INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Dec 17 2024
01:32PM EST
Transaction ID 75245263

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

Defendants Below, Petitioners.

v.)

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

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

Plaintiff Below, Respondent.

PETITIONERS' REPLY TO *RESPONDENTS' BRIEF*

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I. SHORT SUMMARY

The focus of all of the various issues in this appeal boil down to two questions: (1) was the Estate of George C. Baker ("Estate") properly billed reasonable attorney fees by Stephen F. Luby ("Mr. Luby") for his work for respondent Daniel C. Cooper ("Respondent") as Executor of the Estate, for the period beginning with Mr. Luby's engagement in 2010 through November 15, 2016; and (2) if those attorney fees were not reasonable, what amount of attorney fees is reasonable for the work Mr. Luby performed in administering and settling the Estate.

The short answer of petitioners Michael Baker and George Cameron Baker, Trustees, George Cameron Baker, and Susan Ann Baker ("Petitioners") to the first question is "no," they were not reasonable, because: (1) Mr. Luby improperly included attorney fees for work performed for certain J.C. Baker Trusts ("Baker Trusts") in the attorney fees billed to the Estate; (2) Mr. Luby had no authorization from the Baker Trusts to do work for them; (3) Respondent was not a trustee of any of the Baker Trusts who could authorize Mr. Luby's work for the Baker Trusts; and (4) the attorney fees for legal services for the Baker Trusts should have been billed to the Baker Trusts.

Petitioners' short answer to the second question is, based on evidence from Robert G. Tweel ("Mr. Tweel"), an attorney well versed in estate administration matters, which was the only evidence before the County Commission of Braxton County, West Virginia ("County Commission"), the attorney fees related to the administration and settlement of the Estate could have, and should have, been no more than $75,000.00.

II. THE *CIRCUIT COURT ORDER* WAS AN IMPROPER BLIND ADOPTION OF RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In responding to *Petitioners' Initial Brief*, Respondent asserts that the Circuit Court of Braxton County, West Virginia ("Circuit Court") made proper determinations in entering its *Order*

Granting Relief Requested In Appeal By Appellant Daniel C. Cooper ("*Circuit Court Order*"), as though the Circuit Court carefully analyzed the proposed findings of fact and conclusions of law in the version of the *Circuit Court Order* Respondent submitted ("*Respondent's Draft Order*") and, after that careful analysis, adopted *Respondent's Draft Order* as its own. However, even a cursory comparison of the *Circuit Court Order* and *Respondent's Draft Order* unquestionably demonstrates that the Circuit Court simply entered *Respondent's Draft Order* without any analysis at all. Under South Side Lumber Co. v. Stone Const. Co., 151 W.Va. 439, 443, 152 S.E.2d 721 (1967), such adoption may be proper, but only if the findings of fact and conclusions of law "represent the judge's own determination and not the long, often argumentative statements of successful counsel." The *Circuit Court Order* clearly has numerous "long, argumentative statements," such as ¶¶ 10, 12, 18, and 22, among others.[1]

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[1]Paragraph No. 10 is not factually supported and simply reiterates Respondent's disputed version of what transpired at the hearing on Petitioners' *Petition To Remove Executor, Appoint Curator And For Other Relief ("Removal Petition")* (AR1476) (Removal Hearing") concerning the future use of the testimony adduced at the said hearing. See Part IV, *infra*, for a discussion of what actually transpired at the Removal Hearing. All that counsel for Petitioners agreed to at that hearing was that the *Motion For Review Of The Amount Of Attorney Fees Incurred By Executor Incurred [sic] In Connection With His Administration Of the Estate* ("*Attorney Fee Motion*") (AR0038) was not being heard at that time.

Paragraph No. 12 also is an argumentative statement about Respondent's erroneous calculation of the amount of attorney fees that had been billed as of November 15, 2016. The evidence adduced at the Removal Hearing and supporting affidavits to the *Attorney Fee Motion* clearly supports Petitioners' position. Just the amounts billed to Donna Baker, the Estate, and J.C. Baker & Son, Inc. on invoices clearly labeled as for Estate work include $79,483.44 billed to Donna Baker for Estate work (AR1588-1600), $418,569.06 billed to the Estate for Estate work (AR1601-1650) and $72,521.06 billed to J.C. Baker & Son, Inc. for Estate work (AR1669-1675, 1681-1694), totaling just over $570,000.00. Without getting into the "weeds" of the details, additional time is reflected in other invoices not labeled as for Estate work even though the entries clearly reflect Estate work was performed. See, e.g., AR 1664, entries dated 11/10/15, and11/16/15. Respondent claims the attorney fees were discounted, but discounted or not, the amount which Mr. Luby supposedly was willing to "write off" still had been billed to the Estate. Three different entities or persons had been billed for "Estate Work" for at least $570,000.00, and that full amount was in dispute, not just the unpaid portion.

Paragraph 18 makes a "finding of fact" as to the supposed intent by Petitioners to "prejudice" the Fiduciary Supervisor and the County Commission by including the "unpaid billed amount of attorney fees discounted by Steptoe as well as attorney fees paid to J.C. Baker & Son, Inc." Respondent mischaracterizes Petitioners' complaint. It was not the unpaid portion of the attorney fees for Estate work billed to the Estate that was the crux of their complaint, but the total amount of the cost of the legal services actually billed, supposedly for Estate work, no matter by whom paid.

