

SHORT TITLE: Crimes and punishments, mental health and public health and safety; protective services for the elderly or incapacitated; codification; emergency.

STATE OF OKLAHOMA

1st Session of the 44th Legislature (1993)

SENATE BILL NO. 354

By: Brown

AS INTRODUCED

An Act relating to crimes and punishments, mental health and public health and safety; amending 21 O.S. 1991, Sections 701.8, 701.9, 716, 722 and 843.1, which relate to murder, manslaughter and caretakers, 43A O.S. 1991, Sections 10-103 and 10-104, which relate to definitions and reports, 63 O.S. 1991, Sections 1-830, 1-832, 1-833, 1-1911, 1-1912, 1-1916, 1-1916.1, 1-1918, as amended by Section 1, Chapter 173, O.S.L. 1992, 1-1939 and 1-1940 (63 O.S. Supp. 1992, Section 1-1918), which relate to complaints, prohibited acts, penalties, inspections, violations and liability to residents; modifying certain definitions; defining terms; providing penalties; specifying commission of certain violations under certain conditions as being manslaughter in the second degree; providing penalties; prohibiting certain acts by certain caretakers, persons connected with residential care homes and nursing facilities or specialized facilities; providing penalties; modifying certain terms; providing procedures for certain reports; stating certain exception to certain requirement; allowing district attorney to conduct criminal investigation or refer case; prohibiting the Department of Human Services from hindering case; requiring the Department of Human Services to

assist in case if requested; modifying certain penalties; establishing procedures for inspecting and investigating certain reports; stating certain exception; modifying penalties; modifying certain requirement; modifying liability; delaying notice to alleged violaters under certain circumstances; requiring copy of act be posted in designated areas; subjecting certain persons to administrative penalties; providing for codification; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 21 O.S. 1991, Section 701.8, is amended to read as follows:

Section 701.8 A. Homicide is murder in the second degree in the following cases:

1. When perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; or

2. When perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in ~~Section 1,~~ subsection B, of this act subsections B, C and D of Section 701.7 of this title.

B. Any person or business entity in any form, including but not limited to a caretaker and his or its employees, who has or have responsibility for the care of a resident of a nursing facility, specialized facility or residential care home, or who has or have responsibility for the care of an elderly person who is unable to

protect his own interest, an incapacitated person or an adult in need of protective services, commits murder in the second degree when such person or business entity commits abuse of the resident, the elderly person who is unable to protect his own interest, the incapacitated person or the adult in need of protective services, and such abuse is the primary contributing factor in the cause of death of the victim.

C. For purposes of this section:

1. "Abuse" means the intentional infliction of physical pain or injury, or the deprivation of adequate or appropriate food, clothing, shelter or medical care by a caretaker or other person responsible for providing these services;

2. "Adult in need of protective services" means an individual who, because of physical or mental disability, incapacity or other disability, is substantially impaired in his ability to provide adequately for his own care or custody, or is unable to manage his property and affairs effectively, or to carry out the activities of daily living, or to protect himself from abuse, neglect or exploitation without assistance from others;

3. "Business entity" includes individuals, partnerships, business trusts, cooperatives, associates, corporations or any other firm, group or concern which functions as a separate entity for business purposes. Such term shall also include any type of business in the broadest sense of the term, whether or not it is properly licensed to do business in the State of Oklahoma or licensed to carry on the particular business which it is in fact conducting, and such business entity's:

- (1) members or the board of directors,
- (2) managing officers,
- (3) those persons who exercise management authority by whatever title or designation for the business entity,

- (4) managing partners and general partners,
- (5) personnel who make or are responsible for making policy or procedural decisions affecting persons in the care of the business entity, or who implement or are responsible for implementing such policies or procedural decisions, and
- (6) employees, agents and subcontractors of the business entity, who have any duty or responsibility for the medical or personal care of the elderly person who is unable to protect his own interest, incapacitated person or adult in need of protective services;

4. "Caretaker" means a person or any type of business entity who has either:

- a. voluntarily assumed responsibility for the personal care of the elderly person who is unable to protect his own interest, incapacitated person or adult in need of protective services, as a result of family relationships or friendship, or
- b. undertaken responsibility for the personal care of the elderly person who is unable to protect his own interest, incapacitated person or adult in need of protective services by any kind of written or oral agreement, third-party agreement, expressed or implied agreement, or by actions or under circumstances by which intent to be responsible for the care of such person may be inferred;

5. "Elderly person" means any person sixty-five (65) years of age or older residing in this state;

6. "Incapacitated person" means any person eighteen (18) years of age or older who is impaired by reason of mental or physical illness or disability, advanced age, mental retardation,

developmental disability or other cause and whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that they lack the capacity to manage their financial resources or to meet essential requirements for their mental or physical health or safety without assistance; and

7. "Resident" means a person residing in a facility due to illness, physical or mental infirmity, or advanced age. A resident of a nursing home, nursing facility, specialized facility or residential care home is presumed to be an adult in need of protective services, an elderly person who is unable to protect his own interests, or an incapacitated person.

SECTION 2. AMENDATORY 21 O.S. 1991, Section 701.9, is amended to read as follows:

Section 701.9 A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be punished by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

C. A person or any type of business entity who is convicted of or pleads guilty or nolo contendere to murder in the second degree pursuant to paragraph 3 of subsection C of Section 701.8 of this title may also be punished by a fine of not less than Twenty-five Thousand Dollars (\$25,000.00) nor more than Three Hundred Thousand Dollars (\$300,000.00), or by both such fine and imprisonment.

SECTION 3. AMENDATORY 21 O.S. 1991, Section 716, is amended to read as follows:

Section 716. A. Any killing of one human being by the act, procurement or culpable negligence of another, which, under the

provisions of Section 681 of this chapter title, is not murder, nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree.

B. Any person or business entity who violates any provision of Section 843.1 or 843.2 of this title or Section 5 or 6 of this act relating to neglect of a resident, an elderly person who is unable to protect his own interest, an incapacitated person or an adult in need of protective services, and such neglect is the primary contributing factor in the cause of death of such person, commits manslaughter in the second degree.

