IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0757

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.

William Am 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 in the Estate of Shirley A. Martin, the Shirley A. Martin Trust, and the Carl J. Martin Trust,

Respondents.

On Appeal from the Honorable David H. Wilmoth, Judge
Circuit Court of Upshur County
Civil Action No. 20-P-21

RESPONSE BRIEF OF SHERREE D. MARTIN, IN HER INDIVIDUAL CAPACITY

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STATEMENT OF THE CASE

This matter arises from a declaratory judgment action filed by Sherree D. Martin to obtain guidance from the Circuit Court of Upshur County, West Virginia with respect to her mother's Estate, her mother's inter vivos trust, and her father's testamentary trust. (*See* Martin JA - 000001-14.) Carl J. Martin, Sr. passed away a resident of Upshur County, West Virginia on August 9, 1996. (*See* Martin JA - 000004.) Mr. Martin was survived by his spouse, Shirley A. Martin, and his children, William A. Martin, Sherree D. Martin, Carl J. Martin, II, and Teresa A. Martin Pike. (*See* id.) Under the terms of the Last Will and Testament of Carl J. Martin, Sr., Mr. Martin established the Carl J. Martin Marital Trust for the benefit of his surviving spouse, Shirley A. Martin. (*See* id.) Mr. Martin's Will provides that the assets of the Carl J. Martin Marital Trust are to be divided into equal shares for Sherree D. Martin, Teresa A. Martin Pike, and Carl J. Martin, II upon the death of Shirley A. Martin[1]. (*See* id.) Sherree D. Martin was serving as Trustee of the Carl J. Martin Marital Trust at the time of her mother's death. (*See* Martin JA - 000002, 000004.)

Shirley A. Martin passed away a resident of Upshur County on August 11, 2019. (*See* Martin JA - 000006.) Mrs. Martin was survived by her children, William A. Martin, Sherree D. Martin, Carl J. Martin, II, and Teresa A. Martin Pike. (*See* Martin JA - 000002.) Mrs. Martin named her daughter, Sherree D. Martin, as Executrix of her Estate in Article IV of her Last Will and Testament. (*See* id.) In Article III, Paragraph 3 of her Will, Mrs. Martin directed that her "residence property" be sold by her Executrix. (*See* Martin JA - 000006.) Article III, Paragraph 4 directs that the residuary of Mrs. Martin's Estate be distributed to the Shirley A. Martin Living Trust which Mrs. Martin established on November 24, 1997. (*See* Martin JA - 000007.) Shirley

[1] William A. Martin, a son of Carl J. Martin, Sr. and Shirley A. Martin, disclaimed any interest he had in the Estate of Carl J. Martin, Sr. and in the Carl J. Martin Trust.

A. Martin amended the Shirley A. Martin Living Trust on August 20, 2003, May 5, 2005, May 6, 2010, and May 23, 2016. (*See* id.) The 2016 amendment to the Shirley A. Martin Living Trust restated the dispositive provisions of the Shirley A. Martin Living Trust in their entirety. (*See* Martin JA - 000008.)

On or about May 4, 2020, Sherree D. Martin, as Executrix of the Estate of Shirley A. Martin, as Trustee of the Shirley A. Martin Living Trust, and as Trustee of the Carl J. Martin Marital Trust, filed a declaratory judgment action seeking guidance from the Circuit Court of Upshur County, West Virginia on the following issues:

1. The meaning of "my residence property" under Article III, Paragraph 3 of the Last Will and Testament of Shirley A. Martin;
2. The meaning of Article IV, Paragraph 1(g) of the 2016 amendment to the Shirley A. Martin Living Trust regarding a specific devise of "all of the Grantor's property located on Route 20 on the northside of Buckhannon, West Virginia" to Sherree D. Martin; and
3. Guidance from the Court with respect to the language of Article IV, Paragraph 1(h) of the 2016 amendment to the Shirley A. Martin Living Trust directing that Carl J. Martin, II and Sherree D. Martin "draw lots for all of the rest of the Grantor's real property".

(*See* Martin JA - 000009-12.)

