No. 12-

IN THE

Supreme Court of the United States

BEVERLY ENTERPRISES, INC., *et al.*,

Petitioners,

v.

DONNA PING, Executrix of the Estate of Alma Calhoun Duncan,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In its decision below, the Supreme Court of Kentucky announced two rules of state law to defeat the enforceability of arbitration contracts. Neither of the rulings at issue is founded "upon such grounds as exist at law or equity for the revocation of any contract," and each of these rulings raises important issues of preemption under section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, as interpreted by this Court most recently in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*). This case involves a common fact pattern frequently addressed by state courts across the country, and the issues decided below have produced conflicting decisions from the highest courts of the States. Absent review by this Court, these rules of state law will continue to be invoked to defeat arbitration contracts in contravention of the FAA.

This petition presents the following two questions:

1. Does the FAA preempt a rule of state law holding that a broadly worded general power of attorney that is to be "liberally construed" and that grants unrestricted power over the principal's affairs, specifically including all matters relating to the principal's medical care, will be interpreted to exclude the authority to execute an optional arbitration agreement covering disputes arising out of the principal's medical care unless such arbitration-specific authority is expressly stated in the power of attorney?

2. Does the FAA preempt a rule of state law that categorically prohibits the arbitration of wrongful death claims in accordance with a valid arbitration agreement entered into by the decedent?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is sought to be reviewed is as follows:

Petitioners: Beverly Enterprises, Inc.; Beverly Enterprises-Kentucky, Inc.; Beverly Health and Rehabilitation Services, Inc. d/b/a Beverly Health and Rehab. of Frankfort; GGNSC Administrative Services, LLC, d/b/a Golden Ventures; GGNSC Holdings, LLC d/b/a Golden Horizons; GGNSC Equity Holdings, LLC; Golden Gate National Senior Care, LLC d/b/a Golden Living; Golden Gate Ancillary, LLC d/b/a Golden Innovations; GGNSC Frankfort, Inc. d/b/a Golden Living Center–Frankfort; and Ann Phillips, in Her Capacity of Administrator of Golden Living Center–Frankfort, f/k/a Beverly Health and Rehab. of Frankfort.

Respondent: Donna Ping, Executrix of the Estate of Alma Calhoun Duncan.

Other appellees below: John Does 1 through 5 (unknown defendants).

RULE 29.6 STATEMENT

Petitioners are ultimately owned by Fillmore Strategic Investors LLC, Fillmore Capital Partners LLC, and Washington State Investment Board. No publicly held company has a ten percent or more ownership interest in petitioners' entities.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Pet. App., *infra*, 1a-35a) is reported at 376 S.W.3d 581. The opinion of the Kentucky Court of Appeals (Pet. App. 36a-54a) is unreported. The order of the Franklin Circuit Court in Franklin County, Kentucky (Pet. App. 55a-73a) is unreported.

JURISDICTION

The judgment of the Kentucky court was entered on August 23, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, Art. VI, cl. 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, provides in pertinent part:

> A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, * * * or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

INTRODUCTION

Congress enacted the Federal Arbitration Act "in response to widespread judicial hostility to arbitration agreements"—judicial hostility that "had manifested itself in 'a great variety' of 'devices and formulas' declaring arbitration against public policy." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745, 1747 (2011) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 217 F.2d 402, 406 (2d Cir. 1959)); *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) (*per curiam*) (confirming in nursing home context that FAA "'reflects an emphatic federal policy in favor of arbitral dispute resolution'") (citation omitted). This case presents two significant remaining variations in that long line of "devices and formulas" contrived by state courts to thwart the enforceability of arbitration contracts.

The underlying facts are simple, undisputed, and typical of many cases that recur in all parts of the United States:

- An aging parent in declining health executes a broadly worded durable power of attorney directing that it be "liberally construed" so as to grant her adult daughter "full and general power and authority to act on my behalf," including, without limitation, the authority "[t]o make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me."

- On this authority, the daughter admits her mother into a nursing home, and as part of the admissions process, she signs an optional arbitration agreement on her mother's behalf in which both the resident and the nursing home mutually agree to arbitrate any disputes arising from the nursing home's provision of care, including claims for negligence or malpractice that may result in injury or death to the resident.

- The arbitration agreement specifically states that it is intended to benefit and bind all successors and assigns of the parties, including "all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir," and that it is intended "to survive the lives and existence of the parties hereto."

- Following her mother's death in the nursing home, the daughter, as legal representative of her mother's estate, sues the nursing home in court for personal

injury and wrongful death, and the nursing home moves to compel arbitration.

Courts faced with such cases frequently address two issues of state law that bear decisively on the enforceability of these common arbitration agreements: (1) whether a broadly worded general power of attorney granting "full and general power and authority to act on my behalf," including the authority to make decisions and execute documents "regarding medical care" or "related to medical decisions," grants authority to agree to arbitrate claims arising from the medical care provided; and (2) whether such an arbitration agreement is binding on the decedent's beneficiaries in a subsequent wrongful death action that arises, by definition, solely on account of the resident's death. These issues have divided the state courts and spawned inconsistent and conflicting decisions.

In the decision below, the Kentucky Supreme Court held against arbitration on both counts. First, it announced that it would construe general powers of attorney to foreclose arbitration unless the authority specifically to execute arbitration agreements is expressly stated in the power of attorney, or unless the party seeking to enforce the arbitration contract proves that arbitration was "necessary" to carry out the power of attorney (as might be the case, according to the court, if the agreement to arbitrate was not optional but instead a prerequisite for admission to the care facility). Pet. App. 12a-20a. The courts of California, Florida, Georgia, New Mexico, and Tennessee have reached the opposite conclusion on this question. *See infra* pp. 32-33 & n.4.

The rule adopted by Kentucky does not follow from any established precedent of state law generally requiring that powers of attorney be strictly interpreted. Instead, the Kentucky court's reasoning runs against the ordinary principles that have long governed construction of such instruments, as well as the expansive language of the power of attorney at issue here, and is specifically based on a negative view of arbitration despite this Court's precedents to the contrary. *See infra* pp. 20-25. Because it singles out arbitration for disfavored treatment, the state law rule pronounced by the Kentucky court is preempted by the FAA. *See Concepcion*, 131 S. Ct. at 1746-47 (FAA preempts rules of state law that "apply only to arbitration," that "derive their meaning from the fact that an agreement to arbitrate is at issue," that are "applied in a fashion that disfavors arbitration," or that "have a disproportionate impact on arbitration agreements").

Second, the court below held that wrongful death claims in Kentucky are not subject to a previous arbitration agreement entered into by the decedent, even if the arbitration contract was clearly intended to cover such wrongful death claims. Pet. App. 28a-34a. This holding not only flies in the face of this Court's decision last Term in *Marmet* that FAA preemption recognizes no exception for "wrongful death claims" in the nursing home context or otherwise, 132 S. Ct. at 1203, but is also at odds with holdings from the courts of California, Colorado, and Indiana on this question. *See infra* pp. 35 & n.7.

Nevertheless, the court below reasoned that the Kentucky wrongful death statute creates an "independent" claim for the decedent's beneficiaries, not a claim that "derives from" any rights possessed by the decedent,

and that therefore the decedent's contract with the nursing home cannot bind the beneficiaries to arbitrate their wrongful death claims. Pet. App. 32a. Because this holding represents a rule of "'state law [that] prohibits outright the arbitration of a particular type of claim,'" it is manifestly "'displaced by the FAA.'" *Marmet*, 132 S. Ct. at 1203 (quoting *Concepcion*, 131 S. Ct. at 1747); *see also id.* at 1203-04 (holding that a state law "prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim" and therefore "is contrary to the terms and coverage of the FAA"). The FAA declares that an agreement to arbitrate any claims "arising out of" the subject covered by the agreement shall be valid and enforceable, notwithstanding any rule of state law to the contrary, and the federal statute "includes no exception for personal-injury or wrongful-death claims." *Id.* at 1203 (quoting 9 U.S.C. § 2) (internal quotation marks omitted). *See infra* pp. 26-30.

Absent resolution, the pronounced conflicts that exist among the States on each of these issues guarantee the inconsistent enforcement of arbitration agreements in violation of the national policy embodied in the FAA. *See infra pp.* 31-36. The issues raised in this petition are therefore exceptionally important and merit the grant of certiorari and summary reversal of the decision below.

STATEMENT

A. Factual Background

1. On January 19, 1998, Alma Calhoun Duncan executed a "General Power of Attorney" appointing her adult daughter, respondent Donna Ping, as her attorney-in-fact with respect to all matters relating, among other things, to Mrs. Duncan's property, financial affairs, and medical care. Pet. App. 74a-76a.

The power of attorney explicitly confirms the "full and complete" and "general" authority granted to respondent. *Id.* The opening paragraph grants "full and complete power and authority to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present." *Id.* at 74a. This power specifically includes, "but [is] not limited to," the authority:

> To make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me; and
>
> To generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf.

Id. at 74a-75a.

Further, the instrument not only includes language reinforcing that the power of attorney is to be "liberally

construed" to give respondent "full and general power and authority to act on my behalf," but also stresses that the enumeration of any specific items, rights, acts, or powers does not limit or restrict the scope of respondent's authority as Mrs. Duncan's attorney-in-fact:

> It is my intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire. The enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact.

Id. at 76a. The instrument creates a durable power of attorney under Kentucky law, so that by law all acts performed by respondent pursuant to the power of attorney during any "period of disability or incompetence or uncertainty as to whether I am dead or alive shall have the same effect and inure to the benefit of and bind me, my heirs, devises and personal representatives the same as if I were alive, competent and not disabled or incapacitated." *Id.*; s*ee* Ky. Rev. Stat. § 386.093 (2000) (providing that actions taken pursuant to durable powers of attorney are binding on heirs and successors, notwithstanding the death or incapacity of the principal).

2. On March 17, 2006, while her mother was incapacitated in a hospital and unable to manage her

own affairs and make decisions relating to medical care, respondent admitted Mrs. Duncan into the Golden Living Center in Frankfort, Kentucky, a nursing home owned and operated by petitioners. Respondent represented herself to the nursing home as Mrs. Duncan's attorney-in-fact and provided a copy of her power of attorney. As part of the admissions process, respondent signed several documents that were presented to her in a packet by the facility. One of these was an optional arbitration agreement. Pet. App. 78a-82a. She executed the arbitration agreement on behalf of Mrs. Duncan as Mrs. Duncan's "Daughter/POA" and "Authorized representative." *Id.* at 82a.

The arbitration agreement bears the following title in bold capital letters: "**RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION—READ CAREFULLY)**." *Id.* at 78a. The agreement provides:

> It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies . . . arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration . . . and not by a lawsuit or resort to court process.

Id. at 78a-79a. The agreement declares in bold capital letters: "**BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS**

ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES." *Id.* at 80a-81a.

The agreement to arbitrate is mutual and comprehensive. It covers, "but is not limited to," any claim by the facility "for payment, nonpayment, or refund for services rendered" to the resident and any claim against the facility relating to the services and care provided to Mrs. Duncan, including:

> breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement.

Id. at 79a.

In addition, the arbitration agreement contains a paragraph expressly reciting the parties' mutual intent to benefit and bind all successors, assigns, survivors, heirs, or other related persons who may attempt to bring claims arising from the care provided by the nursing home to Mrs. Duncan:

> It is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all persons whose claim is derived

> through or on behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident. The parties further intend that this agreement is to survive the lives or existence of the parties hereto.

Id. at 80a.

The agreement advises that the resident or her authorized representative has the right to seek legal counsel before signing the agreement, that the execution of the agreement was not a precondition to admission, and that the agreement could be rescinded within 30 days of signing. *Id.* at 81a. Further, the agreement provides that money damages may be awarded in the arbitration proceedings to the same extent as in a comparable civil action. *Id.* at 79a-80a.

3. Some months after her admission to the facility, Mrs. Duncan died while under the care of the nursing home, and respondent was appointed executrix of Mrs. Duncan's estate. *Id.* at 1a, 56a n.1. In October 2008, respondent filed suit against petitioners in the circuit court of Franklin County, Kentucky, claiming damages for personal injury to Mrs. Duncan and wrongful death allegedly caused by negligent care provided by the facility. *Id.* at 1a-2a.

Respondent brought the personal injury claim on behalf of the estate of Mrs. Duncan. She brought the wrongful death claim as Mrs. Duncan's "personal representative," pursuant to Kentucky's wrongful death statute, which provides:

> Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased. . . . The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased[.]

Ky. Rev. Stat. § 411.130(1)-(2) (1974); *see* Pet. App. 29a.

Petitioners moved to dismiss respondent's claims and to enforce the arbitration agreement under the FAA and Kentucky's analog of the FAA, the Kentucky Uniform Arbitration Act, Ky. Rev. Stat. §§ 417.045-417.240. *See* Pet. App. 56a. After ordering discovery into the facts surrounding the signing of the arbitration agreement, *id.*, the trial court denied petitioners' motion, *id.* at 72a, and it is the appeal of that decision that is at issue in this petition.

B. Procedural History

1. In an opinion and order dated June 25, 2009, the trial court denied petitioners' motion to compel arbitration on several grounds. Pet. App. 55a-72a. The trial court's decision is a case study of judicial hostility toward arbitration agreements.

Despite the broadly worded grant of authority over all decisions and matters relating to Mrs. Duncan's health care, the trial court ruled that the general power of attorney did not give respondent express authority to agree to arbitration because it "did not contain any specific or express language authorizing [respondent] to arbitrate Ms. Duncan's estate's claims against [petitioners], as well as waive her constitutional rights." *Id.* 59a. The court also ruled that the power of attorney did not grant respondent the necessary implied discretion because, according to the court, "the matter of agreeing to arbitrate pre-dispute legal claims and to waive constitutional rights is unrelated to making either healthcare or investment decisions." *Id.* at 64a.

Further reflecting its hostility to arbitration, the lower court ruled that there was "fraud" in the "execution" of the agreement because it was "falsely represented" to respondent that it was part of the standard admissions packet and her failure to read the agreement was "blameless," since she only spent ten minutes with the facility's admissions director when she signed the documents, the admissions director did not explain to respondent that she had 30 days to review the arbitration agreement and rescind it, and respondent was "preoccupied" with her mother's condition. *Id.* at 67a-69a. According to the trial court, it was "fraudulently misleading" and an "unconscionable manipulation of the contract formation process" for the facility's representative to tell respondent that arbitration was "more expedient" and "less costly" than litigation because there were "conflicting reports" in the academic literature on this point. *Id.* at 69a-70a & n.12 (citing, among other articles critical of arbitration, Jean R. Sternlight, *Panacea*

or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U.L.Q. 637, 678-79 (Fall 1996)). Similarly, the court believed the nursing facility misled respondent by telling her that the arbitration agreement did not limit damages because it was unclear to the court (again, based on the Sternlight article) whether "arbitral award [amounts] had been the same as judgments or jury awards." *Id.* at 69a & n.13.

Finally, the trial court ruled that the arbitration agreement constituted an "inescapable" contract of "adhesion" that was "unfair" and unconscionable "since clearly looming in the fine print is the stipulation that the consent to arbitrate and to waive [Mrs. Duncan's] constitutional rights is a consideration for the provision of nursing facility services." *Id.* at 70a-72a. The court ruled in the alternative that if arbitration was not a condition of admission to the facility, then the contract was unenforceable for lack of consideration. *Id.* at 71a. The court ended by pronouncing that "where a stronger party imposes an adhesion contract on a weaker party, the possibility of overreaching is greater. Our society's preference for arbitration should not come at the price of fundamental fairness and freedom in contracting." *Id.* at 72a.

2. The Court of Appeals of Kentucky reversed the trial court in all respects. Pet. App. 41a-54a. The court of appeals held that the arbitration agreement was valid and enforceable under the FAA and Kentucky's substantially identical arbitration statute, and that respondent had both actual and apparent authority under the broad terms of the power of attorney to execute the arbitration agreement in accordance with Kentucky's precedents. *Id.* at 41a-47a.

The court also rejected each of the trial court's conclusions that the contract was unconscionable or fraudulent. *Id.* at 48a-52a. The court found that there was no evidence the arbitration agreement was concealed from respondent; that the bold title of the agreement instructed respondent to "'Read Carefully'" and there was no evidence respondent was denied the opportunity to read the document; that the terms of the agreement were easy to understand for the ordinary person; that the agreement did not "affect the parties' responsibilities or liabilities but only the forum in which they are to be disputed"; and that there was no basis to conclude that the agreement was unfair or abusive in any respect. *Id.*

Finally, the court rejected the trial court's conclusion that if the arbitration agreement was not a condition of admission, it was lacking in consideration. *Id.* at 49a-50a. Rather, the court of appeals held, the agreement's mutual obligation binding both parties to submit any relevant claims to arbitration constituted sufficient consideration. *Id.* at 50a.

3. The Supreme Court of Kentucky, in turn, reversed the court of appeals. Pet. App. 1a-3a. The Kentucky Supreme Court recognized that the FAA (in addition to Kentucky's parallel arbitration act) applies to the arbitration agreement at issue here because the agreement is a written contract "evidencing a transaction involving [interstate] commerce." *Id.* at 10a-12a (quoting 9 U.S.C. § 2). The court then proceeded to hold the contract unenforceable without acknowledging or addressing petitioners' arguments concerning FAA preemption.

