IN THE SUPREME COURT OF FLORIDA

Case No.: SC09-967
Second DCA Case No. 2D08-276

Upon Petition for Discretionary Review from a Decision of the Second District Court of Appeal

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KATHERINE KAAA,

Petitioner,

and

JOSEPH KAAA,

Respondent.

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

1. THE COURT SHOULD DECLINE JURISDICTION IN THIS CASE BECAUSE THERE IS NO DIRECT CONFLICT BETWEEN THE SECOND DISTRICT'S APPLICATION HERE OF SECTION 61.075(5)(a)2, *FLORIDA STATUTES* (2006), AND THE FIRST DISTRICT'S *STEVENS* OPINION, BECAUSE *STEVENS* DID NOT APPLY THE STATUTE……………………………………………………6

2. PROVIDING THE PETITIONER WITH ANY PORTION OF THE PURELY PASSIVE MARKET APPRECIATION OF THE HUSBAND'S NON-MARITAL REAL PROPERTY WOULD DIRECTLY CONFLICT WITH SECTION 61.075(5)(a)2 ..…………………………………………..8

3. PUBLIC POLICY WOULD FAVOR THE LAW AS APPLIED IN THIS CASE, EVEN IF SECTION 61.075(5)(a)2 DID NOT ALREADY EXCLUDE PURELY PASSIVE APPRECIATION OF NON-MARITAL PROPERTY FROM EQUITABLE DISTRIBUTION……………………..17

CONCLUSION…..……………………………………………………………..20

CERTIFICATE OF SERVICE ………………………………………………...20

CERTIFICATE OF COMPLIANCE ...…………………………………………21

PRELIMINARY STATEMENT

This Answer Brief is submitted on behalf of Former Husband, JOSEPH KAAA, who is referred to herein as "Husband," "Mr. Kaaa," or "Respondent"; the Former Wife, KATHY KAAA, is referred to as "Wife," "Mrs. Kaaa," or "Petitioner." They are referred to jointly as the "Parties." The record is cited as "R:___"; the transcript of the October 18, 2007, final hearing is cited as "T:___."

STATEMENT OF THE CASE AND FACTS

1. Procedural Status. This Court has accepted jurisdiction of a request to invoke discretionary review of the opinion of the Second District Court of Appeal, *Kaaa v. Kaaa*, 9 So.3d 756 (Fla. 2d DCA 2009), based on its certification of a direct conflict with a 14-year-old opinion from the First District Court of Appeal, *Stevens v. Stevens*, 651 So.2d 1306 (Fla. 1st DCA 1995).

The action originally arose from the Wife's claim to a share of the purely passive market appreciation of the Husband's non-marital real estate, contrary to statute and prevailing case law.

2. Factual Background.

In addition to the facts in Petitioner's Initial Brief, the Respondent submits the following information:

Mr. Kaaa was a divorced man with two children and modest assets when the Parties began dating in 1979. (T: 38, 42, 69, 70; R: 344).

That year, while the Parties were living together, but not yet contemplating marriage, Mr. Kaaa invested a portion of his personal assets in a parcel of real property (the "Riverview Property"), both because he got obtained a good deal from an acquaintance and because of the large lot. (T: 21, 23, 24, 38; R: 345).

The Parties moved into the house on the Riverview Property, eventually got married in March 1980, and had their first child six months later; Mr. Kaaa explained, "…it was just an investment to begin with …and then the children came around." (T: 17, 57, 74).

The title to the Riverview Property and the original mortgage and note were in Mr. Kaaa's name only. During the Parties' marriage, the Wife was fully aware that it was titled solely in his name, and Mr. Kaaa never told her that he intended for her to have joint ownership. (T: 19, 20, 69: R: 344, 364, 365).

By the time of the Final Hearing on the Parties' dissolution of marriage, Mr. Kaaa, a high-school-educated meat cutter at Publix who had worked at supermarkets throughout his adult life, was 59 years old and had suffered two strokes. The Wife, 48, had worked for the Hillsborough County School District for almost 20 years, where she was still employed and earning a pension with the Florida Retirement System. (T: 58, 59; R: 262, 265, 283, 314, 315, 332, 336, 344).

