

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

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CLERK, SUPREME COURT

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MARGARET SHARP,
Petitioner,

vs.

MAGALI C. HAMILTON,
Respondent.

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

H. S. MUSSELWHITE,
Petitioner,

vs.

MAGALI C. HAMILTON,
Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

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ARGUMENT

THE EXECUTION OF A MORTGAGE ON TENANCY BY THE ENTIRETY PROPERTY BY THE HUSBAND WITHOUT THE WIFE'S JOINDER DOES NOT BECOME A LIEN ON THE PROPERTY IF IT IS THEREAFTER AWARDED TO THE WIFE AS LUMP SUM ALIMONY.

AND

A JUDGMENT RECORDED AGAINST A HUSBAND DOES NOT BECOME A LIEN ON THE PROPERTY IF IT IS THEREAFTER AWARDED TO THE WIFE AS LUMP SUM ALIMONY.

In the case of Lieberman v. Kelso, 354 So.2d 137, 139 (2nd DCA 1978), this court acknowledged that:

Section 689.15, Florida Statutes (1975) specifies that in the case of estates by the entireties, the tenants shall become tenants in common upon divorce. However, this statute has never been construed to prohibit a court in a dissolution proceeding from awarding full title to entireties property to one of the spouses. See Quick v. Leatherman, 96 So.2d 136 (Fla. 1957). Thus the judgment of dissolution, the very event upon which the appellants rely to make Mr. Heinselman a tenant in common, ordered that the appellee should have sole title to the property. We do not consider the fact that the deed was not actually executed until after the dissolution as relevant because we deem the judgment of dissolution to be controlling. In essence, we believe that the transfer of the husband's interest to the wife pursuant to the judgment of dissolution was equivalent to the defeasance of the husband's interest in the property which would have occurred had he predeceased his wife while the parties were still married. [Emphasis supplied.]

The Fifth District Court of Appeals in Holt v. Boozel, 394 So.2d 226 (5th DCA 1981) viewed with favor the philosophy and law as established in the Liberman case when it agreed with the "proposition" that the statutes have "never been construed to prohibit a court in a dissolution proceeding from awarding full title in property held as a tenancy by the entirety to one of the spouses." The court went on to note that in the case then being considered and in the Liberman case that the final judgment had been entered prior to the time a deed of conveyance was ever executed.

In the Holt case the court considered the case of State Dept. of Com. v. Lowery, 333 So.2d 495 (1st DCA 1976), which case dealt with a deed transferring the husband's interest to the wife pursuant to a stipulation between the divorcing parties, a deed having been executed prior to the time of the final judgment, but recorded after the date of the final judgment. The Court, in Holt, stated that it concurred with the reasoning behind the Lowery and Liberman cases in the First and Second District Courts of Appeal.

The legislature did not intend by enacting Florida Statute 61.08 that an award of alimony by the circuit court could be defeated by the activities or inappropriate conduct of the spouse who is to pay or from whom property is to be transferred as alimony. The principal of law established by

Quick, Liberman, Lowery, and Holt clearly is that the final judgment dissolving the marriage controls and as such is the same as a defeasance of the paying spouse's interest in entirety property as though that spouse predeceased the other while the marriage continued to exist.

It should further be noted that in the Lowery, Liberman and Holt cases the opinions were rendered when there was no "attack on a transfer as a fraud of creditors." No claim or attack based on a theory of fraud of creditors has occurred within this case.

"Black's Law Dictionary, Revised Fourth Edition" defines "nullity" as:

"Nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect."

The SHARP mortgage is and was of no effect since, until a final decree dissolving a marriage is entered by the court, any mortgage deed executed and delivered by only one of the spouses while the property was still held as an estate by the entireties a "nullity", Bullard v. State, 306 So.2d 557 (3rd DCA, 1975).

Since the trial court has the power to consider special circumstances and award exclusive possession of jointly owned property of the spouses to provide shelter for one of the two spouses' parents as it did in Duncan v. Duncan, 379 So.2d 949 (Fla. 1980) and Blunnie v. Blunnie, 415 So.2d 156 (4th DCA

1982), it certainly should, without limitation, be able to award jointly owned property to one of the spouses as lump sum alimony free of any lien created by the activities of the spouse from whom title is transferred.

This Court, in Quick v. Leatherman, 96 So.2d 136, 138 (Fla. 1957) may have already resolved the question now before it when the following was said:

"It is true that upon the entry of the divorce decree any title then held as an estate by the entirety would become a tenancy in common in the absence of a specific provision in the decree to the contrary. [Emphasis supplied.]

The award of lump sum alimony in the Final Judgment by which HAMILTON claims her interest in the property free of any lien of SHARP's mortgage and MUSSELWHITE's judgment is certainly a "specific provision in the decree to the contrary," Quick, supra.

It seems only equitable and reasonable that if MRS. HAMILTON could have received title to the property free and clear of the liens of MUSSELWHITE and SHARP if she had survived her husband, if he had by quit claim deed transferred title to her, if she had reached a marital agreement with Mr. Hamilton and he transferred title of the property to her, or if a special equity in the property had been awarded to her by a final decree of dissolution, that the trial court below had the power to award the property as lump sum alimony free and clear of any obligations of the husband.

CONCLUSION

It is respectfully submitted that the ruling of the court below that the former husband's creditors and purported mortgagee have no interest or lien on the property as a result of the final order dissolving the marriage of the parties and awarding to the wife ownership of the property as lump sum alimony should be affirmed.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing Brief was served by mail upon WILLIAM H. MORRISON, ESQ., 400 Maitland Avenue, Altamonte Springs, Florida 32701, Attorney for Appellant, MARGARET SHARP; and TUCKER H. BYRD, P.O. Box 880, Winter Park, Florida 32790-0880, Attorney for Appellant, H.S. MUSSELWHITE, JR., this 11th day of December, 1986.

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