

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 22, 2013 Session

**JAMES H. WILKINS, ET AL. v. GGNSC SPRINGFIELD, LLC DBA
GOLDEN LIVING CENTER-SPRINGFIELD, ET AL.**

**Appeal from the Circuit Court for Robertson County
No. 74CC12012CV446 Ross H. Hicks, Judge**

No. M2013-01536-COA-R3-CV - Filed February 27, 2014

This appeal stems from a case of alleged nursing home abuse and neglect and involves a dispute as to whether a health care power of attorney executed by decedent was effective to authorize the agent to execute an optional arbitration agreement on the decedent's behalf. The trial court denied the nursing home's motion to compel arbitration, holding that the attorney-in-fact did not have authority to sign the optional arbitration agreement on the principal's behalf. The nursing home appeals. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, M. S., P. J., and FRANK G. CLEMENT, J., joined.

Thomas O. Helton and Daniel J. White, Chattanooga, Tennessee; and Summer H. McMillan, Knoxville, Tennessee, for the appellants, GGNSC Springfield, LLC d/b/a Golden Living Center-Springfield; GGNSC Administrative Services, LLC d/b/a Golden Ventures; GGNSC Clinical Services, LLC; GGNSC Holdings, LLC d/b/a Golden Horizons; Golden Gate National Senior Care, LLC d/b/a Golden Living; GGNSC Equity Holdings, LLC; Golden Gate Ancillary, LLC d/b/a Golden Innovations; and Lori Ann Chambers, in her capacity as Administrator of Golden Living Center-Springfield.

Carey L. Acerra and Cameron C. Jehl, Memphis, Tennessee; and Deborah T. Riordan, Little Rock, Arkansas, for the appellee, James H. Wilkins, Administrator ad Litem of Estate of Sarah Margaret Wilkins, deceased; and on behalf of the wrongful death beneficiaries of Sarah Margaret Wilkins.

OPINION

I. FACTS AND PROCEDURAL HISTORY

On August 18, 2008, Ms. Sarah Wilkins executed two documents that named her son, James Wilkins, as her attorney-in-fact: a General Power of Attorney and a Power of Attorney for Health Care.¹

In June of 2010, Ms. Wilkins was admitted into Golden Living Center–Springfield for respite care. Mr. Wilkins met with the admission representative and, using the General Power of Attorney, signed several documents on his mother’s behalf, including an Admission Agreement and a separate document titled “Alternative Dispute Resolution Agreement” (the “ADR Agreement”).² Ms. Wilkins remained a resident at Golden Living Center until her death on December 4, 2011. On September 13, 2012, Mr. Wilkins, as administrator ad litem of the estate of his mother and on behalf of her beneficiaries, filed a negligence and wrongful death suit against the nursing home and related entities.³

Golden Living moved to dismiss the suit or, alternatively, to stay the proceedings and compel arbitration based upon the ADR Agreement Mr. Wilkins signed at admission. Mr. Wilkins filed an initial response and moved to stay Golden Living’s motion pending the completion of discovery. The court granted the motion and, after discovery, held argument on the issue of the enforceability of the ADR Agreement. The court denied Defendants’ motion, holding that the General Power of Attorney “did not bind Ms. Wilkins to the subject arbitration agreement because that Power-of-Attorney was not effective at the time the arbitration agreement was purportedly executed”⁴ and that the Power of Attorney for Health

¹ The only power of attorney at issue on appeal is the Power of Attorney for Health Care.

² The ADR Agreement included the following statement: “THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR CONTINUED RESIDENCE IN THE FACILITY” (emphasis in original).

³ The complaint named the following as defendants in the suit: GGNSC Springfield LLC d/b/a Golden Living Center-Springfield, GGNSC Administrative Services LLC d/b/a Golden Ventures, GGNSC Clinical Services LLC, GGNSC Holdings LLC d/b/a Golden Living, GGNSC Equity Holdings LLC, Golden Gate Ancillary LLC d/b/a Golden Innovations, and Lori Ann Chambers in her capacity as Administrator of Golden Living Center-Springfield (collectively, “Golden Living”)

⁴ The basis of the court’s holding that the General Power of Attorney was not effective was the language in the instrument that it would “become effective upon . . . disability or incapacity” of Ms. Wilkins, as determined by “a written statement signed by two unaffiliated physicians”; there was nothing in the record complying with that provision. Golden Living does not challenge the holding that the General Power of

Care did not “encompass authority to bind Ms. Wilkins to an optional arbitration agreement regarding her health care.”

