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

MASON LOUIS COTTRELL,

Petitioner,

v.

LOUIS COTTRELL, JR.
CHESAPEAKE APPALACHIA, LLC
SWN PRODUCTION COMPANY, LLC
JAMESTOWN RESOURCES, LLC
APPALACHIA MIDSTREAM SERVICES, L.L.C., and
STATOIL USA ONSHORE PROPERTIES, INC.,
N/K/A EQUINOR USA ONSHORE PROPERTIES, INC.

Respondents.

From the Circuit Court of
Ohio County, West Virginia
Case No. 19-C-159

BRIEF OF RESPONDENT, APPALACHIA MIDSTREAM SERVICES, L.L.C.

Michael G. Connelly (WV Bar No. 10682)
Stephen W. Kiefer (WV Bar No. 11336)
TROUTMAN PEPPER HAMILTON
SANDERS LLP
501 Grant Street
Suite 300
Pittsburgh, PA 15219-2507
T: (412) 454-5000
F: (412) 454-5060
Michael.Connelly@Troutman.com
Stephen.Kiefer@Troutman.com

Attorneys for Respondent
Appalachia Midstream Services, L.L.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. STATEMENT OF THE CASE

A. Response To Petitioner's Statement Of The Case.

This appeal is ostensibly a challenge to a trial court order compelling Petitioner to arbitrate a contract dispute against certain defendants.[1] Petitioner, however, has decided to use this appeal as an improper attempt to have this Court issue a decision on substantive issues that have not yet been addressed by the trial court. This Court should summarily reject Petitioner's bald attempt to eschew this State's procedures for disposition of issues properly before this Court.

Even if this Court considers the non-arbitration-related issues that Petitioner raises, those arguments are meritless. Under West Virginia's Uniform Trust Act legislation (the "UTC"), a party, like AMS, "who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee had properly exercised the power." W. Va. Code § 44D-10-1012(a). The UTC also provides that such a person need not inquire into the extent of the trustee's powers and need not ensure that the trustee properly apply the assets delivered to him. W. Va. Code §§ 44D-10-1012(b)-(c). The West Virginia Legislature has thus plainly directed that any beneficiary of a trust, like Petitioner, may achieve recovery stemming from the misdeeds of a trustee, if at all, against the trustee alone[2]; the statute shields third-parties like AMS from liability for the trustee's misdeeds. So while Petitioner's Amended Complaint alleges regrettable misconduct by a father

[1] Appalachia Midstream Services, L.L.C. ("AMS") did not move to dismiss Petitioner's Amended Complaint on the grounds of an arbitration provision because AMS' agreements with Petitioner contain no such provision. The trial court has indicated as much by permitting Petitioner's case to proceed against AMS in the trial court rather than in arbitration, with AMS' Motion to Dismiss still pending in the trial court. *See* Joint App. 260.

[2] Petitioner did just this by obtaining a default judgment against his father prior to amending his complaint to add the current defendants. Joint App. 20.

trustee, that Complaint does not state a viable cause of action against AMS under West Virginia law.

Even if Petitioner were correct (he is not) that the UTC does not apply to his trust, AMS still would prevail. The statute that Petitioner purports established a mandatory requirement of court approval for AMS' agreements with Petitioner's trust does no such thing. To be sure, the statute on which Petitioner rests his entire case does not apply to AMS as a third-party dealing with a trust, does not apply to the type of agreements AMS entered into with Petitioner's trust, and is merely permissive rather than mandatory.

B. Background.

In the underlying litigation, Petitioner initially sued only his father ("Defendant Cottrell"), alleging that, as trustee of Petitioner's trust, Defendant Cottrell entered into numerous land-use contracts with various oil and gas companies on behalf of the trust. *See* Joint App. 6-10. Petitioner further alleged that Defendant Cottrell squandered the proceeds of the agreements rather than properly maintain the proceeds for the benefit of Petitioner as the beneficiary of the trust. *Id.* On August 7, 2019, Petitioner obtained a default judgment against Defendant Cottrell. *Id.* at 20. Shortly thereafter, in January 2020, Petitioner moved the trial court for leave to file an amended complaint naming additional defendants – several oil and gas entities, including AMS. *Id.* at 25-28. The trial court granted that motion on January 9, 2020, and Petitioner filed an Amended Complaint on February 4, 2020. *See id.* at 30-32. The Amended Complaint alleged that the newly added defendants were required to, but failed, to attain court approval for their contracts with Petitioner's trust. *See generally id.* at 32-52.

All of the newly added defendants moved to dismiss the Amended Complaint. SWN Production Company, LLC ("SWN") and Statoil Onshore Properties, Inc. N/K/A Equinor USA Onshore Properties, Inc. ("Equinor") moved to dismiss and compel arbitration. *See id.* at 70-77.

SWN and Equinor moved to dismiss on the bases that 1) their agreement with the trust was subject to an arbitration agreement found in a March 10, 2011 oil and gas lease (the "Chesapeake Lease"); and 2) West Virginia's Uniform Trust Code barred Petitioner's claims against them. *Id.* Chesapeake Appalachia, L.L.C. ("Chesapeake") and Jamestown Resources L.L.C. ("Jamestown") filed a Joinder Motion to Dismiss and Compel Arbitration joining in SWN's and Equinor's motion. *Id.* at 127-130. Chesapeake's and Jamestown's joinder motion relied on the same arbitration provision asserted by SWN and Equinor. *See id.*

AMS filed a Motion to Dismiss. *See id.* at 56-68. Importantly, because AMS' contracts with Petitioner's trust did not include arbitration clauses, AMS' Motion to Dismiss (which still is pending) did not seek to compel arbitration. AMS' Motion to Dismiss primarily argued that Petitioner's claim was barred by the UTC. *Id.*

On September 1, 2020, the trial court entered an Order granting SWN's and Equinor's and Chesapeake's and Jamestown's Motions to Dismiss and Compel Arbitration. *Id.* at 243-50. The Order analyzed the arbitration issue but did not address any of the parties' statutory arguments; the Order did not so much as mention the UTC. *See id.* The Order also stayed the litigation pending arbitration. *Id.* On September 8, 2020, Petitioner filed a Motion to Alter or Amend the Order. *Id.* at 251-53. This Motion reminded the trial court that AMS' contracts with the trust did not contain arbitration clauses and requested that the court sever Petitioner's claims against AMS. *Id.* at 252. On October 1, 2020, the trial court granted that motion, and reinstated Petitioner's claims against AMS to its active docket. *Id.* at 250-51. The trial court has not yet ruled on AMS' motion to dismiss.

