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FLORIDA'S LIFE CARE LAW: REVITALIZING A DORMANT
STATUTE TO PROTECT THE ELDERLY

A fear common to persons of advanced age is that their money will run out before they die.¹ The incidence of costly illness in the elderly² and the impossibility of an accurate prediction of the time of death lend credence to this fear.³ Partial financial security can be achieved through the purchase of an annuity guaranteeing payments of money for life. Alternatively, the life care contract provides a type of old-age insurance. In exchange for a sum of money or "all worldly goods," an older person may receive a promise of care for life.⁴ "Care" may include food, clothing, shelter, medical attention, and a variety of other supplies and services necessary as one advances in age.⁵

Life care contracts are attractive to persons of advanced age and limited income,⁶ but their functional utility is dependent on the ability of the other party to honor the lifetime promise of care. The purpose of Florida's life care law⁷ is to assure the financial stability of such arrangements by regulating⁸ the institutions that offer life care contracts. The law is designed to prevent plans in which retirement institutions charge a one-time fixed fee for life care without providing a security arrangement.⁹ An elderly person might risk all his worldly goods in reliance on an institution that does not have

1. S. DE BEAUVOIR, *THE COMING OF AGE* 699 (P. O'Brian transl. 1970) [hereinafter cited as *THE COMING OF AGE*]. This work provides a complete discussion of the problems inherent in aging.

2. STAFF OF SENATE SUBCOMM. ON LONG-TERM CARE OF THE SPECIAL COMM. ON AGING, 93D CONG., 2D SESS., SUPPORTING PAPAR NO. 1: *THE LITANY OF NURSING HOME ABUSES AND AN EXAMINATION OF THE ROOTS OF CONTROVERSY* 211 & n.190 (Comm. Print 1974) [hereinafter cited as *NURSING HOME ABUSES*].

3. The rational nature of the fear of losing money and possessions has been disputed. Although it appears to exist, and is often described as avarice, it may be largely attributable to psychological concerns about the self. *THE COMING OF AGE* 699-700. To the extent that this fear reflects an appreciation of reality, legislative solutions may be available. See APPENDIX.

4. Letter from Daniel H. Thompson, Assistant Director, Legal Services for the Elderly, to Victoria J. Powell, Aug. 6, 1975, on file with the University of Florida Law Review. There is some disagreement over the exact definition of a life care contract. *Id.* See also text accompanying notes 15-41 *infra*.

5. See FLA. STAT. §651.02(3) (1975).

6. Although the plan is initially attractive, the elderly may have certain reservations. For example, they may have to give up their homes and move into an institution. See text accompanying notes 58-67 *infra*.

7. FLA. STAT. §§651.01 *et seq.* (1975).

8. See generally FLA. STAT. §651.05 (1975). The statute requires the provider to file the type of agreement for care to be entered into by the parties. If the applicant is engaged in the business of furnishing care, it must also file an itemization of outstanding agreements, dates of the agreements, transferors or their nominees named in such agreements, and the consideration given with respect to each agreement. The applicant must also describe a) the location and description of physical properties being used or proposed to be used in connection with the life care agreements; b) the sufficiency of funds available for the provider to perform its obligation under such agreements. After the issuance of a certificate of authority, an annual statement must be filed specifying the terms of the agreement.

9. See FLA. STAT. §651.09 (1975). The statute requires a \$75,000 deposit to accompany any application for a certificate of authority.

sufficient resources as measured by sound actuarial practices.¹⁰ Since older people are excluded from normal employment opportunities,¹¹ the bankruptcy of a life care institution leaves them in a particularly helpless position.

The limited scope¹² of Florida's current law, combined with certain provisions ill-suited to its purpose,¹³ demonstrates the failure of the law to accomplish its objective. Executive interpretation¹⁴ has further restricted the aegis of the law. This commentary will identify these problem areas and propose necessary substantive corrections.

SCOPE OF THE LIFE CARE LAW

The few existing interpretations of the statute are based on the first section entitled "Legislative Determination."¹⁵ Recognizing abusive business practices in the life care industry, the legislature noted in this section that such practices should be regulated by the state.¹⁶ A 1953 opinion of the Attorney General¹⁷ directed to the Insurance Commissioner¹⁸ emphasized this section in concluding that the life care law was not applicable to a church supported home for the aged. In that situation, the elderly were given board and lodging for life in exchange for a fee determined from expense projections based on recognized mortality tables. Under the plan, the church continued to support the aged who lived beyond their life expectancies. The Attorney General examined the statutory definitions of "person" and "care" juxtaposed against the legislative determination.¹⁹ A "person," as defined by the statute includes "an owner or operator, whether a natural person or a firm or corporation, of a private home, institution, building, residence or other place, whether operated for profit or not, who

10. Letter from Thomas T. Cobb, former State Representative, instrumental in the introduction and passage of the life care law in 1953, to Victoria J. Powell, Sept. 29, 1975, on file with the University of Florida Law Review.

11. See McDougal, Lasswell, & Chen, *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. FLA. L. REV. 639 (1976). For a discussion of the pressures for earlier retirements and concomitant effects, see Bernstein, *Aging and the Law*, in AGING AND SOCIETY, 277-78 (M. Riley, J. Riley, & M. Johnson eds. 1969).

