No. 33523 – *Steven W. Chip Dantzic, David Shawn Dantzic, and Karen Sue (Dantzic) Tucker-Marsh v. Timothy Dantzic, Executor of the Estate of Luetta Dantzic Emmart Miller, Deceased, Timothy Dantzic, Nathan Dantzic, Carla Emmart, Debra Emmart, and Keyser Church of the Brethren*

FILED
June 17, 2008
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting in part, concurring in part:

I agree that this Court should affirm the lower court's determination of the effect of the will in this case. I am compelled to disagree with the majority's direction on the matter of a special appraisal because it is based on law which no longer has vitality and misinterprets the provisions of current statutory law.

There is no question that the lower court has authority under the Uniform Declaratory Judgments Act "[t]o direct . . . executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity," limited, of course, to current law governing the administration of estates. W.Va. Code § 55-13-4 (b). Under the current statutory scheme, there is no provision for raising a court challenge to the appraised value of estate property, even by the Tax Commissioner. The circulated opinion contains a citation to *Aul's Estate v. Haden*, 154 W.Va. 484, 177 S.E.2d 142 (1970), a case involving a suit brought by an executor of an estate to challenge the Tax Commissioner's assessment of inheritance taxes because the assessment was based on some of the property in the estate being valued at a higher rate than that at which it had been appraised. With that backdrop,

this Court in *Aul's Estate* said that the only way that the Tax Commissioner could have the value of estate property increased from the appraised value was by appeal to a circuit court. At the time *Aul's Estate* was decided, West Virginia Code § 11-11-17 expressly afforded the Tax Commissioner – and only the Tax Commissioner – the right to appeal the appraisement of estate property. However, when the Estate Tax replaced the Inheritance & Transfer Tax in 1985, the Tax Commissioner's statutory right to appeal appraisements of a personal representative was not preserved in that section or any portion of the 1985 enactment, nor was it restored by subsequent amendment.

The appraisal of estate property required by our current statute, West Virginia Code § 44-1-14, has importance in two settings. The first instance is if the estate, including non-probate property, is large enough to generate a federal estate tax return with the concomitant requirement of a state estate tax return. Given the generous federal estate tax exemptions currently available, there are relatively few estates in which the probate and non-probate property value has any significance in this context. The second instance in which appraisal becomes important is when beneficiaries or, as in this case, remaindermen after a life estate, may desire to sell probate or non-probate property of an estate and it becomes necessary to ascertain the property value as of the date of decedent's death for the purpose of determining whether any income tax is due the federal government or the state of West Virginia as a result of the sale. In either the estate tax or income tax framework, the appraised value assigned at the time of death is important because it establishes,

presumptively, the market value from which either tax is calculated. I say presumptively because federal tax authorities leave no doubt that with clear and convincing proof the value fixed by the appraisement of an estate of a decedent by its fiduciary as of the time of death may be altered for tax purposes.[1]

Instead of recognizing the presumption employed by the federal authorities and its effects, the majority opinion sets a course that forces the estate fiduciary to expend a substantial sum of money to ascertain an expert's opinion of the value of non-probate property, thus producing a benefit to the interested remaindermen but yielding no benefit whatsoever to the estate or the fiduciary. By utilizing provisions of state law that have long

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[1]The federal position is summarized in *Feldman v. Commissioner of Internal Revenue*, T.C. Memo, 1968-19 (1968), as follows:

> It is well settled that the value at which property is returned for estate tax purposes is prima facie the value for the purpose of computing depreciation and gain or loss on subsequent sale. Such value is not conclusive but is a presumptive value which may be rebutted by clear and convincing evidence. The value at which property is returned for estate tax purposes is, however, entitled to great weight. *Williams v. Commissioner*, 44 F.2d 467, 469 (C.A. 8, 1930), affirming 15 B.T.A. 227; *Rogers v. Helvering*, 107 F.2d 394, 396 (C.A. 2, 1939), affirming on this point 31 B.T.A. 994, 1006; Tax Regs. sec. 1.1014-1(a) and 3(a); and Rev. Rul. 54-97 (1954-1 C.B. 113).

See also Bittker and Lokken, *Federal Taxation of Income, Estates and Gifts*, 1997 WL 439698 (W.G. & L.) (2008).

since been repealed, the majority imposes a duty, accompanied by considerable expense, upon the fiduciary of the decedent's estate with absolutely no authority in law.

In this case, the fiduciary stated what he believes is market value of the subject property as of the date of the decedent's death. The remaindermen contend that an independently retained expert would arrive at a markedly different value. The remaindermen may prove their point by seeking the appraisal they desire. If such is acquired and presented to the fiduciary, the fiduciary retains the option of filing an amended appraisal, a courtesy the fiduciary would certainly consider extending. Even if the fiduciary refuses, the remaindermen are fully equipped to challenge the appraisal of the fiduciary upon any subsequent sale or transfer of the subject real estate. What is crystal clear is that this Court has no business imposing on the cash-strapped estate a costly exercise that is of no benefit to the estate, and serves only the interests of the remaindermen who by way of the majority opinion escape all costs of the appraisal exercise. All of which the majority justifies by citing an opinion of this Court which now has no application because it relies upon a statutory scheme that has had no force and effect for twenty years.

Having concurred in the determination of the effect of the will, I respectfully dissent from the position adopted by the majority regarding special appraisals for the reasons stated above.

I am authorized to state that Justice Starcher joins in this separate opinion.