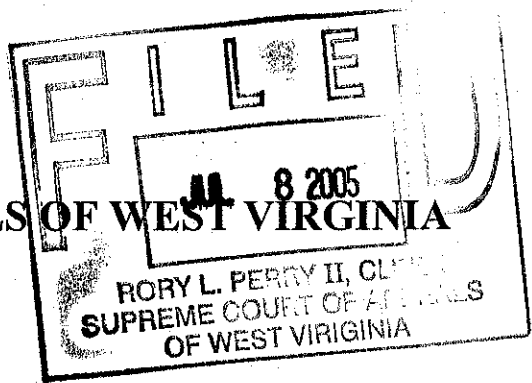


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



**NO. 32691**

**UNITED BANK, INC., as TRUSTEE  
of the ALBERT M. PRICE TRUST, Plaintiff below/Appellee,**

**v.**

**KENNETH N. DICKENS and RICHARD RANDALL  
LAMBERT, JR., et al., and Unknown Heirs of Albert M. Price, Jr.,  
Defendants below/Appellants,**

**and**

**KENNETH N. DICKENS and RICHARD RANDALL  
LAMBERT, JR., individually and on behalf of those similarly situated,  
Third-Party Plaintiffs below/Appellants,**

**v.**

**UNITED BANK, INC, a banking corporation  
Third-Party Defendant below/Appellee.**

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Honorable George W. Hill, Jr., Judge  
Circuit Court of Wood County  
Civil Action No. 03-C-0342

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**BRIEF OF APPELLEE**

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**I. PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS**

United Bank, Inc., the current Trustee of the Albert M. Price Trust (“Trustee” or “Appellee”) filed a Petition for Declaratory Judgment with the Wood County Circuit Court, Civil Action No. 03-C-342, on July 30, 2003, seeking declaratory relief pertaining to the Price Trust and naming numerous respondents. On October 15, 2003, two of the respondents, Kenneth N. Dickens and Richard Randall Lambert, Jr. (“Appellants”), filed a Complaint in Boone County Circuit Court, Civil Action No. 03-C-161, against the Trustee, alleging various torts with respect to the Trustee’s administration of the Price Trust. On December 2, 2003, the Wood County Circuit Court denied the motion of Appellants (and others) to dismiss the Trustee’s suit for improper venue.

On January 7, 2004, the Court below ordered the Appellants’ Boone County transferred to it. Thereafter, on January 30, 2004, the Trustee filed its motion for summary judgment as to both the declaratory judgment action and the Appellants’ tort claims. By Final Order entered July 21, 2004, the Wood County Circuit Court granted complete summary judgment in favor of the Trustee on both its petition for declaratory relief as well as the Appellants’ transferred tort claims. Thereafter, Appellants appealed.

The factual history began when Dr. Albert M. Price (“Dr. Price”) entered into a revocable trust agreement on April 4, 1957 (the original Price trust or “1957 Trust”), naming Kanawha Banking and Trust (“KB&T”) as the original trustee. The 1957 Trust was drafted by an attorney experienced in estate planning and taxation. Appellee is the successor to KB&T by a bank merger and acquisition. The 1957 trust directed the trustee to distribute the income from the trust to the grantor’s sisters. Dr. Price retained the right to direct the trustee, at any time within ten years, to distribute the trust estate to himself.

Upon his death, the corpus of the trust could be invaded if necessary in the event of the sickness, incapacitation, or destitute circumstances of his sisters. Upon the last sister's death, Dr. Price directed that the trust be administered as a perpetual charitable trust to provide college scholarships.

In 1968, Dr. Price executed a pourover will whereby assets passed at his death into the 1957 trust. In 1969, he executed a supplemental agreement of trust. Referring to the scholarships created under the original Price trust, Dr. Price directed that "[s]aid scholarships shall be awarded under reasonable rules and regulations to be prescribed by the Trustee except that first priority and consideration shall be given to the qualified blood relatives of the Grantor..." See pp. 4-5, Sec. 3 of the 1969 supplemental agreement of trust. In addition, the 1957 Trust, as amended, was made irrevocable.

At the time of Dr. Price's death on November 6, 1976, he was survived by, among other heirs, three sisters. His will, as well as a handwritten codicil, was admitted to probate in Boone County, West Virginia, and KB&T was appointed as executor of the estate by the Boone County Commission on November 18, 1976.

In his will, Dr. Price directed that his residuary estate pass to the trust established in 1957, as amended in 1969. KB&T, as executor, realizing that changes enacted by the 1969 Tax Reform Act would prevent the trust from qualifying as a charitable trust for federal estate tax purposes, and thus result in significant estate tax being paid, petitioned the Boone County Circuit Court in 1977 for a determination of the appropriate course of action. Judge Cook found:

"It was the intent and purpose of the testator that the bequest and devise of the residue of his estate to the 1957 trust as amended would constitute a charitable gift deductible for federal estate tax purposes and that the remainder interest in the trust being

dedicated to educational purposes would constitute a charitable trust exempt from federal income taxation.”

Recognizing that inclusion of the preference for blood relatives would compel the Trustee to pay federal income tax, in 1978 Judge Cook ordered the executor to place the residuary estate in a new, court-created, modified trust without such preference.

Ten years later, Dr. Price’s last surviving sister died, and the scholarship phase of each trust began. The 1957 Trust’s preference for qualified blood relatives constituted an impermissible discriminatory provision that would disqualify the trust as a charitable trust. Accordingly, Appellee, which had just recently acquired KB&T and become the new Trustee, sought to address this problem and conform the operation of the trust to the grantor’s intent. On the advice of counsel, the Trustee cleansed the 1957 Trust, as amended in 1969, pursuant to West Virginia Code §35-2-9 (1971), which provided a mechanism to remove the impermissible preference for blood relatives by deeming it a charitable trust and altering it accordingly, thereby being consistent with the 1977 changes for purposes of preserving the Trust’s tax exempt status. After the 1988 cleansing of the preference for qualified blood relatives, the two trusts were substantially the same. Thus, based upon the advice of counsel and in order to reduce administrative costs, the Trustee combined the corpus of the two trusts (the “Trust” or “Price Trust.”)

Fifteen years passed (1988-2003) without incident. Then, in 2003, certain individuals who were distantly related to the late Dr. Price (Appellants being chief among them) approached the Trustee and questioned the Trustee’s administration of the Trust. After a meeting with these individuals, it became clear to the Trustee that litigation would be necessary in order to dispel the notion that the Trust had somehow been improperly administered. Accordingly, the Trustee, since it administered the Trust from its Wood

County headquarters, filed a Petition and Amended Petition for Declaratory Judgment in July 2003 with the Wood County Circuit Court seeking a declaration that the Trustee had properly construed and administered the Price Trust, specifically in its interpretation of the phrase "qualified blood relatives" as the same had been used in Trust documents, and for a determination of trust beneficiaries.

Three months later, while the Wood County litigation was pending, Appellants, being two of the named respondents to the Wood County declaratory judgment action, filed a separate Complaint in Boone County Circuit Court against the Trustee alleging various torts with respect to the Trustee's administration of the Price Trust. The Wood County Circuit Court, being the court where the first litigation was filed, ordered the subsequent Boone County litigation transferred to it and consolidated with the first filed Wood County action pursuant to W. Va. R. Civ. Pro. 42(b).

In October 2003, the Court below heard the Appellants' Motion to Dismiss for Improper Venue and found venue to be proper in Wood County as the Trustee is headquartered in Wood County and the Trust is administered in Wood County. While Appellants assert that the Court had only the Trustee's assertions to this effect, an Affidavit of Jane Sargent, vice-president, attested to this fact. The Affidavit was filed on or about November 5, 2003, with the Court in connection with the Trustee's Motion to Transfer the second-filed Boone County civil action to Wood County. The Court did not enter its Order denying the Motion to Dismiss for Improper Venue until December 2003, a month after the Affidavit had been filed with the Court. The Order properly made findings and conclusions on the issue of the propriety of venue in Wood County.

In February 2003, the Trustee filed its Motion for Summary Judgment. After a full briefing and hearing in April 2003, the Court below granted complete summary judgment to the Trustee with respect to both civil actions. The grounds for the motion, adopted by the Court in its Final Order, included the following.

The Trustee maintained that none of the respondents below (including Appellants) suffered any recoverable damage from the deletion of the preference; that the only surviving *potential* member of the class of qualified “blood relatives,” as the term is legally defined was a non-answering respondent; and that the trust should continue to operate as a perpetual charitable trust without the preference for qualified blood relatives. Additionally, the Trustee maintained that the respondents below had no standing to assert any claims regarding the administration of the Price Trust. Since the trust is a charitable trust, the proper means of enforcement was instead through a suit brought by a public representative, typically the state Attorney General, not private individuals.

The crux of this case arises from a provision in the 1969 Supplemental Agreement of Trust, which amended the original Price Trust by creating a preference for qualified “blood relatives” of the grantor in the scholarship phase. Thus, the court below had to determine if “blood relatives” had a legal meaning and, if so, what the phrase meant as used in the Price Trust.

In their complaint/counterclaim, Appellants claimed that the meaning of the term “blood relatives” was “ambiguous” and, “[u]pon information and belief of the Plaintiffs, the term ‘blood relatives’ means all living persons who descend from the parents of Albert M. Price as common ancestors.” Appellants ignored, however, the provision of the original trust document which expressed only a *preference for qualified blood*

relatives with respect to the awarding of scholarships. Nowhere in the trust documents is there any indication that the grantor wanted the trust to award scholarships to "all living persons who descend from the parents of Albert M. Price as common ancestors."

Upon the Trustee's motion for summary judgment, the Court below held that the definition of the term "blood relatives" was not ambiguous, but instead has a well-established legal meaning, which is restricted to those individuals who would have taken under the statutes of descent and distribution in effect at the time of Dr. Price's death. As a result of applying the legal definition, the Court found that the term "blood relatives" of Dr. Price currently includes only one living person, Patricia Lee Milam, who did not appear although she had been served with Summons and Complaint.

It is important at this juncture to again stress that the Price Trust never provided for automatic payouts to any relatives of Dr. Price or any persons at all. The purpose of the Trust was to establish educational scholarships at two certain colleges. The Trust further, as originally written, provided only a series of *preferences* for the awarding of those scholarships. These preferences were simply precatory in nature, and were later determined by the Trustee in 1988 to be fatal to the Trust's tax exempt status unless they were rescinded. In any event, there was no automatic award of any scholarship to any type of possible relative. Thus, the fact that Appellants think they have some "claim" to trust funds or can assert that the educational trust was somehow not charitable in nature and was meant to automatically and directly benefit all "blood relatives" as defined by Appellants to mean any possible descendant of Dr. Price's parents (since Dr. Price left no lineal descendants) is, to use Appellants' terminology, "ludicrous."

