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CASE NO. 34947

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BEFORE  
THE  
WEST VIRGINIA SUPREME  
COURT OF APPEALS

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CHARLESTON

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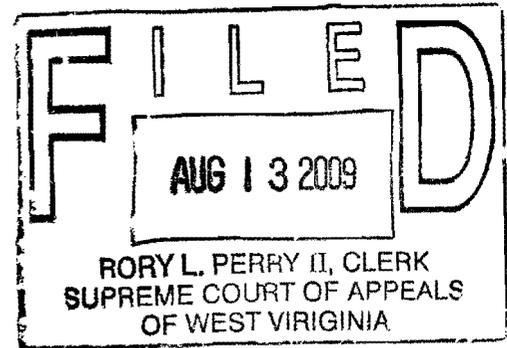
BARBARA K. MOTT,

Plaintiff Below, Appellee,

vs.

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

Defendants Below, Appellants.



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REPLY BRIEF OF APPELLANTS.

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and Frank P. Kirby, Jr.*

**I. WEST VIRGINIA CODE §37-4-1 IS INAPPLICABLE TO AN LLC.**

In her brief, Appellee, Barbara K. Mott (“Mott” or “Appellee”) argues that the partition statute, West Virginia Code §37-4-1, should be applicable to the situation at bar because it applies to closely held corporations of five or less members. She argues that a limited liability company should be construed as the legal equivalent of a corporation, and therefore the Circuit Court had authority to enter an order of partition.

Mott, while acknowledging that the West Virginia Code has separate provisions defining a “corporation” as well as a “limited liability company,” glosses over any distinctions in favor of her construction of the partition statute. Despite any similarities between a corporation and a limited liability company, however, the fact remains that they are *separate legal entities*, defined by statute to have separate and distinct legal meanings.

It is uncontested that this action concerns the Frank P. Kirby Sr. Limited Liability Company (“the LLC”), and that the entity is a bona fide limited liability company. West Virginia Code §37-4-1, as Mott noted, was enacted *prior* to the enactment of the West Virginia Limited Liability Act. W.Va. Code §37-4-1 has never been amended by the Legislature to encompass a limited liability company. How could W.Va. Code §37-4-1 apply to a limited liability company when such a legal creature was not in existence at the drafting of the partition statute, and the statute was meticulously drafted to state to which situations it would apply, namely 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?

Contrary to Mott’s assertions, an LLC does not equate to a closely held corporation as that term is used in West Virginia Code §37-4-1. Appellants and Mott, being members of the

LLC, were not joint tenants, tenants in common, coparceners, or shareholders in a West Virginia corporation. 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.

**II. EVEN IF W.VA. CODE §37-4-1 WAS APPLICABLE, THE COURT BELOW DID NOT PROPERLY APPLY THE STATUTE.**

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 concedes in her Brief that the LLC had other assets besides the Eighth Street Road tract. In fact, she testified at trial that the LLC owned rental property, cash, and other debts, including a \$40,000 + debt owed by her. (*See* April 18, 2007 Transcript, pp. 42-43.) The Circuit 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.

Mott now claims that Appellants acknowledged that the Eighth Street Road tract was a “primary asset” of the LLC in a motion for partial summary judgment that the Circuit Court denied and that the Appellants should therefore be judicially estopped from asserting that the Circuit Court erred by not failing to make a finding that the tract was the “only substantial asset”

of the LLC. First, it is important to recall that the Appellants do not concede in any way that W.Va. Code §37-4-1 is applicable to the situation. Second, being a “primary asset” of a limited liability company is not the same thing as being the “*only substantial* asset.” By Mott’s own testimony, she acknowledged that there was at least \$40,000 in accounts receivable that constituted an asset of the LLC along with undisclosed cash. Thus, the tract, while undoubtedly a significant asset, did not meet the statutory qualification of being the *only* substantial asset as there were other significant assets in the LLC.

Additionally, it was Mott, not the Appellants, who sought partition of the Eighth Street Road tract. Thus, she bore the burden of proof and it was incumbent upon her to make sure the proper evidence was before the Circuit Court in terms of establishing that the tract was the only substantial asset of the LLC. Mott never offered any stipulation of fact, and she never sought any judicial notice of the tract being the only substantial asset. Thus, the evidence produced at trial was that the LLC had several assets in addition to the Eighth Street Road tract, and the Circuit Court made no finding -- and could not make a finding -- that the tract was the only substantial asset of the LLC.

Therefore, even if West Virginia Code §37-4-1 applied, and for reasons previously stated it did not, the fact remains that the Circuit Court did not properly apply the statute as it made no finding at all that the tract was the only substantial asset of the LLC.

**III. DESPITE MOTT’S PROTESTATIONS THAT THE WEST VIRGINIA UNIFORM LIMITED LIABILITY ACT SHOULD NOT APPLY, THE ENTITY AT ISSUE WAS AN LLC AND THE CODE PROVIDES SPECIFIC MEASURES FOR MEMBERSHIP WITHDRAWAL.**

Although Mott is insistent that, as a member of a West Virginia limited liability company, she should have the right to seek partition of a real estate asset, the West Virginia Code provides otherwise. Instead of the general real estate partition statute which is facially

inapplicable to an LLC, the applicable statute governing Mott's dissociation from membership in the LLC is W.Va. Code §31B-7-701, *et seq.*, 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.

Rather than partition of an LLC asset as Mott is seeking, 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 withdrawing member is paid the value of her interest in the LLC. Mott loses sight of the fact that her ownership status is in the LLC and not in the Eighth Street Road tract itself. Under the provisions of W.Va. Code §31B-7-701, 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 for the LLC to purchase the dissociating member's interest; and
- 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.

