IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0761

MASON LOUIS COTTRELL,

Petitioner,

v.

On Appeal from the
Circuit Court of Ohio County
(Case No. 19-C-159)

LOUIS COTTRELL, JR., CHESAPEAKE APPALACHIA, LLC, SWN PRODUCTION COMPANY, LLC, JAMESTOWN RESOURCES, LLC, APPALACHIA MIDSTREAM SERVICES, LLC, and STATOIL USA ONSHORE PROPERTIES, INC.,

Respondents.

BRIEF OF PETITIONER

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I. ASSIGNMENTS OF ERROR

1. The Trial Court committed reversible error in granting Respondents' motions to dismiss and compelling the case into arbitration, and the error involved the following:

a. Determining that Petitioner did not sufficiently challenge the arbitration provisions under applicable legal standards so as to allow the Trial Court instead of an arbitrator to determine their validity;

b. Failing to determine that the implicated contracts were void *ab initio* for lack of court approval, where the approval would have not just involved a wholesale approval or rejection of each contract, but judicial consideration of the contract on a provision-by-provision basis, including respecting the arbitration provisions; and

c. Failing to determine that the Petitioner voided the implicated contracts through disaffirmation upon reaching the age of majority.

2. Because This Honorable Court has determined that the petition for bankruptcy filed by Chesapeake Energy Corporation on June 28, 2020, resulted in an automatic stay that affected all of the proceedings in this action, the Trial Court's order of September 1, 2020, which was entered during the stay, is void and without any legal effect. Consequently, the Trial Court has never legally ruled on the underlying motions to dismiss and to compel arbitration. Plain error is asserted with respect to this assignment of error.

II. STATEMENT OF THE CASE

This case presents this Honorable Court with an important opportunity to reconfirm the vitality and preeminence of long-standing legal protections given to infants in the face of arguments grounded both in the *West Virginia Uniform Trust Code* (W.Va. Code Chapter 44D)

and principles revolving around arbitration. These are issues which can only be properly resolved by our State's highest court. While the critical issues might arise in multiple factual contexts, here they arise from a real property deed given by a mother to her infant son.

When Petitioner Mason Cottrell was seven years old his birth mother, Cheryl A. Danehart, deeded 37.5 acres to him, not in his own name, but rather through Mason's father, Respondent Louis Cottrell, Jr., as Mason's trustee, with the deed stating "Trustee may grant, convey or incur debt on said land for the benefit of Mason Louis Cottrell." (J.A. 12). Respondent Cottrell then engaged in transactions with various gas and mineral corporations, signing contracts that encumbered the land and allowed for the depletion of its resources in return for substantial sums of money. (J.A. 33). However, all of these "contracting" parties chose to forgo obtaining court approval for the respective contracts. (J.A. 39-51). Carried with this choice was not just the evasion of a court's approval of each contract's amount of monetary consideration but also judicial approval or rejection of each material provision of the contract, including whether arbitration would best serve the minor's interests. Moreover, by skipping court approval these parties left the child completely without the safeguards that the court would have certainly imposed covering "trustee" Cottrell's handling of monies given to him on behalf of his ward. With all such judicial protections missing, the danger our law was designed to forestall came to fruition. The monies given by the corporations to Respondent Cottrell were kept, spent, or wasted by him for his own benefit and not for the benefit of the minor. (J.A. 33).

On May 24, 2019, Petitioner turned eighteen years old and within weeks, on June 27, 2019, he brought this suit. (J.A. 06). At first it was brought only against Louis Cottrell, Jr. (J.A. 06) who defaulted, (J.A. 20) but then, with leave of Court, (J.A. 30) on February 4, 2020, Petitioner filed his *Amended Complaint* to bring claims against the corporations, i.e., your corporate respondents, that either directly engaged in the transactions with Respondent Cottrell or that contractually succeeded to such entities' rights. (J.A. 32).

The legal linchpin for the claims against each corporate respondent is the failure to obtain court approval for each contract pursuant to West Virginia Code §37-1-2, with the consequence of the failures being, quite simply and clearly, the voiding of each contract. There are no breach of contract allegations against the corporate respondents because the contracts were never legally valid. Rather the causes of action are all based in tort, including aiding and abetting Respondent Cottrell in his unlawful behavior, trespass, and unlawful diminution of property value. (J.A. 36-51).

In light of the legal issues presented by this appeal, it is important to recognize, as a matter of fact and of procedural history, the effect of the *Amended Complaint* upon each contract with regard to voidance. Devoting separate counts to each corporate respondent, each and every count includes a blunt statement by Petitioner that each contract is void.

> [Para] 50. The Chesapeake Contract is void. (J.A. 39).
>
> [Para] 61. Because the Chesapeake Contract is void, the Jamestown Contract is likewise void and/or it provides no actual rights as against Plaintiff's Property. (J.A. 41).
>
> [Para] 69. Because the Chesapeake Contract is void, the Statoil Contract is likewise void and/or it provides no actual rights as against Plaintiff's Property. (J.A. 42).
>
> [Para] 88. The SWN Contract is void. (J.A. 45).
>
> [Para] 116. The App Contract No. 1, the App Contract No. 2 and the App Contract No. 3 are all void. (J.A. 49).

While the *Amended Complaint* alleges the contracts are all void *ab initio*, undoubtedly it also serves as plaintiff's formal disaffirmation of them all, whether *ab initio* or later. This fact was emphasized to the Trial Court by *Plaintiff's Sur-Reply Memorandum Respecting Judicial Estoppel*:

> [P]laintiff's conduct exemplifies propriety, for by promptly repudiating all of the contracts upon turning 18 through the Amended Complaint, which plainly states as against each corporate defendant its contract is "void", by not ever getting any benefits under any of the contracts, and by bringing all of the corporate defendants

into the action prior to having any damages determined, plaintiff has not misled nor gained any unfair advantage over anyone. (J.A. 237-38).

While the significance of the repudiation is explicated herein below, what is factually clear is that plaintiff has asserted both that the contracts are void *ab initio* (J.A. 238) and that, now that he is an adult, they are disaffirmed. (J.A. 237).

Each corporate respondent responded to the *Amended Complaint* with a motion to dismiss[1] contending that its contract is valid because Petitioner is just wrong about the need for court approval. According to respondents, West Virginia Code §37-1-2, a statute that has been part of our law for well over 100 years and which requires court approval for contracts like those at issue here, is irreconcilable with and has been abrogated by our *Uniform Trust Code*. (J.A. 202). Moreover, because the contract with Respondent Chesapeake Appalachia, L.L.C., dated March 10, 2011, contained an arbitration provision, (J.A. 80) and also because Respondents SWN (J.A. 92) /Statoil (J.A. 86) and Jamestown Resources, L.L.C., are successors in interest under the Chesapeake Appalachia, L.L.C. contract, they all sought to compel arbitration of all issues under that one contract's provision, including whether the lack of court approval rendered all contracts void *ab initio*. Petitioner filed written opposition to each of the motions, outlining the reasons why each should fail.[2] Appalachia Midstream Services then, on June 26, 2020, served a *Reply* in

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[1] SWN Production Company, LLC and Statoil USA Onshore Properties, Inc., n/k/a Equinor USA Onshore Properties, Inc., jointly served their *Motion To Dismiss And Compel Arbitration*, (J.A. 70) with *Memorandum*, (J.A. 104) on May 14, 2020; Appalachia Midstream Services, L.L.C. served its *Motion To Dismiss*, (JA 56) with *Brief*, (J.A. 60) on May 15, 2020; and also on May 15, 2020, Chesapeake Appalachia, L.L.C. and Jamestown Resources, L.L.C. together served their *Joinder* in the *Motion To Dismiss And Compel Arbitration* served by SWN/Statoil. (J.A. 127).

