

# The Elder Law & Disability Rights Extra

Mary M. Aquino, *Chair*  
Camilla O. McRory, *Editor*

## Report from the Chair

*By Mary M. Aquino, Chair*

The Elder Law and Disability Rights Section Council has been busy planning for the 2017-2018 membership year. Our goal is to continue to provide the section members with legal education programs, mentoring, and pro bono opportunities, as well as to co-sponsor events with other MSBA Sections. In addition, we welcome several new section council members: Karen Miller, Lisa Sarro, Kandace Scherr, James Silver, Daniel Tavares, and Adam Zimmerman.

The MSBA Leadership and Orientation Meeting on September 7, 2017 was attended by your Chair, and Vice Chair. Among the presentations were several by MSBA staff and Committee Chairs who discussed the MSBA five year strategic plan, which has the aim to increase the value of MSBA membership by focusing on making changes in several areas such as the governance model and organizational and operational effectiveness. Other planned changes include an increase in the number of CLE programs, increased use of social media, improvements in technology, and increased transparency for the budget of each Section.

The ELDR Section committees and their respective members are:

- Ann Goodman repeating as Chair of the Annual Meeting Committee, with Daniel Tavares serving on her committee. Please send your great ideas for topics to be presented at the Annual Meeting on June 13-16, 2018.

- Adam Zimmerman serves as Chair for the October 23, 2017 CLE on Planning for People with Disabilities. Other CLEs this year include guardianship and hot topics in elder law.
- The General Section Meeting Committee will offer educational/social programs for members with the help of Elena Boisvert, Mary Jo Speier. And Terry Douglas.
- Laurie Frank along with Kandace Scherr will provide information from meetings with other stakeholders, on changes to the Medical Assistance Long Term Care application process and rules.
- Mary Aquino will continue to monitor and report on changes in the Home and Community Based Medicaid programs such as Community First Choice.
- Elena Boisvert will transition to chair of the Legislation Committee under the guidance of Morris Klein who has done an excellent job as chair of this committee for many years. -- Co-Chairs Emmett Irwin and Michael Stelmack of the Mentoring Program/Member Relations Committee will develop programs to attract new members to the section, while also serving the interests of current Section members.
- Camilla McRory continues to do double duty as Committee Chair of Publications and Newsletter (with assistance from Terry Douglas) and is responsible for ELDR Section Technology/Website.

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# Consumer Protection Division of the Office of the Attorney General Pursues Asset Recovery on Behalf of Senior Citizens and Vulnerable Adults

*By Jeffrey H. Myers, Assistant Attorney General, Maryland Department of Aging*

Consumer Protection Division of the Office of the Attorney General is pursuing asset recovery on behalf of financially exploited senior citizens (aged 68 or older) and other vulnerable adults (a person who lacks the physical or mental capacity to provide for his or her daily needs) by bringing a civil action for damages on their behalf against persons who financially exploited them by way of deception, intimidation or undue influence.

This initiative is the result of recently passed legislation, effective July 1, 2016, that was passed by the Maryland legislature and signed by the Governor during the 2016 legislative session.

The new law is now codified as Commercial Law §13-204(15), which states that in addition to any other of its powers and duties, the Consumer Protection Division has the powers and duties to:

(15) (I) Bring a civil action for damages against a person who violates § 8-801 of the Criminal Law Article on behalf of a victim of the offense or, if the victim is deceased, the victim's estate; (ii) Recover damages under this item for property loss or damage;

b) Conviction of offense of exploitation of vulnerable adults not prerequisite to action. -- A conviction for an offense under § 8-801 of the Criminal Law Article is not a prerequisite for maintenance of an action under subsection (a)(15) of this section.

Criminal Law § 8-801 states that:

(1) A person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is a vulnerable adult with intent to deprive the vulnerable adult of the vulnerable adult's property.

(2) A person may not knowingly and willfully obtain by de-

ception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is at least 68 years old, with intent to deprive the individual of the individual's property.

The law is aimed at all abusers who financially exploit seniors or other vulnerable adults, including persons who are close to and trusted by the victim (such as family members, caregivers, financial advisors, accountants, attorneys) as well as complete strangers using phony magazine subscriptions, prize scams, donations to nonexistent charities and retrieval of personal financial information under false pretenses.

Studies have shown that senior citizens and other vulnerable adults are often reluctant to report abuse because they feel afraid, embarrassed, humiliated or ashamed. In addition, they frequently rely on the abuser for everyday functioning (such as caregivers and/or family members), and fear loss of their current life style or living arrangements if the abuse is reported; or they wish to protect the abuser, who may be a child or grandchild.

