

The New Equitable Distribution Statute: A Better Solution to a Thorny Dilemma

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On March 21, 2018 at 5:59 p.m., Governor Rick Scott signed HB 639, effectively abrogating *Kaaa v. Kaaa*, 58 So. 3d 867 (Fla. 2010) and creating a new methodology to measure

the marital share of the passive appreciation of real property when a mortgage has been paid down during the marriage with marital funds.

HB 639, effective July 1, 2018, partially codifies the *Kaaa* decision by expressly including the passive appreciation of non-marital real property that may be distributed between the spouses if marital funds are used to pay down the property's mortgage principal. However, the bill partially overrules the *Kaaa* decision in three important ways. First, the bill provides that a non-owner spouse does not also have to actively contribute to the appreciation of the home in order to be entitled to passive appreciation. Rather, it is sufficient that marital funds are used to pay down the mortgage. Second, the bill replaces the calculation method set out in *Kaaa* with a three-step calculation method incorporating a "coverture fraction" designed to measure the parties' actual marital contributions in paying down the mortgage. Third, the bill does not require a finding of both active *and* passive appreciation in order for the court to distribute passive appreciation as a marital asset between the parties.

Additionally, if a party shows that application of the coverture formula would be inequitable under the circumstances, a court may decide to allocate the passive appreciation differently. Finally, with respect to any marital property that is equitably

distributed, the bill authorizes the courts to recognize the time value of money in determining the amount of installment payments to be paid by one party to another. This may include requiring the party responsible for payments to provide security and a reasonable rate of interest or something similar.

The New Statute F.S. §61.075(6)(a) 1 (c)

Paragraph (a)1 of F.S. §61.075(6) Equitable distribution of marital assets is amended to read:

c. The paydown of principal of a note and mortgage secured by non-marital 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 is determined by multiplying a coverture fraction by the passive appreciation in the property during the marriage.

(I) The passive appreciation is determined by subtracting the 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 described 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 must consist of a numerator, defined as the total payment 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 must be multiplied by the coverture fraction to determine the marital portion of the passive appreciation of the property.

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

(V) The court shall apply the formula specified in this subparagraph unless a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.

Applying the New Statute

While the statute is in accord with the holding in *Kaaa* that a non-owner spouse should be entitled to some portion of the passive appreciation on non-marital real property when the mortgage on a real property is paid down with marital funds, the new statute replaces the coverture formula set out in *Kaaa*. The new statute works as follows:

1. Determine that a parcel of non-marital real property is secured by a mortgage that was paid down during the marriage with marital funds;
2. Measure the mortgage principal paydown during the marriage

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- riage. The mortgage principle paydown is itself a marital asset and is subject to equitable division (regardless of whether there has been any passive appreciation on the subject property);
3. Determine whether the subject real property has passively appreciated during the marriage;
 4. Value the passive appreciation during the marriage of the subject real property by subtracting the 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, 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;
 5. Create a coverture fraction and multiply the passive appreciation by the coverture formula to determine the marital portion of the passive appreciation. The coverture formula is the core of the statute. The coverture formula is a numerator, defined as the total payment 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;
 6. Determine the total marital portion of the property. The total marital portion of the property

consists of the marital portion of the passive appreciation, the mortgage principal paid during the marriage from marital funds, and any active appreciation of the property during the marriage, not to exceed the total net equity in the property at the date of valuation.

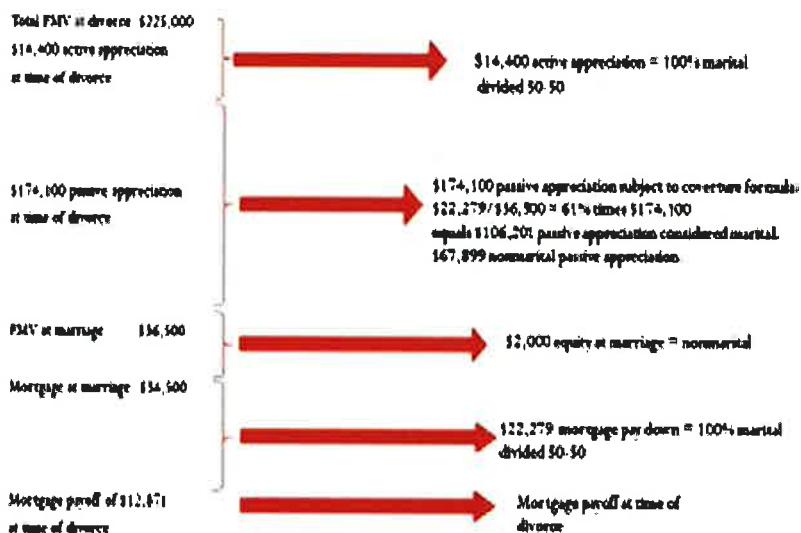
7. The court shall apply the subject formula specified in this subparagraph unless a party shows circumstances sufficient to establish that application of the formula would be inequitable under the facts presented.

