

IN THE FLORIDA SUPREME COURT

**S. Ct. Case No. SC09-1969
DCA NO: 3D-08-2251**

LINDA CRAWFORD,
Petitioner,

VS.

JANNIE BARKER

as Personal Representative of
the Estate of Manuel R. Crawford,
Respondent.

_____ /

**ON APPEAL FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT**

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS **ii**

TABLE OF CITATIONS **iii**

TABLE OF OTHER AUTHORITY **v**

INTRODUCTION **1**

SUMMARY OF ARGUMENT **5**

ARGUMENT **9**

POINT I **9**

**THERE IS NO EXPRESSED AND DIRECT CONFLICT
 BETWEEN A DECISION OF THE FLORIDA SUPREME COURT OR
 ANY DISTRICT COURT ON THE SAME ISSUE OF LAW AS
 DECIDED BY THE THIRD DISTRICT COURT OF APPEAL IN
 THE INSTANT CASE** **9**

POINT II **14**

**THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR
 WHEN IT HELD THAT A SPOUSE WAIVES HER RIGHTS TO
 THE PROCEEDS OF HER SPOUSE'S RETIREMENT FUND
 WHEN SHE SIGNS A MARITAL SETTLEMENT AGREEMENT
 WHICH PROVIDES THAT HER HUSBAND SHALL RECEIVE
 THE PROCEEDS OF THAT FUND** **14**

STANDARD OF REVIEW - *DE NOVO* **14**

ARGUMENT **15**

CONCLUSION **25**

PROOF OF SERVICE **28**

CERTIFICATE OF COMPLIANCE **28**

TABLE OF CITATIONS

CASES	PAGES
<i>Aetna Life Insurance Co. v. White</i> , 242 So.2d 771 (Fla. 4 th DCA 1970)	11
<i>Armstrong v. Harris</i> , 773 So. 2d 7, 11 (Fla. 2000)	14
<i>Bakerman v. Bombay Co., Inc.</i> , 961 So. 2d 259, 261 (Fla. 2007)	14
<i>Barker v. Crawford</i> , No. 3D08-2251 (Fla. 3 th DCA 2009)	4
<i>Canal Lumber Co. v. Florida Naval Stores & Mfg. Co.</i> , 83 Fla. 501, 92 So. 279 (Fla. 1922)	21
<i>Cassoutt v. Cassna Aircraft Company</i> , 742 So.2d 493 (Fla. DCA 1St 1999)	14
<i>Cooper v. Muccitelli</i> , 661 So. 2d 52 (Fla. 2d DCA 1995)	7, 10, 11
<i>Cooper v. Muccitelli</i> , 661 So.2d 52 (Fla. 2n ^d DCA 1995)	17
<i>Cooper v. Muccitelli</i> , 682 S.2d 77 (Fla. 1996)	18,19
<i>Cooper v. Muccitelli</i> , 682 S.2d 77 (Fla. 1996)	5, 8, 11, 13
<i>D'Angelo v. Fitzmaurice</i> , 863 So. 2d 311, 314 (Fla. 2003)	14

Davis v. Davis,
301 So.2d 154 (Fla. 3th DCA 1974) 11

Haddad v. Hester,
No. 3D06-901 (Fla. 3th DCA 2007) 15, 22

Levy v. Dellinger,
760 So.2d 1016 (Fla. 4th 2000) 18

Peoples Gas system, Inc. v. City Gas Co.,
147 So.2d 334 (Fla. 3th DCA 1962) 21

Raggio v. Richardson,
218 So.2d 501 (Fla. 3th DCA 1969) 11

Siegel v. Whitaker,
946 So.2d 1079, 1083 (Fla. 5th DCA 2006) 21

Smith v. Smith,
No 5D04-3832 (Fla. 5th DCA 2005) 5, 8, 10, 12, 19, 20, 23

W. Shore Rest. Corp. v. Turk,
101 So. 2d 123 (Fla. 1957) 14

TABLE OF STATUTES

<u>STATUTES & CONSTITUTION</u>	<u>PAGE</u>
Florida Constitution, Art. V, §3(b)(3)	26

TABLE OF OTHER AUTHORITY

<u>OTHER AUTHORITY</u>	<u>PAGE</u>
Fla. R. Civ. P. 9.210(2)	28
The Harvard Law Review Association, Garnett House, A Uniform System of Citation, 87, Eleventh Edition, 1970.	13, 26

INTRODUCTION

The respondent, in her brief, shall refer to the parties as they stood in the trial court below. Therefore, the respondent, Jannie Barker, who is the daughter Manuel R. Crawford and the personal representative of her father's estate, shall be referred to as the "respondent" or "Daughter". The decedent, Manuel R. Crawford, shall be referred to as "Manny" and the petitioner, Linda Crawford, shall be referred to as the "petitioner", Linda Crawford or Manny's "ex-wife".

