

2006

# Lisa Bybee v. Alan Abdulla and John Does 1 through 5 : Amicus Brief

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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SA BYBEE,

Plaintiff/Appellee,

vs.

ALAN ABDULLA, M.D. and JOHN  
DOES 1 through 5,

Defendant/Appellant.

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:  
: **BRIEF OF AMICUS CURIAE**  
: **UTAH MEDICAL ASSOCIATION**  
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: Court No. 20060424-SC  
: 050903397  
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Appeal From A Decision Of The  
Second Judicial District Court, Davis County  
The Honorable Pamela G. Hefferman, District Judge

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IN THE UTAH SUPREME COURT

LISA BYBEE,  
Plaintiff/Appellee,

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: **BRIEF OF AMICUS CURIAE**  
: **UTAH MEDICAL ASSOCIATION**

ALAN ABDULLA, M.D. and JOHN : Court No. 20060424-SC  
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### **CONSENT FOR AMICUS FILING**

The Utah Medical Association (“UMA”) currently represents approximately 3,000 physician members throughout the State of Utah. Many of these physicians routinely enter into arbitration agreements with their patients. UMA physicians are currently parties in wrongful death lawsuits brought by the spouses and heirs of deceased patients. It is unfortunate, but inevitable, that such cases will continue to be filed against UMA physicians in the future, and that arbitration agreements will be at issue. Many UMA physicians will thus be directly impacted by this Court's ruling in this appeal regarding the enforceability of a physician-patient arbitration agreement against a deceased patient's heirs for claims of wrongful death.

Accordingly, as UMA has a significant interest in the outcome of the Court's ruling in this appeal, all parties, Appellant Alan Abdulla, M.D., and Appellee Lisa Bybee, have consented to the appearance of the UMA as *amicus curiae* as required by Rule 25 of the Utah Rules of Appellate Procedure. A Stipulation Consenting to the Filing of Amicus Brief by the Utah Medical Association was filed with this Court on August 3, 2006. A copy of this Stipulation is attached as Addendum A.

### **STATEMENT OF JURISDICTION** **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

The UMA hereby adopts and incorporates the Statement of Jurisdiction, Statement of Issues and Standard of Review set forth in the brief of Appellant.

### **IMPORTANT STATUTES**

The determination regarding the enforceability of an arbitration agreement in a medical malpractice action is governed in part by the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-17 (2003 and 2004), and the Utah Arbitration Act, Utah Code

Ann. §§ 78-31a-1 through 20 (2002). Copies of these statutes are attached at Addendum B.

### **STATEMENT OF THE CASE**

The Utah Medical Association adopts and incorporates the Statement of the Case set forth in the brief of Appellant.

### **SUMMARY OF ARGUMENT**

Well-settled public policy favoring arbitration compels enforcement of arbitration agreements against non-signatory spouses and heirs. Both the Utah Legislature and Judiciary have repeatedly acknowledged and enforced a policy favoring arbitration in a variety of contexts, including the physician-patient relationship. In 2004, the Utah Legislature amended the Utah Health Care Malpractice Act to specifically provide that arbitration agreements apply to claims brought by a person who is not a party to the contract. The express language of the statute reveals the Legislature's intent that arbitration agreements be enforced against non-signatory spouses and heirs such as Mrs. Bybee.

In addition, fundamental principles of Utah contract law coupled with policy favoring broad construction of arbitration agreements compels the enforcement of the Arbitration Agreement in the instant case. The plain and unambiguous language of the Agreement demonstrates the parties express intent to bind non-signatory spouses and heirs. In accordance with axiomatic contract law, the Court should interpret and enforce the Arbitration Agreement consistent with this intent. Further, this Court has made clear that arbitration agreements should be construed in favor of arbitration. Thus, the Arbitration Agreement should be enforced against Mrs. Bybee to give effect to the parties express intent and uphold the policy of liberally construing arbitration agreements in favor of arbitration.

Failure to enforce the Arbitration Agreement would adversely impact Utah physicians and their patients. It is simply unrealistic to require the signatures of all the spouses and heirs in order to bind them to an arbitration agreement, particularly since they may not even be identified until the time of death. This would also lead to an undesirable invasion of the physician-patient relationship by requiring the patient to disclose confidential medical treatment, and even worse, requiring the patient's spouse and heirs to concur in the treatment.

Finally, if arbitration agreements were held unenforceable against heirs for claims of wrongful death, then they cannot be enforced against heirs for loss of consortium. This would create the potential for anomalous results, as heirs could litigate their claims for loss of consortium, while the patient must arbitrate her medical negligence claim on the same operative facts.

Enforcement of the Arbitration Agreement against non-signatories such as Mrs. Bybee is consistent with the language of the Utah Arbitration statutes, recent amendments to the Utah Healthcare Malpractice Act, and the express language of the Agreement. In addition, it is essential to further the goals of the legislative and judicially declared policy favoring arbitration, to safeguard the physician-patient relationship, to preserve important privacy rights of the patient, and to give effect to the intent of the parties to the Agreement.

### **ARGUMENT**

#### **I. WELL-ESTABLISHED PUBLIC POLICY FAVORING ARBITRATION COMPELS ENFORCEMENT OF ARBITRATION AGREEMENTS AGAINST SPOUSES AND HEIRS.**

American courts, historically, refused to enforce agreements to arbitrate on the ground that such agreements ousted the courts from their jurisdiction. Stephen P. Bedell,

Lolla Harrison and Brian Grant, Arbitrability: Current Developments in the Interpretation and Enforceability of Arbitration Agreements, 13 J. Contemp. L. 1, 1-2 (1987). To remedy this anachronism, Congress enacted the United States Arbitration Act of 1924. Id. The purpose of the Arbitration Act was to place arbitration agreements “upon the same footing as other contracts, where they belong . . . .” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1-2 (1924)). With the passage of the Arbitration Act, Congress established “a strong federal policy favoring arbitration.” Harrison & Grant, supra, at 1-2; accord Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (federal policy favors arbitration). In effect, “the Arbitration Act simply codifi[ed] the common law duty of courts to enforce the terms of valid contracts, and was necessitated only by the traditional reluctance of courts to enforce arbitration clauses.” Harris & Grant, supra, at 1-2.

