2011 WL 10989862 (Ky.App.) (Appellate Brief)
Court of Appeals of Kentucky.

GGNSC STANFORD, LLC d/b/a Golden Living Center-Stanford, et al., Appellants,

v.

Robert ROWE and Richard Rowe, as Co-Administrators of the Estate of Deborah Rowe, Deceased, and on Behalf of the Wrongful Death Beneficiaries of Deborah Rowe, Appellees.

No. 2010-CA-002330.
July 5, 2011.

Appeal from Lincoln Circuit Court No. 10-CI-00187

Brief of Appellees

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***ii INTRODUCTION**

This is a dispute regarding the applicability of an alleged arbitration agreement in an underlying case of nursing home neglect and **abuse**. The administrators of the Estate of Deborah Rowe, Robert and Richard Rowe ("Appellees") are suing a nursing home and a nursing home conglomerate and the nursing home facility administrator, in the Lincoln County Circuit Court for negligence, medical negligence, corporate negligence, wrongful death, and violations of the long term residents' rights statute KRS §§ 216.510, *et seq.*

In Answer and in Motion to Dismiss, GGNSC Stanford, LLC; GGNSC Administrative Services, LLC; GGNSC Holdings, LLC; GGNSC Equity Holdings, LLC; Golden Gate National Senior Care, LLC; Golden Gate Ancillary, LLC; GPH Stanford, LLC; and Administrator Kyle Privett (collectively, "Appellants"), have proffered the existence of an arbitration agreement governed by the Federal Arbitration Act and purportedly made between Appellants and Deborah Rowe. Appellants intended to oust the jurisdiction of the Circuit Court based upon the strength of this agreement. The Circuit Court denied Appellants' motion in a final appealable Order, finding that the alleged signatory to the proferred arbitration agreement lacked authority over Deborah Rowe's affairs, and therefore the agreement was invalid. Appellants have appealed, and Appellees herein respond.

STATEMENT CONCERNING ORAL ARGUMENT

Appellees respectfully request that the Court hold oral argument in this appeal. In their appeal, Appellants propose that under certain circumstances the law should recognize an actual agency/guardianship on behalf of an incapacitated adult, even without an appointment from a judicial forum in a guardianship proceeding. This proposal clearly contravenes the General Assembly's statutory scheme currently in place, and, as such, Appellants are effectively praying for judicial law-making. Oral argument in this instance would permit Appellees to be heard in opposition to this radical proposal.

***1 FACTUAL BACKGROUND**

As Appellants have recounted, Deborah Rowe was admitted to the nursing home as an incapacitated adult, of 53 years of age, upon her parents becoming too **elderly** to care for her. She had been mentally incapacitated all her life. She was a resident at Golden Living Center - Stanford, a facilityowned, operated, managed, and administered by Appellants, from February 22, 2007 to February 17, 2009. (Record at p. 4)

Again, the underlying case here involves extreme instances of nursing home **abuse** and neglect. During the course of her residency at Appellants' facility, Deborah Rowe suffered numerous physical and emotional injuries as a result of Appellants' acts and omissions. These constitute the basis of the underlying action in this matter. Specifically, she sustained numerous falls, dehydration, and urinary tract infection while at the Stanford facility. (R. 10-11) She suffered from chronic constipation as a result of the negligence of Appellants, and, in turn, she eventually died of an abdominal aneurysm. (R. 11) Thus, sShe suffered from severe pain, humiliation, and degradation as a result of Appellants' negligence. (*Id.*)

PROCEDURAL BACKGROUND

On April 15, 2010, Appellees filed suit in the Lincoln County Circuit Court against Appellants, alleging causes of action for negligence, medical negligence, corporate negligence, and violations of Deborah Rowe's long term care resident's rights. (Complaint, R. 2-28) Appellants responded on May 20, 2010, by filing a Motion to Dismiss, relying on an arbitration agreement signed not by Deborah Rowe, but allegedly signed by Nancy Rowe, Deborah Rowe's sister-in law. (R. 40) A power-of-attorney produced by Appellants, that Appellants contended bestowed on Nancy Rowe authority ***2** to bind Deborah Rowe to the propounded arbitration agreement, was granted not by Deborah Rowe, but by her parents, Clara Lavon and William Henry Rowe. (R. 57) Yet, there was absolutely no evidence that Clara Lavon and William Henry Rowe possessed authority to in turn grant to someone else authority over Deborah Rowe's affairs.

As such, on November 19, 2010, after opportunity for a full briefing and hearing on the matter, the Lincoln Circuit Court denied Appellants' motion and issued an Order detailing the same. (R. 402-410) Subsequently, on November 29, 2010, Appellants filed a Motion to Reconsider, essentially re-arguing their earlier Motion to Dismiss. (R. 411-412) This too was denied, on December 20, 2010. (R. 434) This appeal followed.

