IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FILED
NOV 14 2005
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

CHRISTINE McCONAHA, Individually, et al Appellant (Plaintiff below),	)
vs.	) CASE NO. 32726) BRIEF OF THE APPELLEE) SAMUEL WEBSTER HARRISON, JR.
ETHEL ISABELLE RUST, et al Appellee (Defendant below)	)

BRIEF OF THE APPELLEE
SAMUEL WEBSTER HARRISON, JR.

Appellee
Samuel Webster Harrison, Jr.
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BRIEF OF APPELLEE SAMUEL WEBSTER HARRISON, JR.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF THE APPELLEE SAMUEL WEBSTER HARRISON, JR.

Kind of Proceeding and Nature of the Rulings in the Circuit Court

Comes now your Appellee, Samuel Webster Harrison, Jr., one of the Defendants below, and respectfully presents his Brief, and represents and state as follows:

1. Appellant is Christine McConaha, (herein "appellant Christine McConaha"), Plaintiff below in that certain civil action instituted in the Circuit Court of Kanawha County, West Virginia, styled *Christine McConaha, Individually And In Her Capacity as Administratrix of the Estates of James Vinton Slater and Mabel Florence Slater, Plaintiff, vs. Ethel Isabelle Rust, Janet Evene Burdette, Marvin Darrell Slater, Jessee Edward Slater, Jessee Edward Slater, Jr., Roberta I. Kintz, Samuel Webster Harrison, Jr. and George Harrison, Defendants,* Civil Action Number 99-C-2207, (herein sometimes "the partition action"). (Amended Complaint; Record 1.)

2. Appellees are Jessee Edward Slater, Defendant below, and Samuel Webster Harrison, Jr., Defendant below, (herein "appellee Samuel Webster Harrison, Jr."). Each will be filing a separate brief in support of their respective positions.

3. On November 16, 2004, the Circuit Court of Kanawha County, West Virginia, Judge James C. Stucky, presiding, entered its "Final Order".

4. On June 7, 2005, the Supreme Court of Appeals granted the petition for appeal of the appellant Christine McConaha, Defendant below.

Statement of the Facts

Appellee Samuel Webster Harrison, Jr., will supplement the Statement of Facts. The facts are found in the Final Order of the Circuit Court entered November 16, 2004, as follows:

1. This matter was instituted by Christine McConaha, individually, and in her capacity as Administratrix of the Estates of James Vinton Slater, Deceased, and Mabel Florence Slater, Deceased, each of whom died intestate. (Complaint; Record 1.)

2. James Vinton Slater died owning three parcels of real estate located on Sigmon Fork of Tuppers Creek, Poca District, Kanawha County, West Virginia. Those parcels of real estate are more particularly described as: (1) one acre surface, more or less, and ½ interest in minerals; (2) 17.18 acres surface, more or less, and ½ interest in minerals; and (3) 37 acres surface, more or less, and ½ interest in minerals (all of which is herein referred to as the "real estate described above"). This is the real estate in question in this partition action.

3. James Vinton Slater, Deceased, left seven children as his heirs at law, those being the Plaintiff Christine McConaha, and Defendants Ethel Isabelle Rust, Janet Evene Burdette, Marvin Darrell Slater, Jesse Edward Slater, Roberta I. Kintz, and Elvin D. Slater, Deceased. Defendant Samuel Webster Harrison, Jr. is the sole heir at law to of Elvin D. Slater, as his adopted son.

4. Defendant Janet Evene Burdette filed a letter stating that she did not agree to the Complaint which letter was not served on the other parties, and she did not otherwise defend the action; she did testify as a witness. (Rec. p. 13). Defendants Ethel Isabelle Rust and Marvin Darrell Slater did not appear in the civil action other than as witnesses, and did not plead or defend. Roberta I. Kintz, did not appear, plead, or defend, nor did she appear as a witness.

5. The Court appointed John Charnock, Esq. as Special Commissioner, to determine the state of the legal interests in the real estate described above. Special Commissioner held proceedings and issued his report. The Report of John Charnock, Special Commissioner,

dated February 13, 2004, was received by the Court as an Exhibit. Various objections were made to the Report, for which the Circuit Court convened the hearings held below.

6. The following persons testified at the hearings: Defendants Ethel Isabelle Rust, Janet Evene Burdette, Marvin Darrell Slater, Jesse Edward Slater, and Samuel Webster Harrison, Jr. testified on May 12, 2004 (Record p. 54, Transcript). Plaintiff Christine McConaha testified. (Record p. 55, Transcript pp. 49-120).

7. The Court received and admitted to the record numerous exhibits, which are listed on the Exhibit List, and in the Order of 2004.

8. The Court made its findings of fact from the Court's interpretation of the testimony and evidence, including the personal observation of the witnesses and the Court's judgment as to the veracity, demeanor and candor of the witnesses, including the testimony received by the Court and by the Special Commissioner John Charnock, from his Report.

9. The Circuit Court found that Plaintiff Christine McConaha inherited and owns a one/seventh (1/7) undivided interest in and to the real estate described above, as an heir at law of James Vinton Slater, Deceased.

