

## Chapter 55 (Protective Placement)

**DISCLAIMER:** This document is not legal advice. It provides general information about how the La Crosse County Human Services Department evaluates Chapter 55 cases. Chapter 55 is a complicated, technical area of the law which cannot be adequately summarized in a short primer. Nothing in this document replaces the need for consultation with your own legal counsel when faced with questions about this Chapter.

Chapter 55 was created to provide a legal mechanism to address concerns of financial exploitation, abuse, neglect, and self-neglect of incompetent persons with long term care needs.

Chapter 55 authorizes Human Services Departments in Wisconsin, as well as certain other interested parties, to initiate litigation for the purpose of compelling persons who are permanently or likely to be permanently incompetent to remain in a hospital, nursing home, CBRF or AFH against their wishes. Chapter 55 cases may be initiated on either an emergency or non-emergency basis.

### **Method of Initiating an Emergency Protective Placement Proceeding:**

Emergency protective placement may be initiated if a law enforcement officer, firefighter, or authorized representative of the La Crosse County Human Services Department determines there is probable cause to believe that a person is so totally incapable of providing for their own care and custody that they are at substantial risk of serious physical harm to themselves or others if not immediately placed.

Chapter 55 litigation is subject to the general rules of Wisconsin civil procedure, including notice and discovery deadlines applicable to any other case. While emergency Chapter 55 cases must be litigated rapidly (with a final hearing no less than 30 days from the date of the emergency protective placement), non-emergency Chapter 55 cases require a hearing within 60 days of the date of the filing of the petition for Chapter 55. Reports from examiners regarding the advisability of protective placement must be submitted to the Court at least 96 hours in advance of a final hearing.

## Chapter 51 (Involuntary Commitment)

**DISCLAIMER:** This document is not legal advice. It provides general information about how the La Crosse County Human Services Department evaluates Chapter 51 cases. Chapter 51 is a complicated, technical area of the law which cannot be adequately summarized in a short primer. Nothing in this document replaces the need for consultation with your own legal counsel when faced with questions about this Chapter.

Chapter 51 was created to authorize Human Services Departments in Wisconsin to initiate litigation against persons with treatable mental health conditions in situations in which those persons are unwilling to obtain treatment on a voluntary basis, and also meet one of the dangerousness criteria under Wis. Stat. Sec. 51.20(1)(a).

Treatment under Chapter 51 commonly includes, but is not limited to, involuntary admission to a locked inpatient behavioral health facility, and involuntary administration of medical treatment (including the forcible administration of psychotropic medication). Chapter 51 cases are initiated on an emergency basis.

### **Methods of Initiating an Involuntary Civil Commitment Proceeding:**

- Law Enforcement Emergency Detention
- Treatment Director Emergency Hold (Director's Hold)
- Three Party Petition

Chapter 51 litigation is subject to the general rules of Wisconsin civil procedure, including notice and discovery timelines applicable to any other civil case. Though Chapter 51 involves highly accelerated litigation, the Wisconsin rules of civil procedure have not been modified to accommodate the speed with which Chapter 51 cases must be processed.

Chapter 51 litigation must conclude no later than the 14<sup>th</sup> day after a person's detention. Reports from examiners regarding the advisability of an involuntary commitment must be submitted to the Court at least 48 hours in advance of a final hearing.

**General Criteria for Protective Placement:**

1. The person is permanently or likely to be permanently incompetent as a result of a degenerative brain disorder, developmental disability, severe and persistent mental illness, or other like incapacity.
2. The person has a primary need for residential care and custody as a result of the degenerative brain disorder, developmental disability, severe and persistent mental illness, or other like incapacity.
3. The person is so totally incapable of providing for their own care and custody as to create a substantial risk of serious harm to themselves or others. Evidence of substantial risk of physical harm to self or others may include personal observations of the person's acts or omissions.

**Psychiatric Units and Chapter 55:**

A person who is the subject of a Chapter 55 may not be admitted to an inpatient psychiatric unit, even if the person's medical situation (the need for monitored psychotropic medication adjustments, group therapy, individual therapy, etc.) would be best addressed in that setting. Persons who are incompetent as a result of serious and persistent mental illness, and the subject of a Chapter 55, may only be treated in an inpatient psychiatric facility if they also meet the criteria for commitment under Chapter 51, and are transferred to an inpatient psychiatric facility pursuant to an active Chapter 51 detention / treatment director's hold or involuntary commitment order.

**Liberty and Chapter 55:**

**Chapter 55 cannot be utilized to compel a person who is legally competent but facing a life-altering / threatening illness or injury into a higher level of care against the person's wishes.** This is true even if a higher level of care may extend or improve the quality of the person's life. Until the thresholds of permanent incompetency and "totally incapable," are met, a person has the right to make decisions that are wholly inconsistent with maintaining their own physical health and safety.

