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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**DOCKET NO. 21-0757**

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

Petitioner Below, Petitioner,

v.

WILLIAM A. MARTIN, SHEREE 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 in the Estate of Shirley  
A. Martin, the Shirley A. Martin Trust  
and the Carl J. Martin Trust,

Respondents Below, Respondents.

Appeal from Order of the  
Circuit Court of Upshur County  
Civil Action No. 20-P-21  
(Judge David H. Wilmoth)

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**BRIEF OF RESPONDENTS**

**CARL J. MARTIN, II, TERESA A. MARTIN PIKE, JASMINE PIKE, SOPHIA PIKE,  
CARL ROBERT MARTIN, PATRICK STEPHEN MARTIN, AND CARLI JO MARTIN**

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## **I. INTRODUCTION**

A person in a fiduciary position such as a trustee or administrator of an estate has a duty to follow the terms set forth by the settlor in the underlying will or trust. The fiduciary is trusted to effectuate the terms laid out by the settlor. Moreover, the fiduciary has a duty of loyalty to the beneficiaries and is prohibited from using her fiduciary role for her own self-interest.

Petitioner Sherree D. Martin ("Petitioner") accepted the fiduciary role of Trustee of the Shirley A. Martin Trust (the "Shirley Martin Trust"), but filed the underlying litigation for the express purpose of ignoring and striking terms set forth by the settlor in the trust document. Petitioner accepted the fiduciary role of Trustee of the Carl J. Martin Trust (the "Carl Martin Trust"), but filed the underlying litigation to exonerate a debt owed to the Carl Martin Trust. Finally, Petitioner accepted the fiduciary role of Administrator of the Estate of Shirley A. Martin (the "Estate"), but filed the underlying litigation to ignore the unambiguous terms of Shirley Martin's will to include "additional" properties without any basis in fact or law.

Based on those clear violations of her fiduciary duties set forth in her Petitioner, the Circuit Court properly removed Petitioner from her fiduciary roles.

## **II. STATEMENT OF THE CASE**

### **A. Factual Background**

Carl J. Martin passed away on August 9, 1996, and his will created the Carl Martin Trust for the benefit of his wife, Shirley Martin. See Petition at ¶ 12 and 15 (Joint Appendix 4). Shirley Martin served as Administrator of his estate, and as Trustee of the Carl Martin Trust until she resigned in 2016 and Petitioner was appointed. Id. at 14, 16-17 (JA 4). On August 11, 2019, Shirley Martin passed away, leaving a will with certain terms and a residuary clause that directed the remainder of her estate into the Shirley Martin Trust. Id. at ¶ 26-34 (JA 6-7). Petitioner was Administrator of the Estate and Trustee of the Shirley Martin Trust. Id. at ¶ 28 (JA 6).

### **1. The Shirley A. Martin Trust.**

In pertinent part, the Shirley A. Martin Trust<sup>1</sup> expressly directs that the trustee “shall” first divide certain property by having parties “draw lots” and then convey the property with a right of first refusal:

- (h) 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 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.

See Petition at Exhibit L, Art. VI.1.(h) (emphasis added) (JA 145). Contrary to those terms, Petitioner in her fiduciary capacity filed the underlying litigation, asking for “a determination that the properties . . . be divided in accordance to their appraised fair market value as finally determined for estate tax purposes or by some other more equitable means and that the provisions requiring that [Petitioner] and [Respondent] provide each other with a right of first refusal on the properties be stricken.” See Petition at ¶ 67 (JA 12).

### **2. The Shirley A. Martin Will.**

The Last Will and Testament of Shirley A. Martin (the “Will”)<sup>2</sup> provided detailed direction to the Executrix of the Estate to offer and sell her residence property:

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 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

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<sup>1</sup> During her lifetime, Shirley A. Martin created a Trust Agreement, as amended and restated (the “Shirley A. Martin Trust”). See Petition at Exhibit K and L (JA 126-149).

<sup>2</sup> The Will is dated March 23, 2016, was admitted to probate, and is of record in the Office of the Clerk of the County Commission of Upshur County in Will Book 63, at Page 552. See Petition at Exhibit F (JA 77-81).



Executrix shall first offer my 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.

See Petition at Exhibit F, Art. III.3 (JA 77). Based on those terms of the Will, Petitioner in her fiduciary capacity was obligated to offer the property to Ms. Martin's children prior to nine months after her death. She never made such an offer. Moreover, Petitioner admitted and it is undisputed that "[a]t the time of Shirley's death, her home was located on one parcel of land," which is identified as Parcel 28. See Petition at ¶ 30 and 50 (JA 6 and 10). Petitioner also admitted that, outside her residence, "[a]dditionally, there were five contiguous parcels that were purchased over the years and all of the parcels . . .<sup>3</sup> were maintained as separate parcels of land for tax purposes," identified as Parcels 28.4, 28.5, 28.6, and two parcels assessed for tax purposes as 29.1. Id. Contrary to the terms of the Will, Petitioner brought suit in her fiduciary capacity asking the Court to make a determination whether "my residence property" could also include the additional, five other parcels not where the home is situate. Id. at ¶ 51 (JA 10).

