

**IN THE SUPREME COURT
OF THE STATE OF OREGON**

SC251or59

J. GRAHAM KILLAM,

Plaintiff-Respondent,

v.

JACQUELINE KILLAM,

Defendant-Appellant.

APPELLANT'S ABSTRACT OF RECORD AND BRIEF

*Appeal from a Decree of the Circuit Court,
Multnomah County*

HONORABLE JEAN L. LEWIS, Judge

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APPELLANT'S ABSTRACT OF RECORD

On or about the 28th day of June, 1966, plaintiff filed in the circuit court of the state of Oregon for the county of Multnomah, a

SUIT FOR PARTITION

which states for cause of suit as follows:

I

Alleges plaintiff and defendant, JACQUELINE KILLAM were formerly husband and wife, which marriage was dissolved on the 27th day of September, 1962.

II

That plaintiff and defendant, JACQUELINE KILLAM entered into a collateral agreement to a property settlement on the 20th day of September, 1962, wherein and whereby the parties agreed to place the title to a certain Chris-Craft motor boat known as the "Gay-Jay," Oregon License No. _____ together with its boathouse and other equipment in trust to the parties' daughter, Rosalee Hayes, for the benefit of the said parties, a copy of said agreement being attached hereto and marked as "Exhibit A."

III

That since the execution of said agreement, and on or about the 28th day of November, 1965, the defendant, JACQUELINE KILLAM removed the boat, boathouse and equipment from its moorage at Columbia River Yacht Club, without any warning or prior notice to plaintiff, and has ever since said time refused the plaintiff his rights to the use of said boat as provided in said collateral agreement.

IV

That in spite of said collateral agreement, the defendant claims sole ownership of said boat.

V

That the plaintiff has no plain, adequate or speedy recovery at law.

WHEREFORE, plaintiff prays for a decree of this Court declaring the interest of the parties hereto, and an order requiring said trust to be set aside; and that the boat be sold and the proceeds divided between the parties in accordance with the terms of said collateral agreement; and for his costs and disbursements herein incurred.

EXHIBIT A

COLLATERAL AGREEMENT

The parties hereto, JACQUELINE KILLAM and J. GRAHAM KILLAM, husband and wife, entered into and executed a Property Settlement Agreement, under date of 20 September, 1962, and in consideration of their mutual promises contained in said Agreement, the parties further agree as follows:

That the Chris-Craft motor boat, the "Gay-Jay" and its boathouse, now standing in the name of Rosalee Hayes, a daughter of the parties, shall be considered as now held *in trust* by the said Rosalee Hayes for the benefit of JACQUELINE KILLAM and J. GRAHAM KILLAM: the boat and boathouse shall remain in the name of Rosalee Hayes, until such time as the parties mutually agree to sale of each item and equal division of the proceeds; that meanwhile, each shall have equal use of the boat, not to exceed two weekends running consecutively, or for any longer period that may be mutually agreed upon, provided that J. Graham Killam shall maintain the boat in good repair and operable condition and shall pay for repairs and insurance premiums on said boat.

JACQUELINE KILLAM agrees to be responsible for the boat's moorage and yearly licensing.

Dated at Portland, Oregon, this 20th day of September, 1962.

/s/ JACQUELINE KILLAM

/s/ J. GRAHAM KILLAM

AND ON OR ABOUT the 22nd day of July, 1966 defendant, JACQUELINE KILLAM, filed her

ANSWER

as follows:

I

Defendant admits the allegations of paragraphs I and II of plaintiff's complaint herein.

II

Defendant denies all of the allegations contained in Paragraphs III, IV and V of plaintiff's complaint herein.

FOR A FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE the defendant alleges as follows:

I

Plaintiff, and defendant, JACQUELINE KILLAM, were formerly husband and wife and were divorced on the 27th day of September, 1962. In connection with the said divorce the parties entered into an agreement collateral to a property settlement agreement dated September 20, 1962, which agreement is described in Paragraph II of plaintiff's complaint herein and is a part thereof.

