



March 5, 2013

The Honorable Gayle S. Slossberg
The Honorable Catherine F. Abercrombie
Human Services Committee Co-Chairs
Legislative Office Building Room 2000
Hartford, CT 06106-1519

Re: Opposition to House Bill 6543

Senator Slossberg, Rep. Abercrombie, Sen. Coleman, Rep. Stallworth, Sen. Markley, Rep. Wood and other distinguished members of the Human Services Committee:

The Connecticut Chapter of the National Academy of Elder Law Attorneys (herein “CT NAELA”) is a non-profit organization comprising attorneys who advocate for our State’s elderly residents. We submit this written testimony in opposition of Raised Bill 6543 (herein also “the Bill”). Our Opposition focuses on the following two aspects of the Bill:

1. The proposed revision to Connecticut General Statute (herein “C.G.S.”) §19a-535 (b)(7) to, in violation of Federal Law, discharge a patient for the failure to pay to the nursing facility applied income; and
2. The proposed revision to C.G.S. §46b-37 (b)(3) to, in violation of Federal and State Law, impute spousal liability for nursing home expenses.

This letter will address the two issues raised above each one at a time.

I. THE PROPOSED REVISION TO C.G.S. §19a-535 (b)(7) VIOLATES FEDERAL LAW AND MUST BE OPPOSED.

The Bill would amend C.G.S. §19a-535 (b) permitting skilled nursing facilities to evict Medicaid residents who fail to pay the applied income for more than sixty days. The term “applied income” refers to a Medicaid resident’s monthly financial obligation to the nursing facility. The State pays the nursing facility a set monthly rate—referred to as the Medicaid rate—but reduces the payment by the amount of the resident’s monthly fixed income (e.g., social



security and pension), less certain deductions (e.g., monthly premiums for Medicare supplement policies).

1. HB6543 Violates Federal Law.

The Nursing Home Reform Act (“NHRA”) was enacted to protect the rights of nursing facility residents—including the most critical right to remain in the facility. Specifically, 42 U.S.C. §1396r(c)(2) prohibits a nursing facility from discharging a resident unless the discharge falls under one of one of six permitted reasons, one of which is the resident’s failure to pay the private cost of care. When nursing facility residents receive Medicaid benefits they are no longer required to pay the private cost of care; consequently, the nursing facility is prohibited from discharging under the NHRA when a resident fails to pay the applied income.

2. Nursing Facility Residents Often Lack Access to the Applied Income.

Many nursing facility residents suffer from cognitive impairments resulting in their inability to access, control, and pay the monthly applied income to the nursing facility. In these instances, residents often rely on family members to carry out this obligation. Additionally, in cases where the *family member* fails to pay the applied income, it is unjust to fashion a remedy permitting the nursing facility to discharge a resident who was unaware of the circumstances and unable to control them.

3. Nursing Homes Have Less Restrictive Remedies.

Nursing facilities may pursue remedies to collect the applied income without resorting to the severe step of discharge. For instance, in cases where the resident lacks capacity, the Social Security Administration can name the facility representative payee for the resident’s monthly benefits. In cases where there is fixed income from other sources—e.g., a monthly pension—the nursing facility can apply to the probate court for the appointment of a conservator, who would be required to pay the nursing home the monthly applied income. Both actions are less restrictive than discharging the resident and result in the desired outcome for the facility.

4. The Amount of the Applied Income Is Often Subject To Debate.

The Bill would permit nursing facilities to discharge for failure to pay the applied income—even if the resident paid slightly less than the amount determined by the Department of Social Services (“DSS”). DSS may incorrectly conclude, for example, that a resident’s monthly applied income is \$1,500.00, when the resident does not even receive that amount. This can occur in situations where DSS erroneously omits permitted deductions from the resident’s fixed income, or where a creditor is garnishing a portion of the monthly payment. In these cases, the residents would not even have the full amount to pay the nursing facility—due to no fault of their own—yet the facility could still discharge them. This is an inequitable and unjust remedy to address the nursing facility’s problem of collecting the correct applied income.

In cases involving a married couple, the resident's spouse may be entitled to a diversion of his or her spouse's income, thereby reducing the applied income; this, however, may require advocacy on the resident's behalf—sometimes involving an administrative appeal that could take many months—to require DSS to approve the amount. In the interim, the nursing facility could discharge under the Bill.

II. THE PROPOSED REVISION TO C.G.S §46b-37 (b)(3) VIOLATES FEDERAL AND STATE LAW AND MUST BE OPPOSED.

The Bill must be opposed since it would lead to the violation of existing law and would create more problems than the purported issue it seeks to address, non-payment.

1. The Bill Conflicts with Federal and State Law Prohibiting a Third Party Guarantor of Payment.

By imputing spousal liability to a resident's spouse, the Bill would permit a violation of Federal and State law by requiring a resident's spouse to become a third party guarantor of payment.