Conformed copies of the record on appeal shall be included in the Appendix for this brief and shall be indicated by the letter "A" followed by the pagination given to the document in the Appendix.

STATEMENT OF CASE and FACTS

Manny and his ex-wife, Linda Crawford, were married in 1984. [A. 10] During the marriage Manny established a Deferred Compensation Fund through his employer. At the time of the establishment of this fund, Manny designated his wife as the beneficiary of this account.

After 19 years of marriage Manny petitioned for a dissolution of the marriage on August 22, 2005. The former Wife did not answer the petition or file a financial affidavit. [A. 3]

The trial court referred the issue concerning the distribution of the marital property to mediation on February 15, 2006. [A. 3]. An Amended Family Mediation Unit Agreement was signed by the parties which provided for distribution of the marital property, the majority of which was given to the former Wife. However, the former Wife agreed that the proceeds of Manny's retirement account would be distributed to Manny. [A. 8-9].

Manny and Linda were divorced on March 29, 2006 and the Final Judgment of Dissolution of Marriage was adopted and incorporated into the Amended Family Mediation Unit Agreement into the judgment. [A. 10-11]. Manny died approximately one year later on May 6, 2007, and his daughter, Jannie Barker, was appointed as the Personal Representative. [A. 12].

A dispute arose as to who should receive the Deferred Compensation money. An emergency motion to enforce the settlement agreement was filed [A. 12-15] and the matter was referred to General Magistrate William Dellow. [A. 16-17].

As the General Magistrate found, the Amended Family Mediation Unit Agreement provided that: "Husband shall retain retirement money with ... the Deferred Compensation Fund f/ka/ [sic] Pepsco." [A. 39]. It was the General Magistrates opinion that Linda and Manny had "agreed at the time of the signing

of the amended mediated settlement agreement that Manuel R. Crawford should get the money from this fund and that he should be the beneficiary." [A. 39].

The General Magistrate also found that Manny could have reaffirmed the designation of his ex-wife, Linda Crawford, as beneficiary. "The fact that he did not reaffirm Linda Crawford as the beneficiary of this account confirmed Manny's intent that he should be the beneficiary of this fund and that the money from the fund remained his at all times following the dissolution." See the General Magistrates Report [A. 39].

The General Magistrate recommended that the motion to enforce the Amended Family Mediation Unit Agreement should be granted and that Linda Crawford should be ordered to execute all documents required by Nationwide Retirement Solutions (the administrator of the Deferred Compensation Fund) to transfer the funds to the Estate of Manuel R. Crawford. [A. 39-40].

Manny's ex-wife, Linda Crawford, filed exceptions to the report and recommendations. The trial court sustained the exceptions of Manny's ex-wife simply because the court did not find any reference "...in the Amended Family Mediation Unit Agreement ...to Respondent's (ex-wife's) beneficiary rights to the proceeds of the subject deferred compensation account." [A. 44].

The "Order on Respondent's Exceptions" was entered on August 1, 2008. [A. 42-43]. An appeal was filed to the Third District Court of Appeal by Manny's daughter, as personal representative of Manny's estate, within 20 days of the rendition of that final order. [A. 44-47].

In that appeal the Third District was asked to decide whether a wife who was the designated beneficiary under a deferred compensation plan had waived her rights as beneficiary when she signed a marital settlement agreement in which she agreed that her husband should receive the proceeds of the plan.

The Third District, in the case at bar, answered the question in the affirmative. It held that when Mrs. Crawford agreed that her "[h]usband shall **retain retirement money with** the Town of Surfside and **the Deferred Compensation Fund** f/k/a Pepsco" [emphasis added], this was sufficient to act as a waiver, by Mrs. Crawford, of her beneficiary rights to the money or proceeds of the Deferred Compensation Fund. The Third District reversed the trial court's order and affirmed the General Magistrates Report and Recommendations.

STATEMENT OF JURISDICTION

The petitioner, ex-wife, is seeking discretionary review on the basis of misapplication of the law. The opinion of the Third District in *Barker v. Crawford*, No. 3D08-2251 (Fla. 3rd DCA 2009) did not misapply the law as set

forth in *Cooper v. Muccitelli*, 682 S.2d 77 (Fla. 1996)(*"Cooper II"*) or *Smith v. Smith*, 919 So. 2d 525 (Fla. 5th DCA 2005). Therefore, conflict jurisdiction does not exist.

