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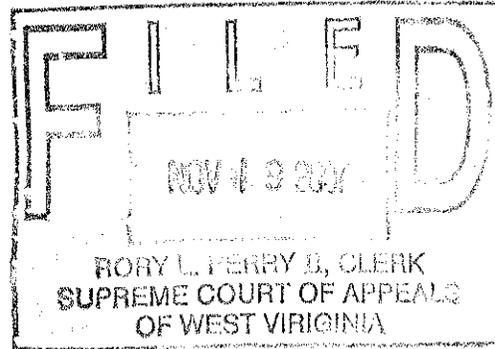
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Steven W. Chip Dantzic,  
David Shawn Dantzic,  
Karen Susan (Dantzic) Tucker-Marsh,  
Appellees,

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,  
Appellants.



**APPELLEES' BRIEF**

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### NATURE OF APPEAL

The cause of action brought in the lower court is in the form of a four count complaint. The cause of action is derived from the West Virginia Uniform Declaratory Judgments Act, Chapter 41 of the West Virginia Code, and Chapter 44 of the West Virginia Code.

Appellees sought to have their Mother's Will interpreted and construed by the Circuit Court pursuant to the West Virginia Uniform Declaratory Judgments Act. Appellees further requested that the Circuit Court direct the Executor to value the real property at fair market value as required by West Virginia Code § 44-1-14 also pursuant to the West Virginia Uniform Declaratory Judgments Act. The remaining two counts alleged goods being carried away and waste pursuant to West Virginia Code § 44-1-23.

The Circuit Court reviewed the Will and declared that the testatrix died partially intestate. With respect to the request that the Court direct the Executor to appraise the real property at fair market value, the Court Ordered that the parties split the cost of a real estate appraiser to have the property appraised. The Court has stayed the proceedings pending Appellant's petition to appeal resulting in no action occurring with regards to the remaining issues of the Appellees' complaint.

### STANDARD OF REVIEW

"A circuit court's entry of a declaratory judgment is reviewed by *de novo*." *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995). Therefore the standard of review is *de novo*.

### STATEMENT OF THE FACTS

Luetta Dantzie Emmart Miller, hereinafter referred to as the Testatrix, died on May 23<sup>rd</sup>, 2006

owning both real and personal property. A Holographic Will was produced and recorded in the Office of the Clerk of Mineral County in Will Book 38 at page 128 (attached to Plaintiffs' Response to Petition to Appeal as Plaintiffs' Exhibit No. 1. located beginning at appeal index page 235, page 257.) Timothy Dantzic qualified and was appointed Executor of the Estate on June 26<sup>th</sup>, 2006.

The Holographic Will (see paragraph 2) stated that "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." Appellees were aware that the Testatrix owned additional property to that mentioned in the Holographic Will. Appellees were concerned that the Holographic Will made no disposition of the additional property. Appellees waited until the expiration of the time period to file an appraisal to determine how the Executor was going to handle the additional property.

The appraisal was to be returned as of September 25<sup>th</sup>, 2006. Appellees filed a three count complaint on November 29<sup>th</sup>, 2006 seeking a declaratory judgment on the Holographic Will, requesting the filing of an appraisal, and alleging that the Executor had caused and or allowed personal property to be taken away.

The appraisal was recorded on December 8<sup>th</sup>, 2006. The appraisal had been returned timely by the Executor. Apparently the appraisal was returned and forwarded to the fiduciary commissioner where it remained until December 8<sup>th</sup>, 2006. This appraisal did not include a 156.25 Acre tract of real property in which the Testatrix owned a life estate. On December 12<sup>th</sup>, 2006, the Executor returned an amended appraisal listing the 156.25 Acre tract and valuing the same at \$65,500.00. On December 20<sup>th</sup>, 2006, the Appellees filed an amended complaint withdrawing the count that the Executor file an appraisal and replacing it with a count that the Executor increase the

value of the 156.25 Acre tract to an amount that would more accurately reflect the fair market value. Appellees' amended complaint also added an additional count for waste by the Executor.

