

Stricken language would be deleted from and underlined language would be added to the law as it existed prior to this session of the General Assembly.

1 State of Arkansas
2 87th General Assembly
3 Regular Session, 2009
4

As Engrossed: H3/13/09
A Bill

HOUSE BILL 1568

5 By: Representative Hobbs
6 By: Senator Bledsoe
7
8

9 **For An Act To Be Entitled**

10 AN ACT TO AMEND VARIOUS PROVISIONS OF THE ADULT
11 AND LONG-TERM CARE FACILITY RESIDENT MALTREATMENT
12 ACT; AND FOR OTHER PURPOSES.
13

14 **Subtitle**

15 AN ACT TO AMEND VARIOUS PROVISIONS OF
16 THE ADULT AND LONG-TERM CARE FACILITY
17 RESIDENT MALTREATMENT ACT.
18
19

20 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:
21

22 SECTION 1. Arkansas Code § 12-12-1703 is amended to read as follows:
23 12-12-1703. Definitions.

24 As used in this subchapter:

25 (1)(A) "Abuse" means with regard to any long-term care facility
26 resident or any patient at the Arkansas State Hospital by a caregiver:

27 (i) Any intentional and unnecessary physical act
28 that inflicts pain on or causes injury to an endangered person or an impaired
29 person, excluding court-ordered medical care or medical care requested by the
30 patient or long-term care facility resident or a person legally authorized to
31 make medical decisions on behalf of the patient or long-term care facility
32 resident;

33 (ii) Any intentional act that a reasonable person
34 would believe subjects an endangered person or an impaired person, regardless
35 of age, ability to comprehend, or disability, to ridicule or psychological
36 injury in a manner likely to provoke fear or alarm, excluding necessary care



1 and treatment provided in accordance with generally recognized professional
2 standards of care;

3 (iii) Any intentional threat that a reasonable
4 person would find credible and nonfrivolous to inflict pain on or cause
5 injury to an endangered person or an impaired person except in the course of
6 medical treatment or for justifiable cause; or

7 (iv) Any willful infliction of injury, unreasonable
8 confinement, intimidation, or punishment with resulting physical harm, pain,
9 or mental anguish.

10 (B) "Abuse" means with regard to any person who is not a
11 long-term care facility resident or a patient at the Arkansas State Hospital:

12 (i) Any intentional and unnecessary physical act
13 that inflicts pain on or causes injury to an endangered person or an impaired
14 person;

15 (ii) Any intentional act that a reasonable person
16 would believe subjects an endangered person or an impaired person, regardless
17 of age, ability to comprehend, or disability, to ridicule or psychological
18 injury in a manner likely to provoke fear or alarm; or

19 (iii) Any intentional threat that a reasonable
20 person would find credible and nonfrivolous to inflict pain on or cause
21 injury to an endangered person or an impaired person except in the course of
22 medical treatment or for justifiable cause;

23 (2) "Adult maltreatment" means abuse, exploitation, neglect, or
24 sexual abuse of an adult;

25 (3) "Caregiver" means a related person or an unrelated person,
26 an owner, an agent, a high managerial agent of a public or private
27 organization, or a public or private organization that has the responsibility
28 for the protection, care, or custody of an endangered person or an impaired
29 person as a result of assuming the responsibility voluntarily, by contract,
30 through employment, or by order of a court;

31 (4) "Department" means the Department of Human Services;

32 (5) "Endangered person" means:

33 (A) A person eighteen (18) years of age or older who:

34 (i) Is found to be in a situation or condition that
35 poses a danger to himself or herself; and

36 (ii) Demonstrates a lack of capacity to comprehend

1 the nature and consequences of remaining in that situation or condition; or

2 (B) A long-term care facility resident who:

3 (i) Is found to be in a situation or condition that
4 poses an imminent risk of death or serious bodily harm to the long-term care
5 facility resident; and

6 (ii) Demonstrates a lack of capacity to comprehend
7 the nature and consequences of remaining in that situation or condition;

8 (6) "Exploitation" means the:

