RENDERED: JULY 25, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000880-MR

KINDRED NURSING CENTERS
LIMITED PARTNERSHIP,
d/b/a KINDRED NURSING AND
REHABILITATION-WOODLAND,
f/k/a WOODLAND TERRACE
HEALTHCARE FACILITY;
KINDRED NURSING CENTERS
EAST, LLC; KINDRED HOSPITALS
LIMITED PARTNERSHIP; KINDRED
HEALTHCARE, INC.; AND KINDRED
HEALTHCARE OPERATING, INC. APPELLANTS

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 13-CI-00008

DOROTHY BUTLER, AS EXECUTRIX
OF THE ESTATE OF OTHA BUTLER,
DECEASED APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, JONES, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Kindred Nursing Centers Limited Partnership, d/b/a Kindred Nursing and Rehabilitation-Woodland, and its related business entities (collectively referred to as "Kindred") appeal from an order of the Hardin Circuit Court denying Kindred's motion to dismiss or in the alternative to stay proceedings and compel arbitration of claims brought by Dorothy Butler, executrix of the Estate of Otha Butler. After our review, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Kindred Nursing and Rehabilitation-Woodland (hereinafter "Woodland") is a nursing and rehabilitation facility in Elizabethtown, Kentucky. On September 28, 2011, Otha Butler was admitted as a resident to the facility. He resided at Woodland from September 28 until October 25, 2011, and died at Hardin Memorial Hospital on November 12, 2011.

On August 24, 2011, about a month before his admittance to Woodland, Otha executed a "Financial Power of Attorney and Healthcare Power of Attorney," which provided, in part:

> I, Otha Butler . . . hereby appoint Dorothy Butler . . . and/or Terry Butler . . . as my Attorneys-in-Fact. Either agent may act independently without the consent of the other. The power of attorney is to be my true and lawful attorney in fact, with full power for me in my name and stead, to make contracts, lease, sell, or convey, or purchase any real or personal property . . . to draw make and sign any and all checks, contracts or agreements . . . to institute or defend suits concerning my property or rights and generally to perform for me and in my name all that I might do if present. . .

Pursuant to this document, Dorothy Butler and Terry Butler, his children, were appointed attorneys-in-fact with respect to all matters including real and personal property, financial affairs, legal affairs, and healthcare decisions.

Six weeks later, Otha was admitted to Woodland. As a part of the admission process, Terry Butler executed a number of documents on behalf of Otha. One of the documents signed by Terry was styled "Alternative Dispute Resolution Between Resident and Facility (Optional)" (hereinafter "the arbitration agreement"). Terry signed the arbitration agreement in his capacity as "son" and did not indicate on the form his status as attorney-in-fact.

The arbitration 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 trial, including their right to a jury trial, their right to a trial by a judge, and their 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.

After Otha's death, Dorothy Butler was appointed the Executrix of his estate. On January 2, 2013, she filed this action against Kindred. In the complaint, Dorothy alleged personal injury, violation of the statutory rights of long-term residents[1] and the wrongful death of Otha. Kindred then filed a motion to compel arbitration based on the arbitration agreement. The trial court denied the motion on April 12, 2013.

The trial court held that Terry did not have the authority to sign the arbitration agreement for Otha. First, the trial court noted that Terry signed as "son" when he entered into the arbitration agreement for Otha. He selected "son" from a list of possible sources of capacity listed next to the "Legal Representative" under the signature line. The list included "durable power of attorney." Hence, the trial court observed that on the face of the arbitration agreement, nothing indicated that it was signed by Otha's attorney-in-fact. Therefore, since the arbitration is signed by Otha's "son," it did not authorize Otha's arbitration agreement.

Second, relying on the Kentucky Supreme Court's decision in *Ping v. Beverly Enterprises, Inc.,* 376 S.W.3d 581 (Ky. 2012), the trial court concluded that even if Otha's power of attorney permitted Terry to sign the arbitration agreement on his behalf, the power of attorney itself was not broad enough to grant Terry (or Dorothy) the power to waive Otha's right to a jury. The trial court cited the Kentucky Supreme Court decision in *Ping*, which said "[a]bsent authorization in the power of attorney to settle claims and disputes or some such express

[1] Kentucky Revised Statutes (KRS) 216.515.

authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.* at 593. Consequently, the trial court determined that the power of attorney was not sufficient to authorize the arbitration agreement. Lastly, the trial court recognized that Otha's power of attorney could not authorize an arbitration agreement for a wrongful death claim. *Id*. at 599-600.

Kindred filed this interlocutory appeal pursuant to KRS 417.220(a). It challenges the trial court's decision that the power of attorney was not sufficiently broad enough to grant Terry the authority, as an attorney-in-fact, to authorize the arbitration agreement. In addition, Kindred contends that the Hardin Circuit Court's interpretation of Otha's power of attorney singles out arbitration for disfavored treatment in contravention of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq. and United States Supreme Court precedent. Furthermore, Kindred argues that the trial court's application of *Ping* to dissimilar facts exhibits hostility toward arbitration.

