

TESTIMONY:

Guam Medical Malpractice Mandatory Arbitration Act

Senator Therese Terlaje, Chairperson,
Committee on Health, Tourism, Historic Preservation, Land and Justice

September 19, 2019

From: David Lubofsky (Speaking for Asher Dean Lubofsky)

I am David Lubofsky, the father of Asher Dean Lubofsky, who at age 5 passed away at the Guam Memorial Hospital on October 31st, 2018, almost one year ago.

Let me first start off by saying that I would prefer to be anywhere else on the planet besides here at this moment, as what has brought me here is the worst nightmare that a parent can face. The death of a child is an unrelenting nonstop painful nightmare. To make it more painful and the reason that we are all here is about how our children and family members die due to medical negligence or malpractice needlessly and those negligent doctors who then walk away with no accountability or even a record of what they did to then see and endanger others on Guam. When Asher entered the Guam Seventh Day Adventist Clinic on October 29th for his annual wellness exam, while also sick with symptoms, and saw Shishin Miyagi or when he ended up at The Guam Memorial Hospital the next day, I had no idea that he would die and I had never heard of The Malpractice Arbitration Act. I will not get into my anger over how Asher was treated, **or better said, NOT TREATED**, you can read that online.

This meeting is about what happened to Asher and many other children and people on Guam after their death, injury etc due to negligent medical care. This meeting is about the discriminatory Medical Malpractice Mandatory Arbitration Act that lets doctors walk away with little or no accountability after our children or family members are injured or killed by their blatant malpractice negligence. **This meeting is about real people, it's about our kids, it's about the death of Asher, Baby Faith, Jqry-Wakyn, Aiden, Charlie and the list goes on and on of our dead kids due to negligence and a legal cover up with the Arbitration**

Act then the doctors who treated or mistreated these kids go on and treat your kids as if nothing happened. With Arbitration, they could kill many kids and no one would even know. IS THERE EVEN RECORDS OF THESE INCIDENTS?

With ASHER's death, when it became time to hold Shishin Miyagi, Ethan Snider, Seventh Day Adventist Clinic and Guam Memorial Hospital responsible, we, like many others on Guam ran into the ARBITRATION Act. We heard **"I AM SORRY, IF YOU WANT TO HOLD THESE PEOPLE ACCOUNTABLE IN THE DEATH OF ASHER; YOU FIRST HAVE TO ENTER ARBITRATION AND PAY THE HUGE EXPENSES OF IT."** We heard this over and over. So, I kept asking, the obvious question, **"Can these doctors kill us, kill our kids and then walk away with no accountability as few can afford the process?"** The killers of our family are protected by a legislative supported law, THE ARBITRATION ACT. **How many families have buried loves ones due to negligence and were told the same thing, sorry, nothing can be done; THERE IS NO ACCOUNTABILITY FOR DOCTORS?**

The Act makes it so people of average or low income cannot afford to seek justice. The Act prevents due process or going to court unless you go thru the expensive, drawn out arbitration process first. **IT DISCRIMINATES AGAINST ALL OF US, ESPECIALLY THE POOR.** When I walked into this second nightmare with the Arbitration Act, it angered me much and still does beyond words, as Guam doctors are a protected class, an elitist group that looks down at the rest of us which is evident in how many of them conduct themselves and how we are treated by this Arbitration Act, AND HOW THEY HAVE discriminated against us, especially the poor on Guam. This does not necessarily apply to all doctors, but has become part of the overall **Physician Culture on Guam**, in my opinion. The Guam Doctors know there is no accountability to the poor (or all of us) as they and we can never afford the Arbitration process. Does this play into how doctors treat us daily?

I had a parent this week message me over and over about how they cannot even get a referral for off island for a very sick 6 month old baby as the doctor seems to be full of excuses for the mother why he cannot do it. The mother is on Public Assistance. The Doctor told her to go see someone else, even though the child has been hospitalized with this same doctor at GMH multiple times and she was at GMH requesting a referral during the last hospitalization with her 6 month old baby. **Is he waiting for the baby to die? The parent is frantic, the doctor is**

indifferent. My opinion, that is what lack of accountability does, makes doctors apathetic and they ignore the plight of our kids This is what happened to Asher, no doctors saw him for his last 12 hours alive, left him without checking him. . APATHY breded by the ARBITRATION ACT.