[2] Served June 11, 2020, were *Plaintiff's Memorandum In Opposition To Motion To Dismiss And Compel Arbitration Of Defendants SWN Production Company, LLC And Statoil USA Onshore Properties, Inc.*; (J.A. 134) *Plaintiff's Response In Opposition To Defendant Appalachia Midstream Services, LLC's Motion To Dismiss*; (J.A. 161) and *Plaintiff's Response In Opposition To Chesapeake Appalachia, L.L.C. And Jamestown Resources, LLC's Joinder In Motion To Dismiss And Compel Arbitration And Memorandum In Support Filed By SWN Production Company, LLC And Equinor USA Onshore Properties, Inc.* (J.A.167).

support of its motion to dismiss, (J.A. 177) to which Petitioner responded, on July 1, 2020, with his *Sur-Reply Memorandum*. (J.A. 236).

Served and filed with the Trial Court June 30, 2020, was a *Notice Of Suggestion Of Pendency Of Bankruptcy For Chesapeake Energy Corporation, Et Al., And Automatic Stay Of These Proceedings*. (J.A. 315). Chesapeake Energy Corporation is not a named party to this action but it is affiliated with Respondent Chesapeake Appalachia, L.L.C. (J.A. 32). With the transactions and resultant claims respecting the remaining respondents being separable from those respecting Chesapeake Appalachia, L.L.C., the Trial Court thereafter, on September 1, 2020, despite the automatic stay and without allowing any oral argument, ruled on the motions other than that of Chesapeake Appalachia. L.L.C. (J.A. 243). None of the parties, not even bankrupt Chesapeake Appalachia, L.L.C., objected or expressed concern to the Trial Court that it was dis-empowered by the bankruptcy automatic stay to judicially act through its order. That only came later, in the Supreme Court.

The September 1, 2020, *Order* upon which this appeal is based granted the Respondents' motions to compel arbitration. (J.A. 250). In so doing, the Trial Court failed to appreciate the wholly nullifying effect of failing to secure court approval for the contracts, including that housing the arbitration provisions. It instead rested its decision upon the misguided view that our law, despite our unique circumstances, required Petitioner to surgically focus solely on the arbitration provision of the implicated contract to the exclusion of the other provisions of the contract or the contract as a whole. "In the present case, Plaintiff is generally challenging the contract as a whole and is not explicitly challenging the enforceability of an arbitration clause within the contract." (J.A. 249). True, Petitioner does challenge the contract as a whole, contending that it simply does not legally exist, but carried with his argument is that the court approval process would have

evaluated and ruled upon each of the contract's provisions, one by one, especially the arbitration provision, standing alone. Such is what occurs in minor contract proceedings, and as such, focus upon the arbitration itself was sufficiently made.

As Petitioner argued to the Trial Court at Page 4 of his *Memorandum In Opposition* to SWN's/Statoil's motion, citing to *Parsons v. Halliburton Energy Servs*, 785 S.E.2d 844, 237 W. Va. 138 (2016):

> Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.
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> Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011). Hence, a state court may assess whether an arbitration agreement is unenforceable under general principles of state law, "such as laches, estoppel, waiver, fraud, duress, or unconscionability." Syllabus Point 9, Id. (emphasis added). "To be clear, this list is not exclusive. Misrepresentation, duress, mutuality of assent, undue influence, **or lack of capacity**, if the contract defense exists under general common law principles, then it may be asserted to counter the claim that a . . . provision binds the parties. Even lack of consideration is a defense." *Geological Assessment & Leasing v. O'Hara*, 236 W. Va. 381, 387, 780 S.E.2d 647, 653 (2015). (J.A. 137).

Misunderstanding the nature of Petitioner's argument, which obviously can be said to attack the arbitration provision itself, and completely ignoring Petitioner's disaffirmation of the contracts via the *Amended Complaint*, the Trial Court incorrectly found:

> Because Plaintiff's claims go to the overall existence of the contract, the doctrine of severability requires this Court to presume that a valid arbitration agreement was formed by the parties. Accordingly, the question of the lack of court approval of the contract raised by Plaintiff must be weighed by the arbitrator. (J.A. 249).

Deeming the matter one for appellate consideration and acknowledging the intended finality of his *Order*, the Trial Court bluntly stated: "The Court invites Plaintiff to appeal this decision." (J.A. 250).

Because the Trial Court's arbitration ruling encompassed Petitioner's claims against all the corporate respondents excepting bankrupt Chesapeake Appalachia, L.L.C., and because Respondent Appalachia Midstream Services, LLC's contract does not have an arbitration provision, on September 8, 2020, within ten days of the *Order* and specifically pursuant to Rule of Civil Procedure 59(e), Petitioner filed his *Motion To Alter Or Amend Order* seeking to have the claims against that respondent reinstated. (J.A. 251). By *Order* entered October 1, 2020, that motion was granted. (J.A. 260). Meanwhile, following the Trial Court's suggestion, on September 29, 2020, Petitioner filed his *Notice Of Appeal*. The *Notice* states at Section 5, which respects "Non-Participant(s)":

> On June 30, 2020, a Notice of Suggestion of Pendency of Bankruptcy for Chesapeake Energy Corporation was filed on behalf of Defendant Chesapeake Appalachia, L.L.C. Consequently, no further proceedings against Chesapeake Appalachia, L.L.C., have since been pursued.

By letter dated October 20, 2020, counsel for Respondent Chesapeake Appalachia, L.L.C., notified Ms. Nash Gaiser, Clerk of This Honorable Court, that Chesapeake had filed for bankruptcy on June 28, 2020, and that an automatic stay had been imposed. She further announced that Chesapeake Appalachia, L.L.C., "remains an interested party in the appeal of Judge Sims' order compelling the claims in the Trial Court Case to arbitration." Her letter was silent on the ramifications of Judge Sims' order being entered during the stay.

Six days later, on October 26, 2020, Petitioner submitted to this Honorable Court *Plaintiff's/Petitioner's Motion To Dismiss Action Solely As Against Defendant Chesapeake Appalachia, L.L.C.* On November 6, 2020, Respondents SWN/Statoil submitted their oppositional *Response To Dismiss Action Solely As Against Defendant Chesapeake Appalachia, L.L.C.*, and concomitantly submitted their *Motion To Dismiss Appeal*, predicated upon an argument that the Trial Court's order was unappealably interlocutory. Respondent Jamestown Resources, L.L.C.,

joined in the motion. On November 13, 2020, Petitioner submitted his *Response In Opposition To Motion To Dismiss Appeal.*

Nothing further transpired in the case until Clerk Nash Gaiser sent her July 13, 2021, letter to counsel for bankrupt Chesapeake Appalachia, L.L.C., requesting by July 30, 2021, a status report as mandated by Rule of Appellate Procedure 28(d). In response, counsel for Chesapeake Appalachia, L.L.C., submitted a formal *Status Report* stating that Chesapeake had emerged from bankruptcy and that the stay was lifted February 9, 2021. Thereafter, on November 4, 2021, the appellate *Scheduling Order* was entered. The Order sets forth:

> Due to notice of bankruptcy proceedings involving Chesapeake Appalachia, LLC, this matter was automatically stayed in accordance with 11 U.S.C. § 362. On July 30, 2021, Nicolle R. Snyder Bagnell, counsel for Chesapeake Appalachia, LLC, submitted a status report indicating that Chesapeake Appalachia, LLC, emerged from bankruptcy and that this appeal was ripe for the lifting of the stay. The stay is lifted, and this appeal may proceed in accordance with this order.

The *Order* also expressly refused Petitioner's motion to dismiss Chesapeake Appalachia, L.L.C., and likewise refused SWN respondents' motion to dismiss the appeal.

