IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JUSTINA GABBERT,

Plaintiff Below/Petitioner,

v.

CASE NO. 22-0074

RICHARD T. COYNE, ESQ.
TRUSTEE OF GERALD COYNE TRUST,

Defendant Below/Respondent.

RESPONDENT'S BRIEF

Appeal Arising from Orders Entered on
November 24, 2021 and January 6, 2022
in Civil Action No. 21-C-137 in the
Circuit Court of Berkeley County, West Virginia

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STATEMENT OF THE CASE

I. FACTS ALLEGED IN PETITIONER'S COMPLAINT

On **August 17, 2006**, Gerald Coyne executed the original Gerald Coyne Trust ("the 2006 original trust"). Complaint, ¶ 7.[1] [JAR 008 and 064] Under Section 1.2, he provided "[t]his is a revocable trust." [JAR 064] He also "reserve[d] the right to withdraw any part or all of the assets in this trust" and "reserve[d] the right to amend or revoke this trust during [his] lifetime . . . ." Complaint, ¶ 9. [JAR 008 and 064] Under Section 2.3B, Gerald Coyne provided that he "may make a list or memorandum expressing how [he] wish[es] certain items of [his] tangible personal property to be distributed [with the] hope that [his] wishes will be carried out, but the list or memorandum shall not be considered part of this trust or legally binding." [JAR 065] Under Section 2.5, Gerald Coyne made specific provisions for Petitioner. [JAR 066–067] Section 2.5 allowed Petitioner "to occupy the residence which is owned by me or this trust at the time of my death, for a period of one year from the time of my death" and directed the Trustee to "pay for all expenses and maintenance of the residence" during this one-year period. Complaint, ¶ 11. [JAR 066] Section 2.5 also directed the Trustee to "provide that [Petitioner] receive $3,000 per month

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[1] Petitioner did not attach the 2006 original trust to her Complaint, only the 2016 restated trust. [JAR 018] Respondent attached the 2006 original trust to his Motion to Dismiss. [JAR 064] The Circuit Court correctly considered the 2006 original trust when ruling on Respondent's Motion to Dismiss because it is "integral to the claim" and "fairly incorporated" by reference into Petitioner's Complaint. Complaint, ¶ 7 [JAR 008]. "[I]t has been recognized that, in ruling upon a motion to dismiss under Rule 12(b)(6), a court may consider, in addition to the pleadings, documents annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. Further, Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice." Forshey v. Jackson, 222 W. Va. 743, 747, 671 S.E.2d 748, 752 (2008) (quoting FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 348 (2d ed. 2006)). Moreover, "[w]hen evaluating a motion to dismiss, *we may consider documents that are attached to or submitted with the complaint* . . . . and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.'" 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357 (3d ed. 2004)." Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of West Virginia, 244 W. Va. 508, 532, 854 S.E.2d 870, 894 (2020) (emphasis in original).

for each month, commencing with the first day of the month following the day of my death, for the remainder of her life." [JAR 066] The 2006 original trust did not make any other provisions for Petitioner as a beneficiary or provide Petitioner any interest in Coyne Properties, LLC.[2] Under Section 2.6 of the 2006 original trust, Gerald Coyne directed distribution of the trust residue to his three brothers—George R. Coyne, Richard T. Coyne, Sr. (Respondent's father), and James T. Coyne—in equal one-third shares. [JAR 067]

On **August 27, 2006**, Gerald Coyne prepared a handwritten note ("the 2006 handwritten note"). Complaint, ¶ 15. [JAR 009 and 030] The 2006 handwritten note provided that "155 Waverly Dr. brick house go to Justina Gabbert [Petitioner] free and clear after the one year at 1239 [Showers Lane] to live in or whatever;" and "Justina Gabbert [Petitioner] get all household belongings except those that came from Elnor's house & were promised. And the Lexus LS430." Complaint, ¶¶ 18 and 24. [JAR 009–010]

On **April 16, 2008**, Gerald Coyne conveyed the real estate identified as 155 Waverly Drive to James W. Steptoe, Trustee, "in trust, nevertheless, to immediately reconvey said real estate to Coyne Properties, LLC" by deed recorded in the Berkeley County Clerk's Office at Deed Book 896, at page 214. [JAR 077] The same day, James W. Steptoe, Trustee, conveyed the real estate identified as 155 Waverly Drive to Coyne Properties, LLC by deed recorded in the Berkeley County Clerk's Office at Deed Book 896, at page 224.[3] [JAR 080]

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[2] Petitioner and Gerald Coyne were never married. Complaint, ¶¶ 5 and 6 [JAR 007]. In all documents discussed, where any relationship attaches to Petitioner, it is as Gerald Coyne's "close friend."

[3] Petitioner did not attach these deeds to her Complaint. However, the Circuit Court properly considered these deeds of record in the Berkeley County land records when ruling on Respondent's Motion to Dismiss because they are "matters of public record" and subject to judicial notice. *See* Mountaineer Fire & Rescue Equip., LLC, 244 W. Va. 508, 854 S.E.2d 870.

On **November 18, 2016**, Gerald Coyne executed an Amended and Restated Gerald Coyne Trust ("the 2016 restated trust"). Complaint, ¶ 7.[4] [JAR 008 and 018] Under Section 1.1, Gerald Coyne specifically stated: "I declare and confirm this trust, and the initial Trustees named above, and I agree to the terms and provisions of this trust agreement." [JAR 018] Under Section 1.2, he provided "[t]his is a revocable trust." [JAR 018] He also "reserve[d] the right to withdraw any part or all of the assets in this trust" and "reserve[d] the right to amend or revoke this trust during [his] lifetime . . . ." Complaint, ¶ 9. [JAR 018] Under Section 1.3, Gerald Coyne specifically stated: "All assets in this trust will be held by my Trustees in accordance with the provisions of this trust agreement." [JAR 019] Under Section 2.3B, Gerald Coyne provided that he "*may* make a list or memorandum expressing how [he] wish[es] certain items of [his] tangible personal property to be distributed [with the] intent that [his] wishes will be carried out, and the list or memorandum shall be considered part of this trust and legally binding." Complaint, ¶ 22 [JAR 019–020] (emphasis added).[5] Under Section 2.5, Gerald Coyne made specific provisions for Petitioner. [JAR 020–021] Section 2.5A allowed Petitioner "to occupy the residence which is owned by me or this trust at the time of my death [1239 Showers Lane in Martinsburg, Berkeley County, West Virginia], for a period of one year from the time of my death . . . [with] the discretion to extend this if [the Trustee] choose[s] to do so, in [the Trustee's] sole and absolute discretion," and directed the Trustee to "pay for all expenses and maintenance of the residence, including

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[4] The Circuit Court properly considered the exhibits attached to Petitioner's Complaint when ruling on Respondent's Rule 12(b)(6) Motion to Dismiss. "A circuit court ruling on a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure may properly consider exhibits attached to the complaint without converting the motion to a Rule 56 motion for summary judgment. Syllabus Point #1, Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008)." *See* Syllabus Point #5, Mountaineer Fire & Rescue Equip., LLC, 244 W. Va. 508, 854 S.E.2d 870.

[5] Section 2.3C specifically defined "tangible personal property" as "personal effects, household goods, automobiles" and specifically excluded "assets that, in the opinion of my Trustee, are held by me primarily for business or investment purposes." Complaint, ¶ 23. [JAR 0020]

specifically insurance, real estate taxes, electricity, heating and cooling, water and sewer, and utilities" from the trust.[6] Complaint, ¶¶ 11–12. [JAR 008 and 020] Section 2.5B directed the Trustee to "hold the sum of $300,000 . . . in trust and make payments of $3,000 per month to [Petitioner] . . . for the remainder of her life."[7] [JAR 021] And, Section 2.5C allowed Petitioner "full use of and access to our home located at Deep Creek Lake, for the rest of her life" beginning one year after Gerald Coyne's death (when her right to occupy 1239 Showers Lane ended); directed that Petitioner "will be responsible for all expenses" while "living in the lake house;" and provided that the "lake house will pass as a part of the residue of this trust" upon Petitioner's death.[8] [JAR 021] The 2016 restated trust did not make any other provisions for Petitioner as a beneficiary or provide Petitioner any interest in Coyne Properties, LLC.[9] The 2016 restated trust also did not make any mention of, or provision for, Petitioner to use the real estate identified as 155 Waverly Drive in Martinsburg, Berkeley County, West Virginia. Under Section 2.6 of the 2016 restated trust, Gerald Coyne directed distribution of the trust residue to his three brothers—George R. Coyne, Richard T. Coyne, Sr. (Defendant/Trustee's father), and James T. Coyne—in equal one-third shares. [JAR 021]

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[6] Petitioner's right to occupy 1239 Showers Lane ended on September 27, 2020—one year after Gerald Coyne's death on September 27, 2019. However, Respondent as Trustee permitted Petitioner to remain in the residence for an additional twenty months, with all of her maintenance and utility expenses paid by the 2016 restated trust, until she could arrange to move to a new residence. [JAR 114]

[7] Petitioner has received every one of her $3000 monthly payments from the 2016 restated trust since Gerald Coyne died on September 27, 2019. Petitioner does not allege that Respondent has ever deprived her of one of these payments.

[8] Petitioner has never been denied "use of" or "access to" the Deep Creek Lake house since Gerald Coyne died on September 27, 2019. She has not paid any expenses associated with "living in the lake house" since September 27, 2019. Petitioner does not allege that Respondent has ever deprived her of the use of or access to the lake house nor has Petitioner sought to live in the lake house and assume the associated expenses.

