

STATE OF WEST VIRGINIA

SCA EFiled: May 03 2023
02:46PM EDT
Transaction ID 69947192

State of West Virginia ex rel.
Denita D. Berg,
Petitioner

vs.) No. 22-853

The Honorable Lynn A. Nelson,
Judge of the Circuit Court of Grant
County, Joseph Berg, Jason Berg, and Jennifer Ford,
Respondents

**RESPONDENTS, JOSEPH BERG'S, JASON BERG'S AND
JENNIFER FORD'S, BRIEF**

Joseph Berg, Jason Berg and Jennifer Ford
Respondents – by Counsel

WALTERS & HEISHMAN, PLLC
ATTORNEYS AT LAW
PO BOX 119
MOOREFIELD, WV 26836
(304)530-6618

By: 

Nathan H. Walters
Counsel for Respondents
WV State Bar #10949
nathan@wkblaw.org

WALTERS & HEISHMAN,
PLLC
ATTORNEYS AT LAW
MOOREFIELD
WEST VIRGINIA

TABLE OF CONTENTS

1. Summary Response in Opposition to Petition for
Writ of Prohibition..... **Page 1**

2. Opposition to Petitioner’s Assignments of Error
Number 1 Through 3..... **Page 15**

3. Conclusion..... **Page 19**

TABLE OF AUTHORITIES

1. Horton v. Prof'l Bureau of Collections of Md., Inc., 238 W. Va. 310, 794 S.E. 2d 395 (W. Va. 2016) **Page 17**

2. State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (W. Va. 1997)
..... **Page 17**

3. W. Va. Code § 42-1-1, et. seq., **Page 8, 19**

4. W. Va. Code §42-2-1, et seq...... **Page 13**

5. W. Va. Code §42-1-3a..... **Page 12, 15, 16**

STATE OF WEST VIRGINIA

**State of West Virginia ex rel.
Denita D. Berg,
Petitioner**

vs.) No. 22-853

**The Honorable Lynn A. Nelson,
Judge of the Circuit Court of Grant
County, Joseph Berg, Jason Berg, and Jennifer Ford,
Respondents**

**SUMMARY RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF
PROHIBITION**

Comes now the above referenced Respondents, Joseph Berg, Jason Berg, and Jennifer Ford, by and through the Law Firm of Walters & Heishman, PLLC, and namely, their undersigned Counsel, Nathan H. Walters, and pursuant to that previously entered *Scheduling Order*, dated November 18, 2022, the said aforementioned Respondents, by and through their aforesaid Counsel, would tender this *Summary Response in Opposition to Petition for Writ of Prohibition* unto the Honorable West Virginia Supreme Court of Appeals.

In support thereof, the Respondents, Joseph Berg, Jason Berg, and Jennifer Ford, by and through their aforesaid Counsel, would hereafter provide the following *Summary Response* to said *Petition for Writ of Prohibition*:

WALTERS & HEISHMAN,
PLLC
ATTORNEYS AT LAW
MOOREFIELD
WEST VIRGINIA

1. That the Respondents, namely, Joseph Berg, Jason Berg and Jennifer Ford, are the biological and natural children of Darvin Ray Berg;
2. That Petitioner is not the biological mother of the Respondents, Joseph Berg, Jason Berg and Jennifer Ford, but was married to Darvin Ray Berg at the time of his death, on January 8, 2018;
3. That as aforesaid, Darvin Ray Berg departed this life on January 8, 2018, intestate, as a resident of Grant County, West Virginia;
4. That, subsequent to the death of Darvin Ray Berg, the Petitioner did employ Duke A. McDaniel, Esquire, for the purpose of aiding the Petitioner in administering the Estate of Darvin Ray Berg;
5. That, during the Administration process, an *Appraisal* was filed; with said document detailing various real property and personal property assets owned by Darvin Ray Berg, at the time of his death (*Supplemental Appendix Page 1*);
6. That, as evidenced by the *Appraisal*, the Petitioner, Denita D. Berg, signed said document verifying that all of the information contained therein was true and correct, so as to give Duke A. McDaniel, Esquire, the ability to file said *Appraisal*;
7. That in conjunction therewith, the Respondents were never provided with said *Appraisal* filed with the Grant County Clerk; (*It should be noted*

