IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ERNESTINE ESPARZA,
Petitioner-Appellee.

v.

FRANK ESPARZA,
Respondent-Appellant

No. 33,222
Sandoval County
No. D1329-DM-2009-00569
Hon. John F. Davis

RESPONDENT - APPELLANT FRANK ESPARZA'S BRIEF –IN-CHIEF

ORAL ARGUMENT REQUESTED

Linda L. Ellison
CARTER & VALLE LAW FIRM, P.C.
Attorney for Respondent-Appellant
8012 Pennsylvania Cir. NE
Albuquerque, NM 87110
(505) 888-HELP[4357]

TABLE OF CONTENTS

References to digital transcript (audio/music format) are by elapsed time from the start of the recording (TR: DATE, CD #, time).

TABLE OF AUTHORITIES

SUMMARY OF PROCEEDINGS

The parties were married November 27, 1981 in Paonia, Colorado. [RP 248] The parties separated in August 2009.[RP 248] The parties had irreconcilable differences and there was no reasonable likelihood of reconciliation. [RP 248]. There are no minor children. [RP 248] On August 11, 2009, Petitioner-Appellee filed her Petition for Dissolution of Marriage [RP 1-3]and on even date therewith a Temporary Domestic Order was entered by the Court. [RP 7-9]. Administrative issues arose due to there being a related DV matter wherein certain filings were made which more appropriate to the DM case. On October 23, 2009, a Hearing Officer's Report was filed recommending the parties to pay the expenses as outlined. [RP 29-33]. On November 5, 2009, Respondent-Appellant timely filed his Objections to Hearing Officer's Report. [RP 37-39]. On November 12, 2009, the Court entered its Final Order on Objections to Recommendations of Hearing Officer/Commissioner which order was entered in the related matter [RP 249]. On November 18, Respondent-Appellant filed his Motion to Reconsider Final Order on Objections to Recommendations of Hearing Officer/Commissioner. [RP46-48] The Court denied his Motion to Reconsider in an Order entered in the related matter and not in the DM case.[RP 249]. On December 15, 2009, in the related matter, since that is where some of the other interim division pleadings/issues had been filed, Respondent-Appellant filed his Motion to Modify Interim Division

Order. [RP 149]. On or about February 25, 2010, Petitioner-Appellee filed her Response to the Motion to Modify Interim Division Order in the related matter. [RP 249] On March 15, 2010, Petitioner-Appellee filed her own Motion to Modify Interim Division Order [RP 73-74] to which Respondent-Appellant filed his Response on March 12, 2010. [RP 71-72]. Both parties testified as to certain expenses and their budgets at a hearing on April 7, 2010. By Order entered April 13, 2010, Petitioner-Appellee's Motion to Modify was denied [RP 84]. Respondent-Appellant's Motion was also denied by separate Order as represented by Petitioner-Appellee's counsel [TR: 10/12/10, CD1, 11:27-12:46] but never received by counsel for Respondent-Appellant [TR: 10/12/10, CD1, 10:53-11:15] nor of record in the domestic matter [TR: 10/12/10, CD1, 11:27-12:46]. This delayed notification resulted in confusion that ended ultimately in a sanction against Respondent –Appellant in the amount of $535.93 [RP 144]The Court also held a pre-trial conference on March 1, 2010 and issued a pre-trial Order which set the case for a two day trial in January 2011. [RP 64]

Respondent-Appellant had been unsuccessfully trying for months to gain access to the marital residence for a walk through/inspection [RP 120-123] as allowed by the Temporary Domestic Order. [RP 8] As the deadline for filing Motions neared, set in the Pre Trial Order, [RP 63], Respondent filed a Motion addressing same on October 7, 2010. [RP 120-123] Respondent-Appellant also

filed a Motion for Order to Show Cause against Petitioner-Appellee regarding a CUNA life insurance policy [RP 127-133]. The Court set both for the trial on the merits set January 10, 2011 [RP 138-139, 140]. At that point, the counsel for Respondent-Appellant served a Request for Entry Upon Land for Inspection and Other Purposes in accordance with Rule 1-034(A)(2) to which Petitioner-Appellee filed a formal Response of record. [RP 154-157] and Respondent-Appellant filed a Reply [RP 161-164]. Ultimately the walk through/inspection was conducted on December 16, 2010. [RP 186-189] Subsequent to the Court ordered deadline for filing Motions, opposing counsel filed a Motion for Sanctions [RP 174-177] to which the undersigned filed a Response and Counter-Motion to Strike and for Rule 11 Sanctions. [RP 178-182] The Counter-Motion also was set to be heard at trial . [RP 185]

