

CHOOSING A NURSING HOME AND MAKING IT WORK FOR YOU



A Guide for People Considering or Receiving Nursing Home Care



**DISABILITY RIGHTS
LOUISIANA**

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FOREWORD

Disability Rights Louisiana (DRLA) is a private, non-profit corporation designated by the Governor as Louisiana's protection and advocacy agency for persons with developmental disabilities, severe disabilities, and mental illness, and for beneficiaries of the U.S. Social Security Administration; and as the Client Assistance Program for clients of the Louisiana Division of Rehabilitation Services. DRLA provides legal services to persons aged sixty and older in several parishes in Louisiana. Under a contract with the Governor's Office of Elderly Affairs, DRLA also provides legal services to nursing home residents. Under a contract with the Louisiana Attorney General's office, DRLA provides ombudsman services to persons residing in community homes.

DRLA's work in the area of nursing home advocacy convinced it of the need for this guide. On an annual basis, DRLA fields hundreds of requests for information about and assistance with nursing home issues. Among other things, people wanted to know how to choose a nursing home, how to pay for nursing home care, how to complain about inadequate care, and how to prepare financially and emotionally for an impending nursing home stay.

As our nation's population ages, even greater numbers of us will have contact with nursing facilities - as residents, as relatives or friends of residents, or as volunteers. Increased contact will mean increased interest in, and questions about, nursing home care. We hope this guide will help answer some questions and provide a starting point for gathering further information.

While this publication deals with legal issues, it is not a substitute for legal advice. While DRLA updates this publication periodically, please note that the law is subject to change. This publication was last updated in July, 2020.

IN MEMORY OF ROBERT SKORNIK

"I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I –
I took the one less traveled by,
and that has made all the difference."

Robert Frost

Bob Skornik's family selected the Robert Frost poem, partially quoted above, to appear on the program of his memorial service. It was an apt choice because, during his short life, Bob never took the easy path.

Having served in the military upon graduation from high school, Bob returned to his family home in New Orleans and joined the Jefferson Parish police force. It was there that Bob was the unfortunate victim of a shooting that resulted in his inability to walk for the rest of his life. At that point, Bob obviously made an important choice: to make the most out of what could have been a devastating situation. He returned to the Sheriff's Department as a Communications Officer and, while supporting himself and his family, went on to earn a bachelor's degree from Loyola University and a law degree from Tulane University Law School.

A year after his graduation from law school Bob came into contact with Disability Rights Louisiana (then, the Advocacy Center) when he applied for a job as a staff attorney in a newly created position, one which would have Bob working exclusively with nursing home laws and regulations. He approached his job with enthusiasm, dedication, hard work, and a sense of humor. He tirelessly traveled the state of Louisiana, visiting his clients in far-flung nursing homes. Although a relatively "new" attorney, he did not hesitate to zealously pursue his clients' rights in and out of the courts. He laid the groundwork for the Ombudsman Legal Assistance Program, which remains a strong and viable component of Disability Rights Louisiana's overall advocacy services.

After working at the Advocacy Center for two years, Bob got "an offer he couldn't refuse" - a position as Associate Director for Legislation with Paralyzed Veterans of America's national staff in Washington, D.C. In January 1993, he was named Advocacy Attorney in the Government Relations Department of PVA. After he left for Washington, Bob remained a good friend and colleague to those of us he left behind at the Advocacy Center/Disability Rights Louisiana, often sending us information about bills before Congress that affected our client population.

Bob died on May 19, 1993 of heart failure at the age of 44. He leaves behind his wife Nancy, daughter Allison and many, many loving relatives and friends. We respectfully and lovingly dedicate this guide to Bob's memory.

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Chapter One

Choosing a Nursing Home

Although this booklet and this chapter in particular are designed for persons considering nursing home care, readers should remember that a nursing home is not the only alternative for a person who finds himself needing assistance in his daily life. Other alternatives that may meet the person's needs in a more desirable way are Medicaid-covered home and community based services¹ Meals on Wheels or other nutrition services, homemaker services, home health care services, adult day care centers, assisted living retirement communities, and other programs. To find out what alternative paid or volunteer resources or services exist in your area, contact your parish Council on Aging or the Aging and Disability Resource Center at 1-877-340-9100.

If a person does decide to enter a nursing home, he is faced with a decision about which facility would best meet his needs. Because the facility chosen will become the person's home, and because the quality of nursing homes varies widely, the decision is one that should be made carefully.

Gathering Information

The first task in choosing a nursing home is discovering what options are available. Perhaps the best way to accomplish this is to obtain a list of area nursing homes from the local Council on Aging or the nursing home ombudsman program in your parish. For more information on the ombudsman program in your area, you may contact the Office of the State Ombudsman², Post Office Box 61, Baton Rouge, Louisiana 70821-0061 (telephone: 225-342-7100 in Baton Rouge or 1-866-632-0922 statewide).

Once you have determined which nursing homes interest you, you may wish to know if any complaints have been filed against the facility and what the state found upon investigating these complaints. To learn this information, you may contact the following state agency:

¹ For information about and to apply for Medicaid Home and Community-Based Services, including Long-Term Personal Care Services (LT-PCS), the Elderly and Disabled Adult (EDA) waiver, and the Adult Day Health Center (ADHC) waiver, call 1-877-456-1146.

² http://goea.louisiana.gov/LTC_ombudsman.html

Department of Health and Hospitals Health Standards Section
Post Office Box 3767
Baton Rouge, Louisiana 70821
Telephone: (225) 342-0138

You may also find information regarding choosing a nursing home on the internet website of the *Centers for Medicare and Medicaid Services*:

<http://www.medicare.gov>

In 2008, the Centers for Medicare and Medicaid Services began a rating system for all Medicare and/or Medicaid certified nursing homes.³ Nursing homes are rated from one star (lowest rating) to five stars (highest rating) in the areas of state inspection results, staffing levels, and quality measures. Each facility also receives an overall rating. It is important to consider that some of the information used to give a rating is self-reported by nursing homes. Some of the information is based on inspections done by the Health Standards Section of the Louisiana Department of Health and Hospitals. If a facility is not forthcoming in its self-reporting or an inspection is not conducted thoroughly, the rating may not reflect the actual quality of care in the facility. Because of this, it is important to also use other sources of information.

Visiting the Nursing Homes

Perhaps the most important step in selecting a nursing home is visiting the facilities that interest you. It is best to visit the facilities more than once and at different times of the day. For example, you may wish to visit:

- in the morning to see if residents are properly assisted in getting out of bed and dressing
- at meal times to see if meals are presented in an appetizing manner and the dining room atmosphere is appealing
- in the evening or on the weekends to see if staffing appears adequate at these "off-times."

On your first visit to the nursing home, you should ask to see a copy of the results of the latest survey of the facility. The state inspects each nursing home annually and the law requires that the facility provide you with the results of such inspections. If the nursing home is reluctant to let you see this report, this may be a warning sign that the facility is hiding problems.

³ <http://www.medicare.gov/NHCompare/Include/DataSection/Questions/SearchCriteriaNEW.asp>

During your first visit, you should also make an appointment to meet with the administrator or admissions director to make sure that the nursing home meets your needs. You should request answers to your questions, such as:

- Is the facility certified for Medicare and Medicaid?
- Does the facility assist residents in applying for these benefits?
- What items and services are included in the basic fee and what services are provided at extra cost?
- Are there nurses (as opposed to aids) on duty around the clock?
- Is the facility able to meet special needs, such as rehabilitation therapy, special diets, or respiratory care?
- What programs does the facility have in place to ensure that residents do not decline physically (such as by losing mobility, becoming incontinent, or otherwise)?
- What is the facility's policy on the use of restraints?
- How does the facility respond to a medical emergency?
- Does the facility honor residents' wishes regarding health care, including those set out in living wills or other documents?
- What evacuation and other plans does the facility have in place for situations such as fires, hurricanes, or extensive flooding?
- Will the facility provide you with references?
- Will the facility provide you with a copy of its policies and rules?

During your visits, take time to speak privately with the residents. Many nursing home residents love visitors and will be more than willing to share their thoughts and experiences with you. Ask them questions such as:

- Would you recommend this nursing home to me as a place to live?
- What do you like and dislike about the facility?
- Is the staff responsive and courteous? Does the staff respond quickly when called? Does the administration consider your complaints seriously and try to correct the problems?
- Does the facility keep your room clean and free from pests?
- Are you allowed to wake up or go to sleep at the times you prefer?
- Are the meals tasty and varied? Are snacks available when you want them?
- Is there a variety of fun and interesting activities or are there simply the same activities (such as bingo) over and over?
- Do outside groups (such as Scouts, church groups, and school groups, for example) visit the nursing home often?
- Are religious services held in the facility? Is transportation available for outside services?
- Is there a television available for residents to watch? Who decides what channel the television is on?
- Does the facility respond quickly (such as by calling a doctor) when you have a medical complaint?

- Have you ever been restrained against your will? Does the nursing home often restrain or over-medicate other residents to keep them under control?
- If you have money in an account with the nursing home, is it easy to get your money when you need it?
- Are you allowed to smoke or to have an alcoholic drink if you wish? If so, are there too many restrictions on these rights?
- Are you allowed to go outside the facility when you wish, such as for shopping, walks, errands, or entertainment?
- Have you or other residents ever had anything lost or stolen here? If so, how did the facility respond?
- Does the facility give you your mail promptly and unopened?
- Do you have access to a suitable telephone for private conversations? If you need a private area for a personal visit, is this provided?

In addition to asking questions, be observant. Notice the following:

- Do staff members seem polite, busy, attentive, and responsive?
- Do residents appear to be clean and properly dressed?
- Are residents restrained or do they appear over-medicated?
- Are residents who need help (such as with eating, walking, or getting a drink) given the necessary help?
- Do the residents seem interested or stimulated by the activities taking place? Are bed-bound residents also provided with alternative activities?
- Are there handrails in the hallways and bathrooms?
- Is the noise level acceptable?
- Do residents have sufficient light for reading or activities?
- Is there a persistent, unpleasant odor?
- Does the facility appear clean?
- Are the grounds well-kept and accessible to residents?

Know Your Rights Regarding Admission

- It is also important that you know your rights regarding admission to a nursing home. For example, the nursing home *may not* take any of the following actions:
 - Require you to give up your rights under Medicare or Medicaid laws;
 - Require oral or written promises that you are not eligible for, or will not apply for, Medicare or Medicaid benefits;

- Require that someone else personally guarantee payment in order for you to be admitted, to be admitted more quickly, or to be allowed to remain in the facility⁴ or
- Charge, solicit, accept, or receive any gift, money, donation, or other consideration as a precondition for admission, expedited admission, or continued stay in the facility, if you are eligible for Medicaid.

