

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HEALTH**

In the Matter of the Involuntary
Discharge/Transfer of B.N., Petitioner,
by Southview Acres Health Care Center,
Respondent

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATIONS**

The Minnesota Department of Health (the Department) initiated this contested case proceeding by issuing a Notice of and Order for Hearing on November 13, 2002. The notice scheduled a hearing in this matter for Friday, November 22, 2002, at Southview Acres Health Care Center, 2000 Oakdale Avenue North, West St. Paul, Minnesota, 55118-4662.

Stephen Tradewell, Director, Advocacy Center for Long-Term Care, Suite 220, 2626 East 82nd Street, Bloomington MN 55425-1381 appeared as representative of the Petitioner, B.N., in this proceeding. Michelle R. Klegon, Attorney at Law, Suite 190 South, 2550 University Avenue West, St. Paul, Minnesota 55114, represented the Respondent, Southview Acres Health Care Center (Southview). The OAH record closed on November 22, 2002, when the hearing ended.

NOTICE

This Report is only a recommendation to the Commissioner and is not a final decision. The Commissioner will make her final decision after reviewing this report and the hearing record. In making that decision the Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations that appear in this report.

Under Minnesota Law,¹ the Commissioner may not make her final decision until after the parties have had access to this Report for at least ten days. During that time the Commissioner must give any party adversely affected by this Report an opportunity to file objections to the Report and to present argument supporting its position. Parties should contact the office of Jan Malcolm, Commissioner, Minnesota Department of Health, 400 Golden Rule Building, 85 East 7th Place, St. Paul, Minnesota 55101, to find out how to file objections or present argument.

¹ Minnesota Statutes, section 14.61. (Unless otherwise specified, all references to Minnesota Statutes are to the 2000 edition.)

The record of this proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.²

STATEMENT OF THE ISSUES

Whether Southview may lawfully discharge the Petitioner for failing, after reasonable and appropriate notice, to pay for her stay at Southview.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner is a 90-year-old woman whose physical and medical condition confines her to a wheelchair. She needs constant assistance in performing activities of daily living, including bathing and some eating assistance.³ She has been diagnosed with senile dementia and is frequently not oriented with regard to her surroundings and interactions with others.⁴

2. The Dakota County District Court has found that the Petitioner is not competent to handle her own financial and other affairs and sometime prior to August 15, 2001, appointed her daughter, Jill Yelton, as her conservator. Ms. Yelton continues to serve in that capacity.⁵

3. On June 26, 2001, Ms. Yelton, as conservator, filed a final accounting of the Petitioner's estate in Dakota County District Court, Probate Division. That accounting indicated that the Petitioner's estate then included net assets of \$245,141.98.⁶ Those net assets included \$131,558.97 in cash held in a revocable trust for the Petitioner's benefit.⁷

4. Prior to August 15, 2001, the Petitioner had resided in Alterra Sterling House of West St. Paul, a long-term care facility. She was hospitalized on August 15, 2001, and discharged on August 18, 2001.⁸ When she was discharged from the

² See Minnesota Statutes, section 14.62, subdivision 2a.

³ Testimony of Margie Jewel.

⁴ *Id.*

⁵ *Id.*; Exhibit 7.

⁶ Exhibit 9.

⁷ *Id.*

⁸ Exhibit 4.

hospital, her attending physician concluded that she would indefinitely require care in a skilled nursing facility.⁹

5. After being discharged from the hospital, the Petitioner was not readmitted to Alterra because her conservator concluded that Alterra was not an optimal placement.¹⁰ At the time of discharge, the Petitioner owed Alterra approximately \$45,000 for the care she had received there prior to her hospitalization. The Petitioner's conservator paid Alterra that sum from the assets described in Finding No. 3.¹¹

6. On August 18, 2001, and at her conservator's request, the Petitioner was admitted to Southview. On the following day, the conservator executed an admission agreement on the Petitioner's behalf. Since the Petitioner was not then receiving any form of public assistance, she was admitted to Southview as a private pay resident.¹² In the admission agreement, the conservator agreed to pay Southview for the Petitioner's care "from the Resident's income or resources."¹³ Contemporaneously, the conservator directed the facility to forward all of the Petitioner's "cards, letters, magazines and business mail" to herself.¹⁴