The parties had community property to be divided and allocated as well as community debt including vehicles, retirement, a marital residence, bank accounts and household goods and furnishings. [RP248-261] Interim division of income was an issue throughout the nearly 1 ½ years of litigation and final resolution needed to be made of any monies due from one party to the other in terms of arrears and non-disclosed income. [RP 205-216]. Separate property also needed to ratified. [RP 205-216] The parties additionally had community debts. [RP 205-216] Spousal support was an issue raised by Petitioner-Appellee to be addressed at

trial. [RP 205-216]. At time of trial, Respondent-Appellant was age 54 turning 55 on April 15th and had been employed with the State of New Mexico Department of Transportation since May 1992.[RP 205] At time of trial, Petitioner-Appellee was 50 years old employed full time with Share Your Care. [RP 249]

At the end of the trial, the Court gave the oral rulings and directed the undersigned to prepare the Final Decree; addressed the methodology for getting the marital residence sold; and assigned a date of fifteen (15) days from January 11, 2011 for filing of Findings of Fact and Conclusions of Law as well as Motions and Affidavits regarding attorney's fees.

The Court also orally ruled on January 11, 2011[TR: 1/11/11, CD#3, Track 1, 27:59-28:30] as follows:

> 1) Husband shall make the January 2011 mortgage payment and beginning February 1, 2011, Wife shall timely make payments until the house is sold and then shall pay Husband Four Hundred Dollars ($400/mo) rent the first month after the mortgage is paid off if the house has not sold until the house is sold;
>
> 2) Wife, shall maintain the residence in proper condition and repair, normal wear and tear excepted, and shall keep the property in good "showing condition" for potential buyers and pay the cost of ordinary repairs and upkeep;

Those provisions were excluded from the Court's Final Decree entered April 8, 2011 [RP 248-261].

Respondent-Appellant and his counsel acted in accordance with the Court's oral directives and rulings in that Respondent-Appellant's Findings of Fact and

Conclusions of Law were timely filed on January 26, 2011 [RP 205-216] and Motion/ Affidavit regarding Attorney's Fees also were timely filed that date as well. [RP 202-204, 217-228]. An Order Appointing Realtor was entered on March 2, 2011. [RP 245-257] Additionally, Respondent-Appellant paid interim division arrears of $779 by February 1, 2011 which was the date ordered in open court. [RP 263, 266; TR: 1/11/11 ,CD#3, Track 1, 42:37]; however this amount was credited improperly against sums he was to receive from Petitioner-Appellee [RP 258, 260] with the result of Petitioner-Appellee receiving double payments instead of an offset without requiring the payment by February 1, 2011 which originally was requested by the Respondent-Appellant's counsel at trial. [TR: 1/11/11, CD#3, track 1, 42:50-43:40]

Petitioner-Appellee proceeded to file her post-trial Affidavit regarding the MADAMS account on or about February 4, 2011 [RP 237-238] to which Respondent-Appellant filed a Post Trial Motion to Strike [RP 239-241] which was set for October 4, 2011. [RP293] Petitioner- Appellee did not timely file Findings of Fact and Conclusions of Law as same were filed by them on or about February 7, 2011 which was twelve (12) days late. [RP 231-236]

Then the Court entered its own Findings of Fact and Conclusions of Law on April 8, 2011 [RP 248-261] which differed from the Court's oral rulings in open court of record herein [TR 1/11/11, CD #3, track 1, 20:11-57:20]. Respondent-

Appellant filed his Motion to Reconsider timely on April 22, 2011 [RP 263-268] which was set for October 4, 2011 [RP 291-292] wherein he requested the Court reconsider its Findings of Fact and Conclusions of Law which differed from the Court's oral rulings at the conclusion of trial. [RP 263-268] . The October 4, 2011 hearing on the Motion to Reconsider was continued at the last minute [RP 334], over Respondent-Appellant's objection [RP 331], and was not reset until January 4, 2012. [RP 335] The Motion to Reconsider has finally been addressed in piecemeal fashion by three different Orders given rulings after several different court dates, February 15, 2012, [RP 407-409] along with the Amended Final Decree [RP 410-412], August 15, 2012 [RP 437-438], and finally, August 6, 2013 [RP 475-476]. The delay and multitude of court appearances since the case's inception has caused Respondent-Appellant to incur in excess of $50,000 in legal fees through July 2012 as stated in the Motion/ Affidavit of Attorney Fees [RP 202-205, 217-228] and the Supplemental Motion/Affidavit of Attorney's Fees [RP 439-442] in addition to those fees necessitated by all post trial entries in the Record Proper and the transcripts of all post-trial hearings (approximately another $12,567), plus the appellate costs and fees, the latter of which are $5,514 through the end of July, 2014 and continue to accrue

ARGUMENT

ISSUE ONE: ***Whether the Court erred when it ruled on the issue of annual leave despite neither party raising the issue or testimony being taken on the issue.***

