IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LINDA JOYCE GARCIA,

Petitioner-Appellee

vs.

No. 28,106
Bernalillo County
DM 94-2778

JERRY M. GARCIA,

Respondent-Appellant.

APPELLANT'S BRIEF IN CHIEF

Respectfully submitted,

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Statement of Compliance. The body of the Brief consists of 10,689 words and does not exceed 11,000 words. The word count is obtained from Corel Wordperfect 8.0.

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SUMMARY OF PROCEEDINGS

Nature Of The Case. Jerry appeals the decision of the district court below concerning the timing of receipt by Linda Joyce ("Linda") of her share of the community portion of the civil service retirement benefits earned by Jerry during their marriage, when Linda's rights to those benefits were set forth in the parties' 1994 *Marital Settlement Agreement* incorporated into the 1994 *Judgment And Final Decree Of Dissolution Of Marriage*, and also set forth in the parties' 1995 *Domestic Relations Order Dividing Civil Service System Retirement Benefits*. Jerry also appeals the district court's calculation of the amount of benefits which Linda is to receive.

In summary, the issues fall into two categories:

1. Given the evidence (or lack of it) adduced below, the District Court should have enforced the provisions of the *Marital Settlement Agreement* and *Domestic Relations Order Dividing Civil Service System Retirement Benefits as written* which required determination of the amount of retirement benefits to be paid to Linda *at retirement*;

2. There was no competent evidence and no substantial evidence adduced below to support the $590 monthly benefit granted to Linda Joyce. Further, the Court's order improperly granted to Ms. Joyce post-divorce increases

in the retirement benefits, contrary to New Mexico law and to the terms of the *Marital Settlement Agreement*. Thus, assuming, but not conceding, that notwithstanding the *Marital Settlement Agreement* provisions that retirement benefits would be calculated *at retirement*, and Mr. Garcia is required to begin making payments to Ms. Joyce at the date he is first eligible to retire, by failing to value the accrued retirement benefits at the time of divorce, which would occur by utilizing the salary earnings and service credits earned during marriage, the District Court impermissibly and unlawfully granted Mr. Garcia's separate property to Ms. Joyce.

Course Of Proceedings.

The underlying proceeding in the district court concerned a post-dissolution of marriage action filed by Linda for enforcement of the parties' September 21, 1994 *Marital Settlement Agreement* incorporated in the December 9, 1994 *Judgment And Final Decree Of Dissolution Of Marriage* relating to Linda's interest in Jerry's federal civil service retirement benefits.

Although Jerry had not yet retired, applying *Ruggles v. Ruggles*, 116 N.M. 52, 860 P.2d 182 (S. Ct. 1993), by July 19, 2006 *Minute Order*, the district court:

1. ordered payment of retirement benefits from Jerry to Linda as of the date he was retirement eligible, which was December 11, 2005;

2. based solely on the argument of counsel, and utilizing the amount of retirement benefits which Jerry would receive if he retired on December 11, 2005, the district court determined that Linda's share of the retirement benefits was $590 per month which represented the amount (as calculated by the Court) that Linda would have received had Jerry retired when he was first eligible, on December 11, 2005;

3. ordered Jerry to pay $590 per month to Linda, commencing December 11, 2005;

4. entered judgment of $4,425 for accrued arrears in payments as of the July 19, 2006 *Minute Order* (7½ months), and ordered Jerry to pay a minimum of $50 per month against the arrearages until paid.

Jerry, who was *pro se* at the time of the July 19, 2006 hearing, obtained counsel and timely filed a *Motion For Rehearing* alerting the district court to claim of error on two issues:

1. The timing of the receipt of benefits by Linda. Jerry claimed that benefits were not to be paid until his retirement as provided in the *Marital Settlement Agreement*, and,

2. The amount of benefits to be received by Linda. Jerry claimed that the district court had granted Linda a portion of Jerry's separate property

interest in his retirement benefits which were earned after divorce, contrary to the terms of the *Marital Settlement Agreement.*

The *Motion For Rehearing* was denied by operation of law, under former Rule 1-059 NMRA. Jerry appealed the July 19, 2006 *Minute Order* to the Court of Appeals, claiming that the district court erred both in the timing of the receipt of benefits by Linda and also the amount of the benefits. Respecting the latter issue, Jerry claimed that the district court erred as a matter of law in failing to apply the provisions in the *Marital Settlement Agreement* and thereby failed to grant to Jerry, as his separate property, all retirement benefits acquired by him before marriage and after August 31, 1994, because it failed to determine the community (and Linda's) interest in the retirement benefits as of August 31, 1994.

By *Memorandum Opinion*, entered February 13, 2007 in *Garcia v. Garcia*, No. 27,158, the Court of Appeals reversed the July 19, 2006 *Minute Order* and remanded ".... for an evidentiary hearing as to when the parties intended that Wife would be entitled to Husband's retirement benefits based upon the ambiguous language of the [*Marital Settlement Agreement*]."

After initially proposing in its January 3, 2007 *Proposed Summary Disposition* to disagree with Jerry's contention that the trial court failed to determine the community interest in the retirement benefits as of August 31, 1994,

in its February 13, 2007 *Memorandum Opinion*, the Court of Appeals determined that the district court had never considered the arguments set forth in Jerry's *Motion For Rehearing* and clarified in his memorandum submitted to the Court of Appeals, because the *Motion For Rehearing* was denied by operation of law. The Court of Appeals concluded that the second issue concerning the amount of benefits was not properly before the Court of Appeals. Following this analysis, the Court of Appeals stated

> "We express no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires." February 13, 2007 *Memorandum Opinion*, p. 7.

Disposition In The Court Below. Following hearing on remand, the district court entered the September 27, 2007 *Order On Hearing Following Remand* which is the subject of the instant appeal. The district court determined that Jerry should begin paying retirement benefits due to Linda of $590 per month, commencing from December 2005. RP 179; 182-183. The district court entered judgment against Jerry of $12,390 for the 21 month period from December 2005 through August 2007. RP 183. Further, the district court modified its previous judgment contained in its July 19, 2006 *Minute Order* and eliminated the provision in that

order permitting Jerry to pay a minimum of $50 per month to reduce and retire the arrearage. RP 61.

Summary Of Facts Relevant To The Issues Presented For Review.

The provisions of the September 27, 2007 *Order On Hearing Following Remand* are incorporated herein by reference. RP 179. The parties were married August 9, 1978 and divorced after 16 years of marriage by December 9, 1994 *Judgment And Final Decree Of Dissolution Of Marriage* incorporating and merging September 21, 1994 *Marital Settlement Agreement.* ¶II(A)(5) and II(B)(4) of the *Marital Settlement Agreement* provide in relevant part (RP 20):

> "II. COMMUNITY PROPERTY: The parties have agreed to the following compromise distribution of the community property:
>
> "A. Wife shall receive as her separate property:
>
> "...
>
> "5. One-half the community interest in Husband's retirement plan with United States Postal Service *through the date of August 31, 1994*, to be determined in accord with the following formula:
>
> $$d = \frac{ab}{2c}$$
>
> where:
>
> a = Husband's gross monthly *retirement* benefits;
>
> b = Months of credited service from August 9, 1978, *through the date of August 31, 1994*, a total of 192 months.

c = total number of months of credited service *at retirement (unknown at this time)*;

d = Wife's interest.

