

Guardianship Jurisdiction/Elder Abuse

Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act

By Lori A. Stiegel, Senior Attorney, and Erica F. Wood, Assistant Director
ABA Commission on Law and Aging

The Uniform Adult Guardianship and Protective Proceedings Act (UAGPPJA or Act) addresses three problems of guardianship jurisdiction that may occur in multi-state or international guardianship, conservatorship, or protective proceedings (hereafter referred to generically as guardianship cases or proceedings). These problems are:

- determining which state has jurisdiction to appoint a guardian or conservator;
- transferring an existing guardianship from one state or country to another; and
- recognizing and giving full faith and credit to a guardianship order from another state.

Case law and anecdotes collected by the ABA Commission on Law and Aging (summaries online at <http://www.abanet.org/aging/guardianshipjurisdiction/home.html>) offer evidence that these jurisdictional problems can cost the incapacitated person or family members thousands of dollars, often take years to resolve, and may result in physical or emotional harm to the incapacitated person. Additionally, courts may waste precious resources addressing

these issues. If widely enacted by states, the UAGPPJA could fix these problems, saving both families and courts money.

However, the UAGPPJA serves another important purpose by providing nine possible ways of reducing elder abuse. Following a brief explanation of the Act, this article discusses the connections between guardianship and elder abuse generally, and then explains the nine ways that the UAGPPJA could help stop or prevent elder abuse.

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What Is Elder Abuse?

There is no national consensus on a definition of elder abuse and state definitions vary widely. The term is used generically to include physical and sexual abuse, financial exploitation, psychological or emotional abuse, neglect by others, abandonment, and—sometimes—self-neglect. Elder abuse is committed by family members, friends, fiduciaries (including guardians and conservators), paid and volunteer caregivers, and others in a relationship of trust to the victim. For more information about elder abuse laws, see the ABA Commission on Law and Aging's elder abuse Web page at www.abanet.org/aging/elderabuse.shtml.

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Veterans Advocacy/Pro Bono Emeritus

ABA Commission Awards Funding for Veterans Advocacy Pro Bono Project

By David Godfrey, Senior Attorney
ABA Commission on Law and Aging

The ABA Commission on Law and Aging is pleased to announce the award of four grants to organizations in states with emeritus attorney pro bono practice rules to establish pilot programs to provide veterans with pro bono legal assistance.

All four of these projects seek to engage retired and inactive attorneys under state emeritus rules in volunteer service to assist veterans who would likely be unable to obtain legal

assistance. Emeritus rules waive at least some of the licensing requirements for retired and inactive attorneys who agree to represent clients without charge. Currently, 28 states and the District of Columbia have adopted emeritus rules (see list at www.abanet.org/legalservices/probono/emeritus.html). The following four projects have been selected for funding:

- 1) **Delaware State Bar Association, Veterans Law Committee, Wilmington, Del.** In collaboration with the Widener School of Law Clinical Program, the committee will recruit emeritus status volunteers and conduct workshops to train attorneys to represent veterans as claimants before the Veterans Administration.
- 2) **Homeless Persons Representation Project Inc., Baltimore, Md.** The project will recruit emeritus volunteers to represent homeless veterans and provide training necessary to become certified to represent claimants before the Veterans Administration in exchange for agreeing to accept pro bono cases.
- 3) **Inner City Law Center, Los Angeles, Calif.** The Inner City Law Center operates a walk-in law clinic on “skid row” in Los Angeles and has a full-time directing attorney operating a homeless veterans project. They will use this funding to recruit emeritus status volunteers and provide training for them to become accredited by the Veterans Administration.
- 4) **Public Counsel Law Center, Los Angeles, Calif.** The Public Counsel Law Center will work with the Los Angeles Bar Association and the Beverly Hills Bar Association to recruit and train emeritus status attorneys to accept pro bono cases referred by the Center for Veterans’ Advancement.

The Veterans Advocacy Pro Bono Project is a joint effort of the ABA Commission on Law and Aging and the Section of Administrative Law and Regulatory Practice, Commission on Homelessness and Poverty, Senior Lawyers Division, Standing Committee on Pro Bono and Public Service, and Standing Committee on Bar Activities and Services, Division of Bar Services. The project is made possible by an ABA Enterprise Fund grant. ABA Enterprise projects create innovative partnerships and collaborations between various ABA entities to further the mission of the ABA.

For more information on this project, or on state emeritus pro bono rules, contact David Godfrey, senior attorney, at Godfreyd@staff.abanet.org.

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Connections Between Guardianship And Elder Abuse

There are strong connections between guardianship and elder abuse. At times, guardianship may be a necessary tool to stop elder abuse. For example, guardianship may be indispensable for removing an incapacitated victim of financial exploitation from the control of the exploiter. Another illustration is when guardianship is needed to obtain medical care for an incapacitated victim of neglect. At other times, however, guardianship may be the cause of elder abuse. A guardian may financially exploit or neglect the incapacitated person for whom the guardian was appointed to act. The failure of courts to monitor guardianships leaves older people vulnerable to elder abuse.

Nine Ways the UAGPPJA Could Reduce Elder Abuse

In situations where guardianship is needed to stop elder abuse, the UAGPPJA could make it easier for the courts to establish, transfer, and recognize guardianships in multi-state cases. Additionally, the Act could also help prevent guardians from committing elder abuse by enabling courts to learn about elder abuse that may have occurred or been alleged in other states and requiring courts to consider that information and the need for monitoring a guardianship when making critical decisions about a guardianship proceeding. Specifically, the UAGPPJA could reduce elder abuse in the following nine ways:

#1. The UAGPPJA Could Reduce Incidents of “Granny Snatching”

Lillian Glasser was an 86-year-old widow and a long-time New Jersey resident. When she visited her daughter in Texas, the daughter immediately filed for and was awarded temporary guardianship. Her son and nephew objected, stating that the matter should be heard in New Jersey. This was a highly-contested battle between siblings to control their mother and her \$25 million fortune. The case involved dozens of lawyers and resulted in legal fees in Texas alone in excess of \$1.5 million. *Matter of Glasser*, 2006 WL 510096 N.J. Super. Ct. (2006).

The *Glasser* case illustrates how “granny snatching,” the unauthorized removal or retention of an older person, may be undertaken to pursue guardianship in another state or to

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Brief Explanation of the UAGPPJA

The Uniform Law Commission (ULC, also known as the National Conference of Commissioners on Uniform State Laws or NCCUSL) approved the Act in 2007 and recommended its enactment by all the states. The ULC provides states with non-partisan, well-conceived, and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. The American Bar Association endorsed the UAGPPJA in August 2007. For more information about these solutions, see the text of the UAGPPJA with prefatory note and comments online at http://www.law.upenn.edu/bll/archives/ulc/ugijaea/2007_final.htm or the ULC’s “Why States Should Adopt the Uniform Adult Guardianship and Protective Proceedings Act” at http://www.nccusl.org/Update/uniformact_why/uniformacts-why-agppja.asp.

Guardianship jurisdiction requires clarity because each state has its own guardianship law and because many people who are the subject of guardianship proceedings have connections to multiple states or countries. As noted above, these facts pose three problems:

- Jurisdiction: An incapacitated person may own property in multiple states and it may be unclear in which state the guardianship proceeding should occur;
- Transfer: An incapacitated person needs to be moved to another state and the second state requires that another full-blown guardianship proceeding be conducted; and
- Recognition: An institution in another state refuses to act on the authority of a guardian appointed by a court in a different state.

Modeled after the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which has been enacted in 48 jurisdictions, the UAGPPJA offers solutions to these three jurisdictional problems. Article 2 of the Act provides a schema for determining an alleged incapacitated person’s “home state” or “significant connection state” in which a guardianship proceeding should be heard by a court. Article 3 creates a procedure for transferring an existing guardianship from one state to another. Article 4 establishes a procedure for registering an existing guardianship in another state, thus enabling the guardian to act on the incapacitated person’s behalf in the second state. The UAGPPJA solutions will be ineffectual, however, unless most states adopt them.

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avoid a guardianship in the state from which the elder was snatched. Case law and anecdotes are replete with examples of granny snatching because guardianship jurisdiction currently may be determined by the alleged incapacitated person's physical presence in the state.

Enactment of the UAGPPJA would render granny snatching ineffective and unnecessary by removing presence as the determining factor for guardianship jurisdiction. The Act creates a three-tiered schema governing jurisdiction: (1) "home state," (2) "significant connection state," and (3) "another state."

