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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

v.) No. 23-547 (Ohio County No. CC-35-2019-C-159)

Mason Louis Cottrell,
Plaintiff Below, Respondent

MEMORANDUM DECISION

Petitioners SWN Production Company, LLC, and Statoil USA Onshore Properties Inc., now known as Equinor USA Onshore Properties Inc., appeal the Circuit Court of Ohio County's June 21, 2023, Order denying the petitioners' motion to compel arbitration and its August 21, 2023, Order denying their motion to alter or amend the court's June 21, 2023, Order under Rule 59(e) of the West Virginia Rules of Civil Procedure. This Court has considered the parties' briefs, oral arguments, and the record on appeal.[1] Upon review, we find there is no substantial question of law and no prejudicial error. Accordingly, a memorandum decision affirming the circuit court's orders is appropriate. *See* W. Va. R. App. P. 21(c).

I. Factual and Procedural Background

In 2007, when the respondent and plaintiff below, Mason Louis Cottrell, was a child, his mother, Cheryl A. Danehart, deeded 37.5 acres to Mr. Cottrell's father, Louis Cottrell, Jr.[2] (hereinafter the "father"), as trustee to hold in trust for Mr. Cottrell until he turned eighteen. The deed permitted the father, as trustee, to "grant, convey or incur debt on said land for the benefit of [Mr. Cottrell]."

As trustee, the father allegedly entered into a series of oil and gas leases, amendments, pipeline agreements, and other mineral-related transactions concerning the subject property. In March 2011, the father, as trustee, signed a Paid-Up Oil and Gas Lease (the "Lease") with Chesapeake Appalachia, LLC,[3] concerning the subject land. The father did not seek or otherwise obtain court approval for the Lease. The Lease contained an arbitration clause providing:

[1] The petitioners are represented by counsel Ramonda C. Marling, Esq. Mr. Cottrell is represented by counsel Anthony I. Werner, Esq., and Joseph J. John, Esq.

[2] Louis Cottrell, Jr., is not a party to this appeal.

[3] Chesapeake Appalachia, LLC, is an Oklahoma limited liability company.

> 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.

Chesapeake Appalachia later partially assigned the Lease to the petitioners SWN Production Company, LLC, and Statoil USA Onshore Properties, Inc., now known as Equinor USA Onshore Properties, Inc.

In 2019, after Mr. Cottrell turned eighteen, he filed suit to remove his father as trustee, compel his father to deed the property to him, and produce a full accounting of all income and distributions received from the agreements his father entered into as trustee. The complaint alleged that the father entered into the agreements for his own benefit and brought claims for unjust enrichment and breach of his fiduciary duties as trustee. The father failed to answer the complaint, and the circuit court entered default against him. The circuit court then ordered the father to execute a deed placing the subject property in Mr. Cottrell's name and ordered the father to be removed as trustee.

Mr. Cottrell then filed an amended complaint against the petitioners, Chesapeake Appalachia, Jamestown Resources, LLC, and Appalachia Midstream Services, LLC,[4] companies with whom Mr. Cottrell alleged his father had signed agreements as trustee. The amended complaint alleged that no memorandum of trust was ever created, furnished to the companies, or otherwise recorded with the Clerk of Ohio County. It further alleged that the failure to obtain court approval for each agreement under West Virginia Code § 37-1-2[5] renders those agreements void.

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[4] Chesapeake Appalachia, Jamestown Resources, LLC, and Appalachia Midstream Services, LLC, are not parties to this appeal.

[5] West Virginia 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; 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 petitioners filed a motion to dismiss and compel arbitration. While that motion was pending, Chesapeake Appalachia filed for bankruptcy in the United States Bankruptcy Court for the Southern District of Texas and filed a notice of suggestion and automatic stay with the circuit court on June 30, 2020. Despite the automatic stay, the circuit court granted the petitioners' motion to dismiss and compel arbitration on September 1, 2020, and Mr. Cottrell appealed. On May 1, 2023, this Court dismissed the appeal and declared the circuit court's order void because it was issued during the automatic bankruptcy stay period. *Cottrell v. Cottrell*, No. 20-761, 2023 WL 3168317, at *2 (W. Va. May 1, 2023) (dismissal order). The bankruptcy court lifted the stay on February 9, 2021. *Id.* The day after this Court entered its order, Mr. Cottrell filed a supplemental memorandum opposing the petitioners' motion to dismiss and compel arbitration with the circuit court, "specifically sever[ing] and challeng[ing] the arbitration clause, including the delegation provision therein, contained within the [Lease]." After additional briefing, the circuit court denied the motion to dismiss and compel arbitration on June 21, 2023. The petitioners then filed a motion under Rule 59(e) of the West Virginia Rules of Civil Procedure, asking the circuit court to alter or amend its June 21, 2023, Order denying their motion to dismiss and compel arbitration. The circuit court denied that motion on August 21, 2023. The petitioners appeal.

