

**Consumer Directed Negotiated Risk Agreements**

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## A. Introduction

Negotiated risk in the assisted living context is a largely misunderstood concept. Opponents and proponents of the concept often fail to agree on fundamental concepts underlying negotiated risk.<sup>1</sup> Similarly, states have enacted legislation authorizing or prohibiting what is described as negotiated risk – however those states have defined the concept so differently than other states that it is difficult to understand the concept as a cohesive whole.<sup>2</sup> Negotiated risk can be broadly defined as the shifting of responsibility for certain consequences between the resident and the assisted living facility. Further concepts of definition vary greatly between lawyers and industry actors, and will be discussed later.

As a polestar, the general opinions regarding negotiated risk should be summarized. Opponents of the concept believe that negotiated risk is an illegitimate and unenforceable imposition upon the rights of assisted living residents by facilities attempting to contract away

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<sup>1</sup> Compare Natalie M. Duval & Charles Moseley, *Negotiated Risk Agreements in Long-Term Support Services* 13-14 (2001) with Eric M. Carlson, *Protecting Rights of Waiving Them? Why 'Negotiated Risk' Should be Removed from Assisted Living Law*, 10 J. Health Care L. & Pol'y 287 (2007).

<sup>2</sup> See ROBERT JENKENS, ET AL, U.S. DEP'T OF HEALTH & HUMAN SERVS., A STUDY OF NEGOTIATED RISK AGREEMENTS IN ASSISTED LIVING: FINAL REPORT iv (2006); see also Mary Jane Ciccarello and Joanne Wetzler, *Assisted Living in Utah: A Brief Overview for Consumers*, 19 Utah B. J. 24, 26 (2006).

liability for resident injuries.<sup>3</sup> Proponents color negotiated risk as a method for residents to exercise greater control over their living conditions and tailor the services supplied and guidelines imposed by the resident's facility.<sup>4</sup>

This paper proposes an alternative approach to negotiated risk that incorporates concerns of opponents of negotiated risk, and the selling points of proponents. A consumer directed negotiated risk agreement – one prepared by the resident's independent attorney, would assist the resident in directing their standard of assisted living, while protecting their interests. A document of this type would require new state legislation authorizing the enforceability of risk shifting, and also delineating the boundaries that such an agreement could be used for. Additional benefits to this type of negotiated risk is that concerns over resident safety and welfare during the admissions process could be addressed without completely overhauling the market-based approach that is a hallmark of assisted living.<sup>5</sup> Also, because residents seeking negotiated risk agreements would have to enlist the aid of an independent attorney, they would be more likely to benefit from advice regarding many other aspects of aging that they may not have otherwise obtained – including Medicaid and estate planning, education about possible exploitation, and review of pertinent resident admissions forms and contracts.

## B. Background

### i. Assisted Living

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<sup>3</sup> See Eric M. Carlson, *In the Sheep's Clothing of Resident Rights: Behind the Rhetoric of "Negotiated Risk" in Assisted Living*, NAELA Q., Spring 2003, at 4, 5.

<sup>4</sup> Duval *supra* note 1, at 5.

<sup>5</sup> Assisted living providers suggest that the market is the best director of services for assisted living, and promotes flexibility, unlike comprehensive regulations. Stephanie Edelstein, *Assisted Living: Recent Developments and Issues for Older Consumers*, 9 STAN. L. & POL'Y REV. 373, 376 (1998).

Assisted living is a term that may be best described by what it is not, rather than what it is. An older adult's housing options range from independent living at one end of the spectrum, to Skilled Nursing Facilities at the other extreme.<sup>6</sup> Assisted living is one type of living choice between the two extremes.<sup>7</sup> Assisted living facilities provide a place for older adults that are unable to live independently, but do not need the full scope of care provided by a skilled nursing facility.<sup>8</sup>

The assisted living industry has been called the fastest growing sector of senior housing.<sup>9</sup> There are currently about one million residents in assisted living, in over 36,000 facilities.<sup>10</sup>

ii. Pennsylvania's approach to Assisted Living

Pennsylvania has licensed facilities operating as types of assisted living, but has called them "Personal Care Homes."<sup>11</sup> The legislature broadly outlined the industry with general policy goals, and implied that consumers and providers should negotiate the specific terms of service.<sup>12</sup> The legislature delegated authority to create applicable rules and regulations to license the facilities to the Department of Public Welfare.<sup>13</sup> The Department of Public Welfare stated that the purpose of Personal Care Homes is:

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See, MARSHALL B. KAPP, LEGAL ASPECTS OF ELDER CARE 160-67 (2010).

<sup>9</sup> Assisted Living Federation of America, Assisted Living Information, [http://www.alfa.org/alfa/Assisted\\_Living\\_Information.asp](http://www.alfa.org/alfa/Assisted_Living_Information.asp) (last visited Dec. 6, 2010); Marshall B. Kapp, Legal Aspects of Elder Care 160 (2010).

<sup>10</sup> *Id.*

<sup>11</sup> Pennsylvania has amended the legislation authorizing "Personal Care Homes" to also include "Assisted Living Residences." These forms of older adult housing differ mostly based upon the housing accommodation requirements, and level of services required by the state. See Pa. Dep't of Aging, Assisted Living Regulations, [http://www.aging.state.pa.us/portal/server.pt/community/regulations/17888/assisted\\_living\\_regulations/716095](http://www.aging.state.pa.us/portal/server.pt/community/regulations/17888/assisted_living_regulations/716095) (last visited Dec. 6, 2010); 55 PA. CODE 2600.1-2600.270; 55 PA. CODE 2800.1-2800.270.

<sup>12</sup> 62 PA. STAT. ANN. § 1057.3.

