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Supreme Court No. 91538-5
(Consolidated with Supreme Court No. 91852-0)
Spokane Co. Superior Court Cause No. 11-2-04875-1

SUPREME COURT OF THE STATE OF WASHINGTON

MARY RUSHING as the Administrator and on Behalf of the Estate
of ROBERT COON, and MARY RUSHING, individually,

Plaintiffs-Petitioners,

vs.

FRANKLIN HILLS HEALTH & REHABILITATION CENTER,
MELISSA CHARTREY, R.N., AURILLA POOLE, R.N., JANENE
YORBA, Director of Nursing,

Defendants-Respondents.

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

Robert Coon was an older gentleman with a long history of serious mental illness and cognitive limitations.¹ He was transferred to a nursing home known as Franklin Hills Health & Rehabilitation Center ("Franklin Hills") after he suffered a fall and needed a higher level of care than his assisted-living facility could provide.² Just over two months after his admission to Franklin Hills, Mr. Coon died from complications from dehydration.³ His daughter, Mary Rushing, individually and as personal representative of her father's estate ("Rushing"), subsequently filed wrongful death and survival claims against Franklin Hills and three of its employees. Franklin Hills moved to compel arbitration of all claims, based on an agreement that Mr. Coon apparently initialed as part of a package of documents presented to him after his admission to the facility.

The superior court concluded that Rushing's wrongful death claims are not subject to arbitration, and conducted an evidentiary hearing to determine whether the arbitration agreement is valid

¹ See, e.g., Exs. D9 & P205 (Spokane Mental Health records). The Spokane Mental Health records were offered by both parties and admitted by stipulation. See RP 104:8-13; CP 960-61.

² See Ex. D6, pp. 12-14 (emergency room record). The emergency room record was offered by Franklin Hills and admitted by stipulation. See RP 104:8-13; CP 960.

³ The allegations regarding the cause of Mr. Coon's death are detailed in Rushing's original and amended complaints. See CP 27-30 (second amended complaint, ¶¶ XI-XVIII).

and enforceable as to the survival claims. In the course of the evidentiary hearing, the court declined to hold Franklin Hills to the standard of a fiduciary, imposed the burden on Rushing to prove that Mr. Coon was incompetent, and concluded that she could not satisfy her burden. After the evidentiary hearing, the court stayed litigation of the wrongful death claims pending arbitration of the survival claims.

This Court granted discretionary review of both the order compelling arbitration of the survival claims and the order staying litigation of the wrongful death claims. This review presents the Court with the opportunity to address whether a nursing home such as Franklin Hills has a fiduciary relationship with its residents such as Mr. Coon, and the effect of such a relationship. This review also presents the Court with the opportunity to address how related arbitrable and nonarbitrable claims should be sequenced in light of the contractual nature of arbitration and the constitutional right to trial by jury.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in compelling arbitration of Rushing's survival claims. CP 807-18 (Court's Decision); CP 902-07 (Order Compelling Arbitration). This order is based on the following additional errors:

a. The superior court erred to the extent it found that Mr. Coon assented to all material terms of Franklin Hills' arbitration agreement. CP 811-12 & 817 (Court's Decision, Findings 13-16 & p.11); CP 904-06 (Order Compelling Arbitration, Findings 13-16 & Conclusion 1).

b. The superior court erred in denying Rushing's motion to dismiss Franklin Hills' arbitration defense for lack of evidence of mutual assent. CP 808-09 (Court's Decision, pp. 2-3); CP 906 (Order Compelling Arbitration, Conclusion 5).

c. The superior court erred in placing the burden on Rushing to prove that Mr. Coon was incompetent to enter Franklin Hills' arbitration agreement. CP 814 & 817 (Court's Decision, pp. 8 & 11); CP 906 (Order Compelling Arbitration, Conclusion 2).

d. The superior court erred in equating testamentary and contractual capacity, and in finding testamentary capacity on the part of Mr. Coon sufficient to enforce Franklin Hills' arbitration agreement. CP 812 & 815-17 (Court's Decision, Findings 19-20 & pp. 9-11); CP 905-06 (Findings 19-20 & Conclusions 3-5).

e. The superior court erred in finding Franklin Hills' expert witnesses "concluded that Mr. Coon possessed the requisite level of competence to enter into [Franklin Hills' arbitration] Agreement." CP 812 (Court's Decision, Finding 18 (brackets added)); *accord* CP 905 (Order Compelling Arbitration, Finding 18).

2. The superior court erred in staying litigation of Rushing's wrongful death claims pending arbitration of the survival claims. CP 897-98.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The following issues arise from the superior court's orders compelling arbitration:

1. Does a nursing home such as Franklin Hills have a fiduciary relationship with residents under its care such as Mr. Coon?

2. Whether or not it is a fiduciary, did Franklin Hills satisfy its burden to prove that Mr. Coon assented to all material terms of the arbitration agreement, where the agreement purports to incorporate rules that impose significant limits on the arbitration process that were not described to or reviewed by Mr. Coon?

3. As a fiduciary, did Franklin Hills have an affirmative obligation to disclose the substance of the rules incorporated into the arbitration agreement, and should its failure to do so preclude it from enforcing the agreement?

4. As a fiduciary, should the burden of proving that Mr. Coon was competent to enter the arbitration agreement be placed on Franklin Hills?

5. Whether or not Franklin Hills is a fiduciary, did the superior court err in equating testamentary and contractual competency, and finding testamentary capacity on the part of Mr. Coon sufficient to enforce Franklin Hills' arbitration agreement?

6. Is review of the superior court's findings of fact for substantial evidence more stringent in the fiduciary context than it is outside of the fiduciary context?

7. Are the superior court's contested findings supported by substantial evidence?

8. Are the superior court's uncontested findings sufficient to support a conclusion that Mr. Coon was competent?

The following issue arises from the superior court's order staying litigation of Rushing's wrongful death claims pending arbitration of the survival claims:

9. When contractual arbitration of a survival claim would potentially have collateral estoppel effect in litigation of a related wrongful death claim, does the right to trial by jury require the proceedings to be sequenced so that litigation precedes arbitration? (Assignment 2.)

IV. STATEMENT OF THE CASE

A. Mr. Coon had a long history of mental illness with cognitive limitations.

For many years, Mr. Coon suffered from schizoaffective disorder, meaning a diagnosis of schizophrenia coupled with bipolar disorder. RP 428:16-429:19, 439:8-12 & 448:21-22. He also suffered from dementia. RP 35:9-20, 439:13-19 & 463:9-11. Although he had graduated from law school and briefly practiced law in the early 1970s, he was incapable of gainful employment and received Social Security disability income. RP 344:18-345:10. He was subject to involuntary treatment for his mental illness and had significant cognitive limitations at the time of his admission to Franklin Hills on April 1, 2011.

1. Mr. Coon was gravely disabled and subject to involuntary treatment for his mental illness at the time of his admission to Franklin Hills.

Mr. Coon required involuntary treatment for his mental illness, and was subject to a less restrictive alternative (LRA) to institutional treatment at the time of his admission to Franklin Hills. In proceedings to continue the LRA on November 18, 2010,

the Spokane County Superior Court found:

[X] As a result of a mental disorder, the Respondent [Robert Coon] is gravely disabled because:

[X] the Respondent manifests severe deterioration in routine functioning as evidenced by recent repeated and escalating loss of cognitive or volitional control over his/her actions; is not receiving, or would not receive if released, such care as is essential for his/her health or safety; and is unable, because of a severe deterioration of mental functioning, to make a rational decision with respect to his/her need for treatment.

[X] the Respondent evidences a prior history or pattern of decompensation and discontinuation of treatment resulting in repeated hospitalizations or repeated peace officer interventions resulting in juvenile offenses, criminal charges, diversion programs, or jail admissions.

Ex. D9, p. 589 (brackets added). These findings were entered by stipulation and deemed to be proven by clear, cogent and convincing evidence. *Id.*, pp. 591 & 593.

The findings were supported by a declaration from Robert L. Mulvihill, M.D., the only psychiatrist who knew Mr. Coon well. RP 460:22-23. Among other things, Dr. Mulvihill testified that "Mr. Coon has been diagnosed with schizoaffective disorder with symptoms of auditory hallucinations, disorganized thought and behaviors," Ex. D9, p. 581; and "Mr. Coon in addition to experiencing hallucinations and delusions/thought, has dementia with impaired cognitive ability manifested as poor executive function, memory and insight/judgment," *id.*, p. 583.

In accordance with its findings, the court ordered involuntary treatment for Mr. Coon for 180 days. Ex. D9, pp. 607-10. The court further ordered Spokane Mental Health to investigate and seek less restrictive alternative treatment for Mr. Coon, subject to a number of specified conditions. *Id.*, pp. 608-10. By its terms, the order did not expire until May 17, 2011.⁴

A petition to continue Mr. Coon's LRA was filed on May 3, 2011, based on the persistence of what the relevant documents describe as Mr. Coon's "grave disability." Ex. D9, pp. 624-29. The petition was supported by another declaration from Dr. Mulvihill, who examined him on March 11, and again on March 25, 2011. Ex. D9, p. 619. Among other things, Dr. Mulvihill testified that:

- Mr. Coon has "ongoing disorganized thought, auditory hallucinations and vivid visual hallucinations due to schizoaffective disorder," *id.*, p. 619;
- Mr. Coon is gravely disabled because he "manifests severe [mental] deterioration in routine function," *id.*, p. 621 (brackets in original); and
- "Mr. Coon continues with disorganized behavior and hallucinations which impair his ability to care for himself," *id.*, p. 621.

On the basis of this testimony, the court continued to find that Mr. Coon was gravely disabled, Ex. D9, pp. 634-41, and continued the

⁴ This order was a continuation of a prior involuntary treatment order. Ex. D9, pp. 569-76.

order of involuntary treatment for another 180 days, *id.*, pp. 642-45.⁵

2. Mr. Coon also suffered from significant cognitive limitations at the time of his admission to Franklin Hills.

In addition to symptoms such as hallucinations, schizophrenia is associated with cognitive deficits. RP 432:2-16 & 434:22-439:7. Cognition refers to a person's intellectual functions. RP 429:20-430:21. The only detailed, in-depth assessment capable of measuring the extent of Mr. Coon's level of cognitive impairment was performed in June 2008. RP 454:23-455:2; Ex. P204, pp. 1110-12.⁶ At that time, Mr. Coon was given an Allen Cognition Level (or ACL) test. RP 456:9-457:22. His test results revealed he had a "moderate cognitive deficit characterized by poor planning and problem solving, and an inability to anticipate consequences to actions." Ex. P204, p. 1110.

Mr. Coon experienced "maximum difficulty in the areas of planning, sequencing, anticipating hazards, identifying problems,

⁵ Mr. Coon's involuntary treatment proceedings and LRA do not give rise to a *presumption* of incapacity. See RCW 71.05.360(1)(b). However, the statutes governing such proceedings contemplate the possibility that a person may be "adjudicated an incompetent in a court proceeding directed to that particular issue." RCW 71.05.360(10)(k). Nothing prohibits courts from considering information generated in the course of involuntary treatment proceedings that is relevant to the issue of competency.

⁶ The cited pages from Exhibit P204 were admitted into evidence. CP 961 & 964.

and problem solving." RP 457:13-15. "His area of major weakness was the ability to process complex information, draw conclusions from it that pertained to the consequences for him in the future of doing or not doing an act." RP 459:17-20. He needed "daily structure and supervision in the community to maintain safety." RP 457: 15-17. "Novel tasks and situations are disruptive, and during periods of transition, cognitive deficits will be more apparent." RP 457:20-22.

While medication can control some of the symptoms of schizophrenia, the cognitive deficits associated with the diagnosis cannot be cured, and Mr. Coon never received any treatment to help him cope with them. RP 433:14-435:8 & 441:16-442:16. As a result, Mr. Coon's cognitive deficits persisted through the time he was admitted to Franklin Hills, and they may have gotten worse. RP 458:4-18.⁷

B. Mr. Coon was transferred to Franklin Hills after he suffered a fall and needed a higher level of care than his assisted-living facility could provide.

On April 1, 2011, Robert Coon suffered a fall at the assisted-living facility where he lived, and was taken to the emergency room.

⁷ The superior court properly found that Mr. Coon's "cognition gradually decreased" over the course of his life "due to aging as well as his diagnosed schizoaffective disorder and dementia," and that "once Mr. Coon's cognition decreased it would not return to previous levels." CP 810 (Findings 4 & 5); CP 903 (Findings 4 & 5).

Ex. D7, pp. 63-65. During the emergency room visit, Mr. Coon reported that he was having hallucinations. *Id.*, p. 63. Specifically, he saw "designs in the wall and sometimes a glittery substance over the furniture." Ex. D7, p. 63; *see also* RP 52:7-11 & 56:21-57:10. The emergency room doctor determined that the assisted-living facility could not provide Mr. Coon with an adequate level of care, and discharged Mr. Coon to Franklin Hills because there was space available at the facility. Ex. D7, p. 64.

C. Two days after his admission to Franklin Hills, a Franklin Hills employee presented Mr. Coon with an "admission packet" of documents including an arbitration agreement.

After the emergency room visit, Mr. Coon was transported by ambulance to Franklin Hills. Ex. D7, p. 281. Two days later, on April 3, 2011, a Franklin Hills employee named Jennifer Wujick presented Mr. Coon with an "admissions packet" containing at least five separate documents: an Admission Agreement, Ex. D1, pp. 2-8; a Patient Admission Record and Agreement, p. 9; a Medicare Secondary Payor Worksheet, pp. 10-14; a Payor Confirmation, p. 15; a Medicare Denial of Benefits Notice, p. 16; a Resident Trust Fund Authorization, p. 17; and an Alternative Dispute Resolution

Agreement: Washington, pp. 19-24. *See also* RP 242:6-243:24 (Feb. 18, 2015).⁸

1. Admission agreement.

The 7-page, single-spaced Admission Agreement is between Franklin Hills and Mr. Coon. Ex. D1, p. 2.⁹ It provides for a commencement date of April 1, 2011. *Id.* It states that Franklin Hills:

Values our customers and our team who cares for them. We are committed to treating them with dignity and respect in an atmosphere of compassion. As health care professionals, we take pride in being responsible to the needs of those who rely upon us.

Id. The agreement obtains Mr. Coon's consent to "treatment and admission," including "routine nursing services such as, but not limited to, personal care, medications and treatments, therapy services, routine lab tests and x-rays." *Id.* It characterizes "all services provided" as being "in the nature of necessities as they are for the health and well-being of the Resident," i.e., Mr. Coon. *Id.* The Admission Agreement further describes the nature and extent

⁸ Exhibit D1 was offered by Franklin Hills and admitted by stipulation. RP 104:8-13 (Feb. 13, 2015).

⁹ The Admissions Agreement indicates that it consists of 12 pages, but only 7 pages are part of Exhibit D1.

of services provided by Franklin Hills, along with payment terms and an assignment of health care benefits. *Id.*, pp. 3-7.¹⁰

2. Trust fund authorization.

The Resident Trust Fund Authorization authorized Franklin Hills "to hold, safeguard, and account for [Mr. Coon's] personal funds." Ex. D1, p. 17. According to Ms. Wujick, it is like a "bank" for incidental expenses of Franklin Hills' residents. RP 265:23-266:22 (Feb. 18, 2015).¹¹

3. Arbitration agreement.

The 5-page, single-spaced Alternative Dispute Resolution Agreement ("arbitration agreement") is between "Extendicare Health Services, Inc. on behalf of its parents, affiliates and subsidiaries including Franklin Hills Health and Rehab. Center (hereinafter referred to as the "Center"), a nursing facility, and Robert H. Coon, a Resident at the Center." Ex. D1, p. 19.¹² Although the arbitration agreement is not a precondition to admission at Franklin Hills, Ms. Wujick has been taught "that getting the

¹⁰ The Admission Agreement also contains an acknowledgment of delivery and receipt of six additional documents, of unknown length and complexity, which are not contained in the exhibit. Ex. D1, p. 7.

¹¹ A second Resident Trust Fund Authorization was dated April 11, 2011. See Ex. D7, p. 48.

¹² The arbitration agreement indicates that it consists of 6 pages, but the last page is blank. A copy of the arbitration agreement is reproduced in the Appendix.

arbitration agreement signed is very important because of lawsuits in the healthcare industry." RP 285:20-24; *accord* RP 286:20-24.

The arbitration agreement contains detailed provisions relating to mandatory mediation and arbitration of disputes between Franklin Hills and its residents. Ex. D1, pp. 19-24. According to Ms. Wujick, the "arbitration agreement would be like Chinese to most people that don't have experience." RP 283:17-21. She said that she believed Mr. Coon understood the arbitration agreement because he said that he had a "background in law" and was "familiar with" arbitration. RP 271:2-12, 272:25-273:6, 274:4-8, 277:10-21, 285:7-8 & 292:1-25. However, she disclaimed any ability to determine whether Mr. Coon was competent to enter the agreement. RP 279:10-18.

The arbitration agreement purports to incorporate by reference "the Extencicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure." Ex. D1, p. 21 (¶ 7). It states that the rules may be obtained from the administrator of Franklin Hills or from a website belonging to the third-party administrator of Extencicare's arbitration services. *Id.* However, Ms. Wujick did not recognize and could not authenticate the arbitration rules. RP 289:20-290:21. She was not aware of the contents of the rules,

and did not explain them to Mr. Coon or give him a copy. RP 290:12-291:1. There is no evidence that the rules were available from the administrator of Franklin Hills, no evidence that Mr. Coon ever asked to see them, and no evidence that he had the ability to obtain them from the internet or by other means.

The arbitration rules impose significant limits on the arbitration process. Discovery is presumptively limited to 30 interrogatories, 30 requests for production, 10 requests for admission, 6 fact witness depositions and 2 expert witness depositions. CP 777. The arbitration is limited to a maximum of 5 days. CP 780. The rules of evidence are not binding. CP 780-81. Arbitration proceedings are conducted confidentially. CP 778-79.¹³

D. Franklin Hills became the "representative payee" of Mr. Coon's Social Security benefits based on representations that Mr. Coon is unable to handle his own benefits and Franklin Hills is in the best position to manage them for him.