The District Court's decisions in making an equitable division of community property and debts are reviewed for abuses of discretion, *See Arnold v. Arnold*, 134 N.M. 381, 77 P.3d 285 (2003). The undersigned addressed this issue at the hearing on the Motion to Reconsider discussing the award of annual leave value to Respondent-Appellant without recorded testimony and omissions in the record. The Trial Judge said that an Exhibit had annual leave appearing on it. [1/4/12, CD1, track 1, 7:18]. However the undersigned opined this remained a problem. [1/4/12, CD1, track1, 8:12-8:53]. The reason this is a problem is because no one was able to ask questions about such an issue, clarify same or argue same. For example, if the annual leave was prior to separation, it was no doubt used up during the 18months of litigation prior to trial under the "first in first out" principle. If it was post-separation, it was Respondent-Appellant's given the interim division order [RP 29-33]that had been in place since October 2009 and therefore, should have no bearing on any allocation of a community estate.

There was no such opportunity to discuss, question, argue or otherwise address such an issue as it was not raised by the pleadings or tried by express or

implied consent. The Trial Judge stated that he would have problems with this especially in *pro se* cases if he were not allowed to simply addresses things as he saw them even if not brought to his attention since *pro se* litigants have no idea what they are doing regarding presenting evidence . [TR: 1/4/12, CD #1, track 1, 8:53-9:55] Even if that were to be a problem, it is of no consequence in this case as both parties had counsel who had conducted numerous trials during their careers and numerous hearings in addition to the multi day trial on the merits in the instant case with no mention of the annual leave.

Pursuant to *Page & Wirtz Construction Co. v. Solomon*, 110 N.M. 206, 208-09, 794 P.2d 349, 351-52 (1990), "when issues not raised by the pleadings are tried by the express or implied consent of the parties, they are treated in all respects as if they had been raised in the pleadings." In this case, the issue of annual leave was not raised by the pleadings nor tried by the express or implied by consent of the parties as nowhere in the Record Proper was this issue raised prior the Court's Findings of Fact and Conclusions of Law nor was this issue discussed in any of court proceedings as the CDs do not reflect any reference thereto especially during the January 10-11, 2011 trial on the merits. Therefore, no citation to the Record Proper or the Transcript of Proceedings prior to April 8, 2011 can be made due to the complete lack of any mention of annual leave until the Court's Findings of Fact and Conclusions of Law [RP 248-261]. The Trial Court abused its discretion when

it made its Finding of Fact 47 [RP 254] and Conclusion of Law No. I [RP 259] to the extent it made a decision on that asset about which no testimony was given or elicited nor was reflected in any pleading or request for relief. Further, this abuse of discretion continued to the extent the value of the leave was figured into the equalization payment ordered.

Issues Two and Three revolve around the Respondent-Appellant's PERA account so will be discussed together.

ISSUE TWO: ***Whether the Court erred in not allocating the payment of the court ordered survivor benefits to Petitioner-Appellee by some mechanism since she was the one who requested them and since the award of same reduces the monthly benefit to the Respondent-Appellant during his lifetime.***

The standard for review in interpreting statutes is *de novo. See N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n,* 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105. This issue appears to be one of first impression at the appellate level in New Mexico.

ISSUE THREE: ***Whether the Court erred in ordering Respondent-Appellant to elect Option B for his PERA retirement, as opposed to Option A or Option C, and in doing so whether the Court erred in wording the Final Decree contrary to his oral ruling in January 2011, with the mandatory designation of Petitioner-Appellee as survivor beneficiary allowing her to recover 100% of Respondent***

Appellant's pension amount in the event of his passing while also forever barring Respondent- Appellant from naming a subsequent survivor for his separate retirement benefits accrued post-divorce.

The standard for review in interpreting statutes is *de novo.* Id. This issue appears to be one of first impression at the appellate level in New Mexico. The statute at issue is Section 10-11-117 NMSA (2013 Edition) Forms of payment of a pension :

A. Straight life pension is form of payment A. The retired member is paid the pension for life under form of payment A. All payments stop upon the death of the retired member,....

B. **Life payments with full continuation to one survivor beneficiary** is form of payment B. **The retired member is paid a reduced pension for life** under form of payment B. **When the retired member dies, the designated survivor** beneficiary **is paid the full amount of the reduced pension until death.** Upon the association's receipt of proof of death of the designated survivor beneficiary, the amount of pension shall be changed to the amount that would have been payable had the retired member elected form of payment A.

C. **Life payment with one-half continuation to one survivor beneficiary** is form of payment C. **The retired member is paid a reduced pension for life** under form of payment C. **When the retired member dies, the designated survivor beneficiary is paid one-half the amount of the reduced pension until death.** If the designated survivor beneficiary predeceases the retired member, the amount of pension shall be changed to the amount that would have been payable had the retired member elected form of payment A.

