

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

Court of Appeals No. 28,106

LINDA JOYCE (f/k/a Linda Joyce Garcia),

Petitioner-Appellee,

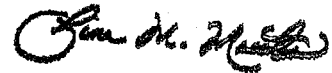
vs.

JERRY M. GARCIA,

Respondent-Appellant.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

SEP 10 2008



APPEAL FROM THE SECOND JUDICIAL DISTRICT
Bernalillo County No. DM 94-2778
The Hon. Ernesto Romero

ANSWER BRIEF

Respectfully Submitted by:

Mary E. Chappelle
Attorney at Law
1000 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 266-0656

and

L. Helen Bennett
L. Helen Bennett, P.C.
P.O. Box 25167
Albuquerque, New Mexico 87125-5167
(505) 242-6300

Attorneys for Appellee Linda Joyce

TABLE OF CONTENTS

Table of Contentsi

Table of Authorities.....iii

Nature of the Case2

This Court’s Prior Disposition of Husband’s
Calculation Contentions is Law of the Case2

Summary of Proceedings and Relevant Facts:.....5

Previous Disposition by the Court of Appeals.....7

Proceedings Before and Disposition by the
District Court Following Remand9

ARGUMENT AND AUTHORITY12

ANSWERING POINT 1: The District Court did not “construe”
the MSA; the District Court conducted the evidentiary hearing
pursuant to this Court’s Mandate from Husband’s first appeal
and found against Husband’s position.12

 Standard of Review:12

 Argument and Authority13

 Preservation16

ANSWERING POINT 2: Husband’s Issues 2, 3, and 4 –
that the District Court erred in its calculation of the amount
of retirement due -- were considered by this Court in the
first appeal and found against Husband; the District Court had
no authority or jurisdiction to change the calculation of the
amount due and payable to Wife17

 Standard of Review:17

 Argument and Authority17

New Mexico Law Governing Retirement Calculation Controls.....	21
Preservation	27
Conclusion.....	28
Signatures	28
Certificate of Service.....	29

TABLE OF AUTHORITIES

New Mexico Case Authority

<i>Apodaca v. Unknown Heirs</i> , 98 N.M. 620, 651 P.2d 1264 (1982)	21
<i>Beals v. Ares</i> , 25 N.M. 459, 185 P. 780 (1919).....	26
<i>Bernal v. Nieto</i> , 1997-NMCA-067, 123 N.M. 621, 943 P.2d 1338	24
<i>Britton v. Britton</i> , 100 N.M. 424, 671 P.2d 1135 (1983).....	13
<i>Dugie v. Cameron</i> , 1999-NMSC-002, 126 N.M. 433, 971 P.2d 390.....	13
<i>Fortuna Corp. v. Sierra Blanca Sales Co.</i> , 89 N.M. 187, 548 P.2d 865 (1976).....	12
<i>Garcia v. Garcia</i> , Slip Op. No. 27,158	Passim
<i>Hadrych v. Hadrych</i> , 2007-NMCA-001, 140 N.M. 829, 149 P.3d 593.....	23
<i>Hughes v. Hughes</i> , 101 N.M. 74, 75, 678 P.2d 702, 703 (1984)	13, 20
<i>Normand ex rel. Normand v. Ray</i> , 109 N.M. 403, 785 P.2d 743 (1990).....	12, 18
<i>Orman v. Nelson</i> , 80 N.M. 119, 452 P.2d 188 (1969)	12
<i>Ruggles v. Ruggles</i> , 116 N.M. 52, 860 P.2d 182 (1993).....	Passim
<i>Sanchez v. Torres</i> , 38 N.M. 556, 37 P.2d 805 (1934).....	20
<i>State ex rel. Del Curto v. District Court</i> , 51 N.M. 297, 183 P.2d 607 (1947).....	12
<i>State v. Gage</i> , 2002-NMCA-018, 131 N.M. 581, 40 P.3d 1025	18
<i>State v. Powels</i> , 2003-NMCA-090, 134 N.M. 118, 73 P.3d 256	25
<i>Varney v. Taylor</i> , 79 N.M. 652, 448 P.2d 164 (1968)	13

New Mexico Rules and Statutory Authority

Rule 12-213(A)(3) NMRA	5
------------------------------	---

Authority from Other Jurisdictions

<i>In re Marriage of Gowan</i> , 54 Cal App 4th 80, 62 Cal Rptr 2d 453 (1997).....	25
<i>In re Marriage of Judd</i> , 68 Cal App 3d 515 (1977).....	24
<i>In re Marriage of Lehman</i> , 955 P.2d 451 (Cal. App. 1998)	24
<i>Kansas Baptist Convention v. Mesa Operating Ltd. Partnership</i> , 898 P.2d 1131, 1136 (Kan. 1995)	17

STATEMENT OF RULE 12-313 PAGE/WORD COUNT COMPLIANCE:

This Brief contains fewer than the 35 pages permitted. Counsel used Microsoft Office Word 2003 with a proportionally spaced Times New Roman typeface. The body of the document consists of 6,687 words total.

