

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000184-MR

KINDRED HEALTHCARE, INC.;
KINDRED NURSING CENTERS
LIMITED PARTNERSHIP D/B/A
HERITAGE MANOR HEALTH
CARE CENTER; KINDRED NURSING
CENTERS EAST, LLC; KINDRED
HOSPITALS LIMITED PARTNERSHIP;
KINDRED HEALTHCARE OPERATING, INC.
AND KINDRED REHAB SERVICES, INC.
D/B/A PEOPLEFIRST REHABILITATION

APPELLANTS

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 12-CI-393

BARBARA CASH, AS ADMINISTRATRIX
WITH WILL ANNEXED OF THE ESTATE
OF LINDA MAE HENLEY, DECEASED

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, MOORE, AND TAYLOR, JUDGES.

MOORE, JUDGE: Kindred Healthcare, Inc. and associated entities (collectively, “Kindred”) appeal the order of the Graves Circuit Court denying its motion to compel arbitration of claims brought by Barbara Cash, as administratrix of the estate of her mother, Linda Mae Henley.¹ After thorough review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Linda Henley executed a General Power of Attorney on January 26, 1999, in which she appointed Nancy Summerville as her attorney-in-fact. The Power of Attorney read as follows:

I, Linda M. Henley, of 1109 Cuba Road, Mayfield, Graves County, Kentucky, hereby constitute and appoint NANCY SUMMERVILLE, of 168 State Route 1276, Mayfield, Graves County, Kentucky, my true and lawful attorney-in-fact, with full power for me and in my name and stead to make contracts, lease, sell, convey or mortgage any real or personal property that I may now or hereafter own and to execute bills of sale and to execute and acknowledge on my behalf any mortgages, bills of sale, and general warranty deeds, upon such terms and conditions that my attorney-in-fact deems advisable, and any sale of my real estate may be either at public sale or private sale, in the discretion of such attorney-in-fact, that is necessary to carry out the power herein given; to receive and receipt for any money which may now or hereafter be due me; to retain or release all liens on real or personal property belonging to me; to draw, make, endorse and sign any and all checks on my account of any bank for me and to pay all of my current bills and write and sign all necessary checks in connection therewith; to invest and reinvest my money for me; and

¹ An order denying a motion to compel is immediately appealable. Kentucky Revised Statutes (KRS) 417.220(1).

generally to do and perform for me and in my name, all that I might do if present.

The rights under this Power of Attorney specifically include, among others, the right to sell, assign, transfer and make gifts of securities, and to execute and deliver all instruments, deeds and contracts. The rights also specifically entitle the attorney-in-fact to make all necessary decisions and sign all necessary documents regarding any health care decisions to be made for me, including but not limited to medical treatment and long-term care.

This Power of Attorney shall not be affected by any disability in accordance with K.R.S. 386.093.

I hereby adopt and ratify all the acts of my attorney-in-fact done in pursuance of the power herein granted, as fully as if I were present acting in my own proper person.

IN WITNESS WHEREOF, I have hereunto set my hand this 26 day of January, 1999.

The document concluded with Ms. Henley's notarized signature. Ms. Henley was admitted to Heritage Manor Health Care Center² on July 18, 2006. Ms. Summerville signed an optional Alternative Dispute Resolution Agreement Between Resident and Facility on July 21, 2006, on behalf of Ms. Henley as her legal representative, although Ms. Summerville did not designate the capacity in which she signed. The ADR Agreement provides in relevant part:

Any and all claims or controversies arising out of or in any way relating to this ADR Agreement ("Agreement") or the Resident's stay at the Facility including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory

² Kindred Nursing Centers Limited Partnership was doing business as Heritage Manor Health Care Center in Mayfield, Kentucky.

or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties (including, without limitation, any claim based on violation of rights, negligence, medical malpractice, any other departure from the accepted standards of health care or safety or the Code of Federal Regulations or unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted to alternative dispute resolution as described in the Dispute Resolution Process for Consumer Healthcare Disputes, Rules of Procedure (the “Dispute Resolution Process”) which are incorporated herein by reference. ...

