[Cite as *Ciavarella v. Ciavarella*, 2004-Ohio-568.]

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

JANE F. CIAVARELLA	)	CASE NO. 2002-CO-11
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
LOUIS G. CIAVARELLA	)	
	)	
DEFENDANT-APPELLANT	)	
	)	
AND	)	
	)	
OHIO POLICE & FIRE PENSION FUND	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 97-CIV-DR-201
JUDGMENT:	Reversed and Remanded.
APPEARANCES:	
For Plaintiff-Appellee, Jane F. Ciavarella:	Atty. Daniel A. Blasdell 139 North Market Street East Palestine, Ohio 44413
For Defendant-Appellant,	Atty. Diane S.A. Vettori

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For Defendant-Appellant,
Ohio Police & Fire Pension Fund:

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Ohio Attorney General
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JUDGES:
Hon. Cheryl L. Waite
Hon. W. Don Reader, Retired of the Fifth District Court of Appeals, sitting by assignment.
Hon. Mary DeGenaro

Dated: February 3, 2004
WAITE, P.J.

{¶1} This divorce case comes before us for the second time and is related to issues decided in the previous appeal to this Court, *Ciavarella v. Ciavarella* (Oct. 20, 1999), 7th Dist. No. 98 CO 53 (hereinafter referred to as *Ciavarella I*). The parties are Jane F. Ciavarella ("Appellee-Wife") and Louis G. Ciavarella ("Appellant-Husband"). The current appeal involves the validity of a qualified domestic relations order ("QDRO") used to divide and distribute the proceeds of a pension from the Police and Fireman's Disability and Pension Fund, now known as the Ohio Police & Fire Pension Fund ("The Fund"). The Columbiana County Court of Common Pleas ordered the revised QDRO to be effective nunc pro tunc, relating back to the same date as the

QDRO that was the subject of *Ciavarella I* and was invalidated by this Court. As the trial court cannot use a nunc pro tunc entry to bypass a ruling issued by this Court, the judgment of the trial court is reversed.

{¶2} At the time the divorce decree was granted on June 18, 1998, the value of Appellant-Husband's pension in The Fund was $198,973.25. (6/18/98 Decree, p. 11.) The marital portion of the pension was $156,009.00 (6/18/98 Decree, p. 12.)

{¶3} Attached to and part of the divorce decree was a QDRO governing the division and distribution of the marital portion of the pension. The QDRO segregated the parties' separate interests in the pension, designated Appellee as an "alternate payee," and ordered The Fund to pay Appellee-Wife's benefits directly to her. (6/18/98 Decree, QDRO.)

{¶4} Appellant-Husband appealed the validity of the QRDO to this Court, resulting in the *Ciavarella I* Opinion. We reversed the trial court's rulings regarding the division of the pension plan. The statutes governing The Fund did not allow it to be subject to attachment, garnishment or seizure pursuant to any legal or equitable process at the time. *Ciavarella I* at 4. We held that The Fund was not legally permitted to make payments to an alternate payee, and could only make payments to a member of The Fund. Id. This Court held that the only option available for distributing Appellee-Wife's share of the fund was for the trial court to order Appellant-

Husband to make direct payments to Appellee-Wife when the pension became vested and matured. Id.

{¶5} We held in *Ciavarella I* that: "the decision of the trial court as related to the division of Mr. Ciavarella's pension plan is reversed and this cause is remanded to the trial court for further proceedings consistent with this court's opinion and according to law." Id. at 5.

{¶6} Appellee-Wife filed a further appeal to the Ohio Supreme Court, but the case was not accepted for review. 80 Ohio St.3d 1424, 723 N.E.2d 1112.

{¶7} On June 8, 2000, the Columbiana County Court of Common Pleas filed an entirely new domestic relations order, replacing the former QDRO. The new order contained a provision for Appellant-Husband to pay Appellee-Wife her portion of the pension plan, rather than imposing the duty on The Fund: "it is hereby Ordered that the Employee [Mr. Ciavarella] shall make direct payments to the Former Spouse of her assigned share of the Pension * * *." (6/8/00 J.E., p. 4.) The new order contained numerous provisions allowing the parties to modify the judgment if The Fund decided at some later date that it was permitted to make direct payments to a former spouse or could give Appellee-Wife an accelerated lump sum payment of her interest in Appellant-Husband's pension.