⁴ The facility may, however, require someone who has legal access to your income or resources to sign a contract to pay the facility out of your funds.

Chapter Two

Legal Planning for Nursing Home Care

People who enter nursing homes usually do so because they have medical needs that cannot be met at home. Because of such medical problems, nursing home residents and their families often must consider planning for disability. The first efforts in planning for disability generally focus on the medical issues, that is, how to arrange and pay for proper medical care. The onset of some degree of medical disability also raises legal issues: who will consent to medical treatment if the patient cannot understand the choices? Who will handle financial affairs if the patient becomes unable to do so, either temporarily or permanently? What are the patient's wishes for treatment during a terminal illness? How will these wishes be communicated to the treating physician?

There are two areas where the nursing home resident may do some simple legal planning that will benefit both the resident and his family should the resident later become unable to make decisions: *medical decisionmaking* and *financial decisionmaking*.

I. Medical Decisions

Consent to Treatment

Except in an emergency and certain situations where there is a court order, a doctor, nurse, or other health professional may not treat a patient without that patient's legal consent. In addition, many medical problems require the patient to choose between different treatments, such as between surgery and medication therapy. Again, the patient must give legal consent to these choices. This means that the patient must understand the choices and be able to communicate a preference. If the patient becomes physically or mentally unable to do this, the Louisiana Medical Consent Law provides that certain individuals can give consent in his place. The law lists those individuals in order of preference. If no one is available in the first category, then the one in the second category makes the decision, and so on. The order of preference for giving consent is as follows:

1. the patient's curator or tutor, if a court has appointed one in a legal proceeding (often an "interdiction")
2. the person appointed by the patient in a medical power of attorney
3. the patient's spouse, if the couple is not judicially separated
4. an adult child or adult children of the patient
5. the patient's parent
6. the patient's brothers and sisters
7. the patient's other ascendants or descendants.

If there is more than one person in a category, then the consent is given by a majority of those available in the category. If none of the above are available or willing, the law provides other individuals who may consent to treatment.

This law works well for those with a competent spouse by ensuring that the spouse will be able to make medical decisions for the patient even if no advance planning has been done. For those who no longer have a competent spouse, however, medical decisions may become more problematic. For example, if the patient has several adult children, medical decisions will have to be made by majority vote. Such decisions may lead to family tensions if there is no general agreement. Such tension may be avoided with advance planning, such as by appointing one person to give legal consent pursuant to a power of attorney. A power of attorney is also important if the patient would want someone other than the family members listed above (such as a special friend or domestic partner) to make such decisions. In the list set out above, a person designated in a power of attorney comes before all other family members under Louisiana's Medical Consent Law.

*Medical Power of Attorney*⁵

A power of attorney for medical decisions is a legal document by which one person (the "principal") designates another person (the "agent"⁶) to make decisions on his behalf. The person giving the power of attorney retains the right to make decisions on his own as long as he is able. Moreover, so long as the principal is able to make decisions, the agent must act in accordance with his wishes. The agent is empowered to make decisions when the principal is either temporarily or permanently disabled. Under a medical power of attorney, the agent can have the ability to consent to medical treatment, make treatment choices, or hire or discharge medical providers. To be effective under Louisiana

⁵ Technically, the term "power of attorney" is incorrect in Louisiana's civil law system. What would be known as a "power of attorney" in other states is more properly called a "procurator" or "mandate" (depending on the circumstances) in Louisiana. The general public, however, is much more familiar with the term "power of attorney," and so that term will be used in this booklet.

⁶ This term, too, is technically incorrect in Louisiana. What is known as an "agent" in other states is more properly called a "representative" or "mandatary" (depending of the circumstances) in Louisiana. To make the discussion easier to understand, however, this booklet retains the use of the more common (if incorrect) term "agent."

law, *the document must specify that it is for medical decisions*; a general power of attorney will not give such power.

It is important to remember that a person may give a valid power of attorney only if he is able to understand what he is doing and can communicate his choice. In other words, when it is too late for the patient to give legal consent to medical treatment, it is also too late to sign a medical power of attorney. The medical power of attorney is only useful when it is executed before disability incapacitates the patient. By signing a medical power of attorney ahead of time, a person can ensure that, at a time of crisis, medical decisions will be made in an orderly way by the person he most trusts to make them.

II. Living Wills⁷

The Medical Consent Law and the medical power of attorney do *not* deal with one area of medical decision making that has become important in the last few years: the question of whether to withhold or withdraw life supports in the event of a terminal and irreversible illness. These decisions are covered in what is usually called a Living Will. A Living Will is a written document or an oral or nonverbal communication in which a person gives directions as to when he wants life-sustaining procedures withheld or withdrawn. Louisiana law directs that the instructions in a Living Will be followed when two doctors certify that the patient suffers from a terminal and irreversible condition, including continual profound coma with no reasonable chance of recovery.

Life-sustaining Procedures

Life-sustaining procedures are medical treatments that would serve to prolong life but would not cure the terminal condition. Examples of life-sustaining procedures would include cardiopulmonary resuscitation, mechanical breathing, the administration of nutrition or hydration, or kidney dialysis. A Living Will declaration *does not* affect the provision of comfort care (such as pain medication). Living wills executed after August 15, 2005, must state specifically that nutrition and hydration shall be withheld or withdrawn or the law will presume that the declarant wishes them to be administered.

Making a Living Will

A person may make a Living Will in writing at any time. A person can also make a Living Will by an oral or nonverbal communication. However, an oral or nonverbal Living Will may be made only after the patient has been diagnosed

⁷ Technically, Louisiana calls this document a Declaration Concerning Life-Sustaining Procedures. Because the more common term for the general public is "Living Will," this booklet will use the term "Living Will."

with a terminal or irreversible condition. Regardless of the type of Living Will, there must be two witnesses present when the declaration is made. Neither of the witnesses may be related to the patient by blood or marriage or entitled to inherit any portion of his estate. The person who makes the Living Will may revoke it, orally or in writing, at any time. Moreover, a Living Will goes into effect only if the patient is incapable of communicating. This means that, if the patient is conscious and able to communicate his wishes, he will make treatment decisions for himself.

Disability Rights Louisiana provides free samples of Living Wills meeting the requirements of Louisiana law. To obtain one, you may contact the Intake Unit, Disability Rights Louisiana, 8325 Oak Street, New Orleans, Louisiana 70118 or call (504) 522-2337 (New Orleans) or 1-800- 960-7705 (toll-free statewide)

Using the Living Will

The purpose of a Living Will is to inform those providing medical treatment of the patient's wishes regarding life-sustaining procedures. Therefore, it is a good idea to provide a copy of the Living Will to the treating physician for inclusion in the patient's medical chart. Family members might also want to present the Living Will when the patient is admitted to a hospital. Nursing Homes often require that, if a Living Will exists, a copy be filed in the resident's file.

Louisiana law also provides that a person may register his Living Will with the Secretary of State's office in Baton Rouge. A doctor or hospital that is treating the person can call the Secretary of State's office and find out whether there is a Living Will on file and obtain a copy. There is a \$20.00 fee for registering a Living Will with the Secretary of State, and a \$5.00 fee for filing notice that the person has revoked his Living Will. More information on the Registry can be obtained by contacting the following office:

Louisiana Secretary of State Publications Division
Post Office Box 94125
Baton Rouge, Louisiana 70804-9125
Telephone: (225) 922-0309

In the Absence of a Living Will

If a person does not wish to make decisions himself concerning when life-sustaining procedures are to be withdrawn or withheld, the law allows him to choose another person (such as a relative, friend, or partner) to have this authority, much like a medical power of attorney. This authority must be given in a written document, signed by the patient in the presence of two witnesses

(neither of whom is related to the patient or entitled to inherit any portion of his estate). A patient could choose the same person designated in a medical power of attorney and use the same document, but the document must specifically state that the agent has the authority to make decisions concerning life-sustaining procedures. Choosing another person to make these decisions, rather than using a Living Will, may allow more flexibility in the face of a changing medical condition or changing technology.

In the absence of a Living Will, Louisiana law provides that certain other individuals can make the decision concerning life-sustaining procedures for an adult⁸ patient who is terminally ill. As with ordinary medical decision making, the law lists those individuals in order of preference, which means that, if no one is available in the first category, then one looks to the second category, and so on. The order of preference for making such decisions is as follows:

1. any person whom the patient has chosen to make these decisions in a written statement before two witnesses;
2. the patient's curator or tutor, if a court has appointed one in a legal proceeding;
3. the patient's spouse, if the couple is not judicially separated⁹;
4. an adult child or adult children of the patient;
5. the patient's parents;
6. the patient's brothers and sisters; or
7. the patient's other ascendants or descendants.

If there is more than one person in the category, all of those available in the category must agree to the making of a Living Will before it can be done. Because decisions must be made *unanimously* by all available members of a category, such as the adult children, disagreement may result in a stalemate. Where disagreement might be an issue, it would be wise to have prepared a Living Will or have designated one person to handle the decision making in advance.

III. Financial Decision Making

In preparing for possible disability, a person must consider how his financial affairs will be conducted should he become temporarily or permanently unable to handle them on his own. Of course, not all residents of nursing homes are unable to handle their own finances. Many are able to maintain complete control, but some suffer from varying degrees of incapacity. All residents may want to plan for the contingency that their ability to control their financial affairs may become interrupted to some degree. Good planning should consider alternative

⁸ The law sets forth separate and different rules when the patient is a terminally ill minor.

⁹ The law sets forth additional limitations in regard to decision making by certain spouses.

arrangements for essential financial functions, such as: receiving income; accessing savings and other assets; paying bills; managing personal funds at the nursing facility; and transacting business with medical providers, insurance companies, and government agencies such as Social Security and Medicaid.

Unlike medical decisionmaking, the law does not provide for others to step in automatically and assume financial powers when a person becomes incapacitated. The chief tool a person can use in planning for such a situation is a power of attorney.

*Power of Attorney*¹⁰

A power of attorney is the legal means by which one person (the "principal") gives to another person (the "agent") the power and authority to perform certain activities for the principal as if the principal were acting for himself. A person who has given a power of attorney to another can still act on his own. He does not give away his right to make decisions for himself by authorizing another to act as his agent. A person can also change his mind and revoke the power of attorney at any time. The power of attorney can be general, which would allow the agent to handle virtually all of the principal's affairs, or it can be for a limited or specific purpose. It can also be for a limited or specific time, if the principal so desires. In Louisiana, all powers of attorney generally remain in effect even if the principal later has a disability.

In order to give a power of attorney to another, a person must be mentally capable of understanding the effects of what he is doing. If a nursing home resident has already become mentally incapacitated, it is too late to grant a power of attorney. If financial matters must then be handled by someone else, the only choice may be to get an order of interdiction from a court. (See *Interdiction* below.)