If you observe what you believe is financial exploitation of a senior citizen or other vulnerable adult, or seek more information concerning whether financial exploitation is occurring, please immediately contact:

Robert E. Frey  
Office of the Attorney General  
Consumer Protection Division  
200 St. Paul Place #1600  
Baltimore, Maryland 21202  
410-576- 6575  
rfrey@oag.state.md.us

## FAQs

### **What conduct is considered to be undue influence?**

Undue influence as defined by Criminal Law § 8-801, means:

(I) domination and influence amounting to force and coercion exercised by another person to such an extent that a vulnerable adult or an individual at least 68 years old was prevented from exercising free judgment and choice.

(ii) "Undue influence" does not include the normal influence that one member of a family has over another member of the family.

#### **What conduct is considered to be deception?**

Deception as defined by Criminal Law § 7-101, means knowingly to:

(I) create or confirm in another a false impression that the offender does not believe to be true;

(ii) fail to correct a false impression that the offender previously has created or confirmed;

(iii) prevent another from acquiring information pertinent to the disposition of the property involved; or

(vii) promise performance that the offender does not intend to perform or knows will not be performed;

(2) "Deception"; does not include puffing or false statements of immaterial facts and exaggerated representations that are unlikely to deceive an ordinary person.

#### **What conduct is considered to be intimidation?**

Although not defined by statute, the ordinary everyday definition of "intimidation" is "to make timid or fearful; to frighten; or to compel or deter by or as if by threats."

#### **Who is a vulnerable adult?**

Vulnerable adult is defined by Criminal Law § 3-604 to mean "an adult who lacks the physical or mental capacity to provide

for the daily needs of the adult."

#### **Must the abuser be charged with or convicted of the crime before the Attorney General can file a lawsuit?**

No - the law specifically states that conviction for an offense under Criminal Law § 8-801 is not a prerequisite for the Attorney General to file a civil action. The Office of the Attorney General will consult with any state's attorney or other similar agency actively pursuing a criminal investigation of the matter.

#### **What standard of proof is required in order for the civil action to be successful?**

Unlike criminal actions that require proof beyond a reasonable doubt, any civil action brought by the Attorney General pursuant to this statute is governed by the normal and regular standard of proof governing civil actions in general – which is the preponderance of the evidence standard.

This means to prove that something is more likely than not. In other words, a preponderance of the evidence means enough evidence so that when considered and compared with the opposing evidence, the evidence is more convincing and leads one to believe that it is more likely true than not true.

#### **Do any restrictions apply to these civil actions?**

Yes. The principle restriction is that the law applies only to conduct occurring after its effective date of 01 July 1 2016. The attorney general has authority to bring these civil actions for any prohibited conduct that occurs after 01 July 2016, even if the conduct started before that date.

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### ***Report from the Chair...***

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- Karen Ellsworth is chairing the Law Day Committee which organizes the May Law Day event in each county.
- The Pro Bono Committee is chaired by Adam Zimmerman and with the help of Lisa Sarro will work to offer opportunities for members to participate in pro bono activities.
- Liaisons to other Sections include Stephen Elville for the Estates and Trusts Section, Larry Adashek for the Veterans and Military Law Section, and Sarah Steege for the Health Law Section.

The 2017&2018 ELDR Section officers are: Chair, Mary Aquino; Vice-Chair, Stephen Elville; Secretary, Wendy Schieke; Treasurer, Ben Woolery. Within the next month, however, Wendy must step down as Secretary (due to a

move to Florida), so Ben Woolery will assume Secretary responsibilities for the remainder of the year and Mary Jo Speier will become Treasurer. Wendy has been an active member of the Section Council for several years. We thank her for her excellent service. Any task Wendy undertook (or that was assigned to her in absentia!) was handled with grace and skill.

Your thoughts and suggestions to improve the quality of the ELDR Section and enhance the benefits of membership are always welcome.

*Mary Aquino*

MSBA Elder Law and Disability Rights  
Section Chair, 2016-2017

# Kindred Nursing Centers v. Clark and Nursing Home Arbitration Clauses

By Elena Sallitto Boisvert

On May 15, 2017, the US Supreme Court ruled that an agent, acting pursuant to an appropriately worded power of attorney, has the authority to sign a binding, pre-dispute arbitration agreement in a nursing home admissions contract. That ruling was followed with proposed changes to Federal Regulations that, if adopted, would permit nursing facilities to require that residents or their representatives sign a pre-dispute arbitration agreement as a precondition to entry into the facility. The significance of these developments is obvious.