On behalf of Mr. Coon, Franklin Hills submitted a form to become the "representative payee" of his Social Security benefits. Ex. D7, pp. 49-53. On the form, Franklin Hills explained that Mr.

¹³ The superior court denied Rushing's offer of the arbitration rules (Ex. P219) as an exhibit for the evidentiary hearing. RP 293:13-296:25; RP 537:22-538:9. However, the court did "accept [the] exhibit with respect to [Rushing's] motion to dismiss" and "made [it] part of the record in the motion to dismiss," reaching what the court described as "the same result for different reasons." RP 538:4-9 (brackets added). A copy of the arbitration rules is reproduced in the Appendix.

Coon "is not able to handle his/her own benefits" because "he lives w/ us in a nursing home." *Id.*, p. 50. Franklin Hills further stated that it "would be the best representative payee" for Mr. Coon because he "lives @ Franklin Hills—we know his needs on a 24 hour/7 day week schedule—have staffed around the clock." *Id.* In submitting the form, Franklin Hills acknowledged that it "[m]ust use all payments made to me/my organization as the representative payee for the claimant's current needs or (if not currently needed) save them for his/her future needs." *Id.*, p. 53 (brackets added). Franklin Hills further agreed to "[u]se the payments for the claimant's current needs and save any currently unneeded benefits for future use." *Id.* (brackets added). After it received the form, the Social Security Administration "selected Franklin Hills to be [Mr. Coon's] representative payee." *Id.*, p. 56.

E. Franklin Hills developed a comprehensive care plan for Mr. Coon, including "help ... with decision making."

Franklin Hills developed what it described as a "comprehensive care plan" for Mr. Coon. Ex. D7, pp. 142-43. The plan included prevention and management of falls and injuries, Ex. D7, pp. 144-47; safety, *id.*, pp. 148-51; infections, *id.*, pp. 152-53; mobility, *id.*, pp. 154-55; bowel elimination and urinary continence,

id., pp. 156-65; cardiovascular care, *id.*, pp. 166-67; prevention and management of elopement from the facility, *id.*, pp. 168-70; pain management, *id.*, pp. 171-72; skin care, *id.*, pp. 173-76; diabetes care, *id.*, pp. 177-79; nutrition, *id.*, pp. 181-84; mood and behavior issues, *id.*, pp. 185-96; cognitive care, *id.*, pp. 197-99; social services, *id.*, pp. 200-01; and "life enrichment," *id.*, pp. 202-03. Franklin Hills also administered Mr. Coon's medication and monitored his health conditions, *id.*, pp. 241-60, and provided physical and occupational therapy, *id.*, pp. 338-88.

The cognitive care plan for Mr. Coon, in particular, notes that his "cognitive ability for decision making" was assessed as "modified independence," meaning that he "needs assist[ance] in new situations." Ex. D7, p. 198 (brackets added). The cognitive care plan stated a "goal" for Mr. Coon to "make good/reasonable decisions," and described necessary "interventions" as including "help resident with decision making." *Id.*

F. After Mr. Coon died from dehydration and his daughter filed suit, the superior court compelled arbitration of her survival claim and stayed litigation of her wrongful death claim.

On June 5, 2011, just over two months after his admission to Franklin Hills, Mr. Coon died from complications from dehydration. CP 1-7 & 14-34. His daughter, Mary Rushing,

individually and as administrator of his estate, filed wrongful death claims against Franklin Hills and three of its employees. *Id.* Franklin Hills subsequently moved to compel arbitration of all claims. *See Rushing ex rel. Estate of Coon v. Franklin Hills Health & Rehab. Ctr.*, noted at 179 Wn. App. 1018, 2014 WL 346540, at *1-2 (Wn. App., Div. III, Jan. 30, 2014).¹⁴

The superior court initially denied Franklin Hills' motion to compel arbitration on grounds that it did not have a sufficient factual record to determine whether the arbitration agreement was valid and enforceable. *See Rushing*, 2014 WL 346540, at *2. Franklin Hills appealed the denial of its motion to compel, but, in the absence of a reviewable decision, the Court of Appeals remanded for an evidentiary hearing to determine whether the agreement is valid and enforceable. *See id.* at *4 (stating "we cannot review the trial court's denial of the motion to compel without a decision on the enforceability of the arbitration agreement"). However, the appellate court contemplated that some issues may be resolved summarily. *See id.* at *5.

On remand, Rushing moved for partial summary judgment, asking the superior court to rule that her wrongful death claims are

¹⁴ A copy of the Court of Appeals decision is reproduced in the Appendix.

not subject to arbitration, and that the burden of proving Mr. Coon was competent to enter the arbitration agreement falls on Franklin Hills because it is a fiduciary, among other things. CP 180-81.¹⁵ The superior court granted the motion in part, ruling that wrongful death claims are not subject to arbitration based on the authority of *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010). CP 899-900.¹⁶ However, the court denied the motion in all other respects and specifically declined to rule that Franklin Hills is a fiduciary or alter the burden of proof. RP 4:20-5:11 (Jan. 30, 2015).¹⁷

Given the superior court's ruling that Rushing's wrongful death claims were not arbitrable, Rushing filed a motion to stay the evidentiary hearing to determine whether Franklin Hills' arbitration agreement was valid and enforceable as to the survival claim. CP 449-50. The court denied the motion, stating it "may be valid" but it is "premature" because the court had not yet decided whether the arbitration agreement was valid and enforceable as to

¹⁵ The burden of proof argument was argued as a basis for the summary judgment motion, as stated in the accompanying memorandum, which is being transmitted to the Court pursuant to a supplemental designation of Clerk's Papers, filed contemporaneously herewith.

¹⁶ The superior court issued a letter ruling explaining the basis for its decision, which is being transmitted to the Court pursuant to a supplemental designation of Clerk's Papers, filed contemporaneously herewith.

¹⁷ The transcript of the January 30, 2015, summary judgment hearing is numbered separately from the rest of the verbatim report of proceedings.

the survival claim. RP 16:18-17:15. The court invited Rushing to renew the motion in the event it found the arbitration agreement valid and enforceable. RP 17:9-15.

The superior court conducted the evidentiary hearing, and found the arbitration agreement to be valid and enforceable. CP 807-18 & 902-07. The court imposed the burden to prove that Mr. Coon was incompetent on Rushing, and concluded that she failed to satisfy her burden of proof. CP 814, 817 & 906. In the course of its analysis, the court equated testamentary and contractual capacity, and found testamentary capacity sufficient to enforce the agreement. CP 812, 815-17 & 905-06. The court also denied Rushing's motion to dismiss Franklin Hills' arbitration defense on grounds that Mr. Coon did not know about or consent to the arbitration rules incorporated into the agreement. CP 764-791, 808-09 & 906.

After the court issued its written decision compelling arbitration, Rushing renewed her motion to stay arbitration of the survival claims pending litigation of the wrongful death claims. CP 829-31. Franklin Hills filed a cross motion for the opposite relief, to stay litigation of the wrongful death claims pending

arbitration of the survival claims. CP 832-33. The court granted Franklin Hills' cross motion. CP 897-98.

This Court granted review of both the order compelling arbitration of the survival claim and the order staying litigation of the wrongful death claim.¹⁸

V. ARGUMENT

A. A nursing home such as Franklin Hills has a fiduciary relationship with residents under its care such as Mr. Coon.

A fiduciary is "[s]omeone who is required to act for the benefit of another person on all matters within the scope of their relationship" and "who owes to another the duties of good faith, loyalty, due care, and disclosure." *Black's Law Dictionary*, s.v. "fiduciary" (10th ed. 2014) (brackets added).¹⁹ A fiduciary "is held to

¹⁸ Rushing initially filed a notice of discretionary review of the order compelling arbitration of the survival claims. CP 845-59. She then filed a motion to amend the notice of discretionary review to include the order staying litigation of the wrongful death claims. The Commissioner eventually granted the motion to amend, and split the proceeding into two cause numbers, one for the order compelling arbitration of the survival claim (No. 91538-5), and the other for the order staying litigation of the wrongful death claim (No. 91852-0). In the meantime, the Commissioner stayed arbitration of the survival claim pending a decision on whether to accept review. Franklin Hills filed a motion to modify the Commissioner's rulings. This Court denied the motion to modify, granted discretionary review of both matters, and consolidated them for review.

¹⁹ *Accord Wool Growers Serv. Corp. v. Ragan*, 18 Wn. 2d 655, 692, 140 P.2d 512 (1943) (stating "[a] person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of their relation"; quotation omitted & brackets added); *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 755 n.33, 110 P.3d 796 (stating "[a] fiduciary is a person with a duty to act primarily for the benefit of another"; quotation omitted & brackets added), *rev. denied*, 157 Wn. 2d 1006 (2005).

something stricter than the morals of the market place." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.). "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Id.*²⁰

Fiduciary obligations arise as a matter of law from the nature of certain types of relationships, such as those between physician and patient, attorney and client, or trustee and beneficiary. See *Liebergessel v. Evans*, 93 Wn. 2d 881, 889-91, 613 P.2d 1170 (1980). Fiduciary obligations also arise as a matter of fact where "one party 'occupies such a relation to the other as to justify the latter in expecting that his interests will be cared for'" or, stated another way, a fiduciary is "any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former." *Id.*, 93 Wn. 2d at 889 & 890-91 (quoting Restatement of Contracts § 472(1)(c) & cmt. c (1932)).

In this case, the relationship between a nursing home such as Franklin Hills and its residents is sufficiently analogous to the physician-patient relationship to give rise to a fiduciary relationship as a matter of law. The circumstances present in this case also

²⁰ Accord *Kane v. Klos*, 50 Wn. 2d 778, 789, 314 P.2d 672 (1957) (alluding to *Meinhard* without attribution); *Keene v. Board of Accountancy*, 77 Wn. App. 849, 858, 894 P.2d 582 (1995) (quoting *Meinhard*).

establish a fiduciary relationship as a matter of fact. In either event, Franklin Hills is properly considered a fiduciary, which influences the analysis of its arbitration agreement with Mr. Coon. *See infra*.

- 1. The relationship between a nursing home and its residents is sufficiently analogous to the physician-patient relationship to give rise to a fiduciary relationship as a matter of law.**

The relationship between physician and patient is considered fiduciary in nature because of the patient's need to disclose private information and provide intimate access to his or her body in order to obtain necessary treatment from the physician. *See Loudon v. Myhre*, 110 Wn. 2d 675, 679 & n.3, 756 P.2d 138 (1988) (referring to Hippocratic Oath and American Medical Association ethical guidelines). While the case law often refers specifically to the relationship between *physicians* and *patients*, nursing homes have a similar relationship with their residents, and there is no reason why they should be treated any differently. In fact, the relationship between nursing homes and their residents is more intrusive in some ways because nursing homes provide comprehensive care of their residents 24 hours per day for an extended, if not indefinite, period of time.

Washington statutes and regulations recognize the vulnerable position of nursing home residents, and impose a

corresponding obligation on nursing homes to protect the interests and foster the welfare of their residents that is entirely consistent with a fiduciary relationship. Nursing homes are licensed and regulated by the state Department of Social and Health Services ("DSHS") to "promote safe and adequate care and treatment of the individuals therein." RCW 18.51.005. They are subject to certain minimum statutory standards. *See* RCW 74.42.020. These standards include:

Residents shall be treated with consideration, respect, and full recognition of their dignity and individuality. Residents shall be encouraged and assisted in the exercise of their rights as residents of the facility and as citizens.

RCW 74.42.050(1).²¹

Furthermore, DSHS has the authority and responsibility to adopt regulations to "promot[e] safe and adequate medical and nursing care of individuals in nursing homes and the sanitary, hygienic, and safe conditions of the nursing home in the interest of public health, safety, and welfare." RCW 18.51.070. Under these regulations, nursing home residents have a number of express rights, including the "right to a dignified existence," and nursing homes are charged with the affirmative responsibility to "promote

²¹ Copies of RCW 18.51.005, 74.42.020 and 74.42.050 are reproduced in the Appendix.

and protect the rights of each resident, including those with limited cognition or other barriers that limit the exercise of rights." WAC 388-97-0180(2) & (3).²² This specifically includes an obligation on the part of nursing homes to "promote the resident's right to exercise decision making and self-determination to the fullest extent possible, taking into consideration his or her ability to understand and respond." WAC 388-97-0240(6). Of course, nursing homes also "must provide each resident with the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, self-care and independence" consistent with these rights. WAC 388-97-1060(1).²³

The confidentiality given to nursing home records supports the analogy to the physician-patient relationship. *See Youngs v. Peacehealth*, 179 Wn. 2d 645, 658-59, 316 P.3d 1035 (2014) (noting importance of confidentiality to physician-patient relationship). Communications with registered nurses are privileged similar to the way that communications with physicians are privileged, and the records of nursing homes are given the same confidentiality as

²² See also WAC 388-97-0860(1)(a) (imposing obligation on nursing homes to ensure that "[r]esident care is provided in a manner to enhance each resident's dignity"). A copy of WAC 388-97-0860 is reproduced in the Appendix.

²³ Copies of RCW 18.51.070 and WAC 388-97-0180, 388-97-0240 and 388-97-1060 are reproduced in the Appendix.

other health care facilities.²⁴ The confidentiality afforded to nursing home records actually appears to be broader in some ways than physician-patient confidentiality, perhaps reflecting the more intrusive nature of the relationship.²⁵

The liability of nursing homes to their residents further supports the analogy to the physician-patient relationship. Both nursing homes and physicians are subject to liability under Ch. 7.70 RCW. *See* RCW 7.70.020(3) (defining "health care provider" to include a "nursing home"). This includes liability for failure to obtain informed consent. *See* RCW 7.70.050. Such liability stems from the "fiduciary duty to disclose relevant facts about the patient's condition and the proposed course of treatment so that the patient may exercise the right to make an informed health care decision." *Stewart-Graves v. Vaughn*, 162 Wn. 2d 115, 122, 170 P.3d 1151 (2007). As with confidentiality, the obligation to obtain informed consent appears to be greater in the nursing home context, encompassing non-medical as well as medical decision

²⁴ *See* RCW 5.62.010 (privilege for registered nurses); RCW 70.02.010(15) (defining "health care facility" to include a "nursing home ... or similar place where a health care provider provides care to patients" under Uniform Health Care Information Act; ellipses added); RCW 74.42.080 (regarding confidentiality of nursing home records). Copies of RCW 5.62.010, 70.02.010 and 74.42.080 are reproduced in the appendix.

²⁵ *See* WAC 388-97-0360 (regarding confidentiality and privacy of all written and telephone communications, accommodations, personal care and visits of nursing home residents). A copy of WAC 388-97-0360 is reproduced in the Appendix.

making, again reflecting the more intrusive nature of the relationship.²⁶

In addition to liability under Ch. 7.70 RCW, nursing homes are subject to liability under Ch. 74.34, regarding protection of vulnerable adults. Adults admitted to a nursing home are, ipso facto, deemed to be vulnerable. *See* RCW 74.34.020(21)(d) (defining "vulnerable adult" to include a person "[a]dmitted to any facility"; brackets added); RCW 74.34.020(6) (defining "facility" to include "nursing homes"). Residents are entitled to bring claims for "abuse" or "neglect" against a nursing home. *See* RCW 74.34.200 (creating cause of action); *see also* RCW 74.34.020(2) & (15) (defining "abuse" and "neglect"). The existence of this claim appears to constitute implicit recognition of the level of dependence and trust that is characteristic of the relationship between a nursing home and its residents, as well as the potential for abuse. *See* RCW 74.34.005 (legislative findings).²⁷

²⁶ *See* WAC 388-97-0240(6) (regarding resident decision making); WAC 388-97-0260 (regarding informed consent process for nursing homes). Copies of RCW 7.70.020 and 7.70.050 and WAC 388-97-0240 and 388-97-0260 are reproduced in the Appendix.

²⁷ Copies of RCW 74.34.005, 74.34.020 and 74.34.200 are reproduced in the Appendix. Rushing has alleged a survival claims against Franklin Hills based on the vulnerable adult statute. *See* CP 6, 21-22, 32-33.

In sum, the grounds for finding a fiduciary relationship as a matter of law are at least as strong for nursing homes and residents as they are for physicians and patients.

2. The circumstances present in this case give rise to a fiduciary relationship between Franklin Hills and Mr. Coon as a matter of fact.

As noted above, fiduciary obligations arise as a matter of fact where "one party 'occupies such a relation to the other as to justify the latter in expecting that his interests will be cared for,'" or the "relationship with another is such that the latter justifiably expects his welfare to be cared for by the former." *Liebergesell*, 93 Wn. 2d at 889 & 890-91 (quotations omitted). In this case, Mr. Coon's mental illness and cognitive limitations; the comprehensive care provided by Franklin Hills; the acknowledged need to help him with decision making; the undertaking to manage his funds and Social Security benefits; and his acknowledged inability to manage his own funds all establish the relationship of dependency and trust that should give rise to fiduciary duties as a matter of fact.²⁸

Under similar circumstances, other courts have found that nursing homes owe fiduciary duties to their residents. For example,

²⁸ Cf. *State v. Chadderton*, 60 Wn. App. 907, 913, 808 P.2d 763 (1991) (holding nursing home aide who commits crime against residents is subject to sentence enhancement for fiduciaries under former RCW 9.94A.390(2)(b)), *rev'd in part on other grounds*, 119 Wn. 2d 390, 832 P.2d 481 (1992).

in *Petrie v. Living Centers-E., Inc.*, 935 F. Supp. 808, 812 (E.D. La. 1996), the court stated:

A simple contract does not establish a fiduciary relationship. A fiduciary duty develops out of the nature of the relationship between those involved. One Louisiana court has defined a fiduciary duty as follows:

One is said to act in a "fiduciary capacity" when the business which he transacts, or the money or property he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the part and a high degree of good faith on the other part. *Office of the Commissioner of Insurance v. Hartford Fire Insurance Co.*, 623 So.2d 37, 40 (La.App. 1st Cir.1993).

While this Court concedes that fiduciary relationships are most often found in financial dealings, the Court can think of no relationship which better fits the above description than that which exists between a nursing home and its residents. As stated eloquently by the *Schenck* court, "one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities" as those created by a business relationship. *Schenck v. Living Centers-East, Inc., et al*, 917 F. Supp. 432, 437-38 (E.D.La.1996).

