

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

BARBARA K. MOTT,

Appellee and Plaintiff Below,

v.

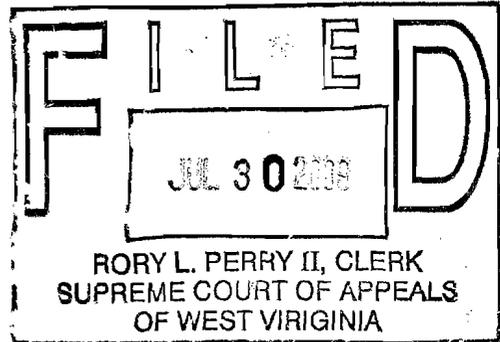
APPEAL NO. 09-0436

Civil Action No.: 03-C-0548

Circuit Court of Cabell County

FRANK P. KIRBY SR.  
LIMITED LIABILITY COMPANY,  
KENNY KIRBY AND  
FRANK P. KIRBY, JR.

Appellant and Defendants Below.



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***BRIEF OF APPELLEE, BARBARA MOTT***

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FILED BY:

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

Barbara Mott filed suit against her brothers Kenny Kirby, Frank Kirby and Frank P. Kirby Sr. Limited Liability Company, in a three count amended Complaint. Count I sought to enforce an agreement between the parties to divide the real estate. Count II asked for an accounting of all assets of the LLC. Count III sought to partition the real estate in kind pursuant to West Virginia's Partition Statute.

Prior to trial the parties agreed to stay the issue of the accounting of the LLC's assets requested in Count II of the complaint. The parties litigated Counts I and III of the complaint. Prior to trial, Appellee filed a partial summary judgment motion on Count III. The Appellants filed a motion for partial summary judgment on Count I of the complaint.

At the pretrial hearing, the Court agreed to the bifurcation of Count II and denied the partial summary judgment motions of each party. Although there was no order entered following the pretrial hearing, the conduct of the parties and the evidence in the record reflects the bifurcation by the lack of any evidence presented on Count II or the lack of a motion for directed verdict on Count II by the Appellants at the close of the Appellee's case.

Counts I and III were tried to the Court which resulted in a decision in favor of the Appellee, Barbara Mott.

**II. STATEMENT OF FACTS**

This Court should not reverse the Final Order entered by the Circuit Court of Cabell County, West Virginia in favor of Barbara Mott, Appellee. Barbara Mott asks this Court to uphold the

Circuit Court Order so that she can receive the real estate that she inherited from her father which has been controlled by her Appellant brothers since her father's death. The Appellants agreed to give Barbara Mott what she inherited but later added stipulations and restrictions which precluded the transfer. Barbara Mott is asking this Court to enforce the agreement of the parties, like the lower Court.

This case involves a dispute among siblings relating to the property they inherited from their father, Frank P. Kirby, Sr. The estate consisted of some cash and, primarily, the subject real estate. Since Mr Kirby's death, Kenny Kirby and Frank Kirby have manipulated control of the assets of the estate and continue to control the remaining inherited assets of Barbara Mott. For some time following the Death of Frank P. Kirby Sr., the Appellants also controlled and manipulated the inherited assets of David Kirby. David Kirby is one of the children of Frank P. Kirby Sr. He was able to gain control of the assets his father left him by disassociating himself from the LLC. The LLC, including the Appellee and Appellant, deeded David Kirby a piece of real estate from the real estate his father left them. David Kirby also received the cash he inherited from his father in the form of a loan from the LLC, which was forgiven. Barbara Mott asked for the same treatment that her brother, David Kirby, received.

All the children of Frank P. Kirby have drawn a significant portion of the cash they inherited from the LLC in the form of loans. Loans are the only way that Kenny Kirby would permit the cash to be withdrawn from the LLC.

The real estate involved in this lawsuit was owned by Frank Kirby, Sr. at the time of his death. Frank Kirby, Sr. was survived by his children, who, other than David Kirby, are the parties to this action. In his Last Will and Testament, Frank Kirby, Sr. left his estate, including cash and the

real estate in question, to his four (4) children, Barbara Mott, David Kirby, Frank Kirby and Kenny Kirby. David Kirby is not a party to the instant action as his real estate and share of the assets of the estate have previously been conveyed to him pursuant to the agreement among all four (4) parties.

Despite the fact that the estate of Frank Kirby, Sr. was willed to the four children, the testimony of Barbara Mott is that Frank Kirby and Kenny Kirby approached her about placing all of their inheritance, including cash and real estate, into a trust. (Trial Transcript at Page 7.) Subsequently, Kenny Kirby contacted Barbara Mott and persuaded her to take the real and personal property from the trust and place it into a LLC under the guise that they would save money on taxes. (Trial Transcript at Page 8.) The primary purpose of the LLC appears to have been to hold the assets of the estate. Other than to hold the estate assets, the LLC has had no other business ventures during its existence.

