

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

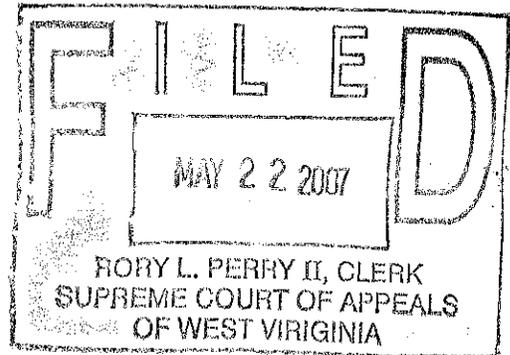
BILL E. MORTON and  
JESS R. MORTON,

Plaintiffs Below/Appellees,

vs.

Appeal No. 33341  
Circuit Court of Kanawha County, West Virginia  
Civil Action No. 05-C-2376  
Honorable Louis H. Bloom

UNKNOWN HEIRS OF ERNEST M. VAN CAMP;  
LINDA KESSLER ARCHER;  
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) DEITZ;  
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,

LINDA KESSLER ARCHER,

Appellant.

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**APPELLEES' MEMORANDUM OF LAW  
IN RESPONSE TO PETITION FOR APPEAL**

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Franklin L. Gritt, Jr. (W.Va. Bar #1494)  
Lisa M. Moye (W.Va. Bar #8582)  
Gritt Law Offices  
19 Valley St.  
Winfield, WV 25213  
(304) 586-3693  
*Counsel for Plaintiffs Below/Appellees*

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Comes now the Plaintiffs Below/Appellees, Bill E. Morton and Jess R. Morton, by counsel, Franklin L. Gritt, Jr. and Lisa M. Moye, and in response to the Petition for Appeal filed by the Appellant, Linda Kessler Archer, the Appellees submit the following:

## **I. NATURE OF PROCEEDING AND NATURE OF RULING OF THE CIRCUIT COURT**

This case involves a *Complaint* filed by the Plaintiffs Below/Appellees in an attempt to seek the sale of a tract of land consisting of 25.5 acres situate in Cross Lanes, Union District, Kanawha County, West Virginia. By an *Order* entered on the 18<sup>th</sup> day of September, 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 Appellant is the only party to the proceeding who objected to the sale. Accordingly, the Appellees file this Memorandum of Law in response to the Petition for Appeal filed by the Appellant on the 17<sup>th</sup> day of January, 2007.

## **II. STATEMENT OF FACTS**

On the 8<sup>th</sup> day of April, 1910, Squire Vancamp acquired the subject real estate. Mr. Vancamp died intestate on the 6<sup>th</sup> day of June, 1930 leaving six (6) children and four (4) grandchildren as his heirs-at-law. Accordingly, each of Mr. Vancamp's six (6) children owned a one-seventh (1/7) interest in the subject property and his four (4) grandchildren shared the remaining one-seventh (1/7) interest. The Appellee's father acquired some of these interests. However, in 1959, the Appellee's father conveyed an undivided one-seventh (1/7) interest in only the surface to the Appellant's parents, William T. Kessler and Eva Kessler. In 1964, William T. Kessler and Eva Kessler conveyed their one-seventh (1/7) interest in the subject real estate unto the Appellant and her sister, Lilly Tucker. During the course of this litigation, the Appellant's sister, Lilly Tucker, conveyed her interest unto the Appellant, giving the Appellant the entire one-seventh (1/7) interest.

In 1982, the Appellee's father conveyed his remaining interest, consisting of approximately thirty-five percent (35%) interest in the whole parcel, unto the Appellees. On the 20<sup>th</sup> day of October, 2005, the Appellees filed a *Complaint* in the Circuit Court of Kanawha County, West Virginia seeking a sale of the subject property.

### III. ALLEGED ASSIGNMENTS OF ERROR

The Appellant alleges that the Circuit Court erred in granting the moving parties' request for a sale of the subject property, contending that the sale of the property will cause irreparable harm to the Appellant and further contending that the moving parties will not be prejudiced by allotting a section of the property to the Appellant.

### IV. POINTS OF LAW & CITATIONS OF AUTHORITIES

- A. W.Va. Code § 37-4-3;
- B. *Consolidated Gas Supply Corp. v. Riley*, 161 W.Va. 782, 247 S.E.2d 712 (1978);
- C. *Croston v. Maile*, 56 W.Va. 205, 49 S.E. 136 (1904); and
- D. *Ark Land Company v. Harper*, 215 W.Va. 331, 599 S.E.2d 754 (2004).