The Final Hearing was in October 2007, at the height of the real estate market in Florida. Unsurprisingly, the value of the Husband's non-marital

Riverview Property had appreciated substantially due to the increases in property values during the Parties' marriage. (T: 65, 68).

In addition to receiving her marital half of the property's enhanced value resulting from marital efforts and funds, which the trial court awarded to her, the Wife also seeks a share of the purely passive market appreciation of the Former Husband's non-marital property resulting from the real estate bubble. (R: 783-804)

The Second District below upheld the trial court's ruling that, pursuant to Section 61.075(5)(a) and (b), *Florida Statutes* (2006)[1], and applicable case law, including *Mitchell v. Mitchell*, 841 So.2d 564 (Fla. 2d DCA 2003), i.e.:

-The Riverview Property was purchased by the Former Husband prior to the marriage and titled in his name alone, and is thus a non-marital asset, pursuant to Section 61.075(5)(b), *Florida Statutes*; and

-Only the increased value of the property due to marital funds or efforts or both is a marital asset subject to equitable distribution, pursuant to Section 61.075(5)(a)2, *Florida Statutes*; and

-The increased value of the Riverview Property due to marital funds or efforts included: (a) the $22,279 reduction in the mortgage balance, and (b) the 360-square-foot addition to the house, which increased its current value by

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[1] The relevant provisions of Section 61.075(5), *Florida Statutes* (2006), were originally located under Section 61.075(3), *Florida Statutes* (1988), and are now found under Section 61.075(6), *Florida Statutes* (2009); however all references herein are to the 2006 statute.

$14,400[2], together totaling $36,679; and

- The purely passive appreciation in the Riverview Property's value caused by market forces remained the Former Husband's non-marital asset.

SUMMARY OF THE ARGUMENT

1. The Court should decline to accept jurisdiction in this case. There is no direct conflict between the opinion on review from the Second District and *Stevens v. Stevens*, 651 So.2d 1306 (Fla. 1st DCA 1995) on the issue of how to apply Section 61.075(5)(a)2, *Florida Statutes* (2006)[3], because the *Stevens* case does not apply or interpret the statute at all, but is based, instead, on pre-statutory case law analysis; there are more recent cases from the First District which properly apply the statute. The inconsistency is caused by *Stevens'* failure to apply the statute, not by any conflict in statutory application or interpretation.

2. The Second District properly applied the express language of the statute in excluding purely passive appreciation of non-marital property from equitable distribution and is in accord with the Third, Fourth, and Fifth Districts, as

[2] The most current appraised value in evidence at the Final Hearing in October 2007.

[3] Petitioner's Initial Brief implies that the certified conflict on review here is between *Mitchell v. Mitchell*, 841 So.2d 564 (Fla. 2d DCA 2003) and *Stevens v. Stevens*, 651 So.2d 1306 (Fla. 1st DCA 1995); however, the Second District's opinion certified a conflict between the instant case and *Stevens*, **not** between *Mitchell* and *Stevens*.

well as with those First District cases which address and apply the statute. The *Stevens* case is an incongruous decision which does not apply or interpret Section 61.075(5)(a)2, but, instead, follows pre-statutory case law and creates factors and even a formula contrary to the express language of the statute. The instant case should be approved and the *Stevens* case disapproved.

3. It would be contrary to public policy to hold that a portion of passive market appreciation of non-marital property becomes a marital asset following the use of marital funds to service a mortgage; such a dramatic shift in established law would likely have widespread and largely undesirable implications for Florida's families. The opinion on review should be approved.

