
CASE NO. 34947

BEFORE
THE
WEST VIRGINIA SUPREME
COURT OF APPEALS

CHARLESTON

BARBARA K. MOTT,

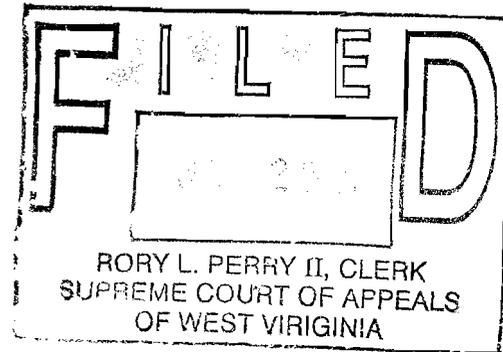
Plaintiff Below, Appellee,

vs.

FRANK P. KIRBY, SR., limited liability
Company, KENNY KIRBY and FRANK P.
KIRBY, JR.,

Defendants Below, Appellants.

BRIEF OF APPELLANTS, KENNY KIRBY AND FRANK P. KIRBY, JR.



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I. INTRODUCTION

In this appeal, Appellants Kenny Kirby and Frank P. Kirby, Jr. (referred to collectively at times as “Appellants” or “the Kirbys”) ask this Court to reverse the Final Order entered by the Circuit Court of Cabell County in favor of Barbara K. Mott (“Mott” or “Appellee”).

The dispute over which this action arises concerns the Frank P. Kirby Sr. Limited Liability Company (“the LLC”). The Kirbys and Mott are the remaining three members of the LLC that was formed after the death of their father, Frank P. Kirby, Sr., to hold title to various assets inherited by the Kirbys, Mott, and their brother, David Kirby. One of the assets of the LLC was a tract of land in excess of 200 acres on Eighth Street Road in Cabell County, West Virginia. As reflected in the minutes of regularly held meetings of the LLC, the LLC members reached an agreement whereby a parcel of the tract was conveyed by deed, with reservations and easements, to David Kirby in order to facilitate his exit from the LLC. The current dispute involves Mott’s attempt to have a parcel separated from the tract for her. While there was a preliminary agreement among the LLC members for the particular portion of the tract to be designated for Mott, the clear minutes of the LLC meetings and the testimony below established that no complete and final agreement was reached, because the members of the LLC could not agree as to the reservations and rights of way to be imposed upon the Mott parcel and no agreement was reached concerning any division or accounting of the other LLC assets. Nevertheless, after a bench trial, the Court below ordered a partition of the LLC’s Eighth Street Road tract with no restrictions pursuant to West Virginia Code 37-4-1, notwithstanding the fact that said statute was on its face inapplicable to a limited liability company.

In this appeal, Appellants ask the Court to reverse the Final Order entered in favor of Mott by the Circuit Court of Cabell County. The evidence was clear that no final agreement had been reached among the remaining members of the LLC as to the division of the remainder of the Eighth Street Tract. In addition, the Circuit Court lacked authority to order partition of real estate owned by a limited liability company and not by individual tenants in common or a closely held corporation. On remand, Appellants ask that the Circuit Court be required to reconsider the issues raised before it by the pleadings in accordance with state law governing dissociation from a limited liability company, that the Circuit Court require an accounting of the LLC's total assets and debts prior to any dissociation or dissolution in accordance with state law governing a limited liability company, and that any division of real estate among the remaining members of the LLC be subject to appropriate reservations and rights of way in accordance with those imposed upon the conveyance by the LLC to former member David Kirby, such that will protect the value of the remainder of the tract and permit all parcels of the tract to have reasonable and proper roadway access.

II. KIND OF PROCEEDING AND NATURE OF THE RULING IN THE CIRCUIT COURT OF CABELL COUNTY

Appellee Mott brought this action against Frank P. Kirby Sr. LLC and Appellants Kenny and Frank P. Kirby, Jr., seeking to have a parcel of the tract of land owned by the LLC on Eighth Street Road in Cabell County, West Virginia, conveyed to her and further sought an accounting of the assets and debts of the LLC for purposes of her withdrawal from the LLC. During the course of the litigation, Mott filed a motion for partial summary judgment, asking the Court to order partition of the LLC's Eighth Street Road tract pursuant to W. Va. Code 37-4-1. The Kirbys and the LLC opposed this motion on the ground that the Court lacked statutory authority under W. Va. Code 37-4-1 to order the partition of real estate owned by the LLC. The Kirbys

and the LLC filed their own motion for partial summary judgment, asserting that there was no enforceable agreement among the remaining members of the LLC to convey a parcel of the Eighth Street Road Tract to Mott as no agreement had been reached regarding the applicable reservations and rights of way to be placed on such a parcel.

