IN THE FLORIDA SUPREME COURT

CASE NO.: SC06-1326

RICHARD A. NIX

Petitioner,

v.

BRENDA W. NIX,

Respondent.

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL
Lower Court Case No.: 1D04-4766

RESPONDENT'S ANSWER BRIEF

Submitted by:

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PRELIMINARY STATEMENT

References to the Appendix, attached hereto and separated by a divider and appropriate tabbing, will be cited as (A-appendix number, page number).

STATEMENT OF THE CASE AND OF THE FACTS

The Petitioner's, RICHARD A. NIX (hereinafter sometimes referred to as "Former Husband") Statement of the Case and of the Facts generally recites the facts necessary for this Court to understand the lower court proceedings. The Respondent, BRENDA W. NIX (hereinafter sometimes referred to as "Former Wife") notes that paragraph 4 of the Order of Findings was not included in the Final Judgment of Dissolution of Marriage, nor was the information contained in paragraph 4 of the Order of Findings included in the formula generated to calculate the Former's Wife's share of the Former Husband's pension benefits. (A-2; A-1, p. 2).

In addition, the Final Judgment of Dissolution of Marriage was entered by the trial court on April 26, 2000, but no appeal was filed following entry of that order. The Amended Qualified Domestic Relations Order, which was entered by the trial court on September 10, 2004, contained the same formula for the distribution of pension benefits as appeared in both the Order of Findings and Final Judgment of Dissolution of Marriage. (A-5, p. 2)

The Former Husband notes that the Former Wife did not seek the entry of the first Qualified Domestic Relations Order until four years after entry of the Order of Findings and Final Judgment of Dissolution of Marriage. However, the Former Husband has not alleged that he was prejudiced by this delay because he is not yet retired.

SUMMARY OF ARGUMENT

The first issue the Former Husband presents on appeal is whether the formula used to calculate the Former Wife's share of the Former Husband's retirement benefits incorporated an improper valuation date. The Former Husband's arguments on appeal are unavailing for a several reasons. First, the formula at issue was stipulated to by the parties and included in the trial court's Order of Findings. That formula was then included, verbatim, in the Final Judgment of Dissolution of Marriage (dated April 26, 2000), the Qualified Domestic Relations Order (dated June 21, 2004), and the Amended Qualified Domestic Relations Order (dated September 10, 2004).

Florida law does not prohibit the parties in a dissolution action from stipulating to a formula used to distribute pension benefits. Therefore, the Former Husband should not now be able to modify the formula the parties stipulated to. Furthermore, the Former Husband raised no challenge to the formula until he filed his Motion to Vacate Qualified Domestic Relations Order and/or Motion for Clarification on July 1, 2004 – four years after the formula was first incorporated into the Judgment of Dissolution of Marriage. Former Husband had an opportunity to challenge the formula prior to that motion; therefore, his appeal should be barred by the doctrine of *res judicata*.

The second issue the Former Husband presents on appeal is whether the provision in the Amended Qualified Domestic Relations Order that awards the Former Wife an interest in any future deferred retirement option plan ("DROP") in which the Former Husband may establish constitutes an impermissible distributions of post-dissolution assets. First, the Former Wife notes that the Former Husband has not, and is not eligible to participate in a DROP. As such, the issues concerning the Former Husband's future DROP participation are not ripe for review. As such, the Amended Qualified Domestic Relations Order should not be disturbed.

Should the Court find that the DROP issue is ripe for review, the award of an interest in a DROP to the Former Wife does not constitute an impermissible distribution of post-dissolution benefits. Both the statute creating the DROP program and the case law addressing the distribution of DROP proceeds show that the funds included in the DROP included retirement benefits accrued during the marriage. As such, it would be unjust and inequitable for a party to shield retirement benefits earned during the course of the marriage from his or her former spouse by having such funds included into a DROP.

ARGUMENT

I. The Former Husband is estopped from challenging the formula created to calculate the Former Wife's share of his pension benefits as he stipulated to that formula. In addition, the Former Husband's challenge to the formula is barred by the doctrine of *res judicata* as any such challenge could have been litigated prior to the present appeal. Finally, the operation of the formula will not result in an impermissible distribution of post-dissolution assets.

