

88 ADM-023

Responsibility of Local Social
Services Districts to Provide
Involuntary Services to Protective
Services for Adults (PSA) Clients
Under Certain Circumstances

ADMINISTRATIVE DIRECTIVE

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES

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SUBJECT: Protective Services For Adults: Serving Involuntary Clients

SUGGESTED DISTRIBUTION: County and Agency Attorneys
Directors of Social Services
Protective Services for Adult Staff
Staff Development Coordinators

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FILING REFERENCES

Previous ADMs/INFs	Releases Cancelled	Dept. Regs.	Soc. Serv. Law & Other Legal Ref.	Manual Ref.	Misc. Ref.
87 ADM-6 85 ADM-5 83 ADM-15 82 ADM-32 81 ADM-57 80 ADM-71 86 INF-11 84 INF-13 84 INF-8 79 INF-8	80 ADM-71	Part 457	Article 98 SSL Mental Hygiene Law Family Court Act Public Health Law Surrogate's Court Procedure Act		

I. Purpose

The purpose of this directive is to clarify the responsibility of local social services districts to provide involuntary services to Protective Services for Adults (PSA) clients under certain circumstances. This transmittal explains and amplifies the Department's regulations and provides guidance in the practical application of involuntary interventions.

II. Background

Although many persons in need of PSA accept services voluntarily, there are a number of involuntary clients who resist the provision of essential services. While local district PSA staff must respect an individual's right to self determination, they also have the legal responsibility to provide necessary services to persons who require them. Authority to protect the life and property of unwilling clients is established in Social Services Law, Mental Hygiene Law, the Family Court Act, Public Health Law and the Surrogate's Court Procedure Act as well as in case law.

Since 1976, when information on the PSA program was first provided by the Department, districts have been reminded of their dual responsibility - protection of the client's rights and protection of the client from harm caused or threatened by reason of the client's incapacities. While the district may not impose a service on a client who is capable of self determination and self care, neither may the district walk away from the client who is threatened with harm, unable to make decisions on his behalf due to impairments and apparently unwilling to accept the needed services.

As part of the Department's PSA case review project to determine compliance with the PSA Process Standards as set forth in Part 457 of the Department's regulations and 85 ADM-5, we have noted that there is still considerable confusion among local staff regarding the responsibility of districts to provide services to involuntary PSA clients. This directive is intended to provide needed clarification to local districts.

III. Program Implications

The information presented below amplifies Department policy, as set forth in applicable laws and regulation, regarding the delivery of services to involuntary PSA clients. This information should enhance the capability of district staff to serve involuntary PSA clients by providing them with a more thorough understanding of:

- o □□□□ the situations in which the district has a responsibility to provide services to involuntary PSA clients; and
- o the legal interventions which are available to assist districts in the delivery of appropriate services to PSA clients.

A. GENERAL INFORMATION

PSA staff should give primary consideration to the individual rights of clients. To the fullest extent possible, clients should be supported by the caseworker in exercising free choice in making decisions, especially those which may involve significant changes in a client's life. A majority of individuals requiring PSA will become voluntary clients when informed of the services available to them. The establishment of trust and respect between worker and client, appropriate counseling and gentle persuasion will often help a resistive client accept services on a voluntary basis. The initial emphasis of the caseworker's efforts must generally be in this direction. PSA staff also must attempt to work with members of the client's family, friends and other persons of significance to the client, including staff of other agencies serving the client, to convince a resistant client to accept services voluntarily.

It is not always possible to convince an endangered client to accept necessary services. Some clients may be so impaired that they are totally unable to comprehend their situation. Other less impaired clients may be able to meet certain basic needs but unable to meet others. When, after a thorough assessment of a client's current situation, there is evidence of a serious threat to the safety and well being of the client and the client is incapable of making choices regarding the danger because of temporary or permanent impairment, the agency is obligated to secure services to ensure the client's safety, even if the client refuses them. Because the ability of the client to make decisions on his behalf is always a consideration when involuntary interventions are being considered, it is advisable to arrange for a mental health evaluation of the individual prior to pursuing any legal intervention.

In considering involuntary intervention, it is important to distinguish between incapacity and incompetence. Incapacity means an inability to function in a given area. A person lacking capacity in one area can retain capacity and rights in other areas. Incompetence is a legal term which refers to a conclusion reached in a court of law that a person is incompetent to manage himself or his affairs. Incompetence means that the person lacks capacity in all areas. Most PSA clients who require involuntary interventions will be incapacitated, rather than incompetent.

