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# Finding the Parameters: The Scope of Arbitration Agreements in Medical Service Contracts in California

*Pietrelli v. Peacock*<sup>1</sup>

## I. INTRODUCTION

There is perhaps no better indicator of the general perception of "crisis" in the American medical system than the lavish attention given President Clinton's health care reform initiatives in the media.<sup>2</sup> In the 1970s, the frequency of medical malpractice claims and the cost of malpractice insurance, two sources of this perceived crisis, came into sharp focus.<sup>3</sup> Experiencing a decline in profits as a result of increased malpractice litigation, many insurers began refusing to provide coverage or demanding high premium increases.<sup>4</sup> This created a problem in malpractice insurance availability to health care providers.<sup>5</sup> Health care providers, insurers, and state legislatures responded with a variety of reforms,<sup>6</sup> some of which aimed to curb the frequency and cost of malpractice controversies through the use of alternative dispute resolution mechanisms such as arbitration.<sup>7</sup>

Private agreements to arbitrate controversies signed before the injury occurred became increasingly prevalent in contracts for medical services,<sup>8</sup> and were paralleled by legislative initiatives aimed at facilitating and regulating their use.<sup>9</sup>

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1. 16 Cal. Rptr. 2d 688 (Cal. Ct. App. 1993).

2. See, e.g., *Clinton's Trillion Dollar Cure (And What He Didn't Tell You)*, NEWSWEEK, Oct. 4, 1993, at 28. Most of this issue is devoted to the health care debate and reports the following statistics from a poll conducted on September 23-24, 1993: 16% of Americans surveyed believe the health care system in this country requires only minor changes, 32% believe it requires fundamental changes, and 47% believe it needs to be completely rebuilt. *Id.* at 34.

3. See Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 502-03 (1989). See also Maureen Dulen, Comment, *Twenty Years Later . . . Contractual Arbitration as Medical Malpractice Tort Reform*, 1992 J. DISP. RESOL. 325, 325-26.

4. See Bovbjerg, *supra* note 3, at 502-03.

5. *Id.*

6. *Id.* at 513.

7. *Id.* at 522. See also Dulen, *supra* note 3, at 326; David M. Ward, Note, *The Scope of Binding Arbitration Agreements in Contracts for Medical Services*, 8 OHIO ST. J. ON DISP. RESOL. 361, 362-65 (1993).

8. See generally *supra* note 7.

9. See, e.g., CAL. CIV. PROC. CODE § 1295 (West 1982).

The philosophy behind arbitration was to provide the parties an alternative forum that is less complicated, less expensive, less public, and more expeditious.<sup>10</sup> The process was also thought to be potentially more flexible and better suited to meeting the needs of the parties.<sup>11</sup>

Yet controversy rages concerning the fairness of legislative attempts to facilitate and encourage arbitration agreements in medical service contracts.<sup>12</sup> For example, an editorial in the October, 1993, issue of *The Missouri Trial Attorney* characterized California's legislation dealing with arbitration agreements as providing for the "[m]andatory arbitration of malpractice claims if the health care provider can trick patients into waiving their right to trial by jury."<sup>13</sup> This Note will explore the scope of arbitration agreements in medical service contracts in California, a state which took the lead in using legislation to encourage arbitration of medical malpractice disputes.

## II. FACTS AND HOLDING

Jeri Pietrelli signed a contract agreeing to submit to arbitration any disputes regarding medical services between herself and the defendant, Doctor Gordon Peacock (Dr. Peacock).<sup>14</sup> The document, entitled Arbitration Agreement, included, in part, the following language: "Any controversy between me and Doctor concerning medical care and any such controversy between Doctor and persons, born or unborn, on behalf of whom I have the power to contract shall be submitted to FINAL AND BINDING ARBITRATION in accordance with the procedure set out in Article 2 below."<sup>15</sup> Ms. Pietrelli, who was not pregnant at the time she signed the agreement, subsequently became pregnant and received obstetric care from Dr. Peacock.<sup>16</sup>

The plaintiff, Robert Pietrelli (Pietrelli), was born in October of 1982, and brought this medical malpractice suit against Dr. Peacock, through his mother as guardian ad litem, in September, 1990.<sup>17</sup> Pietrelli alleged that he received negligent medical care and treatment from Dr. Peacock at or around the time of his birth.<sup>18</sup> Dr. Peacock filed a petition to compel arbitration pursuant to the agreement between himself and Ms. Pietrelli.<sup>19</sup> Pietrelli opposed the motion by arguing that he was not a party to the agreement because, being unconceived, he

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10. LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION FOR LAWYERS* 297 (1987).

