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JURISDICTIONAL STATEMENT

Petitioner-Appellant Paulette Ochoa appeals from a Judgment entered in the Circuit Court of St. Louis County on July 20, 2000 after a hearing on Petitioner's Motion for Approval of Qualified Domestic Relations Order. That Motion was denied.

The Missouri Court of Appeals, Eastern District, sustained the Circuit Court's Order. Wife filed a Motion to Motion for Rehearing or, in the Alternative Application To Transfer To The Supreme Court. Subsequently Wife also filed a Supplement To Appellant's Motion For Rehearing. That Motion was denied.

On September 24, 2001 Wife filed an Application for Transfer to the Supreme Court under Rule 83.04. On October 23, 2001 the Application was sustained. Therefore jurisdiction is properly before this Court under Mo. Const. Art. V, Sect. 10, Supreme Court Rule 83.04 and Sect. 512.020 RSMo 1994.

STATEMENT OF FACTS

This appeal involves a civil domestic relations matter. The parties, Appellant, Paulette M. Ochoa (hereinafter "Wife"), and Respondent, Marco A. Ochoa (hereinafter "Husband"), were granted a Decree of Legal Separation on March 6, 1987 (L.F. 14). There were three children born of the marriage, all now emancipated, namely Antonia Marco Ochoa, born September 22, 1969; Jessica Maria Ochoa, born May 27, 1974; and Nicole Marie Ochoa, born November 13, 1977. (L.F. 17). Neither Husband nor Wife has ever sought a Decree of Dissolution. They remain legally separated.

In the 1987 Decree of Legal Separation, Wife and Husband incorporated therein language intended to serve as a Qualified Domestic Relations Order (QDRO). (L.F. 24-16). The Decree itself incorporated within it the form and language of a Qualified Domestic Relations Order. That Decree was submitted for approval to Husband's employer, Chrysler Corporation in June 1987. (L.F. 67). A certified copy of the Decree containing the terms and conditions upon which Husband's pension and savings plan were to be divided was enclosed. (L.F. 67) In August 1987, the Plan Administrator confirmed receipt of the Decree. (L.F. 66).

On May 5, 1999 Wife filed a Motion to Modify the Separation Agreement and Motion for Contempt. (L.F. 1 and 5). No portion of the Motion to Modify the Decree of Legal Separation sought to change in any way Husband's obligations contained in the QDRO incorporated into the 1987 Decree. Rather the Motion to

Modify and Motion for Contempt involved unreimbursed medical expenses, the children's college costs and other amounts alleged to be due under the terms of the original decree. (L.F. 1).

Wife's Motions were denied on November 3, 1999. (L. F. 40). Wife's Motion for New Trial, or in the Alternative, Motion to Amend Judgment, was heard on December 3, 1999 (L.F. 44). The trial court filed a Family Court Amended Modification Agreement on February 28, 2000 (L.F. 56).

During the course of the 1999-2000 litigation, the plan administrator for DaimlerChrysler made the parties aware that the original language incorporated into the Decree of Legal Separation did not satisfy their understanding of the requirements for a QDRO. Wife's counsel contacted the plan administrators. On or about April 27, 2000, DaimlerChrysler confirmed that the revised Domestic Relations Orders submitted to the plan administrator satisfied their understanding of the requirements for a Qualified Domestic Relations Order. As of today all that remains for a final determination to be made by the Plan Administrator on behalf of DaimlerChrysler Corporation is receipt by them of an original court certified Domestic Relations Order.

On June 30, 2000, Wife's Motion for Approval of Qualified Domestic Relations Order was heard. Wife's Memorandum in Support of Petitioner's Request for Approval of the Qualified Domestic Relations Order was filed on that same date. (L.F. 58).

On July 20, 2000, the Court entered its Judgment denying Petitioner's Motion for Approval of the Qualified Domestic Relations Order. (L.F. 69). An Judgment was made final for purposes of appeal on August 18, 2000. (L.F. 70). The appeal to the Missouri Court of Appeals, Eastern District followed.

The Court of Appeals affirmed the Circuit Court's Order. Wife thereafter filed an Application For Transfer To the Missouri Supreme Court. It was sustained on October 23, 2001.

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR APPROVAL OF THE QUALIFIED DOMESTIC RELATIONS ORDERS BECAUSE SUCH ORDER IS A MISAPPLICATION OF THE LAW IN THAT SECTION 452.330.5 SPECIFICALLY AUTHORIZES THE CIRCUIT COURT TO MODIFY A QDRO TO "ESTABLISH OR TO MAINTAIN THE QDRO'S STATUS AS 'QUALIFIED' UNDER A PARTICULAR PLAN OR TO CONFORM ITS TERMS TO EFFECTUATE THE INTENT OF THE COURT'S ORDER REGARDING DISTRIBUTION OF PROPERTY" AND PLACES NO TIME LIMIT OR RESTRICTIONS UPON THE COURT AS TO WHEN THIS CAN BE DONE.

