

12-19-  
IN THE SUPREME COURT OF FLORIDA  
MONDAY, NOVEMBER 24, 1986

MARGARET SHARP,  
Petitioner,

v.

MAGALI C. HAMILTON, ET AL.,

Respondents.

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H. S. MUSSELWHITE,

Petitioner,

v.

MAGALI C. HAMILTON, ET AL.,

Respondents.

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CASE NO. 69,535  
FIFTH DISTRICT COURT  
OF APPEAL NO. 85-1711 &  
85-1741

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85-1741

APPEAL OF AN OPINION RENDERED  
BY THE FIFTH DISTRICT COURT OF APPEAL  
ON SEPTEMBER 25, 1986

BRIEF OF PETITIONER,  
H. S. MUSSELWHITE, JR.

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STATEMENT OF THE CASE

This is an appeal to review the Affirmance by the Fifth District Court of Appeal of the Summary Final Judgment as to the Cross-Claim of Defendant, MAGALI C. HAMILTON ("Respondent"), entered on November 1, 1985, by the Circuit Court in Seminole County, Florida (R-147). The principal action in which the Cross-Claim was filed was brought by MARGARET SHARP who sought to reform a mortgage to establish a lien on Respondent's real property in Seminole County (R-1).

Respondent filed a Cross-Claim against SHARP, adding Petitioner, H. S. MUSSELWHITE, JR. ("Petitioner"), as a party Cross-Defendant, seeking to quiet title to the real property as to SHARP's mortgage and Petitioner's judgment lien arising from a Judgment against Respondent's former husband, L. E. HAMILTON (R-6). Respondent alleged, inter alia, that she had been awarded title to the subject real property as "lump sum alimony" through a Judgment of Dissolution entered on May 25, 1984, and further alleged the property was protected as former homestead property (R-6).

Petitioner MUSSELWHITE counterclaimed against Respondent seeking a declaratory judgment that his judgment lien attached and encumbered Respondent's real property, and attempting to foreclose the judgment lien (R-19).

Following Respondent's Amendment of her Cross-Claim (R-47), Petitioner moved for Summary Final Judgment as to his Counterclaim and Respondent's Cross-Claim (R-95), which was heard by the Court on June 27, 1985 (R-107). No order was entered by the Court as to Petitioner's Motion at that time.

Following the hearing, MARGARET SHARP filed a Motion for Clarification as to the status of the case and all matters pending before the Court (R-121). Based upon the opinion expressed by the Court at the hearing on the Motion for Clarification that it would ultimately rule in Respondent's favor, Petitioner and MARGARET SHARP stipulated to waive notice of hearing for Respondent's Motion for Summary Judgment as to her Cross-Claim (R-139), and further stipulated to have the Court enter the Order for Summary Final Judgment as to the Cross-Claim of MAGALI C. HAMILTON (R-146). Petitioner and MARGARET SHARP preserved any rights to appeal the Court's Judgment in Respondent's favor (R-146, 147).

The Summary Final Judgment in favor of Respondent was based on the Court's ruling that Respondent held title to the Seminole County, Florida property "free and clear" of Petitioner's judgment lien because she had been awarded title to the property, previously held as a tenancy by the entirety, through a Judgment for Dissolution as "lump sum alimony" (R-147). Having ruled based upon this issue of title, the Court did not address the question before it that Respondent's property was protected because of its homestead status.

On appeal, the claims of the Petitioner and MARGARET SHARP were consolidated by Order of the Court on January 21, 1986. The opinion of the Fifth District Court of Appeal affirming the Trial Court's decision was filed September 25, 1986 (see Appendix - Exhibit "E"). The Fifth District Court of Appeal has certified the conflict created by its opinion and this appeal follows.

## STATEMENT OF FACTS

On November 12, 1975, Petitioner, H. S. MUSSELWHITE, JR., obtained a judgment against L. E. HAMILTON in the amounts of \$32,556.98 and \$22,608.34 which was recorded on November 14, 1975, in the Public Records of Seminole County, Florida. (See Appendix, Exhibit "A"). At the time of this Final Judgment, L. E. HAMILTON was married to the Respondent, MAGALI HAMILTON. They were the owners of real property in Seminole County, Florida, held as tenants by the entirety.