In the Lincoln Circuit Court's Order, the Lincoln Circuit Court here expressly found that, because the guardianship statutes must be strictly construed in Kentucky so as to protect the rights of incompetents and because the Rowe parents had not established a guardianship pursuant to these statutes over their adult daughter, Deborah's parents lacked the power to bequest a power-of-attorney over Deborah to Nancy Rowe. (R. 404-406) The trial court buttressed this finding by further holding that even if the Rowe parents themselves could be considered guardians without having satisfied the rubrics of the guardianship statutes, they could not further delegate this power. (R. 406-407) The principles of agency law, as well as the requirements of Kentucky's guardianship scheme, would not permit this. “In accordance with the heightened burden of proving the authority to delegate expanded duties, the Power of Attorney should be construed narrowly to protect Deborah's fundamental rights outside the statutorily defined judicial procedures.” (R. 407)

***3** The trial court also found that the power-of-attorney itself was facially an insufficient grant of authority over Deborah Rowe's affairs to encompass the arbitration agreement. The arbitration agreement here was a separate agreement from the nursing home admission agreement itself. The purported power-of-attorney here included power over business affairs, but not over health care or the fundamental civil rights of Deborah Rowe. Citing to *Beverly Enterprises, Inc. v. Stivers,* 2009 WL 723002 (Ky.App. 2009), the trial court therefore found that, even if the power-of-attorney was sufficient to effect nursing home admission, the arbitration agreement was optional and separate from admissions and as such, the authority contained within the power-of-attorney was insufficient authority to make the arbitration agreement on Deborah Rowe's behalf. (R. 408)

ARGUMENT

Kentucky law is clear that on appeal of a trial court's denial of a motion to compel arbitration this Court's review is de novo, except that findings of fact are reviewed for clear error only. *Conseco **Finance** Servicing Corp. v. Wilder,* 47 S.W.3d 335, 340 (Ky.App. 2001). While Kentucky law favors the application of arbitration to all disputes between parties, where an arbitration agreement is in existence, this policy comes into play ***only after*** it is determined that the proffered agreement to arbitrate is valid. *See Mt. Holly Nursing Center v. Crowdus,* 281 S.W.3d 809, 813 (Ky.App. 2008) (citing *Kodak Mining Co. v. Carrs Fork Corp.,* 669 S.W.2d 917, 919 (Ky.1984)). Thus, despite Appellants' suggestion otherwise (Appellants' Brief at 21-22), determining the existence of a valid arbitration agreement is a “threshold matter” that “must first be resolved by the court” before all else. ***4** *General Steel Corp. v. Collins,* 196 S.W.3d 18, 20 (Ky.App. 2006). The burden of proving that a valid, enforceable arbitration agreement exists rests squarely upon the party seeking to compel arbitration. *See Dutschke v. Jim Russell Realtors, Inc.,* 281 S.W.3d 817, 824 (Ky. App. 2008); 9 U.S.C. § 4 (directing that the trial court is to order arbitration only “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue”).

Under the Federal Arbitration Act (“FAA”), a waiver of the right to a jury trial and an agreement to arbitrate claims is only enforceable to the extent provided by Kentucky law of contracts and equity. *See* 9 U.S.C. § 2 (agreements to arbitrate are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”); *see also Conseco **Finance** Servicing Corp.,* 47 S.W.3d at 340 n.9 (*citing Doctors Assocs. Inc. v. Casarotto,* 517 U.S. 681 (1996)). Thus, under both federal law and the law of the Commonwealth, a party resisting arbitration may assert State law defenses to contract enforcement.

The Lincoln Circuit Court correctly found here that Appellants have failed to meet the burden imposed upon them under Kentucky law and the FAA. Appellants have not, and cannot, prove the existence of a valid arbitration agreement enforceable against Deborah Rowe, or those who have claims against Appellants derived through her.

Although the arbitration agreement purports to bind Deborah Rowe, the agreement was signed by her sister-in-law Nancy Rowe. (R. 47) Appellants have not alleged that Nancy Rowe signed the arbitration agreement at Deborah's direction, as all parties concede that Deborah Rowe has been incapacitated and of unsound mind all her life. (R. 2) Rather, Appellants base the efficacy of Nancy Rowe as the signatory for Deborah Rowe, upon a power-of-attorney from Deborah Rowe's parents to Nancy Rowe ***5** purporting to grant authority over and on behalf of Deborah Rowe. However, as the parties also concede, 1) Deborah Rowe was an adult, even if mentally incapacitated, and 2) Deborah Rowe's parents never established a guardianship over their adult dauhter.

As such, Deborah Rowe's parents could not delegate authority that they did not legally possess, and could not have delegated that kind of authority anyway. On appeal Appellants contend that Deborah Rowe's parents were guardians *de jure,* and capable of delegating their authority to Nancy. And even if not guardians *de jure,* Appellants contend that the Law will recognize the Rowe parents' authority to bind their daughter's affairs under the circumstances. This is really the *gravamen* of Appellants' appeal.

These arguments are without merit. Appellants misread Kentucky's statutory scheme regarding the requirement of formal guardianship proceedings for an incapacitated adult. Furthermore, while the Law will recognize the authority of third parties in emergency situations to bind principals and wards, being placed in Appellants' nursing home facility is not such an emergency situation. Appellants ludicrously blow up the importance of their arbitration agreements, analogizing them with decisions made in right-to-die cases.

Although not addressed by the Lincoln Circuit Court's Order, Appellants appeal covers in the alternative that Nancy Rowe had apparent authority over Deborah Rowe's affairs even if she did not possess actual authority, and that, in any event, Appellees should be estopped from denying the power-of-attorney in question and contesting the arbitration agreement's validity. Appellants also argue that the power-of-attorney contains sufficient authority to make such an arbitration agreement.

