

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 2010

KATHLEEN N. LEIDER,

Appellant,

v.

Case No. 5D08-2136

JACK S. LEIDER,

Appellee.

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Opinion filed April 16, 2010

Appeal from the Circuit Court
for Orange County,
Robert Evans, Judge.

Shannon McLin Carlyle and Christopher V.
Carlyle, of The Carlyle Appellate Law Firm,
The Villages, for Appellant.

Marcia K. Lippincott, of Marcia K.
Lippincott, P.A., Lake Mary, for Appellee.

SAWAYA, J.

Kathleen N. Leider (Wife) appeals a final judgment of dissolution of marriage, contending that the trial court erred in failing to include in its equitable distribution award the value appreciation of a beach house owned by Jack S. Leider (Husband) prior to the marriage. Wife argues that regardless of the amount of marital funds used to pay the mortgage, the expenditure of marital funds converts the entire appreciated value of the beach house to a marital asset subject to equitable distribution. Husband argues that

the mortgage payments did not enhance the value of the property and, therefore, the trial court was correct in refusing to award Wife any share in the appreciated value of the home. Because the trial court utilized a methodology that did not award the wife an appropriate share of the appreciated value, we reverse the award and remand for reconsideration under the proper legal standard.

We note at the outset that Wife also appeals the trial court's ruling that no improvement in value resulted from the couple's expenditure of marital labor and funds on the property to make certain repairs. As we will subsequently explain, that ruling is supported by competent substantial evidence and so our analysis will focus on the issue regarding the proper methodology to be applied to establish the equitable distribution of value appreciation of non-marital property caused by the expenditure of marital funds during the marriage to pay a mortgage encumbering the property.

The parties were married in October 1997. Prior to the marriage, in January 1994, Husband purchased a beach house in Fernandina Beach, Florida, for \$146,000. He financed the property with a \$131,400 mortgage. Wife made no contributions to the beach house prior to the marriage. At the time of their marriage, the appraised value of the beach house was \$150,000.

The couple lived in California for approximately six years of their marriage. They had two children. In 2002, Wife became a stay-at-home mother, and the family moved to Florida for Husband to pursue a job opportunity. Husband is employed in construction, and during the marriage he used his professional experience to work on the beach house. According to Wife, the beach house required a significant amount of upkeep during the marriage: "The house is an older home that sits directly oceanfront,

so every year, there was just something that needed to be replaced, either water damage and walls, leaky windows, general upkeep. Just various projects that needed to be performed over those years.” Husband testified that the repairs made to the beach house during the marriage were not improvements.

The couple maintained one joint checking account with marital funds. Although they rented out the beach house, it never generated enough income to pay for itself. During the course of the marriage, the couple used marital funds from their joint account to pay for repairs, the mortgage (principal and interest), the management fees, and the homeowner’s association dues. After setting off the rental income, the trial court specifically found that \$54,962 was spent for these purposes, and of this amount, \$40,000 was expended for repairs, which did not contribute to the appreciation in value of the house, and that \$14,000 was spent to pay the mortgage balance.¹

As to the appreciation in value of the house, Wife’s counsel introduced into evidence, with a stipulation from Husband’s counsel, an appraisal that, as of July 28, 2006, valued the beach house at \$805,000. Husband presented no evidence about the value of the beach house, and he presented no evidence as to what portion of the increased value in the house was due solely to passive appreciation. Husband testified that, in his opinion, the major repairs he performed on the beach house “weren’t value increased repairs. These were repairs to keep the rental income maintained and/or keep our ability to use it.”

¹ In the final judgment, the trial court appears to have used the term “mortgage balance” to refer to only the principal balance owing on the mortgage. This term more appropriately references both the principal and interest remaining, and that is the usage this opinion adopts.

The trial court found the beach house was a non-marital asset and that the only marital asset the couple derived from the beach house was \$14,000 they spent to pay the mortgage balance. Instead of awarding one-half of this amount to Wife, the trial court awarded her \$27,481, which is one-half of the total amount Wife contends the couple spent on the beach house. Although not expressly stated, the trial court's actual ruling seems to be that the money the couple spent on the beach house, including mortgage payments and funds for repairs, was a marital asset (\$54,962), and Wife was awarded an equitable distribution of one-half of that amount.

