

IN THE SUPREME COURT OF OHIO

ORIGINAL

MICHAEL FURLONG

Appellant

vs

BERNADETTE FURLONG
nka BERNADETTE DAVIS

Appellee

SUPREME COURT NO.
2010-0081

MEMORANDUM IN OPPOSITION OF JURISDICTION
FILED BY APPELLEE BERNADETTE FURLONG
N/K/A BERNADETTE DAVIS

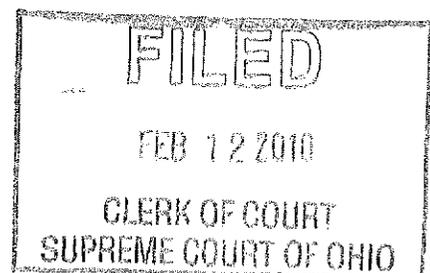
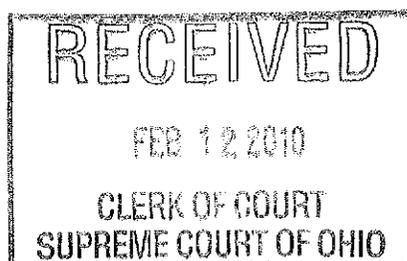
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A. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST.

This case involves a long and torturous divorce. In fact, these parties have been involved in divorce proceedings longer than most couples are married.

The parties were divorced on February 21, 2003. The parties agreement was read into the record by counsel. The Journal Entry was to be prepared, but never was filed. Instead, the Decree of Divorce incorporated a transcript of the proceedings from that hearing.

The Judgment Entry of Divorce included a Shared Parenting Plan, which included a child support order requiring Mr. Furlong to pay Ms. Davis the sum of \$947.15 per month, plus poundage, for child support for the parties' two minor children. This Shared Parenting Plan further required Mr. Furlong to pay 84% of the childrens' extraordinary, non-covered medical, dental, optical, hospital, pharmaceutical, and psychological expenses.

Additionally, the parties agreed that Mr. Furlong would pay Ms. Davis spousal support in the amount of \$800 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 diving those funds. At that time, the parties agreed and 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. And, 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 ***."

This case does not involve itself with serious issues concerning participants in disability pensions plans in the State of Ohio. Rather, this is a case involving a simple divorce which only became complicated due to the spurious actions of Mr. Furlong. Throughout the nearly eight years of this divorce, Mr. Furlong has agreed to decisions of the Court only to come back, sometimes within days, seeking a modification or otherwise objecting to that very same agreement.

There is no way that accepting jurisdiction of this case will ever satisfy Mr. Furlong. Mr. Furlong constantly, repeatedly, claims that he should not be bound by the decisions that he has made. Mr. Furlong has shown no respect for the Trial Court, and no respect for the Court of Appeals.

The evidence which will be before this Court should this Court choose to accept jurisdiction will clearly and unequivocally show that in 2002, the Appellant agreed to a certain division of marital property which included his pension benefits. This Court will also learn that in 2005, Mr. Furlong executed a Division of Property Order (DOPO) reflective of the 2002 agreement. Lastly, this Court will then learn that Mr. Furlong now claims that he should not be bound to that DOPO and should not have been forced to execute a replacement of that DOPO (the original had been misplaced) because he now disagrees with the outcome of that DOPO. (Mr. Furlong urges this Court to review the portion of the appellate court decision in which that court endeavored to list the many motions and hearings held at the beckoning of Mr. Furlong.)

The Court of Appeals applied the doctrine of *res judicata*, holding that Mr. Furlong should have appealed from the initial divorce decree. In his brief before this Court, Mr. Furlong now argues that "he was not dissatisfied with paying spousal support of \$800 per month for 63 months." He has only become dissatisfied, apparently, when other provisions contained within that 2002 actually took effect. Under Mr. Furlong's theory, then, he has the right to re-open and argue any provision of the divorce decree once that provision actually takes effect. Such is not the law. Such is ludicrous.

B. ARGUMENTS AGAINST PROPOSITIONS OF LAW

Argument in Opposition to Proposition of Law No. 1

A trial court does not err 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 the Husband's retirement pension equally.

Mr. Furlong claims that the Trial Court erred by finding his disability benefits to be a marital asset subject to division by a DOPO.

Mr. Furlong now claims that 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 spouse's separate property - - the disability pension. However, this is not true.

The division of marital property is generally not subject to future modification by a trial court. R.C. 3105.171(I). The Division of Public Retirement Pensions is an exception. "The 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). This is notwithstanding R.C. 3105.171(I).

Mr. Furlong and Ms. Davis clearly and unequivocally agree 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 did not address Mr. Furlong's disability benefits and, therefore, did 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. The Court of Appeals rightfully found that the doctrine of *res judicata* barred any appeal to the Ninth District Court of Appeals.

The problem here is quite simple. Mr. Furlong is not happy with the deal that he made in October of 2002 (Separation Agreement) which was then incorporated into the Judgment Entry of Divorce. That is, Mr. Furlong does not like the benefit of his bargain.

