

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

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ROLL NUMBER

DESCRIPTION

1416

2007 HOUSE HUMAN SERVICES

HB 1416

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1416

House Human Services Committee

Check here for Conference Committee

Hearing Date: January 23, 2007

Recorder Job Number: 1724

Committee Clerk Signature



Minutes:

Chairman Price: calls the committee to order and opens HB 1416.

Representative Gary Kreidt, District 33: We will have some amendments for this bill also.

This bill is in regards to nursing homes and illegal transferring of property and assets to individuals. When people apply for Medicaid assistance, whoever receives properties we want to make them responsible for the resident. We want to try to recoup some dollars. See attachment for recommended amendments.

Representative Larry Klemin, District 47 Bismarck: I also have an amendment I would like the committee to consider. See attached. It establishes a priority as to who has this duty of support in the event of a disqualified transfer, at times it is non relative. We felt individual was better language. We could say person instead of individual. You can't give away your property and apply for assistance.

Representative Schneider: What happens to Grandma if no one pays or gives it back?

Representative Klemin: the nursing home would have to decide, and they could be sued.

Shelly Peterson, President of the ND Long Term Care Association: See attached testimony. Attached to my testimony is an explanation of new asset transfer provisions. These will have greater impact in the future.

The day you are applying for Medicaid they go back 5 years of asset transfers. We try to do that now, but we need it in writing in the statute. We have amendment we hope you support attached. We rarely discharge residents. We need to find a place for them and that is not easy.

Curtis Vulosky, Director of Medicaid eligibility: The day Medicaid is applied for we take all in account for the past five years on any transfers.

Representative Schneider: I guess I am struggling with what HB 1416 does.

Ms. Peterson: It doesn't change anything we are trying to do right now; we are able to go after that asset. We are trying to find someone to pay the bill. What we are hoping when people are in estate planning period of time, that people will understand that when they do that, Mom needs care in a period of time that there is an entity that we may come after that asset. It doesn't change the process, but puts them on notice and is critical information to the families. On notice to me means, when they are doing estate planning and being advised that the individuals that are advising them are well aware of the law, and inform them of all options. We think it is a good beginning.

Representative Kaldo: I see what Representative Schneider is saying; this bill doesn't get us any closer than before. You can't terminate someone for none payment unless you find a place for the. Maybe we should be focusing our attention on the recipient of the transfer, rather than on with medical needs.

Helen Funk, State Long Term Care Ombudsman with Department of Human Services: I am testifying against HB 1416. See attached testimony. We have had cases where the child takes home the resident for income reasons, and they are not taken care of properly.

David Boeck, State employee and lawyer for the Protection & Advocacy Project: See attached testimony. I too am in opposition of HB 1416. Transfer trauma kills patients. I think

a more reasonable way to go about it is to put restriction on the recipient of the monies not the resident. The law is binding if they are not going to terminate residents than lets not put in the law. They have extensive procedures when entering the facility. They need to advise th incoming resident of rights and responsibility. That is an easy place to talk about Medicaid eligibility, and if the person is going to be able to pay the bill. We don't want them in a home where possibly someone is an alcoholic or unemployed or other problems. Not all of these transfers are being made with the intent to become illegible for Medicaid. We don't need a law that says we are going to keep medically needed people out of the care they need.

Chairman Price: Any other opposition? If not we will close the hearing on HB 1416.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1416

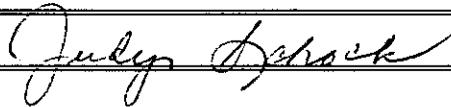
House Human Services Committee

Check here for Conference Committee

Hearing Date: January 24, 2007

Recorder Job Number: 1856

Committee Clerk Signature



Minutes:

Chairman Price: Take out HB 1416. There are amendments in front of you.

The committee discusses proposed amendments.

Representative Porter: There was mention in a testimony that there was a disqualifying transfer of property and that the courts did not make the person pay it back. It still kept the individual from getting on Medicaid. The person who took the disqualified transfer needs to be responsible. **Representative Porter** moves the amendments; **Representative Hatlestad** seconds the motion. 11 verbal yeas, 0 nays and 1 absent.

