Digital Estate Planning: What Every Planner Needs to Know

By Armine Bazikyan, Esq.

Technology has become both a solution and a problem in many areas of life. Once tangible items have now been replaced by more seemingly efficient and virtual replacements. Filing cabinets are now replaced by file folders on a hard drive containing scanned documents. Albums containing printed photographs are now replaced by online photo galleries and slideshows. What once was a love letter has now morphed into a “love email”. Otherwise tangible items from the past have either become obsolete or transitioned to a more efficient virtual counterpart.

This technological transition to the virtual world has created problems when individuals pass away, with access being the biggest problem.

Much of estate planning of yesteryear depended on paper files kept in safe places, and instructions as to where to locate other documents in “Letters of Instruction” or other informal (and legally nonbinding) documents. In the past, fiduciaries would exam boxes or file folders full of documents, sometimes waiting for a monthly statement in the mail, and through this search and track, or discovery method, a fiduciary would come to learn the important information needed to properly administer an individual’s estate or trust. Today, much of this information is kept in computers and cloud storage devices. Often times, passwords are absolutely necessary to access much of this information, creating an administrative burden on the fiduciary administering the estate or trust. Access to these digital assets and accounts are vital to administration of a decedent’s estate or trust estate.

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CANHR BRIEFS

CANHR Welcomes New Staff Attorneys for 2020

CANHR is pleased to welcome Michael Stocker Dark, as a new staff attorney for Litigation and Legal Services Support. Michael brings many years of litigation experience to CANHR and will join our wonderful team of staff attorneys to provide advocacy support and technical assistance to legal services programs throughout California. CANHR also welcomes Dustin Roy Helmer, as the new staff attorney for our State Bar-funded Homeless Prevention project, to defend nursing home and RCFE residents from illegal evictions and transfers. Dustin has extensive experience in eviction defense having worked for the AIDS Legal Referral Service for the past several years. CANHR is fortunate to have found such talented and experienced attorneys, and we welcome Mike and Dustin.

Planned Giving

This is the time of year when many people are thinking of donations and planned giving, whether to give back for all they have or because of tax considerations. Whatever the reason, if your clients are considering a year-end charitable gift, please remember that CANHR is a not-for-profit, 501(c)(3) organization and we rely on consumer contributions for our survival. A planned gift to CANHR is a wonderful way to memorialize a commitment to quality care for long term care consumers. If you would like more information on CANHR’s Planned Giving Program, please contact Pat at patm@canhr.org or call the CANHR office.

Thank You, Attorneys and Advocates!

CANHR’s staff and Board of Directors would like to thank all of you who gave so generously of your time and money to CANHR throughout the year. CANHR could not do the work it does without the contributions of the private bar attorneys, legal services staff and long-term care advocates who have donated their time and expertise to our written materials and to our trainings throughout 2019 and who generously provide technical assistance to the CANHR staff and other attorneys throughout California.

We also thank CANHR’s LRS members, the LRS Advisory Committee, our Elder Justice Advocates and all of the private bar attorneys who have taken on difficult cases for low or no fees, and whose efforts have improved the lives of thousands of California consumers. There is no way that CANHR can repay you for all that you do, but please know that your work makes a difference in the lives of many, and we thank you.
What are digital assets or accounts?

Digital assets and accounts are your assets that exist primarily in the virtual world or online. They include things like your Facebook account, email accounts, photo buckets, PayPal accounts, websites, investment accounts, and so on. But digital assets are not simply limited to the online world. Digital assets also include files, images, documents, audio, video and similar digital files on your electronic devices such as your mobile phone, laptops, tablets and computers.

In 2000, nearly 48% of U.S. adults did not use the internet. This number has decreased significantly as more and more individuals turn to the internet to socialize, stay in touch with family, shop, get news and more. As of 2019, only 10% of U.S. adults did not use the internet (27% of adults over the age of 65). These days, most adults have some form of a digital presence requiring a digital estate plan.

These digital assets and accounts may simply have sentimental and historical value, such as a Facebook account, photographs or emails from loved ones. Otherwise historically tangible items that were passed down from generation to generation are now being digitally stored. But, are they still being passed down from generation to generation? Without proper planning and organization, it becomes difficult for loved ones to access these digital assets of sentimental value and historical value.

