IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 23-547

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SWN PRODUCTION COMPANY, LLC
and STATOIL USA ONSHORE PROPERTIES, INC.,
now known as EQUINOR USA ONSHORE
PROPERTIES, INC.,

Petitioners,

v.

On Appeal from the
Circuit Court of Ohio County
(Case No. 2019-C-159)

MASON LOUIS COTTRELL,

Respondent.

BRIEF OF RESPONDENT MASON LOUIS COTTRELL

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II. STATEMENT OF THE CASE

The tilted statement of the case presented by Petitioners forces Respondent Mason Cottrell to perform some counterbalancing, starting with the transactions upon which the whole litigation is founded.

When Respondent Mason Cottrell was seven years old his birth mother, Cheryl A. Danehart, deeded 37.5 acres to him, not in his own name, but rather through Mason's father, Louis Cottrell, Jr., defendant below, as Mason's trustee, with the deed stating "Trustee may grant, convey or incur debt on said land for the benefit of Mason Louis Cottrell." (J.A. 15). Defendant Cottrell then engaged in transactions with various gas and mineral entities, signing contracts that encumbered the land and allowed for the depletion of its resources in return for substantial sums of money. (J.A. 45). However, all of these "contracting" parties chose to forgo obtaining court approval for the respective contracts. (J.A. 51-63). Carried with this choice was not just the evasion of a court's approval of each contract's amount of monetary consideration but also judicial approval or rejection of each material provision of the contract, including whether arbitration would best serve the minor's interests. Moreover, by skipping court approval these parties left the child completely without the safeguards that the court would have certainly imposed covering "trustee" Cottrell's handling of monies given to him on behalf of his ward. With all such judicial protections missing, the danger our law was designed to forestall came to fruition. The monies given by the corporations/companies to Defendant Cottrell were kept, spent, or wasted by him for his own benefit and not for the benefit of the minor. (J.A. 45).

On May 24, 2019, Respondent turned eighteen years old and within weeks, on June 27, 2019, he brought this suit. (J.A. 09). At first it was brought only against Louis Cottrell, Jr. (J.A. 09) who defaulted, (J.A. 26) but then, with court leave, (J.A. 37) on February 4, 2020, Respondent filed his *Amended Complaint* which brought claims against the corporations/companies, including

Petitioners, that either directly engaged in the transactions with Defendant Cottrell or that contractually succeeded to such entities' rights. (J.A. 44).

The keystone of the claims against the corporate/company defendants is the failure to obtain court approval for each contract pursuant to West Virginia Code §37-1-2, with the consequence of the failures being that the contracts were never formed in the first instance and are void. There are no breach of contract allegations against them because the contracts never legally existed. Rather the causes of action are all based in tort, including aiding and abetting Defendant Louis Cottrell in his unlawful behavior, trespass, and unlawful diminution of property value. (J.A. 48-63).

In light of the legal issues presented by this appeal, it is important to recognize, as a matter of fact and of procedural history, the effect of the *Amended Complaint* upon each implicated contract. Devoting separate counts to each corporate/company defendant, each and every count includes a blunt statement that each contract is void and, because it simply does not exist, it provides no actual rights respecting Respondent's property.

> [Para] 50. The Chesapeake Contract is void. (J.A. 51).
>
> [Para] 61. Because the Chesapeake Contract is void, the Jamestown Contract is likewise void and/or it provides no actual rights as against Plaintiff's Property. (J.A. 53).
>
> [Para] 69. Because the Chesapeake Contract is void, the Statoil Contract is likewise void and/or it provides no actual rights as against Plaintiff's Property. (J.A. 54).
>
> [Para] 88. The SWN Contract is void. (J.A. 57).
>
> [Para] 116. The App Contract No. 1, the App Contract No. 2 and the App Contract No. 3 are all void. (J.A. 61).

While the *Amended Complaint* alleges the contracts are all void *ab initio*, it also serves as the now-adult Respondent's formal disaffirmation of them all, whether *ab initio* <u>or</u> later.

Each corporate/company defendant responded to the *Amended Complaint* with a motion to dismiss[1] contending that its contract is valid because Mason Cottrell is just wrong about the need for court approval. According to defendants, West Virginia Code §37-1-2, a statute that has been part of our law for well over 100 years and which requires court approval for contracts like those at issue here, is irreconcilable with and has been abrogated by our *Uniform Trust Code*. (J.A. 214). Moreover, because the contract with Chesapeake Appalachia, L.L.C., dated March 10, 2011, contained an arbitration provision, (J.A. 93) and also because Petitioners SWN/Statoil and Jamestown Resources, L.L.C., are separate successors in interest under the Chesapeake Appalachia, L.L.C. contract, they all sought to compel arbitration of all issues under that one contract's provision. Respondent opposed each of the motions, outlining the reasons why they should fail.[2] As a pivotal point, Respondent argued "the Court must resolve whether under state law the contract legally exists, and that decision rides on the outcome of the ultimate issue respecting court approval." (J.A. 151).

The Trial Court issued an order on September 1, 2020, that would have compelled the matter into arbitration. (J.A. 266) Respondent pursued an appeal of that order in what might be called "Appeal No. 1". However, this appeal got derailed due to the fact that a petition for bankruptcy was filed by Defendant Chesapeake on June 30, 2020, and concurrently with the

[1] SWN Production Company, LLC and Statoil USA Onshore Properties, Inc., n/k/a Equinor USA Onshore Properties, Inc., jointly served their *Motion To Dismiss And Compel Arbitration*, (J.A. 83) with *Memorandum*, (J.A. 117) on May 14, 2020; Appalachia Midstream Services, L.L.C. served its *Motion To Dismiss*, (JA 68) with *Brief*, (J.A. 72) on May 15, 2020; and also on May 15, 2020, Chesapeake Appalachia, L.L.C. and Jamestown Resources, L.L.C. together served their *Joinder* in the *Motion To Dismiss And Compel Arbitration* served by SWN/Statoil. (J.A. 141).

