

THE MARITAL SHARE OF PASSIVE APPRECIATION OF NONMARITAL PROPERTY: DECONSTRUCTING KAAA FOR A BETTER SOLUTION

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 Family Law

On September 30, 2010, the Florida Supreme Court issued its opinion in *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010), resolving a conflict between the Second District's opinion in *Kaaa v. Kaaa*, 9 So. 3d 756 (Fla. 2d DCA 2009), and the First District's decision in *Stevens v. Stevens*, 651 So. 2d 1306 (Fla. 1st DCA 1995). It would be premature to predict whether the Supreme Court's decision will survive and eventually join the pantheon of Florida's seminal Supreme Court equitable distribution decisions, such as *Ball v. Ball*, 335 So. 2d 5 (Fla. 1976);¹ *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980);² *Landay v. Landay*, 429 So. 2d 1197 (Fla. 1983);³ and *Robertson v. Robertson*, 593 So. 2d 491 (Fla. 1991).⁴ At the same time, it can safely be said, similar to the cited decisions, that the Supreme Court's issue in *Kaaa* represents a bold, sweeping pronouncement on the complex and seemingly intractable issue of quantifying the marital share of passive appreciation on nonmarital property. This issue is potentially far reaching in scope and significance.

First, this article traces the history of the statute and case law regarding this issue. Second, this article analyzes and critiques the Supreme Court's decision,

recognizing the Supreme Court's attempt to address the harsh inequities created by the Second District's decision in *Kaaa*, but revealing internal inconsistencies and conflicts with case law and statute. Third, this article concludes by explaining and analyzing a legislative solution proposed, and defeated, during the 2012 legislative session⁵ that would have equitably allocated a portion of the appreciation as marital in accordance with current case law and statutory principle and created a more balanced, equitable resolution than the construct adopted by the Supreme Court in *Kaaa*.

We begin by restating the issue: What portion, if any, of passive appreciation of a parcel of nonmarital property during a marriage becomes marital when a mortgage on that property is paid down with marital funds during the marriage? The relevant statute, F.S. §61.075(6)(a)1(b), states that marital assets include 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."

At least three principles arise from §61.075(6)(a)1(b). The first is a cornerstone of Florida equitable distribution law: the principle of active appreciation. This principle provides that equitable distribution of marital assets should take into account the active appreciation of a nonmarital asset during the marriage. Appreciation caused by the expenditure of marital funds or labor during the marriage, including the parties' management, oversight, or contribution to principal, is a marital asset subject to equitable distribution.⁶ The

second principle is equally well settled: passive appreciation on nonmarital assets as a result of market forces, such as inflation, is not subject to division.⁷ The third principle is acknowledged in the case law. The district courts of appeal have long agreed that the paydown of a mortgage with marital funds on nonmarital property during a marriage is a marital asset.⁸

Characterizing passive appreciation of a parcel of nonmarital real property when a mortgage on the property was paid with marital funds during the marriage is an issue unresolved by the statute's plain language. Thus, one must turn to case law.

Stevens was the first case in Florida to address this issue directly. The *Stevens* decision must be read particularly carefully because the Supreme Court in *Kaaa* approved *Stevens*.⁹ In *Stevens*, the husband owned a parcel of nonmarital real property which was then used to secure a debt that was serviced by marital funds during the marriage. In concluding that some of the appreciation of the property should be deemed marital when a mortgage on the property is paid down during the marriage, the First District made several distinct pronouncements. First, the court held that if a separate asset is "unencumbered and no marital funds are used to finance its acquisition, improvement, or maintenance, no portion of the value of the property will be included in the marital estate, absent improvements effected by marital labor," and that "[i]f an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate."¹⁰ Second, the court agreed that the equitable distribution of assets should take into

account the appreciated value of nonmarital assets caused by the “expenditure of marital funds or labor, including the parties’ management, oversight, or contributions to principal” as well as a portion of any passive appreciation where “some portion of the current value...must reasonably be classified as a marital asset.”¹¹ This finding broke new ground, as, previous to *Stevens*, courts universally agreed that the sole marital component of nonmarital property was the active appreciation of the property as a result of the efforts or contributions of either party, or the mortgage paydown. The *Stevens* court crafted a formula to determine what portion of the passive appreciation of property during a marriage should be classified as a marital asset. The *Stevens* court held, and the Supreme Court in *Kaaa* adopted, the following language:

