55, but some other person or a court may be involved in making the decision. The goal in each situation is the same. **The goal is to identify services which are truly necessary to reduce risk to the point where the average person would feel comfortable and then ensure that quality services are actually provided.**

### Decision-Making Procedures in Other Statutes

Wisconsin statutes contain a number of procedures for assisting individuals to make decisions about services and living arrangements or to make the actual decisions for them if they are unable to do so. They are often used without any connection to Chapter 55, or they can fit in with Chapter 55 procedures. These decision-making procedures and the chapters of the statutes where they can be found are:

1. Power of attorney for health care - Chapter 155
2. Guardianship - Chapter 880

### Representative payee

The way in which each of these can be used to obtain services or decide where someone will live is covered later in this chapter. There is also another type of decision maker which is not covered in Wisconsin law, but which is sometimes confused with guardianship or a power of attorney. This is a social security “representative payee”. *(For a general discussion of these decision-making tools see Guardianship chapter, pg. 334.)*

### Providers and Types of Protective Services

In Wisconsin, human services are provided by counties through county Departments of Human Services (also called Department of



**When to request assistance and what might happen**

Sec. 55.043, Wis.Stats.

Community Programs or Unified Services). *(See Overview of County Human Services chapter, pg. 188 for a description of how county services are delivered.)* Each county has one agency that is designated to provide “protective services.” The actual services can be provided by either county staff or by private agencies that contract with the county to provide specific services. Concerned friends or relatives usually contact the county to begin services for someone. It is also appropriate to contact the county if there is reason to believe that the help or services someone is already receiving are not enough. In some cases, the person may actually be suffering abuse or neglect from a relative or care provider. The best thing to do is report these issues to the designated protective services agency and request an abuse or neglect investigation. The statutes provide a special abuse investigation procedure in Milwaukee County. The way in which abuse investigations are handled elsewhere varies across the state. *(See Abuse and Neglect of Vulnerable Adults chapter, pg. 299.)*

The responsible county agency can get involved in various ways when it receives a complaint or an ordinary request for assistance. It can make a referral to another agency, provide services itself or make a recommendation about protective placement. Unfortunately, most counties have financial limitations on the services they provide and have waiting lists.



**Waiting lists**

*It is important to ask to be placed on the waiting list and ask about the right to receive other services while waiting. No one should waive the right to be evaluated or to receive any services unless they understand exactly what they are giving up. If the county suggests a service, it is important to ask what other services are available and the pros and cons of receiving that service instead.*

**Definition of a protective service**

Chapter 55 covers protective services. A protective service may be any kind of care that can be provided to assist a person. It can range from housekeeping help provided once a week to 24 hour a day nursing care. Virtually all of the services discussed elsewhere in this guide can be provided as a protective service. The way in which these services can be delivered in specific situations is covered below, but first it is important to compare protective services to protective placement.

**Legal Grounds for Protective Services**

Chapter 55 is not just about where people are to be placed. The person may not need to be placed anywhere if proper services can be provided where s/he already lives or where s/he wants to live. Under 55.05, Wis. Stats., protective services may be provided in the following situations:

Sec. 55.05(2), Wis. Stats.

- The person may seek services on his/her own.
- An interested person may request services on behalf of someone else. The person must ordinarily consent to the services in this situation.

- A guardian may request services for his/her ward and consent to the services on his/her behalf.
  - The State Department of Health and Family Services may provide protective services if no other agency is available to do so.
- Emergency services**
- Emergency services may be provided without a court order and without the person's consent for up to 72 hours, if there is reason to believe that if the services are not provided the person or others will incur a substantial risk of serious physical harm.
  - The court may order protective services for someone under guardianship if that person will otherwise incur a substantial risk of physical harm or deterioration or will present a substantial risk of physical harm to others.
- Sec. 880.33(4m), Wis.Stats.
- The court may order psychotropic (psychiatric) medication for an individual if special guardianship procedures are followed. (*See Guardianship chapter, pg. 340.*)

## Legal Grounds for Protective Placement

Unlike protective services, which can be either voluntary or ordered by a court, a protective placement must always be ordered by a court after a hearing. A petition may be filed by a county, a service agency, or any interested person such as a friend or family member. The State Department of Health and Family Services may also petition. The legal grounds for placement are as follows:

- Sec. 55.06(2), Wis. Stats.
- The person has a primary need for residential care or custody. This is to distinguish long-term care under Chapter 55 from the treatment focus of Chapter 51.
  - The person is incompetent and requires a guardian under Chapter 880. The request for guardianship may be in the petition for protective placement or the person may have been found incompetent in an earlier proceeding.
  - The person is so totally incapable of providing for his/her own care or custody as to create a substantial risk of serious harm to oneself or others. The harm can be proven by evidence of overt acts or acts of omission. This requirement is to ensure that individuals who are eccentric or have minor lapses in self-care do not have their rights restricted unnecessarily.
  - The person's disability is permanent or likely to be permanent. Again, this distinguishes placement from treatment under Chapter 51.



