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FILED
SID J. WHITE
MAR 6 1991
CLERK, SUPREME COURT
By _____ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MARY JO KELLY,

Wife/Petitioner

vs. CASE NO.: 76,946

WILLIAM KELLY,

Husband/Respondent

PETITIONERS BRIEF ON THE MERITS

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STATEMENT OF CASE AND FACTS

The parties have filed a stipulated statement of facts (Appx. 1).

On December 17, 1982, the Circuit Court entered the Final Judgment of Dissolution between Mary Jo Kelly, Wife/Appellant and William Kelly, Husband/Appellee (Appx. 4). The Wife was granted primary residential care of the daughter. The Wife was awarded the exclusive possession of the marital home (owned by the entireties) until the daughter reached the age of eighteen (18), after which the home was to be sold and the proceeds divided.

The Wife and daughter lived in the marital home until the daughter's eighteenth (18th) birthday on February 2, 1989. The Wife expended $24,186.56 on mortgage payments (Total interest and principal due while in exclusive possession) and $2,308.00 for maintenance and repairs (R-274).

On June 1, 1988 the Former Wife filed a petition for modification seeking an increase in alimony and a declaratory judgment that she should receive a credit for the carrying expense (including mortgage, interest and principal) from the proceeds of the sale (R-274-275).

The Husband counterclaimed for partition. He also sought setoff against the Wife's claims for carrying costs based upon the rental value of the home during the Wife's period of exclusive residence. The total rental value exceeded the total carrying expenses (R-275).

On July 5, 1989, a Final Supplemental Judgment was entered adjusting alimony and directing that the property be sold and the proceeds evenly divided (Appx. 6). The Final Judgment denied the Wife's carrying costs claim because it granted the setoff for rental value claimed by the Husband (R-275,279-280).

The Wife timely moved for rehearing. The motion was denied on September 7, 1989. The Court ordered a sale which has been stayed. The Wife filed her notice of appeal before the Second District Court of Appeal Court on September 21, 1989 (R-276).

The District Court in Kelly vs. Kelly, 568 So.2d 70 (Appx. 8) reversed and held that since the Wife had exclusive possession pursuant to Court Order the Husband had no right to offset rental value. The Court went on to hold that the Wife should not receive a credit for the interest she paid on the joint mortgage.

The Wife moved for rehearing on the issue of mortgage interest. The District Court denied the rehearing. The District Court said it was following Rutkin vs. Rutkin, 345 So.2d 400 (Fla. 3d DCA 1977) and commented that:

> To the extent that Iodice v. Scoville, 460 So.2d 576 (Fla. 4th DCA 1984), conflicts, we disagree with the Fourth District.

The Wife petitioned this Court for Conflict Certiorari, citing conflict with the Fourth District in Iodice. On February 6, 1991 this Court took jurisdiction and ordered briefs.

SUMMARY OF ARGUMENT

The general common law is that in the final accounting between cotenants incident to partition, a cotenant will be charged with payments in discharge of both interest and principal. This is based upon the law of "contribution".

The Supreme Court and the First, Third, Fourth and Fifth District Courts of Appeal have recognized this principal.

The Second District Court of Appeal has misconstrued its application in this case and has misplaced its reliance on Rutkin vs. Rutkin, 345 So.2d 400 (Fla. 3d DCA 1977).

The District Courts opinion is based upon "unjust enrichment" instead of "contribution".

The District Court below should have allowed the Wife a credit of one-half of all interest as well as principal payments made by her during her exclusive possession from the proceeds of Partition sale.

ARGUMENT

POINT ONE

ON PARTITION OF A JOINTLY OWNED HOME AFTER THE WIFE'S EXCLUSIVE POSSESSION POST-DISSOLUTION; SHE IS ENTITLED TO A CREDIT FOR PRINCIPAL AND INTEREST SHE HAS PAID ON THE MORTGAGE AGAINST THE HUSBAND'S ONE-HALF INTEREST

The point on appeal springs from the common law dealing with co-tenants in partition; since after dissolution the parties become tenants in common. Section 689.15 Florida Statute (1985).