*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, 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.*¹²

While the general holdings by the *Stevens* court are largely neutral and consistent with the cited principles arising from the statute, the court's resolution of the issue is highly flawed by an arbitrary formula crafted by the court. This formula relates division of any appreciation to a ratio created by dividing the indebtedness on the property at the time of the marriage by the value of the property at the time of the marriage, without regard to the statutory requirements of §61.075(6)(a)1(b). Only the enhancement or appreciation of a nonmarital asset created by marital labor or marital funds creates an asset subject to division.¹³ The *Stevens* formula bears no relationship to the enhancement in value of the asset caused by marital funds during the marriage. Application of the *Stevens* formula in certain situations will result in the entire passive appreciation of nonmarital property being declared marital, even when a minimal portion of the underlying nonmarital mortgage has been paid during the marriage. For example, assume a parcel of nonmarital real property has a mortgage of \$90,000 and a fair market value of \$100,000 at the time of the marriage, which passively appreciates during a four-year marriage to \$300,000. Assume also that the mortgage is also paid down during the marriage by \$10,000. Applying the *Stevens* formula, \$180,000 of the \$200,000 appreciation would be deemed marital, notwithstanding that virtually none of the mortgage principal was paid down during the marriage. Assume that the mortgage at the time of the marriage had been \$10,000, and that because of the terms, the same amount was paid down as in the above hypothetical. In the case of the \$10,000 mortgage, only \$20,000 of the same appreciation would be marital, though the payment on the mortgage was identical.¹⁴ Is that fair? It

is apparent that application of the *Stevens* formula would result in a windfall to the nontitled spouse in contravention of the fundamental equitable distribution principle that passive appreciation on a nonmarital asset is itself nonmarital.¹⁵ As the Fourth District noted in *Rafanello v. Bode*, 21 So. 3d 867 (Fla 4th DCA 2009), “the broad holding in *Stevens* and *Oldham* can be problematic... because it supports the contention that, regardless how brief the marriage or how insubstantial the investment of marital funds, the mere fact that marital funds were used to pay the mortgage entitles a party to half of the equity in the home.”¹⁶

In *Rafanello*, the Fourth District suggested a case-by-case analysis of the mortgage paydown issue, eschewing a hard and fast rule that the nontitled spouse is entitled to one-half of the difference between the value of the property at the beginning of the marriage and its value at dissolution where some marital funds were used to reduce the principal of the mortgage.¹⁷ The Fourth District specifically stated that “[a] trial court may also consider the following...the length of the marriage; whether marital labor, money, or both were used to enhance the value of the marital property; and other equitable factors.”¹⁸ While avoiding the extreme position adopted by the First District in *Stevens*, it is suggested that the Fourth District’s decision in *Rafanello* does not comport with the principles of §61.075 in that it uses the unequal distribution factors set forth in §61.075(1)(a)-(j) for classification purposes. It does not provide any guidelines other than reference to the statutory factors,¹⁹ which leaves the door open for disparate and inconsistent rulings by trial courts.

