IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
AUG 03 2009

CHERYL LEE DURHAM GORDON,

Petitioner-Appellee,

vs. **Ct. App. No. 29,441**

TIMOTHY E. GORDON,

Respondent-Appellee,

COURT OF APPEALS OF NEW MEXICO
FILED
AUG 03 2009

HPSC, Inc., and DE LAGE LANDEN
FINANCIAL SERVICES, INC.,

Intervenors-Appellants,

NASSAU LENS COMPANY, Inc., d/b/a NOVA OPTICAL
LABORATORY, Intervenor,

ZIA TRUST, INC., Receiver-Appellee.

An Appeal from the Eleventh Judicial District Court, San Juan County
Cause Number DM 2004-118-9
Hon. William C. Birdsall, District Court Judge

BRIEF IN CHIEF OF APPELLANTS HPSC, INC. and DE LAGE LANDEN FINANCIAL SERVICES, INC.

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TABLE OF CONTENTS

I. NATURE OF CASE 1

II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS 2

III. ARGUMENT 8

A. The Court erred in setting aside the agreement of the parties; it is clear and unambiguous and is entitled to deference as a settlement agreement. 8

Preservation of issue and standard of review 8

B. Intervenors were intended third-party beneficiaries of the agreement and are entitled to enforce it. 15

C. The underlying premise of the Court's order setting aside the agreement is in error: the assets were no longer exempt when the parties agreed to have them liquidated by the receiver for payment of taxes and community debts. 20

1. Any exemptions were waived. 20

2. The retirement plans and accounts were in "custodia legis" 23

3. Husband and Wife are judicially estopped from asserting a claim of exemption. 24

4. Voluntary assignment does not trigger exemption statutes. 26

IV. CONCLUSION 27

TRANSCRIPT OF PROCEEDINGS – Digital or Other Electronic Recording.

References to recorded transcript are by elapsed time from start of the recording.

TABLE OF AUTHORITIES

NEW MEXICO CASES

Brown v. Amer. Bank of Commerce
79 N.M. 222, 441 P.2d 751 (1968) 18

C & H Constr. & Paving Co. v. Citizens Bank
93 N.M. 150, 597 P.2d 1190 (Ct.App.1979) 21

C.R. Anthony Co. v. Loretto Mall Partners
112 N.M. 504, 510, 817 P.2d 238, 244 (1991) 8

Casias v. Cont'l Cas. Co.
125 N.M. 297, 960 P.2d 839 (Ct.App.1998) 17

Chapman v. Locke
63 N.M. 175, 315 P.2d 521 (1957) 25

Citizens Bank v. C & H Construction & Paving Co.
89 N.M. 360, 552 P.2d 796 (Ct. App., 1976) 24-25

Clay v. Texas-Arizona Motor Freight
49 N.M. 157, 159 P.2d 317 (1945) 25

Cont'l Potash, Inc. v. Freeport-McMoran, Inc.
115 N.M. 690, 858 P.2d 66 (1993) 18

Cooper v. Albuquerque City Comm'n
85 N.M. 786, 518 P.2d 275 (1974) 21

Elephant Butte Resort Marina, Inc. v. Wooldridge
102 N.M. 286, 694 P.2d 1351 (1985) 21

Fleet Mortgage Corp. v. Schuster
112 N.M. 48, 811 P.2d 81 (1991) 17

Hansen v. Ford Motor Co.
120 N.M. 203, 900 P.2d 952 (1995) 18

Herrera v. Herrera
1999-NMCA-034, 126 N.M. 705, 974 P.2d 675. 11

J. R. Hale Contracting Co., Inc. v. United New Mexico
Bank at Albuquerque
110 N.M. 712, 799 P.2d 581 (1990) 21

Laughlin v. Lumbert
68 N.M. 351, 362 P.2d 507 (1961) 24

In re Madison (Appeal of Marron)
32 N.M. 252, 255 P. 630 (1927) 25

Medina v. Sunstate Realty, Inc.
119 N.M. 136, 889 P.2d 171 (1995). 14

Mobile Investors v. Spratte
93 N.M. 752, 605 P.2d 1151 (1980) 18

Montano v. New Mexico Real Estate Appraiser's Board
2009-NMCA-9, ___ N.M. ____, 200 P.3d 544
(filed December 15, 2008). 9, 10, 11

Ollman v. Huddleston
41 N.M. 75, 64 P.2d 97 (1937) 25

Schaefer v. Hinkle
93 N.M. 129, 597 P.2d 314 (1979). 13-14

Shaeffer v. Kelton
95 N.M. 182, 619 P.2d 1226 (1980) 14

Smith v. Price's Creameries
98 N.M. 541, 650 P.2d 825 (1982) 11

Tarin's, Inc. v. Tinley
2000-NMCA-048, 129 N.M. 185, 3 P.3d 680 (Ct. App. 1999) 17