Once the real estate was placed into the LLC, the parties held periodic meetings. The written minutes of the meetings and other writings of the LLC show the intent of the parties. The minutes reflect that the parties agreed to and were in the process of dividing the assets of the LLC. (See page 2 of the Appellants' Motion for Partial Summary Judgment.) In fact, the Appellants in their motion for summary judgment filed in Circuit Court, stated the it was determined that it would be best to terminate the company and divide the assets. Despite this acknowledgment, the testimony of the Appellants is not consistent with the written documentation of the LLC and the parties' actions. These inconsistencies between the testimony of the Appellants and the written minutes of the LLC are even more telling in that the Appellant, Frank Kirby, created the minutes and the other written documentation involved in this action. Likewise, the Appellants' testimony is not consistent with the testimony of the only disinterested witness that testified at the bench trial of this matter, David

Kirby.

The minutes of the LLC reflect that the members discussed a division of the real estate and ultimately agreed to a division. The minutes from the November 1998 meeting prepared by Frank Kirby, state that Appellant, Kenny Kirby, brought a motion that the parties vote to divide the property four (4) equal ways over the next three months. (Trial Transcript at Page 9.)

At that same meeting, the parties voted and decided to divide the property into four (4) equal divisions. Frank Kirby, Kenny Kirby and Barbara Mott voted to divide the property, David Mott objected. Subsequently, David Mott changed his mind, as is evidenced by the fact that his property was conveyed to him. Despite David Mott's objection, the operating agreement provided that a 3/4 vote was sufficient to divide the property. (Trial Transcript at Page 12 and 120.) The parties proceeded to seek a division of the real estate without David Kirby's consent. Ultimately, David Kirby testified that he agreed to divide the property. (Trial Transcript at Page 57.) The decision to divide the property was ultimately a unanimous decision.

The record reflects that there were several meetings about dividing the property. Over the course of a couple of years the parties discussed a division of the real estate. The parties worked on maps, drew lines and went out and looked at the land. (Trial Transcript at Page 13.) Those discussions are reflected in the minutes as well. For example at the 8/6/99 meeting, the minutes reflect that they passed a motion to divide the property and would submit proposals at the next meeting. Minutes from 11/12/99 reflect that "each would submit proposals at next meeting." On 2/19/00 the parties had a work session on how to physically divide the property into equitable proportions. The parties worked on a property division sketch at the 7/20/00 meeting. The parties went to the property on 11/18/00 to determine how the division lines would "more appropriately fit

the terrain.”

The parties held another meeting on February 17, 2001. Those minutes were kept by Frank Kirby. (Trial Transcript at Page 14 and trial testimony from appellant Kenny Kirby at Page 125.) The parties agreed to a division. The minutes Frank Kirby prepared state that “we agreed to the divisions.” The parties had divided the real estate into four (4) parcels. David Kirby picked the parcel of property upon which he was living. Barbara picked a parcel and Frank Kirby and Kenny Kirby drew numbers to divide the remaining two (2) parcels. (Trial Transcript at Page 15.) The last matter mentioned in the minutes from the February 17, 2001 meeting is that “mention made of lining up surveyors as everyone left,” which the parties did. The minutes from this meeting clearly reflect the parties agreed to divide the real estate.<sup>1</sup> (Plaintiff’s Trial Exhibit 4.)

After the meeting and based on the agreement to divide the real estate, the parties confirmed in writing their unanimous decision to divide the real estate. Kenny Kirby and Frank Kirby wrote a letter to David Nemeth which stated “on 2/17/01, the shareholders of Frank Kirby Limited Liability Corp. unanimously made the decision to divide the property between the shareholders, drew the boundary lines, and agreed as to who got each section.” (Trial Transcript at Page 23 and Letter to David Nemeth attached as Plaintiff’s Trial Exhibit 6.) The letter was signed by Barbara Mott, Kenny Kirby and Frank Kirby.

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<sup>1</sup> The minutes of the February 17, 2001 meeting reflect that at 4:30 the meeting was adjourned to look over property line point placement as per DK adjustment; 6:30 returned to discuss division lines; 7:00 DK drew line to adjust prop #4 to fulfill his needs .... we agreed to the divisions .... we agreed to allow DK to chose #4 as drawn .... DK chose to take prop #4 BK chose Prop #3 other 2 props put in a hat ..... KK drew prop #1 ..... FK got prop #2 DK requests to know if BK is going to exercise her option of switching with FK, BK says no, so DK wants to know if switching option is available to him .... FK said it was .... DK said he would stick with this decision of picking prop #4 KK moves to adjourn meeting .... meeting adjourned 8:30 mention made of lining up surveyor as everyone left.

The parties ratified their previous decision to divide the real estate at their next meeting. Kenny Kirby, at the next meeting held on July 31, 2001, made a motion to approve the minutes from the previous meeting of February 17, 2001. Frank Kirby seconded the motion and the minutes were approved. (Plaintiff's Trial Exhibit 10.) The two people who now say there was not an agreement are the very individuals who prepared the minutes and asked that the content of the minutes be accepted as accurate.

