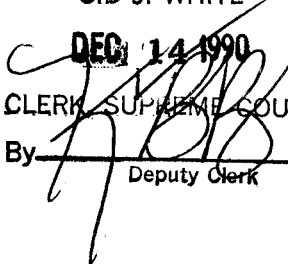


FILED

SID J. WHITE

DEC 14 1990

CLERK SUPREME COURT

By  Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MARY JO KELLY,

Wife/Appellant,

v.

WILLIAM KELLY,

Husband/Appellee.

DISTRICT COURT
APPEAL NO.: 89-02755

AMENDED APPELLANT'S BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

The statement of case and facts, as outlined in the district court's opinion, from which rehearing was taken are as follows. The parties were divorced in 1982. At the time of the divorce, the Wife was awarded exclusive use and possession of the marital home until the parties minor child reached her majority. Upon the child's attaining age eighteen, the trial court, via supplemental final judgment, ordered an equal division of the proceeds of the sale of the property. However, in its order the court refused to credit the Wife one-half the mortgage payments and necessary expenses for repairs and maintenance on the grounds that the Husband was entitled to a set-off of one-half of the home's rental value for that time in which the Wife and child were in possession. The district court reversed.

In reviewing the original final judgment, the district court noted that the alimony and support clauses provided for the Wife's exclusive use and possession of the marital home until the child attained eighteen years of age at which time the house should be sold and the equity divided equally. Just prior to the child attaining her majority, the Wife sought credit for "carrying expenses". The Husband counterclaimed alleging set-off for rental value against the Wife's claim. The trial court found that the rental value of the home during the time in issue was at least equivalent to the amounts paid by the Wife for mortgage and repairs. Consequently, the trial judge directed that the property

be sold and the proceeds divided equally, essentially allowing the Husband's set-off claim to cancel the Wife's claim for contribution.

In reversing, the district court found that the mortgage payments and expenditures for maintenance made by the Wife enhance the equity of both parties so to allow the Husband to avoid paying his proportionate share would enhance his equity beyond that contemplated by the final judgment of dissolution. Moreover, the court found that the Husband was not ousted from possession but rather the Wife's possession was a facet of child support. Consequently, because his lack of possession was not adverse, he was not deprived of any right to possession of the premises. It follows then that he had no right to a set-off against the Wife's claim for "carrying expenses". However, in its opinion rendered August 8, 1990, the district court found that the Wife's entitlement was limited exclusively to principal payments on the mortgage debt and did not include interest payments.

On August 15, 1990, Appellant sought rehearing and clarification on the court's disallowing interest reimbursement contrary to other case law in Florida providing for same. A reply to the motion for rehearing and clarification was filed by the Husband which noted in summary that there were cases from the other districts which went both ways on the question.

An opinion was filed October 12, 1990, on the motion for rehearing denying said motion. Therein the court found that while interest is a necessary component of mortgage payments, it does not

enhance an owner's equity. Consequently, the Wife should be responsible for the interest payments, and in support thereof cites case law from the third district. However, the court further notes that to the extent the second district conflicts with the fourth district, they disagree with the fourth district.

SUMMARY OF THE ARGUMENT

When one spouse is in possession of the marital domicile as a consequence of Court Order for the benefit of the parties minor children, such does not constitute an adverse ouster. Consequently, when the marital domicile becomes sold, the lawful occupant is entitled to reimbursement for one-half of the mortgage payments made during occupancy including interest. This holding is found in Iodice v. Scoville, 460 So.2d 576 (Fla. 4th DCA 1984). However, that holding clearly conflicts with the holding herein where the Second District ruled that the lawful occupant was not entitled to reimbursement for interest.

JURISDICTIONAL ISSUES

WHETHER THE PRESENT DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH IODICE V. SCOVILLE, 460 So. 2d 576 (Fla. 4th DCA 1984).

The second district ruled in the present case that the final judgment of dissolution in this cause did not allow Appellee credit for the rental value of property during Appellant's use and occupancy thereof because said occupancy was for the benefit of the parties minor child and pursuant to court order. Further, the court found that the former Wife was entitled to reimbursement for one-half of the principal payments which she made on the mortgage and for repairs and maintenance. To that extent, this holding squares with the rationale outlined in Iodice v. Scoville, 460 So.2d 576 (Fla. 4th DCA 1984). However, thereafter the two separate with regards to entitlement to reimbursement for interest payments.

The second district rationalized that Appellant ought not to be allowed consideration for that portion of the mortgage payment which represented interest because it did not enhance the Appellee's equity notwithstanding it being a necessary component of the mortgage payment. In Iodice, the court held to the contrary. That court found nothing in the record to justify denying reimbursement for the interest payments made along with the principal. In that case, like the present case, the former Husband's possession of the marital home was via court order for the benefit of their children and did not constitute an adverse ouster, the former Wife therein was disallowed any set-off for fair

rental value during former Husband's use and occupancy thereof.

Iodice conflicts with the present case and cannot be distinguished on alternative grounds. Further, the district court in this case noted that, to the extent that Iodice conflicts, they disagree with the fourth district. The purported holding in Iodice and that of the present case were decided on the same grounds and expressly and directly conflict with one another.

CONCLUSION

The instant district court decision expressly and directly conflicts with another district court decision. Review should be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to JAMES E. AKER, ESQUIRE, 2033 Main Street, Postal Drawer 4195, Sarasota, Florida 34230 on this the 12th day of December, 1990.

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