RENDERED: JUNE 20, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000005-MR

KINDRED HEALTHCARE, INC.;
KINDRED HEALTHCARE OPERATING, INC.;
KINDRED NURSING CENTERS EAST, LLC;
KINDRED NURSING CENTERS LIMITED
PARTNERSHIP, D/B/A OAKVIEW NURSING
& REHABILITATION CENTER;
CYNTHIA PORTER, IN HER CAPACITY AS
ADMINISTRATOR OF OAKVIEW NURSING
& REHABILTATION CENTER — APPELLANTS

APPEAL FROM MARSHALL CIRCUIT COURT
v. HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 12-CI-00178

NICHOLE LEAB, AS ADMINISTRATOR
OF THE ESTATE OF PRISCILLA LEAB,
DECEASED AND NICOLE LEAB, ON
BEHALF OF THE WRONGFUL DEATH
BENEFICIARIES OF PRICILLA LEAB — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: On December 31, 2010, Priscilla Leab became a resident of Oakview Nursing & Rehabilitation Center, a facility owned and operated by Kindred Nursing Centers Limited Partnership; Kindred Healthcare, Inc.; Kindred Healthcare Operating, Inc.; and Kindred Hospitals Limited Partnership (collectively "Kindred"). She remained a resident until her death on November 22, 2011. Nicole Leab, as administrator of the estate of Priscilla Leab, and on behalf of the wrongful death beneficiaries of Priscilla Leab (the Estate) filed this action on May 4, 2012, in the Marshall Circuit Court alleging negligence against Kindred in the care and treatment of Priscilla. On June 13, 2012, Kindred filed a motion to compel arbitration and dismiss or stay the action. The circuit court denied the motion and Kindred's subsequent motion for reconsideration. This appeal followed.

Two documents are pertinent. The first is a general durable power of attorney executed by Priscilla on October 3, 2007, appointing her daughter, Shirley Hinton, and her son, Gary Leab, as her attorneys-in-fact. Section II is pivotal to this appeal and states:

> This Power of Attorney shall be effective upon the Grantor's subsequent physical and/or mental incapacity or incompetency, *satisfactory proof of which shall be shown by my herein named attorney.* The standard for satisfactory proof is a notarized letter from a physician or psychologist stating that I need assistance to manage my daily affairs. (emphasis added).

The second document, an "Alternative Dispute Resolution Agreement Between Resident and Facility" (ADR), was signed by Gary, purportedly as

Priscilla's attorney-in-fact upon her admission to Oakwood. The ADR provided all disputes between Kindred and Priscilla, relating to or arising from her residency at Kindred's nursing care facility, were to be submitted to arbitration rather than trial.

On the basis of the ADR's arbitration provisions, Kindred moved the court to compel arbitration and stay or dismiss the pending lawsuit. The Estate responded arguing no valid arbitration agreement existed because the power of attorney did not confer authority upon Gary to execute the ADR. It further argued the arbitration agreement violates Kentucky's Resident Rights Statute, KRS 216.515, and, finally, that it is unconscionable.

A hearing was held on the motion to compel arbitration. The Estate argued Kindred failed to prove the power of attorney was effective on the date the ADR was signed because there was no evidence Gary showed a notarized letter as required in the power of attorney. Kindred responded that it did not have such a letter in its possession and requested additional time to conduct discovery to determine if Priscilla was physically and/or mentally incompetent when the ADR agreement was signed.

Following a hearing, the circuit court found the absence of any evidence regarding the effective date of the power of attorney resolved all issues and denied arbitration. Kindred filed a motion to reconsider pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, arguing it was premature to deny the motion to compel arbitration without allowing Kindred to conduct limited discovery on the

facts surrounding the effective date of the power of attorney. It also argued that under the facts, the purpose of the provision requiring the showing of a notarized letter from a physician as required by the power of attorney was satisfied. The circuit court denied Kindred's motion to reconsider. Kindred appealed.

This Court has jurisdiction to consider an order denying an application to compel arbitration. KRS 417.220. Having established jurisdiction, we address the issues presented.

Kindred argues the circuit court erroneously denied its request to conduct discovery regarding the effective date of the power of attorney. The Estate counters Kindred had the burden to establish a valid arbitration agreement existed and, therefore, was required to request discovery prior to the circuit court's ruling on the motion to compel arbitration or produce evidence that a notarized letter as required in the power of attorney was shown by Gary when the ADR was signed.