The "home state" is defined as

the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of a petition for a protective order or the appointment of a guardian; or if none, the state in which the respondent was physically present, including any period of temporary absence, for at least six consecutive months ending within the six months prior to the filing of the petition (Section 201(a)(2)).

As explained in the UAGPPJA commentary, "the ability of the home state to appoint a guardian or enter a protective order for an individual continues for up to six months following the individual's physical location to another state." A person can only have one "home state" at a time.

If there is no home state or the court in the home state declines to exercise jurisdiction, then jurisdiction is appropriate in a state to which the person who is the subject of the guardianship proceeding (the "respondent") has a "significant connection." That term is defined to mean "other than mere physical presence and in which substantial evidence concerning the (subject person) is available" (Section 201(a)(3)). In determining whether a significant connection exists, courts are to consider the location of the respondent's family and other persons legally entitled to notification of the proceeding, the length of time the respondent was present in the state and the length of any absence, the location of the respondent's property, and the respondent's ties to the state (e.g., voting, filing tax returns, driver's license, and receipt of services). A person can have multiple "significant connection" states. Once one of these significant connection states establishes jurisdiction, it obtains jurisdictional primacy.

"Another state" can have jurisdiction under two circumstances: (1) the respondent does not have a home state or sig-

nificant connection state, and (2) the respondent's home state and all significant connection states have refused to exercise jurisdiction because another state is more appropriate. This third priority prevents a respondent from being left in legal limbo, but ensures that there is no more appropriate state for the proceeding.

If the UAGPPJA had governed the *Glasser* case, New Jersey would have been the home state, and the Texas court could have declined jurisdiction because of the daughter's unjustifiable conduct. The Act would have facilitated timely resolution and promoted communication between judges, saving vast amounts of time and expense for the family and the courts in both states.

#2. The UAGPPJA Enables a Court to Decline to Exercise Jurisdiction Because of and to Penalize "Unjustifiable Conduct"

Maydelle Trambarulo, age 77, was in deteriorating health with Parkinson's disease. She had resided in New Jersey for close to 50 years and then moved to Delaware where she had lived for one year. She traveled to Connecticut in 2004 with intent to receive treatment only, and packed for a short stay. Her husband and two of her children were in New Jersey, and another child was in Delaware. While she was in Connecticut, her husband's niece filed for conservatorship and a permanent conservator was appointed. Connecticut's probate court thereafter declined to allow her to return to New Jersey. In 2007, when Trambarulo was under hospice care, Connecticut's appellate court found Trambarulo had no intent to establish domicile in Connecticut and ordered that she be allowed to leave and that arrangements be made to transfer the guardianship to an appropriate individual or entity in New Jersey. *Trambarulo v. Whitaker*, 2007 WL 3038792 (2007).

Striking another blow against granny snatching or similar behavior as a means of obtaining or avoiding guardianship jurisdiction, Section 207(a) of the UAGPPJA enables a court to refuse to exercise jurisdiction if that jurisdiction was made possible through "unjustifiable conduct." The Act does not define "unjustifiable conduct," but the commentary provides "unauthorized removal of an adult to another state" as a "common example."

Section 207(b) authorizes a court that obtained jurisdiction as a result of unjustifiable conduct by a party to assess

against that party—not the respondent’s estate—“necessary and reasonable expenses, including attorney’s fees, investigative fees, court costs, communication expenses, witness fees and expenses, and travel expenses.”

The UAGPPJA would have led to a different outcome in this case. New Jersey would have been a significant connection state. The Connecticut court could have declined jurisdiction because New Jersey was a more appropriate forum and because of the unjustifiable conduct of the niece. Thus, Trambarulo would not have been trapped in Connecticut for an extended period until shortly before her death.

#3. The UAGPPJA Requires a Court to Consider Elder Abuse When Determining the Appropriate Forum

Section 206 of the UAGPPJA lists factors that a court must consider in determining whether it is an appropriate forum to hear a guardianship or protective proceeding. One of those factors is “whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation.”

#4. The UAGPPJA Facilitates Monitoring of Guardianships

Section 206 also requires a court to consider its own role in detecting and preventing elder abuse. In assessing whether it is an appropriate forum, the court must appraise “if an appointment were made, the court’s ability to monitor the conduct of the guardian or conservator.” Monitoring is critical to help detect and stop elder abuse.

#5. The UAGPPJA Could Heighten a Non-Home State Court’s Awareness of Abuse

Section 208 of the UAGPPJA provides that if a petition for a guardianship or protective proceeding is brought in a state that was not the respondent’s home state on the date of the petition, then notice of the petition “must be given to those persons who would be entitled to notice of the petition if a proceeding were brought in the respondent’s home state” in the manner required by the state hearing the petition. This requirement helps ensure that the court obtains and considers evidence of granny snatching, other unjustifiable con-

duct, or elder abuse from persons in the respondent’s home state.

#6. The UAGPPJA Facilitates Cross-border Court Communications

Section 104 of the UAGPPJA allows courts in different states to communicate with each other regarding a guardianship or protective proceeding. Through such communications, courts can learn from courts in other states about allegations or evidence of abusive conduct by potential guardians or other persons interested in the outcome of the guardianship proceeding.

#7. The UAGPPJA Enhances a Court’s Ability to Learn About Relevant Criminal Activity in Another State

Section 105 governs cooperation between courts in different states. That section authorizes a court hearing the guardianship proceeding to ask a court in another state to “order any appropriate investigation of a person involved in a proceeding” and to “issue an order authorizing the release of medical, financial, criminal, or other relevant information in that state.” As a result, a court may be able to obtain relevant information about an interested party’s background, including criminal history, before making critical decisions about the guardianship.

#8. The UAGPPJA Establishes Transfer Procedures That Could Remove Individuals From Abusive Situations

Section 301 creates procedures for a guardian to transfer a guardianship or conservatorship from one state to another. This section requires that the guardian or conservator seeking transfer must notify “the persons that would be entitled to notice of a provision ... for the appointment of a guardian or conservator.” Section 301 also requires the court hearing the petition to consider whether “plans for care and services for the incapacitated person in the other state are reasonable and sufficient” and whether “adequate arrangements will be made for management of the protected person’s property.” These transfer procedures expedite the removal of an incapacitated person from a state in which he or she is experiencing abuse, neglect, or exploitation. They also prevent legal limbo situations in which an incapacitated person is

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vulnerable to abuse because of difficulties transferring the guardianship or conservatorship from one state to another.

#9. The UAGPPJA Establishes Registration Procedures That Aid in Notification and Monitoring of Abuse

Ninety-year-old Margaret Enos lived in Florida, where a private non-profit agency was appointed her guardian. Without authority or notice, her daughter took her to Massachusetts, where Enos had no other family or friends, and placed her in a nursing home. Her daughter claimed that the agency had neglected Enos. The agency, with Florida court order, sought return of Enos to Florida. The daughter filed for guardianship in Massachusetts. The Massachusetts court ordered surrender of Enos to the agency for return to Florida and dismissed the daughter's petition. The daughter appealed, contending that Florida guardianship was not entitled to recognition in Massachusetts. The Appellate court affirmed, recognized Florida guardianship and stated that Florida had jurisdiction. The agency spent Enos's funds for the Massachusetts litigation. *In Re Guardianship of Margaret Enos*, 670 N.E. 2d 967 (1996).

Sections 401 and 402 of the UAGPPJA establish procedures under which a guardian or conservator may register the guardianship or conservatorship order in another state to seek authority to act on the incapacitated person's behalf in that state. The Act requires that the guardian or conservator notify the court that appointed him or her of the intent to register in another state. A court receiving such notice would, under Sections 104 and 105, have the opportunity to question the rationale for the registration and to communicate and coordinate with the court in the other state. These procedures enable an appointing court that is concerned about elder abuse by the guardian or conservator to share that information with the other court and possibly prevent an abusive situation in the other state.

If the UAGPPJA had been in effect at the time of the *Enos* case, the Florida agency could have registered and sought recognition of its authority in Massachusetts. The agency would have had to notify the Florida court of its intent to register the guardianship in the other state, which could have triggered the Florida court to investigate the allegations of neglect by the agency and the daughter's unauthorized removal of her mother to Massachusetts.

