No. 24-ICA-253

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MICHAEL BAKER AND GEORGE CAMERON BAKER, Trustees of the George C. Baker Trust Dated July 20, 2002; GEORGE CAMERON BAKER; and SUSAN BAKER,

Defendants Below / Petitioners,

v.

DANIEL C. COOPER, Executor of the Estate of George C. Baker,

Plaintiff Below / Respondent.

Appeal from a final order of the Circuit Court of Braxton County, West Virginia, entered on May 24, 2024

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

Petitioners[1] appeal an Order of the Circuit Court of Braxton County (the "Circuit Court") entered on May 24, 2024 ("*Order*") which reversed a decision of the Braxton County Commission (the "County Commission") dated April 23, 2021 (the "County Commission Order"), which concluded that $75,000 is the total amount of attorneys' fees (past and future) that should be borne for the administration and settlement of the Estate of George C. Baker (the "Estate") despite that the Estate has not been finalized, upholding a February 11, 2021, decision of the Fiduciary Supervisor ("Fiduciary Supervisor Order'). AR 366-375, 520-522. Respondent has been the Executor of the Estate since September 15, 2009.[2] AR 343 at ¶2.

This appeal concerns (1) the facilitation of a Fiduciary Supervisor Order by the Appellants and their counsel, which, in effect, disallowed attorney fees incurred by the Estate for legal services[3] in excess of $14,000, effectively disallowing any of the $412,114 in legal services billed to the Estate and any attorney fees related to the administration of the Estate from 2009 until its closure; (2) the impropriety of the Fiduciary Supervisor's review of unpaid bills for legal services provided to the Estate at a time when the Executor had not yet obtained funds to pay them from debts owed to the Estate, determined how much should be reasonably paid, and paid for legal services; and (3) the efforts of Michael Baker and Cameron Baker, as co-owners of the

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[1] Petitioners are Michael Baker and George Cameron Baker ("Cameron Baker"), as trustees of the George. C. Baker Trust dated July 20, 2002 (the "George Baker Trust"); Susan Baker and Cameron Baker, who are beneficiaries of a trust created under the George Baker Trust.

[2] George C. Baker died on September 6, 2009. The Executor, decedent's nephew, was appointed Executor on September 15, 2009. AR 343 at ¶1.

[3] From 2010 through November 30, 2014, the legal work for the estate administration was primarily performed by Steven Luby during his tenure at the law firm of Lewis Glasser, PLLC ("Lewis Glasser"); thereafter, Mr. Luby's work was done through his current firm, Steptoe & Johnson, PLLC ("Steptoe") In addition, Cooper Law Office, PLLC has provided legal services to the Estate. Raymond Keener has served as special counsel to the Estate from 2019 forward. See, e.g., AR 54-170

J.C. Baker & Son, Inc. (the "Baker Company")[4] and as Petitioner trustees of the George Baker Trust to delay, hinder and avoid the payment of a Stock Purchase Debt owed to the Estate, which was $1.8 Million at the time the Estate obtain its judgment[5] despite a more than 12-year delinquency and having funds to pay that debt; (5) the impact of the non-payment strategy on the Estate's attorneys, who carried the attorney fees[6] and bore the financial risk of that burden for over eight years[7]; and (5) the incessant Law-Fare styled efforts[8] of the Petitioners and the Baker

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[4] The federal estate tax value of the Baker Company was approximately $8 million as of the death of George Baker, after valuation discounts pursuant to the Rufus & Rufus Business Appraisal. AR 379, 1221 (fn 20), 1245. The Baker Company is currently owned by Michael Baker and Cameron Baker, who are also the trustees of the George Baker Trust. AR 362. Michael Baker and Cameron Baker obtained 93.36% of the Baker Company stock as a result of (i) the purchase of George C. Baker's 45% stock interest in the Baker Company in exchange for the Stock Purchase Debt in 2020 and (ii) the distribution of the Baker Company stock to Michael and Cameron Baker from the trusts created under the will of J. C. Baker (the "J. C. Baker Trusts"). AR 3, 575-576, 585.

[5] The Stock Purchase Debt was purchased by the Baker Company in 2000 for $2,240,000 (as amended on November 1, 2002 to be $1,856,310). See J.C. Baker & Son, Inc. v. Cooper, 2021 W. Va. LEXIS 221, *2, 2021 WL 1614342 (April 26, 2021). The Stock Purchase Debt been delinquent since March 29, 2012, resulting in Michael Baker and Cameron Baker receiving all of the benefit of the Baker Company while refusing to pay for the 45% stock interest they purchased from George Baker. AR 778. See also Cooper v. J.C. Baker & Son, Inc., No. 18-C-6 (March 6, 2020 Braxton Co. Cir. Court), affirmed by J.C. Baker & Son, Inc. v. Cooper, 2021 W. Va. LEXIS 221, *2, 2021 WL 1614342 (April 26, 2021). Respondent obtained a judgement in the amount of $1,555,172.32, plus interest, against the Baker Company for its failure to pay the Stock Purchase debt from the Circuit Court of Braxton County on March 6, 2020, which judgment was affirmed on appeal on April 26, 2021. See id. As of January 1, 2025, the Judgement balance will be more than $1.9 Million. As a result on Baker Company's default on the Stock Purchase Debt, Donna Baker, as a beneficiary of the George Baker Trust, received no financial benefit from the Stock Purchase Debt that would have otherwise been payable to the Estate from March 29, 2012 to March 23, 2018, at rate of $16,170 per month. AR 1102.

[6] On September 3, 2015 and thereafter Steptoe deferred the payment of $234,000 legal fees that would have been payable from the sale of marketable securities by the Estate in anticipation that J. C. Baker & Son, Inc. would sell assets to fund payment of the delinquent Stock Purchase Debt. AR 631, 462, 777. This deferral of attorney fees permitted the Executor to fund the monthly distributions to Donna Baker from 2015 until her death on March 23, 2018. AR 777.

[7] Presumably, Respondents and the Baker Company had money to pay their own lawyers during this same eight-year time period. Perhaps they were using money that could have been used to pay the Stock Purchase Debt on their avoidance efforts, which included using the Court system as their unwitting avoidance assistant.

[8] In addition to this matter, Petitioners' efforts of payment avoidance and generalized obfuscation of the Executors efforts include litigation culminating in decisions in favor of the Executor in both J.C. Baker & Son, Inc. v. Cooper, 2021 W. Va. LEXIS 221, *6, 2021 WL 1614342 (April 26, 2021) and George C.

Company to use the court system in order to assist in their strategy to avoid the debt and to delay the Estate administration process for their own benefit.

On October 5, 2018, the Petitioners filed their petition to remove Mr. Cooper as Executor with the Braxton County Commission (the "Removal Petition"). AR 1476. On March 3, 2020, just *two days* before the hearing of the County Commission on March 6, 2020 regarding the Removal Petition (the "Removal Hearing"), the Petitioners filed a reply to the Estate's response to the Removal Petition, which included affidavits of an attorney, Robert G. Tweel and an accountant, John Rowan. AR 687, 1056-1064. Further, on March 3, 2020, the Respondents filed their "Motion for Review of the Amount of Attorney Fees Incurred by Executor Incurred in Connection with his Administration of the Estate ("Attorney Fee Review Motion") with the Braxton County Commission.[9] AR 37-277. The Attorney Fee Review Motion requested that the Braxton County Commission determine the amount of attorney fees ***billed*** to the Estate for legal services by Lewis Glasser and Steptoe were not reasonable and that that not all of the legal services were necessary or proper for the administration of the Estate. The Executor filed a response to the Attorney Fee Review Motion on March 6, 2020. AR 47.[10]

Baker Trust Dated July 20, 2002 v. Cooper, 2022 W. Va. LEXIS 728, *1, 2022 WL 17444547 (Dec. 6, 2022).

[9] The Attorney Fee Review Motion included the following Exhibits: draft invoices for the $77,257 Lewis Glasser 2015-2016 Unpaid Bill, the $321,424 Steptoe 2015-2016 Unpaid Bill prior to the billing adjustments made on December 6, 2016 and Rowan's analysis of those draft attorney bills without consideration of the billing adjustments (Exhibit 1); interrogatory responses provided by the Estate in the Executor Removal Action, including the Cooper Law Office 2010 Paid Bill and the Steptoe Engagement Letter with the Estate (Exhibits 2 and 3); Mr. Tweel's Affidavit (Exhibit 4); and the Estate Appraisement (Exhibit 5). AR 37-277.

[10] On March 24, 2020, the Executor filed a lengthier Objection to Appellants' Motion to Review Attorney's Fees ("Estate's Attorney Fee Review Motion Objection"). AR 1166-1183.

At the Removal Hearing on March 6, 2020, Petitioner presented Mr. Tweel and Mr. Rowan as surprise expert witnesses without any advance notice of their appearance[11] and presented certain exhibits to the County Commission.[12] AR 523-628. The Estate objected to the admission of any testimony by Mr. Rowan or Mr. Tweel at the Removal Hearing on the basis that Mr. Cooper's supervision of *unpaid* attorney bills was not relevant to determining whether Mr. Cooper should be removed from his position as the Executor of the Estate. AR 533-536. The Estate asserted that Petitioners had filed a separate Attorney Fee Review Motion about the determination of the reasonableness of the unpaid attorney bills, which was not the subject of the Removal Hearing. Nevertheless, the County Commission admitted the testimony of Mr. Tweel and Mr. Rowan solely for the *limited purpose* of considering Mr. Cooper's administration of the unpaid the *unpaid* attorney bills was a cause for removal. AR 536 (Petitioners' counsel acknowledging the limited purpose of the testimony).

No action was taken with regard to the Attorney Fee Review Motion from the objection filed on March 24, 2020 until February 2, 2021, when Petitioners' counsel sent an email offering to submit as proposed order on the Attorney Fee Review Motion to the Fiduciary Supervisor. AR 333-334. After Petitioners' counsel engaged in an *ex-parte* communication with the Fiduciary Supervisor on February 8, 2021, a conversation that he contends was

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[11] In the Initial Brief, Petitioners claim that their counsel advised the Executor of the anticipated testimony of Mr. Tweel and Mr. Rowan two days before the Removal Hearing. While Mr. Tweel's and Mr. Rowan's affidavits were supplied with the reply, the Respondent disputes that he, or his lawyers, were advised that the witnesses would be testifying.

