

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.

RESPONDENTS' BRIEF AND APPENDIX

MALKERSON GUNN MARTIN LLP
Thomas F. DeVincke (#301759)
1900 US Bank Plaza
220 South Sixth Street
Minneapolis, MN 55402
(612) 313-0735

Attorneys for Appellant

ANDERSON, HELGEN, DAVIS
& NISSEN, P.A.
Amanda R. Cefalu (#309436)
Rebecca A. Peterson (#392663)
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
(612) 435-6363

Attorneys for Respondents

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).

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES.....6

REQUEST FOR ORAL ARGUMENT7

STATEMENT OF THE CASE.....7

STATEMENT OF FACTS10

 I. The Parties10

 II. The Langstons’ Divorce11

 III. Gary Langston’s Second Marriage and Retirement11

 IV. The Domestic Relations Order12

 V. The Plan’s Review of the DRO13

 VI. Langston’s Subsequent Inaction and Gary Langston’s Death14

 VII. The Family Court Proceedings.....15

 VIII. The Court’s Order and Judgment and Revised Order and Judgment.....16

 IX. The January 9 Opinion and Appellant’s Petition for Review.....17

STANDARD OF REVIEW17

ARGUMENT18

 I. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE JULY 1, 2005 DOMESTIC RELATIONS ORDER WAS NOT A “QUALIFIED DOMESTIC RELATIONS ORDER” PURSUANT TO ERISA §206(d).....18

 A. Pension Plans Governed By ERISA May Not Divide Or Assign Portions Of A Plan Participant’s Pension Benefits Solely Based Upon State Law, Rights Conferred By State Law, Nor Using General Principles Of Fairness Or Equity18

 B. The Court of Appeals Correctly Ruled That Because The Benefits Had Irrevocably Vested In Another Beneficiary The 2005 DRO Violated 29 U.S.C. §1056(D)(I) By Requiring Payment Of A Type Or Form Of Benefit Not Otherwise Provided By The Plan.....21

 i. The Court of Appeals correctly held that the QJSA had irrevocably vested in James under the terms of the Plan Document and applicable law.23

 ii. Federal caselaw supports the conclusion that the DRO would have required payment of a type or form of benefits not available, or that

benefits had already vested prior to the Plan’s receipt of the DRO.....	26
iii. Appellant’s cited authority is irrelevant and distinguishable.....	30
C. The Court of Appeals Correctly Concluded That The July 1, 2005 DRO Would Require The Plan To Provide Increased Benefits.....	33
D. Equitable Principles of Common Sense and Public Interest Are not Relevant Since the Court is Bound to Apply ERISA.....	36
II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT GIVEN THE OUTCOME ON THE MERITS OF THIS CLAIM LANGSTON WAS NOT ENTITLED TO ATTORNEY’S FEES.....	37
A. The Court Should Disregard Appellant’s Arguments As To Fees Because The Petition For Review Did Not Seek Review Of This Issue.	37
B. The Court Of Appeals Correctly Held That Appellant Did Not Ultimately Succeed On The Merits Of Her Claim.....	39
CONCLUSION.....	41

TABLE OF AUTHORITIES

<u>Federal Cases</u>	<u>PAGE</u>
<i>Boggs v. Boggs</i> , 520 U.S. 833 (1997).....	18, 19
<i>Carmona v. Carmona</i> , 603 F.3d 1041 (9th Cir. 2008).....	<i>passim</i>
<i>Curtiss-Wright Corp. v. Schoonejongen</i> , 514 U.S. 73 (1995).....	22
<i>Egelhoff v. Egelhoff</i> , 532 U.S. 141 (2001).....	10, 21
<i>Hardt v. Reliance Standard Life Ins. Co.</i> , 130 S. Ct. 2149 (2010).....	39
<i>Hopkins v. AT&T Global Information Solutions Company</i> , 105 F.3d 153 (4th Cir. 1997).....	<i>passim</i>
<i>Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan</i> , 129 S. Ct. 865 (2009).....	<i>passim</i>
<i>Rivers v. Central and Southwest Corp.</i> , 186 F.3d 681 (5th Cir. 1999).....	26
<i>Samaroo v. Samaroo</i> , 193 F.3d 185 (3rd Cir. 1999).....	<i>passim</i>
<i>Stahl v. Exxon Corp.</i> , 212 F. Supp. 2d 657 (S.D. Tex. 2002).....	35
<i>Szydlowski v. Pension Ben. Guar. Corp.</i> , 2006 U.S. Dist. LEXIS 87986 (E.D. Mo. Apr. 7, 2006).....	22
<i>Trustees of the Directors Guild of American Producer Pension Benefits Plans v. Tise</i> , 234 F.3d 415, 421 (9th Cir. 2000).....	32
<i>TWU-NYC Private Bus Lines Pension Trust v. Adams</i> , 2002 U.S. Dist. LEXIS 26827 (S.D.N.Y. Oct. 15, 2002).....	35
<u>State Cases</u>	<u>PAGE</u>
<i>Bondy v. Allen</i> , 635 N.W.2d 244 (Minn. App. 2001).....	17
<i>In re Collier</i> , 726 N.W.2d 799 (Minn. 2007).....	18
<i>Langston v. Wilson McShane Corp.</i> , 776 N.W.2d 684 (Minn. 2009).....	8
<i>Morton Bldgs., Inc. v. Comm'r of Revenue</i> , 488 N.W.2d 254 (Minn. 1992).....	17
<i>Torres v. Torres</i> , 60 P. 3d 798 (Haw. 2002).....	<i>passim</i>
<u>Statutes</u>	<u>PAGE</u>
ERISA § 205; 29 U.S.C. §1055.....	<i>passim</i>
ERISA § 206; 29 U.S.C. § 1056.....	<i>passim</i>
ERISA § 206(d); 29 U.S.C. § 1056(d).....	<i>passim</i>
ERISA § 402(a)(1); 29 U.S.C. § 1102(a)(1).....	21
ERISA § 402(b)(4); 29 U.S.C. § 1102(b)(4).....	21
ERISA § 404(a)(1)(D); 29 U.S.C. § 1104(a)(1)(D).....	21

ERISA § 502(g)(1); 29 U.S.C. § 1132(g)(1).....39

Other Authorities **PAGE**

Cynthia A. Samuel & Katherine S. Spaht, *Fixing What's Broke: Amending ERISA to Allow Community Property to Apply upon the Death of a Participant's Spouse*, 35 Fam. L.Q. 425, 441 (2001)22

STATEMENT OF THE ISSUES

1. *Whether a domestic relations order which assigns benefits already vested in a third party to an alternate payee, or which assigns benefits no longer available pursuant to the terms of an employee benefit plan, can be “qualified” under ERISA §206(d)(3)(D)(i), 29 U.S.C. §1056(d)(3)(D)(i).*

The Minnesota Court of Appeals correctly reversed the lower court, and held that the relevant domestic relations order provided to Respondents by Appellant in July 2005 was not “qualified” because it would have required the plan to provide a type or form of benefit not otherwise available under the plan.

Most apposite cases and authority:

- *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2008)
- *Hopkins v. AT&T Global Information Solutions Company*, 105 F.3d 153 (4th Cir. 1997)
- *Samaroo v. Samaroo*, 193 F.3d 185 (3rd Cir. 1999)
- *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009)

2. *Whether a domestic relations order which requires payment of increased benefits can be “qualified” under ERISA §206(d)(3)(D)(ii).*

The Minnesota Court of Appeals correctly reversed the lower court, and held that Appellant’s July 2005 domestic relations order would have required Respondent to provide increased benefits and could therefore not be considered a “qualified” domestic relations order.