12. See text accompanying notes 15-34 *infra*.

13. See text accompanying notes 35-44 *infra*.

14. 1953-1954 FLA. ATT'Y GEN. BIENNIAL REP. 581.

15. FLA. STAT. §651.01 (1975).

16. "It is hereby determined by the legislature that the execution of care agreements for life or for a term of years and the business of those who engage by contract to furnish such care, are matters charged with a public interest; that heretofore abuses have been practiced in relation to the execution of said agreements, acquisition of property as consideration therefor, and the conduct of such business; that such persons presently engaged in such business in this state and those who may engage in said business, and such businesses, should be regulated, and that this chapter which regulates such persons and businesses is a valid exercise of the police power of Florida in relation thereto." FLA. STAT. §651.01 (1975).

17. See 1953-1954 FLA. ATT'Y GEN. BIENNIAL REP. 581.

18. See generally FLA. STAT. ch. 651 (1975). The insurance department is statutorily empowered to administer the life care law. *Id.* See text accompanying note 73 *infra* for an alternative administration arrangement.

19. 1953-1954 FLA. ATT'Y GEN. BIENNIAL REP. 581, 582.

undertakes to provide care"²⁰ The language of this section of the statute clearly encompassed a nonprofit corporation created by a church for the purpose of operating a life care center. The Attorney General, however, did not feel this provision was controlling. Citing principles of statutory construction, he indicated that when the legislative intent appears to be contradicted by the strict letter of the statute, courts must be guided by the legislative intent.²¹ Looking to the section entitled "Legislative Determination," the Attorney General underscored the words "business" and "businesses" each of the six times they appeared.²² This focus apparently led to the conclusion that "business" did not include activity by a "nationally organized, recognized and functioning church."²³ Clearly, the legislature could have exempted such an entity had it so intended; yet, the Attorney General strained to exclude the church home from the law.²⁴

In 1974 the statutory definition of person was amended to read "owner or operator, whether a natural person, partnership or other unincorporated association however organized, trust, or corporation"²⁵ This may have been intended to bring churches or benevolent associations under the act, and it is therefore not clear whether the Attorney General's earlier conclusion still has weight.²⁶ Neither the intent nor the effect of this amendment is clear since no adequate investigation into the area was conducted by the legislature.²⁷ In fact, the amendment has not resulted in an expansion of the law's coverage.²⁸

The only judicial interpretation of the life care law is a 1961 decision of the Second District Court of Appeal.²⁹ The case involved an exchange between two individuals of a warranty deed for a promise of life care.³⁰ The court

20. FLA. STAT. §651.02(4) (1953), *as amended*, FLA. STAT. §651.02(4) (1975).

21. 1953-1954 FLA. ATT'Y GEN. BIENNIAL REP. 581, 582.

22. *Id.*

23. *Id.* at 583.

24. A significant factor in the Attorney General's decision to exclude this church supported home was the guarantee of supplementary resources from benevolent funds. *Id.* at 581. Thus, the necessary degree of protection for the savings of the elderly was provided without resort to law.

25. FLA. STAT. §651.02(4) (1975), *amending* FLA. STAT. §651.02(4) (1953).

26. One outspoken advocate for the elderly points out that churches are guilty of creating undercapitalized corporations that offer care and eventually become insolvent. The fully solvent churches' main funds are protected by the corporate entity, and the elderly tenants may lose their investment as well as the care they were promised. Interview with Max Friedson, President, Congress of Senior Citizens Organizations of Florida, Inc., October 24, 1974. This situation suggests that the Attorney General's opinion should be abandoned in favor of protecting the elderly from both nonchurch and church related organizations.

27. Letter from Robert E. Gibson, former Dep't of Insurance attorney, to Victoria J. Powell, July 25, 1975, on file with the University of Florida Law Review. The legislature amended the law without consulting the Department of Insurance. Because of this fact, the legislature did not consider the limited coverage of the law and the fact that the Department has never promulgated any rules or regulations.

28. Letter from Daniel H. Thompson, Assistant Director, Legal Services for the Elderly, to Victoria J. Powell, Aug. 6, 1975, on file with the University of Florida Law Review.

29. *Ellis v. Sholar*, 133 So. 2d 340 (2d D.C.A. Fla. 1961).

30. *Id.*

examined the "Legislative Determination" section as well as the regulatory measures imposed on providers of health care. The opinion concluded that the life care law "does not apply to an isolated contract such as the one involved in this case, but relates to those who make a business of providing care. . . ."³¹ This case revealed another situation in which the wording of the statute was ignored. The statute specifically provided that the "owner . . . of a private home . . . residence or other place . . . who undertakes to provide care for a period of one or more years or for life . . ."³² was included within the purview of the act. Again, great weight was given to the use of the term "business" in the legislative determination.³³ The Second District took a practical approach in deciding that the burdensome security measures were intended for the life care industry and were therefore inapplicable to one-time contractors. Although the court reached the correct result, the case illustrates the ambiguity inherent in the statutory definitions. For instance, the court could have reasoned that the legislature expected the regulatory requirements to keep one-time care contracts out of existence altogether.