II. Standard of Review

The petitioners argue the circuit court erred in denying their motion to dismiss and compel arbitration. "An order denying a motion to compel arbitration is an interlocutory ruling which is subject to immediate appeal under the collateral order doctrine." Syl. Pt. 1, *Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 745 S.E.2d 556 (2013); *see also* W. Va. Code § 55-10-30(a)(1) ("An appeal may be taken from: (1) An order denying a motion to compel arbitration[.]"). "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).

III. Discussion

> 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.

The petitioners ask this Court to enforce the arbitration and delegation clause within the Lease.[6] The parties presume, without argument, that the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ("FAA"), applies to the arbitration clause at issue. When a contract contains an arbitration clause and involves interstate commerce, the FAA governs the arbitration clause. *See Alexander v. Chesapeake Appalachia, LLC*, 839 F.Supp.2d 544, 549 (N.D.N.Y. 2012). Because the Lease involves an oil and gas transaction regarding real property in West Virginia, and it was negotiated between Chesapeake Appalachia, an Oklahoma limited liability company, and the father, as trustee, it involves interstate commerce and therefore falls within the FAA's scope. *See id.* at 550 (finding that an oil and gas lease involved interstate commerce and fell within the FAA's scope when the real property at issue was in New York and the companies who negotiated and/or acquired the lease were from Ohio, Delaware, and Oklahoma).

Whenever a court considers a motion to compel arbitration under the FAA, its authority "is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syl. Pt. 2, in part, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). Because "[a]rbitration is a matter of contract and consent, . . . disputes are subject to arbitration if, and only if, the parties actually agreed to arbitrate those disputes." *Coinbase, Inc. v. Suski*, 602 U.S. 143, 145 (2024). Further, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) (citations omitted).

The petitioners seek to enforce the arbitration clause within the Lease, arguing it contains a delegation clause requiring arbitration of "all disputes, including but not limited to, the formation, execution, validity and performance of the Lease[.]" Mr. Cottrell challenges the Lease, specifically the arbitration and delegation clause, on the basis that his father lacked authority to agree to the Lease on behalf of the trust or Mr. Cottrell, as its beneficiary, because he did not seek or obtain court approval for the Lease under West Virginia Code § 37-1-2.

This Court has explained that "[a] 'delegation provision' is a clause, within an agreement to arbitrate, which clearly and unmistakably provides that the parties to the agreement give to the arbitrator the power to decide the validity, revocability or enforceability of the arbitration agreement under general state contract law." Syl. Pt. 4, in part, *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016). Additionally,

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[6] The petitioners raise fourteen assignments of error, which we consolidate into two categories: (1) whether the circuit court erred in denying the motion to compel arbitration, and (2) whether Mr. Cottrell ratified the lease. *See Tudor's Biscuit World of Am. v. Critchley*, 229 W. Va. 396, 402, 729 S.E.2d 231, 237 (2012) (consolidating assignments of error). We decline to consider the petitioners' arguments on ratification because whether a party ratified a contract is an argument on the merits. *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 n. 6 (3d Cir. 2000). In considering whether the parties have agreed to arbitration, the Court may not rule on "the potential merits of the underlying claims." *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). Therefore, this decision addresses only whether the circuit court erred in denying the motion to compel arbitration.

> Under the Federal Arbitration Act, 9 U.S.C. § 2, and the doctrine of severability, where a delegation provision in a written arbitration agreement gives to an arbitrator the authority to determine whether the arbitration agreement is valid, irrevocable or enforceable under general principles of state contract law, a trial court is precluded from deciding a party's challenge to the arbitration agreement. When an arbitration agreement contains a delegation provision, the trial court must first consider a challenge, under general principles of state law applicable to all contracts, that is directed at the validity, revocability or enforceability of the delegation provision itself.

Id. at 383, 787 S.E.2d at 654, Syl. Pt. 5. However, the severability doctrine "presumes an underlying, existent, agreement." *Sandvik AB v. Advent Int'l. Corp.*, 220 F.3d 99, 106 (3d Cir. 2000). "Even under the severability doctrine, there may be no arbitration if the agreement to arbitrate is nonexistent." *Id.* at 101. Therefore, before "the delegation provision . . . can be enforced, a court needs to decide what the parties have agreed to[.]" *Coinbase, Inc.*, 602 U.S. at 145.

The United States Supreme Court has explained that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Techs.*, 475 U.S. at 648 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). It is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (citations omitted). "[C]ourts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." *Id.* at 299. When, as here, a party contests the existence, formation, and enforceability of the arbitration clause, the court must resolve the disagreement. *Id.* at 299–300.

Although the FAA governs the arbitration clause within the Lease, state law governs the formation of the Lease and the arbitration and delegation clause therein. *See First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts."). This Court has long held that "[t]he fundamentals of a legal contract are competent parties, legal subject-matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement." Syl. Pt. 5, *Virginian Exp. Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926).

