No. 124019

IN THE
SUPREME COURT OF ILLINOIS

Lakewood Nursing &, Rehabilitation Center, LLC, Plaintiff-Appellee,	)	Appeal from the Appellate Court of Illinois, Third Judicial District 3-17-0177
v.	)	On appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois 14-MR-1184
Department of Public Health; Lamar Hasbrouck, Director of Public Health, Defendants-Appellants,	)	The Hon. John C. Anderson, Judge Presiding.
And Helen Sauvageau, Defendant.	)	

BRIEF OF *AMICUS CURIAE* PRAIRIE STATE LEGAL SERVICES

IN SUPPORT OF APPELLANTS

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST

Amicus Prairie State Legal Services, Inc, (PSLS) is a not-for-profit legal aid organization which offers free legal services to low income persons, persons with disabilities, and those age 60 and over who have serious civil legal problems. PSLS represents thousands of clients each year in preventing domestic violence, preventing unlawful evictions, preserving homes, obtaining and maintaining Medicaid, Social Security and other public benefits, and resolving a wide range of other problems for

clients that involve their basic human needs. PSLS has twelve offices serving 36 counties in northern and central Illinois.

On average, PSLS represents more than 110 elderly and disabled clients annually in cases involving nursing homes. These cases primarily concern involuntary nursing home discharge. Our nursing home resident clients often have multiple disabilities, including dementia, which make it difficult for them to understand the nature of the nursing home's action, to reach out to find an attorney, or to participate actively in preparing a defense.

A mandatory ten day time limit from hearing request to hearing will make it impossible for PSLS attorneys to represent nursing home residents adequately. Residents are often unable to contact PSLS immediately upon submitting their requests for hearing. In the few remaining days of a 10 day time period, PSLS attorneys will not be able to go to the nursing home to interview the nursing home resident, contact and interview the resident's agent and other caregivers, investigate the reasons for the proposed discharge, identify potential defenses, obtain and review the nursing home's voluminous records, request and obtain records from other agencies, identify and interview witnesses, and/or request and obtain subpoenas for witnesses or documents, all of which are regularly needed to represent the client. In short, residents will not have a meaningful opportunity for a hearing to avoid the loss of their nursing care and homes. PSLS has a compelling interest in protecting the rights of its vulnerable nursing home resident clients.

ARGUMENT

Introduction

The appellate court found that the Illinois Department of Public Health loses jurisdiction to hold an involuntary discharge hearing if the hearing is not held within 10 days of the resident's request for hearing. The court found that the language "not later than 10 days" in 210 ILCS 45/4-311 is a mandatory command. *Lakewood Nursing & Rehab. Center*, 2018 IL App (3d) 170177. The issue before this Court is whether the legislature intended those words to be mandatory.

This Court has explained that it is presumed that language issuing a procedural command to a government official indicates an intent that the statute is directory unless there is (1) negative language prohibiting further action in the case of noncompliance; or (2) the right the provision is designed to protect would generally be injured under a directory reading. *In re M.I.*, 2013 IL 113776, ¶ 17 (2013). There is no language in section 3-411 establishing consequences if a hearing is commenced later than 10 days and as discussed below requiring a hearing to be held in such a short period of time would be injurious to the very people the Nursing Home Care Act was written to protect residents of nursing homes.

In *Lawler v. Univ. of Chi. Med. Ctr*., 2017 IL 120745, ¶12, the Court set out the process for ascertaining the legislature's intent. It stated that in examining the language in a statutory provision, a court considers the statute in its entirety, keeping in mind the subject it addresses and the intent of the legislature in enacting the statute. *Id.* The Court concluded that it presumed that the legislature did not intend to create "absurd, inconvenient, or unjust results." *Id.* In *Harris v. Manor Health Care Corp.*, 111 Ill. 2d

350, 363 (1986), a case involving the Nursing Home Care Act, the Court further explained that a statute will be interpreted so as to avoid a construction which would raise doubts as to its validity.

Amicus PSLS submits that methods of interpretation established by this Court inevitably lead to the conclusion that a mandatory reading results in severe harm to nursing home residents and is markedly inconsistent with the legislative purpose of the Nursing Home Care Act. Additionally, a mandatory interpretation would run afoul of the federal Medicaid and Medicare protections for nursing home residents and constitutional due process. As such, this Court should adopt a directory reading of the statute. In support of this assertion, PSLS offers the following points.