The confusion over the present "Legislative Determination" section and the weight accorded it by the above interpretations indicates an expansion of the section is necessary. Deleting any reference to "business" and replacing the brief recognition of the problem with a careful enunciation of principles underlying legislative objectives will give firm guidance to future courts.³⁴

STATUTORY LOOPHOLES

The law provides at least two opportunities for life care centers to avoid compliance with its protective measures. First, the definition of "person" suggests that only one "who undertakes to provide care for a period of one or more years or for life, for a fixed fee . . ."³⁵ must comply with the burdensome licensing procedures. On enactment of the life care law some of Florida's homes for the elderly altered the terms of their contracts by requiring monthly charges in addition to the large lump sum required as an admission fee, which removed the contracts from the requirement imposed by the law.³⁶ The fixed fee element in the definition enables homes to escape

31. *Id.* at 344.

32. FLA. STAT. §651.02(4) (1960), as amended, FLA. STAT. §651.02(4) (1975).

33. 133 So. 2d at 343-44.

34. See APPENDIX §1.

35. FLA. STAT. §651.02(4) (1975).

36. These contracts have been called "founders fee" contracts. The lump sum deposited by the elderly citizen is the founders fee, and the additional monthly charge is the element that extricates the contract from the operation of the law. Most homes use founders fee arrangements; therefore, compliance with the protective measures of the law is unnecessary. Letter from Margaret H. Jacks, Director, Div. of Aging, Dep't of Health & Rehabilitative Services, to Victoria J. Powell, Oct. 7, 1975, on file with the University of Florida Law Review. A contrary view held by Thomas T. Cobb, the sponsor of the original legislation, is that the use of founders fee contracts does not frustrate the intent of the law since he feels that founders fee arrangements are actuarially sound. Letter from Thomas T. Cobb, former State Representative, to Victoria J. Powell, Sept. 29, 1975, on file with the University of Florida Law Review.

the life care law; however, the principal evil that the law was designed to eliminate remains — the elderly continue to pay thousands of dollars in lump sums to the homes. Since the life savings of an elderly person are at stake in both the life care contract and the founders fee arrangement, bankruptcy due to inadequate financial reserves would be equally devastating.³⁷

The current definition of "care" supplies the second statutory loophole. Under this definition, only those contracts that provide "for a term of years or for life . . ." ³⁸ are life care contracts within the meaning of the statute. The Department of Insurance has further defined "term of years" as a specific number of years.³⁹ This would exclude completely those contracts that provide for cancellation within less than one year or that are of indefinite duration.⁴⁰

The protective coverage of the law has been restricted by inferior legislative drafting as well as by executive interpretation. The startling effect of this combination is well illustrated by the fact that there is only one institution licensed under the law.⁴¹ The beneficial purpose of the statute has been undermined by exceptions to its coverage. Only by amending the definitions section of the statute to assure broader coverage can comprehensive protection for older citizens be realized.

A proposed bill, appended at the end of this commentary, would rearrange the contents of the definitions section. Clarity is of the essence in this section since the definitions outline what activities and persons fall within the purview of the law. "Person" is renamed "provider"⁴² to help alleviate confusion by conceptually isolating the target of the law. In place of the fixed fee and term of years provisions discussed above,⁴³ the proposal provides that "care" includes contracts that allow for payment in advance or for three months or more at one time.⁴⁴ This provision insures that this chapter will apply in every case in which an elderly person pays for 90 days of care at one time since the principal evil is the loss of large sums of money; yet, it does not place burdens on the operation of month to month rental institutions in which the tenants might lose only one month's care or rent.

37. "There have been a number of these [homes] in the past couple of years that have gone into bankruptcy because they overextended themselves in terms of expenditures and promises of care which they could not fulfill, and the people who invested in terms of a down payment or founders fee have found that they have no way of recouping their investment." Letter from Margaret H. Jacks, Director, Div. of Aging, Dep't of Health & Rehabilitative Services, to Victoria J. Powell, Oct. 7, 1975, on file with the University of Florida Law Review.

38. FLA. STAT. §651.02(3) (1975).

39. Letter from Richard M. Goldstein, Assistant Attorney General, to Victoria J. Powell, Feb. 4, 1976, on file with the University of Florida Law Review.

40. *Id.*

41. Letter from Daniel H. Thompson, Assistant Director, Legal Services for the Elderly, to Victoria J. Powell, Aug. 6, 1975, on file with the University of Florida Law Review. Letter from Robert E. Gibson, former Dep't of Insurance attorney, to Victoria J. Powell, July 25, 1975, on file with the University of Florida Law Review.