SUMMARY OF ARGUMENT

JURISDICTION

There is no conflict between the *Barker* case and the *Cooper II* or the *Smith* case, whether under a theory of misapplication, or otherwise. There is a difference between the question of law addressed in the *Barker* case and the question of law addressed in both the *Cooper II* and in the *Smith* case.

The question of law in the *Barker* case was **whether a wife waives her beneficiary rights to the proceeds of a retirement fund by implication when she signs a marital settlement agreement in which she agrees that her husband should receive the proceeds.**

Cooper II is distinguishable since it involved a different issue of law. In *Cooper II*, the issue involved the proceeds of a life insurance policy. The court was confronted with a marital settlement agreement that did not even indicate that a life insurance policy existed, let alone who should receive the proceeds of that policy. Thus, *Cooper II* is unlike the *Barker* case since the *Barker* agreement **specifically identified the fund and specifically identified who should receive the proceeds** of that fund.

The question of law in the *Cooper II* case was whether the claim of the designated beneficiary of a life insurance policy should take precedence, over the claims of the heirs, to the death benefits of the policy. The sole basis for support of the claim of the heirs was the vague and general waiver language found in the marital settlement agreement in which the policy was never even mention.

The waiver agreement in *Cooper II* stated that each spouse waived all claims **as a surviving spouse** and it merely stated that "each party hereby waives ... **all claims** ... which he or she ... **might have** ... against the other...by reason of any matter... **prior to the date of this agreement.**" Thus, in *Cooper II*, the waiver did not include the life insurance policy since the ex-spouse had a right to the proceeds, not by being a **surviving spouse**, but by being the designated beneficiary of the policy.

The claim of the ex-wife in *Cooper II*, as designated beneficiary, was not waived in the marital settlement agreement because it did not fall under either of the categories found in her marital settlement agreement under which she agreed to waive her rights. First of all, her claim to the life insurance proceeds did not exist as a claim that she had "**prior to the date of the agreement**" since her husband was, obviously, still alive at that point in time. Secondly, the claim of the ex-wife as designated beneficiary did not fall under the category of "...claims ...

which ...she ... might have ... against the other...." Her claim was against the heirs - not against her ex-husband.

In *Cooper II*, the court found, upon an analysis of the facts of that case, that if "... the **general language** in the separation agreement trumps the **specific language in the policy**, [it] would place Academy [the insurance company] in an impossible position...." [Explanation added]. This was clearly distinguishable from the instant case where the language of Manny's settlement agreement was specific and not general.

In *Cooper II*, the court indicated that the insurance company would not be in an impossible position if the settlement agreement had designated who should receive the proceeds and if the insurance company was put on notice of this fact. See fn 1, *Cooper v. Muccitelli*, 682 So.2d at 77. Consequently, in the instant case where the retirement fund was put on notice of both Manny's property settlement agreement as well as the dispute between Manny's ex-wife and Manny's daughter, the fund manager was not in an impossible position. He merely withheld distribution until further order of court.

The court in *Cooper II* stated that: "... we approve the results in *Cooper [Cooper I]* on this issue." There, in *Cooper I (Cooper v. Muccitelli*, 661 So. 2d 52 (Fla. 2d DCA 1995)) the Second District held that: "... **without specific**

reference in a property settlement agreement **to** life insurance **proceeds**, the beneficiary of the proceeds is determined by looking only to the insurance contract." [Explanation added].

Consequently, the legal question in *Cooper I* and *Cooper II* is different than the legal question in *Barker* since in *Barker* the settlement agreement **did make specific reference** to the money or proceeds from the retirement fund. The *Smith case* is equally distinguishable from the *Barker* case. In *Smith*, once again in the marital settlement agreement the parties failed to designate who should receive the proceeds of a retirement plan.

Additionally, the court at bar does not have "misapplication jurisdiction" since the *Barker* decision does not state that the *Cooper* or the *Smith* decisions stand for any particular holding. The Third District, in *Barker*, merely cited *Cooper II* and *Smith* as source material. Therefore, the petition seeking conflict jurisdiction should be denied.

ON THE MERITS

The intent of Manny Crawford should be of paramount importance. After the decision in *Cooper II*, a layperson, such as Manny, would rightly assume that he would need to do nothing in order for his heirs to receive his retirement account if he made sure that his spouse agreed in their property settlement agreement that

he, and not his spouse, was to receive the money or proceeds of from that account. In the instant case, the parties agreed that Manny was to receive the proceed and, in essence, that Manny was to be the beneficiary of his own retirement account.

