

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

AUG 26 1998

**CASE NO. 93,329**

CLERK, SUPREME COURT

By   
Chief Deputy Clerk

**J. REX FARRIOR, JR.,**

Petitioner,

vs.

**MARY LEE FARRIOR,**

Respondent.

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**PETITIONER'S INITIAL BRIEF**

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On Certified Conflict Review  
from the Second District  
Court of Appeal

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Are stocks which were inherited by one spouse as non-marital property converted to marital property subject to equitable distribution where, over 26 years, the stock was pledged as collateral for numerous marital loans, sold in part to fund marital purchases including, *inter alia*, property and homes, reported as a joint asset on gift tax returns, and where throughout the 26 years the other (non-inheriting spouse) was given unrestricted access to the stocks with full authority to sell them?

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## STATEMENT OF THE CASE

This dissolution of marriage case comes to the Court on a certified conflict. Art. V, § 3(b)(4), Fla. Const.; Rule 9.030(a)(2)(A)(vi), Fla.R.App.P. The Second District Court of Appeal reversed a portion of a trial court final judgment which had found that stock inherited by Mary Lee Farrior had become a marital asset because it had been intermingled with marital assets. Recognizing that its reversal of the trial court posed a conflict with Adams v. Adams, 604 So. 2d 494 (Fla. 3d DCA 1992), rev. denied, 614 So. 2d 502 (1993), the Second District certified the conflict for resolution by this Court. Farrior v. Farrior, \_\_\_ So. 2d \_\_\_ (Fla. 2d DCA 1998) ("To the extent our decision conflicts with Adams, we certify the conflict."). Copies of the District Court of Appeal opinion below and the trial court's Final Judgment and are attached as Appendices A and B. The Adams opinion is Appendix C.

### A. THE TRIAL COURT'S FINAL JUDGMENT

After a four-week trial, with a 3,000 page transcript and over 300 exhibits, Circuit Judge Debra K. Behnke entered a detailed Final Judgment which concluded:

[T]he court finds that all of the parties' assets, whether titled jointly or individually, are

marital assets subject to equitable distribution. Similarly, all of the parties' liabilities are marital liabilities. The Court rejects the Wife's contention that the stock inherited by her during the marriage, and titled in her name alone, should be awarded to her as nonmarital property.

R-3103, Final Judgment ¶ r, App. B, p. 6. The trial judge found:

In view of the parties' actions throughout their thirty six year marriage, the Court finds that the wife intended for the individually-titled stock to be treated by both parties as a marital asset.

R-3102, Final Judgment ¶ o; App. B, p. 5.

The wife's brief in the District Court of Appeal acknowledged that the trial court's "holding is, in large measure, based upon facts which are undisputed."

Appellant's Amended Initial Brief, p. 23, No. 96-1493, District Court of Appeal, Second District. The trial court's conclusion was based on its findings of fact that:

The Wife's individually-titled stock was often relied upon by the parties as collateral for numerous marital loans. Specifically, 220,372 shares of the existing 514,648 shares of Coca Cola Company stock were either pledged as collateral for marital debts, or were obtained through the stock splits of shares previously pledged in this manner.

\* \* \*



The individually-titled stock was used by the parties to support a standard of living for the parties and their children that could not have been otherwise obtained by reliance on the parties' combined income alone.

\* \* \*

It is undisputed that throughout the parties' thirty six year marriage the Husband exercised complete control and management over all the parties' property including the stock titled solely in the Wife's name. The Husband controlled, managed, sold, traded and voted the Wife's individually-titled stock. The Wife regularly executed blank stock powers to allow Husband to exercise this control over this stock. The Wife also deferred to his judgment on any financial decisions related to this stock as she did for virtually all of the parties financial decisions. In essence, the Husband had equal access to the Wife's individually-titled stock. The Husband could draw on these assets as a whole for personal and family purposes, and in fact did so often throughout the marriage.

R-3100-3102, Final Judgment, ¶'s k, l, m, App. B, pp. 3-5.

Based upon these facts, the trial court concluded that "all of the parties' assets, including the Wife's individually-titled stock, have lost any separate identity through intermingling." Final Judgment ¶ k; App. B, p. 4.