II. SUMMARY OF ARGUMENT

The trial court order at issue in this appeal dealt with a solitary issue: whether the arbitration provision contained in certain defendants' contract with Petitioner's trust (i.e., the Chesapeake Lease) required the trial court to compel those parties' dispute to arbitration. In resolving this issue, the trial court resolved the only issues it was permitted by law to consider: 1) the contract contained an arbitration provision with a delegation clause; 2) the arbitration provision covered the claims Petitioner asserted in his lawsuit; and 3) Petitioner did not specifically challenge the arbitration provision in the contract. Based on these three determinations, the trial court held that it did not have the authority to determine the validity of the contract and compelled arbitration. That holding was not error; indeed, it was required under well-settled and controlling precedent of this Court and the Supreme Court of the United States which require that an arbitrator resolve issues related to contracts that include arbitration provisions with delegation clauses.

Despite the narrow scope of the trial court's order and the narrow scope of this appeal, Petitioner argues that, in order to resolve the issue of whether the motion to compel arbitration was properly granted, this Court must actually resolve the entire dispute. This improper attempt by Petitioner necessitated AMS' involvement in this appeal; if this Court provides Petitioner with the relief he seeks, it will decide Petitioner's claim against AMS before the trial court has even ruled on AMS' motion to dismiss. Specifically, Petitioner claims that this Court should hold that Section 37-1-2 of the West Virginia Code required court approval for all of the at-issue contracts and that West Virginia's UTC does not apply to this matter. Once this Court makes those determinations, Petitioner claims, it will have no option but to hold that the order compelling arbitration was entered in error. This position is wrong for numerous reasons.

As an initial matter, this Court need not—and should not—address any of Petitioner's statutory arguments in his arbitration-related appeal. The arbitration issue is a narrow one, confined to a review of the contract (i.e., the Chesapeake Lease) and the Petitioner's allegations.

But if this Court does choose to address the statutory issues, AMS clearly prevails on the merits. The UTC, which by its terms applies to Petitioner's trust, expressly forbids Petitioner's suit against AMS and absolves AMS from liability as a result of the trustee's actions or misdeeds. Additionally, the UTC prevents Petitioner from voiding the at-issue contracts. And even if Petitioner is correct that Section 37-1-2 can be applied to this dispute, it expressly did not require court approval of any of the at-issue agreements; that statute is permissive and not mandatory.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

To the extent that this Court determines that appellate review is confined only to the issue of whether the trial court properly found that 1) the Chesapeake Lease contained an arbitration provision with a delegation clause; 2) the arbitration provision covered Petitioner's claims; and 3) the Petitioner did not specifically challenge the arbitration provision, AMS asserts that oral argument would not be necessary because this Court has authoritatively decided those issues. *See* W. Va. R. App. P. 18(a)(3); *see also infra* § IV.B.1. If, however, this Court determines that in order to resolve this appeal it must resolve the substantive issues of the underlying litigation, i.e., that it must address Petitioner's statutory arguments, then oral argument would be necessary. In such a scenario, the case should be scheduled for Rule 20 oral argument because, contrary to Petitioner's assertion that the issues in this case are well-settled, he asserts numerous legal arguments that are entirely unsupported by West Virginia law and/or have never been addressed by this Court. *See infra* § IV.C.

IV. ARGUMENT

A. Standard of Review.

In reviewing an order granting a motion to dismiss, the Court's standard of review is *de novo*. *Bayles v. Evans*, 243 W. Va. 31, 38, 842 S.E.2d 235, 242 (2020). When the motion to dismiss also involves the trial court compelling the matter to arbitration, this Court "confine[s]" its review only to the issues appropriate for the trial court to consider, namely: "whether there is a valid, enforceable arbitration agreement, and whether the claims asserted by" a plaintiff "fall within the substantive scope of the agreement." *Id.* at 39, 243.

B. The Trial Court Did Not Commit Reversible Error In Compelling Arbitration.

The trial court order at issue in this appeal addressed one narrow issue: it granted certain defendants' motions to compel arbitration on the basis of the arbitration provision in the Chesapeake Lease. To reach its conclusion, the trial court analyzed straightforward law regarding its authority, or lack thereof, to review a contract containing an arbitration provision; it did not touch on any legal issue outside of that narrow determination. *See* Joint App. 247-50. Accordingly, to decide this Appeal, this Court must simply determine whether the trial court may adjudicate claims arising under a contract that contains an arbitration provision. As discussed below in section IV.B.1, this Court has already decided this question and determined – based on binding Supreme Court precedent – that a trial court may not adjudicate such claims.