<sup>13</sup> *Id.*

to provide safe, humane, comfortable and supportive residential settings for adults who do not require the services in or of a licensed long-term care facility, but who do require assistance or supervision with activities of daily living, instrumental activities of daily living, or both. Residents who live in personal care homes that meet the requirements in this chapter will receive the encouragement and assistance they need to develop and *maintain maximum independence and self-determination*.<sup>14</sup>

The Department of Public Welfare regulations also provide licensure requirements, operation requirements, and outline resident rights.<sup>15</sup> Residents are not supposed to be admitted or remain in a Personal Care Home if they require the services of a skilled nursing facility.<sup>16</sup>

Like the Personal Care Home regulations, Pennsylvania's new regulations for assisting living residences also state that the purpose of the residences is to "develop and maintain maximum independence, exercise decision-making and personal choice."<sup>17</sup> The assisted living residences are intended, however, to permit residents to "age in place," and the facility will be permitted to supply the resident with supplemental health care services.<sup>18</sup>

### iii. The Role of Negotiations in Assisted Living

State assisted living laws are usually written broadly, leaving the residents and providers to negotiate the specific terms of service.<sup>19</sup> State regulations tend to focus on licensing requirements for facilities, and certain mandatory reporting requirements.<sup>20</sup> Issues of standards of service, types of services provided, and other issues directly affecting residents are usually only briefly discussed in state law.<sup>21</sup> The states tend to define the extreme boundaries of unacceptable facility conduct, and leave the residents and facilities to dictate the terms of their

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<sup>14</sup> 55 PA. CODE § 2600.1 (emphasis added).

<sup>15</sup> 55 PA. CODE §§ 2600.1-2600.270.

<sup>16</sup> 55 PA. CODE §§ 2600.1.

<sup>17</sup> *Id.*

<sup>18</sup> 62 PA. STAT. § 1001; 55 PA. CODE § 2800.4.

<sup>19</sup> Carlson, *supra* note 1, at 293.

<sup>20</sup> Edelstein, *supra* note 5 at 376-77.

<sup>21</sup> *Id.*

relationships.<sup>22</sup> This process can be described as a market based approach, which is in contrast to the heavily regulated nursing home industry.<sup>23</sup>

The negotiations between residents and facilities can occur in the preparation of the admissions contract, a service plan, a negotiated risk agreement, or through informal agreements between the resident and staff.<sup>24</sup> Often residents will have almost no room to negotiate during the execution of an admissions contract, short of choosing whether or not to enter the facility.<sup>25</sup> These contracts have been described as contracts of adhesion, presenting the resident with a “take it or leave it” situation.<sup>26</sup> Additionally, the admissions contract is surrounded with issues of the resident’s financial resources, and the resident’s future financial commitment to the facility, and may be nearly incomprehensible to the resident.<sup>27</sup>

After a resident has chosen to enter a facility, and has been approved financially by the facility, discussions will begin regarding the specific services to be provided by the facility to the resident. The result of this process is usually the service plan.<sup>28</sup> This is an opportunity for residents to choose their desired level of attention from the assisted living facility. Issues discussed would certainly vary depending upon what the facility would be able to offer, or to coordinate from outside providers. Residents can indicate what types of assistance they desire in the completion of daily activities, and what activities they want to perform on their own. Additionally, residents may select what services will be provided by the facility, and what services might be best provided by outside providers.

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<sup>22</sup> Eric M. Carlson, Trends and Tips in Long-Term Care: Who Benefits—or Loses—From Expanded Choices?, 18 ELDER L.J. 191, 192 (2010).

<sup>23</sup> See *id.*; Edelstein, *supra* note 5, at 373, 376.

<sup>24</sup> Carlson, *supra* note 22, at 212.

<sup>25</sup> *Id.* at 192.

<sup>26</sup> *Id.* at 212.

<sup>27</sup> Edelstein, *supra* note 5, at 381.

<sup>28</sup> Jenkins, *supra* note 2, at vii-ix.

Once in a facility, a resident may, of course, come to informal agreements with staff and administrators of the assisted living facility.<sup>29</sup> These agreements might cover any issue imaginable. Informal agreements however offer neither the resident nor facility any significant protection. While a facility may permit a certain choice, or provide a certain service to a resident based on an informal spoken agreement, there is nothing in writing to memorialize this agreement should the provider fail to honor the agreement.

A negotiated risk agreement can be a very powerful tool for residents desiring very specific accommodation of preferences, or for facilities to avoid taking on extra liability when accommodating certain residents. This type of agreement might be reduced to a specific writing separate from any other document, or may be part of an admissions contract or a service plan.<sup>30</sup> The negotiated risk agreement tends to relate to a certain resident accommodation that would be outside of the norm, or it would otherwise be included within the contract or service plan.<sup>31</sup>

#### iv. Negotiated Risk Agreements

##### a. Definition of Negotiated Risk Agreement

Broadly speaking, negotiated risk agreements might refer to the entire panoply of negotiations between a resident and an assisted living provider. For the purpose of this paper it is necessary to hone in on a smaller subset of the negotiations. A negotiated risk agreement is a result of negotiations between a resident and assisted living provider over a desired level of services, or other personal choice, and the provider's willingness to comply with the resident's

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<sup>29</sup> *Id.*

<sup>30</sup> JOSEPH L. BIANCULLI, "NEGOTIATED RISK" AND OPERATIONS, AN OPERATIONAL CONCEPT WITH LEGAL CONSEQUENCES, PENNSYLVANIA ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, SPECIAL SERIES: ASSISTED LIVING ISSUES (September 13, 1996); *see* Storm v. NSL Rockland Place, LLC., 898 A.2d 874, 878-79 (Del. 2005).

<sup>31</sup> JOSEPH L. BIANCULLI AND KEREN B. WILSON, NEGOTIATED RISK IN ASSISTED LIVING, AMERICAN ASSOCIATION OF HOMES AND SERVICES FOR THE AGING 13, (1996).

desires.<sup>32</sup> The negotiated risk agreement, however, should not be used for outlining the entire relationship between the resident and facility, but only used for exceptional circumstances where the facility determines that the desired resident choice is too risky.<sup>33</sup>

A negotiated risk agreement can be thought of as an exchange. The resident offers the facility a waiver of liability in exchange for an accommodation for the resident that the facility would not be willing to make, but for the waiver. In reality, the exchange might not be an absolute waiver of liability, but simply a shifting of a certain amount of liability or responsibility from the facility to the resident depending on the nature of the accommodation. The idea is that the resident wants to exercise control over their lifestyle, but the assisted living facility is reluctant to accommodate the resident because the facility views the resident's desire as subjecting the facility to a heightened risk of a lawsuit if the resident's choice leads to injury or harm.