11. *Id.*

12. Michael W. Manners, *MICRA: Model or Lesson?*, *MO. TRIAL ATT'Y*, Oct. 1993, at 4.

13. *Id.*

14. *Pietrelli*, 16 Cal. Rptr. 2d at 689.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

was not a legal entity at the time of the contract and could not be bound by it.<sup>20</sup> The trial court denied Dr. Peacock's petition, finding that the arbitration agreement "did not bind children not yet conceived at the time" of signing, and "that reference to 'persons, born or unborn,' [in the contract] did not pertain to those not yet conceived."<sup>21</sup>

The California Court of Appeals reversed.<sup>22</sup> Referring to California's "strong public policy favoring arbitration over litigation," the court found there to be "no question" that the services which were the subject of the action fell within the parameters of Code of Civil Procedure Section 1295.<sup>23</sup> The court noted that Section 1295 is included in the State's Medical Injury Compensation Reform Act [hereinafter MICRA], the purpose of which is to encourage and facilitate arbitration of medical malpractice disputes.<sup>24</sup>

The court also found that Pietrelli was an unborn person within the meaning of the agreement, even though he was unconceived at the time it was made.<sup>25</sup> First, the court determined that the usual and ordinary meaning of the language used, and circumstances under which the agreement was made, indicated the intent of Ms. Pietrelli to bind herself and her unborn, and presumably unconceived, children.<sup>26</sup> Second, the court found that a parent's power and authority to bind a minor or expected child to an arbitration agreement is implied from his or her duties and rights as the child's guardian.<sup>27</sup> Finally, the court compared other situations where the law recognizes the ability of a party to act on behalf of, and affect the rights of, persons who have not yet come into existence.<sup>28</sup> The court determined that a child, not yet conceived, can nevertheless be bound to an agreement which determines its rights to recover for injuries caused by the wrongful or negligent act of another at or prior to birth, although those rights do not accrue until the child is born alive.<sup>29</sup> The order denying Dr. Peacock's petition was reversed with directions to compel arbitration under the terms of the contract.<sup>30</sup>

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20. *Id.* at 690.

21. *Id.* at 689.

22. *Id.* at 691.

23. *Id.* at 689.

24. *Id.*

25. *Id.* at 691.

26. *Id.* at 690.

27. *Id.* at 689.

28. *Id.* at 690.

29. *Id.*

30. *Id.* at 691.

### III. LEGAL BACKGROUND

In 1975, California Governor Edmund Brown called an "extraordinary" session of the state legislature to "deal exclusively with the formulation of a legislative solution to the 'crises' in medical malpractice."<sup>31</sup> One solution that the Governor asked the legislature to consider was arbitration.<sup>32</sup> During the session, the legislature approved MICRA, one part of which was Section 1295 of the Code of Civil Procedure.<sup>33</sup> Section 1295 encourages and facilitates arbitration in medical malpractice disputes by specifying a standardized language and format of arbitration clauses within a medical service contract.<sup>34</sup> It also provides that if a contract complies with the provisions of the statute, it shall be deemed neither a contract of adhesion nor unconscionable, and will be enforced by the courts.<sup>35</sup>

This statute paralleled the efforts of medical care providers to privately channel disputes into arbitration by including arbitration clauses in their medical service contracts.<sup>36</sup> It also reinforced an existing trend in judicial opinions treating such clauses favorably.<sup>37</sup>

In the 1965 case of *Doyle v. Giuliucci*,<sup>38</sup> the Supreme Court of California held that a parent can "bind his child to arbitrate by entering into a contract of which the child is a third party beneficiary."<sup>39</sup> The court found that a parent's power to enter into a medical service contract on behalf of his or her child was implicit in the parent's right and duty to provide and care for the child.<sup>40</sup> The court further noted that unless contracts made on behalf of the child unreasonably restrict the minor's rights, they should be sustained.<sup>41</sup>

