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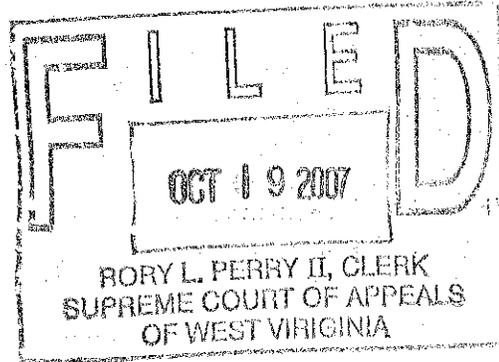
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STEVEN W. CHIP DANTZIC,
DAVID SHAWN DANTZIC
KAREN SUSAN (DANTZIC) TUCKER-MARSH,
Appellants,

v.

CIVIL ACTION NO.: 06-C-144

TIMOTHY DANTZIC, Executor of the Estate of
Luetta Dantzic Emmart Miller,
TIMOTHY DANTZIC,
NATHAN DANTZIC,
CARLA EMMART,
DEBRA EMMART, and
KEYSER CHURCH OF THE BRETHREN,
Appellees.



APPELLANT'S BRIEF

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and
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and

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NATURE OF APPEAL

On May 5, 2005 Luetta Dantzic Emmart Miller revoked her 1996 will with a handwritten will. The second page of the handwritten will reminds the family that in 1965 their problems seemed "insurmountable." However, with help from her parents and later Harry Emmart, with love and the grace of God the family "made it." Mrs. Miller asked that her family remember they are a family and continue to love one another.

Chip Dantzic, Shawn Dantzic and Karen Tucker-Marsh did not accept their mother's advice. On November 29, 2006 three of Mrs. Miller's children filed this lawsuit which in essence would gain them \$1,223.00 at the expense of their step-sisters and Mrs. Miller's Church, the Keyser Church of the Brethren¹. Also the two brothers and sisters asked that their brother be removed as executor and that the property their mother conveyed to them in 1987 be appraised by the estate to save them capital gain taxes in the future. Appellees did not ask for Mrs. Miller's residence to be appraised, even though the will directed that real estate to be sold.

Appellee on January 22, 2007 filed a motion for judgement on the pleadings. By an Order dated February 7, 2007, Judge Jordan granted Appellee's motion for judgement on the pleadings and found that Mrs. Miller died partially testate and partially intestate.

Judge Jordan relied upon *Coberly v. Earle*, 54 SE 336 (1906) and *Spurrier v. Hobbs*, 70 SE 760 (1911) to strictly construe Mrs. Miller handwritten will.

Also on February 7, 2007 Judge Jordan granted Appellee's motion to appoint a special appraiser. Judge Jordan noted in his Order that Appellees and two of their brothers acquired the land in 1987. Judge Jordan found that Appellees and all the Appellants would benefit if the land was appraised. However, it was never explained how the nonowners of the land (the Emmart children

¹Bank Stock, Car, and Money.

and the Church) would benefit. Judge Jordan then ordered Mrs. Miller's estate to pay an equal share of the cost for the appraisal of the property Appellees acquired in 1987.

It is from the two February 7, 2007 orders that Appellant appeals.

Subsequent to the February 7, 2007 orders, Appellees requested that Appellant be prevented from filing this appeal. Appellant filed this appeal on March 19, 2007. A hearing on Appellee's motion to stay the appeal was held on March 26, 2007.

The results of the March 26, 2007 hearing were: (1) Judge Jordan refused to recuse himself; (2) Judge Jordan denied Appellee's motion to stay, in part because the appeal was already filed; (3) Judge Jordan quashed the subpoena Appellees had issued after all discovery had been stayed, but refused to sanction Appellees; (4) However, Judge Jordan noted that future sanctions against Mr. Dantzic and Mr. Staggers were possible if this appeal was unsuccessful².

²Pages 18-19 of March 26, 2007 transcript.

