

Estate Planning & Elder Law

Manning the Minefield of Long-Term Care Regulations

How attorneys can help families ensure the safety of their loved ones

By David Cohen

Estate and elder law attorneys stand at the forefront of the fight to protect the rights of the elderly and infirm in New Jersey and throughout the country. Very often such attorneys are in the best position to help families plan, appreciate and understand the impact of New Jersey's complex regulatory scheme upon residential institutional health-care facilities, and the best way to ensure the safety of individuals who usually cannot speak for themselves.

During the estate planning process, families very frequently reach out to Medicaid attorneys on issues of spending down personal assets, qualifying for Medicaid, establishing trusts and the like. Equally important in this regard is an appreciation of the frequently changing landscape of long-term care residential

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facilities along with the concomitant influx of big business upon the placement of institutional residents.

One of the most notable trends impacting this big-money marketplace is the intrusion of assisted living facilities (ALFs) upon the more traditional nursing home market. These facilities are much less aggressively regulated than traditional nursing homes, which are highly regulated and frequently inspected. ALFs represent a significant opportunity for big business — in particular, real estate investment trusts (REITs).

The challenge facing attorneys in giving good recommendations to their clients is that, much like the business itself, the needs and acuity level of residents are a moving target. ALFs typically now include what are known as “dementia wings,” which in essence are small sections of their facilities, established in a lockdown-type fashion to allow themselves to market services that had historically been limited to nursing homes. (See N.J.A.C. 8:36-19.1 et seq.) The look and feel of ALFs provide visual solace to con-

cerned family members about the home where their loved one is being sent to live out his or her remaining years.

New Jersey has established a regulatory scheme that impacts upon assisted living facilities under N.J.A.C. 8:36-1 et seq. The only means by which an assisted living facility can accept a resident is to have a physician, advanced practice nurse or physician's assistant sign off on that admission. N.J.A.C. 8:36-7.2 notes: “(a) Within 30 days prior to admission to the assisted living residence, comprehensive personal care home, or assisted living program, a physician, advanced practice nurse or physician's assistant shall specify in writing that the resident is appropriate for this level of care.” More often than not, it is the physician who completes this documentation.

Attorneys need to advise families that the primary care physician or internist assigned with this difficult task generally do not have an appreciation for the interrelationship between the services provided by two notably varying types of facilities (i.e., nursing homes versus ALFs). The documents reviewed by physicians are generally quite brief, and the physicians will nearly always advise during the course of discovery depositions that they rely almost exclusively on both the nursing assessment provided by the ALF and the facility itself to ensure that the services needed are in fact delivered. Additionally complicating matters is the fact that ALFs differ tremendously regarding levels of services provided to their resident popula-

tions. Thus, physicians are frequently in the least advantageous position to help a family decide between facilities.

Additionally, the regulations set up an interesting position for the moving-target resident wherein an ALF is permitted to discharge a resident when his or her acuity level exceeds the services that are provided by assisted living, but place very little administrative pressure on these facilities to do so. They also require ALFs to provide a skilled nursing (nursing home) level of care for those residents who need it. As defined in N.J.A.C. 8:36-1.3:

“Nursing home-level care” means that an individual requires “nursing facility services” as defined at N.J.A.C. 8:85-2.1. Nursing home-level care is provided to individuals who have chronic medical condition(s) resulting in moderate to severe impairments in physical, behavioral, cognitive, and/or psychosocial functioning. The need for nursing home-level care and services is determined by a registered professional nurse and identified in a plan of care.

This sets up scenarios wherein ALFs are in direct competition with nursing homes for the same profile of residents.

Unfortunately, what is seen on the ground is that there are recurring problems with ALFs:

1. They frequently accept residents whose admission is inappropriate for the services provided; and
2. They frequently retain long-term residents whose acuity levels are simply beyond the services that they are capable of providing.

Under both circumstances, the stage is set for significant injuries to be suffered by the ALF population. These manifest themselves in the development of pressure ulcers, unnecessary falls, elopements, abuse and malnutrition/dehydration, and a host of others.

