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Journal HOME

The Bursting Bubble — Dealing with the Marital Home During a Real Estate Recession

by Robert M. Schwartz

Once upon a time, in the not so distant past, I would receive a phone call from a client who would tell me on a Friday that he or she had listed their marital home for sale. On Monday, I would often receive another call informing me that a contract for the sale of the home had been signed. Those were the days when "sub-prime" meant a steak of questionable quality and a "bailout" was a way of getting a criminal client out of jail.

Times have changed. Matrimonial attorneys are now working in an environment where there is a large inventory of unsold homes and clients who are economically strapped are unable or unwilling to buy out their spouse's interest. Individuals who might otherwise decide to sell their homes are reluctant or incapable of doing so at depressed values, particularly in those cases where the mortgage balance exceeds the home's fair market value. Even if parties decide to sell at today's values, they face the problem of finding a buyer who is able to obtain financing. Accordingly, divorcing couples are frequently reaching the realization that one of them is going to have to remain in the home until it is sold and/or the real estate market improves.

Exclusive Possession of the Marital Home

An award of exclusive possession of the marital home has been most commonly utilized as an incidence of support. For example, a parent is awarded exclusive possession until all of the children have reached the age of majority. However, support is not the only reason for such an award. One of the relevant factors to be considered in equitably dividing the marital estate is "[t]he desirability of retaining the marital home as a residence for any dependent child of the marriage, *or any other party*, when it would be equitable to do so…."[1] *Duncan v. Duncan,* 379 So. 2d 949 (Fla. 1980), held that an award of exclusive possession "should either be directly connected to the obligation of support or be *temporarily necessary to prevent reduction in the value of the subject property.*" Accordingly, if *Duncan* is read in conjunction with F.S. §61.075 (1)(h), then a court has the ability to award exclusive possession of the marital home in order to maximize the amount that the parties will realize upon a sale. *Ascherman v. Ascherman*, 977 So. 2d 763 (Fla. 2d D.C.A. 2008), exemplifies the flexibility that courts have with respect to an award of exclusive possession. Mr. and Mrs. Ascherman had entered into an agreement with Mrs. Ascherman's grandparents that permitted the grandparents to reside in the marital home for the rest of the grandparents' lives. The court awarded Mrs. Ascherman exclusive possession of the home so that she could honor the parties' agreement.[2]

Rights and Obligations During the Period of Exclusive Possession

In order to understand the rights and obligations of the parties during the period of exclusive possession, the matrimonial attorney needs to know some basic real estate law concepts.

• Real property acquired in the name of husband and wife creates an estate by the entireties.[3]

• F.S. §689.15 provides that, upon dissolution of marriage, the tenants in an estate by the entireties become tenants in common.

• Each cotenant in common has the right to access to the property. In the event that one cotenant wrongfully excludes another from access, then the excluded tenant may be entitled to the fair rental value of his or her ownership interest in the property as a result of an ouster.

• If the property generates income, such as rent, then each cotenant is entitled to a proportion of that income.

• Each cotenant has a right of contribution for the costs of owning the property. Co-tenants can be forced to contribute to the payments of carrying costs such as, real estate taxes, mortgage payments, and repairs.

The interplay between family law and real estate law has resulted in confusion. This confusion is reflected in the following cases that have attempted to reconcile these bodies of law.

Barrow v. Barrow, 527 So. 2d 1373 (Fla. 1988) — Mrs. Barrow was awarded a 50 percent interest in the marital home, *but the final judgment did not provide for exclusive possession or sale.* Subsequent to their divorce, Mrs. Barrow resided outside Florida and Mr. Barrow continued to live in the former marital home. Several years later, Mrs. Barrow commenced an action for partition and Mr. Barrow counterclaimed for half of the amounts that he paid for taxes, insurance, and maintenance. Mrs. Barrow, in return, requested half of the fair rental value during the time that her former husband occupied the home. The *Barrow* court followed the common law in reaching the conclusion that there was no ouster and that Mrs. Barrow was not entitled to half of the fair rental value. The court emphasized the principle that possession by one cotenant is presumed to be possession of all cotenants. Hence, there can be no ouster until such time as the party in possession communicates to the other party that he or she is holding the property adversely. Although the court held that there was no ouster, the court did hold that when the co-tenant in possession seeks contribution for amounts expended for preservation of the property, then that claim may be offset by the fair rental value of the property during the period of occupancy. [4]

