

Involuntary Discharge From Nursing Homes

by Lori Darnel

Colorado's senior population, along with the rest of the country's, is expected to soar to record numbers as "Baby Boomers" reach their golden years. With the growth of the assisted living industry and home healthcare, the elderly are experiencing a better quality of life in their homes or home-like environments for longer periods of time. However, the nursing homes and other long-term care facilities also are seeing more frail and medically complex patients taking up residency. Nursing home resident advocates have come to play a crucial role in monitoring quality of care and quality of life within the long-term healthcare system. This includes residents' rights concerning involuntary discharge.

Even under the best of circumstances, moving can be a stressful experience. For a resident of a nursing home who is facing an involuntary discharge from a facility, the stress created by the discharge process, as well as any move, can be traumatic. Most transfer and discharge issues are resolved informally, and residents or their family members may be assisted in the process by a Long-term Care Ombudsman.¹ The goal of any intervention on behalf of a resident is to minimize any trauma, which means the best result is attempting to stop an involuntary discharge and address the underlying issue.

This article discusses the statutory and regulatory authority, including the Nursing Home Reform Law ("NHRL"), that surround involuntary discharge procedures of a resident from a nursing home—also known as a skilled nursing facility ("SNF"). Also covered are the procedures for appeal of a decision to discharge a SNF resident. The grounds for and challenges against an involuntary discharge from nursing homes are based on the two most common situations: allegations of behavioral problems and non-payment.

Nursing Home Reform Law

Over the last thirty years, nursing home regulations have moved from a cost/

benefit business model of maximizing services, to consideration of resident rights, including providing for due process of resident rights regarding nursing home discharge procedures. The NHRL established basic principles regarding resident rights that states must follow.² The result is a comprehensive collection of codified rights for residents in long-term care facilities that address issues of dignity and privacy, informed consent, cooperative healthcare, and culture change. The NHRL represents a move away from the sterile medical model and toward providing residents with experiences comparable to home-like settings.

The majority of SNFs in Colorado and across the country accept either Medicare or Medicaid insurance;³ most accept a combination of both. Nursing homes that accept Medicare or Medicaid payments for a resident's stay are subject to the NHRL.⁴ In 1986, a committee appointed by the Institute of Medicine recommended fundamental reforms that focus on quality of care results rather than capacity.⁵ The Institute's report led to the passage of the NHRL, which is part of the Omnibus Budget Reconciliation Act ("OBRA").⁶ The NHRL requires that an evaluation of a facility be based on whether the facility's residents receive the services they need.⁷ Specifically, a SNF must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident.⁸ To maintain certification from the state, nursing homes are inspected at least once a year and evaluated based on the OBRA standards.

Resident Rights

Resident rights are firmly grounded in legislative mandates from both state and federal sources outlined in and influenced by OBRA. These statutes require facilities to make public a statement of the resident rights and require appropriate treatment of residents, as necessary.⁹ In Colorado,

the legislature's designation of resident rights granted substantive and procedural due process rights for nursing home residents.¹⁰

The basic tenets of resident rights as recognized in Colorado can be categorized as the right to:

- 1) be treated with dignity and respect;
- 2) be informed in writing regarding services and fees;
- 3) manage one's own financial affairs or to appoint another to manage them;
- 4) privacy (as long as it does not interfere with other residents' rights, health, or safety); and
- 5) informed consent regarding medical care, which includes the right to refuse treatment.¹¹

The Colorado Department of Public Health and Environment ("CDPHE") and the Long-term Care Ombudsman Program ("Ombudsman Program")¹² are responsible for investigating complaints regarding violation of a resident's rights.

The CDPHE is the state agency responsible for oversight of a SNF's licensure and certification.¹³ This allows the CDPHE access to residents' medical records, designated SNF statistics, and the right to enter SNFs at any time for purposes of surveys enforcing compliance of regulatory standards.¹⁴ The Ombudsman Program is a federally mandated program through the Older American's Act to represent the interests of long-term care residents through complaint investigations and resolutions.¹⁵ The intent is to ensure the health, welfare, safety, and rights of those residents in long-term care facilities, including assisted living facilities, personal care boarding homes, and nursing

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homes.¹⁶ An Ombudsman attempts to resolve disputes through regulatory enforcement, as well as negotiation and mediation between residents, family members, interested persons, and the facilities.

When faced with an involuntary discharge, the Ombudsman Program is a valuable resource to gather information, investigate claims, and advocate for the resident who is faced with what is usually a difficult choice. Although a complaint to the CDPHE will trigger a survey of the facility and possible citation for deficient practice for lack of adherence to the regulations,¹⁷ a complaint to the Ombudsman will allow for an investigation that can mediate and negotiate an acceptable settlement to all parties involved.

