IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Dec 21 2023
04:04PM EST
Transaction ID 71677914

**SWN Production Company, LLC and
Statoil USA Onshore Properties Inc.,
now known as Equinor USA Onshore
Properties Inc.,**

Petitioners,

vs.) No. 23-547

Mason Louis Cottrell,

Respondent.

**Lower Court: Circuit Court of Ohio County West Virginia
Case No. CC-35-2019-C-159**

BRIEF OF PETITIONERS
SWN PRODUCTION COMPANY, LLC
AND STATOIL USA ONSHORE PROPERTIES INC.
N/K/A EQUINOR USA ONSHORE PROPERTIES INC.

**Ramonda C. Marling (W. Va Bar No 6927)
Lewis Gianola PLLC
Post Office Box 1746
Charleston, West Virginia 25326
rmarling@lewisgianola.com
(304) 345-2000**
Counsel for Petitioners

<u>**TABLE OF CONTENTS**</u>

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. ASSIGNMENTS OF ERROR

1. The Trial Court erred in holding that the provisions of W. Va. Code §37-1-2 applied to the arbitration agreement set forth in the Lease;

2. The Trial Court erred in holding that the arbitration agreement set forth in the Lease was unenforceable;

3. The Trial Court erred in holding that the provisions of W. Va. Code §37-1-2 applied to the delegation clause set forth in the Lease;

4. The Trial Court erred in holding that the delegation clause set forth in the Lease was unenforceable;

5. The Trial Court erred in holding that the provisions of W. Va. Code §37-1-2 were mandatory rather than permissive;

6. The Trial Court erred in denying the motion to compel arbitration of claims arising under the Lease;

7. The Trial Court erred in implicitly holding that Plaintiff was not bound by the arbitration agreement and the delegation clause set forth in the Lease under estoppel, third-party beneficiary and principal-agent principles;

8. The Trial Court erred in implicitly holding that the provisions of the Uniform Trust Code, W. Va. Code §44D-1-101 *et seq.* ("UTC") did not supersede W. Va. Code §37-1-2 with regard to the Lease, the arbitration provision set forth in the Lease and/or the delegation clause set forth in the Lease;

9. The Trial Court erred in holding that Plaintiff had the unquestionable right to disaffirm the Lease;

10. The Trial Court erred in holding that Plaintiff had the unquestionable right to disaffirm a contract entered into by the Trustee;

11. The Trial Court erred in holding that the Plaintiff effectively disaffirmed the Lease by filing the underlying civil action;

12. The Trial Court erred in holding that this case is in accord with the principles and rationale underlying *Fitness, Fun & Freedom, Inc. v. Perdue*, 2021 W. Va. Lexis 67, 2021 (memorandum decision);

13. The Trial Court erred in implicitly holding that Plaintiff had not affirmed the Lease by accepting royalty payments under the Lease; and

14. The Trial Court erred in denying Petitioners' *Motion to Alter or Amend* its Order entered on June 21, 2023 pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure.

II. STATEMENT OF THE CASE[1]

This case involves a trust created for the benefit of a minor and is predicated upon the minor's efforts to have certain contracts executed by the Trustee, including an oil and gas lease, declared void under W. Va. Code § 37-1-2[2], or to otherwise disaffirm the contracts duly executed

[1] Petitioners acknowledge that Rule 10(c)(4) of the West Virginia Rules of Appellate Procedure calls for a concise statement of the case outlining the procedural history and operative facts. The Statement of the Case is longer than it would otherwise be as this is the second round of appellate review in this matter.
[2] W. Va. Code § 37-1-2 provides:

> 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*;

by the Trustee upon reaching the age of majority. As set forth below, W. Va. Code § 37-1-2 is wholly inapplicable as the UTC superseded W. Va. Code § 37-1-2 as to trusts in 2011.

Further, the oil and gas lease at issue in this matter contains an arbitration provision with a delegation clause that requires arbitrability to be decided in arbitration, not by a judge in a civil action. The Trial Court erred in denying Petitioners' Motion to Dismiss and Compel Arbitration.

The Trust and the Lease

Respondent Mason Louis Cottrell ("Respondent") was the beneficiary of a trust evidenced by deed dated July 12, 2007, recorded in the Office of the Clerk of the County Commission of Ohio County, West Virginia in Deed Book 778, Page 382, from his mother to his father and defendant in this matter, Louis Cottrell, Jr., as Trustee (hereinafter "Deed" or "Trust"). JA 14-16. It is undisputed that Respondent was a minor at the time of creation of the trust. *See also* JA 44-45. The Deed provides that the Louis Cottrell, Jr., as trustee ("Trustee"), "may grant, convey or

---

> 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.

W. Va. Code § 37-1-2. JA 338-339 (emphasis supplied).

incur debt on said land for the benefit of Mason Louis Cottrell." JA 15.

As alleged by Respondent, "[t]he defendant, as Trustee for Mason Louis Cottrell, entered into numerous oil and gas leases, amendments, pipeline agreements and other mineral related transactions regarding the Respondent's property." JA 45. More specifically, the Trustee entered into a Paid-Up Oil and Gas Lease ("Lease") with Chesapeake Appalachia, LLC ("Chesapeake") dated March 10, 2011, that was later partially assigned to SWN Production Company, LLC ("SWN") on July 1, 2014 and to Statoil USA Onshore Properties Inc., now known as Equinor USA Onshore Properties Inc. ("Equinor") on April 20, 2012. JA 91-94; JA 105-116; JA 99-104. As such, it is undisputed that the Trustee, not Respondent, entered into business transactions on behalf of the Trust, of which Respondent was a beneficiary.

The Lease contains an arbitration clause that provides "[a]rbitration shall be the exclusive remedy and cover all disputes, including but not limited to, the formation, execution, validity and performance of the Lease and Order of Payment." JA 93. There is no dispute that during the pendency of the Trust, SWN and Equinor performed under the Lease and made corresponding payments to the Trust through the Trustee.

The First Complaint

Respondent originally filed a Complaint against Defendant Cottrell asserting claims against him in his capacity as Trustee. JA 9-21. The Complaint alleged, for example, "[a]s Trustee, the defendant Louis Cottrell, Jr., was to act in a fiduciary capacity and was to act in the best interest of Mason Louis Cottrell." JA 10, ¶ 7. In Count II of the Complaint, Respondent asserted a breach of fiduciary duty claim against Defendant Cottrell. *See e.g.* JA 11, ¶ 11. ("[t]he defendant… failed to well and truly and faithfully perform all of his duties as Trustee…"). Default judgment was entered against Defendant Cottrell on August 7, 2019, and the Court held that "all allegations set forth in Respondent's Complaint are to be taken as true and admitted." JA 26. The Trial Court entered a second Order on August 19, 2019, granting specific performance and directing the Trustee to convey the property to Respondent. JA 27-30. In so doing, the Trial Court noted that "[t]he aforesaid Deed did not convey the Respondent's property to the defendant individually but as 'Trustee' for the Respondent Mason Louis Cottrell." JA 28, ¶ 5.

SWN's Royalty Payments to Respondent

In January of 2021, Megan Brogan, a tax advisor with The Highlands, contacted SWN's Owner Relations Support Team on behalf of Respondent to effectuate a transfer in ownership of the royalty account and provided the necessary documentation to SWN. JA 492, ¶ 7. The Lease contains a successors clause: "[a]ll rights, duties, and liabilities herein benefit and bind Lessor and Lessee and their heirs, successors, and assigns." JA 93. SWN began tendering royalty payments directly to Respondent as of June 25, 2021 pursuant to the successors clause of the Lease. JA 492, ¶ 8. As of June 28, 2023, Respondent accepted and negotiated royalty payments tendered to him by SWN in the amount of $72,128.60. *Id.*, ¶ 9.

The Amended Complaint

Following entry of default judgment against the Trustee, Respondent moved to amend his Complaint to include claims against additional defendants, including SWN and Equinor. JA 44-64 and JA 31-36. The Amended Complaint continues to include unchanged allegations against Defendant Cottrell. JA 44-64. *See also* JA 33, ¶ 5 (stating that "the proposed amended complaint shall not assert new or additional claims" against Defendant Cottrell). The Motion to Amend was granted on January 9, 2020. JA 37-38.

