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## The Intersection of Agency Doctrine and Elder Law: Attorney-In-Fact Authority to Arbitrate Nursing Home Claims, 49 J. Marshall L. Rev. 39 (2015)

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**THE INTERSECTION OF AGENCY  
DOCTRINE AND ELDER LAW: ATTORNEY-  
IN-FACT AUTHORITY TO ARBITRATE  
NURSING HOME CLAIMS**

Thomas E. Simmons\*

ABSTRACT

With the popularity of durable powers of attorney to manage the estates and personal affairs of individuals with diminished capacity, construction of the scope of powers with which agents are acting is of increasing importance. Some acts should be seen as so inherently personal or so dramatically inconsistent with the expected role of an agent as to be simply outside the scope of agency altogether. Others, such as those involving gifts, self-dealing transactions, or constitutional rights, should be never implied but honored when located within the express terms of an agent's authority. The remaining powers should be construed and mapped according to the language in the power of attorney instrument with reference to longstanding principles of agency law. This article critiques and explains the evolution of this branch of agency law, with a special focus on the power of agents to enter into arbitration agreements on their principals' behalf in view of the 2015 Kentucky Supreme Court decision, *Extendicare Homes, Inc. v. Whisman*.

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In *Ping v. Beverly Enterprises*, the Kentucky Supreme Court held in 2012 that an agent's consent to an arbitration agreement did not bind her principal.<sup>1</sup> In *Pine Tree Villa v. Brooker*, the Sixth Circuit Court of Appeals, applying *Ping*, also concluded that an agent's signature to an arbitration agreement was without effect.<sup>2</sup> Both decisions might have been celebrated for their outcomes, but not for their rationales. Indeed, the rationales of these two cases could have spelled trouble for the utility of powers of attorney in Kentucky and elsewhere. But in the fall of 2015, the Kentucky Supreme Court decided *Extencicare Homes v. Whisman*, a landmark (and lengthy) decision which largely corrects and clarifies the scope of agency law in the field of durable powers of attorney and the scope of authority to enter into arbitration agreements.<sup>3</sup> An examination of the facts, rationales, and implications of these decisions is instructive to attorneys drafting, implementing, and interpreting durable powers of attorney instruments for their clients.

## I. INTRODUCTION

Claims against nursing homes by residents who have wrongfully suffered neglect and injury are best suited (from a plaintiff's perspective) to jury trials. Binding arbitration is a format greatly preferred by defendants in nursing home abuse cases.<sup>4</sup> From a plaintiff's perspective, claims against nursing

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<sup>1</sup> *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 600 (Ky. 2012), *cert. denied*, \_\_ U.S. \_\_, 133 S. Ct. 1996 (2013).

<sup>2</sup> *Pine Tree Villa, LLC v. Brooker*, 612 Fed. Appx. 340, 345 (6th Cir. 2015). The *Pine Tree Villa* case was not selected for publication in the Federal Reporter.

<sup>3</sup> *Extencicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015).

<sup>4</sup> See JAMES T. O'REILLY, LITIGATING THE NURSING HOME CASE 7 (2009) (describing the use of mandatory arbitration as a strategy of the nursing home industry to control the costs of nursing home litigation); Laura M. Ownings and Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43-MAR TENN. BAR J. 20, 24 (2007) (asserting that arbitration "agreements may affect the care a resident receives because they limit a resident's ability to recover for any injuries caused by the facility."); see also Kelly Bagby, et al., *Ending Unfair Arbitration: Fighting Against the Enforcement of Arbitration Agreements in Long-Term Care Contracts*, 29 J. CONTEMP. HEALTH L. & POLY 183, 183 (2013) (noting, "Arbitration can be expensive and biased in favor of the nursing facility"); Ann E. Krasuski, Comment, *Mandatory Arbitration Agreements Do Not Belong in Nursing Home Contracts with Residents*, 8 DEPAUL J. HEALTH CARE L. 263, 267 (2004) (stating, "Arbitration offers nursing homes a number of advantages over litigation"); see also generally, Marjorie A. Shields, Annotation, *Validity, Construction, and Application of Arbitration Agreement in Contract for*

homes for neglect or abuse should be heard by juries.<sup>5</sup> *Ping* and *Pine Tree Villa* favored the plaintiff's preferred forum by limiting the enforceability of arbitration clauses agreed to by agents acting under powers of attorney (or "POAs"). For that reason, advocates for the elderly could cheer outcomes which would permit a nursing home resident (or her estate, where a nursing home's negligence has allegedly resulted in death) her day in court. After all, the constitutional right to a civil jury trial is not a right that should be lightly—or easily—relinquished, especially by proxy.<sup>6</sup>

Yet something ominous was lurking beneath both of these decisions. POAs are widely utilized as simple, inexpensive surrogate decision-making vehicles, much preferred to the costly alternative of a guardianship or conservatorship.<sup>7</sup> The utility of powers of attorney depends on third parties recognizing the authority of the appointed agent and the enforceability of legal acts undertaken by the agent on the principal's behalf. In order to provide an acceptable alternative to guardianship proceedings, the agent's authority needs to be more or less coextensive with that of a guardian. When the principal loses the ability to manage her own affairs, her agent will need to undertake that responsibility for her, and to do so, wide-ranging and sometimes unanticipated realms of agency authority are desirable.<sup>8</sup>

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*Admission to Nursing Home*, 50 A.L.R. 6th 187 (2009) (discussing cases that were litigated because of an issue with a mandatory arbitration agreement in an admission agreement).

<sup>5</sup> See Lisa Tripp, *A Senior Moment: The Executive Branch Solution to the Problem of Binding Arbitration Agreements in Nursing Home Admission Contracts*, 31 CAMPBELL L. REV. 157, 167 (2009) (arguing that arbitration provisions in nursing home admission contracts are unconscionable); see also *Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695, 706 (Miss. 2009) (finding an arbitration agreement in a nursing home admissions packet unconscionable where it, *inter alia*, capped recoverable damages).

<sup>6</sup> See *Conservatorship of Kevin A.*, 240 Cal. App. 4th 1241, 1242 (2015) (setting aside the imposition of a conservatorship where accepting his counsel's waiver of a jury trial over his stated objection and the lower court made no finding that Kevin lacked capacity to make such a determination).

<sup>7</sup> See, e.g., Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 5 (2001) (noting that "guardianships are cumbersome, intrusive, and expensive"); Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 578 (1996) (explaining that DPOAs were "designed to be a less expensive alternative to guardianship or conservatorship proceedings").

<sup>8</sup> See Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 37 (2006) (concurring, "By limiting the scope of choices available to the agent, such provisions limit the ability of the agent to meet the principal's needs and fulfill his or her wishes"); Laura S. Whitton, *Durable Powers of Attorney as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7,

*Ping* and *Pine Tree Villa* were disconcerting because the courts in both cases construed an agent's authority under a POA narrowly.<sup>9</sup> In this sense, it was not the lack of agency authority to consent to binding arbitration which might trouble the elder law attorney, but rather that the reasoning of the courts could also be applied to limit the existence or scope of other agency powers. Since it is nearly impossible to adequately anticipate every legal act that an agent might need to exercise, expansive grants of authority are often attempted, although the courts frequently disregard boilerplate expansive language in POAs.<sup>10</sup> Some additional "wiggle room" is required. Typically, this wiggle room is available under the doctrines of implied and apparent authority, but the *Ping* and *Pine Tree Villa* courts narrowly applied those doctrines to the scope of POA agency questions presented to them.<sup>11</sup>

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19 (2007) (explaining, "If the scope of authority is not broad enough, a guardianship may still be needed in the event of later incapacity").

<sup>9</sup> *But see infra* text accompanying notes 135-39 for a discussion of Justice Noble's dissent in the *Extencicare* decision, acknowledging the need for broad construction of agency powers to meet individuals' reasonable expectations and objectives in signing POAs as incapacity-management tools.

<sup>10</sup> An example of expansive language in a POA follows:

I hereby delegate to my Agent, Agents, and Alternate Agents herein each and every power that I may lawfully delegate, subject only to those limitations specifically set forth in this instrument. It is my intent that this instrument shall be interpreted as a comprehensive full general power of attorney. The delineated powers hereinafter set forth are intended to explain and clarify the breath of powers delegated. The delineated powers are not intended to, nor shall they, limit or restrict this grant of a full and comprehensive general power of attorney.

MICHAEL L.M. JORDAN, 1 DURABLE POWERS OF ATTORNEY AND HEALTH CARE DIRECTIVES § 1.50 (4th ed. 2014). For examples of courts disregarding this kind of language, see *King v. Bankerd*, 492 A.2d 608, 612-13 (Md. 1985); *Aiello v. Clark*, 680 P.2d 1162, 1165-66 (Alaska 1984); *but see* UNIF. POWER OF ATTORNEY ACT § 201(c) (2006) (providing that "if a power of attorney grants to an agent authority to do all acts that a principal could do," that general authority, including powers of property and other interests, is conveyed). *See also infra* note 35.