***6** These too are without merit. The crux of the apparent agency issue is whether the Rowe parents had authority over Deborah Rowe's affairs. If they did not, they had no more ability to hold out someone as holding apparent agency than they did to grant actual authority. Furthermore, Appellees cannot be estopped here for two reasons: First, Appellants waived this factually-driven, equitable issue because they failed to timely raise it in front of the trial court. Second and moreover, because Nancy Rowe did not have authority to sign the agreement, estoppel will not save the agreement from attack as a matter of law. Finally, the power-of-attorney is insufficient to make the arbitration agreement proffered in any event because the subject matter of the power-of-attorney does not include discretionary contracts not intrinsic to the admissions process.

Although not the basis for the Lincoln Circuit Court's findings, it should also be noted that Appellees argued below that the subject agreement was unconscionable for various reasons. (R. 151) Very recently, in *Brown v. Genesis Healthcare,* the Supreme Court of West Virginia had the opportunity to address a question that has never been addressed by the U.S. Supreme Court: Are arbitration agreements made pursuant to the FAA unconscionable in the context of admissions to a nursing home for necessary nursing care? *Clayton Brown v. Genesis Healthcare,* ___ SE2d ___ (W.Va. 2011) (slip op.). Yes they are. The West Virginia Supreme Court - after going through an exhaustive survey of U.S. Supreme Court cases touching on arbitration, and examining the U.S. Congressional history respecting the FAA - held that the U.S. Congress did not intend for a nursing home arbitration agreement to be enforceable under the FAA if the agreement was adopted prior to an occurrence of neglience at the facilit resultin in a ***7** personal injury or wrongful death. Such an arbitration agreement would unconscionabl under those circumstances.

The *Brown* Court was careful to note that when a statute or a Common Law doctrine generally applicable to all contracts has a disproportionate effect on FAA arbitration agreements, a complex pre-emption analysis must occur. However unconscionability in the context of FAA agreements was not pre-empted per se, and in the context of nursing home admissions, such agreements met a combined test of procedural and substantive unconscionability. The *Brown* calculus should apply to the agreement at bar as a matter of law.

I. Nancy Rowe did not have the actual authority to bind Deborah Rowe contractually

Despite a power-of-attorney purportedly granted to her over Deborah Rowe's affairs, Nancy Rowe did not have the actual authority to execute the subject arbitration agreement on Deborah's behalf.

A. Deborah Rowe's parents did not possess the requisite authority to act on Deborah Rowe's behalf and grant agency power to Nancy Rowe.

Appellants argue from the assumption that parents need not be appointed guardians of their children in order to make any and all decisions for them, even if they are incapacitated adult children. This is error. Certainly numerous historical cases from Kentucky attest to the propriety of parents appointed as guardians. *See Mason v. Williams,* 176 S.W. 1171 (Ky. 1915) (the power to make decisions for a child as guardian treated as a separate issue from parentage).

Appellants may object that these older cases refer only to situations where there is a spousal separation within the family, where a decision must be made as to whether one ***8** parent vice another, is to be the custodian for the child. However, more recently the Kentucky Supreme Court has affirmed that to take certain actions with respect to a minor child's business, even a parent must be appointed guardian for the child. *Scott v. Montgomery Traders Bank and Trust Co.,* 956 SW2d 902, 904 (Ky. 1997) (mother "must be appointed as guardian by the [District] Court" to receive money on child's behalf).

Deborah Rowe was a mentally incapacitated adult. Deborah Rowe's parents were never appointed guardians for her. They lacked the power Appellants have alleged.

1. Deborah Rowe's parents could not delegate authority that they did not possess.

Deborah Rowe had been incapacitated from birth, as has been conceded. As such, Kentucky law required a guardianship be established for her in order for the requisite power/authority to reside in anyone, anywhere, to make the proffered arbitration agreement on Deborah's behalf. As such, Appellants' motion must fail. Deborah Rowe's parents themselves never held the requisite authority over Deborah to be able to make an arbitration agreement on her behalf, much less had the power to delegate such authority to Nancy Rowe.

The citizen under Kentucky law is inherently imbued with a right to self-determination upon reaching the age of majority. *See DeGrella By and Through Parrent v. Elston,* 858 SW2d 698, 709 (Ky. 1993) (recognizing the Common Law right of self-determination). Only upon the determination that a person is incapacitated - and only to the extent of that incapacity - can another's judgment substitute for that of the adult. This principle, the requirement of prior adjudication of incapacity, was made manifest by the Kentucky General Assembly in its statutes regarding guardianship. KRS § 387.500, entitled *Declaration of Legislative Purpose,* provides (emphasis added):

9** (1) It is the intent and purpose of the General Assembly to recognize that disabled persons have ***varying degrees of disability.

(2) Persons who are only partially disabled ***must be legally protected*** without a determination of total incompetency and without the attendant deprivation of civil and legal rights that such a determination requires.

(3) To this end, guardianship and conservatorship for disabled persons shall be utilized ***only as is necessary*** to promote their well-being, including protection from neglect, exploitation, and **abuse**....

(4) If the court determines that some form of guardianship or conservatorship is necessary, ***partial guardianship or partial conservatorship shall be the preferred*** form of protection and assistance for a disabled person.

