INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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MICHAEL BAKER and GEORGE CAMERON BAKER, TRUSTEES, GEORGE CAMERON BAKER, and SUSAN ANN BAKER,

Defendants Below, Petitioners.

v.

Appeal No. 24-ICA-253
(Appeal from Braxton County Circuit Court Case No. CC-4-2021-AA-1)

DANIEL C. COOPER, as Executor of the ESTATE OF GEORGE C. BAKER,

Plaintiff Below, Respondent.

PETITIONERS' INITIAL BRIEF

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MICHAEL BAKER and GEORGE CAMERON BAKER, TRUSTEES, GEORGE CAMERON BAKER, and SUSAN ANN BAKER

Defendants Below, Petitioners.

v.

Appeal No. 24-ICA-253
(Appeal from Braxton County Circuit Court Case No. CC-04-2021-AA-1)

DANIEL C. COOPER, as Executor of the ESTATE OF GEORGE C. BAKER,

Plaintiff Below, Respondent.

I. ASSIGNMENTS OF ERROR

A. The Circuit Court of Braxton County, West Virginia ("Circuit Court"), erred in entering its *Order Granting Relief Requested In Appeal By Appellant Daniel C. Cooper* ("*Circuit Court Order*") on May 24, 2024, which reversed the order issued by the Fiduciary Supervisor of Braxton County, West Virginia ("Fiduciary Supervisor"), on February 21, 2021 ("*Fiduciary Supervisor Order*"), and which also reversed the order issued by the County Commission of Braxton County, West Virginia ("County Commission"), on May 21, 2021 ("*County Commission Order*"), that affirmed the *Fiduciary Supervisor Order*, because the Circuit Court failed to address the fact that most of the legal services Steven F. Luby ("Mr. Luby") performed were legal services for trusts and estates he did not represent ("Other Entities"), and for which Donald C. Cooper ("Mr. Cooper") as Executor of the Estate of George C. Baker ("Estate"), had no authority to authorize

him to perform, such that the attorney fees for those legal services are not reasonable administrative expenses of the Estate.[1]

B. The Circuit Court erred in entering the *Circuit Court Order* because it erroneously concluded that Mr. Cooper was deprived of due process by reason of the entry of the *Fiduciary Supervisor Order* and by entry of the *County Commission Order,* or otherwise deprived of process under W.Va. Code §§ 44-3A-1 *et seq*.[2]

C. The Circuit Court erred by entering the *Circuit Court Order* because it reached the wrong legal conclusions regarding the authority and power of the Fiduciary Supervisor.

D. The Circuit Court erred by entering the *Circuit Court Order* because it was limited by law in its review of the *County Commission Order,* to the record before the County Commission on whether to confirm or reverse the *Fiduciary Supervisor Order*, which order was concerned only with the attorney fees as of November 15, 2016, and the Circuit Court considered, and extensively relied on, matters outside that record.

E. The Circuit Court erred by entering the *Circuit Court Order* because it made clearly erroneous findings of fact, relying on attorney argument, and failed to support those findings of fact with proper conclusions of law.

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[1] Mr. Luby is the attorney who was engaged by Mr. Cooper to perform legal services in assistance to him in his administration of the Estate. Mr. Luby began performing legal services for the Estate in 2010 (A.R. 0055) and it is the attorney fees for those legal services rendered through November 15, 2016 that are in dispute in this appeal.

[2] Steptoe & Johnson PLLC ("Steptoe") never filed a motion to intervene and, instead, simply submitted briefs and arguments as an "interested party" because of its interest in the attorney fees in dispute. As explained in Petitioners' *Notice Of Appeal,* Mr. Luby testified before the County Commission at the March 6, 2020 hearing on Petitioners' *Petition To Remove Executor, Appoint Curator And For Other Necessary Relief* filed with the County Commission ("Removal Hearing"). At the time of the Removal Hearing, Mr. Luby was an attorney with Steptoe, so his and its interests were aligned.

II. STATEMENT OF THE CASE

A. Procedural History

This appeal is from an order entered by the Circuit Court in favor of Mr. Cooper following his appeal of the *County Commission Order* which upheld the *Fiduciary Supervisor Order* that determined that nearly $600,000.00 in attorney fees incurred in the supposed administration of the Estate, were not reasonable estate administration expenses for an estate for which, although it had already been open for nearly 10 years, the required annual reports to the County Commission, the appraisement for the Estate, the nonprobate inventory for the Estate, and the federal estate tax return for the Estate, had not been prepared, let alone filed and/or submitted, and the Estate had yet to be finalized and closed. The Fiduciary Supervisor determined, based on evidence in the record before her, that $75,000.00 was a reasonable amount for attorney fees for such administration. *Petitioners' Motion For Review Of The Amount Of Attorney Fees Incurred By Executor Incurred In Connection With His Administration Of The Estate* ("*Attorney Fee Motion*") was filed with the County Commission, requesting that a determination be made on whether or not the nearly $600,000.00 in attorney fees that had been incurred and billed to the Estate, were reasonable. A.R. 0038.[3] The *Attorney Fee Motion* was filed because Petitioners believed Mr. Cooper had not provided proper oversight in allowing the accumulation of such an exorbitant amount of attorney fees and was seeking to liquidate assets in the Estate to pay those attorney fees,

[3] Significantly, Petitioners only had information on attorney fees billed to the Estate through November 15, 2016. Therefore, of necessity, the *Attorney Fee Motion* only sought a determination of the reasonableness of those attorney fees. As of November 15, 2016, attorney fees amounting to nearly $600,000.00 had been billed to the Estate. Those were the only attorney fees before the Fiduciary Supervisor and, in turn, the only fees before the County Commission and, also in turn, the only attorney fees before the Circuit Court. However, as will be discussed below in Part V. D, the Circuit Court relied on events, litigation, and other matters that occurred well after the time period which was under consideration by the Fiduciary Supervisor and the County Commission.

assets which otherwise would pass to a trust the decedent had established.[4] Mr. Cooper filed the *Estate's Response To Petitioner's Motion To Review Attorney's Fees* on March 6, 2020 ("*Estate's Response*"), three days after the *Attorney Fee Motion* had been filed and contemporaneously with the holding of the Removal Hearing. A.R. 1886. He then filed a lengthier *Estate's Objection To Petitioner's Motion To Review Attorney's Fees* on March 24, 2020 ("*Estate's Objection*"). A.R. 0278. While documents were attached to the latter, no authentication of those documents by way of affidavit was supplied, and no affidavits with substantive factual statements were attached, such that all that both the *Estate's Response* and *Estate's Objection* consisted of was attorney argument, which is not evidence.

Petitioners had, on October 5, 2018, approximately a year and a half before filing the *Attorney Fee Motion*, filed a *Petition To Remove Executor, Appoint Curator And For Other Necessary Relief* ("*Removal Petition*"), with the County Commission, seeking to remove Mr. Cooper as Executor of the Estate, citing, among other things, his neglect in permitting the exorbitant attorney fees to accumulate, as a large part of their grounds justifying removal. At the Removal Hearing, Petitioners presented evidence regarding the exorbitant attorney fees as part of the grounds for seeking Mr. Cooper's removal as Executor of the Estate. It was agreed by both parties that the *Attorney Fee Motion* was not being heard at the Removal Hearing, but there was no agreement that the evidence adduced could not be considered later by the Fiduciary Supervisor in connection with the *Attorney Fee Motion.*[5] A.R. 0536-0538. Significantly, it was also

[4] The Trust is represented in this appeal by Michael C. Baker and George Cameron Baker in their capacities as Trustees. George Cameron Baker and Susan Anne Baker are the beneficiaries of that Trust. It should be noted that, although he should be, George Cameron Baker is not included in the style of this appeal in his individual capacity as a beneficiary of the Trust.

[5] Petitioners are surprised that Mr. Cooper is so "incensed" about the Fiduciary Supervisor's reference to the Removal Hearing testimony of Robert G. Tweel ("Mr. Tweel") and John Rowan ("Mr. Rowan"), because the affidavits of Mr. Tweel and Mr. Rowan were submitted to the Fiduciary Supervisor independent of any hearing testimony as they were attached to the *Attorney Fee Motion*. Moreover, the hearing testimony from those two witnesses basically

acknowledged that the *Attorney Fee Motion* would be addressed by the Fiduciary Supervisor. A.R. 0538.

Shortly after the Removal Hearing, Mr. Cooper submitted an affidavit from Harmon A. Brown ("Mr. Brown"), an attorney with whom Mr. Luby had consulted in working on the administration of the Estate, to counter evidence on the attorney fee issue adduced by Petitioners at the Removal Hearing. A.R. 0412. However, Mr. Harmon's affidavit did not address the core issues of the *Attorney Fee Motion*: that the attorney fees were excessive, well beyond what should have been incurred, and that this was so because a large majority of the legal services rendered were for legal services performed for the Other Entities which not only were not the responsibility of the Estate to pay for, but which also were not authorized as Mr. Luby had no attorney-client relationship with the Other Entities.[6] Compare A.R. 0412 and A.R. 0266.

Eleven months after the Removal Hearing, after counsel for Petitioners, in an email also addressed to counsel for Mr. Cooper, inquired about the status of the *Attorney Fee Motion* (A.R. 0340), the Fiduciary Supervisor contacted counsel for Petitioners and requested that he prepare an order to submit to her for her consideration. Counsel for Petitioners did so, by email addressed

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replicated what was already in the record apart from said hearing testimony. To follow Mr. Cooper's reasoning to its logical conclusion, by agreeing that the *Attorney Fee Motion* would not be heard at the Removal Hearing before the County Commission, Petitioners apparently were also supposedly agreeing that the evidence offered by way of Mr. Tweel's and Mr. Rowan's affidavits submitted as part of the *Attorney Fee Motion* as exhibits thereto, could not be considered either, because such evidence was basically what was presented by their testimony at the Removal Hearing, which is utter nonsense. All that was agreed to was that the *Attorney Fee Motion* would be considered and resolved separately by the Fiduciary Supervisor. The affidavits were before the Fiduciary Supervisor as part of the *Attorney Fee Motion*, and when the Fiduciary Supervisor, later and separately from the Removal Hearing, as agreed to at the Removal Hearing, took up the *Attorney Fee Motion*, the affidavits attached to the *Attorney Fee Motion,* as well as the testimony adduced at the Removal Hearing, were properly considered by her.