9 (A) Illegal or unauthorized use or management of an
10 endangered person's or an impaired person's funds, assets, or property;

11 (B) Use of an adult endangered person's or an adult
12 impaired person's power of attorney or guardianship for the profit or
13 advantage of one's own self or another; ~~or~~

14 (C) The fraudulent or otherwise illegal, unauthorized, or
15 improper act or process of a person, including a caregiver or fiduciary, that
16 uses the resources of an endangered person or impaired person, or long-term
17 care facility resident for monetary or personal benefit, profit, or gain, or
18 that results in depriving the endangered person or impaired person, or long-
19 term care facility resident of rightful access to, or use of, benefits,
20 resources, belongings, or assets; or

21 ~~(C)(D)~~ Misappropriation of property of a long-term care
22 facility resident, that is, the deliberate misplacement, exploitation, or
23 wrongful, temporary, or permanent use of a long-term care facility resident's
24 belongings or money without the long-term care facility resident's consent;

25 (7)(A) "Fiduciary" means a person or entity with the legal
26 responsibility to:

27 (i) Make decisions on behalf of and for the benefit
28 of another person; and

29 (ii) Act in good faith and with fairness;

30 (B) "Fiduciary" includes without limitation:

31 (i) A trustee;

32 (ii) A guardian;

33 (iii) A conservator;

34 (iv) An executor;

35 (v) An agent under financial power of attorney or
36 health care power of attorney; or

(vi) A representative payee;

~~(7)~~(8) "Imminent danger to health or safety" means a situation in which death or serious bodily harm could reasonably be expected to occur without intervention;

~~(8)(A)~~(9)(A) "Impaired person" means a person eighteen (18) years of age or older who as a result of mental or physical impairment is unable to protect himself or herself from abuse, sexual abuse, neglect, or exploitation.

(B) For purposes of this subchapter, a long-term care facility resident is presumed to be an impaired person;

~~(9)~~(10) "Long-term care facility" means:

(A) A nursing home;

(B) A residential care facility;

(C) A post-acute head injury retraining and residential facility;

(D) An assisted living facility;

(E) An intermediate care facility for individuals with mental retardation; or

(F) Any facility that provides long-term medical or personal care;

~~(10)~~(11) "Long-term care facility resident" means a person, regardless of age, living in a long-term care facility;

~~(11)~~(12) "Long-term care facility resident maltreatment" means abuse, exploitation, neglect, or sexual abuse of a long-term care facility resident;

~~(12)~~(13) "Maltreated adult" means an adult who has been abused, exploited, neglected, physically abused, or sexually abused;

~~(13)~~(14) "Maltreated person" means a person, regardless of age, who has been abused, exploited, neglected, physically abused, or sexually abused;

~~(14)~~(15) "Neglect" means:

(A) An act or omission by an endangered person or an impaired person, for example, self-neglect; or

(B) An act or omission by a caregiver responsible for the care and supervision of an endangered person or an impaired person constituting:

1 (i) Negligently failing to provide necessary
2 treatment, rehabilitation, care, food, clothing, shelter, supervision, or
3 medical services to an endangered person or an impaired person;

4 (ii) Negligently failing to report health problems
5 or changes in health problems or changes in the health condition of an
6 endangered person or an impaired person to the appropriate medical personnel;

7 (iii) Negligently failing to carry out a prescribed
8 treatment plan; or

9 (iv) Negligently failing to provide goods or
10 services to a long-term care facility resident necessary to avoid physical
11 harm, mental anguish, or mental illness as defined in regulations promulgated
12 by the Office of Long-Term Care;

13 ~~(15)(A)~~(16)(A) "Physical injury" means the impairment of a
14 physical condition or the infliction of substantial pain on a person.

