O/a 12-3-87

IN THE SUPREME COURT
STATE OF FLORIDA

JAMES BARROW,

Appellant,

vs

DONNA BARROW,

Appellee.
_____/

CASE NO.: 70,433

APPELLANT'S
INITIAL BRIEF ON THE MERITS

WILLIAM R. PLATT
315 MADISON STREET
SUITE 514
TAMPA, FLORIDA
33602
(813) 228-7312

ATTORNEY FOR
APPELLANT
JAMES BARROW

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CITATION OF AUTHORITIES

PREFACE

Petitioner, James Barrow will be referred to as "Petitioner or husband".

Respondent, Donna Barrow, will be referred to as "Respondent or wife.

References to the record on appeal will be made by the letter "R" followed by the appropriate page number (R-). The transcript of the trial will be referred to by the letters "TR" followed by the appropriate page number (TR-). The appendix will be referred to by the letter "A" followed by the appropriate page number (A-).

STATEMENT OF THE CASE

Respondent, Donna Barrow filed an action for partition. Petitioner, James Barrow filed his answer, defenses and counterclaim. Respondent, Donna Barrow filed her answer to the counterclaim and affirmative defenses.

There was no dispute that the property was incapable of physical division and partition of the property was requested by both parties (TR-5). The non jury trial was held and the court entered an amended judgment of partition ordering that the property to be sold and granting other relief (A-2; R-132-135). The only ruling appealed from is the award of (1/2) one-half fair rental value to Respondent, Donna Barrow, as a result of occupancy by Petitioner, James Barrow.

Petitioner filed a motion for reconsideration and or rehearing which was denied (A-3, 4; R-128-131, 137).

Petitioners, James Barrow filed an appeal to the District Court of Appeals, Second District which rendered its written opinion affirming the judgment on authority of Adkins v. Edwards, 317 So.2d 770 (Fla. 2d DCA 1975), and acknowledging conflict with Vandergrift v. Buckley, 472 So.2d 1325 (Fla. 5th DCA 1985) and Barrow v. Barrow, 505 So.2d 506 (Fla. 2d DCA 1987).

STATEMENT OF FACTS

The marriage of Petitioner, James Barrow and Respondent, Donna Barrow was dissolved by Final Judgment entered August 5, 1983 (A-1, R-7). The wife was awarded an undivided one-half interest in a parcel of residential real property formerly owned by the husband in his name alone (TR-13) as lump sum alimony (A-1, R-7). Husband had at all times prior to the dissolution occupied this property as his residence and continued to do so at all times subsequent (TR-13). The final judgment of dissolution made no provision for the right of either spouse to occupy the real property or for sale or other disposition (A-1, R-7).

It was undisputed that the wife moved her family to Nampa, Idaho immediately after separating from the husband (TR-88, 89). She has continued to live in Idaho at all times subsequent. The wife made no demand for possession or for rent because of the husband's occupancy (TR-89) and communicated no intention to claim rent (TR-89-90) until the amended complaint was filed in the partition proceeding. The wife did not object to the husband's sole occupancy (TR-14). The wife was not excluded from the premises (TR-14) and the husband did not hold possession of the premises adversely or hostilely to the wife's title (TR-42, 89). The wife was never refused access to the real property (TR-14).

Donna Barrow filed a petition to partition the real property, judgment for partition that awarded the wife rent was entered (A-2, R-132-135) and the property was sold at a judicial sale.

POINTS ON APPEAL

POINT I

THE DECISION IN BARROW V. BARROW, 505 So.2d 506 (Fla. 2d DCA 1987) DIRECTLY AND EXPRESSLY CONFLICTS WITH THE HOLDING IN COGGAN V. COGGAN, 239 So.2d 17 (Fla. 1970) AND VANDERGRIFT V. BUCKLEY, 472 So.2d 1325 (Fla. 5th DCA 1985), WITH RESPECT TO THE RIGHT OF A FORMER SPOUSE OUT OF POSSESSION TO RECOVER RENT FROM A FORMER SPOUSE IN POSSESSION OF RESIDENTIAL REAL PROPERTY OWNED AS TENANTS IN COMMON.

