ORIGINAL

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 93,329

J. REX FARRIOR, JR.,

Petitioner,

vs.

MARY LEE FARRIOR,

Respondent.

PETITIONER'S REPLY BRIEF

On Certified Conflict Review
from the Second District
Court of Appeal

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES (continued)

Page

STATUTES

OTHER

CERTIFICATE OF FONT SIZE

This Brief is prepared using Times New Roman 14-point font.

ARGUMENT

THE REASON FOR A REPLY

The Wife's Answer Brief argues that the Second District Court of Appeal certification of conflict jurisdiction was "half-hearted." Answer Brief, p. 22. The Brief also contends that a "joint account" is required if there is ever to be a finding of commingling, and that since the Wife's stock was always "titled" in her name, it was always a non-marital asset. Answer Brief, *passim*.

The Answer Brief ignores the trial court's extensive findings of fact, and the facts of the 36 years of married life upon which those findings were based. Those facts (and the applicable law) confirm the Husband's position that the Wife's "joint account" and "title" arguments are misdirected. The Husband always had irrevocable stock powers over the stock, and the stock was always held in a joint safety deposit box or in the Husband's office. The Wife's Answer Brief recognizes that the Husband could have sold all of the stock at his discretion. Answer Brief, p. 28 ("The record shows the Husband refrained from using the blank stock powers to sell all of the Coca Cola stock"). Thus, as we detail below, the Wife's "title" and "joint account" arguments are red herrings in this case.

We turn first to the reasons why the District Court of Appeal's certification of conflict was correct, and why that conflict requires resolution by this

Court.

I.

THE CONFLICT WITH ADAMS V. ADAMS

The conflict with Adams v. Adams, 604 So. 2d 494 (Fla. 3d DCA 1992), stems from this undisputed fact recognized by both the trial court and the Second District Court of Appeal:

> Specifically, 220,372 shares of the existing 514,648 shares of Coca-Cola Company stock [titled in the Wife's name] were either pledged as collateral for marital debts or were obtained through the stock splits of shares previously pledged in this manner.

Trial Court Final Judgment, Initial Brief App. B-5; Farrior v. Farrior, 712 So. 2d 1154 (Fla. 2d DCA 1998), Initial Brief App. A-3.[1] Adams held that using nonmarital assets as security to acquire marital assets constituted commingling. The Farrior District Court of Appeal recognized the Adams significance of the trial court's

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[1] The Wife's Brief states that "the number of shares of Coca-Cola stock actually pledged is 29,444. . . ," but acknowledges, as it must, that the 220,372 pledged shares is the figure found by the trial and the appellate court to be the number of shares relevant to the issues presented in this case. Answer Brief, pp. 26, 40. Once the initial shares were pledged, for marital use, they became marital assets and their subsequent splits inured to the marital estate. See Fla. Stat. § 61.075(5)(a)(1,2,3).

finding that nearly half of the Wife's "separately-held stock was . . . used as collateral . . ." for marital purposes (Farrior v. Farrior, App. A-3). The Second District's refusal to apply the Adams commingling finding to the Farrior fact that 220,372 shares of stock had been used as security for acquiring marital assets and as funds for marital expenses, created the conflict with Adams.

Contrary to the Wife's characterization, the conflict certification was not "half hearted." Answer Brief, p. 22. The Second District began its Adams analysis by saying, "[e]ven if we were to agree with Adams. . ." only the pledged shares, not all of the Wife's stock would be viewed as commingled marital assets. App. A-3. Then, the District Court refused to find commingling, but acknowledged that its decision conflicted with Adams to the extent of the pledged shares. (That is what the Second District meant when it certified conflict "to the extent our decision conflicts with Adams"). Adams found that a separately held stock account used as security for acquiring marital assets and to generate funds for marital expenses resulted in the security becoming a marital asset. 604 So. 2d at 496. Farrior rejected the Adams view; thus the District Court of Appeal properly certified conflict.

Neither the Second District nor Adams made an "account" the *sine qua non* for commingling. Nevertheless, the Wife writes that Adams and all commingling cases require an "account," and that without an "account," Adams is irrelevant:

> [T]he 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.

Answer Brief, p. 26-27. The Answer Brief's cramped view of conflict and of Adams is incorrect. Aside from the fact that stock certificates are not "deposited," Adams does not hinge upon an account. It turns on the fact of a nonmarital asset being "used as security" for "acquiring marital assets and as funds for marital expenses." 604 So. 2d at 496, App. C-3. The premise of Adams, as the trial court found, is that "[t]he use of nonmarital assets as collateral for marital debts constitutes intermingling sufficient to make the underlying collateral marital property." App. B, 4-5, ¶ m. Indeed, the Second District Court of Appeal saw Adams that way. That is why it certified conflict with Adams.

