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## Statutory Remedies--The Declaratory Judgment in West Virginia

David L. Palmer

*West Virginia University College of Law*

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## STUDENT NOTES

STATUTORY REMEDIES—THE DECLARATORY JUDGMENT  
IN WEST VIRGINIA

The declaratory judgment is a relatively new remedy in West Virginia, in that the Uniform Declaratory Judgments Acts was enacted in 1941.<sup>1</sup> Similar to the federal act,<sup>2</sup> the West Virginia enactment provides that:

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final decree.

A companion provision provides for further relief:

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why the further relief should not be granted.<sup>3</sup>

The foregoing provisions are quite comprehensive in scope. While the former provision expressly sets forth the power to adjudicate and declare the petitioner's rights, the latter provision grants wide discretion to a court to enforce or supplement its previous decree. The two sections have been construed to require two separate proceedings. In *Tharp v. Tharp*,<sup>4</sup> the court, citing *West Virginia-*

<sup>1</sup> W. VA. CODE ch. 55, art. 13, § 1 et seq. (Michie 1966). It had been earlier proposed that the declaratory judgment remedy be adopted as a procedural rule promulgated by the Supreme Court of Appeals. The suggestion was tendered to that body by the Judicial Council, but the Supreme Court of Appeals refused to act upon the request, stating that the procedure should be instituted by the legislature. Jackson, *A Note on Declaratory Judgment Pleading and Practice*, 48 W. VA. L.Q. 130 (1942).

<sup>2</sup> THE FEDERAL DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201-02 (1964), is the federal counterpart of West Virginia Act. The Federal Act is substantially identical to the West Virginia Act with the notable exception that disputes arising from federal tax obligations are not covered by the Federal Act.

<sup>3</sup> W. VA. CODE ch. 55, art. 13, § 8 (Michie 1966).

<sup>4</sup> 131 W. Va. 529, 48 S.E.2d 793 (1948). This case involved the construction of a will. The testator devised all of his real estate and personal property to his surviving son with a life estate reserved in the testator's

at this time, and was also the father of a son, Eugene. The will provided *Pittsburgh Coal Co. v. Strong*,<sup>5</sup> stated that "this court recognized the difference between simple adjudicating 'rights, status and other legal relations' and the granting of relief, . . . providing expressly that *relief may be sought by petition following declaratory judgment*."<sup>6</sup> However, Rule 57 of the West Virginia Rules of Civil Procedure provides, in part:

*A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action or upon petition to any court in which the declaratory action might have been instituted.*<sup>7</sup>

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widow. The surviving son, Earl M. Tharp, was married to Elwilda Tharp that should the widow remarry or die the whole of the real and personal property should become the absolute property of Earl M. Tharp and his children. Eugene, the only child of Earl M. Tharp, died before the death or remarriage of his paternal grandmother. Elwilda Tharp, plaintiff, asserted that at the testator's death her estranged husband, Earl, and their son Eugene, took a joint vested remainder in the testator's estate. Plaintiff further asserted that upon the death of her son Eugene, she and her husband, under the laws of descent and distribution, took a joint one-half vested remainder in their son's estate. Plaintiff accordingly sought a declaratory judgment to ascertain her rights under the will and prayed for payment out of the testator's estate under a separation settlement between plaintiff and her husband, appointment of a receiver for the testator's estate, and reference of the cause to a commissioner in chancery.

The court held that plaintiff was entitled to a declaratory judgment and agreed that plaintiff was entitled to a share of the testator's estate based upon her deceased son's estate. The court, however, held that the plaintiff was merely entitled to a declaration of her rights and the further relief requested could not be granted in a declaratory proceeding, but must be requested by petition after declaration of her rights.

<sup>5</sup>129 W. Va. 832, 42 S.E.2d 46 (1947). In this case, which involved a declaration of rights under a deed pertaining to ownership of coal rights, the court, speaking to the plaintiff's combination of a specific prayer for relief with declarative relief, stated:

We believe it is quite clear that the bill of complaint is demurrable to the extent that it combines a prayer for an adjudication of rights with a prayer for specific relief. Under the terms of the act the latter can be granted only to the extent that it is justified by a *subsequent separate petition*. *Id.* at 835, 42 S.E.2d at 48-9 (emphasis added).

<sup>6</sup>Tharp v. Tharp, 131 W. Va. 529, 539, 48 S.E.2d 793, 799 (1948) (emphasis added).