1. THE DECISION IN ADKINS V. EDWARDS, 317 So.2d 770 (Fla. 2d DCA 1975) SHOULD BE OVERRULED.

2. THE DECISION OF THE DISTRICT COURT OF APPEALS, SECOND DISTRICT IN BARROW V. BARROW, SUPRA SHOULD BE REVERSED.

POINT II

THE RULE OF LAW ANNOUNCED IN COGGAN V. COGGAN, SUPRA, AND FOLLOWED BY VANDERGRIFT V. BUCKLEY, SUPRA, SHOULD BE REAFFIRMED AS THE LAW OF THIS STATE.

1. NO DISTINCTION SHOULD BE MADE BETWEEN RESIDENTIAL AND NON-RESIDENTIAL REAL PROPERTY OWNED AS TENANTS IN COMMON BETWEEN FORMER SPOUSES WITH RESPECT TO THE RIGHT OF A FORMER SPOUSE OUT OF POSSESSION TO RECOVER RENT FROM A FORMER SPOUSE IN POSSESSION.

POINT III

NO DISTINCTION SHOULD BE MADE BETWEEN CO-TENANTS WHO ARE FORMER SPOUSES AND OTHER CO-TENANTS WITH RESPECT TO THE RIGHT TO RECEIVE RENT FROM THE FORMER SPOUSE IN POSSESSION.

SUMMARY OF ARGUMENT

The decision of the District Court of Appeals, Second District, in Barrow v. Barrow, 505 So.2d 506 (Fla. 2d DCA 1987) is in direct and acknowledged conflict with Vandergrift v. Buckley, 472 So.2d 1325 (Fla. 5th DCA 1985). Vandergrift v. Buckley, supra follows this court's opinion in Coggan v. Coggan, 239 So.2d 17 (Fla. 1970) and Barrow v. Barrow, supra is in conflict with Coggan v. Coggan, supra as well.

The rationale in Adkins v. Edwards, 317 So.2d 770 (Fla. 2d DCA 1975) upon which the Second District Court affirmed the instant case is in conflict with Coggan v. Coggan, supra, Vandergrift v. Buckley, supra and Seesholts v. Beers, 270 So.2d 434 (Fla. 4th DCA 1972). The rationale of Adkins v. Edwards, supra, distinguishes the status of former spouses as tenants in common from other persons who are co-tenants and distinguishes residential real property owned in common from other types of real property. These distinctions are not supported by logic. The opinion in Adkins v. Edwards, supra should be overruled and the rule of law announced in Coggan v. Coggan, supra and Vandergrift v. Buckley, supra, should be clarified as the law of this state.

ARGUMENT

POINT I

THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT AFFIRMING THE TRIAL COURT'S JUDGMENT ON AUTHORITY OF ADKINS V. EDWARDS, SUPRA, IS IN DIRECT CONFLICT WITH COGGAN V. COGGAN, SUPRA, AND VANDERGRIFT V. BUCKLEY, SUPRA.

The amended final judgment of partition with respect to the award of rent by husband to wife was affirmed on authority of Adkins v. Edwards, supra, (Barrow v. Barrow, supra. Adkins v. Edwards, supra, and the opinion of the Second District Court of Appeals in Barrow v. Barrow, supra are in direct and irreconcilable conflict with Vandergrift v. Buckley, supra, with respect to the right to rent between co-tenants from real property owned in common. Adkins is the first majority opinion by a District Court which departs from the rule of law announced in Coggan v. Coggan, supra, with respect to the right to rent between co-tenants, one of whom is in possession and one out of possession.

The facts in Barrow appeal are substantially similar to the facts in Coggan supra, Vandergrift supra, accord, Seesholts v. Beers, supra. The testimony was not disputed that the wife voluntarily left the marital domicile and moved herself and her family to Nampa, Idaho (TR-89). The wife made no demand for rent because of the husband's occupancy; (TR-89) and communicated no intention to claim rent (TR-89, 90). The wife did not object to the husband's

occupancy; (TR-14) she was not excluded from the premises; (TR-14) the husband did not hold possession of the premises adversely or hostilely to the wife's title; (TR-42, 89) and finally, the wife was never refused access to the real property (TR-14). The statements by the trial judge with respect to these facts, made after argument of counsel, are reported in the transcript (TR-88-90).

