

Nos. A10-2219, A11-683 and A11-684

State of Minnesota
In Supreme Court

Patricia Ann Langston,

Appellant,

vs.

Wilson McShane Corporation, as Administrator for the
Twin Cities Carpenters and Joiners Pension Fund, and the
Twin Cities Carpenters and Joiners Pension Fund,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

1. Is Patricia Langston entitled to benefit payments pursuant to the 1993 domestic relations order and subsequent 2005 qualified domestic relations order?

The district court properly held that Langston was entitled to prospective benefit payments. The Court of Appeals reversed the district court holding that the 2005 QDRO required the Respondents to make increased payments not permitted by the Plan.

Authority: 29 U.S.C.A. § 1056(d).

Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise, 234 F.2d 415 (9th Cir. 2000).

May vs. May ex. rel., 713 N.W.2d 910 (Minn. Ct. App. 2006).

2. Did the district court abuse its discretion in awarding Langston attorneys' fees and costs?

The district court properly held that Langston had demonstrated some degree of success on the merits of her claim and, after considering the appropriate factors, awarded Langston \$54,827.50 in attorneys' fees and an additional \$865.00 in taxable costs. The Court of Appeals vacated the fee award based upon its holding that Langston was not entitled to benefits.

Authority: *Hardt v. Reliance Standard Ins. Co.*, 130 S.Ct. 2149 (2010).

29 U.S.C. 1132(g)(1).

I.

Statement of the Case

This is an appeal from the Court of Appeals' January 9, 2012 unpublished decision reversing three orders and resulting judgments of the Anoka County District Court, the Honorable Sharon L. Hall presiding, granting Appellant Patricia Ann Langston's ("Langston's") motion for summary judgment and awarding Langston costs and reasonable attorney's fees.

This civil action arises from Respondents' failure to honor a qualified domestic relations order ("QDRO") served on them in July 2005. Langston initiated this lawsuit seeking retirement benefits that she was awarded nineteen years ago when she divorced her husband Gary Langston. Originally, Respondents failed to appear or defend Langston's claims and, on April 18, 2007, the district court entered a default judgment in favor of Langston.

Thereafter, Respondents filed a motion to vacate the default judgment. The district court denied Respondents' motion to vacate the default judgment. Respondents appealed, and the Court of Appeals reversed the district court, holding, among other things, that the district court lacked jurisdiction over Langston's claims. Langston petitioned the Supreme Court of Minnesota for review of the Court of Appeals' decision. The Supreme Court granted review and, by order dated December 10, 2009, reversed and remanded this action to the district court.

After remand, Langston moved the district court for summary judgment. The district court, by Order dated October 26, 2010, granted Langston's motion for summary judgment, and rejected Respondents' contention that they could not honor the QDRO because Gary Langston had already retired at the time the QDRO was served on Respondents. The district court also granted in part Langston's subsequent motion for an award of costs and attorneys' fees. Of the \$77,980.36 in fees requested, the district court awarded \$54,827.50 or approximately 70% of the requested amount. The district court also awarded Langston \$865.00 in taxable costs. Respondents filed a notice of appeal from the judgments of the district court.

Before the Court of Appeals, Respondents raised two arguments in support of their contention that the 2005 QDRO is not "qualified." First, Respondents contended that the QDRO required the plan to provide a benefit not permitted in the plan documents. This Court should reject this argument because the plan documents, relevant case law, federal regulations and common sense all dictate that Langston is entitled to the benefits awarded. Second, Respondents contended that the QDRO requires payment of increased benefits. This Court should reject this argument because it is unsupported by any evidence. In fact, the QDRO expressly states that it does not require Respondents to pay increased benefits. Nor does the record evidence permit any finding that honoring the 2005 QDRO will result in the payment of increased benefits. That finding is predicated entirely upon Respondents' circular argument that both Ms. James' and Langston's benefits irrevocably vested in Ms. James at Gary Langston's retirement. Should this

Court reject that argument, which it should, then Respondents would not be required to pay Ms. James both her benefits and Langston's benefits.

Accordingly, this Court should reverse the Court of Appeals and remand this civil action to the district court for entry of judgment in accord with the three orders and resulting judgments at issue in this appeal.

II.

Facts¹

Patricia and Gary Langston were married on September 5, 1964. Gary Langston was a carpenter and a participant in the Twin Cities Carpenters and Joiners Pension Fund (the "plan"). The plan is administered by Wilson-McShane Corporation.

In 1992, Patricia Langston initiated a marital dissolution proceeding. The Langstons' marriage was dissolved by a Judgment and Decree dated August 3, 1993. (A.004-017). The Judgment and Decree provides:

Petitioner shall be awarded a one-half interest in the marital share of all future pension payments received by Respondent. This shall include one-half of all payments made to Respondent pursuant to a plan that Respondent is currently participating in, even if Respondent is not currently fully vested in said plan.

¹ Citations reference Appellant's Appendix ("A.") and The Plan contained at A-111 to A-172 of the appendix most recently filed by Wilson-McShane Corporation in the Court of Appeals.

