



ALBANY LAW SCHOOL

GOVERNMENT LAW CENTER

EXPLAINER

Adult Protective Services – Autonomy Versus Protection

By Rose Mary Bailly*

The Government Law Center’s explainers concisely map out the law that applies to important questions of public policy. July 28, 2020

Introduction

Adult Protective Services, sometimes called Protective Services for Adults, is a program mandated by New York law.¹ It is overseen by the state’s Office of Children and Family Services and operated by county departments of social services.² It “involves intake, investigation and assessment of referrals of abuse, neglect, and financial exploitation” of adults who are unable to care for themselves because of a physical or mental impairment and have no one to assist them responsibly.³ It assists all adults, regardless of income. The staff’s work involves maintaining the delicate balance between respecting the autonomy of vulnerable adults and protecting them from harm.⁴ This explainer examines eligibility for Adult Protective Services, its work, and how it balances autonomy with protection.

RESOURCES

More detailed information on the relationship between the New York State Office of Children and Family Services and Adult Protective Services is available at <https://ocfs.ny.gov/main/psa/>

Eligibility

Anyone 18 years of age or older who has a physical or mental impairment and who is at risk of harm in the community is eligible to receive the assistance of Adult Protective Services.⁵ The risk of harm, which is an essential criterion for eligibility, may result from an individual’s inability to meet essential needs or secure entitlements, or to protect themselves from physical, sexual or emotional abuse, active, passive or self-neglect,” financial exploitation, or hazardous conditions.⁶ “Approximately sixty percent of [Adult Protective Services] clients in New York State are over age 60. About 25 percent of all [Adult Protective Services] cases involve a perpetrator (physical abuse, sexual and emotional abuse, neglect by others, and financial exploitation); 75

percent are termed self-neglect cases.”⁷ Adult Protective Services learns of people in need from referrals by family, friends, members of the community, and professionals,⁸ including hospitals planning for a patient’s discharge into the community.⁹ Referrals made to the agency are treated as confidential.¹⁰ Anyone making a report to the agency is immune from civil liability.¹¹ Staff are likewise immune from civil liability for investigating these referrals.¹² Staff do not commence investigations on their own; they act on referrals from third parties. If the potential case is designated as a life-threatening situation, Adult Protective Services must respond within 24 hours.¹³ If the situation is not life-threatening, an investigation must be opened within 72 hours and the person visited within three days.¹⁴ As part of its investigation, Adult Protective Services will determine whether there is a person willing and able to help the individual.¹⁵ If such a person or organization offers, Adult Protective Services will work with them to close its case.

Voluntary intervention

If no one is available to help the individual, and the person is willing to accept help, Adult Protective Services will assess their situation¹⁶ and develop a plan for assistance.¹⁷

This assessment is based on the individual’s specific needs,¹⁸ the risk factors facing the individual,¹⁹ and the promotion of the individual’s independence and self-determination.²⁰

Assistance is provided primarily through linking the client to organizations with services such as advocating for benefits, arranging for medical care and home care, counseling, identifying and securing alternative living arrangements, and providing informal money management.²¹

Assessing the need for involuntary intervention

If the individual refuses help, staff will attempt to persuade the individual by working with family and friends to change their mind.²² If voluntary intervention is unsuccessful, staff will assess whether assistance should be mandated by a court.²³ If the person is refusing to allow staff into their home, Adult Protective Services can seek a judicial “order of access” to perform the assessment.²⁴

An order of access is granted when the court finds that Adult Protective Services has reason to believe that the person needs assistance and has refused help.²⁵ The order permits Adult Protective Services to assess the individual in their home. The assessment evaluates their living arrangement, income and resources, physical, medical and mental limitations, and the willingness of family members and friends to help.²⁶ If the agency determines that the individual is eligible for services, and has the mental capacity to make decisions, staff will offer assistance but the individual can choose to decline it.²⁷ If the agency determines that the individual lacks the mental capacity to make decisions, the agency must obtain legal authorization to intervene.²⁸ The person’s lack of capacity is

the key to turning voluntary acceptance of assistance into involuntary legal intervention. Although other public and private agencies offer voluntary assistance to vulnerable individuals, Adult Protective Services has the responsibility to “take action to seek to protect persons who are found not to be able to protect themselves.”²⁹ This responsibility includes reporting to local law enforcement any suspected crimes committed against the vulnerable adult.³⁰