(Formatting & citations in original.) Washington follows a similar definition of fiduciary relationships, and the rationale for imposing fiduciary duties in the nursing home context is equally compelling under the facts of this case.²⁹

²⁹ Most states have not addressed "the fiduciary status of a nursing home vis-à-vis its patients." *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 341 (N.D. Ill. 1997) (holding a fiduciary duty could exist between nursing homes and residents under

B. The superior court erred in placing the burden on Rushing to prove that Mr. Coon was incompetent.

Placement of the burden of proof is an issue of law that is reviewed de novo.³⁰ The superior court erred in imposing the burden of proof on Rushing on the issue of Mr. Coon's competency,

Illinois law); see also *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 77 & n.27 (W. Va. 2014) (declining to recognize cause of action for breach of fiduciary duty by nursing home "at this time," "[b]ased upon the particular facts of the instant matter, and the small number of jurisdictions who have expressly recognized such a cause of action"; brackets added).

Several courts have recognized the existence of a fiduciary relationship. See, e.g., *Rohlfing, supra*; *Zaborowski v. Hosp. Care Ctr. of Hermitage, Inc.*, 60 Pa. D. & C.4th 474, 488-89 (Pa. Com. Pl. 2002) (stating "the relationship between a nursing home and its residents can be fiduciary in nature"); *Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 45 N.Y.2d 692, 698, 385 N.E.2d 285, 288, 412 N.Y.S.2d 593, 596 (1978) (stating "[t]he acceptance of such responsibility with respect to the aged and infirm who, for substantial consideration availed themselves of the custodial care offered by the institution, resulted in the creation of a fiduciary relationship").

In *Duenas v. Life Care Centers of America, Inc.*, 336 P.3d 763, 771 (Ariz. App. 2014), the court rejected an argument that a nursing home had a fiduciary duty to its patients "in connection with the purely commercial aspects of their relationship," including an arbitration agreement, based on a lack of cited authority under Arizona law. However, the separation of commercial aspects of the relationship appears to be contrary to this Court's decision in *Moon v. Phipps*, 67 Wn. 2d 948, 954-55, 411 P.2d 157 (1966), which imposed fiduciary duties on an agent referred by a doctor to his patient based on "a vicarious transfer of that trust and confidence through the doctor's psychotherapy and advice." *Moon* establishes that the fiduciary relationship is viewed from beneficiary's point of view, and that the beneficiary does not typically make a distinction between different aspects of the relationship. See *id.*

In *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 893 F. Supp. 2d 1172, 1187 (D.N.M. 2012), *aff'd*, 532 F. Appx. 813, 818-19 (10th Cir. 2013), the court rejected an argument that a nursing home had fiduciary duties to prospective patients who have not yet entered into an admission contract. *THI* is distinguishable to the extent that Mr. Coon was transferred to Franklin Hills by ambulance on doctor's orders, and presented with the admission package including the arbitration agreement two days later. He previously resided at the affiliated assisted-living facility next door. RP 233:15-20, 234:24-235:5 & 370:25. *THI* also seems to be contrary to *Moon, supra*.

³⁰ See *Kofmehl v. Baseline Lake, LLC*, 177 Wn. 2d 584, 596-98, 305 P.3d 230 (2013) (treating placement of the burden of proof as an issue of law on review of summary judgment); *State v. P.E.T.*, 185 Wn. App. 891, 896, 344 P.3d 689 (2015) (reviewing placement of burden of proof de novo).

and rejected her request to place the burden of proof on Franklin Hills, given its fiduciary status. *See* CP 814, 817 & 906; RP 4:20-5:13 (Jan. 30, 2015). Reversal is required because of the improper placement of the proper burden of proof. However, remand is unnecessary because Franklin Hills cannot point to evidence sufficient to establish that Mr. Coon was competent, as required to satisfy its burden of proof.

- 1. Because it is a fiduciary, the superior court should have required Franklin Hills to prove that Mr. Coon was competent.**

While it has never had the occasion to address the effect of a fiduciary relationship on the burden of proof regarding competency, the Court has held that a fiduciary relationship shifts the burden of proof on other issues. For example, the existence of a fiduciary relationship may give rise to a presumption of undue influence that the fiduciary must overcome to enforce a will. *See Mueller v. Wells*, 185 Wn. 2d 1, 10-11, 367 P.3d 580 (2016); *In re Malloy's Estate*, 57 Wn. 2d 565, 568-69, 358 P.2d 801 (1961); *Dean v. Jordan*, 194 Wash. 661, 671-73, 79 P.2d 331 (1938). The same rule applies to inter vivos gifts. *See Meyer v. Champion*, 120 Wash. 457, 467-69, 207 P. 670 (1922); *Endicott v. Saul*, 142 Wn. App. 899, 922, 176 P.3d 560 (2008). The fiduciary relationship between the

executor and heirs of an estate requires the executor to prove that statutory heirs have received notice to avoid reopening a probate. See *In re Estate of Little*, 127 Wn. App. 915, 924-25, 113 P.3d 505 (2005), *rev. denied*, 156 Wn. 2d 1019 (2006). The fiduciary relationship between a corporate officer or director and the corporation requires the officer to prove that transactions with the corporation were conducted with the utmost good faith. See *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 79, 180 P.3d 874 (2008). The fiduciary relationship between attorney and client requires a lawyer who benefits from a transaction with the client to prove that the transaction was fair. See *Easton v. Chaffee*, 16 Wn. 2d 183, 192-93, 132 P.2d 1006 (1943) (finding rule inapplicable to the facts). In a malpractice claim brought by the client, the lawyer has the burden to prove any judgment would be uncollectible. See *Schmidt v. Coogan*, 181 Wn. 2d 661, 666-67, 335 P.3d 424 (2014) (plurality opinion). The fiduciary relationship between a trustee and beneficiary requires the trustee to disprove any causal connection between the trustee's actions and losses suffered by the beneficiary. See *Austin v. U.S. Bank of Washington*, 73 Wn. App. 293, 307, 869 P.2d 404 (1994), *rev. denied*, 124 Wn. 2d 1015 (1994). In an action for an accounting, a fiduciary has the

burden of proving the propriety of challenged transactions. See *Wilkins v. Lasater*, 46 Wn. App. 766, 777-78, 733 P.2d 221 (1987).

The rationales for placing the burden of proof on the fiduciary are not always explicitly stated in the case law. However, the alteration of the burden of proof seems to be based in part on the nature of fiduciary relationships, which involve a level of trust and dependence that can easily be taken advantage of.³¹ It also seems to be based in part on the fact that fiduciaries are often in a better position to provide the necessary proof.³² Lastly, it seems to be based in part on the nature of fiduciary duties, which require fiduciaries to place their beneficiaries' interests ahead of their own.³³

All of these rationales are applicable to Franklin Hills' attempt to enforce its arbitration agreement in this case. Mr. Coon was under the care of Franklin Hills around the clock. Franklin Hills was aware of his schizoaffective disorder and dementia, his inability to manage his own funds, and his need for help with

³¹ See, e.g., *Mueller*, 185 Wn. 2d at 11 (stating "[t]he crux of these relationships is a level of trust that leads the testator to believe that the beneficiary is acting in his or her best interests, creating an opportunity for the beneficiary to exert undue influence"; brackets added); *Saviano*, 144 Wn. App. at 79 (emphasizing officers and directors ability to influence how a corporation conducts its affairs).

³² See, e.g., *Wilkins*, 46 Wn. App. at 778 (emphasizing fiduciary's access to information).

³³ See, e.g., *Little*, 127 Wn. App. at 925 (emphasizing fiduciary's duties).

decision making. Like other residents, Mr. Coon was under Franklin Hills' care precisely because he suffered from conditions that prevented him from fully caring for himself. The nature and extent of the care provided by Franklin Hills and the condition of Mr. Coon rendered him vulnerable. The admission package, including the arbitration agreement, was presented to Mr. Coon at a time and place chosen by a Franklin Hills' employee, when no one else was present who could testify about the circumstances of its execution. In this way, Franklin Hills exercises control over the contracting process and has unique access to information relevant to the issue of competence. In the final analysis, Franklin Hills' fiduciary duty to place its residents' interests ahead of its own justifies placing the burden on Franklin Hills to prove that Mr. Coon was competent when it asked him to sign the arbitration agreement.³⁴

³⁴ The prior Court of Appeals opinion recited the rule regarding the burden of proof on the issue of competency that applies outside of the fiduciary context. See *Rushing*, 2014 WL 346540, at *3. This statement does not constitute the law of the case because the placement of the burden of proof was not at issue in the prior appeal. Even if the prior opinion could be considered a decision on the issue, however, it is nonetheless properly reviewed under RAP 2.5(c)(2) (providing "[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review").

2. The superior court's improper placement of the burden of proof on Rushing requires reversal.

Improper placement of the burden of proof requires reversal and remand as long as there is evidence sufficient to satisfy the burden. *See Nissen v. Obde*, 55 Wn. 2d 527, 529-30, 348 P.2d 421 (1960). Under these circumstances, improper placement of the burden of proof is not subject to harmless error analysis because:

we are confronted with the question of whether to review the record to determine whether these findings are sustainable under a correct application of the burden of proof rule, or to remand the case to the trial court for reconsideration of the findings in conformity with the views expressed herein. Since it is the function of the trial court and not of this court to consider the credibility of witnesses and to weigh the evidence in order to determine whether it preponderates in favor of the party having the burden of proof, we are convinced that the proper course for us to follow is to remand.

55 Wn. 2d at 529-30. Assuming Franklin Hills could point to substantial evidence that Mr. Coon was competent, the superior court would be entitled to disbelieve such evidence on remand, or find that it is outweighed by contrary evidence in the record. As such, the Court must, at a minimum, reverse and remand.

3. Remand is unnecessary because Franklin Hills cannot point to sufficient evidence to meet its burden of proof.

In the absence of substantial evidence that Mr. Coon was competent, no remand is necessary and the Court should find the arbitration agreement unenforceable. The relevant inquiry is whether there is substantial evidence that Mr. Coon had the ability to understand the nature, terms and effect of the arbitration agreement. *See Page v. Prudential Life Ins. Co.*, 12 Wn. 2d 101, 109, 120 P.2d 527 (1942) (stating " [t]he rule relative to mental capacity to contract ... is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue"; brackets & ellipses added). The quantum of proof required to prove competency is clear, cogent and convincing evidence. *Id.*, 12 Wn. 2d at 109; *accord Grannum v. Berard*, 70 Wn. 2d 304, 307, 422 P.2d 812 (1967) (citing *Page*). This requires evidence that is more substantial than an ordinary civil case where requisite quantum of proof is only a preponderance of the evidence. *See, e.g., B.P. v. H.O.*, 186 Wn. 2d 292, 313, 376 P.3d 350 (2016). Substantial evidence must be "highly probable" to satisfy this level of proof. *See, e.g., Marriage of Schweitzer*, 132 Wn. 2d 318, 329-30, 937 P.2d 1062 (1997). Furthermore, substantial evidence review

should be even more stringent in the fiduciary context than it is outside of the fiduciary context. *See, e.g., Wilkins*, 46 Wn. App. at 778 (noting "the increased burden of proof" placed on a fiduciary, and discounting self-serving testimony of fiduciary in the absence of supporting documentary evidence).

In this case, the superior court's finding that Franklin Hills' expert witnesses "concluded that Mr. Coon possessed the requisite level of competence to enter into" the arbitration agreement is not supported by substantial evidence. CP 812 (Finding 18); CP 905 (Finding 18). The remainder of the superior court's findings do not support the conclusion that Mr. Coon was competent.

a. Contrary to the superior court's finding, Franklin Hills' experts did not conclude that Mr. Coon possessed contractual capacity.

The superior court found that "Defendants' expert witnesses, Ronald Klein, Ph.D. and James Winter, MD, concluded that Mr. Coon possessed the requisite level of competence to enter into the Agreement." CP 812 (Finding 18); CP 905 (Finding 18). Neither expert provided highly probable testimony regarding the "requisite level of competence" on the part of Mr. Coon, i.e., that he understood the nature, terms and effect of the arbitration agreement.

i. Dr. Klein did not testify that Mr. Coon understood the nature, terms and effect of the arbitration agreement.

Dr. Klein disclaimed any intent to testify regarding competency or capacity, prompting Rushing to file a motion in limine precluding him from offering such testimony at the time of trial. CP 469-70. The superior court "grant[ed] the motion precluding Dr. Klein from testifying about competency as he indicated that he's not able to do that." RP 28:9-11 (brackets added).

During his testimony, Dr. Klein did say that "Mr. Coon had the *requisite knowledge* to know what he was signing on April 3rd, 2011, regarding this alternative dispute resolution process." RP 302:4-6 (emphasis added). However, he described the "requisite knowledge" as being "a fairly narrow point," meaning "when Mr. Coon was presented with and signed a form that asked him to choose ... he made the choice to go with the alternative dispute resolution[.]" RP 304:14-23 (ellipses & brackets added); *see also* RP 305:1-2 (stating "[h]e was presented with the option. He chose an option"; brackets added); RP 306:14-19 (stating "he made a decision to have alternative dispute resolution should that be necessary and it was a part of his ... routine sequence of steps that a

person would be faced with to become a client or a resident ... in that nursing facility"; ellipses added). In this way, Dr. Klein defined the "requisite knowledge" at such a low level that the bare fact that Mr. Coon appeared to initial the arbitration agreement constitutes the requisite knowledge. It is a far cry from understanding the nature, terms and effect of the agreement.

Dr. Klein also stated that he did not see any indication that Mr. Coon did not understand the arbitration agreement. RP 306:6-11 & 309:14-18. However, absence of proof negating competence is not equivalent to highly probable proof of competence.

ii. Dr. Winter did not testify that Mr. Coon understood the nature, terms and effect of the arbitration agreement.

For his part, Dr. Winter testified that "Mr. Coon had enough cognition to make reasonable decisions about his affairs" including "signing or not signing contracts," when he signed the arbitration agreement. RP 156:21-157:5. However, he never explained what he meant by "enough cognition," nor did he testify that Mr. Coon had enough cognition to understand the nature, terms and effect of the agreement.

Furthermore, Dr. Winter testified that he did not see anything in Dr. Mulvihill's records from Spokane Mental Health

suggesting that Mr. Coon lacked "adequate cognition for a man of his age." RP 136:17-22. This is directly contradicted by Dr. Mulvihill's testimony under oath (which is contained in the Spokane Mental Health records), that Mr. Coon has "disorganized thought and behaviors," Ex. D9, p. 581; "impaired cognitive ability manifested as poor executive function, memory and insight/judgment, *id.*, p. 583; and "ongoing disorganized thought," *id.*, p. 619; among other things. In light of this fact, Dr. Winter's testimony cannot serve as highly probable evidence of contractual capacity on the part of Mr. Coon.

b. The superior court's finding that Mr. Coon declined a colorectal cancer screening test does not constitute substantial evidence of contractual capacity.

The superior court found that Mr. Coon declined a colorectal cancer screening (hemocult) test after having the procedure and insurance funding explained to him. CP 810 (Finding 8). This is not substantial or highly probable evidence of contractual competency because the doctor who discussed the test with him was unable to draw any conclusions about Mr. Coon's competency from this or other interactions with Mr. Coon. RP 36:4-6.

c. The superior court's finding that Mr. Coon was interactive and cooperative at the emergency room does not constitute substantial evidence of contractual capacity.

The superior court found that Mr. Coon was "interactive and cooperative" during the emergency room visit that led to his transfer to Franklin Hills. CP 811 (Finding 11). This is not substantial or highly probable evidence of contractual competency because, although the emergency room doctor said that Mr. Coon seemed to understand what was going on, and appeared to have normal cognitive function for purposes of obtaining medical treatment, RP 66:1-2, 67:8-10 & 73:7-10; she did not do anything to determine, nor did she know, whether Mr. Coon had sufficient competency to enter into a contract, RP 70:22-71:7 & 74:3-14.

d. The superior court's finding that Mr. Coon was alert and oriented to person, place and time does not constitute substantial evidence of contractual capacity.

The superior court found that Mr. Coon was "alert and oriented to who he was, where he was, and what date and time it was" when he was admitted to Franklin Hills. CP 811 (Finding 12). This is a gross measure of rudimentary cognition, and it is not substantial evidence of contractual capacity, let alone highly

probable evidence of such capacity. RP 69:1-7, 447:20-448:17. This is especially so in light of Mr. Coon's results on the Allen Cognitive Level test, which showed "moderate cognitive deficit characterized by poor planning and problem solving, and an inability to anticipate consequences to actions." Ex. P204, p. 1110.

- e. The superior court's finding that Ms. Wujick did not notice any symptoms when she presented the "admissions packet" to Mr. Coon is not substantial evidence of contractual capacity.**

The superior court found that Ms. Wujick "did not notice Mr. Coon exhibit any symptoms that would have called into question his me[n]tal capacity" when he reviewed and signed the documents in the admissions packet. CP 811 (Finding 13, brackets added). However, Ms. Wujick admitted that she lacked the ability to determine whether Mr. Coon had contractual capacity. RP 279:10-18. In any event, the absence of an apparent lack of competence does not constitute highly probable evidence of competence.

- f. The superior court's finding that Mr. Coon scored 15 out of 15 on a rudimentary "cognition test" does not constitute substantial evidence of contractual capacity.**

The superior court found that Mr. Coon scored 15 out of 15 on a cognition test. CP 812 (Finding 17). However, the test simply

measured Mr. Coon's ability to provide the date and remember three words. Ex. D7, p. 75. It is another gross measure of rudimentary cognition, not substantial or highly probable evidence of contractual capacity, especially in light of Mr. Coon's results on the Allen Cognitive Level test. Ex. P204, p. 1110.

g. The superior court's finding that Mr. Coon had testamentary capacity does not constitute substantial evidence of contractual capacity.