Valdez v. Cillessen & Son, Inc.
105 N.M. 575, 734 P.2d 1258 (N.M.1987) 17

Young v. Seven Bar Flying Serv., Inc.
101 N.M. 545, 685 P.2d 953 (1984) 21

FEDERAL CASES

Doña Ana Mutual Domestic Water Users Ass'n. v. City of
Las Cruces, New Mexico
516 F.3d 901 (10th Cir., 2008) 17

CASES FROM OTHER JURISDICTIONS

Hossaini v. W. Mo. Med. Ctr.
140 F.3d 1140, 1142 (8th Cir. 1998) 24

United States *ex rel.* Gebert v. Transp.Admin. Svcs.
260 F.3d 909 (8th Cir.2001) 25

NEW MEXICO STATUTES

NMSA 1978, § 42-10-2 (1953) 20, 22, 26

NMSA 1978, § 42-10-3 (1937) 20, 22, 26, 27

NEW MEXICO RULES

Rule 1-065.1 NMRA , *Writs of execution* 22, 23

Uniform Jury Instructions – Civil 13-842, *Waiver* 21

OTHER AUTHORITIES

Black's Law Dictionary, 5th Ed. (1979) 24

Restatement (Second) of Contracts § 302 16-17

I. NATURE OF CASE

This appeal arises from a dissolution of marriage proceeding. A receiver had been appointed in the case by stipulation of husband and wife pursuant to their marital settlement agreement ("MSA"). The MSA and the order appointing the receiver directed the receiver to liquidate marital assets including specified retirement accounts and annuities, and to use the proceeds to pay taxes and other community debt. Intervenors are creditors of the marital community, and were permitted to intervene in the action. The order permitting the creditors to intervene was not appealed. Thereafter, the receiver filed a petition seeking instruction, noting the nature of the retirement accounts and annuities as possibly being exempt from creditors' claims. Intervenors responded to the petition asserting that exemptions had been waived by husband as to one creditor. Intervenors also asserted that husband's and wife's action in stipulating to entry of the order appointing receiver and directing liquidation of the accounts for the specific purpose of paying community debt constituted an agreement of which intervenors were third-party beneficiaries which could not be revoked. Intervenors also claimed that the making of such agreement constituted a waiver of exemptions; and that husband and wife were barred by common-law and judicial estoppel from now claiming that the assets could not be used to pay community debt. The hearing

officer heard argument and requested briefs from husband, wife, and intervenors on the issue of exempt status of the retirement accounts. She filed her recommendations that the proceeds of specified retirement accounts and annuities not be used to pay any creditors' claims, but instead be divided between husband and wife. Intervenors timely objected. The district court without a hearing adopted the hearing officer's recommendations, and this appeal followed.

II. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

Intervenors are creditors of the marital community. Intervenor De Lage Landen Financial Services, Inc. ["DLL"] holds a judgment against husband in a separate action pending before the Eleventh Judicial District Court for San Juan County; Intervenor HPSC, Inc. claims sums due under equipment financing agreements. [RP 335-337]. Husband and wife initiated dissolution of marriage proceedings in February 2004. [RP 1-5]. In November 2007they filed a marital settlement agreement ["MSA"] [RP 309-315] which was approved by the district court and incorporated into a judgment and partial decree of dissolution of

marriage in January 2008 [the "Decree"]. [RP 322-324] Pursuant to the MSA and the Decree, a receiver was agreed to be appointed by the parties with instructions to oversee the filing of tax returns, to take control of certain community assets, and to liquidate the assets to pay taxes and community debts. The assets included retirement plans and accounts: a Vanguard Money Purchase Account, and Vanguard Profit Sharing plan; a Metlife Annuity, Wife's Fidelity IRA, and Husband's Fidelity IRA. [MSA, RP 308-309; Decree, RP 322-324]

Pursuant to the MSA and Decree, Husband and Wife, through their attorneys, filed a *Verified Joint Motion For Appointment Of Receiver* on February 5, 2008. [RP 325-327] On February 7, 2008, the district court entered its *Stipulated Order Appointing Receiver*. [RP 328-334] Later, a *Stipulated Order Amending Order Appointing Receiver* was filed on May 27, 2008 making a minor change to exclude a Ruidoso time share and certain business inventory of Husband's optometry business from the definition of property under the control of the receiver. [RP 352-355] The Orders directed appointment of a receiver to take possession, custody and control of the specified community assets. [RP 329, 353]

Also, the *Stipulated Order Appointing Receiver* recited key terms of the parties' agreement relevant to the Intervenors' claims, which were adopted as judicial findings:

A. Just cause exists for the appointment of a receiver in that in the absence of an appointment of a receiver, the community will have difficulty in marshaling its assets to meet their financial obligations. Irreparable harm may result from the failure to appoint a receiver in that such failure would hinder the ability of the parties to meet **financial obligations**. The appointment of a receiver is recommended by the court's 11-706 financial expert, Sam Baca.

B. Pursuant to the terms of the Marital Settlement Agreement filed herein, the parties have agreed to the appointment of a receiver to oversee the filing of tax returns and the payment of taxes and **other community debt**.

