

**IN THE  
MISSOURI SUPREME COURT**

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<b>JULIA BROOKS,</b>	)	
	)	
<b>Petitioner-Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>No.: 84748</b>
	)	
<b>JEFFREY M. BROOKS,</b>	)	
	)	
<b>Respondent-Appellant.</b>	)	

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**SUBSTITUTE BRIEF OF  
RESPONDENT-APPELLANT, JEFFREY M. BROOKS**

**GILLESPIE, HETLAGE & COUGHLIN, L.L.C.  
By: LAWRENCE G. GILLESPIE, #29734  
7701 Forsyth Boulevard, Suite 300  
Clayton, Missouri 63105-1877  
(314) 863-5444  
(314) 863-7720 - Facsimile  
Attorneys for Respondent-Appellant**

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<b>Respondent-Appellant.</b>	)	

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**JURISDICTIONAL STATEMENT**

This is an action under Chapter 452 R.S.Mo. The marriage of the parties was dissolved October 7, 1994. Under the Decree of Dissolution, Petitioner-Respondent, JULIA BROOKS (hereinafter referred to as “Wife”), was awarded fifty percent (50%) of any benefits payable to Husband as Participant under the Plumbers Union Local No. 35 Retirement Plan.

On July 9, 2001, the trial court entered a Qualified Domestic Relations Order (which was characterized nunc pro tunc as a Qualified Domestic Relations Order and Judgment on November 1, 2001), which purported to implement the provisions of the Decree of Dissolution but which awarded survivor benefits to Wife.

On August 20, 2001, Husband timely filed his Notice of Appeal.

Husband appeals from the trial court’s judgment on the basis that the trial court misapplied the law and lacked jurisdiction to enter the Qualified Domestic Relations Order

and Judgment insofar as it purports to implement the trial court's division of Husband's pension as set out in the Decree of Dissolution, but actually sets over to Wife a greater interest than awarded in the Decree.

On June 25, 2002, the Missouri Court of Appeals, Eastern District, filed its opinion dismissing Husband's appeal for lack of jurisdiction. On July 10, 2002, Husband filed his Motion and Application for Rehearing and/or Transfer to the Missouri Supreme Court. On August 22, 2002, the Missouri Court of Appeals, Eastern District, overruled said motion. On August 30, 2002, Husband filed his Application for Transfer to the Missouri Supreme Court herein, which was granted by this Court on September 24, 2002. The Missouri Supreme Court has jurisdiction herein pursuant to Article V, Section 4 of the Missouri Constitution, as this matter has been transferred pursuant to this Court's general superintending power and implemented under Rule 83.03.

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<b>Respondent-Appellant.</b>	)	

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**STATEMENT OF FACTS**

On October 7, 1994, the trial court entered Findings of Fact, Conclusions and Decree of Dissolution regarding the marriage of Petitioner-Respondent, JULIA K. BROOKS (hereinafter referred to as “Wife”) and Respondent-Appellant, JEFFREY M. BROOKS (hereinafter referred to as “Husband”). [L.F. pp. 6-31]. The Decree, *inter alia*, provided in Paragraph 20 as follows:

20. Wife, as Alternate Payee, shall be, and hereby is assigned 50% of any benefits, whether lump sum payments or a monthly annuity, payable to Husband, as Participant, under the Plumbers Union Local No. 35 Retirement Plan, multiplied by a fraction the numerator of which is the number of years Husband was a member of Plumbers Union Local No. 35 during the parties’ marriage and the denominator of which is the number of years Husband was a member of Plumbers

Union Local No. 35 as of the date payments commence to Husband, but not to exceed a factor of one, as more specifically provided in a Qualified Domestic Relations Order to be prepared by counsel for Wife and submitted to this Court for signature.

[L.F. pp. 22-23].

