

(Another) New Burden Placed on Pennsylvania Long Term Care Facilities- Determining Whether an Agent Actually Had Authority to Sign an Arbitration Agreement

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On February 1, 2017, the Pennsylvania Superior Court ruled in *Petersen v. Kindred Healthcare, Inc.*, 2017 PA Super. 26, that a party, such as a nursing home, must determine whether a successor agent actually has authority to act under a power of attorney (POA) instrument.

Kindred Healthcare sought to enforce an arbitration agreement after a resident filed a negligence lawsuit against it. The resident's daughter, Darlene, signed an arbitration agreement at the time of admission. The POA listed Darlene as the *successor* agent in the event that her sister, Kathleen, was "unwilling or unable to act."

Kindred did not investigate whether Kathleen, the primary agent named in the POA, really was unwilling or unable to act. At the time that she executed the arbitration agreement, Darlene represented herself as having the authority to act, and Kindred did not question that assertion.

The Superior Court found that a party dealing with an agent, known to the party to be "acting only under an express grant of authority (such as a power of attorney), has a duty to take notice of the nature and extent of the authority conferred." Failure to do so is at the party's own peril.

Specifically, the Superior Court said that since Kindred received a copy of the POA, it had actual notice that Darlene only had authority to act under certain conditions. The court said that Kindred should have questioned Darlene's authority and investigated the matter to determine whether Darlene had the authority to sign her mother's paperwork. There was also no evidence of record that Kathleen was, in fact, unable or unwilling to act. Accordingly, the Superior Court found that Darlene had no authority to sign the arbitration agreement, and thus the arbitration agreement was unenforceable.

What does this mean for facilities?

You must exercise extra caution when dealing with a successor agent under a POA document:

- **Always** request a copy of the written POA instrument- never take someone's word for it.
- If the successor agent is claiming that they can act under the POA, investigate why the primary agent is not involved.
- Ensure that the primary agent is unwilling and unable.
- Document all efforts.
- If any doubts or questions, contact your attorney.

You can view a copy of the Superior Court opinion here: <http://www.pacourts.us/assets/opinions/Superior/out/J-A31009-15o%20-%2010297674215918877.pdf?cb=1>

If you have additional questions, or need assistance with determining whether an agent has authority to act on behalf of one of your residents, please contact Danielle Dietrich, telephone: 412-594-5605 or on Twitter at @DLDietrich.