Paragraph 2 of the original Order went on to specifically provide:

> Any funds received by the receiver from the liquidation of any of the assets of the estate (which included the enumerated accounts, plan, annuity and IRA's), shall be divided into two (2) equal accounts, one account for Wife and one account for Husband. The receiver shall draw equally from each account **to pay taxes and other community debts** and shall keep a record of the monies removed from each account.

Paragraph 5 of the original Order also provided:

> The receiver's priority shall be to pay all personal federal and state income taxes due. If any funds remain in the receivership estate, after the taxes are paid, **the receiver shall pay any other debts existing as of July 24, 2007.**
>
> (Emphasis added.) [RP 328-334]

On April 7, 2008 Intervenors filed their motion to intervene in the dissolution of marriage proceedings, alleging a beneficial interest in the funds in the custody of the court by reason of the receivership proceedings. [RP 335-337]

On May 27, 2008, the district court entered an Order granting Intervenors, as creditors of the marital community, permission to intervene in the divorce proceedings, finding that "(t)here may be issues to be decided which may affect the rights and remedies of the (Intervenors) ..." That order was not appealed by Husband or Wife. [RP 359-360]

On September 11, 2008 the receiver filed its *Petition By Receiver For Approval To Pay Outstanding Expenses and Liabilities*, seeking guidance on various issues before it. [RP 384-392] The petition included a request for a court determination of what, if any, of the marital assets might be exempt from the claims of creditors and therefore not be used by the receiver to pay community debts, citing Sections 42-10-2 and 42-10-3 NMSA 1978 which purport to make pensions, retirement funds and annuity contracts exempt from receivers, attachment, garnishment, execution or legal process in favor of creditors. [RP 388-390] This request by the receiver was the first time that any question about potential exempt status of the specified marital assets was brought before the Court. Intervenors filed their Response in opposition to that portion of the Receiver's Petition that sought to deny them any payment. [RP 414-417] In their Response, Intervenors denied there were any applicable exemptions, pointed out that Husband and Wife had stipulated and agreed to specifically earmark and

designate the proceeds of their accounts and retirement plans to payment of claims against the marital community including the Intervenors' claims, and that they had knowingly and voluntarily waived any exemptions with the advice of their legal counsel. [RP 415-416] The Intervenors also raised the doctrines of estoppel, judicial estoppel, *res judicata* and collateral estoppel as barring the application of any exemptions to payment of Intervenors' claims. [RP 416] Neither Husband nor Wife filed any responses to the receiver's petition.

The hearing officer held a hearing on January 30, 2009. During that hearing, Wife's attorney stated that "I also understand that the receiver's recommendation is that the creditors will be paid in full anyway ..." [1-30-09 hearing, TP 12:10] Husband's attorney stated that "I believe because the ... most of the money are proceeds of retirement accounts and annuity accounts, that they are exempt from creditors, and I believe with that statute and that combined with all the things we don't know about the taxes, that we should first be paying the taxes, and then any creditors that remain. We actually provided for that in the order. We realized when we were trying to put the order together to appoint the receiver that besides taxes there were probably other bills that we were not aware of, and the order does provide that once the taxes situation is looked into, then we go ahead and pay the creditors. And that court Order has never been modified, so I think basically that is

now the Order that the receiver needs to proceed under and the Court needs to proceed under, paying administrative expenses, paying the taxes, and then looking to see which creditors should be paid and in what order." [1-30-09 hearing, TP 32:55] The hearing officer entered her findings and recommendations on February 18, 2009, finding that the listed marital assets fell under the definition of assets protected from execution or levy under cited New Mexico exemption statutes. [RP 433-435] The hearing officer recommended that requests to order liquidation of the listed assets to satisfy the claims of Intervenors and other listed creditors be denied, and that the listed assets instead be divided between the parties. [RP 434]

Intervenors timely filed their objections to the hearing officer's findings and recommendations. [RP 444-452] The district court entered its *Order Adopting Findings and Recommendations of Domestic Relations Hearing Officer* on March 6, 2009, denying Intervenors' objections. [RP 454-455] Intervenors HPSC, Inc. and DLL timely filed their notice of appeal [RP 457-464] and this matter was assigned to the General Calendar.

III. ARGUMENT

A. The Court erred in setting aside the agreement of the parties; it is clear and unambiguous and is entitled to deference as a settlement agreement.

This issue was preserved in the court below by *Intervenors' Response to Petition By Receiver For Approval To Pay Outstanding Expenses And Liabilities* [RP 414-415] and argument thereon at hearing (1-30-09 hearing, TP 35:10); and

Intervenors' Objections to Hearing Officer's Findings And Recommendations Regarding Remaining Assets And Debts filed February 27, 2009. [RP 444-452]

Standard of review: the applicable standard of review in reviewing the trial court's interpretation of an unambiguous contract is as a question of law, reviewed de novo. C.R. Anthony Co. v. Loretto Mall Partners, 112 N.M. 504, 510, 817 P.2d 238, 244 (1991).