Conclusion

The UAGPPJA was drafted to fix the three jurisdictional challenges—jurisdiction, recognition, and transfer—that are often faced by individuals and courts in multi-state guardianship cases. Fixing these problems through widespread state enactment of the Act is critical because those challenges can be financially and emotionally costly to the persons involved in multi-state litigation, as well as expensive to the courts hearing the cases. Moreover, several of the UAGPPJA provisions could help courts take action to detect situations where elder abuse is occurring or may be likely to occur—and then prevent or stop the problem. Courts could communicate and coordinate with courts in other states to learn about relevant evidence, abuse, or criminal behavior by parties involved in the case; ensure that interested persons in other states have the opportunity to provide relevant information about abuse or contest the proceeding; decline to exercise jurisdiction over a case because the respondent is in the state due to granny snatching or other unjustifiable conduct; consider evidence of elder abuse and the court's ability to monitor a guardianship when determining whether it should exercise jurisdiction; and transfer guardianship to another state in an orderly and timely fashion to protect an older person from an abusive situation or ensure protection is provided.

This article was written for the ABA Commission on Law and Aging's Joint Campaign for Uniform Guardianship Jurisdiction, with funding from the ABA Section of Real Property, Trust and Estate Law; the American College of Trust and Estate Counsel Foundation; and the Uniform Law Foundation.

Elder Abuse Resources Online

The ABA Commission on Law and Aging is continually expanding its catalog of online resources for professionals working in fields related to elder abuse, including the latest information on:

- the Elder Justice Act;
- elder abuse fatality review teams;
- durable power of attorney abuse;
- neglect; and
- state-by-state analysis of laws related to elder abuse (including APS laws, institutional abuse laws, and long-term care ombudsman laws).

Visit the ABA Commission's elder abuse Web page at: <http://www.abanet.org/aging/elderabuse.shtml>

Guardianship Resources

The ABA Commission on Law and Aging has added several new resources to its Guardianship Jurisdiction Web page. These resources include:

- (1) A one-hour, archived Webcast titled “Why States Should Enact the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act” (originally presented on February 5, 2009). Topics covered in the Webcast include an introduction to guardianship and the need for a uniform law; three key problems of interstate guardianship and how the Act addresses them; how the Act could help reduce elder abuse; and advocating for state enactment.
- (2) The article, published in this issue, “Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act”;
- (3) Three charts on “Reported Cases on Multi-state Guardianship Jurisdiction Issues Supporting Need for the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act”; and
- (4) Three charts on “Multi-State Guardianship Jurisdiction Stories Supporting Need for the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.”

Each set of charts provides the same information but is sorted in three ways—by issue, first state involved, and second state involved—for ease of use. If you only want to see the cases and stories for your state, you will want to look at the charts as sorted by first state involved and second state involved. The case charts also indicate in which state the court case was heard.

You can access these new resources and other information about the Commission’s Joint Campaign for Uniform Guardianship Jurisdiction on the ABA Commission’s Guardianship Jurisdiction Web page at <http://www.abanet.org/aging/guardianshipjurisdiction/home.html>

—Lori A. Stiegel, Senior Attorney
ABA Commission on Law and Aging

Inside the ABA/Commission on Law and Aging Policy Recommendations

Two policy recommendations submitted by the Commission on Law and Aging were adopted by the ABA House of Delegates at the February 2009 midyear meeting. The recommendations concerned guardianship and nursing home arbitration.

The recommendation regarding guardianship

[e]ncourages the federal government to provide funding and support for training, research, exchange of information on practices, consistent collection of data, and development of state, local, and territorial standards regarding adult guardianship.

The recommendation was adopted as ABA policy with no changes or opposition. Co-sponsors included seven other ABA entities, including the Standing Committee on Legal Aid and Indigent Defendants; Commission on Mental and Physical Disability Law; Section on Real Property, Trust & Estate Law; Section of Science & Technology; Section on Government and Public Sector Lawyers; Section of Individual Rights & Responsibilities; and the Young Lawyers Division.

The Nursing Home Arbitration recommendation also had seven ABA entity co-sponsors, including the Commission on Mental and Physical Disability Law; Section of Dispute Resolution; Administrative Law Section; Section of Real Property, Trust and Estate Law; Tort Trial and Insurance Practice; Senior Lawyers Division; and Young Lawyers Division.

While the policy had one individual in opposition, there was no entity opposition. The recommendation

[o]pposes the use of mandatory, binding, pre-dispute arbitration agreements between a long-term care facility and a resident of such facility or person acting on behalf of such resident, and opposes legislation and regulations that would authorize, encourage, or enforce such agreements.

—Jamie Philpotts

Correction: The article by Angela Gandy entitled *Emergency Guardianship Statutes: An Analysis of Legislative Due Process Reforms Since Grant v. Johnson*, which was published in the December 2008 issue of *Bifocal*, stated that Missouri, North Carolina, and South Dakota have no emergency guardianship provisions. This was incorrect. For a complete chart of state emergency guardianship statutes updated through 2007, see www.abanet.org/aging/legislativeupdates/home.shtm.

Thanks to **Reginald Turnbull** for identifying the Missouri error!

Administration on Aging Recognizes Essential Role of Legal Assistance Programs in Helping Seniors Keep Their Homes

By Omar Valverde

U.S. Administration on Aging (AoA) programs and services funded under the Older Americans Act are designed to empower older persons to remain independent, healthy, and safe within their homes and communities for as long as possible.

Few threats to independence and financial security are more serious than the loss of one's home due to foreclosure. Sadly, senior citizens are being disproportionately impacted by the foreclosure crisis, according to a study released last year by the AARP Public Policy Group. The study revealed that, during the six month period ending in December 2007, more than 684,000 older adults (aged 50 and over) were either in foreclosure or were delinquent in mortgage payments. That's more than a quarter of all foreclosures or delinquencies (28.1 percent). In addition, the study indicates that older adults who hold sub-prime first mortgages are 17 times more likely to be in foreclosure than are older holders of prime loans (see full text of the report at: http://assets.aarp.org/rgcenter/econ/i9_mortgage.pdf).

Due to the rapid influx of cases requiring legal interventions related to the income, health, and housing of seniors, it is imperative that federal resources are maximized to the greatest extent possible. Federal grant programs like AoA's Model Approaches to Statewide Legal Assistance Systems are helping to create well-integrated and cost-effective legal service delivery systems that target limited legal resources to seniors most in need. Thirteen states are evolving service delivery models in which state units on aging, senior legal helplines, pro-bono attorney services, and aging services providers are working in close tandem with Older Americans Act Title III-B legal providers to enhance access to priority legal cases impacting seniors, including issues related to foreclosure avoidance.

In the face of the foreclosure crisis, legal services providers from across the country (including legal aid offices, Title III-B providers, legal helplines, and volunteer attorneys) are drawing upon a broad range of federal, state, and local resources to help protect the homes of older Americans.

These providers are helping seniors who have signed predatory mortgages with adjustable interest rates that are impossible to sustain. They also are helping seniors who have suffered the outrage of getting hit a second time by so-called "foreclosure rescue" scams (to learn more about "foreclosure rescue" scams, please see the Consumer Advisory 2008-1 released by the Office of the Comptroller of the Currency, U.S. Department of Treasury).

One example of a successful foreclosure prevention effort comes from California's Senior Legal Hotline (SLH) (<http://www.seniorlegalhotline.org/>). The SLH foreclosure intervention team helps seniors ensnared in predatory loans or who are facing post-foreclosure evictions. In many instances, SLH advocates have successfully negotiated favorable loan modifications or other settlements that allow seniors to keep their homes. In one notable instance, SLH volunteer Ralph Livingstone (a 70-year-old lawyer and specialist in foreclosure law) helped an 89-year-old widow keep her Rio Dell, California, home of 30 years, even after it was foreclosed on and sold by the lender. Mr. Livingstone and others successfully negotiated with the lender to reverse the sale. In 2008, SLH volunteer Ralph Livingstone was honored by the National Association of Area Agencies on Aging and MetLife with their 2008 Older Volunteers Enrich America Award for his outstanding frontline advocacy efforts.

In Florida, the state bar also has taken aggressive action to deal with the foreclosure crisis. The Florida Bar, the Florida Bar Foundation, and Florida Legal Services have started a project called Florida Attorneys Saving Homes. The project is a collaborative effort designed to provide pro bono legal assistance to homeowners who are unable to make mortgage payments. The goal of the project is to create relationships in which the lenders and homeowners can restructure loans that allow the homeowner to remain in the home and avoid foreclosure. Such negotiated resolutions create a beneficial situation for all involved. The Florida project includes a hotline that seniors can call and be assessed for assistance.

