

HANDLING REAL LIFE DILEMMAS IN APS CASEWORK

Alan Lawitz, Esq.
Director
Bureau of Adult Services
New York State Office of Children and Family Services

Involuntary Interventions in Adult Protective Services (APS)

New York Definition of APS

APS serves adults, age 18 and older, who:

- a) Due to physical or mental impairments
- b) Are unable to protect themselves from abuse, neglect or other harm; and
- c) Have no one else available who is willing and able to assist responsibly.

NY Social Services Law Article 9-B (sections 473 and following); regulations at 18 NYCRR Part 457.

Dual Responsibility of APS Staff

APS workers have a dual responsibility: protection of the client's rights and protection of the client from harm when caused or threatened by reason of the client's incapacities. As stated in our administrative directive on Serving Involuntary Clients, (88 ADM-23), "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/her own behalf due to impairment and seemingly unaccepting of the needed services."

Let's take a moment to consider that APS is different from some other types of social services available to adults.

The services that are available to seniors from the **local office for the aging** are generally preventive in nature – meals on wheels, homemaker/housekeeping, senior centers, caregiver support and the range of services under the Expended in Home services for the Elderly, or EISEP program. These are all voluntary services. The local office for the aging will never seek to provide its services on an involuntary basis.

Similarly, the services available from **Domestic Violence** counselors are provided only when the victim seeks out such services or accepts a referral for such services. DV services are never sought to be provided on an involuntary basis.

- a) A referral to a DV provider will not result in the DV provider coming to the door of the reported victim for an interview and assessment of risks. By contrast, the law in New York requires an APS caseworker to visit the home of the person alleged to need APS within specified timeframe – within 24 hours if deemed an emergency, within three working days otherwise.
- b) In New York, if a DV services provider has a reason to believe that a crime has been committed against the victim, there is no legal requirement that the DV provider contact law enforcement to report a crime. The DV counselor will leave it to the victim to decide whether or not to report a crime, and will not report it without the client's consent. By

contrast the Social Services law requires APS to report to law enforcement any time APS has a reason to believe a crime has been committed against the person believed to be in need of APS. (SSL section 473, subdivision 5)

APS has been given a special responsibility under the law that other service providers – public or private – do not have; a responsibility to investigate reports of abuse, neglect and exploitation of vulnerable adults, to visit with the client and others who know the client, to determine eligibility for services, to assess risks, and take action to seek to protect persons who are found not to be able to protect themselves.

APS Responsibility To Pursue Legal Interventions To Protect Adults with Incapacity and at Serious Risk

New York APS regulations state:

“When the district believes there is a serious threat to an adult’s wellbeing and that the adult is incapable of making decisions on his or her own behalf because of mental impairments, the social services official has a responsibility to pursue appropriate legal interventions...even though such interventions may be against the wishes of, or without the knowledge of, the adult at risk. The district must employ the least restrictive intervention necessary to effectively protect the adult.” 18 NYCRR section 457.6.

People sometimes confuse APS with Child Protective Services in terms of the powers that APS caseworkers actually have. **APS itself has no power to remove persons from the home or other location, or to take any involuntary action. APS must request permission to take involuntary actions** from others who can take such action or authorize such action.

Questions To Consider

1. What are you seeking to accomplish with this involuntary intervention?
2. Do you have good reason for seeking the involuntary intervention? Can you prove that the intervention is needed? Have you documented the need?
3. Have you considered whether the involuntary intervention, if granted, may make things worse? Are you adhering to the ethical principle of “do no harm?”
4. Who is the client?

