2017 IL App (1st) 160560-U
No. 1-16-0560
September 29, 2017

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

HOWARD WERTZ, Plaintiff, v. JOANNA CHRISTOPOULOS, Defendant-Appellee, v. LINDA TROUT, Third Party Respondent-Appellant.	))))))))))))))	Appeal from the Circuit Court Of Cook County. No. 13 D 230213 The Honorable John Thomas Carr, Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Mason concurred in the judgment.
Justice Hyman dissented.

ORDER

¶ 1 *Held*: (i) A circuit court retains jurisdiction to enforce its temporary orders with a qualified domestic relations order (QDRO) when the QDRO effectuates a provision for children's benefits in a temporary order that was entered prior to the abatement or dismissal of the dissolution proceedings.

¶ 2 During the pendency of the dissolution proceedings involving Howard Wertz and Joanna Christopoulos, the circuit court entered a temporary order on December 16, 2014, directing Wertz to name his minor children as irrevocable beneficiaries of his life insurance policy. Instead of naming his minor children as beneficiaries of his life insurance policy, Wertz named his sister, Linda Trout, and others as beneficiaries. On March 8, 2015, Wertz died. On June 16, 2015 the circuit court dismissed the dissolution proceedings. On October 1, 2015, Christopoulos filed a motion asking the court to clarify its December 16, 2014 temporary order by making it a Qualified Domestic Relations Order (QDRO). Trout objected and argued that the circuit court lacked jurisdiction to enter the February 2, 2016 QDRO (i) because the dissolution proceedings abated on March 8, 2015, when Wertz died, and (ii) because the QDRO was entered more than thirty days after the case was dismissed on June 16, 2015. The circuit court granted Christopoulos's motion and Trout appealed.

¶ 3 We find that the circuit court's December 16, 2014 order was a temporary order that provided support for Wertz's minor children. We also find that Wertz's death on March 8, 2015, abated the dissolution proceedings, and that the case was dismissed on June 16, 2015, but the February 2, 2016 QDRO enforced the December 16, 2014 temporary order that was entered prior to the abatement or dismissal of the case. Therefore, we hold that the circuit court retained jurisdiction to enter the February 2, 2016 QDRO because it effectuated the provisions providing support for Wertz's minor children in the December 16, 2014 temporary order that was entered prior to the abatement or dismissal of the dissolution proceedings.

¶ 4 BACKGOUND

¶ 5 Howard Wertz and Joanna Christopoulos were married on July 23, 1994, and the couple had two children, Dionysios Wertz, born on September 13, 1999, and Paraskvi Wertz, born on January 26, 2007. During the marriage, Wertz was employed as an attorney for IBM.

¶ 6 On May 2, 2013, Wertz filed a petition for dissolution of marriage and alleged that the parties had been living separately since January 2010, and that there were irreconcilable differences: the wife was guilty of willful desertion, and physical and mental cruelty as defined by the Illinois Marriage and Dissolution of Marriage Act (the Act). He also alleged that the parties' children, Dionysios and Paraskevi, ages 13 and 6 at the time, had lived in Wilmette, Illinois and Nea Chalkidona, Greece, within the last five years. Finally, he alleged that the children were in Christopoulos's custody at the time, but that it would be in the children's best interests for the court to award him custody.

¶ 7 On May 8, 2013, Christopoulos filed a response to Wertz's petition for dissolution of marriage and admitted that the parties had lived separately, and not as husband and wife, since January 2010. However, she denied that the children had lived with Wertz in the last five years. Christopoulos alleged that the children had resided with her in Athens, Greece with the knowledge and consent of Wertz since June 8, 2012 and that he had not seen the children since that date. On May 23, 2013, Christopoulos filed a motion for judgment on the pleadings and requested that the court make a specific finding as to the grounds for dissolution of marriage, but there is no order in the record indicating that the court acted on this motion.

¶ 8 On September 25, 2014, Christopoulos filed a petition to compel the transfer of real estate and requested that the court enter an order which required the parties, due to Wertz's medical condition, to transfer the title to their real estate into a trust pursuant to section 503(g) of the Act. Christopoulos alleged that the creation of the trust was necessary to protect the parties' minor children and to ensure their support, maintenance, education, and general welfare.

¶ 9 On November 2, 2014, Wertz filed a beneficiary designation form with Prudential Insurance Company of America and named his sister, Linda Trout, and others as beneficiaries of his life insurance policy. On November 3, 2014, Wertz filed a response to Christopoulos's petition to compel the transfer of real estate pursuant to section 503(G) of the Act and requested that the petition be denied.

¶ 10 On November 3, 2014, Wertz filed a motion and requested (i) that the court grant him temporary visitation with his minor children, and (ii) that the court enter a temporary restraining order, preliminary injunction and permanent injunction against Christopoulos enjoining her from removing the minor children from the court's jurisdiction. Wertz alleged that he had a right to visit with his minor children pursuant to section 607 of the Act and requested that the court award him visitation rights with his minor children.

