IN THE SUPREME COURT OF MISSOURI

Supreme Court No. SC86568

JOHN BECK,

Respondent,

vs.

ANN FLEMING (f/k/a Ann Fleming Beck),

Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
Cause No. 563906
Honorable Joseph A. Goeke, III, Judge

SUBSTITUTE BRIEF OF RESPONDENT, JOHN BECK

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STATEMENT OF FACTS

John Beck ("Husband") and Ann Fleming (f/k/a Ann Fleming Beck) ("Wife") were married on December 23, 1978. (L.F. 163). On June 24, 1988, the Circuit Court of St. Louis County entered a Decree of Dissolution, dissolving the marriage (the "Judgment of Dissolution"). (L.F. 160-92). Earlier that same day the parties had executed a Marital Settlement and Separation Agreement, which was incorporated into and made a part of the Judgment of Dissolution. (L.F. 160-92).

The marital property divided by the Judgment of Dissolution included certain stock options which had been granted to Husband by Husband's employer pursuant to a document dated February 5, 1986 (the "Stock Option Agreement"). (L.F. 165, 167-68, 185-92). The Stock Option Agreement conferred upon Husband the right to purchase, at a specified price, up to 66 shares of the stock of Husband's employer, beginning November 5, 1986. (L.F. 186). Under the Stock Option Agreement Husband could exercise all of the options at one time, or he could exercise some but not all of the options, at his election. (L.F. 186). The Stock Option Agreement contained a schedule indicating that Husband's right to exercise the options with respect to thirteen shares would expire on

February 4, 1990; his right to exercise the options with respect to thirteen more shares would expire on February 4, 1991; and so on until February 4, 1994, by which time all of the options either would have been exercised or would expire. (L.F. 186). As of the date the circuit court entered the Judgment of Dissolution, Husband had not exercised any of the options, and none of the options had yet expired. (L.F. 186, 192). Accordingly, as of June 24, 1988, Husband could have immediately exercised all of the options had he wished to have done so.

For its division of the stock options, the Judgment of Dissolution required Husband to pay to Wife 12.5 % of any net profit Husband realized "upon the purchase and sale of" the options. (L.F. 167). The Judgment of Dissolution explained how to calculate the net profit, stated that Husband had the sole and exclusive right to choose whether or not to exercise the options, and exempted Husband from any liability to Wife if he chose not to exercise the options, unless Husband made that decision in bad faith and with the purpose to deprive Wife of her interest in the profits therefrom. (L.F. 167-68).

The court file in the parties' dissolution action contains no record of any activity with respect to the stock options from June 24, 1988, until December 7, 2001. (L.F. 1-6). On December 7, 2001, Wife filed with the trial court her Motion to Enforce Decree of Dissolution of Marriage (the

"Original Motion to Enforce"). (L.F. 156-59). In the Original Motion to Enforce, Wife alleged that Husband had exercised "certain stock options granted to him" but had failed to pay to Wife her share of the net profit. (L.F. 158). Wife further alleged that Husband had failed to exercise all the options and that he had made the decision not to exercise the options in bad faith and with the purpose to deprive Wife of her interest in the profits. (L.F. 158).

On December 11, 2001, Husband filed a Motion to Dismiss the Original Motion to Enforce, alleging that the Original Motion to Enforce failed to state a claim for which relief may be granted. (L.F. 153-55).

On February 26, 2002, Wife filed her Amended Motion to Enforce Decree of Dissolution of Marriage (the "Amended Motion to Enforce"). (L.F. 134-36). In the Amended Motion to Enforce, Wife alleged that Husband exercised "all of the stock options granted to him pursuant to a document dated February 5, 1986, however he has failed to pay to [Wife] the full amount of the net profit realized from said transactions." (L.F. 136).

On March 6, 2002, Husband filed his Motion to Dismiss the Amended Motion to Enforce. (L.F. 127-29). Husband's motion alleged, inter alia, that section 516.350.1 of the Revised Statutes of Missouri barred the court from considering the Amended Motion to Enforce. (L.F 128).

On April 23, 2003, the family court commissioner assigned to the case overruled Husband's Motion to Dismiss the Amended Motion to Enforce. (L.F. 104). On May 2, 2003, Husband moved for a rehearing before a circuit court judge. (L.F. 65-103).

On May 13, 2003, the trial court entered an Order and Judgment on the matter. (L.F. 49). The trial court refused to approve the commissioner's April 23, 2003, recommendation that Husband's motion to dismiss be overruled. (L.F. 49). The trial court returned the case to the commissioner and directed the commissioner to make a finding as to whether the provisions of the Judgment of Dissolution, entered June 24, 1988, had expired pursuant to section 516.350 as of August 28, 2001. The trial court specifically directed the commissioner to determine whether the Judgment of Dissolution had ever been revived or whether (and, if so, when) any payments had ever been made with respect to the Judgment of Dissolution. (L.F. 49).

On May 23, 2003, Husband and Wife entered into a Consent Order & Stipulation. (L.F. 48). In that document the parties (and the commissioner) scheduled an evidentiary hearing "on the sole issue of whether or not 'payments' have been made on the specific stock options portion of" the Judgment of Dissolution. (L.F. 48). The parties also "stipulate[d] that the Judgment has not been revived by [Wife] pursuant to § 516.350 (R.S.Mo.

1999) and Supreme Court Rules by not reviving the property division of the Judgment or the Judgment itself within 10 years of the 1988 Decree of Dissolution. [Wife] maintains the claim that the Judgment may have been revived due to partial payments allegedly made on this portion of the Judgment." (L.F. 48).

