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SUPREME COURT
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Supreme Court No. 91538-5) E CR6
(Related Supreme Court No. 91852-0) RECEIVED BY E-MAIL
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.

MOTION FOR DISCRETIONARY REVIEW

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FILED AS
ATTACHMENT TO EMAIL

 ORIGINAL

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1. IDENTITY OF PETITIONER

This motion is filed on behalf of Petitioner, Mary Rushing, individually, and as the Administrator of the Estate of Robert Coon.

2. DECISIONS BELOW

The decisions subject to review are the superior courts orders compelling arbitration of the survival claims of the Estate, attached as Exhibits A and B.¹

3. ISSUES PRESENTED FOR REVIEW

- a. Like other contracts with a fiduciary: (i) should the burden of proof that an arbitration agreement is valid and enforceable rest upon a health care provider seeking to enforce the agreement? and (ii) should the health care provider's patient be entitled to a presumption of undue influence?
- b. Are the superior court's orders compelling arbitration supported by substantial evidence?

4. STATEMENT OF THE CASE

Ms. Rushing filed suit against Franklin Hills Health & Rehabilitation Center and certain employees of the facility for the death of her father, Robert Coon, under the wrongful death and

¹ An order staying litigation of the non-arbitrable wrongful death claims of Ms. Rushing pending arbitration of the survival claims is the subject of a separate motion for discretionary review in related Cause No. 91852-0, pursuant to the Commissioner's rulings in this case and the related cause, dated July 7, 2015. A copy of the order staying litigation of the wrongful death claims is attached to this motion as Exhibit C.

survival statutes.² Mr. Coon, who had a significant history of mental illness, was a resident of Franklin Hills before he died. *See Rushing v. Franklin Hills Health & Rehab. Ctr.*, No. 31055-8-III, slip op., at 1-2 (Wn. Ct. App., Jan. 30, 2014).

The superior court below determined that Mr. Coon was competent and signed a valid and enforceable arbitration agreement as part of his admissions paperwork at Franklin Hills, and compelled arbitration of the *survival* claims of his estate on this basis. *See* Exs. A & B. In accordance with *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010), the lower court properly declined to compel arbitration of the *wrongful death* claims of Ms. Rushing. However, the court stayed litigation of the wrongful death claims pending arbitration of the survival claims. *See* Ex. C.

Ms. Rushing sought direct discretionary review of both the superior court's orders compelling arbitration of the survival claims and the order staying litigation of the wrongful death claims pending arbitration of the survival claims. The Commissioner split

² *See* RCW 4.20.005, .010 & .020 (wrongful death statutes); RCW 4.20.046 & .060 (survival statutes).

the review into two causes, and this motion for discretionary review relates to the decisions compelling arbitration.³

In resolving Franklin Hills' motion to compel arbitration, the superior court placed the burden of proof on Ms. Rushing to establish by clear and convincing evidence that Mr. Coon was not competent, or lacked the capacity, to enter into the arbitration agreement, and found that she failed to meet that burden. *See Ex. C*, at 5:7-9. Ms. Rushing contends that Franklin Hills was a fiduciary, and that, as a result, the burden of proof should be placed on the facility to establish that Mr. Coon was competent. Ms. Rushing also contends that the superior court's decision is not supported by substantial evidence, regardless of who bears the burden of proof.

5. ARGUMENT IN SUPPORT OF DISCRETIONARY REVIEW

- a. In the interests of judicial economy, the Court should address the superior court's orders compelling arbitration of the Estate's survival claims, along with the related order staying litigation of wrongful death claims.**

Ms. Rushing acknowledges that the superior court's orders compelling arbitration of the survival claims of the estate (as

³ The procedural history is complex, and is described in detail in Ms. Rushing's motion for discretionary review of the order staying litigation of the wrongful death claims pending arbitration of the survival claims filed in Cause No. 91852-0.

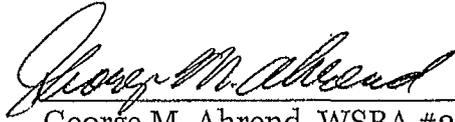
distinguished from the stay order) would not normally satisfy the requirements for discretionary review. *See* RAP 2.3(b). However, the interests of judicial economy militate in favor of reviewing the order at the same time as the jury trial issue arising from the sequencing of arbitration and litigation in this case. While judicial economy does not constitute an independent basis for obtaining discretionary review, it is nonetheless a proper consideration for enlarging the scope of issues subject to review when a case is otherwise properly before the Court.⁴ The Court should review the orders compelling arbitration as well as the order staying litigation.