"Should Husband become eligible to apply for lump sum distribution pursuant to statute *because of separation from service* or other qualifying event, Wife shall be entitled to a proportionate share of said lump sum payment pursuant to the formula set forth above."

"...

"B. Husband shall receive as his separate property:

"...

"4. One-half of the community interest in his retirement plan with United States Postal Service, *and all of the interest he accrued in his retirement plan prior to the marriage and subsequent to August 31, 1994.*" (RP 21)

(Emphasis added.)

Further, the March 28, 1995 *Domestic Relations Order Dividing Civil Service Retirement System Benefits* RP 33-37 provides at ¶3, on page 2 (RP 34):

"3. The Respondent, Jerry Michael Garcia, is a participant in, *and will receive pension benefits from the Civil Service Retirement System* (CSRS) due to his employment with the Federal Government. *The retirement benefits accrued to Participant during his marriage to Linda Joyce*, f/k/a Linda Joyce Garcia, (hereafter Former Spouse) to the date of the divorce are community property, *and the Former Spouse is entitled to receive her share of the benefits directly from the Office of Personnel Management.*

"5. *Former Spouse is entitled to a direct payment from the Office Personnel Management* of a portion of Participant's CSRS *retirement benefits* based upon the following formula:

$$D = 50\% \text{ of } A \times \frac{B}{C}$$

where

A = Participant's gross monthly *retirement* benefits.
B = 192 months
C = Total number of months of creditable service employment of Participant *at his retirement.*
D = Former Spouse's share.

(Emphasis added.)

Thus as provided in II(B)(4) of the *Marital Settlement Agreement*, and in the 1995 *Domestic Relations Order Dividing Civil Service Retirement System Benefits*, Jerry acquired retirement benefits both before marriage and after August 31, 1994, and he was to be accorded all the interest accrued during these periods as his separate property.

At the time of entry of the *Marital Settlement Agreement*, the *Ruggles* case, above referenced, had been decided. (See below.) With respect to distribution of an ex-spouses rights to retirement benefits, *Ruggles* determined that:

> "If a lump sum distribution is not practical or feasible, for any or all of the reasons about to be mentioned, the court may award the nonemployee spouse an amount payable by the employee spouse (reduced by any QDRO [Qualified Domestic Relations Order, which provides for direct payments from a pension plan administrator]

> amount, if available) equal to the share of the retirement benefit she would be entitled to receive if the employee spouse elected to retire." *Ruggles*, 116 N.M. at 67. (Bracketed language added.)

See also the provisions of *Ruggles* provided in ¶ _____ below.

Notwithstanding *Ruggles*, the *Marital Settlement Agreement* did not specify when or how or in what amount Linda's share of Jerry's retirement benefits would be paid.

Jerry was born December 11, 1950, and reached age 55 on December 11, 2005. Jerry was eligible to retire from the United States Postal Service after December 11, 2005, when he had reached 30 years of service and attained age 55. The 30 years of service above referenced were a combination of separate service before marriage and after divorce, and community service during the marriage.

On March 24, 2006 Linda filed a *Motion To Enforce Marital Settlement Agreement*, claiming that Jerry's "... interest in his Civil Service retirement may have matured, in which event he should be directly paying Wife her interest in Husband's retirement", and that if Jerry's "... interest in his Civil Service retirement has already matured, Wife should be granted a Judgment for the *pre-retirement payments* that Husband failed to make." (RP 38) (Emphasis added.)

On July 19, 2006, the district court held a hearing on the motion. Linda did not testify. Jerry appeared pro se. Jerry stated that he was retirement eligible on

December 11, 2005. In response to questioning by the Court, Jerry also stated as follows (7-19-06 hearing; TR 9:22-23):

> JUDGE WHITAKER: Well, Mr. Garcia, I mean part of the representation is, and I know this, you folks have been divorced for some long time. But you remember back in actually let me see if I can get a more specific date, back in 1994, actually, September of 1994, that you signed a Marital Settlement Agreement.
>
> JERRY GARCIA: Yes.
>
> JUDGE WHITAKER: Pursuant to your divorce.
>
> JERRY GARCIA: Yes.
>
> JUDGE WHITAKER: Do your remember that, just listen to my questions.
>
> JERRY GARCIA: I agree with the formula that they came up with.
>
> JUDGE WHITAKER: I'm sorry.
>
> JERRY GARCIA: I agree with the formula that they came up with.
>
> JUDGE WHITAKER: Okay, so you understand what that means Mr. Garcia.
>
> JERRY GARCIA: I thought that was upon retirement, I'm still working.

No testimony was received by the Court from either party at the July 19, 2006 hearing concerning the calculation of the amount of retirement benefits found to be due to Linda. The Court heard argument from Linda's counsel that

counsel had received information in discovery from the Office of Personnel Management that Jerry was entitled to gross retirement benefits of $2,533 per month as of December 11, 2005. The argument was as follows (7-19-06 hearing; TR 9:10-11):

> ELENA SPIELMAN: And so, the reason I was contacting the Postal Service to get the annuity estimate was to determine what he would receive had he retired in December. And the answer that we received after a great deal of effort is at this time his gross annual annuity, the monthly amount I should say, is $2,533 dollars. The annual is $30,401. So we have that in the statement-- it's just the matter of applying the formula to that amount.
>
> ...
>
> ELENA SPIELMAN: So this was negotiated, it's in the Marital Settlement Agreement, this is a very standard formula and my math, we wrote in the formula that the marital months were 192. According to my math, Mr. Garcia spent a total of 824 months earning this retirement. He's worked for the government for a very long time. And so that with my math came out to be 23.2% is Joyce's share of the gross monthly annuity which would be $2,533 dollars. *That's what he would have started receiving on December 11 of 2005.* So I calculated that Mr. Garcia would be require to pay Ms. Joyce $590 per month, that 23.2 times 2533 and he ought to, he should have been paying it since December. So he has accrued an arrearage for 7 ½ months of retirement benefits that Ms. Joyce should have received commencing December 11 and that 7 ½ months times the $590 is $4,425 dollars. So that's that issue. I might add there is a discovery motion pending which got scheduled after this hearing." (7-19-06 hearing; TR 9:15-16).
>
> (Emphasis added.)

Therefore, based on the representations of counsel for Linda, it appears as if the amount of retirement benefits calculated by the court for Linda's share of the retirement benefits was 192/824 x $2,533 = $590.21.

In the Court's *Minute Order*, the Court ordered Jerry Garcia to pay $590 per month to Petitioner, being the amount she would have received had he retired on December 11, 2005, and granted judgment against Jerry Garcia for $4,425 for the 7 ½ months of retirement benefits Petitioner "was entitled to receive commencing December 11, 2005" payable at a minimum of $50 per month, commencing August 15, 2006.

Jerry Garcia has not retired.