[12] Those exhibits were: the Executor's letter to Fiduciary Supervisor requesting and extension (Exhibit 1); the Estate appraisement (Exhibit 2); the Executor's First Settlement Report (Exhibit 3); Mr. Tweel's Affidavit (Exhibit 4); Mr. Rowan's Affidavit, Mr. Rowan's Invoice Analysis, and an Email Explaining Codes used in Rowan's Invoice Analysis (Exhibit 5); the Steptoe Estate Engagement Letter (Exhibit 6); an email chain related the Rufus & Rufus business appraisal that was issued on September 15, 2016 (Exhibit 7). AR 54-288.

initiated by the Fiduciary Supervisor, Petitioners submitted a proposed order to the Fiduciary Commissioner by email at 3:37 pm on February 10, 2021. AR 336. At 6:35 pm on February 11, 2021, the Estate objected to the review of unpaid fees and requested a conference. AR 408, 352-365. That order was entered – without any revisions or edits – one day later – at 10:49 pm on February 11, 2021. AR 366-375, 409. On February 17, 2021, the Estate filed an objection to the Fiduciary Supervisor Order with the County Commission.[13] AR 376-377. The Fiduciary Supervisor did not respond to any of the Executor's objections or requests for a conference or hearing either immediately prior to the issuance of the Fiduciary Supervisor Order or thereafter.

On April 20, 2021, Petitioners filed their response. AR 417-451. On April 23, 2021, the Commission heard oral arguments on the objection. AR 452-519. On May 21, 2021, the County Commission issued an Order affirming the Fiduciary Supervisor Order. AR 960-963.[14] The County Commission adopted the Findings and Fact and Conclusions of law set forth in the Fiduciary Supervisor Order, concluding that the Fiduciary Supervisor could issue the Fiduciary Supervisor Order on that basis of a misapplication of West Virginia law. AR 960-963.

The County Commission Order imposed an arbitrary *initial* maximum amount of $75,000 for attorneys' fees for the entire administration and settlement of the Estate (from 2009-2024 and thereafter) that is reduced by a credit given by Estate to the Baker Company

[13] On March 12, 2021, Steptoe, as an interested party, also filed an Objection before the Commission to the Fiduciary Supervisor Order. AR 385-386.

[14] Prior to the County Commission's hearing, Respondent submitted the Affidavit of Harmon Brown to counter the Affidavit of Robert Tweel that Petitioners submitted as evidence at the hearing. AR 681-684, 686 (noting date of filing was April 14, 2020).

against the delinquent Stock Purchase Debt in the amount of $61,000,[15] resulting in a $14,000 maximum amount. AR 366-375, 960-963. That amount, after taking into account the $13,443 in previously paid fees for work in 2009 and 2010, leaves $557 for all other attorneys' fees incurred by the Estate for the Estate administration, presumably including the litigation (and appeal) on the Stock Purchase Debt judgment, the litigation (and appeals) relating to the Removal Petition, the litigation (and appeals) relating to this matter, litigation to collect on the Stock Purchase Debt, and all other aspects of the Estate administration.[16]

Chart 1: Required Reductions in Maximum Amount

	Amount
Initial Maximum Amount	**75,000**
Less: Stock Purchase Debt Credit	61,000
Maximum Amount	**14,000**
Less: $13,443 Cooper Law Office 2010 Paid Attorney Bill	13,443
Remaining Maximum Amount	**557**
Remaining Maximum Amount for other 2009-2016 Attorney Fee Review Motion Bills	**557**
Remaining Maximum Amount for Post-2016 Attorney Fees	**0**

[15] The Estate agreed to a credit to the Baker Company in September, 2015 against their delinquent Stock Purchase Debt to compromise a claim by the Baker Company about certain attorney fees that was approved and paid by the Baker Company to Lewis Glasser during 2010-2013 for a litigation matter that the Baker Company claimed also benefited the Estate ("Stock Purchase Debt Credit"). The Fiduciary Supervisor's Order, adopted by the County Commission, requires that the initial maximum amount be reduced by the Stock Purchase Debt Credit by stating: "That other entities or persons may have previously paid some of the attorney fees billed to the Estate on the Estate's behalf does not serve to increase the amount which is reasonable above $75,000.00." AR 910. Further, Findings of Fact No. 8 in the County Commission Order incorrectly states that "Payment on the attorney bills for legal services provided Mr. Luby of approximately $61,000 have already been paid." AR 343. The actual Stock Purchase Debt Credit for the attorney fee portion was $54,253, as agreed by the parties in September, 2015, not "approximately $61,000" as Mr. Rowan testified at the Removal Hearing. AR 1169. In Respondent's Notice of Appeal, the remaining maximum amount was $7,315, applying the actual credit of $54,253.

[16] The Fiduciary Supervisor Order affirmed by the County Commission provides that: (1) over $600,000.00 in attorney fees are not reasonable expenses to be borne by the Estate; (2) a total of $75,000.00 is a reasonable expense for attorney fees to be borne by the Estate; and (3) the $75,000.00 amount which is reasonable as an expense for attorney fees to be borne by the Estate includes the $13,443.14 already paid to the Cooper Law Offices for attorney fees for legal services it provided to the Estate, as well as all amounts already paid to Mr. Luby for attorney fees for legal services he provided to the Estate, no matter by whom paid. This statement in the Order is cross reference to Footnote 4 that states: "The uncontradicted evidence is that $75,000.00, **at most**, is a reasonable amount of attorney fees for the administration and settlement of the Estate." (Emphasis added). AR 960-963.

On December 9, 2016, the "Attorney Fee Review Motion Bills" totaled $412,144, which consisted of the $13,443 Cooper Law Offices, PLLC fees paid in 2009-2010, the $77,257 Lewis Glasser 2010-2014 Unpaid Attorney Bill, and the $321,424 Steptoe 2015-2016 Unpaid Attorney Bill. AR 1539-1578. Those attorney bills covered the seven-year period of September 15, 2009 through November 15, 2016. The Fiduciary Supervisor Order imposed a maximum amount of $557 to be allowed for the $77,257 Lewis Glasser 2010-2014 Unpaid Attorney Bill and the $321,424 2015-2016 Steptoe Unpaid Attorney Bill, resulting in a disallowance of $398,124 out of $398,681 of the attorney bills of Lewis Glasser and Steptoe , as set forth below in Chart 2. AR 960-963. See also AR 590-593.

Chart 2: Disallowance of Attorney Fees R: 2009-2016 Attorney Motion Review Bills

Description of Attorney Fee Review Motion Bill	Total	Allowed	Disallowed
$13,443 Cooper Law Office 2010 *Paid* Attorney Bill	13,443	13,443	0
$77,257 Lewis Glasser 2010-2014 *Unpaid* Attorney Bill	77,257	557	76,700
$321,424 Steptoe 2015-2016 *Unpaid* Attorney Bill	321,424	0	321,424
Total	**412,124**	**14,000**	**398,124**

The $77,257 Lewis Glasser 2010-2014 Unpaid Attorney Bill and the $321,424 Steptoe 2015-2016 Unpaid Attorney Bill [17] were for legal services in (1) the preparation and filing of the federal estate tax return and related tax matters,[18] including certain work related to allocations of

[17] The Executor has not paid any attorney fees to Lewis Glasser or Steptoe during the entire estate administration. See, e.g., AR 1887; AR 1539-1578. The Executor has not treated the Stock Purchase Debt Credit as a disbursement by the Estate to Lewis Glasser on its Settlement Reports filed with the Fiduciary Supervisor since the Estate has not disbursed any funds to Lewis Glasser during the administration of the Estate and the credit was granted to compromise the claim of the Baker Company and to induce them to catch up on their delinquent payments.

[18] The federal estate return work consisted of extensive work to prepare the federal estate tax return, gathering and review extensive information, dealing with issues such as the prior period tax credit, deferred estate tax liability, estate tax audit risk and preparation and the preparation of the Allocations. Due to the complicate nature and high tax risk of that work Mr. Luby consulted with Harmon Brown, a member of Schiff Hardin, who is a nation expert in estate and trust work. AR 412-415, 498.

property of the J. C. Baker Trusts to determine the value of the George Baker GST Non-Exempt Trust under the Will of J. C. Baker required to be reported on the federal estate tax return of George Baker (the "Allocations")[19] and (2) other estate administration work administration of the Estate. The draft invoices attached to the Attorney Fee Review Motion were draft invoices provided to the Petitioners in November 2016 and do not reflect the December 9, 2016 billing adjustments, though Petitioners were well aware of those adjustments by the time they presented the Attorney Fee Review Motion. AR 593-594, 1774.

On November 17, 2016, the Estate's legal counsel delivered to the Executor and to Petitioners, their counsel and their accountant the "November 2016 Closing Documents." AR 379, 669. The packet of materials was the final version of drafts that were previously circulated, throughout 2016, including documents relating to the appraisement, non-probate inventory, federal estate tax return and accountings, eighteen memos on technical matters that documented the extraordinary amount of legal work, [20] and a detailed tickler to facilitate the signing of

[19] The J. C. Baker Trusts included three trusts created under the Will of J. C. Baker for the primary benefit of Blanche Baker (the surviving spouse of J. C. Baker) from the death of J. C. Baker on August 22, 1998, until her death on March 4, 2005, and the George Baker GST Non-Exempt Trust created for George C. Baker from Blanche Baker's death on March 4, 2005, until his death on September 9, 2009. AR 4-5. Upon George Baker's death, no property of the J. C. Baker Estate (including the Baker Company stock) had been allocated to any of the J. C. Baker Trusts for a period of twelve years (from 1998-2010) until the Baker Company stock was distributed to Michael Baker and Cameron Baker, and no trustee was duly appointed for eighteen years following J.C. Baker's death (on November 30, 2016). AR 4-5, 413-414. The work of the Estate's lawyer enabled the Executor to report the value of the George Baker GST Non-Exempt Trust on the federal estate tax return of the Estate. See id. See also George C. Baker Trust Dated July 20, 2002 v. Cooper, 2022 W. Va. LEXIS 728, *1, 2022 WL 17444547 (Dec. 6. 2022) (noting that the Executor "was hindered in his ability to discharge his duties until allocations of property and debt to the J.C. Baker Trusts were made and a valuation of the George Baker GST Non-Exempt Trust was determined"). The value of the George Baker GST Non-Exempt Trust was the result of the allocation to that trust from the prior trusts 45% of the Baker Company stock valued at $3,975,000, certain real estate valued at $41,137 and an aggregate debt of $1,807,185.

