

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Tennessee's Continuing Trend to Uphold Mandatory Arbitration For Nursing Home Contracts

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In *Mitchell v. Kindred Healthcare Operating, Inc.*,¹ the Tennessee Court of Appeals upheld the authority of a nursing home patient's spouse to sign a mandatory arbitration agreement for her husband under the terms of a health care power of attorney. In addition, the court concluded that because the agreement was separate from a larger admissions document and was not a precondition to the patient's receiving treatment services, it was not unconscionable; thus, the court ordered the approval of a motion to compel arbitration.

The Tennessee "Durable Power of Attorney Act" (the "Act") authorizes a principal to designate another to act on his or her behalf in the event that the individual becomes incapacitated. Under the terms of the Act, the principal's agent is authorized to make health care decisions "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."² Specifically, the statute includes among those health care decisions the agent is authorized to execute:

- (1) Making a disposition under the Uniform Anatomical Gift Act;
- (2) Authorizing an autopsy pursuant to the Post Mortem Examination Act;
- (3) Directing the disposition of remains; and
- (4) Consent, refusal of consent or withdrawal of consent to health care.³

The statute does not specifically include in "health care decisions" the signing of an arbitration agreement and the waiver of a right to jury trial, but the court in *Mitchell v. Kindred* ruled that this action was within the scope of the health care decisions authorized by the Act. In addition, the case indicates that courts likely will enforce a binding arbitration agreement if not a precondition to receiving nursing home care and if not abrogating the nursing home's duty of care to the patient.

¹ *Mitchell v. Kindred Healthcare Operating, Inc.*, Tenn. Ct. App. No. W2008-00378-COA-R3-CV, 11/19/08.

² T.C.A. § 34-6-204(b).

³ *Id.* at § 34-6-201.

In this case, patient Mitchell suffered from Alzheimer's disease and was admitted to the Cordova Rehabilitation and Nursing Center in April 2005. The patient previously had signed a power of attorney giving his wife the authority to make health care decisions for him in the event that he became incapacitated. Ms. Mitchell presented this power of attorney to the nursing home and signed her husband's patient admissions papers, as well as a separate arbitration agreement, on his behalf. Following the patient's death in 2005, Ms. Mitchell as executrix of her husband's estate filed a complaint against the nursing home alleging several causes of action including negligence, medical malpractice, and wrongful death. In response, the nursing home filed a motion to enforce the arbitration agreement. The trial court denied the motion to compel arbitration. Although the trial court ruled that Ms. Mitchell did have the authority to sign the arbitration agreement, it concluded that she did not knowingly and voluntarily waive her husband's right to jury trial. The lower court thus found the agreement unconscionable.

The court of appeals reversed and remanded. First, the court held that Ms. Mitchell's having the power of attorney to make health care decisions for her husband also encompassed her authority to sign the arbitration agreement on his behalf. The power of attorney signed by Mr. Mitchell was triggered in the event that he did not have the capacity to make informed health care decisions for himself; it authorized Ms. Mitchell to make health care decisions for her husband, as well as "to execute on [Mr. Mitchell's] behalf any documents necessary or desirable to implement the health care decisions" she was authorized to make.⁴ The parties agreed that the patient was incompetent at the time he entered the nursing home, thus triggering his wife's power of attorney. Under that power of attorney, she signed an agreement to submit any claims against the nursing home to binding arbitration. Though Ms. Mitchell argued that she lacked the authority to execute the arbitration agreement on behalf of the patient, the court disagreed, holding that her argument rested on a flawed distinction between a health care services decision and a purely "legal" decision.

In concluding that Ms. Mitchell did have the authority to sign the agreement, the court applied the rule derived from an earlier Tennessee case, *Owens v. National Health Corp.*,⁵ in which a power of attorney for health care was used by the agent as authority to sign an arbitration agreement on behalf of a patient. The court in that case reasoned that creating a distinction between the authority to make health care decisions (including signing an agreement to provide nursing home services) and the authority to make "legal" decisions, such as signing an arbitration agreement, was untenable. In so holding, the court articulated the rationale:

Holding that an attorney in fact can make some "legal decisions" but not others would introduce an element of uncertainty into health care contracts signed by attorneys-in-fact that likely would have negative effects on their principals. Such a holding could make it more difficult to obtain health care services for the principal. And in some cases, an attorney-in-fact's apparent lack of authority to sign an arbitration agreement on behalf of the

⁴ *Mitchell v. Kindred Healthcare Operating, Inc.*, 2008 Tenn. App. LEXIS 676, *9 (Tenn. Ct. App. 2008).

