

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
SECOND DISTRICT

CARRINGTON PLACE OF ST.  
PETERSBURG, LLC, et al.,

Defendants/Appellants,

v.

CASE NO.: 2D08-2679  
L.T. NO.: 07-8766-CI-13

THE ESTATE OF JENNIE MILO, by and  
through ANNETTE BRITO A/K/A  
ANTOINETTE MARY BRITO, Personal  
Representative,

Plaintiff/Appellee.

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APPELLANTS' INITIAL BRIEF

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**PRELIMINARY STATEMENT**

In this Brief, Appellants will be referred to as “Defendants,” Appellee will be referred to as the “Estate,” the resident will be referred to as “Ms. Milo,” and Ms. Milo’s attorney-in-fact will be referred to as “Ms. Brito.”

The following designations will be used:

(App)      Appellants’ Appendix

## STATEMENT OF THE CASE AND FACTS

Jennie Milo was admitted to Carrington Place Nursing and Rehabilitation Center on June 3, 2006. She remained at the facility until December 14, 2006, when she was discharged. Ms. Milo passed away on December 20, 2006.

### **I. Power of Attorney Executed in 2002**

On March 5, 2002, Ms. Milo executed a Durable Power of Attorney (hereinafter "POA"). (App. A) In the POA, Ms. Milo appointed her daughter, Annette Brito, as her attorney-in-fact. Ms. Milo granted Ms. Brito "full power and authority *to exercise* or perform *any* act, power, duty, *right* or obligation whatsoever that I now have or hereafter acquire, *relating to any* person, *matter*, transaction or any interest in property owned by me." (*Id.* at 1) (Emphasis supplied.) Ms. Milo also granted Ms. Brito "full power and authority to do everything necessary in exercising any of the powers granted." (*Id.*) In contrast to these statements of broad grants of authority, the POA included a narrow provision that listed the limitations on the powers conferred. Absent from these limitations is any mention of arbitration. (*Id.* at 3)

### **II. Admission Agreement with Arbitration Clause**

At the time of Ms. Milo's admission to Carrington, Ms. Brito, acting in her capacity as attorney-in-fact for Ms. Milo, executed various admission documents, including an Admission Agreement. (App. B) The Admission Agreement

included an Optional Binding Arbitration Clause, which is a separate and distinct paragraph and provides in full:

**OPTIONAL BINDING ARBITRATION PROVISION—READ CAREFULLY** (If the parties to this agreement do not wish to include the following arbitration provision please indicate so by marking an “X” through this provision. All parties shall also initial that “X” to signify agreement to refuse arbitration). Any and all controversy(ies) or claim(s) arising out of or relating to the Admission Agreement, or the breach thereof, or arising out of or related to the Resident’s stay, care, or rights at the Facility, and whether based on federal or state law, including but not limited to breach or contract, statutory duties (including those contained in the resident rights and other provisions of federal law or state law, as might apply or be claimed to apply) and, tort or other legal basis, shall be settled by final and binding arbitration in accordance with the provisions of the arbitration code for the state in which the facility is located, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The parties expressly waive any right to a jury trial and expressly waive any right to file a court action for any controversy(ies), claim(s), or cause(s) of action related to the Admission Agreement, or breach thereof, or arising out of or related to the Resident’s stay, care, or rights at the Facility. If applicable state law does not permit final and binding arbitration, then arbitration shall be a condition precedent to court proceedings. The Facility shall maintain the right to seek a court order to compel arbitration pursuant to this clause.

(App. B at 8) Neither Ms. Brito nor Carrington marked an “X” through the arbitration clause. There is no evidence that Ms. Brito did not have the authority to execute the admission documents and there is no evidence that there was anything procedurally or substantively unconscionable about the execution of the documents and, in particular, the arbitration agreement.