[20] The eighteen memos consist of memos related to underlying facts and technical memos that covered the administration and collection of the Stock Purchase Debt and other assets, distributions to Donna Baker, technical matters related to the funding and administration of the estate and trusts, tax matters, the federal

documents and the closing of the Estate. On or about December 5, 2016, Michael Baker and Cameron Baker objected to the unpaid 2009-2016 Attorney Fee Review Motion Attorney Bills. On December 9, 2016, the Lewis Glasser and Steptoe bills were discounted by $101,982 to $398,681 in email correspondence by Mr. Luby to Michael Baker and Mr. Rowan. AR 262, 849-861. Mr. Rowan analyzed the bills and recommended that they be discounted by 50% instead of the 26% discount of the Steptoe 2015-2016 attorney bills.[21]

The Executor extended debt relief to the Baker Company from 2012-2016 to enable the Baker Company to sell assets to fund the payment of the delinquent Stock Purchase Debt. AR 281-282. However, in September 2016, the Baker Company sold the Hampton Inn of Summersville for several million dollars and had sufficient funds to pay the delinquent Stock Purchase Debt. AR 473, 1171. However, the Stock Purchase Debt remained unpaid. AR 473. Consequently, the Estate has had virtually no funds to pay its attorney fees and other estate administrative expense. After the Executor exhausted his efforts to negotiate payment of the delinquent Stock Purchase Debt an amount that would be paid from the debt payment proceeds, the Executor filed a complaint before the Circuit Court to obtain a judgement against the Baker Company for the delinquent Stock Purchase Debt on January 26, 2018. See, e.g., J.C. Baker & Son, Inc. v. Cooper, 2021 W. Va. LEXIS 221, *1, 2021 WL 1614342 (April 26, 2021). The

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estate tax return valuation matters and estate tax audit preparatory matters, the J. C. Baker Estate and Trust administration matters, the J. C. Baker Estate and Trust Allocations, and other matters.

[21] On December 14, 2014, Mr. Rowan stated in response Mr. Luby's write off that "While I in no way question that you spent the number of hours that you say, nor that this estate has been a long and difficult road. My discussions are not about hours, but about what is fair, and being accountable to Mike. . . I would suggest a write off of $291,400," which was approximately a 50% discount of the gross charges calculated by Mr. Rowan. AR 262, 849-861.

lawsuit resulted in a judgment for $1,555,112.72, plus post-judgment interest, and was affirmed on appeal by the Supreme Court of Appeals. Id.

In addition to the attorney fees related to the 2009-2016 Attorney Fee Review Motion Bills, the Executor has incurred attorney fees to related to the estate administration and estate litigation since November 16, 2016 (the "Post-2016 Attorney Fees"). That litigation includes: (i) the action to reduce the Stock Purchase Debt to judgment on which the Estate was successful through appeal to the West Virginia Supreme Court of Appeals, which litigation lasted from January 26, 2018 through April 26, 2021; (ii) the action, spanning from October, 2018, through December 6, 2022, whereby Petitioners sought to remove Mr. Cooper as Executor and to substitute Michael Baker and Cameron Baker as co-Executors, on which the Estate was also successful at every level from the County Commission, to the Circuit Court, to the Supreme Court of Appeals; (iii) the ongoing civil action filed by the Estate in January, 2022, in which the Estate seeks to execute the Judgement for the delinquent Stock Purchase Debt by the appointment of a special commissioner to conduct a judicial sale of certain real property of the Baker Company; and (iv) this ongoing civil action, which began in March, 2020, relating to the Attorney Fee Review Motion. All four civil actions result from the efforts of Petitioners and the Baker Company to delay, hinder and avoid the Executor's enforcement of the delinquent Stock Purchase Debt and to interfere with the Executor's ability to administer the Estate and to procure legal assistance to enforce the payment of the delinquent Stock Purchase Debt and to timely administer the Estate.

SUMMARY OF THE ARGUMENT

This Court should affirm the May 24, 2024, Order of the Circuit Court because the Circuit Court did not err in any of its factual findings or legal conclusions. First, the Circuit Court did not err in its determination that the County Commission Order, which disallowed attorneys'

fees in excess of the arbitrary maximum amount of $75,000 for the entire administration and settlement of this Estate was draconian and defied credulity. Second, the Circuit Court did not err in its determination the County Commission Order applied, not just to the period through November 15, 2016, but to entire the administration and settlement of the Estate.

Third, the Circuit Court did not fail to address Petitioners' allegation that attorney fees related to the Allocations had been improperly charged to Estate. The legal work related to the Allocations were already disallowed by the application of the maximum amount. The impropriety of the charges to the Estate for the Allocations was contradicted by Mr. Brown's Affidavit and not uncontradicted, as set forth in the Findings of Fact. Fourth, the Circuit Court properly determined that the Fiduciary Supervisor issued an order that was beyond the express or implied authority provided by Chapter 44 of the West Virginia Code. Specifically, there is no statutory authority for a Fiduciary Supervisor to review and disallow unpaid bills, to determine the reasonableness of attorney fees and disallow them without an evidentiary hearing, and establish an arbitrary maximum of attorney fees for the entire administration and to issue that order in a manner that violated the due process rights of the Executor in the settlement of his accounts, all of which the Fiduciary Supervisor Order did.

Fifth, there was no clear error in the Circuit Court's findings that the Fiduciary Supervisor violated the due process rights of the Executor in the settlement of his accounts. Sixth, the Circuit Court did not err in its determination that not there was no valid evidentiary basis for the findings of fact set forth in the Fiduciary Supervisor Order and that the Executor did not have the opportunity, obligation or burden of providing evidence regarding the reasonableness of the unpaid attorney bills prior to any notice by the Fiduciary Supervisor or an evidentiary hearing on the matter. Further, the Circuit Order did not err in its determination

that there was no evidentiary hearing held on the issues raised by the Attorney Fee Review Motion.

Seventh, the Circuit Court did not err in reaching the conclusion that there was insufficient evidence to support any disallowance of the attorneys' fees for the period covered by the 2009-2016 Attorney Fee Review Motion Bills, let alone the entire administration and settlement of the Estate. Petitioners have not established that Circuit Court erred in its finding that, even if the affidavit and testimony of Mr. Tweel was assumed to be legally valid and procedurally proper testimony for consideration on this issue, his profession opinion was speculative and clearly insufficient to provide a credible evidentiary basis to establish a maximum amount of $75,000 for attorneys' fees for the 2009-2016 Attorney Fee Review Motion Bills, let alone the entire administration and settlement of the Estate from 2009 until the Estate closes. Eighth, the Circuit Court did not err by relying on matters outside the record. The Circuit Court was entitled to consider the entire record, not just the events up to the issuance of the Order. Petitioners improvidently and incorrectly assert that the Circuit Court considered matters outside the record – namely, events outside the scope of the 2009-2016 Attorney Fee Review Motion Bills -- in reaching its decision to reverse the County Commission Order. The evidence was properly considered by the Circuit Court. Ninth, Petitioners have not established that the Circuit Court erred by making erroneous findings of fact, relying upon attorney argument, and failing to support its findings of fact with proper conclusions of law.

It is apparent from the evidence and reasonable inferences to be drawn from the Record that Petitioners' efforts to disallow any more than $75,000 in attorneys' fees is not motivated by any valid or principled concern of the Petitioners about unreasonable attorney fees. Rather, the timing and the conduct of Petitioners throughout the pendency of this Estate suggests that

the premature and preemptive disallowance of unpaid attorney fees is motivated by the desire of Petitioners Michael Baker and Cameron Baker to avoid the payment of a delinquent Stock Purchase Debt.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents submit that oral argument is not necessary, pursuant to West Virginia Rules of Appellate Procedure 18(a)(4). The facts and legal arguments are adequately presented in the parties' brief and the record on appeal, and the decisional process will not be significantly aided by oral argument.

ARGUMENT

I. STANDARD OF REVIEW

The Circuit Court's decision affirming the County Commission's Order is reviewed under an abuse of discretion standard. See Syl. Pt. 1, Haines v. Kimble, 221 W. Va. 266, 654 S.E.2d 588 (2007), citing Syl. Pt. 4, Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996). The Court reviews the challenges to finding of fact under a clearly erroneous standard and conclusion of law are reviewed under a *de novo* standard. See id.

II. THE IMPACT OF THE COUNTY COMMISSION ORDER WAS TO DISALLOW ANY ATTORNEYS' FEES BEYOND $75,000 FOR THE ENTIRE ESTATE ADMINSTRATION AND SETTLMENT, WHICH THE CIRCUIT COURT CORRECTLY DETERMINED WAS IN ERROR.

