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Chop it Up or Sell It Off: An Examination of the Evolution of West Virginia's Partition Statute

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CHOP IT UP OR SELL IT OFF: AN EXAMINATION OF THE EVOLUTION OF WEST VIRGINIA'S PARTITION STATUTE

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I. INTRODUCTION

What happens when co-tenants cannot agree on how to use a parcel of land? Worse yet, what happens when one faction of co-tenants wants to sell the

property while the other faction wants the property partitioned in kind,¹ particularly in West Virginia? In early England, there was no statutory provision for an action to partition land; rather, it was an action created at common law,² but these common law provisions were later codified.³ Much like England, every state in the United States has a statute dealing with partitioning real property either in kind or by sale.⁴

As partition law in the United States developed, there grew a strong preference for partition in kind over partition by sale, and a sale will normally only be ordered if “a fair division is not possible and sale of the property and division of the proceeds is more equitable.”⁵ This is the same type of construction given to the real property partition statute found in both the old and new

¹ Partition is “[t]he act of dividing; esp., the division of real property held jointly or in common by two or more persons into individually owned interests. Also termed *partition in kind*.” BLACK’S LAW DICTIONARY 1151 (8th ed. 2004) (emphasis in original).

² See William H. Loyd, *Partition*, 67 U. PA. L. REV. 162 (1919); JOHN REEVES, HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY, VOL. I, 312 (Rothman Reprints 1969) (1787).

³ See generally Loyd, *supra* note 2; REEVES, *supra* note 2.

⁴ See ALA. CODE §§ 35-6-20 to 35-6-25, 35-6-40 to 35-6-66 (2007); ALASKA STAT. § 09.45.290 (2007); ARIZ. REV. STAT. ANN. § 12-1218 (2007); ARK. CODE ANN. § 18-60-420 (2007); CAL. CIV. PROC. CODE § 872.820 (West 2007); COLO. REV. STAT. ANN. § 38-28-107 (West 2007); CONN. GEN. STAT. ANN. § 52-500 (West 2007); DEL. CODE ANN. tit. 25, § 729 (2007); D.C. CODE § 16-2901 (2007); FLA. STAT. § 64.071 (2007); GA. CODE ANN. § 44-6-166.1 (2007); HAW. REV. STAT. § 668-7 (2007); IDAHO CODE ANN. § 6-512 (2007); 735 ILL. COMP. STAT. 5/17-101 (2007); IND. CODE § 32-17-4-12 (2007); IOWA CODE ANN. RULE 1.1201 (West 2007); KAN. STAT. ANN. § 60-1003 (2007); KY. REV. STAT. ANN. § 389A.030 (West 2007); LA. CIV. CODE ANN. art. § 1336 (2007); ME. REV. STAT. ANN. tit. 18-A, § 3-911 (2007); MD. CODE ANN., REAL PROP. § 14-107 (West 2007); MASS. GEN. LAWS ch. 241, § 31 (2007); MICH. COMP. LAWS § 600.3332 (2007); MINN. STAT. § 558.14 (2007); MISS. CODE ANN. § 11-21-27 (2007); MO. REV. STAT. § 528.340 (2007); MONT. CODE ANN. § 70-29-202 (2007); NEB. REV. STAT. § 25-2181 (2007); NEV. REV. STAT. § 39.120 (2007); N.H. REV. STAT. ANN. § 547-C:25 (2007); N.J. STAT. ANN § 2A:56-2 (West 2007); N.M. STAT. § 42-5-7 (2007); N.Y. REAL PROP. ACTS. LAW § 922 (McKinney 2007); N.C. GEN. STAT. § 46-22 (2007); N.D. CENT. CODE § 32-16-12 (2007); OHIO REV. CODE ANN. § 5307.09 (West 2007); OKLA. STAT. tit. 12, § 1509 (2007); OR. REV. STAT. § 105.245 (2007); 231 PA. CODE 1563 (2007); R.I. GEN. LAWS § 34-15-16 (2007); S.C. CODE ANN. § 15-61-50 (2007); S.D. CODIFIED LAWS § 21-45-28 (2007); TENN. CODE ANN. § 29-27-201 (2007); TEX. PROP. CODE ANN. § 23.001 (Vernon 2007); UTAH CODE ANN. § 78-39-12 (2007) (renumbered in 2008 to § 78B-6-1212); VT. STAT. ANN. tit. 12, § 5174 (2007); VA. CODE ANN. § 8.01-83 (2007); WASH. REV. CODE § 7.52.080 (2007); W. VA. CODE § 37-4-3 (2007); WIS. STAT. § 842.11 (2007); WYO. STAT. ANN. § 1-32-109 (2007).

⁵ 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 50.07(4)(a), (5) (2005). *Contra* Candace Reid, Note, *Partitions in Kind: A Preference Without Favor*, 7 CARDOZO L. REV. 855, 856 (1986) (arguing that although there is a statutory preference for partition in kind in most states, the courts exhibit a preference for partition by sale); JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 296–97 (6th ed. 2006) (stating that “the modern practice is to decree a sale in partition actions in a great majority of cases, either because the parties all wish it or because courts are convinced that sale is the fairest method of resolving the conflict”).

versions of the West Virginia Code.⁶ Although both the old and new partition statutes in the West Virginia Code appear to provide the same type of uniform test for the partition of real property, the West Virginia Supreme Court of Appeals does not seem to be following a uniform test when deciding whether or not to partition by sale or in kind.⁷ This is particularly evident in the last two opinions handed down by the Court.⁸

In *Ark Land Co. v. Harper*, the West Virginia Supreme Court of Appeals lessened the importance of the economic value of the land to be partitioned when it stated that “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.”⁹ However, when the West Virginia Supreme Court of Appeals was presented with a factual scenario similar to *Ark Land* in *Morton v. Van Camp*, the Court refused to solidify partition law in West Virginia when it ignored the sentimental and emotional significance the land held to its owner and ordered the land to be partitioned by sale, because the land held more value when sold as a whole than it would if partitioned in kind and then sold.¹⁰ These two cases muddied the water of partition law in West Virginia, and due to the lack of a uniform partition test, there is confusion in West Virginia’s partition law that leaves both the state’s circuit courts and practitioners in the dark as to the current state of partition law in West Virginia.

In attempting to bring some clarity to this issue, this Note will begin by discussing the history of partition actions from their roots in Europe to their codified existence in the West Virginia Code.¹¹ Next, the Note will provide a historical discussion of the evolution of the partition statute in West Virginia and how the West Virginia Supreme Court of Appeals has interpreted the statute.¹² Furthermore, the Note will try to establish what the current state of partition law is in West Virginia,¹³ and it will conclude by arguing for a more uniform test to allow both the state’s circuit courts and practitioners a more standardized rubric from which to work.¹⁴

⁶ W. VA. CODE § 37-4-3 (2007); W. VA. CODE § 37-4-3 (1931); W. VA. CODE 1918, ch. 79 § 3.

⁷ W. VA. CODE § 37-4-3 (2007); W. VA. CODE § 37-4-3 (1931); W. VA. CODE 1918, ch. 79 § 3.

⁸ *Morton v. Van Camp*, 654 S.E.2d 621 (W. Va. 2007) (per curiam); *Ark Land Co. v. Harper*, 599 S.E.2d 754 (W. Va. 2004).

⁹ *Ark Land Co.*, 599 S.E.2d at 761. For a more in depth discussion of *Ark Land*, see Part IV. A. *infra*.

¹⁰ *Morton*, 654 S.E.2d at 625. For a more in depth discussion of *Morton*, see Part IV. B. *infra*.

¹¹ See *infra* Part II.

¹² See *infra* Part III.

¹³ See *infra* Part IV.

¹⁴ See *infra* Part V.

II. A BRIEF HISTORY OF PARTITION LAW

Due to the system of primogeniture,¹⁵ there was no real need to partition commonly held property in early England, because the land all went to the eldest male sibling while the younger brothers and sisters were excluded.¹⁶ So, at this time in English history, there were neither statutory nor common law actions for partition.¹⁷

Although there was no legal action for partition available in early England, Roman law did provide an action for co-owners to partition commonly held property.¹⁸ At Roman law, co-owners could petition the court for the division of property through *actio de communi dividundo*,¹⁹ while heirs, who owned land jointly, could petition the court to divide the property through *actio familiae erciscundae*.²⁰ Both of these actions were prescribed by the Law of The Twelve Tables.²¹ As the judge made his decision, he

was to be guided by considerations of what was most beneficial to all concerned, or what the parties preferred. If land admitted of easy division, allotments were to be adjudged to the respective co-proprietors; and if one received too large a share he was required to compensate the others. If the subject of partition could not be advantageously divided, then the whole was allotted to one who compensated the others.²²

The factors considered by judges in Roman Courts when determining whether and how to partition land provides foreshadowing for both the statutory language of modern partition statutes and the factors modern judges consider in partition actions.²³ Additionally, in this early Roman law, it can be seen that a

¹⁵ BLACK'S, *supra* note 1, 1230 (defining primogeniture as “[t]he common-law right of the firstborn son to inherit his ancestor’s estate, usu. to the exclusion of younger siblings”).

¹⁶ Loyd, *supra* note 2, at 163.

¹⁷ Reid, *supra* note 5, at 857 (citing Loyd, *supra* note 2, at 162–63).

¹⁸ Loyd, *supra* note 2, at 163.

¹⁹ BLACK'S, *supra* note 1, 28 (defining *actio de communi dividundo* as “[a]n action to partition common property”).

²⁰ *Id.* at 28 (defining *actio familiae erciscundae* as “[a]n action for the partition of the inheritance among heirs”).

²¹ Loyd, *supra* note 2, at 163. The Law of The Twelve Tables is thought to be the first law of Rome and is believed to have set forth the “basic rules and prohibitions” for Roman society, but “it has [since] been lost.” Jeremy M. Miller, *Natural Law: The Perennial Phoenix*, 14 TRINITY L. REV. 65, 90 (2007).

²² Loyd, *supra* note 2, at 163 (internal citations omitted).

²³ See statutes cited *supra* note 4; see also Schnell v. Schnell, 346 N.W.2d 713, 717 (N.D. 1984) (stating that “the question in a partition action is whether or not partition can be accomplished without great prejudice to the owners”); Zimmerman v. Marsh, 618 S.E.2d 898, 900 (S.C. 2005) (stating that “[t]he partition procedure must be fair and equitable to all parties of the ac-

sale could be made to “one who compensated the others” if “partition could not be advantageously divided.”²⁴ Thus, a partition by sale could be had even at early Roman law.

Following upon these Roman laws, England’s partition law was at first wholly a product of the common law.²⁵ John Reeves, in his book *History of the English Law*, describes how this common law action to partition would have taken place during the reign of Henry III:

When an inheritance de[s]cended to more than one heir, and they could come to no agreement among them[s]elves concerning the divi[s]ion of it, a proceeding might be in[s]tituted to compel a *partition*. A writ was for this purpo[s]e directed to four or five per[s]ons, who were appointed ju[s]tices for the occa[s]ion, and were to *extend* and appreciate the land by the oaths of good and lawful per[s]ons cho[s]en by the parties, who were called *extensores*; and this extent was to be returned under their feals, before the king or his ju[s]tices: when partition was made in the king’s court, in pur[s]uance of [s]uch extent, there i[s]sued a *seisinam habere facias*, for each of the *parceners* to have po[ss]e[ss]ion.²⁶

According to William H. Loyd’s article entitled *Partition*, the English common law at this time provided for the partition of land, but a partition by sale was forbidden, and “[i]f . . . the property was capable of division, division was a matter of right no matter how inconvenient.”²⁷

tion”); *Eli v. Eli*, 557 N.W.2d 405, 408 (S.D. 1997) (stating that “[a] sale is justified if it appears to the satisfaction of the court that the value of the land when divided into parcels is substantially less than its value when owned by one person” (quoting *Johnson v. Hendrickson*, 71 S.D. 392, 396) (S.D. 1946)); *Leake v. Casati*, 363 S.E.2d 924, 926 (Va. 1988) (stating “that the question whether a division in kind is convenient is primary; that the question whether the interests of the parties will be promoted by a sale is secondary”); *Sensabaugh v. Sensabaugh*, 349 S.E.2d 141, 146 (Va. 1986) (“First the court must conclude that the property cannot be conveniently partitioned. Next, the court must decide whether sale is in the best interest of the parties.”); *Ark Land Co.*, 599 S.E.2d at 759 (stating that “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”); *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712, 714 (W. Va. 1978) (“It must appear (1) that partition cannot be conveniently, or equitably made, and (2) that the interests of all the joint owners will be promoted by a sale, before the court can properly decree a sale.”).

²⁴ Loyd, *supra* note 2, at 163.

²⁵ *See id.* at 167.

²⁶ *See* REEVES, *supra* note 2, at 312 (emphasis in original). *Extensores* are defined as “[o]fficers appointed to appraise and divide or apportion land; extenders or appraisers.” BLACK’S, *supra* note 1, at 622. *Habere facias seisinam* is defined as “[a] writ of execution commanding the sheriff to give the applicant seisin of the recovered land.” *Id.* at 729.

²⁷ Loyd, *supra* note 2, at 167.

Although there was a common law action for partition, England codified its first partition law in 1539 under Henry VIII, and it stated “[t]hat all Tenants and Tenants in common . . . shall and may be . . . compelled . . . to make Partition . . . by Writ *De participatione facienda* [sic].”²⁸ According to Loyd, one of the main reasons for the law’s enactment was that there was not a remedy for “acts of waste and spoliation on the part of co-owners.”²⁹ This original statute was amended a year later and included a provision that required courts to determine whether or not the partition would result in “‘prejudice’ to joint owners who [were] not party to the suit.”³⁰ The relevant part of the amended statute stated “[t]hat no such Partition or Severance hereafter to be made by force of this act, be, nor shall be prejudicial or hurtful to any person or persons . . . other than such which be parties unto the said Partition.”³¹ Although these statutes provided a statutory action for partition, they still fell well short of the standards set forth in Roman law, because they did not provide for the sale of the property if partition could not be conveniently made.³² Judges in England even went so far as to force parties to make private agreements to sell the property and split the proceeds, because they refused to carve out exceptions “to the statutory rule permitting only partitions in kind.”³³

Due to attempts to try and create a remedy where none existed, Parliament, through the Partition Act of 1868, authorized English courts to decree sales in partition actions.³⁴ Partition sales could be decreed by the court on

²⁸ *Harris v. Crowder*, 322 S.E.2d 854, 857 (W. Va. 1984) (citing 31 Henry VIII, ch. I (1539)). Writ *de partitione facienda* is defined as “[a] writ to partition lands or tenements.” BLACK’S, *supra* note 1, at 468.

²⁹ Loyd, *supra* note 2, at 169.

³⁰ *Harris*, 322 S.E.2d at 857 (citing 32 Henry VIII, ch. XXXII (1540)).

³¹ *Id.* (quoting 32 Henry VIII, ch. XXXII (1540)).

³² Reid, *supra* note 5, at 859 (citing Loyd, *supra* note 2, at 169); *see also supra* notes 18–24 and accompanying text.

³³ *See Reid, supra* note 5, at 859 (citing *Turner v. Morgan*, 32 Eng. Rep. 307 (Ch. 1803)). In *Turner*, the court appointed a commissioner to partition the property at issue. *Id.* The commissioner returned his report granting “the chimneys, the fireplaces, the only staircase in the house, and all of the conveniences in the yard to one co-heir with the remainder of the property going to the other co-heir.” *Id.* The court, facing a very strange and unwieldy partition, recommended “that the parties sell the house out of court since [the court] did not know how to make a better partition and was bound by statute in any event.” *Id.* This request by the court had the effect of forcing the parties out of court to settle their dispute because of the inability of the statute to form a workable remedy for their situation. *Id.* It should be noted that the statute at the time did provide a remedy in the event that a parcel of land was unable to be conveniently partitioned. *Id.* The remedy called for the parties to share the land on a “time-sharing basis.” *Id.* The futility of this remedy seems obvious to this author, because it forces parties who have come to court because they are unwilling to share the land to put aside their petty differences and share the land because the court has so decreed. It seems this creates more problems and would result in further litigation when one party or the other refuses to vacate the premises at the appointed time for the other party to participate in its time-share.