On February 2<sup>nd</sup>, 2007, a hearing was held on the Declaratory Judgment portion of Appellees' complaint. The Circuit Court interpreted the Holographic Will and determined that the Testatrix died partially intestate (Order located at appeal index page 208.) The Circuit Court granted a motion by the Appellees to extend the time period in which to file a response to interrogatories and requests for admissions. Furthermore, the Circuit Court Ordered that an appraiser should appraise the 156.25 Acre tract with the costs to be split between the Appellees and the Estate (Order located at appeal index page 214.)

On February 12<sup>th</sup>, 2007, Appellant, Timothy Dantzic, filed a motion to stay all proceedings pending an appeal. A hearing was held on the motion to stay on February 22<sup>nd</sup>, 2007. At this hearing, Appellees expressed concern that an appeal at this time could be viewed as interlocutory due to the fact that there were issues left unresolved. Appellees did not object to the Circuit Court staying the declaratory judgment portion of the case. Appellees stated that they could not understand why any other portions of the case must be stayed, specifically the sale of the residence and the furnishings. The Circuit Court granted a stay with respect to the issues decided at the February 2<sup>nd</sup>, 2007 hearing. All other matters involved with the administration of the Estate were not stayed.

Appellees filed a motion to stay the filing of an appeal on March 15<sup>th</sup>, 2007. Appellant, Timothy Dantzic, Executor of the Estate of Luetta Dantzic Emmart Miller, filed a Petition to Appeal on March 20<sup>th</sup>, 2007. A hearing was held on this motion on March 26<sup>th</sup>, 2007. Appellees argued that the cost of perfecting an appeal would be far more than the amount in controversy and thus would be a

waste of the assets of the Estate. Furthermore, Appellees argued that it was a waste to appeal the hiring of an appraiser to increase the value of the real property in that the same would benefit all the children of the Testatrix. The Circuit Court denied Appellees motion (Order located at appeal index page 282.) The Circuit Court did take this opportunity to question the Attorney for the Appellant about his motives for using certain verbiage in his petition to appeal (Order located at appeal index page 282, page 285.)

Appellees have taken no further action at the lower level. Appellees did not want the estate to incur any further legal fees associated with this action until the matters before this Honorable Court were resolved.

#### ISSUES

1. Whether a trial court can enter a declaratory judgment without providing a defendant the opportunity to engage in discovery.
2. Whether the Circuit Court can interpret and construe this will pursuant to the plain meaning rule resulting in a case of partial intestacy.
3. Whether a Circuit Court exercise proper jurisdiction pursuant to a declaratory judgment action to determine a question arising in the administration of an estate including questions of construction of a will and/or directing the executor to do or abstain from doing any particular act in their fiduciary capacity.
4. Whether the Circuit Court acted without authority by ordering a professional appraisal of non-probate real estate.

## DISCUSSION OF LAW

### 1. DISCOVERY

This matter involves a Declaratory Judgment action brought pursuant to West Virginia Code § 55-13-1 *et seq.*, the West Virginia Uniform Declaratory Judgments Act. The request in this proceeding was for the Circuit Court to declare the rights and legal relations of the beneficiaries of an Estate. Pursuant to West Virginia Code § 55-13-4 the Circuit Court was to answer a question regarding the construction of a holographic will.

It has long been a function of the judiciary in West Virginia to interpret wills. “The interpretation of a will is simply a judicial determination of what the testator intended; and the rules of interpretation and construction for that purpose formulated by the courts in the evolution of jurisprudence through the centuries are founded on reason and practical experience. *Hobbs v. Brenneman*, 94 W.Va. 320, 323, 118 S.E. 546, 549 (1923). If the Court can determine the clear intention of the testator within the four corners of the will, then job is finished. Specifically, “When the intention is ascertained from an examination of all its parts the problem is solved.” *Hobbs* at page 323, 549.

“The rules pertaining to the construction to the construction of will are well settled in this State. The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rule of law, must control. A will cannot be construed on mere conjecture as to the intention of the testator. Therefore, the intention of the testator must be ascertained, in keeping with certain well defined rules, one of which is that the language of the testator employed in his will, if **plain and unambiguous**, must be made the basis of its construction, and not what someone supposes the

testator may have intended. Another is that the **whole** of the will should be considered in interpreting certain clauses and parts thereof, and that all provisions thereof must be reconciled, if possible.

