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***176 ISSUES RELATING TO THE CARE OF THE ELDERLY IN NURSING HOMES**

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The elderly have weathered life's adversities. They have experienced pain and sorrow, and joy and contentment. They have lived an adventure of exploration and autonomy. Yet when they are older, it is they who are often faced with the crushing realization that they are no longer in control of their lives. Physical and mental disabilities, and societal forces, sometimes deprive them of their liberty, their health, and their dignity. Individuals who were once free and independent fall victim to antiquated elderly care systems that often rob them of their autonomy and sometimes their lives. With a greater number of people reaching older age than ever before, warning signs are telling us that there are many things to consider, and to correct, as we begin to travel down the road of advancing age.

This article analyzes several issues relating to the care of seniors in nursing homes and describes current conditions and current law, identifying trends for the future, and exploring areas where change is needed. To accomplish these goals, we discuss the character--and changing character--of our national population and common disabilities of the elderly and their need for specialized care. Next, we will summarize relevant federal and state laws regulating nursing homes. We will then survey the case law decided nationally over the last few years, addressing when a nursing home may be held civilly or criminally liable for neglect of residents. Finally, we will offer some proposals for change.

DEMOGRAPHICS AND THE APPROACHING PROBLEM

Today, 31.5 million Americans, constituting 12.6% of the population, are 65 years old or older. By the year 2020, this percentage is expected to reach 16% of the population. The number of persons over age 85 is expected to increase significantly. Currently 1.3% of Americans are at least 85 years old. By the year 2010, this number is expected to increase to 2.2% of the population. By 2025, Americans over 65 will outnumber teenagers by more than two to one. [FN1] Women outnumber men in the very old category by a great percentage. For example, as of 1990, it was estimated that of the total population over 85 years old, 71.8% were women and 28.2% were men. [FN2]

The number of senior citizens in need of long-term care in 1989 was 7.1 million. [FN3] By the year 2000, approximately 8.9 million people will need long-term care; and by the year 2020 approximately 12.3 million people will need long-term care. [FN4]

In 1980, there were approximately 1.2 million nursing home residents in the United States. [FN5] In 1990, there

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were approximately 1.8 million people living in nursing homes, with women outnumbering men almost three to one. [FN6] Overall, only 5.1% of the nation's elderly are in nursing homes, but the percentage increases to 24.5% of those aged 85 or older, and 36.5% of those aged 90 years or older. [FN7]

The chance that sometime during an individual's lifetime he or she will spend at least some time in a nursing home is one in two. [FN8] The risk factors that increase the chances for institutionalization are high levels of chronic disability, deteriorating cognitive functioning, advancing age, being female, and spending time in a hospital or other health care facility. [FN9] Thirteen percent of seniors say that the fear of being institutionalized is a major worry. [FN10] Women are twice as likely to enter a nursing home than men--one in four are women over the age of 85, opposed to one in seven men. Of nursing home residents, 93% are white, 6% are black. [FN11]

The number of Americans likely to be residents of nursing homes is expected to increase from 2 million in the year 2000 to 4.6 million in the year 2040. [FN12] Clearly, the changing character of our society requires us to prepare for the pressure that will be *177 placed on our resources for humanely caring for the needs of our aging population.

WHAT IS A NURSING HOME?

A nursing home is one type of institutional living arrangement in which residents--usually older persons who cannot care for themselves--pay a fee to live in a facility which provides shelter, food, medical care, and assistance in daily functions, as needed. Many different living options may meet part or all of this definition, including home health care programs, adult day care centers, elderly housing, retirement villages, nursing homes, and hospices. Some of these programs provide skilled nursing care, intermediate care, or no care, such as in elderly housing. [FN13] Adult foster care homes and homes for the aged offer care at a less intense level than nursing homes, and are referred to as "assisted living" facilities.