### **3. The Carl J. Martin Trust.**

By Deed dated June 30, 2004, Shirley Martin as Executrix for the Last Will and Testament of Carl J. Martin conveyed a number of properties to the Carl Martin Trust, including a property located on Route 20 on the northside of Buckhannon, West Virginia, identified as Parcel 1 (the "Route 20 Property").<sup>4</sup>

In 2012, among other properties, Shirley A. Martin as Trustee of the Carl J. Martin Trust conveyed a one-half (1/2) interest in the Route 20 Property to Petitioner and Respondent. See recorded Deed dated August 30, 2012 (JA 273-76). Then, in 2013, Shirley A. Martin conveyed

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<sup>3</sup> Petitioner includes here a reference of "save the parcel located at Deed Book 376 Page 610" which has been omitted because there is no such deed at Deed Book 376, at Page 610.

<sup>4</sup> The deed is of record in said Clerk's Office in Deed Book 455, at Page 1 (JA264-271).



the other one-half (1/2) interest in the Route 20 Property to Respondent and Petitioner's sole member limited liability company, Chaumont Properties, LLC. See recorded Deed dated March 1, 2013 (JA278-281). Petitioner then conveyed her one-half interest in the same properties to her limited liability company. See recorded Quitclaim Deed dated March 1, 2013 (JA283-285). Thereafter, by recorded Deed of Trust (JA 165-174) and related unrecorded Promissory Note (JA 175-76), the Carl Martin Trust by its Trustee, Shirley Martin, perfected a lien against the properties in the sum of \$920,000 owed by Chaumont Properties.

Petitioner's sole member of a limited liability company has owed \$920,000 to the Carl Martin Trust since 2013. On approximately October 3, 2016, Shirley Martin resigned as Trustee and Petitioner was appointed Trustee See Petition at ¶ 16-17 (JA 4). As the Trustee of the Carl Martin Trust, Petitioner had a fiduciary obligation to ensure the integrity of the Carl Martin Trust and the amounts owed to it. In addition, the Trustee of the Carl Martin Trust has an obligation to defend its title and claims to property conveyed from it seven years ago, including considering bringing a claim against anyone creating a cloud on its title and recovery of available damages.

Petitioner, though, in her fiduciary capacity as Trustee of the Carl Martin Trust and Trustee of the Shirley Martin Trust, filed the underlying litigation asserting that, "[b]ased on the facts and the 2016 Amendment [to the Shirley Martin Trust], it appears that Shirley [Martin] intended to exonerate the indebtedness [owed to the Carl J. Martin Trust from 2013] on the Route 20 Property." See Petition at ¶ 60 (JA 11). Moreover, Petitioner then recorded in 2021 a deed dated 2000 that purported to transfer the same Route 20 Property previously conveyed by the Carl Martin Trust and securing a debt owed by Petitioner to the Carl Martin Trust in the amount of \$920,000, creating a cloud on the interests of the Carl Martin Trust. See recorded Deed dated July 31, 2000 (JA 293-297).

### **III. SUMMARY OF THE ARGUMENT**

The Circuit Court did not abuse its discretion in granting injunctive relief. In her trusted positions, Petitioner had fiduciary duties, including not to exercise her duties for her own benefit and a duty to effectuate the terms of the Will and Trusts as the testator and settlor set forth. Based on Petitioner's actions that were adverse to the the terms and her fiduciary duties owed to the Estate, Trusts, and beneficiaries, the Circuit Court found that she had violated her fiduciary duties. Accordingly, the Circuit Court granted relief and removed Petitioner from those fiduciary roles, appointing a third-party to assume the sacred, fiduciary duties in administration of the Estate and Trusts. This Court should affirm the Circuit Court.

### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

In accordance with Rule of Appellate Procedure 18 (a), oral argument is not necessary because this appeal is frivolous. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there is no prejudicial error.

### **V. STANDARD OF REVIEW**

"In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W.Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 2, *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 844 S.E.2d 133, 135 (2020)(citation omitted).

## VI. ARGUMENT

Petitioner lists sixteen (16) assignments of error, but some are merely statements of law, others are duplicative or overlapping, and some assert errors that are not argued at all. None of the assignments of error, however, reflect any abuse of discretion by the Circuit Court in removing Petitioner from her fiduciary roles and the factual findings of the Circuit Court in support thereof are not clearly erroneous. Moreover, the Circuit Court appropriately applied the controlling law. For the following reasons, Petitioner is wrong on each assignment of error and this Court should affirm the Circuit Court's decision removing Petitioner from her fiduciary roles and appointing an independent fiduciary to properly administer the Estate and Trusts.

### A. **Petitioner's Assignments of Error**

#### 1. and 2. Petitioner Only Cites Standards for Removal of Fiduciary.

Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure provides:

**Argument:** The brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

(Emphasis added.) "A skeletal 'argument', really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs." State Dep't of Health and Human v. Robert Morris N., 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995).