On June 29, 2020, Respondent Carl J. Martin, II ("Respondent Carl Martin") filed his Answer and Counterclaims of Respondent Carl J. Martin, II (the "Counterclaim"), alleging that Petitioner breached her fiduciary duty to the Estate of Shirley A. Martin (the "Estate") by filing the Petition. (*See* Martin JA - 000204-7.)

On November 9, 2020, Respondent Carl Martin moved the Circuit Court for injunctive relief to have Petitioner removed as Trustee of the Carl J. Martin Marital Trust, as Trustee of the

Shirley A. Martin Living Trust (collectively, the "Trusts"), and as Executrix of the Estate. (*See* Martin JA - 000249.) Respondent Carl Martin failed to provide any affidavits in support of his motion to remove Sherree D. Martin in her fiduciary capacities. (*See* id.)

The Circuit Court conducted a Hearing on December 23, 2020, in which Respondent Carl Martin proffered no evidence whatsoever and offered no witnesses in support of the requested injunction. (*See* Martin JA - 000487-529.) Yet, at the conclusion of the Hearing, the Circuit Court determined without such evidence or testimony, and based entirely on the pleadings, that Respondent Carl Martin had satisfied the burden necessary for injunctive relief. (*See* id.) On July 12, 2021, the Circuit Court entered its Order in which, without any evidence proffered, it removed Petitioner Sherree D. Martin from her fiduciary positions and concluded that she had breached her fiduciary duty. (*See* Martin JA - 000530-45.)

On July 20, 2021, Petitioner timely filed a Rule 59(e) Motion to Alter or Amend the Judgment, alleging the Circuit Court had made a clear error of law. (*See* Martin JA - 000547-71.) The Circuit Court held a Hearing on that Motion and denied it through an Order entered on August 27, 2021. (*See* Martin JA - 000605-13.)

On September 22, 2021, Sherree D. Martin, in her capacity as Executrix of the Estate and as Trustee of the Trusts, presented a timely and complete Notice of Appeal to this Court. Sherree D. Martin, in her fiduciary capacity, perfected her appeal on December 27, 2021, at which time she filed her "Brief in Support of Petition for Appeal".

SUMMARY OF THE ARGUMENT

Respondent Sherree D. Martin ("Respondent Sherree Martin"), in her individual capacity as a beneficiary and a named Respondent to this appeal, supports this appeal for the following reasons:

First, the Circuit Court erred in granting an injunction removing the Executrix and Trustee selected by Carl J. Martin and Shirley A. Martin without any proffered evidence in support of that Motion. Indeed, the Circuit Court failed to follow Markwest Liberty Midstream & Resources v. Nutt, 2018 W. Va. LEXIS 72 at *11 (2018) and require that evidence be tendered to support each of the legally-requisite elements for the imposition of injunctive relief.

Second, the Circuit Court's decision is contrary to the holding of Haines v. Kimble, 221 W. Va. 266, 654 S.E. 2d 588 (2007) in which the Supreme Court of Appeals of West Virginia held that it is improper to remove a fiduciary expressly named by a decedent without any "clear" evidence evincing "good cause" for removal, due largely to the strong preference for carrying out the intent of the Decedent in selecting a fiduciary.

Third, the Circuit Court erred in granting injunctive relief when other statutory and common law remedies exist for the Respondents' counterclaims. As this Court has repeatedly held, "[i]njunctive relief is inappropriate when there is an adequate remedy at law." Hechler v. Casey, 175 W. Va. 434, 441, 333 S.E. 2d 799, 805 (1985) (citations omitted). In the instant case, there is a statutorily-defined, adequate remedy at law for breach of fiduciary duty under W. Va. Code § 44D-10-1002 (2014), as well as a common law remedy to the same effect through David v. Davis Trust Co., 106 W. Va. 228, 242, 145 S.E.2d 588, 593 (1928).