¶ 11 In December 2014, Christopoulos filed an emergency petition and asked the court to order Wertz to have Prudential reinstate the policy. On December 16, 2014, the circuit court entered the following order:

"IT IS HEREBY ORDERED:

1. That Howard Wertz, his agents, assigns and/or sister who maintains his General Power of Attorney, execute any and all documents necessary and proper to reinstate, in full, and shall pay any and all costs or premiums incident thereto to so reinstate, or use the cash surrender value, if allowed to do so, as the policy is a Group Universal Policy.
2. That the Prudential Insurance Company of America Policy Number 8310638 shall be reinstated by Howard Wertz, his agents, assigns and/or sister who maintains his General Power of Attorney within 5 business days and said policy shall be reinstated by the IBM Group Insurance as provided herein. Proof of submission shall be provided to counsel.

   That the children of the parties, Dionysious Wertz and Paraskevi Wertz shall be designated as irrevocable beneficiaries, share and share alike, until further order of court, without prejudice."

¶ 12 On January 27, 2015, Christopoulos's attorney, Evan Mammas, filed a motion for leave to withdraw as her attorney. On February 4, 2015, the court granted Mammas' motion.

¶ 13 On March 8, 2015, Wertz died. On March 11, 2015, Christopoulos filed a petition for rule to show cause and asked that Wertz be held in contempt for Wertz’s failure to comply with the circuit court's December 16, 2014 order. Christopoulos alleged that Wertz and/or Trout had not reinstated the insurance policy, and that the policy benefits may have been irrevocably lost due to their noncompliance with the court's order. On April 14, 2015, the court entered an order which spread Wertz's death of record.

¶ 14 On June 16, 2015, the court dismissed the dissolution of marriage case. Then, on September 10, 2015, the court dismissed the dissolution of marriage case for a second time for want of prosecution.

¶ 15 On October 1, 2015, Christopoulos filed a motion to clarify the December 16, 2014 order *nunc pro tunc* and alleged that:

(i) Wertz reinstated the Prudential Insurance Company life insurance policy as directed by the December 16, 2014 order but he did not designate his minor children as the irrevocable beneficiaries; instead, he designated Trout and other family members as the beneficiaries;

(ii) The Plan Administrator of Wertz's life insurance policy may be governed by the Employee Retirement Income Security Act of 1974 (ERISA) and if so, there would be a question as to whether the December 16, 2014 order is a qualified domestic relations order (QDRO) under ERISA, and QDRO status is necessary for Prudential to comply with the December 16, 2014 order;

(iii) The circuit court entered the December 16, 2014 order with the intention of protecting the minor children by directing Wertz to designate them as the beneficiaries of his life insurance policy;

(iv) Because Wertz's life insurance policy may be governed by ERISA, in order to effectuate the interest of the December 16, 2014 order, the order must be clarified *nunc pro tunc* to provide that it is a QDRO as defined under ERISA in order to allocate to the minor children Wertz's life insurance benefits;

(v) A posthumous *nunc pro tunc* order that clarifies an earlier domestic relations order is permitted under Illinois law; and

(vi) The substance of the December 16, 2014 order would not be changed.

Finally, Christopoulos attached as an exhibit a proposed order clarifying the December 16, 2014 order in an attempt to effectuate the intent and terms of the order: specifically, she sought to have the court designate the December 16, 2014 order as a "QRDO" (29 U.S.C. §1056(d)(3)(B)(ii)).[1]

¶ 16 On October 8, 2015, Christopoulos filed a motion to join Trout as a party respondent to her *nunc pro tunc* motion to clarify the December 16, 2014 order. On December 18, 2015, Trout filed a motion for leave to file a response to Christopoulos's motion to clarify, and on December 28, 2015, the court granted Trout's motion. Trout filed a response to Christopoulos's motion to clarify the December 16, 2014 order and objected to Christopoulos's motion requesting that the court designate the December 16, 2014 order as a QDRO and argued that the court lacked jurisdiction to do so. Trout also argued that only a court of competent jurisdiction can posthumously enter a QDRO, and that the divorce case must be pending and active at the time the court entered a post-death QDRO. Because

[1] (B) For purposes of this paragraph –
(i) the term "qualified domestic relations order" means a domestic relations order –
(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to participation under a plan, and
(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which –
(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
(II) is made pursuant to a State domestic relations law (including community property law).

Wertz's divorce case was dismissed on June 16, 2015, Trout argued that the trial court did not have jurisdiction to enter a post-death QDRO. Finally, Trout argued that Christopoulos's request for a *nunc pro tunc* order to clarify the December 16, 2014 order was improper because the order would have to be redrafted which the court lacked jurisdiction to do.