The Fifth District Court of Appeal in *Leider v. Leider*, 48 So. 3d 901 (Fla 5th DCA 2010), a decision later withdrawn in light of the Supreme Court's decision in *Kaaa*, was the Fifth District's attempt to craft a different formula. This formula calculates the amount of mortgage payments made with marital funds during the marriage, divided by the amount of the unpaid principal balance of the mortgage at the time of the marriage, multiplied by the amount of the appreciation during the marriage. The *Leider* formula is contrary to equitable principles. Assume, for example, that a property worth \$200,000 at the time of marriage has a remaining mortgage balance of \$5,000, and that \$5,000 balance is then paid off during the marriage, and that the property then appreciates substantially during the marriage. Using the *Leider* formula, all of the appreciation would be deemed marital, notwithstanding the minimal mortgage paydown. The fundamental problem with the *Leider* formula is it does not relate pay off of the mortgage to the property's value at the marriage, but ties the pay off of the mortgage to the mortgage amount remaining at the time of the marriage, which further results in extreme and harsh consequences for one party involved.²⁰

We now arrive at *Kaaa*. Joseph and Katherine Kaaa married in 1980. Approximately six months before the parties married, Joseph purchased a residence in Riverview, for \$36,500. He paid a \$2,000 down payment at closing from nonmarital funds. Joseph financed the balance of the purchase price with a mortgage on the property and took title to the property in his name alone. The house became the parties' marital home where they lived for the next 27 years. Although the parties refinanced the property several times, Joseph

never transferred any interest in the home to Katherine during the marriage. Throughout the marriage, the parties paid all of the mortgage payments, insurance premiums, taxes, and maintenance expenses of the property from marital funds, and also used marital funds to improve the residence, installing or constructing a carport. During the 28-year marriage, the \$34,500 mortgage was paid down by \$22,279, and the property passively appreciated in the amount of \$174,100. As a result of the carport renovation, the property actively appreciated by \$14,400. At the final hearing, the property had a fair market value of \$225,000 (\$36,500 purchase price, \$174,100 in passive appreciation plus \$14,400 in active appreciation) and was subject to a mortgage balance of \$12,871.46.²¹

Concluding that Katherine Kaaa was entitled to equitable distribution of only the home's appreciation value, the trial court found that Katherine was entitled to \$18,339.50, one-half of \$36,679.00 (\$14,400 in active appreciation plus \$22,279 in mortgage paydown). The trial court ordered Joseph pay that amount to Katherine.²²

The Second District, citing *Straley v. Frank*, 612 So. 3d 610 (Fla 2d DCA 1992), affirmed the trial court's decision, agreeing that the paydown of the principal balance of a mortgage with marital funds is properly considered a marital asset subject to equitable distribution, but that an increase in the value of property resulting from passive appreciation was entirely the husband's nonmarital asset.²³ The court, thus, held that all passive appreciation of \$174,100 was nonmarital and not subject to equitable distribution.

Analyzing the facts of the case reveals the harshness of the Second District's opinion. At the time of the marriage, the parties resided in a property worth \$36,500 with only \$2,000 in equity. The mortgage equated to 94.5 percent of the property's value. The parties resided in the home for 27 years. During the marriage, the mortgage was paid down, from \$34,500 to \$12,871.46 using marital funds. The property appreciated more than 700 percent, from \$36,500 to \$225,000.²⁴ holding that all of the passive appreciation was nonmarital, the Second District effectively said none of the 700 percent appreciation was attributable to the asset created by the marital paydown of the mortgage. The result of the district court's decision completely deprived the former wife of the passive appreciation value in the former marital home, and any return on the marital investment. The Second District decision would have granted the wife only one-half of the dollar-for-dollar mortgage paydown and modest active enhancement. The Second District's position ignores the reality that paying down a mortgage with marital funds is itself an asset subject to passive appreciation. The court's position also wrongfully grants the entire passive appreciation to the titleholder of the property in violation of these principles. The Florida Supreme Court quashed the Second District's decision and approved *Stevens*, "to the extent that it is consistent with this opinion."²⁵

The Florida Supreme Court began its analysis by citing F.S. §61.075(6)(a)1(b),²⁶ which states that "marital assets and liabilities" includes the "enhancement 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.”²⁷ The court rejected Joseph Kaaa’s argument that passive appreciation is not encompassed by the cited language, concluding that passive appreciation “is properly considered a marital asset where marital funds or the efforts of either party contributed to the appreciation.”²⁸ Note that the phrase “or the efforts of either party” is taken word-for-word directly from the cited statutory section.²⁹ Close examination of that phrase is critical when attempting to decipher the precise holding of *Kaaa*, as attempted here.