Fourth, the Circuit Court erred by finding that removing Petitioner from her fiduciary positions served the public interest when, in fact, the opposite is true. For instance, the Circuit Court's ruling undermines public confidence that, as a testator, one's wishes for who will be his or her personal representative will be honored by the courts. Likewise, the Circuit Court's ruling also damages the public interest by chilling the use of declaratory judgment actions by executors and trustees who need the guidance of the courts to discern the meaning and intent of estate

planning documents as such fiduciaries will now think twice about bringing those types of actions for fear it could be turned around on them.

Finally, not only did the Circuit Court grant a motion for preliminary injunction without requiring that any evidence be proffered, but it also, *sua sponte*, converted that motion to a summary judgment motion and granted such motion without any evidence being placed on the record supporting it. Similarly, the Circuit Court improperly made multiple findings of fact without any evidence being introduced supporting those findings.

For these reasons, as set forth in greater detail below, the Supreme Court of Appeals of West Virginia should reverse, vacate, and remand for trial the Circuit Court's Order and the Rule 59(e) Order, which granted Respondent's request for injunctive relief and re-affirmed that decision, respectively, and award any other relief which this Court may deem just and appropriate.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Sherree Martin, in her individual capacity, respectfully requests oral argument as she believes it will aid the Court in deciding the issues on appeal.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing the granting of an injunction, this Court has held that it will apply a three-pronged standard of review in which the Court will "review the final order granting the. . . injunction and the ultimate disposition under an abuse of discretion standard, . . . the circuit court's underlying factual findings under a clearly erroneous standard, and . . . questions of law *de novo*." St Paul Fire & Marine Ins., Co. v. AmerisourceBergen Drug Corp., 2021 W.Va. LEXIS 626 at *14 (2021) (*quoting* Syl. Pt 1, State By & Through McGraw v. Imperial Mktg.,

192 W. Va. 428, 472 S.E. 2d 792 (1996)). In doing so, the Court is guided by its duty to ensure that principles of justice and fairness are upheld. As this Court has stated:

> It is our task to supervise the administration of justice in the circuit courts, and to that end, we must ensure that fair standards of procedure are maintained. Judicial supervision and responsibility "implies the duty of establishing and maintaining civilized standards of procedure and evidence." McNabb v. United States, 318 U.S. 332, 340 (1943). . . . [W]e must act to secure rights and fairness when we are persuaded a procedure followed in a trial court is wrong.

Dimon v. Mansy, 198 W. Va. 40, 46, 479 S.E.2d 339, 345 (1996).

With regard to the abuse of discretion prong of the inquiry, "[i]n general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the ... court makes a serious mistake in weighing them." Shafer v. Kings Tire Serv., Inc., 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) (citation omitted). Moreover, "a circuit court necessarily abuses its discretion if it bases it's ruling on an erroneous assessment of the evidence or an erroneous view of the law." Cox v. State, 194 W. Va. 210, 218 n. 3, 460 S.E.2d 25, 33 n. 3 (1995) (Cleckley, J., concurring). This Court has firmly asserted that "when [this court] find[s] that the lower court has abused its discretion, [this court] will not hesitate to right the wrong that has been committed." Rollyson v. Jordan, 205 W. Va. 368, 379, 518 S.E.2d 372, 383 (1999); *accord* Gribben v. Kirk, 195 W. Va. 488, 500, 466 S.E.2d 147, 159 (1995). Or stated in another fashion: "[This Court] grant[s] trial court judges wide latitude in conducting the business of their courts. However, this authority does not go unchecked, and a judge may not abuse the discretion granted him or her under our law." Lipscomb v. Tucker County Com'n., 206 W. Va. 627, 630, 527 S.E.2d 171, 174 (1999).

With regard to the findings of fact prong of the inquiry, this Court has ruled that

"appellate courts cannot presume to decide factual issues anew[,]" and, instead, must implement a clearly erroneous standard of review. Stantec Consulting Sen's. v. Thrasher Envtl. Inc., 2013 W.Va. LEXIS 1094 at *8 (W. Va. 2013) (*quoting* Tennant v. Marion Health Care Foundation, Inc., 194 W. Va. 97, 106, 459 S.E.2d 374, 383 (1995)). Findings of fact are clearly erroneous "although there is evidence to support the finding, [when] the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. Pt. 1, in part, In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996). As this Court has stated, the Court "will disturb only those factual findings that strike us wrong[.]" Stantec Consulting Sen's. v. Thrasher Envtl. Inc., 2013 W.Va. LEXIS 1094 at *9 (*quoting* Brown v. Gobble, 196 W. Va. 559, 563, 474 S.E. 2d. 489, 493 (1996).

