RENDERED: NOVEMBER 27, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2012-CA-001785-MR

KINDRED NURSING CENTERS LIMITED PARTNERSHIP d/b/a MAPLE MANOR HEALTH CARE CENTER; KINDRED NURSING CENTERS, EAST, LLC; KINDRED HOSPITALS LIMITED PARTNERSHIP; KINDRED HEALTHCARE, INC.; and KINDRED HEALTHCARE SERVICES, INC. — APPELLANTS

v.

APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 12-CI-00269

MARY BULLOCK, as Administratrix of the ESTATE OF WANDALENE BULLOCK, Deceased — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, COMBS, AND JONES, JUDGES.

COMBS, JUDGE: Kindred Nursing Centers Limited Partnership, d/b/a Maple

Manor Health Care Center, and its related business entities (collectively referred to as "Kindred") appeal from an order of the Muhlenberg Circuit Court denying Kindred's motion to dismiss or in the alternative to stay proceedings and to compel arbitration. After our review, we affirm.

Kindred is a nursing and rehabilitation facility in Greenville, Kentucky. On October 21, 2011, Wandalene Bullock was admitted as a resident.

Mary Bullock, Wandalene's daughter, has held a power of attorney from her mother since June 2006. Approximately one week after her mother's admission to the nursing facility, Mary Bullock executed an alternative dispute resolution agreement. The agreement provides that the facility and its resident shall attempt to resolve by mediation any dispute arising out of or relating to the resident's stay at the facility. It also provides that should a dispute not be settled through mediation, the parties shall proceed to binding arbitration.

In bold print, the agreement provided that the parties agreed to waive the right to a jury trial, the right to trial by a judge, and the right to appeal any decision of the arbitrator(s). The agreement indicated that its acceptance was optional and that it might be revoked by the resident by providing notice to the facility within thirty days of its execution. In bold print, it also advised that the agreements of other local nursing homes might not contain an alternative dispute resolution provision. In a separate paragraph, the agreement provided that "the parties hereby make clear their intent . . . that the parties do not want their disputes/claims resolved in a judicial forum." Alternative Dispute Resolution Agreement at 3.

Within three weeks of her admission, Wandalene Bullock died at the nursing facility. Mary Bullock was appointed as the administratrix of her mother's estate. On June 7, 2012, Bullock filed this action against Kindred. She claimed damages for: personal injury, violation of the statute governing the rights of long-term care (Kentucky Revised Statute[s] ((KRS) 216.515)), and wrongful death. Kindred filed a motion to dismiss the action or, in the alternative, to stay proceedings and to compel arbitration pursuant to the provisions of the Uniform Arbitration Act. KRS 417.060. The circuit court denied the motion on September 19, 2012. Kindred filed this interlocutory appeal pursuant to the provisions of KRS 417.220(a).

On appeal, Kindred contends that the trial court erred by concluding that the power of attorney did not vest Mary Bullock with the authority necessary to enter into the arbitration agreement on her mother's behalf. The power of attorney provides, in relevant part, that Mary Bullock is granted authority to:

> make contracts, lease or sell or convey any real or personal property that I now own or may own in the future, to receive and receipt for money which now or hereafter may be due me, to retain and release all liens on real property or personal property, to draw, make and sign any and all checks, contracts or agreements; to invest or reinvest my money; to institute or defend suits concerning my property or rights, and generally do all things for me and in my name all that I might do if personally present, including giving consent for medical treatment; I ratify and adopt all lawful actions that are taken by my attorney, done in my behalf and in pursuance of this power of attorney; provided further that my attorney, is not to bind me as guarantor or endorser for accommodation nor give away any of my property.

Kindred asserts that resolution of its motion turned on the interpretation of these provisions. Since the construction of a power of attorney is a question of law for the court, our review is *do novo*. *Wabner v. Black,* 7 S.W.3d 379 (Ky. 1999).

In denying Kindred's motion, the circuit court relied upon the decision of the Supreme Court of Kentucky in *Ping v. Beverly Enterprises, Inc.,* 376 S.W.3d 581 (Ky. 2012), a case quite similar to the matter before us. In *Ping*, Donna Ping served as the attorney-in-fact for her mother, Mrs. Duncan. *Id.* at 586. Ping entered into an arbitration agreement on her mother's behalf with the nursing home where her mother was a resident. *Id.* at 587-588. After Mrs. Duncan died, Ping filed a wrongful death action on behalf of the Estate. *Id.* at 586. The nursing home sought to compel arbitration of the claim under the terms of the arbitration agreement that Ping had signed on her mother's behalf upon her admission to the facility. The Supreme Court of Kentucky ultimately determined that the power of attorney did ***not*** vest Ping with authority to execute the arbitration agreement on her mother's behalf. *Id.* at 594.