The Michigan Public Health Code, MCLA 333.20101 et seq., defines a nursing home as "a facility which provides organized nursing care and medical treatment to seven or more unrelated individuals suffering or recovering from illness, injury or infirmity." [FN14]

Another term often used (including in the White House Health Care Plan issued in September 1993), is "long-term care," which refers to prolonged health care and domestic services provided to people who are unable to do many things for themselves. [FN15] Long-term care can be provided either in an individual's own home or in residential institutions, such as nursing homes. [FN16]

SPECIAL CONCERNS AND NEEDS OF THE ELDERLY: LOSS OF HEALTH, INDEPENDENCE AND CONTROL

The poor health of many of our elders demands intense care. Many need to be fed, some bathed. Almost half of all nursing home residents have senile dementia or chronic organic brain syndrome. [FN17] Approximately 91% of all nursing home residents require assistance with bathing, and over half have bowel or urinary incontinence. [FN18] Persons over the age of 75 years often have heart conditions, varicose veins, bronchitis, arthritis, diabetes, visual impairments (including cataracts), urinary problems, prostate problems, osteoporosis, cancer, or they might have had a stroke. The highest cause of death and discomfort is heart disease. [FN19]

Another illness that afflicts seniors is Alzheimer's disease. It strikes nearly half of the people who reach the age of 85. [FN20] This disease, described as an organic mental disorder caused by a progressive degeneration of brain cells, [FN21] is devastating both to individuals so afflicted and to their families.

Elderly persons may suffer a series of losses: Health, mobility, independence, faculties, and personal dignity. [FN22] In a survey of 577 nurses and nurses' aides in long-term care facilities, four out of five respondents had seen at least one incident of psychological abuse of a resident in the preceding year, the most prevalent taking the form of yelling at a patient in anger. The second most common form of psychological abuse was insulting or swearing at a

patient, with half of the respondents witnessing such abuse in the previous year. [FN23] In the same survey, the number who saw at least one incident of physical abuse in the preceding year was over one-third, with the most prevalent form listed as unnecessary physical restraint. The second most common form of physical abuse was pushing, grabbing, shoving or pinching a patient, with one in six persons witnessing such abuse in the previous year. [FN24]

Elderly people may find themselves in nursing homes with or without their consent. Decisions are often made for them by their adult children, who may feel that their parents' health is frail and that their safety is at risk if they are not living in an environment where they will receive specialized care.

When circumstances lead elderly persons to live in a nursing home, their inability to take their possessions with them may be disturbing. One nursing home administrator in Michigan explained the significance of this loss as follows:

People work all of their lives for possessions, and when they're older, they have so many things that they have accumulated. Yet, when they're placed in a nursing home, they have nothing. All of their physical possessions are removed from them, and can do nothing for them. The only thing that makes any difference when they are in a nursing home is the personal relationships they have built up during their lives. [FN25]

Elderly persons may also find themselves financially unable to bear the cost of prolonged long-term care. For example, nursing home costs can range from approximately \$30,000 to \$60,000 per year. [FN26] Other estimates put long-term care costs at nearly \$45,000 per year in most parts of the country, and as high as \$80,000 per year in some urban areas. [FN27]

THE STATUTORY REGULATION OF NURSING HOMES

Payment from the Medicare and Medicaid Programs

Medicare and Medicaid will pay for certain nursing home care in limited circumstances. Medicare is a federally funded system of health insurance for the aged and disabled, administered by the Department of Health and Human Services. [FN28] Under Part A of Title II of the Social Security Act, skilled nursing home care is covered for up to 100 days during any "spell of illness," less co-insurance and deductibles. [FN29]

There are other conditions to Medicare reimbursement for nursing home care:

- The required nursing home services must be of a skilled nature, i.e., requiring the supervision of a licensed professional, such as a registered nurse or a physical therapist;
- The services must be performed daily, or, in the case of physical therapy, five days a week;
- The services cannot otherwise be provided on an out-patient basis;
- The prospective resident must have had a three-day hospital stay, and must enter the nursing home within 30 days of discharge; and
- The resident's services must be provided in a Medicare-certified nursing home and in a Medicare-certified bed. [FN30]

Medicaid is a jointly funded federal-state program that pays for necessary medical care for indigent individuals. [FN31] As with Medicare, providers of medical services are reimbursed on a fixed schedule of rates. [FN32] For those persons who meet the financial eligibility guidelines of Medicaid, [FN33] basic (or intermediate) and skilled care are covered. [FN34]

Some persons divest themselves of assets when their need for nursing home care is imminent, but they would otherwise exceed Medicaid's financial eligibility guidelines. [FN35] This ability to "spend down" has been

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substantially limited by the Omnibus Budget Reconciliation Act of 1993, Pub. Law 103-66, which (1) eliminates the use of income-only trusts, (2) permits states to apply eligibility rules to home-care benefits, and (3) imposes more stringent estate recovery provisions.