SECTION 4. AMENDATORY 21 O.S. 1991, Section 722, is amended to read as follows:

Section 722. A. Any person guilty of manslaughter in the second degree pursuant to subsection A of Section 716 of this title is punishable by imprisonment in the State Penitentiary not more than four (4) years and not less than two (2) years, or by imprisonment in a county jail not exceeding one (1) year, or by a fine not exceeding One Thousand Dollars (\$1,000.00), or both fine and imprisonment.

B. A person or business entity who is convicted of or pleads guilty or nolo contendere to manslaughter in the second degree pursuant to subsection B of Section 716 of this title shall be punished by imprisonment in the State Penitentiary for not less than two (2) years nor more than twenty (20) years, or by a fine of not less than Twenty-five Thousand Dollars (\$25,000.00) nor more than Two Hundred Fifty Thousand Dollars (\$250,000.00), or by both such fine and imprisonment.

SECTION 5. AMENDATORY 21 O.S. 1991, Section 843.1, is amended to read as follows:

Section 843.1 A. No caretaker as defined in Section ~~803~~ 10-103 of Title 43A of the Oklahoma Statutes ~~shall willfully abuse,~~ neglect, or financially exploit any person entrusted in his care, or

~~shall cause, secure, or permit any of said acts to be done.~~, in whose care is an elderly person who is unable to protect his own interest, an incapacitated person or an adult in need of protective services:

1. Shall fail to take actions under the circumstances, including instituting and enforcing appropriate written policies and procedures if the caretaker is a business entity to reasonably prevent and detect abuse, neglect and financial exploitation of any such person entrusted to his or its care;

2. Who has knowledge of abuse, neglect or financial exploitation of any such person entrusted to his care shall fail to take reasonable, appropriate and immediate action under the circumstances to prevent further abuse, neglect and financial exploitation of such person; or

3. Shall willfully abuse, neglect or financially exploit any such person entrusted to his care.

B. ~~Any person convicted of violating the provisions of this section~~ caretaker who violates paragraph 1 of subsection A of this section and such abuse, neglect or financial exploitation, which actually occurred, may have been reasonably prevented had reasonable preventive actions been taken by the caretaker, or any caretaker who violates paragraph 2 or 3 of subsection A of this section shall be guilty of a felony punishable by a fine of not ~~more~~ less than Ten Thousand Dollars (\$10,000.00) nor more than Fifty Thousand Dollars (\$50,000.00), or by imprisonment in the State Penitentiary for not less than one (1) year nor more than ten (10) years, or by both said fine and imprisonment.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 843.2 of Title 21, unless there is created a duplication in numbering, reads as follows:

A. No owner, operator, administrator or employee of a residential care home, as such term is defined in Section 1-820 of

Title 63 of the Oklahoma Statutes, and no licensee, owner, administrator or employee of a nursing facility or specialized facility, as such terms are defined in Section 1-1902 of Title 63 of the Oklahoma Statutes:

1. Shall fail to take actions under the circumstances, including instituting by the owner and enforcing by the operator and administrator appropriate written policies and procedures to reasonably prevent and detect abuse, neglect and financial exploitation of a resident of such home or facility;

2. Who has knowledge of abuse, neglect or financial exploitation of a resident shall fail to take reasonable, appropriate and immediate action under the circumstances to prevent further abuse, neglect and financial exploitation of such resident of such home or facility; or

3. Shall willfully abuse, neglect or financially exploit any resident of such home or facility.

B. For purposes of this section:

1. The terms abuse, neglect and exploitation shall have the same meanings as such terms are defined in Section 10-103 of Title 43A of the Oklahoma Statutes; and

2. A resident of a nursing home, nursing facility specialized facility or residential care home is presumed to be an adult in need of protective services, an elderly person who is unable to protect his own interests, or an incapacitated person.

C. Any owner, licensee, operator, administrator or employee of a residential care home, nursing home, nursing facility or specialized home who violates paragraph 1 of subsection A of this section and such abuse, neglect or financial exploitation, which actually occurred, may have been reasonably prevented had reasonable protective actions been taken by the owner, licensee, operator, administrator or employee, or any such person who violates paragraph 2 or 3 of subsection A of this section shall be guilty of a felony

punishable by a fine of not less than Ten Thousand Dollars (\$10,000.00) nor more than Fifty Thousand Dollars (\$50,000.00), or by imprisonment in the State Penitentiary for not less than one (1) year nor more than ten (10) years, or by both such fine and imprisonment.

SECTION 7. AMENDATORY 43A O.S. 1991, Section 10-103, is amended to read as follows:

Section 10-103. When used in the Protective Services for the Elderly and for Incapacitated Adults Act, Section 10-101 et seq. of this title:

1. "Protective services" means services which are necessary to aid an elderly or incapacitated person in meeting the essential requirements for his mental or physical health and safety which such person is unable to provide or obtain without assistance and includes services provided to or obtained for such person in order to prevent or remedy the abuse, neglect, or exploitation of such person;

2. "Services which are necessary to aid an individual to meet essential requirements for mental or physical health and safety" include but shall not be limited to the identification of adults in need of the services, the provision of medical care for physical and mental health needs, provision of social services assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment, guardianship referral, outreach and transportation necessary to secure any of such needs. The term shall not include taking the person into physical custody without the consent of said person except as provided for in Section ~~807~~ 10-107 of this title, and evaluation, monitoring, and provision of protective placements;

3. "Meet essential requirements for mental or physical health and safety" means those actions necessary to provide the health

care, food, shelter, clothing, personal hygiene and other care without which physical injury or illness is likely to occur;

4. "Elderly person" means any person aged sixty-five (65) or over residing in this state;

