ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HOPE LIBERTY SALAZAR,

Petitioner-Appellee,

vs.

ANTHONY JOHN SALAZAR,

Respondent, Appellant.

No. 30,079
Bernalillo County
DM-2007-03650

ANSWER BRIEF

Regarding Appeal from
Trial Court's Findings of Fact and Conclusions of Law
By the Honorable Angela J. Jewell
Bernalillo County, Second Judicial District Court

Submitted By,

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The recorded transcript of this trial is a digital recording. References to the recorded transcript are by elapsed time from the start of the recording and designated herein as "CD, 09-01-09 ____" which indicates the minutes and seconds after the start of the recording.

TABLE OF AUTHORITIES

SUMMARY OF PROCEEDINGS

Appellee, Hope Liberty Salazar (hereinafter sometimes referred to as "Wife") and Appellant, Anthony Salazar (hereinafter sometimes referred to as "Husband"), were divorced on October 24, 2008 by Judgment and Final Decree of Dissolution of Marriage and Custody. The Decree reserved jurisdiction over the payment of Wife's interest in Husband's PERA retirement benefits, to be reviewed at a status hearing in May, 2009 as well as the issue of allocation of attorney fees between the parties, which is still reserved in the trial court. [RP 60]

On May 6, 2009 a Minute Order was filed appointing John Myers, Ph.D. as the court's Rule 11-706 Expert [RP 104] and on May 7, 2009 another Order Appointing Rule 11-706 Expert was filed and served as the Court's letter of instruction to Dr. Myers. The May 7, 2009 Order Appointing Rule 11-706 Expert ordered Dr. Myers to value Wife's interest in Husband's PERA benefits - "reduced to present value" and to submit his written report to the Court. [RP 101]

Dr. John Myers issued his report on June 29, 2009, and that report was admitted into evidence at the trial on September 1, 2009. As set forth in Dr. Myers' Report, Husband had 8.1667 years of service toward his PERA pension when the parties were married on May 1, 2002, and as of the divorce date on October 24, 2008, Husband had accumulated 13.1667 years of service. Dr. Myers valued the community interest in Husband's PERA pension at about $200,000.

[Respondent's Exhibit B]

At the September 1, 2009 trial, Husband testified and called two other witnesses, Karen Risku, Assistant General Counsel to PERA, and CPA Andrew Perkins. Neither of Husband's witnesses were qualified by the trial court as an expert to determine a present value of Wife's interest in Husband's PERA retirement benefits. Ms. Risku testified that PERA does not do present value calculations. [CD, 9-01-09 11:29:55-11:30:00] Mr. Perkins testified that he had not made a present value calculation. [CD, 9-01-09 11:53:26]

At the conclusion of the September 1, 2009 trial, the Court stated her "inclination" and her "thoughts." [CD, 9-01-09 12:04:10] The trial court made no decision at the conclusion of the trial.

The trial court received the parties' Requested Findings of Fact and Conclusions of Law on October 5, 2009. Husband requested Wife receive her community interest in his PERA retirement benefits on a "pay-as-it-comes-in" basis using the annual benefit amount that accrued during the marriage - some $14,646. [RP 112] Wife requested she be awarded her community interest of $100,000 with interest accruing thereon until paid - to be paid as the Court orders. [RP 117]

The trial court's Findings of Fact and Conclusions of Law were filed on October 10, 2009. [RP 124] The trial court's finding No. 6 references its order appointing Dr. Myers to determine Wife's

interest in Husband's PERA benefits, and reduce it to present cash value. [RP 125, FOF 6] The trial court's finding No. 7 references Dr. Myers' determination that the present value of the community interest in Husband's PERA benefits is about $200,000, making each party's interest at $100,000. [RP 125, FOF 7] The trial court concluded, Nos. 2 and 3, that based upon the individual circumstances of the parties, it was not possible or practicable to exercise the preferred method of distribution, that being to order Husband to pay Wife at the time of divorce the present cash value of his interest in the PERA benefits, and chose to exercise the reserved jurisdiction method. [RP 127, COL 2 and 3] In conclusion of law Nos. 4 and 5, the trial court reserved jurisdiction over the issue of distribution to Wife until November 15, 2011, when the court determined that Husband shall commence to pay directly to Wife installment payments on her interest beginning that date and each and every month thereafter if Husband has not elected to retire by November 8, 2011. [RP 128, COL 4 and 5]

The trial court also concluded that in August, 2011, Husband would contact PERA to determine Wife's community interest, No. 6. [RP 128, COL 6] and that when Husband elects to retire, a QDRO would be submitted to the PERA Plan Account Administrator, No. 7. [RP 128, COL 7]

No order or judgment adopting the court's Findings of Fact and Conclusions of Law was entered. However, this Court in its Notice

- Proposed Summary Disposition proposed to hold that the trial court's Findings of Fact and Conclusions of Law were a final order regarding when Husband's payments to Wife for her interest in his PERA retirement benefits would begin.