Paragraph No. 22 continues Respondent's wholly factually unsupported speculation that litigation to remove Respondent as Executor of the Estate "was primarily initiated by the Appellees as part of their strategy to delay and avoid the collection of the Stock Purchase Debt." No evidence has ever been cited supporting the same. Petitioners would point out that even though the County Commission determined that Respondent's conduct did not warrant

Moreover, any reasonable person would conclude the *Circuit Court Order* was not the product of a deliberate and thorough look at the facts and the law, if for no other reason than the fact that *Respondent's Draft Order*, and, thus, the *Circuit Court Order* as well, are really two identical draft orders in one.[2] Even a cursory glance at *Respondent's Draft Order* would have uncovered this fact, and a deliberate adoption of such order following a thorough review would have eliminated one draft. The peculiar format of the *Circuit Court Order,* plainly demonstrating no independent review was done by the Circuit Court, was never addressed by Respondent.[3]

Accordingly, as the *Circuit Court Order* is in violation of South Side, 151 W.Va. 439, it must be reversed and the *Order Following April 23, 2021 Hearing On Objections To Fiduciary Supervisor Order* ("*County Commission Order*") affirmed.

III. THE *COUNTY COMMISSION ORDER* CORRECTLY DETERMINED THAT THE ATTORNEY FEES FOR WHICH THE ESTATE IS TO BE RESPONSIBLE SHOULD BE LIMITED TO $75,000.00

When an estate is administered, the fiduciary representative is obligated to administer and settle the estate by receiving (and eventually paying approved) claims, preparing and filing an appraisement for the estate, preparing and filing the non-probate inventory for the estate, and preparing and filing an estate tax return ("Administrative Tasks"). Upon the accomplishment of

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removal, there was undisputed evidence of questionable administration to warrant the filing of the *Removal Petition*. For example, unquestionably, Respondent failed to file annual estate tax returns for three years, resulting in the Estate paying over $43,000.00 in penalties and interest. AR0564; AR0051 ¶ 12. Those three returns had to be redone by John Rowan ("Mr. Rowan"), who charged the Estate $8,000.00 to correctly prepare those returns "from scratch" (AR0563-0564), whereas Mr. Luby had charged the Estate just under $35,000.00 to incorrectly prepare those tax returns. Most telling of all, it is undisputed that the shocking amount of nearly $600,000.00 had been billed by November 15, 2016.

[2] The *Circuit Court Order* has the peculiar format of having the judge's electronic signature on page 35, with another, but unsigned, identical 35 pages following the page on which the judge's signature appears, compelling the conclusion that no independent review by the Circuit Court was done, as one would expect such a review would have resulted in the second, superfluous copy to have been deleted before it was signed and entered.

[3] Respondent never addressed this problem with the *Circuit Court Order*, which was discussed in *Petitioners' Initial Brief* in footnote 26 as part of their Assignment Of Error E. Therefore, Rule 10(d) of the West Virginia Rules of Appellate Procedure suggests that this Court should assume Respondent agrees with Petitioners' Assignment Of Error E, that the *Circuit Court Order* improperly adopted *Respondent's Draft Order* without an independent analysis in violation of South Side, 151 W.Va. 439, requiring reversal.

the Administrative Tasks, an estate, having been settled, may be closed. The evidence attached to the *Attorney Fee Motion* (and adduced at the Removal Hearing) established that the attorney fees for completing the Administrative Tasks should have been no more than $75,000.00. As Respondent himself admitted at the Removal Hearing, the Estate had no outstanding claims except for the unpaid attorney fees. AR 0587. Evidence through Mr. Tweel clearly established that Respondent improperly took on the responsibilities of the "various J.C. Baker Trusts." AR 0546. His assumption of those responsibilities was improper because the

> various J.C. Baker Trusts should [have paid] their own legal fees to accomplish the work necessary to provide the Estate the information it supposedly needs to file the Estate's estate tax return. Mr. Luby, at Mr. Cooper's direction, appears to have taken on the work on behalf of the various J.C. Baker Trusts and charged the fees for that work to the Estate.

AR0580, ¶ 9.

Respondent argues repeatedly that the Estate could not be settled because it needed the allocations stemming from the Baker Trusts. Be that as it may, the attorney fee invoices that were billed to the Estate on and before November 15, 2016 (i.e. those at issue in the *Attorney Fee Motion*) should **not** have included attorney fees incurred by Mr. Luby in dealing with the Baker Trusts to determine the allocations to "plug into" the Estate's federal estate tax return as those attorney fees for Baker Trust work should have been billed to the Baker Trusts. AR1581, ¶ 9; AR0546-0547; AR0559. Moreover, neither Respondent nor Mr. Luby had any authority to authorize that such work be done, as will be discussed below in Part IV, *infra*. If those improper attorney fees had not been included in what was billed to the Estate, those bills could have been promptly paid at a time when the Estate had funds to pay them. A.R. 0579. See footnote 16 of *Petitioner's Initial Brief.* With the attorney fees no greater than $75,000.00 paid, the Estate could, as Respondent admitted, have been settled and closed, with the Stock Purchase Debt ("Debt")

being transferred directly to the George C. Baker Trust Dated July 20, 2002 ("Trust") which was the beneficiary of George C. Baker's residual estate. AR1506; AR0558. Had that happened, none of the attorney fees for the litigation to remove Respondent as Executor of the Estate and none of the litigation to enforce the Debt, all of which Respondent refers to as "Estate Litigation," would have been incurred because, with reasonable attorney fees billed and paid, there would have been no need to seek Respondent's removal as Executor of the Estate, and no need to reduce the Debt to judgment to pay the attorney fees. Accordingly, the Fiduciary Supervisor and the County Commission properly determined that the Estate could have been settled, incurring no more than $75,000.00 in attorney fees to accomplish the Administrative Tasks and that, therefore, $75,000.00 was a reasonable amount for attorney fees to administer and settle the Estate. The Circuit Court committed clear error when it ignored the undisputed evidence that Mr. Luby's legal services to obtain allocation information regarding the Baker Trusts is not an expense of the Estate, and that $75,000.00 in attorney fees was sufficient to accomplish the Administrative Tasks.

