No. 21-0757

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

(On Appeal from the Circuit Court of Upshur County Civil Action No. 20-P-21)

WILLIAM A. MARTIN, SHERREE D. MARTIN, CARL J. MARTIN, II, TERESA A. MARTIN PIKE, CARL ROBERT MARTIN, PATRICK STEPHEN MARTIN, CARLI JO MARTIN, JEFFREY TODD EDGELL, MARTINA ELIZABETH ANN EDGELL, JASMINE PIKE, AND SOPHIA PIKE, interested parties to the Estate of Shirley A. Martin, the Shirley A. Martin Trust and the Carl J. Martin, Trust.

Respondents.

BRIEF IN SUPPORT OF PETITION FOR APPEAL

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2. The Circuit Court erred in removing Petitioner from her fiduciary positions of Executor and Trustee as no evidence was introduced into the record to allow for the Circuit Court to make such determination under the substantive legal requirements.

3. The Circuit Court erred in failing to consider and apply the standards for issuance of a preliminary injunction.

4. The Circuit Court erred in relying predominantly upon the initial pleading of the Petitioner in granting preliminary injunctive relief.

5. The Circuit Court erred in finding that removing Petitioner from her fiduciary positions served the public interest.

6. The Circuit Court erred in granting injunctive relief when a statutory remedy exists to satisfy claims made by Respondent.

7. The Circuit Court made a clear error in consolidating Respondent's request for injunctive relief and legal claims of Respondent's counterclaim in its order without first providing Petitioner with opportunity to defend herself against Respondent's counterclaims of breach of fiduciary duty by having an evidentiary hearing or allowing a jury to make such a determination of the underlying legal claim.

8. The Circuit Court erred in finding that Petitioner Sherree D. Martin breached her fiduciary duties in her actions as Executrix of the Shirley A. Martin Estate and Trustee of the Carl J. Martin and Shirley Martin Trust by requesting the relief sought in her declaratory judgment action filed under W. Va. Code § 55-13-4, based on the evidence in the record.

9. The Circuit Court erred in finding the Petitioner breached her fiduciary duties as Executor and Trustee as no evidence was introduced to allow for the Circuit Court to make such finding under the substantive legal requirements.

10. The Circuit Court erred in find that Petitioner has used her position of trust to her own benefit in seeking to have several portions of the Will and Trusts modified to favor her personal position as no evidence was introduced into the record that would allow the Court to make such determination.

11. The Circuit Court erred in finding the Petitioner breached her fiduciary duties as Executor and Trustee as no evidence was introduced to allow for the Circuit Court to make such finding under the substantive legal requirements.

12. The Circuit Court erred in finding that Petitioner acted in a self-dealing manner in her fiduciary positions of Trustee and Executor.

13. The Circuit Court erred in finding that there was no ambiguity in what property was encompassed by the term "my residence property" in the Shirley Will as no evidentiary hearing was had to determine what "my residence property" means.

14. The Circuit Court erred in finding there was no ambiguity in the Shirley Martin Will language and that Petitioner created a cloud of title based on the evidence in the record.

15. The Circuit Court erred in finding that Petitioner violated her fiduciary duty as Trustee by creating a cloud of the titled of the Carl J. Martin Trust regarding the Route 20 property by recording a deed on May 26, 2020, as no evidence was introduced into the record that would allow the Circuit Court to make such a finding.

16. The Circuit Court erred in finding that Petitioner violated her fiduciary duties as Executor of the Shirley Will when she filed the litigation in an attempt to create an ambiguity as no evidence was introduced into the record that would allow the Circuit Court to make such a finding.

II. STATEMENT OF THE CASE

Petitioner, Sherree D. Martin, former Executor of the Estate of Shirley A. Martin (the "Estate"), Trustee of the Shirley A. Martin Trust ("Shirley Trust"), and Trustee of the Carl J. Martin, Sr. Trust ("Marital Trust"), appeals the preliminary injunctive relief for Respondent, Carl J. Martin, II, for the circuit court's "*Order Following Hearing on December 23, 2020*" entered on July 20, 2021, in the Circuit Court Civil Action No. 20-P-21 (the "Order") Martin JA 000530, as reaffirmed in the lower court's subsequent *Order Following Hearing on August 5, 2021* entered September 1, 2021 (the "Rule 59(e) Order") Martin JA 000614.

Carl J. Martin, Sr., died testate on August 9, 1996, leaving his will ("Carl's Will") dated May 26, 1982. Martin JA - 000015. Article III of Carl's Will created the Marital Trust (the "Marital Trust" also referenced as "Carl J. Martin Testamentary Trust A" in the record) Martin JA 000016. Shirley A. Martin became the sole Trustee of the Marital Trust with the renunciation of First Community Bank, N.A. Article III, First (A), Paragraphs (4) and (5) of Carl's Will provided that

the Trustee was to distribute all of the annual income of the Marital Trust to Shirley A. Martin. Further, the Trustee had sole discretion to pay to or for the benefit of Shirley A. Martin, so much or all the principal of the Marital Trust as the Trustee determined was required or desired for her support, welfare, and business interest, respectively. Martin JA - 000018. On approximately October 3, 2016, Shirley A. Martin resigned as Trustee of the Marital Trust. By consent of all the beneficiaries of the Martial Trust, the Petitioner was appointed as successor Trustee. Martin JA-000067-000068.

Shirley A. Martin died testate on August 11, 2019, leaving her Last Will and Testament, dated March 23, 2016 ("Shirley's Will"). Shirley's Will nominated the Petitioner as Executrix. Martin JA – 000079. Shirley's Will was admitted to probate and Petitioner was appointed as executor of the estate.

Article III, Paragraph 3 of Shirley's Will provides that:

> "I direct that my Executrix sell my residence property located in Upshur County, West Virginia along with a nonexclusive right of way over across the property devised to my son Carl J. Martin II heretofore, as soon after my death as is practical. My Executrix shall have authority to execute deeds and contracts necessary to convey said real estate and all necessary rights of way hereto. My Executrix shall first offer my residence property to my children at the value ineluctable in my estate. If none of my children elect to purchase my residence property within nine months of the date of my death. My Executrix may sell my residence property to a non-family member."

Martin JA – 000078.

Article III, Paragraph 4 of Shirley's Will provides that:

> "I give, devise and bequeath all the rest, residue and remember of my estate to this Successor Trustee of the Shirley A. Martin Trust Agreement dated the 24th day of November, 1997, as amended and restated by me as Grantor and Trustee, and the property passing hereunder shall be added to the property held in trust by said Trustee and shall become a part thereof, to be administered in accordance with the provisions therein as such exists at the time of my death."

Martin JA – 000079.

On November 24, 1997, Shirley A. Martin established the Shirley A. Martin Trust Agreement ("Shirley Trust"). That trust was amended four times: on 2003 ("2003 Amendment"); 2005 ("2005 Amendment"); 2010 ("2010 Amendment"); and 2016 ("2016 Amendment"). Martin JA – 000090; Martin JA – 000105; Martin JA – 000127; and Martin JA – 000144, respectively.

Through a series of transactions for estate planning purposes, Shirley A. Martin transferred the property located along Route 20 in Buckhannon, West Virginia to Chaumont Properties, LLC. ("Route 20 Property"). Martin JA – 000155.

The 2010 Amendment Article VI (sic) paragraph 1, subparagraph (h) states "The Trustee shall convey by general warranty deed to Sherree D. Martin all of Grantor's property located on Route 20 on the northside of Buckhannon, West Virginia." Martin JA – 000132. The 2016 Amendment Article VI, paragraph 1, subparagraph (g) states "The Trustee shall convey by general warranty deed to Sherree D. Martin all of Grantor's property located on Route 20 on the northside of Buckhannon, West Virginia.

On May 26, 2020, the Petitioner recorded with the Clerk's office of Upshur County in Deed Book 567, at Page 572, dated July 31, 2000, purporting to transfer from Shirley A. Martin as Executrix of Carl's Will to Shirley A. Martin, individually, the Route 20 Property.

The 2016 Amendment Article VI, paragraph 1, subparagraph (h) states: "The Trustee shall arrange for Carl J. Martin II and Sherree D. Martin to draw lots for the rest of the Grantor's real property. After the property is divided, the Trustee shall convey said property to each by general warranty deed which deed shall retain the provision that for the during the lifetime of Sherree D. Martin and Carl J. Martin II if either desires to sell any of said real property, he or she must first

offer the property to the other at appraised value determined by a certified real estate appraiser." Martin JA – 000145-000146.