[6] Exhibit F to the *Estate's Objection* is an email authored by Mr. Luby in which he admits that "there are three estate [sic] being administered for the period going back to George's death in 2009 in the case of George's death and going back to 1998 in the case of the death of JC Baker." A.R. 0304. Mr. Luby then lists five binders of documents of work he has done, including a binder for the JC Baker/Blanche Baker Estate Administration and a binder of JC Baker/Balance Baker Estate Documents binder. Id. The attorney fee bills also reference work for the trusts under the JC Baker Estate. *See, e.g.,* A.R. 1644. Significantly, Mr. Luby also admitted his only client was the Executor of the Estate. A.R. 0258.

also to Mr. Cooper.[7] A.R. 0339. The Fiduciary Supervisor then entered the *Fiduciary Supervisor Order*, the day following her receipt of the proposed order sent by counsel for Petitioners, utilizing the proposed order he sent.[8] A.R. 0336. During the eleven-month period between the filing of the *Attorney Fee Motion* and the entry of the *Fiduciary Supervisor Order*, Mr. Cooper never took any steps to counter the evidence supporting the *Attorney Fee Motion* which had been attached to it other than, as referenced above, submitting the *Estate's Response,* the *Estate's Objection*, and Mr. Brown's ineffectual affidavit. Thus, all Mr. Cooper was relying on was attorney argument and an affidavit which did not serve as any evidence that Mr. Luby was authorized to represent, and provide legal services to, the Other Entities.[9]

By correspondence, dated February 17, 2021, Mr. Cooper forwarded his objection to the *Fiduciary Supervisor Order* to the County Commission ("*Estate Letter Objection*"). A.R. 0376. On March 12, 2021, Steptoe, asserting it was an "interested party," sent its correspondence to the County Commission with its objection to the *Fiduciary Supervisor Order ("Steptoe's Letter Objection")*. A.R. 0385. Both asked to be heard by the County Commission on their objections.

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[7] Mr. Cooper argued before the Circuit Court that counsel for Petitioners had improper *ex parte* communications with the Fiduciary Supervisor, which erroneous contention the Circuit Court adopted lock, stock and barrel. *See* A.R. 1841, ¶ 35. However, there was no evidence of any *ex parte* communication. The Supreme Court of Appeals of West Virginia ("Supreme Court") has made it clear that, to be an *ex parte* communication, there must have been discussion of the merits of the case. Stern Bros., Inc. v. McClure, 160 W.Va. 567, 236 S.E.2d 222 (1997), fn. 1. Receiving a call from the Fiduciary Supervisor in which a request that a proposed order be submitted to her for consideration is not an *ex parte* communication discussing the merits of the case. Expressing in an email, simultaneously sent to opposing counsel (thus, not *ex parte* anything), the hopeful expectation that the proposed order sent in response to that request will be entered soon, does not constitute a communication discussing the merits of the case, let alone an *ex parte* one, as opposing counsel was also included in the same email communication.

[8] Mr. Cooper and the Circuit Court seemed to consider suspicious that the Fiduciary Supervisor simply adopted the proposed order sent by counsel for Petitioners. A.R. 1822-1823, ¶ 10. However, that is exactly what the Circuit Court did – it simply digitally signed the proposed order sent to it by Mr. Cooper. Compare A.R. 1816 with A.R. 1285.

[9] It was only when Mr. Cooper became aware, approximately eleven months after the *Attorney Fee Motion* had been filed, that the Fiduciary Supervisor was ready to make her decision that Mr. Cooper, informed her that he would be "responding this week." A.R. 0335. It is not clear that any additional response would have added anything to the Estate's argument, nor does Mr. Cooper or Steptoe cite any legal authority entitling them to make any further submissions.

On April 23, 2021, the County Commission held a hearing ("County Commission Fee Hearing") to consider the objections submitted by both Mr. Cooper and Steptoe. A.R. 0452. At that hearing, both Mr. Cooper and Steptoe presented their arguments, but neither one of them offered any witness testimony or exhibits, nor did either of them submit any evidence or affidavits prior to the hearing. On May 21, 2021, the County Commission entered the *County Commission Orde*r. A.R. 0520. In the *County Commission Order,* the County Commission affirmed the *Fiduciary Supervisor Order*.

On September 16, 2021, Mr. Cooper filed his *Notice Of, And Petition For, Appeal Of "Order" Of The County Commission Of Braxton County, West Virginia, Entered On May 21, 2021, In The Matter Of George C. Baker, Deceased* with the Circuit Court ("*Mr. Cooper's Appeal Of County Commission Order*"). A.R. 0001. On September 21, 2021, Steptoe filed its *Notice Of, And Petition For, Appeal Of "Order" Of The County Commission Of Braxton County, West Virginia, Entered On May 21, 2021, In The Matter Of George C. Baker, Deceased By Steptoe & Johnson PLLC, As An Interested Party* with the Circuit Court ("*Steptoe's Appeal Of County Commission Order*"). A.R. 0925. Petitioners filed a combined response to both *Mr. Cooper's Appeal Of County Commission Order* and *Steptoe's Appeal Of County Commission Order* on May 2, 2022 ("*Joint Appeal Response*"). A.R. 0965. After a hearing held on March 18, 2024, the Circuit Court directed the parties to submit proposed orders with findings of fact and conclusions of law, which were submitted by Mr. Cooper and Petitioners, but not Steptoe. A.R. 1356; 1285. Each party was also given the opportunity to file objections to the opposing party's proposed order. Mr. Cooper and Petitioners filed such objections on April 17, 2024. A.R. 1377; 1767. On May 24, 2024, the Circuit Court entered the *Circuit Court Order*, which was nothing more than the

Circuit Court signing a copy of Mr. Cooper's proposed order.[10] The *Circuit Court Order* granted Mr. Cooper's appeal of the *County Commission Order* and reversed the *County Commission Order,* as well as the *Fiduciary Supervisor Order*. It is the *Circuit Court Order* which is now on appeal to this Court. A.R. 1816.

B. Statement Of Facts Of Case

Mr. Luby began representing the Estate in 2010, although an engagement letter was not entered into between Mr. Cooper and Steptoe until 2018. A.R. 0258. In that engagement letter, Mr. Cooper and Steptoe agreed that Mr. Luby's only client was the Estate. A.R. 0258. The tasks generally involved in administering an estate primarily include preparing and filing an appraisement for the estate, preparing and submitting a nonprobate inventory for the estate, preparing and filing a federal estate tax return for the estate, and preparing and filing annual reports with the county commission. A.R. 0266, ¶¶ 5-6; e.g., W.Va. Code §§ 44-1-14; 44-4-2; 44-4-14a. Mr. Tweel, who testified at the Removal Hearing, and submitted his affidavit which was attached to the *Attorney Fee Motion*, reviewed between 2,500 and 3,000 pages of documents provided by Mr. Luby and other additional documents, including the filed Estate appraisement, the submitted nonprobate inventory for the Estate, a draft of the estate tax return for the Estate, and a certain valuation report for the stock of J.C. Baker & Son, Inc. A.R. 0267, ¶ 7. These documents were the basis for his opinion, offered in evidence at the Removal Hearing, as well as in his affidavit attached to the *Attorney Fee Motion*, regarding the lack of reasonableness of the nearly $600,000.00 in attorney fees that had been billed to the Estate as of November 15, 2016. A.R. 0270, ¶ 12. In his affidavit, Mr. Tweel clearly stated that, in his professional opinion, between

[10] Even though Steptoe claimed to be an interested party, it never submitted a proposed order to the Circuit Court.

$50,000.00 and $75, 000.00, was a reasonable amount for the cost of legal services needed to complete those administrative tasks for the Estate. A.R. 0270, ¶ 12.

Mr. Rowan's concerns over the improper billing of legal services performed for the Other Entities were brought to the attention of Mr. Cooper in 2017. A.R. 0051, ¶ 9. However, Mr. Cooper effectively ignored this communication. Given that the probate assets of the Estate were only approximately $1,700,000.00, (A.R. 0270, ¶ 12; A.R. 0272), Petitioners became very concerned when attorney fees alone were mounting to about one-third of the assets of the Estate with no end in sight. Because Mr. Cooper was ignoring their concerns, Petitioners filed the *Removal Petition* and, a few days before the Removal Hearing, filed the *Attorney Fee Motion.* In addition to submitting the testimony of Mr. Tweel and Mr. Rowan by way of affidavit attached to the *Attorney Fee Motion* to support said motion, Petitioners also notified Mr. Cooper that they would be calling Mr. Tweel and Mr. Rowan as witnesses at the Removal Hearing and, as well, submitting their affidavits as evidence. In the *Estate's Response*, filed contemporaneously with the Removal Hearing, Mr. Cooper stated three objections: first, that none of the attorney fees referred to in the *Attorney Fee Motion* had been paid yet, as shown by the annual accountings; second, that it would be speculation as to whether or how much he would actually pay Mr. Luby as the Estate had no funds to pay for any of the attorney fees; and third, that he had not charged the Estate for his work in administering the Estate. In the *Estate's Objection* (A.R. 0278), filed on March 24, 2020, Mr. Cooper outlined 12 points objecting to the *Attorney Fee Motion*.[11] In none of those objections is an objection made to the testimony of Mr. Tweel and Mr. Rowan on the grounds of being "surprise" testimony. At the Removal Hearing, the only objection to their testimony was that it was not relevant to the issues involved in the Removal Hearing; no objection was made that calling

[11] While the *Estate's Objection's* last point is numbered 17, the numbered objections jump from number 6 to number 10, and skip numbers 12 and 13, meaning 12 were stated.

them as witnesses constituted an unfair surprise, even though the large part of why removal was sought was because Mr. Cooper had allowed excessive attorney fees to be incurred and billed to the Estate. A.R. 0530.

After several months had passed since the filing of the *Attorney Fee Motion* without action by the Fiduciary Supervisor, Petitioners' counsel sent an email to the Fiduciary Supervisor and to Mr. Cooper on February 2, 2021, to notify the Fiduciary Supervisor that the issue before her on the *Attorney Fee Motion* was in a posture for her decision. In that email, counsel for Petitioners requested that she advise whether or not she would like one or both of the parties to prepare a proposed order. That email was not an *ex parte* communication as both Mr. Cooper and his counsel were copied on that email. Six days later, the Fiduciary Supervisor called counsel for Petitioners and requested that he submit a proposed order. Two days following that call, counsel for Petitioners submitted, via email, a proposed order to the Fiduciary Supervisor, on which Mr. Cooper and his counsel were copied.

