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IN THE CIRCUIT COURT OF UPSHUR COUNTY, WEST VIRGINIA

SHEREE D. MARTIN, EXECUTOR OF  
THE ESTATE OF SHIRLEY A.  
MARTIN, TRUSTEE OF THE SHIRLEY  
A. MARTIN TRUST, and TRUSTEE OF  
THE CARL J. MARTIN, SR. TRUST,

Petitioner,

Civil Action No. 20-P-21  
(Judge Wilmoth)

v.

WILLIAM A. MARTIN, et al.,

Respondents.

**ORDER FOLLOWING HEARING ON AUGUST 5, 2021**

On August 5, 2021, Sherree D. Martin ("Petitioner"), in person and by counsel Roy C. Cunningham, Esquire in her former capacity as Executrix of the Estate of Shirley A. Martin, as Trustee of the Shirley A. Martin Trust, and as Trustee of the Carl J. Martin, Sr. Trust and John F. Hussell, Esquire, in her individual capacity, Respondent Carl J. Martin, II ("Respondent CJ Martin"), by counsel William J. O'Brien, Esquire, Respondent Teresa Martin-Pike ("Respondent Martin-Pike"), by counsel Robert C. Chenoweth, Esquire, and Respondents Jasmine Pike and Sophia Pike, by their Guardian Ad Litem, R. Mike Mullens, Esq., appeared before this Court for a duly noticed hearing on Respondents CJ Martin and Martin-Pike's Joint Motion For Protective Order, Entry of Order, and Expedited Review ("Respondents' Joint Motion") dated June 25, 2021, and Petitioner's Rule 59(e) Motion to Alter or Amend the Judgment dated July 20, 2021 ("Petitioner's Rule 59(e) Motion"). Citizens Bank of West Virginia as Administrator of the Estate of Shirley A. Martin, Trustee of the Shirley A. Martin Trust, and Trustee of the Carl J. Martin Trust by Leesa M. Harris, Sr. VP & Trust Officer appeared as well.

Based on the submissions, oral argument presented at the hearing, the reasons stated on the record, and as set forth below, the Court **GRANTED** Respondents' Joint Motion and **DENIED** Petitioner's Rule 59(e) Motion. Accordingly, the Court **DENIES AS MOOT** Petitioner's Motion to Stay Proceedings Pending Reconsideration dated July 20, 2021.

**A. Counsel for Citizens Bank of West Virginia.**

1. At the beginning of the hearing, the Court noted that it had received correspondence from prospective counsel for Citizens Bank of West Virginia, informing the parties and the Court of a potential conflict of interest based on former employment with a law firm, at which time she drafted various estate planning documents for Shirley A. Martin under the direction and supervision of another attorney, but did not meet with Shirley A. Martin and no longer has access to any of the documents from that work.

2. Prospective counsel requested that the parties execute a waiver of conflict of interest and present them to the Court at the hearing to allow her to serve as counsel for Citizens Bank of West Virginia in its capacity as Administrator of the Estate of Shirley A. Martin, Trustee of the Shirley A. Martin Trust, and Trustee of the Carl J. Martin Trust.

3. Counsel for Petitioner in her individual capacity noted that the prospective counsel's former supervising attorney was already an individual identified as a witness in this proceeding and that the prospective counsel may also become a witness.

4. Accordingly, though noting that there was no objection to the prospective counsel otherwise, Petitioner in her individual capacity did object and would not enter into the waiver of conflict of interest due to the fact that prospective counsel may become a witness and that her former supervising attorney was already an identified witness in this proceeding.

**B. Respondents' Joint Motion.**

5. Respondents' Joint Motion requested that the Court enter a protective order that discovery not be had from Petitioner in her former fiduciary capacities, for expedited review of the same and, in the alternative or in addition, that the Court enter a written order reflecting the Court's removal of Petitioner from her fiduciary positions at the hearing on December 23, 2020. *See* Respondents' Joint Motion at 1.

6. Subsequent to the filing of Respondents' Joint Motion, the Order Following Hearing on December 23, 2020 was entered on July 12, 2021 (the "Order").

7. As set forth on the record, since the Court had previously removed Petitioner in its ruling at the hearing on December 23, 2020, even though the written Order was not entered until July 12, 2021, the Court **GRANTED** Respondents' Joint Motion and **ORDERED** any discovery propounded by Petitioner in her fiduciary capacities after December 23, 2020 withdrawn.

**C. Petitioner's Rule 59(e) Motion.**

8. A motion to alter or amend a judgment should be granted only where: "(1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice." Syl. Pt. 2, *Hinerman v. Rodriguez*, 230 W. Va. 118, 736 S.E.2d 351 (2012).