III. SUMMARY OF ARGUMENT

The Trial Court committed reversible error by granting the corporate Respondents' motions to dismiss and to compel arbitration. The stated basis for the order was that Petitioner did not express under prevailing legal standards a sufficient challenge against the arbitration provisions of the implicated contract so as to allow the Trial Court, as opposed to an arbitrator, to resolve the issue. This finding was errant however, for under the circumstances of this case which involves a minor, long-standing statutory law obligated the parties respondent to obtain court approval of their respective contracts, with approval process being not just on a wholesale contractual basis but on a provision by provision basis. The consequence of forgoing this statutory obligation is the

voidance of every provision of the contract, whether considered individually or on a wholesale basis. The West Virginia Supreme Court has been resolute in its stance that,

> An illegal contract is as a rule void—not merely voidable—and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the grant is illegal in its inception, or whether, being valid when made, the illegality has been created by subsequent statute. . . . "If a contract is tainted with the vice of illegality, it is held to create no obligation, not from any consideration of the individual rights of the parties, who may be equally in fault, but from regard for the public." Generally, the illegality of a contract is a perfect defense to its enforcement, because the law will not require one to do, or punish him for not doing, that which it forbids him to do.

W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co., 820 S.E.2d 416, 423, 241 W. Va. 148, 155, 2018 W. Va. LEXIS 465, *19, 2018 WL 2769058 (internal citations omitted).

Both the substance and presentation of Petitioner's argument below allowed the Trial Court itself, not an arbitrator, to rule on the validity of the arbitration provisions. In finding otherwise, the Trial Court committed reversible error.

Moreover, once he reached the age of majority Petitioner disaffirmed all of the contracts at issue, including that housing the arbitration provision. This was accomplished through his *Amended Complaint* which explicitly expressed the voidance of the contracts, by its pursuit only of tort causes of action, and by the nature of the relief it sought. This nullified the arbitration provisions, clearing the legal pathway for the Trial Court itself to rule on all the legal issues of the case, especially whether the failure to obtain court approval at the commencement of each purported contract rendered it void *ab initio*.

As for the law mandating court approval, being West Virginia Code §37-1-2, it has been part of our jurisprudence for over 100 years, and over the years our High Court has made it clear that it retains its import and potency. Despite Respondents' arguments to the contrary, West Virginia's *Uniform Trust Code*, if it applies at all, is entirely consistent with §37-1-2, but if it were

not, §37-1-2 would prevail over the UTC on whether court approval of a minor's contract is necessary.

Furthermore, and as a completely distinct matter, on June 30, 2020, Respondent Chesapeake Appalachia, L.L.C., notified the Trial Court that non-party Chesapeake Energy Corporation and its subsidiaries, including Chesapeake Appalachia, L.L.C., filed for bankruptcy and that an automatic stay was in place. During the stay, specifically on September 1, 2020, and without leave from the bankruptcy court, the Trial Court entered its order that is now being appealed. No one advised the Trial Court that it was without jurisdiction to so act. Petitioner then filed his *Notice of Appeal* which reported the bankruptcy and held Chesapeake Appalachia, L.L.C. forth as a non-participant. Chesapeake Appalachia, L.L.C. thereafter notified the Supreme Court that it remains an interested party, the Supreme Court deemed the automatic stay to have affected the whole proceedings until it was lifted. The consequence of this is that the Trial Court's September 1, 2020, order is null and void, entered as a matter of plain error, and the case should be returned to the Trial Court for appropriate proceedings.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that this case should be set for a Rule 19 argument, for the law which is at play is well settled. In light of the number of parties respondent, Petitioner submits that good cause exists for additional argument time to be allotted so as to afford a sufficient opportunity to respond in closing. Consequently, Petitioner respectfully requests an additional ten minutes of argument time. Petitioner submits this case is appropriate for a memorandum decision.

V. ARGUMENT

A. Petitioner's Right To Review and Standard of Review

McGraw v. Am. Tobacco Co. states, at Syllabus Point 1:

> A circuit court order compelling arbitration is not subject to direct appellate review prior to the dismissal of the circuit court action unless the order compelling arbitration otherwise complies with the requirements of West Virginia Code §58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure. A party seeking this Court's review of a circuit court order compelling arbitration prior to entry of a final order which complies with the requirements of West Virginia Code §58-5-1 (1998) and Rule 54(b) of the West Virginia Rules of Civil Procedure must do so in an original jurisdiction proceeding seeking a writ of prohibition.

681 S.E.2d 96, 98, 224 W. Va. 211, 213, 2009 W. Va. LEXIS 73, *1.

While the *McGraw* decision confirms the seriousness attached to assuring appellate jurisdiction exists, it does not abrogate our line of case law which allows for appeals to be taken on orders that approximate finality although they omit the full Rule 54(b) expression of intended appealability. *McGraw* cites[3] to *Hubbard v. State Farm Indem. Co.*, which states:

> [E]ven if an order is not certified by a circuit court under Rule 54(b), it may nevertheless be considered "final" if it approximates a final order in its nature and effect. As we explained in syllabus point 1, in part, of *State ex rel. McGraw v. Scott-Runyon Pontiac Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995), "the key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature and effect." Rule 54(b) does not, however, dispense with the requirement of finality as to the claim that is the subject of Rule 54(b). "A judgment properly may be certified under Rule 54(b) only if it possesses the requisite degree of finality. That is, the judgment must completely dispose of at least one substantive claim." *Province v. Province*, 196 W. Va. 473, 479 n.12, 473 S.E.2d 894, 900 n.12 (1996).

213 W. Va. 542, 549-550, 584 S.E.2d 176, 183-184, 2003 W. Va. LEXIS 64, *21-22.

The order which Petitioner appeals granted Respondents' motions to dismiss and to compel arbitration which were brought expressly pursuant to Rule of Civil Procedure 12(b)(6), being the "failure to state a claim upon which relief may be granted." While, following its analysis under Rule 12(b)(6) dismissal standards, the order did not specifically include language pursuant to Rule

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[3] ...at 681 S.E.2d 96, 104, 224 W. Va. 211, 219, 2009 W. Va. LEXIS 73, *21.

of Civil Procedure 54(b) that there was "no just reason for delay" in appealing, the Trial Court essentially stated the same thing by its blunt and unequivocal conclusory statement: "**The Court invites Plaintiff to appeal this decision.**" (J.A. 250). With its grounding in Rule 12(b) and with its clear expression, indeed, near directive that "This Court invites Plaintiff to appeal this decision," the Rule 54(b) standard is met here.

In its Scheduling Order, the Supreme Court refused the SWN Respondents' November 6, 2020, motion to dismiss which argued the Trial Court's order is interlocutory and unappealable, and Petitioner understands this refusal deems the order final and appealable.

As for the standard of review, as *McGraw* further states, it is *de novo*.

> 4. This Court will preclude enforcement of a circuit court's order compelling arbitration only after a *de novo* review of the circuit court's legal determinations leads to the inescapable conclusion that the circuit court clearly erred, as a matter of law, in directing that a matter be arbitrated or that the circuit court's order constitutes a clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate.

681 S.E.2d 96, 99, 224 W. Va. 211, 214, 2009 W. Va. LEXIS 73, *3.

B. <u>The Trial Court Mis-analyzed The Case Under Prevailing Arbitration Standards</u>

As Petitioner submits, there are two reasons why the parties' dispute should not have been compelled into arbitration. The first is the failure to secure court approval of each contract and its various provisions, including arbitration, at its inception, in compliance with West Virginia Code §37-1-2, and this failure resulted in the voidance of each and every provision of each and every contract. The second is the disaffirmation of each contract once Petitioner reached the age of majority. While each of these reasons is particularly argued below, given the Trial Court's expressed reasoning for granting the respondents' motions, discussion of arbitration principles is necessary.

Schumacher Homes of Circleville, Inc., v. Spencer is a seminal case on issues of arbitration, and it provides the analytic framework that supports Petitioner's cause.