Subsequently, on July 9, 2001, the trial court entered a Qualified Domestic Relations Order which provided Wife with survivor benefits as follows:

III. Death Benefits

A. In the event that the participant predeceases the alternate payee prior to the participant's earliest retirement date, the alternate payee shall be deemed to be a surviving spouse, as defined in the Plan, and shall be entitled to receive the portion of the death benefit payable under the Plan with respect to the participant's entire accrued benefit prior to division. The benefit paid under this paragraph shall be in lieu of any other benefit provided under this order.

[L.F. p. 30].

On November 1, 2001, the trial court characterized its entry as a Qualified Domestic Relations Order and Judgment. [Sup. L.F. p. 1].

**POINTS RELIED ON**

**I.**

**THE COURT OF APPEALS ERRED IN DISMISSING THIS APPEAL BECAUSE IT HAD JURISDICTION TO PROCEED IN THAT THE DESIGNATION OF THE QDRO AS A “DECREE” APPEARED WITHIN THE BODY OF THE WRITING IN THE RECITAL OF THE PROCEDURAL HISTORY AS THE BASIS FOR ITS ENTRY.**

Ochoa v. Ochoa, 71 S.W.3d 593 (Mo. banc 2002)

City of Saint Louis v. Hughes, 950 S.W.2d 850 (banc 1997)

Starrett v. Starrett, 24 S.W.3d 212 (Mo. App. 2000)

Rule 74.01

**II.**

**THE COURT OF APPEALS ERRED IN DISMISSING THIS APPEAL BECAUSE IT HAD JURISDICTION TO PROCEED IN THAT THE NUNC PRO TUNC OF NOVEMBER 1, 2001 WAS EFFECTIVE TO INCLUDE “JUDGMENT” IN THE DESIGNATION AND HEADING OF THE QDRO AS SUCH DOCUMENTS ARE SUBSTANTIVELY JUDGMENTS AND THE UNDERLYING DECREE OF DISSOLUTION SERVES AS THE NECESSARY WRITING TO SUPPORT ENTRY OF THE NUNC PRO TUNC.**

County Asphalt Company v. Demien Construction Company, 14 S.W.3d 680

(Mo. App. 2000)

Keck v. Keck, 996 S.W.2d 652 (Mo. App. 1999)

Ochoa v. Ochoa, 71 S.W.3d 593 (Mo. banc 2002)

Slay v. Slay, 965 S.W.2d 845 (Mo. banc 1998)

### III.

**THE TRIAL COURT ERRED IN ENTERING A QUALIFIED DOMESTIC RELATIONS ORDER AND JUDGMENT WHICH AWARDED WIFE SURVIVOR BENEFITS IN EXCESS OF THOSE NECESSARY TO IMPLEMENT THE DIVISION OF PROPERTY SET FORTH IN THE DECREE OF DISSOLUTION BECAUSE SUCH JUDGMENT IS BASED UPON A MISAPPLICATION OF THE LAW AND IS IN EXCESS OF THE TRIAL COURT'S JURISDICTION IN THAT FULL SURVIVOR BENEFITS SET UP A POSSIBLE WINDFALL FOR WIFE IN THE EVENT OF HUSBAND'S DEATH AND PREVENT A SUBSEQUENT SPOUSE OF HUSBAND FROM RECEIVING SURVIVOR BENEFITS.**

Reller v. Hamline, 895 S.W.2d 659 (Mo. App. 1995)

Armstrong v. Cape Girardeau Physician Associates, 49 S.W.3d 821 (Mo. App. 2001)

Lake Wauwanoka, Inc. v. Spain, 622 S.W.2d 309 (Mo. App. 1981)

Wells v. Wells, 998 S.W.2d 165 (Mo. App. 1999)

I.