The Amended Complaint continues to assert that Defendant Cottrell "failed to well and truly and faithfully perform all of his duties as Trustee…" and "breached his fiduciary duties as Trustee…." JA 47, ¶ 21. It further asserts that Trustee entered into transactions with various entities with regard to Trust property for, or related to, mineral production. JA 45, ¶ 8. In the Amended Complaint, Respondent specifically alleged that, by an Assignment dated April 20, 2012, Defendant Equinor was assigned an interest in the Chesapeake Lease between Trustee and Defendant Chesapeake Appalachia, LLC's ("Chesapeake"). JA 54, ¶ 67. Respondent further alleged that "any and all rights and interests obtained in Respondent's Property by Defendant SWN, by and through Defendant Chesapeake is void and/or provided no actual rights against Respondent's Property." JA 58, ¶ 94. Although not specifically alleged in the Amended Complaint, SWN was assigned an interest in the Chesapeake Lease and this assignment is recorded in Ohio County, West Virginia at Deed Book 884, Page 289. JA 105-116.

Importantly, Respondent concedes in the Second Amended Complaint that the Trustee, not the Respondent, contracted with Chesapeake (JA 48-49, ¶ 30-33) and SWN[3] (JA 55 at ¶¶ 74-77) and that the Trustee had a fiduciary duty to act in Respondent's best interest. JA 45.

Moreover, Respondent does ***not*** allege that the Defendants failed to abide by the terms of the contracts negotiated and executed by the Trustee during the existence of the Trust. JA 44-64.

As against Petitioners, the Amended Complaint essentially asserts that the Lease is unenforceable because a memorandum of lease[4] was not recorded and that the Lease and Pipeline

---

[3] The Trustee and SWN entered into a Term Pipeline Option and Right of Way Agreement ("Pipeline Agreement") dated October 20, 2017. JA 55 ¶ 74. Thus, SWN holds a partial interest in the Lease as an assignee of Chesapeake and is also party to the Pipeline Agreement. The Pipeline Agreement does ***not*** contain an arbitration provision.

[4] The Trial Court's June 21, 2023 Order does not address this issue.

Agreement are void because Court approval was not obtained pursuant to W. Va. Code §37-1-2. JA 56-57, ¶¶ 83-87.

The First Motion to Dismiss/Compel Arbitration

The Lease contains an arbitration agreement with a delegation clause as follows:

> ARBITRATION. In the event of a disagreement between Lessor and Lessee concerning this Lease or the associated Order of Payment, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. Arbitration shall be the exclusive remedy and cover all disputes, including but not limited to, the formation, execution, validity and performance of the Lease and Order of Payment. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.

JA 93.

Petitioners filed a Motion to Dismiss and Compel Arbitration based upon the arbitration clause contained in the Lease executed by the Trustee. JA 84-139. In response, Respondent argued that the Lease was void for failure to comply with W. Va. Code §37-1-2, a statute dealing with the sale, mortgage or lease of property held for a minor by a guardian or trustee. JA 152-161. By Order entered September 1, 2020, the Trial Court granted the Defendants' Motions to Compel Arbitration.[5, 6] JA 266-273. The Trial Court found, based upon the allegations in the Amended Complaint, "[P]laintiff asserts that the *entire contractual relationship* was void . . . ." JA 272 (emphasis supplied). Specifically, based upon the allegations in the Amended Complaint, the Trial

[5] Other defendants separately filed motions to dismiss and compel arbitration.
[6] In granting the Motion to Compel Arbitration, the Trial Court indicated that it "abhors the result that the law requires in this case. . . . the law of arbitration is anti-consumer and denies citizens their right to inexpensively and expeditiously access the Courts in this State and seek redress by a jury of their peers. (Why pay overpay (sic) three arbitrators when you have one judge for free?) The Court invites Plaintiff to appeal this decision." JA 273, footnote 3.

Court found that "[b]ecause Respondent's claims go to the overall existence of a contract, the doctrine of severability requires this Court to presume that a valid arbitration agreement was formed by the parties." JA 272.

The First Appeal (Cottrell I)

During the pendency of the Motion to Dismiss and Compel Arbitration (and prior to entry of the Order granting the same), Chesapeake filed for bankruptcy and filed a Notice of Suggestion of Bankruptcy in Trial Court on June 30, 2020. JA 250-252. Respondent appealed the Trial Court's Order compelling arbitration. JA 287-306. This Court vacated the Order compelling arbitration based solely upon its determination that the Trial Court's Order was entered in violation of the automatic bankruptcy stay and remanded for further proceedings. JA 327-329.

Importantly, this Court took no issue with the Trial Court's substantive ruling as to arbitrability. *Id*.

Proceedings on Remand

On May 2, 2023, Respondent filed *Respondent's Supplemental Memorandum in Opposition to Motions to Dismiss and Compel Arbitration.* ("Supplemental Opposition"). In an obvious attempt to correct prior missteps and without amending the allegations in the Amended Complaint, Respondent argued for the first time (i) that he "specifically and separately severs and challenges the arbitration clause, including the delegation provision contained therein, ("arbitration clause") contained in the Chesapeake Lease" (JA 310) and (ii) that he disaffirmed[7] the arbitration clause set forth in the Lease (a contract made by the Trustee) upon attaining the age

[7] Respondent did not raise his disaffirmance argument at the Trial Court level prior to filing his Supplemental Opposition, but had raised it in Cottrell I.

of majority. JA 316-319. Confoundingly, Respondent cited a case in which a minor forged his parent's signature upon a waiver of liability form at a trampoline park and later disaffirmed "his own" contract upon reaching majority in support of his disaffirmance argument. JA 317-318 (citing *Fitness, Fun & Freedom, Inc. v. Perdue,* 2021 W. Va. LEXIS, 67). At no point did Respondent amend or seek to amend the Amended Complaint to make these new allegations.

Petitioners filed a Supplemental Reply (JA 337-346) arguing, among other things, that (i) West Virginia's enactment of the UTC (W. Va. Code §44-51 1 *et seq*.) made that statute the controlling authority in West Virginia regarding trusts, (JA 340), (ii) even if W. Va. Code 37-1-2 were somehow applicable, it applies to an entire transaction (for the sale, mortgage or lease of property) and not an isolated arbitration/delegation clause, (JA 339); (iii) Respondent was incapable of disaffirming a contract made by a Trustee having contractual capacity, particularly based upon case law where a minor disaffirmed the minor's own contract based upon lack of contractual capacity, and (iv) Respondent became the counterparty to the Trust's Lease upon termination of the Trust and that the Respondent further acknowledged and ratified the same by acceptance of royalty payments. JA 342-344.

The Trial Court's Order and the Motion to Alter or Amend

By Order entered June 21, 2023, the Trial Court denied the Motion to Dismiss and Compel Arbitration. JA 964-975. Respondent filed a Motion to Alter or Amend (JA 572-598) which the Trial Court denied (JA 714) and this appeal followed.

III. SUMMARY OF ARGUMENT

This case involves three fundamental concepts that were misapplied below.

First, it is black letter arbitration law that an attack on an entire contract, as opposed to a narrow attack on an arbitration clause itself, is a question that goes to arbitration under the severability doctrine. *Bayles v. Evans*, 243 W. Va. 31, 42-44, 842 S.E.2d 235, 246-48 (2020) (under doctrine of severability, challenges that go to the overall existence of a contract go to an arbitrator). Stated differently, an independent attack on a delegation clause must go to the original formation of the delegation clause. *K.F.C. v. Snap, Inc*., 2021 U.S. Dist. LEXIS 108695, 7, fn 3 (S.D. Ill. 2021).

Notwithstanding Respondent's negligible attention to the severability doctrine claiming he "specifically and separately" challenged the arbitration clause, it is clear that the statutory argument made by Respondent and adopted by the Trial Court necessarily requires an attack on the entire contract and otherwise fails to mount a legitimate challenge to formation of the delegation clause. First, the Trial Court purported to use W. Va. Code §37-1-2 to void an entire Lease that contained an arbitration clause. This is necessarily true because even *if* Section 37-1-2 is applicable, and even *if* it is mandatory – which it is not – the express language of the statute applies to transactions (*i.e*., entire contracts) implicating a minor's interests in real estate. Nothing in that statute requires, much less even contemplates, court approval of an arbitration clause or a delegation clause in isolation. Accordingly, W. Va. Code §37-1-2 contains no language that could be interpreted to require that a trustee obtain court approval of an arbitration clause or delegation clause under the severability doctrine, an attack on the entire contract must be resolved in arbitration.