The following evidence received at the July 25, 2007 hearing is uncontroverted. Notwithstanding that at the time of the Garcia divorce, *Ruggles* had been decided, the *Marital Settlement Agreement* did not specify that Linda would receive her share of Jerry's retirement benefits when he was age 55, nor when he was first retirement eligible, nor any other time prior to actual retirement.

At the time of entry of the *Marital Settlement Agreement*, the provision for immediate retirement for civil service retirees was in effect and found at 5 USC §8336, which provides:

"8336. Immediate retirement

(a) An employee who is separated from the service after becoming 55 years of age and completing 30 years of service is entitled to an annuity.

(b) An employee who is separated from the service after becoming 60 years of age and completing 20 years of service is entitled to an annuity." (7-25-07 hearing; Exhibit B, received as trial aid.)

Both Linda and her former counsel testified that at the time of entry of the *Marital Settlement Agreement* they had a concern that Jerry might not continue working at the Postal Service, and thus he might not continue service under the civil service retirement system.

Jerry submitted the only evidence in the trial court concerning the calculation of his retirement benefits (7-25-07 hearing; Exhibit D), which was the amount of benefits accrued at the date set for division of the retirements benefits, August 31, 1994. Linda submitted no evidence on this issue.

On August 31, 1994, Jerry had accumulated 23 total years (8,404 days) of service under the civil service retirement system, and he had accumulated 16 years (5,866 days) of service while married under the civil service retirement system. (7-25-07 hearing; Exhibit D.) Under the civil service retirement system, a member with 20 years of service may retire at age 60, not age 55. 5 USC §8336(b). (7-25-07 hearing; Exhibit B). Jerry was not eligible to retire at age 55 at the time of the

parties' divorce. Based upon Jerry's time of service at the time of the divorce, Jerry's earliest retirement age was age 60, not age 55.

In its January 3, 2007 *Proposed Summary Disposition*, the Court of Appeals stated:

> "... it is of note that in stating the formula for arriving at the amount of Wife's benefits, the [March 28, 1995 *Domestic Relations Order Dividing Civil Service Retirement System Benefits*] indicates that it will be necessary to determine Husband's total number of months of credible service "*at his retirement.*" ... This suggests that the parties may have anticipated that *Wife would not begin receiving benefits until Husband actually retired.*" (Emphasis added.)

In reversing the District Court's July 19, 2006 *Minute Order*, the Court of Appeals *did not affirm* the previous ruling of the District Court that the amount of benefits to which Linda is entitled is $590 per month. Rather the Court of Appeals did not consider that issue, *because the District Court had not yet considered that issue*. *Memorandum Opinion*, page 6 lines 7-10. The Court of Appeals determined that:

> "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." *Ibid.* p. 6, line 22 to p. 7, line 3.

The Court of Appeals then determined:

> "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." (Emphasis added.) *Ibid.* p. 6, lines 7-11.

The Court of Appeals concluded:

> "We express no opinion as to the amount of benefits that would be due Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires." February 13, 2007 *Memorandum Opinion*, p. 7.

At the time of entry of the *Marital Settlement Agreement*, both parties knew that if Jerry continued his employment under the civil service system, Jerry was retirement eligible when he reached age 55, on December 11, 2005. (See below.) Nonetheless, in their *Marital Settlement Agreement*, the parties explicitly agreed that Jerry's retirement date was *unknown at this time.*

Among the benefits Linda received under the *Marital Settlement Agreement* was the marital residence.

There are no early retirement penalties which are at issue in this case.

The average three year high monthly salary ending on the 36 month period at the time of the parties' *Marital Settlement Agreement* was $2,540.03. (7-25-07 hearing; Exhibit D.)

All references below are to the 7-25-07 hearing following remand, unless

otherwise noted. The first reference is to hour and the second reference is to the minute in the transcript.

Counsel for Mr. Garcia argued that there was no competent evidence to support the $590 amount ordered to be paid to Ms. Joyce (TR 2:29) that words mean what they say [referring to the words "at retirement" in the MSA (TR 2:38)], that Mr. Garcia requested the District Court to consider his arguments concerning the proper calculation of retirement benefits (TR 2:31-32), that Mr. Garcia was entitled to all his separate property interest in the retirement benefits earned after divorce (TR 2:43), that the Court should not use post divorce earnings to calculate Ms. Joyce's interest in the retirement benefits, as such was prohibited by law and by the MSA (TR 2:43-44); that the "High 3 earnings" at the time of divorce were the correct values to utilize to determine the community interest in the retirement benefits (TR 2:43-44).

Elena Spielman, Ms. Joyce's counsel at the time of the divorce testified at trial. (Mr. Ken Cullen is deceased.) Ms. Spielman testified that the *Ruggles* case was decided at the time of entry of the Marital Settlement Agreement and she was aware of the *Ruggles* case and counseled her clients with regarding to the client's rights under that case (TR 3:50), that the lawyers wrote the formula in the *Marital Settlement Agreement* (TR 3:48-49), that there was nothing in her file

which indicated a discussion of the formula to be used or when Linda Joyce would receive the retirement (TR:47-48), the drafts of the marital settlement agreement which went back and forth did not negotiate the terms of the formula, and that there was no disagreement with the subject (TR 49-50), that the discussion was attorney to attorney, and she couldn't independently recollect talking with her client about the subject of when the retirement would be paid with her client (TR 3:50), that there was a concern regarding Mr. Garcia's injuries, health and longevity at the postal service (TR 3:51), there was a concern that Mr. Garcia might not live long enough to receive his retirement (TR 3:52), there was a concern that Mr. Garcia could possibly not remain employed by the postal service, and this came up during negotiations (TR 3:52), she could not remember a 4-way meeting concerning the MSA (TR 3:55), she drafted the provision at issue (TR 3:57-58), she utilized the August 31, 1994 date to not have a dispute as to the date of calculations (TR 3:59), that the community interest in the retirement plan ended on August 31, 1994 (TR 4:01), she could not remember the date of first eligibility for retirement coming up in the negotiations (TR 4:05), she chose not to use the term "age 55" in the MSA (TR 4:16), she chose not to use the "date of first eligibility" in the MSA (TR 4:16), the intention of her client as to when she would receive her share of the retirement benefits was not discussed and not negotiated

(TR 4:22), she did not know the intention of the parties, and the formula was not negotiated and it was not discussed beyond inserting the 192 months and the August date (TR 4:24), and the words "at retirement" in the MSA means what it says (TR 4:25-26).

Mr. Garcia testified that during the marriage (prior to the MSA), he didn't recall discussing his retirement with his wife (TR 3:23), his understanding of the MSA was that the benefits would be paid when he actually retired (TR 3:06), and that if his wife had insisted upon language in the MSA that she would receive her share of the benefits when he was first eligible to retire, he would have agreed to that (TR 3:34-35) (however, given the testimony of Ms. Spielman, no such discussion or request was made, and the parties themselves did not negotiate the MSA.)