Golden Living appeals, articulating the following issue:

Did the trial court err in holding that the Durable Health Care Power of Attorney naming James H. Wilkins as the agent of Sarah Margaret Wilkins did not authorize Mr. Wilkins to execute the Alternative Dispute Resolution Agreement on behalf of Ms. Wilkins July 25, 2010?

II. STANDARD OF REVIEW

“When ruling on the appeal of a denial of a motion to compel arbitration, we follow the standard of review that applies to bench trials.” *Thorton v. Allenbrooke Nursing & Rehab. Ctr., LLC*, No. W2007-00950-COA-R3-CV, 2008 WL 2687697 (Tenn. Ct. App. Jan. 23, 2008) (citing *Spann v. Am. Express Travel Related Servs. Co.*, 224 S.W.3d 698, 706–07 (Tenn. Ct. App. 2006)). Accordingly, our review of the trial court’s findings of fact is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Questions of law are likewise reviewed *de novo* without a presumption of correctness. *Johnson v. Johnson*, 37 S.W.3d 892, 894 (Tenn. 2001).

III. DISCUSSION

The portions of the Power of Attorney for Health Care pertinent to the issue in this appeal provide:

This document gives the person you designate as your agent (the attorney-in-fact) the power to make health care decisions for you. . . .

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service or procedure to maintain, diagnose or treat a physical or mental condition. This power is subject to any limitations that you include in this document. . . .

Attorney was not effective because Ms. Wilkins’ incapacity had not been certified as required.

You have the right to revoke the authority of your agent by notifying your agent or your treating physician, hospital or other health care provider orally or in writing of the revocation.

* * *

(1) This Power of Attorney shall not be affected by subsequent disability or incapacity of the Principal, as the same is executed pursuant to Public Chapter 831 of the 1990 Acts of the General Assembly of the State of Tennessee.

(2) The Agent is authorized in her^[5] sole and absolute discretion to exercise the powers granted herein relating to matters involving Principal's health and medical care. The Agent is authorized by and on Principal's behalf to consent to proposed medical treatment, and shall give, withhold or withdraw consent for Principal based upon any choices of treatment within her best discretion, and to that end, Principal grants the following powers to Agent:

* * *

(c) To give or withhold consent to any medical procedure, test or treatment, including surgery, to arrange for Principal's hospitalization, convalescent care, hospice or home care, to summon paramedics or other emergency medical personnel and seek emergency treatment for Principal, as Agent shall deem appropriate;

* * *

(h) To grant in connection with any instructions given in this instrument, releases to hospital staff, physicians, nurses or other hospital administrative personnel to act in reliance on instructions given by Agent or who render written opinions to the Agent in connection with any matter described in this instrument, from all liability from damages suffered or to be suffered by Principal, to sign documents entitled purporting to be refusal to treatment, and leaving hospital against medical advice, as well as necessary waivers of or release from liability required by a hospital or physician to implement Principal's wishes regarding medical treatment or non-treatment.^[6]

(3) That any consent given by the Agent pursuant hereto to any doctor, nurse, medical technician, hospital, domiciliary home, nursing home, or

⁵ The Power of Attorney for Health Care named Mr. Wilkins as the attorney-in-fact, but uses feminine pronouns throughout.

⁶ Golden Living contends that Paragraph (2)(h) of the Power of Attorney for Health Care "shows that in addition to his authority to sign waivers regarding withdrawal or refusal of treatment, Plaintiff was specifically authorized to execute waivers to implement treatment." This provision, however, specifically references "waivers of or release from liability" and, accordingly, does not apply to the ADR Agreement.

convalescent home, rendering any treatment or medical or surgical procedures to or on behalf of the Principal, shall be deemed to have been given by the Principal under advised consent while sui juris.