About two-thirds of Michigan's nursing home residents receive financial assistance from Medicaid. [FN36] In 1989, nursing homes in Michigan filed a lawsuit against the state contending that the Medicaid reimbursement rates for nursing homes were inadequate. [FN37] After the federal court in the Western District of Michigan ruled in favor of the nursing homes in 1990, the parties entered into a settlement in which the Department of Social Services agreed to change its reimbursement methodology. During the first year under the settlement, Medicaid payments to nursing homes increased approximately \$92 million--from \$353 million in fiscal year 1990, to \$445 million in fiscal year 1991. [FN38] Yet, nursing home administrators with whom we spoke said that the reimbursement levels still do not cover all of the home's costs.

Social Security Act, as Amended by OBRA '87

The Social Security Act provides for various rights of nursing home residents. Under 42 USC 1396r(b):

A nursing facility must 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.

By statute, residents have these rights:

- To choose a personal attending physician;
- To receive notification in advance of, and participate in, the decision to change the care of the resident;
- To be free from physical or mental abuse, involuntary seclusion, and unnecessary physical or chemical restraints;
- To maintain privacy with regard to accommodations, medical treatment, and communications from family;
- To voice grievances;
- To participate in resident and family groups and other activities;
- To examine surveys of the home;
- To refuse certain transfers; and,
- To be informed of his or her rights. [FN39]

Federal regulations also provide that a nursing home resident "has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility." [FN40]

The Omnibus Budget Reconciliation Act of 1987 ("OBRA"), [FN41] contains the Nursing Home Reform Amendments, which is an extensive and progressive piece of legislation designed to improve the care of elderly persons in nursing homes. OBRA significantly enhanced the training required for *179 nurses' aides. It also strengthened and clarified the assessment tool that must be used to gauge residents' needs and abilities. OBRA and its regulations provide for Resident Assessment Instruments (RAI), which include the Minimum Data Set (MDS) and the Resident Assessment Protocols (RAPs). The MDS is the "primary screening and assessment tool." [FN42] It provides "basic screening and assessment items designed to reveal much about a resident's strengths, needs, and preferences" [FN43] such as information on sleeping and eating patterns; bladder continence; history of medication; status of hearing and vision; and ability to perform daily living functions, such as locomotion and dressing. The reason for an assessment is obvious. Only if the nursing home staff is aware of the needs and abilities of a resident, will they be able to provide the appropriate level of care for the resident.

The RAP is a follow-up assessment which is performed when any of 18 problem areas are triggered by responses

set forth in the MDS. Resident assessment protocols requiring additional information and assessment are necessary when the MDS identifies, for example, delirium, cognitive loss/dementia, and difficulties in performing activities of daily living. [FN44]

After an assessment is completed, the nursing home must prepare a care plan designed to meet the needs and abilities of each resident. This may sound like common sense, but, as discussed below, nursing homes can find themselves faced with significant civil and criminal liability when they fail to provide needed attention to nursing home residents who are unable to eat, bathe, or care for themselves in other ways.

Care plans are designed to promote interaction and coordination of nurses, social workers, pharmacologists, physical therapists, and doctors who provide care for elderly persons. [FN45] The plans must be detailed. Specific persons must be assigned specific responsibilities [FN46] in order to meet the statutory goal that the plan provide the highest practicable level of physical, mental and psychological well-being of each resident. 42 USC § 1395i-3(d)(A). One expert stated:

The Nursing Home Amendments of OBRA '87 are the keystone to the whole law regulating nursing homes. The law moved away from minimum standards, and towards expecting the very best possible care; from the substandard to the ideal. This is a fundamental change in policy from prior law. However, if--as is often the case--the law is not carried out, it will not change anything. It certainly will not improve the experiences that nursing home residents have. [FN47]

State Law

All nursing homes in Michigan must be licensed under state law. Licensing and certification inspections are carried out by the Michigan Department of Public Health. [FN48] A national expert in the field of nursing home care has written that:

Specific residents' rights have been a part of Michigan's regulation of nursing homes since the late 1970s. Michigan's provisions are still looked to by other states as a national model. [FN49]

Michigan's bill of rights for nursing home residents is extensive and it applies to hospitals too. It includes many rights provided for by federal law. State rights include:

- Rights to privacy;
- The right to an appropriate diet;
- The right to receive adequate and appropriate care;
- The right to refuse treatment to the extent provided by law; and
- The right to be informed of the consequences of that refusal. [FN50]

Older Americans Act and the Ombudsman Program

The Older Americans Act [FN51] established the State Long-Term Care Ombudsman Program, which acts as a watchdog overseeing the inspections carried out at the state level. State ombudsman programs investigate complaints, monitor care, inform residents of their legal rights and assemble and disseminate information on long-term care issues. Most of the state ombudsman programs operate under the direct authority of a state governmental department. Some states, such as Michigan, contract with a private entity to provide ombudsman functions. The ombudsman is intended to be an advocate of the institutionalized elderly.