- 29 U.S.C. §1056 (d)(3)(D)(ii)

REQUEST FOR ORAL ARGUMENT

Respondents respectfully request oral argument.

STATEMENT OF THE CASE

In July 2005, twelve years after her divorce from Gary Langston, a participant in the Twin City Carpenters & Joiners Pension Plan (“Respondent or the Plan”), Appellant Patricia A. Langston (“Appellant” or “Langston”) served the Plan with a domestic relations order regarding the division of Gary Langston’s pension benefits. The Plan determined that the proposed domestic relations order was not a “qualified” domestic relations order as that term is understood under the Employee Retirement Income Security Act (“ERISA”). The proposed domestic relations order was not qualified for a number of reasons:

First, it required the Plan to provide a form or type of benefit to Langston no longer provided or available under the terms of the plan. Second, the domestic relations order assigned Langston benefits payable over her lifetime, when in light of his retirement and selection of a QJSA, the only available benefit at that time would have been a portion of benefits payable over Gary Langston’s lifetime. Third, because the domestic relations order was served on the Plan by Langston after her ex-husband Gary Langston had already selected a different beneficiary for joint survivor benefits, and after his retirement had already placed the available benefits in “pay status,” Langston’s proposed order could not be qualified because it would have required an increase in

benefits payable under the plan. Instead of revising the domestic relations order to address the deficiencies, Langston commenced this action.

After prolonged litigation relating to the default of prior Plan counsel, and concerning the issue of whether the state courts have concurrent jurisdiction to interpret and apply ERISA, the case was returned for consideration on the merits to the district court and Langston sought summary judgment. Langston sought an Order that the 2005 domestic relations order was “qualified” under ERISA and that the Plan had violated ERISA §1132(a)(1) by failing to pay her benefits due to her under the plan. *See Langston v. Wilson-McShane Corp.*, 776 N.W.2d 684 (2009); *Langston v. Wilson-McShane Corp.*, 758 N.W.2d 583 (Court of Appeals No. A07-2034)(Minn. App. 2009); (A. 8-9).

On December 10, 2010, the district court granted Langston’s motion for summary judgment, ordering the Plan to commence paying “surviving spouse benefits” to Langston. On February 17, 2011, after the district court determined the original Order and Judgment required clarification, it issued an Amended Order again holding that the domestic relations order was qualified and ordering the Plan to immediately commence paying benefits to Langston as if Gary Langston had never retired and pursuant to the domestic relations order. On March 7, 2011, the district court also awarded attorney’s fees and costs to Langston and issued another Amended Order.

On April 27, 2011, the district court issued another Amended Order and Judgment, again clarifying the October 26, 2010 Order and supporting the determination that the DRO was qualified, directing that benefits be paid to Langston, awarding fees to Langston, and directing that judgment be entered. (Respondents’ Appendix, hereafter

“RA,” 4-5). Appellants filed numerous appeals in response to each Order, and address each appeal herein. The Minnesota Court of Appeals extended review to all appeals, including the appeal of the lower court’s award of fees on March 7, 2011 and ordered Appellant to address all issues in one brief. After full briefing by all parties and oral argument, the Court of Appeals issued an opinion on January 9, 2012, reversing the District Court’s opinion in its entirety (“Opinion”).

The Court of Appeals correctly applied the statutory requirements of §1056(d) of ERISA, holding that because benefits had already vested upon Mr. Langston’s retirement, the DRO would have required the Plan to pay increased benefits or provide a benefit not otherwise available under the plan. (Appellant’s Appendix, hereafter “A,” 162-63). Although Langston claims that the Opinion is at odds with *May v. May*, 713 N.W.2d 910 (Minn. App. 2006), this argument is merely an attempt to cloud the real issue for decision. The holding in this case did not turn on whether Langston’s DRO was served on the Plan after Mr. Langston died, and accordingly, does not impact *May’s* ruling that a QDRO may issue after the death of a participant. *Id.* at 915-916. The *May* decision did not involve the question of whether a DRO can be “qualified” when it awards benefits inconsistent with the Plan Document, inconsistent with available Plan options, and when provided to the plan after a particular form of benefits has irrevocably vested in a third-party.

The Minnesota Court of Appeals correctly relied upon *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010) and *Hopkins v. AT&T Global Information Systems Co.*, 105 F.3d 153 (4th Cir. 1997) in finding that QJSA benefits irrevocably vest in a participant’s

spouse (or designated beneficiary) when the participant retires. (A, 164-66). Not only is the Opinion consistent with ERISA's statutory requirements concerning QJSAs, as announced in 29 U.S.C. §1055, and consistent with ERISA's goal to achieve uniform plan interpretation, it is also consistent with the Plan Document. (RA,133, 210, 227-28); *See also Egelhoff v. Egelhoff*, 532 U.S. 141, 148, (2001).

Rather than follow the Plan Document, or apply §1055 or §1056 of ERISA, Langston seeks to have this Court review the Opinion to determine if a distinguishable case out of Hawaii, *Torres v. Torres*, 60 P.3d 798 (Haw. 2002), is persuasive. As noted by the Court of Appeals, *Torres* did not involve the question of whether a QJSA benefit vests upon a participant's retirement, and instead held that surviving spouse benefits do not automatically vest upon a participant's death. (A, 167-68).

STATEMENT OF FACTS

I. The Parties.

Respondent Twin City Carpenters & Joiners Pension Plan ("the Plan") is a multi-employer defined-benefit plan established and administered in accordance with the provisions of ERISA. *See* (RA, 1 at ¶ 2). Respondent Wilson McShane Corporation is a Minnesota business corporation and is the third-party administrator for the Plan. *See* (RA, 1 at ¶ 3); *See also* (RA, 88, ¶ 1). Appellant Langston married Gary Langston on September 5, 1964. (RA, 88 at ¶ 3). At all times relevant to this litigation, Gary Langston was a participant in the Plan. *See* (RA, 88 at ¶ 3).

II. The Langstons' Divorce.

The Langston marriage was dissolved pursuant to a Judgment and Decree (“J&D”) entered on August 3, 1993 in Anoka County District Court. (RA. 1 at ¶ 5; A, 4-13). Pursuant to the J & D, Langston was awarded, amongst other things, a one-half interest in the marital share of future pension payments to be received by Gary Langston. (A, 9-10). Additionally, the J & D ordered that, in the event that Gary Langston’s pension plan allowed him to elect survivor benefits, Gary Langston should elect Langston as his surviving beneficiary. *Id.*

The Summary Plan Description (“SPD”), which was distributed to all Plan participants, and also available by contacting Wilson McShane, provided “if your marital status changes or there are other changes in your personal life which affect the name of your beneficiary, contact the Plan office.” *See* (RA, 157). The SPD also provided that while benefits are automatically paid to a participant’s spouse upon their death, an “otherwise effective designation of a beneficiary will become immediately ineffective if the relationship indicated on the designation ceases.” (RA, 156). Neither Langston nor Gary Langston provided a copy of the J&D, or any other notice to the Plan, regarding their divorce or Gary Langston’s obligations. *See* (RA, 89 at ¶ 8).