Representative Payee

For some nursing home residents, the only source of income is a monthly check from Social Security, SSI, or another government benefit program. These programs can arrange for another person to receive the resident's checks on his behalf without a power of attorney or interdiction. This can be done by naming a family member or other trusted person as the "representative payee" of the resident's checks. The government programs will do this when it is shown that the nursing home resident cannot handle his funds on his own behalf. For more information on how this is done for a particular government program, contact the local office of the program that issues the benefit check.

¹⁰ As noted in footnotes earlier in this chapter, the terms "power of attorney" and "agent" (although commonly used) are not the technically correct terms in Louisiana. They are, however, used to make this booklet more easily understood because they are the terms with which most people are familiar.

Interdiction

Interdiction is the procedure under Louisiana law by which a judge appoints a guardian to handle some or all of the affairs of a person who is unable to manage his person or his affairs himself. In Louisiana, the guardian appointed by the court is called a curator. An interdiction is the result of a court proceeding in which it must be proved that the person to be interdicted is incapacitated. Because such a lawsuit requires presenting evidence in court and may require hiring an attorney, interdiction can be an expensive and time-consuming process. It usually is an alternative of last resort for those who have not done other planning and now require the intervention of others to handle their affairs.

Disability Rights Louisiana's booklet, Legal Status in Louisiana, provides more information on powers of attorney, representative payment, and interdiction. For a free copy of the booklet, you may contact the Intake Unit, Disability Rights Louisiana, 8325 Oak Street, New Orleans, Louisiana 70118 or call (504) 522-2337 (New Orleans) or 1-800- 960-7705 (toll-free statewide) or 1- 855-861-3577 (TTY) or download the booklet on our website, <https://disabilityrightsla.org/>.

Chapter Three

Financing Long-Term Care

Although many people realize that nursing home care can be outrageously expensive, few people give much thought as to how they will pay for such care if they need it. People often believe that private insurance, Medicare, or Medicaid will pay for such care. Unfortunately, this belief is often unrealistic. Although each of these three sources is sometimes available to pay for nursing home care, each also has significant limitations and restrictions. Therefore, it is important to know under what circumstances each will -- or will not -- pay.

I. Private Insurance

Regular Health Insurance Policies Generally Do Not Help

Because health care costs for many people are paid primarily through private health insurance, some people believe that the same insurance would cover medically necessary nursing home care. This is rarely true. Normally, general health insurance policies do not cover the costs of custodial long-term care such as that provided in a nursing home.

Long-Term Care Insurance Policies

Private insurance may be used to pay for long-term care. Although general health insurance policies do not normally offer such coverage, there are now separate policies that are specifically designed to cover such costs. These policies, commonly called long-term care insurance policies, originated in the early 1980s and have soared in popularity since then. Many of these policies now cover home-based long-term care as well as nursing home long-term care.

Buyer Beware: Not All Policies Are Identical

As with many types of insurance, long-term care insurance policies are offered by a variety of insurers and provisions can vary widely. In Louisiana, all policies issued after August 31, 1989, are subject to specific state laws. For example, these laws provide that such policies cannot be canceled because of the insured's age or deteriorating health. In the past many policies provided coverage only if the insured was hospitalized prior to entering the nursing home; this type of limitation is now also prohibited for policies covered by these state laws. Even with these laws, however, policies may still have very different eligibility requirements, coverage, and limitations.

Therefore, consumers must take care in deciding whether a long-term care policy would be beneficial to them and, if so, which policy would best suit their needs.

If You Are Dissatisfied With Your Policy

In Louisiana, if you purchase a long-term care insurance policy and are dissatisfied with it for any reason, you have the right to return the policy within thirty days of its delivery and have your premium refunded.

A helpful free booklet, [The Consumer's Guide to Long-Term Care Insurance](#), is available from America's Health Insurance Plans 601 Pennsylvania Avenue, NW, South Building, Suite 500, Washington DC 20004 (telephone: 202-778-3200) or on the web at: <https://www.ahip.org>

The Louisiana Department of Insurance also publishes a free manual. A copy may be obtained by contacting:

*Louisiana Department of Insurance
Post Office Box 94214, Baton Rouge, LA 70802
(telephone: 1-800-259-5301 or 225-342-5900).*

More information is available on the web at: <http://www.lidi.state.la.us/>

II. Medicare

Medicare is a health insurance program for the elderly and people with disabilities who meet certain criteria. Medicare, unfortunately, is not designed to be a permanent solution to the financial dilemma faced by those requiring long-term care. Although the program does provide some coverage to those requiring nursing home care, the coverage is available only if all of the following conditions are met:

1. The resident must be admitted to a nursing facility after at least a 3-day stay in an acute care hospital; normally, this admission must occur within 30 days of the hospital discharge;
2. The resident must receive daily skilled care for the condition for which he was hospitalized; AND
3. The resident must need and receive a level of care provided or supervised by skilled nursing personnel 7 days per week, or skilled rehabilitation services at least 5 days per week, or a combination of both totaling 7 days per week.

In addition to these restrictions, the coverage for a skilled nursing facility is also limited in the following respects:

1. Coverage extends only to a maximum of 100 days per spell of illness. After at most 100 days, Medicare benefits terminate for that spell of illness and do not begin again until a new spell of illness begins. A new spell of illness begins with the first day of inpatient hospital or skilled nursing facility care and ends when the individual for sixty consecutive days has not been hospitalized in an acute care hospital and has not received a high enough level of nursing home services to meet Medicare Part A level of care requirements.
2. The patient is responsible for the co-payments after the 20th day and until the 100th day (after the 100th day – or earlier if the resident no longer needs a high enough level of nursing home services - Medicare benefits terminate for that spell of illness). The co-payment amount for 2011 is \$141.50 per day. If a resident applies and is eligible for Medicaid, Medicaid can pay the co-payment amount. If the resident has a Medicare Supplement (“Medigap”) policy, it may cover the co-payments.

Because of these limitations on how long Medicare will cover even a portion of an individual’s care and the requirement that “skilled” services be needed, Medicare will not cover **most** nursing facility care.

What To Do If You Think Medicare Should Pay For Your Care

When a person enters a nursing home, the nursing home will determine whether or not it believes Medicare will cover any part of the stay. If the nursing home determines that Medicare will not pay the bill, then it must give the resident written notice of this determination. The nursing home must also give written notice if Medicare has been paying and the nursing home decides to stop billing Medicare because it determines that Medicare will no longer pay. It is important to remember that such a notice is of the nursing home’s determination, *not Medicare’s determination*.

If the resident disagrees with the nursing home’s determination, he must request that Medicare review his claim. Disability Rights Louisiana encourages the resident to request in writing and as soon as possible that Medicare consider his claim.

When a resident requests that Medicare consider his claim, the nursing home is required to file his claim with Medicare. If the resident does ask Medicare to pay, the nursing home is not allowed to bill the resident until Medicare decides whether or not his stay will be covered (although the resident will be responsible for the bill if Medicare ultimately denies coverage).

When Medicare makes a decision about whether or not it will pay for the resident’s care in the nursing home, it will send the resident a written notice. This notice will include information regarding the claims filed, the decisions on the

claims, and the reasons for those decisions. It also includes the appeal rights for the resident in case the resident feels that the decision regarding payment for his care is incorrect. If the resident disagrees with the decision of Medicare, he can appeal that decision according to the instructions included in the notice.

More information about Medicare may be found at the following website:

<http://www.medicare.gov>

Medicare's Prescription Drug Benefit (Medicare Part D)

Starting January 1, 2006, Medicare's prescription drug plan ("Medicare Part D") became effective for all Medicare beneficiaries, including nursing home residents. Participating in Part D is optional. Under Part D, private insurance companies provide partial prescription drug coverage. Individuals choose and pay for the private insurance plan that best matches their prescription drug needs.

Although most Medicare beneficiaries may only sign up for or change plans once a year, **nursing home residents may change plans at any time** (this is known as a "Special Enrollment Period").

For those unable to choose a plan for themselves, Medicare rules only allow the choice to be made by the person who has legal authority under state law. Often, that means only a person who is the legal representative by a power of attorney or one appointed by a court in an interdiction or other legal proceeding. Generally, a person who is only the beneficiary's Social Security Representative Payee **may not** enroll the beneficiary in a plan.

The various drug plans will partially cover different generic and brand name drugs in different categories (listed on the plan's formulary). Therefore, it is possible that not all of a resident's drugs will be covered by his plan. In such situations, the plan may offer additional benefits for an additional premium.

More information on the plans and assistance in choosing a plan is available by calling the Louisiana Senior Health Insurance Program at (800) 259-5301 or by visiting their website at <http://www.lidi.state.la.us/> More information is also available from the following:

The Centers for Medicare and Medicaid Services (CMS)

Phone: 1-800-MEDICARE

Website: <http://www.medicare.gov>

The American Association for Retired Persons

Phone: 1-888-OUR-AARP

Website: <http://www.aarp.org>

The CMS website also includes the Prescription Drug Plan Finder to help individuals choose a plan suited to their needs. Some individuals find the Plan Finder difficult to use and may wish to contact the Louisiana Senior Health Insurance Program for more assistance.

III. Medicaid

While private insurance and Medicare are often not a solution to the problems associated with the costs of long-term care, Medicaid may, under some circumstances, offer the needed assistance. Medicaid is a joint federal and state program that is designed to offer medical care to individuals with limited means. In Louisiana, Medicaid benefits are available to pay for necessary nursing home care for eligible individuals.

Applying for Medicaid

When an individual plans to enter or enters a nursing home, he may apply for Medicaid by contacting his local parish Medicaid office. Medicaid has a separate Long Term Care application for nursing home coverage. Nursing home staff may try to assist a resident in determining eligibility for or applying for Medicaid. An applicant should *never* rely on the nursing home staff to know and understand the Medicaid laws and regulations, nor to complete or monitor the status of the applicant's Medicaid application. Staff may be unfamiliar with or mistaken in their understanding of the law and regulations governing Medicaid. Applicants with questions regarding the law and regulations governing Medicaid are strongly encouraged to contact Disability Rights Louisiana, Medicaid, or an attorney familiar with public benefits law.

Please note that while Disability Rights Louisiana may provide general eligibility information, it does not provide financial planning assistance, advice, or representation. In other words, Disability Rights Louisiana may provide general information as to the different types of programs available, the program eligibility income and resource limits, or if Medicaid considers certain items as countable resources. Disability Rights Louisiana does not provide advice about or legal assistance for activities like selling property, donating property, wills, or successions.