After the letter to David Nemeth, Frank Kirby was the first person from the LLC to contact him. (Trial Transcript at Page 137.) Based on the contact, David Nemeth went out and started surveying the property. Frank Kirby was also the one that primarily worked with David Nemeth on the division of the real estate. (Trial Transcript at Pages 137-138.) David Nemeth separated David Kirby's piece of real estate from the tract and David Kirby's property was eventually conveyed to him by deed. (Trial Transcript at Page 34.) David Kirby then disassociated himself from the LLC and the money he withdrew from the LLC in the form of loans was forgiven. Barbara Mott testified that she then requested that her real estate be conveyed to her. (Trial Transcript at Page 25.)

Next, David Nemeth did some field work and prepared a description for the piece of real estate Barbara Mott chose. (Trial Transcript at Page 28.) Again, Frank Kirby went to the property with David Nemeth and David Mott, Barbara Mott's husband at the time, and staked the division lines for Barbara Mott's portion of the real estate. (Trial Transcript at Pages 84, 85, 86 and 151.) Frank Kirby had no objection to the division of Barbara Mott's piece of real estate. (Trial Transcript at Page 87.) David Nemeth prepared a description for Barbara Mott's real estate.

Almost two (2) years after the parties agreed to divide the real estate; after the parties had agreed on division lines; after the LLC conveyed one member his piece of real estate; and, after the

LLC had a plat and description prepared for Barbara Mott's real estate, Frank Kirby and Kenny Kirby, for the first time, attempted to impose restrictions upon the piece of property Barbara Mott was going to get. Other than agreeing to give her brothers the right to use a road if constructed, restrictions were never discussed at or before the February 17, 2001 meeting nor at any time thereafter. The first mention of land use restrictions related to Barbara's property are documented in the LLC meeting minutes from June 29, 2003.

When Appellants began imposing restrictions more than two years after their agreement, they began to make unreasonable demands. Some of these unreasonable restrictions included Barbara Mott constructing an expensive road at her expense to Frank Kirby and Kenny Kirby's specifications and allow them unrestricted use of the road and if she did not complete the road in a timely fashion, Frank and Kenny Kirby would be able to construct the road and Barbara Mott would be required to pay for it. Other demands were that Barbara Mott had to install an eight (8) inch water line across her property at her expense and to allow Frank Kirby and Kenny Kirby to utilize the water line at no expense to them. (Trail Transcript at Pages 33 and 34 and Plaintiff's Trail Exhibit 8.) Despite the earlier agreement, Barbara Mott, in an attempted to avoid conflict with her brothers, tried to negotiate the restrictions that Frank Kirby and Kenny Kirby later wanted to impose upon Barbara Mott's piece of property.

The only restriction discussed prior to February 17, 2001 agreement was if there was a road built from Woodville Drive across Barbara Mott's property, the other siblings would get to use it. (Trial Transcript at Page 64.) As late as January 23, 2003, the parties had not had any discussions about placing restrictions on Barbara Mott's real estate. (Trial Transcript at Pages 28, 88 and 89 and Plaintiff's Trial Exhibit 7.) The Defendants started by wanting two (2) access roads. (Trial

Transcript at Page 94.) Barbara Mott was doing everything she could to appease her brothers. David Mott believed he and Barbara Mott “were making concessions daily. At some point, I was told that Barbara was not going to get her deed.” (Trial Transcript at Page 97.) The restrictions were the method the Appellants used to renege on their agreement to divide the family farm.

David Mott testified at trial that Kenny Kirby and Frank Kirby wanted the restrictions to apply to Barbara Mott’s property but not their pieces. (Trail Transcript at Page 99.) Kenny Kirby wouldn’t give a direct answer to whether the restrictions they wanted to place upon Barbara Mott’s piece of property would apply to his piece of property. He testified that they were focusing on Barbara Mott’s piece of property and he and Frankie would discuss whether any restrictions would apply to them. (Trail Transcript at Pages 172 and 173.) It is apparent that the attempt to impose unconscionable restrictions by Frank Kirby and Kenny Kirby after the agreement were designed to vacate their previous agreement.

The evidence is overwhelming that the parties reached an agreement for the division of property and more specifically Barbara Mott’s parcel of real estate. Kenny Kirby testified that the deed he had prepared for Barbara Mott contained the same description prepared by David Nemeth with the assistance of Frank Kirby. (Trial Transcript at Page 170.) David Kirby, the only sibling not a party to this litigation, summed up the meeting on February 17, 2001. He stated “all four pieces were divided equitably. Before we came to a decision its time to pick them out, we spent four years devising an equitable solution to this problem. Any we finally had one. And that day we all four got our pieces of property.” (Trial Transcript at Page 60.)

The testimony at trial clearly indicated the parties had reached an agreement on the division of real estate and the restrictions that Frank Kirby and Kenny Kirby were attempting to impose upon

Barbara Mott's real estate came more than two years after they had already reached an agreement. The lower Court's decision was not clearly erroneous in the findings it made. The overwhelming evidence supports the Court's decision and it should be upheld.

### **III. STANDARD OF REVIEW**

This matter was prosecuted as a bench trial. The standard of review is set out in syllabus point 1 of *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996), as follows:

In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.