The Circuit Court did not err in its conclusion that the scope of the County Commission Order rendered the limitations contained therein applicable to the entire administration and settlement of the Estate, not just by the Attorney Fee Review Motion Attorney Bills of

September 6, 2009 through November 15, 2016, as Petitioners now, when it is convenient, allege.[22]

Petitioners' position contradicts the plain language of the County Commission Order, which explicitly states that it would allow $75,000 of attorney fees, as most, for *the administration and settlement of the Estate* and relies entirely upon Finding of Fact Number 17 that states that the entire cost to administer . . . and to *finalize and close the Estate*, should have cost a range of $50,000 to $75,000 ("Mr. Tweel's Estimate"). AR 369-370. The County Commission Order clearly set a maximum amount of fees for the estate administration, which is consistent with Mr. Tweel's estimate the amount of reasonable attorney fees for administration, settlement and finalization of the Estate. Mr. Tweel did not review any of the 2009-2016 Attorney Fee Review Motion Bills. AR 543-544, 557. Petitioners' legal counsel drafted the proposed order that was adopted word-for-word by the Fiduciary Supervisor. Compare AR 342-351 with AR 366-375. The Order does not state that $75,000 of attorney fees, as most, is a reasonable amount for the period covered by the Attorney Fee Review Motion from September 6, 2000 through November 15, 2016. See id. The proposed order of Appellants' legal counsel reflects his goal of setting a maximum amount of $75,000 and then reducing that amount to $565 thereby eliminating all attorney fees that could be incurred or paid by the Executor other

[22] Petitioners shifted responsibility for performing and paying for the legal work from the Estate of J.C. Baker to Executor, who was required to file the federal estate tax return for the Estate. Plaintiffs then objected to the legal work having been performed by the Estate because it serves the interests of Michael Baker and Cameron Baker in the Baker Company's avoidant conduct with regard to the Stock Purchase Debt judgment. Neither the J. C. Baker Estate or J. C. Baker Trusts have held any property since the distribution of all of those assets to Michael Baker and Cameron Baker in July, 2010. AR 412-413.

than the $13,443 Cooper Law Office 2010 Paid Bill and $565. AR 350 (proposed order, paragraph 17).[23]

Petitioner's position in this appeal contradicts its filings and oral argument before the Circuit Court and its filing before the County Commission as well. When asked to explain the obvious flaw in the broad scope of the Fiduciary Supervisor Order to cover the entire estate administration, Petitioners did not respond, as they do now, that the Fiduciary Supervisor Order was limited in its scope to the period covered by the 2009-2016 Attorney Fee Review Motion Bills. AR 417-451, 965-1199. Instead, Petitioners asserted that that the County Commission Order and Mr. Tweel's Affidavit contained a mythical exception for "unusual and out of the ordinary expenses unrelated to the direct administration," when clearly, as the Circuit Court determined, there was no such exception.[24] AR 987. Petitioners did not assert to the County Commission or the Circuit Court that the Fiduciary Supervisor Order only applied to the period

[23] Petitioners should be estopped from now claiming that the order entered by the Fiduciary Supervisor and adopted by the County Commission was inartfully drafted and was not intended to impose a limit for the entirety of the estate administration process. That is insincere in light of Petitioners' counsel's proposed order. See, e.g., Banbury Holdings, LLC v. May, 242 W. Va. 634, 639, 837 S.E.2d 695, 700 (2019) ("judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process").

[24] Petitioner stated in his Response brief before the Circuit Court dated May 2, 2022 that Appellees do not pretend the Fiduciary Order and Order imposes a limitation on attorney fees for unusual and out of the ordinary expenses unrelated to the direct administration of the Estate as outlined by Mr. Tweel in his Affidavit. AR 987. Petitioners also stated: "With respect to litany of other costs that Mr. Cooper outlines, such as costs incurred by Mr. Cooper in the litigation to enforce the Stock Purchase Debt, those supposed issues are nothing but a red herring. Those supposed attorney fees are not only attorney fees incurred in connection with the Stock Purchase debt, but also incurred in connection with the Stock Agreement debt, but also attorney fees incurred in fighting the Petition to Remove Executor, Appoint Curator and Other Relief (Removal Petition) as well as the Attorney Fee Review Motion." AR 985.

covered by the 2009-2016 Attorney Fee Review Motion in its previous filings before those bodies.[25]

Petitioners' newly minted position is inconsistent with their conduct after the issuance of the County Commission Order and is an obvious strategy to attempt to reduce the Estate's attorneys' fees to zero. The application of the of the County Commission Order to the entire Estate administration was not the result of Petitioners' flawed or vague drafting of the proposed order, but it was the result of a purposeful strategy to reduce the attorney fees of Lewis Glasser and Steptoe to zero and to use that County Commission Order as leverage against the Executor.[26]

III. THE CIRCUIT COURT PROPERLY CONSIDERED THE ATTORNEYS' FEES THAT PETITIONER ALLEGES WERE NOT PROPERLY CHARGEABLE TO THE ESTATE.

The Circuit Court addressed – and properly determined – that the bulk of the *unpaid* 2009-2016 Attorney Fee Review Motion Bills that were attributable to the Allocations and were not improperly charged to the Estate.

As an initial matter, Petitioners' assignment of error on this issue is misleading. The County Commission did not disallow the attorneys' fees related to the Allocations on the basis that those fees were not properly chargeable to the Estate; rather, the County Commission effectively disallowed them because the application of the maximum amount of fees allowed

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[25] Respondent asserted, without contradiction by the Appellants, that Fiduciary Supervisor Order limited the attorney fees to a maximum amount for the entire estate administration and settlement. AR 352-365; AR 356 (noting draconian effect of Order and legal work that would be disallowed); AR 927-930 (addressing limitations imposed); AR 1201-1203 (noting effect of the Order and limitations imposed); AR 391-394 (noting effect of the order is that Steptoe will get nothing for its legal work); AR 464 (noting effect of order is to disallow attorneys' fees); AR 464 (same); AR 1236 (same).

[26] Obviously, if the fees are limited as Petitioners have consistently asserted and the County Commission Order clearly establishes, the Estate is effectively denied any ability to have counsel assist with the remaining issues involved in this Estate administration – including the collection of the unpaid judgment on the Stock Purchase Debt and other matters to finalize the Etate.

by the County Commission Order leaves only $565 to cover of the $77,257 Lewis Glasser 2010-2014 Unpaid Attorney Bill and $321,424 Steptoe 2015-2016 Unpaid Attorney Bill, which includes the work for the Allocations.

The Estate's legal counsel performed that work with the knowledge and implied consent of the Petitioners since, when the Estate had received the information necessary to prepare the federal estate tax return on September 15, 2015, Petitioners, as fiduciaries and beneficiaries of the J. C. Baker Estate and J. C. Baker Trusts had failed to perform the Allocations for fifteen years (1998-2015).[27] That failure caused the Executor to have to move expeditiously to discharge his fiduciary duty to file the federal estate tax return.

As the Circuit Court noted, the Affidavit of Harmon Brown contradicted Mr. Tweel's Affidavit. Mr. Brown's opined as to what should have been obvious to a person informed of the Executor's fiduciary duties and the situation with which he was presented – that the Executor has the fiduciary responsibility to prepare the Allocations in order to prepare federal estate tax return, particularly because Petitioners had failed prepare those Allocations for seventeen years.[28] This evidence was submitted to the County Commission and to the Circuit Court, and it served as a viable evidentiary basis for the Circuit Court's decision on this issue.

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[27] See Footnote 18, above.

[28] At Paragraph 8 of his Affidavit, Mr. Brown states: "Mr. Tweel implies in Paragraph 11 of his Affidavit that the Executor was only responsible for administration of the probate assets of the George Baker Estate and not the matters related to the allocations of property and debt to the George Baker GST Non-Exempt Trust. Mr. Tweel's assertion completely ignores an Executor's responsibility under the Internal Revenue Code to report an accurate value for the assets in the George Baker GST Non-Exempt Trust on a Form 706 federal estate tax return." AR 683.

Petitioners were well aware in 2015-2016 that Mr. Luby was preparing the Allocations to file the federal estate tax, did not object for five years, and approved the very Allocations they now claim were unauthorized. AR 304-306, 414, 662, 670. It was impossible to obtain the approval of the trustee of the J. C. Baker Trust until November 30, 2016, because Petitioners had failed to appoint a successor trustee until that time.[29] AR 379, 413, 663. Petitioners Michael Baker and Cameron Baker (as well as their counsel) were well aware the Estate's legal counsel was preparing the Allocations. They did not object to the Estate's counsel performing that legal work until March 3, 2020, nearly five years after the legal work was performed. It is a reasonable inference to be drawn from the circumstances, including the Petitioners' knowledge and the timing of their objection, that the issue was a convenient pretext to support Petitioners' argument that Mr. Cooper should be removed as the Executor.

While it was not necessary for Mr. Luby to obtain the authorization of the fiduciaries of the J. C. Baker Estate and J. C. Baker Trusts to prepare the Allocations since that was work was necessary to prepare and file the federal estate tax return, it was necessary to obtain their approval of the Allocations in order to represent to the IRS that the fiduciaries had actually allocated the property to those trusts pursuant to those Allocations. AR 412-414. Petitioners Michael Baker and Cameron Baker withheld their approval of the Allocations until October 8, 2020 to facilitate the removal of Mr. Cooper for the delinquent federal estate tax return. Petitioners agreed to approve the Allocations only if the Executor agreed to sign

[29] The J. C. Baker Trusts had no acting trustee for the period of August 22, 1998 until the appointment of Robyn Stewart as trustee on November 30, 2016 (other than one day on July 22, 2010 by agreement of Michael Baker and Cameron Baker to permit the distribution of the Baker Shares to themselves from the J. C. Baker Trusts.

a stipulation indicating that their approval would not moot their then-pending petition to remove Mr. Cooper as executor. AR 302-303, 308-310, 316-329, 378-382.

IV. THE FIDUCIARY SUPERVISOR DID NOT HAVE AUHTORITY TO REVIEW UNPAID ATTORNEY BILLS, SET AN ARBITRARY MAXIMUM AMOUNT FOR ATTORNEY FEES, OR DISLLOW ATTORNEY BILLS.

The Fiduciary Supervisor and the County Commission have authority to act with regard to an estate matter only insofar as the authority expressly granted, or reasonably implied by that express grant, under Chapter 44 of the West Virginia Code. Those entities do not have unlimited supervisory powers under Section 44-3A-3(b);[30] rather, they have only that authority that can be reasonably and necessarily implied from the express authority granted under Articles 3A and 4 of the West Virginia Code and that is otherwise consistent with Chapter 44 of the West Virginia Code. In Arthur v. County Court, 153 W. Va. 60, 167 S.E.2d 558 (1969), this Court stated:

> It is pertinent to point out that a county court's implied powers arise from powers expressly conferred upon it. In other words, as expressed in the Barbour case, it has the powers expressly granted by statute, together with such powers as are reasonably and necessarily implied in the full and proper exercise of the powers expressly given. This means that power by implication must be based upon some express statutory authority.

