

# Protecting Long-Term Care Residents' Rights in Florida: Statutory and Practical Tools

October 18, 2023 (12:00 PM - 1:30 PM)



# Webinar: Objectives & Info

Practical roadmap & tools for representing long-term care residents facing a variety of residency-related issues:

- Involuntary discharge
- Termination or reduction in needed therapies
- Drafting or revoking a durable power of attorney (DPOA)
- Legal options related to assisted living facility (ALF) discharges

<https://www.floridahealthjustice.org/protecting-long-term-care-residents-rights-in-florida-statutory-and-practical-tools.html>

# Agenda

- **Introduction**
- **How to Help Residents Who are Told They Cannot Get More Therapy**
- **Addressing Unmet Civil Legal Needs of a Long-Term Care Resident: Roadmap of a Success Story**
- **Involuntary Discharges from an ALF: What Rights ALF Residents Have and The Rights ALF Residents Need**
- **Anatomy of a Successful Nursing Home Discharge Case**
- **Q&A**



MedicareAdvocacy.org

---

# **KEEPING THERAPY IN A SKILLED NURSING FACILITY**

October 18, 2023

---

Toby S. Edelman

Center for Medicare Advocacy

# TYPICAL COMMENT A RESIDENT HEARS

---

- “You’ve reached the maximum therapy”
- What does it mean?
  - No more Medicare coverage for your stay?
  - Do you need to leave the nursing facility?
  - What if you’re applying for, or already receiving, Medicaid?
- What can you do?

# PEOPLE ARE ENTITLED TO MORE MEDICARE COVERAGE/THERAPY THAN THEY ARE GETTING

---

- Most residents in skilled nursing facilities are dually eligible for Medicare and Medicaid
- But most residents who are receiving therapy are using Medicare
- This session is talking about Medicare coverage

# “NO PROGRESS” IS NOT A VALID BASIS TO END MEDICARE COVERAGE

---

- *Jimmo* confirms maintenance coverage
  - Medicare covers medically necessary therapy to improve a patient’s condition *or to maintain function or prevent decline or deterioration* (*Jimmo v. Sebelius* and *Jimmo resources*)
- Identical maintenance coverage standard applies to Parts A and B, traditional Medicare, and Medicare Advantage

# KEY POINTS

---

- Medicare
  - covers improvement and maintenance care
  - provides appeal rights
- Even if Medicare doesn't cover the stay, resident does not necessarily need to leave
  - If resident agrees to pay if Medicare rejects the appeal (resident has another source of payment, Medicaid, private pay)

# KEY POINTS (CONTINUED)

---

- Facility must comply with Nursing Home Reform Law's transfer/discharge requirements to evict a resident
- Implementing regulations prohibit discharge for nonpayment when resident has applied for Medicaid (42 C.F.R. §483.15(c)(1)(i)(E))

# MEDICARE RULES

---

- Medicare provides various notice and hearing rights
- Different initial appeal rules for traditional Medicare and Medicare Advantage

# TRADITIONAL MEDICARE: APPEALS OF SNF DETERMINATIONS OF NON-COVERAGE

---

- If SNF decides Part A will not pay, appeal
  - Expedited appeal
  - Standard appeal
- Different Notices and different purposes of these two appeals; residents entitled to both

CMS explanation of the two appeals (2009 memorandum)

# EXPEDITED APPEAL

## 42 CFR §405.1202

---

- Purpose: to keep services in place
- SNF gives notice at least 2 days prior to discharge from Medicare (i.e., termination of all Part A services, Notice of Medicare Provider Non-Coverage, Form CMS-10123)
- Call Beneficiary and Family Centered QIO **by noon the next day to appeal**
  - FL: Kepro. Call 888 317-0751

# IF EXPEDITED APPEAL IS DENIED

---

- Appeal to next level
- Submit demand bill
- Request coverage of therapy under Part B
- If resident has declined, ask for new assessment
  - Resident may resume Medicare benefit period if no more than 30 days have elapsed since Medicare-covered services were terminated