II. THE CIRCUIT COURT ERRED IN GRANTING A MOTION FOR AN INJUNCTION WITHOUT REQUIRING THAT EVIDENCE BE TENDERED TO SUPPORT EACH OF THE NECESSARY ELEMENTS FOR THE IMPOSITION OF INJUNCTIVE RELIEF (ASSIGNMENT OF ERRORS NOS. 1 – 4).

This Court has repeatedly held that the failure to present evidence in support of a request for an injunction is fatal to a request for injunctive relief:

> Before this Court, the Trust makes no effort to apply the standard criteria for issuing a preliminary injunction, arguing instead, in summary fashion, that the facts involved are unique. We reject the cursory argument of the Trust. The Trust has wholly failed to meet its burden of demonstrating by a clear showing: (1) the likelihood of irreparable harm to the property; (2) the absence of other appropriate remedies at law in this breach of contract action seeking monetary damages; and (3) that balancing the potential harm to each and the public at large weighs in favor of the Trust. *See* Jefferson Cty. Bd. of Educ., 183 W. Va. at 24, 393 S.E.2d at 662, and State ex rel. McGraw, 196 W. Va. at 352 n.8, 472 S.E.2d at 798 n.8. Moreover, no evidence whatsoever was offered, considered, or weighed, in assessing the issuance of the preliminary injunction. This Court has previously announced that a cursory affidavit is insufficient to support the issuance of a preliminary injunction. *See* Jefferson Cty. Bd. of Educ., 183 W. Va. at 24, 393 S.E.2d at 662. Here, to the extent

> the verified complaint serves as an affidavit, it was controverted, and, as to allegations of irreparable harm, was disavowed by the Trust. Thus, it is an inadequate vehicle for the Trust to meet its burden of demonstrating the necessity of a preliminary injunction.

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

This sentiment was recently articulated by the United States District Court for the Southern District of West Virginia as follows:

> Regardless, the plaintiff's Motion must be denied because the plaintiff has failed to satisfy at least two of the requirements for a preliminary injunction. First, the plaintiff failed to present any evidence that he is likely to prevail on the merits of the case. Additionally, the plaintiff presented no evidence that he would be irreparably harmed if the injunction was not entered. . . . General fear of what someone might do is insufficient to satisfy the irreparable-harm prong—especially where that fear is based on an incident that occurred over three years in the past. *See, e.g.* Curtis v Ramsey No 2 12-7885, 2014 U S Dist LEXIS 119924 2014 WL 4296683 at *3..4 (S.D. W. Va. Aug. 28, 2014) ("A mere possibility of harm will not suffice to support the granting of a preliminary injunction.") (citing Winter, 555 U.S. at 21. (emphasis added).

Murray v. Rubenstein, 2016 U.S. Dist. LEXIS 167206 at *4 - *5 (S.D. W.Va. 2016); Consolidation Coal Co. v. Disabled Miners, 442 F.2d 1261 (4th Cir. 1971), cert. denied 404 U.S. 911, 92 S. Ct. 228, 30 L. Ed. 2d 184 (1971) (due process requires that a district court's findings to support a preliminary injunction must be based upon something more than a one-sided presentation of the evidence.)

Here, the Circuit Court granted a motion for an injunction based entirely on the pleadings and arguments of counsel. No sworn testimony was given. No affidavits were produced. No documentary evidence was entered into the record. Clearly, under the law cited above, without such evidence, a circuit court cannot issue an injunction. Yet the Circuit Court did so. Moreover, the Circuit Court acknowledged in its Order that it based its granting of the injunction

solely on the statements in the motion requesting the relief. Further, the Circuit Court conceded that no evidence was entered into the record supporting the granting of the injunction. Accordingly, under the law of this State, this Court should reverse the Circuit Court's Orders on this basis alone.