The superior court found that Mr. Coon had testamentary capacity to execute a will or power of attorney, and equated that with contractual capacity. CP 812 (Findings 19-20).³⁵ However, testamentary capacity is not equivalent to contractual capacity, and evidence of testamentary capacity cannot therefore serve as highly probable evidence of contractual capacity.³⁶

³⁵ The superior court's finding regarding testamentary capacity is based on the testimony of Rushing's expert, James Spar, M.D. The superior court stated that it gave Dr. Spar's testimony "the greatest weight," given that he was the only board certified psychiatrist to testify and "his vast experience working in the psychiatric field." CP 815. Dr. Spar testified: "I do not believe he [Mr. Coon] had the ability to understand and appreciate to the extent relevant the consequences, positive and negative for him and for the other affected parties, mainly his daughter, of signing or not signing that agreement [i.e., the arbitration agreement]." RP 443:3-7 (brackets added). He explained: "I think because of his cognitive impairment it would have been nearly impossible for him to read this and figure out what it meant for him in the future." RP 443:16-18.

³⁶ See *Hackett v. Whitley*, 150 Wash. 529, 540-41, 273 P. 752 (1929) (following "courts holding that "the mental capacity required to sustain the validity of a deed or contract is of a higher degree than that required of a testator to make a will" and quoting *Greene v. Maxwell*, 96 N.E. 227 (Ill. 1911), for the proposition that "[i]n ordinary business transactions are involved a contest of judgment, reason and experience and the exercise of mental powers not necessary in the

The superior court's findings regarding the testimony of Franklin Hills' experts are unsupported by the evidence, and the court's remaining findings are insufficient to conclude that Mr. Coon was competent.

C. The superior court erred in finding mutual assent to the arbitration agreement because Franklin Hills did not disclose and there is no evidence that Mr. Coon knew about the restrictions on his constitutional rights in the arbitration rules referenced in the agreement.

The rules referenced in the arbitration agreement were developed especially for Franklin Hills' parent company. They restrict the right to discovery that would otherwise be available to Mr. Coon in court proceedings, and cloak the arbitration proceedings with confidentiality. In both respects, the rules purport to waive Mr. Coon's right of access to courts under Article I, § 10, of the Washington Constitution. *See Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn. 2d 974, 979, 216 P.3d 374 (2009) (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn. 2d 772, 780, 819 P.2d 370 (1991), for the proposition that "[t]his right of access to courts 'includes the right of discovery authorized by the civil rules'"); *John Doe*, 117 Wn. 2d at 780 (citing on Wash. Const. Art. I, § 10);

testamentary disposition of property. Mental strength to compete with an antagonist and understanding to protect his own interest are essential in the transaction of ordinary business"; brackets added).

Dreiling v. Jain, 151 Wn. 2d 900, 908, 93 P.3d 861 (2004) (noting that Wash. Const. Art. I, § 10, "guarantees the public and the press a right of access to judicial proceedings and court documents"). The failure to disclose the contents of these rules, and the absence of any evidence that Mr. Coon was otherwise aware of their contents should preclude enforcement of the arbitration agreement.

A fiduciary such as has Franklin Hills has the obligation to make a full and fair disclosure of all material facts in any transaction with a beneficiary in order to enforce the transaction. See, e.g., *Valley/50th Ave., L.L.C. v. Steward*, 159 Wn. 2d 736, 743-44, 153 P.3d 186 (2007) (stating fiduciary relationship between attorney and client requires the attorney entering a transaction with the client to make "a fair and full disclosure of the facts on which it is predicated"); *In re Marriage of Hadley*, 88 Wn. 2d 649, 667-68, 565 P.2d 790 (1977) (stating fiduciary relationship between spouses requires spouse seeking to enforce a prenuptial contract to prove that there was "a full and fair disclosure of all material facts relating to the amount, character and value of the property involved so that [the other spouse] will not be prejudiced by the lack of information, but can intelligently determine whether she desires to enter the prenuptial contract"; brackets added); *Mersky v. Multiple Listing*

Bureau of Olympia, Inc., 73 Wn. 2d 225, 229, 437 P.2d 897 (1968) (stating fiduciary duty of real estate broker requires "in all instances, a full, fair, and timely disclosure to the principal of all facts within the knowledge or coming to the attention of the broker or his subagents which are, or may be, material in connection with the matter for which the broker is employed"), *superseded by statute as noted in Jackowski v. Borchelt*, 174 Wn. 2d 720, 733, 278 P.3d 1100 (2012). Franklin Hills' failure to disclose the contents of the arbitration rules should preclude enforcement of the arbitration agreement.

Even if Franklin Hills were not considered a fiduciary, the lack of any evidence that Mr. Coon was aware of the contents of the arbitration rules undercuts the superior court's finding of mutual assent to the arbitration agreement. The requirement of mutual assent includes contract terms that are incorporated by reference:

Incorporation by reference allows the parties to "incorporate contractual terms by reference to a separate ... agreement to which they are not parties, and including a separate document which is unsigned." 11 Williston on Contracts § 30:25, at 233-34 (4th ed.1999) (footnotes omitted). "But incorporation by reference is ineffective to accomplish its intended purpose where the provisions to which reference is made do not have a reasonably clear and ascertainable meaning." Williston, *supra*, at 234. Incorporation by reference must be clear and unequivocal. *Santos v. Sinclair*, 76 Wash.App. 320, 325, 884 P.2d 941 (1994). "[I]t must be clear that the parties to the agreement had knowledge of and

assented to the incorporated terms[.]” Williston, *supra*, at 234.

W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn. App. 488, 494-95, 7 P.3d 861, 865 (2000) (quotations & alterations in original), *rev. denied*, 143 Wn. 2d 1003 (2001). While material terms may be incorporated by reference without a written copy or verbal explanation of the incorporated terms, the parties nonetheless must have knowledge of, and assent to, the incorporated terms. The lack of evidence that Mr. Coon knew about, or assented to, the restrictions on his constitutional rights in the arbitration rules should preclude enforcement of Franklin Hills' arbitration agreement here.

D. The superior court erred in staying litigation of Rushing's wrongful death claims pending arbitration of her survival claims.

While Washington law favors arbitration of disputes, arbitration is nonetheless a matter of contract. *See Hill v. Garda CL Nw., Inc.*, 179 Wn. 2d 47, 53, 308 P.3d 635 (2013); *see generally* Ch. 7.04A RCW. A party cannot be required to submit to arbitration any dispute that she has not agreed to submit to arbitration *See id.*, 179 Wn. 2d at 53; *see also Townsend v. Quadrant Corp.*, 173 Wn. 2d 451, 464-66, 268 P.3d 917 (2012) (Stephens, J., concurring/dissenting, joined by 4 other Justices, holding non-

signatories not bound to arbitration agreement). *Woodall*, 155 Wn. App. at 923-36 (pre-*Townsend* case holding that wrongful death claims are not subject to arbitration based on arbitration agreement between decedent and nursing home because beneficiaries of wrongful death action were not party to the agreement). Relying on *Woodall*, the superior court below held that Rushing's wrongful death claim is not subject to arbitration.

However, if the superior court's order compelling arbitration of Rushing's survival claims is upheld, the court's order staying litigation of her wrongful death claims potentially precludes a jury trial of the wrongful death claims through application of collateral estoppel. This would effectively give Franklin Hills more than it bargained for when it presented the arbitration agreement to Mr. Coon. Even where related litigation is not stayed, arbitration typically lacks the procedural safeguards of court procedures, and therefore takes less time than litigation under current court staffing and caseloads.³⁷ The right to jury trial of related nonarbitrable claims is therefore threatened as a result of nothing more than an accident of scheduling.

³⁷ See, e.g., Jessica Silver-Greenberg & Robert Gebeloff, "Arbitration Everywhere Stacking the Deck of Justice," *New York Times*, Oct. 31, 2015 (available at www.nytimes.com); Jessica Silver-Greenberg & Michael Corkery, "In Arbitration a 'Privatization of the Justice System,'" *New York Times*, Nov. 1, 2015).

Article I, § 21, of the Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate." (Brackets added). It is a right "deserving of the highest protection," "the essential component of our legal system," and "must be protected from all assaults to its essential guarantees." *Davis v. Cox*, 183 Wn. 2d 269, 288-89, 351 P.3d 862 (2015) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). Application of collateral estoppel is consistent with the right to trial by jury when the plaintiff *chooses* to litigate first in a forum where a jury is not available. See *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn. 2d 255, 265-69, 956 P.2d 312 (1998) (addressing collateral estoppel effect of Federal Tort Claims Act judgment on subsequent state court action). However, the right to trial by jury should not be lost when a plaintiff is *forced* to litigate first in a forum where a jury is unavailable (or where a plaintiff is unable to otherwise obtain a jury trial as a result of court staffing and scheduling). A stay of arbitration should be entered in this case to avoid the potential for waiving or mooting Rushing's right to trial by jury of nonarbitrable claims.

Rushing should not have to wait until after an arbitration of her survival claims occurs and Franklin Hills seeks to invoke

collateral estoppel with respect to her wrongful death claims because the right to review would be lost at that point. In *Nielson*, the Court of Appeals held that the plaintiff waived the right to jury trial by not seeking a stay of nonjury proceedings under the Federal Tort Claims Act, and this Court declined to address the issue where plaintiffs had already litigated in the nonjury forum. *See* 135 Wn. 2d at 269. Rushing should not have to face the prospect of losing the right to review by waiting.

Issuing a stay under these circumstances is not an attack on arbitration, but rather it is an issue of general applicability based on the relationship between the right to jury trial and collateral estoppel, which would apply any time related disputes are subject to litigation in both jury and nonjury forums. *See, e.g., Nelson, supra* (involving Federal Tort Claims Act). It strikes an appropriate balance between the contractual rights of the party seeking to compel arbitration and the constitutional rights of nonsignatories to the arbitration agreement. It is particularly appropriate in the fiduciary context, as in this case, because a fiduciary must place the interests of its beneficiary ahead of its own.

Accordingly, if the Court upholds the superior court order compelling arbitration of Rushing's survival claims, the Court

should reverse the order staying litigation of her wrongful death claims, and instead remand with instructions to stay arbitration of her survival claims.

VII. CONCLUSION

Based on the foregoing, Rushing asks the Court to reverse the superior court order compelling arbitration of her survival claim. In the alternative, she asks the Court to reverse the superior court order staying litigation of her wrongful death claim, and direct the superior court to stay arbitration of her survival claim.

Respectfully submitted this 26th day of October, 2016.

s/George M. Ahrend
George M. Ahrend, WSBA #25160

s/Mark D. Kamitomo
Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251

Co-Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

Mark Kamitomo at mark@markamgrp.com
Collin Harper at collin@markamgrp.com

Signed at Moses Lake, Washington on October 26, 2016.



Shari M. Canet, Paralegal

APPENDIX

Alternative Dispute Resolution Agreement: Washington, Ex. D1, pp. 19-24 (admitted)	A-1
Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure, CP 771-85; Ex. P219 (offered but not admitted).	A-7
<i>Rushing ex rel. Estate of Coon v. Franklin Hills Health & Rehab. Ctr., noted at 179 Wn. App. 1018, 2014 WL 346540 (Wn. App., Div. III, Jan. 30, 2014)</i>	A-22
RCW 5.62.010	A-27
RCW 7.70.020	A-28
RCW 7.70.050	A-29
RCW 18.51.005.....	A-31
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RCW 70.02.010	A-33
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RCW 74.42.020	A-41
RCW 74.42.050.....	A-42
RCW 74.42.080.....	A-43
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WAC 388-97-0180	A-45
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**Alternative Dispute Resolution Agreement
Washington**

**(SIGNING THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR
CONTINUED RESIDENCE IN THE CENTER)**

1. **Parties to the Agreement.** This Alternative Dispute Resolution ("ADR") Agreement (hereinafter referred to as the "Agreement") is entered into by Extencicare Health Services, Inc. on behalf of its parents, affiliates and subsidiaries including Franklin Hills Health and Rehab. Center (hereinafter referred to as the "Center"), a nursing facility, and Robert H Coon, a Resident at the Center (hereinafter referred to as "Resident"). It is the intent of the Parties that this Agreement shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns.

2. **Definitions.**
 - a. Center as used in this Agreement shall refer to the nursing Center, its employees, agents, officers, directors, affiliates and any parent, affiliate and/or subsidiary of Center and its medical director acting in his/her capacity as medical director.

 - b. Resident as used in this Agreement shall refer to the Resident, all persons whose claim is or may be derived through or on behalf of the Resident, all persons entitled to bring a claim on behalf of the Resident, including any personal representative, responsible party, guardian, executor, administrator, legal representative, agent or heir of the Resident, and any person who has executed this Agreement on behalf of the Resident.

 - c. Party shall refer to the Center or the Resident, and the term Parties shall refer to both the Center and Resident.

 - d. Alternative Dispute Resolution ("ADR") is a specific process of dispute resolution used instead of the traditional court system. Instead of a judge and/or jury determining the outcome of a dispute, a neutral third party ("Mediator"), who is chosen by the Parties, may assist the Parties in reaching settlement. If the matter proceeds to arbitration, the neutral third party "arbitrator" renders a decision, which becomes binding on the Parties. When mandatory the ADR becomes the only legal process available to the Parties.

 - e. State Law shall mean the laws and regulations applicable in the State of Washington.

 - f. Neutral shall mean the Mediator or Arbitrator conducting ADR under this Agreement.

3. **Voluntary Agreement to Participate in ADR.** The Parties agree that the speed, efficiency and cost-effectiveness of the ADR process, together with their mutual undertaking to engage in that process, constitute good and sufficient consideration for the acceptance and enforcement of this Agreement. The Parties voluntarily agree that any disputes covered by

this Agreement (herein after referred to as "Covered Disputes") that may arise between the Parties shall be resolved exclusively by an ADR process that shall include mediation and, where mediation does not successfully resolve the dispute, binding arbitration. The relief available to the Parties under this Agreement shall not exceed that which otherwise would be available to them in a court action based on the same facts and legal theories under the applicable federal, state or local law. All limitations or other provisions regarding damages that exist under Washington law at the time of the request for mediation are applicable to this Agreement.

The Parties' recourse to a court of law shall be limited to an action to enforce a binding arbitration decision and mediation settlement decision entered in accordance with this Agreement or to vacate such a decision based on the limited grounds set forth in RCW §7.04A.010 et. seq.

4. **Covered Disputes.** This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law sitting in the State of Washington and shall include, but not be limited to, all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, health care, consumer or safety standards. Covered Dispute shall not include (1) involuntary discharge actions initiated by the Center, (2) guardianship proceedings resulting from Resident's alleged incapacity, and (3) disputes involving amounts less than \$2,000.00.

The Neutral, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable.

Nothing in this Agreement, however, shall prevent the Resident from filing a grievance or complaint with the Center or appropriate government agency, from requesting an inspection of the Center from such agency, or from seeking a review under any applicable federal, state or local law of any decision to discharge or transfer the Resident.

All claims based in whole or in part on the same incident, transaction or related course of care or services provided by the Center to the Resident shall be addressed in a single ADR process. A claim that arose and was reasonably discoverable by the Party initiating the ADR process shall be waived and forever barred if it is not included in the Party's Request for ADR ("Request"). Additionally, any claim that is not brought within the statute of limitations period that would apply to the same claim in a court of law in the State of Washington shall be waived and forever barred. Issues regarding whether a claim was reasonably discoverable shall be resolved in the ADR process by the Neutral.

5. **Governing Law.** Except as may be otherwise provided herein, this Agreement shall be governed by the terms of the Washington Uniform Arbitration Act or such laws in the State of Washington in effect at the time of the Request for ADR, which is currently set forth at RCW §7.04A.010 et. seq. If for any reason there is a finding that Washington law cannot support the enforcement of this Agreement, or any portion thereof, then the Parties agree to resolve their disputes by arbitration (and not by recourse to a court of law) pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1-16) and the Federal Arbitration Act shall apply to this Agreement and all arbitration proceedings arising out of this Agreement, including any action to compel, enforce, vacate or confirm any proceeding and award or order of an arbitrator. The mediation and/or arbitration location shall occur in the State of Washington.
6. **Administration.** ADR under this Agreement shall be conducted by Neutral and administered by an independent, impartial entity that is regularly engaged in providing mediation and arbitration services (hereinafter the "Administrator"). The Request for ADR shall be made in writing and may be submitted to DJS Administrative Services, Inc., ("DJS"), P.O. Box 70324, Louisville, KY 40270-0324, (877) 586-1222, www.djsadministrativeservices.com by regular mail, certified mail, or overnight delivery. If the Parties choose not to select DJS, or if DJS is unable to or unwilling to serve as the Administrator the Parties shall select an alternative independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator.
7. **Process.** Regardless of the entity chosen to be Administrator, unless the Parties mutually agree otherwise in writing, the ADR process shall be conducted in accordance with and governed by the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure ("Rules of Procedure") then in effect. A copy of the Rules of Procedure may be obtained from the Center's Administrator or from DJS at the address or website listed in Section 6 of this Agreement.
8. **Mediation.** The Parties agree that any claim or dispute relating to this Agreement or to the resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law shall first be subject to mediation. The Parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with Rule 3.02 of the Rules of Procedure. Any disputes which the Parties cannot resolve regarding the scope and limits of discovery shall be resolved as described in Rule 3.02 of the Rules of Procedure. The Parties shall cooperate with each other, the mediator and DJS prior to and during the mediation process. Claims where the demand is less than \$50,000 shall not be subject to mediation and shall proceed directly to arbitration, unless one of the Parties requests mediation, in which case, all Parties shall mediate in good faith. Mediation shall convene within one hundred twenty (120) days after the request for mediation. The Mediator shall be selected as described in Rule 2.03 of the Rules of Procedure.
9. **Arbitration.** Any claim or controversy that remains unresolved after the conclusion or termination of mediation (e.g., impasse) shall proceed to binding arbitration in accordance with the terms of this Agreement. Arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation or as otherwise specified in Rule 5.02 of the

Rules of Procedure. The Arbitrator shall be selected as described in Rule 2.03 of the Rules of Procedure.