> 5. Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's challenge to the arbitration agreement. **When an arbitration agreement contains a delegation provision, the trial court must first consider a challenge, under general principles of state law applicable to all contracts, that is directed at the validity, revocability or enforceability of the delegation provision itself.**
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> 6. "Nothing in the Federal Arbitration Act, 9 U.S.C. § 2, overrides normal rules of contract interpretation. Generally applicable contract defenses 'such as laches, estoppel, waiver, fraud, duress, or unconscionability' may be applied to invalidate an arbitration agreement." Syllabus Point 9, *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, 724 S.E.2d 250 (2011), reversed on other grounds by *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 132 S.Ct. 1201, 182 L. Ed. 2d 42 (2012).
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> 7. **Under the Federal Arbitration Act, 9 U.S.C. § 2, there are two prerequisites for a delegation provision to be effective.** First, the language of the delegation provision must reflect a clear and unmistakable intent by the parties to delegate state contract law questions about the validity, revocability, or enforceability of the arbitration agreement to an arbitrator. **Second, the delegation provision must itself be valid, irrevocable and enforceable under general principles of state contract law.**

787 S.E.2d 650, 654, 237 W. Va. 379, 383, 2016 W. Va. LEXIS 515, *2-3 (highlight added).

As the body of the *Schumacher* decision emphasizes, "[I]f the delegation provision is ineffective on a ground that exists at law or in equity for the revocation of any contract, then the trial court may examine a challenge to the arbitration agreement." 787 S.E.2d 650, 661, 237 W. Va. 379, 390, 2016 W. Va. LEXIS 515, *23-24.

As the West Virginia Supreme Court of Appeals, in *Parsons v. Halliburton Energy Servs*, 785 S.E.2d 844, 237 W. Va. 138 (2016), well discusses, when addressing the enforceability of arbitration provisions, courts analyze and reconcile matters of state contract law.

> [F]ederal and West Virginia courts may refuse to enforce an arbitration agreement "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also W. Va. Code § 55-10-8 [2015] An arbitration agreement "is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract."). We summarized the law in this way:
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> > Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.
> >
> > Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011). Hence, a state court may assess whether an arbitration agreement is unenforceable under general principles of state law, "such as laches, estoppel, waiver, fraud, duress, or unconscionability." Syllabus Point 9, Id. (emphasis added). "To be clear, this list is not exclusive. Misrepresentation, duress, mutuality of assent, undue influence, **or lack of capacity**, if the contract defense exists under general common law principles, then it may be asserted to counter the claim that a . . . provision binds the parties. Even lack of consideration is a defense." *Geological Assessment & Leasing v. O'Hara*, 236 W. Va. 381, 387, 780 S.E.2d 647, 653 (2015).

785 S.E.2d 844, 852, 237 W. Va. 138, 146.

In the context of this case, where every provision of a minor's contract needed court approval to be valid, the Trial Court essentially, and mistakenly, found that because the arbitration provision was surrounded by other provisions Petitioner also contends to be invalid, it was safe from attack. While, yes, this set of circumstances rendered the whole contract invalid, all of the standards of West Virginia law, and the Federal law on which it leans, have been met by Petitioner's challenge, for it too is a clear and direct attack on the delegation provision itself. As a separate matter, and again, by disaffirming the contracts upon reaching the age of majority, the arbitration provisions, including that respecting delegation, were nullified.

It would be absurd, perhaps even intellectually disingenuous, for Petitioner to argue that the failure to obtain court approval negated only the arbitration delegation provision of each contract. Forgoing court approval amounted to a legal hand grenade that destroyed all of the

contracts in terms of legitimacy, but it certainly can be said to have destroyed the contracts by their individual, provisional, components too. With the delegation provision being one of those components, this amounts to a specific challenge against it. As to the doctrine of severability, this Court has said:

> The gist of the doctrine is that an arbitration clause in a larger contract must be carved out, severed from the larger contract, and examined separately. The doctrine treats the arbitration clause as if it is a separate contract from the contract containing the arbitration clause, that is, the "container contract." Under the doctrine, arbitration clauses must be severed from the remainder of a contract, and must be tested separately under state contract law for validity and enforceability.

Bayles v. Evans, 243 W. Va. 31, 43, 842 S.E.2d 235, 247, 2020 W. Va. LEXIS 258, *25, 2020 WL 1982894.

In this unique type of case, both where court approval is necessary yet missing for the delegation provision's effectiveness and where the provision has been disaffirmed by Petitioner upon reaching majority, a sufficient focus upon the delegation provision has occurred in order to judicially determine its invalidity. Consequently, by finding that Petitioner did not sufficiently mount his challenge to the delegation provision, the Trial Court committed reversible error.

C. <u>As An Independent Matter, The Arbitration Provision Was Nullified By Petitioner's Disaffirmation Of The Contracts</u>

As Petitioner argued to the Trial Court, he clearly disaffirmed the contracts by "promptly repudiating all of the contracts upon turning 18 through the *Amended Complaint*, which plainly states as against each corporate defendant its contract is 'void', by not ever getting any benefits under any of the contracts, and by bringing all of the corporate defendants into the action prior to having any damages determined..." (J.A. 237). By so doing, the arbitration provision was nullified as of the time of the Trial Court's deliberation over the motions to dismiss.

This Honorable Court recently addressed this very issue, in *Fitness, Fun, & Freedom, Inc. v. Perdue*, 2021 W. Va. LEXIS 67, 2021 WL 653240 (memorandum decision). Involving a

trampoline park's liability release which the plaintiff signed while a minor but then wholly disaffirmed upon reaching the age of majority, in that case the long-standing right of an infant to disaffirm a contract was itself re-affirmed.

> West Virginia law clearly provides that "[c]ontracts by minors are generally not void, but voidable only, and may be ratified or disaffirmed after majority." Syl. Pt. 1, *Hobbs v. Hinton Foundry Mach. & Plumbing Co.*, 74 W. Va. 443, 82 S.E. 267 (1914). *See also* Syl. Pt. 2, *Andrews v. Floyd*, 114 W. Va. 96, 170 S.E. 897 (1933) ("Contracts of infants, generally, are not void, but voidable at infant's election, and may be ratified or disaffirmed after majority.). The rule was a part of our case law as early as 1877. *See* Syl. Pt. 2, *Gillespie v. Bailey*, 12 W. Va. 70 (1877) ("A deed or contract for the sale of land, executed by an infant, is not absolutely void, but may be either affirmed or avoided at his pleasure, after he attains his majority."). The record on appeal clearly shows that B.P. was a minor when he signed petitioner's Release, and that B.P. disaffirmed the Release, its arbitration clause, and its delegation provision, when he reached the age of majority. Accordingly, we find no error in the circuit court's determination that there was no valid, enforceable arbitration agreement between the parties.

2021 W. Va. LEXIS 67, *7-8, 2021 WL 653240.

Plainly, the outcome in *Fitness, Fun* should be our outcome now. As of the filing of his *Amended Complaint*, Petitioner has disaffirmed the contract housing the arbitration provision, as is his unquestionable right to do. This consequently cleared the path for the Trial Court to then resolve the issue of whether the voidance of all the contracts actually runs back even further, to their inception, due to the failure to obtain the statutorily-mandated court approval. The disaffirmed contract containing the arbitration clause, with its delegation provision, is no obstacle.

D. Respondents' Failure To Secure Court Approval For Their Respective Contracts Pursuant To West Virginia Code §37-1-2 Renders Them All Wholly Void *Ab Initio*

While Petitioner's disaffirmation argument stands alone, his argument respecting the consequences of forgoing court approval for the contracts is inextricably connected to the arbitration issue. If Petitioner is correct, then there simply is no valid arbitration provision, nor any other valid contract provision, that respondents can rely upon.

> An illegal contract is as a rule void—not merely voidable—and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the grant is illegal in its inception, or whether, being valid when made, the illegality has been created by subsequent statute. . . . "If a contract is tainted with the vice of illegality, it is held to create no obligation, not from any consideration of the individual rights of the parties, who may be equally in fault, but from regard for the public." Generally, the illegality of a contract is a perfect defense to its enforcement, because the law will not require one to do, or punish him for not doing, that which it forbids him to do.

W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co., 820 S.E.2d 416, 423, 241 W. Va. 148, 155, 2018 W. Va. LEXIS 465, *19, 2018 WL 2769058 (internal citations omitted).