This Court's certified conflict jurisdiction, Article V, § 3(b)(4), gives district courts of appeal the opportunity to recognize and certify conflict between their decisions and decisions of another district court of appeal so that this Court can resolve the conflict and maintain uniformity of state law. The district courts of appeal do not lightly "certify conflict." When they do:

> The policy for accepting such cases, of course, is that the very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court.

Gerald Kogan and Robert Craig Waters, The Operation and Jurisdiction of the Florida Supreme Court, 18 Nova L. Rev. 1151, 1243 (1994). The Second District recognized that its decision was not in accord with Adams. The resulting uncertainty should be resolved by this Court.

The significance of the issue presented is underscored by the Wife's inflexible view that commingling can only occur when there is an "account." Answer Brief, p. 39. No case has so limited commingling.[2] Indeed, demanding an "account" is a *non sequitur* when the assets are actual stock certificates. The assets in this case – stock certificates in the Wife's name – were placed in a joint safety deposit box to which both parties had equal access. TR-1797, 1788, 1801, 1836. That fact cannot be disputed. The joint safety deposit box is, for stock certificates, the analog to a "joint account" for cash, or a brokerage account for non-certificated stock, bonds or other securities. Thus, Adams cannot fairly be distinguished merely because there

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[2] The Wife's Brief string cites cases in which nonmarital assets were placed in "joint accounts." Answer Brief, p. 34. None of those cases held that a "joint account" was an essential element of commingling, and none of those cases addressed a joint safety deposit box holding stock certificates combined with irrevocable stock powers giving a spouse absolute discretion to sell all the stock. The "account" cases do not, as the Wife contends, control this case.

was not an "account." The conflict with Adams was appropriately certified by the District Court of Appeal, and should be resolved by this Court.

The resolution should favor the Adams view of commingling. On the facts of this case, the trial court's finding of fact that all of the stock became a marital asset by commingling should be upheld, and the District Court of Appeal decision reversed with instructions to affirm the trial court's Final Judgment.

II.

THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE CORRECT. THE DECISION BELOW SHOULD BE REVERSED AND THE TRIAL COURT'S FINAL JUDGMENT REINSTATED

A. THE TRIAL COURT'S FINDINGS

The trial court found:

- [t]hroughout the parties' thirty-six year marriage, the Husband exercised complete control and management over all of the parties' property including the stock titled solely in the wife's name (App. B-3, ¶ k);
- The Wife regularly executed blank stock powers to allow the Husband to exercise this control over the stock (App. B-4, ¶ k);
- The Husband could draw on these assets, as a whole, for personal and family purposes, and

in fact did so throughout the marriage (App. B-4, ¶ k);

- [A]ll of the parties' assets including the Wife's individually-titled stock, have lost any separate identity through intermingling (App. B-4, ¶ k);

- The Wife's individually titled stock was often relied upon by the parties as collateral for numerous marital loans (App. B-5, ¶ m);

- In view of the parties actions throughout their thirty-six year marriage, . . . the wife intended for the individually-titled stock to be treated by both parties as a marital asset (App. B-5, ¶ o).

These findings of fact should have been respected by the Second District Court of Appeal. The assets, their nature, their use, the parties' access to them, and whether the assets were commingled into the marital estate are all questions of fact. See Macaluso v. Macaluso, 523 So. 2d 615 (Fla. 2d DCA 1988):

> Our view of the process of determining and distributing marital asset is that it is a question of fact whether an asset is a marital or nonmarital asset. Once the fact is properly decided, then, as a matter of law, marital assets must be considered for equitable distribution purposes. It then becomes a matter of sound judicial discretion based upon equitable principles as to the amount each party is to receive as a equitable distribution.

> The only part of that process that must be treated as a matter of law is that all assets factually determined to be marital assets must be considered in any plan of equitable distribution.

Id. at 617 (emphasis supplied).

Thus, the only proper role for the appellate court was to determine whether the trial court's distribution of the marital assets was equitable. It was.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

The District Court of Appeal, contrary to the express findings of the trial court, concluded that "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." App. A-3. That conclusion clashes with each fact found by the trial court in the extensive Final Judgment which the District Court of Appeal "applaud[ed]" and agreed "appear[ed] to be fair in light of the long term marriage." App. A-3. The Second District did not even suggest that the trial court had abused its equitable distribution discretion.