1. The Trial Court Correctly Held That It Was Not Permitted To Determine The Validity Of Contracts Containing Arbitration Provisions.[3]

"When a party to an arbitration agreement makes a motion to dismiss a complaint and to compel arbitration, the power of the trial court to proceed in the case is constrained." *Bayles*, 243 W. Va. at 38-39, 842 S.E.2d at 242-43. The trial court may address two questions: 1) "does a valid arbitration agreement exist," and 2) "do the claims at issue in the case fall within the scope of the arbitration agreement?" *Id.* at 39, 243. If the answer to those two questions is "Yes," then the trial court must compel the matter to arbitration.[4] *See id.* In reviewing the trial court's order granting a motion to compel arbitration, this Court's review is "similarly confine[d]" to those two narrow issues. *Id.*

Under the doctrine of severability, "only if a party to a contract explicitly challenges the enforceability of an arbitration clause within the contract, as opposed to generally challenging the contract as a whole, is a trial court permitted to consider the challenge to the arbitration clause." *Id.* Syl. Pt. 2. When, as here, the arbitration provision contains a "delegation provision" giving the arbitrator sole authority "to determine whether the arbitration agreement is valid, irrevocable or enforceable," the "trial court is precluded from deciding a party's challenge to the arbitration agreement." *Id.* Syl. Pt. 5. As the Supreme Court of the United States has explained, this rule applies to all contracts, regardless of whether the party challenging the contract asserts the contract

---

[3] AMS incorporates by reference the arguments of SWN, Equinor, Chesapeake, and Jamestown in regard to trial court's authority to determine the validity of the contracts containing arbitration provisions.

[4] It is axiomatic under West Virginia law that "a written provision to settle by arbitration a controversy arising out of a contract" is presumptively "valid, irrevocable, and enforceable" unless the arbitration provision itself is independently found to be invalid. *See* Syl. Pt. 1, *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016); *see also Bayles v. Evans*, 243 W. Va. 31, 43, 842 S.E.2d 235, 247 (2020) ("The Supreme Court [has] concluded that under Section 2 of the Federal Arbitration Act, courts should presume an arbitration clause is 'valid, irrevocable, and enforceable' until proven otherwise.").

is voidable or void *ab initio*. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-04 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). Thus, when a party challenges a contract containing an arbitration provision, a West Virginia trial court must dismiss the claim and compel the matter to arbitration unless the party challenging the contract directly and specifically alleges that that arbitration provision is invalid. *Bayles*, Syl. Pts. 2, 5. No such allegation occurred in this case.

Thus, the trial court appropriately determined that the at-issue contract (i.e., the Chesapeake Lease) included an arbitration provision and that the arbitration provision covered Petitioner's claims. *See* Joint App. 247-49. And it correctly determined that Petitioner did not lodge a specific challenge to the arbitration provision.[5] Accordingly, the trial court made the only determination permitted to it under the law, and this Court should uphold its decision.

2. This Court Should Not Address Petitioner's Statutory Arguments.

a. This Court Does Not Rule On Issues Undecided By The Trial Court.

This is a Court of Appeal and it "will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 4, *G Corp., Inc. v. MackJo, Inc.*, 195 W. Va. 752, 466 S.E.2d 820 (1995). Put another way, non-jurisdictional issues not addressed or decided by the trial court are thus not reviewable in this Appeal. *See id.* at 758, 826; *see also*

---

[5] Petitioner strains to construct an end run around of the severability doctrine by arguing that because he generally challenged all of the contracts as void, it must be assumed that he was also separately and specifically challenging each and every provision of the contracts as void by implication, including the arbitration provisions. *See* Pet. Brief at 14-15. This is not the standard. A party to a contract must have a claim "directed solely to the making and performance of the agreement to arbitrate" in order for a court, rather than an arbitrator, to have authority to review the claim. *Bayles*, 243 W. Va. at 43, 842 S.E.2d at 247. Petitioner's 21-page, 126-paragraph Amended Complaint ***does not even mention*** any arbitration provision, let alone specifically challenge one. *See generally* Joint App. 32-52.

Sands v. Security Trust Co., 143 W. Va. 522, 532-33, 102 S.E.2d 733, 740 (1958) ("As the circuit court did not pass upon the validity of the perpetual trust . . . this Court will not in the first instance attempt to do so."). This rule is particularly forceful in cases such as this one, where there is a "limited record" available for this Court to review and "it would be inappropriate for this Court to preemptively and definitively settle" a disputed issue not resolved by the trial court. *See Doering v. City of Ronceverte*, 228 W. Va. 147, 155, 718 S.E.2d 497, 505 (2011).

MackJo is instructive. That case concerned an easement conveyed by MackJo to an appellant, Herman Fletcher, so that Fletcher could begin a residential development. *MackJo*, 195 W. Va. at 754, 466 S.E.2d at 822. Another appellant, G Corp., alleged that the easement violated a protective covenant MackJo had previously conveyed to G Corp. *Id.* G Corp. filed a lawsuit seeking injunctive and declaratory relief, asserting its rights under a "Declaration of Protective Covenants and Restrictions" that had been executed by MackJo in G Corp.'s favor. *Id.* at 755, 823. The lawsuit also alleged that MackJo breached the Declaration and that G Corp. was damaged by MackJo and Fletcher "overburden[ing]" the easement. *Id.* The Circuit Court of Kanawha County entered an order granting an injunction that was "based entirely upon the provision of the Declaration which states that '[n]o part of the Industrial Park shall be used for residential purposes.'" *Id.*

This Court overturned the injunction order and rejected G Corp.'s attempt to argue its cause of action for impairment or interference with the easement at the appellate level. *Id.* at 757-58, 825-26 ("[I]n addition to suggesting a breach of the Declaration, the complaint alleged that the actions of MackJo, Inc. and Herman Fletcher overburdened the right-of-way and resulted in economic loss[.]"). This Court noted that although the "circuit court received evidence as to that cause of action [it] made no final ruling thereon in the final order." *Id.* at 758, 826. Accordingly,

this Court would not consider those issues on the appeal. *Id.* ("That aspect of the case is, therefore, not before us."). Because the trial court order only addressed the issue of the Declaration, "[o]ther issues, beyond the question of the Declaration, thus remain[ed] and need[ed] to be addressed by the circuit court" before this Court could address them. *Id.* Here, the trial court did not even "receive evidence" on the statutory issues Petitioner asks this Court to address and AMS' Motion to Dismiss based on the express language of the UTC remains pending before the trial court.

b. The Trial Court Addressed Only One Narrow Issue And Did Not Rule On Any Statutory Issues.

