

IN THE SUPREME COURT OF THE
STATE OF FLORIDA

MARGARET SHARP,

Petitioner,

vs.

MAGALI C. HAMILTON,

Respondent.

H. S. MUSSELWHITE,

Petitioner,

vs.

MAGALI C. HAMILTON,

Respondent.

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

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

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

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SUMMARY OF THE ARGUMENT

Respondent improperly analogizes the transfer of a husband's interest in tenancy by the entirety property to the wife through a dissolution judgment as "lump sum alimony," to a defeasance of the husband's interest in the same property at his death. This is the argument made and relied upon by the Court in the Liberman case, the very case upon which Respondent, the Fifth District and the Trial Court relied upon in awarding Respondent title free and clear from Petitioner's judgment lien. It is improper to make this analogy for several reasons. The transfer by defeasance is automatic by operation of law, contrary to the lump sum alimony transfer which requires a dissolution judgment to be entered. Where the transfer is by defeasance, it is not made to satisfy a debt obligation. And finally, the transfer by defeasance fulfills the desires of the husband and wife that title pass by survivorship, contrary to the situation where a lump sum alimony obligation is enforced upon the supporting spouse.

Respondent urges this Court to cast aside the factual and legal distinctions between the Hillman case, and the cases of Lowery, Liberman, Holt and Jonas. This Court should be intellectually honest and recognize that the facts of the Hillman case, which are virtually identical to the case under consideration, are unique and distinct from the facts of these

other cases. Accordingly, the Hillman precedent, which is both legally sound and sound from a public policy perspective, should be followed, and the Fifth District's decision reversed.

ARGUMENT IN RESPONSE AND REBUTTAL

Surprisingly, despite the fact the Fifth District expressly certified a direct conflict between this case and the case of Hillman v. McCutcheon, 166 So.2d 611 (Fla. 3d DCA 1964), Respondent has briefed her argument addressing this conflict question without even mentioning or discussing the Hillman case. No attempt was made to distinguish Hillman on its facts, or to refute its legal principles. Instead, Respondent merely quotes from cases which support one side of the conflict, without even touching the issues Petitioners have raised, and attempts to further her argument first by reciting legal truisms which are practically irrelevant to the issue at hand, and then finally by deriving tenuous legal conclusions from this weak support.

Respondent's main argument, which comes from the Liberman case, is that the Judgment of Dissolution of Marriage which passed title to the Respondent is analogous to a defeasance of the husband's title at his death. If Respondent's husband had died before the dissolution, his interest in the tenancy by the entirety property would have passed to her by operation of law. This analogy, however, is inappropriate for several reasons.

First, when title to entirety property passes by defeasance at death, the transfer is automatic by operation of law, even to the exclusion of the decedent's heirs. Bamber v. Bamber, 216 So.2d 806 (Fla. 3d DCA 1968). When title passes by a dissolution judgment to satisfy a lump sum alimony

obligation, the Court in reality has merely compressed several events into one event, the dissolution judgment. As noted in Hillman, the Court "short-circuited" the process of having to dispose of the husband's assets to satisfy the wife's alimony claim by giving her the husband's property in the first instance.

Second, when the transfer occurs by operation of law and death, the transfer is not made to satisfy a debt obligation as it is when the transfer is for lump sum alimony by the dissolution judgment.

Finally, and perhaps most importantly, the automatic transfer at death actually fulfills the desires of the husband and wife who held title as tenants by the entirety. By holding title in this manner, the husband and wife assure themselves that title will pass to the survivor upon the death of one. Thus, the husband and wife have acquiesced to, if not selected, the transfer in advance by holding title in a manner which would insure the transfer. Where the transfer is by dissolution judgment to satisfy the lump sum alimony obligation there is no acquiescence. Rather, the Court is acting to enforce one spouse's demands and entitlements against the other, and to force the supporting spouse to accept, and actually satisfy, the obligation to provide alimony.

Respondent contends that it is "equitable and reasonable" to award her clear title because she would have received clear title had she received a quit claim deed (Jonas case), or if she had

entered into a marital agreement (Lieberman case), or if she had acquired a special equity in the property (Holt case). Respondent fails to appreciate that the difference in this case, there being no deed, no agreement, and no special equity, is precisely why this case should be treated differently from the Lieberman, Jonas and Holt cases. There is nothing equitable and reasonable about treating this case the same as the other in the face of such obvious factual differences.

Respondent asserts several legal propositions, which are true, but which are irrelevant and add nothing to resolve the conflict suggested by these cases. Respondent submits that the Trial Court had the authority to award "exclusive possession" of jointly owned property. Petitioner concurs with this proposition, but fails to see how this even remotely addresses the issue of an intervening lien creditor's rights against the former entirety property.

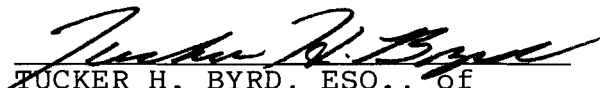
Respondent further submits that the tenancy by the entirety may pass other than to the husband and wife as tenants in common if the divorce decree so dictates. Although this statement is also true, the question still remains as to what happens to the intervening creditor's right in the property. Petitioner admits that Respondent took title in her own name, but this title passed subject to Petitioner MUSSELWHITE's judgment lien. Since the dissolution judgment passing title to Respondent does not even mention the husband's creditors, including MUSSELWHITE, nor state

that title was received by Respondent free and clear, Respondent's contention that the Trial Court ever intended for the wife to receive a clear title is both premature and highly speculative.

CONCLUSION

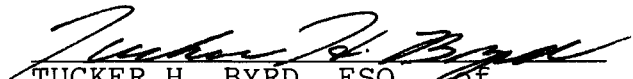
Based upon the argument propounded by Petitioner MUSSELWHITE in his initial Brief to this Court, and upon Petitioner's reply to Respondent's Brief, Petitioner MUSSELWHITE prays that this Court will reverse the Fifth District's decision and remand this matter for further proceedings on the issue of homestead at trial.

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., 801 Orienta Avenue, Altamonte Springs, Florida 32701, Attorney for Petitioner, Margaret Sharp; and to J. DON FRIEDMAN, Friedman & Friedman, P.A., P.O. Box 881, Longwood, Florida 32750, Attorney for Respondent, Magali C. Hamilton, by United States Mail this 5th day of January, 1987.


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