It is important that PSA staff have a basic understanding of the appropriate provisions of law and the practical legal issues they must face on a daily basis with their clients. It is equally important that a strong collaborative relationship be established with the professional legal staff assigned to the agency. If legal action is required, the agency attorney will be needed to prepare the case and present it before a judge, often on short notice. PSA staff must first identify the case as meeting the legal criteria for the appropriate form of intervention and recommend a course of action. The attorney must also be provided with documented evidence of the client's situation and need for the form of intervention recommended by the caseworker and his/her supervisor. A well prepared and well documented case generally results in a successful outcome in court.

The consequences of intervention contrary to the wishes or without the consent of a client cannot be taken too seriously, and such action should be contemplated only after reasonable attempts have been made to secure the client's cooperation. If an involuntary intervention is being considered, the principle of "least restrictiveness" must be carefully observed at each step in the development of an involuntary plan of care. It must be emphasized that this does not mean that intervention is to be avoided. It does mean that each intervention must be limited in scope and include only those specific actions required to eliminate the existing endangering conditions and ensure the client's continued safety and well-being. If involuntary actions are required, to the extent possible, efforts should always be made to provide services in the client's own home with as little disruption to his chosen lifestyle as possible. There are, of course, circumstances in which a client's safety is seriously threatened in his current environment, and removal must be considered. If temporary removal from the client's home is required, every effort must be made to safeguard and maintain the house, and to return the adult to his home as soon as the conditions which necessitated removal are alleviated.

In some situations, it may not be possible to provide the services necessary to ensure the client's safety in his own home. If long term alternative living arrangements and residential placement are required, the client must be involved in the placement decision to the fullest extent possible consistent with his level of impairment. PSA staff should be actively involved in counseling the client and his family throughout the placement process. The district must make every effort to locate and provide advocacy in placing the client in the setting most appropriate for the client's needs.

There are two traditional legal principles, based in the Common Law, under which intervention may be pursued: the police power of the State, which gives the State authority to regulate activities that endanger the health and safety of other persons in society and the theory of *parens patriae*, which gives the State authority to act in a parental capacity for persons who cannot care for themselves or who are dangerous to themselves. These two principles provide a common law basis for the provision of PSA.

In addition to these common law underpinnings, the Social Services Law provides explicit statutory authority for PSA. Local social services districts are mandated by Section 473 of the Social Services Law (SSL) to provide Protective Services for Adults. Services provided under PSA include: receiving and investigating reports of seriously impaired individuals who may be in need of protection; arranging for medical and psychiatric services; arranging for commitment, guardianship, conservatorship or other protective placement; cooperating and planning with the courts as necessary on behalf of individuals with serious mental impairments; and other specific protective services as set forth in the Consolidated Services Plan (CSP). Section 457.6 of the Department's regulations further states, "When the district believes that there is a serious threat to an adult's well-being and that the adult is incapable of making decisions on his or her own behalf because of mental impairments, the local social services official has a responsibility to pursue appropriate legal intervention ..."

Although local districts are mandated to provide PSA as noted above, additional authority to protect the life and property of unwilling clients is established in Mental Hygiene Law, the Family Court Act, Public Health Law and the Surrogate's Court Procedure Law, as well as Social Services Law. The immediacy and seriousness of the threat to the individual determine whether crisis intervention procedures and/or other legal procedures are warranted as set forth below. Districts have the authority as well as the responsibility to utilize these procedures in appropriate situations on behalf of involuntary PSA clients.

B. INVESTIGATING PSA REFERRALS

Local district staff sometimes encounter serious difficulties in investigating PSA referrals because they are unable to gain access to the potential client. Access is denied either by the subject of the PSA referral or by a family member or friend acting as the person's caregiver. Often the caregiver denying access to the potential client is suspected of abusing or exploiting this individual. In order to respond to these cases, local district staff enlist the assistance of family members, friends, neighbors or staff from other agencies already known to the potential client in order to gain access. However, there are still situations where local district staff cannot gain access. In those cases, staff are advised to request assistance from law enforcement personnel. However, the ability and willingness of law enforcement personnel to effectively intervene vary greatly depending on the specific situation and the individual police jurisdiction involved. Section 473-c SSL addresses this problem by providing a mechanism for local districts, in conjunction with law enforcement personnel, to utilize in order to gain access to persons believed to be in need of PSA. Specific information regarding the steps to be taken to effectively utilize Section 473-c SSL may be found in 87 ADM-6.

