

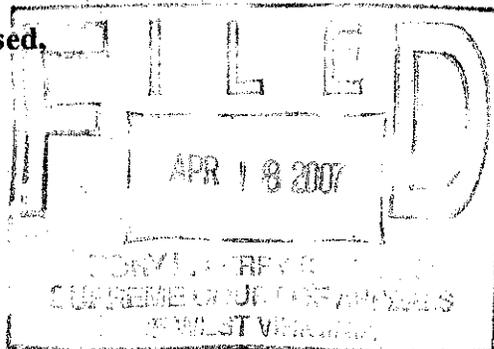
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IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

**STEVEN W. CHIP DANTZIC,  
DAVID SHAWN DANTZIC, and  
KAREN SUSAN (DANTZIC) TUCKER-MARSH,  
PLAINTIFFS,**

**V.  
TIMOTHY DANTZIC, Executor of the  
Estate of Luetta Dantzie Emmart Miller, deceased,  
TIMOTHY DANTZIC,  
NATHAN DANTZIC,  
CARLA EMMART,  
DEBRA EMMART, and  
KEYSER CHURCH of the BRETHREN,  
DEFENDANTS.**

**CASE NO.: 06-C-144**



**ORDER**

This matter came before the Court, the Honorable Phil Jordan presiding, on February 2, 2007, for consideration of Plaintiffs' Motion for Judgment on the Pleadings to determine whether the entire estate of the decedent, Luetta Dantzie Emmart Miller, would pass through her will or whether the decedent had died partially intestate. Plaintiffs were present by their counsel, Jason Sites. Defendants were present by their counsel, Harley Staggers, Jr. and Daniel Staggers. Keyser Church of the Brethren was present by its counsel, Robert Melody. The Court, having considered counsels' arguments and consulted the pertinent legal authority **GRANTS** Plaintiffs' Motion for Judgment on the Pleadings and **FINDS** that the decedent died **partially testate and partially intestate.**

A Motion for Judgment on the Pleadings presents a challenge to the legal effect of the facts rather than proof of the facts themselves. Syl. Pt. 2, Copley v. Mingo County Board of Education, 195 W.Va. 480 (1995). The Court must

*J. Sites  
H. Staggers  
D. Staggers  
R. Melody*

accept as true the well-pleaded allegations of the non-moving party and the inferences that reasonably may be drawn from the allegations; however, a party's legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted. Kopelman and Associates, L.C. v. Collins, 196 W.Va. 489, 493 (1996). In the present case, the Court must only decide whether the decedent's will sufficiently disposes of her entire estate or whether part of the decedent's estate, not mentioned in the will, passes by intestacy. The facts are not in dispute. As only a question of law is presented to the Court, this case is proper for judgment on the pleadings.

The decedent's will reads as follows:

I, Luetta Dantzic Emmart Miller, being of sound mind, declare this to be my last will and testament, in my own script, this 5th day of May, 2006.

My estate consists of the residence and grounds at 164 Parkview Drive, Keyser, WV, along with furnishings. In order to divide, it must be sold.

I appoint Tim Dantzic as my Executor/Administrator of the estate, that he be allowed to serve without bond. It will be up to him to sell at best price and pay all outstanding just debts including funeral expenses.

The balance is to be divided as stated: To Tim Dantzic - 1/10 portion for serving as Ex./Ad. To Tim Dantzic 1/10 portion for living with me and taking care of the property and looking out for me. To Tim Dantzic 1/10 portion as his legitimate share. 1/10 portion to Chip Dantzic, 1/10 portion to Suzy Marsh, 1/10 portion to Shawn Dantzic. 1/10 portion to Nathan Dantzic (Danny's share) 1/10 portion to Carla Emmart, 1/10 portion to Debra Emmart. 1/10 portion to the Keyser Church of the Brethren. 10 equal portions of 10 percent equals 100%.

In 1965 when I was left the total responsibility of the family it seemed like an insurmountable task. However, with the help of Mother and Daddy and later Harry and with the love and grace of God we made it and the family looke (sic) pretty good to me.

You've all done very well for yourselves and your family. Remember, you are a family and continue to love one another. I am very proud of you. I love and cherish each one.

Your Mother  
Luetta Dantzic Emmart Miller

Plaintiffs contend that the decedent's will only applies to the portions of her estate which she named in her will, specifically "the residence and grounds at 164 Parkview Drive, Keyser, WV, along with furnishings." Plaintiffs argue that because the decedent's will did not mention her checking account, Metropolitan Life Insurance, Woodmen of the World Life Insurance, Prudential Financial Life Insurance, Nationwide Life Insurance, and Metlife Stock, the decedent's heirs are entitled to a portion thereof as provided for in the statutes for intestacy.