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Section 452.330, R.S.Mo.

Section 452.360, R.S.Mo.

Section 516.350, R.S.Mo. 10 U.S.C. Section 1408 (1996 and Supp. 1998) 29 U.S.C. Section 1056

29 U.S.C.A. Section 1144

I.R.C. Sect. 401(a)(13) Employees Retirement Security Act of 1984, Sect. 206(d)(1)

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Turner, Brett R., The Mechanics of Dividing Retirement Benefits: Recent Case Law on Preparation of Qualified Domestic Relations Orders, 6 *Divorce Litigation* 105 (June 1998)

II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR APPROVAL OF THE QUALIFIED DOMESTIC RELATIONS ORDERS BECAUSE SECTION 516.350 R.S.MO AS AMENDED EFFECTIVE AUGUST 28, 2001 SHOULD BE APPLIED RETROACTIVELY AS THE MISSOURI GENERAL ASSEMBLY HAS MANIFESTED A CLEAR INTENT THAT THE STATUTE ACT RETROACTIVELY AND BECAUSE ALSO THE STATUTE IS SOLELY PROCEDURAL OR REMEDIAL AND DOES NOT AFFECT THE SUBSTANTIVE RIGHTS OF THE PARTIES. THE COURT FURTHER ERRED IN FINDING THAT SECTION 516.350 IS IN EFFECT A STATUTE OF LIMITATIONS AND NOT, AS THE LANGUAGE OF THE STATUTE ITSELF SUGGESTS MERELY A PRESUMPTION.

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American Family Mutual Insurance Co. v. Fehling, 970 S.W.2d 844 (Mo App. 1998).

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ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR APPROVAL OF THE QUALIFIED DOMESTIC RELATIONS ORDERS BECAUSE SUCH ORDER IS A MISAPPLICATION OF THE LAW IN THAT SECTION 452.330.5 SPECIFICALLY AUTHORIZES THE CIRCUIT COURT TO MODIFY A QDRO TO "ESTABLISH OR TO MAINTAIN THE QDRO'S STATUS AS 'QUALIFIED' UNDER A PARTICULAR PLAN OR TO CONFORM ITS TERMS TO EFFECTUATE THE INTENT OF THE COURT'S ORDER REGARDING DISTRIBUTION OF PROPERTY AND PLACES NO TIME LIMIT OR RESTRICTIONS UPON THE COURT AS TO WHEN THIS CAN BE DONE.

ISSUE

The first issue before this Court is whether under Section 452.330(5) R.S.Mo. a trial court retains continuing, exclusive jurisdiction over a Decree of Legal Separation for more than ten (10) years for the purpose of revising or conforming its terms so as to effectuate the expressed intent of the Order to establish a Qualified Domestic Relations Order. Case law, the plain language of Section 452.330(5) and public policy all suggest that it does.

STANDARD OF REVIEW

The standard of review of the trial court's ruling with regard to the entry of what was essentially a summary judgment on Appellant's Motion for Approval of the Qualified Domestic Relations Order is that this Court must review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Fin. Corp. v. Mid America Marine Supply Corp*., 854 S. W.2d 851, (Mo. Banc 1993). Summary Judgment is granted where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. Rule 74.04. The propriety of summary judgment is purely an issue of law and this Court need not defer to the trial court's judgment. Review is essentially *de novo*. *Hanff v. Hanff*, 987 S.W.2d 352 (Mo. App. E.D. 1998).

ANALYSIS

Generally, pension plan benefits cannot be assigned or alienated. Employee Retirement Income Security Act of 1984 ("ERISA"), Sect. 206(d)(1); IRC Sect. 401(a)(13). The purpose of spendthrift provisions in ERISA is to prevent a participant in such a plan from either bargaining away benefits or having them subject to creditors prior to retirement.[1] In 1984 ERISA was amended to "clarify"

[1] Elizabeth R. Lishner, ERISA Basics: A Primer on ERISA Issues, *American Bar Association Center For Continuing Legal Education National Institute,* (May 1998), 1.

the effect of these spendthrift provisions on family support obligations such as alimony, child support and separate maintenance.[2] In Section 29 U.S.C. Sect. 1056(d)(3)(A), Congress authorized the creation of a Qualified Domestic Relations Order (QDRO) to avoid the general prohibition against the assignment or alienation of pension benefits. A QDRO "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a participant plan. 29U.S. C. Sect. 1056(d) (3)(B)(i)(I) (Supp. 1997).

Under Missouri law, Section 452.330(5) R.S.Mo. prescribes the factors to be considered in the disposition of marital property and the degree of finality that attaches to that disposition depending on the nature of the property being divided. The first sentence of Section 452.330(5) R.S. Mo. begins with a clear statement that "a court's order as it affects distribution of marital property shall be a final order not subject to modification." In effect, the statute of limitations ends once the period for appealing the trial court's decision runs.