Digital assets and accounts may also have significant financial and informational value. For example, there may be crypto currency like Bitcoins or online gaming profiles with high monetary resale values. In order to pass these through to the next generation, a proper estate plan needs to be put into the place by the 90% of U.S. adults utilizing the internet for storage and information exchange.

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**TIER 3: Terms of Use**

At the third tier, if no online tool is used and the estate plan is silent on this issue, then the service provider’s Terms of Use will dictate what shall be done. The terms of use for each service provider is a contract signed by the User when the account is opened. Each service provider has a different set of contractual obligations when it comes to the account, most of which is governed by the Electronic Communications Privacy Act (“ECPA”), which prevents service providers from knowingly divulging contents of an account. For example, Yahoo!’s terms of use include a clause that states accounts are non-transferable and will be deleted upon a user’s death. If the User did not use an online tool (tier 1) or have a digital estate plan (tier 2), then Yahoo! will delete the account without allowing access to the contents for privacy reasons.

**Conclusion**

There are only a few service providers that have incorporated online tools addressing death, such as Google and Facebook. Because only a limited number of service providers offer online tools, the responsibility falls on the individual and estate planners to create a digital estate plan. Otherwise, access to digital assets and accounts may become a nightmare for fiduciaries when the time comes to administer a person’s estate, especially for a person who has lived the last 30+ years of their life paperless and with a heavy reliance on online cloud storage. Modern estate planning should not only include the preparation of the relevant legal documents (wills, trusts, powers of attorney, etc.) to assist in the transfer of traditional assets at death and management during incapacity, but it should also include instructions and provide authority to digital trustees or executors to take control and utilize digital assets and accounts as is necessary to effectively administer the trust or estate.

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**SAVE THE DATE!**

for CANHR’s 2020 Attorney Online Spring Training Series

*All webinars are scheduled Wednesdays, from 12:00pm to 1:30pm.*

*All webinars qualify for one and a half hour of MCLE credits*

**Wednesday, April 8th, 2020**

**Ethics and Care Advocacy**

**Presenter:** Phillip Lindsley, Esq., San Diego Elder Law Center

**Wednesday, April 15, 2020**

**Decision-making Capacity as the Foundation of Elder Law**

**Presenter:** Tony Chichtoel, Esq., CANHR Staff Attorney

**Wednesday, April 22, 2020**

**Civil Elder Financial Abuse: A Roadmap for Legal Services and Private Bar Attorneys**

**Presenter:** Frank Fox, Esq., Majors and Fox, San Diego

**Wednesday, April 29, 2020**

**Trusts & Medi-Cal What You Need to Know**

**Presenter:** Peter Stern, Esq., Palo Alto, CA

More details to follow.
**News & Notes**

**LA Nursing Home Makes Habit of Dumping Residents**

The residents of Vernon Healthcare Center may be happy to say goodbye to 2019 after the facility spent much of the year getting citations for illegally dumping residents into inappropriate settings unfit to meet their care needs. At least three residents were sent to board and care homes while one was dumped into a hospital. At least two of the discharges were done without the resident’s physician's approval. These citations are more evidence of the nursing home discharge crisis recently highlighted by NBC News.

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**Legislation Introduced to Prohibit Pre-Dispute Arbitration Agreements for Nursing Home Residents**

On December 5, 2019, U.S. Representatives Linda T. Sánchez (D-CA) and Jan Schakowsky (D-IL) introduced the **Fairness in Nursing Home Arbitration Act**. If enacted, the bill would prohibit long-term care facilities from requiring or soliciting residents to enter into pre-dispute arbitration agreements. CANHR and other leading advocacy organizations for nursing home residents have endorsed the bill.

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**OIG Reports California Nursing Homes are Poorly Prepared for Emergencies**

An alarming new report – **California Should Improve Its Oversight of Selected Nursing Homes’ Compliance With Federal Requirements for Life Safety and Emergency Preparedness** – by the federal HHS Office of Inspector General (OIG) states California nursing home residents are at increased risk of injury or death during a fire or other emergency due to widespread violations of critical safety standards. In examining emergency preparedness at 20 unnamed California nursing homes from September to December 2018, OIG found serious violations at every nursing home, including 188 violations of emergency preparedness requirements and 137 violations of life safety requirements. One of the nursing homes OIG inspected was later destroyed by a wildfire, illustrating the grave risks facing California nursing home residents today.