Husband filed a Notice of Appeal on November 16, 2009. [RP 129]

ARGUMENT

The trial court did not abuse its discretion by utilizing the preferred method of a lump-sum, present-value, cash-out method of distribution (instead of the pay-as-it-comes-in method) for Wife's interest in Husband's PERA retirement benefits. The trial court correctly established the value of Wife's interest in Husband's PERA retirement benefits at $100,000 pursuant to the court's Rule 11-706 Expert's report. The trial court exercised allowable jurisdiction to determine that Husband would have the ability to make installment payments approximately three (3) years after the parties' divorce when the parties' work-related childcare expenses would reduce - commencing November 15, 2011. The trial court exercised allowable discretion when it reserved jurisdiction to establish the amount of the monthly payments to be made by Husband. The trial court properly directed the entry of an order regarding those benefits to secure those payments until Wife's interest was paid in full.

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADOPTING THE NEW MEXICO PREFERENCE FOR A LUMP-SUM, PRESENT VALUE, CASH-OUT METHOD OF DISTRIBUTION FOR RETIREMENT BENEFITS.

The trial court did not abuse its discretion by adopting the preference expressed by the New Mexico Supreme Court in favor of the lump-sum, present-value, cash-out method of distribution for retirement benefits.

The trial court followed the New Mexico Supreme Court's edict of:

> For the reasons that appear below, we agree with *Koelsch* that the lump sum method is the preferable one for satisfying the nonemployee spouse's claim to her community interest in her spouse's retirement plan, and that the trial court should have discretion in implementing that method, alone or in combination with other methods, including in an appropriate case the reserved jurisdiction method, in distributing the nonemployee spouse's interest upon dissolution.

Ruggles v. Ruggles, 116 N.M. 52, 61, 860 P.2d 182, 191 (1993).

The trial court's adoption of the lump-sum, present-value, cash-out method of distribution best implements New Mexico's underlying community property laws as also set forth in Ruggles:

> First, it is axiomatic that each spouse in a marriage has a present, vested, one-half interest in the spouses' community property.
>
> ....
>
> Second, ... one of the chief incidents of community property lies in the district court's duty on dissolution to divide the property equally.
>
> ....
>
> Third, almost as a corollary to the rule requiring equal division of the community property on divorce, we have recognized the desirability of granting each spouse complete and immediate control over his or her share of the community property in order to ease the transition of the parties after dissolution.

Ruggles, 116 N.M. at 62, 860 P.2d at 192.

POINT II

THE TRIAL COURT CORRECTLY DETERMINED THE PRESENT VALUE OF WIFE'S INTEREST IN HUSBAND'S PERA RETIREMENT BENEFITS BY APPOINTING A RULE 11-706 EXPERT TO DO SO.

The trial court correctly performed the first requirement of adopting the lump-sum, present-value, cash-out method of

distribution for retirement benefits by determining the present value. The trial court appointed the parties' agreed-upon Rule 11-706 Expert to determine the present value of Wife's interest in Husband's PERA retirement benefits. The trial court admitted its Expert's Report into evidence, and accepted its Expert's valuation of Wife's interest of $100,000 in its findings. [RP 125, FOF 7]

Appellant's contention that the trial judge did not accept its Expert's value determination at the conclusion of the September 29, 2009 hearing is incorrect. At the conclusion of that hearing, the trial judge spoke of her inclination and thoughts. [CD, 9-01-09, 12:04:10] However, the judge's expressions at that time do not constitute a decision upon which error may be predicated. This Court in Chapman v. Jesco, Inc., 98 NM 707, 709, 652 P.2d 257, 259 (Ct. App. 1982), stated regarding:

> ... an informal discussion at the close of the case between the district judge and opposing lawyers. We look with favor upon such discussions for an expression of views, but it is the trial court's final findings of fact and conclusions of law which are controlling and not its informal statements and opinions made during the trial. Plains White Truck Company v. Steele, 75 N.M. 1, 399 P.2d 642 (1965). Oral opinions and statements of the judge do not constitute a 'decision' and error may not be predicated thereon. Getz v. Equitable Life Assur. Soc. of U.S., 90 N.M. 195, 561 P.2d 468 (1977). We may resort to a trial court's opinion to explain inconsistent, indefinite or ambiguous findings, or to explain the trial court's theory. Nevins v. Nevins, 75 N.M. 249, 403 P.2d 690 (1965).