The lack of accountability should anger everyone. Name any other profession on Guam that has no accountability as afforded to doctors due to the Arbitration Act? The difference is that our kids our dying. The law discriminates against the poor and that was my biggest issue initially, but as time passed and after talking to many parents and other people on Guam it's evident beyond the discrimination, that the law creates apathy among doctors as I referred to already. A better name for this Act is the **APATHY ACT**. People who are not accountable for their actions and are protected, no matter what they do wrong become apathetic. **We, AS PARENTS, will never allow our kids to be NOT accountable and we want our children to be responsible for their actions, but the people who take care of our kids medically, we do NOT hold them to the same basic standards of accountability that we hold our kids to. IT DOES NOT MAKE SENSE.**

Actually, looking back to when the Arbitration Act was enacted and supportive testimony by Mr. James Gillan, who was the administrator of the Guam Memorial Health plan at the time, lays out the true intent of the Arbitration Act. He said at that time, prior to the Act being passed into law, that doctors were practicing defensive medicine because they were worried about being sued for malpractice. In my opinion, **Defensive medicine means that they were doing everything they could for their patients, lab tests etc etc. Defensive medicine means being responsible doctors.**

Even though there were few if any malpractice cases at that time, 30 years ago, when Gillan gave his testimony, he was making the point that the doctors do too many lab tests etc back then because the feared being sued. In my opinion, he was saying **they were being TOO ACCOUNTABLE** as they worried about malpractice or being sued and that this **APATHY ARBITRATION LAW** would alleviate that so they did not have to worry about being sued and could do less diagnostics with our kids.

LET ME TRANSLATE FOR YOU, JIM GILAN WAS SAYING THAT WHEN DOCTORS PRACTICE DEFENSIVE MEDICINE AND DO EVERY TEST ETC BECAUSE THEY WERE WORRIED TO BE SUED, HE MEANT THE ARBITRATION ACT WILL MAKE IT SO INSURANCE COMPANIES WILL SAVE AND PAY LESS AS DOCTORS CAN DO LESS TESTS ETC. HE WAS SAYING THE LAW WOULD MAKE IT SO THE DOCTORS DO NOT HAVE TO PRACTICE DEFENSIVE MEDICINE. DO NOT HAVE TO BE ACCOUNTABLE, INSURANCE COMPANIES WOULD SAVE MONEY. DOCTORS WOULD HAVE LOWER OR NO MALPRACTICE INSURANCE AND THE STAGE WAS SET FOR APATHETIC MEDICAL CARE ON GUAM UNDER ARBITRRATION. ITS HARD FOR ME TO FATHOM, THE RATIONALE OF PRETTY MUCH TELLING DOCTORS THRU THIS LAW THAT THEY DO NOT HAVE TO PRACTICE DEFENSIVE MEDICINE, WHICH PROTECTED US UP TO THAT TIME, IF THE ARBITRATION ACT WAS PASSED, WHICH IT WAS.

How many have died OVER THE YEARS as this APATHETIC MEDDICAL CARE, A PRODUCT OF ARBITRATION PROTECTION, became part of our Guam Physicians culture? Baby Faith, who passed at GRMC, never got simple lab tests as that doctor seemed to not care and was not practicing defensive medicine. Asher Dean Lubofsky went into the SDA clinic with symptoms, etc but never got a simple CBC blood test, or even the wellness exam that we were there for and paid for, which may have saved his life if that doctor was practicing defensive medicine. Hey Jim Gillan, you did save money on these two dead kids and others. How many other people have died in the same situation on Guam, I would venture to say hundreds over the years? I would venture to guess that this Arbitration Act has "dumbed down" medical care on Guam so much that no matter how much money that you spend of our taxes on GMH will not fix the problems, short of making doctors accountable. **BRING BACK DEFENSIVE MEDICAL CARE.**

