Missouri Law Review

Volume 87 | Issue 3 Article 14

Summer 2022

Nightmare on High Street: The Haunting Effects of Voluntary Arbitration in Nursing Home Administration

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NOTE

Nightmare on High Street: The Haunting Effects of Voluntary Arbitration in Nursing Home Administration

Ingram v. Brook Chateau, 586 S.W.3d 772 (Mo. 2019).

Taylor M. Harrington[*]

I. INTRODUCTION

"Ring…Ring…Ring…" It is one o'clock in the morning. The buzz of your phone wakes you from your sleep. You roll over and check to see who could be calling at this hour. You do not recognize the number, but you answer anyway. The words racing from the voice on the other end of the line are too horrific to be true, but they are. Your dreams suddenly turn into a real-life nightmare as you learn that your loved one waits in a hospital room, fighting for their life. You rush to their bedside. You are with them when they die. "How could this happen?" A nursing home is supposed to be a place of safety. Yet the mysterious nature of your loved one's injuries leaves you with more questions than answers. Perplexed by the circumstances surrounding their death, you hire a lawyer. While the investigation reveals significant negligence by the nursing home, it also reveals a signed voluntary arbitration agreement.[1] The agreement holds your signature. At the time, you assumed that it was just another piece of paper required for admission. Now, with one pen stroke, your loved one's most fundamental guarantee, the right to a civil jury trial, has disappeared.

Arbitration provisions have become standard practice in employment and consumer agreements. However, their place in nursing home contracts is questionable.[2] While claims related to employment or

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[1] A voluntary arbitration agreement, in this context, refers to an arbitration agreement that is not required to obtain services.

[2] John R. Schleppenbach, *Something Old, Something New: Recent Developments in the Enforceability of Agreements to Arbitrate Disputes Between*

consumer transactions often involve the loss of employment or income, claims against nursing homes are typically much graver.[3] Because these claims commonly involve allegations of wrongful death, abuse, or neglect, critics have argued that mandatory arbitration of nursing home claims is against public policy.[4] In response to these arguments, some nursing homes have transitioned to *voluntary* arbitration agreements.[5] However, it is debatable how voluntary these agreements really are.

Issues relating to these voluntary provisions become magnified when the individual consenting to the agreement is an agent acting on behalf of a principal.[6] When an agent mistakes a voluntary arbitration agreement to be mandatory, the question becomes whether the agent held the requisite authority to act. While several courts have limited the enforceability of agreements under such circumstances,[7] the Supreme Court of Missouri recently declined to follow suit. In *Ingram v. Brook Chateau*, the court held that an attorney in fact, i.e., an agent, had the implied authority to enter into agreements incidental to the authority expressly granted in the power of attorney, including voluntary arbitration agreements.[8] This Note argues that the court's analysis was incomplete and thus concludes that the court incorrectly held that tenets of agency law permit attorneys in fact to enter into voluntary arbitration agreements on behalf of their principals absent express authorization.

Part II of this Note provides the relevant facts, procedural background, and holding of *Ingram*. Part III explores the legal background surrounding powers of attorney and explains the role of agency law and its application to power of attorney interpretation. Part IV discusses the majority and dissenting opinions of *Ingram*. Finally, Part V analyzes the soundness of the majority's opinion from both a legal and public policy standpoint. Because Missourians' constitutional right to a jury should not be implicitly revoked via proxy, this Note ultimately advocates for

Nursing Homes and Their Residents, 22 ELDER L.J. 141, 144 (2014) (citing Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 462–79 (2006)).

[3] *Id.* at 151–52.

[4] *Id.* at 144–45 (citing Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 462–79 (2006)).

[5] *See, e.g.*, Ping v. Beverly Enterprises, Inc., 376 S.W.3d 580, 593 (Ky. 2012); Ingram v. Brook Chateau, 586 S.W.3d 772, 774 (Mo. 2019).

[6] Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 1958). The one for whom action is to be taken is the principal. *Id.* The one who is to act is the agent. *Id.*

[7] *See, e.g.*, *Ping*, 376 S.W.3d at 591; Pine Tree Villa, LLC v. Brooker, 612 F. App'x 340 (6th Cir. 2015).

[8] *Ingram*, 586 S.W.3d at 776.

legislative action that limits *Ingram*'s holding. This Note urges the Missouri General Assembly to revise Missouri law to either: (1) permit attorneys in fact to enter into voluntary arbitration agreements *only* if such action is expressly authorized in the power of attorney agreements or (2) expressly forbid such authorization altogether.

II. FACTS AND HOLDING

In November 2015, Theron Ingram ("Ingram") was involved in a motor vehicle accident that resulted in quadriplegia.[9] Upon discharge from the hospital, Ingram executed a written Durable Power of Attorney ("DPOA").[10] The DPOA identified Andrea Nichole Hall ("Hall") as Ingram's attorney in fact.[11] The DPOA included a durability provision,[12] an effective date provision,[13] and an agent's powers provision.[14] The facts of this case turned on the level of authority conferred to Hall by the subsections of the agent's powers provision, which expressly granted Hall the power to: (A) "make all necessary arrangements for health care services on [Ingram's] behalf . . . "; (B) "move [Ingram] into, or out of, any health care or assisted living/residential care facility . . . "; (C) take any other necessary action as authorized in the DPOA; and (D) "receive information regarding [Ingram's] health care . . . ."[15]

When Ingram was discharged from the hospital in March 2016, he was admitted into a residential care facility, Brook Chateau.[16] As Ingram's attorney in fact, Hall executed the paperwork necessary for Ingram's admission into the facility.[17] Among the admissions paperwork was a document titled "Voluntary Arbitration Agreement" ("the Agreement").[18] The Agreement provided, in part, that: (1) any claims arising out of or relating to the Agreement were subject to arbitration;[19] (2) the Agreement

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[9] *Id.* at 773.

[10] *Id.*

[11] *Id.*

[12] *Id.* (The durability provision provided that the written agreement was "a Durable Power of Attorney, and the authority of [Ingram's] Agent, when effective, shall not terminate or be void or voidable if [Ingram]…become[s] disabled or incapacitated or in the event of later uncertainty as to whether [Ingram is]…dead or alive.").

[13] *Id.* (The effective date provision provided that the DPOA was "effective immediately and continues if [Ingram becomes] incapacitated and unable to make and communicate a health-care decision as certified by two physicians.").

