IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ERNESTINE ESPARZA/MONTOYA
Petitioner-Appellee.

v.

FRANK ESPARZA,
Respondent-Appellant

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

PETITIONER-APPELLEE ERNESTINE ESPARZA/MONTOYA'S ANSWER BRIEF-IN-CHIEF

ORAL ARGUMENT REQUESTED

Robert R. Fuentes
FUENTES LAW OFFICE, P.C.
Attorney for Petitioner-Appellee
P. O. Box 15099
Rio Rancho, NM 87174
(505) 892-5991

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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.

Respondent-Appellant, argues that the trial court was in error when it ruled on an issue clearly before it at the request of both Parties, ie. the disposition of community property. The standard of review relating to the issue presented is that of "abuse of discretion". Both parties agree as to the standard to be used. See Page 7 of Brief in Chief, first paragraph under Issue One. Plaintiff-Appellee agrees that the holding in Arnold v Arnold, 134 N.M. 381, 177 P.3d 285 (2003) controls. However, that holding is also conditioned by the holding in Clark v. Clark, 2014-NMCA- 030, 320 P.3d 991, at 24 and 25.

{24} We now address Wife's allegation that the district court erred in characterizing a portion of Husband's income from IPR as his separate property. We review the district court's equitable distribution of assets and liabilities for an abuse of discretion. Arnold v. Arnold, 2003-NMCA-114, ¶ 6, 134 N.M. 381, 77 P.3d 285. The district court here found that IPR was Husband's separate property and that Husband earned both a monthly community property salary of $8,333 per month and a separate income based on his ownership interest in IPR. Thus, the issue raised by Wife on appeal involves only an evidentiary challenge to the district court's rulings, and we shall apply a substantial evidence standard of review. See Bishop v. Evangelical Good Samaritan Soc'y, 2009-NMSC-036, ¶ 25, 146 N.M. 473, 212 P.3d 361 (applying a substantial evidence standard where no legal questions remain); see also Corley v. Corley, 1979-NMSC-040, ¶ 6, 92 N.M. 716, 594 P.2d 1172; Zemke v. Zemke, 1993-NMCA-067, ¶ 14, 116 N.M.

114, 860 P.2d 756. "Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." Landavazo v. Sanchez, 1990-NMSC-114, ¶ 7, 111 N.M. 137, 802 P.2d 1283.

{25} On appeal, it was Wife's duty to present the evidence in the light most favorable to support the district court's findings, and then demonstrate why the evidence failed to support these findings. Jurado, 1995-NMCA-014, ¶ 9. Wife has not provided any citation to the record or other arguments to rebut the district court's conclusions that Husband's ownership interest in IPR was his separate property and that a portion of his salary resulted from this separate ownership interest. In addition, Wife has not provided this Court with any other evidence or arguments as to why it was error for the district court to accept Mr. Johnson's testimony regarding the correct salary for a non-owner employee doing the same work as Husband. See Rule 12-213(A)(4) NMRA; see also Aspen Landscaping, Inc. v. Longford Homes of N.M., Inc., 2004-NMCA-063, ¶ 28, 135 N.M. 607, 92 P.3d 53 (explaining that a party challenging a finding for lack of substantial evidence must refer to "all of the evidence, both favorable and unfavorable, followed by an explanation of why the unfavorable evidence does not amount to substantial evidence, such as is necessary to inform both the appellee and the Court of the true nature of the appellant's arguments").

The point at issue is the same as in Clark, supra, a claim of an improper award of property. The standard of review is the same. Respondent-Appellant fails in his burden on two points. Respondent-Appellant is in error that the issue of disposition of annual leave is not before the Court. In Respondent-Appellant's Proposed Findings of Fact and Conclusions of Law, RP 207 (N) he admits and offers his wage statement as having been earned during the existence of the community. The consequence is that the Court has the authority the rule on that item presented as community property. There is no claim of a limited offer on the part of Respondent-Appellant. The annual leave matter is admitted as appearing on the

exhibit. (1/4/12 CD1 Track 1, 7:18.) The issue of division of community property was clearly before the Court and the matter of annual leave is part of the community property decision. There is substantial evidence that the division of community property in the form of annual leave was before the Court.