It is important to remember that although nursing homes are required to assist residents in contacting Medicaid offices, they are not required to assist residents in completing Medicaid applications. The applicant is responsible for properly completing the application and for cooperating with Medicaid if he is able. When an applicant is mentally or physically unable to participate in the application process, Medicaid may not deny a Medicaid application on the basis of non-cooperation. In such a situation, the burden falls on Medicaid to assist the applicant through the application process.

Appealing a Medicaid Denial or Termination

When Medicaid denies coverage, Medicaid is required to send a written denial notice with information about how to appeal and the deadline for filing an appeal. Medicaid must also send a written notice with information about appeal rights when someone is terminated from Medicaid. For terminations, in order to continue coverage while the appeal is pending, an appeal should be filed before the proposed termination date even if the appeal deadline is later. Residents who are denied Medicaid or terminated from Medicaid can contact Disability Rights Louisiana for possible representation.

How To Know If An Individual Is Eligible For Medicaid

Medicaid is not available to everyone. To be eligible for Medicaid for nursing home care, an applicant must meet both an income and a resource test and must also be found to need a nursing home level of care as determined by the Louisiana Department of Health and Hospitals (DHH). The applicant also must either be at least 65 years old or meet the Social Security disability criteria.

The nursing home level of care test. DHH's Office of Aging and Adult Services (OAAS) determines whether a resident meets a nursing home level of care based on answers to a Level of Care Eligibility Tool (LOCET) questionnaire completed by the nursing home. DHH must send written notice of the determination with information about appeal rights. Residents who are found not to meet a nursing home level of care can contact Disability Rights Louisiana for possible representation.

The income test. For an individual applicant to be eligible for Medicaid coverage for nursing home care, his monthly gross income must not exceed 300% of the monthly SSI benefit rate. In 2011, this means that the applicant's monthly income cannot exceed \$2,022 (three times the SSI 2011 benefit amount of \$674).

Income Exception: Because \$2,022 is significantly less than the average private-pay rate in a nursing home (which is likely to be \$4000 or more per month in Louisiana), it is possible that a person's income could exceed the income limit but still be insufficient to pay for nursing home care. Therefore, Louisiana has a program called the Long-Term Care Medically Needy Program which extends coverage to *some* persons who would be ineligible for regular Medicaid based solely on income. Medicaid applicants with income over the limit should request to be considered for eligibility under the Medically Needy Program.

The resource test. In addition to meeting the income test, an individual applicant must not have countable resources (or assets) that exceed \$2,000.

Although most types of resources that can be sold or converted to cash are counted, there are a few exceptions. For example, subject to certain limitations and requirements, the following types of property are not normally considered countable resources:

- Up to \$500,000 in equity in a home in Louisiana (this must be a home to which the resident would return should the resident recover and from which the resident is absent only because of his need for nursing home care)
- Household goods (such as furnishings)
- Personal effects (such as clothing or jewelry)
- One vehicle if used for transportation
- Some types of life insurance and burial policies (Note: many policies *are* considered countable resources)
- Burial spaces and certain amounts set aside expressly and solely for burial expenses
- Up to \$6,000 of income-producing property that produces income at an annual net rate of return of at least 6%
- Disaster assistance, including Road Home program assistance.

NOTE: Resources may not be sold or given to others for less than their fair market value. If resources are transferred for less than their fair market value (the value the asset would have if sold in an open market), Medicaid will impose a penalty. Please see the section below, "What Happens If You Transfer Your Resources in an Attempt to Become Eligible for Medicaid."

Individuals above the resource limit may spend down their assets to below the resource limit. In spending resources, individuals must spend on their own or their spouse's needs and desires alone. Large gifts or transfers of cash or assets may make an individual ineligible for Medicaid for a period of time, as explained below in the section, "What Happens If You Transfer Your Resources in an Attempt to Become Eligible for Medicaid." Ineligibility may also result if an individual buys something and pays more than fair market value for it.

Special Eligibility Rules for Married Individuals

The income and resource limits discussed above are those for an individual applying for benefits. Applicants should be aware that different rules may apply if the applicant is married and the spouse is either residing in the same nursing home or is remaining at home.

Couples residing in the same facility. If both members of a married couple reside in the same facility, they may be treated either as individuals or as a couple (depending on which is more advantageous to them) for Medicaid eligibility purposes.

If they are treated as a couple, they would both be eligible for benefits if their combined gross income does not exceed \$4,044 per month (2011 amount) and their combined countable resources do not exceed \$3,000.

Spouse remains at home ("Spousal Impoverishment"). If a married person entered a nursing home after September 29, 1989, and his¹¹ spouse remains at home (called the "community spouse"), he and his spouse may take advantage of the "spousal impoverishment" protections afforded under Medicaid. Under spousal impoverishment, the spouse who remains at home may be allowed to retain some or all of the institutionalized spouse's income and resources for her maintenance needs. When applying for Medicaid, a married applicant with a community spouse may have more resources than the individual limit and still be eligible for benefits by giving resources which place him over the limit to his spouse. If certified for Medicaid, an institutionalized spouse may be allowed to transfer some of his income to his spouse.

Income Before Eligibility. It is important to note that spousal impoverishment does not raise the individual income eligibility limit. The institutionalized spouse must meet Medicaid's income limits *before* certification and *before* he allocates income to the spouse remaining at home. If you are not eligible for Long-Term Care Medicaid because of your income, then the spousal impoverishment provisions will not make you eligible. The Long-Term Care Medically Needy Program may allow an individual with income over the limit to qualify for Medicaid, as noted above. Certification for Medicaid under the Medically Needy Program may then allow the resident to share some of his income with the other spouse.

Resources Before Eligibility. The spousal impoverishment provisions begin by protecting a couple's resources at the time of application. If the applicant and his spouse apply under spousal impoverishment, Medicaid looks at the countable resources of the couple rather than only at those of the applicant. The provisions allow a couple to have combined countable resources with a value of up to \$111,560 (2011 amount). The institutionalized spouse may keep up to \$2,000 of this amount. The spouse at home may keep up to \$109,560, the 2011 maximum protected resource amount.

If the couple applies under spousal impoverishment and resources allocated to the spouse remaining at home are in the name of the institutionalized spouse, the institutionalized spouse must transfer all such resources over his \$2,000 limit to his spouse. The transfer must take place within one year from the date he becomes eligible for Medicaid.

11 For clarity throughout this discussion, it is assumed that the institutionalized spouse is male and the spouse remaining at home is female. This is done simply to avoid the repetitive and confusing use of "his or her." The same rules apply regardless of which spouse remains at home.

It is important to note that, under spousal impoverishment, Medicaid looks at *all* of the couple's countable resources.¹² If the spouse remaining at home has separate resources worth more than \$109,560 (2011 amount), then her separate resources above this amount (as well as the fair market value of the couple's countable shared property and the institutionalized spouse's separate property) are countable resources for the institutionalized spouse. This is true even if his resources are below the \$2000 resource limit. The practical result is that if the couple has total resources over \$111,560 (2011 amount), then neither member is eligible for Long-Term Care Medicaid coverage under spousal impoverishment and neither will immediately be able to qualify by transferring any income using the spousal impoverishment provisions.

A couple not meeting the resource test may spend down to become eligible as described above for individuals above the resource limit. However, as long as a couple does not meet the resource test, Medicaid does *not* move on to consider income.

Income After Eligibility. If an applicant meets Medicaid's resource limitations (as described above) and income limitations and is certified by Medicaid to receive benefits, he may allocate income to the spouse who remains at home.

Under spousal impoverishment, the spouse who remains at home is allowed to keep all of her own income. If her income is less than the Monthly Minimum Maintenance Needs Allowance (MMMNA) of \$2,739.00 per month (2011 amount), then she is also allowed to keep that portion of her spouse's income that will increase her monthly income to \$2,739.00 (2011 amount). There are additional rules for dependents. The local Medicaid office will have a copy of these rules.

In all of the following examples, Mr. Z resides in a nursing home and Mrs. Z resides at home.

Example One. Mr. Z has a monthly gross income of \$1,300. Mrs. Z has a monthly gross income of \$800. Under spousal impoverishment, Mrs. Z would be allowed to keep her income and all of Mr. Z's income because even with all of his income she would

¹² Medicaid does not currently follow Louisiana's community property system in determining property ownership. Although Medicaid uses some of the same language (such as "separate resources" and "community spouse"), that language is defined in the state regulations differently than in state law. Medicaid defines separate resources as those acquired "outside of marriage either by prior ownership or inheritance and which are held separately and are identifiable as owned solely" by one spouse. This definition is much more limited than that under Louisiana law. Moreover, instead of community property, Medicaid looks at "shared property" which it defines as, "Resources acquired during the marriage including community assets which may be held in the name of one or both of the couple." Thus, what might be separate property under Louisiana's community law regime, may be considered a "shared resource" under Medicaid's definitions.

have less than \$2,739.00, the 2011 limit. She would have a total income of \$2,100 monthly .

Calculations:

\$2,739 - 800 **\$1,939**

MMMNA (2011 amount)

Mrs. Z's income

Amount per month that Mrs. Z would be allowed to have from Mr. Z's income (but he has only \$1,300 in income so she may keep all of it).

Example Two. Mr. Z has monthly income of \$3,000 per month and Mrs. Z has monthly income of \$1,000 per month. Mr. Z will be eligible under the Medically Needy Program and under spousal impoverishment, Mrs. Z would be allowed to keep all of her income and \$1,739.00 of Mr. Z's income.

Calculations: \$2,739 - 1,000 **\$1,739**

MMMNA (2011 amount)

Mrs. Z's income

Amount per month that Mrs. Z may have from Mr. Z's income

Example Three. Mr. Z has monthly income of \$1,500 and Mrs. Z has monthly income of \$2,800. Because Mrs. Z's income already exceeds the \$2,739.00 limit (2011 amount), Mrs. Z is allowed to keep all of her own income but is not allowed to keep any of Mr. Z's income.

Example Four. Mr. Z has monthly income of \$4,500 and Mrs. Z has monthly income of \$300. Mr. Z is *not eligible* for Long-Term Care Medicaid because his income is over the income limit. Unless he qualifies under the Medically Needy Program, as described earlier in this chapter, the spousal impoverishment provisions, including those allowing him to allocate income to his spouse, are *not* applicable. He must pay for his care in some other way.

Patient Liability

If an applicant qualifies for Medicaid, it is important to remember that this does not mean that his nursing home care is free to him. The resident will generally still have to pay most of his income to the nursing home. This contribution to the cost of his care is called his "patient liability." Medicaid pays only the part due the nursing home that exceeds the applicant's monthly patient liability. Because the resident is only able to keep a very small amount of his income for personal needs (as discussed below), the resident will not have money to pay for such things as homeowner's insurance, property taxes, or storage costs.

