REMOVING THE NON-TITLED SPOUSE FROM THE HOUSE

By: Leon W. Berg

Fare you well, old house! You're naught that can feel or see,
But you seem like a human bein'-a dear old friend to me;
From *Out of the House, Nancy;* Will Carleton (1845-1912)

'Mid pleasures and palaces though we may roam,
Be it ever so humble, there's no place like home;
From *Home, Sweet Home;* J. Howard Payne (1792-1852)

Since the stated topic of this program was announced, I have been amazed by the number of people who have expressed an interest in learning the answer to…is there an effective and speedy way to get the non-titled spouse out of the house? Viewing this as essentially a property law issue, and being primarily a family law practitioner, I feel somewhat like a fish out of the pond. Having left the pond, I start with basic tenets of property law. I rule out the obvious situations where statutory solutions have been imposed in disregard of property rights, as in the case of the domestic violence statute. Then I explore possible applications of landlord-tenant law, and summary proceedings. Finding an oasis with the District Court cause of action for wrongful detainer, I take pause and consider the option of self-help. I conclude the journey with a brief side trip into the realm of inherent equitable authority. Having journeyed this meandering path out of the pond, I can tell you that the answer to the question is an unequivocal "maybe".[1]

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[1] I would like to acknowledge those who were kind enough to review this memo, and offer some feedback: Stephen P. Krohn, Esq., Stuart L. Sagal, Esq.

A brief review of some very basic tenets of property ownership is useful. An owner of property is one who has dominion over property that is the subject of ownership. "Ownership" of property suggests a collection of rights to possess, use, and to enjoy property, including the right to sell and transfer it. A property owner has the right to use his or her property as he or she sees fit, as long as the use does not constitute a nuisance. The law concedes to every person of sound mind the right to dispose of his or her property in any lawful manner that he or she may deem proper. A sole legal owner of real property has the right to exclusively possess, use, sell and transfer it as he or she sees fit. See generally, *Maryland Law Encyclopedia*, Property, §§ 1- 4.

Md. Code, *Family Law Article* §8-202 regarding property disposition in annulment and divorce, authorizes a Court, in an action for annulment or absolute divorce, to resolve any dispute between the parties with respect to the *ownership* of real property. This section authorizes the court to resolve only ownership claims. *Hoffman v. Hoffman,* 93 Md.App. 704, 614 A.2d 988 (1992).

Saying that property is "marital" does not create any separate or additional possesory interest in the property. Therefore, in so far as this topic is concerned, any reliance on the concept of "marital property" is misplaced. In Md. Code, *Family Law Article* §§ 8-204 and 8-205, marital property is identified and valued at the time of absolute divorce for the

purpose of determining if a monetary award should be made to one party or the other as an adjustment of the equities and rights of the parties, based on the specifically enumerated statutory criteria. By defining real property as "marital", no possessory rights or other rights of ownership are created.

As stated in *Kline v. Kline,* 85 Md. App. 28, 581 A.2d 1300(1990):

> "Property" normally connotes corporeal, tangible property, subject to dominion -- a thing, whether real estate or chattel, that can be owned (and thus bought, sold, given away, or otherwise transferred), possessed, and used. The law, of course, also recognizes intangible and incorporeal property, including such personalty as choses in action, patents, and copyrights, and such incorporeal interests or estates in realty as easements, licenses, and profits. But even intangible or incorporeal property traditionally connotes ownership, possession, and use, with all the rights and privileges normally associated therewith. ***When, for purposes of the Act, however, we designate property as marital or nonmarital, we are using words which have no relationship to traditional concepts of property. Whether property is marital or nonmarital has nothing whatsoever to do with who owns it, possesses it, or uses it.*** The very concepts of marital and nonmarital property arise only in the context of a marriage, and they have significance only in the event of and at the time of a judicial dissolution of the marriage relationship. The sole purpose of determining whether property is marital or nonmarital is to enable a divorce court to adjust equities arising out of the marriage relationship by awarding one party or the other a sum of money if a division of property according to ownership would be inequitable.

