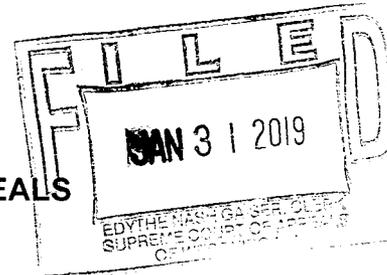


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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



**JEFFREY N. EVANS and  
AMERIPRISE FINANCIAL SERVICES, INC., and  
KRISTINA NICHOLLS and STEPHEN BAYLES,**  
Defendants Below,

**Petitioners,**

**v.**

**No. 18-0876**

**DEBRA K. BAYLES,**  
Plaintiff Below,

**Respondent.**

**PETITIONERS' BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	i
I. ASSIGNMENTS OF ERROR .....	1
1. The Circuit Court erred in allowing Plaintiff to pursue a fraud or concealment claim against Defendants following the death of the decedent, having found Plaintiff's claims for Brokerage and Portfolios account proceeds to be within the substantive scope of valid arbitration agreements.	
2. The Circuit Court erred in allowing Plaintiff to pursue a fraud or concealment claim against Defendants following the death of the decedent, as the Amended Complaint does not allege fraud after the death of the decedent.	
3. The Circuit Court erred in making findings outside of its authority under <i>State ex rel. TD Ameritrade, Inc. v. Kaufman</i> , 225 W.Va. 250, 692 S.E.2d 293 (2010) relative to Plaintiff's claims for proceeds under the Portfolios Account.	
II. STATEMENT OF THE CASE .....	1
III. SUMMARY OF ARGUMENT .....	14
IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....	14
V. ARGUMENT .....	14
A. Standard of Review .....	14
B. The Circuit Court Erred in its September 15, 2018 Order by ..... Allowing the Plaintiff to Pursue a Fraud or Concealment Claim Over Events Following Decedent's Death	15
C. Because Plaintiff Does Not Allege Fraud or Concealment ..... Following the Death of Decedent, the Circuit Court Erred in its Order by Allowing the Plaintiff to Pursue Such a Claim	16
D. The Circuit Court Exceeded its Role and Authority by Making ..... Findings as to the Beneficiary of the Portfolios Account and the Related Beneficiary Confirmation Letter	17

VI. CONCLUSION ..... 18

CERTIFICATE OF SERVICE ..... 20



## I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in allowing Plaintiff to pursue a fraud or concealment claim against Defendants following the death of the decedent, having found Plaintiff's claims for Brokerage and Portfolios account proceeds to be within the substantive scope of valid arbitration agreements.

2. The Circuit Court erred in allowing Plaintiff to pursue a fraud or concealment claim against Defendants following the death of the decedent, as the Amended Complaint does not allege fraud after the death of the decedent.

3. The Circuit Court erred in making findings outside of its authority under *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010) relative to Plaintiff's claims for proceeds under the Portfolios Account.

## II. STATEMENT OF THE CASE

Respondent Debra K. Bayles ("Plaintiff") is the widow of William N. Bayles and serves as the Administratrix of the Estate of William N. Bayles, pursuant to an Order of Appointment entered on April 8, 2013 by the Marshall County Commission.<sup>1</sup> She is the step-mother of Petitioners Kristina Nicholls ("Nicholls") and Stephen Bayles ("Bayles").<sup>2</sup>

William N. Bayles ("Decedent") died on March 26, 2013.<sup>3</sup>

Plaintiff and Decedent were married, but lived apart since 2005.<sup>4</sup>

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<sup>1</sup> *Appendix I at 20.*

<sup>2</sup> *Appendix I at 9.*

<sup>3</sup> *Appendix I at 20.*

<sup>4</sup> *Appendix I at 241.*

During the first half of 2012, Decedent became interested in talking with a professional financial advisor about his financial options. He met with Evans in the presence of his daughter, Kristina, to obtain information and options.<sup>5</sup>

On June 20, 2012, Decedent met with Evans at his office, at which time he decided to roll out his NiSource 401(k) retirement into an Individual Retirement Account ("IRA") with Ameriprise.<sup>6</sup> Plaintiff was present for this meeting.<sup>7</sup> At this time, Decedent had not executed an authorization form for NiSource to roll out his 401(k) retirement.