Basically, a Medicaid beneficiary must pay all of his gross income to the nursing home with five deductions:

- \$38 per month (2011 amount) for personal needs (Note that this personal needs allowance is generally the *only* money the Medicaid resident will be allowed to keep for himself)
- \$90 per month in addition to the \$38 above for a total of \$128 per month (2011 amount) for personal needs if the resident receives a \$90 VA Improved Pension¹³
- the amounts required to pay Medicare Part B premiums (\$96.40 per month in 2011) and Part D premiums (which vary) and other health insurance premiums
- the amounts, if any, that Medicaid allows him to reallocate to the spouse remaining at home and any dependents (see the previous section on the income provisions of spousal impoverishment)
- the amounts needed to purchase certain medical items or services not otherwise paid for by Medicaid or the nursing facility

As to the latter, Medicaid does not cover some medical needs of nursing home residents—for example, most dental care, some dentures, glasses, or hearing aids. For residents who have a monthly patient liability, arrangements can be made with the Medicaid agency to set aside some income to cover these medical expenses that neither Medicaid nor other insurance covers. This is called the “incurred medical expense option.” When this arrangement is made, Medicaid will temporarily increase the amount it pays the facility, and reduce the amount the resident must pay, to allow the resident to purchase the needed medical services. As many nursing homes are unfamiliar with the procedure, assistance from Disability Rights Louisiana may be needed in making the arrangements.

This option is not used when the nursing home is required to pay for the medical need. The incurred medical expense option should not be used for items or services that nursing homes are required to pay for. For example, in 2005, the responsibility for paying for many Durable Medical Equipment (DME) items was transferred from Medicaid to nursing homes. These items when medically necessary, including wheelchairs, electronic voice amplifiers, and many other DME items, should be paid for by the nursing home not the resident or the resident’s family.

¹³ All residents who receive Veterans Benefits should notify the Veterans Administration that they are residing in a nursing home and ask if they are eligible for the VA Improved Pension. If they are, they will be able to keep the \$90 monthly benefit for personal needs. If not, all or almost all of the full VA benefit check will have to go to the nursing home. The VA has forms for making this request.

Example One. Mr. Z, a nursing home resident, has monthly income of \$1,500 per month. Mrs. Z, who remains at home, has monthly income of \$2,800 per month. Mr. Z pays \$300 per month for health insurance premiums. Mrs. Z gets nothing under spousal impoverishment because her income is over the MMMNA for 2011. Mr. Z will have \$300 for the health insurance premiums and \$38 for his personal needs deducted from his income. He will have to pay the nursing home \$1,162 each month.

Calculations: \$1,500	Mr. Z's income
-38	Mr. Z's personal needs allowance
- 300	Mr. Z's health insurance premiums
<hr/>	
\$1,162	Mr. Z's patient liability each month

Example Two. Mr. Z, a nursing home resident, has monthly income of \$1,873.40 per month. Mrs. Z, who remains at home, has monthly income of \$1,000 per month. Mr. Z pays \$96.40 for his Medicare Part B premium (2011 amount), but pays no other health insurance premiums. Under spousal impoverishment, Mrs. Z will receive her income and \$1,739 of Mr. Z's income. Mr. Z will have \$96.40 for the Medicare premium and \$38 for his personal needs deducted from his remaining income. He will have to pay the nursing home nothing each month because after allowable deductions, there is no money left.

Calculations: \$2,739	MMMNA (2011 amount)
- 1,000	Mrs. Z's income
<hr/>	
\$1,739	Amount per month that Mrs. Z may have from Mr. Z's income

\$ 1,873.40	Mr. Z's income
- 38.00	Mr. Z's personal needs allowance
- 96.40	Mr. Z's Medicare premium (2011 amount)
1739.00	Given Mrs. Z (spousal impoverishment)
<hr/>	
\$ 0	Because there is \$0 left, Mr. Z pays no patient liability each month

What Happens If You Transfer Your Resources In An Attempt to Become Eligible for Medicaid (“Transfer Penalties”) 14

Applicants must be aware that when they apply for Medicaid, Medicaid also looks at all resources transferred within the 60 months preceding the application for Medicaid benefits. If an applicant has transferred a resource for less than fair market value during that time, then Medicaid may impose a transfer penalty against the applicant and refuse to pay for nursing home care¹⁵ until the penalty period expires. The penalty period begins to run from the day of the transfer, or what would be the first day of eligibility but for the penalty, whichever is later. The duration of the penalty is determined by dividing the total uncompensated value of the property transferred by \$4,000 (for applications made on or after November 1, 2007). The following examples show how the penalty could be assessed:

Example One. The applicant makes a gift of property on March 1, 2006 worth \$24,000. When \$24,000 is divided by \$4,000, the resulting number is 6. Therefore, Medicaid would refuse to pay for nursing home care for 6 months from the month of the gift or the first day of eligibility but for the gift, whichever is later.

Example Two. The applicant tries to disguise the gift as a sale. The applicant sells property worth \$100,000 to a friend for \$20,000. Because the property was sold for \$80,000 less than its fair market value, Medicaid considers the \$80,000 discount as a gift. Therefore, the Medicaid worker would divide \$80,000 by \$4,000. The resulting number is 20; therefore, Medicaid would not pay for nursing home care for 20 months from the month of the sale/gift or the first day of eligibility but for the sale/gift, whichever is later.

The penalty is applied even if the applicant is otherwise eligible and in need of nursing home care. If a Medicaid applicant would be subject to a transfer penalty, the penalty can be eliminated if all the transferred assets are returned to the applicant. Then the applicant may be ineligible based on excess resources and will need to spend down, unless his countable assets are under the resource limit.

¹⁴ The transfer rules outlined in this section apply only to certain transfers occurring on or after February 8, 2006. For transfers occurring before that date, rules more favorable to applicants applied regarding the calculation and duration of the penalties. Medicaid makes exceptions for certain types of transfers and in certain hardship situations. This section does not detail those exceptions.

¹⁵ A transfer penalty would only affect Medicaid eligibility for nursing home care, waiver care, or other care meeting the definition of an institutional level of care. The applicant may still be eligible for other Medicaid services.

Medicaid Claims Against Your Estate After You Die (“Medicaid Estate Recovery”)

Under certain circumstances, Louisiana is now required by federal law to seek repayment for benefits paid from a Medicaid recipient's estate after the recipient dies. For example, the state must seek reimbursement for nursing home, hospital, and prescription drug services (for residents who did not have Medicare Part D prescription drug services) provided to nursing home residents who are 55 or older.

There are limitations on when the state can assert its claim for reimbursement. For example, the claim can be asserted only after the death of the recipient's surviving spouse, and only after the recipient has no surviving child who is under 21 or who is blind or who has a disability. In addition, the state can assert a claim against home property only after certain qualified siblings¹⁶ or children¹⁷ no longer live there. The state can also waive reimbursement if recovery efforts would not be cost-effective or would cause "undue hardship."

When the state asserts a claim, it will provide the representative of the recipient's estate with notice of the action to be taken, the reason for the action, the services for which it seeks reimbursement, and the amount of reimbursement sought. The state must also provide information on how to request a fair hearing and/or a waiver of the recovery for reasons of undue hardship.

¹⁶ To qualify for this exception, the sibling must have resided in the home for at least one year before the recipient entered the nursing home and must have continued to reside in the home since that time.

¹⁷ To qualify for this exception, the child must prove that he or she (1) resided in the home for at least two years before the recipient entered the nursing home, (2) provided care during that time which permitted the recipient to remain at home rather than enter a nursing home, and (3) has continued to reside in the home since the recipient entered the nursing home.

Chapter Four

Rights of Nursing Home Residents

When a person enters a nursing home he maintains basic rights, and these rights should be respected and enforced. For this to happen, residents and their families must be aware of the rights residents have. Accordingly, the following is a summary of the rights granted to Louisiana nursing home residents under federal¹⁸ and state law.

Dignity: The federal regulations provide that a "resident has a right to a dignified existence, self determination, and communication with and access to persons and services inside and outside the facility."¹⁹ In addition, a "resident has the right to be free of interference, coercion, discrimination, and reprisal from the facility in exercising his or her rights."²⁰ Under state law, a resident has the "right to be treated courteously, fairly, and with the fullest measure of dignity."²¹ A resident also has a right to receive a "prompt response to all reasonable requests and inquiries."²²

18 Federal laws and regulations serve as the primary bases for the rights of nursing home residents. These laws and regulations are applicable only to facilities that are certified to receive Medicare or Medicaid payments; however, they apply to all residents of such facilities, regardless of whether a particular resident's stay is being paid by Medicare, Medicaid, or private funds. If a resident is in a facility that is totally private pay and is not certified for payment under these programs, then he would have to look to state law for his rights.

Note: Although in other chapters we have avoided clogging the text with legal citations, we felt that citations were appropriate in this chapter. These citations will enable residents and their advocates to find and point to the specific laws and regulations that support their positions. To this end, please note that "C.F.R." refers to the Code of Federal Regulations and "La. R. S." refers to the Louisiana Revised Statutes.

Note: All citations to federal authorities are to the Code of Federal Regulations and the Interpretive Guidelines for Surveyors of Nursing Facilities issued by the Centers for Medicare and Medicaid Services (CMS), the federal agency governing nursing homes. Although these regulations are in turn based on laws enacted by Congress and published in the United States Code, we had avoided citations to the Code because it is considerably more difficult to use, less organized, less detailed, and more unfamiliar to the nursing home administrators with whom you will be dealing.

19 42 C.F.R. § 483.10.

20 42 C.F.R. § 483.10(a)(2).

21 La. R. S. § 40:2010.8(A)(9).

22 La. R. S. § 40:2010.8(A)(16).

Equality of Treatment: Private pay residents and Medicaid residents must be treated equally regarding transfers, discharges, and the provision of services under Medicaid.²³

Civil Rights: Under the federal regulations, a "resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States."²⁴ Louisiana law also guarantees that the resident's civil liberties are protected.²⁵

Religious Liberties: Louisiana law provides that a resident retains his full religious liberties.²⁶

Admissions Policies: A facility cannot require residents or potential residents to give up their rights under Medicare or Medicaid. The facilities also cannot require oral or written assurances that residents or potential residents are not eligible for or will not apply for Medicare or Medicaid benefits. Also, a third party (such as spouse, companion, child, other relative, or friend) cannot be required to personally guarantee payment to the facility as a condition for a potential resident's admission or a resident's continued stay at the nursing home.²⁷ If a resident is eligible for Medicaid, the nursing facility may not "charge, solicit, accept, or receive ... any gift, money, donation, or other consideration as a precondition of admission, expedited admission or continued stay in the facility."²⁸

Information: A nursing home resident has a right to receive several kinds of information. For example, "[t]he facility must inform the resident both orally and in writing in a language that the resident understands of his or her rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility."²⁹ For a resident entitled to Medicaid benefits, the facility must inform the resident in writing of the items and services covered by Medicaid and the charges for items and services not covered.³⁰ The facility must also provide a written description of legal rights, including the manner of protecting personal funds, requirements and procedures for applying for and receiving Medicaid benefits, and filing complaints with the state.³¹ The facility must also post information on advocacy groups available to help residents and the results of the

23 42 C.F.R. § 483.12(c).