The trial court order at issue in this appeal addressed a lone issue: certain defendants' motions to dismiss and compel arbitration on the basis of an arbitration provision in the Chesapeake Lease. *See* Joint App. 243-250. Each of the defendants have asserted that the UTC forbids Petitioner's lawsuit against them, and that issue is therefore in dispute.[6] But the trial court never ruled on the UTC issue, and the relevant order does not even refer to the UTC. This Court, therefore, has nothing to review outside of the narrow issue of whether the trial court properly compelled the matter to arbitration. The Petitioner has even conceded that the applicability of the UTC has not been addressed by the trial court. *See* Pet. Br. at 25 (noting that "the Trial Court did not substantively address any of" the issues relating to the UTC).

Despite the lack of a factual record, and despite the fact that the trial court has never addressed any statutory issues,[7] Petitioner claims that this Court should issue what amounts to an

[6] It is not in dispute that the underlying matter involves the defendants' dealings with a trust and trustee. Petitioner has conceded in his pleadings that his father was trustee of an express trust for Petitioner's benefit. *See, e.g.*, Joint App. 33, Am. Compl. at ¶¶ 5-11 (Petitioner pleading that property was deeded to "Louis Cottrell, Jr., as Trustee for Mason Louis Cottrell" and that Defendant Cottrell was "Trustee" for the land conveyed to Petitioner and entered into various agreements as "Trustee" for Petitioner).

[7] Likewise, the trial court has not yet addressed AMS' Judicial Estoppel defense asserted in its motion to dismiss, which AMS incorporates herein by reference. *See* Joint App. 184-86. This is another instance of Petitioner attempting to escape a meritorious defense to his claims and attain a judgment in the underlying litigation before the

advisory opinion interpreting the West Virginia Code. *See generally* Pet. Br. at 16-30. Specifically, he requests that this Court interpret the UTC and West Virginia Code section 37-1-2 ("Section 37-1-2") to find that those code sections required court approval of all of Petitioner's contracts with defendants. *Id.* at 17-25. This Court must make this determination, Petitioner claims, so that it can then conclude that the contracts are void and thus, the trial court order compelling arbitration was error and the trial court may rule on Petitioner's contractual claims. Notwithstanding the authority noted in the above section setting forth that this Court may not rule on issues not addressed by the trial court, this template proposed by the Petitioner is simply wrong.

As noted above, the issue of whether a trial court may determine the validity of a contract with an arbitration provision is narrow. The court must first determine if the contract contains an arbitration provision relating to the claims and, if so, it must then determine whether the party disclaiming the contract specifically challenged the arbitration provision. *See generally Bayles*, 243 W. Va. 38-39, 43, 842 S.E.2d at 242-43, 247 (noting that "power of the trial court to proceed . . . is constrained" when contract includes arbitration provision and noting doctrine of severability in relation to same). In the absence of a specific challenge to the arbitration provision, the court must compel arbitration. *Id.* at 43, 247 (noting that severability "requires a party resisting arbitration to exclusively challenge the enforceability of the arbitration clause, and not the overall contract"). Petitioner attempts to inject state law principles and public policy into the equation. He may not do so. *See Buckeye Check Cashing*, 546 U.S. at 446 (noting that doctrine of severability does not turn on state public policy and state contract law).

---

trial court has an opportunity to address the substantive issues of Petitioner's claims. This Court should reject such subterfuge.

C. If This Court Chooses To Address Petitioner's Statutory Arguments, AMS Prevails On The Merits.

Petitioner's underlying lawsuit is based almost entirely on his incorrect premise that AMS and the other defendants violated Section 37-1-2 by failing to obtain court approval before entering into the subject agreements with Defendant Cottrell. According to the Petitioner, Section 37-1-2 "oblig[ed] the contracting parties to obtain court approval as a prerequisite to having an effective agreement." Pet. Br. at 17; *see also* Joint App. 47-48, Am. Compl. ¶¶ 108, 110-115. But Section 37-1-2 does not govern the underlying dispute and it does not impose any such "prerequisite."

1. The West Virginia Uniform Trust Code Governs The Dispute.

The West Virginia Legislature adopted the UTC in 2011 following "an extensive five-year study of the model Uniform Trust Code by a probate committee of West Virginia lawyers." *Jackson v. Brown*, 239 W. Va. 316, 324, 801 S.E.2d 194, 202 (2017). The UTC applies to "express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree[.]" W. Va. Code § 44D-1-102 (2011); *see also Jackson*, 239 W. Va. at 324, 801 S.E.2d at 202.

The UTC plainly governs Petitioner's trust, the trustee's agreements with AMS, and the underlying litigation:

- The Uniform Trust Code "applies to all trusts created before, on, or after July 1, 2011." W. Va. Code § 44D-11-1105(a)(1). Petitioner's trust was created before July 1, 2011, on July 12, 2007. *See, e.g.*, Joint App. 53.

- As trustee, Petitioner's father entered into agreements with AMS between September 2011 and October 2012, i.e., after the July 1, 2011 effective date of the Uniform Trust Code. *See* Joint App. 46-47, Am. Compl. ¶¶ 98, 100, 102.

- The Uniform Trust Code "applies to all judicial proceedings concerning trusts commenced on or after July 1, 2011." W. Va. Code § 44D-11-1105(a)(2). Petitioner commenced this judicial proceeding concerning his trust in 2019, after July 1, 2011.

It is thus apparent from the Petitioner's own allegations in his Amended Complaint that the UTC governs this action.

In this case, the Petitioner was the beneficiary of an express trust because the deed conveying the subject property set forth that it was made "by and between CHERYL A. DANEHART, party of the First Part, and LOUIS COTTRELL, JR., as Trustee for MASON LOUIS COTTRELL, Party of the Second Part." Joint App. 53. *See* W. Va. Code § 44D-4-401(a)(1) ("A trust may be created by . . . [t]ransfer of property to another person as trustee[.]").