The trial court discussed the beach house at the end of the trial:

I'm saying, its not marital. It hasn't been converted to marital. There isn't enough evidence to support it being converted to marital despite the fact that he went there two or three times and conducted some repairs. Had they added a room on, had they configured the property differently, I mean, this was a passive increase in that property. You know what happened with the beach property in Florida in that period of time. You know, had the property gone down in value, I doubt that you would have been here arguing that you owed half the deficiency but fortunately, that hasn't happened recently, at least in Florida.

The court's written judgment of dissolution of marriage provides that the beach house is non-marital and only the amount paid towards the mortgage balance is a marital asset.

D. The Husband purchased real property prior to the marriage in Fernandina Beach Florida that was never titled in other than the Husband's individual name. The parties used the property as a vacation home; and though some repairs were made to the property, repairs are not in the nature of improvements increasing the value of the property. The Wife argued that the parties had a net expenditure (mortgage payments rental income, repairs and tax consequences, among others were used to calculate this amount) of \$54,962.00 of marital funds during the marriage associated with the ownership of the property. The Husband argued that the expenditure, similarly calculated was

approximately \$50,000. The court finds the property to be the separate non-marital asset of the Husband, as the only increase in the value of the property was the paydown of the mortgage balance in the approximate amount of \$14,000.00. That sum is a marital asset; but the court awards to the wife the total sum of \$27,481.00, representing one half of her calculation of the marital funds expended, including the reduction of the mortgage balance. As reflected in Exhibit A, the Husband has already received his \$27,481.00 share of the marital funds expended in that he is keeping the property and thereby has received the benefit thereof.

The governing statute is section 61.075(5)(a)2., Florida Statutes (2004), which provides that a marital asset can be “[t]he enhancement in value and appreciation of non-marital 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.” However, as the court explained in Martin v. Martin, 923 So. 2d 1236 (Fla. 1st DCA 2006), “improvements or expenditures of marital funds to a nonmarital asset does not transform the entire asset into a marital asset; rather, it is only the ‘enhancement in value and appreciation’ that becomes a marital asset.” Id. at 1238-39 (quoting Strickland v. Strickland, 670 So. 2d 142, 143 (Fla. 1st DCA 1996)); see also Wilson v. Wilson, 992 So. 2d 395, 398 (Fla. 1st DCA 2008).

The trial court’s factual finding regarding equitable distribution is reviewed under an abuse of discretion standard to determine whether it is supported by competent, substantial evidence. Farrior v. Farrior, 736 So. 2d 1177, 1179 (Fla. 1999); Buxton v. Buxton, 963 So. 2d 950, 953 (Fla. 2d DCA 2007); Macaluso v. Macaluso, 523 So. 2d 615, 617 (Fla. 2d DCA 1988). As we have previously indicated, because there is sufficient evidence in the record to support the trial court’s conclusion that the repairs performed by marital labor and with marital funds were not improvements and did not

contribute to the appreciation in value of the beach house, this court is required to affirm regarding the nature of the repairs. Moss v. Moss, 829 So. 2d 302, 304 (Fla. 5th DCA 2002) (citing Adkins v. Adkins, 650 So. 2d 61, 62 (Fla. 3d DCA 1994) (on rehearing)). It follows that since the marital labor did not convert the appreciated value of the beach house to a marital asset, the fact that marital funds financed those repairs also would not convert the appreciated value to a marital asset. The question remaining for this court is whether the trial court erred in ruling that the \$14,000 expenditure of marital funds to pay the mortgage balance did not convert all or a portion of the appreciated value of the beach house into a marital asset.

The reasoning employed by the trial court in reaching its conclusion is generally consistent with decisions rendered by the Second District Court of Appeal. See Kaaa v. Kaaa, 9 So. 3d 756 (Fla. 2d DCA 2009); Mitchell v. Mitchell, 841 So. 2d 564 (Fla. 2d DCA 2003). These decisions essentially hold that only the actual amounts spent toward the mortgage principal reduction are marital assets subject to equitable distribution, but the increase in value of the property resulting from passive appreciation, such as “inflation or fortuitous market forces,” is not a marital asset. Mitchell, 841 So 2d at 567. We disagree with this approach because it often results in inequitable outcomes for the non-owner spouse, as demonstrated by the facts in Kaaa.