Standard of Review

The Former Wife disagrees with the standard of review advanced by the Former Husband. The Former Husband contends that the applicable standard of review is *de novo* because the Former Husband sees this issue as a view of the trial court's discretion in establishing a valuation date. However, the Former Wife asserts that the issue is whether the trial court correctly followed the Final Judgment of Dissolution of Marriage in its Amended Qualified Domestic Relations Order under the doctrine of *res judicata*. Therefore, the appropriate standard of review is whether the trial court's decision was erroneous as a mater of law. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

A. The parties stipulated to the subject formula and the formula, as written is complete:

The Former Husband cannot now challenge the subject formula as the parties stipulated to that formula. The Order of Findings, which the trial court entered into the record contemporaneously with the Final Judgment of Dissolution of Marriage dated April 26, 2000, reads as follows:

> 3. The Court finds the Respondent/Husband and the Petitioner/Wife ***stipulated*** that the Petitioner/Wife would be entitled to an interest in the Respondent/Husband's retirement as follows:
>
> ½ X 27 years and 7 months X Monthly Pymt.
> Number of Years of
> Husband's Employment

(A-1, p. 2) (emphasis added). As is clear from the language cited above, the parties agreed to the subject formula and the formula is to include the number of years of the Former Husband's employment when determining the Former Wife's share. That formula appears in the Final Judgment of Dissolution of Marriage, the Qualified Domestic Relations Order that was entered by the trial court on June 21, 2004, and the Amended Qualified Domestic Relations Order that was entered by the trial court on September 10, 2004. (A-2, p.1; A-3, p. 5; A-5, p. 5).

The Former Husband now argues that the subject formula was not stipulated to, as the valuation date that should have been used was October 15, 1998. In support of that contention, the Former Husband relies on paragraph 4 of the Order of Findings which reads as follows:

> 4. The Court has used a valuation date of October 15, 1998, the date the Petition was filed, or as close as possible thereto in determining the value of the parties' assets.

(A-1, p. 2). The Former Husband argues that the valuation date of October 15, 1998, should have been applied to all assets, including the formula used to

determine the Former Wife's interest in the Former Husband's retirement plan. This argument is unavailing for several reasons.

First, the formula contained in paragraph 3 of the Order of Findings (and reproduced verbatim in the subsequent orders and amended orders) is complete and does not include the valuation date contained in paragraph 4. Specifically, the Court does not need to look to other paragraphs or provisions to determine what dates and other information should be inserted into the formula. The valuation date of October 15, 1998, appears in paragraph 4 – after the subject formula. A logical reading of the Order of Findings would suggest that the date in paragraph 4 is to be applied to the assets described in detail in paragraph 5. If the date in paragraph 4 was meant to be incorporated into the formula, it should have been included prior to the formula in paragraph 3 or, more logically, been inserted into the denominator of the fraction specifically. Moreover, the formula as it appears in the Order of Findings is reproduced verbatim in the Final Order of Dissolution, Qualified Domestic Relations Order, and the Amended Qualified Domestic Relations Order. Since the complete formula as provided in the Order of Findings did not explicitly include the valuation date of October 15, 1998, as the denominator of the fraction and the valuation date of October 15, 1998, does not appear in the Order of Findings until after the complete formula is set forth, it would be illogical and unjust for the Court to disregard the express language used

in the formula and rearrange the Order of Findings to incorporate a different date in the denominator of the fraction.

Under Florida law, there is no authority preventing the parties to a dissolution action from agreeing that the "determination of the parties' respective shares of retirement proceeds will be made pursuant to an agreed-upon formula to be applied once disbursement of retirement proceeds begins." Nix v. Nix, 930 So.2d 711, 713 (Fla. 1st DCA 2006). As such, the parties were free to agree on incorporating the "number of years of husband's employment" rather than some other length of time in the denominator of the subject formula and such an agreement should not now be disturbed by the Court.

B. The Former Husband has waived any objection to the composition of the subject formula:

Moreover, the Former Husband should not now be permitted to challenge the language in the stipulated formula as the time period for making such arguments has long since passed. As discussed above, the stipulated formula first appeared in the Order of Findings and Judgment of Dissolution of Marriage which were entered on April 26, 2000. The identical formula was included in the Qualified Domestic Relations Order entered on June 21, 2004. (A-3, p. 5). The Former Husband did not object to the stipulated formula until he filed his Motion to Vacate Qualified Domestic Relations Order and/or Motion for Clarification on July 1, 2004 – four years after the stipulated formula was incorporated into the

Final Judgment of Dissolution of Marriage and the Order of Findings. The Former Husband should have raised that argument at the trial of the original dissolution action, at the rehearing of the Final Judgment of Dissolution of Marriage, or on appeal in 2000.