A similar argument exists with respect to the Trial Court's use of "minor disaffirmance" case law to void the delegation clause of the arbitration agreement. As set forth below, and notwithstanding that minor disaffirmance has no relevance to a contract made by a Trustee with full legal capacity to contract on behalf of the Trust, a contract by a minor is voidable, not void. *Fitness, Fun* at 7. As a result, a minor's exercise of the right of disaffirmance is retroactive only upon reaching the age of majority. While a minor can assert disaffirmance to render a voidable contract void, that is not the same thing as attacking the original formation of a delegation clause in an arbitration agreement. Indeed, the contract of a minor may also be ratified (*Id*), which necessarily means their subsequent disaffirmance does not equate with lack of formation of an agreement to arbitrate at the inception of the contract. Notwithstanding this Court's opinion in *Fitness, Fun, & Freedom, Inc. v. Perdue*, 2021 W. Va. LEXIS 67 (2021), in which no one raised the fact that retroactive disaffirmance of a voidable contract does not attack formation of the delegation clause in the first instance, the Trial Court erred in finding that Respondent properly challenged the delegation clause.

Second, W. Va. Code §37-1-2 does not support the Respondent's arguments or the Trial Court's decision. The Legislature's passage of the UTC superseded and abrogated the trust provisions in W. Va. Code §37-1-2 as to trusts. The UTC expressly applies to this matter and does not require Court approval for the general exercise of a trustee's powers. W. Va. Code § 44D-8-815.

Moreover, to reach its desired result[8], the Trial Court incorrectly held that use of the word "may" in Section 37-1-2, even with 4 independent uses of the word "shall," meant the word "may" was mandatory.

Finally, irrespective of the severability doctrine argument discussed above, the Trial Court erred in relying upon "minor disaffirmance" to void the delegation clause and the entire Lease under *Fitness, Fun, & Freedom, Inc. v. Perdue*, 2021 W. Va. LEXIS 67 (2021). In that case, the party that formed the contract was under the legal disability of minority, and therefore lacked the capacity to contract. Here, there is no dispute that the Trustee executed the Lease consistent, not only with the rights expressly granted in the Deed creating the Trust, but also under the provisions of the UTC. Case law addressing contracts made by minors has no application whatsoever to contracts made by a trustee. Put simply, minor disaffirmance case law has no application here because the contract at issue, the Lease, was not executed by a minor.

Moreover, legal title to the trust asset is held by the trustee until termination of the trust. Upon Respondent reaching majority and terminating the trust, Respondent became the successor in interest to the subject lease by operation of law. Rather than disaffirming the Lease, Respondent, upon reaching majority and terminating the trust, became the lessor under the lease. This conclusion is confirmed by Respondent's undisputed and continuing acceptance of the Lease's benefits, including acceptance of royalty payments. As such, Respondent ratified the Lease and should be estopped from denying its validity.

[8] As noted in footnote 5 above, the Trial Court found it abhorrent to grant Petitioners' Motion to Compel Arbitration in the first instance.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners do not believe oral argument is necessary under West Virginia Rule of Appellate Procedure 18(a). The dispositive issues in this case have been authoritatively decided under state and federal arbitration standards and have been conclusively addressed in the Uniform Trust Act ("UTA"). Petitioners do not believe that oral argument will significantly aid the decisional process. Should the Court grant oral argument under West Virginia Rule of Appellate Procedure, Petitioners believe this case is appropriate for a memorandum decision.

V. ARGUMENT

A. Standard of Review

The applicable standard of review is *de novo* on all issues.

> "When an appeal from an order denying a motion to dismiss and to compel arbitration is properly before this Court, our review is de novo." Syl. pt. 1, W.Va. *CVS Pharmacy, LLC v. McDowell Pharmacy, Inc.*, 238 W.Va. 465, 796 S.E.2d 574 (2017). Additionally, to the extent we are required to examine the Trial court's interpretation of the parties' written agreements, this Court applies a de novo review. *Zimmerer v. Romano*, 223 W.Va. 769, 777, 679 S.E.2d 601, 609 (2009) (per curiam) ("[W]e apply a de novo standard of review to the Trial court's interpretation of the contract.") . . . . Lastly, because the Trial court's decision relied on the interpretation of a statute, our review is de novo. Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the Trial court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.").

Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C., 242 W. Va. 372, 376-377, 836 S.E.2d 23, 26-27 (2019).

Additionally,

> "[t]he standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e),

> is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed."

Patton v. Cty. of Berkeley, 242 W. Va. 315, 319, 835 S.E.2d 559,563 (2019) (footnotes omitted).

Finally, under *de novo* review, no deference is afforded to either the Trial Court's findings of fact or conclusions of law.

> When employing the *de novo* standard of review, we review anew the findings and conclusions of the Trial court, affording no deference to the lower court's ruling. *See West Virginia Div. of Envtl. Protection v. Kingwood Coal Co*., 200 W. Va. 734, 745, 490 S.E.2d 823, 834, 1997 W. Va. LEXIS 176, *31 (1997) ("'De novo refers to a plenary form of review that affords no deference to the previous decisionmaker.'" (quoting *Fall River County v. South Dakota Dep't of Revenue*, 1996 SD 106,___, 552 N.W.2d 620, 624 (1996) (citations omitted))). See also *West Virginia Div. of Envtl. Protection v. Kingwood Coal Co*.,___ W. Va. at___, 490 S.E.2d 823 at ___, 1997 W. Va. LEXIS 176, *29 ("The term 'de novo' means 'anew; afresh; a second time.'" (quoting *Frymier-Halloran v. Paige*, 193 W. Va. 687, 693, 458 S.E.2d 780, 786 (1995) (quoting Black's Law Dictionary 435 (6th ed. 1990))).

Blake v. Charleston Area Med. Ctr., 201 W. Va. 469, 475, 498 S.E.2d 41,47 (1997).

B. The Trial Court Erred In Relying Upon W. Va. Code § 37-2-1 and "Minor Disaffirmance" to Circumvent the Delegation Clause. (Assignments of Error 1-7, 9-12, and 14).

The Trial Court originally found that Respondent was attacking the entire contract rather than the arbitration clause in the Lease. Upon appeal, this Court remanded based solely upon its determination that the Trial Court's original Order granting Petitioners' Motion to Dismiss and Compel Arbitration was issued in violation of Chesapeake's automatic stay in bankruptcy. On remand, Respondent attempted to change his argument and claimed he was specifically and separately challenging the arbitration clause and the delegation clause of the Lease. However, Respondent continued to argue that (i) the entire contract was void for failure to comply with W.

Va. Code §37-1-2 and (ii) he disaffirmed, upon reaching majority, the original formation of the Lease, including the delegation clause, executed not by Respondent as a minor but by the Trustee. As set forth below, the contract of a minor is voidable, meaning it is otherwise valid unless and until disaffirmed. This necessarily means that disaffirmance does not measure whether a valid delegation clause existed in the first instance. This is further compounded by the fact the Court is necessarily measuring the "intent" of someone who is not the Respondent. It was the Trustee that entered into the Lease and the delegation clause, not Respondent. Respondent has made no argument that the Trustee's intent to arbitrate arbitrability claims was lacking or defective at formation.

1. The Severability Doctrine

As correctly noted by the Trial Court in its original Order compelling arbitration:

> In Syllabus Point 4 of *State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders*, 228 W. Va. 125, 129, 717 S.E.2d 909, 913 (2011), the Court held in part:
>
> > Under the Federal Arbitration Act, 9. U.S.C. § 2, and 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 the trial court permitted to consider the challenge to the arbitration clause.

JA 271-272. The Trial Court continued: "[P]laintiff asserts that the entire contractual relationship was void . . . ." JA 272. Specifically, based upon the allegations in the Amended Complaint, the Trial Court found that "[b]ecause Respondent's claims go to the overall existence of a contract, the doctrine of severability requires this Court to presume that a valid arbitration agreement was formed by the parties." JA 272.