Instead, the Court ignored the LLC status and simply ordered the members of the LLC to divide up the real estate asset. The Court made no attempt to determine the value of Mott's LLC membership interest, and Mott offered no evidence of her membership interest's value and no evidence of the Eighth Street Road tract's value. It was Mott's responsibility, as plaintiff below, to ensure that the Court had before it proper evidence and applied the appropriate law. The

Appellants had raised their opposition to use of the general real estate partition statute 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 Mott 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.

#### **IV. NO FINAL AGREEMENT OF TRACT DIVISION WAS REACHED.**

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 and analyzed in Appellants' Brief previously submitted. 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, the LLC members had reached no such agreement with respect to Mott.

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

Court below focused on the LLC meetings of 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) in reaching its erroneous conclusion that a final agreement of division had been reached.

The February 17, 2001 minutes made clear that only *proposed* property lines for purposes of dividing the Eighth Street Road tract were reached. The tract 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 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 "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.) In other words, all the parties had done was "agree to work toward an agreement."

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.) (Emphasis added.)

Again, the minutes of this meeting equally reflect that the members had not reached a complete agreement, as they specifically recited actions to be considered if a complete agreement could not be reached. 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, ignored or misconstrued the clear minutes of the LLC meetings, and became sidetracked by the fact 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 as representative of his LLC membership interest’s fair value. The evidence before the Circuit Court, however, was that a long history of negotiations had ensued between David Kirby and the remaining LLC members, ultimately culminating, after nearly two years, in a conveyance to Mr. Kirby of a portion of the Eighth Street Road tract with reservations to the LLC and restrictions, and Mr. Kirby’s formal withdrawal from the LLC. (See April 18, 2007 transcript, pages 154-67.)

That the LLC chose to reach an agreement with David Kirby whereby he was dissociated from the LLC by surrendering his interest in the LLC for a section of real estate did not mean that the LLC was forever foreclosed from dissociating another LLC member, i.e., Mott, in accordance with statutory procedures. Where no agreement could be reached with Mott for her dissociation as no agreement was reached regarding reservations and restrictions upon a conveyance of real estate to her in return for her

surrendering her LLC membership, Mott's recourse was not to seek partition of LLC real estate, but, instead, under W.Va. Code §31B-7-701 *et seq.*, to seek payment by the LLC of her membership interest's fair value.

**V. THE CIRCUIT COURT'S FINAL ORDER FAILED TO RESOLVE ALL ISSUES.**

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 Mott wanting to dissociate herself from the LLC, the Court below should have overseen a proper dissociation in accordance with the provisions of W.Va. Code §31B-7-701 and determined a fair value of Mott's distributional interest. Instead, the Circuit Court simply ordered the LLC to divide the remainder of the Eight Street Road tract between Mott and the Appellants, all within a Final Order that neither noted the presence of remaining issues nor reserved jurisdiction to adjudicate anything further.

It is axiomatic that a Court speaks through its written orders. See, e.g., *State of West Virginia v. White*, 188 W.Va. 534, 425 S.E.2d 210, 212n.2 (1992); *State ex rel. Kaufman v. Zakaib*, 207 W.Va. 662, 535 S.E.2d 727, 736 (2000). “[C]ourts of record can speak only by their records, and what does not so appear does not exist in law.” *Syl Pt. 3, Hudgins v. Crowder & Freeman, Inc.*, 156 W.Va. 111, 191 S.E.2d 443 (1972). Despite the fact that Mott claims there was an “understanding” that the trial would only address whether to divide the real estate and that all other matters were reserved, as Mott concedes no such order from the Circuit Court either bifurcating the issues or reserving other matters exists. The only order issued (other than the

order denying post-trial motions) was the Circuit Court's "Final Order" which did not in anyway reserve other matters for adjudication.

The Circuit Court therefore 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.

**VI. THE CIRCUIT COURT EXCEEDED ITS AUTHORITY BY ORDERING AN UNSPECIFIED DIVISION OF THE LLC'S TRACT BETWEEN NON-PETITIONING PARTIES.**

Finally, underscoring the abuse of discretion by the Circuit Court in its Final Order was the fact that the Circuit Court, despite not being asked to do so by any party, arbitrarily ordered a division of the remainder of the Eighth Street Road tract (after carving off a piece for Mott) between the Appellants. Neither Appellant asked the Court to do this at the bench trial, and Mott never sought this "relief" either. Instead, the Circuit Court, having wrongfully exercised partition power in the first place under W. Va. Code §37-4-1, extended this wrongful exercise by ordering further division of LLC real estate to the Appellants. Accordingly, the decision below should be reversed.

**VII. CONCLUSION AND RELIEF PRAYED FOR**

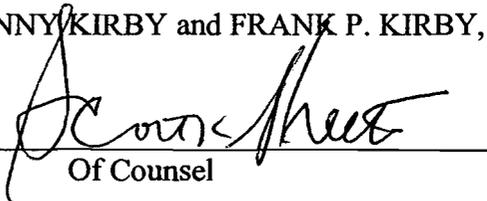
The Circuit Court had no legal authority to order arbitrarily a partition of a limited liability company's real estate. The evidence in the record clearly established that, while the parties had generally agreed that areas of the tract in question would ultimately be assigned to each particular member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

Respectfully submitted,

KENNY KIRBY and FRANK P. KIRBY, JR.

By:   
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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he served the foregoing REPLY BRIEF OF APPELLANTS 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 13th day of August, 2009:

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

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