The opinion in Coggan carefully reviewed prior decisions on this issue in Florida and clarified the law. The facts in Coggan, involved an office building owned as tenants in common by former spouses. This building was occupied by the former husband for a professional practice. The wife may no demand for rent and there was no claim that she was ousted. The issue was whether husband's occupancy and conduct amount to adverse holding or the equivalent of ouster. The court distinguished sole possession from actual exclusion of a co-tenant, denial or invasion of the rights of co-tenant, Coggan supra at 19. In reversing the District Court of Appeals, Second District, which had affirmed the trial court, the Coggan, decision held that there can be no holding adversely or ouster or its equivalent by one co-tenant unless such holding is manifested or communicated to the other Id. at 19. In the opinion the court restated the rule:

> "When one co-tenant has exclusive possession of lands owned as tenant in common with another and uses those lands for his own benefit and does not

> receive rents or profits therefrom, such co-tenant is not liable for accountable to his co-tenant out of possession unless such co-tenant in exclusive possession holds adversely or is the result of ouster or the equivalent thereof." Id. at 18.

If the court had intended to limit the application of the rule announced in Coggan to commercial property, investment property or some other classification such as non-residential property, it could have. It did not. Coggan v. Coggan, supra.

The opinion in Adkins, attempts to distinguish the facts in that case from the rule announced in Coggan, on the grounds that the property owned as tenants in common was residential property occupied by one of two former spouses. In effect, the court announced a holding which is apparently rooted in policy. As stated by the court:

> "In cases like this there frequently exists an aura of hostility and awkwardness not necessarily common to cotenancy of lands or other properties held for commercial purposes. While neither of the parties contended that he or she was ousted from possession, it is unrealistic to believe that parties who could not get along living together while they were married would be expected to enjoy common usage of the former marital home after their divorce." Adkins v. Edwards, supra at 771.

The Adkins, opinion acknowledges that neither of the parties contended that he or she was ousted from possession, Adkins, at 771. Adkins, collides with the holding in Coggan, by excusing the need for the spouse not in possession to communicate an intention or demand possession or to claim rent for occupancy by the other spouses.

Further, Adkins, excuses the need for the trial court to determine whether the tenant in possession held adversely or engaged in conduct essentially equivalent to ouster. Although not expressly stated, Adkins creates a presumption that occupancy by one spouse is hostile and concurrent occupancy by the spouse out of possession is precluded because of the relationship as former spouses. Id. at 771. Cf. Seesholts v. Beers, supra. The Barrow case is an example of how the principle in Adkins, supra, is applied to facts that do not establish a hostile relationship between the spouses separated by the distance from Florida to Oregon, where no exclusion occurred, no objection to the sole occupancy was made known and neither possession nor rent was demanded (TR-89, 90).

The relationship of the parties as former spouses and the nature of residential property is the basis upon which Adkins, distinguishes its facts from the rule announced in Coggan. This distinction is not supported by logic. The relationship of tenants in common whether as spouses, former business partners, brothers and sisters, parent and child, and in today's circumstances unmarried persons who reside together may all possess a degree of hostility as a result of their relationship or disagreement arising out of co-ownership. The court is well aware that the relationship between former spouses may be awkward, and even hostile, but

whether or not this affects their ability to co-own real property is speculative and not a proper basis for a decision based on policy. If co-ownership by former spouse as with any other cotenancy is not workable, the law provides the remedy of partition.

The Adkins, opinion further distinguished the facts of that case and it's holding to apply to residential property. The court applied the reasoning included in Judge Walden's dissent in Seesholts v. Beers, supra. The reasoning in Adkins, as well as the Seesholts dissent, emphasized the fact that occupancy of residential property is precluded by more than one co-tenant. This presents a much too narrow view of the property rights of a co-tenant even in residential property. Admittedly, residential property is ordinarily not suitable for occupancy by more than one family group, even without regard to zoning and municipal land use limitations. But the benefits that a co-tenant enjoys are not limited to the right to occupy. They are much broader and include the right to income from the property, the right to hold the property for future profit and the right to transfer their ownership interest by gift or sale. If concurrent occupancy is impossible or impractical, a co-tenant not in possession has the right to partition. This is a unilateral act on the part of the tenant not in possession. Likewise, a demand for fair

rental value when communicated to the spouse in possession may result in an agreement which is satisfactory to a tenant out of possession. The point is, that the co-tenant out of possession has access to the courts to enforce his or her property rights. The right to enforce property rights by a co-tenant against another co-tenant should not be different between former spouses and persons standing in other relationships.