7. On August 29, 2001, the Dakota County District Court issued Letters of Amended General Conservatorship of the Person to Ms. Yelton allowing her to continue to serve as the Petitioner's general conservator.¹⁵

8. Between August 18, 2001, and March 1, 2002, the conservator made a number of payments to Southview toward the cost of the Petitioner's care but did not pay the full cost of care. There were still arrearages of \$20,305.32 on March 1, 2002.¹⁶ On March 28, 2002, the conservator made a \$16,000.00 payment to Southview toward those arrearages.¹⁷

9. Sometime prior in early summer 2002, the Petitioner's conservator informed Southview that the Petitioner no longer had assets or income available to pay the cost of the Petitioner's care. The conservator indicated that she would be submitting an application to Dakota County on the Petitioner's behalf for medical assistance.¹⁸

10. Based on information that Southview received from Dakota County, Southview wrote the Petitioner's conservator on August 1, 2002, stating that the County

⁹ *Id.*

¹⁰ Exhibit F.

¹¹ Testimony of Jill Yelton.

¹² Exhibit 8; testimony of Kelly Myers.

¹³ Exhibit 8.

¹⁴ Exhibit 6.

¹⁵ Exhibit 7.

¹⁶ Exhibit 2.

¹⁷ *Id.*; testimony of Kelly Myers.

¹⁸ Exhibit 3; testimony of Kelly Myers.

was expecting to deny the medical assistance application because the conservator had not provided the County with sufficient financial information. At that time, the balance of the Petitioner's account with Southview was \$29,955.96. Southview requested payment from the conservator in that amount.¹⁹ The Conservator has never responded to that request for payment.²⁰

11. Dakota County denied the Petitioner's application for medical assistance on October 22, 2002.²¹

12. On October 28, 2002, Southview sent a notice to the Petitioner's conservator of the facility's intent to discharge the Petitioner to her conservator's home on November 28, 2002, because the cost of the Petitioner's care at Southview was not being paid.²² Southview's administrator also hand delivered a copy of the notice of discharge to the Petitioner and attempted to explain its contents to her orally.²³

13. On October 31, 2002, the Petitioner's conservator appealed the discharge,²⁴ and this contested case proceeding ensued.

14. Between October 28, 2002, and the date of the hearing, the Southview social worker assigned to the Petitioner's case has engaged in discharge planning for the Petitioner. The social worker has contacted eight skilled nursing facilities about the possibility of transfer. None have agreed to accept the Petitioner, and the reason explicitly given by at least two has been lack of assurance of payment for the Petitioner's care.²⁵

15. The Petitioner's daughter and conservator, Ms. Yelton, is unable to care for the Petitioner in her home because she works full time and because she is physically unable to care for her wheelchair-bound mother.²⁶

16. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

17. The Memorandum that follows explains the reasons for these Findings, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Findings.

18. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

¹⁹ *Id.*

²⁰ Testimony of Kelly Myers.

²¹ *Id.*; Exhibit 4.

²² Exhibit 1.

²³ Testimony of Lance Lemieux.

²⁴ Exhibit 10.

²⁵ Testimony of Margie Jewell; Exhibit 5.

²⁶ Testimony of Jill Yelton.

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Both Minnesota and federal law give the Administrative Law Judge authority to conduct this proceeding and to make recommendations to the Commissioner. The law also gives the Commissioner authority to make findings, conclusions, and a final order in this proceeding.²⁷

2. The Department gave the parties proper and timely notice of the hearing, and it has also complied with all legal requirements for initiating and proceeding with this administrative contested case.

3. Southview is a 'facility' within the meaning of 42 C.F.R. § 483.5 and is therefore subject to the requirements imposed by federal law before discharging or transferring any of its residents.²⁸

4. The Petitioner is a resident of Southview within the meaning of 42 C.F.R. § 483.12 and is therefore entitled to the rights created by federal law relating to any transfer or discharge by Southview.

5. Before discharging a resident, Southview must notify the resident and a family member or legal representative of its intent to discharge and the reasons for taking that action in writing and in a language and manner that the resident understands.²⁹ The notice must also include notice of the resident's right to appeal under the state process, the reason for the discharge, the effective date, the location to which the resident will be discharged, and the name, address and telephone number of the state's long term care ombudsman.³⁰ Federal law further requires Southview to provide its residents with the written notice of discharge at least thirty days before doing so.³¹ The notice of discharge that Southview issued to the Petitioner on October 28, 2002³² complied with all of those requirements.