I think it's important to note that The Arbitration Act is being questioned if it's organic or constitutional. There is a current LEGAL challenge to it in court. The law in the past, as previously written, was deemed to be unconstitutional, and according to a Guam POST story, Attorney Pipes implied that this current law we are discussing TODAY is also not constitutional. It deprives us the right of due process to bring those who kill or injure our family members to court. Also, an

interesting law is being discussed in Washington and it is said that it will pass. **THE FORCED ARBITRATION INJUSTICE REPEAL ACT, HR 1423 OR THE FAIR ACT**, will ban all forced arbitration in contracts, INCLUDING HEALTH CARE, and I would expect also legislatively enacted FORCED ARBITRATION like our Mandatory Arbitration Act. The reason for this federal law is clear, people were getting their rights violated, were robbed of due process and sold inferior goods, and services, including health care issues, and had to deal with apathy and had no rights when these contracts were in place and enforced. The **FAIR law** has implications for Guam and should be the writing on the wall, if for no other reason that the Arbitration law needs to be repealed.

Let's just step back for a minute and ask who protects us as citizens on Guam from medical negligence, malpractice etc. **With this Arbitration Act, what options exist for the average person with a valid complaint against a doctor?** What do we do, where do we go? Every system of medical care should have a check and balance system with protections for the citizens. What protections do we currently have on Guam? What recourse do we have? **Let me outline them for you briefly.**

When we have a problem with a medical person, we have the Guam Board of Allied Health Examiners and we have the Guam Board of Medical Examiners. We can file complaints with them, but this has been proven to be useless. The Guam Board of Medical Examiners gives off island doctors licenses to practice on Guam to those applicants who only meet minimal qualifications and they have licensed doctors who have malpractice histories. They bring these new doctors here, put us at risk, while offering them low malpractice insurance due to the Arbitration Act, with protection from law suits. Some of these doctors may not be able to work anywhere else, but the Board led by Dr. Nathaniel Berg does not seem to be worried about that. Then when we complain about a doctor, or the death of a child, this Board that has major conflicts of interest, including financial, will investigate and make decisions, not mitigating their own serious conflicts of interest, not interviewing the complaining parties, as in our case, the parents of a dead child, then release the results of their so called investigation to the media before talking to the family or informing the family. In my opinion, there should be an oversight hearing of the Medical Examiners Board, and the law that created it. They were recently described as corrupt on a local news media. **How many doctors on Guam have a history or claims against them for MALPRACTICE and they were then licensed by the Board? How many doctors on Guam have complaints against them for malpractice or investigations of complaints for the**

public to be aware of? ASK THE BOARD THIS? It should be public record. A doctor can kill our kids and go on to the next child and this Board does not have a public record, which is our right. OVERSIGHT HEARING TIME.

The Guam Board of Allied Health Examiners is another place that takes complaints against Physician Assistants, as we filed, but they do not take complaints seriously and do not do what they are mandated to do. A dead 5 year old child, Allied Board gets a complaint regarding a Physician Assistant who denied my son to see a doctor 20 hours before Asher died, among other things. Nine months later, The Allied Board has not done anything with the complaint. It just sits there. They never even communicated with the family. When they are faced with complaints, they do NOT care obviously by their actions. Are they waiting for another child to die before they act on a complaint? Total apathy by this Board, still boggles my mind how they can see themselves as professionals who have the community's best interest in mind.

IT'S CLEAR, we as consumers of health care, families, parents etc. have no protection, not from the politically appointed governing Boards who are apparently self serving, not from the courts due to the Arbitration Act and up to now not from our elected leaders who have allowed us to suffer and die due to these problems with the Boards and Arbitration.

It is too late for my son Asher Dean; nothing you can do will benefit him or us. Our suffering will not be alleviated by a repeal of this Apathy Arbitration Act, but we can take some solace to know that other families will not suffer as we and others have by making doctors responsible for destroying lives. Asher was taught the difference between right and wrong and to be responsible, sadly and obviously his doctor and others were not.

IMPROVE MEDICAL CARE ON GUAM, SAVE LIVES, REPEAL THE MALPRACTICE ARBITRATION LAW.

DAVID LUBOFSKY, FATHER OF ASHER LUBOFSKY who was robbed of his life by the people that this Arbitration ACT protects.