42. See APPENDIX §4.

43. See text accompanying notes 35-40 *supra*.

44. See APPENDIX §5.

DISCLOSURE

In 1974 the life care law was amended⁴⁵ to require disclosure of the bylaws, charter, certificate of authority, registration, and agreement to the person purchasing the contract. Three additional requirements should be added to the law to provide needed information at minimal costs to those who need care. First, the transferor (buyer) should be given the mailing address and telephone number of the insurance official who keeps the files on each provider.⁴⁶ Second, the transferor should be given the mailing address and telephone number of the Division of Aging to enable the person to inquire about any information that the Division has on file from its own investigations of life care providers.⁴⁷ Third, the transferor should be given a statement noting that the files of the Division of Aging are public and that the Division must facilitate access to this information.⁴⁸ This insures a direct and inexpensive means of providing public access to information that has not always been easily obtainable by older citizens and their families.

SUBSTANTIVE CONTRACT PROVISIONS

The current law, through omission, creates additional difficulties. Although specific contract provisions have been required by Florida law,⁴⁹ the provisions are not directed to certain practical problems commonly arising after the contract is signed. Since Florida has little legal history of life care contracts, there should be additions to the required contract provisions to take into account the problems that have arisen in other jurisdictions.⁵⁰ Most of the problems with these contracts in other states have developed not from unconscionable provisions⁵¹ but from failure to prescribe either refund or retention of transferred assets in unexpected circumstances. Thus, the

45. FLA. STAT. §651.074 (1975).

46. See APPENDIX §7.

47. *Id.*

48. *Id.*

49. FLA. STAT. §651.07 (1975).

50. Problems in other jurisdictions include: the death of an inmate during the probationary period, *Lyon v. Willamette Lutheran Homes, Inc.*, 240 Ore. 56, 399 P.2d 895 (1965) (estate entitled to return of decedent's \$5,000 deposit when death occurred during a three month probationary period and contract stipulated that sum was to be held in abeyance until termination of period); the removal of the inmate to a hospital, *Chappel v. Odd Fellow's Home, Inc.*, 85 R.I. 27, 132 A.2d 72 (1957) (board of trustees decided that it was in the best interest of home to transfer decedent to mental hospital; administratrix was entitled to property transferred to home by decedent on admission); *Connelly v. Methodist Home*, 190 A.2d 550 (D.C. App. 1963) (agreement between home and member under which member was to transfer assets to home was not revoked due to member's commitment to a mental institution when home was obligated to take back member if she recovered).

51. Unconscionability has been unsuccessfully argued when the member died before receiving care commensurate with the price paid. See, e.g., *Dalton v. Florence Home for the Aged*, 154 Neb. 735, 49 N.W.2d 595 (1951); *Dodge v. New Hampshire Centennial Home for Aged*, 95 N.H. 472, 67 A.2d 10 (1949).

proposed act requires that the agreement anticipate these circumstances⁵² to prevent unnecessary litigation.

Since one purpose of the law is to ensure disclosure,⁵³ new provisions are recommended that require the agreement to set out in detail the value of the property transferred,⁵⁴ the services and items to be given the transferor,⁵⁵ and the statutory rights of the parties.⁵⁶ An additional provision places the burden of including all the required contract terms on the person undertaking to provide care and mandates that the courts construe the failure to do so against the provider.⁵⁷ While this may be an arbitrary assignment of the burden, it can be justified on the grounds that the provider is typically in a superior bargaining position, more familiar with these legal agreements, and better able to bear the small cost required to comply.

Another significant problem with the current life care law is that it forces presently owned property, which is to be used as consideration for a life care contract, to be converted into money.⁵⁸ The rationale supporting this requirement may be simplification of the valuation and accounting tasks of the Department of Insurance. A home is often the only financial asset owned by an elderly person, and there are many who do not wish to leave their homes for an institution. Institutions that house the elderly provide little contact with the mainstream of life, where people of all ages interact.⁵⁹ The occupants of institutions lose their sense of independence and self-reliance.⁶⁰ People who are relatively healthy fear a life care institution; they view it as a waiting room for death.⁶¹ Life care is not simply an actuarial problem mandating conversion of transferred property. Thus, measures whose function is to simplify the administrative problems of the Department of Insurance must be weighed against their impact on human welfare.

The housing-annuity⁶² or actuarial mortgage plan proposed by Professor Yung-Ping Chen of the University of California provides an alternative to mandatory conversion. This gradual, voluntary home liquidation plan would allow the homeowner to exchange his home for regular payments but permit him to live in the home until he chose to leave or until death, at which

52. See APPENDIX §6, Proposed FLA. STAT. §§651.07(1)(a)-(j).

53. The possibility of retaliation against an elderly tenant who complains emphasizes the importance of the initial process of selecting a life care center. All information that can be gathered prior to entry is essential to a proper selection. For an analogous discussion of selection of nursing homes, see generally NURSING HOME ABUSES.