Petitioner strains to come up with reasons why 1) Section 37-1-2 is the governing statute; and 2) the UTC should be disregarded. *See* Pet. Br. at 25-30. But Petitioner ignores the fact that none of the at-issue contracts constitutes a contract with a ***minor***, which is the sort of agreement addressed in Section 37-1-2. As Petitioner straightforwardly alleges in his Amended Complaint, all of the agreements at issue in this litigation are between commercial entities and a trust, *see* Joint App. 33, Am. Compl. ¶ 8 (Defendant Cottrell "as Trustee for Mason Louis Cottrell, entered into numerous oil and gas leases, amendments, pipeline agreements and other mineral related transactions"), which is precisely the sort of agreement addressed by the UTC, *see, e.g.*, W. Va. Code § 44D-10-1012 (relating to persons "dealing with trustee"). Moreover, his arguments conflict with multiple canons of statutory construction.

Most obviously, his argument conflicts with the bedrock principle that "where two distinct statutes stand in *pari materia*, and sections thereof are in irreconcilable conflict, that section must prevail which can properly be considered as the last expression of the law making power." *Monongalia Cty. Bd. of Educ. v. Am. Fed. Of Teachers - W. Va.*, 238 W. Va. 146, 156, 792 S.E.2d 645, 655 (2016); *Stanley v. Dep't of Tax & Revenue*, 217 W. Va. 65, 71, 614 S.E.2d 712, 718 (2005) ("Furthermore, it is also true – indeed, paramount – that this Court must presume that the Legislature has a new purpose in enacting a new statute."); Syl. Pt. 2, *State ex rel. Dep't of Health & Human Res., Child Advocate Office v. W. Va. Pub. Emp. Retirement Sys.*, 183 W. Va. 39, 393

S.E.2d 677 (1990) ("[I]f several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature."). The 2011 UTC must therefore control over Section 37-1-2, which was enacted in 1849 and amended most recently in 1923.

Similarly, his argument violates the principle "that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled." Syl. Pt. 3, *Young v. State*, 241 W. Va. 489, 826 S.E.2d 346 (2019). Section 37-1-2 is a one-paragraph statute that generally references the "sale, lease or mortgage"[8] of an estate by the "guardian of any minor," the "committee of any insane person or convict," or the "trustee of any estate." By comparison, the UTC's 11 articles and nearly 100 sections deal comprehensively with the creation of trusts, duties and powers of trustees, liabilities of trustees and the rights of persons (like AMS) dealing with trustees. As this Court has explained, the UTC was the result of "an extensive five-year study of the model Uniform Trust Code by a probate committee of West Virginia lawyers," culminating in a comprehensive 120-page bill enacted by the legislature in 2011. *Jackson*, 239 W. Va. 324, 801 S.E.2d at 202 n.11.

The UTC specifically deals with issues central to this dispute. In pertinent part, the UTC specifically provides: 1) that it "governs the duties and powers of a trustee . . . and the rights and interests of a beneficiary," 2) that a trustee may exercise powers conferred upon him/her by the terms of the trust without obtaining court approval, and 3) that a person (like AMS) "who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly

[8] Petitioner does not even attempt to articulate how a statute governing the "sale, lease or mortgage of an estate" applies to the Easement and Right-of-Way Agreement, Surface Use Agreement, or Pipeline Right-of-Way Agreement executed by the trustee and AMS. *See* Joint App. 46-47, Am. Compl. ¶¶ 98, 100, 102. None of AMS' agreements with Defendant Cottrell constituted a "sale," "lease," or "mortgage."

exercised the power." *See* W. Va. Code §§ 44D-1-105(a); 44D-8-815(a)(1); 44D-10-1012. The UTC is more specifically applicable to the underlying litigation and the events described in Petitioner's Amended Complaint, and the UTC must therefore control over the older and more generic Section 37-1-2.

Petitioner also asserts that his contract with Chesapeake is not controlled by the UTC because "the Chesapeake contract which contains the arbitration provisions . . . bears an 'effective date' of March 11, 2011, whereas the effective date of the UTC is four months later on July 1, 2011." Pet. Br. at 25-26. In doing so, Petitioner all but concedes that the UTC applies to his contracts with AMS because all of AMS' agreements with Petitioner are dated after the July 1, 2011 effective date of the UTC. *See* Joint App. 46-47, Am. Compl. ¶¶ 98, 100-02.

Petitioner finally claims that Section 37-1-2 and the UTC can "harmoniously co-exist," but what he seeks to do is render the UTC meaningless. *See* Pet. Br. at 28. Petitioner advances an interpretation of Section 37-1-2 that requires an individual entering into a contract with a trustee to seek court approval of the agreement. The UTC expressly provides for the opposite, stating that "[a] trustee, ***without authorization by the court having jurisdiction***, may exercise . . . powers conferred by the terms of the trust instrument." W. Va. Code § 44D-8-815(a)(1) (emphasis added). Consequently, to the extent Petitioner could possibly be correct that Section 37-1-2 *requires* court approval of a transaction, then that statute would be in irreconcilable conflict with the UTC's provision that no court approval is required. That being so, this Court need only determine which of the two conflicting statutes is the more recent enactment, and/or which is more specifically applicable. Because the UTC is both more recent and more specific than Section 37-1-2, it is inescapable that the UTC applies to the exclusion of Section 37-1-2.

2. The UTC Precludes Petitioner's Action Against AMS.

a. Numerous Provisions Of The UTC Are Directly Applicable To The Dispute.

