

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

HOPE LIBERTY SALAZAR,
Petitioner-Appellee,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

vs.

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

FEB 10 2011



ANTHONY SALAZAR
Respondent-Appellant.

REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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

Attorney for Respondent -Appellant: Colin Hunter
1905 Wyoming Blvd NE
Albuquerque, NM 87102
(505) 888-2008

Attorney for Petitioner -Appellee: Barbara Johnson
1303 Tijeras Avenue N.W.
Albuquerque, NM 87102
(505) 888-2008

APPELLANT'S REPLY BRIEF

Appellant Anthony Salazar (henceforth "Husband") presents the following Reply Brief in Response to Hope Liberty Salazar's (henceforth "Wife") Answer Brief:

A. Wife's Answer Brief is an Improper Cross Appeal

In her Answer Brief, Wife not only requests that the trial court's findings and conclusions be affirmed, but, at the same time, also requests the case be remanded and that the trial court be ordered to make substantive changes to its finding and conclusions adverse to Husband.

For the first time in her Answer Brief, Wife objects to the timing of Husband's payout to wife. Under the trial court's findings and conclusions, the timing of husband's payout to wife was made contingent on his employment status and when separates from government employment.

The trial court's findings and conclusions 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 QDRO, to be submitted to the PERA Plan Account Administer. (R.P. 124-127)

Under the trial court's findings and conclusions, if Husband retires before November 8, 2011 then a QDRO would be entered and Wife would get her share of Husband's retirement benefits when it gets paid out. If he were still a qualified state employ on November 8, 2011 then he would began paying Wife her interest in his PERA on a monthly basis.

For the first time in her Answer, Wife asserts:

[T]hat portion of the trial court's findings and conclusions that states the 'QDRO' should be entered 'when husband elects to retire' is incorrect, but can be corrected on remand or at the time the trial court determines the amount of husband's monthly payment. Again, this is harmless error by the trial court.

Wife further states this change is "allowed by statute," specifically NMSA § 10-11-136 (1995). This substantive change requested by Wife, for the first time in her Answer Brief, is not harmless error, and, while a trial court may have been permitted to take this approach, the statute cited by Wife did not require it, and it

certainly does not require this Court to order the trial court to take this approach, when the matter is being raised for the first time by Wife in her Answer Brief.

This substantive requested reversal by Wife falls outside the narrow window provided by Rule 12-201(C) NMRA 2003 for an appellee to seek review without cross-appeal. Rule 12-201(C) provides that:

An appellee may, without taking a cross-appeal or filing a docketing statement or statement of the issues, raise issues on appeal for the purpose of enabling the appellate court to affirm, or raise issues for determination only if the appellate court should reverse, in whole or in part, the judgment or order appealed from.

Under this rule, "[a]n appellee need not cross-appeal to raise an issue that would preserve the judgment below." *State of New Mexico Highway & Transp. Dep't v. City of Sunland Park*, 1999-NMCA-143, ¶ 11. However, that is not what Wife is requesting in her Answer.

In the most obvious situation, a cross appeal remains necessary where the appellee seeks to obtain a decision more favorable than that rendered by a lower court. Accordingly, Wife's attempt to attack the trial court's judgment in absence of a cross appeal should be rejected. If Wife wanted to improve her position on appeal, rather than simply maintain it, a cross appeal was a necessity.

B. The Trial Court Did Not Enter an "QDRO"

Wife's assertion that the Court entered an Order Diving Retirement Benefits ("QDRO") is factually inaccurate and misstates the record and the trial court's

findings and conclusions. The record is clear and unambiguous on this point: The Court never entered a QDRO. What the trial court did do was order that: "When Respondent elects to retire, then in that event, counsel shall execute a QDRO, to be submitted to the PERA Plan Account Administer." (R.P. 127)

C. The Trial Court did not Determine the Present Value of Wife's Interest in Husband's Retirement Benefits

Contrary to Wife's assertion otherwise, the trial court did not make a present value determination of Wife's interest in husband's retirement benefits. In a complete misstatement of the record, Wife for the first time asserts that the trial court determined a present value of Wife's interest in Husband's retirement benefits at \$100,000. 00. Wife does not cite to any portion of the record proper or the transcripts to support this assertion and Husband asserts that no support for this contention exists anywhere in the record.

It is an indisputable fact, the trial court never accepted the present value determination of the 11-706 expert and, as a result of the non-determination, the trial court's finding and conclusions delegated this function to the PERA, which Husband argued was not permissible in his Brief and Chief. The trial court's conclusions and findings on this point are clear and unambiguous:

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 QDRO, to be submitted to the PERA Plan Account Administer. (R.P. 126-127)

The Court ordered PERA to perform the calculation because it rejected the 11-706 expert's determination. The transcript of the proceedings and the plain meaning of the language of the trial court's findings and conclusions make this clear.

Husband asserted that the trial court agreed that the trial court had no satisfactory evidence upon which to make a finding of present value and this fact is, in part, why the trial court delegated to the PERA Administrator the responsibility for calculating the Wife's interests at a future date. Again, if Wife wanted to improve her position on appeal, rather than simply maintain it, a cross appeal was a necessity.

D. The Court did not Adopt a Straight Lump-Sum, Present Value, Cash-Out Method of Distribution of Retirement Benefits

Wife began her appellant argument by stating that the trial court did not abuse its discretion by adopting the New Mexico preference for a lump-sum, present value, cash-out method of distribution for retirement benefits.

Except the Court did not adopt a straight forward lump-sum, present value, cash-out-method of retirement benefits. Instead the court adopted a hybrid

method. If Husband did not elect to leave his employment, by November 08, 2011, then in that event, he shall commence to pay directly to Wife her interest on a monthly basis a yet to be determined amount. If Husband elects to retire before then a QDRO would be executed and Wife would receive her interests when it came in. Again, if Wife wanted to improve her position on appeal, rather than simply maintain it, a cross-appeal was a necessity.

F. Wife does not Have a Pending Request for an Award of Attorney Fees Incurred in the District Court

Lastly, Wife requests that the case be remanded to the trial court with instructions to “[C]onsider Wife’s pending request for an award of attorney fees incurred in the District Court. . .” Wife never properly requested and the trial court never addressed the issue of an award of attorney fees.

Wife never filed a motion for attorney fees pursuant to Rule 1-054 NMRA and likewise never included an itemization of time expended. Accordingly, the matter was never properly before the trial court and, as a result, this Court should not entertain Wife’s request to direct the trial court to consider a heretofore nonexistent request for an award of attorney fees.

STATEMENT OF REASONS FOR ORAL ARGUMENT

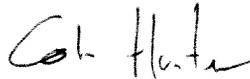
Husband believes that oral argument may assist the Court in deciding the factual and legal issues presented in this appeal. Husband also believes that oral argument may assist the Court in resolving the extensive disagreements between

Husband and Wife regarding what is contained in the record proper and the implications of the trial court's findings and conclusions.

CONCLUSION

For the reasons stated above and in Husband's Brief in Chief, the trial court's finding and conclusions should be reversed with instructions that Wife should not begin receiving her interest in Husband's retirement benefits until it is distributed.

Respectfully Submitted,



Colin Hunter
Attorney for Respondent -Appellant
1905 Wyoming Blvd NE
Albuquerque, NM 87102
505) 888-2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I mailed and faxed copy of the foregoing pleading to all parties of record on this 10th day of February, 2011.



COLIN HUNTER