Appellants cite KRS § 405.020 and *DeGrella* for the proposition that Kentucky law would recognize the next of kin, with or without a guardianship, as possessing sufficient authority to make the arbitration agreement in question. This is error. KRS § 405.020 simply provides that a dependent adult, upon reaching the age of majority, shall remain in the custody and care of his parents, as if he remained a child.

Minority is factual and not a legal question. Thus, parents have power over their minor children's affairs without an adjudication. On the other hand, disability and incapacity are legal conclusions properly to be made by a court. There is nothing in Kentucky's statutes to suggest that parents may unilaterally determine that a child is incapacitated, and to what extent, and thereafter act on the child's behalf in perpetuity.

Appellants confuse a right to custody with the power to act on behalf of someone, to step in the ward's shoes. Guardianship and custody are different creatures of the law. *McCary v. Mitchell*, 260 SW3d 362, 364 (Ky.App. 2008). While KRS § 405.020 establishes the responsibilities and the rights of parents over children, under no reading of ***10** the statute or any case law referring to it, does it indicate that the parent can bind the adult child in a contract made by the parent. Only a guardian appointed pursuant to Kentucky's guardianship statutes, assuming the same role that parents have over their minor children, would have the authority to do this.

Appellants go on to argue that Kentucky case law has confirmed that parents may, at least in certain circumstances, substitute their judgment for that of their children, and therefore contractually bind them. Appellants rely upon the case of *DeGrella By and Through Parrent v. Elston*, for this proposition. This is a terrible overreach and a misreading of this case.

In *DeGrella By and Through Parrent v. Elston*, 858 SW2d 698 (Ky. 1993), the mother of a vegetative adult petitioned the Kentucky courts for a declaratory judgment authorizing her to discontinue the artificially-supplied nutrition and hydration of her daughter. The Supreme Court of Kentucky affirmed the declaratory judgment, effectively authorizing the action. While noting that what Sue DeGrella's mother sought, strictly speaking, was the declared right to substitute her judgment for that of her daughter, this case ultimately involves the extent of acknowledged authority, rather than its locus. The legal issue was not who, but how far? For it must be remembered that even the fully competent person does not hold unfettered rights over himself. *Commonwealth v. Hicks*, 82 SW 265 (Ky.App. 1904) (suicide a felony at Common Law). The DeGrella Supreme Court's decision was to hold that food and water under the circumstances was medical treatment, and that individuals have the legal right to refuse medical treatment. *DeGrella*, 858 SW2d at 703.

11** Appellants' appeal to this case is both in vain and a little bizarre. In addition to the fact that *DeGrella* involved a petition to the courts for the authority to take action, Sue DeGrella's mother ***had already been appointed guardian over her daughter before the petition. As such, the gist of the suit was the breadth of powers held, rather than where power lay. As the Court openly acknowledged, this was Kentucky's first “right-to-die” case.

> The appellant does not challenge these facts; the appellant challenges the existence of the right even though the facts exist, and we affirm the existence of such right. The subject matter of this action is [***] Sue DeGrella's right to terminate treatment, a choice she made before she was reduced to her present state, and retained when this tragedy befell her.

Id. at 710.

It is thus odd Appellants rely upon a case where the root question was the extent of a person's rights over him or herself. There is no question that Deborah Rowe, had she been competent, would have possessed the authority to enter into an arbitration agreement on her own behalf. And there is little question that guardians have the ability to make contracts on behalf of their wards. However, there is absolutely no basis to advance that parents may act in a similar fashion to bind their adult children, without a guardianship, and *DeGrella* certainly does not stand for this proposition. Appellants' argument that parents or next-of-kin may unilaterally foist contracts on their incapacitated children is made all the more preposterous by the *DeGrella* Court's

conspicuous reliance on the fact that Sue DeGrella, prior to injury, had specifically expressed the desire that she did "not want to be kept alive by artificial means," in the event of irreversible coma. In the case at bar, there is absolutely no evidence that Deborah Rowe, in some inexplicable period of lucidity, expressed a preference for ***12** arbitration over litigation. As such, the law of *DeGrella* is wholly inapplicable to the facts of the case at bar. *DeGrella* involved life and death - not arbitration.

Appellants additionally look to Tabor v. Scobee, 254 SW2d 474 (Ky. 1951), and *Strunk v. Strunk*, 445 SW2d 145 (Ky. 1969), for "substitute judgment" authority, or the proposition that next-of-kin may substitute their judgment for that of the principal. In *Tabor v. Scobee*, a minor child was under operation for the removal of her appendix due to appendicitis. The surgeon, upon discovering that her fallopian tubes were also infected, removed these as well. He did not obtain the consent of the girl's stepmother to remove the fallopian tubes, even though the girl's stepmother was in the hospital at the time. The Court held that this made the surgeon liable, implying that the stepmother had authorit to consent on behalf of the minor stepchild to this significant operation

In *Strunk*, another case issuing prior to the passage of the guardianship statutes, the mother of an incompetent man petitioned the courts to permit a kidney transplant from the ward to the ward's brother who was dying of kidney disease. Because the evidence demonstrated that the psychological loss of a brother would be more harmful for the ward than the loss of a kidney, the operation was allowed to proceed. Both of these cases involved the assertion of the right of the next-of-kin to consent, or refuse consent, regarding a medical procedure.