[9] *See* footnote #2, *supra*.

On **September 27, 2019**, Gerald R. Coyne died and his 2016 restated trust became irrevocable under Section 1.2. Complaint, ¶ 4. [JAR 007 and 018] Coyne Properties, LLC, owned the real estate identified as 155 Waverly Drive when Gerald Coyne died. [JAR 077–081]

Since **September 27, 2019**, Respondent, Richard T. Coyne (Gerald Coyne's nephew), has acted as the Successor Trustee of the 2016 restated trust. Complaint, ¶ 25. [JAR 010 and 064]

On **August 24, 2020**, Respondent wrote a letter to Petitioner to provide an update on Gerald Coyne's Estate and a Trustee's Report. Complaint, ¶ 29. [JAR 113] This letter provided Petitioner with a copy of the 2016 restated trust and a copy of the 2006 handwritten note. [JAR 113] It advised Petitioner that Gerald Coyne had "restated all of the terms of the Trust" in 2016 and the 2016 restated trust was irrevocable. [JAR 113] Respondent's letter outlined the provisions of the Trust and his impression that the 2006 handwritten note was intended as a memorandum directing the disposition of certain tangible personal property under Section 2.3B of the 2016 restated trust. [JAR 114] Therefore, the 155 Waverly Drive house would not pass to her under the 2016 restated trust. Respondent's letter also confirmed his agreement to allow Petitioner to remain in the 1239 Showers Lane house (her residence) "past the one-year anniversary" of Gerald Coyne's death "so that [she has] plenty of time to make plans." [JAR 114] Finally, Respondent's letter acknowledged that "[w]hat Jerry has expressed might not be consistent with what you would want;" invited Petitioner to discuss "the best way to align Jerry's intentions with [her] plans for the future;" and suggested that, "[i]f [her] wishes do vary from Jerry's intent, there are ways to modify the provisions [of the 2016 restated trust] (subject to agreement with the residual beneficiaries.)"[10] [JAR 115]

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[10] Petitioner did not attach a copy of Respondent's August 24, 2020 letter to her Complaint. Instead, she selectively quoted and mischaracterized it in Paragraphs 29 and 30 of her Complaint. Complaint, ¶¶

II. PROCEDURAL HISTORY

On **May 13, 2021**, Petitioner filed her Complaint against Respondent as Trustee of the Gerald Coyne Trust. [JAR 007–030] Count I asked the Circuit Court to grant Petitioner a declaratory judgment interpreting Gerald Coyne's 2006 handwritten note as a valid amendment to his 2016 restated trust so she can receive the 155 Waverly Drive real estate identified in the note *in addition to* the Deep Creek Lake real estate interest identified in the trust. Count II asked the Circuit Court to grant Petitioner monetary damages alleging Respondent breached a fiduciary duty to her by interpreting the 2016 restated trust and West Virginia law differently than she does. Counts III, IV, and V similarly asked the Circuit Court to grant her monetary damages alleging Respondent converted her personal property, acted outrageously and beyond the "bounds of decency," and caused her "pain, suffering and emotional distress" and "health care expenses, both past and future." [JAR 007–016] No part of Petitioner's Complaint asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44D-4-415. In fact, neither the word "reform," nor the word "reformation," appeared anywhere in Petitioner's Complaint. Likewise, the citation "W. Va. Code § 44D-4-415 (Reformation to correct mistakes)" did not appear anywhere in Petitioner's Complaint.

29–30. [JAR 011] She then attached a partially legible copy of Respondent's August 24, 2020 letter as Exhibit C to her Response to Respondent's Motion to Dismiss along with her Affidavit. [JAR 083, 102, and 113] These documents are not properly considered at the motion to dismiss stage under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Respondent disputes Petitioner's selective presentation of his August 24, 2020 letter and the misleading allegations in Petitioner's Complaint based upon this letter. This summary of the letter is intended merely to demonstrate how Petitioner's allegations in the Complaint mischaracterize and selectively present the letter. *See* Complaint, ¶¶ 29–33. [JAR 011] Petitioner's mischaracterization of Respondent's August 24, 2020 letter does not create a factual dispute or a need for discovery because, as discussed below, there is no legal basis for Petitioner to claim Respondent as Trustee can unilaterally waive the terms of the Trust for the residual beneficiaries. As Respondent explained to Petitioner in his August 24, 2020 letter, this would require the agreement of the residual beneficiaries. The Circuit Court correctly disregarded these disputed ancillary facts and correctly concluded "[s]uch extrinsic evidence is wholly irrelevant because the 2016 restated trust is not ambiguous." [JAR 376]

On **September 10, 2021**, Respondent filed a Motion to Dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. [JAR 045–081] Respondent's Motion to Dismiss demonstrated that Petitioner cannot obtain the relief she has requested under West Virginia law because: 1) the 2006 handwritten note cannot be a valid amendment to the 2016 restated trust because it was executed long before the 2016 restated trust which makes no mention of the note; 2) the 2006 handwritten note cannot be a valid binding memorandum to the 2016 restated trust because it was executed long before the 2016 restated trust, which explicitly limits such memoranda to future memoranda and "tangible personal property;" and 3) any purported gift of the 155 Waverly Drive real estate to Petitioner adeemed when Gerald Coyne conveyed the same real estate to Coyne Properties, LLC in 2008.

On **September 23, 2021**, Petitioner filed a Response to Motion to Dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. [JAR 083–133] Petitioner's Response insisted she should receive the 155 Waverly Drive real estate and household belongings under the 2006 handwritten note and the Deep Creek Lake real estate interest under the 2016 restated trust arguing all of Gerald Coyne's trust documents executed from 2006 to 2016 should be treated as cumulative and no effect should be given to the fact Gerald Coyne amended *and restated* his Trust in 2016. No part of Petitioner's Response asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44D-4-415. In fact, neither the word "reform," nor the word "reformation," appeared anywhere in Petitioner's Response. Likewise, the citation "W. Va. Code §44D-4-415 (Reformation to correct mistakes)" did not appear anywhere in Petitioner's Response.

On **September 30, 2021**, Respondent filed his Reply in Support of Motion to Dismiss. [JAR 134–152] Respondent's Reply demonstrated that Gerald Coyne's 2016 restated

trust completely replaced all of his prior trust documents, including his 2006 handwritten note, by restating his intentions; therefore, Petitioner was only entitled to the property interests Gerald Coyne provided for her under the 2016 restated trust.

On **October 21, 2021**, while the parties were waiting for a ruling on Respondent's Motion to Dismiss, Petitioner served Plaintiff's Discovery Requests to Defendant (1st Set). Several of these discovery requests sought extensive information about Coyne Properties, LLC. [JAR 153–1667]

On **November 15, 2021**, while the parties were waiting for a ruling on Respondent's Motion to Dismiss, Respondent served a Notice of Deposition of Richard T. Coyne, Esquire to be conducted on December 10, 2021 at 11:00 a.m. [JAR 168–170]

On **November 19, 2021**, Respondent filed Defendant's Objections to Plaintiff's Discovery Requests to Defendant (1st Set). [JAR 171–206] On the same date, Respondent also filed his Motion for Protective Order asking the Circuit Court to stay any discovery until it ruled on Respondent's pending Motion to Dismiss. [JAR 207–362]

On **November 19, 2021**, the Circuit Court entered a one-sentence Order granting Respondent's Motion for Protective Order as follows: "Motion for Protective Order filed by Joseph Caltrider [Respondent's counsel] is hereby GRANTED." [JAR 363]

On **November 24, 2021**, after an intervening weekend, the Circuit Court entered its Order Granting Defendant's Motion to Dismiss Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure finding *inter alia* that, even when all of the facts alleged in Petitioner's Complaint are taken as true: 1) the 2016 restated trust is the controlling document because it "replaces all of [Gerald] Coyne's prior trust documents, represents a complete statement of his intent, and provides all terms of his trust"; and 2) the 155 Waverly Drive property is not part

of the 2016 restated trust because it is not mentioned in the plain terms of the Trust and, furthermore, any purported gift of the property "adeemed when [Gerald Coyne] conveyed the same real estate to Coyne Properties, LLC in 2008." [JAR 364–377]

On **November 29, 2021**, Petitioner filed a Motion Pursuant to West Virginia Rule of Civil Procedure 59(e) to Alter or Amend 11/24/2021 "Order Granting Defendant's Motion to Dismiss Complaint." [JAR 378–381] This Motion sought to have the Circuit Court reconsider, but offered no additional legal authority. This Motion also asked the Circuit Court to allow Petitioner to "file an amended complaint attaching and incorporating the original August 17, 2006 trust document and adjusting her allegations in clarification, consistent with her arguments as set forth in her Response" to Respondent's Motion to Dismiss. No part of Petitioner's Motion asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44D-4-415 or amend her Complaint to assert such a claim. In fact, neither the word "reform," nor the word "reformation," appeared anywhere in Petitioner's Motion. Likewise, the citation "W. Va. Code § 44D-4-415 (Reformation to correct mistakes)" did not appear anywhere in Petitioner's Motion.

On **December 13, 2021**, Respondent filed his Response to Plaintiff's Motion to Alter or Amend. [JAR 387–410]

On **December 14, 2021**, Petitioner filed her Reply to Defendant's Response to Plaintiff's Motion to Alter or Amend. [JAR 411–413] No part of Petitioner's Reply asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44D-4-415 or amend her Complaint to assert such a claim. In fact, neither the word "reform," nor the word "reformation," appeared anywhere in Petitioner's Reply. Likewise, the citation "W. Va. Code §44D-4-415 (Reformation to correct mistakes)" did not appear anywhere in Petitioner's Reply.