5. "Incapacitated person" means any person eighteen (18) years of age or older who is impaired by reason of mental or physical illness or disability, advanced age, mental retardation, developmental disability or other cause and whose ability to receive and evaluate information effectively or to make and to communicate responsible decisions is impaired to such an extent that they lack the capacity to manage their financial resources or to meet essential requirements for their mental or physical health or safety without assistance;

6. "Adult in need of protective services" means an individual who, because of physical or mental disability, incapacity or other disability, is substantially impaired in his ability to provide adequately for his own care or custody, or is unable to manage his property and affairs effectively, or to carry out the activities of daily living, or to protect himself from abuse, neglect, or exploitation without assistance from others;

7. "Caretaker" means a person ~~who has the responsibility for the care of the adult in need of protective services as a result of family relationship or who has assumed the responsibility for the care of the elderly person or incapacitated adult voluntarily, by contract, or as a result of the ties of friendship~~ or any type of business entity who has either:

- a. voluntarily assumed responsibility for the personal care of the elderly person who is unable to protect his own interest, incapacitated person, or adult in need of protective services, as a result of family relationships or friendship, or

b. undertaken responsibility for the personal care of the elderly person who is unable to protect his own interest, incapacitated person, or adult in need of protective services by any kind of written or oral agreement, third-party agreement, expressed or implied agreement, or by actions or under circumstances by which intent to be responsible for the care of such person may be inferred. As used in this paragraph, the term "business entity" means any type of business in the broadest sense of the term, whether or not it is properly licensed to do business in the State of Oklahoma or licensed to carry on the particular business which it is in fact conducting, and such business entity's:

- (1) board members or directors,
- (2) managing officers,
- (3) personnel who exercise management authority by whatever title or designation for the business entity,
- (4) managing partners and general partners,
- (5) persons who make or are responsible for making policy or procedural decisions affecting persons in the care of the business entity, or who implement or are responsible for implementing such policies or procedural decisions, and
- (6) employees, agents and subcontractors of the business entity, who have any duty or responsibility for the medical or personal care of the elderly person who is unable to protect his own interest, incapacitated person, or adult in need of protective services;

8. "Department" means the Department of Human Services;

9. "Evaluation Service" means a team of medical, psychological, psychiatric, and social work professionals established by the Department for the purpose of conducting a comprehensive physical, mental, and social evaluation of an elderly person or an incapacitated adult for whom a petition has been filed in a court for continued protective services on an involuntary basis;

10. "Abuse" means the intentional infliction of physical pain, injury, or mental anguish or the deprivation of adequate or appropriate food, clothing, shelter, or medical care by a caretaker or other person responsible for providing these services;

11. ~~"Exploitation"~~ "Exploit" or "exploitation" means an unjust or improper use of the resources of an elderly person or incapacitated adult for the profit or advantage, pecuniary or otherwise, of another person; and

12. "Neglect" means:

- a. the failure to provide reasonable protection from foreseeable physical injury under the circumstances for an elderly person or incapacitated adult who is unable to protect his own interest; ~~or, an adult in need of protective services, or an incapacitated adult in need of protective services, or an incapacitated adult due to the action or inaction of another or that of such person to be protected,~~
- b. the failure to provide reasonably adequate shelter, appropriate temperate living conditions, or appropriate clothing; ~~or the harming or threatening with harm through action or inaction by either another individual or through the person's own action or inaction because of his lack of awareness, incompetence, or incapacity,~~ under the circumstances for an elderly person who is unable to protect his own interest, an adult in need of protective services, or

an incapacitated adult which has resulted or may result in physical or mental injury to such person,

c. the failure to provide:

(1) reasonably adequate and appropriate hydration or nutrition under the circumstances,

(2) hydration or nutrition resulting in violation of the Hydration and Nutrition for Incompetent Patients Act, Section 3080.1 et seq. of Title 63 of the Oklahoma Statutes,

(3) hydration or nutrition resulting in violation of the rules or regulations of the Department of Human Services, or

(4) hydration or nutrition resulting in violation of the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, Section 3101.1 et seq. of Title 63 of the Oklahoma Statutes,

for an elderly person who is unable to protect his own interest, an adult in need of protective services, or an incapacitated adult which has resulted or may result in physical or mental injury to such person,

d. the failure to provide:

(1) reasonably adequate and appropriate medical care or personal care under the circumstances,

(2) medical care resulting in violation of the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, Section 3101.1 et seq. of Title 63 of the Oklahoma Statutes,

(3) medical care or personal care resulting in violation of the rules or regulations of the Department of Human Services, or

(4) medical care or personal care resulting in violation of the rules or regulations of the State Department of Health,
for an elderly person who is unable to protect his own interest, an adult in need of protective services, or an incapacitated adult which has resulted or may result in physical or mental injury to such person, or
e. the failure to promptly notify by reasonable means appropriate medical personnel under the circumstances for an elderly person who is unable to protect his own interest, an adult in need of protective services, or an incapacitated adult which cause or aggravate physical illness or injury to such person.

SECTION 8. AMENDATORY 43A O.S. 1991, Section 10-104, is amended to read as follows:

Section 10-104. A. Any person having reasonable cause to believe that an elderly person who is unable to protect his own interest, adult in need of protective services, or incapacitated adult is suffering from abuse, neglect, or financial exploitation shall make a report to either the Department of Human Services or the office of the district attorney in the county in which the suspected abuse, neglect, or exploitation occurred. If a report is made to the Department of Human Services, the Department shall notify the district attorney of the county in which the suspected abuse, neglect or financial exploitation occurred and the Attorney General of the particulars as soon as practicable by telephone before any investigation is conducted and in writing; the district attorney or the Attorney General may conduct a criminal investigation or refer the case to another law enforcement agency for criminal investigation, in which case, the Department of Human Services will not hinder the criminal investigation, but assist if requested by the office of the district attorney, the Attorney

General or the other law enforcement agency. If a report is made to the Department of Human Services and after the district attorney and the Attorney General decline to initiate a criminal investigation, the Department of Human Services' county office after investigating the report shall forward its findings to the ~~office of~~ Attorney General and the district attorney in the county in which the suspected abuse, neglect, or exploitation occurred.