But the drafters of this provision carved out a very specific exception to that rule in the second sentence of subsection (5). It states " [O]rders intended to be qualified domestic relations orders affecting pension, profit sharing and stock bonus plans pursuant to the U.S. Internal Revenue Code shall be modifiable only for the purpose of establishing or maintaining the order as a qualified domestic

[2] Id.

relations order or to revise or conform its terms so as to effectuate the expressed intent of the order." Section 452.330(5). No time limit for doing so is either stated or implied.

To the contrary, in *Wells v. Wells*, 998 S.W.2d 165 (Mo. App. W.D. 1999), two years after the circuit court entered a QDRO, Husband filed a motion to modify it. Wife filed a motion to dismiss alleging, *inter alia* that the circuit court lacked jurisdiction to reopen the QDRO because Husband did not appeal within 30 days after the circuit court's entry of the QDRO. *Id*. at 168. The Court of Appeals disagreed, stating unequivocally that "Section 452.330(5) authorizes the circuit court to modify a QDRO, *and it places no time limits or restrictions upon the circuit court as to when this can be one*. To modify a QDRO, a party must only establish that the circuit court would be modifying the QDRO 'to establish or to maintain the QDRO's status as 'qualified' under a particular plan or to conform its terms to effectuate the intent of the court's order regarding distribution of property.'"(emphasis added). *Id*.

In the case now before this court, language denominated as and intended to serve as a QDRO was included in the 1987 Separation Agreement and incorporated by the trial court into its Decree of Legal Separation (L.F. pp. 24-31). At the time they executed the Separation Agreement Husband and Wife specifically agreed "the parties intend that the foregoing provisions of the agreement governing the disposition and assignment of a portion of the participant's (Husband's) benefits to the Wife as alternate payee… will qualify

and be deemed a Qualified Domestic Relations Order…" (L.F. 30). Furthermore, they agreed that "*It is the intention of the Husband and Wife that the foregoing provisions shall qualify as a QDRO* and whenever the provisions herein under are inconsistent with the definition of a QDRO as may be contained, from time to time, in the Internal Revenue Code of 1954, as amended, and/or ERISA, as may or may not be amended, this agreement shall be amended from time to time as may be necessary to comply with the requirements for a QDRO. Both parties shall enter into an agreed order of court as may be reasonably required to amend this article, and/or the Judgment for Legal Separation to so comply. *(*emphasis added*)* (L.F. 30-31).

Conforming the language of the Separation Agreement that both parties admittedly viewed in 1987 as qualifying as a QDRO so that it reflects the contemporaneous intent of the parties is exactly what Section 452.330(5) was designed to allow the trial court the ongoing authority to do.

No one is arguing that Wife is seeking to redivide marital property or attempting to obtain more than what she and Husband agreed in their Separation Agreement that she would receive. *Baird v. Baird*, 843 S.W.2d 388 (Mo. App. 1992). Rather, Husband is attempting to absolve himself from the obligation he agreed to undertake when he executed the Agreement in 1987. To deny him this incredibly unjust result, Wife simply seeks to have the trial court conform/revise the original language of the Separation Agreement (as both parties consented

could be done) so that it satisfies the requirements specified in Section 452.330(5), R.S.Mo. and 29 U.S.C. Section 1056(d)(3).

In *Seal v. Raw*, 954 S.W.2d 681, 685 (Mo App. W.D. 1997), the circuit court entered an order dividing Husband's pension benefits between Husband and Wife. Eight years later Wife filed a motion with the circuit court to enter a QDRO to protect her interest in the pension. The court entered such an order. On appeal Husband argued that doing was beyond the trial court's jurisdiction, contending that the QDRO modified the property agreement between himself and Wife and that such a modification was not provided for in their agreement. The Court of Appeals disagreed. It stated that "We … note that Section 452.330(5) gives the circuit court authority to modify orders intended to be qualified domestic relations orders affecting pension, profit sharing and stock bonus plans … for the purpose of establishing or maintaining the order as a qualified domestic relations order and to revise or conform its terms so as to effectuate the expressed intent of the order. Any questions regarding a variation between the terms of the QDRO and the original decree does not void the entry of the QDRO but the circuit court may address the issue because of its continuing jurisdiction to modify the QDRO…." *Id*. at 685. This analysis by the court indicates that because a QDRO is fundamentally an enforcement device, courts are permitted unlimited modification to make that enforcement device effective, so long as the parties' underlying substantive rights are left unchanged.

In *Starrett v. Starrett* 24 S.W.3d 211 (Mo. App. E.D. 2000) the Court of Appeals addressed the issue of whether a trial court could create as part of a modification order a QDRO out of whole cloth *for the first time* more than ten (10) years after the Decree of Dissolution was ordered. The Court said that the trial court could not. It relied on Section 516.350.1 R.S.Mo. (1994) stating that the 1986 judgment was no longer enforceable as it had not been revived prior to the expiration of the ten (10) year limitation set forth in that statute.

