IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

No. 33341

FILED
November 9, 2007
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BILL E. MORTON AND JESS R. MORTON,
Plaintiffs Below, Appellees

v.

UNKNOWN HEIRS OF ERNEST M. VAN CAMP; LILLY TUCKER; UNKNOWN HEIRS OF MARGARET VAN CAMP PRICE; UNKNOWN HEIRS OF DOROTHY VAN CAMP; UNKNOWN HEIRS OF HELEN VAN CAMP; UNKNOWN HEIRS OF VIOLET VAN CAMP; UNKNOWN HEIRS OF MARTHA VAN CAMP; HERBERT HOPKINS; NATALIE STEELE; GLENNA MAY (HAYNES) DIETZ; BARBARA ANN (HAYNES) GUNNOE YOUNG; MARY LOU (HAYNES) MASON; CAROLYN RUTH (HAYNES) MELTON; WILLIAM RONALD HAYNES; CHARLOTTE ELIZABETH (HAYNES) PLANTZ; AND UNKNOWN HEIRS OF SQUIRE VAN CAMP,
Defendants Below, Appellees

LINDA KESSLER ARCHER
Defendant Below, Appellant

Appeal from the Circuit Court of Kanawha County
Honorable Louis H. Bloom, Judge
Civil Action No. 05-C-2376

AFFIRMED

Submitted: October 9, 2007
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The Opinion of the Court was delivered PER CURIAM.
JUSTICE STARCHER and JUSTICE ALBRIGHT dissent and reserve the right to file dissenting opinions.
JUSTICE BENJAMIN concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "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." Syllabus Point 1, *Public Citizen, Inc. v. First Natl. Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996).

2. "By virtue of W.Va.Code, 37-4-3, a party desiring to compel partition through sale is required to demonstrate that the property cannot be conveniently partitioned in kind, that the interests of one or more of the parties will be promoted by the sale, and that the interests of the other parties will not be prejudiced by the sale." Syllabus Point 3, *Consolidated Gas Supply Corp. v. Riley*, 161 W.Va. 782, 247 S.E.2d 712 (1978).

Per Curiam:

The appellant, Linda Kessler Archer, appeals from the September 18, 2006, order of the Circuit Court of Kanawha County, which directed the sale of real property wherein she owns an undivided one-seventh interest in the property. Based upon the parties' briefs and arguments in this proceeding, as well as the relevant statutory and case law, we are of the opinion that the circuit court did not commit reversible error and accordingly, affirm the decision below.

I.

FACTUAL AND PROCEDURAL HISTORY

On October 20, 2005, the appellees, Bill E. Morton and Jess R. Morton, filed a complaint seeking to sell 25.5 acres of undeveloped land in Cross Lanes, West Virginia. The appellees own an undivided six-sevenths interest of the property, while the appellant, Linda Kessler Archer, owns a one-seventh undivided interest in the property. The appellant and her daughter currently reside on the land in a mobile home and desire to remain living there. The appellees seek to develop the land and state that the only viable entrance is through the portion of property on which the appellant and her daughter reside, making it nearly impossible for development of the residue of the land.

The appellant has resided on the property for much of her lifetime as she grew

up living there with her parents, siblings, and grandmother in a house her parents built. When that house burnt, she continued to reside on the property in a mobile home. The appellant, however, has not continuously lived on the property as she lived in Florida for several years before returning to reside on the property approximately seven years prior to this litigation. After returning to West Virginia to live on the property, the appellant testified that she sold timber from the land without sharing any of the proceeds with the appellees.

On September 18, 2006, the Circuit Court of Kanawha County ordered the property to be sold by a Special Commissioner and to distribute the sale proceeds among the parties pursuant to their ownership interest. The circuit court concluded that, "if Ms. Archer, who only has one-seventh interest in the subject real estate, received the 3.64 acres by partition, the remaining owners would receive much less valuable land and would be required to expend substantial sums of money to place the remaining acreage in a position whereby the acreage could be developed for residential purposes." Subsequently, the appellant, who is the only party objecting to the sale of the land, filed an appeal of the circuit court's order with this Court.

II.

STANDARD OF REVIEW

As we explained in Syllabus Point 1 of *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996), appellate oversight of the findings and conclusions of the circuit court made after a bench trial entails a two-pronged deferential standard of review. We held that: "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." *Id*. With these standards in mind, we now consider the issues presented in this case.

III.

DISCUSSION

In this case, the appellees seek to sell a 25.5 acre parcel of land in which they own an undivided six-sevenths interest. Conversely, the appellant, who owns a one-seventh undivided interest in the property, maintains that the property can be conveniently partitioned in-kind. She states that the interests of the other parties will not be prejudiced by the partition since the one-seventh share she is seeking will not interfere with a developer wanting to maximize the use of the property. The appellant further argues that she is not interested in monetary gain in selling the property and is only concerned with being allowed to continue living on the land.

The appellant points out that in *Ark Land Company v. Harper, et. al.*, 215 W.Va. 331, 599 S.E.2d 754 (2004), this Court dealt with a dispute concerning 75 acres of land owned by a family for approximately 100 years. In that case, a dispute arose after the Ark Land Company purchased 67.5% undivided interest in the property. Ark Land sought to sell the entire parcel of land, while the family objected to the sale and requested a partition in kind. The appellant states that in *Ark Land*, this Court explained that "we [were] troubled by the circuit court's conclusion that partition by sale was necessary because the economic value of the property would be less if partitioned in kind." This Court further stated that, "we have long held that the economic value of property may be a factor to consider in determining whether to partition in kind or to force a sale . . . , [h]owever, our cases do not support the conclusion that economic value of property is the exclusive test for determining whether to partition in kind or to partition by sale." 215 W.Va. at 337, 599 S.E.2d at 760. The appellant then cites Syllabus Point 3 of *Ark Land*, wherein this Court held:

> In a partition proceeding in which a party opposes the sale of property, the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale. Evidence of longstanding ownership, coupled with sentimental or emotional interests in the property, may also be considered in deciding whether the interests of the party opposing the sale will be prejudiced by the property's sale. This latter factor should ordinarily control when it is shown that the property can be partitioned in kind, though it may entail some economic inconvenience to the party seeking a sale.