The U.S. Supreme Court has consistently held that courts must compel arbitration when a valid arbitration agreement exists. See e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Southland Corp. v. Keating, 465 U.S. 2 (1984); Perry v. Thomas, 482 U.S. 483 (1987); Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265 (1995); Doctor’s Assoc., Inc. v. Cassarotto, 517 U.S. 681 (1996). Virtually every state has, moreover, articulated a strong policy in favor of arbitration.<sup>1</sup>

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<sup>1/</sup> See e.g., Bureau of Special Investigations v. Coalition of Public Safety, 722 N.E.2d 441 (Mass. 2000) (strong public policy favoring arbitration); Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999) (same); Martin v. Vance, 514 S.E.2d 306 (N.C. Ct. App. 1999) (same); Thunderstick Lodge, Inc. v. Reuer, 585 N.W.2d 819 (S.D. 1998) (arbitration favored); Northwestern Mut. Life Ins. Co. v. Stinnett, 698 N.E.2d 339 (Ind. Ct. App. 1998) (strong public policy favoring arbitration); Perez v. Mid-Century Ins. Co., 934 P.2d 732 (Wash. Ct. App. 1997) (same); Anthony v. Kaplan, 918 S.W.2d 174 (Ark. 1996) (same); Prudential Securities Inc. v. Marshall, 909 S.W.2d 896 (Tex. 1995) (arbitration of disputes is strongly favored under federal and state law); White v. Kampner,



**A. Both the Utah Legislature and Judiciary Acknowledge and Enforce Policy Favoring Arbitration.**

Utah law comports with its federal and state counterparts in enforcing arbitration agreements. In 1927 the Utah Legislature enacted the Uniform Arbitration Act, which mandated enforcement of arbitration agreements. 1927 Utah Laws 62. Originally, the Act applied only to the arbitration of existing controversies and did not cover agreements to arbitrate future disputes. Allred v. Educators Mutual Ins. Ass'n of Utah, 909 P.2d 1263, 1265 (Utah 1996). However, in 1977 the Utah Legislature amended the Act to include the arbitration of future disputes. Utah Code. Ann. § 78-31-1 (1977). “Thus Utah law has favored arbitration provisions covering future disputes since 1977.” Allred, 909 P.2d at 1265.

The Utah Legislature further revised the Utah Arbitration Act, effective May 2003, “to be more comprehensive and to (1) codify existing case law interpreting arbitration statutes, (2) resolve ambiguities inherent within the statutes, and (3) modernize arbitration practice and procedure.” Kent B. Scott and James B. Belshe, Utah’s Revised Uniform Arbitration Act: A Makeover for the Face of Arbitration, 16 Dec. Utah B. J. 26, 27 (Dec. 2003). The Act makes clear arbitration agreements are valid and enforceable under Utah law, and that parties can agree to arbitrate any controversy. It provides:

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642 A.2d 1381 (Conn. 1994) (arbitration favored); Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908 (Del. 1989) (same); Roe v. Amica Mut. Ins. Co., 533 So.2d 279 (Fla. 1988) (same); Dairyland Ins. Co. v. Rose, 591 P.2d 281 (N.M. 1979) (strong preference for resolution by arbitration); Modern Const., Inc. v. Barce, Inc., 556 P.2d 528 (Alaska 1976) (strong public policy favors arbitration); Grover-Diamond Assoc. v. American Arbitration Ass’n, 211 N.W.2d 787 (Minn. 1973) (same); Jensen v. Arrow Ins. Co., 494 P.2d 1334 (Ariz. Ct. App. 1972) (public policy of Arizona favors arbitration); Dominion Ins. Co. Ltd. v. Hart, 498 P.2d 1138 (Colo. 1972) (arbitration is favored).

An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

Utah Code Ann. § 78-31a-107(1) (2002). Thus, if a party “show[s] an agreement to arbitrate,” the court “shall . . . order the parties to arbitrate.” *Id.* at § 78-31a-108(1).

It is well-established that “the goal of the Act is to encourage extra-judicial settlement of legal disputes.” Pacific Development, L.C. v. Orton, 2001 UT 36, ¶ 12, 23 P.3d 1035. “The [Utah Arbitration] Act supports arbitration of both present and future disputes and reflects long-standing public policy favoring speedy and inexpensive methods of adjudicating disputes. . . .” Allred, 909 P.2d at 1265; accord McCoy v. Blue Cross and Blue Shield of Utah, 2001 UT 31, ¶ 14, 20 P.3d 901; Sosa, 924 P.2d at 359; Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 946 (Utah 1996); DeVore v. IHC Hospitals, Inc., 884 P.2d 1246, 1251 (Utah 1994). In addition, this Court has long affirmed “the strong public policy in favor of arbitration as an approved, practical and inexpensive means of settling disputes and easing court congestion.” Robinson & Wells v. Warren, 669 P.2d 844, 846 (Utah 1983).<sup>2</sup>

**B. The Utah Supreme Court and the Legislature Recognize Policy Favoring the Use of Arbitration in the Physician-Patient Context.**

In 1996, this Court made clear that arbitration agreements are valid and enforceable in the physician-patient context, stating:

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<sup>2/</sup> The Court has a well-established history in defining a general public policy that liberally encourages the broad enforcement of extrajudicial dispute resolution agreements that have been voluntarily entered into. See e.g., Central Florida, 2002 UT 3, ¶ 16; Buzas Baseball, 925 P.2d at 946; Allred, 90 P.2d at 1265; Intermountain Power Agency v. Union Pacific R.R. Co., 961 P.2d 320, 325 (Utah 1988); Docutel Olivetti Corp. v. Dick Brady Systems, Inc., 731 P.2d 475, 479-480 (Utah 1986); Lindon, 636 P.2d at 1073.

We emphasize preliminarily that arbitration agreements are favored in Utah and that no public policy requires such agreements to be subject to a different analysis when they are between physicians and patients. They are enforceable if they meet the standards applicable to all contracts.

Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996). In 1999, the Utah Legislature codified this policy by amending the Utah Health Care Malpractice Act to ensure the enforceability of physician-patient arbitration agreements. Utah Code Ann. § 78-14-17 (1999). It also clarified many of the issues associated with arbitration agreements entered into in the physician-patient context. Among other things, § 78-14-17 specified agreement terms and included the information that must be provided to the patient regarding arbitration, how that information is to be provided to the patient, and an acknowledgment by the patient that she received the information. See Utah Code Ann. § 78-14-17. The level of detail embodied in the statute reveals the Legislature’s intent to ensure the validity and enforcement of arbitration agreements entered into between physicians and their patients. Section (7) of the statute similarly reveals the understanding of the Legislature that the provisions in the statute are only valid to the extent that they apply to a contract that is not subject to the Federal Arbitration Act. See Utah Code Ann. § 78-14-17(7).

**1. The Current Version of § 78-14-17 Specifically Provides that Non-Signatories—Such as Spouses and Heirs—are Bound by Arbitration Agreements Between Physicians and their Patients.**

In 2004, the Legislature brought additional clarity to arbitration agreements in the physician-patient context by amending § 78-14-17 to specifically prescribe that non-signatories – such as spouses and heirs – are bound to agreements entered into by patients (the “2004 Amendment”). The 2004 Amendment added, *inter alia*, the following emphasized language:

(b) the agreement shall require that:

...

(vii) the agreement only apply to:

...

(B) the claim of:

(I) a person who signed the agreement;

(II) a person on whose behalf the agreement was signed under Subsection (6); and

(III) the unborn child of the person described...; and

(C) *the claim of a person who is not a party to the contract if the sole basis for the claim is an injury sustained by a person described in Subsection (1)(b)(vii)(B);*

...

