

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HOPE LIBERTY SALAZAR,
Petitioner-Appellee,

vs.

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

ANTHONY SALAZAR
Respondent-Appellant.

COURT OF APPEALS OF NEW MEXICO
DISTRICT COURT

FILED

NOV 30 2010

Barbara Johnson

APPELLANT'S BRIEF IN CHIEF

APPEAL FROM NO. DM-2007-03650, BERNALILLO COUNTY
DISTRICT COURT, THE HONORABLE JUDGE ANGELA JEWELL

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Statement Regarding References to the Recorded Transcript:

References to the recorded transcript in this brief are by the minute and second of the recording (*e.g.*, “Tr. 1:30 to 1:50, September 29, 2009 Hearing” indicates that the material referenced begins and ends at that point on the recording).

Table of Authorities

NEW MEXICO CASES:

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

Copeland v. Copeland, 91 N.M. 409, 414, 575 P.2d 99, 104 (1978).

STATUTES:

Public Employees Retirement Act, NMSA 1978, Section 10-11-136.

ADMINISTRATIVE REGULATIONS:

Title 2, Section 80.1600.10 and 2.80.1600.30 of the New Mexico Administrative Code

Title 2, Section 2.80.1600.30 of the New Mexico Administrative Code

OTHER:

PERA's Divorce and Your PERA Benefits Manual at <http://www.pera.state.nm.us/publications.html>

SUMMARY OF PROCEEDINGS

On September 2, 2008 this matter was first considered by the District Court. The Court heard argument by the parties and reserved on the issue pending a future evidentiary hearing (R.P. 58). On May 6, 2009 the parties stipulated and the Court issued a minute order appointing John Myers as an 11-706 expert regarding this issue (R.P. 104). On September 1, 2009 the Court heard argument by the parties, heard testimony from two witnesses called by Husband; PERA General Counsel Karen Risku and CPA Andrew Perkins, and heard testimony from Husband. The Court also considered and admitted into evidence Mr. Myers' 11-706 report regarding Wife's interests in Husband's PERA retirement benefits and admitted as a trial aid a spreadsheet prepared by Mr. Perkins on the same topic. The Court issued its ruling and requested the parties submit Findings of Fact and Conclusions of Law to the Court by September 30, 2009. (R.P 110 and Tr. 00 to 56:00, September 29, 2009 Hearing). Counsel for Wife requested, and counsel for Husband agreed, to extend the deadline until October 5, 2009. (R.P. 112-122) On October 16, 2010 Court issued its Findings of Fact and Conclusions of Law. (R.P. 124-134)

In it the Court held that:

The Court finds that based on the individual circumstances of this divorcing couple, it is not possible or practicable to exercise the preferred method of distribution, that being to order

Respondent (Husband) to pay at the time of divorce, the present cash value of Respondent's interest in his PERA benefits.

The Court Chooses to exercise the reserved jurisdiction method.

The Court hereby reserves jurisdiction over the issue of distribution of Petitioner's (Wife) interest in Respondent's PERA benefits, until Alia Salazar (D.O.B.: 11/08/05), that being November 8 of 2011.

If Respondent does not elect to retire by November 08, 2011, then in that event, he shall commence to pay directly to Petitioner, her then valued interest in his PERA account. This shall be effective November 15, 2011, and each and every month thereafter.

The PERA Administration Agency shall be contacted in August of 2011, to determine the Petitioner's community interest in Respondent's PERA benefits. Contact shall be made by Respondent.

When Respondent elects to retire, then in that event, counsel shall execute a ODRO, to be submitted to the PERA Plan Account Administer. (R.P. 124-127).

Husband filed a timely Notice of Appeal on November 16, 2009 and the case was assigned to the General Calendar (R.P. 129).

ARGUMENT

At issue in this matter is Wife's community property interest in Husband's PERA retirement benefits and the method of distribution of Wife's interest.

- I. THE DISTRICT COURT ERRED BY ORDERING THAT WIFE WAS ENTITLED TO HUSBAND'S PERA RETIREMENT BENEFITS BEFORE IT WAS DISTRIBUTED

Ruggles v. Ruggles, 116 N.M. 52, 860 P.2d 182 (1993) remains the seminal case in New Mexico regarding the proper treatment, in a proceeding to dissolve a marriage, of one spouse's community property interest in the other spouse's retirement benefits. Husband agrees with the District Court that this matter should be considered under *Ruggles* and its progeny but asserts that, given the facts and evidence presented in this case, the Court misapplied the *Ruggles* framework and that its order is contrary to law.

- A. If a trial court is unable to place a present value determination on a nonemployee spouse's interest in the other spouse's retirement benefits, it must order the benefits be distributed when it comes in.