That portion of Section 516.350.1 reads in part:

Every judgment, order or decree… except for any judgment, order, or decree awarding child support or maintenance which mandates the making of payments over a period of time, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof ... or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years ... 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.

Id. at 212-213.

The instant case differs from *Starrett* in several respects. First, on its facts, in the case now before this Court, a QDRO was made a part of the trial court's Decree of Legal Separation at the time the initial order was entered in 1987. This had not happened in *Starrett*. The trial court in *Starrett* had never previously

entered an order intended to be a qualified domestic relations order. Section 452.330(5) provides only that "orders intended to be qualified domestic relations orders… shall be modifiable." In the case now before the bar, Wife is not asking for a new order but is merely asking the trial court to exercise its continuing jurisdiction to amend/revise/conform the existing language in the Decree so that it meets the requirements of the Daimler-Chrysler pension plan administrator in 2001.

Starrett cites *Hanff v. Hanff,* 987 S.W.2d 352 (Mo. App. E.D. 1998*)* for the proposition that failure to revive a dissolution judgment within a ten (10) year period precludes any action to enforce the judgment. *Id*. at 213. Section 516.350.1 R.S.Mo. But the facts in *Hanff* are inapposite. In *Hanff* wife was awarded a specific amount of maintenance and life insurance benefits and was to be named as the beneficiary of Husband's pension plan. *Id*. at 354. Husband later remarried and not only failed to pay his former wife maintenance but also removed her name from the insurance policies and as beneficiary of the death benefits from his pension and substituted his second wife instead.

Like in *Starrett*, the *Hanff* court was never called upon and, therefore, did not address the legal aspects of Section 452.330(5). In fact the court stated that "at no time has [former wife] taken any steps to enforce her rights under the decree against either [her deceased former husband] or his estate. The Court was left to decide only whether a former wife could make a claim directly against a successor wife for death benefits, maintenance and life insurance more than ten (10) years

after the decree of dissolution was entered. It ruled that she could not. This suggests that *had* wife requested that the court exercise its authority under 452.330(5) to modify that portion of the original order relating to the pension that its analysis of the case might have been different. The result reached by the *Hanff* court is appropriate, yet inapplicable in the instant case.

In a case decided by the U.S. District Court for the Eastern District of Missouri, *Principal Mutual Life Ins. Co. v. Karney*, 5 F. Supp. 2d 720 (E.D. Mo. 1998), the court makes note of the potential horrific public policy issues involved in requiring divorced persons to go to court at least every ten (10) years to revive their judgment or risk having their decrees nullified. In *Karney* plaintiff life insurance company brought an interpleader action to resolve conflicting claims made by the insured's children from his first marriage and the insured's third wife to the proceeds of an insurance policy. *Id*. at 720. The children's claim to the policy arose out of the terms of their parent's fourteen (14) year old separation agreement in which the parents had agreed the life insurance benefits would go to their children. At the time of their father's death the children discovered that the named beneficiary of the policy was actually father's subsequent wife.

The first issue addressed by the Court was whether the statute of limitations had run on the daughter's claims. The parties were divorced on January 4, 1982. Husband died on August 1, 1996. The defense raised by father's subsequent wife was exactly the same as Husband's in the instant case. She argued that "the sisters' claims were untimely because they have waited too long to revive their

parent's divorce decree and settlement agreement. [Subsequent Wife] specifically argued that Section 516.350 was applicable and that the ten (10) years limitation had expired. *Id.*at 725. Her claim was that the first wife (the daughters' mother) had ten years from the date of the divorce within which to enforce the agreement and, not having done so, any effort to enforce the decree were barred pursuant to Section 516.350 R.S.Mo. *Id*. at 725-726.

The Court found that issue "meritless" saying that if that were true, "the logical extension of [the argument] is that divorced persons would have to go to court no more than every ten (10) years to "revive" their divorce decree; otherwise, their divorce decree would be nullified." Opening that floodgate of litigation was something that the Court rejected out of hand. *Id*. at 726.

The two cases cited by the subsequent wife in support of the statute of limitations argument, *Ronollo v. Ronollo*, 936 S.W.2d 188 (Mo. App. 1996) and *Pirtle v. Cook*, 956 S.W. 2d 235 (Mo. 1997 were considered by the court and rejected. The court distinguished both cases stating that the crucial distinction was that "these cases were cases clearly involving a money judgment or judgment debt of a sum certain". *Ronollo v. Ronollo,* 936 S.W.2d 188 (Mo. App. 1996). In *Ronollo*, the former wife's attorney brought a motion for contempt and execution against former spouses for failure to pay attorney's fees incurred in a divorce action 14 years earlier. In *Pirtle*, former wife sought to revive her 1984 divorce decree in 1994 in which her former husband was to pay her a minimum sum of

$40,000.00. Neither of these cases involved either an award of pension benefits or through a QDRO or Section 452.330(5).