10. The Circuit Court found that Defendant Roberta I. Kintz inherited and owns a one/seventh (1/7) undivided interest in and to the real estate described above, as an heir at law of James Vinton Slater, Deceased.

11. The Circuit Court found that Defendant Ethel Isabelle Rust inherited a 1/7 interest in the real estate described above, as an heir at law of James Vinton Slater, Deceased, but conveyed that interest by instrument which was entitled "Bill of Sale", but which had all the attributes of a deed, to Elvin D. Slater. The Circuit Court found that this instrument was not recorded as a deed, but could have been so recorded, and conveyed the real property interest described

therein. The Court found that Defendant Ethel Isabelle Rust has no further interest in the real estate described above. Defendant Ethel Isabelle Rust did not appeal any rulings adverse to her interest.

12. The Circuit Court found that Defendant Marvin Darrel Slater inherited a 1/7 interest in the real estate described above, as an heir at law of James Vinton Slater, Deceased, but conveyed that interest by instrument which was entitled "Bill of Sale", but which had all the attributes of a deed, to Elvin D. Slater. This instrument was not recorded as a deed, but could have been so recorded, and conveyed the real property interest, described therein. The Circuit Court found that Defendant Marvin Darrel Slater has no further interest in the real estate described above. Defendant Marvin Darrel Slater did not appeal any rulings adverse to his interest.

13. The Circuit Court found that Defendant Janet Evene Slater Burdette inherited a 1/7 interest in the real estate described above, as an heir at law of James Vinton Slater, Deceased, but conveyed that interest by instrument which was entitled "Bill of Sale", but which had all the attributes of a deed, to Elvin D. Slater. The Court noted that this instrument is not an acknowledged instrument, and while it is not a recordable instrument, it has the attributes of a deed, and conveyed the real property interest, described therein. The Circuit Court found that Defendant Janet Evene Slater Burdette has no further interest in the real estate described above. Defendant Janet Evene Slater Burdette did not appeal any ruling adverse to her interest.

14. The Circuit Court found that the deed from Defendant Janet Evene Burdette purporting to convey an undivided 1/7 interest in the real estate described above to Roberta I. Kintz, was void and of no effect, as Defendant Janet Evene Burdette Burdette had already conveyed her

interest to Elvin D. Slater, by the Bill of Sale, and that therefore there was nothing left to convey by deed.

15. The Circuit Court further found that the three instruments entitled "Bills of Sale" described above conveyed the equitable interests of those three owners in and to the real estate described therein, to Elvin D. Slater, who took those 3/7 equitable and legal interests.

16. The Circuit Court found that Elvin D. Slater had already inherited a 1/7 interest in and to the real estate described above. Thus, Elvin D. Slater owned a 4/7 interest in and to the real estate described above during his lifetime.

17. The Circuit Court found that Appellee/Defendant below Jesse Edward Slater inherited and owns a one/seventh (1/7) undivided interest in and to the real estate described above, as an heir at law of James Vinton Slater, Deceased. Appellee Jesse Edward Slater and his family built a house, have lived, resided and farmed the land for many years, and live on it to this day.

18. During his lifetime Elvin D. Slater entered into an agreement with Jesse Edward Slater, whereby Jesse Edward Slater would construct a certain house and certain outbuildings on a portion of the real estate described above in exchange for the 4/7 interest in the real estate described above owned by Elvin D. Slater, except for the 4/7 interest of Elvin D. Slater and 1/7 interest of Appellee Jesse Edward Slater in that certain house (including outbuildings consisting of garage, shop building, and red barn) and the two (2) surrounding acres. That contract was acknowledged by Appellee/Defendant below Samuel Webster Harrison, Jr. Thus, The Circuit Court found that Appellee Jesse Edward Slater acquired and owns (in addition to the 1/7 acquired as set out above) the 4/7 interest of Elvin D. Slater in the real estate described above, except for the 4/7 interest of Elvin D. Slater and 1/7 interest of Jesse

Edward Slater in that certain house (including outbuildings consisting of garage, shop building, and red barn) and the two (2) surrounding acres. Elvin D. Slater lived and resided on the property for much of his life, along with his adopted son Appellee Samuel Webster Harrison, Jr., who resided on the property on and off after his death.

19. Appellee/Defendant below Samuel Webster Harrison, Jr., as the sole heir at law of Elvin D. Slater claimed an undivided interest in the real estate described above, but claims that the undivided interest had been reduced effectively by the agreement stated above to the 4/7 interest of Elvin D. Slater and 1/7 interest of Appellee Jesse Edward Slater in that certain house (including outbuildings consisting of garage, shop building, and red barn) and the two (2) surrounding acres. The Circuit Court found that Appellee Samuel Webster Harrison, Jr. owns the 4/7 interest of Elvin D. Slater and 1/7 interest of Jesse Edward Slater in that certain house (including outbuildings consisting of garage, shop building, and red barn) and the two (2) surrounding acres.