<sup>11</sup> *See* UNIF. POWER OF ATTORNEY ACT § 121 cmt. (2006) (providing that principles of agency supplement statutory enactments regarding powers of attorney). Implied authority is a kind of gap filler. "Implied authority is actual authority circumstantially proven which the principal actually intended the agent to possess and includes such powers as are practically necessary to carry out the duties actually delegated." *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263, 267 (Ky. App. 1990) (citation omitted). In *Mill Street Church*, for example, an agent hired to paint a church ceiling had the implied authority to hire another person since the ceiling "simply could not be painted by one person." *Id.* at 268. "Apparent authority on the other hand is not actual authority but is the authority the agent is held out by the principal as possessing." *Id.* at 267. "It is a matter of appearances on which third parties come to rely." *Id.* (citation omitted). Apparent authority is typically seen in a commercial context, not a DPOA context. "[A]n agent has the apparent authority to do those things which are usual and proper to the conduct of the

Without expressly overruling precedent, the Kentucky Supreme Court in *Extendicare Homes* read *Ping* narrowly (or, perhaps to be fair, intentionally misread it) for the proposition that an agent is not authorized to waive her principal's constitutional right to a civil jury trial in the absence of an express grant of authority.<sup>12</sup> By doing so, the utility of durable powers of attorneys was preserved without diminishing the fundamental right to a jury trial. The longstanding agency principles of implied and apparent authority are essential to the operation of both commercial and private estate-management-type POAs. The broad strokes which the *Ping* and *Pine Tree Villa* opinions employed could have been catastrophic to durable powers of attorney (that is, agencies which survive a principal's later incapacity) serving as alternatives to costly guardianships.<sup>13</sup> *Extendicare's* narrow reading of these opinions against the backdrop of traditional agency law salvaged durable powers of attorney as an important tool for the clients of elder law attorneys and clarified the special treatment of agency powers to arbitrate as inhabiting a fundamental right, the right to a trial by jury.

In the discussion which follows, I will outline the *Ping* and *Pine Tree Villa* decisions, their underlying facts and rationales.<sup>14</sup> I will then briefly critique and reframe those analyses in a way which permits the continued functionality of powers of attorney

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business which he is employed to conduct." *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993, 996 (5th Cir. 1976) (citation omitted). Thus, an agent has apparent authority even when the act in question was eliminated from the express grant of authority unless third parties know of the limitation. *Id.* at 997; *see also* *Nogales Service Ctr. v. Atlantic Richfield Co.*, 613 P.2d 293, 296 (Ariz. Ct. App. 1980) (discussing inherent agency power).

<sup>12</sup> *See* U.S. CONST. amend. VII (preserving "the right of trial by jury"); KY. CONST. § 7 (holding "[t]he ancient mode of trial by jury" as "sacred" and "inviolable"). "The right to trial by jury was probably the only one universally secured by the first American state constitutions . . ." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 341 (1979) (Rehnquist, J., dissenting), *quoting* LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY*, 281 (1960).

<sup>13</sup> *See* UNIF. POWER OF ATTORNEY ACT § 102(2) (2006) (defining a durable power of attorney as one "not terminated by the principal's incapacity."); *see also* KY. REV. STAT. ANN. § 386.093(2) (quoted at text accompanying note 73); *compare* *Kindred Nursing Ctr. Ltd. P'ship v. Leffew*, 398 S.W.3d 463, 470 (Ky. Ct. App. 2013) (noting that a "power of attorney which is not durable terminates with the principal's incapacity") (citation omitted). Virginia was the first state to introduce durability characteristics for POAs in 1954. Dessin, *supra* note 7 at 578. The first uniform act was approved ten years later. *Id.* For purposes of the new uniform act, "incapacity" includes individuals with "an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance" as well as individuals unable to manage their property or affairs on account of incarceration, being unable to return to the country, or missing. UNIF. POWER OF ATTORNEY ACT § 102(5) (2006).

<sup>14</sup> *See* Part II(A)(1)-(2).

while preserving the right to a trial by jury except where the principal has expressly authorized her agent to waive that right on her behalf.<sup>15</sup> Finally, I will consider *Extendicare* and its skillful rephrasing of the *Ping* and *Pine Tree Villa* precedential authority into a doctrine which adheres to fundamental principles of agency and retains the functionality of a power of attorney as a planning device for the clients of elder law attorneys.<sup>16</sup>

## II. DISCUSSION

### A. *Precedents and Problems*

#### 1. *Ping v. Beverly Enterprises*

The *Ping* case involved an elderly woman, Alma Duncan, and her agent, Donna Ping. Ms. Duncan was admitted to the Golden Living Center nursing home in Frankfort, Kentucky, following a stroke.<sup>17</sup> Ms. Ping, as her mother's agent under a durable power of attorney, signed a number of documents contained within an application package without reading them.<sup>18</sup> The process took about ten minutes.<sup>19</sup> A year and a half later, Alma Duncan died as a result of injuries she sustained in the nursing home.<sup>20</sup> Ms. Ping was appointed executor and she brought a claim for wrongful death.<sup>21</sup>

Beverly Enterprises, which operated the long term care facility, filed a motion to dismiss or stay the proceedings pending arbitration, pointing to an arbitration agreement which Ms. Ping had signed as agent in conjunction with her mother's admission to the nursing home.<sup>22</sup> The trial court denied the defendant's motion, reasoning that Ms. Ping lacked the authority to agree to arbitrate claims arising out of her mother's care.<sup>23</sup> The Kentucky Supreme Court agreed.<sup>24</sup>

Examining the POA instrument at issue, the court noted that it specifically authorized the agent to undertake a number of acts such as "tak[ing] possession of any and all monies, goods, chattels,

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<sup>15</sup> See Part II(A)(3).

<sup>16</sup> See Part II(B), (C).

<sup>17</sup> Brief of Appellant at 1, *Ping*, 376 S.W.3d 581 (No. 2010-SC-000558-D) 2011 WL 9526747 [hereinafter, Appellant's Brief]; *Ping*, 376 S.W.3d at 586.

<sup>18</sup> Appellant's Brief at 2.

<sup>19</sup> *Id.*

<sup>20</sup> *Ping*, 376 S.W.3d at 587.

<sup>21</sup> *Id.* at 586.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* The trial court also found that Beverly "had obtained Ms. Ping's signature on the agreement by wrongful means and without providing consideration." *Id.*

<sup>24</sup> *Id.* The intermediate appellate court had reversed the trial court; the Supreme Court reversed the Kentucky Court of Appeals. *Id.*

and effects . . . wheresoever found; . . . receiv[ing], deposit[ing], invest[ing],” etc.<sup>25</sup> Along with numerous financial powers, the power of attorney included health-care decision making authority.<sup>26</sup> The instrument also indicated that it should be “liberally constructed with respect to the power and authority” granted to the agent; 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” and that Ms. Ping was vested with the power “[t]o generally do any and every further act and thing of whatever kind, nature, or type required to be done on [Alma Duncan’s] behalf.”<sup>27</sup>

The decision turned on the scope of the power granted. Did this broad power include the authority to enter into binding arbitration? Given that the language in the durable power of attorney granted Ms. Ping the authority “to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, . . . as I might or could do if personally present,” Beverly Enterprises argued that agreeing to arbitrate was within the scope of Ms. Ping’s agency authority.<sup>28</sup> Not so, said the court; the agent lacked both actual and implied authority.<sup>29</sup>

The Kentucky Supreme Court noted that it had previously held that although the scope of authority is left to the principal to declare, a general power of attorney should not be read as implicitly granting powers coextensive with those of a guardian.<sup>30</sup> The court proceeded to examine the text of the power of attorney instrument, noting that it included both listings of specific powers (e.g., over financial and healthcare matters) and a general grant of authority. The court first limited the application of the general grant of authority, citing the Restatement (Second) of Agency’s proclamation that a “specific authorization of particular acts tends to show that a more general authority is not intended.”<sup>31</sup> The court

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 592.

<sup>27</sup> *Id.* at 587.

<sup>28</sup> *Id.* at 591.

<sup>29</sup> *Id.* at 590-94. The *Ping* court also rejected the defendant’s theory of equitable estoppel and held that neither Alma Duncan’s estate, nor the wrongful death beneficiaries, were bound by the arbitration agreement. *Id.* at 594-600.

<sup>30</sup> *Id.* at 592, *citing* Rice v. Floyd, 768 S.W.2d 57, 59 (Ky. 1989). There is a widely accepted POA “rule of construction to discount or disregard, as meaningless verbiage, all-embracing expressions found in powers of attorney.” *King*, 492 A.2d at 611, *citing* RESTATEMENT (SECOND) OF AGENCY § 34 cmt. h (1958); Von Wedel v. Clark, 84 F. Supp. 299, 300 (D.N.J. 1949); Mercantile Trust Co. v. Harper, 622 S.W.2d 345, 349 (Mo. Ct. App. 1981). However, this “rule of strict construction ‘cannot override the general and cardinal rule’ that the court determine the intention of the parties.” *Id.*, *quoting* Posner v. Bayless, 59 Md. 56, 60 (Md. 1882).