- 10. Costs and Fees.** The Center shall pay the Neutral's fees and other reasonable costs associated with the mediation process. The Center shall pay the arbitrator's fees and other reasonable costs associated with the arbitration process up to and including five (5) days of arbitration. Absent an agreement by the Parties, or as required by a ruling by the Neutral to the contrary, the Parties shall share equally the Arbitrator's fees and costs associated with arbitration days beyond day five (5). The Parties shall bear their own costs and attorney's fees except in cases where the Neutral awards a successful Party such costs and/or fees under a provision of Washington law, if any, that expressly authorizes such an award.
- 11. Severability.** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable in whole or in part the remainder of this Agreement, including all valid and enforceable parts of the provision in question, shall remain valid, enforceable, and binding on the Parties.
- 12. Proof of Agreement.** The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and/or stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.
- 13. Right of Rescission.** The Resident may revoke this Agreement by providing notice to the Center within thirty (30) days of signing it; and this Agreement, if not revoked within that time frame, shall remain in effect for all care and services rendered to the Resident at or by the Center regardless of whether the Resident is subsequently discharged and readmitted to the Center without renewing, ratifying, or acknowledging this Agreement. Any notice of rescission of this ADR Agreement may be provided by the Resident either orally or in writing to a member of the management team of the Center.
- 14. Resident's Understanding.** The Resident understands that he/she has the right to seek advice of legal counsel and to consult with a Center representative concerning this Agreement. The Resident understands that this Agreement is not a condition of admission to or continued residence in the Center.

THE PARTIES UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY ENTERING INTO THIS AGREEMENT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES RESULTING FROM THE ADR PROCESS EXCEPT AS PROVIDED HEREIN. THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. YOUR SIGNATURE BELOW INDICATES YOUR UNDERSTANDING OF AND AGREEMENT TO THE TERMS SET OUT ABOVE. PLEASE READ IT COMPLETELY, THOROUGHLY AND CAREFULLY BEFORE SIGNING. Initial: _____ Resident _____ Center

BY SIGNING THIS AGREEMENT, the Parties acknowledge that (a) they have read this Agreement; (b) have had an opportunity to seek legal counsel and to ask questions regarding this Agreement; and (c) they have executed this Agreement voluntarily intending to be legally bound there to this 3 day of April, 2011 (the "Effective Date").

If signed by a Legal Representative, the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident.

FOR THE RESIDENT:

Signature of Resident

Robert H Coon

Print Name of Resident

Date

FOR THE CENTER:

Signature of Center's Representative

Print Name and Title of Center's Representative

Date

Signature of Legal Representative for
Healthcare Decisions

Print Name and Relationship or Title
(Guardian, Conservator, Power of Attorney, Proxy)

Date

Signature of Legal Representative for
Financial Decisions

Print Name and Relationship or Title
(Guardian, Conservator, Power of Attorney, Proxy)

Date

If Resident signs with an "x" or mark, two witnesses must also sign.

Signature of Witness

Date

Signature of Witness

Date

Print Name of Witness

Print Name of Witness

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Extendicare Health Services, Inc., Alternative Dispute Resolution Rules of Procedure

Program Administrator: DJS Administrative Services, Inc.

P.O. Box 70324

Louisville, KY 40270-0324

719 Old Mill Stream Lane

Shepherdsville, KY 40165

(877) 586-1222

www.djsadministrativeservices.com

Purpose

These procedural rules have been adopted by Extendicare Health Services, Inc., (EHSI) for the purpose of attempting to resolve disputes with consumers of services related to the delivery of health care, long term care or assisted living services. DJS Administrative Services, Inc. (hereinafter "DJS") will act as the administrator of this process in accordance with the rules set forth below.

Due Process Standards for Consumer Healthcare Disputes

DJS reserves the right to refuse to administer any dispute resolution process which may be based upon an agreement between the parties which substantially amends the rules or which does not meet the following Due Process Standards for Consumer Healthcare Disputes.

I. Agreement

There must be a written agreement between the parties to engage in the dispute resolution process. The agreement should be knowing and voluntary.

II. Capacity

The parties must have capacity both at the time of execution of the agreement and at the time of initiation of the dispute resolution process or be represented by a surrogate or agent with capacity.

III. Voluntariness

Execution of an agreement must be voluntary and optional. It must not be executed as a condition of admission, treatment or a condition of remaining in a facility.

IV. Witness

The party's signature on the agreement must be witnessed by an individual who has been trained to explain the dispute resolution process to consumers who have questions and to provide consumers with a written explanation of the dispute resolution process.

V. Right to Rescission with Review by Counsel

The agreement must provide for a minimum of five (5) business days right of rescission period during which the parties may have the agreement reviewed by counsel.

VI. Mediation as Prerequisite to Arbitration

Should the parties' agreement provide for binding arbitration, mediation must be offered as a prerequisite to arbitration, except for those disputes that meet the criteria for resolution under

the Expedited Procedures. However, after a dispute arises, the parties may agree in writing to proceed directly to arbitration.

VII. ADR Sessions

Mediation sessions or arbitration hearings must be conducted with adequate notice and with a fair opportunity to be heard and to understand what information is being presented. The place of the proceedings should be accessible to the parties and to the production of relevant evidence and witnesses.

VIII. Remedies

Parties may not be denied legal remedies otherwise available to them under applicable laws.

IX. Costs

Consumers may not be assessed costs unreasonably related to the costs they would incur had they filed an action in a court with jurisdiction over the matter.

Rules of Procedure for the Resolution of Consumer Healthcare Disputes

1.0 General Rules

1.01 Applicability of Rules

The parties shall be bound by these Rules wherever they have agreed in writing to dispute resolution by DJS or under these Rules. If there is a dispute between the parties regarding the interpretation of these Rules, the presiding arbitrator shall have the authority to make a decision or interpretation regarding the Rules, and the arbitrator's decision or interpretation shall be final and binding.

When parties agree to resolve disputes under these Rules, they accept the terms of these Rules and authorize the Administrator to assist in the process of selecting neutrals and provide such other services as are provided for by the Rules. Parties using these Rules agree to indemnify, hold harmless and release the Administrator, its partners and employees, from any and all liability to the party or a person or entity claiming through the party by reason of or in any way related to the Administrator or its administration of these Rules, the Administrator, the neutral, the Rules, or any action taken or not taken with respect thereto.

1.02 Existence of an Agreement to Resolve Disputes

The provision by the Administrator of any services to parties does not necessarily constitute a determination by the Administrator that an agreement to resolve disputes exists.

1.03 Meaning of Mediator or Arbitrator

The term "neutral" "mediator" or "arbitrator" in these Rules means the mediation or arbitration panel, whether composed of one or more mediators or arbitrators.

1.04 Interpretation of Rules

The provisions of these Rules and any exceptions thereto are subject to applicable laws. Where there is a difference in interpretation among the parties to a dispute resolution process, the issue shall be referred to the presiding arbitrator for a final decision, which shall be binding upon the parties.

2.0 Initiating ADR and selection of Mediators and Arbitrators

2.01 Demand for Alternative Dispute Resolution

The demand for alternative dispute resolution ("ADR") shall be made in writing and submitted to DJS, P.O. Box 70324, Louisville, KY 40270-0324; 719 Old Mill Stream Lane, Shepherdsville, KY 40165, (877) 586-1222, www.djsadministrativeservices.com, by regular mail, certified mail, electronic mail, or overnight delivery. If the parties choose not to select DJS or, if DJS is unwilling or unable to serve as the Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with these Rules. A copy of these Rules may be obtained from the Facility's Executive Director, or from DJS at the address or website listed above.

The demand for ADR (the "Demand") must include the name, address and telephone numbers of all parties, the requested location of the proceeding, a description of the issue(s) in dispute, and the amount(s) in dispute. The Demand must contain a copy of the ADR Agreement ("Agreement") or an affidavit affirming that an Agreement was executed by the Resident or the Resident's legal representative. A Demand Form may be obtained at the web address listed above.

If the Demand is filed by an institution, the required Administration Fees must be included with the Demand.

2.02 Payment of Administration Fees when Demand is filed by a Consumer

Upon receipt of a Demand from a consumer, the Administrator shall send a confirmation letter to all parties including a copy of the Demand within three (3) business days.

In the event the claimant is *pro se* a confirmation letter will be sent to all parties and will include the following information:

- A copy of the formal demand made by the plaintiff
- A copy of the EHSI Alternative Dispute Resolution Rules of Procedure
- A detailed Scheduling Order consistent with the ADR agreement;
- A list of three (3) mediators and three (3) arbitrators including instructions on mediator and arbitrator selection.
- Notice that the mediator and arbitrator must be selected within thirty-five (35) days.

The institution must pay the Administration Fees to DJS no later than ten (10) business days from the date on which the institution receives the confirmation letter.

2.03 Procedures for Selecting Neutrals

Upon receipt of a Demand by a party to commence the ADR process, the parties shall proceed to select a mediator and an arbitrator. The arbitrator will be in charge of resolving all pre-arbitration disputes and will preside over the arbitration. If the parties are unable to agree on the selection of a mediator, then they agree to allow the presiding arbitrator to choose one for them. If the parties are unable to agree on an arbitrator then each party shall select an arbitrator and the two selected will choose a third who will serve as the presiding arbitrator.

The Administrator shall issue a notice to all of the parties confirming the selection of the mediator and arbitrator.

The parties shall proceed to arbitration if mediation is unsuccessful. After a dispute arises, the parties may agree to forego mediation and proceed directly to arbitration. In arbitration proceedings, the parties may agree to resolve their dispute before a panel of three (3) arbitrators or a single arbitrator. The arbitration shall proceed before a single arbitrator unless one or both parties request a panel of arbitrators.

2.05 Notice to the Neutrals of Appointment

Except for disputes resolved under the Expedited Procedures, notice of the selection of the neutrals shall be mailed to the neutrals by the Administrator with a reference to these Rules.

2.06 Disclosure and Withdrawal

Within five (5) business days of receipt of notice of appointment, a person selected as a neutral shall disclose to the parties in writing any circumstances likely to affect impartiality, including a bias, a financial or personal interest in the result of the mediation or arbitration, or a past or present relationship with a party or a party's counsel or other authorized representative.

A neutral shall refrain from accepting employment or continuing as a neutral in any dispute if he reasonably believes or perceives that his participation would be directly adverse to any interest of his, or a person with whom he has a client or other substantial relationship which may materially limit the neutral's ability to perform his responsibilities. This disclosure requirement continues throughout the ADR process and shall include any pertinent information known or made available to the neutral regarding the prior use by either party of the neutral.

After appropriate disclosure of an interest other than a directly adverse interest, the neutral may serve if all parties consent.

3.0 Rules on Regular Procedures for Arbitrations and Mediations

3.01 Preliminary Conferences

A preliminary conference with the parties and/or their counsel and other authorized representatives shall occur within ten (10) days of the selection of the neutrals unless otherwise agreed to by the parties. The neutral may consider any matters that will expedite or facilitate the efficient conduct of proceedings. All agreements reached by the parties during the preliminary conference shall be circulated in writing by the neutral to the parties. In the case of an arbitration a preliminary conference should be scheduled with the presiding arbitrator within (10) days after the mediation has been declared an impasse.

3.02 Discovery

The parties shall be allowed to initiate discovery as soon as the demand for ADR has been filed. Discovery must be completed not later than 180 days after the date the Demand for ADR was filed. Permissible discovery shall include: a) 30 interrogatories inclusive of subparts; b) 30 requests for production of documents inclusive of subparts; c) 10 requests for admissions inclusive of subparts; d) depositions of not more than six (6) fact witnesses, and e) depositions of not more than two (2) expert witnesses.

Where warranted, by agreement or by request to the presiding neutral, the parties may conduct such additional reasonable discovery as may be necessary or proper.

The parties agree that in the case of a dispute over the scope of discovery during the mediation phase of the ADR process, such disputes should be resolved by the presiding arbitrator.

3.03 Fixing the Locale of the Proceeding

The parties may mutually agree on the locale for the proceeding. If there is no mutual agreement, or if a party objects to the locale, the neutral shall have the power to determine the locale in accordance with the Rules of Procedure and due process considerations.

3.04 Date, Time and Place of Proceedings

Unless otherwise agreed by the parties, the neutral shall set the date and time for each proceeding session and shall mail to each party notice thereof at least ten (10) days in advance, unless the parties by mutual written agreement waive such notice or modify the terms thereof.

3.05 Statement of the Issues and Relevant Information

Unless otherwise agreed by the parties and the neutral, at least ten (10) days prior to the mediation or arbitration, each party shall provide the neutral with a brief statement of the issues and that party's position on each issue. The parties should enclose all relevant documents to assist the neutral in resolving the dispute.

3.06 Proceedings

Unless otherwise agreed by the parties and the neutral, mediation shall occur no later than one hundred twenty (120) days after receipt of the demand for ADR. The parties may be represented at proceedings by counsel or other authorized representative.

A party desiring to make a record of an arbitration proceeding shall make arrangements for the making of such record and shall notify all other parties and the arbitrator of these arrangements in advance of the proceeding. The party or parties requesting the record shall pay the cost of the record and shall furnish a copy of the record to the arbitrator. A party shall be entitled to a copy of any official record of the proceeding upon payment therefore including payment of an equal share of the original expense of making the record.

3.07 Authority of the Neutral

The mediator is authorized to facilitate the resolution of the issues in dispute, but may not impose a resolution. The mediator is authorized to determine when each mediation session should be suspended.

The arbitrator is authorized to decide any disputes about discovery or the Rules of Procedure and to render a final and binding award as to the issues in dispute within the scope of the arbitration. Prior to the hearing, the arbitrator shall determine whether a reasoned award explaining the basis for its final award shall issue.

An arbitrator may not delegate any decision-making function to another person without consent of all of the parties.

3.08 Confidentiality

Mediation sessions are considered confidential. A mediation session is a settlement negotiation entitled to the protection accorded by Rule 408 of the Federal Rules of Evidence and its state counterparts. Except as otherwise provided in these Rules, all oral communications disclosed to the mediator as part of the mediation and all papers and other written communications created during or exclusively for the mediation shall remain confidential, and the mediator shall not be required to testify with respect thereto in any proceeding.

The parties shall maintain the confidentiality of the mediation sessions and shall not rely on the following as evidence in any proceeding, views of another party or the mediator with respect to settlement or settlement proposals;

- (a) admissions by another party; and
- (b) settlement proposals.

An arbitrator shall maintain the privacy of any proceeding. It shall be discretionary with the arbitrator to determine the propriety of the attendance of a person other than a party, the

party's counsel or other authorized representative, a stenographer or witnesses. A party may request the application of a rule requiring all persons other than the parties, the party's counsel or other authorized representative and the stenographer to be excluded from the hearing except while testifying as a witness. If a party makes such a request, the arbitrator shall exclude such persons from the hearing except while testifying as a witness.

3.09 Termination of Mediation

The mediation shall be considered terminated:

- (a) by the execution of a settlement agreement by the parties;
- (b) by a written declaration of the mediator to the effect that mediation is not productive;
- (c) by a written declaration of a party or parties that the mediation is not productive, *provided that* the mediation proceeding has commenced and the parties have mediated with the mediator for at least four (4) hours; or
- (d) by the mutual written agreement of the parties; or
- (e) if the parties have not specified a specific period for mediation, upon the expiration of thirty (30) days from the time when the parties were deemed to have mediated with the mediator for at least four (4) hours.

The mediator shall immediately notify the Administrator of the termination of any mediation and the results of such mediation. The parties shall proceed to binding arbitration if mediation is unsuccessful. Upon notification that mediation did not result in settlement, the Administrator will notify the parties and the appointed arbitrator(s) of the initiation of the Arbitration process.

4.0 Rules Exclusive to Arbitrations

4.01 Proceedings

Unless otherwise agreed to by the parties and the neutral, arbitration shall occur no later than sixty (60) days after the unsuccessful termination of mediation.

4.02 Oaths

Before the start of the first arbitration hearing, if any, the arbitrator may take an oath of office. The arbitrator shall require witnesses to testify under oath administered by the arbitrator or a duly qualified person.

4.03 Order of Proceedings

An arbitration hearing shall be opened by the taking of the oath of the arbitrator, if any; by announcing of the date, time and place of the hearing, and the presence of the arbitrator, the parties, and their counsel and other authorized representatives, if any; and by announcing the receipt by the arbitrator of the Demand for arbitration, any response, and the notification of appointment of the arbitrator.

The arbitrator may, at the beginning of the hearing, ask for oral or written statements clarifying the issues involved. In some cases, part or all of the above actions will have been accomplished at the preliminary conference conducted by the arbitrator. The arbitrator may conduct a preliminary hearing to resolve evidentiary issues at the request of the parties or at the arbitrator's discretion.

With respect to each claim, the complaining party shall then present evidence to support its claim. The defending party shall then present evidence supporting its defense. Witnesses for each party shall submit to questions or other examination. The arbitrator may vary this procedure within the arbitrator's discretion but shall afford a full, equal and reasonable opportunity to all parties for the presentation of any material, relevant, and admissible non-duplicative evidence.

Exhibits, when offered by either party, may be received in evidence at the discretion of the arbitrator. The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of any stenographic record.

The maximum length of the arbitration hearing exclusive of the preliminary evidentiary hearing, if required, shall be five (5) days.

4.04 Failure to Appear

The arbitration may proceed in the absence of a party or a party's counsel or other authorized representative who, after due notice, fails to be present or fails to obtain a postponement. The arbitrator shall require each party who is present to submit such evidence as the arbitrator may require for the making of an award.

4.05 Evidence

The parties may offer such non-duplicative evidence as is relevant, material and admissible to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of a party or upon the arbitrator's own motion.

The arbitrator shall be the judge of the duplicative nature, relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. However,

the arbitrator should refuse to allow the introduction of any evidence that the arbitrator believes would result in the disclosure of confidential information which is privileged under any applicable statute or under applicable law, including, but not limited to, information subject to (a) a quality assurance and/or peer review privilege; (b) a patient-physician privilege; or (c) an attorney-client privilege. All evidence shall be taken in the presence of all of the arbitrators and all of the parties and the parties' counsel and other authorized representatives, except where a party is absent after due notice has been given or has waived the right to be present.

4.06 Inspection or Investigation

An arbitrator finding it necessary for there to be a further inspection or investigation in connection with the arbitration or requested by less than all the parties to make a further inspection or investigation may do so and shall advise the parties of the arbitrator's requirements. An arbitrator requested by all of the parties to make a further inspection or investigation shall do so.

4.07 Interim Measures

The arbitrator may issue such orders for interim relief as may be deemed necessary by the arbitrator or all of the parties to maintain the status quo in the dispute without prejudice to the rights of the parties or to the final determination of the dispute.