**THE COURT OF APPEALS ERRED IN DISMISSING THIS APPEAL BECAUSE IT HAD JURISDICTION TO PROCEED IN THAT THE DESIGNATION OF THE QDRO AS A “DECREE” APPEARED WITHIN THE BODY OF THE WRITING IN THE RECITAL OF THE PROCEDURAL HISTORY AS THE BASIS FOR ITS ENTRY.**

The Missouri Court of Appeals, Eastern District, in its decision of June 25, 2002, determined that the Qualified Domestic Relations Order and Judgment (“QDRO”) entered by the trial court July 9, 2001 did not constitute a judgment under Rule 74.01 as it was not denominated “judgment” or “decree” as originally entered. Therefore, the Court of Appeals determined that it did not have jurisdiction to proceed and caused dismissal of the appeal. It is clear, however, from an examination of the document in question that it is a judgment under Rule 74.01 and this Court has jurisdiction to proceed to determine this matter on the merits.

Upon transfer from the Court of Appeals, this Court determines the cause as on original appeal. Missouri Constitution, Article V, Section 10; Shelton v. Saint Anthony’s Medical Center, 781 S.W.2d 48, 49 (Mo. banc 1989).

The question before this Court, whether it has jurisdiction to proceed, see, State ex rel. Dussault v. Board of Adjustment, City of Maryland Heights, 901 S.W.2d 318, 320 (Mo.

App. 1995), is a question of law. State ex rel. In Interest of R.P. v. Rosen, 966 S.W.2d 292, 296 (Mo. App. 1998).

Rule 74.01(a) provides as follows:

“Judgment” as used in these rules includes a decree and any order from which an appeals lies. A judgment is rendered when entered. A judgment is entered when a writing signed by the judge and denominated “judgment” or “decree” is filed. The judgment may be a separate document or entry on the docket sheet of the case. A docket sheet entry complying with these requirements is a judgment unless the docket sheet entry indicates the court will enter the judgment in a separate document. The separate document shall be the judgment when entered.

As originally adopted in 1994, the above-referenced language did not include “decree.” This addition was made less than a month after this Court held in City of Saint Louis v. Hughes, 950 S.W.2d 850 (banc 1997) that the designation “judgment” (now including “decree”) must appear within the body of the writing in some manner, even if it does not appear as a heading at the top of the writing. Id. p. 853.

Here, the QDRO specifically contains the word “decree” in two places within the document itself in its recital of procedural history as the basis for its implementation of the division. This form is consistent with the view of QDROs as somewhat derivative and dependent upon underlying decrees of dissolution, see, Ochoa v. Ochoa, 71 S.W.3d 593, 596

(Mo. banc 2002) and provides the necessary verbiage within the body of the writing to conform to Rule 74.01.

It has also been generally assumed that QDROs were appealable even if they were not denominated “Qualified Domestic Relations Order and Judgment.” In Seal v. Raw, 954 S.W.2d 681 (Mo. App. 1997), the Western District of the Court of Appeals made passing reference to the trial court’s judgment, apparently the dissolution, but specifically talked about the entry of a QDRO as being in recognition of and furthering the enforcement of the rights created by the decree. Id. p. 683. Similarly, in Moore v. Moore, 971 S.W.2d 943 (Mo. App. 1998), the Eastern District spoke of appellant as appealing the judgment entering the decree of dissolution as well as entry of a QDRO. In Starrett v. Starrett, 24 S.W.3d 212, 211 (Mo. App. 2000), the Eastern District also discussed of entry of a QDRO by the trial court.

The adoption of the changes to Rule 74.01 were a well-meaning effort to change the legal culture so that the bar and the judiciary pay somewhat more attention to their respective actions and to consider in advance what may or may not be appealable. Such an effort with regard to QDROs is unnecessary. QDROs already are the culmination of considerable hoop-jumping with plan administrators. The very formal and technical nature of QDROs, see, 29 U.S.C. § 1056, obviates the need for an additional label. In any event, the requirements of Rule 74.01(a) are met in this case by specific inclusion of “decree” in the QDRO. Ochoa, Seal, Moore and Starrett all make abundantly clear that QDROs are dependent upon the underlying judgment or decree. Consequently, almost any reference to that judgment or

decree within the body of the document should, both by definition under Rule 74.01(a), and by recognition of the purpose of such a document, make it clear that a QDRO is being called a “judgment” or “decree” by the trial court. Fowler v. Fowler, 984 S.W.2d 508, 512 (Mo. banc 1999).

