

# **Your Right to Leave**

A Guide to the Rights of Long Term Care  
Consumers to Be Free From Forced Placement



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**CANHR**  
*Long Term Care Justice and Advocacy*

In America, the people who want to deny our rights have to go to court, not the people who want to exercise them.

# **Your Right to Leave**

## **A Guide to the Rights of Long Term Care Consumers to Be Free From Forced Placement**

While this guide is written to help residents of long term care facilities protect themselves, it is not intended to provide legal advice or to substitute for a consultation with an attorney. This guide is for informational purposes only. If you or a loved one is living in a long term care facility and has been the victim of a rights violation, please call CANHR at (800) 474-1116 for more information.

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## Introduction

Imagine you live in an apartment building. You take care of yourself, set your own goals, and live your own life.

One day your landlord shows up and locks you inside of the apartment. An alarm is put on the doors and windows to alert the landlord when you try to leave. When you do try to leave, he forces you back inside. He tells you that he has decided you are no longer making good decisions and you need to be kept in the apartment for your own safety. He has a doctor's opinion that supports this decision. Your food, clothing, and other needs will be taken care of. But you cannot leave.

You call the police. They arrive and speak with the landlord. They speak with you. They tell you that you need a court order to be able to leave and that your case is a "civil matter" and they are not going to get involved.

You are a prisoner in your apartment.

Think this is far-fetched? Think again. Replace the apartment with a long term care facility and the landlord with a facility administrator and you have a scenario that is played out many times in long term care facilities in California every single day.

At CANHR, we receive many inquiries about the right of residents to move freely about the world, usually when it is being violated in some way.

This guide is going to explain how many long term care facilities<sup>1</sup> commit false imprisonment and, more importantly, what you can do about it.

## Why Do Long term Care Facilities Keep People Locked Inside?

Long term care facilities are operated by people in the caring profession. The facilities are set up to take care of people who need various levels of assistance with their health care and activities of daily living, such as eating, bathing, and getting dressed. The staff is made up of professionals who like helping and taking care of people.

Unfortunately, the culture of caregiving and resident dependence in long term care facilities often creates a fair amount of paternalism, creating an environment where the caregivers provide their assistance without much input from the care recipient. Caregivers sometimes feel they know best (they are the professionals after all) and can get in the habit of making decisions on behalf of residents. And sometimes caregivers do things despite the residents' objections based on the idea that the resident is not capable of making good decisions and should therefore not be permitted to object.

The paternalistic environment in some care settings can be worsened by the overwhelming caregiver workload. When you have 10 or 12 or 14 people to take care of, sometimes all that matters is completing tasks, at the expense of engaging the care recipients.

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<sup>1</sup> In this Guide, the term "long term care facilities" refers to nursing homes and assisted living facilities (called RCFEs)<sup>1</sup>

Beyond paternalism, long term care facilities may be motivated by other considerations, such as a desire to keep beds filled, liability concerns, misunderstandings about or disregard for residents' rights or directions from a resident's family or representatives to prevent the person from leaving. Regrettably, one area where facilities often make decisions for residents is regarding the residents' basic right to come and go or leave the facility.

Most often, long term care facilities keep people locked inside because of safety concerns. The staff believe the risks of leaving the facility outweigh the benefits for the resident. ***Despite these concerns, the law generally does not give facilities or their staff members, or anyone other than the resident, the right to make those decisions.***

## How Do Facilities Keep People Locked Up?

There are a number of methods facilities use to lock their residents inside:

- Actually locking the doors and refusing to let residents out;
- Placing alarms on doors and “re-directing” residents inside when they attempt to leave;
- Telling residents they cannot leave, that a doctor has not signed off on a “pass”, or that some friend or family member has to approve the resident walking out the door;
- Providing no physical assistance to residents who tell staff members they want to leave but are physically unable to get out of the door.

## The Right to Move Freely About the World

All adults have the right to move freely and choose where they want to live and whether or not to receive health care or care services from somebody. In other words, when someone goes to a long term care facility, they do not leave their rights at the door. They have every right not to be imprisoned, even if someone like a doctor or a facility administrator believes the resident does not have the capacity to make sound decisions.