The First District Court of Appeal in Wilson and Stevens v. Stevens, 651 So. 2d 1306 (Fla. 1st DCA 1995), has adopted a different approach to resolving the issue of passive appreciation of non-marital assets encumbered by a mortgage paid with marital funds. In Stevens, the court explained:

Equitable distribution of marital assets should take into account the appreciated value of a non-marital asset

caused by the expenditure of marital funds or labor, including the parties' management, oversight, or contribution to principal, Young v. Young, 606 So. 2d 1267, 1270 (Fla. 1st DCA 1992); Massis v. Massis, 551 So. 2d 587, 589 (Fla. 1st DCA 1989), as well as an appropriate portion of any appreciation of a non-marital asset caused by the effects of inflation and market conditions, where "some portion of the current value . . . must reasonably be classified as a marital asset." Sanders v. Sanders, 547 So. 2d 1014, 1016 (Fla. 1st DCA 1989).

An asset brought by one party to a marriage, which appreciates during the course of the marriage, solely on account of inflation or market conditions, becomes in part a marital asset, if it is encumbered by indebtedness which marital funds service. Each spouse's income is deemed marital funds. Here the trial court erred in excluding from the equitable distribution plan the entire amount by which the [husband's non-marital real] property appreciated in value during the marriage, since marital funds were used to make the mortgage payments and pay the taxes. The appreciation, if any, should be allocated between the parties by a "reasonable proration of the appreciated value." Sanders, 547 So. 2d at 1016.

If a separate asset is 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. If an asset is financed entirely by borrowed money which marital funds repay, the entire asset should be included in the marital estate. In general, in the absence of improvements, the portion of the appreciated value of a separate asset which should be treated as a marital asset will be the same as the fraction calculated by dividing the indebtedness with which the asset was encumbered at the time of the marriage by the value of the asset at the time of the marriage. If, for example, one party brings to the marriage an asset in which he or she has an equity of fifty percent, the other half of which is financed by marital funds, half the appreciated value at the time of the petition for dissolution was filed, § 61.075(5)(a)2, Fla. Stat. (1993), should be included as a marital asset. The value of this marital asset should be reduced, however, by the unpaid indebtedness marital funds were used to service.

651 So. 2d at 1307-08. Although we agree with much of what the court said in Stevens, we do not agree with the specific methodology utilized by the court to calculate the portion of appreciated value that constitutes a marital asset when marital funds are used to pay a mortgage encumbering non-marital property.

The correct application of section 61.075(5)(a)2., Florida Statutes (2004), requires the court to directly correlate the amount of value appreciation of the asset during the marriage to the percentage of the mortgage (principal and interest) paid with marital funds during the course of the marriage.² The value appreciation is determined by subtracting the value of the asset at the time of the marriage from the value of the asset at the time of dissolution. The percentage of the mortgage paid with marital funds is determined by dividing the amount of mortgage payments made with marital funds by the amount of the unpaid principal balance of the mortgage at the time of the marriage. This percentage³ is then multiplied by the amount of the value appreciation to arrive at the total amount of the marital asset that is directly attributable to the mortgage payments made with marital funds. This total figure should then be divided by two, with each spouse receiving credit for half. For example, if non-marital property is valued at \$100,000 at the time of the marriage and valued at \$600,000 at the time of dissolution, the value appreciation is \$500,000. If that asset was encumbered with a mortgage that had a principal balance of \$50,000 at the time of the marriage and the mortgage payments (principal and interest) made with marital funds during the marriage totaled

²This formula only applies to situations where the non-marital asset appreciates in value.

³The percentage is capped at 100% in instances where the total amount of mortgage payments made with marital funds exceeds the balance of the mortgage at the time of the marriage.

\$5,000, the percentage of the mortgage paid with marital funds is ten percent. Ten percent of \$500,000 is \$50,000, and each spouse will be entitled, in equitable distribution, to one-half of that amount, which is \$25,000. In addition, each spouse will also be given credit for one-half of the actual amount of marital funds expended to pay the mortgage.