6. Under Minnesota law, a resident appealing notification of an intended discharge must request a hearing in writing no later than 30 days after receiving written notice.³³ The Petitioner filed a timely appeal of Southview's notice of discharge.³⁴

²⁷ See Minn. Stat. §§ 14.50 and 144A.135, as well as sections 1819(e)(3) and 1919(e)(3) of the Social Security Act, codified in 42 U.S.C. §§ 1395-3(e) and 1396r(e).

²⁸ See generally 42 C.F.R. § 483.12.

²⁹ 42 C.F.R. § 483.12(a)(4).

³⁰ 42 C.F.R. § 483.12 (a) 6).

³¹ 42 C.F.R. § 483.12 (a)(5).

³² Exhibit 1.

³³ Minn. Stat. § 144A.135(b).

³⁴ Exhibit 10.

7. Under Minnesota law, Southview must prove facts that are required by law to support its discharge of the Petitioner by a preponderance of the evidence.³⁵

8. Under federal law, one legal basis for discharging a resident from a facility is that “the resident has failed, after reasonable and appropriate notice, to pay . . . for a stay at the facility . . .”³⁶ In order for a facility to rely on that legal basis for discharge, that reason must be specified in the notice of discharge.

9. The notice of discharge that Southview issued to the Petitioner stated that the Petitioner had “failed, after reasonable and appropriate notice, to pay . . . for a stay at the facility . . .”

10. From the time when the Petitioner was admitted to Southview until the present, Jill L. Yelton has been duly appointed by the Dakota County District Court to act as, and she has acted as, the Petitioner’s conservator with full legal power to act for the Resident in financial matters.

11. Neither the Petitioner nor her conservator has made any payments to Southview toward the monthly cost of the Petitioner’s care since March 28, 2002, and as of November 30, 2002, there was an accumulated balance due Southview for the cost of the Petitioner’s care of \$43, 775.30.

12. Southview has provided the Petitioner, through her conservator, reasonable and appropriate notice of all monthly charges for the Petitioner’s care and of the arrearages that have occurred as a result of nonpayment of those charges.

13. Southview has proved by a preponderance of the evidence that the Petitioner has failed, after reasonable and appropriate notice, to pay for her stay at Southview’s facility, and that she may therefore be subject to discharge from the facility.

14. Although Southview has engaged in discharge planning on the Petitioner’s behalf, Southview has not yet been able to find another facility to which to discharge her. Southview is therefore proposing to discharge the Petitioner to her conservator’s home.

15. The Petitioner’s medical and personal needs cannot be adequately met by care at her conservator’s home, even with the assistance of a home care agency.

16. The Memorandum that follows explains the reasons for these Conclusions, and, to that extent, the Administrative Law Judge incorporates that Memorandum into these Conclusions.

17. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

³⁵ Minn. R. pt. 1400.7300, subp. 5; *In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604,610 (Minn. App. 1994).

³⁶ 42 C.F.R. § 483.12 (a)(2)(v).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Commissioner DENY the Petitioner's appeal and ALLOW Southview to proceed with the Petitioner's discharge and transfer to another facility.

Dated this 10th day of December 2002.

/s/ Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape recorded (one tape); no transcript prepared.

NOTICE

Under Minnesota law,³⁷ the Commissioner must serve her final decision upon each party and the Administrative Law Judge by first-class mail.

³⁷ Minn. Stat. § 14.62, subd. 1.

MEMORANDUM

As the result of amendments to the Social Security Act contained in the Omnibus Budget Reconciliation Act of 1987,³⁸ a long term care facility that has been certified as a Medicare provider must permit each resident to remain in the facility and may discharge a resident only in specified situations and where certain statutory due process requirements have been met. Among other situations, the law permits discharge of a resident when the resident has failed, after reasonable and appropriate notice, to pay for his or her stay at the facility.³⁹ That statutory basis for discharge has also been incorporated into the federal regulations that govern operation of Medicare-certified long-term care facilities, such as Southview.⁴⁰ The issue in this contested case proceeding is whether Southview may proceed with discharging the Petitioner for nonpayment.