# DEMAND BILL/SNF ADVANCE BENEFICIARY NOTICE (SNF ABN)

---

- Purpose: to get Medicare payment for services provided
- SNF must give written notice, SNF ABN, CMS-10055, if it believes Medicare Part A will not pay for care as reasonable and necessary
- SNF may not bill beneficiary until Medicare makes an initial determination

# MEDICARE ADVANTAGE APPEAL RIGHTS ARE SIMILAR

---

- Request organization determination
  - Request for service (42 C.F.R. §422.568(b))
  - Request for payment (42 C.F.R. §422.568(c))
- Make request orally (if authorized by the plan) or in writing (§422.568(a)(1))

# FURTHER APPEAL RIGHTS

---

- Redetermination by Qualified Independent Contractor
- Reconsideration
- Hearing before Administrative Law Judge
- Medicare Appeals Council
- Federal District Court

# PREPARING FOR APPEAL

---

- It is never too soon to start collecting evidence
  - Get the medical records
  - Physician support is critical (*see* template)
  - Submit declaration from therapist
  - Have family member prepare declaration with observations about therapy provided to resident, improvements made with it, decline and deterioration without it

# KEY POINTS TO REMEMBER

---

- Medicare (traditional and Medicare Advantage) covers maintenance care provided or supervised by professional therapist
- Do what you can to get SNF to provide daily therapy and skilled nursing services
- Appeal. Chances of winning improve at Administrative Law Judge

For further information, to receive the Center's free weekly electronic newsletter, ***CMA Alert***, update emails and webinar announcements, contact:

**Communications@MedicareAdvocacy.org**

Visit

**MedicareAdvocacy.org**

**Follow us on Facebook and Twitter!**



# Addressing Unmet Civil Legal Needs of a Long-Term Care Resident: Roadmap of a Success Story



B. Maria Carrubba-Fuentes  
Staff Attorney



# Long-Term care residents' often have civil legal needs unrelated to their stay in a facility:

**Ms. B- A success story**

**Self-directed decision-making, and tools to assist trusted helpers**

**Abuse of authority and breach of trust, steps to take for damage control**

# **Ms. B**

## **A Success Story**



# Self-Directed Decision-Making

- ▶ **Things to remember about Long-Term Care Residents:**
  - being in a nursing home or other congregate living setting does not always mean residents no longer have a connection to life outside the facility
  - unless adjudicated incompetent, they retain the ability to make their own decisions, even if they look to someone trusted to help them make important decisions
  - not every person who goes to stay at a nursing home will stay there forever, and many return to their home

# Tools to assist trusted helpers

- ▶ • Long-term care residents, for a variety of reasons, rely on individuals to assist them with day to day matters not related to their care or present housing needs
- ▶ • The most effective tool to give someone authority to act on your behalf is a Durable Power of Attorney
- ▶ **FLORIDA STATUTES CHAPTER 709- POWERS OF ATTORNEY AND SIMILAR INSTRUMENTS**
- ▶ [http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&URL=0700-0799/0709/0709.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0709/0709.html)

# Durable Power of Attorney DPOA

- ▶ What is it?
  - ▶ • Florida Statutes §709.2102(9)
- ▶ Durable or not?
  - ▶ • Florida Statutes §§709.2102 (4) & 709.2104
- ▶ Relevant parties:
  - ▶ • Principal: Florida Statutes §709.2101(11)
  - ▶ • Agent: Florida Statutes §709.2101 (1)
  - ▶ • Co-Agents & Successor Agents: Florida Statutes §709.2111(1)-(6)
- ▶ What is a valid DPOA & When is it effective?:
  - ▶ • Validity: Florida Statutes §709.2106 (1)-(6)
  - ▶ • Effective: Florida Statutes §709.2108 (excluding DPOAs executed prior to 10/1/11)



