Legal Update: Residents With Dementia Who Have No Legal Decision Makers

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We have received several questions recently regarding applicants and residents with dementia who have not been conserved and who have not executed an advance health care directive (i.e., a durable power of attorney for health care). In many cases, a spouse, child, sibling or other relative (or even a close friend) will contact an RCFE to seek placement of, or to request special services for, a loved one.

Although it is obviously preferable for residents with dementia to have either a conservatorship or an advance directive in place, the RCFE regulations specifically contemplate situations in which no one has formal decision-making responsibility. The fact is that conservatorships are rare. The conservatorship process is expensive, time-consuming, cumbersome and invasive. Advance directives are a more desirable option. Unfortunately, a person must execute a directive before he or she becomes incompetent. If this has not been done, then the advance directive option is not available. As a result, it is common for RCFE applicants or residents to have no formal health care decision-maker.

Fortunately, the RCFE regulations provide assistance through the concept of a “responsible person.” Title 22 gives the following as definitions:

- Section 87101(r)(6) defines the term “responsible person” as “that individual or individuals, including a relative, health care surrogate decision-maker, or placement agency, who assist the resident in placement or assume varying degrees of responsibility for the resident’s well-being.”
- Section 87101(h)(3) defines “health care surrogate decision-maker” as “an individual who participates in health care decision-making on behalf of an incapacitated resident. Health care surrogate decision-makers may be formally appointed (e.g., by the resident in a Durable Power of Attorney for Health Care or by a court in a conservatorship proceeding) or, in the absence of a formal appointment, may be recognized by virtue of a relationship with the resident (e.g., the resident’s next of kin).”
- Section 87101(r)(2) defines “relative” to mean spouse, parent, stepparent, son, daughter, brother, sister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin or any such person denoted by the prefix “grand” or “great,” or the spouse of any of the persons specified in this section, even if the marriage has been terminated by death of dissolution.”
  Thus, the term “relative” is extremely broad.

RCFE regulations refer to “responsible person” in numerous sections. Examples include the following:

- Section 87568 states that an RCFE shall complete an admission agreement with each resident and that resident’s responsible person.
- Section 87572(a) states that each resident has a personal right “to have his/her family or responsible persons regularly informed by the facility of activities related to his care or services including ongoing evaluations, as appropriate to the resident’s needs.”
- Section 87589 requires that an eviction notice be copied to the responsible person.
- Section 87561 requires that copies of incident reports be given to the “person responsible for the resident.”
- Section 87583 states that the preadmission appraisal must include a meeting with the resident and his responsible person, if any.
- Section 87587 requires that reappraisals be brought to the attention of the responsible person.
- Section 87724 requires notification of the responsible person when the behavior of a dementia resident changes.

In light of the above, it is clear that Title 22 allows RCFEs to admit and retain residents who are incompetent and who lack a conservatorship or advance directive.

The use of a responsible person, while pervasive in the regulations, is not complete. In some cases, some other term is used – perhaps for historical reasons – to designate who may act on a resident’s behalf. For example, Section 87570(c)(1) states, “The licensee and all employees shall reveal or make available confidential information only upon the resident’s written consent or that of his designated representative.” The term “designated representative” is not defined. “Responsible person” is a broader term that would be more useful here. Most residents with dementia have not previously chosen someone to act as a “designated representative.”

A more significant problem arises when a provider is uncertain as to who should be giving directions to it regarding a resident’s care. The regulations do not deal with a situation in which there are multiple individuals claiming to be the “responsible person.” As providers well know, siblings may have very different views about what is best for their mother or father. This can place the RCFE in the middle of what become very emotional confrontations. The situation can be even more problematic where there are no adult children in the picture. RCFEs should attempt to ascertain, to the extent practicable, who potential surrogate decision-makers might be. Ideally, they can get those people to agree unanimously on the placement of the resident in a community or on the care of one who is already there, and then to agree upon who will be the future decision-maker.

As problems regarding surrogate decision-makers emerge, we are likely to see more attempts to provide clarification and guidance.