In *Pirtle* and *Ronollo*, at the time the divorce decrees were entered a judgment of money damages or fees was clearly denoted; i.e. the interested party received a judgment entitling him or her to a sum of money ascertainable as of the date of the original entry of the judgment. (*Id*. at 726-727). In *Karney*, the court said, "Here no money judgment for a sum certain was awarded …via the settlement agreement. All [it] did was to obligate [Father] to maintain a certain amount of life insurance on himself … a benefit which was not capable of ascertainment until his death." (*Id*. at 727). Because of that the ten (10) year period for the children or their mother to revive the judgment did not apply. (*Id*.).

In his concurring opinion in the *Starrett* case Justice James R. Dowd notes "Section 516.350 R.S.Mo specifically excludes child support and maintenance judgment from its purview, presumably because they normally extend for an indeterminate period of time, often more than ten years." *Starrett v. Starrett*, 24 S.W.3d 211, 214 (Mo. App. E.D. 2000).

Anticipating that in many instances pension benefits may not be payable literally for decades after a divorce or legal separation, the General Assembly built into the language of Section 452.330(5) R.S.Mo a back door provision so that the trial courts can continue to have jurisdiction over these matters. The General Assembly refused to place time restrictions on the time in which it could assert its authority. As the court said in *Wells v. Wells*, 998 S.W.2d 165, 168 (Mo. App.

1999), “Section 452.330(5) authorizes the circuit court to modify a QDRO and it places no time limits or restrictions upon the circuit court as to when this can be done.”

One commentator has suggested “the all time worst-case scenario involving procedural modification is a potential future change in the definition of a QDRO as set forth in federal law. Congress has thankfully refrained from micromanaging the pension division provision of ERISA in the same way it has micromanaged the statutory provisions governing the division of military retirement benefits upon divorce. See 10 U.S. C. Section 1408 (1996 & Supp. 1998). Still the history of federal legislation on the division of retirement benefits suggests that such laws are a complex political balancing act between the rights of nonowning spouses and the convenience of plan administrators, and a cynic could observe without fear of blatant error that Congress has often shown more concern for the plan administrators. It is therefore far from impossible that Congress might at some point add additional requirements. If the effect of such a modification were to disqualify prior QDRO’s there would be great disruption in state domestic relations law. This potential chaos can be largely avoided by the enactment of statutes or by the inclusion of specific provisions reserving jurisdiction to make

nonsubstantive modifications in prior pension division orders."[3] Luckily for Missourians, the General Assembly has already seen fit to do so.

CONCLUSION

POINT I

Pursuant to Section 452.330(5), the trial court below had jurisdiction to revise or conform the terms of the QDRO contained in Paulette and Marco Ochoa's Separation Agreement and Decree of Legal Separation so as to effectuate the expressed intent of the parties and the original order. The trial court therefore misapplied the law in denying Petitioner/Appellant's Motion for Approval of the Qualified Domestic Relations Order. Consequently Petitioner/Appellant Paulette Ochoa respectfully requests this Court reverse the trial court's order denying approval of the revised Qualified Domestic Relations Orders and for such further orders as seem just and proper in the premises prayed.

[3] Brett R. Turner, The Mechanics of Dividing Retirement Benefits: Recent Case Law on Preparation of Qualified Domestic Relations Orders, 6 *Divorce Litigation* 105 (June 1998).

ARGUMENT

II

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR APPROVAL OF THE QUALIFIED DOMESTIC RELATIONS ORDERS BECAUSE SECTION 516.350 R.S.MO AS AMENDED EFFECTIVE AUGUST 28, 2001 SHOULD BE APPLIED RETROACTIVELY AS THE MISSOURI GENERAL ASSEMBLY HAS MANIFESTED A CLEAR INTENT THAT THE STATUTE ACT RETROACTIVELY AND BECAUSE ALSO THE STATUTE IS SOLELY PROCEDURAL OR REMEDIAL AND DOES NOT AFFECT THE SUBSTANTIVE RIGHTS OF THE PARTIES. THE COURT FURTHER ERRED IN FINDING THAT SECTION 516.350 IS IN EFFECT A STATUTE OF LIMITATIONS AND NOT, AS THE LANGUAGE OF THE STATUTE ITSELF SUGGESTS MERELY A PRESUMPTION.

STANDARD OF REVIEW

As in Argument I, the standard of review of the trial court's ruling with regard to the entry of what was essentially a summary judgment on Appellant's Motion for Approval of the Qualified Domestic Relations Order is that this Court must review the record in the light most favorable to the party against whom judgment was entered. *ITT Commercial Fin. Corp. v. Mid America Marine Supply Corp*., 854 S. W.2d 851, (Mo. Banc 1993). Summary Judgment is granted where

the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. Rule 74.04. The propriety of summary judgment is purely an issue of law and this Court need not defer to the trial court's judgment. Review is essentially *de novo*. *Hanff v. Hanff*, 987 S.W.2d 352 (Mo. App. E.D. 1998).