6. CONCLUSION AND RELIEF REQUESTED

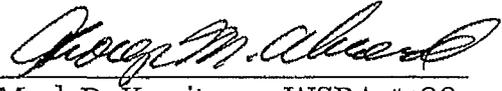
The Court should grant discretionary review of the superior court decisions compelling arbitration of the survival claims of the estate as well as the order staying litigation of the wrongful death claims of Ms. Rushing pending completion of arbitration.

⁴ *See Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn. 2d 178, 185-86, 207 P.3d 1251, 1255 (2009) (stating “[t]he Court of Appeals granted discretionary review of the trial court's ruling denying Colonial's motion for summary judgment and, in the interests of judicial economy, also granted review of the summary judgment dismissing the individual members and entities that formed Colonial”); *Dep't of Natural Res. State of Wash. v. Littlejohn Logging, Inc.*, 60 Wn. App. 671, 673, 806 P.2d 779, 780 (1991) (stating “[f]or reasons of judicial economy, we also granted DNR's cross motion for discretionary review of the court's denial of its motion for summary judgment on the issue of damages”); *see generally* Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1549-50 (1986).

Respectfully submitted this 5th day of November, 2015.



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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 November 5, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

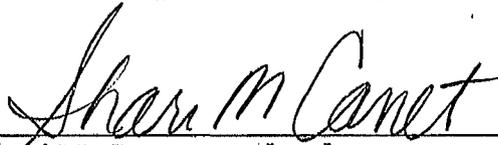
Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
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Email: ceo@winstoncashatt.com

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 on November 5, 2015 at Ephrata, Washington.



Shari M. Canet, Paralegal

APPENDIX

RECEIVED
MAR 04 2015
The Markam Group, Inc., P.S.
Attorneys at Law

	SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE
MARY RUSHING as the Administrator and on Behalf of the Estate of ROBERT COON, and MARY RUSHING, individually,	
	Plaintiffs,
vs.	
FRANKLIN HILLS HEALTH & REHABILITATION CENTER, MELISSA CHARTNEY, R.N., AURILLA POOLE, R.N., and JANENE YORBA, Director of Nursing,	
	Defendants.

NO. 11-2-04875-1

COURT'S DECISION

The Court held an evidentiary hearing on this matter from February 17 through February 20, 2015. The only question before the Court is whether the Alternative Dispute Resolution Agreement (hereinafter "Agreement") is valid and enforceable in light of disputes as to whether Mr. Coon was competent at the time he signed the agreement. The Plaintiffs are represented by Mark Kamitomo and Collin Harper, of the Markam Group, Inc., and George Ahrend of the Ahrend Law Firm, PLLC. The Defendants are represented by Patrick Cronin, Carl Hueber, and Caitlin O'Brien, of Winston & Cashett.

Procedurally, the Honorable Jerome Leveque previously denied the Defendant's motion to compel arbitration. Among other issues, the Defendants appealed the denial of the motion to

compel arbitration. The Court of Appeals, in an unpublished opinion, reversed and remanded for an evidentiary hearing as to whether the arbitration agreement is enforceable.

At the evidentiary hearing, testimony was offered by Jacob Deakins, MD, Lynn Bergman, MD, Janenne Yorba, Aurilla Poole, Jennifer Wujick, Ronald Klein, Ph.D., James Winter, MD, Larry Weiser, Bob Crabb, Naomi Lungstrom, RN, James Spar, MD, and Mary Rushing Green. Both parties also offered numerous exhibits.

As a preliminary matter, during the evidentiary hearing the Plaintiffs brought a motion to dismiss the motion to compel arbitration. The Plaintiffs' motion is grounded in Franklin Hills not providing Mr. Coon the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure as referenced on page three of the Agreement. Based upon this fact, the Plaintiffs claim the parties lacked mutual assent. The Plaintiffs filed a memorandum in support of their motion to dismiss. At the evidentiary hearing, the Court inquired as to whether the Defendants desired an opportunity to respond in writing. The Defendants declined, stating they would address the motion in their closing argument. The Defendants subsequently filed a response to the motion to dismiss. In relying on Defendants' earlier assertion, the Court did not consider their written response in deciding this matter.

