Binding Arbitration in Nursing Homes: Pitfalls With Responsible Parties

*W. Clay Landa, Esquire**
Hancock Daniel Johnson & Nagle PC
Richmond, VA

Introduction

In Chesapeake, VA, a woman is faced with a daunting task—how to ensure adequate care for her comatose sister who needs round the clock medical care and support and is currently residing in a long term care facility in another state, hundreds of miles away.[1] As with most people in this situation, thoughts of going to a court to apply for and obtain a power of attorney or legal guardianship take a backseat to the pressing need to care for a loved one in a stressful time. To provide for this immediate need, the woman locates and chooses a facility near her own home and begins the process of admitting her sister.[2]

Virginia law allows a family member to make medical decisions and act for an incapacitated loved one to admit the resident into a long term care facility under these stressful conditions.[3] The Virginia legislature recognized that the last thing on a person's mind at this time is to seek a power of attorney or legal guardianship prior to attempting to access necessary medical care for a loved one. To further the goal of making it as easy as possible to act under these stressful circumstances, specific authority is granted to act as a "responsible party," which affords the "responsible party" the substantive rights of the resident when being admitted into a facility.[4] Other states have passed similar legislation.[5]

Long term care facilities in turn, face a wide array of issues when admitting a resident based upon the signature of a "responsible party." Key among these is who is ultimately liable for the patient's care, and whether an arbitration agreement signed by the responsible party can act to bind the resident. Long term care facilities, like many businesses, utilize arbitration agreements between themselves and their residents to provide an alternative forum for dispute resolution while seeking to lower their costs to provide necessary services.

Litigation on this topic has been on the rise in recent years with many courts asking what authority such a responsible party (who does not have legal power of attorney or guardianship) has to bind an incapacitated or medically incapable resident to an arbitration agreement. There has been a split of authority in both directions. Courts in a number of states find that a responsible party cannot act to bind an incapacitated resident to an arbitration agreement, predominantly under settled principles of agency law. In many circumstances, however, an analysis of agency law alone cannot provide the answer because state legislatures have adopted medical decision-making statutes empowering responsible parties to act on an incapacitated individual's behalf to make medical decisions, including admission into a long term care facility. While these courts attempt to base their rulings on traditional legal principles of agency authority, they tend to provide a narrow view of the medical decision statutes, all with the worthwhile goal of ensuring a resident does not give up his or her right to seek redress in the courts.

This article explores the current landscape of binding arbitration litigation in the context of a responsible party admitting an incapacitated resident, by detailing case law coming down on both sides of the issue. This exploration will detail the policy implications of allowing or not allowing a responsible party to bind an incapacitated resident to arbitration. Finally, this article will conclude with best practices for long term care facilities when faced with a responsible party seeking to admit an incapacitated resident.

The Current State of Affairs

Courts in various jurisdictions have split, and sometimes split within a state as well, on the question of whether a responsible party may act to bind an incapacitated resident to an arbitration agreement upon admission into a nursing home. Even while arriving at different results, the courts usually employ the same legal analysis of agency law to determine the representative's authority to act for the resident. Adding a wrinkle to this agency analysis, however, are state statutes authorizing a representative to act to make medical decisions and admit persons into facilities without requiring a power of attorney or legal guardianship. Very often, as will be seen below, the courts' decisions rest on very specific facts such as the actual line on the contract signed by the responsible party.

Rulings That No Authority Exists Absent a Legal Relationship

A number of courts have answered whether a responsible party can act to bind an incapacitated resident primarily based upon the actual signature line and title given to the signatory. For example, in *Noland Health Services v. Wright*, 971 So. 2d 681 (Ala. 2007), the Supreme Court of Alabama held that the executor of a deceased resident's estate, acting on behalf of the resident, was not bound by an arbitration agreement in the admitting paperwork signed by the resident's daughter-in-law when she signed

the agreement on the line entitled "responsible party."[6] The court did not engage in a detailed analysis of agency authority, but instead looked to the signature lines and definitions found in the admitting documents. Specifically, a "responsible party" was defined as a person who voluntarily agreed to honor specified obligations of the resident, while a "legal representative" was defined as a person who had legal authority to act on the resident's behalf.[7] Based on the daughter-in-law's choice to sign as a responsible party, the court found that her signature did not bind the resident (or her executor) to the arbitration agreement.[8]