Husband and Wife, embroiled in litigation in their divorce proceedings since 2004, declared a truce of sorts and entered into a Marital Settlement Agreement in November 2007. Pursuant to the terms of that Marital Settlement Agreement, Husband and Wife agreed to the appointment of a receiver to oversee the filing of

tax returns and the payment of taxes and other community debt. [RP 309-315]

The receiver was to take over possession, custody and control of specified community assets consisting of a Vanguard Money Purchase Account, a Vanguard Profit Sharing plan, a Metlife Annuity, Wife's Fidelity IRA, and husband's Fidelity IRA. The agreement was carried over into the *Stipulated Order Appointing Receiver,* submitted by mutual consent of Husband and Wife and approved by their respective attorneys, which specifically provided: "Any funds received by the receiver from the liquidation of any of the assets of the estate (which included the enumerated accounts, plan, annuity and IRA's), shall be divided into two (2) equal accounts, one account for Wife and one account for Husband. The receiver **shall** draw equally from each account to **pay taxes and other community debts** and shall keep a record of the moneys removed from each account. (Emphasis added.) [RP 328-334]

The Order was approved by the District Court's Domestic Violence and Child Support Hearing Officer and ratified by the District Judge. The Stipulated Order was not appealed, and no other relief was sought by Husband or Wife with respect to the Order.

Settlement agreements are favored and generally upheld and enforced by the Courts. *Montano v. New Mexico Real Estate Appraiser's Board,* 2009-

NMCA-9, ¶ 12, ___ N.M. ____, 200 P.3d 544 (filed December 15, 2008). In negotiating a settlement contract, the parties are bound by its provisions and must accept both the burdens and benefits of the contract; and the court's duty is to enforce the terms of the contract which the parties made for themselves. *Montano,* ¶ 12. This Court noted that settlement agreements occupy a favored status, requiring a compelling basis be shown before they can be set aside. "We will allow equity to interfere with enforcing clear contractual obligations only when well-defined equitable exceptions, such as unconscionability, mistake, fraud or illegality justify deviation from the parties' contract." *Montano,* ¶ 12.

Montano involved an appeal from a district court's order overturning a finding by the New Mexico Real Estate Appraiser's Board ("Board") that a licensee, Montano, had violated the terms of a settlement agreement he made with the Board to settle disciplinary proceedings. This Court reversed the district court finding that there had been improper consideration of additional evidence outside the record made before the Board and improper application of the substantial evidence standard. *Montano,* ¶ 23. The Court remanded the case, noting that Montano's failure to meet the requirements set out in the settlement agreement was undisputed.

In *Montano,* both parties negotiated in good faith, were represented by

counsel, and received some benefit from entering into the agreement. *Montano,* ¶ 13.

Marital settlement agreements are contracts, subject to contract law. *See* Herrera v. Herrera, 1999-NMCA-034, ¶ 9, 126 N.M. 705, 974 P.2d 675. Under New Mexico contract law, they should be enforced. *See* Smith v. Price's Creameries, 98 N.M. 541, 544, 650 P.2d 825, 828 (1982) ("[W]here the parties are otherwise competent and free to make a choice as to the provisions of their contract, it is fundamental that the terms of contract made by the parties must govern their rights and duties."). And "(e)ach party to a contract has a duty to read and familiarize himself with its contents before he signs and delivers it, and if the contract is plain and unequivocal in its terms, each is ordinarily bound thereby. (Citation omitted)." Id., 98 N.M. at 545, 650 P.2d at 829.

In the case at bar, as in *Montano,* both parties negotiated in good faith, were represented by counsel, and received some benefit from entering into the agreement. *Montano,* ¶ 13. Moreover, Husband and Wife's agreement as incorporated into the district court's orders is clear and unambiguous. It identifies with specificity the marital assets in question and sets forth a detailed mechanism for their liquidation in the hands of the receiver. It states multiple times just what is to be done with the proceeds of those assets: "The receiver shall draw equally

from each account **to pay taxes and other community debts** ..." *Stipulated Order Appointing Receiver,* ¶ *2.* [RP 329-330] "The receiver's priority shall be to pay all personal federal and state income taxes due. If any funds remain in the receiversnip estate, after the taxes are paid, the receiver shall pay any other debts existing as of July 24, 2007." *Stipulated Order Appointing Receiver,* ¶ *5.* [RP 331]

Having thus clearly expressed their intentions, neither Husband nor Wife appealed nor sought any modifications to the Orders, the receivership mechanism, or the directions for payment of taxes and community debts.

Some months later the court-appointed receiver filed its *Petition By Receiver For Approval To Pay Outstanding Expenses and Liabilities* [R.P. 384-392] seeking approval of its fees, its counsel's fees, the payment of the court-appointed arbitrator and 11-706 expert, and an accountant to be retained. It was only at the end of the Petition, almost as an afterthought, that the receiver mentioned the nature of the receivership assets which on their face might potentially be exempt from creditors' claims under Sections 42-10-2 and 42-10-3 NMSA 1978. The receiver expressed no opinion one way or another, merely asking for the district court to determine what, if any, assets are exempt and could not be used to pay debts of Husband and Wife. *Petition by Receiver, etc.*, ¶ 9. [RP 388-389]

By ruling that the receiver could not use any of the receivership assets to pay any of the listed liabilities (federal tax liabilities, state tax liabilities, the community debts owed to the Intervenors, or any other liabilities, the hearing officer and the district court in effect disregarded and overrode the previous Stipulated Orders and Husband's and Wife's settlement agreement.

