IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

CHERYL LEE DURHAM GORDON,

Petitioner-Appellee,

vs.

TIMOTHY E. GORDON,

Respondent-Appellee,

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.

Ct. App. No. 29,441

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

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

Submitted by:

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I. ARGUMENT

A. There is no issue as to waiver of exemptions; Husband and Wife unambiguously agreed to apply assets to payment of debt; that mutual agreement was supported by consideration.

Wife claims there is no showing in the court below of her intention to waive potential statutory exemptions that apply to pension and retirement funds. *Answer Brief of Petitioner-Appellee Cheryl Gordon,* Point 1, pp. 3-7. Husband makes a similar claim – *Answer Brief of Appellee, Timothy Gordon,* Point C, pp. 6-8. This claim ignores the unambiguous terms of the agreement made by Husband and Wife in their marital settlement agreement (MSA).

The Intervenor-Appellants, as creditors of the community, do not dispute the general notion that certain New Mexico exemption statutes can be raised with respect to efforts to involuntarily[1] subject pension and retirement accounts to payment of debt. See *Brief in Chief of Appellants HPSC, Inc. and De Lage Landen Financial Services, Inc.*, Point (C)(4), pp. 26-27. In this case, however, neither Husband nor Wife made any claim to the funds and accounts. Rather, they agreed in writing that

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[1]No claim is made by Husband or Wife that their voluntary stipulation to appointment of a receiver to liquidate the retirement plans and accounts and apply the proceeds to payment of claims of taxing authorities and creditors in a divorce proceeding constitutes a fine, attachment, execution, garnishment or other legal process to involuntarily subject the assets to such claims within the meaning of the exemption statutes. See Appellants' *Brief in Chief,* Point C(4), pp. 26-27.

a Court-appointed Receiver would liquidate those funds and accounts, divide the proceeds into two equal accounts, one for Wife and one for Husband, and draw equally from each account to pay taxes and other community debts. The directive was for the Receiver to pay any other debts existing as of July 24, 2007. See *Stipulated Order Appointing Receiver* [RP 328-334]. This express, unambiguous intention as to what was supposed to happen with these funds overrides any after-the-fact assertion that Husband or Wife meant to make a differing claim to the funds, whether under a statutory exemption or otherwise.

Intervenors have found little or no authority on the point now asserted by Husband and Wife: that a divorcing couple's stipulation to apply otherwise exempt funds to payment of creditors can be done with reservation of the right to claim statutory exemptions in such funds. Most authority is on the topic of involuntary levies upon exempt assets. *See, e.g.,* Annotation: Employee retirement pension benefits as exempt from garnishment, attachment, levy, execution or similar proceedings, 93 ALR 3d 711 (1979). The reason the argument does not come up is because it is manifestly self-contradictory. Having earmarked the funds for payment of taxes and creditors' claims, Husband and Wife cannot logically claim those funds are exempt.

The express earmarking of the funds for payment of taxes and creditors,

negotiated between Husband and Wife, was indeed supported by consideration. Both Husband and Wife benefitted from the inclusion of this earmarking provision in their Marital Settlement Agreement and the Stipulated Orders. The provision allowed funds (including each other's community interest in otherwise exempt funds) to be applied in reduction of community debt for which the property interests of each was otherwise wholly liable, jointly and severally. *See* Sec. 40-3-10 NMSA 1978 (1995), *Priorities for satisfaction of community debts*. Thus, each spouse received a benefit from the other in the form of access to the other's share of retirement funds to reduce community debt. The other spouse likewise incurred a reciprocal detriment or obligation in a return promise. This is the essence of consideration. *See* UJI-Civ. 13-814, *Consideration; definition.* Thus the agreement to let the funds be applied to payment of debts was amply supported by consideration.

Wife asserts that she has not waived her exemptions because she wasn't served with a lawsuit by any creditor, had not had a judgment entered against her, and wasn't served with notice of right to claim an exemption. This argument overlooks the fact that Wife's stated intention was to pay all community debts. The *Stipulated Order Appointing Receiver* made clear at Paragraph 2 that the Receiver "... shall draw equally from each account to pay taxes and other community debts ...", and at Paragraph 5 that "... the receiver shall pay ***any*** other debts existing as of July 24,

2007." RP 328-334] (Emphasis added.) The clear, unambiguous language of the Order did not limit or otherwise restrict the debts to be paid. It did not specify debts that had been reduced to judgment against Wife, nor did it limit the directive to debts that Wife knew about. In fact, the court below was informed by Husband's attorney that the intent of Husband and Wife in giving the receiver these directions was that "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." [1-30-09 hearing, TP 32:55.] Likewise, Husband acknowledges in his Answer Brief to this Court that the parties " ... realized ... that there might be other outstanding debts of which neither of them were aware .. ." and they needed the assistance of the receiver as a third party in order to " ... marshal the necessary assets, to file tax returns, pay taxes and pay any debts owed as of July 24, 2007." *Answer Brief of Appellee, Timothy Gordon*, Point C, pp. 5-6. These are the acts and intentions of parties who intend that known and unknown creditors, with or without judgments, be paid from the earmarked funds. See Point B below.