The *Doyle* court gave several reasons for its holding. First, noting that children can usually disaffirm their own contracts, it seemed "unlikely that medical groups would contract directly with them."<sup>42</sup> Thus, according to the court's reasoning, children could be assured the benefits of group medical service only if their parents had the power to contract on their behalf.<sup>43</sup> Second, the court found that arbitration provisions in medical service contracts were not an unreasonable restriction on the rights of the minor because they only specified the forum in

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31. *Gross v. Recabaren*, 253 Cal. Rptr. 820, 822 (Cal. Ct. App. 1988) (quoting 7 PAC. L.J. 545 (1976)).

32. *Id.*

33. *Id.*

34. See CAL. CIV. PROC. CODE § 1295 (West 1982).

35. *Id.* § 1295(e).

36. See *supra* note 7 and accompanying text.

37. See, e.g., *Doyle v. Giuliucci*, 401 P.2d 1 (Cal. 1965).

38. 401 P.2d 1.

39. *Id.* at 3.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

which the dispute would be heard, and did not determine the substantive rights of the parties.<sup>44</sup> Third, the court cited "safeguards," including the appointment of a guardian ad litem, that exist in the arbitration process to protect the child's claims.<sup>45</sup>

In the 1976 case of *Madden v. Kaiser Foundation Hospitals*,<sup>46</sup> the California Supreme Court held that an employer acting as an agent for its employees had the implied authority to agree to a medical services contract containing an arbitration clause for the employees.<sup>47</sup> Citing *Doyle*, the court noted the parallel argument that "both parent and agent serve as fiduciaries," and that implicit in both functions was an implied authority to agree to arbitration of potential claims.<sup>48</sup> The court concluded that arbitration is a "proper and usual" means of resolving malpractice disputes, and therefore, it was well within the agent's power to effect the purpose of his agency.<sup>49</sup>

While noting that Section 1295 does not govern provisions in group care contracts (as opposed to individual medical services contracts), the *Madden* court pointed out that by enacting the statute, the legislature acknowledged "arbitration as a means of resolving malpractice disputes."<sup>50</sup> This further supported the court's finding of a strong public policy in favor of arbitration as an accepted and favored method of resolving disputes and relieving overburdened civil dockets.<sup>51</sup>

The *Madden* court also set about defining some parameters to its willingness to enforce arbitration clauses. While rejecting the plaintiff's claim that the contract containing the clause was a contract of adhesion, the court suggested that it might be unwilling to enforce an arbitration clause in a medical service contract imposed by a party of superior bargaining power, especially where the weaker party lacked the opportunity to bargain and look elsewhere for a more favorable contract.<sup>52</sup> The court wanted to avoid situations that would force an individual to "either adhere to a standardized agreement or forego the needed service."<sup>53</sup> In this case, however, the contract was negotiated by the health care provider and the Board of Administration of the State Employees Retirement System, parties of equal bargaining power.<sup>54</sup> Furthermore, the plaintiff had "the opportunity to select from among several medical plans negotiated and offered by the Board, some of which did not include arbitration provisions."<sup>55</sup>

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44. *Id.*

45. *Id.*

46. 552 P.2d 1178 (Cal. 1976).

47. *Id.* at 1184.

48. *Id.*

49. *Id.*

50. *Id.* at 1184 n.9.

51. *Id.* at 1182.

52. *Id.* at 1182-83.

53. *Id.* at 1183.

54. *Id.* at 1185.

55. *Id.* at 1186.

Barring a situation where such unconscionable circumstances might be present, California courts did not act restrictively with regard to the scope of arbitration clauses in medical service contracts until the 1978 case of *Rhodes v. California Hospital Medical Center*.<sup>56</sup> In *Rhodes*, the California Court of Appeals refused to force the husband and son of a decedent to arbitrate their action for the wrongful death of their wife and mother.<sup>57</sup> Although the decedent, in contracting medical services for herself, had agreed to submit to arbitration any claims that should arise, the court noted that neither the husband nor the son "ever contracted to forego their rights to have their cause of action determined in a normal judicial proceeding."<sup>58</sup>

