

Administratrix Kathleen Moore-Stewart,¹ appeals various orders of the Jefferson Circuit Court compelling arbitration, confirming the arbitration award, and dismissing the civil action filed against LP Louisville South, LLC d/b/a Signature Healthcare of South Louisville and Signature Healthcare, LLC. We affirm.

FACTS AND PROCEDURE

During 2012, Alonna was a resident of a nursing home facility owned by Signature. In November 2013, Alonna's mother and legal guardian, Kathleen, filed a complaint against Signature in Jefferson Circuit Court alleging negligence in Alonna's care and treatment. In response, Signature asserted Kathleen signed an arbitration agreement when Alonna was admitted to the facility. Consequently, Signature moved to compel arbitration (and either dismiss or stay the litigation) pursuant to the Kentucky Uniform Arbitration Act (KUAA), KRS² 417.045 *et seq.*, and the Federal Arbitration Act (FAA), 9 U.S.C.³ §§ 1 *et seq.*

Alonna opposed Signature's motion, asserting the arbitration agreement was procedurally and substantively unconscionable, rendering it

¹ The appeal was originally brought by Alonna Green, through her mother and legal guardian Kathleen Moore-Stewart. Alonna Green passed away during the pendency of this appeal and on February 20, 2020, the Court entered an order substituting The Estate of Alonna Green, Through Administratrix Kathleen Moore-Stewart, as the appellant. For ease of comprehension and readability, we shall refer to the appellant as Alonna and to her mother as Kathleen.

² Kentucky Revised Statutes.

³ United States Code.

unenforceable. Alonna claimed Kathleen was misled by Signature's agent regarding the substance of the document containing the arbitration agreement and that Alonna had presented sufficient testimony to make that a contestable question of fact. Alonna also specifically argued impossibility of performance as a defense to enforcement because the arbitrator named in the agreement, the National Arbitration Forum (NAF), had ceased its existence. The trial court rendered an order denying Signature's motion to compel arbitration, concluding the agreement was procedurally conscionable but substantively unconscionable. Signature appealed and Alonna cross-appealed to this Court.

In *LP Louisville South, LLC v. Green*, No. 2014-CA-001069-MR, 2016 WL 1069034 (Ky. App. Mar. 18, 2016), this Court held as follows:

After careful consideration, we conclude the court's order fails to provide sufficient findings of fact and conclusions of law for appellate review; consequently, we must vacate the order. Upon remand, the trial court must reconsider Signature's motion to compel arbitration and render an order with specific findings of fact and separate conclusions of law. In light of our decision to vacate and remand, we believe Green's cross-appeal is moot.

Id. at *3.

On remand, on July 27, 2016, the trial court ordered the parties to arbitration. Alonna filed a notice of appeal from that order. However, this Court dismissed the appeal as having been taken from an interlocutory order compelling arbitration that is not immediately appealable. *Alonna Green, through her Mother*

and Legal Guardian Kathleen Moore-Stewart v. Signature Healthcare, LLC, No. 2016-CA-001206-MR (Ky. App. Feb. 16, 2017).

The arbitration of Alonna’s claims took place on March 13-15, 2018, and the arbitrator found in favor of Signature. Alonna appealed.

STANDARD OF REVIEW

“[O]ur review of a trial court’s ruling in a KRS 417.060 proceeding is according to usual appellate standards. That is, we defer to the trial court’s factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court’s identification and application of legal principles.” *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). In deciding the enforceability of an arbitration agreement, “the circuit court is bound by Kentucky Rules of Civil Procedure (CR) 52.01” *Kindred Nursing Centers Ltd. Partnership v. Sloan*, 329 S.W.3d 347, 348 (Ky. App. 2010). Therefore, a reviewing court is limited by the restrictions of CR 52.01, as with any review of such decisions by a trial court.

ANALYSIS

The KUAA and the FAA govern the effect and enforcement of an arbitration agreement. “Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor.” *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 588 (Ky. 2012).

A party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Id.* at 590. That question is controlled by state law rules of contract formation. *Id.* The FAA does not preempt 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 v. Carlisle*, 556 U.S. 624, 630-31, 129 S.Ct. 1896, 1902, 173 L.Ed.2d 832 (2009).

