

MEMORANDUM

To: Rep. Francis McFaun
From: Monica Caserta Hutt, DAIL Commissioner
Subject: Proposed changes to 33 V.S.A. Chapter 71
Date: November 22, 2019

The Department is requesting your support of a few, though not insignificant, changes to the provisions contained in 33 V.S.A. Chapter 71, *Regulation of Long-Term Care Facilities*. The need for these modifications became apparent through recent experiences with the receivership proceedings authorized by subchapter 3 of this chapter. The modifications, and the justifications therefor, are as follows:

1. The licensing agency is authorized, pursuant to 33 V.S.A. § 7110, to “take immediate enforcement action when necessary to eliminate a condition which can reasonably be expected to cause death or serious physical harm to residents or staff before it can be eliminated through the provisions of § 7111 of this title.” The absence of language authorizing immediate enforcement action when a condition is reasonably expected to cause only *mental harm* to residents or staff frustrates the ability of the licensing agency to take steps that may be most effective and expedient in protecting residents and/or staff from such potential harm.

It is important to note that in evaluating whether to appoint a temporary receiver under 33 V.S.A. § 7203, the Superior Court may consider whether a condition or practice presents an “imminent danger of death or serious physical *or mental harm* to residents.” Without the inclusion of such language in § 7110, however, the licensing agency would be unauthorized to take immediate enforcement action when only mental harm is reasonably suspected and, instead, could be left with no alternative but to pursue the more onerous receivership proceeding when a less burdensome process would otherwise suffice.

Accordingly, the Department proposes amending § 7110 to provide for “mental harm,” and adding to § 7102 of this title for clarification a definition of “mental harm.”

2. 33 V.S.A. § 7202(a)(4) provides that a complaint requesting the appointment of a receiver may be filed in the Superior Court when “the facility is insolvent.” The statute, however, lacks a definition of “insolvent.” The absence of such a definition recently resulted in protracted litigation as to the authority of the state to bring an action under this provision. The Department proposes adding to § 7102 of this title a definition of “insolvent,” which tracks the definition contained in 9A V.S.A. § 1-201(b)(23).
3. It is not uncommon for the Superior Court to appoint a *temporary* receiver, pursuant to 33 V.S.A. § 7203, pending a hearing on the merits of the complaint and an order appointing a receiver. In the interim, in such cases the court will grant certain powers to, and impose

certain obligations upon, the temporary receiver to ensure protections of the facility's residents.

Frequently, in advance of the hearing on the merits, the temporary receiver will have taken steps to improve the operation of the facility and/or address any immediate concerns for the health, safety, or welfare of the residents. In connection with the most recent receivership proceeding, the owner/licensee argued to the court at the merits hearing that the appointment of the receiver was unnecessary, asserting, in part, that the concerning conditions has been addressed following the appointment of the temporary receiver. The state believes that an owner/licensee, against whom a receivership complaint has been filed, should be precluded from citing to the efforts made by the temporary receiver to justify the lack of a need for the appointment of a receiver. The actions of a temporary receiver to address conditions at a facility do not reflect the capacity of the owner/licensee to resume control of the operation and to protect the residents of the facility. Accordingly, the state proposes the addition of § 7203(d) below.

7102. Definitions

As used in this chapter:

(1) "Assisted living residence" means a program which combines housing, health, and supportive services for the support of resident independence and aging in place. Within a homelike setting, assisted living units offer, at a minimum, a private bedroom, private bath, living space, kitchen capacity, and a lockable door. Assisted living promotes resident self-direction and active participation in decision-making while emphasizing individuality, privacy, and dignity.

(2) "Facility" means a residential care home, nursing home, assisted living residence, home for persons who are terminally ill, or therapeutic community residence licensed or required to be licensed pursuant to the provisions of this chapter.

(3) "Home for persons who are terminally ill" means a place providing services specifically for three or more people who are dying, including room, board, personal care, and other assistance for the residents' emotional, spiritual, and physical well-being.

(4) "Insolvent" means:

(A) having generally ceased to pay debts in the ordinary course of business other than as a result of bona fide dispute;

(B) being unable to pay debts as they become due; or

(C) being insolvent within the meaning of federal bankruptcy law.

(45) "Licensee" means any person, other than a receiver appointed under this chapter, which is licensed or required to be licensed to operate a facility.

(56) "Licensing agency" means the Agency of Human Services or the department or division within the Agency as the Secretary of Human Services may designate.

(7) "Mental harm" means...

(68) "Nursing care" means the performance of services necessary in caring for persons who are sick or injured that require specialized knowledge, judgment, and skill and meet the standards of nursing as defined in 26 V.S.A. § 1572.

(79) "Nursing home" means an institution or distinct part of an institution which is primarily engaged in providing to its residents any of the following:

(A) skilled nursing care and related services for residents who require medical or nursing care;

(B) rehabilitation services for the rehabilitation of persons who are injured, have a disability, or are sick;

(C) on a 24-hour basis, health-related care and services to individuals who, because of their mental or physical condition, require care, and services which can be made available to them only through institutional care.

(810) "Owner" means the holder of the title to the property on or in which the facility is maintained.

(911) "Resident" means any person who lives in and receives services or care in a facility.