Utah Code Ann. § 78-14-17 (2004) (emphasis added). This plain and unambiguous language clearly illustrates the Legislature's intent to ensure the enforceability of arbitration agreements that – as in the instant case – expressly bind non-signatories such as spouses and heirs. Although the 2003 version of § 78-14-17 does not contain similar language, it also does not include language expressly prohibiting enforcement of arbitration agreements against non-signatories. See § 78-14-17 (2003). This is because the 2004 Amendment merely codified previously existing common law principles and policy compelling the enforcement of arbitration agreements against non-signatories.<sup>3</sup>

## **II. UTAH LAW COMPELS ENFORCEMENT OF THE ARBITRATION AGREEMENT AGAINST THE SPOUSE AND HEIRS.**

The plaintiff/appellee does not dispute that the Arbitration Agreement is a valid enforceable agreement and that it would have been enforceable against Mr. Bybee had he survived. The question before this Court is whether the terms of this Arbitration Agreement can be enforced against Mr. Bybee's spouse although she was not a signatory to

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<sup>3</sup> UMA does not address the issue of whether the 2003 or 2004 version of § 78-14-17 applies to the instant agreement. UMA refers to the 2004 Amendment to illustrate that the evolution of the policy favoring arbitration in Utah unequivocally includes binding spouses and heirs to arbitration agreements entered into by patients.

the Agreement. The trial court ruled it cannot, finding that “[i]n the instant case there is no factual or legal basis to allow Mr. Bybee to unilaterally bind Mrs. Bybee to an Agreement to Arbitrate.” (R. at 171.) Not only does the court’s ruling ignore public policy favoring arbitration, it is expressly premised on a misinterpretation of Utah law.

**A. Fundamental Principles of Utah Contract Law Coupled with Policy Favoring Arbitration Compel Enforcement of the Arbitration Agreement Against Mr. Bybee’s Spouse.**

The Arbitration Agreement is, essentially, a contract. Pacific Development, L.C., 2001 UT 36 at ¶ 11. It is axiomatic that “in interpreting a contract, the intentions of the parties are controlling.” Dixon v. Pro Image, Inc., 1999 UT 89, ¶ 13, 987 P.2d 48 (quoting Winegar v. Froerer Corp., 813 P.2d 104, 108 (Utah 1991)). The Court should “look to the writing itself to ascertain the parties’ intentions.” Jones v. ERA Brokers Consol., 2000 UT 61, ¶ 12, 6 P.3d 1129 (quoting Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990)). “If the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language.” Cent. Fla. Invests., Inc. v. Parkwest Assocs., 2002 UT 3, ¶ 12, 40 P.3d 599. Further, this Court has “repeatedly held that competent parties are free to bargain for any term that does not require a violation of the law.” Salt Lake County v. Western Dairymen Co-op., Inc., 2002 UT 39, ¶ 18, 48 P.3d 910; accord Phone Directories Co. v. Henderson, 2000 UT 64, ¶ 15, 8 P.3d 256.

In the present case, the plain language of the Arbitration Agreement provides:

**Article 1: Agreement to Arbitrate:** We hereby agree to submit to binding arbitration all disputes and claims for damages of any kind for injuries and losses arising from the medical care rendered or which should have been rendered after the date of this Agreement. *All claims* for monetary damages against the physician, and the physician’s partners, associates, association, corporation or partnership, and the employees, agents and estates of any of

them (hereinafter collectively referred to as “Physician”), *must be arbitrated including, without limitation, claims for personal injury, loss of consortium, wrongful death*, emotional distress or punitive damages...

*We expressly intend this Agreement shall bind all persons whose claims for injuries and losses arise out of medical care rendered or which should have been rendered by Physician after the date of this Agreement, including any spouse or heirs of the patient and any children*, whether born or unborn at the time of the occurrence giving rise to any claim (hereinafter collectively referred to as “Patient”).

(Arbitration Agreement Art. 1) (emphasis added) (copy attached as Addendum C). This plain unambiguous language clearly demonstrates the parties expressly intended to submit to arbitration any dispute of medical negligence arising out of the care provide by the physician, whether it is asserted by the patient or his spouse or heirs. Indeed, this language specifically reveals the parties’ intent to bind the patient’s spouse to the terms of the Agreement exactly as the Legislature endorses in the 2004 Amendment. Thus, fundamental principles of Utah contract law require that the Arbitration Agreement be enforced against Mrs. Bybee to give effect to the intent of Mr. Bybee and Dr. Abdulla as clearly revealed by the plain language of the Agreement. See Dixon, 1999 UT 89 at ¶ 13.

In addition, this Court has made clear that arbitration “is a remedy freely bargained for by the parties.” Lindon City v. Engineers Constr. Co., 636 P.2d 1070, 1073 (Utah 1981). It is the policy of the law in Utah to interpret contracts in favor of arbitration, “in keeping with [the] policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate.” Cent. Fla. Inv., Inc. v. Parkwest Assoc., 2002 UT 3, ¶ 16, 40 P.3d 599. As the Court explained in Lindon:

Arbitration clauses should be liberally interpreted when the issue contested is the scope of the clause. *If the scope of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration unless it can*

*be said that it is not susceptible to an interpretation that covers the asserted dispute.*

Lindon, 636 P.2d at 1073 (emphasis added).

Accordingly, the parties express intent to bind Mrs. Bybee to the Agreement, coupled with this Court's well-settled policy requiring that the Agreement be interpreted in favor of arbitration, mandates that the Arbitration Agreement be enforced against Mrs. Bybee.

**B. Utah Wrongful Death Law Compels Enforcement of the Arbitration Agreement Against Mr. Bybee's Spouse.**

Although Utah courts recognize that "an action for wrongful death is an independent action accruing in the heirs of the deceased," Utah courts have "not entirely separated the heirs' right from the decedent's because the heirs' right is in major part based on the rights of support, both financial and emotional, that run to them from the deceased." Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 332 (Utah 1997). In Jensen this Court stated:

We have held that the *wrongful death cause of action is based on the underlying wrong done to the decedent and may only proceed subject to at least some of the defenses* that would have been available against the decedent had she lived to maintain her own action.

Id. at 332 (emphasis added).

In Utah, the wrongful death cause of action is subject to defenses that could have been asserted against the deceased. Id. The following are examples of defenses that Utah courts have recognized against a decedent's heirs: 1) heirs are bound by a comparative negligence defense to the extent it would be enforceable against the deceased and any causes of action the deceased could have brought, Kelson v. Salt Lake County, 784 P.2d 1152,

1155 (Utah 1998); 2) heirs are bound by the Utah Workers' Compensation Act as to claims against the deceased's employer, Utah Code Ann. § 34A-2-105 (1997); and 3) heirs are bound by a statute of limitations defense enforceable against the deceased and any causes of action the deceased could have brought. Jensen, 944 P.2d at 332.

Had Mr. Bybee survived and sued for the alleged medical negligence at issue in this case, the Arbitration Agreement would clearly be binding against him to terminate litigation and compel arbitration. Where, as here, a patient expressly contracts to submit to arbitration any dispute as to medical malpractice, it must be deemed to apply to all medical negligence claims arising out of the care provided, whether they are asserted by the patient or a third party. See Jensen, 944 P.2d 327 at 332.

In Jensen, this Court held that heirs could not maintain a wrongful death suit where the "injured patient . . . chose to let the statute of limitations run on the underlying personal injury claim" prior to her death. In such a situation, the heirs' wrongful death claims are barred by the statute of limitations." Id. at 332-333.

The Jensen Court declined to separate the death from the causative wrong to permit a wrongful death action, where the decedent's personal injury cause of action was barred at the time of death, stating:

*The injured individual* is not merely a conduit for the support of others, he *is master of his own claim* and he may settle the case or win or lose a judgment on his own injury even though others may be dependent upon him.