The doctrine of *res judicata* bars subsequent litigation of all matters that were, or could have been litigated in the original dissolution proceeding unless the court lacked jurisdiction to address the matter at issue. Davis v. Dieujuste, 496 So.2d 806, 808 (Fla. 1986). The Former Husband has not made a showing that the trial court lacked jurisdiction to hear a challenge to the subject formula. As such, the Former Husband could have litigated that issue in the original dissolution proceeding but chose not to do so. Moreover, in a post-final judgment proceeding, neither the trial court nor an appellate court "can reach back and modify the original terms judgment to effect a difference distribution of property rights." Hamilton v. Hamilton, 508 So.2d 760 (Fla. 1st DCA 1987).

C. The complete formula does take into account the date on which the marriage was dissolved and as such, the Former Wife will not receive a distribution of the Former Husband's post-dissolution retirement benefits.

The Former Husband's contention that the Former Wife will receive a distribution of post-dissolution benefits is premised on a misunderstanding of the operation of the formula. Since the total years of the Former Husband's employment is the denominator of the fraction and also a factor in the amount of

the monthly payment, the increase in years the Former Husband works after dissolution is cancelled out. In addition, the formula incorporates the length of marriage as the numerator of the fraction, which remains fixed despite the continuing employment of the Former Husband. As such, the trial court did value the percentage share of the monthly payment the Former Wife is to receive without any credit for the time the Former Husband worked after filing the Petition for Dissolution of Marriage.

II. The issue of whether the trial court improperly awarded the Former Wife an interest in any future deferred retirement option plan ("DROP") in which the Former Husband may participate likely is not ripe for review because the Former Husband is not yet eligible to participate in a DROP plan. Therefore, the Amended Qualified Domestic Relations Order cannot be disturbed. However, should the Court find that issue to be justiciable, the Wife is entitled to an interest in any DROP account as such an account is comprised of benefits earned prior to the dissolution of marriage.

Standard of Review:

In his Initial Brief on the Merits, the Former Husband argues that the applicable standard of review the Court should apply when considering that portion of the Amended Qualified Domestic Relations Order related to the DROP plan is the *de novo* standard of review. The Former Wife disagrees with that interpretation of the applicable standard of review. In essence, the Former Husband argues that the trial court incorrectly awarded the Former Wife the post-dissolution property of the Former Husband. The Former Wife argues that the trial

court correctly followed the Final Judgment of Dissolution of Marriage in entering the Qualified Domestic Relations Order. As such, the correct standard of review is whether the trial court's decision was erroneous as a matter of law. Canakaris, 382 So.2d at 1197 (Fla. 1980).

A. Ripeness:

The Former Husband notes that the Amended Qualified Domestic Relations Order makes reference to a DROP account even though Former Husband was not eligible, and has not yet become eligible, for participation in a DROP account. Judge Ervin, in his dissent in the underlying appellate court action, wrote that he would have dismissed that portion of the Former Husband's appeal as Former Wife's entitlement to a portion of Former Husband's DROP account is not justiciable as no such account exists. Nix, 930 So.2d at 714. If the Court finds that the Former Wife's interest in a future DROP account is a non-justiciable issue, than the Court cannot disturb that portion of the Amended Qualified Domestic Relations Order referring to the DROP account.

B. The DROP should not be considered a post-dissolution asset:

If the Court finds that the Former Wife's entitlement to a future DROP account is justiciable, it still should not disturb the Amended Qualified Domestic Relations Order as the Former Wife's interest in a future DROP account is not an

impermissible post-dissolution distribution of assets. The Amended Qualified Domestic Relations Order provides:

> 7. Any time the [Former Husband] participates in the Deferred Retirement Option Plan (DROP), the [Former Wife's] share of the [Former Husband's] benefit will be deposited in a separate DROP account where it shall earn interest at the same rate as the [Former Husband's share]."