Kline, 85 Md. App. at 42-43, 581 A.2d at 1307 (emphasis added).

Generally speaking, at no point in a domestic proceeding will a party not on the title to the home ever be entitled to seek any legal ownership interest in the real property.[2] That statute expressly forbids the court from transferring the ownership of real property from one party to the other. Md. Code, *Family Law Article*, § 8-202 (a)(3). Only pensions and retirement plans and, for cases filed after October 1, 2004, family use personal property may be transferred between parties. A party not in title may not force a sale of the real property at the time of the divorce. *Fox v. Fox,* 85 Md. App. 448, 584 A.2d 128 (1991). Therefore, a spouse who does not have a titled interest in the property will not, through any court process, own any portion of the real property, or come into title of the real property, and will never be able to have any identifiable legal right to possess the property at any time in the future (other than temporarily, e.g. by a use and possession order, or by agreement with the titled owner). Thus, if a non-titled spouse in possession requests some type of injunctive relief (which, of course, begs the question of whether injunctive relief is available, to be discussed below), seeking to maintain a *status quo,* the spouse in title should point out that sooner or later, the other spouse simply has to leave.

In certain circumstances, the Court has the authority to grant use and possession of real property to one spouse, even if that spouse to whom such right is conferred is not in title. A "family home" is defined as property in this State

[2] But see the discussion on implied trusts, *infra*.

that: (i) was used as the principal residence of the parties when they lived together; (ii) is owned or leased by ***one or both*** of the parties at the time of the proceeding; and (iii) is being used or will be used as the principal residence by one or both of the parties and a child. Md. Code, *Family Law Article*, § 8-201(c)(1) (emphasis added). Regardless of how a "family home" is titled, the court may decide that a spouse with custody of a minor child of the parties shall have the sole possession and use of the property for the time allowed by statute. Md. Code, *Family Law Article*, § 8-208(a)(1)(i).

A Court does have authority to issue a protective order pursuant to Md. Code, *Family Law Article,* § 4-506 *et seq*. The Court has the authority to remove an individual with sole title to the property, provided that it was otherwise appropriate to issue a protective order pursuant to the terms of the statute.

The Court also has the equitable authority to protect a party, through injunction, from harming or harassing his/her spouse. Md. Code, *Family Law Article,* §1-203. That authority has been used to extend the effect of a protective order after it had expired.[3]

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[3] In *Cote v. Cote*, 89 Md. App. 729, 599 A.2d 869 (1993), the parties jointly owned the property. Wife was granted an *ex parte* injunction barring husband from the marital home upon the expiration of a District Court protective order. After a full hearing, the Circuit Court continued the injunction. The injunction was based solely on Md. Code, *Family. Law Article* §1 -203 (a), which states:

"(a) *Injunctive power of court.* –in an action for alimony, annulment, or divorce, an equity court:

(1) has all the powers of a court of equity; and

In certain situations the non-titled spouse may raise legitimate claims of title that would, then, translate into a potential right to possession. A non-titled spouse may ask that a trustee be appointed to transfer title either to the non-titled spouse, individually, or jointly with the titled spouse (depending on the factual circumstances) based on a claim that an implied trust should be imposed on the residence. This relief may be awarded if a court is persuaded that the non-titled spouse did not have title to the residence as a result of some type of fraud, or simply because under the specific circumstances, title should have been placed in that party's name or both names. This form of relief is discussed in *Frain v. Perry,* 92 Md. App. 605, 614-617, 609 A.2d 379, 384-385 (1992) where the Court of Special Appeals stated:

> Constructive trusts are raised by equity in respect to property which has been acquired by fraud. *Bowie v. Ford*, 269 Md. 111, 118, 304 A.2d 803 (1973); *Wooddy v. Wooddy*, 258 Md. 224, 232-33, 265 A.2d 467 (1970). Constructive trusts are not true trusts in a technical sense, but are imposed by the courts. "Such trusts are 'fraud rectifying' trusts and not 'intent enforcing' ones." *Bowie*, 269 Md. at 119, 304 A.2d 803. If a transferee obtains title to property through his or her own dishonesty or that of another acting for him or her, courts of equity have the power and, indeed, the duty to reach out and regain the property for the benefit of those wronged. *Bowie*, 269 Md. at 119, 304 A.2d 803.