Wife makes the remarkable claim that there is no evidence of the making of a written assignment of one of the earmarked funds, an annuity policy, for the benefit of creditors. *Answer Brief of Petitioner-Appellee Cheryl Gordon,* Point 1, p. 5. But the MSA itself, coupled with the *Stipulated Order Appointing Receiver,*

constitutes the requisite written assignment. Likewise, Husband and Wife made no showing in the court below that any of the earmarked funds or accounts are subject to anti-assignment or anti-alienation clauses. Therefore, if Husband or Wife can take early withdrawals, they can certainly direct the receiver to do so on their behalf with express instructions to apply the proceeds to payment of claims of taxing authorities and creditors of the community. And that is precisely what they have done. See relevant portions of MSA and *Stipulated Order Appointing Receiver* cited in Point B *infra*, pp. 6-7.

The claims of Husband and Wife that Intervenors have not proved they are creditors of the community are both erroneous and untimely. Neither Husband nor Wife appealed from or sought other relief with respect to the district court's Order granting intervention which included a finding that Intervenors are creditors of the community [RP 359-360]. See also the portions of the record establishing Intervenors' status as creditors of the community at Point B, p. 8 *infra*. Husband and Wife cannot now be heard to question Intervenors' status as creditors.

B. By agreeing to apply assets to payment of any and all debt, Husband and Wife made their creditors intended third-party beneficiaries of their Marital Settlement Agreement.

Wife and Husband correctly repeat New Mexico's law of third-party

beneficiaries to contracts cited in Intervenors' Brief in Chief – intent to benefit a third party is a threshold for creditors such as the Intervenors to claim beneficiary status to enforce the agreement. Wife and Husband both claim there was no showing of intent to benefit Intervenors as creditors. *Answer Brief of Appellee, Timothy Gordon*, Point B, pp. 3-4; *Answer Brief of Petitioner-Appellee Cheryl Gordon,* Point 2, pp. 8-9. The record is to the contrary. The unambiguous language of Husband's and Wife's agreement is itself sufficient for proof of their intent to benefit Intervenors as creditors of the community. "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 circumstances surrounding the execution of the Agreement." Hansen v. Ford Motor Co., 120 N.M. 203, 205, 900 P.2d 952, 954 (1995) (citation omitted).

The unambiguous language of the MSA speaks in terms of directing the Receiver to take possession of the parties' specifically identified pension and retirement accounts, to liquidate the accounts, and to use the proceeds to pay taxes and community debt. [MSA, RP 308-309]. The Order For Appointment of Receiver provided for payment of "other community debts" (Paragraph 2) and directed the receiver to pay "any other debts existing as of July 24, 2007" (Paragraph 5) [RP 328-334]. See also all the citations to specific language evidencing an unambiguous

intention to pay community debts contained in the MSA and the *Stipulated Order Appointing Receiver*, set forth in Appellants' *Brief in Chief,* Summary of Relevant Facts and Proceedings, pp. 2-4 and Argument, Point A, pp. 8-9, 11-12. Husband and Wife do not state how such language can evidence an intent ***other than*** to benefit creditors by directing payment of debts owed those creditors. Husband and Wife make no showing in their Answer Brief as to why their detailed plan to employ a receiver with the power and duty to use the earmarked funds to pay debts is not an unambiguous statement of their intention to benefit the very creditors to whom those debts are owed.

Nor is it necessary for Intevenors to be identified by name in order to be intended beneficiaries of the MSA and Stipulated Orders. A third-party beneficiary may be individually named, or may simply be a member of an identified class of beneficiaries. *See* Valdez v. Cillessen & Son, Inc., 105 N.M. 575, 581, 734 P.2d 1258, 1264: "the paramount indicator of third party beneficiary status is a showing that the parties to the contract intended to benefit the third party, either individually **or as a member of a class of beneficiaries.**" (Citations omitted.) (Emphasis added).

