



TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST .....	1
STATEMENT OF THE CASE AND FACTS .....	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW .....	5
Proposition of Law No. 1: A trial court errs in dividing a separate property disability pension post-decree, where the parties had reached a Separation Agreement, incorporated into a decree of divorce, which considered Husband's disability pension for purposes of spousal support and which divided any marital portion of Husband's retirement pension equally. ....	5
Proposition of Law No. 2: A trial court errs in replacing spousal support with a division of Husband's separate property where the parties' Separation Agreement provided that spousal support would terminate after 63 months and retained jurisdiction modification only upon Husband's receipt of retirement benefits, subject to equal division. ....	9
Proposition of Law No. 3: A trial court should not force a party to sign a DOPO upon threat of incarceration in violation of the division of property contained in the parties' decree of divorce. ....	11
CONCLUSION .....	12
CERTIFICATE OF SERVICE .....	13
APPENDIX	<u>Appx. Page</u>
Decision and Journal Entry of the Summit County Court of Appeals (12/9/09)	1

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC  
OR GREAT GENERAL INTEREST

This case contains intertwined issues of great general interest to participants in disability pension plans in Ohio. The Court of Appeals upheld a post-decree action of the trial court which divided a participant's disability pension, despite its being separate property and despite an agreement which provides for the non-participant spouse to receive spousal support from the disability pension and later to receive half of the marital portion of any retirement pension. This action modified the parties' Separation Agreement.

The decision of the Court of Appeals decision places recipients of disability pensions in an untenable position. If one is paying part of one's disability pension as spousal support which is limited in duration, one reasonably should be able to expect that the separate property component of the disability benefit will not subsequently be divided as marital property. However, following this case, a trial court can modify the parties' property division, essentially making spousal support permanent by giving the non-participant spouse one half of a separate property disability pension at a time when she is healthy and the participant is not. This is exacerbated by the fact that the new DOPO would authorize the Ohio Police and Fire Pension Fund to collect from the participant one-half of his disability pension payments from the time of divorce when he already has paid 63 months of spousal support

It is of great general and public interest that R.C. 3105.171 be applied consistently. Elsewhere in Ohio, disability pension is separate property of the injured party. It is error for the trial court to award one half of the obligor's separate property disability pension when the normal term of support expires. The recipient of a disability pensions can now find himself:

1. Paying spousal support based upon his disability pension income.
2. Sharing any marital portion of his retirement pension.
3. Then also sharing separate property in the form of his disability pension.
4. Then also paying one half of disability benefits for the period he was paying spousal support. This could result in the disable party receiving no disability pension for 63 months in this case while the alternate payee receives 100% and can work.

The Court of Appeals applied *res judicata*, holding that Mr. Furlong should have appealed the initial decree. However, he was not dissatisfied with paying spousal support of \$800 per month for 63 months. He was not dissatisfied with sharing the marital portion of his Ohio Police and Fire Pension Fund. He became dissatisfied only when the trial court modified the decree by adding to Wife's share one half of his disability pension, potentially back to the date of the divorce.

This court should accept jurisdiction of this case and review the lower court's decision.

## STATEMENT OF THE CASE AND FACTS

The parties were divorced on February 21, 2003. The parties agreement was read into the record by Ms. Davis's counsel. The Journal entry was to be prepared, but never was filed. Instead, the decree of divorce incorporated a transcript of the proceedings.

The parties' Separation Agreement in this case differentiated between retirement and disability 'pension'. At the time of the parties' agreement, Mr. Furlong was receiving income from his disability pension. At page 3 of the transcript of the Separation Agreement, incorporated into their decree of divorce, the parties agree that Husband will pay Wife spousal support of \$800 per month for 63 months and acknowledge that Mr. Furlong has a disability pension. At page 4, they agree that Ms. Davis would be entitled to one half of the marital portion of Mr. Furlong's retirement pension.

Mr. Furlong consistently has maintained that Ms. Davis was not entitled to a property share of his disability pension. Her claim to a share of his ongoing income, in this case his disability pension, was determined by the parties' spousal support provision: \$800 per month for 63 months.

The parties were in court on numerous occasions. Each party filed contempt charges against the other, along with motions to reallocate parental rights and responsibilities.

On August 29, 2008, Magistrate Stoner issued a Magistrate's Decision as to the various motions. In open court, the Magistrate had ordered Mr. Furlong to sign a Division of Property Order (DOPO), threatening him with a jail sentence if he did not sign in court. This DOPO divided Mr. Furlong's retirement pension differently than the parties had agreed. The Magistrate's Decision granted Wife's motion to adopt her proposed DOPO.

and the decree had ordered.