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(2) may issue an injunction to protect any party to the action from physical harm or harassment."

The Circuit Court's decision was affirmed, but the Court of Special Appeals expressed concern over the injunction's open–ended duration.

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> A resulting trust is "an implied trust which rests upon the presumed intention of the parties. It may arise when the consideration given for a property is furnished by one party while the legal title is taken by another, provided the circumstances surrounding the transaction do not demonstrate a contrary intention by the parties."
> *Levin v. Levin*, 43 Md.App. 380, 387, 405 A.2d 770 (1979); see also *Taylor v. Mercantile-Safe Deposit & Trust Co.*, 269 Md. 531, 539, 307 A.2d 670 (1973); *Fitch v. Double "U" Sales Corp.*, 212 Md. 324, 330, 129 A.2d 93 (1957); *Fasman v. Pottashnick*, 188 Md. 105, 109, 51 A.2d 664 (1947).

Ownership rights in real property are derived from title to the property, and with the exceptions already noted, a non-titled spouse may not hope to acquire, in the course of divorce proceedings, an entitlement to ownership and derivative possessory rights to the property. Is there any other basis for allowing a non-titled spouse to interfere with the titled spouse's possessory interests at any time prior to the divorce, absent the special statutory allowances for circumstances involving domestic violence, or on the basis of a use and possession order associated with the custody of minor children, or on the basis of an implied trust?[4]

If a non-titled spouse took the position that he/she was a tenant, then certain rights afforded to a tenant might be relevant, but certain procedures will be available to the titled spouse to remove the "tenant" under Md. Code, *Real Property Article*, §§ 8-401, 8-402, or 8-402.1[5]. These sections set forth statutory

[4] A request that the Court impose an implied trust is a challenge to title. It seems far less likely that a judge will dispossess a spouse from the property if that spouse has a pending claim to title in the property, with a derivative right of possession.

procedures for landlord actions to repossess property held by tenants. The District Court has exclusive jurisdiction over these possessory actions. *University Plaza v. Garcia,* 279 Md. 61, 367 A.2d 957 (1977). In *Garcia,* the Court of Appeals said that the legislature, in §8-401*, supra.* set out certain rights which accrue to landlords upon non-payment of rent, including the right to repossession. However, the Court of Appeals notes that the term "rent" is not defined by statute. *Id.* 279 Md. at 65, 367 A.2d at 960. The Court of Appeals determined that if the amount of the payment is susceptible to definite ascertainment, and it is paid for the use, possession and enjoyment of the property, it shall be considered as rent if that is the intention of the parties.[6] *Id.* 279 Md. at 67, 367 A.2d at 961.

In *Gelston et. al. v. Sigmund,* 27 Md. 334 (1867), the appellee had been in possession of the leased premises for at least ten years, under written leases, with the understanding that the appellant would renew the lease for another year at the same rent the appellant could obtain from other parties. When the appellant did not renew the lease, the appellee sought specific performance of a contract to renew the lease. The Court of Appeals held that the alleged contract to rent was neither certain nor definite, and that paying "as much as any one else would pay" is

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[5] Section Md. Code, *Real Property Article* § 8-401 permits a landlord to recover possession of leased premises for reason of tenant's failure to pay rent currently due and payable. § 8-402 deals with a tenant holding over after the termination of the lease. § 8-402.1 is a procedure for recovery of the premises where the tenant has breached a covenant other than to pay rent currently due.

[6] In *Garcia*, the Court of Appeals limited its holding, however, to premises leased for commercial purposes.

not an amount ascertainable with certainty. There is also no mutuality to the contract. *Id.* 27 Md. at 343-344. The appellee was under no obligation to continue in possession of the premises or to pay any particular rent. Appellee, alone, had the option of refusing the lease and leaving. The Court of Appeals reversed the relief granted to the appellee and dismissed the bill for specific performance.

