

Presented:

2014 Estate Planning, Guardianship and Elder Law Conference

August 7 and August 8, 2014
Galveston, Texas

Nursing Facility Contracts and Home Health Care: An Overview of Basic Rights and Obligations

**Marilyn G. Miller,
Attorney at Law**

Author contact information:
Marilyn G. Miller
1220 W Hwy 290, Suite 102
PO Box 917
Dripping Springs, Texas 78620

marilyn@mgmillerlaw.net
512-894-0319

PREFACE

(The Evolution of This Article and Acknowledgements)

The foundation of this paper was first authored and presented by Eric Carlson, National Senior Citizens Law Center, as "*15 Falsehoods Told by Nursing Facilities*." He has since updated that publication; it is now called "*20 Problems – and How to Resolve Them*". It may be ordered online at NSCLC's website, www.nsclc.org or by completing the order form at the end of this paper. Wesley E. Wright and Molly Dear Abshire, of Wright Abshire, prepared a Texas adaptation of Mr. Carlson's original paper called, "*Fifteen Misrepresentations Made By Nursing Facilities*" which was presented by Wright at the 2002 South Texas College of Law, Elder Law Conference. Patricia F. Sitchler again presented a revised and supplemented versions of the Wright-Abshire paper at the State Bar of Texas Elder Law Conference in 2003. Mr. Carlson, Mr. Wright and Ms. Abshire graciously gave that author the right to reproduce the general format and contents of their paper; Ms. Sitchler and Mr. Carlson have been similarly gracious with this author.

Any quotations from Mr. Carlson's treatise *Long Term Care Advocacy*, copyright © 2013 by Matthew Bender & Company, a member of the LexisNexis Group, all rights reserved, are used with permission

TABLE OF CONTENTS

I.	THE LAW AND REGULATIONS	1
II.	THE PROBLEMS.....	3
A.	Discrimination Against Medicaid Eligible Residents.....	3
1.	Problem #1. Unavailability of services	3
B.	Providing Care	4
1.	Problem #2. The Care Plan	4
2.	Problem #3. Honoring Resident Preferences	4
3.	Problem #4. Providing necessary services	5
4.	Problem #5. Limiting use of physical restraint	5
5.	Problem #6. Prohibiting Inappropriate Use of Behavior-Modifying Medication	6
6.	Problem #7. Limiting Use of Feeding Tubes	6
C.	Visitors	7
1.	Problem #8. Limitations on family visits	7
D.	The Admissions Process	7
1.	Problem #9. “Responsible Party” provisions in Admission Agreements	7
2.	Problem #10. Arbitration Agreements	8
E.	Medicare-related Issues.....	9
1.	Problem #11. Determining Eligibility for Medicare Payment	9
2.	Problem #12. Continuation of Therapy When Resident is Not Making Measurable Progress..	10
3.	Problem #13. Continuation of Therapy After Medicare Payment has Ended.....	10
4.	Problem #14. Continued Stay in Medicare Certified Bed After End of Medicare Payment	11
5.	Problem #15. Medicaid Certification for Only Certain Beds Within Nursing Homes	11
6.	Problem #16. Readmission From Hospital.	12
7.	Problem #17. Payment	13
8.	Problem #18. Resident and Family Councils	13
F.	Evictions	13
1.	Problem #19. Eviction Threatened for Being “Difficult”	13
G.	A Potpourri of Additional Issues	14
H.	Continuing Care Communities.....	15

III. ADDITIONAL SOURCES OF INFORMATION: THERE’S ALWAYS A 3-RING BINDER	16
IV. HOME HEALTH CARE - THE CARE PROVIDERS	17
A. Level and Type of Care.....	17
B. Caretaker Qualifications	17
A. Federal Law: Taxes.....	18
1. Independent Contractor vs. Household Employee.....	18
2. Social Security and Medicaid Taxes (FICA)	18
3. Federal Unemployment (FUTA).....	18
4. IRS Publication 926	18
B. Wage and Hour- Fair Labor Standards Act.....	19
C. State of Texas.....	19
1. Texas Workforce Commission (TWC).....	19
2. New hire reporting.	20
3. Workers Compensation.....	20
VI. CONCLUSION.....	20

NURSING FACILITY CONTRACTS AND HOME HEALTH CARE: AN OVERVIEW OF BASIC RIGHTS AND OBLIGATIONS

PART I: CONTRACTING WITH THE NURSING HOME

The mother of your client has a medical emergency. She is treated at the local hospital for several days and then your client is told by the attending physician that Mom will no longer be able to fend for herself at home. Mom must go to a nursing home. The Social Worker at the hospital gives your client a list of nursing homes that will accept Mom as a resident. So with a clear head (tongue-in-cheek), your client visits the several facilities and decides that the Heavenly Haven Nursing Home is his choice. He obtains copies of all nursing home documentation that must be signed when Mom enters the nursing home this afternoon and forwards it to you for review. Just how far can a nursing home contract legally go? Once Mom is in the nursing home, what can the nursing home require?

I. THE LAW AND REGULATIONS

In 1983, the Health Care Financing Administration (HCFA) as it was known then (now known as the Center for Medicare and Medicaid Services - CMS), engaged the Institute of Medicine (IOM) to make a study of nursing facilities. The focus was on the quality of nursing facilities and the effectiveness of federal regulations. The IOM report released in 1986, called “Improving the Care of Nursing Homes,” found that many nursing facilities neglected their residents’ individual needs. The IOM further indicated that federal law appeared to condone this neglect. As a result of this report, Congress passed the Nursing Home Reform Act (referred to as “OBRA ‘87” or “NHRA”), requiring a nursing facility to recognize a resident’s individual needs for respect, a stable environment and appropriate care.

