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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000221-MR

KINDRED HOSPITALS LIMITED PARTNERSHIP, D/B/A LIBERTY CARE CENTER; KINDRED HEALTHCARE OPERATING INC.; AND KINDRED HEALTHCARE, INC. — APPELLANTS

v.

APPEAL FROM CASEY CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 05-CI-00030

SUSAN LUTTRELL, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF ALTHA DUNCAN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

KELLER, JUDGE: Kindred Hospitals Limited Partnership,[2] Kindred Healthcare Operating, Inc., and Kindred Healthcare, Inc. (hereinafter referred to collectively as "Kindred") appeal from the circuit court's order denying their motion to dismiss or in the alternative to stay the circuit court proceedings pending completion of alternative dispute resolution (ADR) proceedings. Kindred argues that Susan Luttrell, Administratrix of the Estate of Altha Duncan, (the "estate") signed an ADR agreement binding her mother, Altha Duncan (Duncan) to pursue any disputes with Kindred through ADR proceedings. The estate argues that Susan Luttrell (Luttrell) did not have the authority to enter into that agreement on behalf of Duncan; therefore, the estate is not bound by the agreement. For the reasons stated herein, we affirm.

FACTS

Luttrell lives in Casey County with her boyfriend and nephew. She dropped out of school in the eighth grade and has difficulty reading. Approximately 20 years ago, Luttrell's mother moved into the house next to Luttrell's. Luttrell testified that she owned the house and that Duncan did not pay any rent. However, it appears that Duncan did pay the utility bills, using her only source of income - social security benefits. Luttrell testified that she and Duncan took Duncan's social security checks, which Duncan endorsed, to the bank to cash them. Because Duncan did not have a checking account, she would give cash to Luttrell so that Luttrell could purchase money

[2] As previously noted by the Supreme Court of Kentucky in Case No. 2006-SC-000093-I, Kindred Hospital Limited Partnership, d/b/a/ Liberty Care Center, was incorrectly named in the Complaint. Its correct name is Kindred Nursing Centers Limited Partnership. The Supreme Court, in a case cited hereinafter, referred to the Appellee as Susan Lutrell; however, our record indicates that the Appellee is Susan Luttrell.

orders to pay Duncan's bills. After paying those bills, Luttrell would give the receipt for the money orders to Duncan. Additionally, Luttrell picked up prescription medications for Duncan and took Duncan to her medical appointments. Duncan paid for her medical care through Medicare and Medicaid.

Because of her failing health, Duncan moved into Luttrell's house approximately one year before her admission to the Liberty Care Center ("Liberty") on April 16, 2004. At the time of her admission to Liberty, Duncan had difficulty hearing and seeing. Although Duncan could understand Luttrell when she spoke to her and Duncan could respond appropriately, Luttrell did not believe that Duncan would have been able to understand and sign Liberty's admission documents. Luttrell told the admissions person at Liberty, Debra Luttrell (no relation to Appellee; hereinafter "Debra"), that she was the person who should sign any admissions documents on behalf of Duncan. Luttrell signed the admissions documents; however, beyond believing that the documents were necessary to admit Duncan to Liberty, Luttrell testified that she did not understand the documents she was signing. Luttrell acknowledged that she should have read the documents but did not do so. Furthermore, Luttrell testified that, even though she did not believe she would have been able to read the documents, she did not ask anyone to read them to her.

One of the documents Luttrell signed was the ADR agreement in question herein. Luttrell testified that she did not remember if Debra discussed the nature of that agreement with her. We note that Luttrell's testimony is directly contradicted by Debra,

who testified that she read the entire ADR agreement to Luttrell at the time of Duncan's admission to Liberty.

According to Debra's testimony, the ADR agreement is a stand-alone document and signing the ADR agreement is not a pre-condition to admission to Liberty. When reviewing the ADR agreement with Luttrell, Debra advised Luttrell that she had thirty days to revoke it and that she could have it reviewed by an attorney. Although Luttrell told Debra that she was authorized to sign the documents, Debra was aware that Luttrell did not have power of attorney and that Luttrell was signing the documents as Duncan's daughter.