STANDARD OF REVIEW

“In reviewing the judgement of a lower court this Court does not accord special weight to the lower court’s conclusions of law, and will reverse the judgement below when it is based on an incorrect conclusion of law.” *Foster v. Foster*, 196 W.Va. 341, 472 SE2d 678 (1996); and

Burks v. McNeal, 164 W.Va. 654, 264 SE2d 651, syl. pt. 1 (1980). Therefore the standard of review is *de novo*.

STATEMENT OF FACTS

Luetta Dantzic Emmart Miller was left with the total responsibility of her family in 1965. In 1996, Mrs. Miller had an attorney prepare her will, which divided her estate between her children, step-children, and her Church. Subsequently, many of Mrs. Miller's children and step-children left the Keyser area prior to the handwritten will³. However, Timothy Dantzic stayed in Keyser and took care of his mother.

Mrs. Miller decided to change her will and prepared a holographic will. Mrs. Miller directed that her residence along with the furnishings be sold to pay all debts including funeral expenses. Mrs. Miller then directed that the balance of her Estate be divided among her children, step-children and Church. Mrs. Miller's holographic will was similar to her previous will except Tim Dantzic was rewarded for his care of Mrs. Miller.

Contrary to Appellee's factual assertions in the first complaint, Tim Dantzic did file the required appraisal in a timely manner. Similarly, a parcel of land was not listed on the initial appraisal because Mrs. Miller had only a life estate interest. Mr. Dantzic subsequently amended the appraisal and included the life estate property. Mr. Dantzic also increased the appraised value of the real estate when he discovered that the property benefitted from a farm discount.

Prior to the hearing to decide Appellee's motion, Appellant filed written responses to the motions and argued, in part, at the hearing, that West Virginia's Constitution, Article III § 6 prohibited the Circuit Court from assuming jurisdiction in all matters of probate. Appellant also pointed out the flaw in Appellee's argument that they would be damaged when the property owned with Tim Dantzic, mentioned above, was sold. Appelles had argued that their capital gains tax would increase. The flaw was that Timothy Dantzic, a co-owner, does not want to sell the property.

³See Appellant's Interrogatory Number 7.

Therefore any damages would be totally speculative, and beyond the scope of a declaratory action.

After the Court's hearing on February 2, 2007, the Court issued an Order holding that Luetta Dantzic Emmart Miller did not dispose of her entire estate in her holographic will. The Court held that Mrs. Miller only disposed of her house and the contents therein.

The Court's order also required the Estate to hire a real estate appraiser to appraise a non-probate tract of real estate. The Court, in essence, ruled that even though Appellant used the market value as defined by the West Virginia code, Tim Dantzic would need to expend estate funds to hire a real estate appraiser. The Court gave no statutory or legislative authority when issuing this portion of the opinion. Judge Jordan did find that Appellees and their two brothers acquired their interest in the property interest in 1987.

The Court did not require the Estate to hire an appraiser to appraise the residence, which was in the estate. However, the Court held that the residence was to be sold. Interestingly, Tim Dantzic, the Executor, used the Mineral County Assessor's market value for residence, and neither the Appellees nor the Court found that value objectionable. But, this is the real estate that has to be sold under the will. The real estate Appellee's want appraised, and the Court directed to be appraised, was not and could not be directed to be sold by Mrs. Miller. Also, Tim Dantzic, one of the owners, indicated he does not want sold.

ISSUES

1. Whether a will drafted by one who is not an attorney should be strictly construed to create partial intestacy.
2. Whether the legal presumption that Luetta Dantzic Emmart Miller intended to dispose of her whole estate was overcome by the use of the word "estate."
3. Whether the Circuit Court of Mineral County had jurisdiction to Order an estate to pay for the appraisement of non-estate property which was conveyed nine years prior to the death of Mrs. Miller.
4. Whether a Judgment on the pleadings should be granted prior to the opportunity to engage in discovery.