On or around May 4, 2020, Petitioner acting filed the underlying *Petition for Declaratory Judgment* (the "Petition") under W. Va. Code §55-13-4 seeking three declarations from the Circuit Court. The Petition requested the circuit court to (1) determine the meaning of "my residence property" under Article III, Paragraph 3 of the Shirley Will; (2) determine the meaning of Article IV, Paragraph 1, Sub-Paragraph (g) and (3); to determine a method of distributing the properties of the 2016 Amendment other than "drawing lots" and requested a removal of the right of first refusal of the distributed properties. Martin JA – 000009-000012.

On June 29, 2020, Respondent Carl J. Martin, II, filed his *Answer and Counterclaims of Respondent Carl J. Martin, II* (the "Counterclaim"). The Counterclaim alleges that Petitioner breached her fiduciary duty to the Estate of Shirley A. Martin by filing the Petition. Martin JA – 000204 - 000207.

On November 9, 2020, Respondent filed his *Respondent Carl J. Martin, II's Motion for Preliminary Injunction* ("Motion for Preliminary Injunction") in which Respondent requested the circuit court for "affirmative injunctive relief, remove Petitioner Sherree D. Martin as Executrix of the Estate of Shirley A. Martin, removing her has Trustee of the Shirley A. Martin Trust, and removing her as Trustee of the testamentary trusts of Carl J. Martin, appoint an independent, third-party to serve in those fiduciary positions." Martin JA – 000249.

On December 23, 2020, a hearing was heard on the Motion for Preliminary Injunction. During that hearing the Circuit Court ruled in favor of Respondent and directed Respondent to produce an order from the hearing. On July 20, 2021, the Circuit Court entered the Order. Martin JA – 000530-000545. On July 20, 2021, Petitioner filed her *Petitioner's Rule 59(e) Motion to Alter*

or Amend the Judgment and *Memorandum in Support of Petitioner's Rule 59(e) Motion to Alter and Amend the Judgment* (the "Rule 59(e) Motion"). The Circuit Court had a hearing on the Rule 59(e) Motion on August 5, 2021, The Circuit Court denied the Rule 59(e) Motion. The Rule 59(e) Order was entered on September 1, 2021. Martin JA – 000605-000613. The Circuit Court removed the Petitioner as Executrix of the Estate, Trustee of the Marital Trust, and Trustee of the Shirley Martin Trust. Further in the Order and the Rule 59(e) Order, the Circuit Court ruled that the Petitioner had breached her fiduciary duty as Executor and Trustee.

On August 10, 2021, Petitioner filed a Rule 62(i) which heard on August 24, 2021, and denied in the Order Following hearing on 8/24/21 on September 19, 2021. Petitioner filed its Notice of Appeal of the Rule 59(e) Order[1] with this Court on September 22, 2021.

III. SUMMARY OF THE ARGUMENT

Petitioner filed the Petition under W. Va. Code §55-13-4(c), as Executrix of the Estate of Shirley A. Martin, Trustee of the Marital, and Trustee of the Shirley Trust, to ask the Circuit Court to determine certain terms contained in the Shirley Will, the Shirley Trust, and the Marital Trust.

Respondent filed the Counterclaim alleging that Petitioner breached her fiduciary duty in requesting all relief sought in her Petition based upon her very filing of the Petition, as well as for other unsubstantiated and unproven allegations. While discovery was still ongoing, Respondent filed his Motion for Injunctive Relief requesting an "affirmative injunctive relief, removing Petitioner Sherree D. Martin as Executrix of the Estate of Shirley A. Martin, removing her as Trustee of the Shirley A. Martin Trust, and removing her as Trustee of the testamentary trusts of

[1] "An appeal may be taken from a final order disposing of a motion under Rule 59(e) at any time within the appeal period provided by the entry of the order, or within any proper extension of the appeal period. The denial of a timely filed Rule 59(e) motion is not appealable separately from the underlying judgment that is sought to alter or amend. This is because the two orders, the underlying judgment and the denial of the motion, merge." Davis, Robin Jean, Palmer, Louis J. Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* Fifth Edition Rule 59 § 59(e) at 1381. (citation omitted).

Carl J. Martin, appoint an independent, third-party to serve in those fiduciary positions, and aware Respondent any other just and equitable relief the Court deems appropriate." Martin JA – 000249.

The Circuit Court ruled in favor of the Respondent and granted his Motion for Preliminary Injunction and, additionally, made findings of fact that Petitioner breached her fiduciary duty by filing each count in her Petition and committed acts constituting breach of fiduciary duty.

The Circuit Court abused its discretion in granting the injunctive relief by removing Petitioner from her fiduciary positions without any evidence to do so. The Circuit Court failed to consider the elements required to grant injunctive relief. The Circuit Court made findings of fact that the Petitioner breached her fiduciary duty without having a scintilla of evidence presented to support those findings. The Circuit Court improperly applied the elements required for granting injunctive relief and determined that by bringing the Petition, the Petitioner had violated her fiduciary duty.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument.

V. ARGUMENT

A. Standard of Review

"In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of . . .[an] injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the . . . injunction and the ultimate disposition under an abuse of discretion standard, we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo." *St. Paul Fire & Marine Ins., Co. v. Amerisourcebergen Drug Corp.*, 2021 W. Va. LEXIS 626 at 14, 2021 WL 5296997 (2021)

(quoting *Syl. Pt. 1, State By & Through McGraw v. Imperial Mktg.,* 196 W. Va. 346, 472 S.E.2d 792 (1996).

This Court has ruled under the abuse of discretion standard, it would not disturb a circuit court's decision unless that circuit court made a clear error or judgment or exceeds the bound of permissible choices in the circumstances. *Stanley v. Stanley* 233 W. Va. 505, 508, 759 S.E.2d 452, 455 (2014) (citing *Wells v. Key Communications, L.L.C.,* 226 W. Va. 547, 551, 703 S.E.2d 518, 522 (2010)). "[A]n abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the court makes a serious mistake in weighing them." (quoting *Shafer v. Kings Tire Service, Inc.,* 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004)). ("[A] court necessary abuses its discretion it bases its ruling on an erroneous assessment of the evidence or an erroneous view of the law." *Beto v. Stewart*, 213 W.Va. 355, 359-360, 582 S.E.2d 802, 806-807(2003)).

This Court has ruled that "[f]inding of fact are not to be made de novo by an appellate court: '[u]nder this standard, appellate courts cannot presume to decide factual issues anew. Our precedent ordains that deference be paid to the trier's assessment of the evidence.'" *Stantec Consulting Servs. v. Thrasher Envtl., Inc.,* 2013 W.Va. LEXIS 1094 at 8, 2013 WL 5676826 (2013) (quoting *Tennant v. Marion Health Care Foundation, Inc.*, 1941 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995)). Findings of fact are clearly erroneous "although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." *Syl. Pt. 1*, in part, *In re Tiffany Marie S.,* 196 W.Va. 223, 470 S.E.2d 177(1996). Further,

> "'[W]e should not reverse a trier of fact on a question of credibility when the trier of fact had the advantage of hearing the testimony.' *State v Stuart*, 192 W. Va. 428, 433, 452 S.E.2d 886, 891 (1994). 'The clearly erroneous rule loses none of its rigor "when the [lower] court's findings do not rest on credibility determination, but are based instead on physical or documentary evidence or inference from other facts.' *Fraternal Order of Police*, 196 W.Va. at 100, n.4, 468 S.E.2d at 715, n.4 (quoting *Anderson v. City of Bessemer City,* 470 U.S. at 574). 'We will disturb only those factual findings that strike us wrong with the "force of a five-week-old, unrefrigerated dead fish."'"

Stantec Consulting Servs. v. Thrasher Envtl., Inc., 2013 W.Va. LEXIS 1094 at 9. (quoting *Brown v. Gobble*, 196 W.Va. 559, 563, 474 S.E.2d 489, 493 (1996) (quoting *United States v. Markling*, 7 F.3d 103, 1319 (7th Cir. 1993)).

B. Assignments of Error Nos. 1 and 2.

The Circuit Court, by Judge Wilmoth, erred in granting Respondent Carl J. Martin, II's injunctive relief and removing Trustee and Executor.

The Circuit Court erred in removing Petitioner from her fiduciary positions of Executor and Trustee as no evidence was introduced into the record to allow for the Circuit Court to make such determination under the substantive legal requirements.

The Circuit Court erred in granting the Motion for Preliminary Injunction and removing Petitioner from her roles of Executor of the Estate, as Trustee of the Shirley Trust, and as Trustee of the Marital Trust.

The extent and limits of courts to supervise and direct executors is long established. *Welsh v. Welsh*, 136 W.Va. 914, 925, 69 S.E.2d 34, 40 (1952).