...

This Judgment and Decree shall order all of Respondent's employers which have a pension plan in which Respondent has an interest to withhold payment of any lump sum distributions or early withdrawals to the extent of Petitioner's interest herein.

In the event Respondent's pension plan or plans allow Respondent to elect survivor benefits, Respondent shall be required to elect said survivor benefits and Petitioner shall be named as the survivor beneficiary.

(A. 008-9).

It appears that Gary Langston remarried in 2001. From 1993 through July 2005, it appears that Patricia Langston, as a result of her prior counsel's neglect, failed to procure a QDRO to enforce her entitlement to a portion of the martial share of Gary Langston's retirement benefits awarded her in the 1993 Judgment and Decree.

On July 1, 2005, the district court issued a QDRO. (A. 0018-20). The QDRO was entered by the Clerk of the Court on July 19, 2005. *Id.* The QDRO identifies Patricia Langston as the alternate payee of those retirement benefits guaranteed to her by the 1993 Judgment and Decree. (*Id.*, Paragraphs D and E). On or about August 9, 2005, Langston's counsel served the QDRO on the Administrator. (A. 0021).

By letter dated August 18, 2005, Respondents rejected the QDRO and informed Langston that she was not entitled to the survivor benefits because "benefits to the Participant are already in pay status due to Mr. Langston's retirement. In addition, he remarried prior to retirement and elected to receive his accrued benefits in the form of a

joint and survivor annuity, with death benefits payable to his current spouse.” (A. 0022-3). Respondents claimed that Langston was entitled to receive benefit payments for September and October 2005 only upon the submission of a QDRO so stating.² Respondents now propose to pay the entire survivor benefit to Shelly James, Gary Langston’s wife for the last four years of his life.

Gary Langston retired in 2004 and died on October 19, 2005. (A. 0024). Respondents informed Langston that they would only approve a revised QDRO that would limit her to two months of benefit payments. (A.0025-6). Respondents contend that Langston’s prior legal counsel did not act in a sufficiently timely manner so as to preserve her right to survivor benefit payments. *Id.* Langston brought suite to enforce the QDRO and obtain benefit payments.

On October 26, 2010, the district court issued a forty-page order and memorandum granting Langston summary judgment. (A. 074-115). The district court held that Langston was entitled to judgment as a matter of law because Respondents had no valid reason for refusing to honor the 2005 QDRO. Respondents refused to make timely or full payments to Langston, and Langston initiated contempt proceedings. On February 15, 2011, the parties appeared before the district court, and Respondents agreed to pay Langston the \$385.58 per month to which she was entitled. (A. 116).

² Aside from the dispute regarding what interest Langston has as a “surviving spouse,” Respondents have approved all other provisions of the 2005 QDRO.

On March 7, 2011, the district court granted Langston's motion for attorneys' fees in part. Of the \$77,980.36 in fees requested, the district court awarded \$54,827.50. The district court also awarded Langston \$865.00 in taxable costs. Langston was also awarded additional costs and fees for the necessity of initiating the aforementioned contempt proceedings. Respondents appealed.

On appeal, Respondents contended that the 2005 QDRO is not "qualified." Specifically, Respondents contended that the QDRO requires them to provide increased benefits and a form of benefit not available under the plan documents. Respondents also challenged the district court's award of attorneys' fees arguing that the district court abused its discretion.

The Court of Appeals, in an unpublished decision dated January 9, 2012, reversed the district court in all respects. The Court of Appeals held that the benefits sought by Langston had irrevocably vested in Gary Langston's second wife Shelly James at his retirement. Accordingly, the Court of Appeals reasoned, the 2005 QDRO ". . . would require the Plan to provide a benefit no longer available and to pay increased benefits because the Plan would have to pay Shelly her 50% annuity and Patricia the benefits awarded under the DRO." (A.164)

Langston petitioned this Court for further review of the Court of Appeals' decision and, by Order dated March 19, 2012, this Court granted Langston's petition (A.176-7).

This Court should reverse the Court of Appeals. The Court of Appeals holding that the QDRO requires the plan to provide a benefit not permitted in the plan documents

is unsupported by the record evidence. The plan documents, relevant case law, federal regulations and common sense all dictate that Langston is entitled to the benefits awarded by the 1993 DRO, the 2005 QDRO, and the district court's 2010-2011 Orders and attendant judgments. Also, the QDRO expressly states that it does not require Respondents to pay increased benefits. Nor do the facts of this case support Respondents' contention that honoring the 2005 QDRO will result in the payment of increased benefits. Respondents' contention that it would have to pay James and Langston the same benefits is predicated upon this Court's acceptance of Respondents' argument that Langston's portion of the benefits somehow "irrevocably vested" in Ms. James on the date of Gary Langston's retirement. If this Court rejects that contention, which it should, then Respondents' circular argument fails, and it will simply need to divide the survivor benefit between Ms. James and Langston.