The Supreme Court then recited the facts and holding in *Stevens* as previously discussed in detail.³⁰ For purposes of analyzing *Kaaa*, the critical points to recognize are that the Supreme Court agreed with the reasoning of the First District in *Stevens*, concluding that payment of a mortgage on nonmarital property with marital funds subjects passive appreciation in a home to equitable distribution, not the home itself. The Supreme Court also approved the methodology created by the First District in *Stevens* defining the portion of passive appreciation to be included as a marital asset.³¹

After stating that they agreed with the *Stevens* conclusion and methodology, the Supreme Court pronounced that “the trial court must make a finding that the non-owner spouse made contributions to the nonmarital property during the course of the marriage.”³² The Court went further, stating that there are certain steps a trial court should employ to determine whether a nonowner spouse is entitled to a share of the passive appreciation of a parcel of property. The Court explained those steps as follows: 1) the trial court must first determine the overall fair market value of the home; 2)

the court must determine whether there has been a passive appreciation of the property; 3) the court must determine that marital funds were used to pay the mortgage, *that the nonowner spouse made contributions to the property*, and “to what extent *the contributions of the nonowner spouse* affected the appreciation of the property”; 4) the trial court must determine the value of the passive appreciation; and 5) the court is to then employ the *Stevens* methodology to determine the share of appreciation deemed “marital.”

33

Applying *Stevens* to the facts in *Kaaa*, the Supreme Court concluded that the home was almost entirely financed with a mortgage that was repaid with marital funds, and that “there was ample evidence in the record of contributions by Katherine Kaaa that affected the passive appreciation of the home’s value.”³⁴

The Supreme Court’s opinion in *Kaaa* is problematic for three compelling reasons. First, as discussed here at length, the formula crafted by the *Stevens* court employs a ratio created by dividing the indebtedness on the property at the time of the marriage over the value of the property at the time of the marriage. Use of this formula disregards the statutory requirements of §61.075(6)(a)1(b) that only the enhancement or appreciation created by marital labor or funds creates a marital asset subject to division. It bears no relationship to the amount of the mortgage paid during the marriage, that is, “the work or efforts of the parties,” as required by statute. Put as simply as possible, the formula does not take into account the “efforts or contributions of the parties.” The impropriety of the formula can be seen in the inequities resulting from its

employment in various circumstances. For example, when a heavily mortgaged property is marginally repaid during the marriage, virtually all of the appreciation will be marital, simply because of the *Stevens* fraction, and not because of the parties' efforts. Such a result is contrary to the philosophy in the cited statutory section, which is predicated on the requirement that the trial court find that there were "efforts or contributions of either party" before determining that the appreciation is marital.³⁵

Second, the Supreme Court's decision is internally inconsistent. In one section of the opinion, the Court concluded that passive appreciation "is properly considered a marital asset where marital funds or the efforts of *either party* contributed to the appreciation." The Court proceeded to contradict its own conclusion twice by specifically mandating that a trial court must determine *that the nonowner spouse made contributions to the property*, and that "the trial court must determine to what extent *the contributions of the nonowner spouse* affected the appreciation of the property."³⁶ Is the Court proposing the efforts of either party are sufficient, or is a trial court required to determine that the nonowner spouse directly made efforts or contributions affecting the value of the property? The opinion can arguably be read either way, as the Supreme Court specifically made both pronouncements; however, both cannot be true, as they are internally inconsistent. The statute is clear: Section 61.075(6)(a)(1)(b) states that marital assets include 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.” The case law from every district is in accord.³⁷ To the extent that the Supreme Court, in fact, meant to state that there need be a showing of *the nonowner* spouse’s efforts in improving the value of the property, this pronouncement is directly inconsistent with case law. The Supreme Court may have been inadvertently imprecise with its terminology and meant to follow the case law and statute, which both state that either party’s efforts are enough. To determine otherwise is illogical and strains the facts of the case.