**B. THE TRIAL EVIDENCE**

Mary Lee Farrior and Rex Farrior were married in Atlanta, Georgia in 1958. T-1093. They resided in Tampa, Florida where Rex Farrior was a partner in a prominent local law firm. He was 31 years old; Mary Lee Farrior was 21. T-1093, 1775-76, 2012.

Mary Lee Farrior was the beneficiary of a Trust established by her grandfather, Charles Talbot Nunnally. T-1101. She received income distribution from the Trust until 1968, when the Trust Company of Georgia distributed Trust assets to her which included stock shares of Coca Cola, Coca Cola International and the Trust Company of Georgia. The approximate value of those shares, which were titled in her name, was \$3,100,000. T-2090, 2093; R-3601-3616, 4044-4172. The stocks became the foundation of an expensive lifestyle which the family lived over the next 26 years. T-1824-25, 2219.

From the inception of their marriage, Mrs. Farrior's primary interest was the children, not the family's finances:

Q. Now, as I understand it, Mrs. Farrior, during your marriage, Mr. Farrior took care of the finances of the family?

A. Yes.

\* \* \*

Q. And up until you filed for divorce finances didn't mean a lot to you?

A. No.

\* \* \*

A. The children is what I was really looking forward to, not dealing with finances.

T-1136-37.

The Farris have four sons. T-1103. Their well being was paramount in family decisions, which included substantial property purchases of a 2,200-acre ranch in Ocala and golf course properties in North Carolina, in which Mrs. Farris concurred: “[B]ecause of the children, I knew that the children would enjoy it too. My children are always in every decision.” T-1145.

The 2,200-acre ranch, which was purchased in 1968, was obtained *via* a bridge loan secured by the assignment of the entire corpus of Mrs. Farris's share of the Nunnally Trust as collateral for the loan. T-2097, R-5538 (Exh. 242 – collateral note). The Farris transformed that undeveloped land into a working cattle ranch with barns, a manager's house, a 6,000 square foot main house, and miles and miles of fences and gates, and planted over a half million pines, oaks and cypress trees on the property. T-1854-1864. The ranch was a central focus of Farris family life:

A [REX FARRIOR:] We fished and we hunt. We've got — everything that — that a boy wants, we've tried to have up there.

\* \* \*

Q. Did [Mrs. Farrior] hunt up there?

A. Occasionally. She went with us most every time, but she was driving the truck and occasionally she would get down with the boys and me. Not all the time.

\* \* \*

A. And to hear your son decline a request to go to a rock concert because he wanted to go to the woods with his family is a very satisfying thing.

T-1860-62.

Mrs. Farrior was satisfied with the family roles she and her husband assumed. She chose where the family would live, decided on the raising and discipline of the children, and was the arbiter of domestic family life. T-1785-86. Her goal was "to have six children and to have a happy traditional marriage." T-1237. Their marital understanding placed control of all the family finances, including the stock, with Mr. Farrior. T-1785. The trial court found that it was "undisputed that during the course of their marriage, the Husband handled the parties' finances, with the full blessing of the Wife, while the Wife generally handled the domestic

duties.” T-3009.

\* \* \*

Handling the finances meant the care, custody and control of the stock. T-1824-25, 1834-35. Mr. Farrior was a highly successful lawyer whose law practice and other income contributed, over the course of the 36-year marriage, nearly \$5 million to the marital estate. R 5782-83. But in order to fund their level of family life, including a 7,000 square foot golf course home in Tampa (T-1851), an English Tudor mountain house in Cashiers, North Carolina (T-1839-47), an “elegant southern estate” on Culbreath Avenue in Tampa (T-1810), the Ocala ranch (T-1854), jewelry, investment diamonds, ranch cattle, ranch vehicles, a \$1,500,000 pledge to the University of Florida, a North Carolina hospital pledge (Final Judgment, App. B, p. 17), and a standard of living described as “extremely lavish” (R-3095), the stock – primarily Coca Cola – was necessary either as collateral for loans or to be sold to generate income. T-1824-25, 2219. Mr. Farrior explained:

[I]ndeed when we needed money, we made a conscious decision, and we wanted to live a good lifestyle, and we would sell assets to do it with, and we – I tried – rather than selling Coke. I felt it would be wiser or better to borrow against it - - and hold the stock so that as the stock went up you got the benefit down the road for five, ten, twenty years, whenever it was; to pay the interest each month and that

was very, very burdensome when we were owing half a million dollars . . . .