24 42 C.F.R. § 483.10(a)(1).

25 La. R. S. § 40:2010.8(A)(1).

26 La. R. S. § 40:2010.8(A)(1).

27 The facility may, however, require an individual with legal access to the resident's available funds or resources to sign a contract to pay for services out of the resident's income or resources. 28 42 C.F.R. § 483.12(d).

29 42 C.F.R. § 483.10(b)(1); see also La. R. S. § 40:2010.8(A)(14).

30 42 C.F.R. § 483.10(b)(5); see also La. R. S. § 40:2010.8(A)(5).

31 42 C.F.R. § 483.10(b)(7).

latest state survey (or inspection) of the facility or a notice that such results are available for examination by interested residents.³²

Self-Determination: The federal regulations make clear that a resident has the right to "[c]hoose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care."³³ This right allows residents to have input regarding when they go to and get out of bed, when and with whom they eat their meals, what they wear, and how they choose to bathe, among other things. Unless the health or safety of the resident or other residents would be endangered, the resident should receive reasonable accommodation of such needs and preferences.³⁴

Medical Decisionmaking: The federal regulations also specify that "[t]he resident has the right to be fully informed in a language that he or she can understand^[35] of his or her total health status, including but not limited to, his or her medical condition."³⁶ In addition, the resident has the right to be fully informed in advance about his care and treatment and any changes that may affect his well-being.³⁷ A resident also normally has the right to participate in planning or changing his care and treatment.³⁸ Louisiana law similarly provides that the resident has the right to be adequately informed of his medical condition and proposed treatment and to participate in the planning of treatment.³⁹

Under the federal regulations, a "resident has the right to refuse treatment,^[40] to refuse to participate in experimental research," and to execute an advance directive, such as a living will or a durable power of attorney for health care.⁴¹ The right to refuse treatment is also guaranteed under Louisiana law.⁴²

32 42 C.F.R. § 483.10(g).

33 42 C.F.R. § 483.15(b)(1); see also La. R. S. § 40:2010.8(A)(21) (rights to rise and retire as desired).

34 42 C.F.R. § 483.15(e).

35 For example, the facility may have to provide the information in a foreign language or sign language if necessary. Interpretive Guidelines Tag F154.

36 42 C.F.R. § 483.10(b)(3).

37 42 C.F.R. § 483.10(d)(2).

38 42 C.F.R. § 483.10(d)(3).

39 La. R. S. § 40:2010.8(A)(6).

40 The Interpretive Guidelines, at Tag F155, make clear, however, that "[a] resident's refusal of treatment does not absolve a facility from providing a resident with care that allows him/her to attain or maintain his/her highest practicable physical, mental and psychosocial well-being in the context of making that refusal."

41 42 C.F.R. § 483.10(b)(4); see also La. R. S. § 40:2010.8(A)(18) (right to refuse to participate in medical research).

42 La. R. S. § 40:2010.8(A)(6).

Both federal and state law provide that a resident has the right to choose his own attending physician.⁴³ State law also provides that a resident has the right to use the pharmacy of his choice.⁴⁴

Abuse: The federal regulations provide that a "resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion."⁴⁵

Restraints: Under the federal regulations, a "resident has a right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms."⁴⁶ As with other types of medical treatments, a resident has the right to refuse the use of restraints.⁴⁷

Access to Records: Under the federal regulations, a resident or his legal representative has the right to access all records pertaining to himself within twenty-four hours of an oral or written request.⁴⁸ The resident or representative also has the right to purchase photocopies of his records upon two working days advance notice to the facility.⁴⁹

Personal Finances: Under the federal regulations, a "resident has the right to manage his or her financial affairs, and the facility may not require residents to deposit their personal funds with the facility."⁵⁰ If they so choose, however, residents can authorize the facility to hold, safeguard, manage, and account for their funds.⁵¹ If a resident has over \$50 on deposit with the facility, the facility must place the money in an interest-bearing account for the resident.⁵² If the resident is on Medicaid, the facility also must warn the resident when his balance is near to endangering his Medicaid eligibility.⁵³

Privacy and Confidentiality: The federal regulations provide that a resident shall have personal privacy in "accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and

43 42 C.F.R. § 483.10(d)(1); La. R. S. § 40:2010.8(A)(12)

44 La. R. S. § 40:2010.8(A)(12).

45 42 C.F.R. § 483.13(b); see also La. R. S. § 40:2010.8(A)(10).

46 42 C.F.R. § 483.13(a); see also La. R. S. § 40:2010.8(A)(10).

47 Interpretive Guidelines Tags F221 and F222.

48 42 C.F.R. § 483.10(b)(2)(i).

49 42 C.F.R. § 483.10(b)(2)(ii).

50 42 C.F.R. § 483.10(c)(1).

51 42 C.F.R. § 483.10(c)(2). Louisiana law also provides that a resident may either continue to manage his financial affairs or delegate this responsibility to the facility. La. R. S. § 40:2010.8(A)(4).

52 42 C.F.R. § 483.10(c)(3)(i).

53 42 C.F.R. § 483.10(c)(5).

resident groups."⁵⁴ This right extends to privacy "with *whomever* the resident wishes to be private and ... this privacy should include full visual, and, to the extent desired, for visits or other activities, auditory privacy." (emphasis added)⁵⁵ In addition, the resident normally has the right to "approve or refuse the release of personal and clinical records to any individual outside the facility."⁵⁶ These rights are similarly protected under state law.⁵⁷

Mail: Federal regulations and state law both provide that a resident has the right to privacy in written communications, including the right to send and promptly receive unopened mail.⁵⁸

Telephone: Both federal regulations and state law provide that a resident must have reasonable access⁵⁹ to the use of a telephone where calls can be made without being overheard.⁶⁰

Visitation: Under the federal regulations, any of the following shall have immediate access (without regard to visiting hour limitations⁶¹) to a resident: specified federal and state authorities, the resident's physician, the State Long- Term Care Ombudsman, representatives of Disability Rights Louisiana, and (in accordance with the resident's wishes) the resident's immediate family or other relatives. Subject to reasonable restrictions and the resident's wishes, this right also extends to others who desire to visit the resident. In addition, consistent with the resident's wishes, "[t]he facility must provide reasonable access to any resident by any entity or individual that provides health, social, legal, or other services to the resident."⁶² Visitation rights are also protected under state law.⁶³

Participation in Group Activities: Both residents and their families have the right to organize and participate in groups at the facility. The facility must provide such groups with a private meeting space and designate a staff person to provide assistance and respond to written requests of such groups.⁶⁴

54 42 C.F.R. § 483.10(e)(1).

55 Interpretive Guidelines Tag F164.

56 42 C.F.R. § 483.10(e)(2).

57 La. R. S. § 40:2010.8(A)(8). For example, state law expressly provides that residents are normally entitled to close their room doors and to have staff knock before entering the room.

58 42 C.F.R. § 483.10(i)(1); La. R. S. § 40:2010.8(A)(2)(a).

59 "'Reasonable access' includes placing telephones at a height accessible to residents who use wheelchairs and adapting telephones for use by the residents with impaired hearing." Interpretive Guidelines Tag F174.

60 42 C.F.R. § 483.10(k); La. R. S. § 40:2010.8(A)(2)(a).

61 Interpretive Guidelines Tag F172.

62 42 C.F.R. § 483.10(j).

63 La. R. S. § 40:2010.8(A)(2).

64 42 C.F.R. § 483.15(c).

Married couples: Residents who are married and live in the same facility have the right to share an available room if they both consent.⁶⁵

Personal Property: Subject to some limitations, a resident has a right to keep and use personal property such as furniture and other furnishings, clothing, and mementos.⁶⁶ Moreover, Louisiana law provides that the resident has the right "to be secure in storing and using personal possessions."⁶⁷

Work: A resident has the right to refuse to perform any services for the facility. He may, however, perform such services under certain circumstances if he so chooses.⁶⁸

Alcoholic Beverages: A resident generally has a right to consume a reasonable amount of alcoholic beverages at his own expense.⁶⁹

Tobacco: A resident has a "right to use tobacco at his own expense under the home's safety rules and under applicable laws and rules of the state, unless the facility's policies preclude smoking in patient rooms."⁷⁰

Complaints: A resident has the right to make complaints without discrimination or punishment and to have the facility act promptly to resolve the problems.⁷¹ The facility may not retaliate against a resident for making a complaint against the facility.⁷²

Room Changes: A resident must receive notice before his room or roommate is changed in the facility.⁷³

Transfers and Discharges: A resident cannot be transferred or discharged from the facility except on certain specified grounds.⁷⁴ This right is fully discussed in this manual's chapter entitled "Involuntary Transfers and Discharges from Nursing Homes."

Bed-Hold Policies: If a resident leaves the facility to go to the hospital or for therapeutic leave, the nursing home must inform the resident (and a family

65 42 C.F.R. § 483.10(m).

66 42 C.F.R. § 483.10(l); La. R. S. § 40:2010.8(A)(13).

67 La. R.S. §40:2010.8(A)(8).

68 42 C.F.R. § 483.10(h).

69 La. R. S. § 40:2010.8(A)(20).

70 La. R. S. § 40:2010.8(A)(19).

71 42 C.F.R. § 483.10(f); see also La. R. S. § 40:2010.8(A)(3). 72 42 C.F.R. § 483.10(a)(2).

73 42 C.F.R. § 483.15(e)(2).

74 42 C.F.R. § 483.12(a)(2); La. R. S. § 40:2010.8(A)(11).

member or legal representative) in writing of Medicaid's and the facility's bed- hold policies. For a certain period of time (7 days in 2011), Medicaid will pay a facility to hold a Medicaid resident's bed. *During that time, the facility must readmit the resident* if the resident wishes to return. If a Medicaid resident's hospitalization or therapeutic leave exceeds the bed-hold period, the facility must still readmit the resident to the first available bed in a semi-private room if he needs the facility's services and is eligible for Medicaid benefits.⁷⁵ Under state law, a private pay resident may reserve his bed for up to thirty days for a single hospitalization if he pays for the bed while away.⁷⁶

If a nursing home resident needs assistance because his rights are being violated, he should contact the local ombudsman. The ombudsman's services are free and confidential. More information on the ombudsman program (including how to contact the area coordinator) may be obtained by contacting the Office of the State Ombudsman⁷⁷, Post Office Box 61, Baton Rouge, Louisiana 70821-0061 (telephone: 225-342-7100 in Baton Rouge or 1-866-632- 0922 statewide).