If the law has been erroneously declared or applied, the judgment of the trial court is afforded no deference. *State v. Ruch*, 926 S.W.2d 937, 938 (Mo. App. 1996).

ISSUE

The second major issue in this case concerns the effective interplay of Section 452.330.5, which on its face provides an unlimited right to modification by trial courts of orders intended by the parties to be qualified domestic relations orders, and Section 516.350 as newly amended in 2001.

At the time the trial court entered its order it read in part:

Every judgment, order or decree… except for any judgment, order, or decree awarding child support or maintenance which mandates the making of payments over a period of time, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof ..."
Section 516.350 R.S.Mo.

In its ruling, the Court of Appeals raised questions regarding the inequity of Section 516.350 as it then existed and discussed the impact it has on trial courts' ability to enforce orders involving QDRO's which might not be capable of being

enforced literally for decades after the entry of the original order creating them. The Court acknowledged "the harsh result occasioned by Section 516.350 …" and urged the General Assembly to revisit the issue.

Heeding the suggestion of the Eastern District Court and others, the General Assembly did exactly that. Effective August 28, 2001 Section 516.350 was amended. It now reads in pertinent part:

Every judgment, order or decree of any court of record of the United Sates, or of this or any other state, territory or country, *except for any judgment, order, or decree awarding child support or maintenance or 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 over a period of time or payments in the future,* shall be presumed to be paid and satisfied after the expiration of ten years form the date of the original rendition thereof…" (emphasis added).

Section 516.350.

The question before this Court now, of course, is whether the amendment can be applied retroactively if Section 452.30.5 alone does not truly give trial courts ongoing jurisdiction to amend/conform/revise QDRO's after ten years without revival. The Court of Appeals said it could not. But "if the law has been erroneously declared or applied, the judgment of the … court is afforded no deference." *State v. Ruch*, 926 S.W.2d 937, 938 (Mo. App. 1996). "All canons of statutory interpretation are subordinate to the requirement that the Court ascertain

the intent of the legislature from the language used and give effect to that intent, if possible, and to consider the words in their plain and ordinary meaning." *American Family Mutual Insurance Co. V. Fehling*, 970 S.W.2d 844 (Mo. App. 1998) *citing Butler v. Mitchell-Hugeback, Inc*. 895 S.W.2d 15, 19 (Mo. banc 1995).

Precisely what the General Assembly's intent was in originally enacting Section 516.350 is not clear. But the very title of the section is informative. It is: "516.350. Judgments Presumed To Be Paid, When--Presumption, How Rebutted-Records". Nothing – either in the title or in the body of statute or in any legislative history -- describes or classifies Section 516.350 as a statute of limitations. In the instant case the Court of Appeals simply chose to conclude that it "acts" like a statute of limitations. But there is not sufficient justification provided by any legislative history or case law to support this characterization. As described in the title and the text, the statute merely creates a presumption, a presumption that can be rebutted by evidence that the judgment has not been paid. And in the instant case, Husband freely admits that it has not.

The Court of Appeal's decision in this case cites *State ex rel. Wade v. Frawley* 966 S.W.2d 405, (Mo.App. E.D. 1998) for the proposition that Section 516.350 acts like a statute of limitations. "[O]nce the original statute of limitation expires and bars the plaintiff's action, the defendant has acquired a vested right to be free from suit, a right that is substantive in nature." But that reasoning is flawed. As previously noted, Section 516.350 is not a statute of limitations but

merely a presumption – a presumption that a judgment has been paid within ten years. If that presumption is rebutted, then Wife has the right to have the original Order amended to effectuate the parties' – and the trial court's – original intent.

An irrebuttable presumption, also known as a conclusive presumption, is, according to Black's Law Dictionary, "[a] presumption that cannot be overcome by any additional evidence or argument." Black's Law Dictionary (7th Ed. 1999). "A presumption of law must be based upon facts of universal experience and be controlled by inexorable logic." (Internal quotation marks omitted.) *Ducharme v. Putnam*, 161 Conn. 135, 140, 285 A.2d 318 (1971), citing *Valentine v. Pollak*, 95 Conn. 556, 561, 111 A. 869 (1920). Irrebuttable presumptions are impermissible under the due process clauses of the fifth and fourteenth amendments to the United States constitution when "not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Vlandis v. Kline*, 412 U.S. 441, 452, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973); see *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644-45, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974). "Rather, standards of due process require that the State allow ... the opportunity to present evidence [rebutting the presumption]." *Vlandis v. Kline*, supra, at 452. "This [United States Supreme Court] has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause...." *Heiner v. Donnan*, 285 U.S. 312, 329, 52 S.Ct. 358, 76 L.Ed. 772 (1932);

Tevolini v. Tevolini, 2001 WL 1132331(Conn. App. 2001).