[2] Served June 11, 2020, were *Plaintiff's Memorandum In Opposition To Motion To Dismiss And Compel Arbitration Of Defendants SWN Production Company, LLC And Statoil USA Onshore Properties, Inc.*; (J.A. 148) *Plaintiff's Response In Opposition To Defendant Appalachia Midstream Services, LLC's Motion To Dismiss*; (J.A. 176) and *Plaintiff's Response In Opposition To Chesapeake Appalachia, L.L.C. And Jamestown Resources, LLC's Joinder In Motion To Dismiss And Compel Arbitration And Memorandum In Support Filed By SWN Production Company, LLC And Equinor USA Onshore Properties, Inc.* (J.A.182).

bankruptcy petition's filing came an automatic stay. (J.A. 250). The consequence of this was stated by this Honorable Court's May 5, 2023, *Dismissal Order* (J.A. 327) which brought an end to Appeal No. 1. "[T]he circuit court's entry of the order now before us was an act done in violation of the automatic bankruptcy stay and is therefore void ab initio." This left the Trial Court's September 1, 2020, order and really everything else done in the case during the stay period wholly nullified.

Despite its nullification, it seems nevertheless important to observe (as Petitioners have done at Pet. P. 8) what the crux of the Trial Court's void ruling was. The nullified order stated:

> ...Plaintiff asserts that the entire contractual relationship is void for the failure to obtain court approval for each contract pursuant to West Virginia Code §37-1-2. Plaintiff argues that as a result no contractual relation was formed and therefore, there is no arbitration agreement.
>
> Because Plaintiff'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. (J.A. 272).

The reason the Trial Court's voided finding bears recounting herein is because it served as the impetus for what Respondent did upon return to the Trial Court.

Consistently throughout all of his briefings up to the point of the May 5, 2023, Appeal No. 1 *Dismissal Order*, Respondent maintained what he still maintains: that is, that he sufficiently and properly argued against the enforcement of the arbitration/delegation provision all along. However, because the Trial Court already indicated its viewpoint on how the arbitration/delegation provision must be attacked, via his May 2, 2023, *Supplemental Memorandum In Opposition To Motions To Dismiss And Compel Arbitration* (J.A. 310) Respondent presented the precise type of argument, fully severing and focusing with particularity on the arbitration/delegation provision, that would serve to satisfy the Trial Court. This was not "to correct prior missteps," as Petitioners suggest (Pet. P. 8), but out of opportunity and basic prudence. However, and as is readily seen from the argument below, Respondent has all along been right—even without his *Supplemental Memorandum*.

Back in the Trial Court, following the additional briefings and an in-person June 16, 2023, hearing for oral argument, by its *Order* of June 21, 2023, (J.A. 964) the Trial Court denied the motions to dismiss and to compel arbitration based on two separate grounds: the first being the failure of the transacting parties to secure court approval for their arbitration/delegation provision pursuant to West Virginia Code §37-1-2; and the second being due to Mason Cottrell's disaffirmation of each contract upon reaching majority.

Following the entry of the June 21 *Order* Petitioners filed their *Motion To Alter Or Amend Order*. (J.A. 572). This filing purported to seek a better set of findings of fact and conclusions of law than what the June 21 *Order* offered, but Petitioners' main design was to get 15 more pages of legal argument in the record in the presentation of a first time "successor lessor" argument and to beef up what they did already argue. Plaintiff opposed the motion through his *Response In Opposition To The Rule 59(c) Motion Of Defendants SWN And Equinor*, (J.A. 703) and by *Order* of August 21, 2023, (J.A. 714) the Trial Court denied Petitioners' motion.

Upon these orders Petitioners appealed, first misdirecting the appeal to the Intermediate Court of Appeals on September 5, 2023, and then placing it before this Honorable Court on September 11, 2023.

While in the arguments below the disputed facts and events are squarely addressed, one more aspect of Petitioners' *Statement Of The Case* requires attention now, and it respects the section headed "SWN's Royalty Payments to Respondent", at Pet. P. 5. Respondent submits that this section inaccurately characterizes the nature and significance of payments made to Mason Cottrell. While in the argument below Respondent more fully substantiates his dispute over these "facts", it must nevertheless be exposed as inappropriate now. This is not simply due to Petitioners' reliance on a self-serving and an as-yet unchallenged affidavit of Petitioners' own "Senior Corporate Land Manager" which was created in the recent course of these proceedings, but also due to Petitioners' misstatement of the affidavit language upon which it relies. The Petition alleges that the affidavit, specifically at Paragraph No. 8, states that royalty payments were made "to Respondent as of June 25, 2021 **pursuant to the successors clause of the Lease**. JA 492, ¶ 8." (bold added.) However, nowhere in Paragraph 8, nor anywhere in the affidavit (J.A. 492) for that matter, is any mention to "successors clause", nor to "successor lessor", nor to anything more broadly that amounts to a concession by Respondent of the correctness of Petitioners' characterization of the legal significance of the payments. In short, this whole section is in dispute and deserves no place in a statement of facts.

III. SUMMARY OF ARGUMENT

The Trial Court correctly denied Petitioners' motion to send this case into arbitration.

The core of this case is West Virginia Code §37-1-2--its purpose, its requirements, and its continuing vitality despite the enactment of the West Virginia *Uniform Trust Code*. The arbitration dispute depends on it, but so too does the case in the broader sense. There is also an issue of disaffirmation, but the overall critical issue relates to §37-1-2.

West Virginia Code §37-1-2 obligates parties to a proposed transaction respecting a minor's real property to obtain court approval for the transaction, and not just for the contract granting third-party rights to the minor's property but for the proceeds that serve as consideration for the contract. The statute has been part of our law for over 100 years, it is mandatory, and maintains its vitality despite all of Petitioners' arguments, including that it has been superseded by the *Uniform Trust Code*.