# Durable Power of Attorney DPOA



## ▶ Agent's Duties:

- ▶ • Fiduciary: Florida Statutes §709.2114 (1)
- ▶ • Other Duties: Florida Statutes §709.2114 (1)-(6)
- ▶ • “Super Powers”: Florida Statutes §709.2202 (1)-(6)

## ▶ Authority of Agent:

- ▶ • Generally: Florida Statutes §709.2201
- ▶ • Agent's Acceptance of Appointment §709.2113

# Termination of a DPOA



- ▶ How does a DPOA get terminated?
  - ▶ • Resignation by Agent: Florida Statutes §709.2118
  - ▶ • Termination: Florida Statutes §709.2109 (1)-(4)
  - ▶ • Revocation: Florida Statutes §709.2110
- ▶ Notice Requirements: Florida Statutes §709.2121

# Contact Information

**B. Maria Carrubba-Fuentes, Staff Attorney, *The Florida Senior Legal Helpline of Bay Area Legal Services, Inc.***  
**- [mfuentes@bals.org](mailto:mfuentes@bals.org)**

# INVOLUNTARY DISCHARGES FROM AN ASSISTED LIVING FACILITY:

## *THE RIGHTS RESIDENTS HAVE AND THE RIGHTS RESIDENTS NEED*

---

*Jo-Ann Quiles*, Long Term Care Ombudsman Program, Florida DOEA

*Ellen Cheek*, The Florida Senior Legal Helpline of Bay Area Legal Services, Inc.

# The ABCs of ALFs

---

Chapter 429, Florida Statutes, defines “Assisted Living Facility” and provides rules for its operation and regulation

Chapter 59A-36, Florida Administrative Code

42 CFR 441.530(a)(1)(vi)(A) – HCBS Eviction Rule

# The Long Term Care/Housing Spectrum

Features	Skilled Nursing Facility	Assisted Living Facility	Independent Living
Contract or Lease			
Regulated by State			
Resident's Rights			
Health Care Facility			
Services and Assistance			
Right to a Hearing			

# Notice of Involuntary Discharge 429.28(k), Florida Statutes

---

45 day written notice required “for termination or relocation.”

Reasons for *relocation* must be in writing.

Notice must inform the resident of the right to contact the Long Term Care Ombudsman “for assistance with relocation.”

BUT

**NO NOTICE** required in cases of medical emergency or when “the resident engages in a pattern of conduct that is harmful or offensive to other residents.”

# WHAT'S NOT INCLUDED?



**THE RIGHT TO A HEARING OR AN ADMINISTRATIVE APPEAL  
AN OPPORTUNITY TO CURE**

# NOTICE RECEIVED. NOW WHAT?

---

## *MESSAGE TO THE ALF RESIDENT:*

□ ***Do not*** assume there is nothing you can do.

□ ***Do not*** leave.

□ ***Do call*** The Long Term Care Ombudsman!

# Advocacy Strategies For Ombudsmen

---

- Ombudsmen -- Do not assume there is nothing you can do!
- Make sure reasons given for termination are consistent with facility's license and advertisements! (429.178, Fla. Stat.)
- Check records to confirm that physiologic explanations for signs of dementia, cognitive impairment or change in condition, have been considered and addressed. (429.26(7), Fla. Stat.)
- Contact resident's Medicaid case manager, if applicable, for assistance with relocation or with a care plan which may allow resident to stay.

# Strategies for Advocates

---

Be realistic with resident. Under Chapter 429 as currently written, the resident's right to stay in the facility is not guaranteed.

Initiate meeting to determine whether there is an "opportunity to cure" so resident can stay.

Point out how facility's actions may violate other relevant laws, like State and federal fair housing acts, or form the basis for an AHCA complaint.

If resident can stay, ask LTCO to monitor care and treatment during continued residence.

If facility insists on discharge, negotiate for more time for relocation. Seek services of a "Senior Placement Advisor."