that although Petitioner, Denita D. Berg, was married to the late Darwin Ray Berg for several decades, with Jennifer Ford, at the time of her father's death and continuing today, residing in the former residence of the Petitioner and the decedent, neither of the late Mr. Berg's three (3) children's mailing addresses were provided to the Grant County Clerk by Denita D. Berg, current Petitioner and former Administratrix of Darwin Ray Berg's Estate);

8. That additionally, the aforementioned *Appraisement* did not properly inventory, itemize nor value, multiple items of personal property pertaining to the Estate of Darwin Ray Berg;
9. That, on or about April 18, 2019, the Respondents did consult with and thereafter employ the Law Firm of Walters & Heishman, PLLC, and namely, Nathan H. Walters, to aid them in re-opening the Estate of the late Darwin Ray Berg;
10. That, on April 18, 2019, Counsel for the Respondents did author certain written correspondence to Seymour "Bud" Fisher, the Grant County Clerk, requesting that said Clerk re-open the Estate of Darwin Ray Berg, in order to deal with certain issues subsequent to its closure, inasmuch as the actions and inactions of the Estate's Fiduciary, namely, Denita D.

Berg, the Administratrix thereof, was concerned (*Supplemental Appendix Page 6*);

11. That also encompassed within said April 18, 2019 correspondence, with Seymour "Bud" Fisher, was a request for the Grant County Clerk to appoint a Fiduciary Commissioner to deal with the issues ascertained, inasmuch as the actions and inactions of the prior Administratrix and Fiduciary of the Estate of the late Darvin Ray Berg, Denita D. Berg, were concerned;

12. That, subsequent thereto, the Grant County Clerk did appoint Bradley Goldizen to act as the Fiduciary Commissioner of said Estate;

13. That, prior to formally setting a Fiduciary Hearing, Counsel for the Respondents, as well as the aforesaid Fiduciary Commissioner, did attempt to ascertain who, if anyone, represented the former Administratrix, Denita D. Berg, and information was then provided that seemingly indicated that both Duke A. McDaniel, Esquire, and William H. Judy, III, Esquire, represented Denita D. Berg; therefore notice of the first Fiduciary Hearing previously set for May 15, 2019 was provided to both Counsel, as well as directly to Denita D. Berg;

14. That contact was thereafter made with William H. Judy, III, and he indicated that he may represent Denita D. Berg, in her capacity as the

Administratrix of the Estate of Darvin Ray Berg; however, the May 15, 2019 Fiduciary Hearing did not work with his schedule;

15. That the Fiduciary Hearing previously set for May 15, 2019 was thereafter agreeably **CONTINUED** unto June 18, 2019 (*Supplemental Appendix Page 7*);

16. That, on June 18, 2019, the initial Fiduciary Hearing occurred in the Grant County Circuit Courtroom; with said Hearing preserved by audio and digital recording by the Fiduciary Commissioner, Bradley Goldizen;

17. That the Respondents were all present and accounted for at said Fiduciary Hearing;

18. That the Petitioner, Denita D. Berg, did not appear in person nor with Counsel, despite being properly notified;

19. That the purpose of the said aforementioned Fiduciary Hearing was to attempt to ascertain, itemize and inventory multiple items of personal property that were not properly disclosed or administered by the former Administratrix thereof, Denita D. Berg; with said items having substantial value;

20. That a subsequent Fiduciary Hearing was thereafter set, with proper notice provided to Petitioner, Denita D. Berg, for October 9, 2019 to attempt to place values on the multiple items of personal property that

were not properly disclosed nor inventoried and therefore administered by the former Administratrix, Denita D. Berg, in the Estate of Darwin Ray Berg;

21. That, at said Fiduciary Hearing, on October 9, 2019, the Respondents were all present and accounted for and with their Counsel, Nathan H. Walters;

22. That also at said Fiduciary Hearing on October 9, 2019, the Petitioner, Denita D. Berg, was present in person and without Counsel;

23. That the Fiduciary Hearing on October 9, 2019 was recorded by the Fiduciary Commissioner, Bradley Goldizen; and during said Hearing the Petitioner, under oath, did **ADMIT** that the lionshare, if not all, of the personal property items identified by the Respondents herein had not been subject to the proper Administration of the Estate of Darwin Ray Berg, and were instead, omitted from the Appraisal of said Estate; however, same were still in the possession of the Petitioner *(Supplemental Appendix Page 16)*;

24. That, on or about November 12, 2019, Counsel for the Petitioner, Jason Sites, did cause to be filed a *Petition for Writ of Mandamus*, essentially requesting that the Court re-close the Estate of Darwin Ray Berg;

25. That also accompanying the said aforementioned *Petition for Writ of Mandamus*, was a *Notice of Hearing*, setting the matter for a Hearing in the Circuit Court of Grant County, West Virginia, with the Honorable Lynn A. Nelson presiding, on Monday, November 18, 2019;

26. That Counsel for the Respondents received his certified mailing with the aforesaid *Petition for Writ of Mandamus* and *Notice of Hearing* setting a Hearing for Monday, November 18, 2019, which was only received by Counsel for the Respondents on Friday, November 15, 2019 (*Supplemental Appendix Page 19*);

27. That, on Friday, November 15, 2019, Counsel for Respondents filed a *Motion to Intervene* in Civil Action 19-P-23 and an *Objection to Petitioner's Writ of Mandamus* (*Supplemental Appendix Page 23*);

28. That, on Monday, November 18, 2019, the Court conducted said Hearing, and, at the request of Jason R. Sites several days prior, thereafter entered an *Order Granting Writ of Mandamus*, dated November 18, 2019; with same entered on December 2, 2019 (*Supplemental Appendix Page 38*);

29. That, within the above referenced *Order Granting Writ of Mandamus*, the Court ordered the Estate of Darvin Ray Berg, to be closed again, although afforded Plaintiffs forty five (45) days from November 18, 2019

to file a Civil Action in the Circuit Court of Grant County, West Virginia; and it was the further **ORDER** of this Court that the Grant County Civil action 19-P-23 would be **CONSOLIDATED** with said proposed Civil Action; and

30. That based upon the totality of the events recited herein, the former Administratrix; former Fiduciary of the Estate of Darvin Ray Berg and current Petitioner, Denita D. Berg, did **COMMIT FRAUD** upon the Respondents by omitting substantial personal property assets from the Administration of the Estate of Darvin Ray Berg, which should have been subject to the proper Administration of said Estate; and that pursuant to the applicable West Virginia Code § 42-1-1, et. seq., one-half (1/2) of the omitted assets would and should have descended to Darvin Ray Berg's biological children, which are the named Respondents herein;

31. That the enumerated paragraphs thus far within this document are substantially similar to the enumerated allegations contained in the prior *Complaint*, filed with the Grant County Circuit Court Clerk, by and through the Respondents herein and former Plaintiffs in Grant County Civil Action 19-C-20, whereas the current Petitioner, Denita D. Berg, was the named Defendant therein (*Appendix Page 1*)

32. That thereafter, the customary pre-trial motions were filed by both parties and same are more specifically articulated on the attached *Supplemental Appendix*, filed simultaneously with this *Summary Response*;