A challenge to an arbitration provision must meet strict federal and state legal standards. Following federal law, this Honorable Court has adopted the "severability doctrine" which requires the extraction of the arbitration provision from the overall contract that houses it and which directs a focused judicial analysis of that provision to determine its validity. However, when, as here, there is a contention that the overall contract containing the arbitration provision is non-existent, that it is void *ab initio*, then it is sufficient to challenge the whole contract, including the arbitration provision, on that basis. By challenging the arbitration provision in a dual manner, that is, by both challenging the entire contract as being a device of voided non-existence and by challenging the arbitration provision in a severed and separate fashion, Respondent has clearly satisfied the federal and state "attack" standards.

As to the merits of the attack, it is clear that the consequence of the original transactional parties' decision to forgo the §37-1-2 court approval process is that the arbitration provision and the whole contract housing it are void *ab initio*. Under our deep, broad, and clear law, they simply do not exist, and for this reason the Petitioners' appeal fails.

As an associated but yet independent matter, following well-established West Virginia law, law recently discussed by this Honorable Court in *Fitness, Fun, & Freedom, Inc. v. Perdue,*[3] by his *Amended Complaint* which was brought promptly upon Respondent attaining majority, any theoretic contractual rights were disaffirmed, negating any notion of arbitration and allowing the Trial Court to address the main issue of §37-1-2's potence and effect back to the very beginning of the transactional relationships. Petitioners' arguments against the disaffirmation are unavailing, especially given the fact that the contract housing the arbitration provision is void *ab initio*, and

[3] 2021 W. Va. LEXIS 67, 2021 WL 653240 (Memorandum decision).

because, at worst for Respondent, disaffirmation is a factual matter which is to be left for development and resolution before the Trial Court.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits that under the criteria supplied by R.A.P. 18(a), this case is one for which oral argument is warranted. Moreover, in light of the central issues of this case, especially respecting W.Va. §37-1-2, its relationship with West Virginia's *Uniform Trust Code*, and its ramifications on the analysis a Trial Court must undertake upon an arbitration provision dispute, argument under Rule 20 is deserved, as there are aspects of this matter which are matters of first impression and which certainly are of fundamental public importance.

V. ARGUMENT

A. Standard Of Review.

As Petitioners state, the standard of review here is indeed *de novo*. *Golden Eagle Res., II, L.L.C. v. Willow Run Energy, L.L.C.*, 242 W. Va. 372, 836 S.E.2d 23 (2019). It is further agreed that a *de novo* review involves a "fresh look" at the issues, with no deference to the lower court's ruling. *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997).

B. Challenging An Arbitration Provision.

Conforming with federal law, this Court has firmly observed the guiding standards in analyzing the effectiveness of an arbitration provision. As stated at Syllabus Point 2 in *Bayles v. Evans*, the object of the analysis is to determine two things:

> 2. "When a trial court is required to rule upon a motion to compel arbitration pursuant to the *Federal Arbitration Act*, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syllabus Point 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010).

243 W. Va. 31, 34, 842 S.E.2d 235, 238 (2020).

With respect to the first objective---determining whether a valid arbitration agreement exists---concepts of state law relating to contractual validity are in play.

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

Parsons v. Halliburton Energy Servs, 237 W. Va. 138, 146, 785 S.E.2d 844, 852 (2016) (bold added).

As *Bayles* observed, a court's examination is to focus on the arbitration provision itself, as opposed to the overall contract generally.

> 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 a trial court permitted to consider the challenge to the arbitration clause.

243 W. Va. 31, 43, 842 S.E.2d 235, 247.

The Court further observed[4] that the United States Supreme Court case which established what has been called the "severability doctrine" was *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801 (1967).

However, and contrary to Petitioners' arguments, this "severability doctrine" has its nuances, and one of them is front and center in the instant case where Respondent has ceaselessly contended, from within the *Amended Complaint* until now, that both the arbitration provision and the whole contract housing it are void and non-existent due to lack of court authority pursuant to W.Va. Code §37-1-2. At a minimum, this equates to a "lack of capacity" attack per *Parsons*.

In *Buckeye Check Cashing, Inc. v. Cardegna*, the United States Supreme Court stated:

> *Prima Paint* and *Southland* answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, **the issue of the contract's <u>validity</u> is considered by the arbitrator in the first instance.** Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of those holdings. (bold and underline added.)

546 U.S. 440, 445-446, 126 S. Ct. 1204, 1209 (2006).

But, and of great importance for our purposes, the federal High Court clarified:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain* v. *Robinson-Humphrey Co.*, 957 F.2d 851 (CA11 1992), whether the signor lacked authority to commit the alleged principal, *Sandvik AB* v. *Advent Int'l Corp.*, 220 F.3d 99 (CA3 2000); *Sphere Drake Ins. Ltd.* v. *All American Ins. Co.*, 256 F.3d 587 (CA7 2001), and whether the signor lacked the mental capacity to assent, *Spahr* v. *Secco*, 330 F.3d 1266 (CA10 2003).

546 U.S. 440, 444, 126 S. Ct. 1204, 1208.

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[4] …at 243 W. Va. 31, 43, 842 S.E.2d 235, 247.

While this statement is easy enough to grasp, an examination of the cases cited by *Buckeye* makes it abundantly clear that a contention that the overall contract housing the arbitration provision never came into existence presents an issue for the court, not an arbitrator, to resolve.

In *Sandvik AB v. Advent Int'l Corp* the party challenging the arbitration provision contended that the whole contract, including the arbitration provision, did not exist because its agent that signed it did not have the authority to do so. The court provided the following judicial insights.

> Importantly, as discussed further below, *Prima Paint*'s holding addressed the effect of fraud in the inducement claims. It did not grapple with what is to be done when a party contends not that the underlying contract is merely voidable, but rather that no contract ever existed.

220 F.3d 99 (3rd Cir. 2000).

> Mindful of the doctrine announced in *Prima Paint*, which did not consider a situation in which the existence of the underlying contract was at issue, we draw a distinction between contracts that are asserted to be "void" or non-existent, as is contended here, and those that are merely "voidable," as was the contract at issue in *Prima Paint*, for purposes of evaluating whether the making of an arbitration agreement is in dispute.