³⁴ *Id.* at 860 (citing 32 Vict., c. (1868) (Eng.); 31 Vict., c. 40 (1868) (Eng.)).

commonly owned property when requested by one of the co-owners if “a Sale of the Property and a Distribution of the Proceeds would be more beneficial for the Parties interested than a Division of the Property between or among them” and “unless it [saw] good Reason to the contrary.”³⁵ This law and others that followed took English partition law and turned it from a system that statutorily favored partition in kind to one that statutorily favored partition by sale.³⁶

As the settlers moved across the Atlantic and into North America, English law, including English partition law, came with them.³⁷ The colonies were permitted to enact their own laws so long as they did not conflict with the laws of the Crown, and most partition statutes that were enacted in the colonies were patterned after the 1539 and 1540 partition statutes of Henry VIII.³⁸ As with the statutes of Henry VIII, the colonial partition statutes evidenced a preference for partition in kind.³⁹ Statutes providing for courts to decree sales in partition actions did not make an appearance in American jurisprudence until around the time of the Civil War.⁴⁰ Even though these new statutes allowed for partition by sale, the American judicial system continued to favor partitions in kind.⁴¹ Under these statutes permitting a sale, the courts could only decree a sale “when the party seeking a partition by sale could demonstrate that a partition in kind would result in some degree of injury to the owners or the property.”⁴² This preference for partition in kind over a partition by sale continues today even though English partition jurisprudence broke from its preference to partition in kind with the Partition Act of 1868.⁴³

III. PARTITION LAW MAKES ITS WAY WEST OF THE BLUE RIDGE MOUNTAINS

West Virginia was born of the civil strife that enveloped the United States during the 1860s.⁴⁴ Soon after it received its statehood, West Virginia

³⁵ *Id.*

³⁶ *Id.* Other statutes that solidified the preference for partition by sale were The Trustee Act and The Law of Property Act both passed by Parliament in 1925. *Id.* (citing 15 Geo. 5, c. 19 § 47 (1925) (Eng.); 15 Geo. 5, c. 20 §§ 1, 39 (1925) (Eng.)). These statutes had the effect of placing commonly held property in trust with the co-owners as the trustees. *Id.* After which, “the court would direct a sale unless all trustees agreed upon a plan of division.” *Id.*

³⁷ *Id.* at 860–61.

³⁸ *Id.*

³⁹ *Id.* at 861.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 862.

⁴³ *Id.*; see also *supra* notes 34–36 and accompanying text. *Contra*, DUKEMINIER, *supra* note 5, 296–97 (stating that “the modern practice is to decree a sale in partition actions in a great majority of cases, either because the parties all wish it or because courts are convinced that sale is the fairest method of resolving the conflict”).

⁴⁴ Melvin G. Sperry, E.H. Morton, Charles W. Lynch & Ronald F. Moist, *Final Report of the Revision and Codification Commission in OFFICIAL CODE OF WEST VIRGINIA 1931* viii (1931).

adopted its first Constitution in 1863.⁴⁵ As part of that Constitution, West Virginia adopted all of the laws of the State of Virginia that “were in force within the boundaries of the State of West Virginia when the Constitution became effective, and were not repugnant thereto” to become the law of the land.⁴⁶ Included in these laws were the Virginia laws relating to the partition of land, which were first introduced into the Virginia Code in 1849.⁴⁷ These partition laws were codified in the first incarnation of the West Virginia Code in chapter 79.⁴⁸

A. *The Original Partition Law of West Virginia*

West Virginia’s partition law was originally codified in chapter 79, section 3.⁴⁹ The pertinent part of this statute stated:

When partition cannot be *conveniently* made, the entire subject may be allotted to any party who will accept it, and pay therefore to the other parties such sums of money as their interest therein may entitle them to; or in any case now pending or hereafter brought, in which partition cannot be conveniently made, *if the interests 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, the court . . . may order such sale.*⁵⁰

This code provision was interpreted many times prior to the code revisions of the 1920s, and many of the cases interpreting chapter 79, section 3 are still good law, even in the wake of *Ark Land Co. v. Harper*.⁵¹ Under these cases, the test used to determine whether or not a parcel of land would be partitioned by sale or partitioned in kind was two-fold.⁵² The test set forth that (1) the land could not

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *Hale v. Thacker*, 12 S.E.2d 524, 525 (W. Va. 1940) (stating that Virginia adopted a partition by sale statute in 1849); *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918) (same).

⁴⁸ See W. VA. CODE 1918, ch. 79 § 3 (citing CODE OF VA. 1860, ch. 124); *Loudin*, 96 S.E. at 60 (stating that West Virginia adopted its partition statutes from those of Virginia).

⁴⁹ W. VA. CODE 1918, ch. 79 § 3.

⁵⁰ *Id.* (citing CODE OF VA. 1860, ch. 124) (emphasis added).

⁵¹ See 599 S.E.2d 754 (W. Va. 2004).

⁵² See *Syl., Brockman v. Hargrove*, 137 S.E. 11, 11 (W. Va. 1927) (“To justify a sale of real property in a partition suit, it must affirmatively appear that the land is not susceptible of equitable partition, and that the interests of all the cotenants will be promoted by the sale.”); *Syl., Bracken v. Everett*, 121 S.E. 713, 713 (W. Va. 1924) (stating that in order to order a sale it must appear “that (1) the land cannot be conveniently partitioned in kind and (2) the interests of the co-owners will be promoted by such sale”); *Eagle Land Co. v. Jarrell*, 119 S.E. 556, 560 (W. Va. 1923) (“Partition may be compelled between cotenants, if susceptible of partition in kind, but a sale of

be conveniently partitioned in kind *and* (2) the interests of the parties with a claim to the property would be if promoted by a sale.⁵³ If the property was conducive to an in-kind partition *or* the interests of the parties entitled to the property were not being promoted by the sale, then the property could not be sold and an alternative solution would have to be brokered. Therefore, under the chapter 79, section 3 test, both elements had to be met prior to a sale being ordered. However, this language does little to guide a court on how to actually administer the test. This task fell to the courts, and *Stewart v. Tennant* gives a detailed example of how a court was to carry out this task, with the first step being that the court had to adjudicate “the rights and interests of the parties to the land” and determine if they were “entitled to have partition.”⁵⁴

After determining that the parties were entitled to have the land partitioned, the court would then appoint a group of “commissioners to go upon the land and make partition thereof, if they [found] it . . . susceptible of partition without detriment to the interests of the parties.”⁵⁵ If upon attempting to make this partition, the commissioners determined that partition in kind could not conveniently be made, then they had to report this fact to the court setting forth the specific facts why partition in kind was impracticable.⁵⁶

After the court confirmed the report, it had to make a determination as to whether or not the interests of the parties entitled to a sale would be, in fact, promoted by a sale of the contested property; and upon an affirmative finding in that matter, the court could order a sale of the property with the proceeds being split among those entitled in such amounts as their interests in the land entitled them.⁵⁷ However, even though the report of commissioners sets forth the reasons why the property should or should not be partitioned in kind or by sale, courts in West Virginia do not have to accept it as a final determination; none-

the common property may not be decreed without an affirmative showing that the interests of the partitioners will be promoted thereby.”); Syl. Pt. 1, *Morley v. Smith*, 118 S.E. 135, 135 (W. Va. 1923) (stating that partition “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”); *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918) (“It must appear: (1) That partition cannot be conveniently or equitably made; and (2) that the interests of all the joint owners will be promoted by a sale before the court can properly decree a sale.”); *Smith v. Greene*, 85 S.E. 537, 538 (W. Va. 1915) (“As a prerequisite to a decree of sale, the court must ascertain two things: First, that partition cannot be conveniently made; and, second, that the interests of the parties will be promoted by a sale of the property.”); Syl., *Herold v. Craig*, 53 S.E. 466 (W. Va. 1906) (“A sale of real estate in a partition suit cannot be decreed, unless it affirmatively appears in the record that partition cannot be conveniently made, and that the interests of the parties entitled to such real estate will be promoted by a sale thereof.”).

⁵³ See cases cited *supra* note 52.

⁵⁴ *Stewart*, 44 S.E. at 225–26.

⁵⁵ *Id.*; see also Syl. Pt. 2, *Loudin v. Cunningham*, 96 S.E. 59 (W. Va. 1918) (“The most usual method of ascertaining whether the land is susceptible of convenient partition is by the report of commissioners.”).

⁵⁶ *Stewart*, 44 S.E. at 225.

⁵⁷ *Id.* at 225–26.

theless, the West Virginia Supreme Court of Appeals seems to give the report a great deal of deference.⁵⁸

As the cases and test under chapter 79, section 3 evolved, the meaning and interpretation of the statute evolved as well. To see this evolution, it is instructive to consider the circumstances, reasoning, and holdings of several of the cases under chapter 79, section 3 so that they may be compared and contrasted with the current state of partition law in West Virginia discussed in subsequent parts of the Note.

1. An Undivided Interest in Property Cannot be Sold

The *Stewart* case involved a parcel of land owned by James Stewart, which consisted of 176 acres.⁵⁹ Mr. Stewart died intestate in 1889 survived by a wife and twelve children.⁶⁰ Jacob and Cassie Tennant bought six of the twelve childrens' interests in Mr. Stewart's property, leased the property to South Penn Oil Company for the extraction of oil and gas, and soon after filed suit to force the partition of the land and assignment of the dower.⁶¹ Judgment was entered in favor of the Tennants "adjudicating the right to partition and appointing commissioners to make it and assign the dower."⁶² Prior to the execution of the judgment in 1891, Mr. Tennant received, by way of conveyance, the dower interest of the widow in addition to the interests of four more of the Stewart children.⁶³ The only interests that Mr. Tennant did not own, at this time, were the interests of the two underage children of Mr. Stewart.⁶⁴

Mr. Tennant presented additional evidence showing that the interests of Mr. Stewart's two underage children would be best promoted by a sale of the property and the proceeds from the sale being paid to their guardian.⁶⁵ The court entered a decree selling the interests of the underage children, and Mr. Tennant bought them, giving him ownership of all the land formerly owned by

⁵⁸ *Smith v. Greene*, 85 S.E. 537, 539 (W. Va. 1915) ("Where a report of partition is proper on its fact, every reasonable presumption is in favor of its fairness."); *Syl. Pt. 4, Henrie v. Johnson*, 28 W. Va. 190 (1886) ("The report of commissioners in such suit is not final and may be set aside by the court. But when the court is asked to quash or set aside the report, on the ground that the commissioners erred in making their allotments, whereby an unequal partition has been made, it will not do so 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 evidence, that the commissioners have made a grossly unequal allotment.") (emphasis added).

⁵⁹ *Stewart*, 44 S.E. at 224.

⁶⁰ *Id.*

⁶¹ *Id.* Dower is defined as the "common law...right of a wife, upon her husband's death, to a life estate in one-third of the land that he owned, of which she cannot (with few exceptions) be deprived by any transfer made by him." BLACK'S, *supra* note 1, 529.

⁶² *Stewart*, 44 S.E. at 224.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Mr. Stewart.⁶⁶ Just as with the other land Mr. Tennant bought from the Stewart heirs, he also leased the interests and dower he purchased from these heirs to the South Penn Oil Company.⁶⁷

The plaintiff in this case was one of the underage children of Mr. Stewart and was seeking a one-twelfth interest in the proceeds earned from the land from the time of the sale to the filing of the lawsuit.⁶⁸ He also petitioned the court to enter an injunction against South Penn Oil Company to keep it “from taking and removing any timber, oil, or other material from the lands, and from selling or otherwise disposing of the same or the proceeds thereof.”⁶⁹ The complaint also sought for the court to appoint a receiver to receive any proceeds made from the land by South Penn Oil Company in the event the court allowed them to operate their business while the suit was pending.⁷⁰ The Tennants filed a motion to dismiss the complaint, and it was denied.⁷¹ The trial court ordered that the deed of Mr. Tennant and the lease of the land to the South Penn Oil Company be voided.⁷² Additionally, the court ordered that both Mr. Tennant and South Penn Oil Company pay the plaintiff his share of the profits earned from the land.⁷³

In addressing the concerns of the appellants, the Supreme Court of Appeals took up several questions. However, most pertinent to the current discussion, the court addressed the subject of partition law while discussing the propriety of the court ordered sale that relieved Mr. Stewart’s underage heir of his one-twelfth interest in the contested property.⁷⁴ Beginning its discussion of this matter, the court affirmatively stated that prior to any decree partitioning land by sale, it had to be shown that the land could not be conveniently partitioned in kind.⁷⁵ The court then set forth the doctrine discussed *supra* stating that to determine whether or not the land could be conveniently partitioned in kind, it was the usual practice to establish “such fact . . . by a report of commissioners, so stating, and setting forth the facts from which it appears.”⁷⁶

However, in the *Stewart* case, there was no report of commissioners ever made, and furthermore, there was never any declaration made to the court that a partition in kind could not be conveniently made.⁷⁷ Additionally, the

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 225–26.

⁷⁵ *Id.* at 225.

⁷⁶ *Id.* at Syl. Pt. 5; *see supra* notes 55-58 and accompanying text.

⁷⁷ *Stewart*, 44 S.E. at 225.

court's order decreeing a sale did not contain any language that a report had been made with specific facts stating that a partition in kind could not be completed.⁷⁸ However, the decree of sale did state that the interests of the two underage heirs of Mr. Stewart would be best promoted through a sale of the contested property, but this was not enough and satisfied only half of the partition test.⁷⁹ In fact, the court stated that "[t]he absence of any showing that the land could not be partitioned is fatal to the decree of sale, as one made under the statute providing for sale in partition suits."⁸⁰

The court further dissected the statute⁸¹ by interpreting the language wherein the entire property could be sold or part of the property could be allotted to its owner with the rest of the property being sold to satisfy the other owners.⁸² The court stated that this provision did not apply to an undivided interest in the land, such as the undivided interests of the Stewart heirs.⁸³ Rather, the court relied on section 373 of Hogg's Equitable Principles, which states that "where the court does determine upon the sale of the land, it should be sold as a whole (in the absence of the consent of the parties in interest to the contrary), as it would not be just to sell as to some, and decree a partition as to others."⁸⁴

In agreeing with Hogg's statement, the court maintained that if the owner of a parcel of land is able to keep all or part of his land, then the court must allow him to keep it and not force him to "take money in lieu thereof."⁸⁵ Furthermore, the court stated that the West Virginia statute only "authorizes an allotment of part and sale of the residue," but it does not state anywhere in the statute that an undivided interest may be sold.⁸⁶ From reading this interpretation, it appears that the court was taking the stance that the contested land had to be dealt with as a whole, and if it was to be sold, then all of it was to be sold *or* part of the whole could be divided in kind and the remainder sold.⁸⁷ However, the undivided interests of a group of heirs had to be dealt with as a whole and each of them had to be treated equally because "it would not be just to sell as to some, and decree partition as to others."⁸⁸ So, under the facts of the *Stewart* case, the sale was fatally flawed not only because there was no report of commissioners stating that the land was incapable of being conveniently partitioned

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (citing *Casto v. Kintzel*, 27 W. Va. 750 (1886)).

⁸¹ *Id.* at 225–26.

⁸² W. VA. CODE 1918, ch. 79 § 3 (1918).

⁸³ *Stewart*, 44 S.E. at 226.