33. That the Grant County Circuit Court, with the Honorable Lynn A. Nelson presiding, thereafter denied the previously filed *Motion to Dismiss*, filed by the Petitioner herein, by and through her Counsel, Jason R. Sites. The Court thereafter did appoint Bradley Goldizen as the Special Commissioner within this matter to determine the quantity, location, status and estimated value of the assets owned by Darvin Ray Berg at the date of his death and to submit a report to this Court regarding same. Special Commissioner Goldizen was afforded the ability to proceed in whatever manner he deemed appropriate to complete his tasks. The parties were to fully cooperate with the Special Commissioner. The Special Commissioner's report was to be filed within sixty (60) days of the *Order Denying Motion to Dismiss and Appointing Special Commissioner*, with said Order dated and entered on September 15, 2020 (*Appendix Page 49*);

34. That Bradley Goldizen, in his capacity as the Court appointed Special Commissioner within the matter below, drafted and caused to be filed a *Special Commissioner's Report*, specifically detailing the fair market

value of the substantial items of personal property that were not properly administered by the Petitioner in her capacity as the Administratrix of the Estate of the late Darvin Ray Berg (*Supplemental Appendix Page 40*);

35. That, thereafter, the Petitioner subsequently filed several additional motions, seeking relief from the aforesaid *Order Denying Motion to Dismiss and Appointing Special Commissioner*; (*Appendix Page 49*)

36. That lower Court **DENIED** the former Defendant and current Petitioner's relief requested and said denial is encompassed within that *Order Denying Defendant's Requested Relief*, dated October 19, 2020, and subsequently entered by the Court. (*Appendix Page 58*)

37. That, on November 16, 2020, lower Court, conducted an Evidentiary Hearing to address the items of personal property in dispute within this matter and said *Order* was entered by the Court on November 20, 2020; (*Supplemental Appendix Page 55*)

38. That, thereafter, as the Supplemental Appendix indicates, the Petitioner, filed certain post-Trial motions that are more accurately depicted on the Respondent's Supplemental Appendix;

39. That ultimately, the lower Court did, within that certain *Order*, dated September 15, 2021 and entered by the Court on September 27, 2021, empower the previously appointed Special Commissioner, Bradley

Goldizen, to make sale of the assets identified in his report at public auction, said sale shall be held as soon as practical (*Appendix Page 104*)

40. That thereafter, Petitioner by and through her aforesaid Counsel, filed additional post-Trial motions in an attempt to have the Court modify its ruling, with regard to formally **ORDERING** a sale to be conducted on the disputed items of personal property were not subject to the proper Administration of the late Darvin Ray Berg;

41. That the lower Court subsequently entered a **STAY**, which had the practical effect of precluding an auction occurring in the fall of 2021;

42. That, by virtue of that certain *Order Lifting Stay*, dated September 20, 2022, the Court, once again, formally **EMPOWERED** the Special Commissioner, Bradley Goldizen, with the ability to ascertain, corral, and make ready for sale, any and all items of personal property, not jointly owned, the were previously subject to the proper Administration of the Estate of Darvin Ray Berg; (*Appendix Page 126*)

43. That subsequently, the Petitioner filed a *Petition for Writ of Prohibition*, with the West Virginia Supreme Court of Appeals, on or about November 18, 2022, in a further attempt to seek relief with the Honorable Court;

44. That, Petitioner would offer to this Honorable Court that absent certain written documentation, whether that be in a form of a title to an automobile or another similarly held asset, everything owned by the late Darwin Ray Berg was then the joint property of the aforesaid decedent AND Petitioner. The Respondents vehemently disagree with that legal conclusion by way of a legal presumption that, absent a Will declaring individual ownership of any specific asset, that personal property was jointly owned. Logic does not support that theory, especially given W. Va. Code §42-1-3a;

45. That while the Grant County Circuit Court, with the Honorable Lynn A. Nelson presiding, did agree that the former Defendant and current Petitioner, Denita D. Berg, did not act with fraudulent intent, the Court was still sufficiently convinced that certain items of personal property had not been properly administered through the Estate of the late Darwin Ray Berg, to the detriment of the current Respondents and former Plaintiffs herein, namely, Joseph Berg, Jason Berg and Jennifer Ford;

