Kentucky Supreme Court Narrows Availability of Arbitration in Long Term Care Cases

By Robert Y. Gwin

On August 23, 2012, the Kentucky Supreme Court issued a "to be published "opinion in *Donna Ping, Executrix of the Estate of Alma Calhoun Duncan, Deceased v. Beverly Enterprises, Inc. et.al.* The Court's holding narrows the availability of arbitration in long term care cases in two significant respects.

MS. Ping filed suit alleging, among other things, negligence by the defendants relating to care provided to her mother, Alma Calhoun Duncan at the defendants' Frankfort, Kentucky long term care facility. At the time of her mother's admission to the facility, Ms. Ping signed an agreement to submit any disputes with the facility to arbitration. Prior to admission, Ms. Duncan had executed a general, durable power of attorney making Ms. Ping her attorney-in-fact. The power of attorney granted Ms. Ping authority "to do and perform any , all and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present, including but not limited to…" The power of attorney went on to enumerate specific powers and further provided that Ms. Ping was authorized "to generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf." The power of attorney also provided that it was Ms. Duncan's intention "that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire." The power of attorney specifically stated that "[t]he enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict the general and full power herein granted to my said attorney-in-fact."

The trial court refused to enforce the arbitration agreement on a variety of grounds including lack of authority of Ms. Ping to bind Ms. Duncan to the arbitration agreement. The Kentucky Court of Appeals reversed the trial court, and Ms. Ping sought review in the Kentucky Supreme Court. The Kentucky Supreme Court reversed the Kentucky Court of Appeals and found, among other things, that Ms. Ping lacked authority to bind Ms. Duncan to the arbitration agreement and that Ms. Duncan lacked authority to bind her wrongful death beneficiaries to the agreement.

The Ping decision is certainly not good news for the Long Term Care industry in Kentucky. However, it may not be the end of the story for arbitration in LTC cases. The unanimous Kentucky Supreme Court has not said that arbitration is unavailable to the LTC industry. What it has said is that, to be enforceable, the arbitration agreement must have been signed by a person with authority to bind the plaintiff. The court has defined and narrowed the law regarding who can bind and be bound to an arbitration agreement.

The Ping court has concluded that, in order for an attorney-in-fact to have authority to do an act that creates legal consequences for a principal that are significant, the POA must specifically grant such authority. The ramifications of this surprising pronouncement cannot be fully appreciated at this point but will certainly reverberate well beyond the context of the Ping

decision. The court, however, retreats a bit from the seeming impracticality of its holding, at least as it relates to arbitration agreements, when it goes on to say, "[a]bsent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." This quote indicates that a POA that grants authority to "settle claims and disputes" or a similar express grant of power regarding dispute resolution will be sufficient to allow the attorney-in-fact to bind the principal to an arbitration agreement.

Based on the Ping opinion, a binding signature on an arbitration agreement can come from one of several places:

1) The signature of a competent resident is binding on the resident and the resident's estate (although not on the statutory wrongful death beneficiaries).
2) A valid agreement could also be made by one who has express authority to sign such a document on behalf of the resident, such as where the resident who is of sound mind gives another (such as a family member) full express authority to carry out his or her business. Again the binding effect is limited to the extent to which the resident could bind his or her estate.
3) The signature of a person with a POA that expressly permits the agent to agree to arbitration will have the same binding effect as the signature of a competent resident. While at first, it may seem unlikely that a POA could satisfy this condition, the requirement apparently can be met by language in the POA that grants the attorney in fact the power to settle claims and disputes. Many standard form POA's do include a power to settle claims and disputes.
4) Although the court does not specifically so state, presumably a court appointed guardian would still have power to bind the ward to an arbitration agreement subject to any limitations the court may have imposed on the guardian's power.

After addressing what is necessary to have a binding signature on an arbitration agreement, the court turns gratuitously to a discussion of the ability of a person to bind the beneficiaries of his estate to arbitration. The Court in Ping apparently recognized (but did not specifically discuss) the U.S. Supreme Court's recent decision in *Marmet Health Care Center, Inc. v. Brown, 132 S. CT. 1201 (2012*) in which the U.S. Supreme Court reversed on the grounds of FAA preemption an attempt by the West Virginia court to prohibit arbitration in particular types of claims. Presumably , in an effort to avoid the mistake of the West Virginia Court, the Kentucky Court based its holding that a decedent cannot bind his beneficiaries to an arbitration agreement in a wrongful death case on the proposition that the state court can, even after *Marmet,* still determine what constitutes a binding signature. The Kentucky Court stops short of prohibiting arbitration in wrongful death claims (the error of the West Virginia Court). However, the Kentucky Court finds that, because under Kentucky's wrongful death statute, the wrongful death claim is a separate claim that belongs to statutory beneficiaries (although it is brought for convenience by the personal representative of the estate), the decedent cannot enter into a contract that binds those beneficiaries as to that independent claim. Presumably, to bind the beneficiaries of a wrongful death claim, it would be necessary to have each wrongful death beneficiary sign the arbitration agreement.