Michigan's Older Michiganians Act, MCLA 400.581 et seq., also establishes an ombudsman program. In Michigan, the state has contracted with Citizens for Better Care, a private nonprofit corporation, to be the ombudsman for Michigan. In June 1991, the United States Department of Health and Human Services issued a report identifying 12 states as having the most successful ombudsman programs. Michigan was one of the 12.

[FN52] The report found that successful programs made frequent visits to nursing homes, had highly publicized programs, handled complaints expeditiously, and maintained independence. [FN53]

RECENT CASE LAW

Case law involving neglect and abuse of residents has been developing across the country, in both federal and state courts. We will briefly summarize some of the recent case law.

Civil Causes of Action: Negligence versus Breach of Contract

In Bremenkamp v Beverly Enterprises-Kansas, Inc., 762 F.Supp 884 (D Kan 1991), the court held that a claim for negligence, and not breach of contract, should proceed to trial against the nursing home. The court defined the duty owed as follows:

The administrator of an adult care center or nursing home is under a duty to exercise reasonable care to avoid injuries to patients . . . (citing other authority.) The reasonableness of such care is to be assessed in light of the patient's physical and mental condition. Id. In other words, the court must take into account the patient's ability or inability to care for himself. [FN54]

In Bremenkamp, it was alleged that the nursing home resident fell and broke his leg due to inadequate supervision. The patient suffered from arthritis, mild quadriplegia, a degenerative disease that caused his bones to become brittle, and a history of seizure activity. The court held that it had "no difficulty concluding under these circumstances that defendant's duty, as a matter of law, included at a minimum the escorting of [the nursing home resident] to the bathroom."

A contract action was rejected in Lindstrom v Pennswood Village, 417 Pa Super 495, 612 A2d 1048 (1992), where the court held that a general list of policies contained within a booklet entitled "Resident/Patient's Rights" did not create contractual obligations in light of an integration clause within the resident's written agreement with the nursing home. [FN55] The authors believe that the assessment tools and care plans discussed above may provide a basis to bring a contract action against a nursing home which fails to implement the care plan, *180 because the care plan can convincingly be characterized as a contractual undertaking made to, or for the specific benefit of, the resident.

Failure to Supervise

In Jackson v Pleasant Grove Health Care Center, 980 F2d 692 (11th Cir 1993), the resident left the premises unattended, and was never found--in near- freezing weather. The resident had been diagnosed as suffering schizophrenia, mental retardation and hypertension. The court held that the jury could infer that the nursing home resident died by exposure and that the home was negligent for failing to properly supervise the resident. [FN56] This case represents several others in which nursing homes were held liable when residents needing supervision were left unattended and were either injured or died as a result.

Otis v Sullivan, No. 1:92-CV-426 is a class action lawsuit filed in June of 1992 in the Western District of Michigan, in which the plaintiffs alleged that the state permitted a series of unsanitary and unsafe conditions to exist, including the existence of vermin and pests in nursing homes, improper use of physical restraints, inappropriate diets, insufficient levels of staff, fire safety hazards, and many other problems. The suit was still pending as of this writing.

Failure to Treat

In Montgomery Health Care Facility v Ballard, 565 So 2d 221 (Ala 1990), the court upheld an award of \$2 million in punitive damages where inadequate training of staff led to a patient's bedsores, subsequent infection, and ultimate

death. The home's conduct included failing to hire adequate staff or to train nurses. Two nurses testified that they did not know that bedsores could be life threatening, [FN57] or that a doctor should even be called.

In Cowe v Forum Group, Inc., 575 NE 2d 630 (Ind 1991), the court held that a cause of action was stated where the nursing home was alleged to be negligent in failing to detect a pregnancy (from rape) of a mentally retarded resident of a nursing home, where the child was not given adequate prenatal care.