Husband's and Wife's MSA had been approved by the Court and incorporated into the Decree [RP 322-324]. Again, the MSA provided that "(t)he receiver shall take control of all community assets not specifically set aside to either party in this agreement and shall use those assets to pay debt." It went on to identify the specified retirement accounts and plans as being assets to be in the control of the receiver. And it stated that any modification or waiver of any of its provisions shall be effective only if made in writing and executed with the same formality as the Agreement. MSA, ¶[RP 309-310, 311] Thus, the district court acting on its own had no power to modify the parties' agreement.

Besides exceeding its jurisdiction in seeking to modify the Stipulated Orders, the court disregarded the role of the courts in contract matters. "The function of the courts is to interpret and enforce a contract as made by the parties. (Citation omitted). A contract will be considered and construed as a whole, with meaning and significance given to each part, in its proper context, so as to ascertain

the parties' intentions." Schaefer v. Hinkle, 93 N.M. 129, 131, 597 P.2d 314, 316 (1979). In determining the intent of the parties the courts must consider the entire contract and not just selected portions. Shaeffer v. Kelton, 95 N.M. 182, 185, 619 P.2d 1226, 1229 (1980). When the parties' expressions of mutual assent are clear and unambiguous, the courts must give effect to those expressions. Medina v. Sunstate Realty, Inc., 119 N.M. 136, 139, 889 P.2d 171, 173 (1995).

In the case at bar the district court failed to consider and give effect to the clear intent of the parties to apply the specified assets to payment of community debts and taxes. That intent, as noted, was stated in multiple places in their agreement, an agreement that was ratified and incorporated into court orders. In addition to previously cited provisions, see *Stipulated Order Appointing Receiver*, finding A: "Just cause exists for the appointment of a receiver in that in the absence of an appointment of a receiver, the community will have difficulty in marshaling its assets to meet their financial obligations. Irreparable harm may result from the failure to appoint a receiver in that such failure would hinder the ability of the parties to meet financial obligations. ..." Finding B: "Pursuant to the terms of the Marital Settlement Agreement filed herein, the parties have agreed to the appointment of a receiver to oversee the filing of tax returns and the payment of taxes and other community debt." [RP 328-329] Other provisions of the

Stipulated Orders called for the receiver "to take over possession, custody and control" of the receivership assets, including the retirement plans, and to draw equally from accounts funded from liquidation of those assets to pay taxes and other debts. [RP 329-330; 352-353]

When the court ordered instead that the community assets and debts be divided between Husband and Wife and that requests to order liquidation of the listed assets to satisfy debts be denied, the court basically ignored all of the above-cited provisions of the parties' agreement. Except for the administrative duty of overseeing filing of tax returns, the receiver was left with no substantive role or duties. The entire stipulated scheme was rendered a nullity. The court thus failed to give force and effect to the intent of the parties.

B. Intervenors were intended third-party beneficiaries of the agreement and are entitled to enforce it.

This issue was preserved in the court below by *Intervenors' Response to Petition By Receiver For Approval To Pay Outstanding Expenses And Liabilities* [RP 414-415] and argument thereon at hearing (1-30-09 hearing, TP 35:10); and *Intervenors' Objections to Hearing Officer's Findings And*

Recommendations Regarding Remaining Assets And Debts filed February 27, 2009. [RP 444-452]

As the Receiver's precautionary request for directions about the retirement plans and accounts was presented to the district court, Husband and Wife appeared content to let their agreement for payment of taxes and community debts be overturned. Rather than object to the hearing officer's recommended findings and conclusions or appeal or cross-appeal the district court's ruling, they seem to have acquiesced in the ruling which would permit them to decamp with the community property they had earmarked for payment of taxes and debts, perhaps to take their chances with their creditors and taxing authorities. Faced with this disregard of the court-approved agreement, it is appropriate and necessary for the intervening creditors to be able to enforce the agreement as third-party beneficiaries.

Under certain circumstances, third-party beneficiaries of contracts may enforce those contracts, even though they are not parties to the contracts. Husband's and Wife's agreement meets those circumstances.