Furthermore, the law seems to be well settled in this State and in Virginia that parol declarations of a testator, as to his intention to make a particular bequest or devise, or that he has made such bequest or devise, are not admissible to control the construction of a will, except in cases where the terms used therein may apply to each of several subjects or persons, in which case evidence may be received as to the subjects or persons intended to be dealt with. Of course, if a will is ambiguous and that ambiguity is latent, it has always been the law that extraneous evidence may be introduced in an attempt to clarify the intent of the testator as to such ambiguity, not for the purpose of changing any provision of the will, but to reach the real meaning of the testator." *Hedrick v. Hedrick*, 125 W.Va. 702, 25 S.E.2d 872, 875 (1943). If the Court can construe the will by reading the document, then no further evidence is needed. If the Court finds that no ambiguity exists and there is a clear meaning to the will, then the Court will construe the same. If there be no ambiguity, then no extrinsic evidence will be permitted. What would the role of further discovery be if it will not lead to admissible evidence. In fact, West Virginia Rules of Civil Procedure Rule 26 is premised on the fact that the discovery sought will eventually lead to admissible evidence.

Declaratory Judgment actions seldom involve discovery. The Courts role is to interpret a document in controversy. West Virginia Trial Court Rule 16.12 mandates that a final judgment or decree shall be entered in a declaratory judgment action within one month of submission. This time standard does not leave time for discovery.

Appellant is attempting to argue that they were denied a meaningful opportunity to be heard on

the declaratory judgment action because they were denied the benefit of discovery. Appellant's Interrogatories and Requests for Admissions (attached to Plaintiffs' Response to Petition to Appeal as Plaintiffs' Exhibit No. 5 located beginning at appeal index page 235, page 275) did not even deal with the issues surrounding the declaratory judgment construing the holographic will. Appellant's discovery requests dealt with the remaining counts of the complaint.

Appellant argues in his brief at page 15 that discovery was needed to avoid the lower courts ruling of partial intestacy. Appellees have already pointed out that the discovery requests of the Appellant did not deal with the construction of the will. Appellants argued their position on the definition of the word "estate" at the February 2<sup>nd</sup>, 2007 hearing. The lower court did not agree with the Appellant. The lower court found that the Testatrix defined her "estate," with plain language, as her residence and the furnishings. The lower court, pursuant to its role in a Declaratory Judgment action, interpreted the document in question.

Appellant argues and cites case law regarding judgment on the pleadings illustrate that the lower court abused its discretion by not permitting discovery. This argument is without merit. Appellees have already addressed the role of discovery in Declaratory Judgment actions. Appellees aver that discovery is seldom necessary in such actions. The lower court agreed that discovery was not necessary for the interpretation and construction of the will at issue.

Appellees did not need to file a motion for judgment on the pleadings. It is recognized, if not presumed, that Declaratory Judgment actions are ruled upon from the pleadings. Appellant did not object to a declaratory judgment in his answer to the complaint. Appellant did not assert the need for discovery, with respect to the declaratory judgment, in his response to the Appellees

Motion for Judgment on the Pleadings. Appellant did state the need for discovery on the declaratory judgment in Appellant's Response to Appellees' Motion for Court to Extend the Time Period in Which to File a Response to Appellant's Interrogatories and Request for Admissions, However, as previously pointed out to the Court these discovery requests did not pertain to the construction of the will. Most importantly, it is clear from the record that the lower court did not find any ambiguity in the will and did not feel that it needed any further information in order to fulfill its role as the interpreter of the will.

Appellant should not confuse this case with a normal civil proceeding. This is a declaratory judgment action. Appellees' motion for judgment on the pleadings was a courtesy motion to clearly put the Appellant on notice that the Appellee intended to proceed in an effort to have the Circuit Court interpret the will pursuant to the declaratory judgment action. Furthermore, Appellee's motion for judgment on the pleadings was to clarify the issue for the court that it was the Appellee's position that discovery was not necessary and would not lead to admissible evidence if in fact the court was of the opinion that the Court could interpret and construe the will within the four corners of the document.