9. At the hearing, Petitioner argued that the Order should be altered or amended to allow the Petitioner to remain in her fiduciary roles in order to remedy a clear error of law and to prevent obvious injustice.

10. Petitioner in her individual capacity also agreed with the arguments and relief requested by Petitioner in her former fiduciary capacities.

11. The two fundamental reasons presented by Petitioner in support of her argument is that there was no evidence at the hearing to warrant injunctive relief and the Order makes findings of fact and conclusions of law regarding Petitioner's alleged breach of fiduciary duty without supporting evidence. *See* Memorandum in Support of Petitioner's Rule 59(e) Motion dated July 20, 2020, at 2.

12. A motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 56, 717 S.E.2d 235, 243 (2011).

13. The reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. *Id.*

14. Petitioner in her request to amend or alter the Order, however, merely repeats the argument that there is no evidence the she previously presented in opposition to the motion for injunctive relief, which cannot form a basis for relief under Rule 59(e). *See* Petitioner Sheree D. Martin's, Executor of the Estate of Shirley A. Martin, Trustee of the Shirley A. Martin Trust, and Trsutee of the Carl J. Martin, Sr., Trust, Motion to Deny Respondent Carl J. Martin, II's Motion for Preliminary Injunction dated November 13, 2020; and *See generally* Transcript of Hearing on December 23, 2020.

15. Accordingly, Petitioner has not presented a basis to support her Rule 59(e) Motion or an adequate ground to alter or amend the Order. *See Mey, supra.*

16. In addition, Petitioner's arguments there was no evidence to support the request for injunctive relief is incorrect.

17. Throughout the Motion for Preliminary Injunction and at oral argument, Respondent cited to numerous parts of Petitioner's pleading in this matter as evidence of her

conduct and how it was contrary to the terms of the wills and trusts, and her fiduciary duties at issue. *See generally* Respondent Carl J. Martin, II's Motion for Preliminary Injunction dated November 9, 2020 ("Motion for Preliminary Injunction").

18. No evidence is necessary in a case to prove that a pleading exists in a case.

19. Petitioner's pleading is directly before the Court as part of the file.

20. There is no requirement—and Petitioner cites to none—that an affidavit is required to attest that a pleading was filed in a case by the party filing the pleading or that the pleading says what it says to be reviewed and relied on by a court in a pending proceeding.

21. Petitioner cannot deny the evidence of her own pleading.

22. Accordingly, Petitioner's argument that no evidence supports the ruling is erroneous.

23. Petitioner also creates strawman arguments in her Motion to Alter or Amend.

24. Though Petitioner argues that "Respondent conveniently ignored, it its entirety, the Petitioner's statutory right to "determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. W. Va. Code 55-13-4(c)," *see* Petitioner's Rule 59(e) Motion at 9, Respondent throughout oral argument identified that, while Petitioner had characterized her Petition under the guise of a declaratory judgment action, in reality she had sought very different relief than seeking construction of a writing. *See* Trans. Hrg. 12.23.20 at 27:24-28:14.

25. Petitioner also states that "Respondent has not even offered a supporting legal theory, statute, or case to back up his claim that a fiduciary using W. V. Rule [sic] 55-13-4(c) creates an assumption of fraud" and that "Respondent rests his case on the fact that

Petitioner's interest provides for a breach of fiduciary duty," *See* Petitioner's Rule 59(e) Motion at 10 and 12, respectively.

26. However, Respondent never made any such a claim or argument, Petitioner provides no citation in her brief for those assertions, and the Court did not make such determinations in its Order.

27. Though Petitioner asserts that she "is not trying to modify the terms of the estate for her own benefit, but rather seeking guidance from this Court on how to interpret those terms," *see* Petitioner's Rule 59(e) Motion at 11, Petitioner did not merely seek guidance on how to interpret terms, but as expressly set forth in her Petition sought to remove and replace terms favorable to herself individually.<sup>1</sup>

28. Finally, Petitioner also argues that injunctive relief is inappropriate because there are alternate adequate remedies at law, arguing that Respondent could seek monetary damages for breach of trust and cites W. Va. Code § 1002 as well as case law that provide for monetary relief. *See* Petitioner's Rule 59(e) Motion at 15-16.

29. "The mere existence of a legal remedy is not itself sufficient ground for refusing relief in equity by injunction; nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity. It must also appear that it is as practical and efficient to secure the ends of justice and its prompt administration as the remedy in equity." Syl. Pt. 2, *Consumers Gas Utility Co. v. Wright*, 130 W. Va. 508, 44 S.E.2d 584 (1947).

