

IN THE SUPREME COURT OF FLORIDA

**KENNETH R. PFRENGLE,**  
Petitioner,

v.

**CASE NO. SC08-717**

**PAULA D. PFRENGLE, n/k/a**  
**PAULA D. KAY,**  
Respondent.

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**RESPONDENT'S RESPONSE BRIEF ON JURISDICTION**

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## **STATEMENT OF CASE AND FACTS**

There is no reason for this Court to exercise its discretion to accept review of the District Court's opinion in Pfrenge v. Pfrenge, 33 Fla.L.Wk. D227 (Fla. 2<sup>nd</sup> DCA, January 16, 2008). Although the Petitioner advances an argument that there is an express and direct conflict between the opinion of the Second District Court of Appeal in Pfrenge, supra; and, Archer v. Archer, 712 So.2d 1198 (Fla. 5<sup>th</sup> DCA 1998), an analysis of those cases reveals no conflict.

When the parties were married, the former Husband had, in his own name, a bank account into which he deposited cash. This account was maintained in his sole name. During the course of the marriage, this account received cash deposits from the sale of non-marital property owned by the former Husband, sale of marital property, the former Husband's earned income, and proceeds from the sale of the parties' jointly titled marital home. Nothing was ever deposited in this account but cash.

During trial, the former Husband's accountant testified that she had "traced" cash proceeds from the sale of the former Husband's pre-marital properties in and out of this account. The fact that the account contained nothing but cash, made those funds, by their very nature, untraceable. Although the Trial Court

found that there was not “sufficient commingling of marital and non-marital funds” in this account to cause the non-marital funds to lose their separate identity,” the District Court correctly reversed. As the assets deposited into the Kenneth Pfrengle account were all cash and, by their very nature, fungible and untraceable, the Second District Court of Appeal ruled in line with other districts in the State of Florida. In its opinion, it stated that, when the former Husband commingled marital and non-marital funds in his personal account, all the funds lost their non-marital character.

## SUMMARY OF THE ARGUMENT

The former Husband attempts to show that the opinion rendered by the Fifth District Court of Appeal in Archer v. Archer, 712 So.2d 1198 (Fla. 5<sup>th</sup> DCA 1998) conflicts with the Second District Court of Appeal in the instant case. There is no conflict.

The Archer, supra, Court stated that, only if assets could be traced, were not fungible, and had not been commingled or changed, could a non-marital characteristic be attributed to them. In Archer, supra, this attribution was limited to shares of stocks and securities that were unchanged and intact since their deposit in the account. The Court in Archer, supra, however, went on to state that where marital and non-marital cash is commingled within an account, this asset was fungible and, by its very nature, could not be separately identified and, therefore, was non-marital.

Rather than conflicting with Archer, supra; Pfrenge, supra; and, Archer, supra, are completely supportive of one another.

## ARGUMENT

There is no conflict between the ruling of the Second District Court of Appeal in the instant case and the decision of the Fifth District Court of Appeal in Archer v. Archer, 712 So.2d 1198 (Fla. 5<sup>th</sup> DCA 1998).

In the instant case, the account titled in Kenneth Pfrengle's name contained only cash. This cash came from deposits that included, but were not limited to, the former Husband's income from his job during the marriage, proceeds from sale of non-marital real estate, proceeds from sale of marital real estate, and proceeds from the sale of the parties' jointly titled former marital home.

The Second District Court in its opinion specifically found that marital and non-marital cash, once commingled, is untraceable. It stated:

Money is fungible, and once commingled it loses its separate character. Belmont v. Belmont, 761 So.2d 406, 408 (Fla. 2d DCA 2000). Pfrengle argues that commingling can occur only when funds are deposited in a joint account, but we reject this argument because title alone does not determine whether an asset is marital or nonmarital. "Even if an account is titled in one spouse's name alone, it may become marital if both marital and nonmarital funds are commingled in that account." Steiner v. Steiner, 746 So.2d 1149, 1150 (Fla. 2d DCA 1999).

The former Husband would have this Court believe that this position is in conflict with Archer v. Archer, 712 So.2d 1198, 1200 (Fla. 5<sup>th</sup> DCA 1998). It is not.

In Archer, supra, the Merrill Lynch cash management account (CMA), had been acquired by the former Wife from her mother. It contained stock, securities and cash. The account had been placed in joint names and marital cash added to the non-marital, which the account originally held. However, the stocks and securities remained intact during the marriage, and no change had been made to them. Any change in the value of these specific assets (securities and stock) was the result of market fluctuation, and not any actions of the former Wife's. The Fifth District Court, in Archer, supra, said that the presumption of a gift arose as to only those cash assets in the cash management account which became commingled with marital funds, but that the securities, which had not changed and were identifiable, were not marital:

When a joint account, originally established with non-marital property, is intermingled with marital property so that the property becomes non-traceable, that is, it becomes incapable of being specifically identified as the earlier separate property, such property is properly categorized as marital. The commingling of the marital and non-marital property creates a presumption, similar to the one set forth in Section 61.075(5)(a)5 for real property, that a gift of one-half the jointly held funds was made to the other spouse.

However, as the stocks and other securities had remained unchanged and were clearly identifiable and traceable, there was no presumption of a gift in the entire account. The presumption was limited to the cash assets, which could not



be traced, because they were fungible.

Instead of conflicting with the instant case, Archer v. Archer, 712 So.2d 1198 (Fla. 5<sup>th</sup> DCA 1998); and, Pfrenge v. Pfrenge, 33 Fla.L.Wk. D227 (Fla. 2<sup>nd</sup> DCA, January 16, 2008), are completely supportive of one another.

There is no conflict between the cases and, therefore, this Court should refuse to accept jurisdiction.

## **CONCLUSION**

As there is no conflict between the opinion in the instant case and the opinion in Archer v. Archer, 712 So.2d 1198, 1200 (Fla. 5<sup>th</sup> DCA 1998), the Court should refuse to exercise its discretionary jurisdiction and deny the Petitioner's request that it accept review of the Second District Court of Appeal's opinion.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this Response Brief complies with the font  
(Times New Roman 14-point) requirements of F.R.A.P. Rule 9.100(1).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL to **David A. Maney, Esquire, Patricia Kuhlman, Esquire, and Lee S. Damsker, Esquire**, of Maney, Damsker, Jones & Kuhlman, P.A., Attorneys for Petitioner (former Husband), Post Office Box 172009, Tampa, Florida 33672-2009, this \_\_\_\_\_ day of May, 2008.

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