Committee discusses concerns as written. If the dead beat brother gets money and because he is a dead beat it is gone, I as another child am responsible. This does not see fair. If money in those 5 years was given to a college, it seems as it is written now they would have to go to that foundation. It makes everyone of us who gets a gift is subject to a contingent liability.

Representative Weisz: Shows concern if someone who has rented land for many years, and worked the land and got it ready all those years, it is finally sold to me for about half the money. Now that person has a stroke in the next year or two and they would come after me and the land is worth 100,000. I would not have been able to afford the price, but I was able to buy it at 50,000. So now they come after me for 100,000 and I paid 50,000. Now I have

150,000 invested. This language needs some changes. We have a difference here between family and someone outside the family. There are those people who take advantage and those who do a legitimate under market value purchase, which was done in good intentions.

The committee discusses people need to be responsible for the nursing home when taking gifts. Now the patient is caught in the middle. It also would be pro rated if the patient paid for 4 years and the 5th year applied for Medicaid. Every gift has a contingent liability. It spreads that liability to the whole family, even if I don't know there was a gift given to like the dead beat brother. This is a big statement to get out to the financial planners. The reduction in price is probably something you have earned through the years. I would be upset if a relative gave the money to Concordia College and now I am on the hook.

Chairman Price: Committee you get your actions together by Monday. We have an amended bill, but the does not mean it can't be re-amended.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. HB 1416

House Human Services Committee

Check here for Conference Committee

Hearing Date: January 29, 2007

Recorder Job Number: 2216

Committee Clerk Signature



Minutes:

Chairman Price: Let's take out HB 1416. This bill already has an amendment on it.

Representative Weisz: I would suggest an amendment to further amend the amendments.

We do introduce a disqualifying transfer. It does put them on the top of the list. It does keep in

the family. I move the amendments. Representative Schneider seconds the amendments.

The vote is 6 yeas, 5 nays and 1 absent.

Representative Porter: You're still going to be allowing a situation where the individual who sold the land at a good deal will be a burden to someone, because someone got a good deal.

Either it is a disqualifying transfer or it is not.

Representative Weisz: It was that persons choice to sell it at a below cost value. Again the law says the family has a responsibility to start with. The vast majority ends up with the family anyway. I move a do pass as amended, **Representative Hofstad** seconds the motion. The vote was 3 yeas, 8 nays, and 1 absent.

Chairman Price We have an amended bill. Committee what are your wishes?

Representative Kaldor: I am still not comfortable with the bill. I don't think we have reached the intent of the sponsor. The solution to the problem seems to end up in court anyway. The emphasis is for people to get long term care insurance.

Chairman Price: I think you are going to see more and more nursing homes refuse those who don't have the means to pay.

Representative Porter moves a do not pass as amended, **Representative Potter** seconds the motion. The vote is 8 yeas, 3 nays, and 1 absent. **Representative Kaldor** will carry the bill to the floor.

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1416

Page 1, line 7, after the second "the" insert "individual to whom a disqualifying transfer of property was made, as identified under subsection 2, and then it is the duty of the"

Page 1, line 14, replace "the resident's child" with "another individual"

Page 1, line 15, replace "child" with "individual" and replace the third "the" with "that individual"

Page 1, line 16, remove "child"

Page 1, line 17, replace "child" with "individual"

Renumber accordingly

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1416

Page 1, line 13, after "for" insert "basic care assistance or" and replace "benefits" with "long-term care coverage"

Renumber accordingly

Committee meet to discuss

Proposed Amendments to HB 1416

1. It is the duty of a person who has received a disqualifying transfer of property and then it is the duty of the father, the mother, and every child of any individual who is unable to support oneself, to maintain that individual to the extent of the ability of each. This liability may be enforced by any person furnishing necessaries to the individual who is unable to provide self-support. The promise of an adult child to pay for necessaries furnished to the child's parent is binding.
2. If the individual who is unable to provide self support is a resident of a basic care or nursing facility and has been determined ineligible for Medicaid benefits because of a disqualifying transfer of property, the person who has received a disqualifying transfer is responsible for the resident's basic care or nursing facility care up to the established market value of the property transferred.