The Court below in essence denied both motions and, instead, proceeded to conduct a bench trial on April 18, 2007. After the bench trial, by Final Order entered June 11, 2007, the Circuit Court found that it had jurisdiction over the matter pursuant to W.Va. Code 37-4-1 “because the parties to the lawsuit are stockholders [sic] of the closely-held corporation [sic] Frank P. Kirby Sr. Limited Liability Company” and because the real estate at issue is located in Cabell County, West Virginia. The Court proceeded to find in a letter opinion and the Final Order that there were discussions that all parties “*wished* to divide the property,” shareholder minutes indicating that the parties “*intended* to divide the property,” but, curiously, while arbitrarily ordering that the property be partitioned along the tentative lines of a survey commissioned by the LLC, did not in the Final Order ever find that a final and enforceable agreement for dissociation from the LLC was ever reached by the parties. Further, the Final Order completely ignored the issues of an accounting and valuation of the LLC’s assets and debts, and, instead, premised its finality upon the Court’s arbitrary order of partition under an inapplicable statute. The Final Order also made no attempt to determine whether the ordered division of the property was into parcels of approximately equal value and, instead, summarily dismissed the valuation issue on the Court’s finding that “this case is about restrictions on the land,” when, in fact, the case was about dissociating one of the LLC’s members.

Thereafter, on June 11, 2007, the Kirbys filed “Defendants’ Motion to Alter or Amend Judgment and/or for Relief from Judgment or Order,” which Motion was denied, after

hearing, by Order entered by the Circuit Court on October 31, 2008. Thus, it is from the Final Order of June 11, 2007 and the Order entered October 31, 2008 denying post-trial motions for relief from the Final Order that the Kirbys appeal. Appellants seek to have those orders reversed and vacated in their entirety and to have this case remanded for further proceedings consistent with the West Virginia Uniform Limited Liability Company Act, W.Va. Code §31B-1-101 *et seq.*

III. STATEMENT OF FACTS OF THE CASE

The present litigation arises from a limited liability company formed by the Kirbys, Mott, and their brother, David Kirby, after the death of their father, Frank P. Kirby, Sr. (*See Amended Complaint at ¶ 6, 7; April 18, 2007 Transcript, pp. 7-8; 156-57.*) The LLC owned a variety of assets, including a tract of land originally in excess of approximately 200 acres on Eighth Street Road in Cabell County, West Virginia, rental property, cash, and various debt instruments, including, but not limited to, a debt of \$40,000+ owed the LLC by Mott. (*See April 18, 2007 Transcript, pp. 42-43; 69; 126; 161.*) The LLC operated pursuant to an Operating Agreement, with regularly held meetings of the LLC's four members. (*See April 18, 2007 Transcript, pp. 120, 8.*)

At a meeting held August 6, 1999, the LLC members entertained a motion to divide the LLC property and agreed to continue to work toward an "acceptable plan." Over the course of the next year and one-half, the LLC members held various meetings during which they continued to work on and discuss a property division. (*See Plaintiff's Exhibit 3, April 18, 2007 Trial.*)

On February 17, 2001, the members worked on proposed property lines for purposes of dividing the Eighth Street Road Tract. The members even adjourned to the site location to review proposed line placements for a parcel to be separated out for withdrawing member David

Kirby. They then returned from the site and preliminarily selected among themselves from four parcels into which the Eighth Street Tract was roughly divided. It was agreed to retain the services of a surveyor to assist with proposed property lines. (See Plaintiff's Exhibit 4, April 18, 2007 Trial.) As explained by Frank Kirby, the LLC members were concentrating on dividing the property, "but always the discussions of dividing the property up had underlying details that we had all agreed that we would be working on after we got the surveying started. And we knew that these underlying details, such as restrictions, right-of-ways and utility easement all had to be negotiated and worked on after we got the surveying work started." (See April 18, 2007 Transcript, pp. 126-27.) As Frank Kirby testified, "No, there wasn't a completed agreement. All there was was just an agreement between all of us that we would follow this pattern to try and divide the property up." (See April 18, 2007 Transcript, p. 127.)

On May 7, 2001, the Kirbys and Mott signed a letter to surveyor David Nemeth asking him to survey the Eighth Street Road tract. David Kirby, the other LLC member, did not sign the letter. (See Plaintiff's Exhibit 6, April 18, 2007 Trial.)

On July 31, 2001, the LLC members passed a motion to proceed with the attempted division of the Eighth Street property and the Nemeth survey, but also agreed on an alternative plan in the event the members could not reach a complete agreement:

"Once survey is completed and the stakes have been laid down, if a complete agreement between the parties cannot be reached, then after that, at the next meeting, then at that point we will require the services of an auction company to divide the property up and sell it within the next 180 days." (Emphasis added.)