If a non-titled spouse claimed that the fulfillment of certain marital obligations was intended to be rent, it would seem that such a claim lacks sufficient certainty and mutuality to support the position of an agreement to lease. What if there is an oral agreement to "split" the mortgage, or rent, or other household expenses, and the non-titled spouse contributes his/her share of the mortgage on a monthly basis? What about the mutuality issue? [7]

The case of *DeLauter, et. al. v. Shafer,* 374 Md. 317, 822 A.2d 423 (2003) distinguishes between an agreement to lease, and a simple license to be on the premises. In that case, Mr. and Mrs. Deibert had owned a farm since 1942. Their daughter, Jeanette, married Charles Shafer, the defendant, in 1944. In 1968, Jeanette and Charles moved onto the farm and helped the Deiberts farm the land. Jeanette died in May, 1998, but Charles remained on the farm. Charles testified

[7] I spoke to one attorney who has, for nearly his entire practice of 30 years, represented landlords in landlord/tenant matters. He has, from time to time, been called upon to represent a spouse in title seeking to remove a non-titled spouse in District Court possessory actions. It is his general experience, in the few times he has tried these actions, that District Court judges will bend backwards to find that a non-titled spouse has some possessory interest in the property, sometimes stretching the definition of "rent" to do so. In attempting the District Court route, the attorney suggests bringing actions both under tenant holding over under Md. Code, *Real Property Article* §8-402, and under the wrongful detainer statute, Md. Code, *Real Property Article* §8-402.3, which applies to persons other than tenants holding over, who were retaining possession of real property and who do not have a right of possession. The separate actions could be consolidated by motion.

that there was never any writing setting out the terms of possession, and that Mr. Deibert asked for $125 a month to help pay for taxes and insurance. Since moving onto the farm in 1968, the Shafers paid a total of $750 to the Deiberts . The Deiberts paid the property taxes as well as the insurance on the principal structures on the farm. Mr. and Mrs. Deibert died in 1990 and 1998 respectively. Jeanette's sisters wanted Charles off the property so that it could be sold and the proceeds divided among them, the surviving children and rightful heirs of the Deiberts. The sisters brought actions in the District Court for ejectment pursuant to *Real Property Article* §8-402. The action was transferred to the Circuit Court on Charles' request for a jury trial. Charles filed a counterclaim seeking a declaratory judgment that the estate's interest in the property terminated pursuant to Md. Code, *Real Property Article* §8-107.[8] The jury found that a lease existed, and that no rent had been paid for more than 20 years, so under that statute, the Court entered a declaratory judgment that Charles had title to the property. The Court of Appeals disagreed, stating that the statute requires a specific rent, and in this case no rent at all was provided. The Court of Appeals noted that the question of a landlord and tenant relationship is a question of law to be determined by the Court upon the consideration of the facts. Whether a lease or simply a license to be on the property exists, depends upon the intention of the parties, as determined by an objective interpretation of the writings and surrounding circumstances.[9] *Id.*

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[8] This statute provides that if no demand or payment of a specific rent is made for 20 years, the landlord may not claim rent or recover the property.

[9] Under Maryland law the objective law of contract interpretation requires that the Court

374 Md. at 324, 822 A.2d at 427. Quoting extensively from 1 Tiffany, *The Law of Real Property* §79 (3d ed. 1939), and prior case law, the Court of Appeals distinguishes a lease from a license to be on the premises. The Court concluded, simply, that this was a case of parents giving their child and her spouse a place to live. It was a license, and nothing else. *Id.,* 374 Md. at 325-327, 822 A.2d at 427-428.