West Virginia Code §37-1-2 has been part of our law for well over a century and it focuses specifically upon our scenario whereby a minor's trustee and "interested" gas and mineral corporations wish to enter into contracts encumbering the minor's land. In its fullness, and in obliging the contracting parties to obtain court approval as a prerequisite to having an effective agreement, the statute reads:

> If the guardian of any minor, or the committee of any insane person or convict, think that the interest of the ward or insane person or convict will be promoted by a lease or by a mortgage or by a trust deed upon or by a sale of his estates, or of an estate in which he is interested with others, infants or adults; **or if the trustee of any estate, or any person interested in any estate in trust, whether he be interested with others or not, think the interest of those for whom the estate is held will be promoted by a lease of the same, mortgage or trust deed upon the same, or a sale thereof; such guardian, committee, trustee, or beneficiary, whether the estate of the minor or insane person or convict, or any of the persons interested, be absolute or limited, and whether there be or be not limited thereon any other estate, vested or contingent, and whether the guardian, committee or trustee, or the minor, insane person, convict, or any of the persons interested, reside in this State or not, may, for the purpose of obtaining such sale, lease, mortgage or trust deed, file a bill in equity in the circuit court of the county in which the estate proposed to be leased, sold or encumbered by mortgage or trust deed or some part thereof may be, stating plainly all of the estate, real and personal, belonging to such infant or insane person or convict, or so held in trust, and all of the facts calculated to show the propriety of the sale, lease, mortgage, or trust deed.** The bill shall be verified by the oath of the plaintiff; and the infant or insane person or convict, or the beneficiaries in such trust, when not plaintiffs, and all others interested, shall be made defendants. **The word "lease" as used in this article shall include any**

> **mining or timber lease or any lease of any profit in land,** and the word "sale" shall include the sale of any undivided interest, or any part of the corpus of land, or anything in or growing upon land. (bold added)

In calling for the full disclosure of a minor's estate implicated by the pending deal, in requiring the provision of "all of the facts calculated to show the propriety of the [contract]," by requiring the bill in equity, i.e., the petition, to be verified, and by compelling the petitioner to make all interested parties defendants, this court approval process can hardly be characterized as a perfunctory rubber stamp. The Legislature made it a sincere and serious process, for obvious reasons.

All of the contracts underlying plaintiff's claims against all the corporate respondents fall squarely within the expressed reach of this statute, a fact no respondent seems to deny. Rather, latching on to the use of the word "may", what they deny is that the court approval set forth by the statute is mandatory. Moreover they say, mandatory or not, the statute is superseded by, or is simply trumped by, provisions of the West Virginia Code Chapter 44D, namely, the *West Virginia Uniform Trust Code*. They are clearly wrong across the board.

Really, there is no reason to now argue these matters, for this Honorable Court has already determined court approval under the statute to be mandatory. However, before turning to those decisions, it is right to address Respondents' claim below that the use of the word "may" in the statute renders the statute permissive. (J.A. 120). For this they highlight Syllabus Point 1 of *Pioneer Pipe, Inc. v. Swain*:

> 1. As a **general rule** of statutory construction, the word "may" inherently connotes discretion and should be read as conferring both permission and power. The Legislature's use of the word "may" **usually** renders the referenced act discretionary, rather than mandatory, in nature.

237 W. Va. 722, 723, 791 S.E.2d 168, 169, 2016 W. Va. LEXIS 666, *1 (bold added).

While it is well and good to cite to this "general rule", this hardly ends the analysis. What is being determined is legislative intent, and on this our Supreme Court has said:

> The primary object in construing a statute is, of course, to ascertain and give effect to the intent of the Legislature. As stated in *Spencer v. Yerace*, 155 W. Va. 54, 180 S.E.2d 868 (1971):
>
> > In the construction of statutes, it is the legislative intent manifested in the statute that is important and such intent must be determined primarily from the language of the statute. . . . In ascertaining the legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation. . . . Id. at 59-60.
>
> Furthermore, statutes which relate to the same subject matter should be read and applied together, i.e. in *pari materia*, so that the Legislature's intention can be gathered from the whole of the enactments. *State ex rel. Campbell v. Wood*, 151 W. Va. 807, 155 S.E.2d 893 (1967); *State v. Boles*, 147 W. Va. 674, 130 S.E.2d 192 (1963); *State ex rel. Graney & Ford v. Sims*, 144 W. Va. 72, 105 S.E.2d 886 (1958).

Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 115, 219 S.E.2d 361, 365, 1975 W. Va. LEXIS 240, *12-13.

Further in this vein, the *Pioneer Pipe* decision, at footnote 7, specifically cites to the United States Supreme Court decision of *United States v. Rodgers*, which teaches:

> The word "may," when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however, *see Mason v. Fearson*, 9 How. 248, 258-260 (1850); *see generally United States ex rel. Siegel v. Thoman*, 156 U.S. 353, 359-360 (1895), and cases cited, and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute, *see ibid.*

461 U.S. 677, 706, 103 S. Ct. 2132, 2149, 76 L. Ed. 2d 236, 261, 1983 U.S. LEXIS 40, *11.

Considering the statute just with these rules of construction, it is easy to discern the court approval process the statute prescribes to be mandatory. The purpose is easy to divine; it is to protect minors, the insane and convicts—all of whom are compromised and vulnerable—from being unfairly taken advantage of in business dealings over their estates. When the things that must be done to proceed for court approval are so comprehensive and formal, including laying out each and every proposed provision to determine its propriety, it is manifest that the Legislature did not intend to let those contracting away the rights of minors, insane and incarcerated people to

simply opt to skip it all. Add to this *pari materia* consideration of all the associated statutes which apply to this same §37-1-2 court approval: §37-1-3, requiring the appointment of a guardian ad litem to minors; §37-1-5, a resultant decree approving of the contract must, among other things, require "ample security" to be given respecting a sale of estate on credit; §37-1-7, mandating that the proceeds from the deal "shall be invested under the direction of the court, for the use and benefit of the persons entitled to the estate,..."; §37-1-14, requiring guardians and committees to "enter into bond, with approved security, conditioned for the faithful application of the proceeds of sale or lease;" ...etcetera. Clearly, by structuring such an extensive system of court approval, our Legislature did not intend to allow contracting parties to simply ignore it all, enter into a contract with any provisions they choose to chuck within it, such as arbitration, and unfairly exploit the minor (or insane person or convict). The Legislature intended for it all to be employed, faithfully.

Furthermore, and as a long-standing principle observed by this Court in its 1983 decision, *Hodge v. Ginsberg*, "**when the word may is in a statute made for the benefit of persons it is not permissive, but mandatory or compulsory**." 172 W. Va. 17, 22, 303 S.E.2d 245, 250, 1983 W. Va. LEXIS 515, *15. In support of this principle, *Hodge* cites to *Trail v. Trail*. 56 W. Va. 594, 600, 49 S.E. 431, 434, 1904 W. Va. LEXIS 161. It is noteworthy that *Trail* is itself a 1904 decision, and being of similar vintage to §37-1-2, its observations of legislative intent in that era regarding what is and is not mandatory carry particular weight. Involving issues of creditors' claims upon an estate, what is important is this Supreme Court observation respecting the use of the word "may" in statutes designed to benefit persons:

> It is suggested that a difference exists between the two statutes from the fact that as to a dead man's estate the Code says the court "may" decree a distribution upon the report of debts whereas the other statute says "shall" decree. **Now this statute was made for the benefit of creditors, and the law is that when this word "may" is in a statute made for the benefit of persons it is not comply**

> **permissive, but mandatory or compulsory.** 20 Am. & Eng. Encyc. L. (2d Ed.) 237.