The rule in Adkins, does not do equity where applied to all cases. It is patently unfair by excusing the spouse out of possession from communicating his or her intention or objection regarding the occupancy. It does not take into consideration that certain benefits accrue from occupancy by a co-tenant. This is especially true with respect to residential property that is occupied and not vacant. For example, preservation of the property, landscape and amenity maintenance, protection from vandalism, routine building maintenance, - - in short keeping the property "lived in". Petitioner suggests that such benefits may more nearly enhance the property when the occupant is a co-owner as opposed to a disinterested third party. Common experience teaches that residential real property is exposed to substantial risks from casualty loss if it is left unoccupied. For example, vacant residential property is frequently uninsurable and even if a risk policy is written

the premiums are excessive. Petitioner requests that the court take judicial notice of the fact that unoccupied residential real property subjects the owners to increased risk of loss and that occupation protects against this risk. Petitioner is unable to find any authority which supports a claim for compensation for services attendant to occupancy rendered by a tenant in possession such as landscape, lawn maintenance, deterrence of vandalism or keeping the property functional for occupancy.

The rule in Adkins, is a rule of "hindsight" which permits a former spouse not in possession to sit back and take advantage of benefits which accrue from occupancy by the former spouse in possession. Adkins, allows a non-possessing spouse to defer the decision to demand the payment of rent or sale or partition so long as that spouse deems such arrangement to be in his or her best interest. As an example, during a period of rising real property values, as have been experienced in Florida over the past two decades, there are many compelling reasons why divorced spouses owning residential real property in common may choose to defer disposition of the property in favor of obtaining substantial profits from sale at a later date. But, Adkins will permit the spouse out of possession to receive rent during the period of occupancy, apparently without regard to the length of the period or that the

spouse out of possession may have permitted the occupancy to continue by choice. The holding in Barrow demonstrates that the absence of hostile conduct or adverse holding does not alter this result.

Under Adkins, the former spouse in possession of residential real property owned in common is unable to make an informed decision regarding whether or not to continue that occupancy. By contrast, under the rule in Coggan as well as the law in most jurisdictions the tenant in possession would be informed whether or not possession or rent was demanded. As stated by the trial judge:

> "...It strikes me that there is something a little inequitable about the idea that the other co-tenant is liable for rent even through he does not know -- he or she -- that that claim is being made or going to be made and not knowing it does not have any way to exercise a judgment as to whether he wants to stay on or not,...particularly in the case where you have a large mortgage...." (TR-89).

Under Adkins, the spouse in possession must now initiate the inquiry regarding whether occupancy is objected to or rent will be demanded. A careful reading of the Adkins decision does not indicate whether the spouse out of possession must communicate his or her intention even if requested. In effect, it leaves the spouse in possession at risk of paying rent in an amount to be determined in the future, unless agreed to by the parties, notwithstanding the non-monetary benefits which flow to the non-possessing

spouse.

Two majority opinions follow the rule announced in Coggan, Vandergrift v. Buckley, supra and Seesholts v. Beers, supra. Their facts with minor exceptions are substantially similar to the facts in Barrow.