The retirement fund manager is not in an impossible situation if he is put on notice of the property settlement agreement before he disburses any money from the account. If he is in doubt, he can hold the funds until a court order is entered, as in the instant case, or he can easily interplead the funds into the registry of the court. Even if he disburses the funds after receiving notice of the change of beneficiary, the ex-spouse should be considered to be a constructive trustee of those funds. The heirs should then have the right to recover those funds in an equitable action against the ex-spouse.

ARGUMENT

POINT I

THERE IS NO EXPRESSED AND DIRECT CONFLICT BETWEEN A DECISION OF THE FLORIDA SUPREME COURT OR ANY DISTRICT COURT ON THE SAME ISSUE OF LAW AS DECIDED BY THE THIRD DISTRICT COURT OF APPEAL IN THE INSTANT CASE .

The Third District's decision in *Barker* held that a wife can waive her beneficiary interest in the proceeds of a retirement fund when she signs a marital

settlement agreement giving those specific retirement proceeds to her husband. This decision is not expressly and directly in conflict with either *Cooper v. Muccitelli*, 682 S.2d 77 (Fla. 1996) ("*Cooper II*") or *Smith v. Smith*, 919 So. 2d 525 (Fla. 5th DCA 2005) since the issues of law are different.

In *Cooper I* and *Cooper II*, the agreement did not even mention the existence of any death benefits. There, Mrs. Cooper was the sister of the deceased husband. Mrs. Muccitelli was the husband's ex-wife. Husband and Muccitelli were married in 1984. Husband purchased a life insurance policy in 1987. Muccitelli was named as primary beneficiary. Husband and Muccitelli were separated and entered into a **separation agreement** but the separation agreement **did not mention the life insurance policy**. The Husband died after the marriage was dissolved.

The Second District in the case of *Cooper v. Muccitelli*, 661 So. 2d 52 (Fla. 2d DCA 1995) ("*Cooper I*") held that the rights to the **PROCEEDS** can be fixed by a separation agreement approved by the court. However, the Second District held that "...without specific reference in a property settlement agreement to the insurance **proceeds**, the beneficiary of the **proceeds** is determined by looking only to the insurance contract." *A fortiori*, where the Settlement Agreement makes specific reference to the proceeds of the policy, as in the instant case, the beneficiary is determined by the Settlement Agreement.

The court in *Cooper I*, certified what it believed to be conflict with other district courts, whose decisions it perceived to require an evidentiary determination of intent when the settlement agreement failed to make a specific reference to the proceeds. The court in *Cooper I* held that "...without specific reference in a property settlement agreement to life insurance proceeds, the beneficiary of the proceeds is determined by looking only to the insurance contract." However, in the case at bar, there was specific reference to the proceeds and to whom the retirement proceeds were to go.

The Florida Supreme Court, in *Cooper II*, agreed with *Cooper I* to the extent that the property separation agreement used such vague and general terms that there was no indication that a life insurance policy existed, let alone any mention as to who was to receive the **proceeds** of the policy. The court found that such **general language**, as found in the *Cooper I* separation agreement, which merely provided for the general release of claims between the parties and which **did not** mention who should receive the proceeds, did not trump the **specific language of the policy**. See *Cooper v. Muccitelli*, 682 S.2d at 77.

The Florida Supreme Court did not specifically analyze the holding in the decisions of *Davis v. Davis*, 301 So.2d 154 (Fla. 3¹ DCA 1974); *Aetna Life Insurance Co. v. White*, 242 So.2d 771 (Fla. 4th DCA 1970); or *Raggio v.*

Richardson, 218 So.2d 501 (Fla. 3rd DCA 1969). Also, the Florida Supreme Court **did** indicate that the language of the settlement agreement would be controlling if the agreement names the individual who is to receive the proceeds and if the insurance company is put on notice of this fact. See *Cooper*, 661 So.2d at 77, fnl.

The Third District's decision is also **not** in conflict with *Smith v. Smith*, 919 So. 2d 525 (Fla. 5th DCA 2005). In *Smith*, the husband had policies of insurance and retirement plans to which the wife was named as the beneficiary. When the parties dissolved their marriage, they entered into a property settlement agreement that provided that: "Husband shall receive as his own and Wife shall have no further rights or responsibilities regarding these assets". This, as in the *Cooper* case, was very general language and very confusing. It did not contain the specific language as was contained in the case at bar in which Linda Crawford specifically agreed that Manny was to receive the proceeds from the retirement fund.