On May 25, 1984, a Final Judgment of Dissolution awarded title of the real property to MAGALI C. HAMILTON as "lump sum alimony." (R-47) (See Appendix, Exhibit "B").

MARGARET SHARP, whose appeal has been consolidated with this appeal, obtained a mortgage executed by L. E. HAMILTON, while he was still married to Respondent, purportedly encumbering the same real property. Respondent had not executed the mortgage. (R-47) (See Appendix, Exhibit "C".)

MARGARET SHARP filed her Complaint attempting to reform the mortgage and establish it as a lien on the real property. MAGALI C. HAMILTON filed a Cross-claim attempting to quiet title as to SHARP's mortgage, and as to Petitioner MUSSELWHITE's judgment lien, by removing all clouds on the property created by these liens and encumbrances.



Pursuant to a stipulation entered into by Respondent, Petitioner and MARGARET SHARP, the Court entered a Summary Final Judgment as to the Cross-claim of MAGALI C. HAMILTON (R-147) (see Appendix, Exhibit "D"), finding that the Final Judgment of Dissolution of Marriage for MAGALI C. HAMILTON and L. E. HAMILTON entered on May 25, 1984, which awarded title to the real property to Respondent as "lump sum alimony," vested ownership of that property in her free and clear of both Petitioner's judgment lien and MARGARET SHARP's mortgage. The Court further found that the Final Judgment of Dissolution of the Hamilton marriage created and immediately transferred to Respondent her former husband's interest in the property free and clear of the judgment lien and mortgage. Consequently, the Court quieted title in favor of Respondent.

As a defense to the assertion by Petitioners MUSSELWHITE and SHARP that their liens encumbered the real property, Respondent HAMILTON argued that the real property was homestead real property (R-47). Petitioner MUSSELWHITE disputed the homestead assertion by Respondent HAMILTON upon the basis that she had abandoned the homestead, having not lived there for almost two years prior to the dissolution of her marriage (R-95) (R-103 - Deposition of MAGALI C. HAMILTON). The Trial Court did not reach the homestead issue by ruling that the property previously held as tenants by the entirety vested in Respondent by virtue of the passing of title through the judgment of dissolution.

On appeal, the Fifth District affirmed the Trial Court's decision holding that the Final Judgment of Dissolution of the Hamilton marriage immediately vested title in Respondent free and clear of any liens or encumbrances. (Exhibit "E" - Appendix.)

## SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal erred in affirming the Trial Court's Summary Final Judgment against Petitioner which quieted title in Respondent's favor because as a matter of law Petitioner's judgment lien attached to and became an encumbrance on L. E. HAMILTON's interest in the property prior to its transfer to Respondent. Consequently, Respondent was awarded and transferred this interest subject to Petitioner's lien.

A judgment against one spouse alone does not constitute a lien on a tenancy by the entirety so long as the marriage continues. Once the marriage is dissolved, however, a tenancy by the entirety is converted to a tenancy in common, and any lien or encumbrance against one spouse attaches to and becomes an encumbrance on that spouse's interest.

Where a Final Judgment of Dissolution disposes of and transfers a husband's interest in tenancy by the entireties property, awarding it to the wife as "lump sum alimony," two things happen simultaneously. First, the dissolution converts the tenancy by the entirety to a tenancy in common. Second, the husband's interest as a tenant in common is transferred to the wife in satisfaction of the "lump sum alimony" claim. There is a brief moment "in the twinkling of a legal eye" after the conversion to a tenancy in common, but before the transfer to the wife, when the liens of judgment creditors against the

husband attach to his interest in the property. See, Hillman v. McCutcheon, 166 S.2d 611 (Fla. 3d DCA 1964) (discussed below).

Respondent, MAGALI C. HAMILTON, was awarded her former husband, L. E. HAMILTON's interest in tenancy by the entirety property through the Final Judgment of Dissolution as "lump sum alimony." Under the foregoing principles, Petitioner's judgment lien against L. E. HAMILTON attached "in a twinkling of a legal eye," which meant Respondent was transferred L. E. HAMILTON's interest subject to Petitioner's judgment lien.