**Replacement Medication, Medical Supplies and Medical Equipment for Medi-Cal Recipients Impacted by Wildfires and Power Shutoffs**

On October 31, 2019, in response to the Governor’s proclamation of a statewide emergency due to the risk of wildfires, the Department of Health Care Services (DHCS) issued updated guidance for dispensing replacement medication(s) to impacted recipients. On November 7, 2019, DHCS provided additional guidance for dispensing medical supplies and durable medical equipment.

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FEATURE

PHYSICAL THERAPY UNDER PDPM: THE DARK SIDE OF NEW CHANGES

Dramatic new changes in Medicare reimbursement for physical therapy may have dire consequences for the quality of rehabilitation care being delivered in skilled nursing facilities. Residents and their advocates should scrutinize the delivery of these services to ensure that resident needs, not reimbursement schemes, are shaping care plans.

Physical therapy plays a central role in the care delivered by skilled nursing facilities, ranging from assistance in re-learning dressing and toileting, to interventions intended to help residents regain mobility or speech after a stroke. Therapy can be delivered on an individual basis or in a group setting, defined for Part A of Medicare as “the treatment of 2-6 residents, regardless of payer source, who are performing the same or similar activities, and are supervised by a therapist or an assistant who is not supervising any other individuals.” (Centers for Medicare and Medicaid Services Concurrent and Group Therapy Fact Sheet, posted 8/30/19).

Under the old Medicare payment methodology known as Resource Utilization Groups Version IV, the medical condition and care needs of residents were used to assign them to one of 66 casemix groups that determined reimbursement rates. A vulnerability of this system was that facilities could exaggerate the care needs of residents—and increase reimbursement—by providing more minutes of individual physical therapy.

Partly in an effort to address such systemic abuses, on 10/1/2019, CMS rolled out the new Patient Driven Payment Model (PDPM) to make reimbursement a more “value based” system. Under the new PDPM, facilities can conduct up to twenty five percent of physical therapy in group sessions. This new case-mix classification model will be used under the Skilled Nursing Facility (SNF) Prospective Payment System (PPS) for classifying SNF patients in a Medicare-covered Part A stay.

From the outset, advocates raised alarms that these changes might result in residents being treated in a group setting simply because group services could be delivered more profitably than individual therapy. This may result in declining therapeutic benefits and slower recoveries, especially when residents placed in a group have highly varying levels of function.

CMS acknowledged these concerns in issuing the new rule, stating that it recognized that the change in therapy reimbursement under PDPM may incentivize providers to furnish more group therapy for financial, rather than clinical reasons, but asserted that the 25 percent combined cap would limit abuses. CMS also reminded providers that “PDPM does not change the care needs of SNF patients, which should be the primary driver of care decisions, including the type, duration, and intensity of skilled therapies, made on behalf of SNF patients.” (PDPM FAQ posted 8/30/10).

Notwithstanding this aspiration, many of the concerns about the effect of the new reimbursement system are already coming to pass. Even before the effective date of the new rules, nursing home chains laid off thousands of physical therapists—despite the fact that homes were treating the same residents, with the same care needs, that they had served before the change in reimbursement. (https://www.mcknights.com/news/pdpmss-arrival-brings-reports-of-therapistlayoffs-cuts/).

Moreover, anecdotal reports have emerged that some facilities are requiring therapists to ensure that twenty five percent of physical therapy be conducted in a group setting, effectively turning CMS’ cap into a requirement, regardless of the needs of residents.https://www.nytimes.com/2019/11/29/health/new-old-age-medicare-physical-therapy.html

Residents who find themselves placed in group therapy despite their care needs are not without recourse. In exchange for Medicare payments, certified nursing homes agree to help each resident attain or maintain the highest practicable level of physical, mental and psychosocial well-being. Care, treatment and therapies must be used to maintain and improve health to the highest extent possible, subject to the resident’s right to choose and refuse services. (http://www.canhr.org/factsheets/nh_fs/html/fs_CareStandards.html).

Residents and their advocates are encouraged to reach out to CANHR to report instances of inappropriate placement in group therapy in a skilled nursing setting.
CANHR’s 23rd Annual Elder Law Conference

A sold-out conference welcomed attorneys from throughout California to CANHR’s 23rd Annual Elder Law Conference at the beautiful Monterey Plaza Hotel in Monterey on November 22 & 23rd, 2019.

Three pre-conference sessions – Medi-Cal Basics, an intensive on Long Term Care Staffing for litigators and a special session on elder financial abuse for Legal Services staff - were well received, while individual sessions focused on issues such as Continuing Care Retirement Communities – laws and policies, IHSS, ethics and advocacy, elder financial abuse litigation, and Trusts.