Programs like Atlanta Legal Aid Society's Home Defense Program and others throughout the country are using innovative strategies to save the homes of seniors from imminent foreclosure. In one case, reported by Atlanta Legal Aid,

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a senior citizen had entered into a balloon-payment mortgage that consumed 70 percent of her social security and retirement pension income. The senior defaulted on the mortgage shortly after the loan closing. After aggressive negotiations on the senior's behalf by legal aid attorneys, the mortgage company agreed to cancel a pending foreclosure sale and to accept a substantially reduced payoff of the mortgage using the proceeds of a reverse mortgage. The use of proceeds from reverse mortgages to satisfy loan repayments is becoming a well-recognized innovative tactic to save the homes of seniors from foreclosure.

It is imperative that AoA and its national partners continue to seek innovative and effective ways to support state and local efforts that maintain seniors in their homes and communities for as long as possible.

Foreclosure issues are often so complex that sometimes even the experts need help. The Administration on Aging funds the National Legal Resource Center (NLRC), designed to provide professionals and advocates the support they need to take on the most challenging and complicated legal issues. Staff attorneys at the National Consumer Law Center, a partner under the NLRC, provide advice, case consultation, or in-depth legal assistance to attorneys defending homeowners against foreclosure. Staff will assist attorneys in reviewing loan documents for violations of state or federal law.

In addition, sources of national funding directed specifically at battling foreclosures also exist to address critically stretched local resources. One example is the Center for Responsible Lending, which has responded to the foreclosure crisis by forming the Institute for Foreclosure Legal Assistance (IFLA). The IFLA awards grants to support direct legal assistance to borrowers in ten or more states to fight foreclosure, predatory lenders, and abusive loan services. It does this primarily by providing money to non-profit legal-aid groups and law school clinics. To learn more about this program, see the Institute for Foreclosure Legal Assistance website at <http://www.foreclosurelegalassistance.org/about/>.

The legal assistance programs highlighted in this article represent an impressive cross section of extraordinary efforts by dedicated legal providers in an environment of limited resources. However, it will become increasingly difficult to sustain these efforts to the degree necessary in the face of escalating demand for legal services brought on by current economic conditions. It is therefore imperative that federally-funded legal assistance programs are targeted with precision to those most in need of assistance on high-impact cases, such as foreclosure, healthcare, and income security. It is also imperative that federal agencies like AoA and its national partners continue to seek innovative and effective ways to support state and local efforts that maintain seniors in their homes and communities for as long as possible. Legal assistance and elder rights programs funded by the Older Americans Act and other federal, state, and local resources continue to demonstrate indispensable value in protecting seniors facing the most extreme challenges to their independence and well being.

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Using the Fair Housing Act to Defend Against Discriminatory Discharges and Transfers of Assisted Living and Other Long-Term Care Facility Residents

By Holly Robinson

The Fair Housing Act (FHA) protects the housing rights of elders with disabilities, including those who reside in assisted living and other long-term care facilities. Too often, however, the FHA is overlooked when a resident of an assisted living or other long-term care facility is facing eviction, discharge, or other discriminatory acts. The FHA is a powerful tool to address these actions, and should be one of the first places lawyers and advocates look in their efforts to uphold the housing rights of their clients.

The Fair Housing Act (Abridged)

The FHA was enacted as part of Title VIII of the Civil Rights Act of 1968 and targeted housing discrimination for reasons of race, color, religion, or national origin. 42 U.S.C. §§3601-3619. In 1974, Congress made it illegal to discriminate for reasons of gender. And in 1988, 20 years after the original act was passed, the Fair Housing Amendments Act (FHAA) outlawed discrimination for reasons of familial status and disability. The FHA created a powerful mechanism by which housing providers could be held liable for unlawful discrimination in housing sales and rentals, and classified a housing provider's refusal to grant a request for a reasonable accommodation or modification to a person with a disability as discrimination. Fast forward 20 years and far too few lawyers and advocates are aware how the disability provisions of the FHA can help them overcome discriminatory screening, occupancy, transfer, and eviction policies of residential care, assisted living, and nursing home providers.

The FHA applies to almost all housing activities and transactions, whether in the public or the private sector, to the

provision of services connected with a dwelling, and to zoning, land use, and health and safety regulations. 42 U.S.C. §3601, 24 C.F.R. pt. 100, *et seq.* The FHA covers dwellings used or intended for use as a residence. The U.S. Department of Justice, the U.S. Department of Housing and Urban Development, as well as the courts, have routinely recognized that long-term care facilities—including retirement communities, assisted living facilities, nursing homes, and continuing care retirement communities—are covered dwellings under the FHA.¹

The FHA prohibits the following actions based on disability: discriminating in the sale or rental or otherwise making unavailable or denying a dwelling; setting different terms, conditions, or privileges for the sale or rental of a dwelling; refusing to make reasonable accommodations in rules, policies, practices, or services if necessary for the person with a disability to afford the person equal opportunity to use and enjoy the dwelling; and refusing to let tenants make reasonable modifications to their dwelling or common use areas, at tenants' expense (except in publicly-financed housing), if necessary to afford the tenant full enjoyment of the premises. 42 U.S.C. 3604 (f).

Disability and Aging

Age itself is not considered a disability, but aging increases the chances of developing a disability. According to the 2006 census, 41 percent of the population 65 years and over has a disability, while 12.3 percent of the population age 16 to 64 has a disability. By 2030, there will be 70.3 million Americans who are 65 and older—nearly two times the 34.8 million alive today.

The FHA defines disability as a physical or mental impairment that substantially limits one or more major life activities (seeing, hearing, walking, breathing, caring for oneself, learning, thinking, reading, and interacting with others), has a history of such an impairment, is perceived as someone with such an impairment, or is associated with someone who has such an impairment. 42 U.S.C. §3602(h). Covered conditions include physical or mental disabilities, hearing, mobility and visual impairments, chronic alcoholism, chronic mental illness, obesity, and dementia.

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A person with a disability under the act may be a person with an age-related disability or a person who does not self-identify as having a disability. Generally, residents of assisted living and other long-term care facilities are protected under the act.

Advocating for Facility Residents Using the Fair Housing Act

Residents of long-term care facilities routinely experience certain types of discriminatory housing practices that are prohibited under the FHA: refusing to admit or evicting or discharging a person because of the person's disability, imposing discriminatory terms and conditions, asking applicants questions about their disability, and failing to provide reasonable accommodations or modifications. 42 U.S.C. §3604(f).

Let's use "Betty" as our first example. Betty lives in her own apartment in an assisted living facility. Betty, 75 years old, is getting more frail and her dementia symptoms are increasing. She is becoming more verbally combative and has lately been especially nasty to the housekeeping staff. She receives an eviction notice that states she must leave the premises in seven days, which is the facility's policy, and that she will be charged rent until the unit is re-rented. Betty, of course, is distraught because she likes her apartment of 14 years, doesn't want to leave her home, and has no place to move.

Through the Fair Housing looking glass, it appears that Betty may be experiencing unlawful disability discrimination. There are some steps she can take to protect her housing rights. The FHA prohibits denial of a dwelling or refusal to rent or sell a dwelling to a person based on her or his disability. The Act also makes failure to provide a reasonable accommodation to a person with a disability a prohibited discrimination.

When a person with a disability such as Alzheimer's is threatened with eviction and then requests a reasonable accommodation under the Act in order to stay, the original eviction may be actionable under the FHA and the failure to provide the requested reasonable accommodation may also be actionable.

Advocates have begun to focus on the reasonable accommodation aspects of the FHA as a tool to address disability discrimination.

While the original eviction may be a form of direct disability discrimination, there are few ways to redress it other than filing a complaint with HUD or filing a lawsuit. However, when a resident files a reasonable accommodation request, it also opens the door to possible negotiations which may result in the person being able to stay in the facility,

which is usually the desired remedy. A lawyer or advocate could assist Betty by making a number of reasonable accommodation requests "in rules, policies, practices, or services, if necessary, for the person with a disability to afford the person equal opportunity to use and enjoy the dwelling." The goal is to create a reasonable accommodation plan that eliminates or lessens the lease or contract violations leading to the eviction. The first request may be an extension of the seven-day notice period prior to eviction in order to develop a reasonable accommodation plan to address Betty's behaviors. The second reasonable accommodation request may be to determine if the housekeeping staff could enter Betty's apartment to do their work when she is not there or use different housekeepers if there are some to whom she reacts more favorably. The third reasonable accommodation request may be to develop a plan for Betty that addresses her behaviors and may include a medical assessment, staff training on working with people with dementia, medication management, and behavioral interventions. Accommodation requests must be reasonable,² and a provider's failure to make a reasonable accommodation is another form of disability discrimination under the act.