Nature of the Case:

This matter arises out of proceedings following the parties' dissolution of marriage, and concerns the timing of Wife's receipt of her interest in community retirement benefits. This appeal represents Jerry Garcia's (Husband's) second appeal in this case, and follows an evidentiary proceeding held on this Court's February 19, 2007 remand of No. 27,158. [RP 104 ff]

This Court's Prior Disposition of Husband's Calculation Contentions is Law of the Case:

This Court in No. 27,158 determined the Marital Settlement Agreement (MSA) to be ambiguous on the issue of when the parties intended that Wife would begin receiving payments of her community interest in the retirement benefits accrued during the marriage. [RP 104-107] This Court remanded only for an evidentiary hearing, including extrinsic evidence on this point, but affirmed the District Court's calculation of benefits. This Court Memorandum Opinion following its proposed summary disposition stated:

In this case, as in *Ruggles* [*v. Ruggles*, 116 N.M. 52, 860 P.2d 182 (1993)], the MSA is silent as to when Wife was to begin receiving payment of her share of Husband's retirement. Moreover, even though a Domestic Relations Order was filed in this case, that Order does not indicate when payments are to commence. In light of the silence in the MSA as to when Wife was to begin receiving her share of Husband's retirement benefits and in accordance with *Ruggles*, we proposed to hold that the district court should have admitted extrinsic evidence and made a determination whether the parties had an agreement as to when Wife was to receive her share. If the court determined that the parties had an agreement, the court should have abided by it. If the district court concluded that the parties did not enter into

an agreement as to when Wife was to receive her share, the court should have ordered the immediate distribution of Wife's share in accordance with the principles of New Mexico community property law and the holding of *Ruggles*.

Because the district court failed to conduct the proper evidentiary hearing, we proposed to reverse and remand for an evidentiary hearing so that the district court could consider the intent of the parties as to when Wife was to begin receiving her portion of Husband's retirement benefits. . . .

We reverse the minute order of the district court and remand for an evidentiary hearing for the district court to determine the intent of the parties as to when Wife is to begin receiving her portion of Husband's retirement benefits.

[RP 106, line 19 - 107, line 22 (citations omitted)] This Court made the following disposition of Husband's remaining claims regarding application of the MSA formula – the calculation of Wife's interest -- to determine Wife's share of his retirement benefits:

In his docketing statement, Husband also argued that the district court erred as a matter of law when applying the MSA formula to determine Wife's share of his retirement benefits because it "failed to determine the community interest in the retirement benefits as of August 31, 2994." In our earlier notice, we indicated that we did not understand this issue because it appeared that the district court applied the formula set forth in the MSA.

Husband now seeks to clarify this issue arguing that the district court improperly allocated benefits to Wife based upon Husband's salary at the time of the hearing, or when he became eligible for retirement, instead of at the time he and Wife divorced. He claims that the court improperly included post-divorce increase in the retirement plan when awarding Wife her share. . . .

We decline to address Husband's arguments as to benefit computation because they were not raised in the district court. . . . Although we have not been provided with a transcript from the hearing on Wife's motion, Husband

admits that he did not raise this issue at the hearing on Wife's motion nor did he introduce any evidence to support his interpretation of the terms of the MSA. It appears that Husband did raise this issue in his motion for rehearing, albeit in a somewhat cryptic manner because he did not include any of the analysis or argument set forth in his memorandum in opposition nor did he include the exhibit that he has attached to the memorandum in opposition. . . . We note that Husband's motion to reconsider was denied by operation of law. . . . The lack of analysis contained in the motion for rehearing and the failure of the district court to act upon the motion lead us to conclude that the district court never considered the arguments set forth in Husband's motion for reconsideration and clarified in his memorandum filed with this Court. As a result, Husband's arguments are not properly before us on appeal. . . .

The only proper matter before this Court in the instant appeal is whether the District Court properly conducted an evidentiary hearing in accordance with this Court's mandate from No. 27,158, and whether the decision of the District Court is supported by substantial evidence. Husband had the burden to show that the parties intended that New Mexico law governing community property and *Ruggles* would not apply to the provisions of the MSA. Husband failed to show that the parties did not intend *Ruggles* and New Mexico law to apply.

The issues raised by Husband regarding the calculation of the amount of the annuity were resolved against Husband in the prior appeal. [RP 105, lines 9-10; RP 108-109] Husband's positions regarding both calculation and timing are inequitable and contrary to New Mexico law. Husband's arguments for a lower amount of monthly payment should be disregarded by this Court, as consideration was beyond the scope of this Court's Mandate from No. 27,158. The District

Court properly declined to readdress the matter in its Findings of Fact and Conclusions of Law. [RP 171, ¶ 2]

Summary of Proceedings and Relevant Facts:

Husband claims that certain of the District Court's findings and conclusions were not supported by substantial evidence. However, Husband appears to state only facts favorable to Husband's position, without including the substance of all of the evidence bearing upon the issues. *See* Rule 12-213(A)(3) NMRA. Wife believes it necessary to provide the Court with an answering recitation of the facts and proceedings, in aid of the Court's decision in this case. *See* NMRA 12-213(B).