(101) "Residential care home" means a place, however named, excluding a licensed foster home, which provides, for profit or otherwise, room, board, and personal care to three or more residents unrelated to the home operator. Residential care homes shall be divided into two groups, depending upon the level of care they provide, as follows:

(A) Level III, which provides personal care, defined as assistance with meals, dressing, movement, bathing, grooming, or other personal needs, or general supervision of physical or mental well-being, including nursing overview and medication management as defined by the licensing agency by rule, but not full-time nursing care; and

(B) Level IV, which provides personal care, as described in subdivision (A) of this subdivision (10), or general supervision of the physical or mental well-being of residents, including medication management as defined by the licensing agency by rule, but not other nursing care.

(142) "Therapeutic community residence" means a place, however named, excluding hospitals as defined by statute, which provides, for profit or otherwise, transitional individualized treatment to three or more residents with major life adjustment problems, such as alcoholism, drug abuse, psychiatric disability, or delinquency.

§ 7110. Violation; notice

(a) If, as a result of an inspection or investigation, the licensing agency determines that a condition in the facility violates a rule or provision of this chapter, it shall prepare a written notice of violation, which shall state the following:

(1) a description of each condition that constitutes a violation;

(2) each rule or statutory provision alleged to have been violated;

(3) the date by which the violation must be corrected;

(4) sanctions the licensing agency may impose for failure to correct the violation or failure to provide proof of correction by the date specified;

(5) the right to appeal the notice of violation as provided in section 7118 of this title; and

(6) the right to apply for a variance as provided in section 7106 of this title.

(b) The licensing agency may take immediate enforcement action when necessary to eliminate a condition which can reasonably be expected to cause death or serious physical or mental harm to residents or staff before it can be eliminated through the provisions of section 7111 of this title. A licensing agency taking such action shall explain that action and the reasons for it in the notice of violation.

§ 7202. Application for receiver

(a) The Commissioner of Disabilities, Aging, and Independent Living or the Attorney General may file a complaint in the Superior Court of the county in which the licensing agency or the facility is located, requesting the appointment of a receiver when:

(1) a licensee intends to close and has not secured suitable placements for its residents at least 30 days prior to closure;

(2) a situation, a physical condition, or a practice, method, or operation which presents imminent danger of death or serious physical or mental harm to residents exists in a facility, including imminent or actual abandonment of a facility;

(3) a facility is in substantial or habitual violation of the standards of health, safety, or resident care established under State or federal regulations to the detriment of the welfare of the residents or clients;

(4) the facility is insolvent; or

(5) the licensing agency has suspended, revoked, or modified the existing license of the facility.

(b)(1) A resident or resident's representative may petition the licensing agency or the Attorney General to seek a receivership under this section. If the licensing agency or Attorney General denies the petition or fails to file a complaint within five days, the party bringing the petition may file a complaint in the Superior Court of the county in which the licensing agency or the facility is located, requesting the appointment of a receiver on the same grounds listed in subsection (a) of this section. Prior to a hearing for the appointment of a receiver, the Commissioner of Disabilities, Aging, and Independent Living shall file an affidavit describing the results of any investigation conducted, including a statement of findings with respect to the resident's petition and the reasons for not filing an action under this section. The Commissioner shall include the two most recent reports of deficiencies in the facility, if any.

(2) If the Court finds the grounds listed in subsection (a) of this section are not met, the Court may dismiss the complaint without a hearing as provided for in the Vermont Rules of Civil Procedure.

(c)(1) The licensing agency shall be deemed a necessary party under Rule 19(a) of the Vermont Rules of Civil Procedure. A temporary receiver shall be a necessary party after the temporary receiver is appointed and shall remain a party until a receiver is appointed under section 7204 of this chapter. A receiver appointed under section 7204 of this chapter shall be deemed a necessary party under Rule 19(a) of the Vermont Rules of Civil Procedure.

(2) The entity filing the complaint shall notify the State Long-Term Care Ombudsman and the mortgage holder upon filing of the complaint.

§ 7203. Appointment of temporary receiver

(a) A motion to appoint a temporary receiver may be filed with the complaint or at any time prior to the hearing on the merits provided for in section 7204 of this chapter. The motion shall be accompanied by an affidavit alleging facts necessary to show the grounds for the receivership and the necessity for appointing a temporary receiver prior to the hearing on the merits. A motion for prejudgment attachment under Rule of Civil Procedure 4.1(b)(3) may also be filed with the complaint or at any time prior to the hearing on the merits.

(b) The Court may appoint a temporary receiver ex parte when the Court finds that there is a reasonable likelihood that:

(1)(A) a licensee intends to close the facility and has not secured suitable placements for its residents prior to closure; or

(B) a situation, a physical condition, or a practice, method, or operation presents imminent danger of death or serious physical or mental harm to residents; and

(2) the situation must be remedied immediately to ensure the health, safety, and welfare of the residents of the facility.

(c) If the order for temporary receivership is granted, the complaint and order shall be served on the owner, licensee, or administrator and shall be posted in a conspicuous place in the facility no later than 24 hours after issuance.

(d) If the order for temporary receivership is granted, the actions of the temporary receiver shall not be imputed to the defendant owner/licensee for purposes of determining whether a receiver is warranted at the hearing on the merits.