\* \* \*

[W]e retained the ownership of the stock, and the bank lent us a given amount which we then started paying back; and after you paid back the loans, you got the stock back and it was usually worth a lot more when you got it back than when you tendered it.

T-1824-25.

Sales of the Coca Cola stock were used to satisfy the family's obligations.

- Q. Mr. Farrior, would you tell us the regular practice of the sale of Coca Cola?
- A. When a need arose that we couldn't or shouldn't meet from some other source, then I would make the judgment whether we should sell, how much, and at what price; and I would call the broker.

T-1834.

- A. So, once a sale was announced, they'd send me a confirmation. I'd receive it that day. I'd go to the safe deposit box to pull out a share certificate, combine it with the stock power which was blank, and I would then fill in the blank on the stock power for that particular certificate, give it to the broker.

Q. You said the stock power was blank?

A. Yes. All the stock powers that she signed were in blank, just batches of them, so we could fill in whatever we wanted to whenever we needed to.

T-1835, 1801. That practice continued for 26 years, "from 1968 until October 1, of [19]94." T-1836. These "irrevocable stock powers" (R-5500), were kept in Mr. Farrior's office. T-1836. See also exhibits at R- 4536-47 ("blank Irrevocable Stock or Bond Power"); 4686-94 (same); 5612-19 (same); 4693-97 ("Assignment Separate from Certificate") (Brief, App. D); 5189-5201 ("Stock Powers blank"); 5286-92 (same), and App. D "copy of Assignment Separate from Certificate."

The stock itself was in a joint safety deposit box:

A. [REX FARRIOR:] It was kept in the Marine Bank first because it was a note using it as collateral [for the ranch purchase]. Then in July of '68 it was given to me, and I opened a joint safe deposit box, and that's where it was kept, and as we changed banks, or banks moved, it was always a joint safe deposit box with whatever bank we were banking with at the time.

Q. When you say "joint," she had the right to go into the bank as well as you did?

A. Yes, and she had a key.

T-1796. Occasionally, some or all of the stock was kept in Mr. Farrior's office. Id.

A single Farrior bank account was used from the early 1970's to pay all the Farrior bills. T-1802. The account received all the parties' deposits, including income from the sale of the Coca Cola stock, dividends from the stock, and Mr. Farrior's law firm income; from the account Mr. Farrior paid the mortgages, car payments, medical bills, dental bills, and educational expenses. T-1802-1804. The couple's joint federal income tax obligations, which included taxes on the Coca Cola stock, sales and dividends, were also paid from that account (T-2315), as were their state intangible taxes, which included the value of the Coca Cola stock. T-1802-04. Their Federal Gift Tax Returns, which gifted Coca Cola stock, were similarly joint submissions. "I consent to have the gifts made by me and my spouse to third parties . . . considered as made one-half by each of us." R-5496-99, Exh. 224 and 225 ("U.S. Quarterly Gift Tax Return"); 5691-94, Exh. 271 ("composite of U.S. Quarterly Gift Tax Returns"). Gifts of the Coca Cola stock were used by the Farris to fund trusts for their four sons. T-1829-31.

The stock remained titled in Mary Lee Farrior's name in deference to her mother. T-1795. But 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. . . ." Final Judgment, App. B, ¶ k, p. 4. The "individually titled stock . . . lost any separate identity through intermingling." *Id.* Mrs. Farrior's sister, who was probably "the



closest person in the world to Mary Lee” (T-1515-16), said she knew that all the couple’s money went into “one pot.” T-1522 (Deposition read into evidence). The sister’s former husband agreed:

Q. How did she [Mary Lee Farrior] refer to the Coke stock?

A.. It was always our stock.

Q. Did Mrs. Farrior ever say anything to your knowledge about the fact that their assets were joint assets?

A. I heard her say a couple of times, “Everything we have goes into the – goes in one pot.”

T-1535-1536 (emphasis supplied).