The parties to this Agreement understand that the Dispute Resolution Process contains provisions for both mediation and binding arbitration. If the parties are unable to reach settlement informally, or through mediation, the dispute shall proceed to binding arbitration. Binding arbitration means that the parties are waiving their right to a trial, including their right to a jury trial, their right to trial by a Judge and their right to appeal the decision of the arbitrator(s). Except as expressly set forth herein or in the Rules of Procedure, the provisions of the Uniform Arbitration Act, KRS 417.045 et seq., shall govern the Arbitration.

The other significant portion of the ADR Agreement is the last section appearing just above the signatures. It states that the resident understands that they have the right to seek legal counsel concerning the agreement. It also states that the execution of the ADR Agreement is not a precondition to admission at the facility, but that it was optional and could be revoked within thirty days of signature.

Notice of revocation was never provided.

Ms. Cash was appointed as Administratrix with Will Annexed of her mother’s estate and filed an action for personal injury claims, violations of the

long-term care resident's rights statute, KRS 216.515, and wrongful death³ of her mother allegedly caused by the negligent care provided by Kindred. Kindred filed a motion to compel arbitration and stay or dismiss the pending lawsuit citing the terms of the ADR Agreement signed by Ms. Summerville. The Graves Circuit Court denied Kindred's motion to compel and stay or dismiss Ms. Cash's claims. The circuit court looked to *Ping v. Beverly Enterprises*, 376 S.W.3d 581 (Ky. 2012), and found that the *Ping* power of attorney should not be considered unique because of its "requisite and necessary" language. Further, the circuit court's interpretation of *Ping* led it to determine that in order to grant an attorney-in-fact the power to execute a nursing home arbitration agreement that (1) there must be a "reasonable necessity" for doing so if the grant of power is general, or (2) the power to enter into such an agreement must be expressly conferred in the power of attorney document. The circuit court found that neither of these requirements were applicable to this case, and therefore, denied Kindred's motion to compel arbitration. Kindred now appeals.

II. STANDARD OF REVIEW

"In reviewing an order denying enforcement of an arbitration agreement, the trial court's legal conclusions are reviewed *de novo* 'to determine if the law was properly applied to the facts[;]' however, factual findings of the trial

³ *Ping* held that even if there was a valid arbitration agreement, a decedent or her agent cannot bind her beneficiaries to arbitrate her wrongful death claims because those claims are not derived through or on behalf of the decedent, but accrue separately. *Ping*, 376 S.W.3d at 599. The circuit court's order stated that counsel was in agreement that the attorney-in-fact could not bind those making a wrongful death claim arising out of the death of the principal.

court ‘are reviewed under the clearly erroneous standard and are deemed conclusive if they are supported by substantial evidence.’” *Energy Home, Division of Southern Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 833 (Ky. App. 2013) (quoting *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459 (Ky. App. 2011)). As the facts in this case are not in dispute, our review is *de novo*.

III. ANALYSIS

When determining whether to enforce an arbitration agreement, we look to the Kentucky Uniform Arbitration Act (KUAA), KRS 417.045 *et seq.*, and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.* “Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor.” *Ping*, 376 S.W.3d at 588. The Acts are similar and both provide that a provision in a written agreement between parties to submit any controversy to arbitration is “valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.” 9 U.S.C. § 2; KRS 417.050. The KUAA has been interpreted consistently with the FAA. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004). The existence of an agreement depends on state law rules of contract formation. *Ping*, 376 S.W.3d at 590. The party seeking to compel arbitration has the burden of establishing the existence of a valid agreement to arbitrate. *Id.* The FAA does not preempt generally applicable state law contract principles; however, it does preempt state laws that apply *only* to arbitration agreements. *Great Earth Cos., Inc v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002).

The central issue in this case is whether the power of attorney document executed by Ms. Henley appointing Ms. Summerville as her attorney-in-fact authorized Ms. Summerville to enter into the ADR Agreement with the nursing home upon Ms. Henley's admission as a resident. "[A] power of attorney is a form of agency." *Moore v. Scott*, 759 S.W.2d 827, 828 (Ky. App. 1988). An agency "is the fiduciary relation which results from the manifestation of consent by one person [the principal] to another [the agent] that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Ping*, 376 S.W.3d at 591 (quoting *Phelps v. Louisville Water Company*, 103 S.W.3d 46, 50 (Ky. 2003)). The scope of the authority under which the agent acts must be expressly granted by the principal. *Ping*, 376 S.W.3d at 592.

