- -

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 Tribunal No.: 1D04-4766

- -

PETITIONER'S INITIAL BRIEF ON THE MERITS

- -

ROSS A. KEENE
Florida Bar No. 140686
Beroset & Keene
1622 North 9th Avenue

Pensacola, FL 32503
(850) 438-3111

Counsel for Petitioner

- -

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 12

ARGUMENT .... .15

I. THE VALUATION DATE UTILIZED BY THE TRIAL COURT FOR DETERMIN DISSOLUTION PENSION BENEFITS .... .15

II. THE TRIAL COURT'S AWARD TO THE FORMER WIFE OF ANY FUTURE, P BENEFITS .... .23

CONCLUSION .... .27

CERTIFICATE OF SERVICE .... .28

CERTIFICATE OF FONT SIZE .... .29

TABLE OF CITATIONS

Page

Cases

Blaine v. Blaine, 872 So.2d 383 (Fla. 4th DCA 2004) .... .21

Boyett v. Boyett, 703 So.2d 451 (Fla. 1997)............................. .10,15,16,18,19,25

Coons v. Coons, 765 So.2d 167 (Fla. 1st DCA 2000) .... .20,25

DeLoach v. DeLoach, 590 So.2d 956 (Fla. 1st DCA 1991).................... .7,10,15,20

Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986) .... .19

Giovanini v. Giovanini, 894 So.2d 275 (Fla. 1st DCA 2004) .... .21

Howerton v. Howerton, 491 So.2d 614 (Fla. 5th DCA 1986)............................ .21

Nix v. Nix, 930 So.2d 711 (Fla. 1st DCA 2006), 2006 WL 1152601
.... (Fla.App. 1 Dist.), 31 Fla. L. Weekly D1217 .6,

Pullo v. Pullo, 926 So.2d 448 (Fla. 1st DCA 2006) 7,16,24

Scott v. Scott, 888 So.2d 81 (Fla. 1st DCA 2004)... .21,25

Shuck v. Bank of Am., N.A., 862 So.2d 20 (Fla. 2d DCA 2003)................... .11,24

Statutes and Rules

Section 61.075, Florida Statutes .... .18

Section 61.076, Florida Statutes .... .18

Other

Federal Standards of Review §2.14 Vol. I at 276... .15,23

PRELIMINARY STATEMENT

Petitioner, Richard A. Nix, will be referred to as Petitioner or Former Husband. Respondent, Brenda W. Nix, will be referred to as Respondent or Former Wife. References to the Appendix, attached hereto and separated by a divider and appropriate tabbing, will be referred to as (A-appendix number-page number). References to the Index to Supreme Court Record will be referred to as (SCR-page number). References to the Index to Briefs will be referred to as (Index to Briefs - tab number).

STATEMENT OF THE CASE AND FACTS

I. Trial Court Procedural Background.

The parties' marriage was dissolved by entry of a Final Judgment of Dissolution of Marriage ("Final Judgment") on April 26, 2000. (A-1) On the same date the trial court entered an Order of Findings (A-2) setting forth the factual findings regarding the dissolution; however, not all of the factual findings in the Order of Findings were included in the Final Judgment. The Final Judgment and the Order of Findings equitably distributed the parties' assets and liabilities, including the Former Wife's entitlement to an interest in the Former Husband's retirement based on the following formula to be set forth in a qualified domestic relations order ("QDRO").

Paragraph 2 of the Final Judgment made the following provision regarding the Former Husband's retirement:

> "The Petitioner/Wife shall be entitled to an interest in the Respondent/Husband's retirement as follows:
>
> $\frac{1}{2}$ X $\frac{\text{27 years and 7 months}}{\text{Number of years of husband's employment}}$ X monthly payment
>
> The Court reserves jurisdiction to enter any such QDRO as may be necessary to effect disbursement of the Petitioner/Wife's interest in the Respondent/Husband's Retirement." (A-1)

Paragraph 3 of the Order of Findings made the following provision regarding the Former Husband's retirement:

> "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:
>
> $\frac{1}{2}$ X $\frac{\text{27 years and 7 months}}{\text{Number of years of husband's employment}}$ X monthly payment (A-2)

Paragraph 4 of the Order of Findings made the following provision regarding the valuation date of the parties' assets:

> "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-2)

It is in the Order of Findings that the Court establishes the valuation date for

marital assets, stating in paragraph 4 that the trial Court has used a valuation date of October 15, 1998, which was the date the Petition for Dissolution of Marriage was filed, or a date as close as possible thereto in determining the value of the parties' assets. (A-4) No other explicitly stated date for the valuation of any marital assets appears in either the Final Judgment or the contemporaneously-entered Order of Findings.

