

IN THE SUPREME COURT
STATE OF FLORIDA

FILED
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MAY 1 1987

JAMES BARROW,
Petitioner/Defendant,

vs

DONNA BARROW,
Respondent/Plaintiff.

CLERK, SUPREME COURT
By _____
Deputy Clerk
CASE NO.: 70,433

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pl

APPLICATION FOR DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF
FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

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CITATION OF AUTHORITIES

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<u>Adkins v. Edwards</u> , 317 So.2d 770 (Fla. 2d DCA 1975)	4, 5, 6, 7, 8
<u>Coggan v. Coggan</u> , 239 So.2d 17 (Fla. 1970)	4, 5, 6, 7, 8
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<u>Seesholts v. Beers</u> , 270 So.2d 434 (Fla. 4th DCA 1972)	5, 6, 7
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STATEMENT OF THE CASE AND OF THE FACTS

Defendant/Petitioner, James Barrow, seeks to have reviewed a decision of the District Court of Appeal, Second District, dated and filed on March 18, 1987.

The Petitioner was the original Defendant below and the Appellant before the District Court of Appeal. The Respondent, Donna Barrow, was the original Plaintiff in the trial forum and was the Appellee before the District Court of Appeal. This was an appeal by the Petitioner from an Amended Final Judgment entered by the Circuit Court in and for Hillsborough County in a non-jury action for partition of real property which awarded Respondent one-half the fair market rental value of the subject property to be paid by Petitioner in the amount of \$8,254.50. The District Court of Appeal, Second District, affirmed the trial court in a per curium opinion which expressly acknowledged conflict with the decision of the District Court of Appeal, Fifth District, Vandergrift v. Buckley, 472 So.2d 1325 (Fla. 5th DCA 1985).

In this brief the parties will be referred to by their and by the positions they occupy before this court. The following symbol will be used in reference to the Appendix (A-) to Petitioner's brief.

The essential facts relied upon by Petitioner are that James Barrow was the sole owner of the subject real property

at the time of the Final Judgment of Dissolution of Marriage from Respondent, Donna Barrow. This property was owned free and clear and not subject to a mortgage. The residence had been occupied as the marital residence while the parties resided together as man and wife. Approximately four (4) years prior to the dissolution proceeding, Donna Barrow left the marital residence and moved to the State of Idaho. James Barrow continued to occupy the real property. The Final Judgment of Dissolution of Marriage awarded Donna Barrow an undivided one-half interest in the property as lump sum alimony but made no provision for use, possession or sale.

Donna Barrow initiated a partition action. There was no dispute regarding the desire of the parties to partition this property which could only be done through sale. The real property was not rented or otherwise income producing.

Donna Barrow did not demand payment of rent from Petitioner and she was not excluded from the property. James Barrow did not hold possession hostilely or adversely to the title of Donna Barrow as co-tenant and did not engage in conduct equivalent to ouster.

Donna Barrow in no way communicated her intention to James Barrow that she demanded or intended to claim rent for his occupancy.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE DIRECTLY AND EXPRESSLY CONFLICTS WITH THE HOLDING IN A DECISION OF THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OR THE SUPREME COURT OF FLORIDA THAT RENT MAY NOT BE RECOVERED BY A FORMER SPOUSE OUT OF POSSESSION FOR OCCUPANCY BY A FORMER SPOUSE IN POSSESSION OF PROPERTY OWNED IN COMMON IN THE ABSENCE OF A DEMAND OR CONDUCT BY THE TENANT IN POSSESSION WHICH CONSTITUTES THE EQUIVALENT OF OUSTER.

1. WHETHER OR NOT A DISTINCTION SHOULD BE MADE BETWEEN RESIDENTIAL AND NON-RESIDENTIAL PROPERTY OWNED IN COMMON BETWEEN FORMER SPOUSES WITH RESPECT TO RIGHT OF A SPOUSE OUT OF POSSESSION TO RECOVER RENT FROM THE SPOUSE IN POSSESSION OF SUCH PROPERTY.
2. WHETHER OR NOT A DISTINCTION SHOULD BE MADE BETWEEN CO-TENANTS WHO ARE FORMER SPOUSES AND OTHER CO-TENANTS WITH RESPECT TO THE RIGHT TO RENT.

ARGUMENT

THE PRESENT DECISION BASED UPON ADKINS V. EDWARDS, 317 SO.2D 770 (FLA. 2D DCA 1975), IS IN EXPRESS AND DIRECT CONFLICT WITH THE SUPREME COURT DECISION IN COGGAN V. COGGAN, 239 SO.2D 17 (FLA. 1970) AND THE HOLDING IN VANDERGRIFT V. BUCKLEY, 472 SO.2D 1325 (FLA. 5TH DCA 1985).

This Court decided the issue presented in this appeal in Coggan v. Coggan, 239 So.2d 17 (Fla. 1970). Subsequently the District Court of Appeal, Second District, rendered an opinion on the same point of law Adkins v. Edwards, supra. The Adkins v. Edwards, supra case involved residential real property occupied by one former spouse and there had been no demand for rent or conduct by the tenant in possession essentially equivalent to ouster. The District of Appeal, Second District, distinguished this case from Coggan v. Coggan, supra, in two respects, first the Adkins v. Edwards, supra, involved residential real property whereas Coggan v. Coggan, supra, involved non-residential real property. Second, the court concluded that as between former spouses,

"...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.