DISCUSSION

I. The Circuit Court's Strict Interpretation of the Word "Estate"

Mrs. Miller was not an attorney, nor did she have any legal training. In 1996, she hired an attorney to prepare her will. Mrs. Miller subsequently negated that will with her holographic will. Judge Jordan found that Mrs. Miller's use of the word "estate" meant that the property Mrs. Miller listed as her estate was the only property Mrs. Miller intended to dispose of through her will.

Appellant argued to the Court that a more reasonable interpretation of the word "estate" was the common meaning of the word, which means a person's residence.

Appellant also submitted to the Circuit Court the case of *Matheny v. Matheny*, 182 W.Va. 790, 329 SE2d 230, page 233 (1990) which found that a lay person's use of a word within a will is not given a technical construction. Appellant advised the Circuit Court of the firmly established legal presumption against partial intestacy.⁴ Appellant also directed the Circuit Court to the case of *Rastle v. Gainjager*, 151 W.Va. 499, 153 SE2d 403 (1967) which held, in part, that the trial court must construe every word within the will to avoid the creation of intestacy.

Instead of following this Court's direction in *Rastle*, the Circuit Court found: (1) Mrs. Miller listed her residence and furnishings within her holographic will and therefore no other assets can be added to the "definition of her estate"⁵; (2) Mrs. Miller's use of the words "The balance is to be divided as stated . . .", may have expressed an intention on Mrs. Miller's part to dispose of her whole estate, but the Court can not allow Mrs. Miller's intentions to prevail unless she listed the contents of

⁴*Matheny supra*, *Kubiczky v. Westbanco Bank Wheeling*, 208 W.Va. 456, 541 SE2d 334, syl. pts. 3 and 4 (2000); *Painter v. Coleman*, 211 W.Va. 451, 566 SE2d 588; and *Rubble v. Rubble*, 217 W.Va. 713, 619 SE2d 226 (2005).

⁵Page 4 of Court's Order.

her estate⁶; and (3) Mrs. Miller clearly contemplated that she wished only to dispose of her residence and its furnishings⁷.” The Circuit Court relied upon *Coberly v. Earle*, 60 W.Va. 295, 54 SE 336, page 339, (quoting footnote number 32 from Page on Wills) (1906) to ignore *Rastle*. A more recent treatise on wills states “. . . where testatrix disposed of certain specific items and she wrote ‘Divide Evenly’ followed by a list of eight named persons, the testatrix intended the residue of her estate to be divided evenly among the eight parties named thereafter. See Harrison on Wills, page 36, note 82 (2000), citing *Thomas v. Copenhover*, 235 VA 124, 365 SE2d 760 (1988). Testatrix, in this case, followed the same format in preparing her will, and her will should likewise dispose of her entire estate.

Harrison on Wills also states: “Ordinarily the only reason the testator has for making a will is to change the devolution of his property from that prescribed by the statutes of decent and distributions. There is accordingly a strong presumption that the testator intended to dispose of his entire estate, and Courts are decidedly adverse to adopting a construction which leaves a testator intestate as to a portion of his estate, unless compelled to do so.” Harrison on Wills, Volume 2, pages 36-37.

As discussed above, *Matheny* held that a less technical interpretation will be afforded to a holographic will. Similarly, this Court has consistently held that there is a legal presumption against intestacy. See *Kubiczky v. Wesbanco Bank Wheeling*, 208 W.Va. 465, 541 SE2d 334, syl. pts. 3 and 4 (2000); *Painter v. Coleman*, 211 W.Va. 451, 566 SE2d 588, syl. pt. 5 (2002); and *Ruble v. Ruble*, 217 W.Va. 713, 619 SE2d 226, syl. pts. 3 and 6 (2005).

⁶Page 4 of Court’s Order. The Circuit Court relied upon a 1911 case wherein a will was drafted by a lawyer.

⁷Pages 4 and 5 of Court’s Order.

The Circuit Court acknowledged the legal presumption against intestacy, but strictly construed Mrs. Miller's use of the word "estate". As *Rastle* held⁸, if the word "estate" can be construed to avoid intestacy, then the Court must construe "estate" to avoid intestacy.

