

UNDERSTANDING THE IMPACT OF THE EXPANDED
CRIMINAL OFFENSES FOR NEGLECT AND ABUSE OF
CARE-DEPENDENT PERSONS UNDER ACT 53 OF 2018



KENNEDY, PC

L A W O F F I C E S

Presenters

John Kennedy, Esquire
Benjamin Glatfelter, Esquire
Casey Slotter, Esquire

KENNEDY, PC Law Offices

P.O. Box 5100

Harrisburg, PA 17110

(717) 233-7100

www.kennedypc.net

jkennedy@kennedypc.net

bglatfelter@kennedypc.net

cslotter@kennedypc.net

Overview

- Elder Justice Act
- Section 2713 of the Crimes Code prior to Act 53 changes
- Act 53 Changes to Section 2713 of the Crimes Code
- Act 53 and the Elder Justice Act
- Survey Issues
- Recap
- Recommendations

Elder Justice Act

- Applicability:
 - Applies to crimes committed against residents of and individuals receiving care from “Long-term care facilities.”
 - The federal reporting requirements only apply to entities that annually receive at least \$10,000 of Federal funds.

Elder Justice Act

- Who must report?
 - “Covered Individuals” are required to report.
 - “Covered Individuals” include anyone who is an owner, operator, employee, manager, agent or contractor of a long term care facility which annually receives at least \$10,000 in federal funds.
 - All “Covered Individuals” with knowledge of the incident must report.
 - Individuals, not the facility, have the duty to report.
 - First-hand knowledge not required.

Hypo

A Social Worker at a SNF develops a reasonable suspicion that a crime has been committed against one of the SNF's residents. The Social Worker immediately reports the incident to the SNF's Administrator.

Has the Social Worker fulfilled his/her mandatory reporting obligations?

Does the Administrator have a mandatory reporting obligation?

Elder Justice Act

- What must be reported?
 - Any “reasonable suspicion” of a crime committed against a resident or person receiving care at the facility
 - “Reasonable suspicion” not defined by the federal mandatory reporting statute or regulations
 - “Crime” defined by the laws of the applicable state, city, county, township, or village where a LTC facility is located
- LTC facilities can coordinate with local law enforcement and their attorneys to determine those actions which are considered crimes
- LTC facilities can attempt to develop a reporting procedure with local law enforcement

Hypo

An employee of a SNF witnesses a visitor of a resident striking the resident forcefully with his open hand.

Does this constitute a “reasonable suspicion?”

Hypo

An employee in the business office of a SNF is assisting with a resident's Medicaid application and notices a number of unexplained ATM withdrawals. The resident states she does not know who made those withdrawals and did not authorize them.

Does this constitute a “reasonable suspicion?”

Elder Justice Act

- When must the report be made?
 - If the events that cause the reasonable suspicion of a crime result in **serious bodily injury**, a report must be made **immediately and no later than two hours** after forming the suspicion
 - If the events that cause the reasonable suspicion of crime **do not result in serious bodily injury**, a report must be made **no later than 24-hours** after forming the suspicion

Hypo

An employee of a SNF obtains bank records showing large withdrawals being made from a resident's bank account by the resident's son for the resident's son's personal use while the resident has dementia and is clearly incapable of handling his/her own affairs.

- Is this incident subject to the Federal mandatory reporting requirements?
- When must the employee report the incident?

Elder Justice Act

- To whom should the reports be made?
- The reports should be made to **both** the local police department and the the state survey agency: in Pennsylvania, that is the Department of Health.
 - Police department – call the police department which has jurisdiction over the facility and verbally make the report. Also advisable to fax the report to the police so you have proof the report was delivered.

Elder Justice Act

- To whom should the reports be made?
 - Department of Health-Nursing Home Survey Office – submit the report to your facility’s assigned Survey Field Office. Submit the reports by way of filing a PB22 form through the Department of Health’s Electronic Event Reporting System (ERS). If the covered individual who reports does not have access to ERS system, submit a report to the applicable field office by fax. In addition to timely submitting the PB22 through the ERS and/or faxing the notice to the field office, call and verbally report within the required time frame. Keep records of the date, time, subject matter, and recipient’s names for all verbal reports.

Hypo

A nurse employed by a SNF forms a reasonable suspicion that a crime occurred against one of the SNF's residents. The nurse reports the matter to the Director of Nursing who, in turn, reports the matter to the Administrator.

Who should submit a report to the police and the Department of Health?

How can these individuals file reports?

Elder Justice Act

Penalties for Covered Individuals' Failures to Report:

- A civil monetary penalty of up to \$200,000; and
- Exclusion from participation in any Federal health care program.

Section 2713 of the Crimes Code (prior to Act 53)

2713. Neglect of care-dependent person.

(A) Offense defined.--A caretaker is guilty of neglect of a care-dependent person if he:

- (1) Intentionally, knowingly or recklessly causes bodily injury [or], serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care.

- (2) Intentionally or knowingly uses a physical restraint or chemical restraint or medication on a care-dependent person, or isolates a care-dependent person contrary to law or regulation, such that bodily injury [or], serious bodily injury results.

