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Nursing home arbitration agreements in California – Understanding the basics

A DESKTOP SUMMARY OF ELDER-ABUSE ARBITRATION LAW

Arbitration agreements in nursing home cases have become increasingly common in California as a way for the industry to conceal wrongdoing and prevent residents and their families from holding nursing homes accountable for their actions. They often require the resolution of disputes behind closed doors, away from public scrutiny and oversight. This lack of transparency makes it challenging to identify patterns of neglect or abuse within nursing homes, preventing necessary reforms and improvements.

When families make the difficult decision to place their loved ones in nursing homes, they expect a safe and caring environment for their vulnerable family members. However, many nursing homes present families with a stack of documents to sign, including arbitration agreements, which are often buried within the admission paperwork, leaving families with little opportunity to negotiate or fully understand their implications. They may feel coerced into signing, fearing that refusal could lead to denial of admission or jeopardize the quality of care. This unequal bargaining power often leads to families unknowingly waiving their fundamental constitutional right to have a dispute decided in a court of law before a jury.

But no one should be required to surrender constitutional rights to secure a bed in a care facility. This is especially true for the vulnerable, dependent adult and elderly population who suffer from various physical and mental ailments. In California, specific rules and regulations govern arbitration agreements, and individuals must understand their rights and protections under the law. This article will look closer at nursing home arbitration agreements and what you need to know.

Existence of a valid arbitration agreement

The party seeking to enforce an arbitration agreement bears "the burden to establish a valid Agreement to arbitrate." (*Pagarigan v. Libby Care Center, Inc.* (2002) 99 Cal.App.4th 298, 301.) California Code of Civil Procedure section 1280 et seq. provides a procedure for the summary determination of whether a valid agreement to arbitrate exists, and such summary procedure satisfies both state and federal law. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 356.) Under this procedure, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other evidence, as well as oral testimony received at the court's discretion, to reach a final determination on the issue of arbitrability." (*Id.* at 356-57.)

Plaintiffs "cannot be required to arbitrate anything – not even arbitrability – until a court has made a threshold determination that they did, in fact, agree to something." (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1291; see also *Henry Schein, Inc. v. Archer & White Sales, Inc.* (2019) 139 S.Ct. 524, 530 ["To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists"].)

General principles of contract law determine whether the parties have entered into a binding agreement to arbitrate. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236.) One of the first things to analyze is the identity of the parties to the agreement. "It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them." (Civ. Code, § 1558.) The policy in favor of arbitration does not extend to those who are not parties to an arbitration agreement or who have not authorized anyone to act for them in executing such an agreement. (*Baker v. Birnham* (1988) 202 Cal.App.3d 288, 291; see also *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1, 9.)

The next thing to consider is whether the arbitration agreement was properly authenticated. Attaching the arbitration agreement to a declaration signed by the defendant's attorney is insufficient. (See *Toal v. Tardif* (2009) 178 Cal.App.4th 1208; Evid. Code, § 1401, subd. (a).) For electronic signatures, the petitioner also bears the burden of proving that the signature belongs to the purported signatory. (*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836, 848.)

Nursing home arbitration agreements

There are also strict statutory requirements that nursing homes must follow.

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First, they cannot require residents to sign an arbitration agreement as a condition of admission or medical treatment. (Health & Saf. Code, § 1599.81, subd. (a).) An arbitration agreement must therefore contain the following advisory in a prominent place at the top of the proposed arbitration agreement, in bold-face font of not less than 12-point type: "Residents shall not be required to sign this arbitration agreement as a condition of admission to this facility." (Cal. Code Regs., tit. 22, § 72516, subd. (d).)

Second, an arbitration agreement cannot be buried in a lengthy admission contract; it must be on a form separate from the admission agreement and "shall contain space for the signature of any applicant who agrees to arbitration of disputes." (Health & Saf. Code, § 1599.81, subd. (b).)

Third, immediately before the signature line, the following notice must appear in at least 10-point bold red type: "NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT." (Code Civ. Proc., § 1295, subd. (b).)

Finally, the agreement cannot require a resident to waive their ability to sue for violations of residents' rights. (Health & Saf. Code, §§ 1430, subd. (b) & 1599.81, subd. (d).)

Agency principles

In the nursing home context, the signatory is often a family member of the resident, such as a child or spouse. Thus, when someone other than the nursing home or assisted living facility resident signs the arbitration agreement, you must analyze whether that person had the authority to act for the resident as their agent. Under general agency law, an agency can be either actual or ostensible. (Civ. Code, § 2298.)