In Vandergrift, the wife's right to exclusive occupancy terminated upon remarriage, but she continued to occupy the residence. There was no demand by her former husband that she vacate the house; that he be given possession; advise her that he was claiming rental of the house and never told her that she was claiming adversely to him. The facts with respect to issue of rent are virtually identical to Barrow. The District Court of Appeal, Fifth District, in a carefully reasoned opinion examined the Coggan decision of this court, Seesholts and Adkins. The court rejected the reasoning in Adkins and made the following observation:

> "2. This conclusion was reached despite the absence of any contention of the parties that he or she was ousted from the premises, and the opinion makes no reference to any evidence in that record of animosity or hostility between the parties there. It is equally unrealistic to believe that the former wife in Coggan, apparently not a physician, could jointly occupy the office building which her former husband occupied exclusively for his medical practice, yet the Coggan court refused to find an ouster based on that fact alone. We cannot agree that a rule of law should be based on a surmise as to the relationship of the parties which may or may not be accurate. The principle of law involved here is that stated in Coggan--is the co-tenant in possession holding adversely to the other co-tenant and has such holding been manifested or communicated to the other co-tenant. The evidence

> presented in each case will determine if an actual or constructive ouster has occurred." Vandergrift v. Buckley, supra at 1328 n.2.

The court followed the law set forth in Coggan and the majority opinion in Seesholts. The opinion acknowledged direct conflict with Adkins v. Edwards, supra, an apparent conflict with Finn v. Finn, 464 So.2d 1266, (Fla. 2d DCA 1985), Vandergrift v. Buckley, supra at 1328.

In Seesholts the final judgment made no provision for property which was held as tenants in common after the dissolution. The opinion does not disclose whether demands are made for rent occupancy or an objection to occupancy, however, it does state that the parties agreed the holding was not a result of ouster or the equivalent thereof. The trial court in Seesholts found that the claim for rent was offset by various credits for payments made by the tenant in possession. The appellate opinion restates the rule announced in Coggan and specifically acknowledged the case of Potter v. Garrett, 52 So.2d 17 (Fla. 1951) and indicated that Potter v. Garrett, supra, had been impliedly overruled by the Coggan decision. As noted earlier the dissent in Seesholts together with Potter v. Garrett, supra, which is cited in Seesholts become the basis for the Adkins decision.

Petitioner submits that to the extent that this court finds that Adkins v. Edwards, supra, is in conflict with Coggan v. Coggan, supra, Vandergrift v. Buckley, supra and

Seesholts v. Beers, supra, that the opinion in Adkins v. Edwards, supra, should be reversed and the opinion of the District Court of Appeals, Second District in Barrow should be overruled and remanded for entry of a judgment denying an award of rent to Donna Barrow based upon the undisputed facts in the record.

POINT II

THE RULE OF LAW ANNOUNCED IN COGGAN V. COGGAN, SUPRA, AND FOLLOWED BY VANDERGRIFT V. BUCKLEY, SUPRA, SHOULD BE REAFFIRMED AS THE LAW OF THIS STATE.

The rationale of Coggan v. Coggan, supra, applies to all co-tenants regardless of their status. This includes co-tenants who are former spouses. Application of the rule stated in Coggan, requires that each co-tenant communicate his or her intentions regarding sole occupancy by the other tenant before a tenant out of possession is entitled to recover rent as the result of the other's sole occupancy unless the occupancy is the result of ouster or the equivalent thereof. This rule makes the relationship between co-tenants predictable. It does not permit a tenant out of possession to sit back without communicating his or her intentions and then claim the right to rent at some future time. The facts in Coggan, suggest that the relationship between the former spouses was anything but cordial and perhaps hostile. The opinion carefully reviewed prior decisions and in deciding whether or not the tenant in possession held the property adversely or as the result of ouster or the equivalent thereof stated:

> "There can be no holding adversely or ouster or its equivalent, by one co-tenant unless such holding is manifested or communicated to the other. Where a tenant out of possession claims an accounting of a tenant in possession, he must show that the tenant in possession is holding the exclusive possession of the property adversely or

> holding the exclusive possession as a result of ouster or the equivalent thereof. This possession must be attended with such circumstances as to envince a claim of the exclusive right or title by the tenant in possession imparted to the tenant out of possession. [citations omitted]
>
> > ....
> > ... He [tenant out of possession] has a right to assume that the possession of his co-tenant is his possession, until informed to the contrary, either by express notice, or by acts and declaration that may be equivalent to notice." Id. at 19 [explanation added]

In reversing the District Court of Appeals, Second District which affirmed the trial court, the court stated:

> "[2] In the case at Bar, although the defendant continued in sole possession of the property after the divorce decree the record is devoid of any evidence that prior to the filing of the partition suit, he advised the plaintiff he was claiming adversely to her, or that the had taken any action adverse to her interest or title, or that he had taken any steps to actually or constructively oust her from possession, or that she knew or should have known he was claiming any right of title adverse to her." Id. at 19

The facts in the instant case are substantially similar to the facts in Coggan, but the ruling in the amended final judgment with respect to the award of rent as affirmed by the District Court of Appeals, Second District is different and in conflict with the rule announced in Coggan, supra.

