IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ERNESTINE ESPARZA,
Petitioner-Appellee.

v.

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

FRANK ESPARZA,
Respondent-Appellant

RESPONDENT - APPELLANT FRANK ESPARZA'S REPLY BRIEF

ORAL ARGUMENT AS REQUESTED
IN BRIEF IN CHIEF

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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.***

In the Response Brief ("Response"), Petitioner-Appellee fails to address the issue on appeal which is as stated in the caption sentence and discussed fully in Respondent-Appellant's Brief in Chief ("BIC"). Further the case cited in the Response *Clark v. Clark,* 2014-NMCA-030, 320 P.3d 991 is distinguishable from the instant fact pattern in that *Clark* discusses the issue surrounding income from a subchapter S corporation and the appellate Court therein remanded the matter to the trial court to address two of the issues raised therein to make more specific reviewable findings. The issue at hand is the impropriety of making a ruling on an issue not properly raised before the court in pleadings or in testimony.

The Response, page 3, also alleges the issue was not preserved; however, the issue was preserved at the hearing on the Motion to Reconsider held on January 4, 2012 by the undersigned addressing same why such a ruling on this issue remained a problem. [1/4/12, CD1, track1, 8:12-8:53]. To reiterate, 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 case stated in the BIC, page 8, *Page & Wirtz Construction Co. v. Solomon*, 110 N.M. 206, 208-09, 794 P.2d 349, 351-52 (1990) supports Respondent-Appellant's position in that in the instant 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]. Further, this abuse of discretion continued to the extent the value of the leave was figured into the equalization payment ordered.

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.***

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.***

Issues Two and Three revolve around the Respondent-Appellant's PERA account so will be discussed together. As a starting point, Petitioner-Appellee again misstates the position taken by Respondent-Appellant. The latter is not saying the issue of survivor benefits is itself an issue of first impression but rather the issue of "payment" for same and the issue of Petitioner-Appellee receiving MORE than her share of the community property by requiring Option B which means she actually would be receiving more than her 50% share because she would be receiving Respondent-Appellant's separate property share as well.

These issues are separate and distinct from than the issue in *Irwin v. Irwin,* 1996- NMCA-007, 121 N.M. 266 cited by Petitioner-Appellee. When the interpretation of a statute is at issue, that matter is addressed *de novo* as stated in the BIC, page 9, citing *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007- NMSC-053, ¶19, 142 N.M. 553, 168 P.3d 105. The statute at issue is Section 10-11-117 NMSA (2013 Edition) *Forms of payment of a pension.*

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. Accordingly, Petitioner-Appellee is incorrect when she implies in the Response, page 10, that Respondent-Appellant somehow is asserting that the PERA is not community. That is not what he is saying at all. Respondent-Appellant has not argued that point.

Respondent-Appellant is claiming error on the requirement first that Petitioner-Appellee be selected as the Survivor Beneficiary without having to pay for those benefits in some manner akin to life insurance premiums. Respondent-Appellant complained further that he should not have to name her as Survivor Beneficiary since Petitioner-Appellee could continue to receive her share so long as Respondent-Appellant's survivor beneficiary designee(s) was still alive. [TR: 7/24/12, CD 1, 21:20-21:30]. Error also is asserted that as the survivor beneficiary, Petitioner-Appellee would be receiving at his death should he pre-

decease her, a portion which is clearly his separate property as earned after January 11, 2011. Respondent-Appellant would argue that is not the intent of how this statute should work in application todivorced spouse in furtherance of community property law.

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."

Finally, the disparity of income referred to in the Response, page 12, is irrelevant to the analysis of the PERA statute regarding the very limited narrow issues raised in the BIC.