There is a lack of record evidence of Katherine Kaaa’s efforts. The parties put in a carport. The case history does not indicate that she built the carport herself, but rather, generally states that the parties installed a carport. Thus, it can be said that Katherine Kaaa provided “efforts or contributions” as she was one of the parties. To read the decision of the Supreme Court any other way would ignore 23 years of statutes and case law. We cannot ignore that the decision is inconsistent and leads itself to two interpretations. This is a critical point. There are conceivably many instances in which the owner spouse hires a contractor, uses his or her earnings, or physically improves nonmarital property, without the nontitled spouse doing so. If one reads *Kaaa* narrowly, to mandate that a trial court find that the nonowner spouse provide “efforts or contributions” that improve the value of the property, one cannot find that passive appreciation is marital, even if the passive appreciation is substantial.

Third, as we have noted, the Supreme Court mandated that in order to find a portion of the passive appreciation of nonmarital property marital, two requirements must be met: the mortgage was paid

down with marital funds, and that there be active appreciation as well as passive appreciation.³⁸ The latter requirement contravenes the intent of the statute and case law. There need not be a requirement active appreciation be present in order for passive appreciation to be deemed marital, so long as there is a finding that a mortgage on nonmarital property has been paid down. Florida has long recognized that marital property can have a passive component. For example, *Perlmutter v. Perlmutter*, 523 So. 2d 594 (Fla. 4th DCA 1987), stands for the proposition that when a marital asset passively appreciates between the petition date and the trial date, the parties should equally share in the appreciation. Conversely, when one party's efforts are responsible for appreciation or depreciation from the date of the petition until the date of trial, the earlier date should be used, so that the party whose efforts resulted in the change in value should receive the benefit or detriment of those efforts.

In *Perlmutter*, the court determined that the date of the trial dissolution proceeding, rather than the date of filing of the action, was the appropriate date for valuation of the marital assets for equitable distribution purposes. In *Kaaa*, the marital property had passively increased³⁹ In value by more than \$2,000,000 between filing and the trial date. The separation date of the parties has been justified as an appropriate date for valuation of marital assets in many cases.⁴⁰ This fact — given that in many cases, there is significant passive appreciation between the date of separation and final resolution of the case — bolsters the argument that Florida classifies passive appreciation of a marital asset as marital property. Further, this same principle, that parties' should proportionately share in the passive

appreciation of a marital asset, is found in retirement cases. For example, in *Moon v. Moon*, 594 So. 2d 819 (Fla 1st DCA 1992), the First District applied that principle, noting that a retirement account initially acquired during the marriage contained several marital components: the portion of the account acquired during the marriage as well as passive appreciation on that amount. The foregoing analysis justifies and bolsters the argument that there should not be a requirement of active appreciation as well as a mortgage paydown, for the trial court to find that a portion of the passive appreciation of nonmarital property is marital.

We are still left with the *Stevens* problem. Legislation was proposed during the 2012 legislative session in Florida's House of Representatives and Senate to resolve this dilemma.⁴¹ Had the proposed legislation passed, in a case such as *Kaaa* in which a mortgage on nonmarital property was paid down during the marriage with marital funds and said property had passively appreciated during the marriage, the marital portion of equity in the former marital home would have consisted of two components: paydown of the principal balance of the nonmarital mortgage and an equitable portion of the passive appreciation in the property.