Noting that the scope of authority granted in a power of attorney is left to the principal to declare, the court carefully examined the types of transactions expressly authorized in Mrs. Duncan's power of attorney. *Id.* at 592. The Court observed that the authority granted to Ping "relates expressly and primarily to the management of [Mrs. Duncan's] property and financial affairs and to assuring that healthcare decisions could be made on [Mrs. Duncan's] behalf." *Id.* The Court determined that the decision to sign the arbitration agreement was not a health-care

decision because it was not a prerequisite for admission to the nursing home. *Id.* at 593. It also determined that a financial decision was not involved. *Id.* at 594. After thorough analysis, the Court concluded that Ping lacked authority to enter into the arbitration agreement on her mother's behalf: "Absent 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 will not be inferred lightly." *Id.* at 593. Thus, the Ping Court invited an express authorization as a clear indicator of intent as to the authority to enter into arbitration at the expense of the constitutional right of access to the courts.

Kindred argues that the *Ping* decision is distinguishable because the power of attorney under scrutiny in the case before us authorized Mary Bullock to "make and sign ***any and all*** . . . contracts, or agreements." (Emphasis added.) This clause, they argue, authorized Mary to act beyond merely making the health-care and financial decisions expressly provided for in *Ping* and, instead, encompassed a much broader authority. We disagree that the language is as expansive as Kindred argues it to be.

The *Ping* decision is the culmination of a long series of cases – both published and unpublished – concerning the scope of a power of attorney in the nursing home/arbitration context. Although numerous legal powers involving the making of contracts are recited in the durable power of attorney, the specific issue of arbitration is not addressed. We cannot re-write the power of attorney to include

a clear legal term that has been omitted and that could easily have been inserted had its presence been intended by the parties.

*Ping* is dispositive of this case on two points. First, it reiterates established case law that agreement to engage in compulsory arbitration cannot be construed from a durable power of attorney. Rather, there must be an express statement by the party executing a power of attorney of his or her intent to waive the constitutional right of access to the courts:

> In sum, the trial court correctly held that Mrs. Duncan's power of attorney did not authorize her daughter to waive unnecessarily her right to seek redress for injury in court.

*Id.* at 597.

Second, *Ping,* emphasizes that the rights of third parties in the wrongful death context are not derivative but that those rights belong to the third parties separately as their own cause of action.

> Because under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, we agree with the Courts cited above which have held that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.
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> * * * * *
>
> By executing the arbitration contract, Ms. Ping purported to agree on her mother's behalf, not her own, to arbitrate her mother's claims. Even were her mother's agreement valid, Ms. Ping's having executed it as her mother's representative would not preclude Ms. Ping, as representative of the wrongful death beneficiaries, from litigating their entirely separate claim.

*Id.* at 599.

The trial court's reliance on *Ping* in denying Kindred's motions was wholly appropriate. Therefore, we affirm the order of the Muhlenberg Circuit Court.

CAPERTON, JUDGE, CONCURS.

JONES, CONCURS IN RESULT ONLY BY SEPARATE OPINION.

JONES, JUDGE, CONCURRING IN RESULT: This appeal presents two distinct types of claims: a wrongful death claim under KRS 411.130 and survival claims (negligence, medical negligence, corporate negligence, and violations of the Long Term Care Resident's Rights statute, KRS 216.510) under KRS 411.140. Respectfully, I concur in result only. I write separately because I believe the rule announced by the majority with respect to the survival claims is overbroad in application such that it runs afoul of the Federal Arbitration Act ("FAA").

**Wrongful Death Claim**

I agree with the result reached by the majority that the wrongful death claim is not subject to arbitration. However, I write separately with respect to the wrongful death claim to clarify that the basis for my conclusion flows from the independent nature of the wrongful death claim and not from the scope of the power of attorney ("POA").

Under Kentucky law, wrongful death claims are not derivative claims. They are separate and independent claims created by statute, KRS 411.130. A wrongful death claim "is a statutory right of action which did not exist prior to the

wrongful death but arises by reason thereof." *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967). The actions of a decedent during his or her life cannot bind the statutory wrongful death beneficiaries because the claim never belonged to the decedent.

The wrongful death claim never belonged to W. Bullock. Neither W. Bullock nor her representative had the power to negotiate the claim during W. Bullock's life. Thus, even if W. Bullock had actually signed the ADR agreement herself, the Appellant would not be able to compel the wrongful death beneficiaries to arbitrate their separate and independent wrongful death claims. *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 599 (Ky. 2012) ("Because under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, . . . a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.").

**Survival Claims**

I agree with the majority's conclusion that the POA executed by W. Bullock did not give her daughter, M. Bullock, the authority to enter into the ADR agreement. Unlike the majority, my conclusion in this regard is derived from the express language in the POA, not from the absence of a distinct provision "by the person executing a power of attorney of his or her intent to waive the constitutional right of access to the courts."