Both Federal and State Law states, "with respect to admissions practices, a nursing facility must not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility" 42 United States Code §1396r (c)(5)(A)(2013) and Conn. Gen. Stat. §19a-550(b)(26)(2013) and Conn. Gen. Stat. §19a-550(b)(27)(2013).

Recently, our Supreme Court, in Wilton Meadows vs. Coratolo, 299 Conn. 819 (2011), discussed the interplay between Federal and State law and a nursing facility's quest to impute statutory liability; in Coratolo, the Court declined the nursing facility's invitation to interpret a section of C.G.S. §46b-37 to impute statutory liability (the nursing facility's quest to impute statutory liability in Coratolo is no different than the Bill's quest to impute statutory liability).

[The] statutory prohibition against requiring a third party guarantor as a condition of admission is at odds with the plaintiff's interpretation of §46b-37 (b)(4), which would construe that statute to include nursing home expenses. Under the plaintiff's construction, §46b-37 (b)(4) would make the spouse of a nursing home resident "primarily liable by raising an implied promise from the [resident spouse's] use of goods in the support of the family"; (internal quotation marks omitted) Mayflower Sales Co. v. Tiffany, 124 Conn. 249, 251, 198 A. 749 (1938); and thus would be inconsistent with the mandate against conditioned liability set forth in §19a-550 (b). The plaintiff's construction in essence makes a spouse a third party guarantor as a matter of law. Id. at 830-831.

In a different section of its decision, the Court, briefly and concisely, rejected the Connecticut Association of Health Facilities' argument that modern day nursing facility care is similar to the care hospitals provided when the statute was enacted. The Court, in Footnote 3, stated the following, in pertinent part: "we note that our analysis of the relationship between §46b-37 (b) and General Statutes; see footnote 8 of this opinion; essentially forecloses the construction proffered by the amicus." Id. at 824.

2. Traditionally, Connecticut Has Narrowly Drafted Spousal Liability or Family Expense Statutes.

The Bill's opposition would be in keeping with Connecticut's tradition of narrowly drafting spousal liability or family expense statutes.

As the Court stated in Coratolo in Footnote 7:

The Connecticut General Assembly could have specifically enumerated nursing home expenses as a basis for liability [and] it [Connecticut General Assembly] could have drafted §46b-37 broadly to provide for spousal liability for family expenses generally. Id. at 829.

The General Assembly *could* have but *never* has revised the statute to include what is being proposed now. Now is not the time to impute spousal liability for nursing facility expenses since it would be in violation of Federal and State law and would be inconsistent with Connecticut's long-standing tradition of narrowly tailored family expense statutes.

3. Imputing Spousal Liability for the Payment of Nursing Facility Expenses Is Not Necessary.

The Bill is not necessary since the nursing facility, under the current status of the law, is well positioned to collect a purported debt owed.

The nursing facility controls the following aspects of a resident's admission into the facility, which significantly improves its ability to collect on purported debts owed:

- The nursing facility drafts the resident admission agreement;
- The nursing facility controls the process in which the resident is admitted;
- The nursing facility controls the admission interview;
- The nursing facility controls how the admission interview is conducted;
- The nursing facility controls where the admission interview is conducted;

- The nursing facility controls who is present for the admission interview;
- The nursing facility controls who facilitates or leads the admission interview; and
- The nursing facility controls what portion of the admission agreement and other documents are reviewed (oftentimes, an employee of the nursing facility has certain provisions of the admission agreement tabbed or highlighted to review for signature).¹

Clearly from the list above, the nursing facility has the scales tipped in its favor in order to secure itself by virtue of the admission interview and the various legal documents it requests a resident, and sometimes a family member or friend, so sign. A statutory right of recovery is not necessary since a nursing facility can presently, under the current state of the law, collect on a purported debt owed, including costs, interest, and attorney's fees.

Put most directly, instead of constantly looking for additional tools for recovery, maybe the nursing facility industry should focus on better admission practices and clearer communication with residents, family members, and friends.

4. From a Policy Perspective, Imputing Spousal Liability for Nursing Facility Expenses Promotes An Undesirable Result.

Our society provides various incentives, from taxes to other aspects of daily life, that promote and cultivate marriage. The Bill produces the absurd result of promoting married couples, some who have been married for decades, to get divorced simply to avoid the possibility of losing everything (just because one spouse is in a nursing facility does not mean the other spouse should end up in one because the family home has been taken by the nursing facility for a purported debt owed).

¹ Most disconcerting about the Bill is that irrespective of how poorly or negligently a nursing facility conducts the admission interview and admissions process, it would still have a right of recovery against the spouse merely by virtue of the spouse's uttering the words "I do" decades ago. In other words, a spouse would be statutorily liable irrespective of what the nursing facility does and irrespective of how it conducts itself.



III. CONCLUSION:

HB6543 contravenes Federal and State law on several levels and casts aside the most vulnerable sector of our population, elderly nursing facility residents, to address the nursing facility industry's financial hardships when the industry has far less restrictive remedies available. We respectfully request that the committee take no action on the Bill.

Respectfully Submitted,

The Connecticut Chapter of the National Academy of Elder Law Attorneys

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