

IN THE SUPREME COURT,
STATE OF FLORIDA

FILED

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CLERK, SUPREME COURT

By _____
Deputy Clerk

MARGARET SHARP,
Petitioner,

v.

CASE NO. 69535
FIFTH DISTRICT COURT OF APPEAL
CASE NOS. 85-1711 and 85-1741

MAGALI C. HAMILTON, et al.,
Respondents.

H.S. MUSSELWHITE,
Petitioner,

v.

CASE NO. 69536
FIFTH DISTRICT COURT OF APPEAL
CASE NOS. 85-1711 and 85-1741

MAGALI C. HAMILTON, et al.,
Respondents.

INITIAL BRIEF OF PETITIONER,
MARGARET SHARP

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INTRODUCTION

For purposes of this proceeding, Petitioner MARGARET SHARP, shall hereafter be referred to as "SHARP" and Petitioner H.S. MUSSELWHITE shall be referred to as "MUSSELWHITE". Respondent MAGALI C. HAMILTON shall hereafter be referred to as "WIFE".

Reference to the record on appeal shall be made with the specific page number as (R-).

STATEMENT OF THE FACTS AND OF THE CASE

The facts in this matter are not in dispute. For purposes of simplification, SHARP will here incorporate so much of the decision of the Fifth District Court of Appeal as succinctly sets forth the facts of this case:

Magali Hamilton and L.E. Hamilton, as husband and wife, were the owners of a parcel of property in Seminole County, Florida, as tenants by the entirety prior to the dissolution of their marriage by final judgment entered on May 24, 1984. The final judgment of dissolution provides, for purposes pertinent to this appeal:

The husband's interest in the marital home of the parties described above be and it is hereby awarded to the wife as lump sum alimony. Title to the following property is by this final judgment of dissolution of marriage hereby transferred, set over and conveyed to the wife, Magali C. Hamilton, in fee simple absolute.

During the Hamiltons' marriage, L.E. Hamilton executed, on his own, a \$10,000.00 mortgage on the property in favor of Appellant, Margaret Sharp. Appellant Musselwhite had a Final Judgment against L.E. Hamilton in the amount of \$22,608.34.

The present cause began when Sharp filed a complaint seeking to, inter alia, foreclose her mortgage on the subject property. Musselwhite filed an answer and counterclaim seeking a declaratory judgment as to his rights against the property. Ultimately, all the parties moved for motions for summary judgment.

The lower court determined that the final judgment of dissolution, awarding Magali Hamilton title to the property as "lump sum alimony," vested ownership of the property in her, free and clear of Musselwhite's judgment lien and Sharp's mortgage. The Court thereupon quieted title to the property in favor

of Hamilton as against Musselwhite and Sharp.
Sharp v. Hamilton, 11 FLW at 2047 (Fla. 5th DCA 1986).

The Final Judgment of Dissolution of Marriage entered May 24, 1984 also found the following:

The Husband has been the primary wage earner during the course of this marriage and provided a substantial standard of living for the family and the Wife has subordinated her abilities in the job market to facilitate the development of the family and is not capable of providing herself with the sufficient income to sustain the standard of living to which she has become to rely upon during the course of the marriage. 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 life style which makes it impracticable 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.

Exhibit "A", p. 2, Appendix to Brief of H.S. Musselwhite, Jr. (Filed in the Fifth District Court of Appeal).

The Fifth District Court of Appeal affirmed the ruling of the trial court in quieting title to the property as against SHARP's mortgage. That court also certified its result to be in express and direct conflict with the decision of Hillman v. McCutchen, 166 So.2d 611 (Fla. 3d DCA) cert. denied. 171 So.2d 391 (Fla. 1964).

SUMMARY OF ARGUMENT

The issue before this court is whether, upon dissolution, a mortgage executed solely by the Husband during marriage attaches to property previously held by the entirety which the Final Judgment of Dissolution of Marriage purported to award to the Wife as lump sum alimony.

The subject real property was held as entirety property when the Husband, L.E. Hamilton, alone executed a mortgage in favor of SHARP. When the marriage subsequently was dissolved, title to the entirety property automatically converted to tenancy in common. The separate interest in the property then held by the Husband was ordered to be paid to the Wife as lump sum alimony, to fully satisfy his alimony obligation.

It has long been established law in Florida that an award of alimony requires there be some separate source of property not already owned by the obligee spouse from which that alimony can be paid. Although the fact that the severance of the entireties estate and the award to WIFE of the Husband's interest as lump sum alimony were done in the same legal document there existed an interval during which the Former Husband had a separate interest in the property. It was in this interval that the mortgage previously executed only by the

Husband attached. SHARP's mortgage lien thus attached to the Husband's undivided one-half interest in the real estate before it was given to WIFE as alimony.