Jensen, 944 P.2d at 322 (emphasis added) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 955 (5<sup>th</sup> ed. 1984)). This Court recognized "[t]he majority of states refuse[] to allow a decedent's heirs to proceed with a wrongful death suit



after the decedent has settled his or her personal injury case or won or lost a judgment before dying.” Jensen, 944 P.2d at 332-333.

Under Jensen, as “master of his own claim,” a patient can completely cut off the potential wrongful death claims of his heirs by not initiating a lawsuit prior to the expiration of the statute of limitations, either accidentally or intentionally. The heirs’ wrongful death claim is not so separate and independent as to allow them a separate statute of limitations; rather, they are bound to the limitations period applicable to the patient and to the patient’s relating course of conduct prior to death.

If the Arbitration Agreement this case were not enforced against Mrs. Bybee, then under Jensen, a patient could completely cut off his spouse from asserting a claim for wrongful death by mere inaction, yet that same patient could not intentionally agree to the forum for resolution by entering into an arbitration agreement. Such a result is not only anomalous, but grants spouses and heirs with broader options for recourse relating to medical care provided to the patient than the patient himself would have had.

### **III. COURTS IN OTHER JURISDICTIONS ROUTINELY ENFORCE ARBITRATION AGREEMENTS BETWEEN PHYSICIANS AND THEIR PATIENTS AGAINST NON-SIGNATORY SPOUSES AND HEIRS.**

Cases with similar facts from other jurisdictions have enforced arbitration agreements against spouses and heirs. In Allen v. Pacheco, 71 P.3d 375 (Colo. 2003) (en banc), cert. denied, 2004 WL 324431 (U.S. 2004), for example, a surviving wife filed a wrongful death claim alleging negligence by her husband’s health care providers. The providers sought to submit the claim to binding arbitration pursuant to an arbitration provision between the husband and his HMO. Applying contract construction principles, the Colorado Supreme Court examined the arbitration agreement and determined that the language plainly applied

to “any claim of medical malpractice,” which included the wife’s claim for wrongful death, even though she did not sign the arbitration agreement. Id. at 378-379.

The Allen court stated: “We hold that *the arbitration agreement does apply to non-party spouses* because . . . a non-party may be bound by the terms of an agreement if the parties so intend . . . .” Id. at 379 (emphasis added). It explained:

Although it is true that a wrongful death claim is separate and distinct from a cause of action the deceased could have maintained had he survived, this observation is not helpful in determining whether separate wrongful death claims are in fact included within the plain and ordinary meaning of the agreement. *Because the plain language of the agreement in this case refers to “all claims” including those brought for “death,” and because we must apply a strong presumption in favor of arbitration, we find that the arbitration agreement applies to wrongful death claims.*

Id. at 379-380 (emphasis added).<sup>4</sup>

Similarly, in Mormile v. Sinclair, 26 Cal.Rptr.2d 725 (Cal. Ct. App. 1994), the court held that a physician/patient agreement containing an arbitration provision binding the patient’s spouse to arbitration was enforceable against the non-signatory spouse. In reaching its decision, the Mormile court explained:

Mary’s agreement with her physician provided for arbitration of all claims arising out of or relating to Sinclair’s medical treatment or services, including the claims of any spouse or heir. There is no question the agreement was intended to define and bind those individuals with a potential cause of action if negligent treatment of Mary resulted in her injury or death. (citations omitted). Gary’s loss of consortium claim is based on Mary’s injury or disability allegedly resulting from Sinclair’s professional negligence. An order compelling arbitration of Gary’s claim is consistent with the language of the statute, subverts the legislative goals underlying section 1295, protects Mary’s right to privacy in her relationship with her physician and ensures that

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<sup>4/</sup> The Allen court went on to determine, however, that the arbitration agreement at issue in that case was unenforceable because it failed to comply with the requirements of the Colorado Health Care Availability Act. Allen, 71 P.3d at 384.

no third party will be able to intrude into that relationship or veto Mary's choices. In the balance, Mary's right to decide the terms of her medical treatment outweighs Gary's right to a jury trial of his loss of consortium claim.

Mormile, 26 Cal.Rptr.2d 725 at 730.<sup>5</sup>

Likewise, in Ballard v. Southwest Detroit Hospital, 327 N.W.2d 370 (Mich. Ct. App. 1982), the Michigan Court of Appeals held an arbitration agreement executed by a deceased patient was binding upon the personal representative. The Ballard court stated:

*Any substantive impediment that would have prevented the decedent from commencing suit will likewise preclude suit by the personal representative.* For example, where the decedent's death is the result of an injury arising out of the course of his employment, the estate is bound, as the decedent would have been, to the exclusive remedy provision of the worker's compensation act, and the personal representative will be prevented from maintaining a separate wrongful death action.

Id. at 371 (emphasis added).

Arbitration agreements are, moreover, routinely enforced against non-signing heirs in other contexts. In Jansen v. Salomon Smith Barney, Inc., 776 A.2d 816 (N.J. Super. App. Div. 2001), for example, beneficiaries of retirement accounts brought a negligence action against their father's financial advisors. The New Jersey Superior Court held that the

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<sup>5/</sup> Indeed, in California, arbitration agreements containing similar provisions are routinely enforced against non-signatories in medical malpractice cases. Madden v. Kaiser Foundation Hospitals, 131 Cal.Rptr. 882 (Cal. Ct. App. 1976); Hawkins v. Superior Court, 152 Cal.Rptr. 491 (Cal. Ct. App. 1979); Herbert v. Superior Court, 215 Cal.Rptr. 477 (Cal. Ct. App. 1985); Harris v. Superior Court, 233 Cal.Rptr. 186 (Cal. Ct. App. 1986); Michaelis v. Schori, 24 Cal.Rptr.2d 380 (Cal. Ct. App. 1993); Bolanos v. Khalatian, 283 Cal.Rptr. 209 (Cal. Ct. App. 1991); Gross v. Recabaren, 253 Cal.Rptr. 820 (Cal. Ct. App. 1988); Garrison v. Superior Court, 33 Cal. Rptr.3d 350 (Cal. Ct. App. 2005).

beneficiaries' claim arose out of the father's agreement, and thus they were bound by the arbitration clause. The Jansen court explained:

Arbitrability of a particular claim "depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause."

Id. at 258 (quoting Wasserstein v. Kovatch, 618 A.2d 886, 286 (N.J. Super. App. Div. 1993)).

Similarly, in Smith, Barney, Inc. v. Henry, 775 So.2d 722 (Miss. 2001), the Mississippi Supreme Court determined that the heirs to financial accounts could be compelled to arbitrate their claims relating to negligent management of the funds. The court rejected the plaintiff's argument that she was a non-signatory to the agreement and an unintended third-party beneficiary and held that the express terms of the decedent's will named the plaintiff a successor to the decedent's rights and thus subjected her to arbitration. Id. at 727.