(See Plaintiff's Exhibit 10, April 18, 2007 Trial.) The minutes of this July 31, 2001 meeting were approved by the LLC membership at its February 16, 2002 meeting. (See Defendants' Exhibit 2, April 18, 2007 Trial.) In fact, as Frank Kirby testified, Mott helped draft the language

of the approved motion that, *if a complete agreement could not be reached*, the LLC would require the services of an auction house to sell the LLC's property. (See April 18, 2007 Transcript, pp. 130-31.)

At its February 16, 2002 meeting, the membership voted unanimously to focus on completing the David Kirby parcel division from the Eighth Street Tract and dissociate him from the LLC. The membership also discussed (1) David Kirby's disagreement with a stake marking a proposed division line of his parcel, (2) moving the David Kirby line 50 feet and creating a no cutting, vegetation barrier, (3) the need for all remaining members to have proper right of way road access for them and their children, and (4) extinguishing David Kirby's debt of approximately \$84,000 to the LLC and his ownership claims (25%) on the LLC with the conveyance of a parcel from the Eighth Street Road Tract to him. (See Defendants' Exhibit 2, April 18, 2007 Trial.)

On July 8, 2002, the LLC members reviewed a proposed deed of a parcel of land to David Kirby, including reservations of rights of way, life estate for the LLC members' mother, and water line tap and right as set forth therein. The members agreed that they would schedule the signing of the deed to David Kirby with an attorney. (See Defendants' Exhibit 3, April 18, 2007 Trial.) Thereafter, on July 26, 2007, the LLC members executed a deed of a parcel of the Eighth Street Road tract to David Kirby, reserving therefrom, *inter alia*, a 50 feet wide "no cutting" vegetation boundary, a 20 foot wide haul road right of way, a life estate in a certain portion of the parcel to Nellie Kirby, a 20 foot easement for ingress and egress and the placement of utilities, and a right to add one new tap to the present waterline. All four members of the LLC executed the deed. (See Defendants' Exhibit 1, April 18, 2007 Trial.) The total process for completing the dissociation of David Kirby from the LLC, including the final agreement

regarding the dimensions of his parcel as well as the reservations and restrictions contained within his deed lasted two years “with all kinds of negotiations.” (See April 18, 2007 Transcript, pp. 154-55.) Defendant David Kirby then formally resigned from the LLC to complete his dissociation. (See Defendants’ Exhibits 10 and 11, April 18, 2007 Trial.)

Seven months later, on February 15, 2003, the LLC, now comprised of only three members (the Kirbys and Mott) held a regularly scheduled meeting. At this meeting, the members discussed “moving in direction of dividing remaining property three ways” as well as the possibility of selling off some of the Eighth Street tract to use to develop a mutual road to the proposed Barbara Mott and Frank Kirby parcels. Mott agreed that selling Eighth Street lots for road development would be an acceptable idea, and her husband even agreed to work with Appellants in order to lay out a proposed road location and property division line. (See *Exhibit A* attached hereto.)

On June 29, 2003, the LLC met for its last time with Appellee and Appellants present. At this meeting, however, the hard work of the parties toward a goal of amicable agreement for Mott’s dissociation from the LLC disintegrated, with Mott demanding “her parcel” be conveyed to her immediately without any restrictions or rights of way reserved, and announcing that she no longer wanted to work on coming to a complete agreement with her brothers and would, instead, be suing them. (See *Exhibit B* attached hereto).

At the time of trial in 2007, a complete agreement among the parties was still not reached with respect to the dissociation of Barbara Mott from the LLC, although an eventual agreement with one LLC member, David Kirby, had been reached. As explained by Kenny Kirby in his testimony, a “complete agreement” referred not just to an agreed division of the physical layout of the Eighth Street Road tract, but also to the need for agreements regarding road rights-of way,

property restrictions for adjoining property, promissory notes that each member owed the LLC, and other assets of the LLC. (See April 18, 2007 Transcript, pp. 161, 167.) In other words, no agreement for dissociation was ever reached.

Thereafter, the instant litigation ensued. Following a bench trial on April 18, 2007, Judge Cummings entered a Final Order on June 11, 2007, ordering that a parcel from the LLC's Eighth Street Road tract be conveyed to Mott, with the remainder of the tract to be divided between the Kirbys even though they had never asked for a court ordered division between them. The Court did not address the LLC's other assets and thus left Moot's dissociation from the LLC incomplete. The Court later denied post-trial motions on October 31, 2008 to amend or set aside the judgment, and Appellants accordingly filed this Petition for Appeal.

IV. ASSIGNMENTS OF ERROR

1. The Circuit Court committed clear error in ordering the partition of real estate owned by a limited liability company under West Virginia Code 37-4-1, because said statute is facially inapplicable to a member disassociation from a limited liability company.
2. The Circuit Court abused its discretion by failing to find that there was no enforceable and fully defined agreement among the owners of the limited liability company to dissociate Appellee Mott from the limited liability company and partition said company's real estate.
3. The Circuit Court abused its discretion by issuing a Final Order that failed to address and resolve other contested issues among the members of the limited liability company.
4. The Circuit Court abused its discretion by issuing a Final Order that ordered an unspecified division of the remainder of the limited liability company's tract of real estate between Appellants Kenny Kirby and Frank P. Kirby, Jr. when neither had requested such relief.

V. POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW

- A. The Circuit Court committed clear error in ordering the partition of real estate owned by a limited liability company under West Virginia Code 37-4-1, because said statute is facially inapplicable to a member disassociation from a limited liability company.**

This matter is before this Court following a bench trial held before the Cabell County Circuit Court. As provided in *Phillips v. Fox*, 193 W.Va. 657, 458 S.E.2d 327, 331 (1995):

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.”

- 1. W.Va. Code § 37-4-1 et seq. does not apply to a limited liability company.**

In the case at bar, the Circuit Court committed a clear error of law in ordering the partition of real estate owned by the LLC under West Virginia Code §37-4-1. WV Code §37-4-1 provides for court ordered partition of real estate owned by tenants in common, joint tenants and coparceners of real property, and stockholders of a closely held corporation when there are no more than five stockholders and the only substantial asset of the corporation is real estate. Thus, in order for this partition statute to apply, the owners of the real estate in question must meet one of the particular categories. In the case at bar, the owner of the tract in question is the limited liability company. The partition statute makes no provision for court ordered partition for limited liability companies. Instead, other than individuals (tenants in common, joint tenants or coparceners), the only statutorily created entity which may seek a court ordered partition under W.Va. Code §37-4-1 is a closely held corporation where there are no more than five stockholders and the only substantial asset of the corporation is real estate.

Corporations under West Virginia law are entirely separate from a limited liability company such as the LLC at bar. See W.Va. Code §31B-1-101 and §31D-1-101, the West Virginia Uniform Limited Liability Company Act and West Virginia Business Corporation Act respectively. The fact at the time of the adoption of West Virginia's partition statute, there was no such legal entity as a limited liability company. Thus, the statute clearly did not apply as drafted to a LLC.

It was uncontested that the ownership of the Eighth Street Road tract in question lies with a limited liability company and not with the individual members themselves, who, although they were originally joint coparceners of the land, nevertheless voluntarily transferred the tract in question to a limited liability company following their father's death. As set forth in W.Va. Code §31B-2-201, "A limited liability company is a legal entity distinct from its members." Further, pursuant to W.Va. Code §31B-1-103, the members of a limited liability company may enter into an operating agreement to regulate the affairs and conduct the business of the limited liability company. See *Exhibit C* attached hereto, being a copy of the Operating Agreement of the Frank P. Kirby Sr., LLC. Thus, Appellants and Appellee, being members of the LLC, were not joint tenants, tenants in common or coparceners of the Eighth Street Road tract, but were instead members of the LLC which owned the tract. Accordingly, the Circuit Court erred as a matter of law by ordering partition of the Eighth Street Road tract pursuant to W.Va. Code §37-4-1. That statute was totally inapplicable to a limited liability company, and the court therefore lacked jurisdiction and authority to make its Final Order of partition.

2. Even if the partition statute could somehow be construed as applicable, the Circuit Court failed to apply it properly.

Even if W.Va. Code §37-4-1 were construed to apply to a limited liability company on the theory that a limited liability company was somehow legally the same as a closely held

corporation, which it is not, the partition statute plainly provides that not only must there be five or less stockholders of the closely held corporation, but there must be a finding by the court that the “only substantial asset” of the closely held corporation is the real estate sought to be partitioned. As is plainly evident from the Circuit Court’s final order, it made no such finding that the Eighth Street Road tract, which it ordered partitioned, was the “only substantial asset” of the LLC. In fact, the evidence was to the contrary. Mott testified that the LLC owned rental property, cash, and other debts, including a \$40,000 + debt owed by her, in addition to the Eighth Street Road property. (See April 18, 2007 Transcript, pp. 42-43.) The Court undertook no valuation of the LLC’s assets, and Mott, as plaintiff below never tendered any evidence to establish the value of the LLC’s various assets.

3. The relevant provision of the West Virginia Uniform Limited Liability Act, W.Va. Code 31B-7-701 *et seq.*, provided the means for Mott to dissociate herself from the LLC, and the Circuit Court should have applied the Act.

In reality, however, because the real estate in question was owned by a limited liability company, W.Va. Code §37-4-1 *et seq.* did not apply at all. Instead, the applicable statute was W.Va. Code §31B-7-701 which provides for a member’s dissociation from a limited liability company when the business of a limited liability company is not wound up as was the case when the parties were simply attempting to extricate Mott from the LLC. W.Va. Code §31B-7-701 *et seq.* specifically provides the manner, if not otherwise provided in a limited liability company’s operating agreement, whereby a member of a limited liability company may excise herself from the limited liability company and be paid the value of her interest in the LLC. As is made clear by the statute, it makes a difference whether or not the limited liability company is an at will company or a term company (as disclosed in *Exhibit C*, the LLC’s Operating Agreement makes

clear that it is a term company for a period of 30 years), and provides both the mechanisms and timing for determining the fair value of a member's distributional interest.

