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IN THE SUPREME COURT OF FLORIDA

MARY JO KELLY,

Wife/Appellant,

vs. Appeal No: 76,946

WILLIAM KELLY,

Husband/Appellee,

REPLY BRIEF

ATTORNEYS FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF CASE AND FACTS

The Husband is arguing the same case he argued in the Second District Court. He argues that the language of the Final Judgment requires a 50/50 split of proceeds with no credit to the Wife for carrying costs. This argument is in his Statement Of Facts. Instead of dealing with this argument in this statement it will be dealt with in Argument.

In his brief, the Husband argues from Rutkin v. Rutkin 345 So.2d 400 (Fla. 3rd DCA 1977). The Wife's position on Rutkin is included in her main brief as Point Two.

SUMMARY OF ARGUMENT

The Wife has been asking that property law be applied. The only distinction is that in this case the lower court granted exclusive possession of the marital home to the Wife. Rental value inures to one with right of possession. Since the Husband had no right of possession during the Wife's exclusive possession, he had no right to the value that right may have earned in rental. Thus the remainder of the law with reference to cotenants should be applied equally. General property law requires a con-tenent to contribute his one-half (½) share of mortgage interest paid by his co-tenent.

ARGUMENT

POINT ONE

THE PHRASE "THE EQUITY DIVIDED EQUALLY" DOES NOT CONTROL THE ISSUE OF SETOFF.

The Husband's first argument is that the Final Judgment allowed the "equity" to be divided equally. He says "equally" means "equally", therefore there is no need for further inquiry.

He has failed to review the language of Power and Goolsby. In Power the final judgment provided "... upon the sale of the same to divide the net proceeds equally between them..." (emphasis supplied) 387 So.2d 546, 547. In Goolsby, the final judgment provided that on sale, "the proceeds were to be divided equally" (emphasis supplied) 547 So.2d 227, 228. In both cases, the Courts held against the rental value setoff. See also, Brandt v. Brandt 525 So.2d 1017 (Fla 4th DCA 1988): "...the net proceeds shall be divided between the husband and wife".

The word "equity" may have several meanings depending upon the context. Here the most reasonable meaning is "the value of the property in excess of the liens and encumbrances against it". See Hill v. Hill 477 P.2d 931 (Wash.1940) and Crowder v. State 259 P.2d 387 (Wash. 1953). Where one cotenent discharges the obligation of both contenents he has an equitable lien against the property. Kind v. Manley 7 So.2d 593 (Fla. 1942) Here both parties were equally responsible on mortgage.

The Wife discharged the obligation of both. Thus, she has an equitable lien against the property. An equitable lien is an encumbrance. Equitable Liens are superior to the right of all person (including the Husband) except bona fide purchases for value or valid lienholders without notice. See Miami National Bank v. Citation 157 So.2d 155 (Fla. 3rd DCA 1963) Thus, the "equity" could not have been determined until the Wife's lien was satisfied. The remaining "equity" should be equally divided.

The Wife clearly has a right of contribution. See Brandt v. Brandt (Supra)

Neither the right of contribution, nor the right to equitable lien are destroyed by language that the "equity" should be "equally divided", because the "equity" is not determined until the right of contribution and equitable lien have been deducted from market value._

ARGUMENT

POINT TWO

GENERAL PROPERTY LAWS SHOULD APPLY IN A MARITAL CASE

In our briefs, there is no assertion that the law in a matrimonial situation ought be different that any other case involving co-tenents. The Husband states that he lost on the issue of rental value in the Second District Court. He construes this as an aberration in the law. He sees this as a ruling not following general property law. He is in error. Clearly rentals and rental value are the counter balances to the loss of right of possession: lessor leases property, loses the right of possession and gains rents. The Wife suggest that this same equation holds true in matrimonial situations so long as the party seeking rental values had the right of possession to lose. If so, its loss entitles him to rental value. In this case, his right of possession was granted to the Wife as child support. Absence the right of possession the Husband had no loss to be counter balanced by rent. No general property laws have been violated.

In Barrow v. Barrow 527 So.2d 1373 (Fla. 1988) this Court made the same point. (i.e. No special law is applied to a marital co-tenancy) In Barrow there was no provision in the Final Judgment awarding possession to either co-tenant. Thus, each co-tenant had the right of possession. This Court specifically rejected any exception to the general common law in marital

cases and held that where the tenant in possession ousts his co-tenant, that co-tenant may have an offset for rental value against his co-tenant's claim for carrying charges. Here there was no ouster (wrongful dispossession). There was a legal transfer of the Husband's right of possession to the Wife for a time certain. Thus, the Husband had no loss during the time certain to use as offset.

General property law requires the co-tenant Husband to contribute his share of the carrying costs paid by the Wife including interest on the mortgage payment. (See Appellants Point One in her main brief) There should be no special application of property laws in marital cases. The Wife suggests a rule which applies long tested principles of common law.

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 one-half of all mortgage interest and principal paid by her while she was in exclusive possession.

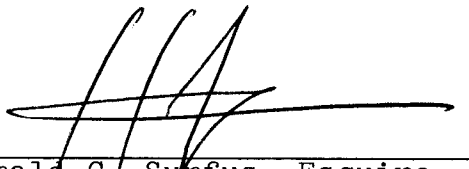
The Second District Court below was in error in applying "unjust enrichment" and allowing only credit for the principal. The Second District Court's opinion below conflicts with opinions from the First, Third, Fourth and Fifth District. The opinions of the First, Third, Fourth, and Fifth Districts are in harmony with the general common law. Thus the opinion of the District Court below ought 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 5th day of April, 1991, to James Aker, Esquire, Suite 600, 2033 Main Street, Sarasota, Florida.



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