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<sup>1</sup> For instance, as one example, in the Shirley A. Martin Trust at Art. VI.1.(h), "[t]he Trustee shall arrange for Carl J. Martin II and Sherree D. Martin to draw lots [for certain property and thereafter] the Trustee shall convey said property to each by general warranty deed which shall retain the provision that for and during the lifetime of Sherree D. Martin and Carl J. Martin" a right of first refusal at appraised market value, *see* Exhibit L to Petition at 2-3, but Petitioner in a fiduciary capacity asked this Court to "make a determination that the properties . . . be divided in accordance to their appraised fair market value as finally determined for estate tax purposes or by some other more equitable means and that the provisions requiring that Sheree [Petitioner] and Carl [Respondent] provide each other with a right of first refusal on the properties be stricken." *See* Petition at 67.

30. As presented in detail in Respondent's Motion for Preliminary Injunction and in the Order, Petitioner has violated the fiduciary duties owed to the beneficiaries. *See generally* Motion for Preliminary Injunction; and Order.

31. Any legal remedy is inadequate as it will delay respondent beneficiaries from being treated appropriately and in accord with the proper fiduciary duties owed to them.

32. Moreover, equitable relief is necessary to prohibit future breach of trust by Petitioner.

33. Any legal remedy that is available would be neither practical nor efficient to secure the ends of justice and its prompt administration in this case.

34. As set forth in the Order, this Court found each and every element established to warrant injunctive relief. *See* Order.

35. While Petitioner attempts to constrain any findings of fact and conclusions of law by the Court to statements made at the hearing on December 23, 2020, the West Virginia Supreme Court has rejected Petitioner's argument. *See Ballard v. Delgado*, 241 W. Va. 495, 514, 826 S.E.2d 620, 639 (2019).

36. Accordingly, it is **ORDERED** that Petitioner's Rule 59(e) Motion is **DENIED**.

**D. Attorneys Fees and Costs.**

37. In Respondent CJ Martin's Response in Opposition to Petitioner's Motion to Stay and Rule 59(e) Motion to Alter or Amend the Judgment dated August 3, 2021, and as argued by the parties at the hearing, Respondent CJ Martin requested that the Court order Petitioner to reimburse the Estate of Shirley A. Martin, the Shirley A. Martin Trust, and the Carl

J. Martin Trust for attorneys fees and costs expended by her related to the motions and incurred by her since her removal from her fiduciary positions on December 23, 2020.

38. Petitioner argued that granting such relief was inappropriate as she had to incur costs and expenses in the continual maintenance and management of the Estate and Trusts.

39. The Court found that it would be premature to rule on the requested relief.

40. The Court found that each side may be correct: that is, there may be some fees and/or costs that were necessary and required such that they would not be reimbursable and there may be some fees and/or costs that were not necessary or required that may be reimbursable.

41. Accordingly, the Court **HELD IN ABEYANCE** the request that Petitioner reimburse fees and costs to the Estate and Trusts until raised with more specificity, which could be raised on a piecemeal basis in the future.

**E. Scheduling Meeting.**

42. Finally, by agreement of the parties, the Court **ORDERED** that, on or before October 1, 2021, Citizens Bank of West Virginia in its capacity as Administrator of the Estate of Shirley A. Martin, Trustee of the Shirley A. Martin Trust, and Trustee of the Carl J. Martin Trust shall meet with the beneficiaries—at least on a preliminary basis—to review the issues pending in this proceeding and any other issues for efficient administration of the Estate and Trusts and potential resolution of the same.


The Court notes for the record the objection of counsel for Petitioner and counsel for Respondent Sheree D. Martin, individually, as set forth on the record to the rulings of the Court.




It is so **ORDERED**.

The Court **DIRECTS** the Clerk to send certified copies of this Order to all counsel of record.

Dated: 2<sup>nd</sup> Aug 21

  
The Honorable David H. Wilmoth  
Circuit Court Judge

Prepared and submitted by:

  
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UPSHUR COUNTY, W.V.  
FILED  
2021 AUG 27 A 11:12  
BRIAN GAUDET  
CIRCUIT CLERK

(16-8/30/21)  
W O'Brien  
T Vorbach  
W. Martin  
M. Edgell  
J. Edgell  
R. Mullens  
S. Manners  
J. Hussell  
R. Chennault

ATTEST: A true copy from the records located in the office of the Clerk of the Circuit Court of Upshur County, West Virginia.

Given under my hand

8/30/21  
BRIAN F. GAUDET, CLERK  
By   
Deputy Clerk