Mr. Furlong filed his objections. On December 2, 2008, the Trial Court overruled Mr. Furlong's objections to the Magistrate's Decision. He promptly appealed to the Ninth District Court of Appeals. His appeal was dismissed for lack of a final order. The trial court vacated the stay imposed on the DOPO by Mr. Furlong's objections. On March 17, 2009, the trial court issued an amended journal entry which overruled her Mr. Furlong's objections.

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A trial court errs in dividing a separate property disability pension post-decree, where the parties had reached a Separation Agreement, incorporated into a decree of divorce, which considered Husband's disability pension for purposes of spousal support and which divided any marital portion of Husband's retirement pension equally. *Res judicata* does not apply where the trial court modifies the effect of the original decree.

The Summit County Court of Appeals decision is contrary to most appellate court decisions in that it permitted the trial court to modify the parties' Separation Agreement by granting the non-participant spouse half of the disabled's spouse's separate property disability pension. The parties equally divided the marital portion of Mr. Furlong's Ohio Police and Fire Pension Fund pension (the retirement pension). The parties agreed to a spousal support provision based, at least in part, upon his Ohio Police and Fire Pension Fund disability pension.

Mr. Furlong's disability pension is not marital property but is his separate property, being in the form of income replacement. *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 178. Unless and until the disability pension is taken in lieu of retirement pension, it is Mr. Furlong's separate property. *Burkhart v. Burkhardt* 2009-Ohio-1307; *Abernathy v. Abernathy*, 2009-Ohio-2263; *Potter v. Potter* (Nov. 14, 2001), Wayne App. No. 01CA0033, unreported; *Elsass v. Elsass* (Dec. 29, 1993), Greene App. Nos. 93-CA-0005 and 93-CA-0016, unreported.

The trial court's action, as affirmed by the court of appeals, granted Ms. Davis one half of Mr. Furlong's separate property disability pension, contrary to the Separation Agreement incorporated into the decree. The DOPO at issue provides that Ohio Police and Fire Pension

Fund is to pay Ms. Davis from the first benefit to which he is entitled. It grants her one half of the coverture fraction of his benefits.

The unfortunate, but very real, potential is that Ohio Police and Fire Pension Fund could now seek to recover one-half of the disability pension payments made to Mr. Furlong from the date of the divorce until the date of first distribution under the trial court's order. Then, Wife could be receiving 100% of his monthly disability pension and could be fully employed, after already having received 63 months of spousal support from his disability pension.

At the time of the divorce, Mr. Furlong already was receiving his disability pension; he agreed to pay spousal support based, in part, upon this income. Because he might at some time receive his retirement pension, in which Ms. Davis was entitled to share, the parties agreed that spousal support would be subject to modification in the event his disability pension turned into a retirement pension and an order divided those funds. This agreement is adopted in the trial court's decree.

The only logical construction of that provision is that Mr. Furlong would received relief from the spousal support obligation if he was receiving only half of his retirement pension. He was to be *protected* from paying both spousal support and one half of his retirement pension. However, if there is any ambiguity as to the construction, the language should be construed against Ms. Davis, whose counsel read this provision into the record. *Central Realty Co. v. Clutter* (1980), 62 Ohio St.2d 411, 413.

The record is bereft of evidence that Mr. Furlong was receiving the retirement, i.e. marital, portion of his pension. There is no evidence that he was entitled to receive his

retirement pension. He was not avoiding division of his retirement pension by taking a disability pension. At the time of the original decree he was on disability and his disability pension was used in determining his spousal support obligation.

The trial court modified the Separation Agreement by forcing him to sign a DOPO which divided his disability pension with Ms. Davis. It is important that this court review the lower court's ruling to protect similar participants throughout the state.

The Court of Appeals determined that the divorce decree was *res judicata* over this issue. However, Mr. Furlong had no objection to the decree, which contained the actual division of property and spousal support award. His objection did not occur until the trial court forced him to sign a DOPO which granted Ms. Davis one half of all of his benefits under his Ohio Police and Fire Pension Fund. If the trial court had issued an order which did not modify the decree's division of property, he would not object now. Unfortunately, the trial court did modify the division of property and it lacked jurisdiction to do this.

So long as a DOPO or QDRO is consistent with the decree, it does not constitute a modification, which R.C. 3109.171(D) prohibits. *Tarbert v. Tarbert* (Sept. 27, 1996), Clark App. No. 96-CA-0036. If the QDRO is inconsistent with the decree, the trial court lacks jurisdiction to issue the same, and it is void. *Hale v. Hale*, 2007-Ohio-867.