The second point upon which Respondent-Appellant fails to meet his burden is that of preservation of the record. The record is absent as to preservation of a claim to somehow break out the annual leave issue or to treat it differently in some manner. That is a failure to preserve an issue which falls on Respondent-Appellant. The matter was submitted as an issue for purposes of division of community property. No special significance was assigned to the annual leave issue; at least none appears of record. If Respondent-Appellant wanted special treatment for the annual leave issue then the exhibit offer should have been conditional. Petitioner-Appellee would argue that any lost opportunity to argue for special consideration was due to the inactions of Respondent-Appellant is his failure to alert the Court as to his position of special consideration of annual leave.

However, there is still a third area to be considered. Respondent-Appellant admits that the issue was brought to the attention of the Court, (1-4-12,CD1, Track 1, 8:12-8:53). The Court hearing the position of Respondent-Appellant, the Court responds that the matter was before him for decision, (1-4-12,CD Track 1, 7:18).

The Court takes no further action. It must be viewed that the Court rejected the argument of Respondent-Appellant. Respondent-Appellant has failed in his burden to show why , when viewed in light most favorable to the holding, that the evidence failed to support the division of the annual leave as an aspect/asset of community property. That is the standard of Clark, supra. {13}.

> "Wife is correct that under New Mexico community property law each spouse has a one-half ownership interest in all community income or community assets acquired during the marriage. Under NMSA 1978, Section 40-3-14(A) (Repl. Pamp. 1994)," Irwin, supra at 13.

There is substantial evidence that the Court considered the annual leave as a community asset to be divided. The Facts and Conclusions submitted by Respondent-Appellant, RP 205 (A) (E), indicate that the entire earnings and job related income of the Parties are community property. Such an admission constitutes substantial evidence that the Court could properly consider annual leave.

ISSUE TWO: ALLOCATION OF SURVIVOR BENEFITS AND ISSUE THREE: OPTION 'B' ELECTION

Because these two issues are related, Petitioner-Appellee will consolidate her responses to Respondent-Appellant's Issues Two and Three. Respondent-Appellant suggests that the division of survivor benefits is one of first impression in New Mexico jurisprudence. Petitioner-Appellee would direct the Courts

attention to its previous ruling in Irwin v. Irwin, 1996-NMCA-007, 121 N.M. 266, 910 P.2d 342 (Ct. App. 1995) at 15-22. This is more fully argued below.

Irwin, supra, at 15-23:

> {15} Husband also argues that the trial court erred in denying his request to apportion the distribution of Husband's pension in order to take into consideration the difference in the parties' respective life expectancies and the value of the survivor's benefit provision in the state educational retirement plan awarded to Wife. No New Mexico appellate decision has squarely addressed this issue.
>
> {16} Husband asserts that because his pension is fully vested and matured, and Wife, at the time of divorce, had a greater life expectancy (twenty-one years) than his (seventeen years), the trial court erred in awarding each party one-half of the monthly distribution of such pension. He reasons that instead of giving each party one-half of the monthly pension payment, the amount awarded to Wife should have been adjusted in order to take into consideration the fact that according to statistical probabilities, Wife has a greater life expectancy than he, and because the trial court ordered him to give Wife the survivor's benefit option under the retirement plan, this will result in Wife receiving during her lifetime a greater portion of such pension benefits than Husband.
>
> {17} Husband contends that the survivor's benefit provision under the retirement plan is a valuable feature of the plan and the value of the survivor's benefits must be factored into the trial court's community property distribution formula. Stated another way, he argues that because of the differences in their ages, according to the mortality tables, there is a mathematical probability that Wife will outlive him, and, because the trial court ordered Husband to designate Wife as his beneficiary in the event of his death, Wife will continue to receive a portion of Husband's pension for the remainder of her life and will receive a greater portion of the total earned community pension benefits. See NMSA 1978, § 22-11-29(A)(1) (Repl. Pamp. 1993).
>
> {18} Wife's response to Husband's claim relies in part on this Court's decision in Ruggles v. Ruggles, 114 N.M. 63, 834 P.2d 940 (Ct. App. 1992)