Involuntary services

Adult Protective Services cannot override the wishes of an individual without judicial approval.³¹ Under well-established New York law, an individual has the right to make decisions for themselves.³² “[T]he greatest possible protection is accorded [their] autonomy and freedom from unwanted interference with the furtherance of [their] own desires.”³³ Exercising its *parens patriae* power, Adult Protective Services can override the wishes of the individual if it can show that the individual is “incapable of making a competent decision” regarding their care.³⁴ In the event Adult Protective Services seeks judicial intervention, it must propose the least restrictive actions that can address safety concerns.³⁵

Intervention by Adult Protective Services over a person’s objection can take one of four forms: STIPSO which is a court order for short-term involuntary protective services (short-term order),³⁶ a court order for involuntary civil commitment to a mental

health facility,³⁷ an assisted outpatient treatment order,³⁸ and guardianship.³⁹

Short-term order

Adult Protective Services can seek a short-term order only if a person refusing help is endangered, meaning that they are at imminent risk of death or serious physical harm, and they do not appreciate the consequences of this risk.⁴⁰ The fact that the individual has a diagnosis of mental illness or has refused to accept the agency’s assistance cannot be the basis for an order.⁴¹ The agency must show that the individual is endangered, voluntary services have been tried and failed, and that the proposed assistance is the least restrictive form of intervention that can assist the individual.⁴² The individual is entitled to written notice of the proceeding with a warning of the consequences of the proposed order, a court-appointed attorney if they do not have a lawyer, and a hearing.⁴³ The agency must establish facts showing the need for the order by clear and convincing evidence.⁴⁴ A short-term order lasts for 72 hours with one 72-hour extension.⁴⁵ This type of order often has been used to provide heavy-duty cleaning where there is hoarding, and transportation to a hospital for an evaluation and care.⁴⁶

The agency cannot, however, use a short-term order to admit an individual to a mental health facility. The agency must seek that relief under the procedure under the Mental Hygiene Law for involuntary civil commitment or assisted outpatient treatment.

Involuntary civil commitment order

Adult Protective Services can seek admission to a mental health facility for an individual known to them as someone with a mental illness who needs involuntary care and treatment at a hospital.⁴⁷ The expression “in need of involuntary care and treatment” means “the 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.”⁴⁸ The application must show that the individual is a danger to themselves or others.⁴⁹

Assisted outpatient treatment order

The agency can also seek an assisted outpatient treatment order for an individual with a mental illness.⁵⁰ The application must show that the individual has a recent history of non-compliance with treatment for the illness, is unlikely to participate in outpatient treatment in order to prevent a relapse or deterioration, and is likely to cause serious harm to themselves or others because of their noncompliance.⁵¹ The person is entitled to written notice of the agency’s application, legal representation by the Mental Hygiene Legal Service or retained counsel, and a hearing.⁵²

A determination that the person needs an assisted outpatient treatment order is not a judicial finding of incapacity for purposes of the appointment of a guardian.⁵³

Guardianship

The appointment of a guardian is the most drastic step that the agency can take to assist an individual.⁵⁴ The agency will seek guardianship only if no less restrictive alternative exists.⁵⁵ The court will appoint a guardian where the person needs a guardian and they consent or are found to be incapacitated.⁵⁶ Incapacity means that the “person is likely to suffer harm because they are unable to provide for their person or property” and do not “adequately understand and appreciate the nature and consequences of such inability.”⁵⁷ The individual is entitled to written notice of the guardianship proceeding, the right to legal representation, a hearing, and several other protections.⁵⁸ A guardian is granted authority to make decisions tailored to the person’s decision-making deficits.⁵⁹ The commissioner of the county department of social services overseeing the local agency can be appointed as the guardian.⁶⁰

RESOURCES

More information about adult protective services for the community and for professionals is available at <http://www.napsa-now.org/get-help/>

RESOURCES

Adult Protective Services often plays a key role in hospitals' planning to discharge patients back into the community. Information about the agency's participation in discharge planning is available in *Discharge Planning: Guidance for Adult Protective Services Programs* (National Adult Protective Services Association Regional Representatives Advisory Board 2017), <http://www.napsa-now.org/wp-content/uploads/2017/10/Discharge-Planning-Brochure.pdf>

Conclusion

The rights and best interests of the vulnerable adult are the first concern of any assessment and intervention by Adult Protective Services. It must carry out its responsibility to protect a vulnerable adult from harm while preserving the individual's independence and human dignity to the greatest extent possible based on the adult's capacity to understand the consequences of their choices.