Vandergrift v. Buckley, supra, is a well reasoned opinion. It examines the rationale of Adkins v. Edwards, supra, Seesholts v. Beers, supra and the extent to which these cases are in conflict with or follow Coggan v. Coggan,

supra.

The court in Vandergrift v. Buckley, supra, rejected the rationale in the Adkins, supra, and characterized the basis of the decision as surmise, Vandergrift v. Buckley, supra, at 1328. The court examined both the majority and dissenting opinion in Seesholts v. Beers, supra and concluded that the Seesholts, supra, opinion correctly followed Coggan, supra. The facts which gave rise to the controversy in the Vandergrift v. Buckley, supra, are substantially similar to the facts in the instant appeal. The Vandergrift, supra, court refused to award rent because the facts did not establish that the occupancy was adverse or the result of ouster or the equivalent thereof Id. at 1328, Coggan v. Coggan, supra. Notwithstanding the similarity in facts between Vandergrift and Barrow, the District Court of Appeals, Second District reaffirmed its reliance on Adkins, and acknowledged conflict with Vandergrift. Id. at 1328.

The rationale in Adkins v. Edwards, supra, has an interesting origin. The court in the Adkins, supra, case borrowed directly from the dissent in Seesholts v. Beers, supra), Adkins v. Edwards, supra at 771. The dissent in Seesholts v. Beers, supra, was based largely on language taken from an earlier case, Potter v. Garrett, supra Id. at 438. Potter v. Garrett, supra, was the second appeal

arising out of one action. See also Garrett v. Potter, 36 So.2d 374 (Fla. 1948). Both were appeals taken from motions to strike various pleadings. The reading of both opinions suggest that this case arose from a purely equitable claim by two heirs at law with respect to their interest in a parcel of real property inherited from their deceased parents. As noted by the court, it may have been more appropriately pursued in a different proceeding as a claim for monies advanced and services rendered to the deceased parents. Unfortunately, the rationale of the decision is not evident other than purely as a matter of equity, but the value of Potter v. Garrett, supra, as a precedent for the Seesholts v. Beers, supra dissent is questionable after Coggan.

In essence, the Seesholts, dissent is grounded in the proposition that residential property owned in common cannot be occupied by both tenants and in the case of divorced spouses it is unrealistic to believe co-occupancy is possible even if the premises physically permitted. The dissent in Seesholts, supra as well as the Adkins, supra case presumes the hostile relationship of former spouses but ignores sound reasons why the property may be co-owned. In fact, the rationale in Adkins, supra, does not terminate the co-ownership or whatever hostility or other problems may exist between the co-tenants but allows the spouse

occupying, perhaps in good faith, to be "blind sided" with a demand for rent that appears to be virtually automatic with respect to co-owned residential property. The court's concern for the relationship between former spouses which may in fact be a difficult one after dissolution of marriage is laudable but that concern for this aspect of the relationship does violence to the well established law with respect to co-tenancy and the right to rent. The unfairness of this rule as applied to facts such as are in Barrow is self evident (TR-14, 89, 90).

Petitioner recognizes that a great many parcels of residential real property do not physically permit occupancy by co-tenants who do not live together as one family. This may be a result of physical limitations of premises or the relationship of the parties. Petitioner submits that there are likewise many non-residential parcels that are subject to the same limitations, that is they are not physically sufficient for more than one tenant or the relationship of the parties may preclude concurrent occupancy. Petitioner submits that the rule in Coggan v. Coggan, supra, protects the co-tenant who is not in possession. That tenant is entitled to communicate a demand for occupancy or for rent from the other. The tenant in possession may then make an informed choice whether to pay the rent or terminate the occupancy. This is no less true with residential property

than with non-residential property.

