

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-002027-MR

GGNSC FRANKFORT, LLC d/b/a
GOLDEN LIVINGCENTER-FRANKFORT;
GGNSC ADMINISTRATIVE SERVICES, LLC d/b/a
GOLDEN VENTURES;
GGNSC HOLDINGS, LLC d/b/a GOLDEN HORIZONS;
GGNSC EQUITY HOLDINGS, LLC;
GGNSC EQUITY HOLDINGS II, LLC;
GOLDEN GATE NATIONAL SENIOR CARE, LLC d/b/a
GOLDEN LIVING; GOLDEN GATE ANCILLARY, LLC d/b/A
GOLDEN INNOVATIONS; GGNSC CLINICAL SERVICES, LLC d/b/A
GOLDEN CLINICAL SERVICES;
AND GPH FRANKFORT, LLC

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00432

RICHARD BOLIN, AS ADMINISTRATOR
OF THE ESTATE OF CLARA B. BOLIN, DECEASED

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND MAZE, JUDGES.

CLAYTON, JUDGE: This is an appeal from the Franklin Circuit Court's determination that Clara Bolin, who was a nursing home resident, did not grant her son, Richard Bolin, as power of attorney the ability to limit her to binding arbitration in actions brought against the nursing home. Based upon the following, we affirm.

BACKGROUND SUMMARY

Clara Bolin executed a power of attorney (POA) and made her son, Richard Bolin, her attorney-in-fact on October 11, 2002. Pursuant to the POA, Richard was authorized:

To make, execute, and deliver for me and in my name any and all deeds, documents, writings, checks, drafts and notes of all kinds and descriptions.

To generally do and perform any and all acts and things whatsoever in and about my estate, property and affairs, in all respects and as fully as I could do if personally present,

Without limiting or derogating from this general power of attorney, I designate Richard S. Bolin as my health care surrogate to make any health care decisions for me when I no longer have decisional capacity...

Richard admitted Clara to Golden LivingCenter – Frankfort (GLC-Frankfort), a long-term care facility in Frankfort, Kentucky. At the time of admission, Richard signed documents, one of which was titled “ALTERNATIVE DISPUTE RESOLUTION AGREEMENT [ADR].” The Agreement was a

separate document and set forth that it was not a condition of admission to or continued residence at GLC-Frankfort. The Agreement provided that:

This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Facility or the Admissions Agreement between the Parties that would constitute a legally cognizable cause of action in a court of law sitting in the state where Facility is located. Covered Disputes include but are not limited to all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party;...negligence; gross negligence; malpractice; and any alleged departure from any applicable federal, state, or local medical, health care, consumer, or safety standards.

Clara remained a resident at GLC-Frankfort until April of 2011, when she was transferred to a hospital and later passed away.

On March 30, 2012, Richard filed suit against GLC-Frankfort asserting negligence, medical negligence, corporate negligence, wrongful death and violations of Kentucky's Residents' Rights Statute, Kentucky Revised Statutes (KRS) 216.515, *et seq.* The Appellants moved the circuit court to dismiss Richard's lawsuit, or to stay it pending Alternative Dispute Resolution (ADR) proceedings. The trial court held the motion in abeyance until the Kentucky Supreme Court issued an opinion in *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012). After the ruling, the trial court denied the Appellants' motion, after which, this appeal was initiated.

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 (Ky. 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.

DISCUSSION

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

[A]n 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 at 592. As in *Ping*, in this case, Richard was granted a durable power of attorney to take care of any health care issues Clara would encounter should she become incapable. It was under the durable power of attorney that Richard was acting when he signed the admission documents for his mother. At the time of admission, Richard was informed that the arbitration Agreement was optional and that his mother's admission did not rely on his signing it. Such was the case in *Ping* as well, and the Kentucky Supreme Court relied on this for its decision:

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.2007); *Triad Health Management of Ga. III, LLC v. Johnson*, 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. *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 593.

As in *Ping*, the arbitration Agreement was not a requirement of the Appellants in order for Clara to be admitted as a resident. Further, the enumerated powers lacked any express authority to arbitrate and to waive Clara's constitutional rights. Richard did not sign the Agreement in his individual capacity and therefore we do not agree with the Appellants that Richard's wrongful death claim is effected by the ADR Agreement. Thus, we agree with the trial court that the *Ping* decision is controlling and the arbitration Agreement was not enforceable. We therefore affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Marcia L. Pearson
Louisville, Kentucky

BRIEF FOR APPELLEE:

Corey T Fannin
Robert E. Salyer
Lexington, Kentucky