While the Fifth District, in *Smith*, acknowledge that a spouse could waive her designated beneficiary rights, the court made specific note of the fact that "The agreement [in *Smith*], however, made no mention of the proceeds or death benefits of the policies and plans." [Emphasis and explanation added]. Thus, the court in *Smith*, held that a spouse can enter into a settlement agreement and waive

her beneficiary rights to a retirement fund when she agrees that her husband should receive the proceeds of the retirement fund.

In the instant case, Mr. and Mrs. Crawford's Settlement Agreement **did address the proceeds of the Deferred Compensation Fund**. The Settlement Agreement **did** specifically address who should receive the proceeds of this fund. Therefore, the case at bar is distinguishable by its facts from the *Cooper II* and *Smith* decisions and, thus, there is no conflict with either *Cooper II* or *Smith*.

Also, the *Barker* decision is not in conflict with *Cooper II* or *Smith* since the Third District did not misapply the holdings in either of those cases. In *Barker*, the Third District merely cited *Cooper II* and *Smith* as general source material. The use of the notational signal "*See*", preceding the Third District's citation to the *Cooper II* and the *Smith* decisions, merely provides an indication that the decision in *Barker* will be suggested by an examination of the *Cooper II* and the *Smith* cases. THE HARVARD LAW REVIEW ASSOCIATION, Garnett House, A Uniform System of Citation, 87, Eleventh Edition, 1970. Therefore, the case at bar is distinguishable from the *Cooper II* and *Smith* decisions and there is no misapplication of either *Cooper II* or *Smith*.

POINT II

THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR WHEN IT HELD THAT A SPOUSE WAIVES HER RIGHTS TO THE PROCEEDS OF HER SPOUSE'S RETIREMENT FUND WHEN SHE SIGNS A MARITAL SETTLEMENT AGREEMENT WHICH PROVIDES THAT HER HUSBAND SHALL RECEIVE THE PROCEEDS OF THAT FUND.

STANDARD OF REVIEW - *DE NOVO*

Where a trial court's ruling is based entirely on written evidence, which is the case in the instant appeal, "the appellate court is in the same position as the trial court in weighing the evidence" and the standard of review is *de novo*. See *W Shore Rest. Corp. v. Turk*, 101 So. 2d 123 (Fla. 1957). An issue of law is reviewed by the *de novo* standard. See *Bakerman v. Bombay Co., Inc.*, 961 So. 2d 259, 261 (Fla. 2007) (question of law is subject to *de novo*.) See also *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003) ("The standard of review for the pure questions of law before us is *de novo*."); See also *Armstrong v. Harris*, 773 So. 2d 7, 11 (Fla. 2000) ("[T]he standard of review for a pure question of law is *de novo*."); *Cassoutt v. Cassna Aircraft Company*, 742 So.2d 493 (Fla. DCA 1' 1999).

ARGUMENT

The Third District Court of Appeal ("Third District") was correct when it reversed the final judgment of the trial court in the case at bar and when the Third District confirmed the decision of the General Magistrate. The trial court erred when it overruled the General Magistrate and denied enforcement of the parties' property Settlement Agreement (Amended Family Mediation Unit Agreement).

In the Settlement Agreement the ex-wife had agreed that the **proceeds** of Manuel R. Crawford's ("Manny")'s Deferred Compensation Fund were to be paid to Manny. The trial court erred when it ruled that Manny's ex-wife needed to specifically state, in the Settlement Agreement, that she was waiving her "beneficiary rights".

The trial court overlooked the fact that, if Manny's ex-wife had any "right" to be the beneficiary of this fund, and/or if she had a "right" to the proceeds of this fund, she clearly expressed her intent to waive that "right" when she agreed that the money from the fund was to go to Manny. Such waiver, by implication, is as enforceable as a written waiver. See *Haddad v. Hester*, No. 3D06-901 (Fla. 3rd DCA 2007).

Moreover, Manny's ex-wife only had an expectancy to receive the proceeds of the fund; she did not have a "right" to the fund at the time she signed the Settlement Agreement. Therefore there is no reason for the mediator of the Family

Mediation Unit, who drafted the Settlement Agreement, to have included such a provision in the Agreement.

In order for Manny's ex-wife to agree that the proceeds of this fund were to go to Manny, she obviously knew that she was giving up whatever "right" she may have had to this fund. Furthermore, Manny, and rightly so, had no reason to think that he needed to do anything else in order for his daughter and/or his estate to collect the proceeds of this fund when he died.

It was the General Magistrate's finding that Manny and his ex-wife "... agreed at the time of the signing of the Amended Family Mediation Unit Agreement that Manuel R. Crawford should get the money from this fund and that he should be the beneficiary." [R.110].