During the meeting, Decedent completed an Ameriprise Brokerage Individual Retirement Account Application ("Brokerage Application") to receive his 401(k) rollover.<sup>8</sup> Evans discussed the Brokerage Application with him.

He advised Decedent that the application made a specific reference to a predispute arbitration clause appearing in the corresponding Ameriprise Brokerage Client Agreement ("Brokerage Agreement").<sup>9</sup> Evans handed Decedent a complete copy of the agreement, which contained the full text of the arbitration clause.<sup>10</sup>

He then described arbitration as a venue for him to express any disagreement relating to his Ameriprise account, in which the parties involved appear before a neutral third party, explain their positions, and obtain a decision which resolves the disagreement.<sup>11</sup>

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<sup>5</sup> *Id.* at 243-244 and 254.

<sup>6</sup> *Id.* at 279-280.

<sup>7</sup> *Id.* at 281.

<sup>8</sup> *Id.* at 387.

<sup>9</sup> *Id.* at 316-317.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

Evans discussed arbitration in the presence of Plaintiff. Neither Decedent nor Plaintiff expressed any concern, problem, or difficulty with arbitration.<sup>12</sup>

The Brokerage Application was assigned an account number ending in 264133. Part 9 of it states in pertinent part:

**You acknowledge that you have received and read the Ameriprise Brokerage Client Agreement (“Agreement”) and agree to abide by its terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in the Agreement. This brokerage account is governed by a predispute arbitration clause which is found on Section 26, page 3 of the Agreement. You acknowledge receipt of the predispute arbitration clause.**<sup>13</sup>

The Ameriprise Brokerage Client Agreement (“Brokerage Agreement”) contains the predispute arbitration clause mentioned in Part 9 of the Brokerage Application. The clause appears at Paragraph 26 and states as follows:

**This agreement contains a predispute arbitration clause. By signing this Agreement the parties agree as follows:**

**(A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.**

**(B) Arbitration awards are generally final and binding; a party’s ability to have a court reverse or modify an arbitration award is very limited.**

**(C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.**

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<sup>12</sup> *Id. at 297.*

<sup>13</sup> *Id. at 26 and 312 (emphasis added).*

(D) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.

(E) The panel of arbitrators may include a minority of arbitrators who were or are affiliated with the securities industry.

(F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

(G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

By reading and accepting the terms of this Agreement, you acknowledge that, in accordance with this Arbitration section, you agree in advance to arbitrate any controversies that may arise with Ameriprise Financial or AEIS. You agree that all controversies that arise between us (including but not limited to those related to your brokerage account and any service or advice provided by a broker or representative), whether arising before, on or after the date you opened your Account shall be determined by arbitration in accordance with the terms of this Agreement and the rules then prevailing of the Financial Industry Regulatory Authority.

Federal and state statutes of limitation, repose, and/or other rules, laws, or regulations impose time limits for bringing claims in federal and state court actions and proceedings. The parties agree that all federal or state statutes of limitation, repose, and/or other rules, laws, or regulations imposing time limits that would apply in federal or state court, apply to any dispute, claim or controversy brought under this Agreement, and such time limits are hereby incorporated by reference. Therefore, to the extent that a dispute, claim, or controversy arises under this Agreement and would be barred by a statute of limitation, repose or other time limit, if brought in a federal or state court action or proceeding, the parties agree that such dispute, claim, or controversy shall be barred in an arbitration proceeding.

**You understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction. The parties agree that venue and personal jurisdiction is proper in Minneapolis, Minnesota.**

**No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce any agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.<sup>14</sup>**

Decedent signed the Brokerage Application on June 20, 2012, thereby acknowledging the Brokerage Agreement and its terms.<sup>15</sup>

During the June 20, 2012 meeting, Plaintiff heard for herself that her husband could change his beneficiary as the account owner.<sup>16</sup>

Shortly after the June 20<sup>th</sup> meeting with Evans, Decedent executed a NiSource Pension Election Authorization Form ("NiSource Form").<sup>17</sup> In so doing, he certified his election to receive a lump sum of \$132,660.86, along with receipt of a rights notice, a special tax notice, and descriptions of his pension options, values, financial affect, and amounts payable.<sup>18</sup> Decedent signed the NiSource Form on June 26, 2012 in order to fund the Brokerage Account opened with Evans six days earlier.