Under contract law, there are two types of third-party beneficiaries to contracts: intended beneficiaries and incidental beneficiaries. See *Restatement*

(Second) of Contracts § 302 (1981). Only intended beneficiaries may seek enforcement of a contract. Tarin's, Inc. v. Tinley, 2000-NMCA-048, ¶ 13, 129 N.M. 185, 3 P.3d 680 (Ct. App. 1999). On the question of intent to benefit a third party, The Tenth Circuit Court of Appeals recently surveyed New Mexico decisions containing the process to ascertain such intent in Doña Ana Mutual Domestic Water Users Ass'n. v. City of Las Cruces, New Mexico, 516 F.3d 901, 904-905 (10th Cir., 2008):

> "The promisor must have `had reason to know the benefit was contemplated by the promisee as one of the motivating causes for entering the contract.'" (citations omitted).
>
> Moreover, "[t]he burden is on the person claiming to be a third-party beneficiary to show that the parties to the contract intended to benefit him. He may do so using extrinsic evidence if the contract does not unambiguously indicate an intent to benefit him." Tinley, 3 P.3d at 686 (citations omitted); see also Schuster[1], 811 P.2d at 83 ("Such intent must appear either from the contract itself or from some evidence that the person claiming to be a third party beneficiary is an intended beneficiary.'" (quoting Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 734 P.2d 1258, 1264 (N.M.1987))); Casias v. Cont'l Cas. Co., 125 N.M. 297, 960 P.2d 839, 842 (N.M.Ct.App.1998) ("The intent of the parties to a contract may be proven by `relying on the unambiguous language of the agreement itself, or, in the absence of such language, on extrinsic evidence such as the

[1] Fleet Mortgage Corp. v. Schuster, 112 N.M. 48, 811 P.2d 81 (1991).

> circumstances surrounding the execution of the agreement.'" (quoting Hansen v. Ford Motor Co., 120 N.M. 203, 900 P.2d 952, 954 (1995))). As always, "`[t]he primary objective in construing a contract is to ascertain the intention of the parties.'" Cont'l Potash, Inc. v. Freeport-McMoran, Inc., 115 N.M. 690, 858 P.2d 66, 80 (1993) (quoting Mobile Investors v. Spratte, 93 N.M. 752, 605 P.2d 1151, 1152 (1980)). In addition, "a contract should be interpreted as a harmonious whole to effectuate the intentions of the parties, and every word, phrase or part of a contract should be given meaning and significance according to its importance in context of the contract." Brown v. Am. Bank of Commerce, 79 N.M. 222, 441 P.2d 751, 755 (N.M.1968). "Further, in construing the contract, reasonable rather than unreasonable interpretations are favored by the law." Id.

A review of Husband's and Wife's agreement contained in the MSA and carried forward into the Stipulated Orders evidences a manifest, express, unambiguous intent to benefit both taxing authorities and community creditors by paying them with money then in the retirement plans and account. The MSA recites that Husband and Wife "have made this compromise agreement as to their rights and obligations, and a division of their property ..." MSA, Preamble. [RP 304] The provisions confirming the parties' separate property and distributing their community property excludes the retirement plans and accounts, MSA pp. 2-4. [RP 305-307] Those community assets not specifically set aside to either Husband or Wife are placed in the control of the receiver. "The receiver shall take

control of all community assets not specifically set aside to either party in this agreement and shall use those assets to pay debt." MSA, ¶ H. [RP 308] "The parties agree that the assets that will be in control of the receiver are as follows: ... 3. The Vanguard Money Purchase account; 4. The Vanguard Profit Sharing plan; 5. The Metlife Annuity; 6. Wife's Fidelity IRA; 7. Husband's Fidelity IRA; ..." [RP 308-309]

See also the specified provisions of the Stipulated Orders, Point A above, with their elaborate provisions for the receiver to liquidate and distribute the accounts and unequivocal directive to pay taxes and debts.

Finally, the MSA contained a merger and integration clause confirming that it "contains the entire understanding of the parties, and there are no agreements other than those expressly stated herein and in the schedules, if any, hereto." MSA, ¶ K(1). [RP 310]

Thus, Husband and Wife, aided by their legal counsel, used unambiguous, explicit language to express their intention to pay creditors and taxing authorities. There is therefore no need to resort to extrinsic evidence to ascertain their intent. In any event the district court had no such extrinsic evidence before it that could have demonstrated an intent to ***not*** use the retirement plans and accounts. It erred in barring the payments.

C. The underlying premise of the Court's order setting aside the agreement is in error: the assets were no longer exempt when the parties agreed to have them liquidated by the receiver for payment of taxes and community debts.

This issue was preserved in the court below by *Intervenors' Response to Petition By Receiver For Approval To Pay Outstanding Expenses And Liabilities* [RP 414-415] and argument thereon at hearing (1-30-09 hearing, TP 35:10); and *Intervenors' Objections to Hearing Officer's Findings And Recommendations Regarding Remaining Assets And Debts* filed February 27, 2009. [RP 444-452]

1. Any exemptions were waived.

The district court's ruling was premised on the Husband's and Wife's retirement plans and accounts being exempt from attachment, garnishment or legal process in favor of creditors under § 42-10-2 NMSA 1978 (1953) and § 42-10-3 NMSA 1978 (1937). The district court found that ordering liquidation of the assets and payment to creditors from those assets would contravene the statutory exemptions. See Hearing Officer's *Findings and Recommendations Regarding Remaining Assets and Debts* filed February 18, 2009 [RP 433-435], and the district court's *Order Adopting Findings and Recommendations Of Domestic Relations Hearing Officer* filed March 6, 2009. [RP 454-455]

This analysis overlooks the stated intent of Husband and Wife to liquidate those retirement plans and accounts for the express purpose of paying taxes and community debts. That intent is manifest and explicit throughout the MSA and the Stipulated Orders. See Points A and B above. By specifically earmarking the otherwise exempt funds from for payment of taxes and community debts, Husband and Wife waived any claims of exemption.