#### b. Purpose of Negotiated Risk Agreements

The purpose of a negotiated risk agreement has been hotly contested.<sup>34</sup> Some proponents of negotiated risk focus on the possibility of the documents to permit resident choice.<sup>35</sup> It is suggested that by permitting residents to exercise their determination over the structure of the resident-provider relationship, the resident's overall independence can be maintained for a longer period of time.<sup>36</sup> This purpose or goal will be referred to as "resident choice."

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<sup>32</sup> See generally Carlson, *supra* note 1; see also Jenkins, *supra* note 2, at 8.

<sup>33</sup> Bianculli, *supra* note 31, at 13.

<sup>34</sup> Jenkins, *supra* note 2, at v.

<sup>35</sup> *Id.*; Duval, *supra* note 1, at 13-14.

<sup>36</sup> See *Id.*



Opponents of negotiated risk focus on the waiver of liability that typically accompanies the agreement, viewing the waiver as the sole purpose of the concept.<sup>37</sup> One prominent writer argues that negotiated risk should be abandoned, and that it is inappropriate to the development of assisted living.<sup>38</sup> It is further premised that residents already have the ability to exercise these types of decisions under current law, and that a negotiated risk agreement is merely an attempt by facilities to circumvent the law and reduce their liability of operating.<sup>39</sup> This purpose is often referred to as liability waiver or shifting of responsibility.

Another surmised purpose identified by opponents, is that some assisted living providers hope to use negotiated risk agreements to keep residents in a facility that does not have the resources to provide necessary services to the resident.<sup>40</sup> Because assisted living facilities are governed by very little regulation, and they serve a population of residents with a varying ability to live independently, there is a wide range of service levels between facilities. An assisted living facility need not be able to provide all services required by any resident not requiring the care of a skilled nursing facility. Some residents who only have moderate difficulty living independently might only limited assistance with their daily activities. Opponents of negotiated risk are concerned that facilities that do not offer comprehensive services will try and use the concept to admit or retain residents knowing full well that the facility does not offer the services internally, and cannot coordinate outside services to meet the resident's requirements.<sup>41</sup> This

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<sup>37</sup> Jenkins, *supra* note 2, at v.; Carlson, *supra* note 1, at 336-37.

<sup>38</sup> *Id.*

<sup>39</sup> Although the cited article discusses assisted living generally, the section concerning resident's ability to act against facility advice concentrates largely on the separately regulated nursing home industry. *Id.* at 319-23.

<sup>40</sup> Eric M. Carlson, *In the Sheep's Clothing of Resident Rights: Behind the Rhetoric of "Negotiated Risk" in Assisted Living*, NAELA Q., Spring 2003, at 6.

<sup>41</sup> Carlson, *supra* note 1, at 295.

potentially insidious practice has been referred to as an “inadequate care” scenario.<sup>42</sup> A facility might seek to use a negotiated risk agreement in this fashion to attract new residents, or to keep residents with a proven record of paying on time, but who should be transferred to a facility with more services due to a change in health or other reason.<sup>43</sup>

By limiting the focus on negotiated risk agreements to the separate purposes of waiving liability or enabling consumer choice, opponents and proponents appear unable to reconcile their arguments.<sup>44</sup> However, the goals do not have to be viewed as mutually exclusive. An attorney advocating on behalf of providers has argued that a negotiated risk agreement should not be thought of as a legal concept, but instead as a process through which residents and facilities negotiate what services the facility will provide, and how the services will be provided.<sup>45</sup> The process described identifies six goals of the negotiation process:

- 1) Empowering resident choice within established boundaries
- 2) Identifying resident preferences
- 3) Performing a realistic assessment for potential harm due to resident preferences
- 4) Identifying potential alternatives to resident preferences, or limited accommodation of resident preferences
- 5) Seeking consensus between the resident and facility on the accommodation of resident preferences
- 6) Documenting the process of negotiation and the decision

These goals, having been written for an intended audience of providers, is surprisingly focused on resident choice. It does, however, offer several limitations on the extent to which residents

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<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> *See Jenkens, supra note 2, at v.*

<sup>45</sup> *Bianculli, supra note 30.*

may affect the ultimate decision suggested by the provider. Goal three focuses on the facility's own assessment of potential risk of accommodating the resident's desire, and would likely focus on the potential for legal liability as a result of the identified risk occurring.<sup>46</sup> Goal four proposes that the facility should suggest to the resident less risky alternatives, or modifications to the resident's desire that would be a compromise between choice and risk.<sup>47</sup> The process as described is not intended to be a substitute for proper service plans, but rather an exception to traditional standard services plans.<sup>48</sup> Although this process appears as though it promotes a certain amount of resident choice, it does not adequately suggest a remedy for when a resident's initial desire is not acceptable to the facility, and the facility's suggested alternatives or compromises are not acceptable to the resident due to the possibility of the facility facing too much potential liability. These results would likely occur when the resident's desired activity or accommodation was "against facility advice."<sup>49</sup>

Anticipating situations when resident's desires are against facility advice, some proponents of negotiated risk agreements suggest that waivers of liability might enable the resident to retain autonomy.<sup>50</sup> A waiver of liability in the negotiated risk context refers to the resident preemptively releasing the facility from liability for certain injuries resulting from the resident's choice that was the subject of a negotiated risk agreement.<sup>51</sup> The concept supposes that a facility might be unwilling to permit certain resident activities, or a resident's refusal or service, if that activity or refusal carries a heightened risk of injury or other harm to the

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<sup>46</sup> See Bianculli, *supra* note 31, at 4.

<sup>47</sup> See *id.* at 4, 6.

<sup>48</sup> See *id.* at 13.

<sup>49</sup> "Against facility advice" has been described as a scenario where "the facility is prepared to provide adequate care, but the resident wants to act against the facility's advice in a way that increases risk to the resident." Carlson, *supra* note 1, at 298.