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<sup>14</sup> *Id.* at 32 and 322 (emphasis added).

<sup>15</sup> *Id.* at 27 and 313.

<sup>16</sup> *Id.* at 290.

<sup>17</sup> *Id.* at 330.

<sup>18</sup> *Id.*

The second page of the NiSource Form contains a spousal consent signed by Plaintiff on the same date. In providing her written consent, Plaintiff consented to the Decedent's election to receive a lump sum. She also certified her review of a rights notice, special tax notice, descriptions of pension options, values, financial effect, and amounts payable, and the first page showing the Decedent's signature. Per the NiSource Form, Plaintiff's signature was required in order for the Decedent to roll out his elected lump sum to fund the Brokerage Account.<sup>19</sup>

Later, on September 5, 2012, the Decedent opened another IRA Account with Ameriprise through Evans. He completed and signed an Active Portfolios Account Application ("Portfolios Application") for this account, which was assigned the account number ending in 961133.<sup>20</sup> He indicated an investment objective of "growth with income" and a risk tolerance of "moderate." The second IRA Account, known as the Active Portfolios Account ("Portfolios Account"), received the sum of \$100,000.00 from the Brokerage Account to begin.<sup>21</sup>

Decedent's Portfolios Application reflected his decision for Plaintiff to be the beneficiary.<sup>22</sup> That same day, he changed his beneficiary on the Brokerage Account to his children, Kristina and Stephen.<sup>23</sup>

Like the June meeting, Evans presented the Ameriprise Active Portfolios Client Agreement ("Portfolios Agreement") to Decedent and advised him of the predispute

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<sup>19</sup> *Id.* at 330-331.

<sup>20</sup> *Id.* at 95-102 and 333-340.

<sup>21</sup> *Id.* at 98 and 336.

<sup>22</sup> *Id.* at 97 and 335.

<sup>23</sup> *Id.* at 289 and 297.

arbitration clause contained therein.<sup>24</sup> Evans also reiterated his description of arbitration as a mechanism to resolve account related disputes.<sup>25</sup> Evans told Decedent to read the document.<sup>26</sup> He looked at the Portfolios Agreement containing the arbitration clause, but did not read every page and took it home with him.<sup>27</sup> Decedent did not ask any questions or express any concerns with the Portfolios Agreement or the attendant arbitration clause.<sup>28</sup>

In his Portfolios Application, Decedent acknowledged the following:

**You acknowledge that you have received and read the Ameriprise Portfolios Client Agreement (version K, dated 03/12), the Ameriprise Managed Accounts Client Disclosure Brochure and the Ameriprise Brokerage Client Agreement, which is hereby incorporated by reference, and agree to abide by the terms and conditions as currently in effect or as they may be amended from time to time. You hereby consent to all these terms and conditions with full knowledge and understanding of the information contained in them. This account is governed by a predispute arbitration provision which is found in Section 25, Page 9 of the Active Portfolios Client Agreement and Section 26, Page 3 of the Brokerage Client Agreement. You acknowledge receipt of the predispute arbitration provision.**<sup>29</sup>

The Portfolios Agreement contains the following predispute arbitration provision at Paragraph 25:

**Arbitration**

**This agreement contains a predispute arbitration clause.**

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<sup>24</sup> *Id.* at 297-298 and 302.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 302.

<sup>27</sup> *Id.* at 303.

<sup>28</sup> *Id.* at 304.

<sup>29</sup> *Id.* at 101 and 339 (emphasis added).

