



No. 16-32

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**In the Supreme Court of the United States**

KINDRED NURSING CENTERS LIMITED PARTNERSHIP,  
DBA WINCHESTER CENTRE FOR HEALTH AND  
REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND  
REHABILITATION, ET AL.,

*Petitioners,*

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,

*Respondents.*

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**On Writ of Certiorari to the  
Supreme Court of Kentucky**

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**JOINT APPENDIX**

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**PETITION FOR CERTIORARI FILED JULY 1, 2016  
CERTIORARI GRANTED OCTOBER 28, 2016**

KENTUCKY COURT OF APPEALS

KINDRED NURSING CENTERS LIMITED  
PARTNERSHIP,

Appellant,

v.

JANIS E. CLARK, Executrix of the Estate of Olive G.  
Clark, deceased,

Appellee.

No. 2012-CA-2113

RELEVANT DOCKET ENTRIES

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION</u>
1	11/19/2012	Circuit Court Judgment
2	12/7/2012	Relief Pursuant to CR 65.07
3	12/7/2012	Motion for Interlocutory Relief
4	12/18/2012	Response to Motion
11	6/25/2013	Order Denying Relief under CR 65
13	9/24/2015	Supreme Court Opinion
15	2/23/2016	Finality

**ALTERNATIVE DISPUTE RESOLUTION  
AGREEMENT BETWEEN  
RESIDENT AND FACILITY (OPTIONAL)**

**I. ALTERNATIVE DISPUTE RESOLUTION  
(ADR) AGREEMENT PROVISIONS**

A. Any and all claims or controversies arising out of or in any way relating to this ADR Agreement (“Agreement”) or the Resident’s stay at the Facility including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be subdued to alternative dispute resolution as described in this Agreement. Only disputes that would constitute a legally cognizable cause of action in a court of law may be submitted to alternative dispute resolution. The parties to this Agreement understand that the Dispute Resolution Process contains provisions for both mediation and binding arbitration. If the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration. Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s). Except as

expressly set forth herein, the provisions of the Uniform Arbitration Act, KRS 417.045 et seq., shall govern the Arbitration. This Agreement includes claims against the Facility, its employees and/or its medical director in his capacity as medical director.

B. It is the intention of the parties to this Agreement that it shall inure to the benefit of and bind the parties, their successors and assigns, including the agents, employees, servants, officers, directors and any parent or subsidiary of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident. The term "Resident" includes the resident, his or her Guardian or Attorney In Fact, his or her agent(s) or any person whose claim is derived though or on behalf of the resident.

C. The "Claimant" may be either the Facility or the Resident, depending on who files the Request for ADR (the "Request"). The other party or parties against whom the Request is filed will be the "Respondent(s)".

D. Any mediation or arbitration conducted pursuant to this Agreement shall be administered by an independent impartial entity that is regularly engaged in providing mediation and arbitration services. The Request for ADR shall be made in writing and may be submitted to the National Arbitration Forum ("NAF"), 6465 Wayzata Blvd., Suite 500, P.O. Box 50191, Minneapolis, MN 55405, (800) 474-2371, facsimile (952) 345-1160 [www.adrforum.com](http://www.adrforum.com) (the "Administrator"), by regular mail, certified mail, or overnight delivery. If the parties choose not to select NAF or, if NAF is unwilling or unable to serve as the

Administrator, the parties shall select another independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator. Requests for ADR, regardless of the entity chosen to be Administrator, shall be conducted in accordance with the NAF Mediation Rules and NAF Code of Procedure (hereinafter, collectively "NAF Rules of Procedure"). A copy of the Rules of the Dispute Resolution Process may be obtained from the Facility's Executive Director, or from NAF at the address or website listed above.

E. All claims based in whole or in part on the same incident(s), transaction(s), or related course of care or services provided by the Facility to the Resident, shall be mediated or arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the Request for ADR and is not presented in the arbitration hearing.