<sup>50</sup> Duval, *supra* note 1, at 7.

<sup>51</sup> Jenkins, *supra* note 2, at 9-10.

resident—and consequently increases the potential legal liability of the facility for permitting the resident to exercise their choice.<sup>52</sup> Another problem for liability waivers is enforceability. The only known attempt by a facility to enforce in court the waiver of liability in a negotiated risk agreement was unsuccessful.<sup>53</sup> The court broadly held that waivers of liability in this context were unenforceable.<sup>54</sup> Indeed, thinkers from both sides of the debate largely agree that waivers of liability are not legally enforceable.<sup>55</sup> Some proponents, while admitting the unlikelihood of enforceability of the liability waiver, nonetheless suggest that the waiver may be effectively used as persuasive evidence that a facility has a limited duty to the resident—in effect increasing the threshold that the resident (or person suing on behalf of the resident) must cross to demonstrate that the facility was negligent.<sup>56</sup>

Proponents of the liability waivers have noted that residents or the families of residents may not understand the operability (or non-operability) of the liability waiver, and may believe that they have in fact waived their legal recourses against the facility.<sup>57</sup> Facility conduct of this type, however, seems tantamount to deception. If a facility were to analyze the risk of legal liability for permitting a resident's choice, it is unlikely that the facility would derogate greatly from their standard practice to accommodate the resident's desire. The facility hope of a resident's ignorance of legal rights should not weigh heavily on a prudent facility administrator. Opponents have suggested that facilities may attempt to use waivers of liability broadly simply to reduce their overall risk of liability, rather than using them strategically for specific resident

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<sup>52</sup> *See id.*

<sup>53</sup> *Storm v. NSL Rockland Place*, 898 A.2d 874, 878-79, 887 (Del. 2005) (holding that a blanket limitation of liability clause in assisted living contract was not effective to completely bar plaintiff's recovery).

<sup>54</sup> *Id.*

<sup>55</sup> *See Jenkens, supra* note 2, at 9.

<sup>56</sup> *Duval, supra* note 2, at 7.

<sup>57</sup> *Id.*

requests.<sup>58</sup> In other words, those facilities may use the liability waivers as blankets of protection rather than band-aids for isolated exceptions.

Minding these concerns, the goals of opponents and proponents need not be mutually exclusive. Negotiated risk agreements must be beneficial to both residents and facilities. Returning to the concept of negotiated risk agreements as exchanges, if a facility was unwilling to accommodate a resident's lifestyle request unilaterally, the facility might be willing to permit resident autonomy if the resident were willing to accept responsibility for the consequences of that autonomous choice. Concerns over this approach under current regulations and market forces include the relative bargaining positions of the parties, and the previously mentioned problems of enforceability of a waiver of liability.<sup>59</sup>

#### c. Terminology of Negotiated Risk

Negotiated risk has become a buzzword in the assisted living industry.<sup>60</sup> As the debate about the topic has grown, the definitions of the terms negotiated risk, and negotiated risk agreement have become more disparate. Additionally, perhaps as a result of criticism, industry proponents and assisted living facilities have created new terms to describe negotiated risk. The concept has been described as “managed risk,” “shared responsibility,” “compliance agreement,” “negotiated plan of care,” and “mutual understanding.”<sup>61</sup> These terms are likely to convey different meanings to residents reading a document that they are being asked to sign. Absent formal recognition by a state legislature or agency, it is likely that the list of terms for negotiated risk will continue to grow.

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<sup>58</sup> Carlson, *supra* note 40, at 6; *see also* Eric M. Carlson, Negotiating for Resident-Centered Care, 10 MARQ. ELDER'S ADVISOR 21, 49 (2008).

<sup>59</sup> *See* David R. Hoffman, Failing to Care: How Effective Compliance Prevents Institutional Elder Neglect, 10 MARQ. ELDER'S ADVISOR 1, 6-7 (2008).

<sup>60</sup> Bianculli, *supra* note 30, at 1.

<sup>61</sup> Bianculli, *supra* note 30, at 2; Jenkens, *supra* note 2, at 6, A12.

#### d. Examples of Resident Choice in Negotiated Risk Agreements

Several common themes arise in discussions of negotiated risk agreements. One theme is the diabetic resident who, against the advice of the facility, wants to eat sugary desserts with meals. Proponents of negotiated risk agreements suggest that a resident deserves the right to choose their diet. However, facilities may be justly concerned that permitting a diabetic resident to continue to consume large amounts of sugar may increase the facility's potential legal liability should the resident suffer adverse effects from their diet.<sup>62</sup> Following the Bianculli process, a facility might attempt to offer the resident an alternative type of dessert that would be in accordance with the facility's recommended diet for that resident. However, if the resident were unwilling to accept this alternative dessert, the facility might have to choose between either permitting the resident to continue to eat the sugary dessert against the advice of the facility, or to take steps to prevent the resident from consuming that dessert. Neither option is particularly appealing, as permitting the resident to continue on a diet that the facility believes is unhealthy may expose the facility to legal consequences if the resident would suffer injury, and preventing the resident from exercising control might negatively impact the resident's quality of life.

Similar situations may occur with residents who smoke. Analogous to the situation with diabetes and dessert, facilities may admit residents with lung cancer that desire to continue smoking. Also, because smoking may pose a fire hazard to other residents within a facility, the conditions under which a resident may smoke might be appropriate for a negotiated risk agreement.

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<sup>62</sup> Carlson, *supra* note 40, at 5 (citing Marshall B. Kapp & Keren Brown Wilson, Assisted Living and Negotiated Risk: Reconciling Protection and Autonomy, 1 J. ETHICS, L., AND AGING 11 (1995)).

Considering the age of residents, facilities are very concerned with falls. Preventing or reducing falls, however, often significantly reduces a resident's mobility.<sup>63</sup> Residents may be forced to use assistance devices such as wheelchairs, or prohibited from moving freely about the facility, or leaving the facility, without supervision of staff persons. This reduction of mobility represents a significant loss of independence and resident autonomy.

