THIS ARTICLE WAS WRITTEN SPECIFICALLY WITH RESPECT TO NORTH CAROLINA BUT CAN SERVE AS A GUIDE FOR THE FACILITY OWNERS AND OPERATORS IN OTHER STATES

Arbitration Can Save Time and Money, If Done Right

By Maria Papoulias Wood

North Carolina public policy favors arbitration for resolving disputes which would otherwise be litigated through the courts.[1] Because discovery is limited in arbitration (depositions, written interrogatories, document production), it can resolve the matter more efficiently and sooner than it would through traditional litigation. This can have a significant impact on the costs associated with the claim. In addition, arbitration removes the dispute from the court system, hopefully keeping it out of the public eye. In the context of adult-care homes, arbitration can be pursued two ways: 1) through an arbitration agreement executed by the resident (or the resident's guardian or power of attorney), and usually done in conjunction with a resident's admission paperwork; or 2) by submitting the claim to voluntary arbitration after suit is filed. Both pose unique challenges in enforcing arbitration as an alternative to courtroom litigation.

Arbitration Provisions in Conjunction with Admissions:

These agreements strive to gain consent from the resident (or, when the resident lacks the mental capacity to consent, from their power of attorney or guardian) to submit any future claims to arbitration rather than filing suit. Typically, they provide for claims to be submitted through either the American Arbitration Association or through North Carolina's Revised Uniform Arbitration Act.

There can be problems involving the enforceability of these agreements in the adult-care home setting. They often arise with respect to whether the resident – or individual who executed the agreement on the resident's behalf – possessed the mental an/or legal capacity to enter into the agreement.

As a basic rule of contract law, the arbitration agreement fails and cannot be enforced if the party who executed it is not the proper party. Therefore, it is incumbent upon the adult-care home to ensure that the proper party executes the agreement. If there are no questions surrounding the resident's mental competence, and the resident has not designate anyone to enter into contractual agreements on his or her behalf (i.e., power of attorney), then the resident should sign the agreement. However, if the resident is not competent, or if there is a designated power of attorney or legal guardian, then the power of attorney or legal guardian needs to execute it on the resident's behalf.

It is important to note that a resident's responsible party is not automatically the proper party to sign an arbitration agreement on the resident's behalf, especially if the resident never authorized that individual to enter into contracts on his or her behalf. By way of example, the North Carolina Court of Appeals has ruled that the mother of a non-responsive nursing home resident did not possess the legal authority to enter into a binding arbitration agreement on her daughter's behalf—*Munn v. Haymount Nursing and Rehabilitation Center, et al*, 704 S.E.2d 290, 296 (2010). In the *Munn* case, there was no indication that the daughter ever authorized her mother (prior to becoming non-responsive) to serve as her general agent. As a result, the Court of Appeals refused to enforce the arbitration agreement, notwithstanding that the mother made decisions regarding her daughter's medical treatment—*Id.* On the other hand, in the *Raper* case, the Court of Appeals enforced an arbitration agreement where the decedent, a resident of an adult-

care home, had executed a power of attorney in favor of the plaintiff—*Raper*, 180 N.C. App. at 422, 637 S.E.2d at 556.

Arbitration When a Suit is Filed:
In addition to arbitration agreements executed upon admission, recent medical malpractice tort reform legislation classifying adult-care homes as healthcare providers[2] allows adult-care homes to submit disputes involving negligent healthcare claims to voluntary arbitration. However, the parties must unanimously agree to arbitration. If they do not agree, they must file a declaration to this effect with the Court prior to the initial discovery scheduling conference. The good news is that the declaration is "without prejudice." This means that the parties may later agree to arbitration as the case proceeds.

We will have to wait and see what additional impact recent medical-liability tort reform has on adult care home litigation, now that they are classified as healthcare providers. For the time being however, adult-care home owners and administrators should consider enactment of arbitration agreements as a way to potentially control the time and expense of defending against tortious claims.

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[1] *See, e.g., Red Springs Presbyterian Church v. Terminix Company of North Carolina, Inc., et al,* 119 N.C. App. 299, 303, 458 S.E.2d 270, 273 (1995) (citations omitted); *Raper v. Oliver House, LLC,* 180 N.C. App. 414, 637 S.E.2d 551, 554 (2006) (citations omitted).

[2] N.C.G.S. § 90-21.11