West Virginia Code Section 44-4-12 provides that "[t]he fiduciary commissioner ***in stating and settling the account*** shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise.[31] See W. Va. Code § 44-4-

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[30] W. Va. Code § 44-3A-3(b) provides that "The fiduciary supervisor shall have the general supervision of all fiduciary matters and of the fiduciaries or personal representatives thereof and all fiduciary commissioners and of all matters referred to such commissioners and shall make all *ex parte* settlements of the accounts of fiduciaries as to those matters referred to fiduciary commissioners for settlement."

[31] Section 44-4-12a, which related to an executor's commission) is not relevant to the Attorney Fee Review Motion pursuant to W. Va. Code 44-4-12a(t) since no compensation has been paid to the Executor.

12 (emphasis added). West Virginia Code Section 44-4-2 provides that the settlement reports report receipts and disbursements, not unpaid invoices.[32] Consequently, the Executor is only required to report to the Fiduciary Supervisor the ***disbursements*** of attorney fees on his settlement reports (accountings), ***not unpaid invoices***. The long form settlement reports are reported in accordance with the well-established procedure. AR 1207, 1226 (Form Proposed Settlement Report provided by the Office of Fiduciary Supervisor of Kanawha County).[33]

On February 11, 2021, the date of the Fiduciary's Supervisor's Order, the only attorney fees subject to the review of the Fiduciary Supervisor and to objection by an interested party are those that were reported in settlement statements filed by the Executor for the period of 2009-2020, which included the payments to Cooper Law Offices, PLLC, to Raymond Keener. AR 776-820. Neither the Fiduciary Supervisor, Petitioners, or any other interested party of the Estate has objected to those settlement reports filed by the Executor. The Attorney Fee Review Motion should have been dismissed since West Virginia Code Section 44-4-6 only permits a request for review of paid attorney bills.[34]

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[32] West Virginia Code Section 44-4-2, entitled "Fiduciaries to exhibit accounts for settlement," provides that "[a] statement of all the money, and an inventory of all securities, stocks, bonds and all other property, including the value thereof, which any personal representative, guardian, curator or committee, has received, become chargeable with ***or disbursed***, within one year from the date of the fiduciary's qualification, or within any succeeding year, together with the vouchers for such disbursements, shall, within two months after the end of every such period, be exhibited by the fiduciary to the fiduciary commissioner to whom the estate or trust has been referred."

[33]This sample long form settlement published by Office of Fiduciary Supervisor of Kanawha County is a typical form used throughout West Virginia by fiduciary supervisors and fiduciary commissioners. Consistent with W.Va. Code § 44-4-2, this sample long form settlement report demonstrates that an Executor reports disbursements only - not unpaid invoices.

[34] West Virginia Code Section 44-4-6 only grants an interested party the right to object to the annual and final accountings required to file by the executor before the Fiduciary Supervisor.

The Appellant erroneously assert that the unbilled attorneys' fees are not an expense of the Estate that are addressed pursuant to West Virginia Code Sections 44-4-12, but constitute a claim against the Estate that is administered in the same manner as the process for reporting and paying claims against the decedent as of the decedent's date of death. The Appellants erroneously stated the Mr. Cooper appears to have failed to get approval and confirmation for the payment of the $47,415 of attorney fees paid by Estate from 2009-2023 pursuant to the statutory process for proof and payment of claims against the decedent.[35]

In their Attorney Fee Review Motion, Petitioners requested that, pursuant to West Virginia Code Sections 44-4-12 and 44-4-12a,[36] the County Commission determine the amount of attorney fees *billed to the Estate* for legal services by Mr. Luby and his law firms is not reasonable and all of the services were not necessary or proper for the administration of the Estate. AR 37-277. The cited authority does not permit the relief requested. Section 44-4-12 states that "[t]he fiduciary commissioner *in stating and settling the account* shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation in the form of a commission on receipts or otherwise." W. Va. Code § 44-4-12 (emphasis added). The Executor has not yet determined

[35] The Executor is not required to obtain pre-approval of the Fiduciary Supervisor for the payment of estate administration expenses but only to report paid expenses on his annual settlement reports for review by the Fiduciary Supervisor. The Executor is required to reimburse the Estate for any disallowed fees. The statutory provisions related to proof, public notice, and approval of creditor claims refers to those claims of creditors against the decedent at his death. That statutory process for creditor claims ensure that all creditors are given the opportunity to prove their claim and obtain payment. West Virginia Code Section 44-3A-26 treats estate expenses as a claim for the purpose of establishing the priority of payment if the estate does not have sufficient assets to pay all of its expenses, taxes, debts and other claims.

[36] West Virginia Code Section 44-4-12a relates to an executor's compensation and was, accordingly, not relevant to the Attorney Fee Review Motion since the Petitioners did not request a review of the executor compensation and the Estate has not paid Mr. Cooper any executor compensation for Estate administration since 2009.

the amount of attorney fees he will pay (or will have the funds to pay) and, accordingly, there is no authority under which the Fiduciary Supervisor or the County Commission could render what is, essentially, an impermissible advisory opinion about the reasonableness of the amount of billed fees. Farley v. Graney, 146 W. Va. 22, 29-30, 119 S.E.2d 833, 838 (1960) ("It is true that the courts will not in such a proceeding adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies . . . Nor will courts resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies").

In filing their Attorney Fee Review Motion to review unpaid attorney bills, Petitioners ignore the explicit wording "*in stating and settling the account,"* contained in West Virginia Code Section 44-4-12, which explicitly describes when a review of paid attorney bills filed on the required settlement reports can occur. They also ignore well-established procedures for the review of the Executor's settlement reports. Instead of interpreting the term "incurred" in the context of Article 4 of Chapter 44 (entitled "Accountings"), Petitioners erroneously and improvidently strain their reading of the term "incurred" by reference to law outside of the realm of estate administration and ignoring the statutory language within which it lies. For purposes of Section 44-4-12 the term "incurred" does not mean the mere performance of legal services, but rather the payment of services. All the cases cited by Petitioners refer to circumstances that are not relevant to this matter and that do not inform the issues presented.[37]

[37] Worsham v. Greenfield, 78 A.3d 358 (Md. App. 2013), is not relevant since in that case the court addresses language in the context of a *Maryland Rule 1-341,* which has no relevance to an estate administration, that the word "incurred" includes the payment of the fees by the plaintiff's insurer or plaintiff himself. Grove v. Myers, 181 W.Va. 342, 382 S.E.2d 536 (1989), is also not relevant since the case involves the interpretation of W. Va. Code 56-6-31 that pre-judgment interest for medical expenses accrues from the date that the right to bring the action accrued, not when the medical expenses were incurred. Long v. City of Weirton 158 W.Va. 741, 214 S.E.2d 832 (1975) is not relevant since in that

The Circuit Court properly concluded that it could not reasonably implied from the express authority granted to the Fiduciary Supervisor under Articles 3, 3A or 4 of the West Virginia Code that the Fiduciary Supervisor has the implied authority to (1) to review unpaid attorney fees and arbitrarily disallow them without an evidentiary hearing or even giving the Executor and opportunity to provide the reasonableness of the disallowed expenses; and (2) to impose an arbitrary $75,000 maximum amount for attorney fees for attorney fees that may be incurred for an ongoing estate administration of over fifteen years including undeterminable future legal services for ongoing Estate administration and litigation, and (3) to arbitrarily expand the scope of disallowance of attorney fees from the scope of the Attorney Fee Review Motion covering attorney bills through November 15, 2016 to attorney fees for an entire administration of an estate without notice or any evidentiary basis for that arbitrary maximum amount; and (4) to disallow any attorney fees resulting from a charging lien against the proceeds of the Judgement that is beyond the jurisdiction of the County Commission. See Trickett v. Laurita, 223 W. Va. 357, 674 S.E. 2d 218 (2009); Hawley v. Falland, 118 W. Va. 59, 188 S.E. 759 (1936).

The Fiduciary Supervisor and County Commission exceeded their lawful authority and went outside the statutorily-mandated procedures and standard estate administration practices regarding the settlement of an Executor's accounts. In issuing Fiduciary Supervisor Order, the Fiduciary Supervisor exercised extraordinary powers far beyond the scope of the supervisor powers granted in Section 4-3A-3(b) and exercised those powers in a manner that was inconsistent with West Virginia Code Sections 44-4-12 and 44-4-2. In doing so, the Fiduciary Supervisor

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cases the considered when medical expenses were "incurred" for the purpose of allocating the medical expenses between the mother and natural father of a minor child.

usurped the Executor's fiduciary authority to procure and pay for professional services that Executor determines is reasonable and necessary to administer the Estate. The County Commission erred in affirming her decision. The Circuit Court's Order is, therefore, proper.

V. THE FIDUCIARY SUPERVISOR VIOLATED THE EXECUTOR'S DUE PROCESS RIGHTS.

The Court did not err in determining the Fiduciary Supervisor and the County Commission violated the Executor's rights to due process.[38]

The Circuit Court correctly determined that the Fiduciary Supervisor should have dismissed the Attorney Fee Review Motion in response to the Estate's Objection to the Attorney Fee Review Motion filed on March 24, 2021 since the Fiduciary Supervisor had no authority to review unpaid attorney bills. Further, the Fiduciary Supervisor should have at least responded to Estate's Objection to the Attorney Fee Review Motion before engaging in a communication with Mr. Rodgers about his proposed order.

The Circuit Court also properly determined that the Fiduciary Supervisor violated the due process rights of the Executor by failing to provide notice or an opportunity to be heard with regard to Petitioners' proposed order on the Attorney Fee Review Motion. After engaging

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[38] The due process clause of the West Virginia Constitution is Article III, Section 10, states that no person can be deprived of life, liberty, or property without due process of law and the judgment of their peers. This clause requires procedural safeguards against state action. In essence, due process requires notice and an opportunity to be heard. See Syl. Pt. 2, Simpson v. Stanton, 119 W. Va. 235, 193 S.E. 64 (1937) ("The due process of law guaranteed by the State and Federal Constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard."); Tasker v. Mohn, 165 W. Va. 55, 62, 267 S.E.2d 183, 188 (1980) ("Basic ingredients of due process are notice and an opportunity to be heard.").

