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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2024-CA-0054-MR

MASONIC HOMES OF KENTUCKY,
INC. D/B/A MASONIC HOME OF
LOUISVILLE D/B/A SAM SWOPE
CARE CENTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE TRACY E. DAVIS, JUDGE
ACTION NO. 23-CI-004009

ESTATE OF RAYMOND LEIST, JR.
BY AND THROUGH CO-
EXECUTORS, ANN “CISSY” LEIST
AND THOMAS LEIST; AND ANN
CISSY LEIST, INDIVIDUALLY

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: THOMPSON, CHIEF JUDGE; EASTON AND KAREM, JUDGES.

KAREM, JUDGE: The Masonic Homes of Kentucky (“Masonic Homes”) appeals from an opinion and order of the Jefferson Circuit Court denying their motion to

stay litigation proceedings and compel arbitration. After careful review of the briefs, record, and law, we find no error and affirm the opinion and order on appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On February 26, 2022, Raymond Leist (“Ray”) executed a document entitled “Durable Power of Attorney” (“DPOA”) granting his son, Frank (“Frank”), power of attorney. As introductory language to the DPOA, the document states:

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself.

This power of attorney does not authorize the agent to make medical and health care decisions for you.

The body of the DPOA read as follows:

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects:

INITIAL each subject you want to include in the agent’s general authority.

INITIAL the line in front of “(N) All Preceding Subjects” if you wish to grant general authority over all of the subjects instead of initialing each subject.

- _____ (A) Real Property
- _____ (B) Tangible personal property
- _____ (C) Stocks and bonds
- _____ (D) Commodities and options
- _____ (E) Banks and Other Financial Institutions
- _____ (F) Operation of Entity or Business
- _____ (G) Insurance and Annuities
- _____ (H) Estates, Trusts, and Other Beneficiary Interests
- _____ (I) Claims and Litigation
- _____ (J) Personal and Family Maintenance
- _____ (K) Benefits from Governmental Programs or Civil or Military
Service
- _____ (L) Retirement Plans
- _____ (M) Taxes
- _____ (N) All Preceding Subjects

The initials “RFL” only appear on the line preceding “(N) All Preceding Subjects.”

Under the heading of “GRANT OF SPECIFIC AUTHORITY (OPTIONAL),” the initials “RFL” appear on all of the following:

- _____ (A) Create, amend, revoke, or terminate an *inter vivos* trust
- _____ (B) Make a gift

_____ (C) Create or change rights of survivorship

_____ (D) Create or change a beneficiary designation

_____ (E) Authorize another person to exercise the authority granted under this power of attorney

_____ (F) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan

_____ (G) Exercise fiduciary powers that the principal has authority to delegate

Subsequently, on November 2, 2022, Ray, at the age of 86, was admitted to the Masonic Homes as a resident to receive ongoing care related to his dementia diagnosis. Frank executed all the admission forms, including an Alternative Dispute Resolution Agreement, which he initialed on the line marked "initial here by Resident/Legal Representative," and signed as the "Resident Representative." Notably, the agreement to arbitrate disputes was not a mandatory condition for Ray's admission to the Masonic Homes.

Sadly, on November 13, 2022, while in the care of the Masonic Homes, Ray tragically passed away just eleven (11) days after he began his residency there. Ray's estate and his beneficiaries filed suit alleging negligence and wrongful death; additionally, a claim for loss of consortium was made on behalf of Ray's wife. Masonic Homes moved to stay the proceedings and compel

arbitration of the negligence claim.¹ The trial court denied the motion, finding that the DPOA did not give Frank the power to enter into an arbitration agreement on Ray's behalf. Masonic Homes appealed.

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 court "are reviewed under the clearly erroneous standard and are deemed conclusive if they are supported by substantial evidence." *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459 (Ky. App. 2011).

Energy Home, Div. of Southern Energy Homes, Inc. v. Peay, 406 S.W.3d 828, 833 (Ky. 2013).

ANALYSIS

"Arbitration agreements, as with any other valid contract, are generally enforceable. State courts must compel arbitration when there is a valid, written arbitration agreement between the parties." *Jackson v. Legacy Health Services, Inc.*, 640 S.W.3d 728, 732 (Ky. 2022) (citation omitted).

The enforcement and effect of an arbitration agreement is governed by the Kentucky Uniform Arbitration Act (KUAA), KRS 417.045 et seq., and the Federal

¹ Both parties acknowledge that the negligence claim is the only claim potentially subject to arbitration. Claims of heirs and beneficiaries are non-arbitral; thus, Masonic Homes motioned the court to stay any proceedings regarding the non-arbitral claims until the issue of negligence was resolved.

Arbitration Act, (FAA) 9 U.S.C.^[2] §§ 1 et seq. “Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor.” *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 588 (Ky. 2012).

But under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Id.* at 589. That question is controlled by state law rules of contract formation. *Id.* at 590. The FAA does not preempt 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 v. Carlisle*, 556 U.S. 624, 630-31, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832 (2009).

Genesis Healthcare, LLC v. Stevens, 544 S.W.3d 645, 649 (Ky. App. 2017)

(footnote omitted).

In the case *sub judice*, both parties agree that the sole issue is whether the DPOA granted Frank the power to enter into an arbitration agreement on Ray’s behalf. Masonic Homes argues Ray’s DPOA, under the heading of General Authority, granted Frank the authority over “Claims and Litigation,” thereby authorizing Frank to bind the principal, Ray, to the arbitration agreement in question as a means of resolving *any* claims Ray or his estate may pursue. Specifically, Masonic Homes argues that the court’s reliance on *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), is misplaced. Masonic Homes

² United States Code.

rightfully directs this Court's attention to *Kindred Nursing Centers Ltd.*

Partnership v. Clark, 581 U.S. 246, 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017) and its progeny.

It is necessary that we take a moment to explain *Kindred's* procedural background. Originally, three independent but similar cases were filed against Kindred Nursing Centers ("Kindred"). All three questioned the enforceability of arbitration agreements when those agreements were signed, not by the resident of Kindred but by the resident's agent in their stead. All three cases proceeded through the judicial system, reaching the Kentucky Supreme Court, where they were consolidated. We will only concern ourselves with the two cases that went on to the United States Supreme Court for decision.

Of the two cases reaching the United States Supreme Court, one involved a DPOA executed by Olive Clark, making her daughter, Janis, her agent; the other involved a DPOA executed by Joe Wellner, designating his wife, Beverly, his agent. Each of these agents, Janis and Beverly, used their power of attorney to complete admission forms, including agreements to arbitrate, at the time Olive and Joe were admitted to Kindred, respectively. Following the deaths of Olive and Joe, their estates brought claims against Kindred, alleging negligence. Kindred moved to dismiss the cases, arguing that the arbitration agreements prevented the estates from bringing the cases to court. The trial judges in each of

the cases denied Kindred's motions. This Court affirmed the trial courts, and the Kentucky Supreme Court subsequently took up the cases. The Kentucky Supreme Court affirmed this Court but distinguished the two cases as outlined in the Federal Court's opinion:

The Kentucky Supreme Court, after consolidating the cases, affirmed those decisions by a divided vote. The court began with the language of the two powers of attorney. The Wellner document, the court stated, did not permit Beverly to enter into an arbitration agreement on Joe's behalf. In the court's view, neither the provision authorizing her to bring legal proceedings nor the one enabling her to make property-related contracts reached quite that distance. By contrast, the court thought, the Clark power of attorney extended that far and beyond. Under that document, after all, Janis had the capacity to "dispose of all matters" affecting Olive. "Given this extremely broad, universal delegation of authority," the court acknowledged, "it would be impossible to say that entering into [an] arbitration agreement was not covered."

And yet, the court went on, both arbitration agreements – Janis's no less than Beverly's – were invalid. That was because a power of attorney could not entitle a representative to enter into an arbitration agreement without *specifically* saying so. The Kentucky Constitution, the court explained, protects the rights of access to the courts and trial by jury; indeed, the jury guarantee is the sole right the Constitution declares "sacred" and "inviolable." Accordingly, the court held, an agent could deprive her principal of an "adjudication by judge or jury" only if the power of attorney "expressly so provide[d]." And that clear-statement rule – so said the court – complied with the FAA's demands. True enough that the Act precludes "singl[ing] out arbitration agreements." But that was no problem, the court

asserted, because its rule would apply not just to those agreements, but also to some other contracts implicating “fundamental constitutional rights.” In the future, for example, the court would bar the holder of a “non-specific” power of attorney from entering into a contract “bind[ing] the principal to personal servitude.”