The non-owner spouse has the burden of establishing the value appreciation by presenting evidence of the value of the asset at the time of the marriage and the value of the asset at the time of the dissolution. The non-owner spouse also has the burden of establishing the amount of marital funds utilized to make mortgage payments and the outstanding balance of the mortgage at the time of the marriage. Once established, the amount of the value appreciation that constitutes a marital asset is presumed to be correct. The trial court may, in its discretion, deviate from the presumptively correct amount based on equitable factors that may include those found in section 61.075, Florida Statutes (2009), see Rafanello v. Bode, 21 So. 3d 867, 870 (Fla. 4th DCA 2009), provided that findings of fact are stated in the final judgment that explain and justify the reasons for the deviation.⁴

⁴For example, the owner spouse may have paid a substantial portion of the mortgage prior to the marriage, leaving a relatively small outstanding balance that is paid with marital funds, and the increase in value during the marriage is largely caused by market forces unrelated to the expenditure of marital funds to pay the outstanding balance. The trial court in its discretion may adjust the presumptive amount downward in consideration of these factors. As another example, the trial court could take into account the nature of the mortgage involved (interest only, principal only, interest and principal, negative amortization, etc.) in determining whether deviation from the presumptively correct amount is necessary to achieve an equitable result. These are but two exemplars where deviation from the presumptive amount may be an appropriate exercise of the trial court's discretion. Our discussion of them does not exclude others.

This methodology affords the non-owner spouse a return on his or her investment of marital funds utilized to satisfy the mortgage that is more closely correlated to the actual amounts of marital funds expended for that purpose. It properly places the burden on the non-owner spouse to prove entitlement to a portion of the value appreciation of a non-marital asset, and it gives the trial court the ability to deviate from the calculations based on equitable factors that may be present in any particular case that requires a measure of judicial discretion in order to achieve a fair allocation.

We note, parenthetically, that the Second District Court in Kaaa certified conflict with the First District Court in Stevens and that the Florida Supreme Court has accepted jurisdiction. Because the methodology we adopt differs from Kaaa and Stevens, we certify conflict with those decisions.

Wife points to this court's decision in Sizemore v. Sizemore, 767 So. 2d 545 (Fla. 5th DCA 2000), as authority for declaring the total amount of value appreciation to be a marital asset based on the mortgage payments of \$14,000 made with marital funds. We believe that Sizemore is clearly distinguishable. It does not involve payment of a mortgage with marital funds encumbering non-marital property; rather, it involves marital labor expended over the course of many years that literally changed most of the holdings in a non-marital brokerage account. In Sizemore, the parties were married twice to each other and both marriages combined spanned twenty-four years. Prior to the first marriage, the wife inherited a brokerage account that she allowed the husband to manage over the term of the first marriage, during the period they were divorced, and during the term of their second marriage. The wife also participated in the management of the account and the husband's name was placed on the account checks. In fact, the

holdings in the account almost entirely changed over the years the husband managed the account. Based on these facts, this court held that the increased value of the account was a marital asset. Although the opinion states that “[a]sset appreciation is subject to equitable distribution where marital labor contributes to its value, even where the increased value is primarily created by passive inflation,” we believe that this language is overly broad dicta that contributes nothing to the conclusion reached by this court in that case. Id. at 547. We also note that Sizemore has not been cited by this court in any subsequent opinion and that the conclusion this court reached in Sizemore was based on the particular facts and circumstances of the case. Hence, neither do we find Sizemore controlling here, nor do we perceive any inconsistency with the methodology we adopt and prior opinions emanating from this court.

We affirm that part of the final judgment holding that the funds spent for repairs were not improvements that contributed to the value appreciation of the house. We reverse that part of the final judgment awarding the wife \$27,481 as a marital asset and remand for further proceedings consistent with this opinion to determine whether part of the value appreciation of the house that occurred during the marriage should be awarded to Wife based on the mortgage payments made with marital funds.

AFFIRMED in part; REVERSED in part; and REMANDED; CONFLICT CERTIFIED.

PALMER and EVANDER, JJ., concur.