III. THE CIRCUIT COURT ERRED BY REMOVING THE FIDUCIARY EXPRESSLY SELECTED BY THE DECEDENT WITHOUT ANY "CLEAR" EVIDENCE EVINCING "GOOD CAUSE" FOR DOING SO (ASSIGNMENT OF ERROR NOS. 1-2).

By removing Petitioner from her position as Executrix of the Estate, as Trustee of the Shirley A. Martin Trust, and as Trustee of the Carl J. Martin Marital Trust without entry of evidence showing endangerment of the Estate or the Trusts, the Circuit Court violated this Court's missive. As this Court has stated before, the removal of a representative chosen by the testator is a *drastic* action that should only occur when the estate is endangered by that representative. *See* Haines v. Kimble, 221 W. Va. 266, 274, 654 S.E. 2d 588, 596 (2007) (*citing* In re Beichner's Estate, 432 Pa. 150, 156, 247 A.2d 779, 782 (1968)) (emphasis added). As this Court has maintained for nearly a century and a half:

> In removing and substituting trustees, the court does not act arbitrarily, but upon certain general principles, and after a full consideration of the case, "courts will not substitute trustees upon the mere *caprice of cestui que trust*, and without reasonable cause; and although the instrument of trust or a statute give the *cestui que trust* full power to remove and appoint other trustees, yet good cause must be shown or the court cannot be put into motion."

MacHir v. Schon, 14 W. Va. 777, 782-783 (1879). Indeed, to remove a personal representative expressly selected by the testator, "the proof of the cause for removal must be clear." Haines v. Kimble, 221 W. Va. 266, 274, 654 S.E. 2d 588, 596 (2007). As this Court has held: "The Court will not ordinarily usurp the representative's function of administering the estate . . . except in cases of abuse . . . . A court ordinarily has no power to limit the authority of the representative

whose duties and powers are fixed by law[.]" Welsh v. Welsh, 136 W. Va. 914, 925, 69 S.E. 2d 34, 40 (1952) (*quoting* 33 C.J.S., Executors and Administrators, Section 147).

Here, the Circuit Court failed to give the deference required to Shirley Martin's selection of Petitioner Sherree D. Martin as her personal representative. Moreover, in removing Ms. Martin without requiring any evidence be entered into the record, the Circuit Court violated this Court's mandate by failing to require that the proof for such removal "be clear" and for "good cause . . . shown[.]" Thus, for this reason too, this Court should reverse the Circuit Court's Orders of July 12, 2021, and August 27, 2021.

IV. THE CIRCUIT COURT ERRED IN GRANTING INJUNCTIVE RELIEF WHEN OTHER STATUTORY AND COMMON LAW REMEDIES EXIST FOR RESPONDENT'S BREACH OF FIDUCIARY DUTY CLAIM (ASSIGNMENT OF ERROR NO. 6).

As this Court has repeatedly held, "[i]njunctive relief is inappropriate when there is an adequate remedy at law." Hechler v. Casey, 175 W. Va. 434, 440, 333 S.E. 2d 799, 805 (1985) (citations omitted). Indeed, "[e]quity does not have jurisdiction of a case in which the plaintiff has a full, complete and adequate remedy at law[.]" Syl. Pt. 3, Severt v. Beckley Coals, Inc., 153 W. Va. 600, 601, 170 S.E. 2d 577, 578 (1969).

Here, the West Virginia Code expressly provides a statutorily-defined, adequate remedy at law for breach of fiduciary duty. Specifically, W. Va. Code § 44D-10-1002 (2014) provides in relevant part, "[a] trustee who commits a breach of trust is liable to the beneficiaries for the greater of: (1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or (2) the profit the trustee made by reason of the breach." Moreover, as this Court has previously held, a trustee may be found personally liable for a breach of trust "by way of compensation or indemnification, which the beneficiary may enforce at his election." David v. Davis Trust Co., 106 W. Va. 228, 242, 145

S.E. 2d 588, 593 (1928). Accordingly, since there are ample legal remedies spelled out by statute and in case law concerning breach of fiduciary duty claims in the estate and trust arena, the Circuit Court's granting of an injunction was improper. Thus, this Court should reverse the Circuit Court's Orders on this basis as well.