(Ruggles I), rev'd, 116 N.M. 52, 860 P.2d 182 (1995). Ruggles I, in accord with our Supreme Court's decision in Schweitzer v. Burch, 103 N.M. 612, 711 P.2d 889 (1985), held, inter alia, that unless the parties agree otherwise, the trial court in a divorce proceeding must apportion the community interest in a spouse's retirement plan on a "'pay as it comes in' basis." Ruggles I, 114 N.M. at 68, 834 P.2d at 945. We note, however, that Ruggles I was subsequently reversed by our Supreme Court. Under the latter decision the trial court in dividing community assets, including a community pension, should award the nonemployee-spouse a lump-sum of cash or other property equal to the value of the nonemployee's interest in the plan, or in exceptional circumstances the court may order that the nonemployee-spouse be paid a monthly amount equal to his or her share of the pension as it is received. Ruggles v. Ruggles, 116 N.M. 52, 67, 860 P.2d 182, 197 (1993) (Ruggles II). The trial court here chose the latter method of distribution. As observed in Ruggles II, the preferred method of dealing with community interests in a retirement plan, when such benefits are vested or matured at the time of dissolution of marriage, is to value, divide, and distribute them in lump sum or other equivalent distribution at the time of dissolution. Id. at 54, 860 P.2d at 184. However, if this method of division is not practicable, the trial court may utilize other methods of distribution. Id. Neither Ruggles II nor the cases discussed therein, however, specifically addressed the issue of the community interest in a survivor's benefit provision as presented here.

{*271} {19} As observed by the intervenor Board, the effect of the trial court's order directing Husband to name Wife as the person entitled to the survivor's benefit option under the retirement plan will result in a lowering of the monthly retirement benefits which are payable during Husband's lifetime, but, assuming that Wife survives him, will result in her receiving a monthly pension payment during the remainder of her lifetime. Section 22-11-29(A)(1).

{20} A community interest in a pension plan containing a survivor's benefit provision constitutes a valuable portion of the community assets, and the survivor's benefit provision should be considered in valuing and distributing the community interest in the retirement plan. Ruggles II, 116 N.M. at 65 n.13, 67 n.17, 860 P.2d at 195 n.13, 197 n.17 (court should consider the effect of any death benefit on the present value of the retirement plan). See generally Copeland v. Copeland, 91 N.M. 409, 413, 575 P.2d 99, 103 (1978) (value of community interest in retirement benefit plan is property subject to division).

{21} Wife also argues that the trial court's distribution and apportionment of the pension rights should be upheld because the trial court found that Husband improperly represented to the Board that he was a single man so as to deprive her of the survivor's benefit option. Wife is correct that where an employee-spouse has a choice of pension options, he or she should not be permitted by the choice of such options to defeat or reduce the interest of the nonemployee-spouse. See In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 100, 148 Cal. Rptr. 9 (Cal. 1978) (en banc) (spouse should not, by invoking condition within his or her control, be permitted to defeat community interest of other spouse). Here, the trial court ordered Husband to revoke his prior exercise of a retirement option which would have eliminated Wife's right to survivor's benefits. Husband was ordered to name Wife as his survivor under the retirement plan, and he was ordered to repay the Board out of his share of the community property the amount necessary to implement Wife's right to receive survivor's benefits under the plan. The record indicates that Husband subsequently complied with this order. In order to properly allocate the community assets of the parties, the trial court is required to fully determine the value of the retirement plan, including the value of the survivor's benefit provision, and to consider such value in apportioning each party's share of the total retirement benefits.

