

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, FOURTH DISTRICT
Fourth DCA Case No. 4D10-3051

DIANNE L. HAHAMOVITCH n/k/a DIANNE LYNN
Petitioner,

vs.

HARRY H. HAHAMOVITCH
Respondent.

JURISDICTIONAL BRIEF OF PETITIONER

Supreme Court Case No. SC14-277

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PRELIMINARY STATEMENT REGARDING RECORD REFERENCES:

References to the Fourth District’s decision (“Decision”) are preceded with “Op.” followed by the page of the Decision referred to. Petitioner is the former wife, Dianne L. Hahamovitch n/k/a Dianne Lynn (“Wife”). Respondent is the former husband, Harry H. Hahamovitch (“Husband”).

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§ 29:4 p. 742-43 (Padovano, Phillip J.) 2

Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 530 (2005) 6

INTRODUCTION:

This petition evolves from the dissolution of a long term marriage. The Fourth District's January 8, 2014 decision interpreted a 1986 prenuptial agreement between the parties (the "PA"). *Hahamovitch v. Hahamovitch*, — So. 3d —, 2014 WL 52717, *reh'g. den.*, February 3, 2014 (Fla. 4th DCA 2014) (the "Decision").

Wife filed her Notice to Invoke this Court's Discretionary Jurisdiction on grounds that the Decision passes on question certified to be of great public importance, and it certifies direct conflict with opinions two other districts. *Fla. Const. Article V § 3(b)(4); Rules 9.030(a)(2)(A)(v) and (vi), Fla.R.App.P.* The Fourth District found the following recurring legal issue to be one that has great impact on the citizens of this state, and certified it to be of great public importance:

WHERE A PRENUPTIAL AGREEMENT PROVIDES THAT NEITHER SPOUSE WILL EVER CLAIM ANY INTEREST IN THE OTHER'S PROPERTY, STATES THAT EACH SPOUSE SHALL BE THE SOLE OWNER OF PROPERTY PURCHASED OR ACQUIRED IN HIS OR HER NAME, AND CONTAINS LANGUAGE PURPORTING TO WAIVE AND RELEASE ALL RIGHTS AND CLAIMS THAT A SPOUSE MAY BE ENTITLED TO AS A RESULT OF THE MARRIAGE, DO SUCH PROVISIONS SERVE TO WAIVE A SPOUSE'S RIGHT TO ANY SHARE OF ASSETS TITLED IN THE OTHER SPOUSE'S NAME, EVEN IF THOSE ASSETS WERE ACQUIRED DURING THE MARRIAGE DUE TO THE PARTIES' MARITAL EFFORTS OR APPRECIATED IN VALUE DURING THE MARRIAGE DUE TO THE PARTIES' MARITAL EFFORTS?

Pursuant to *Rule 9.120(d), Fla.R.App.P.*, when invoking discretionary review

of cases certified as being “questions of great public importance” no jurisdictional brief is filed. *Id.*; *Florida Appellate Practice* (2014 Edition, vol. 2), § 29:4 p. 742-43 (Padovano, Phillip J.). Consequently, certified question jurisdiction is not argued in this brief, other than to state that this Court has certified a question jurisdiction pursuant to *Rule 9.030(a)(2)(A)(v), Fla.R.App.P.* because the entire panel that issued this Decision concurred in certifying the question, there were no dissents disagreeing with the decision to certify, the merits of the legal issue(s) in this Decision were resolved by the panel, and the Decision did not merely certify the question without resolving the merits. *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832 (Fla. 2007). This Court’s review will settle a recurring legal issue that has a significant impact on citizens who have entered into prenuptial agreements. *Id.*

JURISDICTIONAL STATEMENT:

Pursuant to *Rule 9.120(d), Fla.R.App.P.* Wife files this brief in support of her notice invoking the Court’s discretionary certified conflict jurisdiction under *Fla. Const. Article V, § 3(b)(4)*. The Fourth District explicitly identified *Valdes v. Valdes*, 894 So. 2d 264 (Fla. 3rd DCA 2004) and *Irwin v. Irwin*, 857 So. 2d 247 (Fla. 2nd DCA 2003) as decisions of other districts with which it conflicts [Op. 8]. This Court may exercise its jurisdiction under *Article V, § 3(b)(4)* to review any decision of a district

court of appeal that is “. . . certified by it to be in direct conflict with a decision of another district court of appeal” on the same question of law. *Fla. Const. Art. V, § 3(b)(4)*; *Rule 9.030(a)(2)(A)(vi), Fla.R.App.P.* This Court also has conflict jurisdiction under Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.