B. The report shall contain the name and address of the elderly person or incapacitated adult, the name and address of the caretaker, if any, and a description of the situation of the elderly person or incapacitated adult.

C. Any person who knowingly and willfully fails to promptly report any abuse, neglect, or exploitation as required by the provisions of subsection A of this section, upon conviction, shall be guilty of a misdemeanor.

D. Any person participating in good faith and exercising due care in the making of a report pursuant to the provisions of this section shall have immunity from any civil ~~or criminal~~ liability that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any civil judicial proceeding resulting from such report.

E. Any person who willfully or recklessly makes a false report or a report without a reasonable basis in fact for such a report pursuant to the provisions of this section shall be liable in a civil suit for any actual damages suffered by the person or persons being reported and for any punitive damages set by the court or jury which may be allowed in the discretion of the court or jury.

SECTION 9. AMENDATORY 63 O.S. 1991, Section 1-830, is amended to read as follows:

Section 1-830. A. If upon inspection or investigation, or whenever the State Department of Health determines that there are reasonable grounds to believe that a home is in violation of the

Residential Care Act, Section 1-820 et seq. of this title, or of any standard, rule, or regulation promulgated pursuant to the provisions of the Residential Care Act which would have a direct impact upon one or more residents of the home or of any order of the Department, the Department shall give written notice to the alleged violator specifying the cause of complaint, unless there is evidence of abuse, neglect or financial exploitation of a resident in which case the Department shall immediately notify the district attorney in the county in which the suspected abuse, neglect or financial exploitation occurred and the Attorney General of the same so that a criminal investigation may be initiated and the Department shall not give notice of the abuse, neglect or financial exploitation to the alleged violator or to any agent or employee of the residential home, until the criminal investigation is completed, regardless of other provisions of this section, unless an emergency, life-threatening situation exists, in which case the Department shall take immediate action to protect the resident in addition to notifying the Attorney General and the district attorney. The notice provisions of this act shall be tolled to allow for a criminal investigation to proceed without hindrance until completion and, when tolled, shall not affect the administrative hearing process and penalties imposed thereby, if any, but merely delay the same until notice is given. Such notice shall require that the matters complained of be corrected immediately or that the alleged violator appear before the Department at a time and place specified in the notice and answer the charges. The notice shall be delivered to the alleged violator in accordance with the provisions of subsection E of this section.

B. The Department shall give the notice specified by the provisions of subsection A of this section within ten (10) days of an inspection or investigation of the home if the Department determines that the home is in violation of the Residential Care Act

or the rules and regulations promulgated by the Board pursuant to the provisions of the Residential Care Act.

C. The Department shall afford the alleged violator an opportunity for a fair hearing within fifteen (15) days of receipt of notice provided by subsection A of this section in accordance with the provisions of subsection F of this section. On the basis of the evidence produced at the hearing, the Department shall make findings of fact and conclusions of law and enter an order thereon. The Department shall give written notice of such order to the alleged violator and to such other persons as shall have appeared at the hearing and made written request for notice of the order. If the hearing is held before any person other than the Department, such person shall transmit the record of the hearing together with recommendations for findings of fact and conclusions of law to the Department which shall thereupon enter its order. The Department may enter its order on the basis of such record or, before issuing its order, require additional hearings or further evidence to be presented. The order of the Department shall become final and binding on all parties unless appealed to the district court as provided in Sections 317 through 325 of Title 75 of the Oklahoma Statutes within thirty (30) days after notice has been sent to the parties.

D. Whenever the Department finds that an emergency exists requiring immediate action to protect the public health or welfare of any resident of a home licensed pursuant to the provisions of the Residential Care Act, the Department may without notice or hearing issue an order stating the existence of such an emergency and requiring that such action be taken as it deems necessary to meet the emergency. Such order shall be effective immediately. Any person to whom such an order is directed shall comply with said order immediately but on application to the Department shall be afforded a hearing within ten (10) days of receipt of said notice.

On the basis of such hearing, the Department shall continue such order in effect, revoke it, or modify it. Any person aggrieved by such order continued after the hearing provided for in this subsection may appeal to the district court of the area affected within thirty (30) days. Such appeal when docketed shall have priority over all cases pending on said docket, except criminal cases. For the purposes of this subsection, the term emergency shall mean a life-threatening situation.

E. Except as otherwise expressly provided by law, any notice, order, or other instrument issued by or pursuant to authority of the Department may be served on any person affected thereby personally, by publication, or by mailing a copy of the notice, order, or other instrument by registered mail directed to the person affected at his last-known post office address as shown by the files or records of the Department. Proof of service shall be made as in the case of service of a summons or by publication in a civil action or may be made by the affidavit of the person who did the mailing. Such proof of service shall be filed in the office of the Department.

Every certificate or affidavit of service made and filed as in this section provided shall be prima facie evidence of the facts therein stated. A certified copy thereof shall have like force and effect.

F. The hearings authorized by this section may be conducted by the Department. The Department may designate hearing officers who shall have the power and authority to conduct such hearings in the name of the Department at any time and place. Such hearings shall be conducted in conformity with and records made thereof as provided by the provisions of Sections 309 through 326 of Title 75 of the Oklahoma Statutes.