> "The Court will not ordinarily usurp the representative's function of administering the estate to the best advantage of all concerned, and, except in cases of abuse, it will not ordinarily interfere with the discretionary powers conferred on the executor by the will. A court ordinarily has no power to limit the authority of the representative whose duties and powers are fixed by law; nor has it power ordinarily to violate the s of a valid will, although it may relieve an executor from his duty to carry out the provisions of the will if the best interest of the estate is served thereby."

Id. (quoting *33 C.J.S. Executors and Administrators, Section 147*). The removal of a representative chosen by the testator is a drastic action and should only occur when the estate within that representative's control is endangered. *Haines v. Kimble*, 221 W. Va. 266, 276, 654 S.E.2d 588, 596 (2007) (citing *In re Beichners Estate*, 432 Pa. 150, 247 A.2d 779 (Pa. 1968)). Whenever a testator has selected a personal representative, it may be inferred that the testator has reasons for the selection and therefore (1) the testator's desire, when reasonably possible, should control; (2) the selected personal representative should not be removed lightly; and (3) a court should be less willing to remove a personal representative selected by the testator than one selected appointed by a county commission. *Id.* "In removing and substituting trustees, the court does not act arbitrarily, but upon certain general principles, and after a full consideration of the case, 'courts will not substitute trustees upon the mere *caprice of cestui que trust*, and without reasonable cause; and although the instrument of trust or a statute give the *cestui que trust* full power to remove and appoint other trustees, yet good cause must be shown or the court cannot be put into motion.'" *MacHir v. Sehon*, 14 W. Va. 777 at 782-783 (1879). To justify the removal of a testamentary personal representative "the proof of the cause for removal must be clear." *Haines v. Kimble*, 221 W. Va. at 276.

C. Assignment of Error No. 3

The Circuit Court erred in failing to consider and apply the standards for issuance of a preliminary injunction.

"The customary standard applied in West Virginia for issuing a preliminary injunction is that a party seeking the temporary injunction relief must demonstrate by a clear showing of a reasonable likelihood of the presence of irreparable harm; the absence of any other appropriate remedy at law; and the necessity of a balancing of hardship test including: '(1) the likelihood of

irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.'" *State by & Through McGraw v. Imperial Mktg.,* 196 W.Va. 346, 352, 472 S.E.2d 792, 798 n.8 (1996) (quoting *Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990)); *see* also *Markwest Liberty Midstream & Resources v. Nutt,* 2018 LEXIS 72 at 7-8, 2018 WL 527209 (2018). In order to obtain a preliminary injunction, the moving party must demonstrate the presence of irreparable harm. *Jefferson County Bd. of Educ.,* 183 W. Va. at 28, 393 S.E.2d at 662 (1990); *see* also *McClure v. Manchin*, 301 F.Supp.2d 564, 569 (N.D.W.Va. 2003). When applying the balancing test, the two most important factors are the two regarding harm, and a movant must, demonstrate that harm is actual and imminent rather than remote or speculative. *Nader 2000 Primary Comm., Inc. v. Hechler*, 112 F.Supp.2d 575, 578 (S.D.W.Va. 2000) (citation omitted); *Bragg v. Robertson,* 54 F.Supp.2d 635 (S.D.W.Va. 1999).

The circuit court erred in determining that Respondent satisfied its burden to show the presence of irreparable harm.

> 57. As set forth in detail above, Petitioner has not abided by her duties as Executrix or Trustee.
>
> 58. Petitioner has used her fiduciary positions to try and cancel or avoid express terms set forth by the testator and settlor related to offering for sale her residence property.
>
> 59. Petitioner has used her fiduciary position to create a cloud of title of the Carl. J. Martin Testamentary Trust A and "exonerate" the debt she owes of $920,000.00 arising from the transfer of property from the Trust, which is detrimental and would cause irreparable harm to the beneficiaries of the Trust.
>
> 60. Petitioner also has attempted to write-out provisions of the Shirley A. Martin Trust relating to the drawing of lots and right of first refusal, contrary to the testator's intent and contrary to the common law of testamentary freedom.

> 61. These actions and other undertaken by Petitioner are self-dealing and deprive the beneficiaries of their right to property and to be treated fairly and without bias in the administration of the Estate and Trusts.

Martin JA – 000541-000542.

First, the Circuit Court found, and Respondent incorrectly argued, that Petitioner used her position or refuse beneficiaries that ability to purchase Shirley A. Martin's "my residence property." In Count I of the Petition, Petitioner sought under W. Va. Code §55-13-4 for the Court to determine what is meant by 'my residence property' in Article III, Paragraph 3 of Shirley's Will. Martin JA – 000010. Petitioner has sought only guidance from the Circuit Court as to what Shirley A. Martin meant. Petitioner has not deprived Respondent of his rights to purchase the property by bringing an action to interpret what is meant by "my residence property". Once the Circuit Court determines Count I of the Petition, Respondent would have been offered the right to purchase whatever parcels the Circuit Court determined constitute "my residence property."

Second, the Circuit Court found, and Respondent incorrectly argued, that Petitioner used her fiduciary duty to exonerate Sherree D. Martin of a $920,000.00 debt owed to the Martial Trust. Count II of the Petition sought, under W. Va. Code §55-13-4, for "the Court to *make a determination as to what Shirley meant to convey to Sherree by Article IV, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment.*" Martin JA – 000011. (emphasis added). Petitioner sought only for the Circuit Court to decide what Shirley A. Martin intended to convey to Sherree D. Martin, if anything, in Article IV, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment. If the Circuit Court had made a determination, after hearing all the evidence, as to what Shirley A. Martin intended to convey, if anything, Petitioner would have followed that determination. On the other hand, if the Circuit Court determined, after considering all the evidence, that Shirley A. Martin died owning the Route 20 Property and that the devise to the Petition was valid, then Respondent

would not suffer irreparable harm because the Martial Trust would not have an enforceable deed of trust. No evidence or testimony, however, was presented to the Circuit Court on this issue, so the Circuit Court could not make that determination.

Third, Count III of the Petition sought the Circuit Court to determine a method of distributing the properties of the 2016 Amendment in a more equitable manner than "drawing lots" and to remove the right of first refusal between the parties to whom the properties would be distributed. Martin JA – 000011-000012. A court has the power to alleviate the fiduciary from following certain provisions of instruments if the fiduciary believes that the estate is best served. *Welsh*, 136 W.Va. at 925. Again, if the Circuit Court, taking all evidence into account after discovery, determined that the language is clear and instructed the Petitioner to draw lots, Respondent would suffer no irreparable harm. Similarly, if the Circuit Court had determined another method for distribution of the properties, Respondent still would have suffered no irreparable harm.

As the Court has said, to obtain a preliminary injunction, the moving party must demonstrate the presence of irreparable harm. *Jefferson County Bd. of Educ.,* 183 W. Va. at 28. The Circuit Court erred in finding that Respondent had proven the presence of actual and imminent irreparable harm when granting the Motion for Preliminary Injunction.

D. Assignment of Error No. 4

The Circuit Court erred in relying predominantly upon the initial pleading of the Petitioner in granting preliminary injunctive relief.

The failure to present evidence in support of a request for an injunction has been deemed fatal by this Court:

> "Before this Court, the Trust makes no effort to apply the standard criteria for issuing a preliminary injunction, arguing instead, in summary fashion, that the facts involved are unique. We reject the

> cursory argument of the Trust has wholly failed to meet its burden of demonstrating by a clear showing; (1) the likelihood of irreparable harm to the property; (2) the absence of other appropriate remedies at law in this breach of contract action seeking monetary damages; and (3) that balancing the potential harm to each and the public at large weighs in favor of the Trust. *See Jefferson Cty. Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662 and *State ex rel. McGraw*, 196 W. Va. at 352 n.8, 472 S.E.2d 798 n.8. Moreover no evidence whatsoever offered, considered or weighed, in assessing the insurance of the preliminary injunction. This Court has previously announced that a cursory affidavit is insufficient to support the issuance of a preliminary injunction. *See Jefferson Cty. Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662. Here, to the extent the verified complaint serves as an affidavit, it was controverted, and, as to allegations of irreparable harm, was disavowed by the Trust. Thus, it is an inadequate vehicle for the Trust to meet its burden of demonstrating the necessity of the preliminary injunction."

Markwest Liberty Midstream & Resources v. Nutt, 2018 W. Va. LEXIS 72 at 11, 2018 WL 527209 (W. Va. 2018).