The marital portion of passive appreciation of the property could have been determined by applying a formula expressed as the ratio of the marital paydown of the mortgage to the entire purchase price of the property, multiplied by the passive appreciation on the property during the marriage. (Accordingly, the numerator of the ratio would have been the dollar-for-

dollar paydown of the mortgage principal with marital funds while the denominator would have been the purchase price of the property. This ratio would have then been multiplied by the passive appreciation of the property during the marriage.) “Passive appreciation” would have been defined as the increase in value due to market forces on the property between the date of the marriage or the marriage’s initial contribution and the valuation date selected by the trial court.⁴² Application of this formula would have been consistent with case law and the statutory principle that passive appreciation of a marital asset (in these cases, the paydown of the mortgage during the marriage) was itself marital.

Application of the proposed formula to the facts in *Kaaa* would be demonstrated as follows: First, the principal paydown of the mortgage during the marriage was \$22,279. The purchase price of the property was \$36,500. The fraction would, thus, be calculated as $\$22,279 / \$36,500 = 61.04$ percent. Second, the total passive appreciation of the subject property was \$174,100. This amount would be derived by taking the fair market value of the property of \$225,000 at the time of valuation minus the purchase price of \$36,500, minus the active appreciation, in this case determined independently by the trial court to be \$14,400. Thus, \$174,100 represents the marital portion of the total passive appreciation of the subject property ($\$174,000 \times 0.6104 = \$106,270$.)

The total marital interest in the property would then be the sum of several components: 1) the marital paydown of the nonmarital, purchase-money mortgage during the marriage; 2) additional active appreciation on the

property as a result of the expenditure of marital funds or contributions; and 3) the marital portion of the total passive appreciation.

Under the facts of *Kaaa*, those amounts were as follows: the marital paydown of the mortgage during the marriage was \$22,279. The additional active appreciation as a result of marital efforts was \$14,400. The marital portion of the total passive appreciation would thus be \$106,270. The total would be \$142,949. This number would represent the marital interest in the property.

Conversely, the nonmarital interest would be defined as the sum of nonmarital contributions, in this case the down payment and a reasonable portion of the total passive appreciation in the property related to the nonmarital interest in the mixed asset. In *Kaaa*, the down payment was \$2,000. Note that the total passive appreciation in the property was \$174,100. The marital portion was \$106,270, as calculated above. The nonmarital portion of the passive appreciation would, therefore, be \$67,829. Adding the nonmarital down payment of \$2,000 and the nonmarital portion of the appreciation, the total nonmarital value of the property would be \$69,829.

Application of the proposed formula would result in an equitable allocation of the marital and nonmarital components of the passive appreciation of the subject nonmarital real property. It was based on fairness, as measured by the percentage of nonmarital mortgage paid down during the marriage, compared to the purchase price of the property. This measure would have been a litmus test of fairness as it quantified the

“marital effort” during the marriage and applies that effort to parse out the marital portion of the total passive appreciation in the property.

In conclusion, the proposed formula would have likely lead to the most equitable results. First, the subject formula would have ensured that both the marital and nonmarital contributions were treated as capital investments subject to investment gains or losses (if passive appreciation is defined more broadly as passive or market change). Further, the facts in *Kaaa* established the value of nonmarital property at the time of the purchase, not at the time of marriage or at the time the marriage began its contributions. In the absence of such additional information, the proposed formula would have utilized those facts presented and fairly apportion the appreciation between the marital and nonmarital interests. Finally, in *Kaaa*, no proof was made to suggest that the marital and nonmarital interests within the husband’s nonmarital asset did anything other than increase ratably over the course of the marriage.

The Supreme Court’s decision in *Kaaa* is a bold, sweeping pronouncement on the problematic issue of quantifying marital interest in the appreciation of nonmarital property. The Supreme Court’s formula, nevertheless, would benefit from some refinement. The House and Senate bills proposed in 2012 would have assisted with some of the problem areas. Perhaps further legislative efforts will lead to an equitable resolution in the future.

