IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case Number 61,044

GLORIA DAVIS, :

Appellant, :

vs. :

ROSMAN CHARLES DIEUJUSTE, :

Appellee. :

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

BRIEF OF APPELLEE

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II. WHETHER THE TRIAL COURT DECISION DECLARING APPELLANT TO BE THE SOLE OWNER OF THE REAL PROPERTY IS CONTRARY TO THE EVIDENCE.

ARGUMENT

I. A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE IN AN ACTION WHERE PROPERTY OWNED BY THE PETITIONER AND RESPONDENT IS NOT DISCUSSED OR EVEN MENTIONED IS RES JUDICATA TO THE ISSUE OF DIVISION OF THE PROPERTY.

Where a husband and wife own real property as an estate by the entirety and a dissolution of marriage is granted, under Section 689.15 Florida Statutes (1979), they thereupon become tenants in common. Bergh v. Bergh, 127 So.2d 481 (Fla. 1st DCA 1961); Dotter v. Dotter, 147 So.2d 209 (Fla. 2nd DCA 1962); Naf v. Wahlberg, 288 So.2d 576 (Fla. 3rd DCA 1974); Cribb v. Cribb, 261 So.2d 566 (Fla. 4th DCA 1972); Wilber v. Wilber, 299 So.2d 99 (Fla. 3rd DCA 1974); Baker v. Baker, 315 So.2d 217 (Fla. 1st DCA 1975); Cummings v. Cummings, 330 So.2d 134 (Fla. 1976); Hagin v. Hagin, 353 So.2d 959 (Fla. 2nd DCA 1978).

In the absence of an agreement by the parties for a division thereof by the Court upon the dissolution of marriage decree being entered, or of a request for partition in the pleadings, the court has no power to divide or partition property held by the spouses as tenants by the entirety. Bergh, supra; Valentine v. Valentine, 45 So.2d 885 (Fla. 1950); Muhlrad v. Muhlrad, 375 So.2d 24 (Fla. 3rd DCA 1979). The Court has no power to direct disposition of the parties' interest in property held by the entirety, simply as an incident of the

dissolution of marriage. Banfi v. Banfi, 123 So.2d 52 (Fla. 3rd DCA 1960); Harder v. Harder, 264 So.2d 476 (Fla. 3rd DCA 1972); Helsel v. Helsel, 138 So.2d 99 (Fla. 3rd DCA 1962). This doctrine follows from the fact that once the marriage is dissolved, the parties become tenants in common of the property formerly held as an estate by the entireties under Section 689.15 Florida Statutes (1979). Thereafter, it is for them to decide whether the property should be partitioned or disposed of in some other manner. Valentine, Banfi, Helsel, supra; Bailey v. Bailey, 126 So.2d 165 (Fla. 3rd DCA 1961); Glasser v. Glasser, 178 So.2d 749 (Fla. 3rd DCA 1965) Lubarr v. Lubarr, 199 So.2d 123 (Fla. 3rd DCA 1967); Thomas v. Greene, 226 So.2d 143 (Fla. 1st DCA 1969).

In the case sub judice, the Fourth District held that only by an appropriate proceeding in partition could one tenant in common be ordered to convey all of his interest to the other tenant in common. Diejuste v. Davis, 400 So.2d 981, at 982 (Fla 4th DCA 1981). Citing Finston v. Finston, 160 Fla. 935, 37 So.2d 423 (1948) and Cooper v. Cooper, 69 So.2d 881 (Fla. 1954) the Court held that the doctrine of res judicata bars any subsequent action by one party to a dissolved marriage against the other, which places in issue any property right which came into existence or matured at any time prior to rendition of the judgment of dissolution. The Court further held Vandervoort v. Vandervoort, 277 So.2d 43 (Fla. 3rd DCA 1973) to be in conflict with its holding which brings the case to this tribunal.

In Vandervoort, supra, at page 45, the opinion stated that matters of property rights not dealt with before the master and not adjudicated by the Final Judgment can be litigated "in other separate proceedings." Case law in Florida is clear that partition is the proper "other separate proceeding". Hoemke v. Hoemke, 342 So.2d 127 (Fla. 2nd DCA 1977). It is also clear that Appellants "Complaint for Additional Relief After Dissolution of Marriage" is not equivalent to a prayer for partition. Gonzales v. Gonzales, 156 So.2d 206 (Fla. 3rd DCA 1963); Wilkerson v. Wilkerson, 179 So.2d 592 (Fla. 2nd DCA 1965); Sharpe v. Sharpe, 267 So.2d 665 (Fla. 3rd DCA 1972); Rankin v. Rankin, 258 So.2d 489 (Fla. 2nd DCA 1972). Therefore, the Fourth District Decision should be affirmed. Even if the decision is affirmed, or, of the Fourth District decision is reversed, the best interests of justice and equity would not be served unless this court makes inquiry into whether the original trial court decision is correct.

II. THE TRIAL COURT DECISION DECLARING APPELLANT TO BE THE SOEL OWNER OF THE REAL PROPERTY IS CONTRARY TO THE EVIDENCE.

The general rule of partition is set out in 12 Fla. Jur. 2nd, Cotenancy and Partition §40:

> "A suit for the portion of land has as its primary object the actual partition of property between its common owners into shares of fair and equal value, according to the respective interest of the parties, so as to avoid the inconveniences resulting from a joint or common possession and to enable the petitioner to possess, enjoy and improve his share in severalty."

