No. 33341 – *Bill E. Morton and Jess R. Morton, Appellees v. Unknown Heirs of Ernest M. Van Camp; Lilly Tucker; Unknown Heirs of Margaret Van Camp Price; Unknown Heirs of Dorothy Van Camp; Unknown Heirs of Helen Van Camp; Unknown Heirs of Violet Van Camp; Unknown Heirs of Martha Van Camp; Herbert Hopkins; Natalie Steele; Glenna May (Haynes) Dietz; Barbara Ann (Haynes) Gunnoe Young; Mary Lou (Haynes) Mason; Carolyn Ruth (Haynes) Melton; William Ronald Haynes; Charlotte Elizabeth (Haynes) Plantz; and Unknown Heirs of Squire Van Camp, Appellees; and Linda Kessler Archer, Appellant*

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Albright, Justice, dissenting:

I dissent from the majority opinion that endorses the lower court's failure to observe the strong preference for partition in kind rather than sale under the long-established property law of this state. This rush to judgment has unfairly resulted in an heir being deprived of the opportunity to retain a small part of her home place without a full and fair determination that partition in kind was, under the circumstances of this case, not feasible.

Partition by sale was unknown at common law; the right to partition by sale rests solely on statutory enactment. *See Loudin v. Cunningham*, 82 W. Va. 453, 456, 96 S.E. 59, 60 (1918); W. Va. Code § 37-4-3 (1957) (Repl. Vol. 2005). Although partition by sale is possible, partition in kind remains the preferred method by which interests in jointly owned land should be divided. For well over a hundred years, this Court has held that:

> Joint owners of land are entitled to have partition in kind. . . . 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.

Syl. Pt. 7, *Roberts v. Coleman*, 37 W. Va. 143, 16 S.E. 482 (1892). This preference for partition in kind was most recently acknowledged in syllabus point three of *Ark Land Co. v. Harper*, 215 W. Va. 331, 599 S.E.2d 754 (2004), wherein this Court stated:

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

Obviously, the first question that needs to be addressed in a partition case is whether partition in kind can be conveniently made. *See Consolidated Gas Supply Corp. v. Riley*, 161 W. Va. 782, 247 S.E.2d 712 (1978). In order to decide this issue, "[t]he most usual method of ascertaining whether the land is susceptible of convenient partition is by the report of commissioners." Syl. Pt. 2, in part, *Loudin v. Cunningham*, 82 W.Va. at 453, 96 S.E.2d at 59.

The record in this case, which the majority only selectively relates parts of in its opinion, reflects that no commissioners were appointed to make the primary

determination of whether the jointly owned property could be conveniently partitioned in kind, and therefore the decision to order sale of the property was premature at best.

To gain a better insight into this case, it is desirable to supplement the abbreviated recitation of facts in the majority opinion. The record reflects that Appellant and her sister were initially represented by an attorney,[1] who responded to the Morton brothers' request for partition by sale by filing an answer asserting that "[t]he property can most certainly be partitioned in kind." A dispute arose between the attorney and the sisters about payment of legal fees before any court appearance occurred The record contains a letter from the attorney dated January 18, 2006, addressed to Appellant's sister, expressing his concern about the agreement he believed he had reached with the sisters regarding fees. In that letter, the attorney further indicated that if the partition suit could not be resolved amicably, he would move the court to withdraw as counsel for the sisters. On February 14, 2006, a status conference was held and matters which occurred at that hearing were related in an Agreed Order filed on March 21, 2006. This order reflects, among other things, that the parties had all agreed that the property was not susceptible to partition in kind. The record also contains a letter dated May 17, 2006, from Appellant to the presiding judge in which Appellant stated that she never requested that this attorney represent her, and she

[1]At the outset, Appellant and her sister sought an attorney to protect their interests in the subject real estate. During the course of the litigation, Appellant obtained by quitclaim deed her sister's 1/28th interest in the property, giving Appellant a 1/7th interest in the tract.

believed the attorney was misrepresenting her interests. The record shows that a status conference was held on June 2, 2006, with the resulting order reflecting: the attorney's motion to withdraw as counsel for the sisters was granted; the appraisal Appellant obtained for the 3.64 acres she desired as her 1/7th interest was lodged in the court file; a final hearing was set for June 28, 2006, with the parties being advised that the lower court would arrive at a final decision regarding partition at the end of that hearing; and directing the sisters to "move with dispatch to obtain other counsel to appear in this matter on their behalf." There is no transcript in the certified record of what occurred on June 28, 2006, although it is clear from the September 18, 2006, order of the court that a hearing was held and testimony was received by the court on that date. Among the items filed in the court record on June 28, 2006, was Appellant's appraisal of 3.64 acres.

The record does contain a transcript of the continuation of the June hearing, held on July 28, 2006. At the July 28 hearing, Appellant was represented by a different lawyer who kindly donated his services to try to promote the satisfactory resolution of the dispute. This attorney questioned two appraisers who testified at the July 28, 2006, hearing; one appraiser had been retained by the Mortons and the other appraiser engaged by Appellant. Appellant's attorney directed questions to both appraisers about whether it was possible to carve out some portion of land that would represent a 1/7th interest which would allow Appellant to remain on the property. Significantly, both appraisers indicated

it was possible. Appellant also testified at the hearing that although she would prefer not to have to move her trailer, she was willing to bear the expense to move to a different location on the property if it meant that she could keep a part of the land.

Based upon these disputed contentions, the lower court determined that "the subject real estate cannot be conveniently partitioned in kind" and ordered partition by sale. I respectfully submit that the court below abused its discretion in making that ruling because the evidence before the court suggested the contrary: that the land could be partitioned in kind to give Appellant 1/7th of the value thereof at some suitable location, leaving the remainder to be sold, as the petitioners requested. Since the record does not establish that partition in kind could or could not be conveniently made, the lower court had a duty to conform the proceedings with the longstanding practice of appointing commissioners for the purpose of obtaining a report addressing the primary question of whether partition in kind could be conveniently made. Failing to do so represents a blatant abuse of discretion which merits the reversal of the decree below.

I recognize that the case had dragged on for some time, undoubtedly giving rise to frustration among the parties. However, the court below was fully aware that the Appellant's interests had not been fully represented, that the supposed agreed order favoring sale did not enjoy Appellant's endorsement and that Appellant had experienced difficulty

in acquiring and keeping counsel throughout the proceeding. When counsel was obtained, a sufficient record was made to indicate that partition in kind might well be conveniently made so as to address Appellant's right to 1/7th of the value of the land, in kind, and to address the other parties' desire to have their 6/7ths sold at sale.

As I believe that the proper resolution of this case lies in reversal of the lower court's decision and remand for the appointment of commissioners to address whether partition in kind is feasible, I respectfully dissent.

I am authorized to state that Justice Starcher joins in this dissenting opinion.