"An agency is actual when the agent is really employed by the principal." (Civ. Code, § 2299.) One way that actual agency often arises is with a "springing" power of attorney (POA), which grants someone else the authority to act on your behalf in certain situations, but only becomes effective at a future point in time or when a specific event occurs, such as when you become incapacitated or unable to make decisions for yourself. In that situation, the nursing home defendant must present evidence that a physician determined that the resident lacked capacity, such that a power of attorney sprang into effect. (See *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1128-1129.)

A POA can also have multiple primary, secondary, or joint agents. Suppose a secondary agent signed the arbitration agreement. In that case, the nursing home must present evidence that the primary agent refused or could not act on behalf of the resident. (See *Horizon West, Inc.* 220 Cal.App.4th at 1128-1129.) If a power of attorney has joint agents, their authority "is exercisable only by their unanimous action" under Probate Code section 4202, subdivision (b). This means that both agents must sign the arbitration agreement to be valid.

As to a "healthcare" power of attorney, there is currently a split of authority on whether it grants the agent power to waive the principal's constitutional right to a jury trial. (See *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1128-1129 [disagreeing with *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 that the execution of an arbitration agreement constitutes a "health care decision], but compare with *Hutcheson v. Eskaton Fountainwood Lodge* (2017) 17 Cal.App.5th 937, 957 [decision to admit someone to a residential care facility for the elderly is a health care decision even though it is not a health facility].)

An agency is ostensible or apparent when the principal intentionally or by want of ordinary care causes a third person to believe another to be his agent whom he does not employ. (Civ. Code, § 2300; *Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 587-588.) "Words or conduct by both principal and agent are necessary to create the relationship." (*Id*. at 588.) "[A]n agency cannot be created by the conduct of the agent alone; rather, conduct by the principal is essential to create the agency." (*Id*. at 587-588.)

One of the most common ways a nursing home attempts to establish ostensible agency is by submitting a declaration by the admissions coordinator, indicating that they met with the person who signed the arbitration agreement, explaining its purpose and significance. However, these declarations typically focus on the agent's conduct, not the resident-principal. This is usually because the resident did not have mental capacity and, therefore, could not have intentionally or negligently caused the nursing home to believe that the family member had the authority to sign the arbitration agreement on their behalf. (*Garcia v. KND Development 52, LLC* (2020) 58 Cal.App.5th 736, 745 [declarations claiming that verification of the signer's authority was obtained through custom or practice were insufficient evidence].) Indeed, when a plaintiff lacks capacity, an agent cannot sign the admission or arbitration agreement on behalf of the plaintiff unless a durable power of attorney establishes agency. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259; see also Civ. Code, § 1556.)

Another way the nursing home attempts to establish ostensible agency is by arguing that the family member signed various other documents representing to be the agent of the resident, such as the admission paperwork. However, allowing an agent to sign the admission contract if the resident cannot understand and sign it because of their medical condition does not confer authority on an agent to sign an arbitration agreement. (*Pagarian v. Libby Care Center, Inc*. (2002) 99 Cal.App.4th 298, 301-02; see also *Flores, supra*, 148 Cal.App.4th at 588

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[holding that "the mere fact that the husband signed the admission documents, including the arbitration agreement, is insufficient"].)

Possibility of conflicting rulings of fact or law

In cases other than for medical malpractice, Code of Civil Procedure section 1281.2, subdivision (c) authorizes the trial court to deny a petition to compel arbitration where there is a party to the arbitration agreement who is also a party to a pending court action with a third party arising out of the same transaction or series of related transactions, and where there is a possibility of conflicting rulings on common issues of law or fact. Many arbitration agreements now expressly exclude section 1281.2(c), but the provision does not apply if the underlying agreement is invalid. (*Goldman v. Sunbridge Healthcare, LLC* (2013) 220 Cal. App.4th 1160, 1174.) This exclusion also contravenes Civil Code section 3513, which states that a private agreement cannot contravene a law established for a public reason. (Civ. Code, § 3513.)

In wrongful-death cases, it is important to argue that the third-party plaintiff heirs are not subject to arbitration because there is no indication that the arbitration agreement intended to capture those claims. Counsel for the nursing home often points to the agreement's language indicating that the signatory was binding the resident-decedent and themselves to the contract by signing the agreement. However, numerous cases hold that signing under the representative line of an arbitration agreement is insufficient evidence to compel binding arbitration. (See, e.g., *Goldman v. Sunbridge Healthcare, LLC* (2013) 220 Cal.App.4th 1160, 1170-1174 [wrongful death heir not bound by the arbitration agreement even though it listed her as a party and she signed a signature line under "individual capacity"].)