The General Magistrate also found that Manny could have reaffirmed the designation of his ex-wife as beneficiary, if he had wished her to continue to be the beneficiary, but he did not do so. The General Magistrate stated: "The fact that he did not reaffirm Linda Crawford as the beneficiary of this account confirmed Manny's intent that he should be the beneficiary of the fund and that the money from the fund remained his at all times following the dissolution." See the General Magistrates Report [R.110].

The General Magistrate recommended that the motion to enforce the Amended Family Mediation Unit Agreement be granted, and that Linda Crawford

be ordered to execute all documents required by Nationwide Retirement Solutions (the administrator of the Deferred Compensation Fund) to transfer the funds to the Estate of Manuel R. Crawford. [R.110-111].

The Settlement Agreement, signed in 2005, provides that Manny was to retain the proceeds of the retirement fund and therefore this provision trumps the prior "designation of beneficiary", signed by Manny in 1993. See *Cooper v. Muccitelli*, 661 So.2d 52 (Fla. 2^d DCA 1995). The 2005 Settlement Agreement shows that the clear intent of Manny and his ex-wife was to have Manny become the new beneficiary of the fund, which should now go to his daughter.

Even though *Cooper v. Muccitelli* is distinguishable, it is instructive. First of all, in *Cooper*, the agreement did not even address the existence of any death benefits. The facts in the *Cooper case* are fairly straightforward. Cooper is the sister of the deceased Husband. Mrs. Muccitelli is the husband's ex-wife. The husband and Muccitelli were married in 1984. The husband purchased a life insurance policy in 1987. Muccitelli was named as primary beneficiary. The husband and Muccitelli were separated and entered into a **separation agreement**. Later, during the course of the dissolution of their marriage, the **separation agreement** was incorporated into Final Judgment but the **separation agreement did not mention the life insurance policy**. The husband died after the divorce.

The Second District in the *Cooper* case held that the rights to the **PROCEEDS** can be fixed by a separation agreement approved by the court. However, the Second District held that "... without specific reference in a property settlement agreement to the insurance **proceeds**, the beneficiary of the **proceeds** is determined by looking only to the insurance contract." *A fortiori*, where the Settlement Agreement does make specific reference to the proceeds of the policy, the beneficiary is determined by the Settlement Agreement.

The Florida Supreme Court approved the results in the *Cooper* case. The language in the *Cooper* property separation agreement was general and did not mention who was to receive the **proceeds** of the policy nor did it even mention the policy itself. The court found that such **general language**, as found in the *Cooper* separation agreement, which merely provided for the general release of claims between the parties and which **did not** mention who should receive the proceeds, did not trump the **specific language of the policy**. See *Cooper v. Muccitelli*, 682 S.2d 77 (Fla. 1996).

The Fourth District in *Levy v. Dellinger*, 760 So.2d 1016 (Fla. 4th 2000) followed the *Cooper* case and held that: "Where a separation agreement **does not** include any mention of the **proceeds** of a retirement fund, courts 'need look no further than the plain language of the policy' to determine who the decedent intended as the beneficiary of the **proceeds**." [Emphasis added]. Of course, the

Levy case is distinguishable since **in the case at bar** the **Settlement Agreement** **very specifically mentioned the proceeds** and stated that the money from the retirement fund was to go to Manny.

The *Smith v. Smith*, No 5D04-3832 (Fla. 5th DCA 2005)), while distinguishable, is also instructive. There the husband had policies of insurance and retirement plans to which the wife was named as the beneficiary. When the parties dissolved their marriage, they entered into a property settlement agreement which provided that: "Husband shall receive as his own and Wife shall have no further rights or responsibilities regarding these assets". This was confusing language and, once again, very general language, as was also found in *Cooper*.

The Fifth District in *Smith* acknowledge that a spouse could waive her designated beneficiary rights. However, the court made specific note of the fact that "The agreement [in *Smith*], ..., made no mention of the proceeds or death benefits of the policies and plans." [Emphasis added]. After the court discussed the disposition of the life insurance policy **proceeds** it stated: "The same result obtains with respect to IRA and retirement plan **proceeds**, as well. Once again, in *Smith*, the marital settlement agreement did not mention a disposition of the **proceeds....**" of the IRA or the retirement plan. [Emphasis added].

The court in *Smith*, held that an ex-wife **can waives her beneficiary rights** when she specifically gives up her rights to the "proceeds" of a policy or fund.