The headers for Petitioner's first two assignments of error are combined and both contend that the Circuit Court erred in removing her from her fiduciary duties. However, no argument at all is presented. Petitioner also does not citation to any part of the record or to facts. Petitioner

sets forth only a collection of caselaw for establishing removal of a fiduciary. Most tellingly, Petitioner does not dispute that the findings and conclusions of the Circuit Court did satisfy those standards for removing her from her fiduciary roles. Accordingly, except as Petitioner has preserved arguments in other assignments of error, Petitioner's failure to adequately present any argument means that Petitioner has waived any such argument that the Circuit Court somehow erred and did not meet the standards for removing her set forth in Assignment of Error Nos. 1 and 2. As such, this Court may disregard Petitioner's first two assignments of error. To the extent Petitioner in her other assignments of error does present arguments and citations in support of claims that her removal was erroneous, those arguments are addressed below.

**3., 5., and 11. Circuit Court Properly Found Irreparable Harm, Public Interest, and Likelihood of Success on the Merits in Granting Preliminary Injunction.**

A circuit court has the discretion to grant a request for preliminary injunctive relief. Camden-Clark Memorial Hospital v. Turner, 212 W. Va. 752, 575 S.E.2d 362 (2002). In considering a motion for preliminary injunction, a circuit court must balance: "(1) the likelihood of irreparable harm to the [moving party] without the injunction; (2) the likelihood of harm to the [non-moving party] with the injunction; (3) the [moving party's] likelihood of success on the merits; and (4) the public interest." Id. at 756, 575 S.E.2d at 366 (internal citations omitted). Petitioner argues that the circuit court erred in determining that Respondent satisfied the burden to show irreparable harm (Assignment of Error No. 3), public interest (Assignment of Error No. 5), and likelihood of success on the merits (Assignment of Error No. 11). Petitioner does not allege any error in the Circuit Court's determination that Petitioner is not harmed by her removal from her fiduciary positions and therefore has waived any claim of error on that element.

The Circuit Court did not abuse its discretion finding irreparable harm, likelihood of success on the merits, and that an injunction was in the public interest when granting the

injunctive relief and removing Petitioner from the fiduciary roles. First, it is a clear legal right that the beneficiaries are entitled to have the Estate and the Trusts administered with the utmost care and fidelity to the commensurate fiduciary duties as well as in their unbiased interest. “Upon acceptance of a trusteeship, the trustee shall administer the trust and invest the trust assets in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the West Virginia Uniform Trust Code].” W. Va. Code § 44D-8-801. A similar duty applies to an executor of a decedent’s estate. See Latimer v. Mechling, 171 W. Va. 729, 732, 301 S.E.2d 819, 822 (1983) (holding that “[t]he personal representative of the estate of a deceased acts in a fiduciary capacity.”). “Nor must the trustee place himself in a position where his self-interest is antagonistic to the interests of the trust.” Smith, 212 W. Va. at 821, 575 S.E.2d at 431 (quoting Board of Trustees, Etc. v. Mankin Inv. Co., 118 W.Va. 134, 142, 189 S.E. 96, 99 (1936)).

However, as the Circuit Court found, Petitioner had engaged in self-dealing in relation to the Estate and Trust by (1) using her fiduciary positions to cancel or avoid terms she was to effectuate; (2) creating a cloud on the title of trust property, and (3) attempting to write-out provisions. See Order Following Hearing on December 23, 2020 (“Order”) at ¶56-60 (JA 541-42). Those actions were contrary to the testator’s intent and contrary to the law of testamentary freedom. “An executor is a quasi-court officer and has the sacred duty of standing in the place of the deceased and administering his or her estate as directed.” 31 Am. Jur. 2d Executors and Administrators § 343 (Oct. 2020 Update). “A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust. Any attempt to take action contrary to the settlor’s directions may be deemed to constitute a unilateral and invalid deviation from the trust terms even though the trustee is otherwise given broad discretion in administering the trust. This duty of obedience forms a critical aspect of the trustee’s role.”

General duties—Duty to exercise ordinary skill and diligence, Bogert, et al., Bogert's The Law of Trusts and Trustees § 541 (June 2020 Update). Moreover, Petitioner continued to prosecute the underlying litigation that she filed in her fiduciary capacities for her interests as a beneficiary.

As long as Petitioner continued to violate the sacred duties owed as a fiduciary, Respondents would continue to be irreparably harmed, as money damages would not be sufficient to remedy those violations. In addition, as argued separately in a different assignment of error, there is no adequate remedy at law. See Art. VI, Section 6, below. Accordingly, the Circuit Court did not abuse its discretion in finding irreparable harm to the moving party existed.