To compel the wrongful-death cause of action into arbitration, defendants in nursing home cases often cite *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, 849, where the California Supreme Court held that Code of Civil Procedure section 1295 permits patients who consent to arbitration to bind their heirs in actions for wrongful death where the language of the agreement manifests an intent to do so. Whether *Ruiz* controls requires the court to determine whether this case is about "professional negligence," as defined by MICRA, or something else.

The court in *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 841-844 held that *Ruiz* did not control, and instead followed *Daniels v. Sunrise Senior Living, Inc.* (2013) 212 Cal.App.4th 674, 680, which held that an action against a residential care facility for elder abuse, negligence, and wrongful death was not subject to section 1295 because claims for elder abuse and neglect are not claims for medical negligence under MICRA. (See also *Bush v. Horizon West* (2012) 205 Cal.App.4th 924, 929 [distinguishing *Ruiz* because this case did not involve a wrongful death claim predicated on medical malpractice, but instead involved a "claim of negligent infliction of emotional distress predicated on alleged elder abuse"].)

Public policy considerations

"A court must refuse to compel arbitration if 'grounds exist for the revocation' of the arbitration agreement." (*Breazeale v. Victim Services, Inc.* (2016) 198 F. Supp.3d 1070, 1079 [quoting Code Civ. Proc., § 1281.2, subd. (b).]) A party to a contract has grounds for rescission "if the public interest will be prejudiced in permitting the contract to stand." (Civ. Code, § 1689, subd. (b)(6).) Further, "[a]n agreement to arbitrate (like a contract generally) is subject to 'revocation' within the meaning of section 1281(b) if it's contrary to California public policy." (*Breazeale*, *supra*, at p. 1079.)

Arbitration agreements as to Continuing Care Retirement Communities (CCRC) are void as against public policy under Civil Code section 1953, subdivision (a)(4). (*Harris v. University Village Thousand* Oaks, CCRC, LLC (2020) 49 Cal.App.5th 847, 852.) Although Harris did not extend its holding to Residential Care Facility for the Elderly case (RCFE), an argument can be made that it should apply.

Revocation/rescission

Lack of capacity

Civil Code section 1556 states that "all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights." "A contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission …." (Civ. Code, § 39, subd. (a); also see *Smalley v. Baker* (1968) 262 Cal.App.2d 824, 832.). In the nursing home context where the resident signed the arbitration agreement, it is important to look through the resident's medical chart for the "Health & Physical" form to see if a physician decided whether the resident was capable of understanding and making decisions.

30 days notice

Nursing home residents and their legal representatives can also rescind an arbitration agreement by giving written notice to the facility within 30 days of their signature. (Code Civ. Proc., § 1295, subd. (c).) Also, suppose the resident died within 30 days of executing the arbitration agreement. In that case, the nursing home must rescind the agreement since the decedent did not have sufficient time to make a knowing and willing decision. (*Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, but c.f., *Baker v. Italian Maple Holdings* (2017) 13 Cal.App.5th 1152 [FAA preempts 30-day rescission requirement of Code Civ. Proc., § 1295].)

Unconscionability

The court may invalidate an unconscionable arbitration agreement. California law is clear that an arbitration agreement can be revoked upon "such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281.)

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Unconscionability is one of those grounds. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114.) Although a showing of both substantive and procedural unconscionability is required, the court has held they "need not be present in the same degree…the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude that the term is unenforceable and vice versa." (*Suh v. Superior Court* (2010) 181 Cal.App.4th 1504, 1515.)

Procedural unconscionability may be proven by showing oppression, which is present when a party has no meaningful opportunity to negotiate terms or the contract is presented on a take-it-or-leave-it basis. (*Lhotka v. Geographic Expeditions, Inc.* (2010) 181 Cal.App.4th 816, 821.) It can also be shown by "unfair surprise," such as the arbitration clause being buried in a contract or multiple documents. (*Lopez v. Bartlett Care Center, LLC* (2019) 39 Cal.App.5th 311, 320-321 [finding of procedural unconscionability affirmed where the nursing home arbitration agreement failed to identify the plaintiff as a party to the agreement and the clause applicable to the plaintiff was inserted into the arbitration agreement without headings or highlighting].)