[Emphasis added]

Property takes status as community or separate at time and by manner of acquisition. *Michelson v. Michelson*, 89 N.M. 282, 551 P.2d 638 (1976). Section 40-3-8 B. NMSA 1978 (as amended) states that community property is that property acquired by either or both spouses during marriage which is not separate

property. There is a presumption that property acquired during marriage is community property. Pursuant to Section 40-3-8 A. N.M.SA. 1978 (as amended), separate property includes property acquired after entry of a divorce decree. The essence of community property law in New Mexico is that each party should receive ½ of what was earned during the marriage. Therefore, it follows that each party in this case is entitled to ½ of the community interest in the Respondent-Appellant's PERA retirement earned during the marriage which ended effective 1/11/11.

After the trial on the merits, the Trial Judge orally ruled only that Respondent-Appellant was to select Option 'B" at retirement. In the Court's April 8, 2011 Findings of Fact and Conclusions of Law, he stated further that Petitioner-Appellee shall be designated as the survivor beneficiary. In response to Respondent-Appellant's Motion to Reconsider [RP 263-268] wherein this was one of the matters at issue, hearings followed on July 24, 2012, March 12, 2013 and finally on August 6, 2013 resulting with the Judge's final order entered on that date on the matter of PERA issues reaffirming his Findings of Fact and Conclusions of Law in this regard [RP 475-476] and entry of the Order Dividing Retirement Benefits itself [RP 477-480] .

There are other problems with the Order Dividing Retirement in that it states it was on stipulation but it was not because Respondent-Appellant's Counsel signed as to "form only" meaning that is what the Trial Judge ordered be signed. Further, The Trial Court's April 8, 2011 Finding of Fact 30 [RP 252] specifically

allowed Respondent-Appellant to request a refund of contributions prior to retirement and only required they be split 50-50 for any earned prior to 1/11/11. However, the Order Dividing Retirement Benefits contradicts this ruling by stating that the only way the contributions are refunded is if Respondent-Appellant dies! [RP 479] This results in Respondent-Appellant never receiving the benefit of those contributions.

Another issue is the language in the Order Dividing Retirement Benefits [RP 478] that if co-payee [here Petitioner-Appellee] dies prior to Respondent-Appellant that her share goes to her estate instead of reverting back to the member [Respondent-Appellant] as allowed by PERA [TR 7/24/12, CD1, track 1, 40:30 – 40:47] The Trial Judge specifically stated the following on the record and heard by the PERA representative who was testifying at that hearing on July 24, 2012 "If she[Petitioner-Appellee] was to die, prior to Frank Esparza [Respondent-Appellant] he would have the right to designate a new beneficiary. I don't see anybody saying-'no, that's not right', so fortunately I've grasped that much." This makes sense because PERA would be bankrupt in no time if a co-payee's estate were allowed to continue to receive the survivor's benefits depending on how many heirs the co-payee has. For those individuals to receive a member's retirement after the member's death, those benefits could exist for decades and certainly does not further the goals and policy of either community property law or PERA regulations.

Further, by requiring Respondent-Appellant to elect Option B with Petitioner-Appellee as the survivor beneficiary, she in effect would receive

100% of the benefit of what Respondent-Appellant was receiving which not only is in excess of what she is entitled to under community property law but also gives her access to Respondent-Appellant's post-divorce separate property by virtue of the increased pension earned after 1/11/11. Respondent-Appellant should be allowed to allocate that property as he deems appropriate. Therefore, Respondent-Appellant's post –divorce benefit should be available for him to leave to whomever he chooses i.e. becomes part of Respondent-Appellant's estate

There are better options available to the parties, such as Option C which is mutually financially beneficial in terms of more money paid out which was discussed at the trial on the merits [TR: 1/10/11, CD 1, 41:50-54:23 discussion of three options] and where there was testimony at the hearing on that portion of the Motion to Reconsider on July 24, 2012 [TR: 7/24/12, CD 16:45-18:45] . At the July 24, 2012 hearing, the PERA representative, Karen Risku, Esq., testified Option B (wherein the survivor beneficiary receives 100% of the member's pension benefit if member dies first) results in the lowest monthly benefit and Option C (wherein the survivor beneficiary receives 50% of the member's pension benefit if the member dies first) yields more of monthly benefit with Option A resulting in the highest monthly benefit because that option has no survivor beneficiary designation. [TR: 7/24/12, CD1, 16:45-18:45]. The reduction in monthly benefit associated with the selection of either a 50% Option C or 100% Option B is taken "off the top" and what the public generally considers the "cost of the survivor benefit" [7/24/12 , CD 1, 18:45]akin to a life insurance premium . It is not equitable that Respondent-Appellant pay for these benefits in any way. If

PERA cannot allocate the cost to one party administratively, then Petitioner's 50% of the community percentage of the community retirement should be reduced to a lower percentage of community retirement to allocate for such cost of receivership of such benefits.