Finally, this Court should reinstate the district court's award of costs and reasonably attorney's fees. The district court properly exercised its discretion in concluding that Langston had achieved some success on the merits of her claim. Further, the district court considered appropriate factors in determining the fee award. Accordingly, this Court should reverse the Court of Appeals and affirm the district court in all respects.

III.

Argument and Authorities

A. Standards of Review

“When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review *de novo*.” *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006) (citing *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998)).

The district court’s award of attorneys’ fees is reviewed by this Court for an abuse of discretion standard. 29 U.S.C. 1132(g)(1); *Sheehan v. Guardian Life Ins. Co.*, 372 F.3d 962, 968 (8th Cir. 2004).

B. The District Court Properly Ruled That Langston Was Entitled To Benefit Payments.

This Court should affirm the district court because the Judgment and Decree of 1993 and the Court Order of July 2005 entitle Langston to the benefit payments she has now been awarded. Further, Respondents have not provided any valid reason for refusing to honor the QDRO.

i. Langston Is Entitled To Receive Retirement Benefits As An Alternate Payee “Surviving Spouse”.

In 1984, the United States Congress amended the Employee Income Security Act of 1974 (“ERISA”) by enacting the Retirement Equity Act (“REA”). The REA amendments specifically permit the assignment of retirement benefits to alternate payees that obtain QDROs. A former spouse can replace the current spouse as a beneficiary of

the plan if the former spouse obtains a QDRO, recognizing the former spouse as an alternate payee. 29 U.S.C.A. § 1056(d)(3)(A). The district court properly reviewed Respondents' rejection of the 2005 QDRO *de novo*. See *Samaroo v. Samaroo*, 193 F.3d 185 (3rd Cir. 1999).

The Judgment and Decree of 1993 provided that Langston receive a one-half interest in a certain portion of Gary Langston's retirement benefits. The QDRO served by Langston's counsel on the Administrator accurately reflects this entitlement and complies with the requirements of ERISA. Accordingly, Langston is entitled to receive retirement benefits as a "surviving spouse" or alternate payee.

The term "QDRO" means a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a plan. A QDRO may not:

1. require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
2. require the plan to provide increased benefits (determined on the basis of actuarial value), or
3. require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. 1056(d)(3)(D). In this case, the July, 2005, QDRO does not run afoul of ERISA's requirements. ERISA specifically identifies former spouses as appropriate alternate payees. "The term 'alternate payee' means any spouse, *former spouse*, child or other dependent of a participant who is recognized by a domestic relations order as

having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.” 26 U.S.C. § 414(p)(8) (emphasis added).

ERISA provides that “[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.” 29 U.S.C. § 1056(d)(3)(A).

Here, Patricia Langston is an appropriate alternate payee, and the QDRO of July 2005 comports with the statutory requirements of ERISA. Accordingly, the district court properly held that Langston was entitled to receive the benefits awarded her in the 1993 Judgment and Decree.

ii. Respondents Improperly Refused To Qualify The 2005 Qualified Domestic Relations Order.

Respondents refused to honor the QDRO because benefit payments had already begun to Langston’s former spouse. This is not a valid basis for the denial of benefits to Langston. On the contrary, the relevant regulations, case law and sound policy mandate that Langston is entitled to the benefits that she obtained in the 1993 Judgment and Decree.

In 2007, the Department of Labor promulgated 29 C.F.R. § 2530.206 which provides that “. . . a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued.” 29 C.F.R. § 2530.206(c)(1). The examples provided as part of the regulation make clear that a domestic relations order issued after death, divorce and annuity starting date may all be

qualified. Accordingly, the Respondents' denial of benefits to Langston based on the timing of the August 2005 order is without merit.

Further, the United States Court of Appeals for the Ninth Circuit addressed a scenario similar to Langston's in *Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise*, 234 F.2d 415 (9th Cir. 2000). In *Tise*, the Ninth Circuit explained:

Because a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be obtained before the plan participant's benefits become payable on account of his retirement or death. Several features of the statute's language and structure confirm that ERISA erects no such requirement.

First, for all the detail of the QDRO requirements, ERISA nowhere specifies that a QDRO must be in hand before benefits become payable.

Second and more significantly, the statute specifically provides for situations in which no valid QDRO issues until after benefits become payable. Once the pension plan is on notice that a domestic relations order has issued that may be a QDRO, the plan may take a reasonable period to determine whether the order is a QDRO and therefore creates obligations for the pension plan. 29 U.S.C. § 1056(d)(3)(G)(II).

While the plan is making this determination, it must segregate the benefits that would be due to the alternate payee under the terms of the DRO during the first 18 months that those benefits would be payable if the DRO is ultimately deemed a QDRO. 29 U.S.C. S 1056(d)(3)(H)(v). This benefit-segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO.

Third, Congress expressly contemplated that further state court proceedings might ensue during the 18-month QDRO-determination period, through which the alternate payee could attempt to cure any defects in the original DRO and obtain an enforceable QDRO.

Id. at 421-22. This position has been adopted by the United States Court of Appeals for the Eighth Circuit as well. *See Hogan v. Raytheon Co.*, 302 F. 3d 854 (8th Cir. 2002).