"Substantive unconscionability focuses on 'the actual terms of the agreement and evaluates whether they create such 'overly harsh' or 'one-sided' results as to 'shock the conscience.' [Citations]." (*Suh*, *supra*, 181 Cal.App.4th at p. 1515.) "An arbitration agreement is substantively unconscionable if it requires [one party] but not the [other] to arbitrate claims." (*Martinez v. Master Protection Corp* (2004) 118 Cal.App.4th 107, 114.) The Supreme Court recognizes that where an arbitration agreement lacks mutuality, the agreement is permeated to the point "that there is no single provision a court can strike or restrict to remove the unconscionable taint from the agreement." (*Armendariz*, *supra*, 24 Cal.4th at pp. 124-125.)

In nursing home cases, arbitration agreements exclude claims for eviction and billing collections, essentially the only claims the defendant can bring. This can make the agreement unconscionable. (*Martinez v. Master Protection Corp.* (2004) 118 Cal.App.4th 107, 115; see also *Lopez v. Bartlett Care Center, LLC* (2019) 39 Cal.App.5th 311, 321 [holding that a nursing home arbitration agreement was unconscionable regarding a wrongful- death heir who purportedly executed the agreement].)

A provision requiring both parties to split the fees and costs of the arbitration is unconscionable under *Bickel v. Sunrise Assisted Living* (2012) 206 Cal.App.4th 1. In *Bickel*, the court determined that this fee-splitting provision was against the public policy to protect elderly and vulnerable persons. Accordingly, the provision was deemed substantively unconscionable and severed from the rest of the arbitration agreement. (*Id.* at pp. 12-13.)

An arbitrator's award that will be "confidential" contravenes the public policy for transparency of facts involving elder abuse and/or neglect. (See, e.g., Code Civ. Proc., § 2017.310 [prohibiting confidentiality clauses in settlement releases involving elder abuse/neglect].)

Access to justice – compelling the defendant to cover fees and costs

"When a party who has engaged in arbitration in good faith is unable to afford to continue in such a forum, that party may seek relief from the superior court." (*Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) 22 Cal.App.5th 970, 981.) If plaintiffs are unable to pay the costs of arbitration despite signing an agreement requiring them to pay their pro rata share of the arbitration costs, then the defendant must either pay the entire cost of the arbitration or waive its right to arbitrate the dispute. (*Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, 96.) "[T]he trial court should decide the issue of arbitrator fee payment…." (*Aronow v. Superior Court* (2022) 76 Cal.App.5th 865, 884.) "[I]n forma pauperis status is not a prerequisite…." (*Ibid.*)

The issue presented is a separate decision from "should arbitration be ordered at all." (*Spence v. Omnibus Industries* (1975) 44 Cal.App.3d 971.) "The ability of a litigant's attorney to pay for arbitration costs is not relevant." (*Isrin v. Superior Court* (1965) 63 Cal.2d 153, 165 [right to proceed in forma pauperis in appropriate cases may not be denied on the ground that counsel for indigent litigant is representing litigant according to a contingency fee contract]; *Aronow v. Superior Court* (2022) 76 Cal.App.5th 865 at p. 885, fn. 7.)

Plaintiff's attorneys are not, from either a legal or ethical standpoint, obligated to advance the fees for their indigent client. (*Id.* at *Isrin* [an attorney having accepted the representation of an indigent client on a contingency fee basis is not "compelled to advance the costs [of litigation] under pain of being found derelict in his duty to his client"].)

The law is well established, "in forma pauperis status is not a prerequisite; however, the procedures for that determination provide a ready template should the trial court decide to employ it [citation]" in determining the allocation of arbitration fees and costs. (*Aronow*, *supra*, 76 Cal.App.5th at p. 884; *Roldan* at p. 880 ["in forma pauperis status is not required in the first instance for a litigant to seek relief from fees and costs that inhibit his right of access to the judicial process"]; *Hang v. RG Legacy I, LLC* (2023) 88 Cal.App.5th 1243 [(in forma pauperis status is not prerequisite to relieving an indigent litigant of the obligation to pay its share of arbitration fees and costs, but procedures for determining in forma pauperis status provide a ready template should the trial court decide to employ that template in determining the allocation of arbitration fees and costs].)

