



When a conservator signs the arbitration agreement at a health-care facility

PROBLEMS ENFORCING A CONSERVATOR'S EXECUTION OF A HEALTH-CARE FACILITY'S ARBITRATION AGREEMENT

California has a strong public policy in favor of arbitration, but parties can only be compelled to arbitrate when they have agreed to do so. In other words, arbitration is a matter of consent, not coercion. (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th.) Matters tend to become complicated when a party seeks to compel a person to arbitrate if someone else signed the arbitration agreement. When a conservator signed the agreement, matters can become even more confusing. Fortunately, a recent appellate opinion shines some light on this area where there is very little law.

Types of conservatorships

When someone is no longer able to handle his or her personal and/or financial affairs, a court may order a conservator to make personal decisions and/or manage the person's affairs. A conservator may serve as a conservator of the person, as conservator of the estate, or both. The court sometimes orders only a temporary conservatorship or places limitations on the powers of a conservator or the rights of the conservatee. Most conservatorships are covered in the Probate Code, sections 1400 et seq., but if the conservatorship involves a person with special needs or mental health issues, statutes involving it are generally contained in the Welfare and Institutions Code, sections 5350 et seq.

A conservator of the person has the care, custody, and control of the conservatee and the conservator has charge of the conservatee's education. The powers of a conservator of a person are set forth in Probate Code, sections 2350 through 2361. That control does not extend to personal rights retained by the conservatee, such as the right to receive visitors, receive or make telephone calls, and control of personal mail. However, a court might limit a conservatee's personal rights. (Prob. Code, § 2351, subd. (a).)

A conservator of the estate, on the other hand, is responsible for handling the financial affairs of the conservatee. While they may be expanded or limited by orders of the court, the powers of a conservator of an estate are found in Probate Code, section 2451.5. The conservator's powers include contracting for and binding the estate.

Recent appellate opinion

Holley v. Silverado Living Management, Inc. (2020) 53 Cal.App.5th 197, involves an elderly woman with dementia who was admitted to a senior living facility. At the time she was admitted, the patient's family members had been ordered by the court to be her temporary conservators of her person. At the facility, they were presented with a stack of paperwork to sign. The family felt a great sense of urgency during the admissions process, as the facility administrators told them that beds go quickly. One of the conservators, the conservatee's



daughter, said she was told "if I did not get all the forms signed and completed and a check deposited, that the bed could go to someone else on the waiting list." It was under those circumstances that, the conservatee's daughter signed the arbitration agreement.

Within a few weeks, the patient suffered humeral and hip fractures and a number of bruises. She died a few months later. The family filed suit. Thus, the family wore three different hats. They were temporary conservators of the person. They were successors in interest of the decedent. And they became the plaintiffs when they filed the instant action for elder abuse and wrongful death.

The trial court denied the petition to arbitrate brought by the facility. The court found that at the time the arbitration document was signed, there was insufficient evidence that the two family members/conservators who signed the agreement to arbitrate had the authority to bind the patient to the arbitration.

The facility argued the trial court erred, citing *Hutcheson v. Eskaton FountainWood Lodge* (2017) 17 Cal.App.5th 937. In that case, the patient appointed a health care power of attorney, POA, to Hutcheson pursuant to Probate Code, section 4671,

subdivision (a)(2), giving Hutcheson authority to make health care decisions for the patient. The patient also gave a general POA to others pursuant to Probate Code, sections 4000 et seq, but that general POA did not authorize anyone to make medical and health care decisions for her. It was a person with the general POA who signed the arbitration agreement, not the one with the health care POA. The court concluded the patient's admission to the facility was a health care decision that was not included in the powers granted under the general POA. The *Holley* court distinguished *Hutcheson* as it did not concern a conservatorship.

The facility in *Holley* also cited *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, a case where the signer of the arbitration agreement had a health care POA, and the Court of Appeal held the signer did have the power to sign the arbitration clause as part of the health care decision-making process. Because the circumstances in *Holley* did not involve a health care POA, but a conservatorship, the appellate court distinguished *Garrison* as well.

Interestingly, timing was everything in *Holley*. On October 25, the family members were appointed as conservators. On October 26, they signed the arbitration agreement at issue here. On October 30, the probate court entered an order under Probate Code, sections 2354 and 2355. Those sections provide that a conservator has the exclusive authority to make health care decisions if the conservatee lacks the capacity to give informed consent. At the October 30 hearing, the court made the finding that the conservatee lacked the capacity to give informed consent for medical treatment. Had the arbitration agreement been signed after the October 30 adjudication, the result would have been different.

In *Holley*, the Court of Appeal stated three reasons for affirming denial of the

petition to arbitrate. First, the conservators lacked the power to bind the patient to an agreement giving up substantial rights, such as the right to use the courts for redress of grievances, without her consent or a prior adjudication of her lack of capacity. Second, as only temporary conservators, the signers were constrained from making long-term decisions without prior approval. Third, there was no substantial evidence that the plaintiffs intended to sign the arbitration agreement on their own, individual, behalf.

Other takeaways

Other lessons can be learned from the *Holley* opinion. One is that the appeals court was bound by the law rather than the words in the facility's arbitration agreement. At the signature line, the arbitration agreement stated: "Based on the Resident's Mental Capacity, the term Resident may include Responsible Party, POA, Guardian and/or Conservator." The powers and duties of a conservator of the person are set out in the Probate Code. Thus, a conservator's power to make medical decisions is limited under the law, despite the words in the agreement.

Another takeaway from *Holley* is that even though the court recognized that admission to a residential facility is essentially a health care decision, as the *Hutcheson* and *Garrison* courts found, it distinguished cases involving conservatorships from those where the signers had a health care POA.

Also, when a conservator signs an arbitration agreement, it is valid only if the conservator has the consent of the conservatee to do so, or the court has made a *prior* adjudication of the conservatee's lack of capacity.

One more point is that it did not matter that the conservators were also the decedent's heirs. The agreement said: "This agreement is binding on all parties, including their personal representatives, executors, administrators, successors,

guardians, heir, and assigns." However, the appellate court said for that clause to be enforced, the arbitration agreement must be valid in the first place. Because the plaintiffs lacked the power to sign the arbitration agreement, that language was irrelevant.

Conclusion

When a conservator signs an arbitration agreement, the attorney has many factors to consider to determine whether or not the patient is bound by that signature. Most important will be the language in the court's order for the conservatorship. Courts often limit the powers of a conservator, and sometimes make them only temporary powers.

A few Judicial Council documents may be helpful for counsel's analysis. Probate Code section 1834 requires a conservator to acknowledge the conservator's duties and responsibilities. Pursuant to that section, the Judicial Council issued form GC-348 as a mandatory form. It lists the rights of a conservatee and the duties of a conservator. That mandatory form requires the signature of the conservator, acknowledging that the conservator is responsible to the court, as well as the conservator's other duties and responsibilities. One of the first sentences on the form states that "conservatees do not lose all rights or all voice in important decisions affecting their lives." The form is found at: <https://www.courts.ca.gov/forms.htm?query=GC-348>.

Another document that counsel might find useful is the Judicial Council's Handbook for Conservators, found at: <https://www.courts.ca.gov/documents/handbook.pdf>. Also, a basic explanation of conservatorships may be found on the Judicial Council's website at: <https://www.courts.ca.gov/selfhelp-conservatorship.htm>.

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