

RENDERED: JANUARY 23, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001783-MR

BARDSTOWN MEDICAL INVESTORS, LTD.,
D/B/A LIFE CARE CENTER OF BARDSTOWN,
LIFE CARE CENTERS OF AMERICA, INC.;
AND JACKIE CARLIN, IN HER CAPACITY AS
ADMINISTRATOR OF LIFE CARE
CENTER OF BARDSTOWN

APPELLANTS

v. APPEAL FROM NELSON CIRCUIT COURT
HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 12-CI-00680

BOBBY DUKES, INDIVIDUALLY
AND AS NEXT FRIEND OF DORIS DUKES,
AN INCAPACITATED PERSON

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Nelson Circuit Court's denial of a motion to compel arbitration. Based upon the following, we reverse the decision of the trial court and remand for further proceedings.

BACKGROUND INFORMATION

Doris Dukes was admitted to Life Care Center of Bardstown in July of 2011 and remained a resident until January of 2012. Appellee Bobby Dukes was Doris's husband and power of attorney at the time of her admission. The Durable Power of Attorney (POA) Doris executed provided, in relevant part, as follows:

4. To enter into contracts of any kind of description whatsoever, and to exercise any right, option or election which I may have or acquire under any contract.
5. To compromise, settle, or renew any claim of or against me, or any right which I may be entitled to assert and which may be asserted against me;
6. To assert by litigation or otherwise any claim of mine, and to defend any claim that may be asserted against me, with full right to employ counsel and agents which, in the discretion of said attorney-in-fact, may be necessary in connection therewith;

As part of Doris's admission, Bobby agreed to the following agreement to arbitrate:

The parties agree that they shall submit to binding arbitration all disputes against each other...arising out of or in any way related or connected to the Resident's stay and care provided at the Facility, including but not limited to, any disputes concerning alleged personal injury to the Resident caused by improper or inadequate care, including allegations of medical malpractice; and disputes concerning whether any statutory provisions relating to the Resident's rights under Kentucky law were violated; and any other dispute under Kentucky or federal law based on contract, tort, or statute....

On September 27, 2012, the Appellee brought a civil action in Nelson Circuit Court asserting that the Appellants were negligent and had violated the Long Term Care Residents' Rights Act and Kentucky Revised Statutes (KRS) 216.510, et seq. Specifically, the Appellee asserted that Doris had sustained numerous injuries including falls, pressure sores, blisters, bruises, upper respiratory tract infections, pressure sore infections, acute renal failure, sepsis, dehydration, hypernatremia, aspiration pneumonia, and poor hygiene.

On November 12, 2012, Appellants made a motion before the trial court to compel arbitration. The trial court denied the motion based on *Ping v. Beverley Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), holding as follows:

Citing *Ping*, BMI argues the power to enter into arbitration agreements may be inferred through language authorizing Bobby “to settle claims and disputes.” The court does not believe *Ping* establishes a blanket rule wherein any language concerning dispute resolution automatically implies the power to enter into arbitration agreements. Instead, to determine the authority of an agent the court must carefully construe the language present in the POA “with reference to the types of transactions expressly authorized in the document[.]” *Ping*, at 592.

The plain language of the POA clearly provided Bobby with the authority to resolve legal claims through settlement negotiations and litigation. Within these specific, express authorizations Bobby undoubtedly possessed an implied power to waive the right to a jury trial in the course of settling or litigating a recognized legal claim. However, the presence of affirmative authorization to settle or litigate a ripe legal claim does not support the implication Doris intended to authorize Bobby to execute unnecessary, collateral arbitration

agreements and foreclose her right to a jury trial in future or potential legal disputes arising from the negligent conduct of a health care provider.

This appeal followed the trial court's decision.

STANDARD OF REVIEW

Pursuant to the Kentucky Arbitration Act and the Federal Arbitration Act, a party seeking to compel arbitration pursuant to an arbitration agreement, has the initial burden of establishing the validity of the agreement. *Ping, supra; First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004). “Unless the parties clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, First Options, and the existence of the agreement depends on state law rules of contract formation.” *Id.*; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). An appellate court reviews the trial court's application of those rules *de novo*, although the 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). *Ping* at 590. With these standards in mind, we review the trial court's decision.

DISCUSSION

In *Ping, supra*, the Kentucky Supreme Court held that:

...an agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly authorized in the document and subject always to the agent's duty to act with the “utmost good faith.” *Wabner*, 7 S.W.3d at 381. This is consistent with section

37 of the Restatement (Second) of Agency, which provides that:

(1) Unless otherwise agreed, general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates.

(2) The specific authorization of particular acts tends to show that a more general authority is not intended.

Ping, supra, at 592. In this case, Bobby was granted a POA to take care of any financial or contractual issue Doris would encounter should she become incapable.

In making its conclusion regarding the limitation of the power of attorney, the *Ping* court held as follows:

Our conclusion that Ms. Ping was not authorized to bind her mother to Beverly Enterprises' optional Arbitration Agreement is in accord with the decisions of other courts confronted with the same issue. On the one hand, where an agreement to arbitrate is presented to the patient as a condition of admission to the nursing home, courts have held that the authority incident to a health-care durable power of attorney includes the authority to enter such an agreement. *Owens v. National Health Corporation*, 263 S.W.3d 876 (Tenn.2008); *Triad Health Management of Ga.*, 679 S.E.2d 785. On the other hand, where, as here, the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement, courts have held that authority to choose arbitration is not within the purview of a health-care agency, since in that circumstance agreeing to arbitrate is not a “health care” decision. FN4 *Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721 (2010); *Koricic v. Beverly Enterprises–Nebraska, Inc.*, 278 Neb. 713, 773 N.W.2d 145 (2009); *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So.2d 211 (Miss.2008); *Estate of Irons v. Arcadia Healthcare L.C.*, 66 So.3d 396 (Fla.Dist.Ct.App.2011). But see *Barron v. Evangelical Lutheran Good Samaritan Society*, 150 N.M.

669, 265 P.3d 720 (N.M.App.2011) (holding that health-care agent's incidental authority extended to nursing-home admission contract's optional arbitration agreement).

Ping, at 595.

The trial court in this case determined that the language in the POA allowing Bobby “to settle claims and disputes” was insufficient under *Ping* to bring the Dukes to arbitration. We disagree.

In *Ping*, the court concluded that the POA only authorized the attorney-in-fact to make health care decisions and that signing an agreement to arbitrate was not necessary to provide for her medically. In this case, however, the POA is much broader and incorporates business dealings such as contracts and financial actions. By allowing Bobby to enter into contracts and to settle claims and disputes, Doris gave Bobby the ability to sign an agreement to arbitrate. Pursuant to the Restatement (Third) of Agency, § 2.02(1) (2006): “An agent has actual authority to take action designated or implied in the principal’s manifestations to the agent and acts necessary or incidental to achieving the principal’s objectives, as the agent reasonably understands the principal’s manifestations and objectives when the agent determines how to act.”

Thus, we reverse the trial court’s decision and remand the case to the trial court.

ALL CONCUR.

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