IN THE SUPREME COURT OF FLORIDA

J. REX FARRIOR, JR.,

Petitioner,

vs.

MARY LEE FARRIOR,

Respondent.
_____/

Case No. 93,329

2nd DCA No. 96-01493

RESPONDENT'S ANSWER BRIEF

ON CERTIFIED CONFLICT REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL OF FLORIDA

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PRELIMINARY STATEMENT

The Appellee, MARY LEE FARRIOR, is referred to herein as "the Wife" or "Ms. Farrior" and the Appellant, J. REX FARRIOR, JR., is referred to as "the Husband" or "Mr. Farrior." References to the record on appeal, in which the pleadings, exhibits, and trial transcript are indexed, appear as "R:_" followed by the appropriate citation to the record. In addition to the record citation, trial exhibits are referenced herein as "Husband's Ex. _" or "Wife's Ex. _."

STATEMENT OF THE FACTS AND OF THE CASE

The parties separated in October of 1993. (R:1126). The Wife filed her Petition for Dissolution of Marriage on July 7, 1994. (R:1-3). After this case commenced, the Husband sought alimony from the Wife. (R:48-50; 58-62).

It was not until the Husband filed his Second Amended Counterpetition that he alleged for the first time what became his core assertion: "the parties had made an oral agreement prior to and at the beginning of the marriage that all assets acquired during the marriage would be joint property." (R:890-902).

At the final hearing, the Husband was sixty-eight years of age; the Wife fifty-eight, (R:1774), and by then, the Husband had abandoned his claim for alimony. (R:526-527; 548-552; 890-902). The parties stipulated the date of valuation was October 31, 1995. (R:2439-2440). The accountants of the parties agreed on net worth but disagreed on the character of the assets. The net worth as of the date of valuation, October 31, 1995, was $47,684,556. (R:2430-2431; 5766-5781; 3481-3512; Husband's Ex. 294; Wife's Ex. 2).

Two issues were presented to the trial court for resolution: 1) whether the Wife's Coca-Cola stock, SunTrust Bank stock, Genuine Parts stock, and her interest in the Chestnut Street Exchange Fund, were her non-marital assets; and, 2) whether the Wife was entitled to special equities in assets purchased and improved with the sale of her

inherited Coca-Cola stock.

a. The background of the parties and the marriage.

The parties were married in May, 1958 when the Wife was twenty-one years of age and had completed only two years of college. (R:1093; 1774). The Husband, then thirty-one years of age, was a partner in a prominent Tampa law firm. (R:1093; 1775-1776;2012). The marriage was traditional: the Wife was a homemaker and mother; the Husband pursued his career and handled the family finances. (R:1237-1248; 1136-1137; 3120-3121). Four children were born of the marriage, all of whom are now adults. (R:1103).

At trial, the Husband relied on the theory that while the Wife had entered the marriage with substantial assets, they had an "oral agreement" which evolved over time. According to the Husband, the parties agreed their income and assets would be "ours" and all assets would be joint. (R:1786-1788). The Wife testified no such agreement existed. (R:3116-3117). Both the trial court and the Second District rejected the Husband's theory of the existence of such an "oral agreement." *Farrior v. Farrior*, 712 So. 2d 1154, 1155-1156 (Fla. 2d DCA 1998). In this appeal, the Husband has abandoned his "oral agreement" theory.[1]

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[1] But the Husband cannot resist alluding to some notion of an "oral agreement" periodically throughout his Initial Brief. For example, he refers to a "marital (continued...)

b. The Wife's non-marital assets.

Before the marriage, the Wife had been named a beneficiary of a trust established by her grandfather. (R:2089-2090). The trust was funded with stock in the Coca-Cola Company and other securities. (R:1101; 3601-3616; Wife's Ex. 4). At first, the Wife was an income beneficiary of the trust, (R:1107; 3601-3616; Wife's Ex. 4)., then, in 1968, the trustee made a distribution to the Wife of the following stock certificates:

1) 10,298 shares of Coca-Cola Company valued at $1,279,526.00;

2) 291 shares of Coca-Cola International valued at $1,735,524.00; and

3) 281 shares of Trust Company of Georgia valued at $30,677.00, now known as SunTrust Banks. (R:1080; 1044; 2089-2094; 3601-3616; 3767; 4044-4172; Wife's Ex. 4 and 34). As the Husband conceded, all the stock certificates were titled in the Wife's name. (R:2094).

The Husband also admitted that later some of the Wife's inherited Coca-Cola stock was directly exchanged for an interest in the Chestnut Street Exchange Fund, titled solely in the Wife's name. (R:1082-1083; 1814-1815; 4044-4172; Wife's Ex. 34).

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[1](...continued)
understanding" and states "the couple's money went into 'one pot.'" Initial Brief at 6, 10-11.

All of the Coca-Cola and SunTrust stock ever owned by the Wife, including the stock remaining at the final hearing, stemmed from the trust distribution. The stock certificates representing those shares remained in the Wife's name alone. (R:1082-1083; 2900; 4044-4172; Wife's Ex. 34). The increase in the number of shares of Coca-Cola stock owned by the Wife was attributable to stock splits after the trust distribution and to a company mandated exchange of Coca-Cola International stock for Coca-Cola stock. (R:2900; 4044-4172; Wife's Ex. 34). On December 31, 1994, the Wife was the sole owner of stock certificates representing 514,648 shares in the Coca-Cola Company. (R:2901). The Husband conceded the Wife never transferred any of the Coca-Cola stock to his name or to their names jointly. (R:1079; 1794; 2094-2905).

In 1990, the Wife received 429 shares of Genuine Parts stock from her mother as a gift -- and this gift was acknowledged by the Husband. (R:808; 1083-1084; 3481-3512; Wife's Ex. 2). Like the Coca-Cola stock, the certificates representing the shares were at all times titled in the name of the Wife. (R:783-784).

At trial the Wife claimed as her non-marital assets: (1) 514,648 shares of Coca-Cola stock valued at $36,990,325.00; (2) 13,572 shares of SunTrust Banks stock valued at $875,394.00; (3) 429 shares of Genuine Parts stock valued at $16,999.00; and 4) 8,609 shares of the Chestnut Street Exchange Fund valued at $1,638,723.00. (R:3481-3512; Wife's Ex.2).

c. The Husband's so-called "management" of the Wife's non-marital stock.

The Husband, as an alternate basis for his claim to the Wife's inherited Coca Cola stock, argued at trial he was entitled to a portion of the value of the stock because his so-called "management" of that stock somehow enhanced its value. (R:2201).

d. The use of some of the Wife's non-marital assets as collateral for marital obligations.