54. See APPENDIX §6, Proposed FLA. STAT. §651.07(2).

55. See APPENDIX §6, Proposed FLA. STAT. §651.07(3).

56. See APPENDIX §6, Proposed FLA. STAT. §651.07(4).

57. See APPENDIX §6, Proposed FLA. STAT. §651.07(5).

58. FLA. STAT. §651.08 (1975). Property to be used as consideration must be converted within one year. *Id.*

59. See NURSING HOME ABUSES, 214-15.

60. *Id.*

61. *Id.*

62. *Hearings on Homeownership Aspects of the Economics of Aging Before the Subcomm. on Housing for the Elderly of the Senate Special Comm. on Aging*, 91st Cong., 1st Sess. 828 (1969).

time the home would revert to the lender.⁶³ The amount of the payments would be based on the value of the home and the owner's life expectancy.⁶⁴ The plan would allow the elderly to convert a currently passive financial asset into an active source of support while eliminating the psychological trauma induced by mandatory relinquishment of memory laden personality and reality.⁶⁵

The plan may be modified to resolve other problems common to the aged. Older citizens might be provided with delivered services from lawn-cutting to medical care. This option could be coupled with exemplary government programs of "in-the-home" services that are supported by many organizations.⁶⁶ The plan would help to realize major goals of Title 20 of the Social Security Act⁶⁷ by helping people to become economically self-sufficient and to reduce inappropriate institutional care as much as possible.

Neither private industry nor government may implement the above plan under the current statute. An amendment to the mandatory conversion clause is necessary to permit private enterprise to initiate home care plans to further state and national goals.

A further inadequacy in the current law is the provision that requires each person undertaking life care to place \$75,000 on deposit with the Department of Insurance of the State of Florida.⁶⁸ This requirement is apparently designed to insure financial security for the elderly by providing a reserve against possible bankruptcy. This laudable purpose, however, is frustrated by practical pitfalls unforeseen by the legislature. Since the amount of deposit does not vary, the possible recovery for each tenant is dependent

63. Yung-Ping Chen, *Property Tax Concessions to the Aged*, in PROPERTY TAXATION USA 232 (Lindholm ed. 1967). Professor Chen explains the concept as a "voluntary financial arrangement, whereby an elderly homeowner could convert the equity in his home into a lifelong flow of income . . . plus being assured lifelong tenure in his house" Yung-Ping Chen, A Pilot Survey Study of the Housing-Annuity Plan (HAP) 2, March 1973 (Housing, Real Estate & Urban Studies Program, Graduate School of Management, Univ. of Calif., Los Angeles).

Professor Chen also characterizes the plan as essentially the opposite of the process of purchasing a house. "When a young person builds up his home equity, he mortgages his future income to acquire an asset; when an old person disposes of his home equity, he mortgages his asset to acquire a steady income." *Id.*

64. The actuarial formula proposed by Professor Chen takes into account the present market value of the house, assumed growth and expansion, any outstanding mortgage, age and expected lifespan of the owner, and the present value of the payments to be received. *Id.* at 169.

65. See generally THE COMING OF AGE.

66. *Recommendations for the Improvement of Long-Term and Convalescent Health Care in Florida*, 1975 FLA. NURSING HOME ASS'N 8. Both Maine and Massachusetts have enacted laws to facilitate home delivery of services to the elderly. See SPECIAL SENATE COMM. ON AGING, 93D CONG., 2D SESS., REPORT ON DEVELOPMENTS AND TRENDS IN STATE PROGRAMS FOR THE ELDERLY 66, 72 (Comm. Print 1974).

67. Social Security Act, 42 U.S.C. §1397 (1975). The Act was designed to help people become or remain economically self-supporting and self-sufficient and to prevent and reduce inappropriate institutional care as much as possible by making home and community services available. *Id.*

68. FLA. STAT. §651.09 (1975).

on the size of the institution. The \$75,000 deposit might provide some protection to the tenants of very small life care centers, but this protection is ratably diluted as the size of the institution increases. In order for the deposit to have meaningful effect, this provision must be amended to require a reserve varying with the number of people needing protection and taking into account the effect of inflation.

Another possible approach would require the maintenance of reserves sufficient to cover all obligations under the contracts. Failure to maintain these reserves would create a statutory breach of contract by the provider. This method has been adopted by the model act⁶⁹ and by California.⁷⁰ The proposed act adopts this method and limits reserves to certain types of property.⁷¹ Although this protective device may be burdensome to those undertaking care, failure to meet minimal standards has resulted in financial failure of many institutions — a result that impacts heavily on elderly citizens.⁷²

The remaining recommendations for change deal with the functional responsibilities of the administering agency. The proposed act would broaden the definition of "department."⁷³ Since life care requires subjective expertise as well as actuarial and financial expertise, the Department of Health and Rehabilitative Services (Division of Aging) should be required to assist the Department of Insurance in the administration of the law. Thus, the Department of Insurance would examine and assess the financial status of the institutions covered while the Department of Health and Rehabilitative Services would assume the duties of responsible inspection and evaluation of the quality of care. While the Department of Insurance should control the final licensing authority, the Department of Health and Rehabilitative Services should lend its full cooperation in order to provide full protection under the statute.

CONCLUSION

Enactment of the proposed bill in its entirety would resolve most of the problems of the elderly pertaining to life care contracts. Short of a total revision, highest priority should be given to amending the legislative determination and definitions sections in order to expand the protective coverage of the statute. The interests of the elderly citizens are not furthered by provisions filled with loopholes that enable the life care industry to escape regulation. In addition, the restructuring of the statute to require those providing long term care to maintain reserves adequate to meet their expenses deserves high priority. The recent bankruptcy of several homes for the aged leaving many elderly citizens without home or money attests to the

69. LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, LEGISLATIVE APPROACHES TO THE PROBLEMS OF THE ELDERLY: A HANDBOOK OF MODERN STATE LEGISLATION (1971).