From a fair reading of Mrs. Miller's will, it is clear that Mrs. Miller intended to dispose of all her property through her will. As Harrison on Wills, Volume 2, pages 36 and 37, clearly concluded, why make the will if Mrs. Miller intended her property to pass intestate? Not only is the word "estate" easily construed to avoid intestacy, but to construe "estate" to create intestacy is absurd.

The Circuit Court's interpretation of Mrs. Miller's will would also have to conclude that Mrs. Miller was not aware of her assets, and was therefore incompetent. If Mrs. Miller was so incompetent that she forgot what she owned, then the previous will would necessarily have to be used to dispose of the property. The standard of capacity for making a will has virtually become a formula.

Recollection of the objects she possesses is part of the formula. See *Martin v. Thoyer*, 37 W.Va. 38, 16 SE2d 489 (1882); *Eakin v. Hawkins*, 52 W.Va. 124, 43 SE 211 (1902); *Teter v. Teter*, 59 W.Va. 449, 53 SE 779 (1906); *Jackson v. Jackson*, 84 W.Va. 100, 99 SE 259 (1919); *Pickens v. Wismen*, 106 W.Va. 183, 145 SE 177 (1928); *Prichard v. Prichard*, 135 W.Va. 767, 65 SE2d 65 (1951); and *Kerr v. Lunsford*, 31 W.Va. 659, 8 SE 493 (1888).

II. Legal Presumption

Where a will is made it is presumed that the testator intended to dispose of his whole estate, and such presumption should prevail unless the contrary shall plainly appear. *Rastle v. Gamsjager*, 151 W.Va. 499, 153 SE2d 403, syl. pt. 4 (1967).

If possible a will should be so interpreted as to avoid intestacy, and in such cases the context should control technical words, and not the words the context. *Rastle*, syl. pt. 1.

⁸Sixty years after *Coberly*.

In the construction of a will, a court should construe and consider all of the provisions of the will as a whole, in their relation to each other, and in the light of the circumstances which prompted the testator to execute the will. *Rastle*, syl. pt. 5.

Where a will has been executed, the reasonable and natural presumption is that the testator intends to dispose of his entire estate. There is no presumption of an intention to die intestate as to any part of his estate when the words used by the testator will clearly carry the whole. *Foster v. Foster*, 196 W.Va. 341, 472 SE2d 678, page 681 (1996).

Advised of the well established law of this state, Judge Jordan in his February 7, 2007 Order (pages 4-5) found that Mrs. Miller clearly indicated that the only assets of her estate contemplated by Mrs. Miller "during the drafting of her will were the residence and grounds of 164 Parkview Drive and the furnishing thereof."

To overcome the legal presumption that Mrs. Miller intended to dispose of her whole estate, Judge Jordan focused on Mrs. Miller's second paragraph in her handwritten will: "My estate consists of the residence and grounds of 164 Parkview Drive, Keyser, West Virginia, along with furnishings. In order to divide, it must be sold."

However, Mrs. Miller in her will then appointed Tim Dantzic as her Executor/Administrator. Mrs. Miller then states: "It will be up to him to sell at best price and pay all outstanding just debts including funeral expenses." Clearly Mrs. Miller intended that Tim Dantzic sell the residence and furnishings to pay any debts.

Mrs. Miller then directed "the balance" to be divided between her children and her church in 10 equal portions.

The clearest example of Mrs. Miller's intent exists in the next two paragraphs: "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 (Emmart) and with the love and grace of God we made it and the family looks 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."

Mrs. Miller obviously did not intend to divide the family. Just the opposite, she reminded her children that they are a family and directed them to love one another.

Similarly, Mrs. Miller gives God credit for helping her overcome the insurmountable tasks facing her. Mrs. Miller clearly intended that her church receive an equal portion of her estate.