Foreseeably, assisted living facilities may desire to negotiate risk agreements for third party risk. A possible example involves resident spouses, where only one resident smokes, and the facility is concerned about subjecting the non-smoking resident spouse to second hand smoke. If the non-smoking resident spouse desired to continue living in the same unit as the smoking spouse, the non-smoking spouse could execute a negotiated risk agreement, assuming the risk of harm from that second hand smoke.

All of these themes represent situations where residents desire to retain a certain amount of autonomy in exercising decisions concerning their lifestyle. The assisted living facilities, understandably, may not be willing to accommodate the residents' desires without some types of safeguards. If the facility is even willing to consider accommodating the residents' desires, the safeguards put in place by the facility may significantly curtail the residents' independence. Faced with this proposition, older adults who are beginning to have difficulty living independently at home, may nonetheless forego entering an otherwise suitable assisted living facility because the older adults are unwilling to give up certain elements of their independence that brings pleasure to their lives. Negotiated risk agreements could be used in these situations to

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<sup>63</sup> See Joseph V. Agnostini et al., Prevention of Falls in Hospitalized and Institutionalized Older People, *in* Making Health Care Safe: A Critical Analysis of Patient Safety Practices 282 (2001), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.125.2605&rep=rep1&type=pdf#page=290>.

permit residents to exercise autonomy, while shouldering the responsibility for their actions through a waiver of liability granted to the assisted living facility. Overall, this resident who would have been otherwise unwilling to enter assisted living without the negotiated risk agreement, would probably be safer, despite having executed a waiver of liability.

#### e. Mechanics of a Negotiated Risk Agreement

In their current form, a negotiated risk agreement is a tool used by providers. Whether the purpose is to increase consumer choice, used to limit liability for certain resident desires, or to admit or retain a resident in a facility with inadequate services, the assisted living facility provides the consumer with the document to sign.<sup>64</sup>

A negotiated risk agreement provided by an assisted living facility poses several problems. First, the facility is situated in a far greater position of bargaining power.<sup>65</sup> The respective bargaining position of parties has often been a determinative factor when courts decide whether to uphold certain contract provisions where a party contracts away a legal right – in the case of negotiated risk agreements, the waiver of liability.<sup>66</sup> Even if a state were to statutorily recognize waivers of liability in assisted living negotiated risk agreements, residents might successfully challenge certain agreements as unconscionable if they were provided by the facility, and disproportionately favorable to the facility.<sup>67</sup> Second, older adults signing a negotiated risk agreement may often lack true informed consent.<sup>68</sup> A resident signing a waiver of liability gives up important rights, and it is likely that the negotiated risk agreement would be

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<sup>64</sup> See Duval, *supra* note 2, at 14.

<sup>65</sup> See Hoffman, *supra* note 59, at 6-7.

<sup>66</sup> See *Tunkl v. Regents of the University of California*, 383 P.2d 441, 447 (Cal. 1963) (court rejecting liability waiver in hospital setting).

<sup>67</sup> See *Storm v. NSL Rockland Place, LLC.*, 898 A.2d 874, 884 (2005) (citing *Tucker v. Alburn, Inc.*, 1999 WL 1231073, at \*2 (Del. Super. Ct. Sept. 27, 1999)).

<sup>68</sup> See Edelstein, *supra* note 5, at 379-80.



executed concurrently with a stack of other documents during admission.<sup>69</sup> The likelihood that a resident might not fully understand the ramifications of signing a negotiated risk agreement would be high. Not only would admissions staff be unlikely to be properly trained to educate a resident about their legal rights, but even if admissions were handled by an attorney, there would be a conflict of interest between the resident and the assisted living facility. In addition to problems with the resident understanding the legal consequences of a waiver of liability, there is concern for the resident's understanding of the health or safety consequences of their decision. An admissions staff person in a facility may not share the same concern for health that a staff physician might, and may find it easier to liberally execute negotiated risk agreements for any activity or refusal of services that a resident requests.

Even with these concerns, negotiated risk agreements could be positive tools in improving housing options for older adults. By creating certain regulatory safeguards, states could permit the market based approach to structuring assisting living to continue with little interruption. By authorizing waivers of liability through a protective resident oriented document, the states could promote the interests of both residents and facilities while maintaining the stated policy goals of assisted living. The result would be a consumer directed form of negotiated risk agreements.

v. Negotiated Risk in Pennsylvania

Pennsylvania's new assisted living regulations authorize a form of negotiated risk agreements.<sup>70</sup> The Department of Public Welfare regulations name the concept an "informed consent agreement."<sup>71</sup> The regulations state that the agreement should be the result of a

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<sup>69</sup> See Carlson, *supra* note 8, at 41-43.

<sup>70</sup> See *supra* note 11.

<sup>71</sup> 55 PA. CODE § 2800.4.

“thorough discussion” between the resident and facility, and “any individuals the resident wants to be involved.”<sup>72</sup> Pennsylvania also requires that if a facility initiates an informed consent agreement process, the resident must be given contact information for the long term care ombudsman.<sup>73</sup> Although the new regulations purport to provide a document that permits a resident to assume responsibility for a desired risky choice, the regulations also seem to greatly limit the enforceability of any waiver of liability.<sup>74</sup>

### C. Consumer Directed Negotiated Risk Agreements – A Proposal

#### i. Basic Premise

In brief, a consumer directed negotiated risk agreement would be a statutorily authorized document, prepared on behalf of the resident by an independent attorney, to achieve a specific resident choice “against facility advice”, with a specific waiver of liability in exchange for the facility’s accommodation of that choice.

#### ii. Statutory Authorization and Limitation

Because the waiver of liability is a critical component to a negotiated risk agreement, the waiver would need to be enforceable. Under current law, it is unlikely that a court would enforce a waiver of liability. Accordingly, the state should legislatively authorize the waiver contained in a consumer directed negotiated risk agreement. This authorizing legislation should be written narrowly, only permitting an effective waiver if the negotiated risk agreement is created in accordance within a resident-protective framework.

