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No. 63333-3-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MARGARET RICKENBACKER, as personal representative of the
ESTATE OF FRANK RICKENBACKER,

Plaintiff-Respondent

v.

LIFE CARE CENTERS OF AMERICA, INC., d/b/a GARDEN
TERRACE ALZHEIMER'S CENTER OF EXCELLENCE; FEDERAL
WAY MEDICAL INVESTORS, LLC; and MARTHA BOL,

Defendants-Appellants

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Cheryl Carey)

BRIEF OF APPELLANTS

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I. INTRODUCTION AND SUMMARY

Margaret Rickenbacker, acting on her husband's behalf pursuant to a valid power of attorney, admitted her husband to Garden Terrace Alzheimer's Center of Excellence, a skilled nursing facility managed by Appellant Life Care Centers of America, Inc. ("Garden Terrace"). Months after Mr. Rickenbacker's admission, Ms. Rickenbacker signed a voluntary arbitration agreement on Mr. Rickenbacker's behalf that, by its plain terms, bound Mr. Rickenbacker, his estate, personal representatives and heirs, to arbitrate any disputes that might arise in connection with the care he received during his stay at Garden Terrace.

Following Mr. Rickenbacker's death, Ms. Rickenbacker—acting as the personal representative of Mr. Rickenbacker's estate—ignored that arbitration agreement, and filed suit against Life Care, an affiliated company and an individual alleged to be an employee (collectively, "Life Care"). Life Care immediately moved to compel arbitration and stay proceedings. In response, Ms. Rickenbacker did not dispute that she had authority to sign the arbitration agreement on Mr. Rickenbacker's behalf, nor did she dispute that the estate was bound to arbitrate its claims. Indeed, Ms. Rickenbacker has not claimed that the arbitration agreement was procedurally or substantively unconscionable in any way.

Rather, Ms. Rickenbacker argued that the agreement could not be enforced because the American Arbitration Association (“AAA”)—the organization the parties designated to administer the arbitration—no longer arbitrates individual health care cases like this one. In case that argument fell short, Ms. Rickenbacker also argued that since the estate’s wrongful death beneficiaries and some of the defendants had not actually signed the arbitration agreement, they were not bound by its terms. According to Ms. Rickenbacker, if even one claim fell outside the scope of the agreement, then arbitration should be denied on all claims.

The trial court initially rejected Ms. Rickenbacker’s arguments and granted Life Care’s motion to compel arbitration and stay proceedings. Without explanation, however, the court changed its mind and, on reconsideration, denied Life Care’s motion in its entirety. That ruling was erroneous for the following reasons:

- *First*, the unavailability of the AAA to administer the parties’ arbitration does not render the parties’ arbitration agreement unenforceable. Both the Washington Arbitration Act (“WAA”) and the Federal Arbitration Act (“FAA”) require a trial court to appoint substitute arbitrators. In addition, there is no evidence to suggest that the agreement’s AAA provision was material to the parties. On the contrary, the agreement contains a severability clause that requires the court to enforce the parties’ basic agreement to arbitrate even in the absence of the AAA.
- *Second*, the arbitration agreement is binding on Rickenbacker’s wrongful death beneficiaries. It is well-settled Washington law that a decedent may bind heirs and wrongful death beneficiaries to the terms of the decedent’s contracts. On its face, the agreement

binds Rickenbacker's personal representative and heirs. Further, because wrongful death claims are derivative in nature, they are subject to any defense that could have been asserted against the decedent. Thus, courts from around the country, including the federal district court in Washington, recognize that wrongful death beneficiaries are bound by the decedent's arbitration agreement.

- *Third*, all of the defendants are covered by the agreement. The agreement binds not only the facility, but also its owners, employees and any affiliated entities. Moreover, even if some of the defendants were not expressly bound by the agreement, Washington law permits non-signatories to compel arbitration against a signatory to an arbitration agreement where, as here, the claims at issue fall within the scope of the agreement.
- *Finally*, even in the unlikely event that some of Rickenbacker's claims were non-arbitrable, it was error for the court to deny Life Care's motion to compel arbitration in its entirety. Where a dispute encompasses both arbitrable and non-arbitrable claims, a court must compel arbitration of the former. And, the court should exercise its discretion to stay non-arbitrable claims where, as here, they cannot be severed from the arbitrable ones.

The trial court's denial of Life Care's motion to compel arbitration and stay proceedings should be reversed.