III. Gary Langston’s Second Marriage and Retirement.

Approximately eight years after the J&D was finalized, in July 2001, Gary Langston married Shelly James (“James”). (RA, 88-89 at ¶ 3). As of that time, no one had provided any notice to the Plan regarding any aspect of the Langston divorce. (RA, 89 at ¶ 8) On June 12, 2004, Gary Langston retired and submitted an application for

benefits to the Plan. *See* (RA, 89 ¶ 6). As part of the application process, Langston was required to select one of the seven types of benefits available under the Plan. *See* (RA, 201- 220). Gary Langston elected to receive a fifty percent joint and survivor annuity benefit and elected James, his then current wife, as his surviving annuitant. *See* (RA, 89 at ¶ 6). Pursuant to the terms of the Plan Document, a joint and survivor benefit election is irrevocable once benefit payments commence and the applicable election period expires. *See* (Amendment 11, Sections B &D; RA, 230-32)(stating that an election may only be revoked during the “Election Period” or the 90 day period ending on the annuity start date);(RA, 211-13). Upon receipt of Langston’s retirement application, the Plan performed actuarial calculations to arrive at Gary Langston’s joint survivor benefit of \$2,825.63 per month for the remainder of his life, and upon his death, \$1,412.81 per month for the remainder of James’ life. (RA, 89 at ¶ 6); *See also* (RA, 133-34). In June 2004, the Plan had not been provided notice of the Langston’s prior divorce, nor any notice of Langston’s interest in Gary Langston’s pension benefits. (RA, 89 at ¶ 8). Accordingly, the Plan approved the application and Gary Langston’s benefits commenced in the form of an annuity payable over his lifetime on July 1, 2004. (RA, 89 at ¶ 7).

IV. The Domestic Relations Order.

Despite the fact that the J&D was finalized and entered in August of 1993, Langston did not obtain a domestic relations order (“DRO”) until July 1, 2005. *See* (Add. 1-3). A copy of this DRO was provided to the Plan on August 10, 2005, twelve years after the entry of the J&D, after the applicable revocation period, and thirteen months

after Gary Langston's benefits had commenced. (RA, 89 at ¶¶ 6-8). The DRO identified Langston as the alternate payee of a portion of Gary Langston's interest in the Plan and provided, in relevant part:

- (D) **Amount.** The Alternate Payee is hereby assigned 50% of the retirement benefits otherwise payable to the Participant in accordance with the terms of the Plan derived from his accrued vested benefit accumulated from September 5, 1964 through August 3, 1993. The Alternate Payee shall have no rights in or to the portion of the Participant's accrued benefit under the Plan not assigned by this Order, or to any benefit earned by the Participant after August 3, 1993.

- (E) **Distribution.** The accrued benefit assigned by this Order shall be paid to the Alternate Payee in the form of an annuity payable over her lifetime with monthly payments commencing when the participant reaches or would have reached his earliest retirement age under the Plan...In the even the Participant dies before payments to the Alternate Payee begin, the Alternate Payee shall be considered the "surviving spouse" of the Participant for purposes of section 205 of [ERISA].

See (A, 19); (emphasis added).

V. **The Plan's Review of the DRO.**

Upon receipt of the DRO, and in compliance with ERISA and the Plan's internal procedures, the Plan reviewed the DRO to determine whether it was qualified as defined by ERISA §206(d). (RA, 89 at ¶ 9). The Plan determined that the DRO could not be "qualified" for multiple reasons, and it promptly advised Langston of those reasons in a letter dated August 18, 2005 ("Letter"). (A, 22-23).

The Plan informed Langston the DRO could not be "qualified" for two reasons. First, the DRO required payments to be made to Patricia Langston in the form of an annuity payable over her lifetime. (A, 22-23). This type of annuity was no longer

available to Langston because, pursuant to the unambiguous terms of the SPD and Plan Document, benefits could only be payable over Gary Langston's lifetime. (A, 22-23; RA, 210). Even if the SPD and Plan Document would have allowed benefits to be calculated over Langston's lifetime, from an actuarial standpoint, the Plan could not turn back the clock and re-determine the benefits over a different person's—Langston's—lifetime, especially in light of the fact that the benefits had already been determined, were in pay status, and were therefore irrevocable. *Id.*; *see also* (RA, 230-37). As a result, the Plan informed Langston the only payment method available to Langston pursuant to the Plan Document was a shared payment method whereby she would receive a portion of the monthly benefit being paid to Gary Langston, as calculated over Gary Langston's lifetime. (A, 22-23).

The second reason that the DRO could not be “qualified” was because the DRO provided that, in the event that Gary Langston pre-deceased Langston prior to the commencement of any payments, Langston was to be considered the surviving spouse thereby entitling her to survivor benefits. *Id.* However, Gary Langston married James and had elected her as his beneficiary prior to the Plan being served with the DRO. *Id.* The Plan requested that Langston revise the DRO to reflect that she would receive no benefits in the event that Gary Langston predeceased her. *Id.*

VI. Langston's Subsequent Inaction and Gary Langston's Death.

In the August 18, 2005 letter, the Plan invited Langston to submit a revised DRO correcting the defects. (A, 22-23). But Langston chose not to do so, and never sought nor submitted a revised DRO despite the fact that the Judge issuing the DRO specifically

retained jurisdiction and ordered the parties to cooperate with the Plan to make any changes necessary for the DRO to become “qualified.” *See* (RA, 89 at ¶ 11; A, 18-20). Nevertheless, in accordance with ERISA, the Plan withheld and segregated \$381.38, the amount that would have been payable to Langston from the monthly pension benefit being received by Mr. Langston, for the months of September and October, 2005. *See* (RA. 249).

Thereafter, on October 19, 2005, Gary Langston died. *See* (A, 24). The Plan then began paying the survivor annuity to his current spouse, Shelly James, beginning in November 2005, as was required by Gary Langston’s beneficiary designation and the terms of the SPD and Plan Document. *See* (RA, 89 at ¶ 12, 143-44, 87-88, 210-11).

VI. The Family Court Proceedings.

After Gary Langston’s death, Langston brought a Motion to Show Cause and/or Enforce Court Order against the Plan in her marital dissolution action in Anoka County District Court. On June 26, 2006, prior to the hearing on this Motion, the Plan’s counsel sent a letter to Langston’s counsel reiterating the DRO’s defects such that, in light of Gary Langston’s beneficiary designation, the Plan was already properly paying survivor benefits to James. (A, 25-26). The Plan further advised Langston that it would continue to hold the previously withheld payments for Langston’s benefit for eighteen months from the date that the original DRO was submitted; and if no revised DRO was submitted during that time which could be qualified, the payments would revert back to Gary Langston’s estate. *Id.* The Honorable Nancy Logering denied Langston’s Motion finding that the Court lacked jurisdiction over the Plan for purposes of determining the

DRO “qualified,” and thus the Court determined that it could not compel the Plan’s adherence to the DRO. (RA, 253-54). Langston requested reconsideration of this ruling, but the request was denied. *Id.*

VII. The District Court’s Order and Judgment and Revised Order and Judgment.

After the Plan’s former counsel defaulted on the Complaint filed in this action, and a subsequent appeal in which the Minnesota Supreme Court ruled that state courts do have concurrent jurisdiction to consider claims under 29 U.S.C. §1132(a) and whether a DRO is “qualified,” the case made its way back to the district court for disposition on the merits.

Langston’s motion for summary judgment sought entry of a judgment in favor of Langston finding that the 1993 DRO and subsequent 2005 domestic relations order entitle her to benefits. Langston contended that 2005 DRO was appropriately “qualified” pursuant to 29 U.S.C. § 1056(d). In an Order dated October 26, 2010, the district court agreed with Langston, and held that the July 1, 2005 DRO was qualified. (RA, 4-5). The district court ordered the Plan to immediately commence paying Surviving Spouse Benefits to Langston in the appropriate percentage as specified in the DRO. (RA, 4-5). In order to comply with that Order, the Plan recalculated Langston’s benefit as a surviving spouse benefit, rather than a separate interest benefit, and began paying her that amount. Langston brought a Motion for Order to Show Cause based on the recalculation, arguing Langston was awarded a “separate interest,” and at a hearing on February 15, 2011, the district court determined that clarification of the October 26, 2010 Order and Judgment was necessary. *See* (Transcript, February 15, 2011; at pp. 29-32).