The appellant further argues that it is her common law right to keep her portion of land where she has lived for most of her life. She states that none of the co-owners have lived on the property and that sale of the land will create undue hardship on her as she will have to find another place to live. The appellant contends that the circuit court's decision should be reversed and that upon remand a commissioner should be appointed to determine the location and amount of land that, in his or her opinion, would adequately represent a one-seventh value of the whole in order that she may maintain her homestead.

The appellees respond that the circuit court properly ordered the sale of the property. They explain that W.Va. Code § 37-4-3, in part, provides:

> [I]n any case in which partition cannot be conveniently made, if the interests of one or more of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, and the interest of the other person or persons so entitled will not be prejudiced thereby, the court, notwithstanding the fact that any of those entitled may be an infant, insane person, or convict, may order such sale, or such sale and allotment, and make distribution of the proceeds of sale.

They further point out Syllabus Point 3 of *Consolidated Gas Supply Corp. v. Riley*, 161 W.Va. 782, 247 S.E.2d 712 (1978), wherein this Court held:

> By virtue of W.Va.Code, 37-4-3, a party desiring to compel partition through sale is required to demonstrate that the property cannot be conveniently partitioned in kind, that the interests of one or more of the parties will be promoted by the sale, and that the interests of the other parties will not be prejudiced by the sale.

The appellees maintain that the property cannot be conveniently partitioned. They state that the initial 3.64 acre portion of the land requested by the appellant would have substantially diminished the value of the residue and would have created a considerable expense to be incurred by the appellees to make the residue suitable for residential purposes. They further argue that the appellant is the only individual able to derive any benefit from the property and that she does so without regard to the remaining interests of the appellees, who own six-sevenths of the property.

In this case, the appellant initially submitted a survey of 3.64 acres where her mobile home is located and argued that she should be given that parcel of land because her home could not be moved to another location due to its age. However, after her own expert, as well as the appellee's expert, testified that the 3.64 acres was the most valuable acreage and the only acreage suitable for a home site, the appellant changed her mind. It was only after realizing that the testimony of the experts made it unlikely that she would be given the 3.64 acre parcel she requested, that she then said her mobile home could be moved to another location. She then asked that the property be partitioned allowing her to stay somewhere else on the land. She did not, however, provide a survey of an alternative site for her mobile home. The appellant's failure to produce a survey for an alternative site did not allow the circuit court to evaluate the viability or value of any alternative sites.

In making its decision, the circuit court's order demonstrates that the court considered the expert testimony presented by the appellant and the appellee. The appellees expert, Darrell Rolsten, a licensed real estate appraiser, testified that the 3.64 acres requested by the appellant had a fair market value of $50,000, while the remaining 22 acres, which would have been given to the appellees, had a value of $33,000. He further testified that the 3.64 acres was the only flat land of the entire 25.5 acres suitable for a homesite and that any development of the remaining acreage would require significant excavation and the building of a road to access the remaining acreage. Thus, Mr. Rolsten opined that the partition of the 3.64 acres would be an inequitable distribution of the acreage. Moreover, the appellant's expert, Eddie Estep, also a licensed real estate appraiser, indicated that the fair market value for the 3.64 acres of land was $15,000; however, he stated that he was not prepared to offer an opinion on the fair market of the remaining 22 acres.

It is important to note that while the two experts may have disagreed with regard to the fair market value of the 3.64 acres, both did agree that the 3.64 acres constituted the most valuable portion of the subject real estate. Likewise, appellee Bill E. Morton, who is a real estate developer, testified that from his knowledge and experience, the 3.64 acres was the most valuable acreage of the subject real estate because it is the only portion of the acreage currently suitable for development.

Having reviewed the entire record before this Court, we believe that the circuit

court correctly found that the real estate in question cannot be conveniently partitioned in kind. It is clear from the testimony that if the appellant, who holds one-seventh interest in the property, received by partition the 3.64 acres on which her mobile home is located, the remaining owners would receive much less valuable land and would be required to expend substantial sums of money to place the remaining acreage in a position whereby it could be developed for residential purposes. As it stands today, the appellant and her daughter, who has no ownership interest in the property, are the only individuals who are able to enjoy the benefit of residing on the real estate. One example of this was the appellant's sale of timber from the property wherein she kept all of the proceeds from that sale in spite of the fact that she only holds a one-seventh undivided ownership interest. Conversely, however, if the real estate is sold, the remaining owners, who hold six-sevenths interest in the property, will be able to receive a benefit from their ownership interests by deriving a monetary benefit from the sale.

While this Court is sensitive to the appellant's desire to reside on the property, the interests of all the parties to this matter must be considered as a whole and the desires of one party cannot adversely impact the rights of the remaining parties. Thus, since the property cannot be conveniently partitioned, the interests of the majority of the property owners will be promoted by a sale of the property and the interests of the appellant will not be prejudiced as she will receive one-seventh of the proceeds from that sale.

After thoroughly reviewing the record and considering all of the parties' arguments, we find no error with the circuit court's September 18, 2006, order. Thus, we affirm the circuit court's decision.

IV.

CONCLUSION

Accordingly, the final order of the Circuit Court of Kanawha County entered on September 18, 2006, is affirmed.

Affirmed.