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FIGHTING SENIOR POVERTY THROUGH LAW

Promise and Pitfalls in Assisted Living

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Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ+ individuals, and people with limited English proficiency.

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Flexibility, for Better or Worse

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Little Uniformity in Assisted Living

- Almost entirely creature of state law.
- Significant differences from
 - State to state, and
 - Facility to facility.
- Differences in
 - Service package.
 - Type of conditions that can be accommodated.
 - Presence of health care expertise.
 - Staff and staff training.
 - Ability to administer medication.

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Regulatory "Flexibility" Often Is Not in Consumers' Best Interests

- Providers often tout flexibility of assisted living model.
- Supposedly provider and resident negotiate care arrangements.

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Illinois Law Claims Reliance on Contract Model

- E.g., 210 Illinois Statutes 9/5:
 - "Assisted living ... should be based on a contract model designed to result in a negotiated agreement This model supports the principle that there is an acceptable balance between consumer protection and resident willingness to accept risk and that most consumers are competent to make their own judgments about the services they are obtaining."

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Negotiation Model Is Unrealistic and Improper

- Residents don't have enough bargaining power.
- Many aspects of facility care (e.g., staff composition) can't realistically be changed for individual residents.
- Public policy generally doesn't allow consumers to assume risk of inadequate care.
 - See Eric Carlson, Protecting Rights Or Waiving Them? Why "Negotiated Risk" Should Be Removed From Assisted Living Law, 10 J. Health Care L. & Pol'y 287 (2007).

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Broad Definitions of Assisted Living

- Definition may include facilities very different from each other.
 - E.g., "[H]ousing arrangement chosen voluntarily ... where varying levels and intensities of care and supervision, protective supervision, or personal care are provided, based upon their varying needs, as determined in order to be admitted and to remain in the facility."
 - Cal. Health & Safety Code § 1569.2(o)(1).

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Drawbacks to Broad Definition (1 of 2)

- Consumers will assume, wrongly, that status as assisted living facility guarantees more than it actually does.
- Facilities may attempt to evict unwanted residents by declining to provide service that resident needs.

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Drawbacks to Broad Definition (2 of 2)

- Quality of care regulations often are inadequate, since they are based on the lowest-common-denominator of facilities providing low levels of care.
- Reform initiatives tend to be stymied by arguments from low-level-of-care facilities that they don't need or can't afford proposed reform.

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Some States Require Disclosure to Support Consumers

- Texas, Washington, & others have state-developed forms.
 - 26 Tex. Admin. Code § 553.259(a)(3); Wash. Rev. Code § 18.20.300(2).
- More commonly, format of disclosure is within facility's discretion.

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Evaluating Disclosure As a Public Policy Strategy

- Disclosure doesn't change fact that facilities may be very different from each other.
- Many consumers won't/cannot look carefully at disclosure statements.
- Reliance on disclosure limits state's ability to support quality of care through licensing standards and enforcement actions.

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Some States Have Levels of Assisted Living

- E.g., Arkansas licenses assisted living at Level I and Level II.
- Level II facilities are allowed to house residents who need nursing facility level of care.
- Level II facilities must
 - Employ or contract with registered nurse, who does not have to be on-site.
 - Employ licensed practical nurses and certified nurse aides.
 - 20 Ark. Admin. Code 410 (Level I); 411 (Level II).

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Levels Better Allow for Health Care Expertise

- State law can require nurses (for example) for the higher level without worrying that nurses are unnecessary and/or too expensive for the lower level.

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Arguments Re: Social Model of Care

- Arguments against regulation often claim that particular requirement would be inconsistent with assisted living's "social model of care."
- But assisted living should be able to deliver BOTH adequate health care and humane quality of life.
- Today's assisted living facilities house many residents with significant health conditions; it's vital that these facilities have adequate health care expertise.

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Transfer/Discharge Rules Similarly Are Too Vague

- Transfer/discharge rules often have similar problems:
 - Too vague about necessary level of care, giving facility broad discretion to evict for supposedly being unable to meet resident's needs.
 - Allowing justifications for eviction to be created by facility's contract.
- Also, not providing for meaningful appeal opportunity.

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Transfer/Discharge Example (1 of 2)

- Eviction allowed if resident has "pattern ... of not abiding by agreements necessary for assisted living."
- Appeal option is "informal conference" with facility "to determine if a satisfactory resolution can be reached."
 - Haw. Admin. R. § 11-90-10(b).