The Circuit Court did not find any ambiguity. The Circuit Court found the Holographic Will used words with plain meaning and attributed the same to them in construction of the document. The Circuit Court found no ambiguity. We have no reason to believe that any discovery would ever lead to admissible evidence because the same is not needed by the trier of fact to construe the will nor would it ever be permissible in the absence of a latent ambiguity.

The Circuit Court did not err in entering a declaratory judgment prior to discovery.

## 2. FINDING OF PARTIAL INTESTACY

The Holographic Will (attached to Plaintiffs' Response to Petition to Appeal as Plaintiffs'

Exhibit No. 1. located beginning at appeal index page 235, at page 257 at paragraph 2) stated that “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.” In the case *sub judice* when the words are given their plain meaning the Testatrix chose to define her estate for the purposes of her will. The Circuit Court found under the plain meaning rule that the estate of the Testatrix consisted of her residence and the furnishings. Furthermore, the Circuit Court did not agree with the Appellant’s argument that the “balance is to be divided” serves as a residuary clause.

The Will states in paragraphs two through four:

“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 per cent equals 100%”

The estate consists of assets beyond the residence grounds at 164 Parkview Drive along with furnishings. The Executor is attempting to distribute these assets in accordance with the provisions of the Holographic Will.

The Executor has included personal property, automobile, personal effects, checking account, and stock, in the appraisal. These assets are not specifically mentioned in the Will. The Will contains no residuary clause.

West Virginia Code § 41-3-4 provides “Unless a contrary intention shall appear by the will,

such real or personal estate, or interest therein, as shall be comprised in any devise or bequest in such will, which devise or bequest shall fail or be void, or be otherwise incapable of taking effect, shall, if the estate be real estate, be included in the residuary devise, or, if the estate be personal estate, in the residuary bequest, if any residuary devise or bequest be contained in such will, and, in the absence of such residuary devise or bequest, shall pass as in case of intestacy.”

Although this appears to be a case of first impression on this specific fact pattern, as is the case with many Holographic Wills, this Court has addressed similar issues providing outstanding guidance to courts on numerous occasions. In *Harmer v. Boggess*, 73 S.E.2d 264 (1952), the Court quoted in dicta at page 268, a Mississippi case by stating “It is certainly true that, when one dies the owner of lands or goods, not disposed of by will, he dies intestate as to them, and the law casts descent upon his heir, and when the widow is the heir the same result much occur, whether the intestacy be partial or entire.” Furthermore, in *Spurrier v. Hobbs*, 70 S.E. 760, 761 (1911) this Court held that “Where and introductory clause expresses an intent to dispose of such estate “as it has pleased God to entrust with me,” and in the sole disposing clause testator disposes of his personal and mixed estate only, his real estate is not devised.”

In the present case we are dealing with assets of the estate not specifically devised. It can only be reasoned that if a devise is completely absent then it is incapable of taking effect. Therefore, in the absence of a residuary clause, the assets of the estate not specifically devised shall pass in case of intestacy. This would be the plain and simple application of West Virginia Code § 41-3-4.

When applying that in which this Court thought important enough to quote in *Harmer*, we arrive at the same result. “It is certainly true that, when one dies the owner of lands or goods, not

disposed of by will, he dies intestate as to them, and the law casts descent upon his heir, and when the widow is the heir the same result much occur, whether the intestacy be partial or entire.” *Harmer* at page 268.

It is clear that the Decedent did not make a disposition of the assets of her estate beyond her home and the furnishings within. It is clear that without a disposition the Decedent died intestate to those assets. It is clear that this is a case of partial intestacy when applying the reasoning in *Harmer*.

For a more in depth analysis of a similar fact pattern we should address the reasoning found in *Spurrier*. In *Spurrier* at page 761, the testatrix began by stating “as to such estate as it has pleased god to entrust with me, I dispose of the same as follows.” Later the testatrix made her devise by stating, “I give devise and bequeath all my estate personal or mixed of which I shall die seized and possessed at my decease to my husband....”