Kelly v. Kelly, 583 So. 2d 667 (Fla. 1991) — Mrs. Kelly was awarded exclusive possession of the marital home by way of a final judgment. The final judgment provided that Mrs. Kelly's right to possession would end when the parties' child attained age 18. A supplemental judgment was entered by the trial court after the child reached age 18. The supplemental judgment ordered that the proceeds of the sale of the house be divided equally. The trial court, in an apparent attempt to follow the *Barrow* holding, denied Mrs. Kelly credit for half of the mortgage payments and maintenance expenses because the amount of the credit was offset by half of the home's rental value. The Florida Supreme Court affirmed the appellate court's reversal by holding that if no reimbursement for rental value is provided in the judgment, it is assumed that the trial judge intended that there be none.[5] The distinction between *Barrow* and *Kelly* is that Mrs. Kelly, unlike Mr. Barrow, was awarded exclusive possession of the home.

Brandt v. Brandt, 525 So. 2d 1017 (Fla. 4th DCA 1988) — Mr. and Mrs. Brandt entered into a marital settlement agreement that provided that Mrs. Brandt would have exclusive possession of the marital home and that when it was sold, the net proceeds would be divided between them. The agreement went on to state that during the time that Mrs. Brandt had possession of the home, she would be responsible for the mortgage payments, taxes, and upkeep. The agreement was silent with respect to the issue of credits. After the home was sold, Mrs. Brandt requested that the court give her credit for half of the expenses that she paid. The court concluded that Mrs. Brandt's obligation to pay the expenses during the time that she occupied the home only postponed her right to seek reimbursement. It further concluded that in the absence of special circumstances, the non-paying tenant has the obligation to reimburse the paying tenant for common expenses at the time of and from the proceeds of the sale.

Therefore, where there is an agreement but it is silent as to the ultimate liability for such expenses, and no evidence is presented that the non-paying tenant gave consideration to be relieved of his legal obligation

to pay one-half of such expenses … a right of reimbursement in the paying tenant is established *by operation of law*."[6]

Judge Letts, in a concurring opinion, suggested that the majority's strict application of real estate law to a marital settlement agreement created an inequitable result. He pointed out that 1) Mrs. Brandt had probably deducted the interest and real estate taxes up until the house was sold, for which Mr. Brandt did not receive any benefit, and 2) as a result of this inequity, Mrs. Brandt should have been entitled only to a credit for the reduction of mortgage principal.[7] Judge Stone, in his dissent, focused on the clear language of the agreement, and opined that there was nothing to suggest that Mrs. Brandt was entitled to any reimbursement when the house was sold.[8] These dissenting and concurring opinions foreshadowed statutory changes that would arrive almost a decade later.

Goolsby v. Wiley, 547 So. 2d 227 (Fla. 4th DCA 1989) — The facts in *Goolsby* are almost identical to those found in *Brandt*, except that *Goolsby* was decided at the trial court level by way of a final judgment rather than by way of a settlement agreement. The final judgment awarded the former wife exclusive possession of the home pending its sale and required her to be responsible for all the costs. The judgment was silent with respect to the former wife's right to credits. The *Goolsby* court applied the same rationale to a final judgment as previously applied to a marital settlement agreement and held that the former wife was entitled to reimbursement even though the judgment required her to be responsible for all of the costs pending sale and even though the judgment was silent regarding the issue of credits.

As of the end of 1996, the law appeared to draw a distinction between those cases where there was an award of exclusive possession and those cases where there was not such an award. If there was no award, then the party out of possession could seek one-half of the fair rental value of the home as a setoff against a claim by the party in possession for reimbursement or credits for one-half of the amount expended for mortgage payments, taxes, insurance, and maintenance. However, if there was an award of exclusive possession, then the party out of possession was not entitled to receive a setoff for rent if the judgment or settlement agreement was silent with respect to the issue. On the other hand, silence was golden as it related to the entitlement by the party seeking reimbursement for expenses paid during the period of occupancy. The paying party was entitled to reimbursement even if the agreement or judgment was silent on the issue and even if the agreement or judgment required that the party pay the expenses pending sale of the home.

In 1997, the Florida Legislature attempted to come to the rescue and finally resolve all of the confusion surrounding the entitlement to credits and setoffs when the marital home is sold. F.S. §61.077, which became effective on October 1, 1997, provides:

A party is not entitled to any credits or setoffs upon the sale of the marital home unless the parties' settlement agreement, final judgment of dissolution of marriage, or final judgment equitably distributing assets or debts specifically provides that certain credits or setoffs are allowed or given at the time of sale. In the absence of a settlement agreement involving the marital home, the court shall consider the following factors before determining the issue of credits or setoffs in its final judgment:

(1) Whether exclusive use and possession of the marital home is being awarded and the basis for the award.