Although the Final Judgment and Order of Findings were entered on April 26, 2000, no further action was taken by the Former Wife pursuant to the trial Court's reservation of jurisdiction for entry of a QDRO until the year 2004. At that time, a proposed QDRO was proffered to the trial court by the Former Wife's counsel, which QDRO was entered by the trial Court, the Honorable John P. Kuder, June 21, 2004. (A-3) The QDRO provided for distribution to the Former Wife of a portion of the Former Husband's interest in the Florida Retirement System pursuant to the formula stipulated to by the parties and approved by the trial Court in its Final Judgment and Order of Findings. (A-1,2,3) However, said QDRO provided that the Former Wife's portion would include all benefits that have accrued to the Former Husband <u>at the time of his retirement</u>. (A-3) (emphasis added) Therefore, as the language would have provided, the Former Wife would have received an interest in the Former Husband's pension which had accrued

subsequent to the October 15, 1998 valuation date utilized by the trial court in the Final Judgment.(A-3)(emphasis added)

On July 14, 2004, the Former Husband filed his Motion to Vacate Qualified Domestic Relations Order and/or Motion for Clarification setting forth his objections to the valuation date utilized in the QDRO. (A-4) On July 21, 2004, the trial court,

finding that the Court had entered the QDRO in error in light of the Former Husband's objection to the same, issued its Order Upon Former Husband's Motion to Vacate Qualified Domestic Relations Order and/or Motion for Clarification, vacating the QDRO. (A-5)

On August 12, 2004, a hearing was held before the Court regarding the contents of the QDRO; specifically, the valuation date to be utilized by the Division of Retirement in making disbursement to Ms. Nix and also the inclusion of language awarding to Ms. Nix an interest in the Deferred Retirement Option Plan (DROP) if at any time Mr. Nix participated in the same. On September 10, 2004, the trial Court entered its Amended Qualified Domestic Relations Order ("Amended QDRO"). (A-6) The Amended QDRO provided in paragraph 5 that the Former Wife was awarded a portion of Former Husband's entitlement under the Florida Retirement System ("FRS")as a reduction from each monthly benefit

payable to Former Husband from the plan. The amount of the reduction was to be ½ x (27 years and 7 months)/(number of years creditable towards retirement) of all benefits that accrued to the Former Husband at the time of his retirement. (A-6)

The Amended QDRO also provided, in paragraph 7, that if at any time the Former Husband participated in the Deferred Retirement Option Plan ("DROP"), the Former Wife's share of the Former Husband's benefit would be deposited in a separate DROP account and subsequently released to her when Former Husband's participation in the DROP program terminated. (A-6)

Former Husband thereafter appealed the trial court's entry of the Amended QDRO to the District Court of Appeal, First District, Case No. 1D04-4766.

II. District Court Proceedings: Case No. 1D04-4766.

The Former Husband raised two issues on appeal. First, whether the trial court used an improper valuation date for determining the Former Wife's interest in the Former Husband's pension. (Index to Briefs-Tab A) The Former Husband challenged the trial court's Amended QDRO that held that the Former Wife's share value of the Former Husband's defined-benefit State of Florida monthly retirement benefits would be determined at the time the Former Husband retired rather than the stated valuation date in the Final Judgment of October 15, 1998. Id. Second, Former Husband also challenged the trial court's determination that should the

Former Husband elect to participate in the State of Florida DROP – which he had not done at the time the Final Judgment was entered, nor since – the Former Wife would be entitled to share in the DROP proceeds because they were "retirement benefits." Id.

Following briefing and oral argument, the District Court of Appeal, First District ("First DCA") affirmed the trial court's entry of the Amended QDRO. See Nix v. Nix, 930 So.2d 711 (Fla. 1st DCA 2006), 2006 WL 1152601 (Fla.App. 1 Dist.), 31 Fla. L. Weekly D1217. (A-7) In Nix, and first addressing the valuation date of the Former Wife's share of the Former Husband's retirement, the majority held that the trial court could order the Former Wife's share of the Former Husband's retirement to be calculated as of the time the Former Husband began to receive benefits. (A-7 at 1) The Court found:

> Because valuing the appellee's share of the former appellant's monthly retirement benefits as of the date that retirement benefits begin to be paid is consistent with the formula to which the parties agreed prior to entry of the final judgment of dissolution, and because the trial court correctly recognized and properly effected the appellee's right to equitably share in any DROP proceeds, we affirm the order under review.