The lower court's application of *res judicata* is inapposite. *Res judicata* does not apply to a subsequent modification of the original decree. The original decree governs property division, not the QDRO or other enforcement mechanism. *Hale, supra*. Until the trial court modified the parties' agreement by issuing a DOPO, the terms of the agreement were appropriate.

This court should accept jurisdiction of this case to review the modification of property division approved by the lower courts.

Proposition of Law No. 2: A trial court errs in replacing spousal support with a division of Husband's separate property where the parties' Separation Agreement provided that spousal support would terminate after 63 months and retained jurisdiction modification only upon Husband's receipt of retirement benefits, subject to equal division.

A trial court may modify an award of spousal support only in those cases where the final decree expressly grants the court that right to modify. R.C. 3105.18. In this case, the decree retained jurisdiction to modify only the amount of spousal support and not its term. The amount was modifiable "At the event (sic) that [the disability pension] turns into a retirement pension and QDRO Consultants prepares an order which divides those funds. That is an anticipated change of circumstances which would necessitate the modification of spousal support."

Clearly the parties recognized that, if Ms. Davis received one half of each of the Husband's monthly retirement pension payments, the trial court could modify Mr. Furlong's spousal support obligation. If Mr. Furlong's monthly benefits decreased and Ms. Davis's increased, in which way would his spousal support be modified? The only logical construction of this provision is that it was intended to reduce his spousal support obligation if Ms. Davis received half of his monthly retirement benefits

The trial court essentially extended spousal support when it required Mr. Furlong to execute a DOPO which granted Ms. Davis half of his separate property interest in his disability pension. Mr. Furlong had fulfilled all of his spousal support obligation; the trial court erred in extending his spousal support obligation by awarding half of his disability pension to Ms. Davis.

It is beyond cavil that R.C. 3105.18 precludes modification of a spousal support award unless the decree of divorce expressly retains jurisdiction for such modification. *Kimble v. Kimble*, 97 Ohio St.3d 424, 2002-Ohio-6667. The decree of divorce in this matter contains a provision which expressly excludes modification of the term of support. The decree permits modification of the amount only under a single set of circumstances, which had not occurred.

There was only one circumstance which would have permitted modification: Mr. Furlong's receiving a retirement pension. His retirement pension was marital property, subject to equal division. As the decree provides, if Mr. Furlong received his retirement pension, Ms. Davis would receive one half. This circumstance would have mandated a reduction in spousal support because Mr. Furlong's income would have reduced and Ms. Davis's would have increased by one half of each of his monthly benefit payments. There is no logical construction which would form the basis of an alternate explanation. Certainly, at the time of the divorce, it was not agreed that Ms. Davis would receive one half of her Husband's separate property. The trial court's order improperly elongated spousal support.

The norm of spousal support is approximately one year of support for every three years of marriage. Permanent support, or support subject to further order of the court generally occurs only when parties have been married for extended periods and one of the parties is not able to rehabilitate income ability. Permanent support was neither appropriate nor ordered in this case.

It is important that this court review what is essentially the permanent extension of spousal support. If this decision is followed, a forty year old disabled party who was married

for three years could pay spousal support for one year and then share his pension for the rest of his life. A person who is disabled would be deprived of his replacement income while his former spouse could earn significant income from employment. The separate property nature of a disability pension has no meaning if this decision is permitted to stand.

Proposition of Law No. 3: A trial court should not force a party to sign a DOPO upon threat of incarceration in violation of the division of property contained in the parties' decree of divorce.

The trial court forced Mr. Furlong to sign a DOPO which modified the property division contained in the parties' decree of divorce. The DOPO presented to him contains at Section II. A., the form provision designating the type of benefits from which the alternate payee's share should be paid. "If no benefit or lump sum is designated, the Alternate Payee shall receive payment from the first benefit payment or lump sum payment for which Participant is eligible to apply and to receive."

Because no box is checked, the DOPO presented to him grants Ms. Davis 50% of the coverture fraction of his benefits. Because the trial court forced Mr. Furlong to sign the DOPO and the order was filed, the Ohio Police and Fire Pension Fund has been ordered to pay Ms. Davis 50% of all of Mr. Furlong's benefits.

As discussed above, Mr. Furlong faithfully had paid his spousal support and the DOPO he was forced to sign awards his ex-Wife 50% of all of his Ohio Police and Fire Pension Fund benefits. The trial court erred in forcing Mr. Furlong to sign a DOPO with the threat of incarceration. Apart from being an inappropriate division of marital property, the

Magistrate's deprived him of the ability to object to the Magistrate's Decision to challenge the DOPO in the trial court.

#### CONCLUSION

This case involves matters of public and great general interest and substantial constitutional questions. Recipients of disability pensions will be subjected to loss of their separate property interests and could be paying spousal support on top of their separate property interests if this decision is permitted to stand. The appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.