So if we have a non-titled spouse on the premises, and he/she is not under a protective order, or a use and possession order, and no claim is made that he/she is a tenant, what can the titled owner do? The rights of an owner of property to recover possession were recently discussed in *Laney v. State,* 379 Md. 522, 842 A.2d 773 (2004). On review of a denial by the circuit court to suppress certain evidence, the defendant claimed a reasonable expectation of privacy on the premises where the warrantless search occurred. The Court of Appeals affirmed, holding that the defendant had no title to the property, and that the Department of Veterans Affairs (the owner) had authority to enter, possess, and consent to the search of the property. Discussing at length the right of the owner to recover the possession of the property from a former mortgagor, the Court of Appeals discussed both the right of self help and the cause of action for "forcible detainer". As to the right of self-help, the *Laney* Court stated:

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determine the meaning of a contract based on what a reasonable person would conclude, given the particular terms under the particular circumstance, rather than assessing the subjective intent of the parties to the contract.

At common law and prior to the enactment of the statute of 5 Richard 2d, Chapter 8 (1381) in the 14th century, whenever a right of entry existed the party entitled to the right could lawfully enter and regain his possession by force. ***This right of self-help was curbed by 5 Richard 2d Chapter 8 which limited entries under claim of right to entries "not with strong hand, nor with a multitude of people, but only in a peaceable and easy manner."*** Id. (quoting G. Liebmann, *Maryland Practice* 82-83 (vol. 2, 1976)). n14 Our cases have not abrogated the landowner's common law "right of self-help" as modified by 5 Richard 2d, Chapter 8. See Maryland Code, § 14-115 of the *Real Property Article* (1974, 2003 Repl. Vol.) (listing the British statutes that "are no longer in force" in Maryland and not including 5 Richard 2d Chapter 8); *Eubanks v. First Mount Vernon Indus. Loan Assoc., Inc.*, 125 Md. App. 642, 662-63, 726 A.2d 837, 847 (1999) (stating that 5 Richard 2d Chapter 8, as incorporated by the Declaration of Rights, has not been repealed by the Maryland Legislature)***. The right of peaceable self-help, therefore, is a viable mechanism for a title owner of property to obtain actual possession of real property from a holdover mortgagor. n15***

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n14 The full text of 5 Richard 2d Chapter 8 (1381), as recorded in Alexander's British Statutes 247 (2d. ed., vol. 1, 1912), states:

And also the King defendeth, That none from henceforth make any Entry into any Lands and Tenements, but in case where entry is given by the Law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. (2) And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by Imprisonment of his Body, and thereof ransomed at the King's Will.

Laney, 379 Md., at 542-543, 842 A.2d at 785-786. (emphasis added)

As discussed in *Laney, supra*, the cause of action for forcible entry and detainer was modified by both by the Legislature and case law. Ultimately, the requirement of wrongful possession by force was eliminated, and the cause of action was permitted for any type of wrongful possession.

Md. Code, *Real Property Article, §8-402.4 (2004 Supplement)* is the current "wrongful detainer" statute. It provides that a person may file a complaint in the District Court against a person who is not a tenant holding over for restitution of the possession of the property. In Md. Code, *Real Property Article* §8-402.4(b), the statute states that: "A person may not hold possession of property unless the person is entitled to possession of the property under the law." While this seems to be the most suitable approach for an owner to recover possession against a non-tenant, anecdotal experience suggests that district court judges are not necessarily amenable to granting this type of relief. There may also be one more impediment to using this statute as a quick and effective means of freeing up the house, namely a right to a jury trial. In *Bringe v. Collins,* 274 Md. 338, 335 A.2d 670 (1975), the Court of Appeals held that Article XV, §6[10] of the Maryland Constitution guarantees the right to a jury trial in actions at law, where historically there was a

[10] By Chapter 681, Acts 1977, ratified Nov. 7, 1978, this section was transferred to the present Article 23 of the Maryland Declaration of Rights.

right to a jury trial. The Court noted that Md. Code, *Real Property Article* §8-402, which gives the landlord the right to recover possession of the premises, is historically an action at law to which the right to a jury trial has always attached. The Court further notes that since 1970, the Maryland Constitution's guarantee of a right to a jury trial was modified, in civil actions, to apply only where the amount in controversy exceeds the sum of $500.[11] So in an action by a landlord to repossess property, there is a right to jury trial if the tenant properly elects the right, and the amount in controversy exceeds $10,000. It would appear that the same reasoning would apply to the wrongful detainer statute. This statute is derived from the common law causes of action for ejectment or trespass, both of which are actions at law for which a right to jury trial historically attached. *Martin v. Howard County,* 349 Md. 469, 482-483, 709 A.2d 125,132 (1998)

