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Statutes to Combat Elder Abuse in Nursing Homes

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Introduction

Much of life is spent planning for the future. At a young age many of us are encouraged to save for college or that ever-nebulous “rainy day,” we plan out our careers and where we want to settle down, and, at some point along the way, we begin to plan for the golden years. The image often portrayed of growing old in the United States is one of comfort: a plush retirement with all the accoutrements of a peaceful conclusion to a life well lived. But for millions of elderly Americans, this is far from the reality they will experience. According to the most recent census data, 13 percent of people aged 65 and older live at or below the federal poverty level [1], in 2010 it was estimated that 8.3 million Americans over the age of 60 experienced food insecurity [2], and a quarter of elderly people struggle with mental health problems brought about by life limitations (e.g., a recent disability) and personal loss [3]. Perhaps nowhere are the elderly more vulnerable than in the very institutions where they go to receive medical care and social support: nursing homes.

Nursing homes are a common option for older people who require around-the-clock surveillance and on-site nursing care. As of 2011, roughly 1.4 million elderly Americans lived in nursing homes across the country [4], and, with the baby boomer generation filling the beds of these institutions, the numbers of those in assisted living facilities will rise markedly [5]. For a majority of nursing home residents, these care facilities provide safe and reliable surroundings [6], yet far too often nursing homes do not afford the protective atmosphere for which they are intended. Elder abuse is rampant in nursing homes throughout the United States [7], and, despite actions at the federal and state levels, personal stories of neglect, assault, and substandard care are too frequent to count, with many more incidents going unreported [8].

This article discusses the legal efforts made by the federal government to address the persistent problem of elder abuse in nursing facilities. Since the 1980s, two major legislative acts have sought to identify and correct abusive transgressions that have injured and even killed adults in the twilight years of their lives. Starting with the Nursing Home Reform Act in 1987, and followed by the Elder Justice Act of 2010, Congress has sought to close gaps in surveillance and corrective enforcement that have resulted in instances of elder abuse falling off the radar of law enforcement and regulators.

The Problem

The statistics about nursing home abuse are grim. A 2001 report authored by the Special Investigations Division of the U.S. House of Representatives' Committee on Government Reform disclosed that nearly one-third of nursing homes had been cited for violations of federal standards that had the potential to harm or had already harmed residents [7]. The report also found that approximately one out of ten nursing homes had violations that caused residents harm or serious injury or placed them at risk for death [7]. A survey of 2,000 nursing home residents provided equally disturbing data: 44 percent of interviewees stated that they had been abused and 95 percent said they had experienced or witnessed neglect [9]. Those responsible for the provision of care to elderly residents have admitted to such egregious behavior. In one survey, 17 percent of nursing assistants reported having pushed, grabbed, or shoved an elderly resident, and 51 percent reported yelling at a resident under their care [10]. The news media, too, bears stories of nursing home workers taunting patients [11], stealing from residents [12], and violently beating those who rely on their care [13].

Federal Regulations

Nursing Home Reform Act. The modern-day nursing home came into being with the passage of the Social Security Act of 1935 [14], which created federal government programs committed to reimburse facilities—formerly almshouses for the poor and elderly—to care for aging Americans [15]. In subsequent years, concerns about quality, a lack of facilities, and a growing market for private nursing homes spurred some action by Congress in the public nursing home arena, but it was the passage of Medicaid and Medicare in the 1960s that made more public funds available for nursing care and established hospital-like standards that nursing homes had to meet in order to receive public dollars [16]. But these standards focused on the facilities, rather than on the quality of care provided [15].

In 1987, following a wave of publicity that highlighted the poor standard of care given to nursing home residents, Congress enacted the Omnibus Budget Reconciliation Act (OBRA) to address the concerns about deficient care [17]. Known as the Nursing Home Reform Act, OBRA created a regulatory scheme to actively monitor and enforce quality of care standards for nursing facilities nationwide [18]. The act proclaims that a nursing home “must care for its residents in such a manner and in such an environment as will promote maintenance or enhancement of quality of life for each resident” and that it must “provide services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident” [17].

These regulations also set forth a bill of rights for residents of nursing homes that participate in Medicaid and Medicare [19, 20]. It includes, but is not limited to: the right to receive reasonable accommodation of needs; the right to freedom from abuse, mistreatment, and neglect; the right to privacy; the right to be treated with dignity; the right to voice grievances without discrimination or reprisal [21]. Furthermore, nursing homes are required to meet specific quality-of-care standards,

including the prevention of pressure sores, proper treatment and assistance with vision and hearing, treatment and care for urinary incontinence, and so on [22].

CMS determines whether a nursing home is able to abide by these rights and standards through a series of nursing care surveys conducted by contracting agencies in each state [18]. Each survey is intended to measure different levels and dimensions of quality and to certify that the home is continually meeting federal requirements [18]. Deficient institutions face a variety of sanctions, such as civil monetary penalties, termination of participation in federal and state funding programs, or closure of the facility, depending on the violation.

Elder Justice Act. The most recent federal action taken to address the continuing problem of elder abuse in nursing facilities is the Elder Justice Act (EJA) [23], which was enacted as part of the Patient Protection and Affordable Care Act of 2010 (ACA) [24]. This provision of the ACA is considered to be the most comprehensive bill ever passed to combat elder abuse, exploitation, and neglect [25]. Based on the research conducted by the Government Accountability Office demonstrating existing gaps in federal and state safeguards to protect the elderly from harm, Congress set forth the EJA to expand efforts through both the Department of Justice and the Department of Health and Human Services in unearthing and stopping abuse [26].

The EJA adds to the surveillance and enforcement activities to stop elder abuse in nursing homes and more broadly in long-term care facilities in a number of ways. First, the act authorized additional funds for state ombudsman programs—those offices and officers charged with addressing elder care concerns in every state—to carry out investigations into abuse accusations and to establish training programs for organizations and state agencies working with them [27]. Funds have also been authorized for the establishment of a national institute to assist federal and state surveyors who conduct investigations of allegations of abuse, neglect, and exploitation in Medicaid- and Medicare-certified nursing homes [28].

The second pertinent piece of the act is the availability of funds that long-term care facilities and community-based organizations can use to attract and train people interested in providing direct care to the elderly and to provide those workers with continuous training and certification in the field [29]. Finally, the EJA has established strict mandatory reporting requirements for those who suspect that crimes against elderly residents in long-term care are being perpetrated [28]. Every employee or contractor associated with a long-term care facility is required to report any reasonable suspicion of elder abuse to the Secretary of Health and Human Services as well as to law enforcement agencies [28]. Failure to report such suspicions can result in civil monetary penalties of up to \$300,000 and the possible exclusion of nonreporting individuals from federal health care program reimbursement [28].

Conclusion

Eliminating elder abuse in nursing homes continues to be an elusive goal. Given the evidence that far too many Americans fall victim to unscrupulous actions of nursing home employees and operators, the federal government has steadily moved forward in its oversight of these facilities, particularly with the passage and implementation of such legislation as the Nursing Home Reform Act and the Elder Justice Act. Just as OBRA brought about significant reform to a once poorly understood and fairly unregulated area of elder care, it is hoped that the EJA will hold the same promise with its multifaceted approach to curbing elder abuse across the country.

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