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IN THE SUPREME COURT OF FLORIDA

APPEAL NO. SC 14-277

DIANNE L. HAHAMOVITCH N/K/A DIANNE LYNN
Petitioner,
vs.
HARRY H. HAHAMOVITCH
Respondent.

REPLY BRIEF ON THE MERITS OF PETITIONER, DIANNE L. HAHAMOVITCH N/K/A DIANNE LYNN

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS
4th DCA CASE NO. 4D10-3051
L.T. NO. 502008DR001392XXSB

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REBUTTAL ARGUMENT

The rebuttal points all involve interpretation and are intertwined. As a result, the point headings are analyzed together rather than separately.

I. THE FOURTH DISTRICT WAS INCORRECT TO EXCLUDE WIFE FROM ACTIVE AND PASSIVE APPRECIATION, SALARY AND THE FRUITS OF MARITAL LABOR UNDER THE PA AND THE CERTIFIED QUESTION MUST BE ANSWERED IN THE NEGATIVE

II. THE COURT ERRED IN CURTAILING DISCOVERY AS TO WIFE'S PROPERTY

III. THE TRIAL COURT AND 4TH DCA ERRED IN FAILING TO INVALIDATE THE PA

Husband says there is no conflict because the Opinion employed the phrase: "to the extent there is conflict with . . ." [AB pp. 16-17]. Wife disagrees. This Court uses that phrase when quashing conflicting decisions. Intermediate courts do too when certifying conflict. The "certified conflict" was also stated in two other places within the Opinion, as it certified conflict "with other districts" and "with the Second and Third Districts". ***Hahamovitch***, 133 So. 3d at 1010, 1017. It also found other case law inconsistent, including ***Worley***, ***Doig***, ***Witowski*** and ***Cameron***.

Husband erroneously contends that an absence of appreciation, enhancement and marital income language in the ***Valdes*** and ***Irwin*** agreements distinguish them from this PA because the "now owned or hereby acquired" language in the retention of sole property clause (¶5), together with language in the title presumption (¶17) and

mutual release (¶9) clauses of this PA, purportedly waive Wife's claim to marital appreciation and enhancement [AB pp. 16-17]. No so. Those paragraphs provide:

> 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. . . [A-3 ¶5] (e.s.).
>
> 9. MUTUAL RELEASE . . . 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 their marriage* will remain the respective separate property of each after said marriage . . . [A-3 ¶9] (e.s.).
>
> 17. TITLE PRESUMPTION 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 [he] shall be the sole owner of same. If DIANNE purchases property in her own name, then [she] shall be the sole owner of same [A-3 ¶17].

Paragraph 5's "now owned" or "*hereby* acquired" verbiage does not pertain to property acquired after marriage. "Now owned" simply means owned when the PA was entered, and "*hereby* acquired" means acquired by means of entering this PA. ***E.g., Webster's New World Compact Desk Dictionary and Style Guide***, 2nd Ed. p. 227 (Wiley Publishing, Inc. 2002) (e.s.) ("hereby" an adverb meaning "by this means"). In either case, Husband's sole property is that owned *before* marriage.

Husband's entire argument references ¶2 (Dianne's Release) only once. [AB p. 12]. That provision doesn't change the analysis because Wife's release of Husband's property in ¶2 doesn't define "Husband's property" and it starts with the proviso "except as otherwise provided herein . . ." The PA otherwise provides in ¶5, which defines Husband's "sole property" as "now owned or *hereby* acquired", ¶¶15A and 20 (joint property), ¶15B (property acquired solely in Wife's name), and ¶26 (gifts). The only place there is any provision for property acquired in *Husband's* name after marriage is the title presumption provision (¶17). However, ¶17's presumption isn't an *irrebuttable* presumption. Like any presumption, it can be rebutted by evidence, which the trial court precluded. There is an after acquired property provision for property acquired by Husband in *Wife's* name in ¶15B that gives him a credit against the alimony owed to Wife, and she gets to keep such property [A-1 ¶15B] (e.s.).

Even proper after acquired property clauses (absent from ¶5) have uniformly been deemed insufficient to waive appreciation and marital salary when they do not very specifically say so – until this Opinion. ***Irwin*** included an after acquired property clause along with a title presumption that was *insufficient* to waive marital earnings and appreciation because it did not say so:

> [wife] waives and releases all rights in the property and estate of [husband] ... which she may acquire by reason of her marriage to

> [husband]. The foregoing shall apply to any property owned by [husband] at any time, *whether such property is acquired or held prior to or during the marriage, and whether held in his name alone or in both of their names, jointly or as tenants in common*, or whether held in any such manner by him or his estate upon his death.