Although Mrs. Farrior denied that she intended to make a gift of the Coca Cola stock (T-1107), the trial court entered findings of fact and a Final Judgment which determined that the Coca Cola stock had become “completely intermingled with all of the parties’ other assets” (Final Judgment, App. B, ¶ n, p. 5) and that “the Wife intended for the individually titled stock to be treated by both parties as a marital asset.” *Id.* at ¶ o. The Final Judgment itemized and separately calculated the value of each asset and each liability in the marital estate. App. B, pp. 13-17. The total marital estate – \$47,700,938 – was distributed on an equal basis: each spouse receiving \$23,850,469. Mary Lee Farrior appealed that equitable

distribution judgment.

**C. THE DISTRICT COURT OF APPEAL DECISION**

The District Court of Appeal reversed the trial court's equitable distribution but remanded to the trial court for a determination of the value of Mr. Farrior's stock management work:

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.

Farrior v. Farrior, App. A, p. 3. The court rejected equitable distribution of the stock because the stock was in the wife's name:

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.

\* \* \*

Additionally the Husband's access to the stock was not equal to the access enjoyed by the Wife . . . [T]he stock remained titled in the Wife's name alone and was never placed in an

account to which the Husband had equal access. . . . Because the evidence does not support a finding that the Husband had equal access . . . we conclude the stock in the Wife's name did not become a marital asset by intermingling.

App. A at 2.<sup>1</sup>

The court declined to consider the fact that the Coca Cola stock was, from the time it was received, pledged as collateral for loans for family property, business and general living purposes: "there is no equitable basis for a rule that punishes a spouse who use nonmarital property to finance the acquisition of marital property by then converting the nonmarital collateral to marital property." *Id.* at 3. Then, recognizing that its decision conflicted with Adams v. Adams, 604 So. 2d. 494 (Fla. 3d DCA 1992), the court "certif[ied] the conflict." *Id.*

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<sup>1</sup> The District Court of Appeal did not address the undisputed evidence of blank stock powers, assignments separate from certificate, joint safety deposit box and *carte blanche* authority to sell the Coca Cola stock, which was the basis of the trial court's finding of fact that Mr. Fariior did have equal access to the stock. As we discuss below, had he indeed sold all the stock, the proceeds would have been intermingled in the family account and "title" rendered irrelevant.

## STATEMENT OF THE ISSUE

Are stocks which were inherited by one spouse as non-marital property converted to marital property subject to equitable distribution where, over 26 years, the stock was pledged as collateral for numerous marital loans, sold in part to fund marital purchases including, *inter alia*, property and homes, reported as a joint asset on gift tax returns, and where throughout the 26 years the other (non-inheriting spouse) was given unrestricted access to the stocks with full authority to sell them?

## SUMMARY OF THE ARGUMENT

The Second District Court of Appeal decision below reversed a final judgment of a trial court in which the trial court, after a four-week trial, concluded that a wife's inherited stock had become a marital asset by intermingling. The trial court found that the wife intended for the husband to exercise complete control over the stock and that she intended that it be treated by both parties as a marital asset: "In sum, the conduct of the parties throughout the [36-year] marriage shows that the wife's individually titled stock has become completely intermingled with all of the parties' other assets." App. B, p. 5 ¶ n.

The District Court of Appeal rejected that finding. Since it was supported by undisputed evidence, that was error. Bimonte v. Martin-Bimonte, 679 So.2d 18, 19-20 (Fla. 4<sup>th</sup> DCA 1996).

One basis for the trial court's intermingling finding was the use of the stock for security for loans to fund marital expenses. The Second District reversed the trial court and refused to adhere to Adams v. Adams, 604 So. 2d 494 (Fla. 3d DCA 1992), rev. denied, 614 So. 2d 502 (1993), which held that such a use converts the individually titled asset into a marital asset. The Second District certified to this Court its conflict with Adams. The decision in Adams and in the trial court in this

case should be approved. The use of the stock throughout the marriage as collateral for loans funding family obligations constitutes intermingling.