Charting the New Statute

Perhaps the most efficient application of the statute to a set of facts is to, as this writer would put it, to "chart it out." As the *Kaaa* decision underlies the new statute, we will examine the facts there. In *Kaaa*, the parties were married for 27 years. They lived in

a home purchased only six months prior to the marriage by the husband. During those 27 years, the home passively increased in value from its original purchase price of \$36,500 in 1980, to \$225,000 in 2007. When he purchased the home, the husband made a \$2,000 down payment and secured a mortgage to finance the rest of the purchase price. The mortgage was paid by marital funds throughout the marriage, and at the time of divorce, the mortgage principal had been reduced by \$22,279, leaving a \$12,871 balance. Additionally, marital funds were used to add a carport, which increased the value of the home by \$14,400. The home was refinanced several times during the marriage. Because the home was purchased prior to the marriage in the husband's name alone, the home was determined to be his separate, non-marital property. Application of the facts in *Kaaa* to our chart would thus appear as follows:

New Statute as applied to *Kaaa* facts





The Kaaa Critique and the New Statute

Kaaa was problematic for three compelling reasons. First, the formula adopted in *Kaaa*, crafted by the Second District in *Stevens v. Stevens*, 651 So. 2d 1306 (Fla. 1st DCA 1995), used the mortgage at the time of the marriage in the numerator of the coverture fraction. That decision disregards the statutory requirements of F.S. §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. The *Stevens* coverture formula 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. The impropriety of the formula is notable when a heavily mortgaged property is marginally repaid during the marriage. Under *Kaaa*, 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 of non-marital property is marital. 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 then proceeded to contradict its own conclusion twice, by specifically mandating that a trial court must determine that the non-owner spouse made contributions to the property, and that “the trial court must determine to what extent the contributions of the non-owner spouse affected the appreciation of the property.” It was not clear in the Supreme Court decision that the efforts of either party were sufficient, or that a trial court was required to determine that the non-owner 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: F.S. §61.075(6)(a)1(b) states that marital assets include the “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.” The case law from every district is in accord. To the extent that the Florida Supreme Court, in fact, meant to state that there needed to be a showing of the non-owner spouse’s efforts in improving the value of the property, that pronouncement is directly inconsistent with case law. There is a lack of record evidence of the wife’s efforts in *Kaaa*. 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. What if the wife in *Kaaa* did not contribute to the active improvement of the subject real property? Under the court’s decision in *Kaaa*, she is out in the cold.

Third, as we have noted, the *Kaaa* court mandated that in order to find a portion of the passive appreciation of non-marital property marital, two requirements must be met: 1) the mortgage was paid down with marital funds, and 2) there was active appreciation as well as passive appreciation. The latter requirement contravenes the intent of the statute and case law. Simply put, there is no support for the proposition that there needs to be a requirement that active appreciation be present for passive appreciation to be deemed marital, so long as there is a finding that a mortgage on non-marital property has been paid down.

The Result of the New Statute

Application of the new statute will result in an equitable allocation of the marital and non-marital components of the passive appreciation of the

subject non-marital real property. It is based on fairness, as measured by the coverture fraction defined as the percentage of non-marital mortgage paid down during the marriage, compared to the fair market value of the subject property. This measure is the litmus test of fairness as it quantifies the “marital effort” during the marriage and applies that effort to parse out the marital portion of the total passive appreciation in the property. Critically, the new statute is in accord with existing statutory and case law principles that a non-owner spouse should not have to actively contribute to the appreciation of the home to be entitled to passive appreciation. Rather, it is sufficient that marital funds are used to pay down the mortgage. Additionally, the new statute does not require a finding of both active and passive appreciation for the court to distribute passive appreciation as a marital asset between the parties.

To conclude, then, *Kaaa* conflicted with long standing case law and statutory principles of fairness and equity and created an arbitrary coverture formula that led to inequitable results. The new statute fixes those inequities and is in evidence of the continuing evolution of equitable distribution in Florida.

David L. Manz is owner of *The Manz Law Firm*. David has been a member of *The Florida Bar* since 1988 and a member of the *Alabama State Bar* since 1985. He is Board Certified in Marital and Family Law by *The Florida Bar* and is a former Chair of *The Florida Bar Marital and Family Law Board Certification Committee*. David was Chair of *The Family Law Section of the Florida Bar* (2011-2012) and is a former President of the *Florida Chapter of the American Academy of Matrimonial Lawyers* (2010-2011). David regularly lectures statewide lectures and publishes frequently. David was the recipient of *The Florida Bar Family Law Section’s Visionary award for 2018* and has been heavily involved in the *Family Law Section’s equitable distribution agenda over the past decade*.