As Mott brought suit to get her share of the LLC assets, W.Va. Code §31B-7-701 *et seq.* applied, and the Court below should have:

- Determined the fair value of Mott's distributional interest in the LLC as the statute does not provide for a partition of a real estate asset but, rather, determination of a member's share's "fair value" in the limited liability company as a whole
- Specified the terms of the purchase of the dissociating member's interest
- Required the dissociating member to deliver an assignment of her interest in the LLC to the purchaser of her interest upon receipt of the purchase price or the first installment of the purchase price
- Refrained from ordering the then remaining LLC members (the Kirbys) from dividing the Eighth Street Road tract

Because the Circuit Court erroneously concluded that West Virginia's partition statute W.Va. Code §37-4-1 *et seq.*, applied to a partition of real estate owned by a limited liability company, despite the Appellants' opposition to such construction below (as evidenced, *inter alia*, in their motion for partial summary judgment), the Circuit Court's final order of partition is in error *as a matter of law* and must be reversed. Upon remand, the Circuit Court should be instructed to construe Mott's Complaint as a request under the West Virginia Uniform Limited Liability Act to dissociate from the LLC, apply the applicable Operating Agreement and W.Va. Code §31B-7-701 *et seq.* accordingly, and determine the value of Mott's distributional interest in the LLC upon proper evidence.

B. The Circuit Court abused its discretion failing to find that there was no enforceable and fully defined agreement among the owners of the limited liability company to dissociate Mott from the limited liability company and partition said company's real estate.

As noted above, in the case of a bench trial, this court reviews the Circuit Court's Final Order under an abuse of discretion standard and the Circuit Court's underlying factual findings under a clearly erroneous standard. *Phillips v. Fox, supra; Syl. Pt. 1, Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). However, in reviewing the findings of fact:

"Deference accorded to a circuit court sitting as fact finder may evaporate if upon review of its findings the appellate court determines that: (1) an irrelevant factor that should have been given significant weight is not considered; (2) all proper factors, and no improper factors, are considered, but the circuit court in weighing those factors commits an error of judgment; or (3) the circuit court failed to exercise any discretion at all in issuing its decision." *Syl. Pt. 1, Brown v. Gobble*, 196 W.Va. 559, 474 S.E.2d. 489 (1996).

See also Boggs v. Settle, 150 W.Va. 330, 145 S.E.2d 446 (1965):

"This court, in the exercise of its appellate jurisdiction, will reverse a finding of fact made by a Circuit Court if it appears that such finding of fact is not supported by competent evidence."

- 1. The evidence established that the LLC members had not reached a defined agreement on any partition of the LLC real estate to the Appellee.**

In its Final Order, the Court below committed clear error by failing to find under the evidence before it that there was not an enforceable and fully defined agreement among the owners of the limited liability company to divide the LLC's Eighth Street Road tract. In fact, the clear evidence was that the members of the LLC had never reached a complete agreement with respect with what to do with the LLC's Eighth Street Road tract, as disclosed in the minutes of the meetings of the LLC. The minutes

indicated that the members intended to continue to negotiate toward some type of division of the LLC Eighth Street Road tract with appropriate rights of way for ingress and egress and restrictions, and had, in fact, reached an agreement to carve off part of the tract to a former member of the LLC, David Kirby, in order to dissociate him from the LLC. However, with respect to Mott, the three remaining members had yet to reach a final agreement. The facts of this case as brought forth in the bench trial made this conclusion apparent.

It is elementary contract law that “a meeting of the minds is the *sine qua non* of all contracts. *Syl. Pt. 1, Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932). The general focus of both the Appellee and the Circuit Court appeared to be two particular meetings of the LLC, a February 17, 2001 meeting (see Plaintiff’s Exhibit 4, April 18, 2007 trial), and a July 31, 2001 meeting (see Plaintiff’s Exhibit 10, April 18, 2007 trial).

According to the February 17, 2001 minutes, the members worked on *proposed* property lines for purposes of dividing up the Eighth Street Road tract, and preliminarily selected among themselves from four roughly divided sections. Clearly there was no final agreement to divide the tract, as it had not even been surveyed and the members agreed to hire a surveyor to assist them. The scrivener of the minutes, Frank Kirby, testified at the trial that the LLC members were in fact working toward dividing the tract as a means of distributing LLC assets, “but always the discussions of dividing the property up had underlying details that we had all agreed that we would be working on after we got the surveying started. And we knew that these underlying details, such as restrictions, rights of way and utility easements all had to be negotiated and worked on after we got the surveying work started.” Mr. Kirby confirmed that there was not a

completed agreement, “just an agreement between all of us that we would follow this pattern to try and divide the property up.” (See April 18, 2007 transcript, pages 126-27.)