15 (B) If the person is an endangered person or an impaired
16 person, there ~~shall be~~ is a presumption that any physical injury resulted in
17 the infliction of substantial pain;

18 ~~(16)(17)~~ "Serious bodily harm" means sexual abuse, physical
19 injury, or serious physical injury;

20 ~~(17)(18)~~ "Serious physical injury" means physical injury to an
21 endangered person or an impaired person that creates a substantial risk of
22 death or that causes protracted disfigurement, protracted impairment of
23 health, or loss or protracted impairment of the function of any bodily member
24 or organ;

25 ~~(18)(19)~~ "Sexual abuse" means deviate sexual activity, sexual
26 contact, or sexual intercourse, as those terms are defined in § 5-14-101,
27 with another person who is not the actor's spouse and who is incapable of
28 consent because he or she is mentally defective, mentally incapacitated, or
29 physically helpless; and

30 ~~(19)(20)~~ "Subject of the report" means:

31 (A) The endangered person or impaired person;

32 (B) The adult's legal guardian;

33 (C) The natural or legal guardian of a long-term care
34 facility resident under eighteen (18) years of age; and

35 (D) The offender.
36

1 SECTION 2. Arkansas Code § 12-12-1714(d)(6) concerning appointed
2 counsel during investigations by the Department of Human Services, is amended
3 to read as follows:

4 (6)(A) The allegedly maltreated adult has a right to counsel,
5 including appointed counsel if indigent, and a right to a hearing within five
6 (5) business days after ~~issuance of an~~ the allegedly maltreated adult is
7 served with the ex parte order of investigation.

8 (B) If the allegedly maltreated adult is not indigent, the
9 circuit court has the authority to appoint counsel to represent the allegedly
10 maltreated adult and to direct payment from the assets of the adult for legal
11 services received by the adult.

12 (C) If the department determines the allegedly maltreated
13 adult is not endangered or impaired and releases the allegedly maltreated
14 adult or ceases any assessment, a hearing under subdivision (b)(6)(A) is not
15 required.

16
17 SECTION 3. Arkansas Code § 12-12-1715 is amended to read as follows:
18 12-12-1715. Rights of subject of report – Investigative determination
19 of the Department of Human Services – Notice of finding – Appeal.

20 (a) Upon completion of an investigation, the Department of Human
21 Services shall determine that an allegation of adult maltreatment or long-
22 term care facility maltreatment is either:

23 (1)(A) Unfounded, a finding that shall be entered if the
24 allegation is not supported by a preponderance of the evidence.

25 (B)(i) An unfounded report shall be expunged one (1) year
26 after the completion of the investigation.

27 (ii) Demographic information may be retained for
28 statistical purposes; or

29 (2)(A) Founded, a finding that shall be entered if the
30 allegation is supported by a preponderance of the evidence.

31 (B) A determination of founded but exempt shall ~~not~~ be
32 entered ~~solely because~~ on a report if an adult practicing his or her
33 religious beliefs is receiving spiritual treatment under § 5-28-105 or § 12-
34 12-1704.

35 (b)(1)(A) After making an investigative
36 determination, the department shall notify in writing within ten (10)

1 business days:

2 (i)(a) The person identified as the offender.

3 (b) However, in cases of unfounded self-
4 neglect, no notice is required;

5 (ii) Either the:

6 (a) Person identified as the maltreated
7 person;

8 (b) Legal guardian of the maltreated person;

9 or

10 (c) Natural or legal guardian of a long-term
11 care facility resident under eighteen (18) years of age;

12 (iii) The current administrator of the long-term
13 care facility if the incident occurred in a long-term care facility; and

14 (iv) If known by the Office of Long-term Care, the
15 administrator of the long-term care facility that currently employs the
16 offender if different from the long-term care facility in which the incident
17 occurred.

18 (B) If the investigation determines that the report is
19 founded, notification to the offender shall be by process server or by
20 certified mail, restricted delivery.