56 W. Va. 594, 600, 49 S.E. 431, 434, 1904 W. Va. LEXIS 161, *13 (bold added).

Consistently, if not more straightforwardly, the Arkansas Supreme Court explained the same concept:

> In *Pirani v. Barden*, 5 Ark. 81, *Spratley v. La. & Ark. Ry. Co.*, 77 Ark. 412, 95 S.W. 776, and *C. R. I. & P. Ry. Co. v. Jaber*, 85 Ark. 232, this court has recognized that the word "may" is often in(b)terpreted to mean "shall." The general rule of construction is that the word "may" is construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers. *Wheeler v. Chicago (Ill.),* 24 Ill. 105, 76 Am. Dec. 736; *Smalley v. Paine*, 102 Tex. 304, 116 S.W. 38; *People v. Board of Supervisors*, 68 N.Y. 114; *People v. Board of Supervisors*, 51 N.Y. 401, and *Supervisors v. United States*, 71 U.S. 435, 4 Wall. (U. S.) 435, 18 L. Ed. 419.
>
> All of these cases, and many more of like import, recognize that the word "may" is constantly used in statutes without intending that it shall be taken literally, and that, in its construction, the object evidently designed to be reached limits and controls the literal import of the word. They recognize that, in determining whether "may," as used in acts like the present one, is merely permissive or is mandatory, not only the language of the act but the circumstances surrounding its passage and the object had in view must be considered.

Washington County v. Davis, 162 Ark. 335, 339, 258 S.W. 324, 325, 1924 Ark. LEXIS 181, *6-7.

It is in complete accord with these concepts that our Supreme Court has directly determined §37-1-2 to be mandatory.

In 1903 the Supreme Court, in *Haskell v. Sutton*, addressed the scenario where Emma Morrow, the mother and guardian of minor children Walden and George Marrow, entered into an oil and gas lease with one John McKeown. 53 W. Va. 206, 44 S.E. 533, 1903 W. Va. LEXIS 24. However, minors Walden and George had an ownership interest in the leased land and no court approval was obtained for the contract. The failure to obtain court approval doomed the whole lease to invalidity.

> The first question to be considered and determined is the alleged **invalidity of the lease to [lessee] McKeown.**

> In the case of *South Penn Oil Co. v. McIntire, et al*, 44 W. Va. 296, 28 S.E. 922, it is held: "Petroleum oil, as it is found in the crevices of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.' **The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court.** A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but, without approval of the orphan's court, he cannot dispose of any part of the realty. Oil is a mineral, and being a mineral, is part of the realty; and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of a part of the corpus of the estate of his ward." *Wilson, et al. v. Youst, et al.*, 43 W. Va. 826, 834, 28 S.E. 781; Code, chapter 83, sections 2, 12[4].
>
> **The said lease, tested by the authorities cited, was and is without legal validity to bind [minors] Walden and George Morrow, or either of them.**

53 W. Va. 206, 212-213, 44 S.E. 533, 535-536, 1903 W. Va. LEXIS 24, *13-14.

Should all of the foregoing be deemed insufficient to definitively conclude court approval to be mandatory, there is also *Williams v. Skeens*, a 1990 decision written for a unanimous court by Justice Margaret Workman. 401 S.E.2d 442, 184 W. Va. 509, 1990 W. Va. LEXIS 270.

The dispute in *Williams* involved a will renunciation attempted by the committee of an incompetent individual (a severe stroke victim) following her husband's death. The committee reasoned that by renouncing the late husband's will, the incompetent would receive a greater portion of the husband's estate. However, the executrix of the husband's estate challenged the renunciation as not being approved by the circuit court and won below. On appeal the High Court distilled the issue in the following manner:

> The primary issue which this case presents is whether a committee, on behalf of its ward, has the absolute authority to renounce a will pursuant to W. Va. Code §42-3-1 without seeking ratification from a court of competent jurisdiction.

401 S.E.2d 442, 443, 184 W. Va. 509, 510, 1990 W. Va. LEXIS 270, *4.

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[4] At the time of this decision, codification of the court approval mandate was at Chapter 83. Obviously, the difference in citations is of no consequence.

In relating the history of judicial involvement in will renunciation cases, the Court discussed how important judicial protections are when dealing with incompetents.

> Although the distinction between courts of equity and courts of law have long since been abolished, it is this "high obligation owed by a court . . . to protect, secure and enforce the right of an incompetent" which necessitates judicial scrutiny of a committee's desire to effect a will renunciation on behalf of its ward.

401 S.E.2d 442, 445, 184 W. Va. 509, 512, 1990 W. Va. LEXIS 270, *9-10.

With this preface, the Court then turned to a discussion of other similar scenarios where court approval is necessary.

> Persuasive authority on the issue of whether a court should make the final determination regarding the wisdom of a will renunciation proposed on behalf of an incompetent is presented by several statutes which suggest court approval of certain transactions that will affect the rights of an infant, insane person, or convict. The sale or encumbrance of the estate of an infant, insane person, or convict is addressed by W. Va. Code § 37-1-2 (1985) which provides that
>
> > if the guardian of any minor, or the committee of any insane person or convict, think that the interest of the ward or insane person or convict will be promoted by a lease or by a mortgage or by a trust deed upon or by a sale of his estates, or of an estate in which he is interested with others, infants or adults; . . . such guardian, committee, trustee, or beneficiary. . . may, for the purpose of obtaining such sale, lease, mortgage or trust deed, file a bill in equity in the circuit court of the county in which the estate proposed to be leased, sold or encumbered by mortgage or trust deed or some part thereof may be, stating plainly all of the estate, real and personal, belonging to such infant or insane person or convict, or so held in trust, and all of the facts calculated to show the propriety of the sale, lease, mortgage, or trust deed. . . .Id.
>
> In addition to this provision, W. Va. Code § 37-1-11 (1985) authorizes a circuit court to consider by means of summary proceedings the petition of a guardian or committee seeking approval of the sale, lease, or mortgage of the estate of an infant, insane person, or convict. The standard for approval of such petitions is evidence that the requested transaction would benefit the interest of the infant, insane person, or convict. *See Jackson v. Jackson*, 89 W. Va. 571, 574, 109 S.E. 724, 725 (1921). When a compromise is reached in actions which affect the rights of infants and insane persons, judges are routinely asked to confirm the settlement pursuant to W. Va. Code § 56-10-4 (Supp. 1990). That statute provides, in pertinent part,

> in any action or suit wherein an infant or insane person is a party, the court in which the same is pending, or the judge thereof in vacation, shall have the power to approve and confirm a compromise of the matters in controversy on behalf of such infant or insane person, if such compromise shall be deemed to be to the best interest of the infant or insane person. Such approval or confirmation shall never be granted except upon written application therefor by the guardian, committee, curator or next friend of the infant or insane person, setting forth under oath all the facts of the case and the reasons why such compromise is deemed to be for the best interest of the infant or insane person. And the court or judge, before approving such compromise, shall, in order to determine whether to approve or disapprove the compromise, hear the testimony of witnesses relating to the subject matter of the compromise and cause said testimony to be reduced to writing and filed with the papers in the case. The court or judge, upon approving and confirming such compromise, shall enter judgment or decree accordingly.

401 S.E.2d 442, 445-446, 184 W. Va. 509, 512-513, 1990 W. Va. LEXIS 270, *10-13.

Ultimately, the High Court determined that in order to harmonize the law respecting incompetents with that respecting minors, court approval of certain business transactions would be mandatory.

> Despite the fact that incompetents are not expressly included as a class of individuals to whom the protections of W. Va. Code §§37-1-2, 37-1-11, and 56-10-4 apply, the overriding concern of these statutes is to involve the judiciary in certain transactions which affect the interests of a ward or convict. This common concern of securing judicial confirmation that a particular course of action will benefit certain individuals in combination with the well-recognized principle that requires court-approval of renunciations affecting incompetents convinces us that a court of competent jurisdiction should ratify a will renunciation proposed by the committee of an incompetent to confirm that the renunciation will inure to the ward's benefit.

401 S.E.2d 442, 446, 184 W. Va. 509, 513, 1990 W. Va. LEXIS 270, *13.

In further clarification, Justice Workman explained that not all transactions involving incompetents require court approval, just those such as involving real estate where a statutory mandate exists for approval, specifically citing to §37-1-2 for the ruling.