The dispositive issue in this case is whether the amendment to Section 516.350 RSMo affects a vested or substantive right of the party or whether the law is merely procedural in nature. As this Court noted in *Mendelsohn v. State Board of Registration for the Healing Arts*, 3 S.W.3d 783 (Mo. 1999), "[P]rocedural statutes, not affecting substantive rights, may be applied retrospectively, without violating the constitutional ban on retrospective laws. *Id*. at 786. The constitutional prohibition against retrospective laws does not apply to a statute that is procedural or remedial in nature because a litigant has no vested rights in matters of procedure. *Id*.

In *Rice v. Huff*, 22 S.W.3d 774, 783 (Mo.App. W.D. 2000) the court defined and described many of the terms involved in retroactivity analysis: Article I, Section 13 of the Missouri Constitution provides "[t]hat no ex post facto law retrospective in its operation can be enacted." A statute is retrospective in operation "where it 'takes away or impairs a vested or substantial right or imposes a new duty in respect to a past transaction.' " *citing Silcox v. Silcox*, 6 S.W.3d 899, 904 (Mo. banc 1999) (internal citations omitted). The test according to *Rice* is that in order for a right to be vested, "it must have become a title, legal or equitable, to the present or future enjoyment of property." *Id*. "*The constitutional inhibition against laws retrospective in operation does not mean that no statute relating to past transactions can be constitutionally passed, but rather that none can be allowed to operate retrospectively so as to affect such past transactions to the substantial prejudice to the parties interested. A law must not give to something*

already done a different effect from that which it had when it transpired." State ex rel. Clay Equipment Corp. v. Jensen, 363 S.W.2d 666, 670 (Mo. banc 1963) (emphasis added). "A retrospective law is one that relates back to a previous transaction giving it a different effect from that which it had under the law when it occurred. **Merely because a statute relates to antecedent transactions, it is not retrospective if it does not change the legal effect of the transaction."** *Dilworth v. Labor & Indus. Relations Comm'n*, 670 S.W.2d 199, 202 (Mo.App.1984).

Rice v. Hoff, 22 S.W.2d, 774, 783 (Mo.App. W.D. 2000). (emphasis added).

In *Mendelsohn* the plaintiff, a psychiatrist, reached an agreement in 1988 with the Board of Healing Arts to surrender his medical license for one year and to be placed on probation for an additional ten years. In 1995 the General Assembly enacted Section 621.045.5 RSMo which provided a procedural mechanism for contesting the authority of the Board to enter in such an agreement. Mendelsohn did not choose to do so. In 1998 he was charged with violating his probation. Mendelsohn argued that application to his case of a statute enacted in 1995 was retrospective since it impaired “the [vested] right he had enjoyed during 1988 to be free from professional discipline imposed without the procedural safeguards inherent in disciplinary actions brought before and adjudicated by the Administrative Hearing Commission.”

This Court held that the statute that changed the procedure for appeal of a settlement between himself and the Board of Healing Arts did not violate the

constitutional protection against retrospective laws. The statute was procedural, creating only a different process for litigants to challenge the decisions of the licensing board. And litigants have no vested rights in matters of procedure.

The same analysis applies in the instant case. Wife seeks to enforce her rights to the portion of the Husband's employee benefits previously awarded her by the Court. The amendment to Section 516.350 is procedural because it relates only to " the machinery for process in the cause of action. It prescribes only the method of enforcing rights or obtaining redress for their invasion. *Id*.; *Pierce v. State of Missouri Dep't of Social Servs.,* 969 S.W.2d 814, 822 (Mo.App. W.D.1998). This amendment prescribes for Wife a way of enforcing those rights through the revision of the QDRO built into the original decree of legal separation using the "machinery" provided by Section 452.330(5).

By definition a substantive law relates to the rights and duties that give rise to a cause of action. *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W. 3d 783, 785-786 (Mo. banc 1999). "Substantive statutes take away or impair vested rights acquired under existing law, or create a new obligation or impose a new duty." *American Family Mutual Insurance Co. v. Fehling*, 970 S.W.2d 844 (Mo App. 1998). Based on these definitions, it is important to focus on what Wife is *not* seeking in this case. She is *not* seeking a new remedy against Husband. She is *not* seeking a new distribution of marital property. She is *not* seeking to strip away Husband's right to be free from a *new* cause of action by her.

She is *not* seeking to revive a cause of action that has already expired. She is *not* seeking to impose any new obligation, duty or disability on him.

"Remedial laws usually affect only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right." *American Family Mutual Insurance Co. v. Fehling*, 970 S.W.2d 844 (Mo App. 1998), *citing Faulkner v. St. Luke's Hosp*., 903 S.W. 2d 588, 592 (Mo. App. 1995).