The UTC governs all West Virginia trusts, *see, e.g.*, W. Va. Code §§ 44D-1-201, 44D-11-1105, and, *inter alia*, sets forth the following rules. First, a trustee need not seek court authorization to exercise: 1) powers provided to the trustee in the trust instrument; and/or 2) powers related to the "investment, management and distribution of the trust property." W. Va. Code § 44D-8-815 (a). Second, a person dealing in good faith with a trust and trustee is "protected from liability," W. Va. Code § 44D-10-1012 (a), and need not "inquire into the extent of the trustee's powers or the propriety of their exercise," W. Va. Code § 44D-10-1012 (b). Third, a person dealing with a trust and trustee who "in good faith delivers assets to a trustee need not ensure their proper application." W. Va. Code § 44D-10-1012 (c). And fourth, that the UTC modifies West Virginia common law such that any common law in conflict with the UTC is superseded by the UTC. *See* W. Va. Code § 44D-1-106; *see also Jackson*, 239 W. Va. at 325, 801 S.E.2d at 203 n.12 (stating that UTC "modified our common law rule on a trust's liability for a trustee's tort").[9]

These provisions are directly applicable here. As Petitioner's Amended Complaint makes abundantly clear, his trustee, Defendant Cottrell, entered into the at-issue contracts with AMS and the other defendants. *See, e.g.*, Joint App. 33, Am. Compl. ¶ 8 ("The defendant, as Trustee for

[9] The UTC also provides that a beneficiary of a trust cannot void an agreement that "was authorized by the terms of the trust instrument." W. Va. Code § 44D-8-802(b)(1). Because the trust instrument provided Defendant Cottrell power to enter into agreements relating to the land in the trust, Petitioner cannot void the agreements. Moreover, Petitioner's attempt to portray the contracts as void, *see, e.g.*, Pet. Br. at 16-20, ignores the longstanding tenet of West Virginia law that voiding contracts is disfavored. *See* Syl. Pt. 4 *Wellington Power Corp. v. CNA Surety Corp.*, 217 W. Va. 33, 614 S.E.2d 680 (2005) ("The judicial power to declare a contract void as contravening sound public policy is a very delicate and undefined power and should be exercised only in cases free from doubt." (quotations omitted)).

Mason Louis Cottrell, entered into numerous oil and gas leases, amendments, pipeline agreements and other mineral related transactions regarding the [Petitioner's] Property."). The UTC provisions noted above are therefore controlling, as they deal specifically with the rights, duties, and liabilities of third-parties dealing with trusts and trustees. Indeed, Petitioner concedes by silence that AMS prevails if the UTC exclusively applies to his claims, as all of his arguments constitute attempts to bypass the UTC, and he does not even attempt to explain how his claims could fit within the statutory confines of the UTC. Petitioner never explains why the above-noted UTC provisions would not apply to the dispute.

b. The UTC Bars Petitioner's Claims Against AMS.

The crux of Petitioner's allegations, as described in his Amended Complaint, is that Defendant Cottrell, "as Trustee for Mason Louis Cottrell, has spent, wasted and/or depleted most of the plaintiff's money for defendant's own benefit and not for the benefit of the plaintiff." Joint App. 33, Am. Compl. ¶ 11. The UTC is clear that: 1) any claims Petitioner may have arising from such conduct are against Defendant Cottrell, not AMS; and 2) AMS cannot be held liable for such conduct of the trustee.

The deed creating the trust expressly granted Defendant Cottrell the authority to "grant, convey or incur debt on said land for the benefit of Mason Louis Cottrell." Joint App. 54. Accordingly, Defendant Cottrell, as trustee, was free to enter into the agreements with AMS without court approval. *See* W. Va. Code § 44D-8-815 (a)(1) ("A trustee, without authorization by the court having jurisdiction, may exercise . . . [p]owers conferred by the terms of the trust instrument[.]").

And the deed thus provided clear notice that Defendant Cottrell, as trustee, had the authority to enter into agreements on behalf of the trust, including the at-issue agreements with AMS. As a result, AMS is statutorily protected from liability concerning its dealings with

Defendant Cottrell in his capacity as Petitioner's trustee. *See* W. Va. Code § 44D-10-1012(a) ("A person other than a beneficiary . . . who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee had properly exercised the power."). The UTC further absolves AMS of any duty to ensure that Defendant Cottrell was properly exercising his powers as trustee and/or properly managing the trust assets. *See* W. Va. Code § 44D-10-1012(b) ("A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise."); § 44D-10-1012(c) ("A person who in good faith delivers assets to a trustee need not ensure their proper application."). The UTC makes it abundantly clear that the allegations in Petitioner's Amended Complaint simply do not constitute a claim against AMS.

Additionally, the West Virginia UTC is replete with provisions illustrating why any breach of duty alleged in the Amended Complaint was on the part of Defendant Cottrell, as trustee, rather than on AMS' part. *See, e.g.*, W. Va. Code §§ 44D-8-802(a) ("A trustee shall administer the trust solely in the interests of the beneficiaries."); 44D-8-804 ("A trustee shall administer the trust as a prudent person would[.]"); 44D-8-809 ("A trustee shall take reasonable steps to take control of and protect the trust property."); 44D-8-810(b) ("A trustee shall keep trust property separate from the trustee's own property."); 44D-10-1010(c) ("A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property . . . may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity."). These provisions establish that the trustee alone is responsible for the prudent administration of the trust. Petitioner cannot transfer Defendant Cottrell's liability to AMS. West Virginia law forbids it.

3. Even If Section 37-1-2 Governs The Underlying Dispute, It Is Merely Permissive And Did Not Require AMS To Seek Court Approval Of The Agreements.

Section 37-1-2 provides, in relevant part:

> If the guardian of any minor . . . think that the interest of the ward . . . will be promoted by a lease . . . such guardian, [or] trustee . . . ***may***, for the purpose of obtaining such sale, [or] lease . . . 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[.]

W. Va. Code § 37-1-2 (emphasis added). Section 37-1-2 thus provides that a guardian or trustee "**may**" file a bill in equity in a circuit court related to an encumbrance of a minor's property. But "may" is merely permissive, and Section 37-1-2 therefore does not ***require*** anyone to file anything. *See* Syl. Pt. 1, *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 791 S.E.2d 168 (2016) ("The Legislature's use of the word 'may' usually renders the referenced act discretionary, rather than mandatory, in nature.").