Finally, the Circuit Court did not abuse its discretion in determining that the public interest was best served by granting injunctive relief. “An executor is a quasi-court officer and has the sacred duty of standing in the place of the deceased and administering his or her estate as directed.” 31 Am. Jur. 2d Executors and Administrators § 343 (Oct. 2020 Update). As part of that sacred duty, “[t]he representative is charged with collecting, preserving, and protecting the assets until distribution, subject to the continuing control of the court, to see that the proceeding is properly carried out in the interests of the public, as well as those whose interests are directly affected.” Id. The Circuit Court found that the public interest would be best served by granting injunctive relief because then there would be an independent, third party appointed in the fiduciary roles to actually follow and effectuate the terms as set forth, and it would put an end to Petitioner’s self-dealing and breach of fiduciary duties. See Order at ¶ 69-72 (JA 542-43).

Petitioner is appealing the factual basis in other assignments of error, but she cannot argue that the Circuit Court failed to weigh the public interest in its decision. Moreover, in her argument, Petitioner does not dispute or raise as an alleged error of the Circuit Court that her removal in response to her actions in seeking to avoid, remove, modify, or strike terms would be



in the public interest because it supports the “common law testamentary freedom of a person’s ability to dispose of property in the manner he or she chooses.” Id. at ¶ 73 (JA 543).

Petitioner does raise for the first time the specter that “[b]y 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 duties against a fiduciary for administering, and involving the courts to help interpret, trusts and estates in ways they do not agree with.” See Petitioner’s Brief in Support of Petition for Appeal (“Petitioner’s Brief”) at 19-20. Importantly, the law controls the fiduciary duties imposed on someone administering a trust or estate and the law does not agree to allow a fiduciary to administer a trust or estate in violation of the directives of a testator or settlor, providing that such actions are grounds for removal. See Restatement (Third) of Trusts § 76 cmt. (2007) (providing that “The trustee’s duty to administer the trust as stated in this Section is an affirmative duty. Thus, a trustee may commit a breach of trust by improperly failing to act, as well by improperly exercising the powers of the trusteeship.”); see also Welsh v. Welsh, 136 W. Va. 914, 928, 69 S.E.2d 34, 41 (1952) (recognizing that “in the event [an] [executor] fails or refuses to undertake this duty or otherwise neglects his duties, or fails to resign as such executor, he should be removed and another person appointed in his stead.”); and W. Va. Code § 44D-7-706. “A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust. Any attempt to take action contrary to the settlor’s directions may be deemed to constitute a unilateral and invalid deviation from the trust terms even though the trustee is otherwise given broad discretion in administering the trust. This duty of obedience forms a critical aspect of the trustee’s role.” General duties—Duty to exercise ordinary skill and diligence, Bogert, et al., Bogert’s The Law of Trusts and Trustees § 541 (June 2020 Update).



The law expressly provides for removal of a fiduciary when she will not carry out the express terms of a will or trust, as Petitioner did in the underling litigation. Moreover, the Circuit Court did not find that a co-beneficiary who does not agree with an administration can have complete control, which is contrary to the facts in this case and the applied law. In fact, the Circuit Court removed Petitioner only after Petitioner's breach of her fiduciary duties and did not give any control of administration over to any of the co-beneficiaries but rather appointed an independent, third party to serve as fiduciary.

For all the foregoing reasons and the reasons addressed in the other assignments of error that are overlapping, the Circuit Court did not abuse its discretion in finding the likelihood of irreparable harm to the moving party, the public interest was served by granting the injunction, and there was a likelihood of success on the merits when granting the request for injunctive relief and removing Petitioner from the fiduciary roles.

#### **4. The Circuit Court Properly Relied on Petitioner's Pleading.**

Petitioner's Assignment of Error No. 4 is that the Circuit Court erred in relying predominantly upon her own initial pleading. Petitioner does not deny that her Petition is an admission and admissible evidence. Moreover, Petitioner herself has never denied the existence of the pleading or that she made the pleading in her fiduciary capacities, not in her personal capacity. No evidence is necessary to prove that a pleading exists in a case. There is no requirement—and Petitioner cites to none—that an affidavit is required to attest that a pleading was filed in a case by the party filing the pleading or that the pleading says what it says to be reviewed and relied on by a court in a pending proceeding. Accordingly, there is no basis for finding error in the Circuit Court relied on Petitioner's pleading.

Instead, Petitioner seeks a way to avoid her own pleading admissions. To that end, Petitioner tries to dismiss her own pleading as something that cannot be relied on. See

Petitioner's Brief at 14 (citing Markwest Liberty Midstream & Resources v. Nutt, 2018 WL 527209 (2018)). However, in Markwest, the trust disavowed the statements in its own pleading. First, the trust plead that irreparable harm was present in its request for a preliminary injunction. Id. at \*4. At the hearing on the trust's motion for preliminary injunction, the trust relied on its pleading and submitted no other evidence. Id. at \*2. The other party presented witness testimony to controvert the claims in the pleading. Id. "[Thereafter], at the hearing, the Trust conceded on the record that it was unable to demonstrate the reasonable likelihood of the presence of irreparable harm. . . . At that point, the Trust abdicated any effort to meet the criteria for issuance of a preliminary injunction." Id. Accordingly, it was held that "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." Id. at 4.