A request for a reasonable accommodation is a powerful advocacy and negotiation tool that can be used to defend successfully against an illegal discharge or transfer. A request for a reasonable accommodation can be given verbally or in writing. It's almost never too late to request an accommodation and there are no special requirements or procedures for making one. The request only has to make clear that the resident is seeking an exception, change, modification, or adjustment to a rule, policy, practice, or service as an accommodation for a disability. Ideally, a request for a reasonable accommodation leads to an interactive process in which the facility and the resident discuss the resident's disability related need for the requested accommodation and possible accommodations that do not pose an undue financial and administrative burden for the facility. Reasonable accommodation requests are fact-driven and can be as creative and innovative as necessary to maintain a resident's home.

Now, let's move Betty to a facility that primarily serves residents with Alzheimer's and other types of dementia. The facility wants to evict her because her symptoms have increased. All of the responses described above would apply here, including a discriminatory eviction due to her disability. One additional request for accommodations could be made: that the facility change its expectations regarding the range of behaviors it expects from residents with dementia to include those manifested by Betty, especially if the facility has a special license to serve residents with dementia, or markets and advertises itself as an Alzheimer's facility.

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“Sara Jane,” another assisted living facility resident, is also at risk of being evicted. Sara Jane has multiple sclerosis and depression. Recently her physical condition has deteriorated significantly, greatly increasing her care needs, and increasing her depression. The facility is claiming it can no longer meet her needs. Looking through the Fair Housing looking glass, it is questionable whether this eviction is legal, but a reasonable accommodation request would also be effective in defending against the eviction. For Sara Jane, the reasonable accommodation plan may include a new assessment of her physical and mental condition, medical and psychological interventions, moving her to a different room that makes care provision easier or cheers her up, providing extra staff time, and permitting the family to hire additional aides for night hours. Again, the goal of the reasonable accommodation plan is to eliminate or lessen the reasons for the eviction through reasonable accommodations that will permit Sara Jane to stay. A reasonable accommodation plan is also a highly effective negotiation tool since a provider’s failure to make a reasonable accommodation constitutes discrimination under the act.

Prior to receiving her eviction notice, Sara Jane was informed that because she was using her motorized scooter more to get around the facility, she had to buy liability insurance. Maintaining liability insurance is not a requirement of living in the facility, and Sara Jane feels that she is being unfairly treated. Through the Fair Housing looking glass, it appears that Sara Jane is experiencing discrimination based on disability, that the facility is imposing “different terms, conditions, or privileges in rental property for individuals with disabilities” than for individuals without disabilities.

Conflicts Between the FHA and State Licensing Laws

It is possible that state licensing laws may violate federal fair housing laws, in which case, federal law would prevail. For example, for many years Oregon’s law was not “substantially equivalent” to HUD regulations, which meant that all housing discrimination claims based on federal fair housing laws were routed to the HUD regional office in Seattle. In March 2008, Oregon’s fair housing law came back into line with federal fair housing laws.³ This change means fair housing investigations can now be filed, investigated, and resolved in Oregon. These state laws can now be used to protect residents, as well. The U.S. Dept. of Housing and Urban

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Development contracts with the Oregon Bureau of Labor and Industries to investigate housing complaints.⁴

Evaluating whether state licensing laws are in conflict with the FHA is another way to use the Fair Housing looking glass on behalf of residents facing discriminatory discharges and transfers and other discriminatory housing practices.

Through the Fair Housing Looking Glass

Many residents of assisted living and long-term care facilities unknowingly experience disability discrimination and the failure of housing providers to make reasonable accommodations. Using state and federal fair housing laws to challenge involuntary discharges and transfers and other discriminatory housing practices will enable residents to retain their housing, even if housing providers prefer that residents move to a higher level of care. Using the Fair Housing looking glass may mean that a resident can truly choose to age in place.

Footnotes

1. See *HUD v. Strawberry Point*, 2003 WL 1311336 (HUD ALJ March 5, 2003), *U.S. v. Covenant Retirement Communities West, Inc.* Consent Order, Case No. 1:04-cv- 06732AWI-SMS, August 27, 2007).
2. The Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act, May 14, 2004, described as follows a request as “not reasonable – i.e., if it would impose an undue financial and administrative burden on the housing provider or it would fundamentally alter the nature of the provider’s operations.” www.usdoj.gov/crt/housing/jointstatement_ra.htm
3. Chapter 903 (2007 Oregon Laws), effective date, February 1, 2008; Chapter 36 (2008 Oregon Laws), effective date March 11, 2008.
4. www.oregon.gov/BOLI/TA/contact_us.shtml.

State Continuing Care Retirement Community Laws and the Fair Housing Act: Addressing Discrimination on the Basis of Disability

By Rachel Ney

Sally Herriot, a resident at Channing House, a continuing care retirement community (CCRC), received a notice that she was to be transferred from her independent living apartment to an assisted living unit.¹ Channing House made this unilateral decision to transfer Herriot, stating that she was “non-ambulatory” and that state law prohibits “non-ambulatory” persons from residing in independent living units at Channing House.² Herriot employed home health aids to assist her with daily activities, which allowed her to maintain her independence in her comfortable apartment, surrounded by family and visitors.³ The move to an assisted living unit would compromise her desire to “age in place in a comfortable and familiar setting”⁴ and remain active in the community.

Herriot requested that Channing House make a “reasonable accommodation”⁵ under the Fair Housing Act (FHA). She requested that she be allowed to continue to have her home health aids assist her so she could remain in her apartment. Despite the warning from Herriot’s physician that moving her to an assisted living unit would compromise her physical and mental health,⁶ Channing House denied Herriot’s request for a reasonable accommodation. Herriot decided to pursue legal action against Channing House and made a claim pursuant to the Fair Housing Act that she had been discriminated on the basis of disability.

The FHA is intended to help residents and tenants with disabilities age in place by prohibiting discrimination based on disability and requiring housing providers to make reasonable accommodations and modifications like that requested by Herriot. But many residents and tenants are unaware of their FHA rights and many providers are unaware of the provisions of the FHA and their obligation to comply. Unfortunately, as illustrated in *Herriot v. Channing House*, this has led to some residents and tenants being denied their fair housing rights.

Rachel Ney was the ABA Commission on Law and Aging’s 2008 Nancy Coleman Summer Intern. She is currently a third-year law student at New York Law School. Ms. Ney has been committed to the field of elder law throughout her law school career and plans to pursue a profession advocating for the elderly after graduation.

This paper advocates including Fair Housing language in state CCRC statutes and administrative regulations to prevent residents from facing wrongful discrimination based on disability and being denied the right to age in place. This inclusion will enable residents to learn about their fair housing rights. Furthermore, incorporating Fair Housing language in the CCRC laws may persuade CCRC providers to comply with the FHA and dissuade them from drafting contract provisions that may directly conflict with the FHA.

Continuing Care Retirement Communities

The American Association of Homes and Services for the Aging defines a continuing care retirement community (CCRC) as an organization that provides individuals with a combination of housing options, accommodations, and health care services.⁷ Continuing care retirement communities have separate housing units for individuals who “live independently,” for those who need assisted living, and for those who need skilled nursing care, located on one campus setting.⁸

Continuing care retirement communities were first established in the early 1900s and became more prevalent in the 1960s.⁹ Most came into existence after World War II and were formed by churches, like Masonic Lodges, to care for their aging population.¹⁰ In the last couple of decades, most CCRCs have slowly evolved from retirement homes.¹¹ Individuals sign a “life care” contract with a CCRC provider,¹² who may transfer them, according to the terms of the contract, from independent living to assisted living and then to a nursing facility depending on the level of care they need.¹³ Thus, residents are provided with a “lifetime continuum of care.” Continuing care retirement communities are expensive; entry fees range from \$200,000 to \$400,000, with some monthly payments starting at \$200 up to \$2,500.¹⁴

Currently, 38 states have statutes or administrative codes regulating CCRCs.¹⁵ Most of the regulations are insurance regulations that were enacted due to financial solvency concerns.¹⁶ As such, most of the state laws address financial regulations and licensing procedures; not one addresses residents’ fair housing rights.