II

Under said collateral agreement plaintiff was required to maintain the boat (which is the subject of the said agreement) in good repair and operable condition and agreed to pay for all repairs and insurance premiums thereon. Plaintiff has failed and refused to perform his said agreement and defendant has been required to expend substantial sums of money in order to maintain the boat in proper operating condition and to provide moorage therefor.

III

Under said collateral agreement of September 20, 1962, no sale of the boat was to be made, but the trust therein established was not to be set aside, until such

time as the parties mutually agreed upon a sale thereon. Defendant, Jacqueline Killam has not and does not now consent to such sale.

FOR A SECOND FURTHER SEPARATE ANSWER AND DEFENSE the defendant alleges as follows:

I

Defendant realleges all of the allegations of Paragraphs I and II of her first further and separate answer and defense.

II

At the time of the establishment of the trust created, by the said collateral agreement of September 20, 1962, there was due and owing on the boat the sum of \$3,100.00. It was agreed by and between plaintiff and defendant, Jacqueline Killam, that notwithstanding the collateral agreement plaintiff would claim no interest in said boat in consideration of the said defendant's agreement to pay the balance of \$3,100.00 then remaining to be paid thereon. The said sum of \$3,100.00 was in fact paid by defendant pursuant to said agreement, and it was the intention of the parties when entering into the written collateral agreement that it was to provide only for mutual use of the boat, but that the equitable ownership thereof would remain in defendant Jacqueline Killam.

WHEREFORE, having fully answered the complaint and partition herein, defendant prays the court for a decree setting aside the trust established in the collateral agreement dated September 20, 1962; and for a further decree declaring that defendant Jacqueline Killam is the owner of the boat described therein, and that defendant Jacqueline Killam shall have and recover her costs and disbursements incurred herein.

AND ON OR ABOUT THE 23rd day of January, 1967, defendant, ROSALEE HAYES, after being granted her motion to set aside default on December 30, 1966, filed her

ANSWER

as follows:

I

Admits the allegations of Paragraphs I and II of plaintiff's complaint herein.

II

Denies all of the allegations contained in Paragraphs III, IV and V of plaintiff's complaint herein.

FOR A FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE alleges as follows:

I

Plaintiff and defendant, Jacqueline Killam, were formerly husband and wife and were divorced on the 27th of September, 1962. Said parties entered into an agreement which agreement is described in Paragraph II of plaintiff's complaint herein and is a part thereof. It was the intention of the parties when entering into the written collateral agreement that it was to provide only for mutual use of the boat, but that the equitable ownership thereof would remain in defendant Jacqueline Killam.

II

Plaintiff has failed and refused to perform his said agreement and Jacqueline Killam has been required to expend substantial sums of money to insure and maintain the boat in proper operating condition, and for moorage.

III

Defendant, Jacqueline Killam has not and does not now consent to a sale or equal division of the proceeds of sale and continues willing to permit equal use of the boat by plaintiff upon performance by plaintiff of his part of the agreement.

WHEREFORE, having fully answered the complaint and partition herein, defendant Rosalee Hayes prays that plaintiff's complaint be dismissed.

AND ON OR ABOUT THE 5th day of August, 1966, plaintiff filed his reply as follows:

REPLY

Comes now plaintiff and for reply to defendant's first further and separate answer and defense admits and denies as follows:

I

Plaintiff admits paragraph I of defendant's first further and separate answer and defense.

II

Plaintiff denies paragraph II and III of defendant's first further and separate answer and defense.

I

Further in reply to defendant's second separate answer and defense, plaintiff admits paragraph I thereof, and

II

Plaintiff denies paragraph II of defendant's second separate answer and defense and the whole thereof.

WHEREFORE, plaintiff having fully replied to the defendant's first and second separate answer and defense prays for a decree of this court declaring the interests of the parties hereto and for an order requiring said trust to be set aside and that the said boat be sold and that the proceeds be divided according to the terms of said collateral agreement, and for his costs and disbursements incurred herein.

AND ON OR ABOUT THE 12th day of April, 1967 the Court entered its

DECREE

as follows:

THIS MATTER coming on regularly for trial before the Honorable Jean L. Lewis, Judge of the above-

entitled Court, on the 2nd day of December, 1966;
* * *

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiff and defendant Jacqueline Killam or each the owners of an undivided one-half interest in and to the following described personal property as tenants in common, to wit:

That certain Chris Craft motor boat known as the "Gay-Jay", Oregon License Number
together with its boat house and miscellaneous equipment;

and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant Rosalee Hayes holds the bare legal title to the aforesaid boat as trustee for the benefit of plaintiff and defendant Killam and has no further or other interest in said boat; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff and defendant Killam are bound by the terms and provisions of that certain Collateral Agreement entered into by and between them on or about the 20th day of September, 1962, with reference to the aforescribed personal property and that an accounting shall be had between them as to expenses of said personal property chargeable to each under the terms of said Agreement and paid by the other; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant Killam is entitled to credit as a part of said accounting for any insurance premiums paid by her in addition to any other obligations paid by her with reference to the aforesaid personal property over and beyond the terms of said Agreement; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff and defendant, Killam shall agree as to the value of the aforesaid personal property and that, if they are unable to agree, that said value shall be fixed and said parties shall be bound by the determination of an independent appraiser to be agreed upon by them; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, if said parties are unable to agree upon said value and the appointment of an independent appraiser, an appraiser will be appointed by the above entitled Court upon the application of either party; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant Killam shall have a period of thirty (30) days from the date of completion of the aforesaid accounting and the date that the value of the aforesaid personal property has been fixed as heretofore set forth herein whichever shall last occur within which to purchase the undivided one-half interest in plaintiff for one-half of its value subject to such adjustments that may be necessary based upon the aforesaid accounting; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the event that defendant Killam shall be unable or unwilling to purchase said personal property within the aforesaid period of time, the same shall be sold and the proceeds of such sale, after deducting the costs thereof, shall be divided equally between plaintiff and defendant Killam subject to such adjustments as may be necessary due to the aforesaid accounting.

Dated at Portland, Oregon, this 12th day of April, 1967.

/s/ JEAN L. LEWIS
Judge

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This appeal involves a suit by the former husband, J. GRAHAM KILLAM, plaintiff against his former wife, JACQUELINE KILLAM, and their daughter, Rosalee Hayes, as defendants, for the compulsory partition of personal property, i.e., a Chris-Craft motor boat, together with its boathouse and miscellaneous equipment.

The plaintiff and defendant former wife, on September 20, 1962, as part of a property settlement in contemplation of a divorce, entered into a collateral written agreement pertaining to the above personal property, whereby the title thereto which had previously been transferred to their daughter, was held in trust by her, for the mutual benefit and use of the plaintiff and former wife, until such time as they mutually agreed to a sale. The collateral agreement required the plaintiff to maintain the boat in good repair and operable condition; to pay for repairs and insurance premiums. The defendant agreed to pay for moorage and licensing.

In a trial before the court, without a jury, a decree was entered, inter alia, giving the defendant former wife thirty days from the date of completion of an accounting and determination of the value of the personal property within which to purchase plaintiff's one-half interest; that in the event she shall be unwilling to purchase it, the property shall be sold and after deducting costs, the proceeds remaining be equally divided between plaintiff and the defendant former wife.

Defendant former wife appeals.

QUESTION PRESENTED

Whether the court has authority to disregard the express terms of an agreement and compel a partition by ordering a sale of the property?

STATEMENT OF FACTS

Beginning early in 1960 until about May 24, 1962, the Chris-Craft boat, boathouse and equipment were owned jointly by the plaintiff who was then a lawyer and defendant former wife (Tr. 11).

During May, 1962, a mortgage against the boat was overdue and a foreclosure was threatened (Tr. 10). Defendant wife paid the mortgage of \$3,100 from the sale of some of her property. She testified the plaintiff agreed to give her the boat if she paid off the mortgage, and accordingly, in May, 1962, plaintiff gave defendant a general power of attorney to convey his interest (Tr. 30). The title to the boat was placed in the name of their daughter Rosalee Hayes, "so that he couldn't have it encumbered any more. Because it had been transferred several times. One time even the Government had put big papers on the door. Notices that he couldn't use it because he owed so much money" (Tr. 30).

In September, 1962, the plaintiff and defendant entered into a property settlement agreement in contemplation of a suit for divorce. This agreement did not mention the boat, boathouse and equipment (Tr. 31).

At the time this agreement was to be executed there was some conversation concerning the boat at which time she said "Well, honey. You can just use the boat." And he said "Will you put that in writing?" I said, "I would be happy to if you will pay the insurance." She testified that she then submitted a form of agreement (Def. Ex. 2) which was prepared by her attorney declaring ownership to be in defendant and providing for mutual use of the boat provided plaintiff would maintain the boat in good repair and operable condition, and pay for repairs and insurance. Plaintiff rejected this agreement (Tr. 31) and submitted a counter proposal prepared by his attorney to defendant for consideration. Defendant challenged the validity of this agreement contending "I don't see how you can make a trust out of something that just isn't yours." Nonetheless, she acquiesced in the execution of the collateral agreement proposed by plaintiff on September 20, 1962 (Pl. Ex. 1).

Note: There is a variance between the pleadings (Para. II Second Affirmative Defense of Def.) concerning precedence of payment to the time the Collateral Agreement was executed; apparently amended by acknowledgment of the court (Tr. 62) and admitted by plaintiff (Tr. 10).

The parties thereafter shared in the use of the boat until the later part of November, 1965, when she removed the boat and boathouse to a moorage in Vancouver, Washington (Tr. 8, 55). She did this because plaintiff indicated his intention to sell the boat and appeared to be making early preparations for such action (Tr. 34).

This fact he admitted (Tr. 24). Because of the bankruptcy of a tenant in a building owned by her, she was unable to pay the expense of boat moorage (Tr. 33). By oral agreement plaintiff assumed this expense of \$20 per month (Tr. 16, 33). However, at the time defendant moved the boat in November, 1965, plaintiff was in arrears approximately \$100 for moorage (Tr. 7).

The defendant arranged for licensing the boat from September, 1962 onward (Tr. 44, 58) as required by the agreement.

Plaintiff failed to perform his part of the collateral agreement. In the summer of 1965, the boat was "in bad condition," "always dirty," "wouldn't start," "running lights were out" (Tr. 35), and further that three barrels were installed under the boathouse to prevent it from sinking (Tr. 41). Extensive repairs were required to maintain the mechanical and navigational equipment of the boat (Tr. 41 et seq) (Def. Ex. 4). Corroboration that these repairs were necessary was provided by Steward

who was an experienced boatman of many years. He testified that he had operated the boat many times as a guest of defendant and had recommended repairs to the reversing mechanism on both engines, both forward clutches, the carburetors, spark plugs, battery and depth finder (Tr. 67).

Further testimony that the boat was, in November, 1965, in "poor condition due to the fact that it was not kept up" was given by the 21 year old son of the parties, Killam (Tr. 72).

Defendant indicates that plaintiff failed to obtain the annual Coast Guard Auxiliary inspection which would have disclosed maintenance deficiencies (Tr. 44). Plaintiff admits this fact (Tr. 17).

The terms of the collateral agreement required plaintiff to pay the insurance premiums. Plaintiff's insurance broker, Donald Foltz, testified that the policies covering the period April 20, 1962 through April 20, 1966, named plaintiff only as insured and coverage, therefore, extended only to him and members of his household; coverage did not extend to defendant wife following the divorce in September, 1962 (Tr. 84-85).

When defendant attempted to present a claim for the loss of an anchor, she was told by Mr. Foltz that coverage did not extend to her (Tr. 39-40); she thereafter purchased a separate insurance policy for the period commencing sometime in January 1966 to January, 1967 (Tr. 38) (Def. Ex. 3).