Res Ipsa Loquitur

In Caruso v Pine Manor Nursing Center, 182 Ill App 3d 879, 538 NE 2d 722 (1989), the court appeared to use a res ipsa loquitur analysis in upholding the jury's finding that the resident's dehydration was caused by the nursing home's neglect. The evidence showed that when the resident entered the nursing home, he had a significant degree of orientation, but was dependent upon the nursing home for fluid intake because of his physical ailments. Later, when he was taken to the hospital emergency room, he was suffering from severe dehydration. [FN58]

Criminal Liability

Sometimes a nursing home's conduct can violate criminal law as well as civil law. In Kerlin v State of Indiana, 573 NE 2d 445 (Ind App 1991), the resident was 86 years old and suffered from Alzheimer's disease. The staff, concerned that discoloration of the resident's foot indicated gangrene, consulted the defendant physician, who was also the house's medical director. The defendant failed to take any action, and the resident died a short time later of complications from gangrene. The court upheld criminal indictments for neglect.

In State v Cunningham, 493 NW2d 884 (Iowa App 1992), the evidence revealed that the defendant, the owner and administrator of the nursing home, knowingly permitted the following conditions to exist at the nursing home:

- Dried feces was observed on the wall.
- Cockroaches and worms were observed in food preparation areas.
- No soap was available in the kitchen area and, at one point, only one bar of soap and one container of shampoo were found in the entire facility.
- Debris, bugs, and grease were found throughout the entire facility.
- There was inadequate staff supervision and untrained employees.
- Inadequate dosages of medications were administered to patients.
- One patient suffered a seizure because his prescribed medication was not at therapeutic levels. [FN59]

A criminal conviction for wanton neglect of nursing home patients was upheld.

SOME TRENDS IN ELDERLY CARE

Seeking more independence and control over their lives, elderly persons are increasingly seeking alternatives to nursing home care. More than one-third of all Americans over the age of 55 live alone, and a growing number of older people (approximately 49% of those surveyed) would prefer to live alone. [FN60]

"Assisted living" has become extremely popular for those who need assistance with some of their daily functions. Experts estimate that anywhere from 20,000 to 1 million persons receive some form of "assisted living," depending on how the term is defined. [FN61] It usually means the assistance of aides, and/or other persons who perform tasks

for an individual, ranging from laundry, helping clients in and out of beds, assisting with bathing, and assisting with medications. [FN62]

The "assisted living" option is provided for in the White House Health Care Plan issued on September 10, 1993. The core or basic benefit package includes long-term care and home health care. Furthermore, the plan includes an initiative to expand long-term care by creating a wholly separate provision for long-term care under the Social Security Act, separate from the Medicare and Medicaid provisions for long-term care. [FN63] Eligibility for long-term care would be expanded to include those with severe disabilities irrespective of income or age:

The new program of community based services for people with severe disabilities is available to all people, regardless of income--including low income people previously served under the Medicaid program. Some people now receiving Medicaid community LTC [long-term care] services, however, do not meet the functional eligibility requirements of the new program. To avoid reductions in service for this population, current Medicaid programs for those who do not meet the eligibility criteria of the new program are replaced with a new community based LTC program for low income people.

The Medicaid community LTC services which are combined into the new low income program are: personal care, home and community based waiver services, frail elderly, *181 Community Supported Living Arrangements, the long term care portions of Medicaid home health, targeted case management, clinic services and rehabilitation services. [FN64]

SOME SUGGESTIONS FOR CHANGE

Support for the Care-Givers

The needs of the elderly often demand special care and attention. The time needed to care for them is often tremendous. "Aides make or break a home," stated one administrator in St. Louis. [FN65] The court in Deerings West Nursing Center v Scott, 787 SW 2d 494 (Text. App. 1990) spoke about a nursing home's duty to hire competent staff:

A nursing home is under a duty to exercise a high degree of care in selecting employees. This is because many occupants of nursing homes throughout our State and nation are not only elderly but often physically and/or mentally impaired. Many are helpless, lonely, forsaken and ripe for abuse. As has been aptly stated. . . . :

[A]t least half of the nation's nursing homes have one or more serious, life-threatening conditions and are, therefore, sub-standard. The Committee reports that in many cases patients are not treated humanely, and that they frequently encounter abuse and physical mistreatment including negligent and intentional actions which lead to injury or death. [FN66]

Hourly wages for aides in a nursing home are often between \$4.95 to \$5.60. [FN67] This is too low. We are paying much more money to people who take care of our possessions than to the people who take care of our loved ones. In our interviews with nursing home administrators and residents, they emphasize that the staff is the key to making nursing home life pleasant and understanding. Yet, turnover of staff is often too high to assure consistent and quality care. Some aides leave because of poor working conditions and staff shortages. [FN68] We must pay nursing home staff enough money to show them that they are performing a very important role in our society. We must provide adequate staff support, job training, and working conditions. In turn, these caregivers will more likely be dedicated to the job they are doing and to the people they are caring for.