Appellants fail to recognize the principled and stark distinction between *DeGrella*, *Tabor*, and *Strunk* with the case at hand. In certain situations, substitute judgment is called for, and it is natural that this judgment be located with the next of kin. Indeed, in extremis, a medical professional, or indeed anyone, can act to save the life of another, without any need of additional authority from anyone. This is a far cry from ***13** locating, a substitute judgment, to make a wholly unnecessary arbitration contract.

Indeed, throughout argumentation on the issue of arbitration, Appellants attempt a sleight of hand. Rhetorical enthymeme is a method of argumentation where syllogism is constructed, with one unstated premise being the actual point to be advanced. Succinctly, Appellants want this Court to accept the premise that in any circumstance there must exist sufficient authority in someone - either in the principal himself or in someone else - to make a contract for arbitration. Appellants want this Court to believe that the guardianship statute does not create authority; it only finds its locus.

It is for this reason that Appellants point out that the guardianship statutory scheme is meant only remedial. For this reason, Appellants "defend" the Rowe parents' decision not to seek a guardianship: "Thus, there was never any need for the family to invoke the Guardianship Statute's procedural mechanism for Deborah's protection." (Appellants' Brief at 14) Such a point is only relevant if the reader accepts the premise that there must exist decision-making authority somewhere in the world competent to make the arbitration agreement. For this reason, Appellants point out that "[g]uardianship procedures do not always result in the appointment of a Guardian." *(Id.)* This is only an interesting point if the failure to appoint a guardian does not equate to the failure of authority. Unfortunately for Appellants, it does.

KRS § 387.065 may be remedial overall, but within the ambit of the ordinary powers envisaged by it, its verbiage indicates exclusivity. The word "shall" in the statute should not be converted into a mere advisory. KRS § 387.065(8) states in pertinent part (emphasis added):

> (b) The guardian has reason to believe that the ward is disabled or partially disabled as defined in KRS 387.510, in which event, the ***14** guardian ***shall*** institute a proceeding for appointment of a guardian, limited guardian, conservator or limited conservator pursuant to KRS 387.500 to 387.770.

The General Assembly has affirmatively stated that the legal power over a disabled person in the form of guardianship extends commensurate to the minimum degree necessary to promote the disabled person's well-being, implicitly recognizing the necessity for a ***prior adjudication of disability.*** As the Lincoln Circuit Court correctly held, Kentucky's guardianship statutes

regarding adults are non-discretionary. The only exceptions to this are in those instances where a decision is so vital that the Law will recognize a decision-maker. But at the time Nancy Rowe signed the arbitration agreement, neither she nor anyone else in the world held the authority to make that agreement.

Appellants' subtle premise - that they have at least the right to make the offer of arbitration - is wholly unwarranted and points up the vast difference between the case at bar and *DeGrella, Tabor, and Strunk.* Where a decision must be made - either for or against - the Law will find a decision-maker. Where a decision does not rise to the level of life and death, a decision-maker in the case of an incompetent adult must be appointed.

2. Guardianship authority, even if possessed by Deborah Rowe's parents, was non-delegable.

It appears that Lincoln Circuit Court decided this case upon a finding that Deborah's parents could not transfer ersatz guardianship powers from themselves to Nancy Rowe. “The standard of strict compliance required in the implementation of Kentucky's guardianship statutes renders Deobrah's parents inadequate authority to transfer her care to a third party.” (R. 406) That is, even if parentage and guardianship ***15** were synonymous respecting powers over a ward, Mr. and Mrs. Rowe could not simply step into the shoes of a District Court and name a new guardian to relace themselves.

A parent may not just give custody of a child to another, without taking into account both the rights of others and the needs of the child. *See Mason,* 176 SW at 1172 (an instrument purporting to give custody of a child to another, over a non-custodial parent, is void as against public policy). ***Even the principal herself*** may not create a *de facto* guardianship, via a power-of-attorney. *Rice v. Floyd,* 768 SW2d 57, 60-61 (Ky. 1989). If this is so, certainly a guardian cannot just create an ersatz guardian as a replacement. This is the District Court's prerogative.

Rice v. Floyd is particularly illuminating in this regard. In Rice, an **elderly** woman had made her lawyer her attorney-in-fact through the execution of a durable power-of-attorney. Upon lapsing from capacity, her relative sought to be appointed guardian over her. The District Court held that, since a durable power-of-attorney existed, a guardianship proceeding was neither necessary nor appropriate. The Kentucky Supreme Court eventually reversed this holding, affirmatively establishing that a durable power-of-attorney is not a replacement for a guardianship. To the challenge that KRS § 387.500(4) specifies that the least restrictive means of providing for the disabled should be used, and that under the circumstances, this meant utilization of the durable power of attorney vice the establishment of a guardianship, the Supreme Court stated:

> K.R.S. 387.500(4) merely advises the trial court of the legislative intent to impose the least restrictive measures under the individual's circumstances. The trial judge is not granted authority by this section to forego a hearing as set forth in K.R.S. 387.570, because he is of the opinion that the respondent is being adequately taken care of by other means.

Rice, 768 SW2d at 60. Then the *Rice* Court goes on to state:

> ***16** It is the holding of this court that the durable power of attorney is not a substitute for the appointment of a guardian. The existence of a durable power of attorney cannot prevent the institution of guardianship proceedings. ***The disabled person is entitled to have the district court exercise control and supervision of her estate*** by the impaneling of ***a jury to determine whether she is disabled*** pursuant to Chapter 387 of the Kentucky Revised Statutes and if so ***to appoint a guardian in accordance with that chapter,*** and if a fiduciary is appointed then the power of attorney-in-fact shall terminate and an account must be given to the court-appointed fiduciary.