The Sixth Circuit Court of Appeals, relying heavily upon U.S. Supreme Court precedent, discussed the severability doctrine and delegation clauses:

> If an agreement exists, then "as a matter of substantive federal arbitration law, an arbitration provision [and delegation provision] [are] severable from the remainder of the contract." *See Rent-A-Center*, 561 U.S. at 70-72 (quoting *Buckeye*, 546 U.S. at 445). "[U]nder the severability principle, we treat a challenge to the validity of an arbitration agreement (or a delegation clause) separately from a challenge to the validity of the entire contract in which it appears." *New Prime*, 139 S. Ct. at 538. Where, as in this case, a delegation provision calls for an arbitrator to decide the validity and enforceability of both the arbitration provision and the contract in which it appears, courts may only decide a challenge to "the delegation provision specifically," *Rent-A-Center*, 561 U.S. at 72, "or claims that the agreement to arbitrate was '[n]ever concluded,'" *see Granite Rock*, 561 U.S. at 301 (quoting Buckeye, 546 U.S. at 444 n.1)). Thus, "if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator" and that delegation provision stands, "a court may not decide the arbitrability issue." *Henry Schein*, 139 S. Ct. at 530; *see Rent-A-Center*, 561 U.S. at 72-73.

Chaudhri v. StockX, LLC (In re StockX Customer Data Sec. Breach Litig.), 19 F.4th 873, 880 (6^{th} Cir. 2021).

Importantly, the Sixth Circuit laid out the analytical framework for a challenge to a delegation clause:

> Against this backdrop, our analysis proceeds in two steps. First, we resolve any challenge that pertains to the formation or existence of the contract containing the delegation provision. If a contract exists, we proceed to step two. Second, we decide any remaining enforceability or validity challenge only if it would "affect the [delegation provision] alone" or "the basis of [the] challenge [is] directed specifically to the [delegation provision]." *Rent-A-Center*, 561 U.S. at 71-72.

Id.

As set forth below, the Trial Court's analysis under W. Va. Code § 37-1-2 upon remand was a challenge to the entire contract and the question of arbitrability should have gone to arbitration. The Trial Court erred in holding otherwise.

2. Respondent's Supplemental Opposition Establishes that (i) Respondent was Still Attacking the Entire Contract Under W. Va. Code § 37-1-2 and (ii) Improperly Attacking the Delegation Clause Through the Minor Disaffirmance Doctrine.

Respondent's Supplemental Opposition expresses an intent to attack only the delegation clause. However, Respondent quickly proceeds to assert two separate arguments that fail to properly attack the delegation clause in isolation:

> Pursuant to the law, the Respondent hereby specifically and separately severs and challenges the arbitration clause, including the delegation provision contained therein ("arbitration clause") contained within the Chesapeake Lease. This challenge is based on numerous grounds, including, (1) the lack of Court approval pursuant to W. Va. Code 37-1-2 renders the arbitration clause and delegation provision void and unenforceable, and (2) Respondent disaffirmed the arbitration clause upon attaining the age of majority.

JA 310-311. Respondent further confirms he is really attacking the entire contract even when asserting otherwise. First, Respondent states: "Respondent submits that the arbitration provision (and the delegation clause) is completely impotent, non-existent, and unenforceable for failure to follow state law, and so it is not only proper but incumbent on this Court to resolve that issue." JA 311. In the very next sentence, Respondent retreats back to confirming that it is the entire contract at issue:

> In other words, in order to determine the validity of the arbitration provision (and delegation clause), the Court must resolve whether under state law the arbitration clause legally exists, ***and that decision rides on the outcome of the ultimate issue respecting Court approval of the Chesapeake lease*** by its separate clauses and/or by disaffirmance by the Respondent upon attaining the age of majority.

JA 311-312 (emphasis added).

With respect to the statutory argument under W. Va. Code §37-1-2,[9] Respondent is necessarily attacking the entire Lease because that is the only "transaction" that could even be interpreted as requiring Court approval under that statute. The statute in question provides no basis to attack the formation of an independent delegation clause, only a transaction for the sale, mortgage or lease of property. *Id*. This is not an attack on the arbitration clause itself, and the severability doctrine requires that the question of arbitrability be resolved in arbitration. *Sanders, supra* at 129 ("Under the Federal Arbitration Act, 9. U.S.C. § 2, and 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 the trial court permitted to consider the challenge to the arbitration clause"). The Trial Court erred in holding otherwise and denying Petitioners' Motion to Dismiss and Compel Arbitration.

The Trial Court also erred in relying upon "minor disaffirmance" in denying Petitioners' Motion to Dismiss and Compel Arbitration. As an initial matter, the concept of "minor disaffirmance" and case law developed thereunder is wholly inapplicable to contracts, such as the Lease, made by a Trustee acting within the scope of his power with the trust property. Notwithstanding the conceptual disconnect to the case *sub judice*, disaffirmance may be used by a minor upon reaching the age of majority to void a contract he entered while under the disability of minority. By mounting a retroactive challenge to void a voidable contract, the actual formation of the delegation clause is not implicated. Accordingly, minor disaffirmance is not a proper attack

[9] Petitioners continue to maintain that W. Va. Code § 37-1-2 was superseded by the UTC as to trusts and that, even if applicable, does not create a requirement for Court approval.

upon the delegation clause under the severability doctrine even if this Court somehow disregards the fact that a minor was not involved in formation of either the Lease (much less the arbitration clause and delegation clause therein) or the Pipeline Agreement.

3. W. Va. Code § 37-1-2, Even if Applicable (Which it is Not), is an Attack on the Entire Contract for Sale Lease or Mortgage of Property.

W. Va. Code § 37-1-2 applies to a sale, lease or mortgage of a minor's interests in real estate, not to an agreement to arbitrate. Indeed, the statute is entitled: "Sale, lease or mortgage; bill; parties; definition." The relevant portion of the statute provides:

> 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 . . .*

Id. (emphasis supplied).

W. Va. Code § 37-1-2 is not applicable because its trust provisions were superseded by the enactment of the UTC. Additionally, that statute's contemplation of Court approval is permissive, rather than mandatory, as established by the fact that the statute says that one "may" initiate a bill in equity for a transaction involving a minor's interest in real estate, particularly since there are 4 separate uses of the word "shall" in the same statutory provision. *Id*. Notwithstanding those impediments to reliance upon W. Va. Code § 37-1-2 in the first instance, the fundamental point is that the statute necessarily applies to *entire contracts*.

An independent delegation clause for arbitration does not fall within the purview of W. Va. Code § 37-1-2. Rather, the statute applies to the ability to obtain Court approval of a "*lease of the same, mortgage or trust deed upon the same, or a sale thereof.*" *Id*. If, in fact, Respondent was attacking the severed arbitration clause and delegation clause specifically and separately he would be arguing that "Petitioners failed to obtain Court approval of an arbitration agreement and delegation clause under W. Va. Code §37-1-2." Any argument that one may void a sale, lease or mortgage for failure to file a bill of equity and obtain court approval under W. Va. Code § 37-1-2 simply cannot be extended to a severed and isolated agreement to arbitrate. Respondent's invocation of W. Va. Code § 3 7-1-2 is necessarily and fundamentally an attack on the Lease as a whole which must be decided in arbitration under the severability doctrine. The Trial Court erred in relying on W. Va. Code § 37-1-2 to deny Petitioners' Motion to Dismiss and Compel Arbitration. *Sanders, supra* at 913.

4. The Trial Court Erred in Accepting Respondent's Disaffirmance Argument because Minor Disaffirmance Fails to Attack Formation of the Delegation Clause Under the Severability Doctrine.

The Trial Court erred in holding that Respondent disaffirmed[10] the delegation clause by filing the Amended Complaint because minor disaffirmation does not specifically and separately challenge formation of the delegation clause under the severability doctrine. Authorities addressing the legal issue of whether disaffirmance constitutes an attack on the formation of a

[10] As set forth above, minor disaffirmance is wholly inapplicable to the Lease in the first instance because the Trustee, an adult, entered into the Lease, not a minor.

delegation clause at its inception have held that it does not. In 2020, the United State District Court for the Eastern District of Michigan addressed a case where two minors (and others) registered to use StockX, an e-commerce platform for sale of luxury goods and clothing. *In re StockX Customer Data Sec. Breach Litig*., 2020 U.S. Dist. LEXIS 241178, *3 (E.D. Mi. 2020). In the registration process, users agreed to the terms and conditions which included an arbitration clause and a delegation provision that invoked the American Arbitration Act. *Id* at 4-5. There was a data breach at StockX and the Respondents, including the minor Respondents, filed a civil action asserting class claims for failure to protect confidential and personal information. StockX moved to compel arbitration.