Were this Court to follow the reasoning of the Court of Appeals, a Pandora’s box would be opened: it is a safe bet that the overwhelming proportion of QDROs entered since the adoption of the amendments to Rule 74.01(a) has now been termed neither final nor appealable. When that characterization is applied to the multitude of QDROs presently gathering dust in judicial storerooms, the resulting instability may make for numerous unanticipated headaches for practitioners, the trial bar, and this Honorable Court.

Insofar as this Court has jurisdiction to determine this appeal, the trial court’s QDRO should be reversed and remanded for further proceedings in accordance with Point III hereof.

## II.

**THE COURT OF APPEALS ERRED IN DISMISSING THIS APPEAL BECAUSE IT HAD JURISDICTION TO PROCEED IN THAT THE NUNC PRO TUNC OF NOVEMBER 1, 2001 WAS EFFECTIVE TO INCLUDE “JUDGMENT” IN THE DESIGNATION AND HEADING OF THE QDRO AS SUCH DOCUMENTS ARE SUBSTANTIVELY JUDGMENTS AND THE UNDERLYING DECREE OF DISSOLUTION SERVES AS THE NECESSARY WRITING TO SUPPORT ENTRY OF THE NUNC PRO TUNC.**

The Missouri Court of Appeals, Eastern District, in its decision of June 25, 2002, determined that the trial court’s nunc pro tunc denomination of the QDRO herein as a judgment was without effect. Should this Court determine that the QDRO was not already a judgment under Rule 74.01 as set forth in Point I, it should recognize the effectiveness of the nunc pro tunc by the trial court so as to clearly characterize the July 9, 2001 QDRO as a judgment.

Upon transfer from the Court of Appeals, this Court determines the cause as on original appeal. Missouri Constitution, Article V, Section 10; Shelton v. Saint Anthony’s Medical Center, 781 S.W.2d 48, 49 (Mo. banc 1989).

The question before this Court, whether it has jurisdiction to proceed, see, State ex rel. Dussault v. Board of Adjustment, City of Maryland Heights, 901 S.W.2d 318, 320 (Mo.

App. 1995), is a question of law. State ex rel. In Interest of R.P. v. Rosen, 966 S.W.2d 292, 296 (Mo. App. 1998).

The Court's power to issue a nunc pro tunc order correcting its records is a common law power derived from the Court's jurisdiction over its records. A court is considered to have continuing jurisdiction over its records, which exist independently from the court's jurisdiction over its cause or its judgment. Power over its records exist so that the court can cause its records to represent accurately what occurred previously. Errors can occur between the judicial act of the trial court in rendering judgment and the ministerial act of entering it upon the record. The power to issue nunc pro tunc orders constitutes no more than the power to make the record conform to the judgment already rendered; it cannot change the judgment itself. The theory of a judgment nunc pro tunc is that it is entered now for then, and orders that the judgment as corrected shall speak the truth and import verity with respect to the relief which was actually awarded, and, from some oversight or otherwise, failed to be incorporated in the original entry. County Asphalt Company v. Demien Construction Company, 14 S.W.3d 680, 683 (Mo. App. 2000).

The reliance by the Court of Appeals upon Keck v. Keck, 996 S.W.2d 652 (Mo. App. 1999) is misguided. Keck involved a situation where the findings and recommendation of a family court commissioner was caught in the maelstrom surrounding the constitutionality of the provisions of Chapter 487 which purported to convert documents signed by commissioners into judgments. This procedure was determined to be unconstitutional in Slay v. Slay, 965 S.W.2d 845 (Mo. banc 1998).