Consider Other Options

Nursing home care is not always the answer to elderly care. [FN69] Indeed, the great majority of elderly persons are cared for by relatives, not nursing home staff. The number of family relatives providing long-term care to parents or others is between nine and ten million. [FN70] Approximately 80% of all elderly persons in the United States are cared for by relatives, three-quarters of whom are daughters. [FN71]

Relatives may be reluctant to adjust their living arrangements to accommodate elders, and this is consistent with the great emphasis which our culture places on personal autonomy and independence. Yet, we should not let these

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values override our commitment to our elders, who may need our assistance living outside an institution. With so many seniors desiring to remain at home, and with the possibility of realizing great cost savings from home health care, we should do our best to make home care an option for our seniors.

As discussed previously, many seniors want to live at home, and can do so, with "assisted living." Home health care firms, both non-profit and for-profit, can be retained to provide nurses and aides who will make housecalls. These home health care workers make it possible for elderly persons to stay in their homes instead of going to a nursing home. [FN72] One such organization in St. Louis, Missouri provides "choreworkers" who do grocery shopping, cooking, cleaning, laundry, and who assist clients with personal care. [FN73] While somewhat expensive (for example, nurse assistant services may cost \$18 an hour), home care is on average only about one-third the cost of nursing home care because it is not usually rendered on a 24-hour basis, but only on an as-needed basis. [FN74]

It has been predicted that the home health care trend will continue and that doctors, dentists, and others will soon begin making house calls. [FN75] Some home health care agencies also provide physical, speech and occupational therapy, and nutrition counseling. [FN76] Self-diagnostic equipment and how-to books are also expected to increase in sales. Assisted living accommodations are expected to compete with nursing homes, and will soon constitute a \$7 billion industry. [FN77]

Dedicate Ourselves to Maintaining the Dignity of the Elderly

Dr. Clifford Bennett, Ph.D., a nursing home administrator, believed he knew how to operate a nursing home but he felt that he was not identifying core problems. [FN78] In order to better discover deficiencies in the operation of homes, he became a patient at a nursing home in another state. He disguised himself as a disabled patient who needed temporary care for his leg. Once there, Bennett soon experienced what many residents experience--loneliness, the loss of possessions, and the loss of freedom, privacy, and independence.

In his book, Bennett asks: What are nursing homes supposed to do for residents? He responds, to provide a good quality of life. Bennett stated that some necessary ingredients are good nutrition, exercise, freedom from anxiety and stress, freedom from accidents, and freedom from disease and physical disabilities. As Bennett acknowledges, the reality is that there is a need for nursing home care for very ill and dependent people. [FN79] This care will no doubt be enhanced immeasurably if it is provided with a strong commitment to upholding the dignity of our seniors.

CONCLUSION

Our elders are pioneers of life. They have gone before us, and they are now where we shall one day be. With their youth behind them, and their reliance on the rest of society at a heightened level, they deserve our *182 respect and the security of adequate long-term care.

We must be sensitive to the desires of seniors to remain in their homes so that they can retain a greater amount of independence and control over their lives. We should make options available to allow them to remain in their homes even when they are physically or mentally impaired. For those who do need nursing home care, we should make an effort to upgrade the condition of facilities, and the quality of care provided to residents. We simply must do our level best to make the care provided to our elders worthy of the lives that will depend on it.

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[FN1]. The Population Reference Handbook, published by the Population Reference Bureau, a nonprofit

demographics study group in Washington, D.C. (1990).

[FN2]. Advising the Older Client (Editor Lynn P. Chard), Introduction, L. Chard, at 1-1, 1-2 (ICLE 1992).

[FN3]. Fact Book on Aging, Elizabeth Vierck (ABC-CLIO, Inc. 1990) at 118.

[FN4]. *Id.* at 199.

[FN5]. U.S. Bureau of the Census, 1980; George L. Maddox, *The Encyclopedia of Aging* (Springer Publishing Co. 1987), at 489.

[FN6]. Census Bureau statistics as reported in the *St. Louis Post-Dispatch*, Monday, June 28, 1993.