In this matter, Markwest is not analogous because the fact of Petitioner's pleading and the language used therein have never been controverted. Petitioner has never denied her own admissions and there is no dispute as to those facts. Petitioner cites to no law to support her attempt in this assignment of error to avoid her admissions in her Petition or limiting a court's ability to review a party's pleading. Accordingly, Petitioner's Assignment of Error No. 4 fails.

**6. Circuit Court Properly Found No Adequate Remedy at Law.**

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

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: "There is a remedy of law for this, Your Honor, on the back end of this: When the state is settled, if [either Respondent] is unsatisfied with the way the executor or trustee conducted herself, [inaudible] move to have the executor surcharged." See Transcript of Hearing on December 23, 2020 ("Hearing Transcript") at 15:20-16:1 (JA 501-02). It was not until Petitioner's Rule 59(e) Motion to Alter or Amend the Judgment that Petitioner argued that respondents had adequate remedies at law that precluded any equitable relief. See JA 566 and 636. Nevertheless, Petitioner has never addressed how the remedies she identified are adequate, which is because they are not.

For example, in Wright, the complaint sought an injunction to require the continued performance of actions required under a contract. Specifically, the continued performance was the operation of wells and the contract was found to require continued operation of the wells and the case was remanded. Id. at 513-514, 44 S.E.2d at 586-87. The question arose whether the equitable relief of an injunction to command that continued operation was available because an adequate remedy at law existed: that is, a suit could be brought later to obtain a money judgment for damages. Id. at 514, 44 S.E.2d at 587. Petitioner in this case makes the same argument, Brief 22-23, which this Court rejected in Wright.

Petitioner tries to distinguish Wright by claiming the remedies at law were less efficient than in this case. First, the same process (with the same inefficiencies) would have to occur here as in Wright: "...if it [or Respondents] had resorted to the law side of court, could have obtained a money judgment . . .; 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." Id. Petitioner argues that Respondents should have had to seek legal relief at the end of the contract, i.e., termination of the Estate and Trusts. See Petitioner's Brief at 22-23.

Petitioner would have Respondents sit through her underlying litigation and wait till each termination, then file separate suits to seek damages, and recovery of attorneys fees and costs. Id. As held in Wright, the legal remedy Petitioner argues Respondents should be forced to endure is not as efficient as injunctive relief for the already incurred and continuing violation of fiduciary duties. Second, Petitioner's actions were as immediate as the "cut off" in Wright, because as soon as she used her fiduciary positions against or in opposition to her fiduciary duties, the duties owed to Respondents were at that moment violated and the sacred trust broken.

"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 of law afford a test as to the right to relief in equity." Id. at Syl. Pt. 2, in part. The Wright decision identifies just such a case where a legal remedy is available but inadequate, and injunctive relief is appropriate: "It must also appear that it is as practical and efficient to secure the ends of justice and its prompt administration as the remedy in equity." Id. The Circuit Court did not abuse its discretion in issuing the preliminary injunction below and removing Petitioner from her fiduciary roles because requiring Respondents (or any beneficiary) to endure such actions until the termination of the Estate and Trusts and requiring them to institute multiple actions "would not be as efficient." Id. at 514, 44 S.E.2d at 587.

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. On the contrary, equitable relief as was granted in this matter is necessary to prohibit continuing and future breach of trust by a fiduciary. This equitable relief is provided for in the law because any legal remedy that is available would be neither practical nor efficient to secure the ends of justice and its prompt administration in this case. Accordingly, the Circuit Court did not abuse its discretion in finding

that any legal remedy would be inadequate as it would necessarily delay respondent beneficiaries from being treated appropriately and in accord with the proper fiduciary duties owed to them.

**7. Circuit Court Did Not Consolidate Preliminary and Permanent Injunction.**

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 the trial on the merits. Accordingly, Petitioner's Assignment of Error No. 7 must fail.

**8. and 12. Petitioner Cannot Use Fiduciary Powers to Obtain Her Person Benefit.**

Petitioner argues that the Circuit Court erred in finding that her act of filing the underlying litigation was not merely a straightforward declaratory judgment action (Assignment of Error No. 8) and that it was not an act of self-dealing warranting removal from the fiduciary positions (Assignment of Error No. 12). However, the Circuit Court properly identified that Petitioner was not merely seeking a construction determination under the Declaratory Judgement Act concerning trusts and estate 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: "Sheree D. Martin, Executor of the Estate of Shirley A. Martin, Trustee of the Shirley A. Martin Trust, and Trustee of the Carl J. Martin, Sr. Trust." See JA 1. 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.

For instance, in the Shirley A. Martin Trust at Art. VI.1.(h), it commands:

The Trustee shall arrange for Carl J. Martin II and Sherree D. Martin to draw lots [for certain property and thereafter] the Trustee shall convey said property to each by general warranty deed which shall retain the provision that for and during the lifetime of Sherree D. Martin and Carl J. Martin" a right of first refusal at appraised market value, but Petitioner in a fiduciary capacity asks this Court to "make a determination that the properties . . . be divided in accordance to their appraised fair market value as finally determined for estate tax purposes or by some other more equitable means and that the provisions requiring that Sherree [Petitioner] and Carl [Respondent] provide each other with a right of first refusal on the properties be stricken.