¶ 17 On February 2, 2016, the circuit court granted Christopoulos's *nunc pro tunc* motion and entered the following order:

"This court finds:

A) The court has jurisdiction, based on the case law cited by both parties, to enter the proposed Qualified Domestic Relations Order clarifying the December 16, 2014 injunction order.

IT IS ORDERED:

1) The QDRO proposed by Christopoulos shall be entered instanter, over Linda Trout's objection to jurisdiction.

2) *Sua sponte*, the dismissal order of June 16, 2015 is vacated except for the order of fees in favor of Evan Mammas."

¶ 18 On February 11, 2016, Trout filed a timely notice of appeal and requested that the court vacate the February 2, 2016 QDRO.

¶ 19 Analysis

¶ 20 Trout appeals from the February 2, 2016 order which granted Christopoulos's *nunc pro tunc* motion. She maintains that the circuit court lacked jurisdiction to enter the February 2, 2016 order because the dissolution action abated and had been dismissed. Illinois case law

holds that whether a circuit court has jurisdiction is a question of law, subject to *de novo* review. *In Re Marriage of Hall*, 404 Ill. App. 3d 160, 164 (2010); *In Re Marriage of Allen*, 343 Ill. App. 3d 410, 412 (2003).

¶ 21 Temporary Support Orders Survive Abatement and Dismissal

¶ 22 Trout argues that the circuit court lost jurisdiction prior to the entry of the February 2, 2016 QDRO because (i) the case abated when Wertz died on March 8, 2015; and (ii) the QDRO was entered more than thirty days after the dissolution of marriage case was dismissed on June 16, 2015.

¶ 23 Trout argues that the December 16, 2014 order directing Wertz to name his children as beneficiaries could not be enforced once Wertz died on March 8, 2015 and once the case was dismissed on June 16, 2015, and because the February 2, 2016 QDRO was entered more than 30 days after the dismissal, the abatement and the dismissal of the case divested the circuit court of jurisdiction to enter the February 2, 2016 QDRO. We must determine whether the circuit court retained jurisdiction to enter the February 2, 2016 posthumous QDRO (i) after Wertz died and the case abated on March 8, 2015 and (ii) after the February 2, 2016 QDRO was entered more than 30 days after the dissolution case was dismissed on June 16, 2015.

¶ 24 Generally, we note that the death of a party during the course of dissolution proceedings has been held to abate the action. *In Re Marriage of Davies*, 95 Ill. 2d 474, 478 (1983); *In Re Marriage of Platt*, 2015 IL App (2d) 141174, ¶ 18. But where temporary support orders are entered by the circuit court prior to the abatement or dismissal of a dissolution proceeding, the general rule is not followed (See *New York Life Ins. Co. v. Sogol*, 311 Ill. App. 3d 156,

159-60 (1999) (citing 750 ILCS 5/501 (d)(3) (West 1998)) because "an existing obligation to pay support…is not terminated by the death of a parent." 750 ILCS 5/510(d) (West 2014).

¶ 25 In *New York Life*, the circuit court entered a temporary order enjoining the husband, Bruce Muslin, from transferring or otherwise disposing of the parties' property. *New York Life*, 311 Ill. App. 3d at 157. During the dissolution proceedings, Bruce changed the beneficiaries from his wife, Linda Muslin, and children to his girlfriend, Marsha Sogol. *New York Life*, 311 Ill. App. 3d at 158. Bruce died before the circuit court entered a final judgment. *New York Life*, 311 Ill. App. 3d at 158. The insurance companies filed an interpleader action against Linda and Sogol to determine which party should receive Bruce's insurance policy proceeds. *New York Life*, 311 Ill. App. 3d at 158. The circuit court awarded the proceeds of the policy to Sogol and Linda appealed. *New York Life*, 311 Ill. App. 3d at 158. On review, the *New York Life* court based its decision on section 501(d)(3) of the Act, which provides, in part, as follows:

> "(d) A temporary order entered under this Section:
>
> ***
>
> (3) terminates when the final judgment is entered or when the petition for dissolution of marriage or legal separation or declaration of invalidity of marriage is dismissed." *New York Life*, 311 Ill. App. 3d at 159-60; 750 ILCS 5/501(d)(3) (West 1999).

The *New York Life* court found, after reviewing the Act, that the preliminary injunction entered by the circuit court against Bruce did not terminate until his death. *New York Life*,

311 Ill. App. 3d at 160 (citing 750 ILCS 5/501(d)(3) (West 1998)). The *New York Life* court also found that, prior to his death, Bruce did not have the authority to change the beneficiary of his insurance policies because the preliminary injunction was still in effect. *New York Life*, 311 Ill. App. 3d at 160. Finally, the *New York Life* court held that while Bruce's death abated the dissolution of marriage action, it did not abate the preliminary injunction. *New York Life*, 311 Ill. App. 3d at 160.