Other cases from the Supreme Court of Alabama compelling arbitration when the signor still does not have a legal guardianship or power of attorney highlight the intricacies of binding arbitration and responsible parties. In a later case, a daughter signed the admission documentation on behalf of her mother as a legal representative but signed the arbitration provision as a family member responsible for the resident. The daughter did not have a legal guardianship or power of attorney. Under these circumstances, the court compelled arbitration even while acknowledging the responsible party had no actual legal authority to act on the resident's behalf.[9] The court held that the daughter had apparent authority to bind her mother under agency principles because she signed as the legal representative for the overall admission paperwork.[10] The court took note that there was no evidence of mental incompetence at the time of admission but the resident sat passively by while her daughter put forward manifestations that she could act on her mother's behalf.[11] The *Noland* decision was distinguished because there, the resident was mentally incompetent and could not authorize anyone (even by passive acquiescence) to bind her, and the responsible party only signed as a responsible party and not a legal representative.[12]

Courts in Colorado, Florida, Georgia, and Texas have engaged in a similar agency analysis but also considered state statutes that authorize a responsible party to make healthcare decisions for a resident. For example, when a statute authorizes medical decision making by a responsible party, these courts found that a responsible party cannot bind a resident to an arbitration agreement when making the decision to admit the resident into a long term care facility.[13] That is, statutory authorization to make medical decision on behalf of a resident is not akin to authority to bind a resident to arbitration.

As a representative example, the Colorado Court of Appeals considered Colorado's statute allowing a person to act as a healthcare proxy, empowered to make medical treatment and healthcare benefit decisions when a treating physician determines the resident is incapacitated.[14] Under the Colorado statute, a healthcare proxy has no legal authority akin to a power of attorney or legal guardianship.[15] The court found that a decision to arbitrate and forego access to the courts is not a medical treatment decision even while holding that a decision to enter a nursing home is a medical treatment decision. The court differentiated between the two types of decisions because Colorado law forbids a healthcare provider from conditioning the provision of medical services on the patient signing an arbitration agreement.[16]

Under similar circumstances, a Virginia court recently determined that a sister signing as a responsible party cannot bind the resident to an arbitration agreement absent a legal power of attorney or guardianship. In *Gibson v. Medical Facilities of America, Inc.,* the sister signed as a responsible party when admitting a comatose and mentally incapacitated resident into the facility.[17] After an employee abused the resident, the sister brought an action on behalf of the resident and the facility moved to compel arbitration based on the admission agreement.[18]

The court, in one short paragraph, determined the Virginia Patient Bill of Rights that expressly devolves all rights of the patient onto a responsible party, only deals with "information rights," and does not provide any rights akin to a legal guardianship.[19] The facility argued that state regulations define a responsible party as "an individual authorized by the resident to act for him as an official delegate or agent."[20] Even so, the court turned only to agency principles and disregarded the mandate of the regulation to find that the sister had no actual legal authority to act on the resident's behalf.[21] While the regulation defined "responsible party" in this context, the court found reliance upon that definition was misplaced because the agreement itself did not define responsible party in the same manner or refer to the regulation.[22] Similar to the analysis of the Alabama courts, there was also no apparent authority because the resident could not and did not permit her sister to hold herself out as acting on the resident's behalf because the resident was incapacitated.[23] The court also noted the facility could have inquired into the status of a legal guardianship and simply advised the sister to obtain one from a court in a reasonable time.[24]

Rulings Providing for Authority to Act

Utilizing the same agency principles and statutes similar to those in Colorado and Virginia, other jurisdictions have come to the exact opposite conclusion and found that a responsible party can bind a resident to an arbitration agreement. For example, courts in Mississippi, Virginia, Tennessee, and Texas have allowed a responsible party to bind a patient, absent a specific legal guardianship or power of attorney.[25] Decisions in Texas and Tennessee are illustrative of analysis finding that a responsible party may bind an incapacitated resident.

