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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Circuit Court of St. Louis County, Division 35, Thea Sherry presiding on Appellant's Motion for Approval of Qualified Domestic Relations Order.

The Missouri Court of Appeals, Eastern District affirmed the Judgment of the trial and further denied Appellant's Motion for Rehearing and/or Transfer. This Court sustained Appellant's Application for Transfer on October 23, 2001. Jurisdiction lies with the Supreme Court pursuant to Mo. Const. Art V, Section 10 as well as Section 512.020 R.S. Mo and Supreme Court Rule 83.04.

STATEMENT OF FACTS

This appeal involves a post decree domestic relations matter. The parties, Appellant Paulette Ochoa, (herein after referred to as “Wife) and Respondent, Marco Ochoa (hereinafter referred to as “Husband”) were legally separated by a decree of the Circuit Court of St. Louis County on March 6, 1987. (L.F. 14) Pursuant to the decree Wife was awarded seventy-five percent (75%) of Husband’s pension and supplemental savings plan including all additions and increases post decree. (L.F.25, L.F. 27[Paragraph 10.5])

Over the years the parties have filed various post decree motions, none of which are germane to this appeal. (L.F. 1, 5, 44 and 52). Wife filed her *Motion for Approval of Qualified Domestic Relations Order*, on June 30, 2000, which is the subject of this appeal. (L.F. 58-61) (Italics added.)

Wife submitted to the court as part of her Motion for Approval of Qualified Domestic Relations Order a copy of her letter dated June 2, 1987 to Chrysler Corporation, St. Louis Assembly Plant in which she requested that a copy of the court’s decree be placed in Husband’s records. (L.F. 68) Wife also submitted a letter dated August 13, 1987 from Merrill Lynch, Plan Administrator for the *Chrysler Savings Plan* (italics added) indicating that while it had received a copy of the Court’s Decree it could take no further action regarding Husband’s saving plan account without an “additional court order”. (L.F. 66)

Wife made no further efforts to file a qualified domestic relations order on the Chrysler Savings Plan until January and February 2000. (L.F. 59) Further, wife

presented no evidence of any attempt to file a qualified domestic relations order on the Chrysler Pension Plan until January and February 2000. (L.F. 59)

The Circuit Court of St. Louis County, Judge Thea Sherry denied Wife's Motion for Approval of Qualified Domestic Relations Order on July 20, 2000 (L.F. 69) Said order was made final for purposes of appeal on August 8, 2000. (L.F. 70)

The Court of Appeals, Eastern District of Missouri affirmed the Circuit Court's Order on May 1, 2001. On May 16, 2001 Wife filed her Motion for Rehearing and/or Transfer, which was supplemented on June 4, 2001. In her Motion for Rehearing Wife raised the issue of the amendment of Section 516.350 by Senate Bill 10, to become effective August 28, 2001. The Court of Appeal denied Wife's Motion for Rehearing and/or Transfer on September 7, 2001. Wife filed her Application for Transfer with this Court on September 24, 2001.

POINTS RELIED ON

I

THE TRIAL COURT CORRECTLY DENIED WIFE'S MOTION FOR APPROVAL OF QUALIFIED DOMESTIC RELATIONS ORDERS AS THE JUDGMENT HAD NOT BEEN REVIVED WITHIN TEN YEARS, NOR HAD WIFE PERFECTED THE FILING OF ANY QUALIFIED DOMESTIC RELATIONS ORDERS WITHIN THE TEN YEAR PERIOD AND THEY WERE THEREFORE BARRED BY R.S. MO. SECTION 516.350.1.

Cases:

Starrett v. Starrett, 24 S.W.2d 3d 211 (Mo. App. E.D. 2000)

Hanff v. Hanff, 987 S.W. 2d 352 (Mo. App. E.D. 1998)

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

Statutes:

Section 516.350.1, R.S. Mo.

Section 452.330.5, R.S.Mo.

II

THE JUDGMENT OF THE TRIAL COURT, DENYING WIFE'S MOTION FOR APPROVAL OF THE QDRO, SHOULD BE AFFIRMED AS SECTION 516.350 R.S.MO. AS AMENDED EFFECTIVE AUGUST 28, 2001 SHOULD NOT BE APPLIED RETROACTIVELY AS THE MISSOURI LEGISLATURE HAS CLEARLY MANIFESTED ITS INTENT THAT THE AMENDED STATUTE BE APPLIED ONLY TO THOSE JUDGMENTS WHICH HAVE NOT BEEN PRESUMED PAID AS OF AUGUST 28, 2001.

Helfenbein v. Helfenbein, 871 S.W.2d 131 (Mo. App. E.D. 1994)

Lanning v. Lanning, 574 S.W.2d 460 (Mo. App. W.D. 1978)

Pourney v. Seabaugh, 604 S.W.2d 646 (Mo. App. E.D. 1980)

Wade v. Frawley, 966 S.W.2d 405 (Mo. App. E.D. 1998)

Statutes:

Mo. Const. Article 1, Section 13

Section 516.350.1, R.S. Mo. (1996)

Section 516.350.1, R.S. Mo. (2001)

Section 516.350.3, R.S. Mo

Authorities:

Black's Law Dictionary 5th Edition

ARGUMENT

Point I

THE TRIAL COURT CORRECTLY DENIED WIFE’S MOTION FOR APPROVAL OF QUALIFIED DOMESTIC RELATIONS ORDERS AS THE JUDGMENT HAD NOT BEEN REVIVED WITHIN TEN YEARS, NOR HAD WIFE PERFECTED THE FILING OF ANY QUALIFIED DOMESTIC RELATIONS ORDERS WITHIN THE TEN YEAR PERIOD AND THEY WERE THEREFORE BARRED BY R.S. MO. SECTION 516.350.1.

The parties, Paulette Ochoa, (herein after referred to as “Wife) and Marco Ochoa (hereinafter referred to as “Husband”) were legally separated by a decree of the Circuit Court of St. Louis County on March 6, 1987. Pursuant to the decree Wife was awarded as a division of marital property, seventy-five percent (75%) of Husband’s pension and supplemental savings plans including all additions and increases post decree. On June 30, 2000 for the first time and more than thirteen years after the Decree and Judgment was entered, Wife presented proposed Qualified Domestic Relations Orders (Hereinafter QDRO) to the Circuit Court for approval and entry. After receiving oral and written arguments the Circuit Court denied issuance of

the proposed QDROs due to Wife's failure to perfect her QDRO within the ten-year statute of limitations contained in R.S.Mo. Section 516.350.¹

Section 516.350.1 R. S. Mo. states in part: "Every ... decree of any court of record of the United States, or of this or any other state...shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant...then after ten years from and after such revival...such judgment shall be *conclusively presumed* to be paid, and *no execution, order or process shall issue thereon*...for any purpose whatever. (Emphasis added)

Shortly before Wife presented her QDROs for approval, the Missouri Court of Appeals, Eastern District held that enforcement of property division provisions of a decree are subject to the limitations contained in Section 516.350.1. Starrett v. Starrett 24 S.W. 3d 211 (Mo. App. E.D. 2000) The Starrett Court also ruled that "the failure to revive a dissolution judgment within ten year period ... precludes action and the period begins to run when the judgment is rendered, not when the debt becomes certain, due or enforceable." Starrett supra citing Hanff v. Hanff, 987 S.W. 2d 352 (Mo. App. E.D. 1998) Wife admits that trial courts have no authority to issue an original QDRO after the ten year period had run. (Appellant's *Substitute brief page 19.*)

¹For purposes of the section of Respondent's brief, all statutory references are to the Revised Statutes of Missouri prior to the amendments effective August 28, 2001.

The statutory method of judgment revival is exclusive.² Nothing contained in Wife's Brief, Legal File or elsewhere indicates any effort by Wife to revive her Judgment pursuant to the statutory procedures. Wife's Motion for Approval of Qualified Domestic Relations Order(s) was filed on June 30, 2000 well over thirteen years after the Decree of Legal Separation was entered. Section 516.350.1 clearly bars Wife's request, which seeks to enforce the Courts division of marital property.

Wife attempts to distinguish her actions from those of Starrett. In her briefs, Wife now argues that her Motion for Approval of Qualified Domestic Relations Order was really a Motion to Modify an already existing QDRO pursuant to R.S. Mo Section 452.330.5. This is clearly not the case.

Wife's Memorandum in Support of her QDRO belies the position she currently takes as to the status of her Motion. Her request that the court *approve* her proposed QDROs indicates her belief that no QDROs existed at the time of such request. Wife now argues that the separation agreement prepared by Wife's attorney and signed by Husband, pro se, constitutes a QDRO. The trial court issued a Decree of Legal Separation, which incorporated the parties "Agreement" dividing their assets. The Court never executed a Qualified Domestic Relations Order regardless of what the Wife claims was the "intention of the parties."

² R.S.Mo. Sections 511.370 through 511.430 and Rule 74.09 describe the procedure for revival of judgments.

Wife likens her situation to the one in Wells v. Wells, 998 S.W. 2d 165 (Mo. App. 1999) when the two situations are clearly distinguishable. In Wells the trial court issued a QDRO, which was perfected by service and acceptance by the Pension Plan Administrator. Wells supra at 166. Further, the issue in Wells involved husband's *Motion to Modify* the QDRO two years after the same had been issued. The court was not asked to implement a QDRO for the first time, but to amend the QDRO pursuant to Section 452.330.5. The Court never addressed the issue of a Section 516.350.1 bar because the parties never raised it as the moving party's actions were clearly within the ten-year period. Section 452.330.5 contains no time limits within its language, however, nothing in the Wells Court holding addresses the issue of a bar under 516.330.1. In his concurring opinion in Starrett Judge James Dowd correctly points out that "judgments involving pensions, life insurance and other property often require payments over a period of time yet are *not currently excluded in Section 516.350*" Starrett supra at page 214.³ (Emphasis added.) Section 516.350.1 (prior to the amendment of 2001) created a bright line test as to the enforceability of judgments and any attempt to resolve what Wife believes to be a conflict between the bar of Section 516.350.1 and Section 452.330.5 should be resolved by the legislature.

³ Section 516.350 specifically excludes any "judgment, order or decree awarding child support or maintenance which mandates the making of payments over time" from the coverage of the ten year bar.

CONCLUSION

POINT I

Wife accuses Husband of “attempting to absolve himself from the obligation he undertook” and further states that the trial court’s refusal to now issue the requested QDROs is “incredibly unjust.” Wife fails to recognize that her instant problems are of her own making. After initially contacting Husband’s employer in 1987 wife took no further action to perfect her property rights in Husband’s pension and savings plans by either attempting to obtain executed QDROs or even reviving the Judgment until 2000 when the parties were involved in additional litigation arising from their marriage. Wife does not allege that Husband has in any way attempted to frustrate her claimed right nor is any evidence of the same presented. Wife now asks this Court to rescue her from her own folly.

This Court should affirm the Judgment of Judge Sherry in that Section 516.350.1 is a bar to the very action Wife has requested.

ARGUMENT

II

THE JUDGMENT OF THE TRIAL COURT, DENYING WIFE’S MOTION FOR APPROVAL OF THE QDRO, SHOULD BE AFFIRMED AS SECTION 516.350 R.S.MO. AS AMENDED EFFECTIVE AUGUST 28, 2001 SHOULD NOT BE APPLIED RETROACTIVELY AS THE MISSOURI LEGISLATURE HAS CLEARLY MANIFESTED ITS

INTENT THAT THE AMENDED STATUTE BE APPLIED ONLY TO THOSE JUDGMENTS WHICH HAVE NOT BEEN PRESUMED PAID AS OF AUGUST 28, 2001.

It should be noted that Wife first raised her second issue on her appeal to this Court.⁴ Section 516.350 was amended effective August 28, 2001. The effect of the 2001 amendments was to create another class of judgments not barred by § 516.350's 10-year limitation.

§ 516.350 now states in part that “ any judgment, order or decree . . . dividing pension, retirement, life insurance, or other employee benefits in connection with a dissolution of marriage, legal separation or annulment which mandates the making . . . of payments in the future...” shall be exempted from the conclusive presumption of payment.

It would appear that the Missouri Legislature was attentive to the urging of Judge James Dowd in his concurring opinion in Starrett supra at 214 as echoed by Judge Robert Dowd in his opinion in the instant case in the Eastern District Court of Appeals, and reexamined Section 516.350 with respect to obligations such as pensions and the like.

⁴ Wife's various arguments and analysis were neither raised nor argued to neither the trial court, nor the Court of Appeals and are being briefed and presented for the first time to this Court.

While Wife's argument to this Court is couched in numerous phrases and theories, it can be boiled down to the simple belief held by Wife that § 516.350 should be applied retroactively to all judgments that prior to August 28, 2001 had conclusively presumed to have been paid.

§ 516.350 contains no provision that revives any actions that have expired prior to its effective date of August 28, 2001. In fact, when read as a whole, §516.350 clearly acknowledges that certain actions that would no longer be barred by the ten-year limit, shall remain barred if they were presumed paid prior to August 28, 2001.

Revised § 516.350.3 states in part "This subsection shall take effect to all judgment, orders, or decrees *which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001.*" (Emphasis added). The legislature clearly recognized that any such judgment that was barred (by the old §516.350) prior to August 28, 2001 would remain so barred. Any other interpretation of the language contained in § 516.350 flies in the face of logic and common sense and would render this sentence meaningless. Wife argues that the 2001 amendment of § 516.350 should renew a judgment that has already lapsed. § 516.350 was previously amended in 1982 to create an exception for maintenance and child support. Missouri courts have consistently held that the 1982 amendment "could not be used to renew an already lapsed judgment". Helfenbein v. Helfenbein, 871 S.W.2d 131 (Mo. App. E.D. 1994); Sparks v. Trantham, 814 S.W.2d 621 (Mo. App. S.D. 1991); Walls v. Walls, 673 S.W.2d 450 (Mo. App. E.D. 1984). Wife admits that once a statute of limitation expires and bars an action, the right accrued by a "defendant" is substantive

in nature. [Appellants Substitute Brief pg. 29]. Wife further recognizes that if § 516.350 is substantive it cannot be retroactive in application without being violative of Mo. Const. Article 1, Section 13 prohibiting any retrospective application of the law affecting a substantive right. Doe v. Roman Catholic Diocese of Jefferson City, 862 S.W.2d 338 (Mo. Banc 1993); Wade v. Frawley, 966 S.W.2d 405 (Mo. App. E.D. 1998).

Wife attempts to evade this result by arguing that § 516.350 is not a statute of limitations and as such is procedural in nature, and not violative of the constitutional prohibition of ex-post facto laws.

Black's Law Dictionary 5th Edition defines a statute of limitation as "legislative enactments as prescribe the periods within which actions may be brought upon certain claims or *within which certain rights maybe enforced.*" (Emphasis added).

Missouri courts have held that the only way to overcome the *conclusive presumption* of §516.350 are the methods of revival set forth in the statute itself. Missouri Courts have ruled that even an admission by the judgment debtor that the judgment was not paid would not overcome the presumption of satisfaction. Pourney v. Seabaugh, 604 S.W.2d 646 (Mo. App. E.D. 1980). Missouri courts have furthermore categorized § 516.350 as in essence a super statute of limitation in that not only does it bar the remedy (as a statute of limitations would) but also it "wipes out or cancels the debt itself and extinguishes the right of action." Lanning v.

Lanning, 574 S.W.2d 460 (Mo. App. W.D. 1978); Wormington /Woolsey v. City of Monett, 218 S.W.2d 586 (Mo. banc 1949).

CONCLUSION

Point II

It is clear that § 516.350 like all other sections of Chapter 516 is a statute of limitations and as such is substantive in nature. It is equally as clear that retroactive application of the 2001 amendment of § 516.350, as argued by Wife, is violate of Mo. Const. Article 1, Section 13. Wife now asks this court to relieve her from the results of her own making. This court should affirm the judgment of the trial court, as § 516.350, even as amended, is a complete bar to the action requested by Wife.

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IN THE SUPREME COURT OF MISSOURI

In Re The Marriage Of)	
)	
PAULETTE M. OCHOA)	
)	Supreme Court No. SC83966
Petitioner/Appellant)	Appeal No. ED78368
)	Circuit Court No. 550220
vs.)	
)	
MARCO A. OCHOA,)	Court of Appeals Eastern District
)	Circuit Court St. Louis County
Respondent/Respondent.)	

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of Respondent's Substitute Brief along with a floppy disk containing a copy of Respondent's Substitute Brief were mailed postage prepaid this 11th day of December 2001, to:

Mr. David Kullman
Attorney at Law
301 Sovereign Court, Suite 205
St. Louis, MO 63011-4435

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)	
MARCO A. OCHOA,)	Court of Appeals Eastern District
)	Circuit Court St. Louis County
Respondent/Respondent.)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Comes Now Lawrence Wittels, Attorney for Respondent, Marco Ochoa and states to the Court, pursuant to Rule 84.06(C) as follows:

1. Respondent's Brief includes the information required by Rule 55.03.
2. Respondent's brief complies with the limitations contained in Rule 84.06(b) and Special Rule 1.
3. The number of words in Respondent's Substitute Brief excluding the cover, signature block, certificate of service and this certificate is 3281.
4. A floppy disk containing Respondent's Substitute Brief is attached hereto. Counsel certifies that said disk has been scanned for viruses and is virus free.

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