Unlike the trial court, however, the Kentucky Supreme Court did not rule that the arbitration agreement signed by respondent was fraudulently executed, lacking in consideration, or unconscionable in violation of Kentucky public policy. It is notable that while the case was pending before the Kentucky Supreme Court, this Court handed down its decisions in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (*per curiam*), making clear that state legislatures and state courts are not permitted under the FAA to invalidate arbitration contracts, including in the nursing home context, on the basis of general pronouncements of unconscionability. Yet the Kentucky Supreme Court's opinion does not cite or discuss this Court's decisions in either *Concepcion* or *Marmet*.

The Kentucky Supreme Court rendered two principal holdings, both of which are at issue in this petition. First, the court held that under Kentucky law, a broadly worded general power of attorney—including one, as here, regarding the principal's medical care—excludes authority to enter into an arbitration agreement covering claims arising from that medical care, unless the authority specifically to execute arbitration agreements is expressly stated in the power of attorney or unless the arbitration contract is shown to be necessary to carry out the purposes of the power of attorney. Pet. App. 12a-20a. Second, the court held that Kentucky law categorically prohibits the wrongful death beneficiaries from being bound by Mrs. Duncan's arbitration agreement, even assuming the agreement was valid and intended to cover the wrongful death claim. *Id.* at 28a-34a.

4. On the scope of the power of attorney, the Kentucky Supreme Court recited general principles from the Restatements of Agency that agents are generally authorized to perform all acts "incidental to" the subject-matter or primary objective of the power of attorney, those acts that "usually accompany it," those that are "reasonably necessary to accomplish it," or those otherwise "implied in the principal's manifestations to the agent." *Id.* at 16a-17a (quoting Restatement (Second) of Agency § 35 (1958), and Restatement (Third) of Agency § 2.02 (2006)).

Rather than follow a straightforward application of these established principles (each of which supports the conclusion reached by the court of appeals), the Kentucky Supreme Court put decisive weight on comment h of section 2.02 of the Restatement (Third), entitled "Consequences of act for principal," which the court found to be "[o]f particular pertinence to this case." Pet. App. 18a (quoting Restatement (Third) of Agency § 2.02 cmt. h (2006)). Comment h identifies three categories of collateral acts whose legal "consequences" are so serious or benefits so lacking that a reasonable agent would question whether the principal intended to authorize such acts: (1) "crimes and torts"; (2) "acts that create no prospect of economic advantage"; and (3) acts that "create legal consequences . . . significant and separate from the transaction" specifically authorized and that are "fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment." *Id*. at 18a-19a.

The court concluded that it "would place in this third category of acts with significant legal consequences a

collateral agreement to waive the principal's right to seek redress of grievances in a court of law." *Id.* at 19a. On that basis, the court announced a new arbitration-specific rule of Kentucky law: "Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.* at 19a. Thus, the court concluded, Mrs. Duncan's power of attorney "did not thereby authorize [respondent] to waive, where there was no reasonable necessity to do so, her mother's right of access to the courts." *Id.* at 20a. In making this ruling, the court found support from the holdings of several other States, while recognizing that the courts of various States took different positions on the issue with respect to the scope of authority granted in general healthcare powers of attorney. *See id.* at 19a-20a.

5. On the second issue, relating to the wrongful death claim, the Kentucky court created a different basis to avoid enforcing the arbitration agreement. The court ruled that in Kentucky a decedent's predispute arbitration agreement could not bind the heirs and beneficiaries of the decedent's estate to arbitrate their wrongful death claims even where the arbitration agreement was validly executed and stated an intent to cover such claims. *Id.* at 28a-34a.

In holding that such an arbitration agreement can never bind the wrongful death beneficiaries who were not signatories to the agreement, the Kentucky Supreme Court distinguished between wrongful death statutes that create an "independent" cause of action and those that are "derivative" of claims that a decedent could have pursued

if still alive. *Id.* at 28a-32a. In States with "independent" wrongful death actions, the court found that the majority rule was that wrongful death beneficiaries were not bound by a decedent's arbitration agreement, though the court acknowledged that some States with "independent" wrongful death claims, like California and Colorado, have held otherwise. *Id.* at 30a-31a. In States with "derivative" causes of action, the court found that the majority rule was that wrongful death beneficiaries will be bound by a decedent's arbitration agreement. *Id.* at 30a.

The court determined that in Kentucky, "the constitutional status of the wrongful death claim is a 'strong indication' of that claim's independence." *Id.* at 31a. Also, the court found that a Kentucky statute permitting the "[j]oinder of wrongful death and personal injury claims" by a personal representative "left no doubt that in [Kentucky] wrongful death and survival actions are separate and distinct." *Id.* at 31a (quoting Ky. Rev. Stat. § 411.133 (1968)). Even if the arbitration agreement executed by respondent was valid, the court found, respondent still would not be precluded from litigating the wrongful death claim. *Id.* at 32a-33a. Finally, the Kentucky court concluded that although a "third party for whose substantive benefit a contract is made" generally may enforce his or her rights under a contract, third-party beneficiaries of an arbitration agreement "with no substantive rights under the contract and no direct benefits" may not be bound by "procedural provisions, including arbitration clauses[.]" *Id.* at 33a-34a.

REASONS FOR GRANTING THE PETITION

A. By Interpreting General Powers of Attorney to Exclude Arbitration, the Decision Below Singles Out Arbitration for Disfavored Treatment in Contravention of the FAA and the Precedents of this Court.

The Kentucky Supreme Court's pronouncement that a broadly worded general power of attorney regarding or relating to the principal's medical care will be presumed in Kentucky to exclude authority to agree to arbitrate claims "arising out of" that medical care constitutes a rule of state law specific to arbitration. As such, it conflicts with this Court's precedents and is preempted by the FAA. *See Concepcion*, 131 S. Ct. at 1746-47, 53 (FAA preempts state law rules that "apply only to arbitration," that "derive their meaning from the fact that an agreement to arbitrate is at issue," that are "applied in a fashion that disfavors arbitration," that "stand[] as an obstacle to arbitration," or that "have a disproportionate impact on arbitration agreements"); *Marmet*, 132 S. Ct. at 1203-04 (holding that state rule prohibiting predispute agreements to arbitrate personal injury and wrongful death claims against nursing homes was "contrary to the terms and coverage of the FAA"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (FAA preempts state law provision mandating judicial consideration of claims brought under that provision).

1. The language of the power of attorney here granted respondent ample authority to agree to arbitration of disputes relating to Mrs. Duncan's medical care. The decision to enter into the arbitration agreement not only

falls squarely within the "full and general power and authority to act on [Mrs. Duncan's] behalf," as set forth in the executed power of attorney, but also was a decision "regarding" and "relating to" the medical care rendered to Mrs. Duncan by petitioners. Pet. App. 75a. Respondent, furthermore, was expressly given unrestricted power to make "any and all decisions" regarding her mother's medical care "of whatever kind, nature, and type," to the same extent that Mrs. Duncan could have made such decisions herself. *Id.* at 74a-75a. Respondent's execution of the arbitration agreement also fell squarely within her specific authority as attorney-in-fact "to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting" Mrs. Duncan. *Id.* at 75a. Having the express authority to "release" a healthcare provider from liability relating to medical care provided to Mrs. Duncan, respondent surely had the lesser included authority to agree to arbitrate any such claims of liability, particularly where the arbitration agreement expressly preserved the right to obtain money damages. Moreover, any doubt on these points is dispelled by Mrs. Duncan's stipulations that the power of attorney was to be "liberally construed" to preserve the broadest scope of authority and that the "enumeration of specific items" must not be taken to limit or restrict respondent's power as attorney-in-fact. *Id.* at 76a.

2. In reversing the court of appeals' judgment on this point, the Kentucky Supreme Court did not cite any precedents requiring powers of attorney to be strictly limited to specifically enumerated authorities, because there are none. The court quoted the Restatements of Agency, which advise that agents are generally authorized to perform, among other things, all acts "done in connection

with" the subject-matter "to which the authority primarily relates," or those acts that are "incidental to it," or that are "implied in the principal's manifestations to the agent," as reasonably understood at the time by the agent. Pet. App. 16a-17a (quoting Restatement (Second) of Agency §§ 35, 37 (1958); Restatement (Third) of Agency § 2.02 (2006)). The primary subjects of the power of attorney granted to respondent were Mrs. Duncan's property matters, financial affairs, and medical care, and the arbitration agreement with the nursing home was obviously "incidental to" and entered into "in connection with" the medical care provided to Mrs. Duncan by the facility, and the authority to agree to arbitration was undoubtedly "implied" by the broadly worded grant of power and discretion to respondent.

Nevertheless, the Kentucky Supreme Court held that arbitration agreements will be excluded from the broad scope of a general healthcare power of attorney unless the power of attorney expressly and specifically authorizes arbitration or unless arbitration is "necessary" to carry out the objectives of the power of attorney, such as where the arbitration agreement is a "condition of admission to the nursing home," since only then, according to the court, would the decision to choose arbitration be a "health care decision." Pet. App. 19a-20a (following cases from several other States).

How did the court get to this result? The answer is that the Kentucky Supreme Court, like the trial court below and the West Virginia Supreme Court in *Marmet*, acted out of animus against arbitration. Unlike the trial court, however, it was not available to the Kentucky Supreme Court to declare arbitration agreements in the nursing

home context unconscionable as a general matter under Kentucky contract law, since that avenue was foreclosed by this Court's intervening decision in *Marmet*, handed down while this case was pending in the Kentucky Supreme Court. The court needed a different basis to negate the arbitration agreement.

The court manufactured that basis by reference to comment h to section 2.02 of the Restatement (Third) of Agency, which the court judged to be of "particular pertinence to this case." Pet. App. 18a. Comment h notes that even where the principal's grant of authority to the agent leaves broad scope for the exercise of discretion, there are three categories of particular acts that "will impose on the principal" such dire "consequences" that the authority to engage in those acts will not be inferred. Restatement (Third) of Agency § 2.02 cmt. h, *quoted in* Pet. App. 18a. The first category is "crimes and torts"; the second is acts that "create no prospect of economic advantage for the principal"; and the third is acts that are otherwise lawful but "create legal consequences" that are "significant and separate" from the primary transactions authorized and are "fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment." *Id.*

The Kentucky Supreme Court held that arbitration contracts fall into the third category described in comment h because of the "significant legal consequences" of an "agreement to waive the principal's right to seek redress of grievances in a court of law." Pet. App. 19a. Based on the view that the decision to waive the right to judicial process and opt for arbitration is "fraught with major

legal consequences," akin to "confessing judgment," the court held that in Kentucky, "[a]bsent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.*

3. Thus, the court's reasoning singled out arbitration for disfavor and turned on a negative judgment about the choice to arbitrate that compared arbitration to actions that are self-evidently unreasonable and wholly contrary to the "interests and objectives" of the principal—so much so that they are on a par with "crimes and torts" and acts "that create no prospect of economic advantage for the principal." Restatement (Third) of Agency § 2.02 cmt. h. The court's placement of arbitration in the blacklisted categories described in the Restatement's comment h is the equivalent of the FAA-preempted declaration that arbitration in the nursing home context is "against public policy." *Concepcion*, 131 S. Ct. at 1747; *see also Marmet*, 132 S. Ct. at 1203-04 (holding that the FAA preempts a state public policy excluding wrongful death claims from arbitration agreements in the nursing home context).

This decision is impossible to harmonize with Congress's intent in the FAA to confirm the validity and enforceability of arbitration contracts. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (FAA establishes "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary"). It is also anathema to the federal policy judgment behind the FAA that arbitration is favored because it confers

significant benefits on the parties to the agreement in terms of cost-efficient, prompt, and streamlined resolution of disputes. *See Concepcion*, 131 S. Ct. at 1749 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."); *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008) ("[a] prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results") (internal quotation marks omitted); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (in enacting the FAA, Congress saw the benefits "for expedited resolution of disputes" and believed that "the costliness and delays of litigation. . . . can be largely eliminated by agreements for arbitration") (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 2 (1924)).

The Kentucky court's anti-arbitration rule is not in any way founded "upon such grounds as exist at law or in equity for the revocation of any contract" within the meaning of the FAA's saving clause, 9 U.S.C. § 2. The court's novel use of comment h from the Restatement to single out arbitration based on the court's view of the significant legal "consequences" of arbitration cannot be characterized as a generally applicable rule for the "revocation of any contract." Rather, the rule that presumptively excludes the authority to enter into arbitration agreements from broadly worded general powers of attorney is arbitration-specific and betrays a "judicial hostility" to arbitration as a legal arrangement whose consequences are not favored by Kentucky's public policy. As such, it is in conflict with federal law and the decisions of this Court. *Concepcion*, 131 S. Ct. at 1746-47.

B. By Holding that Wrongful Death Claims in Kentucky Are Not Subject to the Decedent's Arbitration Agreement, the Decision Below Forecloses Arbitration for an Entire Class of Claims in Conflict with the FAA as Interpreted by this Court.

The Kentucky Supreme Court also held that under Kentucky law an arbitration agreement previously entered into by a decedent cannot bind the decedent's beneficiaries to arbitration of wrongful death claims, even if the arbitration agreement was validly entered into and regardless of whether it was clearly intended by its terms to cover such claims. Pet. App. 28a-34a. This ruling, too, is foreclosed by the FAA.

1. The court held that the Kentucky legislature intended Kentucky's wrongful death statute to create an "independent" claim for the benefit of the decedent's heirs, rather than a claim that is "derivative" of the decedent's own personal injury claim. *Id.* at 28a-32a. On that basis, the court held that a predispute arbitration contract signed by the decedent or an authorized representative could not reach the wrongful death beneficiaries, even though the Kentucky statute provides that a wrongful death action must be prosecuted by "the personal representative of the deceased" and any amount recovered, less attorney's fees and costs, may go only to "the kindred of the deceased." *Id.* at 29a (quoting Ky. Rev. Stat. § 411.130(2) (1974)). In support of this holding, the court agreed with courts of several other States that have concluded that "a person's contract to arbitrate his or her personal injury claim does not bind the wrongful death claimants to arbitration," where the two types of claims are "deemed independent," because the wrongful death claimants "were not parties

to the agreement and do not derive their claim from a party." *Id.* at 30a.

2. Whether or not the Kentucky Supreme Court's holding is a valid interpretation of Kentucky's wrongful death statute,[1] it is unquestionably a pronouncement of state law that "'prohibits outright the arbitration of a particular type of claim[.]'" *Marmet*, 132 S. Ct. at 1203 (quoting *Concepcion*, 131 S. Ct. at 1747). The court's rule purports to eliminate entirely the arbitration of wrongful death claims arising after the decedent agreed to the arbitration contract—which, of course, is the usual case with nearly all wrongful death claims that may be subject to arbitration. Accordingly, "the analysis [under the FAA]

1. The ruling below is in significant tension with the Kentucky Supreme Court's own previous interpretation of Kentucky's wrongful death action. The court below ruled that the wrongful death claim is "independent" because it is brought "not on behalf of the [decedent's] Estate, but on behalf of the statutory wrongful death beneficiaries." Pet. App. 28a. The court acknowledged that the decedent could bind her own estate to an arbitration agreement, but held that she could not require arbitration of the wrongful death claim because that claim "accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss." *Id.* at 32a. In contrast, the court previously held that the personal representative in a wrongful death action "represents only the decedent's estate, and the estate can recover only for the loss of the decedent's life, not for damages personal to [the decedent's] survivors." *Giuliani v. Guiler*, 951 S.W.2d 318, 324-25 (Ky. 1997); *see Empire Metal Corp. v. Wohlwender*, 445 S.W.2d 685, 687-88 (Ky. 1969) (explaining that Kentucky has a "true" wrongful death statute that compensates for the loss to the decedent's estate, not for pecuniary losses to the beneficiaries, "although the damages, once recovered, are distributed directly to the statutory beneficiaries") (internal quotation marks omitted).

is straightforward: The conflicting rule [announced by the Kentucky Supreme Court below] is displaced by the FAA." *Id.*

The FAA declares "valid, irrevocable, and enforceable" any "contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising out of* such contract or transaction." 9 U.S.C. § 2 (emphasis added). "The statute's text includes no exception for . . . wrongful-death claims," *Marmet*, 132 S. Ct. at 1203, which are brought subsequent to the death of a party to the arbitration contract. Here, the arbitration agreement relates to the nursing care received by Mrs. Duncan in petitioners' facility, and respondent's wrongful death claim "arises out of" her mother's death in the facility and the allegedly deficient nursing care Mrs. Duncan received there. This arbitration agreement is therefore protected by the FAA, and it applies by its terms to the wrongful death claim, notwithstanding any categorical rule of Kentucky law purporting to carve such claims out of the agreement.[2]

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2. The arbitration agreement covers respondent's wrongful death claim as a matter of straightforward contract interpretation. The agreement expresses the parties' intent to bind Mrs. Duncan's heirs following her death as to any claims "derived through or on behalf of" Mrs. Duncan. Pet. App. 80a. Although the court below suggested that this language might not reach wrongful death claims to the extent such claims in Kentucky are not "derivative" of the decedent's rights, *see id.* at 32a, that suggestion confused the legal concept of a "derivative" claim as a matter of statutory interpretation with the question whether respondent's wrongful death claim is derived through Mrs. Duncan within the terms of the arbitration contract. The wrongful death claim raised here is "derived" for purposes of the contract because it arose "through" Mrs. Duncan's death and is based on her alleged

Ultimately, what matters for FAA preemption is not whether the Kentucky Supreme Court deems statutory wrongful death actions to be "independent" or "derivative," but rather whether the wrongful death claim involves "a controversy thereafter *arising out of*" the "transaction" covered by the arbitration agreement within the meaning of the FAA, 9 U.S.C. § 2 (emphasis added)—which in this case means the nursing care Mrs. Duncan received at the Golden Living Center. The wrongful death claim here most definitely does arise out of the relevant transaction under the FAA, and therefore the freedom to contract for the arbitration of that claim is protected by the FAA.