ARGUMENT

1. THE COURT SHOULD DECLINE JURISDICTION IN THIS CASE, BECAUSE THERE IS NO DIRECT CONFLICT BETWEEN THE SECOND DISTRICT'S APPLICATION HERE OF SECTION 61.075(5)(a)2, *FLORIDA STATUTES*, AND THE FIRST DISTRICT'S *STEVENS* OPINION, BECAUSE *STEVENS* DID NOT APPLY THE STATUTE.

In this discretionary review proceeding, the Second District certified a direct conflict between the instant opinion and *Stevens v. Stevens*, 651 So.2d 1306 (Fla. 1st DCA 1995), which was decided by the First District 14 years ago; both cases address the issue of whether passive market appreciation constitutes marital enhancement of non-marital real property for purposes of equitable distribution in a dissolution of marriage.

In the instant case and its antecedents, the Second District applied the express language of Section 61.075(5)(a)2, *Florida Statutes*. The *Stevens* case from the First District, however, while including a citation to the statute, did not quote it, address its clear language, or otherwise apply it, relying instead on case law which preceded or simply ignored the 1988 statute. There are, however, more recent cases from the First District which properly apply the statute. *See, Gaetani-Slade v. Slade*, 852 So.2d 343 (Fla. 1st DCA 2003); *See also, Martin v. Martin*, 923 So.2d 1236, (Fla. 1st DCA 2006). *Cf. Fashingbauer v. Fashingbauer*, 19 So.3d 401 (Fla. 1st DCA 2009)(holding that non-marital property was not converted to a marital asset by either the use of marital funds to pay property taxes on non-marital

property or by the use of the non-marital property as collateral to purchase marital property.)

Accordingly, there is no direct conflict between the districts as to how to interpret or apply Section 61.075(5)a)2; the confusion within the First District was created by *Stevens'* failure to apply the statute at all.

Furthermore, the current economic recession and collapse of Florida's real estate market make it unlikely that the issue of passive appreciation of real property will arise frequently or be of great public interest in the foreseeable future. Accordingly, this is not a pressing issue or one of significant public concern which needs resolution by the Court at this time.

Finally, Supreme Court review would not be appropriate here, where the Parties' resources were modest even before the economic recession; this is not a case of sufficient importance that the Parties should carry the burden of financing a discretionary review proceeding.

Conclusion and Relief Requested. Accordingly, the Court should decline jurisdiction of this matter and allow the First District to resolve the intra-district confusion between its recent cases which properly apply the equitable distribution statute and *Stevens'* misguided failure to apply the statute.

2. PROVIDING THE PETITIONER WITH ANY PORTION OF THE PURELY PASSIVE MARKET APPRECIATION OF THE HUSBAND'S NON-MARITAL REAL PROPERTY WOULD DIRECTLY CONFLICT WITH SECTION 61.075(5)(a)2.

The Second District properly applied the express language of Section 61.075(5)(a)2 in this case, while *Stevens* essentially ignored the statute and, instead, created factors and even a formula directly contrary to the statute.

Equitable distribution of marital assets in dissolution of marriage proceedings has been governed since 1988 by Section 61.075, *Florida Statutes*; before then, the legal concept of equitable distribution was initially established in Florida by *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). Section 61.075 directs trial courts to identify the spouses' marital assets and liabilities, identify and separate any non-marital assets, and equitably distribute the marital estate. The statute provides detailed definitions of marital and non-marital assets and liabilities.

Section 61.075(5) provides that any assets acquired by either party before marriage are expressly classified as *non-marital*, but further carves out a limited marital interest in the

> …. enhancement in value and appreciation of nonmarital assets *resulting either from* the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both. (Emphasis added.) Section 61.075(5)(a)2.

a. <u>The Second District Properly Applied Section 61.075(5)(a)2, While *Stevens* Is Directly Contrary To The Statute.</u>

Providing the Wife with any portion of the purely passive market appreciation of Mr. Kaaa's non-marital asset would directly conflict with Section 61.075(5)(a)2.