Concerning itself only with the forum in which the action was to be brought, the court refused to address the merits of the claim.<sup>59</sup> While the *Rhodes* court noted that a wrongful death action is derivative to the substance of any action brought, the decedent's agreement to arbitrate her possible claims was found ineffective to "bar the constitutional and procedural rights of the decedent's heirs in their own, independent action."<sup>60</sup>

While acknowledging the strong public policy enunciated in *Madden* in favor of arbitration agreements in medical service contracts, the court distinguished *Rhodes* from cases such as *Doyle* and *Madden*.<sup>61</sup> In those cases, the party bringing the suit was bound by an agreement made by someone else, acting on their behalf, while contracting for the services which were the subject of the action.<sup>62</sup> In *Rhodes*, the plaintiffs were not the signatories and had not authorized the decedent to contract on their behalf.<sup>63</sup>

In *Hawkins v. Superior Court*,<sup>64</sup> the California Court of Appeals made this distinction more explicit. In *Hawkins*, a wife was forced to arbitrate her claim for the wrongful death of her husband, where the husband had contracted to receive services on behalf of himself and his wife.<sup>65</sup> In addition, the agreement provided that the heirs of the health care plan member would be required to submit their claims to arbitration.<sup>66</sup>

Distinguishing the case from *Rhodes*, where the individual patient contracted for medical services for herself only, the *Hawkins* court extended the reach of *Doyle* and *Madden* to suits initiated by a person whose spouse did the contracting.<sup>67</sup> While acknowledging that California's "strong public policy

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56. 143 Cal. Rptr. 59 (Cal. Ct. App. 1978).

57. *Id.* at 60.

58. *Id.* at 61.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 152 Cal. Rptr. 491 (Cal. Ct. App. 1979).

65. *Id.* at 495.

66. *Id.*

67. *Id.* at 494-95.

favoring arbitration . . . cannot displace the necessity for an agreement to arbitrate," and that "[a] person cannot be compelled to accept arbitration of a dispute he has not agreed to submit to arbitration," the court nevertheless forced the wife to arbitrate her claim, even though she never agreed to be bound by the arbitration agreement and had not authorized her husband to do so on her behalf.<sup>68</sup> The court stated that the "[d]ecedent had the power to contract for the health plan for himself and his wife and, as in *Doyle* as viewed by Madden, implicit in that power is the implied authority to agree for himself and his wife to arbitrate claims arising out of medical malpractice."<sup>69</sup> The *Hawkins* court found that the implied power of spouses to contract for one another arose from their mutual obligations to care for and support one another.<sup>70</sup>

The *Hawkins* court placed great emphasis on the fact that both the husband and the wife were "beneficiaries" of the medical services contract entered into by the husband.<sup>71</sup> The court expressly refused to address the question of whether the arbitration provision would have been binding upon heirs who were not members of the agreement.<sup>72</sup>

In *Wilson v. Kaiser Foundation Hospitals*,<sup>73</sup> the California Court of Appeals dealt with facts similar to those presented in *Pietrelli*. In *Wilson*, the court reversed a trial court order that refused to compel arbitration of a plaintiff-child's medical malpractice claim for prenatal negligence.<sup>74</sup> According to the court, the agreement signed by the child's mother as part of her health care plan automatically enrolled plaintiff as a "member" upon birth.<sup>75</sup> It further provided that medical malpractice claims for bodily injury of "members" of the health care plan were to be arbitrated.<sup>76</sup>

In rejecting plaintiff's argument that he was not alive, and thus, not a "member" subject to the arbitration agreement signed by his mother, the court characterized plaintiff's effort to avoid arbitration as an attempt to "assert a right to the benefits under the agreement but to avoid the consequences which attach to the acceptance of benefits."<sup>77</sup> In reversing the trial court's order, the *Wilson* court determined that prior to actual birth, the fetus was not a person for purposes of tort law, and that a cause of action did not arise on its behalf until it was born alive.<sup>78</sup> The arbitration agreement bound the child because any cause of action

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68. *Id.* at 493.

69. *Id.* at 495.

70. *Id.*

71. *Id.*

72. *Id.* at 495 n.5.

73. 190 Cal. Rptr. 649 (Cal. Ct. App. 1983).