This Court held “We observe that there is no mention of real estate in the disposing clause of the will. It is devoted to a disposition of personal and mixed estate only. The terms here used are clear, definite, and unambiguous. Reading this operative clause alone, one can have no doubt of the intention of the testatrix to devise only personal and mixed property by it. Does she say otherwise in any part of the will? We do not so find.” *Spurrier* at page 761. This Court went on later to reason about the initial intent of the testatrix to dispose of her entire estate by stating “And true, it would seem that the testatrix did set out to dispose of all her property. But she did not do so. When she came to the point of giving away her estate she did not include any real property. Here by her words she shows clear intention not to dispose of that kind of property. We can not guess or conjecture that she inadvertently failed to use the word ‘real.’ We do not know that she did. She used plain and

unambiguous language when she reached the point of disposing. We must judge her intention from the words here as well as from others in the will. And the intention of the testatrix must be gathered from her will when read in the light of legal principles. She is chargeable with the knowledge of the legal effect of the paper in which she prepared.”

Once again, when applying these principles to the case *sub judice* we have a result of partial intestacy. The Decedent clearly disposed of only her home and furnishings in which she considered to be the estate in which she was passing through will.

The Appellant cites the case of *Matheny v. Matheny*, 182 W.Va. 790, 392 S.E.2d 230 (1990), as authority on this issue. In *Matheny* the husband and wife executed joint holographic wills leaving everything to each other and including a simultaneous death provision leaving the bulk of the estate to one of their three children. The wife died and the will was admitted to probate. The husband then died and was declared intestate. This Court held that “If 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.” *Matheny* at 233, 794. The case *sub judice* differs because we are not dealing with a technical principle like simultaneous death provisions. We are dealing with a plain meaning of ordinary words defining the Testatrix’s estate. Furthermore, *Matheny* differs because any other holding would have left the decedent entirely intestate which was clearly not the intention of the decedent.

Appellant also cites *Rastle v. Gamsjager*, 151 W.Va. 499, 153 S.E.2d 403 (1967), as authority in this matter. *Rastle* deals with technical terms relating to the difference between “devise”

and “bequeath” and well as principles of “joint tenancy” versus “tenancy in common.” This Court held that they would not hold a lay person to understand the technical difference between passing real or personal property with the correct verb. Likewise, a lay person will not be held to understand the principles of various tenancies. Once again, this case differs because the Court in *Rastle* was forced to go past the prong of the plain meaning rule due to the presence of specialized legalese.

It should be noted that several cases cite that the law favors testacy over intestacy. It should also be noted that in many cases the Courts were forced to look past the plain meaning rule to interpret the will and give it effect. Those cases differ from this case because this Will has effect and it does provide for partial intestacy.

Appellant offers that in 1996 the Testatrix had an attorney prepare a will. This fact was never mentioned at any hearing. This alleged will was never produced or entered into evidence. Appellant infers that the only reason she revoked her original will in favor of her Holographic Will was to provide an extra share for the Defendant, Timothy Dantzic, as a result of the care he provided for her. It is interesting to note that the Appellant neglects to mention if the defining of the estate was similar in the previous will. It is clear from the Holographic Will that the Testatrix defined her estate as her residence and the furnishings.

Appellees contend that when reading the relevant cases regarding the interpretation and construction of wills there is a clear and logical progression for courts to follow. “The interpretation of a will is simply a judicial determination of what the testator intended; and the rules of interpretation and construction for that purpose formulated by the courts in the evolution of jurisprudence through the centuries are founded on reason and practical experience. *Hobbs* at page 326, 549.

“The rules pertaining to the construction to the construction of will are well settled in this State. The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rule of law, must control. A will cannot be construed on mere conjecture as to the intention of the testator. Therefore, the intention of the testator must be ascertained, in keeping with certain well defined rules, one of which is that the language of the testator employed in his will, if **plain and unambiguous**, must be made the basis of its construction, and not what someone supposes the testator may have intended. Another is that the **whole** of the will should be considered in interpreting certain clauses and parts thereof, and that all provisions thereof must be reconciled, if possible. Furthermore, the law seems to be well settled in this State and in Virginia that parol declarations of a testator, as to his intention to make a particular bequest or devise, or that he has made such bequest or devise, are not admissible to control the construction of a will, except in cases where the terms used therein may apply to each of several subjects or persons, in which case evidence may be received as to the subjects or persons intended to be dealt with. Of course, if a will is ambiguous and that ambiguity is latent, it has always been the law that extraneous evidence may be introduced in an attempt to clarify the intent of the testator as to such ambiguity, not for the purpose of changing any provision of the will, but to reach the real meaning of the testator.” *Hedrick* at page 875.