On February 17, 2011, the lower court issued an Amended Order and Amended Memorandum on February 17, 2011. In its Amended Order, the court held that the July 1, 2005 DRO was qualified, removed the prior award of surviving spouse benefits, and ordered the Plan to pay the amount of benefits set forth in the July 1, 2005 DRO. (a, 74-75). On March 7, 2011, the district court awarded Langston fees and costs in the amount of \$55,692.50. (A, 116-117). Appellants filed notices appealing both the February 17, 2011 and March 7, 2011 Orders. . On April 27, 2011 the Court issued another order entering judgment for the fees awarded to Langston, and a judgment was entered on May 2, 2011. In an Order dated May 18, 2011, the Minnesota Court of Appeals extended review to all Orders appealed by Appellants.

VIII. The January 9 Opinion and Appellant's Petition for Review.

On January 9, 2012, the Court of Appeals issued its Opinion in which it reversed the district court's decision in its entirety. (A,156). Thereafter, on February 9, 2012, Appellant petitioned this Court for further review of the Opinion. (A,171). The petition for review only sought review on one legal issue concerning the pre-existing rights of a former spouse under a QDRO. (A, 171-72). The petition made no reference requesting review of the reversal of the award of attorney fees by the Opinion. This Court granted review on March 19, 2012. (A, 176-77).

STANDARD OF REVIEW

The facts in this matter are undisputed. The lower court's application of law to undisputed facts is a question of law the Supreme Court reviews *de novo*. See *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992); *In re Collier*,

726 N.W.2d 799, 803 (Minn. 2007). Accordingly, the appellate court is not bound by, and need not give deference to, the district court's substantive legal decision. *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001).

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE JULY 1, 2005 DOMESTIC RELATIONS ORDER WAS NOT A "QUALIFIED DOMESTIC RELATIONS ORDER" PURSUANT TO ERISA §206(d).

The Minnesota Court of Appeals correctly ruled that the district court had erred in concluding that Appellant's July 1, 2005 DRO was "qualified" pursuant to 29 U.S.C. §1056(d), ERISA §206(d). Specifically, the appellate court determined that Appellant's DRO would have required the Plan to pay a form and type of benefit no longer available, or would have required the Plan to pay increased benefits, and was therefore not a "qualified" domestic relations order under ERISA §206(d). *See* (A, 166-69).

A. Pension Plans Governed By ERISA May Not Divide Or Assign Portions Of A Plan Participant's Pension Benefits Solely Based Upon State Law, Rights Conferred By State Law, Nor Using General Principles Of Fairness Or Equity.

The Employee Retirement Income Security Act ("ERISA"), enacted in 1974 and later amended, is a federal law which governs self-funded and multi-employer employee benefit plans, including the Taft-Hartley pension plan at issue in this matter. Pension plans governed by ERISA are subject to various reporting and disclosure requirements, and must comply with particular vesting, funding, and participation requirements announced under federal law. *See* 29 U.S.C. §§1021-1031, §§1051-1086; *see also* *Boggs*

v. Boggs, 520 U.S. 833, 840-41 (1997). ERISA includes an express preemption clause, which provides that the Act “shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . .” 29 U.S.C. §1144(a); *Id.* at 841.

Pursuant to ERISA §206, pension plans are generally prohibited from allowing the assignment or alienation of benefits to non-participants. *See* ERISA § 206(d); 29 U.S.C. § 1056(d). As an exception, a state domestic relations order (“DRO”) will overcome the anti-alienation provisions of ERISA where it has been determined to be a “qualified domestic relations order” (“QDRO”) under ERISA. *See* ERISA §206(d)(3)(A); 29 U.S.C. § 1056(d)(3)(A) (2006). ERISA preempts, and invalidates, all DROs which do not meet the statutory definition of a QDRO. *Boggs*, 520 U.S. at 844.

In the event that the Plan receives a DRO, the administrator must, within a reasonable period, determine whether the domestic relations order is a QDRO under which benefits may be assigned to the spouse of a participant or named alternate payee. *See* ERISA §206(d)(3)(G); 29 U.S.C. §1056(d)(3)(G)(i)(II). Appellant brought this action arguing that the July 5, 2005 DRO, served upon the Plan on August 10, 2005, was in fact “qualified” in accordance with 29 U.S.C. §1056(d)(3)(D), and that the Plan and Plan Administrator violated ERISA when determining the DRO was not “qualified.” *See* (R.A. 1-3).

ERISA defines a “domestic relations order” as any “judgment, decree, or order which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependant, and is made pursuant to a State domestic relations law. *See* ERISA §206(d)(3); 29 U.S.C. § 1056(d)(3)(B)(ii). To

be “qualified,” the DRO must “create or recognize the existence of an alternate payee’s right to, or assign to an alternate payee, the right to receive all or a portion of the benefits payable with respect to the participant under the plan,” and also meet additional requirements. *See* ERISA §206(d)(3)(B)(i); 29 U.S.C. § 1056(d)(3)(B)(i). In addition, a DRO can be considered to be qualified under §1056(d), “**only if**” the order:

- i. does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan;
- ii. does not require the plan to provide increased benefits (determined on the basis of actuarial value); and
- iii. does not require the payment of benefits to an alternate payee which are to be paid to another alternate payee under another order previously determined to be qualified domestic relations order.

29 U.S.C. § 1056(d)(3)(D)(i)-(iii)(emphasis added).

As discussed in detail below, Appellant’s July 1, 2005 DRO was not “qualified” because it did not meet the substantive requirements of 29 U.S.C. §1056(d)(3)(D)(i)-(ii). As concluded by the appellate court, the DRO at issue (i) required the Plan to provide Langston a type or form of benefit, or an option, not otherwise provided for under the plan; and (ii) required the Plan to provide increased benefits by treating Langston as a surviving spouse. *See* (A, 22-23). Accordingly, as a matter of law, Langston’s DRO was not “qualified” in accordance with 29 U.S.C. 1056(d)(3), and the appellate court correctly reversed the district court’s decision.

Appellant claims that this case turns on whether Patricia Langston was “entitled to benefit payments pursuant to the 1993 domestic relations order,” whether the DRO was served before or after Gary Langston died, concepts of fairness, and whether the DRO

was served on the Plan before Gary Langston retired. While those factors are relevant to the outcome of this dispute, the issue for this Court to decide is not whether there “could be” a DRO which entitles Appellant to benefit payments. Instead, the issue before the Court is whether the particular written instrument, the July 1, 2005 DRO, did or did not comply with ERISA’s statutory requirements such that the Plan could assign or alienate benefits without also violating federal law.

B. The Court of Appeals Correctly Ruled That Because The Benefits Had Irrevocably Vested In Another Beneficiary The 2005 DRO Violated 29 U.S.C. §1056(D)(I) By Requiring Payment Of A Type Or Form Of Benefit Not Otherwise Provided By The Plan.

ERISA requires “every employee benefit plan [to] be established and maintained pursuant to a written instrument” specifying the basis on which payments are made to and from the plan. 29 U.S.C. §§ 1102(a)(1), 1102(b)(4). The Plan Administrator is obliged to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of Title I and Title IV of ERISA. *Id.* at § 1104(a)(1)(D). The Act provides no exceptions to this duty when it comes time to paying benefits. *See Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865, 875 (2009). On the contrary, as emphasized by the United States Supreme Court, a claim for benefits only stands or falls by “the terms of the plan” under § 1132(a)(1)(B). *Id.* By requiring a plan to follow the directives of the plan documents, employers may “establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits.” *Id.* (citing *Egelhoff v. Egelhoff*, 532 U.S. 141, 148, 121 S. Ct. 1322, 149 L. Ed. 2d 264

(2001)); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995) (ERISA's statutory scheme "is built around reliance on the face of written plan documents").