SECTION 10. AMENDATORY 63 O.S. 1991, Section 1-832, is amended to read as follows:

Section 1-832. A. No person shall willfully:

1. Fail to correct or interfere with the correction of a violation within the time specified on the notice or approved plan of correction pursuant to the provisions of the Residential Care Act, Section 1-820 et seq. of this title, as the maximum period given for correction, unless an extension is granted and the corrections are made before expiration of extension; or

2. Prevent, interfere with, or attempt to impede in any way the work of any duly authorized representative of the Department in the investigation and enforcement of the Residential Care Act; or

3. Prevent or attempt to prevent any such representative from examining any relevant books or records in the conduct of official duties pursuant to the provisions of the Residential Care Act; or

4. Prevent or interfere with any such representative in the preserving of evidence of any violation of the Residential Care Act or the rules promulgated pursuant to the provisions of the Residential Care Act; or

5. Retaliate or discriminate against any resident or employee for contacting or providing information to any state official, or for initiating, participating in, or testifying in an action for any remedy authorized pursuant to the provisions of the Residential Care Act; or

6. File any false, incomplete, or intentionally misleading information required to be filed pursuant to the provisions of the Residential Care Act, or willfully fail or refuse to file any information required by the Department pursuant to the provisions of the Residential Care Act; or

7. Open or operate a home without a license.

B. No employee of a state or unit of a local government agency shall aid, abet, assist, conceal, or conspire with an administrator, operator or other employee of a home in a violation of any provision of the Residential Care Act or any rule, regulation, or standard promulgated by the Board pursuant to the Residential Care Act.

C. Any person who violates any of the provisions of the Residential Care Act, upon conviction, shall be guilty of a misdemeanor. Each day upon which such violation occurs shall constitute a separate violation.

D. Any person who:

1. Obstructs, impedes, unlawfully prevents or delays an investigation by the Department of Human Services, Attorney General, district attorney or other law enforcement agency into the possible homicide, abuse, neglect or financial exploitation of a resident;

2. Destroys, hides, obliterates, falsifies or omits accurate entries in relation to the medical records pertaining to a resident, or destroys, hides, obliterates, falsifies or omits accurate entries in relation to the financial records pertaining to a resident, with intent to obstruct, impede, unlawfully prevent or delay investigation of the possible homicide, abuse, neglect or financial exploitation of the resident; or

3. Gives investigators or employees of the Department of Human Services, the Attorney General, district attorney or other law enforcement agency intentionally false or misleading statements concerning the medical records or past or present physical condition of a resident, or concerning the past or present financial records of a resident,

shall, upon conviction, be guilty of a felony punishable by imprisonment in the State Penitentiary for up to three (3) years, or by a fine of not less than Five Thousand Dollars (\$5,000.00) nor more than Fifty Thousand Dollars (\$50,000.00), or by both such fine and imprisonment.

SECTION 11. AMENDATORY 63 O.S. 1991, Section 1-833, is amended to read as follows:

Section 1-833. A. Any person who has been determined by the State Department of Health to have violated any provision of the Residential Care Act, Section 1-820 et seq. of this title, or any

rule, regulation, or order issued pursuant to the provisions of the Residential Care Act may be liable for a civil penalty of not more than One Hundred Dollars (\$100.00) for each day that said violation continues. The maximum civil penalty shall not exceed Ten Thousand Dollars (\$10,000.00) for any related series of violations.

B. The amount of the penalty shall be assessed by the Department pursuant to the provisions of subsection A of this section, after notice and hearing. In determining the amount of the penalty, the Department shall include but not be limited to consideration of the nature, circumstances, and gravity of the violation and, with respect to the person found to have committed the violation, the degree of culpability, ~~the effect on ability of the person to continue to do business,~~ and any show of good faith in attempting to achieve compliance with the provisions of the Residential Care Act.

C. Any license holder may elect to surrender his license in lieu of said fine but shall be forever barred from obtaining a reissuance of said license.

SECTION 12. AMENDATORY 63 O.S. 1991, Section 1-1911, is amended to read as follows:

Section 1-1911. A. Every building, institution, or establishment for which a license has been issued shall be periodically inspected by a duly appointed representative of the Commissioner, pursuant to rules and regulations adopted by the Board with the advice and counsel of the Long-Term Care Facility Advisory Board created pursuant to the provisions of Section 1-1923 of this title. Inspection reports shall be prepared on forms prescribed by the Commissioner with the advice and counsel of the Advisory Board.

Facilities licensed pursuant to the provisions of the Nursing Home Care Act, Section 1-1901 et seq. of this title, shall not be exempt from being inspected or licensed pursuant to the laws of this state relating to hotels, restaurants, lodging houses, boarding

houses, and places of refreshment. Inspections of residential care homes shall be conducted in accordance with the standards established by the Commissioner pursuant to the provisions of the Residential Care Act, Section 1-820 et seq. of this title.

B. The State Department, whenever it deems necessary, shall inspect, survey, and evaluate every facility to determine compliance with applicable licensure and certification requirements and standards. All inspections of facilities shall be unannounced. The Department may have as many unannounced inspections as it deems necessary. The Department may periodically visit a facility for the purpose of consultation. An inspection, survey, or evaluation, other than an inspection of financial records, shall be conducted without prior notice to the facility. One person shall be invited from a statewide organization of the elderly by the Department to act as a citizen observer in an unannounced inspection; the individual may be a state or local ombudsman as defined by the Special Unit on Aging established by the Department of Human Services acting pursuant to the provisions of the Older Americans Act of 1965, Public Law No. 89-73, 42 U.S.C., Section 3001 et seq., as amended. The citizen observer shall receive expenses as provided for in the State Travel Reimbursement Act. An employee of a state or unit of a local government agency charged with inspecting, surveying, and evaluating facilities who aids, abets, assists, conceals, or conspires with a facility administrator or employee in violation of the provisions of the Nursing Home Care Act shall be guilty of a misdemeanor and shall be subject to dismissal from employment.

C. The Department shall hold open meetings at least once every four (4) years in each of the licensed facilities to advise and to facilitate communication and cooperation between facility personnel and the residents of facilities in their mutual efforts to improve patient care. Administrators, employees of the facility, residents,

residents' relatives, friends, residents' representatives, employees from appropriate state and federal agencies shall be encouraged to attend these meetings to contribute to this process.

D. 1. The Department shall require periodic reports and shall have access to books, records, and other documents maintained by the facility to the extent necessary to implement the provisions of the Nursing Home Care Act and the rules promulgated pursuant to said provisions.