It is undisputed that Franklin Hills did not provide Mr. Coon with the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure referenced in the Agreement. This, however, is not fatal to the enforcement of the Agreement. As stated in the Agreement, the Extendicare Health Services, Inc., Alternative Dispute Resolution 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." *Plaintiffs' Motion to Dismiss*, Ex. 2, Pg. 3, Sec. 7.

Ms. Wujick informed Mr. Coon that he had the opportunity to take the Agreement with him to be either signed or rejected within 30 days. Ms. Wujick also informed Mr. Coon that he had the right to seek advice from an attorney prior to entering into the Agreement. The

responsibility to acknowledge the contents of a contract rests upon each party individually. "It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973) *citing* Perry v. Continental Ins. Co., 178 Wash. 24, 33 P.2d 661 (1934).

Mr. Coon was provided the Agreement, informed of his right to seek the advice of an attorney, and informed of his right to either sign or reject it within 30 days. Further, even though the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure was not provided to him, the Agreement did provide Mr. Coon information on how it could be obtained. Given the 30 day acceptance or rejection period, Mr. Coon had ample opportunity to obtain and review the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure prior to execution or rejection of the Agreement. As is the case here, "One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand." National Bank of Washington at 912-13. The Plaintiffs' motion to dismiss the motion to compel arbitration is therefore denied.

FINDINGS OF FACT

After reviewing the evidence and being mindful of the arguments of the parties, the Court hereby enters the following findings facts:

1. Robert Coon was diagnosed with mental illness more than three decades ago.
2. During a majority of his life, Mr. Coon lived independently as he continually sought treatment for his mental illness. Indeed, Mr. Coon graduated from Gonzaga University School of Law, passed the bar exam, and practiced law for a brief period of time.

3. At no time during Mr. Coon's life was he ever under a guardianship, deemed incompetent, or granted power of attorney to another.
4. During the course of Mr. Coon's life, his mental illness was treated, but his cognition gradually decreased. This was due to aging as well as his diagnosed schizoaffective disorder and dementia.
5. Other than temporary mental illness related problems, once Mr. Coon's cognition decreased it would not return to previous levels.
6. In late 2010, Mr. Coon sought a power of attorney at Gonzaga University Law School's Legal Clinic. He was presented with the option for an immediate power of attorney or a springing power of attorney. After weighing his options, Mr. Coon settled on a springing power of attorney and executed it on November 9, 2010.
7. This power of attorney became effective upon Mr. Coon's disability and granted his daughter, Mary Rushing, authority over his finances, his medical treatments, the withdrawal or withholding of life-sustaining treatments for him, and the disposition of his remains.
8. On February 1, 2011, Dr. Jacob Deakins requested Mr. Coon complete a hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After explaining the procedure and cost to Mr. Coon, as well as the lack of insurance funding for this procedure, Mr. Coon declined the test.
9. On March 11, 2011, Mr. Coon met with his psychiatrist, Dr. Robert Mulvihill, who stated in his formal Mental Status Examination that Mr. Coon's "thought process is concrete. Insight and judgment is poor. Concentration is normal." D-9, pp. 273-74.
10. On March 25, 2011, Mr. Coon again saw Dr. Mulvihill. Dr. Mulvihill reported in his formal Mental Status Examination that Mr. Coon's "Thought process is

concrete. Insight and Judgment is fair. Concentration is normal. He is alert and oriented times four." D-9, pp. 276-77.

11. On April 1, 2011, Mr. Coon was transported by ambulance from his residence at Cherrywood Place to Holy Family Hospital after he fell while transferring into his wheelchair. Mr. Coon was treated by Dr. Lynn Bergman, who found Mr. Coon interactive and cooperative during his exam.
12. On April 1, 2011, Mr. Coon moved from Cherrywood Place to Franklin Hills Health and Rehabilitation Center as he needed greater assistance than Cherrywood Place could offer. Nurse Aurilla Poole admitted Mr. Coon that afternoon, and noted that he was alert and oriented to who he was, where he was, and what date and time it was. D7, p. 311.
13. On April 3, 2011, Mr. Coon sat in the dining room of Franklin Hills with Ms. Wujick and reviewed a number of documents related to his residency at Franklin Hills. During this meeting, Mr. Wujick did not notice Mr. Coon exhibit any symptoms that would have called into question his mental capacity. He reviewed a number of documents, asked questions, and appropriately executed the documents.
14. Mr. Coon signed every document presented to him. Of importance, Ms. Wujick provided Mr. Coon with the Agreement. She informed Mr. Coon that it was an agreement to resolve disputes through alternatives to court intervention, that it was optional, not a condition of his residency at Franklin Hills, that he had 30 days to make a decision, and that he could seek the advice of counsel if he desired.
15. On April 3, 2011, Mr. Coon, after asking a couple of questions, signed the Agreement in the presence of Ms. Wujick.

