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How Changes to the Nursing Home Care Act Will Affect Long-Term Care Abuse and Neglect Cases

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The Illinois Nursing Home Care Act (210 ILCS 45, "the Act") allows private attorneys who prove violations of resident rights to recover costs and attorneys' fees. To recover fees and costs, a showing of abuse or neglect is required. A July 2010 change to the definition of neglect allows private attorneys to vindicate the rights of abused and neglected nursing home residents, regardless of whether an actual injury is sustained.

Section 45/3-602 of the Act states, "The licensee shall pay the actual damages and costs and attorney's fees to a facility resident whose rights, as specified in Part 1 of Article II of this Act, are violated." Part 1 of Article II of the Act sets forth 18 different categories of "Resident Rights" including the right to be free from abuse and neglect:

"[A]n owner, licensee, administrator, employee or agent of a facility shall not abuse or neglect a resident." (210 ILCS 45/3-107).

Section 1 of the Act sets forth definitions of various terms used throughout the act, including neglect. In July 2010, the legislature changed the definition of neglect from:

"Neglect means a failure in a facility to provide adequate medical or personal care or maintenance, which failure results in physical or mental injury to a resident or in the deterioration of a resident's physical or mental condition." (210 ILCS 45/3-117).

To:

"'Neglect' means a facility's failure to provide, or willful withholding of, adequate medical care, mental health treatment, psychiatric rehabilitation, personal care, or assistance with activities of daily living that is necessary to avoid physical harm, mental anguish, or mental illness of a resident." (210 ILCS 45/3-117, effective July 29, 2010).

Nursing home residents' rights can now be vindicated even if an injury did not result. The old version of "neglect" required a showing that a failure to provide certain care resulted in an injury. Now, "neglect" is established by a failure to provide, or withholding of care that is necessary to avoid an injury. The fee-shifting provision incentivizes private attorneys to take cases where a nursing home fails to provide the most basic of human needs including hygiene, dressing, eating, and drinking, even if these failures did not result in a serious or permanent injury.

The second change in "neglect" is a more specific statement of the categories of treatments and care considered in defining neglect. For example, the pre-2010 version prescribed two types of care that, if found to be inadequate, constitute neglect: medical care or personal care. Medical and personal care together comprise the entirety of care provided at nursing homes. Medical care is care provided by doctors, nurses, and other healthcare practitioners. In the Act, personal care is defined as "assistance with meals, dressing, movement, bathing or other personal needs or maintenance, or general supervision and oversight of the physical and mental well being of an individual, who is incapable of maintaining a private, independent residence or who is incapable of managing his person whether or not a guardian has been appointed for such individual." (210 ILCS 45/1-120).

The most common types of nursing home neglect — including falls, pressure sores, accidents, failures to provide special procedures, infections, unnecessary drugs, incontinence, malnutrition, dehydration, wandering, elopement, choking, and medication errors — are covered by both the old and new definitions of "neglect." However, the new definition specifically recognizes that failing to provide care and therapy for mentally ill residents constitutes neglect and adds specific language that "assistance with activities of daily living" are a category of services that, if withheld or not provided, constitute neglect. The prior version of the Act covered activities of daily living by including failures to provide personal care as a type of "neglect."

It is virtually impossible under either definition to imagine a scenario in a nursing home facility where a caregiver and/or facility have failed to exercise ordinary care and such failure does not constitute "neglect" under the Act. The Illinois Supreme Court, in considering the definition of "neglect" under the Act, has held it is synonymous with negligence. In *Harris v. Manor Healthcare Corporation*, the court construed adequate care as set forth in the pre-2010 version of the Act to be interchangeable with ordinary care, due care, and reasonable care. (111 Ill.2d 350, 489 N.E.2d 1374, 95, Ill. Dec. 510 (Ill. 1986). Therefore, a showing of negligence or failures of ordinary care constitute "neglect" under any version of the Act and is sufficient for an award of attorneys' fees.

Traditionally, plaintiff's attorneys in nursing home cases establish "neglect" by presenting expert testimony of doctors, nurses, or other healthcare practitioners. This testimony includes opinions that the various nursing staff violated the applicable nursing standard of care, and/or state and federal regulations applicable to Illinois long term care facilities; notably the Illinois Administrative Code (77 Illinois Administrative Code Ch. I, Section 300) and the OBRA federal regulations (42 U.S.C. §1396r (1990) et seq.). Under the new definition of "neglect" and the Illinois Supreme Court's definition of neglect as defined in the *Harris* case, it will be up to the courts to determine where expert testimony is actually needed to prove "neglect" in establishing violations of this vitally important right of all Illinois nursing home residents.

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