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POINTS RELIED ON

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JURISDICTIONAL STATEMENT

Respondent concurs with the factual statements pertaining to the filing of this appeal as set forth in Petitioner's Jurisdictional statement. Respondent respectfully states that this Court lacks appellate jurisdiction over this matter and prays that this appeal be dismissed for lack of appropriate jurisdiction.

Petitioner argues that this Court has jurisdiction pursuant to Article V, Section 4 of the Missouri Constitution. This is the Constitutional provision that permits this Court to manage the lower courts through the state court's administrator's office. Article V Section 3 or Article V Section 10 are the more appropriate Constitutional provisions to evaluate whether this Court might have appellate jurisdiction.

The right to appeal is purely statutory. If there is no statutory right to appeal, then no appeal may proceed. State v. Larson, 79 S.W.3d 891 (Mo. 2002). "The Supreme Court is a court of limited jurisdiction." Kuyper v. Stone County Comm'n, 838 S.W.2d 436, 437-38 (Mo. 1992). The Supreme Court only has jurisdiction to hear cases that the Missouri Constitution authorizes. State ex rel. Wabash R. Co. v. Shain, 341 Mo. 19, 23 (Mo. 1937).

The Court of Appeals dismissed this appeal for lack of appellate jurisdiction. Therefore, there was no judgment entered by the Court of Appeals. See Kuyper, 838 S.W.2d at 437-38 (Mo. 1992) (holding that an opinion from the Court of

Appeals that does not address the merits of the trial court's decision is not an opinion for purposes of invoking post-opinion jurisdiction of this Court). Therefore, this Court's acceptance of this case for transfer post-opinion is inappropriate in light of the procedural posture of this case, as set forth in Kuyper, supra.

There are several additional reasons this Court lacks appellate jurisdiction: First, a litigant may only appeal a judgment that is final. The QDRO entered in this matter was not a final, appealable judgment. Respondent's first and second points relied on will address this particular jurisdictional complaint.

The second reason this Court lacks jurisdiction is that the Petitioner is not an aggrieved party to the complaint about the QDRO and therefore the Appellant lacks standing to appeal the entry of the QDRO. This issue will be addressed more thoroughly in Respondent's second point relied on.

While this Court may lack direct appellate jurisdiction, this Court continues to have the authority to issue writs. See Article V, Section 10 (authorizing the Supreme Court to issue writs of certiorari). This Court may issue a writ of certiorari to the Court of Appeals when this Court believes the Court of Appeals is acting contrary to its jurisdictional authority or has issued a void judgment. State ex rel Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 465 (Mo. 1935). In addition, mandamus will lie when the Court of Appeals has dismissed an appeal

for lack of jurisdiction. State ex rel. Wabash R. Co. v. Shain, 341 Mo. 19, 23 (Mo. 1937). Cf. State ex rel. Crites v. Sho-Me Dragways, et al., 719 S.W.2d 785 (Mo. 1986) (denying a writ of mandamus when the Court of Appeals has held there is a lack of appellate jurisdiction yet granting transfer and retransferring the case to the Court of Appeals for a determination on the merits).

Although the Supreme Court is authorized to issue a mandamus, the mandamus is not a writ of right and thus its issuance is subject to this Court's discretion. State ex rel. Yale Univ. v. Sartorius, 349 Mo. 1039 (Mo. 1942). Citing judicial economy, this Court has, on rare occasions, converted a direct appeal to a petition for a writ, at least in matters involving habeas corpus writs. See Larson, 79 S.W.3d at 893 (converting an appeal for a denial of a motion to set aside a guilty plea to a petition for a writ of habeas corpus for purposes of permitting appellate review). See also Jones v. State, 471 S.W.2d 166, 168-69 (Mo. 1971).

This Court may also treat a petition for writ of habeas corpus as a petition for writ of mandamus. State ex rel Haley v. Goose, 873 S.W.2d 221 (Mo. 1994). Respondent has been unable to locate any cases where this Court has converted a direct appeal to a petition for writ of mandamus. However, “[t]his Court may not obtain jurisdiction of the subject matter of [an] appeal by consent, waiver, or in the interest of judicial economy.” Kuyper, 838 S.W.2d at 438 (stating “The

jurisdiction of this Court may not be expanded beyond its constitutional limits, even in the name of judicial economy.”).

Finally, the Notice of Appeal was not timely filed, as set forth in Respondent’s second point relied on, and therefore this Court also lacks jurisdiction over this appeal. There has been no motion to file a Notice of Appeal out of time.