I. Mandating That a Hearing be Held No Later Than Ten Days After a Request From the Resident Will Virtually Deny Residents the Opportunity for a Hearing.

If section 3-411 is interpreted as mandatory and IDPH loses the authority to conduct hearings just 10 days after residents have submitted their hearing requests, residents will be harmed. Perhaps the clearest instance of harm will occur where the nursing home resident is too ill to participate in a hearing within the 10 days. As one example among many, PSLS represented a very frail client in an involuntary discharge case when the client came down with pneumonia and was too ill to participate in preparing for the defense or in the scheduled hearing. Under the Appellate Court's interpretation of 3-411, our client would have lost his right to a hearing and his nursing home care solely due to his medical condition. The legislature could not have intended such a result.

It must be noted that nursing home residents are among the most frail Americans. The Centers for Medicare and Medicaid (CMS) reported as of 2015 that more than half of Illinois nursing home residents had moderate or severe cognitive impairment, more than half needed help with 4 or 5 activities of daily living (bed mobility, transferring, dressing, eating, and toileting), and 29 percent received antipsychotic medication.[1] We can say that based on extensive experience in representing clients in these discharge cases, ten days is simply not enough time for these very vulnerable Illinois residents to understand what the nursing home's intended action is, the reason for it, and to prepare for and participate in a contested evidentiary hearing to challenge it.

Second, nursing home discharge notices are very general and do not describe the reasons for the discharge or transfer with enough specificity to enable residents to prepare a defense. The form notice calls for the facility to just check one of the boxes in a list of the statutory or regulatory permissible bases for discharge, e.g., "the safety of individuals in this facility is endangered" with no further details. The resident often needs to consult with friends or family to determine what the notice is about and how to proceed. About half of our clients seek legal representation after a first prehearing conference because they did not understand that they could be evicted from the nursing home until the administrative law judge explained the purpose of the hearing at the conference.

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[1] CMS Nursing Home Data Compendium 2015 Edition, pp. 215, 219, 231. www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/downloads/nursinghomedatacompendium_508-2015.pdf

Third, nursing home residents have the right to be represented by attorneys in nursing home discharge cases (210 ILCS 45/3-706, 42 C.F.R. §431.242), but to exercise that right they need to have enough time to meet with an attorney and for the attorney to undertake appropriate investigation. Even if residents call our legal aid agency on the first day that they submit a hearing request, the logistics of arranging to meet nursing home residents at the nursing home on short notice is challenging. It typically takes several days to arrange the nursing home visit. It is essential, however, that the attorney visit the client at the nursing home. To illustrate this point, in one case a nursing home sought to discharge our client claiming he was a danger to others in the facility. There were logistical issues in meeting with the client and his agent who lived out of town. When the PSLS attorney was finally able to meet with the client and his family at the facility, it was evident that the client was not a danger to anyone. He was bedridden and could not get out of his bed or take a step without assistance. The attorney successfully presented a complete defense at the discharge hearing to the claim.

Common delays that prevent us from meeting the resident or his/her authorized representative immediately after the hearing request are illness or scheduled medical procedures. Moreover, often frail nursing home residents lack the stamina to participate in a client interview long enough to investigate all the facts the residents can convey; multiple meetings may be required to get a full picture of the facts. Delays also occurs due to challenges in communicating with clients. Most of our nursing home resident clients do not have easy access to a telephone to speak to an attorney. Nursing homes generally do not provide telephones in the resident rooms and Medicaid residents often cannot afford phones on their $30 a month personal allowance. Some nursing homes will

allow residents to make phone calls from the nurses' station which is difficult for those with physical limitations and provides no privacy to the resident. Other nursing homes have a cell phone available for residents. Residents wait for their turn to use the phone and usually have a limited time to use it. Likewise, it is often difficult for an attorney to reach a client in the nursing home. It is not unusual to wait half an hour to get a client on the phone or to leave a message and receive a call back a day or two later.

Fourth, to investigate, at a minimum attorneys need to request the client's nursing home record and learn what the issues are. Just getting the nursing home record typically takes more than a week from the initial request and may involve multiple follow-up requests to the nursing home. Typically the resident's nursing home file includes hundreds of pages. They include doctor orders and notes, nurse's notes, initial and quarterly assessments, care plans, therapy notes, dietary notes, medication information, hospital discharge information, and daily caretaking notes. Some nursing homes have electronic records, but others have paper files in various offices in the nursing home and it can take weeks to months to get the entire record.