Petitioner admits that there are real distinctions between residential and non-residential real property, but to make a distinction for the purpose of determining whether or not a co-tenant is entitled to receive rent or is obligated to pay rent is not logical.

The judgment of the District Court of Appeals, Second District in Barrow v. Barrow, supra, should be reversed and remanded for entry of a judgment denying rent to Respondent, Donna Barrow.

POINT III

NO DISTINCTION SHOULD BE MADE BETWEEN CO-TENANTS WHO ARE FORMER SPOUSES AND OTHER CO-TENANTS WITH RESPECT TO THE RIGHT TO RECEIVE RENT FROM THE FORMER SPOUSE IN POSSESSION.

There are many examples of relationship between tenants in common that may be adverse or even hostile. These ordinarily depend upon the facts and the circumstances existing between the co-tenants not the nature of their relationship. For example, adverse relationships frequently develop between family members such as brother, sister, parent and child. The relationship between former business associates or partners whose relationship is severed and under todays circumstances unmarried persons who reside together and then split-up to mention only some. Circumstances surrounding the party's severed relationship is responsible for any hostility or adversity that exists. The same observation applies to former spouses many of whom are hostile towards each other after dissolution of marriage, but in some instances the hostility is either insignificant or non existent.

The rule in Adkins v. Edwards, supra, applies only to former spouses. The uncertainty introduced by the rule in Adkins, supra, only highlights further the adverse nature of their relationship, if any.

By contrast, the rule in Coggan v. Coggan, supra,

permits the court to take into account evidence of hostility and if circumstances are appropriate the court may award rent even without a demand for possession or adverse holding having been communicated. For example, where the co-tenant in possession engages in conduct which excludes access by the other co-tenant or the action of the co-tenant in possession that is hostile or adverse to the title of the co-tenant out of possession.

The circumstances which exist between co-tenants regardless of the nature of the property owned or their former or present relationship varies from case to case and must be determined by the court from the facts presented rather than by blanket presumption. Vandergrift v. Buckley, supra.

The judgment of the District Court of Appeals, Second District in Barrow v. Barrow, supra, should be reversed and remanded for entry of a judgment denying rent to Respondent, Donna Barrow.

CONCLUSION

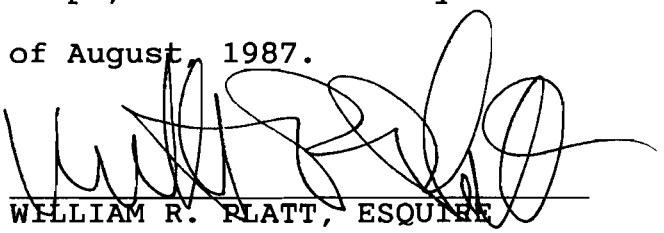
The decision in Adkins v. Edwards, supra, is in direct conflict with the opinion of this court in Coggan v. Coggan, supra, and with the opinion of the District Court of Appeal, Fifth District in Vandergrift v. Buckley, supra. The ruling of the trial court in Barrow, with respect to the right to receive rent is the direct result of this conflict. The state of the law with respect to rent between co-tenants was settled in this court's opinion in Coggan v. Coggan, supra. Vandergrift v. Buckley, supra, correctly followed the rule announced in Coggan v. Coggan, supra, but the Adkins v. Edwards, supra, decision.

The Adkins v. Edwards, supra, decision attempts to distinguish the rule in Coggan, supra, and avoids the necessity for the court to determine whether the factual tests set forth in Coggan v. Coggan, supra, are met before ruling that a co-tenant in possession is obligated to pay rent.

Petitioner request that this court reverse Barrow v. Barrow, supra and order the case remanded to the trial court for entry of a judgment denying the award of rent to Respondent, Donna Barrow. Petitioner further requests that this court reaffirm it's holding in Coggan v. Coggan, supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Stevan T. Northcutt, Esquire, 725 E. Kennedy Blvd., Suite 207, Tampa, Florida 33602 by United States Mail this 17th day of August, 1987.



WILLIAM R. PLATT, ESQUIRE
315 Madison Street, Suite 514
Tampa, Florida 33602
813/228-7312
Attorney for Petitioner
James Barrow