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FEDERAL AND STATE SAFEGUARDS AGAINST THE INVOLUNTARY DISCHARGE OR TRANSFER OF A NURSING HOME RESIDENT BASED UPON A CLAIM BY THE NURSING HOME THAT THE RESIDENT IS A DANGER TO HIMSELF OR OTHERS.

INTRODUCTION.

If a nursing facility accepts money from either the Medicare or Medicaid programs, the facility must comply with the provisions of the federal Nursing Home Reform Act (NHRA). The NHRA, part of the Omnibus Budget Reconciliation Act of 1987, is codified at 42 U.S.C. §§1395i-3 and 1396r. The NHRA limits a facility's ability to transfer or discharge a resident against his or her will. In fact, a transfer/discharge is considered "involuntary" whenever it is initiated by the facility, even if the resident agrees with the facility's decision. Under the NHRA, a nursing facility can conduct an involuntary transfer or discharge in only six circumstances. One of the permitted circumstances occurs when a nursing facility claims that a resident is a danger to himself or others. This article examines the safeguards in federal and state law which can be used to defend against an attempt to discharge a resident based upon a claim that the resident is a danger to himself or others.

THE NURSING HOME MUST PROVIDE 30-DAYS ADVANCE WRITTEN NOTICE OF DISCHARGE, INCLUDING SPECIFIC INFORMATION.

It is settled law that each nursing facility resident has the right not to be transferred or discharged involuntarily unless substantive and due process criteria have been

met. Matter of Involuntary Discharge or Transfer of J. S. By Hall, 512 N.W.2d 604, 609 (Minn. App. 1994), 42 C.F.R. §483.12. Among the procedural requirements of a facility intending to involuntarily discharge a resident is the requirement of proper 30-days notice of the intended discharge to the resident. N.J.S.A. 8:39-4.1(a)(32) This notice is required to be in writing and must include (1) the reason for the threatened discharge; (2) the date on which the discharge is to occur; and (3) the location to which the resident is to be moved. 42 C.F.R. §483.12(a)(4) and (6); N.J.A.C. 10:63-1.10(g)(2). Failure to provide proper notice of discharge should result in a denial of the proposed transfer/discharge.

THE FACILITY MUST DEVELOP A DISCHARGE PLAN OF CARE, AS REQUIRED BY LAW.

Pursuant to 42 C.F.R. §483.20 (1)(3), prior to involuntarily discharging a resident, a facility is required to have a "post-discharge plan of care that is developed with the participation of the resident and his or her family, which will assist the resident to adjust to his or her new living environment." The involuntary transfer of a resident is permitted only "when adequate alternative placement . . . is available." N.J.A.C. 10:63-1.10 (e). In order to determine whether "adequate alternative placement" is available, a facility must pre-

pare a discharge plan before involuntarily discharging a resident, as required in 42 C.F.R. §483.12 (a)(7) and N.J.A.C. 10:63-1.10(h). The discharge plan must take the resident's medical needs into account. Further, any discharge plan must include "involvement of the recipient, family or authorized representative in the placement process with recognition of their choices", as required by N.J.A.C. 10:63-1.10(h)(2)(iii). In addition, the Nursing Home Reform Act requires that a nursing facility "must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility." 42 C.F.R. §483.12(a)(7). In considering a proposed involuntary discharge, the nursing facility must examine:

1. The effect of relocation trauma on the resident;
2. The proximity of the proposed placement to the present facility and to the family and friends of the resident; and
3. The availability of necessary medical and social services as required by Federal and State rules and regulations. N.J.A.C. 10:63-1.10(f). To permit a threatened discharge without the benefit of a proposed discharge plan would be to deprive the resident of the evaluation of these vital issues required by law.

VIOLATION OF A NURSING FACILITY'S RULES AND REGULATIONS, ALONE, CANNOT JUSTIFY AN IN-

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VOLUNTARY DISCHARGE.