Judge Jordan took the word "estate" out of context and strictly construed the word to mean all of Mrs. Miller's assets. A less strict interpretation of estate would result in testacy as opposed to partial intestacy. As *Foster supra* found, the reasonable and natural presumption is that Mrs. Miller intended to dispose of all her assets, not just her residence. Since an alternative and common definition of "estate" is a person's residence, Judge Jordan erred in construing "estate" strictly to presume Mrs. Miller intended to die partially intestate. As *Foster supra* held there is no presumption that a person intended to die intestate as to any part of her estate when a word used by testator can be interpreted to create testacy.

As *Rastle supra* held if the contested word can be interpreted to avoid intestacy, then intestacy must be avoided.

In ascertaining Mrs. Miller's intentions, her will makes it crystal clear that all her family and her church should share in her assets, regardless of her use of the word "estate."

Because of the legal presumption, the burden of proof was on Appellees. There was no contrary reason why the legal presumption of testacy should not prevail. Similarly, Judge Jordan failed to identify why he presumed partial intestacy, except that Mrs. Miller used the word "estate".

III. Jurisdiction

The Court's second Order dated February 7, 2007 assumed jurisdiction over the case pending before the Mineral County County Commission.

It is not disputed that Timothy Dantzic filed his appraisal with the County Clerk.

Therefore any disputes regarding the appraisal should first be decided within that jurisdiction.

However, the Circuit Court speculated that because of the appraisal Timothy Dantzic filed with the County Clerk, all the parties would have a higher capital gains tax when the property is sold in the future.

There are three problems with the Court's conclusion: (1) a Circuit Court can not grant relief based upon pure speculation; and (2) Article VIII, § 6 prohibits Circuit Courts from interfering with the jurisdiction of the County Commissions until such time that the legislature may provide for such jurisdiction; and (3) an individual who does not own the property can not benefit from an appraisal.

At issue is a 156.25 acre parcel of land deeded by Mrs. Miller to some of her children, but with a life estate reserved for Mrs. Miller. Judge Jordan was advised that Timothy Dantzic had no intentions of selling his interest in the 156.25 acre parcel of land. Therefore the Court's conclusion based upon the future sale of the land is purely speculation. Regardless of Appellee's contingent claim, the Circuit Court found that paying to appraise the 156.25 acre parcel would benefit all parties and directed Appellees and the estate to pay a local Realtor for a new appraisal.

West Virginia Code § 11-3-1 requires the County Assessor to assess property annually at its "true and actual value", which means "at the price for which such property would sell if voluntarily offered for sale by the owners." Pursuant to the statute, any assessor who refuses to assess all the property at the fair market value is guilty of malfeasance in office. Under the circumstances of this

case the appraisalment for estate purposes was correct.

This Court in *Crank v. McCaughlin*, 125 W.Va. 126, 23 SE2d 56, first addressed the Declaratory Judgement Act, and held that there must be an actual and existing controversy. This Court subsequently found that trial courts should not adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies. See *Town of South Charleston v. Bd. of Ed.*, 132 W.Va. 77, 50 SE2d 880 (1948). Similarly, this Court has held that trial Courts should not resolve mere academic disputes or render mere advisory opinions which are unrelated to actual controversies. See *Mainella v. Bd. of Trustees of Policemen's Pension or Relief Fund of City of Fairmont*, 126 W.Va. 183, 27 SE2d 486 (1943). In *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 SE2d 55, syl. pt. 4 (1996), this Court set forth guidance to trial courts, and indicated that contingent claims should not be decided by declaratory judgement.

In the case *sub judice*, the trial court speculates that the property may be sold by the owners, when one of the owners asserts it will not be sold. Such an uncertain and contingent event as the future sale of property, when an owner does not want to sell, is not subject to a declaratory judgement. Similarly, the Circuit Court's assumed jurisdiction was premature. Since the matter was before the County Commission, which had jurisdiction, the question of fact should have been resolved there first. If Appellees were unhappy with the County Commission's decision, then an appeal could have been taken.