If qualified, the 2005 DRO would require the Plan to radically alter the type and form of benefit available by forcing it to create an annuity paid over Patricia Langston's lifetime when the QJSA selected by Gary Langston has already been determined on the basis of Gary Langston and Shelly James' lifetimes. There are two types of QDROs, "share payment" methods and "separate interest" QDROS. *Samaroo v. Samaroo*, 193 F.3d 185, 190 (3rd Cir. 1999); *Szydlowski v. Pension Ben. Guar. Corp.*, 2006 U.S. Dist. LEXIS 87986 (E.D. Mo. Apr. 7, 2006). The "shared payment" method assigns a percentage of benefits to an alternate payee after the benefits have been commenced, while a "separate interest" divides the pension prior to the participant collecting benefits and "allows both the participant and the alternate payee to each elect a form of benefits for their respective separate shares." *Szydlowski* at *20; citing *See Cynthia A. Samuel & Katherine S. Spaht, Fixing What's Broke: Amending ERISA to Allow Community Property to Apply upon the Death of a Participant's Spouse*, 35 Fam. L.Q. 425, 441 (2001)(A. 380). The district court confirmed, at the hearing held on February 15, 2011, that Langston's DRO requires payments to Langston over her lifetime. *See* (Transcript, Feb. 15, 2011, pp. 30, lines 12-25); *See also* (Transcript, Feb. 15, 2011, pp. 31-32). In other words, the lower court awarded Langston a "separate interest" QDRO, although under the terms of the Plan, benefits were being paid and had already been calculated over Gary Langston and Shelly James' lifetime.

i. The Court of Appeals correctly held that the QJSA had irrevocably vested in James under the terms of the Plan Document and applicable law.

Agreeing with Respondents' position, the Court of Appeals held that the DRO would require a type or form of benefit no longer provided under the plan. (A, 166-68). Appellant argues that the district court properly classified the 2005 DRO as "qualified" because the Plan generally provides for the option of a monthly annuity paid over the life of a participant or his spouse, therefore the DRO's assignment of 50% of Gary Langston's benefits paid over Patricia Langston's lifetime was a type or form of benefit available under the Plan. Appellant's argument, however, is contingent upon viewing the DRO in a vacuum, and without regard to what benefits are available per the Plan Document at the time a plan receives the purported QDRO. The Court of Appeals correctly concluded the district court erred in failing to conclude that the benefits irrevocably vested in a third-party prior to the Plan receiving the DRO. (RA, 217-19).

Gary Langston's election of the Joint and Survivor benefit was irrevocable and Langston's proposed DRO seeking benefits payable to Langston over her lifetime sought a type of benefit or option no longer available under the Plan. *See* (RA, 210-213). Pursuant to the Plan, a participant's normal retirement benefit will be paid as a Joint and 50% Survivor Benefit unless the participant elects otherwise during the election period. (RA, 210-213). The election of the Joint and Survivor Benefit may be revoked only in writing and during the Election Period. (RA, 210-213). The Election Period is the ninety (90) day period starting on the annuity starting date. (RA, 210-213); *See also* (A, 230; 237).

At the time Langston provided her DRO to the Plan, it is undisputed the election period for Gary Langston had expired, and that he had accepted the Joint and 50% Survivor Benefit electing Shelly James, his new wife, as the intended beneficiary. *See* (A, 22-23). The Plan language strictly provides that Mr. Langston's selection of the QJSA requires the Plan Administrator to calculate benefits payable over his lifetime subsequent to his retirement and prior to his death, and that this election is irrevocable once made by Mr. Langston. *See* (RA, 210-213, Section 7). In other words, Gary Langston's election of a QJSA to be paid over his lifetime, and subsequently the lifetime of his then-current spouse, rendered the type of benefit sought by Langston's DRO to be something the plan could no longer provide. *See* ERISA §205(d)(1)(A)-(B); 29 U.S.C. §1055(d)(1) (A plan is required to pay the participant's *designated surviving spouse* 50% of the amount previously payable to the participant). As recognized by the United States Supreme Court in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, the Plan is bound by the terms of the plan's document and terms of the plan. Under § 1132(a)(1)(B), Langston is entitled to no benefits because the DRO provided to the Plan would have required payment of a type or form of benefit not otherwise provided by the Plan on August 18, 2005, given Gary Langston's prior election. *Kennedy*, 129 S. Ct. at 875.

With respect to surviving spouse benefits, the other type of benefit Langston's DRO attempted to reassign, the Plan clearly and directly provides that Gary Langston's election of Shelly James as the beneficiary of QJSA benefits is irrevocable and could not be changed without obtaining her consent in writing. *See* (RA, 210-213; Section 7.01 Joint and Survivor Benefit). The Plan Administrator interpreted what type or benefits

could be available in accordance with the plan documents, and correctly concluded that the DRO was not qualified because it sought an option no longer available to Langston. The lower court's conclusion that Mr. Langston's election of the QJSA in this case can be ignored by the Plan would nullify Section 7.01 of the Plan Document, and would place the Plan Administrator in the position of selecting a participant's beneficiary in accordance with state law rather than the specific provisions of the Plan Document. Such an action would directly contravene the Plan's fundamental requirement to follow the strict language of the Plan Document. *Kennedy*, 129 S. Ct. at 875.

In addition, even if Gary Langston had not designated James to be his beneficiary and had not selected a QJSA, the same result would have occurred. ERISA requires that with regard to defined benefit plans, the presumed form of payment to vested participants is a QJSA unless specifically waived by both the participant and the current spouse. *See* ERISA §205(c); 29 U.S.C. §1055(c)(2). The statute sets forth stringent and specific requirements for waiver of the automatic QJSA, and also requires pension plans to provide participants with a revocation period. 29 U.S.C. §1055(c)(3). In other words, given Langston's delay in providing the Plan with notice of her DRO, even if Gary Langston had done nothing benefits would have vested in James as his surviving spouse pursuant to §1055(c)(1).

Based on the Plan language and applicable law, the Court of Appeals properly found that the joint survivor annuity elected by Mr. Langston had vested irrevocably in James at the time the Plan received the DRO. As noted in the Opinion, this conclusion is consistent with ERISA §§1056(d) and 1055(c), sound policy regarding application of the

terms of a Plan Document, and federal case law interpreting ERISA and 29 U.S.C. §1056(d). (A.164-68); *see generally Hopkins*, 105 F.3d 153; *Samaroo*, 193 F.3d 185; *Rivers v. Central and Southwest Corp.*, 186 F.3d 681, 683-84 (5th Cir. 1999); *Carmona*, 603 F.3d at 1057-58.

ii. Federal caselaw supports the conclusion that the DRO would have required payment of a type or form of benefits not available, or that benefits had already vested prior to the Plan's receipt of the DRO.