Section 2713 of the Crimes Code (prior to Act 53)

Penalty.--

- (1) A violation of subsection (a)(1) constitutes a misdemeanor of the first degree if the victim suffers bodily injury.
- (2) A violation of subsection (a)(1) constitutes a felony of the first degree if the victim suffers serious bodily injury.
- (3) A violation of subsection (a)(2) constitutes a misdemeanor of the first degree if the victim suffers bodily injury.
- (4) A violation of subsection (a)(2) constitutes a felony of the first degree if the victim suffers serious bodily injury.

Section 2713 of the Crimes Code (prior to Act 53)

Report during investigation.

When, in the course of conducting a regulatory or investigative responsibility, the Department of Aging, the Department of Health or the Department of Human Services has reasonable cause to believe that a caretaker has engaged in conduct in violation of this section, a report shall be made immediately to the local law enforcement agency or to the Office of Attorney General.

Section 2713 of the Crimes Code (prior to Act 53)

Enforcement.

- (1) The district attorneys of the several counties shall have authority to investigate and institute criminal proceedings for a violation of this section.

- (2) In addition to the authority conferred upon the Attorney General under the act of October 15, 1980 (P.L.950, No.164), known as the Commonwealth Attorneys Act, the Attorney General shall have the authority to investigate and institute criminal proceedings for a violation of this section.

Section 2713 of the Crimes Code (prior to Act 53)

Definitions:

"Care-dependent person." Any adult who, due to physical or cognitive disability or impairment, requires assistance to meet his needs for food, shelter, clothing, personal care or health.

Section 2713 of the Crimes Code (prior to Act 53)

Definitions:

"Caretaker." Any person who:

- (1) is an owner, operator, manager or employee of a nursing home, personal care home, domiciliary care home, community residential facility, intermediate care facility for the mentally retarded, adult daily living center, home health agency or home health service provider whether licensed or unlicensed;
- (2) provides care to a care-dependent person in the setting described in paragraph (1); or
- (3) has an obligation to care for a care-dependent person for monetary consideration in the settings described in paragraph (1) or in the care-dependent person's home.

Section 2713 of the Crimes Code (prior to Act 53)

- Section 2713 of Crimes Code (prior to Act 53):
 - Did not criminalize “abuse” (could only be prosecuted by local authorities).
 - Definition of the offense of “neglect of care-dependent persons” did not include death.
 - Definition of the offense of “neglect of care-dependent persons” was limited and required proof of actual injury.
 - Attorney General’s jurisdiction was limited to only “neglect” cases that involved actual injury.

Hypo

Resident's nurse was frustrated with Resident's lack of cooperation and did not change Resident's wound bandages during his shift. As a result, Resident developed an infection that led to the need for his leg to be amputated.

Were the nurse's actions potentially criminal under the old Section 2713?

Hypo

Resident's nurse was frustrated with Resident's lack of cooperation while changing Resident's wound bandage. Resident's nurse finished changing the bandage, then grabbed Resident by the shirt collar and said "If you ever give me trouble like that again, I promise you will pay for it."

Were the nurse's actions potentially criminal under the old Section 2713?

Act 53 Changes to Section 2713 of the Crimes Code

2713. Neglect of care-dependent person.

(a) Offense defined.--A caretaker is guilty of neglect of a care-dependent person if he:

(1) Intentionally, knowingly or recklessly causes bodily injury [or], serious bodily injury **or death** by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of a care-dependent person for whom he is responsible to provide care.

(2) Intentionally or knowingly uses a physical restraint or chemical restraint or medication on a care-dependent person, or isolates a care-dependent person contrary to law or regulation, such that bodily injury [or], serious bodily injury **or death** results.

Act 53 Changes to Section 2713 of the Crimes Code

2713. Neglect of care-dependent person.

(3) Intentionally, knowingly or recklessly endangers the welfare of a care-dependent person for whom he is responsible by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare of the care-dependent person.

*"[A] person acts recklessly when the person consciously disregards a substantial and unjustifiable risk to the care-dependent person."

Act 53 Changes to Section 2713 of the Crimes Code

§ 2713.1. Abuse of care-dependent person.

(a) Offense defined.--A caretaker is guilty of abuse of a care-dependent person if the caretaker:

(1) With the intent to harass, annoy or alarm a care-dependent person:

- (i) strikes, shoves, kicks or otherwise subjects or attempts to subject a care-dependent person to or threatens a care-dependent person with physical contact;
- (ii) engages in a course of conduct or repeatedly commits acts that serve no legitimate purpose;
- (iii) communicates to a care-dependent person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures; or
- (iv) communicates repeatedly with the care-dependent person at extremely inconvenient hours.

(2) Commits an offense under section 2709.1 (relating to stalking) against a care-dependent person.