The parties were divorced by final decree entered October 20, 1994. [RP 27-29]¹ The Judgment and Final Decree incorporated the parties' Marital Settlement Agreement. [RP 19-26] The MSA provided, in relevant part, that Wife would receive one half of the community interest in Husband's retirement through the United States Postal Service through the date of August 31, 1994, and set forth a formula for determining the amount due to Wife. [RP 20] The MSA expressly stated that the total number of months of credited service at retirement was "unknown at this time". [*Id.*] A Domestic Relations Order dividing Husband's civil service retirement was entered March 28, 1995. [RP 33-37] The

¹ A duplicate Final Decree was apparently filed on December 9, 1994 when the original filed Final Decree was misplaced. [RP 30-32] The original was later recovered. [RP 33]

Domestic Relations Order made no mention of the amount of Wife's interest, consistent with the regard of a pension as an appreciating asset. [RP 33-37]

Wife filed a Motion to Enforce the MSA on March 24, 2006. [RP 38-39]

Wife noted that Husband's interest in his Civil Service retirement had matured, and pursuant to New Mexico law, Husband was required to begin making payments directly to Wife for her interest in Husband's retirement, as per the MSA. [RP 38]

Wife requested payment of any arrearage due. [RP 38] Finally, Husband failed to provide Wife with proof that she was the beneficiary of 35% of the face value of Husband's employer-provided life insurance, as required by the MSA. [RP 38]

The parties proceeded to a hearing before the Hon. Stan Whitaker on July 19, 2006. Judge Whitaker heard the arguments of counsel for Wife regarding her efforts to obtain an "Annuity Assessment" to carry out the stated intent of the MSA and begin to obtain payments for Wife. [Tr. 7/19/06; 9:05:11 – 9:30:02] Review of the hearing transcript from the July 19, 2006 hearing reveals that Husband at no time challenged, refuted, or questioned Wife's presentation of the calculation of the amounts due and payable under the MSA, or the applicable law, nor did Husband offer an alternative figure based on his calculations. [*Id.*] Husband stated he thought the formula would apply "upon retirement". [7/19/06; 9:20:15 – 9:37:40 and Tr. 7/25/07; 3:06:30] The Court explained import of *Ruggles* to Husband, and Husband acknowledged he was eligible to retire in December 2005

“when I turned 55”. [Tr. 7/19/06; 9:22:46 – 9:25:50] Wife’s offer of proof regarding the provisions of the MSA, the date of Husband’s retirement, and the amount owed according to the provisions of the MSA, was un-rebutted by Husband at the July 19, 2006 hearing.

Following the July 19, 2006 hearing, the District Court accepted Wife’s presentation of the calculation of the retirement benefit and ordered Husband to pay Wife “Five Hundred Ninety Dollars (\$590.00) per month as her share of [Husband’s] retirement benefit (i.e. the amount he would have received had he retired on December 11, 2005.)” [RP 61] The District Court further found an arrearage “in the amount of Four Thousand Four Hundred Twenty-Five Dollars (\$4,425.00) for the 7 ½ months of retirement benefits [Wife] was entitled to receive commencing December 11, 2005.” Finally, the District Court ordered Husband to provide “evidence [Husband had] named [Wife] 35% beneficiary of his life insurance.” [RP 61]

Husband appealed on October 2, 2006. [RP 74-76]

Previous Disposition by the Court of Appeals:

This Court considered the following issues presented by Husband in Husband’s first appeal of the District Court’s decision:

1. Whether the District Court erred in its construction of the MSA that Wife was entitled to her share of the retirement benefits whether they matured, rather than when Husband retired. [RP 83]

This issue was remanded for an evidentiary hearing. [RP 104-110]

2. Whether the District Court erred in failing to conduct an evidentiary hearing on the factors to apply to the MSA, where the MSA (according to Husband) did not specify when or how or in what amount Wife's share of the retirement benefits would be paid? [RP 84]

This issue concerned calculation of the benefit owed to Wife and was affirmed.

3. Whether the District Court erred in its application of the factors in the MSA? [RP 84]

4. Whether the District Court failed to apply the correct mathematical equation to the MSA formula? [RP 85]

This Court combined Husband's issues 3 and 4 (regarding the formula used to calculate benefits). [RP 99]

This Court assigned the matter to the Summary Calendar. [RP 95-100] The Court determined that the outcome was, indeed, controlled by the Supreme Court's decision in *Ruggles v. Ruggles*, 116 N.M. 52, 860 P.2d 182 (1993) [RP 97], and noted that, with a correction for the error in the stated number of months, the District Court's calculation was correct. [RP 99-100] This Court's Memorandum Opinion [RP 105-110] noted that Husband had disputed that calculation under the MSA in his docketing statement, but agreed with this Court's proposed disposition of the calculation issue. [RP 109, lines 15-18] This Court held:

In light of the silence in the MSA as to when Wife was to begin receiving her share of Husband's retirement benefits and in accordance with *Ruggles* . . . we reverse the minute order of the district court and remand for an evidentiary hearing for the district court to determine the intent of the parties

as to when Wife is to begin receiving her portion of Husband's retirement benefits.