(A-7 at 2)

In referencing the retirement distribution formula utilized by the trial court, the majority in Nix held that the parties' "stipulated" to the distribution of benefits

with the valuation being established as of the date the Former Husband actually retired:

> The parties' pre-dissolution stipulation was entered into after twenty-seven years and seven months of marriage, with the appellant having been a participant in the State of Florida retirement system throughout this period. The stipulation reflected the parties' agreement that the appellee's share of the appellant's monthly retirement benefits would be determined in accordance with a specified formula upon commencement of payment of retirement benefits by the State of Florida. (A-7 at 2)

The First District referred to the *DeLoach* formula reflecting the "deferred-distribution method," see DeLoach v. DeLoach, 590 So.2d 956 (Fla. 1st DCA 1991), and concluded that the formula set forth by the parties (*i.e.*, the length of time the husband worked for the employer until the date the petition was filed, divided by the number of years worked by the husband for the employer before retirement, times a monthly payment to be made at some unspecified time), made it "obvious" that the Former Wife's share should be valued as of the time the Former Husband began to receive benefits. (A-7 at 3)

On the issue of whether the Former Wife wold be entitled to an equitable share of any future, post-dissolution DROP proceeds of the Former Husband, the Nix court rejected the Former Husband's challenge to the trial court's determination that the Former Wife would be entitled to such a distribution, including interest accumulations and cost of living adjustments ("COLA") to her share. (A-7 at 3) Referencing Pullo v. Pullo, 31 Fla. L. Weekly D1069 (Fla. 1st DCA April 13, 2006), the First District certified the following question to this Court as a question of great public importance:

IS A SPOUSE WHO IS AWARDED A PORTION OF THE OTHER SPOUSE'S PENSION AT THE TIME OF DISSOLUTION ENTITLED TO SHARE IN A DROP ACCOUNT CREATED, INCLUDING INTEREST AND COLAS, SOMETIME AFTER THE DISSOLUTION HAS BECOME FINAL?

The dissent in Nix, Ervin, J., was addressed to both issues affirmed by the majority. (A-7 at 3-5). On the issue of whether the trial court used an improper valuation date for determining the Former Wife's interest in the Former Husband's retirement plan, and in urging reversal, Judge Ervin disputed the majority's finding that a "plain reading" of the Final Judgment and the Order of Findings supported their finding that the valuation date should be the date of retirement:

> The majority concludes that a plain reading of the final judgment and the order accompanying it refutes appellant's contention that the trial court intended to determine the former wife's share of the husband's retirement benefits as of the date the petition for dissolution was filed, rather than as of the time of the husband's retirement. My reading of the pertinent language in the final judgment and the order of findings fails to show any such clearly stated intent. (A-7 at 4)

Referencing the actual language in the trial court's order of findings setting out the parties' formula for distribution, Judge Ervin notes that the order states:

> "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-7 at 4)

Judge Ervin continues:

> No other explicitly stated date for the valuation of any marital asset

> appears in either the final judgment or the order entered contemporaneously with it. It reasonably appears from the court's findings that the valuation date recited therein applies to all marital assets without distinction. Nowhere in the record can I find any support for the majority's interpretation of the above rulings that one date applies to the valuation of the retirement benefit (the time monthly retirement benefits commenced) and another to the valuation of the remaining assets in dispute (the date the petition for dissolution of marriage was filed). (A-7 at 4)

Further, the dissent concedes that parties to dissolution litigation can stipulate to a distribution method for retirement benefits. However, Judge Ervin then notes:

> In my opinion, if the parties made any agreement as to the date for an evaluation of their marital assets, it was the date referred to by the court in its order of findings, October 15, 1998,[1] or, if no accord was reached, the valuation occurred by operation of law at the time the judgment of dissolution was entered, April 26, 2000. If the valuation date of October 15, 1998, was neither a clear expression of the parties' intent, nor a finding by the lower court as the time all the parties' marital assets were to be evaluated, the only other date that could have been reasonably contemplated was the date of the final judgment. (A-7 at 4)

Again challenging the "precision" and clarity the majority attribute to the language

---

[1] In a footnote Judge Ervin further points out:

> The numerator portion of the stipulated formula, the length of time the former husband worked for the employer during the marriage, *i.e.,* 27 years and seven months, ended as of the date the petition for dissolution was filed, October 15, 1998, thereby adding support to the former husband's argument that the order of findings fixed the valuation date for all of the parties' assets, including the retirement benefit. (A-7 at 4)

utilized by the trial court in addressing the valuation date, Judge Ervin also writes that if, as the majority notes, the formula agreed to by the parties below "precisely reflects" that approved by the First District in DeLoach, 590 So.2d at 956, the parties:

> ...at the time they made their stipulation, should be presumed to have been aware of the Boyett *caveat* to the DeLoach decision, instructing that the trial court's determination of "equitable valuation ... is not to include post-marriage contributions." Boyett, 703 So.2d at 453. The formula employed by the parties, including the numerator component, *i.e.,* the length of time the husband worked for the employer until the date the petition was filed, divided by the number of years worked by the husband for the employer before retirement, times a monthly payment to be made at some unspecified time, hardly has the clarity of intent attributed to it by the majority. Under the circumstances, the case should be remanded to the trial court with directions for the lower court to revise the QDRO by evaluating the retirement benefit either as of the date the petition was filed or, if no clearly stated intent for same can be determined, as of the date of the final judgment. (A-7 at 4-5)

On the issue of whether the Former Wife wold be entitled to an equitable share of any future, post-dissolution DROP proceeds of the Former Husband, Judge Ervin's dissent reasoned that the issue should not be decided on the merits because the contingency referred to by the trial court never occurred: the Former Husband never participated in DROP:

At the time the QDRO was entered, Mr. Nix had not been given the

> choice by his employer, the Escambia County Sheriff's Department, to participate in the State of Florida's DROP. The lower court's reference to the husband's future participation in DROP was included in the QDRO on the assumption of his eligibility for same if he were successful in his candidacy for the position for Escambia County Supervisor of Elections. The parties, however, conceded that Mr. Nix did not prevail; as a consequence, this is not a justiciable issue that is now ripe for decision. I would therefore dismiss the appeal without prejudice to Mr. Nix's right to challenge this portion of the order if his eligibility to participate in DROP ever occurs. Cf. Shuck v. Bank of Am., N.A., 862 So.2d 20 (Fla. 2d DCA 2003). (A-7 at 3)

It is from the First District's majority opinion in Nix that the Former Husband now appeals to this Court.

SUMMARY OF ARGUMENT

I. THE VALUATION DATE UTILIZED BY THE TRIAL COURT FOR DETERMINING THE FORMER WIFE'S INTEREST IN THE FORMER HUSBAND'S STATE PENSION WAS IMPROPER AND RESULTED IN IMPERMISSIBLE DISTRIBUTION OF POST-DISSOLUTION PENSION BENEFITS.

The trial court erred by using an improper valuation date for determining the Former Wife's interest in the Former Husband's State of Florida pension. The majority's decision on the valuation date issue conflicts with this Court's opinion in Boyett, where this Court determined that the valuation of a vested retirement plan is not to include any contributions made after the original judgment of dissolution.

In upholding the trial court's valuation date determining the Former Wife's interest in the Former Husband's pension, the First District concludes that the parties essentially "stipulated" that the valuation date for the Former Wife's interest would be the date of Former Husband's retirement, referencing language the District Court characterized as conclusive of such a stipulated date. However, and as pointed out by Judge Ervin in the dissenting opinion, the pertinent language in the final judgment and the order of findings fails to show any such clearly stated intent. The trial court should have entered a QDRO employing the formula set

forth in the Final Judgment and Order of Findings, with a valuation date as of October 15, 1998 rather than with the prospective date used by the trial court: the Former Husband's retirement date. . Accordingly, the Opinion of the First District should be reversed and remanded to the trial court for entry of a new QDRO reflecting a valuation date of October 15, 1998.

II. THE TRIAL COURT'S AWARD TO THE FORMER WIFE OF ANY FUTURE, POST-DISSOLUTION DROP PROCEEDS OF THE FORMER HUSBAND WAS AN IMPROPER AND IMPERMISSIBLE DISTRIBUTION OF POST-DISSOLUTION PENSION BENEFITS.