At the conclusion of the September 29, 2009 evidentiary hearing the District Court did not accept the court appointed 11-706's present value determination of Wife's interest in Husband's retirement benefits. The Court ruled that:

Hon. Angela Jewell: Exactly, and I understand that, I know it's a lot more money and it is very speculative. We're assuming that all of these things were going to stay in place just as they are and I know that's not necessarily going to be the case. We're out of time and I don't want to continue this anymore. I didn't want you to come back from... I will give you what my inclination is. I am looking at "Ruggles", Ruggles is really clear that it favors a complete division of property at the time of divorce. That's what Ruggles is.. is...that's the idea it puts...the theory that it, puts out that is the legal presumption in New Mexico. But it gave the court an out, it let's the court look at each individual case and it says that if the court feels that for what ever reason that, that really can't be done like there is no assets to cash that out and pay the spouse out then the court can look to other equitable ways of trying to handle it. including waiting until he vests. In the Ruggles case in fact that is what the court did, they

took the out. One of the outs and just said, you need to wait till this person retires. My thought is that we've got a long way to go here for Mr. Salazar and I don't know what he is going to do. I was trying to get an age where we normally say, okay you can retire and I know 55 is pretty much an age where people start to release that thought process. And my thought is if Mr. Salazar chooses not to retire at that point in time, then in lieu of any kind of cash value out of PERA, I am going to ask you to pay spousal support in the monthly amount of the actual yearly value of the plan. (Tr. 47:20 to 49:62, September 29, 2009 Hearing).

The District Court further stated that:

Hon. Angela Jewell: The court is real uncomfortable doing...like for example accepting Mr. Meyer's reducing it to the present value now, because, so many things that could happen between now and 2020 that I don't think it is fair to either party for me to say "he's going to have all this money in 2020". I don't see it. The economy is getting much worse, in fact, I think he is going to have much less. I don't even know if we are going to have retirement at some if we keep going, so I am not comfortable just relying on that. But I am comfortable taking the present value now...I mean taking what he actually has in his account per John Meyer that occurred during the marriage. He specifically says, "the value of the annual benefit which accrued during the marriage is \$14,646.00 per year" and he puts how he reached that figure. (Tr. 52:60 to 53:45, September 29, 2009 Hearing).

This is not, in fact, what the Court eventually ordered in this matter. Instead the Court held that: "If Respondent does not elect to retire by November 08, 2011, then in that event, he shall commence to pay directly to Petitioner, her then valued interest in his PERA account. This shall be effective November 15, 2011, and each and every month thereafter" (R.P. 126). Which is approximately a decade before Husband is even eligible to retire.

In *Ruggles* the New Mexico Supreme Court held that:

Nevertheless, there undoubtedly will be some occasions when this or some other form of deferred distribution should be employed. One such occasion will arise when the court has no satisfactory evidence upon which to make a finding of present value. Another will relate to the parties' financial circumstances: If there are no other assets, or insufficient assets, or unsuitable assets, with which to satisfy (or secure) a lump sum distribution, the court may be forced to award the nonemployee spouse's share "as it comes in." A third, and very important, factor is the undesirability of forcing, however indirectly, the employee spouse to retire prematurely and remove himself from the workforce. *Ruggles v. Ruggles*, 116 N.M. 52, 67, 860, 875 P.2d 182 (1993).

This holding is clear and unambiguous: if no satisfactory evidence upon which to make a finding of present value is presented, the Court should award the nonemployee spouse's share "as it comes in" and Husband asserts that is what the Court should have ordered in this case.

It critically important to note that a PERA retirement account is a defined benefit plan and retirement benefits are paid based on a formula that considers age, service credit and final average salary. An account balance does not determine a future monthly retirement benefits. This is different from a defined contribution plan like a 401(k) which is valued by a total account balance.

Assistant General Counsel Karen Risku's testified on this point that:

Karen Risku: Um...A PERA Pension is based on the final average salary which is 36 consecutive months high salary to get a monthly salary figure and then it is multiplied by the pension factor, which is different for every pension plan that we have, State General is 3% and

then that is multiplied by the years of service. So in the case of a State General Plan member who works 25 years and retires it would be 25 times 3 is 75% times the monthly salary that you get from your calculation of final average salary. PERA calculates pensions on a monthly basis. So that would give you your monthly pension. Gross. (Tr. 12:22 to 13:15, September 29, 2009 Hearing).

In the instant case, at the hearing on this matter the District Court listed numerous reasons why it did not accept the 11-706 expert's, who did not testify at a single any hearing regarding this matter, calculation of the present value of the Wife's interest in Husband's PERA benefits.