From time to time during the marriage, at the Husband's request, the Wife pledged some of her separately titled Coca-Cola stock certificates as security for marital obligations. (R:1905-1906; 1913-1914). By the time of the final hearing, every one of the joint obligations for which the Coca-Cola stock certificates had been pledged as security had been satisfied. All of the stock certificates previously pledged had been returned to the Wife. All of the stock certificates remained titled, as they always had been titled, in her name. (R:2589). At the final hearing, certificates in the name of the Wife representing 24,012 shares of Coca-Cola stock remained pledged for a letter of credit issued in connection with an investment made by the Husband. (R:2679-2680; 2680-2682).

Of the Coca-Cola stock certificates still in existence at the final hearing, only 29,444 shares were ever pledged during the marriage. (R:2680-2682). None of the remaining Coca-Cola stock certificates, representing 455,204 shares of the 514,648 on

hand as of the valuation date, had ever been pledged as security for marital obligations. Initially, the Husband's accountant testified that 220,372 of the total shares still on hand either had been pledged or were shares resulting from stock splits of the shares represented by the pledged stock certificates. (R:2473-2474; 5813-5827; Husband's Ex. 302). Later, however, the Husband's accountant admitted the 220,372 shares had not actually been pledged; instead, only the predecessor certificates, the certificates in existence before the stock splits, had been pledged. (R:2578-2582).

No evidence was presented the stock certificates representing the shares in Genuine Parts, SunTrust Banks, or Chestnut Street Exchange had ever been pledged for marital obligations. But this fact is masked when the Husband states at page 7 of his Initial Brief that "the stock -- primarily Coca Cola -- was necessary either as collateral for loans . . .". (Emphasis added).

The Husband employs a similar tactic in his treatment of the parties' purchase of their Ocala ranch. In the Answer Brief he filed in the Second District, the Husband conceded "[t]he trial court admitted the ranch loan pledge, the so-called 'blue-green document,' for the limited purpose of proving the existence of an agreement that all assets were to be treated as joint. (T.1936-38)".[2] Yet in this Court, the Husband does

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[2]Included in the Appendix is page 9 of the Husband's Answer Brief filed in the Second District.

an about face. He now represents as fact, Initial Brief at 5 and elsewhere, that the "blue green document" shows the Wife secured the $50,000 ranch loan "by the assignment of the entire corpus of Mrs. Farrior's share of the Nunnally Trust as collateral for the loan."

The Husband's newly minted representation that the trial court declined to adopt is untrue to the record in at least two ways. First, it presents as fact the assertion that the document was admitted for the purpose of proving the Wife pledged her entire share of the trust. The trial court rejected this and found only that the Wife had pledged some shares of her Coca-Cola stock for marital obligations. (R:3102).[3] Second, the Husband's new approach suggests the Wife, at the time of the purported pledge, had stock certificates to pledge in the first place. This is incorrect, as the Wife had not yet received any stock certificates from the trust.

e. The Husband's sales of the Wife's non-marital Coca-Cola stock.

During the marriage shares of Coca-Cola stock were periodically sold and Coca-Cola stock dividends where used to fund the family lifestyle and to purchase certain

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[3]The "blue green document" was incomplete, bearing only the signature of the Wife. (R:1928). The Husband had no recollection of having signed the document.(R:1929). The promissory note was not produced so it was uncertain if the Wife even made herself obligated for the payment of the ranch loan.

assets. (R:1826-1828; 2061; 4174-4178; Wife's Ex. 36-40). But the Husband errs in presenting as fact, at page 7 of his Initial Brief, that any shares of stock in Genuine Parts, SunTrust, or Chestnut Street Exchange were ever sold to fund their lifestyle or to purchase marital assets -- there were no such sales.

Contrary to the Husband's assertion that his "care, custody and control" of the Coca-Cola stock was evidenced by his use of blank stock powers, the record shows that to effect sales of the Wife's Coca-Cola stock, the Husband had to request the Wife to sign the "stock powers" that authorized the Husband to endorse the stock certificates. (R:1120-1121; 2061-2062). As the Wife testified, only once did she sign what the Husband termed a "batch" of stock powers -- in October, 1993, after the parties had already separated but before the commencement of this proceeding. (R:1121; 1126; 1455-1457). The Wife signed the stock powers, five or six in all, not because the Husband had some sort of overall "care, custody or control" but because the Husband had represented to the Wife that cash flow was terrible and they had no money to pay taxes or bills. (R:1127).

The Husband's assertion as fact, at page 7 of his Initial Brief, that he had "control" of and authority over the Coca-Cola stock is nothing more than his assertion, and a disputed one, at that. Consistent with the Second District's conclusion, the record evidence is that throughout the marriage, when he wanted to sell or use Coca-

Cola stock, the Husband had to go to the Wife to obtain her signature on a stock power or a stock certificate. Also without record support is the Husband's statement, at page 10 of the Initial Brief, that "there was no dispute, as the trial court found, that 'the Husband could draw on those assets, as a whole, for personal and family purposes . . .'" As established by the evidence and as the Second District concluded, Mr. Farrior always needed the Wife's permission to do so. *Farrior* at 1156.

f. The bank accounts.

The record evidence does not support the Husband's assertion, at page 10 of his Initial Brief, that "[a] single Farrior bank account was used from the early 1970's to pay all the Farrior bills." (Emphasis supplied). Again, the trial court made no such finding. The record shows that at the beginning of the marriage the parties had two joint bank accounts with the Marine Bank of Tampa for household expenses. (R:2160-2161). One account was used almost exclusively by the Wife. The Wife had signatory authority on the other, which was titled in the Husband's name. In the early 1970's, the parties changed their accounts to First National Bank, which was later acquired by Barnett Bank. (R:2160). After the acquisition, the signature card showed the Wife no longer had signing authority for the account identified as the 8115 account used by the Husband. (R:2187-2188). The 8115 account was titled "J. Rex Farrior, Jr., Attorney at Law." (R:2193). The parties also maintained a joint account at Barnett, from which

the Wife paid her expenses. (R:2183; 2192).

At trial, the Husband described his 8115 account as a "joint account" and testified that he called it the "joint family account." (R:1789; 2161). The Husband's testimony was "explained" by his own secretary of thirty years. She testified the Husband never referred to the 8115 account as the "joint family account" until after the commencement of the instant dissolution proceedings. (R:2310; 2401; 2405-2406). In fact, in the registry of accounts she maintained for the Husband, the secretary identified the 8115 account as the Husband's "personal" account. This registry entry changed, however, several months after the commencement of the proceeding, when the Husband's secretary began to describe the 8115 account as "transfer to joint account for lawyers." (R:2411; 3848, 3849-3880; Wife's Ex. 29 and 30).

In the trial court, the Husband took the position that the Wife had signatory authority over the 8115 account because she signed one check. (R:2188). The Husband conceded in the twenty years or so of the account's existence, this one check was the only one he was aware of the Wife having signed. (R:2189).

The Husband also testified he had an investment or money market account at First National Bank, later Barnett Bank, account number 1243, over which he had exclusive control. The Wife did not have authority to sign on this account and never made deposits or withdrawals. (R:2161-2164).