Ms. Joyce testified that during the marriage, Mr. Garcia had discussed or commented upon retiring when he was age 55 (TR 4:33), her expectation under the MSA was that she would receive her retirement share when Mr. Garcia turned age 55 on December 11, 2005 (TR 4:34), however, even though she had that expectation, the term "age 55" is not in the MSA (TR 4:44), and that she agreed to the terms of the MSA. (TR 4:45)

As trial aids and legal argument, the Court was presented with 5 USC

§8331(4), 5 USC §8336, and 5 USC § 8338 (TR 34-24 to 35-14) which provides the formula for determination of the retirement benefits at issue, all of which were applicable at the time of divorce. These citations provide:

"**8331(4)** "Average pay" is defined in relevant part at 5 USC §8331(4) as:

> "(4) "average pay" means *the largest annual rate* resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service ... with each rate weighted by the time it was in effect;" (Emphasis added.)

"**8336. Immediate retirement**

> (a) An employee who is separated from the service after becoming 55 years of age and completing 30 years of service is entitled to an annuity.
>
> (b) An employee who is separated from the service after becoming 60 years of age and completing 20 years of service is entitled to an annuity."

"**§8339. Computation of annuity**

> (a) Except as otherwise provided by this section, the annuity of an employee retiring under this subchapter is -
>
> (1) 1 ½ percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus
> (2) 1 3/4 percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years; plus
> (3) 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years."

Therefore §8339 provides that the components of Jerry Garcia's retirement are:

(a) average pay, multiplied by
(b) total service years, multiplied by
(c) the applicable multiplier.

Issue 1. Whether the district court erred as a matter of law in its construction of the terms of the *Marital Settlement Agreement* and *Domestic Relations Order Dividing Civil Service System Retirement Benefits* provisions that Linda Joyce was entitled to her share of the retirement benefits when they matured, rather than when Jerry Garcia retired, which contradicts the terms of the *Marital Settlement Agreement* that Mr. Garcia's retirement date was unknown, when the known federal law at the time of the *Marital Settlement Agreement* was that a retiree could retire at age 55 with 30 years of service, that the references in the *Marital Settlement Agreement* and the *Domestic Relations Order* are to "retirement" rather than "eligibility for retirement" when the *Ruggles* case was settled law at the time, and that at the time of the entry of the *Marital Settlement Agreement*, Jerry was not retirement eligible until age 60, and there was no meeting of the minds concerning the timing of receipt of Linda's share of the retirement benefits?

Standard of review. The standard of review for this issue is *de novo* with respect to construction of the controlling *Marital Settlement Agreement* and the

Domestic Relations Order Dividing Civil Service System Retirement Benefits. The trial court's conclusion of law is not binding on the appellate court, and upon *de novo* consideration of the documents presented below it can reach a conclusion different from that of the trial court. *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781-782, 845 P.2d 1232 (S. Ct. 1993).

Preservation. This issue was preserved by Jerry's arguments at the July 19, 2006 hearing, and at the July 25, 2007 hearing and his by his August 3, 2007 *Amended Requested Findings Of Fact And Conclusions Of Law.*

Issue 2. Whether the district court erred as a matter of law in its failure to accord Jerry his separate property interest in his retirement plan as required in the *Marital Settlement Agreement* and New Mexico law, because the Court failed to determine the community interest in the retirement benefits (and thus Linda's ½ share) as of August 31, 1994 as required therein, and instead improperly granted Linda retirement benefits earned by Jerry after divorce because the district court utilized a "high 3" salary factor, using Jerry's post divorce earnings as of December 11, 2005 , rather than the "high 3" factor as of the August 31, 1994 determination date?

Standard of review. All questions of law are reviewed de novo. *Gabaldon v. Erisa Mortgage Co.* 1999-NMSC-039, ¶7, 128 N.M. 84, 990 P.2d 197

Preservation. This issue was preserved by Jerry's August 2, 2006 *Motion For Rehearing* which requested a rehearing on Linda's *Motion To Enforce Marital Settlement Agreement*, and requested that the Court not include post-divorce contributions as divisible property to Linda, and that the retirement benefits be determined as of August 31, 1994, and by Jerry's arguments at the July 25, 2007 hearing and his by his August 3, 2007 *Amended Requested Findings Of Fact And Conclusions Of Law.*

Issue 3. Whether substantial evidence exists to support the trial court's determination that Linda receive $590 per month as her share of the community retirement benefits, commencing December 11, 2005?

Standard of review. "In New Mexico ... a district court abuses its discretion when it misapprehends the law or if the decision is not supported by substantial evidence. See *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶¶ 6-7, 127 N.M. 654, 986 P.2d 450. Although a misapplication of the law is considered an abuse of discretion, our courts review *de novo* the initial decision of whether the correct legal standard has been applied. *Id.* ¶ 7. If the correct law has been applied to the facts, the district court's decision must be affirmed when it is supported by substantial evidence. See *id.* ¶ 8; *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153 (stating that appellate

courts review district court's findings of fact for substantial evidence; "[a]n abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case.")." *Brooks, Donovan & Mayhew v. Norwest Corporation*, 2004-NMCA-134 {7} __ N.M. __, __ P.3d __. "A judgment based upon findings unsupported by substantial evidence will not be upheld on appeal. *Henderson v. Lekvold*, 99 N.M. 269, 657 P.2d 125 (1983); *Getz v. Equitable Life Assurance Society of the United States*, 90 N.M. 195, 561 P.2d 468, *cert. denied*, 434 U.S. 834, 98 S. Ct. 121, 54 L. Ed. 2d 95 (1977)." *Berry v. Meadows*, 103 N.M. 761, 765, 713 P.2d 1017 (Ct. App. 1986)

Preservation. This issue was preserved by Jerry's arguments at the July 25, 2007 hearing and by his August 3, 2007 *Amended Requested Findings Of Fact And Conclusions Of Law.*

Issue 4. Whether the district court erred as a matter of law in failing to determine that Linda's interest in Jerry's civil service retirement plan is $374.53, given the uncontroverted evidence adduced at trial, and the requirements of the *Marital Settlement Agreement* and New Mexico law?

Standard Of Review and *Preservation* are the same as in Issue #3.

ARGUMENT

The above issues will be argued together and with argument concerning the

August 31, 2007 Court's *Findings And Conclusions* below. (RP 168-172).

The March 28, 1995 *Domestic Relations Order Dividing Civil Service Retirement System Benefits* RP 33-37 specifically provides at ¶3, on page 2 (RP 34):

> "3. The Respondent, Jerry Michael Garcia, is a participant in, *and will receive pension benefits from the Civil Service Retirement System* (CSRS) due to his employment with the Federal Government. *The retirement benefits accrued to Participant during his marriage to Linda Joyce*, f/k/a Linda Joyce Garcia, (hereafter Former Spouse) to the date of the divorce are community property, *and the Former Spouse is entitled to receive her share of the benefits directly from the Office of Personnel Management.*
>
> "5. *Former Spouse is entitled to a direct payment from the Office Personnel Management* of a portion of Participant's CSRS *retirement benefits* based upon the following formula:
>
> D = 50% of A X $\frac{B}{C}$ where
> A = Participant's gross monthly *retirement* benefits.
> B = 192 months
> C = Total number of months of creditable service employment of Participant *at his retirement.*
> D = Former Spouse's share.
>
> (Emphasis added.)