¹ *Ball*, 335 So. 2d 5 (creating a presumption of special equity and establishing and codifying the no-gift presumption).

² *Canakaris*, 382 So. 2d 1197 (sanctioning lump-sum alimony to ensure an equitable distribution of property).

³ *Landay*, 429 So. 2d 1197 (creating the special equity formula).

⁴ *Robertson*, 593 So. 2d 491 (recognizing that the gift presumption, as created by 1988 equitable distribution statute, abrogated the rule in *Ball*).

⁵ Fla. H. 565, 2012 Reg. Sess. (Nov. 3, 2011); Fla. Sen. 0752, 2012 Reg. Sess. (Oct. 28, 2011).

⁶ See, e.g., *Young v. Young*, 606 So. 2d 1267 (Fla. 1st DCA 1992); *Massis v. Massis*, 551 So. 2d 587 (Fla. 1st DCA 1989).

⁷ See, e.g., *Straley v. Frank*, 612 So. 2d 610 (Fla. 2d DCA 1992); *Jahnke v. Jahnke*, 804 So. 2d 513 (Fla. 3d DCA 2001); *Hanks v. Hanks*, 553 So. 2d 340 (Fla. 4th DCA 1989).

⁸ See, e.g., *Dyson v. Dyson*, 597 So. 2d 320, 324 (Fla. 1st DCA 1992); *Mitchell v. Mitchell*, 841 So. 2d 564 (Fla. 2d DCA 2003); *Adkins v. Adkins*, 650 So. 2d 61, 67 (Fla. 3d DCA 1994); *Cole v. Roberts*, 661 So. 2d 370, 372 (Fla. 4th DCA 1995).

⁹ *Kaaa*, 58 So. 3d at 868-869.

¹⁰ *Stevens*, 651 So. 2d at 1307.

¹¹ *Id.*

¹² *Id.* at 1307-1308.

¹³ Fla. Stat. §61.075(6)(a)1(b) (2012).

¹⁴ The fundamental flaw in the *Stevens* formula is demonstrated in analyzing any case involving a heavily mortgaged property that appreciates significantly during the marriage, when the mortgage is only minimally paid.

¹⁵ See, e.g., *Wright v. Wright*, 505 So. 2d 699, 700 (Fla. 5th DCA 1987) (holding that passive appreciation of an asset due to inflation or fortuitous market forces not attributable to marital funds or efforts is not a marital asset).

¹⁶ *Rafanello*, 21 So. 3d at 870 (Fla. 4th DCA 2009).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Ironically, the flaw in *Leider* is revealed in cases factually distinct to *Stevens*, if not completely inopposite. The *Leider* formula fails in cases involving minimal mortgages totally paid off during the marriage, whereas *Stevens* fails in cases in which the property is heavily mortgaged at the time of the marriage.

²¹ *Kaaa*, 9 So. 3d at 757.

²² *Id.* at 758.

²³ *Id.* at 759.

²⁴ *Id.* at 757.

²⁵ *Kaaa*, 58 So. 3d at 868-869.

²⁶ This statute was formerly Fla. Stat. §61.075(5)(a)(2).

²⁷ Fla. Stat. §61.075(6)(a)(1)(b).

²⁸ *Kaaa*, 58 So. 3d at 870.

²⁹ *Id.*; Fla. Stat. §61.075(6)(a)(1)(b).

³⁰ See nn. 13-18 and accompanying text (discussing *Stevens* in detail).

³¹ *Kaaa*, 58 So. 3d at 872.

³² *Id.* at 871.

³³ *Id.* at 872 (emphasis added).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (emphasis added).