{¶8} On May 30, 2001, the Ohio Supreme Court decided *Erb v. Erb* (2001), 91 Ohio St.3d 503, 747 N.E.2d 230, which held:

{¶9} "A domestic relations order requiring the Ohio Police & Fire Pension Fund to pay directly to a member's former spouse that portion of the member's monthly benefit that represents the former spouse's property pursuant to a division of marital assets does not violate the terms of the administration of the fund." Id. at syllabus.

{¶10} *Erb* specifically noted that it was rejecting the reasoning used in *Ciavarella I*, as well as similar reasoning found in cases from three other appellate districts. Id. at 507.

{¶11} On November 5, 2001, Appellee-Wife filed a motion for the trial court to reissue and enforce the June 18, 1998, QDRO that this Court overturned in *Ciavarella I*. Appellee-Wife based her motion on the *Erb* decision, particularly on the fact that *Ciavarella I* was mentioned in *Erb.* The motion was assigned to a magistrate. (11/19/01 J.E.)

{¶12} On November 23, 2001, The Attorney General, on behalf of The Fund, filed a memorandum in opposition to Appellee-Wife's motion. The Fund argued that, even after the *Erb* decision, the language of the former QDRO was legally unenforceable. The Fund argued that the former QDRO granted Appellee-Wife the

right to have her share of the pension segregated into a separate account controlled by her. The Fund asserted that this scheme was not feasible for The Fund to administer. The Fund argued that the former QDRO would have allowed Appellee-Wife to elect when she would begin receiving payments from the The Fund, which was not permitted by statute. The Fund also argued that new statutes governing The Fund were to take effect on January 1, 2002, and that the former QDRO did not conform to the new statute. The Fund pointed out that the trial court would not be able to make a ruling on Appellee-Wife's motion until after the effective date of the statutory changes, and that therefore, the trial court would be bound by the statutory changes when it made its ruling.

{¶13} The motion was heard before a magistrate on January 18, 2002.

{¶14} On February 5, 2002, the magistrate filed her decision. Although the decision was signed by the magistrate on January 31, 2002, it was filed nunc pro tunc effective June 18, 1998. The decision was written as a QDRO. The order assigned a portion of The Fund to Appellee-Wife, according a formula identical to the formula used in the original 1998 QDRO. (2/5/02 Decision, section 7.) The QDRO ordered The Fund to directly pay Appellee-Wife her benefits as an alternate payee. (2/5/02 Decision, section 7.)

{¶15} On February 5, 2002, the trial court also signed a QDRO identical to the one contained in the magistrate's decision, but without any reference to the fact that the issue had been referred to a magistrate. The Fund filed an appeal of this judgment entry on March 6, 2002.

{¶16} On February 19, 2002, The Fund filed Objections to the magistrate's decision. The Fund argued that, despite the nunc pro tunc designation of the new QDRO, the new order was bound by the newly enacted provisions of Sub.H.B. 535, including changes to R.C. 742.462 and 3105.88 that provide for a new review and approval process for "Division of Property Orders" dividing a public pension asset. The Fund acknowledged that, under *Erb*, it was permitted to designate Appellee-Wife as an alternate payee. The Fund argued, though, that the original QDRO contained other errors that conflicted with the rules governing The Fund and with specific requirements of R.C. 3105.80 et seq. The Fund argued that:

{¶17} 1. A state pension plan, such as The Fund, is not subject to QDROs pursuant to 29 USC 1002(32) and 29 USC 1003(b)(1).

{¶18} 2. The Fund is a qualified trust under Section 401(A) of the Internal Revenue Code, and as such, is required to be non-alienable and non-assignable.

{¶19} 3. The Fund is not subject to private contractual agreements between private parties, but rather, is subject to the statutes governing The Fund.

{¶20} 4. The formula used by the trial court in determining Appellee-Wife's interest in The Fund does not conform to the requirements of R.C. §3105.82(D).

{¶21} 5. The QDRO awards Appellee-Wife a pro rata share of cost of living adjustments or other economic improvements, which is not provided for in the statutes governing The Fund.