Finally, we note that Kindred argues that the ADR agreement simply changes the forum for resolving disputes. However, the ADR agreement states that determining the extent of permissible discovery is left solely to the discretion of the neutral mediator and/or arbitrator. The ADR agreement does not indicate that discovery is subject to the Civil Rules, which are available to litigants in circuit court and which provide certain ground rules regarding discovery. The ADR agreement limits the number of expert and fact witnesses and limits the amount of time each witness can be deposed, subject to agreement of the parties to the contrary or a decision by the arbitrator. No such limitations are automatically imposed on litigants in circuit court. Therefore, the ADR agreement does more than just change the forum, it also changes the rules under which the parties may proceed.

PROCEDURAL BACKGROUND

Because this matter has taken a somewhat twisted procedural path, we will outline the procedural background in some detail. At the outset we note that there are at least five cases in some stage of litigation throughout the Commonwealth involving counsel for the estate and Kindred. At least one similar procedural issue has arisen in one of those cases and that case will be discussed as necessary.

On February 16, 2005, the estate filed a complaint in Casey Circuit Court alleging that, because of the wrongful conduct of Kindred, Duncan suffered "accelerated deterioration of her health and physical condition beyond that caused by the normal aging process" as well as a number of specific injuries, all resulting in Duncan's death. The complaint contained claims for damages arising from negligence, corporate negligence, medical negligence, violations of long term care resident's rights, and wrongful death. It sought special, compensatory, and punitive damages. Kindred timely filed a response to the complaint and raised as a defense the ADR agreement signed by Luttrell.

On March 22, 2005, Kindred filed a motion to dismiss or, in the alternative, to stay the circuit court action pending ADR proceedings. In support of the motion, Kindred argued that the ADR agreement signed by Luttrell was binding on the estate. On April 18, 2005, the estate filed its response to Kindred's motion and its motion to stay the ADR proceedings. For its response, the estate noted that it had served interrogatories and requests for production of documents on Kindred but that Kindred had not responded to those discovery requests. Furthermore, the estate challenged the validity of the ADR

agreement on the grounds that it did not contain the signature of a person with authorization to bind Duncan and that it was unconscionable. Finally, as an alternative should the court find the ADR agreement binding, the estate asked the court to stay the ADR proceedings pending completion of discovery. Kindred filed a reply, reiterating the contention that Luttrell's signature on the ADR agreement was valid and binding.

On May 11, 2005, the circuit court entered an order finding that Kindred's motion to dismiss or, in the alternative, to stay the circuit court proceedings, was premature. The circuit court ordered the parties to engage in limited discovery reasonably related to the motion to dismiss and/or to stay. The circuit court stayed any other discovery.

Following entry of the circuit court's order, the estate propounded a second set of interrogatories and requests for production of documents. Kindred filed a motion for a protective order alleging that the discovery went beyond the bounds set by the circuit court's order.[3] The estate then filed a motion to compel requesting an order requiring Kindred to respond to the estate's discovery and a response to Kindred's motion for protective order. In its response, the estate argued that the discovery was necessary to evaluate whether the ADR program was legitimate. Kindred then filed a notice to remand the motion for protective order pending resolution of a similar issue that was on appeal before the Court of Appeals from an order issued by the Boyle Circuit Court.[4]

[3] The parties filed other motions which are not pertinent to this appeal. Therefore, we will not address those motions herein.