{22} In sum, we hold that in situations such as those existing here where the community interest in the pension is fully vested and matured, the trial court should value the retirement benefits as a whole, including the value of the survivor's benefit provision of the retirement plan, in order to fully and fairly apportion each party's share of the retirement benefits. Ruggles II, 116 N.M. at 67 n.17, 860 P.2d at 197 n.17. See generally Murray Projector, Valuation of Retirement Benefits in Marriage Dissolutions, 50 L.A. B. Bull. 229, 233-34 (Apr. 1975).

CONCLUSION

{23} The cause is remanded and the trial court is directed to modify its division of community property and allocation of the community indebtedness consistent with the principles discussed herein. The parties shall bear their own costs and attorney's fees on appeal.

There is a failure of argument with regard to Issue Two as presented by Respondent-Appellant. There is no argument. It is good form to note that the issue

may be one of first impression, it is not, Respondent Appellant is in error. The exhaustive opinion of the Irwin Court, conclusively supports the position taken by the trial court. As a consequence Petitioner-Appellee argues that the position of the Court should be sustained.

In fact this issue of award of survivor benefits as been previously decided by this Court and the actions of the trial court are in accordance with this Court's prior ruling. There is no error. Irwin, supra, at 19 and 21.

> {*271} {19} As observed by the intervener Board, the effect of the trial court's order directing Husband to name Wife as the person entitled to the survivor's benefit option under the retirement plan will result in a lowering of the monthly retirement benefits which are payable during Husband's lifetime, but, assuming that Wife survives him, will result in her receiving a monthly pension payment during the remainder of her lifetime. Section 22-11-29(A)(1).
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> {21} ... Wife is correct that where an employee-spouse has a choice of pension options, he or she should not be permitted by the choice of such options to defeat or reduce the interest of the nonemployee-spouse. See In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 100, 148 Cal. Rptr. 9 (Cal. 1978) (en banc) (spouse should not, by invoking condition within his or her control, be permitted to defeat community interest of other spouse).

The argument seems to be that because the oral ruling was not complete in addressing all issues that a subsequent written order, entered after the trial court had an opportunity to reflect and frame its order, that such subsequent action is somehow improper. Respondent-Appellant is simply wrong. Again the standard of review is "abuse of discretion" and "substantial evidence". The requirements of

Clark, supra, apply. Was the claimed error an error of law? That is not the argument advanced. Note the burden Respondent-Appellant bears, he must demonstrate that the ruling of the trial court is not substantiated by the evidence. That is the level of proof required by Clark, supra. The standard is not that there were other options or other that options were more favorable to Respondent-Appellant. But rather, the standard is that there is no evidentiary support in the record to sustain the trial court ruling as it did.

There ample evidence, in fact the most telling is that offered in the Brief in Chief itself. Respondent correctly sets forth the three options under the PERA pay-out. (Brief in Chief Page ten) citing Section 10-11-117 NMSA (2013). Given the options and given the holding in Irwin, supra, at {21}

> {21} ... Wife is correct that where an employee-spouse has a choice of pension options, he or she should not be permitted by the choice of such options to defeat or reduce the interest of the nonemployee-spouse. See In re Marriage of Stenquist, 21 Cal. 3d 779, 582 P.2d 96, 100, 148 Cal. Rptr. 9 (Cal. 1978) (en banc) (spouse should not, by invoking condition within his or her control, be permitted to defeat community interest of other spouse)

the trial court selected the option that in the opinion of the trial court accomplished the directive and principal of law set forth in Irwin, to not reduce the non-employee –spouse interest. The concept being that the right to payment not just the particular sum of money was earned during the existence of the community. That right in New Mexico, a community property state, is that the non-employee spouse be

treated as equally as the employee spouse as possible under the pension disbursement provisions. This was a long duration marriage (RP 248 finding #1). The entire PERA account was found to be community property (RP 251 #27), with the exception of a $5,000 one time contribution. Respondent misses the point that the right to benefits was earned as a community right. The right to a pension pay out was earned as a community.

