IN THE SUPREME COURT OF FLORIDA

KATHERINE KAAA,

Appellant

v.

JOSEPH KAAA,

Appellee.
_____/

Case No. SC09-967

L.T. No. 2D08-276

Fla. Bar No. 436208

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

1. THERE CONTINUES TO BE DIRECT CONFLICT IN THE APPLICATION OF SECTION 61.075(5)(a)(2), FLORIDA STATUTES, BY THE SECOND AND FIRST DISTRICTS.

The appellee's first argument is that the First District in its Stevens decision failed to apply the equitable distribution statute, 61.075, Florida Statutes, even though that court actually cited the statute in its decision. The suggestion that a District Court of Appeals failed to consider a statute which it cites as authority for its decision does not bear further response.

The appellee argues that there is no conflict between the case on appeal and the Stevens case as cited by the Second District, because the Stevens case did not apply the equitable distribution statute. Stevens v. Stevens, 651 So. 2d 1306 (Fla. 1st DCA 1995) This argument is not well taken; he just disagrees with the First District's analysis and application of that statute.

He also argues that later cases in the First District are consistent with Mitchell and not consistent with Stevens. Mitchell v. Mitchell, 841 So.2d 564 (Fla. 2d DCA 2003)

However, neither Gaetani-Slade nor Martin, cited by appellee, are inconsistent with the Stevens case. Gaetani-Slade v. Slade, 852 So.2d 343 (Fla. 1st

DCA 2003); Martin v. Martin, 923 So.2d 1236 (Fla. 1st DCA 2006)

The court in Gaetani-Slade ruled that the trial court had erred in failing to award a portion of the enhanced value in one party's nonmarital asset to the other, based on uncontested evidence that marital funds and efforts were used to both renovate the property and to pay down the mortgage.

That court did not get to the point of ruling on whether passive or market enhancement of the marital portions of the property could be equitably distributed as well, but did note that the burden fell on the owning spouse to prove the portion of enhancement that was not attributable to marital efforts. This could have meant the amount of initial equity at the time of marriage plus a portion of passive enhancement attributable to that non-marital equity: the opinion did not reach that point.

The case is therefore not authority as appellee argues that the First DCA receded from Stevens or that Stevens did not follow the equitable distribution statute which was in effect when it was decided and which that court actually cited in its opinion.

The court in the Martin decision likewise found that there was a failure of proof as to the appreciation in value due to marital efforts, not that any award would be limited to the paydown of a mortgage by marital funds.

> "There are two theories under which former husband could have been awarded an interest in a nonmarital asset: special equity and enhancement in value. The amended final judgment of dissolution of marriage failed to provide sufficient factual support to award former husband a one-half interest in the property under either theory.
> ...
>
> Accordingly, to make an award for the enhancement in value and appreciation of a nonmarital asset, the court must make specific findings as to the value of such enhancement and appreciation during the marriage, as well as which portion of that enhanced value is attributable to marital funds and labor. See id.; see also § 61.075(3)(b), Fla. Stat. (2004).
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> ...
>
> The circuit court found the property to be worth $80,000. It did not find what the property was worth when former wife acquired title, nor did it find the appreciation value of the property attributable to efforts of either party during the marriage or contribution from marital funds. Therefore, the record before us does not support an award of enhancement in value." Martin, supra.

The case of Fashingbauer v. Fashingbauer, 19 So.3d 401 (Fla. 1st DCA 2009), cited by the appellee, also does not support his position that the First District has receded from Stevens. In that case, the court found that the only competent, substantial evidence presented was that only real estate taxes were paid from marital funds on the non-marital real property, and there was expert testimony that this did not increase the value of the property.

There was no evidence of any enhancement in value of this asset so as to trigger a finding of a marital component. That case is therefore distinguishable

from the instant case and from Stevens.

In fact, the First District has specifically cited Stevens on exactly this point as continuing valid governing case law as recently as 2008, in the case of Wilson v. Wilson, 992 So.2d 395 (Fla. 1st DCA 2008). That case in fact was cited by the Second District in its opinion here on appeal as quoting in turn extensively from Stevens.