<sup>31</sup> *Id.* at 592, *citing* RESTATEMENT (SECOND) OF AGENCY § 37(2) (1958).



seemingly imposed a kind of “Catch-22” for POA drafters: enumerating specific powers helps create numerous expressly articulated agency powers but defeats a general grant of authority while relying only on a general grant of authority will leave an agent without any of the typically enumerated powers that are commonly needed to manage an incapacitated person’s affairs.<sup>32</sup>

Moreover, the general authority language in Alma Duncan’s POA related to “every act and thing whatsoever *requisite and necessary*” and not simply acts which were advisable or appropriate.<sup>33</sup> The court then limited the application of the specific grants of authority, reasoning that those agency powers should be limited to only those acts which were “reasonably necessary” to maintaining the principal’s finances or healthcare.<sup>34</sup> Here, the *Ping* court relied primarily on other sections of both the Second and Third the Restatement of Agency.<sup>35</sup>

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Moreover, the court noted, if the general grant of authority were interpreted broadly, it would render superfluous the specific provisions granting authority over financial and healthcare matters. *Id. citing* City of Louisa v. Newland, 705 S.W.2d 916, 919 (Ky. 1986). *Cf.* Tennessee Farmers Life Reassurance Co. v. Rose, 239 S.W.3d 743, 749 (Tenn. 2007) (echoing, “The more specific a power of attorney is concerning the performance of specific acts, the more the agent is restricted from performing acts beyond the specific authority required”) (citations omitted).

<sup>32</sup> *Ping*, 376 S.W.3d at 592.

<sup>33</sup> *Id.* at 592 (emphasis in original).

<sup>34</sup> *Id.* at 591.

<sup>35</sup> The text of the *Ping* court’s “reasonably necessary” reasoning provides, in relevant part:

Mrs. Duncan’s power of attorney relates expressly and primarily to the management of her property and financial affairs and to assuring that health-care decisions could be made on her behalf... [E]ven by their terms the general expressions are limited to “every act and thing whatsoever requisite and necessary to be done,” and again to “every further act and thing of whatever kind, nature, or type required to be done on my behalf,” acts, that is, necessary or required to give effect to the financial and health-care authority expressly created. These general expressions thus make explicit the incidental authority noted in section 35 of the Restatement: “Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it.” Restatement (Second) of Agency § 35 (1958) . . .

Our careful approach to the authority created by a power of attorney is also consistent with the provision in the Restatement (Third) of Agency incorporating the provisions cited above as follows:

(1) An agent has actual authority to take action designated or implied in the principal’s manifestations to the agent and acts necessary and incidental to achieving the principal’s objectives, as the agent reasonably understands the principal’s manifestations and objectives when the agent determines how to act.

Restatement (Third) of Agency § 2.02 (2006). We are not persuaded either that Ms. Ping did understand, or that she reasonably could have

Ms. Ping's agency authority to maintain her principal's finances included the powers to invest and manage Alma Duncan's assets, but she lacked any express power to enter into contracts on her principal's behalf.<sup>36</sup> Nor did the power of attorney include any express rights to settle claims. "Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution," the court emphasized, an agency does not encompass the power to waive a "principal's right to seek redress of grievances in a court of law."<sup>37</sup>

But the power of attorney also included healthcare decision-making authority. Beverly claimed that an arbitration agreement was incidental to Alma Duncan's healthcare in that it related the care she would receive at its nursing home facility.<sup>38</sup> The Kentucky Supreme Court was unpersuaded. It took note of the fact that the arbitration agreement was optional; "where, as here, the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement, courts have held that authority to choose arbitration is not within the purview of a health-care agency, since in that circumstance agreeing to arbitrate is not a 'health care' decision."<sup>39</sup> Nor was

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understood her authority under the power of attorney to apply to all decisions on her mother's behalf whatsoever, as opposed, rather, to decisions reasonably necessary to maintain her mother's property and finances and to decisions reasonably necessary to provide for her mother's medical care.

*Id.* Thus, the *Ping* reasoning, in limiting the agent's authority to powers reasonably necessary to provide for medical care and maintain her estate, the court did quote in passing the "requisite and necessary" language from the POA instrument but relied in greater measure on agency law as articulated in the Second and Third Restatement of Agency. Later, in the *Extendicare* decision (discussed *infra*), dissenting Justice Noble re-characterized the reasoning reprinted above as resting entirely on the language of Mrs. Duncan's POA, thereby limiting the application of this reasoning in *Ping* to cases where the instrument itself limits the agent's powers to those which are strictly "necessary" and not merely advisable. See *Extendicare*, 478 S.W.3d at 361-62 (Noble, J., dissenting) (claiming "the 'requisite and necessary' language became a limit on her discretion"); *infra* notes 133-35 and accompanying text.

<sup>36</sup> *Ping*, 376 S.W.3d at 587.

<sup>37</sup> *Id.* at 593.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, citing *Dickerson v. Longoria*, 995 A.2d 721 (Md. 2010); *Koricic v. Beverly Enterprises-Nebraska, Inc.*, 773 N.W.2d 145 (Neb. 2009); *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So. 2d 211 (Miss. 2008); *Estate of Irons v. Arcadia Healthcare L.C.*, 66 So. 3d 396 (Fla. Dist. Ct. App. 2011); but see *Barron v. Evangelical Lutheran Good Samaritan Society*, 150 N.M. 669, 265 P.3d 720 (N.M. Ct. App. 2011) (holding that health-care agent's incidental authority extended to nursing-home admission contract's optional arbitration agreement). The court also noted "that in the related context of health-care surrogacy under KRS Chapter 311, 'health care decision' is defined as 'consenting to, or withdrawing consent for, any medical procedure,

arbitration within an agency power over property and finances where the principal's agreement to arbitrate was optional.<sup>40</sup> An agent, the *Ping* court suggested, only has agency authority over acts and decisions where necessity demands it, not where convenience or discretion merely permits it.<sup>41</sup>

Having completed its assessment of express and implied authority, the court turned to the doctrine of apparent authority. Beverly argued that even if Ms. Ping lacked actual authority to sign an agreement to arbitrate claims arising out of her mother's care, she had the apparent authority to do so.<sup>42</sup> Apparent authority would depend on whether Beverly "reasonably believe[d] the agent to be authorized and that such belief be traceable to a manifestation of the principal's manifestation . . ." <sup>43</sup> Stated another way, if it was reasonable for Beverly to believe that Alma Duncan's agent had the power to agree to arbitration under a broadly drafted general power of attorney including both healthcare and financial powers, then Ms. Ping had apparent authority even in the absence of actual authority to do so. The precept of apparent authority is to protect third parties' reasonable assumptions about an agent's authority.<sup>44</sup> The Restatement explains: "A principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequences of their acts offer an advantage."<sup>45</sup>

The *Ping* court unpersuasively dismissed a consideration of apparent authority on the same grounds as it had express authority. "Beverly could not", the court stated, "reasonably rely on the power of attorney as 'apparently' granting more authority than on its face it does."<sup>46</sup> In essence, the court seemed to say, there can be no apparent agency authority where there is an absence of actual authority found within the text of the principal's manifestations when it comes to the power of attorney instrument.

Finally, the court took note of an important comment in the Restatement (Third) of Agency, quoting it at length:

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treatment, or intervention." *Ping*, 376 S.W.3d at 593 n. 4, quoting KY. REV. STAT. ANN. § 311.621(8).

<sup>40</sup> *Ping*, 376 S.W.3d at 594 (citation omitted).

<sup>41</sup> *Id.* at 594; *supra* note 35.

<sup>42</sup> *Id.*

<sup>43</sup> RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. b (2006).

<sup>44</sup> See *Gaines v. Kelly*, 235 S.W.3d 179, 183 (Tex. 2007) (emphasizing that "to determine an agent's apparent authority we examine the conduct of the principal and the reasonableness of the third party's assumptions about authority."); see also, e.g., *American Soc'y of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 569 (1982) (holding a nonprofit association liable for antitrust violations because of the acts of lower level staff and unpaid volunteers through the doctrine of apparent authority).

<sup>45</sup> RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c (2006).

<sup>46</sup> *Ping*, 376 S.W.3d at 594.

Even if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts. Three types of acts should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act. First are crimes and torts, . . . Second, acts that create no prospect of economic advantage for the principal, . . . *Third, some acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal.*<sup>47</sup>

The Restatement recognizes – and the Kentucky Supreme Court thus recognized – that even if a grant of agency authority can, under principles of implied or apparent authority encompass certain acts by an agent by “stretching” actual authority, the law should nevertheless decline to locate the power if it is of a certain unusual type.<sup>48</sup> Among the examples given by the Restatement are criminal and tortious acts.<sup>49</sup> The Kentucky Supreme Court in *Ping* included within that list the power to relinquish one's right to a civil jury trial.<sup>50</sup>

## 2. *Pine Tree Villa v. Brooker*

In *Pine Tree Villa*, a panel of the Sixth Circuit Court of Appeals applied the holding of *Ping* to a similar – but not identical

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<sup>47</sup> *Id.* at 593, quoting RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (2006) (emphasis supplied by the court). “A reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as . . . executing an instrument confessing judgment.” RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (2006).

<sup>48</sup> Guardianships follow a similar type of reasoning: certain powers to a guardian are available only with express court approval. *See, e.g.*, IND. CODE § 29-3-9-12.2(a) (providing that when a guardian concludes that dissolution of the protected person's marriage should be pursued, “the guardian shall petition the court to request the authority to petition for a dissolution of marriage”); MD. CODE ANN. EST. & TRUSTS § 13-708(c)(1) (providing that notwithstanding the statutory powers of a guardian, “where a medical procedure involves, or would involve, a substantial risk to the life of a disabled person, the court must authorize a guardian's consent or approval for: (i) The medical procedure”).

<sup>49</sup> *Ping*, 376 S.W.3d at 593. The Restatement explains that even if a principal has expressly directed an agent to commit a criminal act or a tort, the very nature of such an act “may call into question whether the principal has authorized the agent to do such acts” RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (2006).