3. In *Marmet*, this Court held that the FAA preempts States from removing wrongful death claims from the permissible scope of arbitration agreements in the nursing home context—which is precisely what the Kentucky Supreme Court did below. The conclusion that the FAA preempts Kentucky's effort categorically to insulate wrongful death claims from arbitration is also akin to this Court's decision that a State may not decree that punitive damages claims are categorically exempt from arbitration. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995). It is also comparable to this Court's holding that the FAA preempts a state law mandating that

wrongful treatment by the nursing home. Indeed, when the contract expresses an intent to require Mrs. Duncan's "heirs" to arbitrate any claims thereafter "arising out of, or in connection with, or relating in any way to" her treatment at the nursing facility, and states that this requirement is intended to continue in force following Mrs. Duncan's death, *id.* at 80a, it is evident that wrongful death claims are encompassed, since they are the principal claims fitting that description that might be brought by her "heirs" upon her death.

a category of labor disputes be referred to a state labor commissioner for resolution. *See Preston*, 552 U.S. at 356. In each case, this Court held that a private arbitration agreement between the parties must be enforced according to the FAA notwithstanding the conflicting state law rule purporting to remove a category of claims from the reach of the parties' arbitration contract.

For the same reason, the Kentucky Supreme Court's ruling precluding the application of a decedent's arbitration agreement to the wrongful death claims does not fall within the FAA's carveout preserving "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Instead, it is an interpretation of the Kentucky wrongful death statute that purports to exempt an entire category of substantive claims from the reach of arbitration agreements, just like the public policy against arbitration of wrongful death claims struck down by this Court in *Marmet*, 132 S. Ct. at 1203-04. As with the West Virginia public policy at issue in *Marmet*, as a result of the ruling below, healthcare providers in Kentucky can no longer enter into binding arbitration agreements with patients that require the arbitration of wrongful death claims arising from the death of the patient, unless the provider has executed an arbitration contract with every separate potential heir and beneficiary of the patient. The FAA preempts any such categorical state policy, whether based on a judge-made doctrine of unconscionability or an interpretation of the State's wrongful death statute.

C. The Two Issues Addressed Below Arise Across the Country and Both Have Produced Conflicting Decisions from State Courts that Defeat a Consistent National Application of the FAA.

Courts regularly confront both of the issues raised in this petition in cases involving substantially the same facts, and both issues have produced conflicting opinions from the courts of various States. This divided legal landscape translates into an uneven enforcement of comparable arbitration contracts from State to State and means that the FAA will continue to be applied inconsistently across the country if this Court does not resolve the questions presented. The need to ensure a consistent national application of the FAA provides a further compelling reason for granting certiorari.

1. In its decision below, the Kentucky Supreme Court cited the split in authority among the States on each question presented. On whether an attorney-in-fact has authority to agree to arbitration pursuant to a broadly worded healthcare power of attorney, the court stated that its conclusion "is in accord with the decisions of other courts confronted with the same issue." Pet. App. 19a. The court cited cases from Tennessee and Georgia which held that a healthcare power of attorney confers authority to agree to an arbitration clause that is a mandatory part of the patient's admissions agreement. *Id.* (citing *Owens v. Nat'l Health Corp.*, 263 S.W.3d 876 (Tenn. 2008); *Triad Health Mgmt. of Ga. v. Johnson*, 679 S.E.2d 785 (Ga. App. 2009)). And the court cited cases from Maryland, Nebraska, Mississippi, and Florida for the proposition that a general healthcare power of attorney does not include the authority to agree to an optional arbitration

agreement because arbitration in such circumstances is not a "'health care' decision." Pet. App. 19a-20a.[3]

The court noted, however, that the courts of New Mexico disagree and hold that the grant of incidental authority under a healthcare power of attorney includes the authority to agree to an optional arbitration agreement. *Id*. (citing *Barron v. Evangelical Lutheran Good Samaritan Soc'y*, 265 P.3d 720, 728 (N.M. App. 2011) (attorney-in-fact's authority to bind a nursing home resident to arbitration "does not have to be specifically or separately granted" in the power of attorney and can be implied merely from the authority to "complete paperwork" relating to medical care)). In fact, contrary to the Kentucky Supreme Court's suggestion, the States on the opposite side of this issue also include California, Florida, and Tennessee, in addition to New Mexico. *See Garrison v. Superior Ct.*, 33 Cal. Rptr. 3d 350, 359 (Cal. App. 2005) (daughter's decision to agree to an optional arbitration contract in connection with her mother's admission to a healthcare facility was a "proper and usual" exercise of a power of attorney for "health care decisions"); *Jaylene, Inc. v. Moots*, 995 So. 2d 566, 568-70 (Fla. Dist. App. 2008) (general power of attorney that "unambiguously makes a broad, general grant of authority," states that it is to "be construed broadly," and states that "the listing of specific powers is not intended to limit or restrict the general powers granted," authorizes the attorney-in-fact to sign an optional arbitration

3. Citing *Dickerson v. Longoria*, 995 A.2d 721 (Md. 2010); *Koricic v. Beverly Enters.-Neb., Inc.*, 773 N.W.2d 145 (Neb. 2009); *Miss. Care Ctr. of Greenville v. Hinyub*, 975 So. 2d 211 (Miss. 2008); *Estate of Irons ex rel. Springer v. Arcadia Healthcare L.C.*, 66 So. 3d 396 (Fla. Dist. App. 2011).

agreement on behalf of a nursing home resident); *Mitchell v. Kindred Healthcare Operating, Inc.*, 349 S.W.3d 492, 497-98 (Tenn. App. 2008) (power of attorney granting authority over "health care decisions," including "any waivers or releases from liability required by a physician or health care provider," includes the authority to agree to an optional arbitration agreement; thereby making clear that the Tennessee Supreme Court's decision in *Owens*, cited by the Kentucky Supreme Court, does not limit such authority to mandatory arbitration clauses). The decision of the Georgia Court of Appeals in *Triad Health Management*, *supra* (cited in the Kentucky decision), also is not limited by its reasoning to mandatory arbitration provisions; hence, Georgia, too, may fall into the camp of States that stand opposite from Kentucky on this issue.[4]

Moreover, at least one of the cases before this Court last Term in *Marmet* involved an arbitration agreement executed by an attorney-in-fact acting pursuant to a general healthcare power of attorney granting authority to make "decisions regarding [the principal's] care, including nursing home care."[5] Despite its blatant hostility

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4. *See also Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 161 P.3d 1253, 1262-63 (Ariz. App. 2007) (even without a written power of attorney, a wife who had previously signed medical records on her husband's behalf as a "legally authorized representative" without the husband's objection had authority to sign an optional nursing home arbitration agreement for her husband); *Carraway v. Beverly Enters.*, 978 So.2d 27, 30-31 (Ala. 2007) (brother could bind his sister to an optional arbitration agreement where the sister was competent and did not object to his signing the nursing home admissions paperwork for her).

5. Resp't Br. in Opp. at 8, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (No. 11-391) ("Leo Taylor's wife . . .

to arbitration agreements in the nursing home context, even the West Virginia Supreme Court in the *Marmet* cases did not question the attorney-in-fact's authority to execute the arbitration agreement under this power of attorney.

2. On the second issue in this petition—whether the decedent's wrongful death beneficiaries can be bound by a previous arbitration agreement validly executed by the decedent—the Kentucky Supreme Court cited another split among the States. The court stated that "[c]ourts in states where the wrongful death action is derivative have held that an arbitration agreement applicable to a personal injury claim applies as well to the wrongful death claim." Pet. App. 30a (citing *In re LaBatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009); *Ballard v. Sw. Detroit Hosp.*, 327 N.W.2d 370 (Mich. App. 1982)). In contrast, the court noted that in several States where wrongful death claims are deemed "independent," courts have held that an agreement to arbitrate personal injury claims does not bind the wrongful death claimants. *Id.* at 30a (citing cases from Missouri, Utah, Ohio, Illinois, and Washington).[6]

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held a Medical Power of Attorney granting authority to make 'any and all decisions regarding Leo Taylor's care, including nursing home care.'").

6. Citing *Lawrence v. Beverly Manor,* 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla,* 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258 (Ohio 2007); *Carter v. SSC Odin Operating Co., LLC*, 955 N.E.2d 1233 (Ill. App. 2011), *aff'd in part* and *rev'd in part on other grounds*, 976 N.E.2d 344 (2012); *Woodall v. Avalon Care Ctr.–Fed. Way, LLC,* 231 P.3d 1252 (Wash. App. 2010).

At the same time, the Kentucky court recognized that the courts of California and Colorado hold that a decedent's arbitration agreement will bind the subsequent wrongful death beneficiaries even though wrongful death actions in those States are considered "independent" or "wholly separate and distinct" in the same way that the court below found Kentucky wrongful death claims to be independent. *Id.* at 30a-31a (citing *Ruiz v. Podolsky*, 237 P.3d 584 (Cal. 2010), and *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003)). In addition to the cases cited by the Kentucky Supreme Court, the appellate courts of Indiana and New Jersey have ruled that similar wrongful death claims could be bound to arbitration by the decedent's previous contract,[7] and a federal district court in Washington has agreed.[8]

3. This patchwork of disparate state rulings on the questions raised in this petition leaves parties to arbitration agreements in a quandary as to their ability to enter into such agreements and to enforce those validly

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7. *See Sanford v. Castleton Health Care Ctr., LLC,* 813 N.E.2d 411, 420 (Ind. App. 2004) (wrongful death claim subject to arbitration because "regardless of whether [the personal representative] was privy to the contract containing the arbitration clause, the Estate's survival and wrongful death claims arose out of [the nursing home's] alleged negligent treatment" of the resident pursuant to the arbitration agreement); *Estate of Ruszala ex rel. Mizerak v. Brookdale Living*, 1 A.3d 806, 809 (N.J. Super. App. Div. 2010) (holding that a New Jersey statute prohibiting arbitration agreements in nursing home contracts was preempted by the FAA for purposes of plaintiffs' wrongful death and negligence claims).

8. *See Estate of Eckstein ex rel. Luckey v. Life Care Ctrs. of Am., Inc.,* 623 F. Supp. 2d 1235, 1240-41 (E.D. Wash. 2009).

made. The divisions among the States involve recurring fact patterns, and call out for resolution by this Court through a consistent application of the FAA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision below summarily reversed.

November 20, 2012

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF KENTUCKY, DATED AUGUST 23, 2012

SUPREME COURT OF KENTUCKY

2010-SC-000558-DG

DONNA PING, EXECUTRIX OF THE ESTATE OF ALMA CALHOUN DUNCAN, DECEASED,

APPELLANT

v.

BEVERLY ENTERPRISES, INC., ET AL.,

APPELLEES

August 23, 2012, Rendered

OPINION OF THE COURT BY JUSTICE ABRAMSON

REVERSING AND REMANDING

In October 2008, Donna Ping, as the executrix of the Estate of her deceased mother, Alma Calhoun Duncan, of Lawrenceburg, Kentucky, brought suit in the Franklin Circuit Court against the owners and operators of The Golden Living Center, a long-term care facility in Frankfort, where the seventy-nine year old Mrs. Duncan spent the last several months of her life. The executrix alleges that negligence by the facility's staff and the

breach by its management of statutes regulating the provision of nursing home services resulted in injuries to Mrs. Duncan and in her wrongful death. Invoking an Arbitration Agreement executed in conjunction with Mrs. Duncan's admission to the nursing home, the Defendants[1] moved the trial court to dismiss the complaint or to stay it pending arbitration. (The Appellees-Defendants are hereafter referred to collectively as "Beverly Enterprises" or simply as "Beverly.") The trial court denied that motion and explained that in its view Ms. Ping, who executed the Admissions Agreement on behalf of her mother, had not had authority to agree to arbitration, and further that the nursing home had obtained Ms. Ping's signature on the agreement by wrongful means and without providing consideration. Beverly Enterprises appealed that ruling to the Court of Appeals, which reversed. The appellate panel rejected the reasons offered by the trial court for invalidating the Arbitration Agreement, as well as several others offered by the executrix, and held that under Kentucky Revised Statutes (KRS) 417.045 *et seq.*, Kentucky's Uniform Arbitration Act, the agreement was to be enforced. We granted the executrix's motion for discretionary review to consider the important question of an agent's authority to bind his or her principal, as well as others, to an arbitration agreement presented with other documents upon the principal's admission to a long-term care facility. Because we agree with the trial court that

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1. The Appellees-Defendants in this case are Beverly Enterprises, Inc.; Beverly Enterprises-Kentucky, Inc.; GGNSC Administrative Services, LLC; GGNSC Holdings, LLC; GGNSC Equity Holdings, LLC; Golden Gate National Senior Care, LLC; Golden Gate Ancillary, LLC; and GGNSC Frankfort, Inc.

the agent in this case, Ms. Ping, was not authorized to enter an optional arbitration agreement, we reverse the decision of the Court of Appeals and remand the matter to the Franklin Circuit Court for additional proceedings.

RELEVANT FACTS

There is no significant dispute about the relevant facts. In 1998, Mrs. Duncan executed a writing, entitled "General Power of Attorney," in which she named her daughter, Ms. Ping, as her agent. Ms. Ping was given authority "to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present, including but not limited to the following: . . ."

The document then specifically authorized several acts pertaining to the management of Mrs. Duncan's property and finances, such as "tak[ing] possession of any and all monies, goods, chattels, and effects belonging to me, wheresoever found; . . . receiv[ing], deposit[ing], invest[ing] and spend[ing] funds on my behalf; . . . tak[ing] charge of any real estate which I may own in my own name or together with other owners, legally or equitably, and to mortgag[ing], convey[ing] or sell[ing] said real estate and perform[ing] any acts necessary to mortgage, convey or sell said real estate." The document also authorized Ms. Ping "[t]o make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions

affecting me; and [t]o generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf."

> Finally, Mrs. Duncan declared that it was her
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> intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire. The enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact. It is further my intention and desire that this document qualify as a DURABLE POWER OF ATTORNEY pursuant to KRS 386.093 and that the power and authority hereby granted by this document shall not be affected by any later disability or incapacity of me as principal.

Ms. Ping testified that she had no occasion to exercise her power of attorney until early 2006. In February of that year, Mrs. Duncan suffered a broken leg, which required surgery and a hospitalization. Less than two weeks later, while Ms. Duncan was residing at a facility for the rehabilitation of that injury, she suffered a stroke. She was returned to the hospital, and when her condition had again stabilized, she was moved, at her daughter's

direction, to the Beverly Enterprises facility. The move took place on March 17, 2006. According to Ms. Ping, on that day her mother was still incapacitated as a result of her stroke and would not have been able to manage her own admission.

On her mother's behalf, Ms. Ping met with the facility's admissions director, who, according to Ms. Ping, presented her with a stack of documents--what he referred to as the standard application packet--each one of which she signed where he indicated, without having read it or otherwise being aware of its contents. Among those documents was one headed, "RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION--READ CAREFULLY)." As filled in by the admissions director, the parties to this agreement were "BHR Frankfort (the "Facility") and Alma Duncan ("Resident")." The agreement was printed on one-and-a-half single-spaced pages, followed by date and signature lines. Ms. Ping signed the agreement as her mother's "Authorized representative," and the agreement reflects that she is related to the resident both as daughter and as power of attorney.

In pertinent part, the agreement provides that upon execution it would become part of the Admission Agreement,

> and that the Admission Agreement evidences a transaction involving interstate commerce governed by the Federal Arbitration Act. It is understood and agreed by Facility and

> Resident that any and all claims, disputes, and controversies . . . arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure . . . and not by a lawsuit or resort to court process.

The Arbitration Agreement does not purport to limit the remedies available under Federal or State law; it includes a provision allowing the resident to rescind the Arbitration Agreement unilaterally by giving notice to the Facility within thirty days of execution; and it includes a warning, in bold, capital letters, that "BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES."

The agreement also provides that

> it is the intention of the parties to this Arbitration Agreement that it shall inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all

> persons whose claim is derived through or oh behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident.

About six months after her admission to the Beverly facility, Mrs. Duncan died. The probate court of Anderson County appointed Ms. Ping as the executrix of her mother's Estate, and in that capacity Ms. Ping brought the present action against Beverly Enterprises. The Estate alleges that Mrs. Duncan suffered compensable injuries as a result both of negligent treatment by her caretakers at the facility and of management's breach of statutory standards for nursing home administration. As executrix, Ms. Ping also represents the statutory wrongful death beneficiaries, who claim that the injuries Mrs. Duncan suffered at the facility hastened her demise, and so give them a claim for damages separate from the claim of the Estate. The sole issue presented is whether these claims are subject to the Arbitration Agreement Ms. Ping purported to execute in her capacity as her mother's agent. Ruling that they are, the Court of Appeals held that Ms. Ping enjoyed a virtually unlimited authority to act on her mother's behalf, that binding her mother to the Arbitration Agreement was within that expansive authority, and accordingly that that agreement binds as well her mother's Estate. The Estate contends that the Court of Appeals read too broadly Mrs. Duncan's power of attorney. We agree.

