

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**

KATHERINE KAAA,

Petitioner,

and

JOSEPH KAAA,

Respondent.

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

WARE LAW GROUP, P.A.

Jeanie E. Hanna (Fla. Bar No.328413)
600 S. Magnolia Avenue, Ste. 225
Tampa, FL 33606
(813)254-8500
(813)254-9511 (facsimile)
jehanna@tampabay.rr.com
Counsel for Respondent, Joseph Kaaa

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PRELIMINARY STATEMENT

This Answer Brief is submitted on behalf of Former Husband, JOSEPH KAAA, who is referred to herein as “Former Husband.” The Former Wife, KATHY KAAA, is referred to as “Former Wife. The Appendix hereto is cited by tab number and page: “A-__: __”.

STATEMENT OF THE CASE AND FACTS

This matter comes before the Court on a request for discretionary review from an opinion of the Second District Court of Appeal, based on its certification of a direct conflict with a 1995 opinion from the First District Court of Appeal.

The case arose from the Former Wife’s claim to a greater share of the Former Husband’s non-marital Riverview Property than permitted by statute or prevailing case law.

In addition to receiving half the property’s enhanced value resulting from marital efforts and funds, which the trial court awarded to her, the Former Wife also wants a share of the purely passive appreciation to the Former Husband’s non-marital property, which did not result from marital efforts or funds.

The Second District below upheld the trial court’s ruling that, pursuant to Section 61.075(5)(a) and (b), *Florida Statutes*, 2006¹, and applicable case law, including *Mitchell v. Mitchell*, 841 So.2d 564 (Fla. 2d DCA 2003):

¹ The relevant provisions of Section 61.075(5) have been relocated in the 2009 *Florida Statutes* and are now found under Section 61.075(6).

-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; and

- marital funds were used to reduce the mortgage balance and to add square footage to the house, and such enhancement in value resulting from marital funds and/or efforts constituted a marital asset subject to equitable distribution.

- the purely passive appreciation in the value of the Riverview Property remained the Former Husband's non-marital asset.

SUMMARY OF THE ARGUMENT

The Court should decline to accept jurisdiction in this case, because all of Florida's Districts, except the First, have reached consensus on the law as to passive appreciation of non-marital property, and the First District has not directly addressed the issue in 14 years, except once, in dictum.

It is within this Court's discretion to decline this matter and allow the First District to resolve the issue when it is next raised directly and fully briefed for their consideration.

There is no urgency or necessity for the Court to address the issue of passive *appreciation* of real estate, because the economic recession has burst the real estate bubble in Florida, causing a virtually universal *depreciation* in property values.

The Parties' resources and the amount at issue are modest and do not justify the substantial additional expense of pursuing a discretionary review proceeding

with the Florida Supreme Court.

ARGUMENT

1. THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION OVER THE CERTIFIED QUESTION OF THE TREATMENT OF PASSIVE APPRECIATION OF NON-MARITAL REAL PROPERTY, BECAUSE:
 - A. ALL FLORIDA DISTRICTS, EXCEPT THE FIRST, HAVE EVOLVED IN THE PAST DECADE INTO CONSENSUS ON THE ISSUE OF PASSIVE APPRECIATION OF NON-MARITAL REAL PROPERTY, AND IT IS REASONABLE TO EXPECT THAT THE FIRST DISTRICT WILL FOLLOW SUIT WITHOUT SUPREME COURT ACTION IN THIS CASE.

After Section 61.075, *Florida Statutes*, was enacted in 1988, providing for equitable distribution of marital assets, there were some early missteps by Florida's appellate courts as they struggled to deal with the issue of marital enhancement of non-marital property – such as occasionally confusing the concept of equitable distribution with special equity, or relying on a factually dissimilar case which was applicable only to its specific facts.

In the past decade or so, however, the holdings of all but the First District have come into substantial harmony on the issue. There is consistency among recent cases from four of the Florida's five districts that, pursuant to Section 61.075(5)(a)(2), *Florida Statutes*, purely passive appreciation to non-marital real property is not a marital asset, i.e.:

Second District. The Second District's opinion in the subject case was based

upon the long-standing law of that district, which has, for at least 17 years, 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).

Third District. Likewise, the Third District, in *Adkins v. Adkins*, 650 So.2d 61 (Fla. 3d DCA 1995), 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), *Florida Statutes*, citing the Second District case of *Straley v. Frank*, 612 So.2d 610, 612 (Fla. 2d DCA 1992). See also, *Herrera v. Herrera*, 895 So.2d 1171 (Fla. 3d DCA 2005).

Fourth District. And the Fourth District followed suit in *Caruso v. Caruso*, 814 So.2d 498 (Fla. 4th DCA 2002), also citing the Second District case of *Straley v. Frank*.

Fifth District. Finally, the Fifth District followed the same analysis in *Thomas v. Thomas*, 776 So.2d 1092 (Fla. 5th DCA 2001).