There was much discussion at that hearing on July 24, 2012 about what if the member [here Respondent-Appellant]named a survivor beneficiary, not mandated by the Trial Court but simply one chosen by Respondent-Appellant, other than co-payee who is Petitioner-Appellee. Ms. Risku testified "as long as a pension benefit is being paid, the co-payee [in this case Petitioner-Appellee] will get her share." [TR: 7/24/12, CD 1, 21:20-21:30]. Therefore, the member [here Respondent-Appellant] could designate an adult child or a subsequent spouse and so long as that person remained alive after Respondent-Appellant's death and a pension paid than the co-payee [here Petitioner-Appellee] would be receiving her community share. If the member [here Respondent-Appellant] survived the first survivor beneficiary, he could name another one and so forth. The only scenario where the income stream would stop for the co-payee [here Petitioner-Appellant] is if the member [here Respondent-Appellant] died and any survivor beneficiary died prior to the co-payee.[TR: 7/24/12, CD1, 21:30-22:39].

The trial court said it was "trying to be fair" [TR: 7/24/12, CD1, 40:00] However, the trial court did not even address Option C which, if the Court proceeded to require instead, is a more cost effective alternative to both parties while Respondent-Appellant is alive and more equitable than Option B since under Option C Petitioner-Appellee would be able to continue to receive 50% of

Respondent-Appellant's reduced pension which actually is even more than what she is entitled to receive. It is more than what she would receive because she would be receiving 50% of what Respondent-Appellant was receiving at his death which amount would include the percentage, albeit small, attributable to his separate property post-divorce. In this way, the policy behind of community property law is furthered.

ISSUE FOUR: ***Whether the Court erred in failing to include all the Chase card debt along with interest thereon, the majority of which were for divorce litigation attorney's fees, for which there was precedent in this case as indicated in the 2009 Order Approving Domestic Relations Hearing Officer Report concerning interim division, in the calculation of the community debt***

The District Court's decisions in making an equitable division of community property and debts are reviewed for abuses of discretion, *See Arnold, supra.* In the original interim division order, attorney's fees were allowed as a necessary expenses and since the credit card minimum payment was allowed as a community debt [RP 30] , At the conclusion of the trial on the merits, the Court directed the entire debt of $10,800 (which entailed the pre-August 2009 $3,000 balance) to the Respondent-Appellant only as opposed to splitting same. There is no substantial evidence to support the Court's Finding of Fact 48 [RP 254] and Conclusion of Law V and W [RP260-261] that a large portion of the debt was Respondent-Appellant's separate debt not benefiting the community since the law of the case already found that attorney's fees were a community expenses and that is where the majority of the post filing charges were for: $5000 for an initial retainer to

Respondent-Appellant's counsel [RP 30] as well as testimony that the rest was attorney's fees and the dentist. [TR: 4/7/10, CD#1, 12:55 to 14:52; 1/10/11, CD#4, Track 1, 21:08- 47:14 and CD#5, Track 1, 8:24-33:41, 37:40- 42:56; 1/11/11, CD#3, Track 1, 37:02- 40:00;1/4/12, CD#1, Track 2, 3:31- 6:04, and 19:17. and 35:02- 35:32.]

ISSUE FIVE: ***Whether the Court erred in its award of educational spousal support and by failing to set forth all the terms of when the modifiable spousal support would end and specifying the tax treatment of same***

The standard of review for spousal support decisions is abuse of discretion. *See Martinez v. Martinez,* 1997-NMCA-125, ¶ 10, 124 N.M. 313, 950 P.2d 286; "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims,* 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. Pursuant to Section 40-4-7 B. 1. NMSA 1978 (as amended) : The Court may award "(a) rehabilitative spousal support that provides the receiving spouse with education, training, work experience or other forms of rehabilitation that increases the receiving spouse's ability to earn income and become self-supporting. The court may include a specific rehabilitation plan with its award of rehabilitative spousal support and may condition continuation of the support upon compliance with that plan; (b) transitional spousal support to supplement the income of the receiving spouse for a limited period of time; provided that the period shall be clearly stated in the court's

final order..." The Court's Conclusion of Law AA [RP 261] is not supported by the evidence . Despite the length of the parties marriage, Finding of Fact 1 [RP 248] , the parties had not led an extravagant lifestyle, Finding of Fact 72 [RP 257].The Court itself found in Findings 58, 59, 60, 61, 62, 63, 66, part of 67, 72, 73, 74 [RP 255-257] that Respondent-Appellant had health issues and Petitioner-Appellee did not. Petitioner-Appellee did not provide any documentation regarding several of the factors under Section 40-4-7 E. NMSA 1978 (as amended).[1]