{¶22} 6. The QDRO specifies that Appellee-Wife's benefits commence when Appellant-Husband retires, whereas R.C. §3105.82(D)(2)(b) specifies that the right to benefits arises when the named participant in The Fund elects to take benefit or payment.

{¶23} 7. The QDRO creates a potential cause of action against The Fund that is prohibited by R.C. 742.462(H).

{¶24} 8. The QDROs reference to a "military retirement plan" have no basis in the statutes governing The Fund.

{¶25} 9. The QDRO was entered into after the effective date of R.C 742.462 and 31.05.80 et seq., and yet, the QDRO makes no effort to conform to these statutes.

{¶26} 10. The QDRO does not conform to the standard "Division of Property Order" form established pursuant to R.C. 3105.90, specifically referring to pensions governed by The Fund. The Fund specifically objected to nine sections of the QDRO that were not in compliance with the form established by R.C. 3105.90.

{¶27} On March 26, 2002, the Columbiana County Court of Common Pleas ruled on The Fund's objections. The judgment entry stated that *Erb v. Erb* (2001), 91 Ohio St.3d 503, 747 N.E.2d 230, "reversed the Seventh District Court of Appeals Decision in this case * * *." (3/26/02 J.E., p. 2.) This Supreme Court Opinion will be referred to as *Erb II* throughout this opinion, to distinguish it from an earlier Supreme Court opinion arising out the same underlying case, *Erb v. Erb* (1996), 75 Ohio St.3d 18, 22, 661 N.E.2d 175. Based on the language in *Erb II,* the trial court stated, "[a]ccordingly, the original Order of this Court granting Plaintiff a property interest in the Fund on June 18, 1998 was revived." (3/26/02 J.E., p. 2.) The trial court held that, because the QDRO was revived effective June 18, 1998, it was not required to conform to the requirements of Sub.H.B. 535, which significantly modified or added to the statutes governing The Fund and which were not effective until January 1, 2002. The trial court did not address most of the specific objections raised by The Fund because it ruled that the June 18, 1998, nunc pro tunc QDRO was not bound by the new statutes. The trial court stated that the QDRO, "was not intended to be, nor is it, a strict compliance with the newly enacted statute." (3/26/02 J.E., p. 4.) The trial court overruled The Fund's objections and executed the QDRO, to be effective nunc pro tunc from June 18, 1998.

{¶28} On April 23, 2002, The Fund filed an Amended Notice of Appeal to include the March 26, 2002, Judgment Entry as part of its appeal.

STANDARD OF REVIEW

{¶29} A trial court's decision to adopt, reject or modify a magistrate's decision will be reversed on appeal only for an abuse of discretion. *Wade v. Wade* (1996), 113 Ohio App.3d 414, 419, 680 N.E.2d 1305. An abuse of discretion, "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. On the other hand, purely legal issues are reviewed de novo by this Court. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1996), 76 Ohio St.3d 521, 523, 668 N.E.2d 889.

ASSIGNMENTS OF ERROR NOS. 1, 2, AND 3

{¶30} The Fund presents three interrelated assignments of error:

{¶31} “I. The trial court erred in determining that this court’s prior decision in *Ciavarella* was reversed by a subsequent change in decisional law in *Erb v. Erb* (2001), 91 Ohio St.3d 503.

{¶32} “II. The trial court abused its discretion in employing a *nunc pro tunc* entry for the purpose of precluding the legal effect of a statute governing division of property orders.

{¶33} "III. The trial court abused its discretion in ruling that the Qualified Domestic Relations Order – *Nunc Pro Tunc* at issue in this case was an enforceable division of property order."

{¶34} This case is resolved upon first answering two issues raised by The Fund: 1) whether the trial court properly used its nunc pro tunc authority; and 2) if the revised QDRO could not be imposed nunc pro tunc, whether the revised QDRO was correctly executed by the trial court. The answer to both of these questions is no.