The Court of Appeals correctly held that *Carmona v. Carmona*, 603 F.3d 1041, 1057-58 (9th Cir. 2008) and *Hopkins v. AT&T Global Information Solutions Company*, 105 F.3d 153 (4th Cir. 1997) are more persuasive. Based on the reasoning in *Carmona* as it relates to when QJSA benefits vest and whether this particular form of benefits vest at the time of retirement and annuity payout, the Court of Appeals followed the holding in *Carmona* and not *Torres*. (A.164-67). The Court of Appeals agreed with the Ninth Circuit's conclusion that ERISA requires that QJSA benefits vest upon retirement, and correctly noted that the policies underlying ERISA would be frustrated if the vesting date is not fixed at retirement. *Id.*

In *Carmona*, the Ninth Circuit considered whether a participant's retirement "cuts off a putative alternate payee's right to obtain an enforceable QDRO" in relation to surviving spouse benefits of a QJSA. *Carmona*, 603 F.3d at 1055. The Ninth Circuit held that the participant's retirement is the date a joint survivor annuity vests in the participant's spouse. *Id.* at 1057. The *Carmona* Court reasoned that this rule was legally and practically necessary under ERISA's statutory requirements that accentuate the

annuity start date of QJSA benefits. *Id.* The Court further emphasized it is crucial for administrators to know who the spouse is at the time the benefits become payable because a QJSA is calculated using the life of the two spouses at that time. *Id.* at 1059. As this is the presumed method of payment under ERISA §1055(c)(1), it would frustrate the objectives of ERISA if a former spouse, who had failed to enforce her rights to benefits until after the participant retires, could effectively nullify the election and throw the Plan into actuarial uncertainty by late service of a DRO requiring a different method of payment.

Additionally, the *Carmona* Court noted that per the 1984 amendments to ERISA in the Retirement Equity Act, the participant's retirement date is when the surviving spouse's interest in the plan also vests. *Id.* at 1058. Thus, once a participant retires, the spouse at the time (absent a QDRO enacted before that date), becomes the surviving spouse entitled to the QJSA benefits. *Id.* at 1058. Based on the above reasoning, the *Carmona* Court determined ERISA's statutory objectives are best served under the *Hopkins* rule as articulated by the Fourth Circuit.

In *Hopkins*, the Fourth Circuit considered a similar claim in which a former spouse was attempting to divest QJSA benefits from the participant's second wife. 105 F.3d at 154. The Fourth Circuit ruled that under the terms of ERISA §206(d), in order for be enforceable a DRO must create rights to benefits "payable with respect to a participant under a plan," citing 29 U.S.C. §1056(d)(3)(3)(B). The *Hopkins* court reasoned that where QJSA benefits are irrevocable upon the participant's retirement, vesting has occurred and surviving spouse benefits no longer relate to benefits payable to a plan

participant and therefore do not meet the qualifications of a ERISA §206(d). The issue in *Hopkins* dealt with whether her attempt to divest his new wife of her portion of the QJSA benefits (referred to by the *Hopkins* court as the “Surviving Spouse Benefits Order”) after her ex-husband’s retirement, was consistent with the qualification provisions of ERISA §206(d)(3). Within this context, the *Hopkins* court concluded that the participant’s new spouse’s benefits had irrevocably vested upon retirement and could not be attached under the second DRO obtained by the plaintiff in *Hopkins*. *Id.* The Court of Appeals agreed with this reasoning and nothing offered by Appellant demonstrates error in adopting this analysis.

While Appellant does cite to *Carmona*, 603 F.3d 1041, she incorrectly recasts the opinion as actual support for the district court’s ruling. Specifically, Appellant argues that because the former spouse of the participant prevailed over the current spouse, *Carmona*, absent the reasoning as discussed *infra*, mandates that Appellant, as a former spouse, is likewise entitled to the benefits. *See* (Opening Brief at pp. 24-25). Appellant ignores that the *Carmona* ruling is based on the fact that the former spouse was the designated beneficiary and current spouse when the participant retired and at the time the QJSA annuity commenced. The *Carmona* Court specifically held that “a state DRO may not create an enforceable interest in surviving spouse benefits to an alternate payee after a participant’s retirement, because ordinarily at retirement the surviving spouse’s interest irrevocably vests.” *Id.* at 603 F.3d 1041, 1060.

Appellant will likely repeat the argument that because the Plan provides generally for payment of a “survivor annuity” that the DRO sufficiently references a benefit

provided for under the Plan and can be “qualified.” *See* (Court Of Appeals, Respond. Brief at p. 21-22). This position ignores the reality of which benefit options were available according to the terms of the Plan on August 18, 2005. Ms. Langston’s delay in obtaining and serving a DRO upon the Plan allowed intervening events to contract the universe of available benefits and options under the Plan. On Mr. Gary Langston’s irrevocable election of a Joint and Survivor Benefit payable to James, which provides for benefits payable over his lifetime and then subsequent to his death over the lifetime of James, extinguished Langston’s ability to have an annuity calculated over her lifetime as a separate interest. In other words, under the terms of the Plan Langston could only be entitled to 50% of benefits payable over Gary Langston’s lifetime.

Langston’s reliance on the appellate court’s decision in *May v. May*, 713 N.W.2d 910 (Minn. App. 2006) is a further attempt to cloud the issue of whether the DRO was “qualified” consistent with ERISA, the Plan Document and applicable regulations. In *May*, the appellate court ruled that a QDRO may issue after the death of a participant, particularly where a dissolution judgment has previously been issued in which an alternate payee is awarded an interest in benefits payable to the participant. *Id.* at 915-916. The *May* decision did not involve the question of whether a DRO is “qualified” when it awards benefits inconsistent with the Plan Document and available Plan options and was served subsequent to the irrevocable vesting of a particular form of benefits in the participant and their surviving spouse. In fact, the *May* court recognized that the particular DRO at issue could not be qualified because it “misidentified the benefits in which it was granting” the former spouse an interest in, and the question of whether a

DRO may be qualified after a participant's death arose only within the context of considering whether the lower court appropriately ordered the participant to cooperate with the personal representative of the former spouse in drafting an appropriate QDRO. *Id.* at 916. Langston has not sought an Order seeking cooperation in drafting a QDRO, has not attempted to revise the DRO at issue, has not attempted to sue Gary Langston's surviving spouse for cooperation, but instead has held steadfast to the position that the Minnesota Courts should revise the available Plan options regardless of her failure to enforce her interest in Gary Langston's pension for over twelve (12) years. The lower court has interpreted the DRO and ordered the Plan to pay Langston a separate interest over her lifetime. This option was simply no longer available under the Plan Document and applicable law on August 18, 2005, accordingly, as a matter of law, the DRO is not "qualified." The options and benefits available under the Plan cannot be viewed theoretically and without regard to any intervening facts, as Langston and the lower court believe, without invalidating numerous Plan provisions and also violating federal law.

iii. Appellant's cited authority is irrelevant and distinguishable.

In asking this Court to overturn the Court of Appeals' decision, Appellant proffers foreign authority that is irrelevant and distinguishable from the facts before this Court. The Court of Appeals specifically rejected the applicability of these authorities and Respondents urge this Court to do the same.

First, Appellant and the district court relied on the Supreme Court of Hawaii's decision in *Torres v. Torres*, 60 P. 3d 798 (Haw. 2002) in justifying why the 2005 DRO

should be classified as “qualified.” In doing so, both stretch the holding and relevancy of the decision in *May vs. May ex. Rel.*, 713 N.W.2d 910 (Minn. Ct. App. 2006). As discussed above, the *May* court ruled that a QDRO may issue after the death of a participant. *Id.* at 915-916. To the extent *May* follows and cites to *Torres*, it does so merely to demonstrate that the death of a participant does not serve as an automatic bar to qualification of a DRO. Given that the 2005 DRO was provided to the Plan on August 18, 2005 and that the Plan Administrator rejected it prior to Gary Langston’s death, the general question of “can a DRO be qualified after death” is not at issue in this case. The Court of Appeals specifically rejected the application of the *Torres* as followed by the *May* court for this reason. (A, 167-68). Gary Langston’s death is relevant only because now the only benefits at issue, or available to any beneficiary, are survivor benefits.