The public policy of Kentucky is that arbitration is a favored method of dispute resolution. “Arbitration has always been favored by the courts.” *Poggel v. Louisville Ry. Co.*, 225 Ky. 784, 10 S.W.2d 305, 310 (1928). And Kentucky law also “favors the enforcement of arbitration agreements.” *Medcom Contracting Services, Inc. v. Shepherdsville Christian Church Disciples of Christ, Inc.*, 290 S.W.3d 681, 685 (Ky. App. 2009) (citing *Kodak Mining Co. v. Carrs Fork Corp.*, 669 S.W.2d 917 (Ky. App. 1984)); *see also Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 457 (Ky. 2009).

“[O]nce prima facie evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement. The party seeking to avoid the arbitration agreement has a heavy burden.” *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004) (citations omitted). There is, therefore, a

strong presumption that the general arbitration clause is not unconscionable.

Schnuerle v. Insight Communications Co., L.P., 376 S.W.3d 561, 575 (Ky. 2012).

With these principles in mind, we consider Alonna's arguments.

First, Alonna says the arbitration agreement is procedurally unconscionable because a Signature representative misled Kathleen about the terms, conditions, and implications of the document containing the arbitration agreement. Signature asserts the agreement is valid and enforceable and contains no element of unconscionability. We agree with Signature.

Procedural unconscionability, or "unfair surprise" unconscionability, "pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language. . . . [It] involves, for example, 'material, risk-shifting' contractual terms which are not typically expected by the party who is being asked to 'assent' to them and often appear [] in the boilerplate of a printed form." *Conseco*, 47 S.W.3d at 342 n.22 (quoting *Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3rd Cir. 1999)). Factors relevant to the procedural unconscionability inquiry include the bargaining power of the parties, "the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *Schnuerle*, 376 S.W.3d at 576

(quoting *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 875-76 (11th Cir. 2005)).

Here, Alonna asserts Kathleen was misled by Signature regarding the terms, conditions, and implications of the agreement. She further asserts Kathleen was compelled to sign the arbitration contract as part of Alonna's admissions process and that she was never provided a copy of the agreement to review or rescind, or the opportunity to consult with an attorney.

On this question, the trial court, in its capacity as factfinder, made the following findings:

On June 12, 2012, . . . [Kathleen] met with Etta Fint [Signature's agent] and signed, among other documents, The "Facility and Resident Agreement to Resolve Disputes." (Moore-Stewart Depo. p. 16, l. 13-17). . . . Section (D) states clearly that signing the arbitration agreement is not a condition of treatment. It also states that the patient waives his or her right to a jury trial and the right to counsel regarding the agreement itself. Section (H) sets forth the right to cancel. These provisions are not set forth in any special font or type. Page 2 of the agreement, however, sets forth the waiver of the right to a jury trial in bold capital letters.

NAF no longer arbitrates health care disputes.

[Kathleen] did not read the document, (Moore-Stewart Depo., p. 16, l. 25).

[Kathleen] did not know what "arbitration" means, (Moore-Stewart Depo., p. 14, l. 6).

Etta Fint did not know the difference between arbitration and mediation, (Fint Depo., p. 27, 1. 22-24).

Etta Fint believed that a signatory to the agreement retained the right to file suit, (Fint Depo., p. 31, 1. 8-18).

Etta Fint did not explain to Moore-Stewart that she was giving up the right to a jury trial, (Fint Depo., p. 33, 1. 2-6).

(Record (R.) at 504-05).

The trial court then entered the following conclusions of law:

1. The Facility and Resident Agreement to Resolve Disputes was not procedurally unconscionable. [Kathleen] has admitted that she failed to read the document. As stated in *Schnuerle, supra*, such an agreement is enforceable. Further, had she read the agreement, she would have learned that she was waiving her [Alonna's and Alonna's representatives' and successors'] right to trial by jury and [she] had thirty days in which to rescind the agreement. Alonna Green would have been admitted even had [Kathleen] refused to sign the agreement.
2. The Facility and Resident Agreement to Resolve Disputes was not substantively unconscionable. As stated in *Conseco, supra*, merely because one party has rights under the agreement that the other party does not, the agreement is not rendered unconscionable. In this case, even though Signature retains the rights to file suit and compels the Plaintiff [Alonna and her representatives and successors] to arbitrate, the agreement remains valid. Although [Kathleen] has cited "prohibitive costs" as a basis for unconscionability, the *Conseco* Court specifically held that there must be a showing of "a particular likelihood" of such costs. There has been no such showing herein. Further, the agreement is clearly not

impossible to perform as the plain language used indicates that the NAF and its rules are to be used “if possible.” Given the preference under state and federal law for the utilization of alternative dispute resolution measures, arbitration is appropriate herein.