<sup>50</sup> *Ping*, 376 S.W.3d at 593. “We would place in this . . . category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law.” *Id.* “[A]uthority to make such a waiver is not to be inferred lightly.” *Id.*

– set of facts.<sup>51</sup> Helen Elfrig, in declining health, was admitted to Louisville, Kentucky’s Regis Woods Care and Rehabilitation Center.<sup>52</sup> Her daughter Joy Brooker, acting as her agent under an “unlimited” power of attorney, signed an arbitration agreement on her behalf.<sup>53</sup> Later, Helen Elfrig, while under Pine Tree Villa LLC’s care and supervision, fell and suffered a cerebral hemorrhage and a broken hip.<sup>54</sup> She died as a result and her estate sued.<sup>55</sup>

The same issue was framed as in *Ping*: whether the agent’s authority extended to an agreement to arbitrate a dispute arising out of the principal’s nursing home care.<sup>56</sup> A federal district court decided *Pine Tree Villa*. The plaintiff had commenced a wrongful death action in state court. In response, and rather than filing a motion in the state court where the action was pending, the defendant commenced a separate action in federal court to enforce the arbitration agreement.<sup>57</sup> The district court judge granted the Elfrig Estate’s motion to dismiss and Pine Tree Villa appealed.<sup>58</sup>

The power of attorney in *Pine Tree Villa* could be seen as a responsive drafting to the *Ping* decision. *Ping* had reasoned that language purporting to grant broad, encompassing powers of agency were inconsistent (and would therefore be jettisoned) if the POA also included enumerated powers.<sup>59</sup> Kentucky statutes identify healthcare decision-making authority as a power which must be specifically enumerated to be recognized in a POA.<sup>60</sup> Under this reasoning, one could speculate, the attorney drafting the POA for Helen Elfrig intentionally enumerated only healthcare decision-making authority coupled with a broad grant of plenary authority over all other matters. The entire instrument, less durability and revocation provisions, read:

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<sup>51</sup> *Pine Tree Villa*, 2015 WL 3429358, at \*5.

<sup>52</sup> *Id.* at \*1.

<sup>53</sup> *Id.*

<sup>54</sup> Brief of Appellee at 4, *Pine Tree Villa*, 2015 WL 3429358 (No. 14-6199) 2014 WL 7213087.

<sup>55</sup> *Id.*

<sup>56</sup> *Pine Tree Villa*, 2015 WL 3429358, at \*2.

<sup>57</sup> *Id.* at \*1.

<sup>58</sup> *Id.*

<sup>59</sup> See *supra* notes 31-32 and accompanying text (considering the construction of broad invocations of agency authority against specific enumerated agency powers in the same instrument).

<sup>60</sup> See KY. REV. STAT. ANN. § 311.631(1)(b) (providing that an agent under a durable power of attorney is unauthorized to make healthcare decisions for an incapacitated principal lacking an advance directive unless the instrument specifically includes authority for health care decisions). See also KY. REV. STAT. ANN. § 386.093(6) (providing that “a durable power of attorney may authorize an attorney in fact to make a gift of the principal’s real or personal property to the attorney in fact or to others if the intent of the principal to do so is unambiguously stated on the face of the instrument”). The Kentucky statutes do not expressly map out waiving a principal’s right to a jury trial as a power that must be expressly conveyed.

I, Helen Agnes Elfrig . . . grant an unlimited durable power of attorney to Joy Anita Brooker . . . to act as my attorney-in-fact. I give my attorney-in-fact the maximum power under law to perform any acts on my behalf that I could do personally, including the power to make any health decisions on my behalf. My attorney-in-fact accepts this appointment and agrees to act in my best interest as she considers advisable.<sup>61</sup>

Perhaps, the drafter of this POA may have reasoned, by including “maximum power” language without any enumerated powers (other than the single statutorily-required one), the instrument would grant to her client’s agent the broadest possible range of authority, thereby navigating the Catch-22 reasoning in *Ping*.<sup>62</sup> If so, the attorney’s efforts were unsuccessful.

First, the district court considered whether the express grant of healthcare decision-making power included the power to agree to arbitration in a dispute arising out of the principal’s nursing home care.<sup>63</sup> The *Pine Villa* court, like the *Ping* court, determined that it did not.<sup>64</sup> Entering the arbitration agreement was not a precondition to Helen Elfrig’s admission into the Regis Woods nursing home.<sup>65</sup> Therefore, the arbitration agreement was not a necessary health-care decision and not within the purview of the single express power granted to the agent. The Sixth Circuit also declined to interpret the agency created by Helen Elfrig’s instrument any more expansively on account of the “maximum power” language, reasoning “that Kentucky law does not appear to provide for unlimited POAs.”<sup>66</sup> Perhaps, the court suggested, if the POA had included the express power to contract, the result may have been different.<sup>67</sup> The power to contract might impliedly include the power to contract away the right to a jury trial.

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<sup>61</sup> *Pine Tree Villa*, 2015 WL 3429358, at \*1. Street addresses of the principal and agent have been replaced by the author with ellipses.

<sup>62</sup> See *supra* notes 31-32 and accompanying text. See also *infra* note 136 for the reasoning in Justice Noble’s *Extencicare* dissent which attempts to refute the Catch-22 problem of general versus specific language in a POA.

<sup>63</sup> *Pine Tree Villa*, 2015 WL 3429358, at \*3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at \*4.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*, citing *Oldham v. Extencicare Homes, Inc.*, 2013 WL 1878937, at \*5 (W.D. Ky. 2013) (holding that a POA did authorize an agent to sign an arbitration agreement where it granted agency authority “to draw, make and sign any and all checks, contracts, or agreements.”); *GGNSC Vanceburg, LLC v. Taulbee*, 2013 WL 4041174, at \*8 (E.D. Ky. 2013) (compelling arbitration based upon an arbitration agreement signed by an agent since the POA at issue explicitly authorized the agent to “make contracts” and “draw, make and sign in [the principal’s] name any and all checks, promissory notes, contracts, or agreements.”).

### 3. A Pre-*Extendicare* Gloss on *Ping* and *Pine Tree Villa*

Both *Ping* and *Pine Tree Villa* reached the correct result but for (some of) the wrong reasons. Reading both cases together, three principles emerge. First: expansive, global or “maximum power” language in a POA will be disregarded.<sup>68</sup> Second: health care decision-making authority in a POA includes the power to enter into an arbitration agreement in relation to custodial long term care but only when the arbitration agreement is necessary by virtue of the care provider requiring it as a precondition to care services.<sup>69</sup> And third: the power to enter into contracts or to settle claims and disputes will include the implied power to bind the principal to binding arbitration.<sup>70</sup>

Each of these three principles merits criticism, as unpacked below. A narrower reading of *Ping* and *Pine Villa* – one which recognizes the unique and fundamental rights involved when entering into a binding agreement to arbitrate a dispute, while mapping longstanding agency principles which need not undermine a “cautious” approach to POAs – was ultimately endorsed by the *Extendicare* decision.<sup>71</sup> Thus, the *Extendicare* opinion deserves study. Before doing so, however, it merits emphasis that the problems with the unfavorable venue of arbitration for nursing home care claims could be easily solved with thoughtful POA drafting.<sup>72</sup> A provision such as the following would eliminate the expense and uncertainty of litigating the scope of a POA when an agent executes an arbitration agreement:

Notwithstanding any other provision of this general power of attorney, the principal specifically and intentionally *withholds* from the agent any power, authority, or ability to (a) waive the principal’s right to a trial by jury; or (b) agree with or consent to arbitration as a means to advance, pursue, or resolve, any dispute, allegation, or claim in regards to or arising out of the principal’s health care, custodial care, personal care, or long term care. Any attempt by the agent to exercise such a power shall be void and of no effect. This limitation may not be modified by the principal except by a written and notarized amendment to this power of attorney instrument which expressly refers to this section.

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<sup>68</sup> *Ping*, 376 S.W.3d at 591; *Pine Tree Villa*, 2015 WL 3429358, at \*3.

<sup>69</sup> *Ping*, 376 S.W.3d at 593; *Pine Tree Villa*, 2015 WL 3429358, at \*4.

<sup>70</sup> *Ping*, 376 S.W.3d at 593; *Pine Tree Villa*, 2015 WL 3429358, at \*5.

<sup>71</sup> *Ping*, 376 S.W.3d at 592 (describing its approach as “careful”); *Pine Tree Villa*, 2015 WL 3429358, at \*3 (describing the Kentucky Supreme Court’s approach to POAs as “cautious”); *Extendicare*, 478 S.W.3d at 340, quoting *Ping*, 376 S.W.3d at 592 (“careful”) (Amundson, J., dissenting).

<sup>72</sup> Ronald R. Volkmer, *Power of Attorney and Agreement to Arbitrate*, ESTATE PLANNING 48 (Apr. 2013) (considering whether “drafters [should] specifically withhold from the agent the power to enter into an arbitration settlement”).

