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.

REPLY BRIEF TO CARL J. MARTIN II, TERESA A. MARTIN, JASMINE PIKE, SOPHIA PIKE, CARL ROBERT MARTIN, PATRICK STEPHEN MARTIN AND CARLI JO MARTIN'S RESPONSE

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I. Statement of the Case

On October 3, 2016, Sherree D. Martin ("Ms. Martin" or "Petitioner") became the Trustee of Trust A under the Will of Carl J. Martin (the "Marital Trust"). Shirley A. Martin (the "Testator") died on August 3, 2019. The Will of the Testator (the "Will") was admitted to probate before the Upshur County Commission. Ms. Martin was appointed as Executor of the Estate of the Testator (the "Estate"). On November 24, 1997, the Testator established the Shirley A. Martin Trust (the "Shirley Trust"). As a result of the death of the Testator, Ms. Martin became the Trustee of the "Shirley Trust".[1]

In administering the Estate and Trusts, Ms. Martin found certain provisions of the Shirley Trust and the Estate to be ambiguous and unclear. To fulfill her fiduciary obligations to the beneficiaries of the Estate and Trusts, Ms. Martin filed a *Petition for Declaratory Judgment* (the "Petition") under W. Va. Code § 55-13-4(c), requesting a declaration as to: (1) the construction and meaning of the term "my residence property," in Article III, Paragraph 3 of the Will; (2) the construction and meaning as to what property Shirley A. Martin meant to convey to Sherree D. Martin in Article IV, Paragraph 1, Sub-Paragraph (g) of the Shirley Trust, as amended in 2016; and (3) permission to divide certain properties between beneficiaries in an equitable manner. Martin JA – 000009-12.

In response to the Petition, Respondent, Carl J. Martin, II, ("Respondent") filed his *Answer and Counterclaim of Respondent Carl J. Martin, II* (the "Counterclaim") wherein he alleged that Petitioner breached her fiduciary duty to the Estate, the Shirley Trust, and the Marital Trust by merely filing the Petition. Respondent then filed the *Respondent Carl J. Martin, II, Motion for Preliminary Injunction* (the "Injunction") requesting the Circuit Court remove Ms. Martin as

[1] The Marital Trust, the Will, the Estate and the Shirley Trust are collectively referred to as the "Estate and Trusts"; the Marital Trust and the Shirley Trust are collectively referred to as the "Trusts."

Executor of the Estate and Trustee of the Marital Trust and the Shirley Trust. *See generally*, Injunction, Martin JA – 000233-317. Without conducting an evidentiary hearing, being provided one scintilla of evidence, or providing Ms. Martin the opportunity to refute the Counterclaim, the Circuit Court ruled on the merits of the Counterclaim. The Circuit Court found that the Petitioner breached her fiduciary duties to the Estate, Marital Trust, and Shirley Trust by the mere act of filing her Petition. *See* Order Following the December 23, 2020 Hearing (the "Order"), Martin JA – 000530-545. The Circuit Court affirmed its decision when it denied Petitioner's Rule 59(e) motion. *See* Order Following Hearing on August 5, 2021 (the "Rule 59(e) Order"). Martin JA – 000605-660. Ms. Martin was found in breach of her fiduciary duty as Executor and Trustee for the mere act of filing the Petition.

Counter Statement of the Case

Count III of the Petition, the Drawing of Lots

Shirley Trust Article VI, Paragraph 1, Sub-Paragraph (h) provides as follows:

> The Trustee shall arrange for Carl J. Martin II and Sherree D. Martin to draw lots for all the rest of 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 and 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. JA-Martin -000008.

Contrary to the Respondent's assertion, Article VI, Paragraph 1, Subparagraph (h) provides no guidance whatsoever in the "drawing of lots." Petitioner requested guidance from the Circuit Court on this issue. Further, Petitioner has repeatedly stated in the Petition that the drawing of lots would inevitably result in an inequitable disposition of the property described in Article VI, Paragraph 1, Subparagraph (h). Petitioner never requested any particular outcome from the Circuit Court, only that the properties "be divided in accordance to their appraised fair market value as

finally determined by some other more equitable means." Martin JA – 0000011-12. Petitioner further asked the Court to strike the right of first refusal between herself and the Respondent for the properties distributed. Martin JA – 000012. Asking the Circuit Court to determine the best way to divide the properties is not a breach of fiduciary duty. What benefit does the Petitioner derive from the properties being split equally with no restriction of sale being placed upon them?