220 F.3d 99, 107.

The end result was the determination that the court itself would preside over the resolution of the issue of whether the agent did or did not have proper authority to enter into the contract after all. *Id.*

In accord with this principle (which is obviously the reason for *Buckeye*'s cite to it) is *Chastain v. Robinson-Humphrey Co.*, where the 11th Circuit Court of Appeals stated, "*Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all.*" 957 F.2d 851, 855 (11th Cir. 1992). As *Buckeye* noted, the issue in *Chastain* was whether the person entering into the contract had the authority to do so, which of course is what Respondent too is essentially contending. As the *Chastain* court found, it was the trial court's role and not an arbitrator's to determine whether that authority existed.

In *Spahr v. Secco*, also cited by *Buckeye*, the 10th Circuit Court of Appeals addressed the scenario where the party against whom the arbitration provision was asserted claimed a lack of mental capacity to enter into the whole contract and its arbitration provision singularly speaking. Again, in ruling that the issue was one for the trial court to resolve, the appellate court emphasized, "We [] hold that the rule announced in *Prima Paint* does not extend to a case where a party challenges a contract on the basis that the party lacked the mental capacity to enter into a contract." 330 F.3d 1266, 1272 (10th Cir. 2003).

> We hold that Spahr's mental incapacity defense naturally goes to <u>both</u> the entire contract and the specific agreement to arbitrate in the contract. Therefore, Spahr's claim that he lacked the mental capacity to enter into an enforceable contract placed the "making" of an agreement to arbitrate at issue under § 4 of the FAA.

330 F.3d 1266, 1273.

A recognition of these principles guts Petitioners' argument over the "severability doctrine's" ramifications. As discussed below, under any analysis Respondent has met its challenge burden. However, before we get there a discussion of W.Va. Code §37-1-2 is fitting.

C. <u>W.Va. Code §37-1-2 And Its Mandatory, Vital and Continuing Importance.</u>

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

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

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

All of the contracts underlying Mason Cottrell's claims against all the corporate/company defendants fall squarely within the expressed reach of this statute. In denial of this, latching on to the statute's use of the word "may", Petitioners deny that the court approval prescribed by the statute is mandatory. They further argue that the absence of specific reference to "arbitration" in this centenarian statute, despite all else respecting court oversight of post-transaction matters, means that arbitration escapes court scrutiny. And they say, mandatory or not, the statute is superseded by, or is simply trumped by, provisions of the West Virginia Code Chapter 44D, namely, the *Uniform Trust Code* (UTC). They are clearly wrong across the board in all of their arguments.

Actually, there is no room to now argue whether the statute is alive and mandatory, for this Honorable Court has already determined this to be so. Before turning to those decisions though, it is right to address Petitioners' claim that the use of the word "may" in the statute renders it merely permissive. For this they highlight, at Pet. P. 28, Syllabus Point 1 of *Pioneer Pipe, Inc. v. Swain*, which in its fullness sets forth:

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

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

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

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

Smith v. State Workmen's Compensation Comm'r, 159 W. Va. 108, 115, 219 S.E.2d 361, 365 (1975).

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

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

461 U.S. 677, 706, 103 S. Ct. 2132, 2149 (1983).

Considering the statute just with these rules of construction, it is easy to discern the court approval process the statute prescribes to be mandatory. The purpose is easy to divine; it is to protect minors, the insane and convicts—all of whom are compromised and vulnerable—from being unfairly taken advantage of in business dealings over their estates. When the things that must be done in the process for court approval are so comprehensive and formal, including laying out each and every proposed provision to determine its propriety, it is manifest that the Legislature did not intend to let those contracting away the rights of minors, insane and incarcerated people to simply opt to skip it all. Add to this *pari materia* consideration of all the associated statutes which apply to this same §37-1-2 court approval: §37-1-3, requiring the appointment of a guardian ad litem to minors; §37-1-5, a resultant decree approving of the contract must, among other things, require "ample security" to be given respecting a sale of estate on credit; §37-1-7, mandating that the proceeds from the deal "shall be invested under the direction of the court, for the use and benefit of the persons entitled to the estate,..."; §37-1-14, requiring guardians and committees to "enter into bond, with approved security, conditioned for the faithful application of the proceeds of sale or lease;" ...et cetera. Clearly, by structuring such an extensive system of court approval, our Legislature did not intend to allow contracting parties to simply ignore it all, enter into a contract with any provisions they choose to toss within it, such as arbitration, and unfairly exploit the minor (or insane person or convict). The Legislature intended for it all to be employed, faithfully.

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

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

56 W. Va. 594, 600, 49 S.E. 431, 434 (bold added).

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

> In *Pirani v. Barden*, 5 Ark. 81, *Spratley v. La. & Ark. Ry. Co.*, 77 Ark. 412, 95 S.W. 776, and *C. R. I. & P. Ry. Co. v. Jaber*, 85 Ark. 232, this court has recognized that the word "may" is often interpreted to mean "shall." The general rule of construction is that the word "may" is construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power or the performance of the duty to which it refers. *Wheeler v. Chicago (Ill.),* 24 Ill. 105, 76 Am. Dec. 736; *Smalley v. Paine*, 102 Tex. 304, 116 S.W. 38; *People v. Board of Supervisors*, 68 N.Y. 114; *People v. Board of Supervisors*, 51 N.Y. 401, and *Supervisors v. United States*, 71 U.S. 435, 4 Wall. (U. S.) 435, 18 L. Ed. 419.
>
> All of these cases, and many more of like import, recognize that the word "may" is constantly used in statutes without intending that it shall be taken literally, and that, in its construction, the object evidently designed to be reached limits and

> controls the literal import of the word. They recognize that, in determining whether "may," as used in acts like the present one, is merely permissive or is mandatory, not only the language of the act but the circumstances surrounding its passage and the object had in view must be considered.

Washington County v. Davis, 162 Ark. 335, 339, 258 S.W. 324, 325 (1924).