The execution of a power of attorney creates a principal–agent relationship. *Tenn. Farmers Life Reassurance Co. v. Rose*, 239 S.W.3d 743, 749 (Tenn. 2007). “[A] person executing a power of attorney may empower his or her agent to do the same acts, to make the same contracts, and to achieve the same legal consequences as the principal would be personally empowered to do.” *Id.* “The language of a power of attorney determines the extent of the authority conveyed.” *Id.* (quoting *Armstrong v. Roberts*, 211 S.W.3d 867, 869 (Tex. Ct. App. 2006). “The more specific a power of attorney is concerning the performance of particular acts, the more the agent is restricted from performing acts beyond the specific authority granted.” *Id.* A power of attorney evidences to third parties the purpose of the agency and the extent of the agent’s powers. *Id.* A power of attorney “should be construed using the same rules of construction generally applicable to contracts and other written instruments, except to the extent that the fiduciary relationship between the principal and the agent requires otherwise.” *Id.* at 749–50 (footnote omitted). The legal effect of a written contract or other written instrument is a question of law. *Id.* at 750.

In reliance on several cases in which specific language of health care powers of attorney was construed, Golden Living contends that the trial court erred “because, under current Tennessee law, Plaintiff had full authority under the [Power of Attorney for Health Care] to execute the ADR Agreement on Ms. Wilkins’ behalf.” We do not agree that the cases relied upon by Golden Living mandate such a holding.

In *Owens v. National Health Corporation*, 263 S.W.3d 876 (Tenn. 2008), our Supreme Court addressed the question of whether the health care power of attorney at issue in that case was sufficiently broad to give the attorney-in-fact authority to sign an admission agreement which contained a binding arbitration clause. The power of attorney in *Owen* provided:

I grant to my Attorney-in-Fact the power and authority to execute on my behalf any waiver, release or other document which may be necessary in order to implement the health care decisions that this instrument authorizes my Attorney-in-Fact to assist me to make, or to make on my behalf.

This instrument is to be construed and interpreted as a Durable Power of Attorney for Health Care and is intended to comply in all respects with the

provisions of Tennessee Code Annotated, § 34-6-204(b)⁷ *et seq.*; and all terms used in this instrument shall have the meanings set forth for such terms in the statute, unless otherwise specifically defined herein.

The court held that “[b]ecause [the principal] could have decided to sign the nursing home contract containing the arbitration provision had [the principal] been capable, Tenn. Code Ann. § 34-6-204(b) leads us to conclude that [the attorney-in-fact] was authorized to sign the arbitration provision on [the principal’s] behalf.” *Id.* at 884. In the course of its ruling, the Court discussed the plaintiff’s argument the powers granted under the statute only pertained to health care decisions, rather than legal decisions such as arbitration, and expressed a policy concern that it would be “untenable” to require “[e]ach provision of a contract signed by an attorney-in-fact” to be “subject to question as to whether the provision constitutes an authorized ‘health care decision’ or an unauthorized ‘legal decision.’” *Id.* at 884–85.

Unlike *Owens*, execution of the ADR Agreement in this case was not required as a condition of admission; nor was it incorporated into the admission agreement. Accordingly, the policy concerns expressed in *Owens* regarding the untenable position of having to evaluate whether “[e]ach provision of a contract . . . constitutes an authorized ‘health care decision’ or an unauthorized ‘legal decision’” are not present here. Further, the power of attorney in *Owens*, unlike the one before us, specifically stated that it was “intended to comply in all respects with the provisions of Tennessee Code Annotated, § 34-6-204(b) *et seq.*”

In *Mitchell v. Kindred Healthcare Operating Inc.*, 349 S.W.3d 492 (Tenn. Ct. App. 2008), this Court held that language in the power of attorney for health care stating that the agent had authority to act as attorney-in-fact “‘to the same extent’ as [the principal] and to the ‘full extent allowed under the statutes of the state of Tennessee’” gave the attorney-in-fact authority to sign a separate arbitration agreement on behalf of the principal. Moreover, the court found that the “particular power of attorney permits [the attorney-in-fact] to execute

⁷ Tenn. Code Ann. § 34-6-204(b) provides in relevant part:

(b) Subject to any limitations in the durable power of attorney for health care, the attorney in fact designated in the durable power of attorney may make health care decisions for the principal, before or after the death of the principal, to the same extent as the principal could make health care decisions for the principal if the principal had the capacity to do so