Mr. Cottrell argues that the Lease, and the arbitration and delegation clause contained therein, do not bind the trust or Mr. Cottrell because his father did not seek court approval under West Virginia Code § 37-1-2. Section 37-1-2 states that if a trustee "think[s] the interest of those for whom the estate is held will be promoted by a lease," the trustee "may, for the purpose of obtaining" the lease "file a bill in equity in the circuit court of the county in which the estate proposed to be leased" is located, "stating plainly all of the estate, real and personal, . . . so held in trust, and all of the facts calculated to show the propriety of the . . . lease[.]" The statute further

states "[t]he bill shall be verified by the oath of the plaintiff; and . . . the beneficiaries in such trust, when not plaintiffs, and all others interested, shall be made defendants." *Id.*

Although Section 37-1-2 says the trustee "may" file a bill in equity before the circuit court, Mr. Cottrell argues the Legislature intended to require trustees and others falling under the statute to file such bills in equity. We agree. This Court has long recognized that when a statute uses the word "may" for the benefit of others, "it is not simply permissive, but mandatory or compulsory." *Trail v. Trail*, 56 W. Va. 594, 600, 49 S.E. 431, 434 (1904). Here, Section 37-1-2 was expressly created to protect "the interests of those for whom the estate is held" and the interests of "minor[s], . . . insane person[s] or convict[s]" for whom someone else is acting. Therefore, West Virginia Code § 37-1-2 requires trustees, such as the father, to request permission from the circuit court prior to entering into a lease for the benefit of the trust.

This Court has explained that when a party seeks court approval under Section 37-1-2 but fails to substantially comply with all its procedural requirements, the court may judicially ratify a sale or lease after the fact. In *French v. Pocahontas Coal & Coke Co.*, 87 W. Va. 226, 104 S.E. 554 (1920), infants sought to annul a sale of real estate when a court approved the sale in a summary proceeding but did not give notice to the infants. *Id.* at 227–28, 104 S.E. at 555. The Court found that when a sale is otherwise proper but fails only in procedure, the sale is voidable and may be judicially ratified. *See id.* at 227, 104 S.E. at 554, Syl. Pt. 4, ("Though the proceeding under said sections of [W. Va. Code § 37-1-2] is statutory and administrative, and its requirements must be complied with, it is remedial, and, properly construed, authorizes judicial ratification of a sale infirm and defective in point of procedure only."). However, when a party required to act under Section 37-1-2 fails to seek court approval, the defect is more than procedural, and the party lacks authority to act on behalf of another. *See* Syl. Pt. 3, *South Penn Oil Co. v. McIntyre*, 44 W. Va. 296, 28 S.E. 922 (1898) ("Oil and gas being part of the realty in and under which they exist, the committee of an insane person having an interest therein can only sell or lease such interest by decree of court as provided by statute."). Because the father did not seek court approval for the Lease as required by West Virginia Code § 37-1-2, he lacked authority to commit the trust or its beneficiary to the Lease and the arbitration and delegation clause therein.[7]

In order for the Lease or the arbitration and delegation clause therein to be binding, it must be signed by competent parties. *See Virginian Exp.*, 100 W. Va. at 560, 131 S.E. at 254, Syl. Pt. 5. "To be a competent party, the persons or entities signing the Arbitration Agreement must have had the authority to do so." *State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 478, 740 S.E.2d 66, 73 (2013). Because the father lacked authority to sign the Lease on behalf of the trust or its beneficiary, Mr. Cottrell, he was not a competent party, and no contract was formed.

The petitioners argue that whether the Lease was ever formed is an issue for the arbitrator because the delegation clause specifically covers "all disputes, including but not limited to, the *formation*, execution, validity and performance of the Lease[.]" (Emphasis added). In a related

[7] The father signed the Lease in March 2011, prior to West Virginia adopting the Uniform Trust Code, West Virginia Code §§ 44D-1-101–44D-11-1105 ("UTC"). *See* W. Va. Code § 44D-11-1104 (stating that the UTC became effective on July 1, 2011). Therefore, we do not consider what impact, if any, the UTC has on the requirements of West Virginia Code § 37-1-2.

but distinguishable case, the United States Supreme Court in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), required the parties to arbitrate the issue of whether the contract was void or voidable under Florida law because the arbitration agreement contained a delegation clause requiring arbitration of "[a]ny claim, dispute, or controversy . . . arising from or relating to this Agreement . . . or the validity, enforceability, or scope of [the arbitration agreement]." *Id.* at 442. The United States Supreme Court required arbitration of the question of a contract's validity but specifically noted that the issue of a contract's validity differs from whether any agreement was ever created. *Id.* at 440, n.1 (2006) ("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 . . . whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99 (C.A.3 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587 (C.A.7 2001)[.]"); *see also Granite Rock Co.*, 561 U.S. at 300 (stating that *Buckeye* distinguished the "treatment of the generally nonarbitral question whether an arbitration agreement was 'ever concluded' from the question [of] whether a contract containing an arbitration clause was illegal when formed, which [is] arbitrable in certain circumstances").