F. The parties shall attempt to resolve any dispute arising out of or relating to the Agreement or the Resident's stay at the Facility by mediation. Unless the parties agree otherwise, the mediator will be selected as described in the NAF Mediation Rules. The mediation shall convene not later than 120 days after the Request is received by the Administrator. Any claim or controversy that remains unresolved after the conclusion or termination of the mediation shall be settled by binding arbitration in accordance with this Agreement. Unless the parties agree otherwise, the Arbitrator(s) shall be selected as described in the NAF Code of Procedure. The arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation. Claims where the demand is less than \$75,000 shall not be subject to mediation and shall proceed directly to ar-

bitration, unless one of the parties requests mediation, in which case all parties shall mediate in good faith. The parties, at their own expense, may be represented by an attorney at the mediation or arbitration.

G. The parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with the Supplemental Disclosures for Kindred Mediations (“Supplemental Disclosures”). Any disputes which the parties cannot resolve regarding the scope and limits of discovery shall be resolved by the mediator. A copy of the Supplemental Disclosures may be obtained from the Facility’s Executive Director or from NAF at the address or website listed in Paragraph D of this Agreement.

H. Cost of ADR. Facility shall pay the mediator’s fees and other reasonable costs (excluding resident’s attorney’s fees) associated with the mediation. Facility shall pay the Arbitrator(s)’ fees and other reasonable costs associated with the arbitration (excluding resident’s attorney’s fees) up to a maximum of five (5) days of hearing. If the arbitration hearing exceeds five (5) days, the additional fees and costs shall be borne equally by the parties.

I. The losing party must pay the award to the prevailing party within thirty (30) days of the award date. If the award is not timely paid, the prevailing party may bring legal action pursuant to KRS 417.150 to enforce the award as if it were a judgment entered by a court.

J. If for any reason there is a finding that the Uniform Arbitration Act KRS 417.045 et seq., cannot be applied to this Agreement, then the parties here-

by make clear their intent that their disputes/claims be resolved pursuant to the Federal Arbitration Act and that the parties do not want their disputes/claims resolved in a judicial forum.

K. The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.

L. The Resident, or his or her legal guardian, his or her agent or designated legal representative understand that other local nursing home's agreements may not contain an alternative dispute resolution provision. The parties agree that the cost-effectiveness, time-efficiency and public policy reasons stated above are proper consideration for the acceptance of the Agreement.

## **II. ATTORNEY FEES AND COSTS**

The parties to this Agreement expressly agree to bear their own attorney fees and costs incurred in relation to this Agreement, or in relation to any other claim, including a claim to collect on unpaid nursing home charges.

## **III. SEVERABILITY PROVISION**

If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, in whole or in part, the remaining

provisions, and partially invalid or unenforceable provisions, to the extent valid and enforceable, shall nevertheless be binding and valid and enforceable.

**IV. RESIDENT'S UNDERSTANDING OF AGREEMENT**

The Resident understands that (A) he/she has the right to seek legal counsel concerning this Agreement, (B) the execution of this Agreement is not a precondition to the furnishing of services to the Resident by the Facility, and (C) this Arbitration Agreement may be revoked by providing notice to the Facility from the Resident within thirty (30) days of signature. If not revoked within thirty (30) days, this Agreement shall remain in effect for all care and services rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility. (D) Nothing in this Agreement shall prevent Resident or any other person from reporting alleged violations of law to the appropriate administrative, regulatory or law enforcement agency. The Resident, his or her agent or designated legal representative, also had the opportunity to consult with a Facility representative regarding such explanations or clarification.

Olive Clark

0280 Winchester Centre  
for Health &  
Rehabilitation

\_\_\_\_\_  
Print Name of Resident

\_\_\_\_\_  
Print Name and Number  
of Facility

/s/ Jan Clark POA  
Signature of Resident or  
Legal Representative

/s/  
Signature of Title of Fa-  
cility's Authorized Agent

Jan Clark, Daughter  
(Financial Agent)  
Legal Representative  
Printed Name and Ca-  
pacity (i.e., guardian, du-  
rable power of attorney,  
spouse, son, daughter,  
etc.)

/s/  
Printed Name of Facili-  
ty's Authorized Agent

Date: 8/15/08

Date: 8/15/08

If signed by a Legal Representative, the representa-  
tive certifies that the Facility may reasonably rely  
upon the validity and authority of the representa-  
tive's signature based upon actual, implied or appar-  
ent authority to execute this Agreement as granted  
by the resident.