The Court of Appeals further concluded that *Torres* was factual distinguishable and less persuasive. Even a cursory review of the *Torres* decision shows that the Opinion appropriately distinguished the factual and legal issues involved from those presented to this Court. First, and controlling to the Court of Appeals, *Torres* “did not concern a QJSA that requires certainty and predictability and that calculates benefits based on the expected lives of both the participant and his surviving spouse.” (A, 168). Secondly, the *Torres* court encountered serious delays and impermissible practices on the part of the plan. *Id.* at 805. Also, the participant in *Torres* never completed the paperwork necessary to receive pension benefits before his death. *Id.* Finally, the *Torres* court was not considering the question of whether it could deem a DRO to be “qualified” when the

DRO purported to divest a third-party of benefits in direct contravention to the terms of the plan.

Both the district court and Appellant rely upon *Trustees of the Directors Guild of American Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 421 (9th Cir. 2000). (Opening Brief at 13). To this end, Appellant merely block quotes the analysis and ignores the critical factual distinction stated in the Opinion. The Court of Appeals expressly rejected the application of this case because it concerned the vesting of a non-spouse beneficiary at the time of a participant's death. (A, 168). Here, the issue is whether benefits vest in a spouse at the time of the participant's retirement pursuant to the Plan Document and ERISA, §1055(c). Both the district court and Appellant, however, appear to confuse the question of whether a DRO can be qualified as written and presented with whether a DRO can ever be qualified subsequent to a participant's retirement and/or death. The latter is not the operative question or issue in this case. The Plan has repeatedly stated that the DRO presented and as written on July 1, 2005, cannot be qualified because it purports to award Langston benefits no longer available under the Plan. The fact that certain types of benefits are fixed or irrevocable under the Plan due to Langston's retirement and death does not affect whether the QDRO can be qualified. It merely affects the amount of money at stake. Instead of accepting the terms of the Plan, both the district court and Langston want to rewind history and award Langston benefits she would have received if the DRO had been served prior to Langston's retirement and contraction of available benefit options.

In summary, the Court of Appeals correctly relied upon the Plan, ERISA §1056(d) and ERISA §1055(c), as well as the policies underlying ERISA, to conclude that the July 1, 2005 DRO would have required payment of a type, form or benefit option no longer otherwise available under the terms of the Plan. The Opinion should be affirmed.

C. The Appellate Court Correctly Concluded That The July 1, 2005 DRO Would Require The Plan To Provide Increased Benefits.

The DRO incorrectly sought to name Langston as a “surviving spouse” to which any available survivor benefits should be paid. *See* (A, 19; Paragraph E). Langston cannot be defined as the “surviving spouse” without strict violation of the Plan and its requirements. As such, the Plan immediately notified Langston that because Mr. Langston had designated his current spouse as the beneficiary to receive a survivor annuity, there are no survivor benefits available to Langston. (A, 22-23). The lower court ruled that Gary Langston’s failure to properly notify the Plan of Langston’s marital interest and failure to designate her as his surviving spouse had no effect upon the type or form of benefit available or required pursuant to the DRO. *See* (A, 108-09).

As outlined above, the type of benefit available to Langston under the Plan at the time the DRO was served would have been a portion of the joint survivor annuity being paid out on a monthly basis to Gary Langston and Shelly James. The DRO instead proposed to award Langston an annuity paid over her lifetime, and also awarded Langston any surviving spouse benefits to be paid in the event Mr. Langston predeceased Langston. *See* (A, 18-29). As outlined by the Plan Administrator, under the terms of the Plan the benefit being paid to Mr. Langston under his retirement election would cease

upon his death and then convert to a survivor annuity payable to James. *See* (A. 210-12, Section 7.01). The terms of the DRO therefore require the Plan to pay an increase in benefits because it requires the Plan to pay Langston as “the” surviving spouse subsequent to Mr. Langston’s death, while also paying Ms. James surviving spouse benefits. The DRO does not include any delineation of the percentage of surviving spouse benefits to be paid to Langston, but instead designates her as the sole survivor.

Under the terms of the Plan, as discussed above, Mr. Langston’s irrevocable election of benefits resulted in benefits vesting in James upon his retirement and subsequent death. There is no dispute that James was his spouse at the time of his election and his named beneficiary, accordingly, under the terms of the Plan she is entitled to payment of the joint annuity benefit after Mr. Langston’s death. In addition, ERISA §1055(c)(2) requires that a QJSA benefit be 50% of the amount previously payable to the participant. Under ERISA, the Plan is not able to pay James less than the 50% previously paid to Gary Langston. The lower court held that there is no merit to the argument that benefits vested in James upon Mr. Langston’s retirement, and that the Plan could divide portions of the surviving spouse benefits available to both James and Langston. *See* (A, 107-09).

The district court’s decision contradicts the plain language of the Plan Document, is inconsistent with the statutory history and framework of ERISA. The Plan Document specifically provides that the election of the joint survivor annuity benefit upon retirement is irrevocable. *See* (A, 211-214). A plan document may provide that a surviving spouse’s benefits irrevocably vest in the participant’s spouse (or other

designated beneficiary) on the date the participant retires under the terms of the Plan. *Hopkins*, 105 F.3d at 156; *See also TWU-NYC Private Bus Lines Pension Trust v. Adams*, 2002 U.S. Dist. LEXIS 26827, 2003 WL 22383288 *3 (S.D. BY 2003)(A. 340-356); *Hallingby v. Hallingby*, 541 F.Supp.2d 591 (D.D. NY 2008); *See Stahl v. Exxon Corp.*, 212 F. Supp. 2d 657, 671 (S.D. Tex. 2002); *see also Samaroo*, 193 F.3d at 190.

As discussed by the Fourth Circuit in *Hopkins*, the payment of plan benefits is “based on actuarial computations” therefore the Plan Administrator “must know the life expectancy of the person receiving the Surviving Spouse Benefits to determine the participant’s monthly Pension Benefits.” 105 F.3d at 157 n. 7. Accordingly, the Plan needs to know, on the date of the participant’s retirement, to whom any survivor benefit is payable. *Id.* This requirement is reflected in the Plan Document, as it requires the Plan to calculate benefits and provide notice of the same to Gary Langston within a specific period of time. *See* (A, 131-218). If plans could be subject to unreported claims by former spouses, subsequent to the election period, there would be no sound method for determining benefits payable under the plan or using actuarial assumptions.

A joint survivor annuity vested in James upon Mr. Langston’s retirement and then his subsequent death. The DRO provided to the Plan purported to name Langston as the “surviving spouse” and also pay her benefits over her lifetime and therefore subsequent to Mr. Langston’s death. The DRO therefore required an increase in benefits from the Plan because it would have required the Plan to pay Langston benefits after Mr. Langston died, benefits otherwise vested in James. In addition, because a surviving spouse had already been selected, there were no benefits available to pay over Langston’s lifetime.

Accordingly, any requirement to pay Langston over her lifetime and subsequent to his death results in an increase in benefits paid out by the Plan.

In summary, the 2005 DRO requires a type or form of benefit not available under the Plan (particularly when viewed within the context and at the time it was served upon the Plan), and would also require the Plan to pay both James and Langston benefits. Given that Mr. Langston elected a QJSA benefit, the Plan is only able to pay James the 50% benefit. The 2005 DRO is not qualified under ERISA and Respondent's claim fails as a matter of law. The Orders issued by the district court on October 26, 2010 and February 17, 2011, and to the extent any applicable ruling was issued in the March 7, 2011 and April 27, 2011 Orders, all such Orders should be reversed and judgment entered as a matter of law in favor of Appellant.