The above quoted provisions inform both issues before the Court of Appeals:

1. The benefits are to be paid *directly by* Office of Personnel

Management (i.e, not Jerry Garcia) *at the time of his retirement.*

2. What is to be divided is the *accrued retirement benefits* as of the date of divorce. These accrued retirement benefits, as of the date of divorce, are provided by Respondent's Exhibit D above.

Jerry Garcia submits that the above provisions, in accordance with New Mexico law cited above in *Ruggles*, and the provisions of the *Marital Settlement Agreement* are decisive and demonstrate that Ms. Joyce is to receive $374.53 directly from the Office of Personnel Management when Jerry Garcia retires.

The *Domestic Relations Order Dividing Civil Service Retirement System Benefits* specifically provides that Jerry Garcia *will receive* pension benefits from the Civil Service Retirement System, and that and that Linda Joyce *is entitled to receive her share of the benefits directly from the Office Of Personnel Management.* But that is not what the trial court did. It is undisputed that Jerry Garcia is not retired. Therefore, he is not receiving pension benefits from the Civil Service Retirement System as required by the *Domestic Relations Order*. Further, Linda's share of the retirement benefits is to is to be received from the Office Of Personnel Management, not Jerry, which payment can only occur when Jerry retires.

It is clear that nothing in the evidence received below contradicts the above

terms, because there was no meeting of the minds of the parties concerning when Linda would receive her share of the retirement benefits. Jerry thought payments would begin when he retired. Linda testified she thought it would be when Jerry reached age 55, but both she and her counsel clearly had concerns and doubts whether Jerry would continue service, and the *Marital Settlement Agreement* itself clearly sets forth a provision (RP 20, ¶5) which anticipates a separation from service. Regardless what Joyce or her counsel thought, none of Joyce's beliefs were communicated to Jerry, because all the negotiations at issue occurred between counsel. Therefore, the evidence below did not evince an intention of the parties concerning when Joyce would receive her retirement benefits. Accordingly, the terms of the *Marital Settlement Agreement* and the *Domestic Relations Order* control. *Ruggles*.

Regarding the calculation of the amount of the payments, the only substantial evidence of the amount is $374.53. Exhibit D was the only evidence received below which demonstrates what the Civil Service Retirement Benefits would be based on a calculation of retirement benefits using only pre-divorce earning and efforts during the term of the marriage. That amount is $374.53.

Exhibit D demonstrates that at the time of divorce, Mr. Garcia had worked 5,866 days (16 years) during marriage during which he accrued retirement

benefits, and prior to marriage he had accrued 2,538 days (7 years) for a total accrued service at the time of divorce of 8,404 days (23 years). Exhibit D shows that the average three year salary on August 31, 1994 (the agreed date of determination of the community benefits) was $91,441.03, and that the average monthly salary during this period was $2,540.03. Applying this factor ($2,540.03) to the federal formula above results in an accrued monthly benefit at the time of divorce of $1,073.16 [5 years x 1.5% x $2,540.03 ($190.50), plus 5 years x 1.75% x $2,540.03 ($222.25), plus 13 years x 2% x $2,540.03 ($660.41)]. Of the retirement benefit accrued at the time of divorce ($1,073.16), 69.8% of this amount (5,866/8404) was accrued during marriage. Therefore, the community interest in the retirement benefits accrued during marriage is .698 x $1,073.16, or $749.07, of which Ms. Joyce is entitled to ½, or $374.53. Thus, $374.53 is the proper amount of retirement benefits to which Ms. Joyce is entitled.

In contrast to the correct amount, the Court granted Ms. Joyce $590 per month, based on the argument of counsel at the July 19, 2006 hearing, when Mr. Garcia was pro se. Therefore, it is immediately apparent that the Court accepted the argument of counsel that the time period to utilize in calculating benefits was the time Mr. Garcia was first eligible to receive retirement benefits in December of 2005, *which was eleven years after the divorce*. Therefore, applying federal law

as to how the benefits are calculated provided above, the Court utilized the "High 3" salary earnings for the three year period ending December, 2005 to calculate the benefits. This was error, because, as argued at trial, arguments and statements of counsel are not evidence. *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 761, 906 P.2d 742, 752. Therefore substantial evidence is lacking to support the Court's award of retirement benefits of $590 per month to Ms. Joyce from Mr. Garcia. *Berry v. Meadows*, 103 N.M. 761, 765, 713 P.2d 1017 (Ct. App. 1986) above.

The Court's determination was also error, because *Ruggles v. Ruggles*, 116 N.M. 52, 860 P.2d 182 (S. Ct. 1993), makes it clear that the community retirement benefits *must be valued as of the date of divorce.* See footnote 7 in *Ruggles*, which stated with approval:

> "7. Our Court of Appeals has issued at least three significant opinions concerning the division, distribution, and valuation of retirement benefits upon dissolution. *See* (in chronological order) *Madrid v. Madrid*, 101 N.M. 504, 684 P.2d 1169 (Ct.App.1984) (relying on [*Copeland v. Copeland*, 91 N.M. 409, 575 P.2d 99 (1978)] and [*Hurley v. Hurley*, 94 N.M. 641, 615 P.2d 256 (1980)] *to hold that retirement plan must be valued at date of dissolution and concluding that increases in plan's value occurring after dissolution are separate property of employee spouse*); *Berry v. Meadows*, 103 N.M. 761, 713 P.2d 1017 (Ct.App.1986) (relying on [*Hughes v. Hughes*, 96 N.M. 719, 634 P.2d 1271 (1981)] and California case law to hold that unvested, unmatured retirement benefits are

> community property divisible upon dissolution); *Mattox v. Mattox*, 105 N.M. 479, 734 P.2d 259 (Ct.App.1987) (relying on *Copeland*, *Hughes*, [*Ridgway v. Ridgway*, 94 N.M. 345, 610 P.2d 749 (1980)] *Hurley*, and other authorities to address various issues of valuation of a husband's vested but unmatured pension plan; "New Mexico cases state clearly that a spouse is entitled to a community share of the portion of retirement that is vested but unmatured *at the date of divorce*." 105 N.M. at 481, 734 P.2d at 261)."
>
> (Emphasis added.)

Further, increases in Jerry's pension plan occurring after divorce (and also prior to marriage) are separate property (*Ruggles*; *Madrid*, above; increases in plan's value occurring after dissolution are separate property of employee spouse). This *Marital Settlement Agreement* and *Domestic Relations Order* accorded this separate property to Jerry, but the trial court did not.