Having reached this conclusion without evidence in the

record that such hostility in fact existed, the court following the reasoning of the dissent in Seesholts v. Beers, 270 So.2d 434 (Fla. 4th DCA 1972) reh. den., and Potter v. Garrett, 52 So.2d 115 (Fla. 1951) awarded rent and held "...Within the context of the ex-husband/ex-wife situation, this was appropriate..." Adkins v. Edwards, supra at 772. The Court concluded the spouse out of possession was effectively precluded from the property. This holding is in conflict with Coggan v. Coggan, supra and the case history does not indicate that review of this opinion was requested of this court.

The same point of law was involved in the case of Vandergrift v. Buckley, supra, decided by the District Court of Appeal, Fifth District, on July 18, 1985. The facts involved in Vandergrift v. Buckley, supra were essentially identical to the facts in Adkins v. Edwards, supra. The property involved was residential real property which was occupied by one of the former spouses.

In it's opinion, the District Court of Appeal, Fifth District, considered all prior cases which decided the point of law regarding the right to rent between ex-husband/ex-wife, co-tenants when one tenant occupies the real property owned in common. The Court reached it's decision expressly following the opinion of this court in Coggan v. Coggan, supra. In the opinion the Court carefully

examined the rule of law announced in Coggan v. Coggan, supra, and rejected the reasoning of the District Court of Appeal, Second District in Adkins v. Edwards, supra, that excused the requirement to communicate a demand for rent. The District Court of Appeal, Fifth District, also questioned whether the holding in Potter v. Garrett, supra, was impliedly overruled by this court's decision in Coggan v. Coggan, supra. The District Court of Appeal, Fifth District, concluded that the holding in Coggan v. Coggan, supra, was workable even with respect to residential property owned in common by former spouses and that no viable basis existed for creating an exception for residential real property. Vandergrift v. Buckley, supra, Note: 2. at 1328. In this respect the court in Vandergrift v. Buckley, supra, followed the majority opinion in Seesholts v. Beers, supra. This District Court, Fifth District, in it's opinion acknowledged conflict with Adkins v. Edwards, supra. The case history does not indicate that further review was sought in Vandergrift v. Buckley, supra.

In the instant appeal the District Court of Appeal, Second District, was specifically requested to reconsider its ruling in Adkins v. Edwards, supra, in light of the opinions in Vandergrift v. Buckley, supra and Seesholts v. Beers, supra and Coggan v. Coggan, supra.

The facts in the instant appeal involved the same point

of law decided in Coggan v. Coggan, supra, Adkins v. Edwards, supra, Vandergrift v. Buckley, supra and Seesholts v. Beers, supra. On the facts presented the District Court of Appeal, Second District, affirmed the trial court in the instant case on authority of Adkins v. Edwards, supra, and expressly acknowledged conflict with Vandergrift v. Buckley, supra.

The conflicting opinions between the District Courts of Appeal, Fourth District, Second District and Fifth District injects uncertainty in the law for both litigating parties and the courts. Further, the holding in Adkins v. Edwards, supra, purports to limit the holding in Coggan v. Coggan, supra, without approval of this court.

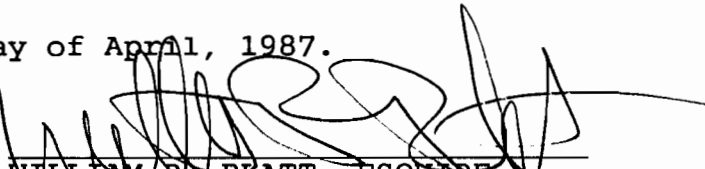
CONCLUSION

The decision of the District Court of Appeal, Second District that Petitioner, James Barrow, seeks to have reviewed is in direct and express conflict with the decision of the District Court of Appeal, Fifth District in the case of Vandergrift v. Buckley, 472 So.2d 1325 (Fla. 5th DCA 1985). Because of the reasons and authorities set forth in this brief, it is submitted that the decision of the present case is erroneous as is the authority upon which it was decided Adkins v. Edwards, 317 So.2d 770 (Fla. 2d DCA 1975). The conflicting decision of the District Court of Appeal for the Fifth District correctly follows the holding in Coggan v. Coggan, supra, and should be approved by this court as the controlling law of this state.

The Petitioner, therefore, requests this court to extend it's discretionary jurisdiction to this cause, and to enter an order quashing the decision hereby sought to be reviewed, approving the conflicting decision of the District Court of Appeal of Florida, Fifth District, as the correct decision with respect to the right to rent for occupancy by one former spouse of residential real property owned by former spouses in common and to grant such other and further relief as shall seem right and proper to the court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Stevan Northcutt, Esquire, 725 E. Kennedy Blvd., Suite 207, Tampa, Florida 33602 by United States Mail First Class this 29th day of April, 1987.



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