# *Other legal considerations....*

---

- AHCA Complaint
- Fair Housing Complaint
- HCBS Settings Rule

# ***Going Forward: Ideas for statutory change***

---

***□ Pre-termination Meeting***

***□ Administrative Appeal***

***□ Relocation Coordination***

# Contact Information

---

*Jo-Ann Quiles, Regional Ombudsman Manager, Long Term Care Ombudsman Program, Florida Department of Elder Affairs*

◦ [Quilesja@elderaffairs.org](mailto:Quilesja@elderaffairs.org)

*Ellen Cheek, Senior Staff Attorney, The Florida Senior Legal Helpline of Bay Area Legal Services, Inc.*

◦ [Echeek@bals.org](mailto:Echeek@bals.org)

# Anatomy of a successful nursing home discharge case

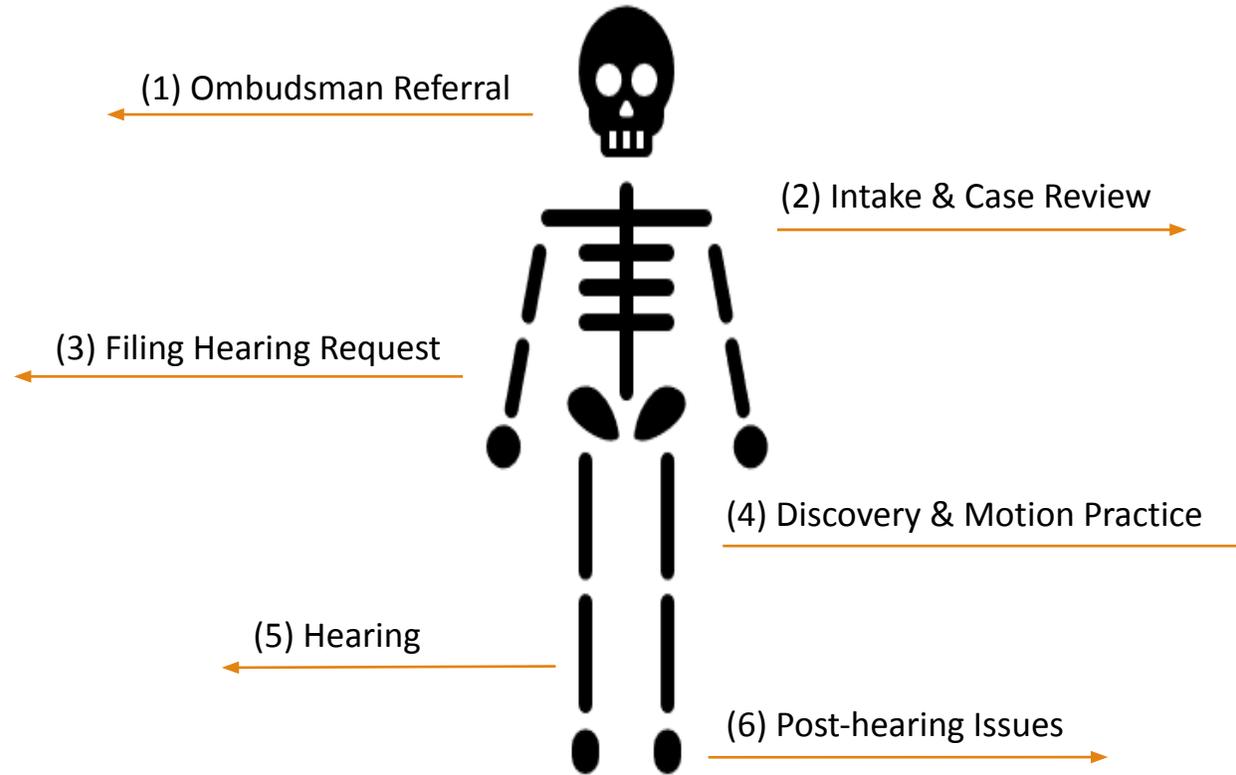
---

JIM KOWALSKI, JACKSONVILLE AREA LEGAL AID, [JIM.KOWALSKI@JAXLEGALAID.ORG](mailto:JIM.KOWALSKI@JAXLEGALAID.ORG)