Rice, 768 SW2d at 61 (emphasis added). The necessary upshot of this is Deborah Rowe's parents could not unilaterally give guardianship powers to another via a power-of-attorney. Again, if a principal could not do so, certainly a guardian could not.

With regard to even simple Common Law agency, an agent of a principal cannot "sub-delegate" to another person that authority over the principal's affairs requiring discretion. Ministerial tasks may be delegated. Those requiring discretion, may not. Thus, as the (alleged) agents of Deborah Rowe, any decisions regarding arbitration made on Deborah's behalf would necessarily have to have been made by her parents themselves. They could not be delegated to another agent, and Appellants' appeal must fail for this reason.

> An agent cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of a principal. Or, as the rule has sometimes been stated, because the agency relationship, which is normally grounded on trust and confidence the principal places in his agent, is personal in nature, agency duties ordinarily cannot be delegated without the express authority of the principal where the duties involve any personal discretion, skill or judgment. An agent may generally, however, delegate the performance of ministerial or mechanical acts, and the performance of such delegated acts will be regarded as the act of the agent and binding on the principal.

***17** 3 Am. JUR. 2d Agency § 155; *see also Gaddie v. Collins of Kentucky, Inc.*, 248 SW2d 722 (Ky. 1952) (agent entrusted with management of business cannot substitute another).

This principle combines with the further principle that "a principal is never bound where the person dealing with the agent knows, or has reason to know, that the agent is exceeding his authority." *Gaines v. Murphy*, 239 S.W.2d 453, 455 (Ky. 1951). Obviously Appellants had reason to know that Deborah Rowe's parents were the duly-appointed guardians for Deborah (except that they were not), that they should have been the persons making decisions on Deborah's behalf, and that therefore the parents were exceeding their authority in sub-delegating their guardianship authority to Nancy Rowe.

"Unless otherwise agreed, an agent cannot properly delegate to another the exercise of discretion in the use of a power held for the benefit of the principal." *Restatement (Second) of Agency* § 18 (1958); *see also id.* at § 78. If some kind of custom or usage created an authority in Deborah Rowe's parents such that they could be considered her agent, they may not give this authority away. The only route to divest themselves of such power, and place it in another, is to pursue a guardianship in another.

In *Jones v. Kindred Healthcare Operating, Inc.*, 2008 WL 3861980 (Tenn.Ct.App. 2008), the Tennessee Court of Appeals considered a similar situation. In Jones, the principal (who was not incapacitated) chose an agent to act on the former's behalf via the grant of a power of attorney. The agent thereafter attempted to delegate this power via another power of attorney. Upon the principal's admission to a nursing home, the sub-agent, signed an arbitration agreement on the principal's behalf. The Tennessee Court of Appeals held that the agent's attempt at delegation to a sub-agent to ***18** be ineffective - there was nothing in the language of the first power of attorney permitting or guiding, the agent in the choice of sub-agent. "It is one thing for the attorney-in-fact to employ agents to carry out her duties; it is quite another for the attorney-in-fact to delegate her powers to another not chosen by the principal." *Id.* at *4.

Here there is not only no permission or guidance in the instrument constituting the power over Deborah Rowe's affairs, regarding substitute agents; there is no instrument at all to look to. A contractual duty may not be unilaterally assigned if it involves one party's skill, trust, or confidence; that is, if the obligee has relied on the obligor's honesty, skill, reputation, character, ability, wisdom, or taste, or the obligor has promised to act in good faith or to use his or her best efforts. *See* 6A CJS ASSIGNMENTS § 40 (Contracts for Personal Services). How much more is this true where the duty was never actually created, just assumed, and the obligee has had no say in the matter?

Clara Lavon and William Henry Rowe possessed no *de jure* authority over their daughter's affairs upon her reaching the age of majority. What is more, even if they did have some authority in this regard, they could not have delegated this kind of authority - authority over one incapacitated - to others without a district court's consent.

B. Even if Deborah Rowe's parents had the requisite authority over her, and could delegate that authority, the power-of-attorney granted to Nancy Rowe is an insufficient grant of authority for Nancy Rowe to make an arbitration agreement on Deborah Rowe's behalf.

The power of attorney facially did not bestow on Nancy Rowe authority to bind Deborah Rowe to an optional arbitration agreement because the power of attorney document only purported to convey to Nancy Rowe authority to make certain, limited decisions for Deborah. There is no authority in this power to make medical decisions or to execute waivers related to such medical or caremakers' decisions. The power of ***19** attorney submitted by Defendants did not convey sufficient authority to bind Deborah Rowe to the arbitration agreement.

Defendants' look to a quote from *Rice v. Floyd*, 768 S.W.2d 57 (Ky. 1989), for support to go around Kentucky's obvious statutory mandate: "The Uniform Probate Code (U.P.C.) was developed with the intention that the durable power of attorney would provide an alternative to court-oriented, Guardianship protective procedures." *Rice*, 768 S.W.2d at 60. What Defendants fail to note is that this comment from the Supreme Court in *Rice* assumes a valid power-of-attorney created by a valid authority. KRS § 386.093 provides that a durable power of attorney may be created that survives incompetence. It does not provide that a power of attorney can be created by an incompetent, or created by others over an incompetent person without some kind of legal authority over that person.