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

This appeal presents a single assignment of error: The trial court erred when it entered its April 9, 2009, Order granting Rickenbacker's motion for reconsideration (the "Order"), which resulted in a denial of Life Care's (previously granted) motion to compel arbitration and stay proceedings. The issues pertaining to this assignment of error are:

1. Whether the Order denying Life Care's motion to compel arbitration should be reversed on the grounds that Rickenbacker cannot

carry her burden of demonstrating that the parties' arbitration agreement does not apply to all the claims raised in this lawsuit when:

a. Rickenbacker's survival action and wrongful death claims fall within the scope of the agreement's "all disputes" language, which mandates arbitration for any dispute "arising out of or in any way related or connected to the [decedent's] stay and care provided at" Garden Terrace;

b. Alternative arbitrators may be appointed to replace the agreement's designated arbitration organization—which no longer administers arbitrations in individual health care cases—pursuant to the provisions of the WAA and FAA, as well as the agreement's severability clause, so that the parties' underlying intent to arbitrate can be fulfilled;

c. Rickenbacker's statutory beneficiaries are bound by the decedent's arbitration agreement under the unambiguous terms of the agreement and well-established Washington law, which holds that derivative wrongful death claimants are subject to the same defenses that could be asserted against the decedent; and

d. The non-signatory defendants are bound by the agreement because, as Rickenbacker alleges, they are "owners, employees, ... [or] affiliates" of Defendant Life Care and, even if

they were not bound by the agreement, they would be entitled to compel arbitration against someone who is, such as Rickenbacker.

2. Whether, to the extent any of Rickenbacker's claims are determined to be non-arbitrable, those claims are so intertwined with Rickenbacker's arbitrable claims, that they too must be stayed pending outcome of the parties' arbitration.

III. STATEMENT OF THE CASE

A. Rickenbacker Voluntarily Agrees To Arbitrate All Disputes Related To Care Provided At Garden Terrace.

Frank Rickenbacker was admitted to Life Care's Garden Terrace nursing facility on or around August 12, 2005. CP 25 (Schneider Decl., ¶ 2). Mr. Rickenbacker's wife Margaret, acting as his attorney-in-fact through a previously executed power of attorney, signed the facility's admission papers as his "Legal Representative." CP 28-38 (admission documents); CP 42-47 (living will and health care power of attorney). Mr. Rickenbacker was discharged from and readmitted to Garden Terrace on two occasions, each time Margaret Rickenbacker signed the facility's memorandum of readmission on Mr. Rickenbacker's behalf. CP 39 & 48.

On September 27, 2007, during Frank Rickenbacker's stay at Garden Terrace, Margaret Rickenbacker signed a "Voluntary Agreement for Arbitration" on behalf of Frank Rickenbacker (the "Agreement"),

again signing the document as his “Legal Representative.” CP 40-41. In bold, simple and clear language, the Agreement stated:

THE UNDERSIGNED ACKNOWLEDGE THAT EACH OF THEM HAS READ THIS ARBITRATION AGREEMENT AND UNDERSTANDS THAT BY SIGNING THIS ARBITRATION AGREEMENT EACH WAS WAIVED HIS/HER RIGHT TO A TRIAL, BEFORE A JUDGE OR JURY, AND THAT EACH OF THEM VOLUNTARILY CONSENTS TO ALL OF THE TERMS OF THE ARBITRATION AGREEMENT.

CP 41. The Agreement was entirely voluntary, and was not a condition to Mr. Rickenbacker’s continued care or stay at the facility. It provided:

The execution of this Arbitration Agreement is voluntary and is not a precondition to receiving medical treatment at or for admission to the Facility.

The Resident and/or Legal Representative understands that he/she has the right to consult with an attorney of his/her choice, prior to signing this Arbitration Agreement.

The Resident and/or Legal Representative understands, agrees to, and has received a copy of this Arbitration Agreement, and acknowledges that the terms have been explained to him/her, or his/her designee, by an agent of the Facility, and that he/she has had an opportunity to ask questions about this Arbitration Agreement.

Id. Margaret Rickenbacker did not argue below, and there is no evidence in the record to suggest, that she did not understand and voluntarily choose to sign the Agreement on her husband’s behalf. She has made no claim of procedural or substantive unconscionability. CP 120-132 (opposition to motion to compel arbitration); CP 196-208 (motion for reconsideration).

The scope of the Agreement is intentionally broad, and covers all disputes and claims related to Mr. Rickenbacker's stay in Garden Terrace:

The parties agree that they shall submit to binding arbitration **all disputes** against each other ... **arising out of or in any way related or connected to the Resident's stay and care provided at the Facility**, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory provisions relating to the Resident's rights under Washington law were violated; **and any other dispute under or Washington or federal law based on contract, tort, or statute.**

CP 40 (emphasis added). The Agreement is equally broad in defining the parties to who would be bound by its terms:

It is the intention of the Facility and the Resident that this Arbitration Agreement shall injure to the benefit of and bind the Facility, its agents, partners, officers, directors, shareholders, owners, employees, representatives, members, fiduciaries, governing bodies, subsidiaries, parent companies, affiliates, insurers, attorneys, predecessors, successors and assigns, or any of them, and all persons, entities or corporations with whom any of the former have been, are now or may be affiliated; and the Resident, his/her successors, assigns, agents, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate; and his/her successors, assigns, agents, insurers, heirs, trustees, and representatives.