16. The signature on the Agreement is comprised of Mr. Coon's Initials, rather than his entire name.
17. On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of the evaluation performed on Mr. Coon showed he scored 15 out of 15.
18. 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.
19. Plaintiffs' expert witness, James Spar, MD, concluded Mr. Coon possessed enough cognitive functioning to allow him to appreciate the difference between arbitrating a claim versus using traditional court intervention, but lacked the cognitive functioning necessary to appreciate the negative consequences associated with the Agreement (that being a reduced monetary award).
20. Dr. Spar further concluded that Mr. Coon possessed a level of cognitive functioning necessary to execute his power of attorney as well as a will.

CONCLUSIONS OF LAW

After considering the evidence and being mindful of the arguments of counsel, the Court enters the following conclusion of law:

The Defendants' filed a motion to compel arbitration. Once such motion is filed, it then becomes the court's obligation to determine whether the arbitration agreement is valid and enforceable. See McKee v. AT&T Corp., 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). If the other party opposes the motion to compel arbitration, "the court shall proceed summarily to decide the issue." RCW 7.04A.07(1). Here, the Court of Appeals directed the trial court to summarily decide the issues surrounding the enforceability of the arbitration agreement. In doing so, the Court of Appeals allowed the trial court to decide the issue of enforceability on affidavits and evidence in the record alone. A full evidentiary hearing may not have been

required. Given the nature of the Plaintiffs' assertions that the Agreement is not enforceable, the Court authorized a four day evidentiary hearing.

Under both Washington law as well as federal law, a strong public policy favoring arbitration is recognized. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 810, 225 P.3d 213, 229 (2009). It is the courts duty to determine whether an arbitration agreement is valid and enforceable, and the party who seeks to avoid arbitration bears the burden of showing that the agreement is not enforceable. McKee v. AT&T Corp., 164 Wn.2d 372, 383, 191 P.3d 845, 851 (2008). An arbitration agreement is enforceable unless the court finds a legal or equitable basis for revocation of contract, RCW 7.04A.060(1).

Initially, the party seeking to enforce an arbitration agreement must only prove the existence of a contract and the other party's objective manifestation of the intent to be bound. Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). A party's signature on a contract shows an objective manifestation of the signor's intent to be bound to the contract. Retail Clerks, 96 Wn.2d at 944. After the proponent of the contract presents such evidence, the burden then shifts to the opponent to prove a defense to contract enforcement. Id.

On April 3, 2011, Jennifer Wujick, Franklin Hills' admission assistant, witnessed Mr. Coon sign, among other documents, the Agreement. After she witnessed Mr. Coon sign the Agreement, Ms. Wujick signed it. Based upon the Plaintiffs' concession that Mr. Coon signed the agreement, as well as the direct evidence provided by Ms. Wujick, the Court concludes the signature on the Agreement is that of Mr. Coon. Therefore, the Defendant (proponent of the enforceability of the Agreement) has met its burden of establishing the existence of a contract and of Mr. Coon's objective manifestation of his intent to be bound by it.

After the proponent of arbitration establishes the party's objectively manifested intent to be bound, the burden shifts to the opponent of the arbitration agreement to prove a defense to

the contractual agreement. See McKee, 164 Wn.2d at 383. One such defense is if the person lacks the mental capacity or competence to appreciate the nature and effect of the contract at issue. Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 108-9, 120 P.2d 527 (1942).

