

Maynard, J., Dissenting Opinion, Case No.23939 West Virginia Trust Fund, Inc. v. Hon. Larrie Bailey & State of West Virginia ex rel. Hon. Darrell V. McGraw

No. 23939 - West Virginia Trust Fund, Inc., a West Virginia Non-Stock, Non-Profit Corporation, as Trustee v. Honorable Larrie Bailey, Treasurer of the State of West Virginia, and State of West Virginia, ex rel. Honorable Darrell V. McGraw, Jr., in his Official Capacity as the Attorney General of West Virginia v. West Virginia Trust Fund, Inc., a West Virginia Corporation; and David Gardner, Chairman, West Virginia Trust Fund, Inc., and Stanley L. Klos v. Honorable Larrie Bailey, Treasurer of West Virginia, and State of West Virginia, ex rel. Stanley L. Klos v. West Virginia Board of Investments, a Body Corporate of the State of West Virginia, and West Virginia Trust Fund, Inc., a West Virginia Corporation

Maynard, Justice, dissenting:

I respectfully dissent because I believe the decision of the majority in this case is simply wrong. This case establishes bad policy, makes bad law and reaches a bad result. To reach the result the majority wanted in this case they had to make a giant leap over a huge body of well-settled trust law. Anybody who can jump that high ought to be making Nike commercials.

All courts and all judges occasionally make bad decisions. You always hope when you do it will be in some minor matter that affects a very small number of people. Unfortunately, this decision adversely affects literally thousands of West Virginians and will have a devastating effect on all of State Government. If you were going to pick a case in which to be wrong, this is the very worst you could choose. This decision is simply a fiscal disaster.

There are two fundamental flaws in this decision. First, it violates the doctrine of separation of powers by striking down a valid and legal statute and usurps the legitimate power of the legislature which enacted the statute and the executive who signed it into law. This Court is doing what all courts do everywhere in our nation today: govern by court decision. Syllabus Point 1 of this case is all that needs to be said in this decision. Just in case you missed it, here it is again:

"In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government

among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).

I only wish the majority really meant what they said.

Second, this case simply ignores a very large body of the well-settled law of trusts. The legal concept of trusts has been recognized in our law for hundreds of years. One of the basic elements of every irrevocable trust is the transfer of title of assets from the trustor to the trustee. Therefore, the person or entity holding title is the trustee and not the trustor. The West Virginia Education Association said it very well in its brief citing Syllabus Point 2 of *Dadisman v. Moore*, 384 S.E.2d 816 (W.Va. 1988):

A "trust" is a legal relation between two or more persons by virtue of which one is bound to hold property to which he has the legal title, for the use or benefit of the other or others who have an equitable title or interest. It is a right, enforceable in equity, to the beneficial enjoyment of property, real or personal, of which the legal title is in another. The person so holding the legal title or interest is called the "trustee," and the one having the equitable interest and entitled to the benefit is the beneficiary or "cestui que trust." The person creating the trust is called the "trustor" or "settlor." An essential feature of trusts is the division of the title to property, the vesting of the legal title in the trustee and of the equitable title or beneficial interest in the cestui que trust.

Legal title to any stock in any corporation owned by the Trust Fund would rest solely with

the trustee of the Fund and would not be held by the State.

For the foregoing reasons, I believe the statute in question does not violate our Constitution, and accordingly, I dissent.