C. CRISIS INTERVENTION

State law contains several specific interventions which can be utilized in crisis situations. For purposes of this directive, a crisis is defined as a situation in which there is an immediate and identifiable danger to a person or his property and the person, because of impairment, regardless of cause or duration, is incapable of making the choices necessary to remove the endangering condition.

1. Social Services Law (SSL): Short Term Involuntary Protective Services Orders (STIPSO)

Chapter 991 of the laws of 1981 established Section 473-a SSL, which authorizes local social services districts to petition a court for a STIPSO on behalf of certain PSA clients who are at imminent risk of death or serious physical harm and are unable to understand the consequences of their situation. This law was enacted in large part because PSA staff had often been unable to take the necessary immediate action to insure the safety of their clients, who, although unable to comprehend the seriousness of their situation, could not be admitted to a psychiatric facility

under Mental Hygiene Law (MHL) because their condition was not the result of mental illness. Because of the need for expeditious action, the provisions of MHL governing the appointment of conservators and committees were also of limited assistance due to the time consuming nature of these proceedings. Specific information regarding procedures for implementing the STIPSO statute can be found in 81 ADM-57 and 82 ADM-32. Information regarding the utilization of STIPSO may be found in 86 INF-II.

2. Mental Hygiene Law (MHL)

a. Involuntary Admission to a Psychiatric Facility

Section 9.47 of MHL provides that directors of community services, health officers and commissioners of social services have a duty to see that all mentally ill persons within their respective communities in need of care and treatment at a psychiatric hospital receive appropriate care. Therefore, the local district has a responsibility to obtain treatment for mentally ill individuals found in the community who are unable to function on their own, are acting in a manner likely to cause harm to themselves or others, and have no other responsible person or service provider available to provide the necessary help.

It is important that the concept of harm to oneself or others be understood within the context of Mental Hygiene Law. The "likelihood to result in serious harm" is defined in MHL to mean "a substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself," or "a substantial risk of physical harm to others as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm" (Section 9.39 MHL).

The following actions must be initiated in appropriate situations by local districts on behalf of persons who appear to be "mentally ill" and "in need of treatment" and whose behavior can be documented to indicate a "likelihood to result in harm" to themselves or others.

1) Enlist the Immediate Assistance of a Peace Officer (Section 9.41 MHL)

Any peace officer of the state, town, village, county or city who is a member of the State Police or of an authorized police department or force or of a sheriff's department may take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to himself or others. The officer may direct the removal of such person or remove him to a hospital with appropriate staff and facilities to care for mentally ill persons. (It is important to emphasize that the decision to admit an individual to a psychiatric facility rests with the facility.)

2) Request Action by the Local Director of Community Services (Sections 9.37 and 9.45 MHL)

The director of community services, usually the county Mental Health Commissioner or his official designee, has the authority to examine and remove a mentally ill person to a psychiatric facility for treatment and care. In addition, the director has the authority to direct any state, county or local peace officer to transport the individual to the facility when required. (However, the decision to admit the person to the facility rests with the facility.)

3) Initiate Application for Admission to a Mental Facility on Certification of Two Physicians (Section 9.27 MHL)

A social services official is authorized to initiate the application for admission to a psychiatric facility on behalf of a mentally ill individual who needs involuntary care. The application must contain a statement of the facts upon which the allegation of mental illness and need for involuntary care is based. The application must be accompanied by the certificates of two examining physicians. (Again, it must be emphasized that the decision to admit the individual to a psychiatric facility rests with the facility.)

b. Admission of Involuntary or Non-Objecting Persons to a Developmental Center
A separate section of MHL gives certain public officials, including commissioners of social services, explicit authority to initiate applications for admission to developmental centers on behalf of mentally retarded individuals. The local districts must initiate the following actions on behalf of persons alleged to be mentally retarded and in need of involuntary care and treatment.

1) Involuntary Application for Admission to a Developmental Center on Medical Certification (Section 15.27 MHL)

A social services official is authorized to initiate an application for admission to a developmental center on behalf of an individual who is alleged to be mentally retarded and in need of involuntary care and treatment. The application must contain a statement of facts upon which the allegation of mental retardation and need for involuntary care and treatment are based and must be accompanied by the certificates of two examining physicians or of one examining physician and one certified psychologist. (The final decision to admit the individual to a developmental center rests with the facility.)

