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Pivotal Nursing Home Suit Raises a Simple Question: Who Signed the Contract?

By MICHAEL CORKERY and JESSICA SILVER-GREENBERG FEB. 21, 2016

Elizabeth Barrow celebrated her 100th birthday at a backyard gathering with her son and three grandchildren in the coastal Massachusetts town where she raised her family and cooked lunches in a school cafeteria.

A month later, in September 2009, Mrs. Barrow was found dead at a local nursing home, strangled and suffocated, with a plastic shopping bag over her head. The killer, the police said, was her 97-year-old roommate.

Workers at the nursing home, Brandon Woods in South Dartmouth, Mass., had months earlier described the roommate in patient files as being “at risk to harm herself or others.”

After a police inquiry, the roommate — despite her age and dementia — was charged with murder. The authorities did not focus on the nursing home, though. Brandon Woods claims that, except for some minor arguments, the two women got along nicely. When the roommate was deemed unfit to stand trial and committed to a state hospital, the sensational case that shocked this corner of New England essentially disappeared.

More than six years after the killing, Mrs. Barrow's only son, Scott, is still trying to hold the nursing home accountable. "The woman had a history of problems," Mr. Barrow said of the roommate in an interview this month. "She should not have been living in that room with my mother."

Mr. Barrow was barred from taking Brandon Woods to court in 2010 because his mother's contract with the nursing home contained a clause that forced any dispute, even one over wrongful death, into private arbitration.

He has been trying ever since to get back to court, and next month he will finally get that chance. A Massachusetts state court is scheduled to hear Mr. Barrow's case against the home, which has evolved into much more than a lawsuit about one woman's death. It has become a crucial test of a legal strategy to prevent nursing homes across the country from requiring their residents to go to arbitration, where there is no judge or jury and the proceedings are hidden from public scrutiny.

Arbitration clauses have proliferated over the last 10 years as companies have added them to tens of millions of contracts for things as diverse as cellphone service, credit cards and student loans. Nursing homes in particular have embraced the clauses, which are often buried in complex contracts that are difficult to navigate, especially for elderly people with dwindling mental acuity or their relatives, who can be emotionally vulnerable when admitting a parent to a home.

State regulators are concerned because the secretive nature of arbitration can obscure patterns of wrongdoing from prospective residents and their families. Recently, officials in 16 states and the District of Columbia urged the federal government to deny Medicaid and Medicare money to nursing homes that use the clauses. Between 2010 and 2014, hundreds of cases of elder abuse, neglect and wrongful death ended up in arbitration, according to an examination by The New York Times of 25,000 arbitration records and interviews with arbitrators, judges and plaintiffs.

Judges have consistently upheld the clauses, The Times found, regardless of

whether the people signing them understood what they were forfeiting. It is the most basic principle of contract law: Once a contract is signed, judges have ruled, it is legally binding.

Mr. Barrow's case is pivotal because, with the help of his lawyers, he has overcome an arbitration clause by using the fundamentals of contract law to fight back.

As is often the case when elderly people are admitted to nursing homes, Mr. Barrow signed the admissions paperwork containing the arbitration clause on his mother's behalf.

Although his mother had designated Mr. Barrow as her health care proxy — someone who was authorized to make decisions about her medical treatment — his lawyers argued that he did not have the authority to bind his mother to arbitration. In 2014, a judge ruled in his favor.

It is a straightforward argument that is catching on. Appeals courts across the country have been throwing out arbitration agreements signed by family members of nursing home residents.

For years, judges hearing elder-abuse cases rejected arguments that arbitration clauses in nursing home contracts were patently unfair because they were signed by people who did not understand them or perhaps even realize they existed.

In a circuit court case involving a man in a Mississippi nursing home who could not read, write or sign his name, the judges held that under state law, "illiteracy alone is not a sufficient basis for the invalidation of an arbitration agreement."

"Any normal human being would say that these contracts don't pass the smell test. But the courts don't accept this," said Martin S. Kardon, a plaintiff's lawyer in Philadelphia with a focus on nursing home cases.

A few years ago, Mr. Kardon and a small network of lawyers across the country

tried a different tack. They began making hyper-technical arguments about the validity of nursing home contracts.

They argued that unless family members had power of attorney, they lacked the authority to agree to arbitration.