Appellate issues

In an appeal filed under Code of Civil Procedure section 1294, subdivision (a) involving a claim under the Elder and Dependent Adult Civil Protection Act in

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which a party has been granted trial preference under Code of Civil Procedure section 36, "the court of appeal shall issue its decision no later than 100 days after the notice of appeal is filed." Thus, in cases involving a living plaintiff where there is a basis to move for trial preference, it is crucial to ensure that the trial court makes a ruling on the motion *at the same time* the petition or motion for arbitration is heard. As a defense tactic, counsel for the nursing home will often try to convince the trial judge to defer such a ruling to prevent the application of section 1294(a) if the nursing home decides to appeal a denial of the arbitration motion.

Suppose the nursing home files an appeal, and the underlying trial court either denies the motion for preference or does not make a ruling. In that case, counsel for the plaintiff can still move for calendar preference with the court of appeal under California Rules of Court, rule 8.240 on the grounds Code of Civil Procedure section 1291.2 mandates calendar preference for appeals involving the enforcement of an arbitration clause. (*Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 582 ["Because this is (an appeal) involving enforcement of an arbitration clause, we have treated the case as a preference matter as required by Code Civ. Proc., § 1291.2"].) (See generally, Cal. Rules of Court, rule 8.240 [defining "calendar preference" as "an expedited appeal schedule, which may include expedited briefing and preference in setting the date of oral argument"].)

Moreover, appellate courts have the inherent power to control their proceedings and have the discretion to grant a motion for appellate calendar preference upon any "appropriate showing." (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1199.) Plaintiff's counsel should therefore ask the court of appeal to grant the calendar preference because "the interests of justice dictate that a litigant who may not survive the delay of an appellate court backlog be afforded calendar preference." (*Warren*, *supra*, 57 Cal.App.4th, 1199.)

California Rules of Court, rule 8.240 includes motions for calendar preference on the ground that the reviewing court should exercise its discretion to grant preference when a statute provides for trial preference, e.g., Code of Civil Procedure, section 36 (party over 70 and in poor health; party with terminal illness; minor in wrongful death action). (*Warren*, *supra*, 1198-1199.) The court may grant statutory priority due to a party's infirm health. (See *Helda v. Superior Court* (1990) 225 Cal.App.3d 525.) Code of Civil Procedure, section 36's "rationale for granting calendar preference to certain litigants is equally applicable to appellate proceedings." (*Warren, supra*, 1198-1199; see *Dana Commercial Credit Corp. v. Ferns & Ferns* (2001) 90 Cal.App.4th 142.)

Arbitration process in elder-abuse cases

The arbitration process in elder-abuse cases is like other arbitration proceedings. First, as discussed above, there must be an agreement to arbitrate. Second, there must be a demand for arbitration by the defending nursing home after a lawsuit has been filed. At this point, it is essential to analyze the likelihood of success in defeating the petition or motion to compel arbitration.

If the chances are low, you should meet and confer with opposing counsel to see if the defendant will agree to cover all costs in exchange for agreeing to arbitrate. Once the parties stipulate to arbitration or a court compels the case to arbitration, the parties involved must select an arbitrator. The arbitrator must be neutral and have experience in handling elder-abuse cases. Before the arbitration hearing, both sides may conduct pre-hearing discovery to gather evidence and information. The arbitration hearing is like a trial, with both sides presenting evidence and arguments to the arbitrator.

After the hearing, the arbitrator will issue an award, a written decision to resolve the dispute. The decision made by the arbitrator is typically final, with limited appeal rights. The pre-hearing discovery process in arbitration can be more limited than in court, which can impact the evidence that is presented. Arbitration awards may be more limited than court judgments, which can impact the compensation that is awarded.

Conclusion

Arbitration agreements in nursing homes significantly impact the rights and well-being of residents and their families. These agreements undermine transparency, accountability, and the rights of vulnerable individuals. Arbitration agreements perpetuate a culture of secrecy and protect nursing homes from public scrutiny by restricting access to the justice system. Public lawsuits can shed light on elder abuse cases, uncover patterns of misconduct, and trigger regulatory action or policy changes. It is, therefore, crucial for lawmakers, advocacy groups, and the public to challenge the validity and enforceability of these agreements to protect the rights and well-being of nursing home residents. Transparency, public accountability, and powerful remedies are essential to ensure the well-being of our elderly population and foster a system that values their dignity and rights.

Art Gharibian founded Gharibian Law, APC, *a boutique civil litigation firm whose practice focuses on elder-abuse/neglect and wrongful-death cases against nursing homes and assisted living facilities. Email: art@gharibianlaw.com.*