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<sup>72</sup> *Id.* Representatives included in the regulations include the resident’s attorney and physician. 55 PA. Code § 2800.30.

<sup>73</sup> 55 PA. CODE § 2800.30.

<sup>74</sup> *See id.* The document is stated to not be a waiver of liability for “acts of negligence . . .,” but does not clearly define whether the duty to protect is shifted. Consequently, a Pennsylvania court might still adopt the reasoning in *Storm v. NSL Rockland Place, LLC.* to render the document ineffective to offer the facility a predictable waiver. *See generally* *Storm v. NSL Rockland Place, LLC.*, 898 A.2d 874 (Del. 2005).

The permissible purposes for executing a negotiated risk agreement should also be statutorily guided. Resident choices that have no affect on the health or safety of third parties should always be honored as within the permissible scope of a negotiated risk agreement. Choices that affect the health of safety of third parties should require an acceptance of the risk by the affected third party.

As part of the statutory or regulatory authorization of waiver of liability in negotiated risk agreements, the state government body could promulgate the general position of the parties concerning liability. The regulation should preclude the defense of assumption of the risk for assisted living facilities against legal claims brought by residents, when a negotiated risk agreement was not used. This should not alter the relationship between the facility and resident in most cases, but should provide incentive to the facility to diligently advise the resident to seek the advice of an independent attorney when the need for a negotiated risk agreement is identified.

Opponents of enforceable liability waivers often state that it would be unwise to permit facilities to engage in “negligent conduct.”<sup>75</sup> However, the waiver would actually shift the responsibility of the resident choice to the *resident*—effectively changing the respective duty to protect against harm by both the resident and facility.<sup>76</sup>

### iii. Agreement Prepared Independently of Facility

A basic hurdle to overcome with negotiated risk agreements in their current form is the inherent imbalance of bargaining power and knowledge between the parties.<sup>77</sup> Central to this proposal is the requirement that enforceable negotiated risk agreements must be prepared by the

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<sup>75</sup> Carlson, *supra* note 1, at 325-29.

<sup>76</sup> The waiver of liability is based on the concept of “assumption of the risk,” where the person agreeing to accept responsibility relieves another party who would otherwise have the duty to protect against harm. *See Storm v. NSL Rockland Place, LLC.*, 898 A.2d 874, 881 (Del. 2005) (citing RESTATEMENT (SECOND) OF TORTS § 496A).

<sup>77</sup> *See Carlson, supra* note 58, at 41-43.

resident's attorney. This arrangement would serve several purposes. The resident would be educated about the legal consequences of executing the negotiated risk agreement, notably, the waiver of liability. Because the resident's attorney would only be serving the interests of the resident, concerns over misrepresentations from admissions staff should be alleviated.

Additionally, the resident's attorney would draft the document in the most narrow fashion possible to ensure that the resident's choice is accommodated, and limit the waiver of liability only to that choice.

By requiring that residents seek independent legal counsel to execute a negotiated risk agreement, it is likely that those residents would also benefit from other legal advice. If the negotiated risk agreement was sought during the admissions process, the resident would likely present the admissions contract to their attorney, who could advise them about other concerns in the contract and service plan. It is likely that experienced Elder Law attorneys would be familiar with the local assisted living facilities, and available forms of long term care, and would be able to assist the resident in identifying the best facility to suit their needs and desires. Similarly, Elder Law attorneys would be able to assist residents in other forms of end of life planning after working with the resident to identify their needs for the negotiated risk agreement.

The negotiated risk agreement could become a part of an Elder Law attorney's overall package of services offered to their customers. Clients who were advised prospectively by their attorneys about the concept would be better educated when it came time for them to select an assisted living facility. The clients would have time to consider their desires and reflect on the necessity for continuing certain activities once deciding that it was time to leave the family home. Additionally, if residents identified important accommodations that they wanted when entering assisted living, they could advise their third party decision makers of these desires. In

this respect, the negotiated risk agreement would be an appropriate subject to discuss when a client was seeking to execute a power of attorney, or advance healthcare directive with a healthcare power of attorney.

Once contacted for the negotiated risk agreement, the attorney might be solicited to take an active role with some of other the more general negotiations with the assisted living facility. The attorney would be able to properly advise clients about facility requests for a “responsible third party.”<sup>78</sup> Introducing attorneys into the negotiations process would likely persuade assisted living facilities to be more careful in their admissions practices. Additionally, the market based approach to crafting individualized relationships between residents and facilities would be strengthened, because the residents would be better educated as to their options with the assistance of an attorney.

#### iv. Additional Safeguards of Consumer Directed Negotiated Risk Agreement

The consumer directed model of negotiated risk should be crafted in fashion to protect the interests of the older adult. The greatest protection of this model is the participation of the drafting attorney representing the resident independently of the assisted living facility, but other safeguards should be put in place.

While the attorney can advise the client of their legal rights in negotiation, and the consequences of a waiver of liability, the attorney would not always be the best person to advise the client about the possible health or safety consequences of their decision. It would be useful for the client to consult with a medical professional of their choosing, to discuss the resident’s desires. By seeking the advice of a medical professional independent of the assisted living facility, the resident might be able to identify acceptable alternatives to their desired lifestyle

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<sup>78</sup> See, e.g., *id.* at 46-47 (discussing third party “guarantors” in the nursing home context).

choice, or even determine that their initial choice is not as important as they previously thought. Although the assisted living facility might be able to suggest these alternatives, the resident would be more likely to trust and consider the suggestions of a trusted person.

The negotiated risk agreement should also be executed in a manner similar to other planning documents, such as powers of attorney. By requiring a formal execution, including witnesses and a notary, the document would serve as a strong indication of the resident's intent. The attorney working with the client should be able to assess the client's capacity to execute the document, especially the waiver of liability, during the drafting process.

Although the assisted facility would no longer be preparing the negotiated risk agreement, it should still be involved in the process. Indeed, without the input from the facility, there might be no need for the agreement. The resident's attorney should solicit the formal opinion of the assisted living facility about the resident's choice, and the facility's reason for not accommodating the choice without a waiver of liability. This opinion should be included in the negotiated risk agreement so the document would contain the entire agreement.