Sometimes nursing homes fail to provide all or part of the nursing home's records and PSLS attorneys must file a motion in the involuntary discharge case to obtain them. If the hearing must move forward within 10 days, there will be no way to resolve a dispute over access to the records, let alone sufficient time to review the records adequately to prepare for an evidentiary hearing.

Obtaining the records is the first step. After they are obtained it takes time to review the records to determine if there is a defense. Review of the full record, however, is essential in evaluating cases that are based on the nursing home's claim that it cannot

care for the resident or that the resident is a danger to others. As an illustration, in one case, the nursing home claimed the client with dementia and kidney failure was a danger to others. Review of the nursing notes indicated that the client refused to go to dialysis and acted aggressively when he did not get the treatment. The notes also indicated that the resident's guardian repeatedly asked the facility to call her if the staff had trouble getting the resident to dialysis, so she could coax him to comply. The notes showed that the staff failed to contact the guardian despite her requests. Only by careful review of the entire record could the attorney determine the nature of the problem and the potential accommodation. Careful review of the resident's file may show that the allegations on the notice of discharge are not consistent with the quarterly assessments of the resident conducted by the facility or that the resident's care plan indicates that the facility made inadequate attempts to address behavioral issues.

Fifth, attorneys need to make sure witnesses are available for hearing, particularly where the nursing home claims that the client's behavior places other residents at risk or that the nursing home cannot meet the resident's needs. These logistics require additional time before a hearing. For example, there are often other residents of the nursing home who may have witnessed alleged safety or behavior events. Resident witnesses have their own medical, physical, or cognitive limitations which make it very difficult and time-consuming to track down and interview them when they are awake, alert, able, and willing to be interviewed. In the event that a witness or document needs to be subpoenaed for hearing, 77 Ill. Adm. Code §100.14 and Illinois Supreme Court Rule 237 require subpoenas to be issued with at least 7 days' notice to the witness before the hearing. For

an attorney to determine who to subpoena within 3 days of the resident initiating the appeal is not feasible.

In some cases, an expert is important. To identify the need for and use of an expert, locate the expert and arrange for the expert to testify all within the 10 day time frame is also just not feasible. In one case, the nursing home claimed it did not have the capacity to care for an obese resident. The PSLS attorney contacted and arranged for an expert to testify that it is common for immobile geriatric patients to gain weight and it was not unusual or out of the ordinary realm of care for nursing homes to care for residents of our client's size. The expert was not available on the scheduled hearing date and a continuance was required in order to enable the expert to testify.

In summary, if the 10 day limit is imposed, nursing home residents will lose the ability to have a meaningful hearing and to prepare and present their defenses to discharge. A lot is at stake for them. They may lose their homes as well as the nursing care they need. The legislature would not have intended for them to be denied a full and fair opportunity for a hearing.

II. Interpreting 3-411 to Mandate That a Hearing be In Ten Days Is Directly Contrary to the Purpose of the Nursing Home Care Act

As supported by the statements of the sponsor of the Nursing Home Care Act, the language of the entire statute, and the consistent decisions of the courts, the purpose of the Act is protection of disabled and elderly persons residing in nursing homes. As this Court stated in *Harris v. Manor Health Care Corp.*, 111 Ill. 2d 350 at 363, the floor debates demonstrate that the Act was adopted amid specific reports of abuse, neglect and unsatisfactory treatment of residents in private nursing homes. (Senate Debates, 81st Ill. Gen. Assem., May 14, 1979, at 182-84 (statements of Senators Richard M. Daley and

Karl Berning)). In introducing the bill, then Senator Richard M. Daly remarked that the proposed statute was written to change existing law that when a person enters a nursing home that person loses his or her rights. (Debates, May 14, 1979 at 182). He stated that the proposed statute specifically "deals with discharge and transfer of a nursing home resident from one facility to another to make sure they have a hearing." *Id.* Senator Martin concluded "[T]his bill may be the most important bill you are voting on this Session for those who are old . . . are sick, who are not able in any way to take care of themselves we are saying we will not permit it to be possible to have you live the way no human should live." *Id* at 183.