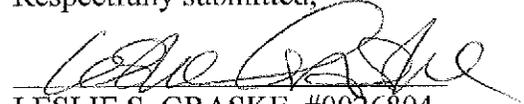
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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. Mail to counsel for appellee, Dreama Anderson, 1650 Home Avenue, Akron, OH 44310 on January 14, 2010.

Respectfully submitted,



LESLIE S. GRASKE, #0026804  
COUNSEL FOR APPELLANT  
MICHAEL FURLONG

APPENDIX

Decision and Journal Entry of the Summit County Court of Appeals  
(12/9/09)

STATE OF OHIO

COUNTY OF SUMMIT

MICHAEL E. FURLONG

Appellant

v.

BERNADETTE DAVIS

Appellee

COURT OF APPEALS  
DANIEL M. HOFFMAN  
IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT  
2009 DEC -9 AM 7:51

SUMMIT COUNTY C.A. No. 24703  
CLERK OF COURTS

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No. 2000-11-11413

DECISION AND JOURNAL ENTRY

Dated: December 9, 2009

CARR, Judge.

{¶1} Appellant, Michael Furlong, appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms.

I.

{¶2} Mr. Furlong and Bernadette Davis were divorced on February 21, 2003. The judgment entry of divorce included a shared parenting plan, which included a child support order requiring Mr. Furlong to pay Ms. Davis \$947.15 per month, plus poundage, for child support for the parties' two children. The shared parenting plan further required Mr. Furlong to pay 84% of the children's extraordinary, non-covered medical, dental, optical, hospital, pharmaceutical and psychological expenses. In addition, the parties entered into an agreement regarding all other issues relevant to their divorce, which agreement was read into the record at a hearing on October 31, 2002. The parties agreed that the transcript of the October 31, 2002 hearing would

be attached to and incorporated into the judgment entry of divorce in lieu of delineated orders regarding all other issues relevant to the parties' divorce.

{¶3} The parties agreed that Mr. Furlong would pay Ms. Davis spousal support in the amount of \$800.00 per month for a non-modifiable period of 63 months. The trial court retained jurisdiction, however, to modify the amount of spousal support in the event that Mr. Furlong's disability pension was converted into a retirement pension, at which time "QDRO Consultants" would prepare an order dividing those funds. The parties acknowledged that Mr. Furlong had a "police and fire pension" and that the marital portion of that pension would be divided equally between the parties pursuant to the prepared order of "QDRO Consultants." The parties agreed that the trial court would "retain jurisdiction as necessary to see that the marital portion of that plan is being divided equally \*\*\*."

{¶4} On April 14, 2004, Mr. Furlong filed a motion for the reallocation of parental rights and responsibilities and for a modification of child support. On June 22, 2004, the magistrate issued provisional orders after a post-decree settlement conference. The magistrate referred the issue of the termination of the shared parenting plan to Family Court Services. The magistrate further ordered the parties to exchange financial information for guideline child support calculation and to expedite the pension division. Neither party filed a motion to set aside the magistrate's June 22, 2004 order.

{¶5} On January 5, 2005, Mr. Furlong filed a motion to adopt his proposed shared parenting plan. His proposed plan named him as the residential parent, and Ms. Davis as the non-residential parent. The plan accorded Ms. Davis visitation with the children on alternate weekends and overnight every Tuesday. In addition, the proposed plan named Ms. Davis as the obligor for child support purposes, and directed that she pay \$579.23, plus poundage, to Mr.

Furlong each month. The proposed plan also divided unreimbursed healthcare costs for the children equally between Mr. Furlong and Ms. Davis.

{¶6} On January 14, 2005, Mr. Furlong filed a motion to correct an error in the child support computation worksheet which was filed on October 31, 2002, to reflect his payment of spousal support and Ms. Davis' receipt of spousal support. On the same day, Mr. Furlong filed an amended motion to adopt his proposed shared parenting plan.

{¶7} The magistrate held a hearing on February 10, 2005. On April 22, 2005, both the magistrate and the domestic relations judge signed an "agreed judgment entry" stating that the parties had reached an agreement at the hearing. The court ordered Ms. Davis to pay Mr. Furlong \$1500.00 in full satisfaction of any claims for medical payment reimbursement through January 31, 2005, and of all utility payment and personal property issues arising prior to January 31, 2005. In addition, the trial court modified Mr. Furlong's child support obligation, the tax dependency exemption schedule, and the parties' respective obligations to pay unreimbursed medical expenses for the children. Finally, the court ordered Mr. Furlong to "execute the QDRO document(s) in accordance with the Divorce Decree" so that the parties could "follow the provisions of the Decree regarding the QDRO's effect on the payment of spousal support with the Court retaining jurisdiction in that matter."