[RP 107] Thus, the very narrow mandate to the District Court on this Court's remand was to hold an evidentiary hearing to "resolve the ambiguity in the MSA as to when benefit payments are to begin". [RP 105, lines 9-10]

Proceedings and Disposition by the District Court Following Remand:

The District Court held the evidentiary hearing July 25, 2007. Wife argued that the burden was upon Husband to show some evidence of an agreement between the parties that would override New Mexico law of community property and application of *Ruggles*. [Tr. 7/25/07, 2:22:50-2:23:30] Husband argued that this Court's mandate included correction of the formula used to calculate benefits, saying that this Court:

[R]evered the entire order. So as we stand now, there is no calculation of retirement benefits.

[Tr. 2:26:32 – 2:27:14] To the contrary, this Court specifically reversed and remanded for an evidentiary hearing on the issue of the parties' intent regarding the timing of receipt. [RP 107, lines 20-22] At no point in the Memorandum Opinion did this Court indicate reversal and remand on the formula or the amount the District Court determined Wife was entitled to receive. Indeed, this Court specifically stated it:

[Declined] to address Husband's arguments as to benefit computation because they were not raised in the district court.

[RP 108, line 15] This Court's Memorandum Opinion did not instruct or allow the parties to reargue or recalculate the amount owed to Wife as her community property share. The merits of Husband's position on the calculation were rejected by the District Court in its first Minute Order, and then by this Court in the first appeal. [*Id.*] Husband's argument that the amount was miscalculated was beyond the scope of this Court's mandate to the District Court.

The District Court interpreted this Court's Memorandum Opinion as affirming the calculation of benefits, [Tr. 2:27:14] and remanding solely for the intent of the parties regarding when the payments were payable to Wife. [Tr. 2:55:32] On this issue, Husband testified about his accredited service in the civil service retirement system. [Tr. 3:12:04 – 3:19:03] Husband testified regarding his knowledge at the time he signed the MSA [*Id.*] Husband admitted that he was ineligible to retire at the time the MSA was signed. [Tr. 3:20:06 – 3:25:52] Husband admitted that his theory would leave him in control of when and whether Wife received her community interest in the retirement benefit. [*Id.*] On the equities of the division, Husband acknowledged the various liabilities assumed by Wife at the divorce, [*Id.*], but insisted Wife was entitled to no benefit from her community interest in the retirement plan until Husband decided to retire. [*Id.*]

Husband's testimony regarding the number of days of service that would be used in calculation of benefits was made over Wife's continuing objection. [Tr.

3:06:55 – 3:12:04] This testimony was irrelevant to the narrow question posed by this Court’s Mandate. The application of the formula in the MSA to the retirement benefit had already been determined by the District Court based on substantial evidence at the July 19, 2006 hearing, and was affirmed by this Court’s Memorandum Opinion. [RP 104-11] Husband’s request that the District Court recalculate benefits according to Husband’s formula was properly disregarded by the District Court in rendering its final decision. [RP 168 - 172] Husband failed to show that the parties’ MSA intended to circumvent New Mexico community property law and the *Ruggles* decision. [RP 107]

Wife elicited testimony from attorney Elena Spielman, who had represented Wife in the dissolution proceedings in 1994. Ms. Spielman testified that at the time she drafted the MSA, she was aware of *Ruggles*. [Tr. 3:50:49] Ms. Spielman testified that, knowing of *Ruggles*, she would not have allowed her client to sign a settlement that provided her with retirement payments “if and when [Husband] chose to retire”. [Tr. 3:54:06] Ms. Spielman testified that one of the concerns in drafting the MSA was that Husband might not remain employed at the postal service. [Tr. 3:52:17] A reasonable inference from this testimony is that no specific date or amount was chosen because Husband’s annuity amount would be affected if he left the position early. Ms. Spielman testified that the MSA was drafted “pursuant to the laws of the State of New Mexico”. [Tr. 4:27:35 – 4:31:47]

Finally, Wife testified about her own understanding and knowledge at the time the MSA was drafted. [4:32:21 – 4:35:19] Wife testified her expectation was that under the MSA she would receive her retirement share “at age 55”, which was December 11, 2005. [*Id.*] Wife testified she never understood that her receipt of her community share of the retirement could be delayed based on Husband’s unilateral decision not to retire. [*Id.*]

ARGUMENT AND AUTHORITY:

ANSWERING POINT 1:

The District Court did not “construe” the MSA; the District Court conducted the evidentiary hearing pursuant to this Court’s Mandate from Husband’s first appeal and found against Husband’s position.

Standard of Review:

On remand, the trial court's jurisdiction over an issue is limited by the appellate court's opinion and mandate. *Normand ex rel. Normand v. Ray*, 109 N.M. 403, 408-09, 785 P.2d 743, 748-49 (1990). The opinion of this Court on the first appeal upon which the mandate was predicated, constituted the law of the case. *Fortuna Corp. v. Sierra Blanca Sales Co.*, 89 N.M. 187, 548 P.2d 865 (1976). As the New Mexico Supreme Court noted:

The [] opinion in the prior appeal constitutes the law of the case. *Orman v. Nelson*, 80 N.M. 119, 452 P.2d 188 (1969). It is binding on the district court, and is to be referred to if there is any doubt or ambiguity regarding the mandate. *State ex rel. Del Curto v. District Court*, 51 N.M. 297, 304, 183 P.2d 607, 611 (1947). Our mandate and opinion in the prior appeal set forth

the full extent of the jurisdiction of the district court on remand. *Varney v. Taylor*, 79 N.M. 652, 448 P.2d 164 (1968).