[4] Kindred made the same objection to discovery in a case pending in Boyle Circuit Court. The Boyle Circuit Court ordered Kindred to comply with the discovery requests. Kindred then

On October 7, 2005, the circuit court herein entered an order denying Kindred's motion to dismiss and/or to stay the circuit court action pending ADR proceedings. Although not reflected in his written order, the circuit court judge stated at the hearing on the motion that he did not believe Luttrell was authorized to waive a jury trial on behalf of Duncan. On October 27, 2005, Kindred filed a Motion for Interlocutory Relief Pursuant to Ky. R. Civ. P. 65.07(1) with the Court of Appeals seeking relief from the preceding circuit court order.[5] On January 25, 2006, this Court denied the motion for interlocutory relief because Kindred had chosen an incorrect method of appeal. As noted by this Court, the Uniform Arbitration Act, KRS 417.045, *et seq.*, states that an "appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action." KRS 417.220(2). Therefore, this Court held that Kindred's motion for interlocutory relief under CR 65.07 was not appropriate.

This Court then issued an order on February 1, 2006, stating that Kindred's CR 65.07 motion was also a notice of appeal. That order preserved Kindred's right to pursue an appeal under CR 73 as well as to pursue its CR 65.07 motion for interlocutory relief.

On February 1, 2006, Kindred filed a motion with the Supreme Court of Kentucky asking it to vacate this Court's January 25, 2006, order denying the motion for interlocutory relief. On May 15, 2006, the Supreme Court rendered an opinion denying

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sought a writ of prohibition from this Court. This Court denied Kindred's request and Kindred appealed that denial to the Supreme Court of Kentucky, which affirmed. *See Kindred Healthcare v. Peckler*, 2005-SC-0837-MR (May 18, 2006).

[5] 2005-CA-002226-I.

Kindred's motion to vacate. *See Kindred Hospitals Ltd. Partnership v. Lutrell*, 190 S.W.3d 916 (Ky. 2006). In doing so, the Supreme Court affirmed this Court's denial of Kindred's motion for interlocutory relief but for different reasons. The Supreme Court noted that a party aggrieved by a circuit court's ruling on the applicability of an ADR agreement could pursue relief under CR 65.07 or through the regular appeal process under CR 73. The Supreme Court noted that a party seeking relief pursuant to CR 65.07 has a high burden to meet, *i.e*. immediate and irreparable injury, loss, or damage pending a final judgment, and that this Court had appropriately denied Kindred's CR 65.07 motion. *Kindred Hospitals Ltd. Partnership*, 190 S.W.3d at 919, 922 (Ky. 2006). The Supreme Court also held that, although a party could choose which avenue of appeal to follow, it could not pursue one path and, if unsuccessful, pursue the other. *Id.* at 921. However, since this was a new rule, the Supreme Court held that it would not apply to Kindred and Kindred's CR 73 appeal could move forward. *Id.* at 922.

STANDARD OF REVIEW

Our review is limited to questions of law, which are reviewed *de novo.* Legal conclusions made thereon by the circuit court will not be disturbed absent an abuse of discretion. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001); *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky.App. 2001).

ANALYSIS

To begin our analysis, we must look to the law that applies to arbitration proceedings in Kentucky. Kentucky law generally favors the enforcement of arbitration

agreements, *Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917, 919 (Ky. 1984), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp*., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983). However, "the existence of a valid arbitration agreement as a threshold matter must first be resolved by the court." *General Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky.App. 2006) (emphasis omitted). ADR agreements are "valid, enforceable, and irrevocable, save upon such grounds as exist at law for the revocation of any contract." KRS 417.050. With these legal principles in mind, we will address the primary issue of whether there was a valid and enforceable ADR agreement.

It is undisputed that Luttrell voluntarily signed the ADR agreement and that the claims made by Luttrell would be governed by the arbitration agreement if found valid. Therefore, the first question we need to address is whether Luttrell had the authority to enter into the ADR agreement.

Kindred argues that Luttrell had actual, implied, apparent, or statutory authority to execute the ADR agreement on behalf of her mother. "[O]rdinary principles of contract and agency determine which parties are bound by an agreement to arbitrate." *See McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980). It is well-established in Kentucky that "[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Phelps v. Louisville Water*

Co., 103 S.W.3d 46, 50 (Ky. 2003). We will address whether Luttrell had actual, implied, apparent, or statutory authority to bind Duncan in turn.