At trial, the appellant asserted that, except for $950.00 provided by appellee, all monies to acquire and continue ownership of this property were provided by Appellant and therefore she is entitled to the entire value of the property. In effect appellant is attempting to establish a special equity in the property. A special equity ordinarily would not arise where property held as tenants by the entireties is acquired with funds generated by a working spouse during the marriage or while the other spouse performs noral household and child rearing responsibilities. Ball v. Ball, 335 So.2d 5 (Fla. 1976); Duncan v. Duncan, 379 So.2d 949 (Fla. 1980); Hoch v. Hoch, 380 So.2d 499 (Fla. 2nd DCA 1980). In Duncan, supra, the Court held that a special equity is a vested interest which a spouse acquires because of contributions of funds, property, or services made over and above the performance of normal marital duties. The spouse who claims an interest in the other spouse's property has the burden of proof of establishing that interest to the exclusion of a reasonable doubt. Roberts v. Roberts, 101 So.2d 884 (Fla. 2nd DCA 1958); Wollman v. Wollman, 235 So.2d 315 (Fla. 3rd DCA 1980) Zuidhof v. Zuidhof, 242 So.2d 739 (Fla. 4th DCA 1971); Singer v. Singer, 262 So.2d 731 (Fla. 3rd DCA 1972). In Tanner v. Tanner, 194 So.2d 702 (Fla. 2nd DCA 1967) the court held that just as in cases involving a constructive trust, the evidence to establish the equity must be so clear, strong and

unequivocal as to remove from the mind of the chancellor every reasonable doubt as to the existence of her special equity. To sustain the burden of proving a special equity incident to a divorce there must be clear, convincing, and satisfactory evidence. Abbott v. Abbott, 297 So.2d 608 (Fla. 2nd DCA 1974); Harrison v. Harrison, 314 So.2d 812 (Fla. 3rd DCA 1975). It has been said that the chancellor has a wide discretion in determining whether the burden of proof has been met and his decision will be affirmed in the absence of a showing of an abuse of discretion. Rampton v. Rampton, 197 So.2d 846 (Fla. 1st DCA 1967); Volpe v. Volpe, 227 So.2d 534 (Fla.3rd DCA 1969). For example in Cyphers v. Cyphers, 373 So.2d 442 (Fla. 2nd DCA 1979) it was held that the trial court abused its discretion in awarding the wife almost all of the parties' furniture and antiques where the wife made no showing of a specific equity in the jointly held property.

In the case sub judice, the evidence clearly shows that the appellant has not established a special equity in the property and the judge abused his discretion when he entered judgment in her favor. Appellant's own admissions and testimony reveal that both parties contributed to the purchase and maintenance of the property, and were it not for Appellee's contributions, the parties would have been unable to purchase the property or make the mortgage payments. The parties were married March 24, 1974 and the marriage was

dissolved April 1, 1977. (R 183-4; 190-1). Appellee would direct this court's attention to appellant's testimony on Deposition and at trial where:

A. Appellant admits that Appellee sent money to Appellant during the period from May, 1974 to December, 1974. (R-10; 32; 121-122, 136-137).

B. Appellant admits that the parties <u>together</u> decided to buy the property in June, 1974; that Appellee signed the contract to purchase the property; that Appellant knew that the Appellee understood they were buying the property; and that Appellee contributed $950.00 toward the down payment on the property. (R at 12; 32, 33, 35, 39-40; 124-126; 131).

C. Appellant admits that Appellee contributed toward the payments on the home between October, 1974 and June, 1975 and that this money was used for the purchase of the home. (R 13-14; 128).

D. Appellant admits that during the marriage, Appellee gave the Appellant money which was used to buy food, pay bills, and purchase things for the home and this enabled the Appellant to save up money to make the down payment on the home, and, after the home was purchased, Appellant admits that that Appellee made some payments toward the mortgage on the home. (R-23; 26-27; 36-37; 41; 132; 134; 138).

The foregoing testimony by the Appellant aptly demonstrates that both marital partners participated together

and each made contributions in a joint effort to sustain each other in the marital relationship and to purchase and pay for the property in question. Under the case law as set forth above Appellant has failed to show a special equity to the exclusion of a reasonable doubt. Appellant's evidence is far from clear, not convincing and totally unsatisfactory and with all due respect the trail court judge has abused his discretion in ruling in her favor.

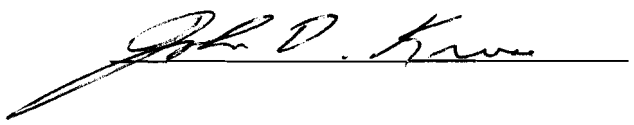
CONCLUSION

Based on the foregoing, it is respectfully submitted that the Circuit Court erred in ruling that they had jurisdiction to entertain a complaint for additional relief one year after the Final Judgment of Dissolution of Marriage had been entered when there was no reservation of jurisdiction.

The Fourth District Court of Appeals decision correctly held that res judicata constitutes a complete defense to Appellant's claim, and this decision should be affirmed.

If this decision is affirmed, or, even if its reversed, the best interests of justice and equity would not be served unless this Court make inquiry and rules on whether the original trial court decision is correct. The evidence and case law as set forth above mandates reversal to hold that the parties hold equal interests in the property.

I HEREBY CERTIFY that a copy of the foregoing Brief of Appellee was furnished by mail to Richard K. Inglis, Attorney for Appellant, 100 Southeast 6th Street, Fort Lauderdale, Florida 33301 this 22 day of February, 1982.



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