#### v. Mechanics of Consumer Directed Negotiated Risk Agreement

The presumable scenario for executing a negotiated risk agreement would occur when a prospective resident sought admission into an assisted living facility, the parties discussed the prospective resident's desires for the relationship, and the facility identified a particular resident desire that the facility would not be willing to accommodate because of the potential risk. As part of the admissions evaluation process, the resident should be advised of their potential options regarding the identified risky choice: giving up on the choice, compromising with the facility on an alternative accommodation, or executing a consumer directed negotiated risk agreement. Ideally, the state regulatory body should create a simple document explaining what a

negotiated risk is, that the decision regarding a negotiated risk is serious, and that if that choice is important to the resident they should consult an independent attorney.

It is likely that under these conditions certain potential residents may be overwhelmed and may not understand the need to consult an attorney. Certain concerns about potential facility actions can be anticipated. It is possible that the assisted living facility may become concerned that the potential overwhelmed resident would seek accommodation elsewhere if the facility was unwilling to accommodate the risky choice without a negotiated risk agreement. The facility would be unwise to attempt to accommodate the choice with a different, unauthorized, but less conspicuous form of waiver of liability, however, because the authorizing law would have explicitly established that any waivers outside of the statutory or regulatory creation would be inoperable. Also, facilities would be unwise to coerce a resident into abandoning their independence, because the consumer directed negotiated risk agreement would be available to the resident after admission. If a resident did finally seek the advice of an attorney, and explain the problems during admission, the attorney might then refer the situation to the local long term care ombudsman.<sup>79</sup> A single incident may not be enough to excite the ombudsmen, but combined with other potential infractions, the ombudsmen might seek regulatory action against the facility.

vi. Operation of Consumer Directed Negotiated Risk Agreements

In order to maximize the positive benefits of negotiated risk agreements for residents, the order of offer and acceptance should be reversed from the current form. Under current conditions, an assisted living facility may premise admission of a resident upon the execution of

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<sup>79</sup> Ombudsmen are individuals who investigate and resolve complaints of long term care residents. The position was mandated by the Older Americans Act. Marshall B. Kapp, *LEGAL ASPECTS OF ELDER CARE* 178-79 (2010); Older Americans Act, 42 U.S.C. § 3027.

a negotiated risk agreement, and would make the offer of the terms of the negotiated risk agreement to the resident. This would certainly be the case if the form of negotiated risk was contained within the admission contract, which are often described as contract of adhesion.<sup>80</sup> This represents an imbalance in the bargaining power between residents and assisted living facilities.

The balance between the resident and assisted living facility could be reorganized to more appropriately reflect the nature of the agreement. Thinking of the negotiated risk agreement as an exchange again, both parties are giving up something—however, when considering the respective “value” of what is bargained, the assisted living facility stands to lose almost nothing. Because the resident is accepting the responsibility for the consequences of their risky choice, the assisted living facility is, if anything, in a better position than without the agreement. For this reason, it makes sense that the consumer directed negotiated risk agreement should carry mandatory acceptance by an assisted living facility. This is consistent with the traditional language of state assisted living policy, that typically states assisted living should be designed to promote resident independence and self-determination.<sup>81</sup>

vii. Mandatory Expiration and Reevaluation

To protect resident safety, the consumer directed negotiated risk agreement should not operate in perpetuity. The document should become inoperable one year after its execution, unless it is renewed by the resident.<sup>82</sup> The renewal process should be more streamlined than the initial execution process, because the underlying resident protections in the document would not be changing. At the minimum, the resident should receive advice from a medical professional to

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<sup>80</sup> See Carlson, *supra* note 1, at 328-29.

<sup>81</sup> See, e.g., 55 PA. CODE. § 2800.1.

<sup>82</sup> This automatic termination has been referred to as a “sunset provision.” Duval, *supra* note 1, at 16.



reevaluate the health and safety consequences of the resident's risky decision as part of the resident's overall health and lifestyle choices. In addition to the annual reevaluation process, the negotiated risk agreement should be reevaluated whenever there is a major change in the resident's mental or physical health. Because staff persons would have regular contact with the resident, the assisted living facility would be the party best able to trigger this review in the event of change of status.

viii. Failure of Waiver of Liability

The waiver of liability should be construed narrowly. Because the purpose of the negotiated risk agreement should be specifically described, the waiver should also be narrowly applied. The waiver should only be effective to shift the responsibility for negative consequences of the resident's desired choice as it is described in the negotiated risk agreement. The parties' obligations to each other are not, however, limited only to the initial agreement. Because the waiver will be in effect for the duration of the negotiated risk agreement, the resident's consideration for the exchange is an ongoing promise to assume responsibility for the consequences of their choice. In accordance, the assisted living facility should also bear the burden of respecting the resident's choice at all times during the life of the negotiated risk agreement. Consequently, if the assisted living facility does not fully honor the resident's choice at all times, that failure should render the waiver of liability ineffective, because the facility would be in breach of the agreement.

The resident, or person acting on behalf of the resident, should also be able to raise other defenses against the waiver of liability if appropriate. A showing of fraud in the execution of a negotiated risk agreement should invalidate the waiver of liability. This might occur if an attorney preparing the document was not actually acting independently of the facility. Fraud

may also be shown if the facility improperly explained the purpose of the negotiated risk agreement to the resident, who then inappropriately obtained the agreement. Also, if a facility was discovered to have exerted undue influence in procuring a negotiated risk agreement, the waiver should become inoperable. This undue influence may arise if a facility takes advantage of its superior bargaining power and premises any admission regardless of the resident's choice, upon the resident obtaining a negotiated risk agreement, rather than the resident seeking the agreement.