## The Kentucky Supreme Court

*Kindred Nursing Centers L.P. v. Clark*, 581 U.S. \_\_\_\_ (May 15, 2017) was an appeal by a nursing home from a Kentucky Supreme court ruling. As relevant here, *Extendicare Homes, Inc. v. Whisman* 478 S. W. 3d 306 (2015) was a consolidated appeal by Kindred Nursing Centers from lawsuits filed by the families of two of its patients. In each case, the family had asserted a wrongful death claim alleging that the deaths of each were caused by substandard care by the facility.

Kindred sought to have the suits dismissed, alleging that the patients' representatives, through valid powers of attorney, had signed binding pre-dispute arbitration agreements as part of their contracts and were bound to pursue their claims in that forum. The lower Kentucky courts rejected the nursing home's argument, allowing the cases to go forward. Kindred appealed.

The Kentucky Supreme Court began with an examination of the authorizing language in each of the powers of attorney. According to the Court, one of the documents at issue was insufficient to authorize the agent to sign an arbitration agreement. The Court determined that the authorizing provision was limited in scope to banking and financial affairs. Therefore, the Court reasoned, the agent had no authority to sign an arbitration agreement in a nursing home contract and that the agreement was invalid. Its analysis as to that Respondent ended there.

The Court found that the document for the other plaintiff, however, was sufficiently broad to implicitly authorize the agent to sign an arbitration agreement. Despite that finding, the Court ruled that the Kentucky Constitution's guarantee of a right to trial by jury made that right "...inviolable, .... sacred... a God-given right...". It could not be taken away absent an explicit statement in a power of attorney document authorizing the

agent to agree to pre-dispute binding arbitration. *Extendicare Homes, Inc. v. Whisman* 478 S.W.3d 306, 329(2015). The Court determined that both cases should be resolved with a jury trial.

Kindred appealed to the U.S. Supreme Court where it found a much friendlier audience.

## The U.S. Supreme Court decision

Justice Kagan wrote the opinion for the majority and held that the Kentucky Court's decision singled out arbitration clauses for disfavored treatment in violation of the Federal Arbitration Act ("FAA"). (Justice Thomas dissented, Justice Gorsuch did not take part in the case).

The Court opined that under the FAA, arbitration agreements can be invalidated based upon general contract principles such as "fraud or unconscionability, but not on legal rules that 'apply only to arbitration'" .... *Id.* at 4. The Court dismissed as disingenuous the Kentucky Court's suggestion that a power of attorney document would need clearly to spell out the authority to contract on any Constitutionally protected right. The Court stated that "[n]o Kentucky court, .... has ever before demanded that a power of attorney explicitly confer authority to enter into contracts implicating constitutional guarantees". The Justices noted the lack of Kentucky cases requiring, for example, specific authority before an agent could sell furniture or sign a non-disclosure agreement despite the Kentucky Constitutionally protected guarantees to "'acquir[e] and protect [ ] property' and to 'freely communicat[e] thoughts and opinions.'" *Id.* at 6. It concluded that the Kentucky Court was singling out arbitration clauses for special treatment and doing precisely what was prohibited by the FAA by disfavoring those provisions.

The Court also declined the invitation to distinguish between arbitration clauses agreed to in contract formation as opposed to the enforcement of post dispute arbitration agreements. The respondents had hoped to persuade the Court that the Kentucky decision was limited to an agent's authority in the contract formation stage and that the FAA came into play only to enforce an arbitration clause that had already been agreed to. The Supreme Court rejected that analysis claiming

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# Knowing Who Your Client Is

*By Stephen R. Elville*

Especially in the practice of elder law, one of the first steps in any client representation is to determine who your client is. Identifying your client at the outset of a representation is not only extremely important, failing to do so is dangerous, both to the client and to your practice. This brief article will explore: (1) how lawyers fall into certain traps leading to the failure to identify the client; (2) what professional guidance is available to navigate these difficult legal and ethical waters; and (3) system(s) to implement so that determination of who the client is becomes routine.