Accordingly, a second basis for summary judgment, pertaining to the action originally filed in Boone County and transferred to Wood County, is the lack of standing in the part of the Petitioners to bring suit to enforce a charitable trust. The Price Trust is and has been operated as a charitable trust, having been cleansed of the blood relative preference by the trustee pursuant to W. Va. Code § 35-2-9 (1971) in order to carry out the testator's intent. As such, mere *potential* beneficiaries of a charitable trust, such as Petitioners, lack legal standing to enforce the trust.

## II. POINTS AND AUTHORITIES RELIED UPON

### CASES:

*Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 133 S.E.2d 770 (W. Va. 1963)

*Baer v. Forbes*, 36 S.E. 364 (W.Va. 1900)

*Brawford v. Wolfe*, 15 S.W. 426 (Mo. 1891)

*Chrystal L.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

*Conley v. Spillers*, 171 W.Va. 584, 301 S.E.2d 216 (1983)

*Couch v. Eastham*, 3 S.E. 23 (W.Va. 1887)

*Darcy v. Kelley*, 26 N.E. 1110 (Mass. 1890)

*Findley v. State Farm Mutual*, 213 W.Va. 80, 576 S.E.2d 807 (2002)

*First National Bank of Cincinnati v. Gaines*, 237 N.E. 2d 182 (Oh. Prob. Ct. 1967)

*Floyd v. Equitable Life Assurance Soc'y*, 264 S.E.2d 648 (W. Va. 1980)

*French v. French*, 14 W.Va. 458 (1818)

*Gallaher v. Gallaher*, 146 S.E. 623, 624 (W. Va. 1929)

*Gardner v. Gardner*, 144 W.Va. 630, 110 S.E.2d 495 (1995)

*Goetz v. Old National Bank of Martinsburg*, 140 W.Va. 422, 84 S.E.2d 759 (1954)

*Graham v. Graham*, 23 W. Va. 36, Syl. Pt. 14 (1883)

*Haba v. Big Arm Bar & Grill*, 196 W.Va. 129, 468 S.E.2d 915 (1996)

*Harding v. Glyn*, 1 Atk. 469, 26 English Reports 299 (1739)

*Hedrick v. Mosser*, 591 S.E.2d 191 (W.Va. 2003)

*Hubbard v. State Farm Indem. Co.*, 213 W.Va. 542, 584 S.E.2d 176 (2003)

*Hobbs v. Brenneman*, 118 S.E. 546, 549 (W. Va. 1923)

*In Re: Charles L. McCune*, 705 A.2d 861, 865 (Pa. 1997)

*In Re: Tinker's Estate*, 215 P. 779 (Ok. 1923)

*In Re: Wehr's Trust*, 152 N.W.2d 868 (Wis. 1967)

*Kania v. Chatham*, 254 S.E.2d 528 (N.C. 1979)

*Kubiczky v. Wesbanco Bank Wheeling*, 641 S.E.2d 334 (W.Va. 2000)

*McCullough Oil, Inc. v. Rezek*, 346 S.E.2d 788 (W. Va. 1986)

*MacDonald v. Long*, 100 W.Va. 551, 131 S.E.2d 252 (1926)

*Moore v. Sun Lumber Co.*, 166 W.Va. 735, 276 S.E.2d 797 (1981)

*New Hampshire v. Maine*, 532 U.S. 750 (2001)

*Painter v. Peavy*, 451 S.E.2d 755, 758 (W. Va. 1994)

*Security Nat'l Bank and Trust Co. v. Willim*, 158 S.E.2d 715, 720 (W. Va. 1968)

*Sheehan v. Wesbanco Bank Wheeling*, 233 B.R. 358, 364 (Bankr. N.D. W. Va. 1999)

*Shellberg v. Shellberg*, 428 S.W.2d 112 (Tex. Civ. App. 1968)

Syl. Pt. 4, *Shobe v. Latimer*, 162 W.Va. 779, 253 S.E.2d 54 (1979)

*Steenek v. University of Bridgeport*, 668 A.2d 688 (Conn. 1995)

*Sticklen v. Kittle*, 168 W.Va. 147, 287 S.E. 2d 148 (1981)

*Strout v. Strout*, 104 A. 577 (Me. 1918)

*Tichenor v. Brewer's Ex'r.*, 33 S.W. 86 (Ky. 1895)

*Transamerica Occidental Life Ins. Co. v. Burke*, 368 S.E.2d 301 (W. Va. 1988)

*Tuthill v. George S. May International Co.*, 285 N.Y.S.2d 317, 55 Misc.2d 542, *aff'd* 296 N.Y.S.2d 1021, 31 App. Div.2d 721 (1968)

*Waldron v. Taylor*, 45 S.E. 336 (W.Va. 1902)

*Wheeling Dollar Savings and Trust Co. v. Hanes*, 237 S.E.2d 499 (W.Va. 1977)

*Wheeling Dollar Savings & Trust Co. v. Singer*, 250 S.E.2d 369 (W.Va. 1978)

*Williams v. Precision Coal, Inc.*, 459 S.E.2d 329 (1995)

*W.Va. DOT v. Robertson*, \_\_\_ S.E.2d \_\_\_, 2005 W.Va. LEXIS 28 (W.Va. 2005)

*Wyatt v. Norris*, 66 S.E. 1016 (W.Va. 1910)

#### **TREATISES:**

4A Scott, supra at 3012; 15 Am. Jur. 2d *Charities*, sec. 150 (1976). Id. at 292

96 C.J.S. *Wills* §919 "Relations" (2001)

96 C.J.S. *Wills* §920 "Relatives" (2001)

Bogert, The Law of Trusts and Trustees §870 (Rev. 2d ed. 1995)

Bogert, TRUSTS AND TRUSTEES (2d Rev. 1991), § 411, pp. 2-3

WILLIAM J. BOWE AND DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS §34.25  
"Relatives, relations, kindred, etc." (3<sup>rd</sup> ed. 1961)

WILLIAM F. FRATCHER, SCOTT ON TRUSTS, § 391, p. 370-71 (1989)

J. Kraut, Annotation, *Meaning of Term "Relatives" or "Relations" Employed in Will*, 5  
A.L.R.3d 715 (1993)

RESTATEMENT OF THE LAW, PROPERTY §307 (1940)

RESTATEMENT OF THE LAW, SECOND, TRUSTS § 391 (1959)

GEORGE P. SMITH, JR., HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND  
WEST VIRGINIA § 265(3) "Technical Words" (3<sup>rd</sup> ed. 1986)

**CODES:**

West Virginia Code § 35-2-2  
West Virginia Code § 35-2-9  
West Virginia Code § 42-1-1  
West Virginia Code § 42-1-3  
West Virginia Code § 56-1-1

**III. ISSUES PRESENTED**

1. Did the Circuit Court properly grant summary judgment to the Trustee on its declaratory judgment action seeking Court declaration that the Trust had been properly administered with respect to its "blood relatives" preference in the awarding of college scholarships and that estoppel did not apply?

2. Did the Circuit Court properly grant summary judgment to the Trustee on the Appellants' counterclaim when the Appellants failed to properly plead their legal standing to assert tort claims against the Trustee?

3. Did the Circuit Court properly find venue of the civil action would lie in the Circuit Court of Wood County, as said county is the site of the Trustee's headquarters and the location of the Trust's administration?

**IV. DISCUSSION OF LAW**

As noted, this case represents the consolidation of a declaratory judgment action filed by the Trustee in Wood County Circuit Court and a breach of fiduciary duty action later filed by the appellants in Boone County Circuit Court and transferred to Wood County. There are therefore two causes of action: (1) a suit by the Trustee asking the Court to declare the meaning of "blood relatives" and whether the Trustee's administration of the Price Trust has been appropriate under the circumstances, and (2) a suit by the Appellants attempting to allege money damages for a breach of fiduciary duty.

The declaratory judgment portion requires consideration of legal terminology such as “blood relatives” and legal theories such as “judicial estoppel” and venue. The Appellant’s counterclaim for money damages, however, can be neatly resolved through the consideration of legal standing, as anyone asserting a cause of action must first have legal standing to do so. Regardless of how “blood relatives” is defined, or whether judicial estoppel has any application to the analysis of defining a qualified “blood relative,” and even assuming, *arguendo*, the Appellants to be “qualified blood relatives” under the Price Trust, they still have not asserted the requisite injury or interest in order to claim money damages to make their transferred Boone County civil action a viable counterclaim to the Wood County declaratory judgment action.

**A. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE TRUSTEE ON ITS PETITION FOR DECLARATORY RELIEF**

Rule 56 of the West Virginia Rules of Civil Procedure provides that summary judgment is proper when the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See e.g., *Floyd v. Equitable Life Assurance Soc’y*, 264 S.E.2d 648 (W. Va. 1980). The Court below properly granted summary judgment in favor of the Trustee because the proper construction of the term “blood relatives” as used in the Price Trust was a matter of law, not a question of fact. The caselaw supports the conclusion that the term “blood relatives” is a technical legal term that means those persons who would take under the statutes of descent and distribution in case of intestacy. This construction can be applied with even greater confidence since the trust instrument invoking the term was prepared by an attorney. Since a preference for blood relatives would create a private trust, the

beneficiaries must be definite and certain and the rule against perpetuities must not be violated. The only way to achieve this result and effectuate the grantor's intent is to give the term "blood relatives" its legal meaning.

**1. THE TERM "BLOOD RELATIVES" AS USED IN THE 1969 SUPPLEMENTAL AGREEMENT OF TRUST, HAS A LEGAL MEANING THAT LIMITS THE CLASS TO THOSE INDIVIDUALS WHO WOULD HAVE TAKEN UNDER THE INTESTACY STATUTES AT THE TIME OF THE GRANTOR'S DEATH.**

The 1969 Supplemental Agreement of Trust stated that a preference would be given to the grantor's qualified "blood relatives" in the awarding of scholarships. The term "relatives" has a well-established legal meaning. Countless cases and treatises have construed the term "relatives," thereby giving the term an established legal meaning. Among these sources, the leading treatise on wills, estate administration and trust administration in West Virginia and Virginia expresses that "...[i]n a legal sense, the word is generally confined in meaning to such persons as would take under the statutes of distribution." GEORGE P. SMITH, JR., HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA § 282 "Relatives" (3<sup>rd</sup> ed. 1986) (Emphasis added).