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

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

> The first question to be considered and determined is the alleged **invalidity of the lease to [lessee] McKeown**.
>
> In the case of *South Penn Oil Co. v. McIntire, et al*, 44 W. Va. 296, 28 S.E. 922, it is held: "Petroleum oil, as it is found in the crevices of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land.' **The only manner in which a guardian can lease or sell the land of his ward for the purpose of its development, or any other purpose, is in the manner prescribed by statute, under a decree of the court.** A guardian has ordinarily power to lease any of his ward's property of such character as makes it the subject of a lease; but, without approval of the orphan's court, he cannot dispose of any part of the realty. Oil is a mineral, and being a mineral, is part of the realty; and a guardian cannot lease the land of his ward for the purpose of its development, as it would, in effect, be the grant of a part of the corpus of the estate of his ward." *Wilson, et al. v. Youst, et al.*, 43 W. Va. 826, 834, 28 S.E. 781; Code, chapter 83, sections 2, 12[5].
>
> **The said lease, tested by the authorities cited, was and is without legal validity to bind [minors] Walden and George Morrow, or either of them**.

53 W. Va. 206, 212-213, 44 S.E. 533, 535-536.

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

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

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

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

184 W. Va. 509, 510, 401 S.E.2d 442, 443.

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

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

184 W. Va. 509, 512, 401 S.E.2d 442, 445.

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

> Persuasive authority on the issue of whether a court should make the final determination regarding the wisdom of a will renunciation proposed on behalf of an incompetent is presented by several statutes which suggest court approval of certain transactions that will affect the rights of an infant, insane person, or convict. The sale or encumbrance of the estate of an infant, insane person, or convict is addressed by W. Va. Code § 37-1-2 (1985) which provides that
>
>> if the guardian of any minor, or the committee of any insane person or convict, think that the interest of the ward or insane person or convict will be promoted by a lease or by a mortgage or by a trust

deed upon or by a sale of his estates, or of an estate in which he is interested with others, infants or adults; . . . such guardian, committee, trustee, or beneficiary. . . may, for the purpose of obtaining such sale, lease, mortgage or trust deed, file a bill in equity in the circuit court of the county in which the estate proposed to be leased, sold or encumbered by mortgage or trust deed or some part thereof may be, stating plainly all of the estate, real and personal, belonging to such infant or insane person or convict, or so held in trust, and all of the facts calculated to show the propriety of the sale, lease, mortgage, or trust deed. . . .Id.

In addition to this provision, W. Va. Code § 37-1-11 (1985) authorizes a circuit court to consider by means of summary proceedings the petition of a guardian or committee seeking approval of the sale, lease, or mortgage of the estate of an infant, insane person, or convict. The standard for approval of such petitions is evidence that the requested transaction would benefit the interest of the infant, insane person, or convict. *See Jackson v. Jackson*, 89 W. Va. 571, 574, 109 S.E. 724, 725 (1921). When a compromise is reached in actions which affect the rights of infants and insane persons, judges are routinely asked to confirm the settlement pursuant to W. Va. Code § 56-10-4 (Supp. 1990). That statute provides, in pertinent part,

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

184 W. Va. 509, 512-513, 401 S.E.2d 442, 445-446.

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

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

184 W. Va. 509, 513, 401 S.E.2d 442, 446.

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

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

184 W. Va. 509, 514, 401 S.E.2d 442, 447 (bold added).

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

In its desperation to resist all of these absolutely clear pronouncements of §37-1-2's mandatory duty, and of the inarguable rationale for it to be so, upon pointing out that the word "shall" is also reflected a few times in this somewhat lengthy statute, Petitioners resort to arguing the following, at Petition Page 29:

> 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);

The way this statement is presented, especially with the immediate and non-qualified cite to *Trail*, Petitioners lead a reader to believe that *Trail* actually expresses this "may/shall" caveat. However, nowhere is this purported statement, nor even a remote insinuation of it, set forth in *Trail*. Instead, *Trail* cites to the secondary Encyclopedia resource to support the following unqualified proposition: "[T]he law is that when this word "may" is in a statute made for the benefit of persons it is not comply permissive, but mandatory or compulsory." 56 W. Va. 594, 600, 49 S.E. 431, 434. This is regardless of the word "shall". Indeed, and again, the legislative desire is what is important, and it amounts to absurdity to argue that the Legislature would set forth such thorough and comprehensive machinations to be completed in the course of the court approval process and following it if transacting parties could simply choose to skip it all without any risk or consequence.

Petitioners demonstrate no less desperation by suggesting that the omission of the word "arbitration" from the statute renders it outside of the court's approval purview. Section 37-1-2 and all the statutes associated with the approval proceedings, as set forth above, involve not just a court's assessment of the proposed contract as an end product, that is to say, by each and every provision which in the aggregate constitute the whole contract, and then be done with it. Court oversight moreover goes to the handling of the minor's transactional proceeds following an approved contract's consummation. Consider §37-1-7 relating to contractual proceeds which states:

> The proceeds of sale shall be invested under the direction of the court, for the use and benefit of the persons entitled to the estate, and, in case of a trust estate, subject to the uses, limitations, and conditions contained in the writing creating the trust. But into whosesoever hands such proceeds may be placed, the court shall take ample security and from time to time require additional security, if necessary, and make any other proper orders for the faithful application of the fund, and for the management and preservation of any property, or securities in which the same may be invested, and for the protection of the rights of all persons interested therein, whether such rights be vested or contingent.

How can these court-charged duties over proceeds which unquestionably encompass resolving any disputes relating to how the proceeds are handled be reconciled with the idea of arbitration of any and all performance disputes under an approved contract? They cannot. Continuing court oversight and arbitration cannot co-exist, and it is absurd to suggest that §37-1-2 does not encompass court consideration of a clearly conflicting arbitration provision in isolation, regardless if literally every other provision in the proposed contract is undeniably benign and in the minor's best interest.