CP 41. Consistent with the parties' intent to arbitrate all potential disputes that could arise from their relationship, the Agreement contains a "severability clause" which preserves the remainder of the Agreement in the event any provision thereof is deemed unenforceable. *Id.*

B. Rickenbacker Files Suit And The Defendants Move To Compel Arbitration And Stay Proceedings.

On November 21, 2008, Margaret Rickenbacker, as the personal representative of the estate of Frank Rickenbacker (“Rickenbacker”), filed a complaint in King County Superior Court. CP 7-10. In it, Rickenbacker asserted a survival action on behalf of the estate and wrongful death claims on behalf of the estate’s statutory beneficiaries. CP 10 (citing RCW 4.20.010, .020, .046 & .060). Rickenbacker named Life Care Centers of America, Inc. d/b/a Garden Terrace, and its alleged administrator Martha Bol, as defendants, as well as Federal Way Medical Investors, LLC, who Rickenbacker alleged was involved in the “ownership, management and/or operation” of Garden Terrace. CP 8. Rickenbacker’s claims all relate to the alleged inadequate care Frank Rickenbacker received during his stay at Garden Terrace. CP 7-10.

The defendants jointly answered the complaint. CP 113-117. Thereafter, on February 17, 2009, the defendants filed a Motion to Compel Arbitration and Stay Proceedings. CP 12-24. Rickenbacker opposed the motion. CP 120-132. Rickenbacker conceded that she had authority to sign the Agreement on behalf of Frank Rickenbacker, and that it bound his estate to arbitrate its claims against Garden Terrace. *Id.* Nevertheless, she argued that the defendants’ motion should be denied because, among other

reasons, (a) the Agreement's designated arbitration organization (the AAA) no longer administered individual health care arbitrations, and (b) the estate's wrongful death beneficiaries and two of the three named defendants were not signatories to the Agreement. *Id.*

C. The Trial Court Initially Grants The Defendants' Motion To Compel Arbitration, But Then Reverses Itself.

The trial court granted Life Care's motion to compel and stay arbitration in an order dated February 27, 2009. CP 186-188. On March 12, 2009, Rickenbacker filed a motion for reconsideration of the February 27 order. CP 196-208.¹ Notably, and as Life Care pointed out in its opposition (CP 253-262), Rickenbacker's motion for reconsideration was a word-for-word verbatim copy of her original opposition to the defendants' motion to compel arbitration. *Compare* CP 120-132 *with* CP 196-208. Contrary to CR 59, Rickenbacker presented no new evidence, new authority, or new argument to support a different result; in fact, Rickenbacker did not cite to CR 59 at all. *Id.*

Inexplicably, and without providing any reasons, on April 9, 2009, the trial court reversed itself and granted Rickenbacker's motion for

¹ At the same time, Rickenbacker filed a motion to extend time to file her motion for reconsideration. CP 189-191. The trial court ultimately granted Rickenbacker's motion to extend time on the grounds that the court's February 27 order was not entered until March 5, 2009, rendering Rickenbacker's motion for reconsideration timely under CR 59's 10-day rule. CP 251-252.

reconsideration. CP 279-280. As a result, Life Care's motion to compel arbitration and stay proceedings was denied in its entirety. CP 280. Pursuant to RCW 7.04A.280(a)(1) and *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 17 P.3d 1266 (2001), Life Care timely appealed the trial court's arbitration order to this Court. CP 285-290.

IV. ARGUMENT

A. Standard of Review

This Court's review of the trial court's decision denying Life Care's motion to compel arbitration is *de novo*. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). Under both the WAA and FAA, this Court must indulge every presumption in favor of arbitrability. *Id.* at 301 & n. 2 (citations omitted).² Rickenbacker, as the party opposing arbitration, bears the burden of showing that the arbitration agreement is inapplicable or unenforceable. *Id.* at 302 (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000)). Rickenbacker did not satisfy that burden below and cannot satisfy it here. The trial court's ruling denying Life Care's motion to compel arbitration must be reversed.

² The issue of whether the WAA or FAA applied to Life Care's motion was not considered or decided below. The FAA applies in both state and federal courts, and covers all contracts within Congress's power to regulate interstate commerce. *See Kamaya Co. v. Am. Prop. Consultants, Ltd.*, 91 Wn. App. 703, 710, 959 P.2d 1140 (1998). The issue of which law applies need not be resolved here, as there is no conflict between the two as it relates to the issues on appeal.

B. The Agreement Encompasses All Disputes Arising Out Of The Care And Alleged Wrongful Death Of Frank Rickenbacker.

As a threshold matter, all of the claims raised in Rickenbacker's complaint fall within the scope of the Agreement. Under the WAA and FAA, written agreements to arbitrate are valid, enforceable and irrevocable. RCW 7.04A.060(1); 9 U.S.C. § 2. When such an agreement applies, a court must enforce the agreement, stay proceedings and compel arbitration. RCW 7.04A.070; 9 U.S.C. §§ 3, 4. Both Washington and federal law reflect a strong public policy favoring arbitration. *Zuver*, 153 Wn.2d at 301 & n.2. As Washington courts repeatedly recognize, "[e]ncouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society." *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995).