Hughes v. Hughes, 101 N.M. 74, 75, 678 P.2d 702, 703 (1984).

This Court reviewed the District Court's construction of the terms of the MSA in Husband's first appeal, No. 27, 158. The District Court was not charged on remand with interpretation or construction the MSA, but with holding an evidentiary hearing to determine the parties' intent as to the timing of the receipt – not amount – of payments. [RP 104-110] Thus, Husband's contention that the standard of review is “*de novo* with respect to construction of the controlling *Marital Settlement Agreement*” is incorrect. [BIC 20]

In accordance with this Court's Mandate, the District Court held an evidentiary hearing to take evidence of the facts surrounding the parties' intent. Factual matters are reviewed for substantial evidence. *Dugie v. Cameron*, 1999 - NMSC- 002, 126 N.M. 433, 971 P.2d 390. The standard review on appeal is whether substantial evidence reasonably supports the factual determinations of the trial court. *Britton v. Britton*, 100 N.M. 424, 430, 671 P.2d 1135, 1141 (1983). The Court reviews the record in the light most favorable to Wife as the prevailing party, viewing all evidence and indulging all inferences in her favor. *Id.*

Argument and Authority:

The District Court did not “construe” the MSA when it determined that Wife was entitled to her share of the retirement benefits upon maturity (eligibility),

rather than when Husband retired. The District Court properly conducted the mandated evidentiary hearing, and considered extrinsic evidence of the parties' intent, as required by this Court's Mandate from No. 27,158, in accordance with this Court's determination that the MSA was ambiguous on the issue of intent.

Whether the MSA was ambiguous was not open for discussion in the hearing before the District Court. The ambiguity in the MSA had already been identified by this Court in the prior appeal, and this Court had remanded for an evidentiary hearing considering extrinsic evidence of the parties' intent. [RP 104-109] This Court had already considered and rejected Husband's arguments regarding an allegedly improper calculation. [RP 95-100; 104-110]

Evidence adduced at the July 27, 2007 hearing supported the District Court's finding that the division was "pursuant to the community property law of New Mexico". [RP 169] Husband himself admitted he could not recall the precise intentions of the parties at the time the MSA was negotiated. [Tr. 3:23:46 – 3:25:52] Ms. Spielman testified she would not have permitted her client to sign an MSA that did not follow New Mexico law, and that she knew about the import of *Ruggles* with regard to the timing of the receipt of benefits [3:54:06] The Domestic Relations Order provided that Wife shall receive her share from the Civil Service Retirement System [CSRS] upon Husband's retirement, [RP 33-37], but made no limitation for Wife's receipt from Husband under *Ruggles* if Husband

chose not to retire when eligible. Ms. Spielman testified that the MSA was drafted “pursuant to the laws of the State of New Mexico”. [Tr. 4:27:35 – 4:31:47]

Wife testified about her own understanding and knowledge at the time the MSA was drafted. [4:32:21 – 4:35:19] Wife testified her expectation was that under the MSA she would receive her retirement share “at age 55”, which was December 11, 2005. [*Id.*] Wife testified she never understood that her receipt of her community share of the retirement could be delayed based on Husband’s unilateral decision not to retire. [*Id.*]

This substantial evidence supported the District Court’s conclusion that Wife did not waive her right to receive her portion of Husband’s retirement benefit at Husband’s earliest eligibility for retirement. [RP 171] This evidence supports the District Court’s determination that:

If Husband waits to pay Wife her retirement until he actually retires, then he is in absolute control of when wife receives her share of the community property.

[RP 170] The District Court properly noted that:

Husband’s assertion that Wife’s retirement benefits be calculated based on his salary at the time of the marriage is without merit and outside the scope of the remand from the Court of Appeals.

[*Id.*] However, the District Court found that:

Husband’s interpretation of limiting [sic] the wife’s calculation of retirement at the time of the divorce would deprive wife of the natural and expected increase in the value of the pension over the years following the divorce.

[*Id.*] Husband failed to show that the parties did not intend *Ruggles* to apply. *Ruggles*, 116 N.M. at 66, 860 P.2d at 196 (holding “if the parties did not agree one way or the other on when and how [Wife] was to receive her interest in [Husband’s] retirement plan, the court should reinstate its judgment awarding Wife \$753.94 per month as her community interest in [Husband’s] retirement plan.”) As in *Ruggles*, the absence of an express provision from the MSA providing for payment by Husband does not necessarily mean that the parties agreed that Wife would not begin to receive any portion of her community share of Husband’s retirement plan until he actually retired. *Ruggles*, 116 N.M. at 59, 860 P.2d at 199. The District Court’s findings were supported by the evidence and its conclusions constitute correct statements of New Mexico law. They should be affirmed by this Court.

Preservation:

Wife made and preserved these contentions and arguments in hearings before the District Court on July 19, 2006 and July 25, 2007, and in her proposed findings of fact and conclusions of law [RP 142- 153]

ANSWERING POINT 2:

Husband's Issues 2, 3, and 4 -- that the District Court erred in its calculation of the amount of retirement due -- were considered by this Court in the first appeal and found against Husband; the District Court had no authority or jurisdiction to change the calculation of the amount due and payable to Wife.