In granting the Motion Injunctive Relief, the circuit court found:

> 58. Petitioner has used her fiduciary positions to try to cancel or avoid express terms set forth by the testator and settlor related to offering for sale her residence property.
>
> 59. Petitioner has used her fiduciary position to create a cloud on the title of the Carl J. Martin Testamentary Trust A and "exonerate" the debt she owes of $920,000 arising from the transfer of property from the Trust, which is detrimental and would cause irreparable harm to the beneficiaries of the Trust.
>
> 60. Petitioner has also attempted to write-out provisions of the Shirley A. Martin Trust relating to the drawing of lots and right of first refusal, contrary to the testator's intent and contrary to the common law of testamentary freedom.
>
> 61. These actions and other undertaken by Petitioner are self-dealing and deprive the beneficiaries of their right to property and to be treated fairly and without bias in the administration of the Estate and Trust.

Martin JA – 000541-000542. There is not a scintilla of evidence in the record to support these findings. No depositions, affidavits, or testimony of any kind has been presented to support the injunctive relief that was granted. No communications between the Petitioner and any beneficiary or third party has been submitted to the record that would support these findings.

In fact, during the hearing on August 5, 2021, regarding to Petitioner's Rule 59(e) Motion, the Circuit Court reiterated the basis of granting Respondent's Motion for Preliminary Injunction.

> "The - - issue of the motion under rule 59 is to address what someone asked the Court to review. The argument presented here – there is no evidence to support; however, um, as the Court noted previously, the contents of the pleading themselves provide the basis for the Court's decision. There was a requested modification in the manner of the distribution of the proceeds. There was a request in the change in the identity of the assets. There was a proposal to alternative methods of distribution. There was questions arising about the use and maintenance of assets.
>
> All those things were issues raised by the respondents in their motion and provided the basis for this Court's decision to remove Ms. Martin as the executor and trustee of the estate."

Martin JA – 000648-000649. As the Petitioner pointed out to the Circuit Court, Petitioner had the duty to act "impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interest." W. Va. Code §44D-8-803. Martin JA – 000565. In addition to being the fiduciary under the Estate of Shirley A. Martin, the Shirley Trust, and the Marital Trust, the Petitioner is a beneficiary under all three entities. Petitioner had a statutory duty to administer the Shirley A. Martin Estate, Shirley Trust, and Marital Trust on her behalf as well.

Additionally, the pleadings themselves do not reflect the findings in the Rule 59(e) Order, or the statements made by the Circuit Court on the record.

In Count I of the Petition, the Petitioner sought under W. Va. Code §55-13-4 for "the Court *make a determination as to what is meant by 'my residence property'* in Article III, Paragraph 3

of Shirley's Will. Martin JA – 000010. (emphasis added). The Petitioner did not seek any additional relief or request the Circuit Court to interpret what "my residence property" meant in any specific way. Petitioner only requested the Circuit Court determine what Shirley A. Martin intended

In Count II of the Petition, Petitioner sought under W. Va. Code §55-13-4 for "the Court to *make a determination as to what Shirley meant to convey to Sherree by Article IV, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment.*" Martin JA – 000011. (emphasis added). Petitioner sought only for the Circuit Court to decide what Shirley A. Martin intended to convey to the Petitioner, if anything, in Article IV, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment.

In Count III of the Petition, , the Petitioner sought the Circuit Court "made a determination that the properties devised under the 2016 Amendment, Article IV, Paragraph 1, Sub-Paragraph (h) 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 provision requiring that Sherree and Carl provide each other with a right of first refusal on the properties stricken." Martin JA – 000012.

Under the 2016 Amendment, Article IV, Paragraph 1, Sub-Paragraph (h), Petitioner had the directive to "arrange for Carl J. Martin II and Sherree D. Martin to draw lots for all the rest of Grantor's real property." Martin JA – 000145. There are innumerable ways Petitioner could have decided to "draw lots" that would have been entirely self-serving. Nothing in the 2016 Amendment identifies a means or mechanism to "draw lots." Rather than deciding on an arbitrary method by which to draw lots, the Petitioner sought for the Circuit Court to order that the properties under that article be distributed in accordance with their appraised fair market value or another equitable means determined by the Circuit Court. As this Court has said "[t]he Court will not ordinarily

usurp the representative's function of administering the estate to the best advantage of all concerned . . . it [the court] may relieve an executor from his duty to carry out the provisions of the will if the best interest of the estate is served thereby." *Welsh*, 4136 W. Va. at 925. The Petitioner believed that it was best for all beneficiaries if the land was distributed equitably based on fair market value rather than the drawing of lots. Martin JA – 000334.

The Circuit Court clearly erred in relying solely on the pleadings, without the presentation of a scintilla of evidence when the Circuit Court granted the Respondents Motion for Injunctive Relief.

E. Assignment of Error No. 5

The Circuit Court erred in finding that removing Petitioner from her fiduciary positions served the public interest.

The Circuit Court erred when it ruled that removing the Petitioner from her role of fiduciary served the public interest. Martin JA – 000542-000543. The Circuit Court found that; "[a]llowing Petitioner to continue as Executrix and Trustee and using those positions to her advantage and against each other in an attempt to modify terms in the Will and Trusts would be contrary to the fiduciary duties the law upholds and against common law testamentary freedom of a person's ability to dispose of property in the manner he or she chooses." Martin JA – 000543.

In the Order, in evaluating the public interest, the Circuit Court concluded that allowing Petitioner to remain in her fiduciary capacities would "be contrary to the fiduciary duties the law upholds and against common law testamentary freedom of a person's ability to dispose of property in the manner he or she chooses." Martin JA – 000543.

As Petitioner argued in its *Petitioner's Motion to Deny Motion for Preliminary Injunction*, "Petitioner's Declaratory Judgment Action is the Petitioner attempting to properly administer," the

Martial Trust, Shirley A. Martin Estate, and Shirley Trust "in good faith and to the best of her ability." Martin JA – 000336.

Children are often placed in trusted fiduciary roles by their parents. It is of extreme public interest that parents can trust that if they place one of their children in a fiduciary role to administer a trust or that parent's estate that the chosen child will not be removed, against the parent's clear intention, without clear and convincing evidence. *Kimble,* 221 W. Va. at 176. Whenever a testator has selected a personal representative, it may be inferred that the testator has reasons for the selection and therefore (1) the testator's desire, when reasonably possible, should control; (2) that selected personal representative should not be removed lightly; and (3) a court should be less willing to remove a personal representative selected by the testator than one selected or appointed by a county commission. *Id.* Respondent argued during the December 23, 2020, hearing for his injunctive relief that the public policy was served by:

> [R]emoving petitioner from her fiduciary capacities will ensure that the terms of the will and the trust are performed without [inaudible], and in accordance with the requisites of fiduciary duties. Ensuring that the wills and trusts are executed without the risk of self-penalizing work would be efficient and practical administration of the decedents' estates. And following the directives set forth in the - - the terms of the will and trusts ensure that the property is transferred how the testator and the seller wished.
> Allowing Petitioner to continue as executrix and trustee - - using those positions against each other, and continuing to modify terms and cancel her own debt, would be contrary to the fiduciary duty she owes, that the law upholds, and would be against the common law testamentary freedom of a person - - of a person's property in the manner he or she chooses."

Martin JA – 000500-000501.

The Circuit Court determined that the public interest was served because of "how the estate could be distributed, the fact that it's in real estate, the impact that it would- - have in the future, in terms of conveyance of the property, and things of that nature. The public interest is served by

having an independent third party - - do the administration of this estate, so it - - it doesn't 0 0 became a problem, years down the road." Martin JA – 000526.

The reliance by the Circuit Court on the Respondents argument is flawed. To the extent that Petitioner attempted to alter, modify, or cancel provisions of the 2016 Amendment, Petitioner could neither determine how she was to "draw lots" based on the language of the Shirley Trust. nor did she see where the Circuit Court could deduce the intention of Shirley A. Martin how to do so. The Petitioner *requested* the Circuit Court to allow her to ignore these provisions, so that the administration of the Shirley Trust could go forth in a more equitable way and beneficiaries could receive what was due to them, rather than create her own method to which the Respondent could have objected.

Petitioner never requested that the Circuit Court determine that Sherree D. Martin be exonerated from her liability to the Martial Trust. Petitioner requested that the Circuit Court determine what Shirley A. Martin intended to convey in the 2010 Amendment and the 2016 Amendment. Petitioner did not pray that the Circuit Court would determine this issue in her favor. Petitioner, rather, provided the Circuit Court with the facts relating to the July 31, 2000 Deed, the transfer for estate planning purposes in 2013 to the Petitioner, and the 2010 Amendment and 2016 Amendment to the Shirley Trust and asked the Circuit Court to make a determination. At no point in the Petition did Petitioner request to personally be exonerated from the $920,000 mortgage held by the Marital Trust. After hearing all the evidence, the Circuit Court could have simply determined that Shirley Martin had mistakenly left the devise of the Route 20 Property in the 2016 Amendment and the devise of the Route 20 Property had been adeemed.