> "The former wife also asserts that the enhancement in the value of the Motel property was due solely to passive market forces and, accordingly, no marital asset exists for distribution. Given our holding, it is not necessary for us to reach this issue for the disposition of this case. Nevertheless, because this issue will recur on remand, we choose to address it to provide guidance on remand. See, e.g., Pangburn v. State, 661 So.2d 1182, 1189 (Fla. 1995); Lodge Constr., Inc. v. Monroe County, 891 So.2d 568, 569 (Fla. 3d DCA 2004).
>
> As this court explained in Stevens v. Stevens, 651 So.2d 1306, 1307 (Fla. 1st DCA 1995):
>
> > 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. . . . 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 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. . . .
>
> "Once a non-owner spouse establishes that marital funds or labor were used to improve [an asset] that was nonmarital, the owner-spouse has the burden to show which parts are exempt." Gaetani-Slade v. Slade, 852 So.2d 343, 347 (Fla. 1st DCA 2003)." Wilson, supra.

Also not well taken are appellee's arguments that the amount in controversy in this matter is de minimus and that because of the current general decline in property values this issue is not in need of determination by the court. The amount in controversy in this case is in excess of $ 175,000.

At the time of the trial, the parties stipulated that the home had a fair market value of $ 225,000, and was subject to a remaining mortgage balance of $ 12,871.46. (T: 85; R: 797)

The 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 the appraiser's testimony of the value of the increase in square footage of the home during its renovation. (T: 107)

These two components constituted $ 36,679 in marital equity out of the $ 212,128.54 in total equity in the home. The result of the final judgment was that $ 175,499.54 in equity in the home was deemed to be non-marital and was awarded to the former husband. One half of this amount, or $ 87,724.77, was the additional amount the former wife was seeking as her share of the equitable distribution of this asset, over and above the amount awarded by the trial court.

It is submitted that $ 87,724.77 is not de minimus in anyone's wallet.

The appellee also cited the current general real estate market decline as a basis for this case not being worth this court's consideration. However, married parties that buy or own at the bottom of the market are more likely to see increased passive or market appreciation in the future. It is rather more likely than less that the issue of whether market appreciation of a marital component of a non-marital real asset is subject to equitable distribution will continue to arise in the future if not dealt with now.

The appellee's assertions of fact about his limited means as contained both in his answer brief and his motion for fees are more properly directed to a trial court on remand; neither is part of the record.

$ 175,000 is worth fighting over, and the appellee will walk away with this sum if the court declines to address the issue raised in this appeal.

2. THE STEVENS CASE LAW DOES NOT CONFLICT WITH THE EQUITABLE DISTRIBUTION STATUTE.

The appellee next argues that the Stevens case does not comply with the dictates of the statute, Section 61.075, Florida Statutes. However, his interpretation of the statute requires that the court ignore and eliminate the plain language of the statute: the enhancement in value and appreciation of nonmarital assets resulting ... (from marital funds or efforts). The appellee's reading of the statute is only correct if one ignores the underscored words.

If Mitchell applies the law as envisioned by the legislature in enacting the statute, would the statute not have omitted the words "and appreciation"? The Mitchell case allows the distribution of only the direct enhancement in value of a nonmarital asset due to marital funds and efforts. It specifically does not permit the distribution of any appreciation of the nonmarital property due to the marital efforts, or attributable to the marital component of the asset. It is the Mitchell

case rather that fails to apply the statute in its entirety.

Where, as here, the vast majority of the equity of the non-marital asset is funded from marital sources, failing to award any appreciation in the value of the marital component does not comply with the statute. Under Mitchell, all appreciation in value of a nonmarital asset is always non-marital. How does this square with the language of the statute that the appreciation is marital?

This is not a question of semantics; the interpretation given to the statute by the appellee and Mitchell do not give effect to the plain language of the statute. The Mitchell decision defines marital appreciation out of existence when one considers a non-marital asset. This does not comply with the statute. Mitchell must be disapproved by this court.

Appellee argues that "Section 61.075 does not permit passive market appreciation of a non-marital asset to be converted to a marital asset." This is true. However, the statute does permit and require the court to define passive market appreciation of the portion of a non-marital asset which is marital due to enhancement from marital funds or labor to be equitably distributed as a marital asset. This is the ruling in Stevens, which should be approved by this court.