(2) Whether alimony is being awarded to the party in possession and whether the alimony is being awarded to cover, in part or otherwise, the mortgage and taxes and other expenses of and in connection with the marital home.

(3) Whether child support is being awarded to the party in possession and whether the child support is being awarded to cover, in part or otherwise, the mortgage and taxes and other expenses of and in connection with the marital home.

(4) The value to the party in possession of the use and occupancy of the marital home;

(5) The value of the loss of use and occupancy of the marital home to the party out of possession;

(6) Which party will be entitled to claim the mortgage interest payments, real property tax payments, and related payments in connection with the marital home as tax deductions for federal income tax purposes.

(7) Whether one or both parties will experience a capital gains taxable event as a result of the sale of the marital home; and

(8) Any other factor necessary to bring about equity and justice between the parties.

If the number of post-1997 appellate decisions are any indication, then the legislature's attempt to rectify the pre-1997 confusion has had limited success. The statute treats marital settlement agreements and final judgments differently. If the marital settlement agreement is silent regarding credits and/or setoffs, then there is no entitlement at the time that the marital home is sold. Consequently, the statute trumps the common law with respect to a cotenant's obligation to pay for the expenses of maintaining the marital home. For example, Mrs. Brandt would not have been entitled to any credits for the expenses that she advanced during her period of occupancy because the marital settlement agreement did not specifically provide for reimbursement.[9] However, if the parties' rights and obligations are determined by way of a final judgment, then the statute requires the court to consider the enumerated factors.

There appears to be a trend in recent appellate decisions that requires the record to reflect that the trial court considered the issue of credits and setoffs. In other words, silence in the final judgment is not enough because silence might merely mean that the issue of credits and setoffs was never presented to and/or addressed by the court. *Holitzner v. Holitzner*, 920 So. 2d 827 (Fla. 4th DCA 2006), was remanded to the trial court in order to determine whether the former wife was entitled to any credits or setoffs when the marital home was sold. The court pointed out that although the trial court allowed the former wife to remain in the home until the children were emancipated, "it [was] unclear how the proceeds from the marital home were to be distributed once the home [was] sold, and if the former wife [was] entitled to reimbursement as a co-tenant for all expenses relating to the home that she [incurred] during the period of exclusive possession." Similarly in *Sweet v. Sweet*, 993 So. 2d 91 (Fla. 2d DCA 2008), the court remanded the case to the trial court to explicitly deal with the issue of credits and setoffs where the former wife and children remained in the home and the former husband was ordered to continue to pay the property expenses until the home was sold, after which the former husband would be required to pay alimony at a reduced rate. The appellate court apparently felt that silence in the final judgment was insufficient and that there must be something added to the final judgment to show that the trial court addressed the issue. Specifically, the appellate court directed the trial court to consider whether the alimony that the former husband was required to pay before the sale of the home was intended to cover the mortgage and property expenses.[10]

Recent cases have also expanded the *Kelly* holding relating to the out-of-possession party's right to be credited for one-half of the rental value during the time that the other party has occupancy of the home. The *Kelly* court held that if the final judgment was silent with respect to this issue, then it was assumed that the court did not intend for the party out of possession to receive a credit. *McCarthy v. McCarthy,* 922 So. 2d 223 (Fla. 3rd DCA 2005), went one step further. The *McCarthy* court held that when possession of the award is for the benefit of the parties' minor child(ren), then the party out of possession is never entitled to a setoff or credit for rental value. The court went on to state that "[s]ection 61.077, Florida Statutes (2004), requires that the court consider the grounds upon which exclusive use and possession of the home is being awarded in determining whether there is a setoff." [11] Therefore, a marital settlement agreement or a final judgment should expressly state the grounds upon which possession is being awarded or given.[12]