Husband's witness, C.P.A. Andrew Perkins, also testified that the 11-706 expert's calculations were speculative and relied on a number of events occurring or not occurring in the future including when and at what age Husband would retire, what the market would do, what his final salary would be, what his future contributions would be, and what his total service credits would be (Tr. 20:30 to 47:15, September 29, 2009 Hearing).

Husband asserts that the District Court agreed and concluded it had no satisfactory evidence upon which to make a finding of present value and this fact was, in part, why the District Court delegated to the PERA Administrator the responsibility for calculating the Wife's interests at a future date.

The New Mexico Supreme Court in *Ruggles* contemplated the situation at issue on this matter and held that "Nevertheless, there undoubtedly will be some occasions when this or some other form of deferred distribution should be

employed. One such occasion will arise when the court has no satisfactory evidence upon which to make a finding of present value.” *Id* at 66.

Instead, under *Ruggles* and its progeny if the District Court was unable to place a present value on Wife’s interest it should have ordered that the Wife’s interest be paid “when it comes.”

B. Ordering the PERA Administration to Perform a Pre Retirement Calculation of Wife’s Interest in Husband’s Retirement Benefits prior to Husband being eligible to retire is contrary to law.

The District Court also erred in ordering that: “The PERA Administrative Agency shall be contacted in August 2011, to determine Petitioner’s interest in Respondent’s PERA benefits” in the event Husband has not retired by November 08, 2011” (R.P. 124-127).

Under no set of circumstances does a District Court have such discretion. The PERA witness who testified in this matter refused to offer any opinion on the present or future value of the fund and testified that they are statutorily and administratively prohibited from doing so (Tr. 1:30 to 1:50, September 29, 2009 Hearing). The PERA expert testified that PERA is prohibited by law from putting cash values on PERA accounts that have not vested.

Ruggles v. Ruggles, 114 N.M 63, 67, 834 P.2d 940, 944, rev’d on other grounds, 116 N.M. 52, 860 P.2d 182 (1993) and *Copeland v. Copeland*, 91 N.M. 409, 414, 575 P.2d 99, 104 (1978) does hold that: “The method of distribution and

implementation of payment of retirement benefits at dissolution is a matter within sound discretion of the district court.”

Husband agrees that district courts’ have discretion regarding whether to divide a pension on a “pay as it comes in” or “lump sum” basis. If it elects to order a “lump sum” distribution Husband also agrees that District Courts have the discretion to order Husband to pay Wife her interest in installments rather than in a single payment.

However, a district court does not, under any set of circumstances, have the discretion to order the parties to contact PERA at a future date and have PERA calculate Wife’s community interest in Husband’s PERA benefits prior to the account vesting or Husband being eligible to retire. Further, Husband contends that PERA would not do so even pursuant to a district court’s order on the ground that doing so is prohibited by its enabling act statues and subsequent implementing regulations. If a district court orders any form of “lump sum” distribution it must place a value on Wife’s interest in Husband’s account, which did not happen in this case. This determination cannot be delegated to PERA, which is also what occurred in this case.

PERA’s enabling legislation and its subsequent implementing regulations are clear: PERA requires court orders to be in a certain form, contain certain

information, and only direct them to perform permissive functions before an order will be accepted and its terms administered by PERA.

The Public Employees Retirement Act, NMSA 1978, Section 10-11-136 states in this regard that:

A court of competent jurisdiction, solely for the purposes of effecting a division of community property in a divorce or legal separation proceeding, may provide by appropriate order for a determination and division of a community interest in the pensions or other benefits provided for in the Public Employees Retirement Act [Chapter 10, Article 11 NMSA 1978]. In so doing, the court shall fix the manner in which warrants shall be issued, may order direct payments to a person with a community interest in the pensions or other benefits, may require the election of a specific form of payment and designation of a specific survivor pension beneficiary, refund beneficiary or survivor pension beneficiary designated in accordance with Section 10-11-14.5 NMSA 1978 and may restrain the refund of accumulated member contributions. *Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the Public Employees Retirement Act.* The court shall not alter the manner in which the amount of pensions or other benefits is calculated by the association or cause any increase in the actuarial present value of the pensions or other benefits to be paid by the association. *Emphasis added.*

Further, Title 2, Section 80.1600.10 and 80.1600.30 of the New Mexico Administrative Code states as follows regarding the form and content of order it will accept and administrator regarding this issue:

- A. The following information must be contained in a court order which divides the community interest in PERA retirement pensions or contributions:

- (1) specific information identifying the parties, i.e., full names, addresses, social security numbers, retirement numbers if any;
- (2) a declaration that there is a community interest in a member's pension or member contributions;
- (3) the percentage or dollar amount of each party's interest in the gross pension as calculated at the time of retirement;
- (4) the percentage or dollar amount of each party's interest in member contributions;
- (5) a direct order to PERA restraining refund of member contributions except according to the provisions of the decree or order, if such a restraint is desired;
- (6) liability for and payment of federal and state income taxes;
- (7) a direct order to PERA to issue separate warrants to each party.