Accordingly, Florida's Second, Third, Fourth, and Fifth Districts have evolved into consensus on the law addressing passive appreciation of non-marital real property, i.e., marital enhancement must result from marital efforts or funds, and does not include purely passive appreciation, pursuant to Section 61.075(5)(a)2, *Florida Statutes*, (2007), which provided that "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" constituted a marital asset.

In this discretionary review proceeding, the Second District certified a direct conflict with the First District's opinion in *Stevens v. Stevens*, 651 So.2d 1306 (Fla. 1st DCA 1995), which was decided 14 years ago.

The court's holding in *Stevens* as to passive appreciation of non-marital property was not subsequently followed by any opinions of the First District until it eventually arose indirectly last year, as dictum, in *Wilson v. Wilson*, 992 So.2d 395 (Fla. 1st DCA 2008), when that court cited *Stevens* "to provide guidance on remand."

Because, however, the issue of passive appreciation was not directly raised in the *Wilson* case, it is unlikely that the issue was briefed or that the court was even aware of the conflict between its 1995 opinion in *Stevens* and the current law of all the other Florida districts.

Conclusion and Relief Requested. The Second, Third, Fourth, and Fifth Districts have reached the consensus that purely passive appreciation of the non-marital real property owing to market forces is outside the ambit of Section 61.075(5)(a)(2), *Florida Statutes* (2007). As such, it remains the non-marital asset

of the property owner. It is reasonable to expect that the First District will, likewise, recognize and come into accord with the prevailing position in Florida when it next encounters the issue directly and it is fully briefed for the court's thorough consideration.

Accordingly, this Court should decline jurisdiction of this matter and allow the First District to address the matter in due time.

B. THE ECONOMIC RECESSION MAKES IT UNLIKELY THAT THE ISSUE OF PASSIVE APPRECIATION OF REAL PROPERTY WILL ARISE FREQUENTLY OR BE OF GREAT PUBLIC INTEREST IN THE FORESEEABLE FUTURE.

This issue has evolved slowly over the past two decades, and, despite the well-documented boom in Florida real estate values over that time period, there has not been a flood of cases to the appellate courts addressing passive appreciation of non-marital real property.

Given the recent, equally well-documented economic recession and associated plunge in Florida real property values, it is logical to anticipate that there will be significantly fewer such cases addressing the issue of passive appreciation, as there will be very little, if any, such appreciation in the value of real estate owned by a divorcing spouse.

Accordingly, this is not a pressing issue or one of significant public concern which needs resolution by the Court at this time or in the foreseeable future.

C. A SUPREME COURT REVIEW WOULD BE INAPPROPRIATE IN THIS CASE, WHERE THE PARTIES' RESOURCES AND THE AMOUNT OF PASSIVE APPRECIATION OF THE FORMER HUSBAND'S NON-MARITAL PROPERTY WERE MODEST, EVEN BEFORE THE SUBSEQUENT ECONOMIC RECESSION.

At the time of the Parties' dissolution in 2007 – in the midst of the Florida real estate bubble – passive appreciation often represented a significant percentage of the value of real property. However, given the universally acknowledged economic crisis and profound decline in the real estate market which has since occurred, the amount of any such “passive appreciation” has undoubtedly been decimated.

The Former Husband, in order to preserve his interest in his non-marital Riverview Property, has already incurred the substantial cost of defending himself against the Wife's appeal to the Second District, in which she raised four separate substantive issues, including the unfounded allegation that the Second District's law was in conflict with three other districts, rather than just the currently certified conflict with the First District.

As a result, Former Husband's appellate defense – which prevailed on all the but the issue of conflict with the First District – necessitated extensive research and analysis of the laws of every district in the state and the preparation of a 35-page Answer Brief, resulting in a significant depletion of the Former Husband's already limited financial resources.

Furthermore, the Parties to this discretionary review proceeding are both of modest means, each earning approximately \$3,000 per month in gross income. (A-1: 21). The Former Husband, who is now 61 years old, was a Publix meat-cutter and has suffered two strokes; the Wife, some 11 years younger, has worked for more than 20 years for the Hillsborough School District. (A-1: 1); (A-2: 5, 6); (A-3: 4, 16); and (A-4: 58, 59).

In view of the modest value of the passive appreciation originally at issue in this matter – which value has surely decreased since trial – and the overall modest financial resources of the Parties, this is not a case of such public importance or substance that the Parties can afford to continue incurring appellate attorney’s fees and other costs associated with pursuing a discretionary review proceeding to the Florida Supreme Court.

CONCLUSION

Accordingly, although this Court has the authority and discretion to exercise its discretion in this case to accept jurisdiction, there is no such obligation.

Respondent respectfully submits that this is not a case in which it would be helpful or necessary for the Court to accept review.

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

July 23, 2009.

JEANIE E. HANNA
Ware Law Group, P.A.
600 S. Magnolia Avenue, Ste. 225
Tampa, FL 33606
(813)254-8500
(813)254-9511 (facsimile)
Fla. Bar No.328413
Attorney for Respondent

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.

JEANIE E. HANNA
Fla. Bar No.: 328413