⁸⁴ *Id.* (quoting Hogg's Eq. Pr. § 373).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* (quoting Hogg's Eq. Pr. § 373).

in kind, but also because the court inequitably ordered a sale of undivided interests, which was not statutorily permitted.⁸⁹

From *Stewart*, we see some of the early interpretations of West Virginia partition law. We are given a process by which it can be determined whether or not land is susceptible to partition in kind, and if it is not, what steps must be taken in order for the court to effectuate a valid decree of sale.⁹⁰ Additionally, the court determined that land must be treated as a whole, as if there is one owner, when it is partitioned, because undivided interests cannot be sold.⁹¹ These principles began to lay part of the groundwork for West Virginia's partition law, and the case that follows, decided over one hundred years ago, continued to build upon that groundwork and is still good law, even after *Ark Land Co. v. Harper*.⁹²

2. A Decision Still Being Cited After 103 Years

One of the most often cited cases under chapter 79, section 3, is *Croston v. Male*,⁹³ which was decided in 1904 and has been cited for support in partition by sale actions in front of the West Virginia Supreme Court of Appeals as recently as May 2007.⁹⁴ *Croston* involved a parcel of land consisting of 240 acres.⁹⁵ The land was divided into thirds with one-third going to one set of underage heirs subject to their mother's dower interest, one-third going to another set of underage heirs "subject to an estate therein by the curtesy belonging to their father," and the last third going to the plaintiff in the case.⁹⁶ However, the entire property was subject to the dower interest of the widow of the deceased former owner of the property, Hiram Male.⁹⁷

⁸⁹ *Id.* at 225–26.

⁹⁰ *Id.* at 225.

⁹¹ *Id.* at 226.

⁹² 599 S.E.2d 754 (W. Va. 2004).

⁹³ 49 S.E. 136 (W. Va. 1904); *see also* *Ark Land Co. v. Harper*, 599 S.E.2d 754 (W. Va. 2004) (citing *Croston*, 49 S.E.2d 754); *Wilkins v. Wilkins*, 338 S.E.2d 388 (W. Va. 1985) (same); *Stillings v. Stillings*, 280 S.E.2d 689 (W. Va. 1981) (same); *Cales v. Ford*, 28 S.E.2d 429 (W. Va. 1943) (same); *Morrison v. Holcomb*, 14 S.E.2d 262 (W. Va. 1941) (same); *Hale v. Thacker*, 12 S.E.2d 524 (W. Va. 1940) (same); *Garlow v. Murphy*, 163 S.E. 436 (W. Va. 1932) (same); *Brockman v. Hargrove*, 137 S.E. 11 (W. Va. 1927) (same); *Loudin v. Cunningham*, 96 S.E. 59 (W. Va. 1918) (same); *Smith v. Greene*, 85 S.E. 537 (W. Va. 1915) (same); *Brown v. Brown*, 67 S.E. 596 (W. Va. 1910) (same); *Herold v. Craig*, 53 S.E. 466 (W. Va. 1906) (same).

⁹⁴ *See* Brief for Appellees at 4, 6, *Morton v. Van Camp*, 654 S.E.2d 621 (W. Va. 2007) (Appeal No. 33341).

⁹⁵ *Croston*, 49 S.E. at 136.

⁹⁶ *Id.* Curtesy is defined as "a husband's right, upon his wife's death, to a life estate in the land that his wife owned during their marriage, assuming a child was born alive to the couple." BLACK'S, *supra* note 1, 411.

⁹⁷ *Croston*, 49 S.E. at 136.

This action was instituted by Mr. Male's daughter, Martha Croston, who sought to have the land partitioned by sale.⁹⁸ In her complaint, Ms. Croston alleged that the three tracts of land that were the subject of the action were adjacent to one another, but they were "irregular" in shape.⁹⁹ According to her complaint, "the average length [of each tract was] more than three times the average breadth, with a narrow place near the center."¹⁰⁰ Finally, Ms. Croston alleged that due to the irregularity of the tracts, the land could not be conveniently partitioned in kind, "and that the interests of those entitled [would] be promoted by a sale of the same."¹⁰¹

The trial court appointed commissioners and ordered them "to go upon the land and make partition thereof," if it could conveniently be made.¹⁰² If the partition could conveniently be made, then the commissioners were ordered to make the division "to each heir of their descendant's per stirpes an equal one-third interest in said estate."¹⁰³ However, if the partition could not be conveniently made, then that particular fact was to be reported back to the court.¹⁰⁴ When the commissioners returned their report to the court, they returned it with a recommendation that the property be sold, and they supported their opinion setting forth specific facts as to why the property could not be conveniently partitioned in kind.¹⁰⁵ Based upon this opinion, the commissioners recommended that the widow of Mr. Male be assigned her dower interest in 25 acres contained within the 106 acres tract of land and that the land be sold subject to the widow's dower interest.¹⁰⁶ The trial court adopted these findings and ordered a sale of the land.¹⁰⁷

⁹⁸ *Id.* at 137.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* Per Stirpes is defined as when property is "[p]roportionally divided between beneficiaries according to their deceased ancestor's share." BLACK'S, *supra* note 1, 1181.

¹⁰⁴ *Croston*, 49 S.E. at 137.

¹⁰⁵ *Id.* Among the facts the commissioners considered salient to their determination that a partition by sale was the proper course of action was that the land laid in two tracts: "one of 135 ½ acres, and the other of 106 1/8 acres. *Id.* Additionally, the land, contained in the 106 1/8 acres tract, was about 30 acres of "rough" terrain on a river bank that was virtually devoid of "good timber," "worthless for farming or grazing purposes," and the rest was "ordinary land, worth about \$20 per acre." *Id.* The other tract of land was situated equidistant between the town of Webster and the Valley River. *Id.* This tract had better land than the other tract and "as a whole" would be "worth about \$25 an acre." *Id.* Additionally, there was a third tract of about 9 acres of bottom land that was considerably more valuable than the other two tracts. *Id.* Furthermore, the two large tracts of land were "on opposite sides of a high river hill, adjoining each other near the top of the hill." *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

The West Virginia Supreme Court of Appeals began its analysis of the issues by stating that “the court has no right to decree a sale without [the parties’] consent unless it finds, first, that partition in kind cannot be conveniently made; and second, that the interests of the parties owning the land will be promoted by a sale.”¹⁰⁸ This further solidified the statutory test for partition by sale in West Virginia’s common law by carrying forward the test previously stated in cases prior to *Croston*.¹⁰⁹ The court also explained how extraordinary a partition by sale decree was, stating that:

[I]t would be at variance with fundamental and basic principles to say the Legislature intended to authorize a sale, instead of a division, for any light or trivial cause. So sacred is the right of property, that to take it from one man and give it to another for private use is beyond the power of the state itself, even upon payment of full compensation.¹¹⁰

This statement by the court shows that the decision to order partition of land by sale is not something to be decided upon personal, simplistic, or trivial reasons. Rather, it is a decision that must be supported by extraordinary facts and evidence, because the court is being asked to adjudicate an individual’s fundamental right; the right to buy, sell, and own property. Therefore, the court’s statement serves as a warning, to its contemporaries as well as to those who would follow it, that ownership of property is a right that is not to be toyed with and is to be treated with the utmost respect and importance.

The court went on to state that the essential question that must be answered by the commissioners when deciding whether or not to recommend a sale is “whether the aggregate value of the several parts [of the property], when held by different individuals in severalty, would be materially less than the whole value of the property if owned by one person.”¹¹¹ In making this determination, the court points to several factors that the commissioner in this case considered when making his determination, and these factors may prove instructive in helping to determine whether or not a particular parcel of land is capable

¹⁰⁸ *Id.*

¹⁰⁹ See Syl. Pt. 7, *Roberts v. Coleman*, 16 S.E. 482 (W. Va. 1892) (“A sale cannot be decreed in a partition suit unless it appears, by report of commissioner or otherwise by the record, that partition cannot be conveniently made, and also that the interests of those interested in the land or its proceeds will be promoted by a sale.”); *Casto v. Kintzel*, 27 W. Va. 750, 757 (1886) (stating that “it is only when peculiar circumstances are found to exist which render a fair partition thereof absolutely impracticable, that the court should call into exercise the extraordinary power of directing a sale of the whole land which in most cases, and especially in this case, would result in a ruinous sacrifice of the interest of the infant defendants, for the benefit of some of the adult heirs, or perhaps for the benefit of some stranger”).

¹¹⁰ *Croston*, 49 S.E. at 138.

¹¹¹ *Id.*

of convenient partition or whether or not the interests of the parties entitled to partition are being promoted.¹¹²

The court applied these principles to the facts of the case and stated that (1) the report of the commissioners did not state that the land when partitioned in kind would be worth less in individual parcels than the value those same individual parcels would have if the entire property was sold as a whole and (2) that the report showed that the land was “improved agricultural land” sitting equidistant from both the railroad and the nearest town, hardly isolated “from human habitation.”¹¹³ Furthermore, the court stated that, at the time the case was decided, small tracts of land located in areas similar to the Male land were known to bring in more money per acre than large tracts of land in similar areas.¹¹⁴ Based upon these facts, the court determined that the trial court erred in finding that the land was not capable of convenient partition and that the interests of the parties entitled to partition were promoted by a sale.¹¹⁵ As such, the court rejected the findings of the commissioners and reversed the decision of the trial court.¹¹⁶

This case is important to partition law jurisprudence in West Virginia because it issues a warning for future generations of judges, attorneys, and legal scholars to be sure to respect the rights of property owners, because when a judicial sale of an owner’s land is ordered for partition or otherwise, it affects the owner’s fundamental right to buy, sell, and own property.¹¹⁷ Furthermore, it is important because it gives future generations of judges, attorneys, and legal scholars a test to use to determine when the interests of the parties entitled to partition are being promoted by a sale: “the relative value of the land when divided and the sum which might be realized by a sale of it undivided.”¹¹⁸ Lastly, this case is significant because it shows us that although the commissioners’ report does carry weight with the court,¹¹⁹ it does not bind the court in making its decision whether or not to partition the land in kind or by sale.¹²⁰ Just as

¹¹² *Id.* Among the factors considered by the court in this case were:

[T]he quantity of land, the number of shares into which it was to be divided, the status of the parties with reference to disability and ability to protect their interests at the sale, the extent of their respective interests in the land, and the relative value of the land when divided and the sum which might be realized by a sale of it undivided.

Id.

¹¹³ *Id.* at 139.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 139–40. See also *supra* note 58 and accompanying text discussing the finality of the commissioners’ report and the weight given it by West Virginia courts.

¹¹⁷ *Croston*, 49 S.E. at 138.

¹¹⁸ *Id.*

¹¹⁹ See *supra* note 58 and accompanying text.

¹²⁰ *Croston*, 49 S.E. at 139–40.

Croston expanded upon the interpretation of the cases before it, so too did a case that followed almost fourteen years later.

3. The Commissioners' Report Must State Facts for a Sale with Specificity or a Sale Will Not Be Upheld

The case of *Loudin v. Cunningham*¹²¹ expanded upon the interpretations of chapter 79, section 3, set forth in the previous cases. It added another layer to the two part test used to determine whether or not property should be partitioned in kind or by sale by requiring that the commissioners' report set forth specific "facts justifying their conclusion" or risk their report advocating a sale being discarded.¹²² *Loudin* involved a tract of land of more than 63 acres, and its title had been severed with different parties owning, in different proportions, "the coal, the oil, [the] gas, and the surface."¹²³ The land was owned in the following proportions: "Mary Loudin, five-twentieths; Edna Whisler, one-twentieth; Ella Marple, one-twentieth; and A.A. and E.E. Cunningham, together, twelve-twentieths."¹²⁴ A.A. and E.E. Cunningham also owned land separately from their interest in the disputed tract, and this land was situated in such a manner that it adjoined the southern piece of the disputed tract.¹²⁵

The case was brought by Ms. Loudin and her co-plaintiffs seeking to have the land partitioned.¹²⁶ Upon taking up the case, the trial court "appointed commissioners to go upon the land and make partition thereof."¹²⁷ Furthermore, the court instructed the commissioners that should they determine that the land could be conveniently partitioned in kind, they should allot to the Cunninghams their twelve-twentieths interest in the land that was adjacent to their property.¹²⁸ However, the court cautioned the commissioners that this was only to be done if so doing would not injure or otherwise "prejudice . . . the interests of the other cotenants."¹²⁹

¹²¹ 96 S.E. 59 (W. Va. 1918).

¹²² *Id.* at Syl. Pt. 2.

¹²³ *Id.* at 59. The tract of land at issue in *Loudin* "consisted of two parts" that adjoined one another, very briefly, at the southeast and northwest corners. *Id.* The two parts were "separated by a county road extending the full distance along the northern boundary of the southern piece." *Id.* The southern part of the tract was the smaller of the two parts, but it was the most conducive to farming. *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* See also Syl., *Brockman v. Hargrove*, 137 S.E. 11 (W. Va. 1927) ("In a partition suit, if two or more of the parties so elect, they may have their shares laid off together, when partition can be conveniently made in that way.").

¹²⁹ *Loudin*, 96 S.E. at 59.

The commissioners entered the land on November 14, 1916, and reported back to the court “that it was not susceptible of convenient and equitable partition among the parties, and ‘that the interests of a majority of those entitled thereto would be promoted by a sale thereof.’”¹³⁰ The reason that the commissioners gave for their decision was that if they partitioned the land in kind and allotted the Cunninghams the part that adjoined their land, then the Cunninghams would be receiving virtually all of the “fertile” land contained in the tract, thus creating an inequitable distribution and rendering “the balance of [the tract of land] almost valueless.”¹³¹ Taking this report into consideration, the trial court ordered that the land be sold and the proceeds split among the interested parties according to their proportional interests in the land.¹³²

As with the cases previous to *Loudin*, the West Virginia Supreme Court of Appeals used the two-part partition by sale test¹³³ to determine whether or not the trial court properly ordered a sale of the property.¹³⁴ In so doing, the court stated that a sale was not to be ordered “unless it *affirmatively appears in the record*” that partition in kind was impracticable and the interests of the parties were “promoted by a sale;” however, the court stated that the commissioners’ report stated no facts justifying their opinion that a sale was the only way to equitably address the interests of the parties.¹³⁵ Furthermore, the only fact stated in the commissioners’ report that tended to support their position was that if the land was partitioned in such a way as to give the Cunninghams their tract of land adjacent to their other land, then they would have an inequitable portion of the fertile land, thus causing the value of the residue of the contested land to be significantly injured.¹³⁶ Therefore, the court found that the commissioners’ re-

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ (1) The land must not be able to be conveniently partitioned in kind, and (2) the interests of the parties entitled to partition must be promoted by a sale. *Loudin*, 96 S.E. at 60; *see also* Syl., *Smith v. Greene*, 85 S.E. 537 (W. Va. 1915); *Croston v. Male*, 49 S.E. 136, 137 (W. Va. 1904); Syl. Pt. 5, *Stewart v. Tennant*, 44 S.E. 223 (W. Va. 1903); Syl. Pt. 7, *Roberts v. Coleman*, 16 S.E. 482 (W. Va. 1892); *Casto v. Kintzel*, 27 W. Va. 750 (1886).

¹³⁴ *Loudin*, 96 S.E. at 60.

¹³⁵ *Id.* (emphasis added).

¹³⁶ *Id.* The court in its decision also briefly addressed the question of whether or not to allow one party to have all, or a significant part, of the most valuable portion of the land as part of their allotment in a partition in kind. *Id.* The court stated that “value as well as quantity” is an important consideration when partitioning land in kind, “and if the Cunninghams’ twelve-twentieths should be assigned to them next to their own land, and that portion of the tract is more valuable per acre than other parts of it, their equitable portion would necessarily be less than twelve-twentieths of the acreage.” *Id.* This passage indicates that a party may not have to get an equitable piece of the acreage of a contested parcel of land so long as the value of the land they are receiving is equitable to the amount received by the other parties entitled to the partition. *See id.*

port was fatally flawed and did not provide enough support for its decision to allow the trial court to order a sale of the property.¹³⁷

In addition to adopting a strict requirement that the commissioners' report must rest its decision on specific facts in order to warrant a sale, the court also addressed another mistake in the reasoning of the trial court. According to the court, both the commissioners' report and the trial court provided only an affirmative showing that a *majority* of the interested parties would have their interests in the land furthered by a sale.¹³⁸ This limited showing of the promotion of the parties' interests was in direct contravention of the statute in force at the time the case was decided.¹³⁹ The court stated that "[i]t [was] essential that *all* of [the parties'] interests be promoted; a sale cannot be made when the effect is to benefit some of the joint owners and injure others; all must be benefited or a sale cannot be lawfully made."¹⁴⁰

Through its opinion, the *Loudin* Court brought additional clarification to partition law in West Virginia by stating that the commissioners' report must state specifically why the land cannot be partitioned in kind *and* that *all* the interested parties will benefit from a sale, and if these two elements of the report are missing, then a sale is not proper.¹⁴¹ The last case to be discussed under chapter 79, section 3, which was overruled seventy-two years after it was decided, further interpreted the statute, giving courts and practitioners a practical way to determine convenience.¹⁴²

4. An Ordinary Test of Convenience

Syllabus Point 2 of *Garlow v. Murphy*, states that "[a]n ordinary test of convenience in partition, under the statute, 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."¹⁴³ This syllabus point clearly brought forward a principle that had been previously stated but not enumerated as one of the holdings of the court.¹⁴⁴

¹³⁷ *Id.*; see *id.* at Syl. Pt. 2. ("The most usual method of ascertaining whether the land is susceptible of convenient partition is by the report of commissioners; but when their report simply states that the land is not susceptible of convenient and equitable partition, and mentions no facts justifying their conclusion, *it does not warrant a decree of sale.*") (emphasis added).