D. Equitable Principles of Common Sense and Public Interest Are not Relevant Since the Court is Bound to Apply ERISA

Appellant argues that "sound public policy and common sense" mandate that this Court recognize her 2005 DRO as "qualified." (Opening Brief at 19). This is simply incorrect. As stated explicitly in the Opinion, despite possible public policy issues, the Court is "bound to strictly apply ERISA." (A, 169). *Kennedy*, 129 S. Ct. at 875 (2009). The Opinion further discusses the policy issues and Congress's intent for the ERISA statutory scheme which have influence the holding that the 2005 DRO cannot be "qualified." (A, 166-67) Appellant raises no cogent or direct arguments to contradict these well-recognized principles and policies. (Opening Brief at 19-22). Appellant also

fails to explain how acceptance of a DRO which directly violates the terms of the Plan and federal law would be an equitable action, or how this would forward public policy.

As noted by this Court in *Langston v. Wilson-McShane Corporation*, 776 N.W.2d 684 (2009), Langston's claim arises under 29 U.S.C. §1132(a)(1)(B), and is for the purpose of recovering benefits due to Langston under the Plan, or an attempt to clarify her rights to benefits due under the Plan. *Id.* at 692. As Langston admitted, the question is whether or not Langston is currently entitled to any benefits due under the Plan by virtue of having a "qualified" or "unqualified" DRO. The question for decision is not whether there is some other "appropriate equitable relief" a court could potentially fashion for Langston---- such a claim would be a §1132(a)(3) claim and within the exclusive jurisdiction of the federal courts. *Id.* Accordingly, Langston's attempt to make an argument that general principles of equity should apply should be disregarded.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT GIVEN THE OUTCOME ON THE MERITS OF THIS CLAIM LANGSTON WAS NOT ENTITLED TO ATTORNEY'S FEES.

A. The Court Should Disregard Appellant's Arguments As To Fees Because The Petition For Review Did Not Seek Review Of This Issue.

Appellant requests that this Court overrule the Court of Appeals' reversal of the trial court's award of attorney fees for the first time in her Opening Brief. (Opening Brief at 28-30) *contrast* (A, 171.77). Under Minnesota Rules of Civil Appellate Procedure 117, a petition for review must included "a statement of legal issues sought to reviewed, and the disposition of those issues by the Court of Appeals..." Minn. R. Civ. App. P.

117, subd. 3. As Appellant failed to raise this issue in her petition, this Court should deny her arguments relating to the reversal of the fee award.

This Court has recognized the general rule that:

"[This] court will generally not address issues that were not specifically raised in the petition for review ...[T]his question must be considered on a case-by-case basis and includes consideration of several factors, such as the relationship of the questioned issue to those specifically highlighted in the statement of issues, the procedural history concerning that issue, and any potential prejudice to the respondent by not specifically including it in the statement of issues. "

George v. Estate of Baker, 724 N.W.2d 1,7 (Minn. 2006). Not once does the petition even mention the award and later reversal of the attorney fees. (A, 171-77). The petition only raises one legal issue for review: "Does the retirement of a plan participant prior to service of a qualified domestic relations order ("QDRO") divest a prior spouse of her pre-existing right to survivor benefits?" (A, 171.). Additionally, Appellant incorrectly characterizes the Court of Appeals' decision as determining that the trial court abused its discretion in granting the fees. This is inaccurate. The Court of Appeals held that the question of attorney fees was irrelevant since the merits of the case were decided in Respondents favor and against the claims brought by Appellant.

Respondents recognize this Court "may take any "action as the interest of justice may require," Minn. R. Civ. App. P. 103.04, and we have the authority to consider issues that were not included in the Rule 117 petition for review. " *In re GlaxoSmithKline PLC*, 732 N.W.2d 257, 274 (Minn. 2007). Appellant failed to address how justice is better served by reviewing the Court of Appeals' decision concerning attorney fees. As such, Respondents respectfully request this Court refrain from addressing this legal issue.

B. The Court Of Appeals Correctly Held That Appellant Did Not Ultimately Succeed On The Merits Of Her Claim.

As argued above, the July 1, 2005 DRO was could not be “qualified” under ERISA because it would have required the Plan to provide and pay out benefits in a form and of a type not available, and would have required an increase in benefit payments. As noted by the Court of Appeals, if the lower court’s decision that the DRO is “qualified” is reversed, Appellant has not achieved success on the merits of her claim and is not entitled to an award of fees and costs under §502(g) of ERISA. (Opinion, p. 15); *Hardt v. Reliance Standard Life Ins. Co.*, 130 S.Ct. 2149, 2156-2158 (2010); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694, 103 S.Ct. 3274 (1983).

In *Hardt*, the United States Supreme Court held that a court may “in its discretion” award fees and costs to either party in an ERISA claim pursuant to 29 U.S.C. §1132(g)(1), but that the claimant must have achieved “some degree of success on the merits” to justify an award. *Hardt*, 130 S.Ct. at 2158-59. In *Hardt*, the lower court had concluded the Plan Administrator failed to follow the appropriate guidelines and her claim was remanded for further proceedings, benefits were ultimately awarded by the Plan to the *Hardt* plaintiff. *Id.* In other words, although the court did not specifically award benefits, she obtained “some success on the merits” of the claim. Here, the Court of Appeals has reversed the lower court’s finding that the DRO was “qualified” and upheld the plan’s determination that it cannot alienate benefits in accordance with the July 1, 2005 DRO. If the appellate decision is affirmed, Appellant is not entitled to a fee award because she will not have secured any degree of success on the merits.

Appellant's argument focuses on whether the lower court applied the *Westerhaus* factors correctly and does not sufficiently explain how reversal of the district court's decision could be viewed to be any degree of success on the merits. The question is elementary—Langston brought this action seeking benefits she claimed were payable to her because the Plan failed to qualify a domestic relations order. If the Plan correctly determined the order is not qualified, Langston is not entitled to benefits and did not achieve success on the merits. The Court of Appeals decision should be upheld in its entirety, including reversal of the fee award.

CONCLUSION

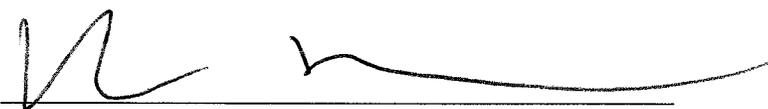
The Court of Appeals properly held that because benefits had irrevocably vested in Gary Langston's designated beneficiary prior to Langston serving the July 1, 2005 DRO, that particular order could not be "qualified" under ERISA §206(d)(3). The lower court also appropriately concluded that given the reversal on the merits Langston did not experience "some success on the merits" and reversed the lower court's award of fees and costs to Langston.

Respondents respectfully request this Court affirm the January 9 Opinion in its entirety.

Respectfully submitted,

Date: May 17th, 2012.

ANDERSON, HELGEN, DAVIS & NISSEN, P.A.

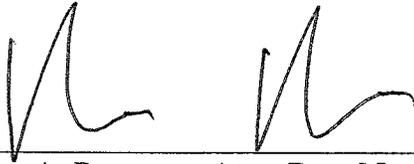
By: 

Amanda R. Cefalu (#309436)
Rebecca A. Peterson (#392663)
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402
Telephone: (612) 435-6363
Facsimile: (612) 435-6379
arc@andersonhelgen.com

Attorneys for Appellants

CERTIFICATE OF LENGTH

This hereby certifies that this brief complies with the word count and length limit requirements of Minn. R. Civ. App. P. 132.01, subd. 3. This brief was typed using Microsoft Word 2007. This brief contains 9,952 words, is less than 45 pages excluding table of contents pursuant to Minn. R. Civ. App. 132.01, subd. 3, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a).

A handwritten signature in black ink, consisting of a stylized 'R' followed by a flourish and another 'R' followed by a flourish.

Rebecca A. Peterson, Atty. Reg. No. 392663