46. That it should be noted that all of the Petitioner's pre-Trial and post-Trial filings, the personal property to be sold, with the current Respondents and former Plaintiffs owning a one-half (1/2) undivided

interest thereof, continued to depreciate, further damaging the Respondents;

47. That in response to the Petitioner's assertions contained within his argument, same are without merit, and clearly, the Respondents herein were damaged by the Petitioner's actions and inactions, by not properly probating certain aspects of personal property that have and continue to have significant, however depreciating value;

48. That, given W. Va. Code §42-2-1, et seq, the only practical and reasonable remedy the Court had before it to decide, after correctly asserting that the Respondents had been damaged, was to conduct a sale and/or auction of those items of personal property, very similar to a Special Commissioner's sale in a real estate partition suit, and thereafter report back to the Court with regard to the status and nature of said sale, with the Court thereafter tasked with dividing the proceeds of said sale and/or auction up in a manner that properly compensates both the Respondents and the Petitioner, given the factual scenario recited hereinbefore;

49. That, while the Petitioner makes much ado about her alleged co-ownership, of essentially ALL of the assets maintained by the late,

Darvin Ray Berg, no document was ever produced by the Petitioner, nor by her Counsel, indicating said joint ownership;

50. That Petitioner and her Counsel, make certain arguments that she, nor her Counsel, were afforded the proper opportunity to be heard on the issue of ownership, is simply not true. As the record indicates, this matter was initiated in December of 2019, thereby affording the Petitioner and her Counsel with more than sufficient time to prove said alleged joint ownership; and

51. That in conclusion and in conjunction with the foregoing, this case was initiated in the Circuit Court of Grant County, West Virginia on December 30, 2019, and multiple and numerous status Hearings were conducted whereby the Petitioner and her Counsel's argument were summarily discounted and thereafter denied by the Grant County Circuit Court. Based upon the same, the Respondents herein request that the Honorable West Virginia Supreme Court of Appeals comes to the same conclusion and formally ratifies the decisions made by the lower Court in this matter.

**OPPOSITION TO PETITIONER'S ASSIGNMENTS OF ERROR NUMBER
1 THROUGH 3**

1. The Circuit Court of Grant County, West Virginia's opinion in its prior rulings within this matter are not clearly erroneous, nor do they violate the abuse of discretion standard. A Circuit Judge is empowered with the ability to appoint a Special Commissioner, and especially in a case involving multiple and numerous assets the Court needs assistance in property assessing and itemizing, prior to making a decision. W. Va. Code §42-1-3a. *Share of heirs other than surviving spouse.* is well set of law in the State of West Virginia and for specificity, said code section hereby recreated below:

“Any part of the intestate estate not passing to the decedent's surviving spouse under section three of this article, or the entire intestate estate if there is no surviving spouse, passes in the following order to the individuals designated below who survive the decedent:

(a) To the decedent's descendants by representation;

(b) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent;

(c) If there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation;

(d) If there is no surviving descendant, parent, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives in the same manner; but, if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half." W. Va. Code §42-1-3a.

2. In the case at hand, certain items of substantial personal property were not properly probated through the Estate of the late Darvin Ray Berg. Specifically, said substantial personal property assets are by virtue of omitting the said aforementioned substantial personal property assets of the Estate of Darvin Ray Berg, the Respondents herein were deprived of their share, that being a one-half (1/2) undivided interest in and to said personal property assets, given the W. Va. Code Section referenced above.
3. Alternatively, the Grant County Circuit Court was tasked with attempting to ascertain and thereafter corral those substantial personal property assets that

were not properly probated through the Estate Administration of the late Darvin Ray Berg and having the Court appoint a Special Commissioner to aid the Court in identifying those assets, corralling said assets, and making same ready for sale, is the most efficient avenue to thereafter equitably divide those substantial personal property assets that were not properly probated by the Petitioner in her former capacity as the fiduciary and Administratrix of the Estate of the late Darvin Ray Berg, the natural father of the Respondents herein.