4.08 Closing of Hearing or Arbitration Proceeding

When satisfied that the record is complete, the arbitrator shall declare the hearing closed. If written statements are to be submitted, the hearing shall be declared closed as of the final date set by the arbitrator for such submission. If there has been no hearing, the arbitrator shall determine a fair and equitable procedure for receiving evidence and closing the proceeding. The time limit within which the arbitrator is required to make the award shall commence to run upon the closing of the hearing or proceeding.

4.09 Time of Award

The award shall be made promptly by the arbitrator but no later than thirty (30) days from the date of closing of the hearing or proceeding.

4.10 Publication and Form of Award

The award shall be in writing and shall be signed by each arbitrator approving the award. A copy shall be forwarded by the arbitrator to the Administrator and shall be available for publication only if both the arbitrator(s) and all parties agree in writing.

4.11 Scope of Award

Submission by the parties to arbitration under these Rules shall constitute an agreement between or among the parties, that arbitration hereunder shall be the exclusive remedy between or among the parties regarding any claim which could or might have been raised out of or relating to any and all matters covered by said submission or the subject matter thereof.

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the ADR agreement of the parties and consistent with the provisions of the state or federal law applicable to a comparable civil action, including any prerequisites to, credits against or limitations on, such damages.

If the parties settle their dispute during the course of the arbitration, the arbitrator may set forth the terms of the agreed settlement in an award.

4.12 Reconsideration of Award

Within five (5) days after the effective date of an award, a party to an arbitration may request, in writing, the arbitrator to reconsider his award. Such request shall contain a concise statement of the reasons that the arbitrator should reconsider the award. Unless the arbitrator notifies all of the parties that the arbitrator has decided to reconsider the award within five (5) days of the effective date of the request, the request is deemed denied. Within five (5) days after the effective date of an award, the arbitrator may, upon the arbitrator's own initiative, modify the written award to correct non-substantive errors in the award. The arbitrator shall immediately furnish a copy of the modified award to the parties.

4.13 Award

An arbitration award, if any, must be paid within thirty (30) days of the effective date of the award. In the event of non-payment of the award, the prevailing party may bring legal action to enforce the award as if it were a judgment entered by a court of competent jurisdiction.

4.14 Release of Documents for Judicial Proceedings

The Administrator shall, upon the written request of a party, furnish to the party, at the expense of the party, certified copies of any papers, notices, process or other communications in the possession of the Administrator that may be required in judicial proceedings relating to the arbitration.

4.15 Applications to Court and Exclusion of Liability

Neither the Administrator, DJS, nor a neutral in a proceeding under these Rules is a necessary party in judicial proceedings relating to any stage of the dispute resolution process, the mediation, or the arbitration. The parties agree to hold harmless, indemnify, and reimburse DJS, the Administrator, or the neutral for time, costs and expenses incurred in the participation of any legal proceedings to which they are not named as a party.

//

Parties using these Rules for binding arbitration shall be deemed to have consented that the claims considered in the arbitration have merged into the award, that the award is the only continuing basis of determining the parties' rights and that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

DJS, the Administrator, their officers, members, employees, agents, attorneys, consultants and representatives shall not be liable to a party or a person or entity claiming through the party by reason of or in any way related to the Administration of a proceeding, these Rules, or any action taken or not taken with respect thereto.

Neither the arbitrator nor mediator shall be liable to a party for any act, error or omission in connection with a dispute resolution process conducted under these Rules unless such party is able to establish by clear and convincing evidence that (i) the arbitrator or mediator has actively participated in an effort by a party to obtain an outcome by fraud or corruption; or (ii) the arbitrator or mediator has engaged in corruption or gross misconduct.

5.0 Rules Exclusive to Expedited Arbitrations

5.01 Expedited Procedures

Expedited Procedures shall be applied in a case where no disclosed claim or counterclaim exceeds \$50,000 exclusive of interest and costs of the proceeding. Parties may also agree in writing to the Expedited Procedures in a case. In any case the parties agree that an award under an expedited process shall not exceed \$50,000.00 exclusive of interest and costs.

(a) Where the Expedited Procedures are to be applied, the arbitration shall be conducted in accordance with the procedures set forth below:

The parties shall accept all notices, process, and other communications from the Administrator by telephone or email.

To the extent that the Rules governing Regular Procedures do not conflict with the Rules governing Expedited Procedures, the Rules governing Regular Procedures shall apply to the Expedited Procedures. All other cases shall be administered in accordance with the Regular Procedures.

5.02 Date, Time and Place of Expedited Hearing

The arbitrator shall set the date, time and place of any hearing and will notify the parties by telephone, at least seven (7) days in advance of the hearing date. Unless mutually agreed upon by the parties, in no event shall the date of the hearing be later than thirty (30) days from the effective date of the notice of selection of the arbitrator.

5.03 Expedited Hearing

Generally, the expedited hearing shall be completed within one day. The arbitrator, for good cause shown, may schedule an additional hearing to be held within seven (7) days.

6.0 Other Procedural Rules

6.01 Communications

Parties to a process shall be deemed to have consented that any paper, notice or other communication necessary or proper for the initiation or continuation of any proceeding under these Rules may be sent to the party by first class mail, postage prepaid, registered or certified, return receipt requested, addressed to the party at the last known address, by overnight delivery service, or made by personal delivery.

The Administrator, neutrals, and the parties may also use facsimile transmission, telex, telegram or other written forms of electronic communications.

All papers, notices, and other communications sent by first class mail shall be deemed received three (3) days after they are deposited in the United States mail. All papers, notices, and other communications sent or delivered by any other means shall be deemed received upon their actual delivery.

6.02 Service

When requested by either the Administrator or the neutral, each party shall provide to the Administrator a copy of any paper, notice or other communication provided by that party to the mediator or another party. The Administrator has no obligation to keep a copy of any paper, notice or other communication provided to it or to act thereon in a timely manner.

6.03 Counting of Days

In all instances in which the counting of days is required by these Rules, the day of the event shall count, but the day on which a paper, notice or other communication is sent shall not count. If the date on which some action would otherwise be required to be taken, a paper, notice or other communication would otherwise be required to be sent or a period would otherwise expire on a holiday, a Saturday or a Sunday, such action shall be taken, such paper, notice or communication sent or such period extended to the next succeeding weekday which is not a weekend day or a holiday. For purposes of these Rules, the term "holiday" means such days that are recognized as holidays by the United States Postal Service.

7.0 Rules on Administration

7.01 Expenses

Except where specified in agreements between the parties, all expenses of the neutrals, including required travel and other expenses of the neutral, shall be borne equally by the parties.

7.02 Neutral's Fee

The compensation of the neutral shall be determined in accordance with the fee and expense schedule of the neutral submitted with the list of neutrals provided by the Administrator, unless other arrangements are made. Other arrangements may be negotiated and agreed upon by the parties and the neutral prior to the commencement of the proceeding. The Administrator should be notified in writing of any arrangements agreed upon that are different from the submitted materials.

7.03 Deposits.

The neutral may require the parties to deposit with the neutral in advance of any proceeding such sums of money as the neutral deems necessary to defray the expense of the proceeding, including the neutral's fee. The neutral shall render an accounting to the parties and return any unexpended balance at the termination of the proceeding, less any costs and expenses associated with the proceeding.

7.04 Amendments and Interpretations

These Rules may be amended or interpreted by the Administrator from time to time, which amendments or interpretations thereafter become binding upon the parties to a proceeding pursuant to these Rules or under the auspices of the Administrator. Any reference to these Rules shall be construed to refer to these Rules as amended and interpreted from time to time.

179 Wash.App. 1018

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 3.

Mary RUSHING as the Administrator and
on Behalf of the ESTATE of Robert COON,
and Mary Rushing, Individually, Respondent,

v.

FRANKLIN HILLS HEALTH &
REHABILITATION, Appellant.

No. 31055-8-III.

Jan. 30, 2014.

Appeal from Spokane Superior Court; Honorable Jerome
J. Leveque.

Attorneys and Law Firms

Patrick Joseph Cronin, Carl Edward Hueber, Winston &
Cashatt, Spokane, WA, for Appellant.

Mark Douglas Kamitomo, The Markam Group Inc PS,
Spokane, WA, George M. Ahrend, Ahrend Albrecht
PLLC, Ephrata, WA, for Respondents.

UNPUBLISHED OPINION

KULIK, J.

*1 The question here is whether the parties should be compelled to arbitrate their dispute. The trial court refused to order arbitration. We reverse and remand for a hearing to address whether the arbitration agreement is enforceable.

FACTS

Robert Coon, a 63-year-old former attorney with a history of mental illness, voluntarily admitted himself to Franklin Hills Health and Rehabilitation Center after he fell and injured himself. During the admission process, Mr. Coon allegedly signed an alternative dispute

resolution (ADR) agreement with Franklin Hills. The ADR applied to any and all disputes arising out of or relating to the resident's stay at the center, including tort, breach of contract, fraud, negligence, wrongful death, departure from any applicable consumer or safety standards, and a variety of other causes of action. The agreement stated that the "intent of the Parties" was that the agreement "shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns." Clerk's Papers (CP) at 45.

Two months later, Mr. Coon died. Mary Rushing, Mr. Coon's daughter, brought a wrongful death action against Franklin Hills in her individual capacity and as the administrator of Mr. Coon's estate. The suit alleged negligence by the nursing staff; failure of Franklin Hills to properly train, instruct, and supervise its employees; and violations by Franklin Hills of the vulnerable adult statute.

Franklin Hills moved to compel arbitration of all Ms. Rushing's claims and produced a copy of the signed arbitration agreement. Ms. Rushing opposed the motion, contending that the arbitration agreement could not be enforced because the signature on the agreement was not that of Mr. Coon and because Mr. Coon did not have the mental capacity to enter into the agreement. As evidence, Ms. Rushing submitted Mr. Coon's power of attorney, the petition to extend Mr. Coon's LRA (least restrictive alternative), Mr. Coon's mental health evaluation, an affidavit of Ms. Rushing, the ADR agreement, and Mr. Coon's mental health authorization to release medical information. Ms. Rushing filed an additional affidavit that addressed Mr. Coon's mental state while he was in Eastern State Hospital and what he would have been capable of understanding when he entered Franklin Hills.

In reply, Franklin Hills asserted that Mr. Coon signed the agreement and was not incapacitated at the time of signing. Franklin Hills filed declarations from six Franklin Hills' staff members who interacted with and evaluated Mr. Coon and their accompanying records and notes. Franklin Hills also filed declarations from a medical doctor and a doctor of clinical psychology who both reviewed Mr. Coon's medical records and concluded that Mr. Coon had a reasonable mental capacity for decision making at the time of admission to Franklin Hills.

At the hearing, the trial court declined to make a finding on whether the arbitration agreement was binding or enforceable. It was concerned about the potential facts that may not be in the record. As a result, the court denied the motion to stay and the motion to compel arbitration. The court said that it did not intend to strike the arbitration agreement, but advised the parties that the issue may be raised again in the same format or through a request for an evidentiary hearing. Specifically, the court stated:

*2 [THE COURT:] Therefore, what ultimately I am doing here is I am going to—I'm denying today the motion to stay. I'm denying that based on the fact that I haven't made a finding as to whether or not the agreement is binding and enforceable or in existence because I do not believe I can do so based on the record provided. That doesn't mean I won't come back in the same format or through a request for evidentiary hearing but I think in either event that it's going to be necessary for me to have the comfort I need to go further with this decision.

Any questions?

[MS. RUSHING]: Just so I understand, Your Honor, you're not clear on either issue, whether it's his signature or the mental competency?

THE COURT: That's true, I have questions on each. No findings one way or the other.

Report of Proceedings (RP) at 31–32.

The trial court did not order an evidentiary hearing. When asked for direction on the scope of discovery, the court's answer was vague:

[FRANKLIN HILLS]: ... I think we're going to need direction from the Court because we would object to all kinds of discovery that don't go to these issues. That's the very purpose for having an arbitration agreement is to not do certain types of discovery and to move the case forward. So I think we're going to need some direction by the Court or perhaps maybe some suggestions or agreements as to what we could do.

On the other hand, Your Honor, I would think by law we could note this up for [an] evidentiary hearing.

THE COURT: You could do that and that would be fine. In terms of direction from the Court, I don't know exactly what you are asking the Court to give. If in fact the parties enter into some discovery or some process that one or the other thinks is inappropriate, the only way to address that for direction would be to understand each party's position on what direction it should go. But to tell you today which direction to go I think is presumptive. Maybe I'm missing both but you got a denial on your motion so it's not stayed and it's not being compelled. That's kind of where you're left and I think your direction now is your basic lawyering instincts on what tactical approach is best suited for your client's best interest. That's vague; I know it.

RP at 32–33. The trial court did not limit the scope of discovery to the issues of whether or not Mr. Coon signed the agreement or was competent. The trial court stated that it was not in a position to put limits on the discovery because it needed to know more about the merits of the argument. The court suggested that the parties come up with their own discovery agreement that the court would resolve any arguments or other issues that arise.

Franklin Hills appeals the denial of its motion to compel arbitration. It contends that the trial court erred in denying the motion because Ms. Rushing failed to establish by clear, cogent, and convincing evidence that Mr. Coon was incapacitated at the time he signed the ADR agreement, or that the signature on the agreement did not belong to Mr. Coon. Franklin Hills also contends that Ms. Rushing is required to arbitrate her individual cause of action according to the terms of the arbitration agreement signed by Mr. Coon.

ANALYSIS

*3 We give de novo review to a trial court's decision to compel or deny arbitration. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). "The party opposing arbitration bears the burden of showing that the agreement is not enforceable." *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). Washington has a strong public policy favoring arbitration. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 341 n. 4, 103 P.3d 773 (2004). A trial court's decision denying a motion to compel arbitration is immediately

appealable. *Hill v. Garda CL Nw., Inc.*, 179Wn.2d 47, 308 P.3d 635, 638 (2013).

Motion to Compel. Courts determine the threshold matter of whether an arbitration agreement is valid and enforceable. See *McKee v. AT & T Corp.*, 164 Wn.2d 372, 383–84, 191 P.3d 845 (2008). An arbitration agreement “is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.” RCW 7.04A.060(1). If a party opposes a motion to compel arbitration, “the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.” RCW 7.04A.070(1).

Standard contract defenses can be used to challenge enforceability of an arbitration agreement. *McKee*, 164 Wn.2d at 383. The person seeking to enforce a contract need only prove the existence of a contract and the other party's objective manifestation of intent to be bound. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). Once a party's objectively manifested intent has been established, the burden then moves to the party seeking to avoid the contract to prove a defense to the contract's enforcement. *Id.*

The signature of a party is evidence of a party's objective intent to be bound. See *id.* The trier of fact has the duty to decide the factual question of whether or not the handwriting in question belongs to the person charged with executing the document. *Mitchell v. Mitchell*, 24 Wn.2d 701, 704, 166 P.2d 938 (1946).

A contract may be invalidated if a person lacks sufficient mental capacity or competence to appreciate the nature and effect of the particular contract at issue. *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 108–09, 120 P.2d 527 (1942) (quoting 17 C.J.S. *Contracts* § 133, at 479 (1939)). In Washington, a person is presumed competent to enter into an agreement. *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). A person challenging the enforcement of an agreement can overcome the presumption by presenting clear, cogent, and convincing evidence that the party signing the contract did not possess sufficient mind or reason at the time he entered into the contract to enable him to comprehend the nature,

terms, and effect of the contract. *Id.* “What constitutes clear, cogent, and convincing proof necessarily depends upon the character and extent of the evidence considered, viewed in connection with the surrounding facts and circumstances.” *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

*4 The question of contractual capacity or competence is a question of fact. *Grannum*, 70 Wn.2d at 307. It is the responsibility of the trial court to determine whether the evidence meets the clear, cogent, and convincing standard because the determination requires weighing and evaluating evidence and credibility determinations that are best suited for the trier of fact. *Bland*, 63 Wn.2d at 154. “Thus, the appellate court's role is limited to determining whether substantial evidence supports the trial court's findings of fact.” *Endicott v. Saul*, 142 Wn.App. 899, 910, 176 P.3d 560 (2008).

“When disputes exist as to the circumstances surrounding an agreement, we remand to the trial court to make additional findings.” *Alder*, 153 Wn.2d at 350. In *Alder*, Mr. Alder sought to void an arbitration agreement for procedural unconscionability, claiming that he lacked meaningful choice in entering the contract and that he did not have a reasonable opportunity to understand the terms of the contract because of his limited ability to comprehend the English language. *Id.* at 348–49. The Washington Supreme Court determined that the circumstances suggested that Fred Lind Manor provided Mr. Alder with a reasonable opportunity to understand the terms of the agreement. *Id.* at 350–51. However, because both parties offered different facts pertaining to the manner in which the contract was entered into, the Supreme Court determined that it could not make a determination of procedural unconscionability without further factual findings. *Id.* The court remanded the case for the entry of additional findings. *Id.*

Here, we cannot review the trial court's denial of the motion to compel without a decision on enforceability of the arbitration agreement. Two reasons support this conclusion. First, under RCW 7.04A.070, the trial court was required to determine whether the agreement was enforceable before denying a motion to compel arbitration. The trial court expressly stated that it did not know whether the agreement was enforceable. Without such a determination, the trial court could not deny the motion to compel. Remand is necessary for the

court to make the appropriate determination regarding enforceability of the arbitration agreement.

Second, much like *Alder*, unresolved factual disputes must be decided by the trial court before we can engage in review. The enforceability of the arbitration agreement depends on whether Mr. Coon was competent when he entered into the agreement and whether he signed the agreement. These are both questions of fact to be determined by the trial court. The trial court has the task of weighing the evidence and credibility of the witnesses to determine if Mr. Coon had the mental capacity to contract. Only after such factual findings are made can this court give de novo review to the trial court's decision on Franklin Hills' motion to compel arbitration.¹

¹ *But see Weiss v. Lonquist*, 153 Wn.App. 502, 513 n. 8, 224 P.3d 787 (2009) (the appellate court determined that the absence of findings and conclusions was of no consequence because the trial court did not receive testimony in relation to the motion).