20. The Circuit Court found that the real estate described above consists of approximately 55.18 acres, more or less. The Circuit Court found that the real estate described above may be partitioned and divided in kind by acreage by survey by metes and bounds and need not be sold and the proceeds divided. The Circuit Court found that the real estate described above can be partitioned and divided in kind into parcels which are of equal value, regardless of their size or acreage, so that the owners of each interest will receive equal value from the partition and division in kind. The Circuit Court found that the real estate described above should be partitioned and divided in kind into the following parcels:

    (1) One parcel of approximately 10 acres, more or less, which is generally located across the road dividing the tract of real estate described above, shall be conveyed to

Appellant/Plaintiff below Christine McConaha, as her interest in the real estate described above;

(2) One parcel of approximately 2 acres, more or less, which is generally described as the two acres surrounding that certain house (including outbuildings consisting of garage, shop building, and red barn), shall be conveyed to Appellee/Defendant below Samuel Webster Harrison, Jr., as his interest in the real estate described above;

(3) One parcel, which is generally located as the flat field behind the parcel to be conveyed to Appellee Samuel Webster Harrison, Jr., shall be conveyed to Defendant Roberta I. Kintz, as her interest in the real estate described above; and

(4) One parcel, being the remainder of the real estate described above, regardless of size, shall be conveyed to Defendant Jesse Edward Slater, as his interest in the real estate described above.

21. The parties testified that they understood the general boundaries of the various parcels. (Record p. 55, Transcript p. 10, 16-20).

22. The Circuit Court found that this partition and division of the real estate described above will result in an equal division of the real estate between and among the owners of the various undivided interests in and to the real estate and that this partition and division and the various parcels themselves are equal in value, regardless of whether the various parcels are equal in size.

23. **The Circuit Court found that the Appellee/Plaintiff below Christine McConaha,** Appellee/Defendant below Jesse Edward Slater and Appellee/Defendant below Samuel Webster Harrison, Jr., **accepted this partition and division in kind as fair and equal on the record at the hearing held before the Court.** (Emphasis supplied).

24. Plaintiff Christine McConaha testified at the hearing held in this matter. (Record p. 55, Transcript pp. 49-120).

She acknowledged the general area of the ten acres assigned to her and that it had been previously surveyed to contain ten plus acres. (Record p. 55, Transcript p. 56). The surveyor was Keith Smith. (Record p. 55, Transcript p. 65-66).

When asked on cross-examination by Appellee Samuel Webster Harrison Jr.,'s counsel, if selling the property would disrupt family relations, she stated: "I don't know whether it would or not." (Record p. 55, Transcript p. 82).

Plaintiff Christine McConaha was questioned extensively by Judge Stucky about whether she would accept the ten acre parcel as her share of the entire property. (Record p. 55, Transcript p. 103-120). When asked, "Do you consider that the ten acre property ... piece of property that you negotiated with previously as being a fair one-seventh of the total property, she replied: ""I wouldn't argue over it, no." (Record p. 55, Transcript p. 103-106). Judge Stucky continued with this line of questioning about whether the ten acres would be fair, and again she answered: "Yes, it seems so." (Record p. 55, Transcript p. 107). And, "That acreage would be fine with me." The Court summarized, speaking of Christine McConaha's intended share: "She said that she would be happy with it, she'd be satisfied with that ten acres for her share." (Record p. 55, Transcript p. 110). Then again, Plaintiff stated: "I'll take the ten acres." (Record p. 55, Transcript p. 12e). The other parties were asked whether they agreed to Plaintiff's share and all agreed. Finally, the Court asked Plaintiff's counsel about the proposal, "Are we agreed". The reply: "Mr. Andrews. "I assume that we are. That's fair. I mean, as long as you're happy with that (looking at his client)." (Record p. 55, Transcript p. 125).

Plaintiff Christine McConaha did not testify or offer any evidence, document, or other witness at all about the alleged rents claimed to be owed to co-tenants by other co-tenants who were allegedly using the whole, or more than their fair share, of the common property. (Record p. 55, Transcript p. 49-120). The entire record is devoid of any evidence or testimony about this issue.

Plaintiff Christine McConaha did not testify or offer any evidence, document, or other witness at all about the issue of partition in kind versus partition by sale. (Record p. 55, Transcript p. 49-120). The entire record is devoid of any evidence or testimony about this issue.

25. The Circuit Court found that Defendant Roberta I. Kintz failed to appear, defend, or otherwise respond to the Complaint and Counter-claim filed therein; that having failed to appear and failed to answer, and having made no defense, Defendant Kintz cannot now object to this partition and division in kind of the real estate described above and that this partition and division in kind is fair and results in an equal share to her for her undivided interest in the real estate described above. Roberta I. Kintz did not appeal any ruling adverse to her interest.

26. The Circuit Court found that the parties shall contract with a surveyor (with the surveyor who performed the boundary survey if that surveyor agrees) to plat the metes and bounds of the four parcels. The Court ordered each party to bear a proportionate share of the cost of the division survey, 1/7 by Plaintiff Christine McConaha, 1/7 by Defendant Roberta I. Kintz, 1/7 by Defendant Samuel Webster Harrison, Jr., and 4/7 by Defendant Jesse Edward Slater.