{¶35} As pointed out by The Fund, it is clear that the trial judge fundamentally misinterpreted the meaning and effect of the Ohio Supreme Court's ruling in *Erb II* in relation to this Court's prior decision in *Ciavarella I*. Although *Erb II* reversed the reasoning used in this Court's *Ciavarella I* decision, and reversed the future impact of *Ciavarella I* as persuasive or controlling authority in other cases, *Erb II* was not a direct appeal to the Ohio Supreme Court of the *Ciavarella I* decision. In fact, Appellee-Wife attempted to appeal *Ciavarella I* to the Supreme Court and the matter was not accepted for review. *Ciavarella*, 80 Ohio St.3d at 1424, 723 N.E.2d 1112.

{¶36} The Fund correctly argues that a change in controlling case law does not change the outcome of prior adverse final judgments in other cases:

{¶37} "The rationale which compels the rejection of appellee's argument is clear--that being the strong interest in the finality of judgments. To hold otherwise

would enable any unsuccessful litigant to attempt to reopen and relitigate a prior adverse final judgment simply because there has been a change in controlling case law. Such a result would undermine the stability of final judgments and, in effect, render their enforceability conditional upon there being 'no change in the law.'" *Doe v. Trumbull Cty. Children Serv. Bd.* (1986), 28 Ohio St.3d 128, 131, 502 N.E.2d 605.

{¶38} Moreover, a change in controlling caselaw is not a reason to obtain relief from judgment pursuant to Civ.R. 60(B). *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St.3d 60, 63, 558 N.E.2d 1178. Appellee-Wife's November 5, 2001, motion to reinstate the prior QDRO was, in effect, a Civ.R. 60 (B) motion for relief from judgment of all prior decisions in this case which affected the enforceability of the prior QDRO. Appellee-Wife did not want the trial court to simply issue a new order because it would have been subject to revised statutory law. Appellee-Wife apparently wanted the trial court to preserve the original QDRO under the earlier statutes which were perceived to be more advantageous to her. The trial court, though, had no authority to grant Appellee-Wife's request, at least not on the grounds that the controlling caselaw emanating from the Supreme Court had changed.

{¶39} Regardless of the impact of the *Erb II* opinion on the instant case, the trial court certainly had no power to overrule this Court's *Ciavarella I* decision by means of a nunc pro tunc entry. The June 18, 1998, QDRO is facially and

substantially different than the February 5, 2002, QDRO. Nunc pro tunc entries are limited to correcting clerical errors so that a judgment entry reflects what was actually decided, rather than implementing what the court should have decided. *State ex rel. Litty v. Leskovyansky* (1996), 77 Ohio St.3d 97, 100, 671 N.E.2d 236.

{¶40} The parties do not appear to dispute the trial court's continuing jurisdiction to issue orders so that the court's original division of marital property could take effect. The trial court, though, did not merely exercise its continuing jurisdiction to issue a new order. It is apparent that the court did not want to be bound by changes in the statutory law governing domestic relations orders pertaining to The Fund. The trial judge emphatically stated that the revised QDRO did not comply with the newly enacted statutes. If the trial court in this matter only had the power to modify its prior orders, its modifications would be subject to the statutory law in effect at the time of the modification.

{¶41} R.C. 3105.80, et seq., regulates how public retirement plans may designate and pay alternate payees. The statute most relevant to this issue is R.C. §3105.89:

{¶42} "(B) The court may modify an order issued under section 3105.171 or 3105.65 of the Revised Code that was effective prior to the effective date of this section for the purpose of enforcing the order or carrying into effect the manifest

intentions of the parties. *A modified order must meet the requirements of section 3105.82 of the Revised Code.*" (Emphasis added.)

{¶43} R.C. 3105.89 is an entirely new statute, enacted through Sub.H.B. 535, effective January 1, 2002. Although statutes are presumed to be prospective only, this statute expressly states that it is retrospective and that any modifications of orders issued under R.C. 3105.171 (division of marital property) must comply with R.C. §3105.82. It appears that the trial court and Appellee-Wife were attempting to avoid the effect of R.C. 3105.82, which states:

{¶44} "An order described in section 3105.81 of the Revised Code shall meet all of the following requirements:

{¶45} "(A) Be on the form created under section 3105.90 of the Revised Code;

{¶46} "(B) Set forth the name and address of the public retirement program subject to the order or, if the court determines that the participant has contributions on deposit with more than one public retirement program, the name and address of each public retirement program that is potentially subject to the order;