REPORT OF STANDING COMMITTEE

HB 1416: Human Services Committee (Rep. Price, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO NOT PASS** (8 YEAS, 3 NAYS, 1 ABSENT AND NOT VOTING). HB 1416 was placed on the Sixth order on the calendar.

Page 1, line 7, remove "1.", overstrike "It" and insert immediately thereafter "If the father, mother, or child of an individual who is unable to support oneself has received a disqualifying transfer of property from that individual, it is the duty of that father, mother, or child to maintain that individual to the extent of the ability of each and then it", after the second "the" insert "individual's", overstrike the third "the", overstrike "and every" and insert immediately thereafter "or", overstrike "of any", remove "individual", and overstrike "who"

Page 1, line 8, overstrike "is unable to support oneself," and insert immediately thereafter "who did not receive a disqualifying transfer of property"

Page 1, remove lines 12 through 17

Renumber accordingly

2007 TESTIMONY

HB 1416

Testimony on HB 1416
House Human Services Committee
January 23, 2007

Chairman Price and members of the House Human Services Committee, thank you for the opportunity to testify in support of HB 1416. My name is Shelly Peterson, I'm President of the North Dakota Long Term Care Association. On behalf of our members, we ask for your support of HB 1416 and I'd like to explain to you why we feel this legislation is important.

I understand that NDCC 14-09-10 Reciprocal Duty of Support – support of poor, was enacted in 1877. I'm not sure why it was enacted and to my knowledge it has been used very little in the past 100 plus years. We are proposing HB 1416 to help facilities receive payment for individuals in their care.

Approximately one in ten residents in a nursing facility have issues with paying for their nursing facility care. One of the top issues in not getting paid, and certainly the one that yields the greatest financial losses, is when an individual believes Medicaid is going to pay the bill and they find out they are not eligible because of assets transferred to children.

HB 1416 accomplishes one purpose, it states that if a resident of a basic care or nursing facility is determined ineligible for Medicaid benefits because of a disqualifying transfer to an adult child, we may discharge the resident to the care of the child (who received the asset) unless the child pays for the long term care stay, up to the value of the asset transferred to the child.

In these circumstances, since Medicaid won't pay for the care the facility's legal options are to try and retrieve the asset so the resident has funds to pay for their care. What's good about HB 1416 is that children are put on notice that if you receive assets from your parents and they suddenly need long term care and Medicaid disqualifies them, they may need to care for their parent or make funds available from the proceeds of the asset that originally belonged to the parent.

I want to assure you that facilities will not be discharging a parent to the home of a child where it is not safe, appropriate or where the parent will not get the care and services they need. How can I assure that to you?

Federal regulations govern every step of the discharge process and first and foremost we must find a suitable discharge location. Further nursing facilities do the right thing and ethically and morally would not complete a discharge where the resident would not be appropriately cared for.

Federal regulations give nursing facilities the right to discharge a resident for non-payment. When we discharge for non-payment we must:

1. Provide a 30 day advance notice of the discharge.
2. The written notice must be in a language and manner that the resident, family member or legal representative understands. The facility needs to be conscious of language barriers, visual barriers or physical and mental limitations of the resident.
3. The notice must be in accordance with North Dakota Administrative Code Section 75-01-03-06.2
4. The notice of discharge must state the specific location of where the resident is being discharged to.
5. The notice of discharge must state the resident has the right to appeal the action to the State Appeals Supervisor.
6. The notice must contain the name, address and telephone number of the State Long-Term Care Ombudsman and Protection and Advocacy.

Regarding the specific location of where the resident is being discharged to, facilities have a specific federal regulation regarding preparation and orientation of the resident to the new location.

CFR 483-12(A)(7) Orientation for Transfer and Discharge – a facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

Interpretive Guidelines 483.2(a)(7):

“Sufficient preparation” means the facility informs the resident where he or she is going and takes steps under its control to assure safe transportation. The facility should actively involve, to the extent possible, the resident and the resident’s family in selecting the new residence. Some examples of orientation may include trial visits, if possible, by the resident to a new location; working with family to ask their assistance in assuring the resident that valued possessions are not left behind or lost; orienting staff in the receiving facility to resident’s daily patterns; and reviewing with staff routines for handling transfers and discharges in a manner that minimizes unnecessary and avoidable anxiety or depression and recognizes characteristic resident reactions identified by the resident assessment and care plan.