On the issue of whether the Former Wife wold be entitled to an equitable share of any future, post-dissolution DROP proceeds of the Former Husband, the First District rejected the Former Husband's challenge to the trial court's determination that the Former Wife would be entitled to such a distribution, including interest accumulations and cost of living adjustments. The First District affirmed the trial court's decision that the Former Wife would be entitled to an equitable share in any DROP proceeds, despite the fact that the Former Husband was not, and has not, actually participated in the DROP. The Final Judgment and Order of Findings also reveals that the trial Court did not award any interest in the DROP to either party. However, the Amended QDRO entered by the trial Court does make such a provision. That provision is error.

In addition, the District Court certified the following question to this Court as a question of great public importance:

> IS A SPOUSE WHO IS AWARDED A PORTION OF THE OTHER SPOUSE'S PENSION AT THE TIME OF DISSOLUTION ENTITLED TO SHARE IN A DROP ACCOUNT CREATED, INCLUDING INTEREST AND COLAS, SOMETIME AFTER THE DISSOLUTION HAS BECOME FINAL?

Petitioner would urge this Court to answer the certified question in the negative, both for the reasons stated above and also as argued in Petitioner's Issue I.

ARGUMENT

I. THE VALUATION DATE UTILIZED BY THE TRIAL COURT FOR DETERMINING THE FORMER WIFE'S INTEREST IN THE FORMER HUSBAND'S STATE PENSION WAS IMPROPER AND RESULTED IN IMPERMISSIBLE DISTRIBUTION OF POST-DISSOLUTION PENSION BENEFITS.

The trial court erred by using an improper valuation date for determining the Former Wife's interest in the Former Husband's State of Florida pension.[2] In his dissenting opinion, Judge Ervin notes that the majority's decision on the valuation date issue, which cited as authority DeLoach v. DeLoach, 590 So.2d 956 (Fla. 1st DCA 1991), conflicts with this Court's opinion in Boyett, where this Court disapproved of that portion of DeLoach that adopted the deferred-distribution method of allocating the value of a non-employee spouse's interest in a nonvested pension plan at the time an employee spouse retires (emphasis added). (A-7 at 5) In Boyett, the Supreme Court held that "the valuation of a vested retirement plan is

---

[2] The standard of review is de novo. Where the decision rests either on a pure matter of law or on documentary evidence that can be evaluated equally well by the appellate and trial courts, the standard of review is de novo. De novo review, or "free review," see Federal Standards of Review §2.14 Vol. I at 276, means simply that "although the trial court is presumed to be correct, the appellate court is free to decide the legal issue differently without paying deference to the trial court's review of the law. The principle here is that, in matters of law, the trial court is not in a superior position to evaluate questions and the appellate court may reach its own conclusion independent of the decision of a lower court.

not to include any contributions made after the original judgment of dissolution." Id. at 452. In reaching this conclusion, the Supreme Court disapproved of the First District's decision in DeLoach, which had adopted a differing valuation formula for retirement benefits subject to distribution in a dissolution proceeding. See Boyett, 703 So.2d at 451-52; see also Pullo v. Pullo, 926 So.2d 448 (Fla. 1st DCA 2006).

In upholding the trial court's valuation date determining the Former Wife's interest in the Former Husband's pension, the First District concludes that the parties essentially "stipulated" that the valuation date for the Former Wife's interest would be the date of Former Husband's retirement. (A-7 at 1-3) This assertion apparently stems from the parties' use of the deferred-distribution method set forth in DeLoach, 590 So.2d at 956, which, it should be noted, was the law at the time within the First District on the allocation of a non-employee spouse's interest in a pension plan. Under the approach utilized in DeLoach, the marital interest is calculated by use of a fraction of the pension payment, the numerator of the fraction being the number of years (or months) of the marriage during which benefits were being accumulated, and the denominator being the total number of years (or months) during which benefits were accumulated prior to payment. Id at 956. The procedure set forth in DeLoach is the formula used by the parties in the

instant Final Judgment and Order of Findings. See (A-1,2)

Utilization of the deferred-distribution method does not mean, however, that the Former Husband "agreed," "stipulated" or otherwise consented to establishing his retirement date as the date of valuation. Nor is use of deferred-distribution inconsistent with the Former Husband's position that the valuation date of the Former Wife's interest should be October 15, 1998: the date used by the trial court in the Order of Findings for determining the value of the parties' assets. (A-2, A-7 at 3) To reinforce the majority's position that the Former Husband essentially agreed to the date of retirement for valuation purposes, the Opinion states that a "plain reading" of the trial court documents supports their decision. (A-7 at 2) The majority also references what it deems to be the obvious intent of the trial court, *i.e.*, the "trial court obviously established a valuation date..." and "This is made obvious by the formula's specific incorporation..." (A-7 at 2)

