O/a 12-3-87

IN THE SUPREME COURT
STATE OF FLORIDA

AUG 19 . 7
CLERK, SUPREME COURT
By ___ Deputy Clerk

JAMES BARROW,

Appellant,

vs

DONNA BARROW,

Appellee.

_______________/

CASE NO.: 70,433

APPELLANT'S INITIAL BRIEF ON THE MERITS

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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