27. The Circuit Court further found that however, certain parties made claims for shares upon which those parties did not ultimately prevail and those parties which made claims which are

not upheld in the Order shall bear their proportionate cost of the original boundary survey. The shares of expenses for payment or reimbursement for the cost of the original boundary survey shall be as follows: 1/7 by Plaintiff Christine McConaha, 1/7 by Defendant Roberta I. Kintz, 1/7 by Defendant Samuel Webster Harrison, Jr., 1/7 by Defendant Jesse Edward Slater, 1/7 by Defendant Janet Evene Slater Burdette, 1/7 by Defendant Marvin Darrel Slater, and 1/7 by Defendant Ethel Isabelle Rust. This finding was not appealed.

26. The Circuit Court ruled that after the four parcels are platted, Counsel for each party shall prepare an appropriate deed for their party.

Points and Authorities

I. APPELLANT CHRISTINE McCONAHA HAS NO STANDING TO OBJECT TO THE CIRCUIT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE EFFECT OF THE BILLS OF SALE, AS THOSE FINDINGS AND CONCLUSIONS WERE NOT ADVERSE TO HER INTEREST. 12

O'Neal v. Stimson, 70 W.Va. 452, 74 S.E. 413 (1912).. 14

II. APPELLANT CHRISTINE McCONAHA OFFERED NO EVIDENCE WHATSOEVER ON THE ISSUE ON THE ISSUE OF RENTS OWED TO CO-TENANTS AND FAILED TO CARRY HER BURDEN OF PROOF 14

Loudin v. Cunningham, 82 W. Va. 453, 96 S. E. 59 (1918). 16

III. THE CIRCUIT COURT PROPERLY FOUND AND DETERMINED THAT THE REAL ESTATE COULD BE PARTITIONED IN KIND AND SHOULD NOT BE SOLD; AND
(1) THOSE FINDINGS AND CONCLUSIONS WERE ACCEPTED BY APPELLANT AT THE HEARING IN OPEN COURT ON THE RECORD BELOW; AND
(2) APPELLANT OFFERED NO EVIDENCE WHATSOEVER ON THE ISSUE AND FAILED TO CARRY HER BURDEN OF PROOF 16

Cases

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McDonald v. Bennett, 108 W. Va. 665, 152 S . E. 533 (1930). 20
McKnown v. McKnown, 93 W. Va. 689, 117 S. E. 557, 46 A . L. R. 352n (1923). 20
Murredu v. Murredu, 160 W. Va. 610, 236 S.E. 2d 452 (1977), overruled on other grounds, *Patterson v. Patterson*, 167 W. Va. 1, 277 S.E.2d 709 (1981). 18
Morley v. Smith, 93 W. Va. 682, 118 S.E. 135 (1923). 18, 19
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Stalnaker v. Stalnaker, 139 W. Va. 658, 80 S. E. 2d 878 (1954). 19
Starcher v. United Fuel Gas Co., 113 W. Va. 397, 168 S. E. 383 (1933) 20
Stillings v. Stillings, 167 W. Va. 796, 280 S. E. 2d 689 (1981). 19
Wilkins v. Wilkins, 175 W. Va. 787, 338 S. E. 2d 388 (1985). 20

Statutes and Other Authorities

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West Virginia Code § 37-4-3 18

Discussion of Law

Standard of Review

When a case is tried by a court in lieu of a jury, its findings will not be disturbed by the appellate court unless it is against the plain and decided preponderance of the evidence, or wholly without evidence to support it. See 1B Michies Jurisprudence, "Appeal and Error", § 276, "Findings of Court", and the hundreds of cases cited there.

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Rule 52(a), West Virginia Rules of Civil Procedure.

The Supreme Court of Appeals cannot disturb a finding of fact made by a trial court unless it is clearly wrong. *Lewis v. Dils Motor Co.*, 148 W.Va. 515, 135 S.E.2d 597 (1964); *Maxey v. Maxey*, 195 W.Va. 158, 464 S.E.2d 800 (1995).

Issue 1, "Bills of Sale" Issue

I. APPELLANT CHRISTINE McCONAHA HAS NO STANDING TO OBJECT TO THE CIRCUIT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE EFFECT OF THE BILLS OF SALE, AS THOSE FINDINGS AND CONCLUSIONS WERE NOT ADVERSE TO HER INTEREST

The first issue for discussion is whether the Circuit Court erred in determining that the several bills of sale conveyed the interest of the transferors to the transferees. While this issue is certainly interesting, the findings of fact and conclusions of law of the Circuit Court are not adverse to the Appellant/Plaintiff Below Christine McConaha.