## Court Procedures for Protective Placement

### Emergency Protective Placement

Sec. 55.06(11), Wis.Stats.

Chapter 55 provides a way to intervene in an emergency situation 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. A law enforcement officer, firefighter or authorized county staff person may detain the person at an appropriate facility and initiate an emergency protective placement. The individual may only be held for 72 hours and must receive a probable cause hearing before a court to authorize further detention. The maximum length of detention is 30 days after the probable cause hearing. If appropriate services can be provided, there may be no need for a permanent placement proceeding. If permanent placement is necessary, that hearing process must be completed within the 30 days authorized by the temporary order.

### Permanent Protective Placement

Sec. 55.06(6), Wis. Stats.

The guardianship procedures in Chapter 880 also apply to protective placements under 55.06, Wis.Stats. The case starts with a petition which sets out the reason for protective placement. The county corporation counsel may start the petition if the county chooses to do so, but many petitions are brought by facilities, family members or friends who must hire their own lawyer. A guardianship petition may be filed at the same time in which case it must be accompanied by a report from a physician or a psychologist.

#### Role of guardian ad litem or defense attorney

After the petition is filed, a guardian ad litem is appointed. This is a lawyer who meets with the person, informs him/her of his/her legal rights and informs the court whether s/he objects to being placed. If the person objects, s/he will also receive a defense attorney who will contest the protective placement. Either the guardian ad litem or the person's defense counsel may request an independent evaluation by a physician or psychologist of his/her choice to see whether this "second opinion" reaches a different result about whether the person meets the criteria and where s/he should be placed.

#### Possibility of a trial

It is possible for the person's lawyer, the guardian ad litem and the petitioner's lawyer to work out a settlement about whether the person will be placed or where s/he will be placed. Protective services may always be provided as a less restrictive alternative to placement and they may be ordered as the result of a settlement. If there is no settlement, and the person continues to object, then there must be a trial about whether the person meets the legal criteria for placement. The person has a right to request a jury trial. Otherwise the trial will be before a judge. The petitioner's lawyer must present evidence that the person meets the legal standards. The physician or psychologist who supplied the original report must testify. The report itself may not be used as evidence in contested cases, but it can be used without testimony in uncontested cases. There must also be a "comprehensive

report” which is supplied by the county or a county agency. The report should review the person’s needs in a variety of areas and make a recommendation concerning the least restrictive placement.

Sec. 55.06(8) and ((9), Wis. Stats.

### **Determining placement**

After the trial, the court decides whether the person meets the legal criteria for placement. If not, that is the end of the process and the person goes on their way. If the person does meet protective placement criteria, the next step is to determine placement. This is often the most complicated legal issue. The court is required to consider any alternatives to placement including court-ordered protective services. The comprehensive report is very important at this stage. It should describe all of the abilities and disabilities of the person and identify services which could be helpful. It must cover medical, psychological, social, vocational and educational needs. Any party may also submit other reports from professionals that will help the court determine the proper placement or services.

**Many individuals can remain in their own homes or move to other community settings with supportive services and the court is required to consider those alternatives before ordering institutional placement.** The usual practice is for the court to specify a type of setting, but not the specific facility. The responsible county agency, with varying degrees of input from the guardian, then finds the placement and/or arranges services.

### **Payment for community services**

One difficult legal issue is payment for community services. Nursing homes are generally covered by Medicaid which is not a county expense. Community services are generally paid for by COP, Medicaid waivers and similar programs. Counties must either pay some portion of the cost or must pay for case management to arrange and monitor the services. The county may also say that it has used up all of the service funds which it received from the state and cannot serve any more clients. All of these issues can be raised and resolved in the protective placement court proceeding. It is beyond the scope of this chapter to discuss how Wisconsin Statutes, the U.S. Constitution and the federal Americans with Disabilities Act all bear on these financial issues.



*It is important to remember that even after identifying the appropriate services and/or placement, advocacy will often still be required to see that they are delivered.*

### **Annual Review of Placements: The Watts Hearing**

Sec. 880.33(5), Wis.Stats.

Because a protective placement is a loss of personal freedom, every placement must be reviewed every year. This is called a Watts hearing after the Wisconsin Supreme Court case which started the procedure. The court appoints a guardian ad litem who is to review files, meet with the person, talk to the guardian and get any other necessary information. The guardian ad litem must then notify the court if the

individual objects to his/her current placement, or if the guardian ad litem believes that the person's placement is too restrictive. If there is no objection, the person's placement is continued for another year. If there is an objection, the case is scheduled for a hearing which is similar to the original placement hearing. The person can request an independent evaluation and other professional evidence can be presented at the hearing. The guardian can present his/her position. Even if the person still meets the legal standards for placement, s/he must be moved if it is not the least restrictive placement. One result of a Watts hearing could be that the person remains in the same placement. The hearing could also result in the person moving to another facility which is less restrictive, or even to his/her own home or apartment with protective services.