Many, many POAs in use today, however, are form documents often secured from a book or online source. Others are drafted by attorneys who have simply not considered the negative connotations of unintentionally authorizing agents to lock their principals into the unfavorable venue of arbitration for nursing home claims. For these reasons, similar disputes involving POAs and agency authority to arbitrate are likely to occur.

a. Disregarding Global or “Maximum Power” POA Provisions

The Kentucky statute which governs the durability of durable POAs states:

All acts done by an attorney in fact under a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal’s successors in interest as if the principal were competent and not disabled.<sup>73</sup>

The expansive language of this statute suggests that the legislature intended for principals to be able to vest their agents with plenary powers that approximate or even match the powers that a court-appointed guardian could exercise. Similar statutes from other states might give a false sense of security that expansively drafted POAs will be interpreted expansively.<sup>74</sup>

The *Ping* court approached the language in Alma Duncan’s POA which granted to her agent the power to “do and perform any, all, and every act and thing . . . as I might or could do if personally present” with skepticism and artificially postured the language as an all or nothing proposition, then rejected that possibility.<sup>75</sup> The court was able to dismiss the broad language by construing it as purporting to invoke essentially unlimited agency powers. Indeed, the *Ping* court was correct in reasoning that “[t]he general expressions upon which Beverly relies did not give Ms. Ping a sort of universal authority beyond those express provisions.”<sup>76</sup> But the *Ping* court was wrong in dismissing the general expressions altogether in construing the scope of agency that was intended. The general expressions indicate that the principal intended for

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<sup>73</sup> KY. REV. STAT. ANN. § 386.093(2).

<sup>74</sup> See, e.g., CAL. PROBATE CODE § 4123(a) (“The attorney-in-fact may be granted authority with regard to the principal’s property, personal care, or any other matter”); TEX. ESTATES CODE § 751.051 (“Each act performed by an attorney in fact or agent under a durable power of attorney during a period of the principal’s disability or incapacity has the same effect, and inures to the benefit of and binds the principal and the principal’s successors in interest, as if the principal were not disabled or incapacitated”).

<sup>75</sup> *Ping*, 376 S.W.3d at 591.

<sup>76</sup> *Id.* at 592.



her agent's scope of authority to be interpreted liberally; that in construing the enumerated powers of her agent, a broad and generous interpretation of those powers should be employed. The *Ping* court's decision, instead, rejected the general language entirely, finding it inconsistent with the grant of enumerated powers. It also gave only lip service to implied and apparent authority.

#### b. Health Care Decision-Making Authority and Arbitration

Both *Ping* and *Pine Tree Villa* recited that an agent vested with health care decision-making power lacks the power to agree to arbitrate a nursing home dispute where the arbitration agreement is not a precondition to admission.<sup>77</sup> The opinions thereby suggested the inverse; that an agent with health care decision-making powers *can* bind her principal to arbitration if the nursing home characterizes arbitration as a mandatory precondition to admission. To the extent that *Ping* and *Pine Tree Villa*'s dictum can be read this way, the decisions represent unsound legal reasoning under longstanding principles of agency and potential trouble for agents managing an incapacitated principal's affairs by means of a POA.

If an agent's authority under an express health care decision-making provision only relates to those acts which are strictly necessary in the narrowest sense, the agent would be handicapped in managing and enforcing her principal's health care needs. A necessity imposition significantly reduces the discretionary decision making of an agent. A number of helpful, appropriate, or even experimental care services are not "necessary" for an individual's health care: acupuncture, massage therapy, personal care attendants, aromatherapy, reflexology, dietary counseling, companionship services, or even second opinions or atypical diagnostic procedures.<sup>78</sup> None of these examples are truly necessary for an individual's health care and thus under the reasoning of *Ping* and *Pine Tree Villa*, a health care agent would appear to lack the authority to engage these kinds of services for her principal.

Agency law has long had its bedrock in the commercial context.<sup>79</sup> Agency law recognized that the marketplace demanded

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<sup>77</sup> *Id.* at 593; *Pine Tree Villa*, 2015 WL 3429358, at \*5.

<sup>78</sup> See Barbara L. Atwell, *Mainstreaming Complementary and Alternative Medicine in the Face of Uncertainty*, 72 UMKC L. REV. 593, 594 (2004) (arguing that "it is inappropriate for health insurers to deny coverage for [complementary and alternative] treatments" even where their efficacy may be uncertain).

<sup>79</sup> Examples of agency in English common law "go back at least to King John (circa 1200 A.D.) when he issued letters of credit empowering agents to

that agents' authority be construed broadly. Agents are vested with all powers expressly conferred on them (express authority) and those incidental powers which may be reasonably implied to carry out their express powers (implied authority), along with additional powers that third parties might reasonably expect (apparent authority).<sup>80</sup> Strictly construing an express grant of authority to only those acts which are strictly necessary to accomplish the acts expressly authorized is inconsistent with the doctrines of implied and apparent authority. Some of the uncertainty in the law governing the interpretation of agency powers in DPOAs derives from the tension between agency in a commercial sense and in a private affairs-management context. State agency law in this regard is in flux and oscillation.

Hundreds of years ago, the inefficiencies of communication across even distances of a dozen kilometers suggested the need for expanding agency powers through the doctrines of implied and apparent authority since consultation directly with the principal might be impractical. Today, communications are typically instantaneous but the diminished and diminishing capacity of elderly principals suggests the continuing need for these doctrines since confirmation with the principal is made impractical today by virtue of the principal's cognitive declines. Granted, POAs often govern personal needs, not commercial relationships, but if anything the contemporary context for POAs suggests that courts should construe agency powers more broadly, not less. Whereas it may have been inconvenient for a third party to confirm an agent's scope of authority by means of messengers travelling by carriage in the past, it is now often impossible for a third party to confirm an agent's scope of authority where the principal is incapacitated.

The typical scenario for an individual signing a POA involves a person of advanced years and declining health concerned with the possibility that they will lose decisional capacity with both their financial affairs and their own health care.<sup>81</sup> A POA is usually signed with the idea that the agent be vested with all the powers necessary to manage the principal's affairs so as to avoid the need for an expensive and privacy-

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borrow money and promise repayment in his name." Charles P. Sabatino, *The Legal and Functional Status of the Medical Proxy: Suggestions for Statutory Reform*, 27 J.L. MED & ETHICS 52, 52 (1999). "Agency law is integral to modern business associations." Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 23 QUINNIPIAC L. REV. 61, 98 (2004).

<sup>80</sup> See RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006) (describing express authority); RESTATEMENT (SECOND) OF AGENCY § 35 (1958) (defining implied or "incidental" authority); RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) (explaining apparent authority).

<sup>81</sup> See *infra* text 135-39 accompanying notes for Justice Nobles' crisp framing of the contemporary use of agency doctrines in the DPOA context.

invasive guardianship proceeding.<sup>82</sup> Absent strong policy reasons to the contrary, a principal's intentions as expressed in the agency instrument should be honored rather than undermined when it comes to the scope of an agency relationship that the principal created.

### c. Contracting or Settlement Authority and Arbitration

*Ping* also suggested (in dicta) that if the POA under consideration had contained a power to settle claims or disputes, it would have vested the principal with the incidental authority to sign an arbitration agreement.<sup>83</sup> *Pine Tree Villa* suggested, again in dicta, that if Helen Efring's POA had contained the power to enter into a contract that her agent's authority could have been viewed as including the implied power to agree to arbitration.<sup>84</sup> Indeed, a pair of unpublished federal district court opinions applying Kentucky law have held that a POA containing a general power to "make contracts" authorizes the agent to enter into an arbitration agreement.<sup>85</sup> As a result, in those cases, the principal (or her estate) was foreclosed from accessing the courts and the right to a jury in a dispute later arising out of the principal's care.<sup>86</sup>

This type of reasoning is more consistent with principles of implied and apparent agency authority, despite the unfortunate result of the principal being forced into the unfavorable mode of arbitration rather than court. Agency powers are typically interpreted generously.<sup>87</sup> The power to contract could arguably

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<sup>82</sup> See KY. REV. STAT. ANN. ch. 387 (governing guardianship proceedings).

<sup>83</sup> *Ping*, 376 S.W.3d at 593.

<sup>84</sup> *Pine Tree Villa*, 2015 WL 3429358, at \*4.

<sup>85</sup> See *Oldham*, 2013 WL 1878937, at \*5 (holding that a POA did authorize an agent to sign an arbitration agreement where it granted agency authority "make and sign . . . contracts, or agreements."); *GGNSC Vanceburg, LLC*, 2013 WL 4041174, at \*8 (enforcing an arbitration agreement signed by an agent where the POA authorized the agent to "make contracts"). See also *Kindred Healthcare, Inc. v. Cherolis*, 2013 WL 5583587, \*4 (Ky. App. 2013) (holding that the agency power to "institute or defend suits" included the power to enter an arbitration agreement); *Sorrell v. Regency Nursing LLC*, 2014 WL 2218175, \*6 (W.D. Ky. 2014) (holding that the power to contract in a POA includes the power to bind the principal to an agreement to arbitrate claims).

<sup>86</sup> Wrongful death beneficiaries are not bound by the terms of a binding agreement between a nursing home resident (or her agent) and the defendant because they suffer an independent loss which is not derivative of the nursing home resident's claim. See *Extendicare*, 478 S.W.3d at 313 (concluding, as did *Ping*, that wrongful death beneficiaries are not bound by a decedent's (or decedent's agent, within her authority) signing an arbitration agreement); but see *Golden Gate Nat. Senior Care, LLC v. Addington*, 2015 WL 1526135, at \*8-9 (E.D. Ky. 2015) (rejecting *Ping*'s holding with respect to wrongful death claims as it "effectively nullif[ies] arbitration in the wrongful death context").

