

MEMORANDUM

TO: Emma James, Esquire

FROM: National Legal Research Group, Inc.
Brett R. Turner, Senior Attorney

RE: Maryland/Family Law/Equitable Distribution/Contribution—Abused Spouse

FILE: 28-22956-247

February 4, 1998

STATEMENT OF FACTS

The parties to this action were married at some point before 1987. In 1987, they purchased a marital home located at 4746 Marion Avenue in Baltimore City. The \$1,000 down payment for the purchase, and \$2,314 in closing costs, came from the husband's nonmarital funds. Mortgage payments were thereafter made regularly, using marital funds.

The parties were separated on February 14, 1988. The immediate cause of the separation was a physical altercation which began when the husband threw the parties' son onto a bed. The wife, outraged by this treatment, attempted to intervene physically between the husband and the son. The husband then punched the wife repeatedly, giving her two black eyes. The wife was on the telephone with her brother at the time, and he overheard the entire altercation. This incident convinced the wife that the parties could not live together peacefully. The incident occurred in late October of 1987, and as soon as the wife was able to obtain employment, she left the marital home.

The parties were divorced by order of this court dated February 27, 1990. The decree expressly reserved jurisdiction to divide the marital home at some future date. The decree was endorsed by counsel for the wife, but the endorsement was qualified by the phrase "APPROVED AS TO FORM."

It was the understanding and expectation of both parties that the husband would purchase the wife's interest. During the years after the divorce, the wife regularly asked the husband to make the purchase, but he regularly refused to do so. It was not until the husband remarried in 1996 and began living with his new wife that he expressed any interest in getting the home sold.

The home was sold on June 12, 1997, yielding net proceeds of \$10,709.61. The husband claims that he should receive all of the proceeds from the sale, because the wife has an obligation to compensate the husband for one-half of the mortgage payments and repairs he made on the property after the divorce. Since the husband made \$50,000 in such payments, the amount of contribution requested by the husband is greater than the wife's share of the proceeds. The husband also argues that the net proceeds are partly separate property. The wife submits that none of the husband's claims are well-taken.

ARGUMENT

I. THE HUSBAND IS NOT ENTITLED TO CONTRIBUTION FOR HIS PAST MORTGAGE PAYMENTS.

A. The Husband Actually Ousted The Wife From Possession Of The Marital Residence.

The husband argues that he is legally entitled to contribution from the wife for his past mortgage payments under *Crawford v. Crawford*, 293 Md. 307, 443 A.2d 599 (1982). But *Crawford* contribution is not an absolute right of law; it is instead a discretionary principle of equity. "[T]he entitlement to contribution is an equitable matter and not a matter of right and is within the sound discretion of the trial court." *Broesus v. Broesus*, 82 Md. App. 183, 570 A.2d 874, 874 (1990). "[W]e have held that by virtue of the [Marital Property] Act a chancellor is not obliged to award such contribution between husband and wife at the time of a divorce." *Kline v. Kline*, 85 Md. App. 28, 581 A.2d 1300, 1310 (1990). For specific recent decisions in which the appellate court affirmed a decision by the chancellor *not* to

award contribution, *see Broesus; Lemley v. Lemley*, 102 Md. App. 266, 649 A.2d 1119 (1994); and *Imagnu v. Wodajo*, 85 Md. App. 208, 582 A.2d 590 (1990). Thus, the wife is permitted to raise equitable defenses to the husband's request.

Two equitable defenses apply on these facts. First, contribution is not available where the party who paid the mortgage wrongfully ousted the other party from possession. "Since the appellant ousted the appellee from the jointly owned property, thereby denying her right to its use and enjoyment, we agree with the trial judge that the appellant is not entitled to contribution." *Young v. Young*, 37 Md. App. 211, 376 A.2d 1151, 1158 (1977). The theory behind the rule is that where the defendant has been ousted from possession, the claimant has an obligation to compensate the defendant for use of the defendant's interest in the property, and that the obligation to pay rent offsets the obligations to contribute to the mortgage. Simply put, if the husband expected the wife to help with the mortgage, he was bound to permit her to live in the home and not to oust her from possession.

"Ouster has been defined as a notorious and unequivocal act by which one cotenant deprives another of the right to the common and equal possession and enjoyment of the property." 376 A.2d at 1158. Among the clearest types of ouster is exclusion by physical force. "Where the chancellor has before him uncontradicted evidence that the appellee was forced to leave her home because of the appellant's violent conduct toward her, we cannot say that the conclusion that she was ousted was clearly erroneous." *Id.*; *see also Keys v. Keys*, 93 Md. App. 677, 614 A.2d 975, 981 (1992) (in finding ouster, court observed that "the option of moving back into the marital home after expiration of the use and possession

order does not appear to have been available to Mr. Keys since Ms. Keys admitted that, in 1984, she stabbed Mr. Keys").