The Husband agreed with the Wife's accountant that commencing in 1975 all proceeds from the sale of Coca-Cola stock were deposited by the Husband into the Husband's 8115 account with the exception of a single deposit into the Husband's 1243 account. (R:1802; 2158; 2906).

g. The Final Judgment of Dissolution of Marriage entered by the trial court.

The trial court made the following findings of fact:

> (1) During the marriage, the Wife inherited 10,298 shares of Coca-Cola stock in her name alone, from a source outside of the marriage. The number of shares remaining from this original inheritance has increased to 514,648 shares, through stock splits and the exchange of other assets inherited by the Wife. . . .
>
> (2) During the marriage, the Wife inherited 281 shares of stock in Trust Company of Georgia (now known as SunTrust Banks) in her name alone. The number of shares in SunTrust Banks remaining from this original inheritance has increased to 13,572 shares, through various company mergers and/or stock splits. . . .
>
> (3) The Wife claims, as nonmarital property, 8,609 shares of the Chestnut Street Exchange Fund, titled in her name alone, which was obtained through a direct exchange for certain shares of Coca-Cola stock.
>
> (4) In August, 1990, the Wife received 429 shares of Genuine Parts stock from her mother as a gift. . . .

(R:3099-3100). (Emphasis supplied).

The trial court determined the stock in Coca-Cola, SunTrust, and Genuine Parts "were initially nonmarital assets upon the Wife's receipt of said assets; both parties

have acknowledged this fact." Based on three factors, which are addressed herein, the trial court concluded the Wife's nonmarital stock became marital through commingling or intermingling. (R:3100; 3102). The trial court concluded:

> In sum, the conduct of the parties throughout the marriage shows that the Wife's individually titled stock has become completely intermingled with all of the parties' other assets. This intermingling has created a presumption that the Wife has made a gift to the Husband of an undivided one-half interest in her individually-titled stock.

(R:3102).[4]

The Wife's contention that the Chestnut Street Exchange Fund was her non-marital property was also rejected by the trial court. According to the trial court, this asset was marital because the Husband made the decision to obtain it in exchange for Coca-Cola stock, and the Wife deferred to his decision. (R:3102-3103).

The trial court ultimately ruled that all of the parties' assets and liabilities were marital. (R:3114). The trial court then distributed the $47,700,938 estate, including $36,990,325 representing 514,648 shares of Coca-Cola stock, equally between the parties. (R:3104-3114). Although unnecessary for it to do so because of its earlier determination that the Wife's inherited stock was marital, the trial court also stated

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[4]Mr. Farrior, at page 11 of his Initial Brief, neglects to mention that the trial court relied on a presumption of a gift. Instead, he argues the trial court concluded the Wife actually intended a gift of her inherited stock.

" . . . the appreciation in the individually-titled stock is attributable to the marital efforts of the parties, particularly through the Husband's management and oversight of the Wife's assets." (R:3103).[5]

h. The Second District's Opinion.

The Second District reversed the Final Judgment of Dissolution of Marriage. It held the stock inherited by the Wife, which remained until the date of dissolution titled in her name, was her nonmarital property. *Farrior* at 1155. Like his depiction of the record evidence, the Husband's characterizations of the reasoning and holdings in the Second District's Opinion are inaccurate.

The Husband's suggestion at page 12 of his Initial Brief that the only reason the Second District reversed the trial court's equitable distribution was because the stock was titled in the Wife's name. The Second District noted that: "[a]t the time of the dissolution in 1996, the total assets for consideration by the trial court were nearly $48 million, three quarters of that amount being stock in the Wife's name which she inherited from her family." (Emphasis added). *Id.* Because the trial court recognized the stock in question was from the outset the Wife's nonmarital asset, the Second

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[5] The trial court also concluded the appreciation in the value of the Wife's individually titled stock was "in great measure created passively by inflation, market conditions, or the general conduct of others." (R:3103).

District concluded the trial court had rejected the Husband's argument that the parties had an oral agreement which converted all assets to marital assets. The Second District also rejected his attempt to use this oral agreement theory as an alternative basis for affirming the trial court. *Farrior* at 1155, 1156.

The Second District rejected the three factors the trial court relied on to support its commingling holding. It first addressed the trial court's determination that the Wife's separate property became marital on the theory that equal access resulted in commingling, and ruled the four cases relied on by the trial court, *Woodard v. Woodard*, 634 So. 2d 782 (Fla. 5th DCA 1994); *Amato v. Amato*, 596 So. 2d 1243 (Fla. 4th DCA 1992); *Crews v. Crews*, 536 So. 2d 353 (Fla. 1st DCA 1988); and *Walser v. Walser*, 473 So. 2d 306 (Fla. 2d DCA 1985), were distinguishable. Unlike the instant case, the trial court's authorities involved joint accounts to which each of the parties had access and into which deposits were made which thereafter became untraceable. The Second District stated that the assets in question here were stock certificates titled in the Wife's name alone. The stock certificates always had a separate identity, were never deposited in an account, and never became untraceable. *Id.* at 1156.

After the Second District concluded the stock certificates were never intermingled, it pointed out the Husband's access to the stock was not equal to the

Wife's:

> While the Wife allowed the Husband to make decisions about whether the stock should be sold or traded, and even allowed the Husband to vote the stock, the stock remained titled in the Wife's name alone and was never placed in an account to which the Husband had equal access. Clearly the Wife deferred to the Husband's judgment on financial decisions related to the stock; however, the Husband's management was always dependent upon the Wife's signing of stock certificates. We can find no case, nor were the parties able to provide us with any law, that converts this arrangement into a presumption of a gift as occurs when monies are deposited into a joint account and are thereby equally available to either party. Because this evidence does not support a finding that the Husband had equal access to the Wife's stock, we conclude the stock in the Wife's name did not become a marital asset by intermingling.

Farrior at 1156.[6]

The second factor articulated by the trial court to support its commingling conclusion was the use of the stock to provide luxuries and enrichment to the parties during the marriage. The trial court relied on *Claughton v. Claughton*, 483 So. 2d 447 (Fla. 3d DCA 1986). As the Second District concluded, *Claughton* does not stand for the proposition that providing luxuries and enriching the standard of living proves

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[6]Mr. Farrior, in his footnote 13 on page 13 of his Initial Brief, misstates both the Second District's decision and the trial court's findings of fact or equal access. The trial court made no findings about assignments separate from certificates or about joint safe deposit boxes. Therefore, the Husband cannot establish the trial court relied on either in determining Mr. Farrior had "equal access." The reasoning of the Second District on the issue of "equal access" is quoted in the preceding paragraph. Finally, whether or not the Husband had "equal access" is not, as urged by the Husband, a finding of fact -- it is a conclusion based on the record evidence.

intermingling. Instead, *Claughton* only holds that nonmarital assets which are intermingled to provide luxuries and an enriched standard of living should be treated as marital assets. The Second District rejected the trial court's interpretation of *Claughton* as applied to the stock at issue holding instead that the trial court correctly applied *Claughton* to the acquisitions purchased with income from the stock. In rejecting the Wife's claim of special equity, the Second District held the trial court correctly found the many acquisitions of the parties resulted from the Wife's interspousal gift of the income from her nonmarital assets and thus became marital assets. *Farrior* at 1156.