Most of us have had this experience, call it situation A - you walk into a client meeting expecting to meet with a single older adult, but as you enter the conference room you see that he or she is accompanied by one or more children, grandchildren, or even friends. What do you do? Do you proceed with the meeting undeterred by the presence of third parties? Situation B - the children of an older adult meet with you for advice about their parent who may have some cognitive decline, and whose diminishing health and increasing level of care needs have caused concern. Do you engage in a comprehensive elder law consultation with the children, even to the extent of discussing the potential for guardianship and less restrictive alternatives, then later assess the mental capacity of the parent, then draft new documents for him or her? Situation C - an older couple meets with you after having recently married - it is a second marriage for each of them, and each of them have children from a previous marriage. You do estate planning for the couple. Eight months later, one of the children calls to report that one of the spouses (the parent of the caller) was recently hospitalized due to a stroke and will soon be discharged to a long-term care skilled nursing facility. There is no long-term care insurance. The cost of care is \$12,000 per month. The reporting child wants to meet with you as soon as possible about the "financial situation" of the parent. During the call, your secretary sends you a message that the children of the other spouse (the healthier spouse) are on the other line wanting to speak with you. What do you do and who is your client? These examples merely illustrate a few of the many possible situations encountered by elder law attorneys, and some problems associated with client identification. There are other related ethical issues involved in these familiar scenarios (e.g., conflict of interest, confidentiality, etc.) but those are beyond the scope of this article. Elder law practice involves, as a general rule, a never-ending series of such scenarios requiring diligence at the outset of any representation (or potential representation).

Note not only the nature of the ethical dangers involved in these examples, but also how quickly a problem may arise.

Fortunately, we can look to several sources for guidance. One of my favorites is the Aspirational Standards For The Practice of Elder Law With Commentaries (Aspirational Standards) published by the National Academy of Elder Law Attorneys (NAELA), NAELA Journal, Vol. II., November 21, 2005. These can easily be viewed online after a simple internet search, even by those who are not NAELA members.

Pay special attention to the four (4) major points (and comments) outlined under the first major topic, "Client Identification." Review this invaluable material now. Consider printing as a reference. Next, look to the Maryland Attorneys' Rules of Professional Conduct, specifically Rule 1.4 (Communication), Rule 1.6 (Confidentiality of Information), Rule 1.7 (Conflict of Interest - General), Rule 1.8 (Conflict of Interest; Current Clients; Specific Rules), Rule 1.9 (Duties to Former Clients); and Rule 1.14 (Client With Diminished Capacity). It is also worth reviewing the related ABA Model Rules of Professional Conduct.

Lastly, review other NAELA publications, and the works of preeminent elder law attorneys, including our own Jason A. Frank (Elder Law in Maryland. Matthew Bender & Company, Inc., a member of Lexis Nexis, originally published 1997), and others including Robert B. Fleming (Elder Law Answer Book. Aspen Publishers, 2004), which outlines several factors to use to gauge who is being represented.

The NAELA Aspirational Standards are intended to reflect best practices for client identification in the most practical terms, as summarized here. When used with the other sources discussed above, the standards provide a sensible way to avoiding the trap of failing to identify the client. There is no substitute for reading and understanding the Standards, especially the comments: (1) do everything possible, as soon as possible, to gather as much information as necessary to determine who the clients is, then communicate that determination to all involved at the earliest possible time; (2) speak in private with the person who is your client so that any necessary capacity evaluation can occur without interference from third parties; and for effective client-attorney communication of the wishes and instructions from the client; (3) be sure

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# Upcoming Continuing Legal Education (CLE) Programs

By Laurie S. Frank, Frank, Frank & Scherr, LLC

*Be sure not to miss these upcoming Continuing Legal Education (CLE) programs brought to you by the MSBA Elder Law and Disability Rights Section and the CLE Department! These seminars keep Maryland elder law and disability rights attorneys current and in the know, with the latest legal changes and developments. Seminars will feature various Maryland attorneys who focus on elder and disability rights law.*



## **Planning for People with Disabilities, 23 October 2017**

Program Chair Jason A. Frank, has arranged for Victoria Collier, from the Elder & Disability Law Firm of Victoria L. Collier, PC to serve as faculty for a Veterans Administration (VA) Benefits seminar. Ms. Collier will be teaching a VA certification program, including a discussion on the potential new VA rules for the aid and attendance program. If the new rules are issued after the seminar she will provide a follow up webinar for all attendees free of charge.

## **Guardianship (Under the New Rules) May 2018**

Program Chair Jason A. Frank, is planning a Medicaid Long Term Care Seminar for May 2017.

## **Hot Topics June 2018**

Led by long-time program chair, Morris Klein, Hot Topics in Elder Law will take place in either June or July of 2017.

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## ***Knowing Who Your Client Is...***

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to use an engagement letter that identifies who the client is, identifies what the scope of the representation is, addresses the attorney obligation of confidentiality, discusses potential conflicts and how those may be resolved, defines the fee arrangement, and discloses that the attorney will share information between joint clients; and (4) engage in an attorney-client relationship before a client executes documents, and be sure to oversee the execution of those documents. Aspirational Standards For The Practice of Elder Law With Commentaries. NAELA Journal, Vol. II., November 21, 2005. In further practical terms, always identify who your client is before the first meeting, identify the fiduciaries (or potential fiduciaries) of the client, and understand who the client has authorized to receive confidential information (if anyone).