Another reputable treatise notes, "The primary meaning of 'relatives' or 'relations' includes such persons as would take under the statutes of descent and distribution if testator had died intestate." WILLIAM J. BOWE AND DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS §34.25 "Relatives, relations, kindred, etc." (3<sup>rd</sup> ed. 1961) (Emphasis added). The authors cite 24 cases in support of this principle.

In an American Law Report article compiling cases that have addressed this issue, the author concluded that "[i]t has been held in a great number of cases that the word 'relatives' or 'relations' when used in a will is presumably used in a restricted sense to

mean relatives or relations who are heirs or next of kin under the statutes of descent and distribution". J. Kraut, Annotation, *Meaning of Term "Relatives" or "Relations" Employed in Will*, 5 A.L.R.3d 715 (1993) (Emphasis added). The author cites 37 cases from 17 states in support, in addition to 20 cases from England and Canada.

"Where the word 'relatives' is used in a will in designating beneficiaries, the testator is presumed to have used the term in its legal meaning, or restricted sense." 96 C.J.S. *Wills* §920 "Relatives" (2001), citing *In re Trickett's Estate*, 239 P. 406 (Cal. 1925); *In re Bernheim's Estate*, 266 P. 378 (Mont. 1928); *In re Gilchrist's Estate*, 58 P.2d 431 (Wyo. 1936); *Futrell v. Estate of Vaughn*, 586 So.2d 68 (Fla. Dist. Ct. App. 2d Dist. 1991). "The word 'relations,' when used in a devise or bequest means those who, in case of intestacy would take under the statutes of distribution as next of kin." 96 C.J.S. *Wills* §919 "Relations" (2001).

The original Restatement of Property established that, "[w]hen a limitation is in favor of the 'next of kin' or 'relatives' of a designated person, or is in other words of similar import, then, unless a contrary intent of the conveyer is found from additional language or circumstances, the persons so described by the limitation as conveyees are those who under the applicable local law would succeed to the personal property of the designated ancestor if such ancestor died intestate." RESTATEMENT OF THE LAW, PROPERTY §307 (1940). The latest Restatement of Trusts discusses the definition of the term "relative" and construes the term as referring to "the heirs of the designated person." RESTATEMENT OF THE LAW, THIRD, TRUSTS § 45, comment d (2003).

"A designation of the beneficiaries by the term 'heirs' or 'heirs at law' is sufficiently certain, construing such term to mean those who would take under the

statutes of descent and distribution, and unless the trust instrument discloses a plain purpose to the contrary, the words 'relatives' or 'relations' may be similarly construed." 76 AM JUR 2D *Trusts* § 63 (1992).

An early West Virginia case cited the case of *Darcy v. Kelley*, 26 N.E. 1110 (Mass. 1890), where the court, construing a trust clause naming "poor relatives" as beneficiaries, stated that "[i]f it is a private trust, [the] poor relatives, inasmuch as there has been no selection by the trustees mentioned in the will, are those who would take under the statute of distributions..." *Gallaher v. Gallaher*, 146 S.E. 623, 624 (W. Va. 1929) (dicta) (emphasis added).

The legal meaning of the term "relatives" can be traced back at least as early as 1739 to the English case of *Harding v. Glyn*, 1 Atk. 469, 26 English Reports 299 (1739). In that case, the court stated that the word "relatives" when used in a will was confined to those individuals who would take under the statutes of distributions. The court cited an additional 12 cases that had held the same. Therefore, for almost three centuries, the courts in England and then the United States have construed the term "relatives" to mean those that would take under the statutes in case of intestacy. "Blood relatives" would therefore be an even more restrictive term.

It is a well-settled rule of construction of wills and trust instruments that technical words, like "blood relatives," ordinarily must be given their legal meaning. Technical words are words that "have a reasonably defined legal meaning." *Hobbs v. Brenneman*, 118 S.E. 546, 549 (W. Va. 1923). See also, GEORGE P. SMITH, JR., HARRISON ON WILLS AND ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA § 265(3) (3<sup>rd</sup> ed. 1986) ("Technical words are such as from a long line of decisions have acquired a judicial

meaning.”). The foregoing authorities overwhelmingly demonstrate that the term “blood relatives” has such a “reasonably defined legal meaning” and is limited to the class of individuals that would take under the statutes of descent and distribution in case of intestacy. Since the term has an established legal meaning, that meaning should prevail.

In *Sheehan v. Wesbanco Bank Wheeling*, 233 B.R. 358, 364 (Bankr. N.D. W. Va. 1999), the court stated the familiar rule that “[i]n construing a will, all words are presumed to have been used in a technical sense and should ordinarily be given their strict meaning.” Clearly, the law in West Virginia is that technical terms in a written instrument must be given their technical meaning unless a contrary intent appears on the face of the instrument.

Since the term “blood relatives” has an established legal meaning, the term as used by the grantor in this trust should be construed accordingly. The burden to prove that the grantor meant to use the term “blood relatives” in a sense other than in its technical sense lies with the party urging a different meaning. Furthermore, in *Hobbs v. Brenneman, supra*, the Court stated that in order to warrant an exception to the general rule that technical words should be given their technical meanings, an intention to use the term contrary to its legal meaning “must be found by necessary implication from the will expressed in its entirety.” *Hobbs*, 118 S.E. 546, 550 (W. Va. 1923). Therefore, in order to satisfy their burden of proof that Dr. Price intended to use the term “blood relatives” in any sense other than its technical legal meaning, Appellants would be required to prove that intention based on the necessary implication of the language of the Price Trust; extrinsic evidence would not be relevant or permissible. “By ‘necessary implication’ is meant a **probability of intention so strong that an intention contrary to it cannot be**

**imputed to the testator.**” *Id.*, (Emphasis added), quoting, *Graham v. Graham*, 23 W. Va. 36, Syl. Pt. 14 (1883).

In construing the term “relatives,” other courts have found that an interpretation encompassing all the hundreds, possibly thousands, of individuals related in any degree to a grantor or testator, would be nonsensical. “It would be astonishing to the ordinary person to find that by leaving a legacy to ‘relatives,’ he might thereby be leaving one to hundreds of persons.” *In re Gilchrist’s Estate*, 58 P.2d 431, 435 (Wyo. 1936).

West Virginia law supports the principle of giving greater weight to technical words used in an instrument drafted by an experienced attorney who later served as State Tax Commissioner, rather than a layperson. The distinction between construction of terms in an instrument drafted by an attorney rather than a layperson was noted in *Transamerica Occidental Life Ins. Co. v. Burke*, 368 S.E.2d 301, Syl Pt. 3 (W. Va. 1988), where the Court held that “[i]f a will was drafted by one who is not a lawyer, a court will be more inclined to assume that the will was written in the language of the lay person and will be more inclined to give effect to the language of the will in accordance with the subjective sense employed by the testator or testatrix, and not according to the technical meaning of the language.”

Since the term “relatives” has an established legal meaning, an attorney prepared the trust document, and legal terms are presumed to have been used in their technical sense, the grantor’s intent in using the term “blood relatives” is presumed to follow the definition recognized in the numerous treatises and cases cited above. No contrary intention appears on the face of the instruments at issue in this case, and so, no genuine issue of material fact can be raised.

It is important to note that, despite prior briefings to this Court and the lower court, Appellants still have not cited a single case disagreeing with the many cases cited by the Trustee that “blood relatives” means heirs at law.

Appellants instead, argue that “blood relatives” is legally equivalent to the term “descendants” and that the term descendants would include issue of the testator’s brothers and sisters into perpetuity. Appellants’ theory on the legal meaning of “blood relatives” as “descendants” is simply wrong. Courts have uniformly held that descendants are those who have descended from another, such as a child or grandchild, to the remotest degree.

For example, Harrison on Wills §280 (3<sup>rd</sup> ed. 1986) states:

A descendant is one who descends as offspring, however remotely, correlative to the ancestor or ascendant.

Black’s Law Dictionary (8<sup>th</sup> Ed. 2004) at 476 (the current version to which Appellants do not cite) defines “descendant” as:

One who follows in lineage, in direct (*not collateral*) descent from a person. (Emphasis added).

W.Va. Code 42-1-1(5) defines the term as:

“Descendant” of an individual means all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this code.

Indeed, the Appellants’ unsupported position that the descendants of Dr. Price (of which there are none based on the traditional definition set forth above) somehow includes descendants of his collateral relatives (brothers and sisters) is in indirect conflict with the decision of West Virginia’s highest court in *Waldron v. Taylor*, 45 S.E. 336 (W.Va. 1902) which states at 328-329:

The same authority defines "descendants" as "those who have issued from an individual, including his children, grandchildren, and their children to the remotest degree." Ambl. 327; 2 Bro. Ch. 30, 230; 1 Roper, Leg. 115; A. & E. E. of L. (2d Ed.) 399, gives the definition of descendant: "A person who is descended from another. Any one who proceeds from the body of another, however remotely, is a descendant of the latter. The word is the converse or opposite of 'ascendant,' rather than of 'ancestor.' Taking all these words in the legal technical sense 'descendants' cannot be construed to include any but lineal heirs without clear indication of a contrary intention. Thus the term does not include collateral relations nor ancestors." Page on Wills, § 527, says: "A descendant is one who descends as offspring, however remotely; correlative to ancestor or ascendant. The term includes the most remote lineal offspring, and is practically synonymous with 'issue' in its legal meaning; hence it excludes collateral relations; nor does it include relatives in the ascending line." In Baker v Baker, 8 Gray, 101, it is held: "The word 'descendants' in a will cannot be construed to include any but lineal heirs without clear indications in the will of the testator of his intention to extend it." And in Armstrong v. Moran, 1 Bradf. Sur. 314: "A legacy to a sister's child is not a legacy to a descendant of the testator's. By 'descendant' is not meant any relative to whom in some possible contingency property might descend, but lineal descendants – issue of the body." In Tichenor v. Brewer's Ex'r, 98 Ky. 349, 33 S. W. 86, "The word 'descendants' does not embrace collateral relations"; citing Rapalje & L. Dict.; Van Beuren v. Dash, 30 N.Y. 393, and Bouv. L. Dic.

...It does not embrace next of kin or heirs at law, for these phrases comprehend persons in the ascending line, and may also include collaterals. When the word 'descendant' is used in a will, it means only lineal heirs in the direct descending line from the person named, unless there is a clear indication of intention on the part of the testator to enlarge its meaning. It is a good term of description in a will."

...In Hamlin v. Osgood, 1 Redf. Sur. 409, it is held: "Brothers and sisters cannot take under the term 'descendants.' The term does not mean next of kin or heirs at law generally, but it means the issue of the body of the person named of every degree; as children, grandchildren, and great-grandchildren." (Emphasis added).

*Waldron, supra*, has been cited with approval on the precise point of the definition of the term “descendants” in *In re Tinker’s Estate*, 215 P. 779, 781-782 (Ok. 1923) and *First National Bank of Cincinnati v. Gaines*; 237 N.E. 2d 182, 190 (Oh.Prob.Ct. 1967).

Other authorities are just as clear that collateral relatives are not to be included in the term descendants. For example, see Page on Wills § 34.23 (2004) at 551 “[d]escendants does not include collateral relations”; C.J.S. Wills §910 (2001) at 339: “[I]t does not mean heirs of a person, including ancestors and collaterals,…” Restatement (Third Donative Transfers) of Property § 25.9 (1998); *In re Wehr’s Trust*, 152 N.W. 2d 868 (Wis. 1967) at 876 “It is common legal knowledge that ‘descendants’ do not include collateral relatives”; *Strout v. Strout*, 104 A.577 (Me. 1918) at 578 “or their descendants,” when used in a will, are construed to include only lineal heirs in the direct descending line.” *Tichenor v. Brewer’s Ex’r.*, 33 S.W. 86 (Ky. 1895); *Brawford v. Wolfe*, 15 S.W. 426 (Mo. 1891).

Appellants also suggest that discovery is necessary to arrive at the proper definition of “blood relatives.” Since the term “blood relatives” has an irrefutable definition equivalent to heirs at law, there is no need to unnecessarily prolong this matter. Extrinsic evidence is never admissible to vary the plain language of a will. *Wyatt v. Norris*, 66 S.E. 1016 (W.Va. 1910); *French v. French*, 14 W.Va. 458 (1818); *Couch v. Eastham*, 3 S.E. 23 (W.Va. 1887); *Baer v. Forbes*, 36 S.E. 364 (W.Va. 1900); Harrison on Wills § 269 (3<sup>rd</sup> ed. 1986). Additionally, Appellants fail to cite a single case that challenges the Trustee’s legal authority that “blood relatives” means “heirs at law.”

In the present case, the language of the Supplemental Agreement of Trust states, “First priority and consideration shall be given to qualified blood relatives of the

Grantor.” Despite the fact that Appellants have failed to cite a single authority to suggest that “blood relatives” is synonymous with “descendants,” and despite the fact that the word “descendants” is presumed to refer only to lineal descendants, Appellants argue that the language contained in the trust provides evidence of the grantor’s supposedly clear intent for “blood relatives” to include collateral descendants. Appellants cite *Security National Bank v. Willim*, 158 S.E.2d 715, 720 (W.Va. 1968) in support of their argument.

In *Willim*, the decedent left her estate to a deceased daughter’s daughter, Margaret, and if Margaret died without issue “then all of the property held in trust under this will . . . shall go to and pass to my brothers and sisters.” *Id.* at 717. This Court held in *Willim* that, contrary to the equity presumption in favor of early vesting, the use of the word “then” combined with other unambiguous language revealed the testator’s intent for her estate not to vest until the death of her granddaughter. *Id.* at 719.

While *Willim* held that a presumption in favor of strict meaning may be overcome by clear proof of the testator’s intent, the grantor in the present case did not provide clear proof of his intent to include collateral relatives. Unlike in *Willim*, the language of Dr. Price’s trust does not provide any unambiguous language that clearly revealing his intent for the words “blood relatives” to include collaterals. If Dr. Price intended to include collateral relatives as “blood relatives,” he could have easily included the words, “including the descendants of the Grantor’s brothers and sisters.” See *Hedrick v. Mosser*, 591 S.E.2d 191, 197 fn.1 (W.Va. 2003); *Kubiczky v. Wesbanco Bank Wheeling*, 541 S.E.2d 334, 341 (W.Va. 2000) (noting that if a decedent did not intend for a presumption to apply, he should have clearly expressed his intentions in his will). Thus, since there is

no language in the trust to the contrary, the word “descendants” must be given its usual meaning, which does not include collateral descendants.

Appellants further rely on dicta from the *Willim* opinion in their argument that the term “descendants” includes collateral descendants. In *Willim*, the Court found that the testator intended for her estate to be divided only among her blood relatives, which included her brothers and sisters and their children. *Id.* at 721. However, that conclusion does not mean that the term “blood relatives” include collateral relatives. Unlike the present case, the testator in *Willim* clearly stated in her trust that her estate may “pass to her brothers and sisters.” *Id.* In effect, the testator there defined her blood relatives. In addition, the trust in *Willim* did not include the words “blood relatives,” and the Court was not interpreting the words “blood relatives.” Moreover, *Willim* has never been cited as adopting the position that “blood relatives” includes collaterals. Thus, in the present case, the grantor’s use of the words “blood relatives” does not support the construction urged by Appellants, that “blood relatives” includes “collateral descendants.”

Appellants’ reliance on *Willim* is also flawed because *Willim* has been overruled on points relevant to this matter in two subsequent cases. In *Wheeling Dollar Savings and Trust Co. v. Hanes*, 237 S.E.2d 499, 501 (W.Va. 1977), the Court overruled *Willim* in part by holding that the provisions of a trust shall apply equally to adopted children and natural children. Thus, “descendants” includes both adopted and natural children, thereby enlarging who “descendants” are, but in no way altering the definition of “descendants” to mean “descending from a testator’s parents,” rather than descending from the testator himself. A testator may only exclude adopted children as beneficiaries if the testator specifically excludes them by unambiguous, explicit language. *Id.* The

following year, the Court overruled *Willim* again to allow equitably adopted children to be treated as natural children. *Wheeling Dollar Savings & Trust Co. v. Singer*, 250 S.E.2d 369, 372 (W.Va. 1978).

Thus, the Court's holdings in these two cases extend the meaning of the words "blood relatives" beyond natural children. However, these holdings cannot be read as an indication that the Court meant to include collateral descendants within the definition of "blood relatives" because neither case expands the definition of "blood relatives" any further than to adopted children of lineal descendants.

It is absurd for Appellants to claim that the term "blood relatives" in the Price Trust means "descendants." It is even more "absurd" for Appellants to argue that the term "blood relatives" as used in the Price Trust means "descendants of his [Dr. Price's] parents." Such argument is a complete fabrication and distortion of the Trust language.

The Trust, as amended, states in relevant part: "Said scholarships shall be awarded under reasonable rules and regulations to be prescribed by the Trustee, except that first priority and consideration shall be given to *qualified blood relatives of the Grantor*, regardless of the place of their residence . . . ." (Emphasis added.) The Trustee submits that absolutely nothing in this language in any way indicates that the Grantor could have possibly meant "descendants of his parents." If that was what was intended, why not simply say "qualified descendants of my parents"? He did not. He used the phrase "blood relatives" and the Trust he made was drafted by an experienced attorney and not a layman, hence the need for a *legal* definition of the legal term utilized. The language plainly states "blood relatives of the Grantor," not "descendants of my parents."

Accordingly, the Court below properly granted summary judgment in the Trustee's favor.

**2. JUDICIAL ESTOPPEL DOES NOT APPLY.**

Appellants argue that the determination of the legal meaning of the term "blood relatives" should not have been addressed by the Circuit Court due to an alleged estoppel arising from the 1977 litigation wherein KB&T, in its capacity as the executor of the Price Estates, sought court approval to place the assets of Dr. Price's residuary estate into a trust that would qualify as a charitable trust for federal estate tax purposes, rather than the 1957 Trust. Appellants allege that the 1977 litigation forecloses a determination of the legal definition of "blood relatives" under the doctrines of both judicial estoppel and collateral estoppel. This is simply not true.

As set forth by Appellants, judicial estoppel bars an issue from being re-litigated when four elements are present: "(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." *W. Va. DOT v. Robertson*, \_\_\_ S.E.2d \_\_\_, 2005 W. Va. LEXIS 28 (W. Va., 2005). Strikingly, none of the four required elements of judicial estoppel is present in this case.

As an initial matter, it should be noted that the issue in this case is not a question of fact, but is instead a *question of law*- what is the legal meaning of the term "blood

relatives”? However, as Appellants note in their citation to *MacDonald v. Long*, 100 W.Va. 551, 131 S.E.2d 252 (1926), estoppel may arise in regards to inconsistent positions in the course of a suit “or series of suits in reference to the *same fact or state of facts*.” (Emphasis added). Appellants also cite *Gardner v. Gardner*, 144 W. Va. 630, 637, 110 S.E.2d 495, 500 (1995) for the proposition that “[a] direct specific *admission of fact* in a pleading is binding and conclusive on the party making it.” (Emphasis added). As explained in greater detail below, the issue addressed by the court in the 1977 litigation is substantially different than the issue presented in the 2003 declaratory judgment action; and importantly, the issue for consideration in the 2003 declaratory judgment action – the legal definition of the term “blood relatives” – is a *question of law* that was not before the Boone County Circuit Court in the 1977 litigation, and was never addressed or resolved in any judicial proceeding prior to the 2003 declaratory judgment action.

The first element that must be present for judicial estoppel to arise is that “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.” *Robertson, supra*. The 1977 litigation concerned a vastly different issue than the 2003 litigation. In the 1977 litigation, which was instituted eleven years before the scholarship phase of the trust even began, the executor of the Price Estates sought court blessing for the creation of a charitable remainder trust, whereas in the 2003 litigation, Appellee, as Trustee of the Price Trust, sought a declaration of the meaning of the term “blood relatives” and a declaration that the Price Trust was being administered properly despite the objections of certain distant, disgruntled relatives.

Appellants assert, however, that the question of “blood relatives” was addressed and determined in the 1977 litigation. The Plaintiff in the 1977 litigation, KB&T, executor of the Price Estate, did name various distant relatives of Dr. Price as respondents, just as Appellee, in its capacity as Trustee of the Price Trust, named various distant relatives of Dr. Price as Respondents in the 2003 declaratory judgment action. However, the Boone County Circuit Court never judicially determined the meaning of “blood relatives” as that term was used in the Price Trust. The phrase was never contested, litigated, or even at issue in the 1977 litigation. All that was at issue then was whether the Price Estate’s executor could establish a charitable remainder trust by judicial fiat for purposes of receiving the residuary estate, or whether those assets had to be poured into the 1957 Trust (as amended in 1969) as the language of Dr. Price’s will seemed to indicate. The Boone County Circuit Court, in its 1978 final order, blessed the creation of a charitable remainder trust. It never made any legal conclusions regarding the phrase “blood relatives,” as the phrase was a non-issue in the 1977 litigation.

The reason that the term “blood relatives” was a non-issue in the 1977 litigation was that the scholarship phase of the Price Trust (which was *when* the need for a definition of “blood relatives” would arise since “blood relatives” were to be given a preference for scholarships) *did not even begin until 11 years later in 1988 when the last of Dr. Price’s sisters died*. Until the death of the last surviving sister, there were zero scholarships permitted to be awarded, and therefore zero need for a judicial determination of the category of persons to be given a preference. Simply put, the term “blood relatives” was not before the court in the 1977 litigation.

This Court has noted that “one of the factors to consider under judicial estoppel is whether the party to be estopped ‘succeeded in persuading a court to accept that party’s earlier position . . . .’” *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 552 (W. Va., 2003), citing, *New Hampshire v. Maine*, 532 U.S. at 750, 121 S. Ct. at 1815, 149 L. Ed. 2d at 978 (2001). Yet, in the 1977 litigation, no position was expressed regarding how the term “blood relatives” should be interpreted for purposes of trust administration. This is abundantly clear based on the simple fact that it would be impossible to read the 1978 Order and come away with any understanding of who exactly should be included in the category of “blood relatives.” Certainly the 1978 Order does not state that the term “blood relatives” includes all collateral descendants, which is the construction of the term that is advocated by the Appellants. In fact, Appellant Kenneth N. Dickens, who upon information and belief was born in 1952, was not even a party to the 1977 action. Indeed, there are countless collateral descendants of Dr. Price that were not parties to the 1977 litigation. Are the collateral descendants that were living at the time of the 1977 action, yet not designated as “blood relatives” in the 1978 Order estopped to argue that “blood relatives” means all collateral descendants- not just those mentioned in the 1978 Order? The 1977 litigation should not constitute an estoppel as to the meaning of the term “blood relatives” because it was not at issue in the 1977 case, and there was no determination by the Boone County circuit court of the legal meaning of the term “blood relative.”

Not only was the issue involved in the 1977 litigation completely different than the issue involved in the 2003 declaratory judgment action, but Appellee, Trustee of the Price Trust, was not even a party to the 1977 litigation, which was instituted by KB&T, executor of the Price Estate, for a determination of the proper disposition of Dr. Price’s

residuary estate. This Court has noted that “[a] fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim.” *Haba v. Big Arm Bar & Grill*, 196 W. Va. 129, 135 (W. Va., 1996), citing, *Conley v. Spillers*, 171 W. Va. 584, Syl. Pt. 8, 301 S.E.2d 216 (1983). This same concern is present in the context of judicial estoppel. Several years after the 1977 litigation, Appellee acquired KB&T. Appellee was never even involved in Dr. Price’s estate. Appellee United Bank, in its capacity as Trustee of the Price Trust, was never a party to any litigation involving the Price Trust or the estate prior to the institution of the 2003 declaratory judgment action.

The second requirement that must be present for judicial estoppel to apply is that the inconsistent positions must have been taken in proceedings involving the same adverse party. *Robertson, supra*. This element also is not present under the circumstances. While there were 35 named defendants in the 1977 action, and 37 named defendants in the 2003 declaratory action, only 3 individuals were respondents or defendants in both suits. KB&, the Price Estate executor in 1977, appears to have listed numerous living relatives of Dr. Price at the time of his death so that any interest that they possibly had *in his residuary estate*, which constituted the asset at issue, would be included in the circuit court’s final order. Merely because KB&T, out of an abundance of caution, appears to have included every known relative of Dr. Price does not mean that the question of “blood relatives” as the phrase is used in the Trust was decided. Instead, the question then was whether the Executor could create a charitable remainder trust. *The 1957 Trust, as amended was not at issue in the 1977 litigation.* The 1957 Trust, as

amended, *is* at issue in the current litigation and requires a determination of the Trust's use of the phrase "blood relatives."

In the case at bar, Appellee also named as respondents as many living relatives of Dr. Price as has been made known to it to avoid multiple suits and has published notice of the pending litigation pursuant to an Order of Publication. Just because Appellee listed numerous distant relatives of Dr. Price, however, does not mean that the Trustee concedes they are "blood relatives" as the term is used in the Trust. That question is a question of law, and was the impetus for the declaratory action in the first place.

Thus, the adverse parties named by KB&T in its 1977 litigation are not the same as the adverse parties named by Appellee in its 2003 declaratory judgment action. In fact, neither Kenneth N. Dickens nor Richard Randall Lambert, Jr., the Appellants in the case *sub judici*, were adverse parties in the 1977 litigation. Thus, the second element required for judicial estoppel to arise is not present in this case.

The third element required for judicial estoppel is that "the party taking the inconsistent positions received some benefit from his/her original position." *Robertson, supra*. Again, as previously stated, Appellee's position regarding the legal meaning of the term "blood relatives" is not inconsistent with any position that was addressed in the 1977 litigation, and the party involved in the 1977 litigation was KB&T, the executor of the Price estate, not Appellee, the Trustee of the Price Trust. Nonetheless, Appellee did not receive any benefit from the allegedly inconsistent position taken by KB&T in the 1977 litigation. Appellee's only interest is to properly fulfill its fiduciary duty.<sup>1</sup> In fact,

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<sup>1</sup> Indeed, Appellee's interest in properly administering the Price Trust in the manner intended by Dr. Price is the very reason that the blood relative preference was stricken from the 1957 trust. In 1988 when the scholarship phase of the Trust was to begin, Attorney David Higgins advised the Trustee that the blood relative preference could be stricken pursuant to W. Va. Code §35-2-9. This would make the Trust a

the cleansing of the blood relative provision and the combination of the two separate trusts into a single trust that fulfilled the intent of the grantor to establish a tax exempt charitable trust, was certainly not in the pecuniary interest of Appellee, as it reduced administrative costs. However, since the Trustee acted only in furtherance of its fiduciary duties, not in the interests of the Trustee's own pecuniary interests, Appellee certainly did not receive any benefit based upon the position allegedly taken by KB&T in the 1977 litigation.

The fourth and final element that must be present for the application of judicial estoppel is that "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." *Robertson, supra*. Appellants, who (like Appellee) were not parties to the 1977 litigation, are not injuriously impacted by Appellee's attempt to determine the proper legal definition of the term "blood relatives." Even if the Appellants or the other Respondents named in the case below could establish that they are properly includable in the category of "blood relatives," they have not alleged that they otherwise qualified to receive scholarships, that they applied and were admitted to either Warren Junior College or Berea College, or that they even applied for a scholarship.

The 2003 declaratory judgment action also does not threaten the integrity of the judicial process. The 1977 litigation, brought by KB&T as executor of the Price estate, addressed the proper disposition of Dr. Price's residuary estate, and occurred over a

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charitable trust, exempt from federal income taxation and would carry out the overarching intent of the Grantor—the creation of a charitable trust. Indeed, the more valid claim for a breach of fiduciary duty would be if the Trustee did not avail itself of the opportunity to comply with exemption requirements and needlessly allowed the trust assets to be depleted by a tax liability that could be properly avoided.

decade before the scholarship phase of the trust even began. There is no way that the Trustee could refer to the 1978 order and reasonably conclude how to determine who should be included in the phrase "blood relatives," because that issue was not raised and not litigated in the 1977 Boone County action. Of the four elements required for the application of the doctrine of judicial estoppel, none are present in this case.

### 3. COLLATERAL ESTOPPEL DOES NOT APPLY.

Appellants also argue that collateral estoppel bars Appellee from obtaining a declaration of the legal meaning of the term "blood relative." As stated by Appellants, three elements must be present for collateral estoppel to arise: "the issue decided in the prior adjudication must be the same as the one sought to be relitigated in the second action; the first action must have resulted in a final judgment on the merits; and the party against whom the estoppel is asserted must have been a party, or in privity to a party, in the prior action." Moore v. Sun Lumber Co., 166 W. Va. 735, 276 S.E.2d 797 (W. Va., 1981). Collateral estoppel does not arise in this case for the same reasons that judicial estoppel does not arise. The issue of the legal meaning of the term "blood relatives" was never litigated prior to the 2003 declaratory judgment action. There was no final judgment on the merits in the 1977 litigation as to the issue of the legal meaning of the term "blood relatives." Finally, KB&T *as executor* brought the 1977 litigation, while the 2003 declaratory judgment action was brought by Appellee, Trustee of the Price Trust.

Therefore, as none of the elements necessary for judicial estoppel or collateral estoppel are present, it was proper for the circuit court to make a determination of the legal meaning of the term "blood relatives."

**B. APPELLANTS HAVE NO STANDING TO SUE THE TRUSTEE OF A CHARITABLE TRUST.**

In order to assert a cause of action, the asserting party must have standing to do so. “Generally, standing is defined as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Findley v. State Farm Mutual*, 213 W.Va. 80, 576 S.E.2d 807 (2002). According to *Findley*:

Standing . . . is comprised of three elements: First, the party . . . [attempting to establish standing] must have suffered an “injury-in-fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, *it must be likely that the injury will be redressed through a favorable decision of the court.*” (citations omitted)

Furthermore, [s]tanding does not refer simply to a party’s capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. *Id.* at 821.

Appellants have asserted various tort causes of actions against the Trustee, including claims for breach of fiduciary duty, conversion, mismanagement, contempt, and a request for removal of trustee. These claims constitute a counterclaim to the first-filed declaratory judgment action concerning the Albert M. Price Trust that the Trustee brought in Wood County. Unfortunately for Appellants, they do not have legal standings to assert such a counterclaim, as they cannot even meet the first requisite of standing: an injury-in-fact or the deprivation of some legally protected interest. How are Appellants themselves harmed by the Trustee’s administration of the Price Trust? What injury-in-fact has the Appellants suffered? What concrete and particularized, actual or imminent invasion of a legally protected interest have the Appellants experienced?

Appellants have taken issue with the manner in which the Trustee has administered the Price Trust with respect to its literal provision that the Trustee give preferences to “qualified blood relatives” of the late Albert M. Price for collegiate scholarships for “worthy boys and girls who are keenly interested in and capable of taking advantage of an opportunity for a college education.” The preferences were stated in order as: (1) “qualified blood relatives of the Grantor,” (2) “qualified boys and girls residing in Boone County, West Virginia,” and (3) “qualified boys and girls residing in the other fifty-four counties of West Virginia.” The relevant provision, as amended in 1969 by Dr. Price, provided that when funds were available for the scholarships (i.e., after the death of the last survivor of Dr. Price’s sisters), then the trustee was to notify the proper authorities of Warren Wilson Junior College at Swannanoa, North Carolina, and Berea College, of Berea, Kentucky, the two colleges for which the scholarships were to be awarded “and consult with them as to the advisability of granting or discontinuing particular scholarships.”

In 1988, after Dr. Price’s last remaining sister died and the scholarship phase of the trust began, the Trustee, in an attempt to preserve the tax-exempt status of the trust, concluded that the trust must be administered without a preference for blood relatives in the awarding of scholarships in order to retain the Trust’s tax exempt status and in furtherance of its charitable goals. Fifteen (15) years later, Appellants attempted to attack the Trustee’s decision to construe the charitable trust in such a manner as to preserve the trust’s tax-exempt status. Appellants have no standing to do so, however.

First, as noted above, a party must have an “injury-in-fact”, an “invasion of a legally protected interest which is concrete and particularized and actual or imminent, as

opposed to conjectural and hypothetical. Appellants have never alleged with any degree of specificity how they were possibly injured by any actions taken by the Trustee *in 1988* to secure the tax exempt status of the Price Trust. The tax exempt-offending provision, i.e., blood relative preference for scholarships, was just that – a preference, not a mandate. As provided by the Trust instrument, the scholarships (limited for only two schools) could actually benefit any potential student with West Virginia residency.

Appellants, however, lack legal standing to assert a cause of action against the Trustee based upon such theories as breach of fiduciary duty, conversion, misrepresentation, contempt, or removal of trustee. Even if their definition of “blood relatives” is adopted, they do not qualify as the Trust documents expressly state “*qualified*” “blood relatives.” Appellants have not alleged and cannot allege that they have applied for admission to one of the two colleges. They have not alleged that they applied for the scholarships and were turned down. They have not alleged and cannot allege that they have been admitted to one of the two colleges. Therefore, how can they possibly be “injured” vis-à-vis the Price Trust when they have neither applied for scholarships nor been admitted to either of the two designated colleges?

Additionally, when a trust, such as the Price Trust, is a charitable trust, the right to monitor its proper enforcement is reserved at common law to a public official, such as the state attorney general. See, eg. Bogert, TRUSTS AND TRUSTEES (2d Rev. 1991), § 411, pp. 2-3. Thus, any concerns over the management of a charitable trust like the Price Trust must be asserted by a public official, not by two distant relatives of the testator who cannot even articulate an actual injury.

Appellants, not unexpectedly, take issue with the charitable nature of the Price Trust. There is no question that the *intent* of the Price Trust is charitable in nature. The West Virginia Supreme Court has defined a charitable trust as having “as its purpose or object ‘the relief of poverty; the advancement of education; the advancement of religion; the promotion of health; governmental or municipal purposes; other purposes the accomplishment of which is beneficial to the community”. RESTATEMENT OF THE LAW, SECOND, TRUSTS § 368....” *Goetz v. Old National Bank of Martinsburg*, 140 W.Va. 422, 84 S.E.2d 759, 757 (1954) (Emphasis added). In addition, “One requisite of a charitable trust is that the beneficiaries of the trust as distinguished from the object or purpose of the trust must be indefinite.” *Id.* Further, “It is a rule of general application that charitable trusts are favored.” *Id.*

The stated purpose of the Price Trust is to provide college scholarships. The Trust’s stated purpose is therefore charitable, as the Trust’s purpose is to advance education. “[T]he public benefits arising from the charitable trust justify the selection of some public official for its enforcement. Since the attorney general is the governmental official whose duties include the protection of the rights of the people of the state generally, it is natural that he has been chosen as the protector, supervisor, and enforcer of charitable trusts . . . .” BOGERT, TRUSTS AND TRUSTEES (2d Rev. Ed 1991) § 411, pp. 2-3.

Thus, any complaints regarding the administration of the trust must be brought, if at all, by the West Virginia Attorney General, and not by two persons who may or may not even be “possible” beneficiaries of the trust:

As a general rule no private citizen can sue to enforce a charitable trust merely on the ground that he believe he is within the class to be benefited

by the trust and will receive charitable or other benefit from the operation of the trust. The courts usually require that suits for enforcement be brought by the established representative of the charity, the attorney general, so that the trustee may not be vexed by frequent suits, possibly based on an inadequate investigation and brought by irresponsible parties, and so that the courts may not find their calendars clogged with an unnecessarily large amount of litigation. BOGERT, supra, § 414, p. 39.

See also WILLIAM F. FRATCHER, SCOTT ON TRUSTS, § 391, p. 370-71 (1989); RESTATEMENT OF THE LAW, SECOND, TRUSTS § 391 (1959); *Kania v. Chatham*, 254 S.E.2d 528 (N.C. 1979); *Goetz*, supra, 84 S.E.2d at 772, recognizing that an Attorney General “may invoke the powers of a Court of Equity to enforce a trust where the public has a general interest in its enforcement”, although conceding that the statutes are “silent.” Not surprisingly, Appellants have ignored these substantive arguments in their previous briefings.

For persons such as the Appellants to have standing to sue to enforce a charitable trust, they must either be the official public representative, or have more than a mere possible interest in the trust. In other words, the would-be plaintiff must have a substantial interest and be able to demonstrate actual beneficiary status. See, e.g., *Steenek v. University of Bridgeport*, 668 A.2d 688 (Conn. 1995).

Appellants’ interests are vague, unsubstantiated, and limited to being within a class of mere potential beneficiaries. As at least one court has noted in considering the question of standing to attack a charitable trust administration, “. . . a party cannot be legitimately aggrieved, unless that party has suffered a loss.” *In Re: Charles L. McCune*, 705 A.2d 861, 865 (Pa. 1997).

Accordingly, neither Appellant has any “substantial interest” in the Price Trust. By the Trust’s terms, any resident of a West Virginia county with an interest in a college

education at Warren Junior College or Berea College has a potential interest, since college bound West Virginia residents in general are given a preference over non-West Virginians. Merely having a “preference” under a charitable trust, however, does not qualify one as an actual beneficiary as opposed to a potential beneficiary. The risk of vexatious litigation is great if the floodgates are opened to allow standing to all of the potential beneficiaries under the Price Trust. That is why the common law provides that an official public representative, typically the state attorney general, is the only proper party to bring an action seeking to enforce the terms of a charitable trust.

In a case similar to the case at bar, a challenger to a charitable trust established for scholarship grants was turned away for lack of standing. *Kania v. Chatham, supra*. In *Kania*, the plaintiff filed suit to have the trustees of a foundation removed and to have himself awarded a scholarship. Unlike the Appellants here, he alleged that he had actually been nominated for a scholarship to the University of North Carolina at Chapel Hill, had superior credentials, but was not awarded a scholarship. He argued that he had standing to challenge the foundation because he was a “potential beneficiary,” having been nominated for a scholarship. *Id.*, 254 S.E.2d at 291-92. In the case at bar, Appellants argue they have standing because they are “potential beneficiaries,” claiming a blood relationship to Dr. Price and the preference originally provided therein for blood relatives to receive college scholarships, although they make no claim to have been admitted to college or nominated for a scholarship.

The Supreme Court of North Carolina was unimpressed with the “potential beneficiary” standing claim, and this Court, as did the court below, should likewise find such an argument unconvincing. According to *Kania*:

“It is readily apparent that the necessary indefiniteness of charitable trust beneficiaries will leave few situations in which courts will hold that individuals have sufficient interest to have standing to sue for enforcement. 56 Va. L. Rev. 716, 722 (1970).

\* \* \*

The mere fact that a person may, in the discretion of the Trustees, become a recipient of the benefit under the trust does not entitle him to maintain a suit for the enforcement of the trust. 4A Scott, *supra* at 3012; 15 Am. Jur. 2d *Charities*, sec. 150 (1976). *Id.* at 292.

As in *Kania*, the Appellants in the case at bar are only “potential beneficiaries” at best. They are simply two of the potentially hundreds if not thousands of individuals who could conceivably be awarded a scholarship under the Price Trust. It is important to recall that the language of the trust did not limit scholarship recipients to just “qualified blood relatives” of Dr. Price, but to any worthy candidate from Boone County, West Virginia, and ultimately any worthy candidate from any of the other fifty-four counties. Under the Trust’s original language, an initial *preference* (not an absolute entitlement) was given to “*qualified* blood relatives.” If there were no *qualified* blood relatives, then the Boone County “worthy candidates” would receive the next preference, followed by “worthy candidates” from West Virginia outright. As the Supreme Court of North Carolina aptly noted:

To grant plaintiff standing to maintain this action would only open the door to similar actions by other unsuccessful nominees now and in the future. This we refuse to do. To do otherwise would not only impose upon our courts the burden of multiple litigation but would also require trustees to expend valuable time and resources in defending unwarranted law suits. . . . [A] party should have the Attorney General or district attorney commence an action . . . when it appears that the trust is being mismanaged through negligence or fraud. *Id.*, 254 S.E. 2d at 292-93.

In the case at bar, if Appellants truly believe that the Price Trust, a public charitable trust, has been mismanaged, their only recourse is to approach the Attorney General for his intervention as the public's representative. The Court below properly held that Appellants lacked standing to assert a cause of action against the Trustee.

But, Appellants assert, it is "absurd" that they can be named as defendants to a declaratory judgment action seeking a definition of "blood relatives" vis-à-vis the administration of the Price Trust and yet not be able to assert a breach of fiduciary claim against the Trustee. As noted by this Court in *Findley*, "Standing does not refer simply to a party's capacity to appear in court." 576 S.E.2d at 821. The Trustee named the Appellants and others as Respondents in the declaratory judgment action because they, being related in some capacity to the grantor, would be interested parties in a judicial determination of the term "blood relatives" as used in the Price Trust. They have the capacity to appear in Court. However unless they meet the definition of "blood relatives," which Trustee asserts they do not, and, even more importantly, unless they establish or even plead that they are qualified blood relatives, then they have no legal issue with the administration of the Trust because it would not even affect them.

Succinctly stated, since the Appellants in no way allege how they could possibly qualify for scholarship consideration, even if they are "blood relatives" of the grantor as that term is used in the Price Trust, it is of no legal consequence. They alleged no application to the two colleges, they alleged no admission to the two colleges, and they alleged no application to the Trustee for consideration of a scholarship award. They never moved to amend their complaint/counterclaim, and, despite the lower Court's apparent willingness to allow them additional briefing time (during which time, of

course, they could have considered amending their complaint/counterclaim or submitting affidavits or other evidence to somehow indicate that they *had*, in fact, *qualified* for scholarship consideration), they instead asked, after “seeing where the Court is headed,” to certify the question of “blood relatives” to this Court. Rather than adopt that route, since the Appellants had provided the Court below with no real authority to counter the Trustee’s legal authority, Judge Hill properly granted summary judgment to the Trustee, and this Court should affirm. (See April 1, 2004 hearing transcript, pp. 53-54.)

**C. THE CIRCUIT COURT CORRECTLY DETERMINED THAT VENUE WAS PROPER IN WOOD COUNTY.**

Appellants have advanced the theory that affirming Wood County venue in this suit seeking a declaratory judgment on the issue of who are beneficiaries of the Price Trust is akin to permitting large multi-national banks *carte blanche* to litigate trust beneficiary determinations in venues far removed from the states wherein the beneficiaries reside. Appellants argue that beneficiaries should be able to litigate in the county where they reside. Of course, what the Appellants conveniently ignore is that fact that trusts frequently have multiple beneficiaries and that multiple beneficiaries frequently live in multiple counties as well as multiple states. Taken to its logical extreme, the theory Appellants advance would mean that a Trustee, in order to seek a declaratory judgment about the statutes of trust beneficiaries, would have to file separate lawsuits in every venue where a potential beneficiary resides. This, of course, would result in multiple and inconsistent declaratory judgments.

In the case at bar, taking the Appellants’ argument at face value means that the Trustee should file a separate lawsuit in each county wherein a potential beneficiary of the Price Trust resides. Although Appellant’s advance Boone County (or relatively,

Kanawha County) as the proper venue, what about Raleigh County or even Virginia where other beneficiaries reside? And given that the Price trust by its literal terms only expressed a *preference* for certain so-called “blood relatives” and permitted the Trust to benefit would-be students in any county of the state, shouldn’t the Appellants be advancing an argument that the Trustee must bring suit in each of the fifty-five counties? And, if not, then why is Wood County, one of the fifty-five West Virginia Counties home to would-be students who could conceivably benefit from the Price Trust, be off limits for venue purposes? Additionally, what if the tables were turned and the Appellants had filed suit first against Appellee United Bank? Do Appellants contend that if they had first sued Appellee in Wood County that venue would not have been proper there? Of course not. Appellants’ argument, even without application of law, makes no sense.

It is worth noting that the venue issue is a non-starter for Appellants. Regardless of which circuit court heard this case, this Court considers the legal questions of the meaning of “blood relatives” and “standing” presented in the motion for summary judgment on a de novo basis in any event. *Syl. Pt. 1, Chrystal L.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). No testimony was taken and no jury trial was held below. If the Wood County Circuit Court properly granted summary judgment to the Trustee as the Trustee contends, then the fact that summary judgment emanated from one circuit court as opposed to another circuit is really of no legal effect.

The relevant West Virginia venue statutes, when given a fair reading in light of the facts as pled in the Trustee’s Petition and Amended Petition for Declaratory Relief, support the lower court’s determination that Wood County, being the forum wherein the

first litigation involving the Appellants and the Trustee was brought, is a proper forum to hear this case involving a testamentary trust administered by a Trustee in Wood County.

Appellants claim that none of the named respondents to the Wood County action are residents of Wood County. That claim is not dispositive. At the hearing below on the motion to dismiss for improper venue, Appellants *verbally* challenged whether the Price trust is actually administered in Wood County as was asserted in the Amended Petition. However, Appellants offered nothing into evidence that in any way indicated that the Price Trust was administered elsewhere. Appellants *concede*, however, that the Trustee is headquartered in Wood County (Appellants' Brief, p. 4.), although they are quick to note that it also has a Kanawha County office (Appellants' Brief, p. 4.) For that matter, the Trustee has trust offices in several counties, but, importantly, not Boone County. As the Appellants note in their Brief, Appellee's website lists the locations where United Bank has its trust offices: <http://www.unitedbank-wv.com/html/tiserv.htm>. There is no trust office for the Trustee anywhere in Boone County.

Regardless of whether the Appellants or any other family members of the late Dr. Price actually reside in Wood County, venue was proper in Wood County Circuit Court for the Trustee's declaratory action. "The general venue statutes for civil actions fix venue in declaratory judgment proceedings." Syl. Pt. 4, Shobe v. Latimer, 162 W.Va. 779, 253 S.E.2d 54 (1979).

**1. THE GENERAL VENUE STATUTE, §56-1-1, PROVIDES THAT VENUE IS PROPER WHERE DEFENDANTS RESIDE OR WHERE THE CAUSE OF ACTION ARISES.**

Appellants cite West Virginia Code §56-1-1, which provides that any civil action, *except where it is otherwise specially provided*, may be brought in the circuit court of

any county where any of the defendants reside or where the cause of action arose. This statute nevertheless supports venue in Wood County.

First, the statute provides that venue is proper where the defendants reside *or* where the cause of action arose. The cause of action at issue when venue was adjudicated below was not a tort case against the Trustee. Instead, the cause of action at issue for determination of venue was and is a declaratory judgment cause of action, brought by the Trustee, seeking a judicial declaration of trust interpretation in light of an apparent recent dispute between certain Price family members and the Trustee regarding the administration of the trust in question and the identification of certain trust beneficiaries. The Trustee did not assert any tort causes of action. Though the Petitioners, as Price family members, subsequently filed a second cause of action (a tort claim against the Trustee) in Boone County, the Wood County Circuit Court then properly transferred that second civil action to Wood County pursuant to W. Va. R. Civ. P. 42(b), Wood County being the court in which the first action arising out of the same transaction or occurrence was pending,

The Trustee's petition for a declaratory judgment regarding certain trust administration practices and pertains to the administration of the Price trust by the Trustee from its admitted headquarters in Parkersburg, Wood County, West Virginia. As set forth and pled in the Amended Petition and attested by the Trustee's vice president, the Trustee's Wood County headquarters is also the site where the trust res is held. Thus, issues regarding whether the trust administration conforms with the trust document clearly arise where the Trustee is headquartered and where the trust is administered and trust res kept -- Wood County.

**2. SECTION 35-2-2 PROVIDES VENUE IS PROPER IN THE COUNTY WHERE THE TRUST SUBJECT OR ANY PART THEREOF IS WHEN IT IS UNCERTAIN WHO BENEFICIARIES ARE.**

The general venue statute, West Virginia Code §56-1-1, upon which the Appellants place such emphasis specifically states that it controls venue *except where it is otherwise specially provided*. Under West Virginia Code §35-2-2, which provides that whenever it is uncertain who the beneficiaries of a trust are, an action may be brought in the circuit court of the county *where the trust subject, or any part thereof, is*. Section 35-2-2 further provides that the court shall have full power to designate the beneficiaries. The Amended Petition for Declaratory Judgment requested that the Wood County Circuit Court declare, *inter alia*, certain matters pertaining to who particular beneficiaries of the trust actually are, i.e., the "blood relatives" as that term is used in the Albert M. Price Trust. The Trustee was simply trying to obtain a designation, once and for all, who the beneficiaries of the Albert M. Price Trust are.

**3. ON A MOTION TO DISMISS, ALLEGATIONS OF A COMPLAINT (OR PETITION) ARE TAKEN AS TRUE.**

Although the Appellants claim that they "contested" whether the trust property is actually held and administered by the Trustee in Wood County, they freely acknowledged that they offered nothing into evidence that contradicted the allegations of the Amended Petition. They had certain papers that they waved before the judge, but did not offer such documents into evidence. (Appellants' Brief, p. 11.) The hearing on venue held by Judge Hill occurred on a motion to dismiss, attacking the Amended Petition brought in Wood County. For purposes of a motion to dismiss, a Petition is construed in the light

most favorable to the *plaintiff* and its allegations are taken as true. See, e.g., *Sticklen v. Kittle*, 168 W.Va. 147, 287 S.E. 2d 148 (1981).

Thus, had the Appellants *truly* contested the allegations that the Price Trust is administered in Wood County, they would have offered evidence of the same into the record. They did not. For purposes of the venue determination, therefore, the averments that the Price Trust assets are held at the Trustee's Wood County headquarters and administered there must be taken as true. Also, prior to entry of its order, the lower Court had before it an Affidavit attesting to the fact that the Trust is administered in Wood County. Accordingly, under either the specific venue statute of West Virginia Code §35-2-2 or the *general* venue statute of §56-1-1, venue is clearly proper for the declaratory judgment petition in the Wood County Circuit Court.

Other jurisdictions similarly recognize that venue is proper in the county where the principal office of the trust is located. See, for example, *Shellberg v. Shellberg*, 428 S.W.2d 112 (Tex. Civ. App. 1968), holding that venue of a suit to determine the rights and duties of the trustee is to be brought in the county where the principal office of the trust was maintained; *Tuthill v. George S. May International Co.*, 285 N.Y.S.2d 317, 55 Misc.2d 542, *aff'd* 296 N.Y.S.2d 1021, 31 App. Div.2d 721 (1968). In general, questions of proper notice and venue are determined by local statute or court rule. Bogert, The Law of Trusts and Trustees §870 (Rev. 2d ed. 1995). In that sense, West Virginia law is clear that proper venue lies in the county where the trust is maintained, i.e., Wood County.

As this Court is well aware, a plaintiff is the master of his own Petition. The Trustee filed its declaratory judgment action first, asking the Wood County Circuit Court to interpret certain provisions of the Price Trust as the same pertains to identification of

particular beneficiaries and also asking the lower court to declare that certain actions, apparently contested, with respect to the administration of the trust were proper.