The Laws That Authorize Imposition of Involuntary Measures Usually Incorporate Provisions Protecting Rights of Allegedly Endangered/Incapacitated Persons

Here are some examples based on New York Laws:

1. Orders To Gain Access

NYS Social Services Law section 473-c authorizes a social services official to apply to the Supreme Court or County Court for an order to gain access to a person to assess whether such person is in need of protective services, when such official, having reasonable cause to

believe that such person may be in need of protective services, is refused access by such person or another individual. The application to the court must include:

- The name and address of the person who may be in need of APS and the premises on which such person may be found;
- The reason the social services official believes the person may be in need of APS – this may include information provided by other agencies or persons who are familiar with the person;
- The person or persons who are responsible for preventing access;
- The efforts made by the social services official to gain access;
- The names of any individuals, such as physicians or nurses or mental health professionals qualified to participate in the assessment, who shall accompany and assist the social services official conducting the assessment;
- The manner in which the assessment shall be performed;
- That the social services official seeks only to conduct an assessment of the need for APS.

Any allegations not based on personal knowledge shall be supported by affidavits provided by a person having such knowledge.

If the court is satisfied that there is a reasonable cause to believe that a person in need of APS may be found at the premises, and that access to such person has been refused, the court shall grant the application and issue an order authorizing the social services official and such persons as may be designated by the social services official, and such other person the court has authorized to accompany the social services official, accompanied by a police officer, to enter the premises to conduct an assessment to determine whether the person named in the application is in need of APS.

The law states that the standard for proof and procedure for such an authorization shall be the same as for a search warrant under the Criminal Procedure law. APS is requesting the court's permission to enter into someone's home without the owner or resident's approval. Such permission should not be lightly sought by APS.

An order to gain access, if granted, does not authorize the removal of the person from the premises or the provision of any involuntary services; it authorizes only an assessment to be conducted.

The application for an order for access can be made on an ex parte basis.

In August of 2011, this statute was amended to require that an APS caseworker who is refused access to a person believed to be in need of APS consult with a supervisor within 24 hours of the refusal of access, determine whether to seek an access order at that point, and to document in the case record the decision made and the reason for the decision. The chapter law essentially included in the statute what our regulations had previously required, consistent with good casework practice.

If access has been refused, APS must make prompt and continuous efforts to obtain access voluntarily before seeking an order to gain access.

Crisis Interventions

2. Short Term Involuntary Protective Services Orders (STIPSO)

The STIPSO allows for the involuntary imposition of services over a period of 72 hours with an optional 72 hour extension. It may only be sought by a social services official. Since this court ordered procedure abridges client civil liberties, it is carefully restricted. A STIPSO is sought in Supreme Court or County Court, and it may be obtained only in the case of an “endangered adult” defined as a person 18 years of age or older who is:

- i. In a situation or condition which poses an imminent risk of death or imminent risk of serious physical harm to him or her; and
- ii. lacking capacity to comprehend the nature and consequences of remaining in that situation or condition, provided that:
 - a) refusal by the adult to accept protective services shall not in itself be sufficient evidence of such lack of capacity; and
 - b) mental illness shall not in itself be sufficient evidence of such lack of capacity.

A STIPSO petition must include facts showing the person meets the definition of endangered adult, what specific protective services are sought – and that they are not overbroad as to extent or duration, and that voluntary protective measures have been tried and failed, and that a future voluntary, less restrictive alternative would not be appropriate or would not be available. The allegedly endangered adult must be served notice of the proceeding and is entitled to attend the hearing and be represented by counsel. A special proceeding is commenced by order to show cause, with petition and supporting affidavits. The order to show cause is returnable within 48 hours of its issuance.

A court must find that all of the material allegations have been admitted or proven by clear and convincing proof.

If the petition is granted the court order must specify the services that are to be provided and by whom. These orders are restricted to addressing only the situation that poses the imminent risk to the endangered adult. A STIPSO can, for example, order the endangered person to be transported to a hospital to receive medical evaluation; other services that have been ordered are counseling, and heavy-duty cleaning.

A STIPSO can be an effective short-term solution for a person in a crisis. It has been used to take victims of malnourishment, victims of hypothermia to the hospital for medical evaluation and subsequent care. (A recent case in Schoharie County involved a client who was neglecting her health, hadn’t see a physician to treat an abdominal wound, and refused to allow APS to assist; there were also code issues relating to the condition of the house. Client

was removed to hospital, later daughter became guardian and moved client out of state with daughter.)