Mr. Luby admitted "extensive work" was done for the Other Entities. A.R. 0304. That the vast majority of the attorney fees were for legal services provided to the Other Entities, is clearly demonstrated by the fact that the: (1) first required annual report to the County Commission was not filed until September 2018 (nine years after the Estate was opened) A.R. 0776; (2) the appraisement for the Estate and the nonprobate inventory for the Estate were not prepared and filed/submitted until August 2018 (again, nine years after the Estate was opened) A.R. 0272-0273; and (3) as of the date of the Removal Hearing in March of 2020 (twelve years after the Estate was opened), the federal estate tax return for the Estate had not been filed. A.R. 0550. In other words, little to no work on administering the Estate had been accomplished for the nearly $600,000.00 in attorney fees billed to the Estate by November 15, 2016.

As important as the evidence that was presented to the Fiduciary Supervisor for her consideration, is the evidence that was not presented. No evidence was presented establishing that Mr. Luby was authorized by the Other Entities to perform legal services for them, nor was any evidence presented establishing that Mr. Cooper, as Executor of the Estate, had the authority to authorize Mr. Luby to perform those services.[12] Mr. Luby assumed a representation of the Other Entities which he did not have. A.R. 0267-0268, ¶ 9; A.R. 0557. Moreover, no evidence was presented to the Fiduciary Supervisor establishing that the attorney fees for the legal services performed for the Other Estates are the financial responsibility of the Estate, instead of the financial responsibility of the Other Entities for whom those services were performed. A.R. 0267, ¶ 9. Finally, no evidence demonstrated how much of the nearly $600,000.00 in attorney fees that was billed to the Estate, was supposedly for work on the Estate's administration, instead of work for the Other Entities.

III. SUMMARY OF ARGUMENT

The Circuit Court totally ignored the lack of authorization for Mr. Luby to perform legal services on behalf of the Other Entities. It never addressed the fact that Mr. Luby was not authorized by any of the Other Entities to do the work he did for them, and that Mr. Cooper, who only occupies the position of Executor of the Estate, had no authority to authorize Mr. Luby to render legal services for the Other Entities. As a result, the Circuit Court also ignored the legal conclusions that the Estate is not responsible for those legal services because those legal services should never have been performed without authorization from the Other Entities, and that they are the financial responsibility of the Other Entities, not of the Estate. An attorney representing one party cannot unilaterally decide he will also represent a second party and thereafter perform legal

[12] For example, it is hornbook law that a trust acts only through its trustee and there were no trustees for any of the J.C. Baker Trusts. A.R. 0618.

services for the second party without any authorization from that second party, even if he is doing so in representation of the first party who is his client. Unauthorized legal services for the Other Entities, which never should have been performed, are not reasonable expenses of the Estate.[13]

The Circuit Court erroneously determined that Mr. Cooper was deprived of due process of law. It based its conclusion, in part, on its erroneous determination that certain hearing testimony could not be relied upon by the Fiduciary Supervisor. Indeed, it had been agreed at the Removal Hearing that the *Attorney Fee Motion* was not being heard at that hearing, but there was no agreement that any evidence adduced at the Removal Hearing could not later be considered by the Fiduciary Supervisor. Significantly, the very evidence to which Petitioners' witnesses testified at the Removal Hearing was also presented by way of their affidavits attached to the *Attorney Fee Motion*, which was properly before the Fiduciary Supervisor. Nowhere in the *Circuit Court Order* does the Circuit Court recognize the same evidence was attached to the *Attorney Fee Motion*.

By statute, an order of a fiduciary supervisor must be confirmed by the county commission to be effective. W.Va. Code § 44-3A-2. A fiduciary supervisor is, in essence, making recommendation to the county commission and due process does not attach to an investigative/recommendation stage. *See* Hoover v. Smith, 198 W.Va. 507, 482 S.E.2d 124 (1997). Mr. Cooper had approximately eleven months between the Removal Hearing and when the *Fiduciary Supervisor Order* was entered to submit evidence refuting the affidavits attached to the *Attorney Fee Motion*. He also requested, and was granted, a hearing before the County

[13] If there were issues regarding how the Other Entities were going to pay for those attorney fees, the answer was not the assumption that the Estate would pay them or that the representation of the Other Entities could be unilaterally assumed by Mr. Luby without proper authorization. The Circuit Court supposedly found that Mr. Luby was not doing "rogue" legal work (A.R. 1433-1434, ¶ 22), but because the Circuit Court never addressed how Mr. Luby was authorized to do work for the Other Entities and, as well, what law authorized Mr. Cooper, as Executor of the Estate (Mr. Luby's only client, A.R. 1755), to authorize Mr. Luby to represent the Other Entities, the Circuit Court's finding is wholly unsupported by any facts.

Commission regarding the *Fiduciary Supervisor Order*, and he still did not submit any such evidence. There was no due process violation.

The Circuit Court also erred because it concluded that a fiduciary supervisor has no authority to review attorney fees billed for legal services to an Estate until they are paid. First, by Constitution, the County Commission is charged with supervision and administration of all probate matters. West Virginia Constitution, Article 8, Section 6. By statute, fiduciary supervisors have "general supervision of all fiduciary matters and of the fiduciaries or personal representatives thereof and of all fiduciary commissioners and of all matters referred to such commissioners." W.Va. Code § 44-3A-3(b). They are empowered to supervise, not just review at the end of the administration of an estate. W.Va. Code § 44-3A-29 also explicitly states that it is only after the report of a fiduciary supervisor on claims against the estate have been confirmed that the claims may be paid. Contrary to the Circuit Court's determination, review by a fiduciary supervisor must occur first.

Moreover, the only attorney fees at issue before the Fiduciary Supervisor in the *Attorney Fee Motion,* were the attorney fees incurred as of November 15, 2016, and, thus, those were the only attorney fees before the County Commission. A review by a circuit court of a county commission decision is "confined strictly to the record made in the lower court." Haines v. Kimble, 221 W.Va. 266, 276, 654 S.E.2d 558 (2007). However, as this particular matter progressed through litigation, both Mr. Cooper and Mr. Luby began defending the amount of attorney fees incurred as of November 15, 2016, on the grounds that no consideration was given to the much later incurred attorney fees associated with certain Estate litigation for which they claim the Estate is responsible. Those Estate litigation attorney fees, however, had not been incurred by November 15, 2016 as the Estate litigation did not commence until two years later.

Thus, those Estate litigation expenses were not a part of the attorney fees which the Fiduciary Supervisor was examining for reasonableness, none of that information was before her at the time she entered the *Fiduciary Supervisor Order*, and none of that information, thus, was relevant to the County Commission's review. Thus, by considering such Estate litigation expenses, the Circuit Court improperly considered matters outside the County Commission record.

Mr. Tweel's expert opinion was based on the work for the Estate that would have been necessary to finalize the Estate, which should have been accomplished no later than the end of 2015.[14] Whether the Estate is responsible for the Estate litigation attorney fees is an issue for later determination. The *Fiduciary Supervisor Order* held only that the reasonable costs for legal services needed to accomplish certain tasks, such as preparing annual tax returns, preparing the appraisement, preparing the nonprobate inventory, preparing required annual reports, and preparing the federal estate tax return, that are the financial responsibility of the Estate, would be a maximum of $75,000.00. And had the Estate been settled within a reasonable time, and before the Estate litigation was initiated, it is, and will be, Petitioners' position that the rest of this dispute could have been avoided.[15] The administration of the Estate could have been completed at a time

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[14] Mr. Cooper has asserted that a certain valuation of J.C. Baker & Son, Inc. was absolutely necessary for the preparation of the appraisement and non-probate inventory and federal estate tax return, which valuation was provided in September of 2015. A.R. 0548-0549. Mr. Tweel testified that such work should have been wrapped up shortly after obtaining that valuation, yet it took another three years before the appraisement, nonprobate inventory, and first annual report to the County Commission were filed/submitted and more than four years before the federal estate tax return was filed. A.R. 0547-0548; 0550.

[15] If an injured motorist tries to recover medical bills for a later occurring unrelated appendectomy from the at-fault driver's insurer, any attorney fees he incurs seeking recovery of those unrelated medical bills would be his responsibility, not the responsibility of the at-fault driver's insurer, even if attorney fees for obtaining a judgment against a recalcitrant insurer are recoverable in his state. Those unrelated medical bills simply would not be the responsibility of the insurer, just as the Other Entities' attorney fees are not the Estate's responsibility.

Mr. Cooper admitted, at the Removal Hearing that, as Executor of the Estate, he could have funded the Trust by simply transferring the debt J.C. Baker & Son, Inc. owed the Estate for its purchase of its stock from George C. Baker before he died ("Debt") to the Trust as directed by the decedent's will. He also admitted he was pursuing the Debt as he felt he owed an obligation to his uncle, the decedent, to fund the Trust for the beneficiaries' benefit. A.R. 0589. However, seeking to liquidate the Debt for the benefit of the Trust's beneficiaries (causing the Estate to incur attorney fees for that litigation) instead of just transferring it to the Trust at a time when there were assets in the Estate to pay the reasonable attorney fees (A.R. 0579), Mr. Cooper was not acting in his capacity as Executor of the Estate, he was assuming the role of trustee of the Trust, which he had declined to accept after his uncle's death. A.R. 0575.

when the Estate had funds available to pay the properly incurred attorney fees.[16]

As discussed below in more detail, the *Circuit Court Order* is replete with clearly erroneous conclusions on which the Circuit Court relied. No legal authority was cited supporting Mr. Luby's authority to perform unauthorized legal services for the Other Entities. Close review shows the *Circuit Court Order* is nothing more than the wholesale adoption of long argumentative paragraphs authored by Mr. Cooper. The *Circuit Court Order* reached legally unsupported conclusions of law regarding the authority of the Fiduciary Supervisor, such as the conclusion, contrary to statute, that the attorney fees had to be paid before they could be reviewed. Finally, it erroneously concluded that Mr. Cooper was somehow deprived of due process when no due process is required at the investigative stage of a non-judicial proceeding, such as a fiduciary supervisor's review of attorney fees for reasonableness.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners believe the decisional process would be significantly aided by oral argument and request Rule 19 oral argument as well as Rule 20 oral argument. As to Rule 19 oral argument, the result below is clearly against the weight of the evidence as there was no evidence placed before either the Fiduciary Supervisor or the County Commission rebutting Petitioners' evidence regarding a reasonable amount for attorney fees to administer the Estate. Case law has clearly established an attorney always bears the burden of proving the reasonableness of his fees to a