The policy favoring arbitrability has led the courts to adopt a unique rule of interpretation that compels arbitration in most cases. Arbitration is required except in the rare instance where it can be said "with positive assurance that no interpretation" of the agreement would encompass the parties' dispute. *Stein*, 105 Wn. App. at 46; *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 739, 862 P.2d 602 (1993). "If any doubts or questions arise with respect to the scope of the arbitration agreement, the agreement is construed in favor of arbitration. ..." *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 456, 45 P.3d 594 (2002).

Here, the Agreement contains broad language in which the parties expressly manifested their intent to arbitrate the claims at issue here. The Agreement provides in relevant part:

The parties agree that they shall submit to binding arbitration all disputes against each other ... arising out of or in any way related or connected to the Resident's stay and care provided at the Facility, including but not limited to any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care ..., and any other dispute under or Washington or federal law based on contract, tort, or statute.

CP 40. On the face of the Complaint, and by their very definition, Rickenbacker's claims—both survival and wrongful death claims—“aris[e] out of” and are “related or connected to” Frank Rickenbacker's stay at Garden Terrace and, particularly, the “care provided at the Facility.” *Id.*; see CP 7-10 (Complaint). Notably, Rickenbacker did not contest this issue below. The trial court should have granted Life Care's motion to compel arbitration on this basis alone.

C. The Unavailability Of The AAA To Conduct The Arbitration Does Not Render The Entire Agreement Unenforceable.

The Agreement provided that the parties would arbitrate their dispute before a panel of three arbitrators, “selected from the American Arbitration Association (“AAA”)” and, in conducting the proceedings, the arbitrators, “shall apply the applicable rules of procedure of the AAA.”

CP 40. As of January 1, 2003, however, the AAA no longer administers

arbitrations arising from pre-dispute arbitration agreements in health care cases like this one. CP 50 (Marney Decl., ¶ 3); CP 139 (Hornbuckle Decl., Ex. 1). Rickenbacker argued below that, despite the parties' agreement to arbitrate, the unavailability of the AAA rendered the entire Agreement unenforceable. CP 122-127.³ This argument ignores the applicable law and terms of the Agreement, and, if accepted, would undermine the public policy favoring arbitration.

1. Where The Chosen Forum For Arbitration Is Unavailable, The Trial Court Must Appoint Alternative Arbitrators.

The fact that the AAA no longer administers arbitrations in certain individual health care cases does not invalidate the parties' Agreement. An alternative forum for arbitration can and, indeed, must be utilized to fulfill the parties' intent to arbitrate their dispute. The WAA contemplates this exact scenario, and leaves no discretion to the trial court:

If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. ***If ... the agreed method fails, or an arbitrator appointed fails or is unable to act*** and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, ***shall appoint the***

³ Even though Rickenbacker knowingly and voluntarily entered into a *pre-dispute* agreement to arbitrate before a panel of AAA arbitrators and her attorney claims that the AAA was a material component of the agreement, she refuses to agree to enter into an identical *post-dispute* agreement to arbitrate (CP 250 (Rickenbacker Decl., ¶ 4)), even though such an agreement would permit AAA to administer the arbitration precisely as the parties intended.

arbitrator. The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method.

RCW 7.04A.110(1) (emphasis added). The FAA contains a substantially similar provision. *See* 9 U.S.C. § 5. Here, there can be no serious dispute that the “arbitrator appointed,” *i.e.*, the AAA, “is unable to act” because—contrary to the parties’ assumption—the AAA no longer administers arbitrations of this sort. Under the plain language of both the WAA and FAA, the trial court was required appoint an alternative arbitration forum. The court’s failure to follow the plain language of the statute was error.

Courts from around the country, including the federal district court in Washington, have considered this issue and held that the unavailability of the AAA to arbitrate individual health care claims does not invalidate an otherwise enforceable arbitration agreement. *See Owens v. Nat. Health Corp.*, 263 S.W.3d 876, 866 (Tenn. 2007); *New Port Richey Med. Invest., LLC v. Stern*, --- So.3d ---, 2009 WL 1563424, *2 (Fla. App. June 5, 2009); *Mathews v. Life Care Ctrs. of Amer., Inc.*, 177 P.3d 867, 872 (Ariz. App. 2008); *Eckstein v. Life Care Ctrs. of Amer., Inc.*, --- F.Supp.2d ---, 2009 WL 1605312, *2-3 (E.D.Wash. June 3, 2009). In each case, the court concluded that alternative arbitrators must be appointed so that the parties’ underlying agreement to arbitrate could be honored.