KRS 417.050 provides that "[a] written agreement to submit any existing controversy to arbitration between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract." [T]he existence of a valid arbitration agreement is a threshold matter to be resolved by the court." *Kindred Nursing Centers Ltd. Partnership v. Brown,* 411 S.W.3d 242, 246 (Ky.App. 2011). "In other words, the court-not an arbitrator-must decide whether the parties have agreed to arbitrate based on fundamental principles governing contract law." *Mortgage Electronic Registration Systems, Inc. v. Abner*, 260 S.W.3d 351, 353 (Ky.App. 2008).

Although arbitration is favored in the law, the burden is upon the party seeking arbitration to establish whether a valid arbitration agreement exists. *GGNSC Stanford, LLC v. Rowe*, 388 S.W.3d 117, 121 (Ky.App. 2012). Necessarily, the power of attorney must have been effective when Gary signed the ADR for that document to be enforceable. As explained in *Kindred Nursing Centers Ltd. Partnership v. Leffew*, 398 S.W.3d 463, 469 (Ky.App. 2013):

> "[A] power of attorney is a form of agency." *Moore v. Scott,* 759 S.W.2d 827, 828 (Ky.App. 1988); *see also* 3 Am.Jur.2d *Agency* § 21 (2013)("A power of attorney is an instrument ... by which one person, as principal, appoints another as his or her agent and confers upon the agent the authority to perform certain specified acts ... [.]"). The scope of an agent's authority is limited to that which the principal confers upon the agent, or that which is reasonable for the agent or third parties to believe the principal intended to confer. *Herfurth v. Horine,* 266 Ky. 19, 98 S.W.2d 21, 24 (1936) ("the principal is bound by the acts of the agent within the apparent scope of the authority conferred by him, and this even though the authority be actually limited, if the person dealing with the agent be ignorant of the limitation."); *see also* 3 Am.Jur.2d *Agency* § 69 (2013).

"If the power of attorney is to become effective upon the disability or incapacity of the principal, the principal may specify the conditions under which the power is to become effective and may designate the person, persons, or institution responsible for making the determination of disability or incapacity." KRS 386.093(5). In this case, the power of attorney was not effective unless when the ADR was signed, Gary presented proof that Priscilla was physically and/or mentally incompetent by showing Kindred a "notarized letter from a physician or

psychologist stating that [Priscilla needed] assistance to manage [her] daily affairs." Consequently, Kindred had the burden of presenting evidence that the power of attorney was effective by satisfaction of that contingency. Having failed to do so, there was no evidence that the arbitration agreement was valid.

Kindred contends the evidence necessary to prove the power of attorney was effective when the ADR was signed by Gary exists exclusively within the Estate's possession and it should have been permitted additional time for discovery. We disagree.

Long ago, this Commonwealth adopted the view expressed in *Gouldy v. Metcalf*, 75 Tex. 455, 12 S.W. 830, 16 Am. St. Rep. 912: "Authority conferred by power of attorney will be construed strictly, so as to exclude the exercise of any power which is not warranted either by the actual terms used, or the necessary means of executing the authority with effect." *U.S. Fidelity & Guaranty Co. v. McGinnis' Adm'r*, 147 Ky. 781, 145 S.W. 1112, 1114 (1912). The power of attorney plainly stated it was effective only upon showing satisfactory proof in the form of "a notarized letter from a physician or psychologist stating [Priscilla needed] assistance to manage [her] daily affairs."

Priscilla unequivocally stated the conditions precedent to the power of attorney being effective. Priscilla not only specified it would not be effective unless she was physically or mentally incapacitated or incompetent but added the condition satisfactory proof be shown by Gary or Shirley in the form of a physician's notarized letter before exercising any authority pursuant to the power

of attorney. Therefore, we conclude Kindred had the burden to present evidence that when Gary signed the ADR as Priscilla's attorney-in-fact, he presented the required notarized letter. Whether that condition was met would necessarily be within the Kindred's knowledge because it accepted Gary's signature as Priscilla's attorney-in-fact.

In its motion to reconsider filed pursuant to CR 59.05, Kindred asserted the Estate's allegations in its complaint that "at all times relevant to this action, Priscilla Leab was of unsound mind and remained of unsound mind to her death" precludes it from denying the Priscilla's incapacity. It also attached medical records signed by her treating physician and included in her Kindred admissions records stating Priscilla was incapable of making her own health decisions.

Procedurally, Kindred's motion was improper. "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion,* 163 S.W.3d 888, 893 (Ky. 2005). Moreover, Kindred's argument does not negate its failure to produce any evidence that Gary showed the required notarized letter at the time the ADR was signed.

Because we affirm the trial court's order denying the motion to compel arbitration, we do not discuss whether the power of attorney granted Gary authority to execute the ADR or other remaining issues. The order of the Marshall Circuit Court is affirmed.

ALL CONCUR.

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