Wolf v. Wolf, 979 So. 2d 1123 (Fla. 2d DCA 2008), illustrates the limitations of *Kelly* and F.S.§61.077 as

well as the significance of the grounds upon which possession is being awarded. Mrs. Wolf obtained a final judgment for protection against domestic violence. The judgment, among other things, awarded her exclusive possession of the parties' marital home but was silent with respect to Mr. Wolf's right to a credit for half of the rental value. Armed with *Kelly*, Mrs. Wolf argued at the trial regarding the parties' divorce action and on appeal that Mr. Wolf did not have any right to a credit for rental value because the judgment awarding her possession of the home was silent with respect to this issue. The Second District Court of Appeal rejected Mrs. Wolf's argument. It distinguished *Kelly* by pointing out that the final judgment in *Kelly* was a final judgment for dissolution of marriage and not a final judgment for the protection against domestic violence. The *Wolf* court emphasized that the trial court's focus during the hearing on the petition for protection against domestic violence was the safety of the parties, not the disposition of property. Therefore, it could not be assumed that silence on the issue of rental value meant that the court considered the issue during the domestic violence hearing. Moreover, the court pointed out that F.S. §61.077 only applies to settlement agreements, final judgments of dissolution of marriage, or final judgments equitably distributing assets or debts and not to a final judgment for the protection against domestic violence. *Wolf* appears to carry out the theme found in the cases decided after the enactment of F.S. §61.077 that silence is not enough. The court noted "that to avoid the need to resort to case law in an effort to intuit a trial court's intent, it may be wise for a trial court to affirmatively state in the final judgment of dissolution that rental value was considered and no award was found to be warranted."[13] Moreover, *Wolf* reiterates the importance of determining the basis of the award of exclusive possession.

Wolf also raises an interesting issue regarding recently enacted F.S. §61.075(5). That provision of the equitable distribution statute permits interim orders that provide for partial equitable distribution. Based on the reasoning found in *Wolf,* F.S. §61.077 is not applicable to those orders because it is neither a settlement agreement nor a final judgment.

What About Taxes?

The court in *Ascherman*, among other things, reversed the part of the final judgment that gave the party who had exclusive possession of the home (the wife) the right to deduct all of the mortgage interest and taxes that she was paying, even though she was to receive credit for one-half of these expenses at the time of sale. The court reasoned that "if the former husband is required to pay half of all costs during the wife's exclusive possession, he certainly is entitled to commensurate income tax deductions."[14] The problem with this reasoning is that it does not recognize the requirements of the Internal Revenue Code and does not provide any guidance as to how and when the former husband is to deduct one-half of the deductions. For example, interest is only deductible if paid by the taxpayer.[15] Furthermore, even if the former husband paid one-half of the mortgage interest during the time of his former wife's use of the home, he might not be able to deduct any interest because the former marital home might not be a qualified residence.[16] Therefore, when dealing with the issue of credits and setoffs at the time of sale, the income tax benefits attained by the party taking the income tax deduction should be carefully analyzed and taken into account pursuant to F.S. §61.077(6).

In 2008, Congress enacted the Housing and Economic Recovery Act and in 2009 Congress enacted the American Recovery and Reinvestment Act. Both of these acts will impact decisions of individuals who purchased their principal place of residence between April 9, 2008, and November 30, 2009, and who were eligible to receive the "first-time homebuyer credit." Individuals who were eligible for the credit and purchased their principal place of residence between April 9, 2008, and December 31, 2008, under the 2008 act could receive a credit of 10 percent of the purchase price of the home, with a maximum available credit of $7,500.[17] The amount of the credit is to be "repaid" in equal annual installments over 15 years. The repayment is made by way of an additional tax on the individual's personal income tax return. The amount to be repaid will be accelerated and become immediately due if the home is sold. If the home is transferred to a spouse in connection with a divorce, then the individual receiving the home will be responsible for the repayment. The credit is similar to an interest-free loan and should be taken into consideration as such when equitably dividing the marital residence.

The 2009 act, among other things, increases the maximum credit from $7,500 to $8,000 and eliminates

the repayment obligation for eligible taxpayers who purchased their principal place of residence on or after January 1, 2009, and before December 1, 2009. However, if the residence is sold within three years from the date of purchase, then the credit will be required to be recaptured (repaid). Consequently, parties who have received the benefit under the 2009 act and subsequently file for dissolution of marriage should consider whether to delay the sale of the residence until the three-year period has expired.

Summary
The following factors need to be considered when dealing with the marital home in today's economic climate:

• The parties should realistically determine the anticipated proceeds, if any, that they would receive if the marital home were sold.

• Each of the parties should determine whether they have the desire and financial ability to purchase the other parties' interest in the home. In those cases where the mortgage balance exceeds the present fair market value of the home, there should be a determination whether one party wants to receive the house, along with the debt, based on the hope that the market will turn around.