Count II of the Petition, Definition of My Residence Property

The Will provides the Executor with the following instruction:

> I direct that my Executrix sell my residence property located in Upshur County, West Virginia along with a nonexclusive right of way over and across the property devised to my son Carl J. Martin II heretofore, as soon after my death as is practical. My Executrix shall have the executed deeds and contracts necessary to convey said real estate and all necessary rights of way hereto. My Executrix shall first offer residence property to my children at the value includable 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.

Count II of the Petition requested the Court to determine what is meant by "my residence property." JA-Martin- 000006. Respondent's assertion that Petitioner admitted that "my residence property" meant solely the parcel of real estate upon which the Testator's home is located is folly at best. As proof of this admission, Respondent suggests that Petitioner makes these admissions in Paragraphs 30 and 50 of the Petition. Response at P. 21. This assertion, however, is utter nonsense. Paragraph 30 of the Petition sets forth that the Testator's home was located on one parcel of land that was contiguously joined to five other parcels of land. Martin JA -000006. Paragraph 50 of the Petition, again, sets forth that the parcel upon which the Testator's home is located was purchased first and then the other parcels were purchased in subsequent years. JA-Martin- 000010. Nothing in either Paragraph 30 or Paragraph 50 is an admission that "my residence property" means the parcel, and only the parcel, upon which the Testator's home is

located. Rather, both Paragraph 30 and Paragraph 50 are descriptions of where the Testator's home is located, that there are five parcels adjacent to the Testator's home, and all the parcels were acquired at different times. Attempting to assert that this is an admission of the meaning of "my residence property" is disingenuous at best and fraudulent at worst. Respondent then attempts to infer a dispositive meaning of "my residence property" from the fact that all these parcels of land were held separately for tax purposes. Response at P. 21. Respondent fails to mention, however, quite conveniently, that the meaning of "my residence property" is derived solely from the intent of the Testator. From the Will, it is clearly ambiguous what the Testator meant by "my residence property."

Further, Respondent asserts that Petitioner gains some advantage or benefit by asking the Circuit Court to determine what "my residence property" means; however, again Respondent, quite conveniently, fails to state or offer any evidence whatsoever as to what advantage the Petitioner gains.

Count II, The Disposition of the Route 20 Property

Article VI, Paragraph (g) of the 2010 Amendment of the Shirley Trust provides: "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."[2] JA Martin- 000008. Through a series of transactions for the purpose of estate planning, the Marital Trust transferred the Route 20 Property to Chaumont Properties, LLC[3]. *Id.* As a result of this transaction, the Marital Trust held a note from Chaumont Properties, LLC in the amount of $920,000. *Id.*

[2] For descriptive purposes, the property located on the Northside of Buckhannon, West Virginia is referred to as the "Route 20 Property."

[3] Chaumont Properties, LLC is a West Virginia limited liability company owned solely by the Petitioner.

In the 2016 Amendment to the Shirley Trust, however, the Testator again, in Article VI, Paragraph 1, Sub-Paragraph (g), provided "The Trustee shall convey by general warranty deed to Sherree D. Martin all of Grantor's property located on Route 20 of the northside of Buckhannon, West Virginia [the Route 20 Property]." *Id.* Because the devise of the Route 20 property remained in the 2016 Amendment to the Shirley Trust, the Petitioner asked the Circuit Court to determine what "Shirley meant to convey to Sherree by Article VI, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment." Martin JA- 000010. Contrary to Respondent's repeated assertions, the Petitioner never requested that the Court exonerate the $920,000 note.

After the Petition was filed with the Circuit Court, the Petitioner discovered a prior unrecorded deed for the Route 20 Property from the Estate of Carl J. Martin to the Testator, individually. Martin JA – 000293-297. As Executor of the Estate, the Petitioner has a duty to marshal the assets of the Estate. Therefore, the Petitioner recorded the prior deed. As the Route 20 Property is potentially an asset of the Estate, the Petitioner had an obligation to record the deed to preserve what interest, if any, the Estate has in the Route 20 Property. Whether the recording of the prior unrecorded deed casts a cloud of title upon the Route 20 Property is irrelevant.