On June 11, 2003, Wife filed in the trial court a Partial Satisfaction of Judgment, indicating the Husband had paid Wife the sum of $3,263.63 in February, 1995. (L.F. 42-43). Wife attached to this pleading documentation confirming Husband's payment and Wife's receipt of the funds. (L.F. 44-47).

On July 8, 2003, Wife filed in the trial court another Partial Satisfaction of Judgment. (L.F. 36-37). This pleading stated that Husband had paid Wife $2,782.75 on July 19, 2001, and $20,151.06 on January 7, 2000. (L.F. 36). Wife again attached documentation to this pleading. (L.F. 38-41).

On July 9, 2003, the commissioner called this matter for hearing, at which time the parties entered into another Stipulation. The parties stipulated that "[three] payments were made on the stock option portion of the June 24, 1988 Decree, specifically in February, 1995, in the amount of $3,263.63, on January 7, 2000 in the amount of $20,151.06, and on July 19, 2001 in the amount of $2782.75." (L.F. 22).

On March 10, 2004, the commissioner entered her recommended Judgment. (L.F. 19-20). The commissioner found that none of the stipulated payments made by Husband were "recorded by the clerk of the court as payments made on the Judgment. There were no payments on the record before the 10 years ran." (L.F. 19). The commissioner further found that Wife filed her partial satisfactions of judgment "well after the case was filed and the 10 years had expired." (L.F. 19-20). The commissioner noted that the parties had also stipulated that the Judgment of Dissolution of June 24, 1988, had never been revived. (L.F. 20). The commissioner concluded that the Judgment of Dissolution was unenforceable as of August 28, 2001, pursuant to section 516.350 of the Revised Statutes of Missouri. (L.F. 20).

The commissioner noted that section 516.350 had been amended in 2001, "to make an exception for judgments for employee benefits in connection with a dissolution . . . . However, 'This subsection shall take effect as to all such judgments, orders, or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001.' This Judgment was presumed paid on June 24, 1998. As of August 28, 2001, this Judgment was presumed paid." (L.F. 20). Accordingly, the commissioner determined that "[a] conclusive presumption exists that [Husband] has paid and fulfilled his obligations under this Judgment

regarding the payment of monies for the stock options. The Court has no choice but to dismiss [Wife]'s Motion to Enforce." (L.F. 20).

On March 13, 2004, the trial court approved the findings and recommendations of the commissioner, at which time the Judgment prepared by the commissioner dismissing the Amended Motion to Enforce became the judgment of the trial court. (L.F. 21).

On March 29, 2003, Wife filed a Motion for Rehearing. (L.F. 15-17). The trial court denied this motion on April 20, 2004. (L.F. 7).

In the meantime, on April 15, 2004, Wife had filed her Notice of Appeal. (L.F. 8-9). On November 9, 2004, the Court of Appeals, Eastern District, filed its Opinion, reversing the trial court's judgment. After that Court denied his Application for Transfer and his Motion for Rehearing, Husband filed with this Court an Application for Transfer pursuant to Rule 83.04 of the Missouri Rules of Civil Procedure.

On March 1, 2005, this Court sustained Husband's Application.

POINTS RELIED ON

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S JUDGMENT DISMISSING WIFE'S AMENDED MOTION TO ENFORCE BECAUSE THE JUDGMENT OF DISSOLUTION AS TO THE DIVISION OF THE MARITAL PROPERTY WAS CONCLUSIVELY PRESUMED TO HAVE BEEN PAID MORE THAN THREE (3) YEARS BEFORE WIFE FILED HER ORIGINAL MOTION TO ENFORCE IN THAT THE JUDGMENT WAS ENTERED ON JUNE 24, 1988; PURSUANT TO SECTION 516.350 OF THE MISSOURI REVISED STATUTES THE JUDGMENT WAS PRESUMED PAID TEN YEARS LATER ON JUNE 24, 1998; WIFE DID NOT FILE HER ORIGINAL MOTION TO ENFORCE UNTIL DECEMBER, 2001; AND THE 2001 AMENDMENT TO SECTION 516.350, BY ITS OWN TERMS, DOES NOT APPLY TO RESURRECT A JUDGMENT ALREADY PRESUMED PAID BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

R.S.Mo. § 516.350 (2000)

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

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

In Re Marriage of Ronollo, 936 S.W.2d 188 (Mo.App.E.D. 1996)

Wormington v. City of Monett, 358 Mo. 1044, 218 S.W.2d 586 (Mo. 1949) (en banc)

II. THIS COURT SHOULD NOT JUDICIALLY RE-INTERPRET THE VERSION OF SECTION 516.350 IN EFFECT PRIOR TO THE 2001 AMENDMENT SO AS TO ALLOW WIFE TO BRING HER MOTION TO ENFORCE MORE THAN TEN YEARS AFTER ENTRY OF THE JUDGMENT BECAUSE THE FACTORS THAT LED THIS COURT TO TAKE A SIMILAR STEP IN HOLT ARE NOT PRESENT IN THE CASE AT BAR.

R.S.Mo. § 516.350 (2000)

Pirtle v. Cook, 956 S.W.2d 235 (Mo. 1997) (en banc)

Holt v. Holt, 635 S.W.2d 335 (Mo. 1982) (en banc)

III. THE 2001 AMENDMENT DOES NOT AND CANNOT APPLY RETROACTIVELY TO RESURRECT A JUDGMENT THAT HAD BEEN EXTINGUISHED THREE YEARS BEFORE THE AMENDMENT'S EFFECTIVE DATE.