As stated above in Part I, the focus of this appeal concerns only whether the attorney fees incurred through November 15, 2016, for supposed Estate administration, are reasonable. Respondent is speciously attempting to boot-strap the *County Commission Order* into supposedly saying something it does not say, that is, by attempting to make the attorney fees issue broader than it is. The reasonableness of the attorney fees for legal services performed for the Baker Trusts are not at issue in this appeal and are a matter between Mr. Luby and Mr. Cooper. Mr. Tweel clearly testified at the Removal Hearing and through his affidavit that Mr. Luby's representation of the Baker Trusts was not authorized and that the legal services provided by Mr. Luby to the Baker Trusts were not the responsibility of the Estate. AR0546-0547; AR0559. No one, not even Harmon A. Brown, consulting attorney to Mr. Luby, and whose affidavit was submitted to the

County Commission following the Removal Hearing ("Mr. Brown"), refuted that evidence, and it should not be obscured by all the extraneous noise cluttering *Respondents' Brief* about the need for dealing with the Baker Trusts to obtain the allocations or the costs of the "Estate Litigation." As discussed in *Petitioners' Initial Brief*, Part V.D., the Circuit Court clearly erred in relying on this noise, as all that was to be considered by the County Commission and then the Circuit Court was what was before the Fiduciary Supervisor, which was the issue of the reasonableness of the attorney fees billed as of November 15, 2016. Haines v. Kimble, 221 W.Va. 266, 275, 654 S.E.2d 588, 559 (2007).[4]

Therefore, when considering only the legal services needed for accomplishing the Administrative Tasks, Mr. Tweel, based on his extensive experience in estate administration, stated that such tasks required at most $75,000.00 in attorney fees.[5] Respondent seems to think that it would have been possible for Petitioners and their experts to precisely determine which attorney fees were for services for the Estate and which were for the Baker Trusts, hence they criticize Mr. Tweel for not examining the attorney fee invoices. However, as Mr. Luby himself admitted, his billing entries were vague (AR0601), rendering any such distinctions impossible.

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[4] Respondent claims Petitioners have taken a "newly minted" position that the *County Commission Order* is not meant to foreclose later properly incurred attorney fees for legal services. *Respondent's Brief*, p. 16. Petitioners have responded previously to this claim by explaining the obvious, that since the *Attorney Fee Motion* sought to challenge only those attorney fees incurred as of November 15, 2016 (the only attorney fees of which Petitioners were aware), and as their evidence concerned only those attorney fees, plainly if other necessary and proper attorney fees later arose, the *County Commission Order* does not necessarily preclude them. The *Attorney Fee Motion* is limited in scope to the outrageousness of nearly $600,000.00 in attorney fees being billed for Administrative Tasks as of November 15, 2016, when, without question, the vast majority of those bills include unauthorized legal services performed for the Baker Trusts. See AR0304, AR407. Moreover, the "Estate Litigation" expenses flowed from the consequences of that improper billing. The attorney fees kept accruing until they were so exorbitantly high, the Estate could not pay them. Despite Respondent's waffling testimony, it is clear that non-payment of the attorney fees is what caused the Respondent to initiate the litigation to collect on the Debt, as otherwise the Debt could have been transferred to the Trust. AR0588. However, because none of the "Estate Litigation" started until 2018, well after the last invoice for attorney fees was provided in November 2016, attorney fees for "Estate Litigation" are not part of the issue before this Court and were improperly considered by the Circuit Court. Haines, 221 W.Va. 266.

[5] Respondent dismisses Mr. Tweel's testimony as "speculative." However, attorneys routinely provide legal services for trust and estate matters for set fees. Their experience gives them the insight and understanding into the amount of time that will be required to enable them to set a reasonable and realistic fee. There is nothing speculative about Mr. Tweel's testimony.

Moreover, since obviously Mr. Luby and Respondent both considered the work of dealing with the Baker Trusts to be part of the Estate work, without a doubt it would be impossible to parse how much of the time, and thus cost of the legal services attributable to that time, can be, with any certainty, attributable to work on the Estate, as opposed to the Baker Trusts, especially when multiple billing entries state nothing more than "working on estate." See, *Attorney Fee Motion*, pp. 2-3 (AR0039-0040). Accordingly, not only the best evidence, but the only evidence, in the record below is Mr. Tweel's affidavit supporting the *Attorney Fee Motion*, as well as his Removal Hearing testimony, that the reasonable cost of legal services to perform the Administrative Tasks was no more than $75,000.00. Furthermore, nor would it have been proper, or even possible, for Mr. Tweel, the Fiduciary Supervisor, or the County Commission to have speculated about other proper expenses that might possibly arise in the future outside of the expenses for Administrative Tasks. Mr. Tweel, the Fiduciary Supervisor, and the County Commission properly kept their review to what was before them within the four corners of the *Attorney Fee Motion*. Haines, 221 W.Va. 266.

