

RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-002149-MR

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP,
D/B/A ROSEWOOD HEALTH
CARE CENTER; KINDRED NURSING
CENTERS EAST, LLC; KINDRED
HOSPITALS LIMITED PARTNERSHIP;
KINDRED HEALTHCARE, INC.;
KINDRED HEALTHCARE
OPERATING, INC; KENNETH GRAVES;
KATHY SKAGGS; AND JENNIFER PHILLIPS

APPELLANTS

v. APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 11-CI-00587

LINDA FOLEY-TOWNSEND, AS NEXT FRIEND AND
POWER OF ATTORNEY OF WILLY HORNSBY, AN
INCAPACITATED PERSON

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Kindred Nursing Centers Limited Partnership, d/b/a Rosewood Health Care Center, and its related business entities (collectively referred to as “Kindred”) appeal from an order of the Warren Circuit Court denying Kindred’s motion to dismiss or in the alternative to stay proceedings and compel arbitration for a claim brought by Linda Foley-Townsend, as executrix of the estate of Willy Hornsby. After our review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of this case are not in dispute. On October 3, 2007, Willy executed a power of attorney appointing his sister, Linda Foley-Townsend as his attorney-in-fact. Pursuant to the power of attorney, Linda had authority to act for Willy with respect to all matters including real and personal property.

On November 21, 2008, Willy Hornsby was admitted as a resident to Rosewood Healthcare Center (hereinafter “Rosewood”), which is a nursing home in Bowling Green, Kentucky. During the admission process, Linda, acting as Willy’s legal representative, signed a document styled as “Alternative Dispute Resolution Between Resident and Facility (Optional)” (hereinafter “the arbitration agreement”). The arbitration agreement provides that the facility and its resident shall attempt to resolve by mediation any dispute arising out of or relating to the resident’s stay at the facility. It also provides that should a dispute not be settled through mediation, the parties shall proceed to binding arbitration.

In bold print, the agreement states that the parties agreed to waive the right to a trial, including their right to a jury trial, their right to a trial by a judge, and their right to appeal any decision of the arbitrator(s). The agreement indicated that its acceptance was optional and that it might be revoked by the resident by providing notice to the facility within thirty days of its execution. Additionally, also in bold print, it advised that the agreements of other local nursing homes might not contain an alternative dispute resolution provision.

On April 8, 2011, Linda, as next friend, filed this action against Kindred. In the complaint, Linda alleged personal injury and violation of the statutory rights of long-term residents.¹ After Linda filed the complaint, Kindred filed a motion to compel arbitration based on the arbitration agreement. The trial court denied the motion on November 27, 2012. The denial was based on the trial court's interpretation and application of the holding in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), which is a case quite similar to the matter before us. The trial court determined that the attorney-in-fact, Linda, the signatory on the arbitration agreement, did not have the authority to enter into an arbitration agreement for Willy.

Kindred appeals the trial court's order and asks that the appellate court reverse the decision and remand the case with instructions to compel arbitration. It filed this interlocutory appeal pursuant to KRS 417.220(a). On February 8, 2013, during the pendency of the appeal, Willy died. Our Court

¹ Kentucky Revised Statutes (KRS) 216.515.

granted Kindred's motion to hold the case in abeyance until the appointment of a personal representative for the estate. Thereafter, Linda was appointed the executrix of the estate, and on July 31, 2013, our Court granted her motion to return the case to the Court's active docket.

Contrary to the reasoning in the trial court's decision, Kindred maintains that Willy's power of attorney permitted his attorney-in-fact sufficient authority to authorize an arbitration agreement. It also claims that the facts here are distinguishable from *Ping* and that the trial court's decision singles out arbitration for disfavored treatment in contravention of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq. and United States Supreme Court precedent. Furthermore, it argues that applying *Ping* to a dissimilar power of attorney exhibits hostility toward arbitration.

In response, Linda argues that Willy's power of attorney did not grant her the authority to bind Willy to an arbitration agreement and state courts do not offend the FAA by construing the powers in a power of attorney instrument nor are there any constitutional implications.

STANDARD OF REVIEW

An appellate court considers the construction of a power of attorney as a question of law, that is, *de novo*. *Ingram v. Cates*, 74 S.W.3d 783 (Ky. App. 2002). Moreover, under both the Kentucky Arbitration Act and the Federal Arbitration Act, a party seeking to compel arbitration under an arbitration agreement must first establish the validity of the agreement. *Ping*, 376 S.W.3d at

590. Unless the parties clearly and unmistakably manifest a contrary intent, the existence of a valid agreement to arbitrate is before the court, not the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

The existence of the agreement depends on state law rules of contract formation. *Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). An appellate court reviews a trial court's interpretation and construction of a contract as a matter of law and, thus, under a *de novo* standard, too. *Lynch v. Claims Management Corp.*, 306 S.W.3d 93, 96 (Ky. App. 2010). Still, a trial court's factual findings, if any, will be disturbed only if clearly erroneous. *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010). With these standards in mind, we turn to the case at hand.

ANALYSIS

The enforcement and effect of an arbitration agreement is governed by the Kentucky Uniform Arbitration Act (KUAA), KRS 417.045 et seq., and the FAA. "Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor." *Ping*, 376 S.W.3d at 588.