A. Actual Authority

A person can grant actual authority to an agent by way of a written document such as a power of attorney. Kindred, through Debra's testimony, has admitted that it knew that Luttrell had no power of attorney and that Luttrell was acting only on behalf of Duncan as Duncan's daughter.

Kindred contends that, despite the absence of a writing, Luttrell had actual authority based on the facts that: (1) Luttrell took cash from Duncan, purchased money orders with that cash, then paid Duncan's bills with those money orders; (2) Luttrell was a co-signer on Duncan's savings account; and (3) Duncan did not object to Luttrell taking actions on her behalf. We note that, with the exception of being a co-signer on Duncan's savings account, Luttrell's handling of Duncan's business and financial affairs consisted of little more than running errands. Furthermore, although Luttrell had access to Duncan's savings account, Luttrell testified that she and her mother would go to the bank together to cash Duncan's social security check and to deposit money into that savings account. There is no evidence that Luttrell ever took any funds from that account. Therefore, we hold that, to the extent these actions by Luttrell evidence a grant of actual authority by Duncan, the authority was limited to financial matters only. Duncan did not make any actual grant of authority to Luttrell to sign an ADR agreement waiving Duncan's right to a trial or to sign any other documents on her behalf.

B. Implied or Apparent Authority

Kindred next argues that Luttrell, when she advised Debra that she was authorized to sign the admissions for Duncan, cloaked herself with the implied or apparent authority to do so.

> Implied authority is actual authority circumstantially proven which the principal actually intended the agent to possess and includes such powers as are practically necessary to carry out the duties actually delegated. *Estell v. Barrickman*, Ky.App., 571 S.W.2d 650 (1978). Apparent authority on the other hand is not actual authority but is the authority the agent is held out by the principal as possessing. It is a matter of appearances on which third parties come to rely. *Estell v. Barrickman*, *supra*.

Mill Street Church of Christ v. Hogan, 785 S.W.2d 263, 267 (Ky.App. 1990). The evidence indicates that the actual authority Luttrell had was to take cash from Duncan, to purchase money orders with that cash, and to use those money orders to pay Duncan's bills. Furthermore, Luttrell had authority to deposit or withdraw funds from Duncan's savings account. There is no evidence that Duncan authorized Luttrell to sign any documents on her behalf or that Luttrell had done so prior to admitting Duncan to Liberty. Furthermore, there can be no serious argument that signing an ADR agreement is necessary to carrying out the actual limited duties Luttrell had. Therefore, we hold that Luttrell did not have implied authority to sign the ADR agreement.

It is undisputed that, when admitted, Duncan was not consulted regarding what, if any, authority Luttrell had. Furthermore, there is no evidence that Debra had any knowledge regarding what, if any, agency relationship existed between Luttrell and

Duncan prior to the date Luttrell admitted Duncan to Liberty. Kindred argues that the assertion by Luttrell that she had the authority to sign documents on her mother's behalf gave Luttrell the apparent authority to do so. However, as noted by this Court in *Mill Street Church of Christ*, it is the authority the agent is held out by the principal as having that constitutes apparent authority. *Id*. at 267. The agent cannot create apparent authority, absent some affirmation by the principal, simply by holding herself out as having it. Therefore, we hold that Luttrell did not have apparent authority to sign the ADR agreement on behalf of Duncan.

C. Statutory Authority

Kindred finally argues that, pursuant to KRS 311.631, Luttrell had the authority to make health care decisions on behalf of Duncan. According to Kindred, that authority, when conjoined with the fact that Luttrell managed Duncan's financial affairs, gave Luttrell the authority to sign the ADR agreement and to bind Duncan. KRS 311.631 states as follows:

> (1) If an adult patient whose physician has determined that he or she does not have decisional capacity has not executed an advance directive, or to the extent the advance directive does not address a decision that must be made, any one (1) of the following responsible parties, in the following order of priority if no individual in a prior class is reasonably available, willing, and competent to act, shall be authorized to make health care decisions on behalf of the patient:
>
> > (a) The judicially-appointed guardian of the patient, if the guardian has been appointed and if medical decisions are within the scope of the guardianship;