Margaret Hoffeditz, Chief of the Medi-Cal Recovery Unit, Dennis Jones, Esq., with Medi-Cal Recovery, Linda Nguyen, Chief of the Medi-Cal Policy Branch, with Brooke Hennessy, Esq. and Theresa Hasbrouck, with Medi-Cal Policy, did a wonderful job of fielding multiple questions about the Medi-Cal Recovery laws and Medi-Cal eligibility issues at the “Ask the Experts” session in Track A. Pam Dickfoss, Deputy Director of the Department of Social Services and Ley Arquisola, Program Administrator for the DSS Adult and Senior Care Program, were enthusiastically welcomed at the “Ask the Experts” session for Track B on Residential Care.

Betsy Butler, Executive Director of the California Women’s Law Center and current Chair of the California Commission on Aging, was the luncheon speaker. Ms. Butler gave a touching and impassioned speech on aging issues and urged participants to get involved in the Governor’s Master Plan on Aging agenda.

The 13th annual William F. Taylor Memorial Award was presented to litigation attorney, Kathryn Stebner, of Stebner & Associates in San Francisco, in recognition of her work in promoting justice for California’s long-term care consumers. Kathryn has successfully litigated numerous cases on behalf of nursing home, RCFE and CCRC residents.

The Timothy Millar Estate Planning Award was presented to Carlos Arcos, Esq., in private practice in Arcadia, California, in recognition of his advocacy and outreach on estate planning for long term care consumers in California. Carlos has been a core part of CANHR’s training team for many years and has generously shared his materials and expertise to educate consumers and estate planning attorneys alike.

CANHR is particularly grateful to the many law firms for their sponsorship of the conference, and to the many private attorneys who contributed to the Timothy Millar Scholarship Fund to underwrite scholarships for 30 legal services program staff.

All participants were invited to the Meet the Speakers reception on Friday evening with complimentary hors d’oeuvres and a no-host bar. As always, CANHR’s Annual Elder Law Conference was a wonderful learning and networking experience. See you next year – same place – same time – the weekend before Thanksgiving!
Betsy Butler, the keynote speaker; Kathryn Stebner, 2019 William F. Taylor Memorial Award recipient; Pat McGinnis, CANHR ED; and Carlos Arcos, 2019 Timothy Millar Estate Planning Award recipient. (l to r)

(l.-r) Brooke Hennessy, Linda Nguyen, Theresa Hasbrouck, Dennis Johnson and Margaret Hoffeditz at the “Ask the Experts” Medi-Cal session.

Phil Lindsley and Guy Wallace – our plenary session speakers.

Kevin Staker, Matt O’Donnell and Gregory Wilcox having fun discussing the post SB 833 Planning.

(l to r) The Fab Five present on Elder Financial Abuse: Frank Fox, Kellie Morgantini, Tom Tagliarini, Patrick Nakao and Doug Rosner.

Peter Stern and Kevin Urbatsch kept attendees engaged during the last session of the conference on trusts.
Ley Arquisola (l) and Pam Dickfoss (r), DSS/CCL experts wowed the Track B RCFE session.

Board President, Anne Marie Murphy, with her twin assistants.

Anna Darr and Molly Davies enjoying the meet the speakers reception.

Legal Services providers gather for a group photo at the special preconference session on Elder Financial abuse.

Lisa Flint, Peter Lomhoff, Mike Moran and Karen Moran enjoying some case talk and cocktails.

The Man, The Myth, Michael Thamer live presenting on Elder Abuse.

Carlos Arcos, Millar Award recipient, his wife, Maura Arcos, and Matt O’Donnell.
MEDI-CAL UPDATES

LTC Services & Supports - Spousal Impoverishment Extended

In its end-of-year funding package, Congress extended protections from spousal impoverishment for individuals receiving Medicaid home- and community-based services (HCBS) and the Medicaid Money Follows the Person program through May 22, 2020. Advocacy groups are advocating for permanent authorizations of both in May as part of a larger health care package that may include prescription drug pricing reforms. Stay tuned. *(From Justice in Aging – 1/9/2020)*

2020 Spousal Impoverishment Standards

CMS has released the 2020 spousal impoverishment standards for 2020. California has opted for the maximum standards:

- **2020 CSRA:** $128,640 (up from $126,420 in 2019)
- **2020 MMMNA:** $3,217 (up from $3,160.50 in 2019).