"A reviewing court may not overturn a finding simply because it would have decided the case differently, and must affirm if the court's account of the event is plausible in light of the record viewed in the entirety." *Phillips v. Fox*, 193 W.Va. 657, 458 S.E.2d.327 (1985) (citing *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985)). "When findings are based on determinations regarding the credibility of witnesses Rule 52(a) demands even greater deference to the trial court's findings." 470 U.S. at 575, 105 S. Ct. at 1512, 84 L.Ed 2d at 529.

In this matter, the Court did not abuse its discretion in making its final disposition of the matters before it, being the division of the real estate, nor was its factual findings clearly erroneous. The lower court should be granted greater deference since its decision was based on determinations

regarding the credibility of witnesses. As such, the Petitioners' appeal should be denied.

#### **IV. DISCUSSION OF LAW**

##### **A. THE TRIAL COURT DID NOT COMMIT CLEAR ERROR BY ORDERING PARTITION OF REAL ESTATE OWNED BY THE LIMITED LIABILITY COMPANY.**

##### **1. W.Va. Code Section 37-4-1 is Applicable to a Limited Liability Company.**

W.Va. Code Section 37-4-1 is clearly applicable to a limited liability company. W.Va. Code Section 37-4-1 provides for partition of real estate owned by stockholders of a closely held corporation when there are no more than five (5) stockholders and the only substantial asset of the corporation is real estate. In the instance case, there are only three (3) individuals involved and the only substantial asset of the company is real estate.<sup>2</sup> The issue then is the difference between a limited liability company<sup>3</sup> and a corporation<sup>4</sup>. A review of the statutory

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<sup>2</sup> The Appellants in their motion for partial summary judgment relating to count one of the Appellee's complaint acknowledges on page 2 of its memorandum in support that "the primary asset of the Company was a parcel of real estate which had previously owned by the members' father. . . ."

<sup>3</sup> Under West Virginia Code Section 31D-3-302, a corporation can conduct basically the same business as an LLC. This statute sets out the business that can be conducted by a corporation. It states that:

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including, without limitation, power:

- (1) To sue and be sued, complain and defend in its corporate name;
- (2) To have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;
- (3) To make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for managing the business and regulating the affairs of the corporation;
- (4) To purchase, receive, lease or otherwise acquire and own, hold, improve, use and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;
- (5) To sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property;

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- (6) To purchase, receive, subscribe for or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;
  - (7) To make contracts and guarantees; incur liabilities; borrow money; issue its notes, bonds and other obligations which may be convertible into or include the option to purchase other securities of the corporation; and secure any of its obligations by mortgage, deed of trust or pledge of any of its property, franchises or income;
  - (8) To lend money, invest and reinvest its funds and receive and hold real and personal property as security for repayment;
  - (9) To be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity;
  - (10) To conduct its business, locate offices and exercise the powers granted by this chapter within or without this state;
  - (11) To elect directors and appoint officers, employees and agents of the corporation; define their duties; fix their compensation and lend them money and credit;
  - (12) To pay pensions and establish pension plans, pension trusts, profit-sharing plans, share bonus plans, share option plans and benefit or incentive plans for any or all of its current or former directors, officers, employees and agents;
  - (13) To make donations for the public welfare or for charitable, scientific or educational purposes and for other purposes that further the corporate interest;
  - (14) To transact any lawful business that will aid governmental policy; and
  - (15) To make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation.

<sup>4</sup> West Virginia Code Section 31B-1-112 sets out the business that can be conducted by an LLC. It holds that:

(a) A limited liability company may be organized under this chapter for any lawful purpose, subject to any law of this state governing or regulating business.

(b) Unless its articles of organization provide otherwise, a limited liability company has the same powers as an individual to do all things necessary or convenient to carry on its business or affairs, including power to:

- (1) Sue and be sued, and defend in its name;
- (2) Purchase, receive, lease, or otherwise acquire, and own, hold, improve, use and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;
- (3) Sell, convey, mortgage, grant a security interest in, lease, exchange and otherwise encumber or dispose of all or any part of its property;
- (4) Purchase, receive, subscribe for or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, grant a security interest in or otherwise dispose of and deal in and with, shares or other interests in or obligations of any other entity;

language reveals that a limited liability company is in essence the same type of entity as a closely held corporation. A corporation and a limited liability company are almost identical in the statutory language.

Only slight changes exist between the powers and authority of the two (2) statutes that permit the creation of a corporation and an LLC. For example, sections West Virginia Code Section 31D-3-302(2), provides for a corporate seal, which the LLC does not. West Virginia Code Section 31D-3-302(3) discusses bylaws of the corporation, which an LLC does not have. Lastly, West Virginia Code Section 31D-3-302(14) permits a corporation to transact business that will aid governmental policy. An LLC does not have such a provision. Otherwise, a corporation and a limited liability company in West Virginia can conduct the exact same business. In fact, it is apparent that the legislature in enacting the limited liability statutes in 1996 just copied, almost word for word, the powers of a corporation. Limited liability companies were created in this state in 1992. At that time,