So the titled spouse simply has to bring an action for wrongful detainer, or to be safe, bring a second action for a tenant holding over and consolidate the two, and be sure *not* to ask for any monetary damages. At worst, a quick appeal to the circuit court is the only remaining hurdle. The wrongful detainer statute requires that an appeal is to be set in for hearing before the Circuit Court between 5 and 15 days from the application for the appeal. *Real Property Article,* §8-402.4(f)(3). Is our disgruntled in-titled spouse "home-free"? Perhaps not. If the "wrongful possessor" claims that the amount in controversy exceeds $10,000, he/she may elect a jury trial. What is the value of the wrongful possessor's continued

[11] Under current Art. 23, Declaration of Rights, the amount in controversy must exceed $10,000.

possession of the property? In *Carroll v. Housing Opportunities Comm'n,* 306 Md. 515, 510 A.2d 540 (1986), the Court of Appeals stated that in computing the amount in controversy in a demand for jury trial pursuant to Art. 23 of the Maryland Declaration of Rights, the court must consider *the value of the tenant's continued possession of the rental property.*

For those of us who have some vague recollection of actions such as ejectment, or petitions to quiet title, these remedies are not effective. It is well settled that a bill to quiet title will lie only where the owner *is in possession.* An action in ejectment is an action at law to remove someone in possession of the premises who has no right to be there. It is not a summary proceeding, and the defendant in possession has a right to a jury trial, if the amount in controversy exceeds $10,000.[12]

What will happen if a titled owner wants to exercise his/her right of self help, and requests the assistance of our County law enforcement officers to remove the non-titled spouse? Assume that the landowner says to the officer,

> "I want to remove the not-in-title spouse, not with strong hand, nor with a multitude of people, but only in a peaceable and easy manner, will the king defendeth... er... I mean, will you help me?"

[12]See *Martin v. Howard County, Maryland,* 349 Md. 469, 709 A.2d 125 (1998).

In a recent discussion with Laura Mullally, Esq., and Kim Detrick, Esq., who are, respectively, a legal officer for the Baltimore County Police and the Chief of the District Court Division of the Office of the State's Attorney, our landowner will not receive any assistance.[13] I was informed that the police are instructed to take absolutely no action in those cases where a titled land owner is refused entry into his/her residence, or where a non-titled spouse refuses to leave the house, etc. The officers are advised to make no trespass reports, and to arrest no one (absent other criminal conduct committed in their presence, of course). Additionally, an officer will take no action if a spouse breaks into the house, even if that "breaking-in" spouse is not in title. The police department's legal counsel takes this position because the officer is not able to ascertain who has rights of possession. Therefore, the police department will not risk civil liability for an improper arrest. Ms. Detrick, with admirable prosecutorial circumspection, stated that any prosecution would be considered on a case-by-case basis. However, she doubts that a case like this (e.g., a malicious destruction by one living but not titled at the residence, or a criminal trespass, etc.) would ever get past a commissioner. She certainly could not recall ever seeing such a case. Needless to say, such cases were not ranked high on any prosecutor's priority list.

[13] I spoke by telephone with Ms. Mullally and Ms. Detrick in September, 2004, specifically with regard to preparing this article.

A review of many of the MSBA Family Law listserve letters on the issue of spousal eviction[14] suggests that this is a much discussed problem, with solutions that are anecdotal at best. One attorney (not of our county) reported that she had a non-titled spouse served with a "Letter of No Trespass" with copies to "all appropriate law enforcement agencies". According to this attorney, the non-titled spouse was arrested when he showed up at the house. One practitioner (not of our county) recommended filing a district court wrongful detainer action but warned of judges who might be "confused" by claims that the house is "marital property" and therefore, would deny relief.[15]

Being a divorce lawyer, I am much more comfortable asking a circuit court judge to do the "equitable thing" and rid the property of this worthless, non-paying, non-titled (no good for nothin') person. Judges generally do not like to be told: "Your Honor…you can not do this." They generally prefer hearing: "Your honor, you can do anything you want…you're the Judge!" Can we just use those big, strong, equitable powers to get the job done? I spoke to one attorney who was successful in removing a non-titled spouse from the residence in the course of a divorce trial. His motion (filed in another county) basically said that the wife did not have title, there were no kids, there was no violence, and

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[14] I thank Jon Greene, Esq. for bringing these to my attention.