> Finally, we do not imply through this opinion that a committee must seek judicial approval of every transaction which it seeks to enact on behalf of an incompetent, only those transactions which require or suggest approval by statute such as a real estate sale or where the need for court approval is required by the principle of *stare decisis* as in all subsequent situations when a committee for an incompetent seeks to effect a will renunciation on behalf of its ward. **See W. Va. Code §§ 37-1-2, -11**, and 56-10-4.

401 S.E.2d 442, 447, 184 W. Va. 509, 514, 1990 W. Va. LEXIS 270, *18 (bold added.)

Because the Court ruled that a business transaction involving an incompetent's real estate requires court approval because, per §37-1-2, court approval is mandated for transactions over a minor's real estate, it can be said that our issue is already resolved. Section 37-1-2 is undeniably mandatory and the consequence of Respondents' decisions to forgo court approval is the total voidance of the contract. As succinctly set forth in *Conrad v. Crouch*, where minors' lands were sold without the necessary court approval, "it necessarily follows that the sale to [the buyers] is not merely voidable, but absolutely void." 69 S.E. 888, 891, 68 W. Va. 378, 385, 1910 W. Va. LEXIS 134, *13-14.

E. The *West Virginia Uniform Trust Code* Provides No Refuge To Respondents

Assuming that Respondents will repeat now what they argued to the Trial Court respecting the *West Virginia Uniform Trust Code* (UTC), that is that it applies here, that it is inconsistent with §37-1-2, and that it supersedes it, Petitioner must now, again, set forth the fallacies of those arguments. This seems particularly warranted given that the Trial Court did not substantively address any of them.

It is well to begin with the fact that the Chesapeake contract which contains the arbitration provisions, i.e., the contract upon which Respondents' arbitration arguments must rely, bears an "effective date" of March 11, 2011, whereas the effective date of the UTC is four months later on July 1, 2011. "This chapter takes effect on July 1, 2011." W.Va. Code §44D-11-1104. As West Virginia Code §44D-11-1105 sets forth:

(a) Except as otherwise provided in this chapter:

(1) This chapter applies to all trusts created before, on, or after July 1, 2011;

(2) This chapter applies to all judicial proceedings concerning trusts commenced on or after July 1, 2011;

(3) This chapter applies to judicial proceedings concerning trusts commenced before July 1, 2011, unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;

(4) Any rule of construction or presumption provided in this chapter applies to trust instruments executed before July 1, 2011, unless there is a clear indication of a contrary intent in the terms of the trust instrument; and

(5) An act done before July 1, 2011 is not affected by this chapter.

(b) If a right is acquired or vested before July 1, 2011, or if a right is extinguished or barred upon the expiration of a prescribed period that has commenced to run under any other statute before July 1, 2011, **that right or statute continues to apply even if the statute has been repealed or superseded.**

This statute is fatal to all claims that the UTC's application has any effect upon the Chesapeake contract's status as it existed before July 1, 2011. Chesapeake, as the predecessor to all the arbitration movants, and Respondent Cottrell entered into and commenced operating under a contract without the necessary court approval. That constitutes "an act done" before July 1. The contract's status was thus established as illegal and void prior to July 1, and by the UTC's plain terms, it retained this established status. It had to. If an act is illegal when it occurs, that illegality stays with it even if the law later changes.

Subsection (b) similarly applies in favor of Petitioner. Before July 1 and as of the effective date of the Chesapeake contract, Petitioner had protective rights under §37-1-2 to have the court determine the propriety of each of the provisions of the proposed lease and, were it all approved, to judicially impose safeguards on his contractual proceeds. Once those rights were violated by

Respondents acting under the signed contract without court approval, Petitioner acquired a cause of action, the right to judicial remedy. As observed by our Supreme Court in *Gibson v. W. Va. Dep't of Highways*:

> The United States Supreme Court has acknowledged that an accrued cause of action is a vested property right and is protected by the guarantee of due process. See *Gibbes v. Zimmerman,* 290 U.S. 326, 78 L. Ed. 342, 54 S. Ct. 140 (1933).

406 S.E.2d 440, 451, 185 W. Va. 214, 225, 1991 W. Va. LEXIS 149, *34 (holding modified on other grounds by *Neal v. Marion*, 222 W. Va. 380, 664 S.E.2d 721, 2008 W. Va. LEXIS 51.)

Assuming *arguendo* §37-1-2 to have been repealed or superceded as of July 1, Petitioner nevertheless retained those vested rights, as subsection (b) states.

The upshot is that the Chesapeake contract is outside the date reach of the UTC. While the obstacle posed to Defendants by this fact cannot be overcome, that is not to imply the other obstacles are of lesser force, for they are not.

The ramifications of Respondents' UTC arguments are radical. In essence, they claim that all judicial oversight afforded by every statute, whether established and maintained for many decades, like §37-1-2, or of more recent enactment, for minors, for the disabled, or for one of any particularly protected status, is circumventable through the single-sentence stroke of a pen in the creation of a trust. Such a proposition amounts to absurdity, and the UTC cannot be reasonably read to justify it.

For instance, in pitching their arbitration argument to the Trial Court, the SWN respondents cited to W.Va. Code. §44-5A-3 of the UTC, titled "Powers which may be incorporated by reference in trust instrument", and specifically refer to subsection (w) of that statute to prove the authority for a trustee to agree to arbitration. (J.A. 111). Although they recited much of this provision verbatim, they unsurprisingly left out its very beginning:

> (w) Litigate, **compromise** or abandon. **To compromise**, adjust, arbitrate, sue on or defend, abandon or otherwise deal with and settle claims in favor

> of or against the estate or trust as the fiduciary considers advisable, and the fiduciary's decision is conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by those persons; and in the absence of fraud, bad faith or gross negligence of the fiduciary, is conclusive between the fiduciary and the beneficiaries of the estate or trust.

The reason Respondents omitted language authorizing a trustee to compromise claims is because it is inarguable that any agreement to compromise and settle a claim involving an injury sustained by a minor, including injury confined just to the minor's property, must have court approval pursuant to the *Minor Settlement Proceedings Reform Act*. W.Va. Code §44-10-14. No settlement contract including releasing language can be given without it and virtually all the same process a court undertakes in association with a §37-1-2 approval is prescribed for the settlement proceedings. This legislative mandate for minor settlement court proceedings is irreconcilable with Respondents' contention that the UTC allows the negation of such judicial involvement simply by stating in the trust no approval is needed. No serious argument to this effect may be advanced, and other than for the difference in the statutes' respective ages and perhaps frequencies of occurrence, there is no meaningful difference between the minor-protecting mandate of §44-10-14 and that of §37-1-2.

This naturally leads to another point of import, that the UTC and §37-1-2, just as the UTC and §44-10-14, harmoniously co-exist. The notion of any conflict whatsoever between these court approval statutes and the UTC is merely a fabrication Respondents deem necessary to found their arguments. Heavily they rely on §44D-8-815, which states that a trustee "without authorization by the court having jurisdiction" may exercise powers conferred by the terms of the trust instrument. However, by this statute's very title, "**General** powers of trustee", one can discern that §44D-8-815 must be read in conjunction with any other laws that apply to a **specific** scenario, and while here we are concerned with §37-1-2 involving minors, it could be any other law that specifically applies to a trust.

While §37-1-2 quite narrowly homes in on property leases for minors, the insane and convicts, in its great breadth the UTC obviously does too relate to this same subject matter. Given this, the following interpretive principles apply.

> Generally, "[s]tatutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." Syl. Pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975). Even "where two statutes are in apparent conflict, the Court must, if reasonably possible, construe such statutes so as to give effect to each." Syl. Pt. 4, in part, *State ex rel. Graney v. Sims*, 144 W.Va 72, 105 S.E.2d 886 (1958).

Barber v. Camden Clark Mem. Hosp. Corp., 240 W. Va. 663, 670-671, 815 S.E.2d 474, 481-482, 2018 W. Va. LEXIS 453, *17-18, 2018 WL 2470652.