21 (2) The notification under subdivision (b)(1) of this section
22 shall include the following:

23 (A) The investigative determination, exclusive of the
24 source of the notification, including the nature of the allegation and the
25 date and time of occurrence;

26 (B) A statement that an offender of a founded report has
27 the right to an administrative hearing upon a timely request;

28 (C) A statement that the request for an administrative
29 hearing shall be made to the department within thirty (30) days of receipt of
30 the notice of determination;

31 (D) A statement that the administrative hearing will be by
32 telephone hearing unless the offender requests an in-person hearing within
33 thirty (30) days after the date of receipt of notice of the determination;

34 ~~(D)~~(E) A statement of intent to report in writing after
35 the offender has had an opportunity for an administrative hearing the founded
36 investigative determination to:

1 (i) The adult and long-term care facility resident
2 maltreatment central registry; and

3 (ii) Any applicable licensing authority;

4 ~~(E)~~(F) A statement that the offender's failure to request
5 an administrative hearing in writing within thirty (30) days from the date of
6 receipt of the notice will result in submission of the investigative report,
7 including the investigative determination, to:

8 (i) The registry; and

9 (ii) Any applicable licensing authority;

10 ~~(F)~~(G) The consequences of waiving the right to an
11 administrative hearing;

12 ~~(G)~~(H) The consequences of a finding by a preponderance of
13 the evidence through the administrative hearing process that the maltreatment
14 occurred;

15 ~~(H)~~(I) The fact that the offender has the right to be
16 represented by an attorney at the offender's own expense; and

17 ~~(I)~~(J) The name of the person making the notification, his
18 or her occupation, and the location at which he or she can be reached.

19 (c)(1) The administrative hearing process shall be completed within
20 one hundred twenty (120) days from the date of the receipt of the request for
21 a hearing unless waived by the offender.

22 (2) The department shall hold the administrative hearing at a
23 reasonable place and time.

24 (3) For an incident occurring in a long-term care facility, the
25 department may not make a finding that an offender has neglected a long-term
26 care facility resident if the offender demonstrates that the neglect was
27 caused by factors beyond the control of the offender.

28 (4) A delay in completing the administrative hearing process
29 that is attributable to the offender shall not count against the time limit
30 in subdivision (c)(1) of this section.

31 (5) Failure to complete the administrative hearing process in a
32 timely fashion shall not prevent the department or a court from:

33 (A) Reviewing the investigative determination of
34 jurisdiction;

35 (B) Making a final agency determination; or

36 (C) Reviewing a final agency determination under the

1 Arkansas Administrative Procedure Act, § 25-15-201 et seq.

2 (6) If any party timely requests an in-person administrative
3 hearing, the hearing officer may notify the parties that the hearing will be
4 conducted by video conference.

5 (d)(1) When the department conducts an administrative hearing, the
6 chief counsel of the department may require the attendance of witnesses and
7 the production of books, records, or other documents through the issuance of
8 a subpoena if the testimony or information is necessary to adequately present
9 the position of the department or the alleged offender in a report.

10 (2) Failure to obey the subpoena may be deemed a contempt and
11 ~~shall be~~ is punishable accordingly.

12 (e) If the department's investigative determination of founded is
13 upheld during the administrative hearing process or if the offender does not
14 timely appeal for or waives the right to an administrative hearing, the
15 department shall report the investigative determination in writing within ten
16 (10) business days to:

17 (1) The offender;

18 (2) The current administrator of the long-term care facility if
19 the incident occurred in a long-term care facility;

20 (3) The administrator of the long-term care facility that
21 currently employs the offender if different from the long-term care facility
22 in which the incident occurred;

23 (4) The appropriate licensing authority;

24 (5) The adult and long-term care facility resident maltreatment
25 central registry; ~~and~~

26 (6) The maltreated person or the legal guardian of the
27 maltreated person; and

28 (7) If required under § 21-15-110, the employer of any offender
29 if the offender is in a designated position with a state agency.

30
31 SECTION 4. Arkansas Code § 12-12-1716(a)(2), concerning the adult and
32 long-term care facility resident maltreatment central registry, is amended to
33 read as follows:

34 (2) The central registry shall contain investigative
35 determinations made by the department on all founded ~~allegations~~ reports of
36 adult maltreatment and long-term care facility resident maltreatment.

1
2 SECTION 5. Arkansas Code § 12-12-1718 is amended to read as follows:
3 12-12-1718. Availability of screened out, pending, and unfounded
4 reports.