Endnotes

* Rose Mary Bailly, Esq. is a special consultant for the Institute on Aging and Disability law with the Government Law Center. Editorial assistance by Michele Monforte.

¹ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(a). There are adult protective services programs nationwide. *Get Help* (National Adult Protective Services Association 2020), <http://www.napsa-now.org/get-help/how-aps-helps/>. "Every state has their own distinct APS system and programs vary from state to state in respect to populations served, services provided and scope of the program." *Id.*

² *Adult Protective Services*, Office of Children and Family Services, <https://ocfs.ny.gov/main/psa/>.

³ *Adult Protective Services*, Office of Children and Family Services, <https://ocfs.ny.gov/main/psa/>; N.Y. Soc. Serv. Law § 473; 18 N.Y. Code of Rules and Regs. 457.1(a).

⁴ *Important Principles of Adult Protective Services*, <https://ocfs.ny.gov/main/psa/principles.asp>.

⁵ N.Y. Soc. Serv. Law § 473. The agency's jurisdiction does not extend into long term care facilities and nursing homes. *See, e.g., In re Jewish Association For Services For The Aged (Cedeno)*, 251 A.D.2d 105, 674 N.Y.S.2d 34 (1st Dept. 1998).

⁶ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(c).

⁷ *Protecting Adults, A Community Concern* (Adult Protective Services Pub-1307 (Rev. 05/2016), <https://ocfs.ny.gov/main/publications/Pub1307.pdf>).

⁸ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(d).

⁹ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(d). *See Discharge Planning: Guidance for Adult Protective Services Programs* (National Adult Protective Services Association webinar, May 23, 2018), <http://www.napsa-now.org/wp-content/uploads/2012/06/Discharge-Planning.pdf>.

¹⁰ N.Y. Soc. Serv. Law § 473-e(2).

¹¹ N.Y. Soc. Serv. Law § 473-b; N.Y. Comp. Codes R. & Regs. tit. 18, § 457.9. See *Dunlop v. County of Suffolk*, 148 A.D.3d 993, 51 N.Y.S.3d 538 (2nd Dept. 2017).

¹² N.Y. Comp. Codes R. & Regs. tit. 18, § 457.9; N.Y. Soc. Serv. Law § 473(3).

¹³ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(c).

¹⁴ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(c).

¹⁵ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(c)(3).

¹⁶ See text at note 27.

¹⁷ *Id.*

¹⁸ *Identifying and Making Referrals for Appropriate Services: Best Practices Guidelines*, <https://ocfs.ny.gov/main/psa/assets/Making-Referrals-Best-Practices.pdf>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.1(d); *Adult Protective Services*, Office of Children and Family Services, <https://ocfs.ny.gov/main/psa/>.

²² *Seeking Orders to Gain Access to Adults Believed to be in Need of Adult Protective Services: Best Practice Guidelines*, <https://ocfs.ny.gov/main/psa/assets/Seeking-Orders-Best-Practices.pdf>.

²³ *Important Principles of Adult Protective Services*, <https://ocfs.ny.gov/main/psa/principles.asp>. There must be an actual refusal of service in order to obtain an order of access. The fact that the individual is not at home is not sufficient basis for claiming refusal. *Seeking Orders to Gain Access to Adults Believed to be in Need of Adult Protective Services: Best Practice Guidelines*, <https://ocfs.ny.gov/main/psa/assets/Seeking-Orders-Best-Practices.pdf>.

²⁴ N.Y. Soc. Serv. Law § 473-c.

²⁵ N.Y. Soc. Serv. Law § 473(3).

²⁶ N.Y. Comp. Codes R. & Regs. tit. 18, § 457.2(b)(1).

²⁷ *Seeking Orders to Gain Access to Adults Believed to be in Need of Adult Protective Services: Best Practice Guidelines*, <https://ocfs.ny.gov/main/psa/assets/Seeking-Orders-Best-Practices.pdf>.

