

Court of Appeals of Georgia.
 ASHBURN HEALTH CARE CENTER, INC. et al.
 v.
 POOLE.
No. A07A0572.

June 20, 2007.
 Certiorari Denied Sept. 10, 2007.

Background: Administrator of resident's estate sued nursing home for the wrongful death of resident. Nursing home moved to compel arbitration of all claims. The Turner Superior Court, Bishop, J., denied the motion, and nursing home appealed.

Holding: The Court of Appeals, Miller, J., held that husband of nursing home resident did not act with actual or apparent authority in signing the arbitration agreement, thereby waiving resident's litigation rights, and accordingly, the arbitration agreement was not enforceable against resident's estate.

Affirmed.

West Headnotes

[1] Alternative Dispute Resolution 25T 213(5)

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(D) Performance, Breach, Enforcement, and Contest
 25Tk204 Remedies and Proceedings for Enforcement in General
 25Tk213 Review
 25Tk213(5) k. Scope and Standards of Review. Most Cited Cases
 Appellate court would review the record de novo to determine whether the trial court's denial of nursing home's motion to compel arbitration of all claims of resident's estate was correct as a matter of law.

[2] Alternative Dispute Resolution 25T 210

25T Alternative Dispute Resolution
 25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest

25Tk204 Remedies and Proceedings for Enforcement in General

25Tk210 k. Evidence. Most Cited Cases
 The party seeking arbitration bears the burden of proving the existence of a valid and enforceable agreement to arbitrate.

[3] Principal and Agent 308 99

308 Principal and Agent
 308III Rights and Liabilities as to Third Persons
 308III(A) Powers of Agent
 308k98 Implied and Apparent Authority
 308k99 k. In General. Most Cited Cases
 Although apparent authority may give rise to an agency relationship, such authority must be based on statements or conduct of the alleged principal that reasonably cause third person to believe that the principal consents to have the act done on her behalf by the purported agent.

[4] Principal and Agent 308 23(5)

308 Principal and Agent
 308I The Relation
 308I(A) Creation and Existence
 308k18 Evidence of Agency
 308k23 Weight and Sufficiency
 308k23(5) k. Sufficiency to Support Verdict or Finding as to Agency. Most Cited Cases
 An agency finding cannot be based upon the assumption that an agency relationship exists or upon an inference drawn from the alleged agent's actions.

[5] Alternative Dispute Resolution 25T 141

25T Alternative Dispute Resolution
 25TII Arbitration
 25TII(B) Agreements to Arbitrate
 25Tk141 k. Persons Affected or Bound.
 Most Cited Cases

Husband and Wife 205 25(1)

205 Husband and Wife

205I Mutual Rights, Duties, and Liabilities
205k25 Agency of Husband for Wife
205k25(1) k. In General. Most Cited Cases

Husband and Wife 205 ↪25(6)

205 Husband and Wife
205I Mutual Rights, Duties, and Liabilities
205k25 Agency of Husband for Wife
205k25(6) k. Evidence of Agency. Most Cited Cases

Husband of nursing home resident did not act with actual or apparent authority in signing arbitration agreement waiving resident's litigation rights, and accordingly, the arbitration agreement was not enforceable against resident or her estate; marriage alone did not establish agency relationship between spouses, resident was not present when her husband executed the arbitration agreement, the mere fact that husband signed on the "authorized representative" line could not establish agency, and resident did not act in a way that raised inference of agency.

[6] Appeal and Error 30 ↪854(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k854 Reasons for Decision
30k854(1) k. In General. Most Cited Cases

Appellate court will affirm a judgment that is right for any reason.

****431** Hawkins & Parnell, David C. Marshall, Atlanta, for Appellants.

Cauthorn & Nohr, Jason Lee Nohr, Marietta, for Appellee.

MILLER, Judge.

***24** Craig Poole, as the administrator of his mother's estate, sued Ashburn Health Care Center, Inc. and Pruitt Corporation (collectively, "Ashburn Health Care") for the wrongful death of his mother, alleging, among other things, that negligence at a nursing home owned and operated by Ashburn Health Care

caused her death. Ashburn Health Care subsequently moved to compel arbitration of all claims. The trial court denied the motion, and we granted Ashburn Health Care's application for interlocutory appeal. For reasons that follow, we affirm the trial court's denial of the motion to compel arbitration.

[1] We review the record in this case de novo to determine whether the trial court's denial of the motion to compel arbitration is correct as a matter of law. See *Cash in Advance of Florida v. Jolley*, 272 Ga.App. 282, 612 S.E.2d 101 (2005); *Harris v. SAL Financial Svcs.*, 270 Ga.App. 230, 231, 606 S.E.2d 293 (2004). So viewed, the record shows that Poole's mother was admitted to a nursing home owned and operated by Ashburn Health Care on March 2, 2004. At that time, her husband-Henry Poole-signed numerous documents at the facility, including an arbitration agreement requiring that claims relating to her care be arbitrated pursuant to the Federal Arbitration ***25** Act. Shortly thereafter, Henry Poole was also admitted to the nursing home, and he died there on April 23, 2004. In August 2004, Poole's mother fractured her hip at the nursing home and was transferred to a hospital, where she later died. Poole then filed suit as administrator of his mother's estate.

****432** Ashburn Health Care did not raise an arbitration defense when it initially answered Poole's complaint. In fact, it waited over three months to file its motion to compel arbitration. During this three-month period, it served and responded to several sets of written discovery. It also deposed Poole even after filing its motion to compel.