ISSUE FOUR: ***Whether the Court erred in failing to include all of 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 Hearing Officer in her Interim Order [RP 30] did in fact find the attorney's fees place on the community credit card, which also included a $3000

pre separation debt, a community expense. [RP 30, 254], However, the Court after trial did not allocate any of the community credit card to Petitioner-Appellee, not even ½ of the $3000 that existed prior to separation [RP 254] Further, there was testimony that were other charges i.e. dental expense, in addition to attorney's fees which are appropriate community debts to go into the equation. *See* 40-3-9 N.M.S.A. 2013 ("B. 'Community debt' means a debt contracted or incurred by either or both spouses during marriage which is not a separate debt.") Without declaring the Chase credit card as a separate debt, instead the Court erroneously simply directed the entire debt of $10,800 (which included the pre-August 2009 $3,000 balance) to the Respondent-Appellant only as opposed to splitting same.[RP 254, 260-261].

The argument on the Response page 13 regarding the Order on Attorney's Fees [RP 443] is misplaced as that Order was entered more than TWO years after the merits trial and more than one year after the Motion for Reconsideration addressing many of the issues raised therein including the issue of this debt. Accordingly, there is no way that the Final Decree was in any way relying on the subsequent Order entered years later.

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***

Petitioner-Appellee's argument in the Response, p. 15, that because the $500 was not paid she did not attend school as she had testified that she was going to do at trial [TR: 1/11/11, CD#3, track 1, 44:35-47:02] is circular at best and irrelevant

at worst. She also admitted that her $400 rent payments were not made to Respondent-Appellant as reflected in the Paragraph 13 of the Order resulting from the March 12, 2013 hearing [RP 458]. Accordingly she had the benefit of the sums available to her to attend school. Petitioner-Appellee also fails to point out there are numerous other statutory factors than just incomes of the parties.

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 argument made in the Response, pages 16-17, does not make sense. Respondent-Appellant is not mixing up sources of funds but rather the Court did. Respondent-Appellant was verbally ordered by the Court to pay the $779 no later than February 1, 2011 [TR: 1/11/11 CD#3, Track #1, 42:37-42:47]. This was already accomplished [RP 263] **prior** to the Findings of Fact and Conclusions of Law [RP 248-261] and Final Decree [RP 262]. As stated in the BIC, 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 pursuant to the Court's Findings of Fact No. 86 [RP 258] and 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***

Petitioner-Appellee's argument in the Response, pages16-17, is simply wrong when she alleges that Respondent did not make a claim for recovery of the additional income. In fact, Respondent-Appellant specifically addressed this issue in Court at the trial on the merits [TR: 1/10/11, CD#2 ,Track 1, 6:18-6:31 ; 27:50-30:20 ; EX F, EX H, EX I, RP 258] Unlike the issue of the annual leave addressed *infra* which was not testified about or sought by Petitioner-Appellee, this issue was specifically discussed as indicated by the aforementioned transcript citations as well as the Court's Findings 80-86 [RP 257-258]. Petitioner-Appellee is also wrong when she tries to assert that disparity in income is related to the division of community property in any way because the Court is required to divide community property equally. *See Ruggles v. Ruggles*, 116 N.M. 52, __ ,

860 P.2d 182, 192, (1993) (*citations omitted).*

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 2010 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]. Yet 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 without explanation 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 .

CONCLUSION

Petitioner-Appellee inappropriately tries to link every decision made by the Court to some sort of fault based action of Respondent –Appellant while failing to address or minimizing Petitioner-Appellee's actions. Petitioner-Appellee further tries to inappropriately link the fact that Respondent-Appellant earned more income during the marriage to several of the property arguments. Respondent-Appellant incorporates all his arguments as set forth in his BIC and the relief requested therein as supplemented by this Reply in Response to Petitioner-Appellee's Response.

Respectfully submitted,
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I hereby certify I caused a true and correct copy of the foregoing pleading to be forwarded on this 3rd day of November, 2014 to:

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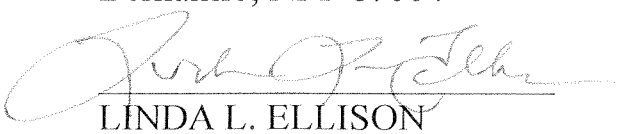

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