In response, Dorothy agrees with the trial court and contends that Terry did not have authority to bind Otha to arbitration because he did not sign as an attorney-in-fact, the power of attorney itself did not provide the authority to bind Otha to arbitration, the decision does not discriminate against arbitration agreements, and wrongful death beneficiaries are not bound to arbitration agreements.

STANDARD OF REVIEW

An appellate court considers the construction of a power of attorney as a question of law, that is, determined *de novo*. *Ingram v. Cates*, 74 S.W.3d 783 (Ky. App. 2002). Moreover, under both the Kentucky Arbitration Act and the Federal Arbitration Act, a party seeking to compel arbitration under an arbitration agreement must first establish validity of the agreement. *Ping*, 376 S.W.3d at 590. Further, unless the parties clearly and unmistakably manifest a contrary intent, that existence of a valid agreement to arbitrate is before the court, not the arbitrator. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995).

The existence of the agreement depends on state law rules of contract formation. *Arthur Andersen, LLP v. Carlisle*, 556 U.S. 624, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009). An appellate court reviews a trial court's interpretation and construction of a contract as a matter of law and, thus, under a *de novo* standard, too. *Lynch v. Claims Management Corporation*, 306 S.W.3d 93, 96 (Ky. App. 2010). Still, a 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). With this standard in mind, we turn to the case at hand.

ANALYSIS

The enforcement and effect of an arbitration agreement is governed by the Kentucky Uniform Arbitration Act (KUAA), KRS 417.045 et seq., and the FAA. "Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor." *Ping*, 376 S.W.3d at 588.

Nonetheless, as observed above, under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. It is a threshold matter which must first be resolved by the court. *Mt. Holly Nursing Center v. Crowdus*, 281 S.W.3d 809, 813 (Ky. App. 2008) (internal citations omitted). Additionally, the determination of the validity of an arbitration agreement is controlled by state law rules of contract formation. *Ping*, 376 S.W.3d at 590.

Initially, we discuss Kindred's claim that the trial court's interpretation of Otha's power of attorney case singles out arbitration for disfavored treatment in contravention of the FAA and U.S. Supreme Court precedent, and whether the application of *Ping* to facts characterized as disanalagous to it exhibits hostility toward arbitration.

As previously mentioned, to decide whether an arbitration agreement exists relies on state law contract principles, including matters concerning the authority of an agent to enter into a contract and which parties may be bound by that contract. *Arthur Andersen LLP*, 556 U.S. at 630-31, 129 S.Ct. at 1901-02. Further, the determination of the existence of an arbitration agreement does not preempt state law contract principles. The burden of establishing the existence of an arbitration agreement that conforms to statutory requirements rests with the party seeking to enforce it. *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 824 (Ky. App. 2008).

The FAA itself requires that these principles must be applied to arbitration agreements in the same manner as other contracts. *Ping*, 376 S.W.3d at 589. Accordingly, the trial court's analysis as to whether a valid agreement had been entered into between Kindred and Otha rests squarely on determining the validity of the arbitration agreement and was not, contrary to the assertions of Kindred, done to disfavor arbitration or show hostility toward arbitration. Rather, under both federal and state law, it must be ascertained whether an agreement exists. If it is determined that a valid agreement exists, courts in Kentucky clearly support arbitration. Here, the trial court correctly followed precedent to evaluate the existence of a valid arbitration agreement.

In order to decide whether an agreement was contractually entered into, we must engage in a rigorous review of the impact of the power of attorney documents. A "durable power of attorney" is defined in KRS 386.093 as:

> a power of attorney by which a principal designates another as the principal's attorney in fact in writing and the writing contains the words, "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time" . . . .

Significantly, the general rule of construction is that when a power of attorney delegates authority to perform specific acts and also contains general words, the powers of attorney are limited to the particular acts authorized. *Harding v. Kentucky River Hardwood Company*, 205 Ky. 1, 265 S.W. 429, 431 (Ky. App. 1924). Courts adopted an "utmost good faith" standard to be used to judge the acts of the attorney-in-fact. *Wabner v. Black*, 7 S.W.3d 379, 381 (Ky. 1999).

However, before directing our attention to the power of attorney, it is necessary to consider the manner in which Terry signed the arbitration agreement. He signed it as "son." The trial court held that Kindred operated under the assumption that Terry signed it as attorney-in-fact but provided no evidence that he represented this to them or even that he did so.

Kindred asserts that Dorothy and the Estate have not denied that Terry had a power of attorney. While this may be accurate, the issue, however, is not whether he was an attorney-in-fact but whether he signed the arbitration agreement in this capacity. Dorothy maintains that because he signed as "son," the arbitration agreement was not authorized, and the Estate is not bound by it.