2) Application for Admission to a Developmental Center on Behalf of Certain Non-Objecting Adults (Section 15.25 MHL)

A social services official is authorized to initiate an application for admission to a developmental center on behalf of an individual in need of care and treatment who does not object but who is so profoundly or severely retarded that he does not have sufficient understanding to give informed consent. The application must conform to the requirements set forth in Section 15.27 MHL (discussed above) and must be accompanied by the certificate of one examining physician or certified psychologist.

c. Temporary Restraining Order to Protect the Property and Welfare Of a Proposed Conservatee (Section 77.08 MHL)

Chapter 489 of the Laws of 1982 amended Article 77 MHL to expand the powers of the court to provide provisional remedies which offer immediate protection of the property and welfare of a proposed conservatee pending the appointment of a conservator. Under the provisions of Section 77.08 MHL, a petition may be made in county or supreme court, upon a showing of good cause, for the issuance of a temporary restraining order preventing any specified person from affecting the property of the proposed conservatee, or from committing an act or allowing an act of omission which could be shown to endanger the welfare of the proposed conservatee. In addition, the law empowers the court to give any such temporary restraining order the effect of a restraining notice to persons having custody or control over the person or property of the proposed conservatee, thereby prohibiting the sale, assignment, transfer or interference with any property of the proposed conservatee, except pursuant to court order.

This statute provides the districts with an effective tool in situations in which a PSA client is unable to protect himself or his property from the neglectful or exploitive actions of another person and prompt action is required to protect the client from further harm. This action must follow a formal petition for conservatorship. Conservatorship proceedings are discussed in greater detail below.

3. Family Court Act (FCA): Orders of Protection

Article 8 of the Family Court Act (FCA) may be utilized to obtain orders of protection on behalf of adults who are victims of abusive or neglectful acts by a child or other member of the family or household. Petitioning a court for an order of protection is a civil proceeding. It provides an alternative to criminal prosecution of the abusive family member or other actions taken on behalf of the abused PSA client which often may result in their removal from the home.

At a minimum, a petition to Family Court for an order of protection must contain an allegation that the accused abuser has committed acts which would constitute disorderly conduct, harassment, menacing, reckless endangerment or assault in the second or third degree, and a statement of the relationship of the alleged offender to the petitioner (Section 821 FCA). Examples of these actions include physical abuse and preventing or interfering with the delivery of essential services and care, including hospitalization and residential care. Whenever possible, abused persons should be encouraged to file for an order of protection on their own behalf. The Family Court Act, however, also authorizes local public welfare officials and representatives of other duly authorized agencies to initiate proceedings for orders of protection (Sections 119 and 822 FCA). The Family Court does not require physical or mental impairment as a prerequisite for issuance of an order of protection on behalf of an adult for whom a third party has initiated a petition. However, it is recommended that districts include any available documentation regarding the client's impairment and inability to protect himself.

Following the filing of a petition, a Family Court may, upon a showing of good cause, issue an immediate temporary order of protection. A temporary order can provide the protection requested before the matter has been fully investigated and decided. It may set forth any "reasonable conditions of behavior" to be observed by the respondent or any other family or household member. Often a situation may be resolved following the issuance of a temporary order of protection with no further court action required. (Section 828 FCA)

Following a hearing and based on a finding that the allegations are "supported by a fair preponderance of the evidence", the Family Court may issue a permanent order of protection, which may remain in effect for up to one year. (Section 842 FCA)

4. Public Health Law (PHL): Situations Where There Is A Danger to the Public Health and Safety

In those situations where the physical health and safety of the client or others is put in jeopardy because of dangerous or unsanitary living conditions, districts should enlist the help and cooperation of local public health officials. Such officials are authorized to investigate complaints of unsanitary or unsafe conditions affecting the public health. It is within their scope of responsibility to cite violations and, if the violations are not removed, file appropriate charges which are subject to fine or imprisonment. Public health officials, upon failure of a property owner to comply with a duly executed order, may enter a premises and remove and/or suppress any condition which is determined to be "detrimental to the public health." In most situations, the official citation of violations may be sufficient to stimulate corrective action or the client's acceptance of services (Sections 1303-1305, 1308,2120 PHL).

5. Parens Patriae: Court Orders to Obtain Medical Treatment

Under the common law principle of "parens patriae", which is discussed above, the State Supreme Court has the authority to issue orders for medical treatment on behalf of certain seriously impaired adults who are unable to act for themselves. Case law gives the court authority to appoint guardians and receivers to protect the interests of disabled adults or to give consent for medical treatment. Courts engage in a case by case review of the specific facts presented. Examples of case law include Weberlist, 360 NYS 2d 783 (Sup. Ct., NYC, 1974); New York City Health and Hospital Cor. v. Stein, 335 NYS 2d 461 (Sup. Ct., NYC, 972; Matter of Roosevelt Hospital NYLJ Jan. 13, 1977 (Sup. Ct., NYC); and Matter of Storar, 438 NYS 2d 266 (1981), cert. den. 454 U.S. 858 (1982).