Because the issue addressed by Defendants' Motion to Reconsider does not involve the efficacy of the power-of-attorney held by Nancy Rowe - it involves the authority of Deborah Rowe's parents to grant the power of attorney in the first place - this point from Rice is immaterial. As *Rice* specifically says: "It is the holding of this court that the durable power of attorney is not a substitute for the appointment of a guardian." *Rice*, 768 S.W.2d at 60-61.

In *Beverly Enterprises, Inc. v. Stivers*, 2009 WL 723002 (Ky. App. 2009) (unpublished), the Kentucky Court of Appeals held that actual, express authority to sign papers necessary to admit a principal to a nursing facility does not reach to authorize optional arbitration agreements. In that case, Bessie Nowlin told an agent to sign papers to admit her to a nursing facility. *Id.* at *1. When the agent signed the admissions ***20** document, she also signed an arbitration agreement that was not a prerequisite to receiving care at the facility. *Id.* The court said,

Ms. Nowlin's granting of authority to her relatives to act as her agent was limited to the signing of *admission documents'* We agree with the trial court that, unlike the medical forms signed by the relatives, the arbitration agreements were not specifically related or necessary to Ms. Nowlin's admission into Appellants' nursing facility. This fact is most persuasively demonstrated by the title of the agreements themselves, which state, "Resident and Facility Arbitration Agreement (Not a Condition of Admission-Read Carefully)."

Id. at *2.

Like *Stivers*, the authority granted here includes the authority to execute ***necessary*** documents and to transact business. The arbitration agreement, however, was a completely optional agreement, and did not constitute transacting business for Deborah Rowe. Even if the power of attorney was valid to give Nancy Rowe some authority over Deborah Rowe's affairs, that authority does not extend to optional agreements that strip her of her fundamental rights. The power-of-attorney in this case, which is limited, simply does not empower Nancy Rowe to make unnecessary, discretionary contracts.

II. Apparent Authority fails in the same measure as Actual Authority

If there is not sufficient evidence that Mr. and Mrs. Rowe had guardianship-type authority over Deborah, then they cannot have held out Nancy Rowe with apparent authority. Agency cannot be created by the declarations or actions of the alleged agent. *White Plains Coal Co. v. Teague*, 173 S.W. 360 (Ky. App. 1915); *Cumnock-Reed Co. v. Lewis*, 128 S.W.2d 926, 930 (Ky. App.

1939). That is, agency cannot be created by someone without authority. "Apparent authority is not actual authority but is the authority the agent is ***held out by the principal*** as possessing." *Golden Living Center-Stanford Nursing Center v. Crowdus,* 281 S.W.3d 809, 813 (Ky. App. 2008) (emphasis ***21** added). If Mr. and Mrs. Rowe did not have authority, they could not have held out Nancy as an agent.

If, on the other hand, Deborah's parents did have authority, but were prevented from delegating it, they could not hold out Nancy Rowe in this event either. The guardianship statutes of Kentucky exist to protect the wards. They do not exist to protect sophisticated parties that know that they are not dealing with a duly appointed guardian.

That is, Appellants could not have justifiably relied upon any holding out of Nancy Rowe with a putative agency power over Deborah Rowe, where Appellants knew that Deborah Rowe was incapacitated, had been since birth, and someone else (Deborah's parents) claimed guardianship powers over her. Under the laws of Kentucky in this area, guardianship power is regulated, KRS § 387 *et seq.*, as Appellants were no doubt aware. They could not have justifiably relied upon any guardian's purported sub-delegation of any but the most mundane of ministerial tasks via a power-of-attorney. "[A] principal is never bound where the person dealing with the agent knows, or has reason to know, that the agent is exceeding his authority." *Gaines v. Murphy,* 239 S.W.2d 453, 455 (Ky. 1951). Simply put, Appellants purport to have relied upon something upon which they should not have relied.

Appellants were put upon inquiry to determine the scope of Nancy Rowe's alleged powers when they realized there was a power-of-attorney signed, not by Deborah Under these circumstances, they had a duty to inquire and to verify Nancy Rowe's authority. Appellants did not do so - to their own peril.

The Lincoln Court noted in its Order that "'[a]pparent authority is not actual authority but is the authority the agent is held out by the principal as possessing."' (R at ***22** 408) (*quoting Golden Living Center-Stanford Nursing Center v. Crowdus,* 281 S.W.3d 809, 813 (Ky. App. 2008)) Deborah Rowe did not hold out Nancy Rowe as having authority over her. This latter fact would not necessarily be decisive if a guardianship had been established over Deborah Rowe in the persons of Deborah's parents, who allegedly signed a power of attorney over Deborah. Yet, such a guardianship did not exist either. Defendants argue that Deborah's parents constituted an ersatz principal, capable of "holding out" someone as an agent, even where the parents were not appointed guardians. This argument is without merit and is addressed *supra.*

Again, the Kentucky General Assembly has affirmatively stated that the legal power over a disabled person in the form of guardianship may only extend to the minimum necessary to promote the disabled person's well-being, and the Assembly has recognized that there are obviously different degrees of disability. KRS § 387.500. This implies that the power over the incapacitated in Kentucky is a power strictly regulated, and that institutions should not be able to willy nilly claim they relied on appearances when decisions are being made over the helpless.