### **III. Procedural History**

On September 6, 2007, Ms. Brito, as personal representative of Ms. Milo's estate, filed a complaint against the Defendants alleging negligence, wrongful death, breach of fiduciary duty, and violations of the Residents' Rights provisions of chapter 400, Florida Statutes. (App. C) The Defendants filed a Motion to Dismiss and Compel Arbitration based on the arbitration clause in the Admission Agreement. (App. D)

On April 23, 2008, a hearing on the Defendants' motion was held. (App. E) The Estate argued that Ms. Brito did not have the authority to agree to arbitration on Ms. Milo's behalf and that the arbitration agreement violated public policy. On May 2, 2008, the trial court entered an order denying the motion to compel. (App. F) The trial court found that the power of attorney was insufficient to authorize Ms. Brito to waive Ms. Milo's right to a jury trial and agree to arbitration. In light of this finding, the trial court declined to address the validity of the arbitration agreement. (*Id.*)

Defendants timely filed a notice of appeal under Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv), seeking review of the trial court's nonfinal order determining entitlement to arbitration.

## SUMMARY OF ARGUMENT

The trial court erred in finding that Ms. Brito did not have the authority to bind Ms. Milo to arbitration. The POA expressly granted Ms. Brito “full power and authority to exercise . . . any right . . . relating to any . . . matter” and “full power and authority to do everything necessary in exercising any of the powers granted.” As the Fourth District Court of Appeal recognized in *Alterra Healthcare v. Bryant*, 937 So. 2d 263 (Fla. 4th DCA 2006), that this type of language confers a broad grant of authority that includes the power to agree to arbitration of claims arising out of the principal’s admission to a nursing home.

Even if the POA did not give Ms. Brito the authority to agree to arbitration on Ms. Milo’s behalf, Ms. Milo was still bound by the optional arbitration agreement because she was, at a minimum, an intended third-party beneficiary of the admission contract that contained the agreement.

Because the trial court erred in denying Defendants’ motion to compel arbitration, its order must be reversed.

## ARGUMENT

### **THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION TO COMPEL ARBITRAION**

#### **I. STANDARD OF REVIEW**

Generally, in reviewing a trial court's order determining entitlement to arbitration, this Court defers to the trial court's factual findings that are supported by competent, substantial evidence but reviews the trial court's application of the law to the facts de novo. *Bland v. Health Care & Retirement Corp. of America*, 927 So. 2d 252, 255 (Fla. 2d DCA 2006). However, the issue presented for review in this case involves the interpretation of a document, which is a pure question of law subject to de novo review. *Bryant*, 937 So. 2d at 268.

#### **II. DURABLE POWERS OF ATTORNEY**

A durable power of attorney is a special form of agency that can continue to exist even if the principal is incapacitated. *See* § 709.08(1), Fla. Stat. (2007). Section 709.08(6), Florida Statutes, provides that “[u]nless otherwise stated in the durable power of attorney, the durable power of attorney applies to any interest in property owned by the principal, including . . . *all other contractual or statutory rights or elections.*” (Emphasis supplied.) The only limitations on a durable power of attorney are those proscribed either by law or the express language of the power of attorney itself. § 709.08(7)(a), Fla. Stat. Thus, absent a law or provision

in the power of attorney to the contrary, an attorney-in-fact “has full authority to perform, without prior court approval, every act authorized and specifically enumerated in the durable power of attorney.” *Id.*

Section 709.08 also provides that a third-party is entitled to rely on the authority granted in a power of attorney. §§ 709.08(4)(a), (b). And, section 709.08(4)(g), Florida Statutes, expressly provides that “[t]hird parties who act in reliance upon the authority granted to the attorney in fact under the durable power of attorney . . . must be held harmless by the principal from any loss suffered or liability incurred.” Further, “[a] person who acts in good faith upon any representation, direction, decision, or act of the attorney in fact is not liable to the principal or the principal’s estate, beneficiaries, or joint owners for those acts.” *Id.*