Cases which involve pre-dissolution transfers of tenancy by the entirety property from one spouse to the other, either by settlement agreements or quit-claim deeds, are inapposite in this case on appeal. See State of Florida Department of Commerce v. Lowery, 333 So.2d 495 (Fla. 1st DCA 1976); Lieberman v. Kelso, 354 So.2d 137 (Fla. 2d DCA 1978); and Royal Flag Jonas, Trustee v. William G. Logan, 10 F.L.W. 2491 (Fla. 3d DCA, November 5, 1985) (discussed below). Where the husband's legal or equitable interest in tenancy by the entirety property is conveyed by deed or agreement prior to the dissolution, there is no "gap" during which judgment liens against the husband alone attach because the husband's interest would have vested in the spouse prior to the dissolution.

In its decision, the Fifth District Court of Appeal certified a direct conflict between the instant case and the seminal case in the area Hillman. Although Hillman is totally

analogous to the present case and represents both the correct application of law and sounder public policy, the Fifth District chose not to follow Hillman. This, Petitioner contends, constitutes error.

ARGUMENT

UPON A DISSOLUTION OF MARRIAGE, A JUDGMENT LIEN AGAINST THE HUSBAND ATTACHES TO THE PROPERTY PREVIOUSLY HELD AS A TENANCY BY THE ENTIRETY AND AWARDED TO THE WIFE AS LUMP SUM ALIMONY.

Petitioner MUSSELWHITE's judgment lien against L.E. HAMILTON attached to his interest in the real property previously held as tenants by the entirety with Respondent HAMILTON when their marriage was dissolved and she was awarded his interest in this property as "lump sum alimony." The case law in Florida, the underlying principles of law pertaining to the nature of a spouse's claim for "lump sum alimony," and public policy support this proposition. The Trial Court's Summary Final Judgment and the Fifth District Court of Appeal holding that Respondent took her husband's interest free and clear of Petitioner's judgment lien, therefore erred as a matter of law.

Property held by a husband and wife as tenants by the entirety maintains special qualities. Because the husband and wife are deemed to hold title as a unit and exercise a "union of control," neither spouse may individually convey or encumber the marital property so as to defeat the rights of the other spouse. Ohio Butterine Company v. Hargrave, 79 Fla. 458, 84 So. 376 (1920). From the peculiar nature of the estate and the relationship of the parties, there must be a unity of estate, a unity of control, a unity of possession, and a unity in conveying or encumbering the property. Id., at 378. Consequently, property

held by the entirety is not subject to a judgment lien against one spouse alone. Teardo v. Teardo, 461 So.2d 276 (Fla. 5th DCA 1985).

When a marriage is dissolved, property held as a tenancy by the entirety is converted to a tenancy in common. §689.15, F.S. (1985). Once converted to a tenancy in common, judgment liens against one spouse alone attach to that spouse's interest in the property because the marital unit has been broken. County of Pinellas v. Clearwater Federal Savings & Loan Assn, 214 So.2d 525 (Fla. 2d DCA 1968); Ohio Butterine v. Hargrave, 79 Fla. 458, 84 So. 376 (1920). A judgment lien attaches to the debtor spouse's newly created interest in the property as though it were after acquired property inuring to the benefit of the judgment lien creditor. The same rule applies regarding a mortgage on entirety property executed by one spouse alone. The mortgage, though not attaching when executed, attaches to the executing spouse's interest as after acquired property and inures to the benefit of the mortgagee. Florida Land Inv. Co. v. Williams, 84 Fla. 157, 92 So. 876 (1922).