These efforts notwithstanding, Judge Ervin did not find the trial court language nearly as definitive or persuasive:

> The majority concludes that a plain reading of the final judgment and the order accompanying it refutes appellant's contention that the trial court intended to determine the former wife's share of the husband's retirement benefits as of the date the petition for dissolution was filed, rather than as of the time of the husband's retirement. My reading of the pertinent language in the final judgment and the order of findings fails to show any such clearly stated intent. (A-7 at 4)

What *was* clearly enunciated is the actual language in the trial court's Order of Findings setting out the parties' formula for distribution. Judge Ervin again writes:

> "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-7 at 4)

Judge Ervin continues:

> No other explicitly stated date for the valuation of any marital asset appears in either the final judgment or the order entered contemporaneously with it. It reasonably appears from the court's findings that the valuation date recited therein applies to all marital assets without distinction. Nowhere in the record can I find any support for the majority's interpretation of the above rulings that one date applies to the valuation of the retirement benefit (the time monthly retirement benefits commenced) and another to the valuation of the remaining assets in dispute (the date the petition for dissolution of marriage was filed). (A-7 at 4)

By characterizing the language contained in the trial court orders as "stipulation" or "agreement" to a valuation date of the Former Wife's pension interest as of the date of retirement, the First District entirely bypasses consideration of this Court's holding in Boyett v. Boyett, 703 So.2d 451 (Fla. 1997), which held that valuation of a vested retirement plan is not to include any contributions made after the original Judgment of Dissolution. In Boyett, this Court approved the holding of the Fifth District that the valuation of a vested

retirement plan is not to include any contributions made after the original judgment of dissolution. The Court's interpretation gives effect to the statutory definition of marital assets as set forth in Sections 61.075 and 61.076, Florida Statutes. 703 So.2d at 453. This Court reiterated its earlier comments from Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986), that "no recitation or formulae, considered in the abstract, could capture the variety of considerations necessary in order to do equity." Boyett, 703 So.2d at 543. The Court stated that the valuation of retirement benefits is fact-intensive, and varies depending upon the plan, and the trial judge must determine the equitable valuation *with the limitation being the valuation is not to include post-marriage contributions.* Id. (emphasis added)

Nevertheless, the First District stated in the instant case:

> Relying upon Boyett v. Boyett, 703 So.2d 451 (Fla. 1997), the appellant argues that delaying determination of the appellee's share of the appellant's retirement benefits until the payment of retirement benefits begins is inconsistent with Florida law because such delay results in an award to the appellee of retirement benefits which accrue after the dissolution of marriage. But neither Boyett nor any other applicable authority prevents 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. (A-7 at 3)

If the trial court orders in the instant case did reflect the clarity and

specificity of the valuation date attributed by the First District majority opinion, then perhaps the First District could avoid accountability to Boyett and progeny that valuation is not to include post-marriage contributions. Judge Ervin specifically addresses this point in his dissent:

> If such is the case, the parties, at the time they made their stipulation, should be presumed to have been aware of the Boyett *caveat* to the DeLoach decision, instructing that the trial court's determination of "equitable valuation ... is not to include post-marriage contributions." Boyett, 703 So.2d at 453. The formula employed by the parties, including the numerator component, *i.e.,* the length of time the husband worked for the employer until the date the petition was filed, divided by the number of years worked by the husband for the employer before retirement, times a monthly payment to be made at some unspecified time, hardly has the clarity of intent attributed to it by the majority. Under the circumstances, the case should be remanded to the trial court with directions for the lower court to revise the QDRO by evaluating the retirement benefit either as of the date the petition was filed or, if no clearly stated intent for same can be determined, as of the date of the final judgment. (A-7 at 4)

Moreover, the instant decision below is also internally inconsistent with other decisional law within the First District regarding the valuation of pension and/or retirement benefits. See Coons v. Coons, 765 So.2d 167 (Fla. 1st DCA 2000). In Coons, the court addressed a wife's interest in her husband's military retirement benefits that accrued during the marriage. The trial court found that the Former Husband had an unvested military retirement benefit, but only a portion of