V. THE CIRCUIT COURT ERRED BY FINDING THAT REMOVING PETITIONER FROM HER FIDUCIARY POSITIONS SERVED THE PUBLIC INTEREST WHEN, IN FACT, THE VERY OPPOSITE IS TRUE (ASSIGNMENT OF ERROR NO. 5).

In evaluating the public interest in its Order, the Circuit Court erroneously concluded that allowing Petitioner to remain in her fiduciary capacities would "be contrary to the fiduciary duties the law upholds and against common law testamentary freedom of a person's ability to dispose of property in the manner he or she chooses." *(See* Martin JA – 000543). The Circuit Court determined that the public interest was served because of "how the estate could be distributed, the fact that it's in real estate, the impact that it would have in the future, in terms of conveyance of the property, and things of that nature. The public interest is served by having an independent third party – do the administration of this estate, so it - - it doesn't become a problem, years down the road." (*See* Martin JA – 000526).

When a testator has selected a personal representative, it may be inferred that the testator has reasons for the selection and therefore (1) the testator's desire, when reasonably possible, should control; (2) that selected personal representative should not be removed lightly; and (3) a court should be less willing to remove a personal representative selected by the testator than one selected or appointed by a county commission. *See* Haines v. Kimble, 221 W. Va. 266, 274, 654 S.E. 2d 588, 596 (2007). Through its ruling, the Circuit Court has armed a disgruntled beneficiary with the power to remove a fiduciary (in contravention of the decedent's wishes) when the fiduciary exercises caution and seeks guidance from the court in interpreting a will or

trust. This logic borders on the absurd. Moreover, it is of great public interest that a disgruntled beneficiary unsatisfied with the way his or her sibling is administering a trust or estate show at least one instance of breach of fiduciary duty through some tangible evidence or testimony. As it stands now, however, the Circuit Court has made the opposite true which undermines the public interest.

Likewise, the Circuit Court's ruling also damages the public interest by chilling the use of declaratory judgment actions by executors and trustees who need the guidance of the courts to discern the meaning and intent of estate planning documents. Indeed, such fiduciaries will now think twice about bringing such actions for fear it could be turned around on them through a counterclaim alleging such an action constitutes a breach of their fiduciary duty. Sadly, that seems to be the message in this matter if the Circuit Court's ruling is allowed to stand. Thus, for these reasons as well, this Court should reverse the Circuit Court's Orders.

VI. THE CIRCUIT COURT ERRED IN CONVERTING, *SUA SPONTE*, A MOTION FOR PRELIMINARY INJUNCTION INTO A MOTION FOR SUMMARY JUDGMENT ON RESPONDENT'S COUNTERCLAIMS, AND, THEN, GRANTING THAT SUMMARY JUDGMENT MOTION WHEN ABSOLUTELY NO EVIDENCE WAS TENDERED TO SUPPORT IT (ASSIGNMENT OF ERROR NOS. 7 – 16).

A. The Circuit Court Erred by Failing to Require that Respondent Carl Martin Provide Evidence Supporting Summary Judgment on His Counterclaims.

Not only did the Circuit Court grant a motion for preliminary injunction without requiring that some evidence be proffered, but it also, on its own, converted that motion to a summary judgment motion and granted it without any evidence being put into the record supporting it either. Indeed, without evidence, the Circuit Court found the Petitioner had used her position for her own benefit. This was improper because the parties did not present any testimony. The record was incomplete since discovery was in its very early stages. No

depositions were part of the record. The Circuit Court made findings of fact concerning the intentions of Petitioner without her, or anyone else, testifying to anything. Instead, the Circuit Court turned the Motion for Preliminary Injunction into a permanent injunction and summary judgment in favor of Respondent Carl Martin on his counterclaims without permitting the Petitioner the opportunity to defend herself.