**III. AN ATTORNEY-IN-FACT WHO HAS BROAD POWER TO EXERCISE ANY RIGHT RELATING TO ANY MATTER AND FULL POWER AND AUTHORITY TO DO EVERYTHING NECESSARY IN EXERCISING THIS POWER HAS THE AUTHORITY TO AGREE TO ARBITRATION OF CLAIMS ARISING OUT OF THE PRINCIPAL’S ADMISSION TO A NURSING HOME**

The trial court erred when it ruled that Ms. Brito, as Ms. Milo’s attorney-in-fact, did not have the authority to agree to arbitration on Ms. Milo’s behalf. The broad powers Ms. Milo granted Ms. Brito included the authorization and power to bind Ms. Milo to the arbitration agreement.

The POA expressly granted the attorney-in-fact a broad scope of authority, giving Ms. Brito “full power and authority *to exercise* or perform *any* act, power, duty, *right* or obligation whatsoever that I now have or hereafter acquire, *relating to any* person, *matter*, transaction or any interest in property owned by me.” (App. A at 1) (Emphasis supplied.) The POA also granted Ms. Brito “full power and authority to do everything necessary in exercising any of the powers granted.”

At its most basic form, arbitration is nothing more than a compromise between the parties to agree to resolve their differences via arbitration as opposed to the court system—a venue or forum choice. *See Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 403 (Fla. 2005) (recognizing that an agreement to arbitration does not “extinguish the claim” but, rather, “constitutes a prospective choice of forum”). Although the POA does not specifically refer to arbitration, it clearly authorized Ms. Brito to exercise *any* Ms. Milo’s Crission’s rights relating to *any* matter. This included Ms. Milo’s right to agree to an alternative forum for dispute resolution.

The Fourth District explained in *Bryant* that section 709.08 “does not prohibit the attorney in fact from consenting to arbitrate claims on behalf of the principle, *absent a provision in the document to the contrary.*” 937 So. 2d at 269 (emphasis supplied). The Fourth District then concluded that the POA gave the attorney-in-fact “broad powers on behalf of the principal,” including the power to

agree to arbitration of claims arising out of the principal's admission to a nursing home. *Id.* In reaching this conclusion, the court did not rely exclusively on the fact that the POA referred to arbitration. The Court also looked to other provisions of the POA that gave the attorney-in-fact the power to execute and acknowledge all contracts and to take all actions that may be necessary for the management of the principal's affairs, "as fully and as effectively as if made or done by the [principal] personally." *Id.* The Fourth District noted that that "broad powers" conferred by the POA evidenced the intent to give the attorney-in-fact "broad authority to effectuate [the principal's] legal rights." *Id.*

The POA in this case gave Ms. Brito similar "broad powers," providing that Ms. Brito had the authority to exercise any of Ms. Milo's rights, relating to any matter. Ms. Brito had the "full power and authority to do everything necessary in exercising" Ms. Milo's rights. Given the broad scope of authority granted to Ms. Brito, the POA should not be construed to prohibit Ms. Brito from binding Ms. Milo to arbitration simply because the POA fails to expressly reference arbitration. The POA fails to specifically mention "nursing homes" but it would be an absurd result to conclude that Ms. Brito did not have the authority to sign the nursing home contract or other admission documents.

Further, there is nothing in the "Limitations" section of the POA that prohibits the attorney-in-fact from agreeing to arbitration. Reading the broad grant

of general powers *in pari materia* with the “Limitations” provision compels the conclusion that Ms. Brito had the authority to exercise Ms. Milo’s right to agree to arbitration as an alternative form of dispute resolution.

Plaintiff’s argument below that Ms. Brito could not bind Ms. Milo to the arbitration agreement because it results in a waiver the right to a trial by jury is also without merit. One of Ms. Milo’s rights was the ability to waive a jury trial. *See Shea*, 908 So. 2d at 398 (“[T]he rights of access to courts and trial by jury may be contractually relinquished.”). When Ms. Brito entered into the admission contract on Ms. Milo’s behalf and exercised Ms. Milo’s right to waive a jury trial, these actions were expressly authorized by the POA.