On **January 6, 2022**, the Circuit Court entered its Order Denying Plaintiff's Motion Pursuant to West Virginia Rule of Civil Procedure 59(e) to Alter or Amend 11/24/2021 "Order Granting Defendant's Motion to Dismiss Complaint." [JAR 449–451]

On **January 24, 2022**, Petitioner filed her Notice of Appeal with this Honorable Court seeking to reverse the Circuit Court's November 24, 2021 Order Granting Motion to Dismiss Complaint.[11] [JAR 452–486]

SUMMARY OF ARGUMENT

Gerald Coyne originally created a revocable *inter vivos* trust by a typewritten document dated August 17, 2006. Ten days later, on August 27, 2006, he created a handwritten document which can only be construed as (1) an amendment under Section 1.2 of his 2006 original trust or (2) a memorandum concerning the disposition of tangible personal property under Section 2.3B of his 2006 original trust. This handwritten document contained property dispositions which he may have intended *at the time*, including real estate at 155 Waverly Drive in Martinsburg as a place for Petitioner to live. However, Gerald Coyne expressed a different intent when he conveyed the 155 Waverly Drive real estate to Coyne Properties, LLC in 2008 and later when he amended and restated his trust in 2016, thereby revoking and replacing all prior trust documents and providing a different place for Petitioner to live.

Gerald Coyne's 2016 restated trust, in plain language, provided that "[a]ll assets *in this trust* will be held by my Trustees in accordance with the provisions of *this trust agreement*." (emphasis added). His 2016 restated trust also included the following provision at Section 2.3B:

> B. BINDING WISHES. I may make a list or memorandum expressing how I wish certain items of my tangible personal

[11] Petitioner also complained about the Circuit Court's November 19, 2021 Order granting Respondent's Motion for Protective Order, but did not identify this Order in her Notice of Appeal. [JAR 363]

> property to be distributed. It is my intent that my wishes will be carried out, and the list or memorandum shall be considered part of this trust and legally binding.

[JAR 019–020] If the 2006 handwritten note was an amendment under Section 1.2 of the 2006 original trust, it was only effective while it represented Gerald Coyne's intent. His intent changed, and any amendment became inapplicable, when he conveyed the 155 Waverly Drive real estate to Coyne Properties, LLC in 2008 and the putative gift adeemed. His intent also changed, and any amendment was revoked and replaced, when he executed his 2016 restated trust and provided a different place for Petitioner to live. If the 2006 handwritten note was a memorandum concerning the disposition of tangible personal property under Section 2.3B of his 2006 original trust, it was always ineffective because the 2006 original trust and the 2016 restated trust limit such memoranda to tangible personal property by their plain terms and 155 Waverly Drive is real property. The 2006 handwritten note was also ineffective because it was not executed after, or specifically identified in, the 2016 restated trust. Petitioner incorrectly asks this Honorable Court to treat all of Gerald Coyne's trust-related documents as cumulative, as if his intent could never change over the span of more than ten years. This is clearly not what Gerald Coyne intended for his revocable *inter vivos* trust.

Under West Virginia law, the "paramount principle" in giving effect to any trust is that "the intention of the settlor prevails." Syllabus Point #1, Hemphill v. Aukamp, 164 W. Va. 368, 264 S.E.2d 163 (1980); Syllabus Point #4, Proudfoot v. Proudfoot, 214 W. Va. 841, 591 S.E.2d 767 (2003). This intention is determined from the trust document itself when there is no ambiguity. Syllabus Point #2, Hemphill v. Aukamp, 164 W. Va. 368, 264 S.E.2d 163; Syllabus Point #3, Belcher v. Powers, 212 W. Va. 418, 420, 573 S.E.2d 12, 14 (2002); Syllabus Point #5, Proudfoot v. Proudfoot, 214 W. Va. 841, 591 S.E.2d 767. Petitioner acknowledges these basic

legal principles, and concedes there is no ambiguity in Gerald Coyne's trust documents, but nevertheless insists the Circuit Court committed reversible error by ruling his 2016 Amended *and Restated* Trust "replaces all of [Gerald] Coyne's prior trust documents, represents a complete statement of his intent, and provides all terms of his trust." [JAR 373] Contrary to these basic legal principles, Petitioner argues the Circuit Court should have ignored the word "Restated" and treated Gerald Coyne's various trust documents—executed over a span of at least ten years—as cumulative in nature and, thus, read together to create her desired result (i.e. ownership and use of the 155 Waverly Drive real estate *and* the Deep Creek Lake real estate). Basic West Virginia law does not support Petitioner's strained attempt to avoid Gerald Coyne's clear intentions and create this unintended result.

The Circuit Court correctly determined that Gerald Coyne's 2016 restated trust is a complete, unambiguous statement of his intentions. It revokes and replaces all of his prior trust documents, including his 2006 handwritten note. And, it "restates" his intentions in their entirety. By the plain terms of his 2016 restated trust, Gerald Coyne intended to provide Petitioner with an income of $3,000 per month and one place to live (i.e. the Deep Creek Lake house) for the remainder of her life. His 2016 restated trust makes no mention of the 155 Waverly Drive real estate whatsoever. This stands to reason because he had already conveyed it to his business, Coyne Properties, LLC, and used it as rental property.

The Circuit Court correctly followed West Virginia law which recognizes that an "amended and restated" trust replaces all prior trust documents. The Circuit Court also correctly followed courts from other jurisdictions which have specifically held that a "restated" document replaces all prior trust documents. Finally, the Circuit Court correctly rejected Petitioner's invitation to "pick and choose" from Gerald Coyne's outdated trust documents to cobble together

an intent, and a result, not expressed in the plain terms of his 2016 Amended *and Restated* Trust. Thus, the Circuit Court correctly granted Respondent's Motion to Dismiss, applying the plain language of Gerald Coyne's 2016 restated trust and upholding the intentions restated in his Trust. By granting Respondent's Motion to Dismiss, the Circuit Court properly recognized that finding otherwise would undermine Gerald Coyne's clearly-stated intentions in violation of the "paramount principle" of trust interpretation.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The legal issues in this case may be resolved by an application of the basic facts pled in Petitioner's Complaint which, even when taken as true, demonstrate she is not entitled to any of the relief she seeks under basic West Virginia law. All legal issues have already been authoritatively decided. The facts and legal arguments are adequately presented in the briefs and record on appeal. This Honorable Court's decisional process would not be significantly aided by oral argument. It need only apply the pled facts to existing West Virginia law and issue a memorandum decision which affirms the Circuit Court's November 4, 2021 and January 6, 2022 Orders. Unless this Court determines other issues arising upon the record should be addressed, oral argument is not necessary under the Rule 18(a) criteria. W. Va. R. App. P. 18(a). Should this Court determine oral argument is necessary, this case is appropriate for Rule 19 argument and disposition by a memorandum decision. W. Va. R. App. P. 19(a) ("cases involving assignments of error in the application of settled law").

ARGUMENT

I. STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point #2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 773, 461 S.E.2d 516, 519 (1995); Syllabus Point #1, Collins v. Heaster, 217

W. Va. 652, 619 S.E.2d 165 (2005); Syllabus Point #1, Tanner v. Raybuck, No. 21-0038, 2022 WL 1124882, at *1 (W. Va. Apr. 15, 2022). Thus, this Honorable Court should apply the same Rule 12(b)(6) standards applied by the Circuit Court.

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure authorizes the court to dismiss a case when a plaintiff's complaint fails to state a claim upon which relief can be granted. W. Va. R. Civ. P. 12(b)(6). "The purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the complaint." Collia v. McJunkin, 178 W. Va. 158, 159, 358 S.E.2d 242, 243 (1987) (citations omitted). When considering the sufficiency of a complaint under Rule 12(b)(6), a court "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus Point # 3, Chapman v. Kane Transfer Co. Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977) (quoting Conley v. Gibson, 355 U.S. 41, 45–46, 78 S. Ct. 99, 2 L.E.2d 80 (1957)).

Although this is a high standard, it is not insurmountable. A court should grant Rule 12(b)(6) dismissal "'where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Mey v. Pep Boys-Manny, Moe & Jack, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011) (citing Murphy v. Smallridge, 196 W. Va. 35, 37, 468 S.E.2d 167, 168 (1996)). This is true in the present case. There is no set of facts consistent with Petitioner's allegations and well-settled West Virginia law which allow Gerald Coyne's 2006 handwritten note to alter Gerald Coyne's intent expressed in the plain, unambiguous terms of his 2016 restated trust.

II. THE CIRCUIT COURT PROPERLY DISMISSED PETITIONER'S COMPLAINT UNDER RULE 12(B)(6) AFTER CORRECTLY FINDING GERALD COYNE'S 2016 AMENDED AND RESTATED TRUST REVOKED AND REPLACED ALL OF HIS PRIOR TRUST DOCUMENTS, REPRESENTS A COMPLETE STATEMENT OF HIS INTENT, PROVIDES ALL THE TERMS OF HIS TRUST, AND DOES NOT GIVE THE 155 WAVERLY DRIVE REAL ESTATE TO PETITIONER.