What is to occur in a §37-1-2 scrutiny is no different than what occurs in the setting of a minor settlement approval proceeding when some aspect of the settlement consideration, say periodic future payments, requires the paying settlor to perform in the future. It would be a certain bet, without any doubt, that the approving court would home straight in on an arbitration provision slipped into the release, perhaps upon alert by the guardian ad litem, and it would undoubtedly have the power to say "Either the arbitration provision comes out, or I do not approve of the settlement." And yet reference to "arbitration" is nowhere to be found in the *Minor Settlement Proceedings Reform Act*. W.Va. Code §44-10-14. Of course, it need not be for the court to deal with it. The court's power in this regard is undeniably implicit, just like for a §37-1-2 proceeding.

D. Respondent Sufficiently Challenged The Arbitration Provision, Which Is Non-existent And Void *Ab Initio.*

Consistent with the discussions set forth above, it is clear that Respondent more than sufficiently challenged the arbitration provision. First, by contending that the contract and each and every provision within it never came into legal existence, the matter was already poised for court, not arbitrator, disposition. With all due respect to the Trial Court, even without the *Supplemental Memorandum* filed upon return from Appeal No. 1, the challenge hurdle was already cleared.

However, prudence clearly dictated doubling down as Respondent did through his *Supplemental Memorandum*, carving out and focusing upon the contract's arbitration/delegation provision in the precise manner which *Bayles, supra*, clearly prescribes all else aside. Thus, the Trial Court plainly had the power to rule on the effectiveness of the arbitration/delegation provision.

Just as plainly, the Trial Court appropriately exercised its analytic powers, determining in the end that the failure to obtain §37-1-2 approval rendered the arbitration/delegation provision void. As succinctly set forth in *Conrad v. Crouch*, where minors' lands were sold without the necessary court approval, "it necessarily follows that the sale to [the buyers] is not merely voidable, but absolutely void." 68 W. Va. 378, 385, 69 S.E. 888, 891 (1910).

This consequence is unsurprising, for what we are addressing in the broader sense is an illegal contract, and on this Justice Walker, writing for the full court in *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co.*, observed:

> An illegal contract is as a rule void—not merely voidable—and can be the basis of no judicial proceeding. No action can be maintained upon it, either at law or in equity. This impossibility of enforcement exists whether the grant is illegal in its inception, or whether, being valid when made, the illegality has been created by subsequent statute. . . . "If a contract is tainted with the vice of illegality, it is held to create no obligation, not from any consideration of the individual rights of the

> parties, who may be equally in fault, but from regard for the public." Generally, the illegality of a contract is a perfect defense to its enforcement, because the law will not require one to do, or punish him for not doing, that which it forbids him to do.

241 W. Va. 148, 155, 820 S.E.2d 416, 423 (2018) (internal citations omitted).

Very consistently, in *State ex rel. Ware v. Henning*, this Court held that a transfer of land which does not comply with the statutory provisions of W.Va. Code §35-1-6, which sets forth a statutory scheme for such transactions, is void *ab initio*. 212 W. Va. 189, 569 S.E.2d 436 (2002). The same result for the same reason is to occur in our case. A transfer, sale, or encumbrance in violation of W. Va. Code §37-1-2 is void *ab initio.* Because the arbitration clause was never approved by the court, it does not legally exist.

E. <u>Petitioners Cannot Rely Upon The *Uniform Trust Code* For Absolution.</u>

Petitioners cannot win by addressing §37-1-2 head on, and so they try to go around it with the argument that it has been supplanted by the *Uniform Trust Code*. In debunking Petitioners' contentions, it is well to begin with the fact that the Chesapeake contract housing the arbitration provision bears an "effective date" of March 11, 2011, whereas the effective date of the UTC is later on July 1, 2011. "This chapter takes effect on July 1, 2011." W.Va. Code §44D-11-1104. As West Virginia Code §44D-11-1105 sets forth:

> (a) Except as otherwise provided in this chapter:
>
> (1) This chapter applies to all trusts created before, on, or after July 1, 2011;
>
> (2) This chapter applies to all judicial proceedings concerning trusts commenced on or after July 1, 2011;
>
> (3) This chapter applies to judicial proceedings concerning trusts commenced before July 1, 2011, unless the court finds that application of a particular provision of this chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this chapter does not apply and the superseded law applies;

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

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

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

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

Subsection (b) similarly applies in favor of Respondent. Before July 1, 2011, and as of the purported effective date of the Chesapeake contract, Respondent had protective rights under §37-1-2 to have the court determine the propriety of each of the provisions of the proposed lease and, were it all approved, to judicially impose safeguards on his contractual proceeds. Once those rights were violated by Chesapeake acting under the signed contract without court approval, Respondent acquired a cause of action, the right to judicial remedy. As observed by our Supreme Court in *Gibson v. W. Va. Dep't of Highways*:

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

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

In short, assuming *arguendo* §37-1-2 to have been repealed or superseded as of July 1, Respondent nevertheless retained those vested rights, as subsection (b) states.

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

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

For instance, along with §44D-8-815, Petitioners make reference to §44-5A-3, which is titled "Powers which may be incorporated by reference in trust instrument," as reflecting a legislative intent <u>against</u> requiring court approval for certain trust activities. (Pet. P. 27) They elaborated on this argument with the Trial Court,[6] specifically referring to subsection (w) of that statute to prove the authority for a trustee to agree to arbitration. They argued,

> [T]he Trustee had the authority to enter into the arbitration agreement on behalf of Plaintiff and bind him to the same under the UTC. **See § W.Va. Code 44-5A-3(w)("to...arbitrate, sue on or defend, abandon or otherwise deal with and settle claims** in favor of or against the estate or trust as the fiduciary considers advisable, and the fiduciary's decision is conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted...") (J.A. 124.) (bold added.)

Although they recited much of §44-5A-3(w) verbatim, they unsurprisingly left out its very beginning, including its topical heading:

> (w) <u>Litigate, **compromise** or abandon</u>. **To compromise**, adjust, arbitrate, sue on or defend, abandon or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary considers advisable, and the fiduciary's decision is conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by those persons; and in the absence of fraud, bad faith or gross

[6] This was before the bankruptcy stay arose.

negligence of the fiduciary, is conclusive between the fiduciary and the beneficiaries of the estate or trust. (bold added.)