Critically, the *Eckstein* court specifically relied on the WAA (and FAA) to reach that result in a case considering the very same “Voluntary Agreement for Arbitration” at issue here (*Eckstein*, at *2-3), and the out-of-state cases similarly cited to statutes identical or nearly identical to RCW 7.04A.110. See *Owens*, 263 S.W.3d at 886; *New Port Richey*, 2009 WL 1563424, at *2; *Mathews*, 177 P.3d at 872.⁴ These cases are indistinguishable from the present case, and their reasoning and result should apply with equal force here.⁵ The trial court’s contrary ruling must be reversed, and—pursuant to the mandatory provisions of the WAA and FAA—a substitute organization appointed to administer the arbitration.

2. The Parties’ Appointment Of The AAA To Administer The Arbitration Was Not A Material Term Of The Agreement.

Rickenbacker argued below that the trial court could not appoint substitute arbitrators pursuant to RCW 7.04A.110 because the choice of AAA as the arbitration organization was “so material to the contract that

⁴ Indeed, the *New Port Richey* and *Mathews* courts also considered this issue in the context of Life Care’s arbitration agreement. See *New Port Richey*, 2009 WL 1563424, at *2; *Mathews*, 177 P.3d at 868.

⁵ In the trial court, Rickenbacker cited *Magnolia Healthcare, Inc. v. Barnes*, 994 So.2d 159 (Miss. 2008), for a contrary result. The *Magnolia* decision, however, provides no authority on this issue. While the court affirmed the trial court’s refusal to compel arbitration, only 3 of the court’s 9 justices reached that decision on the grounds that the parties’ chosen arbitration forum (the “American Health Lawyers Association Alternative Dispute Resolution Service”) was unavailable. 5 justices voted to affirm on unrelated grounds and 1 dissented. *Id.* at 162.

[its] failure ... makes the agreement invalid.” CP 123. But neither Rickenbacker nor any member of the Rickenbacker family provided evidence to support that assertion. Rickenbacker’s declaration stated only:

My husband was injured at Garden Terrace on January 1, 2006, and I am bringing this lawsuit because of that injury and what happened to my husband afterwards. I did not sign a post-dispute arbitration agreement. The only arbitration agreement I signed was dated September 27, 2005, which was before the date of the events that are the basis of this lawsuit. I do not agree to post-dispute arbitration, and I do not agree to the substitution of any other arbitrator for the American Arbitration Association, which I understand is no longer conducting arbitrations in cases such as this lawsuit.

CP 250 (Rickenbacker Decl., ¶ 4). Rickenbacker does not claim that she even considered the Agreement’s AAA provision when she signed the contract, much less that the provision was important to her. In the absence of such evidence, courts uniformly reject “materiality” arguments based on the parties’ chosen arbitration forum, and this Court should as well.⁶

⁶ See *Owens*, 263 S.W.3d at 886 (“there simply is no factual basis for the plaintiff’s assertion that the specification of the [arbitration] organization[] was so material to the contract that it must fail if they are unavailable”); *New Port Richey*, 2009 WL 1563424, *2 (“Ms. Stern did not present any evidence in the circuit court that the choice of the AAA as the forum for any arbitration proceedings was an integral part of the agreement to arbitrate.”); *Mathews*, 177 P.3d at 872 (“the record contains no evidence that an AAA arbitration panel was a significant or material term to Vyntrice when she executed the agreement”); *Eckstein*, 2009 WL 1605312, at *3 (“Plaintiff has not convinced the Court that the designation of AAA as arbitrator was a material term.”).

Rickenbacker's materiality argument is further belied by the Agreement's severability clause, which provides in relevant part:

In the event that any portion of the Arbitration Agreement is determined to be invalid or unenforceable, the remainder of this Arbitration Agreement will be deemed to continue and to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Arbitration Agreement.

CP 41. By including this term, the parties manifested their intent that no portion of the contract be deemed so material that its failure would result in the invalidity of the entire Agreement. This is particularly true in the context of arbitration. The Supreme Court has specifically recognized that where the parties agree to a severability clause in an arbitration agreement, courts should "strike the offending ... provisions to preserve the contract's essential term of arbitration." *Zuver*, 153 Wn.2d at 320. Thus, not only do the WAA and FAA compel arbitration despite the unavailability of the AAA, so do the terms of the parties' own Agreement.

Finally, it should be emphasized that substituting the AAA with an alternative arbitration organization will have almost no effect on the parties' arbitration. To begin with, the Agreement's requirement that the arbitrators follow the "applicable rules of procedure of the AAA" remains entirely enforceable, regardless of who arbitrates the dispute. That is, while the AAA no longer conducts arbitrations based on pre-dispute arbitration clauses in certain health care cases, the AAA's "rules of

procedure” are well-known and generally available, and can be utilized by any arbitrator. *See Trinity Mission Health & Rehab. of Clinton v. Estate of Scott*, --- So.2d ---, 2008 WL 73682, *6 (Miss. App. Jan. 8, 2008) (“While it would appear that the AAA would not administer the arbitration ..., [a]rbitration pursuant to the AAA rules and procedures would still be possible”). Indeed, the AAA presumably still uses these rules of procedure where there is a “post-dispute agreement to arbitrate.” CP 139.