KATY DEBRIERE, FLORIDA HEALTH JUSTICE PROJECT, [DEBRIERE@FLORIDAHEALTHJUSTICE.ORG](mailto:DEBRIERE@FLORIDAHEALTHJUSTICE.ORG)

# What We'll Discuss

---



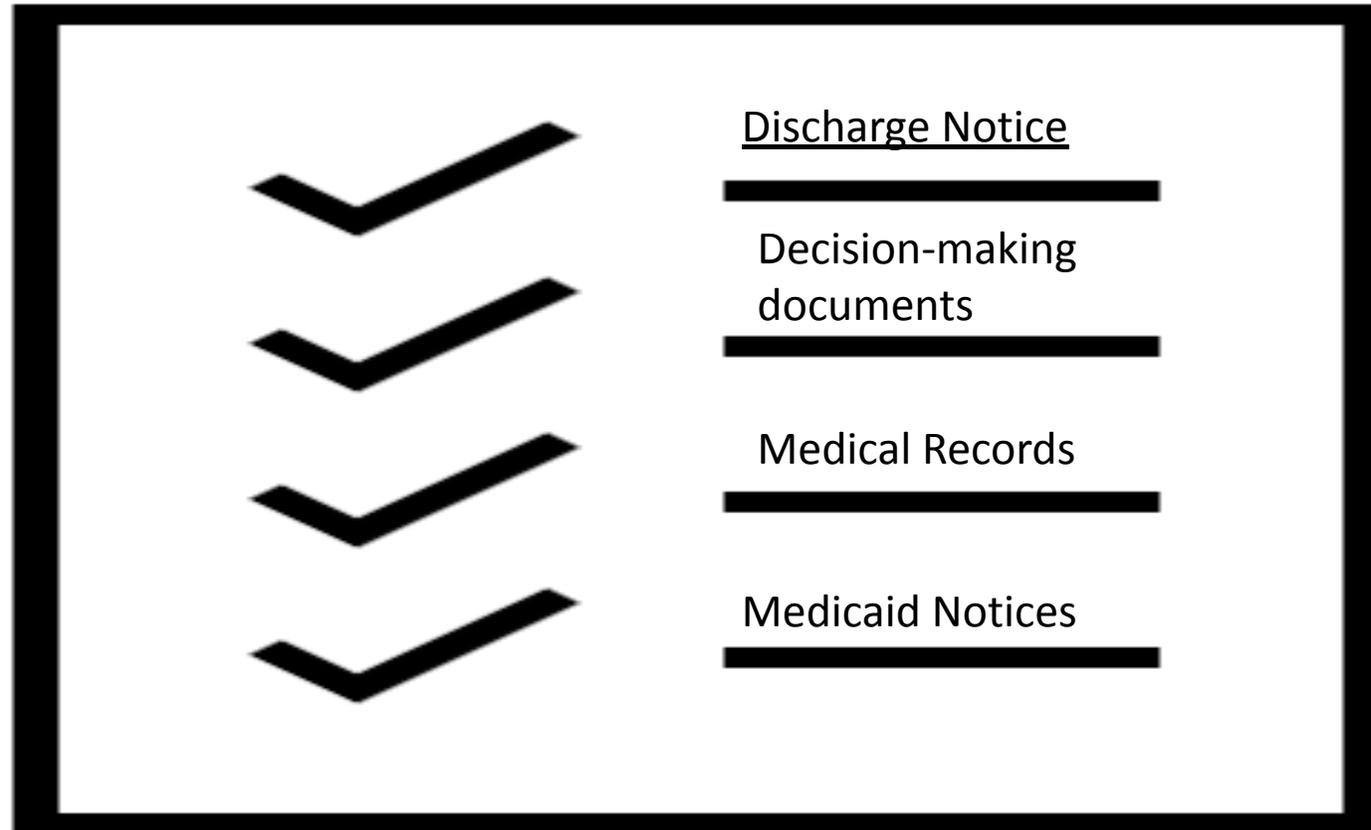
# Ombudsman Referral

---

- ❖ Contact: <https://ombudsman.elderaffairs.org/about-us/district-offices/>
- ❖ Role as referring entity & investigator
- ❖ Confidential communications between the attorney and Ombudsman