Nursing facilities often attempt to rely upon a resident's alleged failure to follow the facility's rules and regulations as justification for an involuntary discharge. However, it is settled law that the violation of a facility's rules and regulations, alone, does not warrant the involuntary discharge of the resident. 42 U.S.C. §§1395i-3(c)(2)(A)(iii), (iv); 42 C.F.R. §483.12(a)(2)(iii), (iv). Rather, a resident may be discharged only for the reasons set forth in governing regulations. As set forth in N.J.A.C. 8:39-4.1(a)(31):

Each resident shall be entitled to the following rights:

* * *

To be transferred or discharged only for one or more of the following reasons, with the reason for the transfer or discharge recorded in the resident's medical record:

- i. In an emergency, with notification of the resident's physician or advanced practice nurse and next of kin or guardian;
- ii. For medical reasons or to protect the resident's welfare or the welfare of others;
- iii. To comply with clearly expressed and documented resident choice, or in conformance with the New Jersey Advance Directives for Health Care Act, as specified in N.J.A.C. 8:39-9.6(d); or
- iv. For nonpayment of fees, in situations not prohibited by law... (emphasis added)

Thus, even assuming, *arguendo*, that the resident violated the facility's rules and regulations, those acts cannot be the basis of an involuntary discharge.

THE INVOLUNTARY DISCHARGE OF A RESIDENT WITH BEHAVIOR PROBLEMS CANNOT BE A FACILITY'S FIRST OPTION.

RATHER, THE FACILITY HAS A LEGAL DUTY TO EXHAUST AVAILABLE ALTERNATIVES TO TREAT A RESIDENT'S BEHAVIORAL PROBLEMS FIRST, BEFORE SEEKING DISCHARGE.

A facility is not permitted under law to ignore a resident's psychological or other needs and then address inevitably resulting behavioral problems by simply discharging the resident. Instead, the facility "must provide the services necessary for a resident to attain or maintain the highest practicable level of functioning.... If ... a resident's assessment reveals difficulty with mental or psychosocial adjustment, the facility must ensure that he receives the treatment necessary to correct the assessed problem." E. Carlson, Long-Term Care Advocacy §2.15 (Matthew Bender & Co., Inc. 2001) (citations omitted) (emphasis supplied). Simply stated, it is clear that "[a] nursing facility has an expansive obligation to treat or ameliorate any behavioral problems presented by residents." Id.

It is equally clear that even the most disruptive or volatile behavior generally does not justify an involuntary discharge. Id. It is only when the behavior is a danger to the welfare or safety of others that such behavior may warrant involuntary discharge. N.J.A.C. 10:63-1.10(e)(2).

The two aforesaid principles combine to render many threatened involuntary discharges of nursing home residents unjustified. For example, in enjoining the discharge of a resident who, *inter alia*, yelled and caused conflicts with other residents, a hearing officer reasoned:

[H]er diagnoses are no different than many other residents in this facility. If her behavior is more disruptive than others, then the physician needs to be made aware of that so he can properly adjust the resident's

medication regimen. Because the resident is difficult to manage is not an acceptable reason to discharge her.

In re Teimer, California Transfer/Discharge Appeal No. 91-0006.

Disruptive behavior of a more serious nature has likewise been found insufficient to justify an involuntary discharge. In a California case, for example, the resident was permitted to remain at the facility despite allegations that the resident threw a wash basin at an aide and was verbally abusive toward the facility's staff and residents. In re J.M., California Transfer/Discharge Appeal No. 04-0016.

When considering an involuntary discharge on the basis that the resident has injured others, "[t]he severity of the injuries generally is the determinative factor."

If the resident has caused significant injuries, then the resident is a danger to others' safety, and involuntary transfer or discharge is appropriate. If, on the other hand, the injuries have been relatively minor, the resident likely has the right to remain in the nursing facility.

Carlson, supra, §4.06[4].

In many cases, behavior of a serious physical nature has been found insufficient to justify involuntary discharge.

In In re George Brown, District of Columbia Transfer/Discharge Appeal No. 91-OAD-090-3 (Feb. 20, 1992), the resident was involved in 15 or more incidents, including "kicking, slapping, choking, and fighting with other residents and staff," and had stabbed another resident with a fork. Nevertheless, the hearing officer denied the discharge request, finding that, [t]he Facility should have acted more promptly to determine why the Resident was acting out, and how they could address the issue. Had

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they done so, ... the Resident's medical and psychiatric conditions would have been recognized sooner, with an appropriate plan of action adopted before the situation reached a critical stage.

Id. Similarly, in a New Mexico case, despite a nursing home resident's history of striking out at others, the facility's transfer request was denied, largely because of the facility's failure to address the resident's behavioral issues.

As a whole, the behavioral treatment plan that [the facility] provided [the resident] seems to be incident driven and consists primarily of telling [the resident] that his behavior is inappropriate and that it will not be tolerated. Such a limited approach does not seem adequate given [the resident's] condition.