As a result of the lack of a final appealable order, the lack of standing, and the lack of any authority to review this matter on direct appeal, and the failure of the Appellant to file the Notice of Appeal in a timely fashion without leave from this Court or the Court of Appeals, the Respondent respectfully states that this Court lacks jurisdiction to review this matter on direct appeal and therefore this appeal should be dismissed.

STATEMENT OF FACTS

On October 7, 1994 the Circuit Court of the City of St. Louis entered Findings of Fact, Conclusions and Decree of Dissolution regarding the marriage of the parties to this appeal. (L.F. 6-20). The Decree used a complicated formula to determine the marital portion of the Appellant's retirement plans. (L.F. 22-23). On July 9, 2001 the Circuit Court entered a Qualified Domestic Relations Order (QDRO) that included a provision for distributing Respondent's survivor benefits. (L.F. 30). A Notice of Appeal was filed on August 20, 2001 and a Judgment Nunc Pro Tunc was entered on November 1, 2001 without the presence of any party.

ARGUMENT

- I. **THERE IS NO BASIS FOR RAISING AN ALLEGATION OF ERROR AGAINST THE COURT OF APPEALS IN THAT APPEALS TO THE SUPREME COURT ARE NOT TREATED AS CHARGING THE COURT OF APPEALS WITH ERROR PURSUANT TO RULE 83.09. THIS COURT, AS WELL AS THE COURT OF APPEALS, LACKS APPELLATE JURISDICTION BECAUSE THE QDRO'S USE OF THE WORD DECREE WAS NOT FOR THE PURPOSE OF DENOMINATION AS A DECREE AND THEREFORE THIS COURT LACKS A FINAL, APPEALABLE JUDGMENT TO RULE UPON.**

Petitioner's first point relied on refers to allegations of appellate court error. Transfers to the Supreme Court are not for the purpose of convicting the appellate court of error. Rule 83.09. See also State v. Scott, 521 S.W.2d 448 (Mo. 1975).

The Court of Appeals correctly followed the law in its determination that the QDRO was not a final appealable judgment. Appellant argues that the inclusion of the word "decree" in the QDRO magically transforms the QDRO into an appealable judgment. In support, Appellant states that the QDRO contained the word decree on two different occasions. The first occasion was the introductory

paragraph setting forth the title of the Decree of Dissolution. The second occurrence is in the wherefore clause, used for the same purpose.

Appellant's tortured reasoning would mean that the mere existence of the word "decree" in the document would convert the QDRO into an appealable judgment. Appellant misconstrues the holding of this Court in City of St. Louis v. Hughes, 950 S.W.2d 850 (Mo. 1997). In Hughes, this Court held that the existence of the word judgment in the document might be an indication that a document is a final judgment if it is clear from the context used. In this case, a review of the recitation of the word "decree" in the QDRO reveals that it was used merely to recite the title of the divorce decree and not used to transform the QDRO into a decree itself.

Appellant cites a stream of cases in support of his position that a QDRO is independently appealable. In Seal v. Raw, 954 S.W.2d 681 (Mo. Ct. App. 1997), the Western District ruled on an appeal from a motion to set aside a QDRO. In Moore v. Moore, 971 S.W.2d 943 (Mo. Ct. App. 1998), the Appellant filed a motion for reconsideration of the QDRO and filed his appeal upon denial of that motion. In Starett v. Starett, 24 S.W.3d 211 (Mo. Ct. App. 2000), a party appealed the trial court's entry of a judgment, which included a QDRO, pertaining to a motion to enforce a property division.

The posture of this case is distinguishable from the above-cited cases. In this case, a QDRO was entered quite some time after the entry of the Decree of

Dissolution. The Appellant filed no authorized motion to modify the QDRO. The Appellant filed no pleading alerting the trial court to possible error. In addition, there is no indication that any party raised the appellate jurisdiction question as to QDROs on any of the above cases. Therefore, there is no final appealable order for this Court to review.