Additionally, in Collins v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 561 So.2d 952 (La. Ct. App. 1990), the Louisiana Court of Appeals reversed the trial court's denial of a motion to compel arbitration, and held non-signatory heirs and successors were bound by a decedent's arbitration agreement with a brokerage firm, where the agreement expressly bound successors and assigns. Id. at 955. The Collins court held the defendants were entitled to arbitration because "the Customer Agreement on its face applies to all accounts of a customer, whether CMA's or otherwise, and clearly requires arbitration of all disputes arising out of the customer's business with Merrill Lynch."<sup>6</sup> Id.

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<sup>6/</sup> Similar results have been reached in other contexts. See, e.g., American Bureau of Shipping v. Tencara Shipyard, 170 F.3d 349, 352 (2d Cir. 1999) (non-signatory insurance underwriter compelled to arbitrate); Seborowski v. Pittsburgh Press Co., 188 F.3d 163,

These cases demonstrate the sound reasoning that a patient should be able to determine by contract the forum where medical care provided to him will be addressed. Decedents are able to bind their heirs through other contracts, wills and testamentary dispositions, so the concept is neither new or illogical. It is, moreover, the policy adopted by most federal and state law across the country.

**IV. FAILURE TO ENFORCE THE ARBITRATION AGREEMENT IN THIS CASE WILL ADVERSELY IMPACT UTAH PHYSICIANS AND THEIR PATIENTS.**

Under the trial court's ruling, the only way to create an enforceable arbitration agreement covering all claims arising out of medical care provided, including claims for wrongful death, would be for spouses and all potential heirs to join in the execution of the arbitration agreement. It is unrealistic to require the signatures of all the spouses and heirs to bind them to an arbitration agreement, particularly since they may not even be identified until the time of death.

Requiring heirs to participate in the creation of the arbitration agreement in order to encompass claims of wrongful death would have the equally troublesome effect of requiring that family members be given some minimum level of disclosure regarding the patient's need for medical treatment. This may not only be at odds with the desires of the patient for complete confidentiality, but it would also violate the Health Insurance Portability and Accountability Act ("HIPAA") and preempt any judicial or statutory law to the contrary. As such, this approach would authorize--indeed require--an intrusion into a patient's

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168 (3d Cir. 1999) (non-signatory beneficiaries of deceased employees compelled to arbitrate claims alleging breach of collective bargaining agreement signed by deceased employees); In re Oil Spill by the Amoco Cadiz, 659 F.2d 789, 795-96 (7<sup>th</sup> Cir. 1981) (non-signatory transport company subject to arbitration as an agent of plaintiff).

confidential relationship with his physician as the price for guaranteeing a third person access to a jury trial *on matters arising from the patient's own treatment*.

Adoption of such a philosophy would violate the sanctity of the physician-patient relationship – a safe haven which would be severely threatened if the physician were obliged to obtain the signature of the patient's heirs to create an arbitration agreement. How is a patient to maintain privacy in his or her physician consultations when, in essence, an heir's intrusion into the relationship is a prerequisite to its formation? Such roadblocks to establishing an arbitration agreement would be at odds with Utah legislation allowing – indeed favoring – physician-patient arbitration agreements for claims arising from the treatment provided. The purpose of the Utah Arbitration Act and § 78-14-17 of the Utah Healthcare Malpractice Act is to facilitate, not eviscerate, the favored process of arbitration.

## **V. ENFORCEMENT OF THE ARBITRATION AGREEMENT IS REQUIRED BY THE PHYSICIAN-PATIENT RELATIONSHIP.**

The physician-patient relationship is wholly voluntary, created by agreement, express or implied. Garay v. County of Bexar, 810 S.W.2d 760, 764 (Tex. Ct. App. 1991). The physician-patient relationship is in this sense contractual, and the physician and the patient may agree to make an arbitration agreement a term of their relationship. See Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996); Utah Code Ann. § 78-14-17 (2004). The patient may not be denied health care for refusing to sign an arbitration agreement. Utah Code Ann. § 78-14-17(7) (2004). Further, the physician's legal duty of care is predicated on the existence of this physician-patient relationship. See Dalley v. Utah Regional Med. Ctr., 791 P.2d 193, 195 (Utah 1990); Farrow v. Health Servs. Corp., 604 P.2d 474, 496 (Utah 1979). Accordingly, claims by a patient's wife for damages allegedly caused by medical negligence, *i.e.*, wrongful death, are predicated on her husband's physician-patient

relationship. As the heirs' claims are premised on the physician-patient relationship, they must be subject to the agreed-upon terms of that relationship: the Arbitration Agreement.

In this case, the physician-patient relationship between the decedent and his physician is the point of origin for any malpractice claim against the physician, by either his wife, the estate, or any other heir. It was the decedent who entered into the physician-patient relationship with Dr. Abdulla, and they undisputedly contracted to make the Arbitration Agreement a term of their physician-patient relationship. Although Mrs. Bybee and the other heirs are not signatories to the Agreement, they are bound by it as it defines the scope and conditions of the physician-patient relationship that forms the basis for their claims.

The necessity of this result is well-illustrated in the informed consent context. Under Utah informed consent law, the physician has a duty to disclose to his patient "risks of injury [that] might be incurred from a proposed course of treatment." Lounsbury v. Capel, 836 P.2d 188, 193 (Utah Ct. App.), cert. denied, 843 P.2d 1042 (Utah 1992). A physician's duty of disclosure arises from the physician-patient relationship and is owed to the patient, not to the patient's spouse or other family members. Id. at 198. The decision whether or not to agree to treatment in light of the risks is vested in the patient. Id. at 197. If the patient agrees to treatment and consents to the risks attendant thereto, his wife is bound by his consent. She could not file a loss of consortium or wrongful death claim on the basis that she did not personally consent to the risks of treatment, or did not sign the informed consent document. Thus, the concept of investing the competent patient with complete and unbridled decision-making power relative to his/her care and all claims arising therefrom, is fundamental to the physician-patient relationship under Utah law.

**VI. FAILURE TO ENFORCE THE ARBITRATION AGREEMENT WILL CREATE THE POTENTIAL FOR ANOMALOUS RESULTS WHEN LOSS OF CONSORTIUM AND SURVIVAL CLAIMS ARE ALSO ASSERTED.**

**A. Loss of Consortium.**

If, as the trial court here ruled, arbitration agreements are held to be unenforceable against spouses and heirs for claims of wrongful death, then arbitration agreements would also be held unenforceable against non-signing spouses for claims of loss of consortium. This would conflict with the fact that a loss of consortium claim is by statute a derivative claim subject to all of the same defenses as the underlying negligence claim. Utah Code Ann. § 30-2-11 (1998).

Moreover, if non-signatories are not bound to arbitrate claims of loss of consortium arising out of medical care rendered by the physician, they could proceed to litigate that claim while the patient would be compelled to arbitrate claims for medical negligence arising out of the same medical care. The physician would have to answer in both arbitration and in a civil suit for claims dependent on the same operative facts regarding the professional standard of care, its breach by the defendant and causation of injury to the patient. This result is contrary to the purpose of the Arbitration Act, no savings would be effected, and there would be the potential for conflicting results.