ANALYSIS

I. Mrs. Duncan's Power Of Attorney For Property and Health Care Management Did Not Authorize Her Agent to Agree to Arbitration.

A. The Kentucky Courts Have Jurisdiction to Enforce the Arbitration Agreement, If It is Valid and Enforceable.

Because the dispute before us concerns the effect of an arbitration agreement, it potentially implicates both the Kentucky Uniform Arbitration Act, KRS 417.045 *et seq*., and the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor. Under the Kentucky Act,

> A written agreement to submit any existing controversy to arbitration or a provision in [a] written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.

KRS 417.050 (1996).[2]

2. Section 250 of the Kentucky Constitution requires the General Assembly to adopt laws providing for arbitration of disputes. Thus, arbitration is constitutionally based in Kentucky.

Similarly, the Federal Act provides that,

> A written provision in any maritime transaction or a contract evidencing a transaction involving [interstate] commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The thrust of both Acts is to ensure that arbitration agreements are enforced no less rigorously than are other contracts and according to the same standards and principles. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) (Federal Act's basic purpose is "to put arbitration provisions on 'the same footing' as a contract's other terms."); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004) (Kentucky Act serves same purposes as the Federal Act.).

The Estate maintains Kentucky courts lack jurisdiction to enforce the Arbitration Agreement in this case because it does not comply with the Kentucky Act as outlined in *Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451 (Ky. 2009). In *Ally Cat*, this Court held that the Kentucky Act applies only to arbitration agreements providing for arbitration

in this State. Here, the agreement provides that the arbitration is "to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility." The Estate maintains that because the contract would allow the arbitration to take place outside Kentucky, if the parties so agreed, a Kentucky trial court is without jurisdiction to enforce it. However, because either party can insist upon a Kentucky arbitration (an arbitration "at the Facility" in Frankfort), the trial court's jurisdiction under the Kentucky Act was properly invoked. In any event, even if the forum selection clause was not consistent with *Alley Cat*, Kentucky courts must and do enforce arbitration clauses in contracts subject to the Federal Act. *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102, fn.2 (Ky. 2010).

The Federal Act applies to arbitration provisions in contracts "evidencing a transaction involving [interstate] commerce," 9 U.S.C. § 2, and almost certainly applies here. Congress's commerce power is interpreted broadly, and "may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57, 123 S. Ct. 2037, 156 L. Ed. 2d 46 (2003) (citation and internal quotation marks omitted). The Supreme Court has held that healthcare is one such activity. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991) (hospital's purchase of out-of-State medicines and acceptance of out-of-State insurance establish interstate commerce). Several courts, moreover, have applied the

FAA to arbitration provisions in nursing home admission contracts. *See, e.g., Cook v. GGNSC Ripley, LLC*, 786 F. Supp.2d 1166 (N.D. Miss. 2011); *Carter v. SSC Odin Operating Company, LLC*, 955 N.E.2d 1233, 353 Ill. Dec. 422, 2011 IL App (5th) 070392B, 2011 IL App (5th) 70392B (Ill. App. 2011); *Barker v. Evangelical Lutheran Good Samaritan Society*, 720 F. Supp.2d 1263 (D.N.M. 2010); *Estate of Eckstein v. Life Care Centers of America, Inc.*, 623 F. Supp.2d 1235 (E.D. Wash. 2009); *Triad Health Management of Ga., III, LLC v. Johnson*, 298 Ga. App. 204, 679 S.E.2d 785 (Ga. App. 2009).[3] We conclude, as did the Court of Appeals, that the Federal Act applies as well as the State Act, although the parties apparently did not address the interstate commerce question to

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3. Beverly contends that the FAA applies because the agreement says it does: "[T]he parties agree . . . that the Admission Agreement evidences a transaction involving interstate commerce governed by the Federal Arbitration Act." We reject this contention, however, and agree with the Supreme Court of Massachusetts, which observed, when confronted with a like claim, that "the Federal Act applies when Congress's commerce power is implicated. Determining when that is so depends on the broad constitutional limits of what constitutes an act in interstate commerce. The parties cannot by agreement make an act not in interstate commerce into one that is in interstate commerce. They can, however, agree that the Federal Act will provide the basis for interpreting the contract, even if the Federal Act would not otherwise apply in a binding way on a State court. Applying the Federal Act as an interpretive guide would only apply once the agreement is deemed valid and enforceable." *Miller v. Cotter*, 448 Mass. 671, 863 N.E.2d 537, 544 nt. 13 (Mass. 2007). In short, the FAA applies not because the parties say so, but because the transaction is connected to interstate commerce.

the trial court. Where the Federal Act applies, it "is enforceable in State, as well as federal court, *Southland Corporation v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), and indeed, '[u]nder the FAA, state courts as well as federal courts are obliged to honor and enforce agreements to arbitrate.' *Vaden v. Discover Bank*, 556 U.S. 49, 129 S. Ct. [1262] at 1278, 173 L. Ed. 2d 206 [(2009)]." *North Fork Collieries*, 322 S.W. 3d at 102, fn. 2.

Under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995); *Louisville Peterbilt, Inc.*, 132 S.W.3d 850. Unless the parties clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, *First Options*, and the existence of the agreement depends on state law rules of contract formation. *Id.; Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009). An appellate court reviews the trial court's application of those rules *de novo*, although the trial court's factual findings, if any, will be disturbed only if clearly erroneous. *North Fork Collieries*, 322 S.W.3d at 102.

B. Ms. Ping Did Not Have Actual Authority to Enter the Arbitration Agreement.

Here, Beverly Enterprises maintains that Ms. Ping, as her mother's agent, could and did validly agree on her mother's behalf to arbitrate any disputes arising in conjunction with Mrs. Duncan's residence at Beverly's

facility. Whether this is so depends on the scope of the authority Mrs. Duncan conferred on her daughter through her power of attorney. The construction of a power of attorney is a question of law for the court. *Wabner v. Black*, 7 S.W.3d 379, 381, 46 16 Ky. L. Summary 30 (Ky. 1999); *Ingram v. Cates*, 74 S.W.3d 783 (Ky. App. 2002). Beverly emphasizes the power of attorney's provisions to the effect that Ms. Ping was to have "full and complete power and authority to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, . . . as I might or could do if personally present," that the document was to be "liberally construed" with respect to Ms. Ping's authority, and that "the enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general full power" granted to Ms. Ping. Beverly insists these provisions establish that Ms. Ping was fully authorized not merely to make financial and health care decisions for her mother--the only decisions specifically provided for in the document--but to make any and all other decisions as well, including an independent decision to relinquish her mother's right of access to the courts. We disagree.

An agency, this Court has noted, "is the fiduciary relation which results from the manifestation of consent by one person [the principal] to another [the agent] that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Phelps v. Louisville Water Company*, 103 S.W.3d 46, 50 (Ky. 2003) (citation and internal quotation marks omitted). A power of attorney is a written, often formally acknowledged, manifestation of the principal's intent to enter into such a relationship

with a designated agent. Since the principal's control of the agent is generally deemed an essential element of the agency relationship, *Phelps, supra*, under the common law the principal's death or incapacity brought the relationship to an end. *Rice v. Floyd*, 768 S.W.2d 57 (Ky. 1989); *Restatement (Second) of Agency*, § 120, 122 (1958). In response, however, to an aging population's increasing need for the means to plan for disability and incapacity, in 1969 the Uniform Probate Code was amended to include provisions allowing for a "durable" power of attorney, an agency, that is, that would continue beyond the principal's incapacity. By 1984, every state had adopted legislation to that effect. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 Stetson L. Rev. 7 (2007).

KRS 386.093 is the pertinent statute in Kentucky. First enacted in 1972 and most recently revised in 2000, that act provides in pertinent part that

> (1). . . "durable power of attorney" means a power of attorney by which a principal designates another as the principal's attorney in fact in writing and the writing contains the words, "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time", or "This power of attorney shall become effective upon the disability or incapacity of the principal", or similar words showing the intent of the principal that the authority conferred shall

> be exercisable notwithstanding the principal's subsequent disability or incapacity, and, unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.
>
> (2) All acts done by an attorney in fact under a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal were competent and not disabled.

Because Mrs. Duncan's power of attorney clearly manifested her intent that it be durable, under this statute Ms. Ping's agency did not lapse when her mother became incapacitated, but continued in effect, "as if the principal were competent and not disabled." *Id*.

Although the statute allows durable powers of attorney to be created, it does not address what authority may be granted therein. The scope of that authority is thus left to the principal to declare, and generally that declaration must be express. In *Rice*, 768 S.W.2d at 59, this Court explained that even a "comprehensive" durable power would not be understood as implicitly authorizing all the decisions a guardian might make on behalf of a ward. Rather, we have indicated that an agent's authority under a power of attorney is to be construed with reference to the types of transaction expressly authorized in the document and subject always to the agent's duty to act

with the "utmost good faith." *Wabner*, 7 S.W.3d at 381. This is consistent with section 37 of the *Restatement (Second) of Agency*, which provides that

> (1) Unless otherwise agreed, general expressions used in authorizing an agent are limited in application to acts done in connection with the act or business to which the authority primarily relates.
>
> (2) The specific authorization of particular acts tends to show that a more general authority is not intended.

Here, Mrs. Duncan's power of attorney relates expressly and primarily to the management of her property and financial affairs and to assuring that health-care decisions could be made on her behalf. The general expressions upon which Beverly relies did not give Ms. Ping a sort of universal authority beyond those express provisions. On the contrary, even by their terms the general expressions are limited to "every act and thing whatsoever *requisite and necessary* to be done," and again to "every further act and thing of whatever kind, nature, or type *required* to be done on my behalf," acts, that is, necessary or required to give effect to the financial and health-care authority expressly created. These general expressions thus make explicit the incidental authority noted in section 35 of the *Restatement*: "Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." *Restatement (Second) of*

Agency § 35 (1958). Understood as Beverly contends, as grants of universal authority, the general expressions would tend to render the specific financial and health-care provisions superfluous, contrary to the fundamental rule that a written agreement generally will be construed "as a whole, giving effect to all parts and every word in it if possible." *City of Louisa v. Newland*, 705 S.W.2d 916, 919 (Ky. 1986).

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

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

Restatement (Third) of Agency § 2.02 (2006). We are not persuaded either that Ms. Ping did understand, or that she reasonably could have understood her authority under the power of attorney to apply to all decisions on her mother's behalf whatsoever, as opposed, rather, to decisions reasonably necessary to maintain her mother's property and finances and to decisions reasonably necessary to provide for her mother's medical care.

Of particular pertinence to this case is comment h. to *Restatement* § 2.02, headed, "Consequences of act for principal." As the comment notes,

> [e]ven if a principal's instructions or grant of authority to an agent leave room for the agent to exercise discretion, the consequences that a particular act will impose on the principal may call into question whether the principal has authorized the agent to do such acts. Three types of acts should lead a reasonable agent to believe that the principal does not intend to authorize the agent to do the act. First are crimes and torts, . . . Second, acts that create no prospect of economic advantage for the principal, . . . *Third, some acts that are otherwise legal create legal consequences for a principal that are significant and separate from the transaction specifically directed by the principal. A reasonable agent should consider whether the principal intended to authorize the commission of collateral acts fraught with major legal implications for the principal, such as granting a security interest in the principal's property or executing an instrument confessing judgment. In such circumstances, it would be reasonable for the agent to consider whether a person in the principal's situation, having the principal's interests and objectives, would be likely to anticipate that the agent would commit such a collateral act, given the nature of the principal's specific direction to the agent.*

Restatement (Third) of Agency § 2.02 comment h. (2006) (emphasis supplied). We would place in this third category of acts with significant legal consequences a collateral agreement to waive the principal's right to seek redress of grievances in a court of law. Absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly. Here, nothing in Mrs. Duncan's power of attorney suggests her intent that Ms. Ping make such waivers on her behalf.

Our conclusion that Ms. Ping was not authorized to bind her mother to Beverly Enterprises' optional Arbitration Agreement is in accord with the decisions of other courts confronted with the same issue. On the one hand, where an agreement to arbitrate is presented to the patient as a condition of admission to the nursing home, courts have held that the authority incident to a health-care durable power of attorney includes the authority to enter such an agreement. *Owens v. National Health Corporation*, 263 S.W.3d 876 (Tenn. 2008); *Triad Health Management of Ga.*, 298 Ga. App. 204, 679 S.E.2d 785. On the other hand, where, as here, the arbitration agreement is not a condition of admission to the nursing home, but is an optional, collateral agreement, courts have held that authority to choose arbitration is not within the purview of a health-care agency, since in that circumstance agreeing to arbitrate is not a "health care" decision.[4] *Dickerson v.*

4. We note that in the related context of health-care surrogacy under KRS Chapter 311, "health care decision" is defined as "consenting to, or withdrawing consent for, any medical procedure, treatment, or intervention." KRS 311.621(8).

Longoria, 414 Md. 419, 995 A.2d 721 (Md. 2010); *Koricic v. Beverly Enterprises-Nebraska, Inc.*, 278 Neb. 713, 773 N.W.2d 145 (Neb. 2009); *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So.2d 211 (Miss. 2008); *Estate of Irons v. Arcadia Healthcare L.C.*, 66 So.3d 396 (Fla. Dist. Ct. App. 2011). *But see Barron v. Evangelical Lutheran Good Samaritan Society*, 2011 NMCA 94, 150 N.M. 669, 265 P.3d 720 (N.M. App. 2011) (holding that health-care agent's incidental authority extended to nursing-home admission contract's optional arbitration agreement).

Courts have also held that an optional nursing home arbitration agreement does not involve a financial decision within the authority of an agent authorized to manage his or her principal's property and finances. *Dickerson*, 414 Md. 419, 995 A.2d 721; *Carrington Place of St. Pete, LLC v. Estate of Milo*, 19 So.3d 340 (Fla. Dist. Ct. App. 2009). We agree with these cases and hold that Mrs. Duncan's power of attorney, properly construed as giving her daughter authority to manage Mrs. Duncan's property and finances and to make health-care decisions on her behalf, did not thereby authorize Ms. Ping to waive, where there was no reasonable necessity to do so, her mother's right of access to the courts.

C. Ms. Ping Did Not Have Apparent Authority to Enter the Arbitration Agreement.

Against this conclusion, Beverly argues that even if Ms. Ping did not have actual authority to bind her mother to the Arbitration Agreement, she had apparent

authority to do so, and on that basis the agreement should be upheld. An agent is said to have apparent authority to enter transactions on his or her principal's behalf with a third party when the principal has manifested to the third party that the agent is so authorized, and the third party reasonably relies on that manifestation. The principal will then be bound by such a transaction even if the agent was not actually authorized to enter it. *Mill Street Church of Christ v. Hogan*, 785 S.W.2d 263 (Ky. App. 1990). *See also Restatement (Second) of Agency* § 27 (1958); *Restatement (Third) of Agency* § 2.03 (2006). Beverly maintains that the document containing Mrs. Duncan's power of attorney, which Ms. Ping showed to the admissions director, was couched in such broad and general terms that a reasonable third person would have believed that it authorized Ms. Ping to enter the Arbitration Agreement on her mother's behalf. As explained above, however, the power of attorney is reasonably understood as granting Ms. Ping authority to make only health care and property or finance-related decisions. Beverly could not, therefore, reasonably rely on the power of attorney as "apparently" granting more authority than on its face it does.

Beverly also contends that Ms. Ping held herself out as authorized to "sign the documents," and thus that it could rely on her apparent authority to enter the Arbitration Agreement. This contention fails for at least a couple of reasons. First, it appears that Ms. Ping believed that she was signing her mother's "admission" documents, which is how the admissions director presented them to her. Her willingness to sign, therefore, was not necessarily an assertion that she believed herself to

have authority to execute an arbitration agreement collateral to the admission. More importantly, as noted above, apparent authority arises not from the purported agent's manifestations of authority, but rather from manifestations by the principal. The principal here, Mrs. Duncan, was incapacitated at the time of her admission and so could not have done anything to lead Beverly to believe that her daughter had more authority than the power of attorney said she had.

D. The Estate is Not Equitably Estopped From Disavowing the Arbitration Agreement.

Beverly next maintains that because Ms. Ping held herself out as authorized to enter the Arbitration Agreement on behalf of her mother, her mother's Estate should now be equitably estopped from denying that authority. Equitable estoppel is a defensive doctrine founded on the principles of fraud, under which one party is prevented from taking advantage of another party whom it has falsely induced to act in some injurious our detrimental way. Under Kentucky law, "equitable estoppel requires both a material misrepresentation by one party and reliance by the other party." *Fluke Corporation v. LeMaster*, 306 S.W.3d 55, 62 (Ky. 2010) (discussing the elements of an equitable estoppel defense).

