IN THE SUPREME COURT OF FLORIDA
CASE NOS. SC15-1881 / SC 16-589
CONSOLIDATED

NANCY HOOKER,

Petitioner / Cross-Respondent,

vs.

TIMOTHY I. HOOKER ,

Respondent / Cross-Petitioner.

_____/

Fourth DCA No. 4D13-1841
15th Cir. No. 50 2010 DR 004790

FORMER WIFE'S RESPONSE TO MOTIONS FOR REHEARING

Petitioner / Cross-Respondent, Nancy Hooker (the "Former Wife"), by and through her undersigned counsel, hereby responds to the motions for rehearing submitted by Timothy I. Hooker ("Former Husband") and the Family Law Section and the American Academy of Matrimonial Lawyers (the "*amici*"), as follows:

Summary of this Response

The motions should be denied for the following reasons:

First, the March 30, 2017 plurality opinion in *Hooker* is not an opinion of this Court, because it was joined by only three Justices. It is literally impossible to say that any fact or point of law was overlooked or misapprehended by the Court

for purposes of Rule 9.330. The remaining three of the six participating Justices concurred in the result only.

For the same reason, the plurality opinion and 6-0 decision does not create binding precedent under the Florida Constitution. It is therefore incapable of unleashing the "chaos" promised by the Former Husband and the *amici*. There is only one other published case cited by the litigants in which one spouse was found to have "gifted" title to a residence to a spouse under similar circumstances (*Vigo v. Vigo*[1]). Disputes over *inter vivos* gifts of real property in divorce cases do not appear to be a recurring problem. Florida "gift" jurisprudence typically deals with transactions among non-spouses and/or relates to personal property.

Second, there was competent, substantial evidence of intent to share ownership, including the statements of the Former Husband, real property transfer documents signed by both parties as grantor and mortgagor, and his diligent sequestration of *other* non-marital assets from the Former Wife. Notably, the same trial judge found that the Former Husband intentionally gifted and an interest in a second piece of property, Lake George, as a tenth anniversary gift.

Third, the former husband did not raise a "statute of frauds" argument until the parties were in this Court, at which point the issue was waived. Assuming that the statute of frauds can be a defense to an *inter vivos* gift claim in a Chapter 61

[1] 15 So.3d 619 (Fla. 3rd DCA 2009).

case, it is something that must be pleaded or raised below. In any event, in this case there are writings that are evidence of intent to share ownership.

Fourth, the type of litigants who have the resources to engage in pre-marital planning are also capable of using lawyers to draft agreements and transfer instruments that do not leave doubt about title or distribution in the event of a death or dissolution. It is easy to include dispositive language in an ante-nuptial agreement. Simple examples are provided in the Argument below.

The motions for rehearing do not raise any issues that were not carefully ventilated when this case was originally argued. In his brief on the merits, the Former Husband predicted the same "chaos" that is now parroted by the *amici*. Each of the six participating Justices necessarily took those arguments into consideration in voting on the result.

ARGUMENT

1. There is no majority opinion to address here under Rule 9.330.

The first, fundamental reason to reject the motions is the fact that there is literally no opinion of this Court to complain about via Rule 9.330. There is only a case-specific "decision" and result that is not explained. It is impossible to say that the "Court" overlooked or misapprehended a specific fact or point of law, because the "Court" (meaning a four-Justice majority) has not spoken, except to deliver a unanimous 6-0 result. The movants have offered a critique of a written

opinion of only three Justices that, standing alone, is *not* the reasoning of the full Court.

For the foregoing reasons, a motion for rehearing under Rule 9.330 is technically inappropriate. "Under the Florida Constitution, both a binding decision and a binding precedential opinion are created to the extent that at least *four members* of the Court have joined in an opinion and decision. See art. V, § 3(a), Fla. Const." *Santos v. State*, 629 So. 2d 838, 840 (Fla. 1994) (emphasis supplied); *cf. Jones v. State*, 640 So. 2d 1084, 1091 (Fla. 1994) ("there obviously is no fourth vote and thus no binding 'decision' or 'opinion' with respect to any portion of the plurality opinion" with which a specially concurring Justice has stated a reservation).

Here, there is no way for the movants to know whether the Court "overlooked" or "misapprehended" anything, because three of the six Justices who voted on the result have written absolutely nothing to reveal their own reasoning. *Cf. McDonnell v. Sanford Airport Auth.*, 200 So. 3d 83, 85 (Fla. 5th DCA 2015) ("a motion for rehearing cannot direct the court to matters overlooked if no written opinion has been published.").