Note that California has not released an ACWDL on this yet.

Home Equity Limits: (under the DRA, which has not yet been implemented in California) is now at a maximum of $878,000 for 2019 and the 2020 limits haven’t been released yet. Remember that the Republican Congress has had a number of bills that would limit the home equity limits to $500,000, although none are currently being heard.

Family Member Base Allocation Amount

Per ACWDL 19-19, effective July 1, 2019, through June 30, 2020, the Family Member Base Allocation Amount (FMBA) for a family member living with the community spouse of an institutionalized spouse and HCBS spouse is $2,114. The FMBA amount for 2018-2019 was $2,058. The FMBA amount is used to determine how much of their income the institutionalized spouse and Home and Community Based Services (HCBS) spouse may allocate to family members.

Aged and Disabled Income Level Increased to 138% of FPL

After a number of legislative attempts by advocacy groups over the years, SB 104 amended the Welfare and Institutions Code to increase the Aged and Disabled Federal Poverty Level Program income limits by increasing the income disregard of all countable income above the 100% FPL up to 138% of the federal poverty level. The changes are effective August 1, 2020, and the Department has issued a draft ACWDL while seeking comments on the implementation. This change will have an immediate impact on many low-income aged and disabled beneficiaries. For example, the current FPL of 100% for a single individual is $1,271. Under the 138% FPL the current amount is $1,437 - a significant increase.

Disposition of Estates Without Administration

AB 473 (Maienschein), effective 1/1/2020, includes a number of changes to the Probate Code regarding the disposition of small estates, including raising the small estate set aside amounts for personal and real property petitions to $166,250. This is important for Medi-Cal recovery purposes, since there is no recovery on small estates subject to summary probate administration. The current limit is $150,000. The bill also creates a COLA effective 4/1/22 and every three years thereafter for the Judicial Council to adjust the dollar amounts for certain estates. To read the full bill, see:

GARRISON AND HOGAN ARE WRONG – WHY HEALTH CARE AGENTS CANNOT BIND PRINCIPALS TO PRE-DISPUTE ARBITRATION AGREEMENTS

By Tony Chicotel, CANHR Staff Attorney

Two California Court of Appeal decisions, Garrison and Hogan, hold that agents named in health care powers of attorney (usually embedded in Advance Health Care Directives) have the authority to bind their principals to pre-dispute arbitration agreements.¹ The idea that an agent tasked with “health care decisions” can unilaterally reduce a principal’s choices regarding the resolution of legal matters deserves scrutiny. In this article, CANHR will review the cases, examine their reasoning, compare them to cases in other states, and explain why ultimately Garrison and Hogan are wrong.

The opinion in Garrison (132 Cal. App. 4th 253 (2nd Dist., 2005)) largely relies on the fact that the arbitration agreement was part of the nursing home admission agreement package, rendering arbitration “part of the admission process.” Since the decision whether to enter a nursing home is a health care decision, the documents that are routinely part of the admission process must also be part of the health decision. The Garrison court found agents are authorized to choose among health care options: one option is a nursing home that requires arbitration as part of the admission process and another option is a nursing home that does not.

The Garrison court found that health care agency is broad, giving the agent the ability to do “whatever is necessary or proper in the ordinary course of business” when engaging the health care system. Health care decisions presumably include resolution of disputes over treatment unless the principal explicitly restricts that authority. Interestingly, the power of attorney at issue in the case included a provision giving the agent the power to sign waivers of liability “required by a hospital or physician.” The court could have interpreted this very unusual provision to support the idea that the agent was therefore NOT empowered to sign waivers required by health care providers other than hospitals or physicians but it did not.

Hogan (148 Cal. App. 4th 259 (4th Dist., 2007)), used much of the same rationale as in Garrison: the power to select health care providers implies the power to execute health care admission contracts. The court cited Health and Safety Code § 1599.81 as support that arbitration agreements can be part of admission contracts and thus part of the health care decision process.

The bottom-line holdings in Garrison and Hogan are that arbitration agreements included in a nursing home admissions process are absorbed into the health care decision of choosing a nursing home.