¶ 26 In this case, the circuit court entered a temporary order on December 16, 2014 that directed Wertz to reinstate his life insurance policy and to designate his children as beneficiaries. Wertz reinstated the policy, but violated the court's December 16, 2014 temporary order when he named his sister, Linda Trout, and others as beneficiaries. Wertz's death on March 8, 2015 abated the dissolution proceedings, but his death did not abate the temporary order directing Wertz to name his children as beneficiaries. *New York Life*, 311 Ill. App. 3d at 160 (citing 750 ILCS 5/501(d)(3) (West 1998)); 750 ILCS 5/510(d) (West 2014).

¶ 27 We note that a court retains inherent power to enforce its orders. *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291, 297 (2000) ("It is an elementary principle of law that a court is vested with the inherent power to enforce its orders."). Although the December 16, 2014 order was labeled a "temporary" order, there was nothing temporary about the court's direction to Wertz and Trout to designate Wertz's minor children as *irrevocable* beneficiaries, a direction that both Wertz and Trout indisputably failed to obey. Wertz's death may have abated the dissolution of marriage proceeding, but it did nothing to abate the court's direction that the policy be maintained for the benefit of Wertz's children.

While Trout suggests that Christopoulos's remedy lies in the initiation of separate litigation aimed at enforcing the court's unequivocal order, she offers no persuasive reason why the judge who entered the order should not also be the one to enforce it. And that the court, having jurisdiction to enforce its order, chose to enter a QDRO to effect its purpose instead of holding Trout in contempt is of no moment.

¶ 28 Section 501(d)(3) of the Act provides that a temporary order terminates when the final judgment is entered or when the dissolution proceeding is dismissed. 750 ILCS 5/501(d)(3) (West 2014). But section 510(d) of the Act provides that "an existing obligation to pay support…is not terminated by the death of a parent," and that equitable enforcement may take place at the time of the dissolution of marriage or thereafter. 750 ILCS 5/510(d) (West 2014). The circuit court's December 16, 2014 temporary support order directing Wertz to name his children as beneficiaries was entered prior to the case abating on March 8, 2015, the date of Wertz's death, and prior to the case being dismissed on June 16, 2015. We find that once the temporary support order was entered Wertz had no authority to change the beneficiaries of his Prudential insurance policy, or terminate the existing temporary obligation to support his children. 750 ILCS 5/510(d) (West 2014). Following *New York Life* and considering the mandate of section 510(d) of the Act that support orders be equitably enforced, we find that the circuit court retained jurisdiction to enforce its December 16, 2014 temporary support order because it was entered prior to Wertz's death and the abatement of the action on March 8, 2015, and prior to the dismissal of the case on June 16, 2015. *New York Life*, 311 Ill. App. 3d at 160; 750 ILCS 5/510(d) (West 2014).

¶ 29 We find that the circuit court's February 2, 2016 QDRO recognized the right of Wertz's minor children, as alternate payees, to receive all the benefits from Wertz's Prudential life insurance policy under the plan. *Yale-New Haven Hosp. v. Nicholls*, 788 F.3d 79, 82 (2nd Cir. 2015); 29 U.S.C. §1056(d)(3)(B)(i)(ii); 26 U.S.C. §401(a)(13)(A)(B). We also find that the February 2, 2016 QDRO met the requirements of a domestic relations order because the order (i) listed Wertz as the participant in the plan and the minor children as alternate payees; (ii) distributed the benefits to Wertz's children "share and share alike;" (iii) remained in effect until "further order of court"; and (iv) named Prudential life policy number 8310638 as part of the plan the order applied to. *Nicholls*, 788 F. 3d at 82; 29 §1056(d)(3)(C). Finally, we find that under ERISA the circuit court judge was authorized to enter the February 2, 2016 QDRO that enforced its December 16, 2014 temporary order and assigned Wertz's insurance benefits to his children for support. 29 U.S.C. §1056(d)(3)(B)(i),(ii); see also *In re Marriage of Thomas*, 339 Ill. App. 3d 214, 225-26 (2003) (ERISA authorizes the entry of a qualified domestic relations order to transfer the value of pension and retirement accounts to satisfy family support obligations); *In re Marriage of Allen*, 343 Ill. App. 3d 410, 412-13 (2003) (the circuit court retains jurisdiction, 30 days after entry, to amend a QDRO, conform it to the original order and enforce the provisions of the judgment).

¶ 30 Accordingly, we hold that the December 16, 2014 temporary support order entered prior to Wertz's death and the dismissal of the case survived the abatement and the dismissal of the dissolution action and neither Wertz's death nor the dismissal of the dissolution case divested the circuit court of jurisdiction to enter the February 2, 2016 QDRO enforcing the support

provisions in the temporary order entered on December 16, 2014. *New York Life,* 311 Ill. App. 3d at 158-60; 750 ILCS 5/501(d)(3) (West 2014); 750 ILCS 5/510(d) (West 2014).