Nonetheless, as observed above, under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. It is a threshold matter which must first be resolved by the

court. *Mt. Holly Nursing Center v. Crowdus*, 281 S.W.3d 809, 813 (Ky. App. 2008) (internal citations omitted). Additionally, the determination of the validity of an arbitration agreement is controlled by state law rules of contract formation. *Ping*, 376 S.W.3d at 590.

Initially, we discuss Kindred's claim that the trial court's interpretation of Willy's power of attorney case singles out arbitration for disfavored treatment in contravention of the FAA and U.S. Supreme Court precedent and whether the application of *Ping* to facts characterized as disanalogous to it exhibits hostility toward arbitration.

As previously mentioned, to decide whether an arbitration agreement exists, an appellate court must rely on state law contract principles, including matters concerning the authority of an agent to enter into a contract and which parties may be bound by that contract. *Arthur Andersen LLP*, 556 U.S. at 630–31. Further, the determination of the existence of an arbitration agreement does not preempt state law contract principles. The burden of establishing the existence of an arbitration agreement that conforms to statutory requirements rests with the party seeking to enforce it. *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 824 (Ky. App. 2008). The FAA itself requires that these principles must be applied to arbitration agreements in the same manner as other contracts. 9 U.S.C. § 2.

Accordingly, the trial court's analysis as to whether an arbitration agreement exists between Kindred and Willy rests squarely on determining the

validity of the arbitration agreement. Furthermore, contrary to the assertions of Kindred, the decision herein was not done to disfavor or show hostility toward arbitration. Rather, under both federal and state law, it must be ascertained whether an agreement exists. If it is determined that a valid agreement exists, courts in Kentucky clearly support arbitration. Here, the trial court correctly followed precedent and initially evaluated the validity of the arbitration agreement.

In order to decide whether an agreement was contracted, we must engage in a rigorous review of the impact and meaning of the power of attorney documents. A “durable power of attorney” is defined in KRS 386.093 as:

a power of attorney by which a principal designates another as the principal's attorney in fact in writing and the writing contains the words, “This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time”

Willy’s power of attorney stated:

I, WILLY JACK HORNSBY, appoint LINDA FOLEY, of Vero Beach, Florida, as my attorney-in-fact in my name and stead to transact any and all business for me, including but not limited to, deposit and withdrawal of any funds from my bank account or other depository, endorsement of any commercial papers, voting of any proxy or proxies, execution of any legal documents necessary to encumber, sell, transfer, or pass title to any real or personal property in which I own an interest, and to transact any and all business for me and on my behalf. I give to each and every such act done by my attorney the same force and effect as if done by me in my person and absolve all persons dealing with the attorney-in-fact from any liability for his acts as such. This power is not revoked or affected by my subsequent incapacity or disability. I request my attorney-in-fact to be appointed

my fiduciary if I am determined to be incompetent or disabled. I revoke all powers previously granted.

First, we evaluate the language in the power of attorney to ascertain the scope of the authority conferred upon Linda, and more particularly, to determine whether it authorized her to sign a binding arbitration agreement on his behalf. *Ping*, 376 S.W.3d at 590.

To determine the meaning of a particular power of attorney, the general rule of construction is that when a power of attorney delegates authority to perform specific acts and also contains general words, the powers of attorney are limited to the particular acts authorized. *Harding v. Kentucky River Hardwood Company*, 205 Ky. 1, 265 S.W. 429, 431 (Ky. App. 1924); *Wabner v. Black*, 7 S.W.3d 379, 381 (Ky. 1999). Further, courts adopted an “utmost good faith” standard to be used to judge the acts of the attorney-in-fact. *Id.* at 381.

Here, Willy’s power of attorney relates expressly and primarily to the management of Willy’s property and financial affairs. Although some language is broad, for example, “to transact any and all business for me,” for the most part, the directives are quite specific. Willy authorizes his attorney-in-fact to perform the following actions: “deposit and withdrawal of any funds from my bank account or other depository, endorsement of any commercial papers, voting of any proxy or proxies, execution of any legal documents necessary to encumber, sell, transfer, or pass title to any real or personal property in which I own an interest.” Willy’s power of attorney expressly relates to the management of property and financial

decisions and that the specific provisions of a power of attorney govern its authority. Since a power of attorney is based on specific directives rather than general expressions of authority, Linda's authority under the instrument did not extend to entering into an arbitration agreement. *Ping*, 376 S.W.3d at 592.

In sum, Willy's power of attorney confers the power to handle financial and property decisions but does not mention any acts related to alternative dispute resolution. Consequently, the power of attorney instrument does not allow his attorney-in-fact, Linda, to enter into an arbitration agreement and waive his right to a bench or jury trial. As noted in *Ping*, "[a]bsent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.* at 593.

Therefore, under the direction of the Kentucky Supreme Court, since Willy's power of attorney does not specifically mention the authority to enter into alternate dispute resolution, or for that matter, the authority to enter into a contract for him, Linda did not have the authority as an attorney-in-fact to sign this agreement.

CONCLUSION

We affirm the decision of the Warren Circuit Court.

TAYLOR, JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANTS:

Donald L. Miller, II
Jan G. Ahrens
Kristin M. Lomond
Louisville, Kentucky

BRIEF FOR APPELLEE:

Brian M. Jasper
Robert E. Salyer
Lexington, Kentucky