Waiver is the intentional relinquishment of a known right. Young v. Seven Bar Flying Serv., Inc., 101 N.M. 545, 685 P.2d 953 (1984). As noted in Uniform Jury Instructions – Civil 13-842, *Waiver:* "Waiver is the voluntary giving up of a known right. A waiver may be express or implied from a person's statements or conduct. ..." See also J. R. Hale Contracting Co., Inc. v. United New Mexico Bank at Albuquerque, 110 N.M. 712, 716-717, 799 P.2d 581, 585-586:

> Our decisions recognize that the intent to waive contractual obligations or conditions may be implied from a party's representations that fall short of an express declaration of waiver, or from his conduct. Elephant Butte Resort Marina, Inc. v. Wooldridge, 102 N.M. 286, 289, 694 P.2d 1351, 1354 (1985); Cooper v. Albuquerque City Comm'n, 85 N.M. 786, 790, 518 P.2d 275, 279 (1974); see also C & H Constr. & Paving Co. v. Citizens Bank, 93 N.M. 150, 161, 597 P.2d 1190, 1201 (Ct.App.1979). While not express, these types of "implied in fact" waivers still represent a voluntary act whose effect is intended.

Thus, even without an express reference to the statutory exemptions contained in NMSA 1978 Sections 42-10-2 and 42-10-3, Husband and Wife could, and did, make an implied waiver of such exemptions. That intent to waive can be implied from their conduct in expressly turning over control of the retirement plans and accounts to the receiver, and directing the receiver to use their proceeds to pay community debts. MSA, pp. 5-6 [RP 308-309]; Stipulated Orders [RP 328-334; 352-355]. Once Husband and Wife earmarked those plans and accounts for payment of taxes and debts, the only reasonable or even conceivable intention that can be implied from that earmarking was that claims to hold exempt those funds from creditors and taxing authorities were being voluntarily given up.

New Mexico law and court rules governing the assertion of claims to exempt property provide that such exemptions can be waived by failure to timely claim them. Execution on judgments is governed by Rule 1-065.1NMRA, *Writs of execution.* That rule provides for a judgment creditor to give notice to a judgment debtor of his or her right to claim statutory exemptions prior to issuance of a writ of execution. If the claim is not timely asserted it is waived – see Subsection (E): *Failure to file claim of exemption:* "If the judgment debtor fails to file a claim of exemption within ten (10) days after service of the notice of the right to claim exemptions, the judgment debtor shall be deemed to have waived the right to claim

an exemption." This is just what happened with respect to the judgment of intervening creditor DLL. DLL had been granted a judgment against Husband in Eleventh Judicial District Cause No. CV-07-1021-8, of which the district court was asked to take judicial notice (see *Motion to Intervene*, ¶ 4 [RP 335-337] and *Findings and Recommendations Regarding Motion to Intervene, and Order* granting intervention. [359-360]

In the underlying case Husband was served with statutory Notice of Right To Claim Exemptions from Execution and failed to claim any exemptions including exemptions of proceeds of pensions or retirement plans. He is therefore deemed by Rule to have waived any such exemption. See the prominent notice required by Rule 1-065.1 to be included in the Notice served to Husband: FAILURE TO COMPLETE AND FILE A CLAIM OF EXEMPTIONS ON EXECUTION FORM WITHIN TEN (10) DAYS AND SERVE A COPY ON THE JUDGMENT CREDITOR WILL RESULT IN THE LOSS OF YOUR RIGHT TO CLAIM AN EXEMPTION. The cumulative effect of the actions and inaction of the parties to assert any exemption claims, and to voluntarily subject the funds and accounts to payment of community creditors, is a waiver.

2. The retirement plans and accounts were in "custodia legis"

By voluntarily turning over the retirement plans and accounts to the

receiver, Husband and Wife placed them in "custodia legis" – that is, "in the custody of the law." *Black's Law Dictionary*, 5th Ed., p. 346 (1979). As such, they were subject to the orders and rulings of the court. Incidentally, they would not be subject to garnishment or other process brought by creditors, see Laughlin v. Lumbert, 68 N.M. 351, 353, 362 P.2d 507, 509 (1961), but as discussed below no such process was utilized and therefore the operative language of the exemptions statutes never applied. The precise orders and rulings of the court affecting the retirement plans and accounts were the MSA, Final Decree, and Stipulated Orders. Husband and Wife agreed what was supposed to happen with the funds in those accounts. The district court in its Decree adopting the MSA and in its Stipulated Orders ruled that the funds were to be used to pay taxing authorities and creditors. Having so ruled, and with no claim of exemption having been asserted by Husband or Wife in their agreement, the district court erred in applying the statutory exemptions to the funds earmarked for taxes and debts.

3. Husband and Wife are judicially estopped from asserting a claim of exemption.

Simply stated, the doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation. Hossaini v. W. Mo. Med. Ctr., 140 F.3d 1140, 1142 (8th Cir. 1998). See also *See also* Citizens Bank v.