¹³⁸ *Id.*

¹³⁹ W. VA. CODE 1918, ch. 79 § 3 (stating that the sale ordered by the court must be in the interest of the parties entitled to the partition).

¹⁴⁰ *Loudin*, 96 S.E. at 61 (emphasis added).

¹⁴¹ *Id.* at 60–61.

¹⁴² See Syl. Pt. 2, *Garlow v. Murphy*, 163 S.E. 436 (W. Va. 1932), *superseded by statute*, W. VA. CODE § 37-4-3 (1931), *as recognized in Ark Land Co. v. Harper*, 599 S.E.2d 754, 763 (W. Va. 2004).

¹⁴³ *Id.*

¹⁴⁴ See *Croston v. Male*, 49 S.E. 136, 138 (W. Va. 1904) (stating that among other factors that could be used to determine whether or not partition in kind is equitable is "the relative value of the

The contested tract of land in *Garlow* consisted of sixty-eight acres, produced both oil and gas, and had "three valuable seams of coal" below the surface.¹⁴⁵ The interests of the parties to the land were as follows: Estelle Davis, to whom the plaintiff Mary Garlow granted her interest, two-elevenths interest in the entire tract; Edwin Murphy, one-eleventh interest in the entire tract; Delia Hoskinson, one-eleventh interest in oil and gas and one eleventh interest in The Pittsburgh Seam; Michael Murphy, seven-elevenths interest in the oil and gas, seven-elevenths interest in The Pittsburgh Seam, and eight-elevenths interest in what was left of the rest of the tract of land.¹⁴⁶ Ms. Davis, who had been granted the plaintiff's interest in the property, owned land containing coal that was adjacent to the contested property and under a lease that gave "her land a . . . value of \$500 an acre."¹⁴⁷ Also, included in the lease of Ms. Davis's land, was a provision that allowed the lessee to use Ms. Davis's allotment of the contested land if it was partitioned in such a way as to "adjoin her land."¹⁴⁸ Therefore, due to this agreement, Ms. Davis sought for the property to be partitioned in kind and to have her portion allotted so that it adjoined her other land, but Ms. Hoskinson and Mr. Murphy opposed a partition in kind, "particularly that sought by [Ms.] Davis," and wanted the court to sell the whole property and divide the proceeds according to the proportional interests of the parties.¹⁴⁹

The trial court appointed commissioners to go upon the land and report upon the prospect of partitioning it.¹⁵⁰ Two of the three commissioners reported to the court that partition in kind was impracticable and that the interests of the parties "would be promoted by a sale."¹⁵¹ However, the third commissioner, who was a mining engineer, disagreed with his colleagues and reported to the trial court that even though partition in kind could not be conveniently made, it was possible to allocate Ms. Davis's share of the land in such a manner as to allow it to adjoin her other land, and such an allotment would not "prejudice . . . the . . . other cotenants."¹⁵² In addition to his report, the third commissioner submitted a detailed plan to show the court how his plan could be carried out, and the plan was witnessed by five people including three "civil and mining engineers."¹⁵³ However, the trial court rejected the mining engineer's plan and

land when divided and the sum which might be realized by a sale of it undivided" should be considered).

¹⁴⁵ *Garlow*, 163 S.E. at 437. The seams of coal below the surface were (1) The Pittsburgh Seam-66 acres, (2) The Sewickley Seam-40 acres, and (3) The Red Stone Seam-no acreage given, but it was between the Pittsburgh and Sewickley seams. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

adopted the plan of the other two commissioners and decreed “that the tract was not susceptible of a fair partition, that the share of [Ms.] Davis could not be fairly set off in kind, and that the interests of all the owners would be promoted by a sale.”¹⁵⁴ However, the trial court postponed the sale, and in the interim, Ms. Davis filed her appeal.¹⁵⁵

On appeal, the West Virginia Supreme Court of Appeals stated that under common law, “a cotenant had an absolute right of partition,” and the sale of a co-tenant’s interest only became available through statutory innovation.¹⁵⁶ However, to trigger a statutory sale, the court stated that “it [must] affirmatively appear . . . that partition ‘cannot be conveniently made’”¹⁵⁷ and that the interests of the parties entitled to partition will be promoted by a sale of the entire property.¹⁵⁸ After setting forth the statutory two-step test for partition by sale,¹⁵⁹ the court turned its attention to determining the meaning of the term “convenient” in the context of a partition suit.¹⁶⁰ The court stated that the term “conveniently,” taken in the context in which it is used in the partition statute, “does not have its usual significance, but means rather practicably and justly.”¹⁶¹ In this regard, the court stated that the test to be used when determining whether or not a parcel of land can be conveniently partitioned in kind is to ask if “any interest assigned [will] be materially less in value than the interest undivided.”¹⁶² If any interest that is allotted to an interested party has a value less than the interest would be if the property were not partitioned in kind, then the entire tract should be sold; however, if the opposite is true and any interest that is allotted has a value that is greater than the interest would have if the property were partitioned in kind, then the tract should be partitioned in kind.¹⁶³ Applying this test to the facts of the case, the court determined that the interests of the parties to the litigation would not “be materially less in value than the interest undivided.”¹⁶⁴

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 438.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (citing *McDonald v. Bennett*, 152 S.E. 533 (W. Va. 1930); *Brockman v. Hargrove*, 137 S.E. 11 (W. Va. 1927); *Morley v. Smith*, 118 S.E. 135 (W. Va. 1923); *Loudin v. Cunningham*, 96 S.E. 59 (W. Va. 1918); *Smith v. Greene*, 85 S.E. 537 (W. Va. 1915); *Herold v. Craig*, 53 S.E. 466 (W. Va. 1906); *Croston v. Male*, 49 S.E. 136 (W. Va. 1904)).

¹⁵⁹ For additional cases stating the two-step partition by sale test, see *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918); *Syl., Smith v. Greene*, 85 S.E. 537 (W. Va. 1915); *Croston v. Male*, 49 S.E. 136, 137 (W. Va. 1904); *Syl. Pt. 5, Stewart v. Tennant*, 44 S.E. 223 (W. Va. 1903); *Syl. Pt. 7, Roberts v. Coleman*, 16 S.E. 482 (W. Va. 1892); *Casto v. Kintzel*, 27 W. Va. 750 (1886).

¹⁶⁰ *Garlow*, 163 S.E. at 438.

¹⁶¹ *Id.* (citing *Oneal v. Stimson*, 74 S.E. 413 (W. Va. 1912); *Croston v. Male* 49 S.E. 136 (W. Va. 1904); *Casto v. Kintzel*, 27 W. Va. 750 (1886)).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

In addition to considering whether or not the partition could be conveniently made, the court took up the question of whether or not the interests of the parties would have been promoted by a sale, stating that “promotion” could not be determined “from opinions alone;” rather, specific facts must be offered that tend to show the promotion of the interests of the parties.¹⁶⁵ The court stated that the record was devoid of any evidence that the interests of any of the parties would be promoted by a sale of the land, and the contention of the commissioners, that “[y]ou couldn’t divide them gas wells into eleven parts,” was not sufficient to show that the interests of the parties would be promoted by a sale.¹⁶⁶ Furthermore, the court stated that an additional factor that should be considered in determining whether or not to order a judicial sale was whether or not an interested party has the financial ability to protect their interests in a sale.¹⁶⁷ The court found that there was no evidence in the record that supported the notion that any of the parties in the case had the ability to protect their interests in a sale.¹⁶⁸ Therefore, based on the court’s findings set forth above, the decision of the trial court was reversed, and the court directed the trial court to enter an order decreeing a partition of the land in kind.¹⁶⁹

The *Garlow* case gave trial courts and practitioners an easy test to follow to make a determination of whether or not a partition in kind was convenient.¹⁷⁰ This test served the courts in West Virginia for seventy-two years before being overruled by *Ark Land Co. v. Harper*.¹⁷¹ However, as will be discussed *infra*, the changes made to the West Virginia Code in 1931 did not substantially change partition law in West Virginia as it existed prior to its re-codification, and the premise on which the “ordinary test of convenience”¹⁷² was overruled was the result of a very narrow reading and interpretation of the statute; a reading that contradicts the intention of the 1931 revisers of the West Virginia Code.¹⁷³

B. *The Re-codification of the West Virginia Code*

The West Virginia Code, since its inception in 1868, had been published and republished as a compilation of general laws with numerous supplements.¹⁷⁴

¹⁶⁵ *Id.* (citing *Bracken v. Everett*, 121 S.E. 713 (W. Va. 1924); *Eagle Land Co. v. Jarrell*, 119 S.E. 556 (W. Va. 1923)).

¹⁶⁶ *Id.* at 438–39.

¹⁶⁷ *Id.* at 438.

¹⁶⁸ *Id.* at 438–39.

¹⁶⁹ *Id.* at 439.

¹⁷⁰ *See id.* at Syl. Pt. 2.

¹⁷¹ 599 S.E.2d 754 (W. Va. 2004).

¹⁷² *See* Syl. Pt. 2, *Garlow*, 163 S.E. 436.

¹⁷³ *See Revisers’ Note* to W. VA. CODE § 37-4-3 (1931).

¹⁷⁴ Sperry, *supra* note 44, at ix. The various compilations of the Code after 1868 were as follows: BARNES’ CODE OF W. VA. (1923); BARNES’ CODE OF W. VA. (1918); BARNES’ CODE OF W.

The problem with this was that a compilation of the laws of a state merely collected in one edition the general “acts of the legislature . . . for convenience in use,”¹⁷⁵ and “the contents of such a volume . . . are construed and dealt with just as if they had never been published in a single volume.”¹⁷⁶ However, “[a] code of laws when adopted by the lawmaking body has the same effect as one general act of the legislature containing all the provisions embraced in it. It is not merely evidence of the law, but the law itself.”¹⁷⁷

Therefore, the legislature decided that the state needed to “collate, revise, and codify all the general statutes, civil and criminal, of this State, which may be in force at the time of the completion of [the revising commission’s] work, and properly index the same.”¹⁷⁸ To perform this task, the legislature directed the Governor to appoint three commissioners from a list of ten lawyers, who were citizens of West Virginia and had been nominated by the West Virginia Supreme Court of Appeals, “to revise, codify and index, with suitable marginal citations and references,” all of the previous compilations of West Virginia law into one uniform code.¹⁷⁹

The Governor complied and appointed Melvin G. Sperry from Clarksburg, E.H. Morton from Webster Springs, and M.J. Cullinan from Wheeling. However, prior to the completion of the codification process, Mr. Cullinan passed away and was replaced by Judge Charles W. Lynch from Clarksburg.¹⁸⁰ The commission chose Mr. Sperry to chair the commission and Ronald F. Moist to be its secretary.¹⁸¹ In performing its task, the commission received assistance from Lawrence R. Lynch; J.O. Henson; John Ross, Jr.; Joseph R. Curl; W.O. Wysong; Dean J.W. Madden of the West Virginia University College of Law; and various other members of the College of Law’s faculty.¹⁸²

As the commission began to fulfill its purpose, it had no idea of the monumental task to which it had been assigned.¹⁸³ For ten years, the commission toiled to unwind and bring order to “the confused jumble of compiled legislative acts which had served as substitutes for codes of laws for almost seventy years.”¹⁸⁴ When finished, the new code, which had been greatly reduced and

VA. (1916); HOGG’S CODE OF W. VA. (1913); WEST’S CODE OF W. VA. (1906); WARTH’S CODE OF W. VA. (1899); WARTH’S CODE OF W. VA. (1891); WARTH’S CODE OF W. VA. (1887); WARTH’S AMENDED CODE OF W. VA. (1884); KELLY’S REVISED W. VA. STATUTES (1878). *Id.*

¹⁷⁵ Sperry, *supra* note 44, at ix.

¹⁷⁶ *Id.* (citing *Grant v. Baltimore & Ohio R.R. Co.*, 66 S.E. 709 (W. Va. 1909)).

¹⁷⁷ *Id.*

¹⁷⁸ 1921 W. Va. Acts 248. This act was introduced as House Bill 443 by the House Committee on the Judiciary, passed on April 13, 1921, and approved by the Governor on April 20, 1921. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Sperry, *supra* note 44, at ix.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

compacted into sixty-three chapters, made “substantial changes” to the existing statutes, but for each change, the commission provided revisers’ notes to explain the change and the reasoning that accompanied it.¹⁸⁵ The commission expressly stated that it did not claim to have achieved perfection in the new Code, but the job that was done was such “that any errors which shall be disclosed in the application of the laws can be speedily corrected without impairing the structure of the laws.”¹⁸⁶ It is with this knowledge that we begin an examination of the changes made to the West Virginia partition statute.¹⁸⁷

C. *The Partition Statute Finds a New Home in Chapter 37*

Under the revised Code, West Virginia’s partition statute moved from chapter 79, section 3 to chapter 37, article 4, section 3 and underwent an extensive revision.¹⁸⁸ In its previous incarnation, the partition statute, in order for a judicial sale to be authorized, required that the property be incapable of convenient partition and that the interests of the parties entitled to partition be promoted by a sale.¹⁸⁹ The revised partition statute changed the two-part test slightly by requiring that the interests of only one of the parties entitled to partition needed to be promoted by a sale while not prejudicing the interests of any of the other parties so entitled.¹⁹⁰

Although the addition of the new language seems to add another layer to the two-part test that had been in use since the birth of the state, a close reading of the statute and the revisers’ note reflects that the intention of the revisers was not to create a new or more complicated test; rather, they were simply trying to clear up any doubts regarding what was meant by the promotion of all of the interests of the parties entitled to partition.¹⁹¹ In pertinent part, the *Revisers’ Note* stated the following:

Section 3, c. 79, Code 1923, is modified to make it clear that the consent of all interested parties is not necessary to a sale in partition proceedings. There has heretofore been some doubt among the members of the profession upon this question.¹⁹²

¹⁸⁵ *Id.* at x.

¹⁸⁶ *Id.*

¹⁸⁷ W. VA. CODE § 37-4-3 (1931).

¹⁸⁸ See W. VA. CODE § 37-4-3 (1931); W. VA. CODE 1918, ch. 79 § 3.

¹⁸⁹ W. VA. CODE 1918, ch. 79 § 3.

¹⁹⁰ W. VA. CODE § 37-4-3 (1931).

¹⁹¹ *Id.*; see also *Revisers’ Note* to W. VA. CODE § 37-4-3 (1931).

¹⁹² *Revisers’ Note* to W. VA. CODE § 37-4-3 (1931). This particular *Revisers’ Note* has been included in all subsequent versions of the West Virginia Code including the current edition. See W. VA. CODE § 37-4-3 (2008).