See Petition at 67 (JA 12). A declaratory judgment action could have asked the Circuit Court to construe those terms. However, contrary to Petitioner's argument, Petitioner did not merely seek unbiased guidance on construction or administration. Instead, as set forth in her Petition, Petitioner sought to remove and replace terms more favorable to herself because she wanted a more equitable distribution to herself. Petitioner admits this: "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." Petitioner's Brief at 28. Petitioner's fiduciary duty required her to effectuate the terms of the Trust, not impose her personal belief as to what was more equitable to her than what the Trust directed.

It was such self-interested acts that the Circuit Court appropriately found to be self-dealing. Again, for example, Petitioner expressly plead that it appeared Shirley Martin, who died in 2019, intended to "exonerate" in 2016 the \$920,000 debt Petitioner owed to the Carl Martin Trust since 2013. The Circuit Court properly found that Petitioner owed a fiduciary duty to protect the Carl J. Martin Trust and to act in the best interest of the beneficiaries. See Order at ¶



41 (JA 539). “However, Petitioner in her fiduciary position filed litigation pleading that, ‘[b]ased on the facts and the 2016 Amendment [of the Shirley A. Martin Trust], it appears that Shirley intended to exonerate the indebtedness on the Route 20 Property [owed to the Carl Martin Trust beginning in 2013].’ See Petition at ¶ 60.” Id. at ¶ 42 (JA539-40). As the Circuit Court found, there is no legal basis to claim that the Shirley Martin Trust as amended in 2016 could modify the Carl Martin Trust’s interests in a recorded Deed of Trust and a Promissory Note from 2013. See Deed of Trust (JA 165-74); Promissory Note (JA 175-76); and Order at ¶ 44 (JA 540). Petitioner provides no legal basis for this claim and continues to ignore this per se self-dealing as her sole member limited liability company owes the \$920,000 debt to the Carl Martin Trust that she as believes should be exonerated.

The Circuit Court did not abuse its discretion finding that, contrary to Petitioner’s mischaracterization, the Petition was not a simple declaratory judgment request but rather expressly set forth Petitioner’s self-dealing using her fiduciary positions to seek remedies for herself as a beneficiary.

**9. and 10. Circuit Court Properly Found Petitioner Breached Her Fiduciary Duties, as Her Actions in Her Fiduciary Capacities Sought Her Personal Gain.**

Petitioner’s Assignment of Error No. 9 contends that the Circuit Court erred in determining that she breached her fiduciary duties. She also claims error in Assignment of Error No. 10 that she used her positions of trust to her own benefit. Importantly, though, Petitioner acknowledges that she filed the Petition in her fiduciary capacities to “absolve” her of certain provisions that she felt were unequitable. See Petitioner’s Brief at 28. Petitioner also argues for the first time on appeal that she also filed the Petition to “absolve” her of following the terms she was responsible for effectuating because “she did not feel like she could execute them without causing problems for the trust and amongst the beneficiaries.” Id. Petitioner’s pleading,



however, only asserts her personal believe in the inequity of the terms, and makes no mention, description, or explanation of how she could not execute the terms or what problems she now claims she would have caused. Paradoxically, Petitioner's entire Petition and appeal is an attempt to overcome the other parties' desire that the terms and testator's desires actually be effectuated, and trying to effectuate her own self-created, substitute terms.

In her argument, Petitioner also attempts to claim error by identifying a number of arguments presented in Respondent Carl J. Martin, II's Motion for Preliminary Injunction, see Petitioner's Brief at 29 (citing JA 243-244). However, in claiming such error, Petitioner does not cite to the Circuit Court's decision, because the Circuit Court did not rely on those arguments in underlying briefing in its determination. See generally Order at (JA 530-45). Accordingly, those arguments by Petitioner cannot form the basis of an error in the Order.<sup>5</sup>

Petitioner did not like the testator's terms, because she felt that those terms "were not equitable" to her as a beneficiary. Id. at 28; and Petition at ¶65 (JA 12). However, the common law of testamentary freedom has been long established: "When a testator has the legal capacity to make a will, he has the legal right to make an unequal, unjust, or unreasonable will. *Voluntas stat pro ratione.*" Syl. Pt. 5, Couch v. Eastham, 29 W. Va. 784, 3 S.E. 23 (1887). 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 duty to the beneficiaries: "A fiduciary does have the duty to administer the trust or estate solely in the interest of the beneficiary." See Petitioner's Brief at 28-29 (citing Smith v. First Cmty. Bancshares, Inc., 212 W. Va. 809, 821, 575 S.E.2d 419, 431 (2002)). In this way, Petitioner

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<sup>5</sup> Petitioner is also incorrect that no evidence was submitted to the Court that substantiates the claims. For instance, Petitioner argues that "In Respondent's pleadings he alleges that Petitioner attempted to sell Estate property which exceeded her authority; . . ." See Petitioner's Brief at 29. Petitioner herself admitted in her Reply to Counterclaim of Carl J. Martin, II to that allegation that she did attempt to sell Estate property and then had to withdraw the property from market. See Petitioner's Reply at ¶¶ 21-22 (JA 222).