Moreover, the AAA was not even responsible for actually selecting the arbitration panel. The parties were. Under the Agreement, the AAA would select a roster of arbitrators from which, “one [is] chosen by each side in the dispute with the third chosen by the two arbitrators previously chosen.” CP 40. Again, the unavailability of the AAA will have little impact; the parties will still choose their panel in the method provided by the Agreement. At most, the only difference will be that the list of potential arbitrators will come from an organization other than the AAA. Rickenbacker did not argue below that this difference matters. It does not. Various organizations handle wrongful death arbitrations in the nursing home context. CP 50 (Marney Decl., ¶ 3); CP 155-185 (Marney Decl., ¶2 & Ex. 6-8). The AAA can be replaced without a material affect on the

Agreement. Rickenbacker's effort to throw the baby out with the bathwater must be rejected.⁷

D. All Parties To And Beneficiaries Of This Action Are Subject To Arbitration Under The Agreement And Washington Law.

In the alternative, Rickenbacker argued that even if the Agreement were enforceable generally, the trial court could not compel arbitration because neither the estate's wrongful death beneficiaries, nor Defendants Federal Way Medical Investors, LLC and Martha Bol, were signatories to the Agreement. Rickenbacker is wrong on both counts. Moreover, even if some or all those parties or claims are not subject to the Agreement, there is no dispute that the estate's primary survival action against Life Care is. Thus, in any event, that primary action must be arbitrated, and the non-arbitrable claims, if any, stayed pending the outcome.

1. The Wrongful Death Claims Of Rickenbacker's Statutory Beneficiaries Are Subject To Arbitration.

Frank Rickenbacker's heirs are not plaintiffs in this action, nor did they assert any separate claims against Life Care. CP 7-10 (Complaint, p. 4, ll. 4-6). Rather, as required by Washington law, Rickenbacker, as the

⁷ Rickenbacker also argued below that the Agreement was void because it violated RCW 70.129.105, which prevents nursing homes from requesting or requiring residents to "sign waivers of potential liability for losses of personal property or injury ..." The Agreement did no such thing; Rickenbacker may recover in arbitration any damages to which she would otherwise be entitled to "based on contract, tort, or statute." CP 40.

personal representative of Frank Rickenbacker's estate, asserted both a survival action and wrongful death claims on behalf of the estate's statutory beneficiaries. *Id.*; see RCW 4.20.010, .020, .046, &. 060; *Beal v. City of Seattle*, 134 Wn.2d 769, 776, 954 P.2d 237 (1998) ("wrongful death action must be brought by the personal representative of the decedent's estate and cannot be maintained by the decedent's children or other survivors"). Rickenbacker did not argue below that the estate's survival action was exempt from arbitration under the Agreement, nor could she. She was plainly authorized by the terms of the POA to bind Frank Rickenbacker and his estate to arbitrate any and all claims arising from the care he received at Life Care's facility. *See* CP 42-47 (POA).

Rickenbacker did argue, however, that the claims of the estate's wrongful death beneficiaries were not subject to arbitration because two of the beneficiaries (Frank Rickenbacker's sons, Michael and Jimmie) never signed the Agreement, nor did they authorize Rickenbacker to bind them to arbitration. CP 127-129. Simply put, Rickenbacker argued that the beneficiaries' wrongful death claim was a separate cause of action that belonged to them personally, not Frank Rickenbacker or his estate. *Id.* (citing *Warner v. McCaughan*, 77 Wn.2d 178, 179, 460 P.2d 272 (1969) ("the claim for damages for the wrongful death is not one that belonged to the decedent")). Even putting aside the obvious fact that the estate, and

not Frank Rickenbacker's sons, is the only party-plaintiff in this suit, Rickenbacker's argument must be rejected on two related grounds.

a. The Agreement Is Binding On Heirs.

To begin with, Rickenbacker could contractually compromise the potential claims of wrongful death beneficiaries during his lifetime, and he did so by the plain terms of the Agreement. The Agreement states:

It is the intention of the Facility and the Resident that this Arbitration Agreement shall injure to the benefit of and bind ... the Resident, his/her successors, assigns, agents, insurers, heirs, trustees, and representatives, including the personal representative or executor of his or her estate ...

CP 41. On its face, the Agreement not only binds Rickenbacker and the estate, but also Frank Rickenbacker's "heirs." *Id.* Even though a future wrongful death claim is nominally considered a separate claim that the decedent's personal representative may bring for the benefit of the decedent's heirs, Washington law squarely holds that the decedent may compromise, or even release, that claim during his or her lifetime.