By its ruling, the Circuit Court established an ability of a co-beneficiary, not charged with the duty of administering an estate or trust, to have complete control over the administration by

claiming breach of fiduciary duty against a fiduciary for administering, and involving the courts to help interpret, trusts and estates in ways they do not agree with. It is of great public interest that a beneficiary unsatisfied with the way a co-beneficiary is administering a trust or estate show at least one instance of breach of fiduciary duty through some tangible evidence or testimony to have that co-beneficiary appointed by the grantor or decedent removed from their fiduciary roles. As it stands, that is the exact standard set by the Circuit Court and it runs afoul of the public interest.

F. Assignment of Error No. 6

The Circuit Court erred in granting injunctive relief when a statutory remedy exists to satisfy claims made by Respondent.

The Circuit Court erred when failed to consider the existence of a legal remedy for the alleged breach of fiduciary duty of Petitioner during the hearing on December 23, 2020 and in the Order; and it erred in determining that "any legal remedy is clearly inadequate as it will delay the respondent beneficiaries from being treated appropriately in accord with the proper fiduciary duties owned to them," in its Rule 59(e) Order. Martin JA – 000663.

"Injunctive relief, like other equitable or extraordinary relief, is inappropriate when there is an adequate remedy at law." *Hechler v. Casey,* 175 W. Va. 434, 441, 333 S.E.2d 799, 805 (1985) (citing *Pullman v Allen,* 466 U.S. 522, 104 S. Ct. 1970, 1978, 80 L.Ed.2d 565, 576 (1984); *Allegheny Development Corp. v. Barati*, 166 W. Va. 218, 273 S.E.2d 384, 386-387 (1980). "Equity does not have jurisdiction of a case in which the plaintiff has full, complete and adequate remedy at law, unless some peculiar feature of the case comes within the province of [a court of] equity." *Syl. Pt. 3 Severt v. Beckley Coals, Inc.,* 153 W. Va. 600, 170 S.E.2d 577 (1969)" *Syl Pt. 1 Truby v. Broadwater*, 175 W.Va. 270, 332 S.E.2d 284 (1985). W. Va. Code § 44D-10-1002 states that: "(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what

they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach."

Respondent based his request for injunctive relief on the underlying Counterclaim alleging that Petitioner breached her fiduciary duty in filing her Petition. In response to the Motion for Preliminary Injunction, Petitioner identified the customary standard in West Virginia for granting preliminary injunctive relief which includes the moving party demonstrate "the absence of any other appropriate remedy at law." Martin JA – 000325. Respondent's Motion for Preliminary Injunction was silent to this factor. During the hearing on December 23, 2020, Respondent's counsel did not address this requirement of the standard. However, counsel for Petitioner begin his argument by addressing this issue.

> "Mr. Cunningham: There is a remedy of law for this, Your Honor, on the back end of this: When the state is settled, if Mr. O'Brien's client or Mr. Chenoweth's client is unsatisfied with he way that the executor or trustee conducted herself, [inaudible] move to have the executor or trustee surcharged."

Martin JA – 000501-000502. However, the Circuit Court did not consider this during that hearing, and it is absent in the Order which granted Respondent's injunctive relief and removed Petitioner from her position as Trustee and Executor. When Petitioner filed her Rule 59(e) Motion, she again made pointed out to the Circuit Court that it improperly granted the Motion for Preliminary Injunction as there were multiple remedies at law for beneficiaries who felt that a trustee or executor had breached her fiduciary duty, including common law remedies and W. Va. Code §44D-10-1002. The Rule 59(e) Motion at p. 15; Martin JA – 000566. Counsel for Petitioner again restated during the August 5, 2021, hearing on her Rule 59(e) Motion that:

> "Mr. Cunningham: …Equity does not have jurisdiction of a case in which the plaintiff has full, complete, and adequate remedy at law unless some particular features of the case comes within the providence of equity. First of all, West Virginia Code 44D-10-1002

> states that a trustee who commits a breach of duty is liable to the beneficiaries affected for the greater of the amount required to restore the value of the trust, property, and trust distributions to what they would have been had the breach not occurred, or the profit the trustee made by the reason of the breach in a settled law that a trustee is personally liable for, the breach of trust by way of compensation or indemnification, which the beneficiaries may force his election.'

Martin JA – 000636.

As a rebuttal, Respondent relies on *Syl. Pt. 2, Consumers Gas Utility Co. v. Wright*, 130 W. Va. 508, 44 S.E.2d 584 (1947) ("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 afford a test as to the right to relief in equity. It must also appear that it is a practical and efficient to secure the ends of just and its prompt administration as the remedy in equity"). The reliance on *Wright* is mistaken. In *Wright*, a gas producer contracted with a utility to supply it all the gas that "it may produce" from certain wells. *Id.* The producer during the contract eventually shut off gas production at the well and the utility sought injunctive relief to have the producer honor the contract and turn the wells back on. *Id.* at 512. The Court determined that "if it had resorted to the law side of the court, could have obtained a money judgment upon the difference between the cost of the gas, if it was required to purchase on the open market and the contract price; but resort to a court of law would necessitate plaintiff's either waiting until the expiration of the contract before instituting an action, or being required to institute two or more actions. So it seems to us that the legal remedy in the instant would not be as efficient as that which plaintiff here seeks." *Id.* at 514. In the case at bar, W. Va. Code §44D-10-1002 provides relief for beneficiaries for the exact alleged breaches of fiduciary duty claimed by Respondent. Further, there are additional remedies at common law. A suit may be brought against the trustee, acting as a fiduciary, for torts arising from the administration of a trust, including control of the trust property,

even when the trustee has no personal liability. *Jackson v. Brown*, 239 W. Va. 316, 801 S.E.2d 194 (2017).

Unlike *Wright*, where the remedies at law were less efficient because the utility company would have had to negotiate with a new producer for gas at potentially higher cost, purchaser and transport the gas, and sue the original producer for breach of contract at the end of the contract term, the Respondent only had to bring an action against the Petition for breach of fiduciary duty under the statute or at common law. Further, unlike the producer in *Wright* who just shut off the gas after a warning to the utility, Petitioner did not start distributing trust and estate property at issue at her volition. Petitioner went to the Circuit Court for relief outlined in the Petition In response, Respondent filed his Counterclaim. The Counterclaim alleges breach of fiduciary duty for bringing forth each count of the Petition and sought preliminary and injunctive relief and the for the same relief that could be awarded for a successful action under W. Va. Code §44D-10-1002. Martin JA – 000207-000208. Respondent proceeded initially with the proper alternative remedy at law.

Even if Respondent had not filed the Counterclaim on the onset, he could have done so after successfully defeating the relief requested in the Petition.

At the conclusion of litigating the Petition, the Circuit Court would have either declined to determine the meaning of provisions of the Shirley Will and 2016 Amendment, and granted the relief requests in Count III, or the Circuit Court would decline. If the Circuit Court would have granted Petitioner's sought-after relief, then the Petitioner would have acted properly as fiduciary, and Respondent would have no claim. If the Circuit Court had dismissed any of the relief sought by Petitioner, then Respondent could have filed suit under W. Va. Code §44D-10-1002 and Petitioner would have had to return all the costs of litigating her claims to the Estate of Shirley A.

Martin, the Shirley Trust, and the Marital Trust. Further, pursuant to W. Va. Code §44D-10-1004, the Respondent could have potentially recouped his attorney's fees for his effort should he have been successful.

The Circuit Court did not address the issue during the August 5, 2021, hearing. In fact, the only time the Circuit Court addressed Respondent's alternative remedies at law was in its Rule 59(e) Order, which merely consisted of a verbatim restatement of the argument in Respondent's *Response in Opposition to Petitioner's Motion to Stay and Rule 59(e) Motion to Alter or Amend the Judgment* without any analysis or explanation to the Circuit Court's ruling. *See* Respondent's Response to Rule 59(e) Motion. Martin JA 00597-598; Rule 59(e) Order Martin JA 00610-00611.

The Circuit Court erred in failing to consider not only that Respondent did not show by clear evidence that no alternative remedy at law exists, but that Respondent was currently engaged in that alternative remedy at law by filing the Counterclaim. Any damages to the Estate, the Shirley Trust, or the Marital Trust that Petitioner might have caused by bringing the Petition, if it was found that any of her claims for declaratory relief were unjustified, could have been recouped by the Estate, the Shirley Trust or the Marital Trust by way of the Counterclaim.