⁷⁵ 42 C.F.R. § 483.12(b).

⁷⁶ La. R. S. 40:2010.8(A)(15).

⁷⁷ http://goea.louisiana.gov/LTC_ombudsman.html

Chapter Five

The Louisiana Long-Term Care Ombudsman Program

What is an Ombudsman?

Ombudsmen are men and women trained to respond to the problems and needs of residents of nursing homes and other long-term care facilities. Each facility is assigned a local ombudsman who is supervised by the State Long-Term Care Ombudsman in the Governor's Office of Elderly Affairs in Baton Rouge. All ombudsman services are provided free of charge.

What Do Ombudsmen Do?

Ombudsmen serve as advocates for residents of nursing homes and assisted living facilities. They receive and investigate complaints made by or on behalf of residents and try to solve their problems. Ombudsmen also monitor the state's activities in regulating facilities and advocate for better enforcement of existing laws and regulations. They share information with state surveyors to assist with their inspections of nursing homes and attend the final conference between surveyors and the facility staff when survey results are discussed. Ombudsmen often provide educational information to the public and may assist residents and families when they have been unsuccessful in their attempts to change conditions in a facility.

How Are Ombudsmen Trained?

Certification training for ombudsmen was initiated in Louisiana in 1982. Everyone involved in the Ombudsman Program has received some degree of training, depending on the level of the program for which they volunteer.

Long-Term Care Visitors undergo six hours of training by the local parish coordinator. Certified Ombudsmen complete twenty-six hours of initial classroom training and a twelve-hour internship, plus an additional fifteen hours of training annually.

Observations/Evaluations are made by the State Ombudsman, the local ombudsman coordinator, and the nursing home administration in which the internship is completed.

To What Kinds of Problems Do Ombudsmen Respond?

Ombudsmen are interested in any concern, problem, or complaint a resident may have. Common problems experienced by nursing home residents regard quality of care, food, activities, visitation, and the ability to exercise their rights as a resident or citizen. For example, an ombudsman should be able to help if residents encounter problems such as the following:

1. Residents are restrained inappropriately
2. Residents are neglected or abused by facility staff
3. Residents are told to move out of the nursing home against their will
4. Residents' requests for food substitutions or preferences are not honored
5. Bed-bound residents are not included in activities
6. Family members are not allowed to visit after normal visiting hours
7. Staff members do not respect residents' privacy, such as by knocking before entering residents' rooms, closing doors when residents are treated or ensuring residents are properly covered or dressed while waiting to enter the whirlpool
8. Residents are not furnished the opportunity to vote.

Do Ombudsmen Have Any Legal Authority?

Ombudsmen are given legal authority under both state and federal laws. These laws provide, for example, that ombudsmen shall have immediate access to any resident, may communicate privately and confidentially with residents, and may review and obtain any relevant records (including medical, social, or financial records) with the written consent of the resident or his legal representative.

Who Should Contact an Ombudsman?

Anyone who has questions or concerns about specific or general issues of quality of care and/or rights violations in a specific nursing home should contact an ombudsman. For example, ombudsmen are often contacted by concerned family members and friends, as well as by residents themselves.

How Do You Contact an Ombudsman?

Ombudsmen visit facilities regularly. Posters are placed in all facilities with the name and telephone number of the local ombudsman. If you cannot locate or reach the local ombudsman, you may contact the State Long-Term Care

Ombudsman⁷⁸ at 225-342-7100 (Baton Rouge) or leave a message at 1-800- 259-4990 (toll-free statewide).

Will the Ombudsman Keep My Inquiry Confidential?

The ombudsman must keep all matters relating to any inquiry or referral confidential, unless the resident or his legal representative consents in writing to the disclosure or unless ordered otherwise by a court.

May the Nursing Home Retaliate Against Me For Contacting the Ombudsman?

State law prohibits retaliation against any resident or employee of a long-term care facility for having filed a complaint with, provided information to, or spoken with the ombudsman.

How Can You Become an Ombudsman?

Concerned citizens are needed to visit and work with residents of nursing homes and other long-term care facilities. The Ombudsman Program relies heavily on volunteers who serve as either Long-Term Care Visitors or Certified Ombudsmen. If you are interested in volunteering with the Ombudsman Program, please contact your local ombudsman.

⁷⁸ http://goea.louisiana.gov/LTC_ombudsman.html

Chapter Six

How To File A Complaint Against A Nursing Home

Recent congressional hearings have highlighted care issues in nursing homes. Filing a complaint about such issues may be one means of improving the care provided. However, it is important to provide as much information and detail as possible when filing a complaint. Doing so will greatly increase the likelihood that the state agency will find the complaint valid and cite the facility in question.

Grounds for Complaints

Louisiana law provides that a complaint can be filed if (1) a nursing home resident has been abused or neglected, (2) a nursing home has violated a state law, minimum standard, rule, regulation, plan of correction, or federal certification rule, or (3) a nursing home resident is not receiving the care and treatment to which he is entitled under state or federal laws. These categories are so broad that almost any questionable nursing home practice can form the basis of a complaint.

*Who **May** File A Complaint*

Under Louisiana law, *any* person with knowledge of a violation may file a complaint against a nursing home.

*Who **Must** File A Complaint*

Although any person may file a complaint, the law actually requires that some individuals file certain types of complaints. The law provides that the following individuals must submit a report to the state⁷⁹ (or the local law enforcement agency) within twenty-four hours if they have knowledge that a resident's physical or mental health or welfare has been or may be further adversely affected by abuse,⁸⁰ neglect,⁸¹ or exploitation: (1) any person engaged in the practice of medicine, social services, facility administration, psychological or

⁷⁹ Nursing homes are also required to report to DHH and report to appropriate authorities according to state law: all incidents of actual or suspected abuse, neglect, misappropriation of property/funds, major injuries of unknown origin which could possibly be the result of abuse or neglect, and suspicious death.

⁸⁰ Abuse is defined as the infliction of physical or mental injury or the causing of the deterioration of a resident by means including, but not limited to, sexual abuse or exploitation of funds or other things of value to such an extent that his health, mental, or emotional well-being is endangered.

psychiatric services, or (2) any registered nurse, licensed practical nurse, nurse's aide, personal care attendant, respite worker, physician's assistant, physical therapist, or any other direct caregiver. If these individuals fail to file a required complaint, they can be fined up to \$500 or imprisoned for up to 2 months or both.

Confidentiality of Complaints

The state is prohibited from disclosing the identity of the complainant unless he consents to this disclosure. If disclosure is considered essential to the investigation or if the investigation results in a court proceeding, the complainant must be given the opportunity to withdraw the complaint rather than to have his identity disclosed.

A Complainant's Immunity

The law provides that any person (other than the person responsible for the violation) who submits a complaint in good faith is immune from any civil liability that might otherwise result from the complaint. This immunity also applies if the complainant participates in any resulting court proceedings on the matter.

Posting of Complaint Process and Contact Information

Nursing homes are required to conspicuously post notice in accessible areas of the DHH complaint procedure and information about how to contact DHH to file a complaint. Nursing homes must also post information about how to file complaints with the Office of Civil Rights and the Medicaid Fraud Control Unit.

Prohibition Against Retaliation

Nursing homes, other health care providers, and government agencies are prohibited by law from discriminating or retaliating against any person acting in good faith to assist the authorities investigating a complaint. Any person violating this law can be fined between \$100-\$500.

How To File A Complaint

The law provides that complaints can be submitted to the state in writing, by telephone, or in person. Complaints should be filed within 120 days of the incident reported. If they are not, the state does not have a responsibility to investigate them.

Disability Rights Louisiana strongly urges that complaints be submitted in writing. To make a written complaint, a person needs only to write a simple letter explaining the reason for the complaint. If possible, the letter should include the following information:

1. The name of the resident involved
2. The name and address of the nursing home
3. Any relevant background information
4. A description of the incident about which the complaint is being made
5. The names of other persons involved in the incident
6. The names addresses and telephone numbers of any witnesses to the incident
7. Any documentation (such as pictures, signed statements, medical records, etc.) that supports the complaint.

The letter should also specifically request that the resident and all witnesses be interviewed. Finally, the letter should request that the complainant be sent copies of the investigation findings and an explanation of their right to appeal the results of the investigation. Letters of complaint should be filed with the following office:

Nursing Home Complaint Desk
Department of Health and Hospitals
Health Standards Section
Post Office Box 3767
Baton Rouge, Louisiana 70821

The complainant should be certain to keep a copy of the complaint for his records. As noted above, it is also possible to file a complaint by telephone. This method is strongly discouraged because the complainant would have no record of the actual complaint which would be helpful if he later wishes to appeal the state's determination. If the complainant chooses to file the complaint by telephone, it is suggested that he confirm the complaint by letter. The telephone number for making such complaints is 225-342-0138 (Baton Rouge) or 1-888-810-1819 (toll free statewide).

The State's Responsibility Once A Complaint Is Filed

When a complaint is received, the state reviews it and determines whether there are reasonable grounds for an investigation.

If grounds for an investigation do not exist: The state will not investigate a complaint if it determines that it is not made in good faith, is outdated,⁸² is trivial,⁸³ or is not within the state's investigative authority. If the state decides not to investigate the complaint, it must notify the complainant of this decision and the underlying reasons within 15 workdays after receiving the complaint.

If grounds for an investigation do exist: When the state determines that an investigation is needed, it must determine if the violation has the potential for causing more than minimal harm to the resident(s). "Minimal harm" is defined as "an incident that causes no serious temporary or permanent physical or emotional damage and does not materially interfere with the [resident's] activities of daily living."

If the violation has the potential for causing more than minimal harm, then the state must investigate the complaint within 30 days. Both the nursing home administrator and the complainant shall be notified of the state's findings within 30 days of the completion of the investigation.

If the violation does not have the potential for causing more than minimal harm, then the state will investigate the matter by telephone, by seeking a report from the nursing home, or at the time of the state's next scheduled visit to the facility (which could be a year or more in the future).

In either event, the state should not give the nursing home the substance of the complaint prior to the commencement of the investigation.

Informal Reconsideration of the State's Findings

If the complainant is dissatisfied with the state's findings regarding the complaint, he has 30 days in which to ask for an informal reconsideration. Disability Rights Louisiana encourages the complainant to request the reconsideration in writing. If a reconsideration is requested, the state must schedule the reconsideration in a timely manner.