70. CAL. WELF. & INST'NS CODE §§16,300 *et seq.* (West 1969).

71. See APPENDIX §9.

72. Letter from Max Friedson, President, Congress of Senior Citizens Organizations of Florida, Inc., to Victoria J. Powell, Sept. 15, 1975, on file with the University of Florida Law Review.

73. See APPENDIX §2.

need for proper reserves. Special consideration should also be given to the amendment of that provision of the current statute that forces all consideration for long term care contracts to be converted into money. The proposed revision would enable private industry to institute more progressive plans of housing alternatives for the elderly. Florida's status as a retirement state should stimulate legislative efforts to protect its elderly. The proposed bill, if enacted, would contribute to the well being of many of Florida's citizens by revitalizing the current law to create viable protection for the elderly.

VICTORIA J. POWELL

APPENDIX

CODING: Roman type indicates no changes; under-lined type indicates deletions; italicized type indicates additions.

A BILL

An act relating to the Florida life care law; amending chapter 651, Florida Statutes, by amending section 651.01 F.S., expanding the legislative determination; amending section 651.02 by redefining "care" in subsection 651.02(3) and redefining and renaming "person" in subsection 651.02(4); amending section 651.03(3) requiring the maintenance of an information file; adding subsection 651.03(4) requiring the Department of Insurance to send copies of files to the Division of Aging in the Department of Health and Rehabilitative Services and to keep the copied files up to date; amending section 651.07 F.S. repealing subsections 651.07(1) restricting the number of transferors, 651.07(2) permitting cancellation, 651.07(3) requiring certain disposition of unearned reserves; repealing subsection 651.07(4) allowing certain contract provisions; adding new subsection 651.07(1) requiring care agreements to provide for certain enumerated eventualities; adding new subsection 651.07(2) requiring the agreement to show the value of all property transferred; adding new subsection 651.07(3) requiring the agreement to detail services and items to be provided and to specify the monthly cost thereof; adding subsection 651.07(4) requiring the agreement to specify the statutory rights of the parties; adding subsection 651.07(5) providing that the person providing care bear the burden of including the provisions required in subsections 651.07(1)-(5) amending section 651.074, F.S. by adding subsection 651.074(6) requiring disclosure of and copies provided of the address and phone number of the official who maintains the files required in subsection 651.03(3) of this act, and of the address and phone number of the official in the Division of Aging who receives the copied files required in subsection 651.03(5) of this act, and of the text of subsection 651.03(4) of this act, requiring that access by older citizens be facilitated; amending section 651.08, F.S., by providing that section 651.08 shall not apply to cause conversion of certain real and personal property; repealing section 651.09, F.S., requiring a \$75,000 deposit, and adding new subsection 651.09(1) requiring the maintenance of reserves sufficient to cover contract obligations;

adding subsection 651.09(2) providing that failure to maintain reserves shall be a breach of all care agreements; adding subsection 651.09(3) specifying the permissible forms of reserves; adding subsection 651.09(4) requiring department approval of the proportion of reserve assets held by each provider; amending section 651.10, F.S., requiring the Department of Insurance to rely whenever possible on reports, examinations, and evaluations made by officials of the Department of Health and Rehabilitative Services relating to the quality of care provided; adding section 651.101 providing that sale of a facility shall be conditioned on permission of the Department of Insurance; amending subsection 651.11(1)(d) to provide for liquidation for failure to comply with reserve requirements. Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 651.01, Florida Statutes, is amended to read:

651.01 Legislative Determination. — It is hereby determined by the legislature that the execution of care agreements for life or for a term of years and the business of those who engage by contract to furnish such care, are matters charged with a public interest, that theretofore abuses have been practiced in relation to the execution of said agreements; acquisition of property as consideration therefore, and the conduct of such business, that such persons presently engaged in such business in this state and those who may engage in said business, and such businesses, should be regulated, and that this chapter which regulates such persons and businesses is a valid exercise of the police power of Florida in relation thereto, whether in an institution or not, and the activity of those who engage by contract to furnish such care are matters charged with a public interest.

It is recognized that abuses have been practiced on the elderly. Therefore the provisions of this law are designed to ensure full disclosure between parties to care agreements, ready access to information for those citizens who need it most, balanced bargains as free from government restraint as possible, adequate but not onerous regulation of care, and continued maintenance of full financial security.

It is the objective of this law and of the legislature, in keeping with the traditional American concept of the inherent dignity of the individual in our society, that the older people of this state who enter contracts for care shall be protected from abuses to their mental and physical health, their economic security, their social and educational potential, their political and legal rights. The older citizens of this state are entitled to the best possible services and the provision of long term care shall be in keeping with these objectives through full, good faith compliance, by all named departments and all parties involved, with the spirit and provisions of this law.

Section 2. Subsection (1) of section 651.02, Florida Statutes, is amended to read:

651.02 Definitions. — As used in this chapter:

(1) "Department" means the department of insurance, unless otherwise provided.