<sup>7</sup>M. Lugar & L. Silverstein, W. VA. RULES 443 (1960) (emphasis added). In a note following Rule 57 the reporter stated that the material quoted would change the present law. *Id.* The intent of the Rules was to change many basic judicial procedures that appear in the W. Va. Code as statutory rules of court. W. VA. CODE ch. 51, art. 1, § 4 (Michie 1966) provides, in part:

The supreme court of appeals may, from time to time, make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record in this State. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect

It appears therefore that declaratory and coercive relief may both be obtained in the original proceeding without the need of petitioning the court for further relief or enforcement of its previous decree.

Understanding the purpose behind the Uniform Declaratory Judgments Act enables one to better understand its value as a remedy. Judge Kenna, in *West Virginia-Pittsburgh Coal Co. v. Strong*,<sup>8</sup> pointed out that the design of the act was "to anticipate the actual accrual of causes for equitable relief or rights of action, by anticipatory orders which adjudicate real controversies before violation or breach results in loss to one or the other of the persons involved . . ."<sup>9</sup> One leading author expressed the purpose of the declaratory judgment as follows:

[T]o make disputes as to rights, or titles, justiciable without proof of a wrong committed by one party against the other, and to afford a remedy, speedy and inexpensive in character, whereby the legal duties, rights, and liabilities may be adjudicated before wrongs have actually been committed or damages have been suffered, and with this in view, the statute and the remedy afforded thereby should be liberally construed and freely applied, and in the end resulting in relief from insecurity and uncertainty with respect to rights, status, liabilities, and other legal relations.<sup>10</sup>

Although liberal construction of the declaratory judgment is contemplated,<sup>11</sup> an action for declaratory relief is properly sought only in certain instances.

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unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section.

Since the procedural provisions of the Uniform Declaratory Judgments Act antedate the W. Va. Rules, the provisions of the latter will prevail over the former.

Rule 57 of the West Virginia Rules of Civil Procedure also provides that in a proceeding under the Uniform Declaratory Judgments Act, the right to trial by jury may be demanded pursuant to Rules 38 and 39. If, however, the pleadings or proof disclose no issue other than the establishment of a party's personal status, or other legal relation, a jury trial may be properly refused. *E.g.*, *Watterman v. Taylor*, 168 F.2d 413 (2d Cir. 1948).

<sup>8</sup> 129 W. Va. 832, 42 S.E.2d 46 (1947).

<sup>9</sup> *Id.* at 835, 42 S.E.2d at 48.

<sup>10</sup> W. ANDERSON, DECLARATORY JUDGMENTS 4-5 (1st ed. 1951).

<sup>11</sup> W. VA. CODE ch. 55, art. 13, § 12 (Michie 1966) provides:

This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and it is to be *liberally construed and administered*. (emphasis added).

## WHEN THE DECLARATORY JUDGMENT CAN BE USED

The Uniform Declaratory Judgments Act provides imaginative methods of serving clients. The Act expressly provides for construction of contracts before or after breach,<sup>12</sup> declarations concerning trusts and estates,<sup>13</sup> and the validity of statutes, ordinances, or franchises.<sup>14</sup> The Act does not restrict itself to those matters alone; Section 5 provides that despite the enumeration in the Act of specific instances when the remedy may be used no specific limitations are intended. For example, in *Lake v. Potomac Light and Power Co.*,<sup>15</sup> plaintiff sought a declaratory judgment to determine if defendant's electrical equipment was trespassing on plaintiff's property. In a more recent case, the Circuit Court of Cabell County was asked to render a declaratory judgment to determine the official duties of the county clerk.<sup>16</sup>

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<sup>12</sup> W. VA. CODE ch. 55, art. 13, § 3 (Michie 1966) provides: "A contract may be construed either before or after there has been a breach thereof."

<sup>13</sup> W. VA. CODE ch. 55, art. 13, § 4 (Michie 1966) states:

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others, or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

<sup>14</sup> W. VA. CODE ch. 55, art. 13, § 11 (Michie 1966) provides in part: In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general of the State shall also be served with a copy of the proceeding and be entitled to be heard.

In *Lance v. Board of Educ.* 170 S.E.2d 783 (W. Va. 1969), plaintiffs brought declaratory judgment actions contesting the constitutionality of certain West Virginia statutes. The court stated that the declaratory judgment actions were proper proceedings by which to determine the rights of the parties. *Id.* at 786.