In that context, the trial judge in Keck attempted to breathe life into the findings therein by entering a nunc pro tunc order so as to label such findings a final appealable judgment. The Court of Appeals rejected that effort by the trial court, and with good reason. The entry of the nunc pro tunc therein was nothing more than judicial alchemy: an attempt to turn something which was not a judgment into gold, *i.e.*, a judgment. As Judge Holstein noted in his concurrence in Slay, supra, a judgment can only be entered by one authorized to exercise judicial power under Article V. A nunc pro tunc cannot alter the fact that a commissioner is not such a person. Such an effort is nothing more than an attempt to turn a sow's ear into a silk purse.

Here, however, it has never been seriously questioned but that a QDRO is in fact substantively a judgment. See, Seal v. Raw, 954 S.W.2d 681 (Mo. App. 1997), Moore v. Moore, 971 S.W.2d 943 (Mo. App. 1998) and Starrett v. Starrett, 24 S.W.3d 211 (Mo. App. 2000). In all of those cases, QDROs, seemingly without the talismanic terminology, were entered. The Court of Appeals in each case dealt with the matters on appeal on the merits; there was no question but that the courts had jurisdiction to decide those cases. Therefore, if the substance of a QDRO is a judgment, the entry of the nunc pro tunc remedying the omission of the magic word does not run afoul of Keck.

As Keck noted, the correction must be supported by a writing in the record. Id. p. 654. That writing within the record is the underlying decree. As this Court recently noted in Ochoa v. Ochoa, 71 S.W.3d 593 (Mo. banc 2002), the underlying decree sets out the intention to create a QDRO by division of the benefits. If specific reference to the decree

within the body of the QDRO is not enough, as argued in Point I herein, to allow the QDRO to be viewed as an appealable judgment, then those very same references, as well as the inclusion of the decree within the record before the trial court, are the appropriate “writings” which support the characterization nunc pro tunc of the QDRO as a judgment. Consequently, the nunc pro tunc is effective and this Court has jurisdiction to decide this matter on the merits in accordance with Point III hereof.

### III.

**THE TRIAL COURT ERRED IN ENTERING A QUALIFIED DOMESTIC RELATIONS ORDER AND JUDGMENT WHICH AWARDED WIFE SURVIVOR BENEFITS IN EXCESS OF THOSE NECESSARY TO IMPLEMENT THE DIVISION OF PROPERTY SET FORTH IN THE DECREE OF DISSOLUTION BECAUSE SUCH JUDGMENT IS BASED UPON A MISAPPLICATION OF THE LAW AND IS IN EXCESS OF THE TRIAL COURT'S JURISDICTION IN THAT FULL SURVIVOR BENEFITS SET UP A POSSIBLE WINDFALL FOR WIFE IN THE EVENT OF HUSBAND'S DEATH AND PREVENT A SUBSEQUENT SPOUSE OF HUSBAND FROM RECEIVING SURVIVOR BENEFITS.**

The trial court's entry of the Qualified Domestic Relations Order July 14, 2001 granted Wife survivor benefits which were not awarded to her by the trial court in the Decree of October 7, 1994. Consequently, the trial court's entry of the Qualified Domestic Relations Order (QDRO) was based upon a misapplication of law, was entered without jurisdiction and, consequently, must be reversed.

In reviewing this case, the judgment of the trial court will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence or it erroneously applies the law. Reller v. Hamline, 895 S.W.2d 659, 660 (Mo. App. 1995). Section

452.330.5 R.S.Mo. provides the authority for entry of qualified domestic relations orders to implement provisions of dissolution judgments dividing pension benefits.

The question of whether the trial court entered a QDRO in accordance with the Decree of Dissolution is a question of law. Consequently, this Court reviews the trial court's ruling de novo. Armstrong v. Cape Girardeau Physician Associates, 49 S.W.3d 821, 825 (Mo. App. 2001).

The leading case on the issue before the Court is Wells v. Wells, 998 S.W.2d 165 (Mo. App. 1999). In Wells, the Western District of the Court of Appeals dealt with a situation where the former Husband therein sought to modify a QDRO entered more than two (2) years previously. The trial court dismissed the motion and Husband appealed the dismissal.