[16] Mr. Cooper admitted that the Estate had sufficient assets to pay the attorney fees at one point. A.R. 0579. The Estate, as admitted by Mr. Cooper, paid $370,590.00 to Donna Baker (widow of the decedent) ("Ms. Baker") for her monthly living expenses from 2009 to 2018 (when she passed away) "in lieu of paying attorney fees." A.R. 1289, ¶ 7. According to the First Settlement Report, Ms. Baker was paid $4,200.00 per month beginning in March 2011 and ending in March 2018, totaling 85 monthly payments. A.R. 0777. Had the Estate been more promptly administered, such as within five (5) years as required in W.Va. Code § 44-4-14a, those last four (4) years of monthly payments to Ms. Baker, amounting to $201,600.00, would have been avoided and would have more than covered the reasonable attorney fees attributable to legal services for the Estate. Had that occurred, there would have been no Estate litigation nor the accumulation of attorney fees for that litigation. Similarly, had the Estate been settled in late 2015, after the receipt of the valuation report, which supposedly was essential to settlement of the Estate, twenty-seven (27) monthly payments would not have been necessary, freeing up over $113,000.00 for reasonable attorney fees.

client. Lawyer Disciplinary Bd. v. Scotchel, 234 W.Va. 627, 646, 768 S.E.2d 730, 749 (2014) (holding that "[t]he burden of proof is always upon the attorney to show the reasonableness of the fees charged" to a client), *quoting* Bass v. Coltelli Rose, 216 W.Va. 587,592, 609 S.E.2d 848, 853 (2004). The Circuit Court ignored this clear case law.

As to a Rule 20 hearing, this matter involves an issue of first impression regarding the "general supervision" authority of fiduciary supervisors in supervising the administration of estates. W.Va. Code § 44-3A-3(b). At issue is the question of whether a fiduciary supervisor is limited to reviewing attorney fees charged an estate for legal services only after paid by the executor and only at the end of the estate administration, or whether "general supervision" authority grants fiduciary supervisors to intervene when a question arises mid-stream in estate administration as to the reasonableness of expenses the executor is authorized to incur. Rule 20 oral argument is also appropriate because of the public interest. This appeal involves legal services rendered by an attorney who was not engaged by the entities for which he performed those legal services. The rationale forwarded as to why the attorney fees for those legal services should be the responsibility of the Estate, is because the end supposedly justifies the means. The Estate supposedly needed certain information for its administration that had to come from certain estates and trusts. Instead of taking the appropriate steps to work through obtaining proper authorization for representation of those estates and trusts, Mr. Luby simply did the work without authorization because the information was supposedly needed. Clearly the integrity of the legal profession would be damaged if attorneys could justify "representing" a non-client who has not consented to that representation whenever the end supposedly justifies the means.

V. ARGUMENT

A. The Circuit Court Erred By Entering The *Circuit Court Order* Because It Failed To Address The Fact That Most Of The Legal Services Mr. Luby Performed Were Legal Services For Other Entities Which He Did Not Represent, And For Which Mr. Cooper Had No Authority To Authorize Him To Perform, Such That The Attorney Fees For Those Legal Services Are Not Reasonable Administrative Expenses Of The Estate

Mr. Luby first began providing legal services to the Estate in 2010. A.R. 0055.[17] As of November 15, 2016, Mr. Luby had billed the Estate close to $600,000.00 for legal services he performed.

Although nearly $600,000.00 in attorney fees had been billed to the Estate by November 15, 2016, Mr. Luby testified no work could be, and was not, started on the appraisement of the probate assets, the nonprobate inventory, the federal estate tax return, the finalization and settlement of the Estate, or any of the other "complexities" of the Estate, until after he received a certain valuation of the stock of J. C. Baker & Son, Inc. ("Valuation"). A.R. 0601. The Valuation was provided September 15, 2015, yet the appraisement and nonprobate inventory were not prepared and filed/submitted until August 2018, nearly three (3) years later, the first annual settlement report required to be submitted to the County Commission was not prepared or filed until September 2018, also three (3) years after receipt of the Valuation, and the federal estate tax return was not filed until after March of 2020, well after receipt of the Valuation. A.R. 0272, 0776, and 0050. Despite performing little to no legal services in preparation of these documents in the period leading up to September of 2015 when the Valuation was provided, somehow a little over a year later, attorney fees in the amount of nearly $600,000.00 supposedly had been incurred. Significantly, Mr. Luby has admitted that the bulk of the legal services billed as of November 15,

[17] However, Mr. Cooper and Mr. Luby failed to enter into an engagement letter until November 28, 2018, well after nearly $600,000.00 in attorney fees had been billed to the Estate. A.R. 0258.

2016 were for the Other Entities. A.R. 0304.[18] While it may have been necessary to utilize certain information related to the Other Entities in preparing the Estate's federal estate tax return, the Estate's responsibility extended only to obtaining the information from those Other Entities; the Estate's responsibility was "not taking on representation of [those] estate[s] or trust[s]," which was the responsibility of those Other Entities to prepare. A.R. 0558.

Petitioners have consistently questioned the basis for the Estate being responsible for the legal services performed for the Other Entities. As an attorney, Mr. Luby is bound by the West Virginia Professional Rules of Conduct ("Professional Rules"). An examination of the Professional Rules makes it clear that an attorney must obtain the consent and agreement of a person or entity to representation, before an attorney-client relationship exists. Rule 1.2 requires an attorney to "abide by a client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which [those objectives] are to be pursued." The requirement to communicate with the client promptly over matters requiring the client's consent is required in Rule 1.4. Rule 1.5 requires that the attorney communicate the scope of the attorney's representation and the rate of the attorney's fee and expenses in writing "before or within a reasonable time after commencing representation." These duties, all directed toward an attorney's responsibilities toward the person or entity for whom he is performing legal services, clearly contemplate that an attorney-client relationship – a mutual agreement that the attorney will represent the client and the client will pay for that representation – must exist before an attorney may provide legal representation for a person or entity.

[18] For example, even though none of the J.C. Baker trusts were a probate asset of the Estate and none were the responsibility of Mr. Cooper, as Executor of the Estate (A.R. 0545), twelve "memos" concerning the work done on those trusts were prepared by Mr. Luby, and both the work done on those trusts, as well as the work preparing the "memos" were billed to the Estate. A.R. 0546. Moreover, at the County Commission Fee Hearing, Mr. Luby represented to the County Commission that a "tremendous amount" of the work he did was work on the J.C. Baker trusts. A.R. 0470.

Mr. Luby had no attorney-client relationship with any of the estates or trusts for which he assumed representation. A.R. 1580-1581, ¶ 9; A.R. 0557. Moreover, as Mr. Luby and Mr. Cooper both agreed in the tardily executed engagement letter, Mr. Luby's only client was Mr. Cooper in his capacity as Executor of the Estate A.R. 1755. In sum, Mr. Luby simply had no authority to perform any legal services for the Other Entities.

Mr. Cooper was appointed as Executor only for the Estate. He was not the executor of any other estate nor was he a trustee of any of the J.C. Baker trusts or the Trust. Moreover, none of the J.C. Baker trusts was a probate asset of the Estate and none were the responsibility of Mr. Cooper as Executor of the Estate. A.R. 0545-0546. A person who is named executor in a will and then is appointed to that position by the county commission is authorized to administer only the estate for which he or she has had been named and appointed. *See* W.Va. Code § 44-4-12. Because an executor is named by a testator under his will to administer the testator's estate, and because the county commission qualifies him to administer the estate of the decedent who appointed him, it follows that an executor has a duty to administer only the estate for which he has been appointed executor. Therefore, an executor of a particular estate has neither the authority over, nor the responsibility for, any other estate or trust or for taking on representation of that other estate or trust. Because a person's appointment as executor of a particular estate confers no authority to administer another estate, such appointed executor also had no authorization based on that appointment, to engage legal services for any other estate or trust. Thus, Mr. Cooper had no authority to authorize Mr. Luby to represent the Other Entities. As Mr. Tweel put it, Mr. Luby assumed a representation he did not have. A.R. 0557.

Attorney fees for legal services performed which are not related to the work to be performed for the client are not appropriately recoverable from the client. Wolfe v. Green, Civil

Action No. 2:08-01023, 2010 WL 3809857 at *8 (S.D.W.Va. September 24, 2010). In other words, in order for legal services to be compensated, they must be related to the work to be performed for a client. The bedrock, then, is that the legal services performed for a person or entity must be incurred in the context of legal representation, meaning within an attorney-client relationship, and Mr. Luby had no such relationships with the Other Entities.

The Estate simply is not liable for the attorney fees for the unauthorized legal services performed by Mr. Luby for the Other Entities. Even a lay person would recognize that a client, such as an estate, is not liable for unauthorized legal services supposedly performed on its behalf. Wolfe, 2010 WL 3809857. How much less so, then, is a client, such as an estate, liable for the unauthorized legal services performed for another person or entity who has not consented to representation. Attorney fees for such unauthorized legal services cannot, in any sense, be characterized as reasonable expenses for the administration of the Estate.

An attorney seeking compensation from an estate bears the burden of proving the reasonableness of the fees he has charged that estate for his services. Lawyer Disciplinary Bd. v. Scotchel, 234 W.Va. 627, 646, 768 S.E.2d 730, 749 (2014) (holding that "[t]he burden of proof is always upon the attorney to show the reasonableness of the fees charged" to a client), *quoting* Bass v. Coltelli Rose, 216 W.Va. 587,592, 609 S.E.2d 848, 853 (2004). Petitioners presented evidence that only $75,000.00 of the attorney fees billed to the Estate, was necessary to administer the Estate, and that the remainder representing legal services for the Other Entities should not have been billed to the Estate, but to the Other Entities. A.R. 0546; A.R. 1589, ¶¶ 5, 9, 12. Mr. Cooper failed to prove the reasonableness of the fees charged to the Estate because he contended that all of the attorney fees billed by Mr. Luby are the responsibility of the Estate. Thus, he has offered no proof as to what portion of the attorney fees billed to the Estate were for legal services provided

to the Estate, as opposed to legal services provided to the Other Entities. Petitioners, however, presented evidence, which was never refuted, supporting the Fiduciary Supervisor's recommendation, adopted by the County Commission after a hearing in which Mr. Cooper and Steptoe participated, that $75,000.00 was a reasonable amount for attorney fees needed to administer and finalize the Estate.

