

RENDERED: FEBRUARY 7, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2012-CA-000977-MR

LARRY STEPP, INDIVIDUALLY AND  
LARRY STEPP, AS ADMINISTRATOR OF  
THE ESTATE OF SUSIE STEPP, DECEASED

APPELLANTS

v.

APPEAL FROM GREENUP CIRCUIT COURT  
HONORABLE ROBERT B. CONLEY, JUDGE  
ACTION NO. 10-CI-00345

WURLAND HEALTH CARE CENTER, INC.,  
D/B/A WURLAND MANOR NURSING HOME,  
A/K/A WURLAND NURSING & REHABILITATION  
CENTER; DIVERSICARE LEASING CORP.; ADVOCAT,  
INC.; AND CINDY SAYLERS, IN HER CAPACITY AS  
ADMINISTRATOR OF WURLAND HEALTH  
CARE CENTER, INC., D/B/A WURLAND MANOR  
NURSING HOME, A/K/A WURLAND NURSING &  
REHABILITATION CENTER

APPELLEES

OPINION  
REVERSING AND REMANDING

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BEFORE: MOORE, NICKELL AND STUMBO, JUDGES.

STUMBO, JUDGE: Larry Stepp, individually and as administrator of the estate of Susie Stepp, Mr. Stepp's wife, appeals from an order of the Greenup Circuit Court which enforced an arbitration agreement and dismissed the underlying case. We find that the issues on appeal concerning the enforceability of the arbitration are not ripe for a judgment on the merits, but reverse and remand the trial court's order to correct some errors made by the trial court.

On March 13, 2009, Mrs. Stepp was admitted to the Appellee's nursing home in Wurtland, Kentucky. She was suffering from a number of illnesses at the time of her admission. At the time she was admitted, Mrs. Stepp signed a number of documents. One of those documents was an optional arbitration agreement. The arbitration agreement required that any disputes which related to Mrs. Stepp's residency at the nursing home would be submitted to arbitration proceedings. Mrs. Stepp died on March 30, 2009.

Mr. Stepp originally filed suit in Greenup Circuit Court on March 29, 2010. It was briefly removed to federal court, but later refiled in the Greenup Circuit Court on May 6, 2010. The Appellees filed a motion to compel arbitration and dismiss the lawsuit on June 25, 2010. The trial court allowed limited discovery to determine the enforceability of the arbitration agreement. After some discovery, on April 18, 2012, the trial court entered Findings of Fact and Conclusions of Law wherein it enforced the arbitration agreement and dismissed Mr. Stepp's claims. This appeal followed.

Kentucky Courts have consistently held that orders compelling arbitration are not appealable. *See American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 547 footnote 2 (Ky. 2008); *Cobalt Mining, LLC v. Smith*, 2011 WL 4407464, 2 (Ky. App. 2011); *Unit Collieries, Inc. v. Rogers*, 2010 WL 4137442, 2 (Ky. App. 2010); *Jones v. JP Morgan Chase Bank, N.A.*, 2009 WL 1974849 (Ky. App. 2009); *Com. ex rel. Stumbo v. Philip Morris, USA*, 244 S.W.3d 116, 120 (Ky. App. 2007); *Fayette County Farm Bureau Federation v. Martin*, 758 S.W.2d 713, 714 (Ky. App. 1988).<sup>1</sup> Normally, we would dismiss this appeal; however, we decline to do so in this case due to a recent decision of the Kentucky Supreme Court and to correct a procedural error made by the trial court.

In this case, Mr. Stepp brought a personal injury action on behalf of the estate of Mrs. Stepp, along with other claims. One of the claims brought in the underlying action was for wrongful death. The trial court held that this claim had to be arbitrated. Pursuant to KRS 411.130, an estate's representative brings a wrongful death action not on behalf of the estate, but on behalf of the statutory wrongful death beneficiaries. In *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012), the Kentucky Supreme Court found that "under [Kentucky] law the wrongful death claim is not derived through or on behalf of the [deceased], but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss." *Id.* at 599. The Court agreed with courts from other jurisdictions which have held that "a decedent cannot bind his or her

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<sup>1</sup> Unpublished cases are cited pursuant to CR 76.28(4)(c).

beneficiaries to arbitrate their wrongful death claim.” *Id.* The Court ultimately held that “the wrongful death claimants would not be bound by their decedent’s arbitration agreement . . . because their statutorily distinct claim does not derive from any claim on behalf of the decedent, and they therefore do not succeed to the decedent’s dispute resolution agreements.” *Id.* at 600. Due to the holding in *Ping*, the trial court erred when it required the wrongful death claim to be arbitrated.

Mr. Stepp also sought damages for loss of consortium. The trial court also required that this claim be arbitrated. This too was in error for the same reasons set forth above and based on the recent holding in *Ping*. Pursuant to KRS 411.145(2), “a wife or husband may recover damages against a third person for loss of consortium, resulting from a negligent or wrongful act of such third person.” As with the wrongful death action discussed above, a loss of consortium claims would be a separate and independent cause of action that accrues to a non-party to the arbitration agreement; therefore, Mrs. Stepp could not bind Mr. Stepp to arbitrate this cause of action.

Finally, we note that the trial court dismissed Mr. Stepp’s case when it compelled arbitration. This was in error. The trial court should have stayed the personal injury part of the lawsuit pending the outcome of arbitration rather than dismissing it with prejudice. *See* KRS 417.060.

Based on the foregoing, we find that the issues on appeal dealing with whether the arbitration agreement is enforceable are not currently ripe for adjudication on the merits. In addition, the wrongful death and loss of consortium

claims are not subject to the arbitration agreement because they are independent claims and Mrs. Stepp could not bind the beneficiaries of these claims to arbitration. Finally, we leave to the discretion of the circuit court to either stay the remaining claims brought by Mr. Stepp pending the resolution of the arbitration or permit the claims to continue to adjudication.

MOORE, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING: I concur, but write separately to express my concern about an issue not mentioned in the majority opinion, but contained in the trial court's findings of fact and conclusions of law—that being when a fiduciary relationship arises between a nursing home and its residents. If, as the trial court found, “The [arbitration] Agreement was a separate, optional contract and was not a precondition to admission[,]” then I am troubled with its subsequent holding that “execution of the Arbitration Agreement occurred as part of the formation of the relationship between the [nursing home] and Mrs. Stepp, not after the relationship was formed.”

BRIEFS AND ORAL ARGUMENT  
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BRIEF FOR APPELLEES:

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ORAL ARGUMENT FOR  
APPELLEES:

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