[redacted]
RE: [Defendant]

LEGAL MEMORANDUM

Issue Presented

In a partition action where real property is held by two unmarried tenants in common, to what is each co-tenant entitled?

Brief Answer

Under Florida law, all co-tenants bear equal responsibility for payments necessary to maintain their ownership interests in the property, whether the co-tenant maintains possession of the property or not. Thus, an out-of-possession co-tenant must reimburse the co-tenant in possession for one-half the value of all mortgage payments, taxes, insurance payments, and improvements necessary for the repair and maintenance of the property upon partition. Further, although an out-of-possession co-tenant is generally entitled to a reimbursement of one-half the fair rental value of the property for the time he was not in possession as an offset against the maintenance-payment reimbursement he owes the co-tenant in possession, such an offset need not be granted where (1) there has been no ouster or adverse possession, and (2) there has been an agreement between the co-tenants to allow one co-tenant to possess the property exclusively.

Discussion

I. Florida Statutes

Partition actions are governed by Ch. 64 of the Florida Statutes. Specifically, under Section 64.051 ("Judgment"):

> The court shall adjudge the rights and interests of the parties, and that partition be made if it appears that the parties are entitled to it. When the rights and interests of plaintiffs are established or are undisputed, the court may order partition to be made, and the interest of plaintiffs and such of the defendants as have established their interest to be allotted to them, leaving for future adjustment in the same action the interest of any other defendants.

and under Section 64.071 ("Sale where nondivisible"):

> (1) ORDER OF SALE.--If the commissioners report that the lands of which partition is directed are so situated that partition cannot be made without prejudice to the owners and if the court is satisfied that such report is correct, the court may order the land to be sold at public auction to the highest bidder by the commissioners or the clerk and the money arising from such sale paid into the court to be divided among

the parties in proportion to their interest.

The Florida District Courts of Appeal have emphasized the importance of **evidence** concerning both (1) any expenses paid by the tenant in possession for maintenance of ownership interest, including mortgage and tax payments, *see, e.g.,* O'Donnell v. Marks, 823 So.2d 197 (Fla. 4th DCA 2002), and (2) the reasonable fair rental value of the property, *see* Nelson v. Nelson, 544 So.2d 273 (Fla. 1st DCA 1989).

II. Florida Case Law

A. The Florida Supreme Court

In Kelly v. Kelly, 583 So.2d 667 (Fla. 1991), the court held that, in a tenancy in common, all co-tenants "have equal responsibility in making all payments necessary to maintain their ownership of the property." *Kelly* at 668. Therefore, a wife who has made mortgage payments while in sole possession of the property is "entitled to reimbursement for one-half the full mortgage payments" she has made on the property. *Id*. This is because "the possession of a tenant in common is presumed to be the possession of all tenants." Barrow v. Barrow, 527 So.2d 1373, 1377 (Fla. 1988).

Further, "[t]he rights of an out-of-possession co-tenant for **credit for fair rental value** depends [sic] on the circumstances." *Kelly*, 583 So.2d at 688. The general rule is that an out-of-possession co-tenant is entitled to reimbursement of one-half the fair rental value of the property for the time he was not in possession **if** the other co-tenant has claimed exclusive ownership of the property under adverse possession or ouster. The possessory co-tenant's intent to claim exclusive possession must be clearly communicated to the other co-tenant, because "until the one in possession communicates to the other the knowledge that he or she claims the exclusive right or title and there can be no holding adversely or ouster by the cotenant in possession unless the adverse holding is communicated to the other." *Barrow*, 527 So.2d at 1377.

However, there is an important **exception** to the *Barrow* offset rule: where the co-tenant in possession makes a claim for *contribution* from the out-of-possession co-tenant for expenses she has paid to maintain the property, including mortgage and tax payments, then the out-of-possession co-tenant *can* claim an offset of one-half the fair rental value of the property, even if there has been no ouster or adverse possession. *Barrow*, 527 So.2d at 1376.

The *Barrow* offset exception has been cited with approval by the Second DCA as recently as 2002. *See* Schryver v. Franklin, 829 So.2d 264 (Fla. 2d DCA 2002), thus it appears to remain good law.

Nevertheless, under case law from the Fourth DCA as outlined below, there may be an **exception to this exception** where the parties (or the court) have made an agreement regarding possession of the property that fails to mention fair rental value reimbursements.

B. The Florida Fourth District Court of Appeal

In Brandt v. Brandt, 525 So.2d 1017, 1020 (Fla. 4th DCA 1988), after noting that "in the absence of special circumstances, the law imposes a duty on the nonpaying tenant to reimburse the paying tenant for common expenses," the court held that "where there is an agreement but it is silent as to the ultimate liability of such expenses, and no evidence is presented that the nonpaying co-tenant gave consideration to be relieved of his legal obligation to pay one-half of such expenses, we hold that *a right of reimbursement in the paying tenant is established by operation of law*." [emphasis added].

As to the issue of the **fair rental value offset**, the Florida Supreme Court in *Kelly* cites with approval Goolsby v. Wiley, 547 So.2d 227 (Fla. 4th DCA 1989) on the point of fair rental value reimbursements. "[*W]here exclusive possession by a co-tenant is sanctioned by* court order or *agreement of the parties*, *there can be no offset* (of one-half of the fair rental value of the property for the term of the lawful possession) *against the claim of that tenant for reimbursement* from the proceeds of a sale of the property *for necessary and proper expenses incurred in the preservation and protection of the property*." *Id*. at 230 [emphasis added].

The rationale of the *Goolsby* court is particularly helpful in the present case: "Where the parties have agreed that one should have exclusive possession and there is no provision in the agreement for rent, it seems inappropriate to subsequently engraft such a requirement on the contract made by the parties." *Id*.

This *Goolsby* rationale may be extended to the fact that the property at issue in the present case was not brought up in [Plaintiff's] previous child support action. Just as a court "presumably would have said" (*id*. at 230) whether reimbursement of rental value was contemplated in an award of possession to one tenant, the court ruling on the previous child support action "presumably would have said" whether a fair rental value reimbursement from [Defendant] to [Plaintiff] entered the calculus of the child support payments due.

Similarly, in Ombres v. Ombres, 549 So.2d 1113 (Fla. 4th DCA 1989), the court ruled that the out-of-possession co-tenant is entitled to a rental value offset where (1) he hasn't agreed to the other co-tenant's occupancy, or (2) there is no court-awarded use or occupancy of the property. In [Defendant]'s case, [Plaintiff] apparently *did* agree to [Defendant]'s occupancy, along with that of their child, thus it would be, in the words of the *Goolsby* court, inappropriate to "engraft" a provision regarding reimbursement of rental value at this late date.

C. Other Florida DCAs

The issue of the effect of a minor child's residence on the rental value offset has not been explicitly addressed in the Florida Supreme Court or the Fourth DCA. The closest case to address this issue appears to be Fitzgerald v. Fitzgerald, 558 So.2d 122, 126 (Fla. 1st DCA 1990), where the court found that the out-of-possession husband *was* owed the fair rental

offset because his agreement with his former wife concerning her exclusive possession was contingent on their minor child's continuing to live on the property. Thus, the husband was granted one-half the fair rental value of the property for a period of time during which the child lived elsewhere. *Fitzgerald*, 558 So.2d at 126.

[Defendant] may therefore wish to argue that the reasoning of the Fitzgerald court suggests that where a minor child maintains residence in the property along with the co-tenant in possession, the award of one-half the fair rental value as an offset to maintenance-expense reimbursements is inappropriate, especially coupled with the agreement between the parties to grant her exclusive possession without reference to rental value offsets, as well as the absence of any evidence of ouster or adverse possession, i.e., the conditions that generally must be demonstrated for the fair rental value offset to apply.

Conclusion

Because there has been no ouster or adverse possession in [Defendant]'s case, and because the parties appear to have agreed to [Defendant]'s exclusive possession without having contemplated any fair rental value offset, in a partition action, [Defendant] would be owed one-half of all payments she has made in furtherance of both co-tenant's ownership interests, without subtracting an offset in [Plaintiff]'s favor for any fair rental value.