This note taken together with the language of the statute and the commission's self described attempt to bring order to the jumbled mess that was the compilation of statutory law in West Virginia prior to 1931 leads this author to believe that the revisers did not mean to add another layer to the existing two-part test.¹⁹³ Rather, the revisers merely were attempting to bring order to the question of what constituted the promotion of the interests of the parties, i.e., did the interested parties need to consent to a sale for their interests to be promoted.¹⁹⁴

On this point, the revisers simply stated that consent was not necessary.¹⁹⁵ Further support for this interpretation is found in the text of the statute itself wherein the statute states that the interests of at least one party in a sale must be promoted and the rest of the parties not prejudiced.¹⁹⁶ If consent was a necessary ingredient, then the statute would have so stated. However, the provision requiring that at least one party's interests be promoted and the rest of the interested parties' interests not prejudiced by the sale simply clarifies the care¹⁹⁷ to be taken when a property owner does not consent to the sale, and the addition of the new statutory language was not intended to add more complexity to the partition statute.¹⁹⁸

D. *The Amendments to the 1931 Partition Statute*

The West Virginia partition statute has been amended twice since 1931.¹⁹⁹ The first amendment to the statute was made in 1953,²⁰⁰ followed four years later by another amendment in 1957.²⁰¹ Although these amendments made substantive changes to the statute, they did not affect the language of the statute that is currently under examination, which is the language of the statute stating that when partition cannot be conveniently made, the interests of the parties entitled to partition must be promoted by a sale and none of the parties' interests may be prejudiced by a sale.²⁰² However, it is instructive to consider

¹⁹³ See *Revisers' Note* to W. VA. CODE § 37-4-3 (1931); W. VA. CODE § 37-4-3 (1931); Sperry, *supra* note 44 at ix-x.

¹⁹⁴ See *Revisers' Note* to W. VA. CODE § 37-4-3 (1931).

¹⁹⁵ *Id.*

¹⁹⁶ W. VA. CODE § 37-4-3 (1931).

¹⁹⁷ Care in the context mentioned here is the type of care that must be taken to protect a property owner's fundamental right to buy, sell, and own land. See *Syl. Pt. 2, Croston v. Male*, 49 S.E. 136 (W. Va. 1904) ("This statute is an innovation upon fundamental principles of the common law and of American jurisprudence, and cannot become a license to the courts to take from the citizen, for light or trivial causes, his freehold on payment of compensation, though full and adequate.").

¹⁹⁸ W. VA. CODE § 37-4-3 (1931).

¹⁹⁹ See 1957 W. Va. Acts 666-68; 1953 W. Va. Acts 485-86.

²⁰⁰ 1953 W. Va. Acts 485-86.

²⁰¹ 1957 W. Va. Acts 666-68.

²⁰² See W. VA. CODE § 37-4-3 (1931); 1957 W. Va. Acts 666-68; 1953 W. Va. Acts 485-86.

the individual amendments, because they allow us to understand the full scope and history of the statute as it exists today.

1. When it is Clear to the Court that Partition Cannot be Conveniently Made Then Commissioners Need Not be Appointed

The first amendment to the partition statute was passed on February 23, 1953, and was introduced in the West Virginia House of Delegates as House Bill Number 173 by Delegate H.L. Snyder, Jr., from Kanawha County.²⁰³ This bill made a very simple change to the partition statute by adding the language “[w]here it clearly appears to the court that partition cannot be conveniently made the court may order sale without appointing commissioners.”²⁰⁴ This change streamlined the process in partition actions by giving courts the freedom to order a sale without going through the painstaking process of having commissioners go upon the land and attempt to make partition in kind when it was clear all along that partition in kind was impracticable.²⁰⁵ Therefore, this amendment took a common sense approach to partition actions and allowed courts to save valuable judicial time and resources when it was obvious that partition in kind could not be made.²⁰⁶ As with the 1953 amendment, the 1957 amendment was also a common sense amendment codifying a process that would allow a value to be placed on the contested property when the interested parties could not agree on its value.²⁰⁷

2. A Procedure Codified to Fix Value When Value is Disputed

West Virginia’s partition statute was amended for a second time with a bill passed on February 28, 1957, just four short years after the statute’s initial amendment.²⁰⁸ The amendment was introduced in the West Virginia Senate as Senate Bill Number 97 by Senator Clarence E. Martin, Jr., of the Sixteenth Senatorial District.²⁰⁹ This amendment created a procedure whereby a parcel of land for which the court had decreed a sale could have a value affixed for that sale when the parties in interest could not agree on a value themselves.²¹⁰

The process called for the court to appoint three persons who had no interest in the pending sale to establish the fair market value of the contested land

²⁰³ 1953 W. Va. Acts xviii, 485.

²⁰⁴ *Id.* at 486.

²⁰⁵ *See supra* notes 55–58 and accompanying text describing the commissioner appointment and partition process prior to ordering a judicial sale.

²⁰⁶ *See* 1953 W. Va. Acts 485–86.

²⁰⁷ *See* 1957 W. Va. Acts 666–68.

²⁰⁸ *Id.* at 666.

²⁰⁹ *Id.* at xix, 666.

²¹⁰ *Id.* at 667.

and report their findings to the Clerk of the Court within thirty days of being duly appointed and sworn.²¹¹ However, if the appraisers could not agree or for some reason did not produce a report to the court within thirty days, then more appraisers could be appointed to carry out the same function.²¹²

When the report was filed, it became binding on all of the parties in interest unless they filed a timely objection to the report within thirty days of the appraisers filing their report with the Clerk of the Court.²¹³ After the filing of the objection, the court was authorized to hear evidence regarding the value of the contested property and to fix the fair market value of the property after such evidence had been heard.²¹⁴

In addition to providing a mechanism to set the fair market value of a tract of land when the value was disputed by the parties, the amendment also provided a way for title to be transferred from a party in interest to the party to whom the tract had been allotted when the party in interest “refuses, or is unable” to transfer the title.²¹⁵ This process required the court to appoint a special commissioner, who was required to “give bond,”²¹⁶ to receive the “purchase money” from the party to whom the tract of land had been allotted, execute and deliver the deed to the tract of land, and distribute the proceeds from the sale to the interested parties.²¹⁷ This amendment, in addition to the 1953 amendment, was a common sense amendment that allows the court to step in and set the fair market value for a tract of land among belligerent co-owners who have already been to court fighting over whether or not the property should be partitioned or sold.²¹⁸

Although these amendments are not the primary focus of this note, they are instructive to the overall understanding of the West Virginia partition statute, which has remained unchanged since the last amendment was made in 1957.²¹⁹ Now, we turn our attention to the interpretation that the West Virginia Supreme Court of Appeals has given the partition statute between 1931 and *Ark Land Co. v. Harper* in 2004.²²⁰

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 668.

²¹⁵ *Id.*

²¹⁶ Bond is defined as “[a] written promise to pay money or do some act if certain circumstances occur” BLACK’S, *supra* note 1, at 187.

²¹⁷ 1957 W. Va. Acts 668.

²¹⁸ See 1957 W. Va. Acts 666–68; 1953 W. Va. Acts 485–86.

²¹⁹ See W. VA. CODE § 37-4-3 (2007); W. VA. CODE § 37-4-3 (1957); 1957 W. Va. Acts 666.

²²⁰ *Ark Land Co. v. Harper*, 599 S.E.2d 754 (W. Va. 2004).

E. Interpretation of the 1931 Partition Statute

The changes to the partition statute when it was re-codified in 1931 appear to change the two-part test for partition by sale utilized prior to 1931²²¹ into a three-part test.²²² In one of the first cases to consider the new statutory language, *Starcher v. United Fuel Gas Co.*, the West Virginia Supreme Court of Appeals continued to treat the test for partition by sale as a two part test incorporating the new statutory language regarding prejudice into the second prong of the test.²²³ In reversing the trial court's sales decree, the court stated that there was a "phraseology" change to the second prong of the test.²²⁴ This change required the party seeking partition to show that its interests were being promoted by a sale while also requiring that party to establish that none of the other parties' interests were being prejudiced.²²⁵ However, as we will see in the cases that follow, some courts covered the test in two parts while others covered it in three.²²⁶

1. Using the Two-Part Test Under the New Statute

In a case that is still considered good law in West Virginia,²²⁷ the West Virginia Supreme Court of Appeals decided the case of *Hale v. Thacker* under what may be considered the wrong test²²⁸ if it were not for one statement in the

²²¹ For cases stating the two-step partition by sale test, see *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918); *Syl., Smith v. Greene*, 85 S.E. 537 (W. Va. 1915); *Croston v. Male*, 49 S.E. 136, 137 (W. Va. 1904); *Syl. Pt. 5, Stewart v. Tennant*, 44 S.E. 223, 225 (W. Va. 1903); *Syl. Pt. 7, Roberts v. Coleman*, 16 S.E. 482 (W. Va. 1892); *Casto v. Kintzel*, 27 W. Va. 750 (1886).

²²² See W. VA. CODE § 37-4-3 (1931).

²²³ *Syl. Pt. 2, Starcher v. United Fuel Gas Co.*, 168 S.E. 383 (W. Va. 1933) ("Under Code 1931, chapter 37, article 4, section 3, in order to warrant a judicial sale of land in lieu of partition in kind, it must affirmatively appear (1) that partition 'cannot be conveniently made,' and (2) that '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 interests of the other persons so entitled will not be prejudiced thereby.'").

²²⁴ *Id.* at 384.

²²⁵ *Id.*

²²⁶ See *Wilkins v. Wilkins*, 338 S.E.2d 388, 391-93 (W. Va. 1985) (per curiam) (using a three-part test), *overruled by Ark Land Co. v. Harper*, 599 S.E.2d 754, 763 (W. Va. 2004) (stating that *Wilkins* was overruled for improperly relying on *Syl. Pt. 2, Garlow v. Murphy*, 163 S.E. 436 (W. Va. 1932), which had been superseded by statute); *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712, 714-17 (W. Va. 1978) (using a three-part test); *Syl., Hale v. Thacker*, 12 S.E.2d 524, 525 (W. Va. 1940) (citing W. VA. CODE § 37-4-3 (1931)) (using a two-part test).

²²⁷ See *Ark Land Co. v. Harper*, 599 S.E.2d 754, 760 (W. Va. 2004) (citing *Hale*, 12 S.E.2d at 526, as still being good law in West Virginia in 2004).

²²⁸ *Syl., Hale*, 12 S.E.2d 524, 525 (citing W. VA. CODE § 37-4-3 (1931)) (citing *Syl. Pt. 1, Bracken v. Everett*, 121 S.E. 713 (W. Va. 1924)) ("[A] sale [of realty] can only be decreed where partition in kind cannot be conveniently made, and the interests of the co-owners will be promoted by a sale.").

opinion declaring that a person who owns a share of land that is capable of convenient partition “has the right to insist upon his common-law right to partition in kind, so long as the right is not exercised in such a way as to unduly prejudice the rights of his co-owners.”²²⁹ However, another reason this case may have survived *Ark Land Co. v. Harper*²³⁰ is that it reverses a judicially decreed sale and preserves the statutory preference for partition in kind even though, on its face, it seems to use the wrong test to reach the desired outcome.²³¹

Hale involved a tract of land consisting of 113 acres originally owned by John Thacker.²³² Mr. Thacker died and was survived by two siblings, Mertie Hale and Reuben Thacker, both of whom became the joint owners of Mr. Thacker’s 113 acres after his death.²³³ Suit was brought for partition of the property, and the commissioners, who were appointed to go upon the land and make partition, reported to the court that partition in kind was impracticable and a sale would best promote the interests of the parties.²³⁴ Pursuant to the report of the commissioners, the trial court “directed a sale of the land and a division of the proceeds thereof equally between the owners.”²³⁵ However, at the time the report was made, neither party objected to it, and the issue of the report stating insufficient grounds for a sale was not raised until the case came to the West Virginia Supreme Court of Appeals.²³⁶

In rendering its opinion, the Supreme Court set forth the newly codified 1931 statute, but after so doing, it stated that the test to be used when determining whether or not a judicial sale was proper was that “a sale can only be decreed where partition in kind cannot be conveniently made, and the interests of the co-owners will be promoted by a sale.”²³⁷ Furthermore, the court stated that the record must reflect the inability to partition the land in kind in addition to showing that the interests of the parties are being promoted by a sale.²³⁸

Delivering its decision, the court stated that when the report issued by the commissioners was measured against the above stated standard, it fell well short of containing the required information necessary to order a sale.²³⁹ The court addressed the plaintiff’s lack of a timely objection to the commissioners’ report by distinguishing the case at bar from the past precedent of the court.²⁴⁰

²²⁹ *Id.* at 526.

²³⁰ 599 S.E.2d 754.

²³¹ *Hale*, 12 S.E.2d at 526.

²³² *Id.* at 525.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* (citing *Bracken v. Everett*, 121 S.E. 713 (W. Va. 1924)).

²³⁸ *Id.* (citing *Eagle Land Co. v. Jarrell*, 119 S.E. 556, 560 (W.Va. 1923)).

²³⁹ *Id.* at 526.

²⁴⁰ *Id.*

Reiterating past precedent “that ‘where the report of a commissioner...goes unchallenged as to any fact or omission in his report, the party claiming to be affected thereby will be deemed to have acquiesced therein,’” the court stated that this should be the general rule where the issue in the case is “equality of the assignment” or a question of procedure.²⁴¹ However, when the question is whether or not the land should have been partitioned at all, the lack of a timely objection to the commissioners’ report should not be a bar to a party exercising the right to have the property partitioned in kind, which is “fundamental [in] nature.”²⁴² As such, the court reversed the ruling of the trial court and remanded the case “for further proceedings.”²⁴³

The *Hale* case is an interesting commentary on the new statute, because it outlines all of the new provisions that were codified in 1931,²⁴⁴ but it falls back to the old two-part test using the language of the pre-1931 statute.²⁴⁵ Even more interesting is that *Ark Land Co. v. Harper* went to great lengths to overrule the cases that did not take into consideration the proper factors under the 1931 statute, but it did not overrule *Hale*, which although citing and quoting the correct statute uses a test whose “phraseology” had changed and had been replaced by *Starcher v. United Fuel Gas Co.*’s Syllabus Point Two.²⁴⁶ However, as stated *supra*, *Hale* reversed a judicially decreed sale and preserved the statutory preference for partition in kind even though on its face it used the wrong test to reach the desired outcome, and this may have preserved it from being overruled.²⁴⁷

2. Prejudice is Determined by the Facts of Each Case

As the partition statute was amended and the case law surrounding it continued to develop, the partition jurisprudence of West Virginia made its way

²⁴¹ *Id.* (citing *Eagle Land Co. v. Jarrell*, 119 S.E. 556, 560 (W. Va. 1923)).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See W. VA. CODE § 37-4-3 (1931).

²⁴⁵ See W. VA. CODE 1918, ch. 79 § 3916. For cases stating the two-step partition by sale test, see *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918); Syl., *Smith v. Greene*, 85 S.E. 537 (W. Va. 1915); *Croston v. Male*, 49 S.E. 136, 137 (W. Va. 1904); Syl. Pt. 5, *Stewart v. Tennant*, 44 S.E. 223 (W. Va. 1903); Syl. Pt. 7, *Roberts v. Coleman*, 16 S.E. 482 (W. Va. 1892); *Casto v. Kintzel*, 27 W. Va. 750, 757 (1886).

²⁴⁶ See *Hale v. Thacker*, 12 S.E.2d 524, 525–26 (W. Va. 1940); *Starcher v. United Fuel Gas Co.*, 168 S.E. 383, 384 (W. Va. 1933); Syl. Pt. 2, *Starcher*, 168 S.E. 383 (“Under Code 1931, chapter 37, article 4, section 3, in order to warrant a judicial sale of land in lieu of partition in kind, it must affirmatively appear (1) that partition ‘cannot be conveniently made,’ and (2) that ‘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 interests of the other persons so entitled will not be prejudiced thereby.’”).