This guide explains the formal process required to keep a person in a care facility against their will. Basically, ***only a judge has the ability to declare someone incompetent and take away their right to come and go as they please.*** Any other opinion regarding a person's capacity to make decisions is just that – an opinion – and has no direct legal bearing on that person's rights.

U.S. and California law generally permit people to move about freely in their worlds. The U.S. and California Constitutions provide a right of privacy and guarantee that liberty interests may not be deprived without due process of law. The right to choose your own residence, be free from detention, and control health care decisions are guaranteed as part of the fundamental concept of liberty that Americans celebrate and defend.<sup>2</sup>

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<sup>2</sup> Supportive case law includes *Cervantez v. J.C. Penney Co.* (1979) 24 Cal. 3d 579, *Park Redlands Covenant Control Comm. v. Simon* (1986) 181 Cal. App. 3d 87, *Cruzan v. Director, Missouri Dept. of Health* (1990) 497 U.S. 261, and *Cobbs v. Grant* (1972) 8 Cal. 3d 229.

The only three exceptions to the right to be free from forcible detention are imprisonment for criminal misbehavior, involuntary mental health treatment pursuant to California legal processes, and authorization of a court-appointed conservator following a judicial determination of incompetence. Each of these three exceptions requires an extensive array of procedural protections, primarily an adversarial hearing governed by a judge or magistrate. The reason such protections are required is because the right to not be imprisoned is so fundamental. Abridging such a right should be difficult and only permitted in the most extreme cases.

The right to move freely is well-established under general legal principles. These laws should be enough by themselves to ensure residents in long term care facilities are not imprisoned. Nonetheless, there are laws specific to long term care facilities that enhance the general rules.

### **a) Nursing homes**

Nursing homes are licensed health care providers, offering 24-hour nursing care in an institutional setting to people with significant care needs due to a chronic medical condition or a recent health crisis.

In California, Civil Code Section 1708.9 makes it unlawful to interfere or restrict a person's freedom of movement to enter or exit a health facility, such as a nursing home. The victim may sue for interference and recover up to \$5,000 per violation.

Other state and federal nursing home laws give residents the rights to control their lives and care during a nursing home stay and to move from the facility whenever they want. Key residents' rights to self-determination include the right to:

- Discharge themselves without advance notice to the facility (Health & Safety Code §1599.71);
- Self-determination (42 C.F.R. § 483.10(a));
- Exercise their rights as residents of the facility and citizens of California and the United States (42 C.F.R. § 483.10(b) and 22 Cal. Code of Regs § 72527(a)(7));
- Be free from interference in exercising their rights (42 C.F.R. § 483.10(b)(1));
- Consent to or refuse any treatment or procedure (42 C.F.R. § 483.10(c) and 22 Cal. Code of Regs § 72527(a)(4));
- Be free from restraint (42 C.F.R. §§ 483.10(e)(1), 483.12(a)(2) and 22 Cal. Code of Regs § 72527(a)(24));
- Free choice in determining treatment (42 C.F.R. § 483.10(c));
- Be treated with consideration and dignity and have all of their rights promoted and protected (42 C.F.R. §§ 483.10(a)(1), 483.10(e) and 22 Cal. Code of Regs § 72527(a)(11).

Some nursing home operators claim nursing home law does not contain a clear statement that residents have a right to leave. Although the above-cited laws and regulations disprove this claim, a

nursing home resident's civil right to leave a nursing home does not depend on their interpretation. There's no law that says library patrons may not be locked in libraries or restaurant customers may not be locked in restaurants, yet no one ever claims that readers and diners are fair game for imprisonment.