In *In re Ledet*, a son signed all of the admitting paperwork for his mother, who suffered from Alzheimer's disease, as her legal representative.[26] In a subsequent suit on the mother's behalf by her daughter, she argued that neither she nor her mother ever agreed to the arbitration provision. The court found that the evidence unequivocally showed the son signed "on his mother's behalf as her responsible party."[27] Further, while the court stipulated that the son had no legal authority to bind his mother i.e., power of attorney or legal guardianship, the court viewed regulations and statutes allowing for the delegation of residents rights and granting a surrogate decision-maker decision-making capacity for an incapacitated resident, as conferring the necessary legal authority.[28]

A Tennessee court of appeals reached a similar conclusion under the Tennessee Health Care Decisions Act. While the court ultimately did not allow a son's signature to bind his mother to an arbitration agreement because a treating physician had not determined the resident to be incapacitated, the court held, "[e]xecution of the documents admitting the Decedent to the Ripley skilled-care facility, *including execution of the accompanying arbitration agreement*, is clearly a 'health care decision' within the meaning of the Act."[29]

Policy Implications of Responsible Party Signatures

The varied opinions issued by courts throughout the nation leave many long term facilities with questions as to who can be bound not only to an arbitration agreement, but also to the admission agreements themselves. Sweeping opinions like the Virginia opinion in *Gibson* hold that the signature of a responsible party has no affect to bind the resident in any way. Under the Virginia circuit court's analysis of agency law, and its limited consideration of statutes authorizing a responsible party to act on behalf of an incapacitated resident, the responsible party has no authority to bind the resident to any contract. The natural question then ensues, who has the responsible party bound?

The obvious answer is only the responsible party, thereby potentially binding a loved one to any and all obligations that would otherwise have been the responsibility of the resident, insurance, or applicable government program, including payment obligations. In fact, numerous courts have already held a responsible party liable for the payment obligations for the resident.[30] The decision to admit a loved one into a long term care facility is already a stressful event, imbued with pressure to provide the best care possible for a family member. Court decisions like those in Virginia and elsewhere holding that a responsible party cannot bind a resident in any way may unwittingly impose full liability for those services on the responsible party alone. As one author put it, "family members who feel trapped—or tricked—by a nursing home into paying for care involuntarily, are unlikely to feel comfortable about staying active in their elders' lives."[31]

Decisions, like those in Colorado parsing a healthcare decision-making statute, also present anomalies. The court noted that a decision to admit a resident into a nursing home is a health care decision, capable of being made by a responsible party. But the same court found that even when the arbitration agreement is a part of that admission agreement, it is not a medical decision because it does not concern the provision, withholding, or withdrawal of medical care. The court did not analyze whether the responsible party is personally liable for any obligations. But, under the limited authority the court appears to have granted a responsible party, the possibility exists that the responsible party is only consenting to the resident receiving care, and not binding the resident for payment. Instead, just as other courts have found, if the responsible party is not binding the resident, the responsible party could also be liable for payment.

Facilities currently exist in a shifting landscape, facing ever-increasing costs of providing necessary care and increased litigation, both justified and unjustified. Arbitration, as many courts have noted, is only a selection of the forum to dispute potential issues, and is not a forum whereby facilities seek to avoid liability.[32] Further, the Federal Arbitration Act, as well as most states' arbitration acts, "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[33] Attempting to arbitrate disputes to lessen overall costs is in line with the national policy favoring arbitration and does not remove an avenue for residents to seek a remedy.

While both parties must agree to arbitrate disputes, it appears inconsistent to hold that a responsible party may make medical decisions, including those of life or death for the resident, but cannot make a decision to contract for payment or arbitration. There may be no greater decision than determining what medical care, if any, to provide a loved one and the choice of where that loved one will reside. This authority may rest with a responsible party with the clear intent to ease the process of locating and obtaining such care. If a responsible party may hold such power over life and death decisions, why can't the person also determine to arbitrate disputes over those decisions?

