

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

SC251or59  
J. GRAHAM KILLAM, *Plaintiff-Respondent,*  
v.  
JACQUELINE KILLAM, *Defendant-Appellant.*

**RESPONDENT'S BRIEF**

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

HONORABLE JEAN L. LEWIS, Judge

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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

The plaintiff's statement of facts being incomplete, an amplification appears necessary. The Chriscraft and boat house were purchased in plaintiff's own name. Thereafter, at some point, the title became joint with his wife (Tr. 11). Thereafter, while the parties were still married, and due to financial problems, the title was transferred to Rosalee Hayes, one of the defendants, a daughter of the parties, subject to return to the parties or selling it (Tr. 5). This was accomplished by the defendant-wife through the use of a special Power of Attorney given to her by the plaintiff (Tr. 30). The husband and wife continued to use the craft, and about September 20, 1962, as part of a property settlement in contemplation of divorce the parties entered into the collateral agreement for the joint use and sale of the boat as shown by Exhibit A in defendant's Ab., p. 2, generally providing for the joint use of the boat until such time as the parties mutually agreed to sale, for a division of the proceeds of sale and provided that the wife pay boat moorage and yearly licensing, and the husband pay for maintenance thereon and insurance.

The wife admittedly failed to pay the moorage for over three years (Tr. 33), and in November, 1965, she removed it to Vancouver, Washington, locked it and prevented the husband from access thereto (Tr. 7-8). The wife in turn charges the husband with failure to keep the boat in operating condition. The suit herein by the hus-

band seeks partition. The wife contends that the plaintiff is without right to partition until her consent is obtained, further seeks a decree setting aside the trust established by the collateral agreement, and declaring that she is the owner of the boat. The defendant, Rosalee Hayes, filed an answer claiming no interest in herself and joining substantially with her mother in her claims. The defendant, Rosalee Hayes entered no appearance at the trial. From a decree of partition and accounting the wife has appealed. The appellant wife says that the question presented herein is, "Does the Court have authority to disregard the express terms of the collateral agreement as to mutual use of the boat by the parties and order a partition prior to such time as the parties mutually agree to sale." This likewise constitutes the appellant's only assignment of error.

#### ANSWER TO APPELLANT'S ASSIGNMENT OF ERROR

##### POINTS AND AUTHORITIES

Partition of personal property is proper where there is no express provision forbidding the same.

ORS 107.100.

Harris v. Harris, 138 Or 243, 6 P2d 230.

Stout v. Van Zante, 109 Or 430, 219 P 804.

40 Am Jur 87, Partition § 104.

Partition and sale of personal property is a proper remedy where tenants in common of personal property are unwilling to use the property in common.

Michael v. Sphier, 129 Or 413, 272 P 902.

#### ARGUMENT

Under the conditions of strife between the parties over the joint use of the subject yacht, they should not be compelled to continue their tenancy. This court has said, in *Michael v. Sphier, et al*, 129 Or 413.

"Courts should be, and are, adverse to any rule which will compel unwilling persons to use their property in common. The rule of the civil as of the common law, that no one should be compelled to hold property in common with another, grew out of a purpose to prevent strife and disagreement. And additional reasons are found in the more modern policy of facilitating the transmission of titles, and in the inconvenience of joint holding."

\* \* \* \* \*

"According to the weight of the authorities, every cotenant is entitled as a matter of right to demand a partition of the subject of the cotenancy, and this right cannot be defeated by showing that a partition would be inconvenient, injurious or even ruinous to the parties in interest."

Both parties admit there was strife and disagreement. The wife failed to pay the moorage as was required by the agreement, and the husband paid it from 1962 until 1965 (Tr. 7). The wife claims the husband constantly left the boat in a "very deplorable, moldy musty condition. And three or four ketchup bottles were laying on the floor \* \* \* and bottles — empty liquor bottles" (Tr. 46). The wife tacitly admits leaving champagne bottles. However, she finds a class distinction in empty bottles, and says "but the champagne bottles do not make it dirty" (Tr. 50). The wife complains that the boat was constantly "out of repair and we had gone down and it wouldn't start. Everything was broken. The running lights were out. One time he removed the fuses. Then

we found ourselves out in the middle of the river at night with no lights whatsoever" (Tr. 35). The wife further complained about not being given a key to the boat and she was forced to kick in the window (Tr. 45). The husband complains that the boat was always gone when he attempted to use it (Tr. 25); that the wife surreptitiously removed the boat and house from its moorage, took it to the State of Washington, and refused him further use thereof (Tr. 7-8).

Counsel contends that partition may not be granted in violation of the express agreement of the parties; that it should remain in trust until a mutual agreement to sell. It is true that in proper cases of trusts partition may not be had to destroy the trust where such an intent is so expressed, *Harris v. Harris*, 138 Or 243. In the instant case it is plain that the parties did not intend a trust for an unlimited time, and indeed, such an agreement would be unenforceable.

"An agreement never to partition or for an unreasonable length of time is contrary to public policy and will not be enforced." 68 CJS 66, Partition §§ 44.

The wife's admitted failure to pay moorage and her affirmative action in moving the craft are positive violations of her duties under the collateral agreement. Her right to equal use is predicated upon her compliance with the contract. This right she has waived by her several breaches.