The issue in this case is precisely the question that *Buckeye Check Cashing* did not address: whether the court must require arbitration when the contract containing the arbitration and delegation clause was signed by a party who lacked authority to commit the principal. Indeed, courts have found that when a signatory to a contract lacks authority to enter into the agreement on behalf of a principal, the contract and arbitration agreement therein do not bind the principal. *See, e.g.*, *Sandvik AB*, 220 F.3d at 112 (declining to require arbitration when a company's agent lacked authority to sign a contract containing an arbitration clause on behalf of the company); *King*, 230 W. Va. at 480–81, 740 S.E.2d at 75–76 (refusing to require arbitration when a health care surrogate, with authority to make health care decisions on behalf of her mother, did not have authority to sign an arbitration agreement on her mother's behalf because the decision to arbitrate is not a medical decision); *Beckley Health Partners, Ltd. v. Hoover*, 247 W. Va. 199, 202, 875 S.E.2d 337, 340 (2022) (applying *King* and affirming the circuit court's order denying arbitration finding that a health care surrogate lacked authority to bind her mother to an arbitration agreement).

As previously stated, "competent parties, legal subject matter, valuable consideration and mutual assent" are required to prove the parties agreed to arbitrate. *See Virginian Exp.*, 100 W.Va. at 560, 131 S.E. at 254, Syl. Pt. 5, in part. Without those elements, the language of the arbitration and delegation clause alone cannot prove the parties agreed to arbitrate. Without agreement by competent parties, a delegation provision stating "[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," is insufficient to prove that the parties agreed to arbitrate. The father was not a competent party because he lacked authority to sign the Lease on behalf of the trust, as he failed to seek court approval under West Virginia Code § 37-1-2. Therefore, the trust and its beneficiary, Mr. Cottrell, never entered into the arbitration and delegation clause, and it cannot bind them.

IV. Conclusion

For the foregoing reasons, we affirm the circuit court's June 21, 2023, Order denying the petitioners' motion to dismiss and compel arbitration, and the circuit court's August 21, 2023,

Order denying the petitioners' motion to alter or amend the June 21, 2023, Order under Rule 59(e) of the West Virginia Rules of Civil Procedure.

Affirmed.

ISSUED: November 13, 2026

CONCURRED IN BY:

Justice William R. Wooton
Justice James W. Flanigan
Judge Richard Lindsay, sitting by temporary assignment

DISSENTING:

Justice Charles S. Trump IV
Justice H.L. Kirkpatrick

NOT PARTICIPATING:

Chief Justice C. Haley Bunn

Wooton, Justice, concurring:

I respectfully concur with the memorandum decision in this case, but I write separately to emphasize one thing: the respondent and the circuit court below correctly severed the arbitration and delegation provisions from the container contract before the court found them unenforceable under state law.

Both West Virginia's case law and federal cases interpreting the Federal Arbitration Act (9 U.S.C. § 2) apply the "severability doctrine." That doctrine requires a party disputing the enforcement of an arbitration clause (or a provision delegating interpretation of the clause to an arbitrator)[1] to "sever" or "separate" the arbitration clause or delegation provision from the underlying container contract. The arbitration clause or delegation provision must be carved out,

[1] A "delegation provision" is nothing more than an agreement to arbitrate wedged into an overarching agreement to arbitrate. Such a provision is simply an agreement to arbitrate the interpretation and effect of the arbitration clause within a larger container contract. As one member of the Supreme Court said, delegation provisions are "something akin to Russian nesting dolls" that suggest an "infinite severability rule" that is "difficult for any lawyer – or any person – to accept, but this is the law." *Rent-A-Ctr., West, Inc. v. Jackson*, 561 U.S. 63, 85-87 (2010) (Stevens, J., dissenting).

"severed" from the container contract, and the party resisting arbitration must challenge the clause or provision alone and separately from the container contract. *See* Syl. Pt. 4, *State ex rel. Richmond American Homes of West Virginia, Inc. v. Sanders*, 228 W. Va. 125, 717 S.E.2d 909 (2011) (outlining the doctrine of severability regarding challenges to an arbitration clause); Syl. Pt. 5, *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 787 S.E.2d 650 (2016) (outlining the doctrine of severability regarding challenges to a delegation provision). The circuit court must then weigh that challenge by focusing its analysis specifically on the clause or provision.

Nevertheless, when a court analyzes a challenge to a severed arbitration clause or delegation provision, it does not do so in a vacuum. Instead, it must apply standard canons of state contract law. Those canons are clear that a court must examine a contract as a whole; detached words, clauses, or provisions standing alone are not controlling but rather must be analyzed in relation to the parties' overall agreement as a singular entity. If a state law compels the conclusion that the parties' overall agreement is unenforceable, that logic generally applies equally to any arbitration clause or delegation provision, and meets the dictates of the severability doctrine. Let me explain.