B. The Circuit Court Erred by Making Numerous Findings of Fact that Were Unsupported by Any Evidence.

The crux of Respondent Carl Martin's counterclaims is that Petitioner allegedly attempted to sell Estate property which exceeded her authority, purportedly acted in a generally hostile manner toward other beneficiaries, allegedly undervalued the Trust, and supposedly misappropriated debt to the Estate. (*See* Martin JA -000243- 000244). Significantly, however, no one submitted any evidence to the Circuit Court substantiating these claims. There were no examples of hostile correspondence or testimony indicating hostility provided to the Circuit Court. Neither the Petitioner nor any other beneficiary of the Estate or Trusts provided testimony or submitted an affidavit setting forth the alleged hostile conduct of the Petitioner. Further, no one presented evidence of conflicting appraisals of Trust assets, nor did anyone offer expert testimony regarding a difference of opinion as to the value of the Trust assets. Thus, the Circuit Court erred in finding that Petitioner used her fiduciary positions for her own benefit without any evidence having been presented to prove as much. Therefore, the Circuit Court's finding that Respondent Carl Martin would have succeeded on the merits of his claim for breach of fiduciary duty was in clear error because no evidence exists for a such finding.

The Circuit Court additionally found that Petitioner breached her fiduciary duty through self-dealing because she requested in her declaratory judgment action that certain provisions be altered or removed. (*See* Martin JA -000540; 000542). According to the Circuit Court,

Petitioner violated her fiduciary duties as Executrix when she filed a declaratory judgment action attempting to create an ambiguity where none existed and thereby needlessly wasting Estate resources. Per the lower court, Petitioner's attempt to include the "additional properties" in the transfer of the "residence property" was also in her self-interest as it would enable her to avoid dividing those properties with Respondent Carl Martin so that the proceeds of the sale would go towards the monetary bequests of which she was a beneficiary. (*See* Martin JA – 000539).

Filing Counts I and II in the Petition for Declaratory Judgement under W. Va. Code § 55-13-4 (2015) was not improper, nor was it a breach of fiduciary duty. Indeed, W. Va. Code § 55-13-4 (2015) allows a party to seek from the Circuit Court a determination of "any question arising in the administration of the estate or trust, including questions of construction of wills and other writings." That is precisely what Petitioner did in the present matter. For instance, Count I of the Petition requests only that the Circuit Court determine the meaning of "my residence property." The record is empty of any instance where Petitioner sought the additional properties being added to "my residence property." Instead, the Petitioner merely requested that the Circuit Court determine if "my residence property" was solely the parcel of property upon which Shirley A. Martin's residence is located or whether "my residence property" also includes five contiguous parcels around the parcel upon which Shirley A. Martin's residence is located. Regarding Count II of the Petition, the Circuit Court found that: "Contrary to that fiduciary duty, Petitioner created a cloud on the title of the Carl J. Martin Testamentary Trust A as to the Route 20 Property by recording on May 26, 2020, a deed that purports to affect the title to the Route 20 Property adverse to the title of the Carl J. Martin Testamentary Trust A and the Deed of Trust." (*See* Martin JA -000540). But no evidence was presented to indicate the Petitioner was using her position as Executrix or Trustee in a self-dealing fashion. In filing Counts I and II in the

Petition, Petitioner did not ask the Circuit Court to make a specific determination. Instead, Petitioner explained in her Petition that in the 2016 Amendment to the Shirley A. Martin Trust Agreement, Shirley Martin devised the Route 20 Property to the Petitioner. (*See* Martin JA – 000145). However, to the knowledge of Petitioner, at the time of making that amendment in 2016, Shirley had already transferred, as Trustee of the Marital Trust, the Route 20 Property to Petitioner's company in 2013. Petitioner, as Trustee of the Shirley A. Martin Trust, therefore, had legitimate concern about a conveyance that Shirley either had full ability to perform, no ability to perform, or simply forgot to remove the provision from the 2010 Amendment to the Trust Agreement when amending the Trust in 2016. Given this, Petitioner simply requested that the Circuit Court determine the status of the Route 20 Property. There was no self-dealing nor evidence establishing any such thing.