New Mexico Transfer/Discharge Appeal No. 525-16-1061 (July 1, 1997). See also, In re the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall, supra, 512 N.W. 2d at 613 (despite allegation that resident endangered safety of others, transfer request denied because facility failed to "create an appropriate assessment or comprehensive care plan which would identify options geared for [the resident's] particular needs and the protection of other individuals in the facility").

Notably, where a facility claims to be concerned for the safety of other residents, "a resident's need for extensive (and/or expensive) care is not [a] legitimate justification[] for involuntary transfer or discharge." 42 U.S.C. §§ 1395i-3(c)(2)(A), 1396r(c)(2)(A); 42 C.F.R. § 483.12(a)(2). In In re E.R., Washington Transfer/Discharge Appeal No. 1293 A-211 (Mar. 16, 1994), a resident suffering from dementia had touched other residents in a

sexually inappropriate manner. In response, the facility had placed the resident in a private room and had heightened the level of monitoring of the resident. After a period of time, the facility attempted to discharge the resident, claiming, *inter alia*, that the resident drained the facility's resources and diverted resources away from other residents. The hearing officer denied the facility's discharge request on the following basis:

It was not the intention of the [federal] legislature to permit nursing facilities to discharge or to transfer patients whose dementia results in a need for increased nursing attention on the basis [of] an alleged danger to the safety of other patients. The facility's duty under the law is to provide appropriate care in the facility itself.

(Id. (emphasis supplied)). See also In re L.R., California Transfer/Discharge Appeal No. 05-0006 (Feb. 17, 1993) (denying transfer because facility had failed to take active steps toward behavior modification to address a male resident's inappropriate touching of female residents). Likewise, a facility's claimed fear that it would be held legally liable for a resident who frequently grabbed, hit and bit others was rejected as a basis upon which to discharge the resident: "The potential for liability helps to assure that the staff is careful to minimize the effects of [the resident's] behavior." In re M.E., Minnesota Transfer/Discharge Appeal No. 1-0900-5189-2 (Jan. 29, 1991), *aff'd*, Minnesota Commissioner of Health, 3/25/91.

Particularly instructive is the reasoning of a California hearing officer who denied a requested discharge based upon the resident's combativeness:

The facility has not shown a community standard that

Resident's behavioral problems were so extraordinary that it could not find effective conventional treatments, such as psychoactive medication, counseling and behavior modification approaches. Furthermore, since the consultant psychiatrist had not completed his assessment and no treatment regimen has been devised to help Resident or the facility deal with the behavioral problems already displayed, the facility has not exhausted all reasonable approaches for Resident's care at the facility.

In re J.C., California Transfer/Discharge Appeal No. 02-0042 (Aug. 3, 1993) (emphasis supplied).

As the foregoing case law makes abundantly clear, the involuntary discharge of a resident with behavior problems cannot be a facility's first option.

It is not uncommon for the elderly to act out feelings of depression and isolation in a nursing facility setting. However, a nursing facility must address a resident's behavioral problems through medication, counseling and/or behavior modification, and exhaust those options first, before seeking to discharge the resident. See, In re J.C., *supra*, California Transfer/Discharge Appeal No. 02-0042 (Aug. 3, 1993).

CONCLUSION.

Thus, if the resident's behavior does not rise to the level of a genuine threat to the welfare or safety of others, and the facility has failed to exhaust available avenues to treat his behavioral problems, the facility cannot prove that the threatened discharge of the resident is warranted. ❖

**A PUBLICATION OF THE
LAW OFFICES OF DONALD VANARELLI**

CORRECTION: The amount of Medicaid's Community Spouse Resource Allowance for year 2002 was reported incor-

Donald D. Vanarelli, Esq., **certified as an Elder Law Attorney** by the National Elder Law Foundation, an ABA-approved certifying organization, and **certified as a Registered Guardian** by the National Guardianship Foundation, will be conducting **free** seminars on "Protecting Your Assets From Catastrophic Nursing Home Costs" at local libraries in the next several months. In these hands-on workshops, participants will learn how to qualify for government assisted medical programs while still preserving their assets for their heirs.

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How To Protect Your Estate From Catastrophic Nursing Home Costs

Thursday, April 4	Clark Library	7:00 PM-8:30 PM
Wednesday, May 15	North Edison Library	1:00 PM-2:30 PM <i>and</i> 7:00 PM-8:30 PM
Thursday, June 6	Woodbridge Library	1:00 PM-2:30 PM <i>and</i> 7:00 PM-8:30 PM

To register, please call 908-232-7400

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