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." See Petitioner's Brief at 30.

However, as the Circuit Court noted, the law is clear that 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." See Order at C.22 (citing Smith, 212 W. Va. at 821, 575 S.E.2d at 431 (quoting Syl. Pt. 1, Robinson v. Hall, 116 W.Va. 433, 181 S.E. 542 (1935) and Lapinsky's Estate v. Sparacino, 148 W. Va. 38, 45, 132 S.E.2d 765, 769 (1963))) (JA 537). A fiduciary "is bound not to exercise for his own benefit and to the prejudice of the party, to whom he stands in such relation, any of the powers or rights, or any knowledge or advantage of any description, which he derives from such confidential relation." Syl. Pt. 1, Newcomb v. Brooks, 16 W. Va. 32, 32 (1879). Petitioner cannot avoid her fiduciary duties to the Estate and Trusts and cannot use those positions to her own advantage as a beneficiary, which is precisely what she is doing when she wants to impose her own more equitable terms over the directives of the testator. "A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust. Any attempt to take action contrary to the settlor's directions may be deemed to constitute a unilateral and invalid deviation from the trust terms even though the trustee is otherwise given broad discretion in administering the trust. This duty of obedience forms a critical aspect of the trustee's role." General duties—Duty to exercise ordinary skill and diligence, Bogert, et al., Bogert's The Law of Trusts and Trustees § 541 (June 2020 Update).

Petitioner admits that she filed the Petition in her fiduciary capacities, seeking to unilaterally deviate from the terms of the Will and Trusts, because she in her personal capacity as a beneficiary felt that the terms were unequitable. Accordingly, Petitioner's Assignment of Error No. 10 that she did not use her position of trust for her own benefit must fail based on her own admission in her Assignment of Error No. 9 that she was seeking remedies in the Petition for her own better treatment under the terms. Moreover, as a matter of law, Petitioner using her fiduciary roles to advance her own better treatment as a beneficiary was a breach of Petitioner's fiduciary duties. See Smith, supra; and Bogert's, supra. Accordingly, the Circuit Court did not abuse its discretion in determining that Petitioner used her fiduciary positions to try to modify the Will and Trusts to her personal benefit and, in doing so, violated her fiduciary duties.

**13., 14., and 16. Circuit Court Properly Found No Ambiguity in Will.**

Petitioners' Assignment of Error Nos. 13 and 14 argue that the Circuit Court incorrectly found that the Will was unambiguous and instead should have found ambiguity and admitted evidence to interpret the terms of the Will.<sup>6</sup> However, based on the fact that there was no ambiguity and Petitioner used her fiduciary position to try to create ambiguity where none existed, the Circuit Court properly found the Petitioner violated her fiduciary duties, which is alleged to be another error of the Circuit Court by Petitioner in her Assignment of Error No. 16.

The language of Shirley Martin's Will was clear that Petitioner was appointed to the fiduciary position of Executrix. Moreover, the Will clearly directed the executrix to sell "my residence property" along with the right of way access "as soon after my death is practical." There was no dispute that Shirley A. Martin's residence was located on one parcel of land: "At

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<sup>6</sup> The title to Petitioner's Assignment of Error No. 14 states: "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." However, Petitioner presented no argument in Assignment of Error No. 14 on a cloud of title issues and the Circuit Court made no such finding in relation to the unambiguous language in the Shirley Martin Will.

the time of Shirley's death, her home was located on one parcel of land," which is identified as Parcel 28. See Petition at ¶ 30 and 50 (JA 6-7 and 10), and Exhibit G – The Estate of Shirley A. Martin Plat of Retracement Survey dated December 3, 2019 (the "Plat") (JA 83).

But Petitioner tried to imply that additional, separately held and treated properties should be considered to be added to "my residence property": "Additionally, there were five contiguous parcels that were purchased over the years and all of the parcels . . .<sup>7</sup> were maintained as separate parcels of land for tax purposed." See Petition at ¶ 50 (emphasis added). Accordingly, even based on Petitioner's own admission that those other properties are in addition to the residence, the Circuit Court properly found that there was no ambiguity in the Will.<sup>8</sup> For that reason, the Circuit Court did not abuse its discretion finding that Petitioner seeking to insert an ambiguity where none existed was a violation of her fiduciary duties.

Accordingly, the Circuit Court did not abuse its discretion in finding no ambiguity as to what is meant by "my residence property" in Shirley A. Martin's Will and bringing such action is unfounded, is merely a pretext for Petitioner's self-interested benefit, and is a waste of Estate resources. As such, the Circuit Court properly found that Petitioner had breached her fiduciary

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<sup>7</sup> See footnote 3, *supra*.