Here, not only is it doubtful that Ms. Ping "misrepresented" her authority, but even assuming that she did, she is not the party making claims against Beverly. That party is Mrs. Duncan's Estate, and there is no suggestion that either Mrs. Duncan or Ms. Ping in

her capacity as representative of the Estate wrongfully induced Beverly to do or to forebear from doing anything. The Estate would be estopped, of course, if Mrs. Duncan were estopped. But under *Restatement (Third) of Agency* § 2.05, a principal may be estopped from disavowing an agent's unauthorized transaction with a third party only if the third party justifiably was induced to make a detrimental change in position because it believed the agent had authority and then only if "(1) the [principal] intentionally or carelessly caused such belief, or (2) having notice of such belief and that it might induce others to change their positions, the [principal] did not take reasonable steps to notify them of the facts." Ms. Ping's assumed misrepresentation of her authority is not be attributed to Mrs. Duncan, then, or her Estate, because Mrs. Duncan neither caused Beverly's mistaken belief about the scope of Ms. Ping's authority, nor failed to correct Beverly's misapprehension after having notice of it. *See Compere's Nursing Home, Inc. v. The Estate of Farish*, 982 So.2d 382 (Miss. 2008) (where decedent/principal did nothing to mislead nursing home into believing that agent had authority to agree to arbitration, estate was not estopped from denying his authority); *but see THI of New Mexico at Hobbs Center, LLC v. Patton*, 2012 U.S. Dist. LEXIS 5252, 2012 WL 112216 (D.N.M. 2012) (estate estopped from denying alternate agent's authority because of agent's and alternate agent's misleading acts).

We agree with the Court of Appeals of Maryland, furthermore, that at least where, as here, the Arbitration Agreement was not a condition of admission, the nursing

home has failed to show that its mistaken belief regarding Ms. Ping's authority resulted in the sort of detriment that would support an estoppel. *Dickerson*, 414 Md. 419, 995 A.2d 721. Apparently Mrs. Duncan would have been admitted to Beverly's facility even had there been no mistake, so the only detriment to Beverly is the loss of its bargain to arbitrate. As is noted in comment b. of section 2.05 of the *Restatement*, however, in this context "'[d]etrimental change of position' means an expenditure of money or labor, an incurrence of a loss, or subjection to legal liability, not the loss of the benefit of a bargain." *Restatement (Third) of Agency* § 2.05 comment b. Mrs. Duncan's Estate, in sum, is not estopped from disavowing the Arbitration Agreement.

E. The Estate is Not Bound to the Arbitration Agreement as a Third Party Beneficiary.

Finally, at oral argument Beverly asserted that the Estate should be bound to the Arbitration Agreement under a third party beneficiary theory. That is a theory of the law of contracts and is an exception to the general rule that only parties to a contract may enforce or be bound by its provisions. The exception comes about when the contracting parties intend by their agreement to benefit some person or entity not otherwise a party. This "third-party beneficiary" may "in his own right and name enforce [the] promise made for his benefit even though he is a stranger both to the contract and to the consideration." *Presnell Construction Managers, Inc. v. EH Construction, LLC*, 134 S.W.3d 575, 579 (Ky. 2004) (citation and internal quotation marks omitted). As the

United States Supreme Court recognized in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 370, 104 S. Ct. 1844, 80 L. Ed. 2d 366 (1984) (citing *Restatement (Second) of Contracts* § 309, cmt. b (1981); S. Williston, *Contracts* § 395 (3d ed. 1959); and 4 A. Corbin, *Contract* § 819 (1951)), the general rule is that a third party beneficiary asserting rights under the contract is subject to any defense that the promisor would have against the promisee. This general rule is widely deemed to extend to arbitration clauses: "'[W]here [a] contract contains an arbitration clause which is legally enforceable, the general rule is that the beneficiary is bound thereby to the same extent that the promisee is bound.'" *Benton v. Vanderbilt University*, 137 S.W.3d 614, 618 (Tenn. 2004) (quoting from *Williston on Contracts* § 364 A (3d ed. 1957) and collecting cases). The rule has been applied in the nursing home context where, even though the principal/decedent's agent did not have authority to bind the principal as a party to the arbitration clause, the agent entered the admissions agreement not merely as a purported representative but also in his or her individual capacity, and the decedent, and hence the estate, has been deemed bound by the arbitration clause as a third party beneficiary of the contract between the facility and the agent. *Cook*, 786 F. Supp.2d 1166; *Patton*, 2012 U.S. Dist. LEXIS 5252, 2012 WL 112216.

Here, however, there is no suggestion that Ms. Ping entered the Admissions Agreement on her own behalf as well as that of her mother. Indeed, Beverly does not base its claim on the Admissions Agreement, which was not made a part of the record. The Arbitration Agreement provides

that Mrs. Duncan was the intended party with Ms. Ping signing the agreement only in her capacity as power of attorney. We reject Beverly's oral argument contention that Ms. Ping became a party to either agreement merely by virtue of having signed it. In general, as the *Restatement* notes, "[w]hen an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal, (1) the principal and the third party are parties to the contract; and (2) the agent is not a party to the contract unless the agent and the third party agree otherwise." *Restatement (Third) of Agency* § 6.01 (2006); *see Potter v. Chaney*, 290 S.W.2d 44, 46 (Ky. 1956) ("After the principal is disclosed, the agent is not liable, generally speaking, for his own authorized acts."). Absent evidence of a contrary arrangement, therefore, Ms. Ping, who was authorized to admit her mother to Beverly's facility, did not become a party to the Admissions Agreement, and so her mother cannot be deemed a third party beneficiary of a non-existent agreement between Ms. Ping and Beverly.

The result is the same with respect to the Arbitration Agreement itself, for although Ms. Ping did not have authority to bind her mother to that agreement, her purporting to do so did not make her a party unless, again, she and Beverly agreed otherwise, which plainly they did not. *Restatement (Third) of Agency* § 6.10 cmt. b ("[A]n agent does not become a party to a contract made on behalf of a disclosed principal unless the agent so agrees with the third party. . . . Thus, if the principal on whose behalf the agent purports to act is not bound by a contract because the agent acted without actual or apparent authority, the third party may not subject the

agent to liability on the contract unless the agent agreed to become a party."). Since there was no contract between Ms. Ping and Beverly of which Mrs. Duncan could have been a third party beneficiary, that theory cannot serve to bind the Estate to the Arbitration Agreement.[5]

In sum, the trial court correctly held that Mrs. Duncan's power of attorney did not authorize her daughter to waive unnecessarily her right to seek redress for injury in court. Since the trial court's denial of Beverly's motion to compel arbitration is to be upheld on this ground, we decline, with one exception, to address the alternative grounds urged by the Estate for denying the motion to compel arbitration.

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5. At oral argument, Beverly seemed to suggest that Ms. Ping, individually, should be held to the Arbitration Agreement as a third party beneficiary of the admissions contract between her mother and Beverly. This suggestion comes to naught, however, because (a) Ms. Ping, individually, is not a party to the suit; (b) as a person interested in her mother's well being, Ms. Ping was an incidental beneficiary of the Admissions Agreement between her mother and Beverly, but since the agreement was not made for her sake, she was not an intended beneficiary of it so as to bring her within the third-party-beneficiary rules, *see Sexton v. Taylor County*, 692 S.W.2d 808 (Ky. App. 1985) (discussing the intent necessary to confer third-party-beneficiary status); *Bybee v. Abdulla*, 2008 UT 35, 189 P.3d 40 (Utah 2008) (holding that wife was incidental, not third party, beneficiary of husband's medical treatment); and (c) even if Ms. Ping could be deemed a third party beneficiary of the Admissions Agreement, for the reasons discussed above, the Arbitration Agreement never became a part thereof.

II. The Wrongful Death Beneficiaries Are Not Bound By the Arbitration Agreement.

The one exception concerns the distinction to be drawn between the survival claims under KRS 411.140, which the Estate, as Mrs. Duncan's successor, brings on its own behalf, and the wrongful death claim, under KRS 411.130, which the Estate's representative brings not on behalf of the Estate, but on behalf of the statutory wrongful death beneficiaries. The beneficiaries maintain that regardless of whether the Estate is subject to the Arbitration Agreement, that agreement cannot bind them, because they were not parties to it, and because their statutory claim is separate and independent from the claims of Mrs. Duncan. We agree and believe this important issue merits further discussion.[6]

6. As Beverly notes, the wrongful death beneficiaries did not raise this argument before either the trial court or the Court of Appeals, and our general practice is not to address issues which the trial court was not given an opportunity to consider. *Fischer v. Fischer*, 348 S.W.3d 582 (Ky. 2011). We have distinguished, however, between unpreserved arguments in support of the trial court's Judgment and unpreserved claims of error. *Id*. While review of the latter is governed by our palpable error rules and standards, *id*., we have taken a somewhat more discretionary approach to the former, and have occasionally addressed an unpreserved, purely legal argument supporting a judgment in order to demonstrate an important, independently decisive ground for the trial court's decision or to avoid what could be a misleadingly incomplete statement of the law. *Kentucky Farm Bureau Mutual Insurance Co. v. Shelter Mutual Insurance Co*., 326 S.W.3d 803 (Ky. 2010). We believe that the question of a decedent's ability to require arbitration of a wrongful death claim is of sufficient importance

> The wrongful death statute, KRS 411.130, provides in pertinent part that
>
> [w]henever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it.

This provision is in accord with section 241 of our present Constitution, which, departing from the common law, creates a cause of action for damages against the person or entity wrongfully causing a death. That section authorizes the General Assembly to provide "how the recovery shall go and to whom belong." Pursuant to that constitutional authority, the General Assembly has provided that the wrongful death action "shall be prosecuted by the personal representative of the deceased," and, as pertinent here, that the amount recovered, less certain expenses, "shall be for the benefit of and go to the kindred of the deceased in the following order: . . . (c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children." KRS 411.130(2) (1974).

The General Assembly has also provided that, with exceptions not pertinent here, "[n]o right of action for personal injury or for injury to real or personal property shall cease or die with the person injuring or injured." KRS 411.140. This is the so-called survival statute,

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both to this case and to a full statement of the law in this area to warrant review despite the lack of preservation.

another extension of the common law, and under it a personal injury claim does not lapse upon the death of the injured person, as was the common-law rule, but may be "brought or revived by the personal representative" on behalf of the decedent's estate.

Although in some states the wrongful death action is deemed to be derivative of the personal injury claim, in others the two claims are regarded as independent. *See, e.g., In re LaBatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009) (derivative); *Peters v. Columbus Steel Castings Co.*, 115 Ohio St. 3d 134, 2007 Ohio 4787, 873 N.E.2d 1258 (Ohio 2007) (independent). Courts in states where the wrongful death action is derivative have held that an arbitration agreement applicable to a personal injury claim applies as well to the wrongful death claim. *LaBatt*, 279 S.W.3d 640; *Ballard v. Southwest Detroit Hospital*, 119 Mich. App. 814, 327 N.W.2d 370 (Mich. App. 1982). Where the claims are deemed independent, however, courts have held that a person's agreement to arbitrate his or her personal injury claim does not bind the wrongful death claimants to arbitration, because they were not parties to the agreement and do not derive their claim from a party. *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee*, 2008 UT 35, 189 P.3d 40; *Peters*, 115 Ohio St. 3d 134, 2007 Ohio 4787, 873 N.E.2d 1258; *Carter*, 955 N.E.2d 1233, 353 Ill. Dec. 422, 2011 IL App (5th) 070392B, 2011 IL App (5th) 70392B; *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (Wash. App. 2010). *But see Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003) (holding that independent wrongful death claim was nevertheless subject to decedent's arbitration

agreement); *and see Ruiz v. Podolsky*, 50 Cal. 4th 838, 114 Cal. Rptr. 3d 263, 237 P.3d 584 (Cal. 2010) (holding that specific provision in state's medical malpractice Act required arbitration of wrongful death claims where the decedent had agreed to arbitrate any claim arising from medical provider's services.).

In Kentucky, the constitutional status of the wrongful death claim is a strong indication of that claim's independence, *cf. Bybee*, 2008 UT 35, 189 P.3d 40 (construing similar constitutional provision), but we need not invoke the Constitution, because the General Assembly has left no doubt that in this state wrongful death and survival actions are separate and distinct:

> It shall be lawful for the personal representative of a decedent who was injured by reason of the tortious acts of another, and later dies from such injuries, to recover in the same action for both the wrongful death of the decedent and for the personal injuries from which the decedent suffered prior to death, including a recovery for all elements of damages in both a wrongful death action and a personal injury action.

KRS 411.133 (1968). *See also, Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967) (noting that "the wrongful death action is not derivative. . . . [It] is distinct from any that the deceased may have had if he had survived."). Mrs. Duncan, of course (or an *authorized* agent), could have agreed to arbitrate *her* claims against Beverly, and, because a survival action would have asserted

her claims, the Estate bringing those claims in her stead would likewise have been bound by her agreement. Indeed, Beverly's Arbitration Agreement provides for just that. It purports to bind "all persons whose claim is derived through or on behalf of the Resident." Because under our law the wrongful death claim is not derived through or on behalf of the resident, but accrues separately to the wrongful death beneficiaries and is meant to compensate them for their own pecuniary loss, we agree with the Courts cited above which have held that a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim. This then is another reason, at least with respect to the wrongful death portion of the complaint, to uphold the trial court's denial of Beverly's motion to compel arbitration.

In taking issue with this conclusion, Beverly again conflates the different roles Ms. Ping has played and argues that she "agreed [individually] to arbitrate that claim [the wrongful death claim] by executing the [arbitration] agreement." But, of course, she did no such thing. By executing the arbitration contract, Ms. Ping purported to agree on her mother's behalf, not her own, to arbitrate her mother's claims. Even were her mother's agreement valid, Ms. Ping's having executed it as her mother's representative would not preclude Ms. Ping, as representative of the wrongful death beneficiaries, from litigating their entirely separate claim.

Beverly also contends that the wrongful death claimants, as heirs of Mrs. Duncan, are third party beneficiaries of the Arbitration Agreement itself, as

opposed to the Admissions Agreement, and as such are bound by its terms. Beverly refers us to that portion of the Arbitration Agreement which provides that "this Arbitration Agreement . . . shall inure to the benefit of and bind the parties . . . and all persons whose claim is derived through or on behalf of the Resident, including . . . executor, legal representative, administrator, or heir of the Resident." This reference to heirs, Beverly asserts, is enough to bind the wrongful death claimants to arbitration. As noted above, however, even had the Arbitration Agreement been validly executed, it would not, and could not, have applied to the wrongful death beneficiaries, because their claim is not "derived through or on behalf of the Resident."

Furthermore, as interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that *tort* claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. *See, In re Weekley Homes, L.P.*, 180 S.W.3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was

subject to repair contract's arbitration clause because daughter, although a non-party, was a direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contract--individuals or entities with no substantive rights under the contract and no direct benefits--may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants. This is what Beverly purports to do. Arbitration is a matter of contract, however; it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Citation and internal quotation marks omitted.). Since Beverly's theory would allow just that, *i.e.*, would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

CONCLUSION

In sum, because Mrs. Duncan's power of attorney did not authorize her agent, Ms. Ping, to do more than make financial, property-related, and healthcare decisions, the trial court correctly determined that the optional Arbitration Agreement the agent purported to execute on Mrs. Duncan's behalf was beyond the scope of the

agent's authority and therefore unenforceable against Mrs. Duncan's Estate and wrongful death beneficiaries. In the absence of actual authority, Beverly attempts to establish apparent authority on the part of Ms. Ping but that theory is similarly unavailing. The Estate and the beneficiaries, furthermore, are neither estopped from disavowing the Arbitration Agreement, nor bound to it under third-party beneficiary principles. Finally, the wrongful death claimants would not be bound by their decedent's arbitration agreement, even if one existed, because their statutorily distinct claim does not derive from any claim on behalf of the decedent, and they therefore do not succeed to the decedent's dispute resolution agreements. Accordingly, we reverse the Opinion of the Court of Appeals, and remand this matter to the Franklin Circuit Court for additional proceedings consistent with this Opinion.

All sitting. All concur.

APPENDIX B — OPINION REVERSING AND REMANDING BY THE COMMONWEALTH OF KENTUCKY COURT OF APPEALS, DATED JULY 23, 2010

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2009-CA-001361-MR, NO. 2009-CA-001379-MR

BEVERLY ENTERPRISES, INC.; BEVERLY ENTERPRISES-KENTUCKY, INC.; BEVERLY HEALTH AND REHABILITATION SERVICES, INC.; GGNSC ADMINISTRATIVE SERVICES, LLC; GGNSC HOLDINGS, LLC; GGNSC EQUITY HOLDINGS, LLC; GOLDEN GATE NATIONAL SENIOR CARE, LLC; GOLDEN GATE ANCILLARY, LLC; AND GGNSC FRANKFORT, LLC,

APPELLANTS

v.

DONNA PING, EXECUTRIX OF THE ESTATE OF ALMA CALHOUN DUNCAN, DECEASED,

APPELLEE

AND

ANN PHILLIPS,

APPELLANT

v.