In this case, Respondents claim, and the Court of Appeals held, that Patricia Langston is not entitled to any retirement benefit payments because Gary Langston had already retired at the time the QDRO was served. It is true that in certain situations courts have held that a QDRO can be served too late to protect an alternate payee's right to retirement benefits (*see, e.g., Rivers v. Central and Southwest Corp., et al.*, 186 F.3d 681 (5th Cir. 1999)). Those cases, however, occur only when the alternate payee's right to receive the benefits does not exist at the time the plan participant retires or dies. *Id.* at 682.

Here, Patricia Langston's entitlement to retirement benefits was created in 1993. The QDRO now at issue is merely a vehicle for enforcing Patricia Langston's interest in the benefit payments. Accordingly, the fact that Respondents had already commenced benefit payments to Gary Langston at the time the QDRO was served in August 2005 does not divest Patricia Langston of her entitlement to benefits created in 1993.

Langston obtained a court-ordered entitlement to a portion of Gary Langston's survivor benefits more than a decade before Gary Langston's retirement and served the

July 2005 QDRO on Respondents two months before Gary Langston's death. As such, this case falls squarely within the decisions of the Third, Eighth, Ninth and Tenth Circuits, as well as the United States District Court for the District of Vermont,³ the Supreme Court of Hawaii,⁴ and the United States District Court for the Eastern District of Michigan.⁵

Each of these courts has held that state courts may enter QDROs after a participant has died or the right to benefits has otherwise been transferred or expired. See *Hogan*, 302 F.3d at 857 (8th Cir. 2002); *Tise*, 234 F.3d at 421, as amended upon denial of reh'g, 255 F.3d 661 (9th Cir. 2000); and *Patton v. Denver Post Corp.*, 326 F.3d 1148, 1153-1154 (10th Cir. 2003).

As held in *Tise*, the participant's death does not preclude the entry of a QDRO. A state court domestic relations order that is not a QDRO nonetheless transfers an interest in the pension from the participant to the claimant. *Tise*, 234 F.3d at 421. The absence of a QDRO, the Ninth Circuit held, "merely prevent[s] [the claimant] from enforcing that interest until the QDRO is obtained." *Id.* "Because a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be obtained before . . . death." *Id.* The Eighth Circuit's decision in *Hogan* is to the same effect,⁶ as is

³ *IBM Sav. Plan v. Price*, 349 F. Supp. 2d 854 (D. Vt. 2004)

⁴ *Torres v. Torres*, 60 P.3d 798, 819-824 (Haw. 2003).

⁵ *Payne v. GM/UAW Pension Plan*, 1996 WL 943424 (E.D. Mich. May 7, 1996).

⁶ 302 F.3d at 857 (following *Tise*).

the Third Circuit's decision in *Files v. ExxonMobil Pension Plan*, 428 F.3d 478 (3rd Cir. 2005).

In *Patton*, the Tenth Circuit went so far as to uphold a *nunc pro tunc* DRO issued eleven years after a divorce decree pertaining to plan benefits not known about at the time of the divorce. The Tenth Circuit declined to infer that the plan must have been notified of the interest prior to the death of the participant. *Patton*, 326 F.3d at 1153-54.

Two cases in which courts disqualified the surviving former spouse from benefits are *Rivers v. Central and Southwest Corp.*, 186 F.3d 681 (5th Cir. 1999) and *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997). These cases actually support Langston's cause. In *Rivers*, "a community property settlement agreement was entered into between Rivers and Franklin on the day of their divorce. The agreement did not address Franklin's pension benefits in SWEPCO." 186 F.3d at 681 (emphasis added). After Franklin had retired and died, Rivers sought and obtained an order purporting to confer upon Rivers an entitlement to Franklin's benefits. The court refused to recognize Rivers' proposed QDRO. The time line of the *Rivers* case is instructive:

1. Rivers and Franklin marry 1946
2. Rivers and Franklin divorce and the divorce decree makes no mention of Rivers' right to benefit payments 1972
3. Franklin remarries 1972
4. Franklin retires and begins receiving benefit payments 1983
5. Franklin dies 1987
6. Rivers files suit seeking QDRO and benefit payments 1997

Id. at 681.

In the case presently before this Court, Langston's divorce decree states:

Petitioner shall be awarded a one-half interest in the marital share of all future pension payment received by Respondent. This shall include one-half of all payments made to Respondent pursuant to a plan that Respondent is currently participating in, even if Respondent is not currently fully vested in said plan.

(A. 008). Accordingly, the determinative fact present in *Rivers* - the ex-spouse's failure to address the pension benefits in the divorce decree - is not present here. For this reason, any reliance on *Rivers* would be misplaced.