{¶8} On May 3, 2005, the magistrate issued a decision, also stemming from the February 10, 2005 hearing, dismissing Mr. Furlong's motion to correct an error in the child support calculation of October 31, 2002, which was attached to the parties' divorce decree. The magistrate concluded that Mr. Furlong could only raise the issue by way of a motion for relief from judgment pursuant to Civ.R. 60(B).

{¶9} On May 27, 2005, Mr. Furlong moved the trial court to interview the minor children. On June 10, 2005, he filed a motion for an emergency hearing on the reallocation of parental rights stemming from his motion filed April 14, 2004, and his motion to interview the children. After a hearing on June 30, 2005, and an interview with the children, the magistrate ordered that the elder child would attend the Hudson school system, while the younger child would attend the Stow school system. The magistrate left the issue of where the children would reside to the parties, but ordered that the children would reside with Ms. Davis if the parties could not otherwise agree. The magistrate did not name a primary residential parent for school purposes. Both Mr. Furlong and Ms. Davis filed objections to the magistrate's decision.

{¶10} On November 4, 2005, Mr. Furlong filed post decree motions for a reduction in his child support obligation and clarification of an order regarding medical bills. The magistrate heard the matter on January 10, 2006. On February 21, 2006, the magistrate issued a decision dismissing Mr. Furlong's April 14, 2004 motion for reallocation of parental rights and responsibilities, which had earlier been referred to Court Family Services, because "this issue is more than one year old[.]" The magistrate continued the hearing on Mr. Furlong's November 4, 2005 post decree motions. On February 22, 2006, Mr. Furlong filed a new motion for reallocation of parental rights and responsibilities. The trial court referred the matter to mediation. On January 26, 2007, the magistrate issued an interim order that Mr. Furlong would be the residential parent for school purposes and that he will enroll both children in the Hudson School District.

{¶11} A hearing was held on January 25, 2007, on the motion for reallocation of parental rights and responsibilities. The trial court's February 1, 2007 judgment entry stated that the parties had reached an agreement and that counsel would file an agreed judgment entry

within 30 days. On February 13, 2007, the parties filed an agreed order modifying the shared parenting plan, with such modifications described as "appearing to be fair and equitable," rather than in the best interest of the children. Mr. Furlong was named as the residential parent for school purposes only, and he maintained a child support obligation of \$125.00 per month per child.

{¶12} Less than three months later, on May 8, 2007, Mr. Furlong filed several motions, including motions for contempt; to modify companionship; to modify or terminate child support; allowing the children to remove certain personal items from Ms. Davis' home; for the payment of medical expenses and school fees; and for attorney fees. On July 2, 2007, Ms. Davis filed a motion for attorney fees, given her inability to pay to defend Mr. Furlong's newly filed motions addressing issues the parties had recently resolved. Ms. Davis further moved for an order increasing Mr. Furlong's child support obligation. On September 10, 2007, Ms. Davis filed a motion for contempt premised on Mr. Furlong's alleged failure to abide by the parties' parenting schedule and his alleged interference with her companionship.

{¶13} On June 26, 2008, Ms. Davis filed a motion to adopt a division of property order ("DOPO") on Mr. Furlong's police and fire retirement benefits, and a motion to modify spousal support. On August 8, 2008, Mr. Furlong filed a motion to dismiss Ms. Davis' June 26, 2008 motions. He argued that there was full compliance with the DOPO read into the record for purposes of the divorce decree. He further argued that the period of spousal support had terminated in February 2008, rendering any motion for modification of spousal support moot. Also on August 8, 2008, Mr. Furlong filed motions for contempt; modification of companionship; modification or termination of child support; and judgment for failure to pay medical bills.

{¶14} On August 29, 2008, the magistrate issued a decision after hearing arguments on July 9, 2007; October 11, 2007; and August 19, 2008. The magistrate found, based on a review of “all the testimony and evidence presented at the hearing on October 11, 2007,” that (1) there was no change of circumstances warranting (a) a change to the parties’ February 13, 2007 agreed order modifying the shared parenting plan, or (b) a modification or termination of Mr. Furlong’s child support obligation; and (2) Mr. Furlong did not comply with the local rules when filling out the required forms for reimbursement of out-of-pocket expenses. The magistrate further found the Mr. Furlong had signed a DOPO when the parties divorced, that the original had been lost, and that Ms. Davis was requesting that Mr. Furlong sign another original. This matter was addressed at the August 19, 2008 hearing. Finally, the magistrate found that Mr. Furlong’s “new motion[s] filed on August 8, 2008,” were “not new.” Nevertheless, she “stayed” those motions pursuant to Mr. Furlong’s request. The magistrate ordered as follows: (1) Mr. Furlong’s motions are all denied and dismissed; (2) Ms. Davis’ motion regarding the modification of spousal support is dismissed; (3) Mr. Furlong is not guilty of failing to facilitate parenting time; (4) Ms. Davis’ motion to adopt the DOPO is granted because Mr. Furlong signed an original DOPO in open court, which mirrored the previously signed copy presented to the court; and (5) “[a]ll other pending motions are dismissed.”