Section 3. Subsection (3) of section 651.02, Florida Statutes, is amended to read:

651.02 Definitions. — As used in this chapter:

(3) "Care" means furnishing to an individual shelter, food, clothing, drugs, *therapy*, medicine, medical attention, *education*, entertainment, or other personal advantage or attention, either one or more, for a term of years or for life, *if three or more months' care is paid for in advance or at one time, or if a sum is paid for care that represents the estimated value of three or more months' care notwithstanding additional periodic charges. Care may be provided by delivery, or in an institution, private home, building, residence, or other place, or in an establishment licensed under Chapter 400 or Chapter 608.*

Section 4. Subsection (4) of section 651.02, Florida Statutes, 1974 Supplement, is amended to read:

651.02 Definitions. — As used in this chapter:

(4) "Provider" "Person" means the owner or operator, whether a natural person, partnership or other unincorporated association however organized, trust, or corporation of a private home, institution, building, residence or other place, whether operated for profit or not, anyone who undertakes to provide care, for a period of one or more years or for life, for a fixed fee for the period of such care, payable either in a lump sum or in installments, or the owner or operator of an establishment licensed under the provisions of Chapter 400 or Chapter 608, who undertakes to provide care for a fixed fee, for the period of such care, payable either in a lump sum or in installments whether a natural person, partnership or other unincorporated association however organized, trust or corporation.

Section 5. New subsections (3), (4) and (5) of section 651.03, Florida Statutes, are created to read:

651.03 Administration; regulations. — The administration of this chapter is vested in the department, which shall:

(3) *maintain a file for each provider which file shall contain all statements, reports, records of examinations, certificates, applications, and any other relevant information obtained by the department.*

(4) *make all files required by subsection 651.03(3) of this act available to the public and the department shall make the files easily accessible to older citizens or their families seeking care information.*

(5) *mail or otherwise deliver a copy of each file required by subsection 651.03(3) of this act to the Division of Aging in the Department of Health and Rehabilitative Services, and shall keep the copied files up to date, with reasonable promptness.*

Section 6. Subsections (1), (2), (3), and (4) of section 651.07, Florida Statutes, are repealed, and new subsections (1), (2), (3), (4), (5), and (6) of section 651.07, Florida Statutes, are created to read:

651.07 Agreement Provisions. — In addition to such other provisions as may be considered proper to effectuate the purpose of any care agreement, each agreement executed on and after July 1, 1977, shall comply with the following requirements:

(1) *The agreement shall provide for the disposition of the unearned reserve, to the transferor or other person, in the following eventualities, if applicable:*

- (a) *cancellation of the agreement;*
- (b) *death of transferor during probationary period;*
- (c) *death of transferor after notice of termination, but during notice period;*
- (d) *death of transferor before effective date of contract;*
- (e) *termination of contract during probationary period;*
- (f) *termination of contract by either party without proper notice;*
- (g) *transferor's removal to hospital;*
- (h) *transferor's voluntary absence from facility;*
- (i) *transferor's voluntary absence from site of delivery;*
- (j) *death of transferor.*

(2) *The agreement shall show the value of all property transferred, and all amounts paid or payable by or on behalf of the transferor.*

(3) *The agreement shall show, in detail, all the services and items the transferor is to be provided — such as board, room, medical care, clothing, burial and incidentals — and for how long such items and services will be provided, and the estimated monthly cost to the provider.*

(4) *The agreement shall state the statutory rights of the parties.*

(5) *Failure to fully specify the items required in subsections 651.07(1)-(4) shall be presumed to be an omission by the provider and shall be construed against the provider, and the provider shall have the burden of proving otherwise.*

Section 7. Section 651.074, Florida Statutes, is amended and new subsection 651.074(6) is created to read:

651.074 Disclosure Requirements. — Prior to entering an agreement to furnish life care or care for a term of years, the provider person undertaking to furnish such care or his agent shall make full disclosure of, and provide copies to the prospective transferor or his nominee of, the following information relative to the undertaking:

(1) The agreement to furnish life care. or care for a term of years.

* * *

(6) *The mailing address of the department official in charge of maintaining the files required in subsection 651.03(3), and the mailing address of the Division of Aging official who receives the copies required in subsection 651.03(5), and the telephone numbers of the officials including toll-free or not, and a copy of subsection 651.03(4), unless it is written out in full in the agreement pursuant to subsection 651.07(6).*

Section 8. Section 651.08, Florida Statutes, is amended to read:

(1) When the consideration received by any such provider person to furnish care in pursuance of an agreement is in a form other than money or securities or other investments as described in section 651.09, the provider person shall convert the property into money within one year of the date of the agreement unless an extension is granted by the department; and during such one year period and extension, if any be granted, prior

to conversion of said the property into money, the value thereof as set forth in such the agreement is an admissible asset of the provider person for the purposes of available funds or unearned reserve. in relation to such agreement. Such Property not converted into cash within one year, or the extended period, shall not be counted an asset in relation to such agreement for any purpose under this chapter. Provided, that as to any such property received as consideration by a provider person in connection with such an agreement prior to July 1, 1953, the provider person shall have one year from the effective date to convert the property into money.