While in Washington there is a presumption that a person is competent to enter into an agreement, the person challenging such agreement may overcome the presumption by presenting "clear, cogent and convincing" evidence that the party signing the contract lacked sufficient mind or reason at the time he entered into the contract. Grannum v. Berdard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). The clear, cogent, and convincing burden has been defined as something greater than a preponderance of the evidence and less than beyond a reasonable doubt. Holmes v. Raffo, 60 Wn.2d 421, 374 P.2d 536 (1962); Matter of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). "Substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305, 312 (2005) quoting In re Marriage of Schweltzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

When a person possesses sufficient mental capacity to understand the nature of the contract, it is not invalidated because the person is aged, mentally weak, or insane. Page, 12 Wn.2d at 108. Incidents remote in time are irrelevant to the mental capacity of the party at the time of the contract; therefore, the party disputing competence must show that a mental unsoundness or insanity both occurred at the time of the transaction and were of such character that he had no reasonable perception or understanding of the nature and terms of the contract. See Page, 12 Wn.2d at 109-10. The trial court determines whether the evidence meets the clear, cogent, and convincing standard because the determination requires weighing and evaluating evidence and credibility determinations, viewed in connection with the surrounding facts and circumstances. Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

It is undisputed that Mr. Coon suffered from schizoaffective disorder with a bi-polar component. The diagnosis did not render Mr. Coon incompetent, but did impact his cognitive abilities. Certainly, this cognitive deficit can be seen in the records from Mr. Coon's numerous visits with his psychiatrist, Dr. Mulvihill. In fact, on both March 11, 2011 and March 25, 2011, Dr. Mulvihill noted Mr. Coon's cognitive functioning as "thought process is concrete. Insight and judgment is fair. Concentration is normal. He is alert and oriented."

Of all the expert testimony presented, this Court affords the greatest weight to that of Dr. Spar. Dr. Spar was the only board certified psychiatrist to testify at the evidentiary hearing. The opinions rendered by Dr. Spar were based on his vast experience working in the psychiatric field at UCLA. Dr. Spar's testimony provided that cognitive deficiencies related to schizoaffective disorder and/or dementia present at various ranges conditioned on a number of factors. The range of the continuum would show Mr. Coon's capacity to accomplish day to day tasks while also indicating his inability to appreciate the potential negative consequences of his decisions.

In reviewing the evidence, the Court finds it compelling that Mr. Coon did not agree to everything presented to him. Rather, Mr. Coon was able to process certain situations and make decisions based upon the information before him. An example of this can be found in his decision to forego a medical test recommended by his physician. On February 1, 2011, Dr. Deakins requested Mr. Coon complete a hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After explaining the procedure and cost to Mr. Coon, as well as the lack of insurance funding for this procedure, Mr. Coon declined test.

After reviewing numerous records related to Mr. Coon's mental illness, Dr. Spar concluded that Mr. Coon possessed sufficient cognitive functioning to understand the difference between arbitrating any potential claims against Franklin Hills versus using traditional court intervention to resolve any potential claims against Franklin Hills. However, according to Dr.

Spar, Mr. Coon would not have been able to understand the negative aspects of the Agreement (that being the potential for a reduced award). Dr. Spar further opined that Mr. Coon possessed an appropriate level of cognitive functioning to execute both his power of attorney and a will, but lacked the level of cognitive functioning necessary to enter into the Agreement. According to Dr. Spar, this conclusion was based upon the power of attorney and will not have the same negative consequences as the Agreement.

In reviewing the Agreement and Mr. Coon's power of attorney, the Court is unable to accept the distinction provided by Dr. Spar. If Mr. Coon had sufficient insight and judgment to execute both his power of attorney and potentially a will, he certainly possessed the necessary cognitive abilities to enter into the Agreement. The Agreement is a six-page document whereby the parties agree to resolve their disputes through alternative dispute resolution. This process may favor Franklin Hills, but may also favor Mr. Coon as it is an expedient and cost saving manner of resolving disputes.

In the Agreement, Mr. Coon agreed to arbitrate any potential claims against Franklin Hills rather than seek court intervention. This decision is minor compared to executing his power of attorney. A power of attorney delegates authority from one person to another. A power of attorney is used to allow agents to bind the principals in certain affairs. Here, on November 9, 2010, Mr. Coon executed a springing power of attorney appointing Ms. Rushing as his attorney-in-fact. Once the springing power of attorney were to become effective, Ms. Rushing would have absolute power over Mr. Coon's assets and liabilities, all powers necessary to make health care decisions on his behalf (including authorizing surgery, medication and the withholding or withdrawing of life-sustaining treatment), and upon death, authority to control the disposition of his remains.