The change in language between the trial courts Findings of Fact and Conclusions of Law RP 252, and the Order Dividing Retirement, RP 477-480 occurs after a hearing with a representative of the PERA fund. Note, as exhibits accepted in the record were correspondence directed to Respondent-Appellant and correspondence to Petitioner –Appellee. RP 469-474. These items of correspondence make clear that the form of Order as confirmed by the trial court and submitted by Petitioner-Appellee was in compliance with PERA requirements. (RP 473) while that suggested by Respondent-Appellant was not in compliance.

There is no citation as to testimony by Respondent Appellant on the issue of which he complains. Again the standard is, why the testimony given, does not support the ruling. In the absence of any citation of testimony, Appellant fails in his burden. It can be reasonably believed that given the Clark, supra, guidance, that the trial court was attempting to ensure an equitable division of benefits and ensure

that the employee spouse, the one who was the controlling party did not diminish the benefit position of the non-employee spouse. In order to do this the trial court place restrictions upon refunding of contributions. There is no notation to testimony or evidence that this was not proper. It is not an "abuse of discretion" for the trial court to do a reasonable act allowed by law, the selection of Option "B". To argue that there are other options does not sustain the burden of an abuse of discretion argument. Citation to testimony and argument as to why the ruling is not supported by the testimony is the standard to be applied. The evidence that is cited shows substantial evidence to support the trial court action.

Respondent-Appellant's argument as to the assignment of the benefits to the estate of the co-payee, Petitioner-Appellant as a potential bankrupy of the PERA pension is addressed by the very language of Option "B". "When the retired member dies, the designated survivor beneficiary is paid the full amount of the reduced pension until death" section 10-11-117 (2013). The payments by operation of law cease upon the death of the designated survivor. The fact that the co-payee, the non employee spouse may actually receive more than the retire member was addressed in Clark, supra, wherein this Court did not find that objectionable.

In this case there was/ is a significant disparity in income earnings between the Parties. Respondent-Appellant earned a gross monthly income of $4,143.81

while the Petitioner-Appellee earned only $250.75. This disparity as to earning ability continued through the time of the final decree. (RP 31, Interim Allocation of Monthly Income and Expenses). The disparity shown of record constitutes substantial evidence upon which the trial court could rely to make the property allocations it did.

ISSUE FOUR: FAILURE TO INCLUDE THE CHASE CREDIT CARD IN COMMUNITY DEBT ALLOCATION

While it is correct that in the interim division allocation the Chase credit card was treated as a community debt, Respondent-Appellant fails to recognize that the allocation was clearly on an interim basis, a temporary basis pending final determination of the a property settlement. Contrary to the representation of Respondent-Appellant the Hearing Officer never concluded that the attorney fees incurred by Respondent-Appellant were community property. Rather the ruling was at #5 RP 30, Recommendations as to Interim Division of Income and Expenses:

> The Commissioner included the minimum monthly payment of $162 on Husband's credit card. Counsel for Wife argued that this amount should be reduced, as the minimum monthly payment increased substantially as a result of Husband charging the $5000 retainer fee on that credit card. However, legal fees are appropriately included in interim allocation calculations.

Then the Commissioner at #7 RP 30, directed:

> The parties are reminded that they are to follow these recommendations until further order of the Court, in this or in the DM case.

This subsequent directive makes it clear that there was no final determination as to the issue of attorney fees. However, the trial court did make a definitive ruling on the matter of attorney fees. The court entered Order on Attorneys Fees on 31, January, 2013, RP 443. That Order held that each party was to bear their own costs and fees. Given this Order, it is then consistent that the Chase expense be assigned to Respondent-Appellant since a significant portion the of the expense on the bill was represented by the attorney fee expense charged against the card. As to the balance of the card there is no argument. The Order relating to attorney fees RP 443 is substantial evidence that the Court found the Chase bill to be significantly composed of charges relating to Respondent-Appellant attorney fees.