Section 9. Section 651.09, Florida Statutes, is repealed and new section 651.09, and new subsections 651.09(1), (2), (3), (4) are created to read:

651.09 *Reserve Requirements.* — Any application for an original certificate of authority shall be accompanied by a deposit with the department by the person making such application, of bonds or revenue certificates of the United States, of any of the states of the United States, of the District of Columbia, or of the cities or counties of Florida, in the aggregate market value of \$75,000, which securities, if such certificate of authority is issued, shall be receipted for by the department and held by it in the manner and for the purposes hereinafter mentioned. Such deposit, in said aggregate value, shall be maintained by any such person entering into care agreements. Whenever such person ceases to engage in such business in this state, and has settled all claims arising in connection with such care agreements or business in connection with performance of such care agreements, upon proof of such facts to the department, and delivery to the department of the latter's receipt for such securities, the department shall deliver said securities to such person or his assignee. During the period said securities are deposited with the department, the owner of the same shall be entitled to the interest collected thereon. Such bonds so deposited shall be held by the department solely for the purpose of satisfying judgments obtained by transferors or their nominees for breach of, or amounts adjudged to be due under, said care agreements. When such a final judgment has been rendered against any person party to such a care agreement, he shall pay same within 60 days thereafter, provided he does not prosecute or appeal from said judgment within said period, and if an appeal is so prosecuted and on the appeal the judgment is affirmed, such person shall pay same within 15 days from the date mandate from the appellate court is filed in the cause in the trial court. Should any such person fail to pay such a judgment within the time contemplated by the immediately preceding sentence, the department shall, in pursuance of order entered in the cause in the trial court, sell sufficient of the securities of such persons so deposited with it to satisfy said judgment and costs, and shall pay to the person recovering such judgment the amount thereof and costs.

(1) *A provider shall maintain reserves covering obligations assumed under all agreements entered into and maintained. Reserves shall be in an amount not less than the sum computed in accordance with the*

standard of valuation based upon a modern and up to date table of mortality selected by the department.

(2) Failure to maintain reserves as provided in this section shall be deemed a breach of all care agreements.

(3) Reserves shall consist of the following:

(a) Deposits in commercial and savings accounts with banks which are members of the Federal Deposit Insurance Corporation and approved by the department.

(b) Investments in certificates issued by building and loan associations which are members of the Federal Savings and Loan Insurance Corporation and approved by the department.

(c) Notes receivable secured by first deeds of trust and first mortgages.

(d) Bonds and stocks selected from an approved list, as determined by the department. In the event stocks, bonds, and securities that are not on the approved list are part of the reserves, and if they are to be retained as part of the reserves, it shall not be necessary that such unapproved stocks, bonds, and securities be disposed of immediately, but they shall be disposed of in accord with regulations of the department, which disposal shall be accomplished in a gradual manner so as to avoid loss to certificate holders. Securities not on the approved list may be retained with the specific approval of the department.

(e) Real estate used to provide care for holders of life care contracts, or equities therein, owned by the provider. Valuation shall be based on the net equity, which shall be the appraised value less any depreciation and encumbrances. The appraisal shall be made by an appraiser by the department.

(f) Furniture and equipment situated in property used to provide care and housing for holders of life contracts. Valuation shall be based on the net equity.

(g) Any other investments approved by the department.

(4) The proportion of assets enumerated in subsection (3) of this section held by each provider shall be subject to the approval of the department.

Section 10. Section 651.10, Florida Statutes, is amended by adding new subsection number 651.10(1) and by creating new subsection 651.10(2) to read:

651.10 Examinations. — The department shall have the power and is required from time to time as it may deem necessary, to examine the business of any provider person engaged in the execution of or engaged in the performance of obligations under such agreements in the same manner as is provided for examination by insurance companies. Such Examinations shall be made by the department's designated representative or examiner, whose compensation shall be fixed by the department. The written report of all such examinations, when completed, shall be filed in the office of the department, and when so filed shall constitute public records. Any such provider person being examined shall produce, upon request, all records of the business or facility. The department's designated

representative may at any time examine into the records and affairs and inspect the physical property of any such provider person, whether in connection with a formal examination or not.

(2) *The department shall rely whenever possible on evaluations made by the Department of Health and Rehabilitative Services regarding the quality of care.*

Section 11. New Section 651.101, Florida Statutes, is created to read:

651.101 Approval of Sale. — No provider shall sell or transfer a business or facility for providing care without first obtaining the written approval of the department. Approval shall be conditioned upon compliance by the buyer or transferee with the provisions of this chapter. The provider selling shall notify all transferors and nominees under care contracts at least ninety days in advance of any sale or transfer.

Section 12. Subsection (1)(d) of section 651.11, Florida Statutes, is amended to read:

(1) Whenever the department shall determine that any provider such person so engaged in the entering into said care agreements or the business of the performance of obligations under such agreements so entered into:

(d) Has failed to maintain with the department the deposit in the amount of \$75,000 required by S. 651.09; comply with section 651.09 of this chapter; or