• In the event that neither party has the desire and/or the financial ability to purchase the other parties' interest, then they need to decide whether to sell the property now or delay the sale until the market recovers. A decision to sell the home creates additional issues such as the listing price, minimum acceptance price, and whether either or both parties will remain in the home until sale. If the parties decide to delay the sale and one party has exclusive possession, then the final judgment or marital settlement agreement should clearly state when the right to exclusive possession ends.[18] In addition, the marital settlement agreement or final judgment should explicitly indicate the purpose for providing exclusive possession, *e.g.*, incident of child support, preservation of property value, etc.

• In cases where a party has exclusive possession until sale, then the marital settlement agreement or final judgment should clearly set out whether there will be credits or setoffs. Attorneys need to carefully analyze the facts of their case in order to determine whether credits and setoffs are appropriate. The factors set out in F.S. §61.077 provide a good starting point. For example, in situations where alimony and child support are not being awarded and the party in possession pays for all of the expenses, then contribution by the party out of possession as well as a setoff for rental value might be warranted. On the other hand, if support is awarded and the support covers the party in possession's housing expenses, then it would probably be inequitable for the out-of-possession party to be charged with one-half of the costs of maintaining the home in addition to support.

In conclusion, these hard economic times require difficult decisions. Clients are not only dealing with the loss of their marriages, but also the possible loss of their homes. It is essential that matrimonial attorneys do their utmost to assist their clients in preserving what is very often the most significant marital asset.q

[1] Fla. Stat. §61.075(1)(h) (emphasis added).

[2] *See also Blunnie v. Blunnie,* 415 So. 2d 156 (Fla. 4th D.C.A. 1982).

[3] *See Losey v. Losey*, 221 So. 2d 417 (Fla. 1969).

[4] *Barrow v. Barrow*, 527 So. 2d 1373, 1377 (Fla. 1988); *see also Ombres v. Ombres*, 549 So. 2d 1113 (Fla. 4th D.C.A. 1989.)

[5] The court also held that Mrs. Kelly was entitled to be reimbursed for 50 percent of the entire mortgage payments and not just 50 percent of the principal payments.

[6] *Brandt v. Brandt*, 525 So. 2d 1017, 1020 (Fla. 4th D.C.A. 1988) (emphasis added).

[7] *Id.* at 1021.

[8] *Id*. at 1021-1022.

[9] Judge Stone's conclusion in the *Brandt* dissent that an agreement must specifically provide for reimbursement became law as a result of Fla. Stat. §61.077.

[10] *Sweet v. Sweet*, 993 So. 2d 91, 92 (Fla. 2d D.C.A. 2008); See also *Cardella-Navarro v. Navarro*, 992 So. 2d 856 (Fla. 3d D.C.A. 2008) (case remanded to trial court when credit was awarded, but record did not reflect that court considered Fla. Stat. §61.077 factors); *Silverman v. Silverman*, 940 So. 2d 615 (Fla. 2d D.C.A. 2006) (case remanded to trial court in order to address issue of credits and setoffs in accordance with Fla. Stat. §61.077 when neither the final judgment nor the parties referenced the statute).

[11] *McCarthy v. McCarthy*, 922 So. 2d 223, 226 (Fla. 3d D.C.A. 2005); *see also Sweet,* 993 So. 2d at 92.

[12] The court in *Parks v. Parks*, 34 Fla. L. Weekly D143 (Fla. 2d D.C.A. 2009), recently held that the wife was entitled to a setoff equal to one-half of the reasonable rental value of the home that her husband occupied since the parties' separation. The trial court had awarded the husband one-half of the mortgage payments and home loan interest payments that he made. Apparently, as in *Barrow*, the husband was not *awarded exclusive possession* and for that reason, there were no grounds upon which the husband occupied the home.

[13] *Wolf v. Wolf*, 979 So. 2d 1123, 1127 (Fla. 2d D.C.A. 2008).

[14] *Ascherman v. Ascherman,* 977 So. 2d 763, 765 (Fla. 2d D.C.A. 2008).

[15] *See Kazupski v. Commissioner*, T.C. Memo 1982-182.

[16] *See* I.R.C. §163(h) (3).

[17] The credit is subject to phase out when adjusted modified adjusted gross income reaches a certain level. The full amount of the credit is available for married couples filing jointly whose modified adjusted gross income is $150,000 or less and for other taxpayers whose modified adjusted gross income is $75,000 or less.

[18]*Duncan,* 379 So. 2d at 952.

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This column is submitted on behalf of the Family Law Section, Peter Gladstone, chair, and Susan W. Savard and Laura Davis Smith, editors.

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