## **Admission Authority to Residential Settings**

Persons with disabilities, like anyone else, have the right to choose where they wish to live. A person who is legally and actually capable of consenting may admit him/herself to any kind of facility. The law recognizes that some persons with significant mental disabilities may need help in making that type of decision. The way in which that decision is made will depend on several issues. One is the type of residence or facility. Another issue is whether the person has a health care agent under a power of attorney for health care, a guardianship of the person only, or a guardianship in connection with a protective placement. The law concerning admissions is different for each of these. The best way to review these issues is to look at the type of setting.

### **Living in the community in an apartment or private home**

- Sec. 155.01(3) and (4), Wis. Stats. • Health care agent - May decide what services the person needs but does not decide where the person should live.
- Sec. 880.38, Wis. Stats. • Guardian - May decide what services the person needs and where the person should live.
- Sec. 55.06(a), Wis. Stats. • Protective placement - Can specify where the person is to live and what services are to be provided.

### **Community-based residential facility (CBRF)**

- Sec. 155.20(2)(c), Wis. Stats. • Health care agent - May admit for a temporary stay of 30 days for respite care if the person lives with the health care agent. May also admit to a CBRF for a long-term stay if the health care power of attorney document specifies this power, but not if the person is either developmentally disabled or mentally ill at the time of admission.
- Sec. 55.05(b)1., Wis. Stats. • Guardian - May admit someone to a CBRF of less than 16 beds, but not to a larger facility.

- Sec. 55.06(a), Wis. Stats. • Protective placement - A person may be admitted to a CBRF of any size.

### Nursing home

- Sec. 155.20(2)(c), Wis. Stats. • Health care agent - May admit directly from a hospital for rehabilitative care up to three months. May admit to a nursing home for a long-term stay if the power of attorney document specifies this power, but not if the person is either developmentally disabled or mentally ill at the time of admission.
- Sec. 55.05(5)(b)2., Wis. Stats. • Guardian - May not admit permanently, but may admit directly from a hospital for rehabilitative care of up to three months. This does not apply if the hospital admission was for psychiatric treatment.
- Sec. 55.06(a), Wis. Stats. • Protective placement - Person may be admitted to a nursing home.
- Sec. 50.06, Wis. Stats. • Protective placement in progress - There is a special procedure to admit someone directly from a hospital if they are not developmentally disabled or mentally ill:
1. If the person is incapacitated as determined by two physicians or a physician and a psychologist;
  2. If a family member or friend agrees to the admission and if no closer relative disagrees; and
  3. A petition for guardianship and protective placement must be filed before admission and must be concluded within 60 days.

- Sec. 155.20(2)(a)4., Wis. Stats.  
Sec. 51.10(8), Wis. Stats.  
Sec. 55.06(a), Wis. Stats.
- Psychiatric hospital** - Admission to this setting is covered by Chapter 51. (*See Civil Commitment & Voluntary Treatment chapter, pg. 352.*) Generally speaking, neither a health care agent or guardian may admit a person for psychiatric treatment. A protective placement also may not be used to admit a person for psychiatric treatment.

### When Person Objects to CBRF or Nursing Home Placement

- Sec. 55.05(5)(c), Wis. Stats. The statutes provide that if a person admitted to a CBRF or nursing home under a guardian's signature, either verbally objects or otherwise actively protests the admission, certain steps must be taken. The situation must be reported to the county protective services agency and a representative must visit the person. The visit must be as soon as possible and within 72 hours. The county's representative must consult with the person to see whether the protest continues and determine the reason for the admission from the guardian. If the protest continues and if there is no basis for protective placement under 55.06(2) or (11), Wis. Stats., the representative must make arrangements for the person to be released within 72 hours. If there are grounds for



protective placement, that procedure must be initiated and the person may be held at the facility under court order until the placement proceeding is concluded. The statutes are less clear about whether this procedure also applies to admission by health care agents, but the best course would be to follow it when someone objects. The least restrictive principle is a basic right under Chapter 55 and there is no reason not to apply it to individuals under power of attorney for health care.

### **Applicability to Persons Under the Age of 18**

Sec. 55.06(1), Wis. Stats.

Chapter 55 is generally thought of as applying to elderly people and adults with disabilities, but it can also be used to place children with developmental disabilities at age 14. Since most children with developmental disabilities do not require placement outside of their home, this provision is only rarely used. Also, many children, with and without disabilities, are placed under Children's Court orders which are often used instead of Chapter 55. (*See The Child Welfare and Juvenile Justice Systems and Children with Complex and Enduring Needs chapter, pg. 149.*)

#### **Transition from children to adult services system**

One issue that does often come up in regard to children with significant disabilities is how to transition them from services in the children's system to services in the adult system. Parents and professionals should discuss adult service needs and potential placements long before the child reaches age 18. Placement orders are not necessarily required to place someone in a supervised apartment, adult family home, or small community-based residential facility, but a Chapter 55 order may be needed to get county funding. A proceeding for adult protective placement may be filed with the court six months before the person turns 18 so that these issues can be resolved.