In view of the multiple directives in the parties' agreement to pay "taxes and other community debts" (*Stipulated Order Appointing Receiver*, ¶ 2 [RP 329-330]; "... the receiver shall pay any other debts existing as of July 24, 2007"

(*Stipulated Order Appointing Receiver*, ¶ 5 [RP 331]), how can Husband or Wife argue that the creditors to whom such debts are owed are not intended beneficiaries? This is especially true in light of the fact that the court below had already determined that Intervenors were creditors of the community. *See* Finding No. 1 in Order for intervention entered May 27, 2008: "The Interveners are creditors of the community." [RP 359]. That Order was never appealed or set aside. And the court's own Order adopting Hearing Officer's findings and recommendations regarding remaining assets and debts included a finding which identified "several outstanding community debts of the parties, included (*sic*): ... HPSC, Inc. – $40,309.60; De Lage Landen Financial Svcs. Inc. – $55,988.53, Nassau Lense (*sic*) Co. dba Nova Optical - $8,243.60" [RP 433-435; 454-455]. The parties by their MSA and by their stipulation to entry of the *Stipulated Order Appointing Receiver*, and the court below by its entry of the Final Decree incorporating the MSA, by its entry of the *Stipulated Order Appointing Receiver,* and by its Order permitting intervention, have all agreed that creditors of the community are to be paid from the earmarked funds, and that Intervenors are within that class of persons intended to be benefitted from such payments. The Receiver itself has concluded the Intervenors are creditor-beneficiaries of the directives to pay debts – see Exhibit 2, statement of liabilities, appended to Inventory report of Receiver. [RP 373-377] It is beyond cavil that

Intervenors are intended creditor-beneficiaries of the MSA and of the stipulated orders implementing its directive to pay debts.

If there is a remaining question about the amount or priority of a particular creditor's claim, that is still within the purview of the receiver before final disbursement. Such a determination might logically have to await final determination of income tax liabilities of Husband and Wife, given that those tax liabilities have not been conclusively determined – see Finding No. 2 of Hearing Officer's *Findings and Recommendations Regarding Remaining Assets and Debts* [RP 433-435]. But in any event, the parties' intent that creditors' claims be paid is clear and unambiguous and should not be subverted by the court below.

III. The Court below erred in holding that the earmarked assets were exempt and in prohibiting the Receiver from using those assets; the effect was to render the parties' MSA and the Court's own receivership orders a nullity.

The court below erred in misapplying the exemption statutes to assets which Husband and Wife specifically directed be used to pay creditors' claims. This error of law, reviewable by this Court de novo, makes the Order appointing Receiver a practical nullity. The court's role, having already approved the MSA and having already implemented it with appointment of the receiver, is to enforce and not subvert the agreement of the parties. By disregarding the MSA's directive that the receiver

use the proceeds of liquidation of the identified retirement plans and accounts to pay taxes and creditors' claims, the court has erroneously failed to give effect to the entire contract. 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).

Neither Husband nor Wife make a showing of what it is that the Receiver is supposed to do now that the court has held no payments are to be made from the earmarked funds for creditors or taxing authorities. They were content to let the court's orders for payment from the funds stand as to their own attorneys' fees, and the fees of the court-appointed 706 expert and mediator, but they make no logical or rational distinction as to the claims of the Intervenors. The court under these circumstances cannot and should not apply an exemption when the parties themselves, represented by legal counsel, elected not to do so, and instead formulated a process to have the receiver liquidate those funds for payment to creditors and taxing authorities.

IV. CONCLUSION

Husband and Wife unambiguously stated their intent that any and all creditors of the community be paid by the Receiver with the proceeds of liquidation of the parties' retirement funds and accounts. Now Husband and Wife argue that

their intent is ***do not*** pay creditors of the community with the proceeds of liquidation of the parties' retirement funds and accounts, and by so doing they have led the court below into error. This change of position is judicial estoppel. It should not be sanctioned or enabled. The clear directive to use the main source of the parties' liquidity was freely bargained for by Husband and Wife, and is supported by consideration. They impliedly waived any otherwise applicable exceptions. The order of the court below should be reversed and the matter should be remanded to permit the receiver to marshal all the assets, liquidate the earmarked funds and accounts, and pay creditors and taxing authorities as originally intended by the MSA and stipulated orders of the court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Intervenors-Appellants HPSC, Inc. and De Lage Landen Financial Services, Inc.* was mailed to the following persons on October 13, 2009:

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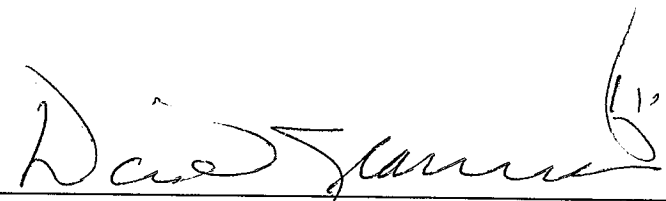

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