C & H Construction & Paving Co., 89 N.M. 360, 366, 552 P.2d 796, 802 (Ct. App., 1976):

> The doctrine of "judicial estoppel" is a rule which estops a party from playing "fast and loose" with the court during the course of litigation. Chapman v. Locke, 63 N.M. 175, 315 P.2d 521 (1957). It is not, however, strictly a question of estoppel. **"Judicial estoppel" simply means that a party is not permitted to maintain inconsistent positions in judicial proceedings.** Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. In re Madison (Appeal of Marron), 32 N.M. 252, 255 P. 630 (1927); Clay v. Texas-Arizona Motor Freight, 49 N.M. 157, 159 P.2d 317 (1945); Ollman v. Huddleston, 41 N.M. 75, 64 P.2d 97 (1937). (Emphasis added)

The doctrine is designed to prevent parties from making a mockery of justice by inconsistent pleadings, and to prevent parties from playing fast and loose with the courts to suit the exigencies of self interest. United States *ex rel.* Gebert v. Transp.Admin. Svcs., 260 F.3d 909 (8th Cir.2001).

In this case, Husband and Wife assumed a certain position in their dissolution of marriage proceedings with respect to intended use of the funds in the retirement plans and accounts. That position, the intent to have the funds applied to payment of taxes and community debts, was approved by the district court in the

Decree adopting the MSA and in the Stipulated Orders. Thus, Husband and Wife "succeeded" in maintaining the position they had assumed in the proceedings. Therefore, they may not now assume a contrary position. The elements of judicial estoppel are met, and Husband and Wife may not now claim as exempt the funds they previously asked the court to order be placed in custody of the receiver for payment of taxes and debts.

4. Voluntary assignment does not trigger exemption statutes.

Finally, the exemption statutes by their terms do not apply. The statutes do not purport to put funds in retirement plans and accounts off limits forever. Such funds remain subject to disposition by Husband and Wife.

Sec. 42-10-2 NMSA 1978 and Sec. 42-10-3 NMSA 1978 contemplate that the specified is that such funds and contracts are exempt from **involuntary** efforts to levy, whether by receivers, bankruptcy trustees, or creditors utilizing attachment, garnishment or legal process. *See, e.g.*, Sec. 42-10-2 NMSA 1978, which speaks in terms of "... any interest in or proceeds from a pension or retirement fund of every person supporting only himself is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, executors or administrators in probate, fines, attachment, execution or foreclosure by a judgment creditor." This case is not a bankruptcy, insolvency or probate

proceeding. Husband and Wife are not being "fined". Intervenors are not attaching, executing on or foreclosing against the funds. See also Sec. 42-10-3 NMSA 1978, which states insurance and annuity benefits "... shall in no case be liable to attachment, garnishment or legal process ... or subject in any manner to the debts of the person ... unless such policy, contract or deposit be taken out, made or assigned in writing for the benefit of such creditor." Here intervening creditors are not attaching, garnishing or pursuing legal process. Rather, Husband and Wife have knowingly and voluntarily elected to submit their community assets to payment of taxes and "other community debts" by their action in moving the district court for entry of the Stipulated Orders directing turnover of those assets to the Receiver, for that specific purpose. This was in effect an assignment, which is expressly contemplated by Sec. 42-10-3 NMSA. No statutory exemptions apply under these circumstances, and the district court erred in disregarding the intention to apply the funds to taxes and community debts as agreed by Husband and Wife and as previously ordered.

IV. CONCLUSION

The retirement plans and accounts were agreed by Husband and Wife to be liquidated. They were thus transformed by voluntary act and agreement into a receivership estate to be devoted to payment of taxes and creditors' claims. As

intended third-party beneficiaries, the intervening creditors are entitled to enforce that agreement.

Also, Husband's and Wife's voluntary agreement for payment of taxes and debts with the earmarked funds was submitted to the district court and was ratified by, and incorporated into, final, unappealed court orders. Having prevailed in that position, Husband and Wife may not now adopt a contrary position. The doctrine of judicial estoppel bars any such claims.

Finally, Husband and Wife have made a knowing and voluntary waiver of any exemption claims. No exemptions apply under these circumstances. The district court's ruling should be reversed and the case remanded with instructions to enter judgment denying any exemptions with respect to the funds and ordering payment of taxes and community debts from such funds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Brief in Chief of Intervenors-Appellants HPSC, Inc. and De Lage Landen Financial Services, Inc.* was mailed to the following persons on August 3, 2009:

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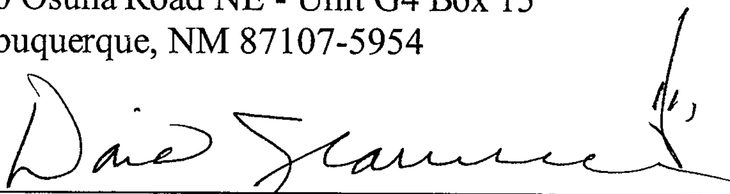

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