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GUARDIANSHIP AND ADULT PROTECTION SERVICES SYSTEM - RECENT CHANGES TO CHAPTERS 54 (FORMERLY CHAPTER 880) AND 55 AND SECTION 46.90, WISCONSIN STATUTES

I. INTRODUCTION

Wisconsin has long been recognized as a leader in its approach to protecting and serving its vulnerable and elderly citizens. With the passage of groundbreaking legislation during the past legislative session, it continues to lead. Three significant laws affecting adults with disabilities and the elderly were recently signed by Governor Jim Doyle. The changes will significantly impact the services of long-term care providers and other professionals who work with the elderly and persons with disabilities in residential and community settings.

The first of these laws, signed by Governor Doyle on April 5, 2006 which recodifies chapter 55 of the Wisconsin Statutes, affects the placement and services for persons with disabilities. The changes become effective on November 1, 2006. The second, signed on May 4, 2006 and effective on December 1, 2006, totally revised the guardianship laws. The third, dubbed the "APS Modernization Bill" was signed on May 10, 2006 and will go into effect on December 1, 2006. The third law revises the requirements for reporting and responding to allegations of maltreatment (abuse, neglect, financial exploitation and self-neglect) of elders in Wisconsin's Adult Protective Services System. A summary of the significant changes mandated by each of these laws is set forth below. A more detailed explanation of these three laws authored by Betsy Abramson, elder law attorney, and Jane Raymond, DHFS Advocacy and Protection Systems Developer, will appear in the August issue of Wisconsin Lawyer magazine, available from the State Bar of Wisconsin.²

II. CHAPTER 55 RECODIFICATION

Chapter 55 of the Wisconsin Statutes provides for the voluntary and involuntary protective services and placement for persons with disabilities. It was greatly in need of updating. In addition, significant cases had interpreted

various provisions of the statute finding some portions of the law to be unconstitutional; other court decisions provided clarification of the required procedures or processes or identified ambiguities in the law, *see Watts v. Combined Cmty. Servs.*³. Effective November 1, 2006, the new changes to the provisions of this chapter update outdated terminology and codify case law decisions concerning the procedural rights afforded to persons with disabilities and procedures for protective services and placement.⁴

The law sets forth new terms and definitions. For example, "degenerative brain disorder" replaces references to the outdated term "infirmities of aging" and "serious and persistent mental illness" replaces the term in the text "chronic mental illness".⁵

New procedures are created for pursuing court-ordered protective services, providing the same due process rights as for those needing protective placement.⁶ The law codifies the requirements and procedures for the annual *Watts* review, including requiring the county adult protective services agencies to have written policies about the annual review procedures and county judges to file annual reports about whether the reviews were completed as required.⁷

Chapter 55 now clarifies the authority and duties of the guardian and guardian ad litem in general.⁸ The law expands the ability of a *guardian to admit* a ward to a nursing home or assisted living facilities, deleting the prior requirement that a ward be transferred from a hospital.⁹ It also provides procedures for a guardian to transfer a ward who has been found incompetent in another state but who is a resident of Wisconsin to a facility in Wisconsin.¹⁰

Major changes in the law permit a guardian to consent to the involuntary administration of medication, other than psychotropic medication, and to involuntary medical treatment if that is in the ward's best interest.¹¹ Under the changes governing mental health treatment in chapter 55, the guardian may consent to the administration of psychotropic medication for non-protesting wards if the guardian has made a good faith attempt to discuss the medicine with the ward and the ward does not protest.¹² For protesting wards, it revises the current standard for the involuntary administration of psychotropic medication and provides a process to petition the court for an order for the involuntary administration of psychotropic medication.¹³ If a guardian seeks to involuntarily administer psychotropic medication to a protesting ward, a petition must allege, in part, that there is a lawful prescription, the person is not competent to refuse to take the medicine, the person refuses to take the medicine voluntarily or attempting to administer the medicine is not feasible or in the person's best interest, the reasons for the refusal, the number of attempts made, whether the person's condition is likely to improve with the medication, and evidence that without the medication there is an imminent substantial probability of harm to the person or others. To provide additional guidance, DHFS must promulgate rules that require long-term care residential facilities, including nursing homes and assisted living facilities, to provide information about complying with the procedures for the involuntary administration of psychotropic medications.¹⁴