Moreover, Section 37-1-2 plainly and expressly refers only to "the guardian of a minor," "the committee of any insane person or convict," the "trustee," and "any person interested in any estate in trust." W. Va. Code § 37-1-2 AMS was none of these; Defendant Cottrell was. So even if Section 37-1-2 could be interpreted as creating a mandatory prerequisite of court approval—which it cannot—the duty would only extend to the guardian and/or representative, i.e., Defendant Cottrell; such a duty would not extend to AMS or to any other third party dealing with the guardian/trustee. Hence, even if Petitioner is somehow correct that Section 37-1-2 establishes a mandatory court-approval requirement (which he is not), the wrongdoer in violation of the requirement was Defendant Cottrell, against whom Petitioner has already achieved a judgment. Petitioner has no recourse against AMS in relation to Section 37-1-2 because that Section imposed no duties on AMS or any similarly-situated entity.

Petitioner strains to place great significance on *dicta* in *Williams v. Skeen*, a decision from this Court that did not even interpret or apply Section 37-1-2 and did not deal with land held in trust for a minor.[10] *See* Pet. Br. at 22-25. *Skeen* dealt with the renunciation of a will by the committee of an incompetent individual, not a land-use agreement entered into by a trustee. *See generally Williams v. Skeen*, 184 W. Va. 509, 401 S.E.2d 442 (1990). And in *Skeen*, the statute providing for the committee's ability to preserve and manage the incompetent's estate did not address court approval at all, *see* 184 W. Va. at 511, 401 S.E.2d at 444 (citing W. Va. Code § 27-11-4), so the Court did not have textual guidance as to what the Legislature intended. Here, Section 37-1-2 expressly provides that a guardian "may" seek court approval; the text therefore evidences that the statute is permissive. Notably, *Skeen* merely referred to Section 37-1-2 as one of "several statutes which *suggest* court approval of certain transactions." *Id.* at 512, 445 (emphasis added). Its description of "suggested" court approval is entirely consistent with the permissive language in Section 37-1-2 that a trustee "may" obtain court approval.

Finally, in determining that the committee of an incompetent individual is required to attain court approval for a will renunciation, this Court in *Skeen* relied on the "generally-accepted principle" that:

> ***[E]xcept where statutes . . . authorize the guardian . . . to make an election on his or her behalf . . . without obtaining judicial consent,*** approval, or authorization, the election ordinarily must be made either by a court . . . or by the guardian . . . acting pursuant to the authorization, consent, direction, or supervision of such court.

[10] *Williams v. Skeen* also pre-dates the enactment of the UTC by 21 years. So, even if the opinion recognized or created a common law rule requiring a trustee to obtain court approval for a contract, the UTC expressly modified such "rule." *See* W. Va. Code § 44D-1-106 ("The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter . . . ."). As this Court recognized, the UTC modified any common law rules to the extent any such rules conflict with the UTC. *Jackson*, 239 W. Va., 801 S.E.2d at n.12.

Id. at 511, 444 (emphasis added) (citing 80 Am.Jur.2d *Wills* § 1614 (1975 & Supp. 1990)). This "generally-accepted principle" on which the *Skeen* Court relied does not apply here because there ***is*** a statute expressly authorizing trustees to manage a trust without court approval, i.e., W. Va. Code § 44D-8-815.

D. Petitioner Has Not "Disaffirmed" The Contracts.

Petitioner claims that the arbitration provision was "nullified" by his "disaffirmation of the contracts." Pet. Br. at 15. Petitioner relies heavily on *Fitness, Fun, and Freedom, Inc. v. Perdue*, an unreported and unpublished opinion which is of limited precedential value. Syl Pt. 5 *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014). *Perdue* dealt with a minor who forged his mother's signature on a release related to attendance at a trampoline park. *Perdue*, No. 20-0344, 2021 WL 653240, at *1 (W. Va. Feb. 19, 2021). The minor's parents filed the lawsuit on behalf of the minor prior to his eighteenth birthday. *Id.* The defendant asserting the arbitration provision answered the complaint and later filed a motion to compel arbitration over two months after answering the complaint. *Id.* Upon the minor's eighteenth birthday, he and his parents filed an amended complaint in which he expressly "'disaffirmed' and refused to be bound by the Sky Zone Release." *Id.* at *2. This Court found that the minor had "unequivocally" disaffirmed the contracts and that he also had "specifically" challenged the arbitration provision independently from the contract. *Id.* at *4.

Perdue is distinguishable for numerous reasons. First, and most importantly, *Perdue* did not involve a trust at all. As discussed in section IV.C.1, because this matter concerns a trust, AMS did not enter into an agreement with Petitioner as a minor, it entered into a contract with the trust, which was entirely appropriate. *See, e.g.*, W. Va. Code §§ 44D-8-815(a), 44D-10-1012(b). In *Perdue*, the minor himself entered into the at-issue release by forging his mother's name. 2021 WL 653240, at *1. As Petitioner has conceded here, Petitioner's father – and not Petitioner himself

– entered into the agreements as the trustee of Petitioner's express trust. This is wholly appropriate under West Virginia law.

Second, the minor in *Perdue* filed an amended complaint expressly disaffirming the contract after reaching the age of eighteen. Here, Petitioner has never expressly disaffirmed the contracts, despite turning eighteen almost three years ago on May 24, 2019. *See* Joint App. 32, Am. Compl. ¶ 3 (noting Petitioner's birthday). Indeed, his Amended Complaint, which he filed in February of 2020, almost a year after turning eighteen, ***did not disaffirm any of the contracts***. Petitioner attempts to conflate his request that the trial court find that the contracts were void with disaffirmance. *See, e.g.*, Pet. Br. at 15 (stating that "the arbitration provision was nullified as of the . . . Trial Court's deliberation over the motions to dismiss" because the Amended Complaint "plainly states as against each corporate defendant its contract is 'void'"). But as *Perdue* makes clear, the disaffirmance of a contract must be express and "unequivocal." 2021 WL 653240, at *3.