Similar to a power of attorney, choosing to arbitrate a potential claim against Franklin Hills rather than seek court intervention is minor compared to executing a will. To execute a

will, Mr. Coon would have had to possess testamentary capacity. This means Mr. Coon would have to have sufficient mind and memory to understand the transaction, to comprehend generally the nature and extent of the property which constitutes his estate, and to recollect the natural objects of his bounty. In re Bottger's Estate, 14 Wn.2d 676, 129 P.2d 518. According to Dr. Spar, Mr. Coon possessed this level of executive functioning.

The Court rejects Dr. Spar's conclusion that Mr. Coon had the mental capacity to execute the power of attorney and a will but not the capacity to enter into the Agreement. Dr. Spar's conclusion that Mr. Coon lacked sufficient mental capacity to execute the Agreement is premised on Dr. Spar's perceived negative consequences involved in arbitrating claims. Washington's public policy, however, strongly favors alternative dispute resolution such as arbitration. See Satomi Owners Ass'n v. Satomi, 167 W.2d 781, 810, 225 P.3d 213, 229 (2009). Clearly, appointing another power of attorney over finances, medical treatments, withdrawing or withholding life-sustaining treatments, and the disposition of remains has substantially greater consequences than possibly receiving a reduced monetary award of a potential claim.

If Mr. Coon possessed requisite cognitive ability to make decisions about granting a third party authority over his assets, health care, and termination of life-sustaining treatment (not to mention the final disposition of his estate), he most certainly possessed a reasonable perception and understanding between resolving any potential claims between he and Franklin Hills through alternative dispute resolution or the traditional court process.

Here, the Defendants have the burden of proving the existence of a contract and Mr. Coon's objective manifestation to be bound. The Defendants have met their burden. The Plaintiffs then have the burden of proving by clear, cogent, and convincing evidence that Mr. Coon was not competent when he entered into the Agreement. After considering all of the evidence, the Court concludes that the Plaintiffs have not met their burden. Rather, the

evidence showed that Mr. Coon did have the cognitive ability to appreciate the nature and effect of the consequences of the Agreement.

CONCLUSION

Based upon the foregoing, the Defendants' motion to compel arbitration is granted.

DATED this 3rd day of March, 2015.



Judge John O. Cooney

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SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

No. 11-2-04875-1

vs.

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

Defendants.

ORDER COMPELLING ARBITRATION
OF CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF
THE ESTATE OF ROBERT COON

THIS MATTER came on for hearing on Defendants' Motion to Compel Arbitration. The Court held an evidentiary hearing on this matter from February 17-20, 2015. After reviewing all the parties' briefing, hearing argument of counsel, and hearing all witnesses and reviewing all admitted exhibits, and being fully advised herein, the Court makes the following Findings, Conclusions, and Order.

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 1

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FINDINGS OF FACT

1. Robert Coon was diagnosed with mental illness more than three decades ago.

2. During a majority of his life, Mr. Coon lived independently as he continually sought treatment for his mental illness. Indeed, Mr. Coon graduated from Gonzaga University School of Law, passed the bar exam, and practiced law for a brief period of time.

3. At no time during Mr. Coon's life was he ever under a guardianship, deemed incompetent, or granted power of attorney to another.

4. During the course of Mr. Coon's life, his mental illness was treated, but his cognition gradually decreased. This was due to aging as well as his diagnosed schizoaffective disorder and dementia.

5. Other than temporary mental illness related problems, once Mr. Coon's cognition decreased it would not return to previous levels.

6. In late 2010, Mr. Coon sought a power of attorney at Gonzaga University Law School's Legal Clinic. He was presented with the option for an immediate power of attorney or a springing power of attorney. After weighing his options, Mr. Coon settled on a springing power of attorney and executed it on November 9, 2010.

7. This power of attorney became effective upon Mr. Coon's disability and granted his daughter, Mary Rushing, authority over his finances, his medical treatments, the withdrawal or withholding of life-sustaining treatments for him, and the disposition of his remains.

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 2

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1 8. On February 1, 2011, Dr. Jacob Deakins requested Mr. Coon complete a
2 hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After
3 explaining the procedure and cost to Mr. Coon, as well as the lack of insurance funding for this
4 procedure, Mr. Coon declined the test.

5 9. On March 11, 2011, Mr. Coon met with his psychiatrist, Dr. Robert Mulvihill,
6 who stated in his formal Mental Status Examination that Mr. Coon's "thought process is
7 concrete. Insight and judgment is poor. Concentration is normal." D-9, pp. 273-74.