In sum, the *County Commission Order* was properly supported by the evidence and, therefore, should be affirmed.[6]

[6] Courts will not order impossible or meaningless relief. Farran v. Johnston Equipment, Inc., Civ. A. No. 93-6184, 1995 WL 549005 (E.D.Pa. Sept. 12, 1995. Therefore, as outlined in this Part III, because it would be impossible for anyone, including Mr. Luby, to recreate accurate billing entries encompassing only work done on the Administrative Tasks, and so determine accurate attorney fees for just those tasks performed anywhere between eight and fourteen years ago now, relief contemplating that determination clearly would be futile. As Mr. Luby failed to bear the burden of proving the reasonableness of his fees, Lawyer Disciplinary Bd. v. Scotchel, 234 W.Va. 627, 646, 768 S.E.2d 730, 749 (2014), *quoting* Bass v. Coltelli Rose, 216 W.Va. 587,592, 609 S.E.2d 848, 853 (2004), the Fiduciary Supervisor's and the County Commission's findings on the reasonable amount of attorney fees for the administration of the Estate through November 15, 2016, which should have been sufficient for the eventual settlement of the Estate, are well supported for this Court to affirm the *County Commission Order*.

IV. THE CIRCUIT COURT CLEARLY ERRED IN DETERMING THAT THE ATTORNEY FEES FOR LEGAL SERVICES PROVIDED TO THE BAKER TRUSTS ARE CHARGEABLE TO THE ESTATE

The clearly undisputed facts are that Mr. Luby had no authorization to deal with the Baker Trusts, that he did not represent the Baker Trusts, and that he was not in an attorney-client relationship with the Baker Trusts.[7] Just as the *Circuit Court Order* clearly ignores these undisputed facts, so does *Respondents' Brief*. Respondent claims in his brief that it was "impossible to obtain 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." *Respondent's Brief*, p. 18. Not only does Respondent fail to point to any evidence or to cite to any legal authority supporting his position that Mr. Luby was somehow nevertheless authorized by the Baker Trusts to perform legal services for them for this reason, but he also attempts to lay the "blame" for his breach of fiduciary duty to the Estate at Petitioners' feet.[8] That no trustees had been appointed for the Baker Trusts is no excuse for performing unauthorized legal services for them. See *Petitioners' Initial Brief*, Part V.A., p. 18.[9] Respondent, instead of contesting the lack of authorization, instead takes pages in *Respondents' Brief* to explain the amount of work done, but the amount of unauthorized legal services performed for the Baker Trusts does not legitimize

[7] In footnote 22 of *Respondents' Brief*, Respondent posits an argument about the lack of assets in the Baker Trusts. Because the Baker Trusts had no funds and no trustees, his claim apparently is that their autonomy could supposedly be commandeered by the Estate and its attorney. It was a difficult situation, but the course of action chosen by Respondent and Mr. Luby – to hide their heads in the proverbial sand and plow ahead to get what they needed because the ends justify the means – cannot be condoned by this Court, or any court. It was incumbent upon them to find a solution. Indeed, this Court even recognizes that a trust must act through its trustee as this Court's scheduling order changed the case style to substitute the Trustees of the Trust for the Trust itself as one of the Petitioners. Compare AR0001with the *Scheduling Order* entered by this Court on July 8, 2024.

[8] Respondent and Mr. Luby ensured that trustee approval was given to the allocations, demonstrating awareness that trustee approval was needed for the Baker Trusts to act. Thus, they were aware that the Baker Trusts could act only through a trustee and so should have known a trustee was necessary to authorize the performance of legal services for the Baker Trusts.

[9] The Table Of Authorities in *Petitioners' Initial Brief* failed to include Rule 1.2, Rule 1.4 and Rule 1.5 of the West Virginia Rules of Professional Conduct, which were cited on page 18 of *Petitioners' Initial Brief*.

them.[10] Respondent only excuses the unauthorized work done by Mr. Luby because the ends justified the means.

The law in West Virginia is clear: "[t]he burden of proof is always upon the attorney to show the reasonableness of the fees charged" to a client. Scotchel, 234 W.Va. 627, 646. Attorney fees for legal services performed where no legal representation exists simply are not reasonable. The Circuit Court, however, completely glossed over this failure to prove reasonableness.[11] It blindly adopted *Respondent's Draft Order* (which failed to address this issue) without any examination of the impact of the complete absence of any attorney-client relationship between the Baker Trusts and Mr. Luby, and the complete absence of any authorization by the Baker Trusts for legal services to be provided on their behalf. Mr. Tweel's affidavit evidence, that Mr. Luby assumed a representation of the Baker Trusts he did not have and then improperly billed the Estate for legal services performed for the Baker Trusts, was uncontradicted. Not even Mr. Brown's affidavit, which was submitted by Respondent to the County Commission following the Removal Hearing (AR0681), disputed such lack of authorization. Instead, Mr. Brown focused solely on the need for the allocations to prepare the Estate's federal estate tax return, but, like Mr. Luby and Respondent, ignored the fact that the legal services performed to obtain those allocations were unauthorized. Respondent argues Mr. Luby pressed forward without authorization based on some supposed "implied consent" of the Petitioners (*Respondents' Brief*, p. 17), who are not and never have been the trustees, or fiduciaries, of the Baker Trusts. "Implied consent" of non-fiduciaries of the Baker Trusts serves as no authorization.[12]

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[10] This Court, then, may assume Respondent agrees there was no authorization as Rule 10(d) of the West Virginia Rules of Appellate Procedure provides that if an assignment of error is not addressed in a response brief, the Court "will assume that the respondent agrees with the petitioner's view of the issue."

[11] Indeed, the *Circuit Court Order* improperly held that Respondent had no duty to address this issue. AR1878, ¶ 37.

[12] Respondent also makes several leaps of logic in drawing other negative conclusions in the absence of evidence. For example, he asserts counsel for Petitioners "offered" to submit a proposed order to the Fiduciary

As the Circuit Court failed to address the impact of the lack of authorization for the work performed dealing with the Baker Trusts, it reached the clearly erroneous conclusion regarding the Estate's responsibility for the attorney fees for that work. In contrast, the *County Commission Order* clearly recognized that the billed attorney fees included fees for legal services performed for the Baker Trusts, and recognized the correctness of Mr. Tweel's determination that, absent those attorney fees, the Estate could have, and should have, been finalized and settled with a maximum amount of attorney fees incurred in the amount of no more than $75,000.00.

Accordingly, the *Circuit Court Order* should be reversed, and the *County Commission Order* affirmed.

V. THE FIDUCIARY SUPERVISOR HAD THE AUTHORITY TO REVIEW THE *ATTORNEY FEE MOTION*

Respondent misconstrues the statutory authority he relies upon in contending the Fiduciary Supervisor did not have the authority to review the *Attorney Fee Motion*. As an initial matter, Respondent completely ignores Section 6 of Article VIII of the West Virginia Constitution ("Section 6"). As explained in *Petitioners' Initial Brief*, county commissions have constitutionally granted powers over "all matters of probate, the appointment and qualification of personal representatives, guardians, committees and curators, and the settlements of their accounts:" that

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Supervisor when the email chain clearly shows the Fiduciary Supervisor initiated the contact to request the proposed order. AR 0336. Counsel for Petitioners then responded to the Fiduciary Supervisor and to counsel for Respondent (hence not an *ex parte* communication) in which he expressed his hope the proposed order he was submitting would be entered soon. The only evidence as to the content of the call from the Fiduciary Supervisor is the email from counsel for Petitioners, in which he states only that he is forwarding the proposed order requested by the Fiduciary Supervisor, period. Since a communication must be about the merits of the case to *ex parte*, Stern Bros., Inc. v. McClure, 160 W.Va. 567, 236 S.E.2d 222 (1997), fn. 1. (see *Petitioners' Initial Brief*, footnote 7), there is no evidence whatsoever to support in even the slightest fashion that the merits were discussed in that telephone call. No matter how many times Respondent repeatedly describes a communication as supposedly being *ex parte*, such repetition does not make the communication *ex parte.* Respondent has cited to no evidence of any *ex parte* communication. Zealous argument is distinct from inviting a court to make an unsupported finding of fact based on a baseless conclusion.

As another example, discussed above, Respondent also misrepresented in *Respondent's Draft Order*, which the Circuit Court blindly adopted, that "the Affidavit Of Harmon Brown…contradicts the Affidavit Of Mr. Tweel." AR1816, ¶ 13. However, Mr. Brown's affidavit never addresses the lack of authorization for Mr. Luby to perform services for the Baker Trusts.

would otherwise vest in the circuit courts if the Legislature were ever to enact the appropriate legislation. Section 6 (emphasis added); *Petitioners' Initial Brief*, p. 27. W.Va. Code § 44-3A-3(b) then basically tracks this broad Constitutional grant of power to county commissions by providing that fiduciary supervisors "have general supervision of all fiduciary matters and of the fiduciaries or personal representatives thereof and of all fiduciary commissioners and of all matters referred to such commissioners."[13] Id. (emphasis added). Undefined words used in legislative enactments "will be given their common, ordinary and accepted meaning." Syl. Pt. 2, in part, State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000), *quoting* Syl. Pt. 6, in part, State ex rel. Cohen v. Manchin, 175 W.Va. 525, 336 S.E.2d 171 (1984); Verizon Services Corporation v. Board of Review of Workforce West Virgina, 240 W.Va. 355, 361, 811 S.E.2d 885, 891 (2018); State ex rel. Youth Services Systems, Inc. v. Wilson, 204 W.Va. 637, 515 S.E.2d 594 (1999) (citing definition of "political subdivision" in Black's Law Dictionary 1043 (5th Ed. 1979). As defined in Webster's Third New International Dictionary (Unabridged) 54, (2002), "all" has several meanings, including "the whole amount," "the whole extent," and "every."[14] In other words, no task of supervision with respect to every fiduciary matter, and no task of supervision over every personal representatives like Respondent, is excluded from authority of a county's respective fiduciary supervisory under W.Va. Code § 44-3A-3(b).

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[13] It is hard to comprehend how much broader a grant of power and authority could be: not only the power to supervise all fiduciary matters, but also the power to supervise all personal representatives like Respondent.

[14] To paraphrase the Court in Thomas v. Firestone Tire and Rubber Co., 164 W.Va. 763, 266 S.E.2d 905, 909 (1980) (in construing the word "any"):

> We are impressed that the word ["all"] represents a fundamental and irreducible concept. It is a statute wrought from the letters [A, L and L]; a monument to an idea; an artistic rendering designed to signify a meaningful unit of English language. The Court is led to the unavoidable conclusion that the word ["all,]" when used in a statute, should be construed to mean, in a word, [all].

Thomas, 266 S.E.2d at 909.

To the extent, however, that Respondent is suggesting there is a conflict between the West Virginia Constitution's grant of authority to county commissions over "all" probate matters, (which, by virtue of W.Va. Code § 44-3A-3(b), is conferred on fiduciary supervisors with respect to fiduciary matters), and the provisions guiding the final settlement of accounts, such as W.Va. Code § 44-4-12, clearly the broader Constitutional grant prevails. Underwood Typewriter Co. v. Piggott, 60 W.Va. 532, 56 S.E. 664 (1906).

However, where there are conflicts in statutory provisions, they to be resolved by giving a reasonable construction to both so as to give effect to each. Syl. Pt. 2, in part, In Re Sorsby, 210 W.Va. 708, 559 S.E.2d 45 (2001). To the extent, then that, for example, W.Va. Code § 44-4-12 and W.Va. Code § 44-3A-3(b) may appear to conflict, reasonable construction of the introductory phrase "in settling the account" in W.Va. Code § 44-4-12 leads to a resolution of this supposed conflict. Thus, while W.Va. Code § 44-4-12 governs what is to occur at the final settlement of the account, it does not implicate the fiduciary supervisor's broad authority granted in W.Va. Code § 44-3A-3(b) to examine attorney fees for which an estate is purportedly liable for reasonableness at any other stage of the estate settlement process. Such construction gives meaning to both provisions. That this construction is sound in reasoning is also supported by Respondent's observation that W.Va. Code § 44-4-2, along with the long settlement form published by the Office of Fiduciary Supervisor of Kanawha County, West Virginia, calls for an executor of an estate to report disbursements, not unpaid invoices, at final settlement. That disbursements at final settlement are to be reported, however, does not limit the fiduciary supervisor from reviewing billed but unpaid invoices in the interim. Similarly, W.Va. Code § 44-4-6 establishes an orderly proceeding for objections to final settlements, which does not preclude receiving and acting upon interim objections. These statutory provisions, which establish what must be done and reported at

final settlement, as well as objections to those final settlements, contain no language restricting interim reviews of estate administration. Applying the well-established legal principle that entities such as county commissions are possessed of powers "reasonably and necessarily implied in the full and proper exercise of" powers expressly granted to them (Syl. Pt. 1, State ex rel. State Line Sparkler of WV, Ltd. v. Teach, 187 W.Va. 271, 418 S.E.2d 585 (1992), when a power granted is so broad as to authorize a fiduciary supervisor to exercise supervision over "all matters" fiduciary and over "all personal representatives," like Respondent, the only meaningful construction requires the conclusion that the supposed "restrictions" which Respondent claims operate in W.Va. Code §§ 44-4-2, 44-4-6 and 44-3A-3(b) do not restrict this broad exercise of authority as Respondent claims, because the "full and proper" exercise of authority over "all" matters on a certain topic logically cannot be accomplished by restrictions on that power.

The Fiduciary Supervisor and the County Commission have the authority to perform interim reviews of an executor's administration of an estate.[15] Thus, the Fiduciary Supervisor's consideration of the *Attorney Fee Motion*, and her rendering of her report for County Commission review and approval or rejection, was well within the powers she has been statutorily granted. The Circuit Court committed clear error in concluding otherwise.

VI. RESPONDENT'S DUE PROCESS RIGHTS WERE NOT VIOLATED

The Circuit Court's erroneously concluded Respondent's due process rights somehow were violated because the Fiduciary Supervisor supposedly did not have the authority to review the attorney fees that were not paid (but see Part V, *supra*), and because the Fiduciary Supervisor

[15] Again, applying the "common, ordinary and accepted meaning" of the word "supervision," fiduciary supervisors have the authority to manage, direct or oversee all fiduciary matters and personal representatives. Black's Law Dictionary 1576 (9TH Ed.) As Webster's defines it, fiduciary supervisors have the authority to direct, inspect and exercise critical oversight over all fiduciary matters and personal representatives, such as Respondent. Webster's Third New International Dictionary (Unabridged) 2296 (2002). Clearly, being authorized to inspect "all" fiduciary matters encompasses the entirety of the administrative process, not just the end at the final settlement.

supposedly failed to give Respondent proper notice and a right to be heard regarding the 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* submitted by Petitioners' counsel ("*Fiduciary Supervisor Order*"). However, W.Va. Code § 44-3A-2 explicitly states that fiduciary supervisors are not vested "with judicial power." The office of fiduciary supervisor has been

> created to aid and assist the county commission in the proper and expeditious performance of the duties of such commissions with respect to the administration of estates and trusts and every order or finding of any fiduciary supervisor…shall be subject to confirmation and approval of the county commission.

Id. Furthermore, all fiduciary supervisor orders "shall…be considered for confirmation at the next regular or special session of the commission" and either confirmed or, if not confirmed, scheduled for a hearing. Id. It is clear that Petitioners addressed their motion, and sought relief from, the County Commission, not the Fiduciary Supervisor. AR 0038; AR0047. The County Commission then "sent" the *Attorney Fee Motion* to the Fiduciary Supervisor for assistance in its evaluation. AR0537-0538. The *Fiduciary Supervisor Order* involved in this appeal, then, constituted an advisory recommendation following the Fiduciary Supervisor's investigation into the issue. Respondent cites no authority contrary to Hoover v. Smith, 198 W.Va. 507, 482 S.E.2d 124 (1997), cited in *Petitioners' Initial Brief* at pages 12, 25 at fn. 20, holding that no due process rights attach to an investigatory stage where no legal rights are determined. Pursuant to W.Va. Code § 44-3A-2, a determination is made solely by the county commission either upon acceptance of the fiduciary supervisor's recommendation after review of the matter, or following a hearing held by the county commission if not accepted.

Respondent requested a hearing before the County Commission, which he received on April 23, 2021 (AR0542) ("County Commission Hearing") to urge it to not adopt the *Fiduciary*

Supervisor Order. As discussed in *Petitioners' Initial Brief*, Respondent failed to address the issues about which he now complains at that hearing. He continued to rely on nothing more than outlining all the work that supposedly had to be done to obtain the allocations from the Baker Trusts to administer the Estate, never once addressing the elephants in the room, namely that Mr. Luby had never been authorized by the Baker Trusts to perform that work, that Respondent had no authority to engage him to do so, and that nearly $600,000.00 in attorney fees for this unauthorized work had been billed to the Estate. Despite, as discussed in *Petitioners' Initial Brief* at pages 24-25, having been given four (4) notices and having participated in two (2) hearings in which the Estate's responsibility for the disputed attorney fees, because of lack of authorization from the Baker Trusts, was front and center, neither Mr. Luby nor Respondent ever submitted evidence that such authorization had been given. That the County Commission was not satisfied with Respondent's presentation at the County Commission Hearing does not translate into denial of due process. At the stage where legal rights were to be determined before the County Commission, Respondent was given the hearing he requested.[16] It was incumbent upon him to successfully present his case based on evidence, which he failed to do.

At the Removal Hearing, counsel for Petitioners merely acknowledged that only the *Removal Petition* was being heard at that time, but never agreed that evidence relevant to the

[16] It should be noted that Respondent frames his arguments in reliance on West Virginia Code provisions applicable to the procedures for final account settlements. However, the review involved here was not a final account settlement and so any provisions concerning the process for final settlements do not control. Evidence was adduced at the Removal Hearing before the County Commission, which then made its decision based on that evidence (AR0693), clearly demonstrating the County Commission receives evidence. Respondent points to no evidence about how he was supposedly denied the opportunity to present evidence at the County Commission Hearing on his objection to the *Fiduciary Supervisor Order.* In fact, Respondent's Removal Hearing witness, Mr. Luby, was present at that hearing and spoke at length ass counsel for Steptoe & Johnson, PLLC (AR0452, AR0453), but neither he nor Respondent chose to present any evidence at that hearing, including having Mr. Luby sworn in to give evidentiary testimony. Respondent's cry of "foul" is groundless.

Attorney Fee Motion that might be elicited at the Removal Hearing could not be used in connection with the *Attorney Fee Motion*. Respondent's objection was quite limited:

> Mr. Tweel, with all due respect, I have – Mr. Tweel is going to testify about the issue of reasonableness of attorney fees, and I have – in my remarks, I have said that I don't believe that its appropriate for this body to consider the issue of the appropriateness of attorney fees in regard to removal. So I guess, I'm asking you to rule on that issue before Mr. Rodgers begins his direct examination.

AR0535-0536. Counsel for Petitioners responded to this objection by demonstrating that the reasonableness of the attorney fees was relevant to the *Removal Petition* even though the Attorney *Fee Motion* was not being heard that day. AR0536. Recognizing such relevancy, the County Commission overruled Respondent's objection. AR0537-0539. Nothing in either Respondent's objection, nor Petitioners' response to such objection, nor the County Commission's ruling on such objections, supports a conclusion that the evidence adduced at the Removal Hearing could not be used in connection with the *Attorney Fee Motion*.

Respondent concedes he was able to cross examine Petitioners' witnesses, but contends it was insufficient because it was not done at a hearing on the *Attorney Fee Motion*. This is a specious argument for at least four (4) reasons. First, it was the same issue in both matters. Second, any competent attorney would have been prepared to fully address the claim based on the unreasonableness of the attorney fees at the *Removal Petition* and been prepared to defend those fees, as mandated by Scotchel, because the unreasonableness of them clearly was at issue. Third, Respondent objected to and forewent the opportunity to engage in discovery. Fourth, he had eleven (11) months from the date of the Removal Hearing to the date the *Fiduciary Supervisor Order* was entered, to submit evidence countering the evidence attached to the *Attorney Fee Motion*, which he did not do, instead relying solely on argument in the two (2) objections/responses to the *Attorney Fee Motion* that he did file and Mr. Harmon's affidavit. AR0278; AR1522;

AR0681AR. That Respondent's trial tactics (his stance on discovery, not being prepared at the Removal Hearing to fully meet his burden that the attorney fees were reasonable, and ignoring the *Attorney Fee Motion* – and the evidence attached thereto - for eleven (11) months without submitting any counter evidence) backfired, does not create grounds to support his claim he was denied due process.[17]

In sum, the Circuit Court's determination that Respondent was denied due process is clearly erroneous.

VII. PETITIONERS PRESENTED SUFFICIENT PROBATIVE EVIDENCE SUPPORTING THE *COUNTY COMMISSION ORDER*

Mr. Luby admitted that his billing entries were vague, which he stated was a "huge mistake." AR0601. He also admitted work on the Administrative Tasks did not start until he received the valuation of J.C. Baker & Son, Inc. ("Baker, Inc."), by which time a "tremendous" (AR0470) amount of "extensive" (AR0304) work for the Baker Trusts had been done, amounting to hundreds of thousands of dollars in attorney fees that had been billed to the Estate, before work on the Administrative Tasks began in mid-September 2015! As discussed in Part III, pages 7-8, *supra*, Mr. Luby would have to be a magician to be able to accurately reconstruct how much of the attorney fees billed to the Estate as November 15, 2016, were actually for Estate work.[18]

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[17] Petitioners are totally perplexed as to the basis for Respondent's position, blindly adopted by the Circuit Court, that Respondent had no burden to submit evidence on the reasonableness of the attorney fees in opposition to the *Attorney Fee Motion* when Mr. Tweel's affidavit attached to, and incorporated into, the *Attorney Fee Motion,* clearly demonstrated their unreasonableness. As stated above, the proponent of the reasonableness of the attorney fees has the burden of proving they are reasonable; the *Attorney Fee Motion* and accompany affidavit gave well supported grounds and evidence for determining they were unreasonable; yet the Circuit Court improperly concluded Respondent supposedly had no duty to submit counter evidence in response to the *Attorney Fee Motion.*

[18] Mr. Luby explained away the shocking amount of attorney fees billed by testifying that when a file is, in essence, overworked, and a client complains, well, then, "that's something you negotiate, right? That's something you do." AR0602. Furthermore, Respondent himself testified that "they [Mr. Luby and Steptoe] never expected us to pay $600,000." AR0586. If it was never expected by anyone that the Estate would pay nearly $600,000.00 in attorney fees, why was that amount billed to the Estate? And why was no "discount" even suggested until there were complaints?

Resort to other evidence was necessary regarding the amount of attorney fees that would be reasonably expected to accomplish the Administrative Tasks because of the impossibility of determining exactly what amount had properly been incurred and billed. Accordingly, Mr. Tweel reviewed between 2,500 to 3,000 pages of documents provided by Mr. Luby (AR0540-0543), and determined, from his experience, that the administration and settlement of the Estate should have been completed for a cost of no more than $75,000.00 in attorney fees. Moreover, Mr. Tweel's conclusion was also based on his recognition that the attorney fee invoices covered Mr. Luby's extensive work for the Baker Trusts, which Mr. Luby was not authorized to do.

Petitioners unquestionably demonstrated that approximately $600,000.00 in attorney fees were highly unreasonable. They offered reasoned, supported evidence from a highly respected attorney with extensive estate administration experience skilled in "sizing up" what would be required to administer and settle an estate from a legal services point of view. The Fiduciary Supervisor and the County Commission properly accepted that evidence, as the same was set forth in both Mr. Tweel's Removal Hearing testimony and his affidavit attached to the *Attorney Fee Motion*.

In sum, the Circuit Court clearly erred in concluding that the uncontradicted evidence did not support the determination by the Fiduciary Supervisor and County Commission, that legal services for the Administrative Tasks in administering and settling the Estate should have cost a maximum of $75,000.00.

VIII. CONCLUSION

The Fiduciary Supervisor, granted broad authority over all fiduciary matters, was authorized to review the incurred attorney fee invoices, whether paid or not. The evidence clearly established the nearly $600,000.00 in attorney fees incurred by November 15, 2016 were

unreasonable, given that the bulk of the attorney fees were incurred for unauthorized legal services performed for the Baker Trust and given that, by that time, none of the legal services related to the Administrative Tasks had been started, let alone completed. Furthermore, the evidence also clearly established that a reasonable cost for legal services to administer and settle the Estate was $75,000.00. Respondent was not denied due process. He was aware from the *Removal Petition* that the issue of the reasonableness of the attorney fees billed by Mr. Luby would be part of the Removal Hearing, obligating him to defend those attorney fees. He had ample opportunity to submit evidence in opposition to the *Attorney Fee Motion*, but failed to do so. Respondent was afforded a hearing at the determinative stage before the County Commission on the *Attorney Fee Motion*, but did not present any evidence at that hearing. And there is no question but that the Circuit Court improperly considered matters (what Respondent refers to as the "Estate Litigation") outside the scope of what was before the Fiduciary Supervisor and County Commission. The Circuit Court clearly erred in reversing the *County Commission Order*. Therefore, Petitioners respectfully request that this Court reverse the *Circuit Court Order* and affirm the *County Commission Order.*

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

Defendants Below, Petitioners

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

Defendants Below, Petitioners.

v.

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

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

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, R. Terrance Rodgers, counsel for defendants below/petitioners Michael Baker and George Cameron Baker, as Trustees of the George C. Baker Trust Dated July 20, 2002, George Cameron Baker, and Susan Ann Baker, hereby certify that, on the 17th day of December, 2024, I filed *Petitioners' Reply To Respondents' Brief,* electronically, through File & ServeXpress, which will send the same to plaintiff below/respondent Daniel C. Cooper, as Executor of the Estate of George C. Baker, by email to Daniel C. Cooper at dan.cooper@cooperlawwv.com.

/s/ R. Terrance Rodgers
R. Terrance Rodgers