[15] I have been contacted by other practitioners who have generally reported attempting district court summary proceedings to remove a non-titled spouse. The district court judges often take the position that this is a divorce problem, and leave it to the judge in the circuit court to handle.

there was no legal right for that party to be in possession; please order her to leave the property. The judge entered such an order! Was the judge authorized to do so? Can it be said that a judge has the inherent authority to order the non-titled spouse out of the house? In *Taylor v. Taylor*, 306 Md. 290, 508 A.2d 964 (1986), the Court of Appeals considered the appellant's argument that there is no express statutory authority for an award of joint custody in Maryland, so an equity court lacks the authority to grant it. The Court of Appeals held that the authority to grant joint custody is "…an integral part of the broad and inherent authority of a court exercising its equitable powers to determine child custody." 306 Md. at 298, 508 A.2d at 968 The Court stated that the proper inquiry was whether the Legislature has attempted to limit a power that exists as a part of the inherent authority of the court. *Ibid.* Of immediate note, of course, is the following distinction: by statute, a court of equity specifically has jurisdiction over the custody, guardianship, paternity, legitimation, maintenance, visitation, and support of a child.[16]

In so far as property is concerned, the equity court has the right to determine any dispute with respect to the *ownership* of real property.[17] It

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[16] *Family Law Article,* §1-201.

[17] *Family Law Article,* § 8-202. Ownership of personal and real property
(a) Determination of ownership. --
(1) When the court grants an annulment or a limited or absolute divorce, the court may resolve any dispute between the parties with respect to the ownership of personal property.
(2) When the court grants an annulment or an absolute divorce, the court may resolve any dispute between the parties with respect to the ownership of real property.

would appear that the broad mandate of an equity court with regard to matters of custody is different from what appears to be a more limited authority to deal with real property. Certainly, the Legislature could have provided that the equity court, in an action for divorce, shall resolve any dispute with regard to the ownership *and possession of* real property, or *any dispute with regard to real property.* However, this is not the case. But, if you regard the "ownership" of real property as that bundle of rights attributed to ownership, including the right to the use and possession of the property, perhaps such additional statutory language would be surplusage. After all, §8-202(a)(2) does *not* say that the Court may resolve any dispute with respect to the *title* to real property; it says it may resolve disputes with respect to *ownership.* The same statute provides that the Court may only grant relief limited to stating "…what the *ownership interest of each party is;* [or ordering partition or sale in lieu thereof, if owned jointly]*."* §8-202(b). Can this be read to include possessory interests? In the *Hoffman* case, *supra,* the appellee argued that the trial court had the authority, under § 8-202 of the *Family Law Article*, to order that jointly owned property be sold, and that the parties receive certain "credits" prior to dividing the net proceeds. The Court of

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(3) Except as provided in § 8-205 of this subtitle, the court may not transfer the ownership of personal or real property from 1 party to the other.
(b) Decree and order. -- When the court determines the ownership of personal or real property, the court may:
(1) grant a decree that states what the ownership interest of each party is; and
(2) as to any property owned by both of the parties, order a partition or a sale instead of partition and a division of the proceeds.

Special Appeals disagreed, stating that under that section, "…the trial court is *merely* provided with a means of resolving ownership claims to property." The Court of Special Appeals then noted that the properties in question were titled tenants by the entireties, the trial court was not required to determine *legal ownership,* so § 8-202 does not apply. *Id.* 93 Md. App. at 716-717, 614 A.2d at 994. (emphasis added). This decision would support a very limited interpretation of the trial court's authority under § 8-202.

