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IN THE FLORIDA SUPREME COURT
Case No.: SC06-1326

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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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent incorporates the Preliminary Statement from his Initial Brief on the Merits but would supplement as follows:

References to the Respondent=s Answer Brief will be referred to as (Ans. Brf. - page number).

STATEMENT OF THE CASE AND FACTS

Respondent incorporates the Statement of the Case and Facts from his Initial Brief on the Merits.

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.[1] The Respondent asserts that Petitioner=s challenge of the trial court Amended QDRO is barred by the doctrine of *res judicata*. See Ans. Brf. at 7-12. The Petitioner would note that the First District=s opinion in Nix v. Nix, 930 So.2d 711 (Fla. 1st DCA 2006), did not even distinguish the *res judicata* argument asserted by the Former Wife, or that review of the QDRO might somehow be precluded on that basis. Indeed, it would be difficult to imagine how the Former Husband could have challenged the language of a QDRO entered in 2004 at the time the Final

[1] 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.

Judgment and Order of Findings were entered in 2000. Moreover, because Paragraph 4 of the Order of Findings clearly established the valuation date of October 15, 1998 (the date the petition for dissolution of marriage was filed), there was no need to seek rehearing, reconsideration, or direct appeal of those proceedings. The delay in seeking review was occasioned by the Former Wife=s four year wait before she undertook QDRO-related proceedings. Once undertaken, and following the Former Husband=s challenge of the proposed QDRO orders, review of the matter was procedurally timely. The Respondent=s *res judicata* argument also proceeds within a vacuum to the extent she asserts that only the language in the Final Judgment and Order of Findings provide the basis for review purposes, and not the QDRO itself. For these reasons Respondent=s *res judicata* argument should be rejected.

Moreover, and within the general *res judicata* argument, the Respondent asserts that because Paragraph 4 of the Order of Findings (establishing the valuation date of October 15, 1998 for the parties= assets, without exception) came after the paragraph outlining the QDRO formula, yet before Paragraph 5 which addressed other marital assets, that the Paragraph 4 date Alogically@ could apply only to the non-QDRO assets. See Ans. Brf. at 9. Ideally, while paragraph sequencing in some legal documents may have logical purpose, the language of

Paragraph 4 of the Order of Findings does not *say* it applies solely to subsequent paragraphs addressing asset distribution. Respondent states that it would be A...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.@ See Ans. Brf. at 9-10. Petitioner would further add that it would be improper and unjust to disregard the precise language in Paragraph 4 that the valuation date should be October 15, 1998. As noted by Judge Ervin in his dissent:

> 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:

> "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)
>
> * * * *
>
> 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)

As noted by the majority in Nix, 930 So.2d at 711:

> As the supreme court observed in *Boyett,* valuation of a spouse's interest in a retirement plan is fact-intensive and varies in accordance with the particular circumstances involved. Accordingly, A[n]o recitation of formulae, considered in the abstract, could capture the variety of considerations necessary in order to do equity.@ Boyett, 703 So.2d at 453 (quoting Diffenderfer v. Diffenderfer, 491 So.2d 265, 269 (Fla. 1986))

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 clearly identified as 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.[2]

Petitioner incorporates by reference argument from his Initial Brief on the Merits.

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[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.

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,

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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 February 1, 2007.

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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.

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