[FN7]. *Id.*

[FN8]. Fact Book on Aging, *supra*, at 121.

[FN9]. *Id.*

[FN10]. *Id.*

[FN11]. *Id.*

[FN12]. *Id.* at 123.

[FN13]. See Jay Nassau, *Choosing a Nursing Home*, 11-25 (1985); Jones, *Caring for the Aged*, 5-30 (1982).

[FN14]. MCLA 333.20109(1).

[FN15]. *The Michigan Long-Term Care Reader* (The Citizens For Better Care Press 1992).

[FN16]. *Id.* at 3-6.

[FN17]. *Id.*

[FN18]. *Id.* at 122.

[FN19]. 1992 Statistical Abstract of the United States (U.S. Department of Commerce), Table No. 195.

[FN20]. Don't Count On It!: A Report on Long-Term Care Insurance Coverage of Alzheimer's Disease (Washington, D.C.: Alzheimer's Association 1992), at 1.

[FN21]. Heaton v State Health Benefits Commission, 264 N.J. Super. 141, 145, 624 A.2d 69, 71 (1993).

[FN22]. Life Magazine, Can We Keep Mom At Home? (August 1993) at 34.

[FN23]. Fact Book on Aging, *supra*, at 123-24.

[FN24]. *Id.* at 124.

[FN25]. Comments made by Gloria Minando in May, 1993.

[FN26]. See Michael Daitch, Assisting Clients with Evaluating Long-Term Care Insurance Policies, January 1993 Michigan Bar Journal, at 38, citing Polniasek & Firman, Long-Term Care Insurance: A Professional's Guide to Selecting Policies (Washington, D.C., United Seniors Health Cooperative 1991), at 1.

[FN27]. 1993 CCH Medicare and Medicaid Guide, Number 767, at 8.

[FN28]. 42 USC 1395-1395XX (1982) and Supp. III 1985.

[FN29]. 42 USC 1395d(a), (e).

[FN30]. 42 CFR 409.30, 409.31.

[FN31]. 42 USC 1396 (1982) and Supp. III (1985).

[FN32]. 42 USC 1396a(a)(13).

[FN33]. See "Planning For Long-Term Health Care," George A. Cooney, § 3.17 in *Advising the Older Client* (ICLE 1992).

[FN34]. 42 USC 1396 et seq.

[FN35]. See "Planning For Long-Term Health Care," George A. Cooney, § 3.17 in *Advising the Older Client* (ICLE 1992).

[FN36]. *The Michigan Practitioner's Guide to Financing Nursing Home Care at 2-1*, (The Citizens for Better Care

Press, October 1992).

[FN37]. See Health Care Association of Michigan, et al. v Babcock, et al., No. K89-50063CA (WD Mich 1989).

[FN38]. See The Michigan Practitioner's Guide to Financing Nursing Home Care, at 2-48, citing Michigan Department of Social Services, Medical Services, Report to the House Appropriations Subcommittee on Social Services (March 18, 1992).

[FN39]. 42 USC 1396r(c).

[FN40]. 42 CFR 483.10 (1991).

[FN41]. 42 USC 1395i-3; Pub L 100-203, 101 Stat 1330-182 (1987).

[FN42]. John and Morris, et al., Resident Assessment Instrument, Training Manual and Resource Guide (Eliot Press 1991), at 2-1.

[FN43]. *Id.*, at 2-2.

[FN44]. *Id.* at 7-1 through 7-16, and Appendix F.

[FN45]. Comments of Susan Titus, Executive Director, Citizens For Better Care, in September 1993.

[FN46]. Comments of Sara Hunt, Consultant on Aging (MSW, University of Wisconsin-Madison), in September 1993.

[FN47]. Comments of Michael Connors, Project Director, Citizens for Better Care, in October 1993.

[FN48]. The Michigan Long-Term Care Reader, *supra*, at 56.

[FN49]. Nursing Home Care, by Hollis Turnham, § 6-37, in *Advising the Older Client* (ICLE 1992).

[FN50]. MCLA 333.20201.

[FN51]. 42 USC 3001 et seq.

[FN52]. Department of Health and Human Services, Office of Inspector General, "Successful Ombudsman Programs," June 1991, at 5.

[FN53]. Id. at 5-8.

[FN54]. 762 F Supp at 890.

[FN55]. The court further found no breach of the written Agreement in that:

Our careful review of the record reveals nothing which suggests that appellee precluded appellants from the right to live independently or from the right to occupy their living accommodations. The record is equally devoid of the slightest suggestion that appellee has neglected a significant health care or dietary need of any resident.