The Husband asserts at page 13 of his Brief that the Second District "declined to consider" the pledge of the Wife's individually titled stock as collateral for marital obligations. This is incorrect. The Second District's Opinion shows it considered and rejected this very point, which was the third factor cited by the trial court to support its intermingling conclusion. The trial court relied on *Adams v. Adams*, 604 So. 2d 494 (Fla. 3d DCA 1992). On this point, the Second District concluded:

> Even if we were to agree with Adams, the trial court found that less than fifty percent of the Wife's separately-held stock was ever used as collateral and thus would not convert all of the Wife's stock into a marital asset. We find no other cases, however, that follow the rule advocated by the Husband. And we conclude there is no equitable basis for a rule that punishes a spouse who uses nonmarital property to finance the acquisition of marital property by then converting the nonmarital collateral to marital

> property. It is completely illogical to say that the pledge of $10 million in stock to secure a $100,000 debt would convert the $10 million in stock to a marital asset. To the extent our decision conflicts with Adams, we certify the conflict.

Farrior at 1156-1157.

The Second District concluded the trial court's decision was:

> not legally sustainable under the law of equitable distribution. Section 61.075, Florida Statutes (1995), sets forth the rules for equitable distribution, including definitions of marital and nonmarital property. Section 61.075(5)(b)2 specifically defines nonmarital assets as "[a]ssets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets." We conclude the status of the inherited stock did not change during the marriage and thus continued to be a nonmarital asset at the time of the dissolution.

Id. at 1157. It reversed the equitable distribution and remanded to the trial court to make adjustments in the distribution

> that were not considered when it ordered the equal division of all assets. The trial court found that the Wife's stock, although it appreciated passively to a great extent, was also enhanced by the Husband's efforts. To the extent the trial court can find that this stock was enhanced through the efforts of the Husband, the enhancement would become marital property and thus subject to division.

Id. (Emphasis supplied).

Contrary to the intimation by the Husband at page 12 of his Initial Brief, the Second District never held the Husband's so called "stock management work" had a value and all that remains is to assign a dollar value. Instead, the Second District

remanded the case to the trial court to determine, as a threshold matter, whether there was any appreciation in the value of the Wife's inherited stock due to Husband's efforts.

Based on the Opinion of the Second District, the Husband sought discretionary review in this Court. On July 6, 1998, this Court entered its Order postponing a decision on whether to accept jurisdiction and requesting briefs on the merits.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction. The Second District's decision does not conflict with the Third District's decision in *Adams v. Adams*, 604 So. 2d 494 (Fla. 3d DCA 1992). The Second District pointed out the factual differences between the present case and *Adams*. Although it certified the case, the District Court did so with hesitation and qualification, stating only "[t]o the extent our decision conflicts with Adams, we certify the conflict." (Emphasis supplied). *Adams* is readily distinguishable, as it involves the placement of nonmarital funds in an account with marital funds so that the deposited funds became untraceable and therefore intermingled. *Adams* follows the well established law governing the doctrine of commingling in the context of assets placed in accounts. *Adams* does not stand for the proposition that the mere use of nonmarital assets as collateral for marital obligations, in the absence of true commingling in an account, transforms nonmarital assets into marital.

Here, in contrast to the accounts in *Adams*, the Wife's inherited and gifted nonmarital assets consisted of stock certificates, titled in her name alone. The certificates were never placed in an account, joint or otherwise. As a consequence, the stock certificates, which had always been titled in the Wife's name alone, remained separate, identifiable, and readily traceable. Commingling of the stock with marital funds never occurred. *Adams* is therefore inapplicable and the instant decision does not

conflict with it.

As the Second District correctly held, the concept of equal access did not support the trial court's intermingling conclusion either. The Husband did not have equal access to the Wife's separately titled stock certificates. At all times, the stock certificates remained titled in the Wife's name. The sale of stock represented by a stock certificate could be effected only if the Wife endorsed the certificate or executed a power of attorney. Moreover, the stock certificates were never surrendered for deposit into an account, stock, joint, or otherwise. Indeed, the stock retained a separate identity, a "traceable" asset still owned solely by the Wife.

The Second District was also correct to reject the trial court's conclusion that the use of some nonmarital assets to enhance the marital standard of living established commingling. Consistent with the statutory definitions set forth in Section 61.075, *Fla. Stat.* and *Claughton*, the Second District held only those nonmarital assets actually used to enhance the standard of living become marital.

Neither statutory provision nor case decision stands for the sweeping proposition that the pledge of a nonmarital asset as security for a marital obligation means the nonmarital asset must be reclassified as marital. The Second District correctly reversed the trial court's attempt to extend Florida law to reach such an erroneous and illogical result. In any event, as the Second District pointed out, there was no evidence that the

Wife ever pledged all of her inherited and gifted stock. To the contrary, as the trial court found, not even half of the Wife's Coca-Cola shares had ever been pledged. As to the Wife's separately titled nonmarital stock in Genuine Parts, SunTrust Banks, or the interest in Chestnut Street Exchange, there was no evidence that even one share had been pledged.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS CONFLICT JURISDICTION BECAUSE THE SECOND DISTRICT'S OPINION DOES NOT CONFLICT WITH THE THIRD DISTRICT'S OPINION IN *ADAMS V. ADAMS*, 604 SO. 2D 494 (FLA. 3D DCA 1992).[7]

If two cases are factually distinguishable, no jurisdictional conflict exists. *Department of Revenue v. Johnson*, 442 So. 2d 950 (Fla. 1983); *Kyle v. Kyle*, 139 So. 2d 885, 887 (Fla. 1962). Recognizing the factual differences between the present case and *Adams*, the Second District only half-heartedly certified this case "[t]o the extent our decision conflicts with Adams, we certify the conflict." *Farrior* at 1157. (Emphasis added). As established below, *Adams* is distinguishable. No jurisdictional conflict exists.

The Second District, applying settled case law, concluded the trial court relied on a legally erroneous definition of commingling. The trial court overlooked that commingling requires the placing of assets in a joint account with the result that the assets became untraceable.[8] The Second District pointed out Ms. Farrior's stock

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[7]In *Heinrich v. Heinrich*, 609 So. 2d 94, 97 (Fla. 3d DCA 1992), *Adams* was confined to its facts with the Court observing that *Adams* "involves an unique set of circumstances. . . ".

[8] Indeed, the fungibility of securities in a stock or securities account is explicitly recognized by Section 678.107, *Fla. Stat.*: "a person obligated to transfer securities [a (continued...)

certificates have always been titled in her name and her name alone.