2. Any holder of a license or applicant for a license shall be deemed to have given consent to any authorized officer, employee, or agent of the Department to enter and inspect the facility in accordance with the provisions of the Nursing Home Care Act. Refusal to permit said entry or inspection, except for good cause, shall constitute grounds for denial, nonrenewal, or revocation of a license as provided in the provisions of the Nursing Home Care Act.

E. The Department shall make at least one annual report on each facility in the state. All conditions and practices not in compliance with applicable standards within the year for which the report is made shall be specifically stated. If a violation is corrected or is subject to an approved plan of correction, such action shall be specified in the annual report. Upon receiving a written request for a copy of the annual report, the Department shall send a copy of the report to any person making the written request. The Department may charge a reasonable fee for copying costs.

F. The Department shall immediately notify by telephone and in writing the district attorney and the Attorney General of evidence of abuse, neglect or financial exploitation of any resident found by the inspection team so the district attorney or the Attorney General may initiate a criminal investigation or refer the case to another law enforcement agency for criminal investigation, in which case, the Department will not hinder the criminal investigation, but

assist if requested by the office of the district attorney, the Attorney General or other law enforcement agency.

SECTION 13. AMENDATORY 63 O.S. 1991, Section 1-1912, is amended to read as follows:

Section 1-1912. A. If upon inspection or investigation, the State Department of Health learns of any evidence that any resident may have been or is being abused, neglected or financially exploited, then in addition to reporting same in accordance with subsection F of Section 1-1911 of this title, the Department shall not notify in any way the facility or any agent or employee of the facility of the abuse, neglect or financial exploitation, but shall allow the criminal investigation to proceed without hindrance, regardless of the notice requirement to the licensee contained herein, until the criminal investigation is completed or until the district attorney approves of specific notice to the licensee of the abuse, neglect or financial exploitation, unless an emergency, life-threatening situation exists, in which case the Department shall take immediate action to protect the resident and notify the district attorney and Attorney General. The notice provisions of this act shall be tolled to allow for a criminal investigation to proceed without hindrance until completion and, when tolled, shall not affect the administrative hearing process and penalties imposed thereby, if any, but merely delay the same until notice is given.

B. If upon inspection or investigation, the Department determines that a facility is in violation of this act or of any rule promulgated thereunder, it shall promptly serve a notice of violation upon the licensee, provided, however, this requirement shall not apply to inspection or investigation of cases of abuse, neglect, or financial exploitation as these terms are referred to in subsection A of this section. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision or rule alleged to have been violated.

The notice shall inform the licensee of any action the Department intends to take including the requirement of a facility plan of correction, imposition of administrative penalties, placement of a monitor, temporary manager or receiver in the facility, a conditional license, or license suspension or revocation. The Department shall also inform the licensee of rights to a hearing.

SECTION 14. AMENDATORY 63 O.S. 1991, Section 1-1916, is amended to read as follows:

Section 1-1916. A. No person shall:

1. Intentionally fail to correct or interfere with the correction of a violation within the time specified on the notice or approved plan of correction under this act as the maximum period given for correction, unless an extension is granted and the corrections are made before expiration of extension;

2. Intentionally prevent, interfere with, or attempt to impede in any way the work of any duly authorized representative of the Department in the investigation and enforcement of this act;

3. Intentionally prevent or attempt to prevent any such representative from examining any relevant books or records in the conduct of official duties under this act;

4. Intentionally prevent or interfere with any such representative in the preserving of evidence of any violation of this act or the rules promulgated under this act;

5. Intentionally retaliate or discriminate against any resident or employee for contacting or providing information to any state official, or for initiating, participating in, or testifying in an action for any remedy authorized under this act;

6. Willfully file any false, incomplete or intentionally misleading information required to be filed under this act, or willfully fail or refuse to file any information; or

7. Open or operate a facility without a license.

B. A violation of this section is a misdemeanor.

C. The district attorney of the county in which the facility is located, or the Attorney General, may be requested by the Department to initiate prosecutions under this section.

D. Any person who:

1. Obstructs, impedes, unlawfully prevents or delays an investigation by the Department of Human Services, Attorney General, district attorney or other law enforcement agency into the possible homicide, abuse, neglect or financial exploitation of a resident;

2. Destroys, hides, obliterates, falsifies or omits accurate entries in relation to the medical records pertaining to a resident, or destroys, hides, obliterates, falsifies or omits accurate entries in relation to the financial records pertaining to a resident, with intent to obstruct, impede, unlawfully prevent or delay investigation of the possible homicide, abuse, neglect or financial exploitation of the resident; or

3. Gives investigators or employees of the Department of Human Services, the Attorney General, district attorney or other law enforcement agency intentionally false or misleading statements concerning the medical records or past or present physical condition of a resident, or concerning the past or present financial records of a resident,

shall, upon conviction, be guilty of a felony punishable by imprisonment in the State Penitentiary for up to three (3) years, or by a fine of not less than Five Thousand Dollars (\$5,000.00) nor more than Fifty Thousand Dollars (\$50,000.00), or by both such fine and imprisonment.

SECTION 15. AMENDATORY 63 O.S. 1991, Section 1-1916.1, is amended to read as follows:

Section 1-1916.1 A. Any person who has been determined by the State Department of Health to have violated any provision of the Nursing Home Care Act, Section 1-1901 et seq. of this title, or any rule, regulation or order issued pursuant to the provisions of the

Nursing Home Care Act may be liable for an administrative penalty of not more than One Hundred Dollars (\$100.00) for each day that said violation continues. The maximum administrative penalty shall not exceed Ten Thousand Dollars (\$10,000.00) for any related series of violations.

B. The amount of the penalty shall be assessed by the Department pursuant to the provisions of subsection A of this section, after notice and hearing. Within ten (10) days of the ~~inspection documenting the violation~~ notice of the action taken by the Department, the facility may appeal this decision pursuant to ~~Article II the provisions~~ the provisions of the Administrative Procedures Act, Section ~~309~~ 308a et seq. of Title 75 of the Oklahoma Statutes. In determining the amount of the penalty, the Department shall include but not be limited to consideration of the nature, circumstances and gravity of the violation, the repetitive nature of the violation at this facility or others operated by the same entity, the previous degree of difficulty in obtaining compliance with the rules, and, with respect to the person found to have committed the violation, the degree of culpability, ~~the effect on ability of the person to continue to do business~~, and any show of good faith in attempting to achieve compliance with the provisions of the Nursing Home Care Act.