Overwhelmingly, the most common reasons behind an involuntary discharge of a resident from a skilled nursing facility involve either financial matters or behavioral concerns. Following is a brief discussion of each.

Involuntary Discharge for Financial Reasons

A nursing home's rates usually range from \$4,500 to \$5,500 per month for basic room, board, and maintenance healthcare services. Medications and equipment, acute nursing care, and rehabilitation services can more than double that cost. Whether residents receive private insurance or public benefits, including Medicaid, most residents are still responsible for a portion of the costs to reside in a SNF. Failure to meet these monthly financial obligations may result in involuntary discharge from or transfer out of the facility.

Residents who receive long-term care Medicaid benefits are expected to turn over a significant portion of their monthly Social Security checks to the nursing home. Generally, only a \$50 pass through is earmarked for "spending money" for the resident to keep. Problems arise when residents, family members, or responsible parties who are in charge of financial matters fail to meet payment obligations on behalf of the resident.¹⁸

In many instances, a medically frail individual is not able to remain at home due to care and safety issues. However, sometimes family members and responsible parties are unable or even unwilling to turn over to the SNF the income they have been receiving to care for the individual at home. Faced with the lack of payment and the difficulty of absorbing such costs associated with providing indi-

vidual healthcare, it is not unusual for a nursing home to be left with the difficult decision of either discharging a resident back to a potentially unsafe environment or letting the resident stay without being compensated for the cost of the resident's care. Nursing homes and protection agencies, such as county Adult Protective Services programs, the Ombudsman Program, and the CDPHE, struggle with the identification and recognition of potential financial exploitation of these residents without becoming the "bill collectors" of an overburdened system.

Assistance from the legal community becomes invaluable in this situation to help with interventions of the underlying issues. Specifically, many of these types of cases raise concerns about the resident's cognitive capacity to manage his or her own affairs, as well as questioning of the responsible party's ability to look out for the welfare of the resident. Seeking court intervention for a guardian or conservator can often secure a resident's placement and eliminate the SNF's concerns regarding payment.

Involuntary Discharge for Behavioral Reasons

Expected to maintain the health, welfare, and safety of each resident, a SNF must find a balance among resident rights, high clinical standards, and safety of the nursing home community. Challenges for nursing homes arise frequently, and may stem from individual disease processes, deterioration of mental health, and knowing and intentional actions of residents.

Residents with behaviors related to mental health, certain types of dementia, and other debilitating diseases may exhibit agitation, aggression, and wandering, all of which can put residents and others at some risk. The decline in a resident's brain functioning may negate the culpability of the individual, but the potential for risk to others can be severe. Although such residents are clearly in need of care themselves, their presence in a community environment places other frail and medically compromised residents at risk for both injury and neglect of care. Many incidents with residents with behavioral problems involve physical abuse, such as a resident striking out at others, grabbing, or pulling, as well as unwanted sexual contact.

Cognitively responsible residents pose new issues for SNFs. Such residents may understand risks and make informed de-

isions, under resident rights, and still may make poor choices. Residents cannot be discharged for refusing medical care affecting only themselves when that choice is knowing and voluntary after informed consent;¹⁹ however, when those choices affect other residents, nursing homes become less tolerant and must intercede. These behaviors may include direct contact, such as physical and sexual abuse directed at another resident, and indirect behaviors, such as smoking with or near oxygen.

Nursing homes continually struggle to balance a resident's rights and what is best for the SNF community as a whole. Often, the initiation of involuntary discharge procedures is triggered by this conflict and a nursing home's difficulty in being able to adequately address the consequences of a resident's behavior. Advocates, including the legal community, should determine and ensure that all available resources and interventions have been attempted to address the resident's needs prior to an involuntary discharge. Often, these are the most contested situations. The tools available in the regulatory procedures for involuntary discharge become helpful in sorting out the issues.

Discharge or Transfer Procedures

The NHRL and federal regulations circumscribe specific instances when a nursing home can involuntarily discharge or transfer a resident from a facility.²⁰ Within the statutory definition and regulatory authority, a "discharge" is considered to be a resident's move from a nursing facility to a non-institutional setting; a "transfer" constitutes a resident's move from a skilled nursing facility to another institutional setting.²¹ Federal mandates limit involuntary discharges and transfers from a nursing home to the following six circumstances:

1. The transfer or discharge is necessary to meet the resident's welfare, and the resident's welfare cannot be met in the facility.
2. The transfer or discharge is appropriate, because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility.
3. The safety of individuals in the facility is endangered.
4. The health of individuals in the facility would otherwise be endangered.