In a well-known case involving false imprisonment in a nursing home, the court concluded nursing homes do not have any special authority to lock people in against their will. (*Big Town Nursing Homes, Inc. v. Reserve Insurance Co.* (1974) 492 F.2d. 523) And in 2015, the federal Department of Health and Human Services (the agency in charge of federal nursing home rules) held that nursing home residents may not be confined against their will, even if a power of attorney agent has consented. "Otherwise, nursing facilities could be turned into prisons in which family members lock their relatives away purely for the sake of convenience. ....Residents of nursing facilities have rights and those rights include the right to freedom of movement."<sup>3</sup>

Perhaps the most robust expression of residents' rights to come and go is in a 2016 Centers for Medicare and Medicaid Services' (CMS) memo about residents who are admitted from jails or prisons on medical parole programs. The memo holds that not even prisoners can be locked up in nursing homes. ALL residents have the same rights and "a nursing home cannot incorporate into care plans restrictions that violate resident rights." ([CMS Memo S&C 16-21-ALL](#) (p.6)) Locking up any resident, including convicted criminals, without specific legal authority to do so, violates the federal nursing home rules.

### **b) Assisted Living Facilities – Residential Care Facilities for the Elderly (RCFEs)**

RCFEs are like nursing homes, except the residents typically do not need quite as much care. RCFE residents usually need supervision and assistance with some daily activities but have fewer medical needs. RCFEs increasingly provide services to residents with dementia, a slow, progressive brain condition marked by memory loss and confusion.

The laws and regulations that apply to RCFEs are quite specific about residents' rights to come and go. All RCFE residents have the right to move from a facility at any time. (Health and Safety Code § 1569.269(a)(23)) Facilities with locked doors or fences must have written statements, signed by the resident, consenting to the placement. If a resident does not have the capacity to consent to the placement, only a court-appointed conservator may do so on the resident's behalf. (Health and Safety Code § 1569.698; 22 Cal. Code of Regs. §§ 87705(i), 87468(a)(6))

The right to leave an RCFE also includes the right to be free from "an egress alert device" which is often a bracelet attached to a resident's wrist or ankle to set off an alarm when near a door. (22 Cal. Code of Regs. § 87705(i)) In cases involving substantial interference with the resident's personal rights, consent can only come from the residents themselves or their duly appointed legal conservator. A very detailed explanation of the rights of residents to exercise their rights is in the Department of Social Services' [Provider Information Notice, 21-48-ASC](#), "Authority of Conservators and Agents under Powers of Attorney Related to Residents' Rights."

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3 [NMS Healthcare of Hagerstown v. Centers for Medicare & Medicaid Services](#), Department of Health and Human Services, Departmental Appeals Board, Civil Remedies Division, April 10, 2015. The Board upheld a fine of \$380,750 (\$5,650 / day) against the nursing home for placing a resident in a locked unit against her will with the consent of her daughter.



## Who Can Restrict a Resident's Right to Leave?

There is only one person who can restrict a resident's right to leave a long term care facility: a court-appointed conservator acting with specific authority to place the resident against the resident's will.<sup>4</sup>

The following is a partial list of people who DON'T have the authority to restrict a resident's right to leave:

1. The facility management or staff. There is simply no legal authority at all giving long term care providers the ability to hold a resident against the resident's will.
2. Physicians. Other than in the case of specified mental health holds, there is no legal authority for physicians to confine residents in long term care facilities. Physicians may recommend residents stay in a long term care facility or they may give an opinion on whether the resident has the cognitive capacity to make decisions about staying or leaving but their patients are free to disregard those recommendations and opinions.
3. Surrogate decision-makers. Surrogates might be agents under a power of attorney, spouses, family members, or friends. The law does not empower surrogates to make decisions over the express objection of the principal. Even agents under powers of attorney are subject to the veto power of the principal at any time and the principal's veto power persists despite any opinions regarding the principal's "capacity."<sup>5</sup>

For more information about the limits of surrogate decision-making please see page 4 of CANHR's guide "[Your Right to Visit](#)."

In many cases, even the most out-of-touch facility operators will concede that residents have the right not to be imprisoned. But they may insist residents who "have lost capacity" to make their decisions may not appropriately exercise the right and therefore lose it. Those operators are wrong. California law presumes that all adults have capacity to make their own decisions and may thus make their own decisions until they are found by a court to lack decision-making capacity.<sup>6</sup>

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4 Probate Code Section 2356.5 permits conservators to place a conservatee with dementia into a locked facility for the treatment of dementia. Without a specific grant of Section 2356.5 powers, a conservator may not place a conservatee in a locked facility. If a conservator has authorized locked placement that someone wishes to challenge, please see CANHR's fact sheet "[FAQs Regarding Probate Conservatorship Problems](#)."