The minor Respondents argued "minor disaffirmance" (also known as the "infancy doctrine") allowed them to disaffirm the agreement to arbitrate. *Id.* at 12. In rejecting the minor's disaffirmance argument, the District Court first noted that the delegation clause and the corresponding incorporation of the American Arbitration Acts created "'clear and unmistakable evidence' that the parties agreed to arbitrate arbitrability." *Id.* at 18. Ultimately the District Court held that:

> Respondents' infancy defense is no different from their argument that the entire arbitration agreement is unenforceable. Moreover, contrary to Respondents' argument, minors are capable of contracting; "their contracts [are] valid until disaffirmed." *Semmens v. Floyd Rice Ford, Inc*., 1 Mich. App. 395, 400, 136 N.W.2d 704 (1965). Therefore, the relevant question is whether the delegation clause in StockX's Terms extends to the issue of whether a minor effectively disaffirmed the arbitration agreement; that is, whether pursuant to the delegation clause the arbitrator has exclusive authority to determine if the minor Respondents disaffirmed the agreement. Because the issue relates to the enforceability of the arbitration agreement, the Court finds that it does.

> . . . even if the court believes that the defendant's assertion that the Respondents' claims in this lawsuit are subject to arbitration is utterly without merit, or "wholly groundless," *Henry Schein* prohibits denial of the Motion to Compel on that basis, because the fact remains that the enforceability of the contract, based on the validity of [Respondent]'s infancy defense as a basis for rescinding the contract, is a question of arbitrability that has been delegated to the arbitrator.

Id. at 19 (citing *Ingram v. Neutron Holdings, Inc*., 467 F. Supp. 3d 575, 585 (M.D. Tenn. 2020)).[11]

A year later in 2021, the United States District Court for the Southern District of Illinois was faced with this precise issue. *K.F.C. v. Snap, Inc*., 2021 U.S. Dist. LEXIS 108695, *1 (S.D. Ill. 2021). There, K.F.C, a minor, consented to terms and conditions of use for a camera application called Snapchat. The terms and conditions contained a delegation clause for arbitration through the American Arbitration Association. [12] *Id*. K.F.C. filed suit alleging that certain scans of facial geometry from Snapchat violated her rights under Illinois privacy statutes. *Id.* Defendant Snapchat sought to enforce the arbitration clause and Respondent attempted to use "minor disaffirmance" to challenge, not only the contract, but also the delegation clause. *Id* at 5.

In adjudicating Snapchat's motion to compel arbitration, the Southern District of Illinois emphasized that invocation of the American Arbitration Act in the delegation clause "demonstrates an intent to submit gateway issues to arbitration." *Id*. at 6. K.F.C, like Respondent here, argued that the entire arbitration agreement was unenforceable because she entered into it as a minor and had disaffirmed it. *Id* at 7. As stated by the Court:

> . . ., Respondent suggests that the arbitration provision that is part of the Terms of Service is void as disaffirmed and, therefore, its

[11] *Henry Schein, Inc. v. Archer & White Sales, Inc*., 139 S. Ct. 524, 528 (2019) cited above, stands for the proposition, among others, that "when the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id*.
[12] The arbitration clause in the Lease likewise invokes the American Arbitration Association. JA 93.

> requirements that the matter be submitted to arbitration cannot be enforced. (footnote omitted). Nevertheless, the law requires that the court "enforce a valid delegation clause even if the underlying arbitration agreement is potentially void." *Kuznik v. Hooters of Am., LLC*, 2020 U.S. Dist. LEXIS 186548, 2020 WL 5983879, at *4 (C.D. Ill. Oct. 8, 2020) (citing *Rent-a-Center*, 561 U.S. at 71-72). Because the delegation clause contained in the AAA arbitration rules appears to be valid, the court must refer to the arbitrator the question of the arbitration agreement's enforceability—including issues related to Respondent's status as a minor and the effectiveness of any disavowal on the part of the Respondent.

Id. The importance of this holding is clear: a valid delegation clause is to be enforced even if the agreement to arbitrate is potentially void. In the footnote omitted from the quote above, the District Court further reasoned that:

> Section 4 [of the American Arbitration Act] says that a court, in response to a motion by an aggrieved party, must compel arbitration "in accordance with the terms of the agreement" when the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." *Henry Schein, Inc*., 139 S. Ct. 524, 530, 202 L. Ed. 2d 480 (2019). While a contract with a minor is "voidable" under both Illinois and California law, it becomes void only upon disaffirmance. Thus, the formation or "making" of the agreement is not at issue in the present matter . . . .

Id at 7, fn 3.

West Virginia law likewise acknowledges that a contract formed by a minor is merely voidable rather than void:

> 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.").

Fitness, Fun, & Freedom, Inc. v. Perdue, 2021 W. Va. LEXIS 67, *7. Indeed, it is axiomatic that if the contract is voidable, and may be ratified, disaffirmance does not attack formation. Because the act of disaffirmance is retroactive, disaffirmance makes no challenge to the formation of the delegation clause. Stated differently, because the minor's contract is only voidable at execution, disaffirmance does not challenge the formation of the delegation clause at the time it was formed.

Thus, the reasoning set forth in *In re StockX, Ingram and K.F.C.* applies with equal force and clarity here. The Trial Court mistakenly applied disaffirmance to the delegation clause of the Lease (again, disregarding that disaffirmance is wholly inapplicable to a contract made by a Trustee). Because West Virginia law makes the contract, voidable rather than void, the severability doctrine and the foregoing authorities presume the validity of the delegation clause at formation. Accordingly, the question of whether the Respondent can disaffirm the contract, or even the arbitration clause, is a question for the arbitrator and the Trial Court erred in failing to send that issue to arbitration.

To the extent this Court looks to *Fitness, Fun* on the question of disaffirmance of a delegation clause, it is both immaterial on the one hand and distinguishable on the other. The Trial Court relied upon *Fitness, Fun* to justify two propositions: (i) that a minor can disavow a contract independently made by a Trustee (JA 794-795); and (ii) that the doctrine of minor disaffirmance can be used to challenge a delegation clause in an arbitration agreement. *Id*. *Fitness, Fun* offers zero support for the notion that a minor beneficiary can disaffirm a contract duly executed by an adult Trustee. Further, *Fitness, Fun* acknowledges that the question goes to whether the parties formed a valid agreement to arbitrate arbitrability claims. *Id*. at 6-7. This is consistent with *In re StockX* cited above: "[C]ontrary to Plaintiffs' argument, minors are capable of contracting; 'their contracts [are] valid until disaffirmed.'" *In re StockX Customer Data Sec. Breach Litig*., 2020 U.S. Dist. LEXIS 241178, *18 (E.D. Mi. 2020). As a result, the intent to arbitrate arbitrability claims is necessarily measured by the intent, at formation, of the party that made the agreement in the first instance. That person is not Respondent. This further underscores that *Fitness, Fun* is utterly and completely immaterial to the Lease made by the Trustee.[13]

C. The Trial Court Erred in Relying Upon West Virginia Code § 37-1-2. (Assignments of Error 1, 3, 5 , 8 and 14).

The Trial Court erred in relying on W. Va. Code § 37-1-2 to deny Petitioners' Motion to Dismiss and Compel Arbitration for two independent reasons: (i) the UTC superseded W. Va. Code §37-1-2 with respect to trust; and (ii) W. Va. Code §37-1-2 is permissive, not mandatory.

1. The UTC Superseded W. Va. Code § 37-1-2 With Respect to Trusts.

By relying upon W. Va. Code § 37-1-2 to deny Petitioners' Motion to Dismiss and Compel Arbitration, the Trial Court erred in implicitly rejecting Petitioners' arguments that the UTC superseded W. Va. Code § 37-1-2 with respect to Trusts.[14] Indeed, the Trial Court cited with approval to and with full acknowledgement of the UTC in its August 19, 2019 Order. JA 28, ¶ 8[15]. No one disputes that W. Va. Code § 37-1-2 was enacted in 1849 or that it was last amended in 1923. It is likewise undisputed that the Legislature enacted the UTC in 2011. By its express

[13] There is an argument that *Fitness, Fun* was incorrectly decided, given that even a minor's intent to arbitrate can be found valid at formation, even if later disaffirmed. But a challenge to *Fitness, Fun* is not needed because the party with intent to arbitrate at formation of the contract in this case is not the same party as the Respondent. It simply does not apply.