Kindred Nursing Centers Ltd. Partnership v. Clark, 581 U.S. at 250-51, 137 S. Ct. at 1425-26 (citations omitted). The Kentucky Court’s reasoning did not convince the United States Supreme Court. Instead, they opined the new “clear-statement rule,” as they dubbed it, created by the Kentucky Court undermined the supremacy of the Federal Arbitration Act. *Id.* at 254, 137 S. Ct. at 1428. However, like the Kentucky Court, the Federal Court distinguished the two cases, reversing the Kentucky Court’s denial of arbitration for the Clark family but remanding the Wellner case for further review.

The [Kentucky] court invalidated the agreement with Kindred only because the power of attorney did not specifically authorize Janis to enter into it on Olive’s behalf. In other words, the decision below was based exclusively on the clear-statement rule that we have held violates the FAA. So[,] the court must now enforce the Clark–Kindred arbitration agreement.

By contrast, our decision might not require such a result in the Wellner case. The Kentucky Supreme Court began its opinion by stating that the Wellner power of attorney was insufficiently broad to give Beverly the authority to execute an arbitration agreement for Joe. If that interpretation of the document is wholly independent of the court’s clear-statement rule, then nothing we have said disturbs it. But if that rule at all influenced the construction of the Wellner power of attorney, then the

court must evaluate the document's meaning anew. The court's opinion leaves us uncertain as to whether such an impermissible taint occurred. We therefore vacate the judgment below and return the case to the state court for further consideration.

Id. at 256, 137 S. Ct. at 1429 (citations omitted).

Following the directive of the United States Supreme Court, the Kentucky Court once again rendered an opinion explaining their analysis of the Wellner DPOA in relation to whether or not Beverly had the authority to enter into the pre-dispute arbitration agreement on behalf of Joe, absent any reliance on the, now prohibited, "clear-statement rule." *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189, 190-92 (Ky. 2017). The Court explained their previous opinion relied on *two* factors: 1) the prohibited clear statement rule and 2) the fact that the provisions of the Wellner DPOA failed to give the agent the authority to execute, on behalf of her principal, a pre-dispute arbitration agreement. *Id.* at 192. While they could no longer consider the first factor, the Court opined as to the second factor that Beverly had the authority to bind the principal as to property rights but not his personal rights. Because Joe's constitutional right to a jury trial was not a property right, Beverly had no authority to enter into the agreement.

Rather than any reliance upon the clear statement rule, our decision with respect to this provision of the POA was based exclusively upon the clear fact that Kindred's pre-dispute arbitration contract did not relate to any

property rights of Joe Wellner. It did not buy, sell, give, trade, alter, repair, destroy, divide, or otherwise affect or dispose of in any way any of Joe Wellner's personal property. By executing Kindred's pre-dispute arbitration agreement, Beverly did not "make, execute and deliver deeds, releases, conveyances and contracts of [any] nature in relation to [Joe's] property." The only "thing" of Joe Wellner's affected by the pre-dispute arbitration agreement was his constitutional rights, which no one contends to be his real or personal property.

Id. at 194 (citations omitted).

Similarly, in the case *sub judice*, the DPOA executed by Ray granted Frank limited authority to bind the principal to decisions and acts "with respect to [Ray's] property." Just as Beverly had no authority to enter into the pre-dispute agreement on behalf of Joe, Frank had no authority to enter into the arbitration agreement on behalf of Ray.

Lastly, Masonic Homes asserts that the Uniform Power of Attorney Act provided Frank the authority through the DPOA to bind the principal, Ray, to arbitration. Notably, Masonic Homes did not raise this argument at the trial court level. "An appellate court 'is without authority to review issues not raised in or decided by the trial court.'" *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) (citations omitted). Thus, further discussion of this argument is unwarranted and improper.

CONCLUSION

Based on the foregoing, we find that the circuit court correctly denied Masonic Homes' motion to compel arbitration and stay the proceedings. Thus, the order of the Jefferson Circuit Court is AFFIRMED.

ALL CONCUR.

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