R.S.Mo. § 516.350 (2000)

Wormington v. City of Monett, 358 Mo. 1044, 218 S.W.2d 586 (Mo. 1989) (en banc)

Dalba v. YMCA of Greater St. Louis, 69 S.W.3d 137 (Mo.App.E.D. 2002)

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S JUDGMENT DISMISSING WIFE'S AMENDED MOTION TO ENFORCE BECAUSE THE JUDGMENT OF DISSOLUTION AS TO THE DIVISION OF THE MARITAL PROPERTY WAS CONCLUSIVELY PRESUMED TO HAVE BEEN PAID MORE THAN THREE (3) YEARS BEFORE WIFE FILED HER ORIGINAL MOTION TO ENFORCE IN THAT THE JUDGMENT WAS ENTERED ON JUNE 24, 1988; PURSUANT TO SECTION 516.350 OF THE MISSOURI REVISED STATUTES THE JUDGMENT WAS PRESUMED PAID TEN YEARS LATER ON JUNE 24, 1998; WIFE DID NOT FILE HER ORIGINAL MOTION TO ENFORCE UNTIL DECEMBER, 2001; AND THE 2001 AMENDMENT TO SECTION 516.350, BY ITS OWN TERMS, DOES NOT APPLY TO RESURRECT A JUDGMENT ALREADY PRESUMED PAID BEFORE THE EFFECTIVE DATE OF THE AMENDMENT.

This Court should affirm the trial court's judgment dismissing Wife's Amended Motion to Enforce because the Judgment of Dissolution which Wife sought to enforce thereby had, by the time Wife filed her motion, become absolutely unenforceable as a matter of law. At all times between entry of the original Judgment of Dissolution on June 24, 1988, and the ten-

year period beginning on that date and continuing until June 24, 1998, the relevant Missouri statute provided:

> Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country . . . shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof . . . and after the expiration of ten years from the date of the original rendition . . . such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever.

R.S.Mo. § 516.350.1 (1986) (reproduced in the Appendix hereto at p. A2).[1]

The effect of this statute upon a litigant who fails to revive a judgment within the required ten-year period is clear and unambiguous:

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[1]The statute also provided that a properly filed and served revival of the judgment could extend the ten-year period. See R.S.Mo. § 516.350.1 (1986). In the present case, however, Husband and Wife stipulated that the original Judgment of Dissolution had never been revived in this manner. (L.F. 48). An examination of the trial court minutes confirms the absence of any revival of the trial court's June 24, 1988, Judgment of Dissolution. (L.F. 1-6).

> Absent timely revival, section 516.350 plainly forbids the enforcement of judgments over ten years old by conclusively presuming the judgments have been paid. The language of section 516.350 naturally lends itself to a bright-line approach: either revive a judgment within ten years of its entry or relinquish all rights of enforcement.

Hanff v. Hanff, 987 S.W.2d 352, 356 (Mo.App.E.D. 1998) (holding unenforceable provision in a 1983 divorce decree requiring former husband to retain former wife as beneficiary of life insurance policies and a pension plan, where former wife did not move for enforcement of those provisions until 1996). See also Starrett v. Starrett, 24 S.W.3d 211 (Mo.App.E.D. 2000) (divorce decree entered in 1986; former wife did not, until 1997, seek enforcement of provision requiring former husband to retain former wife as a survivor beneficiary under pension plan; held, decree unenforceable, since 1986 judgment was more than ten years old and had not been revived).

In the present case, the Judgment of Dissolution was entered on June 24, 1988. (L.F. 2, 162). After that date, Wife neither revived nor attempted to revive that judgment. Pursuant to section 516.350, therefore, a conclusive, non-rebuttable presumption existed since June 24, 1998, that Husband paid and fulfilled all his obligations under the Judgment of

Dissolution. As a result, the trial court had no choice but to dismiss Wife's Amended Motion to Enforce; as a matter of law, section 516.350.1 barred the trial court from issuing any "execution, order or process" with regard to the applicable provisions of the Judgment of Dissolution, or from permitting "any suit [to] be brought, had or maintained thereon for any purpose whatever."

The fact that Husband, under the terms of the stock option agreement, might have exercised some options within the ten-year period preceding the filing of Wife's Original Motion to Enforce, in no way alters the conclusive presumption of section 516.350 that the Judgment of Dissolution has been satisfied. In Hanff, the former wife tried to avoid the effect of section 516.350 by arguing that the pension and insurance benefits she sought were not collectible during the ten-year period following entry of the dissolution decree such that section 516.350 should not begin to run until such benefits are collectible. See Hanff, 987 S.W.2d at 356. The Court of Appeals rejected that argument:

> The statute dictates that the limitation period begins to run when the judgment is rendered, not when the debt becomes certain, due or enforceable. The statute provides no tolling period during which debts are uncertain or uncollectible. Consequently, the inability

to collect a debt does not prevent the normal operation of section 516.350.1.

Id. (quoting Pirtle v. Cook, 956 S.W.2d 235, 245 (Mo. 1997) (en banc)).

Similarly, in another case, a 1981 divorce decree awarded the wife's attorney $2,400.00 for fees, to be paid out of the proceeds of the sale of the family residence; ordered the parties to list and sell the residence "within a reasonable time"; and provided that if the parties failed to sell the residence then the court would order the house sold at a public sale. See In Re Marriage of Ronollo, 936 S.W.2d 188, 189 (Mo.App.E.D. 1996). The property was never sold. Fourteen years later, the wife's attorney filed a motion for contempt and for execution, in which he alleged that the former spouses failed to sell the home within a reasonable time and that he still had not been paid. Id. The trial court dismissed the attorney's motion on the grounds that the divorce decree was more than ten years old and that section 516.350, therefore, established a conclusive presumption that the former spouses had satisfied the obligation to pay the attorney. Id. The attorney appealed, and the Court of Appeals affirmed. In so doing, the Court stated, "Even if the attorney's fee did not become due during the ten year period because the fee was ordered paid out of proceeds of property that was never sold, the presumption applies unless the judgment for fees

is revived. The ten years runs from the date of judgment, not the date the judgment becomes collectible." Id. at 190 (citation omitted).