{¶15} Mr. Furlong filed objections to the magistrate’s decision. Although he filed praecipes with the court reporter for the preparation of transcripts of both the October 11, 2007, and August 19, 2008 hearings, only a transcript of the August 19, 2008 hearing was filed, first, on September 15, 2008, and again on November 20, 2008. Mr. Furlong also filed a praecipe with the court reporter for preparation of a February 10, 2005 hearing before Magistrate Schneider. That transcript was also never filed with the trial court.

{¶16} Ms. Davis filed a motion to dismiss and reply to Mr. Furlong's objections. Mr. Furlong opposed the motion to dismiss. He later filed amended objections to the magistrate's decision. On December 2, 2008, the trial court issued a journal entry vacating the stay order; dismissing all of Mr. Furlong's motions; dismissing Ms. Davis' motion to modify spousal support; finding Mr. Furlong not guilty of interfering with parenting time; granting Ms. Davis' motion to adopt the DOPO, which Mr. Furlong signed at the August 19, 2008 hearing; and dismissing all of Mr. Furlong's August 8, 2008 motions because they merely raised issues which had been previously decided by the court.

{¶17} Mr. Furlong filed an appeal, but this Court dismissed his appeal by journal entry because the trial court had not explicitly ruled on his objections. On March 17, 2009, the trial court issued a journal entry explicitly overruling all of Mr. Furlong's objections and reiterating the orders in its December 2, 2008 order. Mr. Furlong filed a timely appeal, raising four assignments of error for review. This Court consolidates some assignments of error for ease of discussion.

{¶18} All of the assignments of error challenge the trial court's adoption of the magistrate's decision. When reviewing an appeal from the trial court's ruling on objections to a magistrate's decision, this Court must determine whether the trial court abused its discretion in reaching its decision. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, at ¶10. "In so doing, we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. "Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093. An abuse of discretion is more than an error of judgment; it means that the trial court was

unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

## II.

### ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THE DISABILITY PAYMENTS RECEIVED BY APPELLANT TO BE MARITAL ASSETS DIVISIBLE BY A DIVISION OF PROPERTY ORDER, RATHER THAN NON-MARITAL ASSETS NOT DIVISIBLE BY A DIVISION OF PROPERTY ORDER, TO WHICH APPELLEE HAS NO LEGAL CLAIM.”

{¶19} Mr. Furlong argues that the trial court erred by finding his disability benefits to be a marital asset subject to division by a DOPO. This Court disagrees.

{¶20} Mr. Furlong has consistently argued that the parties’ agreement, which was read into the record and incorporated as part of their 2003 divorce decree, states that Ms. Davis is only entitled to part of his pension in the event that it reverts from a disability pension into a retirement pension. He relies on the following language from page 3 of the transcript incorporated into the decree:

“With respect to spousal support, husband will pay to wife the sum of \$800.00 per month. And we anticipate that spousal support will be for a period of 63 months effective November 1, 2002. The duration of spousal support will not be modifiable. The amount of spousal support will be modifiable by the Court upon the -- Mr. Furlong has a disability pension. At the event that that turns into a retirement pension and QDRO Consultants prepares an order which divides those funds. That is an anticipated change of circumstances which would necessitate the modification of spousal support.”

{¶21} It is clear that the parties recognized that they could not consider Mr. Furlong’s disability benefits as income for purposes of calculating his spousal support obligation. The

plain language of the agreement demonstrates that the parties further recognized that, in the event that Mr. Furlong's disability terminated, his retirement income should appropriately be considered for purposes of calculating spousal support.

{¶22} Page 4 of the transcript incorporated into the decree addresses a completely different matter, specifically the division of marital property. The agreement states:

"There is a police and fire pension which is in husband's name. The marital portion of that pension will be divided equally between the parties. It is anticipated that QDRO Consultants will prepare the order dividing that plan. \*\*\* And that this Court will retain jurisdiction as necessary to see that the marital portion of that plan is being divided equally together with the (inaudible) and other benefits that go along with that. It is anticipated that there may be life insurance required to protect wife's interest in that plan. And that the parties will follow the recommendation of QDRO Consultants with respect to the necessity of life insurance and that they would divide the cost of that, if necessary."