Kindred argues that this case is disanalogous to *Ping* because the language used in Ms. Henley's power of attorney is much broader than the language in the *Ping* power of attorney and is without any limitations on the power to contract granted therein. In *Ping*, the daughter, Donna Ping, served as the attorney-in-fact for her mother, Mrs. Duncan. *Id.* at 586. Ping entered into an arbitration agreement with a nursing home on her mother's behalf upon her mother's admission as a resident to the home. *Id.* After Mrs. Duncan died, Ping filed a wrongful death action on behalf of the estate. *Id.* The nursing home sought to compel arbitration of the claim under the terms of the arbitration agreement Ping signed on her mother's behalf.

The Kentucky Supreme Court refused to compel arbitration, finding the power of attorney did not vest Ping with the authority to execute the arbitration agreement on her mother's behalf. *Id.* at 594. The scope of authority in Mrs. Duncan's power of attorney limited Ping to make only financial and medical care decisions on her behalf. It also included a "catch-all" provision "to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present" *Id.* at 586. The Court determined that because the arbitration agreement was not a prerequisite for admission to the nursing home that it did not constitute a medical care decision. *Id.* at 593. The Court also recognized that the execution of the arbitration agreement did not involve a financial decision. *Id.* at 594. Additionally, the "catch-all" provision did not authorize Ping to execute the arbitration agreement on her mother's behalf. *Id.* at 592. The Court observed that the general expressions were limited by the "requisite and necessary" language used in the power of attorney document, and that if the general provisions were given effect, the grants of authority to perform specific acts would be unnecessary. *Id.* The *Ping* Court concluded "[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. The Court did not find any indication in the power of attorney suggesting Ping had the authority to make such waivers on her mother's behalf.

In this case, Ms. Henley's power of attorney relates primarily to her property, finances, and health-care decisions. Kindred relies on the following language: "The rights under this Power of Attorney specifically include, among others, the right to sell, assign transfer and make gifts of securities, and to execute and deliver all instruments, deeds, and contracts" to assert that Ms. Summerville had the authority to enter into the ADR Agreement on Ms. Henley's behalf.

However, the Court in *Ping* held that an agent's authority under a power of attorney is to be construed with reference to the types of transactions expressly authorized in the document. *Id.* at 592. In reading Ms. Henley's power of attorney document as a whole, it is clear that the expressions relied on by Kindred are limited to those actions that are *necessary* to carry out the power given. In the specific powers granted relating to Ms. Henley's real and personal property, the powers are ultimately qualified by actions "that are necessary to carry out the power herein given." Additionally, the powers granted relating to her finances allow Ms. Summerville to "write and sign all necessary checks." And finally, Ms. Henley's attorney-in-fact is entitled to "make all necessary decisions and sign all necessary documents" in regards to Ms. Henley's health care. We are unable to construe the language cited by Kindred as a grant of universal authority to Ms. Summerville beyond those actions necessary to give effect to the authority expressly authorized. Ms. Henley limited the scope of the agency to necessary matters relating to her property, finances, and health care.

Furthermore, the *Ping* Court recognized other cases in which agreeing to an arbitration agreement that is not a condition of admission to a nursing home does not involve a property, financial or health-care decision. *Id.* at 593-94.

Accordingly, we conclude that Ms. Henley’s power of attorney did not authorize Ms. Summerville to enter into the optional ADR Agreement with Kindred on her behalf. Therefore, we affirm the order of the Graves Circuit Court denying Kindred’s motion to compel arbitration.⁴

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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⁴ We pause to note that Kindred first raises the argument that Cash cannot maintain a wrongful death claim in its reply brief. This is an impermissible way to present an argument for review. *See Milby v. Mears*, 580 S.W.2d 724, 728 (Ky. App. 1979) (“[a] reply brief is not a device for raising new issues which are essential to the success of the appeal”); see also Kentucky Rules of Civil Procedure (CR) 76.12(4)(e). Additionally, Kindred did not include this argument in its prehearing statement. Pursuant to CR 76.03(4)(h) a prehearing statement must include “[a] brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[,]” and CR 76.03(8) provides that “[a] party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion.” *See Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004) (“Since that issue was not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for “good cause shown,” CR 76.03(8), this matter is not properly before this court for review.”). Accordingly, this argument is not properly before this Court for review.