In *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 159 P. 791 (1916), a man was injured in a car collision and made a claim for damages. The parties ultimately settled the claim, which included a full release of all claims he then had, "or which he might thereafter have, by reason of the injuries received by him in the collision." *Id.* at 574-75. The man later died and his widow and children brought an action claiming that

his death was caused by injuries suffered in the collision. The defendant argued that the decedent's release was binding on the decedent's statutory beneficiaries, and the Supreme Court agreed. After discussing the separate nature of survival and wrongful death claims, the Court held:

But, notwithstanding the seeming separate nature of the two causes of action the courts hold with substantial unanimity that a release and satisfaction by the person injured of his right of action for the injury bars the right of the beneficiaries to maintain an action for his death occasioned by the injury. ...

If the deceased, in his lifetime, has done anything that would operate as a bar to recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. ...

Id. at 576 (quotation marks and citation omitted); *also Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993) (decedent's release barred wrongful death claims). *Brodie* remains good law. It follows that if a decedent can agree to completely release a wrongful death beneficiary's "separate" claim, the decedent can agree to have such a claim resolved in a particular forum. Rickenbacker agreed to just that in this situation.

Relying on precedent analogous to *Brodie*, the Texas Supreme Court recently held that the decedent's agreement to arbitrate could bind statutory beneficiaries after death:

[W]e long ago held that a decedent's pre-death contract may limit or totally bar a subsequent action by his wrongful death beneficiaries. ...

* * *

Despite this line of authority, the wrongful death beneficiaries argue that agreements to arbitrate are different than other contracts, and they should not be bound by [the decedent's] agreement. We reject their argument. If we agreed with them, then wrongful death beneficiaries in Texas would be bound by a decedent's contractual agreement that completely disposes of the beneficiaries' claims, but they would not be bound by a contractual agreement that merely changes the forum in which the claims are resolved. Not only would this be an anomalous result, we believe it would violate the FAA's express requirement that states place arbitration contracts on equal footing with other contracts.

In re Labatt Food Service, LP, 279 S.W.3d 640, 644-46 (Tex. 2009) (citations omitted); also *Allen v. Pacheco*, 71 P.3d 375, 379-80 (Colo. 2003) (arbitration agreement binds heirs of signatory if parties so intend). Like any other kind of contract, the parties were free to extend their agreement to arbitrate to heirs and other successors. By its plain terms, the Agreement applies to Rickenbacker's "heirs," which unquestionably includes the wrongful death beneficiaries at issue here.

b. Wrongful Death Claims Are Derivative And Subject To Defenses That Would Be Available Against The Decedent.

Further, even in the absence of a contract, Washington law recognizes that a wrongful death claim, although nominally "separate" from an estate's survival action, is "essentially derivative." *Ginochio v. Hesston Corp.*, 46 Wn. App. 843, 846, 733 P.2d 551 (1987) ("[e]ven though creating a 'new' cause of action, the wrongful death action is

essentially derivative”). As such, it is well-settled that “all defenses available to the defendant, if the action had been brought by the person injured, prior to his death, are available to the defendant in an action brought by his personal representatives.” *Ostheller v. Spokane & I.E.R. Co.*, 107 Wash. 678, 684, 182 P. 630 (1919); *see also Ryan v. Poole*, 182 Wash. 532, 536, 47 P.2d 981 (1935); *Ginocchio*, 46 Wn. App. at 846; *Griffin v. Gehret*, 17 Wn. App. 546, 564 P.2d 332 (1977). Thus, just as Life Care could demand arbitration of Frank Rickenbacker’s claims during his lifetime, it can also demand arbitration of his statutory beneficiaries’ wrongful death claims following his death.

Although no Washington state court has applied this long-standing rule in the context of arbitration, the *Eckstein* court recently considered this issue under Washington law and held that statutory beneficiaries were bound by the decedent’s arbitration agreement. *Eckstein*, 2009 WL 1605312, *4. In so holding, the court followed the great weight of authority. The cases uniformly hold that where, as here, wrongful death claims are considered derivative under state law, the decedent’s arbitration agreement applies equally to statutory beneficiaries. *See Labatt*, 279 S.W.3d at 645-47; *Cleveland v. Mann*, 942 So.2d 108, 117-19 (Miss. 2006); *Sanford v. Castleton Health Ctr., LLC*, 813 N.E.2d 411, 420 (Ind. App. 2004); *Herbert v. Superior Court*, 169 Cal.App.3d 718, 725-27, 215

Cal.Rptr. 477 (1985); *Ballard v. SW Detroit Hosp.*, 327 N.W.2d 370, 371-72 (Mich. App. 1982); *Wilkerson v. Nelson*, 395 F.Supp.2d 281, 288-89 (M.D.N.C. 2005). This authority is entirely consistent with long-standing Washington law, and should be followed here.

This result makes sense. Compelling non-signatory statutory beneficiaries to adhere to their decedent's arbitration agreement advances the public policy in favor of arbitration. Indeed, any other result would essentially nullify the affect of such agreements in the health care context when the patient or resident dies. *See Herbert*, 169 Cal.App.3d at 725 ("it is obviously unrealistic to require the signature of all the heirs, since they are not even identified until the time of death, or they might not be available when their signatures are required"). So that the parties can truly resolve "all disputes ... in any way related or connected to the Resident's stay and care provided at the Facility" (CP 40), the estate's and the statutory beneficiaries' interrelated claims should be decided at one time, in one proceeding, and in the forum the decedent chooses.

