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.*

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Albright, Justice, dissenting:

I dissent in this matter because this Court should either reverse the judgment of dismissal below and permit this action to proceed under West Virginia Code § 55-13-4, permitting a declaratory judgment proceeding to declare legal relations and rights in estate matters, or remand with instructions to amend the final judgment in this matter to authorize an amendment of the complaint to plead a case for equitable relief from a judgment independent of Rule 60(b), as specifically authorized by Rule 60(b).

I understand the reluctance of the majority to permit the use of the declaratory judgment statute to collaterally attack otherwise final judgments. I acknowledge that this Court and the vast majority of other jurisdictions generally observe that rule. Our adoption of that rule is set forth in syllabus point three of *Hustead v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996), as follows: "A declaratory judgment action can not be used as a substitute for a direct appeal." I believe the reliance of the majority on this syllabus point is misplaced.

In the body of the excellent opinion in *Hustead*, Justice Workman cites as the basis for the rule the agreement of this Court with the holding of *School Committee v. Commissioner of Education*, 482 N.E.2d 796 (Mass. 1985). The specific ruling in *School Committee* cited by Justice

Workman in *Hustead* is as follows: "*Absent special circumstances,* an action for a declaratory judgment cannot be used as a substitute for a timely appeal . . . ." *Hustead*, 197 W.Va. at 61, 475 S.E.2d at 61 (emphasis added). It is regrettable that syllabus point three of *Hustead* did not pick up the exception for "special circumstances." That does not alter the fact that this Court's opinion adopting the general rule expressly and properly recognized that it should not apply in the face of "special circumstances." As will be discussed in the course of this opinion, the present case has highly relevant special circumstances.

One of the most readily apparent special circumstances is that the declaratory judgment act expressly recognizes the likelihood that persons involved in the settlement of estates may need the relief provided for in the act, undoubtedly in contemplation of the fact that the administration and closing of an estate often involves unforseen questions arising in the process of executing the directions of the law applicable to estates.

Another special circumstance is the novelty of the questions for which Appellant's action seeks direction and answers. The statute involved here, West Virginia Code § 42-3-1, *et seq.*, was adopted in 1995 and introduced into our law the concept of an "augmented" estate, thereby substantially altering the meaning of a surviving spouse's elective share and, *inter alia*, stating special rules for determining who was liable for paying over such elective share and to what extent. It appears that the statute has not been the subject of litigation in this Court and, perhaps, not extensive litigation in the circuit courts.

Directly related to the circumstances presented by the relative novelty of the subject statute is the fact that the matters contained in the commissioner's report and confirmed and adopted as the order of the Circuit Court of Jackson County lack a level of clarity and certainty which would permit their easy and certain enforcement by any court or other officer directed to assist in that enforcement. The entire text of the portion of the commissioner's report relating to a judgment reads as follows:

> k. That judgment by award of the elective share [of the estate] should be rendered as follows:
>
> > Based on the numbers provided at the hearing and in all other forms offered by the respective counsel, and upon calculation through the elective share formula, the amount should be $77,035.00, as of the date of the hearing.
> >
> > In calculating the final amount due and owing, counsel must exchange proof of all interest earned on the accounts held by the estate in order that 38% percent of that income will also be paid as part of the elective share due Plaintiff.
>
> l. Costs should be assessed to the plaintiff and defendant as incurred by each party individually in the prosecution and defense of this case. Costs of the Special Commissioner should be assessed equally between Plaintiff and Defendant.

Not only is the "judgment" facially uncertain, the fact that it does not disclose against whom the "judgment" is rendered demonstrates that the "judgment" cries out for clarification, direction and definition, especially in light of the fact that someone other than the Executor of the Last Will and Testament of the decedent spouse could be liable for some part of the elective under the "augmented estate" scheme adopted in the statute. It readily appears from the record that the amount of the elective share determined

in the commissioner's report was calculated by applying a factor of 38% to $202,724.00, the sum of the value of the probate estate of $117,801.00, all or part of which may be in the hands of the fiduciary, and $84,923.00 of "reclaimable estate," most of which was not likely in the hands of the fiduciary. While it is not crystal clear from the scanty record before us, it appears that persons holding or suspected of holding parts of the "augmented estate," other than the fiduciary, were parties to this action, or at least the prior action in which this uncertain judgment was rendered, and would likely be amenable to the jurisdiction of the Circuit Court of Jackson County to untangle this web. I also note from the briefs filed in this matter that attempts have been made to collect this uncertain judgment, not only from the fiduciaries, but from their personal holdings and/or those of third parties. This is a mess crying for resolution, not disposition by conformity to rules rigidly and improperly applied.

Accordingly, I would reverse the judgment of the Circuit Court of Jackson County and direct that this action, with such parties added as may be necessary, proceed to completely dispose of the matter.

An alternative remedy is to remand the case with directions to allow an amendment of the complaint to state an independent action for equitable relief from a judgment whose prospective application was not contemplated by the entering court. It is regularly recognized that a dismissal should not be effected under Rule 12(b) of the Rules of Civil Procedure unless there is no set of facts under which the party praying for relief might recover that relief. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff

can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977) *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is likewise the policy of the rules that amendment shall be freely allowed to the end that justice may be served. Amendments are controlled by West Virginia Rule of Civil Procedure 15, which states in pertinent part:

> (a) Amendments. – A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

See Poling v. Belington Bank, Inc., 207 W. Va. 145, 529 S.E.2d 856 (1999).

Rule 60(b) expressly preserves such an independent action, where justified, apart from a showing of entitlement to relief under that rule, by providing: "[T]he procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules *or by an independent action.*" (Emphasis added.)

For all the reasons previously assigned as special circumstances justifying a declaratory judgment proceeding in this case, I believe that a skillful pleader could set forth a cause of action to address what Appellant believes to be the inequitable effect of the uncertain judgment confirmed, adopted and entered by the Circuit Court of Jackson County in the case underlying the case *sub judice*.

The majority opinion does a distinct injustice by preventing the affected parties from gaining a workable, effective and certain order under which to settle and close the affected estates. I hope our judicial system, by a rehearing in this Court, or otherwise, has and seizes the opportunity to make our system of laws work to bring about a just result on the merits in this matter – whatever that result may be after full hearing and adjudication of the issues we have thus far not allowed to be heard.

I am authorized to state that Chief Justice McGraw joins in this dissenting opinion.