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5. The resident has failed, after reasonable and appropriate notice, to pay for a stay at the facility.

6. The facility ceases to operate.²²

The involuntary discharge process is guided by federal statute and regulation.²³ Colorado enforces even more strict standards for involuntary discharge or transfer:²⁴

- The transfer or discharge is necessary for the resident's welfare. Facilities that are certified to participate in the Medicaid and/or Medicare reimbursement program also must demonstrate that the resident's needs cannot be met in the facility.²⁵
- The transfer or discharge is only for medical reasons. Facilities that are certified to participate in the Medicaid and/or Medicare reimbursement program also must demonstrate that resident's needs cannot be met in the facility.²⁶
- The transfer or discharge is necessary to preserve the welfare of other residents.²⁷
- The resident has failed to pay for (or to have paid under Medicaid or Medicare) a stay at the facility. Facilities that are certified to participate in the Medicaid and/or Medicare reimbursement program also must provide reasonable and appropriate notice of non-payment and its consequences to the resident prior to initiating a transfer or discharge of that resident for reasons of non-payment.²⁸

As defined in CDPHE regulations,²⁹ nursing homes are required to give adequate notice and due process to residents in the event of an involuntary discharge or transfer. Generally, nursing homes are required to give a minimum of thirty days' notice for the involuntary discharge or transfer; however, there are occasions

when this is not possible. In emergency circumstances, residents and their representatives must be notified as soon as practicable before the transfer or discharge if the safety of residents in the facility is endangered, the health of residents in the facility is endangered, and an immediate transfer or discharge is required by the resident's issues.³⁰

From a practical standpoint, a resident's transfer from a nursing home to a hospital is usually based on emergency circumstances, which fits within the third criteria meeting the resident's needs. The first two criteria are somewhat more difficult to discern. The safety and health of residents include behavioral problems resulting in imminent danger, infectious disease control issues, and matters outside the control of the staff or residents triggering endangerment issues.

In the non-emergency circumstances, an involuntary discharge requires "adequate notice," with the opportunity to appeal. Adequate notice is commonly referred to as a "thirty-day discharge letter" and minimally includes the reason for the transfer or discharge; the effective date of the transfer or discharge; the location to which the resident is transferred or discharged; the grievance procedure; notice of appeal rights and procedure; notice of Ombudsman help in the process; and notice of other social services agencies, such as mental health or developmental disability cases, as appropriate.³¹

Colorado's regulation is very specific as to the language expected to be used in the involuntary discharge or transfer letter. Therefore, the letter should be written directly from the relevant sections provided in the regulation.³²

An appeal from a discharge or transfer notice follows the Colorado Nursing Home Grievance Procedure ("Grievance Proce-

dures") laid out in the state regulations (see Appendix to the accompanying article by Valerie Corzine at page 31). The Grievance Procedure is designed to address any complaint within the nursing home facility. However, the Grievance Procedure is primarily used in a specific appeal process involving an involuntary discharge or transfer of a resident.³³

Ombudsman Program And CDPHE as Attorney Resources

Nursing homes or skilled nursing facilities must abide by specific statutory and regulatory guidelines when involuntarily discharging a resident from the facility. Residents, family members, and attorneys are encouraged to use the resources provided by the nursing home systems whenever a conflict between the resident and the SNF arises. The CDPHE and Ombudsman Program have the experience, regulatory knowledge, and expertise to resolve most complaints that develop into discharge or transfer issues. In the event a discharge notice is provided, the nursing home must follow proper regulatory procedures or the facility can be asked to reissue the discharge notice, which will renew the thirty-day time period for enforcement.

Conclusion

Advocacy for a resident is the most important aspect of the discharge and grievance process. Nursing homes want to work cooperatively with residents and advocates to avoid a discharge whenever possible and usually are open to negotiations leading to solutions. Legal intervention may be helpful with underlying issues—actions for guardians or conservators. The involuntary discharge process can be intimidating and stressful to residents, who may fear retaliation from staff.

Attorneys involved in a discharge proceeding should contact the local Ombudsman Program to determine if the proper notification was provided to the regulatory agencies, as well as to obtain substantive information about the nursing home's efforts to resolve matters.³⁴ Nursing home residents are keenly aware of their dependence on caregivers and the risk of losing that care. Caregivers and counsel must understand the rights of these residents in the face of an involuntary discharge procedure.