B. The Circuit Court Erred In Entering The *Circuit Court Order* Because The Circuit Court Erroneously Concluded That Mr. Cooper Was Deprived Of Due Process By Reason Of The Entry Of The *Fiduciary Supervisor Order* And By Entry Of The *County Commission Order* Or Otherwise Deprived Of Due Process Under W.Va. Code §§ 44-3A-1 *Et Seq*.

Due process does not require perfection, only fairness. State v. Stollings, 158 W.Va. 585, 589, 212 S.E.2d 745 (1975, *overruled on other grounds*, State v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977), *overruled on other grounds*, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983). Here, Mr. Cooper was made aware of Petitioners' concerns over the attorney fees voiced in an email sent to him in March of 2017, three (3) years before filing of the *Attorney Fee Motion*. A.R. 0196. This objection to the attorney fees was also included in the *Removal Petition* filed on October 5, 2018. It was one of the grounds on which Petitioners were relying in seeking to remove Mr. Cooper as Executor of the Estate and, without question, put Mr. Cooper on notice that Mr. Luby would be required to defend his attorney fees under Scotchel, 234 W.Va. 627. A.R. 0038-0045. A year and a half later, a hearing, originally scheduled for November 16, 2018, was scheduled for March 6, 2020, for the County Commission to consider the *Removal Petition. See* A.R.1148. In the order setting the hearing for November 16, 2018, the County Commission directed that the parties could conduct discovery. Mr. Cooper conducted no discovery, including discovery aimed at identifying Petitioners' witnesses or the documents any witnesses would be relying on. In the *Attorney Fee Motion*, Mr. Cooper was given notice that Petitioners had two

expert witnesses who would be giving evidence on the reasonableness of the attorney fees billed to the Estate as of November 15, 2016. Attached to the *Attorney Fee Motion* were Mr. Tweel's and Mr. Rowan's affidavits. The information presented in the *Attorney Fee Motion* fleshed out Petitioners' objection to the attorney fees which was included in the *Removal Petition*.

The Circuit Court incorrectly determined that the *Fiduciary Supervisor Order* and *County Commission Order* should be reversed because the Fiduciary Supervisor did not take testimony or make independent findings of fact at a hearing held on the *Attorney Fee Motion*, citing W.Va. Code § 44-3A-2; W.Va. Code § 44-3A-5; W.Va. § 44-3A-41. The *Circuit Court Order* is erroneous, however, because Mr. Cooper and Steptoe were not entitled to a hearing under any of those provisions. W.Va. Code § 44-3A-2 requires that any order of a fiduciary supervisor is subject to confirmation and approval of the County Commission, which occurred here. W.Va. Code § 44-3A-5 provides that, if a dispute arises as to a matter of law or fact, then the matter may be referred to a fiduciary commissioner. W.Va. Code §44-3A-41 does not require a hearing, as the Circuit Court held, but instead provides that a county commission may hold a hearing if one party requests a hearing, but shall hold a hearing only if the request is a joint request. There was no joint request.

However, the question is whether there was fairness. The practice in civil litigation is that, when a party files a motion, it is to be supported with the evidence relied upon. The opposing party then has a right to counter that evidence. A hearing is then held not to receive new evidence, but to argue the merits based upon the evidence received. Even if a defending party fails to offer counterevidence, the motion may be determined by the court without a hearing. Green v. Hood, No. 23-ICA-374, 24 WL 3582140 at *2 (W.Va. Ct. App. July 30, 2024) (holding that the circuit court did not err in refusing to hold a hearing "to look at the evidence" as petitioner had requested,

where the petitioner had failed to "introduce specific evidence in opposition to [movant's] motion for summary judgment.")

Absolutely no objection was made that the testimony should not be heard nor the affidavits received because Mr. Cooper had insufficient notice of the same. Thus, any objection based on "undue surprise" or "due process violation" was waived. Having been waived, Mr. Cooper and Steptoe forfeited any claim that the supposed insufficient notice before the Removal Hearing deprived them of due process because they were unduly surprised.

The testimony and affidavits having been properly admitted at the Removal Hearing, there is no question but that once the Removal Hearing was concluded, the evidence adduced at that hearing could be utilized in other matters before the County Commission related to the dispute over the attorney fees. The cry about the "understanding" at the Removal Hearing that it would not be used elsewhere is specious. Plainly, had the *Attorney Fee Motion* not been filed until after the Removal Hearing, Mr. Cooper would have no reason to believe the testimony and affidavits concerning the attorney fees would be used for any reason but the Removal Hearing, just as he claims he believed based upon the supposed "agreement" concerning the same at the Removal Hearing. Assume the *Attorney Fee Motion* was filed after the Removal Hearing. What valid objection could Mr. Cooper have for claiming the evidence adduced at the Removal Hearing on the attorney fee issue, which was relevant not only to the issue of removal but also to the dispute over the attorney fees, could not be relied upon in support of the *Attorney Fee Motion*? None. That the *Attorney Fee Motion* was filed prior to the Removal Hearing does not render the evidence taken at that hearing inadmissible for determining the *Attorney Fee Motion*.

Mr. Cooper and Steptoe were given a hearing before the County Commission in keeping with W.Va. Code § 44-3A-2, which provides that every order of a fiduciary supervisor is "subject

to confirmation and approval of the county commission and be considered for confirmation at the next regular or special session and be promptly confirmed or, if not confirmed, a date set for hearing thereon." Because the *Fiduciary Supervisor Order* was confirmed, no hearing was required after its confirmation. However, Mr. Cooper and Steptoe, as an interested party, were granted a hearing on their objections to the *Fiduciary Supervisor Order* and had the opportunity both before and at the hearing to submit evidence supporting their position. A review of Steptoe's argument at that hearing, even had it been under oath and possibly constituting evidence, however, again reveals Mr. Luby failed to explain how he was authorized by the Other Entities to perform the legal services for them that he did.

The only counterevidence to the *Attorney Fee Motion* submitted by either Mr. Cooper or Mr. Luby/Steptoe was the affidavit of Mr. Brown. However, that affidavit also did not serve as any evidence opposing Mr. Tweel's affidavit and his testimony that Mr. Luby was "assuming a representation" of the Other Entities which he did not have, nor did it oppose Mr. Tweel's affidavit and his testimony that the Other Entities were responsible for the legal services provided to them, not the Estate. Both of Petitioners' assertions regarding the non-representation of the Other Entities by Mr. Luby, and it being the responsibility of the Other Entities to pay for those services, coupled with Mr. Luby's effective admission that the bulk of the attorney fees he billed to the Estate were for his legal services performed to, in essence, administer those estates and trusts, clearly supported the relief requested by Petitioners in the *Attorney Fee Motion* and clearly supported the *Fiduciary Supervisor Order*.

Mr. Cooper and Mr. Luby/Steptoe were given notice in 2017 that Petitioners objected to the attorney fees billed to the Estate; they were further given notice in October 2018 when the *Removal Petition* was filed citing the excessive and unauthorized attorney fees as grounds for

removal; they were once again given notice on March 3, 2020 when the *Attorney Fee Motion* was filed with the affidavits of Mr. Tweel and Mr. Rowan attached; finally, they were given notice at the Removal Hearing.[19] Despite being given four (4) notices and participating in two (2) hearings where the excessiveness of the attorney fees and the lack of authorization to perform legal services for the Other Entities, were clearly an issue, requiring Mr. Luby to justify both his authorization and his attorney fee billings to the Estate for work performed for the Estate (and not the Other Entities), other than Mr. Harmon's insufficient affidavit, nothing in the way of evidence was offered by either Mr. Cooper or Mr. Luby/Steptoe. Clearly, there was no deprivation of due process.

In addition, Mr. Cooper was not deprived of any right by reason of the *Fiduciary Supervisor Order* to which due process supposedly was not given. First, by statute, an order entered by a fiduciary supervisor must be confirmed before it is effective. W.Va. Code § 44-3A-2. Therefore, the *Fiduciary Supervisor Order* was not a final order, and its entry was not a deprivation of anything to which Mr. Cooper claims entitlement. Thus, the failure of the Fiduciary Supervisor to delay entering such order after a request by Petitioners that she take up the matter, was not a final order on the unreasonableness of the nearly $600,000.00 in attorney fees that had been billed to the Estate, and operated no deprivation of any right.[20]

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[19] The Circuit Court was correct in concluding that Mr. Cooper had no obligation to address the attorney fee issue in connection with the *Attorney Fee Motion* at the Removal Hearing. However, since the excessive nature of the unauthorized attorney fees were, most importantly, a large part of the grounds supporting the *Removal Petition* (A.R. 0530), Mr. Cooper nevertheless did have an obligation to address the attorney fee issue in connection with the *Removal Petition* at the Removal Hearing for that purpose.

[20] Although the Fiduciary Supervisor titled her decision as an order, pursuant to W.Va. Code § 44-3A-2, her decision is more accurately a recommendation subject to County Commission review and adoption. *See also* W.Va. Code § 44-3A-19(h). Plainly due process rights do not attach to an investigation by a fiduciary supervisor into the reasonableness of an expert's fee so as to make a recommendation to the county commission since it is at the county commission review stage that legal rights will be affected. *See* Hoover v. Smith, 198 W.Va. 507, 482 S.E.2d 124 (1997) (no due process rights must be afforded at investigative stage as long as they are provided at subsequent proceedings). Here, the subsequent proceeding was the hearing before the County Commission which was granted as requested by Mr. Cooper and Mr. Luby/Steptoe.