### V. DISCUSSION OF LAW

In regard to the partition of real estate, W.Va. Code § 37-4-3 states in pertinent part as follows:

...[I]n any case in which partition cannot be conveniently made, if the interest 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 their interest of the other person or persons so entitled will not be prejudiced thereby, the court .... may order such sale, or such sale and allotment, and make distribution of the proceeds of sale...

In interpreting W.Va. Code § 37-4-3, the West Virginia Supreme Court of Appeals has held as follows:

[A] party desiring to compel partition through sale is required to demonstrate [(1)] that the property cannot be conveniently partitioned in kind, [(2)] that the interests of one or more of the parties will be promoted by the sale, and [(3)] 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 (W.Va. 1978).

In regard to the first criteria to compel partition through sale, the Circuit Court properly found the subject property could not be conveniently partitioned. When the Appellant initially made her proposal for the Court to grant her a section of the subject property, the Appellant submitted a survey of 3.64 acres where her mobile home is currently located and argued that her mobile home could not be moved to another location due to the age of the mobile home. This 3.64 acres consisted of not only the area of her mobile home, but also all of the flat land surrounding the mobile home.

When both the expert testimony and lay testimony in this matter revealed that the 3.64 acres was the most valuable acreage and the only acreage suitable for a homesite, it became apparent that the Circuit Court would probably not grant the Appellant's request. Accordingly, the Appellant then decided that her mobile home could be moved to another location on the subject property and thus requested any other section of the property upon which she could place her mobile home. The Appellant failed to produce a survey for this alternative section, contending that she did not have monetary funds to pay for a survey even though she had already obtained a survey for the aforesaid 3.64 acres. Without a survey of an alternative site for the Appellant's mobile home, the remaining parties and the Circuit Court were unable to evaluate the viability or value of an alternative site, especially since prior testimony suggested that the aforesaid 3.64 acres was the only land suitable for residential use.

In regard to the second criteria to compel partition through sale, the Circuit Court properly concluded that the interests of the majority of the parties would be promoted by a sale. The Court specifically found that carving out the 3.64 acres as initially proposed by the Appellant would substantially diminish the value of the residue and further noted that substantial expense would be incurred to make the residue suitable for residential purposes. While the diminished value to the residue and the substantial expense to make the residue

suitable may not be the exclusive test in determining if the interests of the parties will be promoted by the sale, it is a "fair test" for the Court to consider. Syl. Pt. 6, *Croston v. Maile*, 56 W.Va. 205, 49 S.E. 136 (1904).

As noted by the Circuit Court, the Appellant is currently the only individual deriving a benefit from the property because both she and her adult daughter, who does not have an ownership interest in the property, are residing on the real estate. The Appellant has also enjoyed the benefit of timbering the property without regard to the remaining owners. The Appellant admitted during her testimony that she timbered the real estate and did not share any of the proceeds with the remaining owners. Therefore, if the property is sold as ordered by the Circuit Court, the remaining owners will be derive a benefit from their ownership of the property.

In regard to the third criteria to compel partition by sale, the Circuit Court properly concluded that the Appellant would not be prejudiced by a sale of the subject real estate. If the real estate is sold, the Appellant will have an opportunity to move her mobile home to another location with the funds she would receive from the sale. The Appellant's desire to reside on the property can not adversely impact the legal rights of the remaining owners.

The Appellant primarily argues that she will be prejudiced by the sale of the subject property due to her sentimental or emotional interest in the property. In support of her Petition for Appeal, the Appellant states that there is long standing family ownership going back multiple generations and further states that her family resided on the property for generations. However, these statements are not supported by the record of this matter. As stated hereinbefore, it was the Appellee's father who conveyed an undivided one-seventh (1/7) interest in the subject property unto the Appellant's parents in 1959. In 1964, the Appellant's parents conveyed their interest in the property to the Appellant and her sister. Additionally, while the Appellant's Petition for Appeal contends that this is the Appellant's

only homeplace, the Appellant left the property and resided in Florida for several years. The Appellant only returned to reside on the subject property approximately seven (7) years ago. During the period of time in which the Appellant resided in Florida and for several years prior, the Appellees paid the taxes on the property, not the Appellant. If the Appellant had such a sentimental interest in the property, she would not have left to reside in Florida and would have paid the real estate taxes on a consistent basis.