The decision below found that the husband did not have "equal access" to the stock because the stock remained in the wife's name. That appellate finding was contrary to the uncontroverted trial evidence that the wife had signed in advance blank pads of stock powers and assignments allowing the husband complete custody and control of the stock so that it could be used for marital purposes. The appellate failure to follow trial court findings supported by competent and substantial evidence is, alone, reason for reversal. But the irony of the decision below is that fact that the husband's access and control preserved the stock. Had he sold it to fund the family expenses, the cash proceeds would have been part of the marital estate. The fact that he preserved the asset should not result in the inequity of excluding the stock from the marital estate.

## ARGUMENT

### I.

#### **THIS COURT HAS JURISDICTION BASED ON THE CERTIFIED CONFLICT WITH *ADAMS V. ADAMS*, 604 SO.2D 494 (FLA. 3D DCA 1992)**

Adams v. Adams, 604 So. 2d 494 (Fla. 3d DCA 1992), rev. denied, 614 So. 2d 502 (1993), held that an account which contained assets gifted to the husband before and during the marriage was a marital asset because it had been “used as security for the margin account” which was used “for marital expenses”:

When the portfolio account was used as security for the margin account, it lost its separate character, and in effect, became co-mingled with the margin account. Thus, the portfolio account, via the margin account, became subject to distribution.

Adams, 604 So. 2d at 496. The Adams court required equitable distribution of the portfolio account to the wife. Id.

Here, the Second District Court of Appeal refused to follow Adams. It reversed the trial court’s equitable distribution to the husband, despite the undisputed fact that assets inherited by the wife had been used as security for, and to fund, marital expenses in every aspect of the Farriors’ family life, including:

- the Coca Cola stock was pledged as collateral for a loan to purchase the family ranch (R-5538; T-2097)
- the Coca Cola stock was pledged as collateral for a letter of credit to purchase an interest in the San Francisco Giants (T-2631-32)
- the Coca Cola stock certificates were kept in a joint safe deposit box with joint access (T-1797, 1788, 1801, 1836)
- the Husband had blank, signed in advance, stock powers allowing him full authority to sell the stock at his discretion (T-1797, 1788, 1801, 1836)
- proceeds from the sale and dividends of the stocks 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 sales of property, Coca Cola dividends, and investment account transfers (T-1789, 1802, 2507)
- the parties filed joint federal tax returns which included income from the Coca Cola stock sales and dividends on the stock (T-1802-04, 2315)
- the parties filed joint state intangible tax returns and paid the intangible tax from the joint account (T-1802-04).

Nevertheless, the court below declined to follow Adams, even though



it conceded that, at the least, nearly half of the wife's stock was within the Adams equitable distribution doctrine:

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.

Farrior v. Farrior, App. A, p. 3. Thus, at a minimum, the conflict with Adams is starkly presented as to the "220,372 shares of the existing 514,648 shares of Coca Cola Company stock [which] were either pledged as collateral for marital debts, or were obtained through the stock splits of shares previously pledged in this manner." Final Judgment, App. B, ¶ m, p. 5. The trial court had found that "The Wife's individually titled [inherited] stock was often relied upon by the parties as collateral for numerous marital loans." Id. Similarly, the Adams court found that the husband's gifted stock was the collateral for an account "used by the parties during the marriage as credit for acquiring marital assets and as funds for marital expenses." Adams, 604 So. 2d at 496, App. C, p. 3. Although we maintain that the trial court's findings here with regard to all the stock bring all the shares within the ambit of Adams, there can be no doubt that as to 220,372 shares, Farrior and Adams are irreconcilably in conflict.

Not only does the Second District's opinion expressly conflict with

Adams, it conflicts with another Second District opinion, Baird v. Baird, 696 So. 2d 844 (Fla. 2d DCA 1997). In Baird, the husband sold shares from his “solely titled account for living expenses and hypothecated over 1,300 shares as security for a \$20,000 marital debt.” 696 So. 2d at 847. In addition, the parties “lived in part off dividends and proceeds from the sale” of the solely titled stock. Id. The Baird court held that “the stock lost its separate character by such commingling and hypothecation.” Id. But for the size of the assets, the Farrior case is the same.

