

**RECENT DECISION HOLDING ARBITRATION AGREEMENT  
NOT ENFORCEABLE AGAINST WRONGFUL DEATH MINOR  
HEIR WHEN THE DECEDENT DIED WITH THE 30 DAY  
RESCISSION PERIOD OF CCP §1295(C)**

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Division Seven of the Second Appellate District recently held that an arbitration agreement signed by a patient who dies within the 30 statutory “cooling off” period pursuant to Code of Civil Procedure section 1295(c) cannot be enforced against the decedent’s heir in a wrongful death action and ordered the trial court to vacate its order granting defendant’s petition to arbitrate. The decision in Rodriguez v. Superior Court (Witzling) (August 26, 2009) 09 C.D.O.S. 11053, is the latest of a recent series of appellate court decisions that have found arbitration agreements unenforceable for a variety of reasons, particularly in the context of a wrongful death action.<sup>1</sup>

Plaintiff minor Rodriguez sought a writ of mandate from the court of appeal after the Superior Court of Los Angeles granted defendant Sandy Witzling, M.D.’s petition to arbitrate the wrongful death claim Rodriguez brought following the death of her mother. The arbitration agreement was signed by Rodriguez’s mother on October 17, 2006, four days before what was expected to be routine gallbladder surgery. The agreement specifically stated that the signatories to the agreement were giving up their right to a jury trial, and that any dispute would be arbitrated “as provided by California law.” The agreement further stated “it was the parties’ intention that the agreement was binding on ‘all parties,’ including the patient’s children.” The agreement provided that “it could be ‘revoked by written notice delivered to the physician within 30 days of signature and if not revoked [the agreement would] govern all medical services received by the patient.’”

On October 21 the patient died, allegedly as a result of a nick to her liver made by Dr. Witzling during the surgery. Rodriguez was 8 years old at the time of her mother’s death and the sole heir to her estate. She filed a medical malpractice action through a guardian ad litem against Witzling and others. In July, Witzling filed a petition to compel

<sup>1</sup> Ruiz v. Poldolsky which held decedent’s arbitration agreement was not enforceable against non-signatory heirs in wrongful death action for medical malpractice (requests for depublication and petitions for review to the Supreme Court are pending); Birl v. Heritage Care LLC, in which the court found the trial court did not abuse its discretion by refusing to enforce an arbitration agreement where there are third parties in the action unaffected by the agreement; and, Burlage v. Superior Court, in which the court affirmed the trial court’s vacation of a private arbitration award on the grounds that the arbitrator’s exclusion of evidence substantially prejudiced a party.

arbitration. Rodriguez opposed the petition “based, in part, on her assertion that to permit a physician whose malpractice was the alleged cause of the patient’s death to enforce an arbitration agreement for which the statutory cooling-off period had not expired as of the time of the death would be inconsistent with the policy underlying section 1295 and against public policy requiring that waivers of the constitutional right to a jury trial be voluntary, knowing and intelligent.” Witzling replied that the minor’s guardian had the standing and ability to revoke the arbitration agreement, but having failed to do so, waived the issue.

The trial court granted Witzling’s petition to arbitrate and stayed proceedings as to him until the arbitration was completed. Rodriguez argued in her writ petition that “unless her petition is granted, she will be deprived of her constitutional right to a jury trial for the wrongful death of her mother” primarily because her mother died within the statutory 30-day rescission period, and it was impossible for Rodriguez to have acted during the rescission period since “she was a minor who was the subject of a custody dispute and no guardian had been appointed by the court within the 30-day rescission period.”

In granting Rodriguez’s writ and ordering the trial court to vacate its order compelling arbitration the appellate court discussed the policies behind and procedures of arbitrating medical malpractice claims under CCP section 1295. While the court said there is a strong public policy “favoring arbitration over a jury trial,” it noted there is “no conclusive presumption that a person who signs a document containing the text complying with section 1295 requirements has in fact consented to arbitration as required to form an enforceable contract.” It pointed to the mandatory 30-day cooling-off period during which the patient may give written notice of rescission.

The court observed that the parties were primarily focused on whether “the document signed by Newton is binding on her minor daughter, Rodriguez.” However, the court said in its opinion “the threshold issue is raised by Rodriguez’s contention that no valid waiver of the right to a jury trial was made. Without a valid waiver, no enforceable arbitration agreement would exist.” It noted “[t]he right at issue is a constitutional right held by Rodriguez.” Even if, for the sake of argument, Newton had the authority to waive her child’s right to a jury trial, “such waiver would be ineffective if not knowingly and voluntarily made.”<sup>2</sup> The fact the patient died before the end of the 30-day cooling off period made full compliance with section 1295 “impossible.” In light of this fact, the court found Witzling “would be unable to carry his burden of proving an agreement

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<sup>2</sup> The court referenced the Ruiz decision (see footnote 1) after stating that “California law establishes the right of a parent to bind a minor child to an arbitration agreement, under some circumstances, when it is the parent, not the child, who is the patient, even though the effect of such an agreement is ultimately to require arbitration of the child’s wrongful death action.” Ruiz held that the children of the decedent could not be bound by his arbitration agreement since a wrongful death action is an independent claim belonging to them that the deceased patient could not waive.

exists.”

The court explained that after “weighing the competing interests of an individual’s constitutional right to a jury trial against the Legislative preference for arbitration of medical malpractice claims” when there is no evidence of a knowing waiver of the right to a jury trial, the litigant’s constitutional rights must prevail. Compliance with section 1295’s cooling off period “should be interpreted as a strict and exclusive prerequisite for waiver of a jury trial,” and it makes “no provision for tolling the period on any basis in the event the patient who signed the agreement dies before the 30-day period has run.”

The notion of “equitable tolling” was addressed by the court, but it found the concept inapplicable to the facts before it.

This is a very interesting case, since many wrongful death cases arise from situations in which a patient sees a physician for a particular type of treatment—perhaps for the first time—is asked to sign an arbitration agreement, and then has the procedure that ends up being at the center of the wrongful death allegations. Toward the end of its opinion, the court seems to suggest a way in which an arbitration agreement might be drafted to apply to a minor heir by providing that a guardian appointed for the child after the parent’s death “may exercise the right to rescind set forth in section 1295, subdivision (c), and otherwise satisfies the section’s requirements;” such an agreement “would be enforceable in the event the guardian did not timely exercise the right to rescind.” Then, if the parties argue about whether an attempted rescission was timely, the court might apply the “equitable tolling doctrine to extend the time for the guardian to act to exclude any period before the guardian was appointed, as well as any additional time between appointment and the time the guardian knew (or reasonably should have known) about the arbitration agreement.” The court went on to note at oral argument the attorneys suggested the “excluded period of time in most cases should end no later than the date the section 364 notice of intent to sue is served.” Clients who use arbitration agreements should be advised to rewrite their agreements in a manner consistent with the suggestions of this decision. However, depending on the fate of the Ruiz decision, the modifications suggested by the Rodriguez court may be for naught.