Instead, after receiving the parties' Requested Findings of Fact and Conclusions of Law, the trial court entered its Findings of Fact and Conclusions of Law which reflect she correctly followed

New Mexico law and properly exercised her discretion in this case. Again, this Court in Blea v. Sandoval, 107 N.M. 554, 560, 761 P.2d 432, 438 (Ct. App. 1988) stated:

> Oral comments of a trial court may be used to explain the trial court's theory, although they may not be used to overturn a finding made by that court. See Chapman v. Jesco, Inc., 98 N.M. 707, 652 P.2d 257 (Ct. App. 1982); cf. Ledbetter v. Webb, 103 N.M. 597, 711 P.2d 874 (1985).

In Husband's Requested Findings of Fact and Conclusions of Law, he requested the pay-as-it-comes-in-basis method of distribution. [RP 112] The trial court did not adopt any of Husband's Requested Findings of Fact and Conclusions of Law in support of his requested method of distributing to Wife her interest on a pay-as-it-comes-in basis. In support of his request for the pay-as-it-comes-in-basis, Husband requested the trial court establish the amount Wife would receive using the annual benefit accrued during marriage of $14,646 (as calculated by the court's Expert). [RP 112] Husband also tried to discredit the Rule 11-706 Expert's present value calculation with a requested finding regarding the testimony of his witness, Mr. Perkins, who disputed the methods and assumptions used by Expert Myers in determining the present value of Wife's interest at $100,000. [RP 112] However, the trial judge did not make Husband's Requested Findings of Fact and Conclusions of Law those of the court. "The refusal by the court to accept any of Frank Jr.'s requested findings of fact is regarded on appeal as a finding against the party. See Pucci Distrib. Co.

V. Nellos, 110 N.M. 374, 376, 796 P.2d 595, 597 (1990)." Montoya v. Torres, 113 N.M. 105, 112, 823 P.2d 905, 912 (Ct. App. 1991).

Contrary to Appellant's assertion, the trial court properly assured it had the information necessary to chose New Mexico's preferred method of a lump-sum, present-value, cash-out distribution and did not abuse its discretion by making that choice.

POINT III

THE TRIAL COURT PROPERLY ESTABLISHED A SPECIFIC DATE WHEN HUSBAND'S INSTALLMENT PAYMENTS TO WIFE WOULD BEGIN AND RESERVED JURISDICTION TO DETERMINE THE AMOUNT.

After properly determining the present value of Wife's interest in Husband's PERA retirement benefits, the trial court carefully considered the factors relevant to establishing Husband's payment to Wife for her interest. The trial court found the community had no other assets sufficient to make that payment [RP 127, FOF 17], with neither party receiving any large asset or cash award in the distribution of their other assets [RP 126, FOF first 11]. Having found no ability for an immediate offset to satisfy the distribution, the trial court took the next required step of considering the other relevant factors - the parties' ages [RP FOF second 11], their children's ages [RP 126 FOF 10], the parties' monthly earnings [RP 126 FOF 12], the costs of work-related childcare paid by Wife and the resulting child support obligation of Husband [RP 126 FOF 13]. The trial judge then properly

exercised its discretion by reserving jurisdiction until a date approximately three (3) years after divorce to begin an installment payment from Husband to Wife for Wife's interest in the PERA retirement benefits on November 15, 2011, and each month thereafter. [RP 128 COL 5]. The New Mexico Supreme Court in Ruggles discussed that option.

> ... the nonemployee spouse's lump sum interest in the plan can be satisfied in several ways: by an award of cash or property equal to the value of the interest or by an installment obligation, which may or may not correspond with the amount the nonemployee spouse would receive if the employee spouse were to retire, and which may be secured by a lien on some or all of the employee spouse's separate property and may bear interest. *Id.* at 183, 713 P.2d at 1241.

Ruggles, 116 N.M. at 61, 860 P.2d at 191.

The trial court found that given the parties' then-existing financial circumstances regarding the costs of work-related daycare being paid by Wife and the resulting child support being paid by Husband, it would reserve jurisdiction to determine the pay-out amount until those costs and that child support would be reduced when their youngest child began school full-time. [RP 126 FOF 13, 14 and 18] The trial court on remand will use its Expert's present value of $100,000 as of the date of the parties' divorce to fashion a monthly installment payment which the trial court determined would begin on November 15, 2011.

POINT IV

THE TRIAL COURT PROPERLY SECURED WIFE'S AWARD WITH THE ENTRY OF A "QDRO" [ORDER DIVIDING PERA BENEFITS].