Therefore, the calculation made by the trial court was erroneous as a matter of law, because applying §8339 above, the $2,533 amount utilized by the trial court included the factor of Jerry Garcia's average pay *as of December 2005*, and this factor and the resulting computation violated ¶ II(B)(4) of the *Marital Settlement Agreement*, because it included the interest Mr. Garcia accrued in his retirement plan *subsequent to August 31, 1994.*

The *Marital Settlement Agreement* was careful to provide to Jerry Garcia the entire interest in his retirement benefits which he accrued after the date provided

in the *Marital Settlement Agreement*, which was August 31, 1994. ¶ II(B)(4) of the *Marital Settlement Agreement* provides:

> "B. Husband shall receive as his separate property:
>
> "...
>
> "4. One-half of the community interest in his retirement plan with United States Postal Service, *and all of the interest he accrued in his retirement plan prior to the marriage and subsequent to August 31, 1994*."
>
> (Emphasis added.)

With regard to the first factor in the pension calculation, average pay, there was no evidence provided in the district court at the earlier July 19, 2006 hearing concerning Jerry Garcia's average pay as of August 31, 1994, which is the applicable determination date. On the contrary, based on the statement of counsel to the district court, the annuity estimate obtained was the amount Jerry Garcia "... would receive had he retired in December 2005, which is $2,533. See above:

> ELENA SPIELMAN: And so, the reason I was contacting the Postal Service to get the annuity estimate was to determine what he would receive had he retired in December. And the answer that we received after a great deal of effort is at this time his gross annual annuity the monthly amount I should say is $2,533 dollars the annual is $30, 401. So we have that in the statement it's just the matter of applying the formula to that amount.

Therefore, the improper calculation of Joyce Garcia's interest in Jerry

Garcia's retirement benefits is apparent. What Exhibit D shows is the proper calculation. What is apparent from the record below is that the trial court made the incorrect calculation as a matter of law, because the $2,533 retirement pay figure necessarily includes post divorce increases in the retirement plan, contrary to the terms of the *Marital Settlement Agreement* and *Ruggles* and *Madrid, supra.*

Due to the provisions of ¶ II(B)(4) of the *Marital Settlement Agreement*, the factor defined as "a" in the formula provided in ¶ II(A)(5) of the *Marital Settlement Agreement* should refer to the gross monthly retirement benefits as of August 31, 1994, not the gross monthly retirement benefits as of December, 2005. The use of the August 31, 1994 date and not the December, 2005 date, is made clear by the language utilized prior to the definition of factor "a", that Joyce Garcia is entitled to:

> "One-half the community interest in Husband's retirement plan with United States Postal Service *through the date of August 31, 1994* ..."

Therefore, factor "a" in ¶ II(A)(5) represents the *accrued benefit* as of August 31, 1994, and not the accrued benefit as of December 2005, as determined by the trial court. That the accrued benefit as of August 31, 1994 is the intended benefit, is made clear by the provisions of ¶ II(B)(4), which insures that Jerry Garcia will obtain, as his separate property, all accrued benefits in his retirement

plan after August 31, 1994, and also the terms of the *Domestic Relations Order*.

In interpreting the MSA the terms thereof cannot be contradicted.

> "Because of this ambiguity, extrinsic evidence of the parties' intent may be considered to aid in interpreting its terms. *C.R. Anthony Co. v. Loretto Mall Partners*, 112 N.M. 504, 508, 817 P.2d 238, 242 (1991). This is true even though the agreement contains an integration clause, stating that there are no other agreements between the parties. *While extrinsic evidence is inadmissible to contradict, and perhaps even to supplement, the terms of an integrated agreement*, it is admissible to **explain** [emphasis in original] the terms of the agreement. See id. at 509, 817 P.2d at 243; Restatement (Second) of Contracts § 212 & cmt. c (1979) (statements of intention admissible to show meaning of integrated agreement), § 213 (parol evidence rule bars prior inconsistent statements), § 216 (consistent additional terms inadmissible to supplement completely integrated agreement); 3 Arthur L. Corbin, Corbin on Contracts § 539, at 84 (Supp.1992) (process of interpretation is divorced from notions of integration). *Ruggles*, above, 116 N.M. at 69. (Other emphasis added.)
>
> "Evidence may be presented to the fact finder to aid in the interpretation of the agreement, *but no evidence should be received when its purpose or effect is to contradict or vary the agreement's terms*. *Maine v. Garvin*, 76 N.M. 546, 550-51, 417 P.2d 40, 43 (1966); see also *C.R. Anthony*, 112 N.M. at 509, 817 P.2d at 243." *Mark V, Inc. v.* , 114 N.M. 778, 782, 845 P.2d 1232 (S. Ct. 1993).

Regarding the following numbered findings made by the trial court, Jerry argues as follows:

(6) At the time of the entry of the MSA, both parties knew and anticipated that if husband continued his employment under the civil service

system, he would be eligible for retirement when he reached age 55 on December 11, 2005.

Regarding Finding of Fact 6 and 8 (RP 191), since the parties had no discussion regarding the terms of the MSA, and the MSA formula was drawn by the lawyers, there lacks substantial evidence to support this Finding. *See Ruggles*, quoted above.

The evidence below was that at the time of entry of the MSA, there simply was no discussion between the parties concerning when Ms. Joyce would receive her share of the retirement benefits. It was the lawyers who drew the relevant retirement formula and there was no evidence of any discussion of these provisions with the lawyers' clients. What the lawyers knew or understood about the MSA is irrelevant, *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 761, 906 P.2d 742, 752, above, and actually there was no evidence of what the lawyers intended regarding the receipt by Ms. Joyce of her retirement benefits, because there was no discussion of the matter and Ken Cullen is deceased. As to Ms. Joyce, there was no evidence that Ms. Spielman even had a discussion of the formula to be used or when Linda Joyce would receive the retirement, the terms of the formula were not negotiated, there was no disagreement about the subject, the discussions were attorney to attorney, there was no evidence that Ms. Spielman

even talked with her client about the subject of when the retirement would be paid with her client, the August 31, 1994 date was inserted in the MSA to not have a dispute as to the date of calculations, there was not a four way meeting concerning the MSA, the date of first eligibility for retirement did not come up in the negotiations, Ms. Spielman chose not to use either "age 55" or the "date of first eligibility" in the MSA, her client's intention as to when she would receive her share of the retirement benefits was not discussed and not negotiated, Ms. Spielman did not know the intention of the parties, the formula was not negotiated and it was not discussed beyond inserting the 192 months and the August date, and the words "at retirement" in the MSA means what it says.

On the contrary, the unrebutted evidence that there was a concern regarding Mr. Garcia's injuries, health and longevity at the postal service at the time of the divorce, and that he might not even live long enough to receive retirement, and at the time of entry of the MSA, Mr. Garcia was not eligible to retire until age 60. Although Ms. Joyce testified that it was her expectation under the MSA that she would receive her retirement share when Mr. Garcia turned age 55 on December 11, 2005, that expectation was not communicated to Mr. Garcia at the time of entry of the MSA, and notwithstanding that expectation, neither age 55 nor the date of first eligibility was inserted in the MSA and she agreed to the terms of the

MSA. However, it was Mr. Garcia's understanding of the MSA that the benefits would be paid when he actually retired, and that has been his consistent position, even when he was *pro se* and did not have the guidance of counsel.