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- (5) Make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises or income;
  - (6) Lend money, invest and reinvest its funds and receive and hold real and personal property as security for repayment;
  - (7) Be a promoter, partner, member, associate or manager of any partnership, joint venture, trust or other entity;
  - (8) Conduct its business, locate offices and exercise the powers granted by this chapter within or without this state;
  - (9) Elect managers and appoint officers, employees and agents of the limited liability company, define their duties, fix their compensation and lend them money and credit;
  - (10) Pay pensions and establish pension plans, pension trusts, profit sharing plans, bonus plans, option plans and benefit or incentive plans for any or all of its current or former members, managers, officers, employees and agents;
  - (11) Make donations for the public welfare or for charitable, scientific or educational purposes; and
  - (12) Make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited liability company.

the statutes creating and governing the operations of limited liability companies were codified as a subpart of the West Virginia corporation statutes. It was not until 1996 that the legislature enacted the current limited liability statutes.

In 1992, when the legislature first permitted the creation of limited liability companies, it stated in West Virginia Code Section 31-1A-4 that “[i]n addition to the provisions of subsection (a) of this section, a limited liability company shall have and **exercise all powers granted to corporations under the laws of this state.**” (Emphasis added.) The legislature intended for a limited liability company to have all powers of a corporation, which would include the partition of real estate by a closely held company with no more than five (5) members and the only substantial asset of the company is real estate, pursuant to West Virginia Code Section 37-4-1.

Limited Liability Companies are defined in Michies Jurisprudence:

Limited liability companies, although a relatively recent innovation, have become an increasingly popular form of business organization. A limited liability company is a form of legal entity that has attributes **of both a corporation and a partnership** but is not formally characterized as either one. Limited liability companies are a conceptual hybrid, sharing some of the characteristics of partnerships and some of corporations. The general purpose of forming a limited liability company is to create an entity that offers investors the protections of limited liability and the flow-through tax status of partnerships. Emphasis added

4B M.J., Corporations § 4

Both corporations and partnerships referred above can partition real estate under W.Va. Code Section 37-4-1. There is no distinction that can be made in this case between the LLC formed by the parties and either a closely held corporation of which the major asset is real estate or two (2) or more partners who own real estate. As stated above, an LLC is a hybrid of both of these entities and, as such, should be treated no differently than either entity.

In the case at hand, the members of the LLC failed to recognize a distinction between a corporation and an LLC. They treated the entity as a corporation, as evidenced by the letter to David Nemeth following the February 17, 2001 meeting. The parties referred to the LLC as a limited liability corporation, referred to themselves and shareholders and referenced their corporate bylaws. (letter to David Nemeth attached as Plaintiff's Trial Exhibit 6.) Clearly, the members of the LLC made no distinction between a corporation and an LLC.

The Court properly determined that the partition statute applies to the real estate in the instant case. The Court did not abuse its discretion in its final order and the ultimate disposition of this case nor are the are the circuit court's underlying factual findings clearly erroneous.

**2. West Virginia Code Section 37-4-1 Was Applied Properly to the Facts of this Case.**

The Appellants argue that if West Virginia Code Section 37-4-1 were construed to apply to limited liability companies, then the trial court failed to apply it properly. The Appellants set forth two arguments in support of this position. The first argument is that the real estate was not the only substantial asset of the LLC and the second argument was that the circuit court failed to appoint appraisers. The facts clearly show that the real estate was the only substantial asset and appraisers were not needed to make any determination, because the parties had agreed to a partition in kind and had equitably divided the real estate.

First, the Appellants maintain that the real estate of the LLC was not the only substantial asset, a finding of West Virginia Code Section 37-4-1, which the Court did not make. The position of the Appellants take now is contrary to the previous pleading to the lower court. The Appellants

in their motion for partial summary judgment relating to count one of the Appellee's complaint acknowledges on page 2 of its memorandum in support that "the primary asset of the Company was a parcel of real estate which had previously owned by the members' father. . . ."

The Appellants should be judicially estopped from now attempting to argue that the real estate was not the only substantial asset of the LLC. The Court addressed judicial estoppel in *West Virginia Department of Transportation, Division of Highways v. Robertson*,

Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

217 W.Va. 497, 618 S.E.2d 506, footnote 11 (2005).

The Appellants admitted in their partial summary judgment motion that the real estate was the primary asset of the LLC. The Appellee relied upon the Appellants admission and did not present any evidence at the bench trial relating to the real estate being the only substantial asset of the LLC. To allow the Appellants to now argue that the real estate was not the only substantial asset of the LLC would be injurious to the Appellee because she can point to no evidence presented during the bench trial to prove her position. She relied upon the Appellants admission that the real estate was the only substantial asset of the LLC in presenting her case and did not think that she needed to produce evidence relating to this point. Now, after the fact and after admitting in their summary judgment brief that the real estate was the only substantial asset of the LLC, the Appellants want to change their position. Here, the Appellants have changed their position which involves the same

parties. The Appellants receive the benefit of claiming the real estate was the substantial asset of the LLC and the Appellee relied upon this claim to her detriment. This conduct is the essence of why judicial estoppel is available to a party.