Plaintiff also violated the terms of the collateral agreement by changing the lock on the boathouse and advising defendant that she had no right to go into the boathouse or be on the premises, since she was not paying the moorage (Tr. 23, 45). Defendant found it necessary to go through a window to gain access to the boat and thereafter returned the original lock to the boathouse door (Tr. 45).

Notwithstanding plaintiff's failure to comply with the terms of the collateral agreement he admits that he had access to the property (Tr. 24) and that defendant

had advised his attorney in writing that she was willing to permit his use of the boat (Tr. 26).

Plaintiff testified that he wanted to have the boat sold (Tr. 24, 25) despite the fact the collateral agreement calls for "mutual agreement."

ASSIGNMENT OF ERROR

The collateral agreement requires the personal property to be held in trust until such time as the parties mutually agree to a sale. It was error for the court to disregard the terms of the agreement and compel a partition of the property by decreeing a sale.

POINTS AND AUTHORITIES

Partition should not be granted in violation of an express agreement that it shall remain in trust until such time as the parties mutually agree to a sale.

Harris v. Harris, 138 Or 243, 6 P2d 230.
Henderson v. Henderson, 136 Iowa 564, 114 NW 178.
Miranda v. Miranda, 81 Cal App 2d 61, 183 P2d 61.
McInteer et al v. Gillespie, 31 Okla 644, 122 P 184.
68 CJS 66, § 44.
132 ALR 666.
Ann Cases 1913E page 402.

One of the beneficiaries cannot terminate the trust.
Clossett et al v. Burtchaell et al, 112 Or 585, 597, 230 P 554.

Courts are not authorized to rewrite the terms of a contract.

Ramsay Signs, Inc. v. Dyck, 215 Or 653, 659, 337 P2d 309.

Wheeler v. White Rock Bottling Co., 229 Or 360, 366 P2d 527.

The court should preserve the agreement as one entered into freely and voluntarily.

Eldridge v. Johnston, 195 Or 379, 245 P2d 239.

ARGUMENT

The "Collateral Agreement"

The Collateral Agreement was executed by plaintiff and defendant Jacqueline Killam about a week before their divorce in late September, 1962. The obvious purpose of the document was only to provide for the joint use of and responsibility for expenses of the property. The agreement, as originally drafted by counsel for Jacqueline Killam provided the property would "be and remain" Jacqueline Killam's but that "Graham Killam shall have equal use * * * provided that he * * * pay for repairs and insurance premiums * * *."

Plaintiff testified that the executed document was also prepared by defendant's counsel and signed in that office (Tr. 2). Defendant testified that it was prepared by plaintiff's counsel and signed in his office (Tr. 33). The watermarks and type clearly show it came from the office of plaintiff's lawyer (Tr. 95, 96).

The expenses to be borne by plaintiff annually represent a substantial percentage of the depreciated value of the property and plaintiff may have intended, by addition of the trust provision and the clause for equal division of the proceeds of sale, to obtain some assurance of being ultimately repaid to some extent for future expenses of preserving the value of the property. Plaintiff does not claim or admit this was his purpose but we submit this is the most probable reason for change of the original draft of agreement.

By the terms of the Collateral Agreement the plaintiff is estopped to demand partition and the court was without authority to enter such a decree. 68 CJS 66 et seq, § 44.

The mere fact that plaintiff no longer wishes to use the property, or does not want to perform his agreement is no basis at law or under the Collateral Agreement for compelling defendant to sell her interest. If plaintiff no longer wishes to have the use of the property or keep up the repairs or maintenance he may waive any right he may have or may develop to ultimately share in proceeds of a sale.

A right to partition was never intended to interfere with a contract of the parties restricting partition.

In *Harris v. Harris*, 138 Or 243, 6 P2d 630, the court held that the right to partition real property is subject to the terms and provisions of a will.

"Again, it is very evident that, if the testator had intended that the land should be divided into severalty ownerships, he would have made such division

by the will. It was his to do with as he pleased, and he has provided otherwise. One of his devisees is seeking to undo the provisions of the will by having this land partitioned. Having accepted the devise, he is personally bound to carry out the terms and provisions of the will so far as they affect his undivided interest in the land. If plaintiff had desired to escape his responsibility, he should have refused to accept the devise."

In *Miranda v. Miranda*, 81 Cal App 2d 61, 183 P2d 61, it was held that a property settlement agreement, that family home was to remain in names of husband and wife as long as the wife did not remarry and so long as the property was occupied by her as a home for herself and children, constituted a restriction upon rights of parties to partition the property so long as such conditions existed and waived right of either party to partition.

Also, see 132 ALR 666.

At bar, the setting up of a trust in this type of situation suggests the likelihood that the "beneficiaries" may disagree from time to time on matters concerning the property. Therefore, friction between the beneficiaries is no reason to terminate the trust. Plaintiff does not allege that he has requested relief and was refused by the Trustee or that a new Trustee should be appointed.

The Collateral Agreement does not provide that the property may be sold with equal division of the proceeds when only *one* of the parties so desires. On the contrary, it provides that the property will be *held* until *both* parties mutually *agree to a sale and to equal division* of the proceeds. If the trust was to be terminable at the option of either party, the agreement should have so provided.

The requirement for mutual agreement is a protection against one party's unilateral termination to the prejudice of the other. One of the beneficiaries cannot terminate the trust. *Closset et al v. Burtchaell et al*, 112 Or 585, 597, 230 P 554.

If plaintiff insists on applying the terms of the Collateral Agreement, he should be bound not only by the provision that the property will remain in trust until the parties mutually agree to a sale, but also by the further provision that the parties must mutually agree before there will be an *equal* division of the proceeds. The defendant does not agree to a sale, nor does she agree to an equal or any division of the proceeds of a sale at this time.

For the court to decree a partition under the circumstances here amounts to rewriting the terms of the Collateral Agreement. Courts are not authorized to rewrite the terms of a contract. *Ramsay Signs, Inc. v. Dyck*, 215 Or 653, 659, 337 P2d 309; 17 Am Jur 2d 627, § 242.

Moreover, the Court has stated its position with respect to enforcement of valid agreements in *Eldridge v. Johnston*, 195 Or 379, 245 P2d 239 as follows:

"Public policy requires that persons of full age and competent understanding shall have the utmost liberty of contracting and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice; and it is only when some other overpowering rule of public policy intervenes, rendering such agreements unfair or illegal, that they will not be enforced."

What is Plaintiff's Basis for Claim of Part Ownership

Plaintiff was not understood to claim he secured any legal or equitable title by virtue of the Collateral Agreement, but instead *testified* that he at all times prior to execution of that document owned one-half of the property (Tr. 11). Furthermore, a trust established for the mutual benefit of two persons does not necessarily contemplate equal equitable ownership or a right to equal or any division of the res on termination of the trust. This is so particularly when, as here, the time of termination and the division of the res are left to the subsequent *agreement* of the beneficiaries of the trust. In this instance the fact that a trust device was set up suggests that ownership rights of the parties were not equal or one had no ownership at all.

Since plaintiff does not and cannot claim any title by reason of the Collateral Agreement or trust and since he has no record title, we must look behind or beyond the Collateral Agreement for any evidence of his rights.

The property was purchased during the late years of this 37 year marriage relationship and was owned *equally* by the plaintiff and defendant for several years prior to May, 1962. In May of 1962 payments on a mortgage on the property, executed by both parties were substantially in *arrears*.

Plaintiff *testified* that defendant sold an automobile which he says was really his, and satisfied the obligation. He then gave defendant a *general* power of attorney to convey the property and it was agreed by defendant that

she would use this power of attorney to transfer legal title to Rosalee Hayes, leaving the equitable ownership of the property in the defendant, but giving plaintiff a right to use under certain conditions.

Defendant claims that plaintiff agreed to transfer his interest in the property to her if she would pay the mortgage. She testified the automobile which she sold was hers; that she paid the obligation; and received from plaintiff the *general power of attorney to do whatever she wished* with the property.

We submit that it is clear that plaintiff intended to release his legal interest with the understanding he could use the boat from time to time.