Finally, the trial court proceeded to secure Wife's award with an Order Dividing PERA Retirement Benefits, even though the trial court incorrectly named that Order a QDRO. In doing so, the trial court made some superfluous findings and conclusions regarding PERA and some errors regarding the timing of entry of an Order Dividing PERA Retirement Benefits. The trial court's unnecessary or superfluous conclusion is harmless error which this Court should not correct.

> The making of unnecessary and superfluous findings of fact or the presence of error in findings of fact on immaterial, irrelevant, or purely collateral issues is harmless and nonreversible error if the judgment is otherwise sufficiently support.

Ortiz v. Lane, 92 N.M. 513, 518, 590 P.2d 1168, 1173 (Ct. App. 1979), citing to United Veterans Org. v. New Mexico Prop. Ann. Dept., 84 N.M. 114, 118, 500 P.2d 199, 203 (Ct. App. 1972).

The trial court concluded that Husband should contact PERA in August of 2011, to determine the Wife's community interest. [RP 128, COL 7] This conclusion is unnecessary because the present value of Wife's interest at the required time of divorce was established and the trial court had determined that commencing November 15, 2011, Husband would begin paying Wife on a monthly basis for her interest in his PERA retirement. The value of Wife's

interest was correctly established at the time of the parties' divorce - October 24, 2008 - by the trial court's Rule 11-706 Expert to be $100,000. In Ruggles, the New Mexico Supreme Court, citing to Copeland, affirmed that:

> [t]he cases are in agreement that at the time of the divorce the court must place a value on the pension rights and include it in the entire assets, then make a distribution of the assets equitably. *Id.* at 413, 575 P.2d at 103.
>
> ....
>
> In *Ridgway* ... [w]e first noted that *Copeland* had held that, in dividing a pension plan which is vested but unmatured, a spouse is entitled to a community interest for such portion of the plan as was earned during coverture and that, in valuing the unmatured pension benefits for purposes of division of assets, a determination of the present value of such benefits should be made. 94 N.M. at 347, 610 P.2d at 751.

Ruggles, 116 N.M. at 58, 860 P.2d at 188. Thus, there is no reason for PERA or any other person or entity to establish another present value as of November 15, 2011 - the court's established date for Husband's payments to begin.

After properly determining the value of Wife's interest at the time of the parties' divorce, and reserving jurisdiction to establish the amount of the installment payments to begin on November 15, 2011, the trial court properly exercised its discretion to secure the same. The trial court correctly found and concluded that a "QDRO" should be entered, even though the document was incorrectly named. [RP 127, 128 FOF 19 and COL 7] Since the PERA benefits are public or governmental benefits - not private - they are not governed by ERISA/REA and thus a "QDRO" is not

appropriate. However, an Order Dividing PERA Retirement Benefits should be entered upon remand.

That portion of the trial court's findings and conclusions that state the "QDRO" should be entered "when Husband elects to retire" is incorrect, but can be corrected on remand or at the time the trial court determines the amount of Husband's monthly payment. Again, this is a harmless error by the trial court. "Finding no prejudice the error was harmless. We do not correct harmless error." State v. Lindwood, 79 N.M. 439, 441, 444 P.2d 766, 768 (Ct. App. 1968), citing to Irwin v. Lamar, 74 N.M. 811, 399 P.2d 400 (1964). As allowed by statute, NMSA 1978, § 10-11-136 (1995), an Order Dividing PERA Retirement Benefits should be entered immediately to secure Wife's interest by (1) preventing Husband from withdrawing his contributions prior to Wife being paid in full for her interest in the benefits, (2) naming Wife as the pre-retirement surviving annuitant in the event of Husband's death prior to Wife being paid for her interest in the benefits, and (3) in the event Wife has not been paid in full for her interest in the benefits at the time of Husband's retirement, securing the remaining balance due to Wife.

CONCLUSION

The trial court's findings and conclusions should be affirmed and this case remanded to the District Court for the proceedings anticipated in that Court's reservation of jurisdiction to:

A. Determine the monthly amount Husband will pay Wife as installment payments on her $100,000 interest in his PERA retirement benefits commencing November 15, 2011;

B. For entry of an Order Dividing PERA Retirement Benefits securing Wife's interest by (1) preventing Husband from withdrawing his contributions prior to Wife being paid in full for her interest in the benefits, (2) naming Wife as the pre-retirement surviving annuitant in the event of Husband's death prior to Wife being paid for her interest in the benefits, and (3) in the event Wife has not been paid in full for her interest in the benefits at the time of Husband's retirement, requiring the remaining balance due to Wife be paid by PERA; and

C. Consider Wife's pending request for an award of attorney fees incurred in the District Court and her anticipated request for those incurred in this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Answer Brief was served upon Counsel for the Respondent-Appellant by sending an endorsed copy thereof by first-class mail with the proper postage affixed this 18th day of January, 2011, to:

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