While intra-district conflict is not a basis for this Court’s jurisdiction, the Second District’s inconsistency underscores the importance of the now certified conflict between Adams and Farrior. That certified conflict between district courts of appeal requires resolution by this Court. Article V, § 3(b)(4), Fla. Const.

## II.

### **THE UNCONTRADICTED EVIDENCE COMPELS THE CONCLUSION THAT THE WIFE'S INDIVIDUALLY TITLED STOCK WAS COMMINGLED WITH THE PARTIES' MARITAL ASSETS AND THUS BECAME A MARITAL ASSET SUBJECT TO EQUITABLE DISTRIBUTION**

It seems almost intuitive that if a husband, for 36 years, had turned over to his wife full and complete control of his solely titled inheritance so that she could use that asset as she pleased (including selling it all) to fund the family's life, to pledge the asset for loans to purchase properties and investments, to deposit the dividends and income from the assets sale into a family account from which all the family's bills and taxes were paid, and if the husband had his wife sign joint gift tax returns which reflected joint ownership of the asset, that a court would say that the asset was part of the couple's marital estate.

To say, as the court below effectively did, that the name on the asset ends the inquiry, is inconsistent with, and undermines, the law of equitable distribution. Equitable distribution looks beyond simple title. While in this case it is the husband who is denied a fair share, allowing "title" to trump the ultimate proof of married life – the way the life has been lived and the asset used – benefits neither woman, nor man, nor marriage. It denies a spouse his or her share in the partnership of marriage, contrary to the purpose of equitable distribution.

Because equitable distribution is premised on the theory of an equal partnership in marriage, the court should begin this task on the premise that each spouse is entitled to receive an equal division.

Robertson v. Robertson, 593 So. 2d 491, 493 (Fla. 1991).

The decision below is not only antithetical to the statutory goal of equitable distribution (§ 61.075, Fla. Stat.), it is not in accord with established case law and it violates the established principle of appellate review that findings of fact cannot be reversed unless they are clearly erroneous. See Bimonte v. Martin-Bimonte, 679 So.2d 18, 19-20 (Fla. 4<sup>th</sup> DCA 1996) (“The trial court's findings of fact come to this court clothed with the presumption of correctness and shall not be disturbed unless there was no competent evidence to sustain them.”); cf., Storer v. Storer, 305 So. 2d 212, 213 (Fla. 3d DCA 1974) (“It is well established that the chancellor's findings come to the appellate court clothed with a presumption of correctness, and should not be disturbed unless they are clearly erroneous . . .”). In this case the trial court’s final judgment was correct; the appellate court decision was erroneous.

**A. THE TRIAL COURT'S FINDINGS WERE CORRECT AND NOT SUBJECT TO APPELLATE REJECTION**

We have detailed the trial court's careful findings of fact at pp. 1-3, *supra*, and have included a copy of the Final Judgment as Appendix B for ease of reference. The trial court's "first task is to divide the parties combined assets and liabilities into two categories: (1) marital and (2) nonmarital." Williams v. Williams, 686 So. 2d 805, 808 (Fla. 4<sup>th</sup> DCA 1997). There are three ways that an interest in a non-marital asset can be transferred: interspousal gift (§ 61.075(5)(a)3, Fla. Stat.); a contribution of labor or funds enhancing the asset (§ 61.075(5)(a)2, Fla. Stat.); intermingling or commingling (Walser v. Walser, 473 So. 2d 306 (Fla. 2d DCA 1985)).

The trial court in this case found that the non-marital asset had been intermingled, and detailed the facts upon which that finding was based: equal access, collateral for marital debts, use of the assets "to support a standard of living for the parties and their children that could not have been otherwise obtained by reliance on the parties combined income alone." Final Judgment, App. B, ¶ 1, p. 4. The Statement of the Facts, and the Certified Conflict Argument, pp. 17-20, *supra*, relate the evidence upon which those findings were based. Because there was abundant competent evidence to support them, the district court of appeal was obliged to defer

to those findings. See Bimonte v. Martin-Bimonte,, and Storer v. Storer, *supra* p. 22.