74. *Id.* at 650.

75. *Id.* at 651-52.

76. *Id.* at 651.

77. *Id.* at 654.

78. *Id.* at 653.

that he had arose at the time of his birth, the same moment he became a member of the health plan under the terms of his mother's health care contract.<sup>79</sup>

The *Wilson* court stated that the case was essentially analogous to *Doyle*, and, as such, was governed by the same principles of law and policy.<sup>80</sup> The court also implied that it would not have compelled arbitration of the plaintiff's claim if the injuries had resulted under facts similar to *Rhodes*, where the signatory to the agreement had contracted for services for herself only, rather than under a family health care plan.<sup>81</sup> Finally, the *Wilson* court emphasized the importance to be placed on the language of the agreement itself, hinting that it would not enforce an agreement which did not specifically contemplate the addition or inclusion of third parties, including newborn children.<sup>82</sup> Similar analysis was applied in *Pietrelli*.

#### IV. THE INSTANT DECISION

The issue presented in *Pietrelli* was "whether plaintiff was bound by an arbitration agreement which was signed by his mother at a time when plaintiff was both unborn and unconceived."<sup>83</sup> In determining the scope of the arbitration clause, the court looked first to the language of the contract that Ms. Pietrelli had signed.<sup>84</sup> The agreement called for arbitration of any controversy between the doctor and "persons born or unborn" on behalf of whom she had the power to contract.<sup>85</sup>

Pietrelli made two arguments which the court addressed. First, he argued that at the time of the agreement, he was not a "person, born or unborn," as provided for by the terms of the contract, and was thus outside its scope.<sup>86</sup> Second, he attacked the power of a parent to bind someone to arbitration who does not exist as a legal entity at the time of the contract.<sup>87</sup> In rejecting Pietrelli's contention that he was not a party explicitly covered by the language of the agreement, the court looked to the intent of the parties in light of the contract language used and the circumstances surrounding its formation.<sup>88</sup> The court noted that public policy in California favored arbitration and that the agreement complied with the

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79. *Id.* at 654.

80. *Id.* "The logic of identical treatment for the unborn child and the already born child is evident since neither a fetus nor a minor has capacity to contract for the necessary medical services on his or her own behalf, and must do so through an authorized representative." *Id.*

81. *Id.* at 655.

82. *Id.*

83. *Pietrelli*, 16 Cal. Rptr. 2d at 688.

84. *Id.* at 689.

85. *Id.*

86. *Id.*

87. *Id.* at 690.

88. *Id.* at 689.

requirements of Section 1295.<sup>89</sup> As such, subsection (c) of Section 1295 provided that since the contract was not rescinded by written notice, it was ongoing and governed all transactions subsequent to its signing.<sup>90</sup> The language of the agreement determined its scope, and the agreement bound "persons, born or unborn."<sup>91</sup> Even though Pietrelli was not an "unborn person" at the time the agreement was signed, he became one at the moment of his conception, and thus, was bound by the contract terms,<sup>92</sup> provided Ms. Pietrelli had power to contract on his behalf.<sup>93</sup>

In disposing of Pietrelli's second argument, the court noted that the law recognizes in other contexts the power of one party to act on behalf of and affect the rights of persons not yet in existence.<sup>94</sup> As an example, the court cited provisions made for the appointment of a guardian ad litem for beneficiaries of a testamentary bequest who are not ascertained or are not parties yet in being.<sup>95</sup>

The court found that the principles which required arbitration in *Wilson* also applied in the present case.<sup>96</sup> Thus, "by electing to receive the obstetric services provided for under the agreement, Ms. Pietrelli impliedly agreed to arbitration for her unborn child."<sup>97</sup> Once Pietrelli became an unborn person as defined by the contract, any claims he might have to bring were governed by its terms.<sup>98</sup>

## V. COMMENT

The California Court of Appeal's approach in *Pietrelli* was basically to give expression to the intent of the parties as indicated in the language of the contract signed by Ms. Pietrelli. Once the court determined what it perceived to be the intent of the parties, it had only to place the child within the scope of the agreement. In doing so, the court was guided by the policies and parameters expressed in the legislation and case law.