DONNA PING, EXECUTRIX OF THE ESTATE OF ALMA CALHOUN DUNCAN, DECEASED,

APPELLEE

July 23, 2010, Rendered

BEFORE: CAPERTON AND MOORE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

OPINION
REVERSING AND REMANDING

BUCKINGHAM, SENIOR JUDGE: Appellants (Beverly Enterprises, Inc., *et al*) appeal from an order of the Franklin Circuit Court denying their motion to compel arbitration in an action filed against them by Appellee (Donna Ping, executrix of the estate of Alma Calhoun Duncan).[2] We reverse and remand.

Alma Duncan was admitted to Golden Living, a long-term care facility, by her daughter and power of attorney, Appellee Donna Ping. At the time of Ms. Duncan's admission to the facility, Appellee represented herself to the facility as Ms. Duncan's power of attorney and produced an executed copy of the General Power of Attorney evidencing her authority. Appellee signed the facility's admission documents on Ms. Duncan's behalf, although she states that she did not read the documents despite having the opportunity to do so. Appellee also signed a separate Alternative Dispute Resolution

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1. Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

2. Both Appeal No. 2009-CA-001361-MR and Appeal No. 2009-CA-001379-MR have been consolidated pursuant to an order of this Court dated October 1, 2009.

Agreement ("ADR Agreement" or "Agreement") on Ms. Duncan's behalf as part of the admissions documents packet.

Ms. Duncan subsequently passed away, and Appellee, as executrix of Ms. Duncan's estate, filed this lawsuit alleging negligence with respect to the care provided to Ms. Duncan while she was a resident of the facility. Thereafter, Appellants filed an answer to Appellee's complaint and a motion to dismiss or, in the alternative, to stay the lawsuit pending alternative dispute resolution proceedings. The Franklin Circuit Court ordered the parties to engage in limited discovery regarding the enforceability of the ADR Agreement. After completion of the limited discovery, Appellants filed a renewed motion to enforce the ADR Agreement. The trial court entered an order denying Appellants' motion, and this appeal followed.

The ADR Agreement states in bold capital letters that it is a **RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION—READ CAREFULLY)**. In the first paragraph of the two-page Agreement, it states:

> It is understood and agreed by Facility and Resident that any and all claims, disputes and controversies . . . arising out of, or in connection with, or relating in any way to the [ADR] Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding

> arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this [ADR] Agreement, and not by a lawsuit or resort to court process. This [ADR] Agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Section 1-16.
>
> This [ADR Agreement] includes, but is not limited to, any claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the [ADR] Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement.

The ADR Agreement further advises that the intention of the parties is that the ADR Agreement will "inure to the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees, and servants of the Facility . . . including any parent, spouse, sibling, child, guardian,

executor, legal representative, administrator, or heir of the Resident." The ADR Agreement adds that the parties intend that its provisions will survive the lives or existence of the parties to the Agreement.

The second page of the ADR Agreement, which is the signature page, contains in bold print an acknowledgement of the nature of the Agreement as an arbitration agreement that results in the parties giving up their constitutional rights to have any claims decided in a court of law before a judge and jury. Immediately above the signature lines is the provision that states:

> The undersigned certifies that he/she has read this [ADR] Agreement and that it has been fully explained to him/her, that he/she understands its contents, and has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the Resident or otherwise to execute this [A]greement and accepts its terms.

Appellee's signature appears at the bottom of the page, and "Daughter/POA" is written next to the statement "Relationship to Resident."

This Court reviews a trial court's factual findings in an order denying enforcement of an arbitration agreement to determine if the findings are clearly erroneous, but we review a trial court's legal conclusions under a *de novo* standard. *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

Appellants first argue that they have established that a valid arbitration agreement exists under 9 U.S.C. § 1-16 and that the ADR Agreement includes the claims brought by Appellee in this lawsuit. Both the United States Congress and the Kentucky General Assembly have enacted legislation to govern certain types of arbitration agreements: the Federal Arbitration Act ("FAA") at 9 U.S.C. § 1 and the Uniform Arbitration Act ("KUAA") at KRS 417.045-240.[3] Both acts have been found to benefit arbitration agreements, at least to the point of ensuring that arbitration agreements are reviewed using the same criterion that is applied to other contracts. *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984); *Kodak Min. Co. v. Carrs Fork Corp.*, 669 S.W.2d 917, 919 (Ky. 1984).

In this case, the ADR Agreement comes within the broad provisions of both the FAA and the KUAA.[4] The Agreement is a written pre-dispute arbitration agreement involving interstate commerce.[5] Moreover, by its terms the

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3. The FAA and the KUAA have been construed consistently with each other by Kentucky courts. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004) ("we have interpreted the KUAA consistent with the FAA[.]").

4. Because an appeal at the end of the litigation will not often afford an adequate solution to the wrongful denial of a request to arbitrate, both the FAA and the KUAA provide that an appeal may be taken from an interlocutory order denying an application to compel arbitration. 9 U.S.C. § 16; KRS 417.220.

5. Not only does the agreement involve interstate commerce, but the agreement states that it "shall be governed by and

ADR Agreement applies to negligence and malpractice claims. Appellee's claims are all based on negligence and medical malpractice and are, therefore, within the scope of the ADR Agreement.

Both acts state that qualifying agreements[6] are "valid, enforceable and irrevocable, *save upon such grounds as exist at law for the revocation of any contract*." KRS 417.050 (emphasis added); 9 U.S.C. § 2. The last clause refers "only to revocation based upon fraud, mistake or other defect in the making of the agreement[.]" *Kodak Min. Co.*, 669 S.W.2d at 919. Therefore, "the existence of a valid arbitration agreement as a threshold matter must first be resolved by the court." *Mortgage Elec. Registration Sys., Inc. v. Abner*, 260 S.W.3d 351, 353 (Ky. App. 2008) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). State contract law governs in determining whether a valid

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interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16." *See Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 472, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and *Conseco*, 47 S.W.3d at 341, n.11.

6. The FAA applies to: "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal[.]" 9 U.S.C. § 2. The KUAA applies to: "[a] written agreement to submit any existing controversy to arbitration or a provision in [a] written contract to submit to arbitration any controversy thereafter arising between the parties[.]" KRS 417.050.

arbitration agreement exists. *Gen. Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky. App. 2006). Further, "[t]he party seeking to avoid the arbitration agreement has a heavy burden." *Cox*, 132 S.W.3d at 857 (citing *Valley Constr. Co., Inc. v. Perry Host Mgmt. Co. Inc.*, 796 S.W.2d 365, 368 (Ky. App. 1990)).

The trial court here denied the motion to compel arbitration, finding that Appellee did not have authority to sign the ADR Agreement, and, therefore, that a valid agreement was not formed due to a lack of mutual assent between the parties. The trial court concluded that there was no actual authority for Appellee to enter into the Arbitration Agreement because the power of attorney did not contain any specific or express language to that effect.

Appellee cites to a case holding that "any power of attorney which delegates authority to perform specific acts that also contains general words, is limited to the particular acts authorized." *Harding v. Kentucky River Hardwood Co.*, 205 Ky. 1, 265 S.W. 429, 431 (1924). The case in *Harding*, however, dealt with a power of attorney that was given for a specific limited purpose. The power of attorney in *Harding* stated the following:

> That the Commercial Bank of Raleigh, N.C., does hereby appoint W.N. Cope, attorney of Jackson, Ky., as its attorney to act for it in all respects in its behalf in a suit against the Kentucky River Hardwood Company and other, with full power to sign in its name a bond for costs and do other acts necessary.

Id. The court noted that the specific act authorized to be performed was to sign the bank's name to the cost bond, and therefore the power was limited to that act, notwithstanding the general words contained therein. *Id*. at 431-32.

More recent guidance on the Kentucky Supreme Court's approach when confronted with a principal's clear statement or intent in a power of attorney appears in *Ingram v. Cates*, 74 S.W.3d 783 (Ky. App. 2002). In *Ingram*, this Court stated the following:

> Here, the power of attorney . . . grants a general power. . . to "convey any personal property that I now or hereafter own . . . ." It is an unlimited power of attorney authorizing [the attorney-in-fact] to make any conveyance of personal property. It is undeniable that the power of attorney did not specifically bestow upon [the attorney-in-fact] the power to make a gift to himself or to another. Even so, it is clear that the general power to convey any personal property . . . permits these specific transfers. We know of no rule of law requiring that a power of attorney specifically delineate each and every transaction the attorney-in-fact is authorized to perform.
>
> Cates points out the general rule of construction that when a power of attorney delegates authority to perform specific acts and also contains general words, the powers of attorney are limited to the particular acts authorized.

> In this case, however, the power of attorney contained general terms without limitation and the obvious purpose was to give [the attorney-in-fact] authority to handle and transact all financial affairs as agent for Mr. Ingram.

Id. at 787-88 (internal citations omitted).

The power of attorney held by Appellee in this case was a general power of attorney as evidenced by its title (General Power of Attorney). In its first paragraph, Ms. Duncan appointed Appellee as "my true and lawful attorney" and set forth the following powers:

> [G]iving and granting to her full and complete power and authority to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present, including but not limited to the following[.]

Various specific powers were thereafter enumerated.

Later in the document, Duncan gave Appellee the following specific power:

> To make any and all decisions of whatever kind, nature or type regarding my medical care, to execute any and all documents, including, but not limited to, authorizations and releases, related medical decisions affecting me[.]

On the second page of the General Power of Attorney, Ms. Duncan clearly stated her intentions as follows:

> It is my intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire. The enumeration of specific rights or acts or powers herein is not intended to, nor does it limit or restrict, the general full power herein granted to my said attorney-in-fact.

We are not persuaded by Appellee's arguments that the General Power of Attorney in this case did not give Appellants the authority to enter into the ADR Agreement on Ms. Duncan's behalf. On page 5 of Appellee's brief, she cites language from a case that is over 175 years old, *Southard v. Steele*, 3 T.B. Mon. 435, 19 Ky. 435 (1826). The language from *Southard* cited by Appellee states that a general agent cannot bind his principal to arbitration without special authority. A close reading of the case, however, reveals that the cited language was not the words of the court; rather, it was the words of counsel in a petition for rehearing. Further, the *Harding* case, discussed earlier herein, is distinguishable as we have noted.

We conclude that Appellee had the actual authority to enter into the ADR Agreement by the terms of the General Power of Attorney given to her by Ms. Duncan.

Additionally, Appellee had apparent authority to enter into the Agreement on behalf of Ms. Duncan. Under Kentucky law, "[a]pparent authority is not actual authority, but rather 'is that which, by reason of prevailing usage or other circumstance, the agent is in effect held out by the principal as possessing.'" *Estell v. Barrickman*, 571 S.W.2d 650, 652 (Ky. App. 1978), *overruled on other grounds by Mid-States Plastics., Inc. v. Estate of Bryan ex. rel. Bryant*, 245 S.W.3d 728 (Ky. 2008). By designating Appellee as her power of attorney and giving her the authority to make medical decisions and to execute releases on her behalf, Ms. Duncan created the appearance that Appellee was authorized to act on her behalf. It was reasonable for Appellants to assume that Appellee had authority to enter into the ADR Agreement on behalf of Ms. Duncan because of the language in the power of attorney.[7]

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7. These circumstances differentiate the present case from that of *Beverly Enterprises, Inc. v. Stivers*, 2009 Ky. App. Unpub. LEXIS 241, 2009 WL 723002 (Ky. App. 2009) (No. 2008-CA-000284-MR), and *Beverly Health & Rehab. Services, Inc. v. Smith*, 2009 Ky. App. LEXIS 49, 2009 WL 961056 (Ky. App. 2009) (No. 2008-CA-000604-MR) (non-final decision), particularly the latter case, in which the family member who executed the challenged arbitration agreement directly advised the employee involved that she did *not* have authority to sign on behalf of her father, and the power of attorney was held by her mother. *Stivers*, 2009 Ky. App. Unpub. LEXIS 241, 2009 WL 961056 at *1-2. This case presents no evidence that Appellee told anyone that she did not have the authority to execute the admission documents or the ADR agreement.

The trial court also found, and Appellee argues, that the evidence in this situation indicates fraud, thereby resulting in a defect in the formation of the Agreement. Under Kentucky law, there are two types of fraud: fraud in the inducement and fraud in the execution, or *factum*. To show fraud in the inducement, one must show through clear and convincing evidence that there was (1) a material representation; (2) which is false; (3) known to be false or made recklessly; (4) made with inducement to be acted upon; (5) acted in reliance thereon, and (6) injury. *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 468, 46 6 Ky. L. Summary 44 (Ky. 1999). Fraud in the execution occurs when a party's signature to an instrument is obtained without the knowledge of its true nature or content and renders the contract void, such as when one party encourages the other to sign a document by falsely stating that it has no legal effect. *Hazelwood v. Woodward*, 277 Ky. 447, 126 S.W.2d 857, 862 (1939).

The trial court found that the admissions director led Appellee to believe that the papers presented to her, which included the ADR Agreement, were for purposes of admitting Ms. Duncan and nothing more, while in reality the ADR Agreement had the effect of waiving her mother's constitutional right to a trial by jury. Therefore, the trial court concluded that Appellee's signature could not serve as evidence of her consent.

The only statement Appellee attributes to the admissions director during the admissions process, however, was that he was presenting to her the "standard admissions packet." This statement was not

a misrepresentation and does not rise to the level of obtaining Appellee's signature without her knowledge of the Agreement's true nature or contents.

The very title of the Agreement indicates in bold letters that it is an arbitration agreement, contains the words "Read Carefully" in bold and capital letters, and states that execution of the Agreement is not a condition for admission. Moreover, Appellee never testified that she was in any fashion misled by any employee of Appellants or by the language of the Agreement, which she did not read before signing.

Additionally, the trial court found it significant that the admissions director appeared to be in a hurry and that Appellee signed where he told her to sign. Appellee, however, never stated that she was denied an opportunity to read any of the papers. Even if Appellee was rushed when executing the documents, she had the right under the Agreement to seek legal counsel and to rescind the Agreement within 30 days. None of this evidence leads to the conclusion that any type of fraud was present at the time Appellee signed the Agreement.

The trial court also found that there was a lack of consideration between the parties because if signing the ADR Agreement was not a condition of admission, there was no reciprocal benefit to Appellee under the terms of the ADR Agreement. It is not necessary, however, that both parties to an agreement have reciprocal rights or obligations of the same kind or nature. *David Roth's Sons, Inc. v. Wright & Taylor, Inc.*, 343 S.W.2d 389, 390 (Ky.

1961) (citing *Bank of Louisville v. Baumeister*, 87 Ky. 6, 7 S.W. 170, 9 Ky. L. Rptr. 845 (1888)).

In this situation, the rights and obligations incurred by Appellants and Appellee were the same. The ADR Agreement stated that any claim stemming from Duncan's residency was to be submitted to arbitration, including any claims that Appellants may have had, and not only Duncan's claims. Therefore, both parties were obligated under the Agreement to submit their claims to arbitration.

Additionally, we do not read the language that "[t]his Arbitration Agreement is executed . . . in conjunction with an agreement for admission and for the provision of nursing facility services" as a statement that the consent to arbitrate is consideration for the provision of nursing facility services. Rather, it is a preliminary statement of the subject matter of the Agreement. Therefore, Appellants' agreement to submit its own claims to arbitration provided sufficient consideration under Kentucky law.

Appellee next contends, and the trial court agreed, that the ADR Agreement is revocable because it is unconscionable. Kentucky law recognizes unconscionability as a defense to the enforcement of an arbitration agreement. *Wilder*, 47 S.W.3d at 341. As stated by the Court in *Wilder*, however, "[a] fundamental rule of contract law holds that, absent fraud . . ., a written agreement duly executed by the party to be held, who had an opportunity to read it, will be enforced according to its terms." *Id.* (citing *Cline v. Allis-Chalmers Corp.*, 690 S.W.2d 764 (Ky. App. 1985)).

While the doctrine of unconscionability has arisen as an exception to this rule, the doctrine "is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences per se of uneven bargaining power or even a simple old-fashioned bad bargain." *Id*. (citing *Louisville Bear Safety Serv., Inc. v. South Central Bell Tel. Co.*, 571 S.W.2d 438, 440 (Ky. App. 1978)). An unconscionable contract is "one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other." *Id*.

We agree with Appellants that the ADR Agreement was not abusive or unfair. The Agreement was not hidden within the other admissions documents, but rather was a separate document whose title was printed in bold capital letters. Moreover, its terms are such that a person of ordinary experience and education is likely to understand, and the Agreement does not affect the parties' responsibilities or liabilities but only the forum in which they are to be disputed. *See Wilder*, 47 S.W.3d at 343.

Moreover, the United States District Court for the Western District of Kentucky has analyzed the exact same agreement and has come to the conclusion that the agreement was not unconscionable. *Holifield v. Beverly Health and Rehab. Servs., Inc.*, 2008 U.S. Dist. LEXIS 47909, 2008 WL 2548104 (W.D. Ky. 2008) (Civil Action No. 3:08CV-147-H). We find the analysis utilized by the Court in *Holifield* persuasive. In *Holifield*, the Court found that the language of the agreement was

not deceptive or misleading and that none of its terms were hidden or concealed. It further stated that "[t]his particular arbitration agreement is not unusual" and the institution's "failure to mention or separately identify the ADR Agreement does not rise to 'unconscionable' conduct." 2008 U.S. Dist. LEXIS 47909, [WL] at *5. We conclude that the ADR Agreement is not unconscionable.