Gerald Coyne's 2016 restated trust does not give Petitioner the 155 Waverly Drive real estate. Instead, it gives her an interest in the Deep Creek Lake real estate after a one-year tenancy at the Showers Lane real estate. Petitioner asked the Circuit Court, and now asks this Honorable Court, to give some effect to the 2006 handwritten note so she can receive both the 155 Waverly Drive real estate and the Deep Creek Lake real estate interest. In order to obtain this result, however, she must identify some set of facts under which the 2006 handwritten note could be given legal effect as part of the 2016 restated trust. Petitioner's arguments fail, and the Circuit Court correctly granted Respondent's Motion to Dismiss under Rule 12(b)(6), because there is no set of facts consistent with Petitioner's allegations which can alter the intent Gerald Coyne clearly, unambiguously, and completely expressed in his 2016 restated trust.

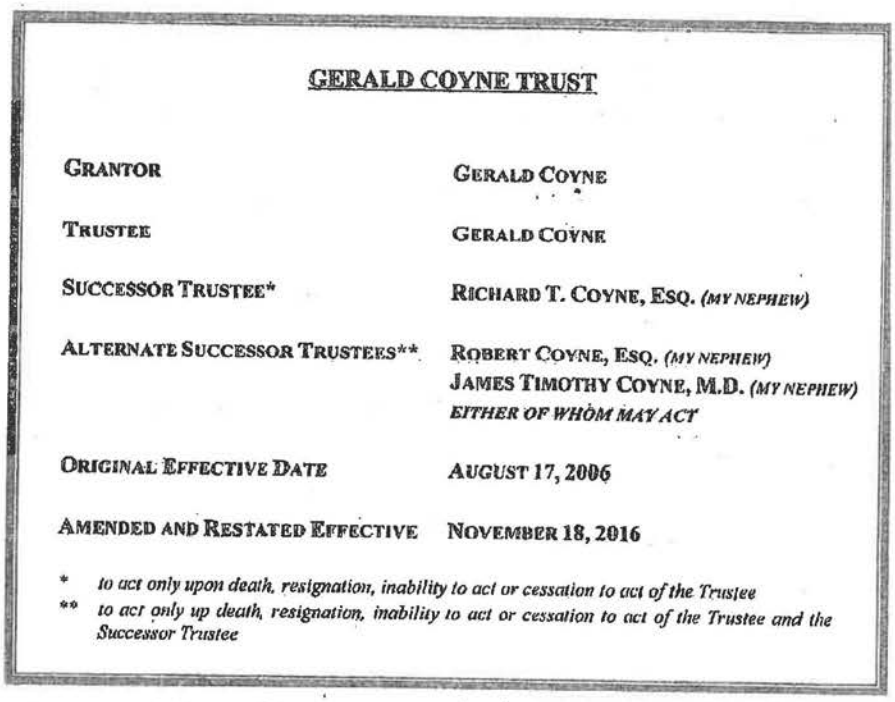
A. Gerald Coyne Revoked and Replaced the 2006 Handwritten Note When He Executed His 2016 Amended and Restated Trust.

Petitioner relies upon Syllabus Point #1 of Hemphill and Syllabus Point #4 of Proudfoot for the basic principle that a trust settlor's intentions govern the interpretation of his trust documents, but ignores the remainder of these holdings. "In ascertaining the intent of the settlor, *the entire trust document should be considered.*" Syllabus Point #5, Proudfoot v. Proudfoot, 214 W. Va. 841, 843, 591 S.E.2d 767, 769 (2003) (quoting Syllabus Point #2, Hemphill v. Aukamp, 164 W. Va. 368, 264 S.E.2d 163 (1980)) (emphasis added). Likewise, "[i]n construing a deed, will or other written instrument, *it is the duty of the court to construe it as a whole, taking and considering all the parts together*, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law

inconsistent therewith." Syllabus Point #3, Belcher v. Powers, 212 W. Va. 418, 420, 573 S.E.2d 12, 14 (2002) (quoting Syllabus Point # 1, Maddy v. Maddy, 87 W. Va. 581, 105 S.E. 803 (1921)) (emphasis added). When one fairly considers the entire 2016 restated trust, not just the parts Petitioner prefers, and takes the 2016 restated trust as a whole, considering all of its parts together, it is clear that, *in 2016*, Gerald Coyne did not intend the 2006 handwritten note to be a part of its terms or control the final disposition of his property

1. The word "Restated" must be given meaning and effect.

Petitioner focuses solely on the fact that Gerald Coyne "amended" his trust on November 18, 2016 and completely ignores the fact that he also "restated" his trust at the same time. The 2016 restated trust states in bold, framed text that it is both "Amended *and Restated* Effective November 18, 2016":



GERALD COYNE TRUST

GRANTOR	**GERALD COYNE**
TRUSTEE	**GERALD COYNE**
SUCCESSOR TRUSTEE*	**RICHARD T. COYNE, ESQ.** *(MY NEPHEW)*
ALTERNATE SUCCESSOR TRUSTEES**	**ROBERT COYNE, ESQ.** *(MY NEPHEW)* **JAMES TIMOTHY COYNE, M.D.** *(MY NEPHEW)* ***EITHER OF WHOM MAY ACT***
ORIGINAL EFFECTIVE DATE	**AUGUST 17, 2006**
AMENDED AND RESTATED EFFECTIVE	**NOVEMBER 18, 2016**

* *to act only upon death, resignation, inability to act or cessation to act of the Trustee*
** *to act only up death, resignation, inability to act or cessation to act of the Trustee and the Successor Trustee*

[JAR 018] Petitioner would have this Court completely ignore one half of the most basic statement of Gerald Coyne's intent: the title page of the document. This is not permitted when determining a trust settlor's intent under West Virginia law. "And Restated" cannot be ignored and effectively

written out of the document as Petitioner suggests. This language is the dispositive indicator of Gerald Coyne's intent to revoke his 2006 handwritten note and replace all of his prior trust documents, including his 2006 handwritten note, with his 2016 restated trust.

2. The 2016 Amended and Restated Trust does not mention the 2006 handwritten note or the 155 Waverly Drive real estate.

There are three elements that must exist in order to incorporate a document by reference into a will: (1) the extrinsic document sought to be incorporated must be in existence at the time the will is executed; (2) the intention of the testator to incorporate the extrinsic document into the will must appear clearly from the will; and (3) the reference in the will must identify the extrinsic document with sufficient certainty that the written document referenced in the will is the written document proffered. Cyfers v. Cyfers, 233 W. Va. 528, 759 S.E.2d 475, 477 (2014).[12] Moreover, although "[t]he settlor of an *inter vivos* trust has power to revoke or modify the trust to the extent the terms of the trust so provide," a document will only be revived if there was a recognition of the earlier document in the later document. Syllabus Point #6, Proudfoot v. Proudfoot, 214 W. Va. 841, 843, 591 S.E.2d 767, 769 (2003); *see* Francis v. Marsh, 54 W. Va. 545, 554, 46 S.E. 573 (1904); *see also* Cyfers v. Cyfers, 233 W. Va. 528, 759 S.E.2d 475. Petitioner does not, and indeed cannot, dispute the fact that the 2016 restated trust makes no reference whatsoever to any existing document disposing of real estate, let alone any specific reference to the 2006 handwritten note or the 155 Waverly Drive real estate. Thus, the 2006 handwritten note fails the Cyfers requirements. Likewise, the 2006 handwritten note cannot be

[12] Cyfers discusses this basic principle of law in terms of wills, but the principle is equally applicable to trusts. *See* W. Va. Code § 44D-1-112 ("The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.").

revived by the 2016 restated trust because there is no recognition of the prior document in the restated trust. Thus, the 2006 handwritten note also fails the Proudfoot requirements.

3. Courts in other jurisdictions have found "amended and restated" documents revoke and replace all prior documents.

If there were any question about the legal import of Gerald Coyne's decision to amend *and restate* his trust in 2016, this Court has considered restated documents and tacitly reached the same conclusion: A person using the phrase "amended and restated" in an estate document intends that document to be the most updated, complete, and final version. *See* In re Isner, No. 18-0317, 2019 WL 6998322 (W. Va. Dec. 20, 2019) (identifying a new trust created by a non-judicial settlement agreement under W. Va. Code § 44D-1-111 as a "restated trust."); Daniel v. United Nat. Bank, 202 W. Va. 648, 505 S.E.2d 711 (1998) (analyzing an "amended and restated" *inter vivos* trust). Courts in several other jurisdictions have specifically considered the question and held that an amended and restated document replaces all prior documents. *See* Cartwright v. Batner, 15 N.E.3d 401 (Ohio Ct. App. 2014) (finding a restated revocable trust has the effect of replacing any prior trust documents); Dobson v. Hershberger, No. H022392, 2002 WL 1357242 (Cal. Ct. App. June 19, 2002); Doolittle v. Exchange Bank, 193 Cal. Rptr. 3d 818, 820 (Cal. Ct. App. 2015); In re Estate of Little, No. 05-18-00704-CV, 2019 WL 3928755, at *3 (Tex. App. Aug. 20, 2019); Cty. of Washington v. Ctys. of Warren & Washington Indus. Dev. Agency, No. 93-CV-0086, 1997 WL 152001, at *2 (N.D. N.Y. Mar. 31, 1997) (finding an "original contract was replaced by the 'Amended and Restated Construction Contract' . . . which was replaced . . . by the Second Amended and Restated Construction Contract."); Sun Life Assurance Co. of Canada v. Imperial Premium Fin., LLC, 904 F.3d 1197, 1205 (11th Cir. 2018) (finding that "[a]fter [an

insurance] policy was issued Imperial immediately replaced the [irrevocable life insurance] trust agreement with its own amended and restated trust agreement").[13]

As this legal authority demonstrates, Gerald Coyne's specific decision to amend *and restate* his trust in 2016 is dispositive of the central legal issue in this case. When he amended *and restated* his trust in 2016, Gerald Coyne revoked his 2006 handwritten note—however it may be characterized—and replaced all his prior trust documents with his 2016 restated trust. He also replaced his putative gift of the 155 Waverly Drive real estate (which he had already conveyed to Coyne Properties, LLC in 2008 and leased commercially) with his gift of the Deep Creek Lake real estate interest. This Honorable Court should reach the same conclusion as the Circuit Court and those other courts which have held that an amended *and restated* document revokes and replaces all prior documents and, thus, find that Gerald Coyne's 2016 restated trust revoked the 2006 handwritten note and replaced all of his prior trust documents.