On remand, discovery must be limited to the issues surrounding the validity of the arbitration agreement. "If a party files a motion with the court to order arbitration under this section, the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." RCW 7.04A.070(5). The threshold question of arbitrability must be resolved without inquiry into the merits of the dispute. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn.App. 400, 403, 200 P.3d 254 (2009).

*5 However, a full evidentiary hearing may not be required. Whether an agreement is enforceable is to be summarily decided by the trial court. RCW 7.04A.070(1). The trial court may decide the issue of enforceability if the affidavits and evidence in the record are sufficient to summarily make a determination. If needed, the trial court should allow the parties to produce additional evidence regarding the enforceability of the arbitration agreement. *See Alder*, 153 Wn.2d at 353–54 (where the court set forth the procedure on remand for the introduction of evidence regarding costs of arbitration).

Findings are needed in order to review the trial court's reasoning in denying the motion to compel. The matter must be remanded for the trial court to determine whether the arbitration agreement is enforceable. Discovery must

be limited to the issues surrounding the validity of the arbitration agreement.

The parties also dispute whether the declarations of Franklin Hills' employees are inadmissible under the deadman's statute, RCW 5 .60.030, and whether Mr. Coon's power of attorney precluded him from contracting with Franklin Hills. These issues were argued at the motion hearing but not decided by the trial court. The issues may be raised again on remand.

Individual Claims. Franklin Hills contends that Ms. Rushing's individual claims are subject to arbitration even though she did not sign the agreement because Ms. Rushing's claims arise out of the admission contract, which therefore binds her to all of its terms, including the arbitration agreement. The arbitration agreement expressly provides that it applies to all disputes that arise out of the agreement or the resident's stay at the center, and that heirs of the parties were bound by the agreement.

Generally, a nonsignatory party is not subject to an arbitration agreement signed by another. *Satomi Owners Ass'n*, 167 Wn.2d at 810. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* (internal quotation marks omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)). However as an exception, equitable estoppel "precludes a party from claiming the benefits from a contract while simultaneously attempting to avoid the burdens that contract imposes." *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012) (internal quotation marks omitted) (quoting *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045–46 (9th Cir.2009)); *see also Townsend*, 173 Wn.2d at 464 (Stephens, J., concurring/dissenting).

Again, the trial court did not make a decision on whether Ms. Rushing was bound by the arbitration agreement. Also, it is possible that this issue is irrelevant if the trial court determines that the arbitration agreement is not enforceable because Mr. Coon did not have the capacity to enter into the agreement. Therefore, even though Ms. Rushing's obligation to arbitrate is an issue of law, remand is necessary for a resolution of the underlying factual issues that may affect this court's decision.

*6 *Attorney Fees.* Franklin Hills requests attorney fees on appeal as the prevailing party. Neither party prevailed. Thus, we decline an award of attorney fees.

WE CONCUR: BROWN and FEARING, JJ.

We reverse and remand for a hearing to address whether the arbitration agreement is enforceable.

All Citations

Not Reported in P.3d, 179 Wash.App. 1018, 2014 WL 346540

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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West's Revised Code of Washington Annotated
Title 5. Evidence (Refs & Annos)
Chapter 5.62. Witnesses--Registered Nurses

West's RCWA 5.62.010

5.62.010. Definitions

Currentness

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Registered nurse" means a registered nurse or advanced nurse practitioner licensed under chapter 18.79 RCW.

(2) "Protocol" means a regimen to be carried out by a registered nurse and prescribed by a licensed physician under chapter 18.71 RCW, or a licensed osteopathic physician under chapter 18.57 RCW, which is consistent with chapter 18.79 RCW and the rules adopted under that chapter.

(3) "Primary care" means screening, assessment, diagnosis, and treatment for the purpose of promotion of health and detection of disease or injury, as authorized by chapter 18.79 RCW and the rules adopted under that chapter.

Credits

[1994 sp.s. c 9 § 703; 1987 c 198 § 1; 1985 c 447 § 1.]

Notes of Decisions (1)

West's RCWA 5.62.010, WA ST 5.62.010

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West's Revised Code of Washington Annotated Title 7. Special Proceedings and Actions (Refs & Annos) Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)
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West's RCWA 7.70.020

7.70.020. Definitions

Effective: June 10, 2010

Currentness

As used in this chapter "health care provider" means either:

(1) A person licensed by this state to provide health care or related services including, but not limited to, an East Asian medicine practitioner, a physician, osteopathic physician, dentist, nurse, optometrist, podiatric physician and surgeon, chiropractor, physical therapist, psychologist, pharmacist, optician, physician assistant, midwife, osteopathic physician's assistant, nurse practitioner, or physician's trained mobile intensive care paramedic, including, in the event such person is deceased, his or her estate or personal representative;

(2) An employee or agent of a person described in part (1) above, acting in the course and scope of his employment, including, in the event such employee or agent is deceased, his or her estate or personal representative; or

(3) An entity, whether or not incorporated, facility, or institution employing one or more persons described in part (1) above, including, but not limited to, a hospital, clinic, health maintenance organization, or nursing home; or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment, including in the event such officer, director, employee, or agent is deceased, his or her estate or personal representative.

Credits

[2010 c 286 § 13, eff. June 10, 2010; 1995 c 323 § 3; 1985 c 326 § 27; 1981 c 53 § 1; 1975-'76 2nd ex.s. c 56 § 7.]

Notes of Decisions (1)

West's RCWA 7.70.020, WA ST 7.70.020

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West's Revised Code of Washington Annotated
Title 7. Special Proceedings and Actions (Refs & Annos)
Chapter 7.70. Actions for Injuries Resulting from Health Care (Refs & Annos)

West's RCWA 7.70.050

7.70.050. Failure to secure informed consent--Necessary elements of proof--Emergency situations

Effective: July 22, 2011
Currentness

(1) The following shall be necessary elements of proof that injury resulted from health care in a civil negligence case or arbitration involving the issue of the alleged breach of the duty to secure an informed consent by a patient or his or her representatives against a health care provider:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts;

(d) That the treatment in question proximately caused injury to the patient.

(2) Under the provisions of this section a fact is defined as or considered to be a material fact, if a reasonably prudent person in the position of the patient or his or her representative would attach significance to it deciding whether or not to submit to the proposed treatment.

(3) Material facts under the provisions of this section which must be established by expert testimony shall be either:

(a) The nature and character of the treatment proposed and administered;

(b) The anticipated results of the treatment proposed and administered;

(c) The recognized possible alternative forms of treatment; or

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment administered and in the recognized possible alternative forms of treatment, including nontreatment.

7.70.050. Failure to secure informed consent--Necessary elements..., WA ST 7.70.050

(4) If a recognized health care emergency exists and the patient is not legally competent to give an informed consent and/or a person legally authorized to consent on behalf of the patient is not readily available, his or her consent to required treatment will be implied.

Credits

[2011 c 336 § 252, eff. July 22, 2011; 1975-'76 2nd ex.s. c 56 § 10.]

Notes of Decisions (114)

West's RCWA 7.70.050, WA ST 7.70.050

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West's Revised Code of Washington Annotated
Title 18. Businesses and Professions (Refs & Annos)
Chapter 18.51. Nursing Homes (Refs & Annos)

West's RCWA 18.51.005

18.51.005. Purpose

Currentness

The purpose of this chapter is to provide for the development, establishment, and enforcement of standards for the maintenance and operation of nursing homes, which, in the light of advancing knowledge, will promote safe and adequate care and treatment of the individuals therein. An important secondary purpose is the improvement of nursing home practices by educational methods so that such practices eventually exceed the minimum requirements of the basic law and its original standards.

Credits

[1951 c 117 § 1.]

Notes of Decisions (1)

West's RCWA 18.51.005, WA ST 18.51.005

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West's Revised Code of Washington Annotated Title 18. Businesses and Professions (Refs & Annos) Chapter 18.51. Nursing Homes (Refs & Annos)

West's RCWA 18.51.070

18.51.070. Rules

Effective: July 22, 2011
Currentness

The department, after consultation with the board of health, shall adopt, amend, and promulgate such rules, regulations, and standards with respect to all nursing homes to be licensed hereunder as may be designed to further the accomplishment of the purposes of this chapter in promoting safe and adequate medical and nursing care of individuals in nursing homes and the sanitary, hygienic, and safe conditions of the nursing home in the interest of public health, safety, and welfare.

Credits

[2011 c 151 § 3, eff. July 22, 2011; 1979 ex.s. c 211 § 64; 1951 c 117 § 8.]

Notes of Decisions (2)

West's RCWA 18.51.070, WA ST 18.51.070

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Revised Code of Washington Annotated Title 70. Public Health and Safety (Refs & Annos) Chapter 70.02. Medical Records--Health Care Information Access and Disclosure (Refs & Annos)
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West's RCWA 70.02.010

70.02.010. Definitions (as amended by 2014 c 220) (Effective until April 1, 2018)

Effective: April 1, 2016 to March 31, 2018
Currentness

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Admission" has the same meaning as in RCW 71.05.020.
- (2) "Audit" means an assessment, evaluation, determination, or investigation of a health care provider by a person not employed by or affiliated with the provider to determine compliance with:
 - (a) Statutory, regulatory, fiscal, medical, or scientific standards;
 - (b) A private or public program of payments to a health care provider; or
 - (c) Requirements for licensing, accreditation, or certification.
- (3) "Commitment" has the same meaning as in RCW 71.05.020.
- (4) "Custody" has the same meaning as in RCW 71.05.020.
- (5) "Deidentified" means health information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual.
- (6) "Department" means the department of social and health services.
- (7) "Designated mental health professional" has the same meaning as in RCW 71.05.020 or 71.34.020, as applicable.
- (8) "Detention" or "detain" has the same meaning as in RCW 71.05.020.

(9) "Directory information" means information disclosing the presence, and for the purpose of identification, the name, location within a health care facility, and the general health condition of a particular patient who is a patient in a health care facility or who is currently receiving emergency health care in a health care facility.

(10) "Discharge" has the same meaning as in RCW 71.05.020.

(11) "Evaluation and treatment facility" has the same meaning as in RCW 71.05.020 or 71.34.020, as applicable.

(12) "Federal, state, or local law enforcement authorities" means an officer of any agency or authority in the United States, a state, a tribe, a territory, or a political subdivision of a state, a tribe, or a territory who is empowered by law to: (a) Investigate or conduct an official inquiry into a potential criminal violation of law; or (b) prosecute or otherwise conduct a criminal proceeding arising from an alleged violation of law.

(13) "General health condition" means the patient's health status described in terms of "critical," "poor," "fair," "good," "excellent," or terms denoting similar conditions.

(14) "Health care" means any care, service, or procedure provided by a health care provider:

(a) To diagnose, treat, or maintain a patient's physical or mental condition; or

(b) That affects the structure or any function of the human body.

(15) "Health care facility" means a hospital, clinic, nursing home, laboratory, office, or similar place where a health care provider provides health care to patients.

(16) "Health care information" means any information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care, including a patient's deoxyribonucleic acid and identified sequence of chemical base pairs. The term includes any required accounting of disclosures of health care information.

(17) "Health care operations" means any of the following activities of a health care provider, health care facility, or third-party payor to the extent that the activities are related to functions that make an entity a health care provider, a health care facility, or a third-party payor:

(a) Conducting: Quality assessment and improvement activities, including outcomes evaluation and development of clinical guidelines, if the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; population-based activities relating to improving health or reducing health care costs, protocol development, case management and care coordination, contacting of health care providers and patients with information about treatment alternatives; and related functions that do not include treatment;

(b) Reviewing the competence or qualifications of health care professionals, evaluating practitioner and provider performance and third-party payor performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of nonhealth care professionals, accreditation, certification, licensing, or credentialing activities;

(c) Underwriting, premium rating, and other activities relating to the creation, renewal, or replacement of a contract of health insurance or health benefits, and ceding, securing, or placing a contract for reinsurance of risk relating to claims for health care, including stop-loss insurance and excess of loss insurance, if any applicable legal requirements are met;

(d) Conducting or arranging for medical review, legal services, and auditing functions, including fraud and abuse detection and compliance programs;

(e) Business planning and development, such as conducting cost-management and planning-related analyses related to managing and operating the health care facility or third-party payor, including formulary development and administration, development, or improvement of methods of payment or coverage policies; and

(f) Business management and general administrative activities of the health care facility, health care provider, or third-party payor including, but not limited to:

(i) Management activities relating to implementation of and compliance with the requirements of this chapter;

(ii) Customer service, including the provision of data analyses for policy holders, plan sponsors, or other customers, provided that health care information is not disclosed to such policy holder, plan sponsor, or customer;

(iii) Resolution of internal grievances;

(iv) The sale, transfer, merger, or consolidation of all or part of a health care provider, health care facility, or third-party payor with another health care provider, health care facility, or third-party payor or an entity that following such activity will become a health care provider, health care facility, or third-party payor, and due diligence related to such activity; and

(v) Consistent with applicable legal requirements, creating deidentified health care information or a limited dataset for the benefit of the health care provider, health care facility, or third-party payor.

(18) "Health care provider" means a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.

(19) "Human immunodeficiency virus" or "HIV" has the same meaning as in RCW 70.24.017.

(20) "Imminent" has the same meaning as in RCW 71.05.020.

(21) "Information and records related to mental health services" means a type of health care information that relates to all information and records compiled, obtained, or maintained in the course of providing services by a mental health service agency or mental health professional to persons who are receiving or have received services for mental illness. The term includes mental health information contained in a medical bill, registration records, as defined in RCW 71.05.020, and all other records regarding the person maintained by the department, by regional support networks and their staff, and by treatment facilities. The term further includes documents of legal proceedings under chapter 71.05, 71.34, or 10.77 RCW, or somatic health care information. For health care information maintained by a hospital as defined in RCW 70.41.020 or a health care facility or health care provider that participates with a hospital in an organized health care arrangement defined under federal law, "information and records related to mental health services" is limited to information and records of services provided by a mental health professional or information and records of services created by a hospital-operated community mental health program as defined in *RCW 71.24.025(6). The term does not include psychotherapy notes.

(22) "Information and records related to sexually transmitted diseases" means a type of health care information that relates to the identity of any person upon whom an HIV antibody test or other sexually transmitted infection test is performed, the results of such tests, and any information relating to diagnosis of or treatment for any confirmed sexually transmitted infections.

(23) "Institutional review board" means any board, committee, or other group formally designated by an institution, or authorized under federal or state law, to review, approve the initiation of, or conduct periodic review of research programs to assure the protection of the rights and welfare of human research subjects.

(24) "Legal counsel" has the same meaning as in RCW 71.05.020.

(25) "Local public health officer" has the same meaning as in RCW 70.24.017.

(26) "Maintain," as related to health care information, means to hold, possess, preserve, retain, store, or control that information.

(27) "Mental health professional" means a psychiatrist, psychologist, psychiatric advanced registered nurse practitioner, psychiatric nurse, or social worker, and such other mental health professionals as may be defined by rules adopted by the secretary of social and health services under chapter 71.05 RCW, whether that person works in a private or public setting.

(28) "Mental health service agency" means a public or private agency that provides services to persons with mental disorders as defined under RCW 71.05.020 or 71.34.020 and receives funding from public sources. This includes evaluation and treatment facilities as defined in RCW 71.34.020, community mental health service delivery systems, or community mental health programs, as defined in *RCW 71.24.025, and facilities conducting competency evaluations and restoration under chapter 10.77 RCW.

(29) "Minor" has the same meaning as in RCW 71.34.020.

(30) "Parent" has the same meaning as in RCW 71.34.020.

(31) "Patient" means an individual who receives or has received health care. The term includes a deceased individual who has received health care.

(32) "Payment" means:

(a) The activities undertaken by:

(i) A third-party payor to obtain premiums or to determine or fulfill its responsibility for coverage and provision of benefits by the third-party payor; or

(ii) A health care provider, health care facility, or third-party payor, to obtain or provide reimbursement for the provision of health care; and

(b) The activities in (a) of this subsection that relate to the patient to whom health care is provided and that include, but are not limited to:

(i) Determinations of eligibility or coverage, including coordination of benefits or the determination of cost-sharing amounts, and adjudication or subrogation of health benefit claims;

(ii) Risk adjusting amounts due based on enrollee health status and demographic characteristics;

(iii) Billing, claims management, collection activities, obtaining payment under a contract for reinsurance, including stop-loss insurance and excess of loss insurance, and related health care data processing;

(iv) Review of health care services with respect to medical necessity, coverage under a health plan, appropriateness of care, or justification of charges;

(v) Utilization review activities, including precertification and preauthorization of services, and concurrent and retrospective review of services; and

(vi) Disclosure to consumer reporting agencies of any of the following health care information relating to collection of premiums or reimbursement:

(A) Name and address;

(B) Date of birth;

(C) Social security number;

(D) Payment history;

(E) Account number; and

(F) Name and address of the health care provider, health care facility, and/or third-party payor.

(33) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(34) "Professional person" has the same meaning as in RCW 71.05.020.

(35) "Psychiatric advanced registered nurse practitioner" has the same meaning as in RCW 71.05.020.

(36) "Psychotherapy notes" means notes recorded, in any medium, by a mental health professional documenting or analyzing the contents of conversations during a private counseling session or group, joint, or family counseling session, and that are separated from the rest of the individual's medical record. The term excludes mediation prescription and monitoring, counseling session start and stop times, the modalities and frequencies of treatment furnished, results of clinical tests, and any summary of the following items: Diagnosis, functional status, the treatment plan, symptoms, prognosis, and progress to date.

(37) "Reasonable fee" means the charges for duplicating or searching the record, but shall not exceed sixty-five cents per page for the first thirty pages and fifty cents per page for all other pages. In addition, a clerical fee for searching and handling may be charged not to exceed fifteen dollars. These amounts shall be adjusted biennially in accordance with changes in the consumer price index, all consumers, for Seattle-Tacoma metropolitan statistical area as determined by the secretary of health. However, where editing of records by a health care provider is required by statute and is done by the provider personally, the fee may be the usual and customary charge for a basic office visit.

(38) "Release" has the same meaning as in RCW 71.05.020.

(39) "Resource management services" has the same meaning as in RCW 71.05.020.

(40) "Serious violent offense" has the same meaning as in RCW 71.05.020.