Id., at 248 (e.s.). Likewise ***Valdes*** had a specific after acquired property clause along with a title presumption. That too was *insufficient* to waive marital appreciation of non-marital property because appreciation was not specified in that agreement:

> . . . Each Party acknowledges and agrees that the other Party may purchase any real, personal or mixed property subsequent to their marriage and *if said property is taken or titled in the individual name of said Party purchasing same, the other Party shall have no interest in said after acquired property, nor make any claim to said property should this marriage be dissolved* by a Court of Competent Jurisdiction

Valdes, at 265 (e.s.). Just like ***Valdes*** and ***Irwin***, there is no express waiver of marital efforts, appreciation or salary here. This PA also lacks an after acquired property clause as to Husband that is not merely presumptive, and ¶5 limits Wife's waiver of his sole property to that already owned or acquired by means of the PA, with no mention of after acquired property, marital efforts or appreciation.

Nevertheless, the Fourth District essentially rewrote the PA to ignore the limitation of Husband's property to that now owned or hereby acquired property in ¶5, while adding a discovery bar into ¶17 when that is merely a presumptive provision that would be subject to proofs to the contrary. It read this PA to waive Wife's right

to appreciation or enhancement value, and all marital efforts in conflict with substantially similar clauses.

Even though Husband entered the Kaplan Draft into evidence,[1] he now claims it's irrelevant because both parties agreed that the PA is unambiguous [AB pp. 18-20]. Wife disagrees. It is well settled that a contract can be rendered ambiguous even when both parties adamantly contend, and the court holds, the contract to be clear and unambiguous. ***E.g., Royal Am. Realty, Inc. v. Bank of Palm Beach & Trust Co.***, 215 So. 2d 336 (Fla. 4th DCA 1968). A contract is ambiguous as a matter of law when it is reasonably or fairly susceptible to different constructions. ***Id***. If it is not clear that these parties declined to waive appreciation, salary and martial efforts, then at best there is ambiguity that is cleared up in Wife's favor by the Kaplan Draft.

Husband insists that the parties waived appreciation of nonmarital property through "clear" waiver and release language by relying on the definition of "nonmarital property" in § 61.075(5)(b)4 and ***Cameron v. Cameron***, 591 So. 2d 275 (Fla. 5th DCA 1991) [AB pp. 10-13]. The statute does not help him in the absence of an express wavier in this PA, and ***Cameron*** actually supports Wife. ***Cameron*** requires an agreement to contain an *express reference to appreciation* to waive it.

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[1] The Kaplan Draft was admitted into evidence by Husband without any objection [T1 p. 105, H. Ex 37; A-3].

Cameron ruled that agreement shielded husband's plumbing company because the company itself was expressly referred to in that waiver. It also found the waiver provision *ambiguous* as to all assets *acquired after* marriage. ***Id.*** at 277 (e.s.). ***Cameron*** turned on wife's *extrinsic* testimony that she understood the primary point of their agreement to shield her husband's premarital plumbing business, but not assets acquired *after* marriage. ***Id***. (e.s.). Applying ***Cameron*** here, elimination of the Kaplan Draft's following language shows the parties' intent not to waive appreciation, salary or marital efforts:

> . . . DIANE shall not claim or acquire any interest in any of [Harry's] property *now owned or to be acquired* nor shall DIANE claim or acquire any interest in any such property *if it increases in value during the marriage and DIANE waives any rights to any such increases*.

[A-3 p. 1 ¶5] (e.s.). Elimination of that language from the final PA shows that the parties chose not waive appreciation, marital salary, value increases or items generated by marital efforts. Husband's alternative contentions that the Kaplan Draft shows that the parties felt that the "broad waivers" in the final PA make more specific language unnecessary and that § 61.075 cannot apply because it was enacted after the date of this PA have no merit [AB pp. 18-19]. The Opinion itself recognizes that prior to section 61.075's enactment such items were subject to equitable distribution. ***Hahamovitch***, at 1013 (citing ***Keller v. Keller***, 521 So. 2d 273 (Fla. 5th DCA 1988), ***Crapps v. Crapps,*** 501 So. 2d 661 (Fla. 1st DCA 1987), and ***Sanders v. Sanders***, 492

So. 2d 705 (Fla. 1st DCA 1986)). It necessarily follows that an express waiver of same has always been required to exclude such marital property from the distributable marital estate.