One might also recall the principle that when a court has assumed jurisdiction over an equitable action, it will retain that jurisdiction to adjust and determine all rights of the parties to the proceeding. As stated in *Lassiter-Geers v. Reichenbach,* 313 Md. 88, 492 A.2d 303 (1985):

> Thus, when a court has assumed such jurisdiction, ordinarily it will retain it for all purposes, deciding all the issued raised by the subject matter of the dispute between the parties and awarding complete relief, even as to matters over which *it would not have taken jurisdiction* originally, although the principle will not be extended to an unrelated controversy in which any of the parties to the original litigation is involved. 313 Md. at 93 (emphasis added)

In *Lassiter-Geers,* the Court of Appeals held that it had jurisdiction to pass a decree, in the exercise of its jurisdiction in a divorce action, giving a child the father's surname, over the mother's objection, relying on the above-quoted principle. Perhaps one can argue that restoring the possession of property that is the subject of a divorce suit, during the pendency of that suit, to the rightful owner

is necessary to afford complete relief. But does this principle permit a court to stretch its jurisdiction to include a matter over which *Real Property Article* §8-202 does not seem to otherwise cover? In *Martin v. Howard County, supra* the Maryland Court of Appeals reversed a decision by the Court of Special Appeals that held pursuant to *Real Property Article* §14-120, a court had the right to order a tenant to vacate the premises, in the exercise of its injunctive powers, and there was no right to a jury trial. The statute in question permits certain persons (e.g. the State's Attorney, county attorney or community association) to bring an action to abate a nuisance when certain property is being used for certain controlled dangerous substance offenses. The Court of Appeals noted that the remedial portions of the statute, which ultimately allow the court to order the "tenant" to vacate the premises, is essentially an ejectment action for breach of a statutorily prescribed covenant in the lease. Therefore, a right to a jury trial is constitutionally mandated, and it was not within the trial court's equitable authority to oust the tenant. As stated in *Martin, supra*:

> An action by or on behalf of a property owner not in possession,
> but who has the right of possession, to oust a person occupying the property, is an action at law ***regardless of whether the occupant is a tenant in a property law sense or even a trespasser***. 349 Md. at 491, 709 A.2d at 136. (emphasis added).

Disregarding the contention that the *statute simply extended an equitable right to enjoin a nuisance by authorizing the court to remove the offending party from the*

premises, the Court of Appeals held that the Legislature *"…has no authority to create a statutory equitable action to determine 'legal rights' or resolve legal disputes and thereby circumvent a party's right of trial by jury." Id.* 349 Md. at 487, 709 A.2d at 134 (emphasis added).

So it would appear, in conclusion, that a non-titled spouse has certain enforceable rights of possession in cases involving domestic violence, harassment, or as a custodial parent seeking use and possession of the home, or as one claiming title through an implied trust (i.e. constructive or resulting). In all other cases, the non-titled spouse probably is only a permissive user of the property. Once permission is withdrawn, such a non-titled spouse is in wrongful possession of the property and ought be removed with a court's assistance. This may be achieved by a district court action for wrongful detainer under Md. Code, *Real Property Article* §8-402.4; unless, of course, the district court judge finds that the non-titled spouse is a "tenant", in which case he/she must be allowed proper statutory notice and the action would have to be brought under the provisions applicable to a tenant holding over. One must not rule out the possibility that the district court might be incorrectly persuaded that because the home is "marital property", somehow the non-titled spouse derives some type of possessory interest. This would almost certainly be corrected in the expedited appeal to the circuit court. Notwithstanding the summary procedures afforded by the district court, there is the right to a jury trial that can really slow things up *if* the amount in controversy exceeds $10,000. I would not rely on the equitable authority of the circuit court

judge to remove a non-titled spouse in view of the arguably restrictive language in *Real Property Article* §8-202, but it just might work anyway. Of course, there is the possibility that the titled spouse can "not with strong hand, nor with multitude of people, but only in peaceable and easy manner" figure a way of getting the non-titled spouse off the property, but in that situation, I wouldn't count on the king to defendeth.

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