5 Probate Code Section 4689 states "nothing in this division authorizes an agent under a power of attorney for health care to make a health care decision if the principal objects to the decision."

6 Probate Code Section 810(a) creates a legal presumption that "all persons have the capacity to make decisions and to be responsible for their acts or decisions" that can only be rebutted in a court of law.

# What to Do When a Facility Is Imprisoning You or a Loved One

## **a) Talk with Facility Management/Staff.**

There are many options for dealing with a facility that is denying a resident's right to leave the facility. Before undertaking any action, however, it is best to talk to the facility management. One topic to discuss is whether the facility is really restricting the resident or if it is simply strongly recommending that the resident not leave. False imprisonment is a serious accusation so it is important to make sure that the facility will physically prevent the resident from leaving.

Another topic to discuss with the facility management or staff is planning for a safe outing or discharge. If the facility is resisting the resident's right to leave, it may be based on real safety concerns. The resident should listen to those concerns and, if possible, work out a solution so the safety concerns and the resident's right to leave are both accommodated.

## **b) Have a Good Plan for Safety.**

If the facility is not willing to work with you regarding your desire to leave, you're likely going to have to fight for your rights. Your fight will be more difficult to win if you don't have a safe and viable plan for where you are going to go. If you want to leave the facility temporarily on an outing, it may be a good idea to have someone with you in case an emergency arises. If you want to leave the facility permanently, it is a good idea to have a place to go and have a way to address your needs for food, medication, or assistance with daily activities.

Although a plan for safety is not a requirement to exercise your right to leave, it is certainly a good idea. Nursing homes are required to help residents with discharge planning to make sure they have a safe transition. (42 CFR Sec. 483.20(1)(3)).<sup>7</sup>

## **c) Give a Warning.**

Before you walk out the door, you should let the facility know your plan if you have not already done so. If you are leaving for good, you will likely need help packing or moving your personal belongings. You may also need help in getting your medications squared away. And basic courtesy suggests you should let the facility know you are leaving so the staff members do not needlessly worry about your whereabouts. If you are concerned the facility will stop you from leaving, it may be better to notify the facility after you have left.

## **d) Leave.**

The law is clear: unless a court has said otherwise, you have the right to leave a long term care facility any time. The facility may strongly encourage you to stay; in fact, it may have a duty to do so in some cases, but no one from the facility may keep you locked in or physically prevent you from leaving.

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<sup>7</sup> For additional assistance in moving out of a nursing home, contact your local Community Transitions Project <http://www.dhcs.ca.gov/services/ltc/pages/cct.aspx>.

## **If You Are Physically Stopped from Leaving**

If the facility staff members refuse to unlock the doors or physically prevent you from leaving (e.g. stand in your way and don't let you pass or actually put their hands on you and restrain you), **DO NOT** get physical. Even though you may feel indignant or outraged, you must maintain your composure. You have options for relief.

### **a) Call DPH or CCL.**

Nursing home operations are overseen by the state Department of Public Health while RCFEs are overseen by the state Department of Social Services. You can file a complaint with these agencies whenever your rights are being denied in a long term care facility. CANHR has helpful information about filing complaints for nursing homes and for RCFEs. While the state may be helpful to you in vindicating your rights, it often takes months or even years to complete an investigation. For that reason, it's probably best to file your complaint about false imprisonment to make sure an investigation is started and then move to other options on this list.

### **b) Call the police.**

False imprisonment is a crime. If someone is physically preventing you from leaving a facility without legal authority, the police should be called.

However, be warned: in long term care cases, police officers often get it wrong. They see two parties: one, a frail elder maybe with a family member who is upset and the other, a business, with multiple professional staff members. Siding with the business is the choice that looks like it has the lowest degree of risk.