Courts may, under other statutes, appoint a conservator (Article 77 MHL), committee (Article 78 MHL) and Guardian for the Mentally Retarded (Article 17-A, Surrogate's Court Procedure Act) and authorize that person, under court supervision, to make certain specified medical decisions. Courts, however, do not have the authority to authorize intrusive medical procedures with a STIPSO under Section 473-a SSL.

Local district staff are responsible, where appropriate, for arranging for medical services for PSA clients. This is usually accomplished through referral to other appropriate agencies. However, situations do arise in which a PSA client urgently requires a specific medical intervention, such as surgery, and is unable, due to mental and/or physical impairments, to make an informed decision to proceed with the needed treatment and does not have a court appointed surrogate. In these circumstances, it may be necessary for the district to be involved in pursuing a court order to obtain medical treatment. It should be noted that neither an adult child, the parent of an adult child nor a local social services official may lawfully make substitute decisions regarding medical treatment on behalf of another adult without first obtaining a specific court order except in certain limited instances involving psychiatric inpatients.

Careful consideration is necessary when determining whether to seek a court order to impose medical treatment against the wishes of an impaired adult. Even with a non-resistant adult who is considered too impaired to provide "informed consent", a court order must be sought to provide medical treatment. Under all circumstances, medical intervention should be limited to the least restrictive appropriate measure.

In certain emergency situations in which consent is not "reasonably possible", such as in the case of a seriously mentally disabled individual who needs emergency surgery, it is legally defensible for a hospital to provide treatment in the absence of the patient's informed consent (Section 2805-d PHL).

D. LEGAL PROCEDURES OF LONG TERM CONSEQUENCES

The following legal interventions involve the use of court procedures which provide for long term management of the property or the property and person of impaired individuals by court appointed surrogates. These procedures require more time to implement than is afforded in emergency or crisis situations. They are to be initiated only for persons who have demonstrated such a degree of incapacity that supportive services alone are not adequate to achieve a plan of protection. These procedures are set forth in Articles 77 and 78 of MHL and Article 17-A of the Surrogate's Court Procedure Act, which govern the appointment of conservators, committees and guardians for the mentally retarded. Conservatorship and committee proceedings are initiated in the Supreme Court or County Court, while guardianship for the mentally retarded proceedings are initiated in the Surrogate's Court. A discussion of the Community Guardian Program follows a discussion of the above-noted procedures.

1. Conservator

Article 77 of MHL sets forth the procedures for the designation of a conservator for the property of a person who has not been declared to be incompetent by a court but who "by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs, or other cause, has suffered impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support." Any "friend" of the proposed conservatee, including a relative, a corporate body, a public agency or a social services official may initiate a conservatorship proceeding and act as a conservator.

The primary duties of a conservator are to preserve, maintain and care for the proposed conservatee's income and assets. The court must, however, approve a plan for the conservator to provide for the conservatee's well-being, including the provision of necessary personal and social protective services to the conservatee. Therefore, the court may grant additional powers to a conservator, including control over personal care and placement decisions, which are specified in the court order. Although several conservatorship orders have given the conservator the authority to make placement decisions, not all courts are willing to do so.

The following proof/documentation regarding the proposed conservatee must be presented to the court:

- the reason for concern for the financial and personal well-being of the individual;
- clear and convincing proof of the need for a conservator, including proof of functional impairment (an assessment by a mental health professional is not required by law, but may be required by the judge);

- the name and address of the proposed conservatee, his spouse, his legal heirs and the person or agency, if any, currently having custody of his person;
- the nature, probable value and income of all property;
- the anticipated duration of the conservatorship, and if indefinite, why a fixed period is not more appropriate;
- the extent of income and assets to be placed under the conservatorship and the necessity for so doing; and
- the petitioner's proposed plan to insure the preservation, maintenance and care of the proposed conservatee's income, assets and personal well-being, including the provision of necessary personal and social protective services to the conservatee.

The local social services district must first determine if there is another interested and responsible person or agency to file the petition and act as conservator on behalf of a PSA client. If no one else is willing or capable of acting in this capacity, the district must apply for conservatorship as required by Section 457.1(c)(9) of the Department's regulations.