⁵ *Owens v. National Health Corp.*, 2007 WL 3284669, * 19 (Tenn. Nov. 8, 2007).

principal presumably could result in the principal being unable to obtain needed health care services.⁶

Thus, regardless of the fact that the patient in *Mitchell* did not explicitly grant his wife the authority to waive his right to a jury trial, her authority to make all health care decisions regarding his admission to the nursing facility and services rendered there encompassed her authority to sign the binding arbitration agreement on his behalf. Further, the court adhered to the policy rationale in *Owens*, reasoning that limiting the decisionmaking power of an agent acting under a health care power of attorney could prevent an incapacitated patient from receiving necessary health care services.⁷

Second, the court in *Mitchell* held that the arbitration agreement itself was not unconscionable. Under Tennessee law, an agreement will be held unconscionable when "the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on one hand, and no honest and fair person would accept them on the other."⁸ Here the court weighed several factors, including the fact that the arbitration agreement was separate from the admissions document, rather than a clause buried within a larger admissions agreement. Its terms were clear and easy to read, and Ms. Mitchell's signing of the arbitration agreement was not a precondition to her husband's receiving care at the nursing home. Further, the agreement did not abrogate the nursing home's duty to the patient, but merely altered the procedure for dispute resolution between the parties. The court reasoned that the agreement by its terms did not "change the [nursing home]'s duty to use reasonable care in treating [the patient], nor limit liability for breach of that duty, but merely shifted disputes to a different forum."⁹ Taken together, these facts allowed the court to conclude the agreement was fairly executed and was not unconscionable.

Lastly, the court ruled that Ms. Mitchell did have the mental capacity to knowingly waive her right to jury trial by signing the arbitration agreement. The plaintiff contended that her medical condition at the time she signed the agreement rendered her incapable of knowingly and voluntarily waiving the right to jury trial. The court noted that adults are presumed competent and that the plaintiff must carry the burden of proving her incapacity. Specifically, stated the court, the person seeking to show incapacity must prove either "that (1) they are unable to understand in a reasonable manner the nature and consequences of the transaction or (2) they are unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of their condition."¹⁰ Here, because the record did not reveal anything about Ms. Mitchell's mental condition on the day she executed the agreement, and because she did not present any evidence other than her own testimony about her condition, the court found that plaintiff did not meet the burden of demonstrating that she was incompetent at the time she signed the ADR agreement.

⁶ *Id.*

⁷ *Mitchell v. Kindred* at *12-13.

⁸ *Trinity Industries, Inc. v. McKinnon Bridge Co, Inc.*, 77 S.W. 3d 159, 170 (Tenn. Ct. App. 2001) [quoting *Haun v. King*, 690 S.W. 2d 869, 872 (Tenn. Ct. App. 1984)].

⁹ *Reagan v. Kindred Healthcare Operating, Inc.*, 2007 WL 4523092, *15 (Tenn. Ct. App. Dec. 20, 2007), cited in *Mitchell v. Kindred* at *18.

¹⁰ *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W. 3d 291, 297 (Tenn. Ct. App. 2001) [citing *Knight v. Lancaster*, 988 S.W. 2d 172, 177-8 (Tenn. Ct. App. 1998)].

Thus, the appellate court reversed the trial court ruling and remanded for the entry of an order compelling arbitration. If you have any questions about this Health Law Update, please contact any of the attorneys in our Healthcare Practice Group listed below.

Bass, Berry & Sims Healthcare Attorneys

H. Stanford Adams, Jr.
(615) 742-7775
sadams@bassberry.com

Kevin L. Alonso
(615) 742-7913
kalonso@bassberry.com

H. Lee Barfield, II
(615) 742-6202
lbarfield@bassberry.com

Philip F. Berg
(615) 742-7908
pberg@bassberry.com

Krista Thornton Cooper
(615) 742-7734
kthornton@bassberry.com

Mary Beth Fortugno
(615) 742-7739
mfortugno@bassberry.com

Nesrin E. Garan
(615) 742-7903
ngaran@bassberry.com

Pooneh Ghiassi
(615) 742-7782
pghiassi@bassberry.com

Anna Grizzle
(615) 742-7732
agrizzle@bassberry.com

Elisa E. Harris
(615) 742-6553
eharris@bassberry.com

Angela Humphreys
(615) 742-7852
ahumphreys@bassberry.com

Clevonne M. Jacobs
(615) 742-7769
vjacobs@bassberry.com

J. James Jenkins, Jr.
(615) 742-6236
jjenkins@bassberry.com

Seth A. Killingbeck
(615) 742-7707
skillingbeck@bassberry.com

David King
(615) 742-7890
dking@bassberry.com

Claire F. Miley
(615) 742-7847
cmiley@bassberry.com

T. Scott Noonan, Co-Chair
(615) 742-6273
stnoonan@bassberry.com

Brenda N. Phillips
(615) 742-6237
bnphillips@bassberry.com

Shannon Pinkston
(615) 742-7727
spinkston@bassberry.com

Cynthia Y. Reisz
(615) 742-6283
creisz@bassberry.com

Brian D. Roark
(615) 742-7753
broark@bassberry.com

Scott B. Shanker
(901) 543-5932
sshanker@bassberry.com

Catherine J.B. Sloan
(615) 742-7789
csloan@bassberry.com

Danielle M. Sloane
(615) 742-7763
dsloane@bassberry.com

Leigh Walton, Co-Chair
(615) 742-6201
lwalton@bassberry.com

Elizabeth S. Warren
(615) 742-7719
ewarren@bassberry.com

Douglas M. Wolford
(615) 742-7917
dwolford@bassberry.com

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315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900
1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200