

RENDERED: January 9, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-001459-MR

WARNIE MILLER HEIRS PARTNERSHIP

APPELLANT

v. APPEAL FROM MAGOFFIN CIRCUIT COURT
HONORABLE JOHN ROBERT MORGAN, JUDGE
ACTION NO. 95-CI-001

HIGHLANDS COAL SALES, INC.;
BANNARD WIREMAN; PAM WIREMAN;
WOODROW WIREMAN; MAGGIE JEAN
WIREMAN; OSCAR WIREMAN; and
MAGGIE JEAN WIREMAN, as GUARDIAN
OF JAMES B. WIREMAN and CHRISTOPHER
S. WIREMAN

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON and JOHNSON, Judges.

JOHNSON: The Warnie Miller Heirs Partnership (the partnership) appeals from the order of the Magoffin Circuit Court entered on April 17, 1996, which adopted the recommendation of the special commissioner establishing boundary lines for the mineral rights of five parcels of property. The partnership argues that the trial court's decision in setting the boundary lines is contrary to the intent of the deeds and not supported by the evidence. Having concluded that these findings of fact are not clearly erroneous, we affirm.

In 1940 or 1941, the five heirs of Steven Wireman decided to divide his tract of land which the deed stated was approximately 300 acres into five parcels of equal size. The surface ownership was not in dispute and the heirs only divided the mineral rights underlying this property. All of the land, surface and mineral, was under lease and was mined by Highland Coal Sales, Inc. (Highland). All of the heirs walked the acreage, agreed to the division, and calls for the five tracts were written. However, the tracts were not surveyed to determine the exact size of the lots which were described as being 65 acres more or less.¹

In 1987, the partnership was formed by the Miller heirs to enable them to more effectively offer their coal rights to coal companies and they hired the Nesbitt Engineering firm (Nesbitt) to determine the coal tonnage on the property. Members of the partnership and a geologist from Nesbitt walked each section and found most of the markers. Without a survey and without any deeds, the geologist prepared a map for the partnership. The geologist was not a surveyor and conceded that a map prepared by making reference to deeds and surveys would be more accurate than the one he prepared.

Later, Highland requested that the Alchemy Engineering firm (Alchemy) survey the inner boundary lines of the five mineral tracts so it could properly apportion the tonnage removed. Alchemy

¹ The original tract, deeded in 1891, consisted of approximately 300 acres. However, the division of the property into five parcels of approximately 65 acres each results in approximately 330 acres. Obviously, from approximately 300 acres, it is impossible to create five parcels of approximately 65 acres each. Five parcels of approximately 60 acres each would be a more equal division of the approximate 300 acres.

used the 1891 deed to the original tract, the dividing deeds, and deeds of surrounding properties to set the boundaries. Surveyors from Alchemy also walked the property with an heir to locate monuments. All monuments were found except for a chestnut tree and a marked rock. The result of Alchemy's map was to give the Wiremans (the appellees) more land and the partnership less land. In other words, this division did not divide the property proportionately between the five heirs. In fact, based upon the division as determined by Alchemy, the two Wiremans owned almost as much acreage as the three Miller heirs, who we refer to as the partnership.

At the Wiremans' request, Joe Curd (Curd), a surveyor, reviewed the work of Alchemy and Nesbitt, reviewed the deeds, and walked the property with one of the Wiremans. Curd stated that, in his opinion, the boundary lines as determined by Alchemy were correct.

The partnership filed a lawsuit wherein it alleged that Alchemy's map did not follow the intent of Steven Wireman which had been to divide the property equally between the five heirs. A special commissioner was appointed on February 2, 1995. Proof was taken at a hearing held on August 15, 1995, and by deposition. On January 9, 1996, the special commissioner recommended that the line between lots 1 and 2 be the line claimed by the partnership and that the line between lots 3 and 4 be the line claimed by the Wiremans. The commissioner stated that such lines would maintain the acreage of each lot at approximately 60 acres.

Both the partnership and the Wiremans filed exceptions to the recommendation of the commissioner. The partnership took exception to the determination of the boundary between lots 3 and 4, on the grounds that it was not supported by the evidence and that the boundary as established by the commissioner created a great disparity in size between lots 3, 4, and 5 and did not leave each lot with 60 acres as the commissioner had presumed. The Wiremans took exception to the determination of the boundary between lots 1 and 2, on the grounds that the partnership had not provided sufficient evidence to support the recommendation of the commissioner in determining that boundary. In response to the Wiremans' exceptions, the partnership alleged that the Wiremans had waived their right to file exceptions because they had not been timely filed. It argued that according to Kentucky Rules of Civil Procedure (CR) 53.06, a party has ten days after being served with notice of the filing of a commissioner's report to serve written objections upon the other parties and the Wiremans filed their exceptions outside the time allowed.

On April 4, 1996, the trial court overruled the exceptions of both parties. On April 18, 1996, the trial court ordered that the recommendation of the special commissioner be adopted. The partnership appealed from that order.

Our standard of review requires us to affirm the findings of fact of the trial judge unless they are clearly erroneous. CR 52.01. "It is the rule that, where this Court cannot say on appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence,

the decree will not be disturbed." Rowe v. Blackburn, Ky., 253 S.W.2d 25, 27 (1952); cited in Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980).

The partnership argues that the trial court's findings are contrary to the intent of the deeds dividing the Steven Wireman property and not supported by the evidence. It argues that each lot should be approximately equal in size. As the partnership points out in its brief, the undisputed testimony was that the heirs of Steven Wireman walked the parent tract in 1940 or 1941 to divide the property into five equal parts and each heir agreed to the division and calls. However, the heirs of Steven Wireman did not survey the tract to ensure that the lots were of equal size, they merely estimated the size and agreed to the calls for each lot.

At Highlands' request, Alchemy performed the first actual survey of the tract. Alchemy found all but two of the monuments used in the calls. Often in older deeds, monuments noted in the deed are missing. When this occurs, a surveyor may rely upon individuals who are familiar with the land and know where the monument used to be located. Sells v. Hurley, 301 Ky. 199, 201-202, 191 S.W.2d 212 (1942). Adam Wireman, a life-long resident of the area, walked the land and pointed out where the missing monuments used to be located. The fact that the lots are of uneven size is a result of the original estimate of their size--an act to which each of the Steven Wireman heirs acquiesced. Furthermore, another surveyor, Curd, agreed with the lines as determined by Alchemy. The trial court chose to follow the line between lots 3

and 4, and this is the same line determined by Alchemy and Curd. Thus, there is substantial evidence of record to support the trial court's findings of fact and they will not be disturbed on appeal. The evidence relied upon by the partnership is the map by Nesbitt. The trial court, as the fact-finder, was permitted to put more weight on the proof by the Wiremans.

The judgment of the Magoffin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Hon. Frank C. Medaris, Jr.
Hazard, KY

BRIEF FOR APPELLEES,
BANNARD WIREMAN; PAM WIREMAN;
WOODROW WIREMAN; MAGGIE JEAN
WIREMAN; and MAGGIE JEAN
WIREMAN, as GUARDIAN OF JAMES
B. WIREMAN and CHRISTOPHER
S. WIREMAN:

Hon. Gordon B. Long
Salyersville, KY