For similar reasons, the concerns expressed by the *amici* and the Former Husband about precedent cannot be correct. There is no binding opinion of the Court joined by four Justices. There is only a 6-0 decision and result. There is no

precedent created this decision, except as to the existence *vel non* of conflict-based jurisdiction.

Ironically, long before this Court's non-binding March 30, 2017 plurality opinion and 6-0 decision, Florida trial courts statewide were already bound to follow the 2009 *Vigo v. Vigo* decision from the Third District. No crisis in family or real property law resulted. In addition, since the summer of 2015, Florida trial courts have been bound by the portion of the *Hooker v. Hooker*[2] Fourth District decision affirming an *inter vivos* gift of Lake George. *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). No confusion or calamity has resulted since then either.

If the *amici* really had *bona fide* concerns about *inter vivos* gifts between spouses, the time to articulate them was in 2009 and in 2015, when the Third and Fourth Districts were actually hearing and deciding *Vigo* and *Hooker* and creating decisional law on *inter vivos* gifts that actually is binding in Florida divorce courts. To our knowledge, these are the only two appellate cases in which a disputed *inter vivos* gift of real property between spouses has ever been discussed.

[2] 174 So. 3d 507 (Fla. 4th DCA 2015).

2. The unusual facts presented in this case presented competent substantial evidence of an *inter vivos* gift.

Because they have no majority opinion to address, the movants attack the plurality opinion. The issues raised, however, were thoroughly explored when the case was briefed on the merits.

The analysis in this case is fact-specific and fact-intensive. The Former Wife's trial testimony was that she and the Former Husband conferred regarding major decisions concerning Hickstead. It was "we," (Tr. 304:6)[3] and "us" (Tr. 304:10, 15) making tax, title, and financial decisions regarding Hickstead, not the Former Husband alone. The testimony is "substantial competent evidence." In stark contrast, as to truly non-marital property, the Former Husband exclusively controlled the information and activity. (R 488-89, 491 (Amended Final Judgment at 12-13, 15)). The Former Husband's manner of handling his separate assets was a relevant, competent factor supporting the determination of past donative intent.

The Former Husband now argues that Hooker Hollow LLC was not marital property, and quibbles over whether this factor was important to the trial court. Nobody knows precisely what was or was not important to the trial court; nor is it relevant in finding "competent substantial evidence" supporting an appellee in a

[3] This response includes references to the trial transcript ("Tr.__"), the record on appeal from the Circuit Court ("R. ___") and to the Appendix to the Petitioner's Brief on the Merits, which contains trial exhibits. ("Tab __").

trial record. Hooker Hollow LLC was itself clearly a marital entity because it was created during the marriage. On the other hand, Hickstead *could* have retained or lost its non-marital character, depending on the Former Husband's intent. The parties' joint conveyance of Hickstead to a marital entity is simply one piece of supporting evidence that the Former Husband intended to share ownership of the asset with the Former Wife since at least since 1997.

Joint ownership is consistent with the express terms of the 1991 mortgage. (Tab 1 (WX 13)). Although a mortgage does not itself convey title, it is a useful way to determine whom the parties believed were the owners of the property at the time. In 1991, the Former Husband voluntarily signed this mortgage, including its clear recitations that the Former Wife was "lawfully seized" of the Hickstead property. The Former Husband also caused the Former Wife to undertake non-monetary and monetary obligations to the lender that would only be appropriate for the owner of the property. For example, the Former Wife could not have lawfully agreed with a bank that she would maintain insurance on the mortgaged property, pay off liens, or prevent waste thereon, unless she was a co-owner with control over the property. The notarized, witnessed recitations in this mortgage are "competent" and "substantial" evidence of his intentions.

3. The statute of frauds was never raised below.

The Former Husband complains that the plurality opinion did not address his argument regarding the statute of frauds. But it is unreasonable to assume that appellate judges are ignoring issues merely because they are not specifically discussed in a written opinion. All six Justices who voted on this case correctly rejected "statute of frauds" arguments without any need for discussion. One possible reason is that the Former Husband never raised the statute of frauds in the Fourth District. As a result, the issue was not preserved for review.

The statute of frauds is substantively inapplicable here for various reasons, including existence of writings such as the deed, mortgage, and anniversary card, and completion of the gift, i.e., full performance. But, even if the statute of frauds does govern *inter vivos* gifts between spouses, this is the wrong case to write an opinion about it: the issue has been waived.

4. There is no chaos; and it is easy to prevent a controversy at divorce or death by drafting a proper prenuptial agreement or properly drafting transfer instruments.

The *amici* argue that the non-binding plurality opinion will adversely affect the ability of personal planning lawyers to advise clients about antenuptial agreements. These concerns are not well founded.

As shown above, these concerns are belied by the fact that *Vigo v. Vigo* has already been on the books for eight years, and a deluge of disputes about *inter vivos* transfers during a marriage has not arisen.

But if the *amici* are truly as alarmed as they say, there are easy ways to resolve their concerns. Sophisticated, wealthy individuals who use prenuptial agreements are typically represented by lawyers. Lawyers are capable of drafting appropriate clauses. To totally neutralize claims of interspousal gift of real property, for example, the language such as the following could be easily inserted into prenuptial agreements or amendments thereto:

> **Title Controls Distribution.** In any dissolution case or between these parties, real property shall be subject to distribution according to record title only, *without regard to any provisions of state law regarding inter vivos gifts or equitable distribution*.

And on a deed or mortgage, the following language may be inserted:

> This instrument does not constitute a transfer of title as between the grantors/mortgagors, *nor is it evidence of such a prior transfer*.

There are no doubt limitless additional ways to avoid controversy.

5. <u>The usual violations of Rule 9.330 are present here.</u>

Assuming that Rule 9.330 applies at all, the Former Husband's Motion for Rehearing breaks the rules and re-argues the merits of the case. Even in the plurality opinion, using the correct standard of review, three Justices have already evaluated the record evidence to test whether it supports the factual findings of the

trial court. With respect to Hickstead Place, the three Justices in the plurality observed that:

- Hickstead served as the marital residence throughout most of the marriage, and is where the spouses raised their children and lived as a family; (Op. 15)

- The Former Wife was extremely and directly involved in all aspects of Hickstead Place; (Op. 15–16)

- Both spouses signed the mortgage on Hickstead Place; (Op. 15)

- Both spouses signed the warranty deed transferring Hickstead Place to Hooker Hollow LLC; (Op. 16)

- Hooker Hollow LLC is a new entity created during the marriage to hold Hickstead Place, the marital home; (Op. 16)

- Former Wife always understood from Former Husband's actions and the family that she had an interest in Hickstead Place; (Op. 16)

- Former Wife could and did treat Hickstead Place as her own; (Op. 17)

- Former Wife was not limited from incurring costs and expenses of maintaining and operating Hickstead Place; (Op. 17)

- Former Wife had unfettered access to Hickstead Place; (Op. 17)

- Former Husband's actions, and inactions, over many years confirmed his intent to make an interspousal gift of Hickstead Place; (Op. 17–18)

- Former Wife played an active role in the design, construction, and taking care of Hickstead; (Op. 18)

- Former Husband told Former Wife that it was in their best interests to convey Hickstead to Hooker Hollow, LLC; (Op. 18)

- The parties continued to use Hickstead as their marital residence after transferring it to Hooker Hollow, LLC; (Op. 18)

The Motion for Rehearing attempts to minimize these facts.

6. The Movants' remaining arguments are meritless.

a. Lake George arguments.

After rearguing the facts related to Hickstead Place, the Former Husband states that, "[f]or all the same reasons, rehearing is required as to the Lake George Property." (Motion at 12). All the "same reasons," however, do not apply to Lake George. Lake George was not transferred to Hooker Hollow LLC. Lake George was also a New York vacation property. Unlike Hickstead Place—the family residence where the spouses raised their children—the trial court found that Former Husband purchased Lake George as a tenth anniversary gift for the Former Wife. In sum, the reasons for the plurality opinion as to Hickstead Place and Lake George were quite different. *Compare* Op. 15–19 *with* Op. 19–21. Thus, the Motion for Rehearing for "all the same reasons" should be denied.

b. The plurality Opinion does not misapply section 61.075 or conflict with *Hahamovitch*.

The Former Husband erroneously claims that the plurality opinion of three Justices has misapplied Florida Statute section 61.075(6)(a)1.a, which defines a marital asset. This plurality opinion, Former Husband states, also conflicts with *Hahamovitch v. Hahamovitch*, 174 So. 3d 983 (Fla. 2015).

This argument is circular and erroneous. *Hahamovitch* did not involve the question of interspousal gift. Like *Hahamovitch*, Former Husband traced his current assets to his premarital assets. But unlike *Hahamovitch*, this case turns on whether Former Husband made an interspousal gift during the marriage. This interspousal gift converted Hickstead Place and Lake George from nonmarital property to marital property. (Op. 11). *See* section 61.075(6)(a)1.c. (identifying interspousal gifts as marital assets). The prenuptial agreement and section 61.075 were thoroughly considered here. The Motion for Rehearing states no points of law that were overlooked or misapprehended.

c. <u>The Court has not overlooked or misapprehended the second and third elements of an interspousal gift.</u>

The Former Husband complains that the plurality opinion analyzes donative intent, but not the two other elements of an interspousal gift: delivery of possession, and surrender of control of the gift. (Motion at 11). There is no basis to assume that the plurality of the Justices, much less the entire Court, "overlooked" anything. Acceptance and delivery were briefed by the parties. There is no basis to assert that the six Justices who voted on the result did not consider the Former Husband's arguments.

Hickstead was the marital home. It was occupied by the Former Wife without restriction. Execution of the deed, the mortgage, and her occupancy, control, and maintenance of Hickstead over many years indicates "acceptance" and

"delivery." The trial court had discretion to find that it was "accepted" by the Former Wife and "delivered" under *Vigo v. Vigo*, 15 So. 3d 619, 622 (Fla. 3d DCA 2009).

In the case of Lake George, the Former Husband gave the Former Wife unrestricted physical access for the duration of the marriage. (Tr. 354:6-8). She furnished the home with some of her separate property (Tr. 354:2-5, 375-77), whether or not she was accompanied by the Former Husband. (Tab 4 at 8). The trial court therefore had discretion to find that Lake George was "accepted," possessed, used by the Former Wife as a summer home with "unfettered access", and "delivered" under *Vigo v. Vigo*, 15 So. 3d 619, 622 (Fla. 3d DCA 2009). (Tab 4 at 7-9). Like the marital property in *Vigo*, Lake George was marital property and possessed by the Former Wife. *See* section 61.075(6)(a)1.c (interspousal gifts during the marriage remain marital property, not the separate property of the recipient). Acceptance, delivery and possession occurred over many years.

A house differs from tangible personal property. Requiring proof of possession of either Hickstead or Lake George *to the exclusion of the Former Husband* would be illogical and erroneous here. The parties were spouses. Section 61.075(6)(a)1.c explains that interspousal gifts during the marriage remain marital property, *not* the separate or exclusive property of the recipient.

CONCLUSION

This Court's 6-0 decision is not an opinion of the Court and is not subject to a reasonable argument under Rule 9.330 that some fact or point of law was overlooked or misapprehended. Without a majority opinion, the movants have directed their criticisms to a plurality opinion joined by only three Justices.

The resulting "decision" of the Court does only two things: (1) it confirms the existence of inter-district conflict on the standard of review (which was necessary to establish jurisdiction); and (2) reverses and remands with instructions to reinstate the trial court's Amended Final Judgment. The post-decision motions presented to this Court for rehearing misstate the legal effect and implications of a plurality opinion and then re-argue the merits. Rehearing should be denied.

WHEREFORE, this Court should deny the motions for rehearing.

Respectfully submitted this 23rd day of May, 2017, by:

/s/ Robert J. Hauser
Robert J. Hauser
Florida Bar No. 55141

PANKAUSKI HAUSER P.L.L.C.
415 South Olive Avenue
West Palm Beach, Florida 33401
Phone: (561) 514 0900 Ext. #102
hauser@phflorida.com
courtfilings@phflorida.com

-and-

Susan G. Chopin
Florida Bar Number 146211
CHOPIN & CHOPIN, LP
701 South Olive Avenue, Suite 117
West Palm Beach, Florida 33401
Ph: (561) 651-7800
Fax: (561) 651-7822
chopinlaw@bellsouth.net
chopinsg@bellsouth.net

Attorneys for the Former Wife

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Motions for Rehearing was filed electronically and served via e-mail upon **Jane Kreusler-Walsh, Esq., Rebecca Mercier Vargas, Esq., and Stephanie L. Serafin, Esq**., Kreusler-Walsh, Compiani & Vargas, P.A., 501 South Flagler Drive, Suite 503, West Palm Beach, FL 33401-5913 (janewalsh@kwcvpa.com; rvargas@kwcvpa.com; sserafin@kwcvpa.com; eservice@kwcvpa.com); **Melinda P. Gamot**, The Gamot Law Firm, P.L., 2701 PGA Blvd., Suite C, Palm Beach Gardens, FL 33410 (Melinda@gamotlaw.com; Pamela@gamotlaw.com), Counsel for Former Husband; and **Cynthia L. Greene, Esq**., Greene Smith & Associates, P.A., 2555 Ponce de Leon Blvd., Ste. 230, Coral Gables, FL 33134 (CLG@greenesmithlaw.com), Counsel for *amici curiae*, on this 23rd day of May, 2017.

/s/ Robert J. Hauser
Robert J. Hauser
Florida Bar No. 55141