

No. 33891 In re: Tax Assessment of Foster Foundation's Woodlands Retirement
Community

Benjamin, J., dissenting:

FILED
January 9, 2009
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

This case presents, among other issues, what the proper burden of proof should be for a taxpayer who challenges an assessor's tax assessment. More specifically, we have prior decisions of this Court which are inconsistent and conflicting with respect to whether the taxpayer must meet a "preponderancy of the evidence" burden, or whether the taxpayer must meet the more difficult "clear and convincing" burden of proof in order to prevail. I applaud my colleagues for resolving this conflict, but respectfully dissent to Syllabus Points 5 and 6 of the majority opinion to the extent that the taxpayer is required to meet a "clear and convincing" burden of proof when challenging assessments. I believe the proper burden of proof should be a "preponderancy of evidence" as it is in other valuation-type disputes within our judicial system.

As correctly noted by the majority opinion, the West Virginia Legislature has not established what should be the proper burden of proof for a case such as this involving a taxpayer's challenge to a tax assessment. That is unfortunate because it requires this Court to do so.

The majority opinion lists our prior cases which have touched on the burden of proof issue. While I appreciate that a decision in favor of one standard or the other is needed to resolve the issue of inconsistency in our prior decisions, I am unpersuaded by the majority's rationale for its adoption of the "clear and convincing" standard. In essence, the only rationale in the majority opinion which appears to be advanced to charge a citizen taxpayer with a higher burden is that there is a presumption that valuations of property for purposes of taxation are presumed to be correct. Op., _____. See *Western Pocahontas Props. v. County Comm'n of Wetzel Co.*, 189 W.Va. 322, 431 S.E.2d 661 (1993). I fail to see why such a presumption compels a burden of proof on a taxpayer which is onerous and which is much more difficult to meet than that which applies to the State.

In reviewing other jurisdictions, I observe that the same inconsistency which was heretofore present in our jurisprudence is present among the other states. Nevertheless, a pattern emerges that state legislatures are more likely than courts to use the preponderancy burden. See Arizona Rev. Stat. Ann. § 42-1255 (2004); *Aileen H. Char Life Interest v. Maricopa County*, 93 P.3d 486, 491 (Ariz. 2004); Cal. Rev. & Tax. Code §§ 51.5(e), 110(b), 5170; *Paine v. State Board of Equalization*, 137 Cal. App.3d 438, 442, 187 Cal. Rptr. 47, 49 (Cal.Ct.App. 1982); Florida Statutes, § 194.301; *Smith v. Royal & Sons, Ltd*, 801 So.2d 255, 257-8 (Fla. Ct. App. 2001) (per curiam); Idaho Session Law 63-511 (1985); Iowa Code § 429.2 (2006); *Post Week Cable, Inc. v. Board of Review of Woodbury County*, 497 N.W.2d 810, 813 (Iowa 1993); Kansas S.A.2003 Supp 79-2005(I); *Saline County Board of*

Commissioners v. Jensen, 88 P.2d 242, 244-45 (Kan. Ct. App. 2004); *In re Colorado Interstate Gas Co.*, 79 P.3d 770 (Kan. 2003); Ky. Rev. Stat. Ann. § 13B.090 (1996); *U Hall Real Estate Co. v. County of Dakota*, 2008 WL 650290 (Minn. Tax. Ct. March 7, 2008); *Southern Minnesota Beet Sugar Coop v. County of Renville*, 737 N.W.2d 545 (Minn. 2007); *In re Walsh (New Hampshire Board of Tax and Land Appeals)*, 934 A.2d 528, 532 (N.H. 2007); *Porter v. Town of Sanbornton*, 840 A.2d 778, 783 (N.H. 2003); Okla. Stat. tit. 68 § 221 (2002); *Estate of Sieber v. Oklahoma Tax Comm’r.*, 41 P.3d 1038, 1041-42 (Okla. Civ. App. 2001); O.R.S. §305.427 (Oregon 2005); R.I. Gen. Laws §8-8-28 (1984); Tex. [Tax] Code Ann. §§41.43 and 42.43 (2007); *Mills v. Board of County Commissioners of Burleigh County*, 305 N.W.2d 832, 833-34 (N.D. 1981); *Board of Assessment Appeals v. Sampson*, 105 P.3d 198, 204 (Colo. 2005); OCGA § 48-5-41 (Ga.); *Lamad Ministries, Inc. v. Dougherty County Bd. of Tax Assessors*, 602 S.E.2d 845, 849 (Ga. Ct. App. 2004); Miss. Code § 27-77-7(4) (2006); Utah Code Ann. § 59-1-604 (1992); and *West Creek Associates, LLC v. County of Goochland*, 665 S.E.2d 834, 842-43 (Va. 2008). States which use a “clear and convincing” or more stringent standard seem generally to do so by court decision. *See City of Pinson v. Utilities Board of Oneonta*, 986 So.2d 367, 370 (Ala. 2007); *Arkansas Beverage Co. v. Heath*, 521 S.W.2d 835, 836-37 (Ark. 1975); *Leonard v. Comm’r of Revenue Services*, 823 A.2d 1184 (Conn. 2003); *Leader Treks, Inc. V. Dept. of Revenue*, 895 N.E.2d 683 (Ill. Ct. App. 2008); *Gannet Company, Inc. v. State Tax Assessor*, ___ A.2d ___, WL 4911798 (Me., Nov. 18, 2008); *Brenner v. Banner County Board of Equalization*, 753 N.E.2d 802, 813 (Neb. 2008); *SER Board of Equalization v. Barta*, 188 P.3d 1092, 1097-98

(Nev. 2008); *Edmondson Mgmt. Serv. Inc. v. Woods*, 603 S.W.2d 716, 717 (Tenn. 1980); and *Washington Beef, Inc. v. County of Yakima*, 177 P.3d 162, 167 (Wash. App. Ct. 2008).

It may be observed that burdens of proof lack general uniformity, even within states. Indeed, it is not unusual for a given state to have a lesser burden for one issue, such as assessments, and a more stringent burden for another issue, such as exemptions. *See generally McDonnell Douglas Corp. v. Franchise Tax Board*, 446 P.2d 313, 316 (Cal. 1968); *Lamad Ministies*, at 849; *North Alamo Water Supply Corp. v. Willacy County Appraisal District*, 804 S.W.2d 894, 899 (Tex. 1991). Here, we have a taxpayer simply challenging an assessment. Such a challenge is governed mainly by expert opinions. Absent a compelling reason to hold the taxpayer citizen to a stiffer burden than the State, I believe that the proper burden, consistent with expert disputes in civil cases, is that the taxpayer must prove his or her case by a “preponderancy of the evidence.” To the extent that policy considerations may dictate more stringent burdens in tax matters, I believe that is a matter which should be left to the Legislature. Absent such legislative action, there should be no disparity in burdens between the State and its citizens in matters such as this.

Accordingly, I respectfully dissent.