

**IN THE FLORIDA SUPREME COURT
TALLAHASSEE, FLORIDA**

**JOHN DANIEL SELF
Petitioner/Former Husband**

v.

**CASE NO.: SC05-1626
2DCA CASE NO.: 2D04-1486**

**LINDA GAYLE SELF,
Respondent/Former Wife.**

_____ /

**PETITIONER'S JURISDICTIONAL BRIEF
On Notice To Invoke Discretionary Jurisdiction To Review
Second District Court of Appeal Decision**

KAROL K. WILLIAMS, P.A.

**Karol K. Williams
Florida Bar No. 0849960
1304 S. De Soto Ave., Ste. 403
Tampa, FL 33606
(813) 254-5810**

Counsel for Petitioner
TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE FACTS AND CASE	2
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
I. THIS COURT HAS CONFLICT JURISDICTION	7
II. THE COURT SHOULD ACCEPT REVIEW TO PROVIDE FLORIDA COURTS WITH A UNIFORM VIEW OF THE NATURE OF A QDRO IN THE ABSENCE OF ANY FLORIDA PRECEDENT TO GUIDE THE COURTS	8
CONCLUSION	10
CERTIFICATE OF SERVICE	10
CERTIFICATE OF COMPLIANCE	10

TABLE OF AUTHORITIES

Caselaw

<i>Dade Co. School Bd. v. Radio Station WQBA</i> , 731 So.2d 638 (Fla 1999)	7
<i>OBS Co., Inc. v. Pace Constr.Co.</i> , 558 So.2d 404 (Fla. 1990)	7
<i>Richardson v. Richardson</i> , Case No. SCO5-1084.	9
<i>Richardson v. Richardson</i> , 900 So. 2d 656 (Fla. 2d DCA 2005)	9

Other Authorities

Article V, section 3(b)3Florida Constitution	<i>passim</i>
--	---------------

STATEMENT OF THE CASE AND FACTS

Introduction

In this brief, the parties are referenced as the “Former Wife” and the “Former Husband”. The Second District’s Opinion is included in the Appendix to this Jurisdictional Brief, with citations to the Opinion noted as “ A-page no.” in the brief.

Statement of the Case and Facts

The appeal below arose from the grant of summary judgment in favor of the Former Husband on the Former Wife’s attempt to modify a QDRO more than two years after the QDRO was entered. A-1. Both the QDRO and Final Judgment were entered at the same uniform motion hearing in December, 1999. A-3. The Former Wife’s motion to modify the QDRO was filed in March, 2003. A-2.

Prior to entry of the divorce Final Judgment and the QDRO at a uniform motion hearing in December, 1999, the parties entered into a settlement agreement that references the QDRO. A-2. The Final Judgment ratifies and incorporates the settlement agreement that specifically references the QDRO. A-1. The QDRO likewise specifically references the Final Judgment incorporating the settlement agreement. A-4.

Relevant to this case, the settlement agreement, as incorporated into the Final Judgment of Dissolution of Marriage, includes an equitable distribution provision

that gives the Former Wife “full ownership” of

her percentage of the [Former] Husband’s State of Florida retirement as stated in the QDRO [sic] (currently calculated at \$537.08 per month.

A-2. The QDRO, in turn, conditions the above described “full ownership” right of the Former Wife on: (1) the Former Husband remaining alive, (2) the Former Wife remaining alive, and (3) the Former Wife remaining unmarried . A-2.

The Plan Administrator, the Director of the Division of Retirement, is hereby ordered and directed to make the payments provided for herein until either the Participant [the Former Husband] or Alternate Payee [the Former Wife] dies, Alternate Payee remarries [sic], or until further order of this Court, whichever occurs first. A-2.

Another provision of the QDRO (paragraph 15 of the QDRO) provides for the modification of provisions of the Final Judgment by provisions of the QDRO.

[e]xcept as modified by this Order, all provisions set forth in the Final Judgment of Dissolution of Marriage dated () shall remain in full force and effect. A-4.

In March, 2003, the Former Wife filed a motion seeking a modification of the QDRO to conform to the provision of the settlement agreement that awarded her “full ownership” of a percentage of the Former Husband’s retirement plan.

A-2. She specifically challenged the above-cited language that called for termination of her “full ownership” to this percentage if she dies or remarries. A-2. She asked the court to modify the QDRO by eliminating these contingencies in the

QDRO. A-2.