³⁷ See, e.g., *Webb v. Webb*, 636 So. 2d 883 (Fla. 3d DCA 1994) (holding “marital appreciation” of separately owned assets is subject to equitable distribution if either spouse expended marital labor on that asset....”); *Heinrich v. Heinrich*, 609 So. 2d 94 (Fla. 3d DCA 1992) (holding that appreciation of nonmarital assets resulting from efforts of either party renders the appreciation a marital asset).

³⁸ See n. 36 and accompanying text (describing the required analysis).

³⁹ *Perlmutter* has been cited repeatedly on the issue of passive appreciation. *Nicewonder v. Nicewonder*, 602 So. 2d 1354 (Fla. 1st DCA 1992); *Augoshe v. Lehman*, 962 So. 2d 398 (Fla. 2d DCA 2007); *Jahnke v. Jahnke*, 804 So. 2d 513 (Fla. 3d DCA 2001); *Claughton v. Claughton*, 625

So. 2d 853 (Fla. 3d DCA 1993); *Catalfumo v. Catalfumo*, 704 So. 2d 1095 (Fla. 4th DCA 1997); *see also Leonardis v. Leonardis* 30 So. 3d 568 (Fla. 4th DCA 2010) (holding it was error for the trial court to value the property as of the date of the filing of the petition for dissolution because the property had declined in value substantially since the date of the filing of the petition); *Byers v. Byers*, 910 So. 2d 336 (Fla. 4th DCA 2005) (affirming the trial court's valuation date when the husband's marital 401(k) supersaver retirement account passively appreciated between the date of the petition and the date of trial by over \$70,000).

⁴⁰ *See, e.g., O'Neil v. Drummond*, 824 So. 2d 1032 (Fla. 1st DCA 2002); *Norwood v. Anapol-Norwood*, 931 So. 2d 951 (Fla. 3d DCA 2006); *Catalfumo*, 704 So. 2d at 1098-1099; *Edel v. Walker*, 927 So. 2d 989 (Fla. 5th DCA 2006); *Noone v. Noone*, 727 So. 2d 972 (Fla. 5th DCA 1998).

⁴¹ The exact language as introduced in Florida's House of Representatives was (and the Senate bill substantially mirrored this language, Fla. Sen. 0752, 2012 Reg. Sess. at 2-3): "c. The paydown of principal of a note and mortgage secured by nonmarital real property and a portion of any passive appreciation in the property, if the note and mortgage secured by the property are paid down from marital funds during the marriage. The portion of passive appreciation in the property characterized as marital and subject to equitable distribution shall be determined by multiplying a coverture fraction by the passive appreciation in the property during the marriage.

"(l) The passive appreciation shall be determined by subtracting the gross value of the property on the date of the marriage or the date of acquisition of the

property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage, as defined in sub-subparagraph b., and less any additional encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds.

“(II) The coverture fraction shall consist of a numerator, defined as the total paydown of principal from marital funds of all notes and mortgages secured by the property during the marriage, and a denominator, defined as the value of the subject real property on the date of the marriage, the date of acquisition of the property, or the date the property was encumbered by the first note and mortgage on which principal was paid from marital funds, whichever is later.

“(III) The passive appreciation shall be multiplied by the coverture fraction to determine the marital portion of the passive appreciation in the property.

“(IV) The total marital portion of the property shall consist of the marital portion of the passive appreciation, as defined in subparagraph 3., the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property, as defined in sub-subparagraph b., not to exceed the total net equity in the property at the date of valuation.

“(V) The court shall apply this formula unless a party shows circumstances sufficient to establish that application of the formula would be inequitable

under the facts presented. Fla. H. 565, 2012 Reg. Sess. at 2-3.”

⁴² *Id.*

David L. Manz is the immediate past chair of the Family Law Section of The Florida Bar and a former president of the Florida Chapter of the American Academy of Matrimonial Lawyers. He publishes and lectures frequently in the area of marital and family law.

This column is submitted on behalf of the Family Law Section, Carin Marie Porras, chair, and Sarah Kay and Monica Pigna, editors.

 **Family Law**

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