At the next step, following which a final order could potentially affect the claim that the Estate was responsible for payment of all accumulated attorney fees, Mr. Cooper and Mr. Luby/Steptoe were afforded a meaningful hearing. That they failed to address the core issue, that Mr. Luby was not authorized by the Other Entities to perform work on their behalf and, thus, the Estate was not responsible to pay for that work, to the satisfaction of the County Commission, does not translate into a denial of due process.

Moreover, W.Va. Code § 44-3A-21 contemplates, that after the fiduciary supervisor makes a report on a claim, and gives notice of that report to interested parties, a ten (10) day period is provided for such interested parties to examine the report and the evidence behind it. Here, the report was the *Fiduciary Supervisor Order* and the evidence behind it was already possessed by Mr. Cooper and Mr. Luby/Steptoe – the *Attorney Fee Motion* and attached affidavits and the hearing transcript on the *Removal Petition*. W.Va. Code § 44-3A-21 then provides that the interested parties may file objections, which Mr. Cooper and Mr. Luby/Steptoe did. Following the filing of those objections, the matter became one for the County Commission. This procedure was followed and the County Commission took up the matter at a hearing at which Mr. Cooper and Mr. Luby/Steptoe appeared and participated.

Finally, neither the *Fiduciary Supervisor Order* nor the *County Commission Order* precludes Mr. Luby and Steptoe from recovering the attorney fees in dispute. Those orders simply eliminate the Estate as the source of payment of any attorney fees that exceeded $75,000.00 out of the nearly $600,000.00 billed as of November 15, 2016. Since those orders merely removing the Estate as a source of payment do not affect their right to payment, no right to which due process attaches has been implicated by those orders or the actions taken underpinning those orders.

C. The Circuit Court Erred In Entering The *Circuit Court Order* Because The Circuit Court Reached The Wrong Legal Conclusions Regarding The Authority And Power Of The Fiduciary Supervisor

The Circuit Court erroneously concluded that the Fiduciary Supervisor could not review the reasonableness of the attorney fees billed to the Estate until the conclusion of the Estate administration, and that she and the County Commission were limited in their authority by certain statutory provisions. However, both constitutional law and case law demonstrate otherwise.

The West Virginia Constitution provides that, after January 1, 1976, the West Virginia Legislature ("Legislature") was empowered to enact legislation providing that "all matters of probate, the appointment and qualification of personal representatives, guardians, committees and curators, and the settlements of their accounts would vest exclusively in circuit courts." West Virginia Constitution ("Constitution"), Article 8, Section 6 ("Section 6"). Section 6 continues to provide, however, that "until such time as the Legislature provides otherwise, jurisdiction in such matters shall remain in the county commissions or tribunals existing in lieu thereof or the officers of such county commissions or tribunals." Constitution, Section 6. The Legislature has yet to vest jurisdiction over circuit courts exclusively. Thus, the jurisdiction of the county commissions over all probate matters is, constitutionally, both exclusive and broad, because all matters of probate are controlled by county commissions. Furthermore, county commissions are possessed of powers "reasonably and necessarily implied in the full and proper exercise of" powers expressly granted to them. Syl. Pt. 1, State ex rel. State Line Sparkler of WV, Ltd. v. Teach, 187 W.Va. 271, 418 S.E.2d 585 (1992). These reasonably and necessarily implied powers should be construed liberally, given the exclusive jurisdiction granted to county commissions over probate matters. To do otherwise would impinge upon the exclusive jurisdiction which county commissions are granted over probate matters.

Fiduciary supervisors "have general supervision of all fiduciary matters and of the fiduciaries or personal representatives thereof and of all fiduciary commissioners and of all matters referred to such commissioners." W.Va. Code § 44-3A-3(b). Because fiduciary supervisors are empowered by legislative enactment to supervise the settlement of estates, and to enter orders and make findings, fiduciary supervisors also have those same powers that are reasonably and necessarily implied for the full and proper exercise of their authority to oversee estate settlement which has been expressly granted to them. *See* Syl. Pt. 1. State ex rel. State Line Sparkler of WV, Ltd v. Teach, 187 W.Va. 271, 418 S.E.2d 585 (1992). One of the responsibilities of fiduciary supervisors is to review estate administrative expenses for reasonableness and make a report to the county commission for its approval. W.Va. Code § 44-1-14(i). Thus, in order to fulfill their duty to actually review and make a recommendation of their conclusions as to reasonableness, fiduciary supervisors must also have the power to decline to recommend certain expert expenses based on their determination that the expert fees are unreasonable as estate expenses. If they did not, the requirement that they review and recommend would be meaningless, as their function would be reduced to rubberstamping whatever expenses were submitted to them. The authority to determine that expenses are unreasonable, is a reasonable and necessary power implied from the authority to determine expenses are reasonable. Sparkler of WV, Ltd, 187 W.Va. 271.

Furthermore, while W.Va. Code § § 44-3A-1 *et seq*. contains provisions relating to the final settlement wrap-up of an estate, such provisions do not contain any restrictions precluding fiduciary supervisors from, time to time or when requested, throughout the administration of an estate, examining the progress of the administration of an estate or the costs it is incurring. W.Va. Code § 44-3A-3(b) specifically states that fiduciary supervisors have "general supervision of all fiduciary matters." General supervision plainly contemplates continuing supervision, not merely

a review at the end of administration. General supervision of all fiduciary matters clearly means taking an active role in overseeing all fiduciary matters, and logically includes intermittent review as well as final review.[21] Furthermore, it would also include addressing matters coming to the fiduciary supervisor's attention, such as a request that the fiduciary supervisor exercise his or her general supervisory responsibilities with respect to a particular estate drawn to his or her attention to make sure its administration is being done correctly. Giving attention to, and not ignoring, a potential problem with an estate is wise and prudent supervision.

As discussed above, to supervise means to ensure that an activity is being performed correctly and implies overseeing the activity as it progresses, not just making a review at its conclusion. A fiduciary supervisor, as part of his or her general supervision of all probate matters, is empowered to approve or disapprove "any reasonable expenses incurred" by the executor. W.Va. Code § 44-4-12. Significantly, the Legislature did not use the word "paid," but "incurred." Expenses for legal services are incurred when the services are performed. Worsham v. Greenfield, 435 Md. 349, 78 A.3d 358 (2013); *see* Grove By and Through Grove v. Myers, 181 W.Va. 342, 350, 382 S.E.2d 536 (1989); Syllabus Pt. 14, Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975). Therefore, there is no requirement that a fiduciary supervisor wait until expenses are paid if he or she becomes aware of an alarming accumulation of attorney fee expenses. Waiting until they are paid to review is tantamount to shutting the barn door after the horse has bolted.[22]

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[21] To "supervise" an activity means to make certain that activity is being done correctly (https://dictionary.cambridge.org/us/dictionary/english/supervise#google_vignette); (https://www.collinsdictionary.com/us/dictionary/english/supervise#google_vignette)

[22] Taking action to prevent harm after the harm has already occurred https://dictionary.cambridge.org/us/dictionary/english/shut-close-the-stable-barn-door-after-the-horse-has-bolted. While Mr. Luby contends he would refund any disallowed attorney fees (A.R. 1236), might not other executors or estate beneficiaries be put in the position of having to litigate to obtain such a refund. If fiduciary supervisors could not review administration of an estate when notified of a problem, estates could be plundered with no hope of recovery. The better practice, plainly, is to stop the plundering before it happens, or from continuing once made aware of it.

Moreover, it is only "after the report of the fiduciary supervisor . . . on the claims against the estate of any decedent has been confirmed . . . [that] the personal representative may pay the claims allowed by the [fiduciary supervisor] against the decedent's estate . . ., according to the order of payment set forth in such supervisor's … report." W.Va. Code § 44-3A-29 (emphasis added).[23] In other words, before payment of any claims of an estate, including estate administrative expenses, the fiduciary supervisor first is required to make a recommendation to the county commission that the claims tendered for payment are reasonable, with that recommendation being confirmed by the county commission, before payment may be made. Mr. Cooper's contention that he had to first pay the attorney fees before the Fiduciary Supervisor could review them for reasonableness, is in direct opposition to W.Va. Code § 44-3A-29, yet the Circuit Court effectively adopted this contention.

D. The Circuit Court Erred By Entering The *Circuit Court Order* Because The Circuit Court Was Limited By Law In Its Review Of The *County Commission Order* To The Record Before The County Commission On Whether To Confirm Or Reverse The *Fiduciary Supervisor Order,* Which Order Was Concerned Only With The Attorney Fees As Of November 15, 2016, And The Circuit Court Considered, And Extensively Relied On, Matters Outside That Record

Pursuant to W.Va. Code § 58-3-5, an appeal of a county commission decision to a circuit court "shall be decided upon the original record of the proceeding [before the county commission]." Haines v. Kimble, 221 W.Va. 266, 654 S.E.2d 558 (2007). Such review is

> confined strictly to the record made in the lower court. It must consider every part of it and no more. In order to accomplish the purposes of a review the appellate court must have before it the identical questions based upon the identical pleadings and proof that were before the lower court.

[23] W.Va. Code § 44-3A-26 specifies "costs and expenses of administration" are a claim against a decedent's estate. It appears Mr. Cooper failed to get approval and confirmation for the attorney fees he did pay.

Kimble, 221 W.Va. at 275, *quoting* In re Estate of Edwin A. Durham, 119 W.Va. 1, 5, 191 S.E. 847, 849 (1937) (emphasis added). Such appeal must be heard by the circuit court "without taking [or considering] any new evidence." Kimble, 221 W.Va. at 276.

What was before the County Commission was the *Fiduciary Supervisor Order,* which addressed only the reasonableness of the attorney fees accumulated as of November 15, 2016, so the dispute before the Fiduciary Supervisor only concerned the attorney fees billed to the Estate as of that date. When the County Commission reviewed the *Fiduciary Supervisor Order*, it held a hearing and had before it the *Estate's Response* (to the *Attorney Fee Motion*), the *Estate's Objection* (to the *Attorney Fee Motion*), Mr. Harmon's affidavit, the *Estate's Letter Objection* (to the *Fiduciary Supervisor Order*), and *Steptoe's Letter Objection* (to the *Fiduciary Supervisor Order*). It also had the *Attorney Fee Motion* with its attached exhibits, including the affidavits of Mr. Tweel and Mr. Rowan. Finally, it had before it the transcript of the Removal Hearing.