Even if the Appellants are allowed to argue this point, the only evidence that the Appellants point to is the testimony of the Barbara Mott indicating that she wanted her money from the LLC which was given to her by Kenny Kirby in the form of a loan. (Trial Transcript at Page 42.) Barbara Mott concedes there was money in the LLC, which was the cash she and her brothers inherited from their father. Despite having some cash, the primary asset of the LLC was at that time and still is the real estate. Barbara Mott's actions were consistent with the other members of the LLC and former member David Kirby, all of whom had taken their cash from the LLC. (Trial Transcript at Page 43.) No other evidence was presented and the Appellants did not make any argument or present any other evidence that the real estate was anything other than the only substantial asset of the LLC. As such, the Appellants failure to object during trial waives their right to raise this issue on appeal<sup>5</sup>. Further, whatever small amount of cash remains in the LLC would be divided equally, accounting for the alleged loan, since each member had equal shares in the LLC and what money was left would not effect the division of property. The Court did not abuse its discretion in its application of West Virginia Code Section 37-4-1 to the facts of this case.

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<sup>5</sup> *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." (citation omitted)). See also *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997) ("A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and then complain of that error at a later date." (citations omitted)); *State v. Asbury*, 187 W. Va. 87, 91, 415 S.E.2d 891, 895 (1992) (per curiam) ("Generally the failure to object constitutes a waiver of the right to raise the matter on appeal.").

Secondly, the Appellants argue that the Court failed to order the sale of the tracts or appoint appraisers to assess an evaluation of the real estate. Despite the Appellants assertion in their Amended Answer that the property could not be partitioned in kind, the overwhelming evidence at trial was that the property could be and actually had been divided in kind by the members of the LLC. (Kenny Kirby moved to divide the property in November 1998 - Trial Transcript at Page 143); (February 17, 2001 meeting minutes reflect parties agreed to divide property - Trial Transcript at Page 147); (Parties chose which piece of property they would received on February 17, 2001 - Trial Transcript at Page 148); (Parties wrote and signed a letter to David Nemeth, surveyor, stating that the parties unanimously agreed to divide property - Trial Transcript at Pages 148 and 149); (Frank Kirby assisted the surveyor in the division of property, including Barbara Mott's piece - Trial Transcript at Pages 149 and 150); (The LLC, through Frank and Kenny Kirby, prepared a deed to Barbara Mott with the surveyed description prepared by David Nemeth - Transcript at Pages 169 and 170.) The most telling evidence was a letter from Frank Kirby to Barbara Mott stating that "it is in all of our best interest to come to an agreement and divide the property rather than auction it." (Trial Transcript at Page 38 and Plaintiff's Trial Exhibit 9.)

The record is void of any objection to proceeding to trial without the appointment of appraisers to assess value. Again, since the parties had agreed on a division of the real estate, the appointment of appraisers was unnecessary. The testimony at trial was that the parties had agreed to a division of the property in February of 2001. As previously stated, the parties agreed to divide the real estate among the four (4) members, had the real estate surveyed in separate parts, actually conveyed David Kirby his part and prepared the description and a deed for the part Barbara Mott was to receive.

David Kirby testified that although everybody was not receiving equal acreage, he did an evaluation on useable real estate among the parties. His testimony was that Barbara Mott had the least amount of useable acreage between the other members of the LLC. (Trial Transcript at Pages 105 and 106.)

The Appellants point to the case of *Ark Land Company v. Harper*, 215 W.Va. 331, 599 S.E.2d 754 (1996). *Ark Land Company* deals with a partition suit where Ark Land Company wanted to mine property in which it owned an interest with other heirs. The trial court appointed three commissioners who found the land could not be conveniently partitioned in kind and recommended that it be sold. The heirs objected. The trial court authorized a partition sale and the heirs appealed. The *Ark Land* court held that partition in kind was the preferred partition in that the partitioning sales statute was construed to narrowly. The Court reversed the Circuit Court's judgement and remanded the matter, directing the property be partitioned in kind.

Following the Court's ruling in *Ark Land*, since the parties, prior to filing the suit, determined that the property could be partitioned in kind and took steps to divide the same and in fact did transfer one piece of property to David Kirby, partitioning the property in kind was the appropriate remedy ordered by the Court in this case. The parties' agreement is sufficient for the Court to determine that no commissioners were necessary and the property had been partitioned among the heirs.

The Appellants had previously acknowledged that the real estate was the primary asset of the LLC. The parties had agreed to a division of the real estate. Therefore, the Court did not abuse its discretion in its application of West Virginia Code Section 37-4-1 and not appointing appraisers to determine if the property could be partitioned in kind.

**B. THE TRIAL COURT DID NOT ERROR BY FAILING TO MAKE A FINDING THAT THE PROPERTY BE DIVIDED PURSUANT TO WEST VIRGINIA CODE SECTION 31B-7-701, ET. SEQ.**

The Appellants maintain that applicable statute to this matter is W.Va. Code 31B-7-701, et. seq. which provides for how a member dissociates from the limited liability company, when the business of the limited liability company is not wound up. The Appellants also maintain that to the extent that a LLC may be winding up its business entirely, W.Va. Code 31B-8-801, et. seq. provides for the winding up of the business. It maintains that since the Court applied W.Va. Code 37-4-1, et. seq. the Court's final order is in error as a matter of law and must be reversed. For the reason set forth above, the Appellee believes the applicable code section for the partition of the real estate owned by the LLC was West Virginia Code Section 37-4-1.