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

could be canceled within thirty days of admission into the facility;[20] (3) the Agreement was binding on all parties and party affiliates;[21] and (4) all parties agreed that consent to the Agreement constituted a health care decision.[22] Furthermore, the opening clause of the Agreement stated: "The parties are waiving their right to a trial before a judge or jury of any dispute between them. Please read carefully before signing. *The patient will receive services in this center whether or not this agreement is signed*."[23] Despite the latter exemption, Hall executed the Agreement.[24]

In February 2018, Ingram brought suit against Brook Chateau.[25] Ingram alleged negligence, claiming that support staff at Brook Chateau failed to properly turn him where his quadriplegic state left him unable to turn himself.[26] Ingram argued that the staff's failure resulted in pressure ulcers and other wounds, causing him significant pain and suffering.[27] In response to Ingram's claims, Brook Chateau filed a motion to dismiss and compel arbitration according to the Agreement.[28] After reviewing the evidence, the circuit court overruled Brook Chateau's motion,[29] and Brook Chateau appealed. The Missouri Court of Appeals for the Western District affirmed.[30] Pursuant to Section 435.440, Brook Chateau filed for interlocutory appeal,[31] and the Supreme Court of Missouri granted transfer.[32]

Ingram argued to the Supreme Court that the DPOA did not grant Hall the authority to execute the Agreement.[33] Specifically, Ingram contended that Hall had the authority only to "make all *necessary* arrangements for health care services on [Ingram's] behalf."[34] Thus, Ingram reasoned that, because the Agreement was voluntary and not necessary for admission to Brook Chateau, Hall did not have the authority to execute the Agreement under the DPOA.[35] The Supreme Court of

[20] *Id.*

[21] *Id.*

[22] *Id.* at 744.

[23] *Id.* (Russell, J., dissenting) (emphasis added); Brief for Appellant at 13, Ingram v. Brook Chateau, 586 S.W.3d 772 (Mo. 2019) (en banc) (No. SC 97812).

[24] *Ingram*, 586 S.W.3d at 773.

[25] *Id.* at 774.

[26] Brief for Appellant, *supra* note 23, at 13.

[27] *Ingram*, 586 S.W.3d at 774; Brief for Appellant, *supra* note 23, at 13.

[28] *Ingram*, 586 S.W.3d at 774.

[29] *Id.*

[30] *Id.*

[31] *Id.;* Section 435.440 permits an interlocutory appeal from an order denying an application to compel arbitration. MO. REV. STAT. § 435.440 (2003).

[32] *Ingram*, 586 S.W.3d at 774.

[33] *Id.* at 775.

[34] *Id.*

[35] *Id.*

Missouri disagreed, however, and held that relevant Missouri law "obligated the circuit court to order the parties to proceed to arbitration" because "the Agreement was signed by Hall on behalf of Ingram pursuant to Hall's authority established by the DPOA."[36]

III. LEGAL BACKGROUND

The relevant history of arbitration in the United States begins with the Federal Arbitration Act ("FAA"). Since the FAA's enactment, the Supreme Court of the United States has significantly expanded its scope.[37] FAA expansion has led to questionable outcomes in some context, including the enforcement of arbitration agreements that are signed by attorneys in fact, pursuant to a power of attorney.[38] When an attorney in fact signs a document on behalf of the principal, the question becomes whether the attorney in fact had the authority to do so.[39] While there is some ambiguity in the way courts address this question, Missouri law and the Restatement (Second) of Agency provide direction on when an agent may reasonably take legal action under these circumstances.[40] Further, other jurisdictions that have addressed this issue provide similar guidance.

A. Development and Operation of Arbitration in the United States

The FAA was enacted in 1925.[41] Generally, the FAA mandates that arbitration clauses be deemed presumptively valid, irrevocable, and enforceable.[42] Some have argued that Congress intended for the FAA to apply *only* to contracts between businesspersons—as opposed to contracts involving consumers.[43] However, in *AT&T Mobility v. Concepcion*, the United States Supreme Court opted to implicitly extend the scope of the FAA to consumer contracts.[44] Many states have attempted to limit this

[36] *Id.* at 776.

[37] *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[38] *See*, *e.g.*, Ingram, 586 S.W.3d at 774 (Mo. 2019).

[39] *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c.

[40] *See id*. § 33–35; *id.* § 39.

[41] *Concepcion*, 563 U.S. at 339 .

[42] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017).

[43] *See Concepcion*, 563 U.S. at 343–45, 350; 9 U.S.C. § 2 (stating that the FAA applies to contracts "evidencing a transaction involving commerce."); *see also* Margaret L. Moses, *How the Supreme Court's Misconstruction of the FAA has Affected Consumers*, 30 LOY. CONSUMER L. REV. 1, 3 (2017) ("Supporters of the Act made clear in Congressional Hearings the limited nature of the Act. It would not apply to workers, almost all of whom were considered at that time not to be in interstate commerce, and it would not apply in merchant-to-consumer transactions, only in merchant-to-merchant transactions.").

[44] *See Concepcion*, 563 U.S. at 351.

expansion, particularly in the nursing home context, by enacting legislation that prohibits the enforceability of arbitration clauses in some cases.[45] However, the Supreme Court has made clear that these laws are preempted by the FAA and therefore unenforceable,[46] leaving plaintiffs with no choice but to proceed with arbitration.

Arbitration is a type of alternative dispute resolution where disputes between parties are resolved privately by an arbitrator rather than publicly by a judge or jury.[47] Similar to judges and juries, an arbitrator can review the evidence and hear testimony by the parties prior to deciding the outcome.[48] However, arbitration is not bound by the traditional rules of evidence used by the courts, so the tools of discovery are extremely limited.[49] As noted by the United States Supreme Court, "the factfinding process in arbitration usually is not equivalent to judicial factfinding,"[50] and, in many cases, this limited factfinding can harm the outcome of the case.[51] As a policy matter, arbitration outcomes are generally binding and final.[52] To protect the integrity of the arbitration system, decisions made by an arbitrator are rarely, if ever, overturned on appeal.[53] This is true

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[45] *See*, *e.g.*, OKLA. STAT. tit. 63, § 1-1939 (2013) ("[a]ny party to an action brought under this section shall be entitled to a trial by jury and any waiver of the right to a trial by a jury, whether oral or in writing, prior to the commencement of an action, shall be null and void, and without legal force or effect."); 210 ILL. COMP. STAT. 45/3-606 (2013) ("[a]ny waiver by a resident or his legal representative of the right to commence an action under [the state's Nursing Home Care Act], whether oral or in writing, shall be null and void, and without legal force or effect."); W.VA. CODE § 16-5C-15(e) (2013) ("[a]ny waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy.").