¶ 31 *Nunc Pro Tunc* Orders

¶ 32 Finally, Trout argues that the February 2, 2016 QDRO did not meet the requirements for a *nunc pro tunc* order because, instead of correcting clerical errors, the QDRO made substantive changes to the December 16, 2014 temporary order: (i) the title of the order was changed from "Order" to "Qualified Domestic Relations Order;" (ii) the order added the name of the plan participant; and (iii) the order changed from a temporary order to an order that superceded all prior orders entered in relation to the plan. Trout also argues that, because the February 2, 2016 order did not correct a clerical error but corrected a judicial error, it would not qualify as a *nunc pro tunc* order, and therefore, the court did not have jurisdiction to enter the order more than 30 days after the case was dismissed.

¶ 33 We note that the circuit court's December 16 2014 temporary support order directed Wertz, his agents and his sister to reinstate the Prudential life insurance policy, and directed that Wertz's children be designated as irrevocable beneficiaries. Christopolous's motion maintained that the December 16, 2014 order was intended to distribute to Wertz's minor children the proceeds from the Prudential policy. Christopoulos requested that the December 16, 2014 order be clarified *nunc pro tunc* upon the realization that (i) Wertz's life insurance policy may be governed by ERISA; and (ii) the December 16, 2014 order needed to be clarified and renamed a QDRO in order to ensure that Wertz's insurance benefits would be distributed to Wertz’s minor children. Finally, Christopolous's motion maintained that the

substance of December 16, 2014 temporary order would not be changed because the policy benefits remain the same, the intended beneficiaries remain the same, and the policy obligations of Prudential remain the same.

¶ 34 We have found other jurisdictions that have allowed posthumous QDROs to be entered as *nunc pro tunc* orders. See *Patton v. Denver Post Corp.*, 326 F. 3d 1148, 1152-54 (10th Cir. 2003); *Hogan v. Raytheon, Co.*, 302 F. 3d 854, 857 (8th Cir. 2002). In *Patton*, eleven months after the death of her husband, a wife requested a declaration from a federal court that a state domestic relations order granting her survivor benefits in her former husband's pension plan be designated as a "qualified domestic relations order" under ERISA. The district court granted the wife's motion for summary judgment. On appeal, the *Patton* court approved the district court's entry of a posthumous QDRO as a *nunc pro tunc* order and explained its holding as follows:

> "In sum, this is precisely the type of situation, particularly in the domestic relations arena, for which the *nunc pro tunc* doctrine is appropriate. Courts in domestic relations contexts must have the power to effect equitable settlements by responding to newly acquired information or to changes in circumstances. If necessary changes once effected by the state court are not then recognized by plan administrators or by federal courts adjudicating disputes, state courts are effectively stripped of their ability to equitably distribute marital assets in a divorce." *Patton*, 326 F. 3d at 1150, 1154.

¶ 35 In this case, we find that the circuit court's entry of the February 2, 2016 QDRO directing Prudential to pay Wertz's policy benefits to his minor children was necessary for the court to effectuate the provisions in the circuit court's December 16, 2014 temporary order directing Wertz and his agents to make his minor children the irrevocable beneficiaries of the Prudential policy. We find, like the *Patton* court, that circuit courts must have the power to effect equitable settlements by responding to "newly acquired information or changes in circumstances" like the death of Wertz, like the fact that the distribution of the Prudential policy benefits might be governed by ERISA, and like the fact that ERISA directed that the Prudential policy benefits, if part of a pension plan, had to be distributed to Wertz's children through a QDRO. *Patton*, 326 F. 3d at 1154. We note that the circuit court had jurisdiction over the parties at the time it entered the temporary support order and that the *nunc pro tunc* order changed the label on the order to QDRO but did not change the substance (the amount of the children's award) of the temporary support order and did not present a new case to the court. *Warren v. Warren*, 88 Ill. App. 3d 543, 546 (1980) (When reviewing an order where the circuit court exercised its equitable powers, this court should look at the substance of the order and not its label). We find the circuit court had the power, pursuant to the Act and ERISA, to enter the February 2, 2016 QDRO to ensure that Wertz's minor children received the support that was prescribed in the December 16, 2014 temporary order. 750 ILCS 5/510(d) (West 2014); 29 §1056(d)(3)(C). Therefore, since the December 16, 2014 temporary order was entered before the dissolution proceedings were abated or

dismissed, the circuit court did not err when it entered the February 2, 2016 QDRO *nunc pro tunc* to clarify its temporary order more than thirty days after the case was dismissed.

¶ 36 Support Orders Are Equitably Enforced

¶ 37 The dissent maintains that the circuit court was divested of jurisdiction when the case was dismissed and therefore, did not have the power to enter the *nunc pro tunc* support order. We disagree. We begin by noting that in Illinois both parents have a duty to support their children. *In Re Marriage of Turk*, 2014 IL 116730, ¶ 14. We also note that a parent's obligation to support his or her child terminates no earlier than when the child attains the age of eighteen: the Wertz children are presently thirteen and seventeen. 750 ILCS 5/505(g) (West 2014).