Even if the Court should have applied W.Va. Code 31B-7-701, et. seq. or 31B-8-801, et. seq. the outcome of the case would be the same and any error would be a harmless error and, therefore, not subject to reversal on that ground. See, *Jennings v. Smith*, 165 W. Va. 791, 795, 272 S.E.2d 229, 231 (1980): "It is not our function to reverse jury verdicts merely because some error occurred in the course of a civil trial. Errors that are harmless or do not affect the substantial rights of the parties do not require reversal."

Appellants stated in their motion for partial summary judgment that the parties "determined that it would be best to terminate the company and divide the assets." (See page 2 of the Appellants' Motion for Partial Summary Judgment.) The minutes reflect that the parties agreed to and were in the process of dividing the assets of the LLC. The testimony of Frank Kirby, Jr. was that the parties met on August 6, 1999, and would try to divide the property among themselves and dissolve the corporation. (Trial Transcript at Pages 119 and 120.) The record reflects that on November 29, 1998,

the parties made a motion to divide the property. (Trial Transcript at Page 120.) The record is clear that the parties intended to dissolve the company and distribute the real estate among the members. The parties took steps to divide the property and, in fact, conveyed David Kirby his property and had extensive negotiations about dividing the property and did agree to divide the property among the remaining three (3) members of the LLC.

Therefore, the Court was correct in ordering the division of the property. As is further set out in the Response, the parties agreed to stay the distribution of the remaining cash in of the LLC. The Court did not abuse its discretion.

**C. EVEN IF WEST VIRGINIA CODE SECTION 37-4-1 DOES NOT APPLY, WHICH IT DOES, THE COURT PROPERLY ORDERED THE DIVISION OF THE REAL ESTATE AS THERE WAS AN ENFORCEABLE AGREEMENT, BOTH WRITTEN AND ORAL, TO PARTITION THE REAL ESTATE.**

This action was tried to the Court on two counts of Appellee's complaint. One count was to enforce an agreement between the parties for the division of real estate. The other count was for a partition under West Virginia Code Section 37-4-1, et seq. The evidence presented at trial in this matter reveals the parties had an enforceable agreement to divide real estate. Even if West Virginia Code Section 37-4-1 and 31B-7-707 were not properly applied by the Court, the parties still had a binding agreement to divide the property.

West Virginia Code 36-1-3 sets forth that any contract for the sale of real estate must be in writing. West Virginia Code Section 36-1-3 does not itself specify a particular type of writing that is necessary to satisfy the memorandum requirement. Its words suggest a degree of flexibility as the language identifies several forms of writings: It states that "the contract or some note or

memorandum thereof” is sufficient to meet the written requirement. *See, Timberlake v. Heflin*, 379 S.E.2d 149 (W.Va. 1989). Here, the minutes of the various meetings kept by the LLC and prepared by the Defendants are a sufficient memorandum of the agreement of the parties. (Trial Transcript at Pages 143, 147 and 148. ) In addition, there was a written instrument setting forth the parties agreement to divide the real estate signed by all the parties, including the Appellants. (Trial Transcript at Pages 148 and 149.) The parties had a written enforceable agreement sufficient to satisfy the requirements of West Virginia Code Section 36-1-3.

In addition to the written instrument, the parties had an oral enforceable agreement. An exception to written requirement for the transfer of real estate set out in West Virginia Code Section 36-1-3, is partial performance of the oral contract. In *Steenrod v. Wheeling P. & B.R.R.*, the Court held that:

While this section requires every contract for the sale of land to be signed by the party to be charged, still where there has been such part performance as will take the case out of the operation of the statute, a written contract signed by the vendor alone may be by him enforced against the vendee in a court of equity.

27 W. Va. 1, (1885).

Further, the West Virginia Supreme Court held in *Bennett v. Charles Corp.* that “A defendant may be estopped to assert the statute of frauds in defense of an action for enforcement where certain limited circumstances exist. Those limited situations include fraud and part performance.” 159 W.Va. 705, 226 S.E.2d 559 (1976).

In this case, there was clearly partial performance of the agreement between all members of Frank P. Kirby Sr. Limited Liability Company. The partial performance included: (i) Frank P. Kirby, Jr. testified that all of the members agreed upon which piece of property they wanted; (ii) pursuant

to this agreement, the limited partners of Frank P. Kirby Sr. Limited Liability Company conveyed David Kirby his part of the real estate; (iii) the members of Frank P. Kirby Sr. Limited Liability Company sent a letter to David Nemeth, stating that an agreement had been reached between the parties as to the partition of the subject real estate; (iv) David Nemeth prepared a survey of the portion of the real estate to be conveyed to the Appellee; and (v) the Appellee agreed to accept the real estate. Most importantly, the parties conveyed David Kirby his property pursuant to their agreement. Given these undisputed facts, the statute of frauds does not apply to this case and the agreement should be enforced.