4. Counsel for the Respondents has thoroughly reviewed Horton v. Prof'l Bureau of Collections of Md., Inc., 238 W. Va. 310, 794 S.E. 2d 395 (W. Va. 2016) and State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (W. Va. 1997). While the State ex rel. Hoover v. Berger addresses a Court entertaining a *Writ of Prohibition*, the Horton v. Prof'l Bureau of Collections of Md., Inc. addresses certain aspects of fraud. "Constructive fraud" seems to be the most applicable term to describe the Petitioner's conduct, in her capacity as the Administratrix of the Estate of the late Darvin Ray Berg. While the issue of the actions of the Petitioner can be absolutely be construed as "constructive fraud," the Grant County Circuit Court did not see it that way, and found that no fraud had occurred and instead, found that Denita D. Berg, in her capacity as the former Fiduciary and Administratrix

of the Estate of the late Darvin Ray Berg, simply omitted multiple and numerous aspects of personal property that were thus, not properly administered through the Estate of the late Darvin Ray Berg. Petitioner and her Counsel give great credence to the Grant County Circuit Court not finding that the Petitioner had engaged in any type of fraud. However, complete reliance on that theory is misplaced, as a party can certainly be damaged by another party by virtue of certain actions, and in this case, inactions, of a particular individual, to the detriment of the other party. Essentially, the Grant County Circuit Court gave Petitioner the "benefit of the doubt" by not specifically finding that she acted in a fraudulent manner, and not properly disclosing certain substantial personal property assets of her late husband. Lastly, the Grant County Circuit Court was well within its power to appoint a Special Commissioner, much akin to a Guardian ad Litem in a Family Court case, to perform certain investigations of a particular case, in a much more efficient manner.

5. That in conjunction with the foregoing paragraph, a Circuit Judge can appoint a Special Commissioner to sell personal property when the issue of ownership was properly before the Grant County Circuit Court on multiple and numerous occasions and in which the Petitioner's assertion that certain

joint ownership was alleged, had not been proven by preponderance of the evidence at the Trial Court level.

6. That pursuant to W. Va. Code 42-1-1, et seq, a Circuit Judge can appoint a Special Commissioner to sell personal property within a contested Civil Action, where it has been proven, by a preponderance of the evidence, that a party had been damaged by not receiving their proportionate share of certain property, subject to an Estate Administration not properly administered and/or probated.

CONCLUSION

WHEREFORE, the above referenced Respondents, Joseph Berg, Jason Berg, and Jennifer Ford, by and through the Law Firm of Walters & Heishman, PLLC, and namely, their Counsel, Nathan H. Walters, would respectfully request the following relief from this Honorable Court:

1. That the *Petition for Writ of Prohibition* previously filed by the former Defendant and current Petitioner, Denita D. Berg, by and through her Counsel, Jason R. Sites, be summarily **DISMISSED** and **DENIED**; and

2. That this Honorable Court further **ORDER** any and all relief as the nature and premises of this case may require.

Respectfully submitted:
Joseph Berg, Jason Berg, and
Jennifer Ford
Respondents - By Counsel

Prepared by:




Nathan H. Walters
Counsel for Respondents
WALTERS & HEISHMAN, PLLC
204 North Elm Street
P.O. Box 119
Moorefield, West Virginia 26836

WALTERS & HEISHMAN,
PLLC
ATTORNEYS AT LAW
MOOREFIELD
WEST VIRGINIA

CERTIFICATE OF SERVICE

I, **Nathan H. Walters**, Counsel for Joseph Berg, Jason Berg, and Jennifer Ford, hereby certify that, I served a true copy of the attached *Summary Response in Opposition to Petition for Writ of Prohibition*, on **Jason R. Sites**, by File & Serve Xpress and via the U.S. Mail, postage prepaid, on the 3rd day of May, 2023.



Nathan H. Walters