Appellee also contends that the trial court does not have subject matter jurisdiction to enforce the ADR Agreement because the Agreement does not state that the arbitration must take place in Kentucky. *See Ally Cat, LLC v. Chauvin*, 274 S.W.3d 451, 454 (Ky. 2009). The *Alley Cat* case stands for the proposition that when an arbitration agreement "fails to comply with the literal provisions of KRS 417.200," then Kentucky courts lack subject matter jurisdiction to enforce the agreement. *Id*. at 455-56. KRS 417.200 states:

> The term "court" means any court of competent jurisdiction of this state. The making of an agreement described in KRS 417.050 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereafter.

Therefore, "[s]ubject matter jurisdiction to enforce an agreement to arbitrate is conferred upon a Kentucky court only if the agreement provides for arbitration in this state." *Id*. at 455.

Here, the ADR Agreement states that the claims shall be resolved by binding arbitration "to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated into this Agreement[.]" Although there are no Kentucky cases directly on point, other courts interpreting statutes identical to KRS 417.200 have held that where an arbitration agreement contains a provision which could result in that particular state being the site of arbitration, then that provision fulfills the statutory requirement that the agreement provide for arbitration in that state. *L.R. Foy Constr. Co. v. Dean L. Dauley & Waldrof Associates*, 547 F. Supp. 166, 169 (D.C.Kan. 1982).

In this case, the parties could agree that the arbitration would take place in Kentucky. Additionally, if the parties could not agree on a site to hold the arbitration, the arbitration would take place at the facility, which is located in Kentucky. Therefore, the Agreement complies with KRS 417.200 and is sufficient to provide the court with subject matter jurisdiction to enforce the Agreement.

The trial court gave additional reasons to support its ruling, and Appellee raises other arguments as well. We conclude that none of these have merit or warrant discussion. Among these are the trial court's holdings that a primary caregiver cannot reasonably be expected to enter into a contract when transferring or admitting a patient, that Appellant's agent, Mr. Brand, manipulated the process to such an extent that it amounted to concealment, that the ADR Agreement "causes confusion

and is substantively manipulative," and that Appellee entered into the Agreement "under duress and/or undue influence." We also reject Appellee's arguments that the terms of the Agreement are illusory and that Appellants breached a fiduciary duty owed to Ms. Duncan by not fully explaining the terms of the Agreement to Appellee.

The order of the Franklin Circuit Court is reversed and remanded for further proceedings consistent with this opinion. The parties' remaining arguments are rendered moot.

ALL CONCUR.

APPENDIX C — OPINION AND ORDER OF THE COMMONWEALTH OF KENTUCKY, FRANKLIN CIRCUIT COURT, DIVISION II, DATED JUNE 25, 2009

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT, DIVISION II

CIVIL ACTION No. 08-CI-1650

DONNA PING, Executrix of the Estate of Alma Calhoun Duncan, Deceased.

PLAINTIFF

vs.

BEVERLY ENTERPRISES, INC., ET. AL.

DEFENDANTS

OPINION AND ORDER

This matter is before the Court upon the Defendants' *Renewed Motion to Dismiss and to Enforce Arbitration Agreement:* The Plaintiff opposed the motion. The Court, after reviewing the record and applicable law, and having been sufficiently advised, hereby renders this order.

The events in this case began when Ms. Alma Calhoun Duncan (whose estate is represented by the Plaintiff) was admitted on March 17, 2006, as a resident at the Golden Living-Frankfort (the "Facility"), a nursing home operated and owned by the Defendants. While Ms. Duncan

resided at the Facility, she allegedly suffered accelerated deterioration of health and physical condition beyond the normal aging process. As a result of the alleged negligence and/or wrongful conduct of the Defendants, their employees and servants, Ms. Duncan died. Whereupon, the Plaintiff, in her capacity as the Executrix of the Estate of Ms. Duncan, (hereinafter, the "Estate"), instituted the instant negligence and wrongful death actions against the Defendants.[1]

On October 22, 2008, the Defendants (first) moved to dismiss the Plaintiffs wrongful death action, on ground that there is an enforceable arbitration agreement (the "ADR Agreement") signed on March 17, 2006 (the day when Ms. Duncan was admitted at the Facility) by the Plaintiff herself. According to the Defendants, the claims in Plaintiffs lawsuit are covered by its ADR Agreement.

After hearing the arguments at that time, this Court allowed the parties to conduct discovery for purposes of determining the circumstances surrounding the signing of the ADR Agreement.

On April 15, 2008, the Defendants' renewed their motion to dismiss, asserting that, based on the deposition given by Joshua Brand, the Facility's Admissions Director, as well as the Plaintiffs deposition, the ADR Agreement is binding and enforceable.

1. The Plaintiff was appointed as the Estate's Executrix pursuant a court order in a separate probate proceeding before the Anderson County District Probate Court.

Under the Kentucky Uniform Arbitration Act, KRS 417.045 *et seq.,* a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon the grounds as exist at law for the revocation of any contract. KRS 417.050. Our courts have favored the enforceability of arbitration agreements. *Kodak Mining Co. v. Carrs Fork Corp.,* 669 S.W. 2d 917,919 (Ky. 1984). However, there is a threshold matter which must be resolved before a party may be compelled to go to arbitration. The party compelling arbitration must establish that the arbitration agreement is a valid contract. *General Steel Corp v. Collins,* 196 S.W. 3d 18, 20 (Ky. Ct. App. 2006). After a prima facie case of validity is established, the party resisting arbitration, in order to avoid the contract, must offer proof that defenses exist in law for avoiding it. In view of the preceding, the Court must address the following issues: (1) is there a valid written arbitration agreement; (2) if the Defendants (as the party compelling arbitration) carried its burden of establishing a prima facie case of the existence of a valid contract, has the Plaintiff proven a defense to avoid it?

Existence of a valid arbitration agreement.

In determining whether a valid arbitration agreement exists, this Court must apply the basic principles governing Kentucky contract law. *See Jackson v. Mackin,* 277 S.W.3d 626, 228 (Ky. Ct. App. 2009) (validity of a contract to arbitrate is reviewed under applicable Kentucky contract law). The Defendant's assertion that the ADR Agreement expressly provided that "it is 'governed by and interpreted

under the Federal Arbitration Act (FAA), 9 U.S.C. Section 1-16'"[2] does not deprive this Court of its authority to decide whether the parties agreed to arbitrate in accordance with the rudimentary principles governing contract law. *See General Steel Corp., v. Collins,* 196 S.W.3d 18, 20 (Ky. Ct. App., 2006). Even under the FAA, ordinary contract principles govern whether parties agreed to arbitrate, *see Paterson v. Tenent Healthcare, Inc.,* 113 F.3d 832, 834 (81th Cir. 1997), principles that in this case are derived from Kentucky law.

Following our contract principles, a contract is valid where these essential elements are present: (1) a lawful subject matter; (2) consideration or the bargained-for-legal-benefit and/or detriment; and (3) the mutual assent of the parties. *See Kernan v. Carter,* 104 S.W. 308, 309 (Ky. 1907).

The Defendants assert that there is a valid agreement to arbitrate. To the Defendants, the Plaintiff voluntarily entered into the written ADR Agreement: (1) she willingly affixed her signature, (2) she had the authority to sign on behalf of Ms. Duncan, (3) she was given the opportunity to read the ADR Agreement, and (4) she did not rescind the ADR Agreement within 30 days from signing it, even if the ADR Agreement provided her an opportunity to do so. The foregoing, the Defendants contend, renders the ADR Agreement enforceable.

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2. *See* Defendants' Memorandum in Support of Renewed Motion to Dismiss and Enforce Arbitration Agreement, pp. 6-9.

The Court examined the ADR Agreement. It was in writing and bore the signature of the Plaintiff, signing as Ms. Duncan's daughter and "POA". The Court also examined the General Power of Attorney (the "POA"), relied upon by the Plaintiff for purposes of executing documents, i.e., admission papers, relating to medical decisions affecting Ms. Duncan. The Defendants contend that the POA served as the actual authority to bind Ms. Duncan and her successors to the ADR Agreement.

After reviewing the 2-page POA, the Court finds that it did not contain any specific or express language authorizing the Plaintiff to arbitrate Ms. Duncan's estate's claims against the Defendants, as well as waive her constitutional rights.[3] Accordingly, the Plaintiff did not possess an express authority to submit pre-dispute claims against the Defendants to arbitration, nor to waive Ms. Duncan's constitutional rights.

The Defendants' reliance in *Kindred Hosp. Ltd P'ship. v. Lutrell,* 2006-CA-000221-MR (Ky. Ct. App. July 27, 2007) is misplaced. The facts in *Lutrell, supra.,* are

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3. The ADR Agreement stipulated that by signing, the Plaintiff was waiving [Ms. Duncan's] constitutional rights to have any claim decided by a court of law before a judge and a jury, as well as any appeal from a decision or award of damages.

Under Ky. Const. §7, "the ancient mode of trial by jury shall be held sacred, and the right thereon shall remain inviolate, subject to such modifications as may be authorized by this Constitution."

Under Ky. Const. § 115, "is all cases, civil or criminal, there shall be allowed as a matter of right at least one appeal to another court."

distinguishable from this case. In *Lutrell,* the purported agent of the principal allegedly signed an arbitration agreement on behalf of her purported principal in the course of the latter's admission into a nursing home. In concluding that the there was no binding agreement to arbitrate, the *Lutrell* Court found that the agent did not have any written document to prove his authority. The *Lutrell* Court gave as an example of written authority a written power of attorney, but did not state that any power of attorney constitutes proof, by itself, (regardless of enumerated powers expressed), of an authority to arbitrate. Here, the Plaintiff had a general power of attorney to act on behalf of Ms. Duncan on specific matters. In the enumeration of powers, however, an express authority to arbitrate and waive constitutional rights were lacking. It is erroneous for the Defendants to extrapolate from the opinion or ruling in *Lutrell, supra.,* the proposition that any POA, regardless of the language contained (or lacking) therein, grants the agent specific or express power to submit any or all claims to arbitration, or to waive a principal's constitutional rights. To conclude otherwise is inconsistent with the fundamental principle that an agent cannot bind its principal for acts outside the scope of its actual authority. For a principal to be bound by an act of its agent, the latter must have acted with either express or implied authority of his principal. *See Bottoms v. Bottoms,* 880 S.W.2d 559, 561 (Ky. Ct. App. 1994). Express authority arises from direct, intentional granting of specific authority from a principal to an agent. *Mills Street Church of Christ v. Hogan,* 785 S.W.2d 263 (Ky. Ct. App. 1990). For these reasons, (and contrary to the Defendants' characterization of the law during the hearing

of their motion),[4] powers of attorney must be strictly construed and closely examined in order to ascertain the intent of the principal. *See generally De Bueno v. Castro,* 543 So. 2d 393, 394 (Fla. 4th DCA 1989). Contrary to the Defendants' assertion, not any or every power of attorney constitutes evidence of an express authority to arbitrate. The facts in *Lutrell* did not present that question, and so the ruling in *Lutrell* is limited by its own facts.

Absent an expressed authority in the POA, the Court must next examine whether actual authority may be implied from the language of the POA. According to the Defendants, the authority of the Plaintiff to arbitrate may be inferred from the broad and expansive language of the POA. Upon the other hand, the Plaintiff argues that the breadth of her authority under the POA must be read in the context of the subject matter intended by Ms. Duncan to be addressed.

The POA, executed by Ms. Duncan in January 1998, contained several specific authorities.[5] One specific

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4. During the hearing on Defendants' Motion, the Defendants argued that powers of attorneys should be broadly construed and interpreted. *See* Video 48-02-09 VCR 15 of the hearing on Defendants' Renewed Motion held on May 20, 2009.

5. The specific powers granted to the Plaintiff included the powers to (a) take possession of all monies, goods, chattels and effects belonging to Ms. Duncan wherever found; (b) draw, collect and receive monies on deposit with Ms. Duncan's bank accounts, (c) to deposit or remove contents from any safety deposit boxes held by Ms. Duncan, (d) handle and dispose of any securities and execute documents necessary to handle those securities; (e) spend and invest any of Ms. Duncan's funds; and (f) perform acts necessary to convey or mortgage real property owned by Ms. Duncan.

authority of relevance in this case relates to the Plaintiffs power to make decisions relating to medical decisions affecting Ms. Duncan. Concededly, the subsequent sections of the POA contained language that the Plaintiffs authority to act was "to be liberally construed," and "the specific items, rights, or acts or powers herein is not to be intended to, nor does limit or restrict, the general and full power herein granted to my attorney-in-fact." Thus, the question to be ascertained is whether from the language in the POA, (which is the agency contract between the Plaintiff and Ms. Duncan), specifically:

> ".... to make any and all decisions of whatever kind, nature or type regarding [Ms. Duncan's] medical care, and to execute any and all documents, including, but not limited to, authorization and releases, related to medical decisions affecting [her]..."

may be reasonably interpreted as conferring an authority to submit pre-dispute claims to arbitration, and to waive Ms. Duncan's constitutional rights.

Our Supreme Court in the case of *Mogg v. Farley,* 265 S.W. 449 (Ky. 1924) summarized the fundamental rules in the construction of contracts as follows:

> "Courts, in the construction of contracts, look to the language employed, the subject matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract

> was executed, and accordingly they are entitled to place themselves in the same situation as the parties would have made the contract, so as to view the circumstances as they viewed them, and so as to judge the meaning of the words and of the correct application of the language to the things described. It is therefore an established canon of construction that in order to arrive at the intention of parties, the contract itself must be read in the light of the circumstances under which it was entered into. General or indefinite terms employed in the contract may thus be explained or restricted as to their meaning and application. And the contract must be so construed as to give it such effect, and none other, as the parties intended at the time it was made." (Citation omitted).

Applying the foregoing, the Court does not find that an authority to arbitrate or to waive Ms. Duncan's constitutional rights may be reasonably inferred or implied. First, nowhere in the POA is there any mention that the Plaintiff was authorized to sue or be sued on behalf Ms. Duncan. In fact, the word "action" or "actions" is nowhere mentioned in the POA. Second, the POA is also silent on whether the Plaintiff, as Ms. Duncan's attorney-in-fact, can adjust, settle, discharge or compromise any of Ms. Duncan's accounts, debts, claims and demands. Further, the Court gathers from the record that Ms. Duncan executed the POA at a time when she suffered a stroke or related medical condition in 1998. In order that timely medical healthcare decisions can be made on her

behalf onwards, Ms. Duncan appointed her daughter as an attorney-in-fact. The Court agrees with the Plaintiff that the matter of agreeing to arbitrate pre-dispute legal claims and to waive constitutional rights is unrelated to making either healthcare or investment decisions. Even if the POA dealt with Ms. Duncan's financial interests, (a point raised by the Defendants), this did not remove the fact that the Plaintiffs authority "to sign any and all documents and papers" are restricted either by that which is (1) "necessary to carry out the handling of any such investments, or interests in such investments," or (2) "related to medical decisions affecting [Ms. Duncan]." The attachment of a stand-alone document, i.e., the ADR Agreement here, behind a stack of papers presented to the Plaintiff as relating to the admission of her mother to the Facility for continued medical care can be misleading, if not deceptive. These facts, which put in proper context the purpose for which the specific authorities were intended (by Ms. Duncan) to be used, should restrict the breadth of her implied authority to carry out her principal's, (Ms. Duncan), intentions. Because it is reasonable to construe that healthcare- or investment-related considerations restrict the reach of the Plaintiffs authority to sign documents, it cannot be reasonably inferred that the authority to arbitrate or to waive constitutional rights were contemplated or intended by Ms. Duncan in her POA.

Accordingly, the Court concludes that Plaintiff did not have the capacity to bind her principal to a arbitration nor to a waiver of constitutional rights.

Defenses to avoid the ADR Agreement

Even if a reasonable inference can be made that Ms. Duncan conferred on the Plaintiff the authority to submit to arbitration, the Court next determines whether the Plaintiff established the existence of any defense/s under Kentucky contract law that avoid/s the ADR Agreement.

The Plaintiff contends that her deposition and of Mr. Brand established that she did not knowingly sign the ADR Agreement. While her mother was at the Intensive Care Unit (ICU) of the Frankfort Regional Medical Center (FRMC), she went over the admissions process with the admissions counselor at the FRMC for several hours.[6] She was made to understand that her mother cannot be discharged or released from FRMC until there is a bed available at another healthcare facility. The Defendants' Facility had an available bed and so was chosen. At the Facility, she said Mr. Brand presented her with a stack of papers, which Mr. Brand identified as the "standard application packet." According to the Plaintiff, she affixed her signature on the spaces pointed to her by Mr. Brand.[7] She signed where Mr. Brand told her to sign.[8] At her deposition, she testified that Mr. Brand did not tell her about the ADR Agreement, but he simply folded pages over to her where she was supposed to sign.[9] Mr.

6. *See* Plaintiffs Response to Defendants' Renewed Motion to Dismiss and to Enforce Arbitration Agreement, pp. 2-4.