The appellee uses enhancement and appreciation interchangeably; they are not interchangeable and each signify different things. If they were the same

thing, the legislature would probably have used only one of the terms in the statute. We must interpret the statute as if all of the words in it count and are to be given effect.

Appellee cites certain pre-statute cases as providing the provenance of the Stevens decision by the First District. Such a provenance is not inconsistent with the proper interpretation of the statute: one might as well say that the statute's provenance is consistent with the First District's pre-statutory cases.

The Adkins case cited by appellee did not hold contrary to the Stevens case, but rather noted that passive appreciation on the non-marital component of a partly marital asset is not subject to distribution. Adkins v. Adkins, 650 So.2d 61 (Fla. 3d DCA 1995) This holding is consistent with Stevens, Mitchell, and the statute. There was no proof in the Adkins case of the portion of the passive increase in value of the asset which was attributable to the marital component thereof.

The remaining cases cited by appellee in this section of is brief are entirely consistent with the Stevens case, contrary to his argument. Pleas v. Pleas, 652 So.2d 435 (Fla. 1st DCA 1995); Graff v. Graff, 569 So.2d 811 (Fla. 1st DCA 1990)

Appellant contests appellee's contention that the districts are all in accord on the issue on appeal here: is there such a thing as marital appreciation in value of a marital component of a non-marital asset.

Herrera, cited by appellee as supporting Mitchell, dealt with direct enhancement in value due to mortgage paydown and improvements; passive appreciation of either the marital or the non-marital components was not an issue determined. Herrera v. Herrera, 895 So.2d 1171 (Fla. 3d DCA 2005)

Caruso v. Caruso, 814 So.2d 498 (Fla. 4th DCA 2002), cited by appellee, did not deal with passive appreciation at all, but rather with the marital definition of a business deal in progress on the date of filing the divorce petition. Thomas v. Thomas, 776 So.2d 1092 (Fla. 5th DCA 2001), also did not involve any discussion of passive appreciation of a mixed asset.

The claimed differences between the districts cited by the appellee are agreed to exist only as between the Second District and the First District for reasons of this appeal, but it is submitted that there appear to be no cases in any other district which apply the ruling in Mitchell to the issue of allocation of passive appreciation in a mixed asset.

Stevens and its reasonable proration formula is good law today in the First District, and Mitchell and is limitation to direct enhancement is good law today in the Second District. These lines of cases are incompatible, and the discrepency should be resolved by this court adopting the Stevens case and its progeny as setting forth the correct rule of law in this area.

3. PUBLIC POLICY DOES NOT SUPPORT THE MITCHELL CASE.

Public policy would not be enhanced by adopting the reasoning of the appellee. The appellee argues that parties owning pre-marital real properties will be discouraged from moving their families in to the property if a portion of any subsequent appreciation in value might become marital and subject to distribution.

However, a party owning a premarital home can prevent such a result simply by making all payments on the property out of his or her non-marital funds, and continuing to maintain tracing of his non-marital contributions. This is true under any interpretation of the statute.

But if the non-marital asset is improved and its equity expanded by way of marital funds and efforts, the legislature has provided that the non-owning spouse is entitled to distribution of the subsequent enhancement and appreciation.

The only question remains whether the portion of the asset which is marital can throw off its distributable appreciation, or if all of the appreciation is deemed to arise from the non-marital portion. The facts of this case provide a clear basis for a ruling, and the Stevens case provides the more equitable approach which is consistent with and carries out the language of the statute. The Mitchell case should be disapproved and the Stevens case approved as the proper analysis under Florida law.

The appellee's speculation that landowning spouses would have an incentive to live in a rental house in order to avoid his or her spouse deriving any benefit from the marital contributions does not seem a likely result of the ruling in Stevens. There has been no indication in the case law, despite fifteen years of Stevens being the law in the First District, that married couples who live in the First District have opted out of cohabitation in the non-marital property. Indeed, the Stevens scenario continues to arise there. Wilson, supra.

The appellee's comparison of this case to the Farrior case and Justice Pariente's concurring opinion is not well taken. Farrior v. Farrior, 736 So.2d 1177 (Fla.1999)

Here, unlike in Farrior, the vast majority of the purchase consideration for the asset in question was marital. This factual distinction renders appellee's comparison invalid.

The appellee's policy argument is not well taken or persuasive.

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 January 19, 2010.

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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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