# Intake

---



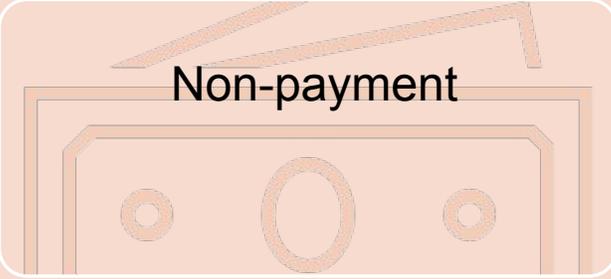
# Case Review

---

- ❖ [Is it a nursing facility?](#)
- ❖ [“Defending Evictions from Florida Nursing Facilities”](#)
  - ❖ Fla. Stat. § 400.0255
  - ❖ [42 C.F.R. § 483.15](#)
  - ❖ [Appendix PP to CMS State Operations Manual](#)
  - ❖ Justice in Aging
- ❖ DCF Office of Appeal Hearing – [prior decisions](#)

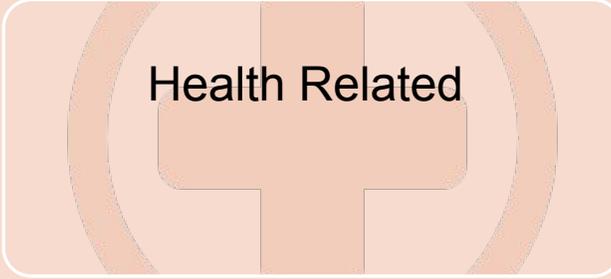
# Case Review – Issue Spotting

---



## Non-payment

- Pending Medicaid application?
- Attempted to assist with Medicaid application?



## Health Related

- Signed by resident's physician?
- Lists specific needs that cannot be met?



## Restricted Behavior

- Opinion of resident's physician?
- Pretext for a non-allowable discharge?

# Filing Hearing Request

---

- ❖ [Form](#)

- ❖ Stay of Discharge: 10 days from date of notice

- ❖ Notice of Appearance

- ❖ [Filing request](#): no docket

- ❖ Chapter 65-2, Florida Administrative Code

# Case Planning – Discovery

---

- ❖ Discovery, Fla. Admin. Code R. 65-2.057(6)
  - Requests for Production
  - Depositions [duces tecum] pursuant to Fla. R. Civ. P. 1.310(b)(6)
    - Common topics
    - Location
    - Communication with opposing counsel or unrepresented party

# Case Planning – The Spirit of Depositions

---



# Case Planning – Motion Practice

---

## ❖ Common Motions

- to Continue
- to Set hearings via Teams or at the facility
- to Compel
- to Shorten Time for Response
- for Dismissal without Prejudice/Withdrawal of Hearing

# Hearing

---

## ❖ Location

## ❖ “Mini” Trial

- Present witnesses: subpoena power
- Cross-examine
- Make objections
- Legal argument

## ❖ Court reporter

# Post Hearing Issues

---

- ❖ [“Transition from a Florida Nursing Facility into the Community”](#)
- ❖ [Advocate’s Guide to the Florida’s Long Term Care Medicaid Waiver](#)

# Questions?

---



# Q&A

If there is not time to answer all questions in the Q&A box, we will follow-up with the presenters and post their answers on the [webinar's website](#).