<sup>15</sup> 150 W. Va. 641, 149 S.E.2d 230 (1966). In this case the Supreme Court of Appeals reversed and remanded the trial court's summary judgment favoring the defendant on the basis that there was a genuine controversy. The court further held that plaintiff was entitled to a jury trial of the issues in controversy.

<sup>16</sup> *Arthur v. County Court of Cabell County*, 167 S.E.2d 558 (W. Va. 1969). Plaintiff county clerk in this case instituted a declaratory judgment action for the purpose of determining whether plaintiff was entitled to receive reasonable compensation in addition to his regular salary for preparation of the County's annual financial statement. The trial court held for plaintiff but the Court of Appeals reversed. The controversy centered upon a 1967 amendment to the W. Va. Code which authorized the county court

Other jurisdictions have made wide use of the declarative remedy. It has been used to ascertain whether a particular grievance arising under a written contract is properly subject to arbitration under the agreement,<sup>17</sup> to determine the boundary lines of a school district,<sup>18</sup> to ascertain whether the right to redeem property sold at a judicial sale exists,<sup>19</sup> to determine the identity of a judgment debtor,<sup>20</sup> to secure a widow's right to Social Security benefits,<sup>21</sup> and to ascertain whether a tree overhanging a property line was a nuisance.<sup>22</sup> These are but a few of the instances where the declarative remedy may be used. In short, the declarative judgment may be utilized in nearly every conceivable type of justiciable controversy.

#### AN ACTUAL CONTROVERSY

Although the Uniform Declaratory Judgments Act does not expressly require a justiciable controversy,<sup>23</sup> case law in West Virginia is solidly behind the requirement of a clashing of adverse interests. "Adverseness" has been defined as a claim of legal rights asserted by one party and denied by the other.<sup>24</sup> Unless such adverseness is present a court will not take jurisdiction of the matter.

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to employ the county clerk to assist the county court to perform its required duty of preparing the annual county financial statement. Prior to the amendment, the Code provided that the county clerk *shall* prepare the report for the county court. The apparent effect of the 1967 amendment was to place the duty of preparing the report upon the county court instead of the county clerk. The Supreme Court of Appeals held that this was a narrow view of the legislative intent and pointed out that the Code has long provided that the clerk is to perform such functions for the county court. Moreover, the Court observed that the means of preparing the financial statement were in the exclusive possession of the clerk and if the legislative intent was as the plaintiff contended then the legislature would have made specific provision to supply the means by which the county court could have performed that duty.

<sup>17</sup> *Harvey Machinery Co. v. Alvarey*, 76 Cal. App. 2d 427, 173 P.2d 65 (1946).

<sup>18</sup> *Dean v. Board of Educ.*, 247 Ky. 553, 57 S.W.2d 477 (1933).

<sup>19</sup> *Klein v. Morgan*, 301 Ill. App. 203, 22 N.E.2d 269 (1939).

<sup>20</sup> *Naftel Dry Goods Co. v. Mitchell*, 212 Ala. 31, 101 So. 653 (1924).

<sup>21</sup> *Lamay v. Hobby*, 132 F. Supp. 738 (E.D. Wis. 1955).

<sup>22</sup> *Bonde v. Bishop*, 112 Cal. App. 2d 1, 245 P.2d 617 (1952).

<sup>23</sup> THE FEDERAL DECLARATORY JUDGMENT ACT, 28 U.S.C. § 2201 (1964) is much more explicit in requiring a justiciable controversy. In pertinent part the federal act declares:

In the case of *actual controversy* within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party . . . (emphasis added.)

<sup>24</sup> *Mainella v. Board of Trustees*, 126 W. Va. 183, 186, 27 S.E.2d 486, 488 (1943).

In *South Charleston v. Board of Education*,<sup>25</sup> the city was negotiating with the federal government for the purchase of land. The city sought a declaratory judgment to declare a contract between it and the Board of Education null and void. The contract in question provided for the city to lease land to the Board of Education should the city acquire the property from the federal government. The West Virginia Supreme Court of Appeals reversed the ruling of the lower court which had granted relief to the plaintiff. Judge Lovins, speaking for the Court, stated that a justiciable controversy did not exist between plaintiff and defendant because South Charleston had no actual interest in the land. The United States Government, not South Charleston, was still the owner of the land and was not a party to the action. The mere fact that the plaintiff was contemplating a conveyance from the United States Government did not give South Charleston standing to seek the declaratory relief. The court stated that "a declaration of rights will not be based on a future contingency."<sup>26</sup>