Additionally, without any evidence or any sort of evidentiary hearing, the Circuit Court ruled on what "my residence property" means. This is contrary to proper procedure. For the Circuit Court to rule on what "my residence property" means, the Circuit Court should have had an evidentiary hearing as to what Shirley A. Martin thought "my residence property" meant at the time she signed her Will. The Circuit Court did not do so, however. Thus, in this regard too, the Circuit Court made a clear error in finding that there was no ambiguity in the term "my residence property" as the Circuit Court did not have an evidentiary hearing concerning that issue, nor had discovery been completed so that the Circuit Court could make that determination.

The Circuit Court also erroneously found that Petitioner used her position of trust to her own benefit in seeking to have several portions of the Will and Trusts modified to favor her personal position. Order at p. 12 (*See* Martin JA – 000537). Neither the Circuit Court nor Respondent Carl Martin's pleadings provide any evidence of any benefit Petitioner gained in

filing the Petition. Instead, a fiduciary has the duty to administer a trust in good faith, in accordance with the trust terms, and in the best interest of the beneficiaries. W. Va. Code § 44D-8-801 (2014). Count III of the Petition merely asks the Circuit Court to determine a method of distributing properties from the Shirley A. Martin Trust other than "drawing lots" and removing the right of first refusal between the parties who are to receive these properties. (*See* Martin JA - 00001 000012.) No evidence was presented indicating in any fashion a benefit bestowed upon Petitioner to the detriment of the other beneficiaries for seeking this relief. In fact, Respondent Carl Martin was just as likely to benefit from the relief sought in Count III of the Petition as Petitioner. Should Petitioner have arbitrarily devised a method to draw lots, Respondent Carl Martin could have ended up with the lowest valued properties and Petitioner could have ended up with the most valuable properties, or *vice versa*. No one has presented evidence that Petitioner Sherree D. Martin gained a benefit from the relief requested.

Finally, it was inappropriate for the Circuit Court to remove Sherree D. Martin as Trustee of the Trusts merely because she is one of the beneficiaries of the Trusts and sought the guidance of the Court with respect to the administration of the Trusts. In decisions throughout the country, courts have quite properly refused to remove a trustee named by the grantor in spite of the fact that the trustee (a) has an interest which is potentially antagonistic to that of another beneficiary and (b) might be tempted to favor herself unduly. In that regard, the Third Restatement of Trusts, §37, Comment f(1), states:

> Thus, the fact that the trustee named by the settlor is one of the beneficiaries of the trust, or would otherwise have conflicting interests, is not a sufficient ground for removing the trustee or refusing to confirm the appointment. This is so even though the trustee has broad discretion in matters of distribution and investment.

Unlike attorneys, trustees are not prohibited from having conflicts of interest. A child can serve as trustee of a parent's trust, even though other siblings are also beneficiaries of the trust. That may appear to be a conflict of interest, but trustees are not disqualified from serving in a fiduciary capacity merely because a potential conflict exists. Based on the foregoing, the Circuit Court erred in granting summary judgment on Respondent Carl Martin's Counterclaims and in making unsupported findings of fact to support such a ruling. Accordingly, the two Orders should be reversed for these reasons too.

CONCLUSION

For the reasons set forth above, the Court should reverse, vacate, and remand for trial the Circuit Court's Order of July 12, 2021, which granted a disgruntled beneficiary's request for injunctive relief and the Rule 59(e) Order which re-affirmed that decision. Respondent Sherree D. Martin further requests that the Court award her such other relief which it deems just and appropriate.

Respectfully submitted,

SHERREE D. MARTIN, IN HER INDIVIDUAL CAPACITY

By Counsel

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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.

**William Am 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 in the Estate
of Shirley A. Martin, the Shirley A. Martin Trust,
and the Carl J. Martin Trust,**

Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, Sherree D. Martin, in her Individual Capacity, does hereby certify that the foregoing **Response Brief of Sherree D. Martin, in her Individual Capacity** has been served upon the following by this day mailing to them, by first class mail, postage prepaid, a true copy thereof:

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This 10th day of February, 2022.

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