Husband reads this PA to vest him with unfettered and undiscoverable control over Wife's separate and/or joint property, even if she never knew she owned sole and marital property. He mentions ¶9 (mutual release) and ¶17 (title presumptions), without addressing the lack of any reference to property acquired after marriage in ¶5 (retention of sole property) [AB pp. 7, 17]. Although he glances at ¶5 in his brief, he declined to address Wife's right to her own sole property, her right to ½ of all property where title is unclear, gifts, all joint ownership provisions and that his own "sole property" is expressly limited to what is already owned or "*hereby* acquired" (i.e., by means of the PA itself) [A-1 ¶¶15A, 19, 20, 21; IB pp. 12-16, 20-21, 29, 35-36, 39, 43-47] (e.s.). His construction defies all principles of good faith and fair dealing in that it allows for his unchecked transmutations as to Wife's individual, joint and marital property into his own name. ***See Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc***., 785 So. 2d 1232, 1235 (Fla. 4th DCA 2001) (Florida law recognizes implied covenants of good faith and fair dealing in every contract). If his construction is correct, then this PA should be invalidated under ***Casto*** for unfairness on its face when entered [IB pp. 48-49].

Husband had ample opportunity to address the merits of this issue, and merely claims it is not within the scope of the certified conflict or question [AB pp. 21-23]. Wife disagrees. This is a dispositive issue that the parties briefed, and turns on PA interpretation. ***E.g., Savona v. Prudential Ins. Co. of America***, 648 So. 2d 705, 707 (Fla.1995) (jurisdiction can be exercised to consider more than the issues on which jurisdiction is based when issue is dispositive, properly briefed and argued) (citing ***Savoie v. State***, 422 So. 2d 308, 310 (Fla.1982)).

Husband points to competent, substantial evidence supporting fairness when entered. He misses the point [AB pp. 21-23]. The Fourth District interpreted this PA as *a matter of law* in a manner that stripped Wife of her own nonmarital property, loans to Husband, all ability to discover what became of them, appreciation and fruits of same, and all property arising from marital efforts rendering this PA unfair or unreasonable on its face when entered. The court's construction turned solely on its interpretation of the title presumption clause (¶17), while ignoring ¶5's limitation on Husband's sole property. The parties could have used the words "hereafter acquired" in ¶5, but chose to use "*hereby* acquired" instead. The balance of Husband's arguments were already addressed in point III of Wife's initial brief.

If this PA does waive Wife's marital property distributions as Husband claims, there would be no reason to include language that eliminates alimony at the point her

property distribution exceeds the sliding schedule in ¶¶15A and 19 of the PA [A-1 pp. 8, 9, 12]. Nor would there be any reason for the provision in ¶15B that gives Husband a credit against alimony for the amount by which property acquired in Wife's name exceeds the sliding alimony scale, where she keeps such property and neither owes the other [Id.]. There is no mirror provision for Husband in this regard, and his reading ignores the limitation of his sole property to what is now owned or hereby acquired (not hereafter acquired) in ¶5 of this PA. A mere *presumptive* provision in ¶17 does nothing to change the limitation of Husband's sole property in ¶5. As to Wife's sole property, ¶15B of this PA expands it to that acquired after marriage in a non-presumptive provision entitled "Property in Dianne's Name Solely". The Fourth District's interpretation rendered the provisions for Wife's sole and joint property meaningless and inserted the petition date as a restriction on her ownership into the presumptive title provision (¶17) even though no date is stated.

Husband's reliance on ***Ledea–Genaro v. Genaro***, 963 So. 2d 749 (Fla. 4th DCA 2007), ***Heiny v. Heiny***, 113 So. 3d 897 (Fla. 2nd DCA 2013), ***Timble v. Timble***, 616 So. 2d 1188 (Fla. 4th DCA 1993) and ***Stern v. Stern***, 636 So. 2d 735 (Fla. 4th DCA 1993), is misplaced [AB pp. 10-16]. ***Ledea–Genaro's*** agreement unambiguously required wife to quit-claim her interest in the parties' home upon a dissolution petition in exchange for a full release from mortgage obligations. ***Id***. at 751. ***Heiny's***