Other States Disagree with Garrison and Hogan

A fairly large number of states have reached the opposite conclusion of the Garrison and Hogan courts and determined that arbitration agreements are not health care decisions and thus outside of the scope of a surrogate health care decisionmaker. These states hold that arbitration agreements are not medical decisions but legal or business decisions related to important rights to trial by jury, dispute resolution, and access to the judicial system.² (Dickerson v. Longoria, 995 A. 2d 721 (Maryland, 2010), Lujan v. Life Care, 222 P. 3d 970 (Colorado, 2009), Blankfeld v. Richmond Health Care, 902 So. 2d 296 (Florida, 2005), Manor Oaks, Inc. v. Campbell, 276 So.3d 830 (Florida, 2019), Life Care v. Smith, 298 Ga. App. 739 (Georgia, 2009), and Texas Cityview v. Fryer, 227 S.W. 3d 345 (Texas, 2007))

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Many of the foregoing and other state cases have found that even if an arbitration agreement is linked to a nursing home admission process, entering into the agreement is not a health care decision if it is not mandatory. When the arbitration agreement is an optional piece of an admission contract, it is not an integral part of the consideration for receiving health care and thus limited to the purely legal issue of limiting dispute resolution options. The approval or refusal to sign an arbitration agreement would make no difference on the health care provided to the principal. (Dickerson v. Longoria, Lujan v. Life Care, Life Care v. Smith, Koricic v. Beverly Enterprises-Nebraska, 773 N.W. 2d 145 (Nebraska, 2009), Mississippi Care Center of Greenville v. Hinyub, 975 So. 2d 211 (Mississippi, 2008)) The distinction between optional arbitration agreements and those that are a prerequisite for receiving care is especially important where state laws prohibit nursing homes from requiring an arbitration agreement before admission. Such laws demonstrate a “clear legislative intent” to separate a health care facility admission from an agreement to arbitrate a dispute with the facility. (Lujan v. Life Care)

Recent California Cases

Since Garrison and Hogan were decided, a couple of California cases have addressed the authority of power of attorney agents to bind principals to arbitration agreements. In Young v. Horizon West (220 Cal. App.4th 1122 (6th Dist., 2013)), the court found that when the agent’s authority is contingent on an event, such as a physician formally stating that the principal has lost capacity to make their own decisions, the agent has no authority until that event takes place. The court, in dicta, also cast doubt on Garrison and Hogan:

The [Garrison] court did, however, express the view that the term “health care decisions” made by an agent encompasses the execution of arbitration agreements on behalf of the patient. So broad an interpretation of “health care decisions” seems unnecessary to the result in Garrison, and to the extent that the court intended such a general application, we disagree with its conclusion. (at 1129)

Another case, Hutcheson v. Eskaton Fountainwood Lodge (17 Cal. App. 5th 937 (3rd Dist., 2017)), supports the idea that paperwork, such as an arbitration agreement, for entrance into a health care facility, is part of a health care decision. The court footnoted the Young case but accepted the Garrison and Hogan conclusions with virtually no discussion.

Arbitration Agreements Are NOT Health Care Decisions

Despite California case law holding otherwise, arbitration agreements are not health care decisions. Several states have found that arbitration, which is about remedies of legal disputes, is significantly distinct from accepting or rejecting proffered medical treatment. While arbitration agreements are often part of the nursing home admission process and linked to the decision of accepting nursing home care, signing an arbitration agreement can only be considered part of a health care decision when it is mandatory.3

Fortunately, California, much like Colorado in the Lujan case, prohibits arbitration agreements as a condition of admission to a nursing home. Health and Safety Code § 1599.81(a) bans mandatory use of arbitration agreements in nursing homes. Inexplicably, neither Garrison nor Hogan ever addresses this prohibition.4 As other states have found, the fact that the arbitration agreement is a voluntary standalone agreement means it has no bearing on the receipt of health care.5 Whether the agent agrees to arbitrate during the admission process is immaterial to whether the resident will receive nursing home care. In fact, the law prohibits such a quid pro quo.

In addition to state law, prohibiting arbitration agreements as a prerequisite of nursing home admissions has been recently adopted as a federal regulation at 42 CFR § 483.70(n)(1)).
How to Argue Against Arbitration Agreements
Signed by Agents

In a lawsuit where a nursing home is petitioning to compel arbitration to enforce an agreement signed by a health care agent, there are several possible defenses. The plaintiff can argue the power of attorney was defective or the nursing home resident lacked the capacity to execute it. The plaintiff can argue the agent’s authority was contingent on some event that had not occurred, as in the Young case. Or the plaintiff can simply argue that health care agents may not bind their principals to arbitration because arbitration is separate from the admissions agreement and has nothing to do with obtaining health care - as described above.\(^1\)

\(^1\) The remainder of this article will refer to pre-dispute arbitration agreements as “arbitration agreements.”