**B. Survival Claims.**

The failure to enforce arbitration agreements against spouses heirs for claims of wrongful death would also be inconsistent with Utah law governing survival claims. Utah law is clear that wrongful death and survival claims are separate and distinct claims, allowing recovery of separate and distinct damages. Camp v. Office of Recovery Services, 779 P.2d 242, 2476 (Utah Ct. App. 1989). However, Utah law also provides that the personal



representative of a decedent's estate is bound by contracts signed by the decedent. See In re Estate of Shepley, 645 P.2d 605 (Utah 1982); see also Colorado Nat'l Bank of Denver v. Friedman, 846 P.2d 159 (Colo. 1993) (en banc). Thus, a survival claim is subject to an arbitration agreement by the decedent.

Wrongful death claims often go hand-in-hand with survival claims, as the starting point for both actions is an injury resulting in the decedent's death. If arbitration agreements were held to be unenforceable against heirs for claims of wrongful death, then the survival and wrongful death claims could be separated between the courts and arbitration. The result would be unworkable, inefficient, and would create the potential for conflicting results.

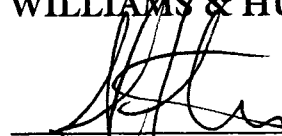
### **CONCLUSION**

The reasons requiring the non-signing spouse heirs to be bound by an Arbitration Agreement are far more convincing than any arguments to avoid enforcement of that Agreement. It is not only consistent with the language of the Utah Arbitration statutes and recent amendments to the Utah Healthcare Malpractice Act, it is essential to further the goals of the legislative and judicially declared policy favoring arbitration, to safeguard the physician-patient relationship, to preserve important privacy rights of the patient, and to give effect to the intent of the parties to the Agreement.

DATED this 30 day of August, 2006.

**WILLIAMS & HUNT**

By



ELLIOTT J. WILLIAMS  
KURT M. FRANKENBURG  
STEPHEN T. HESTER

Attorneys for Amicus Curiae Utah Medical  
Association

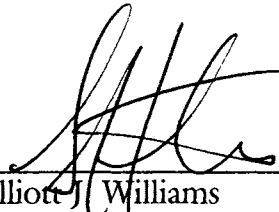
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 30<sup>th</sup> day of August, 2006, two (2) true and correct copies of the foregoing Brief of Amicus Curiae Utah Medical Association were mailed by first class mail, postage prepaid thereon, to:

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Elliott J. Williams  
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Stephen T. Hester

## **ADDENDA**

- A. Stipulation Consenting to the Filing of a Brief by the Utah Medical Association as An Amicus Curiae
- B. Utah Code Ann. § 78-14-17 (2003); Utah Code Ann. § 78-14-17 (2004)
- C. Arbitration Agreement

A

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IN THE SUPREME COURT OF UTAH

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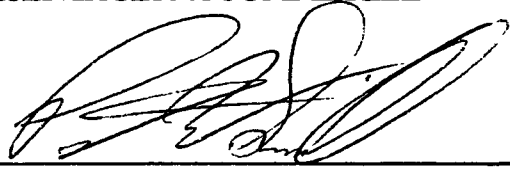
LISA BYBEE,	:	STIPULATION CONSENTING TO
	:	THE FILING OF A BRIEF BY THE
Plaintiff and Appellee,	:	UTAH MEDICAL ASSOCIATION AS
	:	AN AMICUS CURIAE
v.	:	
	:	
ALAN ABDULLA, M.D., and JOHN DOES	:	Supreme Court No. 20060424
I through 5,	:	
	:	Trial Court No. 050903397
Defendant and Appellant.	:	
	:	
	:	

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Pursuant to Rule 25 of the Utah Rules of Appellate Procedure, the parties, by and through their respective counsel of record, hereby stipulate and give their consent for the Utah Medical Association to file a brief as an *amicus curiae* in support of the position of defendant/appellant Alan Abdulla, M.D. within the time allowed for the submission of the briefs of defendant/appellant, which is through and including August 30, 2005.

HASENYAGER & SUMMERILL

Dated: 8/1/2006

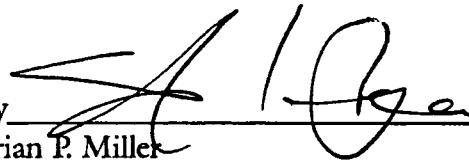
By 

Peter W. Summerill

Attorneys for Plaintiff/Appellee Lisa Bybee

SNOW, CHRISTENSEN & MARTINEAU

Dated: 8/3/06

By 

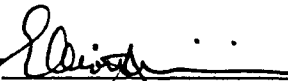
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WILLIAMS & HUNT

Dated: 8/2/06

By 

Elliott J. Williams

Kurt M. Frankenburg

Stephen T. Hester

Attorneys for the Utah Medical Association

**B**

(3) Per diem reimbursement to panel members and expenses incurred by the panel in the conduct of prelitigation panel hearings shall be paid by the division. Expenses related to subpoenas are paid by the requesting party, including witness fees and mileage.

(4) The proceedings are informal and formal rules of evidence are not applicable. There is no discovery or perpetuation of testimony in the proceedings, except upon special order of the panel, and for good cause shown demonstrating extraordinary circumstances.

(5) (a) A party is entitled to attend, personally or with counsel, and participate in the proceedings, except upon special order of the panel and unanimous agreement of the parties. The proceedings are confidential and closed to the public.

(b) No party has the right to cross-examine, rebut, or demand that customary formalities of civil trials and court proceedings be followed. The panel may, however, request special or supplemental participation of some or all parties in particular respects.

(c) Communications between the panel and the parties, except the testimony of the parties on the merits of the dispute, are disclosed to all other parties.

(6) The division shall appoint a panel to consider the claim and set the matter for panel review as soon as practicable after receipt of a request.

(7) Parties may be represented by counsel in proceedings before a panel. 1994

#### **78-14-14. Decision and recommendations of panel — No judicial or other review.**

The panel shall render its opinion in writing not later than 30 days after the end of the proceedings. The panel shall determine on the basis of the evidence whether each claim against each health care provider has merit or has no merit and, if meritorious, whether the conduct complained of resulted in harm to the claimant.

There is no judicial or other review or appeal of the panel's decision or recommendations. 1995

#### **78-14-15. Evidence of proceedings not admissible in subsequent action — Panelist may not be compelled to testify — Immunity of panelist from civil liability — Information regarding professional conduct.**

(1) Evidence of the proceedings conducted by the medical review panel and its results, opinions, findings, and determinations are not admissible as evidence in an action subsequently brought by the claimant in a court of competent jurisdiction.

(2) No panelist may be compelled to testify in a civil action subsequently filed with regard to the subject matter of the panel's review. A panelist has immunity from civil liability arising from participation as a panelist and for all communications, findings, opinions, and conclusions made in the course and scope of duties prescribed by this section.