STATEMENT OF THE CASE AND FACTS:

The Fourth District interpreted the PA’s waiver, release and title presumption provisions far broader than other district courts have interpreted substantially identical provisions, announced a rule of law that conflicts with a rule of law previously announced by two other district courts and certified direct conflict with the Second District’s *Irwin* decision and the Third District’s *Valdes* decision [Op. 8]. The language of the waiver, release and title presumption provisions of the prenuptial agreements in this Decision, *Irwin* and *Valdes* are all substantially identical [Id.]. Even so, the Decision deemed the PA’s title presumption and release provision broad enough to waive Wife's right to any asset titled in Husband’s name that was acquired or enhanced during the marriage with marital labor or earnings, even though the waiver is silent on the issue of appreciation of non-marital property and there’s no specific waiver of salary.¹ In doing so, the Fourth District recognized that *Irwin* and

¹ In this long term marriage, the PA provides in part:

2. DIANNE'S RELEASE. Except as otherwise provided for herein, in the event either

Valdes interpret “substantially similar” title and release provisions as not waiving appreciation of non-marital property unless there is an express reference to appreciation [Op. 5].

of the Parties hereto institutes legal proceedings for dissolution of marriage, DIANNE hereby waives and releases, and is hereby barred from any and all rights and claims of every kind, nature and description that she may acquire or to which she may be entitled under the laws of any jurisdiction as a result of the marriage between the Parties, in and to any of HARRY's property, including, but without intending thereby to limit the generality of the foregoing, any and all right to alimony, either lump sum, rehabilitative, permanent, or otherwise, support and maintenance, equitable distribution, division of property, special equities, attorney's fees, or any other rights that DIANNE may have against HARRY relative to financial issues.

5. RETENTION OF SOLE PROPERTY. Except to the extent that the parties may otherwise desire, HARRY and DIANNE shall, during their respective lifetimes, keep and retain sole ownership, control, enjoyment and power of disposition with respect to all property, real, personal or mixed, now owned or hereby acquired by each of them respectively, free and clear of any claim by the other.

9. MUTUAL RELEASE. In consideration of the marriage of the Parties to each other, and in consideration of the other provisions herein contained, each party agrees that neither will ever claim any interest in the other's property and that the property of every kind, nature and description which either one has on the date of the marriage will remain the respective separate property of each after said marriage, and each agrees not to make any claim against the property of the other.

17. TITLE PRESUMPTIONS. It is additionally understood that if HARRY purchases, acquires, or otherwise obtains, property and title to said property is in HARRY's name with DIANNE and no explanation is made as to the percentages of interest that either party has, then it shall be presumed that they shall be 50% – 50% owners of said property. If HARRY purchases, acquires, or otherwise obtains, property in his own name, then HARRY shall be the sole owner of same. If DIANNE purchases property in her name, then DIANNE shall be the sole owner of same [Op. 3-4].

In addition, the Decision details the inconsistencies in the case law among all District Courts of Appeal as to waiver of active versus passive appreciation under prenuptial agreements [Op. 6-7]. The Decision conflicts with the Second District, which holds that a simple express waiver of appreciation waives *only passive* appreciation – but does not waive increase in value attributable to marital labor and funds [Op. 6 (citing *Doig v. Doig*, 787 So. 2d 100, 103 (Fla. 2nd DCA 2001))]. Conversely, this Decision deems both active and passive appreciation of non-marital property and Husband’s income is waived, even though the PA is silent as to appreciation that occurs as a result of marital labor or marital income [Id.]. The Decision aligns itself with *Cameron v. Cameron*, 591 So. 2d 275, 276-77 (Fla. 5th DCA 1991), on waiver of both active and passive appreciation, even though the Fifth District requires an express reference to appreciation [Op. 6]. *Id.*