\*If a person is detained on an emergency basis under Chapter 55, Wisconsin law requires that they have rapid access to the Court system in order for a Judge to evaluate whether there is a sufficient legal basis for the person to be held in a location against their will.

**General Criteria for Chapter 51:**

1. The person is diagnosed with a mental illness.
2. The person's mental illness, or symptoms of mental illness, are treatable.
3. The individual meets one of the dangerousness criteria set forth in Wis. Stat. Sec. 51.20(1)(a).

**Most utilized Chapter 51 dangerousness standards:**

1. The person evidences a substantial probability of physical harm to themselves as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.
2. The person evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt, or threat to do serious physical harm.
3. The person evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to themselves or other individuals. **(SEE NOTE.)**
4. The person has engaged in acts or omissions, that due to mental illness, have rendered them unable to satisfy basic needs for nourishment, medical care, shelter, or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. **(SEE NOTE.)**

**NOTE: The probability of physical impairment or injury is not substantial if reasonable provision for the person's protection is available in the community and there is a reasonable probability that the person will avail themselves of those services. Alternatively, the probability of physical impairment or injury under Chapter 51 is not substantial if the person may be provided with protective placement under Chapter 55.**

\*If a person is detained on an emergency basis under Chapter 51, Wisconsin law requires that they have rapid access to the Court system in order to have a Judge evaluate whether there is a sufficient legal basis for the person to be held in a location against their will.

### **Probable Cause Hearing (Emergencies) Chapter 55:**

- In the event of an emergency protective placement a Court hearing must be held within 72 hours of the person's detention (excluding weekends and holidays).
- The person has the right to be physically present in court for all proceedings unless their appearance is waived by their guardian ad litem (GAL).
- The person has the right to representation by adversary counsel if they object to protective placement. The public defender's office appoints counsel when there is an objection, though the person may also retain an attorney privately if they wish to.
- Prior to the Court considering whether or not there is a basis for a temporary / emergency protective placement, the person must have a guardian, or a petition for guardianship must accompany the petition for Emergency Protective Placement.
- The person must be examined by a psychologist or physician in advance of the probable cause hearing as it relates to the issues of competency and the need for temporary / emergency protective placement.
- The person's guardian ad litem (GAL) must provide a recommendation to the Court regarding the person's need for guardianship, protective placement, or both.
- After the evidentiary portion of the hearing, the Judge determines if there is probable cause (reason) to continue to detain the person against their will.

### **Probable Cause Hearing Possible Outcomes (55):**

1. Case is dismissed for lack of sufficient evidence that the individual is appropriate for a Temporary / Emergency Protective Placement.
2. Probable Cause is found:
  - a. Temporary Guardianship (for up to 60 days) and/or Temporary Protective Placement (for no more than 30 days) is ordered by the Court.
  - b. Final hearing must be scheduled within 30 days of the date / time of the emergency protective placement.

### **Probable Cause Hearing Chapter 51:**

- In the event of an emergency detention or treatment director's hold a Court hearing must be held within 72 hours of the person's detention (excluding weekends and holidays).
- The person has the right to be physically present in court for all proceedings with limited exceptions if they are detained more than 100 miles away from the courthouse.
- The person is entitled to representation by adversary counsel at all stages of the proceedings, and a public defender is assigned in all cases.
- Witnesses at the probable cause hearing must testify from personal observations about the allegations of dangerousness in the emergency detention or director's hold.
- A physician's testimony is required if there is a request to obtain a court order for involuntary administration of psychotropic medications.
- After the evidentiary portion of the hearing, the judge determines if there is probable cause (reason) to continue to detain the person against their will.

### **Probable Cause Hearing Possible Outcomes (51):**

1. Case is dismissed for lack of sufficient evidence that the individual is mentally ill, treatable and / or dangerous. [Vast majority of cases are dismissed due to an inability to produce sufficient admissible evidence of dangerousness.]
2. Parties negotiate a settlement agreement to stay the proceedings (pause the litigation). If the person successfully completes the terms of the agreement, the case is dismissed.
3. Case is converted to temporary guardianship and protective placement, if there is probable cause to believe the person is likely permanently incompetent and would be better served by a protective placement under Chapter 55.
4. Probable Cause is found:
  - a. An Order for Final Hearing is approved by the Court, with the Court noting the least restrictive setting the person may be detained in prior to the Final hearing.
  - b. Final hearing must be scheduled within 14 calendar days of the date / time of the emergency detention.