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NOTES

1. Local Long-term Care Ombudsman Programs, generally housed in local Area Agencies on Aging throughout the state of Colorado, conduct complaint investigations and direct advocacy on behalf of nursing home residents in long-term care facilities. Local Long-term Care Ombudsman Programs often advocate on behalf of nursing home residents in involuntary discharge situations. Interested persons should contact local Area Agencies on Aging or the Colorado Long-term Care Ombudsman Program at The Legal Center for further information on the nearest local Long-term Care Ombudsman Program—(303) 722-0300 Voice/TTY, (303) 722-3619 TTY, toll free (800) 288-1376 Voice/TTY, Fax (303) 722-0720, <http://www.thelegalcenter.org>. Practitioners should remember that nursing home residents, their family members, and their particular situations are individual and unique. The level and nature of the advocacy wanted and needed varies based on both the personalities involved and the factual nature of the cases. In some cases, residents may desire additional information regarding their situation from a legal perspective and may even desire legal representation. In addition to the Colorado Long-term Care Ombudsman Program, the Long-term Care Law Project at The Legal Center provides information from a resident attorney's perspective on

nursing home involuntary discharge. The Law Project may be able to provide legal representation to nursing home residents facing involuntary discharge who do not have access to other legal resources and desire formal legal representation. See a description of The Legal Center programs in the sidebar in the accompanying article by Valerie Corzine at 33.

2. 42 U.S.C. §§ 1395i-3 and 1396r.

3. 42 U.S.C. §§ 1395i-3 (Medicare-certified facilities) and 1396r (Medicaid-certified facilities).

4. See *id.* and 42 CFR §§ 483.1–483.75 (regulations applicable to both Medicare-certified and Medicaid-certified facilities).

5. Institute of Medicine, *Improving the Quality of Care in Nursing Homes* (1986).

6. See Carlson, *Long-Term Care Advocacy* (Matthew Bender, 2004) at § 2.02.

7. 42 U.S.C. §§ 1395i-3 and 1396r.

8. 42 U.S.C. §§ 1395i-3(b)(1)(A)

9. CRS § 25-1-120; 42 U.S.C. § 1395i-3.

10. *Macleod v. Miller*, 612 P.2d 1158 (Colo. App. 1980).

11. See CRS § 25-1-120.

12. The Colorado Department of Public Health and Environment (“CDPHE”), Health Facilities Division, can be reached at (303) 692-2800. It provides access to information via their website at <http://www.cdphe.state.co.us>. The State of Colorado Long-term Care Ombudsman Program, (303) 722-0300, provides

information and referral to regional programs for specific complaint investigations.

13. 6 CCR § 1011-1, Ch. 2.

14. 6 CCR § 1011-1, Ch. 2 and 2.18.

15. 42 U.S.C. § 3058g.

16. *Id.*

17. The CDPHE will investigate an involuntary discharge once the issue has been brought through the grievance process.

18. Responsible parties may include a power of attorney, conservator, and guardian.

19. 42 CFR § 483.10(b)(4).

20. 42 U.S.C. § 483.202; 42 CFR § 483.12.

21. 42 U.S.C. § 483.202; 6 CCR 1011-1.

22. 42 U.S.C. §§ 1395(c)(2)(A) and 1396r(c)(2) (A); 42 CFR § 483.12(a)(2).

23. 42 U.S.C. § 483.202; 42 CFR § 483.12.

24. 6 CCR 1011-1, Ch. 5, 12.6.2.

25. 6 CCR 1011-1, Ch. 5, 12.6.2(1).

26. 6 CCR 1011-1, Ch. 5, 12.6.2(2).

27. 6 CCR 1011-1, Ch. 5, 12.6.2(3).

28. 6 CCR 1011-1, Ch. 5, 12.6.2(4).

29. 6 CCR 1011-1, Ch. 5, 12.6.5.

30. *Id.*

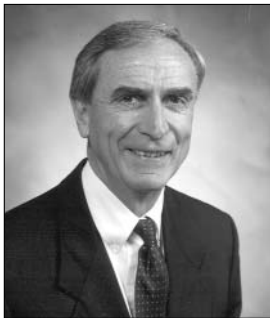
31. CCR 1011-1, Ch. 5, 12.6.6.

32. *Id.*

33. 6 CCR 1011-1, Ch. 5, 12.4.

34. For information on Local Ombudsman Programs, contact Area Agencies on Aging or The Legal Center's Colorado Long-term Ombudsman Program, note 1, *supra*. ■

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