No principled basis existed for the district court to say that “the evidence does not support a finding that the Husband had equal access to the wife’s stock . . . .” Farrior, App. A at p. 2. The undisputed evidence showed that Mr. Farrior had equal, if not superior, access by virtue of the signed-in-advance blank “Irrevocable Stock or Bond Powers,” and “Assignment Separate from Certificate” and possession of the stock. See p. 9, *supra*. Access was a critical aspect of the intermingling inquiry in this case. Mr. Farrior’s unfettered authority gave him such complete control over the stock that “title” was meaningless. The district court decision that “[b]ecause [there was not] equal access . . . we conclude the stock in the Wife’s name did not become a marital asset by intermingling” (App. A, p. 2), was contrary to the uncontested evidence. The decision below should be reversed and the Final Judgment reinstated.

**B. THE FAILURE TO APPLY ESTABLISHED LAW REQUIRES REVERSAL**

If, as the district court believed, separate title precludes a finding of intermingling, then Baird v. Baird, 696 So. 2d 844 (Fla. 2d DCA 1997), and Adams v. Adams, 604 So. 2d 494 (Fla. 3d DCA 1992), were wrongly decided. There is no

question that in Adams the husband held stocks and bonds which had been gifted to him in a separately titled account – his portfolio account. He used that account as security for a joint loan account – the margin account – that was used during the marriage “for acquiring marital assets and as funds for marital expenses.” 604 So. 2d at 496. The Third District held that use of the portfolio account as security for the parties’ marital loans demonstrated commingling; the portfolio account “lost its separate character” because it was the real funding source of the marriage. The husband’s separate title was not decisive.

Nor was Mr. Baird’s “solely-titled account” containing his United Parcel Service shares immune from a finding of commingling. He “periodically sold shares from the sole-titled account for living expenses and hypothecated over 1,300 shares as security for a \$20,000 marital debt.” 697 So. 2d 844, 847. Just as Mrs. Farris gave her husband *carte blanche* power to transfer, sell, exchange, or borrow against the stock, Mr. Baird put some of his separately titled stock in an account where his wife had access to it. Id. As a result, all of Mr. Baird’s “stock lost its separate character by such commingling and hypothecation.” Id.

Here, Mrs. Farris’s Nunnally Trust distribution, which contained and was the source of all the Coca Cola stock, was used early in the marriage (1968) as collateral to secure the loan for the family’s purchase of an Ocala ranch:

[REX FARRIOR:] We were -- we were talking about the ranch and she was as excited as I was. We had two children then. And she said, even though we're not getting the distribution until later, would the bank lend on that distribution? . . . [A]fter that discussion I asked the bank if they would be interested in making a loan on something that we had not yet received. . . .

They later contacted me after some time went by and said yes, we will loan based on that, provided that the distribution from the Trust when it arrives must come directly to the bank. . . .

And we went down. . . and sign[ed] the papers.

T- 2102-2103, R- 5538, T-1936-38 (admitting document). The executed note provided that “[t]he collateral is also pledged as security for all other liabilities. . . of each maker. . . .” R-5538-5539 (Exh. 242).

More than twenty-five years later, in 1994, Coca Cola stock was still used jointly as security and a source of funding for the family’s pleasure and investments, as they sought to bring the San Francisco Giants to Tampa. Mrs. Farrior said she “was very much involved in the baseball . . . group” and that she and Mr. Farrior “had been discussing baseball sometime before that . . .” use of Coca Cola stock to guarantee their letter of credit (T-2632-34) -- a letter obtained over both of



their signatures on a note and pledge agreement to First Union. T-1913-14.

Those loan guarantees were bookends to a long term marriage in which the Coca Cola stock was the *sine qua non* for funding family life. During the marriage the couple pledged 220,372 shares of the Coca Cola stock as security for loans necessary to pay for family obligations, expenses and debts. Final Judgment, App. B, ¶ m, p. 5. Indeed, the stock was the foundation for the family's lifestyle; Rex Fariior had more than equal access to it:

The Husband could draw on those assets as a whole for personal and other purposes and in fact did so often throughout the marriage.

Final Judgment, ¶ k, App. B, p. 5. Mr. Fariior's access to all of the stock was at least equal to his wife's when it was in the joint safety deposit box to which they both had a key (T-1796), and it was superior to hers when it was in his office lock box . *Id.* Mary Lee Fariior's conveyance to him of blank signed stock powers and Assignment Separate From Certificate evidences a degree of access which meets or surpasses the examples drawn in the cases.