**By signing this Agreement the parties agree as follows:**

**(A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.**

**(B) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.**

**(C) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.**

**(D) The arbitrators do not have to explain the reason(s) for their award unless, in an eligible case, a joint request for an explained decision has been submitted by all parties to the panel at least 20 days prior to the first scheduled hearing date.**

**(E) The panel of arbitrators may include a minority of arbitrators who were or are affiliated with the securities industry.**

**(F) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.**

**(G) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.**

**By reading and accepting the terms of this Agreement, you acknowledge that, in accordance with this Arbitration section, you agree in advance to arbitrate any controversies that may arise with the Sponsor or AEIS. You agree that all controversies that arise between us (including but not limited to those related to your brokerage account and any service or advice provided by a broker or representative), whether arising before, on or after the date you opened your Account shall be determined by arbitration in accordance with the terms of this Agreement and the rules then prevailing of the Financial Industry Regulatory Authority.**

**Federal and state statutes of limitation, repose, and/or other rules, laws, or regulations impose time limits for bringing claims in federal and state court actions and proceedings. The parties agree that all federal or state statutes of limitation, repose, and/or other rules, laws, or regulations imposing time limits that would apply in federal or state court, apply to any dispute, claim or controversy brought under this Agreement, and such time limits are hereby incorporated by reference.**

**Therefore, to the extent that a dispute, claim, or controversy arises under this Agreement and would be barred by a statute of limitation, repose or other time limit, if brought in a federal or state court action or proceeding, the parties agree that such dispute, claim, or controversy shall be barred in an arbitration proceeding.**

**You understand that judgment upon any arbitration award may be entered in any court of competent jurisdiction. The parties agree that venue and personal jurisdiction is proper in Minneapolis, Minnesota.**

**No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce any agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein. This paragraph does not constitute a waiver of any right of private claim or cause of action provided by the Advisers Act.<sup>30</sup>**

Decedent signed the Portfolios Application on September 5, 2012, thereby acknowledging the Portfolios Agreement and its terms.<sup>31</sup>

On September 24, 2012, Ameriprise mailed a beneficiary confirmation letter ("Letter") to the Decedent at his home address.<sup>32</sup> The Letter showed that his two

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<sup>30</sup> *Id. at 57 and 350* (emphasis added).

<sup>31</sup> *Id. at 102 and 340.*

children, Kristina and Stephen, were the beneficiaries of both of his IRA accounts. Decedent gave the Letter to Kristina for safekeeping.<sup>33</sup> The Letter instructed him to inform Ameriprise of any discrepancy or error in the beneficiary designations. Decedent elected not to do so.<sup>34</sup> Consequently, the account proceeds from both accounts were paid to Kristina and Stephen following Decedent's passing on March 26, 2013.

Plaintiff prepared her own Will and executed it in 2011 or 2012. Her wishes were to leave everything to Decedent if she predeceased him. Alternatively, in the event her husband died before her, only Plaintiff's natural children would take under her Will. In other words, Plaintiff did not include Kristina and Stephen in her Will. Notably, Plaintiff shared her executed Will with her husband, such that Decedent was aware of her intentions with respect to his children.<sup>35</sup>

Decedent never contacted Evans after either of the two meetings to ask questions or express concerns with the arbitration clauses attendant to the IRA accounts.<sup>36</sup>

Plaintiff filed her Complaint in the Circuit Court of Marshall County on September 5, 2014 naming Evans, Ameriprise, Nicholls, and Bayles as defendants.<sup>37</sup> The predicate for each of her claims is the IRA accounts. In response, Defendants filed a Motion to Dismiss and Compel Mandatory Arbitration on November 17, 2014.<sup>38</sup>

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<sup>32</sup> *Id.* at 353

<sup>33</sup> *Id.* at 249 and 254-255.

<sup>34</sup> *Id.* at 298.

<sup>35</sup> *Id.* at 370-371.

<sup>36</sup> *Id.* at 304.

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *Id.* at 8.

The Circuit Court heard oral argument on the Defendants' motion on February 27, 2015. Focusing on the Brokerage Application and Brokerage Agreement, the Circuit Court found that the signed Brokerage Application incorporated the predispute arbitration clause found in the Brokerage Agreement by reference.<sup>39</sup> The Circuit Court also found that there was no signature of Decedent in the Brokerage Agreement.<sup>40</sup> Therefore, the Circuit Court denied the motion under the rule of *contra proferentem*.<sup>41</sup>

On May 19, 2015, the Circuit Court entered an Order denying the Motion to Dismiss and to Compel Mandatory Arbitration.<sup>42</sup> The Order does not contain its finding of incorporation by reference. An appeal followed.