In *Hopkins*, Vera Hopkins and her former husband had been divorced for eight years before Vera Hopkins sought a QDRO. At the time of the divorce, "Mr. Hopkins's pension was deemed a marital asset; nevertheless, Vera Hopkins was not awarded a portion of the pension in the equitable distribution of the marital assets." *Hopkins*, 105 F.3d at 154. After Mr. Hopkins retired, Vera Hopkins obtained a judgment against the participant for unpaid alimony. *Id.* at 155. Vera Hopkins then sought to satisfy this post-retirement judgment via a QDRO. Again, just like in *Rivers*, Hopkins' divorce settlement made no mention of the participant's pension benefits. On these particular facts, the

United States Court of Appeals for the Fifth Circuit held that the participant's second spouse could not be divested of survivor benefit payments.⁷

Accordingly, as set forth in both *Rivers* and *Hopkins*, when the ex-spouse fails to obtain any right to benefit payments at the time of the divorce, he or she may be divested of any right in those payments. In this case, Langston's divorce decree does entitle her to receive a portion of Respondents' benefit payments. This district court properly recognized this entitlement, and this Court should affirm the district court.

iii. The Minnesota Court of Appeals Has Already Held, In A Published Decision, That A QDRO May Be Entered After The Death Of A Plan Participant.

In this case, Langston served her QDRO prior to Gary Langston's death. Even if she had not, however, the result would remain the same and Langston would be entitled to benefits.

In *May vs. May ex. rel.*, 713 N.W.2d 910 (Minn. Ct. App. 2006), the Minnesota Court of Appeals held that a QDRO may be entered after the death of a defined benefit plan participant. *Id.* at 915. This Court enumerated four reasons why a QDRO need not be served prior to a plan participant's death. First, there was no authority for the

⁷ While *Hopkins* is so factually distinct that it should not be applied to the instant matter, Langston notes that the reasoning of the *Hopkins* court is fundamentally flawed. For a detailed criticism of *Hopkins* see *Torres v. Torres*, 60 P.3d 798 (Haw. 2003). ("Based on the foregoing, we do not find the conclusion in *Hopkins* that surviving spouse benefits vest in the participant's current spouse at the time of retirement to be persuasive.")

proposition precluding entry of a QDRO after the death of the plan participant.⁸ Second, requiring service of a QDRO prior to death would render 5 C.F.R. § 838.237(b)(3) superfluous.⁹ Third, the former spouse [like Langston here] was recognized by a domestic relations order as having a right to receive benefits. Finally, permitting posthumous QDROs is consistent with foreign case law. *Id.*

⁸ For a detailed discussion on ERISA's failure to set any deadline for submission of a QDRO, see *Marker vs. Northrop Grumman Space & Missions Systems Corp.*, 2006 WL 2873191 (N.D.Ill 2006), 39 Employee Benefits Cas. 1004. (A. 063). Also, the Court will note that the plan documents in this case similarly impose no deadline for service of a QDRO.

⁹ 5 C.F.R. § 838.237(b)(3) provides:

Death of the former spouse.

- (a) Unless the court order acceptable for processing expressly provides otherwise, the former spouse's share of an employee annuity terminates on the last day of the month before the death of the former spouse, and the former spouse's share of employee annuity reverts to the retiree.
- (b) Except as otherwise provided in this subpart, OPM will honor a court order acceptable for processing or an amended court order acceptable for processing that directs OPM to pay, after the death of the former spouse, the former spouse's share of the employee annuity to:
 - (1) The court;
 - (2) An officer of the court acting as fiduciary;
 - (3) The estate of the former spouse; or
 - (4) One or more of the retiree's children as defined in section 8342(c) or section 8424(d) of title 5, United States Code.

In *May*, the Minnesota Court of Appeals specifically cited *Torres vs. Torres*, 60 P.3d 798, 825 (Hawaii 2002) with approval. In *Torres*, a former spouse successfully sought benefits through a posthumous QDRO. The former spouse obtained benefits even though the participant had a surviving spouse that would otherwise be entitled to those same payments. Further, the *Torres* court offered a detailed rejection of the argument that a surviving spouse's right to benefit payments irrevocably vests at the participant's death. *Id.* at 814-822.

Since the Minnesota Court of Appeals has cited *Torres* with approval, it would be consistent for this Court to adopt the *Torres* court's reasoning and permit the post-retirement QDRO here. The United States Court of Appeals for the Eighth Circuit is also in accord that a QDRO need not be served prior to any arbitrary triggering event - - including the participant's death. *Hogan*, 302 F.3d at 857 (8th Cir. 2002).

iv. Sound Public Policy And Common Sense Support Langston's Claim For Benefits.

Respondents' position, if accepted, would result not only in a "harsh" result, but a result that frustrates sound public policy and common sense. Respondents had actual knowledge of Langston prior to the 1993 DRO and prior to Gary Langston's 2004 retirement. Further, Respondents were in the best position to inquire of Gary Langston if any prior spouse existed or had rights in his pension. Despite these facts, Respondents

did not even inquire of Gary Langston if he had a prior spouse at the time of his retirement.

Instead, Respondents used what appears to be a dated benefit election form that did not contain a single type of benefit election option that would account for a prior spouse. Indeed, the election form provided by Respondents did not even permit Gary Langston the option of informing Respondents about his prior spouse's right to receive a portion of his pension benefits.