The sole objection is the "abuse" argument of assignment of that debt as a separate debt as opposed to a community property division. Yet of the total debt, even taking the amounts used by Respondent-Appellant himself, Brief in Chief at page 15, Issue Four , a total debt on the card of $10,800, with $5000 of that being Respondents –Appellants charge for his retainer attorney fees. The balance on the card is admitted as being for further attorney fees and a dentist bill for Respondent-Appellant. Brief in Chief at page 16. (TR: 4/710, CD #1, 12:55to 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. In light of the respective assignment of attorney fee and cost expense of the Order of January 31, 2013, RP 443, there is substantial evidence to support the action of the trial court. If the Chase card represents attorney fees and the Order assigns such fees to the respective parties, the allocation of the Chase card debt to Respondent-Appellant is consistent with the Order regarding attorney fees.

ISSUE FIVE: SPOUSAL SUPPORT

Howard v. Howard, 1983-NMSC-050, 100 N.M. 105, 666 P.2d 1252 (S. Ct. 1983) at note #9:

> {9} The award or denial of alimony rests within the sound discretion of the trial court. Burnside v. Burnside, 85 N.M. 517, 514 P.2d 36 (1973). Such an award will be reviewed only to determine whether there was an abuse of discretion in fixing an amount which was contrary to all reason. Fitzgerald v. Fitzgerald, 70 N.M. 11, 369 P.2d 398 (1962).

This holding in Howard, supra, seems to resolve the issues raised by Respondent-Appellant as to spousal support. In reviewing the presentation made by Respondent-Appellant the argument appears to be A) the nature of the spousal support was mislabeled and B) the amount of the spousal support was excessive.

Citing Clark v. Clark, supra, at #7 and #8:

> {7} Spousal support represents a substitute for or a continuation of the right to support that the spouse had during marriage. Ellsworth v. Ellsworth,

1981-NMSC-132, ¶ 1, 97 N.M. 133, 637 P.2d 564. In determining whether to order spousal support, the district court is to consider: (1) the needs of the proposed recipient, (2) the proposed recipient's age, health, and means of self-support; (3) the proposed payor's earning capacity and future earnings; (4) the duration of the marriage; and (5) the amount of property owned by the parties. See Michelson v. Michelson, 1974-NMSC-022, ¶ 8, 86 N.M. 107, 520 P.2d 263. The actual need of the proposed recipient is a focal consideration in determining whether to order spousal support. Mattox v. Mattox, 1987-NMCA-021, ¶ 29, 105 N.M. 479, 734 P.2d 259.

{8} The district court has wide discretion to award spousal support, and its decision will only be set aside if it constitutes an abuse of discretion. See Martinez v. Martinez, 1997-NMCA-125, ¶ 10, 124 N.M. 313, 950 P.2d 286; Ellsworth, 1981-NMSC-132, ¶ 2. "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. Further, to establish an abuse of discretion, "it must be shown that the court's ruling exceeds the bounds of all reason or that the judicial action taken is arbitrary, fanciful, or unreasonable." Meiboom v. Watson, 2000-NMSC-004, ¶ 29, 128 N.M. 536, 994 P.2d 1154 (alteration, internal quotation marks, and citation omitted). "When there exist reasons both supporting and detracting from a [district] court decision, there is no abuse of discretion." Talley v. Talley, 1993-NMCA-003, ¶ 12, 115 N.M. 89, 847 P.2d 323. "Where the court's discretion is fact-based, we must look at the facts relied on by the [district] court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence." Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citation omitted).

The trial court had before it the significant disparity in income between the parties. RP 32 Allocation of Income and Expenses. The trial court had before it the earning ability of the parties. Further, as Respondent-Appellant acknowledges, TR 3-12-13, CD#2, Track 2,41:13 the spousal support was not paid. The support was the means by which the educational process would be financed. Absent the payments there were no educational pursuits. Given this circumstance, as reflected

in the record, cited above, the trial court had the authority to change the nature of the spousal support. Respondent-Appellant fails to consider the change in circumstances, caused by his own actions. The evidentiary presentation demonstrated a different circumstance. That different circumstance, documented in the record, cited above, warranted a change in the nature of the spousal support.

As to the amount awarded, Respondent fails to point out that in reality his net support was only $100 per month in that Petitioner occupied the former community residence paying Respondent- Appellant $400 per month for his portion of the rental value of the former community residence pending sale.