²⁴⁷ See *supra* notes 228–229 and accompanying text.

to the case of *Consolidated Gas Supply Corp. v. Riley*.²⁴⁸ In *Consolidated*, the court espoused the three-part test that is embedded in the West Virginia partition statute.²⁴⁹ The property at issue in this case consisted of three tracts of land.²⁵⁰ Of which, Consolidated Gas owned an “eleven-twentieths undivided interest” and leased all of the oil and gas that was underneath the whole of the property.²⁵¹ Consolidated Gas filed suit to compel partition of the land, stating “that the oil and gas property was incapable of being partitioned in kind and that the interest of all parties in said property would be promoted by sale of the same.”²⁵²

Arguing that “there [was] no genuine issue as to any material fact[s]” in the case, Consolidated Gas moved the court to enter summary judgment in its favor and order a sale of the contested property.²⁵³ The trial court agreed with Consolidated Gas and entered summary judgment in its favor and “appointed counsel of Consolidated Gas as special commissioner to conduct a public auction and offer for sale...the oil and gas property, subject to Consolidated Gas’ existing oil and gas lease.”²⁵⁴

The court began its decision by surveying the history of partition law in West Virginia citing the pre-1931 two-part test.²⁵⁵ However, the court stated that in 1931 the code was revamped, and in order “to compel partition through sale[, the party seeking partition must] 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 interest of the other parties will not be prejudiced by the sale.”²⁵⁶ Addressing the type of information needed to determine if a party’s interests were promoted or prejudiced by a sale, the court stated that it would have to determine that question based upon the particular facts of each case.²⁵⁷ However, in this case, the court decided that there were not sufficient facts that supported the court’s grant of summary judgment to Consolidated Gas and ordered the decision reversed and remanded.²⁵⁸

In a strongly worded dissent, Justice Neely railed against the majority, stating that by remanding the decision to the trial court, it subjected the appel-

²⁴⁸ 247 S.E.2d 712 (W. Va. 1978).

²⁴⁹ *Id.* at 715.

²⁵⁰ *Id.* at 713.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 714–15.

²⁵⁶ *Id.* at 715 (citing *Morrison v. Holcomb*, 14 S.E.2d 262, 265 (W. Va. 1941); *Starcher v. United Fuel Gas Co.*, 168 S.E. 383, 384 (W. Va. 1933)).

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 717. Additionally, the court stated that a “principle goal[] of partition is to promote the alienability of property which has come into divided ownership...[and] permits those co-owners who wish to obtain present realization of the value of their interest to do so.” *Id.*

lant to a “sentence [of] slow death by due process[.]”²⁵⁹ Justice Neely stated that “it [was] inconceivable that anyone could not perceive that a partition by sale would prejudice the appellants’ interest....”²⁶⁰ He argued that the reason the appellant would be perpetually prejudiced by any judicial sale was because Consolidated Gas not only owned an eleven-twentieths interest of the property with a lease for the oil and gas, but the lease also gave it the exclusive right of removal of all the oil and gas.²⁶¹ Based on these facts, Justice Neely stated that it was likely that Consolidated Gas “[would] be the only bidder at the sale and thus have the power to be judge in its own cause by setting the fair market value which, as a result, can be guaranteed to be very low.”²⁶² So, even when the case was remanded and the facts of the case were developed, the appellant would be eternally injured by any decree of sale. Therefore, Justice Neely, in his view, would have reversed the decision of summary judgment in favor of Consolidated Gas and entered summary judgment in favor of the appellant.²⁶³

Justice Neely’s dissent is important, because it raises the issue of what type of prejudice may be enough to render a judicial sale prejudicial to an interested party.²⁶⁴ Although the majority did not agree that there was enough evidence to enter summary judgment for the appellant, it did state that prejudice and promotion must be determined based upon the facts of each case, and the fact that the appellant may not be able to protect his financial interest in the property at a judicial sale seems to be a fact that the trial court should consider when determining the issue of prejudice.²⁶⁵ Although Justice Neely disagreed with the majority’s opinion, the opinion did yield an important piece of the partition puzzle: prejudice and promotion must be determined on a case-by-case basis.²⁶⁶

Although the West Virginia partition statute underwent substantial changes in the statute’s 1931 revision and subsequent amendments, the approach taken in partition cases remained much the same both before and after 1931. As stated in *Loudin v. Cunningham*, “value as well as quantity must be considered.”²⁶⁷ This remained true throughout the evolution of West Virginia’s partition law, and the value of the land, although considered as a factor in partition actions, has not been considered as the only test to determine whether or not

²⁵⁹ *Id.* at 719 (Neely, J., dissenting).

²⁶⁰ *Id.* at 718 (Neely, J., dissenting).

²⁶¹ *Id.* (Neely, J., dissenting).

²⁶² *Id.* (Neely, J., dissenting).

²⁶³ *Id.* at 719 (Neely, J., dissenting).

²⁶⁴ *Id.* at 718–19. *See* W. VA. CODE § 37-4-3 (2008).

²⁶⁵ *See Consol.*, 247 S.E.2d at 715; *see also Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918) (“In making partition of land, value as well as quantity must be considered.”).

²⁶⁶ *Consol.*, 247 S.E.2d at 715.

²⁶⁷ 96 S.E. at 60.

partition can be conveniently made.²⁶⁸ However, as West Virginia's partition law continued to develop, the West Virginia Supreme Court of Appeals took a slightly different stance on the issue of monetary considerations. As to monetary considerations, the court has stated that they are not "the exclusive test" in determining whether or not a judicial sale will be ordered, and at the same time, the court overruled a case that provided a workable test to determine if there was a legitimate monetary factor to be considered.²⁶⁹

IV. FLUX OR THE CURRENT STATE OF PARTITION LAW IN WEST VIRGINIA

In the last four years, the West Virginia Supreme Court of Appeals has decided two cases that seem to be somewhat similar on their facts but were decided completely differently.²⁷⁰ In both cases, the appellants were long-time owners of their respective parcels of land with strong sentimental and emotional ties to the property.²⁷¹ In both cases, there was a co-owner who was seeking partition by sale for monetary reasons.²⁷² However, instead of solidifying partition law in West Virginia, the Supreme Court threw the current state of partition law into flux, of which, the author will now attempt to make some sense.

A. *Longstanding Ownership and Sentimental Value are Valid Considerations*

Partition law in West Virginia took on a new twist with the West Virginia Supreme Court of Appeals's decision in *Ark Land Co. v. Harper*.²⁷³ Until that point, a party seeking partition could, with some validity, claim that economic or monetary concerns were of considerable value in the determination of whether or not the contested land should be partitioned by sale.²⁷⁴ Although this

²⁶⁸ See *Wilkins v. Wilkins*, 338 S.E.2d 388, 392 (W. Va. 1985) (per curiam) ("Prejudice is not measured solely in monetary terms."), *overruled by Ark Land Co. v. Harper*, 599 S.E.2d 754, 763 (W. Va. 2004) (stating that *Wilkins* was overruled for improperly relying on Syl. Pt. 2, *Garlow v. Murphy*, 163 S.E. 436 (W. Va. 1932), which had been superseded by statute); *Hale v. Thacker*, 12 S.E.2d 524, 526 (W. Va. 1940) (stating that there are "many considerations, other than monetary" to consider in partition actions).

²⁶⁹ *Ark Land Co. v. Harper*, 599 S.E.2d 754, 760, 763 (W. Va. 2004), *overruling Garlow v. Murphy*, 163 S.E. 436 (W. Va. 1932).

²⁷⁰ See *Morton v. Van Camp*, 654 S.E.2d 621 (W. Va. 2007) (per curiam); *Ark Land Co. v. Harper*, 599 S.E.2d 754 (W. Va. 2004).

²⁷¹ *Morton*, 654 S.E.2d at 622; *Ark Land Co.*, 599 S.E.2d at 757.

²⁷² *Morton*, 654 S.E.2d at 622; *Ark Land Co.*, 599 S.E.2d at 758.

²⁷³ 599 S.E.2d 754.

²⁷⁴ See Syl. Pt. 2, *Garlow*, 163 S.E. 436 ("An ordinary test of convenience in partition, under the statute, 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."), *superseded by statute*, W. VA. CODE § 37-4-3 (1931), *as recognized in Ark Land Co.*, 599 S.E.2d at 763; *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918) ("In making partition of land, value as well as quantity must be considered.").

factor was never considered dispositive, it was nonetheless an important consideration.²⁷⁵ Due to the wording of the *Ark* opinion and its choice of authority to support its position, the decision casts doubt on whether or not the economic value of property still plays a significant roll in partition actions.²⁷⁶

The contested land in *Ark* consisted of roughly 75 acres located in Lincoln County, West Virginia.²⁷⁷ The property, which had been in the Caudill family for almost one hundred years, was a typical small farm complete with a farmhouse, barns, and a garden.²⁷⁸ Up until 2001, the property had been entirely owned by the Caudills, but in 2001, a group of Caudill family members split from the family and sold their interests, totaling 67.5%, to the Ark Land Company.²⁷⁹ Ark Land, seeing an opportunity to possibly acquire the entire 75 acres tract to surface mine for coal, attempted to purchase the rest of the Caudill family's interests in the land, but their advances were refused.²⁸⁰

After having its offer rebuffed, Ark Land filed suit "to have the land partitioned and sold," and the court, complying with precedent, appointed commissioners to go upon the land and attempt to make partition in kind and report back to the court.²⁸¹ The commissioners reported that the land was not conducive to partition in kind.²⁸² The Caudills filed a timely objection to the commissioners' report, and the court held a hearing on the matter.²⁸³ At the hearing, the Caudills put on the testimony of their own expert Gary F. Acord, a mining engineer, who stated that the "lands surrounding the family home did not have coal deposits and could therefore be partitioned [in kind] from the remaining lands."²⁸⁴ After hearing this evidence, the trial court adopted the position of the appointed commissioners and "entered an order directing the partition and sale of the property."²⁸⁵

In considering the Caudills' appeal, the West Virginia Supreme Court of Appeals recognized that the common law right to partition in kind had been

²⁷⁵ See *Wilkins v. Wilkins*, 338 S.E.2d 388, 392 (W. Va. 1985) (per curiam) ("Prejudice is not measured solely in monetary terms."), overruled by *Ark Land Co.*, 599 S.E. at 763 (stating that *Wilkins* was overruled for improperly relying on Syl. Pt. 2, *Garlow*, 163 S.E. 436, which had been superseded by statute); *Hale v. Thacker*, 12 S.E.2d 524, 526 (W. Va. 1940) (stating that there are "many considerations, other than monetary" to consider in partition actions).

²⁷⁶ 599 S.E.2d at 760-61.

²⁷⁷ *Id.* at 757.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.* at 758.

²⁸⁵ *Id.* at 757.

“expanded” statutorily to “include partition by sale.”²⁸⁶ Furthermore, the court stated that even though partition by sale is statutorily permitted, “[p]artition in kind . . . is the preferred method of partition”²⁸⁷ The court then set forth the test that it would use to determine if the judicial sale ordered by the trial court was proper:

[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 interest of the other parties will not be prejudiced by the sale.²⁸⁸

In applying the partition by sale test, the court stated that it was “troubled” that the trial court concluded that a “partition by sale was necessary because the economic value of the property would be less if partitioned in kind.”²⁸⁹ The court stated that it was a long held principle in West Virginia that the economic value of the property was a factor to be considered when deciding whether or not to partition in kind.²⁹⁰ However, the court went on to hold that the economic value of the land was not a dispositive factor in the determination of whether or not the land was susceptible to be partitioned in kind, and it cited several cases from other jurisdictions in support of this position, some of which seem to foreshadow a move by the court to minimize the value of the land as a factor in partition actions.²⁹¹

²⁸⁶ *Id.* at 758–59 (citing Syl. Pt. 2, *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712 (W. Va. 1978) (“The common law right to compel partition has been expanded by statutes to include partition by sale.”); Syl. Pt. 1, *Croston v. Male*, 49 S.E. 136 (W. Va. 1904) (“But for the statute authorizing it, a sale of real estate could not be decreed in a suit for partition thereof.”)).

²⁸⁷ *Id.* at 759 (citing 7–50 POWELL ON REAL PROPERTY § 50.07(4)(a) (2004)).

²⁸⁸ *Id.* (citing Syl. Pt. 3, *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712 (W. Va. 1978)). Although the court cites *Consol.* for this premise, it is the same test that has been used in virtually every partition case since the 1931 statute was enacted. See Syl. Pt. 2, *Starcher v. United Fuel Gas Co.*, 168 S.E. 383 (W. Va. 1933) (“Under Code 1931, chapter 37, article 4, section 3, in order to warrant a judicial sale of land in lieu of partition in kind, it must affirmatively appear (1) that partition ‘cannot be conveniently made,’ and (2) that ‘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 interests of the other persons so entitled will not be prejudiced thereby.’”).

²⁸⁹ *Ark Land Co.*, 599 S.E.2d at 760.

²⁹⁰ *Id.* (citing Syl. Pt. 6, *Croston v. Male*, 49 S.E. 136 (W. Va. 1904) (“Whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among, and held in severalty by, the different parties, be materially less than the value of the same property if owned by one person, is a fair test by which to determine whether the interests of the parties will be promoted by a sale.”)).

²⁹¹ *Id.* at 761 (stating that “[m]onetary considerations, while admittedly significant, do not rise to the level of excluding all other appropriate considerations.” (quoting *Eli v. Eli*, 557 N.W.2d 405, 409 (S.D. 1997))); *Leake v. Casati*, 363 S.E.2d 924, 927 (Va. 1988) (“Even evidence that the property would be less valuable if divided was held ‘insufficient to deprive a co-owner of his

After stating its holding, the court provided that:

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.²⁹²

Applying this, the court found that the Caudills or their kin had owned the land for almost one hundred years, and Ark Land, which had only recently purchased its interest, now wanted to partition the land by sale, because mining the coal out of the property would make it more valuable than partitioning it in kind.²⁹³ The court called Ark Land's attempt to partition the land "self-serving" even though the court stated that it was sympathetic to the fact that Ark Land would have to dole out huge amounts of money to mine the coal due to a partition in kind.²⁹⁴ However, the court equated Ark Land's current predicament to taking a calculated risk and having it backfire by stating that Ark Land's additional business costs in no way outweighed the emotional significance of the land to the Caudill heirs.²⁹⁵ Furthermore, the court went on to overrule the *Garlow* Court's

"sacred right" to property." (quoting *Sensabaugh v. Sensabaugh*, 349 S.E.2d 141, 146 (Va. 1986)); *Delfino v. Vealencis*, 436 A.2d 27, 32-33 (Conn. 1980) ("It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants." (citations omitted)).

²⁹² *Ark Land Co.*, 599 S.E.2d at 761. The court's consideration of sentimental and emotional interests in this case is somewhat puzzling, because in two cases involving recovery of damages for personal property (death of a dog), the court held that sentimental and emotional values were not interests that could be recovered. *Syl. Pt. 3, Carbasho v. Musulin*, 618 S.E.2d 368 (W. Va. 2005) ("In order to recover damages for loss of a dog the market value, pecuniary value or some special value must be proved and the general rule is that damages for sentimental value or mental suffering are not recoverable." (quoting *Syl., Julian v. DeVincent*, 184 S.E.2d 535, 535 (W. Va. 1971))); *Syl. Pt. 5, Carbasho*, 618 S.E.2d at 369 ("Dogs are personal property and damages for sentimental value, mental suffering, and emotional distress are not recoverable for the negligently inflicted death of a dog."). Although the *Ark* case deals with the partition of real property and the *Carbasho* and *DeVincent* cases deal with the loss of real property, it is peculiar how sentimental and emotional values are treated in these cases. It seems to this author that based upon the precedent set in the *DeVincent* case, decided twenty-three years prior to *Ark*, the court would find that sentimental and emotional values are not interests that may be considered when determining whether to partition land in kind or by sale.

²⁹³ *Ark Land Co.*, 599 S.E.2d at 762.