G. Assignment of Error No. 7

The Circuit Court made a clear erred in consolidating Respondent's request for injunctive relief and legal claims of Respondent's counterclaim in its order without first providing Petitioner with opportunity to defend herself against Respondent's counterclaims of breach of fiduciary duty by having an evidentiary hearing or allowing a jury to make such a determination of the underlying legal claim.

The Order found that Respondent was entitled to the injunctive relief of the removal of Petitioner as Executor of the Estate, Trustee of the Shirley Trust, and Trustee of the Marital Trust. Further, the Order Found that Petitioner had breached her fiduciary duty as Executor of the Estate, Trustee of the Shirley Trust, and Trustee of the Marital Trust.

The West Virginia Rules of Civil Procedure allow for a trial on the merits to be consolidated with hearing for application for preliminary injunction.

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial for the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

W. Va. R. Civ. P. Rule 65(a)(2).

The Counterclaim seeks relief on three counts of Petitioner's alleged breach of fiduciary duty and a request for injunctive relief to remove the Petitioner. The Motion for Preliminary Injunction did not request that the Circuit Court determine whether Petitioner breached her fiduciary duty. Martin JA – 000249. The Circuit Court did not order a trial on the action on the merits to be advanced and consolidated with the application for preliminary injunction either before or after the commencement of the hearing for the application. Nevertheless, in the Order, the Circuit Court effectively determined the merits of the Counterclaim and granted permanent injunctive relief.

As no depositions had been taken, no affidavits were sworn, no testimony at the hearing provided, and discovery was still in progress, therefore, the Circuit Court committed clear error in the Order when the Circuit Court found that Petitioner had breach her fiduciary duty in bringing the Petition. While this Court has in the past found that lack of formal notification on a circuit court's decision to consolidate is not fatal, the instant action of the Circuit Court do not comport with the circumstances of those previous decisions of this Court. *Nicholas Cnty. Comm'n v. Clifford*, 2015 W. Va. LEXIS 742 at n.2, 2015 WL 3672028 (2015). On the other hand, in *Clifford*, during the hearing at the circuit court level, "all three Commission members testified regarding

their decision to create the county administrator positions and to hire Mr. Beverage as county administrator. Mr. Beverage also testified in this regard. These witnesses also testified regarding respondent's contention that West Virginia Code §7-1-1(a) was violated." *Id.* In the case at bar, the Circuit Court heard no testimony. The record, as discovery was still ongoing, was incomplete. No depositions are part of the record. The Circuit Court made findings of fact concerning the intentions of Petitioner without her, or anyone else, testifying to anything.

In effect, the Circuit Court turned the Motion for Preliminary Injunction into a permanent injunction and summary judgment in favor of Respondent on his counterclaims without permitting the Petitioner the opportunity to defend herself.

F. Assignment of Error No. 8

The Circuit Court erred in finding that Petitioner Sherree D. Martin breached her fiduciary duties in her actions as Executrix of the Shirley A. Martin Estate and Trustee of the Carl J. Martin and Shirley Martin Trust by requesting the relief sought in her declaratory judgment action filed under W. Va. Code § 55-13-4, based on the evidence in the record.

West Virginia Code §55-13-4(c) allowed Petitioner to seek from the Circuit Court a determination of "any question arising in the administration of the estate or trust, including questions of construction of wills and other writings." In Count I of the Petition, Petitioner sought under W. Va. Code §55-13-4 for "the Court make a determination as to what is meant by 'my residence property' in Article III, Paragraph 3 of Shirley's Will. Martin JA" – 000010. In Count II of the Petition, Petitioner sought under W. Va. Code §55-13-4 for "the Court to make a *determination* as to what Shirley meant to convey to Sherree by Article IV, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment. Martin JA – 000011. In Count III of the Petition, Petitioner sought the Circuit Court "made a determination that the properties devised under the 2016 Amendment, Article IV, Paragraph 1, Sub-Paragraph (h) 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 provision requiring that Sherree and Carl provide each other with a right of first refusal on the properties stricken." Martin JA – 000012.

In granting the Respondent's Motion for Preliminary Injunction, the circuit court found:

> 48. Those per se acts of self-interest are violations of her fiduciary duties of utmost good faith and trust to the Estate of Shirley A. Martin, the Shirley A. Martin Trust, and Carl J. Martin Testamentary Trust.

Martin JA - 000540.

First, Count I clearly only asked the Circuit Court to determine the meaning of "my residence property" in the Shirley Will. Martin JA – 000010.Petitioner did not seek any to have the Circuit Court make a ruling that "my residence property" meant the parcel of land containing Shirley A. Martin's home and the five contiguous parcels. In fact, Petitioner did not even provide or suggest a determination that the Circuit Court should make. There is no testimony, affidavit, or piece of evidence whatsoever that even indicates that the goal in Petitioner's filing was to have a certain outcome be determined, yet alone evidence to show that Petitioner did so for a self-serving reason.

Second, Count II merely asked the Circuit Court to determine what Shirley A. Martin meant to convey to Sherree D. Martin in Article IV, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment of Shirley Trust. No other relief is sought in Count II of the Petition. The Petitioner did not request that the Circuit Court exonerate Sherree D. Martin of the $920,000.00 promissory note.

Third, Count III did ask the Circuit Court to alter provisions of the 2016 Amendment., Asking the Circuit Court to alter the provisions of the 2016 Amendment is not a per se act of self-interest and is not by itself a breach of fiduciary duty. As identified in *Welsh*, "A court ordinarily has no power to limit the authority of the representative whose duties and powers are fixed by law;

nor has it power ordinarily to violate the provisions of a valid will, *although it may relieve an executor from his duty to carry out the provisions of the will if the best interest of the estate is served thereby.*" 136 W.Va. at 925 (quoting *33 C.J.S. Executors and Administrators, Section 147*) (emphasis added). The 2016 Amendment provided no instruction other than the drawing of lots to divide the remaining properties of Shirley A. Martin. As the remaining properties varied greatly in value, the Petitioner believed that the most equitable way for these properties to be divided was based on fair market value as determined for estate tax purposes or by whatever means the Circuit Court would proscribe. Martin JA – 000334

I. Assignment of Error No. 9

The Circuit Court erred in finding the Petitioner breached her fiduciary duties as Executor and Trustee as no evidence was introduced to allow for the Circuit Court to make such finding under the substantive legal requirements.

The Circuit Court made a clear error when it ruled that Petitioner "breached her fiduciary duties in her actions as Executrix and Trustee." Martin JA – 000537. Petitioner filed the Petition seeking the Circuit Court's guidance in interpreting certain provisions of the Shirley Will and the Shirley Trust and requesting that she be absolved from following certain provisions of the 2016 Amendment as she felt those, not only were not equitable, but also constructed in such a way that she did not feel like she could execute them without causing problems for the trust and amongst beneficiaries.

As stated *supra*, the Circuit Court erred in using the Petition as the basis for finding and granting the Motion for Preliminary Injunction, but also finding that it was a breach of Petitioner's fiduciary duty to even bring the Petition the Circuit Court. A fiduciary has the duty to administer that trust in good faith and in accordance with the trust terms and in the best interest of the beneficiaries. W. Va. Code 44D-8-801. A fiduciary does have the duty to administer the trust or

estate solely in the interest of the beneficiary. *Smith v. First Cmt'y Bancshares*,212 W. Va. 809, 821, 575 S.E.2d 419 (2002). "If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing and distributing the trust property, giving due regard to the beneficiaries' respective interest." W. Va. Code §44D-8-803.

The Circuit Court failed to even consider the fact that the Petitioner is a beneficiary of the Estate, the Shirley Trust, and the Marital Trust. Petitioner's duty is to administer the Estate, the Shirley Trust, and the Marital Trust according to the intent of Shirley A. Martin and in a way that is fair and equitable to the beneficiaries of the Estate, the Shirley Trust, and the Marital Trust. The sole basis for the findings of fact that the Petitioner had violated her fiduciary duty as Executor of the Estate, Trustee of the Shirley Trust and Trustee of the Marital Trust, was the filing of the Petition. There was not one scintilla of evidence before the Circuit Court for it to make this finding. In Respondent's pleadings he alleges that Petitioner attempted to sell Estate property which exceeded her authority; Petitioner acting in a generally hostile manner toward other beneficiaries; an alleged undervalued truck; misappropriated debt to the Estate; and others. Martin JA – 000243-000244. However, no evidence was submitted to the Circuit Court to substantiate these claims. There were not hostile correspondence or testimony indicating hostility provided to the Circuit Court. Neither the Petitioner nor any other beneficiary of the Estate of Shirley A. Martin, the Shirley Trust, or the Marital Trust provided either testimony or submitted an affidavit setting forth the hostile conduct of the Petitioner. No appraisal for the trust or expert testimony opining as to the value of the truck were presented.