At the March 12, 2013 hearing discussing [3/12/13, CD#1, track 1, 4:28-5:15] Petitioner-Appellee's Motion to Enforce, Respondent-Appellant]s counsel during her opening statement related to the Trial Court Respondent-Appellant's explanation for why the $500/month spousal support payments had not been provided and affirmatively informed the Trial Court that the rental payments of $400 per month by Petitioner-Appellee to Respondent-Appellant had not been made pursuant Minute Order from January 4, 2012 Hearing [RP 407-408] and the Amended Final Decree [RP 410-412] . Pursuant to the Trial Court's verbal ruling

---

[1] E. When making determinations concerning spousal support to be awarded pursuant to the provisions of Paragraph (1) or (2) of Subsection B of this section, the court shall consider: ... (2) the current and future earnings and the earning capacity of the respective spouses; (3) the good-faith efforts of the respective spouses to maintain employment or to become self-supporting; (4) the reasonable needs of the respective spouses, including:.... (b) the maintenance of medical insurance for the respective spouses; and ... (7) the type and nature of the respective spouses' assets; provided that potential proceeds from the sale of property by either spouse shall not be considered by the court, unless required by exceptional circumstances and the need to be fair to the parties; (8) the type and nature of the respective spouses' liabilities; ...

at the close of the merits trial, the spousal support had a definite educational reasoning behind it.[TR: 1/11/11, CD#3, track 1, 44:35-47:02] The Trial Court remarked that Petitioner-Appellee's educational plan "was not as good as I would have liked." [TR: 1/11/11, CD#3, track 1, 44:30] The Trial Court specifically said he wants it reviewed if Petitioner-Appellee is not doing what she needs to do to get her degree; therefore, as there is an expectation by the Court for her to use the money to her benefit, in the event of non-compliance by Petitioner-Appellee, Respondent-Appellant had the right to return to court for modification and redress by the court by stating "Judge she's just not doing it. [TR: 1/11/11, CD #3, Track 1, 44:35-47:02]. Subsequently, at the time of the March 13 hearing, Respondent-Appellant testified that he understood was not enrolled in school [TR:3/12/13, CD #2, Track 1, 58;12=58:22], nor did she introduce any evidence to that she was in school, contrary to the provisions of her award of which counsel reminded the Trial Judge of his the ruling at the end of the merits trial on January 11, 2011and the language regarding his exact expectations.

Notwithstanding same, with the closure of all discussions on the matter on March 12, 2013, the Judge proceeded to sternly admonish the Respondent-Appellant [TR 3/12/13, CD#2, track 2, 41:13] from the bench stating it was "transitional not rehabilitative" therefore she did not have to prove she was in school. However, her entire presentation at the trial on the merits involved a vague intention of going back to school as referenced in the Court's Findings of Fact 54-61 [RP 255].

In the instant case, Petitioner-Appellee had the benefit of interim support for seventeen (17) months and an additional thirty-six (36) months of support at an

amount even higher than the amount received during the interim and such an amount is far more than just "transitional." Despite the label put on it in the Conclusion of Law AA [RP 261] given the Trial Court's verbal ruling, it was more in the nature of rehabilitative spousal support for which there was not substantial evidence other than the fact that Respondent-Appellant earned more than Petitioner-Appellee. A wife is not entitled to support in order afford herself an opportunity to achieve an earning capacity reasonably comparable to that of her husband, nor in order to support herself in a style reasonably comparable to that enjoyed by the parties during the marriage; these are not factors upon which alimony is determined. *See Hertz v. Hertz*, 99 N.M. 320, 657 P.2d 1169 (1983). The circumstances of both spouses must be considered in determining the amount of any spousal support, if any, in order to avoid hardship on the supporting spouse and not to permit the recipient spouse to abdicate responsibility for his or her own support and maintenance. *See Mitchell v. Mitchell*, 104 N.M. 205, 719 P 2.d 432 (Ct.App.), *cert. denied,* 104 N.M. 84, 717 P.2d 60 (1986).

Additionally, Petitioner-Appellee offered no testimony of her efforts to become self supporting other than finally going full time at her work, and she ended up hiding those wages which is to be discussed *infra* in this brief.

The Court also failed to specific that tax treatment of the spousal support.