In 2011, this Court noted that, "Whether an arbitration agreement was validly formed, and whether the claims maintained by the plaintiff fall within the scope of the agreement, are evaluated under state law principles of contract formation." *Richmond Am. Homes*, 228 W. Va. at 134, 717 S.E.2d at 918. In Syllabus Point 2 of *Richmond American Homes*, applying the severability doctrine, this Court said that basic contract principles mandate that a challenged, severed arbitration clause be assessed within the four corners of the parties' contract:

> [T]he trial court may rely on general principles of state contract law in determining the enforceability of the arbitration clause. If necessary, the trial court may consider the context of the arbitration clause within the four corners of the contract, or consider any extrinsic evidence detailing the formation and use of the contract.

Id., 228 W. Va. at 129, 717 S.E.2d at 913, Syl. Pt. 2.

In 2024, the United States Supreme Court reached the same conclusion when it found that the severability doctrine is satisfied when a court disavows an arbitration or delegation provision for contract law reasons that apply to the whole contract. As the Supreme Court said,

> The severability principle establishes that a party seeking to avoid arbitration must directly challenge the arbitration or delegation clause, not just the contract as a whole. But this rule *does not* require that a party challenge *only* the arbitration or delegation provision. Rather, where a challenge applies "equally" to the whole contract and to an arbitration or delegation provision, a court must address that challenge. Again, basic principles of contract and consent require that result. Arbitration and delegation agreements are simply contracts, and, normally, if a party says that a contract is invalid, the court must address that argument before deciding the merits of the contract dispute.

Coinbase, Inc. v. Suski, 602 U.S. 143, 150-51 (2024) (emphasis added, citation omitted).[2]

The canons of state contract law apply to *all* contract terms – including arbitration clauses and delegation provisions. Those canons direct that "[a] contract must be considered as a whole, effect being given, if possible, to all parts of the instrument." Syllabus*, Clayton v. Nicely*, 116 W. Va. 460, 182 S.E. 569 (1935). "No word or clause in a contract is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it." Syl. Pt. 3, *Carnegie Nat. Gas. Co. v. S. Penn Oil Co.*, 56 W. Va. 402, 49 S.E. 548 (1904). A contract must be "construed, if possible, as to give meaning to every word, phrase and clause and also render all its provisions consistent and harmonious." Syllabus, in part, *Henderson Dev. Co. v. United Fuel*, 121 W. Va. 284, 3 S.E.2d 217 (1939). Accord, *Elliott Assocs. v. Avatex Corp*., 715 A.2d 843, 854 (Del. 1998) (A court must give effect to all terms of the contract and, if possible, "reconcile all the provisions of the instrument.").

In this case, respondent Mason Louis Cottrell clearly challenged the enforceability of both the arbitration clause and the delegation provision within the arbitration clause. Under principles of state contract law, the circuit court assessed the enforceability of the clause and the provision. I concur to emphasize that the circuit court's assessment was correct: West Virginia Code § 37-1-2 applies equally to the arbitration clause, the delegation provision, and to the overall oil and gas contract asserted by the petitioners. Under that statute, the circuit court fittingly found that, within the four corners of the contract, the arbitration and delegation provisions were wholly unenforceable. In sum, the circuit court properly applied the severability doctrine, applied state law, and refused to enforce the arbitration and delegation terms.

Lindsay, Judge, concurring:

I join the majority but write separately to emphasize and reaffirm the essential role our Courts play in protecting the rights and interests of minors and incompetents. Most understand that our Courts exist to dispense justice, resolve controversy or contemplate remedy. But just as important is our role in shielding those who do not have the faculties to protect themselves whether they are incapable or a child.

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[2] The Supreme Court in *Coinbase* noted that the party resisting arbitration made a very succinct challenge to a delegation provision, one the Court thought sufficient:

> When opposing Coinbase's motion to compel arbitration in the District Court, respondents pointed out that "courts can refer the question of arbitrability to an arbitrator only 'if a valid [arbitration] agreement exists,' " and, "since Official Rules ¶10 'superseded' the parties' prior arbitration agreements, any prior agreement to arbitrate . . . disputes no longer exists." . . . Respondents' District Court challenge was "directed specifically to" the delegation provision.

Coinbase, Inc. v. Suski, 602 U.S. at 151 fn.*

At heart in this matter is whether a century-old statute—*W.Va. Code § 37-1-2 (eff. 1923)*—requires court approval when an adult or corporation contracts with a minor trust for its mineral rights or land interests. Thankfully, it does. It does so because long ago our jurisprudence rightfully decided that it is a Court's solemn responsibility to stand with a child and protect her interests where and when necessary.

As an example, our Courts endeavor to protect the interests of children by first appointing a Guardian Ad Litem (GAL) or attorney to a child in every circumstance—infant settlement proceeding, custody dispute, truancy, juvenile delinquency, creation of a minor trust or abuse and neglect—wherein a child finds herself before the Court. Thereafter, and following a recommendation by a GAL or the child's attorney, the question before the Court—the question that the Court is empowered to and responsible for answering—is whether the issue or action is in the child's best interest? In answering this question, our Courts are expected to impartially weigh the various costs and benefits that undoubtedly accompany every undertaking or endeavor of value. The Court does so not for the benefit of one party over another, the trustee or for the benefit of the Court, but only for the child's benefit and in her best interests. By affirming the lower court and reinforcing this principle, our Supreme Court of Appeals of West Virginia has again validated our indispensable role in protecting the interests of children in our state. I believe this is a sacred charge and one that should not be weakened nor disturbed.