[14] Respondent has acknowledged that the Trial Court implicitly rejected Petitioners' UTC arguments. JA 706.

[15] "Since there was never a formal, written Trust Agreement established for Mason Louis Cottrell, the requirements of W. Va. Code 36-a-4a (Memorandum of Trust and/or ***W. Va. Code 44D-10-1013*** (Certification of Trust) cannot be met and the filing or recording of such memorandum/certification of trust cannot be made". (emphasis added).

terms, the UTC applies to "all trusts created ***before***, on, or after July 1, 2011." *See* W. Va. Code §44D-11-1105(a)(1) (emphasis supplied). Likewise, the UTC applies to "all judicial proceedings concerning trusts commenced on or after July 1, 2011." W. Va. Code §44D-11-1105(a)(2). The Lease was executed in March 2011 and this civil action was initiated in 2019. As a result, regardless of the date of the creation of the trust, the initiation of this suit in 2019 calls for the Court to view Respondent's claims and allegations through the lens of the UTC.

The Legislature confirmed that the UTC is "superseding" legislation. Although not relevant to these proceedings, W. Va. Code §44D-11-1105(a)(3) states:

> (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;

W. Va. Code §44D-11-1105 (emphasis supplied). While this statutory provision of the UTC is inapplicable to this case as the civil action was commenced *after* July 1, 2011, it confirms that the UTC supersedes other laws that cover the same subject matter.

There is no question the UTC applies to the Lease at issue. The UTC provides: "[e]xcept as otherwise provided in the terms of the trust instrument, **this chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary**." W. Va. Code § 44D-1-105(a) (emphasis added). The UTC further specifically provides that **court authorization is not required,** *inter alia,* to exercise powers conferred by the terms of the trust instrument and other powers conferred by the code. *See* W. Va. Code § 44D-8-815 (emphasis added). This language is clear and plain, not subject to interpretation or construction. There is no need to construe or interpret a plainly written statute; instead, it should be applied as enacted. *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed") (citations omitted); *Ashby v. City of Fairmont*, 216 W.Va. 527, 531, 607 S.E.2d 856, 860 (2004) (holding that when addressing a statutory provision, the "Court is bound to apply, and not construe, the enactment's plain language.").

To the extent W. Va. Code § 37-1-2 previously applied to trusts, it has been superseded. Notwithstanding the Trial Court's reliance on this statute to require court approval, the more recently enacted UTC confirms that **court authorization is not required,** *inter alia,* to exercise powers conferred by the terms of the trust instrument and other powers conferred by the code. *See* W. Va. Code § 44D-8-815 (emphasis added).

Finally, under Respondent's theory that W. Va. Code § 37-1-2 is mandatory, these statutes cannot be read together because they conflict. A trustee cannot, under one statute have the power and authority to manage, lease, and sell trust property without court approval, and under another be required to obtain court approval to do so. *Compare* W. Va. Code § 44D-8-815 and W. Va. Code § 44-5A-3 *with* W. Va. Code with § 37-1-2. There is no exception in W. Va. Code § 44D-8-815 as "court authorization is not required" for trusts that have a minor beneficiary. As such, because the UTC is the latest statute passed, there is a direct conflict regarding court approval, and because the UTC is more specific with regard to trusts, it prevails. *See* Syl. Pt. 2, *State ex rel. Department of Health & Human Resources, Child Advocate Office v. West. Va. Pub. Employees Retirement Sys*., 183 W. Va. 39, 393 S.E.2d 677 (1990) ("As a general rule of statutory construction, if several statutory provisions cannot be harmonized, controlling effect must be given to the last enactment of the Legislature").

The Trial Court erred in applying W. Va. Code § 37-1-2 to a trust governed by the superseding and more recently enacted provisions of the UTC.

2. W. Va. Code § 37-1-2 is Not Mandatory.

In the event this Court reaches an analysis of the actual language in W. Va. Code § 37-1-2 notwithstanding Petitioners' foregoing arguments, the Legislature's own choice of words in the statute confirms that court approval of the Lease was not mandatory, but rather permissive under W. Va. Code § 37-1-2. The Trial Court erred in holding otherwise. JA 733. The pertinent part of the statute provides that a Trustee:

> ***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 Respondent; and the infant or insane person or convict, or the beneficiaries in such trust, when not Respondents, 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.

W. Va. Code § 37-1-2.

The Legislature's use of the word "may" generally "renders the referenced act discretionary, rather than mandatory, in nature." Syl. Pt. 1, *Pioneer Pipe, Inc. v. Swain*, 237 W. Va. 722, 723, 791 S.E. 2d 168, 169 (2016). W. Va. Code § 37-1-2 clearly begins with the word "may" followed by "shall" four separate times.[16] In keeping with the rule of statutory construction regarding the use of "may" and "shall" in the same statute, a plain reading of the statute would be that a trustee has the discretion to file a bill in trial court if he intends to lease property for the benefit of a minor. If the Legislature intended to make it mandatory for a trustee to file a bill any time a trustee wished to lease trust property, then the statute would only have used the term "shall." The fact that the Legislature used both "may" and "shall" signifies that the Legislature intended to differentiate between permissive and mandatory requirements in these circumstances and, therefore, a trustee is permitted to, but is not required to file a bill in equity.

The Trial Court held that applying the "rules of statutory construction, it is clear that the court approval process the statute prescribed to be mandatory. It is purpose is to protect minors, the insane and convicts, all of whom are under a legal disability." JA 733. In so ruling, the Trial Court reasoned that "as a long 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 compulsive.' . . . . In support of this principle, *Hodge* cites to *Trail v. Trail* . . . ." JA 734. The Trial Court however failed to acknowledge this Court's citation to the Second Edition of Volume 20 of the American and English Encyclopedia of Law in *Trail* which goes on to explain that where, as here, a particular statute uses both "may" and "shall," then a court cannot give "may" a mandatory connotation. *Trail v. Trail*, 56 W. Va. 594, 49 S.E. 431 (1904); *See also* 20 Am. & Eng. Encyc. L. (2d ed.), at 238-39 ("Where by the use in other provisions of

[16] "May" is used twice in W. Va. Code § 37-1-2. The second "may" in the statute is part of the verb phrase "may be" which, from context, refers to the second definition of "may" in *Black's Law Dictionary*, which is "to be a possibility." *Black's Law Dictionary* at 1127 (10th Ed. 2014).

the statute of the words 'shall' or 'must' it appears that the legislature intended to distinguish between these words and 'may,' 'may' will not be construed as imperative."). JA 201-209.

Section 37-1-2 uses the word "may" once and the word "shall" four times. The Legislature thus obviously intended to distinguish between "may" and "shall." Had it intended to make court approval mandatory, the Legislature could have, and would have, provided that a trustee "shall file a bill in equity in the circuit court." But it did not. It used "may." And its use of "may" merely a few lines above its repeated use of the word "shall" compels the conclusion that the Legislature intended for court approval to be permissive.

Thus, the Trial Court erred, not only in relying upon W. Va. Code § 37-1-2, but further in finding that use of the word "may" in the face of multiple uses of the word "shall" in the same paragraph, created a mandatory requirement for Court approval.

3. W. Va. Code § 37-1-2 Necessarily Attacks the Entire Contract, Requiring Application of the Severability Doctrine.

As set forth more fully above, Respondent's assertion that he was attacking only the arbitration clause is wholly undermined by arguing for the application of W. Va. Code § 37-1-2. Now that the other defects in the application of that statute have been identified, it bears repeating that, ***<u>even if</u>*** the Court disregards that the UTC superseded W. Va. Code § 37-1-2 regarding trusts, and ***<u>even if</u>*** the Court interprets the word "may" in that statute as mandatory, the Respondent can only be attacking the entire contract.

Again, the scope of W. Va. Code § 37-1-2 is the sale, mortgage or lease of a minor's interest in property. A separate arbitration clause would not invoke that statute even if it applied and even if it was mandatory. As such, Respondent is necessarily attacking the entire Lease if he is trying to obtain relief under W. Va. Code § 37-1-2. As set forth above, under the severability doctrine, that question goes to arbitration.