Several months later, on July 31, 2001, the LLC members met and passed a unanimous motion to proceed with an attempted division of the Eighth Street Road property and a survey of the tract by David Nemeth. Specifically, the members agreed:

“Once survey is completed and the stakes have been laid down, if a complete agreement between the parties cannot be reached, then after that, at the next meeting, then at that point we will require the services of an auction company to divide the property up and sell it within the next 180 days.” (See Plaintiff’s Exhibit 10, April 18, 2007 trial.)

Clearly, the members had not reached a complete agreement, as the minutes specifically reflected that a complete agreement was lacking and noted that *if* a complete agreement could not be reached, the members would at that point place the property up for auction. As explained by Kenny Kirby in his testimony before the court, a “complete agreement” referred not just to an agreed division of the physical layout of the LLC’s Eighth Street Road tract, but also to the need for agreements regarding road rights of way, property restrictions for adjoining property, resolution of promissory notes that each member owed the LLC, and consideration of what to do with other assets owned by the LLC. (See April 18, 2007 transcript, pages 161-167.)

The Circuit Court, however, ignoring the clear minutes of the LLC meetings, nevertheless focused upon the fact that the LLC was able to dissociate *one* of its members, David Kirby, from the LLC and parcel off to him a part of the Eighth Street Road tract. What the court ignored, however, was the history of the negotiations that led to the eventual deed to David Kirby, which negotiations stretched over many months and required give and take from both the remaining members as well as the dissociating

member on issues of his debt to the LLC, reservations in the proposed deed to him and resolution of boundaries of the parcel to be conveyed to him. For example, the February 16, 2002 meeting of the LLC, (Defendants' Exhibit 2, April 18, 2007 Trial), outlined that the LLC membership voted unanimously to focus on completing the separation of David Kirby from the LLC. Also included within that meeting were discussions about David Kirby's disagreement over a proposed division line of his parcel, consideration of moving one line of the proposed David Kirby parcel 50 feet and creating a vegetation barrier, consideration for the remaining LLC members to have a proper right of way road access to their property across David Kirby's property, how to extinguish David Kirby's \$84,000 debt to the LLC and his 25% ownership claims on other assets of the LLC.

Thereafter, on July 8, 2002, the members met, reviewed a proposed deed which included reservations of rights to way, a life estate for the LLC members' mother, a water line tap agreement, and other reservations, and *finally* reached agreement to schedule a closing with David Kirby in an attorney's office to complete Mr. Kirby's withdrawal. (See Defendants' Exhibit 3, April 18, 2007 Trial.) On July 26, 2002, all four members of the LLC unanimously reached final agreement by executed a deed to David Kirby of a parcel carved from the Eighth Street Road tract branch and in the process received a formal resignation and withdrawal of David Kirby from the LLC. (See Defendants' Exhibits 1, 10 and 11, April 18, 2007 Trial.) The total process for completing the dissociation of David Kirby from the LLC, including final agreement regarding the boundary lines of his parcel, the reservations and restrictions to be included in his deed, and his withdrawal formally from the LLC, took nearly two years. (See April 18, 2007 transcript, pages 154-55.)

2. The fact that LLC member Kirby was dissociated from the LLC by a property conveyance did not constitute a waiver of objections to further property partition.

The Circuit Court, citing no authority, construed the negotiations which led to an ultimate final agreement for David Kirby's withdrawal and a conveyance to him of a parcel from the Eighth Street Road tract, to constitute a waiver to any objections to partition in kind. The Circuit Court was right that a final agreement had been reached *as to David Kirby's withdrawal from the LLC*. However, in construing the withdrawal and parcel conveyance as a waiver of objection to partition in kind, the Circuit Court was again laboring under the misperception that it had legal authority to order partition of an LLC's real estate under W.Va. Code §37-4-1 *et seq.*, when, as shown above, the Circuit Court had no such authority and instead was bound by the provisions of the West Virginia Uniform Limited Liability Company Act pertaining to dissociating members. Additionally, an agreement reached and finalized as to one LLC member in no way was indicative that an agreement had been reached and finalized as to another LLC member (Mott). The mere fact that certain acreage was cut from the tract in question to dissociate David Kirby was not evidence that the entire tract remainder could be easily divided without affecting the overall value of the whole.

3. Mere intent to divide LLC assets does not constitute a full and complete agreement.

In fact, the Circuit Court's own Final Order and a letter sent from the Circuit Court to Mott's attorney (said letter being filed in Court documents and list in the Circuit Court's docket sheet) clearly show that the Circuit Court itself knew that a final agreement of division of LLC assets among the remaining LLC members had not been reached. The Circuit Court in both documents noted that the parties "intended" to divide

the tract in question, agreed that there was testimony that “if the parties could not agree” the property would be sold, and even noted that there was “no mutual agreement” about the proposed restrictions upon the land. All of these factors point to the overriding conclusion under both the testimony before the Court and the official minutes of the LLC that the parties were intending to divide up the property but had to finalize and negotiate the details.