Consequently, the court in *Smith*, held that, since the ex-wife in *Smith* did not specifically agree that her husband was to receive the proceeds, the court must look to the insurance contract to determine the name of the beneficiary. Here, this is not the case. See also, e.g., *Roxy v. Roxy*, 454 So. 2d 84 (Fla. 2d DCA 1984); *Dixon v. Dixon*, 184 So. 2d 478 (Fla. 2d DCA 1966) which hold that a named beneficiary of an insurance policy is not entitled to the death benefits because the dissolution judgment provided that the children or former spouse were entitled to the proceeds.

The interpretation of the appellate court in the *Smith case* is in accord with the decisions of the Third District, as is set forth below, concerning an implied waiver. Consequently, when one party agrees that the other party is to receive the proceeds, the first party, by reason of such agreement, has waived her right to those proceeds by implication.

In the instant case, Manny's Settlement Agreement was approved by the court and adopted into the final judgment for dissolution of marriage. This Settlement Agreement **did address the proceeds** of the Deferred Compensation Fund. The Settlement Agreement **did** specifically addresses who should get the proceeds of this fund. The mediator who drafted this Settlement Agreement

specifically wrote that: "Husband shall retain retirement money with ... the Deferred Compensation Fund fika/[sic] Pepsco¹."

A marital settlement agreement is a contract (*Siegel v. Whitaker*, 946 So.2d 1079, 1083 (Fla. 5th DCA 2006)) and it must be interpreted in such a manner so as to give meaning to all of its terms. *Canal Lumber Co. v. Florida Naval Stores & Mfg. Co.*, 83 Fla. 501, 92 So. 279 (Fla. 1922)(Here the court approved an interpretation that "...is more consistent with the general intent of the contract and with the common sense of the thing." Moreover, it held that "[t]he interpretation should be of the whole instrument and not of disjointed parts of it"); *Peoples Gas system, Inc. v. City Gas Co.*, 147 So.2d 334 (Fla. 3rd DCA 1962)("No word or part of an agreement is to be treated as a redundancy or surplusage if any meaning reasonable and consistent with other parts can be given to it."). Marital Settlement Agreement "[t]erms are to be construed to promote a reasonable, practical and sensible interpretation consistent with the intent of the parties...." *Siegel v. Whitaker*, *supra* at 1083.

"The Settlement Agreement is an agreement interpreted by courts as any other contract. *Berry v. Berry*, 550 So. 2d 1125, 1126 (Fla. 3^d DCA 1989). Accordingly, in order to determine the intention of the parties, we look to the language of the contract and consider the contract as a whole, with each provision being construed with

¹ The Deferred Compensation Fund with Pepsco is one and the same as the Deferred Compensation Fund with Nationwide Retirement Solutions which fund is at issue in this case.

reference to the others. See *Specialized Mach. Transp., Inc. v. Westphal*, 872 So. 2d 424, 426 (Fla. 5th DCA 2004); *Jerry's Inc. v. Miami*, 591 So. 2d 1000, 1001 (Fla. 3d DCA 1991) ('In determining the intention of the parties, individual terms of a contract are not to be considered in isolation, but as a whole and in relation to one another.')."
Haddad v. Hester, No. 3D06-901 (Fla. 3th DCA 2007)

In light of the entire Settlement Agreement in the case at bar, what could these eleven words have meant, other than the interpretation given to them by the General Magistrate and the Third District Court of Appeal. The General Magistrate found that it was Manny and his ex-wife's intent that Manny should be the beneficiary of this retirement fund.

This mediated settlement agreement, in the instant case, was drafted and entered into at the end of a mediation session. It clearly was not the subject of lengthy ruminations with drafts and counter drafts passing between the attorneys for the parties. Manny's ex-wife made a simple contract in which she agreed that Manny should get the proceeds from his retirement account. In consideration of Manny's agreement, to give his ex-wife the bulk of the marital assets, it is her contractual obligation to turn the Deferred Compensation money over to Manny's estate for his children.

The Third District held that the trial court erred when it overruled the recommendation of the General Magistrate. It held that Manny's ex-wife gave up

her right to the proceeds and that in the Settlement Agreement Manny had to do no more than simply have his ex-wife agree that Manny should receive the proceeds.

Manny's children did not need to show an express waiver of Manny's ex-wife's beneficiary rights. The Third District agreed and held that the trial court was wrong when it ruled otherwise. The trial courts ruling was also contrary to the law that states that a waiver may be implied from the language in an agreement or the action of the parties.

The waiver language, required by the trial court, would have been redundant. Manny's ex-wife did not need to specifically state that she was waiving her interest in the proceeds, as the trial court contends, since she specifically agreed that Manny was to receive the proceeds of the retirement fund.