When facilities are faced with an issue of non-payment it is very difficult on everyone. First the parent, if they are cognitively intact, are worrying about the bill and where will they go to for care. Secondly, children fighting over assets can be very troubling to the parents mental and physical health. Long term care facilities are caught in the middle; they really don't want to discharge but need to get paid so they can pay their bills. It is almost impossible to find a new location for the resident. When they call other facilities and tell them you are discharging for non-payment, no one will take them. No one will take them and they have no place to go. The option of sending a resident back home could never occur if in our assessment the children were ill equipped to care for the parent.

Parents and children need to know that when transfers of property and possessions are occurring, they need to plan how they will pay for their long term care should they need it. The discussion and planning needs to occur when property is being given away. Children need to know that if they receive assets from a parent and the parent suddenly needs 24-hour care, the assets may need to be available for their care. The ideal solution in all of this is planning for your long term care and if you have assets you want to protect, purchase long term care insurance.

In summary, HB 1416 puts into statute a process to help assure individuals can receive care and provide payment from assets they've accumulated. If they can't get access to their asset, and children can't care for them, what should we do with them? HB 1416 provides that solution. This concludes my testimony and I would be happy to try and answer any questions you may have.

Shelly Peterson, President
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Amendment to HB 1416

Page 1, Line 13, after "for" insert "basic care assistance or" and replace "benefits" with "long term care coverage."

IMPLEMENTATION OF TRANSFER OR DISCHARGE REQUIREMENTS BY NURSING FACILITIES

1. Develop facility policies and procedures for transfer or discharge.
2. Write the notice in a language and manner the resident and family member or legal representative understands. Be conscious of language barriers, visual barriers, or physical limitation of the resident.
3. Type a form using 12 point type and facility identifying information.
4. Give notice in accordance with North Dakota Administrative Code (NDAC) Section 75-01-03-06.2 which provides as follows:
 1. Any notice required to be given by this chapter may be given by first class mail or personal delivery unless some provision of law specifically requires notice to be given in another manner.
 2. Any notice required to be given by certified or registered mail may be so given without requesting a return receipt unless some provision of law specifically requires a return receipt to be requested.
 3. Any notice given by certified or registered mail, return receipt requested is deemed to be effectively given if delivered or if refused.
 4. Any notice required to be given by certified or registered mail, return receipt requested, if returned undelivered but not refused, may be supplemented by a notice given by first class mail. A notice given by first class mail, in supplementation of such a returned notice, is deemed to have been received unless it is shown, by a preponderance of the evidence that:
 - a. The mail was not properly addressed;
 - b. The mail containing the notice was returned by the postal service;
 - c. The mailing of the notice cannot be shown by an affidavit.
5. Give the original notice to the resident, a copy to the resident's family/legal representative, and a copy is placed in the resident's medical record.
6. Refer to 42CFR 483.12(a)(3){F202}, regarding a physician's documentation supporting the transfer or discharge, in the resident's clinical record.
7. To calculate the correct date for the appeal, always add 30 days to the date the notice will be issued to the resident. Count the days on a calendar for the exact date to be recorded in the Right to Appeal section of the forms.
8. DO NOT give a Notice of Transfer or Discharge for Nonpayment for a failure by a resident or their representative to pay for charges for private rooms, bedholds in excess of 15 consecutive hospital days or 24 therapeutic leave days per calendar year, or special services not included in the daily rate. (Refer to NDAC Chapter 75-01-03-08(7)(j)).
9. Only issue both a written transfer or discharge notice and the facility's bedhold notice when a resident is hospitalized. (The requirements for bedhold do not apply for a Medicare only hospital based distinct part nursing facility, or a swing bed unit.

NOTICE OF TRANSFER OR DISCHARGE FOR NONPAYMENT

Resident Name _____

Transfer or Discharge Information:

NDAC 75-01-03-08.1(7)(j) authorized a transfer or discharge due to lack of payment for nursing facility covered services.