D. The Trial Court Erred in Relying Upon Minor Disaffirmance. (Assignments of Error 2, 4, 6, 7, 9-12 and 14).

The second rationale set forth by the Trial Court for denying Petitioners' Motion to Dismiss and Compel Arbitration is minor disaffirmation. As stated by the Trial Court:

> When the lease housing the arbitration clause was signed on his behalf by his father, purportedly as his trustee, Respondent was under the disability of minority. When Respondent turned 18, he filed an action to have his father's trustee capacity dissolved, which was accomplished by this Court's Order of August 19, 2019.

JA 735. There is a lot to unpack in this sentence. First, the Trial Court effectively acknowledged that Respondent was not separately attacking the arbitration clause. Rather, it was an attempt to disaffirm "the ***<u>lease</u>*** housing the arbitration clause" which is acknowledged to have been "signed . . . by his father." *Id*. (emphasis supplied). This alone mandates reversal under the severability doctrine. Moreover, as discussed above, because the contract is voidable rather than void (*Fitness, Fun, supra* at 7), the act of disaffirmance does not "specifically and separately" challenge formation of the delegation clause. *See* discussion of *StockX and Snap, Inc., supra*. Yet, the Court's analysis is further flawed by treating the Trustee's contract as a contract *executed* by a minor.

Indeed, the case relied upon by the Trial Court actually involved a minor who executed a contract *as a minor*. In *Fitness, Fun*, the critical fact was that an arbitration agreement and waiver were signed by a minor, B.P., who forged his parent's signature. *Fitness, Fun, & Freedom, Inc. v. Perdue*, 2021 W. Va. LEXIS 67 (2021) (memorandum decision) at *8. The Court considered this a contract signed by a minor. As set forth above, under West Virginia law, ***contracts with***

minors are voidable, not void, and can be affirmed or disaffirmed after majority. *Id*. at *7 (internal citations omitted) (emphasis added).

It is axiomatic that the public policy underlying minor disaffirmance is that the ***maker*** of the contract was a minor. Clearly, a minor suffers from the disability of contract. *Id*. Here the Trustee expressly had the power to contract and suffered from no disability to make a contract. It is undisputed that the Trustee had full contractual power and authority.

First, the Deed creating the Trust expressly provides that the Trustee "may grant, convey or incur debt on said land for the benefit of Mason Louis Cottrell." JA 15. Second, this is consistent with the general powers of a trustee as outlined by the Legislature in the UTC:

> §44D-8-815. General powers of trustee.
>
> (a) *A trustee, without authorization by the court having jurisdiction, may exercise*:
>
> (1) *Powers conferred by the terms of the trust instrument*; or
>
> (2) Except as limited by the terms of the trust instrument:
>
> (A) *All powers over the trust property which an unmarried competent owner has over individually owned property*;
>
> (B) *Any other powers appropriate to achieve the proper investment, management and distribution of the trust property*; and
>
> (C) Any other powers conferred by this code.
>
> (b) The exercise of a power is subject to the fiduciary duties prescribed by this article.

Id.

As such, there is no dispute that the Trustee had the power to negotiate the Lease and was legally competent (i.e., suffered no disability such as minority) to make a contract. Case law predicated upon the fact that a minor lacks the capacity to contract simply has no application here and the Trial Court erred in holding that the Respondent could disaffirm the Lease or the delegation clause.

Rather, a minor's right to disaffirm is personal to the minor and does not extend to contracts executed by a third party for the benefit of a minor. As stated by the Washington Court of Appeals:

> The right to disaffirm is personal to the minor and should not be stretched beyond what his needs require. 2 Williston on Contracts § 232 (3d ed. 1959). In *Snodderly v. Brotherton*, 173 Wash. 86, 90, 21 P.2d 1036 (1933), the court observed:
>
> > [T]he first consideration of the law, and its policy is to protect the infant against improvidence and folly, because his mind and judgment are immature.
>
> Again, the court in *Lubin v. Cowell*, 25 Wn.2d 171, 185, 170 P.2d 301 (1946), in discussing the effect of a disaffirmance, said:
>
> > [T]he law intends the privilege of infancy simply as a shield to protect the infant from injustice and wrong, and not as a sword to be used to the injury of others.

Wise v. Truck Ins. Exch., 11 Wn. App. 405, 408 (Wa. Ct. App. 1974).

This concept is embodied in California law regarding medical care provided to a minor: "[If] a parent signs the contract, the minor cannot disaffirm it, no matter the nature of the medical care involved, including pregnancy care." *Michaelis v. Schori*, 20 Cal. App. 4th 133, 138 (Cal. Ct. App. 1993). *See also Eriksson v. Nunnink*, 233 Cal. App. 4th 708, 710 (Cal. Ct. App. 2015) ("[T]he right to disaffirm a minor's contract does not extend to a release of liability signed by a parent on behalf of the minor."). This is because the right of disaffirmance is personal to the minor. *See Daubert v. Mosley*, 1971 OK 90, P6 (Ok. 1971) ("disaffirmance is a privilege personal to a minor.").

Moreover, this concept has been applied in the context of an arbitration clause:

> *In Doyle v. Giuliucci*, 62 Cal. 2d 606, 43 Cal. Rptr. 697, 401 P.2d 1 (1965), the Respondent's father entered into a contract for group medical services which included care and service to dependents. When the Respondent and his father filed a medical malpractice suit, the defendant medical group demanded arbitration. The Respondent argued that the California statute allows minors to disaffirm contracts, therefore, the Respondent could disaffirm the contract requiring arbitration.
>
> Pointing out that the contract was entered into between adults (the Respondent's father and the defendant medical group), the California court held that a parent had the power to bind his child to arbitration by entering into a contract of which the child is a third party beneficiary. The court stated:
>
>> The crucial question . . . is whether the power to enter into a contract for medical care that binds the child to arbitrate any dispute arising thereunder is implicit in a parent's right and duty to provide for the care of his child. There are compelling reasons for recognizing that power. Since minors can usually disaffirm their own contracts to pay for medical services, it is unlikely that medical groups would contract directly with them. They can be assured the benefits of group medical service only if parents can contract on their behalf. Unless such contracts unreasonably restrict minors' rights, they should be sustained. [para.] The arbitration provision in such contracts is a reasonable restriction, for it does no more than specify a forum for the settlement of disputes.
>
> *Doyle*, 62 Cal. 2d at 610, 43 Cal. Rptr. at 699, 401 P.2d at 3.

Ling Wo Leong v. Kaiser Found. Hosp., 71 Haw. 240, 248-249, 788 P.2d 164, 169 (Haw. 1990). Thus, given the underlying principles that distinguish between a minor's personal right to disaffirm the minor's own contract and a minor's inability to disaffirm a contract independently made by one with authority to contract on the minor's behalf, such as a parent, *Fitness, Fun* is wholly inapplicable. The Trial Court erred in holding otherwise.

E. Respondent Became a Party to the Lease Upon Termination of the Trust and Has Further Ratified the Lease by Accepting Its Benefits. (Assignments of Error 7, 9 - 14).

As set forth below, legal title to the trust *res*, including contracts, passes to a beneficiary upon termination. As such, consistent with applicable case law and the "successors and assigns" clause in the Lease, Respondent actually became the successor counterparty to the Trust's Lease as a matter of law upon reaching the age of majority and terminating the trust. Additionally, it is undisputed that, after termination of the Trust, Respondent has continued to accept the benefits of the Lease by accepting royalties paid directly to Respondent. As such, Respondent is a successor to the lessor's position in the Lease, has ratified the same, and is estopped to deny it.

1. Respondent is the Successor Lessor

It is beyond dispute that the Respondent was never a party to the Lease while Respondent was a minor and the Trust was in effect.[17] However, upon reaching majority, Respondent terminated the Trust. Yet, termination of a trust is not a termination of the trust's contract and leases. Rather, legal title to the trust assets passes to the beneficiaries. When a trust creates no affirmative duties for the trustee, the "statute of uses executes the trust and the res of the trust passes, by operation of law, to the beneficiary." *Provident Life & Accident Ins. Co. v. Little*, 88 F. Supp. 2d 604, 2000 U.S. Dist. LEXIS 3554 (S.D. W. Va.), aff'd, 238 F.3d 414, 2000 U.S. App. LEXIS 35568 (4th Cir. W. Va. 2000).