II. THIS COURT LACKS APPELLATE JURISDICTION OVER THIS APPEAL IN THAT THE “NUNC PRO TUNC” ORDER WHICH ATTEMPTED TO TRANSFORM THE QDRO INTO A “JUDGMENT” WAS ENTERED UNTIMELY AND ERRONEOUSLY AND THUS THERE IS NO FINAL JUDGMENT SUBJECT TO APPELLATE REVIEW, THE NOTICE OF APPEAL WAS FILED UNTIMELY WITHOUT LEAVE OF COURT TO FILE THE NOTICE OF APPEAL OUT OF TIME, AND THE APPELLANT FAILED TO RAISE ANY ISSUE REGARDING THE QDRO AT THE TRIAL COURT LEVEL; AND THE APPELLANT LACKS STANDING TO PURSUE THIS APPEAL BECAUSE HE IS NOT AN AGGRIEVED PARTY, ALL OF WHICH BEAR DIRECTLY ON THE JURISDICTION OF THIS COURT TO REVIEW THIS MATTER ON DIRECT APPEAL.

Respondent (Wife) maintains that the QDRO entered by the trial court on July 9, 2001 was in conformance with the Findings of Fact, Conclusions, and

Decree of Dissolution entered by the trial court on October 7, 1994. The Respondent incorporates the arguments pertaining to whether the Court of Appeals erred as set forth in her response to the first Point Relied On.

A. The trial court improperly entered a Nunc Pro Tunc order declaring the QDRO to be a judgment in that the trial court entered the order outside of the 30 days time for the Court and after the Notice of Appeal had been filed.

On or about July 9, 2001 the trial court entered its QDRO in this matter. Appellant filed his Notice of Appeal on August 20, 2001. On November 1, 2001 the trial court, sua sponte, issued a nunc pro tunc order declaring the QDRO to be a Judgment.

Once the Appellant filed a Notice of Appeal, the trial court lost jurisdiction to enter any order in this cause. Jordan v. City of Kansas City, 972 S.W.2d 419 (Mo. Ct. App. 1998) (holding that the trial court lost jurisdiction to change the judgment once the notice of appeal was filed). A nunc pro tunc is only effective within 30 days of the entry of a judgment and there is no separate rule authorizing amendments to orders. Mo. Rule Civ. Pro. 75.01. In this case, not only did the trial court lack jurisdiction to enter an nunc pro tunc order as a result of the filing of the Notice of Appeal, the nunc pro tunc order was entered well outside the mandatory time limits of Rule 75.01. Thus, the only order properly in front of this Court is the “Qualified Domestic Relations Order” entered on July 9, 2001.

In addition, the Court of Appeals in the opinion below, held that a “nunc pro tunc” order could not be used to convert a document into a judgment for purposes of determining appealability. The reasoning for this holding is consistent with the provisions of the Missouri Rules of Civil Procedure. Rule 81.04(a) permits the appeal of orders and judgments. Section 512.020 RsMo authorizes appeals from orders rendered after final judgment for the purposes of enforcement. A judgment is entered when a writing, signed by the judge and denominated 'judgment', is filed. Rule 74.01(a). It must be clear from the writing of the trial court that the document is being called a judgment. City of St. Louis v. Hughes, 950 S.W.2d 850, 853 (Mo. 1997).

A nunc pro tunc order is intended to modify the record to reflect the true judgment of the court in the nature of clerical errors of the court. See Pirtle v. Cook, 956 S.W.2d 235, 241 (Mo. 1997). In Pirtle, this Court set forth the history of the nunc pro tunc remedy and the appropriate uses for the remedy. This Court held that the Appellant has the burden of proving that the original order entered did not accurately reflect the Court’s intentions and the change made by the nunc pro tunc must be discernible from the record. Id. at 243. Thus, the Court of Appeals was correct in its holding that the Circuit Court’s attempted use of the nunc pro tunc remedy to modify the title of the QDRO to include Judgment was in error in conformance with Keck v. Keck, 996 S.W.2d 652 (Mo. Ct. App. 1999).

B. This Court lacks general appellate jurisdiction over the QDRO entered on July 9, 2001 in that the trial court has not entered a final judgment.

A final “judgment” is required in order for this court to exercise its general appellate jurisdiction. Gillespie v. Gillespie, 634 S.W.2d 493 (Mo. Ct. App. 1982). Rule 74.01 states that a judgment is entered when it is denominated as such by the trial court.

In St. Louis v. Hughes, 950 S.W.2d 850 (Mo. 1997), this Court refused to confer general appellate jurisdiction when a party attempted to appeal four separate orders. This Court clearly stated:

The requirement that a trial court must "denominate" its final ruling as a "judgment" is not a mere formality. It establishes a "bright line" test as to when a writing is a judgment. The rule is an attempt to assist the litigants and the appellate courts by clearly distinguishing between when orders and rulings of the trial court are intended to be final and appealable and when the trial court seeks to retain jurisdiction over the issue.

Id. at 853.

In this matter, the QDRO entered on July 9, 2001 was not labeled as a Judgment and thus this Court has no jurisdiction to rule on this appeal. As stated above, the use of the “nunc pro tunc” remedy was inappropriate for converting the QDRO into a separate, appealable judgment.

C. This Court lacks appellate jurisdiction since the Notice of Appeal in this matter was filed untimely, without leave of Court to file the Notice of Appeal out of time, and the timely filing of a Notice of Appeal is required for appellate jurisdiction on a direct appeal.

Both Section 512.050 RsMo and Rule 81.04(a) require that a Notice of Appeal be filed within 10 days of the date the order appealed becomes final. If the notice of appeal is not filed in a timely fashion, the Court of Appeals lacks jurisdiction over the appeal and must dismiss. In re Marriage of Huey, 716 S.W.2d 479 (Mo. Ct. App. 1986). A special order issued after a final judgment, as opposed to a judgment, is immediately appealable pursuant to Section 512.020 RsMo. Such a provision applies to the appealability of post-trial enforcement orders. McFadden v. Hartman, 677 S.W.2d 948 (Mo. Ct. App. 1984).

In this case, the challenged order was entered on July 9, 2001. The Notice of Appeal was not filed until August 20, 2001, approximately 42 days after the issuance of the QDRO. Thus, to the extent this QDRO is appealable, the Appellant's failure to timely file a Notice of Appeal causes this Court to lack appellate jurisdiction.

D. The Appellant failed to preserve any issues regarding the entry of the QDRO at the trial court level and therefore this Court is estopped from addressing the issues raised in Appellant’s brief on appeal.

The trial court entered the QDRO on June 14, 2001. The docket entries in Appellant’s legal file indicate that the Appellant failed to file any motion in the trial court asking the trial court to amend or modify the QDRO. In Wells v. Wells, 998 S.W.2d 165 (Mo. Ct. App. 1999), the Western District held that, pursuant to Section 452.330.5 RsMo, the trial court retains jurisdiction to modify a QDRO to conform to the terms of the court’s property distribution order. However, the Appellant never filed a motion to modify the QDRO at the trial court level.

In Walker v. Walker, 954 S.W.2d 425 (Mo. Ct. App. 1997), the Court of Appeals stated that a party could not raise an issue on appeal regarding a QDRO that had not been raised at the trial court level. Id. at 428 (holding “In Missouri, parties are estopped from raising issues on appeal which were not raised at the trial court level.”).

The legal file, including the docket entries, reveals that the Appellant failed to file any type of motion in the trial court asking for affirmative relief and failed to file any challenge to the QDRO with the exception of notice of this pending appeal. As a result, this Court is estopped from reviewing the trial court’s entry of the QDRO.

E. The Appellant lacks standing to pursue this appeal pertaining to survivorship benefits since he is not an aggrieved party in interest.

Section 512.020 RsMo sets forth the standards for who may appeal a judgment. Pursuant to Section 512.020 RsMo., a party is “aggrieved” within the meaning of the statute when the judgment operates prejudicially and directly on his personal or property rights or interests and such effect is immediate and not merely a possible remote consequence. Shelter Mut. Ins. v. Briggs, 793 S.W.2d 862 (Mo. 1990). Embedded within this definition of a party aggrieved is the requirement that the judgment appealed from must prejudicially affect the legal rights of the appellant.

While Appellant certainly meets the first prong of standing – he is a party to the underlying action – he fails the standards for proving that his claim of error pertaining to survivorship benefits will affect his property rights and he has also failed to demonstrate a direct and immediate harm from the entry of the Court’s QDRO. Survivorship benefits only trigger upon the death of the pension holder. A survivor obtains no benefits prior to that time.

As to the second prong that the judgment must prejudicially affect the legal rights of the appellant, this Court must look to ERISA to determine the nature of survivorship benefits. The only parties affected by the survivor election would be a surviving widow of the Appellant, the Respondent, and the Plan Administrator.

See 29 U.S.C. Section 1132 (Supp. 1997) (stating that a participant may file a civil action regarding benefits to the participant or to address actions that violate the plan's provisions). The potential for dispute over "surviving spouse" benefits would be a dispute involving the Plan Administrator, the Respondent, and any future spouse of the Appellant.

Regarding the third prong – the need for the prejudicial effect to be direct and immediate -- the Appellant's interests in the "surviving spouse" benefit are non-existent since the benefits only trigger upon the Appellant's death. In addition, this issue is not ripe for review in that there is no present consequence to the QDRO, merely a remote consequence that Appellant might remarry and die before the Respondent.

III. THE TRIAL COURT DID NOT ERROR IN ENTERING THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO) WHICH AWARDED SURVIVOR BENEFITS TO THE RESPONDENT IN THAT ENFORCEMENT OF THE QDRO IS PREEMPTED BY ERISA WHICH REQUIRES AN AFFIRMATIVE ACT OF A SPOUSE IN ORDER TO WAIVE SURVIVOR BENEFITS, WHICH DID NOT OCCUR IN THIS MATTER SINCE THE DISSOLUTION WAS TRIED BY THE COURT, AND WHEN ERISA CONTINUES TO PROVIDE SURVIVING SPOUSE

**BENEFITS TO ANY POTENTIAL FUTURE SPOUSE OF THE
APPELLANT.**

The trial court entered Findings of Fact, Conclusions and Decree of Dissolution on October 7, 1994. In said decree, several provisions were entered pertaining to the allocation of marital property. The pertinent provision is set forth in paragraph 20 and it provides:

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 the 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 . . . (L.F. 22-23).

Husband and Wife were married on May 13, 1978. (L.F. 6). The Court made a specific finding that there was no separate property of the parties. (L.F. 8). The QDRO entered in this matter awarded Wife 50% of the value of the vested accrued benefits as of October 7, 1994. Also, pursuant to the QDRO, the alternate payee shall be deemed to be the surviving spouse and therefore entitled to receive the

portion of the death benefit payable under the plan for the entire accrued benefit prior to the date of dissolution. (L.F. 30).

A. The QDRO entered by the trial court does not provide for distributions that differ from the underlying dissolution decree.

Appellant complains that the initial dissolution decree did not provide for the Respondent to receive survivorship benefits. Appellant cites Wells v. Wells, 998 S.W.2d 165 (Mo. Ct. App. 1999). In Wells, the husband filed a motion to modify wife's QDRO arguing that the QDRO did not comply with the terms of the property settlement agreement. Id. at 166. Under the terms of the property settlement agreement, Wife would receive 50% of Husband's retirement plan as of the date of dissolution. The QDRO further granted wife full survivorship benefits in the event husband predeceased wife.

The Wells court held that "without the designation of [Wife] as a surviving spouse, her interest in the plan would be lost if [Husband] died before retirement and would end when he died after retiring." Id. at 167. The Court further stated that Wife's designation, as a surviving spouse in Husband's retirement plan, is appropriate. Id. at 167. The Wells court then held that the "surviving spouse" language in the QDRO gave Wife a windfall in the event the Husband predeceased the wife by giving Wife the entire participant's share. Id. at 167-68.

However, a review of the QDRO entered by the Circuit Court in this matter reveals somewhat different language from that in Wells. First, the benefit division date and the commencement dates are defined in paragraphs H and I of the QDRO. (L.F. 28). The Alternate Payee is awarded 50% of the present value of the plan pursuant to paragraph IIA. (L.F. 28). Paragraph III sets forth the death benefits stating that the alternate payee shall be the 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." (L.F. 30). Appellant has not filed with this Court a copy of the provisions of the Plan defining how the company would define a surviving spouse benefit. Finally, paragraph IV.A.2 states that nothing in the QDRO shall require the Plan to provide increased benefits to an alternate payee. (L.F. 30). This final phrase was missing from the QDRO in the Wells case.

B. ERISA preempts state law with respect to interpretation of survivor benefits under defined benefit and defined contribution plans.

Appellant argues that the language in the QDRO entered by the trial court divests the Appellant's future spouse of any potential survivor benefits. Such an interpretation is incorrect under federal law. The interpretation of pension plans is governed by the federal enactment of the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. Sect. 1056 et seq. (Supp. 1997). ERISA

preempts all state law relating to employer funded employee retirement benefits. 29 U.S.C. Sec 1144(a) (Supp. 1997). See also Boggs v. Boggs, 117 S. Ct. 1754 (1997). ERISA specifically provides that a former spouse may be treated as a surviving spouse for purposes of calculating the form of payment under a QDRO. 29 U.S.C. Section 1056(F).

By the terms of ERISA, a QDRO cannot be used to eliminate survivor benefits without the written, notarized consent of the spouse. 29 U.S.C. Sec. 1055(a)(2) & (c)(2)(A). Almost all plans are subject to the Retirement Equity Act qualified pre-retirement survivor annuity (“QPSA”) and qualified joint and survivor annuity (“QJSA”) requirements. See IRC Sec. 401(a)(11) Sec. 417. If the participant dies prior to the "annuity starting date" a current spouse must be provided with a qualified pre-retirement survivor annuity ("QPSA"), and if the participant dies after the annuity starting date, payments must be exclusively in the form of a qualified joint and survivor annuity ("QJSA"). IRS Reg. § 1.401(a)-20. See also 29 U.S.C. Section 1055 (Supp. 1997).

The Retirement Equity Act (REA) mandates distribution to the employee upon maturity by a nonassignable joint and survivor annuity or survivor's annuity, unless otherwise agreed by the participant and his or her spouse. Id. Qualified plans, such as the one in this case, are governed by REA and Title I of ERISA. IRC Sec. 401(a). However, individual plans may provide for the survivor annuity to

only pay 50% of the benefits to the surviving spouse. See 29 U.S.C. Sec. 1055(e)(2) (Supp. 1997).

A spouse's right as beneficiary under an ERISA governed plan can only be extinguished by specific statements indicating those rights are extinguished. National Auto Dealers & Assocs. Retirement Trust v. Arbeitman, 89 F.3d 496, 500 (8th Cir. 1996). See also 29 U.S.C. Sec. 1055 (Supp. 1997).

A spouse can agree to waive those rights in a separation agreement, but the agreement must be clear regarding the waiver. See Hurwitz v. Sher, 982 F.2d 778 (2d Cir. 1992), cert. denied, 508 U.S. 912 (1993) (holding that state law is not to be applied to determine the adequacy of antenuptial waivers of surviving spouse benefits). See also Moore v. Philip Morris Co., 8 F.3d 335 (6th Cir. 1993) (holding that ERISA preempts Kentucky state law which causes forfeiture of all rights in property of the other spouse for certain marital misconduct and therefore a specific written waiver from the spouse is required); Estate of Altobelli v. IBM, 77 F.3d 78 (4th Cir. 1996) (holding that a spouse may waive, in a notarized separation agreement, her right to spousal benefits). A spouse's intent to waive survivor benefits is irrelevant and the waiver must comply with the very strict requirements of ERISA. Lasche v. George W. Lasche Basic Profit Sharing Plan, 111 F.3d 863 (11th Cir. 1997).

In addition, any decree by a Court divesting a spouse of survivor benefits must clearly state that survivor benefits are to be divested. Hill v. AT&T Corp., 125 F.3d 646 (8th Cir. 1997) (declaring the federal common law for the 8th Circuit to be that a divorce decree must specifically set forth a waiver of survivorship benefits in order to divest a spouse of survivor benefits). See also Lyman Lumber v. Hill, 877 F.2d 692 (8th Cir. 1989) (holding that a divorce decree which does not specifically extinguish survivorship interests does not operate to divest a former spouse of survivorship benefits).

In this case, there is no language indicating that the trial court terminated Respondent's rights to the survivor benefits. Under the terms of ERISA, a trial court could not, even if it chose to do so, divest the Respondent of her survivorship benefit rights, without her consent. There is no dispute that the Respondent has not and does not consent to the extinguishment of her surviving spouse benefits. The Respondent has an absolute right to survivor benefits under ERISA and such a determination is made pursuant to ERISA not Section 452.330 RsMo. Therefore, under ERISA, the trial court lacked any authority to waive survivorship benefits, had that been the trial court's intent, without the consent of the spouse. There was no such spousal consent in this matter and therefore the QDRO signed by the trial court was appropriate and this appeal should be dismissed, or, in the alternative, the QDRO affirmed.

CONCLUSION

For all of the foregoing reasons, Appellant's appeal should be dismissed for lack of appellate jurisdiction and lack of standing. In the alternative, this Court should affirm the QDRO entered by the trial court on the basis that federal ERISA law provides the protection for subsequent survivor spouses that Appellant raises.

CERTIFICATE OF COMPLIANCE

Respondent certifies that one (1) copy of the foregoing Substitute Brief of Respondent and one (1) copy of the disk were mailed, as specified in Rule 84.06(a), U.S. postage prepaid this _____ day of November, 2002 to: Lawrence Gillespie, Gillespie, Hetlage, & Coughlin, L.L.C., 7701 Forsyth Blvd., Suite 300, Clayton, MO 63105-1877. Counsel further certifies that this brief contains 6253 words and that the disk provided to the Supreme Court has been scanned for viruses and is virus free.