<sup>87</sup> Thomas Earl Geu, *A Selective Overview of Agency, Good Faith and*

include an agreement relating to forum or venue selection; the power to settle a claim could be viewed as including an election of alternative dispute resolution.<sup>88</sup> But this kind of reasoning ignores the fundamental right – the right to a jury trial – that is relinquished when an arbitration agreement is executed.

Although a principal typically wishes to vest her agent with a broad and far-ranging set of guardian-esque powers, there are some decisions and acts which most principals probably do not contemplate their agents undertaking on their behalf. Few principals would contemplate their agents going to the ballot box and voting in their name. Few would contemplate an agent with the power to divorce the principal from her spouse – or to select a new spouse for them.<sup>89</sup> Nor would most principals feel comfortable with the idea of the agent rewriting their will, pleading guilty to a criminal indictment, or donating significant amounts of the principal's funds to charities.<sup>90</sup> These kinds of decisions and acts are either deemed outside of the kinds of authority that can be delegated to an agent or only a part of an agency relationship when the principal has expressly and unambiguously conveyed the power.<sup>91</sup>

The power to make gifts is one of these kinds of special powers that requires an express enumeration in order to be

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*Delaware Law*, 10 DEL. L. REV. 17, 22 (2008). Powers of attorney, however, are often construed narrowly. *See, e.g.*, *Archbold v. Reifenath*, 744 N.W.2d 701, 708 (Neb. 2008) (stating: "Powers of attorney are by necessity strictly construed").

<sup>88</sup> *See Extendicare*, 478 S.W.3d at 327 (reasoning that "a literal comprehension of . . . these provisions—'to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way' and 'to do and perform for me in my name all that I might if present'" would allow the agent to sign an arbitration agreement on behalf of the principal but for the fact that such a power should not be inferred on account of its fundamental nature).

<sup>89</sup> *See* Kurt X. Metzmeier, Note, *The Power of an Incompetent Adult to Petition for Divorce Through a Guardian or Next Friend*, 33 U. LOUISVILLE J. FAM. L. 949, 949 (1995) (noting that typically courts have ruled that even guardians with plenary powers lack the power to undertake a divorce on behalf of an individual under a guardianship).

<sup>90</sup> *See, e.g.*, TENN. CODE ANN. § 34-6-18(c)(5) (restricting an agent's power under a power of attorney to change a life insurance beneficiary designation by virtue of incorporating statutory enumerated agency powers); *but see Tennessee Farmers Life Reassurance Co.*, 239 S.W.3d at 751 (holding that a power of attorney instrument expressly granted agency powers to alter a life insurance beneficiary designation).

<sup>91</sup> *See, e.g.*, *Estate of Casey v. Commissioner*, 948 F.2d 895, 900 (4<sup>th</sup> Cir. 1991) (holding that in the absence of a controlling statute, a power of attorney agent lacks any authority to make gifts on her principal's behalf unless the instrument expressly conveys that power); *contra*, *Ingram v. Cates*, 74 S.W.3d 783, 788 (Ky. Ct. App. 2002) (holding that a general power of attorney which included the power "to convey" property included the power to make gifts of the principal's funds to the agent and his sister).

effective for agency purposes.<sup>92</sup> A gifting power cannot be generated under an implied or apparent authority analysis.<sup>93</sup> Nor can the authority to self-deal be inferred.<sup>94</sup> The waiver of a principal's right to a jury trial is another unique and fundamental right.<sup>95</sup> If a POA explicitly provides the agent with the power to waive the principal's right to a civil trial by jury and to enter into binding arbitration, the agent should be capable of exercising these powers. Without an express grant, there should be no implied or apparent authority which can graft the power into a POA, even a POA with contracting or settlement authority or expansive or general language. The recognition of special kinds of powers allows broad-based agency authority principles to apply to the construction of a POA without casually disregarding a principal's rights. *Extendicare* confirms this recognition and preserves the functionality of POAs in an elder law setting; it can serve as a model for courts across the country struggling with an agent's authority to waive his principal's right to a jury trial.

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<sup>92</sup> *E.g.*, UNIF. POWER OF ATTORNEY ACT § 201(a) (2006). The uniform act provides:

An agent under a power of attorney may do the following on behalf of the principal or with the principal's property only if the power of attorney expressly grants the agent the authority and exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

- (1) create, amend, revoke, or terminate an inter vivos trust;
- (2) make a gift;
- (3) create or change rights of survivorship;
- (4) create or change a beneficiary designation;
- (5) delegate authority granted under the power of attorney;
- (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; [or]
- (7) exercise fiduciary powers that the principal has authority to delegate; or
- (8) disclaim property, including a power of appointment].

*Id.* (emphasis supplied).

<sup>93</sup> *See Ping*, 376 S.W.3d at 593, *citing* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. h (2006) (singling out "acts that create no prospect of economic advantage" (e.g., gifts or the uncompensated use and enjoyment of the principal's property)).

<sup>94</sup> *See, e.g.*, *Bienash v. Moller*, 721 N.W.2d 431, 435 (S.D. 2006) (proclaiming that "if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist.").

<sup>95</sup> *See Hoshijo v. Caracaus*, 284 P.3d 932, 945 (Haw. App. 2012) (concluding, after "indulging every reasonable presumption against the waiver" of [a party's] right to a jury trial . . . that there was [not] 'an unequivocal and clear showing of waiver of such right by express or implied conduct.'") (citations omitted).

## B. *Extencicare Homes v. Whisman*

### 1. *Facts*

The *Extencicare* case involved three consolidated appeals. Each involved the death of a nursing home resident and wrongful death claims, coupled with personal injury and Kentucky Long Term Care Facilities Act violation allegations, filed in Kentucky circuit courts.<sup>96</sup> Each involved an optional arbitration agreement signed on the resident's behalf by an agent acting under a DPOA and in each case the defendant unsuccessfully moved for an order of dismissal and to compel arbitration.<sup>97</sup> The circuit courts denied the motions, reasoning that the agents lacked the power to waive the residents' rights to access the courts under *Ping*.<sup>98</sup> The Kentucky Court of Appeals affirmed and the defendant nursing homes appealed.<sup>99</sup>

#### a. *Extencicare Homes v. Whisman*

In the first of the three consolidated cases, Van Buren Adams had executed a power of attorney instrument which named his daughter, Belinda Whisman, as his agent.<sup>100</sup> The instrument granted Ms. Whisman the power "to draw, make and sign any and all checks, contracts, notes," etc., and "to institute or defend suits concerning my property or rights."<sup>101</sup> A month after signing the POA, Mr. Adams was admitted to the Shady Lawn Nursing Home and his agent signed an agreement to submit any disputes to binding arbitration.<sup>102</sup> Later, the plaintiff alleged, Ms. Adams was injured and, as a result, passed away on account of Shady Lawn's negligence.<sup>103</sup> Her estate brought a claim.

#### b. *Kindred Nursing Centers v. Clark*

In the second of the consolidated *Extencicare* cases, Olive Clark had executed a POA which designated her daughter, Janis Clark, as her agent.<sup>104</sup> The POA, drafted with impressive broadness, endowed Ms. Janis with:

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<sup>96</sup> *Extencicare*, 478 S.W.3d at 312. The Long Term Care Facilities Act is codified at KY. REV. STAT. ANN. § 216.510 *et seq.*

<sup>97</sup> *Extencicare*, 478 S.W.3d at 312.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 315.

<sup>101</sup> *Id.* at 316.

<sup>102</sup> *Id.* at 315.

<sup>103</sup> *Id.* at 315-16.

<sup>104</sup> *Id.* at 317.

[the] full power for me and in my name, place, and stead, in her sole discretion, to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way . . . To institute or defend suits concerning my property or rights . . . to make all decisions regarding my health care and medical treatment.<sup>105</sup>

Two years later, Olive Clark entered the Winchester Centre for Health and Rehabilitation and Ms. Janis, as her agent, signed an arbitration agreement. The plaintiff alleged that Olive Clark suffered injuries as a result of the Centre's negligence and died as a result.<sup>106</sup>

### c. Kindred Nursing Centers v. Wellner

In the third of *Extendicare* case, Joe Paul Wellner signed a POA naming his wife as his attorney-in-fact and three months later entered the same facility as Olive Clark had.<sup>107</sup> Mrs. Wellner, acting as her husband's agent, signed an arbitration agreement at the Winchester Centre.<sup>108</sup> Her husband died thirteen months later.<sup>109</sup> The text of the Wellner POA expressly granted the agent the power "[t]o demand, sue for, collect, recover and receive all debts, monies, interest and demands whatsoever now due or that may hereafter be or become due to me (including the right to institute legal proceedings therefor)" among other powers including the "full power to make all health care decisions for me and in my stead . . ." <sup>110</sup> Sadly, the plaintiff alleged, Mr. Wellner was injured as a result of the Centre's staff's negligence and later died as a result.<sup>111</sup>

## 2. Analysis

Whether the three separate arbitration agreements were enforceable, the Kentucky Supreme Court noted, "depends entirely upon the scope of authority set forth in the written power-of-attorney instrument."<sup>112</sup> The court felt that a literal approach to the "extraordinary broad grant of authority" in Olive Clark's POA, "to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way" would require the conclusion that Olive Clark's agent possessed the ability to forfeit her principal's rights to access the courts and to a trial by jury under general

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<sup>105</sup> *Id.* at 317-18 (bolded emphasis by the court removed).