II. STATEMENT REGARDING ORAL ARGUMENT

The facts and legal proceedings of this case are complex, and this Court would benefit from oral argument. Therefore, Petitioner reasserts her request for oral argument.

III. ARGUMENT

Omnibus Reply regarding all assignments of error

Underlying the entirety of Respondent's Response is the allegation that Ms. Martin used the procedures set forth under W. Va. Code § 55-13-4(c) as a guise for self-dealing and a means to effectuate the alleged breaches of fiduciary duty in her capacity as Executor of the Estate and

Trustee of the Trusts. This is simply not true. Instead, Respondent has improperly used Ms. Martin's legitimate actions against her, in direct violation of W. Va. Code § 55-13-1, et seq. ("Uniform Declaratory Judgments Act"), to effectively remove her from her role as Executor of the Estate and Trustee of the Trusts.

Inherent to the power of the courts is the ability to declare rights, status, and other legal relationships in the form and effect of declaration. *See* W. Va. Code § 55-13-1, et seq. Specifically, the Uniform Declaratory Judgments Act authorizes courts of record to issue declarations of "rights, status and other legal relations ***whether or not further relief is or could be claimed***." W. Va. Code § 55-13-1 (emphasis added). The purpose of the Act is set forth in W. Va. Code § 55-13-12: "This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." *See also United Steelworkers of America v. Tri-State Greyhound Park*, 178 W. Va. 729, 364 S.E.2d 257 (1987).

Importantly, within the Uniform Declaratory Judgments Act, "W.Va. Code, 55-13-4 provides that an executrix may bring a declaratory judgment action to determine questions of construction or administration of wills or trusts." *See also Berry v. Union Nat'l Bank*, 164 W. Va. 258, 262, 262 S.E.2d 766, 769 (1980). Under this provision: "any person interested, as or through an executor, administrator, trustee or other fiduciary, in the administration of a trust or the estate of a decedent may have a declaration of rights to determine '***any question*** arising in the administration of the estate or trust[.]'" *Dantzic v. Dantzic*, 222 W. Va. 535, 544, 668 S.E.2d 164, 173 (2008); *see also* W.Va. Code § 55-13-4 (emphasis added). Regarding such actions, and above all other arguments made in this case, ***"No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for."*** W. Va. Code § 55-13-1. Instead,

"[s]ubsection (b) gives a circuit court authority '[t]o direct the executors . . . to do or abstain from doing any particular act in their fiduciary capacity[.]'" *See*, *Dantzic*, 222 W. Va. at 544, 668 S.E.2d at 173 (2008); *see also* W.Va. Code § 55-13-4(b).

Simply, the Uniform Declaratory Judgments Act permits ***"any interested party"*** to ask the court to determine ***"any question"*** arising in the administration of the estate or trust. It thereafter calls upon the court to resolve that question and protect the asking party from any objections made solely because the question was asked. Instead, the court has the power to require the parties to abstain from any such actions, specifically in their fiduciary capacity. Thus, the entirety of this case is contained within the plain language of the Uniform Declaratory Judgments Act.

Yet, instead of addressing the questions posed in the Petition, the Circuit Court found, in direct contravention to the above-prescribed procedure, that Ms. Martin breached her fiduciary duty solely for filing the action, instead of simply requiring she abstain from the same under W.Va. Code § 55-13-4(b):

> Petitioner argues that this action is simply one for declaratory judgment.
>
> However, Petitioner in her fiduciary capacities seeks in this litigation to remove and replace terms of the documents she has a fiduciary duty to effect and advocates for her own benefit, not for the benefit or best interest of the beneficiaries.

Martin JA – 000543. Moreover, in his Response, Respondent attempts to unilaterally limit the broad scope of W.Va. Code § 55-13-4. Respondent states:

> [T]he Circuit Court properly identified that Petitioner was not merely seeking a construction determination under the Declaratory Judgments Act concerning trusts and estates pursuant to West Virginia Code § 55-13-4(c), but rather was seeking her own personal relief using her fiduciary capacity to accomplish that goal. Petitioner filed her Petition in her fiduciary roles, as the style of the Petition reflects . . .There has never been a dispute that a declaratory judgment action could have been brought regarding construction of

> wills or other writings, but in reality, she had sought very different relief than seeking construction of a writing. *See* Hearing Transcript at 27:24-28:14 (JA 513-14). Most clearly, Petitioner's requests as the fiduciary are to actively not effectuate the testator's wishes. Instead, Petitioner asks to instead use her own preference for distribution of property and that other terms that she dislikes be stricken, which is not simply asking for a declaratory judgment.