- j. The resident fails to pay, or to arrange for payment of, any part of charges based on the daily rate established under chapter 75-02-06, provided that no involuntary transfer or discharge may be based on a failure to pay charges for private rooms, bedholds in excess of fifteen consecutive hospital days or eighteen therapeutic leave days per calendar year, or special services not included in the daily rate.

You are being transferred or discharged to _____ on _____
because _____ (Location) (Date)

(Reason)

Right to Appeal:

If you do not agree with this transfer or discharge, you have the right to appeal within 30 days after the date of this notice. Your written request for a hearing must be made by 5:00 p.m. (CT) on _____ to:
(Date)

Appeals Supervisor
Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505
Phone: (701)328-2341

If your appeal request is filed before the transfer or discharge is to occur, the transfer or discharge will be delayed until the hearing decision is made.

If the Medicaid program is paying for any of the cost of your services in the facility, Medicaid will continue to pay for these services until the hearing decision is made unless you are notified in writing that:

1. There is a change in your eligibility for the Medicaid program and benefits; or
2. That the Medicaid payments for services will stop because of a specific state or federal law or policy which prohibits such payments.

Right of Representation:

You have the right to represent yourself at the hearing or may use legal counsel, a relative, a friend, or another spokesperson.

If you would like assistance with your appeal, you may also contact:

Helen Funk
State Long-Term Care Ombudsman
Aging Services Division
600 E Boulevard Ave Dept 325
Bismarck, ND 58505-0250
701-328-4601 or 1-800-451-8693

If you are a resident with a developmental disability or are mentally ill, assistance may be obtained from:

Office of Protection and Advocacy
400 E Broadway Ste 409
Bismarck, ND 58501-4071
701-328-2950 or 1-800-472-2670

Persons Notified: _____ (Resident) _____ (Date)
_____ (Family Member/Legal Representative) _____ (Date)

Facility Representative Who Completed Form _____ Date _____

Summary of the Transfer of Asset Provisions

1. **Extension of Look-back Period and Computation of Penalty Period**
 - a. The “**look-back period**” is **lengthened** from the 36 months prior to the month of application to **60 months** prior to the month of application.
 - b. The **penalty period** no longer begins with the date of transfer, but now **begins** on the later of the date of transfer or the date **the individual would otherwise be eligible** for Medicaid coverage of long-term care expenses.
 - c. For transfers that are less than the average cost of care for one month, **States must impose partial month penalties.**

2. **Promissory Notes, Loans and Mortgages**

The DRA also addresses the treatment of promissory notes, loans, and mortgages. Often, individuals would transfer large sums of money, **claiming that the transfer was not a gift but a loan, when in fact there was no meaningful repayment plan.** The DRA provides that any purchase of a note, or any loan or mortgage, will be treated as a transfer, subject to penalty unless specific conditions are met.

3. **Life Estates**

At times, individuals pay sums of money to others in exchange for the right to live in that individual's home. The purchaser has no right to sell or take a loan against the property, only the right to use it as a residence. The DRA provides that **the purchase of a life estate (the right to reside in property which belongs to another) is a transfer of assets unless the purchaser actually resides in the property for at least one year after the date of purchase.**

4. **Undue Hardship**

The DRA does mandate that every State implement undue hardship provisions that allow for the waiver of a penalty period where an individual would be deprived of medical care such that the individual's life or health would be endangered, or that the individual would be deprived of food, clothing, shelter or other necessities of life.

5. **Annuities**

Section 6012 of the DRA addresses the use of annuities as a method of sheltering assets. To discourage the use of annuities to shelter funds for heirs while qualifying for Medicaid, this provision requires specific criteria to be met.

- a. Applicants must disclose to the State any interest the applicant or spouse has in any annuity;
- b. The State must be named as the remainder beneficiary, or as the second remainder beneficiary after a community spouse or minor or disabled child, for an amount at least equal to the amount of Medicaid benefits provided; and
- c. Annuities purchased by or on behalf of the applicant must be part of a bona-fide retirement plan or must be irrevocable, non-assignable, actuarially sound, and provide for equal monthly payments.

An annuity purchased after February 7, 2006 that does not meet the requirements above will be treated as a transfer of assets subject to penalty.