<sup>106</sup> *Id.* at 317.

<sup>107</sup> *Id.* at 318.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 319 (bolded emphasis by the court removed).

<sup>111</sup> *Id.* at 318.

<sup>112</sup> *Id.* at 321.

rules of construction.<sup>113</sup> But – the court concluded, general rules do not apply to a unique power such as waiving a jury trial right, and for this reason, Olive Clark’s agent lacked the authority to sign an arbitration agreement, optional or not.<sup>114</sup>

The Whisman and Wellner POAs, despite containing the power to make contracts (in Whisman’s case) and to sue, institute proceedings, and make health care decisions (in Wellner’s case) simply fell short, the court concluded, of conveying the agency power to agree to arbitrate, notwithstanding *Ping*’s suggestion that a power to settle claims and *Pine Tree Villa*’s dicta that the power to contract both would encompass the implied power to agree to arbitration.<sup>115</sup> *Extendicare*, therefore, signaled a departure from the troublesome reasoning in both of those cases, and announced its reasoning:

There are limits to what we will infer from even the broadest grants of authority that might be stated in a power-of-attorney instrument . . . It makes no difference that arbitration clauses are commonplace in nursing home contracts and that a principal might anticipate that someday his agent will act to admit him to one. This reality does not vitiate our conclusion that to cloak the agent to waive the fundamental right to an adjudication by judge or jury, the power-of-attorney document must *expressly* so provide.<sup>116</sup>

The court thus framed and departed from its decision in *Ping* along with the federal district court’s reasoning in *Pine Tree Villa* that seemed, at times, to consider the right to a jury trial as any other agency power. An agreement to arbitrate is not subject to the standard interpretive doctrines of agency powers because of its impact on the principal’s right to a jury trial. The court then went on to explain how other fundamental rights – or “audacious powers” – would fall under the same exceptional rubric.<sup>117</sup>

“Lest there be any doubt concerning the propriety of drawing a line that limits the tolerable range of inferences we would allow” from a broad or universal grant of agency authority, the court offered a prediction “considering how we would react when other fundamental rights are at stake.”<sup>118</sup> Broad grants of agency authority cannot be construed as authorizing an agent to waive a principal’s civil rights.<sup>119</sup> Nor can generalized authority be construed as conferring upon an agent the power to constrain the

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<sup>113</sup> *Id.* at 327. See *supra* notes 11, 80 (regarding implied and apparent agency authority).

<sup>114</sup> *Extendicare*, 478 S.W.3d at 328.

<sup>115</sup> *Id.* at 323-26; *Ping*, 376 S.W.3d at 593; *Pine Tree Villa*, 2015 WL 3429358, at \*4.

<sup>116</sup> *Extendicare*, 478 S.W.3d at 329 (emphasis supplied).

<sup>117</sup> *Id.* at 328.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*



principal's right to worship, to consent to the termination of parental rights, "put her child up for adoption; consent to abort a pregnancy; consent to an arranged marriage; or bind the principal to personal servitude."<sup>120</sup> A POA instrument may convey to the agent the power to bind her principal to arbitration, and so relinquish the right of access to the courts and to a jury trial, but to do so, it must do so expressly.<sup>121</sup> The power will not be implied under apparent authority, nor implied authority, doctrines.<sup>122</sup> The court did not expand its holding to require all of these particular powers or rights to be expressly granted in a POA, nor did it confirm whether agency powers could encompass authority over such fundamental concerns.<sup>123</sup>

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<sup>120</sup> *Id.* "Absent a clearly expressed, knowing, and voluntary waiver, we do not conclude that an individual has waived his constitutional right to remain silent in the face of police questioning; to have the assistance of counsel during a trial; to plead guilty to a crime and thereby waive his right to a trial." *Id.* at \*16, *citing* *Brady v. United States*, 397 U.S. 742, 748 (1970). Justice Abramson, in his dissent, would call this list a "parade of horrors." *Extencicare*, 478 S.W.3d at 353 (Abramson, J., dissenting).

<sup>121</sup> *Extencicare*, 478 S.W.3d at 329. The *Extencicare* court also dismissed the defendants' argument that its construction of agency law principles were preempted by the Federal Arbitration Act (FAA). *Id.* at \*17-18; 9 U.S.C. § 1, *et seq.* The court contrasted the United States Supreme Court's holding that a California proclamation of arbitration clauses in consumer contracts with class action waivers. *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). The Kentucky Supreme Court also distinguished the United States Supreme Court's determination that West Virginia's voiding of arbitration clauses in nursing home admission agreements was similarly preempted. *Marmet Health Care Center, Inc. v. Brown*, \_\_ U.S. \_\_, 132 S.Ct. 1201 (2012). The *Extencicare* court explained:

A straight-forward application of our rule that an attorney-in-fact cannot act beyond the powers granted in the power-of-attorney document stands in stark contrast to the blanket prohibitions against arbitration agreements condemned in *Marmet* and *Concepcion*. Whatever hostility our rule evinces is not against the federal policy favoring arbitration; indeed, Kentucky shares that same policy, as we have proclaimed on several occasions. Our rule merely reflects a long-standing and well-established policy disfavoring the unknowing and involuntary relinquishment of fundamental constitutional rights regardless of the context in which they arise.

*Extencicare*, 478 S.W.3d at 331 (internal footnote omitted); *see also* *Nitro-Lift Technologies, L.L.C. v. Howard*, \_\_ U.S. \_\_, 133 S.Ct. 500, 501 (2012) (vacating the Oklahoma Supreme Court's declaration of noncompetition agreements containing arbitration clauses as void in violation of the FAA) (per curiam).

<sup>122</sup> *E.g.*, *GGNSC Louisville Hillcreek, LLC v. Watkins*, 2016 WL 815295 \*1, 5 (W.D. Ky. 2016) (construing a POA which authorized the agent to "arbitrate or dispose of any lawsuit" as "specifically authoriz[ing the agent] to arbitrate on [the principal's] behalf, whereas the POAs in *Whisman* did not").

<sup>123</sup> *See Extencicare*, 478 S.W.3d at 353 (Abramson, J., dissenting) (noting that "the majority seems at some points in its discussion to suggest that" its rationale "applies only to 'sacred' constitutional rights").

### 3. *The Dissents*

Mention should be made of the two separate dissenting opinions in *Extencicare*. Justice Abramson, joined by Chief Justice Minton and Justice Noble, filed a dissenting opinion.<sup>124</sup> Separately, Justice Noble, joined by Chief Justice Minton, also dissented.<sup>125</sup> Justice Abramson distinguished *Ping* in which the POA contained on generalized authority with a specific agency power to contract. “The grant of an unqualified power to contract is necessarily ‘express authorization’ to agree to dispute resolution through arbitration,” Justice Abramson believed.<sup>126</sup> So would a power to “settle claims and disputes” impliedly invoke the power of an agent to enter into an agreement to arbitrate, he emphasized.<sup>127</sup>

Justice Noble dissented separately and stated: “In retrospect, it has become clear to me that while this Court reached the right result in *Ping*, at least half of the reason we gave for reaching that result was not actually correct.”<sup>128</sup> In the business world, agents are typically endowed with specific authority to engage in specific kinds of transactions on their principal’s behalf.<sup>129</sup> Generalized language tacked on at the end or beginning of a commercial agency must be narrowly construed, lest it “swallow the entire principal-agent relationship.”<sup>130</sup>

Justice Noble then went on to recast *Ping*. He characterized an “unfortunate reading of our holding in *Ping*” as one in which a general durable power of attorney was to be transformed into a specific power of attorney if specific powers were listed.<sup>131</sup> Some read *Ping* as saying that “if specific powers are enumerated in a power of attorney, the scope of the power is limited to those enumerated acts” even if the language of the instrument suggests that the principal intended to convey broad and encompassing agency powers “aimed at giving the agent full authority to conduct the principal’s affairs.”<sup>132</sup> Justice Noble preferred to recast *Ping* as turning on the “requisite and necessary to be done” language in

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<sup>124</sup> *Id.* at 333 (Abramson, J., dissenting).

<sup>125</sup> *Id.* at 335 (Noble, J. dissenting).

<sup>126</sup> *Id.* at 342 (Abramson, J., dissenting).

<sup>127</sup> *Id.* Justice Abramson also reasoned that a construction of agency law such as the majority had articulated would be preempted under the Supremacy Clause given the FAA’s broad reach. *Id.* at 344-45.

<sup>128</sup> *Id.* at 357 (Noble, J., dissenting).

<sup>129</sup> *Id.* at 358. “Most people encounter this type of relationship when buying insurance from an agent of an insurance company.” *Id.* “That agent no doubt has a limited authority to engage in certain types of transactions, usually the selling of insurance products.” *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

Alma Duncan's POA.<sup>133</sup> It was this language, Justice Noble felt, which qualified the otherwise broad grant of authority and trimmed the agent's authority. Although Alma Duncan's agent had the express authority to execute documents relating to medical care, and the arbitration agreement "was clearly related to health-care decisions, as it was part of the admissions packet for a nursing home", it was not required for Alma Duncan's admission to the nursing home.<sup>134</sup> Because the agency authority was limited to acts "requisite and necessary" for Alma Duncan's healthcare according to the terms of the POA instrument, her agent's execution of an optional arbitration agreement exceeded her authority; it wasn't "necessary."<sup>135</sup>

Finally, Justice Nobles acknowledged how difficult it is for elder law attorneys to "draft a purely general power of attorney."<sup>136</sup> *Ping* suggested (wrongly, he felt) that including specific examples of acts that may be done as a guide to agents and third parties "runs the risk of defeating the general power granted, leaving the agent without necessary authority."<sup>137</sup> But by omitting

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<sup>133</sup> *Id.* "What the Court should have placed more emphasis on in *Ping* is the 'requisite and necessary to be done' and 'required to be done' language that qualified the otherwise general grant of 'full and complete power and authority to do and perform any, all, and every act'" emphasized Justice Nobles. *Id.*, quoting *Ping*, 376 S.W.3d at 590-91. "Boiled down, this seemingly broad grant (any, all, and every act) was to do all things 'requisite and necessary.'" *Id.* at 359.