In closing, it is important to understand that the field of elder law is a complex mixture of disability law, estates and trusts law, tax law, family law, health care law, public benefit law, and much more, applied in the thorny context of family dynamics. This is not a place to rush in &quot;where angels fear to tread&quot; despite the desire to do so. You will be able to use your skills, knowledge, and desire to help others in a big way - you will be able to make a big difference in the lives of your clients and their families - but only after doing due diligence to identify the client as soon as possible, consistent with your legal and ethical obligations, and in furtherance of the best interests of the client.

## Kindred Nursing Centers...

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that the respondents' reasoning would enable any state to prohibit anyone from agreeing to an arbitration clause in the contract formation stage and thus render the FAA completely ineffective. The Court lastly acknowledged that the Kentucky Court's attempt to create special rules pertaining to the ability of attorneys-in-fact to enter into arbitration agreements, by definition, placed arbitration clauses on an entirely different footing from all other contracts in blatant disregard of the mandates of the FAA.

In applying its reasoning to the powers of attorney before it, the Court analyzed the language of the two documents that were at the heart of the case. It agreed that the language in the document had to be sufficiently broad to include the authority to enter into an agreement to arbitrate. Absent that authority, whether explicitly or implicitly given, an agent would not be able to agree to arbitration. The Court remanded the case so the state court could determine whether an aversion to arbitration played any role with respect to its construction of the document it believed failed to provide the agent with the power to agree to arbitrate. *Id.* at 9.

### Proposed Nursing Home Arbitration Rule

The *Kindred* case was decided against a backdrop of regulatory reform measures precisely on point; that is, whether a nursing home can require a patient or his or her representative to sign a pre-dispute arbitration agreement as a condition to their entry into the facility.

On October 4, 2016, CMS published a final rule amending 42 CFR 483.70(n) to, *inter alia*, prohibit long term care facilities from entering into pre-dispute arbitration agreements with residents or their representatives or requiring that a resident sign an arbitration agreement as a condition of admission to the facility.

The rule was challenged by the American Health Care Association and a group of affiliated nursing homes, and its enforcement was enjoined by the U.S. District Court for the Northern District of Mississippi. *American Health Care Association, et. al. v. Burwell*, Case No. 3:16-cv- 00233-MPM- RP, Filed 1/9/2017. The District Court sympathized with the government and recognized that nursing home arbitration clauses were often used to discourage and delay otherwise meritorious suits by residents or their families. The Court determined however, that any attempt to limit the reach of the FAA to nursing home contracts was the proper purview of Congress, rather than the administrative agency.

Almost immediately after the *Kindred* decision was issued, on June 7, 2017, CMS issued a revised proposed rule. The new

rule would remove the requirement prohibiting nursing facilities from entering into pre-dispute arbitration agreements, and would permit the facilities to require those agreements as a condition to admission. In its entirety, the proposed rule reads:

2. Section 483.70 is amended by revising paragraph (n) to read as follows:

#### § 483.70 Administration.

\* \* \* \* \*

(n) Binding arbitration agreements. If a facility chooses to ask a resident or his or her representative to enter into an agreement for binding arbitration, the facility must comply with all of the requirements in this section.

(1) The facility must ensure that:

(i) The agreement for binding arbitration is in plain language. If an agreement for binding arbitration is a condition of admission, it must be included in plain language in the admission contract;

(ii) The agreement is explained to the resident and his or her representative in a form and manner that he or she understands, including in a language the resident and his or her representative understands; and

(iii) The resident acknowledges that he or she understands the agreement.

(2) The agreement must not contain any language that prohibits or discourages the resident or anyone else from communicating with federal, state, or local officials, including but not limited to, federal and state surveyors, other federal or state health department employees, and representatives of the Office of the State Long-Term Care Ombudsman, in accordance with § 483.10(k).

(3) When the facility and a resident resolve a dispute through arbitration, a copy of the signed agreement for binding arbitration and the arbitrator's final decision must be retained by the facility for 5 years and be available for inspection upon request by CMS or its designee.

(4) A notice regarding the use of agreements for binding arbitration must be posted in an area that is visible to residents and visitors.

More than 1000 comments have been filed including strong opposition to the Rule from eighteen state Attorneys General. That comment, led by Maryland Attorney General Brian Frosh, is available at the following link: [http://www.marylandattorneygeneral.gov/news%20documents/LTC\\_Arbitration.pdf](http://www.marylandattorneygeneral.gov/news%20documents/LTC_Arbitration.pdf).