(41) "Sexually transmitted infection" or "sexually transmitted disease" has the same meaning as "sexually transmitted disease" in RCW 70.24.017.

(42) "Test for a sexually transmitted disease" has the same meaning as in RCW 70.24.017.

(43) "Third-party payor" means an insurer regulated under Title 48 RCW authorized to transact business in this state or other jurisdiction, including a health care service contractor, and health maintenance organization; or an employee welfare benefit plan, excluding fitness or wellness plans; or a state or federal health benefit program.

(44) "Treatment" means the provision, coordination, or management of health care and related services by one or more health care providers or health care facilities, including the coordination or management of health care by a health care provider or health care facility with a third party; consultation between health care providers or health care facilities relating to a patient; or the referral of a patient for health care from one health care provider or health care facility to another.

Credits

[2014 c 220 § 4, eff. July 1, 2014; 2013 c 200 § 1, eff. July 1, 2014; 2006 c 235 § 2, eff. March 27, 2006; 2005 c 468 § 1, eff. July 24, 2005; 2002 c 318 § 1; 1993 c 448 § 1; 1991 c 335 § 102.]

Notes of Decisions (3)

West's RCWA 70.02.010, WA ST 70.02.010

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

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West's Revised Code of Washington Annotated Title 74. Public Assistance (Refs & Annos) Chapter 74.34. Abuse of Vulnerable Adults (Refs & Annos)

West's RCWA 74.34.005

74.34.005. Findings

Effective: June 12, 2014

Currentness

The legislature finds and declares that:

- (1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;
- (2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts;
- (3) A vulnerable adult may lack the ability to perform or obtain those services necessary to maintain his or her well-being because he or she lacks the capacity for consent;
- (4) A vulnerable adult may have health problems that place him or her in a dependent position;
- (5) The department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults;
- (6) The department must provide protective services in the least restrictive environment appropriate and available to the vulnerable adult.

Credits

[1999 c 176 § 2.]

Notes of Decisions (5)

West's RCWA 74.34.005, WA ST 74.34.005

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

West's Revised Code of Washington Annotated
Title 74. Public Assistance (Refs & Annos)
Chapter 74.42. Nursing Homes--Resident Care, Operating Standards (Refs & Annos)

West's RCWA 74.42.020

74.42.020. Minimum standards

Currentness

The standards in RCW 74.42.030 through 74.42.570 are the minimum standards for facilities licensed under chapter 18.51 RCW: PROVIDED, HOWEVER, That RCW 74.42.040, 74.42.140 through 74.42.280, 74.42.300, 74.42.360, 74.42.370, 74.42.380, 74.42.420 (2), (4), (5), (6) and (7), 74.42.430(3), 74.42.450 (2) and (3), 74.42.520, 74.42.530, 74.42.540, 74.42.570, and 74.42.580 shall not apply to any nursing home or institution conducted for those who rely upon treatment by prayer or spiritual means in accordance with the creed or tenets of any well-recognized church or religious denomination, or for any nursing home or institution operated for the exclusive care of members of a convent as defined in RCW 84.36.800 or rectory, monastery, or other institution operated for the care of members of the clergy.

Credits

[1995 1st sp.s. c 18 § 68; 1982 c 120 § 1; 1980 c 184 § 6; 1979 ex.s. c 211 § 2.]

West's RCWA 74.42.020, WA ST 74.42.020

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West's Revised Code of Washington Annotated Title 74. Public Assistance (Refs & Annos) Chapter 74.42. Nursing Homes--Resident Care, Operating Standards (Refs & Annos)
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West's RCWA 74.42.050

74.42.050. Residents to be treated with consideration, respect--Complaints

Currentness

(1) Residents shall be treated with consideration, respect, and full recognition of their dignity and individuality. Residents shall be encouraged and assisted in the exercise of their rights as residents of the facility and as citizens.

(2) A resident or guardian, if any, may submit complaints or recommendations concerning the policies of the facility to the staff and to outside representatives of the resident's choice. No facility may restrain, interfere, coerce, discriminate, or retaliate in any manner against a resident who submits a complaint or recommendation.

Credits

[1979 ex.s. c 211 § 5.]

West's RCWA 74.42.050, WA ST 74.42.050

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

West's Revised Code of Washington Annotated
Title 74. Public Assistance (Refs & Annos)
Chapter 74.42. Nursing Homes--Resident Care, Operating Standards (Refs & Annos)

West's RCWA 74.42.080

74.42.080. Confidentiality of records

Currentness

Residents' records, including information in an automatic data bank, shall be treated confidentially. The facility shall not release information from a resident's record to a person not otherwise authorized by law to receive the information without the resident's or the resident's guardian's written consent.

Credits

[1979 ex.s. c 211 § 8.]

West's RCWA 74.42.080, WA ST 74.42.080

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West's Revised Code of Washington Annotated
Title 74. Public Assistance (Refs & Annos)
Chapter 74.34. Abuse of Vulnerable Adults (Refs & Annos)

West's RCWA 74.34.200

74.34.200. Abandonment, abuse, financial exploitation, or neglect of
a vulnerable adult--Cause of action for damages--Legislative intent

Effective: July 28, 2013

Currentness

(1) In addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. This action shall be available where the defendant is or was a corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or an individual provider.

(2) It is the intent of the legislature, however, that where there is a dispute about the care or treatment of a vulnerable adult, the parties should use the least formal means available to try to resolve the dispute. Where feasible, parties are encouraged but not mandated to employ direct discussion with the health care provider, use of the long-term care ombuds or other intermediaries, and, when necessary, recourse through licensing or other regulatory authorities.

(3) In an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorneys' fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.

Credits

[2013 c 23 § 219, eff. July 28, 2013; 1999 c 176 § 15; 1995 1st sp.s. c 18 § 85.]

Notes of Decisions (25)

West's RCWA 74.34.200, WA ST 74.34.200

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

KeyCite Yellow Flag - Negative Treatment
Proposed Regulation

Washington Administrative Code
Title 388. Social and Health Services, Department of
Aging and Adult Services
Chapter 388-97. Nursing Homes (Refs & Annos)
Subchapter I. Resident Rights, Care and Related Services
Resident Rights

WAC 388-97-0180

388-97-0180. Resident rights.

Currentness

- (1) The nursing home must meet the resident rights requirements of this section and those in the rest of the chapter.
- (2) The resident has a right to a dignified existence, self-determination, and communication with, and access to individuals and services inside and outside the nursing home.
- (3) A nursing home must promote and protect the rights of each resident, including those with limited cognition or other barriers that limit the exercise of rights.
- (4) The resident has the right to:
 - (a) Exercise his or her rights as a resident of the nursing home and as a citizen or resident of the United States. Refer to WAC 388-97-0240;
 - (b) Be free of interference, coercion, discrimination, and reprisal from the nursing home in exercising his or her rights; and
 - (c) Not be asked or required to sign any contract or agreement that includes provisions to waive:
 - (i) Any resident right set forth in this chapter or in the applicable licensing or certification laws; or
 - (ii) Any potential liability for personal injury or losses of personal property.
- (5) The nursing home must take steps to safeguard residents and their personal property from foreseeable risks of injury or loss.

Credits

Statutory Authority: Chapters 18.51 and 74.42 RCW and 42 C.F.R. 489.52. WSR 08-20-062, S 388-97-0180, filed 9/24/08, effective 11/1/08.

Current with amendments adopted through the 16-18 Washington State Register dated, September 21, 2016.

WAC 388-97-0180, WA ADC 388-97-0180

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Chapter 388-97. Nursing Homes (Refs & Annos)
Subchapter I. Resident Rights, Care and Related Services
Resident Rights

WAC 388-97-0240

388-97-0240. Resident decision making.

Currentness

(1) At the time of admission, or not later than the completion of the initial comprehensive resident assessment, the nursing home must determine if the resident:

- (a) Has appointed another individual to make his or her health care, financial, or other decisions;
- (b) Has created any advance directive or other legal documents that will establish a surrogate decision maker in the future; and
- (c) Is not making his or her own decisions, and identify who has the authority for surrogate decision making, and the scope of the surrogate decision maker's authority.

(2) The nursing home must review the requirements of (1) of this section when the resident's condition warrants the review or when there is a significant change in the resident's condition.

(3) In fulfilling its duty to determine who, if anyone, is authorized to make decisions for the resident, the nursing home must:

- (a) Obtain copies of the legal documents that establish the surrogate decision maker's authority to act; and
- (b) Document in the resident's clinical record:
 - (i) The name, address, and telephone number of the individual who has legal authority for substitute decision making;
 - (ii) The type of decision making authority such individual has; and

- (iii) Where copies of the legal documents are located at the facility.
- (4) In accordance with state law or at the request of the resident, the resident's surrogate decision maker is, in the case of:
- (a) A capacitated resident, the individual authorized by the resident to make decisions on the resident's behalf;
 - (b) A resident adjudicated by a court of law to be incapacitated, the court appointed guardian; and
 - (c) A resident who has been determined to be incapacitated, but is not adjudicated incapacitated established through:
 - (i) A legal document, such as a durable power of attorney for health care; or
 - (ii) Authority for substitute decision making granted by state law, including RCW 7.70.065.
- (5) Determination of an individual's incapacity must be a process according to state law not a medical diagnosis only and be based on:
- (a) Demonstrated inability in decision making over time that creates a significant risk of personal harm;
 - (b) A court order; or
 - (c) The criteria contained in a legal document, such as durable power of attorney for health care.
- (6) The nursing home must promote the resident's right to exercise decision making and self-determination to the fullest extent possible, taking into consideration his or her ability to understand and respond. Therefore, the nursing home must presume that the resident is the resident's own decision maker unless:
- (a) A court has established a full guardianship of the individual;
 - (b) The capacitated resident has clearly and voluntarily appointed a surrogate decision maker;
 - (c) A surrogate is established by a legal document such as a durable power of attorney for health care; or
 - (d) The facility determines that the resident is an incapacitated individual according to RCW 11.88.010 and (5)(a) of this section.

(7) The nursing home must honor the exercise of the resident's rights by the surrogate decision maker as long as the surrogate acts in accordance with this section and with state and federal law which govern his or her appointment.

(8) If a surrogate decision maker exercises a resident's rights, the nursing home must take into consideration the resident's ability to understand and respond and must:

- (a) Inform the resident that a surrogate decision maker has been consulted;
- (b) Provide the resident with the information and opportunity to participate in all decision making to the maximum extent possible; and
- (c) Recognize that involvement of a surrogate decision maker does not lessen the nursing home's duty to:
 - (i) Protect the resident's rights; and
 - (ii) Comply with state and federal laws.

(9) The nursing home must:

- (a) Regularly review any determination of incapacity based on (4)(b) and (c) of this section;
- (b) Except for residents with a guardian, cease to rely upon the surrogate decision maker to exercise the resident's rights, if the resident regains capacity, unless so designated by the resident or by court order; and
- (c) In the case of a guardian notify the court of jurisdiction in writing if:
 - (i) The resident regains capacity;
 - (ii) The guardian is not respecting or promoting the resident's rights;
 - (iii) The guardianship should be modified; or
 - (iv) A different guardian needs to be appointed.

Credits

Statutory Authority: Chapters 18.51 and 74.42 RCW and 42 C.F.R. 489.52. WSR 08-20-062, S 388-97-0240, filed 9/24/08, effective 11/1/08.

Current with amendments adopted through the 16-18 Washington State Register dated, September 21, 2016.

WAC 388-97-0240, WA ADC 388-97-0240

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Chapter 388-97. Nursing Homes (Refs & Annos)
Subchapter I. Resident Rights, Care and Related Services
Resident Rights

WAC 388-97-0260

388-97-0260. Informed consent.

Currentness

(1) The nursing home must ensure that the informed consent process is followed with:

(a) The resident to the maximum extent possible, taking into consideration his or her ability to understand and respond; and

(b) The surrogate decision maker when the resident is determined to be incapacitated as established through the provision of a legal document such as durable power of attorney for health care, a court proceeding, or as authorized by state law, including RCW 7.70.065. The surrogate decision maker must:

(i) First determine if the resident would consent or refuse the proposed or alternative treatment;

(ii) Discuss determination of consent or refusal with the resident whenever possible; and

(iii) When a determination of the resident's consent or refusal of treatment cannot be made, make the decision in the best interest of the resident.

(2) The informed consent process must include, in words and language that the resident, or if applicable the resident's surrogate decision maker, understands, a description of:

(a) The nature and character of the proposed treatment;

(b) The anticipated results of the proposed treatment;

(c) The recognized possible alternative forms of treatment;

(d) The recognized serious possible risks, complications, and anticipated benefits involved in the treatment and in the recognized possible alternative forms of treatment including nontreatment; and

(e) The right of the resident to choose not to be informed.

(3) To ensure informed consent or refusal by a resident, or if applicable the resident's surrogate decision maker, regarding plan or care options, the nursing home must:

(a) Provide the informed consent process to the resident in a neutral manner and in a language, words, and manner the resident can understand;

(b) Inform the resident of the right to consent to or refuse care and service options at the time of resident assessment and plan of care development (see WAC 388-97-1000 and 388-97-1020 and with condition changes, as necessary to ensure that the resident's wishes are known;

(c) Inform the resident at the time of initial plan of care decisions and periodically of the right to change his or her mind about an earlier consent or refusal decision;

(d) Ensure that evidence of informed consent or refusal is consistent with WAC 388-97-1000 and 388-97-1020; and

(e) Where appropriate, include evidence of resident's choice not to be informed as required in subsections (2) and (3) of this section.

Credits

Statutory Authority: Chapters 18.51 and 74.42 RCW and 42 C.F.R. 489.52. WSR 08-20-062, S 388-97-0260, filed 9/24/08, effective 11/1/08.

Current with amendments adopted through the 16-18 Washington State Register dated, September 21, 2016.

WAC 388-97-0260, WA ADC 388-97-0260

KeyCite Yellow Flag - Negative Treatment
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Chapter 388-97. Nursing Homes (Refs & Annos)
Subchapter I. Resident Rights, Care and Related Services
Resident Rights

WAC 388-97-0360

388-97-0360. Privacy and confidentiality.

Currentness

(1) The resident has the right to personal privacy and confidentiality of his or her personal and clinical records. Personal privacy includes:

- (a) Accommodations;
- (b) Medical treatment;
- (c) Written and telephone communications;
- (d) Personal care;
- (e) Visits; and
- (f) Meetings with family and resident groups.

(2) The resident may approve or refuse the release of personal and clinical records to any individual outside the nursing home, unless the resident has been adjudged incapacitated according to state law.

(3) The resident's right to refuse release of personal and clinical records does not apply when:

- (a) The resident is transferred to another health care institution; or
- (b) Record release is required by law.

Credits

Statutory Authority: Chapters 18.51 and 74.42 RCW and 42 C.F.R. 489.52. WSR 08-20-062, S 388-97-0360, filed 9/24/08, effective 11/1/08.

Current with amendments adopted through the 16-18 Washington State Register dated, September 21, 2016.

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Chapter 388-97. Nursing Homes (Refs & Annos)
Subchapter I. Resident Rights, Care and Related Services
Quality of Life

WAC 388-97-0860

388-97-0860. Resident dignity and accommodation of needs.

Currentness

(1) Dignity. The nursing home must ensure that:

(a) Resident care is provided in a manner to enhance each resident's dignity, and to respect and recognize his or her individuality; and

(b) Each resident's personal care needs are provided in a private area free from exposure to individuals not involved in providing the care.

(2) Accommodation of needs. Each resident has the right to reasonable accommodation of personal needs and preferences, except when the health or safety of the individual or other residents would be endangered.

Credits

Statutory Authority: Chapters 18.51 and 74.42 RCW and 42 C.F.R. 489.52. WSR 08-20-062, S 388-97-0860, filed 9/24/08, effective 11/1/08.

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WAC 388-97-0860, WA ADC 388-97-0860

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Subchapter I. Resident Rights, Care and Related Services
Quality of Care

WAC 388-97-1060

388-97-1060. Quality of care.

Currentness

(1) Consistent with resident rights, the nursing home must provide each resident with the necessary care and services to attain or maintain the highest practicable physical, mental and psychosocial well-being, self-care and independence in accordance with his or her comprehensive assessment and plan of care.

(2) Based on the comprehensive assessment of a resident, the nursing home must ensure that:

(a) A resident's abilities in activities of daily living do not decline unless circumstances of the resident's clinical condition demonstrate that the decline was unavoidable. This includes the resident's ability to:

(i) Bathe, dress, and groom;

(ii) Transfer and ambulate;

(iii) Toilet;

(iv) Eat; and

(v) Use speech, language, or other functional communication systems.

(b) A resident is given the appropriate treatment and services to maintain or improve the resident's abilities in activities of daily living specified in subsection (2)(a) of this section; and

(c) A resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene.

(3) The nursing home must ensure that the appropriate care and services are provided to the resident in the following areas, as applicable in accordance with the resident's individualized assessments and plan of care:

- (a) Vision and hearing;
- (b) Skin;
- (c) Continence;
- (d) Range of motion;
- (e) Mental and psychosocial functioning and adjustment;
- (f) Nasogastric and gastrostomy tubes;
- (g) Accident prevention;
- (h) Nutrition;
- (i) Hydration;
- (j) Special needs, including:
 - (i) Injections;
 - (ii) Parenteral and enteral fluids;
 - (iii) Colostomy, ureterostomy, or ileostomy care;
 - (iv) Tracheostomy care;
 - (v) Tracheal suction;
 - (vi) Respiratory care;
 - (vii) Dental care;

(viii) Foot care; and

(ix) Prostheses.

(k) Medications, including freedom from:

(i) Unnecessary drugs;

(ii) Nursing home error rate of five percent or greater; and

(iii) Significant medication errors.

(l) Self-administration of medication; and

(m) Independent living skills.

(4) The nursing home must ensure that each resident is monitored for desired responses and undesirable side effects of prescribed drugs.

Credits

Statutory Authority: Chapters 18.51 and 74.42 RCW and 42 C.F.R. 489.52. WSR 08-20-062, S 388-97-1060, filed 9/24/08, effective 11/1/08.

Current with amendments adopted through the 16-18 Washington State Register dated, September 21, 2016.

WAC 388-97-1060, WA ADC 388-97-1060

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October 26, 2016 - 3:17 PM

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