8 10. On March 25, 2011, Mr. Coon again saw Dr. Mulvihill. Dr. Mulvihill reported in
9 his formal Mental Status Examination that Mr. Coon's "Thought process is concrete. Insight and
10 judgment is fair. Concentration is normal. He is alert and oriented times four." D-9, pp. 276-77.

11 11. On April 1, 2011, Mr. Coon was transported by ambulance from his residence at
12 Cherrywood Place to Holy Family Hospital after he fell while transferring into his wheelchair.
13 Mr. Coon was treated by Dr. Lynn Bergman, who found Mr. Coon interactive and cooperative
14 during his exam.

15 12. On April 1, 2011, Mr. Coon moved from Cherrywood Place to Franklin Hills
16 Health and Rehabilitation Center as he needed greater assistance than Cherrywood Place could
17 offer. Nurse Aurilia Poole admitted Mr. Coon that afternoon, and noted that he was alert and
18 oriented to who he was, where he was, and what date and time it was. D7, p. 311.

19 13. On April 3, 2011, Mr. Coon sat in the dining room of Franklin Hills with Ms.
20 Wujick and reviewed a number of documents related to his residency at Franklin Hills. During
21 this meeting, Mr. Wujick did not notice Mr. Coon exhibit any symptoms that would have called
22
23
24

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON --- 3

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1 into question his mental capacity. He reviewed a number of documents, asked questions, and
2 appropriately executed the documents.

3 14. Mr. Coon signed every document presented to him. Of importance, Ms. Wujick
4 provided Mr. Coon with the Alternative Dispute Resolution Agreement. She informed Mr. Coon
5 that it was an agreement to resolve disputes through alternatives to court intervention, that it was
6 optional, not a condition of his residency at Franklin Hills, that he had 30 days to make a
7 decision, and that he could seek the advice of counsel if he desired.

8
9 15. On April 3, 2011, Mr. Coon, after asking a couple of questions, signed the
10 Agreement in the presence of Ms. Wujick.

11 16. The signature on the Agreement is comprised of Mr. Coon's initials, rather than
12 his entire name.

13
14 17. On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of the
15 evaluation performed on Mr. Coon showed he scored 15 out of 15.

16 18. Defendants' expert witnesses, Ronald Klein, Ph.D. and James Winter, MD,
17 concluded that Mr. Coon possessed the requisite level of competence to enter into the
18 Agreement.

19 19. Plaintiffs' expert witness, James Spar, MD, concluded that Mr. Coon possessed
20 enough cognitive functioning on April 3, 2011, to allow him to appreciate the difference between
21 arbitrating a claim versus using traditional court intervention, but lacked the cognitive
22 functioning necessary to appreciate the negative consequences associated with the Agreement
23 (that being a reduced monetary award).
24

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 4

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1 20. Dr. Spar further concluded that Mr. Coon possessed on April 3, 2011, a level of
2 cognitive functioning necessary to execute his power of attorney as well as a will.

3 CONCLUSIONS OF LAW

4 1. Defendants met their burden of establishing the existence of the arbitration
5 contract, and Mr. Coon's objective manifestation of his intent to be bound by that arbitration
6 agreement.

7
8 2. Plaintiffs failed to meet their burden to prove by clear, cogent, and convincing
9 evidence that Mr. Coon was not competent when he entered into the arbitration agreement.

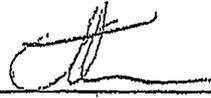
10 3. The entirety of the evidence showed that Mr. Coon had the cognitive ability to
11 appreciate the nature and effect of the consequences of the arbitration agreement.

12 4. The arbitration agreement is valid and enforceable between the Estate of Robert
13 Coon (Mary Rushing as the Administrator and on behalf of the Estate) and the defendants.

14 5. In addition, the court's written decision issued on March 3, 2015, is hereby
15 incorporated by reference in its entirety.

16
17 IT IS HEREBY ORDERED that defendant's motion to compel arbitration is granted as to
18 Mary Rushing, as the Administrator and on behalf of the Estate of Robert Coon; and she is
19 compelled to arbitrate those claims against the defendants in accordance with the arbitration
20 agreement.

21
22 DONE IN OPEN COURT this 10 day of April, 2015.