As background information, James Vinton Slater, Deceased, left seven children as his heirs at law, those being the Plaintiff Christine McConaha, and Defendants Ethel Isabelle Rust, Janet Evene Burdette, Marvin Darrell Slater, Jesse Edward Slater, Roberta I. Kintz, and Elvin D. Slater, Deceased. Defendant Samuel Webster Harrison, Jr. is the sole heir at law to of Elvin D. Slater, as his adopted son. The Circuit Court found that Plaintiff Christine McConaha inherited and owns a one/seventh (1/7) undivided interest in and to the real estate described above, as an heir at law of James Vinton Slater, Deceased. This is a finding which Appellant did not and could not contest. She was one of seven children, therefore, she inherited a 1/7 interest. She inherited NONE of the other 6/7. It is completely and totally irrelevant to her interest who owns the other 6/7 interest, whether one or seven. Likewise, she cannot complain that Jesse Edward Slater owns at least 1/7, as he, likewise, was one of the seven children. The Circuit Court found that Defendant Jesse Edward Slater inherited and owns a one/seventh (1/7) undivided interest in and to the real estate described above, as an heir at law of James Vinton Slater, Deceased. That much is clear and uncontestable.

Appellant is complaining that Jesse Edward Slater obtained three other 1/7ths (less the house property owned by Appellee Samuel Webster Harrison, Jr.,) by conveyances from three other heirs which she claims did not rise to the level of deeds. As to Appellant herself, one can only ask, SO

WHAT? She cannot complain how Jesse Edward Slater obtained the other interests from three other heirs, since those other three interests are not going to be hers in any event. The only persons who could have validly complained about those other interests are the persons who lost those interests.

The Circuit Court found that Defendant Ethel Isabelle Rust, Defendant Marvin Darrel Slater, and Defendant Janet Evene Slater Burdette each inherited a 1/7 interest in the real estate, as heirs at law of James Vinton Slater, Deceased, but conveyed those interests to Elvin D. Slater. Defendants Ethel Isabelle Rust, Janet Evene Burdette, and Marvin Darrell Slater did not appear in the civil action other than as witnesses, and did not plead or defend. None of those three defendants appealed any rulings adverse to their respective interests. Those are the persons who "lost" their 1/7 interest to Elvin D. Slater, and ultimately to Appellee Jesse Edward Slater, and Appellee Samuel Webster Harrison, Jr. Appellant has no interest in their 1/7ths, has no rights to their interests, and cannot complain if those three persons won or lost those interests. It does not affect the Appellant at all.

It is noted that Elvin D. Slater conveyed his interest to Appellee Jesse Edward Slater, except for a house which he built and devised to his adopted son, the Appellee Samuel Webster Harrison, Jr.

Those three individuals, the Defendants Ethel Isabelle Rust, Marvin Darrel Slater, and Janet Evene Slater Burdette, are the ONLY persons who had a valid interest in the issue involving the bills of sale, and who could complain and appeal the findings of the court below that their bills of sale, which each admitted signing and delivering for consideration, constituted deeds. All three of them recognized their prior act (and deed) of selling their interest and accepted the inevitable conclusion: they sold their interests many years ago and cannot now complain. None of those three persons appeared and defended the partition action. Not one of them filed any pleadings whatsoever (one sent an unserved letter), made any motions, or filed any objections: nothing, de nada, zero! None of those

three persons objected at the hearing, and none appealed the Final Order of the Circuit Court to the Supreme Court of Appeals. As to their 3/7 interests, the Final Order of the Circuit Court is final and binding in all respects. Appellant Christine McConaha does not represent any of those individuals, she makes no claim to their interests, she has no interest in their interests, and consequently, she has no right, title, interest, or standing to complain about what happened to their interests. She has only her 1/7 interest regardless of who owns those 3/7 interests, whether it is those three individuals or the Appellees Jesse Edward Slater and Samuel Webster Harrison, Jr.

In partition, if no injustice is done to other cotenants, an allotment may be made so as to render effective a conveyance by a cotenant purporting to be in severalty though operating when made to convey only his undivided interest. *O'Neal v. Stimson*, 70 W.Va. 452, 74 S.E. 413 (1912).

This issue must be simply be dismissed as moot. It was not appealed by those in interest, and Appellant Christine McConaha had no interest to appeal.

Issue II, The Issue of Rents Owed to Co-Tenants

II. APPELLANT CHRISTINE McCONAHA HAS NO STANDING TO OBJECT TO THE CIRCUIT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE ISSUE OF RENTS OWED TO CO-TENANTS, AS APPELLANT OFFERED NO EVIDENCE WHATSOEVER ON THE ISSUE AND FAILED TO CARRY HER BURDEN OF PROOF.

The next issue for discussion is whether the Circuit Court erred in determining that there were no rents owed to co-tenants by their relatives, or by co-tenants to other co-tenants for their co-tenants use of the property.

In addition to her other claims regarding the division of the real estate, Appellant Christine McConaha also sued Jesse Edward Slater, Jr. and George Harrison, for rents alleged owed to her and others for living in their parent's and brother's homes. Jessee Edward Slater, Jr., is the son of Appellee/Defendant below Jesse Edward Slater, and at some times resided with his family on the real estate. George Harrison is the brother of Appellee/Defendant below Samuel Webster Harrison,

Jr., and sometimes they resided together on the property in the house which undisputedly belongs to Appellee Samuel Webster Harrison, Jr.

Plaintiff Christine McConaha did not testify or offer any evidence, document, or other witness at all about the alleged rents claimed to be owed to co-tenants by other co-tenants who were allegedly using the whole, or more than their fair share, of the common property. (Record p. 55, Transcript p. 49-120). The entire record is devoid of any evidence or testimony about this issue.