This testimony should be reviewed in the light of the legal considerations. Paragraph 5(A) of the MSA (RP 23) provides an integration clause as follows:

> "Total Agreement: *This Agreement contains the entire understanding of the parties, and there are no representations other than those expressly stated herein.*" (Emphasis added.)

The agreement also contains a *Waiver of Provisions* clause (RP 24), as follows:

> "*Waiver of Provisions*: *A modification or waiver of any provision herein shall be effective only if made in writing and executed with the same formality as this Agreement.* The failure to insists upon performance of any provision herein shall not be a waiver of any subsequent default." (Emphasis added.)

Lawyer drafted agreements are given their legal interpretations.

> "When an issue to be determined rests upon interpretation of documentary evidence, this Court is in as good a position as the trial court to determine the facts and draw its own conclusions. *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 103, 678 P.2d 1170, 1178 (1984). *We note that words and expressions in lawyer-prepared instruments are to be given their legal connotations. Miller v. Weller*, 288 F.2d 438, 440 (3d Cir.1961). The trial court found that both the buyout and income reporting agreements were drafted and reviewed by attorneys for the parties. *Generally, when terms having a definite legal meaning are knowingly used in a written instrument, the parties will be presumed to have intended such terms to have their proper legal meaning and significance, at least in the*

> *absence of any contrary intention appearing in the instrument. Malbone Garage, Inc. v. Minkin*, 272 App. Div. 109, 72 N.Y.S.2d 327 (1947)." *Levenson v. Mobley*, 106 N.M. 399, 403, 44 P.2d 174 (S. Ct. 1987).

Further, ambiguities present in the agreement should be construed against the party who drafted it. *Smith v. Tinley*, 100 N.M. 663, 665, 674 P.2d 1123 (S. Ct. 1984), citing *Schultz & Lindsay Construction Co. v. State*, 83 N.M. 534, 494 P.2d 612 (S. Ct. 1972).

It is undisputed that Ms. Joyce's counsel drafted the MSA provisions which are at issue.

Given the foregoing, the best that can be said is that there was no meeting of the minds as to when Ms. Joyce would receive her retirement benefits. Due to the lack of evidence regarding the parties' intention, the language of the MSA should be applied and enforced. As Ms. Spielman testified, "at retirement" means what it says. In this connection, it is significant to compare the provisions at issue in this case with those that were at issue in the *Ruggles* case. In *Ruggles*, the applicable language of the MSA was that Wife "would receive as her separate property '[o]ne-half of the community retirement benefits earned' by Joseph from the date of marriage to February 1, 1988." *Ruggles,* above, 116 N.M. at 68. *See also Ruggles*, above at p. 56. Thus, what was at issue in *Ruggles* was the nature and

extent of Wife's "one half of the community retirement benefits.". *Ruggles* resolved that issue was by determining the nature of those rights, including the right to receive retirement benefits when the employee is retirement eligible. However, those rights could be altered by agreement, such as the agreement in this case. *Ruggles* did not involve a formula, use of the words "at retirement", nor any of marital settlement agreement language which is at issue in this case. Accordingly, the MSA in this case means what it says, it should be applied as it reads, and the testimony at trial below does not shed light on an alternate interpretation.

(7) During the marriage, Wife understood that at age 55, Husband would have sufficient age and years to retire from the Postal Service.

What is relevant to a determination of the issue before the Court is whether there was a meeting of the minds at the time of entry of the MSA. For there to be a meeting of the minds, *both parties* need to not only understand that retirement benefits would be paid at some other time than "at retirement", but more importantly, agree that Ms. Joyce would receive her retirement benefits at the time Mr. Garcia is first eligible to retire, and then put those terms in the MSA. Evidence is lacking that there was even a discussion of this issue when the MSA was entered.

Significantly, the *Ruggles* MSA did not use the terms "at retirement" in the language of the MSA which was at issue in that case.

(8) The division formula for determining Wife's share states that the total number of months of credited service was "unknown" at the time of the divorce, because that total could have been affected by many variables, including whether Husband actually did continue to work at the Postal Service after the MSA was entered.

This finding appears to contradict the Court's finding Ms. Joyce's testimony that it was her expectation under the MSA that she would receive her retirement share when Mr. Garcia turned age 55 on December 11, 2005. It is clear that at the time of the divorce, Mr. Garcia was not retirement eligible until he reached at 60. If Mr. Garcia did not continue to work at the Postal Service, which was anticipated, he could not retire at age 55, which is what the Court below has ruled. Therefore, the key provision which would have resolved this issue is to insert "the date of first eligibility" in the MSA, which was not done, despite the recent holding of the *Ruggles* case. On the contrary, the uncontradicted testimony of Ms. Spielman was that the date of first eligibility for retirement did not come up in the negotiations, she chose not to use the "date of first eligibility" in the MSA, and the intention of her client as to when she would receive her share of the

retirement benefits was not discussed and not negotiated.

(9) The parties stipulated that New Mexico community property law applies to the division of the retirement asset. The evidence for this finding is the March 28, 1995 *Domestic Relations Order Dividing Civil Service Retirement System Benefits*, page 3, ¶4, 9 (RP 35), which states that "The division of the CSRS benefits is made pursuant to the community property law of New Mexico and is being made incident to the parties' divorce." This provision, of course, incorporates the *Ruggles* case and the authorities and legal principles provided herein. Further, the same order clarifies that the retirement benefits at issue are the "retirement benefits *accrued* to Participant during his marriage to Linda Joyce." The retirement benefits *accrued* during marriage are provided by the provisions of Exhibit D, provided above. The error in the Court's calculations are that the Court utilized retirement benefits accrued after divorce. Further, in that same order, the formula repeats the MSA provisions in two places regarding calculation of the benefits *at retirement*. There is no requirement in that order for Civil Service (or Mr. Garcia) to pay retirement benefits *prior to retirement* although direct payments by Office of Personnel Management are required by ¶5 (RP 35), and ¶3 states that Mr. Garcia "will receive pension benefits from the Civil Service Retirement System (CSRS) due to his employment with the Federal Government."

This provision anticipates payments at retirement, not prior to retirement. No direct payments from Mr. Garcia are mentioned in that order or the MSA.

(10). If Husband waited to pay Wife her retirement benefit until he actually retires, then Husband is in absolute control of when wife receives her share, which is contrary to the applicable policies set forth in *Ruggles*.

Had the parties, not entered the MSA with counsel, there would be no issue concerning the above proposition. But according to *Ruggles*, those principles can be modified by an MSA, which is the case here. Mr. Garcia's testimony was that by giving Ms. Joyce the marital residence and furnishings (7-25-07 hearing; TR 3:25-26), he was permitted to control the timing of his retirement. Such an exchange is very common in domestic relations cases. But the testimony supplied by Ms. Joyce also supports this proposition, because at the time of the divorce, there was a concern whether about Mr. Garcia's longevity at the postal service and that Mr. Garcia could possibly not remain employed by the postal service. Thus, Mr. Garcia had absolute control over whether he would continue working at the postal service, or as stated in the MSA, whether he would "separate from service", and if he did, then he would still not be retirement eligible until age 60, which has not occurred. It does appear that at the time of the divorce, utilizing the accrued benefits and the time of community service (16 years), the time for retirement

would be no later than age 62. See 5 USC §8336(f), providing for retirement at age 62 with at least 5 years of service. However, as argued at trial, with the combined separate and community credits earned at the time of the divorce, Mr. Garcia could have retired at age 60 if he did no further work.

