

August 24, 2012

Recent Kentucky Supreme Court Regarding Arbitration
Ping v Beverly Enterprises, Inc., et al

On August 23, 2012, the Kentucky Supreme Court released its opinion in the matter of *Ping v Beverly Enterprises, Inc., et al.* in which it held that the daughter and attorney in fact of a deceased nursing home resident could not bind the estate to arbitration by executing a non-mandatory arbitration agreement during the admission process. The court further held that wrongful death beneficiaries would not be bound by a decedent's arbitration agreement, even if one existed, because they are statutorily distinct and their claim does not derive from any claim raised on behalf of the decedent.

Ms. Ping, the daughter and attorney in fact of a nursing home resident, executed a non-mandatory arbitration agreement that was a part of the facility's admission packet. In finding that the estate was not bound by the arbitration agreement executed by Ms. Ping, the court determined that the power of attorney expressly provided that Ms. Ping was authorized to make financial decisions, decisions with regard to the management of property and health care decisions. The court noted that the power of attorney did not give Ms. Ping universal authority, stating that the power of attorney was limited to "requisite and necessary" acts and those that were "required" to be done, which would not include a decision with regard to arbitration. The court noted that had the resident intended to vest legal decision making in Ms. Ping, the power of attorney would have spoken to such. Moreover, the court stated that because the execution of the arbitration agreement was not a mandatory condition of admission it could not be construed to be a decision relating to healthcare. The court rejected the facility's argument that Ms. Ping had apparent authority to execute the arbitration agreement, pointing to the fact that the power of attorney spoke to the express authority vested in Ms. Ping, as well as the fact that under agency principles apparent authority arises from the principal's manifestation of authority in the agent, which the resident could not provide as she was incapacitated at the time of admission. The court further rejected the facility's argument that the estate was bound to arbitrate the claims under a third party beneficiary theory. In so doing, the court pointed to the fact that there was no suggestion that Ms. Ping entered into the admission agreement on her own behalf; thus, the resident and the estate could not be deemed third party beneficiaries of a non-existent agreement between Ms. Ping and the facility. Although not raised in the trial court, the Kentucky Supreme Court elected to hear and decide the issue of whether the wrongful death beneficiaries could be bound to arbitration, finding that the wrongful death beneficiaries would not succeed to the decedent's agreement to arbitrate, as their claims are statutorily distinct and do not arise from any claim raised on behalf of the resident.

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