On the arbitration agreement document, the left side of the signatures is for the resident. Three signature lines are listed and they say, on the first line, "Print Name of Resident"; on the second line, "Signature of Resident or Legal Representative"; and on the third line "Legal Representative Printed Name and Capacity." The following capacities for a legal representative are provided for the signatory to choose from – "guardian, durable power of attorney, spouse, son, daughter, etc."

Terry chose the capacity of "son" in filling out the third line of signatures. He is authorized under KRS 311.631, which is titled "Responsible parties authorized to make health care decisions," to sign in this capacity. This statutory capacity allows him to make decisions about medical treatment but does not encompass the authority to authorize an arbitration agreement for his father.

The trial court recognized that there is a difference between signing as "son" rather than "attorney-in-fact." It is undeniable that a signature of an individual can signify a vast array of legal relationships. This factor is extremely important for persons given authority under a power of attorney because in that capacity they have actual authority to act for another.

Dorothy presents several cases that show examples demonstrating the importance of setting forth capacity of the signatory. *See, e.g. Kennedy v. Joy Mfg. Co.*, 707 S.W.2d 362 (Ky. App. 1986); *Enzweiler v. Peoples Deposit Bank of Burlington, Ky.*, 742 S.W.2d 569 (Ky. App. 1987). In these cases, failure by the party to indicate the capacity under which a signature was executed caused the party to be bound by the capacity by which they signed a document.

Kindred attempts to distinguish the situation here by claiming that since Otha executed a power of attorney document naming Terry as an attorney-in-fact, Terry's mere signature, notwithstanding that he signed it as "son," implicated the power of attorney directive. Yet, as previously explained, Kindred did not establish that when the arbitration agreement was signed, it operated under the knowledge that Terry had a power of attorney. If so, it could have asked for him to sign in this capacity. Nor does the power of attorney document suggest that any time Terry signs his name to a document, it is in the capacity as Otha's attorney-in-fact.

Kindred cites *Flushing Preferred Funding Corp. v. Patricola Realty Corp.*, 36 Misc.3d 1240(A), 964 N.Y.S.2d 58 (N.Y. Sup. 2012), for support of the

proposition that it was not necessary for Terry to indicate that he was signing as an attorney-in-fact because of the separate power of attorney document. First, New York law is not persuasive in Kentucky. Second, the issue therein was whether the execution of a mortgage was sufficient after the party recited her capacity *as agent* without disclosing the power of attorney. The case can be distinguished since Terry signed as "son," not as an agent. Second, *Flushing* involved a mortgage, which is subject to specialized New York law.

The second case cited by Kindred, *Holifield v. Beverly Health and Rehabilitation Services, Inc.*, 2008 WL 2548104 (W.D.Ky. 2008), is an unpublished federal case. That case, too, is inapposite since it involved a case where the arbitration agreement was signed by an attorney-in-fact. The last case, *Oldham v. Extendicare Homes, Inc.*, 2013 WL 1878937 (W.D.Ky. 2013), also permitted a party who was designated as an attorney-in-fact to sign an arbitration agreement. Kindred suggests that the arbitration agreement was signed by the attorney-in-fact she did not so designate. Although the case states that the agent signed the agreement as Jerald's legal representative, it does not say that she did so without indicating that she was an attorney-in-fact. Moreover, Terry did not just omit the "attorney-in-fact" designation; he signed the agreement as "son."

Additionally, our review of the Woodland arbitration agreement shows that not only did Terry sign it as "son" without indicating he was an attorney-in-fact, but also Woodland improperly signed the agreement, that is, no authorized agent of Woodland signed the agreement. Again, on the right side of

the document where Woodland signs the arbitration agreement, there are three signature lines. The first line says "Print Name and Number of facility." The second line says "Signature and Title of Facility's Authorized Agent." Lastly, the third line says "Printed Name of Facility's Authorized Agent."

On the second line, which requires the signature and title of the facility's authorized agent, is hand-printed "Admissions Coordinator." No signature is provided. Then, on the third line, a partial, printed name is crossed out and initialed "CK" and the printed name "Jennifer Ray" appears. It is questionable whether Woodland signed the agreement. Therefore, we concur with the trial court that the arbitration agreement is not valid because of Terry's signature as "son."

Since we have decided that the arbitration agreement was not properly executed and concurred with the trial court on this issue, it is not necessary for us to specifically address whether the power of attorney itself allowed for the attorneys-in-fact to bind Otha to arbitrate any disputes with Kindred.

However, as stated in both *Ping* and the trial court's decision, without any authorization in the power of attorney to settle claims and disputes or an express authorization to waive jury trials, such a waiver should not be inferred lightly. *Ping*, 376 S.W.3d at 593.

CONCLUSION

Terry Butler, by signing the arbitration agreement as "son," did not authorize an arbitration agreement with Woodland on his father's behalf. The decision of the Hardin Circuit Court is affirmed.

JONES AND TAYLOR, JUDGES, CONCUR IN RESULT ONLY.

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