Although the *South Charleston* case made it quite plain that declaratory relief could not be predicated on a future contingency, in *Farley v. Graney*<sup>27</sup> the court narrowed this prohibition. Here the court considered an application for declarative relief in a constitutional challenge of a newly enacted state statute concerning the operation of junk yards. The statute, adopted by the legislature on June 11, 1959, was not to become enforceable until July 1, 1960, three months after plaintiff brought suit. Although plaintiff, the operator of a junk yard, would not have been in violation of the statute until its enforcement date, the court found the action to involve an actual controversy, not a future contingency. The court stated:

It would not be consonant with the spirit, intent and purpose of the declaratory judgment statutes to have required the plaintiff to wait until [the] July 1, 1960 deadline, then to violate the statute and to be arrested in order to have a determination of his rights, duties, and responsibilities under the statute. Only in a limited sense can it be said that the plaintiff has sought herein a declaratory judgment before the statute became effective. Only the enforcement

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<sup>25</sup> 132 W. Va. 77, 50 S.E.2d 880 (1948).

<sup>26</sup> *Id.* at 84, 50 S.E.2d at 883.

<sup>27</sup> 146 W. Va. 22, 119 S.E.2d 833 (1960).

provisions were in abeyance at the time this proceeding was commenced.<sup>28</sup>

In *Crank v. McLaughlin*,<sup>29</sup> a suit to obtain declaratory relief from a state agency regulation, the actual controversy requirement was again the primary issue. The dispute arose over a regulation of the defendant State Commissioner of Agriculture which abrogated certain parts of a milk regulation ordinance enacted by the City of Charleston. The plaintiff, a milk handler, sought a declaratory judgment testing the legality of the defendant's action. Judge Fox, speaking for the court, stated that plaintiff did not have the necessary standing to bring the action because a relationship or status did not exist between the parties that would entitle a court of competent jurisdiction to grant relief. The court stated:

No one has a vested right in any law or ordinance, in the sense that a continuance thereof may be demanded, although rights accruing thereunder are always protected up to the time of any repeal or modification thereof. The plaintiffs would not have had any right to complain had the city, through action of its proper authorities, adopted an ordinance which would have carried out to the letter the provisions of the regulation promulgated by the Commissioner of Agriculture.<sup>30</sup>

Therefore, the plaintiff milk handler, lacking standing to bring the action, failed to present the justiciable controversy requisite to declaratory relief.

The purpose behind the requirement of an actual controversy in an action for declarative relief is the court's long standing refusal to render advisory opinions or to resolve academic disputes.<sup>31</sup> In the final analysis, whether a justiciable controversy exists will depend upon the facts of the case at the time the proceeding is commenced.<sup>32</sup>

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<sup>28</sup> *Id.* Among those cases cited granting declarative relief prior to the effective date of a statute were: *Pierce v. Society of Sisters*, 268 U.S. 510 (1924); *Hoagland v. Bibb*, 12 Ill. App. 2d 298, 139 N.E.2d 417 (1957).

<sup>29</sup> 125 W. Va. 126, 23 S.E.2d 56 (1942).

<sup>30</sup> *Id.* at 131, 23 S.E.2d 59.

<sup>31</sup> *Maniella v. Board of Trustees*, 126 W. Va. 183, 185, 27 S.E.2d 486, 488 (1943).

<sup>32</sup> *E.g.*, *Robertson v. Hatcher*, 148 W. Va. 239, 247, 135 S.E.2d 675, 681 (1964). This case involved a declaratory judgment proceeding contesting the constitutionality of an apportionment statute. The plaintiffs challenged the constitutionality of a Legislative act which apportioned the state into Congressional and Senatorial Districts and which gave every county within the

## NECESSITY OF COMPLETE RESOLUTION

The West Virginia Code precludes the use of the declaratory judgment "where such judgment or decree, if rendered and entered, would not terminate the uncertainty or controversy giving rise to the proceeding."<sup>33</sup>

The problem of an inadequate remedy often arises where a necessary party to the action is not joined, resulting in the court's inability to properly define the rights and liabilities of the parties. In *Mainella v. Board of Trustees*<sup>34</sup> declaratory relief granted by the lower court was held ineffective because all of the necessary parties were not before the court. Since the justiciable controversy could not be settled, the case was reversed and remanded with instructions.