In support of the Appellant's argument that this real estate should not be sold due to her sentimental attachment to the property, the Appellant alleges that this case is similar to the facts of *Ark Land Company v. Harper*, 215 W.Va. 331, 599 S.E.2d 754 (2004). However, while the Ark Land Company case holds that evidence of longstanding ownership, coupled with sentimental or emotional interests in property, should be considered in determining whether a party opposing a sale will be prejudiced by the sale, the facts of the instant case can be easily distinguished from the facts in the Ark Land Company case.

In the Ark Land Company case, the Appellants' family owned the property for nearly one hundred (100) years and the farmhouse located on the property was not a mobile home capable of being moved to another location. Furthermore, unlike Ark Land Company, the Appellees in this matter did not buy their interest in the property in hopes of financial gain. Instead, the Appellee acquired their interest from their father who had owned an interest in the property since 1955. Additionally, as noted earlier, it was the Appellee's father who conveyed the subject one-seventh interest to the Appellant's family. Therefore, the Appellee's family has owned this property for longer than the Appellant's family and the Appellant would not have any interest if the Appellee's father had not conveyed the subject one-seventh (1/7) interest to her parents.

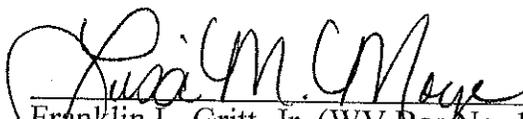
As stated by the West Virginia Supreme Court in the *Consolidated Gas Supply Corp. v. Riley*, 161 W.Va. 782,788, 247 S.E.2d 712, 715 (1978), "[t]he question of what promotes or prejudices a party's interest when a partition through sale is sought must necessarily turn

on the particular facts of each case.” The facts of this case are simply that the Appellant, who has sporadically resided on the property, without payment of any rent to the remaining owners, and sporadically paid the real estate taxes, now seeks to remain the property without regard for the remaining owners. The Appellant’s disregard for the remaining owners is evident by her survey of the aforesaid 3.64 acres requesting the most valuable portion of the property upon which to place her mobile home and by the Appellant’s timbering of the property without regard the interest of the remaining owners. Accordingly, based on the totality of the evidence in this matter, the Circuit Court properly concluded that the Appellant will not be prejudiced by a sale and thus a sale of the subject property is appropriate under the circumstances.

#### **VI. PRAYER**

For the reasons set forth herein, the Appellees pray Honorable Court will affirm the Circuit Court’s Order authorizing a sale of the subject property and grant the Appellees such other further and general relief as the Court deems appropriate.

BILL E. MORTON and  
JESS R. MORTON  
By Counsel

  
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Franklin L. Gritt, Jr. (WV Bar No. 1494)  
Lisa M. Moye (WV Bar No. 8582)  
Gritt Law Offices  
19 Valley Street  
Winfield, WV 25213  
(304) 586-3693  
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CERTIFICATE OF SERVICE

I, Lisa M. Moye, counsel for Appellees, Bill E. Morton and Jess R. Morton, hereby certify that service of the foregoing *Appellee's Memorandum of Law in Response to Petition for Appeal* was made upon the following counsel on the 21<sup>st</sup> day of May, 2007, by mailing a true and exact copy thereof, postage prepaid, to the following addresses:

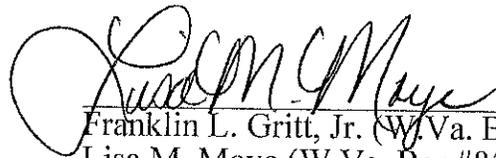
Larry G. Kopelman, Esq.  
9 Pennsylvania Ave.  
Charleston, WV 25302

Harvey D. Peyton, Esq.  
Peyton Law Firm  
P.O. Box 216  
Nitro, WV 25143

J. Mark Adkins, Esq.  
Bowles Rice McDavid Graff & Love LLP  
P.O. Box 1386  
Charleston, WV 25325

James E. Garvin, Esq.  
Turley Garvin & Turley  
3751 Teays Valley Road  
Hurricane, WV 25526

Anne E. Deitz, Esq.  
1424 Kanawha Blvd. E #11  
Charleston, WV 25301



Franklin L. Gritt, Jr. (W.Va. Bar #1494)  
Lisa M. Moye (W.Va. Bar #8582)  
Gritt Law Offices  
19 Valley St.  
Winfield, WV 25213  
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*Counsel for Plaintiffs Below/Appellees*