{¶47} "(C) Set forth the names, social security numbers, and current addresses of the participant and alternate payee;

{¶48} "(D) Specify the amount to be paid to the alternate payee as one of the following:

{¶49} “(1) As both a monthly dollar amount should the participant elect a benefit and as a one-time payment should the participant elect a lump sum payment;

{¶50} “(2) As a percentage of a fraction determined as follows of a monthly benefit or lump sum payment:

{¶51} “(a) The numerator of the fraction shall be the number of years during which the participant was both a member of a public retirement program and married to the alternate payee.

{¶52} “(b) The denominator, which shall be determined by the public retirement program at the time the participant elects to take the benefit or payment, shall be the participant's total years of service credit or, in the case of a participant in a retirement plan established under Chapter 3305. of the Revised Code, years of participation in the plan.

{¶53} “(E) If the participant is eligible for more than one benefit or lump sum payment, specify in accordance with division (D) of this section the amount, if any, to be paid to the alternate payee from each benefit or lump sum payment.

{¶54} “(F) Require an individual who is a participant or alternate payee to notify the public retirement program in writing of a change in the individual's mailing address;

{¶55} “(G) Notify the alternate payee of the following:

{¶56} “(1) The payee's right to payment under the order is conditional on the participant's right to a benefit payment or lump sum payment;

{¶57} “(2) The possible reduction under section 145.571, 742.462, 3307.371, 3309.671, or 5505.261 of the Revised Code of the amount paid to the alternate payee;

{¶58} “(3) The possible termination of the payee's rights as described in section 3105.86 of the Revised Code.

{¶59} “(H) Apply to payments made by the public retirement program after retention of an order under section 145.571, 742.462, 3305.21, 3307.371, 3309.671, or 5505.261 of the Revised Code.”

{¶60} The trial court readily conceded that the new order was not in compliance with the applicable statutes. The record bears this out. As an initial observation, the new domestic relations order is not on the form created pursuant to R.C. §3105.90, and does not contain the specific language required by the statute.

{¶61} Furthermore, R.C. 742.462, also newly enacted by Sub.H.B. 535, requires The Fund to approve of all “Division of Property Orders” pertaining to The Fund:

{¶62} “(B) On receipt of an order issued under section 3105.171 or 3105.65 of the Revised Code, *the Ohio police and fire pension fund shall determine whether the order meets the requirements of sections 3105.80 to 3105.90* of the Revised Code.

The fund shall retain in the participant's record an order the fund determines meets the requirements. Not later than sixty days after receipt, the fund shall return to the court that issued the order any order the fund determines does not meet the requirements." (Emphasis added.)

{¶63} The trial court's refusal to apply the provisions of Sub.H.B. 535 to the revised domestic relations order attempts to take away The Fund's power to review the order and correct any errors in the order. The trial court's revised order bypasses the requirements of Sub.H.B. 535 and prejudices The Fund's ability to maintain the uniformity and correctness of domestic relations orders affecting The Fund. Even if there were no other errors in the trial court's revised QDRO, this decision must be reversed so that the QDRO may conform to the review provisions of Sub.H.B. 535.

{¶64} Based on the aforementioned reasons, we sustain all three of Appellant's assignments of error.

{¶65} It is unnecessary to review every specific error in the revised domestic relations order, because the trial judge himself admitted that it did not conform to the applicable statues that became effective through Sub.H.B. 535. After this case is remanded, the trial court will have an opportunity to insure that any future order conforms to the revised statutes, and The Fund will have a chance to review the order as well. Any further errors can be dealt with administratively.

{¶66} In conclusion, it is clear that the trial court attempted to make more than clerical corrections to a prior judgment entry. Further, the trial court had no authority to change or disregard a decision of this Court since it should be obvious that this Court's prior judgment in *Ciavarella I* was not reviewed or overturned by the Supreme Court on direct appeal. The trial court had no power to "revive" the QDRO that was overruled by this Court, and the judgment of the trial court is hereby reversed and this case is again remanded for further proceedings consistent with this Opinion and according to law.

Reader and DeGenaro, JJ., concur.