agreement also exactingly spelled out that Husband would take the marital home's principal payments and improvements during marriage, and there was no retention of ownership. ***Id***., 113 So. 3d 899-900 (e.s.). Our PA is inapposite. This PA only requires Wife to *vacate* the marital residence, while *retaining ownership* [A-1 ¶20] (e.s.). There is no quit-claim or other requirement that Wife be title holder in order to take her share of the asset or its appreciation. Our PA is nothing like ***Stern*** or ***Timble*** where the agreements specifically named the waived entities and then expressly and specifically waived their appreciation. ***Stern*** at 737; ***Timble***, at 1189. The ***Stern*** agreement very specifically waived all *appreciation value* in very specifically named entities. ***Id***. at 738-741. In fact all language to that effect was removed from the final PA here.

Husband's alternative contention that ***Timble***, ***Cameron***, ***Ledea–Genaro*** and ***Stern's*** agreements were "broad enough" to waive appreciation and enhancement because they waived the rights to "entire assets" is also incorrect. He glossed past the exacting specifics of the expressly named companies contained in those express waivers – absent here [AB pp. 15-16]. Further, even if he were correct (he's not), this PA contains no list or other identification of property that Husband owned on entry

into this PA.[2] The PA only describes his assets as "approximately ten million" and even that was incorrect [A-1 p. 15; IB pp. 3, 5-6].

No case Husband relies on supports him. This PA has no exacting language that specifically identifies property waived, and no specific waiver of enhancement value, salary or marital efforts as the cases he relies on do. Our Opinion vastly altered the scope and specificity required to effectuate a valid wavier. This Court should adopt the construction and scope employed in ***Valdes*** and ***Irwin***. Doing otherwise will upend decades of case law and run contrary to every case that Husband relies on. Moreover, allowing the non-disclosure to stand with no specific waiver would lead to unfair (and unintended) waivers in other cases without knowing what property was waived. It will actually promote non-disclosure. That is not good policy.

Husband criticizes Wife's reliance on the definition of "marital assets" in section 61.075(5)(a)2., rather than the definition of "nonmarital assets" in section 61.075(5)(b)4 [AB 10-11]. He misses the point. The definition of "marital assets" includes enhancement in value and appreciation of nonmarital assets. This Court has also included passive appreciation in the definition and set the formula for

[2] Husband did not even provide a full list of assets with values in either of the financial affidavit filed during this case [IB pp. 7, 17] (e.s.).

distribution. ***Kaaa***. It does not matter that ***Kaaa*** did not involve an antenuptial agreement. The point is the property is marital unless properly waived.

Prior to our Opinion, the only way to exclude such items from the distributable marital estate was by way of a very specific waiver of enhancement or appreciation in a valid written agreement. ***Timble***, ***Cameron***, ***Ledea–Genaro***, ***Stern, Witowski v. Witowski***, 758 So. 2d 1181, 1184 (Fla. 2nd DCA 2000). This was so prior to enactment of section 61.075. ***E.g. Turner v. Turner***, 529 So. 2d 1138, 1141 (Fla. 1st DCA 1988); ***Keller***; ***Crapps***; ***Sanders***. It makes no difference that section 61.075(5)(a)2. predates this PA. The Kaplan Draft itself shows that the parties knew in 1986 what case law required for an effective wavier, and the waiver was omitted from the final PA. The only thing to be gleaned here is that there was no intent to waive appreciation – let alone all fruits of marital labor. ***See, e.g., Turner***.

Husband steered clear of all cases that involve asset transmutation, including commingling, which render property ownership unclear at best even when there is a valid antenuptial agreement [IB pp. 44-48]. Husband ignored ***Greenberg v. Greenberg***, 602 So. 2d 626 (Fla. 4th DCA 1992) (citing ***Landay v. Landay,*** 429 So. 2d 1197 (Fla. 1983)). Money is fungible, and once commingled it loses its separate character. ***Pfrengle v. Pfrengle***, 976 So. 2d 1134, 1136 (Fla. 2d DCA 2008); ***Becker v. Becker***, 639 So. 2d 1082, 1084 (Fla. 5th DCA 1994) (where marital and nonmarital

funds commingled in account, husband unable to establish which assets nonmarital). Even when accounts are titled in husband's name alone, that fact is not relevant when marital and nonmarital funds are commingled in that account. ***Pfrengle***, 976 So. 2d at 1136 (quoting ***Steiner v. Steiner***, 746 So. 2d at 1150)). If this Court does not adopt ***Irwin*** and ***Valdes*** it will be quashing decades of case law about tracing, commingling and transmutations despite antenuptial agreements. The cases all support the proposition that marital efforts are not *ipso facto* waived by virtue of an agreement without examining the transactions during marriage, the marital efforts or exactly what the parties did and did not waive by agreement. Wife was not even permitted to trace assets or income due to an erroneous discovery bar read into the title presumption provision. Notably, substantially similar title presumption clauses in ***Valdez*** and ***Irwin*** did nothing to stop discovery, as both cases gave rise to awards for marital salary and/or appreciation of non-marital property. Thus, discovery is necessary – not barred.

