

**S276545**

Case No.

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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CHARLES LOGAN,

Plaintiff and Respondent,

v.

COUNTRY OAKS PARTNERS, LLC et al.,

Defendants and Appellants.

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**PETITION FOR REVIEW**

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Review Sought of a Judgment by the Court of Appeal,  
Second Appellate District, Division Four (B312967)  
(Los Angeles County Super. Ct. No. 20STCV 26536)

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BUCHALTER, A PROFESSIONAL CORP.  
Harry W.R. Chamberlain II\* (No. 95780)  
Robert M. Dato (No. 110408)  
Lauren S. Jacobs (No. 335265)  
1000 Wilshire Blvd., Suite 1500  
Los Angeles, CA 90017  
Telephone: 213.891.0700  
hchamberlain@buchalter.com  
rdato@buchalter.com

SUN MAR MANAGEMENT SERVICES  
Julieta Y. Echeverria (No. 315740)  
Brittany A. Ortiz (No. 305775)  
3050 Saturn Street, Suite 101  
Brea, CA 92821  
Telephone: 714.577.3880  
jecheverria  
@sunmarhealthcare.com

Attorneys for Defendants and Appellants  
COUNTRY OAKS PARTNERS, LLC  
dba COUNTRY OAKS CARE CENTER and  
SUN MAR MANAGEMENT SERVICES, INC.

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## INTRODUCTION AND ISSUES PRESENTED

A patient designates a relative as his health care agent and attorney in fact using a form advance health care directive. The relative selects a health care provider and at the same time agrees to arbitrate any dispute arising out of the medical services rendered to the patient. When such a dispute arises, is the agent's agreement to arbitrate within the scope of his authority and thus binding on the patient?

This issue has split courts in California and throughout the nation. In this case, Division Four of the Second District held—in a published opinion (82 Cal.App.5th 365)—that the agent's authority to make “health care decisions” on the patient's behalf does not include the authority to execute an arbitration agreement. In so holding, the Court of Appeal distinguished this court's decision in *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699 on the questionable ground that the arbitration provision in *Madden* was contained in the health care facility's admission agreement whereas the arbitration provision here was in a separate document. The Court of Appeal also declined to follow *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 and *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, in which the courts held that health care decisions made by an agent encompass the execution of arbitration agreements on behalf of the patient. Review is needed to secure uniformity of decision and to settle an important question of law.

But perhaps a more compelling issue is whether this and other Court of Appeal opinions conflict with the United States Supreme Court's decision in *Kindred Nursing Centers Ltd. v. Clark* (2107) \_\_\_ U.S. \_\_\_ [137 S.Ct. 1421]. In *Kindred*, the high Court held it was improper to invalidate arbitration clauses in agreements that family member agents entered into with a nursing home because (1) it violated the Federal Arbitration Act (9 U.S.C. § 2) (FAA) by singling out arbitration agreements for disfavored treatment, and (2) doing so flouted the FAA's command to place arbitration agreements on an equal footing with all other contracts. The Court of Appeal here did exactly what *Kindred* forbids: it singled out an arbitration agreement for disfavored treatment.

This case presents the following issues for review:

1. Should this court resolve the conflict between the Court of Appeal's opinion here and the opinions in *Garrison* and *Hogan*, as to whether an advance health care directive and power of attorney encompass an agreement to arbitrate disputes, including whether the Court of Appeal's opinion conflicts with this court's decision in *Madden*?
2. Should this court resolve the conflict between cases like the Court of Appeal's opinion here and *Kindred*, which held that arbitration agreements cannot be singled out for disfavored treatment?

Defendants and appellants Country Oaks Partners, LLC, dba Country Oaks Care Center, and Sun Mar Management

Services, Inc. (collectively Country Oaks) submit that the above questions must be answered in the affirmative.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Solely for purposes of this petition, Country Oaks accepts the Factual and Procedural Background in the Court of Appeal's opinion. (See 82 Cal.App.5th at pp. 369-370 [typed opn. at pp. 2-4].) As will be shown, the legal conclusions to be drawn from those facts *are* in dispute and present issues worthy of this court's review.

### **REASONS WHY REVIEW SHOULD BE GRANTED**

#### **I**

#### **This Court Should Resolve the Conflict Between the Court of Appeal's Opinion Here and Cases Such as *Garrison* and *Hogan*, and Whether the Opinion Conflicts With *Madden*.**

In holding that the advance health care directive and power of attorney in this case did not include the authority to execute an arbitration agreement, the Court of Appeal expressly declined to follow *Garrison, supra*, 132 Cal.App.4th 253, and *Hogan, supra*, 148 Cal.App.4th 259. This is a classic example of where review is necessary to secure uniformity of decision.<sup>1</sup>

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<sup>1</sup> The Court of Appeal also cited dicta in *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1129, where that court disagreed with *Garrison's* conclusion that "the term 'health care decisions' made by an agent encompasses the execution of arbitration agreements on behalf of the patient." (82 Cal.App.5th at p. 373, fn. 5 [typed opn. at p. 10, fn. 5].)

This split of authority may require a further discussion of this court's decision in *Madden*. Here, the Court of Appeal attempted to distinguish *Madden* on the basis that the arbitration provision in *Madden* was contained in the health care facility's admission agreement whereas the arbitration provision here was in a separate document. (82 Cal.App.5th at p. 373 [typed opn. at p. 9].) Country Oaks submits there is nothing in *Madden* that supports the conclusion that such a distinction is material. Rather, *Madden* is based on the theory of implied authority: "[A]n agent empowered to negotiate a group medical contract has the implied authority to agree to the inclusion of an arbitration provision." (17 Cal.3d at p. 1182.) Such a theory would apply to one or multiple contracts covering the same general subject matter.

The Court of Appeal also found *Madden* inapplicable because "there is nothing . . . 'necessary or proper and usual' about signing an optional arbitration agreement" in placing a patient into a skilled nursing facility. (82 Cal.App.5th at p. 373 [typed opn. at p. 10], citing Health & Saf. Code, § 1599.81, subs. a & b and 42 C.F.R. § 483.70(n)( 1).) However, the fact that admission to a facility cannot be preconditioned on agreeing to arbitration does not render such an agreement "unnecessary" or "improper" or "unusual." Arbitration agreements have been very common in the health care industry for years. (See, e.g., jt. hg. before Subcom. on Antitrust, Competition Policy & Consumer Rights of Com. on the



Judiciary and Special Committee on Aging, U.S. Senate Hg. No. 110-618 (June 18, 2008), stmt. of Sen. Kohl at p. 1.)

This court is the final arbiter over what *Madden* means. This is one more reason to grant to review and secure uniformity of decision concerning an important question of law.

## II

### **This Court Should Decide Whether the Court of Appeal’s Opinion Conflicts With *Kindred* Because It Singles Out Arbitration Agreements for Disfavored Treatment.**

*Kindred, supra*, 137 S.Ct. 1421, involved a Kentucky state rule that an attorney-in-fact has power to enter an arbitration agreement only if specifically granted that authority. The U.S. Supreme Court held that Kentucky’s rule was preempted by the Federal Arbitration Act (FAA) because it singled out arbitration contracts for disfavored treatment. The high Court held:

A court may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. [Citation.] The FAA thus preempts any state rule discriminating on its face against arbitration .... And not only that: The Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.

(*Kindred, supra*, 137 S.Ct. at p. 1426, internal quotation marks omitted.) The *Kindred* court held that Kentucky could not “adopt a legal rule hinging on the primary characteristic of an

arbitration agreement—namely, a waiver of the right to go to court and receive a jury trial”, without placing arbitration agreements on a different plane than other contracts. (*Id.* at p. 1427.)

Since *Kindred* was decided, the Ninth Circuit has taken up the preemption question in the employment context. In *U.S. Chamber of Commerce v. Bonta* (9th Cir. 2021) 13 F.4th 766, a divided panel (in an opinion written by Judge Lucero) initially held that Labor Code section 432.6, which prohibits an employer from forcing a prospective or current employee to “waive any right, forum, or procedure for a violation of any provision” of the Fair Employment and Housing Act, was not preempted by the FAA. In dissent, Judge Ikuta stated: “Like a classic clown bop bag, no matter how many times California is smacked down for violating the [FAA], the state bounces back with even more creative methods to sidestep the FAA.” (13 F.4th at p. 782.) Judge Ikuta concluded that section 432.6 “is a blatant attack on arbitration agreements, contrary to both the FAA and longstanding Supreme Court precedent” and that the original panel opinion would create a split among the federal circuits. (*Ibid.*) On August 22, 2022, the Court of Appeals granted rehearing and vacated the prior opinion, over the dissent of Judge Lucero.

Many of themes raised in both the majority and dissenting opinions in *Chamber of Commerce* are likewise in play here. The issues have divided courts in California and

throughout the country.<sup>2</sup> This is yet another reason why this case presents issues worthy of this court's review.

### CONCLUSION

There is a split among the Courts of Appeal as to whether a power of attorney in an advance health care directive authorizes the agent to bind the principal to arbitrate disputes with a health care provider. And there is likewise uncertainty as to whether the Court of Appeal's opinion in this case (and others) runs afoul of the FAA under the preemption doctrine as recently articulated in *Kindred*. This petition for review should be granted so that this court can address these issues.

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<sup>2</sup> See, e.g., *Drummond v. Bonaventure of Lacey, LLC* (2021) 20 Wn.App. 2d 455 [500 P.3d 198] [decedent's daughter's execution of arbitration agreement binding]; *LP Louisville E., LLC v. Patton* (Ky. 2021) 621 S.W.3d 386 [resident's son with power of attorney had the authority to sign the arbitration agreement to obtain resident's admittance into long-term care facility]; *Ingram v. Brook Chateau* (Mo. 2019) 586 S.W.3d 772 (Mo. 2019) [patient's attorney-in-fact had authority to execute arbitration agreement on patient's behalf]; *Evangelical Lutheran Good Samaritan Soc'y v. Moreno* (D. N.M. 2017) 277 F.Supp.3d 1191 [under New Mexico law, nursing home resident's temporary legal guardian had authority to sign admission agreement with nursing home containing arbitration agreement]; but cf. *Arredondo v. SNH SE Ashley River Tenant, LLC* (2021) 433 S.C. 69 [856 S.E.2d 550] [agent not authorized to sign arbitration agreement because that agreement did not concern property right patient possessed when agent signed it].)

Respectfully submitted,

BUCHALTER, A PROFESSIONAL CORPORATION  
Harry W.R. Chamberlain II  
Robert M. Dato  
Lauren S. Jacobs

SUN MAR MANAGEMENT SERVICES  
Julieta Y. Echeverria  
Brittany A. Ortiz

Attorneys for Defendants and Appellants  
COUNTRY OAKS PARTNERS, LLC  
dba COUNTRY OAKS CARE CENTER and  
SUN MAR MANAGEMENT SERVICES, INC.

**APPENDIX**

**Court of Appeal Opinion**

Filed 8/18/22

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

CHARLES LOGAN,

Plaintiff and Respondent,

v.

COUNTRY OAKS PARTNERS,  
LLC, et al.,

Defendants and Appellants.

B312967

(Los Angeles County  
Super. Ct. No.  
20STCV26536)

APPEAL from an order of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Cole Pedroza, Kenneth R. Pedroza and Cassidy C. Davenport; Sun Mar Management Services, Trent Evans and Kevin Khachatryan for Defendants and Appellants.

Lanzone Morgan, Ayman R. Mourad and Alexander S. Rynerson for Plaintiffs and Respondents.

## **INTRODUCTION**

Plaintiff Charles Logan designated his nephew, Mark Harrod, as his health care agent and attorney-in-fact using an advance health care directive and power of attorney for health care decisions form developed by the California Medical Association (the Advance Directive). After the execution of the Advance Directive, Logan was admitted to a skilled nursing facility. Nineteen days later, Harrod executed an admission agreement and a separate arbitration agreement purportedly on Logan's behalf as his "Legal Representative/Agent."

The sole issue on appeal is whether Harrod was authorized to sign the arbitration agreement on Logan's behalf. The answer turns on whether an agent's authority to make "health care decisions" on a principal's behalf includes the authority to execute optional arbitration agreements. We conclude it does not. We therefore affirm the trial court's order denying the motion to compel arbitration.

## **FACTUAL AND PROCEDURAL BACKGROUND**

In 2017, Logan executed the Advance Directive under California Probate Code<sup>1</sup> sections 4600-4805 (Health Care Decisions Law), appointing Harrod as his health care agent. Under the Advance Directive, if Logan's primary physician found he could not make his own health care decisions, Harrod had the "full power and authority to make those decisions for [Logan]," subject to any health care instructions set forth in the Advance Directive. In the Advance Directive, Logan specified that Harrod

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1 All further undesignated statutory references are to the Probate Code.

“will have the right to: [¶] A. Consent, refuse consent, or withdraw consent to any medical care or services, such as tests, drugs, surgery, or consultations for any physical or mental condition. This includes the provision, withholding or withdrawal of artificial nutrition and hydration (feeding by tube or vein) and all other forms of health care, including cardiopulmonary resuscitation (CPR). [¶] B. Choose or reject my physician, other health care professionals or health care facilities. [¶] C. Receive and consent to the release of medical information. [¶] D. Donate organs or tissues, authorize an autopsy and dispose of my body, unless I have said something different in a contract with a funeral home, in my will, or by some other written method.” The Advance Directive does not specifically address Harrod’s authority to execute an arbitration agreement on Logan’s behalf.

On November 10, 2019, Logan was transferred from a hospital to Country Oaks Partners, LLC dba Country Oaks Care Center (Country Oaks), a skilled nursing facility. Nineteen days later, on November 29, 2019, Harrod executed an admission agreement, and a separate arbitration agreement purportedly on Logan’s behalf as his “Legal Representative/Agent.” The arbitration agreement stated (in boldface): “Residents shall not be required to sign this Arbitration Agreement as a condition of admission to this facility or to continue to receive care at the facility.”

On December 13, 2019, Logan was transferred from Country Oaks to another skilled nursing facility. Following his discharge from Country Oaks, Logan filed a complaint against Country Oaks and its owner and operator, Sun Mar Management Services, Inc., alleging causes of action for declaratory relief,



elder abuse and neglect, negligence, and violation of Residents' Bill of Rights (Health and Saf. Code, § 1430, subd. (b).)<sup>2</sup>

Country Oaks filed a petition to compel arbitration. Following an initial hearing on the petition, the trial court continued the hearing to allow both parties to submit supplemental briefing on the issue of whether a health care agent may bind his principal to arbitration. After reviewing the supplemental briefs and hearing oral argument, the trial court denied the petition. The court concluded Country Oaks failed to meet its burden of proving the existence of a valid, enforceable arbitration agreement because Harrod lacked authority to enter into the agreement on Logan's behalf. It explained that although the Advance Directive was effective at the time Logan entered the facility,<sup>3</sup> the Advance Directive "only entitle[d] Harrod to make health care decisions for [Logan], not enter a binding arbitration agreement on his behalf."

Country Oaks timely appealed the order denying its petition.

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2 Logan also named Alessandra Hovey, the administrator of Country Oaks, as a defendant in the complaint. Logan dismissed Hovey from the action on December 17, 2020.

3 On appeal, neither party disputes the trial court's factual finding that the Advance Directive sprung into effect at the time Logan was admitted to Country Oaks (i.e., that Logan's primary physician found he could not make his own health care decisions).

## DISCUSSION

### A. Governing Law and Standard of Review

The Federal Arbitration Act (FAA) provides arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” (9 U.S.C. § 2.)<sup>4</sup> “[E]ven when the [FAA] applies, [however], interpretation of the arbitration agreement is governed by state law principles . . . . Under California law, ordinary rules of contract interpretation apply to arbitration agreements. . . . “The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. . . .”” (*Valencia v. Smyth* (2010) 185 Cal.App.4th 153, 177.)

Although federal and California law favor enforcement of valid arbitration agreements, “[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate.” [Citation.]” (*Metters v. Ralphs Grocery Co.* (2008) 161 Cal.App.4th 696, 701.) “The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement.” (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 586.)

The issue on appeal—i.e., did the Advance Directive confer authority on Harrod to enter into an arbitration agreement on Logan’s behalf—presents a legal question. We therefore apply the de novo standard of review. (See *Lopez v. Bartlett Care Center*,

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<sup>4</sup> The arbitration agreement states: “The parties to this Arbitration Agreement acknowledge and agree that the Admission Agreement and this Arbitration Agreement evidence a transaction in interstate commerce governed by the [FAA].”

*LLC* (2019) 39 Cal.App.5th 311, 317 [legal conclusions underlying a trial court’s denial of a petition to compel arbitration are reviewed de novo].)

**B. Harrod Lacked Authority to Bind Logan to Arbitration with Country Oaks**

Country Oaks contends the Advance Directive granted Harrod actual authority to execute the arbitration agreement on Logan’s behalf. Relying on *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 (*Garrison*), Country Oaks argues that because the Advance Directive expressly authorized Harrod to make health care decisions, including “choos[ing] . . . health care facilities,” Harrod also was authorized to sign an optional arbitration agreement when admitting Logan to the nursing facility. We respectfully disagree with the reasoning set forth in *Garrison* and conclude the Advance Directive did not confer such broad authority on Harrod.

In *Garrison*, a daughter, who was designated as her mother’s attorney-in-fact under a health care power of attorney, admitted her mother into a health care facility. (*Garrison, supra*, 132 Cal.App.4th at p. 256.) In doing so, the daughter signed two arbitration agreements (one pertaining to medical malpractice claims and one pertaining to all other claims against the facility). (*Id.* at pp. 256, 259-261.) Following the death of her mother, the daughter and other family members sued the facility. (*Id.* at pp. 256-257.) The trial court granted the facility’s motion to compel arbitration, and the Court of Appeal agreed that the daughter had authority to enter into the arbitration agreements on her mother’s behalf. (*Id.* at pp. 262, 266.)

The health care power of attorney at issue in *Garrison* provided the daughter was authorized to “make health care

decisions” for the mother. (*Garrison, supra*, 132 Cal.App.4th at p. 265.) In concluding the daughter had authority to sign the arbitration agreements because they were “executed as part of the health care decisionmaking process,” the *Garrison* court relied on three provisions of the Health Care Decisions Law in Probate Code section 4600 et seq. (*Garrison, supra*, 132 Cal.App.4th at pp. 265-266.) As discussed below, we are unpersuaded these provisions support that conclusion.

First, the *Garrison* court relied on section 4683, subdivisions (a) and (b), which provide, in relevant part: “An agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so” and “may also make decisions that may be effective after the principal’s death.” That an agent is permitted to make health care decisions to the same extent as the principal says nothing, however, about the agent’s authority to agree to enter into an arbitration agreement and thereby waive the principal’s right to a jury trial. As defined in the Health Care Decisions Law, the provisions of which are specifically referenced in the Advance Directive, a “health care decision” is limited to “a decision made by a patient or the patient’s agent . . . , regarding the patient’s health care . . . .” (§ 4617.) “Health care,” in turn, is defined as “any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient’s physical or mental condition.” (§ 4615.) Thus, section 4683 merely confers upon the agent the authority to make decisions affecting the principal’s “physical or mental health” to the same extent the principal could make those decisions. The decision to waive a jury trial and instead engage in binding arbitration does not fit within these definitions. It is not

a health care decision. Rather it is a decision about how disputes over health care decisions will be resolved.

The *Garrison* court next relied on section 4684, which provides: “An agent shall make a health care decision in accordance with the principal’s individual health care instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent’s determination of the principal’s best interest. In determining the principal’s best interest, the agent shall consider the principal’s personal values to the extent known to the agent.” (*Garrison, supra*, 132 Cal.App.4th at p. 266.) Where, as here, neither the plain language of the Advance Directive nor any evidence in the record demonstrates Logan’s wishes or personal values regarding arbitration, we fail to see how section 4684 sheds light on whether the agent’s execution of an arbitration agreement is a “health care decision.”

Finally, the *Garrison* court cites to section 4688, which “clarifies that if there are any matters not covered by the Health Care Decisions Law, the law of agency is controlling.” (*Garrison, supra*, 132 Cal.App.4th at p. 266.) It therefore turned to Civil Code section 2319: “An agent has authority: [¶] 1. To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency . . . .” Relying on our Supreme Court’s decision in *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699 (*Madden*), the *Garrison* court held “[t]he decision to enter into optional revocable arbitration agreements in connection with placement in a health care facility, as occurred here, is a ‘proper and usual’ exercise of an agent’s powers.” (*Garrison, supra*, 132 Cal.App.4th at p. 266.) The

facts in *Madden*, however, are distinguishable from both the facts in *Garrison* and this case.

In *Madden*, the defendants appealed from “an order denying enforcement of an arbitration provision in a medical services contract entered into between the Board of Administration of the State Employees Retirement System . . . and defendant Kaiser Foundation Health Plan.” (*Madden, supra*, 17 Cal.3d at p. 702, fn. omitted.) Plaintiff, a state employee who enrolled under the Kaiser plan, contended she was not bound by the provision for arbitration. (*Ibid.*) Our Supreme Court held that Civil Code section 2319 granted the Board (as agent for the employee) the authority to do whatever is “proper and usual” to carry out its agency, and therefore the Board “enjoyed an implied authority to agree to arbitration of malpractice claims of enrolled employees.” (*Id.* a pp. 702-703.) Thus, based on *Madden*, when two parties “possessing parity of bargaining strength” (*id.* at p. 711) negotiate a group contract, it is “proper and usual” to negotiate provisions of the contract, which may include an arbitration provision. The holding in *Madden* is inapplicable here, however, where the skilled nursing facility’s admission agreement does not contain an arbitration provision negotiated between parties of equal bargaining power. Rather, as required by California and federal law, Country Oaks presented Harrod with a separate document from the admission contract, which contained an optional arbitration agreement. (See Health & Saf. Code, § 1599.81, subds. a & b [(a) All contracts of admission that contain an arbitration clause shall clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility. ¶] (b) All arbitration clauses shall be included on a form separate from the

rest of the admission contract. . . .”; see also 42 C.F.R. § 483.70(n)(1) (2019) [“The facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility and must explicitly inform the resident or his or her representative of his or her right not to sign the agreement as a condition of admission to, or as a requirement to continue to receive care at, the facility.”].) There is nothing, therefore, “necessary or proper and usual” about signing an optional arbitration agreement “for effecting the purpose of his agency,” i.e., placing Logan into a skilled nursing facility. Rather, the “health care decision” (whether to consent to admission into the skilled nursing facility) has been expressly decoupled from the decision whether to enter into the optional arbitration agreement.

Based on the foregoing, we decline to follow *Garrison’s* broad interpretation of “health care decisions.”<sup>5</sup> Rather, we begin our analysis by reviewing the plain language of the Advance Directive. (See *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1214 [“The scope of a power of attorney depends on the language of the instrument, which is strictly construed. [Citation.]”].) Logan stated in the Advance Directive: “If my primary physician finds that I cannot make my own health care decisions, I grant my agent full power and authority to make

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<sup>5</sup> We note *Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 262 followed *Garrison*, opining *Garrison* was “well reasoned.” In *Young v. Horizon West, Inc.* (2013) 220 Cal.App.4th 1122, 1129, however, the court in dicta disagreed with the *Garrison* court’s conclusion that the “the term ‘health care decision’ made by an agent encompasses the execution of arbitration agreements on behalf of the patient.”

those decisions for me, subject to any health care instructions set forth below.” That grant of authority is immediately followed by a list of four specific powers granted to Harrod, including the power to “[c]hoose or reject my physician, other health care professionals or health care facilities.”

The Advance Directive does not address arbitration agreements or the resolution of legal claims. Nor can we infer Harrod had authority to enter into an optional arbitration agreement from the fact he had express authority to make “health care decisions” and “[c]hoose . . . health care facilities.” As discussed above, an agent’s decision to sign an *optional* arbitration agreement with a skilled nursing facility is not a decision regarding the “patient’s physical or mental condition.” (§ 4615.)

Our conclusion that the execution of an arbitration agreement is not a “health care decision” finds further support in the regulatory history of the recently enacted federal regulatory scheme prohibiting nursing facilities participating in Medicare or Medicaid programs from requiring a resident (or his representative) to sign an arbitration agreement as a condition of admission. (42 C.F.R. § 483.70(n)(1) (2019).) Specifically, in the Centers for Medicare & Medicaid Services’ (i.e., the agency’s) responses to public comments published in the Federal Register, the agency explained: “[C]ommenters noted that the number of [nursing] facilities practically available to an individual may be extremely limited. For example, it is entirely reasonable for a resident to want to remain close to family and friends. However, many times there is only one nursing home within a reasonable geographic distance of the resident’s family or friends. Likewise, factors such as the type of payment the facility will accept, the



health care and services it offers, and the availability of beds limit an individual's choice of facilities. Therefore, many residents may only have a few, and perhaps only one or two, suitable facilities from which to choose. Once a facility is selected, commenters stated that some residents believe they have no choice but to sign the [arbitration] agreement in order to obtain the care they need." (84 FR 34727-34728 (2019).) The agency "agree[d] that many residents or their families usually do not have many [nursing] facilities to choose from and the existence of one of these agreements as a condition of admission is not likely to be a deciding factor in choosing a facility. We also agree that no one should have to choose between receiving care and signing an arbitration agreement. Therefore, we have finalized § 483.70(n)(1) to state that the facility must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission to, or as a requirement to continue to receive care at, the facility." (84 FR 34728 (2019).) These comments and responses demonstrate that, practically speaking, arbitration agreements are not executed as part of the health care decisionmaking process, but rather are entered into only *after* the agent chooses a nursing facility based on the limited options available and other factors unrelated to arbitration (such as geographic distance from family members and type of payment the facility will accept).

Accordingly, for the reasons discussed above, we conclude the authority granted to Harrod in the Advance Directive to make health care decisions of behalf of Logan, including choosing a skilled nursing facility, does not extend to executing optional arbitration agreements. Because Harrod lacked authority to sign

the arbitration agreement, the trial court properly denied Country Oaks' petition to compel arbitration.

**DISPOSITION**

The order is affirmed. Logan is awarded his costs on appeal.

**CERTIFIED FOR PUBLICATION**

CURREY, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.

**WORD COUNT CERTIFICATION [CRC 8.204(c)(1)]**

Counsel for defendants and appellants hereby certify that this petition contains 1,698 words as measured by the word processing software program used to create this document.

BUCHALTER, A PROFESSIONAL CORPORATION  
Harry W.R. Chamberlain II  
Robert M. Dato  
Lauren S. Jacobs

SUN MAR MANAGEMENT SERVICES  
Julieta Y. Echeverria  
Brittany A. Ortiz

Attorneys for Defendants and Appellants  
COUNTRY OAKS PARTNERS, LLC  
dba COUNTRY OAKS CARE CENTER and  
SUN MAR MANAGEMENT SERVICES, INC.

**PROOF OF SERVICE**  
(Code Civ. Proc., § 1013a, subd. (3))

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to this action; my business address is 18400 Von Karman Avenue, Suite 800, Irvine, California 92612. I served the Petition for Review on the interested parties in this action by placing true copies enclosed in sealed envelopes addressed as follows:

Ayman R. Mourad  
Lanzone Morgan, LLP  
5001 Airport Plaza Dr., Suite 210  
Long Beach, CA 90815-1286  
(Attorneys for respondent)  
(by electronic service via TrueFiling)

Clerk of the Court for  
Hon. Monica Bachner  
111 North Hill Street  
Los Angeles, CA 90012

Court of Appeal  
Second District, Division Four  
(through Sup. Ct. e-filing)

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/s/ Raquel Moreno  
Raquel Moreno

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

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Case Number: **TEMP-5NDYGML8**

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Harry W.R. Chamberlain 95780	hchamberlain@buchalter.com	e-Serve	9/26/2022 12:41:40 PM
Lauren S. Jacobs	ljacobs@buchalter.com	e-Serve	9/26/2022 12:41:40 PM
Ayman R. Mourad 304161	arm@lanzonemorgan.com	e-Serve	9/26/2022 12:41:40 PM
Julieta Y. Echeverria	jecheverria@sunmarhealthcare.com	e-Serve	9/26/2022 12:41:40 PM

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Date

/s/Rachel Moreno

Signature

Dato, Robert (110408)

Last Name, First Name (PNum)