Further, it is well settled that waivers of both statutory and constitutional rights are enforceable under Florida law. *See Unicare Health Facilities v. Mort*, 553 So. 2d 159, 161 (Fla. 1989) (“Clearly, statutory rights can be waived.”); *In re Amendment to the Rules Regulating the Florida Bar—Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct*, 939 So. 2d 1032 (Fla. 2006) (adopting amendment to Rules Regulating the Florida Bar that provides for contractual waiver of constitutional cap on contingent fees in medical malpractice cases). In *Mort*, the Supreme Court expressly recognized that the statutory rights in chapter 400 can be waived: “The attorney’s fees provision of section 400.023 is merely a statutory

right to seek fees. Clearly, statutory rights can be waived.” 553 So. 2d at 161.<sup>1</sup> This Court similar recognized in *Bland* that “as a general proposition, a party may waive statutory rights.” 927 So. 2d at 258. And, the Fourth District recently upheld an arbitration agreement between a nursing home and its resident, concluding that “a voluntary waiver of access to the courts to resolve claims arising under the Nursing Home Residents Act is valid.” *Slusser v. Life Care Ctrs. of Am., Inc.*, 977 So. 2d 662, 663 (Fla. 4th DCA 2008). Because Ms. Milo could have waived her right to a jury trial to redress claims brought under chapter 400, Ms. Brito had the authority do the same on Ms. Milo’s behalf. The trial court erred in finding to the contrary and its order denying Defendants’ motion to compel must be reversed.

This Court’s decision in *In re Estate of McKibbin v. Alterra Health Care Corp.*, 977 So. 2d 612 (Fla. 2d DCA 2008), does not require a different result. In that case, this Court concluded that Ms. McKibbin was not bound to arbitrate claims against Alterra because she did not sign the residency agreement that contained the arbitration clause and her son, who did sign the residency agreement, did not have the authority to bind her to arbitration. *Id.* at 613. Ms. McKibbin’s son signed the residency agreement on behalf of his mother pursuant to his

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1. The attorney fee provision referred to by the Court in *Mort* has since been repealed. See ch. 2001-45, §4 Laws of Fla.

authority under a durable power of attorney. *Id.* Without discussing the language of the power of attorney, the Court summarily concluded that nothing in the power of attorney gave the son the legal authority to enter into the arbitration agreement on Ms. McKibbin's behalf. *Id.* Because the *McKibbin* decision does not set out the language of the power of attorney at issue, it is of limited precedential value. *McKibbin* cannot be controlling in a case in which the POA clearly evidences an intent to give the attorney-in-fact "broad authority to effectuate [the principal's] legal rights." *Bryant*, 937 So. 2d at 269.

This Court's decision in *Kotsch v. Kotsch*, 608 So. 2d 879, 879 (Fla. 2d DCA 1992), which is cited in *McKibbin*, is also unpersuasive in this case. In *Kotsch*, the power of attorney executed by the father gave the son "the power to manage and sell his father's real and personal property for the purpose of maintaining and caring for the father during his lifetime." The son transferred "the bulk of his father's liquid assets" in to an irrevocable *inter vivos* trust, which named the son as trustee, the father as the initial beneficiary and the son's children as additional beneficiaries. *Id.* The trust also provided for a testamentary disposition of the trust estate to the son and his children. *Id.* The Court held that the power of attorney did not give the son authority create the trust. The Court explained the power to sell the father's property for the father's care and

maintenance did not authorize the son to make a gift of the property or to transfer or convey it without consideration that benefits the father. *Id.* at 880.