¶ 38 We are mindful, as pointed out by the dissent, that section 501(d)(3) of the Act provides that temporary orders terminate "when the final judgment is entered or when the petition for dissolution of marriage…is dismissed." 750 ILCS 5/501(d)(3) (West 2014). But we are also mindful of section 510(d) of the Act which provides that "an existing obligation to pay support or educational expenses, or both, is not terminated by the death of a parent. When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced…as equity may require, and that determination may be provided for at the time of the dissolution of marriage or thereafter." 750 ILCS 5/510(d) (West 2014). These statutes require some interpretation.

¶ 39 One rule of statutory construction provides that statutes must be construed so that each word, clause, and sentence is given meaning, and not rendered superfluous. *Brucker v.*

Mercola, 227 Ill. 2d 502, 514 (2007); *Williams v. Stables*, 208 Ill. 2d 480, 493 (2004); *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003). Case law indicates that we must presume that several statutes relating to the same subject are governed by one spirit and a single policy, and that the legislature intended the several statutes to be consistent and harmonious. *Wade v. City of North Chicago Police Pension Bd.*, 226 Ill. 2d 485, 512 (2007). When we construe section 501(d)(3) and compare it to section 510(d), we find that section 501(d)(3) provides that temporary (non-support) orders terminate when final judgment is entered or the case is dismissed (750 ILCS 501(d)(3) (West 2014)), and section 510(d) provides (i) that death does not terminate support orders and (ii) that there should be equitable enforcement of support orders. 750 ILCS 510(d) (West 2014). We find that the legislature realized that dissolution proceedings involving child support orders are *sui generis*, and therefore intended (i) for a parent's temporary support obligations to survive his or her death, and (ii) that equitable enforcement of the support obligation "may be provided for at the time of the dissolution of marriage or thereafter." 750 ILCS 5/510(d) (West 2014). Accordingly, we find that section 510(d) permits the circuit court to exercise its discretion when enforcing a support order. 750 ILCS 5/510(d) (West 2014).

¶ 40 The dissent argues that the majority's reliance on section 510(d) to confer jurisdiction on the circuit court to enforce its temporary order is misplaced. 750 ILCS 5/510(d)(West 2014). The dissent points out that section 510(d) provides that temporary orders can only be enforced "at the time of the dissolution of marriage or thereafter." 750 ILCS 5/510(d)(West 2014). Continuing, because the marriage between Wertz and Christopoulos was never

dissolved, and will never be, the dissent argues that section 510(d) does not apply and the temporary order cannot be enforced. By making the argument that the temporary order can be enforced only "at the time of the dissolution of marriage or thereafter," the dissent fails to construe the word "may" in section 510(d), which precedes the words quoted by the dissent: "that determination 'may' be provided for at the time of the dissolution of marriage or thereafter." 750 ILCS 5/510(d)(West 2014). We find that the word "may" is the operative word in the statute. Our supreme court has held that there is a significant difference in the nature of the obligation when "may" is used and when the word "shall" is used in a statute. *People v. Garstecki*, 234 Ill. 2d 430, 443 (2009). The *Garstecki* court held that "may" is permissive and allows the court to exercise its discretion, while "shall" imposes a mandatory obligation on the court. *Garstecki*, 234 Ill. at 443. Therefore, we find that the statute's use of the word "may" permits the court to exercise its discretion when enforcing a support order and does not make it mandatory that support orders be enforced only (i) at the time of the dissolution of marriage or (ii) thereafter. Accordingly, the circuit court can correct and enforce a temporary or final support order *nunc pro tunc*. See *Smithberg v. Illinois Municipal Retirement Fund*, 192 Ill. 2d 291, 297-98 (2000).

¶ 41 We note that the *Smithberg* court stated that irrespective of empowering statutes, a court retains its traditional equitable powers, and the court's equitable power cannot be taken away or abridged by the legislature. *Smithberg*, 192 Ill. 2d at 298. The dissent ignores the command of *Smithberg* that a statutory command, like section 501(d)(3) of the Act, can be ignored when the statute will encroach upon the judicial prerogative of the circuit court to do

what ought to be done and what is right. *Smithberg*, 192 Ill. 2d at 298. By ignoring *Smithberg*, the dissent also forgets that we are an appellate court bound by our supreme court's decisions. See *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 551 (1983) ("It is fundamental that appellate courts are without authority to overrule the supreme court or to modify its decisions.") Accordingly, since we find that section 510(d) empowered the circuit court with discretion to determine the time to equitably correct and enforce its support orders coupled with the court's inherent equitable power to do what ought to be done and what is right, we hold that the circuit court did not err by equitably enforcing the temporary support obligations with a *nunc pro tunc* QDRO after the dismissal of the case.