²⁸ *Id.*

²⁹ Alan Lawitz, *Handling Real Life Dilemmas in APS Casework*, <http://www.nypwa.com/SC18%20CLE%20Handouts/Dilemmas%20in%20APS%20Casework/Handling%20Real%20Life%20Dilemmas%20in%20APS%20Casework.pdf>.

³⁰ N.Y. Soc. Serv. Law § 473(5).

³¹ Alan Lawitz, *Handling Real Life Dilemmas in APS Casework*, <http://www.nypwa.com/SC18%20CLE%20Handouts/Dilemmas%20in%20APS%20Casework/Handling%20Real%20Life%20Dilemmas%20in%20APS%20Casework.pdf>.

³² *Rivers v. Katz*, 67 N.Y.2d 485 (1986).

³³ *Id.* at 492 (citations omitted).

³⁴ *Id.* at 496.

³⁵ Alan Lawitz, *Handling Real Life Dilemmas in APS Casework*, <http://www.nypwa.com/SC18%20CLE%20Handouts/Dilemmas%20in%20APS%20Casework/Handling%20Real%20Life%20Dilemmas%20in%20APS%20Casework.pdf>.

³⁶ N.Y. Soc. Serv. Law § 473-a.

³⁷ N.Y Men. Hyg. Law Art. 9.

³⁸ N.Y Men. Hyg. Law § 9.60(e)(1)(vii).

³⁹ N.Y Men. Hyg. Law Art. 9.

⁴⁰ N.Y. Soc. Serv. Law § 473-a.

⁴¹ N.Y. Soc. Serv. Law § 473-a(1)(ii)(a)&(b).

⁴² N.Y. Soc. Serv. Law § 473-a(4)(c).

⁴³ N.Y. Soc. Serv. Law § 473-a(5)&(7).

⁴⁴ N.Y. Soc. Serv. Law § 473-a(9).

⁴⁵ N.Y. Soc. Serv. Law § 473-a(10)(f).

⁴⁶ Alan Lawitz, *Handling Real Life Dilemmas in APS Casework*, <http://www.nypwa.com/SC18%20CLE%20Handouts/Dilemmas%20in%20APS%20Casework/Handling%20Real%20Life%20Dilemmas%20in%20APS%20Casework.pdf>.

⁴⁷ N.Y Men. Hyg. Law § 9.47. If the agency does so, it must notify the director of community mental health services. *Id.*

⁴⁸ N.Y Men. Hyg. Law § 9.01.

⁴⁹ Alan Lawitz, *Handling Real Life Dilemmas in APS Casework*, <http://www.nypwa.com/SC18%20CLE%20Handouts/Dilemmas%20in%20APS%20Casework/Handling%20Real%20Life%20Dilemmas%20in%20APS%20Casework.pdf>.

⁵⁰ N.Y Men. Hyg. Law § 9.60(e)(1)(vii).

⁵¹ N.Y Men. Hyg. Law § 9.60(c).

⁵² N.Y Men. Hyg. Law §§ 9.60(f),(g) & (h).

⁵³ N.Y Men. Hyg. Law § 9.60(o).

⁵⁴ Alan Lawitz, *Handling Real Life Dilemmas in APS Casework*, <http://www.nypwa.com/SC18%20CLE%20Handouts/Dilemmas%20in%20APS%20Casework/Handling%20Real%20Life%20Dilemmas%20in%20APS%20Casework.pdf>.

⁵⁵ N.Y. Soc. Serv. Law § 473(1)(c).

⁵⁶ N.Y Men. Hyg. Law § 81.02.

⁵⁷ N.Y Men. Hyg. Law § 81.02(2)(b).

⁵⁸ N.Y Men. Hyg. Law §§ 81.07, 81.10, 81.11. A court evaluator is appointed at the beginning of the proceeding to make an independent assessment of the individual's circumstances and wishes, a finding of incapacity must be based on clear and convincing evidence, the duration of the guardian's appointment must be set by the court, and the guardian is accountable to the court for their actions. *See* N.Y Men. Hyg. Law §§ 81.09, 81.12, 81.15(a)(5), 81.20, 81.30 & 81.31.

⁵⁹ N.Y Men. Hyg. Law §§ 81.15(4).

⁶⁰ N.Y Men. Hyg. Law § 81.19(a)(2).