

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.

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

JURISDICTIONAL 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 parties were married to each other on March 31, 1980. (T: 17)

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)

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 district court of appeals in its opinion summarized the facts and findings below.

“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 foot [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 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 v. Mitchell, 841 So.2d 564 (Fla. 2d DCA 2003). (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. 1st 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 conflict needs resolution by this court. Based on the case law and scholarly article cited in the opinion under review, as well as those cited in the briefs below, the issue of treatment of appreciation in partly marital and partly nonmarital assets arises frequently in the state's divorce litigation practice. The disparity in treatment of this issue between the districts gives rise to a real and ongoing conflict in an area of the law which should be uniform statewide.

The instant case squarely presents the conflict issue for determination by this court. This conflict in approach by the different districts should be resolved by this court, to promote uniformity of the law within this state in the interpretation and application of the equitable distribution statute.

ARGUMENT

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 should therefore take jurisdiction over this appeal to resolve this ongoing substantial conflict between the districts in this state in practice and principal in this area.

CONCLUSION

For the reasons cited, this court should take jurisdiction over this appeal to resolve this conflict among the district courts of appeal.

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 June 23, 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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