The reason Petitioners did not give the Trial Court the statutory subsection's full language including authorization to compromise claims, and no doubt the reason why the same §44-5A-3(w) elaboration is absent from the Petition, is because it is inarguable that any agreement to compromise and settle a claim involving an injury sustained by a minor, including injury confined just to the minor's property, must have court approval pursuant to the *Minor Settlement Proceedings Reform Act*. W.Va. Code §44-10-14. No release, which of course is a form of contract, can be given without the court approval and virtually all the same processes a court undertakes in association with a §37-1-2 approval is prescribed for the settlement proceedings. This legislative mandate for minor settlement court proceedings is irreconcilable with Petitioners' contention that the UTC allows the negation of such judicial involvement simply by stating in the trust no approval is needed. No serious argument to this effect may be advanced, and other than for the difference in the statutes' respective ages and perhaps frequencies of occurrence, there is no meaningful difference between the minor-protecting mandate of §44-10-14 and that of §37-1-2.

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

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

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

Barber v. Camden Clark Mem. Hosp. Corp., 240 W. Va. 663, 670-671, 815 S.E.2d 474, 481-482 (2018).

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

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

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

Id.

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

F. As A Wholly Separate Basis Supporting The Trial Court's Ruling, Respondent Disaffirmed And Did Not Ratify The Contract And The Arbitration Provision.

As the Trial Court ruled, disaffirmation stands as a completely separate basis for defeating Petitioners' arguments on arbitration. As recounted herein, Respondent effectively disaffirmed all of the challenged contracts, arbitration clause and delegation provision included, promptly after reaching the age of majority, and particularly in consideration of this Honorable Court's recent decision in *Fitness, Fun, & Freedom, Inc. v. Perdue*[7], the consequence of the disaffirmation is clear and unfavorable to Petitioners. Realizing this, Petitioners hang their hats upon a couple of dredged up federal district court cases[8] and, albeit in a sheepish footnote fashion, the contention that *Fitness, Fun*, a unanimous decision, was "incorrectly decided". (Pet. P. 25, at Ft. 13) They themselves are wrong.

Respondent was under the disability of minority when the lease housing the arbitration clause was signed on his behalf, by his father, purportedly as his trustee. Promptly upon having his disability removed, i.e., when he turned 18, Respondent turned to the court system to have his father's trustee capacity dissolved, which was accomplished by this Court's *Order* of August 19, 2019. This did not halt Petitioners from utilizing and depleting Respondent's land of its resources, however, and so in order to protect his interests, your now-adult Respondent promptly took what was logically and legally the next step. He then brought the defendant corporations/companies, including Petitioners, into the existing court action, not on breach of contract contentions, but by

[7] 2021 W. Va. LEXIS 67, 2021 WL 653240 (Memorandum decision).

[8] …not even from somewhere within the 4th Circuit.

alleging the contracts to be void, he sued for the recovery of tort damages caused by each corporation's/company's misconduct. Respondent's *Amended Complaint* specifically declared all contracts "**void**", and thus, disaffirmation is a formal and clear matter of record.

As Petitioners recognize but clearly do not prefer, a thorough discussion of *Fitness, Fun, & Freedom, Inc.*, is warranted. It involved a trampoline park's liability release which the plaintiff signed while a minor, purporting to be his mother, but then he wholly disaffirmed it upon reaching the age of majority. In legally dissecting the matter, the Court recognized and re-affirmed the long-standing right of an infant to disaffirm a contract under our law.

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

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

The only outcome in the instant case which would be in accordance with our law, as taught and exemplified by *Fitness, Fun*, is that very outcome that our Trial Court reached—that due to disaffirmation the contract housing the arbitration/delegation provision is void, justifying the denial of the motions to dismiss and to compel arbitration.

Beyond arguing that *Fitness, Fun* is an errant decision, Petitioners claim the facts and rationale of that case simply do not match up to our own, rendering it inapplicable. A little deeper look at *Fitness, Fun* shows this is not so. Petitioners state: "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....The Court considered this a contract signed by a minor." (Pet. P. 31) Petitioners then argue this is a critical distinction between that case and our own, where defendant Louis Cottrell in the capacity of Respondent's trustee signed the contract, rendering *Fitness, Fun* "wholly inapplicable". (Pet. P. 34) Petitioners obscure the point. The plaintiff in *Fitness, Fun* signed his mother's name. While this constitutes fraud, it places the mother, in her parental capacity respecting the minor, but <u>not the minor himself</u>, in the role of contracting party. While this Court may well have negated the arbitration clause on fraud grounds, it did not need to, for it deemed this to be a contract <u>with</u> a minor, voidable once the disability of minority ended. That is the point: that once the disability ended the now-adult had an opportunity to disaffirm a contract <u>which purportedly bound him</u>.

This analytically is no different at all from our case where "trustee" Cottrell, without any lawful authority do so, signed a contract which purported to bind up minor Cottrell's property interests. Under West Virginia law, once the shackles of his minority were removed, the now-adult Cottrell had and took the opportunity render void via disaffirmation a contract which purportedly bound him including, as *Fitness, Fun* recognized above, the arbitration provision within that contract. Everything about this case is in straight accord with the principles and rationale underlying *Fitness, Fun.*

Petitioners fall back to a claim of ratification built upon the contention that, in a "successor lessor" capacity, Respondent ratified the contract by accepting payments under it. For support they recite the contract's provision that "All rights, duties, and liabilities herein benefit and bind

Lessor and Lessee and their heirs, successors, and assigns." (Pet. P. 36) These contentions are unavailing and erroneous.

Petitioners refuse to recognize where the failure to obtain §37-1-2 approval leaves them. As set forth above, and as is clearly our law, not only is the arbitration provision nullified, but the whole contract is illegal and non-existent, and of course that includes the "successors" provision which the Petition alludes to at Page 36. This illegality negates any prospect of ratification.