2. Defendants Federal Way Medical Investors, LLC And Martha Bol Are Bound By The Agreement And Can Compel Arbitration Against Rickenbacker.

Rickenbacker's argument that she was not required to arbitrate her claims against Defendants Federal Way Medical Investors, LLC and Martha Bol can also be rejected for two reasons. *First*, all the defendants

are bound by the express terms of the Agreement. Under the Agreement, Rickenbacker agreed to arbitrate “any dispute that might arise between [Frank] Rickenbacker (the “Resident”) and Garden Terrace (the “Facility”),” which is defined to include Defendant “Life Care Centers of America, Inc.” CP 40. The Agreement also provides:

The parties agree that they shall submit to binding arbitration all disputes against each other and their agents, partners, officers, directors, shareholders, **owners, employees, representatives, members, fiduciaries, governing bodies, subsidiaries, parent companies, affiliates, insurers, attorneys, predecessors, successors and assigns, or any of them, and all persons, entities or corporations with whom any of the former have been, are now or may be affiliated ...**

Id. (emphasis added). Rickenbacker specifically alleged that Defendant Federal Way Medical Investors, LLC “was involved in the ownership, management and/or operation” of Garden Terrace, and that Martha Bol was employed as the facility’s administrator. CP 8 (Complaint, p. 2, ll. 5-14). By Rickenbacker’s own admissions, therefore, both Defendants Federal Way and Martha Bol, as an alleged owner/affiliate and employee respectively, are bound by the terms of the parties’ Agreement.

Second, even if Defendants Federal Way and Martha Bol were not expressly subject to the Agreement, Washington law would still entitle them to compel arbitration against Rickenbacker. In *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 890 P.2d 466 (1995), this Court held

that non-signatories can avail themselves of an arbitration agreement against a signatory so long as the dispute falls within the scope of the agreement. *Id.* at 315. For the reasons discussed above, Rickenbacker and the wrongful death beneficiaries are bound by the Agreement, and their claims (including any they may have against Federal Way and Martha Bol) concededly fall within the scope of its “all disputes” language. In short, all three defendants can compel arbitration under the Agreement.

3. The Court Must Stay Non-Arbitrable Claims Pending Resolution Of Claims That Are Subject To Arbitration.

All of Rickenbacker’s claims must be arbitrated. But even if this Court were to conclude that some claims were non-arbitrable, Life Care’s motion to compel arbitration must be granted at least in part. As discussed above, Rickenbacker did not dispute below that she had the requisite authority to bind the estate to arbitration with respect to the estate’s survival action, and that those claims fell within the scope of the Agreement. It is well-established that a trial court has no discretion to deny arbitration of arbitrable claims, despite the presence of multiple parties and intertwined non-arbitrable claims. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). Thus, at the very minimum, the trial court’s ruling must be reversed to the extent it denied Life Care’s absolute right to arbitrate Rickenbacker’s concededly arbitrable claims.

Moreover, if that occurs, the trial court should be further ordered to stay non-arbitrable claims, if any. Both the WAA and FAA require a trial court to stay arbitrable claims. *See* RCW 7.04A.070(6); 9 U.S.C. § 3. The court also has discretion to stay non-arbitrable claims where, as here, those claims cannot easily be severed from the arbitrable ones. *Id.*; *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983). Here, the parties' arbitration will necessary resolve the dispositive issue of whether Life Care is liable for the care provided to Frank Rickenbacker. Because the facts relevant to that issue would also predominate any non-arbitrable claim, and would likely dictate its outcome, efficiency and comity compel a complete stay. *Cf. Simitar Entm't, Inc. v. Silva Entm't, Inc.*, 44 F.Supp.2d 986, 997 (D.Minn. 1999) ("Expanding the stay, so as to encompass all of the non-arbitrable claims ... is appropriate where the arbitrable claims predominate, or where the outcome of the non-arbitrable claims will depend upon the arbitrator's decision").

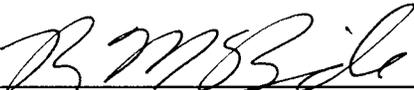
V. CONCLUSION

For the reasons set forth above, this Court should reverse the ruling of the trial court denying Life Care's motion to compel arbitration in this matter, and instruct the trial court to enter an order compelling the parties to arbitrate all of Rickenbacker's claims. In the alternative, to the extent

Rickenbacker has asserted both arbitrable and non-arbitrable claims, all trial court proceedings should be stayed pending arbitration.

RESPECTFULLY SUBMITTED this 26 day of June, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2009, I caused to be served a copy of the foregoing BRIEF OF APPELLANTS on the following person(s) in the manner indicated below at the following address(es):

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Kathryn Savaria
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