Under OAH rules,⁴¹ the party to a contested case proceeding proposing that certain action be taken must prove the facts at issue by a preponderance of the evidence unless substantive law provides a different burden or standard. Here, Southview proposes to discharge the Petitioner from its facility. So it bears the burden of proving by a preponderance of the evidence that it has met the legal requirements for discharge.⁴² At the hearing, Southview presented uncontroverted evidence that between April and November 2002, the Petitioner has been accruing monthly charges for her care of between \$4,261.80 and \$5,271.24 per month, and that she had accumulated arrearages of \$43,775.30 as of November 30, 2002. Southview also established that it had given the Petitioner's conservator monthly statements of account showing the accumulating arrearages. Nevertheless, no payments toward the cost of the Petitioner's care were made during that six-month period. That evidence is sufficient to establish a legal basis for discharging the Petitioner from Southview.⁴³ Unfortunately, the situation here is not that simple and straightforward.

Before transferring to Southview on August 19, 2002, the Petitioner had been residing at Alterra Sterling House of West St. Paul, another long-term care facility. Either before or during her stay at Alterra, she had been diagnosed with senile dementia and had been adjudicated incompetent to handle her own affairs. The Dakota County District Court had appointed Ms. Yelton as conservator to handle her mother's financial and other affairs. An accounting filed with the Court on June 26, 2001,

³⁸ Section 1919(c) of the Social Security Act Amendments of 1987, Public Law 100-203, codified at 42 U.S.C. § 1396r(c)(2).

³⁹ *Id.*

⁴⁰ 42 C.F.R. § 483.12. The regulations are identical to the statute, except that reference in 42 C.F.R. § 483.12 (a)(2)(i) is made to "the resident's needs cannot be met" rather than "the resident's welfare cannot be met." Further references in this Memorandum are to the requirements as set forth in 42 C.F.R. § 483.12.

⁴¹ Minn. R. 1400.7300, subp. 5.

⁴² In *Ebenezer Hall*, *supra*, 512 N.W.2d at 610, the Minnesota Court of Appeals confirmed that "a nursing facility proposing to transfer or discharge a resident must prove the supporting facts by a preponderance of the evidence."

⁴³ Southview appears to have delayed action to discharge the Petitioner for nonpayment in order to give the conservator an opportunity to apply for medical assistance on the Petitioner's behalf.

indicates that the Petitioner then had net assets of \$245,141.98. Ms. Yelton, testified that she had subsequently made a payment of about \$45,000 to Alterra, the Petitioner's former facility. But she also testified that after making that payment, that there were no additional funds in the Petitioner's account from which Southview's charges could be paid, and that she has no idea of why the accounting had suggested that there were still about \$200,000 in net assets available. Ms. Yelton expressed a belief that the final accounting that had been submitted to the District Court was mistaken. Consequently, last summer she submitted an application to Dakota County to obtain medical assistance for the Petitioner. That application was denied in August 2002. Although no one from Dakota County was present at the contested case hearing, Southview expressed its belief, based on information that it had received from the County, that the medical assistance application had been denied because Ms. Yelton had failed to provide the County with adequate documentation of the Petitioner's bank accounts and assets.

At the hearing, the Ombudsman's Office argued on the Petitioner's behalf that 42 U.S.C. § 1396r(c)(2)(a)(v) and 42 C.F.R. § 483.12 (a)(2)(v) should be interpreted not to apply where a failure to pay nursing home charges occurs because of the actions of an incompetent resident's guardian or conservator rather than because of resident's own actions. In other words, any refusal to pay by a guardian or conservator could never be imputable to a nursing home resident. In effect, the Ombudsman's interpretation would mean that a discharge for nonpayment would only be possible when a competent resident intentionally refused to pay.⁴⁴ In all other cases, a nursing home would be obliged to continue to provide care without any assurance of payment. But the ALJ concludes that neither Congress nor the U. S. Department of Health and Human Services intended U.S.C. § 1396r(c)(2)(a)(v) or 42 C.F.R. § 483.12 (a)(2)(v) to have that interpretation. First, 42 C.F.R. § 483.12 (d)(2) provides that a "facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal financial liability, to provide facility payment from the resident's income or resources." In other words, federal authorities clearly contemplated an alternative mechanism for payment when a resident was incompetent to handle his or her own financial affairs.⁴⁵ Second and more important, the Ombudsman's interpretation would mean that long term care facilities would always be exposed to the risk of having to provide uncompensated care to persons who are incompetent to handle their own affairs. So, that interpretation would likely have the undesirable effect of discouraging facilities from accepting those persons as residents.