See Response, p. 15-16. As stated above, Ms. Martin is not bound to questions regarding the construction of writings. Pursuant to the plain language contained within W. Va. Code § 55-13-4, Ms. Martin is afforded the right to ask ***any question arising in the administration of the estate or trust***, including questions of construction, but certainly not limited to the same. W. Va. Code § 55-13-4. This rule is not ambiguous and is not open to interpretation and it should be applied liberally. *See Willard v. Whited*, 211 W. Va. 522, 525, 566 S.E.2d 881, 884 (2002) ("the statute authorizing declaratory judgment demands a liberal construction. The declaratory judgment act is designed 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.'"). Even if the Circuit Court found the questions, permissibly asked, to be self-serving, it retained the power to officially direct Ms. Martin to abstain from any such behavior. Instead, in direct violation of the Uniform Declaratory Judgments Act, Ms. Martin was stripped of her obligations on the grounds that she prayed for a declaratory judgment. Martin JA – 000543.

As discussed herein and within Ms. Martin's *Brief in Support of Appeal* ("Appeal Brief"), the procedure for stripping her of this duty was otherwise not in accordance with the laws of West Virginia pertaining to injunctive relief. Moreover, the grounds for the same were simply in reliance of the above proceedings, which were in error. Thus, Ms. Martin asserts that the Circuit Court abused its discretion and was clearly wrong in stripping her of her duties without properly assessing the facts of the case, without properly following the procedures prescribed by West

Virginia statutory law, without affording Ms. Martin the relief requested in her Petition yet granting Respondent's injunctive relief based on the same in violation of the Uniform Declaratory Judgments Act. For these reasons, the Order and Rule 59(e) Order must be reversed.

1. Assignments of Error 1 and 2

In the case at hand, Respondent alleges in his Response that "Petitioner does not dispute that the findings and conclusions of the Circuit Court did satisfy those standards for removing her from her fiduciary roles." Response at P.7. This is simply not true. As established above, the assignments of error set forth in Ms. Martin's Appeal Brief are interrelated. The facts that support one assignment of error support all. As stated in the Appeal Brief, and as stated above, the predominant justification and basis for the Circuit Court's decision to remove Ms. Martin from her roles was the mere fact that Ms. Martin filed her Petition:

> 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.

Martin JA – 000648.

The Appeal Brief sets forth the standards required for a Circuit Court to remove a trustee and testamentary representative of an estate. As stated therein, the removal of a representative chosen by the testator is a drastic action and should only occur when the estate 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)). To justify removing a testamentary personal representative, "the proof of the cause for removal must be clear." *Haines v. Kimble*, 221 W. Va. at 276 (2007).

However, in the case at hand, the "proof of the cause for removal" is not clear and it certainly did not amount to the burden required to remove Ms. Martin as Executor of the Estate and Trustee of the Trusts. In fact, as stated in the Appeal Brief, the only proof of the cause for

removal put forth by Respondent is Ms. Martin's Petition. *See* Appeal Brief, p. 12. For the reasons stated above, this does not amount to proof showing cause for removal and, in fact, such a finding is in clear violation of the Uniform Declaratory Judgments Act. Thus, Respondent has not met the burden required to remove Ms. Martin and Respondent certainly did not meet the burden of showing that such removal justifies the Court make a ruling contrary to the Testator's desire to have Ms. Martin as her personal representative. *See Haines,* 221 W. Va. at 276, 654 S.E.2d at 596 (2007) (delineating the factors a court should consider prior to removing a personal representative selected by the testator including the testator's desire). For these reasons, Respondent failed to clearly prove a legitimate cause for the removal of Ms. Martin as a personal representative and the Circuit Court failed to make findings supporting the same. Thus, the Order must be reversed.

2. Assignments of Error 3, 5, and 11.

The general standard in West Virginia for issuing a preliminary injunction includes a balancing of hardship tests 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, 475 S.E.2d 792, 798 n.8 (1996).