In reviewing the long torturous history of this case, this Court learns that Mr. Furlong is never satisfied with anything. For example, on April 22, 2005, the Magistrate and the Domestic Relations Judge signed an "Agreed Judgment Entry" reciting that the parties had reached an Agreement at a hearing held on February 10, 2005. Just 35 days later, Mr. Furlong

filed a new motion, on May 27, 2005, requesting that the trial court interview the minor children. Then, 14 days later, on June 10, 2005, Mr. Furlong filed another motion - - this one seeking an emergency hearing as to the reallocation of parental rights.

Again, on February 1, 2007, another Judgment Entry was filed in which it was indicated that the parties had reached an agreement relative to the reallocation of parental rights and responsibilities. An Agrced Order was filed on February 13, 2007. Thereafter, less than three months later, on May 8, 2007, Mr. Furlong filed several Motions seeking to modify the shared parenting plan and to otherwise terminate child support.

Enough is enough. This Court should not accept jurisdiction of this matter since any resolution of the issue raised in the proposition of law number one will not actually affect the parties to this Appeal. That is because of the doctrine of *res judicata*. Mr. Furlong should have either:

1. Not entered into the agreement that he entered into;
2. Filed an Appeal from the final Divorce Decree if he felt that he was victimized by same; or
3. Alternatively, filed a Civil Rule 60(B) Motion for Relief from Judgment.

Not having chosen any of these avenues, Mr. Furlong has waived his right to complain.

Argument in Opposition to Proposition of Law No. 2

A trial court does not err in replacing spousal support with a division of the 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.

In his second proposition of law, Mr. Furlong, again, complains that he should have not been required to execute the DOPO. Here, Mr. Furlong claims that the Trial Court essentially extended spousal support beyond the 63 months which he claimed was the basis of his original agreement when it required him to execute the DOPO. That is not true.

Initially, it must be noted that Mr. Furlong did not make such an argument below in the court of appeals. Mr. Furlong has advanced this argument for the first time now before this

Court. As such, Mr. Furlong waived any alleged error. See *Stores Realty Co. v. Cleveland Bd. Of Bldg. Stds. & Bldg. Appeals* (1975), 41 Ohio St.2d 41, 43.

Additionally, the arguments made above in opposition to the First Proposition of Law with respect to the issues of *res judicata*, appeal, and a 60(B) motion equally apply herein. That is, if Mr. Furlong was not pleased with the agreement that he entered into, he should have either not entered into the agreement, filed an appeal from the Final Divorce Decree, or prepared and filed a Motion for Relief from Judgment pursuant to Civil Rule 60(B). Not having chosen any of those avenues, the delayed Appeal to the Ninth District and, ultimately, to this Court, are not viable or proper.

Argument in Opposition to Proposition of Law No. 3

The trial court did not err or abuse its discretion in threatening to incarcerate the Appellant to sign a DOPO.

In his third proposition of law, Mr. Furlong complains that the trial court should not have forced him to sign a DOPO upon threat of incarceration. He claims that such a threat was improper and that the DOPO was then in violation of the division of property contained in the parties' Decree of Divorce.

The issues of *res judicata*, appeal, and a 60(B) Motion equally apply herein.

In the instant case, Ms. Davis presented evidence at the August 9, 2008 hearing that Mr. Furlong had signed the appropriate DOPO, but that the original Order had been lost before it could be filed. Ms. Davis, in fact, presented Exhibit B at the hearing which was a copy of the DOPO, signed by Mr. Furlong, and bearing a facsimile time-stamp of May 17, 2006. This evidenced the fact that Mr. Furlong had signed the original Order at that time.

Thereafter, during the hearing, counsel for Ms. Davis presented an identical DOPO to the one that had been previously signed and asked Mr. Furlong to review and compare the two documents. Instead of doing so, Mr. Furlong became evasive, claiming that he needed an opportunity to present evidence and witnesses in support of his argument that his pension was not subject to division as marital property. What evidence is there to present? What witnesses

could have been called? Having agreed to the language in the DOPO, and having actually executed a DOPO in 2005, there was no need to present anything.

Under this proposed proposition of law, Mr. Furlong does not cite this Court to any law or any reasoning, for that matter, as to why he was not in contempt of court and as to why he should not have been instructed to sign the identical DOPO.

Before the Ninth District Court of Appeals, Mr. Furlong claimed that he had maintained the same position throughout the case that his disability income was not a marital asset and, as such, not subject to division. However, there is no evidence of same, and more importantly, Mr. Furlong was unable to explain why he had signed a DOPO in 2005 which completely contradicted such argument. The identical DOPO.

“Courts, in their sound discretion, have the power to determine the kind and character of conduct which constitutes direct contempt of court.” *State v. Kilbane* (1980), 61 Ohio St.2d 201, ¶ one of the syllabus. The magistrate had the authority to instruct Mr. Furlong that, under the circumstances, that his failure to execute the new DOPO (which was identical to the 2005 DOPO) would be contemptuous.

With all his experience in court, including all of his experience with filing Motions and Objections, Mr. Furlong could not be heard to claim that he did not know what to do in Court.

Mr. Furlong had two choices: (1) he could sign the DOPO, or (2) he could have refused to sign same and objected to the Magistrate’s finding him guilty of direct contempt of court. If Mr. Furlong had followed the second path, then he could have sought a stay of the magistrate’s decision pending the judge’s final ruling.

C. CONCLUSION

For the foregoing reasons, this Court should not accept jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent, via Regular United States Mail postage pre-paid, on February 11th 2010 to:

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