SUMMARY OF THE ARGUMENT:

This Court has certified conflict jurisdiction under Rule 9.030(a)(2)(A)(vi). Certification itself presumes that the law is unsettled and that the inconsistency needs resolution. Conflict jurisdiction also exists under Rule 9.030(a)(2)(A)(iv) because of the conflict among Districts as to whether a simple waiver of “appreciation” waives both active and passive appreciation. This Court should exercise its jurisdiction to settle these matters because of the large number of prenuptial agreements in this state

and the great impact that these splits of authority will have on equitable distribution for its citizens. Settling these issues will assist prenuptial agreement drafters and obviate the inevitable forum shopping that will erupt because of the conflict among the Fourth, Third, Second and Fifth Districts should this Decision stand.

ARGUMENT:

I. THIS COURT HAS JURISDICTION BECAUSE FOURTH DISTRICT CERTIFIED ITS DECISION TO BE IN DIRECT CONFLICT WITH THE THIRD DISTRICT'S DECISION IN VALDES v. VALDES, 894 SO. 2D 264 (FLA. 3RD DCA 2004) AND THE SECOND DISTRICT'S DECISION IN IRWIN v. IRWIN, 857 SO. 2D 247 (FLA. 2ND DCA 2003)

Although it is not necessary for a District Court to explicitly identify an opinion of another District with which its decision conflicts to create conflict jurisdiction, this Decision does so. *Ford Motor Co. v. Kiwis*, 401 So. 2d 1341, 1342 (Fla. 1981). The Decision explicitly identified *Irwin* and *Valdes* as decisions that it is in direct conflict with [Op. 5, 8].

“[T]he very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court, a view that the Court has approved.” Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 530 (citing *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001)). The law is now quite unsettled among the Districts when it comes to the interpretation of

title presumption and general release clauses in prenuptial agreements. The Second and Third Districts both construe title presumption and release provisions that are “substantially similar” to that contained in this PA to be *insufficient* to waive a spouse's claim to the enhanced value of the other spouse's non-marital property [Op. 5, 8]. *Valdes*, 897 So. 2d at 267; *Irwin*, 857 So. 2d at 248 (e.s.). In the Fourth District, however, the general release and title presumption clauses are *sufficient* to waive such entitlement [Id.] (e.s.). Given the explicit identification of *Irwin* and *Valdes* as cases with which the Decision directly conflicts, this Court has jurisdiction under *Fla. Const. Article V, § 3(b)(4)*. *See also Fla. R. App. P. 9.030(a)(2)(A)(vi)*.

In *Valdes* the antenuptial agreement contained a title presumption clause, and general release of property already owned or to be acquired, that was silent on enhancement and appreciation of non-marital property. *Id.*, 897 So. 2d at 265, 267. The *Valdes* antenuptial agreement stated: 1) the parties would have no interest in or to property acquired prior to the marriage nor make any claim against said property, and 2) assets acquired by parties, where ownership or title was not taken jointly or as tenants by entireties, would be presumed to be non-marital assets, and would be considered the separate property of the spouse acquiring same. *Id.* at 267. The Third District found the waiver and title provisions in that agreement *insufficient* to waive entitlement to enhancement and appreciation of non-marital property. *Id.* (e.s.).

The *Irwin* prenuptial agreement also had title presumption and general release provisions substantially similar to that of this PA [Op. 5, 8]. Under *Irwin*, a prenuptial agreement that does not *specifically designate* a spouse's earnings as separate property does not waive assets acquired with those earnings as marital. *Id.*, 857 So. 2d at 248-49 (e.s.) (citing *Witowski v. Witowski*, 758 So. 2d 1181, 1185 (Fla. 2nd DCA 2000) (without *specific provision* stating husband's salary will be his separate property, it's not protected). Our PA does not specifically waive salary or appreciation. The Decision disagreed with both *Irwin* and *Valdes*, and found salary earned by Husband during the marriage, along with all property obtained with those earnings, to be waived and expressly certified a conflict [Op. 8].