Standard of Review:

On this court's review of a second appeal, the only issue is whether the District Court satisfied the mandate; thus, the District Court's decision is reviewed for conformance with the mandate. *Kansas Baptist Convention v. Mesa Operating Ltd. Partnership*, 898 P.2d 1131, 1136 (Kan. 1995). There is no reason for the Court to review its former decision in this same cause and on the same facts. *Id.* This Court will not consider questions which could have been answered in the previous appeal, nor does this Court engage in a full-scale review of the proceedings in the District Court. *Id.* Instead, at issue is the adherence to and enforcement of this Court's instructions to the District Court. *Id.*

Argument and Authority:

Husband attempts to raise in his second appeal challenges that either were or could have been brought in his first appeal. This Court should reject Husband's attempt to obtain review of new arguments on appeal through the mechanism of an appeal of the decision of the District Court on remand. On remand, the trial court's jurisdiction over an issue is limited by the appellate court's opinion and mandate.

Normand, 109 N.M. at 408-09, 785 P.2d at 748-49. The District Court was not required to – and did not – consider whether there was an ambiguity in the MSA. That determination had already been made by this Court, and was law of the case. *See State v. Gage*, 2002-NMCA-018, ¶ 20, 131 N.M. 581, 40 P.3d 1025 (noting the “hard-and-fast rule” that the law of the case established on appeal binds the district court on remand under the appellate court mandate).

Husband raised the issue of the proper calculation of Wife’s share of the community retirement in his first appeal. [RP 77-91] This Court analyzed the matter in its Calendar Notice proposing summary reversal of the timing of receipt of benefits, but proposing summary affirmance of the amount. [RP 95-100] This Court set forth the facts underlying the District Court’s decision, which facts were not altered or affected by the proceedings on remand. This Court’s proposed summary disposition stated:

Husband attained age 55 on December 11, 1995, at which time he was eligible to retire from the United States Post Office and begin receiving benefits. On March 24, 2006, Wife filed a motion to enforce the MSA claiming that she was entitled to begin receiving her interest in Husband’s retirement because that interest matured once Husband was eligible to retire.

The district court held a hearing on Wife’s motion on July 19, 2006. The court took very little testimony. It heard testimony that Husband was still working and that he “agreed with the formula” used in the MSA. It also heard testimony by Wife’s counsel that, had Husband retired on December 11, 2005, he would have been entitled to receive \$2,533 per month. It heard counsel’s testimony that, as of December 11, 2005, Husband had spent 824 months earning the retirement. Counsel then testified that Wife was entitled to \$590.00 per month. Counsel arrived at this figure by dividing the number

of marital months, 192, by the number of total months spent earning the retirement benefits, 824. The result was 23.2 %. Counsel then multiplied the amount Husband was entitled to had he retired, \$2,533 per month, by 23.2% and determined that Wife was entitled to receive \$590.00 per month. The district court ordered Husband to pay \$590.00 per month to Wife and an additional \$4,425 for the seven and a half months since December 11, 2005, when Husband was eligible to retire. We propose to reverse.

As an initial matter, we wish to clarify the use of 824 as the total “months spent earning retirement” allegedly used in determining Wife’s entitlement. Even though Wife’s counsel allegedly used a formula based upon 824, we understand this figure to actually represent Husband’s amount of service multiplied by two. To do otherwise would assume that Husband worked 68 years (824 divided by 12) a technical impossibility as Husband is not yet even 68 years old. . . .

Husband contends that, even if Wife was entitled to begin receiving benefits once Husband was eligible to retire, the district court erred in applying the wrong formula to determine the amount of benefits. We propose to affirm.

The district court determined that Wife was entitled to receive \$590.00 per month. Applying the formula set forth in the MSA suggests that this figure is correct: $\$2,533 \times 192 \text{ divided by } 824 = \590.00 . Husband suggests that the proper figure for division is 2×824 , not 824. However, as previously discussed, Husband cannot have earned 824 months of service because that would amount to 68 years. Instead, we understand Husband to have earned 412 months of service, which, when multiplied by two, equals 824. therefore, if the district court is correct that Wife is entitled to begin receiving benefits, we propose to hold that the correct amount of benefits appears to be \$590.00 per month.

[RP 96-97, 99-100 (internal citations omitted)] This Court’s subsequent

Memorandum Opinion incorporated this analysis from the Calendar Notice and held:

[A]s the fourth issue in his docketing statement, Husband disputed the use of “824” as the denominator in the formula set out in the MSA to compute

Wife's benefits. We proposed to affirm on this issue and Husband has indicated that he agrees with our proposed disposition.

[RP 109] Thus, Husband raised the issue of the method of calculation of benefits in his first appeal, and apparently conceded in his memorandum in opposition that the District Court's calculation was essentially correct. [*Id.*] The District Court's decision is not only law of the case, but Husband conceded any argument that the calculation based on the formula in the MSA was incorrect in his first appeal. *See Sanchez v. Torres*, 38 N.M. 556, 37 P.2d 805 (1934) (holding law of case doctrine applies to questions which might have been, but were not, raised or presented on prior appeal).