¶ 42 Conclusion

¶ 43 We find that the circuit court retained jurisdiction to enter the February 2, 2016 QDRO in order to enforce the support provisions in the December 16, 2014 temporary order that was entered before the dissolution case abated or was dismissed. Therefore, we affirm the decision of the circuit court.

¶ 44 Affirmed.

¶ 45 JUSTICE HYMAN, dissenting.

¶ 46 I disagree with my colleagues that the trial court had jurisdiction to enter the February 2, 2016 order that purported to transform its 2014 temporary order into a Qualified Domestic Relations Order, as required by ERISA. Without jurisdiction, the trial court had no power, equitable or otherwise, to enter that order. The trial court may have been attempting to rule equitably for the sake of Wertz's minor children. But in the process, the trial court (and the

majority) have misapplied the concept of the *nunc pro tunc* order. We should not stretch this legal procedure beyond its legitimate boundaries to reach a desired outcome for sympathetic litigants.

¶ 47 No one disputes the essential facts: Wertz died before his marriage to Christopolous was dissolved, the marriage dissolution case was dismissed, and it was not until well outside the 30-day window that anyone thought to question whether the temporary order could direct the distribution of Wertz's life insurance policy to his children. To achieve that end, the trial court needed somehow to reacquire the jurisdiction it had lost when the case was dismissed over seven months earlier. The majority's theory seems to be that the trial court could exercise jurisdiction to amend the December 16, 2014 order to retroactively provide for a QDRO well after the case's dismissal due to a death of a party…and the December 16, 2014 order would become a QDRO once the court transformed it into a QDRO through *nunc pro tunc*.

¶ 48 Everything depends on whether it was proper for the trial court to retroactively inject a QDRO into the 2014 order through a *nunc pro tunc* entry. It was not.

¶ 49 As our supreme court has explained, a *nunc pro tunc* order may not be used to supply omitted judicial action, correct judicial error, or alter a court's judgment. See *People v. Melchor*, 226 Ill. 2d 24, 32 (2007). A *nunc pro tunc* order only can reflect that which the trial court actually did. "[T]he use of *nunc pro tunc* orders or judgments is limited to incorporating into the record something which was actually previously done by the court," that is, to correct the record for a clerical or inadvertent scrivener's error. *Id;* see *also*

Harreld v. Butler, 2014 IL App (2d) 131065, ¶ 13 ("A *nunc pro tunc* order is an entry now for something previously done, made to make the record speak now for *what was actually done then*." (emphasis in original) (internal quotation omitted). Further, the evidence supporting the order must "clearly demonstrate that the order being modified fails to conform to the decree actually rendered by the court." (Internal citations omitted) *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 53 (1999).

¶ 50 The trial court was not correcting a clerical or scrivener's error—there is no indication that it entered the temporary order as a QDRO and inadvertently mislabeled it. (Nor was it written as a temporary injunction—making this case markedly different from *New York Life*, on which the majority also relies.) The record does not "clearly demonstrate" that the temporary support order was always intended to be a QDRO; Christopolous didn't ask for a QDRO and the trial court didn't enter a QDRO. *Id.* Rather, it seems that the trial court and Christopolous probably anticipated that a QDRO would be entered when the marriage was dissolved (as typically occurs), and now regretted not doing so sooner. The majority characterizes the trial court's action as simply correcting the "label" on the order, but that would only be permissible if the record showed flat out that the original "label" had been accidentally applied. It does not. The majority is allowing the trial court to rewrite history, to correct for the failure (Christopolous's failure) to foresee that dismissing the dissolution action after Wertz's death, but before disposing of this asset, would affect the minor children. This is not the function at all of the *nunc pro tunc* doctrine. See *People v. Jones*, 2016 IL App (1st) 142582, ¶ 12 (*nunc pro tunc* order "may not supply omitted judicial action or

correct judicial errors under the pretext of correcting clerical orders"); see *also In re Marriage of Padgett*, 172 Cal. App. 4th 830, 853 (Cal. Ct. App. 2009) (discussing overuse of *nunc pro tunc* orders in marital dissolution proceedings). The doctrine is in no way more expansive in the domestic relations context than it is in other areas of litigation.