At this time, a few months before the divorce, the parties were not enjoying a normal husband-wife relationship and it is not reasonable to believe that defendant would part with her property to satisfy one of plaintiff's obligations, nor that plaintiff would give defendant a general power of attorney to dispose of the property *if he did not in fact mean for her to have the property* as her own.

Furthermore, it is difficult to believe that under the strained relationship existing at the time and since the time of divorce, plaintiff would assume obligations to annually insure (\$400 to \$500), maintain (\$200-\$500), and subsequently to moor (\$200) the property as against a \$10 license fee paid by defendant, if he in fact was at that time to be considered an *equal owner* with her. The scales of expense would be less disproportionally balanced

if it was recognized that she was incurring the expense of having her money invested in the property while he had none invested.

We submit, therefore, that plaintiff has not proved he owned any part of the property at the time of the execution of the Collateral Agreement; that the evidence from both plaintiff and defendant shows no ownership was conveyed to plaintiff by execution of any document, and that plaintiff's conduct since execution of the document has not equitably or otherwise vested an equal or any ownership interest in him.

Clean Hands Doctrine

Even assuming plaintiff had grounds for seeking relief in a court of equity, he must come with clean hands. In this situation it is plaintiff himself who has failed to abide by the terms of an agreement on which he relies.

For several years following the divorce, the property was kept at plaintiff's club. However, because he made it difficult for defendant to obtain access at that location and because of his failure to insure, and his failure to adequately maintain the property, defendant moved the property to a nearby public moorage, procured adequate insurance and adequate maintenance.

Plaintiff admits his attorney received a letter prior to institution of this suit which confirmed defendant's continued willingness to let him use the property. He also admits he has not been refused use of the property and has keys to it. Obviously, if plaintiff cannot have the

property on his terms he does not want it at all; nor does he want defendant to have it.

Plaintiff alleges in his complaint that he was not notified of the intended movement of the property. We do not believe he was damaged by any failure to give notice or that this violated the terms of any agreement.

In summary, not only has plaintiff failed to prove the essential allegations of his complaint, or any breach by defendant, the evidence is clear that he himself is guilty of serious misconduct in violating the terms of the Collateral Agreement. Under these circumstances a court of equity should leave plaintiff where it finds him—*Rothwell v. Rothwell*, 219 Or 221, 347 P2d 63; *Hollingsworth v. Hollingsworth*, 173 Or 286, 292, 145 P2d 466.

CONCLUSION

Defendant Jacqueline Killam's prayer for relief consists of (1) a request to have the Collateral Agreement and the trust established thereby set aside and held for naught for failure of plaintiff to perform and (2) a request for a declaration that she is sole owner of the property.

Although defendant continues willing to share the use of the property with plaintiff as provided in the Collateral Agreement plaintiff has indicated an unwillingness to continue such use or to perform his obligations. Therefore, defendant should be relieved from any further obligation to plaintiff under the Collateral Agreement and trust, and from any requirement to obtain plaintiff's

approval of a sale, or any obligation to make any division with plaintiff of proceeds of any sale.

Plaintiff's misconduct in failing to insure, failing to maintain, and restricting defendant's access to the property is "very great" as compared to any breach by defendant which if existing at all is "very slight." Therefore, a court of equity, if willing to retain jurisdiction should grant relief to defendant and deny relief to plaintiff. *Mueller v. Mueller*, 165 Or 153, 156, 105 P2d 1095.

Respectfully submitted,

EUGENE L. PARKER,
Attorney for Appellant.

service of the within

by accepted in

County, this

day of

, 19

giving a copy thereof.

I hereby certify that I served the foregoing

on

on the

day of

, 19, by mailing to him a true and correct copy thereof, certified by me as such. I further certify that said copy was placed in a sealed envelope

addressed to the said attorney at which is his regular office address, or his address as last given by him on a document which he has filed in the above entitled cause and served on me; said sealed envelope

was then deposited in the United States post office at Oregon, on the day last above mentioned, with the postage thereon fully paid.

Attorney for

Attorney for