[17] As discussed below, to the extent the Respondent successfully terminated the Trust upon attaining the age of majority, at that point the Respondent succeeded to the Trustee's position as counterparty to the Lease under the Lease's successors and assigns clause. Rather than being able to disaffirm the contract, Respondent became a party to the contract upon reaching the age of majority and termination of the Trust.

Under a trust, the trustee is the legal owner of the property. Syllabus Point 2, *Dadisman v. Moore*, 181 W.Va. 779, 384 S.E.2d 816 (1988). This necessarily means the trust's interests and obligations pass to beneficiaries upon termination of the trust. *See* e.g. *Bailey v. Franks Petroleum, Inc*., 479 So. 2d 563, 564 (La. Ct. App. 1st Cir. 1985) ("The petitioners are the proper parties to enforce the rights of the lessors under the lease as beneficiaries of the trust and/or the naked owners of the property, subject to Mrs. Willie P. Foster's usufruct. The trusts have terminated and the corpus of the trusts have devolved to the beneficiaries.")

In 2017, this Court took the opportunity to discuss third parties who contract with a Trustee and the fact that such dealings are approached as any other commercial transaction:

> Third persons, in trust law parlance, are persons other than trustees and beneficiaries. These are the persons who purchase property from the trust, sell property or provide services to the trust, or otherwise engage in transactions with the trustee. . . .
>
> The provisions of the [Uniform Trust Code] addressing trustee relations with third persons are built on the premise that third persons should approach transactions with trustees the same way they approach any other commercial deal. The theory is that trust beneficiaries are helped more by the free flow of commerce than they were by the largely ineffective protective features of former law.
>
> David M. English, The Uniform Trust Code (2000): Significant Provisions and Policy Issues, 67 Mo. L. Rev. 143, 209 (2002) (emphasis added).

Jackson v. Brown, 239 W. Va. 316, 326, 801 S.E.2d 194, 204 (2017). This makes sense. Otherwise, no commercial party would choose to do business with a trust for fear of loss of its bargain and investment upon trust termination. Part of the bargain under the Lease was that it applied to successors and assigns of both Chesapeake and the Trustee. "All rights, duties, and liabilities herein benefit and bind Lessor and Lessee and their heirs, successors, and assigns." JA

93. As such, not only is Respondent unable to disaffirm the Lease, Respondent succeeded to the Trustee as lessor under the Lease as a matter of both contract and law.[18]

2. By Accepting Royalties, Respondent has Ratified the Lease and is Estopped to Deny its Validity.

The fact that Respondent is now successor to the Trust's rights as lessor under the Lease is further supported by the undisputed fact that SWN has tendered royalty payments directly to Respondent under the Subject Lease since June 25, 2021. Specifically, SWN tendered $72,128.60 in royalty payments under the Subject Lease to Mason Louis Cottrell and he accepted those payments. JA 492 at ¶¶ 8 - 9. Indeed, the Lease has express payment provisions that call for payments to the "Lessor." JA 492.

By accepting those royalty payments, Respondent has ratified the Lease as a binding contract and has acted as "Lessor" under the Lease. Notwithstanding the Trial Court's misapplication of the law of both the severability doctrine in arbitration and a minor's disaffirmance of a contract, Respondent's acceptance of those payments is wholly inconsistent with the idea of disaffirmance.[19] By accepting the benefits of the Lease to which he has succeeded as Lessor, Respondent has either ratified the Lease or is otherwise estopped to deny its validity. Respondent is estopped to deny that he has, in fact, ratified the Lease. *See Quadrant Exploration, Inc. v. Greenwood*, 1983 Ohio App. LEXIS 14550, *7 (Ct. App. 4th App. Dist, Ohio 1983) ("[W]e conclude, as did the trial judge, that appellant, by knowingly accepting the delay rental payments

[18] This further supports that not only is the Lease still in effect with the Respondent succeeding to the Trustee as lessor, but further confirms that the arbitration provision in the Lease is directly applicable to Respondent.

[19] Respondent has made no offer to return payments SWN directly made to him under the Lease.

for the years 1978, 1979 and 1980, has ratified the 1973 lease to Hiland and is now estopped to deny the validity of such lease."). The Trial Court erred in implicitly holding otherwise.

This Court has held that acts contrary to disaffirmance can operate as ratification:

> With few exceptions not necessary to be noted here, the contracts of infants are voidable, and not void. *Blake v. Hollandsworth*, 71 W. Va. 387, 76 S.E. 814. . . .
>
> While ratification is, generally speaking, a question of intention, it is not essential that the purpose to ratify shall be expressly declared. It may be, and ordinarily is, inferred from the free and voluntary acts and conduct of the party sought to be charged, although at the time he may not have had in mind any definite idea or purpose of ratification. But, to effectuate a ratification, his acts, words or conduct must be inconsistent with any other purpose; as where, after arriving at age, he retains for an unreasonable length of time the property purchased by him while in infancy, or uses it as his own, or exercises such acts of ownership over it as clearly evinces a purpose to ratify. *McCartney v. Carter*, 49 Ill. 53, 95 Am. Dec. 572; *Dixon v. Merritt*, 21 Minn. 196; *Turner v. Gautier*, 83 N.C. 357; *Mustard v. Wohlford*, 15 Gratt. 329. Whether he acts within a reasonable time after full age, and, if he does, what acts constitute a confirmation of contracts made in infancy, are questions of fact, to be determined in the usual manner, either by a jury under proper instruction or by the chancellor when properly submitted to him. *Durfee v. Abbott*, 61 Mich. 471, 28 N.W. 521; *Irvine v. Irvine*, 9 Wall. 617, 19 L. Ed. 800.

Hobbs v. Hinton Foundry, Mach. & Plumbing Co., 74 W. Va. 443, 44682 S.E. 267, 268 (1914). There is no dispute that Respondent has continued to accept the benefits of the stcLease, payable to the "Lessor" under the Lease, after termination of the Trust. Notwithstanding the proposition that a minor cannot disaffirm a Trustee's contract, Respondent's post-termination actions are wholly inconsistent with disaffirmance. As a result, the Trial Court erred in failing to hold that Respondent is actually bound to the Lease, arbitration clause, and delegation clause, as a successor in interest to the Lease which Respondent has ratified through continued acceptance of the Lease's benefits.

VI. CONCLUSION

For the reasons set forth above, Petitioners respectfully submit that the Trial Court's Order of June 21, 2023 must be reversed and remanded with instructions to grant Petitioners' Motion to Dismiss and Compel Arbitration and for such other relief as the Court deems appropriate.

SWN PRODUCTION COMPANY, LLC
and STATOIL USA ONSHORE PROPERTIES INC.
N/K/A EQUINOR USA ONSHORE PROPERTIES INC.

By Counsel,

LEWIS GIANOLA PLLC

/s/ Ramonda C. Marling
Ramonda C. Marling (WVSB #6927)
Post Office Box 1746
Charleston, West Virginia 25326
Tel: (304)345-2000
Fax: (304) 343-7999
rmarling@lewisgianola.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SWN Production Company, LLC and
Statoil USA Onshore Properties, Inc.,
now known as Equinor USA Onshore Properties, Inc.,

Petitioners,

vs.) No. 23-547

Mason Louis Cottrell,

Respondent.

Lower Court: Circuit Court of Ohio County West Virginia
Case No. CC-35-2019-C-159

Ramonda C. Marling (W. Va Bar No 6927)
Lewis Gianola PLLC
Post Office Box 1746
Charleston, West Virginia 25326
rmarling@lewisgianola.com
(304) 345-2000
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Ramonda C Marling, counsel for Petitioners, do hereby affirm that on December 21, 2023 counsel for Respondent was served with a copy of *Brief of Petitioners,* via electronic mail and through File and Serve Xpress to the following record of counsel:

Joseph J. John, Esquire
Anthony I. Werner, Esquire
John & Werner Law Office, PLLC
Board of Trade Building, Suite 200
80 – 12th Street
Wheeling, West Virginia 26003
Counsel for Respondent

/s/ Ramonda C. Marling
Ramonda C. Marling (W. Va Bar No 6927)