Husband argues that "the testimony of counsel is not evidence". [BIC 28] Husband ignores the fact that the presentation of counsel for Wife at the July 19, 2006 hearing was in the nature of an offer of proof and was not rebutted by Husband. At no time during the July 19, 2006 hearing did Husband make the arguments or offers of proof of calculations that he makes now. Husband's appeal of the findings based on the July 19, 2006 hearing concluded with this Court's Memorandum Opinion affirming the District Court on the calculation issue. [RP 104-110]

As noted in argument, *supra*, on remand the trial court has only such jurisdiction with respect to an issue appealed as is conferred by the opinion and mandate of the appellate court. *Hughes v. Hughes*, 101 N.M. at 75, 678 P.2d at

703; *Apodaca v. Unknown Heirs*, 98 N.M. 620, 624-25, 651 P.2d 1264, 1268-69 (1982). The Memorandum Opinion of this Court detailed facts previously determined by the District Court and which this Court found controlling in addressing Husband's first appeal. [RP 96-100; 104-110] The District Court had no authority under this Court's Mandate to change the calculation of the amount due and payable to Wife, and properly declined to do so. [RP 171] As this Court noted in its Memorandum Opinion, substantial evidence supported the District Court's application of the MSA formula. [RP 108-109] The District Court's calculation of the amount owed to Wife according to the terms of the MSA and the formula set forth therein should be affirmed.

New Mexico Law Governing Retirement Calculation Controls:

Without waiving objection to Husband's attempt to use an appeal of the District Court's proceedings on remand as an opportunity to re-litigate the issue of calculation, Wife addresses the lack of merit in Husband's contentions regarding calculation of her community interest in the retirement plan:

Husband's first issue on appeal contends that he was in control of Wife's receipt of her share of the community property. On the issues of calculation, Husband asked the District Court to determine as a matter of fact and law that Wife agreed to forego both receiving her community share of the retirement benefit as a lump sum at the time of divorce, and also agreed that her community share of the

retirement would have a static value. Husband adduced no evidence – either in the July 2006 or the July 2007 hearings that – taken in context – would support a finding that Wife agreed to accept a static or diminishing asset – i.e. an asset that would not accrue value between the date of the dissolution and the time Husband elected to retire. Review of the MSA provisions and the distribution upon dissolution provides no evidence of such an inequitable agreement, nor any inferences that could be construed to support one.

At the time the parties divorced in 1994, there were two ways that vested but unmatured retirement benefits could be divided. The first was the lump sum method, under which the court would attempt to determine the value of the retirement benefits at the time of divorce and divide the assets of the community taking that value into account. *See Ruggles*, 116 N.M. at 58, 860 P. 2nd at 188. This method results in a lump sum payment to the non-employee spouse of his or her share of the community interest in the pension plan. *See id.* In *Ruggles*, the Supreme Court expressed a preference for the lump sum method because it “provid[es] a clean break between the parties and an unencumbered pension plan to the employee, [and it] reliev[es] the court of any further supervision over the parties' relationship.” *Id.* at 61, 860 P.2d at 191.

The second method of dividing pension plans used was the “pay as it comes in” or “reserved jurisdiction” method. *Id.* at 54-55, 58, 860 P.2d at 184-85, 188

(internal quotation marks omitted). Under this method, “only the formula for division is determined at the time of divorce[.]” *Id.* at 64, 860 P.2d at 194 (internal quotation marks and citation omitted). Under the reserved jurisdiction method, the district court would divide community property:

equally when the community is dissolved [,]” and would “not distribute the community interests [in retirement benefits] at the time of dissolution, but reserve[] jurisdiction to distribute the benefits when the employee spouse actually receives them.

Id. at 58, 60, 860 P.2d at 188, 190 (internal quotation marks and citation omitted).

Thus, the non-employee spouse would receive his or her portion of the benefits when the benefits are paid. *Id.* at 58, 860 P.2d at 188.

Ruggles recognizes the inequities of Husband’s positions regarding both the time of receipt and the amount of the calculation. *See also Hadrych v. Hadrych*, 2007-NMCA-001, ¶ 11, 140 N.M. 829, 149 P.3d 593 (stating “we cannot accept the inequity and unfairness that results when one party is allowed to unilaterally reduce the other's benefits established either under an agreement or a final decree”). With regard to the timing of receipt of community share, in *Ruggles*, the working spouse elected to work past his retirement date, effectively reducing the value of, or diminishing the total value of his retirement proceeds, to the detriment of the non-working spouse. The *Ruggles* Court held that the preferred method of distribution on divorce is that the working spouse must begin to pay the non-

working spouse an amount equal to what she was to have received had the working spouse retired timely. *Id.*

The *Ruggles* Court found it significant – as did the District Court in the instant case -- that when bargaining for the provisions of the MSA, the non-working spouse “probably relied on the timely retirement of the working spouse”. *Bernal v. Nieto*, 1997 -NMCA- 067, ¶ 16, 123 N.M. 621, 943 P.2d 1338. New Mexico recognizes the desirability of severing the interests of the respective spouses at the time of the MSA from contingencies that might arise later, to prevent the “risk of future strife” caused by unilaterally affecting the other's interest. *Id.*

