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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

MARY JO KELLY,)
)
Wife/Petitioner,)
)
v.)
)
WILLIAM KELLY,)
)
Husband/Respondent.)

Case no. 76,946

RESPONDENT'S BRIEF ON THE MERITS

ON CERTIORARI FROM THE SECOND DISTRICT COURT OF APPEAL

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TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF CONTENTS</u>	i
<u>TABLE OF CITATIONS</u>	ii
<u>STATEMENT OF THE CASE AND FACTS</u>	1
<u>SUMMARY OF ARGUMENT</u>	3
<u>ARGUMENT</u>	4
<u>CONCLUSION</u>	7
<u>CERTIFICATE OF SERVICE</u>	8

TABLE OF CITATIONS

<u>Cases:</u>	<u>Page</u>
<u>Barrow v. Barrow</u> , 527 So.2d 1373 (Fla. 1988)	4
<u>Rutkin v. Rutkin</u> , 345 So.2d 400 (Fla. 3d DCA, 1977)	5
<u>Canakaris v. Canakaris</u> , 382 So.2d 1197 (Fla. 1980)	6

STATEMENT OF THE CASE AND FACTS

The husband does not disagree with the wife's statement of the case and facts except to note a material fact not mentioned by the wife. The Final Judgment of December 16, 1982, which dissolved the parties' marriage, while giving the wife exclusive use and possession of the marital home until the child reached majority, provided that the home would then be sold and the equity divided equally. The Final Judgment required the husband to pay for one-half of the taxes and insurance on the home, but did not require him to pay for one-half of the mortgage, maintenance or carrying charges. One can logically infer that it was the implied, if not express, intent of the trial court in the Final Judgment that the wife, and not the husband, pay 100% of the mortgage payments.

The trial court in this post-dissolution of marriage proceeding ruled that the wife's claim for contribution for "carrying expenses" on the home would be denied because it was exceeded by the husband's claim for a setoff for his rental value of the property.

The Second District Court of Appeal reversed the trial court and held that the wife was entitled to contribution and the husband was not entitled to a setoff because the wife's exclusive use and occupancy was court-ordered. The Second District based its decision upon the rationale that the husband should not be able to avoid paying his proportionate share of those expenses which enhanced his equity beyond that contemplated by the Final Judgment.

Accordingly, the Second District held that the wife's entitlement was limited to expenditures she made for maintenance and repairs and principal payments which reduced the mortgage debt, but not for any interest payments because interest payments did not enhance the husband's equity. The Second District noted that under the totality of the circumstances (the husband had been paying alimony, child support, health and life insurance premiums and one-half the taxes and insurance) the wife should be responsible for the interest payments.

SUMMARY OF ARGUMENT

Since pure property and contribution law is not applied in a domestic setting in determining credits upon sale of a jointly-owned marital home (the out-of-possession husband receives no credit for his lost rental value), the court should not allow the wife a credit for interest payments which do not enhance the husband's equity. Alternatively, the court should use its discretion in determining whether to allow credit for interest payments based upon the totality of the circumstances.

ARGUMENT

ON PARTITION OF A JOINTLY-OWNED HOME AFTER THE WIFE'S EXCLUSIVE POSSESSION POST-DISSOLUTION, THE WIFE IS NOT ENTITLED TO A CREDIT FOR INTEREST PAYMENTS SHE MADE ON THE MORTGAGE BECAUSE THOSE INTEREST PAYMENTS, UNLIKE PRINCIPAL PAYMENTS, DO NOT ENHANCE THE OUT-OF-POSSESSION HUSBAND'S EQUITY.

The husband disagrees with the primary ruling of the Second District Court of Appeal which was that the wife was entitled to a credit for one-half of the contributions she made to the marital residence and that the husband was not entitled to an offset for the rental value of the property. Application of pure property or contribution law (which the wife now wants to apply) would have allowed the husband an offset for the rental value of the property. In Barrow v. Barrow, 527 So.2d 1373 (Fla. 1988), this court cited with favor 51 A.L.R.2d 388 "Accountability of Co-tenants for Rents and Profits for Use in Occupancy" which summarizes the majority position. The general statement of the law from the A.L.R. Annotation is as follows:

Nevertheless, where one owner has enjoyed the occupancy and in any way seeks the assistance of a court in obtaining contribution from others in respective improvements or protective expenditures made, he is ordinarily charged, by way of offset, with the reasonable value of his occupancy in excess of his proportionate share, even though he would not otherwise be liable; and similar adjustments are commonly made in partition suits, generally.

Thus, pure property and contribution law provide that not only are joint tenants liable for expenditures relating to the property, but they are also equally entitled to rental income from the property. However, the Second District refused to apply pure property or contribution law and held that in a domestic setting

where exclusive use and occupancy is awarded to the wife, the husband does not receive an offset for his lost rental value. The Second District allowed the wife credit for her "carrying charges" to the extent they enhanced the absent husband's equity. That was the Second District's rationale for denying the wife a contribution for her interest payments on the mortgage.

In Rutkin v. Rutkin, 345 So.2d 400 (Fla. 3d DCA, 1977), the court held that the law was well settled and a spouse who reduces the mortgage principal on the marital home jointly held as tenants in common with his ex-spouse is entitled upon sale of the home to a credit for mortgage principal reduction allocable to his ex-spouse's interest in the home. If a credit is to be given to the wife, it should only be given for expenses which enhance the equity of the party out-of-possession. That is reasonable and logical. The Rutkin decision is fair and reasonable. The wife has received the entire tax deduction for the interest payments. Separation of principal from interest is easily and routinely done each year by mortgage institutions. If the court in the Final Judgment of Dissolution of Marriage proceeding, based upon the evidence and the financial needs and circumstances of the parties, feels that the wife should upon sale receive a credit for interest payments she makes, the court can so rule. The court did not so rule in this case.

If this court is not inclined to adopt a rule providing that the credit is to apply to principal reduction, then this court should allow the lower court to use its discretion in determining

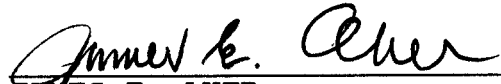
whether to allow interest payments as credit based upon the totality of the circumstances. This position is buttressed by the fact the pure property and contribution law is not applied in a domestic setting (husband not allowed on off-set for rental value in this case). Allowing the court discretion would be consistent with Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) in which this court stated the appellate court should avoid establishing inflexible rules that make achievement of equity between the parties difficult and that the remedies used by the trial court be reviewed by the appellate courts as a whole, rather than independently. That is the way the Second District reviewed the interest issue in this matter. Considering the totality of the circumstances, the Second District Court felt that the wife should not receive reimbursement for the interest payments and also because the wife's interest payments did not enhance the husband's equity.

CONCLUSION

The husband respectfully requests that this court affirm the Second District Court of Appeal opinion.

CERTIFICATE OF SERVICE

I certify that copy hereof has been furnished by mail to
Gerald C. Surfus this 29 day of March, 1991.



JAMES E. AKER
Attorney for Husband/Respondent

cc: William Kelly