The plaintiff has painfully endured his diminishing rights to the use of the boat for four years. The defendant's act in moving the craft to Washington and denying

the plaintiff further use requires a termination of the agreement.

The appellant intimates that partition is not applicable in a suit involving personal property. The law, however, opposes this view.

"It is now the well-settled general rule that a co-tenant of personal property has a right to have the same partitioned and the exercise of this right is not subject to the control of another tenant. A tenant in common of personal property has a right to partition, if partition is possible, and if not, to a regulation of its use equivalent to partition, or to a sale." 40 Am Jur 87, Partition § 104.

The statutory law of Oregon allowing partition in realty should apply equally to personal property. It was held in *Stout v. Van Zante*, 109 Or 432, as follows:

"In the first case the court said 'that the rules governing estates or interests in lands, whether founded upon statutes or upon general principles of law, should as far as practicable, be applied to estates or interest of a like character in personal property.' And quoted with approval from a former decision of that court, as follows: 'There is certainly much force in the position that one body of law should not declare a different rule for two kinds of property, when there is nothing in the nature of either kind of property or in the nature and effect of the rule that calls for it.'"

It is likewise the intent of our law that personal property held by former husband and wife is subject to partition. ORS 107.100, Sub-section 5, provides:

"If, as a result of a suit for the dissolution or annulment of a marriage, the parties to such suit become owners of an undivided interest in any real or personal property, or both, either party may maintain supplemental proceedings by filing a petition in such suit for the partition of such real or personal property, or both, within two years from the entry of said decree. \* \* \*"

Two years having elapsed since the decree of divorce, the plaintiff was forced to file a separate proceeding.

#### Plaintiff's Claim of Part Ownership

The appellant vaguely argues that the plaintiff has no legal or equitable title in the subject of this controversy. She argues that the time of termination as well as the division of the Res is left to the subsequent agreement of the parties herein, apparently basing her argument upon the statement in the collateral agreement that "the boat and boat house 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." Technically speaking, there is some punctuation missing from this phrase but taken as a whole, there is no question but that the boat was held in trust by Rosalee Hayes for the benefit of Jacqueline Killam and J. Graham Killam. The "equal division of proceeds" at the conclusion of the mutual use was a fixed right of the parties. The conveyance to Rosalee Hayes was accomplished by the appellant with the use of a Power of Attorney given by the plaintiff. His rights cannot be extinguished by the wife's use of the Power. In any event, the collateral agreement of the parties was entered into by both parties with advice of counsel and fixed their rights. The agreement clearly spells out a tenancy in common and all parties admit this in the pleadings. The defendant's theory at the trial was that the collateral agreement of the parties was a nullity, title being in the name of the daughter. She says: "I mean we couldn't bargain with something that isn't ours. Well, it already belonged to Rosalee. There

was no trust. You can't just grab the trust out of the air." (Tr. 32). This statement and theory is in conflict with the prayer of her answer seeking to set aside the trust established by the collateral agreement and declaring her, the defendant, to be the owner of the boat. Likewise, her present claim of ownership is in conflict with the allegations of her second further separate answer and defense in which she states that *after* the execution of the collateral agreement in September, 1962 it was agreed between the parties that notwithstanding the collateral trust agreement this plaintiff "would claim no interest in the boat in consideration of the defendant's agreement to pay the balance of \$3100 then remaining to be paid thereon." (App. Br. 4). This claim was abandoned at trial. Appellant likewise contends that when the plaintiff gave the defendant Power of Attorney to dispose of the boat he meant for her to have the property as her own. This of course is not borne out by the terms of the collateral agreement which the defendant reluctantly signed with the advice of her attorney after the husband had refused to execute an agreement giving the wife sole ownership. The use of the power of attorney evidenced a right of ownership by the husband and the wife can hardly dispute the title of her husband while using the power so granted.

#### Clean Hands

The defendant says the plaintiff has not abided by the terms of the agreement and should be denied relief.

The plaintiff, by the agreement, was required to "maintain the boat in good repair and operable condition

and shall pay for repairs and insurance premiums on the boat." The defendant complains because he kept the boat at the club where she "found it difficult to obtain access"; he failed to insure or adequately maintain the property. Apparently the moorage was satisfactory for many years and no objection thereto was expressed by her; insurance was maintained by the plaintiff and the only complaint was that the defendant was not named as an insured. No evidence was introduced as to the intent of the parties concerning "insurance." The claims of failure to pay for repairs or to keep the boat operable are based upon testimony that batteries were low, lights weren't operable at times, motors were hard to start, etc. The record is devoid of any reference to demands upon the plaintiff for repair or that the boat was ever inoperable. The court heard the testimony and apparently concluded there was no reason to withhold equitable relief from the plaintiff.

## CONCLUSION

The thrust of the appeal herein is to deny the partition forever by merely refusing to agree thereto. The appellant would maintain that she can deny the plaintiff use of the boat by surreptitiously removing the same from its moorage, fail to pay moorage, and require the plaintiff to maintain the boat as operable according to her standards.

Joint operation of a boat by a former husband and wife is by necessity bound to provide "strife and disagreement." Equity should grant the relief prayed for.

Respectfully submitted,

FRANCIS F. YUNKER  
Attorney for Plaintiff-Respondent