Best Practices

As the cases have dictated, very often the determination of who is bound by an admissions agreement and for what provisions of the agreement, comes down to the simple matter of the signature line. Facilities would be well served to clearly note the resident's name on the actual "Resident" line of any admissions paperwork. Further, the courts have consistently relied upon definitions placed in the admission documents to determine what authority a person has when signing admission documents.

To address this, admissions paperwork should clearly delineate the authority of all parties to the agreement, including the responsible party. Even in a state where the courts will not bind the resident, the facilities may choose to follow the advice of the Virginia court in *Gibson* and inquire into the specific legal authority of the party admitting the resident into the facility. This will serve to advise the facility of what specific authority the party has to aid the facility in determining its potential issues for arbitration and for payment liability. Finally, as the court urged in *Gibson*, the facility may well inform the party that he or she may wish to obtain a legal guardianship or power of attorney over the resident. In doing so, the facility should not seek to provide any legal advice on the benefits or perils of such legal authority. Favorable admissions agreements have clearly and broadly defined the parties to the agreement to include all signors. Accordingly, a definition of all parties subject to the agreement's terms should include the resident, legal representatives, personal representatives, responsible parties, or any other signor.

Facilities must familiarize themselves with their own states' laws concerning healthcare decision-making. Very often, as was the case in Tennessee, a responsible party may act to bind the resident if a treating physician has determined the resident is incapacitated. Ensuring that such information is documented may serve to protect the facilities' interests in arbitration.

Conclusion

One thing is for certain concerning arbitration in nursing homes, nothing appears completely settled. In many states, such as Virginia, courts within the state have issued opinions that are completely at odds with one another. Further, there is a sharp difference of opinion on whether an agreement to arbitrate as part of an admissions agreement is a medical care decision. These state laws seek to ease the process of providing care for loved ones by allowing access to medical care without having to weave through the legal process of obtaining authority. Courts have attempted to ensure access to such care by allowing that these laws grant authority to consent to care. But, by holding that a responsible party cannot bind the patient, the courts may have inadvertently opened up the responsible party to liability for the resident's obligations. This paradox would seem to impose a burden where the true intent of the statute was to lift burdens on seeking care.

**Clay Landa is an associate with Hancock Daniel Johnson & Nagle PC, in Richmond, VA, practicing in the commercial litigation practice group. His practice focuses on all aspects of commercial litigation supporting healthcare providers as well as insurance coverage litigation and counseling.*

Mr. Landa earned his JD, magna cum laude, from the University of Richmond School of Law. While in law school, he served as the vice president of the Moot Court Board and the general assembly editor of the Journal of Law and the Public Interest.

Mr. Landa also earned a Master's in Public Administration from Virginia Commonwealth University. While in graduate school, he received the L. Douglas Wilder Master's of Public Administration Student of the Year Award. Mr. Landa also worked for the Virginia State Board of Elections while earning his MPA, where he focused on legislative and policy matters.

1 *See Gibson v. Med. Facilities of America, Inc.*, 80 Va. Cir. 56, 59-60 (Norfolk City 2010).

2 *See Gibson*, 80 Va. Cir. at 59-60.

3 *See* Va. Code § 32.1-138 (noting that "all of the rights and responsibilities" of an incapacitated patient or patient "medically incapable of understanding these rights" "shall devolve to such patient's guardian, *responsible party as defined by regulation*, next of kin" and that such persons are "deemed to have the legal authority to act on the patient's behalf with respect to matters specified in this section"); *see also* 54.1-2986.

4 *See* Va. Code §§ 32.1-138; 54.1-2986; 12 VAC 5-371-10.

5 *See e.g.* Colo. Rev. Stat. § 15-18.5-103; Tex. Code § 313.004.

6 *Noland Health Services v. Wright*, 971 So.2d 681, 685 (Ala. 2007).