Respondent's predominate basis for his alleged irreparable harm is the language contained within Ms. Martin's Petition. Moreover, the Circuit Court agreed and found that Respondent suffered irreparable harm largely because of the implications within the Petition. *See* e.g. Order ¶56-58; 60-62. Martin JA – 000541-542. As explained herein, the mere filing of the Petition cannot constitute irreparable harm. Under West Virginia law, "an 'irreparable injury' is one that is 'actual and imminent' and 'it is likely that the [past] offensive conduct will recur.'" *Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 369, 844 S.E.2d 133, 140 (2020) citing 3 N.Y.

Practice, Com. Litig. in New York State Courts § 18:9 (4th ed.). Here, no offensive conduct was actual and imminent. Ms. Martin explicitly asked the Circuit Court for ***permission*** to move forward by way of her Petition. Moreover, the Circuit Court held the power to deny the same under W.Va. Code § 55-13-4(b) which gave the Circuit Court the authority to direct Ms. Martin to abstain from doing any act in her fiduciary capacity. Thus, it is senseless to allege that any such irreparable injury stemming from the Petition was actual or imminent.

The only remaining claim of irreparable harm that is apparent from the record of this case is Respondent's allegation that Ms. Martin created a cloud of title on the Route 20 Property. As argued under Assignment of Error 15 of the Appeal Brief, Petitioner owed a fiduciary duty to the Estate. Appeal Brief at P. 37; *see also* Martin JA – 000293-297. Specifically, Ms. Martin, as Executor, has a duty to marshal the assets of the Estate. The recording of the deed was an effectuation of the Executor's duty to marshal the assets of the Estate and does not cause irreparable harm to the Respondent.

Next, Respondent argues that Petitioner is just now raising her argument concerning the public interest. *See* Response at P. 10. That "specter" was raised by Petitioner in the Rule 59(e) Motion. *See* Rule 59(e) Motion at 17. Martin JA – 000658. The Circuit Court erred in finding that Respondent satisfied the elements necessary to grant preliminary injunction. Therefore, the Order must be reversed.

3. Assignment No. 4 – Circuit Court Erred in Granting Preliminary Injunction on Pleadings.

Regarding this argument, Ms. Martin incorporates the arguments contained under subheading 1- "Omnibus Reply regarding all assignments of error." To the extent an additional reply is warranted, Ms. Martin states as follows:

In *Markwest,* this Court found that when a verified complaint serves as an affidavit, without any evidence offered, considered, or weighed, that complaint is an inadequate vehicle necessary for a preliminary injunction. *Markwest Liberty Midstream & Resources*, 2018 W. Va. LEXIS 72, at 11, 2018 WL 527209 (W. Va. 218) (memorandum opinion). Respondent misconstrues the facts of that case by incorrectly asserting that the opposing party in *Markwest* presented witness testimony to counter the complaint. *See* Response at 12. Respondent also argues that the language of the Petition has never been controverted. *Id.* However, Respondent denied the allegations of the Petition in his Answer and the Counterclaim. *See* Martin JA-000182-196. Here, no evidence or testimony was heard at the December 23, 2020 hearing. The Circuit Court relied predominantly, if not solely, on the Petition.

> 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.

Martin JA – 000648.

The Circuit Court clearly erred in relying on the pleadings in issuing the Preliminary Injunction. Therefore, the Order must be reversed.

4. Assignment No. 6 – The Circuit Court erred as there are alternative remedies at law.

In his Response, Respondent attempts to improperly shift the burden of proof to Petitioner. Specifically, he states: "Petitioner's initial position was a remedy at law existed, but she did not argue or present to the Circuit Court that such remedies were adequate." *See* Response, p. 13. Under West Virginia law, "***a party seeking the temporary relief*** must demonstrate by a clear showing of a reasonable likelihood . . . the absence of any other appropriate remedy at law. . ." *State by & Through McGraw v. Imperial Mktg.*, 472 S.E.2d 792, 810 (W. Va. 1996) (emphasis added). Meaning, it is the Respondent's burden to make a clear showing that no other appropriate

remedies at law exist, not the Petitioner's burden. However, Respondent cannot meet this burden. Instead, he attempts to attack one suggested, but not exhaustive, remedy offered by Petitioner. *See* Response, p. 13. He thereafter attempts to chide Petitioner by suggesting that Petitioner untimely suggested alternative remedies of law in her Rule 59(e) Motion. *See id.* Finally, he states that such remedies are not adequate, but still fails to suggest that there is an absence of any other appropriate remedy at law. This is likely because adequate remedies exist.