(1) <u>Second District's Application of the Statute</u>. The Second District carefully applied the statute in distributing the Wife her marital share, properly excluding passive market appreciation as non-marital:

> Marital funds enhanced the value of the property by paying down the principal balance of the mortgage and by increasing the size of the residence. These enhancements are marital assets subject to equitable distribution. *See* § 61.075(5)(a)2, Fla. Stat. (2006); *Mitchell*, 841 So. 2d at 567. The trial court properly made an equitable distribution to the Wife of a one-half share in the value of these marital assets. However, under *Mitchell*, the increase in the value of the Riverview property resulting from passive appreciation is the Husband's nonmarital asset. *See* 841 So. 2d at 567 ("Where, as here, the increase in market value is attributable to 'inflation or fortuitous market forces,' the expenditure of marital funds on the nonmarital asset does not transform the appreciated asset into marital property.") (citing *Straley v. Frank*, 612 So. 2d 610, 612 (Fla. 2d DCA 1992)). Thus the trial court properly declined to award the Wife any portion of the increase in the value of the property resulting from passive appreciation. *Kaaa*, 9 So.3d at 758.

(2) <u>Stevens Ignored the Statute and Created A Non-Statutory Marital Asset and Formula</u>. The *Stevens* case from the First District, however, cites but fails to analyze or apply Section 61.075(5)(a)2; the very language of *Stevens* is

expressly contrary to that provision which expressly limits the marital component of non-marital assets to include only "enhancement in value and appreciation of non-marital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both."

Stevens, however, adds its own criteria, expanding marital assets to include:

> …the appreciated value of a non-marital asset caused by the expenditure of marital funds or labor, including the parties' management, oversight, or contribution to principal(…) ***as well as*** an appropriate portion of any appreciation of a non-marital asset caused by the effects of inflation and market conditions, where 'some portion of the current value . . . must reasonably be classified as a marital asset.' (Emphasis added) *Stevens*, 651 So.2d at 1307.

Thus, *Stevens* created a marital asset excluded from the statute as non-marital, i.e., "appreciation of a non-marital asset caused by the effects of inflation and market conditions," apparently on the basis of pre-statutory case law.

Stevens then goes even further, crafting a formula by which its expansive opinion can be implemented:

> In general, in the absence of improvements, the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage. If, for example, one party brings to the marriage an asset in which he or she has an equity of fifty percent, the other half of which is financed by marital funds, half the appreciated value at the time of the petition for dissolution was filed (…) should be included as a marital asset. The value of this marital asset should be reduced, however, by the

unpaid indebtedness marital funds were used to service. *Stevens*, 651 So.2d at 1308.

Section 61.075 does not permit passive market appreciation of a non-marital asset to be converted to a marital asset, and certainly includes no formula for doing so. The *Stevens* opinion is simply misguided and overzealous, and makes no attempt to apply the statute as written.

Stevens' addition of a portion of appreciation due to "inflation and market conditions" to those assets classified as marital, plus an allocation formula, is clearly erroneous; is the duty of the court to interpret laws and not to make them, and they are to make no subtraction or addition to the meaning of the statute. *Essex Insurance v. Zota*, 985 So.2d 1036 (Fla. 2008).

(3) Plain Language of Statute is Clear and Unambiguous. A statute must be given its plain and obvious meaning; if the language of the statute conveys a clear and definite meaning, there is no need to resort to statutory construction. See, *Florida Dept. of Environmental Protection v. Contractpoint Florida Parks*, 986 So.2d 1260, 1265 (Fla. 2008), citing, *Holly v. Auld,* 450 So. 2d 217, 219 (Fla. 1984) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.,* 604 So. 2d 452, 454 (Fla. 1992). When a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to statutory construction. *Borden v. East European Insurance*, 921 So.2d 587 (Fla. 2006).

Accordingly, Section 61.075(5)(a)2 must be given its plain and obvious

meaning; i.e.: a non-marital asset can become marital only to the extent of enhancement and appreciation in value "resulting…from" the contribution of marital efforts or expenditure of marital funds. Petitioner proposes instead an interpretation that would rewrite the statute to eliminate the requirement that appreciation must "result from" marital efforts or funds in order to be recharacterized as marital.