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Transfer/Discharge Example (2 of 2)

- Eviction allowed if
 - "Failure of the resident to comply with general policies of the facility."
 - 22 Cal. Code Regs. § 87724(a)(3).
 - "Care is required that is inconsistent with the [facility's] program statement and beyond that which the facility is required to provide under the terms of the admission agreement and this chapter."
 - Wis. Adm. Code DHS § 83.31(4)(b)(3).

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Thinking About Intergenerational Models

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What Do People Want?

- Attractiveness of
 - Active residents involved with activities and community.
 - Interacting with children.
- E.g., Glencroft Generations in Phoenix, AZ
 - CCRC sharing space with
 - Preschool and
 - Residence for young adults aged out of foster care.

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Considering Integration with Community

- Federal Setting Rule prioritizes access to broader community (as we'll discuss).
- On other hand
 - Adults often seek communities with other older persons.
 - Fair Housing Act has exception for older persons, allowing discrimination against families with children.
 - 42 U.S.C. § 3607(b).

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Assisted Living and Medicaid

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No "Assisted Living" Benefit in Medicaid

- Medicaid has certain mandatory services:
 - E.g., Hospital services
 - Doctor services
 - Nursing facility care, etc.
- Also optional services:
 - E.g., Dental care
 - Home and community-based services, etc.
- "Assisted living" is not listed as either mandatory or optional

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So How Does Medicaid Cover Assisted Living?

- Generally classified as home and community-based services (HCBS), via programs that mostly are used to provide services at participant's home.
 - HCBS Waiver (aka Section 1915(c) waiver)
 - Medicaid Demonstration Waiver (Section 1115 waiver)
 - Community First Choice Option (Section 1915(k))

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Also Might Be State Plan Service

- Personal care services.
 - Since these are an optional service, rather than a waiver service, they must be made available without enrollment caps or waitlists.

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HCBS-Funded Residential Facilities

- HCBS regulations refer to these facilities as “provider-owned or controlled residential settings.”
- Includes but not limited to assisted living.
 - E.g., can include group homes and other facilities for persons with disabilities.

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HCBS Settings Rule

- Establishes minimum standards to ensure that Medicaid HCBS consumers live and receive services in settings that are truly non-institutional.
 - 42 C.F.R. § 441.301(c)(4)-(5).
- Became effective March 2023.

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"Assisted Living" Rights?

- Regulation sets standards for "provider-owned or controlled residential setting" aka residential facility, that accepts Medicaid HCBS reimbursement.
 - E.g., Eviction protections at least as good as landlord/tenant law.
 - Privacy, including lockable doors to living unit.
 - Choice of roommates.
 - Right to accept visitors.

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Rights and Wrongs

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Access to Community

- Wrong: When resident says she wants to go to public concert, facility does nothing more than providing city bus schedule.
- Law: Facility must support "full access" to the community, including engaging in community life.
- Depending on circumstances, facility may need to provide transportation and assistance.

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Schedules and Activities

- Wrong: No space for resident to do exercises.
- Law: Resident must "have the freedom and support to control their own schedules and activities."

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Staff Access to Room

- Wrong: Staff goes in and out of resident's room whenever they please.
- Law: Entrance doors to living room must be lockable, with only appropriate staff having keys.
- Even with keys, staff should knock before entering.

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Food

- Wrong: Facility serves breakfast, lunch and dinner, but no other food is available.
- Law: Resident must "have access to food at any time."

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Roommates

- Wrong: Facility tells resident that roommate is moving in tomorrow.
- Law: "Individuals sharing units have a choice of roommate in that setting."
- Facility should consult with all affected residents in deciding who will be sharing with whom.

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Visitors

- Wrong: Facility sets visiting hours from 10 a.m. to 8 p.m.
- Law: Resident has right "to have visitors of their choosing at any time."

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Decorating and Furnishing Living Unit

- Wrong: Facility prohibits resident from hanging anything on walls.
- Law: Resident has right to furnish and decorate living unit.

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Restraints

- Wrong: Facility routinely restrains residents for convenience. State law allows restraints as long as they are called for in the service plan.
- Law: The setting must ensure "freedom from coercion and restraint."

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Transfer Within Facility

- Wrong: Facility tells resident they must move from one living unit to another.
- Law: Living unit is "specific physical place" rented under a "legally enforceable agreement."
- Resident has right to remain in original unit.