In this case, the wife was forced to leave the marital home because of the husband's physical violence. The incident which triggered the separation was the husband's repeated punching of the wife and unwarranted physical abuse of their son. As a result of the husband's actions, the wife feared for the physical safety of herself and her child. To the extent the husband claims that the wife provoked the incident, she did so only by attempting to prevent the husband from committing further acts of violence on the son. Had the husband not begun the entire incident by pushing the son onto the bed, the wife would have had no occasion to intervene. Moreover, the husband's repeated punching of the wife, giving her not one but two black eyes, goes far beyond the borders of any privilege he may have had to defend himself from the wife's intervention. Even if the wife did attempt to physically restrain the husband from further abusing the son, such restraint did not justify the husband's repeated acts of unnecessary violence.

The wife recognizes that she remained in the marital home for several months after this incident occurred. She was not economically able to leave immediately; it took her time to obtain employment and find alternate housing. During the period after the incident, the parties lived in separate bedrooms and did not engage in marital relations. They were as separated as the wife's economic circumstances permitted them to be. The wife would have left the marital home immediately if her financial condition had so permitted.

The wife also recognizes that there is some suggestion in the cases that contribution could be awarded even where ouster is present, where the equities of the case so require.

E.g., Gravenstine v. Gravenstine, 58 Md. App. 158, 472 A.2d 1001, 1008 (1984). This case is controlled by *Young*, however, where the court held that ouster was a complete defense. Moreover, where ouster is present, any obligation of contribution should at a minimum be offset by the possessing spouse's equitable duty to pay rent for use of the ousted spouse's interest in the premises. The court expressly so held in *Kline*, finding that where ouster is present, "the tenant out of possession [can] offset his obligation for contribution by the value of the benefits enjoyed by the tenant in possession." 581 A.2d at 1310. Further, in *Broesus*, the court actually affirmed a denial of contribution on this basis, reasoning that "the payments from April 1986 to the divorce were less than the fair rental value of the premises." 570 A.2d at 879. In this case, a fair rental value is approximately equal to the wife's share of the mortgage. There is accordingly no equitable basis upon which to hold the wife liable for contribution.

In sum, the wife was forced out of the marital home because of the husband's physical violence. Out of fear of that violence, she refused to stay in the marital home longer than absolutely necessary, and she was not reasonably able to return after she left. Where physical violence forces a spouse out of the home, ouster has occurred, *Young*, and contribution is not available. The wife therefore submits that she is entitled to 50% of the net proceeds of the sale.

B. The Husband Wrongfully Delayed The Sale Of The Marital Residence.

In addition to the husband's ouster of the wife from possession of the home, the wife asserts a second equitable defense. Under Maryland law, contribution is not available to the extent that the spouse in possession delayed unreasonably in completing the sale of the property.

The leading case establishing this rule is *Keys*. In that case, the parties agreed that the marital home would be sold. After making that agreement, the wife, who was in possession of the home, delayed the sale by a variety of methods, including refusing to permit a necessary inspection. When the home finally sold, the trial court refused to grant contribution:

After considering all of the available evidence, the trial court concluded that Ms. Keys had delayed the sale of the home and that, under equitable considerations, she was not entitled to contribution from Mr. Keys for mortgage payments made after the conclusion of the use and possession period. The trial court found that Ms. Keys would be unjustly enriched if the court were to order Mr. Keys to pay one-half of the mortgage payments from September, 1988, since those expenditures were caused by Ms. Keys' actions in delaying the sale of the property.

614 A.2d at 980. Because "Ms. Keys willfully and intentionally delayed the sale of the property, we hold that the trial court did not err in denying Ms. Keys contribution." *Id.*

In this case, there was admittedly no agreement that the home would be sold. But such an agreement is not the only source which can impose upon the spouse in possession a duty to move promptly. The decree in this case expressly reserved jurisdiction to divide the marital home. Under Md. Code Ann., Fam. Law § 8-203(a) (1991), such a provision imposes upon the parties and the court a duty to resolve the issue within 90 days. *Brodak*

v. Brodak, 294 Md. 10, 447 A.2d 847 (1982); *Ticer v. Ticer*, 63 Md. App. 729, 493 A.2d 1105 (1985). Instead of complying with that duty, the husband deliberately and intentionally delayed the sale for the specific purpose of obtaining all of the sale proceeds for himself. The wife, by contrast, did everything within her power to comply with the duty imposed by § 8-203(a), regularly urging the husband to cooperate in making a sale.

The delay in sale which occurred in this case was the result of the husband's unwillingness to cooperate in resolving the issue upon which the trial court had deferred jurisdiction. The husband's uncooperativeness violated his statutory duty to assist the wife and the court in resolving the issue within 90 days of the divorce decree. Md. Code Ann., Fam. Law § 8-203(a). The husband's violation caused him to incur excessive mortgage payments, payments which would not have been incurred if the issue had been resolved in timely fashion. Because the mortgage expenditures were caused by the husband's wrongful conduct, he is not entitled to seek contribution from the wife. *Keys*. The proceeds of sale should therefore be divided equally between the parties.