With regard to the amount of the retirement benefit, and as further support for this Court’s first resolution of Husband’s appeal, the District Court considered and apparently approved the “time rule” theory of division of retirement as applicable and equitable here. [RP 170] Substantial evidence and New Mexico law supported the District Court’s determination that what was intended by the parties was reflected by the entire formula for division of the postal service retirement. *See In re Marriage of Lehman*, 18 Cal 4th 169, 955 P2d 451 (1998), and *In re Marriage of Judd*, 68 Cal App 3d 515, 137 Cal Rptr (1977). Under the “time rule”, the community is allocated a fraction of the benefits, the numerator representing length of service during marriage but before separation and the

denominator representing the total length of service by the employee spouse. The ratio is then applied to the final plan benefit. *See In re Marriage of Gowan*, 54 Cal App 4th 80, 62 Cal Rptr 2d 453 (1997).

Application of this method of calculation means that the non-employee spouse's interest will continue to accrue value – an outcome obviously intended where the non-employee spouse is not “cashed out” of the retirement account by a lump sum payment, and therefore cannot invest the funds and increase their value. If Wife had been given a lump sum, she could have invested her funds as she saw fit to increase the value. But Wife had no control over the funds from the period of the parties' divorce until she began to receive payments. It would clearly be inequitable to force Wife to take an amount representing the value at the time of divorce, with no allowance for the increase in value of those funds over time, and with no ability to control the funds herself to increase their value.

Husband's contention [BIC 29] that: “increases in [Husband's] pension plan occurring after divorce . . . are separate property” misses the mark. The increase in the value of Husband's share of his pension plan occurring after the divorce is Husband's separate property. Similarly, the increase in the value of Wife's share of the pension plan occurring after the divorce is Wife's separate property, and must be distributed to her in accordance with the provisions of the MSA. *State v. Powels*, 2003 -NMCA- 090, ¶ 4, 134 N.M. 118, 73 P.3d 256 (noting since *Beals v.*

Ares, 25 N.M. 459, 492-93, 185 P. 780, 790 (1919), the rule has been well settled in New Mexico that the interest of each spouse in the community property is equal with that of the other spouse).

Husband was permitted to testify, over objection, that the amount of payments due to Wife should be recalculated. [Tr. 3:11:00 -3:20:06] However, the District Court recognized that the mandate would not permit relitigation and recalculation of benefits. [RP 171] Husband failed to persuade the District Court that he had Wife intended to ignore or override New Mexico law and give Wife a static community interest in an increasing asset. Indeed, Husband's showing was purely negative – he argued that the silence of the MSA and Domestic Relations Order meant that Wife should receive no increase in the value of her share of the community asset, and that he could control Wife's receipt of her community share. Husband's attempted showing of consideration – that Wife received the community residence – was rebutted by Wife's testimony that the residence was without equity. [Tr. 7/25/08 4:32:21 – 4:46:17] The award to Wife of the marital residence was not a trade for this control, when Wife had to pay the associated tax lien in the amount of the equity in the property. [Tr. 4:32-42 – 4:46:17] Because Husband failed to prove to the District Court's satisfaction that the parties intended that New Mexico law and *Ruggles* would not apply, the District Court properly applied *Ruggles* and determined that the amount of \$590.00 per month previously

established by the District Court, and that Wife was entitled to receive payments upon Husband's eligibility. The District Court's decisions are supported by substantial evidence, conform to this Court's Mandate and New Mexico law, and should be affirmed.

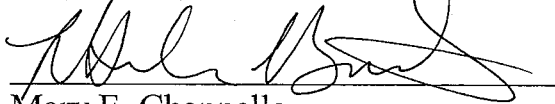
Preservation:

Wife made and preserved these contentions and arguments in hearings before the District Court on July 19, 2006 and July 25, 2007, and in her proposed findings of fact and conclusions of law [RP 142- 153]

CONCLUSION:

For the foregoing reasons, this Court should reject Husband's attempt to re-open and re-litigate the issue of the calculation of Wife's community property interest in this subsequent appeal. The determination of the District Court that the parties intended that Wife should begin receiving her community property when Husband became eligible to retire was supported by substantial evidence, and was made in accordance with New Mexico law. The District Court should be affirmed in all respects.

Respectfully submitted,



Mary E. Chappelle
Attorney at Law
1000 Lomas Blvd. NW
Albuquerque, NM 87102
(505) 266-0656

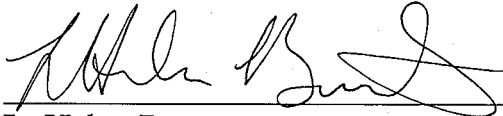
and

L. Helen Bennett
Attorney at Law
P.O. Box 25167
Albuquerque, NM 87125-5167
(505) 242-6300

Attorneys for Appellee Linda Joyce

I certify that a true copy of the foregoing was mailed via first class mail, postage prepaid, this 15th day of September 2008 as follows:

Thomas C. Montoya, Esq.
Attorney at Law
P.O. Box 3070
Albuquerque, NM 87190-3070

A handwritten signature in cursive script, appearing to read "L. Helen Bennett", is written over a horizontal line.

L. Helen Bennett