All Wife seeks is to have the Circuit Court exercise the power and authority the General Assembly granted it under Section 452.330.5. Unequivocally that Section provides that "[O]rders intended to be qualified domestic relations orders affecting pension, profit sharing and stock bonus plans pursuant to the U.S. Internal Revenue Code shall be modifiable only for the purpose of establishing or maintaining the order as a qualified domestic relations order and *to revise or conform its terms so as to effectuate the expressed intent of the order*." *Id*. (emphasis added). Wife wants only to effectuate the intent of the parties and the Court as expressed in the 1987 Decree. Section 516.350 as amended provides the machinery for the process and prescribes the method of enforcing her rights. Section 516.350 does not create a right for Wife to create a QDRO out of whole cloth where the parties and court never intended one to exist before. *See Starrett, supra*. . It does not create a new cause of action against Husband. Nor does it provide her with a way to gain access to assets she might have otherwise obtained in the original proceedings

The language added to Section 516.350 relates solely to "the machinery for process in the cause of action and prescribes the method of enforcing Wife's right to maintain or *establish* a QDRO. *American Family Mutual Insurance Co. v. Fehling*, 970 S.W.2d 844 (Mo App. 1998). And as noted in *Faulkner, supra*, it provides an appropriate remedy for the enforcement of Wife's existing right to a QDRO.

Husband has never denied that the language in the Decree of Legal Separation was intended to be a QDRO. Husband and Wife specifically agreed "the parties intend that the foregoing provisions of the agreement governing the disposition and assignment of a portion of the participant's (Husband's) benefits to the Wife as alternate payee… will qualify and be deemed a Qualified Domestic Relations Order…" (L.F. 30). Furthermore, they agreed that "*It is the intention of the Husband and Wife that the foregoing provisions shall qualify as a QDRO* and whenever the provisions herein under are inconsistent with the definition of a QDRO as may be contained, from time to time, in the Internal Revenue Code of 1954, as amended, and/or ERISA, as may or may not be amended, this agreement shall be amended from time to time as may be necessary to comply with the requirements for a QDRO. Both parties shall enter into an agreed order of court as may be reasonably required to amend this article, and/or the Judgment for Legal Separation to so comply". (emphasis added) (L.F. 30-31). By agreeing that the agreement "shall be amended from time to time as may be necessary" he waived the affirmative defense of the statute of limitations even if the Court finds Section

516.350 as amended does not apply retroactively. *See, Rincon v. Rincon* 571 S.W.2d 475, 476 (Mo.App. 1978).

CONCLUSION

In a recent law review article one commentator analyzed the United States Supreme Court's decisions that focus on retroactive civil legislation. She writes, "The Supreme Court has had difficulty in formulating a crisp test applying to all potential scenarios. Indeed, on the surface, a review of the Supreme Court's retroactive legislation decisions suggests that, much like Justice Stewart's "I know it when I see it" pornography standard, the Court relies more on its own sense of whether a particular piece of legislation should be applied retroactively than upon a fully articulated, consistently applied set of standards." She concludes, however, "a consistent theme of fairness ties the Court's retroactivity decisions into a cogent whole."[4]

Pursuant to Section 452.330(5), and Section 516.350 as amended the trial court below has jurisdiction to revise or conform the terms of the QDRO contained in Paulette and Marco Ochoa's Separation Agreement and Decree of Legal Separation so as to effectuate the expressed intent of the parties and the original order. The trial court therefore misapplied the law in denying Petitioner/Appellant's Motion for Approval of the Qualified Domestic Relations

[4] Bassett, Debra L., *In the Wake of Schooner Peggy*: *Deconstructing Legal Retroactivity*, 69 U. Cin. L. Rev. 453 (Winter 2001)

Order. Consequently Petitioner/Appellant Paulette Ochoa respectfully requests this Court reverse the trial court's order denying approval of the revised Qualified Domestic Relations Orders and for such further orders as seem just and proper in the premises prayed.

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CERTIFICATE OF SERVICE

Signature above is also certification that one printed copy and a floppy disk containing a copy of the above and foregoing were hand delivered this 21st day of November 2001 to: Mr. Lawrence B. Wittels, 7701 Forsyth, Suite 950, Clayton, MO 63105.

_____
David G. Kullman, Attorney for Appellant

IN THE SUPREME COURT OF MISSOURI

In Re the Marriage of:	)	
	)	
PAULETTE M. OCHOA,	)	
	)	
Petitioner/Appellant,	)	Supreme Court No. SC83966
	)	Circuit Court No. 550220
vs.	)	Appeal No. ED 78368
	)	
MARCO A. OCHOA,	)	
	)	Court of Appeals, Eastern Dist.
Respondent/Respondent.	)	Circuit Court for St. Louis County

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

COMES NOW David Kullman, Counsel for Petitioner-Appellant and pursuant to Rule 84.06(c) states to the Court as follows:

1. Appellant's brief includes the information required by Rule 55.03.
2. Appellant's brief complies with the limitations contained in rule 84.06(b).
3. The number of words in the brief, exclusive of the cover, the certificate of service, this certificate required by Rule 84.06(c) and signature block is 7,548.
4. A floppy disk containing Appellant's Substitute Brief is also being filed. Counsel certifies that it has been scanned for viruses and is virus-free.

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