Unfortunately, merely concluding that Southview may lawfully discharge the Petitioner falls far short of resolving the serious issues that this case poses. Either an inaccurate accounting, a dissipation of the Petitioner's assets, or an inability of Ms. Yelton to take necessary actions to protect the Petitioner's interests has placed the

⁴⁴ The interpretation advanced by the Ombudsman leaves open the possibility that a nursing home could discharge an incompetent resident who intentionally refused to pay, but that interpretation raises the issue of whether such a resident was competent to make a decision not to pay.

⁴⁵ But the ALJ notes that federal law specifically excludes creation of any personal liability of a guardian or conservator for payment and also falls short of creating any federal right of action by a facility against a guardian or conservator who refused to pay on the resident's behalf.

Petitioner at risk of discharge. Ms. Yelton suggests that the accounting that was filed with the Dakota County District Court on June 26, 2001, was incorrect, that the Petitioner has never had sufficient assets to pay Southview's monthly charges, and that the Petitioner is therefore entitled to obtain medical assistance to pay those charges. But those are issues that neither the ALJ nor the Commissioner has authority to address and resolve in the context of this proceeding. Secondly, it is possible that the Petitioner actually did have net assets of \$245,141.98 on June 26, 2001, but that those assets were subsequently secreted or dissipated without the Petitioner's knowledge or consent. Those are likewise issues that neither the ALJ nor the Commissioner has authority to address and resolve in the context of this proceeding. Thirdly, it is also possible that nothing inappropriate has happened but that the Petitioner's conservator is unsure about what she must do to perform her court-ordered tasks. That is also something that cannot be rectified in this proceeding.

Whichever of those three possibilities is true, several observations seem pertinent. First, the Dakota County District Court appears to be the appropriate forum for adjudicating the matters that need to be resolved with regard to the Petitioner's financial affairs. Second, given the Petitioner's unresolved financial situation, it is unlikely that any other long term care facility will be willing to accept her as a resident without some kind of assurance of payment. Third, the Petitioner's conservator, Ms. Yelton, testified that she would be unable to care for the Petitioner's needs at home, even with the assistance of a home care agency. And the ALJ strongly believes that discharging the Petitioner to Ms. Yelton's home would place the Petitioner's health and safety at risk. Fourth, it seems unfair to require Southview to continue providing the Petitioner with care indefinitely without any reasonable prospect of payment in the foreseeable future. Finally, it appears to the ALJ that Dakota County is currently in the best position to ensure that the Petitioner's short term needs will be met while the Petitioner's legally complex financial situation can be resolved in an appropriate forum.⁴⁶

⁴⁶ The ALJ notes that while Southview and Ombudsman appeared to have contacted Dakota County prior to the hearing, the potential discrepancies in the Petitioner's financial situation and potential issues about the current conservatorship were not then fully apparent. So in the County's view, no adult protection would have been necessary until a possible discharge to an inappropriate setting was imminent.

In view of the foregoing, the ALJ concludes that Southview has established by a preponderance of the evidence a legal basis for discharging the Petitioner for nonpayment for her care. And the ALJ recommends that the Commissioner deny the Petitioner's appeal and order Southview to discharge her to an appropriate facility or program with the possible assistance of Dakota County.⁴⁷

B. H. J.

⁴⁷ At the hearing, both Southview and the Ombudsman both agreed that having Dakota County intervene to protect the Petitioner's interests seemed to be the only practical course for resolving the underlying issues. Both requested that a representative from the County's adult protection services attend the hearing, but no representative of the County appeared. Neither Southview nor the Ombudsman offered suggestions at the hearing about the role in which the County should become involved. But as noted above, there is a suspicion of financial exploitation of the Petitioner's assets by someone. Even if there was no financial exploitation, this may be a case where public guardianship, rather than private conservatorship, is a more appropriate vehicle for protecting the Petitioner's interests. The ALJ has therefore referred this matter to Dakota County for appropriate investigation and action even before the Petitioner's discharge becomes imminent. It is the ALJ's recommendation that before entering a final order in this proceeding, the Commissioner seek the County's advice and direction concerning discharge planning and an appropriate discharge placement. It seems unfair to expect Southview to continue providing the Petitioner with uncompensated care pending what might turn out to be a lengthy investigation into the handling of the Petitioner's financial affairs.