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The Fair Housing Act

In 1968, Congress passed the FHA to remedy discrimination in housing.¹⁷ In 1988, the FHA was extended to cover persons with disabilities.¹⁸ The FHA defines seven prohibited bases for discrimination: race, color, religion, national origin, sex, disability and familial status.¹⁹ The FHA defines disability as a physical or mental impairment which substantially limits one or more of such person's major life activities,²⁰ having a record of having such impairment, or be regarded as having such impairment.²¹ This does not include the illegal use of, or addiction to controlled substances.²² While age is not a disability,²³ 41 percent of people over the age of 65 have a disability.²⁴

Discrimination Prohibited Under the FHA

Under the FHA, a housing provider may not discriminate against a tenant based on a disability.²⁵ First, the FHA prohibits discrimination in the sale or rental, or to otherwise make unavailable, or deny a dwelling to any buyer or renter due to disability.²⁶ Second, the FHA makes it illegal to discriminate against a person with a disability in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling."²⁷ Finally, under the FHA, discrimination includes a housing provider's refusal to permit a person with a disability to make reasonable modifications of existing premises occupied or to be occupied²⁸ at the person's expense and a refusal to make reasonable accommodations in rules, policies, practices, or services at the expense of the provider.²⁹

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A reasonable accommodation is a change in rules, policy, practice, or service that would accommodate the resident with a disability.³⁰ For example, a reasonable accommodation would be a change in a building's no-pet policy to allow a resident who is blind to have a Seeing Eye dog.³¹ Another example of a reasonable accommodation would be a parking space close to a unit for a resident who is mobility impaired in a building that has a "parking on a first come basis" policy.³² Courts interpreting the Fair Housing language on reasonable accommodations have often ruled on side of the tenant. For example, the Colorado Court of Appeals, in *Weinstein v. Cherry Oaks Ret. Cmty.*, 917 P.2d 336 (Colo. Ct. App. 1996), held that a residential care facility's requirement that residents who use wheelchairs or walkers to transfer to ordinary chairs when taking meals in the dining room was discrimination on the basis of disability and violated the FHA.³³ The court required the facility to make a reasonable accommodation and change their existing policy.³⁴

A reasonable modification is a structural change to the premises, at the resident's expense, that may be necessary for full enjoyment of the premises.³⁵ An example of a reasonable modification would be installing grab bars in the bathroom³⁶ or modifying the bathroom door to allow wheelchairs to pass thru.³⁷

"Dwellings"

A "dwelling" under the FHA is any "building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families...."³⁸

The FHA has been successfully applied to CCRCs in numerous cases. In *U.S. v. Country Manor Apts.*, an administrative law judge found that a CCRC's policy mandating residents who use electric wheelchairs to purchase liability insurance was discrimination in the terms and conditions,³⁹ thereby violating the FHA. The CCRC provider was unable to overcome the discriminatory policy despite their claim that the policy was for the health and safety of other residents, as the policy was not narrowly tailored⁴⁰ and there was no empirical evidence that the plaintiff's use of the wheelchair posed a substantial risk.⁴¹ The CCRC was enjoined from reinstating the policy and the ALJ imposed a civil penalty.⁴² In *Country Manor Apts.*, the court stated that when a policy discriminates against persons with disabilities, it is facially discriminatory; thus the provider must narrowly tailor the policy by articulating a legitimate justification for their policy by establishing that there is a compelling business necessity for the policy and that they have used the "least restrictive means" to achieve that necessity.⁴³ The "health and safety" reason cited by the provider in *Country Manor Apts.* failed this test because first, there could have been other

actions taken to remedy the problem; second, the respondents had not established an empirical basis to conclude that the motorized wheelchairs posed a “health and safety” risk; and third, the implementation of the policy without supporting data amounted to improper stereotyping, which has been rejected in several fair housing cases.⁴⁴

In *Bell v. Bishop Gadsden*, a CCRC provider attempted to unilaterally transfer a resident from independent living to a nursing facility because the resident no longer met the independent living requirements of her rental agreement.⁴⁵ The case was resolved by consent decree; the CCRC provider agreed to abandon their “independent living requirement” and pay the resident \$55,000.⁴⁶

Interface Between CCRC Laws and the FHA

Contract Provisions

State CCRC laws give broad discretion to CCRC providers to establish contract requirements for residents to be accepted and to continue as residents in the facility.⁴⁷ Seventeen states have contract requirement provisions.⁴⁸ Each of these states requires the provider to describe in the contract the conditions upon which the provider may require the resident to relinquish their designated spot, the conditions to continue as a resident, and the effect of any changes in the resident’s health and financial conditions on residency.⁴⁹ These provisions sometimes permit a CCRC provider to include in their contract requirements that a resident must meet a certain level of health conditions to be accepted or continue as a resident.

Courts have found that CCRCs are prohibited under the FHA from requiring that a resident be capable of “independent living”⁵⁰ or be “healthy”⁵¹ to continue as a resident. In *Bell v. Bishop Gadsden Retirement Community*, a 2006 case resolved by consent decree, the CCRC facility, Bishop Gadsden, cited their contract requirement of “independent living” when attempting to transfer Blanche Bell. Bishop Gadsden Retirement Community is located in Charleston, South Carolina. South Carolina CCRC laws do not prohibit CCRCs from transferring a resident when incapable of “independent living.” Rather, the South Carolina law requires the CCRC provider to establish the conditions under which a resident’s living unit may be made available to another, and does not restrict the “conditions” the CCRC provider may include in their contract, or prohibit the provider from using terms in the contract that would facilitate discrimination and violate the FHA, such as an “independent living” requirement.

Rhode Island, the District of Columbia, Texas, and Arkansas have CCRC laws that address health or independent living requirements in CCRC contracts. Rhode Island’s

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law requires the CCRC facility to describe in the resident’s contract the physical and mental health conditions upon which the provider may require the resident to relinquish her space in the facility and to continue as a resident.⁵² This is a very broad provision and Rhode Island law does not restrict the “physical and mental conditions” the CCRC facility may include and that may facilitate discrimination on the basis of disability by a provider.

Under District of Columbia law, a CCRC provider must include in a disclosure statement conditions for acceptance, such as ability to move or communicate.⁵³ One’s ability to move and communicate may be symptomatic of a person’s disability, thus could be broad discrimination based on stereotyping. Pursuant to *Country Manor Apts.*, broad discrimination is prohibited, and conditions based on ability to move or communicate must show a legitimate interest for the discriminatory policy.⁵⁴ Furthermore, there must be empirical evidence that such status meets the legitimate interest and that there must be an absence of least restrictive alternatives.⁵⁵ None of these requirements are contained in the District of Columbia’s CCRC law.

Texas’s CCRC statute states that a CCRC contract is cancelled if the resident is precluded under the terms of the contract from occupying a living unit in the facility because of illness, injury, or incapacity.⁵⁶ The terms “illness, injury, or incapacity” are very broad and may include disability. The Texas statute does not require that the provider make reasonable accommodations and modifications. Nor does the statute prohibit discrimination on the basis of disability or require that the eviction be for the “health and safety” of the resident. It would appear that, under Texas CCRC law, a CCRC provider may cancel the contract if a resident is suffering from an illness indicative of a disability in violation of the FHA.

The Arkansas CCRC law requires a CCRC to include policy and procedures in their contracts for determining when a resident is incapable of “independent living” and requires a permanent move to a nursing facility.⁵⁷ Yet, the

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CCRC law does not mention any of the FHA rights and protections available to a resident. Under Arkansas state law, if a CCRC decides that a resident is incapable of “independent living,” they would be allowed to unilaterally move the resident to a nursing facility. As in Rhode Island, the District of Columbia, and Texas, it appears that the FHA and the Arkansas state law may conflict.

State CCRC Transfer and Eviction Provisions

State transfer provisions may also give CCRCs broad power to transfer or evict a resident due to disability status. Vermont, Maine, and California have transfer requirement provisions⁵⁸ that establish requirements for transfer and the circumstances under which it is appropriate for the provider to transfer a resident.