A notice of the conservatorship petition must be served on the proposed conservatee, his spouse and children, or if none are known, his legal heirs, or if none are known, the person with whom he resides or the director of the facility in which he resides. The court may appoint a guardian ad litem to represent the interest of the proposed conservatee. The guardian must fully investigate the situation and arrive at a finding for presentation to the court. A hearing will take place before the judge unless the court determines that a trial by jury is appropriate, for reasons stated in the law. Local districts must act as a conservator for a PSA client if no one else is willing and capable of acting in this capacity. An annual accounting and inventory must be filed with the court every January. If the district is named conservator, the client's estate must be managed in accordance with the requirements set forth in 83 ADM-15 and briefly discussed in the following section entitled Financial Management Procedures.

Article 77 MHL contains a provision for a temporary restraining order to protect the property and welfare of a proposed conservatee when there is a need for prompt intervention. This is described in greater detail in Section B.2.c. above.

2. Committee

Article 78 of Mental Hygiene Law sets forth the procedures for the appointment of a committee for a person who is incompetent to manage himself or his affairs. Anyone may commence a special proceeding to declare a person incompetent and to appoint a committee of an incompetent. Where the property of any person is endangered by reason of his incompetence and no proceeding has been commenced, the local social services commissioner is required to bring the proceeding (Section 78.03 MHL).

The essential element in the establishment of a committee is the finding by the court that the adult is legally incompetent. This results in a substantial reduction in personal civil rights. It is not a procedure to be pursued for persons who are only partially or sporadically impaired in their functioning and are capable of retaining some independence. The totality of both the disability of the affected person and the duties and powers of the committee, albeit subject to the supervision of the court, are strong reasons why a committee proceeding should only be considered when it is clear that an adult is severely and permanently impaired and no less restrictive measures would suffice. Additionally, Section 78.02 MHL requires that, prior to the appointment of a committee, the court must first consider whether the interests of the individual could best be served by the appointment of a conservator.

The procedure to be followed in the establishment of a committee is basically the same as that for a conservatorship (discussed above).

3. Guardianship for the Mentally Retarded

Article 17-A of the Surrogate's Court Procedure Act established a procedure for the protection of persons who are mentally retarded. The law provides for the appointment of a guardian for a mentally retarded person who is certified as incapable of managing himself and/or his affairs because of permanent mental retardation. The certification must be made by at least two licensed physicians, or a licensed physician and a certified psychologist. The guardian may be appointed over the person, the property or both. Parents, relatives or other interested persons may be appointed as guardian. A non-profit corporation may be appointed as corporate guardian of the person only. A standby guardian may be appointed by the court to assume guardianship upon the death of the guardians/parents.

Because case management responsibility for individuals who have been formally diagnosed as mentally retarded is generally assumed by other agencies, local social services districts probably will have limited involvement in this area. However, in accordance

with Section 473.1(c) and (e), SSL and Section 457.1(c)(7) of the Department's regulations, local districts must petition for the appointment of a guardian of the mentally retarded in appropriate situations where no one else is willing and able to act on behalf of the client. The process and information to be presented to the court is similar to that for conservatorship and committee, with the exception of the need to present a certification of mental retardation. The agency attorney should be consulted immediately if it appears necessary for the district to pursue guardianship.

4. Community Guardian Program

Section 473-c SSL established a Community Guardian Program which allows a social services official to contract with a non-profit organization or government agency to serve as conservator or committee for PSA clients. Under provisions of this statute, the local social service official may bring a petition to appoint a conservator or committee under Article 77 or 78 MHL for a person who is:

- eligible for and receiving PSA;
- living outside a hospital or residential facility or able to return to the community if a conservator or committee is appointed; and
- without capable friend, relative or agency willing to serve as conservator.

Upon being appointed conservator or committee, the Community Guardian Program must:

- make best efforts to maintain the person in the community;
- obtain medical, social, mental health, legal and other services that are available and required for the person's safety or well-being;
- advocate for all entitlements, public benefits and services for which the person qualifies and which the person requires; and
- obtain an annual assessment from two qualified psychiatrists or a qualified psychiatrist and a qualified psychologist to determine if services are still required.

Additional information regarding the Community Guardian Program may be found in Section 457.12 of the Department's regulations.