For example, an appropriate remedy at law is specifically delineated within the Uniform Declaratory Judgments Act. *See* W.Va. Code § 55-13-4(b). Upon receipt of the Petition, the Circuit Court had the opportunity, in response, to direct Ms. Martin to do or abstain from doing any particular act in her fiduciary capacity. *Id.* The Circuit Court has failed to issue any such decision. Alternatively, as an interested party, Respondent could have brought his own declaratory judgment action against Petitioner if he felt that the Petition was a breach of fiduciary duty. *See Syl. Trail v. Hawley*, 163 W. Va. 626, 259 S.E.2d 423 (1979) ("Heirs, who will be the ultimate beneficiaries . . .may bring a declaratory judgment action against the personal representative of the decedent's estate to determine if the representative is acting in consonance with his or her fiduciary duty to the heirs. . .")

Thus, given that W. Va. Code §55-13-4(b) expressly allows the Circuit Court to afford the relief requested by Respondent, the Circuit Court's Order is clearly erroneous in finding that "[a]ny legal remedy that is available would be neither practical nor efficient to secure the ends of justice and its prompt administration in this case." Martin JA – 000598. Certainly, issuing a declaration as to Petitioner's rights and abilities is more efficient and practical than the situation at hand. Moreover, such a declaration has the force and effect of a final order and is binding on the parties.

W. Va. Code § 55-13-1 ("The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.").

Otherwise, statutory remedies exist under the West Virginia Uniform Trust Code for Respondent's exact claims. *See* W. Va. Code §44D-7-706(b) (outlining instances in which a court may remove a trustee); *see also* Martin JA – 000327-328; Martin JA – 000327-328. West Virginia's Uniform Trust Act also provides monetary relief under W. Va. Code §44D-10-1002.[4] Yet, Respondent generally concludes that the only option that existed was for Respondent to sit on his hands and wait for the conclusion of the Petition or move for injunctive relief. *See* Response, p.14. This argument not only misstates Petitioner's position, but also misstates the law.

First, Petitioner never restricted Respondent's relief to the monetary damages under W. Va. Code §44D-10-1002, but rather identified one alternative remedy at law to satisfy Respondent's alleged irreparable harm of a diminishing corpus. Appeal Brief at P.23-24. Second, it is Respondent's sole burden to disprove that an alternative remedy at law exists. Respondent ignored that burden in his Motion for Preliminary Injunction and the Circuit Court failed to analyze this factor at the hearing and in the Order. Finally, Respondent's conclusion that "Petitioner's argument would mean that a fiduciary could never be removed because anyone with standing would be limited to suffering under the fiduciary's abuse until the end of the trust or estate and then have to sue for only legal remedies" is nonsensical. W. Va. Code § 44D-7-706(b) specifically outlines the statute permitting a beneficiary to move a court to remove a trustee for breach of fiduciary duty.

[4] "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 properly and trust distribution to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach." W. Va. Code §44D-10-1002.

Thus, many alternative, adequate, and efficient remedies at law exist. Respondent simply ignores these options rather than disproving them. The burden of disproving that an alternative remedy at law exists rests squarely on the shoulders of Respondent. As a result, the Circuit Court committed reversible error by improperly allowing Respondent to shift his burden to Petitioner which, in turn, affected the substantial rights of Petitioner. *State v. Starr*, 158 W. Va. 905, 916, 216 S.E.2d 242, 249 (1975) (finding that a trial court committed reversible error by "applying an improper standard of proof"). For these reasons, the Circuit Court's Order must be reversed.

5. Assignment of Error No. 7 - The Circuit Court erred in Consolidating the Petition for Injunction into a trial on the merits of the claim

The Response states that:

> Petitioner argues for the first time in her Assignment of Error No. 7 that the Circuit Court consolidated the request for injunctive relief into a trial on the merits under West Virginia Rule of Civil Procedure 65(a)(2). Petitioner never raised this issue below and, therefore, it is waived. Moreover, no party sought and the Circuit Court did not order a consolidation with a trial on the merits. Accordingly, Petitioner's Assignment of Error No. 7 must fail.