California’s statute states that a provider may transfer a resident when the resident is “non-ambulatory.”⁵⁹ However, CCRCs may not require automatic transfers out of “independent living” due to an increase in disability.⁶⁰ Conversely, pursuant to the FHA, CCRCs must make a reasonable accommodation or modification.⁶¹ Courts interpreting fair housing discrimination have continually struck down requirements that mandate a resident be ambulatory. In

Baggett v. Baird, 1997 WL 151544 (N.D. Ga. 1997), the U.S. District Court, N.D. Georgia, struck down a state rule allowing only ambulatory people in a personal care home, stating that the FHA must be given a broad and inclusive interpretation, that claims of facial discrimination warrant more exacting scrutiny, and that there was no evidence that non-ambulatory individuals had increased health needs and therefore required nursing home care.⁶² The personal care home in *Baggett* is similar to an assisted living facility, since it provides housing and supportive services. However, the court defined a personal care home as “any dwelling which undertakes through its ownership to arrange for housing, food, and one or more personal services.”⁶³ Since it appears that *Baggett*’s ruling would apply to CCRCs, the California provision may facilitate a provider to discriminate against a resident in a dwelling based on disability, and may be facially discriminatory⁶⁴ because it is not narrowly tailored.⁶⁵

The California statute goes into greater detail on transfer requirements and outlines procedures to take when a resident disputes a transfer decision.⁶⁶ Under California law, a provider must involve the resident in the counseling of a transfer decision.⁶⁷

The states give broad discretion to providers to establish transfer requirements. As a result, providers are allowed to make unilateral transfer decisions that do not include reasonable accommodations and modifications in the transfer plans. For example, a resident agreement used by a CCRC in Virginia states that if the facility determines that the resident cannot reasonably be cared for in the resident’s apartment,

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the provider may transfer the resident to a more appropriate level of care. The agreement also provides that the decision for permanent transfer will be made by the executive director upon the recommendation of an interdisciplinary team of professionals and consultation with the resident.⁶⁸ The agreement does not mention any recourse a resident may have with the facility's transfer decision, such as a right to appeal the transfer decision or request a reasonable accommodation. Nor does it require that the facility consider all reasonable alternatives. The facility has laid out the foundation for making a unilateral transfer decision that does not take into account fair housing rights.

State CCRC Laws and Fair Housing Language

Fair housing rights are invaluable to CCRC residents with disabilities; however, many residents are not aware of their FHA rights or that they may be experiencing discrimination based on disability. As previously mentioned, CCRCs are regulated by state law, and no state has incorporated Fair Housing language into its statutes and administrative regulations.

Of the 38 states regulating CCRCs, only Florida and California have "residents' rights sections."⁶⁹ These sections affirm that CCRC residents may not be deprived of any civil or legal rights, benefits, or privileges guaranteed by the law, by the state constitution, or by the U.S. Constitution.⁷⁰ Yet, fair housing rights are not explicitly mentioned in the statutes.

Maryland's CCRC transfer provisions state that residents' housing accommodations may be changed only to protect the health or safety of the resident or the general welfare of other residents.⁷¹ This language is similar to the provision in the FHA that allows denying tenancy only for the "health and safety of others."⁷² However, even though this is an added protection, it still leaves the decision in the hands of the provider, without addressing the additional requirements established by case law that require the housing provider to show a legitimate interest and demonstrate that there are no least restrictive alternatives.⁷³

Maine's CCRC statute has language most similar to FHA language. The statute requires providers to consider all reasonable alternatives when making transfer decisions.⁷⁴ The "reasonable alternatives" language is similar to the "reasonable accommodation and modification" language in the FHA. In Maine, the transfer decision must be in writing and detail why the resident's health care needs are not able to be met by the facility.⁷⁵ Other protections are in place such as the right of the resident to appeal the provider's determination.⁷⁶

Maine and Maryland's statutes contain limited FHA protections for residents without using the actual words of the FHA, despite the absence of language prohibiting discrimination based on disability and other Fair Housing language.

Conclusion

Age alone is not a disability, though the incidence of disability increases with age. An increase in the elderly population with disabilities may result in an increase in requests for accommodations to allow seniors to "age in place."

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Elderbar is a project of the ABA Commission's National Legal Assistance Support Center. It is a closed list; messages can only be posted and read by members.

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State CCRC Laws

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At the same time, the third most common allegation in housing discrimination complaints filed with U.S. Department of Housing and Urban Development is a landlord's failure to make a reasonable accommodation.⁷⁸

Continuing care retirement community laws are not adequately drafted to address fair housing rights and, as shown, may facilitate discrimination or conflict with the FHA. Residents of CCRCs would, more than likely, not be able to find the applicable fair housing rights in the state laws that prohibit a provider from drafting a discriminatory contract or imposing discriminatory "terms and conditions" in their contracts. Furthermore, a resident would not know that FHA rights, like the right not to be "discriminated against due to disability" or the right to request a "reasonable accommodation," apply.⁷⁹

Fair housing rights are invaluable tools for seniors to age in place. Only two states have residents' rights provisions. However, these states do not directly mention fair housing rights. Seventeen states have CCRC laws with provisions that regulate CCRC contracts. In Texas, Arkansas, and the District of Columbia, the contract provisions may conflict with the FHA because they may facilitate discrimination on the basis of disability. Furthermore, the California CCRC law that addresses transfer provisions may conflict with the FHA as it allows for broad discrimination on the basis of disability status.

Moreover, with the exception of Maine, none of the state CCRC provisions provide for reasonable accommodations and modifications. Finally, Maryland is the sole state to address discrimination in transfer provisions and allows only for the "health and safety" of the resident or other residents. However, the state law is missing Fair Housing language that would fully protect residents.

One remedy would be for states to adopt Fair Housing language in their CCRC laws to inform residents of their rights, educate providers that the law applies, and help residents avoid unlawful discrimination. Given the increase in the senior population with disabilities, it is likely that more CCRC residents will face unlawful discrimination in housing due to disability and be denied the right to lawfully "age in place."

Notes

1. Complaint, *Herriot v. Channing House*, C.A. No. 07-10385 (U.S. District Court, E.D. Mich. Jan. 24, 2007).
2. *Id.*
3. *Id.*
4. *Id.*

5. *Id.*
6. *Id.*
7. Nelson, Encyclopedia of Aging, Continuing Care Retirement Communities, <http://www.agis.com/Document/142/continuing-care-retirement-communities.aspx> (last visited June 24, 2008).
8. AARP, Continuing Care Retirement Communities (2008), www.aarp.org/families/housing_choices/other_options/a2004-02-26-retirementcomm (last visited July 8, 2008).
9. *Supra* n 7.
10. *Id.*
11. *Id.*
12. Helpguide.org, Continuing Care Retirement Communities, www.helpguide.org/elder/continuing_care_retirement_communities.htm (last visited July 8, 2008).
13. *Id.*
14. *Id.*
15. ALA. ADMIN. CODE R.560-X-25(2007), ARIZ. REV. STAT. §20-1801(2008), ARK. CODE ANN. § 23-93-101, CAL. HEALTH & SAFETY CODE §1770-1789(2008), COLO.REV.STAT. §10-16-413.5, CONN. GEN. STAT. §17B-520(2008), DEL. CODE ANN.TIT.18, § 4601(2008), D.C. CODE §44-151-.05(2008), D.C. MUN. REGS. TIT. 26, §8204 (2008), FLA. STAT. §651.011(2008), GA. CODE ANN. §33-45(YEAR), IDAHO CODE ANN. §26-3700(2008), IND. CODE ANN. §23-2-4-1(2008), § 26-37, IOWA CODE ANN. §523D.1(2008), KY. REV. STAT. ANN. §216 B. 330(2008), LA. REV. STAT. ANN. §51:36(2008), ME. REV. STAT. ANN. TIT.24, §73-6201(2008), MD. CODE ANN., [HUMAN SERVS.]§10-400(2008), MASS. GEN. LAWS ANN. CH. 93§76(2008), MICH. COMP. LAWS ANN. §333.20161(2008), MINN. STAT. ANN. § 80D (2008), N.H. REV. STAT. ANN. §420-D: 1 (2007), N.J. STAT. ANN. § 52:27D-330(2008), NM STAT. ANN. §24-17-1(2008), NY PUB. HEALTH LAW §4601(2008), N.C. GEN. STAT. §58-64-1(2008), OHIO REV. CODE ANN. §173.13(2008), OK STAT. ANN. TIT. 63 §1-1900(2008), OR REV. STAT. §10-101(2008), PA. CONS. STAT. ANN. §40:12-3201(2008), R.I. GEN. LAWS §23-59-1 (2008), S.C. CODE ANN. § 37-11-10(2008), S.C. CODE ANN. REGS. 28-600(2008), S.D. ADMIN. R. 67:46:05:55(2008), TEX. HEALTH&SAFETY CODE ANN. §4:246, VT. STAT. ANN. TIT.8,§4:151(2008), 21-040-015, VT. CODE R.99-3(2008), VA. CODE ANN. § 38.2-49(2008), WASH. REV. CODE ANN., WIS. STAT. ANN. §647.01(2008).
16. *Id.*
17. U.S. Dept. Housing and Urban Development, Fair Housing & Equal Opportunity, History of Fair Housing, <http://www.hud.gov/offices/fheo/aboutfheo/history.cfm>(last visited August 12, 2008).
18. *Id.*
19. 42 U.S.C. §3604 (a).
20. 42 U.S.C. §3602 (h).
21. 42 U.S.C. §3602 (h)(2).
22. 42 U.S.C. §3602 (h).
23. Michael Allen, *We Are Where We Live: Senior Housing Choice and the Fair Housing Act*, Human Rights Magazine, Spring 2004, Vol. 31 No. 2, www.abanet.org/irr/hr/spring04/seniors.html.
24. U.S. Census Bureau, 2006 American Community Survey, [BIFOCAL February 2009](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2006_EST_G00_S1801&-ds_name=ACS_2006_EST_G00_(last visited August 12, 2008).</div><div data-bbox=)