Finally, the new law significantly changes the procedures for emergency protective placements. It begins by permitting law enforcement to make emergency protective placements based on reliable reports rather than on their personal observation.¹⁵ Further, it permits placement based on the subject individual's conduct that creates a "substantial risk of serious harm" to the subject or others.¹⁶ Finally, it requires each county to designate at least one facility as an intake facility for the purpose of emergency protective placements.¹⁷

III. GUARDIANSHIP

Years in the making, this new law completely revises the provisions for guardianship in Wisconsin.¹⁸ The changes will go into effect on December 1, 2006. Chapter 880 of the Wisconsin Statutes, the current guardianship law will no longer exist. The new guardianship law will be found in chapter 54 of the Wisconsin Statutes.

As was the case with respect to the modifications to chapter 55, subchapter I of the new law introduces new terminology, such as "degenerative brain disorder," "serious and persistent mental illness," "other like incapacities," "interested person," "least restrictive" and "spendthrift." It also updates definitions.

Subchapter II contains the procedures, standards and required findings for the appointment of a guardian of an adult. In conjunction with the new provisions of chapter 55, it permits the filing of a protective placement petition and authorizes the appointment of a guardian before a minor reaches age 18.¹⁹ It authorizes the appointment of a guardian of the person, guardian of the estate or both for an individual who is a minor; or an individual who is incompetent.²⁰ The new law articulates different standards for appointing each type of guardian. To help to protect a person from financial exploitation, the new law authorizes the appointment of a guardian of the estate for a spendthrift.²¹ Before appointing a guardian of the person or the estate, the court must find that "the individual's need for assistance in decision-making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept."²²

Subchapter III governs the nomination of the guardian and the guardian's powers, duties and limitations. The choice of a guardian is ultimately based on a determination of what is in the ward's "best interest"²³ but the law lists other factors to be considered, including any advance planning by the proposed ward, such as a power of attorney, to avoid the need for guardianship.²⁴ It limits the duties and powers of a guardian to those authorized by statute or court order and that are the "least restrictive" form of intervention.²⁵ It clarifies that the ward retains all rights not assigned to the guardian or otherwise limited by law and directs the guardian to act responsibly and honorably toward the ward and the ward's property.

Guardians of the Estate are required to provide the ward with the greatest financial independence and self-determination in light of the ward's functional level, wishes and preferences.²⁶ Certain acts, such as making gifts of the wards'

property or exercising rights under a retirement plan, require court approval.²⁷ Other acts, by a Guardian of the Estate, such as applying for public or private benefits or supporting a person whom the ward is legally obligated to support, do not require court approval.²⁸

Guardians of the Person must advocate for the ward's best interests²⁹ and be actively involved in the determination of how best to meet the ward's needs for care, treatment and services.³⁰ Guardians of the Person are under new requirements to meet or visit the ward regularly to be familiar with the ward and the ward's surroundings, treatment and condition.³¹ The new law specifies that the powers of a Guardian of the Person are limited to the powers ordered by the court and affirms that certain rights are always retained by the ward, including the ability to communicate with legal counsel, protest a residential placement and exercise certain constitutional rights, including the rights to free speech and freedom of association.³² The law specifies that other rights may be removed by the court and either may be transferable to a guardian, such as the right to make financial or medical decisions, or may not be transferable, such as the rights to marry or vote of a person who has been declared to be incompetent.³³ There were no substantive changes made to the provisions in current law addressing admission to and care in a hospice for incapacitated persons.³⁴

The guardian is required to submit to the court a sworn and notarized statement attesting to the guardian's background and personal information, such as any prior convictions, bankruptcies, and suspensions, revocations or other limitations of the guardian's professional license or credentials.³⁵ In this way, the court can consider the proposed guardian's background, among other factors, when determining whether to grant the petition.