Even if the statute were ambiguous and needed statutory construction, the holding in *Stevens* would be error pursuant to the principle of statutory construction which holds that "the mention of one thing implies the exclusion of another; expressio unius est exclusion alterius." *Essex Insurance*, 985 at 1049, citing *Capers v. State* 678 So.2d 330, 332 (Fla. 1996), quoting *Thayer v. State*, 335 So.2d 815, 817 (Fla. 1976).

Because Section 61.075(5)(a)2 expressly states that marital assets include enhancement and appreciation resulting from just two factors – "the efforts of either party during the marriage" and/or "the contribution (…) of marital funds" – it necessarily excludes other factors which are not stated, such as *Stevens'* addition of "the effects of inflation and market conditions."

(4) First District's Opinions Have Been Inconsistent. *Stevens'* misguided approach reflects its reliance on three early cases, two of which do not cite the statute at all, likely because they pre-date its enactment, i.e.: *Massis v. Massis,* 551

So.2d. 587 (Fla. 1st DCA 1989) and *Sanders v. Sanders*, 547 So.2d 1014 (Fla. 1st DCA 1989), and the third case, *Young v. Young*, 606 So.2d 1267 (Fla. 1st DCA 1992), which only purports to consider Section 61.075, but, in fact, also relies exclusively on earlier cases which pre-date and/or do not mention the statute. Interestingly, the Third District interpreted *Young* and *Sanders* to reach the opposite result of *Stevens*, holding that, "…in accord with established Florida law, such passive appreciation is not a marital asset under Section 61.075(5)(a)2…." *Adkins v. Adkins*, 650 So.2d 61 (Fla. 3d DCA 1995).

The confusion in the First District is further complicated by two other cases, one pre-dating *Stevens* and one issued the very same day as *Stevens*, which appear to accurately apply the statute without ever citing it. *See, Graff v. Graff*, 569 So.2d 811 (Fla. 1st DCA 1990); *Pleas v. Pleas*, 652 So.2d 435 (Fla. 1st DCA 1995). Neither case suggests that marital enhancement of non-marital property includes the effects of inflation and market conditions.

b. <u>Current Consensus Among Florida's Districts as to Application of Statute</u>.

More recent cases from the First District, which actually analyze and apply Section 61.075(5)(a)2, accurately hold that marital funds used to pay down the mortgage and to make improvements to non-marital real property create a limited marital interest subject to equitable distribution, and the owner-spouse then has the burden to show which parts are attributable to passive appreciation and thus

exempt from equitable distribution. *See, Gaetani-Slade*, 852 So.2d 343; *See also, Martin*, 923 So.2d 1236; *Cf. Fashingbauer,* 19 So.3d 401 (holding that non-marital property was not converted to a marital asset by either the use of marital funds to pay property taxes on non-marital property nor by the use of the non-marital property as collateral to purchase marital property); *But see, Wilson v. Wilson,* 992 So.2d 395, 399 (Fla. 1st DCA 2008)(quoting *Martin* as to statute, but quoting *Stevens* to provide guidance on remand.)

Similarly, when applying Section 61.075(5)(a)2, all the other districts have come into substantial harmony in the past decade or so, holding that marital enhancement to non-marital real property must result from marital efforts or funds, and does not include purely passive market appreciation.

The Second District's opinion in the instant case was based upon its long-standing law, which, for at least 17 years, has followed the reasoning articulated in *Mitchell v. Mitchell*, 841 So.2d 564 (Fla. 2d DCA 2003), citing, *inter alia*, *Straley v. Frank*, 612 So.2d 610, 612 (Fla. 2d DCA 1992), and *Cornette v. Cornette*, 704 So.2d 667, 668 (Fla. 2d DCA 1997).