Courts do have some liberty if the will cannot be construed under the plain meaning rule. “Where words are used in a will in a context which renders them **doubtful** or **meaningless**, they may be substituted by other words, if such substitution will carry into operation the real intention of the testator as expressed in the will, considered as a whole and read in light of the attending circumstances.” Syllabus Point 2, *In re Conley*, 122 W.Va. 559. “Words are not to be changed or

rejected unless they manifestly conflict with the **plain intention** of the testator, or unless they are **absurd, unintelligible, or unmeaning**, for want of any subject to which they can be applied.”

Syllabus Point 6, *Painter v. Coleman*, 211 W.Va. 451, 566 S.E.2d 588 (2002).

It is clear that courts must interpret wills giving the language the plain meaning. The interpretation must not be based on conjecture. If the court cannot interpret the will based on the plain meaning of the language, then the court may be more liberal in its construction.

Once the plain meaning prong is satisfied and the will is still without effect, the court may do the following:

1. Substitute words is doubtful or meaningless;
2. Change or reject words if they;
  - a. Manifestly conflict with the plain intention; or
  - b. Are absurd, unintelligible, unmeaning;
3. May give interpretation to technical terms, for example simultaneous death provisions, tenancies, life estates, anti-lapse provisions and other specialized legalese events.

While always bearing in mind the plain meaning of the language used by the testator.

It is clear that when applying the analysis of this Court in prior cases to the specific facts of this case we have situation of partial intestacy. The Will makes no specific disposition of any assets other than the real property including her home and the personal property, limiting to furnishings, within the home. There is no residuary clause found within the Will. The terms used within the Will are clear, definite, and unambiguous. In reading the Will there is no doubt that the Decedent intended that her home and the furnishings be sold, that the proceeds be used to pay her debts, and the balance should be divided in 10 equal portions to the named beneficiaries. The Circuit Court was not permitted to guess or conjecture that the Decedent inadvertently failed to include other assets. The intent of the

Decedent must be gathered from a plain meaning of the language used in her will. She shall be held accountable for having knowledge of the legal principles and effects of the paper in which she prepared. In the absence of a specific bequest or residuary clause, all assets of the estate not disposed of by the Will must pass according to the laws of intestacy.

Appellant argues in his brief at page 12 that the Court took the word estate to mean all of the Decedents assets. This is not true. Appellant wanted the lower court to defined the word estate as all assets. The lower court found that the word estate did not mean all assets. The lower court found that the Testatrix defined her estate for the purposes of her will as her "home and the furnishings." (Order located at appeal index 208, at page 211.)

Appellant now asks this Honorable Court to speculate, conjecture and presume what the Testatrix intended. This Court has consistently warned against such action. The lower court followed this Court's guidance and refused to speculate, conjecture or presume. The lower court applied the law advising against such speculation, conjecture and presumption. The lower court found plain meaning to the non-technical terms used by the Testatrix resulting. The lower court construed the will in accordance with the law resulting in a finding of partial intestacy.

The Circuit Court did not err in interpreting and construing the will by using the plain meaning of the language employed by the testatrix and finding this to be a case of partial intestacy.

#### 3 & 4. JURISDICTION OF CIRCUIT COURT AND AUTHORITY TO APPOINT AN APPRAISER

Appellant never raised subject matter jurisdiction by way of a formal 12(b)(1) motion at any time during the proceedings. Counsel for the Appellant did mention a lack of subject matter jurisdiction

during the February 2<sup>nd</sup>, 2007, hearing. It appeared that jurisdiction was raised with respect to the removal of the Executor. Appellee responded that jurisdiction was proper in the circuit court for the purposes of the declaratory judgment action.