On June 1, 2016, this Court issued a Memorandum Opinion finding the arbitration clause in the Brokerage Agreement to be clear and unambiguous, and remanded this matter to the Circuit Court to determine the validity and scope of the Brokerage and Portfolios account arbitration agreements.<sup>43</sup>

In response, on June 14, 2016, Plaintiff filed a Motion to Amend Complaint to allege fraud.<sup>44</sup>

Defendants responded to the motion on procedural grounds on June 22, 2016, and later opposed the motion on substantive grounds on July 15, 2016.<sup>45</sup>

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<sup>39</sup> *Appendix II – Transcript of February 27, 2015 Hearing at 22.*

<sup>40</sup> *Id. at 23.*

<sup>41</sup> *Id.*

<sup>42</sup> *Appendix I at 127-131.*

<sup>43</sup> *Id. at 148-163.*

<sup>44</sup> *Id. at 164.*

<sup>45</sup> *Id. at 169-173.*

Counsel appeared for oral argument on the motion to amend on August 3, 2016. The Court granted Plaintiff's motion with the specific directive to plead fraud satisfactorily. The Court entered an Order for the hearing on October 25, 2016, specifying that leave was granted to include a fraud count "provided that the new count is pled satisfactorily."<sup>46</sup>

The Amended Complaint sought to allege fraud in Count IV against Evans and Nicholls **without setting forth a factual basis**. The operative pleading does not allege facts or circumstances with particularity as required by WVRCP 9.<sup>47</sup>

Consequently, Defendants moved to dismiss the Amended Complaint on November 14, 2016. The motion sought dismissal of the fraud claim as deficient, and reiterated that this matter is subject to mandatory arbitration.<sup>48</sup> Plaintiff did not file an opposition to the motion.

On January 19, 2017, the Circuit Court heard oral argument on the dismissal motion for the Amended Complaint. The Circuit Court denied the motion from the bench, held the rest of the motion concerning arbitration in abeyance, and established a discovery schedule and a briefing schedule. The Court entered an Order on January 25, 2017, for its rulings.<sup>49</sup> The parties then proceeded with written and deposition discovery limited to the arbitration issue.

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<sup>46</sup> *Id.* at 174.

<sup>47</sup> *Id.* at 176-185. The pleading merely adds the words "fraud" and "fraudulently" in selective places without setting forth new facts supporting the use of such words.

<sup>48</sup> *Id.* at 187-200.

<sup>49</sup> *Id.* at 209-211.

On June 16, 2017, Defendants filed their Renewed Motion to Compel Mandatory Arbitration.<sup>50</sup> Plaintiff filed her response brief on July 20, 2017.<sup>51</sup> Defendants filed their reply brief on August 7, 2017.<sup>52</sup>

On August 18, 2017, the Circuit Court heard oral argument on the renewed arbitration motion and took the same under consideration per the hearing transcript.<sup>53</sup>

On September 15, 2018, the Circuit Court entered an Order relative to Defendants' Renewed Motion to Compel Mandatory Arbitration ("Order") finding the arbitration clauses in the Brokerage Agreement and Portfolios Agreement to be valid and enforceable. The Circuit Court also found the Plaintiff's claims for the assets under both agreements to be within the substantive scope of both arbitration clauses.

The Circuit Court went beyond its authority under *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010), however, and allowed Plaintiff to pursue a fraud or concealment claim against Defendants following the March 26, 2013 death of the Decedent. Likewise, the Circuit Court went beyond its *TD Ameritrade* authority in making findings relative to the beneficiary of the Portfolios Account and a beneficiary confirmation letter.<sup>54</sup> These portions of the latest Order serve to deny the renewed arbitration motion in pertinent part, precipitating this appeal.

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<sup>50</sup> *Id.* at 215-383.

<sup>51</sup> *Id.* at 390-857.

<sup>52</sup> *Id.* at 858-872.