In holding that a controversy in question could be finally resolved by a declaratory judgment of the rights of plaintiff under a will, the court in *Tharp v. Tharp* observed that such a "suit will remove the uncertainty involved here, and will serve to bring to a speedy termination the matters in controversy between plaintiff and defendant."<sup>35</sup> It is clear that unless the requested judgment is capable

state at least one seat in the House of Delegates. In apportioning the state into Senatorial Districts the Legislature "superimposed" the Seventeenth Senatorial District over the Eighth Senatorial District in order to give Kanawha County an additional two state senators. Among other defenses, the defendants contended "that an actual controversy did not exist at the time the action was instituted as no legal right had been claimed by the plaintiffs and denied by the defendants." *Id.* at 246. The Supreme Court of Appeals disposed of this contention by pointing out that although the plaintiff had not yet been denied a legal right, the Legislative act in issue had indeed been enacted prior to the institution of the plaintiff's action and therefore posed adverseness to the plaintiff's interests. Hence, at the time the action was instituted the facts indicated that a justiciable controversy did in fact exist.

<sup>33</sup> W. VA. CODE ch. 55, art. 13, § 6 (Michie 1966).

<sup>34</sup> 126 W. Va. 183, 27 S.E.2d 486 (1943). In this case plaintiff sought a declaratory judgment against the Board of Trustees of the Policemen's Pension and Relief Fund of the City of Fairmont. The action concerned the Board's refusal to continue payment of a pension to plaintiff, disabled policeman. The defendant appealed an adverse judgment and the Supreme Court of Appeals reversed and remanded the case to the lower court with directions. While holding that a declaratory judgment was otherwise appropriate, the Court held that the merits of the cause could not be fully and completely adjudicated without the joinder of the City and the Mayor as co-defendants. The judgment for plaintiff rendered in the lower court was therefore defective and ineffective. Moreover, W. VA. CODE ch. 55, art. 13, § 11 (Michie 1966) provides:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which could be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise such municipality shall be made a party and shall be entitled to be heard. . . .

<sup>35</sup> *Tharp v. Tharp*, 131 W. Va. 529, 533, 48 S.E.2d 793, 795-96 (1948).

of resolving the controversy, the relief will be inappropriate and therefore denied.<sup>36</sup>

#### JURISDICTION

The Uniform Declaratory Judgments Act does not, and was not intended to enlarge a court's jurisdiction.<sup>37</sup> Before it has been determined that a justiciable controversy exists, it is necessary to determine if the other jurisdictional requirements are present in order that declarative relief may be granted. An initial jurisdictional inquiry relates to the parties to the action. All necessary parties to the action must be joined before the court can render an effective decree.<sup>38</sup> Similarly, a court must have jurisdiction over the *res* when an *in rem* declaratory judgment is sought. In short, to satisfy the jurisdictional requirement, the controversy between the parties to the action "must be of such nature as would warrant a court of law or equity in taking jurisdiction, if the same were asserted in some other proceeding."<sup>39</sup>

#### CONCLUSION

Despite the fact that the declaratory judgment remedy has been available in West Virginia for nearly thirty years, an examination of the cases of the West Virginia Supreme Court of Appeals discloses that it is not often employed. The advantages of the act dictate a more frequent utilization of the remedy. Foremost among the advantages are savings of time and expenses. Another advantage of the declarative remedy is the opportunity to secure preventive relief against a threatened breach of duty. Since the legislature intended liberal construction of the act, wide utilization was contemplated. The declaratory judgment remedy is a valuable and worthwhile procedural tool. With more frequent use, the declarative remedy should prove to be, as indeed it is, a short-cut to the better administration of justice.

*David L. Parmer*

<sup>36</sup> W. VA. CODE ch. 55, art. 13, § 6 (Michie 1966).

<sup>37</sup> *Dolan v. Hardman*, 126 W. Va. 480, 484, 29 S.E.2d 8, 10 (1944): The Uniform Declaratory Judgments Act does not confer on courts of this State new jurisdiction nor extend jurisdiction in existence prior to its enactment, unless it can be said that authority to grant declaratory relief instead of coercive relief is an extension of jurisdiction.

<sup>38</sup> *E.g.*, *Mainella v. Board of Trustees*, 126 W. Va. 183, 27 S.E.2d 486 (1943); *South Charleston v. Board of Educ.*, 132 W. Va. 77, 50 S.E.2d 880 (1948).

<sup>39</sup> *Crank v. McLaughlin*, 125 W. Va. 126, 131, 23 S.E.2d 56, 59 (1942).