Husband also ignores this PA's gift provision [A-1 ¶26]. When a spouse deposits funds into a joint account where they are commingled with other funds, a presumption is created that the spouse made a gift to the other spouse of an undivided one-half interest in the funds. ***Amato v. Amato***, 596 So. 2d 1243, 1244 (Fla. 4th DCA 1992). The presumption can be overcome by showing that no gift was intended. ***Id***.

at 1245. Wife was precluded from showing any gifts due to an erroneous construction of the title presumption clause. This permitted Husband to defease gifts without having to account for a thing.[3] Once a gift is completed it cannot be unilaterally defeased, and all should have been discoverable no matter when made. ***See Florida Nat. Bank of Palm Beach County v. Genova***, 460 So. 2d 895, 897 (Fla.1984) (gift completed when made, and donor no longer retains any control over ownership of property). The term "otherwise obtained" doesn't circumvent this problem, as Husband contends, because no sensible or fair construction contemplates such antics. If it does then this PA was *unfair when entered* and must be invalidated under ***Casto*** as a dispositive issue that was briefed and argued.

Husband also declined to squarely address the certified question, other than to say jurisdiction should be discharged, without saying why. Wife rests on her initial brief except to say that the answer has great impact on Florida citizens who enter antenuptial agreements. Following our Opinion allows a waiver of marital efforts when none is stated. This is especially problematic where no particular asset is specified let alone identified or disclosed, even during the case. It also allows one party to shuffle title and other documents around before filing a dissolution petition

[3] In the face of annual tax returns showing Wife's individual income that Husband kept [T1 pp. 73, 682-83, 700-01].

thereby defeasing the other of all joint property, marital efforts, the fruits thereof along with gifts while remaining unchecked. Florida residents must know the scope and specificity of what is being waived for a wavier of appreciation and marital efforts to be effective, in addition to when and whether it is permissible to do so. It is unsound public policy to adopt the Fourth District's reading of this PA.

CONCLUSION

Wife respectfully asks this Court to quash the Decision of the Fourth District, approve ***Irwin*** and ***Valdes*** and answer the certified question in the negative. This Court should remand for discovery and equitable distribution of marital and Wife's nonmarital assets, plus all appreciation and property obtained with marital salary, efforts and the like. Should this Court quash the Decision under ***Casto***, then remand for discovery and equitable distribution under the Act is still required.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Reply Brief was filed electronically on October 7th, 2014 and a true and authentic copy has been furnished via electronic mail to **Jane Kreusler-Walsh, Esq**. Kreusler-Walsh, Compiani & Vargas, P.A. (Husband's appellate counsel), 501 S. Flagler Drive, Suite 503 West Palm Beach, Fl 33401-5913 email: janewalsh@kwcvpa.com, rvargas@kwcvpa.com, sserafin@kwcvpa.com and eservice@kwcvpa.com; **Joel M. Weissman, Esq.** (Husband's trial counsel) and Sarah A Saull, Esq., 515 N. Flagler Drive, Suite 1100, West Palm Beach, Florida 33401, email Joel@jmwpa.com, Sarahs@jmwpa.com and info@jmwpa.com; 515 N. Flagler Drive, Suite 1100, West Palm Beach, FL 33401, email Joel@jmwpa.com and info@jmwpa.com; and **Robert W. Sidweber**, **Esq.**, and **Karen B. Weintraub**, **Esq**. Sidweber & Weintraub, P.A. (Wife's trial and appeal co-counsel), The Tides at Bridge side Square 3020 NE 32nd Avenue, Suite 301, Ft. Lauderdale, FL 33308, email: Bob@Sidweberlaw.com and Karen@sidweberlaw.com all this 7th day October, 2014.

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CERTIFICATE OF TYPESETTING AND EFILING 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 listed in the certificate of service.

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