[FN56]. The jury returned a verdict for \$1.3 million and the trial court entered a judgment notwithstanding the verdict. On appeal, the 11th Circuit reversed that ruling (but did, however, uphold a separate order granting a new trial because of improper closing arguments by the plaintiff).

[FN57]. The court noted that:

Bedsore, also known as decubitus ulcers and pressure sores, are caused by the compression of body tissue between a bony structure and a supporting structure such as a bed or wheelchair. This pressure obstructs the blood supply to the tissues, resulting in a deprivation of oxygen and nutrients to the area. The early stages of pressure sores involve only superficial tissues. In later stages, fat, muscle, and even the underlying bone can be affected. Bacterial infection of the sore can lead to the patient's death. 565 So.2d at 222-23.

[FN58]. In Franklin v Collins Chapel Connectional Hospital, 696 SW 2d 16 (Tenn App 1985), the court similarly held that it was error to refuse to give a res ipsa loquitur instruction where the injury, thermal burns, would not ordinarily occur absent negligence on the part of the nursing home, and where the instrumentality--the bath--was within the home's exclusive control.

[FN59]. 493 NW2d at 887-88.

[FN60]. 34 AARP Bulletin, No. 8 (Sept. 1993), at 19.

[FN61]. 34 AARP Bulletin, No. 8 (Sept. 1993), "A Place To Call Your Own," at 10.

[FN62]. Id. at 10-11.

[FN63]. Administration Health Care Reform Proposal, dated September 7, 1993 as "A preliminary draft of the President's Health Reform Proposal," at 24 and 156.

[FN64]. Id. at 156.

[FN65]. St. Louis Post-Dispatch, June 13, 1993, at 10A.

[FN66]. 787 SW 2d at 499 (citing authority).

[FN67]. St. Louis Post-Dispatch chart, June 13, 1993, at 10A, citing the Hospital and Healthcare Compensation Service, Oakland, N.J.

[FN68]. For example, in *Bremenkamp*, supra, the court noted that several employees had resigned from the nursing home because they believed that the facility was understaffed. The court held that it had "no trouble" in holding that the plaintiff was entitled to seek punitive damages to redress the inadequate supervision provided by the home. *Id.* at 894-95.

[FN69]. There are at least three different psychological perspectives of nursing home care. First, the interactionist approach to nursing homes considers that nursing homes provide the elderly a chance to make new friends with people their own age and share life's experiences with each other. Being home alone with no one to talk to can be a devastating experience. By being a resident at a nursing home, there is always someone to talk to and theoretically someone who cares even if it is their job to care.

The functionalist view of nursing homes also asserts the positive value of nursing homes. They enable younger family members to avoid being full-time care-givers. Young family members do not have to give up their jobs and can rear children without the stress of caring for an aging family member. Elderly people need stability and security. They also need to be free of fear that they will be thrown away by society just because they are older and sometimes sick. Nursing homes can address these needs and fears because they offer shelter and a stable environment. Functionalists also see many other latent benefits that result from nursing home care, such as providing people jobs.

The conflict perspective holds that institutionalized nursing home care is not good for people because older people are warehoused and controlled by others. This perspective believes that many institutions, including nursing homes, deny people their individuality. The most important goal of the nursing home institution, as in all institutions, is to maintain the institution. Conflict theory asserts that the nursing home will maintain its financial soundness by ordering employees and residents to comply with regimented rules. Nursing home residents therefore lose much of their control over what they can do on a daily basis.

[FN70]. Fact Book on Aging, supra, at 119.

[FN71]. Life Magazine, Can We Keep Mom At Home? (August 1993), at 36.

[FN72]. St. Louis Post-Dispatch Section F, at 1, 4, Where The Heart Is (September 15, 1993). See Theresamarie Mantese, et al., Legal Peril In Home Health Care: Standards of Care for Modern-Day House Calls in Missouri Medicine at 309 (June 1988) for a discussion of the standard of care applicable to home health care workers.

[FN73]. *Id.*

[FN74]. *Id.*

[FN75]. *Id.*

[FN76]. 1993 brochure issued by Renaissance Home Health Care.

[FN77]. *Id.*

[FN78]. C. Bennett, Ph.D., Nursing Home Life: What It Is And What It Could Be (Tiresias Press 1980).

[FN79]. Id. at 179.

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