C. Any license holder may elect to surrender his license in lieu of said fine but shall be forever barred from obtaining a reissuance of said license.

SECTION 16. AMENDATORY 63 O.S. 1991, Section 1-1918, as amended by Section 1, Chapter 173, O.S.L. 1992 (63 O.S. Supp. 1992, Section 1-1918), is amended to read as follows:

Section 1-1918. A. ~~All principles enunciated in this section~~ A copy of subsections A through H of Section 1-1918 of this act shall be posted in a four conspicuous, easily accessible ~~place~~ places in each facility, including inside the main entrance and on at least one hallway of resident rooms, and each resident and personally

appointed representative, if any, shall be provided a copy of ~~these principles~~ this statute, and advised verbally, prior to or upon admission. The facility shall ensure that its staff is familiar with and observes the rights and responsibilities enumerated in this section. The facility shall make available in a timely manner to each resident, such resident's relative and such resident's personal representative, upon reasonable requests, a current written statement of such rights. Violation of the provisions of this paragraph, in addition to criminal penalties, after notice and hearing, subjects the licensee, owner, and administrator to administrative penalties as set forth in Section 1-1916 of this title.

B. A statement of rights and responsibilities shall include, but not be limited to, the following:

1. Every resident's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed and the facility shall encourage and assist in the exercise of these rights;

2. Every resident shall have the right to have private communications, including telephonic communications and visits and consultations with the physician, attorney, meetings of family and resident groups or any other person or persons of his choice, and may send and promptly receive, unopened, his personal mail;

3. Every resident shall have the right, without fear of reprisal or discrimination, to present grievances with respect to treatment or care that is or fails to be furnished on behalf of himself or others to the facility's staff or administrator, to governmental officials or to any other person and to organize to join with other residents or individuals within or outside of the facility to work for improvements in resident care. The family of a resident shall have the right to meet in the facility with other residents' families. Every resident shall have the right to prompt

efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents;

4. Every resident shall have the right to manage his own financial affairs, unless the resident delegates the responsibility, in writing, to the facility. The resident shall have at least a quarterly accounting of any personal financial transactions undertaken in his behalf by the facility during any period of time the resident has delegated such responsibilities to the facility;

5. Every resident shall have the right to receive adequate and appropriate medical care consistent with established and recognized medical practice standards within the community. Every resident unless adjudged to be mentally incapacitated shall be fully informed by his attending physician of his medical condition and advised in advance of proposed treatment or changes in treatment in terms and language that the resident can understand, unless medically contraindicated, and to participate in the planning of care and treatment or changes in care and treatment. Every resident shall have the right to refuse medication and treatment after being fully informed of and understanding the consequences of such actions unless adjudged to be mentally incapacitated;

6. Every resident shall receive respect and privacy in his medical care program. Case discussion, consultation, examination and treatment shall remain confidential and shall be conducted discreetly. Personal and medical records shall be confidential, and shall include such documentation or information so as to alert a health care provider or an emergency medical care facility of the existence of a directive to physicians or a living will;

7. Every resident shall have the right to reside and to receive services with reasonable accommodation of individual needs and preferences, except where the health or safety of the individual or other residents would be endangered;

8. Every resident shall have the right to receive notice before the room or roommate of the resident in the facility is changed and if the resident has a telephone in his or her room, the resident must be informed of any charges to be incurred when moving;

9. Every resident shall have the right to retain and use his personal clothing and possessions, unless medically contraindicated, and shall have the right to security in the storage and use of such clothing and possessions;

10. Every resident shall have the right to receive courteous and respectful care and treatment and a written statement of the services provided by the facility, including those required to be offered on an as-needed basis, and a statement of related charges, including any costs for services not covered under medicare or medicaid, or not covered by the facility's basic per diem rate;

11. Every resident shall be free from mental and physical abuse, corporal punishment, involuntary seclusion, and from any physical and chemical restraints imposed for purposes of discipline or convenience and not required to treat the resident's medical symptoms, except those restraints authorized in writing by a physician for a specified period of time or as are necessitated by an emergency where the restraint may only be applied by a physician, qualified licensed nurse or other personnel under the supervision of said physician who shall set forth in writing the circumstances requiring the use of restraint. Use of a chemical or physical restraint shall require the consultation of a physician within twenty-four (24) hours of such emergency;

12. Every resident shall receive a statement of the facility's regulations and an explanation of the resident's responsibility to obey all reasonable regulations of the facility and to respect the personal rights and private property of the other residents;

13. Every resident shall receive a statement that, should they be adjudicated incompetent and have no ability to be restored to

legal capacity, the above rights and responsibilities shall be exercised by a court-appointed representative;

14. No resident shall be required to perform services for a facility;

15. Every resident shall have privacy for spousal visits. Every resident may share a room with their spouse, if the spouse is residing in the same facility;

16. When a physician indicates it is appropriate, a facility shall immediately notify the resident's next of kin, or representative of the resident's death or when the resident's death appears to be imminent;

17. Every resident shall have the right to participate in social, religious, and community activities that do not interfere with the rights of other residents in the facility; and

18. Every resident shall have the right to examine, upon reasonable request, the results of the most recent survey of the facility conducted by the Department with respect to the facility and any plan of correction in effect with respect to the facility.

C. No licensed facility shall deny appropriate care on the basis of the resident's source of payment as defined in the regulations. Appropriate care shall not include duplication of services by a nursing home, hospice, or any combination of care providers.

D. Each facility shall prepare a written plan and provide appropriate staff training to implement each resident's rights as stated in this section.