(11.) Husband failed to show by a preponderance of the evidence that there was any discussion, negotiation or agreement that wife would be paid her retirement only when he actually retired.

While the evidence shows there was no discussion or negotiation of any sort regarding when Ms. Joyce would received her retirement benefits, the parties' MSA language utilizing the terms "*at retirement*" itself contradicts this finding. Because of the lack of discussion or negotiation on the issue, there is no evidence to change the terms of the agreement. The agreement should be enforced as it speaks, and it means what it says. "The historical and current public policy of this state is to favor the settlement of disputed claims." *Gonzales v. Atnip*, 102 N.M. 194, 195, 692 P.2d 1343. Agreements to settle are enforceable through judicial proceedings. *Gonzales v. Atnip*, 102 N.M. at 195. *See Herrera v. Herrera*, 1999-NMCA-034, ¶17, 126 N.M. 705, 974 P.2d 675. The uncontradicted testimony of Ms. Spielman was that the date of first eligibility for retirement did not come up in the negotiations, she chose not to use the "date of first eligibility"

in the MSA. and the intention of her client as to when she would receive her share of the retirement benefits was not discussed and not negotiated.

(13) Under the terms of this MSA, if Wife waited 13 years after the divorce to obtain her retirement benefit, she would not obtain the natural and expected increase in the value of her share following divorce.

This provision is a legal conclusion which is not binding on the Appellate Court. *Lytle v. Jordan*, 2001-NMSC-016, ¶48, 130 N.M. 198, 22 P.3d 666 (legal conclusions are reviewed *de novo*.) This statement of the trial court is simply an incorrect statement of law. It is clear that increases in plan's value occurring after dissolution are separate property of employee spouse. See *Ruggles*, above, footnote 7. Further, there was just no evidence supplied below concerning the extent, value or amount of "natural and expected increase". Such a determination, that Mr. Garcia is now being paid the same wages and salary as at the time of divorce is simply wrong, and contradicted by the unrebutted testimony accompanying Exhibit D. (7-25-07 hearing; TR 3:08-20). Ms. Spielman contradicted the this notion by her testimony that there was a concern that Mr. Garcia could possibly not remain employed by the postal service following divorce. Further, this finding is contradicted by ¶3 of the March 28, 1995 *Domestic Relations Order Dividing Civil Service Retirement System Benefits* (RP

34), which accords Ms. Joyce her half of *the accrued retirement benefits as of the date of divorce*, and also the MSA which accords to Jerry all retirement benefits accrued after divorce. This is the correct formulation under *Franklin v. Franklin*, 116 N.M. 11, 17-18, 859 P.2d 479 (Ct. App. 1993).

In *Franklin v. Franklin*, 116 N.M. 11, 17-18, 859 P.2d 479 (Ct. App. 1993), the Court of Appeals determined:

> "*The question of whether to apply Husband's salary at the time of retirement or the time of divorce involves the characterization of the salary component of the Plan as community or separate property rather than an issue of pension valuation.* It is well settled that a pension is community property. *See LeClert v. LeClert*, 80 N.M. 235, 236, 453 P.2d 755, 756 (1969), overruled on other grounds by *Espinda v. Espinda*, 96 N.M. 712, 713-14, 634 P.2d 1264, 1265-66 (1981). There is also no dispute between the parties that their divorce decree acknowledges that the Plan is community property. Nor do the parties seem to contest the following community property principles, which are well settled in New Mexico: (1) property takes its status as community or separate at the time and by the manner of its acquisition, *Bustos v. Bustos*, 100 N.M. 556, 557, 673 P.2d 1289, 1290 (1983); and (2) *property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage is separate property*, NMSA 1978, § 40-3-8(A)(1) (Cum.Supp.1992).
>
> *What is in question is which part of the Plan is due to community effort and which part of the Plan is attributable to Husband as his sole and separate property.* This precise issue is a case of first impression in New Mexico and was not directly raised in either *Mattox*, 105 N.M. at 482, 734 P.2d at 262 (substantial evidence requirement was met when the trial court's valuation of the pension fell within the range of figures offered by the parties' experts and both experts testified that their calculations of the present value of the

> pension did not take into consideration husband's earnings between the date of trial and date of maturity of the pension), or *Madrid v. Madrid*, 101 N.M. 504, 505, 684 P.2d 1169, 1170 (Ct.App.1984) (when pension is given a discounted value for the purpose of division, it should be calculated as of the time of divorce).
>
> We need not decide this question of first impression in this case. We believe that the most that Wife would be entitled to under *Fondi* and *Bulicek*, on which she relies, would be a requirement that Husband, as the employee-spouse, would bear the burden of proving that any postdivorce increases in salary are due to his singular separate efforts. *See Hare v. Hodgins*, 586 So.2d 118, 127-29 (La.1991). *Even if we adopted this view of the law advocated by Wife, which we expressly do not do, Wife would still lose on the issue of which average salary figures to use as part of the formula.*
>
> *Husband presented the only evidence on this issue* -- that his postdivorce salary increases were due to the separate efforts of relocating to a new state and undertaking significantly new and different job duties and responsibilities. *Accordingly, we hold that in the instant case, the trial court did not err in refusing to include Husband's postdivorce salary increases in the calculation of Wife's share of the community interest in the Plan.*" *Emphasis added.*

In *Franklin*, above, the Court of Appeals rejected Wife's argument that the average salary figures to be utilized are those at the time of retirement, rather than the time of divorce. Husband's final average monthly compensation at the time of divorce was $2,689.47, and it was $3,989.51 at the time of his retirement. *Ibid* at 13. Thus, the correct final average figures utilized in the *Franklin* case was the final average figures at the time of divorce.

Conclusion of Law 6. There is sufficient information/evidence for the

district court to determine that Wife's share of the community interest in the retirement benefits was $590 per month.

Jerry Garcia appealed the previous order of the Court concerning the proper valuation of the benefit payment. The Court of Appeals reversed that order, and determined that it expressed no opinion as to the amount of benefits that would be due to Wife if the district court should determine that Wife is entitled to begin receiving benefits before Husband retires. The District Court has determined the amount of those benefits in paragraph 6 of the order under appeal. (RP 182-183). Jerry Garcia challenges that finding and conclusion, which challenge has been set forth above.

CONCLUSION

The Court should reverse the trial Court on the above issues, and require the Court to issue a *Domestic Relations Order* that the Office of Personnel Management remit to Joyce $374.53 per month, plus applicable cost of living benefits thereon, commencing upon Jerry's retirement from Civil Service.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify I have caused to be mailed to the Honorable Stan Whitaker, and the Honorable Ernesto J. Romero, County Courthouse, POB 488, Albuquerque, New Mexico and opposing counsel, a copy of the foregoing on July 22, 2008.

Thomas C. Montoya