Response at P. 15. Petitioner does not argue that the Circuit Court consolidated the preliminary injunction with a trial on merits under W. Va. R. Civ. P. 65(a)(2) and erred in doing so; instead, Petitioner asserts error because the Circuit Court ruled on merits of the Counterclaim without properly doing so under W. Va. R. Civ. P. 65(a)(2).

W. Va. R. App. P. Rule 10(c)(3) states that "[if] the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion to alert the Court to the fact that plain error is asserted." While the term "plain error" is not stated, this assignment is stated in such a way to notify this Court that plain error is being asserted as she claims the Circuit Court denied Ms. Martin the opportunity to defend herself against the Counterclaim. Appeal Brief at 24.

"To trigger the 'plain error' doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Syl. Pt. 7 State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

Preliminary injunctions require less evidence than a trial on the merits. *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981) (internal citations omitted))[5].

> A party thus is not required to prove his case in full at a preliminary-injunction hearing ... In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give final judgment. Should an expedited decision on the merits be appropriate, Rule 65(a)(2) of the Federal Rules of Civil Procedure provides a means of securing one. That Rule permits a court to 'order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.' Before such an order may issue, however, the courts have commonly required that "the parties should normally receive clear and unambiguous notice [of the court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases".

Id.

The rationale of the Order was based upon the plain error of using a determination of the merits of the Counterclaim as the foundation to satisfying the elements necessary to grant Respondent's preliminary injunction. *See* Order at ¶65-66. Martin JA – 000542; Order at ¶21-55. Martin JA-000537-541; and Order at ¶69-79; Martin JA – 000542-453. Petitioner asserted a plain error that the Circuit Court, in the Order, functionally consolidated the preliminary injunction into a determination on the merits of the Respondent's Counterclaim without abiding by W. Va. R. Civ. P. Rule 65(a)(2). Therefore, the Order must be reversed.

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[5] "Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to the federal cases, especially those of the United States Supreme Court, in determining the meaning and scope of the four rules." *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 n. 6 (1994).

6. Assignments of Error Nos. 8 and 12.

In his Response, Respondent reasserts the Circuit Court's baseless findings that Petitioner, in filing the Petition, was "seeking her own personal relief using her fiduciary capacity to accomplish that goal." *See* Response at 15. Respondent cites to the Petition only in part in an attempt to distract this Court from what it was that the Petition sought and the reality of circumstances surrounding it.

Counts I and II of the Petition sought, under W. Va. Code §55-13-4©, for the Circuit Court to "make a determination" as to what is meant by 'my residence property' in the Will (Martin JA – 000010) and as to what Shirley meant to convey to Sherree by Article IV, Paragraph 1, Sub-Paragraph (g) of the 2016 Amendment. (Martin JA – 000011), respectively. Count III of the Petition sought for the Circuit Court to "make a determination that the properties devised under the 2016 Amendment, Article IV, Paragraph 1, Sub-Paragraph (h) be divided in accordance with 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. The Circuit Court found "[t]hose 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 – 00540.

As shown in the "Omnibus reply concerning all assignments of error", *supra*, the Uniform Declaratory Judgments Act, "W.Va. Code §55-13-4 provides that an executrix may bring a declaratory judgment action to determine questions of construction or administration of wills or trusts." *See also Berry v. Union Nat'l Bank*, 164 W. Va. 258, 262, 262 S.E.2d 766, 769 (1980). Under this provision: "any person interested, as or through an executor, administrator, trustee or

other fiduciary, in the administration of a trust or the estate of a decedent may have a declaration of rights to determine '***any question*** arising in the administration of the estate or trust[.]'" *Dantzic v. Dantzic*, 222 W. Va. 535, 544, 668 S.E.2d 164, 173 (2008); *see also* W.Va. Code §55-13-4 (emphasis added).

Without a scintilla of evidence, and contrary to law, the Circuit Court ruled that filing the Petition constituted a breach of fiduciary duty as Trustee of the Trusts and as Executor of the Estate.

7. Assignments of Error Nos. 9 and 10.

Respondent incorrectly asserts that Petitioner is, for the first time ever, justifying Count III of her Petition as properly adhering to her fiduciary duty.