From the time of Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), this Court has made clear that a trial court's equitable distribution discretion must be respected. In Hamlet v. Hamlet, 583 So. 2d 654, 657 (Fla. 1991), the Court wrote,

"We again emphasize that an appellate court, in reviewing a dissolution judgment, must examine the judgment as a whole in determining whether the trial court abused its discretion." Canakaris, quoting an early case, described the standard of review:

> "If reasonable men [and women] could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion."

382 So. 2d at 1203 (citation omitted).

We respectfully submit that no reasonable person could differ with the conclusion that where a husband and wife have shared their lives for over 36 years, equitable distribution requires that neither spouse should be shortchanged. Pastore v. Pastore, 497 So. 2d 635, 636-637 (Fla. 1985). Here, the Wife melded her stock with her husband's assets (marital and nonmarital), for the benefit of the marriage and family, for over 36 years. The trial court's findings were amply supported by the evidence; they should not have been disturbed on appeal.

C. THERE WAS COMMINGLING

The District Court of Appeal based its no-commingling decision on two *sua sponte* findings of fact. Both were erroneous. First, it found that the Wife's stock "was never placed in an account to which the Husband had equal access." App. A-2.

That no-access finding is belied by the record: all the stock certificates were kept in a joint safety deposit box with joint access. T 1797, 1788, 1801, 1836.

The District Court also found that "the Husband's management was always dependent upon the Wife's signing of stock certificates." App. A-2. That, too, is contradicted by the record. 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.[3] The trial court so found. App. B-4. Those irrevocable stock powers contained in the "Assignments Separate from Certificate" (see App. D to Initial Brief), which the Wife had given to the Husband, permitted him to sell all of the Coca Cola stock, had he wished to do so – a fact that the Wife's Brief concedes when it acknowledges that :

> The record shows the Husband refrained from using the blank stock powers to sell all of the Coca Cola stock.

Answer Brief, p. 28 (emphasis supplied). Thus, contrary to the Second District's finding, the Husband was not a supplicant; *he could have sold all of the stock at his discretion.*

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[3] The Wife's Brief disputes the Final Judgment's finding of fact that she had "regularly executed blank stock powers. . . ." App. B-4, ¶ k. The Wife writes she "testified" that "only once did she sign the stock powers. . . ." Answer Brief, p. 8. Obviously the trial court, based on the evidence, found otherwise, a fact that the Wife later acknowledges. Answer Brief, p. 28.

Florida law confirms that the stock powers he held, coupled with the Husband's unrestricted access to the certificates in the joint safety deposit box, made the stock an asset he could use throughout the marriage, whenever he wished:

> An indorsement of a certificated security in registered form is made when an appropriate person signs on it or on a separate document an assignment or transfer of the security or a power to assign or transfer it or her or his signature is written without more upon the back of the security.

Fla. Stat. § 678.308(1) (emphasis supplied).[4] Because the Husband had the separate

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[4] That statute was recently repealed and replaced. 1998 Fla. Sess. Law Serv. Ch 98-11 § 24 (H.B. 1083) (West 1998). See newly enacted § 678.1021(1)(k) (Ch. 98-11 § 1) and § 678.3041 (Ch. 98-11 § 3), Fla. Stat.:

> § 678.1021(1)(k) "Indorsement" means a signature . . . on a separate document for the purpose of assigning, transferring, or redeeming the security or granting a power to assign, transfer, or redeem it. (emphasis supplied).
>
> § 678.3041(3) An indorsement . . .does not constitute a transfer . . . if the indorsement is on a separate document, until delivery of both the document and the certificate. (emphasis supplied).

The new statutes do not affect prior actions (Ch. 98-11 § 24), but on the undisputed facts of delivery of the assignments and delivery of the stock into the joint safety deposit box, the result would be the same: the Husband had full use of the stock.

stock power document and the stock certificates, his "access" was complete as a matter of fact and law. Therefore, the Second District's contrary conclusion was erroneous.