The majority correctly cites *Ping v. Beverly Enterprises, Inc., supra,* as the controlling authority regarding whether a durable POA vests an agent with the authority to bind the principal to arbitration. In *Ping*, the Court held that even a comprehensive durable POA is not all-encompassing. Rather, "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.'" *Id*. at 592 (internal citations omitted). Quoting section 37 of the *Restatement (Second) of Agency*, the Court explained that "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." *Id.*

The *Ping* Court determined that the power of attorney before it related only to health-care and financial matters. Although the power of attorney contained a broad, catch-all provision, the Court determined that the catch-all provision was limited by the more specific provisions. Since the Court did not believe that the arbitration contract fell within the scope of health-care or financial matters, it held that the catch-all provision did not authorize the agent to agree to arbitration on behalf of the principal. Citing the *Restatement (Third) of Agency*, section 2.02, the Court then held that "absent 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."

In my opinion, the POA in the present case is broader and more specific than the one at issue in *Ping*. It states:

> I, Wadalene Bullock . . . do hereby constitute and appoint Mary Bullock . . . to act as my true and lawful attorney in fact, with full power in my name, to make contracts, lease or sell or convey any real or personal property that I now own or may own in the future, to receive money which now or hereafter may be due me, to retain and release all liens on real property or personal property, to draw, ***make and sign any and all checks, contracts or agreements***; to invest or reinvest my money; to **institute or defend suits concerning my property or rights**, and generally do all things for me in my name all that I might do if personally present, including giving consent for medical treatment; I ratify and adopt all lawful actions taken by my attorney, done in my behalf and in pursuance of this power of attorney; provided further that my attorney, is not to bind me as guarantor or endorser for accommodation nor give away any of my property. (emphasis added)

The POA in *Ping* did not contain express provisions granting the attorney-in-fact the authority "to institute or defend suits concerning my property or rights" or to "make and sign any and all checks, contracts or agreements." In my opinion, the POA conferred on M. Bullock the right to bring and defend legal "actions" regarding W. Bullock's rights and property (which would include the survival claims) and to make contracts and other decisions related to those "actions."

Thus, in my opinion, the determinative issue is whether agreeing to arbitration is an act generally done in connection with the act or business of instituting or defending "suits." This requires consideration of the meaning of the term "suit." This Court has previously defined suit as "[a] generic term of

comprehensive signification, and applies to any proceeding by one person or persons against another or others ***in a court of justice*** in which the plaintiff pursues, ***in such court***, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity." *Sahni v. Hock,* 369 S.W.3d 39, 48 (Ky. App. 2010) (quoting BLACK'S LAW DICTIONARY (revised 4th ed. 1968) (emphasis added)).

In my opinion, the use term "suit" in the Power of Attorney vests M. Bullock with the power to take actions consistent with instituting or defending matters involving her rights or property *in a court of justice*. Implicit in such a grant would be the authority to determine whether to file an action, engage the services of an attorney, or settle a claim before trial. I do not believe, however, that arbitration or alternative dispute resolution is consistent with the commonly accepted definition of suit such that the power to agree to arbitration can be inferred from or implicitly flows from the POA.

While no court in Kentucky has been confronted with this precise issue,[1] several courts from other jurisdictions have held that outside of the insurance coverage arena "suit" does not include arbitration. *See, e.g., Personal Sec. & Safety Systems Inc. v. Motorola Inc.,* 297 F.3d 388, 396 (5th Cir. 2002); *Kel Homes, LLC v. Burris*, 933 So.2d 699 (Fla. App. 2 Dist. 2006) ("Term 'suit' in

[1] *In Aetna Cas. & Sur. Co. v. Com*., 179 S.W.3d 830, 837 (Ky. 2005), the Kentucky Supreme Court held the term "suit" was ambiguous as used in an insurance policy, and therefore, determined that the insurer had a duty to defend administrative proceedings even though they were not before a court of justice. The public policy concerns and rules of contract construction involving insurance contracts are not present in this claim. As such, I believe the *Aetna* case is inapposite.

provision of contract between home builder and home purchaser that authorized purchaser to file a 'suit for specific performance' in the event of default by builder did not mean an arbitration proceeding."); *Vaubel Farms, Inc. v. Shelby Farmers Mut.*, 679 N.W.2d 407, 412 (Minn. App. 2004). The Seventh Amendment to the United States Constitution guaranteeing a right to trial by jury in federal court uses the term "suit" specifically to refer to an action in a court of justice. ("In Suits at common law . . . trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."). This adds further evidence in support of the proposition that the most commonly accepted definition of the term "suit" is an action in a court of justice, not before an arbitrator.