ARGUMENT

A MORTGAGE ON AN ESTATE BY THE ENTIRETY EXECUTED BY ONLY ONE SPOUSE ATTACHES TO THAT SPOUSE'S INTEREST UPON A SUBSEQUENT DISSOLUTION OF MARRIAGE PRIOR TO THE ENFORCEMENT OF A CLAIM FOR ALIMONY

The Final Judgment of Dissolution of Marriage of the WIFE and her Husband expressly provided that the Husband's interest in the marital home be awarded to the WIFE as lump sum alimony. In making that award, the trial court expressly found that the WIFE was "not capable of providing herself with the sufficient income to sustain the standard of living to which she has become to rely upon during the course of the marriage" and that "the Husband is well able to pay periodic alimony." There was no finding of any special equities or justification for any equitable distribution. On the contrary, the court specifically awarded the home as lump sum alimony to supplant the WIFE's needs for periodic alimony. See Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980); Tronconi v. Tronconi, 466 So.2d 203 (Fla. 1985); Ledford v. Ledford, 469 So.2d 828 (Fla. 5th DCA 1985).

The source of funds for the Husband to pay the lump sum alimony was his interest in the marital property as tenant-in-common created when the estate by the entireties was severed in the Final Judgment of Dissolution. See Fla. Stats. Section 689.15; Salyers v. Good, 443 So.2d 152 (Fla. 2d DCA

Kelso, 354 So.2d 137 (Fla. 2d DCA 1978) and Hillman v. McCutchen, supra. Following brief discussions and characterizations of both Hillman and Liberman, the Court held that Liberman could not "be honestly distinguished from the instant case, since the deed was executed after judgment" Sharp at FLW 2048. Without discussion, the Court then certified its decision to be in express and direct conflict with Hillman.

In Liberman the Final Judgment of Dissolution incorporated a previously executed Property Settlement Agreement which provided that the Husband convey his interest in the marital home to the Wife. A Property Settlement Agreement is a contract between the parties. In Liberman, the contract was to convey the entireties properties solely to the wife. By the doctrine of "equitable conversion" the wife at least became the beneficial owner of the real property and the Final Judgment of Dissolution merged her equitable title with legal title. In re Sweet's Estate 254 So.2d 562 (Fla. 2d DCA 1971).

In the instant case, there was no Property Settlement Agreement, no deed executed, and no voluntary act or agreement between the parties to convey the home to the WIFE. The Final Judgment of Dissolution of Marriage itself operated as the conveyance of the Husband's interest to the WIFE when it expressly stated that "[t]itle to the following property is by this Final Judgment of Dissolution of Marriage hereby

transferred, set over and conveyed to the Wife, MAGALI C. HAMILTON, in fee simple absolute." The fact that Liberman did involve a Property Settlement Agreement is a relevant distinguishing factor. In contrast to this, the instant facts are virtually identical to Hillman.

As reasoned by the court in Hillman, the warranty contained in the mortgage executed by the husband is effective as an expression of an intention on his part to create a lien on his interest in the real estate for the debt. While the mortgage may have been ineffective at its inception to encumber entirety property, the mortgage is effective to secure the Husband's after-acquired title. Hillman, supra at page 613. The same reasoning applies in the instant case.

The very reason given by the trial court in the dissolution proceeding for conveying the interest of the Husband to the WIFE as lump sum alimony was ". . .and his living a lifestyle which makes it impracticable for the wife to enforce obligations for periodic payments." Ergo, the award of the Husband's interest in the marital property to WIFE was to serve as a source to satisfy his obligation to pay periodic alimony.

As noted by the court in Hillman, supra, had the trial court ordered the interest of the Husband sold and the money realized thereby paid as alimony, a mortgage lien would have attached to his interest before any alimony payments would

have been made to the Wife. Accordingly, in the instant case, title as tenant in common vested in the Husband and SHARP's mortgage lien attached to that interest prior to the enforcement of any claim on the part of the WIFE for alimony.

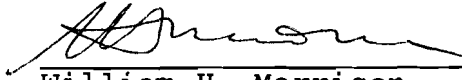
CONCLUSION

The trial court and the Court of Appeal both ruled the mortgage interest of SHARP was ineffective against the property awarded the WIFE as lump sum alimony. Such rulings were improper in view of the fact that after the estate by the entirety was severed by the Final Judgment of Dissolution, the WIFE was awarded that separate interest of the Husband as lump sum alimony. In the period after the entirety estate was severed, the mortgage lien against the Husband's interest attached. When title to the property was then awarded by the Final Judgment of Dissolution of Marriage to the WIFE, it was subject to the mortgage lien of SHARP. All this happened by operation of law in the "twinkling of a legal eye."

The Order for Summary Final Judgment as to Crossclaim of Magali C. Hamilton, and opinion and decision of the Fifth District Court of Appeal affirming the ruling quieting title to the property as against the mortgage should be reversed and remanded to the trial court for further proceedings after acknowledging the validity of the mortgage lien against the Husband's interest in the property.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by hand/by mail this 25th day of November, 1986 to Tucker H. Byrd, Esq., P.O. Box 880, Winter Park, FL, Pierre L. Steward, Esq., P.O. Box 459, Orlando, Florida 32802, W.L. Kirk, Esq., P.O. Box 1873, Orlando, Florida 32802, J. Don Friedman, Esq., P.O. Box 881, Longwood, FL 32750, Ralph C. Losey, Esq., P.O. Box 285, Orlando, Florida 32802, and Joseph A. Frien, Esq., 1051 Winderley Place, Maitland, Florida 32751.



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