During the several hearings held on the various issues, Appellant Christine McConaha offered testimony and evidence, however, she offered NO testimony or evidence whatsoever on this issue. She offered no evidence or testimony on the value of any rents owed by these relatives of the "co-tenants", none on the value of any improvements made or used, nor what would be owed to her or to any other defendants, nor what would be owed by the defendants below who allowed these family members to reside with them to other co-tenants. She offered NO evidence whatsoever on the issue. She never even brought it up at any hearing. Now she is appealing the issue?

The Circuit Court found that "Jesse Edward Slater, Jr. and George Harrison were made defendants as tenants by sufferance on the real estate described above, and as such had no ownership interest in the real estate described above." Based on this, the Circuit Court ruled in the final Order that: "With regard to defendant George Harrison and defendant Jesse Edward Slater, Jr., any claims against or by these two parties are dismissed for lack of evidence."

Now, Appellant Christine McConaha is apparently attempting to bolster her rather weak appeal by throwing in this issue. Clearly, she has no standing to appeal. She offered no evidence; she filed no objections to the final Order of the Circuit Court, she made no effort whatsoever to even bring this issue up, other than to make the claim in her original complaint. She failed to carry her

burden of proof on this issue. Clearly, there is no valid objection, and the Circuit Court found that there was in fact a complete "lack of evidence" on this issue.

The burden is upon plaintiff to prove the matters alleged in a partition action. *Loudin v. Cunningham,* 82 W. Va. 453, 96 S. E. 59 (1918).

This issue is adverse to the Appellant and must be affirmed as the Circuit Court was correct, no evidence was offered, and Appellant failed to carry her burden of proof.

Issue III, Partition in Kind or Sale of the Real Estate

III. THE CIRCUIT COURT PROPERLY FOUND AND DETERMINED THAT THE REAL ESTATE COULD BE PARTITIONED IN KIND AND SHOULD NOT BE SOLD; AND
(1) THOSE FINDINGS AND CONCLUSIONS WERE ACCEPTED BY APPELLANT AT THE HEARING IN OPEN COURT ON THE RECORD BELOW; AND
(2) APPELLANT OFFERED NO EVIDENCE WHATSOEVER ON THE ISSUE AND FAILED TO CARRY HER BURDEN OF PROOF

Plaintiff Christine McConaha did not testify or offer any evidence, document, or other witness at all about the issue of partition in kind versus partition by sale. (Record p. 55, Transcript p. 49-120). The entire record is devoid of any evidence or testimony about this issue.

In its final Order, the Circuit Court found that the "Appellee/Plaintiff below Christine McConaha, Appellee/Defendant below Jesse Edward Slater and Appellee/Defendant below Samuel Webster Harrison, Jr., **accepted the partition and division in kind as fair and equal on the record at the hearing held before the Court"**. (Emphasis supplied).

Plaintiff Christine McConaha was questioned extensively by Judge Stucky about whether she would accept the ten acre parcel as her share of the entire property. (Record p. 55, Transcript p. 103-120). When asked, "Do you consider that the ten acre property ... piece of property that you negotiated with previously as being a fair one-seventh of the total property, she replied: ""I wouldn't argue over it, no." (Record p. 55, Transcript p. 103-106). Judge Stucky continued with this line of

questioning about whether the ten acres would be fair, and again she answered: "Yes, it seems so." (Record p. 55, Transcript p. 107). And, "That acreage would be fine with me." The Court summarized, speaking of Christine McConaha's intended share: "She said that she would be happy with it, she'd be satisfied with that ten acres for her share." (Record p. 55, Transcript p. 110). Then again, Plaintiff stated: "I'll take the ten acres." (Record p. 55, Transcript p. 12e). The other parties were asked whether they agreed to Plaintiff's share and all agreed. Finally, the Court asked Plaintiff's counsel about the proposal, "Are we agreed". The reply: "Mr. Andrews. "I assume that we are. That's fair. I mean, as long as you're happy with that (looking at his client)." (Record p. 55, Transcript p. 125).

Note that West Virginia Code § 37 - 4 -2, "Allotting shares together", provides: "Any two or more of the parties, if they so elect, may have their shares laid off together, when partition can be conveniently made in that way." Appellee Samuel Webster Harrison, Jr. and Appellee Jesse Edward Slater have agreed to a division of their properties and have no disagreement among themselves as to the division, the location, the values, nor any other respect to the land and its partition in kind.

After making his rulings, Judge Stucky asked each party if he or she had any objections. Appellant Christine McConaha spoke up at the final hearing and accepted the findings of the Circuit Court. Christine McConaha did not object to the findings of the Circuit Court in this regard, and even accepted them. Clearly, for this reason alone, she has no appeal on this issue.

However, there is another, even more fundamental reason why her appeal on this issue cannot stand: she offered NO evidence whatsoever that the property could not be divided in kind, and she offered no evidence whatsoever of the value of the property, or that sale of the property and division of the money would be a better solution than dividing the property up among the heirs in kind. The record is even devoid of her evidence, testimony and/or objections to this issue.