Kirkpatrick, Justice, dissenting, joined by Trump, Justice:

The majority's decision rises and falls on its conclusion that by failing to comply with a statutory court-approval process for an oil and gas lease, Louis Cottrell Jr. ("Trustee") was stripped of the legal capacity to enter into the lease at issue, which covered property held by Trustee in trust for Respondent Mason Louis Cottrell's ("Respondent Cottrell") benefit. The statute says no such thing, nor do the cases applying it. To the contrary, Trustee possessed the express power to enter into leases and take other action respecting the property he held in trust, and, in this case, he entered into a lease that contained an arbitration clause in a valid exercise of that authority. Then, after Respondent Cottrell dissolved the trust, caused the property to be deeded to himself, and negotiated royalties paid under the lease, Respondent Cottrell became bound under the lease, including its arbitration provision. Accordingly, Respondent Cottrell is required to arbitrate the dispute between him and Petitioners SWN Production Company, LLC, and Statoil USA Onshore Properties, Inc., now known as Equinor USA Onshore Properties, Inc., assignees of the lease, and I respectfully dissent to the majority's contrary conclusion.

The subject real property (the "Property") was deeded to Trustee, "as Trustee for" Respondent Cottrell, in July 2007. The deed/trust instrument explicitly authorized Trustee "to grant, convey or incur debt on said land for the benefit of" Respondent Cottrell, Trustee's son. In March 2011, Trustee entered into a paid-up oil and gas lease (the "Lease") covering the Property. Trustee and Chesapeake Appalachia, L.L.C. ("Chesapeake") were the signatories to the Lease; however, Chesapeake later partially assigned the Lease to the petitioners. The Lease contains an arbitration and delegation provision, requiring that

> [i]n the event of a disagreement between Lessor [Trustee] and Lessee [Chesapeake] 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.

The Lease also provided that "[a]ll rights, duties, and liabilities herein benefit and bind Lessor and Lessee and their heirs, successors, and assigns."

Approximately eight years after the Lease was executed, Respondent Cottrell sued Trustee. The crux of Respondent Cottrell's 2019 complaint was that Trustee entered into oil and gas leases and other agreements covering the Property, pursuant to which Trustee received "large sums of money" that he spent for his own benefit. Accordingly, Respondent Cottrell requested that the deed conveying the Property reflect Respondent Cottrell's "sole and unencumbered ownership" of the Property, and he sought money damages resulting from, generally, Trustee's alleged breaches of fiduciary duties, conversion, and unjust enrichment.

Trustee failed to answer or appear, so the circuit court entered default against him on August 7, 2019. A few days later, the court ordered Trustee to execute a deed conveying the Property to Respondent Cottrell and prohibited him from taking further action as trustee. On August 20, 2019, Trustee executed a deed conveying the Property to Respondent Cottrell. Respondent Cottrell then amended his complaint and asserted claims against various entities with whom Trustee had contracted, including Chesapeake and the petitioners.[1]

The gist of Respondent Cottrell's June 4, 2020, amended complaint was that the Lease was void because Chesapeake failed to secure court approval of it under West Virginia Code § 37-1-2,[2] and actions taken by Chesapeake and the petitioners, as assignees of an allegedly void Lease, were illegal and invalid and rendered Chesapeake and the petitioners liable to Respondent Cottrell.

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[1] Chesapeake is not a party to this appeal.

[2] In relevant part, West Virginia Code § 37-1-2 provides that

> if the trustee of any estate . . . 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 . . . 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, . . . 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 beneficiaries in such trust, when not plaintiffs, and all others interested, shall be made defendants.

Citing the arbitration provision, the petitioners moved to dismiss Respondent Cottrell's complaint and compel arbitration. The circuit court initially granted the petitioners' motion, but, on appeal, we vacated that order because it was entered in violation of a bankruptcy stay. *Cottrell v. Cottrell*, No. 20-0761, 2023 WL 3168317 (W. Va. May 1, 2023) (memorandum decision).

On June 25, 2021, while Respondent Cottrell's appeal was pending before this Court, he began receiving and negotiating the royalties paid under the Lease. As of June 2023, the last date for which this Court has figures, Respondent Cottrell had negotiated payments received under the Lease totaling $72,128.60.