The Second District hinged its no-commingling decision on the fact that the "stock remained titled in the Wife's name alone and was never placed in an account to which the husband had equal access." App. A-2. The Wife posits the same view: "equal access was literally impossible as long as the stock remained titled solely in the Wife's name." Answer Brief, p. 37. Not only do the facts and the law demonstrate that "title" was irrelevant once the stock assignments were given and the stock was in the joint safety deposit box, but the cases leave no doubt that "title" does not end the equitable distribution inquiry. See Sigmund v. Elder, 631 So. 2d 329, 331 (Fla. 1st DCA 1994) ("it is well established that the title to property is not always determinative of whether the property is a marital asset for equitable distribution purposes"); Hamm v. Hamm, 492 So. 2d 467, 468 (Fla. 1st DCA 1986) ("The fact that the shares of stock are titled in the husband's name only, however, is not determinative"). In this case, access to, and use of, the stock were the essential elements of commingling, and both elements were established.

The Answer Brief buttresses Mr. Farrior's position when it cites Winterton v. Kaufmann, 504 So. 2d 439 (Fla. 3d DCA 1987), on the issue of "title."

The bearer bonds in Winterton were in a joint safety deposit box, as were the stock certificates here. We agree that such bonds "by their nature are not titled in the name of one or more persons" (Answer Brief, p. 28), but once the Wife delivered irrevocable stock powers in Assignments Separate from Certificate with the understanding that the stock was to be used for acquiring marital assets and as funds for marital expenses, the stock became commingled with all the marital funds. Mr. Farrior was the bearer of the stock clothed with the same power as one possessed of bearer bonds.

Therefore the Wife's "title" was meaningless; the stock became a marital asset. Mrs. Farrior contributed $3 million of Coca Cola (and other) stock to the marriage, which generated $4.9 million in earnings over 26 years of the marriage. R-5784-85. Mr. Farrior, over 36 years of marriage, contributed more than $4.8 million of law practice and other income, as well as his own nonmarital assets to the marriage. R-5782-83, 5786. Mr. Farrior did not sell the Coca Cola stock because by borrowing against it, and using his own income to pay loans to help preserve the asset, he increased the value of the marital estate. An accountant found that by borrowing against, instead of selling, the Coca Cola stock, the Husband added more than $19 million to the parties' assets. R 5828-30. An equitable distribution of this marital estate required the court to consider all of those facts. The trial court did.

The Second District did not.

The Second District's substitution of its judgment for the facts expressly found by the trial court was plainly erroneous. In Conner v. Conner, 439 So. 2d 887 (Fla. 1983), the Court exercised conflict jurisdiction to correct a district court of appeal which found that the wife had been "shortchanged" by the trial court and reversed portions of the trial court's equitable distribution judgment. The Court held that the reversal directly and expressly conflicted with prior Supreme Court cases holding that an appellate court may not substitute its judgment for that of the finder of fact. The district court decision here also violated that principle.

D. SOME FINAL THOUGHTS

Many of the Answer Brief's factual and legal assertions are incorrect or irrelevant. Some of them are noted here.

For example, the Wife, referring to the checking account which was used to pay the family expenses, writes "whether the parties really had a `joint account' was disputed at trial and never resolved by the trial court." Answer Brief, p. 29; Id. at 9-10.

The name on that account is not important; what is important is the fact that for the duration of the marriage that account, or its predecessor, was the account

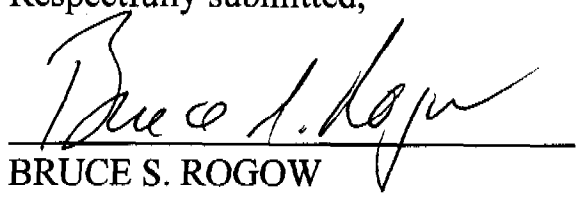
which received the family income from various sources, and paid the family's bills. That proves what the Answer Brief ignores: that this 36 year marriage was a joint effort, no matter whose name appeared on the checks paying the family's bills.

Another irrelevancy is the Answer Brief's quarrel about why the "blue-green document" signed by Mrs. Farrior was admitted. Answer Brief, pp. 6-7. The Wife's counsel described its language pledging or depositing the "rights, title, and interest in that certain trust [or] will [of] Charles T. Nunnally." T 1932. The trust generated the stock used for marital purposes. That is the important fact.

CONCLUSION

The Court should exercise its certified conflict jurisdiction. The conflict with Adams should be resolved by adopting the Adams rationale that a nonmarital asset used as security for, and to acquire, assets for a marriage, is a marital asset. On the facts of this case the Court should reverse the District Court of Appeal decision and order reinstatement of the trial court decision finding all of the stock to be a marital asset.

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, 13th Floor, Tampa, FL 33602, by U.S. Mail this 30th day of October, 1998.

BRUCE ROGOW