In contrast, *Adams* involves the use of a stock account, not individually titled stock certificates. The Husband ignores this determinative distinction.[9] *Adams* stands

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(...continued)
broker] may transfer any certificated security of the specified issue in bearer form or registered in the name of the transferee, or indorsed to him or her or in blank, or he or she may transfer an equivalent uncertificated security to the transferee or a person designated by the transferee." (Emphasis added). A broker is not required to deliver specific stock certificates to a purchaser in the absence of an agreement to the contrary. *Price v. Johnson*, 222 So. 2d 211 (Fla. 3d DCA 1969).

[9] The Husband contends the present case is in non-jurisdictional conflict with another Second District decision, *Baird v. Baird*, 696 So. 2d 844 (Fla. 2d DCA 1997). Initial Brief at 19-20. *Baird* involves a stock account; that is, as in *Adams*, *Baird* deals with untraceable shares in stock accounts, not easily identifiable stock certificates. In reversing an award to the husband of a nonmarital interest in stock, the Second District stated, at page 847:

> We do, however, agree that the commingling of the stock accounts defeated the separate character of the shares. Mr. Baird commingled his stock in the jointly-titled account, periodically sold shares from the solely-titled account for living expenses and hypothecated over 1,300 shares as security for a $20,000 marital debt. They lived in part off dividends and proceeds from the sale of that stock during a period from 1985 to 1990 during which neither worked full-time. During the litigation, the court ordered that stock be sold to pay an IRS obligation, satisfy a judgment lien and reinstate the mortgage on the marital home. The accountant conceded that he could not trace specific shares through the various sales and transfers. The stock lost its separate character by such commingling and hypothecation. [citations omitted].

(Emphasis added). 696 So. 2d at 847. The Second District was no doubt aware that *Baird* was distinguishable when it stated that is could find no cases other than *Adams*,
(continued...)

for a proposition not in issue here -- that commingling occurs when marital and nonmarital funds are placed in an account resulting in the nonmarital funds becoming untraceable. *Adams* does not stand for the proposition that the use of nonmarital assets as collateral for marital debts, without commingling in an account, converts nonmarital collateral to marital property. Just as importantly, *Fla. Stat.* Section 61.075 does not include within its definition of the term "marital asset" nonmarital assets used as collateral for marital obligations.

Although the Husband relies primarily on *Adams*, his brief neglects to mention operative facts in *Adams*, which distinguish *Adams* from the present case.

In *Adams*, the husband owned approximately $185,000 in stocks and bonds as a result of gifts. These securities were held in two different accounts -- a margin account, which was jointly titled in the names of the husband and wife, and a portfolio account which was in the name of the Husband. The margin account was used for marital expenses and as a credit for acquiring marital assets. Both parties borrowed from and repaid the margin account on several occasions. The portfolio account was used as security for the joint margin account. The District Court held the gifted assets

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[9](...continued)
supposedly supporting the intermingling theory the Husband relies on here. Indeed, the Husband filed in the Second District a Notice of Supplemental Authority citing *Baird*.

in both the portfolio and margin accounts were marital assets because they were intermingled with marital assets. The Court's reasoning was that the portfolio account lost its separate character when it was used as security for the joint margin account, thereby, in effect, becoming commingled with the margin account:

> Thus, the portfolio account, via the margin account, became subject to distribution.

Id. at 496.

Ms. Farrior never used her non-marital stock as the husband used his portfolio account in *Adams*. In *Adams* there was a joint account, the margin account, which was used by both the husband and the wife for the payment of marital expenses; both marital and non-marital funds were deposited into the joint margin account. Ms. Farrior never "deposited" or transferred her non-marital stock certificates to any account, joint or otherwise. Her nonmarital stock, represented by certificates in her name alone, remained readily identifiable. Ms. Farrior never maintained a margin account with the Husband or any other person. Ms. Farrior never deposited her non-marital stock in a stock account.

In short, contrary to the trial court's misapplication of *Adams* and the Husband's misplaced reliance on it, *Adams* does not stand for the proposition that the mere use of a non-marital asset as collateral for a marital obligation transforms the asset into a

marital asset. The Second District noted factual differences between *Adams* and this case. While the Second District disagreed with *Adams*, this disagreement, as the Second District's Opinion makes clear, was not the basis for its reversal of the trial court. Instead, the Second District determined *Adams* was not applicable.

Contrary to the Husband's assertion, the Second District did not "conced[e] that, at the least, nearly half of the wife's stock was within the *Adams* equitable distribution doctrine." Initial Brief at 18-19. The Second District did not conclude *Adams* stands for the proposition that nonmarital stock certificates pledged for marital obligations become marital. The passage relied on by the Husband has to do with the Second District's discussion of the trial court's finding that 220,372 shares of the 514,648 shares existing as of the valuation date of Coca-Cola Company stock were either pledged as collateral for marital debts or were obtained through stock splits of shares previously pledged in this manner. The record evidence established the number of shares of Coca-Cola stock actually pledged is 29,444, and there is no evidence the SunTrust Bank stock or the Genuine Parts stock was ever used as collateral for marital obligations.

The Husband struggles to liken his case to *Adams* by reciting selected facts at pages 17 and 18 of his Initial Brief. But the Husband cannot establish the existence of the one critical fact he must establish if he is to show a conflict with *Adams* -- that the

Farriors had a joint account into which the Coca-Cola stock certificates were deposited. Absent this fact, there is no conflict jurisdiction. In all of the relevant Florida cases, including *Adams*, commingling requires a joint account from which marital expenses are paid and into which deposits of marital funds are made. *Adams*, like *Fla. Stat.* Section 61.075, indicates pledging alone will not transform a nonmarital asset into a marital asset -- there must also be commingling of the nonmarital funds with the marital funds in a joint account.

The Husband urges the "blue green document" supports his assertion that all of the Coca Cola stock was pledged as collateral for the purchase of the ranch. However, the Husband conceded in the Second District that this document was admitted for the limited purpose of establishing, or more appropriately, attempting to establish, an oral agreement, a theory so foreign to Florida law that neither lower court ever endorsed it. It was not admitted to prove that all of the Coca Cola stock actually had been pledged for the ranch loan, and the trial court ultimately found that most of the Coca-Cola stock had never been pledged. And even this limited pledging cannot establish the requisite existence of a joint account. Thus, there was no commingling under the case law, including *Adams*.

The Husband makes much of his assertion that the Coca Cola stock certificates were kept in a joint safe deposit box with joint access or in his office lock box. But the

Husband's "physical placement" argument is not the law. Significantly, Mr. Farrior scrupulously refrains from citing *Winterton v. Kaufmann*, 504 So. 2d 439 (Fla. 3d DCA 1987), which he cited in his Second District. *Winterton* held the husband's assets, which were bearer bonds in a joint safe deposit box became marital because:

> Bearer bonds, by their nature, are not titled in the name of one or more persons. The joint funds that Roma and Veit used to purchase the bearer bonds never lost their joint nature at any time before or after their purchases. Roma and Veit were together at all times when they purchased the bonds. The funds moved from joint accounts through a brokerage account and into the joint safe deposit box. At no time were the joint funds placed beyond Roma's control in such a manner that would be inconsistent with her continued joint possession and ownership.