Given the statistical probability that a participant has a prior spouse (and the attendant likelihood that the prior spouse has rights to a portion of the pension), this benefit election form defies common sense. Respondent seek to remain willfully blind to the existence of prior spouses. Given their fiduciary duty to alternate payees like Langston, this practice should not be encouraged at Langston's expense.

The United States Supreme Court, in the case of *Kennedy v. Plan Administrator for DuPont Sav. And Investment Plan*, 129 U.S. 865 (1999),¹⁰ addressed the difficulties sometimes encountered by defined benefit plans by the enforcement of a QDRO. In *Kennedy*, the Court examined whether a beneficiary's federal common law waiver of plan benefits is effective where that waiver is inconsistent with plan documents. The

¹⁰ Respondents also cited to *Kennedy* for the proposition that they need not look beyond plan documents to determine benefit payments due. This argument grossly mischaracterizes *Kennedy*, in which the Court expressly stated that QDROs are documents that must be reviewed. Respondents' argument would, of course, render all QDROs null.

plan argued that looking beyond plan documents would create a hardship at odds with the simplicity sought by ERISA. The Court stated:

The Estate of course is right that this guarantee of simplicity is not absolute. The very enforceability of QDROs means that sometimes a plan administrator must look for the beneficiaries outside plan documents notwithstanding §1104(a)(1)(D); §1056(d)(3)(J) provides that a “person who is an alternate payee under a [QDRO] shall be considered for purposes of any provision of [ERISA] a beneficiary under the plan.” But this in effect means that a plan administrator who enforces a QDRO must be said to enforce plan documents, not ignore them. In any case, a QDRO enquiry is relatively discrete, given the specific and objective criteria for a domestic relations order that qualifies as a QDRO, see §§1056(d)(3)(C), (D), requirements that amount to a statutory checklist working to “spare [an administrator] from litigation-fomenting ambiguities,” (*citing Metropolitan Life Ins. Co. v. Wheaton*, 42 F. 3d 1080, 1084 (7th Cir. 1994).

Id. at 876 (emphasis added).

Further:

If an alternate payee’s right to ERISA plan proceeds were automatically cut off once an event occurred that, absent an enforceable QDRO, would make the proceeds payable to someone else, then a plan participant’s retirement, the vicissitudes of court scheduling, or a plan participant’s death, all events beyond the control of the alternate payee, could determine the parties’ substantive rights. However, Congress [did not mean] to ask the impossible, not the literally, but the humanly, impossible, or to make a suite for legal malpractice the sole recourse of an ERISA beneficiary harmed by a lawyer’s failure to navigate the treacherous shoals with which the modern state-federal law of employee benefits abounds.

Metropolitan Life Ins. Co., v. Wheaton, 42 F.3d 1080, 1085 (7th Cir. 1994).

Accordingly, sound public policy and common sense both weigh in favor of honoring the post-retirement QDRO and awarding Langston benefits. For these reasons, this Court should affirm the district court.

C. This Court Should Reject Respondents' Contentions That The QDRO Violates The Plan Documents And That The QDRO Requires Additional Benefit Payments.

Respondents have raised two objections to the QDRO. First, Respondents contend that they simply cannot honor the QDRO because it violates the express written terms of the plan documents. This position is contrary to the plain language of the plan documents. Second, Respondents contend that the QDRO would require the plan to make additional benefits in contravention of ERISA. This Court should reject this argument because the QDRO does no such thing. Further, this *ex post facto* rationalization was never put forth by the Plan in its August 5, 2005 written rejection of the QDRO.

i. The QDRO Is Not Inconsistent With ERISA Or The Plan Documents.

The QDRO provides that the plan pay a survivor annuity to Langston. The QDRO also expressly states that it does not require the plan to provide any type or form of benefit or require the plan to provide increased benefits. (A. 0018-20).

The plan documents specifically provide for payment of a survivor annuity. (Plan §§7.01 – 7.04). The plan documents also specifically provide for payment to a former spouse pursuant to a QDRO. (Plan §3.04; Wilson-McShane Court of Appeals Appendix,

pp. 99-101). In fact, the plan documents address the impact of a QDRO: “Notwithstanding any other provisions of the Plan to the contrary, all benefits otherwise payable under the Plan with respect to a Participant shall be adjusted to the extent necessary to comply with a duly qualified domestic relations order.” (Plan, §3.04).

The plan documents do not provide that a QDRO must be served prior to the retirement of the plan participant. Nor do the plan documents provide that a qualified joint survivor annuity interest irrevocably vests in the participant’s surviving spouse. In fact, the plan provides that a surviving spouse’s interest, at his or her death, reverts back to the participant during his or her lifetime. (Plan, §7.02). Further, by Respondents’ own admission, the benefits payable to Gary Langston would have reverted to Langston even though he had already retired prior to service of the QDRO. Accordingly, the plan documents allow for adjustment and reversion of the surviving spouse’s interest post-retirement and pre-death.

ii. The QDRO Does Not Require The Plan To Provide Increased Benefits.