Pursuant to West Virginia Code § 44-1-14(a) "The personal representative of an estate of a deceased person shall appraise the deceased's real estate and personal probate property, or any real estate or personal probate property in which the deceased person had an interest at the time of his or her death, as provided in this section." West Virginia Code § 44-1-14(b) and (b)(1) provide "After having taken the appropriate oath, the personal representative shall, on the appraisal from prescribed by the tax commissioner, list the following items owned by the decedent or in which the decedent had an interest and the fair market value of the items at the date of the decedent's death: (1) All probate and non-probate real estate including, but not limited to, real estate owned by the decedent, as a joint tenant with rights of survivorship with one or more parties, as a life estate, subject to a power of appointment of the decedent, or in which any beneficial interest passes by trust or otherwise to another person by reason of the death of the decedent; and..." West Virginia Code § 44-1-14(i) authorizes "Every personal representative has authority to retain the services of an expert as may be appropriate to assist and advise him or her concerning his or her duties in appraising any asset or property pursuant to the provisions of this section."

It cannot be disputed that it is the duty of the executor to appraise the property at the fair market value. The executor, in his fiduciary capacity, must act in a manner that will benefit the beneficiaries. Furthermore, the executor is authorized to hire experts to assist him or her in the duties.

In the case *sub judice* three of the beneficiaries raised the issue that the Executor was not

fulfilling his duty. The value that the Executor used was low and would be the cost basis the beneficiaries would have in the property. In the event that the property would be sold the result would be an unnecessary increase in the capital gain realized by the parties. The Appellees never envisioned that this would be a point of contention because it would benefit the Executor as well as the Appellees.

The complaint was brought in part under the West Virginia Uniform Declaratory Judgments Act, West Virginia Code § 55-13-1 *et seq.* It is clear that the circuit courts have jurisdiction to hear matters under this act. West Virginia Code § 55-13-4 grants jurisdiction for the circuit court to “direct the executor to do or abstain from doing any particular act in their fiduciary capacity.” Additionally, the circuit court may grant further relief pursuant to § 55-13-8 and may distribute costs pursuant to § 55-13-10.

Plaintiffs informed the Circuit Court that it was their position that \$106,200.00 as a fair market value of the 156.25 acre tract was low. In order to establish a true fair market value the property should be appraised by a professional. The court could then use the appraisal to determine the true fair market value.

The Circuit Court was well within their authority to appoint an appraiser to determine the fair market value of the real estate in controversy and attribute the costs amongst the parties. In fact, it was both prudent and judicially efficient to do so in order to avoid further controversy and negate a possible cause of action in the future against the personal representative for waste. Tim Dantzic, the beneficiary, is in fact gaining a windfall because his share of the costs of the appraisal is being paid by the estate.

Appellant’s argument that jurisdiction lies with only the County Commission fails under the

authorities granted in West Virginia Code § 55-13-1 *et seq.* Appellant's logic fails that the damage is speculative in that it is always advantageous, for the purpose of capital gains, to have the highest basis possible if supportable. Furthermore, the fact that the Tim Dantzic does not intend to sell his share fails to account for the fiduciary obligation owed by the Executor to all beneficiaries.

Appellant's argument that the value used is supported by the annual appraisalment conducted by the Assessor is true. The value attributed by the Assessor can be challenged, and is not accepted by many lending institutions when granting a loan or by the federal government when determining estate tax consequences. Appellant listed on the appraisalment the value of the Testatrix's residence as \$109,600.00. When listing this property with a real estate agent the asking price is \$258,900.00. Surely the Appellant recognizes that the appraised value of this property is apparently below the price the property is going to bring on the open market, or the fair market value.

Appellant argues in his brief at page 13 that this Order wrong because the damages are based upon speculation. Although the benefit to the parties is not yet realized, this is not the issue. The issue is that the Executor has the duty to protect the interest of the beneficiaries and the duty to appraise the value of the property at fair market value. A circuit court has the authority to direct the personal representative to fulfill his duties. Appellant received benefit from this order in that he, personally, bears no cost of the appraisal.

