No. 31695 – *James L. Laurita, Jr., Thomas A. Laurita, and Toni D. Dering v. Estate of Kenneth Fay Moran, Sheila Rose Lightfoot, Personal Representative of the Estate of Kenneth Fay Moran, Sheila Rose Lightfoot, Tina Marie Fischer, Robert Dean Moran and Paul Allen Moran*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

I dissent because the Partition Commissioners' report discloses on its face that the Commissioners disregarded the preeminent principles of partition law: fairness and equity. Specifically, the Commissioners acknowledged that their deliberations probably did not do justice: "Of course, receipt of that northern portion of the property [by Appellants] may not guarantee the same value the coal would have if situate closer to the active workings of the adjoining [Appellees'] Laurita tract." It is axiomatic that the law of partition in kind has as its objective the division of land in an equitable fashion "so as to do justice to all the parties as nearly as the subject will admit." *Henrie v. Johnson*, 28 W.Va. 190, 194 (1886). As the comment above quoted from the Commissioners' report makes clear, that principle was simply ignored in this case.

Appellees own coal lands adjoining the tract partitioned in this case. Our case law established long ago that in a partition in kind, Appellees are entitled to be awarded a portion of the partitioned tract adjoining their other land "if this can be done without injury

to the interests of" Appellants. *Garlow Murphy*, 111 W.Va. 611, 614, 163 S.E. 436, 438 (1932).

The first problem with the decision below is that by rejecting Appellees' request for an east/west partition and insisting on a north/south partition, the Commissioners missed the chance to both fulfill the historic preference for causing a portion of the partitioned land to adjoin Appellants' other land and the chance of minimizing any injury to the interests of Appellants arising from the partition.

Appellants correctly argue that the decision to divide the subject parcels in a north/south fashion and the allotment to Appellants of the northern section of the property results in depriving them of good access to whatever mineable coal underlies the property. Appellees own a fifty-seven acre parcel contiguous to the southern parcel of the partitioned property awarded to Appellees. Through this manner of effecting partition, Appellants have been placed at a specific disadvantage with regard to extracting the valuable minerals underlying their parcel of property given their lack of attainable access to the coal.[1]

[1]In its findings, the Partition Commissioners concluded that: "The coal estate of the Subject Property does not have any easements or rights of way incidental or appurtenant to access the coal." The Commissioners further determined that "[t]he coal estate . . . is not capable of being developed by either the Lauritas or the Moran Heirs without the acquisition of an easement or right of way for the purpose of accessing and developing such coal estate."

While Appellees dispute that Appellants are in worse shape than they are with regard to gaining access to the coal in place, the facts of this case suggest otherwise. Appellees argue that their only right of surface access to the southern portion of the parcel has been extinguished due to the termination of a lease agreement under which they previously had such access. However, the fact that they own the adjacent parcel of property certainly suggests that they are in a superior bargaining position to obtain the easements or rights of way necessary for development of the coal estate. Lacking that same bargaining position, Appellants will now be forced to enter into some sort of an agreement with Appellees to effectuate removal of any extracted coal from their portion of the parcel or forego the exploration and development of the northern parcel assigned to them. Consequently, the effect of the north/south partition, given Appellees' ownership of an adjacent parcel of property, is to effectively reduce the bargaining power of Appellants with regard to mining the coal underlying their share of the parcel. By leaving Appellants in this uneven bargaining position, the partition effected by the lower court's ruling runs afoul of the desired objectives of this state's partitioning statutes not to prejudice the interests of one party while promoting the specific interests of another. *See* W.Va. Code § 37-4-3 (1957) (Repl. Vol. 1997).

As previously noted, the Partition Commissioners bluntly acknowledged the resulting inequity inherent to the partition selection they made. The Commissioners shrugged off responsibility for achieving a fair and just result by reasoning that "the purpose

of our review for partition is not to maximize or minimize the value of a cotenant's share but to recommend an equitable division of the property." However, the fact is that the approach taken by the Commissioners, and adopted by the circuit court, does not achieve a fair and equitable division of the land and mineral rights at issue. *See* Syl. Pt. 4, *Consolidated Gas Supply Corp. v. Riley,* 161 W.Va. 782, 247 S.E.2d 712 (1978) (recognizing that statutory right to partition in kind exists where mineral rights are involved).

In ascertaining the value of coal property appearing to have essentially equal quantity and quality of coal underlying the surface, there remains at least two other major factors which contribute to an overall assessment of the value of that coal: mineability and accessibility. It appears from the record that the Commissioners failed completely in their obligation to assess the impact on mineability and accessibility arising from their decision to divide the property in a north/south manner. Likewise, it appears likely that the decision to award only the northern portion of the tract to Appellants resulted in Appellants receiving coal lands substantially reduced in value because of the lack of accessability for mining. Appellants only recourse appears to be subsequent negotiations with Appellees. In short, Appellants likely got some "home cooking" in this deal and it was neither fair, equitable, nor necessary.

Given the inherent inequitable result of the partitioning decision at issue when value is examined in terms not limited to acreage, and particularly the announced intention

of the Commissioners to disregard the disadvantage to which Appellants have been put with regard to accessing and removing their coal, I must respectfully dissent from this Court's decision. I consider that the majority did not intend the resulting injustice; the majority simply failed to recognize and rectify that injustice.