The STIPSO was enacted in 1981, as a means of obtaining assistance to incapacitated person for short term crisis managements. This is an alternative to use of the Article 9 Mental Hygiene Law provision that in practice have required proof of mental illness and danger to self or others, a standard that the courts have interpreted very narrowly. The STIPSO also preceded the enactment of Article 81 Guardianship under Mental Hygiene Law article 81 there is also a means to provide for crisis intervention through appointment of a court evaluator, a temporary guardian and other provisional remedies.

A STIPSO cannot order involuntary commitment to a psychiatric hospital. A proceeding under Article 9 of the Mental Hygiene Law would be needed to achieve that goal.

3. **Civil Commitment Under New York Mental Hygiene Law (MHL) Article 9**

Social services officials (local DSS commissioners) are charged with the duty of seeing that mentally ill persons within their respective communities who are in need of care and treatment at a psychiatric hospital are admitted to a hospital pursuant to the provision of Article 9 of the MHL. Such officials must notify the director of community services of any such person coming to their attention. MHL section 9.47.

APS/district may apply for:

- An involuntary admission on medical certification of two examining physicians (the so-called “2 PC”) for any person alleged to be mentally ill and in need of involuntary care and treatment. The application is made to a director of a psychiatric hospital. MHL section 9.27

The term “in need of involuntary care and treatment” means that a person has a mental illness for which care and treatment as a patient in a hospital is essential to such person’s welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment. MHL section 9.01

Although this statute does not expressly require that the person also a danger to himself or others, both federal and state case law have required the element of a danger to self or others for involuntary admission. O’Conner v. Donaldson, 422 U.S. 573 (1975); Project Release v. Prevost, 722 F.2d 960 (2d Cir, 1983); In re Harry M, 96 A.D.2d 201 (2d Dep’t 1983); Scopes v. Shah, S9 A.D.2d 203 (3 Dep’t 1977)

Other involuntary provisions include:

- Involuntary admission on certificate of a director of community services or designee for any person found by such official to have a mental illness for which immediate inpatient care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or herself or others. MHL section 9.37

The term “likely to result in serious harm” means (a) a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or (b) a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm. MHL section 9.01

- Emergency admissions for immediate observation, care and treatment, upon a finding by a staff physician of a hospital that a person has a mental illness for which immediate observation, care and treatment in a hospital is appropriate and which is likely to result in serious harm to self or others. MHL section 9.39
- Emergency admissions for immediate observation, care and treatment; powers of certain peace officers and police officers. A peace or police officer may take into custody any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others. The officer may remove the person to a hospital, comprehensive psychiatric emergency program (CPEP) or, pending examination or admission, in another safe and comfortable place, in which case the director of community services or other designated official shall be immediately notified. MHL section 9.41
- Emergency admissions for immediate observation, care and treatment; power of court. A court may order that a person before the court who appears to have a mental illness which is likely to result in serious harm to himself or herself or others, be removed to a psychiatric hospital or CPEP for a determination by the director of such program whether the person should be retained for care and treatment. MHL section 9.43
- Emergency admissions for immediate observation, care and treatment; powers of directors of community services. A director of community services may order removal of a person to a psychiatric hospital or a CPEP upon a report that a person has a mental illness for which immediate care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or herself or others. It shall be the duty of a police or peace officer, or upon request, an ambulance service, to transport any such person. MHL section 9.45
- Emergency admissions for immediate observations, care and treatment; powers of qualified psychiatrists. Similar authority as is described above for director of community services. MHL section 9.55
- Emergency admissions for immediate observations, care and treatment; powers of emergency room physicians. Similar authority as described above. MHL section 9.57
- Assisted Outpatient Treatment (AOT). A social services official is among the many persons eligible to petition a court for an order authorizing AOT. A person may be ordered to receive AOT if the court finds that such person:
 1. Is 18 years of age or older; and
 2. Is suffering from mental illness; and
 3. Is unlikely to survive safely in the community without supervision, based on a clinical determination; and
 4. Has a history of lack of compliance with treatment for mental illness that has:

- i. Prior to the filing of the petition, at least twice within the last thirty-six months been a significant factor in necessitating hospitalization in a hospital, or receipt of services in a forensic or other mental health unit of a correctional facility or a local correctional facility, not including any current period, or period ending within the last six months, during which the person was or is hospitalized or incarcerated; or
 - ii. Prior to the filing of the petition, resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious violent behavior towards self or others or threats of, or attempts at, serious physical harm to self or others within the last 48 months, not including any current period, or period ending within the last 6 months, in which the person was or is hospitalized or incarcerated; and
5. is, as a result of mental illness, unlikely to voluntarily participate in outpatient treatment that would enable him or her to live safely in the community; and
 6. in view of his, or her treatment history and current behavior, is in need of AOT in order to prevent a relapse or deterioration which would likely to result in serious harm to the person or others; and
 7. is likely to benefit from AOT.

MHL section 9.60

- iii. **Involuntary admission to a “school”, meaning the in-patient service of a developmental center or other residential facility for individuals with developmental disabilities** under the jurisdiction of the Office for People With Developmental Disabilities. A social services official, among others, may apply to the director of a Developmental Disabilities Services Office for the involuntary admission of a person who has a developmental disability and is in need of involuntary care and treatment, subject to the review of two examining physicians or one examining physician and one certified psychologist. MHL section 15.27

iv. Orders of Protection

APS will assist an adult to apply, or apply on his or her behalf to family or county court for an order of protection to control abusive or criminal acts between family members or people in the same household. The order may instruct a person, for example, not to hit the client, or to stop interfering with the delivery of necessary services, such as home care. A person may be ordered to participate in a counseling or substance abuse treatment program (Family Court Act, Article 8.)

4. Guardianship

Guardianship is a drastic measure. It greatly limits an individual’s autonomy and should be used only where no viable alternative exists. While guardianship can often be a mechanism to keep a vulnerable adult safe, there is widespread concern that in many jurisdictions the system that currently exists has serious shortcomings. In a 2010 report the General Accounting Office found that a lack of adequate screening of guardians, combined with a failure of many state courts to properly oversee the appointed guardian has led to a system that is often plagued by abuse and exploitation. GAO Report (GAO-10-1046, Sept 2010)

A. New York Social Services Law (SSL) section 473, subd.1(c):

APS includes “arranging, when necessary, for commitment, guardianship, or other protective placement of such individuals either directly or through referral to another appropriate agency, provided, however, that where possible, *the least restrictive of these measures shall be employed before more restrictive measures are imposed.*”

B. Regulations at 18 NYCRR Section 457.1 (d): APS services include:

“(7) arranging for guardianship, commitment or other protective placement as needed;”

“(9) functioning as a guardian...where it is determined such services are needed and there is no one else available or capable of acting in this capacity;”

C. Mental Hygiene Law (MHL) Article 81:

Standard for Appointment of Guardian; MHL section 81.02:

a) The court must find

1. That appointment is necessary to provide for the personal needs of that person, including food, clothing, shelter, health care or safety, and/or to manage the property and financial affairs of that person AND

2. The person agrees to the appointment, or that the person is incapacitated

b) The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because

1. The person is unable to provide for personal needs and/or property management; and

2. The person cannot adequately understand and appreciate the nature and consequences of such inability.

c) In reaching its determination the court shall give primary consideration to the functional level and functional limitation of the person.

1. Where a guardian is named for personal needs, there is a statutory preference to maintain the person at home if possible. MHL section 81.22(a)(9)

This Guardianship Statute contains numerous protections for Alleged Incapacitated Person (AIP).