Simply, unless this Court agrees with the Circuit Court and the Respondent that in filing the Petition was a breach of fiduciary duty, the Circuit Court erred in finding that Petitioner breached her fiduciary duty based on the evidence in the record.

J. Assignment of Error No. 10

The Circuit Court erred in finding that Petitioner has used her position of trust to her own benefit in seeking to have several portions of the Will and Trusts modified to favor her personal position as no evidence was introduced into the record that would allow the Court to make such determination.

The Circuit Court erred in ruling that Petitioner "used her position of trust to her own benefit in seeking to have several portions of the Will and Trusts modified to favor her personal positions," Martin JA – 000537. Neither the Circuit Court nor Respondent's pleadings provide any evidence of any benefit Petitioner gained in filing the Petition.

A fiduciary has the duty to administer that trust in good faith and in accordance with the trust terms and in the best interest of the beneficiaries. W. Va. Code 44D-8-801. A fiduciary does have the duty to administer the trust or estate solely in the interest of the beneficiary. *Smith v. First Cmt'y Bancshares*, 212 W. Va. 809, 821, 575 S.E.2d 419 (2002). Count III of the Petition requested the Circuit Court to determine a method of distributing properties from the Shirley Trust other than "drawing lots" and removing the right of first refusal between the parties who are to receive these properties. Martin JA – 000011-000012. No evidence has been presented of a benefit bestowed upon Petitioner to the detriment of the other beneficiaries for seeking this relief. The Respondent is just as likely to benefit more from the relief sought in the Count III of the Petition than Petitioner. Should Petitioner have arbitrarily devised a method to draw lots, the Respondent could have ended up with the lowest valued properties and Petitioner could have ended up with the most valuable properties, or vice versa. Neither has there been presented evidence that Petitioner gains a benefit from the relief requested nor has any benefit gained by the Petitioner been identified.

K. Assignment of Error No. 11

The Circuit Court erred in that Respondent was likely to succeed on the merits of his breach of fiduciary duty claim as no evidence was introduced into the record that would allow for the Circuit Court to make such finding under substantive legal requirements.

The circuit court found:

> 22. A "trustee cannot place [herself] in a position where [her] self-interest will and possible may conflict with [her] duties as trustee" and "the trustee is generally prohibited from manipulating the trust property to [her] own advantage." Smith v. First Cmty. Bancshares, Inc., 212 W. Va. at 821, 575 S.E.2d at 431.
>
> 23. Contrary to those prohibitions, Petitioner has used her position of trust to her own benefit in seeking to have several portions of the Will and Trusts modified to favor her personal position.

Order at p. 12; Martin JA – 000537. The Petitioner is herself a beneficiary. Petitioner had a duty to administer the Estate, the Shirley Trust, and the Marital Trust with respect to every beneficiary. Sometimes those interest may conflict. The Court has failed to consider this contingency.

The Circuit Court found the Petitioner used her position for her own benefit. No evidence, however, was ever presented to the Circuit Court to prove this mere allegation. Again, Counts I and II of the Petition only request that the Circuit Court determine the meaning of a provision of the Shirley Will and of the meaning of a provision of the 2016 Amendment. Petitioner never made a specific request for a specific determination to be made under W. Va. Code §55-13-4. No evidence has been presented that Petitioner personally benefited from either of these requests. Petitioner has preserved all parcels that potentially could be construed to be "my residence property" and has not gained a single dollar from preserving them. If the Circuit Court had ruled that "my residence property" meant only the parcel on which Shirley A. Martin's home sat, Petitioner would not have personally gained. If the Circuit Court had determined that "my residence property" meant all six parcels, then Petitioner would not have personally gained. Petitioner initiated the Petition in accordance with W. Va. Code 44D-8-803.

In the 2016 Amendment, Shirley A. Martin devised the Route 20 Property to the Petitioner. Martin JA – 000145. However, to the knowledge of Petitioner, at the time of making that

amendment in 2016, Shirley had already transferred, as Trustee of the Marital Trust, the Route 20 Property to Sherree D. Martin's company in 2013. Petitioner as Trustee of the Shirley Trust had sincere concern about Shirley A. Martin conveying interest to a property that she either had full ability to covey, no ability to convey, or simply forgot to remove the provision from the 2010 Amendment to the Shirley Trust when amending the trust in 2016.

The Circuit Court erred in finding that Petitioner used her fiduciary positions for her own benefit without any evidence having been presented to prove such benefit. Therefore, the Circuit Court's finding that Respondent would have succeeded on the merits of his claim for breach of fiduciary duty was in clear error because no evidence exists for such finding of fact.

L. Assignment of Error No. 12

The Circuit Court erred in finding that Petitioner acted in a self-dealing manner in her fiduciary positions of Trustee and Executor.

Petitioner does not dispute that Count III of the Petition requests that the Circuit Court alter and remove provisions. Petitioner, however, does dispute that Circuit Court's finding that those actions were "self-dealing." Martin JA –000540; 000542.

As shown *supra*, filing Counts I and II in the *Petition for Declaratory Judgment* under §55-13-4 were not improper nor a breach of fiduciary duty. The Circuit Court, however, made additional findings of fact, with neither evidence nor analysis, to support its conclusion that Petitioner had breach her fiduciary duty.

First, regarding Count I of the Petition the Circuit Court found that:

> 38. Petitioner violated her fiduciary duties as Executrix when she filed litigation *attempting to create an ambiguity* where none existed and thereby needlessly wasting Estate resources.
>
> 39. Petitioner's *attempt to include the "additional properties"* in the transfer of the "residence property" were also in her self-interest as it would have meant that, under the Shirley A. Martin Trust, she

> would have avoid dividing those properties with Respondent CJ Martin (which she was trying to cancel) and then the proceeds of the sale would have gone towards the monetary bequests, of which she was a beneficiary

Martin JA – 000539. (emphasis added). As shown, Count I of the Petition requests only that the Circuit Court determine the meaning of "my residence property." The record is barren of any instant where Petitioner sought for the additional properties to be added to "my residence property." The Petitioner merely requested the Circuit Court determine if "residence property" was solely the parcel of property upon which Shirley A. Martin's residence is located or whether "my residence property" also includes the five contiguous parcels around the parcel upon which Shirley A. Martin's residence is located.

Second, regarding Count II of the Petition, the Circuit Court found that:

> 47. Contrary to that fiduciary duty, Petitioner *created a cloud on the title of the Carl J. Martin Testamentary Trust A to the Route 20 Property* by recording on May 26, 2020, a deed, that purports to affect the title to the Route 20 Property adverse to the title of the Carl J. Martin Testamentary Trust A and the Deed of Trust.
>
> ***
>
> 50. Further, Petitioner's failure to honor her fiduciary duties and engaged in self-dealing has been detrimental to the estate and Trusts and is a clear breach of her duties.

Martin JA – 000540. (emphasis added). No evidence was presented to indicate that the Petitioner was using her position as Executor or Trustee in a self-dealing manner.

As shown *supra*, filing Counts I and II in the *Petition for Declaratory Judgment* under §55-13-4, Petitioner did not request the Circuit Court to make a specific determination. Petitioner explained in her Petition that Shirley A. Martin transferred to Sherree D. Martin the Route 20 Property in 2013 from the Martial Trust as part of a complex estate plan. Martin JA – 000010. The discovery of the July 31, 2000 Deed, conveying the Route 20 Property from the Estate of Carl J.

Martin to Shirley A. Martin, individually, casts some doubt on the efficacy of this transaction. Despite the 2013 transfer, Shirley A. Martin repeated the same provision in her 2016 Amendment to the Shirley Trust. Despite that Shirley A. Martin transferred the Route 20 Property to the Petitioner in 2013, Shirley was receiving annual interest payments for the sale and personally and not in the capacity of the Trustee of the Marital Trust, and it appeared to the Petitioner that Shirley A. Martin intended to convey some benefit, Petitioner concluded that Shirley intended to exonerate the indebtedness on the Route 20 property. Martin JA – 000011. *However*, Petitioner did not unilaterally forgive herself of the debt. Petitioner did not even request that the Circuit Court exonerate the debt. Petitioner simply requested that the Circuit Court determine the status of the Route 20 Property. Relying on the pleadings for the foundation of this finding of fact that Petitioner, in her fiduciary duty, engaged in self-dealing is clearly erroneous and is a finding of fact that flies in the face of what Petitioner requested in the Petition.

M. Assignment of Error No. 13

The Circuit Court erred in finding that there was no ambiguity in what property was encompassed by the term "my residence property" in the Shirley Will as no evidentiary hearing was had to determine what "my residence property" means.