> To escape the fiduciary duty to effectuate the terms she personally felt were inequitable, Petitioner on appeal tries to take a new position and defend her actions by relying on her other fiduciary duties to the beneficiaries: "A fiduciary does have the duty to administer the trust or estate solely in the interest of the beneficiary."... In this way, Petitioner attempts to characterize her actions as the opposite of self-serving, arguing that if she had not wanted to modify the terms and strike other terms that Respondent Carl J. Martin, II, was likely to benefit as well because otherwise he "could have ended up with the lowest valued properties and Petitioner could have ended up with the most valuable properties, or vice versa."

Response at 18-19 (*citing* Petitioner's Appeal).

Respondent is mistaken as Petitioner made this argument from the outset. Martin JA – 000333-334. In support thereof, Petitioner refers Respondent to *Petitioner's Motion to Deny Motion for Preliminary Injunction* wherein she stated: "Petitioner has the right to bring this Declaratory Judgment Action before the court in accordance with W. Va. Code §55-13-4© and an obligation under W. Va. Code §44D-8-801 to request this Court's assistance in ascertaining the

meaning of 'draw lots' provision." Martin JA – 000334. At that time, Petitioner identified the statutory obligation to give due regard to each beneficiary's respective interest in the trust under W.Va. Code §44D-8-803. Martin JA – 00326. Therefore, the Order must be reversed.

8. Assignments of Error Nos. 13, 14 and 16.

Respondent argues in his Response that there was no ambiguity of the Will and Petitioner filed the Petition alleging ambiguity. The Circuit Court improperly found Petitioner violated her fiduciary duty. *See* Response at P. 20. Petitioner filed her Petition under W. Va. Code § 55-13-4 requesting a determination of the meaning of the term "my residence property." The Circuit Court found that not only was the term "my residence property" unambiguous, but also that by filing the Petition, Ms. Martin breached her fiduciary duty as Executor of the Estate. Martin JA – 000538-539.

The evidence cited by Respondent to demonstrate the lack of ambiguity does not justify the Circuit Court's improper ruling as they are not conclusive of the intent of Shirley A. Martin or what she considered "her residence" property. *See* Response at P. 21. The Will is simply silent on what she meant by "my residence property." Martin JA – 000077-80. The deeds referenced by Respondent predate the Will. Response at P.21 n. 8. In support of his argument, Respondent also cites to Paragraph 50 of the Petition Response at P. 21. Because the Circuit Court never properly responded to the Petition, this remains ambiguous. Therefore, the Circuit Court erred by finding no ambiguity in the term "my residence property" and that filing the Petition was for Petitioner's self-interested benefit. For the reasons stated, the Order must be reversed.

9. Assignment of Error No. 15.

In his Response, Respondent states that Petition has not provided legal support requiring her to record the July 31, 2000 deed. *See* Response at P. 22. The legal support for Petitioner

recording the prior unrecorded deed is her fiduciary duty to the Estate. "It shall be the duty of every personal representative to administer well and truly the whole personal estate of his decedent." W. Va. Code § 44-1-15. The Response unfairly ignores the duties Petitioner had to the Estate upon the discovery of the prior unrecorded deed, and instead mischaracterizes these actions as a breach of fiduciary duty. *See* Response at 22-23. As stated in the Appeal Brief, "there seemed to be a conflicting interest between the Marital Trust, the Estate, and the Shirley Trust…the Circuit Court, however, determined, without an evidentiary hearing regarding the deed… that the Marital Trust's interests were superior to all others." Appeal Brief at P. 37. For these reasons, the Order must be reversed.

CONCLUSION

For all the reasons in the Appeal Brief and this Reply, 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, Sr. Trust, prays that this Court reverse, vacate and remand the Orders of the Circuit Court and reinstate Petitioner as Trustee to the Trusts and Estate.

SHEREEE 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 Trust

By Counsel

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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 2nd day of March, 2022, I served a copy of the foregoing **"REPLY BRIEF TO CARL J. MARTIN II, TERESA A. MARTIN, JASMINE PIKE, SOPHIA PIKE, CARL ROBERT MARTIN, PATRICK STEPHEN MARTIN AND CARLI JO MARTIN'S RESPONSE"** via U.S. Mail upon:

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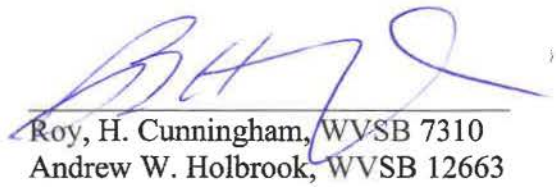

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