The Decision also found the case law among other districts to be very inconsistent as to the equitable distribution of active versus passive appreciation – active appreciation being the result marital labor and earnings [Op. 6-7]. The Fourth District pointed at one of its own prior cases that “suggested” both active and passive appreciation were waived even though the agreement did not expressly describe the nature of the enhancement waived [Op. 6 (citing *Timble v. Timble*, 616 So. 2d 1188, 1189 (Fla. 4th DCA 1993))]. In sharp contrast, the Second District holds that a simple waiver of appreciation or value increase waives *only passive* appreciation – i.e., increase in value that is not attributable marital labor and funds. *Witowski*, 758 So.

2d at 1185 (e.s.); *Worley v. Worley*, 855 So. 2d 632, 635 (Fla. 2nd DCA 2003); *Doig*, 787 So. 2d at 103 (agreement that neither party shall claim or acquire interest in appreciation of other party's separate property during marriage addresses *only passive* appreciation) (e.s.). Conversely, the Fifth District holds that both types of appreciation are waived, including any enhancement in the value of such property, when the waiver specifically addressed future enhancement [Op. 7 (citing *Cameron*)].

As a result of the conflict among the Districts on active versus passive appreciation, this Court also has conflict jurisdiction under *Fla.R.App.P. 9.030(a)(2)(A)(iv)*. With certified direct conflict as to enhancement value, appreciation and salary, and the merits of the Decision being, therefore, irreconcilable with that of *Irwin* and *Valdes*, this Court has and should exercise jurisdiction to review this Decision. *See, e.g., Williams v. Duggan*, 153 So. 2d 726 (1963) (Supreme Court has jurisdiction to resolve conflict resulting when one district court of appeal renders a decision wholly irreconcilable with that of another district). There is also conflict jurisdiction with the Second District's *Doig* decision as to simple express waivers only waiving passive appreciation.

II. THIS COURT SHOULD EXERCISE ITS JURISDICTION TO RESOLVE THE CONFLICTS AND RESULTING UNCERTAINTY IN THE LAW

Exercise of jurisdiction will clarify uncertain and conflicting case law. There

are an enormous number of prenuptial agreements in this state. Title presumption provisions are very common in prenuptial agreements. The Decision itself states that the issues have significant impact on the citizens of this state [Op. 11]. Resolution of the conflicts will assist prenuptial agreements drafters, curb litigation over entitlement to salary and appreciation occurring during marriage from marital efforts and eliminate forum shopping for the desired outcome of a spouse's claim for a share of salary and appreciation of non-marital assets. The scope and specificity of waivers must be resolved. This Court can reject the unwarranted, newly expanded reading of title presumption clauses. The waiver of appreciation value – be it active or passive, or both – conflicts among the districts and remains quite unsettled. This Court should exercise jurisdiction and resolve these issues.

CONCLUSION:

This Court has discretionary jurisdiction. Petitioner respectfully asks the Court to exercise it.

Respectfully submitted:
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CERTIFICATE OF TYPESETTING AND COMPLIANCE:

The undersigned certifies that this Jurisdictional Brief complies with **Rule 9.210(a) (2), Fla.R.App.P.**, as it is typed with times new roman 14 point font in Corel WordPerfect® X5 format. The Brief has been filed electronically and a copy supplied to all counsel.

By: /s/ Jeanne C Brady, Esq.

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CERTIFICATE OF E-SERVICE:

I HEREBY CERTIFY that a true and authentic copy of the foregoing has been furnished via email to **Robert W. Sidweber, Esq.**, and **Karen B. Weintraub, Esq.** Sidweber & Weintraub, P.A., The Tides at Bridgeside Square 3020 NE 32nd Avenue, Suite 301, Ft. Lauderdale, FL 33308, email: Bob@Sidweberlaw.com and Karen@sidweberlaw.com ((Wife's trial counsel); and **Joel M. Weissman, Esq.**, Joel M. Weissman, P.A., 515 N. Flagler Drive, Suite 1100, West Palm Beach, FL 33401, email Joel@jmwpa.com (attorneys for Husband) and that same has been e-filed with this Court this 18th day of February, 2014.

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