Nor is any evidence offered by Respondents that dividing the survivor benefit between Langston and Ms. James will lead to increased benefit payments on an actuarial, or any other, basis. In fact, given the respective life expectancies of Langston and James, the amount of benefit paid will, on an actuarial basis, decrease if the July 2005 QDRO is enforced. For an analogous circumstance, see *Bailey vs. New Orleans Steamship Assoc.*, 100 F.3d 28, 30-31 (5th Cir. 1996).

The Plan can comply with the QDRO without offending its own documents and without offending ERISA. The survivor annuity is appropriate and the amount of money paid is, pursuant to the QDRO, expressly limited to an amount that would not result in increased payments for the plan. In fact, the Respondents have already performed the necessary actuarial calculation to determine the survivor benefit payable to Langston. (A. 52-54).

Respondents argue, and the Court of Appeals wrongly concluded, that if the 2005 QDRO is honored, Respondents will have to continue paying Shelly James her full benefit and pay Langston pursuant to the QDRO. That argument, however, is predicated entirely upon Respondents' contention that Ms. James' benefits irrevocably vested at the time of Gary Langston's retirement. If the Court

Respondents have also argued that the 2005 QDRO violates ERISA, but that argument is also predicated upon Respondents' incorrect contention that the QDRO requires either a form of benefit not allowed under the plan or an increase in benefit payments. Because the QDRO does not so offend the plan documents, it also does not violate ERISA.

iii. The Case Law Upon Which The Court Of Appeals Relied Does Not Support Divesting Langston Of Her Entitlement To Benefits.

The Court of Appeals relied heavily on *Carmona vs. Carmona*, 603 F.3d 1041 (9th Cir. 2010). *Carmona*, however, is at once supportive of Langston's position and

distinguishable from the instant case. In *Carmona*, the United States Court of Appeal for the Ninth Circuit addressed whether one spouse can create enforceable rights after the retirement of the participant. 603 F.3d at 1055. The Ninth Circuit held that such rights cannot be created after retirement. The spouse seeking benefits (the participant's eighth wife) in *Carmona* had obtained no right to payments prior to the assignment of those benefits to a prior spouse (the participant's seventh wife).

Carmona, while factually distinct, expressly supports the result sought by Langston - - the prior spouse retains her right to benefits (created pre-retirement) rather than losing them to a subsequent wife. The *Carmona* court specifically recognized that “. . . congressional intent is not advanced by permitting a subsequent post-retirement spouse to collect benefits accrued during an economic partnership she or he was not a part of.” *Id.* at 1058 & n. 12. Here, Langston was the spouse during the bulk of the economic partnership that generated the benefits at issue. Moreover, Langston is not seeking to divest Ms. James of her portion of the retirement benefits.

In this case, of course, Langston's right to payments (created by the 1993 Judgment and Decree) were not susceptible to vesting in Ms. James at Gary Langston's retirement. Only those survivor benefits retained by Gary Langston in the 1993 divorce were capable of vesting in Shelly James at Gary Langston's retirement. Accordingly, *Carmona* can and should be read consistently with Langston's position.

Finally, the *Carmona* court pointedly emphasized the unfairness associated with divesting a prior spouse of her benefit payments when she was part of the economic union that had amassed those benefits in the first place. *Id.* at 1058. Here, Langston is that prior spouse. Accordingly, this Court would, in affirming the district court, honor the Congressional mandate to protect a surviving prior spouse's entitlement to benefits.

Respondents have cited *Carmona* for the proposition that a former spouse is not entitled to benefits. Respondents' Court of Appeals Brief, p. 32. In fact, *Carmona* held that the spouse at the time of death, Judy Carmona, was not entitled to benefits. The former spouse in *Carmona*, Janis Carmona, actually prevailed.

iv. This Court Should Reject Respondents' Belated Argument That Gary Langston Was Not A Plan Participant.

After this Court remanded this matter back to the district court Respondents, for the first time, advanced a theory wholly unsupported by the law or logic: Gary Langston, as of July 1, 2004, was not a plan participant. On appeal, Respondents stated "to the extent the DRO is being applied to the period subsequent to Mr. Gary Langston's death in an attempt to divest benefits from the second spouse, Langston's DRO no longer related to a benefit payable to a 'participant' as Gary Langston's joint and survivor annuity benefits had already vested in another beneficiary." Respondents' Court of Appeals Brief, p. 19.

There are numerous problems with this position. First, it was not a reason for refusing to qualify the DRO. Second, the QDRO was served prior to Gary Langston's death. Accordingly, he was a plan participant at the relevant time. This fact is conceded by Respondents. Finally, the plan documents and ERISA provide that Gary Langston qualifies as a "participant". Accordingly, this argument should be rejected by the Court.