Right to Appeal

Unfortunately, experience has shown that the state does not validate many of the complaints received. For example, in 1995, the Department of Health and Hospitals received 624 nursing home complaints. Of these complaints, only 149 (24%) were declared valid. In the past, a complainant was able to appeal an adverse decision on a complaint and get a hearing before an impartial administrative law judge. Changes in the law, however, severely

⁸² A complaint is outdated if the incident occurred 120 days or more before the filing of the complaint.

⁸³ A complaint is considered trivial if the underlying violation "causes no physical or emotional harm and has no potential for causing harm."

limited the availability and effectiveness of such appeals.

Under current law, a complainant may file an appeal of an adverse decision only if the complaint involves issues that have resulted or are likely to result in serious harm or death to the resident(s). Further, the administrative law judge is limited to determining whether the investigation was conducted properly. If the judge determines the investigation was not conducted properly, he may only order a reinvestigation. (Therefore, even if the ultimate *findings of the investigation were wrong*, the judge apparently would be powerless to correct the mistake if the investigation itself was done properly.)

Contacting Law Enforcement Authorities

It is important to remember that incidents of abuse, neglect, or other criminal acts against a nursing home resident may also be reported to local law enforcement authorities. In some instances, this alternative may produce better results.

In addition, the State Attorney General's Office⁸⁴ will investigate allegations of abuse, neglect, financial exploitation, or Medicaid fraud involving residents of Medicaid-certified nursing homes. If such allegations are substantiated, the Attorney General can prosecute the offenders. To report such incidents, you may contact the following office:

Louisiana Attorney General's Office
Medicaid Fraud Unit
Post Office Box 94005
Baton Rouge, Louisiana 70804

Telephone: 225-326-6210 (Baton Rouge)
1-888-799-6885 (Toll-free)

⁸⁴ <http://www.ag.state.la.us/Article.aspx?articleID=28&catID=12>

Chapter Seven

Involuntary Transfers and Discharges from Nursing Homes

Once a resident is admitted to a long-term care facility, the facility then becomes that person's home. One of the most traumatic things that can happen to a resident is for the facility to attempt to force him to leave this home against his will. Accordingly, it is important to know under what circumstances a nursing home is allowed to force a resident to leave and how this action can be challenged.

Can a Nursing Home Transfer or Discharge a Resident Against His Will?

Yes. Under certain circumstances, a resident can be transferred or discharged from a nursing home without his consent and against his will. The nursing home must give written notice including notice of appeal rights to the resident and, if known, to a family member or legal representative.

Under What Circumstances Can a Nursing Home Involuntarily Transfer or Discharge a Resident?

Under federal law, a nursing home can involuntarily transfer or discharge a resident, after written notice including notice of appeal rights, only for the following reasons:

1. The transfer or discharge is necessary for the resident's welfare and his needs cannot be met by the facility⁸⁵
2. The transfer or discharge is appropriate because the resident's health has improved sufficiently so that he no longer needs the services provided by the facility⁸⁶
3. The safety of individuals in the facility is endangered

85 If this is the reason given, the resident's clinical record must contain documentation from the resident's physician verifying that transfer or discharge is necessary for this reason. In addition, if the resident is being discharged to another nursing home, the discharge summary and the resident's physician should explain why the transferring facility cannot meet the resident's needs if the receiving facility is able to do so.

86 If this is the reason given, the resident's clinical record must contain documentation from the resident's own physician verifying that transfer or discharge is necessary for this reason.

4. The health of individuals in the facility would otherwise be endangered;⁸⁷
5. The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility; or⁸⁸
6. The facility ceases to operate.

If the nursing home does not provide the evidence (see footnotes to the reasons for discharge) required or a resident feels that there is no evidence to support the reason given, the resident should appeal the discharge as described below.

Does the Resident Have to Be Notified in Advance of an Involuntary Transfer or Discharge?

Yes. Under federal law, the resident must be notified in writing of the transfer or discharge at least thirty days in advance if he is being discharged because of nonpayment or because the facility is ceasing to operate. The notice may be given as soon as is practicable if the transfer or discharge is required to meet the resident's urgent medical needs, his health improves sufficiently to allow a more immediate transfer or discharge, or the safety or health of individuals in facility would be endangered. The notice may also be given as soon as practicable if the resident has resided in the facility for less than thirty days.

Does the Notice Have to Be Given in a Particular Manner?

Yes. The notice must be given to the resident and, if known, a family member or legal representative. The notice must also be given to the local ombudsman. The notice must be in writing and in a language and manner the recipient understands. In addition, the notice must include the following information:

1. The reason for the transfer or discharge
2. The effective date of the transfer or discharge
3. The location to which the resident is transferred or discharged
4. A statement that the resident has the right to appeal the action to the state
5. The name, address, and telephone number of the state long- term care ombudsman
6. The mailing address and telephone number of Disability Rights Louisiana, if the resident has a developmental disability or mental illness diagnosis.

⁸⁷ If this is the reason given, the resident's clinical record must contain documentation from a physician verifying that transfer or discharge is necessary for this reason

⁸⁸ For a resident who becomes eligible for Medicaid after admission to a nursing facility, the nursing facility may charge the resident only allowable charges under Medicaid. Furthermore, a resident may not be transferred or discharged for nonpayment if he has submitted all the necessary paperwork to a third party payor (such as Medicare or Medicaid) to attempt to have that agency pay for his care. In this situation, transfer or discharge would be appropriate only if the third party payor denies the claim and the resident thereafter refuses to pay for his stay after exhausting his appeal rights.

What Should Be Done If the Resident Wishes to Challenge the Involuntary Transfer or Discharge?

If the resident wishes to remain in the nursing home, he should file an appeal to challenge the involuntary transfer or discharge. The appeal should be filed in writing with the following office:

Division of Administrative Law – HH Section Post Office Box 4189
Baton Rouge, Louisiana 70821
Facsimile no. (225) 219-9823

To file an appeal by telephone:

Telephone no. (225) 342-5800
Alternate Telephone no. (225) 342-0443

The written notice of appeal by the resident should also include a request that the Bureau of Appeals notify the nursing home that an appeal has been filed and that the resident is entitled to stay in the facility until the matter is resolved. Once this notice of appeal has been filed, a hearing will be scheduled in which an administrative law judge will decide whether or not the involuntary transfer or discharge is appropriate. If the resident is dissatisfied with the judge's ruling, he may further challenge the action in a court proceeding.

When the resident files an appeal, he should also send a copy to the nursing home administrator. This should in itself put the administrator on notice that an appeal has been filed. The nursing home may not discharge or transfer the resident until an appeal has been resolved, except in certain emergency situations described below.

Because challenges to involuntary transfers or discharges can be complicated, a resident may wish to contact either the State Long-Term Care Ombudsman or Disability Rights Louisiana for assistance:

Linda A. Sadden
State Long-Term Care Ombudsman
Governor's Office of Elderly Affairs Post Office Box 61
Baton Rouge, Louisiana 70821-0061

Telephone: (225) 342-7100
1-866-632-0922 (Toll-free)

Disability Rights Louisiana
8325 Oak Street
New Orleans, Louisiana 70118

Telephone: (504) 522-2337 or 1-800-960-7705 (Toll-free-Voice)
1-855-861-3577 (TTY)

Email: info@disabilityrightsla.org

Does the Resident Have a Right to Remain in the Nursing Home While the Appeal is Pending?

In Louisiana, a resident who files a notice of appeal is automatically allowed to remain in the nursing home until his appeal is resolved. If the nursing home wishes to remove the resident prior to resolution of the appeal, it can contact the Bureau of Appeals for permission to do so. An administrative law judge will then hold an emergency hearing to determine whether immediate removal is appropriate. A second hearing will be held later to determine if the discharge itself (rather than just the immediacy of the discharge) is appropriate.

What is the Nursing Home's Obligation to Assist With the Transfer or Discharge?

Under federal law, the facility must provide sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility.⁸⁹

Do These Laws and Regulations Also Apply to Room Changes Within the Same Facility?

No. The protections discussed in this chapter apply only to transfers or discharges from the facility. If the resident is merely transferred to another bed within the same facility, then these protections are not applicable. Where only a room change is involved, the nursing home need only notify the resident (and, if known, the resident's legal representative or an interested family member) of the change in advance. There is no formal procedure for appealing such a change. However, some room changes may be discriminatory or otherwise improper and a complaint to the Nursing Home Complaint Desk (as described in Chapter Six above) can be filed.

⁸⁹ On this obligation, Appendix PP to the State Operations Manual, Guidance to Surveyors for Long Term Care Facilities, issued by CMS states, at Tag F204, the following:

"Sufficient preparation" means the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation. The facility should actively involve, to the extent possible, the resident and the resident's family in selecting the new residence. Some examples of orientation may include trial visits, if possible, by the resident to a new location; working with family to ask their assistance in assuring the resident that valued possessions are not left behind or lost; orienting staff in the receiving facility to resident's daily patterns; and reviewing with staff routines for handling transfers and discharges in a manner that minimizes unnecessary and avoidable anxiety or depression and recognizes characteristic resident reactions identified by the resident assessment and care plan.

Conclusion

Choosing a nursing home is an important step in an individual's life. Understanding the individual's needs and the services provided by a prospective facility are critical to choosing what will become an individual's home. Legal planning for long-term care issues may alleviate resident and family concerns about long-term decisionmaking. Being familiar with the financial mechanisms by which such care may be paid may ensure that, once a resident has chosen his new home, he may remain there. Finally, a resident should always remember that, like any other citizen, he has rights that should be respected and can be enforced.

To help insure Disability Rights Louisiana publications remain available free of charge in print and on the Internet, please consider making a tax- deductible donation. A \$25 donation will cover the costs of duplicating and distributing this publication to 5 people.

To donate, visit <http://disabilityrightsla.org> or call 1-800-960-7705 Voice or 1-855-861-3577 (TTY).

Disability Rights Louisiana is a 501c3 non-profit organization that provides free legal services and advocacy to people with disabilities living in Louisiana. All donations are tax deductible.



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For Assistance:

Call TOLL-FREE 1-800-960-7705

Write: 8325 Oak Street, New Orleans, LA 70118

Visit our website: www.disabilityrightsla.org

Serving Louisianans, Statewide

*To request services in Vietnamese, call 1-800-960-7705, extension 4.
Ể ĐỒI HỎI NHỮNG CÔNG TÁC (DỊCH VỤ) BẰNG TIẾNG VIỆT, XIN GỌI 1-800-960-7705, MỞ RỘNG 4.*

For information in Spanish, please call 1-800-960-7705, ext. 3. Para información en español por favor llame 1-800-960-7705, ext.3.