7. *Id.*

8. *Id.*

9. *Id.*

Brand stated that he was a newly employed at the Facility when he admitted Ms. Duncan. At that time, he said he had very minimal training in the admissions process and in the contents of the documents used for admission. The only briefing he received on the contents of the ADR Agreement came from the business office manager and the assistant bookkeeper. Based on what he was told, the ADR Agreement contained three things (1) it was not a condition of admission, (2) arbitration was an expedited process, and (3) it did not limit damages. Unlike the process with FRMC's admissions counselor, the Plaintiff spent only 10 minutes with Mr. Brand to complete the admissions process.[10]

To the Court's mind, these facts essentially put in question the quality of the Plaintiffs consent when she signed the ADR Agreement. Was it a product of a meaningful consent on the part of the Plaintiff? Can the ADR Agreement be taken as the product of genuine mutual consent between the parties? If this Court were to uphold the rule that a party cannot be required to submit to arbitration unless both parties have agreed that the dispute be arbitrated. *Oakwood Mobile Homes v. Sprowls,* 82 S.W. 3d 193, 195 (Ky. 2002), the Court must inquire into the quality of the Plaintiffs consent (or assent) and the contracting environment when (and where) she signed off on the ADR Agreement.

Here, the facts indicate that the Defendants' Admissions Director led the Plaintiff to believe that the papers in front of her, which included the ADR Agreement,

10. *Id.*

were for purposes of admitting Ms. Duncan, and nothing more. During the 10 minutes that the Plaintiff spent at Mr. Brand's office to complete the admission of Ms. Duncan, the Defendants' Admissions Director directed the Plaintiff to sign on specific spaces on papers that were folded. He did not give minimal adequate information (or even warning) that one document standing alone, yet mixed in the stack, will bind her mother and her mother's successors-in-interest to arbitration, and constitute a waiver of her mother's constitutional rights. These facts, to the Court's mind, support the defense of fraud in *factum.*

Fraud in *factum* or "execution", as distinguished from fraud-in-inducement,[11] occurs when a party makes a misrepresentation that is regarded as going to the very character of the proposed contract itself, as when one party induces the other to sign a document by falsely stating that it has no legal effect. If the misrepresentation is of this type, then there is no contract at all (contract is insufficiently formed and therefore unenforceable), or what sometimes is anomalously described as a void, as opposed to a voidable, contract. *See Cancanon v. Smith Barney, Harris Upham & Co.,* 805 F.2d 998 (11th Cir. 1986); *Dougherty v. Mieczkowski,* 661 F. Supp. 267 (D. Del. 1987). Such is what happened in this case. Since the ADR Agreement was falsely represented as "standard admissions packet," her signature thereon cannot serve as evidence of her consent at all.

11. In fraud-in-inducement, a party's consent to the contract is not in issue. The agreement procured through fraud in inducement is enforceable against at least one party, and the agreement is voidable at the option of the innocent party.

The Defendants insist that the Plaintiffs mistake as to what she was signing is attributed only to her failure to read it. The Defendants argue that a person who fails to read is bound by what she signs.

The Plaintiff perhaps failed to read each and every page of the papers in the "standard admissions packet." However, while she was not literally deprived of an opportunity to read, it can hardly be said that she had ample time to do so within the 10-minute period that the admissions process with Mr. Brand took. While she went home with a copy of the ADR Agreement, together with the rest of admissions packet, there was no reasonable expectation that the Plaintiff had only 30 days to read it, refer the same to her lawyer and rescind it, when Mr. Brand failed to disclose (or perhaps himself did not know) that such term exists. Contrary to the Defendants' assertion, the knowledge of the terms of the ADR Agreement by the agent of the Defendants contracting in their behalf is a critical one. If both agents here are unaware of the terms of the contract they are purportedly executing, how can the Court conclude that there was a meeting of the minds or that a contract was sufficiently formed? *See Harlan Public Service Co., v. Eastern Cost. Co,* 71 S.W. 2d 24 (Ky. 1934) (to constitute a binding contract, minds of the parties must meet, and one cannot be bound to a contract by un-communicated terms without his consent).

The Plaintiffs failure to read is blameless. First, a primary caregiver preoccupied with the transfer and admission of a patient (recently discharged from the ICU) cannot be reasonably expected, at that point in time, to be

in a position to objectively negotiate and excise contractual terms. Those familiar with hospital discharge and transport procedures understand that the timing of the discharge with the availability of a bed at another facility is vital. The patient and caregivers waiting hardly have any choice. As soon as a bed space comes up, one has to take it or be left carrying the financial burden of additional hospital charges, assuming the hospital will let you stay at all until another bed space from your preferred hospice or rehabilitation center comes along. Any expectation that the Plaintiff and other similarly situated caregivers are in any position to demand terms of admission fails to reflect the reality presented in the process involved here. Consent obtained while a party is under this type of distress is not full consent.

More, the information which Mr. Brand outlined to the Plaintiff was fraudulently misleading. There are conflicting reports whether arbitration process is more expedient or less costly.[12] There has also been no indication that the arbitral award had been the same as judgments or jury awards.[13] Further, if Mr. Brand pointed only to

12. *See* JEAN R. STERNLIGHT, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 Wash. U.L.Q. 637, 678-679; (Fall 1996); AMY E. ELLIOTT, *Arbitration and Managed Care: Will Consumers Suffer if the Two are Combined?,* 10 Ohio St. J. on Disp. Resol. 417 (1995); THOMAS J. STIPANOWICH, Rethinking American Arbitration, 63 Ind. L. J. 425,460 (1988).

13. *See* JEAN R. STERNLIGHT, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration,* 74 Wash. U.L.Q. at 683-684.

the spaces in the ADR Agreement where the Plaintiff's signature was required, then this would constitute an unconscionable manipulation of the contract formation process. Mr. Brand's failure to disclose the essential terms of the ADR Agreement, (i.e., by signing, the Plaintiff waived on behalf of Ms. Duncan the latter's constitutional rights), crosses over to concealment.

The unconscionable manipulation perpetrated on the Plaintiff is further manifested by the Defendants' choice in timing the execution of the ADR Agreement. Here, the ADR Agreement is presented for the Plaintiff's signature at about the time that Ms. Duncan is transported and wheeled into the Facility. The Plaintiff did not have a genuine choice to say "no," even assuming she read (and understood) the ADR Agreement. The terms of the ADR Agreement clearly provided that it"(was] executed ... in conjunction with the agreement for admission and for the provision of nursing facility services." The Court finds the meeting at Mr. Brand's office on March 17, 2006, presented an inescapable adhesion to the Plaintiff. As for the purported ability of the Plaintiff to rescind the ADR Agreement within 30 days from signing it, the Defendants fail to appreciate that Ms. Duncan would have by then residing in the Facility for 29 days, and her care by the Facility would have then significantly progressed that there is nothing more to be done but acquiesce meekly.

The Defendants asserted that at the top of the first page of ADR Agreement, it clearly stated in bold and capital letters that the ADR Agreement was "NOT A CONDITION OF ADMISSION- READ CAREFULLY."

Thus, according to the Defendants, the Plaintiff could have freely refused to sign the ADR Agreement. However, following this quoted bold and capitalized text, there was another stipulation but in a finer print: "The [ADR Agreement] is executed ... in conjunction with an agreement for admission and for the provision of nursing facility services." The Court, in construing and interpreting the quoted bold text, (by itself and in juxtaposition with the fine print), concludes that the ADR Agreement causes confusion and is substantively manipulative. If the ADR Agreement is not a condition for admission, as the Defendants say it is, what is the consideration for the Plaintiff to submit to arbitration and waive her constitutional rights? *See Beverly Health and Rehabilitation Services, Inc., et al., v. Smith,* 2008-CA-000604-MR (Ky. Ct. App. April 10, 2009). If in fact there is no return promise or legal detriment on the part of the Defendants, the Plaintiff, (whose principal gained nothing), can clearly avoid the ADR Agreement for lack of consideration. Second, such "bold" representation that the ADR Agreement is not a condition for admission is indeed illusory or deceptive, since clearly looming in the fine print is the stipulation that the consent to arbitrate and to waive her constitutional rights is a consideration for the provision of nursing facility services. The Plaintiff did not have any option but to adhere and sign. Thus, the ADR Agreement may also be avoided on the ground that it was entered into under duress and/or undue influence.

The expansion of arbitration agreements outside the world of merchant-to-merchant (or parties in an equal playing field) in which arbitration agreements were

conceived, and into the world of consumer transactions, prompts this Court to take a closer consideration at the specific facts, and guard against a formalistic review of contracts. The indicia of true consent is not merely the existence of a signature, but the degree of disclosure of the terms of arbitration and its impact on the resisting party's knowledge or access to knowledge of the differences between arbitration and its alternative forums. There must be careful and searching scrutiny of the process that goes into forming the contract, i.e., ADR Agreement, to ensure that this process meets the minimum levels of integrity. Our society adopted alternative dispute settlement procedures in order to deliver, not just speed and economy, but also fundamental fairness. Where parties deal at arms length and possess equal bargaining power, there is less concern one party will take unfair advantage of the other. Conversely, where a stronger party imposes an adhesion contract on a weaker party, the possibility of overreaching is greater. Our society's preference for arbitration should not come at the price of fundamental fairness and freedom in contracting.

Considering the evidence in the record, the Court finds that the Plaintiff showed proof of the grounds to avoid the ADR Agreement. Most critical is the proof that the ADR Agreement did not result from the Plaintiffs informed and freely-given consent.

ACCORDINGLY, the Defendants' *Renewed Motion to Dismiss and/or to Stay the Lawsuit Pending Alternative Dispute Resolution Proceedings* is **DENIED.** The Court directs the parties to prepare for pre-trial and trial.

The Court further urges the parties to refer this case to mediation in accordance with its local Rule 14.

This order is appealable as provided in KRS 417.220(a).

SO ORDERED, this 25 day of June, 2009.

/s/______________________________
THOMAS D. WINGATE
Judge, Franklin Circuit Court

APPENDIX D — GENERAL POWER OF ATTORNEY, DATED JANUARY 19, 1998

General Power of Attorney

KNOW ALL MEN BY THESE PRESENTS:

That I, Alma C. Duncan, presently residing at 310 Forrest Drive, Lawrenceburg, Anderson County, Kentucky, being an adult resident of such city, county, and state, and being under no legal disability of any kind, have made, constituted, and appointed, and do by these presents hereby make, constitute and appoint Donna A. Ping, of 3416 Westridge Circle, Lexington, Fayette County, Kentucky 40502, also an adult resident of such city, county and state, my true and lawful attorney in fact, giving and granting to her full and complete power and authority to do and perform any, all, and every act and thing whatsoever requisite and necessary to be done, to and for all intents and purposes, as I might or could do if personally present, including but not limited to the following:

To take possession of any and all monies, goods, chattels, and effects belonging to me, wheresoever found;

To draw, collect and receive any and all monies on deposit to my credit in any banks, savings and loan associations, trust companies, credit unions and all other financial institutions;

To enter and deposit or withdraw and remove the contents from any safety deposit box held by me;

To purchase, transfer, sell, assign, redeem, convert and/or reinvest, and to generally dispose of and handle any and all United States Treasury securities of whatever kind and nature and United States Treasury bonds of whatever kind and nature and any and all interests in stocks, mutual funds, securities, and any and all other investments of any kind whatsoever, and wheresoever situated, and to execute and sign on my behalf all documents and papers necessary to carry out the handling of any such investments, or interests in such investments;

To receive, deposit, invest and spend funds on my behalf;

To take charge of any real estate which I may own in my own name or together with other owners, legally or equitably, and to mortgage, convey or sell said real estate and perform any acts necessary to mortgage, convey or sell said real estate;

To make any and all decisions of whatever kind, nature or type regarding my medical care, and to execute any and all documents, including, but not limited to, authorizations and releases, related to medical decisions affecting me; and

To generally do any and every further act and thing of whatever kind, nature, or type required to be done on my behalf.

I hereby ratify and confirm all that the said Donna A. Ping, as my attorney-in-fact shall lawfully do or cause to be done by virtue hereof. I further hereby cancel and

revoke any and all documents previously executed by me granting any power or appointing any other person to serve as my attorney-in-fact.

It is my intention and desire that this document grant to my said attorney-in-fact full and general power and authority to act on my behalf and I thus direct that the language of this document be liberally construed with respect to the power and authority hereby granted my said attorney-in-fact in order to give effect to such intention and desire. The enumeration of specific items, rights, or acts or powers herein is not intended to, nor does it limit or restrict, the general and full power herein granted to my said attorney-in-fact.

It is further my intention and desire that this document qualify as a DURABLE POWER OF ATTORNEY pursuant to KRS 386.093 and that the power and authority hereby granted by this document shall not be affected by any later disability or incapacity of me as principal, if being my intention and desire that the power and authority hereby conferred shall be exercisable by my said attorney-in-fact notwithstanding any disability or incapacity which I may in the future suffer, or any later uncertainty as to whether I am dead or alive. All acts done by my said attorney-in-fact pursuant to the power and authority hereby conferred during my period of disability or incompetence or uncertainty as to whether I am dead or alive shall have the same effect and inure to the benefit of and bind me, my heirs, devises and personal representatives the same as if I were alive, competent and not disabled or incapacitated. In the event a fiduciary is hereafter appointed by a Court of appropriate jurisdiction

for me, the power and authority hereby conferred shall thereupon terminate and my said attorney-in-fact herein appointed shall then account to the fiduciary appointed by such Court of appropriate jurisdiction.

IN WITNESS WHEREOF, I have hereunto affixed my signature on this the 19 day of January, 1998.

/s/________________________
Alma C. Duncan
310 Forrest Drive
Lawrenceburg, Kentucky 40342

STATE OF KENTUCKY
COUNTY OF FRANKLIN

Subscribed, sworn to and acknowledged before me a Notary Public in and for the state and county aforesaid by Alma C. Duncan, on this the 19th day of January, 1998.

My Commission Expires: 10/20/2000

/s/________________________
Notary Public, State at Large

This instrument Prepared By:

/s/__________________
Larry Cleveland
CLEVELAND & AYER
420 Ann Street
P.O. Box 595
Frankfort, Kentucky 40602

APPENDIX E — RESIDENT AND FACILITY ARBITRATION AGREEMENT, DATED MARCH 17, 2006

RESIDENT AND FACILITY ARBITRATION AGREEMENT (NOT A CONDITION OF ADMISSION – READ CAREFULLY)

This Arbitration Agreement is executed by BHR Frankfort (the "Facility") and Alma Duncan ("Resident" or "Resident's Authorized Representative," hereafter collectively referred to as "Resident") in conjunction with an agreement for admission and for the provision of nursing facility services (the "Admission Agreement") by Facility to Resident. The parties to this Arbitration Agreement acknowledge and agree that upon execution, this Arbitration Agreement becomes part of the Admission Agreement, and that the Admission Agreement evidences a transaction involving interstate commerce governed by the Federal Arbitration Act. It is understood and agreed by Facility and Resident that any and all claims, disputes, and controversies (hereafter collectively referred to as a "claim" or collectively as "claims") arising out of, or in connection with, or relating in any way to the Admission Agreement or any service or health care provided by the Facility to the Resident shall be resolved exclusively by binding arbitration to be conducted at a place agreed upon by the Parties, or in the absence of such an agreement, at the Facility, in accordance with the National Arbitration Forum Code of Procedure, which is hereby incorporated

into this Agreement[1], and not by a lawsuit or resort to court process. This agreement shall be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement to arbitrate includes, but is not limited to, any claims for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards, as well as any and all claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement. However, this agreement shall not limit the Resident's right to file a grievance or complaint with the Facility or any appropriate government agency from requesting an inspection from such an agency, or from seeking review under 42 C.F.R. section 431.200 et seq. of a decision to transfer or discharge the Resident.

The parties agree that damages awarded, if any, in an arbitration conducted pursuant to this Arbitration Agreement shall be determined in accordance with the provisions of the state or federal law applicable to a

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1. Information about the National Arbitration Forum, including a complete copy of the Code of Procedure, can be obtained from the Forum at 800-474-2371, by fax at 651-604-6778 or toll-free fax at 866-743-4517, or on the internet at http://www.arb-forum.com.

comparable civil action, including any prerequisites to, credit against, or limitations on, such damages. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion shall not be effective and the remainder of the agreement shall remain effective.

It is the intention of the parties to this Arbitration Agreement that it shall inure the benefit of and bind the parties, their successors, and assigns, including without limitation the agents, employees and servants of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including any parent, spouse, sibling, child, guardian, executor, legal representative, administrator, or heir of the Resident. The parties further intend that this agreement is to survive the lives or existence of the parties hereto.

All claims based in whole or part on the same incident, transaction, or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose and should reasonably have been discovered prior to the date upon which notice of arbitration is given to the Facility or received by the Resident and such claim is not presented in the arbitration proceeding.

THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION

AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) that execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this Arbitration Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

The undersigned certifies that he/she has read this Arbitration Agreement and that it has been fully explained to him/her, that he/she understands it contents, and has received a copy of the provision and that he/she is the Resident, or a person duly authorized by the Resident or otherwise to execute this agreement and accept its terms.

Date: ___________________

Signature: ________________________________
(Resident)

Witness: ____________________________

If the resident is unable to consent or sign this provision because of physical disability or mental incompetence or is a minor and an authorized representative is signing this provision, complete the following:

Date: 3/17/06

Relationship to Resident: Daughter/POA

Signature: /s/ Donna A. Ping
(Authorized Representative)

Witness: /s/ Joshua B. Brand

For Facility:

Date: 3/17/06

Authorized Representative Signature: /s/

Print Name and Title: Joshua Brand, AD