Again, what is being addressed is a void contract, and where there is a void contract there can be no ratification as a matter of law. This is unquestionable and has been unequivocally and repeatedly expressed by this Court over the years. In *Haskell v. Sutton*, discussed at length above, the Court observed:

> The said lease to McKeown [the lessee] was and is void, and is of no effect as to the Morrows, or either of them. It was not ratified by either Walden, or George Morrow [the minors]. In order that a contract, made during infancy, may be ratified after full age, it must of necessity be a contract merely voidable. The lease under consideration being void, cannot be confirmed. Nothing but a new agreement, made after full age, could deprive the Morrow heirs of their land, and none such is alleged. (citations omitted.)

53 W. Va. 206, 215-216, 44 S.E. 533, 537 (1903).

As stated in *Shonk Land Co. v. Joachim*:

> A transaction entered into with the fatal infirmity of being in violation of law cannot be purged of its infirmity by means of an estoppel; and no ratification can make good the act of a corporation or of an individual which is prohibited by law; for the act being void in its inception is incapable of ratification.

96 W. Va. 708, 717, 123 S.E. 444, 447 (1924).

The 2019 case of *Sluss v. McCuskey* made the same basic observation in the context of a disputed public school employment contract, but this contextual difference is immaterial, for what is being explicated is the legal effect of not following a statute governing the creation of a contract.

> An unauthorized or illegal contract executed by a public corporation is incapable of enforcement. It is absolutely void, and neither the doctrine of estoppel nor ratification can be invoked to maintain it.

2019 W. Va. LEXIS 567, *15, 2019 WL 5960252 (Memorandum decision).

In the same factual context and even more recently it was explained:

> We have previously held that: A purported teaching contract entered into between a Board of Education and a teacher, in direct contravention of the prohibitive provisions of a valid statute, is void *ab initio*, and cannot be subsequently validated by ratification, nor can execution thereof be made the basis of an equitable estoppel. Syl. Pt. 2, *Cochran v. Trussler*, 141 W. Va. 130, 89 S.E.2d 306 (1955).

Bd. of Educ. v. Dawson, --W. Va.--, 895 S.E.2d 66, Ft.10 (2023).

The underlying rationale for this is readily apparent. If statutory prerequisites to the creation of a contract can be circumvented simply by engaging in transactional conduct involving the exchange of consideration with an after-the-fact court finding that through ratification the contract was infused with life, then the Legislature's intent in enacting the statute would be illegally offended. That cannot be condoned, and so a void contract can confer no rights and cannot be ratified. This essentially is what Justice Walker observed in *W. Va. Inv. Mgmt. Bd. v. Variable Annuity Life Ins. Co., supra.*

While the foregoing principles should end any concerns respecting ratification, some further discussion of the factual basis of Petitioners' assertion—that as an adult Respondent was paid some monies by Petitioners—must be given, if for no other reason than to avoid potential appellate suspicion through silence on the topic. In their statement of the case Petitioners assert, as if proven or indisputable, that a "tax advisor"—not any lawyer for Respondent—contacted Petitioners' "Owner Relation Support Team"—not any lawyer for Petitioners—to transfer ownership of the royalty account, supposedly pursuant to the "successors clause of the Lease." They refer to an in-house affidavit tailor made for the litigation, yet as discussed above, the affidavit does not even say a word about the "successors clause". They say that they sent monies to Respondent as the successor lessor and in that capacity he kept them. This amounts to ratification, they say.

Respondent does not deny that Petitioners sent him monies and that he had kept them in this setting where Petitioners have been using his land and depleting it of its resources on a continuing basis. However, Respondent strongly disagrees as to his capacity in getting these monies and what it means to the claims of this case. In this litigation, and for some years now, Respondent has steadfastly maintained that Petitioners are basically and continually stealing from him, and the significance of the monies that have been tendered during the alleged theft remains to be seen in the further litigation of the case, once we finally get past the arbitration contention. Even were ratification as a claim theoretically available to Petitioners to litigate, that claim could not now be resolved by this Honorable Court but must be vetted through discovery and ultimately resolved by the jury, just as *Hobbs v. Hinton Foundry, Mach. & Plumbing Co.*, that very same case Petitioners cited to for support, at Pet. P. 38, holds. As Petitioners themselves admit *Hobbs* states:

> 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.

74 W. Va. 443, 446, 82 S.E. 267, 268-269 (1914).

Hobbs then adds:

> While much depends upon the promptitude with which acts are performed by way of ratification or disaffirmance after attaining his majority, no period of time generally applicable in all cases has been, or in the nature of things can ever be, definitely fixed. The acts and conduct relied on for confirmation, and the reasonableness of the time, must be determined from the facts and circumstances of each particular case; for what may be a reasonable time, and what a ratification, under some conditions, may be unreasonable and insufficient under other conditions.

74 W. Va. 443, 446-447, 82 S.E. 267, 269.[9]

All of this certainly does not help Petitioners now, and if ratification theoretically ever could help them, that could only be following development, argument and maybe a jury trial below. But this cannot be so even in theory, for consistent with the above principles, and as Petitioners themselves recite, *Hobbs* begins with the huge caveat that the contract at issue be voidable <u>but not void</u>. 74 W. Va. 443, 446, 82 S.E. 267, 268. In short, whatever significance the Petitioners' payments to Respondent holds, it cannot relate to the issues before the Court now. It is for the Trial Court to address upon remand.

VI. CONCLUSION

For the reasons stated herein, and as may be additionally argued orally, Respondent prays that this Honorable Court affirm the Trial Court's orders upon which Petitioners' appeal is based, remanding the case to the Trial Court for further proceedings.

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[9] In straight accord with *Hobbs* is *Carroll v. Fetty*, where the Court succinctly and clearly stated: "At most, ratification is a question for the jury." 121 W. Va. 215, 221, 2 S.E.2d 521, 524 (1939).

Respectfully submitted, Respondent
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Brief of Respondent Mason Louis Cottrell** was electronically filed using the FILE AND SERVE XPRESS system, which will send notification of such filing to petitioners' counsel of record as set forth below, on this 29th day of January, 2024:

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