5 (a) A record of a screened-out report of adult maltreatment or long-
6 term care facility resident maltreatment shall not be disclosed except to the
7 Office of the Attorney General, the prosecuting attorney, and an appropriate
8 law enforcement agency and may be used only within the Department of Human
9 Services for purposes of administration of the program.

10 ~~(a)(1)~~(b)(1) A ~~screened out report or a~~ pending report, including
11 protected health information, ~~shall be~~ is confidential and shall be made
12 available only to:

13 (A) The Department of Human Services, including the Death
14 Review Committee of the Department of Human Services;

15 (B) A law enforcement agency;

16 (C) A prosecuting attorney;

17 (D) The office of the Attorney General;

18 (E) A circuit court having jurisdiction pursuant to a
19 petition for emergency, temporary, long-term protective custody, or
20 protective services;

21 (F) A grand jury or court, upon a finding that the
22 information in the report is necessary for the determination of an issue
23 before the grand jury or court;

24 (G) A person or provider identified by the department as
25 having services needed by the maltreated person;

26 (H) Any applicable licensing or registering authority;

27 (I) Any employer, legal entity, or board responsible for
28 the person named as the offender;

29 (J) Any legal entity or board responsible for the
30 maltreated person; and

31 (K) The Division of Developmental Disabilities Services
32 and the Division of Aging and Adult Services as to participants of the waiver
33 program.

34 (2) The subject of the report may only be advised that a report
35 is pending.

36 ~~(b)(c) Upon completion of the administrative hearing process~~

1 satisfaction of due process and if an allegation was determined to be
2 unfounded, the investigative report, including protected health information,
3 ~~shall be~~ is confidential and shall be made available only to:

- 4 (1) The department, including the committee;
- 5 (2) A law enforcement agency;
- 6 (3) A prosecuting attorney;
- 7 (4) The office of the Attorney General;
- 8 (5) Any applicable licensing or registering authority;
- 9 (6) Any person named as a subject of the report or that person's
10 legal guardian;
- 11 (7) A circuit court having jurisdiction pursuant to a petition
12 for emergency, temporary, long-term protective custody, or protective
13 services;
- 14 (8) A grand jury or court, upon a finding that the information
15 in the record is necessary for the determination of an issue before the grand
16 jury or court;
- 17 (9) A person or provider identified by the department as having
18 services needed by the person;
- 19 (10) Any employer, legal entity, or board responsible for the
20 person named as the offender;
- 21 (11) Any legal entity or board responsible for the maltreated
22 person; and
- 23 (12) The Division of Developmental Disabilities Services and the
24 Division of Aging and Adult Services as to participants of the waiver
25 program.

26 ~~(e)(1)~~(d)(1) An unfounded report shall be expunged one (1) year after
27 completion of the investigation.

28 (2) However, demographic information may be retained for
29 statistical purposes.

30 ~~(d)(1)~~(e)(1) Except for the subject of the report, no person or agency
31 to which disclosure is made may disclose to any other person a report or
32 other information obtained under this section.

33 (2) Upon conviction, any person disclosing information in
34 violation of this subsection is guilty of a Class C misdemeanor.

35 (f)(1) The department may not release data that would identify the
36 person who made a report except to law enforcement, a prosecuting attorney,

1 or the office of the Attorney General.

2 (2) A court of competent jurisdiction may order release of data
3 that would identify the person who made a report after the court has reviewed
4 in camera the record related to the report and has found that disclosure is
5 needed:

6 (A) To prevent commission of a crime; or

7 (B) For prosecution of a crime.

8
9 SECTION 6. Arkansas Code § 12-12-1720 is amended to read as follows:
10 12-12-1720. Penalties.

11 ~~(a)(1) Any person or caregiver required by this subchapter to report a~~
12 ~~ease of suspected adult maltreatment or long-term care facility resident~~
13 ~~maltreatment who purposely fails to do so shall be guilty of a Class B~~
14 ~~misdemeanor.~~ A person commits the offense of failure to report under this
15 subchapter in the first degree if he or she:

16 (A) Is a mandated reporter under § 12-12-1708;

17 (B) Has observed or has reasonable cause to suspect that
18 an endangered person or impaired person has been subjected to conditions or
19 circumstances that constitute adult maltreatment or long-term care facility
20 resident maltreatment; and

21 (C) Knowingly fails to report or cause a report to be made
22 to the adult and long-term care facility resident maltreatment hotline.