The result of this bit of artful dodging is that the Court has left the largest component of compensatory damages available in most LTC cases subject to arbitration. By recognizing that wrongful death and survival claims are separate causes of action in Kentucky and by further recognizing that the survival claim is derived from the decedent, the Court is forced to acknowledge on page 27 of its opinion that, "Mrs. Duncan, of course (or an *authorized* agent) , could have agreed to arbitrate *her* claims against Beverly, and, because a survival action would have asserted *her* claims, the Estate bringing those claims in her stead would likewise have been bound by her agreement."

This distinction is significant. The compensatory damages for a wrongful death claim are pecuniary loss to the estate. This loss traditionally includes the funeral bill, the costs of administration and, the largest component , the loss of power to labor and earn money. In most LTC cases there is no claim for loss of power to labor and earn money. Therefore, the compensatory damages in a wrongful death claim in most LTC cases may be limited to the funeral bill and the costs of administration. The survival claim for personal injury to the decedent, on the other hand, carries with it damages for pain and suffering, traditionally the largest element of compensatory damages in a LTC case. The resident can still bind his or her estate to arbitrate survival claims.

Punitive damages may be available in both wrongful death and survival claims. However, the constitutional limits on punitive damages arguably apply to limit the amount of punitive damages in the wrongful death context to some multiple of compensatory damages. Kentucky follows the analysis used under federal law to determine whether a jury's award of punitive damages conforms to due process. Under federal law, courts consider three guideposts:

> (1) degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Ragland v. DiGiuro, 352 S.W.3d 908, 917 (Ky. 2010) (*citing State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). With regard to guidepost (2), the ratio between the punitive damages award and the compensatory damages, Kentucky also agrees with the U.S. Supreme Court's pronouncement in *Campbell* that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Ragland*, 352 S.W.3d at 920-21(*citing Campbell*, 538 U.S. at 425). The *Ragland* Court also recognized that certain types of awards were more likely to justify higher ratios, namely cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine, and *cases involving low awards of compensatory damages* (for example, where a particularly egregious act has resulted in only a small amount of economic damages). *Ragland*, 352 S.W.3d at 921. Noting that the ratio analysis is, in essence, a multiplication problem, i.e. compensatory damages x ratio = punitive damages, the *Ragland* Court stated: "Generally speaking, due process will not permit both factors [compensatory damages and ratio] to be "substantial" because of the enhancing properties of the multiplication process. However, when either the compensatory award or the ratio is relatively low, the resulting product – the punitive award – is markedly reduced and constitutionally palatable."

An award of funeral expenses and costs of administration will certainly exceed the nominal damages threshold but may not generally rise to the level of open ended pain and suffering damages. It is not yet clear how compensatory damages available in a wrongful death claim where there is no loss of power to labor and earn money but pain and suffering damages are available in a related arbitration forum will come into play in the context of punitive damages limits.

There may also be questions relating to issue preclusion between the arbitration and the court case. There is Sixth Circuit case law suggesting that the arbitration of similar, related claims may have a preclusive effect on the underlying facts of a wrongful death claim in a judicial proceeding. See e.g. *Ivery v. U.S.*, 686 F.2d 410, 413-14 (6th Cir. 1982) and *Central Transport, Inc. v.Four Phase Systems, Inc.*, 936 F.2d 256, 261 (6th Cir. 1991). The underlying facts of a negligence or malpractice claim would largely be identical to the facts underlying a wrongful death claim. The issues to be determined in those claims are also strikingly similar to the issues in a wrongful death claim. As such, there may be an argument that the plaintiff is estopped from arguing the same facts and issues argued in arbitration. If the arbitrator finds no liability in the survival claims, that decision may have issue preclusive effect in the wrongful death court case.

The end result of the Ping decision is a brave new world of sorts. Where there is a binding signature on an arbitration agreement, the survival claims must go to arbitration. The wrongful death claims will remain in court. Federal case law indicates, however, that the wrongful death claim can likely be "severed" from the related arbitrable claims and stayed while arbitration of the remaining claims takes place. Absent a stay, the claim that reaches resolution first may well have issue preclusive effect on the remaining claim.