(Emphasis added). *Winterton* illustrates the invalidity of the Husband's physical placement theory, at least in this case. The stock certificates placed by the Husband into the joint safe deposit box and his office lock box were and are in the name of the Wife only. The Wife's intent to retain the stock as her separate property and to maintain dominion and control of the stock is established.

The Husband also argues this case is governed by *Adams* because the Husband had in his possession blank, signed in advance, stock powers allowing him to sell stock. On this issue the trial court found the Wife regularly signed blank stock powers to allow the Husband to exercise control over the stock. The record shows the Husband refrained from using the blank stock powers to sell all of the Coca Cola stock. The

Husband's actions were consistent with his knowledge that his power to sell stock was limited and could be exercised only from time to time as specific needs to do so arose.

In any event, the mere fact that the Husband held and exercised stock powers did not establish what the Husband must establish to prevail, even under *Adams* -- the existence of a joint account. No commingling occurred. There is not conflict with *Adams*.

Finally, the Husband contends that "proceeds from the sale and dividends of the stock [but not the Coca Cola stock certificates] were deposited into a family checking account; an account which was the depository of all the family's income including the Husband's wages, proceeds from the sales of property, Coca Cola dividends, and investment account transfers . . . [and] the parties filed joint federal tax returns which included income from the Coca Cola stock sales and dividends on the stock". Initial Brief at 18. Whether the parties really had a "joint" account was disputed at trial and never resolved by the trial court.[10] Even if the Husband could establish commingling of income or the proceeds of Coca Cola stock sales in a joint account, the remaining

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[10]According to the Husband, all proceeds from the sale of Coca Cola stock were deposited by the Husband into the 8115 account, titled "J.Rex Farrior, Attorney at Law," over which the Wife had no authority, except one which was deposited into the 1243 account titled solely in the Husband's name. Under such circumstances, the Husband did not establish commingling even of income from or the proceeds of sale of the Wife's Coca Cola stock.

undisposed of certificates representing Coca Cola, SunTrust and Genuine Parts stock were never commingled. The Second District concluded that as to the shares of Coca Cola stock which were sold and as to the income from that stock, the Wife made an interspousal gift of and therefore was not entitled to a special equity. But like all of the other facts discussed above, this one does not establish the existence of a joint account into which the stock certificates, as distinguished from the sales proceeds or income from the Coca Cola stock, were placed. *Adams* cannot provide a basis for conflict review.

In sum, *Adams* is distinguishable. The Husband cannot prove there exists a joint account into which undisposed of stock certificates were placed. No conflict exists, and this Court should decline to exercise its discretionary jurisdiction.

II. FOLLOWING WELL ESTABLISHED LAW, THE SECOND DISTRICT CORRECTLY CONCLUDED THE WIFE'S INHERITED AND GIFTED STOCK CERTIFICATES, ALWAYS TITLED SOLELY IN HER NAME, WERE NONMARITAL ASSETS.

The Second District, following the law, held the trial court's determination that the Wife's inherited and gifted stock were marital assets "is not legally sustainable under the law of equitable distribution." *Farrior* at 1157. Faced with this holding, the Husband ignores the statutory law of equitable distribution and the case law of commingling. Instead of correctly analyzing the controlling equitable distribution law, the Husband speaks broadly of the "partnership of marriage," Initial Brief at 21, in an effort to obtain, for himself, one-half of the Wife's sizeable inherited and gifted stock. The Husband contends the decision of the Second District is contrary to the statutory goal of equitable distribution. According to the Husband, his "fair share" is one-half of everything including the Wife's inherited and gifted stock. Initial Brief at 21.

The Husband's approach is at odds with the statutory goal of equitable distribution, as defined by the plain language of the statute. The principle of equitable distribution recognizes that a spouse's separate inherited and gifted assets are nonmarital even after a long-term marriage.

The Husband's argument is also blind to the fact that marital and nonmarital assets are specifically defined in *Fla. Stat.*, Section 61.075. The Second District

correctly pointed out Section 61.075 sets forth the rules of equitable distribution. It quoted Section 61.075(5)(b)2, which specifically defines nonmarital assets as "[a]ssets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets."

Here, there is no dispute the Wife received the Coca-Cola stock and SunTrust stock from her grandfather as part of a trust distribution and the Genuine Parts stock from her mother as a gift. In fact, even the trial court made specific findings that this was so. (R:3099-3100). Nor is there any dispute that the stock certificates in Coca-Cola, SunTrust Banks, and Genuine Parts were at all times titled in the Wife's name or that some of the Wife's inherited Coca-Cola stock was directly exchanged for the interest in the Chestnut Street Exchange Fund, again titled in her name. The trial court found this was so. (R:3100).The trial court also concluded the shares of stock in Coca-Cola, SunTrust, and Genuine Parts were the Wife's nonmarital assets when she received them, a fact the Husband acknowledged. (R:3100). Against the background of this undisputed evidence, the Second District correctly applied and reversed the trial court's determination that the Wife's inherited and gifted stock certificates were marital assets subject to equitable distribution.

Sidestepping the controlling statute, the Husband asserts, without citation to authority (because none exists), that if he had "control" of or "equal access" to the

Wife's solely titled inheritance, her inheritance should be deemed marital. Initial Brief at 21. According to the Husband, "control" encompasses the three factors the trial court relied on for its holdings: equal access to the nonmarital assets, the use of the nonmarital assets as collateral for marital obligations, and the use of the nonmarital assets to support the parties' standard of living. Initial Brief at 21, 23.

The Husband's "control" argument cannot withstand scrutiny under Florida law. The Husband uses the label of "the statutory goal of equitable distribution," Initial Brief at 22, to describe what is in reality an effort is to drastically alter and extend Florida law. The truth is that neither the Supreme Court nor any District Court has ever defined commingling as the trial court did or as the Husband urges here. Simply put, the Husband's argument that his three factors add up to "control" has no support in Florida law. The Second District held neither the statute, discussed *supra*, nor the case law defining commingling, supports the Husband's interpretation of the law defining marital and nonmarital assets.