6. **The "Income First Rule"**

Section 6013 of the DRA addresses the methodology for calculating the amount of resources that may be preserved for a community spouse. The "income first rule" requires that the amount of the institutionalized spouse's income that would be made available to the community spouse be considered to be available to the community spouse before computing the amount of additional resources that would be required to bring the community spouse's income up to the standard.

7. **Home Equity Provision**

Section 6014 of the DRA imposes a limit of \$500,000 on the value of an individual's home equity. States may increase this figure up to \$750,000 by submitting a State Plan amendment.

8. **Deposits with Continuing Care Retirement Communities (CCRC)**

Section 6015 pertains to deposits individuals make with continuing care retirement communities (CCRC) or life care communities. Such communities require large sums to be deposited upon entrance to the community. The DRA specifies that these funds are countable, precluding eligibility until these funds, in addition to any other countable assets, are within the State's Medicaid limits.

By: **Shelly Peterson, President**
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Testimony
House Bill 1416 – Department of Human Services
House Human Services Committee
Representative Price, Chairman
January 23, 2007

Chairman Price and committee members, I am Helen Funk, State Long Term Care Ombudsman with the Department of Human Services. I am here to testify against House Bill 1416 relating to family members reciprocal duty of support.

It is most often not in the interest of a resident, who requires twenty-four hour skilled nursing care, to be discharged against medical advice to an adult child. Financial exploitation of the resident may have occurred, with disqualifying transfers causing a resident to be ineligible for Medical Assistance.

Each case of transfer and discharge should be assessed individually for appropriateness of transfer and discharge. The medical risk for the resident who is requested to leave may be serious and could result in death of the resident in some cases.

Adult children of residents, who financially exploit the resident, often have problems that prevent them from caring for their parent in a responsible and reliable manner. We have known of situations where a resident has been moved out of a nursing facility into a situation that is totally inadequate for the resident. I have received concerned telephone calls from Nursing Facility and Basic Care Facility Social Workers, Nurses, their Doctors or other concerned individuals when the resident with multiple care needs has had to leave a facility under these circumstances.

It is my belief that the resident should be offered more protection in the case of financial exploitation. Guardianship may be necessary for the incapacitated resident, who cannot care for his/her own needs. Other people such as County States Attorneys may be called upon to assist in recouping assets that have been taken from them.

State and Federal law, as well as Administrative Code, already define what a Nursing Facility should do when a transfer and discharge of a resident occurs.

This concludes my testimony.

House Human Services Committee
Sixtieth Legislative Assembly of North Dakota
House Bill No. 1416
January 23, 2007

Good afternoon, Chairman Price and Members of the House Human Services Committee. I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project advocates on behalf of people with disabilities.

Current law provides nursing facilities and basic care facilities the ability to sue an individual's parents and children to recover expenses for care of the individual. This powerful tool is probably little used.

Rather than sue the parents or children to recover expenses, HB 1416 would allow a nursing facility or basic care facility to evict a resident/patient who is dependent on the facility for care. A nursing facility or basic care facility could evict without restrictions on the exercise of this new power.

Upon eviction, the resident/patient might go to a caring and supportive relative, but might go to relatives who have little interest or ability to care for the individual. This law overlooks the potentially deadly consequences.

North Dakota criminal law prohibits this kind of action by all North Dakotans, including nursing facilities and basic care facilities. A few years ago, the press identified the prohibited behavior as granny dumping. North Dakota has not changed so much that we now endorse this mistreatment of vulnerable adults.

North Dakota has laws in place to prevent a facility from discharging or transferring a resident without adequate discharge or transfer planning. Our laws closely regulate this action. There are good reasons for the current laws and we cannot overlook those reasons. Federal law has similar conditions on discharge and transfer.

In some cases, HIPAA would prevent a facility from disclosing adequate health information to the unwilling parent or child. This is an invitation to disaster.

Please visualize the situations that await an evicted, discharged resident. The destination may be that of an exploitive parent or child whose conduct created this crisis. An exploitive parent or child might be happy to gain access to the resident's retirement or disability income and not so anxious to undertake the care of the resident.

Thank you for the opportunity to testify in favor of this legislation. Please let me know if you have questions.