The burden of proof on the issue partition in kind or sale of realty in a partition suit is on the party proposing a sale rather than partition in kind.

A partition suit under West Virginia Code Section 37-4-1, is equitable in nature and it must be shown that the interest of the persons owning the land would be promoted by the sale. *Murredu v. Murredu*, 160 W. Va. 610, 236 S.E. 2d 452 (1977), overruled on other grounds, *Patterson v. Patterson*, 167 W. Va. 1, 277 S.E.2d 709 (1981).

The right to partition of real estate in kind, as required by West Virginia Code Section 37-4-1, cannot be denied where demanded, unless it affirmatively appears upon the record that such partition cannot be conveniently made and that the interests of the co-owners will be promoted by a sale of the property. *Morley v. Smith,* 93 W. Va. 682, 118 S.E. 135 (1923); *Bracken v. Everett,* 95 W. Va. 550, 121 S.E. 713 (1924).

The court may decree a division in kind, although there is no specific prayer for it in the bill. *Croston v. Male*, 56 W. Va. 205, 49 S. E. 136, 107 Am. St. R. 918, 1918D L.R.A. 460n (1904).

West Virginia Code § 37-4-3, "Allotment or sale; procedure for allotment", provides in pertinent part:

> "When partition cannot be conveniently made or **in 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." (Emphasis supplied).

The word "conveniently" as used in West Virginia Code Section 37-4-3, does not have its usual significance, but means rather practicably and justly. *Garlow v. Murphy,* 111 W. Va. 611, 163 S.E. 436 (1932). In order to warrant a judicial sale of land held in cotenancy, it must affirmatively appear that (1) partition "cannot be conveniently made" and (2) the interests of all the cotenants "will

be promoted by sale of the entire subject". An ordinary test of convenience in partition, under this section, is, will any interest assigned be materially less in value than the interest undivided? If so, the tract should be sold; if not, it should be partitioned.

While West Virginia Code Section 37-4-3, provides for an allotment in kind where partition cannot be conveniently made, the right of any owner to have such an allotment is by the statute made to depend on a number of contingencies, none of which was made to appear in the instant case. *Maxwell v. Stalnaker*, 142 W. Va. 555, 96 S.E. 2d 907 (1957).

Under West Virginia Code Section 37-4-3, **it must be demonstrated that the interests of one or more of the parties will be promoted by the sale and that the interest of the other parties will not be prejudiced.** *Stillings v. Stillings*, 167 W. Va. 796, 280 S. E. 2d 689 (1981).

To justify a sale it must be shown that land is not susceptible of equitable partition. *Croston v. Male,* 56 W. Va. 205, 49 S. E. 136, 107 Am. St. R. 918, 1918D L. R. A. 460n (1904); *Herold v. Craig,* 59 W. Va. 353, 53 S. E. 466 (1906); *Smith v. Greene,* 76 W. Va. 276, 85 S. E. 537 (1915); *Loudin v. Cunningham*, 82 W. Va. 453, 96 S. E. 59 (1918); *Morley v. Smith*, 93 W. Va. 682, 118 S. E. 135 (1923); *Bracken v. Everett*, 95 W. Va. 550, 121 S. E. 713 (1924); *Brockman v. Hargrove,* 103 W. Va. 254, 137 S. E. 11 (1927); *Hale v. Thacker*, 122 W. Va. 648, 12 S. E. 2d 524 (1940); *Stalnaker v. Stalnaker*, 139 W. Va. 658, 80 S. E. 2d 878 (1954).

Inconvenience of partition as one of the circumstances authorizing a sale, does not contemplate physical impossibility of division, but the requirement is not satisfied by anything short of a real and substantial obstacle of some kind to division in kind, such as would make it injurious to the owners. Meagerness of area in some or all of the shares, due to the necessity of dividing a small tract of land among a number of people and the existence of dower and courtesy estates in the land, do not per se make partition inconvenient within the meaning of the statute. *Croston v. Male*,

56 W. Va. 205, 49 S. E. 136, 107 Am. St. R. 918, 1918D L. R. A. 460n (1904); *Wilkins v. Wilkins*, 175 W. Va. 787, 338 S. E. 2d 388 (1985).

Under West Virginia Code Section 37-4-3, in order to warrant a judicial sale of land in lieu of partition in kind, the **plaintiff must establish that his interests will be promoted and that the interests of other cotenants will not be prejudiced.** *Starcher v. United Fuel Gas Co.*, 113 W. Va. 397, 168 S. E. 383 (1933).

A report of commissioners in a partition suit will not be set aside on the ground that the commissioners erred in making their allotments, whereby an unequal partition has been made, except in extreme cases – cases in which the partition is based on wrong principles, or **it is shown by a very clear and decided preponderance of the evidence, that the commissioners have made a grossly unequal allotment**; and an exception to the report of the commissioners in such suit to the effect that the allotment is unfair, unsupported by any proof, is properly overruled. *McKnown v. McKnown*, 93 W. Va. 689, 117 S. E. 557, 46 A . L. R. 352n (1923).