The plan documents provide that "[a]n Employee shall become a Participant as of the first day of the Plan Year following the date on which contributions are first made to the Pension Fund on his behalf. A Participant shall remain a Participant until the earlier of his death or until he suffers Forfeited Service."¹¹ (Plan § 1.20). As of July 1, 2004, Gary Langston was alive. Accordingly, Gary Langston was a participant under the plan's definition of that term.

29 U.S.C. §1002 (7) defines the term "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." *Id.* Under this definition, Gary Langston is a participant because as of July 1, 2004, he was eligible to receive benefit payments from the Plan. In fact, Gary Langston was receiving

¹¹ The Plan defines "Forfeited Service" in pertinent part as "The number of Years of Service as otherwise credited to a Participant that become forfeited by occurrence of one or more Breaks in Service as described below." Here, there is no allegation that Gary Langston suffered "Forfeited Service" due to any "Break in Service." Plan § 1.16.

benefit payments from the Plan on July 1, 2004 - so he was obviously a participant. This fact is further established by the August 18, 2005, letter from Respondents to Langston's prior legal counsel which states “. . . benefits to the Participant are already in pay status due to Mr. Langston's retirement.” (A. 022) (emphasis added).

For these reasons, this Court should reject Respondents' newly minted and meritless argument that Langston cannot obtain benefits because the 2005 QDRO does not relate to payments to a “participant”.

D. The District Court Did Not Abuse Its Discretion In Awarding Langston Attorneys' Fees. Langston Obtained “Some Degree Of Success On The Merits Of Her Claim,” And The District Court Considered Proper Factors In Determining The Fee Award.

Congress enacted ERISA to protect participants' and beneficiaries' interests in employee benefit plans by setting out substantive regulatory requirements, including standards of conduct, responsibility, and obligation for fiduciaries, and by providing for appropriate remedies, sanctions, and ready access to the courts. ERISA § 2(b), 29 U.S.C. § 1001(b); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 264 (1993). ERISA provides that “[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.” 29 U.S.C. § 1132(g)(1).

The discretionary award of attorneys' fees serves an important role in the enforcement of ERISA's protections. As the Supreme Court recognized in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, one of the reasons Congress permits fee-shifting in certain statutes is "to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation." 421 U.S. 240, 263 (1975).

Under ERISA, a beneficiary such as Langston may obtain a discretionary fee award so long as she obtains "some degree of success" on the merits of her case. *Hardt v. Reliance Standard Ins. Co.*, 130 S.Ct. 2149 (2010). Under this standard, Langston is entitled to the fees awarded - - and probably more than the fees awarded.

The district court carefully considered appropriate, though not mandatory, factors in assessing Langston's fee petition. Ultimately, the district court awarded only about 70% of the requested attorneys' fees. The district court correctly took issue with Appellant's disingenuous assertion (repeated now to this Court) that Langston is somehow responsible for the length of this litigation. Langston could not have submitted a revised QDRO without forfeiting her right to all but two monthly payments. Respondents' omission of this determinative fact was properly troubling to the district court. Further, the district court properly noted that the deterrent effect of the litigation and relative merit of the parties' positions weighed in favor of a fee award.

The well-reasoned, lengthy order and memorandum of the district court, while not entirely agreeable to either party, certainly is no abuse of discretion. The district court's lengthy and detailed memorandum on the issue of fees largely speaks for itself. In the interest of economy, Langston will not revisit all of the issues therein. The district court applied the proper legal standard and considered relevant factors in awarding Langston approximately 70% of the fees requested.

Such fee awards are rarely denied a prevailing plaintiff in ERISA litigation. *Martin v. Arkansas Blue Cross And Blue Shield*, 299 F.3d 966, 973 (8th Cir. 2002) (“Martin admitted at oral argument that few, if any, fee awards have been denied a prevailing plaintiff in ERISA cases nationwide.”).

IV.

CONCLUSION

Patricia Langston was eighteen (18) years old when she married Gary Langston in 1964. She was forty-seven (47) years old when they divorced almost thirty years later in 1993. Langston was awarded and is entitled to her share of the pension benefits that Gary Langston earned during their marriage. Respondents, however, seek to take all of Langston's benefits and pay them to Gary Langston's second spouse - Shelly James. This inequitable result is unnecessary and, frankly, difficult to understand.

The text of ERISA, the terms of the Plan, relevant case law, sound public policy and the intent of the United States Congress in enacting the REA amendments to ERISA

unanimously provide that Langston is entitled to the benefits she was awarded in the 1993 Judgment and Decree and that are the subject of the 2005 QDRO. Langston seeks only her portion of the retirement benefits. Ms. James is entitled to her portion of those benefits. Respondents have put forward no good reason why Ms. James should obtain all of the benefits at issue.

Finally, the district court properly applied the *Hardt* standard and painstakingly considered appropriate factors in awarding Langston approximately 70% of the attorneys fees requested. Accordingly, this Court should reverse the Court of Appeals and remand this civil action to the district court for entry of judgment consistent with the district court's amended order and judgment of February 17, 2011 as well as the order and resulting judgment of March 7, 2011.

Dated: April 19, 2012.

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 8,415 words. This brief was prepared using Microsoft Word.

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