- In deciding whether the appointment is necessary the court shall consider
 - 1) The report of the court evaluator. The court evaluator is a person appointed by the court to mediate. The petitioner, the AIP and others and to make a recommendation to the court as to the need for appointment of a guardian.
 - 2) The sufficiency and reliability of “available resources: In essence, “available resources” requires the petitioner and the court to address what alternatives to guardianship have been considered and explored and to determine whether such alternatives are sufficient and reliable to protect the AIP without appointment of a guardian. The statute defines “available resources” as meaning resources such as, but not limited to, visiting nurses, homemakers, home health aides, adult day care, and multi-purpose senior citizen centers, powers of attorney, health care proxies, trusts, representative and protective payees, and residential care facilities.
- Any guardian appointed shall be granted only those powers which are necessary to provide for personal needs and/or property management of the incapacitated person in

such a manner appropriate to the individual and which shall constitute the least restrictive form of intervention.

- In reaching its determination as to capacity, the court shall give primary consideration to the functional level and functional limitations of the person. This includes assessment of that person's:
 1. Management of the activities of daily living;
 2. Understanding and appreciation of the nature and consequences of any inability to manage the activities of daily living;
 3. Preferences, wishes and values with regard to managing the activities of daily living; and
 4. The nature and extent of the person's property and financial affairs and his or her ability to manage them.
- The proceeding is commenced upon the filing of a petition and an order to show cause. The order and the notice have to be served on the AIP. The order to show cause shall contain what is in essence a warning to the AIP, in large type, in plain language and in a language other than English if necessary, to inform the AIP of his or her rights.
- The AIP has the right to counsel. If the AIP does not have counsel at the time of issuance of the order to show cause, the court evaluator shall assist the court in determining whether counsel should be appointed. Counsel must be appointed where the AIP requests counsel; the AIP wishes to contest the petition, the AIP does not consent to authority requested in the petition to move the AIP from where the AIP resides to a nursing home or other residential facility. The AIP does not consent to major medical or dental treatment requested in the petition. The petition requests appointment of a temporary guardian; whether the court determines there is a possible conflict between the court evaluator's role and the advocacy needs of the AIP or at any time the court determines that appointment of counsel would be helpful to resolution of the matter.
- The hearing must be conducted in the presence of the AIP, either at the court house or where AIP resides, so as to permit the court to obtain its own impression of the AIP's capacity, unless all the information before the court clearly establishes that the AIP is completely unable to participate in the hearing or that no meaningful participation by the AIP will result from the AIP's presence at the hearing.
- If the AIP is found to be incapacitated, the court without appointing a guardian, may authorize, direct, or notify any transaction or series of transactions needed to meet the foreseeable needs. The court may appoint a special guardian to assist in the accomplishment of any protective arrangement or other transaction authorized. These are short-term alternatives to a long-term guardianship.
- Guardian:
 - Must exercise only those powers set forth in court order.
 - Must exercise utmost care and diligence when acting on behalf of Incapacitated Person (IP).
 - Must exhibit utmost degree of trust, loyalty and fidelity in relation to IP.
 - Must file initial and annual reports with the court examiner, who has a duty to review the report and may require the filing of a more complete report and seek other action including remand of the guardian if guardian has failed to act in good faith.
- Provisional remedies
 - a) Temporary guardianship

b) Injunction and TRO

Alternatives To Guardianship

Proper planning, such as executing an advance directive, such as a Power of Attorney, a Health care proxy, or a living will, , can often delay or avoid the need for a guardian.

Daily money management programs, or representative payees are other alternatives.

Family Health Care Decision Making Acts

Permit surrogate decision making for people who have not executed an advanced directive, who lack the capacity to make health care decisions and who are in a health care facility (hospital, nursing home) or other setting set forth in law. This provides an alternative to guardianship where an incapacitated individual needs to have critical medical decisions made. The Act provides a list of surrogate who may make health care decisions for an adult who lacks capacity and does not have a legal guardian or proxy. The New York State Family Health Care Decision Act became effective