25. Sec.804 42 U.S.C. 3604 (f) 1.
26. 42 U.S.C.A. §3604(f)(1).
27. 42 U.S.C.A. §3604(f)(2).
28. 42 U.S.C. §3604 (f) (3) (A).
29. 42 U.S.C. §3604 (f) (3) (B).
30. 42 U.S.C. §3604 (3)(B).
31. 24 100.204 Example (1).
32. *Id.* at Example (2).
33. *Weinstein v. Cherry Oaks Ret. Cmty.*, 917 P.2d 336 (Colo. Ct. App. 1996).
34. 42 U.S.C. 3604 (3) (b).
35. 42 U.S.C. 3604 (3) (a).
36. *Supra* n. 31.
37. *Id.* at Example (2).
38. 42 U.S.C. 3602 (b).
39. *HUD v. Country Manor Apartments*, HUDALJ 05-98-1649-8, 2001 WL 1132715, at *11 (ALJ September 20, 2001).
40. *Id.* at 11.
41. *Id.* at 12.
42. *Id.*
43. *Id.* at 11 citing *Bangertner*, 46 F.3d at 1501; *U.S. v.; Badgett*, 976 F.2d 1179 (9th Cir. 1992).
44. *Id.* at 12, 13.
45. See *Consent Order United States v. Resurrection Retirement Cmty.*, No. 02-CV-7453(N.D. Ill. 2002), available at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm>.
46. See Complaint at 5, *Bell v. Episcopal Church Home*, No. 2:05-1953 (D.S.C. July 8, 2005)
47. Consent to Order of Dismissal with Prejudice at, *Estate of Bell v. Episcopal Church Home*, No. 2:05-1953-DCN-RSC (Jan. 4, 2006).
48. Ark. Code. Ann. 23-93-101.
49. *Supra*.
50. See *Cason v. Rochester Housing Authority*, 748 F. Supp. 1002, 1003 (W.D.N.Y. 1990); *Symons v. City of Sanibel* (M.D. Fla. 2003, settlement at 1 FH-FL repr., Report Bulletin 1.8 (Jan. 1 2004), (FHA based challenge to senior communities requirement that residents be “capable of independent living”, resulted in settlement enjoining community from inquiring about “independent living” or as a requirement for tenancy); *HUD v. Strawberry Point Lutheran*, HUDALJ No. 07-584-82003, 2003 WL 1311336 (ALJ March 5, 2003). (settlement in which retirement community agreed to cease all eviction efforts to a nursing home of resident who required assistance in transferring from bed to wheelchair).
51. See Consent Order *United States v. Resurrection Retirement Cmty.*, No. 02-CV-7454 (N.D. Ill. 2002) available at <http://www.usdoj.gov/crt/housing/documents/resurrectsettle.htm>. (resurrection retirement community ordered to refrain from imposing a term or condition of tenancy that applicants and tenants be healthy and able to live independently of any assistive services which are necessary because of such applicant’s or tenant’s disability requirement).
52. R.I. GEN. LAWS §23-59-6(4-5).
53. D.C. MUN.REGS. tit. 26, §8204 (2008).
54. *HUD v. Country Manor Apartments*, HUDALJ 05-98-1649-8(September 20, 2001), 11.
55. *Id.* at 12.
56. Tex. Stat. Ann §4:246.057.
57. Ark. Code Ann. §23-93-108 (23).
58. CAL. HEALTH & SAFETY CODE §17889(a)(10)(2008), ME. REV. STAT. ANN. tit.24, §73-6228(2008), VT. STAT. ANN. tit.8,§ 8005(d)(9)(2008).
59. Cal. Health and Safety Code §1787 (10)(A)(i).
60. U.S.C. §3604(f)(2).
61. 42 U.S.C. 3602 (C) (3) (a) (b).
62. *Baggett v. Baird*, 1997 WL 151544,5, (N.D. Ga. 1997), 14.
63. *Baggett v. Baird*, 1997 WL 151544,5, (N.D. Ga. 1997), 6.
64. 42 U.S.C.A. §3604(f)(1).
65. 42 U.S.C. §3604(9).
66. Cal. Health and Safety Code §1787(10)(B).
67. Cal. Health and Safety Code §1787 (10)(B)(i).
68. This is from a CCRC agreement obtained from a relative of a CCRC resident.
69. FL §651.083 (1), CA Health and Safety Code §1771.7.
70. CA Health and Safety Codes §1788 (10) (A) (i).
71. MD Ann Code 10-4444 (4).
72. 42 U.S.C. 3604 (9).
73. *Bangertner*, 46 F.3d at 1501; *U.S. v.; Badgett*, 976 F.2d 1179 (9th Cir. 1992); *HUD v. Country Manor Apartments*, HUDALJ 05-98-1649-8(September 20, 2001) at 11.
74. Me. Rev. Stat. Ann. §24-73-6201.
75. *Id.*
76. *Id.*
77. U.S. Census Bureau, 2006 American Community Survey, National 2006 Population, available at http://factfinder.census.gov/servlet/STTable?_bm=y&geo_id=01000US&-qr_name=ACS.
78. HUD Enforcement of the Fair Housing Act, FY 2007 Annual Report on Fair Housing, U.S. Department of Housing and Urban Development, 8.
79. 42 U.S.C. §3604 (f)(2).

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The ABA Commission is providing free bulk copies of the Spanish-language brochure **Health and Financial Decisions: Legal Tools for Preserving Your Personal Autonomy**. The brochure explains the range of legal tools—such as powers of attorney, trusts, health care advance directives, and living wills—that seniors can use to ensure that their personal, health care, and financial wishes are honored in the event they become sick, disabled, or incapacitated. It’s a valuable resource for seniors, as well as for lawyers who work with seniors, caregivers, and family members. Complimenting the brochure is a 19-minute Spanish-subtitled version of the video *In Your Hands: The Tools for Preserving Personal Autonomy*. E-mail the ABA Commission today at abaaging@abanet.org to request your supply.

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The Borchard Fellowship in Law & Aging affords the opportunity to pursue research and professional interests for one year for two law school graduates interested in, or perhaps already in the early stages of pursuing, an academic or professional career in law and aging.

During the fellowship period, the center's executive director and assistant director stand ready to assist each fellow with the further development of his or her knowledge, skills, and contacts.

A legal services or other non-profit organization involved in law and aging must supervise a fellow's activities and projects.

In addition to the fellow's planned activities and project (unless the fellow's project includes the provision of legal services), the fellow must also provide some pro bono direct legal services to older persons under appropriate supervision.

A fellow is expected to provide the center with monthly activities reports.

The fellowship is \$40,000 and is intended as a full-time position only. The fellow's sponsoring agency is responsible for providing employee benefits, workspace, administrative support, computer, telephone, e-mail access, and employer's FICA payment.

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- Writing and publication of state-specific, consumer-oriented handbooks on legal issues affecting older persons;
- Teaching elder law and related courses at law schools where fellows reside;

- Development of a non-profit senior law resource center providing direct legal services and public education;
- Development of an interdisciplinary elder law clinical program at a major public university law school;
- Development of a mediation component for a legal services program elder law hotline;
- Development of an interdisciplinary project for graduate students in law, medicine, and health advocacy to foster understanding and collaboration between professions;
- Development of training materials and statewide trainings for lawyers, judges and other court personnel, and social service providers on new comprehensive state guardianship laws;
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- Providing supervised pro bono legal representation of older clients;
- Analysis of Medicare policies;
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Application Process

Applicants must submit a completed application form, an explanation of the applicant's planned activities and projects, a current curriculum vitae, a law school transcript, a letter of support from the proposed supervisor, and two other letters of support.

Fellowship application information and form are available at www.borchardcenter.org. Completed applications should be sent to:

The Borchard Foundation Center on Law & Aging
Mary Jane Ciccarello, Assistant Director
335 4th Avenue
Salt Lake City, Utah 84103

Applications must be postmarked by April 15, 2009. Selections are made by June 1, 2009.

For further information, please contact: Mary Jane Ciccarello, 801-598-5810, mjcr@xmission.com.