Likewise, the Third District agreed that the passive appreciation resulting from an increase in land values in the area is not marital, pursuant to Section 61.075(5)(a)2. *See Adkins,* 650 So.2d 61, also citing the Second District case of *Straley,* 612 So.2d 610. See also, *Herrera v. Herrera*, 895 So.2d 1171 (Fla. 3d

DCA 2005).

The Fourth District followed suit in *Caruso v. Caruso*, 814 So.2d 498 (Fla. 4th DCA 2002), likewise citing *Straley*; and the Fifth District followed the same analysis in *Thomas v. Thomas*, 776 So.2d 1092 (Fla. 5th DCA 2001).

In summary, since the 1988 enactment of Section 61.075, Florida's Equitable Distribution Statute, there have been some missteps by Florida's appellate courts as they struggled to deal with the issue of marital enhancement of non-marital property, such as: (a) occasionally confusing the concept of equitable distribution with special equity, *See, e.g., Stefanowitz v. Stefanowitz*, 586 So.2d 460 (Fla. 1st DCA 1991); (b) relying on pre-statutory case law, as in *Stevens*; (c) failing to differentiate between cases involving real property (where, as here, expert appraisal evidence regularly provides the basis for owner-spouses to meet their burden to show what portion of the appreciation of non-marital property resulted from purely passive market forces rather than marital efforts or funds), and cases involving family businesses or investment accounts (where such evidence is frequently unavailable, sometimes leaving the impression that all appreciation is marital, when some marital enhancement was shown and no attempt was made to meet the burden to show part of it is non-marital.) *See generally, Sizemore v. Sizemore*, 767 So.2d 545 (Fla. 5th DCA 2000); *Pagano v. Pagano*, 665 So.2d 370 (Fla. 4th DCA 1996); *Turner v. Turner*, 529 So.2d 1138 (Fla. 1st DCA 1988); and

(d) even applying the statute to real property which was not owned by either spouse, but by a third party. *See, Rafanello v. Bode*, Fla. L. Weekly D2213 (Fla. 4th DCA October 28, 2009) (In which no brief was filed for appellee.)

c. Petitioner's Arguments Flawed.

Petitioner's Initial Brief incorrectly suggests that Section 61.075(5)(a)2 uses "appreciation" to mean only passive market appreciation; but, in fact, the word "appreciation" simply means "increase in value," according to *Merriam-Webster's Collegiate Dictionary* 61 (11th Ed. 2003). *See, School Board of Palm Beach County v. Survivors Charter Schools*, 3 So.3d 1220 (Fla. 2009) (Where the legislature has not defined the words used in a statute, the language should be given its plain and ordinary meaning, as ascertained by reference to a dictionary, e.g., *Merriam-Webster's Collegiate Dictionary* 61 (11th Ed. 2003).

Further, there is no basis for Petitioner's assertion that, "The marital component is limited in the Second District to a return of principal only, while all subsequent passive increase in value (…) is attributed to the non marital portion." (Initial Brief, p. 12).

To the contrary, in the instant case, the Wife received her marital share of the appreciation which resulted from marital efforts and funds, including her marital share of the current, appreciated value of the additional square footage which the Parties had added to the non-marital property, plus the equity resulting

from the Parties' payments on the mortgage.

It is clear that, when, as in this case, the spouses have increased the square footage of a non-marital home, or, in another case, may have substantially upgraded it, marital enhancement includes not just the cost of the upgrade, but also necessarily includes the passive market appreciation of that marital improvement. *E.g., Hall v. Hall*, 962 So.2d 404 (Fla. 2d DCA 2007).

Summary and Relief Requested. The plain, unambiguous language of Section 61.075(5)(a)2 provides that marital assets include enhancement and appreciation in the value of non-marital property, which *result from* the contribution of marital efforts or funds. The Second District correctly applied the statute in the instant case, which should be approved; the *Stevens* case did not apply or interpret the statute at all, resulting in an erroneous, incongruous opinion which should be disapproved.

3. PUBLIC POLICY WOULD FAVOR THE LAW AS APPLIED IN THIS CASE, EVEN IF SECTION 61.075(5)(a)2 DID NOT ALREADY EXCLUDE PURELY PASSIVE APPRECIATION OF NON-MARITAL PROPERTY FROM EQUITABLE DISTRIBUTION.

The consensus among the districts as to the proper application of Section 61.075(5)(a)2 reflects not only the statute's express language, but is consistent with public policy. It would be contrary to public policy to hold that the contribution of marital funds to service a mortgage on non-marital real property converts a portion of even passive market appreciation into a marital asset.

Such a major change in Florida law would have a chilling effect on family stability, by discouraging spouses who own non-marital residences from living there with their families, thus denying those families the many benefits of residing in one spouse's existing non-marital residence.

Under current Florida law, as applied in the instant case, married couples can enjoy not only the security of raising a family together in one spouse's non-marital residence, they can receive the economic benefits of building equity by servicing the mortgage, using the residence as collateral, and making necessary improvements and/or additions to provide for the family's changing needs.

Further, under existing law, such marital efforts and contributions often create a limited marital interest which can appreciate in value and be equitably distributed in the event of later dissolution of the marriage, as was done in this case and its predecessors, including *Hall*, *Mitchell*, *Straley*, etc.

The change to the law sought by the Wife would encourage spouses who own mortgaged, non-marital homes to protect that non-marital status by not using the homes as family residences, but, instead, leasing them to third parties in order to pay the mortgages with the resulting non-marital rental income and avoid the conversion of their property's passive appreciation into a marital asset. As a result, fewer married couples would enjoy the security and other benefits of living in one spouse's non-marital house and would, instead, end up living in a rental

house or apartment and using marital funds to pay rent to a landlord.

Such a result would (a) deny Florida families the security of living in a home owned by one of the spouses, (b) prevent the accrual of a marital asset created by paying down the mortgage, (c) deny the non-owner spouse the opportunity to build a marital asset by making marital improvements to the home and realizing the appreciation thereon, (d) deny the family the ability to modify their residence to suit their needs, and (e) deny the family the pride and stability of home ownership.

To paraphrase the analysis so well expressed in Justice Pariente's concurring opinion in *Farrior v. Farrior*, 736 So.2d 1177 (Fla. 1999): In the instant case, because of the Husband's voluntary act of living with his Wife and family in the security of his non-marital Riverview Property and using it as collateral for various mortgages, the Wife now seeks to enjoy not only the benefits of having lived in his house, using it as collateral, and recouping her share of their marital investment, she would further lay claim to the appreciated value of the non-marital asset itself.

A change in the law to that effect would be detrimental to Florida families; future non-owner spouses in Mrs. Kaaa's position could find themselves denied the many benefits the current law has provided her, as their spouses take the necessary actions to protect non-marital property. Such a change would clearly be inequitable and have a chilling effect on the beneficial use of non-marital homes by Florida families, contrary to public policy.

CONCLUSION

1. Although this Court has the authority to exercise its discretion in this case to accept jurisdiction, there is no such obligation. Respondent respectfully submits that there is no direct conflict between this case and *Stevens,* and, even if there were, this is not a case in which it would be helpful or necessary for the Court to accept review.

2. The opinion on review should be approved and the *Stevens* case disapproved, because, the Second District properly applied the express language of Section 61.075(5)(a)2 and is in accord with the Third, Fourth, and Fifth Districts, as well as with those First District cases which actually apply the statute. The *Stevens* case is an incongruous decision which does not apply or interpret the statute, but, instead, follows pre-statutory case law and creates factors and even a formula contrary to the express statutory language.

3. The opinion on review should be approved; even if the statute did not mandate the result below, a reversal would be contrary to public policy, by discouraging the enjoyment of non-marital homes by Florida families.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by U.S. Mail to Mark A. Neumaier, Esquire, 334-B, West Bearss Avenue, Tampa, FL 33613, this December 22, 2009.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Fla. R. App. P., that this Initial Brief of Appellant is prepared and filed using Times New Roman 14-point font as required.

____

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