E. FINANCIAL MANAGEMENT

Many PSA clients will have limited or no ability to manage day-to-day financial transactions and/or protect themselves from exploitation. Sometimes financial management is the client's primary need. A client's inability to manage his finances may result in failure to pay essential bills, wasting of resources, and/or failure to purchase adequate food, clothing, shelter or medical care. This inability may also leave them vulnerable to exploitation by others, which can include unauthorized use of a client's telephone or property, theft of food or household possessions, unauthorized withdrawals from bank accounts, and refusal to purchase essential goods and services by a caregiver who controls the client's funds.

In accordance with the requirements of Section 473 SSL and Part 457 of the Department's regulations, districts must be prepared to provide certain financial management services to their PSA clients. Section 457.1(c)(4) of the Department's regulations requires local districts to provide counseling to PSA clients and their families, which includes advice regarding the use of the client's funds. Section 457.1(c)(9) requires the districts to function as conservator, representative payee or protective payee when these services are determined to be necessary and no other individual or agency is willing and capable of providing them.

The Social Security Administration can designate a representative payee to receive cash benefits on behalf of a beneficiary receiving either OASDI or SSI benefits when there is positive legal, medical or other acceptable evidence presented which establishes that the beneficiary is unable to manage his assets or protect his interests by reason of physical or mental impairment. Other retirement systems have established procedures similar to those of the Social Security Administration for appointing fiduciaries on behalf of beneficiaries who are unable to manage their benefits. The Railroad Retirement System uses the term "representative payee" and the Veterans Administration uses the term "fiduciary" or "custodian". When it becomes apparent that a PSA client is in need of the appointment of a representative payee (or fiduciary or custodian), every effort should be made to involve a legal guardian, relative or friend as the representative payee. If no responsible person can be found to act in this capacity, the local district commissioner must apply to be designated as representative payee.

Part 381 of the Department's regulations includes procedures designed to address the needs of clients who by reason of mental or physical incapacity are unable to manage their public assistance grants. One mechanism involves protective payments, i.e. the issuance of the client's ADC or HR grant to an individual other than the recipient when the client has demonstrated an inability to manage funds. This payment may be made to a staff member of the local social services district, preferably staff providing protective services.

Additional information regarding financial management services and the Department's requirements for a written financial management system may be found in 83 ADM-15, 84 INF-8 and 79 INF-8.

F. IMMUNITY FROM CIVIL LIABILITY

Local social services staff often have concerns regarding the potential liability of the agency and themselves in civil lawsuits initiated on behalf of PSA clients. While these issues are generally of greatest concern in the context of providing services to seriously at risk involuntary clients, they also pertain to voluntary clients. Laws providing immunity from civil liability for local district PSA staff and individuals who make good faith reports of persons in need of PSA are discussed below. Additionally, it should be noted that districts are usually more liable for not acting on behalf of an impaired adult than for taking actions they deem appropriate.

1. Immunity of Public Officials

Section 473.3 SSL provides explicit immunity from civil liability for any social services official or his designee involved in the provision of PSA. This subdivision of the law reads as follows:

"Any social services official or his designee authorized or required to determine the need for and/or provide or arrange for the provision of protective services to adults in accordance with the provision of this section, shall have immunity from any civil liability that might otherwise result by reason of providing such services, provided such official or his designee was acting in the discharge of his duties and within the scope of his employment, and that such liability did not result from the willful act or gross negligence of such official or his designee."

Although this law provides immunity from civil liability for PSA staff acting in the discharge of their duties and within the scope of their employment, it does not prevent them from being sued. The law does, however, provide PSA staff and the local districts with a strong legal defense for responding to such lawsuits.

2. Immunity for Persons Who Report Endangered Adults or Persons in Need of Protective Services

Chapter 523 of the Laws of 1984 established Section 473-b SSL, which provides immunity from any civil liability to persons who in good faith believe that an adult may be endangered or in need of protective services, and who report or refer such person to the Department, the State Office for the Aging, any local social services district, area agency on aging, law enforcement agency, or any other person, agency or organization that the reporters believe, in good faith, will take appropriate action. The immunity provision also extends to persons who testify in any judicial or administrative proceeding which results from a report or referral.

Immunity from civil liability may encourage referral sources and other persons whose testimony may be necessary in a judicial or administrative proceeding to disclose more information to local district staff during the course of PSA investigations. As with the immunity law for PSA staff, this law is not a guarantee against lawsuits. It does, however, provide a strong legal defense for responding to such lawsuits. Local districts should make other local agencies and referral sources aware of this statute. Additional information regarding immunity for reporters may be found in 84 INF-13.