Outside of Florida, the common law in such instances is:

> "In the final accounting between co-tenants incident to partition, a co-tenant will be charged with ... payments in discharge of principal and interest on mortgage and other liens..."
> 2 American Law of Property Section 6.26 at 117 (1952). See also Lawrence v. Harvey 186 Mont. 314, 607 P2d 551; Baily v. Mormino (1958) 6 App Div. 2d 993, 175 N.Y.S. 2d 993; Fundaburk v. Cody (1954), 261 Ala. 25, 72 So.2d 710; Hermance v. Weisner (1938) 228 Wis 501, 279 N.W. 608

The point on appeal has been recognized by this Court in a co-tenant situation. It has been recognized by the First, Third, Fourth and Fifth District Courts of Appeal in marital situations.

In Potter vs. Garrett, 52 So.2d 115 (Fla. 1951), this Court had before it a co-tenant who had paid mortgage principal and interest on property owned in common with her sister out of

possession. She was seeking a credit for same from sale proceeds on partition. This Court held:

> We think Appellee is entitled to a reimbursement for one-half the money she paid on the principal and interest of the mortgage, for taxes and insurance and for other moneys she spent on essential improvements to preserve the property. Emphasis supplied 52 So.2d 116.

This Court restated this principle recently in the case of Barrow vs. Barrows, 527 So.2d 1373, (Fla. 1988).

The First District had the same principle before it in Singer vs. Singer, 342 So.2d 861 (Fla. 1st DCA 1977):

> The marital home became a tenancy in common upon entry of the judgment dissolving the marriage. Tenants in common have a mutual obligation to pay the charges upon the property. Mintz vs. Ellison, 233 So.2d 156 (Fla. 3rd DCA 1970). The equity of one of the parties should not be increased by any expenditures made by the other party. Maroun vs. Maroun, 277 So.2d 572 (Fla. 3rd DCA 1973). The judgment before us violates both of these principles. The judgment should provide that payments on the mortgage, taxes, insurance, maintenance and repairs shall be paid equally by the parties. 342 So.2d 861, 862 (Fla. 1st DCA 1977).

The First District again visited the matter in Smith vs. Smith 390 So.2d 1223 (Fla. 1st DCA 1980), where it said:

> ... a wife who pays all of the ownership expenses on jointly-owned property is entitled to a credit against the

> husband's one-half of the proceeds upon the sale of the property. Rubino v. Rubino, 372 So.2d 539 (Fla. 1st DCA 1979); See Schatz v. Schatz 356 So.2d 892 (Fla. 3rd DCA 1978).

The most recent First District case is Breland vs. Breland, 565 So.2d 368 (Fla. 1st DCA 1990). Wherein the Court firmly reiterated the same principle and also cited Smith vs. Smith, 390 So.2d 1223 (Fla.. 1st DCA 1980); Rubino v. Rubino, 372 So.2d 539 (Fla. 1st DCA 1979); Fischer v. Fischer, 503 So.2d 399 (Fla. 3rd DCA 1987); Delehent v. Delehent, 442 So.2d 1009 (Fla. 4th DCA 1983).

Other than the case at bar the undersigned has found no Second District case on the issue. However, we note that in Atkins v. Edwards, 317 So.2d 770 (Fla. 2nd DCA 1975) (a decision quashed by this Court in Barrow), the Second District cited Potter v. Garrett with approval.