In the case sub judice, Petitioner was awarded the husband's interest in the entirety property as "lump sum alimony." (R-47) The Court awarded alimony to Respondent HAMILTON after finding that her husband had been a "primary wage earner," and that the Respondent wife was "not capable of providing herself with sufficient income." (R-47) (See Appendix, Exhibit "B.") As

the justification for awarding alimony in a lump sum, the Court stated:

The Husband is well able to pay periodic alimony but because of his historical refusal to comply with his personal obligations, the obligations of this Court and his living a lifestyle which makes it impractical for the Wife to enforce obligations for periodic payments, the Husband's interest in said marital home should be awarded to the wife as lump sum alimony. (R-47) (See Appendix, Exhibit "B.")

A Court may award lump sum alimony in those instances where the evidence reflects: "(1) a justification for such payment and (2) the financial ability of the other spouse to make such payment without substantially endangering his or her economic status." Canakaris v. Canakaris, 382 So.2d 1197, 1201 (Fla. 1980).

Three "justifications" for lump sum alimony have been recognized by this Court. Tronconi v. Tronconi, 466 So.2d 203 (Fla. 1985). The first is the traditional "support-type" justification based upon the ability of one spouse to pay and the needs of the other spouse. Id., 466 So.2d 203. The second justification, recognized in the Canakaris case, is based on a "special claim" of a spouse, which is distinguishable from the concept of a "special equity," a vested property right acquired during the marriage. Id., 466 So.2d 203. The third and most recently recognized justification is one based on a "equitable distribution" of the jointly-held property. Tronconi, 466 So.2d 203.



The terms of the Final Judgment of Dissolution of Marriage entered by the Trial Court dissolving the marriage of Respondent HAMILTON to her husband clearly awarded lump sum alimony to her upon the traditional support type justification.

Lump sum alimony is a right created upon the entry of a Final Judgment; Miller v. Miller, 455 So.2d 436 (Fla. 2d 1874); Cann v. Cann, 334 So.2d 325 (Fla. 1st DCA 1976). It is a vested right, not terminable and not subject to modification. Granville v. Granville, 445 So.2d 362 (Fla. 1st DCA 1984). The purpose of the lump sum award, particularly when based upon "support," is to discharge the supporting spouse (husband) from any obligation to the supported spouse (wife) after the final date of the judgment. Frischkorn v. Frischkorn, 223 So.2d 380 (Fla. 3d DCA 1969). A lump sum award is used as an alternative to periodic alimony payments to avoid having the supported spouse undertake multiple, vexatious lawsuits to enforce a periodic obligation. The Trial Court in dissolving Respondent's marriage, awarded lump sum alimony for the very purpose of avoiding multiple lawsuits, stating that it would be "impracticable" for the Respondent to enforce periodic payments because of her husband's history of recalcitrance.

Once the alimony is awarded, unless awarded and satisfied as a "lump sum," the supported spouse becomes a creditor of the supporting spouse. As a creditor she has the full panoply of creditor's rights at her disposal, including the right to

garnish, levy and attach. See §§61.12 and 61.17 F.S. (1985). (Permitting attachment, garnishments and other court enforced methods of securing alimony and/or child support payments.) She may secure her alimony award by having the Court order the husband to provide security in the form of a lien on his assets. §61.08(3), F. S. (1985). As a creditor of the husband, the wife seeking to enforce the alimony awarded is subject to the same rules of collection and priority as other creditors; see, e.g., Teardo, 461 So.2d 276 (Fla. 5th DCA 1985) (where judgment of spouse for alimony did not constitute lien on real property held by former husband as tenants by the entirety with second wife), except in a few narrow instances. See, 11 USC 523(5) (precluding the dismissal in bankruptcy of alimony support obligations); see also §61.081 and §61.12(2) F.S. (1985) (permitting spousal income deduction orders and continuing writs of garnishment).

The question before the Trial Court below was whether Respondent HAMILTON, awarded her husband's interest in entirety property as "lump sum alimony," took that interest subject to the lien of her former husband's judgment creditor, Petitioner MUSSELWHITE. The only case dealing directly with this issue on virtually identical facts is the case of Hillman v. McCutcheon, 166 So.2d 611 (Fla. 3d DCA 1964).