In *Smith*, the agreement identified the insurance policies in dispute, as well as various retirement plans. However, the parties thereafter used general language and did not specify who was to receive the proceeds. The agreement in *Smith*, merely concluded that "Husband shall receive as his own and Wife shall have no further rights or responsibilities regarding these assets." The court found that the agreement made no mention of the **proceeds** or death benefits of the policies and plans. Once again, that is not the situation in the case at bar since the ex-wife in our case specifically agreed in the Settlement Agreement that Manny would receive the proceeds of the retirement fund.

Why would Manny's ex-wife need to say that she was waiving her right to the proceeds when she has already agreed that Manny was to receive the proceeds? Her agreement to give Manny the proceeds is evidence of her intent to waive any right she may then have had to recover the proceeds upon Manny's death.

The Third District agreed that the General Magistrate was correct in his ruling when he found that it was Manny's "intent that he was the beneficiary of this fund and that the money from the fund remained his at all times following the dissolution." Since the General Magistrate gave the Settlement Agreement this interpretation, why would Manny, a layperson, think that he had to do anything else in order for this fund to go to his daughter and his estate. Clearly he died believing that his daughter would benefit from this fund.

The holding of the Third District Court of Appeal in the instant case honors the clear intent of the parties as expressed in their settlement agreement and the final judgment. While it may be preferable, once a property division has taken place, for the person retaining the retirement account to change the designation of beneficiary, such action is not what most lay individuals would think to be necessary.

Having specifically divided the assets, and providing that Manny was to receive the proceeds of the retirement account, Manny, and most lay people, would assume that their former spouse would have no legal interest in the proceeds of the

account. As the General Magistrate concluded in the trial court below, if the account owner desires otherwise, because the marriage ended amicably or for other reasons, the owner could easily reaffirm the beneficiary designation after the dissolution.

The concern of some courts for the sensibilities of the insurance company or retirement fund manager is misplaced. If the insurance company or fund manager is put on notice of a dispute concerning the ownership of the proceeds before the proceeds are disburse, and they feel unsure of their legal liability, all they need do is hold the funds until the parties obtain a court order resolving the issue. If the funds have already been disbursed, then it would be the responsibility of the parties to resolve the issue among themselves in an equitable proceeding based on a theory of a constructive trust.

CONCLUSION

The petition seeking discretionary review of the decision of the Third District Court of Appeal in the instant case should be denied for a number of reasons. The decision of the Third District does not involve the same legal question or facts as the cases cited by the petitioner. Unless the legal question is

the same there can not be any conflict jurisdiction. Florida Constitution, Art. V, §³(b)(³).

In addition, the Third District's decision is distinguishable because it concerns whether the waiver of beneficiary rights of a designated beneficiary can be implied when the settlement agreement specifically refers to the proceeds of a retirement fund and specifically designates the person who is to receive those benefits. This is distinguishable from the cases cited by the petitioner for conflict, since in those case the settlement agreements never mentioned the policy or fund and/or never mentioned who should receive the proceeds of the policy or fund.

Finally, the Third District's citation to the *Cooper* and *Smith* decisions did not suggest that these cases were **precedence** for the Third District's holding. Instead, the Third District merely cited these cases with the notational signal, "See", which merely provides an indication that the decision in *Barker* will be suggested by an examination of the *Cooper* and the *Smith* cases.

The *Barker* holding does not create a problem for insurance companies or fund managers since the bright line test is whether they were put on notice of the settlement agreement. Furthermore, the retirement fund administrator in the instant case was not a party to the instant case. Moreover, there was no need to involve the retirement fund directly since the family court is a court of equity and,

had the funds been disbursed, the court had the power to declare a resulting trust and required that the funds be transferred between the parties.

The respondent respectfully requests that the court find that there is no conflict jurisdiction and dismiss the petition. In the alternative, if the court finds that there is conflict, the court should align itself with the Third District's decision in the *Barker* case and affirm the Third District's decision as well as the recommendation of the General Magistrate.

Dated, _____2010.

Respectfully submitted,
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PROOF OF SERVICE

I hereby certify, under penalty of perjury, that on this _____ day of _____, 2010, I caused to be placed in the United States First Class Mail, Postage Prepaid copies of "Respondent's Jurisdictional Brief" addressed as follows:

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CERTIFICATE OF COMPLIANCE

Counsel for the Respondent certifies that the brief complies with font requirements of Fla. R. Civ. P. 9.210(2).

By _____
Thomas F. Pepe, Esquire