In this case, the POA authorized Ms. Brito to exercise any of Ms. Milo's rights, relating to any matter. Operating with the clear bounds of the authority conferred by the POA, Ms. Brito exercised Ms. Milo's legal right to enter into the nursing home admission contract, which included a valid agreement designating arbitration as the forum for resolving disputes concerning Ms. Milo's residency at Carrington Place. This prospective choice of forum agreement benefited both the facility and Ms. Milo by providing the parties with a much more expeditious and cost effective resolution of any subsequent disputes. As the California Supreme Court has explained:

The speed and economy of arbitration, in contrast to the expense and delay of jury trial, could prove helpful to all parties; the simplified procedures and relaxed rules of evidence in arbitration may aid an injured plaintiff in presenting his case. Plaintiffs with less serious injuries, who cannot afford the high litigation expenses of court or jury trial, disproportionate to the amount of their claim, will benefit especially from the simplicity and economy of arbitration; that procedure could facilitate the adjudication of minor malpractice claims which cannot economically be resolved in a judicial forum.

*Madden v. Kaiser Found. Hosp.*, 17 Cal. 3d 699, 711-12 (1976); *see also Shea*, 908 So. 2d at 403 (recognizing that an arbitration agreement "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and

expedition of arbitration”) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 628 (1985)).

Because the POA gave Ms. Brito a broad grant of authority to act on Ms. Milo’s behalf, the trial court erred in finding that the POA did not grant Ms. Brito the power to bind Ms. Milo to the optional arbitration agreement included in the admission contract.

#### **IV. MS. MILO WAS BOUND BY THE OPTIONAL ARBITRATION AGREEMENT IN THIS CASE BECAUSE SHE WAS, AT A MINIMUM, AN INTENDED THIRD-PARTY BENEFICIARY OF THE CONTRACT THAT CONTAINED THE AGREEMENT**

When a contract contains a valid and enforceable arbitration agreement, a nonsignatory third-party beneficiary of the contract is bound to the agreement to the same extent that the promisee is bound. *See Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574, 579 (Fla. 1st DCA 2007); *Germann v. Age Institute of Florida, Inc.*, 912 So. 2d 590, 592 (Fla. 2d DCA 2005); *Martha A. Gottfried, Inc. v. Paulette Koch Real Estate*, 778 So. 2d 1089, 1090 (Fla. 4th DCA 2001). This is no different in the context of long term care than it is in any other setting. *Linton*, 953 So. 2d at 579; *see also Germann*, 912 So. 2d 591-92.

In *Linton*, the First District ruled that an arbitration clause contained in an assisted living facility’s residency agreement was binding on resident’s estate, despite the fact that the agreement was not signed by resident but, rather, by her

son. *Linton*, 953 So. 2d at 579. The court concluded that the resident was an intended third-party beneficiary of the agreement. *Id.*

In *Germann*, this Court agreed that a third-party beneficiary of a contract is bound by an agreement to arbitrate contained therein. *See* 912 So. 2d at 592. However, the Court concluded that the nonsignatory resident was nothing more than an incidental beneficiary of the contracts between two corporate entities for consulting and financial processing service, and thus, was not bound by those entities' agreements to arbitrate. *Id.*

As recognized in *Linton*, an admission contract, such as the one at issue in this case, clearly provides the resident with more than an incidental or consequential benefit. Accordingly, even without the POA, which defendants assert clearly granted Ms. Brito the authority to act on Ms. Crission's behalf in accepting the optional arbitration agreement, Ms. Milo is still bound by the terms of that agreement because she was, at a bare minimum, an intended third-party beneficiary of the admission contract.

### **CONCLUSION**

For the reasons set forth above, Defendants respectfully request that this Court reverse the trial court's order denying Defendants' motion to compel arbitration.

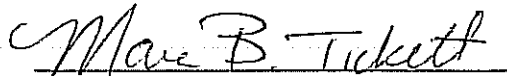
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Isaac Ruiz-Carus, Wilkes & McHugh, P.A.**, Tampa Commons, Suite 800, One N. Dale Mabry Highway, Tampa, Florida 33609, on this 13<sup>th</sup> day of June, 2008.

**CERIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Initial Brief was typed in Times New Roman 14 point font.

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