[46] Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1426 (2017) ("The FAA . . . preempts any state rule discriminating on its face against arbitration—for example, a 'law prohibit[ing] outright the arbitration of a particular type of claim . . . [and] [t]he Act also displaces any rule that covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements.") (citations omitted).

[47] JAMS Arbitration Services, *Arbitration Defined: What is Arbitration?*, JAMS, https://www.jamsadr.com/arbitration-defined/ [https://perma.cc/58D7-EZ9Z] (last visited Apr. 22, 2022).

[48] *Id*.

[49] Paul Radvany, *The Importance of the Federal Rules of Evidence in Arbitration*, 36 REV. LITIG. 469, 505 (2016).

[50] Alexander v. Gardner-Denver Co., 415 U.S. 36, 57–58, (1974) (rather, "[t]he record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.").

[51] *See* Radvany, *supra* note 49 at 506.

[52] *Arbitration Defined: What is Arbitration?*, *supra* note 47.

[53] *See* Radvany, *supra* note 49 at 506.

even when an arbitrator fails to justify her decision with any conclusion of law or fact, as arbitrators are not required to provide any justification for their decisions.[54] In some contexts, it thus follows that arbitration provides effectively no protection for its "litigants" against an arbitrator's potentially erroneous decision.[55] Such an outcome becomes extremely troublesome when consent to arbitrate in the first place is implicitly placed in the hands of a third party, such as an attorney in fact or other agent.

B. History of Powers of Attorney

A power of attorney is a legal document that authorizes one person to act as the agent for another, typically the executor of the document.[56] Generally, because a power of attorney is a legal manifestation of an individual's intent to designate an agent, common law principles of agency apply to the document.[57] Agency is defined as a legal relationship established when one person – known as the "principal" – manifests assent to another person – known as the "agent" – to act on the principal's behalf and subject to the principal's control.[58] Therefore, the agent may act only within the scope of her authority as granted by the principal.[59]

Because an agent only has the authority to act subject to the principal's control, an agent's authority at common law ceased to exist upon the incapacitation or death of the principal.[60] Since then, however, many states, including Missouri, have recognized the limitations to automatic termination of authority and codified what is known as the DPOA.[61] A DPOA is a specialized power of attorney in which the "authority of the attorney in fact does not terminate in the event the principal becomes disabled or incapacitated."[62] In Missouri, the creation

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[54]American Arbitration Association, *A Guide for Commercial Arbitrators*, NEUTRALS ECENTER 13, https://www.adr.org/sites/default/files/document_repository/A%20Guide%20for%20Commercial%20Arbitrators.pdf [https://perma.cc/EH54-AEDV].

[55] *See generally Alexander*, 415 U.S. at 57–58.

[56] *Power of Attorney*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[57] *See generally* American Bar Association, *Estate Planning FAQs: Power of Attorney*, AMERICAN BAR ASSOCIATION (last visited Apr. 22, 2022), https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/power_of_attorney/ [https://perma.cc/B7L4-D8JT].

[58] RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) (the individual appointed to act as the legal agent of a principal in a power of attorney is referred to as the "attorney in fact").

[59] *Id.* § 1.01 cmt. c.

[60] *Id.* § 122.

[61] *See, e.g.*, MO. REV. STAT. § 404.705 (2016).

[62] *Id.* § 404.703 (2016).

of a DPOA depends on the parties' adherence to specific requirements.[63] DPOAs are used frequently in cases of medical and disability estate planning.[64]

C. Authority and Duties of an Agent

The duties of an agent stem from three possible sources: (1) the state's power of attorney statute; (2) the language of the power of attorney itself; and (3) common law principles of agency, so long as the principles are consistent with the state statute and language of the document.[65] Under Missouri Code Section 404.710.6, an attorney in fact's authority to perform certain duties – such as execute, amend, or revoke a trust agreement or fund a trust with the principal's assets when the principal did not create the trust – must be specifically and expressly stated in the document.[66] By contrast, Section 404.710.7 prohibits a principal from extending authority to an attorney in fact for the performance of certain duties, even when expressly granted in the power of attorney.[67] Section 404.710.7 denies an attorney in fact the authority to make or amend a principal's will or take any action that is expressly prohibited by the principal.[68] If the authority a principal seeks to confer does not fall within the scope of sections 404.710.6 or 404.710.7, the attorney in fact holds the license to act only as granted by the language of the power of attorney.[69]

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[63] *Id.* § 404.705 (2003) (A durable power of attorney may only be created in Missouri if it (1) is in writing, (2) carries the title of durable power of attorney, (3) contains a notice of its continuing effect during incapacity, (4) is signed by the principal, (5) is dated, and (6) is acknowledged before a notary.).

[64] Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 5 (2001).

[65] Linda S. Whitton, *Understanding Duties and Conflicts of Interest – A Guide for the Honorable Agent*, 117 PENN ST. L. REV. 1037, 1040 (2013).

[66] MO. REV. STAT. § 404.710.6 (2016) ("Any power of attorney may grant power of authority to an attorney in fact to carry out any of the following actions if the actions are expressly authorized in the power of attorney . . . .").

[67] *Id.* § 404.710.7 ("No power of attorney, whether durable or not durable, and whether or not it delegates general powers, may delegate or grant power or authority to an attorney in fact to do or carry out any of the following actions for the principal: (1) To make, publish, declare, amend or revoke a will for the principal; (2) To make, execute, modify or revoke a living will declaration for the principal; (3) To require the principal, against his or her will, to take any action or to refrain from taking any action; or (4) To carry out any actions specifically forbidden by the principal while not under any disability or incapacity.").

[68] *Id.*

[69] *Id.* § 404.714.7 ("An attorney in fact shall exercise authority granted by the principal in accordance with the instrument setting forth the power of attorney . . . .").