ISSUE SIX: ***Whether the Court erroneously used the $779 interim division arrears payment as a set off against monies owed Respondent- Appellee when the Court already ordered the $779 to be paid by February 1, 2011 which had already been paid by the time the Court entered its Final Decree as opposed to ordering a direct payment from Petitioner-Appellee to Respondent-Appellant resulting in a double payment to Petitioner-Appellee.***

The District Court's decisions in making an equitable division of community property and debts are reviewed for abuses of discretion, *See Arnold, supra*, 134 N.M. 381, 77 P.3d 285 . The Court abused its discretion by Finding of Fact 86 [RP 258] and Conclusion of Law U [RP 260]. The Court made its Finding and Conclusion notwithstanding its oral ruling in open Court on January 11, 2011 [Tr. 1/11/11, CD #3, track 1, 42:37] that the $779 was to be paid by February 1, 2011 which was accurately reflected even in Petitioner-Appellee's untimely Findings of Fact and Conclusions of Law in proposed Fact 19 which states that the $779 was to be paid by February 1, 2011 [RP 235]. Further, this abuse of discretion continued to the extent the $779 was calculated into the equalization payment as the Court did not specify how it arrived at same. There is not substantial evidence to support the Court's offset of the $779 against Petitioner-Appellee's undisclosed community wages during the interim period that she failed to split with Respondent-Appellant since it was specifically ordered that the payment be made prior to entry of the Findings of Fact and Conclusions of Law [RP 248-261] as well as the Final Decree of Dissolution of Marriage. [RP 262]. Respondent-Appellant has still yet to receive any of these funds. This error was compounded by the fact that the Court declined to recalculate interim division based on the wages that were purposefully hidden from the Court by Petitioner-Appellee [TR: 1/11/11, CD #3, Track 1, 42:48-43:50] after Respondent-Appellant had paid $13,183.78 in interim

support payments to Petitioner-Appellee, and community expenses on his side of the interim division worksheet including the mortgage payments on the marital residence [RP 31-33].

ISSUE SEVEN: ***Whether the Court erred in failing to order Petitioner-Appellee to reimburse Respondent-Appellant for one-half of the additional monies she received during the divorce proceedings***

The District Court's decisions in making an equitable division of community property and debts are reviewed for abuses of discretion, *See Arnold, supra*, 134 N.M. 381, 77 P.3d 285 . The Court found in Finding of Fact 83 [RP258] and Conclusion of Law U [RP 261] that Petitioner-Appellee did owe funds to Respondent-Appellant that the former admitted she received in full time income since May 2010l but did not share with him [TR: 1/10/11, CD#2 ,Track 1, 6:18-6:31 ; 27:50-30:20 ; EX F, EX H, EX I]. There was a complete absence of a Statement of when and how these funds were to be paid to Respondent-Appellant and there was no accounting of these funds or substantial evidence supporting about why this amount was not due Respondent-Appellant by a date certain or why Petitioner-Appellee was allowed to retain these monies [RP 261]. Petitioner-Appellee further was allowed to retain all of her MADAMS account referenced in Findings of Fact 41 and 42 [RP 253] without splitting it with Respondent – Appellant in the Court's Conclusion of Law H [RP 259] . There was no evidence that support the Court's Findings and Conclusion in this regard either.

ISSUE EIGHT: ***Whether the Court properly credited the $5000 separate interest in the Deferred Compensation***

The District Court's decisions in making an equitable division of community

property and debts are reviewed for abuses of discretion, *See Arnold, supra.* The Court gave Respondent-Appellant credit for his $5000 separate property interest his Deferred Compensation in the Finding of Fact 32- 33 [RP 252] and Conclusions of Law K-L. [RP 259] It is unclear when the Trial Court ordered a division of the Deferred Compensation if the Court deducted the $5000 before ordering same. Respondent-Appellant requests clarifying language to remove any possibility of Petitioner-Appellee improperly receiving $2500 which would be 1/2 of his separate property interest.

CONCLUSION

Respondent-Appellant maintains that the abuse of discretion as outlined herein and the lack of sufficient substantial evidence to support the Findings of Fact and Conclusions of Law attacked along with giving every benefit of every doubt as to credibility to Petitioner-Appellee stems from a bias the Trial Judge had against Respondent-Appellant going back to October 12, 2010 wherein the Judge unnecessarily berated Respondent-Appellant at the conclusion of the hearing. [TR: 10/12/10, CD1, 43:12] From that point forward, in subsequent proceedings the trial judge did not appear to address any of wrongdoings of Petitioner-Appellee when brought before the Trial Court by Respondent-Appellant's counsel; i.e. not sanctioning the Petitioner-Appellee for violations of Court Orders [RP 457] in obvious contrast to when allegations were made against Respondent-Appellant [RP 142-144]. Petitioner-Appellee's violations were alleged in several Show Cause motions [RP 127-139 , 325-328]; her unwarranted denial of access to the residence requested by Respondent-Appellant as provided by the Temporary Domestic Order [RP 8] which was as stated in the Motion filed by Respondent-Appellant regarding same [RP120-123]; and her attempted of the entire 2010 federal tax refund [RP

326] following a mandated order for the couple to file jointly in Conclusion of Law X [RP 261] together with the summarily denied [TR: 7/24/12, CD#1, Track 1, 46:46-58:18] Rule 11 requested motion to sanction opposing counsel for his post deadline filing violation for motions beyond the date ordered in the Pretrial Order.