Even if the police are inclined to side with the facility, you should make your arguments. This Guide is written, in part, to be shared with police officers so they understand the law. For police officers, the most important thing to know is all adults have rights and only judges can take them away. If a long term care facility is trying to prevent someone from leaving, it must have an order signed by a judge or else it is violating the law.

### **c) File a lawsuit.**

In cases where a long term care facility insists on denying its residents their right to leave, it may be sued for a number of causes of action including violations of resident rights. The police may also be liable for civil rights violations. The primary violation is false imprisonment.

False imprisonment has three elements:

1. The nonconsensual, intentional confinement of a person;
2. Without lawful privilege;
3. For an appreciable period of time, however brief. (from *Blaxland v. Commonwealth Director of Public Prosecutions* (2003) 323 F.3d 1198)

Obviously, anytime a person is held in a long term care facility against his will, all three criteria are satisfied. Actual physical restraint may be necessary – threats to keep a resident locked up may not be enough.

Other causes of action in a false imprisonment lawsuit may include Health and Safety Code Section 1430(b) (violation of nursing home resident rights), Business and Professions Code Section 17200 (unlawful business practice), and Health and Safety Code Section 1708.9 (unlawful restriction of free movement out of a health care facility).

In a lawsuit for violating a resident's right to leave, you can seek a restraining order preventing the facility from denying your right, as well as money damages. The causes of action include false imprisonment, violations of resident rights, and elder or dependent adult abuse (isolation).

One lawsuit option is to file a Petition for an Elder Abuse Restraining Order. Many courts have special clinics that help people with filling out and filing the forms for these lawsuits. For more information on how to obtain an Elder Abuse Restraining Order, see the California courts' website. For a possible referral to an attorney or other assistance, please call CANHR.

#### **d) Alert the Media.**

A resident illegally imprisoned in a long term care facility, state agencies slow to help, the police turn their backs – that's a powerful story and the media might be interested. If you have any way to contact journalists about your case, they may be able to help by exposing the illegal conduct.

## **Short Outings or Temporary Leaves of Absence**

If you don't want to permanently leave your facility, but just want to go outside from time to time for a walk or lunch with a friend, you have the right to do so.

Long term care facilities often deny a resident's right to leave on a short outing because a physician has not authorized it. While physician approval is helpful, failure to obtain it does not justify locking a resident in the facility. The principles are the same as above: residents have the right to move freely about the world unless a court has taken the right away.

One issue with a short outing is determining whether the resident is moving out permanently – permitting the facility to refuse his return. The general rule is that residents are allowed to leave for short outings, including somewhat lengthy (overnight) leaves of absence. The key is to make sure the facility knows you are returning. The best way to do that is to tell the staff in advance of the outing and let them know when you are leaving. If the outing will be longer than a day, tell the staff in writing. Leaving your personal property behind is a strong indication of your intent to return.

Both Medicare and Medi-Cal pay for temporary (overnight or longer) leaves of absence.<sup>8</sup> Physician approval may be needed in order to ensure the facility is paid to hold your bed.

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<sup>8</sup> For more information about Medicare payments for leaves of absence, see [http://www.medicareadvocacy.org/InfoBy-Topic/SkilledNursingFacility/SNF\\_YouCanLeaveTheSNF.htm](http://www.medicareadvocacy.org/InfoBy-Topic/SkilledNursingFacility/SNF_YouCanLeaveTheSNF.htm) and [http://www.aarp.org/health/medicare-insurance/info-02-2010/ask\\_ms\\_medicare\\_question\\_77.html](http://www.aarp.org/health/medicare-insurance/info-02-2010/ask_ms_medicare_question_77.html) For Medi-Cal, see W&I Code §14108.2; 22 CCR §51535; and 42 CFR §483.12.

## **Conclusions**

All adults have the right not to be locked in long term care facilities. That includes people with disabilities and those with dementia. Only a court of law can deprive an adult of the right to move freely about the world.

Despite the basic right to leave, long term care facilities are notorious for illegally falsely imprisoning residents. The reason: because they have been able to get away with it. This Guide is intended to stop this practice by informing residents, their friends, and family of the law and to give some instructions for addressing false imprisonment. If you have any questions about any- thing in this Guide or need more help, please call CANHR.