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Eviction Protections

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Eviction

- Wrong: Facility tells resident that they must move out due to excessive care needs, and they have no right to appeal facility's decision.
- Law: Resident must be protected by state's landlord/tenant law, or have comparable rights provided by admission agreement.

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The Eviction Law (1 of 2)

- Resident at a minimum has "the same responsibilities and protections from eviction that tenants have under the landlord/tenant law of the State, county, city, or other designated entity."

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The Eviction Law (2 of 2)

- "For settings in which landlord tenant laws do not apply, the State must ensure that a lease, residency agreement or other form of written agreement will be in place for each HCBS participant, and that the document provides protections that address eviction processes and appeals comparable to those provided under the jurisdiction's landlord tenant law."

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Ways for State to Explicitly Comply

- Via landlord-tenant law.
 - Specifying that landlord-tenant law applies, or
 - Supplementing landlord-tenant law with good-cause requirements appropriate for residential facilities.
- Requiring written agreements that establish protections equivalent to landlord-tenant law.
 - Developing compliant template agreement, or
 - Requiring that facilities develop and use compliant agreements.

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One Other Common Approach: Providing Administrative Appeals

- Creating administrative appeal system that establishes “comparable” protections.
 - Maybe not technically in compliance with federal regulation – because landlord-tenant law doesn’t apply, and there’s no separate written agreement – but may be seen as good outcome regardless.

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First Rule of Defending Evictions in Assisted Living

- Don’t Move Out!
- Yes, this is obvious ... but, due to the power dynamic within facilities, residents can be very hesitant to contest an eviction.

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Utilize Available Appeal Processes

- Either:
 - Unlawful detainer processes under landlord-tenant law;
 - Landlord-tenant look-alike processes as set forth in residency agreements; or
 - Administrative appeal procedures.

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Multiple States Do Not Provide Required Eviction Protections

- Nevada's landlord/tenant law does not apply to "[r]esidence in an institution, public or private, incident to detention or the provision of medical, geriatric, educational, counseling, religious or similar service."
 - Nev. Stat. § 118A.180.

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Nevada Transition Plan Fails to Address Non-Compliance

- "Action Steps" are:
 - Update manuals to add exact eviction-related language from Settings Rule.
 - "[Medicaid agency] will meet with [Behavioral Health] to propose remediation of language to ensure compliance with the lease agreement requirement. If [BH] does not support the proposal, [Medicaid] plans to update the policy to include the required language and will require HCBS providers to adhere to this requirement."

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Hawaii Also Non-Compliant

- Informal conference if requested in writing within 10 days of receipt of discharge notice.
- Purpose is to determine if "satisfactory resolution" can be reached.
- "Participants in the conference may include the facility representative, the resident, and others as designated by the resident, a family member, or all of these individuals."
 - Hawaii Admin. Rules 11-90-10(b)(3).

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Hawaii Transition Plan Fails to Address Non-Compliance

- An inconsequential promise:
 - "The State will amend the provider contract to add language that ensures legally enforceable agreement by the individual receiving services."
- Also, claiming compliance while ignoring eviction issue:
 - State regulations requires "a service contract which documents a completed agreement between the resident and the facility, describing services to be provided, rates charged, and conditions under which additional services or fees may be charged."

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Washington Non-Compliant; LTC Ombudsman Files Lawsuit

- Issue is whether WA law provides "comparable" protections. Missing rights include:
 - No nonpayment eviction for debt for something other than rent.
 - Right to reinstate tenancy by court-ordered payment plan.
 - No attorney's fees award to facility if eviction for less than two months of rent.

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Additional Missing Rights

- Right to be evicted only for one of sixteen reasons listed in landlord-tenant law.
- No waivers of eviction rights.
- Right to have property stored after eviction.
- Rent control protections.

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Addressing State Noncompliance with Eviction Protections

- CMS was beginning to be useful in addressing noncompliance, but that changed beginning in January 2025.
- Litigation against state probably the best strategy at this point.

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Three Guides from Justice in Aging

- Rights and Wrongs in Medicaid-Funded Assisted Living
- Defending Evictions from Medicaid-Funded Assisted Living Facilities
- An Illusion of Protection: Meaningless Federal "Quality Measures" Endanger Assisted Living Residents

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Questions?

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