The guardian must file a report annually with the court and the county, try to secure any necessary care or services that are in the ward's best interest; regularly conduct in-person inspections of the ward's condition, surroundings, and treatment; examine health care and treatment records; make inquiries into and about the ward's health care treatment and any proposed treatments; and consult with providers of health care and social services in making all necessary treatment decisions.³⁶

Subchapter IV addresses the procedures to be followed in guardianship matters. It includes procedures for foreign guardianships and adoptions, with modifications, a recent Wisconsin court holding.³⁷ In addition, it provides a consistent process for determining venue and standards for determining county of responsibility regardless of disability.³⁸

The new law requires the appointment of Guardians ad Litem ("GALs") in more situations, such as temporary guardianships, any action to expand, review or terminate a guardianship or to review the conduct of a guardian.³⁹ The new law specifies the procedures to obtain a temporary guardian.⁴⁰ It also clarifies when a stand-by guardian may act.⁴¹ Further, it codifies the Wisconsin Supreme Court rule mandating continuing legal education for GALs on specific subjects.⁴²

One change requires the petitioner to be responsible for ensuring that the individual sought to be protected attends the hearing, unless the GAL, after personally interviewing the individual, waives attendance and certifies in writing to the court why the person is unable to attend.⁴³ Factors to be considered in determining whether the individual should attend include the ability of the person to understand and meaningfully participate in the proceedings, the effect of attendance on the person's physical or psychological health and the individual's wishes.⁴⁴

When there is a preexisting power of attorney, the law now provides as follows: (1) The powers of attorney are to remain in effect unless there is good cause shown to revoke them, (2) the court must dismiss a guardianship petition if the court determines that the ward's prior advance planning makes guardianship unnecessary, and (3) a preexisting power of attorney is one more factor in determining whether a ward's estate should pay the petitioner's costs.⁴⁵

Subchapter V addresses matters that arise post-appointment. This includes the requirement that all guardians, including corporate guardians, file an annual accounting of the estate within 60 days, unless (for estates smaller than \$20,000 or for married wards) the court determines that an accounting is not needed.⁴⁶ It provides that reviews and modifications of guardianships may be requested by wards or anyone on the ward's behalf, if it is more than 180 days since the last request or under exigent circumstances.⁴⁷

Because not all guardians are capable or honorable and some guardians can be responsible for the intentional maltreatment and exploitation of their wards, the new law lists specific grounds for removing a guardian and establishes a cause for court action against a guardian and remedies.⁴⁸ Guardians may be removed for failing to timely file the required accounting; fraud, waste and mismanagement of the ward's funds; abuse or neglect of the ward or knowingly permitting others to do so; failing to provide adequately for the needs of the ward; self-dealing; and failing to provide due diligence and reasonable care in assuring that the ward's personal needs are being met in the least restrictive environment consistent with the ward's needs and capacities.⁴⁹

Subchapter VI covers conservatorships and specifies that conservators have all powers of a Guardian of the Estate.⁵⁰ Conservatorships may only be terminated pursuant to a hearing.⁵¹

Subchapter VII covers the Uniform Guardianship Acts. This subchapter combines current ch. 880 subchapters covering the Uniform Veterans Guardianship Act, Uniform Transfer to Minors Act, Securities Owned by Minors, Incompetents and Spendthrifts and the Uniform Custodial Trust Act.

IV. ADULT PROTECTIVE SERVICES SYSTEM MODERNIZATION

The changes to the Adult Protective Services "APS" law⁵² are the result of the Joint Legislative Council's Special Study Committee on the Decodification of chapter 55, Placement and Services for Persons with Disabilities. The changes, effective December 1, 2006, are based in large part on the recommendations of the Wisconsin Department of Health and Family Services' APS Modernization

Project. The project members, and later the joint legislative council members, recognized that issues of power and control, commonly found in domestic violence situations, are present in cases involving the abuse and neglect of the elderly and disabled adults. Therefore, the goal of the changes is to create a state-wide and county-based system that protects and provides needed services across their lifespan to those adults who have experienced, are experiencing or are at risk of experiencing maltreatment. This system incorporates a social services approach as well as intervention by the criminal justice system, as appropriate.