<sup>8</sup> Moreover, the only information presented confirmed the lack of any ambiguity in "my residence property." There was only one property assessed as her residence and given the Homestead Exemption for tax purposes, namely Parcel 28. See 2019 Tax Ticket for Residence Property (JA 252). See also W. Va. Code § 11-6B-2(4) (defining "Homestead" under the Homestead Property Exemption Article as "a single family residential house, including a mobile or manufactured or modular home, and the land surrounding such structure, . . .") (emphasis added). As shown in the Plat prepared for Petitioner, Parcel Nos. 29.1 and 28.6 were part of a separate development plat, identifying Lots 2, 3, 4, and 5, and providing their own road access and waterlines. See JA 83. Shirley A. Martin, during her lifetime, established her residence property, and Petitioner agreed, that it only encompassed the property on which her residence sits. As identified on the Plat that was attached to the Petition, Petitioner identifies a "20 FEET RIGHT OF WAY" leaving the "OLD ELKINS ROAD – WV RT. 151" to the residence of Shirley A. Martin in the middle of the Plat which is Parcel 28 and not to the other "additional" or "other" properties Petitioner references in the Petition. The Plat also indicates that the burdened parcel was conveyed by conveyance in Deed Book 517, at Page 271. In that deed, Shirley A. Martin conveyed a one-half interest in the underlying property and retained the identified right of way "to her residence property . . ." See recorded Deed from Shirley A. Martin to Carl J. Martin II and Chaumont Properties LLC dated February 1, 2013, at 3 (emphasis added) (JA 254-257). Moreover, Petitioner herself acknowledged and similarly described the right of way as going "to the adjacent residence property of Shirley A. Martin" in a quitclaim deed she executed dated March 5, 2013. See recorded Quitclaim Deed from Sherree D. Martin to Carl J. Martin II dated March 5, 2013 at 3 (JA 259-262).

duties in refusing to follow the terms of the Will and wasting Estate resources on unnecessary litigation.

**15. The Circuit Court Properly Found As a Matter of Law Recording of Deed Create Cloud on Title.**

The elements establishing a cloud on title are well established in West Virginia:

It is well established that “[t]he attributes generally recognized as necessary to create a cloud are that the claim must be (1) apparently valid, and (2) capable of embarrassing title. The first element includes a situation where the instrument or claim of [one accused of creating a cloud] appears to be valid on its face, but for some reason or matter that can only be shown by extrinsic evidence is in fact void. The foregoing elements constitute the requisites of a cloud in this jurisdiction, with the exception that it need not be necessarily valid on its face.

Gardner v. Buckeye Sav. & Loan Co., 108 W. Va. 673, 677-78, 152 S.E. 530, 532 (1930) (citation omitted). There is no dispute in this matter of the fact that Petitioner recorded in 2020 a Deed dated July 31, 2000, which purports to affect title to the same property conveyed by the Carl J. Martin Trust to Petitioner and her sole member limited liability company, which was secured by a promissory note and Deed of Trust in favor of the Carl J. Martin Trust in the amount of \$920,000. The Circuit Court can take judicial notice of all matters of public record and Petitioner did not dispute the truth of those facts. As a matter of law, the Circuit Court did not abuse its discretion in finding this is a cloud on title.

Petitioner argues that she “was compelled to record a previously unrecorded deed if said deed purported to convey interest to Shirley Martin individually.” See Petitioner’s Brief at 37. However, Petitioner provides no legal support for any such requirement. Instead, Petitioner admits that she knew full well that Shirley Martin had conveyed the Route 20 Property to the Carl J. Martin Trust after the date on the discovered, unrecorded deed. Petitioner also knew that the Carl Martin Trust, by Shirley Martin as Trustee at the time, conveyed the same Route 20



Property to Petitioner and Respondent. Thereafter, Petitioner's sole member limited liability company acquired the entirety of the Route 20 Property, secured in the favor of the Carl Martin Trust by a recorded Deed of Trust and Promissory Note in the amount of \$920,000. Despite knowing those facts, Petitioner recorded the deed, which created a cloud on the title of the Carl Martin Trust.

Based on these undisputed facts and her attempt to exonerate the debt she owed related to those transactions, the Circuit Court did not abuse its discretion in finding that Petitioner breached her fiduciary duties to the Carl Martin Trust. The Circuit Court then properly applied the controlling law and granted injunctive relief to remove Petitioner from her fiduciary role for breach of her fiduciary duties. Accordingly, Petitioner's allegation of error fails.

## **VII. CONCLUSION**

For all of the foregoing reasons, this Court should affirm the judgment of the Circuit Court in all respects.

Respectfully submitted this 10<sup>th</sup> day of February 2022.



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of February 2022, I caused the foregoing "Brief of Respondents Carl J. Martin, II, Teresa A. Martin Pike, Jasmine Pike, Sophia Pike, Carl Robert Martin, Patrick Stephen Martin, and Carli Jo Martin" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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