

No. 29327 -- Geraldine Willard and Denzil Rhodes, Co-Executors of the Estate of Alma Whited, deceased v. Gary Eugene Whited, Executor of the Estate of Delbert R. Whited, deceased

Starcher, J., concurring:

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As a general rule, a declaratory judgment action cannot be used as a vehicle to collaterally assault a judge's order. Our case law plainly states that "[a] declaratory judgment action can not be used as a substitute for a direct appeal." Syllabus Point 3, *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996). While I agree with this principle, the instant case demonstrates the need for some procedure whereby a circuit judge's confusing order may be amended, corrected, or clarified.

The declaratory judgment act is designed "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered." *W.Va. Code*, 55-13-12 [1941].

In the spirit of the act, my dissenting colleagues suggest that the rule in *Hustead* should instead be read to mean that "*absent special circumstances*, a declaratory judgment action cannot be used as a substitute for a timely appeal[.]" In the complex area of the settlement of estates, "uncertainty and insecurity" can abound when a judge issues a vague, confusing, or incomplete order.

I am troubled that the appellant in the instant case did not advocate this position. However, after examining the record, I too believe this should be the rule adopted by this Court. The judge in the instant case has issued an order that does not clearly resolve complex issues. The instant case does present

“special circumstances” requiring the clarification of the judge’s order through the use of a declaratory judgment.

Should this issue be presented to the Court in the future -- by rehearing or otherwise -- I would advocate for the adoption of a rule recognizing that in special and limited circumstances, a declaratory judgment action might be used to clarify the meaning and application of an existing order of a circuit judge.

I otherwise concur with the majority’s opinion.