²⁹⁴ *Id.*

²⁹⁵ *Id.* (citing *Syl. Pt. 4, Croston v. Male*, 49 S.E. 136 (W. Va. 1904) ("Inconvenience of partition, as one of the circumstances authorizing such 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 a 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

“ordinary test of convenience”²⁹⁶ as being superseded by the 1931 revisions to the partition statute.²⁹⁷

In its conclusion, the court stated that the trial court had erred in determining that the property could not be partitioned in kind, and it ordered the decision of the trial court to be reversed and remanded to have a partition in kind order entered in favor of the Caudills consistent with the testimony of their expert Gary F. Acord.²⁹⁸

Concurring in part with the majority’s opinion, Chief Justice Maynard stated he agreed with the “new law” that the majority had created allowing “sentimental or emotional attachment” to be considered in partition actions.²⁹⁹ However, he dissented because the property owned by the Caudill heirs was only used sporadically, and “the sporadic use of the property by the appellants in [the] case [did] not outweigh the economic inconvenience that the appellee [would] suffer as a result of [the] property being partitioned in kind.”³⁰⁰ Chief Justice Maynard stated that he believed that “coal mining is an . . . important economic activity,” and the court, by ordering that the land be partitioned in kind, had destroyed the land’s value for coal extraction and in the process may have put “many innocent coal miners . . . out of work.”³⁰¹

As discussed *supra*, the court’s decision in *Ark*, from its tone and the cases it cites in support of its opinion, seems to have minimized monetary value of the land as a consideration in partition cases not only when sentimental or emotional attachment is involved, but also when there are other strong considerations that could tip the balance away from a sale.³⁰² This type of standard seems to be no standard at all, because the way the court has worded it, any party that can demonstrate a sentimental or emotional attachment to the land automatically trumps a party that has an economic interest in the land no matter the significance of the economic interest. However, as quickly as this standard was introduced, the court turned the opposite direction while sparsely citing and

among a number of people, and the existence of dower and curtesy estates in the land, do not per se make partition inconvenient, within the meaning of the statute.”)).

²⁹⁶ See *supra* Part III.A.4.

²⁹⁷ See Syl. Pt. 2, *Garlow v. Murphy*, 163 S.E. 436 (W. Va. 1932), *superseded by statute*, W. VA. CODE § 37-4-3 (1931), *as recognized in Ark Land Co.*, 599 S.E.2d at 763.

²⁹⁸ *Id.* at 763–64.

²⁹⁹ *Id.* at 764 (Maynard, C.J., concurring in part and dissenting in part).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.* at 761 (stating that “[m]onetary considerations, while admittedly significant, do not rise to the level of excluding all other appropriate considerations.” (quoting *Eli v. Eli*, 557 N.W.2d 405, 409 (S.D. 1997))); *Leake v. Casati*, 363 S.E.2d 924, 927 (Va. 1988) (“Even evidence that the property would be less valuable if divided was held ‘insufficient to deprive a co-owner of his ‘sacred right’ to property.” (quoting *Sensabaugh v. Sensabaugh*, 349 S.E.2d 141, 146 (Va. 1986))); *Delfino v. Vealencis*, 436 A.2d 27, 32–33 (Conn. 1980) (“It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants.” (citations omitted)).

not overruling any of its partition jurisprudence to affirm a sale of land on which a mother and daughter had maintained a home for a significant amount of time, and in so doing, threw the current condition of partition law in West Virginia into a state of flux.³⁰³

B. *A Confusing Decision*

A group of family members who do not live on the property and only visit it sporadically are allowed to keep their old homestead due to sentimental value while a mother and daughter who live on their land and want to stay there are forced out of their home by a judicial sale.³⁰⁴ When the court set forth the new factors of sentimental and emotional attachment to the land in *Ark*, one would have thought that the latter situation would definitely have been a candidate to fall under the new factors, but evidently, there are some forms of sentimental and emotional attachment that do not trump economic value, even though *Ark* tended to indicate otherwise.³⁰⁵

The property at issue in *Morton v. Van Camp*, consisted of “25.5 acres of undeveloped land in Cross Lanes, [Kanawha County,] West Virginia.”³⁰⁶ Bill E. Morton and Jess R. Morton, the appellees, “own[ed] an undivided six-sevenths interest” in the land while Linda Kessler Archer, the appellant, “own[ed] a one-seventh undivided interest” in the land.³⁰⁷ Ms. Archer and her daughter lived on the property in a mobile home and desired to continue to make their home in that location.³⁰⁸ The Mortons sought to develop the land and claimed that the only feasible location for an entryway into the property was directly through the portion where Ms. Archer and her daughter lived in their mobile home.³⁰⁹ According to the Mortons, the non-viability of an entrance in any other location made “it nearly impossible for development of the residue of the land.”³¹⁰

Ms. Archer had lived on the land for most of her life, growing up and living in the family home there until it burned and then moving into a mobile home in the same location.³¹¹ Although Ms. Archer lived in Florida for many

³⁰³ See *Morton v. Van Camp*, 654 S.E.2d 621 (W. Va. 2007) (per curiam). Per Curiam opinions in West Virginia are of limited precedential value; however, in *Walker v. Doe*, 558 S.E.2d 290, 293–96 (W.Va. 2001), the West Virginia Supreme Court of Appeals set forth the circumstances in which per curiam opinions may be cited for their precedential value.

³⁰⁴ Compare *Morton*, 654 S.E.2d 621, with *Ark Land Co. v. Harper*, 599 S.E.2d 754 (W. Va. 2004).

³⁰⁵ See *supra* Part IV.A.

³⁰⁶ 654 S.E.2d at 622.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

years, she spent about seven continuous years prior to the beginning of the “litigation” living on the contested property.³¹² During those seven years, Ms. Archer stated that she sold some of the land’s timber and kept the proceeds of the sale without sharing them with the Mortons.³¹³

Taking up the case, the trial court entered an order to sell the contested property and divide the proceeds among the parties, because

if Ms. Archer, who has only a 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.³¹⁴

After entry of the order, Ms. Archer filed a timely appeal claiming that the interests of the Mortons would not be prejudiced by an in-kind partition, because they would still own a sixth-sevenths interest from which development could be made.³¹⁵ In support of her appeal, Ms. Archer cited the new holding of *Ark Land Co. v. Harper*,³¹⁶ which made sentimental and emotional attachment to the land of paramount importance over economic factors.³¹⁷

The Mortons argued that the West Virginia partition statute required that only one of the parties entitled to partition had to have their interests promoted by a sale while the rest of the parties so entitled to partition could not be prejudiced by the sale.³¹⁸ Furthermore, the Mortons cited Syllabus Point 3 of *Consol. Gas Supply Corp. v. Riley*, setting forth the three part test for partition by sale under chapter 37, article 4, section 3, of the West Virginia Code.³¹⁹ Under this test, the Mortons argued that the property could not be conveniently partitioned, and although Ms. Archer would be able to derive a benefit, albeit the only benefit, from the land, a partition in kind would greatly prejudice the Mortons by “substantially diminish[ing] the value of the residue” of the property

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 623.

³¹⁶ 599 S.E.2d 754 (W. Va. 2004).

³¹⁷ *Morton*, 654 S.E.2d at 623.

³¹⁸ *Id.* at 624 (citing W. VA. CODE § 37-4-3 (2007)).

³¹⁹ *Id.* (“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.” (quoting Syl Pt. 3, *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712, 713 (1978))).

and creating “considerable expense to be incurred . . . to make the residue suitable for residential purposes.”³²⁰

Taking these arguments into consideration, the West Virginia Supreme Court of Appeals stated that the land on which Ms. Archer lived was agreed to be the most valuable area of the contested property by all of the experts involved in the case even though these same experts failed to agree on the fair market value of the property.³²¹ The court stated that allowing the land to be partitioned in kind would result in Ms. Archer being the only party being able to benefit from the land while the Mortons would receive land that was “much less valuable” and would have “to expend substantial sums of money to place the remaining acreage in a position whereby it could be developed for residential purposes.”³²² Furthermore, as the court expressed sensitivity to the situation of Ark Land in Ark,³²³ the court also expressed its understanding toward the situation of Ms. Archer but stated that “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.”³²⁴ Based upon these facts, the court stated that partition of the land in kind was not convenient, the interests of one or more “of the property owners [would] be promoted by a sale . . . and the interests of [Ms. Archer would] not be prejudiced” because “she will receive one-seventh of the proceeds from [the] sale.”³²⁵ Therefore, the court affirmed the sale of the contested property.³²⁶

Dissenting from the majority, Justice Albright stated that a close reading of the record in this case “reflects that no commissioners were appointed to make the primary determination of whether the jointly owned property could be conveniently partitioned in kind,” thus making the order for a sale “premature.”³²⁷ Furthermore, Justice Albright stated that the failure of the trial court to

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.* at 625. As evidence of Ms. Archer’s being the only party able to benefit from the land, the court points out that she sold the timber taken from the land without giving over any of the proceeds to the Mortons. *Id.* The court seems to be trying to undo that inequity by affirming the sale; however, in so doing, the Mortons may receive an equitable compensation for the sale of the timber in the sale, but when the land is developed for residential purposes with the Mortons as the sole owners of the property, they will receive a potentially greater benefit from the land than Ms. Archer received from the sale of the timber. Additionally, while the Mortons are reaping the benefits of the real estate development business, Ms. Archer was effectively evicted from the land of her childhood and the home she had made on it for at least seven consecutive years prior to the onset of litigation.

³²³ See *supra* note 294 and accompanying text.

³²⁴ *Morton*, 654 S.E.2d at 625. See also *Ark Land Co. v. Harper*, 599 S.E.2d 754, 762 (W. Va. 2004) (stating the court’s sensitivity for *Ark Land Co.* having to “incur greater costs in conducting its business”).

³²⁵ *Morton*, 654 S.E.2d at 625.

³²⁶ *Id.*

³²⁷ *Id.* at 626 (Albright, J., dissenting).

obtain “a report addressing the primary question of whether partition in kind could be conveniently made” was “a blatant abuse of discretion which merit[ed] the reversal of the decree below.”³²⁸ From Justice Albright’s dissent, which was joined by Justice Starcher, it appears that the majority not only split from its previous decision in *Ark*,³²⁹ but it also allowed the trial court to ignore a procedure that had been in place for over a hundred years to help determine whether or not the land could be conveniently partitioned in kind.³³⁰

From the outcome of *Morton*, and *Ark* before it,³³¹ what is the current state of partition law in West Virginia? It is hard to say at this point, because the two decisions seem to state the same standards but apply them in diametrically opposed ways to similar sets of facts.³³² Thus, partition law in West Virginia has been thrown into a state of flux, and it is the contention of this Note that we should take a look from whence the statute and its accompanying case law originated to determine the direction it should proceed in the future.³³³

V. REACHING BACKWARD TO GO FORWARD

From the origin of West Virginia’s partition law, it has always been important that the fundamental right to buy, sell, and own property is not abrogated by a court of law unless there is a substantial reason therefore.³³⁴ On this principle, the West Virginia Legislature, in the 1860s, adopted from Virginia and re-codified in 1931 a statute designed to not only ensure the alienability of land but also to make sure that the rights of the owners to that land were adequately protected in a partition action.³³⁵

When the Revision and Codification Commission sought to re-codify the partition statute in 1931, it did so with a caveat stated in a revisers’ note stating that it was modifying the old statute “to make it clear that consent of all interested parties is not necessary to a sale in partition proceedings.”³³⁶ This revisers’ note, the language of the statute, and the Revision and Codification Commission’s attempt to bring order out of the chaos that was the compilation of statutory law in West Virginia prior to 1931 demonstrates that the revisers did

³²⁸ *Id.* at 627 (Albright, J., dissenting).

³²⁹ 599 S.E.2d 754.

³³⁰ *Morton*, 654 S.E.2d at 625 (Albright, J., dissenting).

³³¹ Compare *Morton*, 654 S.E.2d at 625, with *Ark Land Co. v. Harper*, 599 S.E.2d 754, 763–64 (W. Va. 2004).

³³² Compare *Morton*, 654 S.E.2d at 622–23, with *Ark Land Co.*, 599 S.E.2d at 757.

³³³ See *supra* Part III.

³³⁴ See Syl. Pt. 2, *Croston v. Male*, 49 S.E. 136 (1904) (“This statute is an innovation upon fundamental principles of the common law and of American jurisprudence, and cannot become a license to the courts to take from the citizen, for light or trivial causes, his freehold on payment of compensation, though full and adequate.”).

³³⁵ See W. VA. CODE § 37-4-3 (1931); Sperry, *supra* note 44, at viii.

³³⁶ *Revisers’ Note* to W. VA. CODE § 37-4-3 (1931).

not intend to complicate the existing two-part test, which stated that (1) the land must not be able to be conveniently partitioned in kind and (2) the interests of the parties entitled to partition must be promoted by a sale.³³⁷ Rather, the revisers were merely attempting to bring order to the question of what constituted the promotion of the interests of the parties, i.e., did the interested parties need to consent to a sale for their interests to be promoted.³³⁸

To clarify this issue, the revisers stated that consent was not necessary.³³⁹ This interpretation finds additional support in the statute's text where it is stated that the interests of at least one party to a sale must be promoted while the rest of the parties' interests not be prejudiced.³⁴⁰ If consent was required, then the statute would have so stated. Yet, the provision requiring that at least one party's interests be promoted and the rest of the interested parties' interests not be prejudiced by the sale simply clarifies the care³⁴¹ to be taken when a property owner does not consent to the sale, and the addition of the new statutory language was not intended to add more complexity to the partition statute.³⁴²

From the revised 1931 statute, comes the three-part partition by sale test that has served West Virginia for over seventy years and was set forth in Syllabus Point 3 of *Consol. Gas Supply Corp. v. Riley*.³⁴³ This test stated that a co-owner who sought to have the land, in which his co-interest was located, partitioned by a sale must show "[1] that the property cannot be conveniently partitioned in kind, [2] that the interests of one or more of the parties will be pro-

³³⁷ See *id.*; Sperry, *supra* note 44, at ix-x. For cases stating the two-part partition test, see *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918); *Syl.*, *Smith v. Greene*, 85 S.E. 537 (W. Va. 1915); *Croston*, 49 S.E. at 137; *Syl. Pt. 5*, *Stewart v. Tennant*, 44 S.E. 223 (W. Va. 1903); *Syl. Pt. 7*, *Roberts v. Coleman*, 16 S.E. 482 (W. Va. 1892); *Casto v. Kintzel*, 27 W. Va. 750 (1886).

³³⁸ See *Revisers' Note* to W. VA. CODE § 37-4-3 (1931).

³³⁹ *Id.*

³⁴⁰ W. VA. CODE § 37-4-3 (1931).

³⁴¹ Care in the context mentioned here is the type of care that must be taken to protect a property owner's fundamental right to buy, sell, and own land. See *Syl. Pt. 2*, *Croston v. Male*, 49 S.E. 136 (W. Va. 1904) ("This statute is an innovation upon fundamental principles of the common law and of American jurisprudence, and cannot become a license to the courts to take from the citizen, for light or trivial causes, his freehold on payment of compensation, though full and adequate.").

³⁴² W. VA. CODE § 37-4-3 (1931).

³⁴³ 247 S.E.2d 712 (W. Va. 1978) ("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."). See also *Syl. Pt. 2*, *Starcher v. United Fuel Gas Co.*, 168 S.E. 383 (W. Va. 1933) ("Under Code 1931, chapter 37, article 4, section 3, in order to warrant a judicial sale of land in lieu of partition in kind, it must affirmatively appear (1) that partition 'cannot be conveniently made,' and (2) that '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 interests of the other persons so entitled will not be prejudiced thereby.'").

moted by the sale, and [3] that the interests of the other parties will not be prejudiced by the sale.”³⁴⁴ The West Virginia Supreme Court of Appeals’s interpretation of this test led to the creation of a tapestry of factors that continued to be created up until the court’s decision in *Ark Land Co. v. Harper*,³⁴⁵ when the tapestry began to be pulled apart. It is the contention of this Note that all of the factors, both before and after *Ark*, that are used to determine whether to partition land in kind or by sale have a place in the partition jurisprudence of West Virginia, and none of these factors should singly be dispositive; rather, all of the factors should be considered together in the aggregate when deciding whether or not to partition land in kind or by sale.

Of particular concern is the court’s recent treatment of the economic value of the land as a factor in determining whether or not to partition land in kind. The court, in *Ark*, seemed to minimize monetary factors as considerations in partition actions.³⁴⁶ However, in light of the court’s decision in *Morton v. Van Camp*,³⁴⁷ it appears that monetary factors are not minimal considerations, although the court has yet to render a standardizing decision that would solidify the factors, both monetary and non-monetary, that may be used when determining if land should be partitioned in kind or by sale. In the paragraphs that follow, we will explore what factors partition jurisprudence in West Virginia, both past and present, has used in partition cases in an attempt to create a rubric that may be used in the future.