(3) Nothing in this chapter may be interpreted to prohibit the division from considering any information contained in a statutory notice of intent to commence action, request for prelitigation panel review, or written findings of a panel with respect to the division's determining whether a licensee engaged in unprofessional or unlawful conduct. 1994

#### **78-14-16. Proceedings considered a binding arbitration hearing upon written agreement of parties — Compensation to members of panel.**

Upon written agreement by all parties, the proceeding may be considered a binding arbitration hearing and proceed under Title 78, Chapter 31a, except for the selection of the panel, which is done as set forth in Subsection 78-14-12(4). If the

proceeding is considered an arbitration proceeding, the parties are equally responsible for compensation to the members of the panel for services rendered. 1995

#### **78-14-17. Arbitration agreements.**

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed:

(a) the patient shall be given, in writing and by verbal explanation, the following information on:

(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

(iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;

(iv) the right of the patient to decline to enter into the agreement and still receive health care if Subsection (2) applies;

(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date;

(vi) the right of the patient to have questions about the arbitration agreement answered; and

(vii) the right of the patient to rescind the agreement within 30 days of signing the agreement; and

(b) the agreement shall require that:

(i) one arbitrator be collectively selected by all persons claiming damages;

(ii) one arbitrator be selected by the health care provider;

(iii) a third arbitrator be jointly selected by all persons claiming damages and the health care provider from a list of individuals approved as arbitrators by the state or federal courts of Utah;

(iv) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

(v) the patient be given the right to rescind the agreement within 30 days of signing the agreement; and

(vi) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date.

(2) Notwithstanding Subsection (1), a patient may not be denied health care of any kind from the emergency department of a general acute hospital, as defined in Section 26-21-2, on the sole basis that the patient or a person described in Subsection (5) refused to enter into a binding arbitration agreement with a health care provider.

(3) A written acknowledgment of having received a written and verbal explanation of a binding arbitration agreement signed by or on behalf of the patient shall be a defense to a claim that the patient did not receive a written and verbal explanation of the agreement as required by Subsection (1) unless the patient:

(a) proves that the person who signed the agreement lacked the capacity to do so; or

(b) shows by clear and convincing evidence that the execution of the agreement was induced by the health care provider's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(4) The requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.

(5) A legal guardian or a person described in Subsection 78-14-5(4), except a person temporarily standing in loco parentis, may execute or rescind a binding arbitration agreement on behalf of a patient.

(6) This section does not apply to any arbitration agreement that is subject to the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq. 2005



**78-14-17. Arbitration agreements.**

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed:

(a) the patient shall be given, in writing, the following information on:

(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

(iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;

(iv) the right of the patient to decline to enter into the agreement and still receive health care if Subsection (3) applies;

(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date;

(vi) the right of the patient to have questions about the arbitration agreement answered;

(vii) the right of the patient to rescind the agreement within ten days of signing the agreement; and

(viii) the right of the patient to require mediation of the dispute prior to the arbitration of the dispute;

(b) the agreement shall require that:

(i) except as provided in Subsection (1)(b)(ii), a panel of three arbitrators shall be selected as follows:

(A) one arbitrator collectively selected by all persons claiming damages;

(B) one arbitrator selected by the health care provider; and

(C) a third arbitrator:

(I) jointly selected by all persons claiming damages and the health care provider; or

(II) if both parties cannot agree on the selection of the third arbitrator, the other two arbitrators shall appoint the third arbitrator from a list of individuals approved as arbitrators by the state or federal courts of Utah; or

(ii) if both parties agree, a single arbitrator may be selected;

(iii) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

(iv) the patient be given the right to rescind the agreement within ten days of signing the agreement;

(v) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date;

(vi) the patient has the right to retain legal counsel;

(vii) the agreement only apply to:

(A) an error or omission that occurred after the agreement was signed, provided that the agreement may allow a person who would be a proper party in court to participate in an arbitration proceeding;

(B) the claim of:

(I) a person who signed the agreement;

(II) a person on whose behalf the agreement was signed under Subsection (6); and

(III) the unborn child of the person described in this Subsection (1)(b)(vii)(B), for 12 months from the date the agreement is signed; and

(C) the claim of a person who is not a party to the contract if the sole basis for the claim is an injury sustained by a person described in Subsection (1)(b)(vii)(B); and

(c) the patient shall be verbally encouraged to:

(i) read the written information required by Subsection (1)(a) and the arbitration agreement; and

(ii) ask any questions.

(2) When a medical malpractice action is arbitrated, the action shall:

(a) be subject to Chapter 31a, Utah Uniform Arbitration Act; and

(b) include any one or more of the following when requested by the patient before an arbitration hearing is commenced:

(i) mandatory mediation;

(ii) retention of the jointly selected arbitrator for both the liability and damages stages of an arbitration proceeding if the arbitration is bifurcated; and

(iii) the filing of the panel's award of damages as a judgement against the provider in the appropriate district court.

(3) Notwithstanding Subsection (1), a patient may not be denied health care on the sole basis that the patient or a person described in Subsection (6) refused to enter into a binding arbitration agreement with a health care provider.

(4) A written acknowledgment of having received a written explanation of a binding arbitration agreement signed by or on behalf of the patient shall be a defense to a claim that the patient did not receive a written explanation of the agreement as required by Subsection (1) unless the patient:

(a) proves that the person who signed the agreement lacked the capacity to do so; or

(b) shows by clear and convincing evidence that the execution of the agreement was induced by the health care provider's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(5) The requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.

(6) A legal guardian or a person described in Subsection 78-14-5(4), except a person temporarily standing in loco parentis, may execute or rescind a binding arbitration agreement on behalf of a patient.

(7) This section does not apply to any arbitration agreement that is subject to the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq.

identifying information from the bureau, in the form established by the bureau. A court of competent jurisdiction or a child placing agency licensed under Title 62A, Chapter 4a, Part 6, may accept that request from the adult adoptee or adult sibling, in the form provided by the bureau, and transfer that request to the bureau. The adult adoptee or adult sibling is responsible for notifying the bureau of any change in information contained in the request.

(b) The bureau may only release identifying information to an adult adoptee or adult sibling when it receives requests from both the adoptee and his adult sibling.

(c) After matching the request of an adult adoptee with that of his adult sibling, if the bureau has been provided with sufficient information to make that match, the bureau shall notify both the adoptee and the adult sibling that the requests have been matched, and disclose the identifying information to those parties.

(3) Information registered with the bureau under this section is available only to a registered adult adoptee and his registered birth parent or registered adult sibling, under the terms of this section.

(4) Information regarding a birth parent who has not registered a request with the bureau may not be disclosed.

(5) The bureau may charge a fee for services provided under this section, limited to the cost of providing those services.

1995

#### **78-30-19. Restrictions on disclosure of information — Violations — Penalty.**

(1) Information maintained or filed with the bureau under this chapter may not be disclosed except as provided by this chapter, or pursuant to a court order.

(2) Any person who discloses information obtained from the bureau's voluntary adoption registry in violation of this chapter, or knowingly allows that information to be disclosed in violation of this chapter is guilty of a class A misdemeanor.