{¶23} The division of marital property is generally not subject to future modification by the trial court. R.C. 3105.171(I). There is an exception for the division of public retirement pensions. Specifically, "[n]otwithstanding [R.C. 3105.171(I)], t]he court shall retain jurisdiction to modify, supervise, or enforce the implementation of an order [that provides for a division of property that includes a benefit or lump sum payment and requires one or more payments from a public retirement program to an alternate payee]." R.C. 3105.89(A).

{¶24} The parties agreed that Mr. Furlong's public retirement plan contained a marital portion in which Ms. Davis had an interest. The agreement regarding the division of marital property does not address Mr. Furlong's disability benefits and, therefore, does not order the division of such. Mr. Furlong never appealed from the final decree of divorce which recognized Ms. Davis' interest in the marital portion of his pension. Accordingly, his argument fails under the doctrine of res judicata.

{¶25} Under the doctrine of res judicata, “[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.” *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus. In addition, Ohio law has long recognized that “an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.” *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 62, quoting *Rogers v. Whitehall* (1986), 25 Ohio St.3d 67, 69. The doctrine serves the valid policy of ultimately ending any given litigation and ensuring that no party will be “vexed twice for the same cause.” *Green v. Akron* (Oct. 1, 1997), 9th Dist. Nos. 18284/18294, quoting *LaBarbera v. Batsch* (1967), 10 Ohio St.2d 106, 113.

{¶26} In this case, the trial court concluded that “the issue of whether there should be a Division of Property Order was previously resolved.” In fact, the parties themselves agreed in 2003 that Ms. Davis was entitled to the marital portion of Mr. Furlong’s police and fire pension and that the plan was subject to a DOPO. No party appealed from the decree. Accordingly, the trial court did not abuse its discretion by adopting the magistrate’s decision in this regard. Mr. Furlong’s first assignment of error is overruled.

#### **ASSIGNMENT OF ERROR II**

“THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THE APPELLANT’S CLAIM FOR REIMBURSEMENT FROM APPELLEE OF MEDICAL BILL PAYMENTS FOR THE CHILDREN DUE TO FAILURE TO COMPLY WITH LOCAL COURT RULES.”

#### **ASSIGNMENT OF ERROR III**

“THE TRIAL COURT ERRED IN SUMMARILY DENYING APPELLANT THE OPPORTUNITY TO TERMINATE CHILD SUPPORT AND REALLOCATE PARENTAL RIGHTS AND RESPONSIBILITIES.”

{¶27} Mr. Furlong argues that the trial court abused its discretion by dismissing his claims for reimbursement of medical expenses and the reallocation of parental rights and responsibilities. This Court disagrees.

{¶28} In her August 29, 2008 decision, the magistrate found “[a]fter reviewing all the testimony and evidence presented at the hearing on October 11, 2007,” that (1) Mr. Furlong did not fill out the forms required by the local rules for reimbursement of medical expenses, and (2) there was no change of circumstances warranting either a change to the parties’ agreed entry of February 2007 regarding the shared parenting plan or a modification or termination of Mr. Furlong’s child support obligation.

{¶29} Civ.R. 53(D)(3)(b)(iii) provides:

“An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.”

The party who objects to the magistrate’s decision has the duty to provide a transcript to the trial court. *Weitzel v. Way*, 9th Dist. No. 21539, 2003-Ohio-6822, at ¶17.

{¶30} When disposing of objections, the trial court pursuant to Civ.R. 53(D)(4)(b) “may adopt or reject a magistrate’s decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.” “When a party fails to file a transcript or an affidavit as to the evidence presented at the magistrate’s hearing, the trial court, when ruling on the objections, is required to accept the magistrate’s findings of fact and to review only the magistrate’s conclusions of law based upon those factual findings.” *Saipin v. Coy*, 9th Dist. No. 21800, 2004-Ohio-2670, at ¶9, quoting *Stewart v. Taylor*, 9th Dist. No. 02CA0026, 2002-Ohio-6121, at ¶11. Upon appellate review, this Court is limited to determining whether the trial court abused its discretion in adopting,

rejecting, or modifying the magistrate's decision, where the objecting party failed to provide a transcript or affidavit to the trial court in support of his objection. *Weitzel* at ¶19.