As the Court of Appeals succinctly put it in yet another case concerning this issue, "We have held that failure to revive a dissolution judgment within ten-year period provided by statute governing enforceability of judgments precludes action and the limitation period begins to run when the judgment is rendered, not when the debt becomes certain, due or enforceable." Starrett, 24 S.W.3d at 213.

These cases unmistakably establish that, in the present case, the ten-year period after which the provisions of the Judgment of Dissolution were presumed paid began to run from June 24, 1988, and not from some later date upon which Husband in this case might have exercised the stock options or sold the stock which he had obtained as a result of the exercise of the options.

Wife recognizes that the version of section 516.350 in effect at all times through June 24, 1998, would utterly bar her from pursuing any action based upon the Judgment of Dissolution entered on June 24, 1988. Consequently, Wife asks this Court to hold that, because she filed her Original Motion to Enforce on December 7, 2001, the trial court should have applied section 516.350 as amended by the Legislature in 2001, effective August 28, 2001. See Substitute Brief of Appellant at pp. 11-13.

This Court should reject Wife's contention. In 2001, the legislature amended subsection 1 of section 516.350 to exclude a "judgment . . . dividing pension, retirement, life insurance, or other employee benefits in connection with a dissolution of marriage . . . which mandates the making of payments over a period of time or payments in the future" from the rule that judgments are presumed paid within ten (10) years following the date the judgment is entered. See R.S. Mo. § 516.350.1 (Supp. 2003) (reproduced in the Appendix hereto at p. A4). At the same time the legislature added a new subsection 3 which provides, in part, that a judgment of the type set forth in the preceding sentence "shall be presumed paid and satisfied after the expiration of ten years from the date that periodic payment is due." Id. at 516.350.3. The final sentence of the new subsection 3 provides, "This subsection shall take effect as to all such judgments, orders or decrees which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001." Id.

The straightforward and common-sense meaning of the final sentence of the new subsection 3, see International Business Machines Corp. v. Director of Revenue, 958 S.W.2d 554, 557 (Mo. 1997)(en banc) ("[i]n determining the meaning of a statute, the starting point is the plain language of the statute itself"), is simply that, if a particular judgment was presumed paid pursuant to subsection 1 of section 516.350 in effect prior to

August 28, 2001 (the effective date of the 2001 amendment[2]), then the 2001 amendment would not affect that judgment; if, on the other hand, as of August 28, 2001, a particular judgment was not yet presumed paid pursuant to subsection 1 of section 516.350, then the rule embodied in the new subsection 3 of the statute would apply to periodic payments mandated by that judgment.

Not only does this interpretation follow from a logical reading of the words of the statute, this interpretation also comports with the pronouncements of the courts of this state as to the nature of the conclusive presumption established by section 516.350. As this Court has stated:

> The conclusive presumption of payment created by [the predecessor to section 516.350], though imposing a limitation on actions on judgments, is to be distinguished from the bar of the remedy created by the usual statute of limitations. The usual statute of limitations imposes a bar to the recovery of the debt; it operates to

[2] See R.S.Mo. § 1.130 (2000) (law "takes effect ninety days after the adjournment of the session at which it is enacted"). The 2001 legislative session adjourned on May 30, 2001. See Session Laws of Missouri (2001) at Cover Page. Ninety days thereafter fell on August 28, 2001.

> prohibit an action upon the debt. On the other hand a presumption of payment statute . . . wipes out or cancels the debt itself; it extinguishes the right of action. It is not concerned with the remedy because there is no right left to be enforced.

Wormington v. City of Monett, 358 Mo. 1044, 1049, 218 S.W.2d 586, 588 (Mo. 1949) (en banc). See also Lanning v. Lanning, 574 S.W.2d 460, 462 (Mo.App.W.D. 1978); Swan v. Shelton, 469 S.W.2d 943, 950 (Mo.App.E.D. 1971).

Application of this rule to the facts of the present case establishes that, on June 24, 1998, the tenth anniversary of the entry of the Judgment of Dissolution, a conclusive presumption arose that Husband satisfied all his payment obligations imposed in that judgment. This presumption, to use the words of this Court in Wormington, "wiped out", "canceled" and "extinguished" the debt owed by Husband to Wife pursuant to that judgment. When the legislature amended section 516.350, effective August 28, 2001, Husband's obligations under the Judgment of Dissolution had long since disappeared. Accordingly, the newly-enacted subsection 3 of section 516.350 (changing the time from which the ten-year period begins to run from the date of entry of the judgment to the due date of the payment) did not apply, as subsection 3 only took effect "as to all judgments . . . which have not been presumed paid pursuant to subsection

1 of this section as of August 28, 2001." R.S.Mo. § 516.350.3 (Supp.2003) (emphasis added).

This Court should reject Wife's reading of this Court's decision in Holt v. Holt, 635 S.W.2d 335 (Mo. 1982) (en banc), as suggesting that the second sentence of subsection 3 does not mean what it plainly says. Specifically, Wife asks this Court to construe that sentence ("[t]his subsection shall take effect as to all such judgments . . . which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001") as instead providing, "This subsection shall take effect as to all such judgments . . . which have not been 'adjudicated to have lapsed' as of August 28, 2001. See Substitute Brief of Appellant at pp. 13-14. Wife claims that the Holt opinion supports such a reading. Wife, however, is incorrect.

In Holt, a husband and wife had divorced in January, 1970. The divorce decree required the husband to pay child support of $150 per month, which the husband paid until April or May, 1973. Thereafter, the payments began coming from the Air Force in the amount of $100 per month. These payments continued until December, 1980. The previous month, the wife had filed a garnishment in aid of execution for the arrearages that had accumulated. Holt, 635 S.W.2d at 335.

The trial court granted the husband's motion to quash the garnishment. The trial court based its ruling upon the version of section 516.350 then in effect, which provided that every judgment would be presumed paid ten years after it was entered, unless revived within that time by a motion to revive or by payments made on the record. See R.S.Mo. § 516.350.1 (1978) (reproduced in the Appendix hereto at p. A1).

The wife appealed, and the Court of Appeals transferred the case to this Court. This Court noted the existence of a line of cases which held that child support and maintenance payments were subject to section 516.350, that the ten-year period set forth in the statute began to run when the support order was entered, and that failure to revive the judgment within the ten-year period barred the recipient from collecting the payments, even as to payments that first came due long after the entry of the judgment. Holt, 635 S.W.2d at 336. The Court then traced the development of this line of cases, and found that all of those decisions ultimately rested upon two very early (1893 and 1917) cases which the Court found to be factually inapposite to the situation before it. Id. This Court summarized its historical review by saying, "These and other cases, however, have failed to recognize the peculiar nature of future periodic payments and instead have relied on cases which are inapplicable." Id. This Court further stated, "[W]hat [these] cases failed to recognize is that decretal installment

payments and sum certain judgments, when originally entered, are categorically different. Because of these differences, they are incapable of being treated as the same and are not analogous." Id. at 337.

This Court then quoted the Ohio Supreme Court, which had said:

> An order or judgment for installment support payments is a judgment unlike any other because of its uncertainty of amount, although it is similar to an award of installment alimony payments where the total alimony awarded by the court is not designated as a sum certain at the time judgment is rendered. The usual order for installment support payments is not rendered in the form of a judgment for a sum certain, payable in installments, but, as in the instant case, it is usually an order to pay a certain amount periodically until the minor . . . reaches a certain age.

Holt, 635 S.W.2d at 337 (quoting Smith v. Smith, 168 Ohio St. 447, 449, 156 N.E.2d 113, 116 (1959)).

This Court in Holt concluded, "The reasoning of the Ohio Supreme Court in Smith v. Smith, supra, is sound and would be applied in this case which would afford relief to the [wife] under the statute (§ 516.350) in its present form." Holt, 635 S.W.2d at 337.

In other words, this Court was fully prepared to modify the application of the pre-1982 version of section 516.350 to judgments for child support

(and presumably periodic maintenance as well) such that the ten-year period would not begin to run when the judgment was entered. The unique nature of child support payments (regular, recurring and subject to modification or termination) supported treating these types of judgments differently from other types of judgments.

A legislative amendment to section 516.350, however, enabled this Court to reach the same result via a different route. This Court rendered its decision in Holt on July 6, 1982. The Court noted that earlier that year the legislature had passed, and on June 22, 1982, the Governor had signed, Senate Bill 468. Senate Bill 468 amended section 516.350, effective August 31, 1982, by explicitly providing that, for any judgment awarding child support or maintenance, "each periodic payment shall be presumed paid and satisfied after the expiration of ten years from the date that periodic payment is due." Holt, 635 S.W.2d at 337-38. See also R.S.Mo. § 516.350.2 (1986) (reproduced in the Appendix hereto at p. A2). Because the Holt case had been in litigation at the time of the enactment of the amendment to section 516.350, "the Court is of the view that the appropriate course is to afford [wife] the benefit of the new law. In this way there will be a consistent and uniform guide for courts when adjudicating similar cases." Holt, 635 S.W.2d at 338.

Thus, in Holt, this Court did not construe the 1982 amendment to section 516.350 as providing, by its own terms, that it should apply to judgments entered prior to August 30, 1972. Rather, this Court in Holt stated that, even absent the 1982 amendment, the Court would have re-interpreted the pre-1982 version of section 516.350 to provide that, for maintenance and child support payments, the ten-year period of that section begins to run when each installment payment falls due, rather than from the date of the judgment.[3] This Court went on to say, however, that

[3] Shortly after this Court decided Holt, this Court stated:

> Holt hold[s] that the bar of § 516.350 applies separately to each installment of a judgment for periodic payments of child support, rather than the previous rule which operated to bar the entire judgment once the ten year period runs. The Holt opinion suggested that the earlier authorities were not so clear or consistent as appellant now insists and to the extent they are contrary to Holt they are no longer controlling. Holt is the definitive statement of the present law of Missouri.

DeMoranville v. Tetreault, 654 S.W.2d 71, 72 (Mo. 1983) (en banc). Significantly, this Court in DeMoranville did not even mention the 1982 amendment to section 516.350.

for the sake of consistency and uniformity, it would "afford [Mrs. Holt] the benefit of the 1982 amendment." Id. at 338. The distinction between what the Court in Holt did not hold (that the 1982 amendment to section 516.350 by its own terms provides that it should be applied even to judgments that were already barred by the version of the statute in effect prior to August 31, 1982) and what the Court in Holt did hold (that, for maintenance and child support, the ten year period, even under the pre-1982 version of section 516.350, should run from the date the payment is due rather than the date of the judgment, and that, for the sake of consistency and uniformity, the Court will apply the new statute to the case before it) is subtle, but the distinction has great importance in understanding what Wife asks the Court to do in this case.

Wife asks this Court to alter the plain meaning of the second sentence in subsection 3 of the 2001 version of section 516.350 ("[t]his subsection shall take effect as to all such judgments . . . which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001"). For the reasons set forth herein, and for the additional reasons set forth in Part III of this Brief, see infra at pp. 41-44, this Court should not do so.

The policy argument Wife advances in support of her position, see Substitute Brief of Appellant at p. 15-16, is not convincing, and policy

considerations actually support the opposite conclusion. Wife wants this Court to adopt a rule that says that, despite the clear language of section 516.350, a judgment can never really be presumed paid unless and until there has been an adjudication that the judgment has lapsed.

Such a rule will lead to two undesirable results. First, such a rule will hold open the possibility that a legislative enactment might - by its own terms or through judicial interpretation - resurrect a judgment many years after that judgment had been presumed paid. Every year the circuit courts of this State enter many, many judgments. Under the plain language of section 516.350, all concerned parties - both the judgment-creditors and the judgment-debtors - know that the vast majority of those judgments will be presumed paid, and thus of no further force or effect, ten years after the date the judgment was rendered, unless the judgment is revived or payments are made on the record. Under Wife's proposed rule, however, resurrection of an ancient judgment remains possible unless and until some court adjudicates that the judgment has lapsed.

This possibility leads to the second undesirable result that will occur if this Court accepts Wife's proposal: it will encourage a spate of litigation. Specifically, prudent judgment-debtors will, at some point after the expiration of ten years from the date of the judgment, rush to court for a declaratory order that the judgment has lapsed. This Court should not

encourage such a needless proliferation of motions when section 516.350 is so clear and unambiguous.

Accordingly, this Court should reject Wife's proposed construction of the last sentence of the 2001 version of section 516.350.3. This Court should affirm the judgment of the trial court, which dismissed Wife's Amended Motion to Enforce on the grounds that the judgment which Wife sought to enforce had been presumed paid in 1998, as that judgment had been entered in 1988, more than ten years prior to the filing of Wife's motion.

II. THIS COURT SHOULD NOT JUDICIALLY RE-INTERPRET THE VERSION OF SECTION 516.350 IN EFFECT PRIOR TO THE 2001 AMENDMENT SO AS TO ALLOW WIFE TO BRING HER MOTION TO ENFORCE MORE THAN TEN YEARS AFTER ENTRY OF THE JUDGMENT BECAUSE THE FACTORS THAT LED THIS COURT TO TAKE A SIMILAR STEP IN HOLT ARE NOT PRESENT IN THE CASE AT BAR.

This Court should affirm the trial court's judgment for the reasons set forth in response to Point I of Wife's brief. See supra at pp. 15-31.

This Court should reject Wife's request that this Court adopt in this case, a case involving a division of marital property, the interpretation of section 516.350 which this Court adopted in Holt, a case which involved child support and maintenance. For a number of reasons, Wife is incorrect when she claims, "The present situation is analogous to Holt in all respects." Substitute Brief of Appellant at p. 18.

In fact, a subsequent decision of this Court demonstrates that the Holt case simply does not apply to the case at bar. In Pirtle v. Cook, 956 S.W.2d 235 (Mo. 1997) (en banc), the husband and the wife were divorced

on September 10, 1984.[4] The divorce decree provided that the parties would sell certain real estate and divide the net proceeds in a particular manner. The decree further provided that, if the wife's share of the net proceeds amounted to less than $40,000.00, then the husband was required to pay to the wife, "[a]s a division of the martial (sic) property," a sum of money equal to the difference between $40,000.00 and what the wife received from the sale of the real property. Pirtle, 956 S.W.2d at 237. The parties, however, never sold the real property. Instead, some time after entry of the judgment, the lender foreclosed and the husband and wife received nothing out of the foreclosure sale. In addition, the husband failed to pay to the wife the payment as required by the decree. Id. at 238. On September 22, 1994, the wife filed in the trial court a motion to revive the judgment of September 10, 1984. The trial court granted the motion. Id.

[4]Much of the discussion in Pirtle concerned whether a September 26, 1984, order entered by the trial court constituted an amended judgment or a nunc pro tunc order correcting a clerical error in the September 10, 1984, judgment. The Court concluded that the later order constituted a nunc pro tunc order, such that the effective date of the divorce was September 10, 1984. See Pirtle, 956 S.W.2d at 238-44.

This Court reversed. This Court held that the ten year period specified in section 516.350 began to run on September 10, 1984; that the wife's motion to revive the judgment was filed more than ten years later; and that the judgment, pursuant to section 516.350, was conclusively presumed paid and could no longer be enforced by the wife, even though she had never received the payment which the judgment required the husband to make to her. See Pirtle, 956 S.W.2d at 238-39, 244. This Court rejected the wife's argument that the ten-year period should not begin to run until the property was foreclosed, since until that date the amount of money due to her could not be determined. Id. at 244. This Court stated, "The statute dictates that the limitations period begins to run when the judgment is rendered, not when the debt becomes certain, due or enforceable . . . The statutes provide no tolling period during which debts are uncertain or uncollectible." Id. at 245.

This Court, on its own initiative, then considered whether its previous decision in Holt might warrant a different conclusion:

> [Holt], a case cited by neither party, states that decretal incremental child support and maintenance payments are not subject to the normal application of section 516.350.1 because the future payments are uncertain and, consequently, not subject to collection . . . . Holt concluded that the statutory exception for child support and

> alimony, which stated that the limitation period ran for each periodic payment when it became due, applied retroactively[5] . . . . Holt should not be followed here because Holt turned on the unique nature of the periodic payments at issue in that case. Holt did not address the application of section 516.350.1 to single payments like that involved in the instant case . . . . With regard to judgments for single sums, this Court concludes that our precedent is clear that the inability to collect does not affect the time limitation in section 536.150.1. See Wormington, 358 Mo. at 1048-1050, 218 S.W.2d at 587-89, which is more consistent with the statute's plain language than the decision in Holt.

Pirtle, 956 S.W.2d at 245 n.5. Thus, in Pirtle, this Court limited the holding and reach of its Holt decision to cases involving recurring, periodic payments of child support and maintenance.

The facts of the instant case are closer to those of Pirtle than to the facts of Holt. Specifically, the judgment at issue in this case confers upon Husband the obligation to pay to Wife 12.5% of the net profits he receives

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[5] For the reasons stated above, see supra at pp. 24-29, Husband respectfully contends that Holt did not actually conclude that the 1982 exception applied retroactively.

in the event he chooses to exercise certain stock options granted to him by his employer. (L.F. 167-68). The judgment does not call upon Husband to make ongoing, recurring, periodic payments, as was the case in Holt. Wife's statement that "[t]he options expired at different times in the future, making it inevitable that the proceeds would be obtained and paid over different periods of time in the future," Substitute Brief of Appellant at p. 18, is incorrect. Under the terms of the stock option agreement, Husband could exercise all of the options immediately, at one time. See L.F. 186 (all of the options were exercisable as early as November 5, 1986, and could be exercised "in whole or in part"). Husband then could sell all of the stock acquired as a result of his exercise of the option; at that time, he would then owe to Wife a single sum: 12.5 % of the net profit realized from the transaction.[6] As was the case in Pirtle, the case at bar involves a division of marital property in which Husband may have to make a payment to Wife

[6]Husband acknowledges the possibility he could have exercised the options at different times and/or sold the stock acquired thereby at different times, thereby possibly entitling Wife to more than one payment. Nevertheless, Husband respectfully maintains that this scenario represents a far cry from the situation in Holt, involving regular, recurring and periodic (i.e. monthly) child support payments.

at some point in the future, in an amount to be determined.[7] The Court in Pirtle explicitly determined that its decision in Holt should not be extended to cover such a situation but that Holt should be limited to recurring, periodic child support and maintenance payments.

This Court should keep in mind that the case at bar involves a division of marital property, while Holt involved maintenance and child support. In Holt itself, this Court noted the distinction between periodic maintenance and child-support orders, on the one hand, and "[a]ll other judgments," Holt, 635 S.W.2dat 337, on the other:

> All other judgments remedy past wrongs in a sum certain. Periodic maintenance and child-support orders are aimed toward the future. The word "order" is used because at the time a decree awarding maintenance or child support is issued, it looks to the future and it is not at that time (when entered) a

[7]Wife is incorrect when she characterizes Pirtle as a situation involving "a single, sum certain payment of $40,000.00." Substitute Brief of Appellant at p. 20. In Hanff, the Court of Appeals discussed the Pirtle case and, in so doing, noted that "[t]he exact amount [the wife in Pirtle] was entitled to receive under the decree could not be determined until the sale of the real property." Hanff, 987 S.W.2d at 356 n.2.

> judgment of a sum then due and owing as are most other awards of money. Other money judgments, by their nature, constitute a fixed sum. The amount of future installment payments is uncertain. Unlike sum certain judgments, they are subject to future modifications, contingencies, and even termination.

Id.

Husband respectfully contends that the judgment at issue bears a closer resemblance to "all other judgments" than it does to periodic maintenance and child support orders. At the time the judgment at issue was entered, Husband and Wife were parties to a divorce proceeding. At that time Husband had received, but had not yet exercised, stock options. An unresolved matter between the parties, therefore, concerned how to divide the stock options between the parties. The judgment at issue resolved the matter, with nothing left to future determination other than calculating the amount due Wife if and when Husband exercised the options, sold the stock acquired thereby and realized a profit. To use the language of Holt, the judgment at issued provided a "remedy" for the problem of how to divide the stock options. In that respect, the judgment at issue was more like a money judgment than like an order imposing upon one party an obligation to make periodic, recurring and regular payments.

In addition, the judgment at issue falls outside this Court's reasoning in Holt because the stock-option provision – unlike maintenance and child support orders – was not "subject to future modifications, contingencies, [or] . . . termination." Id. The stock-option provision of the judgment in the case at bar constitutes the division of marital property. As this Court well knows, judgments dividing marital property are simply not subject to modification. See R.S.Mo. § 452.330.5 (2000); Bauer v. Bauer, 28 S.W.3d 877, 885 (Mo.App.E.D. 2000). In contrast, of course, maintenance and child support orders are generally modifiable. See R.S.Mo. § 452.335.3, 452.370 (2000).[8]

[8]The law recognizes other distinctions between judgments dividing marital property, on the one hand, and maintenance and child support orders on the other. The former is subject to discharge in bankruptcy proceedings; the latter are not. See 11 U.S.C. § 523(a)(5); Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986). Also, maintenance and child support orders accrue interest at a higher statutory rate than do other judgments, including judgments arising out of a property division. Compare R.S.Mo. § 454.520 (2000) and R.S.Mo. § 408.040 (2000); see also Orem v. Orem, 149 S.W.3d 589, 594 (Mo.App.W.D. 2004).

The only relevant difference between a standard money judgment and the stock-option provision at issue in this case lies in the fact that, at the time the judgment in this case was entered, the Husband's obligation could not be stated as a sum certain. As this Court's opinion in Pirtle makes clear, see supra at pp. 32-35, 37 n. 7, however, the lack of a sum certain judgment does not justify a judicial modification of section 516.350's directive that judgments are conclusively presumed paid ten years after entry of the judgment.

This Court, therefore, should affirm the decision of the trial court in the case at bar.

III. THE 2001 AMENDMENT DOES NOT AND CANNOT APPLY RETROACTIVELY TO RESURRECT A JUDGMENT THAT HAD BEEN EXTINGUISHED THREE YEARS BEFORE THE AMENDMENT'S EFFECTIVE DATE.

In Point III of her Brief, Wife appears to argue that the 2001 amendment to section 516.350 should be applied retroactively on the grounds that the amendment was only procedural or remedial. See Substitute Brief of Appellant at p. 21. Wife is incorrect.

This Court cannot apply the 2001 amendment to section 516.350 retroactively because the legislature did not intend for the amendment to be applied in that manner, and because the amendment constitutes a substantive law. "Statutes are generally presumed to operate prospectively . . . . A statute may be applied retroactively if: (1) the legislature clearly expresses its intent that it be given retroactive application in the express language of the act or by necessary or unavoidable implication; or (2) the statute is merely procedural or remedial, not substantive, in its operation." Dalba v. YMCA of Greater St. Louis, 69 S.W.3d 137, 140 (Mo.App.E.D. 2002).

In the present case, the legislature did not clearly express an intent that the 2001 amendment to section 516.350 be given retroactive application. On the contrary, the legislature expressed the opposite intent, when it provided that the amendment "shall take effect as to all . . . judgments . . . which have not been presumed paid pursuant to subsection 1 of this section as of August 28, 2001." R.S.Mo. § 516.350.3 (Supp. 2003).

Nor can the amendment to section 516.350 be given retroactive effect because the amendment is substantive, not procedural or remedial. As the Court of Appeals has explained:

> A substantive law relates to rights and duties giving rise to the cause of action, while procedural statutes supply the machinery used to effect the suit . . . . [A] substantive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.

Dalba, 69 S.W.3d at 140.

As set forth above, see supra at p. 22-23, this Court has distinguished section 516.350 from the usual statute of limitations. "The usual statute of limitations imposes a bar to the recovery of the debt; it operates to prohibit an action on the debt. On the other hand a presumption of payment statute

. . . wipes out or cancels the debt itself; it extinguishes the right of action. It is not concerned with the remedy because there is no right left to be enforced." Wormington, 358 Mo. at 1049, 218 S.W.2d at 588 (emphasis added) Accordingly, any debt owed by Husband to Wife pursuant to the Judgment of Dissolution was extinguished on June 24, 1998, pursuant to the version of section 516.350 in effect at that time. To the extent the 2001 amendment could be read as reviving that debt (which the legislature clearly did not intend but which Wife here suggests is the case), such a revival would clearly be substantive, not procedural, as such a revival would impose upon Husband a new duty or obligation with respect to a matter which had already passed under prior law.

The case cited by Wife, Loard v. Tri-State Motor Transit, 813 S.W.2d 71 (Mo.App.S.D. 1991), does not advance her argument in this case. In that case, an employee suffered an injury on August 14, 1980. At the time of her injury, the applicable statute required her to make a workers' compensation claim within two years following the injury. In 1981, before the time to make her claim expired, the legislature amended the statute to allow a claim to be made within two years following the injury or within two years after the last payment made under the workers' compensation law on account of the injury. The employee in Loard received payments on account of the injury from September, 1980, through October, 1987. She

filed her claim in November, 1987. Loard, 813 S.W.2d at 71-72. The Court of Appeals held that the employee timely filed her claim. The Court noted that "[t]he statute of limitations had not run on [employee]'s claim on . . . the effective date of the 1981 law." Id. at 75. Accordingly, the 1981 law simply extended the time allowed for her to file her claim until two years after the last payment made to her on account of the injury. The Court therefore concluded that the 1981 amendment was not substantive but procedural and that the amendment applied in the case before it. Id.

In contrast, in the present case, Husband's payment obligation under the Judgment of Dissolution had expired on June 24, 1998, more than three years before the enactment of the 2001 amendment to section 516.350. Application to the present case of the 2001 amendment would not simply extend the time within which Wife could enforce that obligation but would rather impose upon Husband a substantive duty which had been extinguished under prior law.

This Court, therefore, should affirm the trial court's judgment dismissing Wife's Amended Motion to Enforce.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's dismissal of Wife's Amended Motion to Enforce.

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IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

JOHN BECK,	)	
	)	
Respondent,	)	
	)	
v.	)	No. ED 84457
	)	
ANN FLEMING (f/k/a Ann Fleming Beck),	)	
	)	
Appellant.	)	

CERTIFICATE AS TO COMPLIANCE

The undersigned hereby states that the undersigned has:

1. pursuant to Rule 84.06(c), complied with all requirements of Rule 55.03;

2. pursuant to Rule 84.06(c) complied with the applicable 27,900 word limitation, in that this brief contains 8,662 words; and

3. pursuant to Rule 84.06(g), scanned the attached computer disk and certifies that it is virus-free.

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	)	
ANN FLEMING (f/k/a Ann Fleming Beck),	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the Substitute Brief of Respondent, and one floppy disk containing a copy of the brief, were served by Regular Mail, Postage Prepaid, upon Maia Brodie & Aimee Ruder, Keefe & Brodie, 130 South Bemiston Avenue, Suite 602, Clayton, Missouri 63105, this 14th day of April, 2005.

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APPENDIX

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