Petitioners, in pursuing a motion to dismiss on venue grounds, were simply irritated that they did not race to the courthouse and file their own suit first in a forum of their choice, before the Trustee filed its Petition for Declaratory Relief.

#### 4. VENUE DOES NOT LIE IN BOONE COUNTY.

Appellants argument that venue for this litigation lies in Boone County and not Wood County. While arguments could be made that venue could also be roper in counties other than Wood County, Boone County is decidedly not one of those counties.

First, the Trustee, United Bank, does not even have a trust office in Boone County. Second, as noted above, the Trustee's vice-president, Jane Sargeant, submitted an Affidavit to the Court which was filed in conjunction with the Motion to Transfer the second filed Boone County civil action to Wood County which expressly stated that United Bank is headquartered in Parkersburg, Wood County, West Virginia; that the Price Trust is administered by a specific trust officer in Wood County; and that the Price Trust assets are kept in Wood County. Appellants at no juncture of the litigation offered anything to the contrary.

Third, although Appellants claim that certain documentation which they brought to the October 2003 hearing on the Motion to Dismiss for Improper Venue indicated that some trust matters are handled in Charleston, none of the documentation they had with them at the hearing (but, importantly, did not offer as exhibits and did not append to any affidavit in support of their position) in any way contradicted the pleading that the Price

Trust is administered in Wood County and the Sargeant affidavit submitted to the Court prior to the entry of the Order denying the Motion to Dismiss for Improper Venue.

In any event, it is worth noting that when Appellants' counsel *described* these documents to Judge Hill, he indicated that he had a document attached to a 1989 IRS filing listing the rules and regulations of the scholarship fund, a 2001 return of a private foundation listing a Charleston address (although the transcript from the October 2003 venue hearing (p. 10) does not indicate that the "2001 return of a private foundation" in any way showed the Price Trust was being administered outside of Wood County), and a letter from a United Bank Trust Officer in the Charleston office to the Bank's counsel in 1994 seeking advise regarding the Trust. Again, there is no indication from the description of the letter in the transcript (p. 10) that the trust officer indicated the trust was being administered other than in Wood County. Clearly, however, such documentation never evidenced any connection between United Bank and Boone County, where, according to Appellants, venue and jurisdiction lie. (Appellants' Brief, p. 10.)

Further, "showing" documents to a judge at a hearing, but failing to offer such documents into evidence either then or later, does not augment the Appellants' argument that venue lies other than as properly pled by the trustee in its Amended Complaint. All that Appellants had was some correspondence between *one* of its trust officers and an attorney for the Trustee, which correspondence was apparently sent to a Charleston address, and another piece of correspondence and filing with a Charleston address for United Bank's trust department. United Bank does not dispute that it has a trust office in Charleston as well as in Parkersburg, but notes that the Price Trust was administered from the Parkersburg headquarters, not the Charleston office.

Fourth, Appellants argue that the general venue statute required that they be sued in the county of their residence. This was impossible when there were several respondents below who do not all live in Boone County. While these Appellants may argue that they should have been sued in Boone County since they reside in Boone County, other respondents reside in Raleigh County and Kanawha County, and still other respondents reside in other states. Why should certain respondents be entitled to be sued in their home county, but other respondents not have that option?

Finally, as Judge Hill aptly noted at the hearing on venue:

“[H]ere is where this action has been brought, and the fact that the court says, ‘I am retaining jurisdiction,’ doesn’t mean anything except that it remains in the breast of the court, and it could be anywhere. I mean that particular judge has no special interest in having jurisdiction, and that court [Boone County] has no special interest in conducting litigation in a case. It simply says the court is retaining jurisdiction over this matter to resolve any further issues that come up so it doesn’t speak to venue. It doesn’t speak to where that court or any court is going to decide the case. It could be this court. Just because I am the judge of this court doesn’t mean anything. It is where it is.” (10/20/03 Transcript, pp. 32-33.)

**5. KANAWHA COUNTY DOES NOT HAVE EXCLUSIVE VENUE RIGHTS TO THE CASE AT BAR.**

Appellants have added a supplemental argument to their attack on venue. Clearly, they devoted their briefing on this issue to asserting that the majority of Price family members reside in Boone County, Dr. Price resided in Boone County at the time of his death, and that Boone County should be the proper venue. Alternatively, apparently, they assert that the trust officer in charge of the Trust *in 1977* (at the time of the 1977 Boone County litigation involving the Price Estate) was located in Kanawha County and that when the Trust was reorganized *in 1988*, the trust officer in charge of the Trust was also in Kanawha County. They also assert that the Price Trust contained an alleged “forum

selection clause” expressing a preference for a Kanawha County venue. (Appellants’ Brief, pp. 12, 20-31.) None of these is a valid argument.

First, in 1977 the Price Trust was administered by Kanawha Banking & Trust, *not* United Bank. Appellants attach undue significance to where the Trust was administered *15 years prior to the litigation at bar*, rather than where the Trust was administered at the time this civil action was filed in 2003. The relevant factor is not where the trust was administered in 1977 or 1988, but where it was administered in 2003. The Trustee has unequivocally provided that answer – Wood Count.

Second, the Trustee denies that any improper actions occurred in 1988. (In any event, the applicable statute of limitations would bar any alleged cause of action arising from a 1988 event by the time litigation was instituted in 2003.) What occurred in 1988 was that the Trustee, in order to recognize the principal charitable goal of the Trust and secure the Trust’s exemption from income taxation, relied upon W. Va. Code Section 35-2-9 to cleanse the trust of the tax exemption offending provision, namely the priority of blood relatives in receiving scholarships, and operate the trust in a manner that qualified it for tax-exempt status. After cleansing the Trust of the offending provision, there remained two separate trusts (the 1957 Trust and the Residuary Trust (modified trust) which were essentially equivalent in their dispositive provisions. Thus, the Trustee, for purposes of convenience, treated the two trusts as one trust.

The 1988 trust realignment was nearly 17 years ago. Much has occurred since then, particularly the fact that the Price Trust is administered in Wood County and has been for years. Events in 1988 have no relevance to a venue determination in 2003.

Finally, Appellants made the patently flawed argument that the Price Trust contained a forum selection clause designating Kanawha County as the forum of choice for litigation pertaining to the trust. The original 1957 trust document does contain a provision for a limited choice of Kanawha County, but only if the trust is being terminated outright and the assets distributed. That is not the situation in the matter at bar. The Trustee is not asking that the Price Trust be terminated and assets distributed.

**6. FIRST TO FILE CHOOSES ITS FORUM SO LONG AS VENUE IS APPROPRIATE.**

One of the principal factors in determining the propriety of Wood County venue was that the Trustee, the Petitioner or *Plaintiff*, being the master of its Petition, chose to bring the first-filed declaratory judgment action in Wood County, that being the location of the trust administration and the location of the trust property. Under both West Virginia Code §§56-1-1 and 35-2-2, the Trustee was fully justified in selecting this forum, as these statutes make clear that a Wood County courtroom is indeed a proper forum. The fact that the Petitioners preferred a different forum is irrelevant. They did not file suit first; Trustee United Bank did.

**D. PATRICIA MILAM NEVER APPEARED BELOW, AND APPELLANTS DO NOT REPRESENT HER INTERESTS.**

Finally, Appellants attack the summary judgment order for concluding that that Patricia Milam is the sole surviving “blood relative” of Dr. Price. Milam was named as a party defendant to the declaratory judgment action, but failed to appear despite service. Accordingly, the court noted a default as to her in its final order.

Appellants were never granted class action status by the Circuit Court. Their counsel never entered any appearance on behalf of Milam. Accordingly, Appellants’

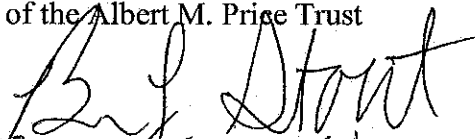
arguments on behalf of Milam are of no consequence. Whether Milam is the sole surviving blood relative or not (and United Bank alleged she was and, upon default, the Court so held with respect to Milam), the fact remains that Appellants have no standing to contest rulings with respect to Milam that do not pertain to them. That the Court found that Milam was a "blood relative" as that term was defined by the Court was a matter which Milam, had she appeared and defended the litigation, could have taken issue with or utilized to her benefit, but the fact remains that she did *not* appear and defend.

V. CONCLUSION AND PRAYER FOR RELIEF

For all the foregoing reasons, Appellee United Bank, Inc., individually and as Trustee of the Albert M. Price Trust, respectfully prays that this Court **AFFIRM** the Final Order of the Circuit Court of Wood County, West Virginia.

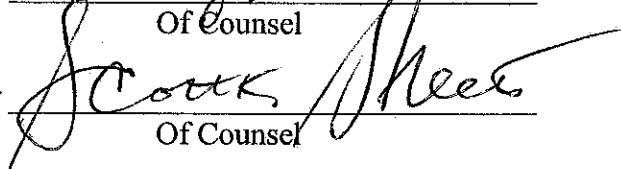
UNITED BANK, INC., individually and as  
Trustee of the Albert M. Price Trust

By



Of Counsel

By



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

UNITED BANK, INC., as TRUSTEE  
of the ALBERT M. PRICE TRUST,

Plaintiff below/Appellee,

v.

KENNETH N. DICKENS and RICHARD RANDALL  
LAMBERT, JR., individually and on behalf of those  
similarly situated, and Unknown Heirs of  
Albert M. Price, Jr.

Defendants below/Appellants,

and

KENNETH N. DICKENS, and RICHARD  
RANDALL LAMBERT, JR., individually  
And on behalf of those similarly situated,

Third-Party Plaintiffs below/Appellants,

v.

United Bank, Inc., a banking corporation,

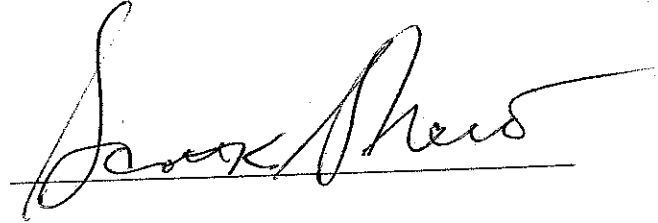
Third-Party Defendant below/Appellee.

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he served the foregoing "BRIEF OF APPELLEE" upon the following persons by depositing true copies thereof to their last known addresses in the regular manner, United States mail, postage pre-paid, from Huntington, West Virginia on the 8th day of July, 2005:

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A handwritten signature in cursive script, appearing to read "Scott K. Sheets", written over a horizontal line.

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