7 *Id.* at 683.

8 *Id.* at 685-86. The court noted there were arguments that the daughter-in-law had a power of attorney because the plaintiff's initial complaint specifically provided that she was a duly appointed attorney in fact. The court found it did not need to determine the implications of the complaint listing her as a power of attorney because when executing the admission documents, she did not sign as a legal representative but only a responsible party. *Id.*

9 *Tenn. Health Mgmt. v. Johnson*, 49 So.3d 175 (Ala. 2010).

10 *Id.* at 180.

11 *Id.*

12 *Id.* at 180-81.

13 *See Lujan v. Life Care Ctrs. of America*, 222 P.3d 970 (Colo. Ct. App. 2009); *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 301 (Fla. Ct. App. 2005) ("There is nothing in the [health care proxy] statute to indicate legislative intent that such a proxy can enter into contracts which agree to things not strictly related to health care decisions. In our opinion, a proxy is not authorized to waive the right to trial by jury . . ."); *Life Care Ctrs. of Am, v. Smith*, 298 Ga. App. 739, 681 S.E.2d 182, 185 (Ga. Ct. App. 2009) (holding that a "health care power of attorney did not give [a daughter] the power to sign away her mother's or her mother's legal representative's right to a jury trial"); *Tex. Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345, 352 (Tex. Ct. App. 2007) ("[N]othing in medical power of attorney indicates that it was intended to confer authority . . . to make legal, as opposed to health care, decisions . . ., such as whether to waive [the] right to a jury trial by agreeing to arbitration of any disputes.").

14 *Lujan*, 222 P.3d at 972-73.

15 *Id.* at 973.

16 *Id.* at 973-74.

17 *Gibson*, 80 Va. Cir. at 59-60.

18 *Id.* at 60.

19 *Id.* at 61 (citing Va. Code § 32.1-138(E)).

20 *Id.* (citing 12 VAC 5-371-10).

21 *Id.*

22 *Id.*

23 *Id.* at 62.

24 *Id.*

25 *See Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007) (overruled on other grounds that contract and arbitration provision were unconscionable but not overruling holding that a responsible party may bind a resident if the arbitration provision is an essential consideration for the contract); *Barbee v. Kindred Healthcare Operating, Inc.*, 2008 Tenn. App. LEXIS 630 (Tenn. Ct. App. Oct. 20, 2008) (finding that "[e]xecution of the documents admitting [a resident] to the . . . skilled care facility, including execution of the accompanying arbitration agreement, is clearly a 'health care decision'" within the meaning of Tennessee's Health Care Decisions Act that can bind the resident if there is a physician determination of incapacity and the signer is designated as the surrogate.); *In re Ledet*, 2004 Tex. App. LEXIS 11474 (4th Dist. Tex. Ct. App. Dec. 22, 2004): *Dung Bui v. Medical Facilities of America XI LP*, Case No. 09001389 (Arlington Cir. Ct. 2010) (compelling arbitration even when a responsible party did not have a power of attorney).

26 *In re Ledet*, 2004 Tex. App. at *2.

27 *Id.* at *9.

28 *Id.* at *9-11.

29 *Barbee*, 2008 Tenn. App. at *33 (emphasis added).

30 *See e.g. Holloway v. Riley's Oak Hill Manor*, 2002 Ark. App. LEXIS 568 (3rd Div. Ark. Ct. App. Oct. 9, 2002) (holding the son liable as a signatory "responsible party" to the admission documents); *Sturman v. Socha*, 463 A.2d 527 (Conn. 1983) (holding a son personally liable for expenses under the plain meaning of a responsible party).

31 Pearson, Katherine C., *The Responsible Thing to Do about "Responsible Party" Provisions in Nursing Home Agreements: A Proposal for Change on Three Fronts*, 37 U. Mich. J.L. Reform 757 (2004).

32 *See Covenant Health & Rehab. of Picayune, L.P. v. Moulds*, 14 So. 3d 695, 703 (Miss. 2009).

33 *Id.* at 698.