

## Surrogate Decision Making Alert

### Agent Authority to Enter Arbitration Agreements within Nursing Home Admission Forms

Mary Elizabeth Anderson<sup>1</sup>

As boomers age and elder abuse awareness increases, cases involving nursing home litigation will continue to rise including disputes regarding an agent's ability to bind the principal to arbitration agreements entered into during the nursing home admission process. Summarized below are recent cases highlighting some of the issues that are likely to increase with nursing home litigation and agent authority.

The Massachusetts Supreme Court decided two cases, *Licata v. GGNSC Malden Dexter, LLC*, 466 Mass. 793 (2014) and *Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779 (2014) based on the same theory that under the Massachusetts health care proxy statute a health care surrogate does not have the authority to enter into an arbitration agreement. In both cases, the patient signed a valid health care proxy designating a health care agent and later was admitted to a nursing home facility. As part of the admission process, the health care agent signed several documents including an arbitration agreement. The sole issue before the Court was whether the agent's decision to enter the arbitration agreement is a "health care decision" under the statute. Looking to the language of the statute as well as the legislative history, the Court concluded the definition of "health care decisions" are "those that directly involve the provision of responsible medical services, procedures, or treatments of the principal's physical or mental condition." Further, "the Legislature intended to distinguish between a health care proxy, which limits an agent's decision-making authority on behalf of an incapacitated person to health care decisions, and a durable power of attorney, guardianship, or conservatorship, all of which authorize broad decision-making power on behalf of an incompetent person, including over the person's financial interests and estate."

Turning to authority under a power of attorney, the Kentucky Court of Appeals decided two cases in the Fall of 2013, *Kindred Healthcare, Inc. v. Cherolis*, 2013 WL

5583587 (Ky. Ct. App., Oct. 11, 2013) and *Kindred Nursing Centers Ltd. Partnership v. Bullock*, 2013 WL 6198354 (Ky. Ct. App., Nov. 27, 2013)(unpublished) with different outcomes regarding the same issue, the application of the Kentucky Supreme Court case *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012). In *Cherolis*, the Court distinguished *Ping* and held the agent did have the authority to enter into an arbitration agreement while the Court in *Bullock* followed *Ping*.

The Court in *Ping* found that entering into an arbitration agreement is neither a health care decision nor a financial decision, and absent expressed authority within the document, a power of attorney limited to “every act and thing whatsoever requisite and necessary to be done” will not be interpreted to authorize the agent to enter into arbitration agreements that are not necessary.

In *Cherolis* the power of attorney authorized the agent “[t]o draw, make, and sign in my name any and all checks, promissory notes, contracts, or agreements . . . [t]o institute or defend suits concerning my property or right”. The Court noted the power here is broader than the one in *Ping* because the document “specifically authorized Cherolis to enter into contracts and to institute or defend suits”. In distinguishing this power to that of *Ping* the Court held that “[a]lthough the power of attorney did not expressly authorize Cherolis to enter into an arbitration agreement, [the Court] can find no reasonable interpretation of the document which would limit her authority to do so. The power of attorney clearly anticipated that the agent could make decisions with legal implications for the principal. Consequently, the holding of *Ping* is not applicable in this case.”

Contrast, bewilderingly, this decision with that of *Bullock* in which the agent had the authority “with full power in my name . . . to make and sign any and all checks, contracts, or agreements . . . 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”. Here the Court interpreted *Ping* as requiring “expressed authorization” within the power of attorney to indicate the principal granted “the authority to enter into arbitration at the expense of the constitutional right of access to the Courts.” Although

the power of attorney contained the authority “to make and sign any and all contracts” the Court did not interpret this to include arbitration agreements, and noted that where “the specific issue of arbitration is not addressed. [The Court] 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.”

In light of these cases and others and the understanding that these issues will increase, it is important to review who has what authority, and how broad is that authority under the document and state law. The issue is not drafting to avoid arbitration or other alternative dispute resolution processes, but whether and to what extent the agent should be able to enter these and communicating the abilities or limits to the principal and the agent.

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<sup>1</sup> Beth ([banderson@wyattfirm.com](mailto:banderson@wyattfirm.com)) is a member of Wyatt Tarrant and Combs, LLP’s Trusts, Estates & Personal Planning Service Team. She concentrates her practice in the areas of estate planning, trust administration, estate tax, inheritance tax, gift tax, probate, business planning and elder law.