In Florida, all of the cases turning on the issue of commingling involve non-marital funds that have been commingled in joint bank accounts or investment accounts used for the deposit of marital funds and for the payment of marital expenses, where a deposit has lost its separate identity and could not be traced. For example, in *Walser v. Walser*, 473 So. 2d 306, 308 (Fla. 2d DCA 1985), the District Court found there was

"commingling [separate funds] with joint funds in active joint accounts to which each has equal access and into which each had made substantial deposits and withdrawals over a period of four years. . ." such that the nonmarital asset became untraceable thereby raising a presumption of a gift. (Emphasis added). Among the other Florida cases to the same effect, see: *Terreros v. Terreros*, 531 So. 2d 1058 (Fla. 3d DCA 1988); *Vandegrift v. Vandegrift*, 477 So. 2d 638 (Fla. 5th DCA 1985); *Adams v. Adams*, 604 So. 2d 494 (Fla. 3d DCA 1992); *Becker v. Becker*, 639 So. 2d 1082 (Fla. 5th DCA 1994); *Adkins v. Adkins*, 650 So. 2d 61 (Fla. 3d DCA 1994); *Heinrich v. Heinrich*, 609 So. 2d 94 (Fla. 3d DCA 1992); *Amato v. Amato*, 596 So. 2d 1243 (Fla. 4th DCA 1992); *Woodard v. Woodard*, 634 So. 2d 782 (Fla. 5th DCA 1994); *Walser v. Walser*, 473 So. 2d 306 (Fla. 2d DCA 1985), *Crews v. Crews*, 536 So. 2d 353 (Fla. 2d DCA 1988); *Claughton v. Claughton*, 483 So. 2d 447 (Fla. 3d DCA 1986); *Williams v. Williams*, 686 So. 2d 805 (Fla. 4th DCA 1997). The Husband cannot cite any contrary authority. Instead he is forced to rely on some of the same joint account decisions that prove the Wife's case, *Amato*, *Walser*, and *Williams*. Initial Brief at 27-28.

Significantly, in the instant case the trial court never found that the Wife actually made a gift to the Husband. Instead, the trial court accepted the Husband's contention that the Wife's individually titled stock lost its separate identity through commingling

due to"the conduct of the parties throughout the marriage." (R:3101, 3102). Based on this premise -- which is not supportable under the law -- the trial court said there was ". . . a presumption that the Wife has made a gift to the Husband of an undivided one-half interest in her individually titled stock." (R:3102).

The cases involving joint accounts are undeniably and completely distinguishable. As noted, the instant record establishes without dispute that the Coca-Cola, SunTrust, and Genuine Parts stock certificates were all titled solely in the Wife's name. None of this stock was ever placed in any kind of account, joint, active, or other. At all times, the stock certificates remained, as the Second District pointed out, readily traceable from the initial trust distribution to the present day. Even Mr. Farrior is forced to concede the stock certificates remain traceable. Initial Brief at 28.

As the Second District recognized. the trial court's treatment of the issue of commingling was not only novel and without legal precedent, but also clearly erroneous. The trial court employed an erroneous definition of commingling that hinged on three "factors" factors the Second District correctly concluded do not add up to commingling under the case law. No presumption of gift ever arose, and the Wife's inherited and gifted stock was and remained her nonmarital property.

Notwithstanding the Husband's assertion to the contrary, Initial Brief at 22, the Second District did not quarrel with or fail to defer to the trial court's findings of fact.

Instead, the Second District reversed the legally erroneous conclusions the trial court had reached based on the facts.[11]

The Husband argues he had "control" of and "equal access" to the Wife's separate stock, which meant the stock was commingled and became marital. To defend his premise, the Husband argues a hypothetical. According to the Husband, because he had blank stock powers signed by the Wife, he could have (but didn't) sell all of the stock. The Husband also urges the parties signed joint gift tax returns; the stock certificates (titled in her name) were sometimes kept in his office lock box; and the certificates (titled in her name) were sometimes kept in the parties' joint safe deposit box. The reality is that the Husband did not sell all the stock which is evidence that he had no power or authority to do so.

The Husband's elaborate commingling argument is defeated by the law: the Farriors did not have an account into which the stock certificates were deposited. As the Second District pointed out, the four equal access cases cited by the trial court for its commingling conclusion, *Walser v. Walser*, 473 So. 2d 306 (Fla. 2d DCA 1985), *Crews v. Crews*, 536 So. 2d 353 (Fla. 2d DCA 1988), *Amato v. Amato*, 596 So. 2d 1243 (Fla. 4th DCA 1992) and *Woodard v. Woodard*, 634 So. 2d 782 (Fla. 5th DCA

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[11] Mr. Farrior's assertion that the trial court made a finding of fact that the Wife's nonmarital assets had been commingled, Initial Brief at 23, muddies the waters. The issue whether or not commingling has occurred is a question of law not fact.

1994), are

> factually distinguishable because they involved cash deposited into joint accounts to which each of the parties had access. As explained by Amato, 'funds so intermingled lose their separate identity and become untraceable.' 596 So. 2d at 1244 (citations omitted). In this case, the assets were stock certificates that were titled in the Wife's name alone. The stock certificates always maintained a separate identity and never became untraceable.

Farrior at 1156. As stated by the Second District:

> We can find no case, nor were the parties able to provide us with any law, that converts this arrangement into a presumption of gift as occurs when monies are deposited into a joint account and are thereby equally available to either party.

Farrior at 1156. As in the Second District, the Husband cannot offer any authority for his "control" argument.

The trial court's conclusion[12] and the Husband's assertion that he had "equal access" to the stock titled in the name of the Wife are indefensible -- as the Second District correctly noted. The Husband endeavors to minimize the telling fact that title to the stock certificates in this case has always remained in the Wife's name Initial Brief at 24. Yet equal access was literally impossible as long as the stock remained titled solely in the Wife's name. In fact, the record shows that for the duration of the

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[12]Just as he did with commingling, the Husband argues "equal access" is a fact finding entitled to deference. Initial Brief at 23. But as before, equal access is a legal conclusion.

marriage, the Husband could not conduct any transactions unless he first went to the Wife, asked and obtained her permission to sell or use the Coca-Cola stock, and had her sign the stock powers or certificates. On this issue, the Second District stated:

> the Husband's access to the stock was not equal to the access enjoyed by the Wife. While the Wife allowed the Husband to make decisions about whether the stock should be sold or traded, and even allowed the Husband to vote the stock, the stock remained titled in the Wife's name alone and was never placed in an account to which the Husband had equal access. Clearly the Wife deferred to the Husband's judgment on financial decisions related to the stock; however the Husband's management was always dependent upon the Wife's signing of stock certificates.

Farrior at 1156.

The Husband's assertion that commingling occurred because the Wife's nonmarital assets were used as collateral or security for the payment of marital obligations and to purchase marital assets, Initial Brief at 21, fares no better. According to the Husband, "[i]f, as the district court believed, separate title precludes a finding of intermingling, then *Baird* [citation omitted] and *Adams* [citation omitted] were wrongly decided." Initial Brief at 21. The Husband's argument rests on a misapprehension of *Baird* and *Adams*. misses the point. *Adams v. Adams*, 604 So. 2d 494 (Fla. 3d DCA 1992) does not stand for the proposition that the use of non-marital assets as collateral for marital debts, without any additional facts, constitutes intermingling sufficient to convert the non-marital collateral to marital property. In

addition, the Husband reads *Adams* in such a way that is conflicts with §61.075, *Fla. Stat.*, which does not include within its definition of the term "marital assets" non-marital assets used as collateral for marital obligations.