23 
24 _____
JUDGE JOHN O. COONEY

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING A.S.
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 5

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2 Presented by;

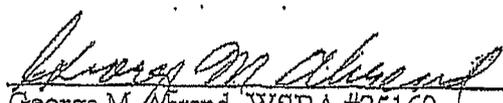
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4 
5 PATRICK J. CRONIN, WSBA No. 28254
6 CARL E. HUEBER, WSBA No. 12453
7 CAITLIN E. O'BRIEN, WSBA No. 46476
8 WINSTON & CASHATT, LAWYERS,
9 a Professional Service Corporation
10 Attorneys for Defendants

11
12 *as to form only bmt*
13 Approved and Notice of Presentment Waived:

14 THE MARKAM GROUP, INC., P.S.

15
16 
17 MARK D. KAMITOMO, WSBA #18803
18 COLLIN M. HARPER, WSBA #44251
19 Attorneys for Plaintiff

AHREND LAW FIRM PLLC

20
21 
22 George M. Ahrend, WSBA #25160
23 Attorney for Plaintiff

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ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 6

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SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

No. 11-2-04875-1

vs.

ORDER GRANTING DEFENDANTS'
CROSS MOTION TO STAY MARY
RUSHING'S WRONGFUL DEATH CLAIM
PENDING ARBITRATION

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

Defendants.

THIS MATTER having come before this Court on Defendants' Cross Motion to Stay
Mary Rushing's Wrongful Death Claim Pending Arbitration, and the Court having heard oral
argument of counsel, having considered the files and records herein, and being otherwise fully
advised in the premises, now, therefore,

IT IS HEREBY ORDERED that Defendants' Cross Motion to Stay Mary Rushing's
Wrongful Death Claim Pending Arbitration is GRANTED.

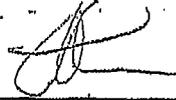
The wrongful death claim shall be stayed for 180 days subject to return to court.

ORDER GRANTING DEFENDANTS' CROSS
MOTION TO STAY MARY RUSHING'S
WRONGFUL DEATH CLAIM PENDING
ARBITRATION
PAGE 1

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GWA
[Signature]

1
2 DATED this 10 day of April, 2015.



HONORABLE JOHN O. COONEY
Spokane County Superior Court Judge

3
4
5
6
7 Presented by:

8 WINSTON & CASHATT, LAWYERS,
9 a Professional Service Corporation

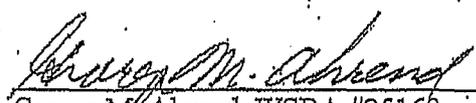
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11 
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15 WINSTON & CASHATT, LAWYERS,
16 a Professional Service Corporation
17 Attorneys for Defendants

18 Approved ^{as to form only} and Notice of Presentment Waived:

19 THE MARKAM GROUP, INC., P.S.

20 
21 MARK D. KAMITOMO, WSBA #18803
22 COLLIN M. HARPER, WSBA #44251
23 Attorneys for Plaintiff

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24 
George M. Ahrend, WSBA #25160
Attorney for Plaintiff

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ORDER GRANTING DEFENDANTS' CROSS
MOTION TO STAY MARY RUSHING'S
WRONGFUL DEATH CLAIM PENDING
ARBITRATION
PAGE 2

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EXHIBIT C - Page 2 of 2

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To: Shari Canet
Cc: Patrick Cronin; Carl Hueber; Caitlin O'Brien; Mark D. Kamitomo; Collin M. Harper; George Ahrend; Mary Rua; Cheryl Hansen; Linda Lee
Subject: RE: Supreme Court No. 91538-5, Rushing v. Franklin Hills et al.

Received on 11-05-2015

Supreme Court Clerk's Office

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Sent: Thursday, November 05, 2015 3:14 PM
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Cc: Patrick Cronin <pjc@winstoncashatt.com>; Carl Hueber <ceh@winstoncashatt.com>; Caitlin O'Brien <ceo@winstoncashatt.com>; Mark D. Kamitomo <mark@markamgrp.com>; Collin M. Harper <collin@markamgrp.com>; George Ahrend <gahrend@ahrendlaw.com>; Mary Rua <Mary@markamgrp.com>; Cheryl Hansen <crh@winstoncashatt.com>; Linda Lee <ll@winstoncashatt.com>
Subject: Supreme Court No. 91538-5, Rushing v. Franklin Hills et al.

Please accept for filing the attached **Motion for Discretionary Review and Statement of Grounds for Direct Review.**

Thank you.

--

Shari M. Canet, Paralegal
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