<sup>53</sup> *Appendix II – Transcript of August 18, 2017 Hearing.*

<sup>54</sup> *Appendix I at 875-877.*

### **III. SUMMARY OF ARGUMENT**

The subject arbitration clauses are clear and unambiguous. Plaintiff's claims for account proceeds are well within the substantive scope of the arbitration agreements. Meanwhile, there is simply no evidence of fraud. The Amended Complaint does not aver fraud satisfactorily or even after the Decedent's death. Any fraud or concealment claim by the Plaintiff is subject to arbitration. The Order improperly allows for a fraud or concealment claim to be brought by the Plaintiff against the Defendants outside of arbitration. Further, the Circuit Court exceeded its authority by going beyond the threshold arbitration issues of agreement and scope, so as to usurp the role of a FINRA arbitrator.

### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Defendants submit that oral argument is necessary under Rule 20 given the error committed below, the prior appeal below, and the clear language appearing in the predispute arbitration clauses.

Defendants submit that a Rule 20 argument and resulting decision will best serve not only the parties herein and the Circuit Court, but other litigants, circuit court judges and members of the bar.

### **V. ARGUMENT**

#### **A. STANDARD OF REVIEW**

An Order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine.<sup>55</sup> As the Circuit Court's

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<sup>55</sup> *Credit Acceptance Corp. v. Front*, 231 W.Va. 518, 745 S.E.2d 556 (2013).

Order effectively denies Defendants' Renewed Motion to Compel Mandatory Arbitration, this Court shall review said Order *do novo*.<sup>56</sup>

**B. THE CIRCUIT COURT ERRED IN ITS SEPTEMBER 15, 2018, ORDER BY ALLOWING THE PLAINTIFF TO PURSUE A FRAUD OR CONCEALMENT CLAIM OVER EVENTS FOLLOWING DECEDENT'S DEATH.**

The arbitration clauses appearing in the Brokerage Agreement and the Portfolios Agreement are clear, valid and enforceable.

The Circuit Court correctly held in its Order that Plaintiff's evidence of fraud falls short. In so ruling, the Circuit Court correctly held that the Brokerage Account arbitration clause was valid and enforceable, and that Plaintiff's claims for account proceeds were within the substantive scope of the arbitration clause.

Yet, on its own, the Circuit Court has allowed the Plaintiff to pursue a fraud or concealment claim regarding events after the March 28, 2013, passing of the Decedent. This aspect of the Order is plain error, and without evidentiary support in the record below. Moreover, the Brokerage Account arbitration clause applies to "any controversies that may arise."<sup>57</sup> This plain text encompasses any alleged fraud or concealment occurring after the death of the Decedent, as the same is related to his IRA accounts and their proceeds.

Notably, this Court does not permit plaintiffs to avoid arbitration by casting claims as tort claims.<sup>58</sup> West Virginia arbitration jurisprudence recognizes and upholds federal policy favoring arbitration of disputes reasonably contemplated by the text of an

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<sup>56</sup> *West Virginia CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W.Va. 465, 796 S.E.2d 574 (2017).

<sup>57</sup> On June 1, 2016, this Court found the arbitration clause to be clear and unambiguous. See *Evans v. Bayles*, 237 W.Va. 269, 787 S.E.2d 549 (2016) and *Appendix I at 148-162*.

<sup>58</sup> See *Salem Int'l University, LLC v. Bates*, 238 W.Va. 229, 793 S.E.2d 879 (2016).

arbitration clause.<sup>59</sup> The plain text at bar – “any controversies that may arise” - captures any claim for account proceeds regardless of how labeled or framed. Hence, the Circuit Court’s attempt to avoid arbitration rings hollow.

**C. BECAUSE PLAINTIFF DOES NOT ALLEGE FRAUD OR CONCEALMENT FOLLOWING THE DEATH OF DECEDENT, THE CIRCUIT COURT ERRED IN ITS ORDER BY ALLOWING THE PLAINTIFF TO PURSUE SUCH A CLAIM.**

Plaintiff’s operative pleading is her Amended Complaint.<sup>60</sup> It does not allege fraud with particularity. Moreover, Plaintiff does not allege fraud or concealment following the March 26, 2013, death of Decedent. **Similarly, her response to Defendants’ Renewed Motion does not aver fraud after that date.**<sup>61</sup> Nonetheless, the Circuit Court’s Order allows such a claim outside of arbitration.