Adams and *Baird* were not disposed of solely on the basis of title or solely because nonmarital stock was used as security for marital obligations. *Adams* and *Baird*, like all of the cases involving commingling, turned on the existence of an account. Even the Husband acknowledges this critical distinction when he states: "[t]here is no question that in Adams the husband held stocks and bonds which had been gifted to him in a separately titled account . . . He used that account as security for a joint loan account" and "Mr. Baird put some of his separately titled stock in an account where his wife had access to it . . . As a result, all of Mr. Baird's 'stock lost its separate character by such commingling and hypothecation.'" Initial Brief at 25.

Lost on the Husband is the significance of the facts he recites. *Adams* and *Baird* dealt with stock accounts in which stock, like money in a bank, is fungible and therefore untraceable. The Second District noted that the stock certificates in this case were always titled in the Wife's name and never placed in an account. The Wife's individually titled stock certificates were not fungible and never became untraceable. Commingling did not occur as a matter of law.

When distilled, the Husband's argument is not rooted in *Adams* and *Baird*, or in any other Florida case. It is instead a request to the Supreme Court to alter and extend settled Florida law. Under the rule the Husband proposes, if a spouse pledges his or her nonmarital assets for marital obligations those assets become marital. The extension of the law the Husband seeks is illogical, unworkable and unfair. The Second District rejected it and concluded there is:

> no equitable basis for a rule that punishes a spouse who uses nonmarital property to finance the acquisition of marital property by then converting the nonmarital collateral to marital property. It is completely illogical to say that the pledge of $10 million in stock to secure a $100,000 debt would convert the $10 million in stock to a marital asset.

Id at 1157.

As noted only certificates representing 29,444 of the 514,648 Coca Cola shares on hand as of the final hearing had been pledged as security for marital obligations. None of the SunTrust or Genuine Parts stock was ever used as collateral for any marital obligations. In any event, the Husband's assertion that 220,372 shares of Coca Cola stock were actually pledged, Initial Brief at 27, is incorrect. The 220,372 shares referred to by the Husband are in reality only 29,444 shares actually pledged. As the trial court found, these shares generated an additional 190,928 shares through stock splits.

The Husband also asserts, based on *Claughton*, that commingling occurred because the dividends and proceeds from sales of Coca Cola stock were deposited into a "family account" and "the stock was pooled with the husband's income to fund the business, charitable, and family life of the couple and their four children." Initial Brief at 21, 28-29. The so-called "joint family account" was identified by the Husband's secretary of thirty years as his "personal account" until after the commencement of this litigation. Even if such an account had existed and received dividends and proceeds from sales of some Coca Cola stock, the undisposed of Coca Cola stock certificates were never placed in that account.

Claughton, like all the other commingling cases, had to do with an account. At issue in *Claughton* was a fungible item -- money -- not separately titled stock certificates. In fact, *Claughton* relied on *Vandegrift v. Vandegrift*, 477 So. 2d 638 (Fla. 5th DCA 1985) and *Smith v. Smith*, 428 So. 2d 276 (Fla. 1st DCA 1983), both of which involved commingling of marital and non-marital funds in a joint bank account.

Moreover, *Claughton* is consistent with §61.075(5)(b)(3), *Fla. Stat.*, which provides that all income derived from non-marital assets during the marriage are non-marital assets unless the income from the non-marital assets was treated, used or relied upon by the parties as a marital asset. Neither *Claughton* nor §61.075, *Fla. Stat.* supports the Husband's argument, which is that the use of non-marital assets and

income to supplement the parties' standard of living, even if there is no intermingling of non-marital and marital funds in a joint bank account, establishes intermingling and gives rise to a presumption of gift. For that matter, §61.075 does not include within the definition of "marital assets" assets used for providing luxuries and enriching the standard of living of the parties. As the Second District aptly put it:

> [w]e conclude that Claughton does not stand for the proposition that providing luxuries and enriching the standard of living is an indication of intermingling. Rather, Claughton holds that nonmarital assets which are intermingled to provide luxuries and an enriched standard of living should be treated as marital assets.

Farrior at 1156.

The Husband cannot have it both ways. With respect to Wife's claim of a special equity in the assets purchased with income and sales proceeds from the Wife's inherited stock, the Second District held the trial court correctly applied *Claughton*. The assets became marital through the Wife's interspousal gift of her income from the stock. *Id.* But Mr. Farrior's assertion that "the stock -- all of it -- lost its separate character, " Initial Brief at 29, claims too much. His contention that all of the stock became marital because some of it was used to provide luxuries for the family is not the law in Florida.

In apparent recognition that Florida law does not support his definition of commingling and he therefore cannot prevail on this record, the Husband speculates:

> Had Mr. Farrior used his absolute authority to sell the stock, the certificates would have been turned into cash. The cash would have been deposited into the family account and become untraceable. Commingling . . . would have occurred.

Initial Brief at 28. The problem with the Husband's speculation is that it boldly assumes in the Husband's favor a fact not in the record -- that the Husband had "absolute authority." Sale of the Wife's inherited and gifted stock hinged on her permission and consent, which the Husband repeatedly sought and received. The Husband was able to live a lifestyle during the marriage above and beyond that which he could have financed, as the Husband correctly points out. Initial Brief at 29. The net result is that with respect to the Coca Cola shares that were sold and the dividends which were spent to enhance the marital standard of living, the Second District held the Wife made an interspousal gift. But as to the undisposed of shares of stock, no such gift was ever made. The Husband's argument that he is entitled to half of the remaining shares penalizes the Wife for her earlier generosity and produces a result that is both inequitable and unsupportable under the law. The undisposed of shares of stock remain her nonmarital assets under the law of this State.

CONCLUSION

For the foregoing reasons, the Opinion of the Second District Court of Appeal reversing the trial court's Final Judgment of Dissolution of Marriage should be affirmed.

Respectfully submitted,

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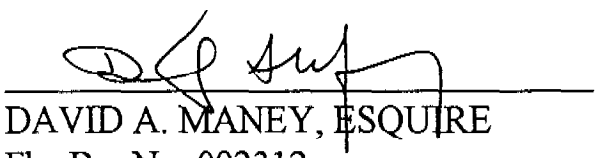

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by Federal Express on this 5th day of October, 1998, to Bruce S. Rogow, Esquire and Beverly A. Pohl, Esquire, Bruce S. Rogow, P.A., Broward Financial Centre, Suite 1930, 500 East Broward Boulevard, Fort Lauderdale, Florida 33394; John Beranek, Esquire, Ausley & McMullen, 227 South Calhoun Street, Tallahassee, Florida 32301; and Robert F. Kohlman, Esquire, Kohlman & Mack, P.A. Suite 1020 Ingraham Building, 25 S.E. 2nd Avenue, Miami, Florida 33131.

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