Once the case was remanded to the circuit court, the court reconsidered the petitioners' motion to dismiss and compel arbitration (and supplemental briefing). The court changed course and denied the petitioners' motion on June 21, 2023. In denying the motion, the court determined that the failure to comply with the court-approval process set forth in West Virginia Code § 37-1-2, which it deemed mandatory, rendered the Lease's arbitration and delegation clauses void: "Section 37-1-2 is undeniably mandatory and the consequence of Chesapeake's decision to forgo court approval of the arbitration clause and delegation provision is the total voidance of the arbitration clause and the delegation provision." Contradictorily, the court also found that Respondent Mason Cottrell disaffirmed the (allegedly void) contract containing the arbitration clause.[3]

When considering a motion to dismiss and compel arbitration, a court's authority is "limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syl. Pt. 2, in part, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010). And when a party separately challenges the enforceability of an arbitration or delegation provision, it must be excised from the agreement within which it resides and its enforceability examined separately: "[A]rbitration clauses must be severed from the remainder of a contract, and must be tested separately under state contract law for validity and enforceability." *Schumacher Homes of Circleville, Inc. v. Spencer*, 237 W. Va. 379, 387–88, 787 S.E.2d 650, 658–59 (2016). Similarly, the delegation clause, which gives "the arbitrator the power to decide the validity, revocability or enforceability of the arbitration agreement under general state contract law," *id.* at 383, 787 S.E.2d at 654, Syl. Pt. 4, in part, must be severed and examined independently. *See id.* at 383, 787 S.E.2d at 654, Syl. Pt. 5, in part ("When an arbitration agreement contains a delegation provision, the trial court must first consider a challenge, under general principles of state law applicable to all contracts, that is directed at the validity, revocability or enforceability of the delegation provision itself.").

The majority was wise to distance itself from the circuit court's determination that the alleged failure to comply with any court-approval process applicable to the Lease rendered the

[3] The circuit court also denied the petitioners' motion to alter or amend the order denying their motion to dismiss and compel arbitration under Rule 59(e) of the West Virginia Rules of Civil Procedure.

arbitration and delegation provisions void because the court plainly failed to sever the arbitration and delegation provisions. West Virginia Code § 37-1-2 provides, relevantly, that

> if the trustee of any estate . . . think the interest of those for whom the estate is held will be promoted by a lease of the same, . . . [such] trustee . . . may, for the purpose of obtaining such . . . lease, . . . file a bill in equity in the circuit court of the county in which the estate proposed to be leased . . . may be, stating plainly all of the estate . . . so held in trust, and all of the facts calculated to show the propriety of the . . . lease.

This statute says nothing about obtaining court approval for arbitration or delegation provisions. As a result, had the circuit court severed and examined those provisions independently, as it was required to do, it is clear that the statute does not render them invalid or unenforceable.

The circuit court, instead, examined the Lease as a whole and determined that it was void for the failure to obtain court approval under the statute. Then, having determined that the Lease was void on the whole, its arbitration and delegation clauses were likewise void. The United States Supreme Court made clear in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), that the rule of severability means that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Id.* at 445–46. That an arbitrator may later find the agreement containing the arbitration clause void is of no moment in view of the separate enforceability of an arbitration provision. *Id.* at 448–49. The circuit court, thus, reached an erroneous decision by failing to sever the arbitration and delegation provisions and assessing the validity of the Lease as a whole, a determination that was not proper for the court to make but for an arbitrator.

The majority works to salvage the circuit court's erroneous conclusion, but in the process, it makes its own. The majority recognizes that Respondent Cottrell has offered no viable challenge to the enforceability of the delegation or arbitration provisions themselves, and so the only means of avoiding arbitration here is to find that an agreement to arbitrate was never *formed* in the first place. *See Buckeye Check Cashing*, 546 U.S. at 444 n.1 ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded."); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) ("It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide."). But any alleged failure to comply with West Virginia Code § 37-1-2 did not strip Trustee of the legal capacity to enter into the Lease. Unquestionably, Trustee possessed the authority to enter into the Lease. The trust instrument expressly authorized him to "grant, convey or incur debt on" the Property. And *South Penn Oil Co. v. McIntyre*, 44 W. Va. 296, 28 S.E. 922 (1898)—the sole authority supporting the majority's claim that Trustee lacked legal capacity—does not say otherwise. *South Penn* dealt with a committee appointed for an incompetent person whose appointment was, in fact, not legally valid at the time the committee entered into a lease affecting the incompetent's property. *Id.* at 297, 28 S.E. at 922. As a result, he was "clothed . . . with no authority whatever as such committee," and the lease entered into while not validly appointed as committee conveyed no interest. *Id.* at 305, 28 S.E. at 925. The *South Penn* Court said nothing about a trustee's contracting authority, nor did it say that West Virginia Code § 37-1-2 must be complied with to vest a contracting party with legal competency

to contract. Instead, cases applying West Virginia Code § 37-1-2 demonstrate that failure to comply with its terms might affect the validity of the lease or sale of the land at issue, but it is not a statute that affects formation of any such agreement. *See, e.g.*, *Haskell v. Sutton*, 53 W. Va. 206, 213, 44 S.E. 533, 536 (1903) (concluding that the failure to comply with § 37-1-2's precursor rendered "*lease*, tested by the authorities cited [including *South Penn*], . . . without legal validity" to bind children and that the children took no subsequent action that would estop them from denying validity (emphasis added)); Syl., in part, *French v. Pocahontas Coal & Coke Co.*, 87 W. Va. 226, 104 S.E. 554 (1920) (concluding that "[t]o effect a regular and unimpeachable *sale* of the real estate of an infant," compliance with statutory process is necessary).