ISSUE SIX: ALLOCATION OF THE $ 779

Respondent-Appellant is confusing two different matters. The $779 payment was the amount which Respondent-Appellant had been ordered to pay in the form of bills and other expenses related to the Interim Order.

The net excess income amount was a different issue. That amount given to Respondent-Appellant would not have been that amount had he complied with the order to pay. If the deduction is not made from the net amount then in fact he recoups what he was to pay under a different obligation, the Interim Support. The deduction is in accordance with the record in that the deduction is an equalization

of a different source of money unrelated to payments due under the Interim Support Order.

ISSUE SEVEN: ADDITIONAL INCOME BY PETITIONER-APPELLEE

The disclosure of additional income was made. (RP 258 #83 Findings of Fact) The argument is that Respondent-Appellant did not share in that income. There is no argument that Respondent –Appellant made a Motion to recover the funds. Respondent-Appellant argues that the funds were community property. Yet there is no argument that the trial court cannot under the equalization doctrine assign income or assets to one party over another to accomplish equalization. This concept of equalization would also apply to the MADAMS funds. Respondent – Appellant does not challenge the authority of the trial court to make an assignment of assets to accomplish equalization but merely complain that he thinks it is unfair. All amounts were disclosed and can be viewed as a form of equalization. The equalizations are justified by the record reflecting the great disparity in ability to earn income. The disclosure together with earning capacity constitute substantial evidence to support the division of community property as done by the trial court.

ISSUE EIGHT: $5000 SEPARATE CONTRIBUTION

Petitioner-Appellant is a bit confused as to the argument of Respondent-Appellant. The relief sought, clarification of an award of separate property which

is not contested does not seem to be a matter for appeal. Even if there were a dispute, which there is not, the various orders of the trial court make the matter clear. RP 252 #31, 32 and 33 make it clear that the trial court is making an equitable division. The trial court clearly identifies the $5,000 contribution as separate property. The Order relating to payments and division of the pension benefits RP 479 -480 make the distinction of community funds and separate funds.

There is no claim of error or abuse as to this point. The matter would be better handled by a Motion addressed to the trial court. There is no dispute as to the $5000 being the separate property of Respondent-Appellee.

CONCLUSION AND RELIEF SOUGHT

This was an extremely contentious domestic proceeding. From the beginning, the overreaching and unwillingness of Respondent-Appellant to recognize the nature of community property resulted in unnecessary litigation. RR #29, RP #37, RP #46, RP #66 and RP #83. These instances are representative of the nature and attitude displayed by Respondent-Appellant.

Now it is apparent that what was a very contentious but reasonably fair property settlement is viewed as unfair and improper because of judicial bias. That is simply untrue. The trial judge was fair and consistent given a difficult situation.

The points of argument, with the exception of Issue Eight, the clarification issue, are all directed to matters of judicial discretion. Respondent-Appellant has argued bias as the reason for alleged "abuse of discretion" rulings. Yet the record when viewed objectively shows positions taken by Respondent-Appellant to be extreme and not reasonable. The record shows substantial evidence before the trial court in the form of exhibits and/or testimony which support a reasonable mind making the conclusions which Respondent-Appellant attacks. Each decision attacked is one supported by substantial evidence and clearly within guidelines of established case law.

The points of appeal advanced by Respondent-Appellant should be denied by this Court. Further, because of the nature of the attacks and unfounded claims of judicial bias as being the grounds for the actions attacked, Petitioner-Appellee should have an award of her attorney fees against Respondent-Appellant for the expense of this appeal.

The determination to grant oral argument is within the discretion of this Court. However, given the nature of this appeal, the Court's resource would be best spent elsewhere.

Respectfully submitted,

S/ Robert R. Fuentes

Robert R. Fuentes

Attorney for Ernestine Esparza/Montoya
P. O. Box 15099
Rio Rancho, NM 87174
(505) 892-5991
FAX: (505) 892-5835