\(^2\) This is borne out by real-life experience. As a former high-volume legal services attorney, I prepared and reviewed hundreds of health care powers of attorney with clients. Not a single client ever suggested they had considered legal dispute resolution options or arbitration agreements as part of the authority they would be granting their health care agent. We discussed treatment options, physicians, and long-term care but the only time arbitration was raised was when I brought it up.

\(^3\) The loose connection between health care decisions and arbitration agreements distinguishes health care powers of attorney from the powers of attorney reviewed by the U.S. Supreme Court in the Kindred v. Clark case (137 S.Ct. 1421 (2017)). In Kindred, the Court rejected the “clear statement rule” - requiring the authority to enter arbitration agreements be specifically stated in a power of attorney - as a violation of the Federal Arbitration Act. However, the powers of attorney at issue were financial and included general grants of power involved financial, contractual, and legal matters. In fact, the Court remanded the case regarding one of the powers of attorney because it “may have been insufficiently broad” to include arbitration agreements. Health care powers of attorney are only linked to arbitration agreements when arbitration is a condition of the receipt of a medical service.

\(^4\) The Garrison court not only failed to mention the prohibition against arbitration agreements as a condition of admission, it erroneously stated nursing homes could “absolutely require the use of arbitration.”

\(^5\) California nursing homes are required to use a universal admission agreement that cannot include an arbitration agreement. 22 Cal. Code Regs § 73518

\(^6\) If a court nonetheless rejects all of the possible defenses and concludes a nursing home arbitration agreement is in fact a health care decision, then informed consent must be obtained and the agent must be told of all risks and alternatives prior to signing the agreement. For more discussion of these requirements, see “xxx” in the xxx, 2018 issue of the CANHR Net News.
2019 EADACPA IN REVIEW

By Michael Dark, CANHR Staff Attorney

2019 saw California appellate courts issue a pair of new decisions providing useful guidance on the scope and breadth of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), as well as illustrating the increasing comfort and familiarity of the judiciary with its provisions.

Born in 1982 as a mandatory reporting statute, EADACPA came into its own in 1991 as one of the most powerful and flexible laws in the nation benefiting abused and neglected elders. That year, to encourage civil recoveries on behalf of elderly and dependent persons, the legislature added provisions providing enhanced remedies to plaintiffs who, by clear and convincing evidence, are able to establish (1) the physical abuse, neglect or financial abuse of elders and dependent adults, and (2) that such mistreatment was conducted with recklessness, oppression, fraud, or malice. Welfare & Institutions Code § 15600 et seq.

One benefit of the statute is the breadth of its definition of “abuse”, encompassing, among other things, physical abuse, abandonment, neglect and “other treatment”, if that treatment results in harm or mental suffering to the elder. While neglect and abandonment are defined by the statute to apply only to persons having the care or custody of an elder, no such special relationship is required under the statute for claims under its physical abuse. Welfare & Institutions Code §§ 15610.05, 15610.57.

In Darrin v. Miller, 32 Cal. App. 5th 450 (Ct. App. 2019), the First District Court of Appeal made clear that plaintiffs invoking the “other treatment” provisions of the Act are similarly not required to demonstrate the existence of any care or custody relationship with the defendants. In Darrin, the plaintiff, an elder, argued that she need not demonstrate any special relationship with her neighbor to be granted a restraining order under EADACPA on account of the neighbor’s alleged harassment and threats, misconduct that had resulted in fear and anxiety on the part of the plaintiff.

The Court agreed after undertaking a close examination of the statute’s language, noting that while the Act’s provisions regarding abandonment and neglect did require the demonstration of a special relationship between victim and accused, no such requirement existed with respect to “other treatment” under the statute. Id. At 455-56. The court observed that “[w]hen the legislature intended special relationships be required for claims of elder abuse, it specified what those relationships were. It did not do that for the provision here.” Id. at 455.