Before 1989, Missouri law required powers of attorney to enumerate authority with specificity.[70] However, modern law allows "[a] principal [to] delegate to an attorney in fact . . . *general powers* to act in a fiduciary capacity."[71] The power conferred under these general grants of authority is limited to only that which is necessary to achieve the goals of the expressed subjects in the power of attorney.[72] Stated differently, an attorney in fact is "authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts."[73] A third party who deals with an attorney in fact may freely rely on these general powers without regard to whether the power of attorney authorizes the act with specificity.[74] However, this rule is not without limitation, as fiduciary duties associated with agency significantly limit general grants of authority.[75] Generally, an attorney in fact has a duty to act prudently, in good faith, and in accordance with the principal's instructions and best interest.[76]

D. Authority Under Power of Attorney

When interpreting the authority conferred by a power of attorney, a court should interpret it in light of the surrounding circumstances, including the formality or informality with which the document was executed.[77] Usually, powers of attorney are drafted by lawyers with specialized skills and the ability to articulate the principal's intent "with a high degree of particularity."[78] When executed in this manner, a power of attorney is deemed a formal document and presumed to express the principal's intent with specificity.[79] Such a presumption, however, does

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[70] *Durable Power of Attorney*, MISSOURI LEGAL SERVICES (Feb. 17, 2020), https://www.lsmo.org/node/57/durable-power-attorney [https://perma.cc/YEN4-CC5X] ("Prior to 1989, a valid power of attorney had to spell out in detail all of the authorizations granted to the agent.").

[71] *Id.* § 404.710.1 (emphasis added) ("A principal may delegate to an attorney in fact in a power of attorney general powers to act in a fiduciary capacity on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. A power of attorney with general powers may be durable or not durable.").

[72] *Id.*

[73] RESTATEMENT (SECOND) OF AGENCY § 33 (AM. L. INST. 1958).

[74] MO. REV. STAT. § 404.710.8 (2016).

[75] *Id.* § 404.714.1 (2016).

[76] *Id.;* RESTATEMENT (SECOND) OF AGENCY § 39 (AM. L. INST. 1958) ("Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal.").

[77] RESTATEMENT (SECOND) OF AGENCY § 34(e) (AM. L. INST. 1958).

[78] *Id.* § 34, cmt. h.

[79] *Id.*

not require that the power of attorney be construed strictly.[80] Rather, the presumption assumes that any construction will be fair and carry out the principal's intent.[81]

Missouri courts have, on some occasions, applied strict construction to powers of attorney.[82] For example, in *In re Estate of Lambur*, the Missouri Court of Appeals for the Southern District held that powers of attorney are to be strictly construed.[83] The question before the court was whether an attorney in fact was permitted to gift to herself the principal's property upon the principal's death.[84] The authority to make an "at-death gift" was not expressly authorized in the power of attorney.[85] Rather, the attorney in fact was authorized to make inter vivos gifts of the principal's property to herself.[86] Relying on Section 404.710.6(3) – which requires express authorization – the court stated that "[t]he law is clear that powers of attorney are to be strictly construed."[87] Therefore, according to the court, "in order for an attorney-in-fact to make a gift to herself of the principal's property, she must be *expressly* authorized to do so in the power of attorney."[88] Thus, the court concluded that the power of attorney did not authorize at-death gifts because the gifting authority was expressly limited to inter vivos gifts.[89]

In contrast to *Lambur* and similar cases – where the attorney's action fell within the scope of Section 404.710.6 – Missouri courts have not expressly held that powers of attorney be strictly construed when the authority delegated is for an act that falls outside Section 404.710.6.[90] In cases where strict construction is not possible or reasonably required, authority may be inferred.[91] Generally, the authority to act includes the authority to perform acts that are incidental, usually accompany, or are reasonably necessary to accomplish the act with which power was expressly granted.[92] Under these circumstances, authority may be

[80] *Id*.

[81] *Id*.

[82] *E.g.*, *In re* Est. of Lambur, 397 S.W.3d 54, 64 (Mo. Ct. App. 2013) ("Powers of attorney are to be strictly construed.").

[83] *Id*.

[84] *Id*.

[85] *Id.; See id.* at 67.

[86] *Id.* at 57; *See id.* at 67. An inter vivos gift refers to a transfer or gift given to someone while both the giver and the receiver are alive.

[87] *Id.* at 67.

[88] *Id*. (emphasis in original).

[89] *Id.*

[90] *See, e.g.*, Mercantile Tr. Co., N.A. v. Harper, 622 S.W.2d 345, 350 (Mo. Ct. App. 1981).

[91] *See* RESTATEMENT (SECOND) OF AGENCY § 35 (AM. L. INST. 1958).

[92] *Id.*

inferred.[93] One exception to this rule provides that "dangerous powers" may not be inferred absent evidence to support an intent to include such action.[94] While courts have not expressly defined "dangerous powers," a Michigan court noted that an interpretation that permits an agent "unlimited discretion" over a matter directly affecting the principal likely constitutes a dangerous power.[95]

E. Voluntary Agreements and Powers of Attorney in Nursing Home Contracts

Similar to *Ingram v. Brook Chateau*, other courts have directly addressed the question of whether a DPOA – which expressly authorizes the attorney in fact to do only what is necessary for the principal's health care – confers an attorney in fact the power to enter into *voluntary* arbitration agreements.[96] In 2012, for example, the Supreme Court of Kentucky decided *Ping v. Beverly Enterprises, Inc*.[97] In this case, Donna Ping served as her mother's attorney in fact under a DPOA.[98] In this capacity, Ms. Ping signed several documents pursuant to her mother's admission to the Golden Living Center, a nursing home in Kentucky.[99] When her mother died due to injuries allegedly sustained in the nursing home, Ms. Ping brought a wrongful death claim against Beverly Enterprises, the care facility's operator.[100]

Beverly Enterprises filed a motion to stay the proceedings pending arbitration, citing an arbitration agreement that Ms. Ping signed in conjunction with her mother's admission to the facility.[101] The language of the power of attorney authorized Ms. Ping "to do and perform any, all, and every act and thing whatsoever requisite and necessary to be

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[93] *See id.*

[94] RESTATEMENT (SECOND) OF AGENCY § 34, cmt. h (AM. L. INST. 1958); *see, e.g.*, Carlson v. Citizens Fed. Sav. & Loan Ass'n of Cleveland, No. 36946, 1978 WL 217774, at *4 (Ohio Ct. App. Feb. 16, 1978); Est. of Collins v. U.S., No. 93-CV-70151-DT, 1994 WL 464357, at *1 (E.D. Mich. Mar. 23, 1994).