Responding to Ashburn Health Care's motion, Poole challenged the validity of the arbitration agreement and, alternatively, argued that Ashburn Health Care had waived any right to arbitrate by engaging in the litigation process. The trial court found the agreement valid but denied the motion, concluding that Ashburn Health Care had waived its arbitration rights. We need not reach this issue, however, because we agree with Poole that the arbitration agreement is invalid.

[2] As the party seeking arbitration, Ashburn Health Care bears the burden of proving the existence of a valid and enforceable agreement to arbitrate. See *TranSouth Financial Corp. v. Rooks*, 269 Ga.App. 321, 324(1), 604 S.E.2d 562 (2004). Such agreement is, at base, a contract, and the Federal Arbitration Act

“does not require parties to arbitrate when they have not agreed to do so.” *Volt Information Sciences v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

Poole's mother never signed the arbitration agreement relied upon by Ashburn Health Care. Instead, her husband executed the document. Ashburn Health Care argues that an agent can bind a non signatory to an agreement governed by the Federal Arbitration Act and that Henry Poole acted as his wife's apparent agent at the time of her nursing home admission. See *Thomson-CSF, S.A. v. American Arbitration Assn.*, 64 F.3d 773, 777 (2d Cir.1995).^{FN1}

FN1. Ashburn Health Care does not claim that Henry Poole was his wife's actual or express agent. In fact, Poole offered evidence that his mother had granted a durable power of attorney relating to health care and financial issues to Poole and his sister, not to their father.

[3][4] “The relationship of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf.” OCGA § 10-6-1. Although apparent authority may give rise to an agency relationship, such authority must be based on “statements or conduct of *the alleged principal* [that] reasonably cause [a] third person to believe that the principal consents to have the act done on [her] behalf *26 by the purported agent. [Cits.]” (Emphasis in original.) *Hinely v. Barrow*, 169 Ga.App. 529, 530, 313 S.E.2d 739 (1984). An agency finding cannot be based upon the assumption that an agency relationship exists or upon an inference drawn from the alleged agent's actions. See *id.* at 530-531, 313 S.E.2d 739; *Ellis v. Fuller*, 282 Ga.App. 307, 309(1), 638 S.E.2d 433 (2006).

Ashburn Health Care conceded below that marriage alone does not establish an agency relationship between spouses. See *Brown v. Little*, 227 Ga.App. 484, 487(2), 489 S.E.2d 596 (1997) (physical precedent only);^{FN2} see also *Barron v. Chamblee*, 199 Ga. 591, 599-600(4), 34 S.E.2d 828 (1945) (indicating that agency relationship *may* exist between husband and wife). Nevertheless, it broadly asserts on appeal—without any supporting citations to the record—that “the facts establish that [Henry Poole] acted as the

agent for his wife.” We disagree.

FN2. We note that, while *Brown* is physical precedent only (see Court of Appeals Rule 33(a)), it has been cited with approval and without qualification in other cases that serve as binding precedent. See, e.g., *Whiten v. Murray*, 267 Ga.App. 417, 599 S.E.2d 346 (2004); *Drake v. Wallace*, 259 Ga.App. 111, 576 S.E.2d 87 (2003); *Nat. Council on Compensation Ins. v. Strickland*, 241 Ga.App. 504, 526 S.E.2d 924 (1999).

The record shows that Poole and several other family members accompanied his parents to the nursing home on the day of his mother's admission. While the others helped Mrs. Poole, Poole and his father met with nursing home personnel outside the facility, where Poole's father signed the admission documents. Poole testified that he did not review the documents or discuss them with his father.

****433** These circumstances do not reveal an agency relationship between Poole's parents. Mrs. Poole was not present when her husband executed the arbitration agreement, and the mere fact that he signed on the “authorized representative” line cannot establish agency. See *Hinely*, supra, 169 Ga.App. at 530-531, 313 S.E.2d 739. Moreover, although Poole was present when his father signed the document, Ashburn Health Care asserts that they did not then know that Poole held a durable power of attorney for his mother. Poole's failure to object to the arbitration agreement, therefore, could not have led Ashburn Health Care to believe that Poole had given his father apparent authority to execute the document.

On appeal, Ashburn Health Care has offered no legal or factual basis for finding an agency relationship in this case. For example, it has not shown that Poole's mother acted in a way that raises an inference of agency. It also has not demonstrated that she knew about the arbitration agreement, authorized her husband to sign the document, or otherwise agreed to arbitrate claims arising out of her nursing home stay. See *Hinely*, supra, 169 Ga.App. at 530-531, 313 S.E.2d 739; *27 compare *Barron*, supra, 199 Ga. at 599 (4), 34 S.E.2d 828 (evidence permitted finding of agency relationship where husband acted for his wife in her presence, without objection from wife); *Aronoff v. Woodard*, 47 Ga.App. 725(5), 171 S.E. 404

(1933) (agency relationship arises where wife knowingly and without objection permits husband to manage and control her property).

[5][6] Simply put, Ashburn Health Care failed to establish that Henry Poole acted with actual or apparent authority in signing the arbitration agreement, thereby waiving his wife's litigation rights. Accordingly, the agreement is not enforceable against Poole's mother or her estate, and the trial court properly denied the motion to compel arbitration. See *TranSouth*, supra, 269 Ga.App. at 324(2), 604 S.E.2d 562. Although the trial court found the agreement to be valid but denied the motion to compel on other grounds, we will affirm a judgment that is right for any reason. See *Stewart v. Favors*, 264 Ga.App. 156, 157(1), 590 S.E.2d 186 (2003); see also *Nelson v. Polk County Historical Society*, 216 Ga.App. 756, 758(3), 456 S.E.2d 93 (1995).

Judgment affirmed.

BARNES, C.J., and SMITH, P.J., concur.
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