While the general area of the tract to be assigned to David Kirby was selected in February 2001, the exact boundaries had to be determined and negotiations had to be completed with respect to the reservations and rights of way that would attach to and encumber the parcel. In addition, the LLC had to determine how ultimately to dissociate David Kirby from the LLC, given that he owed the LLC a sizeable debt. Ultimately this was accomplished, with the giving of a deed and formal papers of withdrawal in July 2002.

All of these factors had to be negotiated and finalized, much like an agreement to settle a civil action for \$X. An agreement as to the amount of money to be parceled out in a settlement of a civil action may still require further negotiations over other details (release document, confidentiality covenants, etc.) before there is a final and completed settlement. In the case at bar, while there may have been agreement as to the area of the Eighth Street Road tract to be assigned to Mott in a planned dissociation from the LLC, the minutes of the LLC meetings indicate that there were on-going negotiations over other details related to her dissociation from the LLC, meaning that no final and completed agreement had yet been reached. This clear fact the Circuit Court ignored.

4. The Circuit Court arbitrarily ignored the valuation issues inherent in a division of LLC assets.

Finally, the Circuit Court committed clear error in finding that its division of the Eighth Street Road tract “is approximately of equal value.” On what basis could the Circuit Court make such a finding? There was no basis. There was no testimony as to value of either the overall Eighth Street Road Tract or of those portions tentatively assigned to Mott and the Kirbys. There were neither appraisers appointed nor expert testimony. Mott offered nothing to establish that the value of the portion of the Eighth Street Road tract she wanted represented a fair value of her distributional interest in the LLC.

West Virginia Code 31B-7-701(e) requires the Circuit Court to determine the fair value of the distributional interest of the member seeking to disassociate. This cannot be done without some evidence of the LLC’s assets’ values. Nothing in the record supports the Circuit Court’s finding that a proposed division of the LLC’s real estate assets was of approximate equal value.

Further, the Circuit Court made the unfounded finding that any discrepancies in equity (tacitly acknowledging that there was no valuation evidence) “is provided for, because this case is about restrictions on the land” It is true that restrictions and reservations constituted *part* of the overall negotiations regarding the balance of the Eighth Street Road tract. But there were other considerations as well, which the Circuit Court ignored: other LLC rental property, LLC cash, debts owed the LLC by remaining members. The case was actually about how to dissociate Barbara Mott from the Frank P. Kirby, Sr. Limited Liability Company. Thus, all of these matters – Eighth Street Road

tract, rental property, LLC cash, debts owed to the LLC -- needed to be appropriately valued and considered by the Court in determining a fair value of a distributional interest for Mott.

The reason, of course, that the Circuit Court appeared to ignore the need for proper valuation evidence and a full and final agreement regarding the manner in which Mott would be dissociated from the LLC is because the Court made its initial and compounding mistake of law in wrongly assuming that W.Va. Code 37-4-1 applied to the partition of LLC tract. Had the Circuit Court properly construed this matter under the West Virginia Uniform Limited Liability Act and its provision for dissociation of members, it should have followed the provisions therein which carefully outline the extent of the Circuit Court's authority in such matters.

5. In summation, the parties never reached a final agreement.

In summation, the clear evidence before the Circuit Court was that a final and complete agreement regarding the withdrawal of Mott from the LLC and the assignment of LLC assets to her as representative of her interest in the LLC had never been reached. While there were negotiations among the remaining LLC members regarding a further division of the LLC's Eighth Street Road tract after David Kirby's withdrawal, no agreements were reached regarding the *terms* of such a division, nor the manner in which other LLC matters (rental property, cash assets, member debts) would be addressed, *as they explicitly were in the withdrawal and dissociation of David Kirby from the LLC.*

Accordingly, the Circuit Court was clearly wrong under the evidence before it in finding that a final agreement of division of property had been reached with respect to Mott. This Court should therefore reverse the Final Order of the Circuit Court and

remand this matter for further proceedings in accordance with the West Virginia Limited Liability Act, W.Va. Code 31B-1-101 *et seq.*, and, in particular, those provisions applicable to dissociation of members from an LLC and valuation of a distributional interest, W.Va. Code 31B-7-701 *et seq.*

C. The Circuit Court abused its discretion by issuing a Final Order that failed to address and resolve other contested issues among the members of the limited liability company.