Additionally, I find it relevant that the ADR agreement at issue uses different terms to refer to arbitration and a matter before a court of justice. The Agreement refers to arbitration as a "proceeding," but refers to a matter before a court of justice as a "legal action."[2] This supports the conclusion that there is a meaningful distinction between arbitrations and suits/actions and that the Appellant, the drafter of ADR agreement, recognized the distinction.

In sum, in my opinion the POA vested M. Bullock with the incidental authority to make decisions related to instituting or defending suits concerning her property or rights in a court of justice. By using the term "suit," I believe that W.

[2] "The terms 'action' and 'suit' are nearly if not quite synonymous. But lawyers usually speak of proceedings in courts of law as 'actions,' and of those in courts of equity as 'suits.'" (BLACK'S LAW DICTIONARY 9th ed. 2009).

Bullock expressed her intent that M. Bullock proceed in a court of justice. Agreeing to arbitrate a future dispute outside a court of justice is not a power that would be incidental to exercising the power to institute or defend a suit. Thus, I would hold that the POA did not vest M. Bullock with actual authority to enter into the arbitration agreement at issue. Furthermore, I do not believe that Appellant could have reasonably believed that M. Bullock had apparent authority to do so where the ADR agreement itself distinguished between suits/actions and arbitration proceedings.

Instead of focusing on whether the power to institute and defend actions incidentally includes the power to agree to arbitration, the majority focuses on the absence of an express statement in the power of attorney indicating that W. Bullock's grant of authority included the right to waive her "constitutional right of access to the courts." In other words, the majority's conclusion is that the "specific issue of arbitration" must be addressed in the power of attorney. I believe requiring such an express statement runs afoul of the Federal Arbitration Act.

The Federal Arbitration Act was enacted "to ensure judicial enforcement of privately made agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985). The FAA preempts any contradictory state law and applies to any contract that evidences an intention to settle any controversy arising from the transaction through arbitration. *Stuler v. T.K. Constructors Inc.*, 448 F.3d 343, 345 (6th Cir. 2006). The FAA provides that an agreement to arbitrate will be enforceable except for "such grounds as exist at law

or in equity for the revocation of any contract." *Id.* State law governing the validity, revocability and enforceability of contracts applies to arbitration clauses. *Id.* State laws applicable only to arbitration agreements, however, are preempted by the FAA. *Great Earth Cos., Inc. v. Simons*, 288 F.3d 878, 889 (6th Cir. 2002). The United States Supreme Court has held that the states cannot apply state common law doctrines in such a way as to place heightened requirements on arbitration. *See Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions.").

I believe that in interpreting *Ping* to require a power of attorney to contain an express statement regarding the power to enter into arbitration, the majority runs afoul of the Federal Arbitration Act's mandate that state contract law cannot be applied in a way that is applicable only to arbitration provisions.[3] *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 166 (5th Cir. 2004) ("[A] state court or legislature may not invalidate arbitration agreements on the basis of a rule of law that applies only to such agreements.").

I respectfully submit that if the POA at hand granted M. Bullock the right to make decisions related to "disputes," "claims," or "proceedings" affecting

[3] In an unpublished opinion, a federal district court decided that applying *Ping* in this fashion does violate the FAA, and therefore, is preempted by it. *See GGNSC Vanceburg, LLC v. Taulbee*, No. 5:13–CV–71–KSF, 2013 WL 4041174, *9 (E.D.K.Y., Aug. 7, 2013) ("Taulbee's arguments that arbitration agreements are different and require more than the general power to contract for authorization to execute one are of no help to her. That line of reasoning would simply result in preemption of such a requirement under the FAA.").

her property or rights, she would have had authority to enter into the arbitration agreement. Deciding whether to arbitrate a claim or dispute is as incidental to the dispute/claim/proceeding process as deciding whether to hire an attorney or enter into a settlement or any one of the multitude of decisions involved in the litigation process. I believe that all such acts would have fallen squarely within M. Bullock's incidental authority to make decisions related to any disputes, claims, or proceedings concerning her property or rights and to make contracts associated therewith.

In this particular case, however, W. Bullock expressed a desire to have any disputes related to her property or rights instituted or defended as part of a suit in a court of law. Her stated preference for such issues to be litigated as a suit in a court of law precluded M. Bullock from entering into the ADR agreement on her behalf. Therefore, I agree with the majority that the trial court's order should be affirmed, but disagree with the majority that the absence of an express provision in the POA was required.

BRIEF FOR APPELLANTS:

Donald L. Miller, II
J. Peter Cassidy, III
Kristin M. Lomond
Louisville, Kentucky

BRIEF FOR APPELLEE:

Mary J. Perry
Robert E. Salyer
Tampa, Florida