The Third District has followed the principle allowing the credits in Tinsley v. Tinsley, 490 So.2d 205 (Fla. 3rd DCA 1986) there seems to have been no doubt in the Court's opinion were it said:

> Thus, a person who makes mortgage payments on a home jointly held with the ex-spouse as tenants in common is entitled to a credit for the ex-spouse's share of the ownership expenses. Wertheimer v. Wertheimer, 487 So.2d 90 (Fla. 3rd DCA 1986); Price v. Price, 389 So.2d 666 (Fla. 3rd DCA 1980), rev. denied, 397 So.2d 778 (Fla. 1981);

> Rutkin v. Rutkin, 345 So.2d 400 (Fla. 3rd DCA 1977). The fact that possession of the marital home is awarded to one spouse as a part of alimony or maintenance has no effect upon the ownership by the parties who hold the property as tenants in common, see Thomas v. Greener, 226 So.2d 143 (Fla. 1st DCA), cert. denied, 234 So.2d 117 (Fla. 1969), and the right to reimbursement is only postponed until the property is sold, Whitely v. Whitely, 329 So.2d 352 (Fla. 4th DCA 1976).

Other cases cited by the Third District in the Tinsley opinion are Abella-Fernandez v. Abella 393 So.2d 40 (Fla. 3rd DCA 1981); Singer v. Singer 342 So.2d 861,862 (Fla. 1st DCA 1977); Mintz v. Ellison 233 So.2d 156, 157 (Fla. 3rd DCA 1970); Maroun v. Maroun 277 So.2d 572 (Fla. 3rd DCA 1973); Spikes v. Spikes 396 So.2d 1192 (Fla. 3rd DCA 1981); Kohn v. Kohn 423 So.2d 575 (Fla. 1st DCA 1982) and Rubino v.& Rubino 372 So.2d 539 (Fla. 1st DCA 1979).

The Third District again followed the same reasoning in Hendricks v. Hendricks 312 So.2d 792 (3rd DCA 1975) and in Wertheimer v. Wertheimer 487 So.2d 90 (Fla. 3rd DCA 1986). It is interesting to notice that in the Wertheimer case the third District reversed the lower court for allowing the Wife credit for principal reduction only and failing to allow her interest.

We believe that the Fourth District has given one of the most in-depth analysis of the situation in its EN BANC OPINION

ON REHEARING in Brandt v. Brandt 525 So.2d 1017 (Fla. 4th DCA 1988) there the Fourth District reviewed most all of the arguments and approved the legal principle here advanced.

Mortgage interest is specifically addressed in the Fourth District's case of Guthrie v. Guthrie 315 So.2d 498 (Fla. 4th DCA 1975):

> ... we determine that the trial court abused its discretion in not directing that the wife be given credit at the time of sale of the home for all of the items such as mortgage interest, taxes, insurance, and repairs which the wife paid in excess of her one-half interest. Emphasis supplied 315 So.2d 498, 499 (Fla. 4th DCA DCA 1975)

The Fourth District again addressed interest credit in Iodice v. Scoville 460 So.2d 576 (Fla. 4th DCA 1984) when the trial court was reversed for failure to award the spouse in possession reimbursement for the interest paid on the joint mortgage. The Fourth District also, cited Brandt and the principle herein sought in its well reason opinion of Goolsby v. Wiley 547 So.2d 227 (Fla. 4th DCA 1989).

The Fifth District recognized this principle in its case of Mitchell v. Mitchell 477 So.2d 2 (Fla. 5th DCA 1985) where it held that the mortgage, insurance, taxes, and maintenance is the shared responsibility of both parties where the Wife has exclusive possession after dissolution.

Thus, it appears that the Supreme Court and the First,

Third, Fourth and Fifth Districts have recognized the right of the Wife with exclusive possession to receive a credit for interest paid on the mortgage. The Second District has recognized it with reference to co-tenants by citing the Supreme Court.

ARGUMENT

POINT TWO

RUTKIN v. RUTKIN DOES NOT SUPPORT THE SECOND DISTRICT COURT'S RULING IN THIS CASE.

The District Court's opinion in this case was:

> "the Husband must repay the Wife to the extent that her contributions have enhanced his equity, her entitlement is limited to principal payments applied in reduction of mortgage debt."