> (b) The attorney-in-fact named in a durable power of attorney, if the durable power of attorney specifically includes authority for health care decisions;
>
> (c) The spouse of the patient;
>
> (d) An adult child of the patient, or if the patient has more than one (1) child, the majority of the adult children who are reasonably available for consultation;
>
> (e) The parents of the patient;
>
> (f) The nearest living relative of the patient, or if more than one (1) relative of the same relation is reasonably available for consultation, a majority of the nearest living relatives.

KRS 311.621(8) states that "'[h]ealth care decision' means consenting to, or withdrawing consent for, any medical procedure, treatment, or intervention." The ADR agreement does not involve "health care decisions" as defined by KRS 311.621(8). It involves what method parties to the agreement can use to resolve disputes. It does not involve medical procedures, judgments, or interventions. Therefore, KRS 311.631, in and of itself, does not provide any authority for Luttrell to bind Duncan to the ADR agreement. Furthermore, we discern nothing about the authority Luttrell did have, essentially running errands for Duncan, that could enhance the authority granted in KRS 311.631 so that it would rise to the level argued by Kindred.

In so holding, we note that some jurisdictions have dealt with this issue and stated quite clearly that absent a power of attorney, guardianship, or conservatorship, a relative, by virtue of that status alone or in conjunction with a statutory designation as a

health care proxy, does not have the authority to bind a nursing home resident to an arbitration agreement. *See Pagarigan v. Libby Care Center*, *Inc.*, 120 Cal.Rptr.2d 892 (Cal. Ct. App. 2002); *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. Dist. Ct. App. 2005).

We also note that other jurisdictions have held to the contrary. Specifically, the Mississippi Supreme Court did so in *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007), as cited by Kindred. However, we believe that case is distinguishable for at least three reasons. First, the issue before the Mississippi court was whether the ADR agreement was unconscionable. Although the court held that Mississippi's surrogate health care statute authorized a surrogate to sign an ADR agreement, it did so in a summary fashion with no real analysis of the issue. Second, the Mississippi court did not set forth or analyze how that state's definition of "health care decision" acted to extend that authority to a surrogate. We note that the Mississippi statute defines "health-care decision" as:

> [A] decision made by an individual or the individual's agent, guardian, or surrogate, regarding the individual's health care, including:
>
> (i) Selection and discharge of health-care providers and institutions;
>
> (ii) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
>
> (iii) Directions to provide, withhold or withdraw artificial nutrition and hydration and all other forms of health care.

Mississippi Code Annotated 41-41-203(h). This is significantly different from the definition contained in the Kentucky Revised Statutes. Finally, as noted by the estate, the ADR agreement in *Brown* was part of and incorporated into the admissions agreement and not a separate document. Therefore, it is unclear if the Mississippi court's holding went to the authority to sign the admissions agreement as part of "selecting health care providers" or to signing an ADR agreement as a stand alone document.

Finally, we note that Kindred has cited *Owens v. National Health Corporation, et al*., 2006 Tenn. App. LEXIS 448 (March 30, 2006), to support its position. We believe that *Owens* can be distinguished from this case because the health care surrogate in *Owens* had a Power of Attorney that empowered her to execute any waiver, release, or other document that would be necessary to implement health care decisions. Luttrell had no such Power of Attorney.

Having reviewed both positions, we hold that the jurisdictions that have found no statutory authority in their surrogate legislation to bind a person to an ADR agreement to be most persuasive. Therefore, we adopt that position.

CONCLUSION

For the foregoing reasons, we hold that Luttrell did not have the authority, either actual, apparent, implied, or by statute, to bind Duncan or her estate to the ADR agreement. Because we have so held, we need not address the additional arguments raised by Kindred and Luttrell regarding the terms of the ADR agreement.

The decision of the Casey Circuit Court is affirmed.

ALL CONCUR.

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