Third, *Perdue* dealt with a minor who forged his mother's signature on an online release, and the trampoline park never confirmed that the minor had signed a release and did not attempt to confirm his age prior to his entrance and subsequent injury at the park. *Id.* at *1. Here, the defendants entered into contracts with Petitioner's trustee pursuant to the trustee's express authority under West Virginia law and the trust-deed. *See* §§ IV.C.1, IV.C.2.

Fourth, the defendant in *Perdue* did not immediately assert the delegation clause of the arbitration provision; it answered the plaintiff's complaint and sought to compel arbitration several months later. 2021 WL 653240, at *1. Here, the defendants asserting the arbitration provision did so in their very first pleading – a motion to dismiss and compel arbitration. And fifth, the plaintiff in *Perdue* specifically challenged the delegation clause in the release. *Id.* at *2 ("[T]he record

shows, and Sky Zone concedes, that respondents' written response to Sky Zone's motion to compel arbitration specifically contains a challenge to the arbitration clause."). Petitioner here did not.

In addition to *Perdue* being distinguishable, Petitioner cannot claim that he has disaffirmed the contracts because he has, in fact, ratified the agreements. Indeed, Petitioner has continued to cash royalty checks sent to him pursuant to the contractual arrangements. *See* Br. of Respondents SWN Production Company LLC and Statoil USA Onshore Properties Inc. Thus, Petitioner has not only failed to disaffirm the contracts, he has ratified them by accepting the benefit of the bargains. *Wallis v. Neale*, 43 W. Va. 529, 27 S.E. 227, 229-30 (1897) ("[R]atification will be presumed if, after becoming of age, he receives and retains the benefit with knowledge of the facts . . ."). Petitioner is accepting an ongoing benefit under the contracts, while at the same time suing the defendants in an attempt to recover prior benefits already conferred on his trust previously. Petitioner is attempting to have his cake and eat it too, and this Court should reject this attempt.

E. Chesapeake Appalachia LLC's Bankruptcy Petition Does Not Void The Trial Court's Order.

Petitioner's second assignment of error is a meritless attempt to portray the trial court's order as "void" because the trial court never stayed the matter pursuant to a party bankruptcy. Once again, this is an issue that Petitioner never raised at the trial court level and, therefore, the issue is not reviewable here. *See supra* § IV.B.2.a. None of the cases cited by Petitioner support his position that the bankruptcy stay voids the trial court's order. AMS incorporates by reference the arguments of SWN, Equinor, Chesapeake, and Jamestown in regard to the effect, if any, of Chesapeake's bankruptcy petition.

V. CONCLUSION

This Court should reject Petitioner's request to expand the scope of this appeal beyond the subject matter of the appealed order. Indeed, what Petitioner is attempting to do in this appeal is

obtain a judgment against AMS before the trial court rules on AMS' Motion to Dismiss. Petitioner's endeavor to achieve a legal victory over AMS before AMS can even assert its defenses or respond to Petitioner's factual allegations is impermissible under West Virginia law and is contrary the tenets of this State's legal system. This Court should address only the narrow issue of whether the trial court properly compelled arbitration pursuant to the arbitration provisions in the relevant contracts, as set forth in the trial court's order. Because the trial court acted appropriately – indeed, it reached the only holding permitted to it – this Court should affirm its order on this basis.

If, however, the Court addresses the non-arbitration-related issues raised by Petitioner, it must rule against Petitioner on those issues as well. Petitioner's non-arbitration-related arguments are meritless and are contrary to established precedent of this Court and the express intention of this State's Legislature as set forth in its Code. This Court should reject Petitioner's attempt to rewrite the laws of this State.

AMS respectfully requests that this Court affirm the trial court order at issue in this appeal.

Respectfully Submitted,

Michael G. Connelly (WV Bar No. 10682)
Stephen W. Kiefer (WV Bar No. 11336)
TROUTMAN PEPPER HAMILTON
SANDERS LLP

501 Grant Street
Suite 300
Pittsburgh, PA 15219-2507
T: (412) 454-5000
F: (412) 454-5060
Michael.Connelly@troutman.com
Stephen.Kiefer@troutman.com

Attorneys for Respondent
Appalachia Midstream Services, L.L.C.

Dated: February 17, 2022

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

MASON LOUIS COTTRELL,

Petitioner,

v.

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

Respondents.

From the Circuit Court of
Ohio County, West Virginia
Case No. 19-C-159

CERTIFICATE OF SERVICE

Service of the foregoing Brief of Respondent, Appalachia Midstream Services, L.L.C. were made upon the following by mailing a true and correct copy thereof, by U.S. Mail, postage prepaid, on this 17th day of February 2022:

Anthony I. Werner, Esq.
Joseph J. John, Esq.
Anthony I. Werner, Esq.
John & Werner Law Offices, PLLC
Board of Trade Building, Ste 200
80 – 12th Street
Wheeling, WV 26003
Counsel for Mason Louis Cottrell

Nicolle R. Snyder Bagnell, Esq.
Reed Smith LLP
225 Fifth Ave
Pittsburgh, PA 15222
Counsel for Chesapeake Appalachia LLC and Jamestown Resources, LLC

Richard L. Gottlieb, Esq.
Valerie H. Raupp, Esq.
Ramonda C. Marling, Esq.
Lewis Glasser PLLC
300 Summers Street, Suite 700
Charleston, WV 25301
Counsel for Respondents SWN Production Company, LLC and Statoil USA Onshore Properties, Inc., n/k/a Equinor USA Onshore Properties, Inc.

Louis Cottrell
5220 Dallas Pike Road
Triadelphia, WV 26059
Pro Se

Michael G. Connelly (WVSB #10682)
Stephen W. Kiefer (WVSB #11336)
TROUTMAN PEPPER HAMILTON SANDERS LLP
501 Grant Street, Suite 300
Union Trust Building
Pittsburgh, PA 15219
Phone: (412) 454-5000
Fax: (412) 454-5060