¶ 51 The cases the majority relies on for the proposition that a posthumous QDRO can be entered *nunc pro tunc* are unhelpful. In *Patton v. Denver Post Corporation*, the married couple finalized their divorce with a QDRO in place to ensure the distribution of the husband's pension plan. 326 F.3d 1148, 1150 (10th Cir. 2003). Eleven years later, the now ex-husband died, and his ex-wife discovered that a second pension plan also existed. *Id*. So that she could receive the benefit of that plan as well, the state court entered a *nunc pro tunc* order amending the original QDRO, and backdated it to the date of the divorce. *Id*. In approving this use of the *nunc pro tunc* order, the Tenth Circuit noted that the parties had "lacked full information as to the assets to be distributed" at the time of the divorce, so the *nunc pro tunc* order "simply allotted them as it had intended under the original plan." *Id*. at 1153. Thus, the *nunc pro tunc* order did "not attempt to rewrite historical facts," but was "more akin to the correction of a clerical error." *Id*. There is an obvious factual distinction from this case: the Patton divorce was long-completed by the time of the *nunc pro tunc* order. The intent of the parties, and of the trial court's original order, was clear from the original QDRO, which only needed to be amended to include facts of which no one had been aware. Here, the Wertz divorce proceedings were incomplete, no QDRO had been entered, and in fact the Wertz case had been dismissed months beforehand without a judgment.

¶ 52 The majority's other case, *Hogan v. Raytheon Co*., 302 F.3d 854 (8th Cir. 2002), is even less helpful because no *nunc pro tunc* order was entered—none was needed. There, the husband died after the judgment of divorce had been entered but before the anticipated QDRO, so the trial court entered a posthumous QDRO, which it had jurisdiction to enter because the case was still pending. *Id*. at 855-56. This certainly does not give authority for the trial court here to use the *nunc pro tunc* doctrine to reopen the dismissed case. In fact, not one case cited by the majority bestows on the trial court what it needed: jurisdiction.

¶ 53 To confer the trial court jurisdiction to act, the majority repeatedly refers to the temporary order as a "support" order, and relies on 750 ILCS 5/510(d) (West 2014), which states that "support" obligations do not terminate at a parent's death and may be equitably enforced "at the time of the dissolution of the marriage or thereafter." But the temporary order (even if it did qualify as a "support" order within the meaning of the statute) cannot be equitably enforced "at the time of the dissolution of the marriage or thereafter" because the marriage was never dissolved, and never will be. Thus, the majority's reliance on the permissive word "may" has no force whatsoever; whether "may" is "permissive" or "mandatory" is a red herring. (The cases interpreting whether "may" is permissive are not determining whether the trial court has jurisdiction to take an action, only whether the trial court is required to act.) Regardless of whether the trial court has discretion to enforce support obligations, that discretion may only be used "at the time of the marriage or thereafter." We cannot transform the dismissal of the petition into a dissolution so that the trial court can equitably enforce its

orders. The majority's interpretation allows a misuse of the *nunc pro tunc* doctrine, which can only be used to reflect reality, not to correct missteps.

¶ 54 And, the doctrine does not allow a court to claim jurisdiction where it did not exist. Because there was no judgment of dissolution before the dismissal, "the trial court lost its jurisdiction to rule on all of the other matters concerning [the] marriage relationship." *In re Marriage of Ignatius*, 338 Ill. App. 3d 652, 658 (2003)*;* see *also Brandon v. Caisse*, 145 Ill. App. 3d 1070, 1072-73 (1986) (death of petitioner prior to judgment of dissolution deprived trial court of jurisdiction to enter judgment of dissolution and distribute property). As the Marriage Act is a "statutory enactment from our legislature," a trial court's authority in dissolution proceedings is conferred by that statute, and the trial court "may not rely upon its general equity powers." *Ignatius*, 338 Ill. App. 3d at 657. The dismissal of the divorce proceeding in its entirety before entry of judgment for dissolution is as if a petition for dissolution of the parties' marriage had never been filed.

¶ 55 The majority relies on *Smithberg* in saying that we may "ignore" a statute if that statute encroaches on the trial court's judicial prerogative. (An odd choice, since in *Smithberg*, the trial court had expressly retained jurisdiction following the dissolution of a marriage to enforce the marital settlement agreement—in other words, an utterly different situation than here. 192 Ill. 2d at 298.) Nowhere in *Smithberg*, or in any other case cited by the majority, has our Supreme Court stated that our trial courts may use their equitable powers, through the *nunc pro tunc* doctrine, to rewrite history. It is not, as the majority insists, "ignor[ing] the command" of our Supreme Court to state that our Supreme Court has neither commanded,

nor even purported to authorize, the anomalous actions taken by the trial court. Saying that a trial court has "equitable" power does not anoint that court jurisdiction to use those powers, where jurisdiction does not exist because the case has been dismissed.

¶ 56 I sympathize with the desire to protect Wertz's children. But Wertz's death—and more fundamentally, the dismissal of the divorce proceedings—deprived the trial court of its ability to enter the necessary QDRO after that consequent fact. (The Wertz children must instead pursue the claim in a different venue—and indeed they are pursuing a claim in federal court.) The *nunc pro tunc* order, having failed to satisfy the legal criteria necessary for its entry, was inappropriate, unjustified, and irregular, and must be reversed. I disagree with the majority's tacit approval of it and the selective and potentially harmful precedent the majority sets for the use of *nunc pro tunc* orders.