(R. at 507-08).

The trial court’s findings of fact are not clearly erroneous, and they are supported by substantial evidence in the record. Furthermore, we find no error in the trial court’s application of the law to these factual findings.

We find the approach to the procedural unconscionability inquiry expressed in *Harris, supra*, – whether there was “unfair surprise” – entirely appropriate here. The trial court obviously took that proper approach concluding, as does this Court, that signing the arbitration agreement was not a condition of admission to the facility and that Alonna would have received the same quality of care and treatment irrespective of whether her mother signed it. The trial court concluded, as does this Court, that the agreement gave Kathleen the right and fair opportunity to cancel it, including time to consult legal counsel about whether agreeing to arbitrate was the best course for Alonna and Kathleen. The trial court concluded, as does this Court, that the arbitration agreement did not contain any unconscionable surprise because it stated in bold letters:

THE PARTIES UNDERSTAND AND AGREE THAT
BY ENTERING INTO THIS ARBITRATION
AGREEMENT, THEY ARE GIVING UP AND
WAIVING THEIR CONSTITUTIONAL RIGHT TO

HAVE A CLAIM DECIDED IN A COURT OF LAW
BEFORE A JUDGE AND JURY.

(R. at 30).

We find the conspicuousness and the comprehensibility of the contract language sufficient, the oppressiveness of any term noticeably absent, and the prevalence of meaningful choice more than apparent. As the Kentucky Supreme Court stated in *Hathaway v. Eckerle*, “[i]t is the settled law in Kentucky that one who signs a contract is presumed to know its contents, and that if he has an opportunity to read the contract which he signs he is bound by its provisions, unless he is misled as to the nature of the writing which he signs or his signature has been obtained by fraud.” 336 S.W.3d 83, 89-90 (Ky. 2011) (quoting *Clark v. Brewer*, 329 S.W.2d 384, 387 (Ky. 1959)).

In keeping with the trial court’s analysis and factfinding, we do not find the deposition of either Kathleen or Etta Fint sufficient to establish that Signature attempted to conceal the arbitration clause, deceive Kathleen, or fraudulently induce her to sign the agreement. More importantly, substantial evidence supports the trial court’s conclusion to the contrary.

Second, Alonna argues that the agreement is substantively unconscionable and impossible to perform. She asserts that unconscionability stems from: (1) the agreement’s requirement to use the NAF and arbitration rules she claims are skewed in favor of Signature; (2) the agreement is inequitable and

permits Signature to sue Alonna in court but denies her the right to do the same; and (3) arbitration would be prohibitively expensive for Alonna.

Substantive unconscionability “refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.” *Conseco*, 47 S.W.3d at 342 n.22 (citation omitted). Courts consider “the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns.” *Jenkins*, 400 F.3d at 876 (citation omitted).

Under § 2 of the FAA, there are two types of challenges to the validity of an arbitration agreement. The first type challenges the validity of the agreement to arbitrate, while the second “challenges the contract as a whole, either on a ground that directly affects the entire agreement . . . , or on the ground that the illegality of one of the contract’s provisions renders the whole contract invalid.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70, 130 S.Ct. 2772, 2778, 177 L.Ed.2d 403 (2010) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, 126 S.Ct. 1204, 1208, 163 L.Ed.2d 1038 (2006)). Only the first type of challenge is relevant to a court’s determination whether the arbitration agreement at issue is enforceable. The second class of challenge is solely within the initial purview of the arbitrator. *Id.* See also *Dixon v. Daymar Colleges Grp., LLC*, 483 S.W.3d 332, 340 (Ky. 2015).