(A-5, p. 2). The Former Husband argues that paragraph 7, if invoked, would result in an impermissible distribution of post-dissolution assets. The Former Husband's argument is premised on the notion that all potential sums from the DROP are benefits earned by the Former Husband as a result of his post-dissolution efforts.

DROP funds are retirement benefits based on prior service that would be paid out each month if a Florida Retirement System participant had not elected to participate in the DROP, but instead had just retired. The statute creating the DROP provides that the DROP allows a participant to "[defer] receipt of retirement benefits while continuing employment with his or her Florida Retirement System employer." FLA. STAT. § 121.091(13). Obviously, the DROP would allow the Former Husband to delay receipt of retirement benefits earned while still married to the Former Wife. Therefore, the Former Wife is entitled to receive a portion of any potential DROP benefits as a portion of the retirement benefits that fund the DROP became property of the Former Wife upon entry of the Final Judgment of Dissolution of Marriage.

The Fourth District Court of Appeal addressed each party's interest in a DROP account in Swanson v. Swanson. 869 So.2d 735 (Fla. 4th DCA 2004). In Swanson, the final judgment provided that each party was to receive 45% of the other party's pension as of January 17, 1990. Id. at 735. The trial court failed to award the former wife interest and cost of living adjustments for accrued benefits in the former husband's DROP account. The Fourth District Court of Appeal found this to be an error because it held that 45% of the value of the former husband's pension benefits as of January 17, 1990, belonged to the former wife; therefore, "the interest and cost of living adjustments which were applied to the former wife's share, despite being in the former husband's drop account, should also belong to the former wife." Id. at 739. The implication of the Court of Appeal's reasoning in Swanson is clear – the DROP account includes benefits that were earned while the parties were married and therefore constitute pre-dissolution assets, a share of which belongs to the former wife.

Although the Former Husband also argues that the provision of the Amended Qualified Domestic Relations Order referencing the DROP is improper because neither the Final Judgment of Dissolution of Marriage nor the Order of Findings reference the DROP, this argument is without merit. First, the DROP did not exist at the time of the Final Judgment of Dissolution. Second, the final judgment at issue in Swanson made no mention of the DROP, yet that fact did not

prevent the District Court of Appeal from holding that it was error for the trial court to not award the former wife interest and cost of living adjustments from the DROP.

As the language of the statute creating the DROP and case law addressing DROP accounts in the context of divorce makes clear, a DROP is funded by a marital asset (i.e., the pension), a portion of which was awarded to non-participant spouse. If the Court were to hold that the DROP was a non-marital asset, the participant spouse could prevent the non-participant spouse from receiving a share of the DROP even though it was not totally comprised of benefits earned from post-dissolution efforts. This certainly would be unjust.

CONCLUSION

The formula used to calculate the Former Wife's share of the Former Husband's retirement benefits was stipulated to by the parties and appeared, verbatim, in the Order of Findings, Final Judgment on Dissolution of Marriage, Qualified Domestic Relations Order, and Amended Qualified Domestic Relations Order. The Final Judgment on Dissolution of Marriage was entered in 2000, yet the Former Husband did not raise a challenge to the stipulated formula until fours years later. As the Former Husband could have challenged the stipulated formula in the underlying proceeding yet chose not to do so, his arguments on appeal should be barred by the doctrine of *res judicata*.

The provision of the Amended Qualified Domestic Relations Order referring to the Former Wife's interest in any future DROP in which the Former Husband may participate is an issue that is not ripe for review as the Former Husband has not, nor is eligible currently to participate in a DROP. Should the Court find that the DROP issue is ripe for review, the statute creating the DROP and the case law discussing a former spouse's interest in a DROP account provide that proceeds of such accounts are comprised of retirement benefits earned during the course of the marriage. Therefore, the Amended Qualified Domestic Relations Order does not provide for an impermissible distribution of post-dissolution assets.

For the foregoing reasons, the Amended Qualified Domestic Relations Order should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing was furnished to Ross A. Keene, 1622 North 9th Ave., Pensacola, Florida 32503, via United States mail, properly addressed and postage pre-paid, this _____ day of December 2006.

_____
PHILLIP S. HOWELL
RYAN PEDRAZA

CERTIFICATE OF COMPLIANCE

We hereby certify that Respondent's Answer Brief complies with the font requirements of Fla. R. App. Pro. 9.210(a)(2).

Respectfully submitted,

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