This is an errant theory. This view looks toward some type of equitable theory of "unjust enrichment" as opposed to proper theory of "contribution" among co-tenants. We believe the proper basis on the co-tenant out of possession obligation is set forth in Brandt v. Brandt 525 So.2d 1017 (Fla. 4th DCA 1988):

> Upon dissolution of marriage the tenants of an estate by the entireties become tenants in common. § 689.15, Fla. Stat. (1985) As co-tenants, each is ultimately liable for his or her proportionate share of the obligations of the property, including taxes, mortgage payments, insurance and maintenance and repairs. 525 So.2d 1017, 1019.

This theory is firmly rooted in "Contribution" among co-tenants. See 12 Fl. Jur. 2nd "Cotenancy and Partition" Sections 28 and 29.

The focus is upon the obligation one co-tenant to the other

has for joint debts including interest and principal.

The Second District Court relied upon Rutkin v. Rutkin 345 So.2d 400 (Fla. 3rd DCA 1977). In Rutkin the only issue presented to the Court was the in-possession Husband's right to a credit for mortgage principal reduction. The issue of interest was never presented in the Rutkin case. Thus, Rutkin may not be used as authority that credit for interest should not be imposed. In turn, the Rutkin Court relied upon Whitely v. Whitely 329 So.2d 352 (Fla. 4th DCA 1966) and Lyons v. Lyons 208 So.2d 137 (Fla. 3rd DCA 1968).

In Whitely the lower court allowed the Wife exclusive possession and directed that she pay the mortgage, etc. during her possession. It further said that she would not be entitled to credit for any amounts expended by her for the payment of principal of the mortgage. The Fourth District reversed. It held contribution among co-tenants is mandated in such a case. The Whitely case may not be looked upon to support a theory of unjust enrichment between co-tenants. It is grounded in the theory of contribution.

The Rutkin case further relies upon Lyons v. Lyons 208 So.2d 137 (Fla. 3rd DCA 1968). In Lyons the court specifically addressed the issue as to whether or not the in-possession co-tenant ought have a credit for mortgage interest paid. The trial court had allowed the in-possession Wife a credit for

one-half of the reduction of principal only. The Third District reversed and held the Wife was entitled to one-half of all that she pays of the charges against the property for items such as mortgage interest, taxes, insurance and repairs. Thus, the Lyons case can not be seen as supporting "unjust enrichment". It too is grounded in "Contribution". Neither Rutkins nor Lyons support the District Court opinion.

Thus, the Second District Court's reliance upon Rutkins was misplaced.

CONCLUSION

In accordance with the common law, this Court and four of the five District Courts of Appeal, the law of "contribution" should be applied. Thus, the co-tenant in possession wife has a credit of receive one-half of all mortgage interest and principal paid by her while she was in exclusive possession.

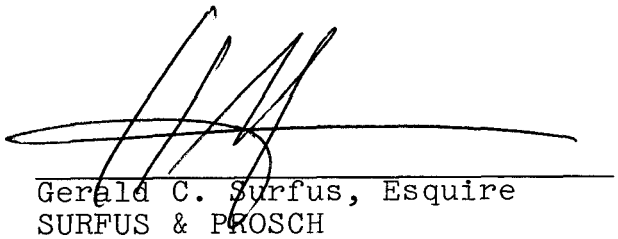
The Second District Court below was in error in applying "unjust enrichment" and allowing only credit for the principal. The Second District Court's opinion below conflicts with opinions from the First, Third, Fourth and Fifth District. The opinions of the First, Third, Fourth, and Fifth Districts are in harmony with the general common law. Thus the opinion of the District Court below should be reversed and brought into harmony with the prevailing common law of the state. We respectfully request that the Court remand the case directing that the Wife be allowed a credit for one-half of all interest paid on the mortgage as well as one-half of the principal and maintenance costs allowed by the Second District.

Respectfully submitted,

Gerald C. Surfus, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this 4th day of March, 1991, to James Aker, Esquire, Suite 600, 2033 Main Street, Sarasota, Florida.



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