Defendants counter that the decedent's language in her will shows that she intended to dispose of her entire estate. Defendants argue that the Court must determine the decedent's testamentary intent from her will. Defendants contend that because the decedent stated "my estate consists of. . ." she had the intent to dispose of her entire estate through her will even though she failed to mention all assets of her estate. In support of this argument, Defendants correctly argue that generally "the intention of the testator is the controlling factor in the interpretation of a will." Hobbs v. Brenneman, 118 S.E.2d 546, 549 (1923) and that the law "favors testacy over intestacy." Syl. Pt. 3, Painter v. Coleman, 211 W.Va. 451 (2002).

However, the West Virginia Supreme Court explained that the testator's intent and the law's preference for testacy does not give the Court power to correct and change the actual words used by the decedent:

It is true that courts have always leaned to constructions which will avoid intestacy, and their swift willingness in this regard has passed into a rule of construction, but there are well-defined limits, beyond which the courts have not gone, and beyond which they could not go without subverting all rules and leaving the interpretation of every will to the mere caprice and whim of the chancellor. One of these rules, firmly established and never departed from or even criticized, is that the expressed intent will not be varied under the guise of correction because the testator misapprehended its legal effect. The testator is presumed to know the law. If the legal effect of his expressed intent is intestacy, it will be presumed that he designed that intent. The inquiry will not go to the secret workings of the mind of the testator. It is not, what did he mean? But it is, what do his words mean?

Coberly v. Earle, 54 S.E. 336, 339 (1906). In the present case, the decedent specifically named the assets she considered part of her estate for the purposes of her will and the Court does not have the power to add assets to the decedent's definition of her estate.

Furthermore, even if the Court were to interpret the decedent's words, "my estate," to include all assets she possessed at her death thereby demonstrating her intent to devise and bequeath her entire estate through her will, the West Virginia Supreme Court has held

Though an introductory clause in a will may express an intention on the part of the testator to dispose of his whole estate, this does not supersede the necessity of his subsequently carrying that intention into effect by an actual disposition.

Syl. Pt. 1, Spurrier v. Hobbs, 70 S.E. 760 (1911). Consequently, even if the decedent had intended to dispose of her entire estate, including items she did not list in the contents of her estate, in order for the Court to allow the decedent's entire estate to pass through her will, the decedent must have disposed of all assets of her estate in her will. The decedent's will in this case clearly indicates

that the only assets of her estate contemplated by the decedent during the drafting of her will were the residence and grounds of 164 Parkview Drive and the furnishings thereof.

Defendants also argue that the language in the will, "the balance is to be divided as stated . . .," serves as a residuary clause for the will and therefore the will disposes of the decedent's entire estate. Defendants argue that even though the decedent limited her definition of her estate to 164 Parkview Drive and its furnishings, the decedent's use of the language "the balance is to be divided . . .," acts as a residuary clause to cover the unlisted assets of her estate. The Court disagrees with this interpretation of the decedent's use of the word "balance."

In Barker v. Haner, 161 S.E. 34 (1931), the West Virginia Supreme Court held that the word "balance" by itself does not constitute a residuary clause in a will. In Barker, the decedent owned a plot of land on which there was a residence. The decedent willed that the residence would be used by the church for Sunday School. A later clause in the decedent's will stated that "the balance of my real estate with which I am seized" should go to his wife. The Court ruled that the decedent's intended meaning by the phrase, "the balance of my real estate," pertained only to the plot of land on which the residence stood. "The balance" referred to the plot of land once the residence was set aside for Sunday School use. Id.

Similarly, in the present case before this Court, the decedent's use of the word "balance" clearly refers to the balance of her estate, as defined by her in her will, once Tim Dantzie paid all outstanding just debts and funeral expenses. If the

Court read the decedent's use of the word "balance" to include in her estate items not mentioned by her, the Court would be engaging in conjecture and speculation not supported by the decedent's will as a whole. "A court cannot rewrite a will under the guise of construction or construe such will on the basis of speculation or conjecture." Syl. Pt. 5, Farmers and Merchants Bank of Keyser v. Farmer and Merchants Bank of Keyser, 158 W.Va. 1012 (1975).

THEREFORE, any asset owned by the decedent at the time of her death not in joint right of survivorship that is not the residence and grounds at 164 Parkview Drive, Keyser, WV or the furnishings thereof, passes by intestacy to the decedent's heirs at law. Any of the decedent's life insurance policies for which beneficiaries are not named in the policy shall be distributed to the decedent's heirs as required by statutory law.

The Court hereby **GRANTS** Plaintiffs' Motion for Judgment on the Pleadings and **DIRECTS** Timothy Dantzic, as the Executor of Luetta Dantzic Emmart Miller's estate, to distribute all assets of the decedent's estate in compliance with this Order.

The Clerk SHALL forward an attested copy of this Order to all parties and counsel of record.

DONE and ENTERED this 7th day of February 2007.

  
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The Honorable Phil Jordan, Circuit Judge  
21st Judicial Circuit