23 (2) Failure to report under this subchapter in the first degree
24 is a Class B misdemeanor.

25 (b)(1) A person commits the offense of failure to report in the second
26 degree if he or she:

27 (A) Is a mandated reporter under § 12-12-1708;

28 (B) Has observed or has reasonable cause to suspect that
29 an endangered person or impaired person has been subjected to conditions or
30 circumstances that constitute adult maltreatment or long-term care facility
31 resident maltreatment; and

32 C)(i) Knowingly fails to make a report in the manner and
33 time provided in this subchapter to the adult and long-term care facility
34 resident maltreatment hotline.

35 (ii) Knowingly fails to cause a report to be made in
36 the manner and time provided in this subchapter to the adult and long-term

1 care facility resident maltreatment hotline

2 (2) Failure to report in the second degree is a Class C
3 misdemeanor.

4 ~~(b)(c)~~ Any person or caregiver required by this subchapter to report a
5 case of suspected adult maltreatment or long-term care facility resident
6 maltreatment who purposely fails to do so ~~shall be~~ is civilly liable for
7 damages proximately caused by the failure.

8 ~~(e) Any person, official, or institution willfully making false~~
9 ~~notification under this subchapter knowing the allegations to be false shall~~
10 ~~be guilty of a Class A misdemeanor.~~

11 ~~(d)(1) Any person, official, or institution willfully making false~~
12 ~~notification under this subchapter knowing the allegations to be false and~~
13 ~~who has been previously convicted of making false allegations shall be guilty~~
14 ~~of a Class D felony. A person commits the offense of false reporting of~~
15 adult abuse if he or she purposely makes a false report to the adult and
16 long-term care facility resident maltreatment hotline knowing the allegation
17 in the false report to be false.

18 (2) For a first offense, false reporting of adult abuse is a
19 Class A misdemeanor.

20 (3) For a subsequent offense, false reporting of adult abuse is
21 a Class D felony.

22 ~~(e)(1) Any person who willfully permits and any other person who~~
23 ~~encourages the release of data or information contained in the adult and~~
24 ~~long-term care facility resident maltreatment central registry to a person to~~
25 ~~whom disclosure is not permitted under this subchapter shall be guilty of a~~
26 ~~Class A misdemeanor. A person commits the offense of unlawful disclosure of~~
27 data or information under this subchapter if:

28 (A) He or she purposely discloses data or information to a
29 person to whom disclosure is not permitted under § 12-12-1717 or § 12-12-
30 1718; or

31 (B) He or she purposely encourages or permits the release
32 of data or information to a person to whom disclosure is not permitted under
33 § 12-12-1717 or § 12-12-1718.

34 (2) Unlawful disclosure of data or information under this
35 subchapter is a Class A misdemeanor.

36 ~~(f)(1) Any person required to report a death as the result of~~

1 ~~suspected adult maltreatment or long term care facility resident maltreatment~~
2 ~~who knowingly fails to make the report in the manner and time provided in~~
3 ~~this subchapter shall be guilty of a Class C misdemeanor.~~ A person commits
4 the offense of failure to report a death under this subchapter if he or she:

5 (A) Is required to report a death under § 12-12-1709;

6 (B) Has reasonable cause to suspect that an adult or long-
7 term care facility resident has died as a result of maltreatment; and

8 (C) Knowingly fails to make the report in the time and
9 manner required under this subchapter.

10 (2) Failure to report a death under this subchapter is a Class C
11 misdemeanor.

12 ~~(g) Any person required to report suspected adult maltreatment or~~
13 ~~long term care facility resident maltreatment who knowingly fails to make the~~
14 ~~report in the manner and time provided in this subchapter shall be guilty of~~
15 ~~a Class C misdemeanor.~~

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17 */s/ Hobbs*
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