Unlike ALFs, nursing homes are the subject of a much more detailed set of regulations, both on the federal and state levels. New Jersey’s regulatory scheme is set forth in N.J.A.C. 8:39-1 et seq. Additionally, the federal regulations, which largely mirror those of New Jersey (and

yet are distinct in a number of regards), are contained within 42 C.F.R. 483-1 et seq., also called OBRA (Omnibus Budget Reconciliation Act of 1987).

Both ALFs and nursing homes are subjected to routine surveys and complaint inspections by the New Jersey Department of Health and Senior Services, which is charged with enforcement of all of these regulations. As noted, however, the degree of intensity of such surveys and complaint investigations is much lighter with regard to ALFs, again setting the stage for significant injury. These regulatory schemes, along with established residents bills of right (N.J.S.A. 30:13-1 et seq. for nursing homes, and N.J.A.C. 8:36-1.1 et seq. for ALFs), are largely alike in their composition.

Understanding the complex regulatory schemes that govern these facilities is only one piece of the puzzle. Attorneys need to advise their clients that under any circumstance in which their rights are violated, New Jersey provides a right of recovery, either through common law or statute. In this regard, N.J.S.A. 30:13-8 provides fee- and cost-shifting in the event that any rights of a nursing home resident are violated. Additionally, there is a complex interrelationship between the regulatory and statutory schemes which govern assisted living facilities and nursing homes.

Addressing this vexing issue, primarily centering on the issue of arbitrations, was the recent case *Ruszala v. Brookdale Living Communities*, 1 A.3d 806 (2010). Interesting in the analysis of the *Ruszala* court was that the defendant facility involved in that matter was uncontestedly that of a licensed ALF, and one which obviously was governed by the ALF regulations. In this opinion, the Appellate Division nonetheless noted and took as a given that the fee- and cost-shifting provisions of N.J.S.A. 30:13-8 apply to ALFs.

Beyond this reference in *Ruszala*, New Jersey courts have yet to address the issue of this potential application. However, an Ohio court on a different tack a number of years ago has settled this problem. Namely, in the matter of *Peskin v. Seasons Health Care*, 141 Ohio App. 3d 436., the court under a similar statutory scheme, noted that Ohio’s nursing home statute would apply to ALFs when and if such facilities were acting more as a nursing home than as an ALF. Based upon New Jersey’s current

business climate of ALFs accepting residents whose profiles are more that of a traditional nursing home resident, it appears that the interrelationship between these two cases may set the stage for New Jersey’s fee- and cost-shifting nursing home statute to apply in many or all situations involving assisted living.

A third category of long-term care residential health care regulations is that of group homes. These are yet another step down the scale from a purely acute care setting and generally involve adults who are much younger in age, but who nonetheless require long-term care residential placement because of varying difficulties from cognitive and physical points of view. The regulations are governed and administered by the Department of Community Affairs, rather than the Department of Health and Senior Services. Group homes are also the subject of routine inspections.

Making these cases even more interesting is that the regulatory scheme appears to recognize that these facilities are not so much health-care facilities, as facilities governing people with significant needs requiring a much lower quotient of nursing and medical care. Nonetheless, New Jersey has likewise established a statutory scheme that is specifically designed to protect the rights of these individuals when they are the subject of injury, abuse and other rights violations. The language nearly mirrors that of NJSA 30:30-8:

55:13B-21. Violation of rights; action for damages; costs and attorney’s fees. Any person or resident whose rights as defined herein are violated shall have a cause of action against any person committing such violation. The action may be brought in any court of competent jurisdiction to enforce such rights and to recover actual and punitive damages for their violation. Any plaintiff who prevails in any such action shall be entitled to recover reasonable attorney’s fees and costs of the action.

Because elder law attorneys and estate attorneys frequently have the very first contact with families attempting to place their loved ones in an institutional health-care

setting, the ability to advise families on the multiple levels of acuity, and health-care institutions and the regulations that govern them, empower these attorneys to provide the best services for their clients and hope-

fully ensure the highest level of safety for their loved ones. These attorneys also frequently have the last contact with these families, when catastrophic injuries occur. Having a familiarity with the panoply of

rights that New Jersey offers residents (and their estates) can help in identifying cognizable claims that can be handled by litigation attorneys who concentrate in this area. ■