A summary of these parameters follows. First, California has a strong public policy favoring and facilitating private arbitration agreements.<sup>99</sup> Second, where the non-signatory was represented by a fiduciary — an agent,<sup>100</sup> a parent,<sup>101</sup>

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 690.

93. See *infra* notes 100-103 and accompanying text.

94. *Pietrelli*, 16 Cal. Rptr. 2d at 690.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 690-91.

99. See CAL. CIV. PROC. CODE § 1295 (West 1982); *Madden v. Kaiser Foundation Hosps.*, 552 P.2d 1178, 1182 (Cal. 1986); *Gross v. Recabaren*, 253 Cal. Rptr. 820, 822 (Cal. Ct. App. 1988).

100. See, e.g., *Madden*, 552 P.2d 1178.

or a spouse,<sup>102</sup> who is legally authorized to act on behalf of the non-signatory — the clause will be enforced unless the situation surrounding formation is unconscionable.<sup>103</sup> Finally, where the non-signatory is not a party to the contract and was not entitled to receive medical care under it, separate claims deriving from injuries to the signatory might or might not have to be arbitrated, depending on the jurisdiction which has control over the dispute.<sup>104</sup> The *Pietrelli* court relied on the fiduciary rationale outlined above to bring the plaintiff within the scope of the agreement. In doing so, the court embraced the pre-MICRA case of *Doyle v. Giuliucci* for the rule that gave Ms. Pietrelli the authority, by virtue of her fiduciary capacity as guardian, to contract for medical services on behalf of the plaintiff. The policy reasons supporting the *Doyle* rule are compelling. Parents should have the power to contract on their children's behalf to ensure the availability of medical services. Minors are incompetent to contract for themselves; because of this, health care providers might be unwilling to provide medical care if the contract specifying the terms under which care is provided could be repudiated by the child through the guardian when legally advantageous.

In order to apply the *Doyle* rule, which on its face applies only to children in existence, to the facts of *Pietrelli*, where plaintiff was not a legal person at the time the agreement was signed, the court made a comparison to testamentary bequests where the law allows a guardian ad litem to represent a party not yet in being. There are, however, some problems with the logic of the opinion. Most testamentary dispositions do not involve "rights." If they do, the guardian is appointed to protect something, usually a property interest conferred by the disposition. On the other hand, a medical service contract containing an arbitration clause takes away a right that the child would already possess if born alive; namely, the right to a jury trial.<sup>105</sup> Of course, the substantive right of the child to bring an action is not forfeited by an arbitration agreement, which merely

101. See, e.g., *Doyle v. Giuliucci*, 401 P.2d 1. See also *Wilson v. Kaiser Foundation Hosps.*, 190 Cal. Rptr. 649.

102. See, e.g., *Hawkins v. Superior Court*, 152 Cal. Rptr. 491.

103. See the discussion of *Madden*, *supra* notes 46-55, and accompanying text. But see CAL. CIV. PROC. CODE § 1295(e), under which an arbitration clause that complies with the requirements of the statute is presumptively not of adhesion.

104. See *Rhodes v. California Hosp. Medical Ctr.*, 143 Cal. Rptr. 59 (Cal. Ct. App. 1978) (wife's binding arbitration agreement entered into to provide services for only herself does not limit husband's wrongful death action); *accord* *Baker v. Bimbaum*, 248 Cal. Rptr. 336 (Cal. Ct. App. 1988) (wife's contract for medical services for only herself does not require her husband to arbitrate his loss of consortium claim arising out of those services). *Contra* *Bolanos v. Khalatian*, 283 Cal. Rptr. 209 (Cal. Ct. App. 1991) (husband is forced to arbitrate an emotional distress claim for injuries allegedly sustained by wife even though the wife alone contracted for the services); *Gross v. Recabaren*, 253 Cal. Rptr. 820 (Cal. Ct. App. 1988) (wife is required to arbitrate her loss of consortium claim even though her husband contracted for services for himself only); *Herbert v. Superior Court*, 215 Cal. Rptr. 477 (Cal. Ct. App. 1979) (non-minor children must arbitrate their action for the wrongful death of their mother even though the children were not beneficiaries of medical services under the contract). See generally *Ward*, *supra* note 7, at 382.