The Circuit Court, however, incorporated extensive discussion about events occurring both after the Removal Hearing, after the entry of the *Fiduciary Supervisor Order*, and totally outside the scope of the limited issue presented by the *Attorney Fee Motion*. Without question, these extraneous and after-occurring events are not part of the record which was before the County Commission, yet they form a great deal of the backbone of the *Circuit Court Order*, and include, but are not limited to, the following paragraphs in the *Circuit Court Order*[24]: ¶ 4 (discussing details of the value of Mr. Baker's estate, referencing litigation on the Debt, and the ownership and operation of J. B. Baker & Son, Inc., which is not even a party to the *Attorney Fee Motion* dispute.); ¶ 5 (discussing Mr. Cooper's responsibility to collect on the Debt); ¶ 11 (matters associated with the effort by Petitioners to remove Mr. Cooper as Executor of the Estate and reference to provisions

[24] Interestingly, the Circuit Court recognized that, under Kimble, it could not consider new evidence, *Circuit Court Order* ¶ 40, yet proceeded to do just that.

in an order entered more three (3) years after the *Fiduciary Supervisor Order* was entered, in an entirely different matter, and in which that order made irrelevant remarks regarding how the County Commission should have done its job regarding its affirmation of the *Fiduciary Supervisor Order* when that order was not part of that matter); ¶ ¶ 12 and 13 (which paragraphs do nothing more than incorporate attorney argument made by Mr. Cooper and Mr. Luby/Steptoe); ¶ 16 (which paragraph incorrectly states that the *Fiduciary Supervisor Order* limited the maximum amount for the entire administration of the Estate to $75,000.00);[25] ¶ 17 (which paragraph focused on the "Disallowed Attorney Fees" which were not before the Fiduciary Supervisor nor the County Commission because they were not only not part of the attorney fee billings as of November 15, 2016, they had not even been incurred yet); ¶ 18 (which paragraph incorrectly identifies the issue as what attorney fees remain unpaid, when the issue is whether the amount of attorney fees billed to the Estate were excessive because the amount billed represents the amount of legal services rendered which the Estate was expected to pay, yet not all of those attorney fees were for legal services performed for the Estate, but, instead, a large bulk of them were for legal services performed for the Other Entities; furthermore, who is responsible for the attorney fees that were rendered by Mr. Luby in other matters and after November 15, 2016, was not before the Fiduciary Supervisor or the County Commission); ¶ ¶ 20, 21, and 22 (the decision and litigation referenced, occurring in 2021 and 2022, and the attorney fees for November 15, 2016 on, are well outside the

[25] Mr. Tweel was specific in his testimony. He gave what would be a reasoned cost for legal services to administer the Estate by preparing and filing/submitting required forms, such as the appraisement and non-probate inventory, and then finalizing and closing the Estate. His testimony did not address extraordinary expenses, such as the Estate litigation expenses that supposedly became necessary because Mr. Cooper and Mr. Luby failed to recognize that the Estate was not responsible for the legal services provided to the Other Entities. Because of this failure to recognize that the Estate is not liable for those expenses (as Mr. Luby should never have performed those legal services since he did not represent those Other Entities), they engaged in unnecessary litigation to try to fill Estate coffers in order to wrongfully pay the attorney fees for legal services rendered to the Other Entities, which they insisted had to be paid to close the Estate. Had the attorney fees for legal services to the Other Entities not been part of Mr. Luby's claim for compensation, the Estate could have been settled with the assets it did have. *See* footnotes 17 and 18, *supra*.

scope of what was before the Fiduciary Supervisor and County Commission), to name a few. A.R. 1816 *et seq.* Plainly, the Circuit Court improperly relied on matters outside the record on which it was permitted to rely, requiring that the *Circuit Court Order* be reversed, and the *Fiduciary Supervisor Order* and *County Commission Order* be affirmed.

E. The Circuit Court Erred By Entering The *Circuit Court Order* Because It Made Clearly Erroneous Findings Of Fact, Relying On Attorney Argument Which Is Not Evidence, And Failed To Support Those Findings Of Fact By Its Conclusions Of Law

The Circuit Court clearly erred in making certain findings of fact on which it heavily relied in reaching its ultimate conclusion, apparently simply affixing its signature to Mr. Cooper's proposed order without much consideration.[26] In Paragraph No. 36 of the *Circuit Court Order*, the Circuit Court concluded that the evidence at the Removal Hearing was improperly considered by the Fiduciary Supervisor and that Mr. Tweel's and Mr. Rowan's testimony could not be considered by the Fiduciary Supervisor because "it was clear [their testimony] was admitted for a very limited purpose" of considering it as a factor among factors to be considered in determining whether Mr. Cooper should be removed as Executor of the Estate. A.R. 1842, ¶ 36. When the entirety of the exchange at the Removal Hearing is considered, however, that was not what was agreed and determined. Counsel for Petitioners clearly and plainly stated he agreed that the *Attorney Fee Motion* was not being heard at the hearing which was then being conducted by the

[26]A court may adopt one party's proposed order only if the findings and conclusions "represent the judge's own determination and not the long, often argumentative statements of successful counsel." South Side Lumber Co. v. Stone Const. Co., 151 W.Va. 439, 443, 152 S.E.2d 721 (1967). It is not difficult to see that the Circuit Court did not make its own determination. In the first instance, the individually numbered "findings/conclusions" are clearly "long, argumentative statements" of Mr. Cooper; the following paragraphs are examples of the same as they are one or more typed pages long: ¶¶ 4, 8, 10, 12, 18, 22, 24, 28, 29, 31, 36, and 42. Moreover, little to no law is cited supporting these argumentative statements. But most significantly, the proposed order submitted by Mr. Cooper was actually two copies of the exact same order, with the exception of the title of the order and the signature page. Surely, had the Circuit Court actually reviewed Mr. Cooper's proposed order carefully enough to assure itself such order was actually its "own determination," it would have noticed the two copies combined into one order and deleted one of them before entering the order. From all appearances, the Circuit Court may not have even read Mr. Cooper's proposed order before signing it. Clearly, the *Circuit Court Order* failed to comply with South Side Lumber, 151 W.Va. 439.

County Commission. A.R. 0536. That is not the same thing as agreeing that the evidence submitted at that hearing could not later be considered with respect to the *Attorney Fee Motion*. The agreement had nothing to do with whether the evidence could or could not be later used, but only whether the *Attorney Fee Motion* was being "tried" at that hearing, which it was not. Furthermore, what would be that point? Neither Mr. Cooper nor the Circuit Court gave any explanation or authority supporting the conclusion that testimony adduced at the Removal Hearing, which simply mirrored Mr. Tweel's and Mr. Rowan's affidavit evidence submitted as part of the *Attorney Fee Motion* prior to that hearing, was then precluded from being considered in conjunction with the *Attorney Fee Motion,* of which it was part.[27] If ever a desperate argument was made, it is this one.[28]

In Paragraph No. 37 of the *Circuit Court Order*, the Circuit Court wrongly concluded that the attorney fee invoices were not relevant to the Removal Hearing. The Circuit Court's conclusion is wrong because Mr. Cooper's failure to oversee Mr. Luby's work, resulting in the accumulation of approximately $600,000.00 in attorney fees not properly attributable to the Estate, was a large ground for Petitioners seeking his removal as Executor of the Estate. A.R. 1843, ¶ 37. There is no question but that the attorney fees were relevant to the removal issue before the County Commission. Plainly, Mr. Cooper facilitated the Circuit Court's adoption of this patently incorrect conclusion to excuse the failure of Mr. Cooper to seek a continuance of the Removal Hearing to another day, or to otherwise proffer evidence, in order to controvert the relevant evidence related to the attorney fees adduced at the Removal Hearing, and to excuse his failure to

[27] *See* also Part V.B., *supra*.

[28] Since neither Mr. Cooper, nor Mr. Luby/Steptoe ever submitted evidence or explanation to the County Commission controverting what Mr. Tweel and Mr. Rowan stated in their affidavits, particularly about Mr. Luby's unauthorized assumption of the representation of the Other Entities, Petitioners are hard-pressed to see how Mr. Cooper was somehow disadvantaged or prejudiced by the Fiduciary Supervisor's reference to the hearing testimony of those two witnesses, testimony which was also stated by them in their affidavits attached to the *Attorney Fee Motion.*

otherwise submit evidence on the attorney fee issue to the Fiduciary Supervisor, a conclusion that was clearly erroneous.

In Paragraph No. 38 of the *Circuit Court Order*, the Circuit Court adopted Mr. Cooper's flawed reasoning regarding Petitioners reference to West Virginia Trial Court Rule 6.01(c) ("Trial Court Rule 6.01(c)"). The point of Petitioners' reference to that rule was to illustrate that, if due process somehow requires a specified amount of time that notice must be given, Petitioners' notice met due process requirements since they gave more notice than is provided in Trial Court Rule 6.01(c). Furthermore, and extremely significant, at the Removal Hearing, the only objection counsel for Mr. Cooper made to Petitioners' offer of Mr. Tweel and Mr. Rowan as witnesses, was based on the relevancy of the evidence; absolutely no objection was made based on "surprise" or insufficient notice in violation of due process. A.R. 0535-0539. Without question, that objection was waived by Mr. Cooper. The Circuit Court was clearly erroneous for relying on the supposed "surprise" element of Mr. Tweel's and Mr. Rowan's testimony as that objection was never made to the County Commission for it to consider and was without question waived by Mr. Cooper.

In Paragraph No. 39 of the *Circuit Court Order*, the Circuit Court erroneously relies on Mr. Cooper's misstatement of the law. W.Va. Code § 44-4-12 clearly states that an executor may be allowed any "reasonable expenses incurred" in the estate administration. Significantly, it does not say an executor is allowed any reasonable expenses he or she has paid. Expenses for legal services are incurred when the services are performed. Worsham v. Greenfield, 435 Md. 349, 78 A.3d 358 (2013); *see* Grove By and Through Grove v. Myers, 181 W.Va. 342, 382 S.E.2d 536 (1989); Syllabus Pt. 14, Long v. City of Weirton, 158 W.Va. 741, 214 S.E.2d 832 (1975).

The Circuit Court also concluded that

> [t]he Executor has the authority to determine if and when attorney bills that are submitted to him will be paid. The Executor does not have the burden under Article

> 4 of Chapter 44 of the Code to prove to the Fiduciary Supervisor or the County Commission the reasonableness of unpaid attorney fee bills before the Executor determines when and if he will pay those invoices and actually pays those invoices.