1987

### **CHAPTER 31**

#### **ARBITRATION [REPEALED]**

**78-31-1 to 78-31-22. Repealed.**

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### **CHAPTER 31a**

#### **UTAH UNIFORM ARBITRATION ACT**

##### **Section**

**78-31a-1 to 78-31a-20. Repealed.**

**78-31a-101. Title.**

**78-31a-102. Definitions.**

**78-31a-103. Notice.**

**78-31a-104. Application.**

**78-31a-105. Effect of agreement to arbitrate — Nonwaivable provisions.**

**78-31a-106. Application for judicial relief.**

**78-31a-107. Validity of agreement to arbitrate.**

**78-31a-108. Motion to compel arbitration.**

**78-31a-109. Provisional remedies.**

**78-31a-110. Initiation of arbitration.**

**78-31a-111. Consolidation of separate arbitration proceedings.**

**78-31a-112. Appointment of arbitrator — Service as a neutral arbitrator.**

**78-31a-113. Disclosure by arbitrator.**

**78-31a-114. Action by majority.**

**78-31a-115. Immunity of arbitrator — Competency to testify — Attorney's fees and costs.**

##### **Section**

**78-31a-116. Arbitration process.**

**78-31a-117. Representation.**

**78-31a-118. Witnesses — Subpoenas — Depositions — Discovery.**

**78-31a-119. Judicial enforcement of preaward ruling arbitrator.**

**78-31a-120. Award.**

**78-31a-121. Change of award by arbitrator.**

**78-31a-122. Remedies — Fees and expenses of arbitration proceeding.**

**78-31a-123. Confirmation of award.**

**78-31a-124. Vacating an award.**

**78-31a-125. Modification or correction of award.**

**78-31a-126. Judgment on award — Attorney's fees and litigation expenses.**

**78-31a-127. Jurisdiction.**

**78-31a-128. Venue.**

**78-31a-129. Appeals.**

**78-31a-130. Electronic Signatures in Global and National Commerce Act.**

**78-31a-131. Effect of chapter on prior agreements or proceedings.**

**78-31a-1 to 78-31a-20. Repealed.**

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#### **78-31a-101. Title.**

This chapter is known as the "Utah Uniform Arbitration Act."

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#### **78-31a-102. Definitions.**

As used in this chapter:

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) "Court" means a court of competent jurisdiction in this state.

(4) "Knowledge" means actual knowledge.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

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#### **78-31a-103. Notice.**

(1) Except as otherwise provided in this chapter, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in ordinary course whether or not the other person acquires knowledge of the notice.

(2) A person has notice if the person has knowledge of the notice or has received notice.

(3) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business, or at another location held out by the person as a place of delivery of such communications.

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#### **78-31a-104. Application.**

(1) This chapter applies to any agreement to arbitrate made on or after May 6, 2002.

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**ARBITRATION AGREEMENT**

**Article 1: Agreement to Arbitrate:** We hereby agree to submit to binding arbitration all disputes and claims for damages of any kind for injuries and losses arising from the medical care rendered or which should have been rendered after the date of this Agreement. All claims for monetary damages against the physician, and the physician's partners, associates, association, corporation or partnership, and the employees, agents and assigns of any of them (hereinafter collectively referred to as "Physician"), must be arbitrated including, without limitation, claims for personal injury, loss of consortium, wrongful death, emotional distress or punitive damages. We agree that the Physician may pursue a legal action to collect any fee from the patient and doing so shall not waive the Physician's right to compel arbitration of any malpractice claim. However, following the assertion of any malpractice claim against the Physician, any fee dispute, whether or not the subject of any existing legal action, shall also be resolved by arbitration.

We expressly intend that this Agreement shall bind all persons whose claims for injuries and losses arise out of medical care rendered or which should have been rendered by Physician after the date of this Agreement, including any spouse or heirs of the patient and any children, whether born or unborn at the time of the occurrence giving rise to any claim (hereinafter collectively referred to as "Patient").

**Article 2: Waiver of Right to Trial:** We expressly waive all rights to pursue any legal action to seek damages or any other remedies or a court of law, including the right to a jury or court trial, except to enforce our decision to arbitrate, to collect any arbitration award and to facilitate the arbitration process as permitted by the Utah Arbitration Act.

**Article 3: Procedures and Appointment of Arbitrators:** Patient shall serve Physician by certified mail with a written demand for arbitration which shall specify the nature of the claim, the date of the claimed occurrence, the complained of conduct by the Physician, and a description of the Patient's injuries and damages. Within 60 days after the demand, the parties shall agree upon a neutral arbitrator to be selected from a list of individuals approved as arbitrators by the State or Federal courts of Utah. If the parties cannot agree upon a neutral arbitrator, the court shall select an individual from that list. The neutral arbitrator shall: preside over the arbitration hearing and pre-arbitration conference; establish scheduling orders; supervise the conduct of discovery to prevent abuse and insure efficiency and cost-effectiveness; rule on all motions including motions for summary judgment and motions to dismiss for failure to proceed with reasonable diligence; administer oaths; issue subpoenas; and exercise other powers granted to arbitrators in the Utah Arbitration Act. Within six months of the demand for arbitration or as otherwise ordered by the neutral arbitrator, Patient shall select one arbitrator and Physician shall select one arbitrator. Patient and Physician shall pay the fees and expenses of his or her own arbitrator. Each party shall share equally the expenses and fees of the neutral arbitrator. The parties agree that the arbitrators have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator under this Agreement.

All claims based on the same occurrence, incident, or care shall be arbitrated in one proceeding; however, Patient or Physician shall have the absolute right to arbitrate separately issues of liability and damage upon written request to the neutral arbitrator. Arbitration hearings will be held in the County of the Physician's principal place of business or elsewhere as the parties may agree.

The parties consent to the participation in this arbitration of any person or entity that would otherwise be a proper additional party in a court action and which agrees to be bound by the arbitration decision. Any existing court action against such additional person or entity shall be stayed and agreement to participate in the arbitration.

The parties agree that the arbitration proceedings are private, not public, and the privacy of the parties and of the arbitration proceedings shall be preserved.

**Article 4: Applicable Law:** With respect to any matter not herein expressly provided for, the arbitration shall be governed by the Utah Arbitration Act. All provisions of the Utah Health Care Malpractice Act, with the exception of the notice of intent and pre-litigation hearing requirements which the parties hereby waive, shall apply to the arbitration. The comparative fault provisions of Utah law apply to the arbitration and the arbitrators shall apportion fault to all persons or entities who contributed to the claimed injury whether or not they are parties to the arbitration.

**Article 5: Revocation:** This Agreement may be revoked by written notice mailed to the Physician, by certified mail, within 30 days after signature, and if not revoked shall govern all medical services received by the Patient after the date of this Agreement.

**Article 6: Term:** The term of this Agreement is one year from the date it is signed. It shall be automatically renewed from year to year thereafter unless either party to this Agreement notifies the other of his or her election not to renew in writing delivered by certified mail prior to its renewal date.

**Article 7: Read and Understood:** I (Patient or Patient's representative) have read and I understand the above Agreement which has been thoroughly explained to me to my satisfaction. I understand that I have the right to have my questions about arbitration answered and I do not have any unanswered questions. I execute this agreement of my own free will and not under any duress, and I understand that my signing of this agreement is not a requirement in order to receive medical services from Physician.

**Article 8: Received Copy:** I have received a copy of this document.

**Article 9: Severability:** If any provision of this Agreement is held invalid or unenforceable, the remaining provisions shall remain in force and shall not be affected by the invalidity of any other provision.

DIAN R. ABELT  
Name of Physician, Group or Clinic

[Signature]  
Signature of Physician

(Date)

Mark A. Birbee  
Name of Patient (Print)

[Signature]  
Signature of Patient or Patient's

(Date)