> We have recognized that notice and an opportunity to be heard work in tandem. "The office of notice is to afford an opportunity for hearing, and the two must necessarily go together." *Simpson*, 119 W. Va. at 240, 193 S.E. at 67. Without adequate notice, there is no real opportunity to be heard. "Notice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits.

State ex rel. Dilly v. Hall, ___ W. Va. ____, 902 S.E.2d 487, 498 (2024).

in an *ex-parte* communications with the Fiduciary Supervisor on February 8, 2021, Petitioners' counsel submitted a proposed order granting his Attorney Fee Review Motion on February 10, 2021. On February 11, 2021, just as one day after the Fiduciary Supervisor received it from Petitioners' counsel (and just three days after the Fiduciary Supervisor's *ex parte* communication with Petitioners' counsel) the Fiduciary Supervisor adopted, verbatim, the Petitioners' proposed order.[39] The Fiduciary Supervisor's Order was circulated to counsel at 10:49 pm, approximately four hours after receiving Respondent's email requesting a conference regarding the proposed order. Prior to the entry of the Fiduciary Supervisor's Order, the Fiduciary Supervisor did not give counsel an opportunity to speak as to the merits of the Attorney Fee Review Motion (beyond her ex parte communication with Petitioners' counsel) and did not take any testimony or evidence from the parties. The Fiduciary Supervisor did not respond to the objections of the Estate and request for conference or hearing on the matter prior to issuing the Fiduciary Supervisor Order.[40]

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[39] On February 2, 2021, Petitioners' counsel sent an email to the Fiduciary Supervisor requesting the Commission review the attorney fees pursuant to the Attorney Fee Review Motion and inquired whether the Fiduciary Supervisor would like one or both of the parties to prepare an order. AR 333-334. On February 8, 2021 the Fiduciary Supervisor contacted only Petitioners' counsel about the proposed order. AR 336. On February 10, 2021, Mr. Rodgers sent an email to the Fiduciary Supervisor, with a copy to the Estate, that stated: *"As per the request you made of me when you called me late in the day on Monday, February 8, 2021,* I have prepared and am attaching hereto, in both PDF and Word formats, a proposed Order Granting "Petitioners' Motion For Review Of The Amount Of Attorney Fees Incurred By Executor Incurred [sic] In Connection With His Administration Of The Estate" And Approving $75,000.00 In Attorney Fees. I assume you will enter this proposed Order soon." (emphasis added). AR 336. The Estate and his counsel were copied on the February 10, 2021, email. On February 11, 2021, the Estate notified the Fiduciary Supervisor of its objection to consideration of the Attorney Fee Review Motion and requested a hearing on the motion. AR 408, 352-365. The Petitioners' proposed order was entered and circulated to counsel just 4 hours later – at 10:49 pm. AR 366-375, 409.

[40] The Fiduciary Supervisor did not reply to the requests from the Estate to reject the Appellant's for a conference with the Fiduciary Supervisor to discuss its concerns.

Despite the clear appearance of impropriety with regard to the facilitation of the Fiduciary Supervisor Order, Petitioners' counsel contends his communication with the Fiduciary Supervisor was not an *ex parte* communication and was not improper because he contends that he did not discuss the merits of the case and that he notified the Executor promptly after the *ex parte* communication occurred.[41] However, the effect of the Fiduciary Supervisor Order, the circumstances of its issuance, the lack of response by the Fiduciary Supervisor to the Executor's objections and the conduct of Petitioners' counsel prior to and after its issuance indicate either a prearranged plan or understanding that the Fiduciary Supervisor would only consider the narratives of Petitioners as findings of fact. The actions of Petitioners are particularly troubling since the Fiduciary Supervisor is not a lawyer that has limited legal training and experience to make finding of fact and conclusions of law for this controversy. After the Fiduciary Supervisor Order was issued, Petitioners' counsel sent numerous letters to the Executor demanding that he withdraw his objections to the Fiduciary Supervisor Order before the County Commission and asserted, in his filings to the Circuit Court, that the Executor was in breach of his fiduciary duties by appealing the County Commission Order to the Circuit Court. AR 439-440, 444, 447-449, 920-923.

In addition to the foregoing, the Circuit Court properly concluded that the Fiduciary Supervisor violated the Executor's due process rights by making findings of fact in the Fiduciary Supervisor Order without an evidentiary basis for those findings. The Fiduciary

[41] *Ex parte* communications undermine the fairness of a proceeding by introducing new information to the decision-maker without giving the other party any opportunity to hear the information, or to express his own position. Rules of Professional Conduct 3.5 provides that a lawyer shall not seek to influence a judge, juror, or other official by means prohibited by law and provides. Comment 2 to that rule provides that, during a proceeding, a lawyer may not communicate *ex parte* with persons serving in an official capacity in the proceeding such as judges, masters, or jurors, unless authorized to do so.

Supervisor should have at least provided the Executor fair and reasonable opportunity to contradict the purported evidence of the Appellants. It is self-evident that the Fiduciary Supervisor abused her authority by not making findings of fact pursuant to an evidentiary hearing and making findings of fact based on affidavits and testimony that were not valid evidence for the Attorney Fee Review Motion. While it is within the discretion of the County Commission to refer a controversy to a fiduciary commissioner to hold an evidentiary hearing,[42] it is an abuse of the discretion of the Fiduciary Supervisor to make findings of fact without having an evidentiary hearing and basing her order only on the arguments of one of the parties couched as evidence in a proposed order. See W. Va. Code § 44-3A-5. In this case, there was a clear controversy regarding the Attorney Fee Review Motion order. Given the limited legal knowledge and experience of the Fiduciary Supervisor, the matters should have been referred to a fiduciary commissioner to take testimony and make a recommendation to the County Commission.[43]

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[42] West Virginia Code Section 44-3A-5 provides that every fiduciary supervisor shall have the power to take testimony with respect to a proceeding as may be required for purposes of Chapter 44 and that every order finding of any fiduciary supervisor shall be subject to confirmation and approval of the county commission. It also provides that, if a dispute arises as to a matter of law or fact and the county commission is not prohibited from making a referral to a fiduciary commissioner pursuant to the (a)-(d) exceptions (related to estates that are small, sole beneficiary or without controversy), the county commission may refer the dispute to a fiduciary commissioner, "Provided, That in any case in which a reference would otherwise be prohibited, the commission may refer a matter for the sole purpose of resolving a disputed question of law or fact or may, *if the matter can be resolved expeditiously*, permit the fiduciary supervisor to conduct the necessary proceedings and to prepare a recommendation on such disputed question. (emphasis added)

[43] West Virginia Code Section 44-4-7 (applicable to fiduciary commissioner counties) and West Virginia Code Section 44-3A-41 (applicable to fiduciary supervisor counties) both provide that when there is a controversy in connection with the accounts of the Executor, the County Commission may on its own motion or the motion of any party to the controversy, may refer the matter to a fiduciary commissioner to make finding of fact and advise the county commission on the law governing the decisions of the matter. Any party may file an exception to the County Commission's finding of fact and the County Commission shall hear the case on the commissioner's report and the exceptions thereto, without taking any additional evidence.

There is no legal basis for Petitioners' contention that the Executor is not entitled to due process in the settlement of his accounts before the Fiduciary Supervisor because the settlement of accounts is merely in the investigative/recommendation stage of a non-judicial proceeding. The Fiduciary Supervisor did not merely investigate or make a recommendation to allow or disallow attorney fees, she ordered the disallowance of attorney fees. That order remains effective unless and until overruled by the County Commission or a higher court. See W. Va §44-3A-2.

The Circuit Court was also correct in its finding that the Fiduciary Supervisor abused her authority by not exercising due diligence or independent judgement in making the findings of fact set forth in the Order. It is evident that the Fiduciary Supervisor did not understand the inherent contradiction in her Findings of Fact with regard to the application of the maximum amount to disallow all attorney fees in excess of that maximum amount. There is nothing in the Record that indicates the Fiduciary Supervisor did anything other than rubber stamp the findings of fact and conclusion of law prepared by Petitioners' counsel. It is clear that she did not actually review the attorney bills, address any contradictions in the proposed Findings of Fact before adopting them *in toto*, or consider any the extraordinary circumstances of the Estate administration or of the well-established reasonable fee factors set forth in is well-established in West Virginia law. See Aetna Cas. & Sur. Co. v. Pitrolo, 176 W. Va. 190, 195-196, 342 S. E.2d 156, 161-162 (1986). Instead, the Fiduciary Supervisor was seemingly prejudiced by the false narratives of the Petitioners about the estate administration, including but not limited to the Petitioners' oft-repeated (knowing it to be incorrect) claim that the Estate was billed over $600,000 of attorney fees for legal work up to November 15, 2016 and that attorney bills were inherently unreasonable based on a ratio of attorney fees to the value of the probate

estate. AR 366-376. The Executor's testimony at the hearing was that he never intended to pay that amount, and that the lawyers never expected it. AR 586. See also AR 30, 762-765.

VI. THE FIDUCIARY SUPERVISOR'S FINDINGS OF FACT WERE NOT SUPPORTED BY VIABLE EVIDENCE.

A. The Testimony Adduced during the Removal Hearing was Improperly Used to Support the Fiduciary Supervisor and County Commission's Findings on the Attorney Fee Review Motion.

The Court properly determined that there was no evidentiary basis for the County Commission Order because the testimony on which Petitioners relied was elicited at a hearing wherein the testimony was taken for a limited purpose of the Removal Petition. The Circuit Court correctly determined that it was improper for the Fiduciary Supervisor to make Findings of Fact based on the testimony of Mr. Tweel and Mr. Rowan adduced during the Removal Hearing and the Affidavits of Mr. Rowan and Mr. Tweel that were attached to the Attorney Fee Review Motion. The testimony of Mr. Rowan and Mr. Tweel was not admissible evidence for the review and disallowance of attorney fees since that testimony was testimony admitted by the County Commission in a separate hearing concerning a wholly separate matter. The County Commission admitted the evidence for the limited purpose of evaluating whether Mr. Cooper should be removed as the Executor of the Estate. In short, neither the testimony at the Removal Hearing, nor the affidavits, were subject to cross-examination by Respondent, which is the *sine-qua-non* of a fair hearing.