Like a glove, the purposes of the UTC fit with the unwavering and long-standing statutory commitments to court oversight of business dealings involving minors. The Legislature is essentially stating: "Trustee, you have these powers generally, but when a minor is involved you must have court approval for such things as compromising claims and entering into leases for real property." The court approval statutes can in no way be said to do harm to the legislative purposes underlying the UTC.

Respondents have misunderstood the import of W.Va. Code §44D-3-303(3) and (5). Found within the Code article "Representation", and specifically in the statute titled "Representation by fiduciaries and parents," these subsections and all the other subsections of §44D-3-303 do authorize "parents" and "trustees" and "conservators" and "guardians" and "personal representatives" and even "agents" to represent and bind persons, but that certainly does not mean without any necessary court approval. All this statute does is create standing to act for someone. When court approval, say for a minor settlement, is granted, it is not the court that signs the settlement agreement and release, but rather it is the parent, or guardian, or trustee of the minor

who does so, ultimately binding the child. Although there is no statutory conflict, even if there were, the UTC would have to yield to §37-1-2. As *Barber* continues to state:

> However, when it is not reasonably possible to give effect to both statutes, the more specific statute will prevail. As we held in syllabus point one of UMWA by *Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984), "[t]he general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." *See also Int'l Union of Operating Eng'rs v. L.A. Pipeline Constr. Co., Inc.*, 237 W.Va. 261, 267, 786 S.E.2d 620, 626 (2016) ("[W]here two statutes apply to the same subject matter, the more specific statute prevails over the general statute."); *Newark Ins. Co. v. Brown*, 218 W.Va. 346, 351, 624 S.E.2d 783, 788 (2005) ("When faced with a choice between two statutes, one of which is couched in general terms and the other of which specifically speaks to the matter at hand, preference is generally accorded to the specific statute."). *Id.*

While in the face of conflict it is §37-1-2 that overcomes the UTC, in truth there is no need to find any conflict for the two bodies of law can be applied harmoniously. In any event, the statutory obligation to secure court approval for the contracts remains in full force and effect.

F. Entered In Violation Of The Automatic Bankruptcy Stay, The Final Order Is Void

Until counsel for Respondent Chesapeake Appalachia, LLC, announced by her October 20, 2021, letter to this Honorable Court that her client is indeed an interested party respecting Judge Sims' order on arbitration and this consequential appeal, neither Judge Sims nor any of the other parties to this action perceived that the automatic stay put a halt to the whole proceedings and precluded the entry of the September 1, 2020 *Order*. No one notified Judge Sims that he was acting outside of his power. Most notably, and curiously, counsel for Chesapeake Appalachia, L.L.C., sat silently back.

With the final order being entered, of course Petitioner had no choice but to timely file his *Notice Of Appeal*, and while in it he disclosed the filing of the *Notice Of Suggestion Of Pendency Of Bankruptcy For Chesapeake Energy Corporation, Et Al, And Automatic Stay Of These Proceedings*, he expressed his belief that Chesapeake was no longer a participant due to its

bankruptcy and that the proceedings against it in this suit ceased. Then came Chesapeake Appalachia's formal contention that Petitioner is wrong, indicating that it too wants to argue for the benefits of Judge Sims' order.

The effect of this October 20, 2021, announcement of continuing interest is, unfortunately, case changing. In its *Scheduling Order* this Honorable Court expressly recognized that the automatic stay placed a halt on the proceedings until the date that it was lifted. Petitioner certainly respects this determination, and anyone else wishing to debate its correctness would find that wish foreclosed, at least by the *law of the case doctrine*.

> "The general rule is that when a question has been definitely determined by this Court its decision is conclusive on parties, privies and courts . . . and it is regarded as the law of the case." Syl. Pt. 1, in part, *Mullins v. Green*, 145 W.Va. 469, 115 S.E.2d 320 (1960).

In re Name Change of Jenna A.J., 234 W. Va. 271, 273, 765 S.E.2d 160, 162, 2014 W. Va. LEXIS 1079, *4.

The reason the stay changes everything does not relate to when it was lifted but rather to when it commenced. By the June 30, 2020, *Notice*, counsel for Chesapeake informed the Trial Court and all parties of the June 28, 2020, bankruptcy petition and of the in-place automatic stay. It was thereafter, and during the stay, that the September 1, 2020 *Order* now on appeal was entered. This chronology renders the order null and void, with its entry constituting plain error.

> The automatic stay provided by Section 362 of the Bankruptcy Code is effective upon the filing of the petition. Actions taken in violation of the stay are null and void irrespective of whether the creditor has had any notice of the filing of the case and the accompanying stay.

In re Scott, 1982 Bankr. LEXIS 2933, *1, 24 B.R. 738 (M.D.Ala. 1982).

In re Scott follows United States Supreme Court's holding that any action taken by a state court during a bankruptcy without the bankruptcy court's permission is void and without legal

effect. *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370, 1940 U.S. LEXIS 1189. Reflecting on *Kalb*, the United States Bankruptcy Court for the District of Maryland described:

> In *Kalb v. Feuerstein,* the United States Supreme Court held: (1) that the filing of a petition by a farmer and his spouse under § 75 deprived a State Court of power and jurisdiction to proceed in any manner with the foreclosure proceedings previously initiated against them without the consent of the Bankruptcy Court, and (2) that the State Court's confirmation of the sheriff's sale and Order ejecting the debtors from their farm "was not merely erroneous, but was beyond its power, void, and subject to collateral attack." 308 U.S. 433, 438, 60 S. Ct. 343, 84 L. Ed. 370 (1940).

In re Murray, 5 B.R. 732, 733, 1980 Bankr. LEXIS 4538, *3, 6 Bankr. Ct. Dec. 921.

The seemingly unavoidable consequence of this is the nullification of the final order, indeed, the nullification of all actions of record in the case *sub judice* from the date of the stay's imposition until the date it was lifted, which per the *Status Report* of Chesapeake Appalachia, L.L.C.'s attorney was on February 9, 2021. This should leave the parties back before the Trial Court preliminary to any ruling on the motions to dismiss, where the Trial Court would be addressing the motions, legally speaking, in the first instance.

VI. CONCLUSION

Given the foregoing, while the exact and full nature of the Supreme Court's relief may vary, the essential judicial element for any outcome should be the dis-empowering of the Trial Court's September 1, 2020, *Order*. Petitioner respectfully submits that this Honorable Court should not only find that the Trial Court committed reversible error in granting the motions to dismiss and compelling arbitration, but that it should specifically find that each of the contracts at issue is void *ab initio* for the failure to obtain court approval pursuant to West Virginia Code §37-1-2, remanding the case for further proceedings consistent with that holding.

Alternatively, the Court should find that Petitioner disaffirmed each of the contracts, most notably that which houses the arbitration provisions, upon reaching the age of majority, and then remand the case to the Trial Court to address whether the contracts were actually void *ab initio* for the same §37-1-2 failures, and thereupon allow for the litigation of the remaining issues to ultimate circuit court conclusion.

Should the Court determine that the bankruptcy automatic stay voids the September 1, 2020, *Order* and all other proceedings occurring during the stay, then Petitioner humbly submits the result is the vitiation of the appeal, leaving the parties before the Trial Court to address and judicially resolve, in the first instance, all issues pending as of the time the bankruptcy stay commenced.

Respectfully submitted, Petitioner
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0761

MASON LOUIS COTTRELL,

Petitioner,

v.

On Appeal from the
Circuit Court of Ohio County
(Case No. 19-C-159)

LOUIS COTTRELL, JR., CHESAPEAKE APPALACHIA, LLC, SWN PRODUCTION COMPANY, LLC, JAMESTOWN RESOURCES, LLC, APPALACHIA MIDSTREAM SERVICES, LLC, and STATOIL USA ONSHORE PROPERTIES, INC.,

Respondents.

CERTIFICATE OF SERVICE

Service of the foregoing **Brief of Petitioner** and **Joint Appendix** were made upon the following by mailing a true copy thereof, by United States Mail, postage prepaid, on this 3rd day of January, 2022:

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