This holding by the Circuit Court is plain and substantial error. Not only does the plaintiff fail to allege fraud or concealment occurring after March 26, 2013 throughout the course of this litigation, the record below does not support such a claim.

This Court previously held that the Brokerage Account arbitration clause is clear and unambiguous.<sup>62</sup> The arbitration clause found in the Portfolios Account is likewise clear and unambiguous.

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<sup>59</sup> *Id.*

<sup>60</sup> *Appendix I at 176-185.*

<sup>61</sup> *Id. at 390-415.*

<sup>62</sup> *Id. at 148-162.*

Only fraud in inducing a party to enter into a contract containing an arbitration provision is relevant to a challenge of an arbitration provision.<sup>63</sup> The Circuit Court held correctly that the plaintiff's evidence of fraud to invalidate the arbitration clause "falls short."<sup>64</sup> The Amended Complaint is void of any fraud or concealment claim following the death of the Decedent. Regardless, any claim of fraud or concealment occurring after the passing of the Decedent is subject to arbitration, as such a claim relates to the IRA accounts. Critically, under *Bates, supra*, the Circuit Court's fraud or concealment label does not escape the reach of the arbitration clauses.<sup>65</sup>

**D. THE CIRCUIT COURT EXCEEDED ITS ROLE AND AUTHORITY BY MAKING FINDINGS AS TO THE BENEFICIARY OF THE PORTFOLIOS ACCOUNT AND THE RELATED BENEFICIARY CONFIRMATION LETTER.**

The Circuit Court correctly held that the Portfolios Account arbitration clause "is valid and without any meritorious legal challenge," and that Plaintiff's claim for account proceeds is within the substantive scope of the arbitration clause. Yet, the Circuit Court went on to make an express finding that the September 24, 2012 beneficiary confirmation letter "DID NOTHING to modify or otherwise affect the designation of" the plaintiff "as the sole beneficiary of the Portfolios Account or the assets therein."<sup>66</sup>

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<sup>63</sup> See *West Virginia Investment Management Board v. Variable Annuity Life Insurance Company*, 241 W.Va. 148, 155, 820 S.E.2d 416, 423 (2018) ("Petitioners do not dispute that they agreed to arbitrate, nor do they claim fraud or any other untoward inducement to enter into the agreement."); Syl. Pt. 2, in part, *State ex rel. Johnson Controls, Inc. v. Tucker*, 229 W.Va. 486, 729 S.E.2d 808 (2012) ("Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses – such as laches, estoppels, waiver, fraud, duress, or unconscionability – may be applied to invalidate an arbitration agreement.").

<sup>64</sup> *Appendix I at 876.*

<sup>65</sup> See *Salem Int'l University, LLC v. Bates*, 238 W.Va. 229, 793 S.E.2d 879 (2016).

<sup>66</sup> *Appendix I at 876.*

Regrettably, the Circuit Court overreached and went beyond what it is supposed to do in this instance.

When a Circuit Court is required to rule upon a motion to compel arbitration, its authority is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties and (2) whether the claims averred by the plaintiff fall within the substantive scope of the arbitration agreement.<sup>67</sup>

Here, the Circuit Court determined both *TD Ameritrade* threshold issues in the affirmative, but did not stop.

Instead, the Circuit Court kept going and made findings beyond its province under this Court's arbitration jurisprudence. Such findings were made before dismissal in favor of arbitration, and usurp the role and authority of a FINRA arbitrator.

Accordingly, the Circuit Court's findings and holdings warrant reversal relative to the aforementioned beneficiary confirmation letter, and the plaintiff's status as a beneficiary.

## VI. CONCLUSION

WHEREFORE, for reasons heretofore stated, Petitioners respectfully request entry of an Order enforcing the predispute arbitration clauses appearing in the Brokerage and Portfolios Accounts, reversal of the September 15, 2018, Order entered by the Circuit Court of Marshall County, and directing the dismissal of the matter below in favor of arbitration.

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<sup>67</sup> *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

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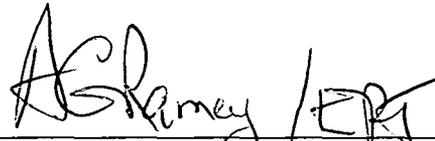
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