[95] *See generally Est. of Collins*, at *3, n.1 ("A power to make gifts can be found in paragraph 12 of the instrument only if that provision is read to grant the agent unlimited discretion in the use of the principal's funds. Such "dangerous" powers will not be inferred." (citing RESTATEMENT (SECOND) OF AGENCY § 35, cmt. h (AM. L. INST. 1958))).

[96] *See e.g.*, Genesis Healthcare, LLC v. Stevens, 544 S.W.3d 645, 651–52 (Ky. Ct. App. 2017) (holding that the relevant DPOA did not grant the attorney in fact power to institute and defend actions on behalf the of the DPOA's principal).

[97] Ping v. Beverly Enter., Inc., 376 S.W.3d 581, 588 (Ky. 2012).

[98] *Id.* at 586.

[99] *Id.* at 586 n.1.

[100] *Id.* at 586.

[101] *Id.*

done . . . ."[102] Beverly Enterprises argued that the power of attorney's language granted Ms. Ping the authority to sign the arbitration agreement,[103] but the Supreme Court of Kentucky disagreed.[104] The court held that Ms. Ping lacked both actual and implied authority to enter into the agreement.[105] While the power of attorney provided for a general grant of authority, the court noted that the general authority related only to acts that were "requisite and necessary," as opposed to acts that were merely suggested or recommended.[106] Thus, the court determined that authority under the power of attorney should be limited to acts that were "reasonably necessary" to maintain the principal's health care.[107] The court stated that "[a]bsent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution," an agent does not encompass the power to waive a "principal's right to seek redress of grievances in a court of law."[108] Beverly Enterprises argued in the alternative that the arbitration agreement was incidental to the principal's health care and suggested that principles of implied authority should govern.[109] However, the court reiterated that the arbitration agreement was optional and held that implied authority may not be inferred where an agreement is not required for admission and is merely incidental to health care decisions.[110]

Other courts have similarly declined to compel arbitration where a voluntary arbitration agreement was presented in conjunction with health care documents.[111] For example, the Sixth Circuit recently held that an agreement is not a necessary health care decision where it was not a precondition for admission to a facility.[112] And thus, the authority granted

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[102] *Id.*

[103] *Id.* at 590.

[104] *Id.* at 591.

[105] *Id.* at 594.

[106] *Id.* at 592.

[107] *Id.*

[108] *Id.* at 593.

[109] *Id.* at 594.

[110] *Id.* at 593 (holding that "where, as here, the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement… [the] 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.").

[111] *See, e.g.*, Texas Cityview Care Ctr., L.P. v. Fryer, 227 S.W.3d 345, 352 (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) (declining to compel arbitration); Life Care Centers of America v. Smith, 681 S.E.2d 182, 186 (Ga. Ct. App. 2009) (upholding trial court's refusal to compel arbitration on the basis of a broad POA).

[112] Pine Tree Villa, LLC v. Brooker, 612 F.App'x 340, 345 (6th Cir. 2015).

by powers of attorney in these situations does not include the power to submit to arbitration.[113]

IV. INSTANT DECISION

The ultimate issue in *Ingram* was whether the Agent's Power provision – which granted Hall the authority to make arrangements necessary for Ingram's health care and take any other action necessary to execute the duties stated within the DPOA – conferred to Hall the authority to execute agreements that were incidental, but not necessary, to the duties expressly stated in the DPOA.[114] Using principles of agency law, the majority determined that the express language of the provision allowed Hall to execute incidental, unnecessary agreements.[115] It reasoned that such authority is construed to apply to acts that are incidental to or are reasonably necessary to achieve the expressed intent, unless otherwise agreed.[116] In contrast, the dissent questioned whether agency law was applicable in the instant case and noted that, even if it was, the language should not be so broadly construed as to include the authorization of incidental, unnecessary agreements.[117]

A. Majority Opinion

The majority opinion determined that, notwithstanding the authority conferred by the "necessary arrangements" provision, Hall had express and actual authority to move Ingram into a care facility.[118] It was from this authority, the majority argued, that Hall's power to sign the Agreement was derived.[119] In coming to this determination, the majority relied on Sections 33 and 35 of the Restatement (Second) of Agency.[120] Section 35 provides that "[u]nless 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."[121] Section 33 operates as a limitation to Section 35 and provides that, notwithstanding Section 35, "[a]n agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestations and the facts as he knows or should know

[113] *See id.* at 344.
[114] Ingram v. Brook Chateau, 586 S.W.3d 772, 775 (Mo. 2019).
[115] *Id.*
[116] *Id.*
[117] *Id.* at 777 (Russell, J., dissenting).
[118] *Id.* at 775.
[119] *Id.*
[120] *Id.* at 776.
[121] RESTATEMENT (SECOND) OF AGENCY § 35 (AM. L. INST. 1958).

them at the time he acts."[122] First, the court noted that admissions documents, which are to be signed prior to patient entry, are a "natural part" of a residential care facility's admission process and commonly presented in conjunction with arbitration agreements.[123] Then, applying Sections 33 and 35, the court held that Hall's express authority to move Ingram into a care facility collaterally provided Hall the authority to sign admissions documents on Ingram's behalf.[124]

The majority also rejected the dissent's argument that power granted under a DPOA does not extend to acts that may typically be covered by the implied authority doctrine.[125] Relying on Section 404.710.8, which allows a third party to freely rely on general grants of authority,[126] the majority concluded that there were no limitations in the application of implied authority as to DPOAs.[127] The majority then reiterated that the DPOA expressly authorized Hall to move Ingram into a residential care facility.[128] In light of that authorization, the majority held that the signing of the Agreement was purely incidental to the DPOA's express purpose.[129]

B. Dissenting Opinion

The dissenting opinion categorized its argument into three main points.[130] First, the dissent argued that the majority improperly applied, and relied on, agency principles to interpret authority under the power of attorney.[131] Second, the dissent argued that the majority erred in its broad application of Section 35.[132] Third, the dissent argued that the majority erred in its factual application of Section 33.[133]

As a preliminary matter, the dissent noted that an attorney in fact may only act in accordance with the authority set out in the power of attorney.[134] The dissent then reasoned that the express language of the power of attorney – authorizing Hall to do that which was *necessary* for Ingram's health care – collaterally prohibited Hall from entering into

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[122] *Id.* § 33.