Furthermore, in entering the Lease, Trustee was not acting *on* Respondent Cottrell's behalf or affecting *Respondent Cottrell's* land. "A 'trust' is a legal relation between two or more persons by virtue of which one is bound to hold property to which he has the legal title, for the use or benefit of the other or others who have an equitable title or interest." Syl. Pt. 2, in part, *Dadisman v. Moore*, 181 W. Va. 779, 384 S.E.2d 816 (1988). "An essential feature of trusts is the division of the title to property, the vesting of the legal title in the trustee and of the equitable title or beneficial interest in the cestui que trust." *Id.* At the time the Lease was executed, Trustee held legal title to the Property, and in executing that Lease, Trustee did not then bind Respondent Cottrell to its terms.

> A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such.

Taylor v. Mayo, 110 U.S. 330, 334–35 (1884); *see also* Syl. Pt. 1, *Smith v. Chambers*, 117 W. Va. 204, 185 S.E. 211 (1936) ("The contract of a trustee in administering a trust is his personal undertaking at common law, and not that of the trust estate unless he contracts against personal liability[.]").

Trustee, by the terms of the trust instrument, possessed authority to enter into the Lease, and by validly doing so, he bound himself to the Lease's terms, including its arbitration provision. Respondent Cottrell's own subsequent action, however, undertaken with full knowledge of the Lease, then served to bind Respondent Cottrell to the Lease.

Ordinarily, only signatories to an arbitration agreement will be bound to arbitrate. *Bayles v. Evans*, 243 W. Va. 31, 39, 842 S.E.2d 235, 243 (2020). But "[t]hat rule is not inflexible and is subject to traditional principles of contract and agency law." *Id.* Thus,

> "A signatory to an arbitration agreement cannot require a nonsignatory to arbitrate unless the non-signatory is bound under some traditional theory of contract and agency law. The five traditional theories under which a signatory to an arbitration agreement may bind a non-signatory are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." Syllabus Point 10, *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 781 S.E.2d 198 (2015).

Id. at 34, 842 S.E.2d at 239, Syl. Pt. 4. Procedurally, Respondent Cottrell, after averring that Trustee was not administering the trust property for Respondent Cottrell's benefit, successfully removed Trustee; dissolved the trust; effected the legal transfer of the Property to himself, thereby succeeding Trustee as lessor under the Lease; and requested and negotiated royalty payments *under the Lease*. As a result, Respondent Cottrell is estopped to now deny that he is bound to arbitrate as required by the terms of the Lease. "As a general rule, the doctrine of equitable estoppel allows a court to prevent a nonsignatory from embracing a contract, but then turning his, her, or its back on the portions of the contract (such as an arbitration clause) that the nonsignatory finds 'distasteful.'" *Id.* at 41, 842 S.E.2d at 245 (quoting *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)). Respondent Cottrell has sought and negotiated royalty payments—royalty payments emanating from the *Lease*. Having maintained that the payment provision be enforced to his benefit, he cannot now turn his back on the arbitration provision: "[A] nonsignatory may not cherry-pick beneficial contract terms while ignoring other provisions that do not benefit it or that it would prefer not to be governed by such as an arbitration clause." *Id.* (quoting 21 Williston on Contracts § 57:19).

The *Bayles* Court also recognized "[a]nother way" to examine estoppel, which is to consider whether a nonsignatory has received a "direct benefit" from the contract that the nonsignatory is otherwise seeking to disavow. *Id.* A nonsignatory can become bound by a contract containing an arbitration clause when that nonsignatory "knowingly seek[s] and obtain[s] 'direct benefits' from that contract." *Id.* at 245–46, 842 S.E.2d at 41–42 (quoting *Noble Drilling Servs., Inc. v. Certex USA, Inc.*, 620 F.3d 469, 473 (5th Cir. 2010)). Respondent Cottrell has received direct benefits under the Lease that total, at last update, $72,128.60. No matter how viewed, Respondent Cottrell is equitably estopped from disavowing the Lease.

In sum, Trustee possessed the legal authority to enter into the Lease, including its arbitration and delegation provisions, and any effect the alleged failure to comply with West Virginia Code § 37-1-2 has on the Lease's validity is for an arbitrator to determine, not a court. Further, by succeeding Trustee as lessor under the Lease and negotiating royalty payments made pursuant to it, Respondent Cottrell is estopped to deny the validity of the Lease, including its arbitration clause, and Respondent Cottrell is required to arbitrate his claims arising under the Lease.

For these reasons, I respectfully dissent, and I am authorized to state that Justice Trump joins in this dissent.