Appellant argues in his brief at page 14 that jurisdiction for this Order directing an appraisal should have been with the County Commission. This overlooks the fact that the circuit court also has this authority and jurisdiction under the Declaratory Judgment action. Since the parties were in circuit court under the Declaratory Judgment action it was judicially efficient to handle this matter in a joined

claim.

Appellant addresses the appraisal of the residence at page 15 of his brief. The appraisal of the residence is not at issue in this appeal. To clarify, the Appellant listed the residence with a realtor after the lower court directed that the sale of the residence would not be stayed and should proceed. The value of the residence on the appraisal was not addressed because the Appellees assumed that when the property sold for more than the value on the appraisal, the Appellant would amend the appraisal to reflect the sale price. That is to say that the sale price, the price in which a buyer is willing to pay and a seller is will to sale for, would be the undisputed fair market value. Furthermore, that the increase on an amended appraisal from the assessed value to the sale value would also protect the interest of the beneficiaries and eliminate the unnecessary capital gain. Due to the fact that the 156.25 acre may not be sold, partitioned or otherwise until after the estate was final, there was an immediate need to make certain the value on the appraisal was a true "fair market value."

Beneficiaries under a will only get on bite at the "step up in basis" apple. If the value in the appraisal for the property received is not a true "fair market value" then they have lost their opportunity to obtain the maximum step up in cost basis for capital gains purposes.

The duty of a personal representative to obtain a fair market value and protect the interest of the beneficiaries is an important task. The legislature has recognized and thus regulated this important role. The Courts have recognized and thus governed this important role. Our legal system is designed to permit parties to question authority and action of personal representatives and have the Courts decide various controversies.

In the present case, if the Appellees questioned the value applied to the 156.25 acre parcel by the Executor, then the Court should have resolved the issue. The Appellant brought this appeal before the Court even ruled on whether or not the Executor was going to be directed to increase the value in the appraisal on the 156.25 acre parcel. If Appellant wanted to stop the professional appraisal from occurring then perhaps the proper cause of action would have been to file for a writ of prohibition. Perhaps it would have been prudent to see what the professional appraisal reflected and then, if the increase was only nominal, moved the Circuit Court to reconsider the directive that the Estate pay half the costs.

The Circuit Court did not err when appointing and appraiser to determine the true fair market value of the 156.25 acre tract. The Circuit Court was ordering that evidence be obtained that would allow the court to determine if the Executor had appraised the property at a "fair market value" and therefore permit the Circuit Court to make an informed ruling on the need to direct the Executor to fulfill his obligation and duty to list the real property at "fair market value" and protect the interests of the beneficiaries. Furthermore, the Circuit Court was well within its jurisdiction to do so under the West Virginia Declaratory Judgments Act.

#### CONCLUSION

Appellees brought this action to have the court construe a will and determine the value and location of various assets. Appellant has created a situation which is unnecessarily adversarial as evidenced by the motions for sanctions and numerous correspondence. Appellant has acted in such a manner that has resulted in increased attorney fees to the Estate.

Appellees sought to have a will construed. The Circuit Court construed the will according to

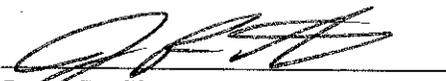
existing case law. Appellant sought to have this overturned at the expense of the Estate.

Appellees questioned the value in the appraisal for the 156.25 acre parcel. The Circuit Court found some merit in this request. The Circuit Court ordered that a professional appraisal be conducted and that the Estate should pay half of the costs. Appellant sought to have this overturned at the expense of the Estate.

The Circuit Court had jurisdiction to enter the orders on appeal pursuant to the West Virginia Uniform Declaratory Judgments Act. The Circuit Court did not err in the construction of the will resulting in a finding of partial intestacy. The Circuit Court did not err in directing a professional appraisal of the 156.25 acre parcel.

Wherefore, Appellees respectfully request that this Honorable Court affirm the Order's of the Circuit Court of Mineral County, remand this case for further hearing on the remaining issues, and Order Appellant to personally pay all reasonable costs and reasonable attorney fees.

Respectfully Submitted,  
Appellees, By Counsel,



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