B. A separate account may not be created for a member's former spouse who has a court-determined interest in a member's account.

C. A model order containing provisions for the determination and division of the community interest in a PERA member's account shall be available on request from PERA's office of general counsel.

D. Payments made pursuant to such orders shall only be made when member contributions are refunded or a pension is payable in accordance with the provisions of the Public Employees Retirement Act. . . .

PERA has a process whereby parties submit can submit proposed orders to its Legal Counsel's office for prior approval. In this instance, the

law and the transcript of the PERA witnesses' testimony support Husband's contention that PERA would reject the order as contemplated in the District Court's Finding of Facts and Conclusions of Law. Husband contends that, unless the law on this issue were to substantively change in the interim, PERA would reject the District Court's order to place a present value calculation on wife's interest as inconsistent with its legal obligations.

Although it does not carry the force of law, PERA's Divorce and Your PERA Benefits Manual contains instructive questions and answers on PERA's role and responsibilities on this issue that supports Husband's view that a district court cannot direct PERA to place a present value on Wife's interest in Husband's benefits. The Manual includes the following sample questions and answers relevant to this issue:

Can PERA determine the present value of my future retirement benefits?

No. PERA can provide you with a monthly history of your account balance. For computation of the present value of your retirement benefits, you should consult an actuary, accountant, or other financial professional.

Do I have to obtain pre-approval from PERA of an Order Dividing PERA Retirement Benefits before the judge signs the order?

No. However, PERA rules do require written approval by PERA's Office of General Counsel before a court-endorsed Order Dividing Retirement Benefits will be administered. The Office of General Counsel will provide a model order with

instructions, upon request. The Office is also available to assist parties in preparing orders and will, upon request, pre-approve proposed orders prior to submission to the court. If PERA receives an order signed by a judge which does not comply with New Mexico law or PERA rules, the parties must return to court to modify the order. *See* PERA's Divorce and Your PERA Benefits Manual at www.pera.state.nm.us/publications.html

This is consistent with the PERA Assistant General Counsel Karen Risku's September 1, 2009 testimony in this matter. She testified as follows on this issue:

Karen Risku: PERA doesn't do present values we will do estimates of a members pension benefit when they are within three years of the minimum requirements to retire. The reason is...you've suggested that if you only got half of your years of service in, it would be very difficult for us to estimate what your final average salary would be and even what your pension factor would be. You might even change employment and go to a state plan that has a different pension factor.

Colin Hunter: So if I am understanding it is too speculative to make a judgment at a particular time unless a person is further along in their service.

Karen Risku: PERA....

Barbara Johnson: Sorry, I wanted to enter an objection please. She answered your question. She's not qualified to give present values. That's not what PERA does.

Hon. Angela Jewell: I don't think that was exactly the question though.

Barbara Johnson: Okay.... (inaudible) misunderstood.....

Hon. Angela Jewell: Let's ask the question one more time.

Colin Hunter: If I understand your testimony correctly, the reason why you guys don't put present values with somebody with Mr. Salazar's level of service because it would be speculative and you

would not have enough information to make an accurate determination of a present value.

Barbara Johnson: I renew my objection. Okay, then I do understand. You don't apply present value at all?

Karen Risku: Correct.

Hon. Angela Jewell: Why is that? I would like to know why.

Karen Risku: Because PERA's benefits are only payable at the time of retirement, so to give a present value now halfway through an employee's career is meaningless to PERA, because we don't payout benefits that way (Tr. 13: 33 to 15:20, September 29, 2010).

Husband contends that this issue is an issue of first impression in New Mexico and is not directly addressed in *Ruggles* or its progeny and that the District Court abused its discretion when it ordered PERA to calculate the Wife's interest in Husband's benefits be calculated by PERA at a future date prior to the Husband being eligible for retirement or the account vesting.

CONCLUSION

For the reasons stated above, The District Court's Order should be reversed with instructions that Wife should not begin receiving her interest in Husband's retirement benefits until it is distributed.

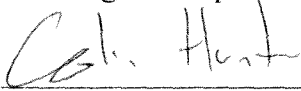
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed and faxed copy of the foregoing pleading to all parties of record on this 30th day of November, 2010.



COLIN HUNTER