The Former Husband was awarded summary judgment based on the Former Husband's legal argument that the Former Wife's failure to either timely appeal the Final Judgment of Dissolution of Marriage or make a timely motion for relief from judgment under Rule 1.540, Fla. R. Civ. P. now barred any attack on the QDRO for lack of jurisdiction. A-2-3.

The Former Wife appealed. In her appeal, she argued for the first time that her motion to modify was not brought under Rule 1.540. A-4. She also argued for the first time that her motion was improperly titled as a motion to modify, and that it was really brought as a motion to enforce the terms of the settlement agreement. A-3-4. She further claimed for the first time on appeal that the trial court had authority to amend the QDRO as a means of enforcing the terms of the settlement agreement based on the Final Judgment's reservation of jurisdiction to enforce its provisions. A-4.

In his response to these new claims in the appeal, the Former Husband argued that the settlement agreement, as incorporated into the divorce Final Judgment, must be interpreted as one document with the QDRO, so that the terms of the QDRO are the terms of the Final Judgment. A-4. The two documents cross-reference each other. They were also entered by the divorce court at the same

time. A-3,4. The Former Husband argued that the terms of the QDRO were accordingly included in the divorce Final Judgment as expressly provided in paragraph 15 of the QDRO:

[e]xcept as modified by this [QDRO] Order, all provisions set forth in the Final Judgment of Dissolution of Marriage dated () shall remain in full force and effect. A-4.

The Second District reversed the summary judgment in favor of the Former Husband, finding that the QDRO was not incorporated into the Final Judgment, so the qualifying language of the QDRO could not be read as a term of the Final Judgment. A-5. The Second District also agreed with the Former Wife's new argument on appeal that her motion to modify the QDRO was improperly titled. A-4. The district court found that the motion nonetheless directed the trial court's attention to the issue of whether the QDRO properly carried out the terms of the settlement agreement that was ratified and incorporated into the Final Judgment. A-4.

The Second District concluded that the intent of the settlement agreement was to award the Former Wife "full ownership" of a percentage of the Former Husband's retirement benefits. A-5. The court found that the limitations in the QDRO regarding the Former Wife's marital status or the length of her life are not consistent with such "full ownership". A-5.

The Second District also agreed with the Former Wife's new argument that the trial court erred in imposing the time limitations of Rule 1.540 to find that it lacked jurisdiction to modify the QDRO. A-4. The Opinion finds that the QDRO is inconsistent with the terms of the Final Judgment, and that the trial court had jurisdiction to consider the motion to modify the QDRO as a request to enforce the terms of the Final Judgment. A-5-6. The case was remanded for further hearings on the motion. A-6.

The Former Husband's timely Motion for Rehearing/Clarification was denied by the district court. The Former Husband then timely sought review from this Court.

SUMMARY OF THE ARGUMENT

The Opinion shows conflict on its face with two rules of law confirmed by this Court in prior decisions: (1) a rule of law that where a writing expressly refers to and sufficiently describes another document, the other referenced document is to be interpreted as part of the writing, and (2) that new claims may not be raised for the first time on appeal.

Should this Court accept jurisdiction, the Court will also have the opportunity to offer much needed guidance to the courts of this state regarding the nature of a QDRO. The Opinion in this case holds, *sub rosa*, that a QDRO is not a final order

subject to Rule 1.540 time limitations or the usual legal bar to post-judgment modification of an equitable distributed pension award. To the contrary, the Opinion finds that the trial court has jurisdiction to modify a QDRO at any time in order to enforce an equitable distribution award in a divorce final judgment.

There is currently no decision of any Florida district court or this Court squarely addressing this issue, i.e. the precise legal nature of a QDRO. The Court needs to provide guidance to the courts across the state by determining whether a QDRO entered either at the same time as a divorce final judgment or separately as a post-judgment order, is a final order subject to the one year time constraint under Rule 1.540 for relief from its provisions.

The Court can also establish uniform precedent as to whether a QDRO is an equitable distribution order that is non-modifiable as a matter of law, and whether a QDRO is properly viewed, as the Second District viewed the QDRO in this case, as a non-final order subject to modification at any time at the discretion of a Florida court.