Appellants point to the minutes from the July 31, 2001 for their position that there was not an agreement among the parties. Appellants refer to the second to last paragraph where one of the parties made a motion to sell the property if the parties could not agree they would require the services of an auction company. However, the Appellants did not refer the Court to the first sentence of that paragraph where the motion was to “proceed with the division of the property as agreed in the February meeting....” (Plaintiff’s Trial Exhibit 9.)

Additionally, those minutes clearly indicate the discussion to retain the services of the auction company came in response to David Kirby raising objections to the property division made in the previous meeting. (Plaintiff’s Trail Exhibit 9.) The parties never obtained the services of an auction company but instead deeded David Kirby his property consistent with their agreement.

There was an enforceable agreement, both written and oral, between the parties to partition the real estate

**D. THE ONLY MATTER BEFORE THE COURT WAS THE WAS THE DIVISION OF THE REAL ESTATE.**

The Appellants argue that the trial court abused its discretion by issuing a final order that failed to resolve other contested issues. Contrary to the Appellants' argument, the Court did not "close the book" on the litigation. The final order entered by the Court related to counts one and three of the Appellee's complaint, which dealt with the division of real estate. The parties agreed to try only the division of the real estate.

While there is no order of the Court staying or bifurcating any remaining dissolution of the limited liability company, the trial record is absent any testimony or evidence related to the other issues among the parties. The only reference to any issues other than the real estate were mentioned briefly when Appellants' counsel asked Appellee about her and the other members drawing their money out of the LLC. (Trial Transcript at Page 42.) Later, it was again mentioned that all parties had drawn money out of the LLC. (Trial Transcript at Page 52.)

At the close of Appellee's case, the Appellants did not ask the Court for a directed verdict on any issues not raised by Appellee in her case in chief. (Trail Transcript at Page 118.) The Appellants did not present any evidence that matters of the LLC other than the division of the real estate needed to be addressed. Nor did the Appellants make any motions at the close of all evidence relating to issues in the Appellee's complaint not addressed during the trial. (Trial Transcript at Page 176 and 177.) As previously stated, a parties failure to object during the course of the trail is a waiver to a parties right to raise the objection on appeal.<sup>6</sup>

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<sup>6</sup> *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." (citation omitted)). See also *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997) ("A party simply cannot acquiesce to, or be the source of, an error

Prior to the bench trial on the partition of the real estate between the parties, counsel for Barbara Mott and the previous counsel for the Appellants agreed to stay all other matters between the parties, other than the division of the real estate, as this was the main contention between the parties. The parties agreed that once the issue of the division of the real estate was resolved, the remaining issues could either be worked out between the parties or then litigated.

The issue of staying the case was addressed at the pretrial of this matter as were the motions for partial summary judgment of each party. There was no order or transcript for the pretrial hearing. The Court further denied the parties' summary judgment motions and did not enter an order denying these motions. Counsel for Barbara Mott reminded this Court of this agreement during the hearing on the Appellants' Rule 59 or 60 motion heard by the Circuit Court on June 9, 2008. Counsel for Barbara Mott at the post trial hearing that the parties had agreed at the pretrial to stay all proceedings, other than the division of the real estate. (June 9, 2008 Transcript at Page 25.) At no point did counsel for the Appellants refute that this was the agreement of the parties. In fact, the first time this was ever brought up was in this appeal. As such, this Court's order did address all matters before the Court, which, by the agreement of the parties, was only the division of the real estate.

#### **V. CONCLUSION AND PRAYER FOR RELIEF**

The Circuit Court of Cabell County properly considered the evidence presented to it and found that the subject real estate is subject to partition. If there was any error it was harmless error. The evidence revealed that there was an agreement to divide the real estate between the parties and

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during proceedings before a tribunal and then complain of that error at a later date." (citations omitted)); *State v. Asbury*, 187 W. Va. 87, 91, 415 S.E.2d 891, 895 (1992) (per curiam) ("Generally the failure to object constitutes a waiver of the right to raise the matter on appeal.").

found that the agreement was enforceable. The Court's factual findings were not clearly erroneous as the Court did not abuse its discretion when it ordered the parties to convey unto Barbara Mott her part of the real estate as part of her dissolution from the LLC. The Circuit Court's decision should be affirmed.

BARBARA K. MOTT,  
By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BARBARA K. MOTT,

Appellee and Plaintiff Below,

v.

APPEAL NO. 09-0436  
Civil Action No.: 03-C-0548  
Circuit Court of Cabell County

FRANK P. KIRBY SR.  
LIMITED LIABILITY COMPANY,  
KENNY KIRBY AND  
FRANK P. KIRBY, JR.

Appellants and Defendants Below.

CERTIFICATE OF SERVICE

I, Paul E. Biser, counsel for Respondent, do hereby certify that I served a true and exact copy of the foregoing "Brief of Appellee, Barbara Mott" upon the following via facsimile and by depositing the same in the regular course of the United States mail, postage pre-paid, this 28 day of July, 2009.

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