The NHRA, passed in 1987, is found in 42 U.S.C. §1395i-3 (applying to Medicare certified facilities) and §1396r (applying to Medicaid certified facilities).

The regulations interpreting the NHRA can be found at Title 42 of the *Code of Federal Regulations* §483. Section 483.25 sets out the NHRA requirement for a resident’s right to quality care. The regulation states that “[e]ach resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.” Title 40 of the Texas Administrative Code echoes the same requirements for licensure of a nursing facility in §§19.703, 19.802, 19.901, 19.1001 and 19.1901.

The NHRA further requires a nursing facility to “care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of the quality of life of each resident” insuring dignity, self-determination, participation in resident and family groups and other activities. 42 C.F.R. §483.15; *See also*, 40 T.A.C. §19.701.

Each institution must meet certain requirements in order to be licensed as a nursing facility and also to qualify to participate in the Medicare and Medicaid programs. The requirements serve as a basis for survey activities for licensure and certification. The Center for Medicare and Medicaid Services also issues program instructions. “Program instructions are day-to-day operating instructions, policies and procedures based on statutes and regulations, guidelines, models, and directives. They are used by CMS program components, contractors, and State survey agencies to administer CMS programs. For many

others, they are a good source of technical and professional information about the Medicare and Medicaid programs.” www.cms.gov/manuals. “Skilled nursing facilities and nursing facilities are required to be in compliance with 42 C.F.R. §483, subpart B, to receive payment under Medicare or Medicaid programs.” *State Operations Manual, Appendix P & PP*. http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_pp_guidelines_ltcf.pdf [last visited 7/20/2014]. The survey procedures for long-term care facilities can be found at this website.

Private pay residents would have the same rights as those residents receiving Medicare and/or Medicaid benefits. The legislative history of NHRA and the subsequent Department of Health and Human Services administrative interpretation make clear that the statutes apply not just to Medicaid and Medicare recipients, but also to private pay nursing home residents -- persons who pay for nursing home costs with their own funds. (See H.R. No. 100-391(II) 1987 U.S. Code Cong. & Admin. News, pp. 933-934 [“A [participating nursing home] would have to establish and maintain identical policies and practices regarding transfer, discharge and covered services for all individuals regardless of source of payment.”] 56 Fed. Reg. 48841 (Sept. 26, 1991) [based on the relevant statutes, DHHS regulation banning third party guarantees “applies to all residents and prospective residents regardless of payment source in both Medicaid [nursing homes] and Medicare [nursing homes]”].) (See the discussion of the federal statutes in *Podolsky v. First Healthcare Corporation*, 50 Cal. App.4th 632, 58 Cal. Rptr. 2d 89 (1996).) Keep in mind, though, that NHRA applies to nursing homes and not to assisted living facilities.

Texas has enacted statutes that address the licensure and certification of nursing homes and standard of care required by such facilities. *Texas Health & Safety Code* §§222.0255 and 242.301 et seq. and *Texas Human Resources Code* §32.0213 sets out the licensure and certification requirements. *Texas Human Resources Code* §102.001 et seq. sets out the *Rights of the Elderly*. Further, the *Nursing Home Residents’ Rights*, which is statutory can be found at §242.501 of the *Texas Health and Safety Code*. This law was effective September 1, 1997. This list of *Residents’ Rights* is to be interpreted to be consistent with §102.003 [*Rights of the Elderly*] but shall reflect the unique circumstances of a resident at a nursing home. Title 40 of the *Texas Administrative Code* implements the statutes. The Texas statutes and regulations mirror the NHRA requirement that each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, as defined by and in accordance with the comprehensive assessment and plan of care. §§19.703, 19.802, 19.901, 19.1001 and 19.1901.

Title 4 of the Texas Health & Safety Code, Chapter 242 is the primary legislation for the regulation and oversight of nursing facilities in the State of Texas. Chapter 242 is divided into seventeen subchapters. These subchapters generally fall into three broad categories: administrative requirements, medical care and services and enforcement. The subchapters within the administrative requirement category deal with day-to-day operation of an institution. See *Texas Health & Safety Code* §§242.032-.049, .221-.226, .301-.322.

The medical care and services category includes general requirements about the quality of care persons are to receive and about particular services that are to be provided. See *Texas Health & Safety Code* §§242.151-.161, .201-.204, .401-.404, .601-.615, .801-.805. Provisions in this category govern, among other things, the administration of medications and the services provided to specific kinds of residents, such as children and residents suffering from Alzheimer’s disease. See *Texas Health & Safety Code* §§242.201-.204, .601-.615, .801-.804. Enforcement is found in *Texas Health & Safety Code* §§242.061-.073, .094-.099, .125-.134, .251-.268, .501-.504, .551-.554, .651-.655.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Nursing Facility Contracts and Home Health Care: An Overview of Basic Rights and Obligations

Also available as part of the eCourse

[Elder Law Primer: A Toolkit, plus Nursing Facility and Home Health Care Contracts](#)

First appeared as part of the conference materials for the
16th Annual Estate Planning, Guardianship and Elder Law Conference session
"Nursing Facility and Home Health Care Contracts: An Overview of Basic Rights and Obligations"