[123] *Ingram*, 586 S.W.3d at 776.

[124] *Id.*

[125] *Id.* at 775.

[126] MO. REV. STAT. § 404.710.8 (2003); *see also supra* text accompanying note 74.

[127] *Ingram*, 586 S.W.3d at 775.

[128] *Id.* at 776.

[129] *Id.* at 775.

[130] *Id.* at 778–79 (Russell, J., dissenting).

[131] *Id.*

[132] *Id.*

[133] *Id.* at 779 (Russell, J., dissenting).

[134] *Id.* at 778 (Russell, J., dissenting) (citing MO. REV. STAT. § 404.714.7 (2003)).

unnecessary agreements like the Voluntary Arbitration Agreement.[135] In its criticism of the majority's *sua sponte* application of agency law, the dissent contended that "the terms of the agreement entered into by the parties necessarily govern over general agency principles."[136] On these grounds, the dissent concluded that Hall did not have the authority to sign the Agreement.[137]

The dissent also claimed that, even if agency principles were applicable, the majority's broad application of Section 35 was improper.[138] The dissent argued that Section 35's application is limited to incidental transactions that are necessary to complete the authorized objective stated in the power of attorney.[139] The dissent pointed out that Hall could have accomplished Ingram's expressed intent – to be moved into a residential care facility – without signing the Agreement.[140] In furtherance of this point, the dissent cited to *Lambur*, which noted that powers of attorney are to be strictly construed.[141]

Lastly, relying on a black letter statement of Section 33,[142] the dissent noted that nothing in the power of attorney indicated an intent to allow Hall to enter into unnecessary agreements.[143] The dissent argued that authorization to move an individual in or out of a health care facility *does not* translate to an authorization, incidental or otherwise, to waive that individual's right to a trial by judge or jury.[144]

V. COMMENT

The majority's *sua sponte* application of agency principles did not paint a clear picture of the breadth of agency law and its application to power-of-attorney interpretation. Rather, the majority omitted pertinent principles of agency that would logically guide the court to a decision in the alternative. While the dissent's "strict construction" argument is

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[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 778–79; RESTATEMENT (SECOND) OF AGENCY § 35 (AM. L. INST. 1958) ("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.").

[139] *Ingram*, 586 S.W.3d at n.4.

[140] *Id.*

[141] *Id.* at 779 (Russell, J., dissenting).

[142] RESTATEMENT (SECOND) OF AGENCY §33 (AM. L. INST. 1958) ("'An agent is authorized to do, *and to do only*, what it is reasonable for him to infer that the principal desires him to do *in the light of the principal's manifestations and the facts as he knows or should know them at the time he acts*.'") (emphasis added).

[143] *Ingram*, 586 S.W.3d at 779. (Russell, J., dissenting).

[144] *Id.*

similarly limited, its approach would have led to a more appropriate outcome in this case. Both opinions ultimately failed to recognize the fiduciary duties owed by an attorney in fact. As a matter of first impression, the court also failed to consider how other jurisdictions have approached this same issue. Had the *Ingram* court heeded these principles, it could have avoided the haunting effects now facing Missouri citizens.

A. Strict Construction

The *Ingram* majority and dissenting opinions ultimately disagreed about the circumstances under which powers of attorney must be strictly construed.[145] The dissent stated that, generally, powers of attorney should be narrowly interpreted.[146] In contrast, the majority suggested, in dicta, that powers of attorney will only be strictly construed when the attorney in fact's action requires express authority under Section 404.710.6.[147] While both approaches have some legal merit, they both are similarly flawed.

First, the dissent's suggestion fails to recognize that Missouri common law has only required strict construction where an act falls under Section 404.710.6. Likewise, the Missouri General Assembly has never required that powers of attorney be strictly interpreted outside of Section 404.710.6. The General Assembly's hesitance to formally require narrow construction is supported by comment h to Section 34 of the Restatement, which recommends that "[t]here . . . be neither a 'strict' nor a 'liberal' interpretation, but a fair construction which carries out the intent as expressed."[148] Thus, the dissent's assessment that powers of attorney be narrowly construed is fair only to the extent the act in question is one for which the legislature has required express authorization.[149]

Second, the majority's suggestion to totally abandon principles of strict construction absent any legislative requirement goes too far and fails to consider interpretative guidance provided by the Restatement (Second) of Agency. Specifically, the majority failed to consider that an analysis of

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[145] *Id.*

[146] *Id.*

[147] *Id.* at 775.

[148] RESTATEMENT (SECOND) OF AGENCY § 34, cmt. h (AM. L. INST. 1958).

[149] Ingram v. Brook Chateau, 586 S.W.3d 772, 775 (Mo. 2019) ("The dissenting opinion cites *In re* Estate of Lambur, 397 S.W.3d 54, 64 (Mo. Ct. App. 2013) to support that powers of attorney are to be strictly construed and therefore, attorneys in fact cannot have implied authority under a durable power of attorney. However, a strict construction does not preclude implied authority to act, as demonstrated by § 404.710.6(1)-(12)."). *See* MO. REV. STAT. § 404.710.6 (2003) (listing actions that require express authorization in a power of attorney); *see also id.* § 404.710.7 (listing actions that, even when expressly stated in a power of attorney, may not be conferred via power of attorney).

the document's plain language is critical to carry out the principal's intent. The majority also erred when it did not consider the circumstances surrounding the creation of the power of attorney, including the formality under which it was executed. These omissions are in direct conflict with Section 34. Consequently, had the majority considered the factors detailed in Section 34, the court's decision would likely be different.

Section 34, comment h, suggests that powers of attorney should be "construed so as to carry out the intent of the principal."[150] Further, Section 34 requires that powers of attorney be interpreted in light of the formality with which they are drawn.[151] With Section 34 in mind, one could reasonably conclude that Ingram's intent was to grant Hall authority to carry out only matters *necessary* for health care. There is limited, if any, evidence to support a holding that Ingram intended to authorize Hall to enter into agreements that were unnecessary to obtain health care services. Indeed, the only relevant mention of legal authority permitted Hall to grant waivers of liability only when *required* by the health care provider.[152] The authority to sign such a waiver was coupled with a provision that allowed Hall to take legal action at the expense of Ingram's estate.[153] These provisions standing alone suggest that Hall's authority to waive legal liability was limited to circumstances in which doing so was required for admission into the facility. Where such waiver was not required to obtain health care, Hall had the authority to *litigate rather than to arbitrate*.