In Amato v. Amato, 596 So. 2d 1243 (Fla. 4<sup>th</sup> DCA 1992), "the wife deposited the proceeds into a joint checking account. . . . There each party drew upon those funds and others deposited over the years." *Id.* at 1244. See also Williams v. Williams, 686 So. 2d 805, 808 (Fla. 4<sup>th</sup> DCA 1997). In Williams, "the husband made

a decision to contribute his premarital assets to the marital partnership by inextricably commingling them and using the proceeds to support the family and purchase marital assets.” *Id.* at 809. And see, Walser v. Walser, 473 So. 2d 306, 307 (Fla. 2d DCA 1985), where the wife’s “action over the years and her admission that both parties ‘pooled’ their money together were sufficient evidence” to establish a marital asset.

On this record, the fact that the assets were stock certificates in the wife’s name and thus, unlike commingled cash, remained traceable, is not determinative. 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, even under the Second District’s construct, would have occurred. But rather than sell the Coca Cola stock, Mr. Farrior sought to conserve it and enhance the value of the marital estate by borrowing against it. He pooled his own substantial income and resources to pay loans designed to save the stock. The district court of appeal opinion punishes him for that effort by declaring him ineligible for equitable distribution because the stock lives – in his wife’s name. That result exalts traceability and title over equity, and should, on the facts of this case, be rejected.

The undisputed evidence in this case was that the stock was pooled with the husband’s income to fund the business, charitable, and family life of the couple

and their four children. Compare Claughton v. Claughton, 483 So. 2d 447, 449 (Fla. 3d DCA 1986), in which the court acknowledged that “[i]nherited or gifted assets which are intermingled with marital assets lose their separate character and become marital assets,” and remanded for a determination of whether the husband’s “other acquired funds became marital assets” because they “were intermingled and used to provide luxuries for his family and enrich their standard of living.” Here the stock – all of it – lost its separate character on that basis. Mrs. Fariior’s “title” does not entitle her to take from the marriage all of the assets that were husbanded for the family’s benefit.


A 36-year marriage and its product – a family – is a mixture, a blending, and uniting of two people and their children. Financing the Fariior marriage and raising their family was a united effort. In this case, the husband’s business income was substantial but insufficient to fund the generous lifestyle lived by the couple and their four sons. A ranch in Ocala, a home in the mountains of North Carolina, an estate and social activities in Tampa, trusts for their children, contributions and donations to hospitals, universities and other charities, were possible only because the wife united her inheritance with the efforts, assets and income of her husband. That blending benefitted her and her family. The trial court’s finding that she intermingled her inheritance is factually beyond dispute. Indeed, the district court complimented

the trial judge on her “effort to reach a fair resolution” and wrote, “we may agree that the trial court’s decision appears to be fair in light of the long-term marriage. . . .” App. A, at p. 3. It was fair, and it was supported by the cases and the evidence. It is ironic that the district court, in rejecting proof of the parties’ oral agreement to share their assets, held “we are persuaded by the parties’ actions during their marriage rather than by reports and explanations of their early conversations.” App. A, p. 2. Those actions were undisputed and persuaded the trial court that the 36-year marriage was a model of shared responsibilities, and that “all of the parties’ assets, whether titled jointly or individually, are marital assets subject to equitable distribution.” Findings of Fact, App. B, ¶ r, p. 6. The trial court’s findings were correct, and should not have been disturbed on appeal. Bimonte v. Martin-Bimonte, *supra*; Storer v. Storer, *supra*.

### CONCLUSION

For the foregoing reasons, the decision of the Second District Court of Appeal should be reversed with directions to reinstate the trial court’s Final Judgment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to (1) DAVID A. MANEY / LORENA L. KIELY, Maney, Damsker, Harris & Jones, P.A., P.O. Box 172009, Tampa, FL 33672-0009, and (2) STUART MARKMAN, 100 S. Ashley Drive, 13<sup>th</sup> Floor, Tampa, FL 33602, by Fed Ex this 25th day of August, 1998.

  
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BRUCE ROGOW