In the Hillman case, Hillman attempted to foreclose a mortgage executed by McCutcheon's husband alone, purportedly encumbering tenancy by the entirety property owned by Mr. and

Mrs. McCutcheon. Mrs. McCutcheon had neither executed, nor had knowledge of the mortgage. Mrs. McCutcheon had obtained a final decree of divorce against her husband in which the real property was awarded to her "as lump sum alimony." The issue before the Court was whether she took her former husband's interest in the real property subject to the prior mortgage in favor of to Hillman.

Hillman argued that the mortgage became a lien on the husband's interest in the real property "coincident with the severance of the marriage relationship and the consequent conversion of the estate by the entirety into an estate in common." Id., at 612. The Court acknowledged that the tenancy by the entirety was immediately converted into a tenancy in common upon divorce which vested title in the husband as a tenant in common, even though title immediately passed into and out of him by operation of law in a "twinkling of a legal eye." Since the husband's interest in the property was awarded to the wife to satisfy her future claim to alimony, the only way for this to have occurred was for the tenancy by the entirety first to have been terminated, and then for the husband's interest in the property to have been transferred to Mrs. McCutcheon by decree.

The Hillman Court stated:

The second point depends upon whether or not the divorced husband was ever vested with title as a tenant-in-common. We conclude that in this instance he was so vested, because no specific time is required for the vesting of title. . . . [w]e therefore conclude that

title may pass into and out of a person by operation of law in the 'twinkling of a legal eye'. It will be noted in the instant case that the property of the husband was sequestered by the decree of divorce to satisfy a future claim of the wife; that is, her right to alimony. Thus, it was necessary that the property subjected to the claim be the property of the husband. The only way that this could be effected was for the estate by the entirety to be terminated first and then for the interest of the husband to be transferred to the wife by judicial decree. It is apparent that if the judge had ordered the interest of the husband sold and the money paid as alimony, then the husband would have been, during the period of time from the decree to the sale, vested with title to this undivided one-half interest, and plaintiff's lien would have attached. In the divorce decree the chancellor 'short-circuited' this process but the effect was the same. Therefore, the subjection of the husband's interest to the wife's claim of alimony did not defeat the vesting of title in the husband and plaintiff's lien attached to that interest prior to the enforcement of the claim for alimony. Id., at 613.

The Court concluded the "wrong rule of law" was applied at the trial level and reversed the final decree with directions to enter a decree in favor of the creditor, Hillman.

The facts in this case on appeal are almost identical to those in Hillman. The only difference is that in Hillman a creditor asserted a mortgage lien, and here, Petitioner is asserting a judgment lien. Since Petitioner's judgment lien attached to subsequently acquired property, just as a mortgage would attach to subsequently acquired property, this is a distinction without a real difference.

The Court in the Hillman case correctly applied the general principles of debtor-creditor law to its facts in determining that the wife took her husband's interest subject to the prior lien. The wife's right to alimony was but a "future claim" which could have been satisfied by the Court's order that the husband's interest be sold and the money paid as alimony. The Court avoided this two-step process by ordering that the husband's interest be awarded to the wife as a way of "short-circuiting" the procedure.

The Fifth District Court of Appeal in the instant case, in affirming the Trial Court below, refused to follow the Hillman case, preferring instead to follow the Second District's opinion and reasoning in the case of Liberman v. Kelso, 354 So.2d 137 (Fla. 2d DCA 1978). Surprisingly, the Court found that Hillman and Liberman were in "express and direct conflict" despite the obvious factual and legal differences between the two cases. The Court further found that Liberman could not be "honestly distinguished" from the instant case, despite these same differences.

In Liberman, the husband and wife entered into a property settlement agreement granting the wife all title to the marital home formerly held as tenants by the entirety. This agreement was incorporated into the Final Judgment of Dissolution. The wife subsequently brought a quiet title action against the holder of a judgment against her former husband, which resulted in the property being determined by the Court to be free and clear of the judgment lien.