Moreover, a power of attorney is a formal document which is presumed to articulate the principal's intent "with a high degree of particularity."[154] Therefore, it is likely that Ingram intended to grant Hall the authority to take action, including legal action, *only* where necessary or required. Nothing in the power of attorney strongly supports the assumption that Ingram intended to grant Hall the authority to enter into unnecessary agreements, like the Voluntary Arbitration Agreement.[155] Rather, Ingram's power of attorney, when presumed to articulate his intent with particularity, clearly demonstrated that Ingram did not intend – and thus did not authorize – Hall to forgo Ingram's legal right to trial by judge or jury.

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[150] RESTATEMENT (SECOND) OF AGENCY § 34, cmt. h (AM. L. INST. 1958).

[151] *Id*. § 34.

[152] Ingram v. Brook Chateau, 586 S.W.3d 772, 773 (Mo. 2019) (emphasis added).

[153] *Id.*

[154] RESTATEMENT (SECOND) OF AGENCY § 34, cmt. h (AM. L. INST. 1958).

[155] *Ingram*, 586 S.W.3d at 773.

B. Fiduciary Duties and Dangerous Powers

"The heart of agency law is often thought to lie in the fiduciary duties that agency law mandates agents owe their principals."[156] And yet, the *Ingram* court failed to fully consider the implications of these duties.[157] The majority glossed over this duty by burying reference to it in the middle of its recitation of agency law,[158] and the dissent made no mention of it at all.[159] Notwithstanding the court's omission, Section 404.714.1 makes clear that Hall had a duty as Ingram's attorney in fact to act for the benefit, and in the interest, of Ingram.[160] However, it is questionable whether Hall fulfilled this duty.

Historically, jury trials are the best forum for plaintiffs to bring claims against residential care facilities.[161] By contrast, binding arbitration is the forum preferred by most residential care defendants.[162] Over the years, defendants have seen exponential growth in liability costs associated with litigation.[163] Looking for ways to keep these costs low, defendants have opted for arbitration.[164] For defendants, arbitration provides a forum where the likelihood of liability is minimized.[165] This means a lower rate

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[156] Gabriel Rauterberg, *The Essential Roles of Agency Law*, 118 MICH. L. REV. 609, 641 (2020).

[157] MO. REV. STAT. §§ 404.710.8, 404.714.1 (2003) ("An attorney in fact who elects to act under a power of attorney is under a duty to act in the interest of the principal."); RESTATEMENT (SECOND) OF AGENCY § 39 (AM. L. INST. 1958) ("Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal."); *Id.* § 39, cmt. h ("Authority is conferred to carry out the purposes of the principal and not those of someone else.").

[158] *Ingram*, 586 S.W.3d at 775 (Mo. 2019).

[159] *Id.* at 776–80.

[160] MO. REV. STAT. §§ 404.710.8, 404.714.1 (2003) ("An attorney in fact who elects to act under a power of attorney is under a duty to act in the interest of the principal."); RESTATEMENT (SECOND) OF AGENCY § 39 (AM. L. INST. 1958) ("Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal."); *Id.* ("Unless otherwise agreed, authority to act as agent includes only authority to act for the benefit of the principal.").

[161] *See generally* Michelle Andrews, *Signing a Mandatory Arbitration Agreement with a Nursing Home Can be Troublesome*, WASH. POST: HEALTH AND SCIENCE, (Sep. 17, 2012), https://www.washingtonpost.com/national/health-science/signing-a-mandatory-arbitration-agreement-with-a-nursing-home-can-be-troublesome/2012/09/16/ccf851ba-6a2c-11e1-acc6-32fefc7ccd67_story.html [https://perma.cc/83PJ-VP4K].

[162] *See* 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) (noting that "Arbitration offers nursing homes a number of advantages over litigation").

[163] Andrews, *supra* note 161.

[164] *Id*.

[165] *Id*.

of success for plaintiffs.[166] Moreover, even when successful, plaintiffs subject to arbitration often receive lower payouts than those who litigate.[167] These lower rates can likely be attributed to the narrow range of discovery options available in arbitration.

Because one goal of arbitration is to keep costs low, the tools of discovery are extremely limited.[168] Under traditional evidentiary rules, plaintiffs are much more likely to collect the breadth of evidence needed to support their claims.[169] On the other hand, limited discovery tools in arbitration often reduce a plaintiff's ability to make a compelling case. [170] And because arbitration decisions are almost always final and binding, arbitration plaintiffs have virtually no right to overturn erroneous decisions stemming from a lack of evidence.[171] Further, the confidentiality of arbitration is enticing for defendants who "prefer to know in advance that their disputes will be determined out of the public gaze."[172] Traditional litigation protects plaintiffs and creates accountability for defendants by providing a public record that can help transform industry practice.[173]

In *Ingram*, Hall had a duty to act in the interest and benefit of Ingram.[174] Hall's authority also extended only to acts that "carry out the purposes of the principal and not those of someone else."[175] But research shows that, despite the benefit of efficiency, the arbitration of residential care facility claims is commonly to the detriment of the plaintiff.[176] By signing the Agreement, Hall subjected Ingram to the many risks associated with arbitration and conferred to Brook Chateau the benefits of arbitration. Therefore, Hall's act appears to violate her fiduciary duty, as it was in direct opposition of her duty to act for the benefit of Ingram. Under this theory alone, the court could have invalidated the voluntary arbitration agreement as a violation of Hall's fiduciary duty to Ingram.

Whether due to mere oversight or an intentional avoidance, the majority attempted to shadow Hall's violation by arguing that the

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[166] *Id*.

[167] *Id*. ("[N]early 12 percent of claims without arbitration agreements resulted in awards of $250,000 or more, compared with 8.5 percent of claims with arbitration agreements.").

[168] Paul Radvany, *The Importance of the Federal Rules of Evidence in Arbitration*, 36 REV. LITIG. 469, 505 (2016); JAY GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 6:2 (4th ed. 2021).