The purpose of the Nursing Home Care Act to protect nursing home residents is reflected in the provisions of the Act. Article II of the Act sets forth specific rights that residents possess and responsibilities nursing homes have to protect these rights. For example, section 2-101 provides that no resident shall be deprived of any rights, benefits, or privileges guaranteed by law, the Constitution of the State of Illinois, or the Constitution of the United States solely on account of his status as a resident of a facility. The article then sets out rights for instance to ensure that a resident manages her or his financial affairs (2-102), has use of his or her personal property (2-103), can choose a personal physician (2-104), and to confidentiality (2-106). Article II is also directed at facilities setting forth their responsibilities in caring for their residents including protecting residents' funds (2-201), establishing a resident advisory council (2-203), having written policies and procedures (2-210), and maintaining confidentially of resident's records. All of these provisions are directed at protecting residents consistent with the purposes stated by legislators in enacting the statute.

Article III of the Act sets forth the obligations of the Department and additional obligations the facility. Part 4 concerns transfers and discharges. This Part also demonstrates the legislature's intent was to protect residents. For example, section 3-401 restricts the reasons that a facility can involuntarily discharge a resident and section 3-402 requires a facility to provide a notice when seeking to discharge a resident.

A review of the Nursing Home Care Act as a whole demonstrates the legislature's intent to protect residents. To read section 3-411 as a jurisdictional deadline for a resident contesting an involuntary discharge is at odds with all of the specific provisions of the Act that consistently protect residents.

Finally, court decisions since the enactment of the Nursing Home Care Act have repeatedly recognized that the intent of the legislation is to protect residents. "The primary purpose of the Act undoubtedly is to protect nursing home residents. The legislature promulgated the Act amid concern over reports of inadequate and degrading treatment of nursing home residents." *Moon Lake Convalescent Center v. Margolis*, 180 Ill. App. 3d 245, 255-256 (1st Dist. 1989*). See also*, *Harris v. Manor Health Care Corp.*, 111 Ill. 2d 350 at 363, *UDI No. 2, LLC v. IDPH*, 2012 IL App. (4th) 110691, ¶24 ("the welfare of residents is paramount").

In sum, a reading of section 3-411 that has the result of depriving residents of a hearing if the hearing does not occur within 10 days after a resident's request will harm residents contrary to the legislature's clearly evident intent of protecting residents.

III. Interpreting 3-411 to Mandate that Residents Would Lose the Right to a Hearing After 10 Days Would Conflict with the Federal Requirements for Facilities that Accept Medicaid and Medicare

Congress enacted the Federal Nursing Home Reform Law (FNHRA) of 1987 to provide a framework for regulating nursing homes that participate in the Medicare and Medicaid programs. *Anderson v. Cabinet for Human Res*., 917 S.W.2d 581, 583-84 (Ky. App. 1996*).* U.S. News and World Report reports that 703 of Illinois' 733 nursing homes receive Medicare funds and 697 receive Medicaid funds.[2]

States and nursing homes are required to comply with all mandatory provisions of the law in order to participate in the Medicare and Medicaid programs. 42 U.S.C. §1396r, 42 U.S.C. §1395i-3, 42 C.F.R. §483.1. This Court has stated that "[a]lthough a state possesses wide discretion in administering its Medicaid programs, that discretion is qualified by its mandate to adhere to federal statutes and corresponding federal regulations." *Hines v. Dep't of Pub. Aid*, 221 Ill. 2d 231(2006).

States that participate in Medicaid must provide a fair hearing process for residents who face involuntary discharge; the process must comply with federal fair hearing regulations. 42 U.S.C. §§1396r(e)(3),(f)(3). The regulations require states to "grant an opportunity for a hearing to… any resident who requests it because he or she believes a skilled nursing facility or nursing facility has erroneously determined that he or she must be transferred or discharged." 42 C.F.R. §431.220(a)(3). The Medicaid rights applies to all residents of nursing homes that accept Medicaid or Medicare funds. 42 C.F.R. §483.1(b).

[2] https://health.usnews.com/best-nursing-homes/area/il?medicaid=true&medicare=true

The federal regulations require that the state fair hearing process meet the due process standards set forth in *Goldberg v. Kelly*, 397 U.S. 254 (1970). 42 C.F.R. §431.205. Under *Goldberg*, due process requires "an effective opportunity to defend by confronting any adverse witnesses and by presenting arguments and evidence orally." 397 U.S. at 268. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." 397 U.S. at 269.

The regulations further provide that hearings must be conducted at a reasonable time, date and place, after adequate notice of the hearing. 42 C.F.R. §431.240(a). Reading section 3-411 as mandatory is incompatible with these federal requirements since it cuts off a resident's opportunity to challenge a discharge in an evidentiary hearing after ten days. For the reasons described in the preceding section on harm, the 10 day limit is not reasonable. The mandatory interpretation would leave no room for the administrative law judge to consider what is reasonable or to tailor the hearing to the resident's capacities or circumstances.