‘waivers’ on behalf of [the principal].” *Id.* The health care power of attorney executed by Ms. Wilkins does not contain such provisions.⁸

Contrary to Golden Living’s argument, neither *Owens* nor *Mitchell* changed the general rule, cited above, that the specific language of the power of attorney controls the scope of the power granted; rather, those cases construed specific language in each power to determine whether it authorized the act in question. Consistent with those cases, we must determine whether the language in Ms. Wilkins’ power of attorney for health care authorized Mr. Wilkins to sign the optional, stand-alone arbitration agreement on her behalf. We have determined that it does not.⁹

The powers listed in Ms. Wilkins’ power of attorney were specifically limited by the following preamble:

The Agent is authorized in her sole and absolute discretion to exercise the powers granted herein relating to matters involving Principal’s health and medical care. The Agent is authorized by and on Principal’s behalf to consent to proposed medical treatment, and shall give, withhold or withdraw consent

⁸ Ms. Wilkins’ power of attorney for health care included the following language: “This Power Of Attorney shall not be affected by subsequent disability or incapacity of the Principal, as the same is executed pursuant to Public Chapter 831 of the 1990 Acts of the General Assembly of the State of Tennessee.” This act is codified at Tenn. Code Ann. § 34-6-201 et seq. We do not construe the quoted language to adopt the specific definitions, provisions or powers granted in Tenn. Code Ann. § 34-6-201 et seq.

⁹ The other cases cited by Golden Living are likewise distinguishable. In *Cabany v. Mayfield Rehab. & Special Care Ctr.*, No. M2006-00594-COA-R3-CV, 2007 WL 3445550 (Tenn. Ct. App. Nov. 15, 2007), this Court held that the specific language of the power of attorney for health care at issue in that case granted the attorney-in-fact authority “as broad as the relevant Tennessee statutes permit” which would have permitted the attorney-in-fact to sign the admission agreement containing an arbitration clause; however, this court held that the trial court erred by failing to determine the principal’s incapacity at the time the admission agreement was signed, as was required for the power of attorney at issue to become effective. *Id.* at *4 Likewise, in *Raines v. Nat’l Healthcare Corp.*, No. M2006-1280-COA-R3-CV, 2007 WL 4322063 (Tenn. Ct. App. Dec. 6, 2007), this Court held, relying on *Owens*, that the attorney-in-fact could sign a mandatory arbitration clause as part of a contract admitting the principal to a nursing home; this Court remanded for the trial court to determine whether the principal had the capacity to enter into a power of attorney for health care and whether the agreement was unconscionable. In *Necessary v. Life Care Cntrs. of Am., Inc.*, No. E2006-00453-COA-R3-CV, 2007 WL 3446636 (Tenn. Ct. App. Nov. 16, 2007), this Court evaluated a separate, voluntary arbitration agreement signed by the plaintiff in the process of admitting her husband into a health care facility; this Court held that the plaintiff’s husband had orally given her express authority to sign the admission documents and that this express authority included the power to sign a separate, voluntary arbitration agreement on her husband’s behalf.

for Principal based upon any choices of treatment within her best discretion, and *to that end*, Principal grants the following powers to Agent:

(emphasis added.) Thus, although Mr. Wilkins was authorized by paragraph (2)(c) of the power of attorney to “arrange for Principal’s hospitalization, convalescent care, hospice or home care,” such power was only granted in order to “consent to proposed medical treatment” and to “withhold or withdraw consent . . . based upon any choices of treatment.”

Paragraph (3) of the power of attorney, quoted above, contrary to Golden Living’s argument, does not compel the conclusion that Mr. Wilkins’ execution of the ADR Agreement bound Ms. Wilkins. That provision, which states that “any consent given by the Agent pursuant hereto shall be deemed to have been given by the Principal”, is not a separate grant of power or authorization to give consent; rather the “consent” is construed with reference to the powers granted elsewhere in the power of attorney. This language does not grant authority for Mr. Wilkins to sign the optional and separate arbitration agreement on Ms. Wilkins’ behalf.

IV. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

RICHARD H. DINKINS, JUDGE