“We had to start speaking the language of judges,” Mr. Kardon said.

When Mr. Barrow, now 67, brought his parents to the nursing home in 2006, signing the paperwork seemed like little more than a formality, the final step of an already tough process.

At first, his parents — sweethearts since they met working at a textile mill — shared the same room at the home, a tidy brick building with a decorative pond outside. After his father died the next year, his mother had a string of roommates. Known for walking the halls, asking other residents if they needed hugs, Mrs. Barrow made friends easily. And the light in her south-facing room was perfect for cultivating her beloved African violets.

Things changed in 2008 when she got a new roommate, Laura Lundquist, who was moved because of an argument with her previous roommate, Mr. Barrow’s lawyers said in a court filing.

The change of scenery did not seem to help Ms. Lundquist, who had been diagnosed with dementia, delusions, anxiety disorder, depression and paranoia.

Ms. Lundquist did not like to eat in the dining hall, so Mrs. Barrow would take her own meals in their room to keep her company, Mr. Barrow said.

In court papers, lawyers for Brandon Woods cited those meals as evidence that the two women “generally carried on a caring friendship.”

In January 2009, court records show, workers at the nursing home reported that at times Ms. Lundquist “became jealous of her roommate, who she perceived sometimes got extra attention.”

Her agitation, the records show, grew when Mrs. Barrow had visitors. Ms. Lundquist also accused Mrs. Barrow of having “too many flowers and of taking her belongings,” according to records made by workers at the home just a month before the death.

Knowing that his mother was not one “to rock the boat,” Mr. Barrow said he asked a member of the nursing staff whether she should get a new roommate. The staff member did not seem to think there was a problem, he said.

On Aug. 21, Mrs. Barrow turned 100. Her son and three grandchildren took her on a shopping trip to Walmart. They ate cake with green frosting, and she declared it her goal to live to 104.

A month later, back at the nursing home, a simple disagreement between the roommates escalated.

It began when Mrs. Barrow asked a nursing assistant to move a table from the foot of Ms. Lundquist’s bed so that she could get to the bathroom. At that request, Ms. Lundquist got out of bed, screamed, “was verbally abusive and hit” the nursing assistant, records show. It took two staff members to calm Ms. Lundquist.

Officials at Brandon Woods and lawyers for the nursing home did not respond to requests for comment.

In the court papers, lawyers for the nursing home said Mrs. Barrow had assured the nurse that she felt safe in the room “and that Ms. Lundquist would cool off.”

At 6:20 the next morning, a staff member found Mrs. Barrow in bed with a plastic bag on her head and the covers pulled up. The table was back at the foot of Ms. Lundquist’s bed.

When the nursing home called to inform Mrs. Barrow’s son of her death, he had to press for details. “They said, ‘There was more to it,’ ” Mr. Barrow said.

For weeks Mr. Barrow knew nothing, until he came home from a sales trip to

find his driveway filled with television news trucks. The Bristol County district attorney had just filed charges against the roommate.

That was not the way to seek justice for his mother's death, Mr. Barrow said. "It's like charging a 2-year-old who happened to take a gun off a table and shoot a sibling," he said.

Ms. Lundquist's lawyer, Carl S. Levin, said, "We maintain her innocence."

Having been blocked from court, Mr. Barrow was forced to go to arbitration. The nursing home had to turn over files that included the details about Ms. Lundquist's past behavior.

Mr. Barrow said he was optimistic but soon became disillusioned with the process. His legal team said they discovered that the arbitration firm running the hearing had previously handled more than 400 arbitrations for the law firm representing the nursing home company.

His lawyers David Hoey and Krzysztof Sobczak questioned whether the process could be objective when the arbitration firm had drawn so much business from one of the parties. The arbitrator ultimately ruled in the nursing home's favor but provided no explanation. His ruling consisted of a single check mark, indicating that Brandon Woods had not been negligent in its care of Mrs. Barrow.

But Mr. Barrow kept fighting. For him, the case has always been about the nursing home, not about Ms. Lundquist, who is now 104 and remains in a state hospital in Massachusetts. She is evaluated yearly to determine if she can stand trial, but given her age, that seems unlikely, a spokesman for the district attorney said.

"I can't do anything for my mother," Mr. Barrow said, "but I want people to realize that they have to investigate nursing homes. Everyone could end up there."

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