IV. Required Action

A. Local commissioners must assure that a procedure is in place which ensures the availability of the local agency's legal staff for prompt consultation with PSA staff when requested and timely implementation of legal interventions on behalf of PSA clients in appropriate situations. This procedure must assure that in those situations where there is a disagreement between services and legal staff about the appropriateness of a legal intervention on behalf of a PSA client, the matter will be promptly referred to the local commissioner or his designee, who will make the decision on whether to pursue legal action.

B. PSA and legal staff must familiarize themselves with the range of interventions set forth in this directive which can be utilized on behalf of involuntary PSA clients and the situations in which each of these interventions can be appropriately employed on behalf of the client.

C. Since involuntary interventions will often require the involvement of other agencies, local districts must continue their community education/networking activities in accordance with Section 457.7 of the Department's regulations, including meetings with representative community agencies for the purpose of establishing specific agency roles and areas of responsibility in the provision of PSA.

D.1. As noted above, when involuntary interventions are being considered, it is advisable to arrange for a mental health evaluation of the client. Usually, such an evaluation is conducted in the client's home by a qualified mental health professional. The State Office of Mental Health (OMH) has indicated that local mental health departments, in accordance with their service planning and delivery responsibilities set forth in Section 41.01 and 41.13 of the Mental Hygiene Law (MHL), are responsible for providing or arranging for the provision of mental health evaluations by qualified personnel on behalf of involuntary PSA clients when the district is contemplating legal intervention. Therefore, local districts must establish a process to obtain such evaluations through the local mental health department. Depending on the service delivery structure of a given locality, these evaluations should be provided either by the mental health department, a voluntary agency under contract with the mental health department, or the State Psychiatric Facility serving that

geographic region. The State Office of Mental Health also has advised us that mental health evaluations performed on behalf of involuntary PSA clients may be shared with the districts pursuant to Section 33.13(d) MHL and the provisions of Sections 41.01 and 41.13 MHL which require mental health officials to cooperate with other public agencies, including local departments of social services.

2. In order to assure that appropriate evaluations are conducted, local district staff must provide mental health professionals with as much information as possible about their observations of a client's behavior, living situation and ability to make decisions. District staff also shall indicate to mental health professionals the specific legal interventions they are considering since the statutory criteria for utilizing the various forms of legal intervention are different.

3. If district staff are unable to obtain mental health evaluations, the local commissioner shall initiate efforts to resolve the problem through discussions with the director of community mental health services. If these efforts are unsuccessful, the local commissioner shall pursue the matter with the appropriate local government authorities, such as the County Executive or the Chairman of the Board of Supervisors. If these efforts fail, the local commissioner shall advise the Deputy Commissioner of the Division of Adult Services in writing of the problem and the efforts which were made to resolve it at the local level. Upon receipt of a letter from a local commissioner, the Deputy Commissioner of the Division of Adult Services will pursue the matter with appropriate representatives from State Office of Mental Health.

4. If a district is unable to obtain mental health evaluations on behalf of involuntary PSA clients through local mental health department, it must contract for the delivery of this service until the matter is resolved through the process described above. The cost of these evaluations shall be considered a Title XX PSA expenditure.

E. Districts must mark each PSA case file in which involuntary intervention has been pursued by the district, regardless of the outcome of the intervention. This will assure the prompt availability of these cases for review by Department staff.

V. Systems Implications

None

VI. Additional Information

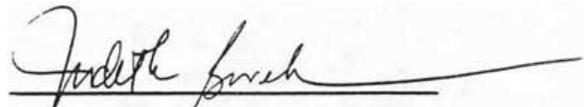
As noted above, in considering involuntary intervention, it is important to distinguish between incapacity and incompetence. Incapacity means an inability to function in a given area. A person lacking capacity in one area can retain capacity and rights in other

areas. Incompetence is a legal term which refers to a conclusion reached in a court of law that a person is incompetent to manage himself or his affairs. Incompetence means that the person lacks capacity in all areas. Most PSA clients who require involuntary interventions will be incapacitated, rather than incompetent.

Involuntary PSA clients are considered incapacitated if their inability to make decisions on their own behalf makes them unable to meet one or more of their essential needs or to protect themselves from harm, neglect or financial exploitation. As discussed above, districts must pursue the appropriate interventions on behalf of involuntary PSA clients who are believed to be incapacitated and, therefore, incapable of making decisions about certain areas of their lives.

VIII. Effective Date

June 1, 1988



Judith Berek
Deputy Commissioner
Division of Adult Services