Mr. Wells sought to remove his former wife as a surviving spouse. In dealing with the challenge of Mr. Wells, the Western District noted:

Without the designation of Terry Wells as a surviving spouse, her interest in the plan would be lost if Stacey Wells died before retirement and would end when he died after retiring. [citation omitted]. Hence, we disagree that Terry Wells should not have been designated as a surviving spouse. Terry Wells is entitled to her portion of Stacey Wells' retirement plan without regard to when Stacey Wells dies. Her designation as a surviving spouse protects her interest in the retirement plan.

Id. p. 167.

Judge Spinden, writing for the Western District, found that the survivor benefit of the former Mrs. Wells would need to be limited because it would prevent a subsequent spouse from being a surviving spouse. The Wells court recognized that the designation of the former wife therein as surviving spouse gave her the right to receive the full surviving spouse benefit, which was contrary to the Decree of Dissolution:

Indeed, it seems to set up Terry Wells for a windfall in the event of Stacey Wells' death. The property agreement merely gave Terry Wells 50 percent of the value of Stacey Wells' retirement plan as of the date of dissolution; therefore, Terry Wells should be entitled, it seems, only to that portion of the surviving spouse benefit.

Id. p. 168.

The present case presents an even more compelling argument in favor of remedying the difficulty. In Wells, the former wife claimed that the former husband, through his attorney, had approved the QDRO and did not timely appeal the entry of the QDRO. Here, a review of the minutes does not indicate that the proposed QDRO was provided to Husband prior to its entry or that he consented to its entry in any way. [L.F. p. 4]. Further, this matter was timely appealed upon entry of the QDRO.

The trial court's QDRO, assigning to Wife survivor benefits in excess of those necessary to protect her interest in Husband's pension plan, had no basis in judicial authority. Consequently, the trial court's QDRO in this respect is in excess of its

jurisdiction: it granted relief which was not authorized. Lake Wauwanoka, Inc. v. Spain, 622 S.W.2d 309, 314 (Mo. App. 1981).

In accordance with the holding of Wells, the trial court's QDRO should be reversed and remanded for further proceedings to correct this difficulty.

## CONCLUSION

For all the foregoing reasons, Respondent-Appellant, JEFFREY M. BROOKS, prays that the Court determine that the QDRO entered July 9, 2001 is a judgment under Rule 74.01(a), or in the alternative, that the nunc pro tunc order of November 1, 2001 was effective to qualify said QDRO as a judgment and, in turn, reverse the QDRO and remand this matter to the trial court for correction of the language contained therein with regard to survivor benefits.

Respectfully submitted,

GILLESPIE, HETLAGE & COUGHLIN, L.L.C.

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By: LAWRENCE G. GILLESPIE, #29734  
7701 Forsyth Boulevard, Suite 300  
Clayton, Missouri 63105  
(314) 863-5444  
(314) 863-7720 - Facsimile  
Attorneys for Respondent-Appellant

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one (1) copy of the foregoing Substitute Brief of Respondent-Appellant, as specified in Rule 84.06(a) and one (1) copy of the disk as specified in Rule 84.06(a), were mailed U.S. postage prepaid, this 22<sup>nd</sup> day of October, 2002, addressed to: Nathan S. Cohen, Attorney for Petitioner-Respondent, 210 South Bemiston, Clayton, Missouri 63105 and Benicia Baker-Livorsi, Co-Counsel for Petitioner-Respondent, 566 First Capitol Drive, Saint Charles, Missouri 63301.

\_\_\_\_\_  
Lawrence G. Gillespie

STATE OF MISSOURI                    )  
  ) ss.  
COUNTY OF SAINT LOUIS            )

Comes Now LAWRENCE G. GILLESPIE, being duly sworn upon his oath, deposes, and states that the facts stated in the foregoing are true and correct to the best of his knowledge, information and belief.

\_\_\_\_\_  
Lawrence G. Gillespie

Subscribed and sworn to before me, a Notary Public, this the 22<sup>nd</sup> day of October, 2002.

\_\_\_\_\_  
Notary Public

My Commission Expires: