

IN THE SUPREME COURT OF FLORIDA

KATHERINE KAAA,

Case No. SC09-967

Appellant

v.

L.T. No. 2D08-276

JOSEPH KAAA,

Fla. Bar No. 436208

Appellee.

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT, STATE OF FLORIDA

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INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE FACTS AND THE CASE

This is a discretionary appeal from an opinion of the Second District Court of Appeals based on direct conflict certified by the lower court.

The appeal is from a final judgment and an amended final judgment of dissolution of marriage. References to the record are designated as (R: ). References to the trial transcript are designated as (T: ). The surname of the parties is Hawaiian; it is pronounced “Ka - ah - ah”, with three syllables.

The parties were married to each other on March 31, 1980. (T: 17) The dissolution of marriage action was filed in 2007, twenty seven years later.

Prior to the trial, the parties entered into a partial mediated settlement agreement, which left the issues of equitable distribution and fees for resolution by the court. (R: 89, 793) The parties stipulated to the valuation of a number of the marital assets and liabilities. (Id.) They agreed to a present fair value of \$ 225,000 for the marital dwelling, but specifically did not agree whether any portion of the marital dwelling would be considered a marital asset. (R: 797)

It is with regard to the court’s determination of the marital or non-marital status of the appreciation in value of the marital dwelling that this appeal is concerned.

The trial court found that it was required to determine the marital and non-marital enhancement components of the home under the law set forth by the

Second District in the case of Mitchell v. Mitchell, 841 So.2d 564 (Fla. 2d DCA 2003). (T: 10, 106)

The trial court made a finding of fact that the paydown of the original mortgage from \$ 35,150.00 to \$ 12,871.46 constituted marital equity of \$ 22,279.00 subject to equitable distribution. (T: 107) It further found that there was marital appreciation in the amount of \$ 14,400.00 in accordance with an appraiser's testimony of the value of certain renovations performed on the home during the marriage. (T: 107) The court awarded one half of the sum of these two components of marital equity to the wife in the final judgment.

It was from these rulings limiting the marital equity from the home that the wife took her appeal to the Second District. As the facts were not disputed, but rather the proper application of the law in this state, the standard of review below was de novo. Henderson v. Henderson, 905 So.2d 901, 903 (Fla. 2d DCA 2005).

In its opinion below, the Second District Court of Appeals summarized the facts and findings of the trial court.

“Katherine Kaaa (the Wife) raises a single issue in her appeal from the final judgment that dissolved her marriage to Joseph Kaaa (the Husband). She challenges the trial court's denial of her claim to a portion of the passive appreciation in the Husband's nonmarital real property, even though the mortgage debt encumbering the property was paid with marital funds throughout the course of the parties' twenty-seven year marriage. Because the trial court correctly applied this court's decision in Mitchell v. Mitchell, 841 So. 2d 564 (Fla. 2d DCA 2003), in disposing of the Wife's claim, we

affirm the final judgment in all respects. However, we certify that our decision is in direct conflict with the First District's decision in Stevens v. Stevens, 651 So. 2d 1306 (Fla. 1st DCA 1995).

The parties were married in 1980. They had four children. At the time of the final hearing, three of the children had reached the age of majority. The parties continued to occupy the same residence through the date of the final hearing. The trial court entered the final judgment of dissolution of marriage on December 18, 2007. In October 1979, approximately six months before the parties were married, the Husband purchased a residence in Riverview, which was located on a one-and-one-quarter-acre lot. This residence, referred to as "the Riverview property," became the parties' marital home. The Husband took title to the property in his name alone. Although the parties refinanced the Riverview property several times, the Husband never transferred any interest in the property to the Wife. The Husband purchased the Riverview property for approximately \$36,500. The down payment required at the closing was \$2000. The Husband financed the balance of the purchase price with a mortgage on the property. During the course of the marriage, the parties paid all of the mortgage payments, insurance premiums, taxes, and maintenance expenses of the Riverview property from marital funds. In addition, the parties used marital funds to improve the residence by closing in a carport. At the final hearing, the parties stipulated that the Riverview property had a current fair market value of \$225,000 and was subject to a mortgage with a balance of \$12,871.46.”

...

## **“II. THE CIRCUIT COURT'S RULING**

The trial court made the following findings of fact concerning the Riverview property:

H. [The Riverview property] was purchased by the Husband prior to the marriage, continues to be titled in the Husband's name alone, and is, therefore, the Husband's non-marital property pursuant to Section 61.075(5)(b)[,] Florida Statutes.

I. During the marriage, the balance of the mortgage on the Husband's home was reduced by \$22,279, and an addition was made to the home of 360

square feet, increasing the current value of the home, at \$40 per square feet [sic] as credibly testified to by the Wife's expert . . . by \$14,400.00.

J. The enhancement of the home as described in Section I hereof, totaling \$36,679, was made through the use of marital funds or efforts or both, and is therefore a marital asset subject to equitable distribution pursuant to Section 61.075(5)(a)[,] Florida Statutes.

Based on these findings, the trial court ruled that the Husband was entitled to the exclusive use and ownership of the Riverview property. In addition, the trial court ordered the Husband to pay the Wife an equalizing payment of \$18,339.50. The equalizing payment represented the Wife's one-half interest in the paydown on the mortgage and the increase in the value of the property attributable to closing in the carport.”

After consideration of the evidence and case law, the trial court announced its ruling. (T: 10) The court found that it was required to determine the marital and non-marital enhancement components of the home under the law set forth by the Second District in the case of Mitchell, supra. (T: 106) It is from these rulings limiting the marital equity from the home that the wife took her appeal to the Second District Court of Appeal.

In the opinion subject to this appeal, the Second District Court of Appeal ruled that:

### **“III. DISCUSSION**

The trial court correctly decided the issue of the extent of the Wife's interest in the enhancement of the value of the Riverview property in accordance with this court's decision in Mitchell. 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.

In the briefs and at oral argument, the Wife has directed our attention to the First District's decision in Stevens. We agree with the Wife that the First District takes a different approach than Mitchell relative to the treatment of the passive appreciation of nonmarital real property where the value of the property has been enhanced by marital funds or labor. In Stevens, the First District explained its approach as follows:

Equitable distribution of marital assets should take into account 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, Young v. Young, 606 So. 2d 1267, 1270 (Fla. 1st DCA 1992); Massis v. Massis, 551 So. 2d 587, 589 (Fla. 1st DCA 1989), 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." Sanders v. Sanders, 547 So. 2d 1014, 1016 (Fla. 1<sup>st</sup> DCA 1989).

An asset brought by one party to a marriage, which appreciates during the course of the marriage, solely on account of inflation or market conditions, becomes in part a marital asset, if it is encumbered by indebtedness which marital funds service. Each spouse's income is deemed marital funds. Here the trial court erred in excluding from the equitable distribution plan the entire amount by which the [husband's nonmarital real] property appreciated in value during the marriage,

since marital funds were used to make the mortgage payments and pay the taxes. The appreciation, if any, should be allocated between the parties by a "reasonable proration of the appreciated value." Sanders, 547 So. 2d at 1016. If a separate asset is encumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of its value should ordinarily be included in the marital estate, absent improvements effected by marital labor. If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. 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, § 61.075(5)(a)[(2)], Fla. Stat. (1993), 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. 651 So. 2d at 1307-08 (ellipsis in original); see also Wilson v. Wilson, 992 So. 2d 395, 399 (Fla. 1st DCA 2008) (quoting extensively from Stevens to provide guidance to the trial court on a remand for further proceedings).

The Wife argues that the treatment of the passive appreciation of the Riverview property under Mitchell—particularly on the facts shown here—is manifestly unfair to her. She points out that the Husband's contribution of nonmarital funds to the Riverview property was limited to his relatively small down payment and the minimal reduction in the principal balance of the mortgage during the six-month period between his acquisition of the property and the parties' marriage. Indeed, marital funds were the source of virtually all of the monies used to service the mortgages on the property and the various expenses associated with it. Under the First District's approach in Stevens, the Wife would be entitled to equitable distribution of a share of substantially all of the passive appreciation in the Riverview property during the course of the parties' twenty-seven-year marriage.

However, under Mitchell, the Wife is not entitled to any portion of the considerable passive appreciation in the value of the property. The Wife submits that this result "is neither equitable nor in compliance with the statute." She asks us to either recede from Mitchell or to certify conflict with Stevens.

This panel is bound by Mitchell. Accordingly, we affirm the final judgment of dissolution of marriage in all respects. However, we do certify that our decision in this case is in direct conflict with Stevens on the issue of the treatment of the passive appreciation of nonmarital real property that is encumbered by an indebtedness serviced by marital funds. See generally Dawn D. Nichols & Sean K. Ahmed, Nonmarital Real Estate: Is the Appreciation Marital, Nonmarital, or a Combination of Both?, 81 Fla. B.J. 75 (Oct. 2007) (describing a conflict between Mitchell and the analyses employed by the four other district courts of appeal to the treatment of the appreciation in the value of nonmarital real estate).

Affirmed; conflict certified.”

It is from this opinion that the appellant takes this appeal.

## SUMMARY OF ARGUMENT

The instant case presents a material issue which has been resolved by application of the case law in the Mitchell case by the Second District. That court has specifically certified conflict with the Stevens case from the First District.

The case law announced by the First District in Stevens follows the requirements of the equitable distribution statute, unlike the Mitchell case of the Second District. Only by apportioning any appreciation in equity from assets which are partly marital and partly non-marital, and distributing the marital portion of the appreciation, can trial courts follow the requirements of the statute. This court should therefore reverse the opinion below, disapprove the Mitchell line of cases, and approve the analysis and methodology set forth in the Stevens case.

## ARGUMENT

1. THE COURT HAS JURISDICTION TO REVIEW EXPRESSLY  
CONFLICTING DISTRICT DECISIONS.

This case falls squarely within the parameters for the exercise of

discretionary jurisdiction by this court under Section 9.030(a)(2)(iv).

“The discretionary jurisdiction of the supreme court may be sought to review... Decisions of district courts of appeal that ... expressly and directly conflict with a decision of another district court of appeal ... on the same question of law.” Id.

This court’s function is to act “as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice.” Jenkins v. State, 385 So.2d 1356, 1357 - 1358 (Fla. 1980)

The instant appeal presents squarely the opportunity to resolve the ongoing conflict in case law between the districts. As reflected in the opinion below, cases with similar fact patterns are being decided in substantially different ways among the Florida Districts.

The application of the Second District’s Mitchell case below resulted in a substantially different result than would be obtained in the First District under Stevens, on the same facts. There is no policy or reason for such disparate treatment of a relatively common factual scenario based on the fortuity of place of residence of the parties within the state.

This court has and should exercise the power to issue an opinion resolving

the conflicting case law of the District Courts of Appeal, by approving the Stevens case and disapproving the Mitchell case.

## 2. THE STATUTORY AND CASE LAW ON EQUITABLE DISTRIBUTION OF APPRECIATION OF PARTLY MARITAL ASSETS.

The governing statute in this area is Section 61.075(5)(a)2, Florida Statutes, which defines marital assets subject to equitable distribution to include:

"[t]he 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. . . ."

All of the districts in Florida are in accord that if marital efforts or funds are used to increase the value of non-marital assets of one party, a portion of the value of that asset becomes marital in nature. Thus, the entire asset is of a mixed nature: part non-marital and part marital. The value of the marital part is subject to equitable distribution, pursuant to the statute.

Where the districts are in conflict is in their consideration of this question: once an asset becomes mixed due to the marital enhancement of value, is subsequent passive appreciation of the marital portion of that asset also marital and subject to equitable distribution?

It is clear that in the Second District, the answer is no. Mitchell, supra.

In the Second District, the law as to methodology to determine marital and nonmarital components of a separately owned, nonmarital asset has been expressed in the Mitchell case.

“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. See Straley v. Frank, 612 So.2d 610, 612 (Fla.2d DCA 1992). But an increase in equity due to the use of marital funds to pay down a mortgage balance is a marital asset subject to equitable distribution. Cornette v. Cornette, 704 So.2d 667, 668 (Fla.2d DCA 1997). Therefore, Ms. Mitchell's rightful interest in the Carrollwood home is limited to her one-half share of the amount by which the mortgage was reduced with marital payments.” Mitchell, supra, at 567.

In Mitchell, the court basically requires that once an asset owned by one party prior to the marriage is determined to have some marital component due to 61.075(5)(a)(2) enhancement, the trial court is to determine which portion of the increase in value is directly and immediately linked to the marital efforts or funds.

Only that restricted amount is deemed marital, and the entire remainder of the enhancement or appreciation in value of the asset is deemed to be nonmarital. It is up to the claiming spouse to prove the amount attributable to marital enhancement.

Under Mitchell, the appreciation in the mixed asset attributable to the marital component of the asset is entirely nonmarital, and not subject to equitable

distribution. The non-owning spouse, in effect, is limited to a distribution of the principal marital component of the asset, but none of the passive appreciated value attributable to that marital component. The marital component is limited in the Second District to a return of principal only, while all subsequent passive increase in value of the entire mixed asset is attributed to the nonmarital portion of the asset.

The First District takes a different approach than Mitchell relative to the treatment of the passive appreciation of nonmarital real property where the value of the property has been enhanced by marital funds or labor. Subsequent passive appreciation of the marital portion of a mixed asset is attributed to that marital portion, and is deemed a marital asset subject to equitable distribution. If the asset is partly marital and partly nonmarital, then there is an apportionment of any subsequent passive or market appreciation of the asset into marital and nonmarital components.

In Stevens, the First District explained its approach as follows:

“Equitable distribution of marital assets should take into account 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, Young v. Young, 606 So. 2d 1267, 1270 (Fla. 1st DCA 1992); Massis v. Massis, 551 So. 2d 587, 589 (Fla. 1st DCA 1989), 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." Sanders v. Sanders, 547 So. 2d 1014, 1016 (Fla. 1<sup>st</sup> DCA 1989).

An asset brought by one party to a marriage, which appreciates during the course of the marriage, solely on account of inflation or market conditions, becomes in part a marital asset, if it is encumbered by indebtedness which marital funds service. Each spouse's income is deemed marital funds. Here the trial court erred in excluding from the equitable distribution plan the entire amount by which the [husband's nonmarital real] property appreciated in value during the marriage, since marital funds were used to make the mortgage payments and pay the taxes. The appreciation, if any, should be allocated between the parties by a "reasonable proration of the appreciated value." Sanders, 547 So. 2d at 1016. If a separate asset is encumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of its value should ordinarily be included in the marital estate, absent improvements effected by marital labor. If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. 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, § 61.075(5)(a)[(2)], Fla. Stat. (1993), should be included as a marital asset.

There is therefore a conflict between the districts on this issue. It is submitted that the law of the First District is more equitable and more accurately tracks the language of the statute. That case law should therefore be adopted by this court.

3. THE ‘REASONABLE ALLOCATION’ METHODOLOGY SET FORTH IN STEVENS SHOULD BE ADOPTED BY THIS COURT AS THE PROPER METHOD OF IDENTIFYING AND VALUING THE APPRECIATION IN VALUE OF A PARTLY MARITAL AND PARTLY NONMARITAL ASSET.

The better methodology would require the court to distinguish between the appreciation attributable to the marital portion of the asset and the appreciation attributable to the nonmarital portion of the asset.

“An asset brought by one party to a marriage, which appreciates during the course of the marriage, solely on account of inflation or market conditions, becomes in part a marital asset, if it is encumbered by indebtedness which marital funds service. Each spouse's income is deemed marital funds. Here the trial court erred in excluding from the equitable distribution plan the entire amount by which the Robbie Road property appreciated in value during the marriage, since marital funds were used to make the mortgage payments and pay the taxes. The appreciation, if any, should be allocated between the parties by a ‘reasonable proration of the appreciated value.’” Sanders v. Sanders, 547 So.2d 1014, 1016 (Fla. 1st DCA 1989)

“If a separate asset is unencumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of its value should ordinarily be included in the marital estate, absent improvements effected by marital labor. If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. 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.” Stevens v. Stevens, 651 So.2d 1306 (Fla. 1<sup>st</sup> DCA 1995)

Under First District case law, once an asset - including a parcel of real estate - is determined to be mixed in nature, any subsequent appreciation in value should be reasonably allocated between the nonmarital principal component and the marital principal component of the asset.

“A separately owned non-marital asset may become in part a marital asset when its enhanced value is due to marital funds or labor. Id. For the period when an asset is properly classified as a marital asset, the parties are entitled to an equitable distribution of any increase in value caused by inflation or market conditions. Sanders v. Sanders, 547 So.2d 1014, 1015 (Fla. 1st DCA 1989); Crapps v. Crapps, 501 So.2d 661 (Fla. 1st DCA 1987).” Massis v. Massis, 551 So.2d 587 (Fla. 1<sup>st</sup> DCA 1989)

The passive appreciation of that portion of the increased value of the asset attributable to marital funds or efforts is subject to equitable distribution as a marital asset. The portion of the passive appreciation of that asset not attributable to the expenditure of marital funds is not subject to equitable distribution. The court must allocate the passive appreciation between the marital and nonmarital portions of the asset.

In the case under review, almost all of the original asset was acquired with marital funds. The increase in the value of the land is not unrelated to the purchase of the land. So the increase in value of the land due to market and inflationary forces should be allocated between the nonmarital portion of the asset - i.e. the value of the husband’s portion of the down payment and any

consideration of the first six months' worth of mortgage payments - and the value attributable to the payment of the entire balance of the consideration for the property.

In this case the asset at issue was a mixed marital and nonmarital asset, for which almost the entire purchase consideration was marital. Under Mitchell, the court awarded all of the substantial subsequent appreciation in value for this mixed asset to the title holding party. It is submitted that this is neither equitable nor in compliance with the statute.

What if a party had signed a purchase agreement for a home in his or her name alone the day before the marriage, with no money down? Then the entire asset was paid for with marital funds during the marriage. By application of the Mitchell case, the entire subsequent increase in valuation would be the nonmarital property of the purchasing spouse, despite the entire consideration being marital. The other spouse would be limited to distribution of a partial refund of the mortgage balance.

How can this scenario be reconciled with the statutory definition of marital assets:

"[t]he 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. . . ." Section 61.075(5)(a)(2), Florida Statutes.

The Mitchell case, it is submitted, ignores the words “and appreciation” in the above quoted statute. It only provides for the equitable distribution of enhancements in value of nonmarital assets resulting from the efforts of either party and the expenditure of marital funds. It does not provide under any scenario for the equitable distribution of any appreciation in value of the mixed asset.

The Mitchell case defines all appreciation on a nonmarital asset to be nonmarital and not subject to equitable distribution. This is directly contrary to the plain language of the statute, which defines such appreciation as marital and subject to equitable distribution, if resulting from marital efforts or funds.

It is submitted that the only benefit to the Mitchell approach to distributing appreciated mixed assets is that it is easy in application. The increase in value of the mixed asset is irrelevant: the paydown of any mortgage and the fair market increase of any renovations are the sole focus of the court’s attention. The title holder by default receives the entire appreciation of the entire asset, even if all of the consideration for the asset was marital. The result is easy to compute, but harsh and inequitable in operation.

By contrast, the Stevens case does follow the clear language of the statute. It allocates the appreciation in value of an asset between the original nonmarital

component and any marital component created by marital efforts or funds. The appreciation in value attributable to the marital component is subject to equitable distribution, the appreciation in value attributable to the nonmarital component is not.

The methodology set forth in Stevens as a general guide, i.e. allocation based on the expenditure of marital versus nonmarital funds and efforts as the consideration for the acquisition or maintenance of the asset as a ratio, to be utilized in allocating the appreciation in the entire asset, appears to be workable and equitable. Its placement of the burden of proof on the title holding spouse to demonstrate the proper allocation does not appear to be objectionable from a policy standpoint.

In particular cases either party might argue that some other manner of making a reasonable allocation of the appreciation between marital and nonmarital might be appropriate, and the Stevens opinion appears to allow for that. The ratio of consideration formula is a general rule, not an exclusive one.

“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, § 61.075(5)(a)[(2)], Fla. Stat.

(1993), should be included as a marital asset. “ Stevens, supra. (emphasis added.)

The Mitchell analysis, by contrast, is not equitable, in that it does not provide for any of the appreciation in value of a partly marital asset to be defined as marital in nature, or for any such portion to be equitably distributed.

Certain cases considering the issue of distribution of appreciation of value of mixed assets might also appear to be harsh in application, but in favor of the spouse rather than in favor of the title holding party. A reading of the Fourth District case of Pagano v. Pagano, 665 So.2d 370 (Fla. 4th DCA 1996), might indicate that once an asset is determined to be mixed in nature, one hundred percent of the appreciation in value is distributable as a marital asset. This approach also does not appear to follow the statutory requirement of only defining as marital the appreciation resulting from marital efforts or funds.

An approach such as such an application of Pagano would be inequitable when most of the consideration for an asset was premarital. In such scenarios, the entire appreciation is deemed to be marital and subject to equitable distribution even though only a small portion of the consideration might have been marital.

Only by making a fair allocation of the appreciation of an asset between the marital and nonmarital components of the asset, as in Stevens, can the statute be

effectuated and equity be achieved. Both alternative analyses are flawed and can be overly harsh in application.

This court should therefore reverse the opinion of the Second District below, disapprove the Mitchell case and its progeny, and approve the Stevens case and its methodology for application in the area of distribution of mixed assets with appreciated value.

### CONCLUSION

For the reasons cited, this court should enter its order approving the methodology for consideration of appreciated mixed assets set forth in Stevens, disapprove the methodology set forth in Mitchell and as applied by the District Court below, reverse the order under appeal, and remand for further proceedings under the case law as set forth in Stevens on this issue.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U. S. Mail on Jeanie E. Hanna, Esq., 600 S. Magnolia Ave., Ste. 225, Tampa, FL 33606 on November 3, 2009.



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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above initial brief is in compliance with the font requirements of Rule 9.210 (a)(2), Florida Rules of Appellate Procedure.

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Mark A. Neumaier, Esq.