B. Gerald Coyne Clearly Indicated That His 2016 Amended and Restated Trust Was a Complete Statement of His Intent.

In addition to the crucial indicator of Gerald Coyne's intent found in the title of the document, the body of the 2016 restated trust also contains plain language which demonstrates he intended to revoke and replace all of his prior trust documents, including his 2006 handwritten note. Section 1.1 states: "I declare and confirm *this trust*, and the initial Trustees named above, and I agree to the terms and provisions of *this trust agreement*." [JAR 018] (emphasis added). Section 1.2 states: "I reserve the right to withdraw any part or all of the assets in *this trust*" and "reserve the right to amend or revoke *this trust* during my lifetime ...." [JAR 018] (emphasis

[13] Should the Court wish to clarify this point of law in West Virginia, Respondent suggests adopting the following Syllabus Point: "A person using the phrase 'amended and restated,' or words of like import, in a document intends that document to be the most updated, complete, and final version. Thus, an amended and restated document revokes and replaces all prior documents concerning the same subject matter."

added). Furthermore, Section 1.3 states: "All assets in *this trust* will be held by my Trustees in accordance with the provisions of *this trust agreement*." [JAR 019] (emphasis added). Gerald Coyne's 2016 restated trust makes no reference whatsoever to prior trust documents or previous statements of intent other than the "original effective date" of the 2006 original trust which was revoked and replaced by the 2016 restated trust. Instead, Gerald Coyne's 2016 restated trust unambiguously provides that "this trust agreement" governs all assets held in the trust at his death.[14] Petitioner identifies no pled facts and no supporting law to justify contradicting this clear, complete statement of Gerald Coyne's intent or violating the most basic principle of trust interpretation.

In an effort to avoid these clear statements of intent, Petitioner conflates contract law and trust law. She argues Gerald Coyne's trust documents are cumulative and the 2006 handwritten note "remains in full force" because "separate written instruments will be construed together" to form a contract and the 2016 restated trust lacks a formal "merger provision." Petitioner's Brief, pp. 22–24. A merger clause is "[a] provision in a contract" which provides "the written terms may not be varied by prior or oral agreements." Frederick Bus. Properties Co. v. Peoples Drug Stores, Inc., 191 W. Va. 235, 240 n. 2, 445 S.E.2d 176, 181 n. 2 (1994) (quoting BLACK'S LAW DICTIONARY 989 (6th ed. 1990)) (emphasis added). Petitioner cites multiple contract cases to suggest a formal merger provision is *required* to revoke and replace Gerald Coyne's prior trust documents including the 2006 handwritten note. Petitioner's Brief pg. 22; TD Auto Fin. LLC v. Reynolds, 243 W. Va. 230, 842 S.E.2d 783 (2020) (finding merger clause in

[14] Gerald Coyne never conveyed the 155 Waverly Drive real estate to a trust. Instead, he conveyed this real estate to a separate LLC in 2008 which rented the property and owned it when he died in 2019. If extrinsic evidence were necessary to determine his intent, this is clear evidence that Gerald Coyne's intent changed after 2006 and his 2016 restated trust superseded all prior trust documents or statements of intent. It is also clear evidence that any gift of the 155 Waverly Drive real estate in the 2006 handwritten note adeemed.

retail installment sales contract nullified prior agreement); Antero Res. Corp. v. Directional One Servs. Inc. USA, No. 20-0965, 2022 WL 1055592 (W. Va. Apr. 8, 2022) (finding merger clause nullified prior argument in breach of contract). Even if the 2016 restated trust is viewed as a contract, this is simply not true. Petitioner's argument takes the contract cases out of their proper context and grossly overstates their holdings. Certainly, Gerald Coyne could, and did, express his intent to amend and restate his trust through multiple provisions of his 2016 restated trust. Petitioner's argument ignores Sections 1.1, 1.2, and 1.3 of the 2016 restated trust. Regardless of whether the 2016 restated trust contains a formal merger provision, it still contains Gerald Coyne's clear directive that "[a]ll assets in this trust will be held by my Trustees in accordance with the provisions of *this trust agreement*." (emphasis added). Semantics aside, the effect is the same.

Petitioner also engages in semantics by arguing that Gerald Coyne's 2006 original trust only granted him power to amend or revoke. Petitioner's Brief, pp. 21–22. She reasons, without any legal authority, that Gerald Coyne had no power to "restate" his trust, replace his prior trust documents, or "nullify" his prior statements of intent—as if restatement is not a form of amendment or otherwise a plain statement of intent. This exercise in semantics is unavailing. It suggests Gerald Coyne reserved the right to amend or revoke some of the terms of his trust, but not all of them. In essence, Petitioner suggests Gerald Coyne could not replace his 2006 original trust and his 2006 handwritten note by executing his 2016 restated trust.[15] This argument turns Cyfers and Proudfoot inside out; under West Virginia law, Gerald Coyne must have referred specifically to his 2006 handwritten note to incorporate or revive it in his 2016 restated trust, not

[15] The absurdity of this argument is highlighted when Petitioner later argues that Respondent as Trustee somehow had greater power to alter Gerald Coyne's trust documents through wavier and estoppel than Gerald Coyne himself did through the plain expressions of intent found in his 2016 restated trust. Petitioner's Brief, pg. 26–28.

the other way around. Regardless of whether Gerald Coyne "amended" his 2006 original trust and the 2006 handwritten note by replacing them with his 2016 restated trust or "restated" his 2006 original trust, as amended, with his 2016 restated trust, the result is the same: the 2016 restated trust revoked and replaced all of his prior trust documents, represents a complete statement of his intent, and provides all of the terms of his trust. This Honorable Court should not accept Petitioner's exercise in semantics and invitation to frustrate Gerald Coyne's clear intent by ignoring one half of the title of his 2016 Amended *and Restated* Trust.

C. Gerald Coyne's 2016 Amended and Restated Trust Is Unambiguous; Therefore, Its Interpretation Is Limited to the Four Corners of the Document.

Petitioner herself attached the 2016 restated trust to her Complaint. [JAR 018] She does not dispute its content. She does not claim any provisions are ambiguous. Nevertheless, she attempts to graft a ten year-old document—the 2006 handwritten note—into the 2016 restated trust to alter Gerald Coyne's plain statement of his intent. Basic West Virginia law prevents Petitioner from using extrinsic evidence to alter the plain terms of the 2016 restated trust and manufacture her desired result in this manner.

If a writing is unambiguous, it must speak for itself by its words, without aid of any extrinsic evidence. Syllabus Point #1, *in part*, Uhl v. Ohio River R. Co., 51 W. Va. 106, 41 S.E. 340 (1902); *see also* Sally-Mike Properties v. Yokum, 175 W. Va. 296, 300, 332 S.E.2d 597, 601 (1985) ("Intention disclosed, if at all, by inference or implication is not allowed to prevail over a different intention expressed in terms."). In the context of wills and trusts, only "[w]here the words of a will are ambiguous as to testamentary intent, [is] extrinsic evidence [] admissible to prove the testator's intent." Syllabus Point #4, In re Teubert's Est., 171 W. Va. 226, 227, 298 S.E.2d 456, 457 (1982); W. Va. Code § 44D-1-112 ("The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation

of the terms of a trust and the disposition of the trust property."); *see also* Faith United Methodist Church v. Morgan, 231 W. Va. 423, 443, 745 S.E.2d 461, 482 (2013) (quoting Syllabus Point # 9, Paxton v. Benedum-Trees Oil Co., 80 W. Va. 187, 94 S.E. 472 (1917) ("Extrinsic evidence will not be admitted to explain or alter the terms of a written contract which is clear and unambiguous.")).

Most of Petitioner's argument focuses on extrinsic evidence (e.g. selected parts of letters written by Respondent as Trustee; vague comments made by Gerald Coyne to Respondent). Such extrinsic evidence is wholly irrelevant because the 2016 restated trust is not ambiguous. Therefore, this Honorable Court should simply disregard these arguments. Instead, the Court should focus on the plain language of the 2016 restated trust. Clear and unambiguous language is not subject to judicial construction or interpretation, but full effect will be given to the plain meaning of the words. Syllabus, Keffer v. Prudential Ins. Co., 153 W. Va. 813, 172 S.E.2d 714 (1970). "Amend" means to "change the wording of" or "alter." Meanwhile, "restate" means to "state again in a new form." BLACK'S LAW DICTIONARY (7th ed. 1999). Gerald Coyne stated his trust again, in its new form, when he executed his 2016 restated trust. He did not add to his prior trust documents; rather, he replaced them with a unitary, comprehensive statement of his intent. Thus, when the plain meaning of the words Gerald Coyne chose for his 2016 restated trust is applied, there is no question he intended the document to be a complete statement of his intentions and a replacement for all prior trust documents.