105. *Doyle*, 401 P.2d at 3. A minor is authorized to enforce his rights by civil action in the same manner as an adult, provided a guardian or guardian ad litem is appointed. *Id.*

preselects the forum in which those rights will be adjudicated. But given the fact that the body acting as the trier of fact can make a crucial difference in determining the results of legal disputes, the court's analogy has its limits.

Much more compelling is the court's reliance on *Wilson v. Kaiser Foundation Hospitals*.<sup>106</sup> The *Wilson* case emphasized the fact that the arbitration agreement specifically contemplated the addition of children, not born at the time of its signing, to the health care plan. In *Wilson*, the agreement provided newborn children would automatically become members of the health care plan at birth. Similarly, in *Pietrelli*, the agreement specifically contemplated the inclusion of unborn persons who Ms. Pietrelli had authority to bind. This being the case, "[a]t the moment of his conception, plaintiff became an 'unborn person' within the definition set forth in the contract."<sup>107</sup>

This reasoning makes sense given the existence of a public policy favoring arbitration as an inexpensive and expeditious means of resolving malpractice disputes. Further, arbitration encourages freedom of contract insofar as it allows the parties to determine the scope of their own agreement. This reasoning does not, however, make explicit the other rational operative in *Wilson*; namely, that it was fair to hold the child to the agreement because he received medical care under it.<sup>108</sup> As in *Wilson*, the court in *Pietrelli* noted that by electing to receive obstetric care under the agreement, Pietrelli should be held to have impliedly consented to its terms.<sup>109</sup> This seems fair because otherwise, a party could receive benefits under a medical services agreement while avoiding the consequences inherent in the acceptance of those benefits; namely, submission to arbitration of claims arising out of the services rendered.<sup>110</sup>

There is nothing in the factual or procedural background of the case to indicate that Ms. Pietrelli was either "tricked" into signing away her future child's right to a jury trial or that the contract was formed in an unconscionable manner. Where the rights of a non-signatory are concerned, it is far from clear that courts would be willing to enforce the agreement.<sup>111</sup> Although compliance with the Section 1295 requirements, concerning the language and format of the arbitration agreement within the medical services contract, creates a statutory presumption that the contract is not unconscionable,<sup>112</sup> the case law indicates that the courts have developed parameters defining and limiting the scope of agreements that will be enforced.<sup>113</sup>

The *Pietrelli* court indicated its inclusion among those courts which would force non-signatories, who were not at the same time direct beneficiaries of

106. 190 Cal. Rptr. 649.

107. *Pietrelli*, 16 Cal. Rptr. 2d at 690.

108. *Wilson*, 190 Cal. Rptr. at 654.

109. *Pietrelli*, 16 Cal. Rptr. 2d at 690.

110. *See Wilson*, 190 Cal. Rptr. at 654.

111. *See Madden*, 552 P.2d at 1182-83.

112. CAL. CIV. PROC. CODE § 1295(e) (West 1982).

113. *See supra* notes 99-104 and accompanying text.

services under the agreement, to arbitrate claims deriving from injuries to the signatory,<sup>114</sup> but this dicta was not necessary to the court's decision. Pietrelli was represented by a fiduciary, his mother, who was authorized to contract on his behalf. In addition, he was the recipient of obstetric care under the agreement. It seems more fair to bind him to the agreement as a consequence of receiving such benefits than it would be to bind someone who had not.

## VI. CONCLUSION

California courts have developed a set of judicial rules which both give effect to a state policy favoring arbitration agreements in medical service contracts and allow the parties to determine the scope of that agreement. The extent to which the health care recipients are free to negotiate the terms of the agreement is debateable, but the courts have recognized the potential injustice of requiring arbitration in all cases, and have developed persuasive reasons for extending the scope of the agreement when binding non-signatories, including unborn children. The desirability and success of judicial and legislative facilitation of arbitration agreements as a panacea for the perceived medical malpractice crises is also debateable, but the enforcement of properly formed agreements, against signatories and third party non-signatories who received care under the agreement and were represented by fiduciaries, seems fair and is consistent with a state policy favoring the use of arbitration in the resolution of such disputes.

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114. *Pietrelli*, 16 Cal. Rptr. 2d at 690 n.1.