Essential to the fairness of an adversary proceeding is the ability of a party to cross-examine evidence presented by his opponent. Here, Respondent never had that opportunity with regard to the opinions of Mr. Rowan and Mr. Tweel that were relied upon in the Fiduciary Supervisor Order and the County Commission Order. Though the witnesses appeared at a hearing

and testified as to their opinions,[44] that hearing was on Petitioners' Removal Petition – not their Attorney Fee Review Motion. The Estate objected to the admission of any testimony by Mr. Rowan and Mr. Tweel at the Removal Hearing on the basis that their testimony was irrelevant to the Removal Hearing since Mr. Cooper's supervision of *unpaid* attorney bills was not relevant to determining whether Mr. Cooper should be removed. That the testimony of Mr. Rowan and Mr. Tweel was admitted at the Removal Hearing for the *limited purpose* of considering whether Mr. Cooper breached his duties in the administration of the Estate, subjecting him to removal, regarding the oversight of attorney fees.[45]

Mr. Rowan offered no testimony of any relevance to the issues. Moreover, because the motion relating to fees was — by Appellee's own representations — not a subject for the hearing at which Mr. Rowan was testifying, Appellant did not have any opportunity to cross-examine him with regard to the issues pertinent to the motion relating to fees. It simply was not an issue before the tribunal before whom Mr. Rowan was testifying.

Though it had been filed on March 3, 2020, the Attorney Fee Review Motion was not decided by the Fiduciary Supervisor until February 11, 2021, which was almost one year after the

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[44] Neither Respondent nor his counsel were notified that these witnesses would be appearing to provide testimony at the Removal Hearing. In the Initial Brief, Petitioners claim that their counsel advised the Executor of the anticipated testimony of Mr. Tweel and Mr. Rowan two days before the Removal Hearing. Though the affidavits were supplied two days prior, the Executor disputes that assertion that he was advised that those witnesses would be testifying.

[45] Not only did the County Commission, the Circuit Court and the West Virgnia Supreme Court of Appeals determine that Mr. Cooper should not be removed, but also those tribunals determined that the executor's administration of unpaid bills was not a cause for removal of an executor. Ultimately, the County Commission and the Circuit Court determined that unpaid attorney fees were not a relevant factor as to the removal of Mr. Cooper as Executor. Further, the County Commission, the Circuit Court and West Virginia Supreme Court of Appeals denied the petition of the Appellants to remove Mr. Cooper and did not find that Mr. Cooper had breached his fiduciary duties in his supervision of the attorney fee invoices. AR 692-696 (County Commission). See also George Baker Trust Dated July 20, 2022 v. Cooper, No. 20-AA-2 (Braxton Co. Cir. Court Sept. 23, 2021), affirmed by George C. Baker Trust Dated July 20, 2002 v. Cooper, 2022 W. Va. LEXIS 728, *4, 2022 WL 17444547 (Dec. 6, 2022).

March 6, 2020, hearing on the Removal Petition. The Fiduciary Supervisor was not responsive to any of the Estate's objections before issuing the Fiduciary Supervisor Order and did not provide the Executor the opportunity to object to that purported evidence or to contradict that purported evidence. In combination, those matters establish a deviation from well-established due process procedures. There was no notice – during the Removal Petition – that the testimony of Petitioners' witnesses would be used for purposes of the Attorney Fee Review Motion. In fact, the contrary is true as the scope of the hearing was specifically limited to that which was relevant to the Removal Petition. Accordingly, Respondent never had an opportunity to cross-examine those witnesses or to present his own evidence on the issues relating to the Attorney Fee Review Motion, in violation of the most basic due process and fairness principles.

Despite Petitioners' counsel's acknowledgement, at the Removal Hearing, that the Attorney Fee Review Motion and matters relating thereto were not being heard, Petitioners' counsel prepared the proposed order that was adopted by the Fiduciary Supervisor to circumvent that limited purpose and to prevent the Executor from cross-examining the testimony of Mr. Tweel and Mr. Rowan and presenting his own testimony on the issues.

The testimony of Mr. Tweel and Mr. Rowan cannot be considered valid admissible evidence for purposes of the Attorney Fee Review Motion unless the Executor is given notice of the appearance of that expert witness and has a full and full and fair opportunity to cross examine those expert witness and present its own evidence, witness testimony and expert testimony and this is particularly so, since the testimony of the determination of the reasonableness of the attorney fees was simply not an issue before the County Commission at the Removal Hearing.

B. The April 23, 2021, Hearing before the County Commission was not an Evidentiary Hearing and, Accordingly, does not Suffice as Respondent's "Opportunity to be Heard" Regarding the Attorney Fee Review Motion.

The hearing held by the County Commission on April 23, 2021 to hear oral arguments from Steptoe and the parties regarding objections to the Fiduciary Supervisor Order was not an evidentiary hearing. AR 452-519. The purpose of the County Commission hearing was not to make findings of fact, but for County Commission to consider whether or not to affirm the Fiduciary Supervisor Order. The County Commission Order specifically states that "The Fiduciary Order sets forth a specific factual and legal basis and determined the reasonable amount of expenses and should be allowed based on the evidence presented." AR 520-522. The County Commission is not an appropriate forum for an evidentiary hearing. The fiduciary supervisor and the fiduciary commissioner are granted the authority to hold evidentiary hearings regarding the settlement of the Executor's account and have the power to summon witnesses and take testimony. See W. Va. Code § 4-3A-2.

C. The Estate Did Not Fail to Provide Evidence

Petitioners speciously contend that Respondent's rights to due process were not violated because the Executor could have admitted evidence regarding attorney fees before the County Commission at or after the Removal Hearing, requested that the Fiduciary Supervisor hold an evidentiary hearing regarding attorney fees, or unilaterally submitted evidence to the Fiduciary Supervisor. The Estate had no reason, obligation, or burden to submit evidence to the County Commission after the Removal Hearing since the County Commission had denied the petition to remove Mr. Cooper as Executor on April 17, 2020. They erroneously contend that since the Executor failed *to offer* counter evidence to their purported evidence from Mr. Tweel's Affidavit, Mr. Rowan' Affidavit, and their testimony at the Removal Hearing, the Fiduciary Supervisor may

proceed to determine their Attorney Fee Review Motion without an evidentiary hearing.[46] Contrary to Appellant's position, the Executor did not have the burden of providing evidence regarding the reasonableness fee factors for unpaid attorney bills that were not required to be reported to Fiduciary Supervisor, providing evidence at the Removal Hearing or County Commission hearing, or provide evidence to the Fiduciary Supervisor that was requested by the Fiduciary Supervisor.[47]

VII. THE EVIDENCE WAS NOT SUFFICIENT TO ESTABLISH A MAXIMUM AMOUNT OF ATTORNEY FEES

The Circuit Court properly found even if even if the affidavit and testimony of Mr. Rowan and Mr. Tweel was assumed to be legally valid and procedurally proper testimony for consideration on this issue that, there was not a sufficient evidentiary basis for the County Commission to disallow attorney fees that exceeded the maximum amount set forth in the County Commission Order.

The testimony of Mr. Rowan was not accurate, credible, or relevant but it was very prejudicial. At the Removal Hearing, Petitioners introduced Mr. Rowan as a "Certified Fraud Examiner" implied that the Estate had been improperly billed. The testimony of Mr. Rowan was prejudicial and misleading since he testified on March 6, 2020 that over $600,000 had

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[46] The Appellants cited 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.") In that case, Mr. Green failed to respond to motion for summary judgement and failed to introduce, or even allege, specific evidence in opposition to Respondent's motion for summary judgement. In this case, it is the Fiduciary Supervisor and the Appellants who failed to respond to the Estate's Attorney Fee Review Motion Objection and it objections to the proposed order.

[47] Despite the lack of any obligation under the circumstances, the Fiduciary Supervisor had, but apparently did not consider, Harmon Brown's Affidavit, which was submitted on or about April 10, 2020, in response to certain assertions made in Mr. Tweel's Affidavit.

been *billed* to Estate when the total amount of the bills was $412,114 as a result of the billing adjustments made on December 9, 2016 that is set forth in the exhibits to the Attorney Fee Review Motion. In promoting (and repeating) the false narrative that the billed fees were over $600,000, Petitioners ignored the billing adjustments and arbitrarily asserted additional fees paid by the Baker Company for other matters in 2010-2013 should be counted as fees billed or paid to the Estate. While Petitioners argued to the County Commission that the legal work was unnecessary and the billing was improper, the evidence showed that there was never any question in December 2016 about the scope of the legal work or the time had been expended.

The evidentiary basis for the $75,000 initial maximum amount ("Mr. Tweel's Attorney Fee Estimate") relies entirely upon Finding of Fact Number 7 which states that the "uncontradicted" testimony of Robert G. Tweel ("Mr. Tweel') at the March 6, 2020, hearing on the Petition to Remove, which was that the entire legal cost to administer, settle, and finalize and close the Estate should have been a range of $50,000 to $75,000. It was patently erroneous for the Fiduciary Supervisor to rely on Mr. Tweel's Attorney Fee Estimate as the sole evidentiary basis to establish the $75,000 Attorney Fee Ceiling and to issue Conclusion of Law Number 17 that "Attorney fees of $75,000, including the $13,443.14 already paid to Cooper Law Offices and all amounts already paid to Mr. Luby, constitutes a reasonable amount for legal services performed for the purpose of administering and settling the Estate."