The long tortuous litigation was totally unnecessary given that the only real assets the community had were the marital residence and the PERA retirement. When Respondent-Appellant's timely Attorney's Fees Affidavit and Motion [RP 202-204, 217- 228] were submitted along with Supplemental Attorney's Fees [RP 438-442] the Court did not grant reimbursement to either party [RP 443] and given the extreme conduct as stated in Respondent-Appellant's Motion/Affidavits referenced herein such a result was a continuation of the Court's failure to redress the inequities of the case. Respondent-Appellant seeks the reversal of the Trial Court Orders and an award of the following:

1. One-half ($597 being his ½) of Petitioner-Appellee's Madam's Account that was improperly liquidated despite the Temporary Domestic Order.
2. One-half ($4391.41 being his ½) of Petitioner-Appellee's excess undisclosed income until trial which she received during the pendency without an offset of the $779 interim division payment which was already paid by 2/1/11.
3. Reevaluation /recalculation of the interim division due to the Petitioner-Appellee's undisclosed income as Respondent-Appellant had paid $13,183.78 in interim support payments to Petitioner-Appellee as well community expenses on his side of the interim division worksheet including the mortgage payments on the marital residence [RP 31-33] while she in turn hid additional funds she received.
4. Clear language regarding the division of the Deferred Compensation Account properly addressing Respondent-Appellee's separate property interest therein and

ensuring Petitioner-Appellee does not receive an improper award of $2500.

5. Return of the $18,000 in spousal support.

6. Removal of any reference to his annual leave.

7. Return of one-half ($5,400) of the community credit card .

8. Return of $535.93 award for sanctions when the Order denying Respondent-Appellant's Motion to Reconsider was never received by Respondent-Appellant's Counsel.

9. Return of equalization payment of $2807.15 which includes interest of $432.15 which was ordered and paid by 3/31/13 as there was no rationale stated regarding, or substantial evidence supporting, the Court's Conclusion of Law Z [RP 261] that Respondent-Appellee owed an equalization payment. The Court did not order an equalization at the conclusion of the trial when it was giving his oral rulings [TR: 1/11/11, CD #3, Track 1, 20:13-57:20] . The Court's Findings of Fact and Conclusions of Law [RP 248-261] do not provide any rationale for same or how same was calculated.

10.Removing the requirement that he be mandated to choose Option B and the requirement that he be mandated to name Petitioner-Appellee as surviving beneficiary and if Option C is required by this Court and he is required to name Petitioner-Appellee as the survivor beneficiary that the cost of same be allocated to her by removing the language prohibiting same from any Amended Order Dividing Retirement Benefits.

11.Removing the requirement that a refund of community contributions cannot be made prior to Respondent-Appellant's death and reinstituting the Trial Court's Finding of Fact 30.

12. Removing the language in the Order Dividing Retirement Benefits [RP 478] that if co-payee [here Petitioner-Appellee] dies prior to Respondent-Appellant's death that her share goes to her estate since PERA requirements are that such reverts back to the member [Respondent-Appellant] as Option A.

13. Reimbursement of attorney's fees and costs of $62,567 through the filing of the Notice of Appeal in August 2013, including all pre-trial, the merits trial, and post trial proceedings.

14.Reimbursement of all fees related to this Appeal final costs $5,514 through end of July 2014 and those continuing in the briefing and any oral argument.

BASIS FOR REQUEST FOR ORAL ARGUMENT

In addition to many of the Findings of Fact and Conclusions of Law not being supported by substantial evidence, the case involves some issues of first impresession and it would be beneficial to the Court to have counsel appear before it so the panel can make any inquiries regarding the facts, positions taken by the parties, and arguments regarding the application of PERA as outlined in the record proper, CD transcripts and briefs.

Respectfully submitted,

CARTER & VALLE LAW FIRM, PC.

LINDA L. ELLISON
Attorneys for Respondent-Appellant
8012 Pennsylvania Cir. NE
Albuquerque, NM 87120
(505) 888-HELP[4357]

I hereby certify I caused a true and correct copy of the foregoing pleading to be forwarded on this 11th day of August, 2014 to:

Robert Fuentes
Fuentes Law Firm
P.O. Box 15099
Rio Rancho, NM 87174

Hon. John F. Davis
Thirteenth Judicial District Court
P.O. Box 600
Bernalillo, NM 87004

Court Reporter
Thirteenth Judicial District Court
P.O. Box 600
Bernalillo, NM 87004

District Court Clerk
Thirteenth Judicial District Court
P.O. Box 600
Bernalillo,NM 87004

LINDA L. ELLISON