The Circuit Court below also abused its discretion by issuing a Final Order that failed to resolve other contested issues. In her Amended Complaint, Mott asked for an accounting of LLC assets. As noted above, the LLC had a number of assets other than the Eighth Street Road tract. The LLC also owned rental property and had assets in the form of debt owed it by its members, including the Mott who admittedly owed the LLC over \$40,000. With the Mott wanting to dissociate herself from the LLC, the Court below should have overseen a proper dissociation in accordance with the LLC's by-laws or, if such did not provide for disassociation, the Circuit Court should have applied the dissociation provisions of W.Va. Code 31B-7-701 and determined a fair value of Mott's distributional interest.

Instead, the Circuit Court, without even determining or making any finding whether the Eighth Street Road tract was the LLC's only substantial asset, ordered the LLC to convey a certain parcel of the tract to Mott, ordered the LLC to divide the remainder of the parcel between the Kirbys who had not even asked for a division for themselves, and closed the book on the litigation by issuing a Final Order, leaving the members of the LLC hanging with respect to all other matters, assets and debts of the LLC.

In issuing its Final Order in such a manner, the Circuit Court abused its discretion and abandoned all other matters before it under the pleadings, notwithstanding the fact that partition

of the LLC's Eighth Street Road tract would fail to completely disassociate Mott – or the Kirbys -- from the LLC. Accordingly, the Final Order must be reversed and this case remanded for further proceedings.

D. The Circuit Court abused its discretion by issuing a Final Order that ordered an unspecified division of the remainder of the limited liability company's tract of real estate between LLC members Frank P. Kirby, Jr. and Kenny Kirby when neither had requested such relief.

Finally, the Circuit Court abused its discretion by granting certain relief in its Final Order when the same was in no way requested. Along with ordering a conveyance to Mott, the Court in its Final Order ordered that the remainder of the LLC's Eighth Street Road property be divided between the Kirbys. The survey of the Tract did not have a defined division line for the Kirbys. The Kirbys did not request that they be parceled out part of the Eighth Street Road tract and, instead, had specifically alleged in their Answer to the Amended Complaint that the tract was incapable of being equitably partitioned and should be sold as a whole for the LLC's benefit as division would greatly impair the LLC's value of this particular LLC asset. (*See Answer to Amended Complaint, P XVI.*) Nevertheless, in an abuse of its discretion, the Circuit Court not only ordered a parceling of the tract to Mott, but also ordered that the remainder then be divided between the Kirbys.

On this error alone, the entire case should be reversed and remanded so that the Circuit Court might properly consider the issues before it under the applicable statute, the West Virginia Uniform Limited Liability Company Act, W.Va. Code §31B-1-101, *et seq.*

VI. CONCLUSION AND RELIEF PRAYED FOR

The Circuit Court had no legal authority to order arbitrarily a partition of a limited liability company's real estate. The evidence in the record clearly established that, while the parties had generally agreed that areas of the tract in question would ultimately be assigned to

each particular member of the LLC, the members had failed to reach agreement regarding the terms and conditions of any division. Further, W.Va. Code 37-4-1, the Circuit Court's stated statutory authority for ordering partition, is legally inapplicable to the LLC.

Additionally, the Circuit Court clearly erred by failing to apply applicable state law governing limited liability companies. When it was clear that the parties did not have a final and complete agreement for partition and division of the LLC's assets, Mott's recourse was to invoke the dissociation provisions of the West Virginia Uniform Limited Liability Act. The Circuit Court, however, failed to undertake any type of accounting and valuation of the LLC's assets and debts before arbitrarily ordering that the LLC and its members convey a parcel from the LLC's Eighth Street Road tract to Mott and other parcels, which were not even split by survey to the Kirbys. The Circuit Court committed clear error in findings under the record before it that the parties had reached a full and complete agreement regarding the manner of Mott's dissociation from the LLC. Instead, a valuation should have been made of the LLC's overall assets in order to determine an appropriate purchase price for Mott's distributional interest in the LLC.

Accordingly, Appellants respectfully request that this Honorable Court REVERSE and VACATE the Circuit Court's Final Order and REMAND this case to the Circuit Court for further proceedings consistent with applicable law.

Appellants request oral argument.

Respectfully submitted,

KENNY KIRBY and FRANK P. KIRBY, JR.

By: 
Of Counsel

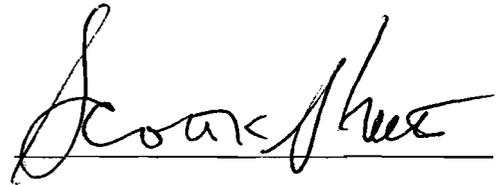
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served the foregoing BRIEF OF APPELLANTS, KENNY KIRBY AND FRANK P. KIRBY, JR. upon the following persons by depositing true copies thereof to their last known addresses in the regular manner, United States mail, postage pre-paid from Huntington, West Virginia, on the 1st day of July, 2009:

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A handwritten signature in black ink, appearing to read "Scott K. Sheets", written over a horizontal line.

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EXHIBITS
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