Specifically, the law revises chapter 46 of the Wisconsin Statutes governing the reporting of and response to allegations of the maltreatment, abuse, neglect, financial exploitation and self-neglect involving persons age 60 or older. It also amends the provisions of chapter 55 of the Wisconsin Statutes to allow all counties in Wisconsin to investigate reports of suspected maltreatment of persons with disabilities ages 18 to 59.⁵³

Significant changes include the introduction of the terms "adult-at-risk" and "elder adult-at-risk" to refer to adults who have experienced, are experiencing or are at risk of experiencing maltreatment.⁵⁴ The county agencies that will have responsibility for receiving reports of, responding to and investigating reports of maltreatment of elders (persons age 60 or older) or other adults (age 18-59) who are at risk of harm will be called "elder-adult-at-risk agencies" or "adult-at-risk agencies".

The law also identifies who reports, who is reportable, what is reportable, where to report and who investigates reports. It requires the reporting by certain professionals in limited circumstances where the adult-at-risk⁵⁵ has requested the professional to make a report of suspected maltreatment or where there is reasonable cause to believe the adult-at-risk is at imminent risk of serious bodily harm, death, sexual assault, or significant property loss and the adult-at-risk is unable to make an informed judgment about whether to make the report or other adults-at-risk are at risk of death, serious bodily harm, sexual assault or significant property loss inflicted by a suspected perpetrator. Those professionals who are required to report include employees of any entity regulated or licensed by DHFS, health care providers as defined in Wisconsin Statutes section 155.01(7), and social workers, professional counselors or certified marriage and family therapists.⁵⁶ Attorneys and those who work under the supervision of attorneys remain voluntary reporters who are permitted, but not required, to report.⁵⁷ Further, the new law provides protection from liability for those who report in good faith, outlines what an appropriate response includes and the services that may be offered if maltreatment is substantiated, clarifies confidentiality requirements and creates a restraining order for adults-at-risk⁵⁸ to protect victims and adult-at-risk agency workers.

V. CONCLUSION

The significant changes made to the Adult Protection Service System and Guardianship laws represent the coordinated and thoughtful work of many advocates, health care providers, county agency representatives, government representatives and employees, social workers and attorneys. The laws, as

amended, provide needed clarity about the many systems involved in and services provided to elderly and disabled individuals. The changes codify existing case law and reorganize sections to make it easier for a non-lawyer to find and understand the legal rights, procedures and standards involved in protecting the most vulnerable citizens in Wisconsin. With these important changes, Wisconsin, as it has in the past, leads other states in the way it serves and protects its citizens.

The Health Care Department attorneys of Reinhart Boerner Van Deuren s.c. are available to help you understand and respond to these new legal requirements.

¹ Atty. Dawson gratefully acknowledges the contributions of Jane Raymond, DHFS Advocacy and Protection Systems Developer and Attorneys Ellen Henningsen and Betsy Abramson to this summary. Ms. Dawson, a shareholder in the Health Care Department of Reinhart Boerner Van Deuren s.c., was the co-chairperson of the Adult Protective Services Modernization committee when she served as Deputy Chief Legal Counsel of the Department of Health and Family Services. She, Ms. Raymond and Atty. Abramson worked on the development of many of the changes discussed in this article.

² Copies of the Wisconsin Lawyer magazine may be obtained by contacting the State Bar of Wisconsin or by accessing the State Bar's website at <http://wisbar.org>.

³ *Watts v. Combined Cmty. Servs. Bd. of Milwaukee County*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

⁴ The history and text of the changes to Chapter 55 may be found at www.legis.state.wi.us/2005/data/acts/05Act264.pdf and www.legis.state.wi.us/2005/data/AB785hst.html.

⁵ See, Wis. Stats §§ 55.01(2v) and 51.01(4t).