The economic value of land is a flexible factor that can be used in all three elements³⁴⁸ of the three-part partition test to determine whether or not partition by sale should be ordered, and according to *Loudin v. Cunningham*, “[i]n making partition of land, value as well as quantity must be considered.”³⁴⁹

³⁴⁴ See *supra* note 336 and accompanying text.

³⁴⁵ 599 S.E.2d 754 (W. Va. 2004).

³⁴⁶ *Id.* at 761 (stating that “[m]onetary considerations, while admittedly significant, do not rise to the level of excluding all other appropriate considerations.” (quoting *Eli v. Eli*, 557 N.W.2d 405, 409 (S.D. 1997))); *Leake v. Casati*, 363 S.E.2d 924, 927 (Va. 1988) (“Even evidence that the property would be less valuable if divided was held ‘insufficient to deprive a co-owner of his “sacred right” to property.’” (quoting *Sensabaugh v. Sensabaugh*, 349 S.E.2d 141, 146 (Va. 1986))); *Delfino v. Vealencis*, 436 A.2d 27, 32–33 (Conn. 1980) (“It is the interests of all of the tenants in common that the court must consider; and not merely the economic gain of one tenant, or a group of tenants.” (citations omitted)).

³⁴⁷ 654 S.E.2d 621 (W. Va. 2007) (per curiam) (where the court allowed the monetary prejudice to the plaintiffs if the land was partitioned in kind to play a substantial role in its decision).

³⁴⁸ *Syl. Pt. 3, Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712 (W. Va. 1978) (“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.”).

³⁴⁹ 96 S.E. 59, 60 (W. Va. 1918). *Loudin* is still good law, so unless *Ark Land Co.* overruled *Loudin*, the value of the land is a factor that *must* be considered in partition actions.

As to the first element, convenience of partition, monetary value was used in *Garlow v. Murphy* to help set forth “[a]n ordinary test of convenience” for partition actions that was subsequently overruled in 2004 by *Ark*.³⁵⁰ *Garlow* stated in Syllabus Point 2 that “[a]n ordinary test of convenience in partition, is, Will any interest assigned be *materially less in value* than the interest undivided[.]”³⁵¹ As evidenced from an earlier quotation of this same syllabus point, part of *Garlow*’s Syllabus Point has been dropped.³⁵² The part of the syllabus point that was dropped stated that if the interest assigned to a party was “materially less in value than the interest undivided,” then the interest should be sold, and if the opposite was true, then partition in kind could be had.³⁵³ This particular language in *Garlow*’s Syllabus Point 2 was the language that the court took issue with in *Ark*, because the case “was decided under a version of [the partition statute] that had no requirement that a sale must not prejudice the interests of a co-owner.”³⁵⁴

However, when *Garlow*’s syllabus point is amended so that it does not include the language about compelling a sale if certain monetary factors are met, the syllabus point closely approximates Syllabus Point 6 of *Croston v. Male*, which is still good law and states:

Whether the aggregate value of the several parcels into which the whole premises must be divided will, when distributed among, and held in severalty by, the different parties, be *materially less than the value* of the same property if owned by one person, is a fair test by which to determine whether the interests of the parties will be promoted by a sale.³⁵⁵

So, it seems that the only offending part of the *Garlow* syllabus point is the language that would compel a sale if certain monetary factors are met;³⁵⁶ therefore, that part of the syllabus point should be overruled, leaving in tact the “ordinary test of convenience,” because to overrule “the ordinary test of convenience”

³⁵⁰ See Syl. Pt. 2, *Garlow v. Murphy*, 163 S.E. 436 (W. Va. 1932) (“An ordinary test of convenience in partition, under the statute, 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.”), *superseceded by statute*, W. VA. CODE § 37-4-3 (1931), *as recognized in Ark Land Co.*, 599 S.E.2d at 763.

³⁵¹ Syl. Pt. 2, *Garlow*, 163 S.E. 436 (emphasis added).

³⁵² *Id.* (“An ordinary test of convenience in partition, under the statute, 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.”).

³⁵³ *Id.*

³⁵⁴ *Ark Land Co.*, 599 S.E.2d at 763.

³⁵⁵ Syl. Pt. 6, *Croston v. Male*, 49 S.E. 136 (W. Va. 1904) (emphasis added).

³⁵⁶ Syl. Pt. 2, *Garlow*, 163 S.E. 436 (“An ordinary test of convenience in partition, under the statute, 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.*” (emphasis added)).

would be, in effect, to overrule Syllabus Point 6 of *Croston* as well.³⁵⁷ The offending parts of *Garlow's* Syllabus Point 2 should be stricken because they are not dispositive factors in determining whether or not a sale should be ordered.³⁵⁸

However, under the test for convenient partition, monetary value of the land is not the sole factor that should be considered;³⁵⁹ rather other factors, such as the quantity of the land³⁶⁰ or “the number of shares into which [the land is] to be divided”³⁶¹ should also be considered. However, as *Croston* points out, whether or not a division of the land is convenient does not always depend on the “physical impossibility of division;” rather, this “requirement is not satisfied by anything short of a real and substantial obstacle of some kind to a division in kind, such as would make it injurious to the owners.”³⁶² Therefore, monetary value should have a value equal to any other factors the court considers in determining the convenience of partition.

Syllabus Point 4 of *Croston* leads into the second and third elements of the partition statute where one or more of the concerned parties' interests must be promoted by a sale and none of the other concerned parties' interests may be prejudiced by the sale.³⁶³ As stated above, monetary considerations and the value of the land when sold versus the value of the land when partitioned in kind are not dispositive of whether or not a party's interest is promoted or prejudiced.³⁶⁴ Rather, it is just one of many considerations that may be taken into consideration, such as “the status of the parties with reference to disability and ability to protect their interests at the sale”³⁶⁵ or “[e]vidence of longstanding

³⁵⁷ Syl. Pt. 2, *Garlow*, 163 S.E. 436; Syl. Pt. 6, *Croston*, 49 S.E. 136.

³⁵⁸ See *Ark Land Co.*, 599 S.E.2d at 761 (holding that “the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale”); *Wilkins v. Wilkins*, 338 S.E.2d 388, 392 (W. Va. 1985) (per curiam) (“Prejudice is not measured solely in monetary terms.”), overruled by *Ark Land Co.*, 599 S.E.2d at 763 (stating that *Wilkins* was overruled for improperly relying on Syl. Pt. 2, *Garlow*, 163 S.E. 436, which had been superseded by statute); *Hale v. Thacker*, 12 S.E.2d 524, 526 (W. Va. 1940) (stating that there are “many considerations, other than monetary” to consider in partition actions).

³⁵⁹ See *supra* note 351.

³⁶⁰ *Loudin v. Cunningham*, 96 S.E. 59, 60 (W. Va. 1918) (“In making partition of land, value as well as quantity must be considered.”).

³⁶¹ *Croston v. Male*, 49 S.E. 136, 138 (W. Va. 1904).

³⁶² *Id.* at Syl. Pt. 4.

³⁶³ See W. VA. CODE § 37-4-3 (1931).

³⁶⁴ See *Ark Land Co.*, 599 S.E.2d at 761 (holding that “the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale”); *Wilkins v. Wilkins*, 338 S.E.2d 388, 392 (W. Va. 1985) (per curiam) (“Prejudice is not measured solely in monetary terms.”), overruled by *Ark Land Co.*, 599 S.E.2d at 763 (stating that *Wilkins* was overruled for improperly relying on Syl. Pt. 2, *Garlow*, 163 S.E. 436, which had been superseded by statute); *Hale v. Thacker*, 12 S.E.2d 524, 526 (W. Va. 1940) (stating that there are “many considerations, other than monetary” to consider in partition actions).

³⁶⁵ *Croston*, 49 S.E. at 138.

ownership, coupled with sentimental or emotional interests in the property.”³⁶⁶ However, none of these factors should be able to singly trump another factor in order to prove dispositive when ordering a sale or a partition in kind.³⁶⁷ Rather, all of the factors should be considered together, monetary factors included, when determining if one or more parties’ interests are promoted by a sale and that no party’s interest is prejudiced.

Rolling all of the above into one standardized statement, the factors that should be considered when determining whether or not to partition land in kind or by sale are many. Some of the factors fit with all of the elements set forth in the statute while other factors find a niche with one particular element. However, no matter what factors fit the particular facts of a case,³⁶⁸ no one factor should prove dispositive,³⁶⁹ but all of the factors should be determined in the aggregate and weighed against the fundamental right of any property owner to buy, sell, and own property to make sure, above all else, that right is never taken away for an inconsequential purpose.³⁷⁰

In *Morton v. Van Camp*, the West Virginia Supreme Court of Appeals had an opportunity to solidify partition law in West Virginia.³⁷¹ *Morton* set forth facts that were very similar to *Ark Land Co. v. Harper*.³⁷² In *Morton*, a woman owned a parcel of land on which she had lived with her daughter for many years.³⁷³ The woman’s relatives, who were co-owners with her, sought to partition the land by sale to further their goal of developing the land for real estate purposes.³⁷⁴ As the case was decided on appeal, both the majority and

³⁶⁶ *Ark Land Co.*, 599 S.E.2d at 761 (The author is using the quoted language to take the contrary position.).

³⁶⁷ *Contra id.* (“This latter factor [sentimental or emotional interest] 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.”).

³⁶⁸ *See* *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712, 715 (W. Va. 1978) (“The 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.”).

³⁶⁹ *See contra* *Ark Land Co.*, 599 S.E.2d at 761 (holding that “the economic value of the property is not the exclusive test for deciding whether to partition in kind or by sale,” but also stating that “[t]his latter factor [sentimental or emotional interest] 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.”).

³⁷⁰ *See* Syl. Pt. 2, *Croston*, 49 S.E. 136 (“This statute is an innovation upon fundamental principles of the common law and of American jurisprudence, and cannot become a license to the courts to take from the citizen, for light or trivial causes, his freehold on payment of compensation, though full and adequate.”).

³⁷¹ *See* 654 S.E.2d 621 (W. Va. 2007) (per curiam).

³⁷² *Compare* *Morton*, 654 S.E.2d at 622–23, with *Ark Land Co.*, 599 S.E.2d at 757 (W. Va. 2004).

³⁷³ *Morton*, 654 S.E.2d at 622.

³⁷⁴ *Id.* at 622. *Morton* presented a very similar factual scenario to the facts encountered by the court in *Ark Land Co.* *See* *Ark Land Co.*, 599 S.E.2d 754. In *Ark*, the Caudills owned land that had been in the family for roughly one hundred years. *Id.* at 757. Some of the Caudills broke

dissenting opinions cited *Ark*; however, the majority did not refer to *Ark* in deciding the case. Instead, it rested on Syllabus Point 3 of *Consol. Gas Supply Corp. v. Riley* and upheld the circuit court's order to partition the land by sale.³⁷⁵ In so doing, the court seems to be minimizing its *Ark* decision. The court could have rested its *Morton* decision on *Ark* and held that Ms. Archer was entitled to have the land partitioned in kind to preserve the residence she had maintained on the land for many years. Rather, the court decided to retreat from its *Ark* decision and order the land partitioned by sale, because the land was more valuable when sold as a whole than when partitioned in kind and then sold.³⁷⁶ In so doing, the West Virginia Supreme Court of Appeals missed an excellent opportunity to solidify partition law in West Virginia for many years to come.

By moving away from its holding in *Ark*, and instead resting on *Consol.*'s Syllabus Point 3, the court added weight to this Note's argument discussed *supra* that there is no standard test for partitioning property in kind or by sale in West Virginia.³⁷⁷ To solidify partition law in West Virginia, the court should continue to use Syllabus Point 3 of *Consol.*;³⁷⁸ however, when the court considers the interests of the parties involved, it should weigh all the factors surrounding the partition and/or sale of the property, including monetary and sentimental factors, equally and in the aggregate so that no one factor proves dispositive in the outcome of the case. Therefore, partition law in West Virginia craves a standardizing decision, a decision that will bring together all of the factors discussed *supra* and weigh them together evenly, giving no one factor the power to prove dispositive.³⁷⁹ This type of decision will bring more standardized results to partition actions in West Virginia and will give the state's circuit courts and practitioners a more standardized rubric from which to work.

from the family and sold their land to Ark Land Co. *Id.* Ark Land, after an unsuccessful attempt to buy out the rest of the Caudills, sought to have the land partitioned by sale, so it could acquire the rest of the Caudills' land for coal mining purposes. *Id.* The West Virginia Supreme Court of Appeals held that the Caudills had a strong sentimental and emotional attachment to their family's home, the land was capable of partition in kind, and the circuit court erred in decreeing a sale of the property. *Id.* at 762–64.

³⁷⁵ Syl. Pt. 2, *Morton*, 654 S.E.2d 621 (“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.” (quoting Syl. Pt. 3, *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712 (W. Va. 1978))).

³⁷⁶ *Id.* at 624–625.

³⁷⁷ See *supra* notes 334–70 and accompanying text.

³⁷⁸ Syl. Pt. 3, *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712 (W. Va. 1978) (“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.”).

³⁷⁹ See *supra* note 377.

VI. CONCLUSION

Partition law has a very long and storied past. From its beginnings in the feudal societies of Europe and codification by the Kings and Queens of England to its passage across the Atlantic and its embodiment in both the common and statutory law of every state in the Union, partition law has been a large part of the law of real property. In particular, the partition statutes in West Virginia have been changed and amended several times over our 144 year history. There have been court opinions that have made helpful interpretations of the partition statute and others that have clouded these past interpretations.

Most recently, the West Virginia Supreme Court of Appeals has issued two back to back decisions which confuse the issue of partition law in the state.³⁸⁰ At this point in time, it is unclear whether or not a party's sentimental and emotional attachment to the land will prove dispositive as the court indicated it should in *Ark Land v. Harper*.³⁸¹ The court had the opportunity in *Morton v. Van Camp* to solidify the role of sentimental and emotional factors by allowing Ms. Archer to keep the land on which she had made her residence for many years and partitioning the rest of the land in kind.³⁸² Rather, the court went the opposite direction and determined that the land held more value as a whole and should be sold as such.³⁸³ In so doing, the court reversed course from *Ark* and handed down a decision that appears to be very much inconsistent with its previous precedent set just three years previous.

To rectify this confusion, it is the contention of this author that the court should reconcile these two decisions and issue a ruling, at its next opportunity, that will create a unifying precedent that will give the state's circuit courts and practitioners a more standardized rubric from which to work. The court should endorse the court's traditional three part test enunciated in *Syllabus Point 3 of Consol. Gas Supply Corp. v. Riley*, and when considering the factors relevant to each parties' interests, it should consider all relevant factors, including sentimental and emotional factors, in the aggregate and not allow any one factor to be controlling.³⁸⁴

This Note traced partition law from its origins in Europe to its arrival in the United States and West Virginia before turning, specifically, to the evolution of partition law in West Virginia. While discussing the development of West

³⁸⁰ Compare *Morton*, 654 S.E.2d 621, with *Ark Land Co. v. Harper*, 599 S.E.2d 754 (W. Va. 2004).

³⁸¹ *Ark Land Co.*, 599 S.E.2d at 761.

³⁸² See *Morton*, 654 S.E.2d at 621.

³⁸³ *Id.* at 624–25.

³⁸⁴ Syl. Pt. 3, *Consol. Gas Supply Corp. v. Riley*, 247 S.E.2d 712 (W. Va. 1978) (“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.”).

Virginia's partition law, this Note also discussed what this author believes to be the present confusion in West Virginia's partition law.³⁸⁵ This Note gives, what this author believes to be, a very workable and consistent solution to this confusion.³⁸⁶ It is this author's hope that this Note brings together not only the story of how partition law came to West Virginia, but also provides a solution that can be used to cure the conflict in West Virginia's partition law.

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³⁸⁵ See *supra* Parts II–IV.

³⁸⁶ See *supra* Part V.

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