Therefore the Circuit Court lacked jurisdiction over the appraisalment since that issue was under the jurisdiction of the County Commission. Likewise, the Circuit Court lacked jurisdiction to declare the value of the appraisalment based upon the possible sale of the property in the future over the objection of one of the property's owners. More importantly, why should Appellees benefit from an appraisalment paid in part by the estate? Mrs. Miller's will was clear that her residence should be

sold. Tim Dantzic placed a for sale sign in front of the residence. Appellee alleged that Tim Dantzic had not attempted to sell the residence which is patently false. Subsequently, Tim Dantzic listed the property with a local realtor only to discover that one of the agents believed that the family had promised her that she would get the commission.

However, Appellees have never requested that the estate property be appraised. Only Appellees' property was ordered to be appraised. Apparently, Appellees do not question the appraisement of the residence. However, the legal logic of why a non-estate property should be appraised and paid in part by the estate has never been explained.

IV. Judgement of the Pleadings

Pursuant to West Virginia Code § 55-13-9, any issue of fact in a declaratory judgement action, is to be determined like any other civil action and is therefore controlled by the West Virginia Rules of Civil Procedure. See also *Joslin v. Mitchell*, 213 W.Va. 771, 584 SE2d 913, page 917 (2003); and *Rubble v. Rubble*, 217 W.Va. 226, 619 SE2d 226 (2005).

In the case *sub judice*, the circuit court made a determination of fact, i.e., the intent of Mrs. Miller, without allowing Appellant to engage in any discovery. A key factual issue was Mrs. Miller's meaning of the word "estate". Although a common meaning of the word "estate" is a residence on privately owned property, the Circuit Court determined that when Mrs. Miller used the word "estate", she could only have meant that she only intended part of her real and personal property to pass through her will.

The pertinent part of Mrs. Miller's will read: "My estate consist of the residence and grounds at 164 Parkview Drive, Keyser, WV, along with furnishings." However, Mrs. Miller then directed that "The balance" be divided between her children, step-children and Church.

Appellant argued to the Circuit Court that Mrs. Miller obviously used the word "estate" to

mean her residence which was on her property, and did not mean all of her real and personal property.

Appellees' position was that Mrs. Miller intended the word "estate" to mean that just her house and contents therein were to pass through her will. Without any legal authority to support the position and without any evidence to support Appellee's position, the Circuit Court resolved this question of fact for Appellees. Appellant was denied discovery and its day in Court.

It was an abuse of the Circuit Court's discretion to grant Appellees a judgement based upon Appellee's assertion, without allowing Appellant any discovery. See *Elliot v. Schoolcraft*, 213 W.Va. 69, 576 SE2d 790 (2002).

Burch v. Nedpower Mount Storm, LLC, ___ W.Va. ___ 647 SE2d 879, syl. pts. 1 and 2 (2007), held that a motion to dismiss on the pleadings should only be granted in very limited circumstances.

Because of the well-established legal presumptions against intestacy, and the questions of facts regarding Mrs. Miller's intentions, this is not a case for judgement on the pleadings.

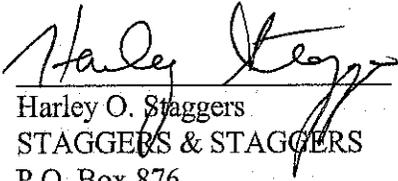
Conclusion

Appellees have made several false allegations against Appellant from the beginning. Appellees have promised more charges against Appellant. Appellees have consistently asked that Tim Dantzic be removed as Executor. Appellees conduct can only be construed as mean spirited. There is no reason to believe that Appellees will not carry out their threats of continued harassment.

Since the trial court's orders are wrong as a matter of law both orders should be reversed. Appellant request that his relief be granted and the two February 7, 2007 orders reversed. Additionally, Appellant request that this Court direct the following: (a) to dismiss Appellees' complaint; and (b) to order Appellees to pay all reasonable costs including reasonable attorney fees.

PLAINTIFF

By counsel



Harley O. Stagers

STAGGERS & STAGGERS

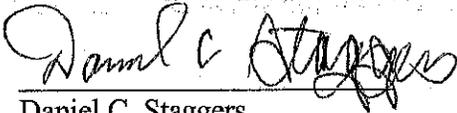
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