A.R. 1844, ¶ 39. However, this is a clear misstatement of the law. First, Article 3A of Chapter 44 of the Code governs fiduciary supervisors, and, as stated above in Part V. C., Section 29 of that Article clearly states that it is only "after the report of the fiduciary supervisor . . . on the claims against the estate of any decedent has been confirmed . . . [that] the personal representative may pay the claims allowed by the [fiduciary supervisor] against the decedent's estate . . ., according to the order of payment set forth in such supervisor's … report." W.Va. Code § 44-3A-29 (emphasis added).[29]

Paragraph No. 40 of the *Circuit Court Order* reiterates "findings" and "conclusions" addressed above, but to summarize: Mr. Cooper waived, on behalf of the Estate, his contention of violation of due process because the only objection he made at the Removal Hearing to the testimony of Mr. Tweel and Mr. Rowan was that the evidence being offered was supposedly irrelevant to the *Removal Petition,* which it clearly was not.[30]

The Circuit Court, clearly and without question, erroneously determined there was no evidentiary basis for the *Fiduciary Supervisor Order* because the Removal Hearing testimony supposedly should be ignored, but itself totally ignored that the very same affidavits presented at the Removal Hearing as exhibits, were attached as affidavits to the *Attorney Fee Motion*. In sum, the *Attorney Fee Motion* was more than amply supported by the evidence attached to it.

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[29] Again, expenses of estate administration are a claim against the estate. W.Va. Code § 44-3A-26.

[30] Mr. Cooper makes reference to his non-existent objection based on "surprise" to Mr. Tweel's and Mr. Rowan's testimony at the Removal Hearing, an objection that had already been waived, and while Steptoe did raise the issue of insufficient notice and adequate time to present evidence, it had not yet sought to be made an "interested party" at that point and so was effectively represented through Mr. Cooper, who waived that objection at the Removal Hearing. In any event, Steptoe can hardly complain about the procedure followed by the Fiduciary Supervisor in February of 2021 and by the County Commission in May 2021 when it did not even seek to "intervene" as an interested party until after the *County Commission Order* was entered.

In Paragraph Nos. 41 and 42 of the *Circuit Court Order*, the Circuit Court clearly erred in concluding that Mr. Tweel's testimony "was insufficient to establish the $75,000.00 Attorney Fee Ceiling." A.R. 1845 ¶ 42. The Circuit Court, adopting Mr. Cooper's faulty understanding of what was before the Fiduciary Supervisor and Mr. Tweel's testimony and opinion, wrongly assumed that the attorney fees for all of Mr. Luby work was before the Fiduciary Supervisor, which, as explained above, is incorrect. In addition, Mr. Tweel's testimony was not directed at the attorney fees for what has been referred to as "Estate Litigation." Mr. Tweel testified, at the hearing and in his affidavit, that Mr. Luby should have billed the Estate for legal work done for the Estate, not for legal work done for the Other Entities. The legal work which Mr. Luby should have billed to the Estate should have been only for such things as preparation of the appraisement for the Estate and preparation of the nonprobate inventory, among other similar general administrative tasks. Mr. Tweel's testimony was that, had Mr. Luby billed only that work to the Estate and timely settled the Estate,[31] his legal services should, at most, have cost $75,000.00. As stated above, who owes for the legal services performed for the Other Entities is not before this Court, and was not before the Circuit Court, as all the *Fiduciary Supervisor Order* and the *County Commission Order* affirming that order determined, was that the Estate was not liable for it.[32]

Paragraph No. 43 of the *Circuit Court Order* likewise is clearly erroneous because it, too, relies on matters outside the scope of what was before the Fiduciary Supervisor and the County

[31] By the time of the Removal Hearing, the Estate had been open for eleven years and Mr. Luby had been working on it for ten of those years. Moreover, after obtaining the Valuation, it still took him three (3) years or more to finish up work that supposedly only needed the Valuation "plugged" into the documents. Clearly legal services to accomplish that work would not cost nearly $600,000.00.

[32] Interestingly, Mr. Luby has stated that Mr. Cooper is liable for attorney fees that are not approved as expenses of the Estate. A.R. 1235. If so, Mr. Cooper has a definite conflict of interest because his personal interest in not being held liable for hundreds of thousands of dollars in unapproved attorney fees pits him against his fiduciary duty to the Estate to ensure only reasonable and approved expenses are paid by the Estate. He is off the hook personally if he can convince this Court that the Estate is responsible for all of Mr. Luby's attorney fees, even though payment of them will deplete the assets directed in the decedent's will to fund the Trust.

Commission. Mr. Luby bore the burden of proving the reasonableness of his attorney fees. Scotchel, 234 W.Va. 627. Therefore, it was incumbent on him to demonstrate that the amount of the attorney fees billed to the Estate as of November 15, 2016, represented work properly performed for the Estate. Mr. Tweel's examination of 2,500 to 3,000 pages of documents, the appraisement, the non-probate inventory, and similar documents was, based on his 26 years of experience as an attorney practicing in the area of probate, with a master's degree in taxation, that $50,000.00 to $75,000.00 would have covered that work. His testimony was not speculative but, rather, was a well-grounded opinion of an expert in the field who quickly recognized what neither Mr. Cooper nor Mr. Luby did – that Mr. Luby was not only performing work that should never have been done since he was not representing the Other Entities and did not have the necessary authorization from the Other Entities, but that the work he was performing for the Other Entities was their financial responsibility, not the financial responsibility of the Estate.

With respect to the supposed Findings Of Fact which the Circuit Court adopted from Mr. Cooper, the law relied on by the Circuit Court was totally inadequate. The Circuit Court made no separate conclusions of law, and with respect to the law it did cite, the Circuit Court failed to cite any legal authority supporting its conclusions on critical issues determinative of the appeal before it. For example, none of the legal authorities cited by the Circuit Court supported Mr. Luby's authority to perform legal services for the Other Entities, a representation he simply assumed. Nor did any of those legal authority support Mr. Cooper's ability to authorize Mr. Luby to assume that representation. Additionally, the Circuit Court failed to cite any legal authority supporting its conclusion that the Fiduciary Supervisor could not consider Mr. Tweel's and Mr. Rowan's testimony when their testimony was the same evidence in their affidavits attached to the *Attorney Fee Motion*.

VI. CONCLUSION

When reviewing the final disposition of a circuit court effectively acting as an intermediate appellate court, this Court is to review "the circuit court's final order and ultimate disposition under an abuse of discretion standard [and] review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo." Darago v. Darago, No. 22-ICA-269, 2023 WL 7403409, at *2 (W. Va. Ct. App. Nov. 8, 2023). The Circuit Court clearly made erroneous factual determinations, including, but not limited to, every factual determination relying on matters outside the record below, because those facts should not have been considered. Kimble, 221 W.Va. 266. Moreover, it erroneously made a factual determination that Mr. Luby did not do "rogue" work, meaning he did not perform unauthorized legal services. Finally, it made an erroneous determination that Mr. Cooper was denied due process.

The Circuit Court also reached erroneous conclusions of law. It wrongly concluded that the attorney fees had to be paid before the Fiduciary Supervisor could review them. It wrongly concluded that the Fiduciary Supervisor improperly considered the testimony of Mr. Tweel and Mr. Rowan when there was no agreement by the parties or determination of the County Commission that the evidence could not be later used in resolving the *Attorney Fee Motion*, especially since that very evidence was included in the affidavits of those witnesses which were exhibits to the *Attorney Fee Motion*. It reached a clearly erroneous conclusion when it determined the attorney fee invoices were not relevant to the *Removal Petition* when those attorney fees were clearly an important part of the grounds on which Petitioners were relying in seeking Mr. Cooper's removal as Executor of the Estate. It reached a clearly erroneous conclusion that the "surprise" of those witnesses' testimony constituted a due process violation when that claim of "surprise" was waived by Mr. Cooper as it was never asserted at the Removal Hearing. It reached a clearly

erroneous conclusion when it interpreted W.Va. Code § 44-4-2, which authorizes review of reasonable expenses "incurred," as meaning paid. The Circuit Court also reached erroneous conclusions of law when it failed to conclude that: (1) Mr. Luby was not authorized to perform legal services for the Other Entities; (2) those unauthorized legal services were the financial responsibility of the Other Entities; (3) the Estate has no financial responsibility for those unauthorized legal services; and (4) including those unauthorized legal services in the attorney fees billed to the Estate was unreasonable. Finally, it certainly appears that the Circuit Court did not appropriately consider and analyze the proposed order submitted by Mr. Cooper before adopting it *in toto*, such that it was not its "own determination."

For all of these reasons, the *Circuit Court Order* should be reversed. In addition, because Mr. Tweel's testimony on what would constitute a reasonable amount for attorney fees to complete the administration of the Estate was unrefuted, and because Mr. Luby bears the burden of proving the reasonableness of his fees, which he totally failed to do, the *Fiduciary Supervisor Order* and the *County Commission Order* should be affirmed by this Court.

MICHAEL BAKER and GEORGE CAMERON BAKER, TRUSTEES, GEORGE CAMERON BAKER, and SUSAN ANN BAKER,

Defendants Below, Petitioners

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MICHAEL BAKER and GEORGE CAMERON BAKER, TRUSTEES, GEORGE CAMERON BAKER and SUSAN ANN BAKER,

Defendants Below, Petitioners.

v.

Appeal No. 24-ICA-253
(Appeal from Braxton County Circuit Court Case No. CC-4-2021-AA-1)

DANIEL C. COOPER, as Executor of the ESTATE OF GEORGE C. BAKER,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, R. Terrance Rodgers, counsel for defendants below/petitioners Michael Baker and George Cameron Baker, as Trustees of the George C. Baker Trust Dated July 20, 2002, George Cameron Baker, and Susan Ann Baker, hereby certify that, on the 14th day of October, 2024, I filed *Petitioners' Initial Brief,* electronically, through File & ServeXpress, which sent the same to plaintiff below/respondent Daniel C. Cooper, as Executor of the Estate of George C. Baker, by email to Daniel C. Cooper at dan.cooper@cooperlawwv.com.

/s/ R. Terrance Rodgers
R. Terrance Rodgers