ARGUMENT

I. THIS COURT HAS CONFLICT JURISDICTION

Conflict jurisdiction is established by showing direct and express conflict within the four corners of the Opinion with a decision of this Court or other district courts of appeal on the same question of law. See Article V, section 3(b)3, Florida Constitution. The Opinion in this case, on its face, first expressly and directly conflicts with this Court's holding in *OBS Co., Inc. v. Pace Constr.Co.*, 558 So.2d 404 (Fla. 1990). In *OBS*, this Court held that where a writing expressly refers to and sufficiently describes another document, the other writing is to be interpreted as part of the writing. Id. At 406.

The Opinion finds, in clear conflict with *OBS*, that the QDRO is not a part of the divorce Final Judgment despite the Opinion's concessions that the settlement agreement incorporated into the Final Judgment expressly references the QDRO, and the QDRO expressly references the Final Judgment. This Court has jurisdiction to resolve the direct and express conflict between the two decisions.

The Opinion also presents a direct and express conflict with the well-settled rule of law that new issues may not be presented for the first time on appeal. See e.g. *Dade Co. School Bd. v. Radio Station WQBA*, 731 So.2d 638 (Fla 1999) (a claim not raised in the trial court will not be considered on appeal). The face of the Opinion in this case shows that the Former Wife, for the first time on appeal,

raised a claim/issue that her motion to modify the QDRO was“mistitled” ---- and that it was really a motion to enforce an equitable distribution award granted in the Final Judgment under the Final Judgment’s reservation of jurisdiction to enforce its provisions.

The Former Wife also raised a claim/issue for the first time on appeal that her motion to modify the QDRO was not brought under Rule 1.540. The Opinion’s review of the Former Wife’s arguments to the trial court do not include either of these claims newly raised on appeal nor were they raised in the trial court.¹

This Court accordingly has conflict jurisdiction under Article V, section 3(b)3, Florida Constitution. Jurisdiction should be accepted to eliminate these two conflicts between the Opinion and prior holdings of this Court.

**II. THE COURT SHOULD ACCEPT REVIEW TO PROVIDE
FLORIDA COURTS WITH A UNIFORM VIEW OF THE
NATURE OF A QDRO IN THE ABSENCE OF ANY FLORIDA
PRECEDENT TO GUIDE THE COURTS**

The Court should also accept jurisdiction of this case to permit the Court to uniformly advise Florida courts regarding the substantive or procedural constraints, if any, on post-judgment requests to modify a QDRO for any purpose. In doing so,

¹ Though not noted in the Opinion, the Former Husband preserved this conflict issue for review by this Court by challenging the Former Wife’s new claims

the Court will also be able to establish a clear characterization of the final or non-final nature of a QDRO for Florida courts. At present, the Former Husband can find no decision by this Court or any district court addressing these QDRO issues. The Former Husband is aware, however, of a related issue currently before the Court on jurisdictional briefings. See *Richardson v. Richardson*, Case No. SCO5-1084. That case asks the Court to address the jurisdiction of the district court to direct the remand court to modify a QDRO, entered post-judgment, to conform with the district court's reversal of certain provisions of the final judgment, where the separately entered QDRO was not appealed.

The *Richardson* district court Opinion similarly shows a *sub-rosa* treatment of the post-judgment QDRO in that case as a modifiable non-final order. The *Richardson* district court directs the remand trial court to modify the separately entered QDRO even though the QDRO was not before the district court in the appeal ---- only the final judgment was appealed in that case. See *Richardson v. Richardson*, 900 So. 2d 656 (Fla. 2d DCA 2005). This related *sub-rosa* characterization of a QDRO as a modifiable non-final order strongly underscores the need for this Court to address the nature of a QDRO order *vis a vis* a court's jurisdiction to later modify the terms of the QDRO for the guidance of the courts.

as improper because the claims were not first raised before the trial court.

CONCLUSION

For all the foregoing reasons, this Court has conflict jurisdiction in this case, and the Court should accept review of the Second District's Opinion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Virginia Vetter, Esq., P.O. Box 7834, Tampa, FL 33673-7834 on this 12th day of September, 2005.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the above document is submitted in Times New Roman proportionately spaced 14-point font.

Karol K. Williams, P.A.

Karol K. Williams
Florida Bar 0849960
1304 Desoto Ave., Ste. 403
Tampa, FL 33606
(813) 254-5810

Counsel for Petitioner