To justify setting aside an allotment made in a partition suit by commissioners and confirmed by the trial court, it must be shown that the allotment has been made on wrong principles, or by a clear and decided preponderance of the evidence that a grossly unequal allotment has been made. *Bland v. Bland,* 182 W. Va. 686, 391 S. E. 2d 376 (1990).

The burden is upon plaintiff to prove the existence of such facts and conditions as render a sale necessary. *Loudin v. Cunningham,* 82 W. Va. 453, 96 S. E. 59 (1918).

It is reversible error, in a partition suit, to decree a sale of the subject matter of the partition without an affirmative showing on the record that the interests of those who are entitled to the subject matter, or its proceeds, will be promoted by a sale. *McDonald v. Bennett*, 108 W. Va. 665, 152 S . E. 533 (1930).

There is another reason that Appellant's position on this issue is patently wrong, and that is the concept that a sale in partition may not be ordered if the sale would cause a disruption of long-standing family relations and use of the land. For example see: *Ark Land Co. v. Harper,* 215 W. Va. 331, 599 S .E. 2d 754, 2004 W. Va. LEXIS 24 (2004), where it was held that the emotional interests of certain heirs in maintaining the family homestead also had to be considered, and where the heirs showed that a partition in kind was feasible, their interests controlled, despite the economic inconvenience a partition in kind would impose on the corporation. The court also held that economic value of property is not the exclusive test for deciding whether to partition in kind or by sale. **Evidence of long - standing ownership, coupled with sentimental or emotional interests in the property, 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.

When asked on cross-examination by Appellee Samuel Webster Harrison Jr.,'s counsel, if selling the property would disrupt family relations, Appellant/Plaintiff Below Christine McConaha stated: "I don't know whether it would or not." (Record p. 55, Transcript p. 82). Therefore, even if there were not this long-standing ownership and use of the land by the Slater families, Appellant failed in her burden of proof, offering none.

Appellee Samuel Webster Harrison, Jr., asserts that the facts and law are clear on this issue. Judge Stucky did not err in his decision. The Circuit Court found that the real estate consists of approximately 55.18 acres, more or less, found that the real estate may be partitioned and divided in kind by acreage by survey by metes and bounds and need not be sold and the proceeds divided, and found that the real estate can be partitioned and divided in kind into parcels which are of equal value, regardless of their size or acreage, so that the owners of each interest will receive equal value

from the partition and division in kind. The Circuit Court found that the real estate should be partitioned and divided in kind into four equally valued parcels (see Final Order).

What is remarkable is that these families, including Appellee Jesse Edward Slater, his family, including his son Defendant Jesse Edward Slater, Jr., the deceased Elvin D. Slater, and his adopted son, the Appellee Samuel Webster Harrison, Jr, and his brother Defendant George Harrison, have been living on the land for years, in fact the property has been continuously occupied and used as farm and residences since James Vinton Slater died in 1962, over 40 years ago. Now, Appellant Christine McConaha wants to disrupt these families, up root them, and sell off their land. Well, she can sell her ten acres if she pleases, but Appellees would like to keep their homes.

Summary

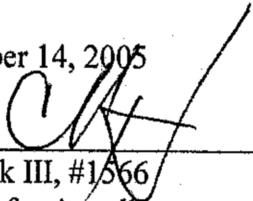
With regard to the issue of the transfers of the three 1/7 interests of three other heirs, Appellant Christine McConaha has no standing to contest the findings of the Circuit Court with regard to other litigants whose interests do not involve her interest and especially where the three actual transferors did not contest or appeal the rulings of the Circuit Court. Likewise, with regard to the co-tenant rents, she has no objection or appeal since she offered no evidence at the hearings below and failed to carry her burden of proof. With regard to the issue of sale or division in kind of the real estate, the 55.18 acres is clearly divisible in kind, as Judge Stucky found, each of the heirs has known for years where his or her parcel lies, the sale of the real estate would seriously disrupt the lives and homes of these individuals, and Appellant offered no evidence otherwise and failed to carry her burden of proof. For these reasons, the decisions of Judge Stucky should stand, the Appellant's Appeal should be denied and the decision below affirmed.

Relief Prayed For

WHEREFORE, Appellee Samuel Webster Harrison, Jr. requests that the Supreme Court of Appeals do affirm the decision of the Court below.

Respectfully submitted,
Appellee Samuel Webster Harrison, Jr.
By Counsel

Dated: November 14, 2005



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHRISTINE McCONAHA, Individually, et al **Appellant (Plaintiff below),**	
vs.	**) CASE NO. 32726** **) BRIEF OF THE APPELLEE** **) SAMUEL WEBSTER HARRISON, JR.**
ETHEL ISABELLE RUST, et al **Appellee (Defendant below)**	

CERTIFICATE OF SERVICE

I, C. Page Hamrick III, counsel for Appellee Samuel Webster Harrison, Jr. do hereby certify that I have served the required number of copies of the foregoing Brief of the Appellee Samuel Webster Harrison, Jr. on all parties concerned by mailing a true copy by First Class Mail, postage prepaid, to Appellant's counsel of record at the following addresses, and upon the persons named on the Certificate of Service Sheet attached hereto, this November 14, 2005:

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