[169] *See generally* GRENIG, *supra* note 168.

[170] *Id*.

[171] *Id*.

[172] David St. John Sutton, et. al., RUSSELL ON ARBITRATION § 1:5 (23d ed. 2009).

[173] Andrews, *supra* note 161.

[174] MO. REV. STAT. §§ 404.710.8, 404.714.1 (2003).

[175] RESTATEMENT (SECOND) OF AGENCY § 39, cmt. a (AM. L. INST. 1958).

[176] Andrews, *supra* note 161.

voluntary arbitration agreement was incidental to the authority granted to Hall to do what was necessary for Ingram's health care.[177] However, "dangerous powers" may not be incidentally inferred unless there is evidence to support such an intent.[178] Toeing the line of unconstitutionality, it can hardly be argued that forced arbitration – especially when authorized by proxy – is *not* a dangerous power.[179]

While constitutional rights, including the right to a civil jury trial, may be waived,[180] such waivers cannot be easily inferred.[181] Waiver of constitutional rights may only be found when the intent to do so is clear.[182] In *Ingram*, the court held that Hall had the incidental authority to waive Ingram's constitutional right to a civil jury trial.[183] However, guidance from the Supreme Court of the United States on constitutional waiver calls the *Ingram* holding into question.[184] In *Ingram*, there was very limited evidence of Ingram's intent to confer to Hall the authority to enter into the Agreement.[185] Incidental agency principles alone demonstrate that Ingram likely did not intend to confer such authority, and the plain language of the power of attorney further emphasizes Ingram's intent to grant Hall the authority only to take necessary actions. At the very least, it is not *clear* that Ingram intended to authorize Hall to enter into voluntary agreements. As a result, the court erroneously determined both that Ingram waived his constitutional right to a civil jury trial and that Hall held the incidental authority to execute such a dangerous power.

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[177] Ingram v. Brook Chateau, 586 S.W.3d 772, 775 (Mo. 2019).

[178] RESTATEMENT, SECOND OF AGENCY § 34, cmt. h (AM. L. INST. 1958).

[179] *See generally* Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV., 1 (1997); Est. of Collins v. United States, No. 93-CV-70151-DT, 1994 WL 464357, at *1, n.1 (E.D. Mich. Mar. 23, 1994) (A dangerous power has been suggested to permit an agent "unlimited discretion" over matter directly affecting the principal likely constitutes a dangerous power. "A power to make gifts can be found in paragraph 12 of the instrument only if that provision is read to grant the agent unlimited discretion in the use of the principal's funds. Such 'dangerous' powers will not be inferred." (citing RESTATEMENT, SECOND OF AGENCY § 34, cmt. h (AM. L. INST. 1958)).

[180] Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986) ("As a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried.").

[181] Aetna Ins. Co. v. Kennedy to Use of Bogash, 301 U.S. 389, 393 (1937) ("But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.").

[182] Fuentes v. Shevin, 407 U.S. 67, 95 (1972) ("For a waiver of constitutional rights in any context must, at the very least, be clear.").

[183] Ingram v. Brook Chateau, 586 S.W.3d 772, 776 (Mo. 2019).

[184] *See supra* text accompanying notes 180–82.

[185] *Ingram*, 586 S.W.3d at 773; *see also supra* text accompanying note 152–53.

C. A Path Forward

In matters of first impression, it is common for courts to look to other jurisdictions for guidance.[186] Faced with very similar factual backgrounds, the Sixth Circuit and Supreme Court of Kentucky have held that implied authority will not be inferred when an agreement is not a requirement of admission.[187] These decisions stand for the proposition that attorneys in fact, absent express authority to enter into agreements, have the implied authority to act only where necessary. The Supreme Court of Missouri, for reasons left to speculation, declined to follow suit, and alternatively held that attorneys in fact have the implied authority to act even when unnecessary.[188] From a legal perspective, this outcome is troublesome because it is unclear whether the majority, despite its *sua sponte* application of agency law, adequately applied agency principles, including those of fiduciary duties. From a policy perspective, *Ingram*'s outcome is concerning because it provides a gateway for attorneys in fact to claim incidental authority for potentially careless acts. As a result, legislative action may serve as an appropriate remedy in this case.

First, the Missouri General Assembly could amend Section 404.710.6 to require a power of attorney to expressly authorize an attorney in fact's power to enter into voluntary arbitration agreements. Second, the Missouri General Assembly could alternatively amend Section 404.710.7 to expressly prohibit an attorney in fact's ability to enter into voluntary arbitration agreements altogether. Either option would successfully incentivize careful execution of powers of attorney and ensure that an individual's right to a jury trial is not involuntarily relinquished via proxy.

VI. CONCLUSION

It is undeniable that arbitration agreements, mandatory or otherwise, have become common practice. While arbitration can be more efficient and affordable at times, it may not be the appropriate forum for all disputes. In the present case, arbitration was compelled because Ingram's agent, a mere proxy, entered into an arbitration agreement on his behalf.[189] The court had two logical rationales at its disposal to correctly decide Ingram's case: (1) Ingram's power of attorney authorized his agent to do only what was *necessary*, and the arbitration agreement was not *necessary*

[186] *See* FIRST IMPRESSION, LEGAL INFORMATION INSTITUTE, (last accessed Apr. 23, 2022), https://www.law.cornell.edu/wex/first_impression [https://perma.cc/4WVH-TV7W].

[187] Ping v. Beverly Enter., Inc., 376 S.W.3d 561 (Ky. 2012); Pine Tree Villa, LLC v. Brooker, 612 F. App'x 340 (6th Cir. 2015).

[188] Ingram v. Brook Chateau, 586 S.W.3d 772, 776 (Mo. 2019).

[189] *Id.* at 773.

or *required*, or (2) interpretive and fiduciary laws prescribed by Section 404.714.1 and the Restatement (Second) of Agency govern Hall's duty to Ingram, and Hall's agreement to arbitrate was a violation of those principles. Instead, the court's misguided approach incentivizes careless action by both drafters and actors of the power of attorney. To limit the erroneous effect of *Ingram*, the Missouri General Assembly should seek to amend Section 404.710.6 to require express authorization for an attorney in fact to execute voluntary arbitration agreements, or Section 404.710.6 to expressly decline such authorization. Doing so will cure the haunting effects *Ingram* is bound to have.