This ruling widens the lens practitioners should use in determining whether a claim is viable under the Act. Even in the absence of a showing of a custodial or care relationship, harm resulting in significant pain or mental distress can still fall within the ambit of the statute so long as a plaintiff meets the definition of an elder or dependent adult and meets the statute’s considerable burden of proof as to required mental state. This interpretation leaves open, for example, potential liability under the statute of a retirement living community that has no custody or care relationship with a resident but nevertheless caused an elder resident significant harm or distress with the requisite state of mind.

The court in Tanguilig v Valdez, 36 Cal App 5th 514 (Ct. App 2019) took a similarly broad view of EADACPA’s “other treatment” language in upholding the issuance of a restraining order to protect an elder from harassment by his neighbor. The 74-year old plaintiff sought protection for himself and other family members, including his son in law, after a neighbor repeatedly blocked his driveway with trash cans and sprayed him with water. Id. at 517-18.

The court first made quick work of the appellant neighbor’s argument that younger family members could not properly be protected by a restraining order filed by an elder under the Act, noting that the Act permits elders to seek restraining orders not only for themselves, but for their families. Id. at 522.

[continued on next page]
The court was equally unconvinced by the appellant’s other arguments that that his conduct causing plaintiff “mental anguish and “emotional distress” did not meet the statutory threshold for a showing of abuse, and did not support a finding of the requisite culpable state of mind. Citing the new decision in Darrin, the court held that “treatment with resulting...mental suffering”, including fear or other forms of emotional distress brought about by intimidation, were sufficient to invoke the statute. *Id.* at 526-27. Furthermore, it concluded, the persistence of the harassing neighbor’s conduct in the face of complaints by the elder were sufficient evidence that the actions were deliberate. *Id* at 527.

Taken together with its predecessor decision in *Darrin*, *Tanguilig* reflects the courts’ increasingly sophisticated understanding of the intent of EADACPA to address the special vulnerabilities of elders, and their desire to facilitate access to the remedies the statute provides by avoiding overly narrow and legalistic views of what constitutes “abuse”.

CANHR tracks developments in the rapidly evolving law of EADACPA closely, and practitioners considering bringing claims under the statute are encouraged to reach out to our staff attorneys for assistance.
Year 2020 Rate and Cost of Living Adjustments

Rate and Cost Increases Effective 1/1/2020

There will be a 1.6% Cost of Living Increase (COLA) in 2020.

2020 Medicare Rate Increases: See Medicare website: www.medicare.gov

MEDICARE PART A
Hospital Deductible (Day 1-60): $1,408.00 (up from $1,364.00)

Coinsurance per day:
Day 61-90 $352.00 (up from $341.00)
Day 91-150: $704.00 (up from $682.00)
All cost for each day beyond 150 days.
Skilled Nursing Facility (SNF) Coinsurance: $176 per day for days 21-100 (up from $170.50)

MEDICARE PART B
Premium per month: $144.60 - $491.60 (based on income)
Deductible per year: $198.00 (up from $185.00)

2020 Medi-Cal Resources Rates:
Community Spouse Resource Allowance (CSRA): $128,640.00
Minimum Monthly Maintenance Needs Allowance (MMMNA): $3,216.00
Average Private Pay Rate (APPR): $9,337.00 (effective January 1, 2019 – new rate won’t be known until February or March 2020)

Supplemental Security Income (SSI) & State Supplemental Program Rates (SSP):

<table>
<thead>
<tr>
<th></th>
<th>Single</th>
<th>Couple</th>
</tr>
</thead>
<tbody>
<tr>
<td>Aged or Disabled: **</td>
<td>$943.72</td>
<td>$1,582.14</td>
</tr>
<tr>
<td>Blind: **</td>
<td>$1000.23</td>
<td>$1,751.00</td>
</tr>
<tr>
<td>One is Blind, One is Aged or Disabled **</td>
<td>$1,675.65</td>
<td></td>
</tr>
</tbody>
</table>

**Rates noted are for independent living only.

SSI Non-Medical Board and Care Rate:

Total Payment: $1,206.37 (up from $1,194.37)
Amount Payable to RCFE for Basic Services: $1,069.37 (up from $1,058.37)
Personal and Incidental Needs Allowance: $137 (up from $136)

Aged and Disabled Federal Poverty Level Program: Effective 4/1/2019:

<table>
<thead>
<tr>
<th></th>
<th>Single</th>
<th>Couple</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individual:</td>
<td>$1,271.00 (up from $1,242.00)</td>
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</tr>
<tr>
<td>Couple:</td>
<td>$1,720.00 (up from $1,682.00)</td>
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