The Fifth District's reliance upon the Lieberman case is greatly misplaced because of the obvious factual and legal differences. First, Lieberman involves a pre-dissolution property settlement agreement, unlike the present case where no such agreement had been reached. Property settlement agreements are not different from ordinary contracts, and they should be construed and interpreted the same as other contracts. Sosnowitz v. Sosnowitz, 342 So.2d 524 (Fla. 3d DCA 1977), cert. denied, 352 So.2d 174. Under an ordinary contract to convey title to real property, the transferee would be regarded as the beneficial or equitable owner of an (equitable) interest in the realty involved. Lafferty v. Detwiler, 155 Fla. 95, 20 So.2d 338 (Fla. 1944). A transferee of real property under an ordinary contract would be entitled to specifically enforce the contract for the sale and transfer of the real property. A wife under a property settlement agreement would be afforded the same beneficial or equitable title in the real property at the time of the agreement, and she too could specifically enforce the property settlement agreement through an equitable action in Court. Logan v. Logan, 310 So.2d 435 (Fla. 3d DCA 1975).

Where a property settlement agreement has been executed prior to the dissolution, giving the wife the beneficial or equitable title to the husband's interest in the marital property, the husband does not retain a sufficient interest in the property to which his judgment creditors' liens could attach

at the time of dissolution. The wife's interest would be analogous to a claim for "special equity," which, as defined in the classic sense, is a vested property right arising prior to the dissolution. Where the spouse is awarded her husband's interest in the property as "special equity," the husband does not acquire a vested interest in the property as a tenant in common at dissolution to which his judgment creditors' liens can attach. Holt v. Boozle, 394 So.2d 226 (Fla. 5th DCA 1981).

Where a spouse obtains her husband's interest in entireties property through a voluntary transfer prior to dissolution, such that she becomes the true equitable owner of the interest, the husband simply retains naked, legal title. Consequently, he has no vested interest to which his judgment creditors' liens can attach. His wife, therefore, should take title to the property after dissolution free and clear from these judgment liens.

In the Hillman case, as in the instant case, there was no such predissolution transfer, either by contract or deed. No vested equitable interest in the wife arose prior to the time of dissolution. Her interest was created at the time of dissolution.

The Second District in the Liberman case, a case upon which the Fifth District in the instant case relied, itself relied heavily upon the case of State of Florida, Department of Commerce, Division of Employment Security v. Lowery, 333 So.2d 495 (Fla. 1st DCA 1976). In the Lowery case, the husband, who had numerous judgments against him alone, entered into a

stipulation with his wife in anticipation of a divorce in which he agreed to convey to her his interest in property held by the entirety. Before the Final Judgment of Divorce, the husband conveyed by quit-claim deed the subject property, but the deed was recorded after the divorce judgment. In a quiet title suit filed by the wife against these competing lien creditors, the First District determined that the conveyance to the wife terminated the estate by the entirety, and when the Final Judgment of Dissolution was entered, the wife took clear title because the former husband had no interest to which any judgment liens could attach.

Surprisingly, the Fifth District in relying upon Lieberman distinguished the Lowery case because it involved the execution of a deed from the husband to the wife prior to the entry of the judgment of dissolution. This distinction is tenuous and completely ignores the fact that the wife would have already obtained the beneficial or equitable interest in the property prior to the time of dissolution through the property settlement agreement itself. The only act remaining to fully consummate the transaction would have been the execution of a deed, which is a ministerial act at best, and which could have been specifically enforced by the wife in equity.

The Court, as stated above, correctly distinguished the Hillman case from the Lowery case and the case of Jonas v. Logan, 478 So.2d 410 (Fla. 3d DCA 1985). In the Logan case, the husband



had executed a mortgage deed and note on tenancy by the entirety property forging his wife's name. In anticipation of a pending divorce, and in accordance with a property settlement agreement, the husband transferred the property by quit-claim deed to the wife prior to the entry of the Final Judgment, which then incorporated the property settlement. The Third District determined that the mortgage lien did not attach to the husband's interest in the estate when the property settlement agreement was executed, and when the Judgment of Dissolution was entered. The Hillman case was distinguished because there had been a conveyance of the husband's interest in the property prior to the dissolution, thereby vesting title in the wife before the dissolution was entered.