Arbitration agreements are contracts and we are required to enforce contracts according to their terms. *Rent-A-Center*, 561 U.S. at 67, 130 S.Ct. at 2776. “[C]ourts cannot make a new contract for the parties under the guise of interpretation or construction but must determine the rights of the parties according to the terms agreed upon by them.” *Ritchie v. Turner*, 547 S.W.3d 145, 148 (Ky. App. 2018) (citation omitted).

Alonna argues that because the agreement incorporates the NAF Code that can only be administered by the NAF, the arbitration agreement effectively requires the NAF as arbitrator. Because the NAF is unavailable to arbitrate the dispute, argues Alonna, the agreement is impossible to perform. We disagree.

Alonna’s particular complaint about the NAF and its Code is that Signature selected both the arbitrator and the procedural rules to decide these important issues and that such choices have been authoritatively rejected as flawed. She notes: (1) the NAF was banned from arbitrating healthcare disputes because of its unconscionable treatment of injured patients;⁴ (2) use of the NAF as an

⁴ “The NAF is headquartered in Minneapolis, Minnesota. In July 2009, the Minnesota Attorney General filed a complaint against the NAF and related entities alleging violations of state consumer-protection laws. The complaint sought civil penalties as well as an injunction barring the NAF from engaging in those practices of the organization that allegedly violated the relevant statutes. On July 17, 2009, the parties entered into a consent judgment under which the NAF agreed that it would not administer, process, or ‘[i]n any manner participate in’ any consumer arbitration filed on or after July 24, 2009.” *Genesis Healthcare, LLC v. Stevens*, 544 S.W.3d 645, 648 n.3 (Ky. App. 2017), *review dismissed* (Mar. 15, 2018) (quoting *Miller v. GGNSC Atlanta, LLC*, 323 Ga. App. 114, 116, 746 S.E.2d 680, 683 (2013)).

arbitrator is an integral part of the arbitration agreement and its prohibition against serving as such in consumer disputes makes performance of the arbitration agreement impossible; and (3) appointing another arbitrator is contrary to the terms of the agreement. None of these arguments is persuasive.

Regarding these issues, the trial court found:

[The agreement] requires that parties submit their claims on forms supplied by NAF. In section (B)(2), it provides that NAF will conduct the arbitration, *but if that is not possible*, then the parties are *urged to use* the NAF Rules with another alternative dispute resolution association, again, *if possible*. Section (B)(4) pertains once again to the claim form. Section (B)(5) references the NAF Code. Section (B)(7) requires the parties to use the NAF Rules to select a location for the mediation within the state. NAF no longer arbitrates healthcare disputes.

(R. at 504) (emphasis added).

Specifically, section (B)(2) of the agreement reads as follows:

Who Will Conduct Arbitration. The arbitration shall be conducted by NAF in accordance with the Code of Procedure of NAF. *If the NAF process is no longer in existence at the time of the dispute, or the NAF is unwilling or unable to conduct the arbitration, then the arbitration shall be administered by another alternative dispute resolution association, pursuant to NAF rules if possible.*

(R. at 28) (emphasis added) (citations omitted).

The plain language of the agreement expressly considers the possibility that the NAF and its rules might be unavailable, making the provision severable so that the agreement as a whole would survive and remain enforceable.

We reiterate, as a general rule, “Kentucky law favors arbitration agreements.” *Mortgage Electronic Registration Systems, Inc. v. Abner*, 260 S.W.3d 351, 353 (Ky. App. 2008) (citation omitted). We are not persuaded by Alonna’s argument that the non-availability of the NAF as an arbitrator, or its rules as a procedural guide, make the agreement unenforceable.

Furthermore, arbitration occurred in March 2018, and Alonna did not assert either in her brief or in the record before this Court that the arbitration was conducted using the NAF rules as she feared. Similarly, we find Alonna’s argument that the agreement’s terms made arbitration “prohibitively expensive” unpersuasive given that arbitration has concluded. We are well aware that an appeal was not a remedy available to her until arbitration was complete, but we cannot accept Alonna’s unsupported contention that arbitration is cost prohibitive relative to litigation.

CONCLUSION

Based on the foregoing analysis, this Court affirms the various orders of the Jefferson Circuit Court compelling arbitration, and its orders confirming the arbitration and dismissing the civil action.

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