II. THE HUSBAND SHOULD NOT RECEIVE ANY NONMARITAL INTEREST IN THE PROCEEDS OF SALE.

A. The Husband's Attempt To Invoke The Law Of Equitable Distribution Is Untimely.

In addition to seeking relief under the law of real property, as set forth in *Crawford*, the husband also seeks relief under the law of equitable distribution. In particular, he asks

this court to treat part of the proceeds of sale as his nonmarital property. The court is required to deny this request, because it was not made within the proper time period.

The controlling rule on this point is found in § 8-203(a), which provides:

In a proceeding for an annulment or an absolute divorce, if there is a dispute as to whether certain property is marital property, the court shall determine which property is marital property:

- (1) when the court grants an annulment or an absolute divorce;
- (2) within 90 days after the court grants an annulment or divorce, if the court expressly reserves in the annulment or divorce decree the power to make the determination; or
- (3) after the 90-day period if:
 - (i) the court expressly reserves in the annulment or divorce decree the power to make the determination;
 - (ii) during the 90-day period, the court extends the time for making the determination; and
 - (iii) the parties consent to the extension.

This statute is binding as to the time at which the court may grant relief under the law of equitable distribution. *Brodak; Ticer; see also Davis v. Davis*, 335 Md. 699, 646 A.2d 365 (1993) (rule would have prevented relief if issue had been raised in the trial court). Thus, if the court does not act within the time period set forth by the rule, it cannot apply equitable distribution law.

On the facts of this case, the requirements of the rule were not met. The court clearly did not divide property either in the divorce decree or within 90 days after its entry. Thus, if relief is to be granted at all, it must be granted under § 8-203(a)(3). That statute applies only if all three requirements are met. The husband can satisfy requirement (i), because the

divorce decree does reserve jurisdiction. But he cannot satisfy requirements (ii) and (iii), because the court did not extend the 90-day period within its term, and the wife did not consent to the extension.

The husband might attempt to argue that the divorce decree itself satisfied requirement (ii). To construe the divorce decree itself to extend the 90-day term would make requirement (ii) superfluous, as it would read no differently from requirement (i). The only way to give meaning to both of the first two requirements is to hold that the extension required by requirement (ii) must be contained in a separate, later order than the divorce decree itself. Moreover, even if the divorce decree meets requirement (ii), it could not meet requirement (iii), as the wife did not consent to it. Her counsel's endorsement, "APPROVED AS TO FORM," is a clear refusal to approve as to substance--the precise type of approval required by the statute. It should also be noted that the parties themselves cannot by agreement extend the 90-day period; specific action by the court is required. *Davis; Ticer*.

Because the husband did not request that the court apply equitable distribution law within 90 days of the divorce decree, his request is plainly untimely. *Brodak*. Thus, the court must deny the husband's request that a portion of the proceeds of sale of the home be treated as nonmarital property.

B. Contributions To Closing Costs Do Not Create Any Nonmarital Interest In The Proceeds Of Sale.

Assuming for the sake of argument that the husband's request for relief under the law of equitable distribution is somehow timely, the wife concedes that he is entitled to

compensation for the \$1,000 in nonmarital funds he spent on the down payment. He is not entitled, however, to be compensated for the nonmarital funds he spent on closing costs.

Maryland equitable distribution law is clear that a nonmarital interest in property arises only when nonmarital funds are used for *acquisition* of the property. When nonmarital funds are used for related expenses, no nonmarital interest arises. For example, "[t]axes and interest are not ordinarily capital investments and, in the absence of some compelling reason to consider them as such, we decline to depart" from the normal rule that only contributions to principal create a nonmarital interest. *Blake v. Blake*, 81 Md. App. 712, 569 A.2d 724, 728 (1990). Similarly, "payment of property tax does not involve the acquisition of land." *Gravenstine*, 472 A.2d at 1008. Nonmarital property is created only by contributions to acquisition, such as the down payment or the principal portion of the mortgage payment. Related expenses such as taxes and insurance do not change in any way the underlying character of the property.

In this case, the husband seeks a nonmarital interest based upon payment of closing costs. The husband has not submitted the settlement sheet from the purchase of the home (he submitted only the sheet from the sale of the home), so the record contains no breakdown of the total cost figure. The wife submits that at a minimum, the court must examine the settlement sheet and exclude any amounts paid for interest or taxes. *Blake; Gravenstine*. In addition, to the extent that costs were paid for other nonacquisition items such as broker's fees, those costs also do not contribute directly to equity. Under the reasoning of *Blake* and *Gravenstine*, therefore, they should not give the husband any additional nonmarital interest in the sale proceeds.

CONCLUSION

The husband cannot obtain contribution on these facts, as he ousted the wife from possession of the home by committing physical violence upon her. He also delayed unreasonably in selling the marital home. The husband is also not entitled to relief under equitable distribution law, as his request was not submitted within the time period established by Md. Code Ann., Fam. Law § 8-203(a). The court should hold that the proceeds of sale must be divided equally between the parties.