1	IN THE SUPREME COURT OF THE STATE OF NEVADA		
2	* * * *		
3 4 5	JANIS CARMONA a/k/a JANIS KESTER, Appellant, vs.		
6 7	JUDY CARMONA, as successor representative of Lupe N. Carmona, deceased,		
8	Respondent.		
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10	RESPONDENT'S SUPPLEMENTAL MEMORANDUM		
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12	Respondent, Judy Carmona, as successor representative of Lupe N. Carmona, deceased,		
13	pursuant to NRAP 31(d), submits the following additional authorities. There are two main issues		
14	in this appeal: whether a court has the power to direct the flow of survivorship benefit payments to		
15	a specific beneficiary; and whether the court below could hold Janis (the former spouse) in contempt		
16	when she repeatedly ignored court orders to preserve the funds at issue until the district court could		
17	decide the matter. RAB at 1.		
18	Since the filing of the Answering Brief, filed September 3, 2002, a number of authorities		
19	supporting Judy's position have come to light, which were not cited previously. Some of these rely		
20	on other, earlier cases that neither party cited in the three briefs on file.		
21	Recently, both federal and state courts have reaffirmed that, in determining whether there has		
22	been a valid waiver or relinquishment of beneficiary status by a named survivor beneficiary, a court		
23	is to apply federal common in determining whether (as Judge Gaston found to be the case here) the		
24	benefits have been waived or relinquished by the named beneficiary. Melton v. Melton, 324 F.3d		
25	941 (7th Cir. 2003); Pinkard v. Confederation Life Ins. Co., 647 N.W.2d 85 (Neb. 2002). In Melton,		
26	the court decided that there had not been an adequately specific waiver, and in <i>Pinkard</i> , the court		
27	determined that there had been such, stating that the court was able to:		
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P.C.			

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conclude as a matter of law that (Pinkard) relinquished her expectancy interest as the beneficiary of the worker's compensation annuity. The decree of dissolution, which incorporated the property settlement agreement, terminated her interest as a beneficiary of the annuity.

Id., 647 N.W.2d at 89. See Discussion in Respondent's Answering Brief at 39-45.

All of these cases cite to *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990), which stands for the proposition that a court should look to state law to determine what constitutes a "waiver" or "relinquishment," because ERISA does not address what constitutes a proper waiver. Additional authorities that have come to our attention regarding the federal common law of permitting waiver or relinquishment of beneficiary status in a property settlement agreement or divorce decree include *Estate of Altobelli v. IBM*, 77 F.3d 78 (4th Cir. 1996); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994); *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir. 1995); *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000); *Weaver v. Keen*, 43 S.W.3d 537 (Tex. Ct. App. 2001).

One of this line of cases is notable because the state court chose to directly apply the applicable state law *as* the applicable federal common law, in determining that the decedent's widow, and not his ex-wife, was the appropriate beneficiary of the survivorship benefits. *See Emmens v. Johnson*, 923 S.W.2d 705 (Tex. Ct. App. 1996).

As explained in detail in the briefs, the main distinction between the cases cited above and this appeal is that, in *this* case, the determination of waiver/relinquishment by Janis was made during the worker's *lifetime*, and only the pendency of this litigation has prevented entry of the QDROs necessary to attempt to carry that intention to fruition. *See* RAB at 66-68. This should make the result both clearer and easier to reach than in several of those opinions, which attempted to divine intent post-death.

In fact, one other recent decision goes to that very point, specifically authorizing the entry of a QDRO, after the death of the worker, in order to carry into effect the decision of the trial court as to who should receive the survivorship benefits. *See Patton v. Denver Post Corp.*, 326 F.3d 1148 (10th Cir. 2003) (under ERISA, there is no requirement that a domestic relations order be prepared

or submitted either at the time of divorce or at any other particular time). See RAB at 32-33 (going 2 over string of district court orders that clarified the ownership of the survivor benefits.

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Z	over suning of district court orders that clarified the ownership of the survivor benefits.
3	Also in <i>Patton</i> , the court reiterated that, a domestic relations order must be qualified by the
4	plan administrator in order to become a QDRO and in order for the benefits to be distributed
5	according to the terms of the QDRO. The domestic relations order must fit within the requirements
6	of ERISA. ERISA requires that in order to be "qualified," a domestic relations order may not
7	provide a type or form of benefit or an option not otherwise provided by the plan, require the plan
8	to provide increased benefits, or divest a beneficiary under an earlier established QDRO. 29 U.S.C.
9	§ 1056(d)(3)(D)(i)-(iii). In the present case, no benefit not otherwise provided in the plan is being
10	sought, nor is either of the plans in question being asked to revoke the benefit election – only to
11	change the named beneficiary.
12	These additional authorities are respectfully submitted to this Court in the hope that they will
13	be useful in resolution of this appeal.
14	Respectfully submitted,
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1	CERTIFICATE OF MAILING
2	I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded via United
3	States Postal Service, postage prepaid in full to:
4	William E. Freedman, Esq.
5	William E. Freedman, Esq. WILLIAM E. FREEDMAN, CHTD. 411 South Sixth Street
6	Las Vegas, Nevada 89101 Attorney for Appellant
7	on the day of, 2003.
8	DATED this day of June, 2003.
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11	Employee of Law Office of Marshal S. Willick, P.C.
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