Other federal procedural rights required in fair hearings include: the right to examine at a reasonable time before the hearing and during the hearing the resident's file and electronic account, and all documents and records to be used by nursing facilities at the hearings; the right to bring witnesses; and the right to establish all pertinent facts and circumstances. 42 C.F.R. §431.242. As discussed above, it is essential that residents facing discharge have an adequate opportunity to review the records. In our experience, it is not uncommon to find that the nurses' notes or the assessments for the past few years indicate that a resident who has dementia is no trouble to staff, and that he gets along well with others, yet the discharge notice says that he is a danger. Sometimes the care plans

indicate that the nursing home is not providing the specialized care that a dementia patient requires. A nursing home cannot discharge a resident if the problem is caused by its failure to provide required care. *See*, *In re Involuntary Discharge or Transfer of J.S. by Hall,* 512 N.W.2d 604, 613 (Minn. Ct. App. 1994).

The federal nursing home regulations also require that a physician document in the nursing home file the need for the discharge for discharge other than those due to non-payment. 42 C.F.R. §483.15(c). If the allegation is that the nursing home cannot meet the resident's needs, the nursing home must document what resident needs it cannot meet and what it has done to try to meet those needs. 42 C.F.R. §483.15(c)(2). It takes time after the file is received to verify that the records are documented and that the information is accurate. On one occasion, the doctor's note in the file that was alleged to support the discharge was cryptic. When the PSLS attorney contacted the doctor, he did not support the discharge of the resident and was not aware that his note was being used as the basis for a discharge. The attorney, however, needed adequate time to review the file and to make that contact.

Another federal regulation provides that if the hearing officer considers it necessary to have a medical assessment done in a hearing involving a medical issue, the assessment must be obtained. 42 C.F.R. §431.240(b). This assessment could never be accomplished if the Department loses jurisdiction after ten days.

The federal regulations only allow two grounds for not a holding a hearing once it has been requested by the resident. The state agency may deny or dismiss a request for a hearing if "(a) the applicant or beneficiary withdraws the request in writing; or (b) the applicant or beneficiary fails to appear at a scheduled hearing without good cause." 42

C.F.R. §431.223. A mandatory reading of the section 3-411 cutting off a right to the hearing, would not allow for a determination of "good cause" and would be inconsistent with this entire provision.

As discussed above, the ten day time frame will rarely provide a resident the opportunity to obtain an attorney, obtain and review the nursing home record, and find and prepare witnesses. A mandatory reading of 210 ILCS 54/3-411 would run afoul of these federal requirements and deny nursing home residents the right to participate in a fair hearing with the full range of federal protections.

IV. Interpreting 3-411 to Mandate that Residents Would Lose the Right to a Hearing After 10 Days Would be Incompatible with Constitutional Due Process

The result of a mandatory interpretation of section 3-411 would deprive residents facing an involuntary discharge of the opportunity for a hearing to contest the grounds for the facility's proposed action. A nursing home residence is a protectable property interest encompassed within the coverage of the Due Process Clause of the 14th Amendment to the United States Constitution.

The United States Supreme Court has determined the type of interests that are protected by the Due Process Clause of the Fourteenth Amendment. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Court found that such an interest stems from an independent source such as a state statute. The Nursing Home Care Act is such a statute enacted for the purpose of protecting nursing home residents. The United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 267 held that the essence of procedural due process is affording the opportunity of a hearing. A 10 day limitation to go forward on a hearing would not meet that basic requirement. It is highly unlikely that the legislature

intended that the Nursing Home Care Act, which sets forth protections and rights of nursing home residents in detail, deprive a resident of a constitutional right to a discharge hearing.

Conclusion

For the forgoing reasons, *Amicus* PSLS respectfully requests that this Court affirm the Department of Public Health's final administrative decision and reverse decision of the Appellate Court.

Respectfully submitted,

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Rule 341(c) Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1)statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 16 pages.

/s/Sarah Megan
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Certificate of Filing and Service

I certify that on March 14, 2019, I electronically filed the foregoing Prairie State Legal Services' Motion For Leave to File *Amicus Curiae* Brief in Support of Appellants and accompanying Brief with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that the other participant in this appeal named below is not a registered service contact on the Odyssey eFileIL system and was served by transmitting a copy from my e-mail address to

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I further certify that other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus were served through the Odyssey eFileIL system.

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Under penalties of law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information and belief.

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