The Court did not err in finding that even if the affidavit and testimony of Mr. Tweel was assumed to be legally valid and procedurally proper testimony for consideration on this issue, his profession opinion was speculative and clearly insufficient finds to provide a credible evidentiary basis to establish a maximum amount of $75,000 for attorney fees that could be reasonably incurred for the entire administration and settlement of the Estate from 2009 to 2024

and thereafter until the Estate closes. Mr. Tweel's testimony was insufficient to support the County Commission Order because it is not accurate, credible, or relevant. The testimony and affidavit of Mr. Tweel clearly does not provide any basis for a Finding of Fact that the 2009-2016 Attorney Fee Review Motion Bills should be limited to $75,000 let alone a Finding of Fact the attorney fees for entire administration, settlement and finalization of the Estate should be limited to $75,000. Mr. Tweel's testimony was not accurate or relevant since Mr. Tweel's estimate of $50,000 to $75,000 relates only to a simple administration of probate assets of $1.8 million and he did not consider the extraordinary circumstances of this particular Estate.

Mr. Tweel's Affidavit demonstrates that he was not fully informed about the Estate and consequently made unfounded and erroneous speculations about the nature of the legal work and the risks.[48] Mr. Tweel testified that did not review **any** of the legal bills before spouting off is opinion. Moreover, he never inquired of Mr. Luby about the scope of the legal work or the circumstances in which the legal work was performed. The extraordinary amount of time arose from the difficulty of the situation caused by the conduct of the Appellees, high risk of the legal work, and the concern that unless all of the issues and risks were document that the Appellees would attempt to shift any adverse legal or tax consequences to the Executor or to Steptoe. Mr. Tweel could not have considered all of the legal work on which a reasonable

[48] Mr. Tweel's purported review of the extensive amount of legal work should have demonstrated to him that the Estate administration was complicated, extensive and difficult; yet, based purely on speculation, he assessed it as a typical matter. As the West Virginia Supreme Court of Appeals noted in its Memorandum Decision entered on December 6, 2022, wherein it upheld this Court's decision on Appellee's unsuccessful petition to remove the executor: "Moreover, the court's findings of fact about respondent's competence and the discharge of his fiduciary duties are not clearly erroneous, **especially where the record indicates that this was a complicated estate matter** and respondent was hindered in his ability to discharge his duties until allocations of property and debt to the J.C. Baker Trusts were made and a valuation of the George Baker GST Non-Exempt Trust was determined." George C. Baker Trust Dated July 20, 2002 v. Cooper, 2022 W. Va. LEXIS 728, *4, 2022 WL 17444547 (Dec. 6, 2022) (emphasis added).

fee estimate would be bases since he was unaware of any legal work that was beyond what he speculated was reasonable for a typical simple administration of probate assets.[49] It is well-settled that "evidence [in the form of expert testimony] which is no more than speculation is not admissible under Rule 702." State v. LaRock, 196 W. Va. 294, 307, 470 S.E.2d 613, 626 (1996), cited in Brady v. Deals on Wheels, Inc., 208 W. Va. 636, 643, 542 S.E.2d 457 (2000).

Moreover, and contrary to the County Commission's finding that Mr. Tweel's testimony was "uncontradicted", the Affidavit of Harmon Brown, which was submitted to rebut Mr. Tweel's opinions, clearly and fully contradicts the affidavit and testimony of Mr. Tweel. AR 681-687. Mr. Brown was very familiar with the matter, since the Estate's counsel consulted with him from 2014 to 2020 concerning the Allocations and the delinquent federal estate tax return. Despite that, the County Commission failed to consider, in any respect, Mr. Harmon's affidavit and instead relied on the unfounded, inapplicable, and uncredible testimony of Mr. Tweel, which was wholly insufficient to support its ultimate decision. Knowing that Mr. Brown's affidavit existed and contradicted Mr. Tweel's testimony, the County Commission still concluded that Mr. Tweel's testimony was "uncontradicted," establishing clear error on its part.

[49] In Paragraph 7 of Mr. Tweel's Affidavit, Mr. Tweel identifies the limited document and information that he reviewed in making his professional opinion about Tweel's $75,000 Attorney Fee Estimate, stating: "The documents and information I reviewed in order to reach my opinions include the certain documents provided to Mike Baker by Mr. Luby of between 2,500 and 3,000 pages, some of which were hard copies provided by Mr. Luby and some of which were on a CD copied from a flash drive provided by Mr. Luby. In addition, I reviewed other documents, including (1) the filed appraisement of the Estate; (2) the submitted non-probate inventory for the Estate; (3) a draft of the estate tax return for the Estate; and (4) the valuation report for the stock of J. C. Baker & Son, Inc. ("Stock Valuation")." AR 1579 at ¶ 7. Mr. Tweel's Affidavit states $75,000 Attorney Fee Estimate is based on his review the numerous documents referenced in Paragraph Number 7 of Mr. Tweel's Affidavit. See id. See also AR 35 (Mr. Tweel's testimony that he did not review any of the bills for legal services provided to the Estate).

It is clear that Mr. Tweel's statements in his Affidavit were not fully informed and were prepared in haste so that it could be submitted two days before the Removal Hearing. Mr. Tweel's Affidavit reflects contrived reasons to justify a pre-determined judgement that Mr. Luby had performed unnecessary legal work given the risks to the Estate. There were numerous errors in the Affidavit and testimony of Mr. Tweel to which the Estate and Steptoe has filed objections and which made it readily apparent that Mr. Tweel's testimony is not a reliable as a basis for the determination of the reasonableness of the attorney fees. First, Mr. Tweel's Affidavit is clearly in error where, at Paragraph 11, he states that there is a question as to whether the federal estate tax return should be filed.[50] AR 1581-1582. It is clear that Internal Revenue Code Section 6075 requires that federal estate tax return be filed, and that Mr. Cooper could be personally liable for any federal estate tax due as a result of it not being filed. Second, Mr. Tweel's assignment of responsibility to the late-filed federal estate tax return to the Estate, was clearly wrong as the responsibility for the late-filed return clearly stems from the Baker Company's refusal to provide information to the Business Appraiser, causing the Business Appraisal not to issue until September 15, 2015, and, in addition, from the efforts of Petitioners (or some of them) to the delay the filing of the federal estate tax return from December 1, 2016 to October 8, 2020. Third, Mr. Tweel's suggestion that the

[50] Paragraph 7 of Mr. Brown's Affidavit states: The assertion of Mr. Tweel in Paragraph 11 of his Affidavit there "there is a real question as to whether the federal estate tax return should be filed at this point," is simply incorrect for the following reasons: (i) the Internal Revenue Code requires the executor of the George Baker Estate to file the federal estate tax return if the value of a decedent's gross estate exceeds Mr. Baker's remaining estate tax exclusion; (ii) as a tax practitioner, Mr. Luby owes certain duties under the tax practitioner rules issued under Treasury Department Circular No. 230 to file a proper Form 706; and (iii) the Executor of the George Baker Estate or any successor executor (or curator) cannot be discharged from personal liability for any federal estate that would be owed, if the Estate distributes its assets, without a final determination of the federal estate tax by the Internal Revenue Service, and has insufficient assets to pay that tax. There is no time limitation as to the filing of a Form 706, although interest and penalties could be owed if a federal estate tax is owed. AR 681-684.

legal work related to the Allocations was not within the scope of the legal work of the Estate and should not be charged to the Estate was plainly incorrect for the reasons stated hereinabove. Mr. Tweel improvidently dismissed any of the legal work related to the Allocations as not relevant to the probate administration of the Estate and therefor beyond the scope of reasonable and necessary legal work.

VIII. THE CIRCUIT COURT DID NOT ERR BY CONSIDERING MATTERS OF RECORD IN RELATED LITIGATION.

In reviewing the County Commission's Order on appeal, the Circuit Court was entitled to consider the entire record that was before the County Commission at the time of its decision. See W. Va. Code § 58-3-4 (noting that the record includes the papers filed in the County Commission proceedings and the testimony and evidence presented at the hearing on the matter that was held before the County Commission).

Appellant improvidently assert that the Circuit Court considered matters outside the record – namely, the four civil actions initiated or caused by the Appellants or the Baker Company against the Estate -- in reaching its decision to reverse the County Commission's Order. The record considered by the Circuit Court contained evidence regarding those civil actions was a relevant matter to the disallowance of the attorney fees for the estate administration, whether for the 2010-2016 period or the entire administration of the Estate. Petitioners made the same complaint in its appeal to the West Virginia Supreme Court of Appeals concerning the denial of their petition to remove Mr. Cooper as Executor. The Court held:

> Additionally, petitioners argue that the circuit court improperly considered matters beyond the county commission's ruling, including arguments of counsel, that were not supported by the evidence. Further, petitioners maintain that although the stock purchase debt was discussed in the hearing that does not mean all the evidence offered in that civil action now becomes evidence before the county commission. . . . We agree with respondent that the circuit court was entitled to consider the entire record, including the stock purchase debt litigation . . .

George C. Baker Trust Dated July 20, 2002 v. Cooper, No. 21-0866, 2022 W. Va. LEXIS 728, *4-5, 2022 WL 17444547 (Dec. 6, 2022).

Petitioners claim the Circuit Court 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 Review Motion*. They assert those 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.* While the Appellants now contend that the County Commission Order did not disallows the Post-2016 Attorney Fees, that position contradicts its prior position in this matter. It was proper for the Circuit Court to consider the civil actions since, in addition to their general relevance to the overall dispute between these parties and the extensive nature of the litigation, they were relevant to the disallowance of the Post-2016 Attorney Fees. See id. (discussing ability of the Circuit Court to look at the entirety of the record, including other litigation and noting that "the record indicates that this was a complicated estate matter and respondent was hindered in his ability to discharge his duties until allocations of property and debt to the J.C. Baker Trusts were made and a valuation of the George Baker GST Non-Exempt Trust was determined").

Furthermore, the "backbone" for the Circuit Court decision to reverse the County Commission was not the consideration to the extraneous and after-occurring events referred by the Petitioners in Section IV.D and Section IV.E. but the Circuit Court's decision was based on draconian and arbitrary nature of the maximum amount imposed by the order, the lack of express or implied authority to issue the Order and the violation of the Executor's right to due process in the settlement of his accounts.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court **AFFIRM** the Circuit Court of Braxton County's order entered May 24, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2024, I served a true copy of the foregoing "Respondent's Brief" by uploading the same for electronic filing through the Court's electronic filing system, which will deliver electronic service of the same, via email, to the following:

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