The only real difference between the Liberman case and the Lowery and Jonas cases is that Liberman did not involve a deed executed prior to dissolution. By relying on this difference, the Fifth District ignores the important fact that the wife in Liberman had already obtained her husband's beneficial and equitable interest in the property before the dissolution through the property settlement agreement. Liberman is actually closest by analogy to the Holt case, supra, because in Holt the wife had obtained her interest, though vested and equitable in nature, prior to dissolution.

The instant case differs from Liberman, Lowery, Jonas and Holt because here there is no pre-dissolution deed, agreement or

equitable interest arising by operation of law. The Respondent's interest was created and arose solely at the time of dissolution. Hillman is the only case whose facts are similar to the instant case, and Hillman should control.

Not only should the Hillman case be controlling because of its precedential value, but also because its ruling is supported by the general principles of law and by public policy.

A spouse's claim for alimony when set up as a periodic award becomes an obligation of the supporting spouse to be satisfied over time. The supported spouse becomes a creditor of the supporting spouse whose rights, as stated previously, can be enforced through collection methods. The sole purpose in awarding lump sum alimony, when awarded to satisfy the support obligations, is to avoid the necessity of having multiple actions brought to enforce each successive alimony payment when it becomes due. As stated in Hillman, the lump sum award satisfies "future claims" for alimony. It is manifestly inconsistent for the spouse having a periodic alimony award to be subordinated to prior creditors' claims and liens against her husband, while the spouse who is awarded lump sum alimony, in order to satisfy the same support obligation, to be given a priority over the same creditors. If the Fifth District's decision is upheld, such that the Respondent, who was awarded lump sum alimony to satisfy the support obligation, takes a priority over pre-existing judgment creditors, then the Court, in essence, would be establishing a

super priority for her. Since an award of lump sum alimony simply compresses the time within which the support obligation is satisfied, a decision upholding the Fifth District's ruling would establish an arbitrary and artificial distinction between periodic alimony and lump sum alimony recipients.

The Court should distinguish cases where there is a pre-dissolution transfer of title to entireties property, or at least an agreement to transfer title, from those cases where there is no such transfer, as in the instant case. The State has always recognized the concept of "union control" of entireties property. The Court has always taken steps to safeguard the sanctimony of entireties property prohibiting one spouse from transferring or encumbering the interest of the other spouse in this property. Where the marital estate is intact and the spouses convey or agree to convey title prior to dissolution, the marital unit is acting in concert or union to transfer title. However, where there is no such transfer or agreement to transfer prior to dissolution, and the Court itself effects the transfer through the dissolution order, then the marital unit cannot be said to be acting as a union. Instead, the Court is acting on its own behalf in transferring the interest of one spouse to the other in satisfaction of the obligee spouse's claim for alimony, much like satisfying a creditor's claim.

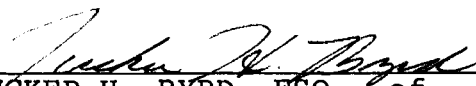
A ruling by this Court upholding the rationale of the Hillman case would not create a dramatic increase in the number

of spouses who become wards of the State. The Courts dissolving the marriages and making the lump sum alimony awards could simply take into consideration existing liens or encumbrances against the supporting spouse in making the award and structure the alimony award granting or conveying the husband's property interests to the wife so as to insure that she is adequately supported, while at the same time preserving the priority of pre-existing claims of lien creditors.

CONCLUSION

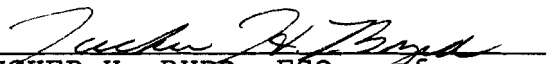
Because the Trial Court and the Fifth District erred as a matter of law in finding that Respondent took her former husband's interest in their marital property free and clear of Petitioner's judgment lien, Petitioner, H. S. MUSSELWHITE, JR., prays that this Court will reverse the lower courts' findings and remand this matter for further proceedings on the issue of homestead.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: WILLIAM H. MORRISON, ESQ., 400 Maitland Avenue, Altamonte Springs, FL 32701; and to J. DON FRIEDMAN, ESQ., P.O. Box 881, Longwood, FL 32750, by United States Mail this 24th day of November, 1986.

  
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