**Least Restrictive Setting and Chapter 55:**

Wisconsin law requires that people be provided with care and services in the least restrictive setting available to meet their needs. There may be situations in which a person could be served in a setting less restrictive than the one they are located in, but there are no facilities or homes available to accept the person for admission. The lack of availability of beds in nursing homes, CBRF's and AHF's is a statewide issue in Wisconsin, and not within the Department's control.

It is not uncommon for a person to no longer be in need of hospitalization, but unsafe to return home independently, and also lacking an appropriate residential location to transition to.

This problem is often exacerbated (made worse) by a person's behavioral history, complex medical issues, lack of Medicaid or private insurance, and / or history of unpaid debts.

Individuals without an appropriate family or social network face additional challenges in that in-home planning is not possible without a safe and reliable support system in place. These factors, which are also outside of the Department's control, can contribute to persons who would otherwise be rapidly ready for discharge being hospitalized for extended periods of time.

**Liberty and Chapter 51:**

Wisconsin law is rapidly developing in the area of Chapter 51, with many recent appellate decisions emphasizing the importance of individual liberty.

Appellate court decisions since 2023 have noted that chapter 51 uniquely deprives otherwise competent citizens of their freedom (by authorizing their detention in locked facilities), and also restricts their right to select or refuse medical treatment. The collateral consequences of a civil commitment have been likened to the consequences of criminal convictions, including involuntary locked detention (aka incarceration), loss of constitutional rights (firearms privileges), financial consequences (medical bills), employment consequences (job loss) and social stigma.

Appellate Courts now analyze Chapter 51 cases through a constitutional lens despite Chapter 51 being a statutory creation. The Department is appropriately cautious when analyzing the facts and circumstances of Chapter 51 cases in advance of litigation given increasing arguments by persons who have been detained or committed that they have been unlawfully deprived of their freedom of movement, freedom to make private healthcare decisions without government intrusion or interference, and freedom to seek medical care at facilities of their own choosing.

**Requirements for an Order for Involuntary Administration of Psychotropic Medications as a Protective Service under Chapter 55**

1. A physician (MD or DO) has prescribed psychotropic medication for the person. [The psychotropic medication may have been prescribed to reduce or control symptoms the person is experiencing, even though the person's underlying medical condition is permanent and untreatable.]
2. The person is not competent to refuse the administration of psychotropic medications.
3. The person is refusing to voluntarily accept psychotropic medication(s).
4. There have been a reasonable number of documented attempts to administer psychotropic medication(s) to the person voluntarily, using appropriate interventions that could reasonably be expected to increase the ward's willingness to take psychotropic medication voluntarily, which were not successful.
5. The condition for which the person was prescribed psychotropic medication(s) is likely to be improved by administration of psychotropic medication, and the person is likely to respond positively to psychotropic medication.
6. Unless psychotropic medication is administered involuntarily, the person will incur a substantial probability of physical harm, impairment, injury, or debilitation or will present a substantial probability of physical harm to others.
7. The substantial probability may be proven by direct evidence of at least 2 episodes in the previous 24 months that indicate a pattern of overt activity, attempts, threats to act, or omissions that resulted from the person's failure to participate in treatment, including psychotropic medication, and resulted in a finding of probable cause for commitment under Wis. Stat. Sec. 51.20, OR, by direct evidence that the person currently meets one of the dangerousness criteria under Wis. Stat. Sec. 51.20.

**Requirements for an Order for Involuntary Administration of Psychotropic Medications in an Involuntary Commitment under Chapter 51**

1. The person has a mental illness.
2. The mental illness or symptoms of mental illness are treatable.
3. A physician (MD or DO) has prescribed psychotropic medications to treat the person's mental illness or symptoms of mental illness.
4. The psychotropic medication will have therapeutic value for the person.
5. The psychotropic medication will not unreasonably impair the person's ability to prepare for or participate in court proceedings.
6. The physician has discussed, or attempted to discuss, the advantages of each psychotropic medication they are seeking to prescribe for the person, with the person. [Physician must recite advantages on the record.]
7. The physician has discussed, or attempted to discuss, the disadvantages of each psychotropic medication they are seeking to prescribe for the person, with the person. [Physician must recite disadvantages on the record.]
8. The physician has discussed, or attempted to discuss, the alternatives to each of the psychotropic medication they are seeking to prescribe for the person, with the person. [Physician must recite alternatives, if any, on the record.]
9. The physician opines that the person is not currently able to process and apply an understanding of the advantages, disadvantages, and alternatives to psychotropic medications in order to make an informed choice as to whether or not to take them on a voluntary basis.

**FINAL DISCLAIMER:**

**This document was created to assist community partners of the La Crosse County Human Services Department in understanding how the Department evaluates Chapter 55 and Chapter 51 cases. This document is not legal advice.**

**This document is current as of March 2024, but may be updated as appellate litigation in the areas of Chapter 55 and 51 continues.**