#### D. Conclusion

The concept of negotiated risk is appealing when considered as a tool to promote the policies of maximum independence and self-determination in assisted living. A central component of negotiated risk agreements is the waiver of liability granted to the assisted living facility by the resident, which is necessary to encourage the facility to permit resident decisions that would be otherwise unacceptable, because they are too risky. However, the waiver of liability represents a significant curtailment of the resident's rights, and accordingly any waiver must be carefully executed.<sup>83</sup> With facility provided negotiated risk agreements, there will always be concerns about the equity of a resident's waiver of liability. This concern becomes even more pronounced when the purported waiver is contained in a broadly applicable clause in an admissions contract. Additionally, because of the disparity in specialized knowledge between the resident and assisted living facility, there will often be a likelihood that the resident did not fully understand the legal or health and safety consequences of the negotiated risk agreement. For these reasons, the criticisms of negotiated risk persuasively suggest prohibiting their enforcement when the agreement is provided by the assisted living facility.

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<sup>83</sup> See Carlson, *supra* note 1, at 337.

The consumer directed negotiated risk agreement model addresses opponent concerns, while promoting resident's independence and self-determination. The model requires that residents consult an independent attorney, who can educate the resident about their legal rights, and determine the resident's capacity to enter the arrangement with the assisted living facility. This consultation may also benefit the resident in other ways, as the attorney may advise the resident about other potential problems with the admissions contract in general. If the resident were to visit an elder law attorney, the attorney may be able to assist the resident with other issues typically faced by older adults including end of life planning and protecting against exploitation. Because the consumer directed negotiated risk model operates within guidelines requiring a knowing and understanding choice by the resident, at the resident's direction, it addresses the concerns about unequal bargaining power and true resident consent, legitimizing a waiver of liability.

Unlike comprehensive state regulations, which would likely impose paternalistic value decisions regarding appropriate levels of resident risk, the consumer directed model promotes maximum resident risk; ultimately the resident should be given the ability to pursue their choices, even when they make "bad" decisions. The resident would be given the ability to create their desired lifestyle, accommodating their needs and desires, while the assisted living facility would be able to control their exposure to unacceptable levels of risk that would otherwise preclude the resident's independence.

Appendix A: Sample Consumer Directed Negotiated Risk Agreement

**Negotiated Risk Agreement**

**IMPORTANT NOTICE**

This document must be presented to you by an attorney of your choosing. If you have been asked to sign this document by anybody other than an attorney of your choosing, please contact the Pennsylvania Office of the State Long-Term Care Ombudsmen at:

Pennsylvania Department of Aging  
Office of the State Long-Term Care Ombudsman  
555 Walnut Street, 5th floor  
Harrisburg, Pa. 17101-1919  
(717) 783-8975

The purpose of this Negotiated Risk Agreement is to limit liability of a Personal Care Facility that accommodates your specific lifestyle choices. This agreement modifies the remedies available to you at law or equity for injuries, death, or other harm sustained as a result of the Personal Care Facility accommodating your choice.

The rights and liabilities as they pertain to you and the Personal Care Facility are explained more fully in 20 Pa.C.S. Ch. XX. Your attorney will explain them fully.

This document is intended to be a willing and knowing waiver by you of your ability to sue the Personal Care Facility. This waiver may not be induced, motivated, or otherwise procured by the direction of the Personal Care Facility, or any of its employees, through the offer of a lower service fee, or any other offer of value.

This document is intended to enable you to take full responsibility for the consequences of your choices. It requires that you demonstrate an understanding of your waiver by consulting with an attorney of your choosing, and a physician of your choosing. These professionals shall not be affiliated in any way with any Personal Care Facility.

If there is anything about this document that you do not understand, you should ask the attorney of your own choosing to explain it to you.

I have read or had explained to me this notice and I understand its contents.

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*Name of Resident*

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*Date*

I, {name of resident}, currently residing at {address}, hereby waive my ability to sue, or otherwise seek compensation from {name of facility}, from injury, death, or other harm resulting from my decision to:

{description of behavior, lifestyle choice, or other topic for negotiated risk agreement}.

I recognize that the consequences of my decision may negatively impact my health and safety. I have made my decision without influence from {name of facility} and with input from a physician of my choosing. A statement by my physician is included within.

I recognize that the consequences of my decision may limit my legal rights. I have made my decision without influence from {name of facility} and with input from an attorney of my choosing. A statement by my attorney is included within.

This agreement shall be effective for one year unless renewed by me or a person of my choosing. This agreement must be reviewed by me upon a significant change in my mental or physical health, or a person of my choosing.

This waiver of liability shall be inoperable upon a showing of fraud, undue influence, or the Personal Care Facility's failure to observe my decision.

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*Name of Resident*

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*Date*

Statement of Personal Care Facility

It is the opinion of {personal care facility} that:

{description of resident's desired , lifestyle choice, or other topic for negotiated risk agreement}

represents a significant risk to {name of resident}'s health or well-being. Accordingly, it is the intention of {name of facility} not to permit this choice.

\_\_\_\_\_

*Name of Director*

\_\_\_\_\_

*Date*

\_\_\_\_\_

*Name of Facility Physician*

\_\_\_\_\_

*Date*

Statement of Resident's Physician

I have discussed with {name of resident}, and explained the medical consequences of the following lifestyle choice:

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It is my professional opinion that {name of resident} understood the consequences of the above decision.

I attest that I have no affiliation with {name of facility}.

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*Name of Physician*

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*Date*



Statement of Resident's Attorney

I have discussed with {name of resident}, and explained the legal consequences of the following lifestyle choice:

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It is my professional opinion that {name of resident} understood the consequences of the above decision.

I attest that I have no affiliation with {name of facility}.

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*Name of Attorney*

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*Date*

IN WITNESS WHEREOF, and intending to be legally bound, I have hereunto set my hand and seal this {date}.

Signed, sealed and delivered

in the presence of:

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Witness

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{name}, Resident

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Witness

COMMONWEALTH OF PENNSYLVANIA :  
 : SS  
COUNTY OF CUMBERLAND :

On the 11th day of August, 2010, before me, a Notary Public, personally appeared {resident's name} known to me (or satisfactorily proven) to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he/she executed it for the purposes therein contained.

WITNESS my hand and notarial seal.

\_\_\_\_\_  
Notary Public

My Commission expires: \_\_\_\_\_