<sup>134</sup> *Id.* at 362 n.30.

<sup>135</sup> *But see supra* note 35 for a discussion relative to the construction of the word "necessary" in the DPOA context from *Ping*.

<sup>136</sup> *Id.* at 362.

<sup>137</sup> *Id.* Justice Noble also criticized the puzzling reasoning in *Ping* that disregarded general grants of authority as being inconsistent with enumerated areas of authority in a general durable power of attorney, highlighting the *Ping* court's reliance on section 37 of the Restatement (Second) of Agency which has no analogue in the Restatement (Third):

[T]he power of attorney in *Ping* was not limited to a specific transaction. Rather, it was intended to allow the daughter to manage *all* of her mother's affairs in her stead, especially if she was incapacitated. Section 37 of the Second Restatement has caused considerable confusion because lawyers—and courts—fail to note that a general power of attorney, especially one for the care and welfare of a person, is not limited to a single transaction. Most likely, this is why no analogous provision was included in the Third Restatement. In fact, the Third's cross-index notes that Section 37 of the Second Restatement is covered by Section 2.02, comment e, of the Third Restatement. That comment, however, says nothing about specific language displacing general grants of power; rather, it notes that the agent's authority is limited to those things that she reasonably believes the principal has consented to. *See* Restatement (Third) of Agency § 2.02 (2006) ("An agent does not have actual authority to do an act if the agent does not reasonably believe that the principal has consented to its commission. . . . Lack of actual authority is established by showing either that the agent did not believe, or could not reasonably have believed, that the principal's grant of actual authority encompassed the act in question.").

the general grant of authority alongside specific powers, the agent may be left without the authority necessary to manage her principal's affairs.<sup>138</sup> "This," Justice Nobles sympathized, "is certainly a difficult dilemma for lawyers drafting and principals executing general powers of attorney."<sup>139</sup>

He concluded:

At the same time, such documents, especially durable powers of attorney, are becoming more and more of a necessity for the smooth operation of a person's later life. A very large portion of the American population is either already at (the Greatest Generation) or very near (the Baby Boomers) the point in their lives where they face incapacity from medical conditions such as Alzheimer's disease or, as in *Ping*, the devastating effects of a stroke. Many of them prepare for the management of their affairs in the event of such incapacity by executing a broad power of attorney ahead of time.<sup>140</sup>

It was not the intent of the *Ping* court to undermine the use of DPOAs or to jettison long-standing principles of agency law, Justice Nobles believed.<sup>141</sup> Rather, the determination of the agent's lack of authority in *Ping* rested on the drafting attorney's use of the word "necessary" to constrain an otherwise broad grant of agency authority relating to health care decision making.<sup>142</sup> Justice Nobles was not persuaded by the majority's view of arbitration agreements as requiring any special or express kind of language in the creation of the agency.

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In other words, the agent is to take into account all of the principal's instructions to her and must not ignore general instructions just because there are also specific ones.

*Extendicare*, 478 S.W.3d at 360-61 (Noble, J., dissenting) (emphasis in original); *but see* *Bardstown Medical Investors, Ltd. v. Dukes*, 2015 WL 300677 \*3 (Ky. Ct. App. 2015) (quoting *Ping* and the RESTATEMENT (SECOND) OF AGENCY § 37 (1958) to reverse a trial court's determination that a POA allowing an agent "to settle claims and disputes" was insufficient to bind the principal to arbitrate a nursing home claim). *Bardstown* is an unpublished decision decided prior to *Extendicare*. *See also* *Mercantile Trust Co., N.A. v. Harper*, 622 S.W.2d 345, 349 (Mo. Ct. App. 1981) (reasoning that "apparently grants broad power to convey the principal's property, such as the power to convey 'as sufficiently as (the principal) could do personally,' is deemed to be mere 'window dressing' and must be disregarded.") (quoting WARREN ABNER SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 21 (1964)).

<sup>138</sup> *Extendicare*, 478 S.W.3d at 362 (Noble, J., dissenting).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

### C. The Projected Legacy and Possible Impact of *Extendicare*

Assuming that the holding in *Extendicare* is not later overturned under preemption grounds on account of the FAA, its impact on other states' application of agency principles to DPOAs may turn out to be negligible, or it may be significant.<sup>143</sup> A number of courts have had little difficulty in finding that agents acting under health care DPOAs have the authority to bind their principals to arbitrating claims arising out of negligent nursing home care.<sup>144</sup> A number of courts have found that agents acting under general financial or property DPOAs also have the implied authority to agree to arbitration and waive the right to a jury trial.<sup>145</sup> The fundamental rights aspect of an arbitration agreement has been infrequently examined or argued. *Extendicare's* rationale may reflect an unstated antagonism towards arbitration as a forum, and that antagonism may be well grounded. It remains to be seen what impact the compelling rationale of *Extendicare* will have on other courts.

Of particular interest will be the legacy of the fundamental or unique rights listing by the *Extendicare* court – what Justice Abramson called a “parade of horrors.”<sup>146</sup> The list included waiving the principal's right to worship freely, to consent to the termination of parental rights, abortion, marriage, to plead guilty, to remain silent, to have the assistance of counsel, or even personal servitude.<sup>147</sup> None of these types of powers are enumerated among the powers that may be expressly (but not impliedly) authorized in an agency delegation under the Uniform

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<sup>143</sup> See *Preferred Care of Delaware, Inc. v. Crocker*, \_\_ F.Supp.3d \_\_, 2016 WL 1181786 \* 9 (W.D. Ky. 2016) (concluding “that Kentucky's requirement that a power of attorney explicitly enumerate an attorney-in-fact's power to sign an arbitration agreement violates the FAA”).

<sup>144</sup> See, e.g., *Owens v. National Health Corp.*, 263 S.W.3d 876, 885 (Tenn. 2007) (holding that an agent under a health care power of attorney had the power to bind the principal to an arbitration agreement); *Hogan v. Country Villa Health Servs.*, 55 Cal.Rptr.3d 450, 453–55 (Cal. 2007) (same); but see *Texas Cityview Care Ctr., L.P. v. Fryer*, 2007 WL 1502088, \*5 (Tex. App. 2007) (concluding that a health care power attorney did not “confer authority on [the agent] to make legal, as opposed to health care, decisions for [the principal], such as whether to waive [the] right to a jury trial by agreeing to arbitration”); *Estate of Irons ex rel. Springer v. Arcadia Health Care, L.C.*, 66 So. 3d 396, 400 (Fla. Ct. App. 2011) (same); *Life Care Centers of America v. Smith*, 681 S.E.2d 182, 186 (Ga. Ct. App. 2009) (same).

<sup>145</sup> See, e.g., *Baron v. Evangelical Lutheran Good Samaritan Soc'y*, 265 P.3d 720, 726 (N.M. Ct. App. 2011) (holding that agency authority to “complete her paperwork” included the power to sign an arbitration agreement).

<sup>146</sup> *Extendicare*, 478 S.W.3d at 353 (Abramson, J., dissenting).

<sup>147</sup> *Id.* at 328.

Power of Attorney Act.<sup>148</sup> Perhaps these are among the powers that should never reside in an agency delegation, whether the principal attempted to convey them to her agent or not.

### III. CONCLUSION

Prior to *Extendicare*, *Ping* and *Pine Tree Villa* could have only been read as standing for the proposition that the right to a trial by jury is such an important and fundamental right that only an express grant of this authority can create an agency stocked with the power to waive that right, but only by straining the analysis of the decisions. Some of the court's language in *Ping* emphasized this concept, but reading *Ping* in this way required that one characterize other rationales articulated by the court (such as its failure to find a power to agree to arbitration under the doctrine of apparent authority) as dicta when in fact the holding seems to have rested on several bases including, but not limited to the reasoning that because an agreement to arbitrate invokes a fundamental right of the principal, it will not be inferred or implied. Reading *Pine Tree Villa* in this way is even more difficult. *Pine Tree Villa* seemed to rest even more squarely on a narrow construction of POA language.

*Extendicare* resolves the problematic agency principles suggested by *Ping* and *Pine Tree Villa*. *Extendicare* confirms that certain unique or fundamental powers must be enumerated and will not be inferred. Such a holding avoids diminishing the utility of POAs in other spheres and permits courts to honor the principal's intent in construing agency powers under a POA instrument. Allowing an agent to exercise the power to give up her principal's right to have a claim of nursing home abuse or negligence heard by a jury of her peers unless it is clear that the principal intended to convey that power is too dear.

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<sup>148</sup> *Supra* note 92 (quoting relevant provisions of the Uniform Power of Attorney Act).