Act 53 Changes to Section 2713 of the Crimes Code

Definitions:

"Caretaker." Any person who:

(1) is an owner, operator, manager or employee of any of the following licensed or unlicensed entities:

- (i) A nursing home, personal care home, assisted living facility, private care residence or domiciliary care home.
- (ii) A community residential facility or intermediate care facility for a person with mental disabilities.
- (iii) An adult daily living center.
- (iv) A home health service provider.
- (v) A health care facility as defined in section 802.1 of the act of July 19, 1979 (P.L.130, No.48), known as the Health Care Facilities Act;

Act 53 Changes to Section 2713 of the Crimes Code

Definitions:

"Caretaker." Any person who:

(2) provides care to a care-dependent person in the settings described under paragraph (1);

(3) has an obligation to care for a care-dependent person for monetary consideration in the settings described under paragraph (1);

(4) is an adult who resides with a care-dependent person and who has a legal duty to provide care or who has voluntarily assumed an obligation to provide care because of a familial relationship, contract or court order; or

(5) is an adult who does not reside with a care-dependent person but who has a legal duty to provide care or who has affirmatively assumed a responsibility for care, or who has responsibility by contract or court order.

Hypo

Resident's nurse was frustrated with Resident's lack of cooperation while changing Resident's wound bandage. Resident's nurse finished changing the bandage, then grabbed Resident by the shirt collar and said "If you ever give me trouble like that again, I promise you will pay for it."

Were the nurse's actions potentially criminal under the new Section 2713?

Who can investigate these allegations?

Hypo

Resident's nurse was frustrated with Resident's lack of cooperation and did not change Resident's wound bandages during his shift. The nurse on the following shift changed Resident's bandages the next day. No infection developed and there was otherwise no injury to the Resident.

Were the nurse's actions potentially criminal under the new Section 2713?

Would the nurse's actions potentially have been criminal under the old Section 2713?

Hypo

Resident's night-shift nurse was bored and, for no reason other than his own entertainment at Resident's startled reactions, decided to wake Resident up every hour throughout the evening and say "Just checking on you."

Were the nurse's actions potentially criminal under the new Section 2713?

Would the nurse's actions potentially have been criminal under the old Section 2713?

Hypo

Resident's care plan called for a two person assist with a Hoyer lift when transferring the resident. Nurse aid received training on two person assists with a Hoyer lift. Nurse aid was aware Resident needed a two person assist when transferring. One evening late in the shift, the nurse aid attempted to transfer the Resident by himself. The Resident fell and sustained fracture.

Were the nurse's actions potentially criminal under the new Section 2713?

Would the nurse's actions potentially have been criminal under the old Section 2713?

Hypo

During the admission process, the social worker met with the resident and the daughter. Daughter indicated the son/POA had been living with their mother and alleged the son was using the Resident's money to pay his own bills. As a result, the Resident ended up not being able to obtain her prescriptions for a short time and had her electricity shut off before the daughter stepped in.

Were the son's actions potentially criminal under the new Section 2713?

Would the son's actions potentially have been criminal under the old Section 2713?

Elder Justice Act and Act 53 Considerations

- Important to understand what constitutes a potential crime
- If an administrative agency reports a “reasonable suspicion” of neglect or abuse to local law enforcement or the Attorney General but the matter is not reported by any representatives of the SNF with knowledge of the incident, have these individuals failed to comply with the Elder Justice Act?

Survey Issues

- **F608 §483.12(b)**

The facility must develop and implement written policies and procedures to ensure reporting of crimes occurring in accordance with the Elder Justice Act.

Survey Issues

- **F609 483.12(c)**

The facility must report alleged violations related to mistreatment, exploitation, neglect, or abuse, including injuries of unknown source and misappropriation of resident property and report the results of all investigations to the proper authorities within prescribed timeframes.

Survey Issues

- *“Abuse,” is defined at §483.5 as “the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. Abuse also includes the deprivation by an individual, including a caretaker, of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being. Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish.*

Survey Issues

- *“Neglect,” as defined at §483.5, means “the failure of the facility, its employees or service providers to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish or emotional distress.”*

Reporting Summary

- Under the EJA, 'providers' must report any reasonable suspicion of a crime to DoH and police.
- Providers must also report numerous types of incidents to DoH, DoA, APS, and/or DHS.
- State agencies have a mandatory obligation under (old and new) § 2713 to report any potential violation of Act 53 to a local law enforcement agency or to the Office of Attorney General.

Recap

- Act 53 contains expanded definition of “neglect” that no longer requires actual injury.
- Act 53 now includes a violation for “abuse” of a care-dependent person.
- Attorney General’s Office now has much broader jurisdiction over neglect and abuse cases.
- Elder Justice Act obligates “covered individuals” to report “reasonable suspicion” of crimes.
- Potential non-compliance with Elder Justice Act if administrative agency reports a reasonable suspicion of a crime to local law enforcement or the Attorney General, but representatives of a SNF with knowledge of the incident have not reported the incident.

Recommendations

- Develop policies to specifically identify the obligations of the Elder Justice Act and the expanded definitions of what constitutes a crime under the Act 53 Amendments.
- Include external and internal focus.
- Provide training on the updated policies.
- When in doubt, err on the side of reporting.
- Investigate, follow up, train, and retrain as contemplated by F608 and F609.