D. The 2006 Handwritten Note Cannot be a Valid Binding Memorandum to the 2016 Amended and Restated Trust under West Virginia Law.

Where the provisions of a contract are clear and unambiguous, the court should give full effect to the plain meaning. Cherrington v. Erie Ins. Property & Cas. Co., 231 W. Va. 470, 486, 745 S.E.2d 508, 524 (2013). This is also true of trust language. The 2016 restated trust

clearly states that Gerald Coyne "*may make* a list or memorandum expressing how [he] wish[es] certain items of [his] *tangible personal property* to be distributed [with the] intent that [his] wishes will be carried out, and the list or memorandum shall be considered part of this trust and legally binding." Complaint, ¶ 22 (emphasis added). [JAR 010] The phrase "may make" is prospective in nature and only contemplates a future memorandum. There is no mention of the 2006 handwritten note, and certainly no specific mention of this existing document. Thus, the plain language of the 2016 restated trust actually nullifies the 2006 handwritten note by stating that Gerald Coyne "may make" a memorandum in the future to dispose of tangible personal property rather than acknowledging the 2006 handwritten note in some fashion. Giving full effect to the prospective wording, Gerald Coyne could not have been referencing the 2006 handwritten note as it had already existed for ten years.[16]

Further, the 2006 handwritten note cannot be a binding memorandum to the 2016 restated trust which conveys real estate because the trust itself limits such memoranda to "tangible personal property,"[17] and the 155 Waverly Drive real property cannot be considered tangible personal property. Under the terms of the 2016 restated trust, tangible personal property is defined to exclude assets "held by me primarily for business or investment purposes," but "does include such things as my personal effects, household goods and automobiles." *See* Complaint, Exhibit A, Section 2.3(C). [JAR 19–20] Thus, applying the plain meaning of the words, any binding

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[16] Indeed, for the 2006 handwritten note to have any legal effect under West Virginia law, the 2016 restated trust must specifically identify the 2006 handwritten note as an intended amendment or intended binding memorandum. As discussed above, no portion of the 2016 restated trust meets these requirements under McCandless, Cyfers, and Proudfoot.

[17] Under West Virginia law, personal property is defined to include "fixtures attached to land, if not already included in the valuation of such land entered in the proper landbook; all things of value, moveable and tangible, which are the subjects of ownership; all chattels real and personal . . ." W. Va. Code § 11-5-3.

memorandum must necessarily be limited to tangible personal property and cannot include the real estate—155 Waverly Drive—which Gerald Coyne conveyed to his business in 2008.

E. Gerald Coyne's Putative Gift of the 155 Waverly Drive Real Estate to Petitioner in 2006 Adeemed When He Conveyed the Same Real Estate to Coyne Properties, LLC in 2008.

A specific legacy is adeemed if the testator sells or disposes of the identical thing bequeathed so that it does not form a part of his estate at the time of his death. Morriss v. Garland, 78 Va. 215 (1883). A specific legacy is a gift of a particular or specified fund or thing. Claymore v. Wallace, 146 W. Va. 379, 120 S.E.2d 241 (1961). Further, "[a] specific legacy . . . is subject to ademption if not in existence . . . ." Syllabus Point # 3, in part, Claymore v. Wallace, 146 W. Va. 379, 120 S.E.2d 241 (1961). Ademption is said to be the most distinctive feature of a specific legacy. Morriss, 78 Va. 215.

In this case, even if the Court were to find the 2006 handwritten note is somehow a part of the 2016 restated trust, the real estate at 155 Waverly Drive adeemed, and is no longer available to Petitioner, because Gerald Coyne did not own it at his death and never included it in his 2006 original trust or his 2016 restated trust. Instead, he chose to convey it to his business and use it as rental property. The potential devise was a specific devise because the 2006 handwritten note explicitly identified the real estate which is a unique and particular thing that cannot be procured with a reasonable alternative. On April 16, 2008, about two years after he created the 2006 handwritten note, Gerald Coyne conveyed this real estate to James W. Steptoe, Trustee, "in trust, nevertheless, to immediately reconvey said real estate to Coyne Properties, LLC." The real estate was in fact conveyed and the deed recorded in 2008. Thus, neither Gerald Coyne, nor his 2006 original trust, owned the real property when he executed his 2016 restated trust. And, neither Gerald Coyne, nor his 2016 restated trust, owned the real property when he died in 2019. Because

the 155 Waverly Drive real estate was not part of Gerald Coyne's trust at the time of his passing, this specific devise is adeemed and is no longer available to Petitioner in this case.

In an effort to avoid ademption, Petitioner cites Syllabus Point #5 of Gable v. Gable, 245 W. Va. 213, 858 S.E.2d 838, 842 (2021). Her reliance on Gable is misplaced. Gable was a premises liability case involving application of the "open and obvious" rule. The Supreme Court held it is not necessary for plaintiff to plead negative facts to avoid this defense (i.e. that plaintiff was *not* a trespasser; that the alleged hazard was *not* open and obvious) and found the circuit court "erred in making factual determinations based upon assertions in the defendant's motion to dismiss." Id at 218, 843. The same is not true in this case. The Circuit Court did not make factual determinations based upon mere assertions in Respondent's Motion to Dismiss; it rightfully made factual determinations based upon deeds found in the public record. Mountaineer Fire & Rescue Equip., LLC, 244 W. Va. at 532, 854 S.E.2d at 894 ("When evaluating a motion to dismiss, *we may consider documents that are attached to or submitted with the complaint* . . . . and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.'" (quoting 5B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357 (3d ed. 2004)) (emphasis in original). Therefore, this Court should not find error in the Circuit Court's consideration of ademption as a basis for dismissing Petitioner's Complaint and also as an expression of Gerald Coyne's overall intent vis-à-vis the 155 Waverly Drive real estate.[18]

[18] As part of this argument, Petitioner insists the Circuit Court should have taken as true her allegation that "Respondent now, still, has the power and duty to convey the house to Petitioner." Petitioner's Brief, pg. 21. This is also not true. Neither the Circuit Court, nor this Honorable Court, has any obligation to accept as true *legal conclusions* contained in Petitioner's Complaint. Rule 12(b)(6) only requires a court to accept as true *factual* allegations contained in the complaint. Kopelman & Assocs., L.C. v. Collins, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996) (citing Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L.Ed.2d 59, 65 (1984)) ("[A]lthough the plaintiff enjoys the benefit of all

F. Petitioner Cannot Alter the Unambiguous Terms of Gerald Coyne's 2016 Amended and Restated Trust by Claiming Waiver or Estoppel as to Respondent's Actions in the Administration of the Trust.

Petitioner incorrectly argues from extrinsic evidence—selected portions of letters—that Respondent as Trustee somehow waived provisions of the 2016 restated trust or is somehow estopped from opposing her attempts to graft the 2006 handwritten note into the 2016 restated trust.[19] These arguments fail upon proper application of the waiver and estoppel doctrines.

1. A trustee cannot waive or modify the terms of an irrevocable trust without the consent of all the beneficiaries.

Petitioner incorrectly argues that Respondent, as trustee of the 2016 restated trust, somehow waived specific terms of the trust for her benefit and to the detriment of three non-party residual beneficiaries after Gerald Coyne died and the Trust became irrevocable.[20] Not only does this argument ignore applicable West Virginia law, but it also fails to acknowledge the other interested parties who are beneficiaries under the 2016 restated trust.

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inferences that plausibly can be drawn from the pleadings, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted.").

[19] Although not germane to the legal issues, the Court should note that Petitioner's selective presentation of Respondent's letters is highly self-serving. When the complete letters are read in proper context, it is clear Respondent proposed various trust modifications—which must be approved by the other trust beneficiaries—in an effort to address Petitioner's "expectations," give deference to her loss, maintain peace in the family, and avoid all the unpleasantness and cost of litigation. *See* W. Va. Code § 44D-4-411(b) ("A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.").

[20] Petitioner argues "Respondent acted under the sole force of the 2006 handwriting in order to distribute property to himself and others, and in so doing he arguably waived any argument that the handwriting was legally impotent." Petitioner's Brief, pg. 27. She appears most concerned about Gerald Coyne's Rolex watch and Lincoln Navigator, even though she has no interest in this personal property under the 2016 restated trust. *See* Petitioner's Complaint, ¶ 27; Petitioner's Brief, pg. 7. This concern is misplaced. Respondent has taken control of certain personal property owned by Gerald Coyne at his death specifically because it is his legal duty as Trustee to do so. *See* W. Va. Code § 44D-8-809 ("A trustee shall take reasonable steps to take control of and protect the trust property."). Petitioner has no standing to dispute Respondent's actions as to this personal property because she has no interest in this personal property under the 2016 restated trust.

"The doctrine of waiver focuses on the conduct of the party against whom waiver is sought, and requires that party to have intentionally relinquished a known right." Potesta v. U.S. Fid. & Guar. Co., 202 W. Va. 308, 315–16, 504 S.E.2d 135, 142–43 (1998). Here, Petitioner focuses on the conduct of Respondent, as Trustee of the 2016 restated trust, not the parties against whom the waiver is actually sought: Gerald Coyne's 2016 restated trust and its three residual beneficiaries (George R. Coyne, Richard T. Coyne, Sr., and James T. Coyne). In other words, Petitioner's focus is misplaced and waiver cannot apply.