{¶31} Mr. Furlong objected to the magistrate's factual findings, yet he failed to support his objections with a transcript. Although he requested the preparation of a transcript of the October 11, 2007 hearing, the transcript was never filed with the trial court. Nor did Mr. Furlong file an affidavit of the evidence in the case that a transcript was not available. As the trial court was obligated to accept the magistrate's findings of fact regarding the lack of a change of circumstances and Mr. Furlong's failure to use the proper forms for reimbursement of medical expenses, it did not abuse its discretion by overruling his objections. Mr. Furlong's second and third assignments of error are overruled.

#### ASSIGNMENT OF ERROR IV

"THE TRIAL COURT ABUSED ITS DISCRETION BY APPROVING THE MAGISTRATE'S ACTION IN ORDERING APPELLANT TO SIGN THE DOPO OR GO TO JAIL, WITHOUT FIRST ALLOWING HIM THE OPPORTUNITY TO FILE OBJECTIONS TO THE JUDGE."

{¶32} Mr. Furlong argues that the trial court abused its discretion when it effectively condoned the magistrate's action in ordering him to sign the DOPO or be held in direct contempt of court. This Court disagrees.

{¶33} This Court has stated:

"Contempt of court is defined as the disregard for, or the disobedience of, an order of a court. *Thompson v. Thompson* (Aug. 22, 2001), 9th Dist. No. 00CA007747. 'It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions.' *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, paragraph one of the syllabus." *State v. Nelson*, 9th Dist. No. 03CA008242, 2003-Ohio-3922, at ¶5

We have further held that “conduct will only be considered direct contempt if it constitutes an imminent, not merely a likely, threat to the administration of justice.” (Internal quotations omitted.) *Id.* at ¶6.

{¶34} In this case, Ms. Davis presented evidence at the August 19, 2008 hearing that Mr. Furlong had signed the appropriate DOPO years earlier but that the original order had been lost before it could be filed. Ms. Davis’ Exhibit B, presented at the hearing, is a copy of the DOPO, signed by Mr. Furlong, and bearing a facsimile time-stamp of May 17, 2006, evidencing that he had signed the order by that time.

{¶35} Ms. Davis’ attorney asserted that she was presenting Mr. Furlong with a DOPO which was identical to the one he had previously signed. She told Mr. Furlong to review and compare the two documents. When the magistrate asked Mr. Furlong whether he was “free to sign” the DOPO, he was evasive. He repeatedly asked for a continuance so he could bring in evidence and witnesses in support of his argument that his pension was not subject to division as marital property. Because he had agreed in open court on October 31, 2002, that the marital portion of his pension would be divided equally and because he had already signed the DOPO once before, the magistrate ordered Mr. Furlong to sign another original order. Mr. Furlong asked the magistrate what would happen if he refused to sign the DOPO. The magistrate informed him that he would be held in direct contempt of court. Mr. Furlong signed the DOPO.

{¶36} Mr. Furlong argues that he should have been allowed to file objections to the magistrate’s threat that she would find him in direct contempt if he refused to sign the DOPO. This argument is without merit. Mr. Furlong had two choices. He could either sign as he did and file objections to the magistrate’s decision granting Ms. Davis’ motion to adopt the DOPO. Or he could have refused to sign and objected to the magistrate’s finding him guilty of direct

contempt of court, if she ultimately made such a finding. Instead, he signed the DOPO and merely objected that the magistrate told him that he would be facing contempt sanctions if he failed to obey her order. “Courts, in their sound discretion, have the power to determine the kind and character of conduct which constitutes direct contempt of court.” *In re Contempt to Kafantaris*, 7th Dist. No. 07-CO-28, 2009-Ohio-4814, at ¶16, quoting *State v. Kilbane* (1980), 61 Ohio St.2d 201, paragraph one of the syllabus. The magistrate had the authority to instruct him that his disobedience of the order to sign the DOPO under these circumstances would be contemptuous.

{¶37} Because he had agreed to an equitable division of the marital portion of his pension and had previously signed a DOPO to that effect, Mr. Furlong’s refusal to re-sign an original order after the prior order was lost could constitute conduct tending to impede or obstruct the court in the performance of its functions. See *Nelson* at ¶5. Based on those facts, the trial court, in ruling on the objections, concluded that “[Mr. Furlong’s] refusal to sign a replacement Division of Property Order was without justification.” Under these circumstances, this Court concludes that the trial court did not abuse its discretion when it adopted the magistrate’s decision adopting the DOPO. Mr. Furlong’s fourth assignment of error is overruled.

### III.

{¶38} Mr. Furlong’s assignments of error are overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

  
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DONNA J. CARR  
FOR THE COURT

MOORE, P. J.  
WHITMORE, J.  
CONCUR

APPEARANCES:

GEORGE M. MILLER, Attorney at Law, for Appellant.

DREAMA ANDERSON, Attorney at Law, for Appellee.