⁶ Wis. Stats. §§ 55.075, 55.08, 55.09, and 55.10.

⁷ Wis. Stats. §§ 55.18 (1) and (4).

⁸ Wis. Stats. §§ 55.10(4)(b) and 55.18(2).

⁹ Wis. Stats. § 55.055 (1)(b)

¹⁰ Wis. Stats. §§ 55.055(1)(c) and (d).

¹¹ Wis. Stats. §§ 880.38(2) and (4). Provisions addressing the administration of psychotropic medications currently are found in chapter 880. Those provisions have been removed from chapter 880 and moved to chapter 55.

¹² Wis. Stats. § 880.38(4).

¹³ Wis. Stats. § 55.14.

¹⁴ Wis. Stats. § 50.02(2)(ad).

¹⁵ Wis. Stats. § 55.135(1).

¹⁶ *Id.*

¹⁷ Wis. Stats. § 55.02(2)(b).

¹⁸ The history, text and a discussion of the guardianship law may be found at www.cwag.org/legal/guardian-support

¹⁹ Wis. Stats. §§ 54.1(3)(a)1 and 55.06.

²⁰ Wis. Stats. § 54.10(1).

²¹ Wis. Stats. § 54.10(2).

²² Wis. Stats. § 54.10(3)(a) 4.

²³ Wis. Stats. § 54.15.

²⁴ Wis. Stats. §§ 54.10 (2)(b) and (c).

²⁵ Wis. Stats. § 54.18.

²⁶ Wis. Stats. § 54.19.

²⁷ Wis. Stats. § 54.20(2).

²⁸ Wis. Stats. § 54.20(3).

²⁹ Wis. Stats. § 54.18(2)(b).

³⁰ Wis. Stats. § 54.25(1).

³¹ *Id.*

³² Wis. Stats. § 54.25(2).

³³ Wis. Stats. §§ 54.25(2) and (3).

³⁴ Wis. Stats. § 50.94.

³⁵ Wis. Stats. § 54.15.

³⁶ Wis. Stats. § 54.25(1).

³⁷ Wis. Stats. § 54.34. See, *In re Guardianship of Jane E.P.: Grant Co. DSS v. Unified Bd. of Grant and Iowa Counties*, 2005 WI 106, 283 Wis. 2d 258, 700 N.W.2d 863.

³⁸ Wis. Stats. § 54.30.

³⁹ Wis. Stats. § 54.40.

⁴⁰ Wis. Stats. § 54.50.

⁴¹ Wis. Stats. § 54.52.

⁴² Wis. Stats. § 757.48(1)(a).

⁴³ Wis. Stats. § 54.44(4).

⁴⁴ Id.

⁴⁵ Wis. Stats. §§ 54.46(1)(a)2, (2)(b) and (c), and (3)(a)4.

⁴⁶ Wis. Stats. § 54.62.

⁴⁷ Wis. Stats. § 54.64.

⁴⁸ Wis. Stats. § 54.68.

⁴⁹ Id.

⁵⁰ Wis. Stats. § 54.76.

⁵¹ Id.

⁵² The history and text of the APS law may be found at www.legis.state.wi.us/2005/data/AB539hst.html.

⁵³ Under current law, only Milwaukee County has this statutory authority.

⁵⁴ Wis. Stats. §§ 46.90(1)(br) and 55.01(1e).

⁵⁵ Drafter's note: For ease in reading, unless there is a need to use the specific term, the generic term "adult-at-risk" is used when referring to both elder-adults-at-risk (age 60 and older) and adults-at-risk (ages 18-59).

⁵⁶ Wis. Stats. § 46.90(4)(ab) and (ad); Wis. Stats. 55.043(1m)(a)

⁵⁷ Wis. Stats. § 46.90(4)(ar); Wis. Stats. § 55.043(1m)(br). Under federal law, employees of financial institutions are also voluntary reporters who are permitted to report. See, 31 U.S.C. § 5318(g)(3) (2005).

⁵⁸ Wis. Stats. § 813.123(2)(a).

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