which was earned during the parties' marriage. The trial court found that "the portion earned during the marriage should be a marital asset." Id. However, the First District found that the trial court's written judgment failed to distinguish clearly between the amounts that accrued during the marriage and the non-marital sum. The final judgment was reversed as this omission was held to be error as a matter of law pursuant to Boyett. Id.; see also Scott v. Scott, 888 So.2d 81 (Fla. 1st DCA 2004) (trial court reversed where final judgment regarding husband's military retirement benefits found violative of Boyett rationale); Giovanini v. Giovanini, 894 So.2d 275 (Fla. 1st DCA 2004) (First District reversed that portion of the trial court final judgment that improperly used military pay scale for 2001 rather than 1988, the year of the final judgment). The First District's decision in the present case also conflicts with authority from other District Courts of Appeal in relation to Boyett. See Blaine v. Blaine, 872 So.2d 383 (Fla. 4th DCA 2004) (retirement pension must be viewed as a marital asset, but that only the marital portion may be equitably distributed); Howerton v. Howerton, 491 So.2d 614 (Fla. 5th DCA 1986) (award of 50% of former husband's pension to former wife improper where husband continued to work for the same employer and pension increased, therefore final judgment would have allowed former wife to share in subsequently accrued benefits).

In the present case, paragraph 2 of the Final Judgment does set forth the formula by which Ms. Nix's interest in Mr. Nix's state pension is to be determined. That formula was reiterated in paragraph 3 of the Order of Findings. (A-2) Moreover, in paragraph 4 of the Order of Findings, the trial court stated that it was using a valuation date as to marital assets of October 15, 1998: the date the Petition for Dissolution of Marriage was filed, or as close as possible thereto in determining the value of the parties' assets. (A-2) Thus, the trial Court's intent to exclude post-dissolution benefits is supported by the Court's clear enunciation of the valuation date utilized for <u>all</u> assets.

The trial court should have entered a QDRO employing the formula set forth in the Final Judgment and Order of Findings, with a valuation date as of October 15, 1998 rather than with the prospective date used by the trial court: the Former Husband's retirement date. The Amended QDRO in its current form allows for inclusion of post-dissolution benefits accrued by the Former Husband which is contrary to both the terms of the Final Judgment and established case law of this Court and other District Courts of Appeal. Accordingly, the Opinion of the First District should be reversed and remanded to the trial court for entry of a new QDRO reflecting a valuation date of October 15, 1998.

II. THE TRIAL COURT'S AWARD TO THE FORMER WIFE OF ANY FUTURE, POST-DISSOLUTION DROP PROCEEDS OF THE FORMER HUSBAND WAS AN IMPROPER AND IMPERMISSIBLE DISTRIBUTION OF POST-DISSOLUTION PENSION BENEFITS.[3]

On the issue of whether the Former Wife wold be entitled to an equitable share of any future, post-dissolution DROP proceeds of the Former Husband, the First District rejected the Former Husband's challenge to the trial court's determination that the Former Wife would be entitled to such a distribution, including interest accumulations and cost of living adjustments ("COLA") to her share. (A-7 at 3) The First District affirmed the trial court's decision that the Appellee will be entitled to an equitable share in any DROP proceeds of the Appellant, despite the fact that the Appellant was not, and has not, actually participated in the DROP. A review of the Final Judgment and Order of Findings reveals that the trial Court did not award any interest in the DROP to either party. However, the Amended QDRO entered by the trial Court, as prepared by Former

---

[3] The standard of review is de novo. Where the decision rests either on a pure matter of law or on documentary evidence that can be evaluated equally well by the appellate and trial courts, the standard of review is de novo. De novo review, or "free review," see Federal Standards of Review §2.14 Vol. I at 276, means simply that "although the trial court is presumed to be correct, the appellate court is free to decide the legal issue differently without paying deference to the trial court's review of the law." The principle here is that, in matters of law, the trial court is not in a superior position to evaluate questions and the appellate court

Wife's counsel, states in paragraph 7:

> "Any time the participant participates in the Deferred Retirement Option Plan (DROP), the Alternate Payee's share of the Participant's benefit will be deposited in a separate DROP account where it shall earn interest at the same rate as the Participant's share". (R-11-97)(A-4)

As expressed by Judge Ervin in his dissent, this future contingency referred to by the trial court in its Amended QDRO never actually occurred as the Former Husband did not, and has not, participated in DROP to which the Former Wife could claim an interest. The trial court's ruling was based on an "assumption" of eligibility, not actual eligibility, and therefore the issue is not justiciable. (A-7 at 4); see Shuck v. Bank of Am., N.A., 8 62 So.2d 20 (Fla. 2d DCA 2003). Judge Ervin's dissent reasoned that the issue should not be decided on the merits:

> At the time the QDRO was entered, Mr. Nix had not been given the choice by his employer, the Escambia County Sheriff's Department, to participate in the State of Florida's DROP. The lower court's reference to the husband's future participation in DROP was included in the QDRO on the assumption of his eligibility for same if he were successful in his candidacy for the position for Escambia County Supervisor of Elections. The parties, however, conceded that Mr. Nix did not prevail; as a consequence, this is not a justiciable issue that is now ripe for decision. I would therefore dismiss the appeal without prejudice to Mr. Nix's right to challenge this portion of the order if his eligibility to participate in DROP ever occurs. Cf. Shuck v. Bank of Am., N.A., 862 So.2d 20 (Fla. 2d DCA 2003). (A-7 at 3)

---

may reach its own conclusion independent of the decision of a lower court.

Referencing Pullo v. Pullo, 31 Fla. L. Weekly D1069 (Fla. 1st DCA April 13, 2006), the First District certified the following question to this Court as a question of great public importance:

> IS A SPOUSE WHO IS AWARDED A PORTION OF THE OTHER SPOUSE'S PENSION AT THE TIME OF DISSOLUTION ENTITLED TO SHARE IN A DROP ACCOUNT CREATED, INCLUDING INTEREST AND COLAS, SOMETIME AFTER THE DISSOLUTION HAS BECOME FINAL?

Petitioner would urge this Court to answer the certified question in the negative.

The Final Judgment and Order of Findings are devoid of any award to either party of an interest in the DROP. (A-1, 2) At the hearing held before the trial court August 12, 2004, the Former Husband argued he was not a participant in the DROP as a result of his employment with the Escambia County Sheriff's Department, but rather he was running for political office that might involve a Florida State Retirement interest which could result in the development of an interest in the DROP. The Amended QDRO, in its current form, would allow the Former Wife to participate in those subsequently accrued benefits, if they were to be established, which is improper because the benefits: 1) would not have accrued during the marriage; 2) were not provided for in the parties' Final Judgment of

dissolution of marriage; and 3) were improperly awarded to her in an Amended QDRO. Appellant asserts that the trial court is without authority to award to the Former Wife any interest in any benefit earned by Mr. Nix in the Florida State Retirement system that was not actually earned during the marriage and delineated by the parties' Final Judgment. See Boyett, 703 So.2d at 451; Coons, 765 So.2d at 167; Scott, 888 So.2d at 81.

Post-dissolution benefits that may accrue from another source of employment, or that are not provided to either party in a final judgment of dissolution of marriage, should not be included in any distribution to a former spouse. The trial Court's inclusion of any future DROP benefits in the Amended QDRO is error and should be reversed with instructions to the trial court to strike from the Amended QDRO any provision for the Former Wife to entitlement to post-dissolution DROP benefits.

CONCLUSION

The Petitioner respectfully moves this Court to reverse the First District and remand the case for further trial court proceedings, including directions for the lower court to revise the QDRO to establish a valuation date of October 15, 1998 as contained in the parties' Final Judgment and Order of Findings or, if no clearly stated intent for same can be determined, as of the date of the final judgment.

Regarding the certified question on whether a spouse awarded a portion of the other spouse's pension at the time of dissolution is entitled to a subsequently-created DROP account, the Petitioner would request that the Court answer the question in the negative and remand with instructions to the trial court to strike from the Amended QDRO any provision for the Former Wife to entitlement to post-dissolution DROP benefits.

Respectfully submitted,

ROSS A. KEENE
Florida Bar No. 140686
Beroset & Keene
1622 North 9th Avenue
Pensacola, Florida 32503
(850) 438-3111

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by U.S. Mail to Phillip Howell, 1101 Gulf Breeze Parkway, Suite 2, Gulf Breeze, FL 32561 on November 13, 2006.

ROSS A. KEENE
Florida Bar No. 140686
Beroset & Keene
1622 North 9th Avenue
Pensacola, Florida 32503
(850) 438-3111
Counsel for Petitioner

CERTIFICATE OF FONT SIZE

Pursuant to Fla. R. App. P. 9.210(a), undersigned counsel hereby certifies that this brief complies with the font requirements the Rule, and is formatted in Times New Roman 14-point font.

ROSS A. KEENE
Florida Bar No. 140686
Beroset & Keene
1622 North 9th Avenue
Pensacola, Florida 32503
(850) 438-3111
Counsel for Petitioner