Only the settlor or beneficiaries of a trust can waive the terms of the trust. *See* Smith v. First Cmty. Bancshares, 212 W. Va. 809, 575 S.E.2d 419 (2002) (holding settlor can waive duty of loyalty); Dearing v. Selvey, 50 W. Va. 4, 40 S.E. 478 (1901) (holding beneficiary can waive trustee's unauthorized act through ratification). The trustee of a trust is tasked with administering and managing the trust according to its terms. *See* W. Va. Code § 44D-8-801 ("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 this chapter"). A trustee cannot unilaterally modify the terms of an irrevocable trust. Any modification of an irrevocable trust must be approved by all of the affected beneficiaries. *See* W. Va. Code § 44D-4-411(b) ("A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust."). Thus, contrary to Petitioner's arguments, Respondent as Trustee cannot legally waive provisions of the 2016 restated trust to create the result she desires.

By arguing waiver on the part of *the trustee*, Petitioner actually argues against the "paramount principle" of trust interpretation that the "intention of *the settlor* prevails." She incorrectly encourages this Court to find as a matter of law that a trustee can waive the plain

language of an irrevocable trust to the detriment of some beneficiaries and the benefit of others if the trustee so chooses (i.e. an "intentional relinquishment of a known right"). This is clearly contrary to the most basic tenets of West Virginia trust law.

2. A trustee cannot be estopped from administering an irrevocable trust in accordance with its plain terms.

Petitioner also incorrectly argues that Respondent is somehow estopped from administering the 2016 restated trust in accordance with its plain terms. Once again, this argument ignores applicable West Virginia law and fails to acknowledge the other interested parties who are beneficiaries under the 2016 restated trust.

First and foremost, Respondent has a duty to administer the 2016 restated trust in accordance with its plain terms as he reasonably understands them. *See* W. Va. Code § 44D-8-801 ("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 this chapter"); W. Va. Code § 44D-10-1006 ("A trustee who acts in reasonable reliance on the terms of the trust instrument as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance."). The 2016 restated trust became irrevocable when Gerald Coyne died in 2019. Respondent should not deviate from the plain terms of the irrevocable 2016 restated trust without consent from all trust beneficiaries to some modification. *See* W. Va. Code § 44D-4-411(b) ("A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust."). Even the letters Petitioner selectively quoted in her Complaint and attached to her Response to Motion to Dismiss demonstrate Respondent's

clear communication of these duties.[21] Given Respondent's basic legal duties vis-à-vis the 2016 restated trust, and his explicit acknowledgment of those duties to Petitioner, estoppel clearly does not apply.

Beyond proper compliance with the 2016 restated trust, "[e]stoppel [only] applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syllabus Point #2, *in part*, Ara v. Erie Ins. Co., 182 W. Va. 266, 267, 387 S.E.2d 320, 321 (1989). Petitioner did not rely to her detriment on an act or omission of Respondent. Indeed, Petitioner only speculates that Gerald Coyne somehow relied on an act or omission of Respondent.[22] Such speculation is not sufficient to satisfy the legal requirement that Petitioner herself somehow relied to her detriment upon some act or omission of Respondent.

Finally, "[t]he doctrine of estoppel is an equitable doctrine." Samsell v. State Line Dev. Co., 154 W. Va. 48, 61, 174 S.E.2d 318, 326–27 (1970) (quoting 31 C.J.S. ESTOPPEL § 63 390). Even when it applies, "it should be applied with caution and in furtherance of equitable considerations." Id. "'The doctrine of estoppel should be applied cautiously and only when equity clearly requires it to be done." Id. (quoting Syllabus Point # 3, Humble Oil & Refining Co. v. Lane, 152 W. Va. 578, 165 S.E.2d 379 (1969)). Here again, by arguing estoppel against

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[21] *See* Plaintiff's Response, Exhibit C ("What Jerry has expressed might not be consistent with what you would want. Therefore, we need to discuss the best way to align Jerry's intentions with your plans for the future . . . . If your wishes do vary from Jerry's intent, there are ways to modify the provisions subject to agreement with the residual beneficiaries.") [JAR 115] and Exhibit D ("Because I do not have the legal ability to give you 155 Waverly Court, I asked the three brothers [residual beneficiaries] if they would simply give you the house, since it is really theirs to give based on all reasonable legal interpretations.") [JAR 130].

[22] *See* Response to Motion to Dismiss, pg. 14 ("Quite conceivably, in his hybrid capacity of successor trustee/attorney/confidante, by statements made or should have made to Gerald [Coyne] concerning the latter's gifting of Waverly to plaintiff, defendant is now estopped from blocking the property's transfer to plaintiff.") [JAR 096].

Respondent, Petitioner actually argues against the "paramount principle" of trust interpretation that the "intention of the settlor prevails." She incorrectly encourages this Honorable Court to find as a matter of law that a trustee can somehow be prevented from administering a trust in accordance with its plain language to the detriment of some beneficiaries and the benefit of others and contrary to the stated intent of the trust settlor. This self-serving position is not an appropriate application of the *equitable* doctrine of estoppel or the paramount principle of trust interpretation.

G. Petitioner Cannot Alter the Unambiguous Terms of Gerald Coyne's 2016 Amended and Restated Trust by Advancing Speculative "Reformation" Arguments She Failed to Raise before the Circuit Court.

In her attempt to avoid the word "Restated," alter the plain terms of the 2016 restated trust, treat all of Gerald Coyne's trust documents executed over a ten-year span as cumulative, and resurrect the 2006 handwritten note, Petitioner argues "she may obtain a judgment in her favor [] by proving Gerald [Coyne's] intention to gift her the [155 Waverly Drive real estate] and personalty, even if the unambiguous terms of the Trust documents would dictate otherwise." Petitioner's Brief, pp. 25–26. The only authority she offers for this novel argument is the general provisions of West Virginia Code § 44D-4-415 (Reformation to correct mistakes):

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the grantor's intention if it is proved by preponderance of the evidence that both the grantor's intent and the terms of the trust instrument were affected by a mistake of fact or law, whether in expression or inducement.

W. Va. Code § 44D-4-415. Petitioner then points to Paragraph #30 of her Complaint which selectively quotes, but does not attach, Respondent's August 24, 2020 letter:

> While Jerry's writing is plain that the 155 Waverly house was to pass to you free and clear after one year for you to live in, unfortunately the terms of the Trust only permit tangible personal property, not real estate, to pass under the external memorandum. And, I'm sure Jerry did not realize this when he wrote the memo.

[JAR 011] Based upon Respondent's observation, taken out of context, Petitioner argues that Gerald Coyne's intentions never changed after he prepared his 2006 handwritten note and, thus, she has a basis to present this speculation to a jury in spite of his 2008 conveyance of the 155 Waverly Drive real estate to Coyne Properties, LLC and the unambiguous language of his 2016 Amended *and Restated* Trust. Petitioner's new "reformation" arguments fail for at least three reasons.

1. Petitioner never presented her new "reformation" arguments to the Circuit Court.

"In the exercise of its appellate jurisdiction, [the Supreme Court] will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Wang-Yu Lin v. Shin Yi Lin, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009) (citing Syllabus Point #1, Mowery v. Hitt, 155 W. Va. 103, 181 S.E.2d 334 (1971)).[23] Petitioner filed her Complaint on May 13, 2021, but no part of her Complaint asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44D-4-415. [JAR 007] Petitioner filed her Response to Motion to Dismiss on September 23, 2021, but no part of her Response asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44D-4-415. [JAR 083] In her Response, Petitioner even asked the Circuit Court for leave to amend her Complaint "for sake of clarification," but still failed to mention reformation under W. Va. Code § 44-D-415. [JAR 092] Petitioner filed her Motion Pursuant to West Virginia Rule of Civil Procedure 59(e) to Alter or Amend 11/24/2021 "Order Granting Defendant's Motion to Dismiss Complaint" on November

[23] *See also* Whitlow v. Bd. of Educ. of Kanawha Cnty., 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) ("Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal."); Shrewsbury v. Humphrey, 183 W. Va. 291, 395 S.E.2d 535 (1990); Cline v. Roark, 179 W. Va. 482, 370 S.E.2d 138 (1988); Crain v. Lightner, 178 W. Va. 765, 364 S.E.2d 778 (1987); Trumka v. Clerk of the Circuit Court, 175 W. Va. 371, 332 S.E.2d 826 (1985).

29, 2021, but no part of this Motion asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44-D-415. [JAR 378–381] In her Motion, Petitioner again asked the Circuit Court for leave to "file an amended complaint attaching and incorporating the original August 17, 2006 trust document and adjusting her allegations in clarification, consistent with her arguments as set forth in her Response," but still failed to mention reformation under W. Va. Code § 44-D-415 [JAR 380] And, Petitioner filed her Reply to Defendant's Response to Plaintiff's Motion to Alter or Amend on December 14, 2021, but no part of her Reply asked the Circuit Court to reform the 2016 restated trust under W. Va. Code § 44D-4-415 [JAR 411–413] Indeed, neither the word "reform," nor the word "reformation," appears anywhere in Petitioner's Complaint, Response, Motion, or Reply. Likewise, the citation "W. Va. Code § 44D-4-415" does not appear anywhere in Petitioner's Complaint, Response, Motion, or Reply. Petitioner's new reformation argument is not jurisdictional. She clearly did not raise this novel argument before the Circuit Court. The Circuit Court certainly did not consider and decide it. Therefore, this Honorable Court should not consider Petitioner's new reformation argument on appeal.