Article III, Paragraph 3 of Shirley's Will provides that Petitioner was to sell "my residence property" to Respondent. Martin JA – 000078. The Circuit Court found that it was undisputed that Parcel 28 was the only parcel on which Shirley A. Martin had a residence, and it was the only parcel of property assessed as her residence and given the Homestead Property Exemption for tax purposes. Martin JA – 000539. The Circuit Court used as further proof of a lack of ambiguity the definition of "Homestead" under W. Va. Code §11-6B-2(4). Martin JA – 000539

While these can be used as evidence for the Circuit Court to infer what Shirley A. Martin intended to mean by "my residence property" it is not dispositive. For the Circuit Court to rule as

to what "my residence property" means, the Circuit Court should have had an evidentiary hearing as to what Shirley A. Martin thought "my residence property" meant at the time she signed her Will. The Circuit Court made a clear error in finding that there was no ambiguity in the term "my residence property" as the Circuit Court did not have an evidentiary hearing concerning that issue, nor had discovery been completed so that the Circuit Court could make that determination.

N. Assignment of Error No. 14

The Circuit Court erred in finding there was no ambiguity in the Shirley Martin Will language and that Petitioner created a cloud of title based on the evidence in the record.

The circuit court found that:

> 32. Instead, Petitioner attempted to create ambiguity in the Will where none existed to potentially avoid the terms in the Shirley A. Martin Trust she sought to cancel and replace.

Martin JA – 000539. Count I of the Petition Petitioner sought under W. Va. Code §55-13-4 for "the Court *make a determination as to what is meant by 'my residence property'* in Article III, Paragraph 3 of Shirley's Will." Martin JA – 000010. (emphasis added). The Petitioner did not seek any additional relief or request the Circuit Court to interpret what "my residence property" meant in any specific way. She only requested a determination of the meaning for the Circuit Court.

The Respondent presented no evidence and the Circuit Court heard none and weighed no evidence that could lead the Circuit Court to make a finding of fact that Petitioner intended to create an ambiguity where none existed and thereby breach her fiduciary duty to the Estate. "The Court will not ordinarily usurp the representative's function of administering the estate to the best advantage of all concerned, and, except in cases of abuse, it will not ordinarily interfere with the discretionary powers conferred on the executor by the will. *Welsh*, 136 W.Va. at 925 quoting *33 C.J.S. Executors and Administrators, Section 147*). Petitioner felt that the term "my residence

property," could have meant either the parcel upon which Shirley A. Martin's was located, or that parcel along with five other contiguous parcels of land. Martin JA- 000010.

The Circuit Court made a clear error in making the determination that Petitioner breached her fiduciary duty by attempting to create ambiguity where none existed when she filed the Petition to have the Circuit Court determine what was meant my "my residence property."

O. Assignment of Error No. 15

The Circuit Court erred in finding that Petitioner violated her fiduciary duty as Trustee by creating a cloud of the titled of the Carl J. Martin Trust regarding the Route 20 property by recording a deed on May 26, 2020, as no evidence was introduced into the record that would allow the Circuit Court to make such a finding.

The circuit court held that:

> 46. Petitioner has a fiduciary duty to defend the interests of the Carl J. Martin Testamentary Trust, including defendant its title and claims against its interest.
>
> 47. Contrary to that fiduciary duty, Petitioner created a cloud on the title of the Carl J. Martin Testamentary Trust A to the Route 20 Property by recording on May 26, 2020, a deed, that purports to affect the title to the Route 20 Property adverse to the title of the Carl J. Martin Testamentary Trust A and the Deed of Trust

Martin JA – 000540. Petitioner agrees with the Circuit Court that she has a duty to defend the interest of the Marital Trust. Petitioner also has an obligation to defend the interests to the Estate and Shirley Trust. However, the Circuit Court found that by recording a deed purporting to affect the title to the Route 20 Property, adverse to the title of Martial Trust and the Deed of Trust, the Petitioner had created a cloud of title contrary to her fiduciary duty.

The Circuit Court did not hold an evidentiary hearing on the validity of the of deed to the Route 20 Property, dated, July 31, 2000, and recorded on May 26, 2020. The Circuit Court neither inquired into the circumstances by which the July 31, 200 Deed was found or recorded, nor did the Circuit Court analyze the law in terms of validity of the acceptance and delivery of the deed

by Shirley A. Martin during her lifetime. Additionally, the Circuit Court never considered Petitioner's fiduciary duty to Sherree D. Martin. A fiduciary had the duty to administer the trust in good faith and in accordance with the trust terms and in the best interest of the beneficiaries. W. Va. Code §44D-8-801. Martin JA – 000333. As Trustee of the Shirley Trust, Petitioner has a duty to defend the interests of that trust. Petitioner was compelled to record a previously unrecorded deed if said deed purported to convey interest to Shirley A. Martin individually. Put simply, there seemed to be conflicting interest between the Marital Trust, the Estate, and the Shirley Trust It would have been a breach of duty to not record the deed. The Marital Trust, the Shirley Trust and the Estate have an interest in determining who truly owned the Route 20 Property and when. The Circuit Court, however, determined, without hearing any evidence regarding the deed recorded May 26, 2020, that the Marital Trust's interests were superior to all others and that, in essence, Petitioner should have never of filed her Petition to determine what exactly Shirley A. Martin meant to convey in the 2016 Amendment, and, further, afterward while administering both the Estate, the Shirley Trust, and the Marital Trust, Petitioner should have simply ignored the unrecorded deed. No evidence was every presented or heard that could permit the Circuit Court to find that Petitioner breached her fiduciary duty by recording said deed.

It was clear error by the Circuit Court to make a finding of fact that Petitioner breached her fiduciary duty by recording the deed on May 26, 2020.

N. Assignment of Error No. 16

The Circuit Court erred in finding that Petitioner violated her fiduciary duties as Executor of the Shirley Will when she filed the litigation in an attempt to create an ambiguity as no evidence was introduced into the record that would allow the Circuit Court to make such a finding.

The Circuit Court found that:

> 38. Petitioner violated her fiduciary duties as Executrix when she filed litigation attempting to create ambiguity where none existed and thereby needlessly wasting Estate resources.

Martin JA – 000539. Count I of the Petition, Petitioner sought under W. Va. Code §55-13-4 for "the Court *make a determination as to what is meant by 'my residence property'* in Article III, Paragraph 3 of Shirley's Will. Martin JA – 000010. (emphasis added). The Petitioner did not seek any additional relief or request the Circuit Court to interpret what "my residence property" meant in any specific way. She only requested a determination of the meaning from the Circuit Court.

The Respondent presented no evidence, besides mischaracterizing the relief sought in the Petition, and the Circuit Court heard no evidence and weighed no evidence that could lead the Circuit Court to make a finding of fact that Petitioner intended to create an ambiguity where none existed and thereby breach her fiduciary duty to the Estate.

The Circuit Court made a clear error in making the determination that Petitioner breached her fiduciary duty by attempting to create ambiguity where none existed when she initiated her Petition to have the Circuit Court determine what was meant my "my residence property."

CONCLUSION

Based on the foregoing discussion, this Court should reverse, vacate and remand for trial the Circuit Court's Order and the Rule 59(e) Order, which granted Respondent's request for injunctive relief and re-affirmed that decision, respectively, and any further award any other relief the Court may deem just and appropriate.

SHERREE D. MARTIN, as Executor of the Estate of Shirley A. martin, Trustee of the Shirley A. Martin Trust, and Trustee of the Carl J. Martin Marital Trust.

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No. 21-0757
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

(On Appeal from the Circuit Court of Upshur County Civil Action No. 20-P-21)

WILLIAM A. MARTIN, SHERREE D. MARTIN, CARL J. MARTIN, II, TERESA A. MARTIN PIKE, CARL ROBERT MARTIN, PATRICK STEPHEN MARTIN, CARLI JO MARTIN, JEFFREY TODD EDGELL, MARTINA ELIZABETH ANN EDGELL, JASMINE PIKE, AND SOPHIA PIKE, interested parties to the Estate of Shirley A. Martin, the Shirley A. Martin Trust and the Carl J. Martin, Trust.

Respondents.

CERTIFICATE OF SERVICE

I, Roy H. Cunningham, counsel for Petitioner, *Sherree D. Martin, Executor of the Estate of Shirley A. Martin, Trustee of the Shirley A. Martin Trust, and Trustee of the Carl J. Martin Trust*, do hereby certify that on this 27th day of December, 2021, I served a copy of the foregoing "**BRIEF IN SUPPORT OF PETITION FOR APPEAL**" via U.S. Mail upon:

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