E. Any person convicted of violating any provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not less than One Hundred Dollars (\$100.00) nor more than Three Hundred Dollars (\$300.00) or imprisonment in the county jail for not more than thirty (30) days, or by both such fine and imprisonment.

F. In addition to the penalties provided in this section, an action may be brought against an individual by any resident who is injured by any violation of this section, or who shall suffer injury from any person whose threats would cause a violation of this section if carried through, may maintain an action to prevent, restrain or enjoin a violation or threatened violation. If a violation or threatened violation of this section shall be established in any action, the court shall enjoin and restrain or otherwise prohibit the violation or threatened violation and assess in favor of the plaintiff and against the defendant the cost of the suit, and the reasonable attorney fees incurred by the plaintiff. If damages are alleged and proved in the action, the plaintiff shall be entitled to recover from the defendant the actual damages sustained by the plaintiff. If it is proved in an action that the defendant's conduct was willful or in reckless disregard of the rights provided by this section, punitive damages may be assessed.

G. Any employee of a state agency that inspects any nursing facility or special facility shall report any flagrant violations of this act or any other statute to the administrative head of the state agency, who shall immediately take whatever steps are necessary to correct the situation including, when appropriate, reporting the violation to the district attorney of the county in which the violation occurred.

H. Upon the death of a resident who has no sources of payment for funeral services, the facility shall immediately notify appropriate county officials who shall be responsible for funeral and burial procedures of the deceased in the same manner as with any indigent resident of the county.

SECTION 17. AMENDATORY 63 O.S. 1991, Section 1-1939, is amended to read as follows:

Section 1-1939. A. The owner and licensee are liable to a resident for any intentional or negligent act or omission of their

agents or employees which injures the resident. Also, any state employee that aids, abets, assists, or conspires with an owner or licensee to perform an act that causes injury to a resident shall be individually liable.

B. A resident may maintain an action under this act for any other type of relief, including injunctive and declaratory relief, permitted by law.

C. Any damages recoverable under this section, including minimum damages as provided by this section, may be recovered in any action which a court may authorize to be brought as a class action. The remedies provided in this section, are in addition to and cumulative with any other legal remedies available to a resident. Exhaustion of any available administrative remedies shall not be required prior to commencement of suit hereunder.

D. Any waiver by a resident or his legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void, and without legal force or effect.

E. Any party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect.

F. A licensee or its agents or employees shall not transfer, discharge, evict, harass, dismiss or retaliate against a resident, a resident's guardian or an employee or agent who makes a report, brings, or testifies in, an action under this section, or files a complaint because of a report, testimony or complaint.

G. Any person, ~~institution or agency, under this act,~~ participating in good faith in the making of a report, or in the investigation of such a report shall not be deemed to have violated any privileged communication and shall have immunity from any civil

liability, ~~civil or criminal~~, or any other civil proceedings, ~~civil or criminal~~, as a consequence of making such report. The good faith of any persons required, or permitted to report cases of suspected resident abuse or neglect under this act shall be presumed.

H. A facility employee or agent who becomes aware of abuse or neglect of a resident prohibited by this act shall immediately report the matter to the facility administrator. A facility administrator who becomes aware of abuse or neglect of a resident shall immediately act to rectify the problem and shall make a report of the incident and its correction to the Department.

SECTION 18. AMENDATORY 63 O.S. 1991, Section 1-1940, is amended to read as follows:

Section 1-1940. A. The operation or maintenance of a facility in violation of this act, or of the rules and regulations promulgated by the State Department of Health, is declared a public nuisance inimical to the public welfare. The ~~Director~~ Commissioner of Health in the name of the people of the state, through the Attorney General, or the district attorney of the county in which the facility is located, may, in addition to other remedies herein provided, bring action for an injunction to restrain such violation or to enjoin the future operation or maintenance of any such facility.

B. 1. Any person with personal knowledge or substantial specific information who believes that this act, a rule promulgated under this act, or a federal certification rule applying to a facility may have been violated may request an investigation. The request may be submitted to the Department in writing, by telephone, or personally. An oral complaint shall be reduced to writing by the Department. Provided that any person who willfully or recklessly makes a false request or a report without a reasonable basis in fact for such a request under the provisions of this act shall be liable in a civil suit for any actual damages suffered by a facility so

requested to be investigated for any punitive damages set by the court or jury which may be allowed in the discretion of the court or jury when deemed proper by the court or jury.

2. The substance of the complaint shall be provided to the licensee, owner or administrator no earlier than at the commencement of the on-site inspection of the facility which takes place pursuant to the complaint, unless the complaint involves abuse, neglect, or financial exploitation of a resident, in which case the Department shall immediately notify the district attorney of the county in which the facility is located and the Attorney General of the same, and take other actions as required in Section 1-1912 of this title.

3. The Department shall promulgate rules and regulations to protect the identity of the complainant, provided that said person is a present resident or resident's designated guardian or a present employee.

4. Upon receipt of a complaint, the Department shall determine whether this act, a rule promulgated under this act, or a federal certification rule for facilities has been or is being violated. A determination about a complaint which alleges a violation shall be made in writing, within thirty (30) days after the complaint's receipt. The determination shall state the reasons therefor.

5. In all cases, the Department shall inform the complainant of its findings within ten (10) days of its determination unless otherwise indicated by the complainant, and the complainant may direct the Department to send a copy of such findings to one other person. The notice of such findings shall include a copy of the written determination, the correction order, if any, the warning notice, if any, and the state licensure of federal certification for, or both, on which the violation is listed.

6. A written determination, correction order or warning notice concerning a complaint shall be available for public inspection.

7. The Department shall issue a written determination signed by the Commissioner which shall serve as a final appealable order subject to trial de novo in the appropriate district court.

8. The Department shall establish any additional rules and regulations necessary for the investigation and hearing of complaints as provided herein, and is authorized to employ hearing officers, and hire attorneys to represent the Department and Commissioner to ensure that this and other laws pertaining to the Department are being properly executed.

SECTION 19. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

44-1-0351

CJ