Where a party relies upon a power of attorney over a person, the party must seek to establish the grant of authority from the principal, or, in lieu thereof, the legal mechanism whereby the grant exists absent the principal's volition. They may not rely upon appearances, when they are on notice of incapacity. *C.f. Gaines v. Murphy,* 239 S.W.2d at 455 (principal not bound when third party on notice of question of authority).

III. Appellants have waived any argument regarding equitable estoppel, and it is otherwise without merit.

Appellants have waived estoppel as an issue. Appellants did not raise the issue of estoppel either in their initial memorandum of law supporting their Motion to Dismiss or ***23** in their Reply to Plaintiffs' Response in Opposition. Appellants did raise issues of estoppel in their Motion to Reconsider in front of the Lincoln Circuit Court. (R. at 416, 419) However, motions to reconsider are extraordinary instruments and do not exist to make new arguments that could have and should have been advanced in the regular course of litigation. The U.S. Court of Appeals for the Sixth Circuit had this to say regarding motions to reconsider: "A motion under Rule 59(e) is not an opportunity to re-argue a case." *Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146

F3d 367, 374 (1998) (citations omitted). Motions to Reconsider exist to facilitate reconsideration given "'an intervening ***change of controlling law,*** the availability of ***new evidence,*** or the ***need to correct a clear error or prevent manifest injustice.***"' *Virgin Atlantic Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2nd Cir. 1992) (citations omitted). Defendants exhibited none of these factors in their instant motion, and, significantly, the Lincoln Circuit Court denied the Motion to Reconsider. [1] (R. at 434)

It is true that palpable errors at trial, even if unpreserved, may be reviewable if they are "easily perceptible, plain, obvious and readily noticeable." *Burns v. Level*, 957 SW2d 218, 222 (Ky. 1997). Such palpable error refers to judgments of the trial court that may not have been technically preserved by the affected litigant. They do not refer to instances where the trial court has been silent on an issue because a litigant has not raised it. However, it is the law in this Commonwealth that a finding of ***"palpable error must result from action taken by the Court rather than from an act or omission by the attorneys or litigants."*** *Carrs Fork Corp. v. Kodak Mining Corp.*, 809 SW2d 699, 701 (Ky. 1991) (emphasis added). The litigant cannot omit an issue and expect it to be ***24** preserved. For the effective operation of our judicial system, the trial court must be afforded an opportunity to pass on an issue before placing it before the appeals court.

This principle that issues not bypass the trial court level is made ever more imperative where the issue may require fact-finding. Defendants on appeal now decide to proffer equitable estoppel against Plaintiffs. Inquiry into equitable estoppel is a highly fact-intensive inquiry into the totality of circumstances surrounding the subject transaction. Because it exists to prevent a party, on equitable grounds, from showing the legal truth of a matter, estoppel is disfavoured. *Sachs v. Wadsworth*, 48 F2d 928, 930 (Cust & Pat. App. 1931). As such, it requires clear established facts to justify its application. *Id.* And it requires proof of a certain element of fraud, either an intended deception or a gross negligence regarding the truth. *Bloemker v. Laborers' Local 265 Pension Fund*, 605 F3d 436, 443 (6th Cir. 2010). The facts as regards this issue have not been developed by the trial court, and Appellants have waived the issue.

In any event, equitable estoppel would not apply in this instance. If Nancy Rowe did not have authority to sign, estoppel simply will not save the agreement from attack on Mrs. Clara Rowe's behalf. *See Mt. Holly Nursing Center v. Crowdus*, 281 SW3d 809, 817 (Ky.App. 2008) (where a party does not have authority to sign an agreement on behalf of another, that other party will not be estopped).

Furthermore, as Appellants have recited in their brief, they must be able to show that Clara Rowe knew that the power-of-attorney was invalid, and Appellants must establish that they relied in good faith on Mrs. Rowe's statements. There is no evidence that the **elderly** Mrs. Rowe had any idea that the power-of-attorney she signed was invalid. On the other hand, Appellants, being collectively a vast nursing home ***25** conglomerate, deal with agreements, powers-of-attorney, guardianships, and disabled persons every hour of every day. Appellants knew that Deborah Rowe was incapacitated, knew that someone else was signing for Deborah, knew that no guardianship papers were being presented. Knowledge of the power-of-attorney's invalidity should be chargeable to Appellants, and not to Mrs. Rowe or to Plaintiffs prosecuting this case.

IV. In the event this Court reverses the Circuit Court's decision, Appellees pray this Court direct this case be returned below with instructions for the parties to conduct discovery on remand pertinent to the arbitration issue.

In the event this Court reverses the Circuit Court's decision, Appellees pray that the Court remand with directions that the parties are entitled to discover all information necessary for an informed determination of the enforceability of the arbitration agreement. *See Walker, et al. v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370 (6th Cir. 2005) (court recognized need for broad discovery regarding arbitration).

CONCLUSION

WHEREFORE, for each of these reasons argued *supra*, the Circuit Court should be affirmed.

Footnotes

1 That is, particularly given that Appellants did not bother to present an argument regarding the propriety of reconsideration, the Circuit Court did not address the issue of estoppel as it was not properly before it.

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