In Wang-Yu Lin, the Supreme Court found waiver of an issue argued on appeal—whether an automobile rental insurance policy is outside the scope of W. Va. Code § 33-6-31(a) due to the fact that it is regulated by W. Va. Code § 33-12-32—because it was not raised by the appellants below, nor was it decided by the circuit court. The Supreme Court found waiver of this issue *even though* both Mr. Lin, in his pleading, and the circuit court, in its order, cited W. Va. Code § 33-12-32 because this citation did not address the specific issue raised by the appellants. Wang-Yu Lin v. Shin Yi Lin, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009). In the present case, Petitioner never even cited West Virginia Code § 44D-4-415 (Reformation to correct mistakes)—the very statute upon which she bases her new argument—once in four separate

pleadings and over thirty-five pages of allegations and argument which included two unrelated motions to amend. Therefore, even more so than the appellant in Wang-Yu Lin, Petitioner waived consideration of this statute and her novel "reformation" arguments on appeal.

2. Petitioner cannot create a legally sufficient Complaint through sheer speculation and conjecture.

In Kopelman & Assocs., L.C. v. Collins, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996), Justice Cleckley explained:

> We read a pleading liberally and accept as true the well-pleaded allegations of the complaint and the inferences that reasonably may be drawn from the allegations. *See* State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). Conversely, although the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from the pleadings, *a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted. See* Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L.Ed.2d 59, 65 (1984).

Id. (emphasis added); *see also* Highmark West Virginia, Inc. v. Jamie, 221 W. Va. 487, 491, 655 S.E.2d 509, 513 (2007) ("[B]ald statements or a carelessly drafted pleading will not survive a Rule 12(b)(6) motion to dismiss."). Thus, under Rule 12(b)(6), while Petitioner is entitled to have the facts pled in her Complaint taken as true, and entitled to have *reasonable* inferences from the facts pled in her Complaint taken as true, she is certainly *not* entitled to engage in rank speculation based upon an extrinsic letter to avoid the plain language of a trust document she herself acknowledges as unambiguous.[24] And, she is certainly *not* entitled to an opportunity to exhort a jury to ignore

[24] Petitioner forgets these presumptions only apply when the legal sufficiency of her Complaint is evaluated under Rule 12(b)(6) by suggesting this Honorable Court should rule "in a dispositive manner on the plain terms of the Trust documents" by reversing the Circuit Court and mandating a judgment in her favor "on her claims of ownership of the Waverly Drive house and the household belongings." Petitioner's Brief, pg. 25. Clearly, this is not proper. Respondent concedes Petitioner's factual allegations are taken as true at this stage under Rule 12(b)(6), but would certainly contest many of her allegations if it were necessary to develop the facts for a trial.

the plain language of Gerald Coyne's 2016 restated trust on the unwarranted inference that his intentions did not change from 2006 to 2016.

Petitioner's reformation argument is premised upon pure speculation about Gerald Coyne's intentions in 2016, when he restated his trust, and in 2019, when he died, based upon Respondent's August 24, 2020 letter. She asks this Honorable Court for an opportunity to argue to a jury that Gerald Coyne's intent never changed after he "wrote the memo" in 2006, even though his 2008 conveyance of the 155 Waverly Drive real estate to Coyne Properties, LLC and his 2016 restated trust plainly demonstrate otherwise. Petitioner never presented the Circuit Court with an opportunity to reject these speculative "reformation" arguments, but it would have been entirely justified in doing so. This Honorable Court should reject Petitioner's speculation; it does not create a "set of facts" sufficient to avoid dismissal under Rule 12(b)(6).

3. Petitioner cannot use reformation under W. Va. Code § 44D-4-415 to re-write Gerald Coyne's unambiguous 2016 Amended and Restated Trust and create her desired result.

Petitioner's expansive interpretation of W. Va. Code § 44D-4-415 would allow any person to challenge any trust provision, regardless of the plain, unambiguous terms of the trust, simply by alleging he/she can prove the trust settlor had some alternative intent at some point in the past. Petitioner acknowledges Gerald Coyne's intent as a trust settlor is "paramount," but then asks this Honorable Court for an opportunity to change the plain terms of his 2016 restated trust as if this unambiguous document is not the most complete, accurate, and up-to-date statement of his intentions before he died in 2019. This argument turns basic West Virginia law inside out. Although it did not have an opportunity to consider Petitioner's new "reformation" arguments, the Circuit Court implicitly rejected them by correctly finding "[t]he 2016 restated trust replaces all of [Gerald] Coyne's prior trust documents, represents a complete statement of his intent, and provides all terms of his trust." [JAR 373] Likewise, this Honorable Court should reject Petitioner's

suggestion that she is entitled to an opportunity to defeat Gerald Coyne's intent plainly and completely established by his 2016 restated trust.

III. THE CIRCUIT COURT ACTED WELL WITHIN ITS DISCRETION BY GRANTING RESPONDENT'S MOTION FOR PROTECTIVE ORDER WITHOUT PETITIONER'S RESPONSE FIVE DAYS BEFORE IT ENTERED ITS ORDER GRANTING RESPONDENT'S MOTION TO DISMISS.

A. Petitioner Cites No Legal Authority for Her Position.

"As a general rule, [the Supreme] Court has held that '[a]lthough we liberally construe briefs in determining issues presented for review, issues which are . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.' State v. LaRock, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996); *see also* Tiernan v. Charleston Area Med. Ctr., Inc., 203 W. Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) ("Issues . . . merely mentioned in passing are deemed waived. (citation omitted))." State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 41, 658 S.E.2d 728, 732 (2008). Petitioner complains that the Circuit Court somehow abused its discretion by granting Respondent's Motion for Protective Order on November 19, 2021 without providing her an opportunity to respond before it granted Respondent's Motion to Dismiss on November 24, 2021. [JAR 363 and 364] However, Petitioner cites no "pertinent authority" to support her complaints. Therefore, this Honorable Court should disregard her complaints on appeal.

B. There Was No Need for Discovery with Respondent's Motion to Dismiss Pending.

Rule 26(c) of the West Virginia Rules of Civil Procedure provides that, "for good cause shown, the court in which the action is pending . . . may make any order which justice so requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery not be had ...." W. Va. R. Civ. P. 26(c). Such "[d]iscovery orders lie within the sound discretion of a trial court." Bartles

v. Hinkle, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) (citing Syllabus Point #4, Cox v. State, 194 W. Va. 210, 460 S.E.2d 25 (1995)). Certainly, the Circuit Court had "good cause" to block Petitioner's onerous discovery requests when it was so close to granting Respondent's Motion to Dismiss (i.e. November 19 to November 24, 2021—five days with an intervening weekend). The Supreme Court has specifically observed that "Rule 26(c)(2) may be used to stay discovery pending the outcome of a dispositive motion or other matter." State ex rel. Nationwide Mut. Ins. Co. v. Kaufman, 222 W. Va. 37, 44, 658 S.E.2d 728, 735 (2008) (quoting FRANKLIN D. CLECKLEY, ROBIN J. DAVIS & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE § 26(c)(2), 348 (2d ed. 2006)). Petitioner had no need for discovery to resist Respondent's Motion to Dismiss. All of the facts in her Complaint are already taken as true under Rule 12(b)(6). Therefore, Petitioner cannot demonstrate that the Circuit Court abused its discretion by blocking her discovery requests, and the corresponding wasted resources, five days before it granted Respondent's Motion to Dismiss. This was a sound, practical decision by the Circuit Court which was well within its legal authority and discretion.

CONCLUSION

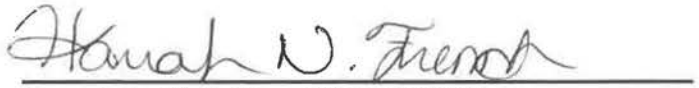
Given the plain language of the documents Petitioner has acknowledged in her Complaint and well-settled West Virginia law, Petitioner is not entitled to receive the 155 Waverly Drive real estate identified in the 2006 handwritten note *in addition to* the Deep Creek Lake real estate interest identified in the 2016 restated trust. She is only entitled to receive the gifts Gerald Coyne intended to provide her through the plain terms of his 2016 restated trust. This complete statement of his intent explicitly provides that "[a]ll assets in this trust will be held by my Trustees in accordance with the provisions of *this trust agreement*" and makes no mention of either the 2006 handwritten note or the 155 Waverly Drive real estate. Therefore, the Circuit Court was absolutely correct in concluding there is no set of facts upon which Petitioner could alter Gerald

Coyne's 2016 restated trust and absolutely correct in granting Respondent's Motion to Dismiss under Rule 12(b)(6).

WHEREFORE Respondent, RICHARD T. COYNE, ESQ., TRUSTEE OF THE GERALD COYNE TRUST, respectfully requests this Honorable Court to affirm the Circuit Court's rulings, deny Petitioner's appeal, dismiss this case with prejudice, and grant such other relief as it shall deem proper.

DATED the 10th day of June 2022.

RESPONDENT
RICHARD T. COYNE, ESQ., TRUSTEE OF THE GERALD COYNE TRUST
By Counsel



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CERTIFICATE OF SERVICE

I certify that I served the foregoing RESPONDENT'S BRIEF upon all counsel of record by placing a true and accurate copy in the United States Mail, first class, postage prepaid, in an envelope addressed as follows:

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