IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

NOEL O. ONTIVEROS,

Petitioner and Appellee,

vs. Docket No. 29,892

ERICA SILVA,

Respondent and Appellant.

APPELLEE'S ANSWER BRIEF

Don Maddox, District Judge
(Docket No. DM-2008-157-M)
Lea County, New Mexico

FOR THE APPELLEE

Mark Terrence Sánchez
Reagan & Sánchez, P.A.
1819 North Turner, Suite G
Hobbs, New Mexico 88240-3834
Telephone: (575) 397-6551

Laura K. Castillo
Fredlund, Bryan & Castillo
616 East Bender Boulevard
Hobbs, New Mexico 88240
Telephone: (575) 393-5400

I. TABLE OF CONTENTS

II. RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

In referring to the transcript of proceedings, counsel for the Petitioner and Appellee Noel O. Ontiveros uses the date and time notations on the compact disc on which hearings were recorded. The recordings are accessible by playing on The Record Player, a program that can be downloaded from the website for the Fifth Judicial District Court at

http://www.fifthdistrictcourt.com/

[.] References are therefore noted as follows: TP, hearing of January 1, 2008, 1:15 p.m. to 1:30 p.m. When citing to exhibits, counsel for the Appellee will refer to the number of such exhibit, e.g., Father's Exhibit 1, and, if necessary to avoid ambiguity, to the date of the hearing, e.g., Father's Exhibit 1, hearing of January 1, 2009.

In citing to the record proper, counsel for the Appellee uses the numbers assigned by the clerk of the trial court in preparing the record for transmission to the Court of Appeals, e.g, RP, pages 1-20. The Petitioner and Appellee Noel O. Ontiveros will be referred to as the Father, and the Respondent and Appellant Erica Silva will be referred to as the Mother.

III. LIST OF LEGAL ISSUES

A. The Mother's brief fails to attack the trial court's findings of fact and fails to include the evidence bearing on the findings; reviewed under a standard of substantial evidence, the decision of the trial court must be affirmed.

B. The parties did not jointly hold title to property, the parties did not jointly incur debt, the Mother contributed no capital, and under their loose association each of them was free to establish a new companionship or to marry outside the relationship —these facts, supported by substantial evidence, combined with the rule against circumventing the prohibition on common-law marriage, justify affirmance of the decision by the trial court.

II. TABLE OF AUTHORITIES

NEW MEXICO AUTHORITY

Supreme Court Opinions

Opinions of the Court of Appeals

Statutory and Regulatory Law

AUTHORITY FROM OTHER JURISDICTIONS

Opinions

III. SUMMARY OF PROCEEDINGS

A. Nature of the Case

This is an appeal by the Mother from a paternity action brought in the trial court by the Father against the Mother. RP 1 through 13 and 89 through 97. A Judgment of Paternity, filed with the trial court on March 20, 2009, determines that Father and Mother are the parents of twins Omar Ontiveros Jr. and Daisy Ontiveros; gives the parties joint legal custody of the children; adopts a parenting plan agreed to as a result of mediation; sets child support; and reserves jurisdiction over matters involving property. RP 49 through 53. The paternity matters have not been appealed. RP 89 through 97.

On May 26, 2009, the trial court held a final hearing on matters involving property, and at the conclusion of proceedings asked counsel to submit letter briefs setting forth the positions of the parties. RP 59. The trial court issued a letter ruling dated June 15, 2009, in which it determined entitlement to ownership and possession of items of real and personal property. (The letter ruling is not part of the record proper; however it includes the substance of the trial court's findings and conclusions, RP 70 through 73.) The parties then filed requested findings of fact and

conclusions of law. RP 61 through 69. In her requested findings of fact and conclusions of law, Mother sought a determination that the parties were involved in a joint venture or partnership, even though she had not specifically alleged the theories in her answer and counterpetition. RP 7 through 13 and 61 through 64. The trial court made findings of fact and conclusions of law, in which it found that the Father, who was never married to the Mother, held title by himself to a residence on Glorietta Drive in Hobbs (the "Residence" hereinafter) and household furnishings, horses, a horse trailer, an automobile, and personal belongings (together the "Personal Property" hereinafter) and had made all payments on the note secured by a mortgage on the residence. RP 70 through 73. The trial court also concluded that there existed no joint venture or partnership. RP 70 through 73, see, especially, ¶ 5, RP 72.

The trial court then approved a Final Judgment that incorporated its findings of fact and conclusions of law. RP 74 through 76. It is from this order that the Mother appeals. RP 82 through 86.

B. Course of Proceedings

This paternity action involves the usual questions of parentage, custody, visitation, and child support. RP 1 through 13. It also involves questions of

entitlement to ownership and possession of property. RP 61 through 69. The trial court bifurcated proceedings, deciding traditional issues associated with paternity actions first and then deciding property issues. RP 49 through 53. In her requested findings of fact and conclusions of law the Mother urged the trial court to determine that the parties, who were never married, were involved in a joint venture or partnership. RP 61 through 64. Although she claims that she held property in joint tenancy or as tenants in common with the Father, the Mother's initial pleadings do not include a claim that asks for a determination that the Residence and Personal Property were held in a partnership or as property associated with a joint venture. RP 7 though 13. In those pleadings, the Mother does not ask for an accounting of partnership property or for the dissolution of a partnership. RP 7 though 13.

Observing that the Father had obtained title to the Residence and Personal Property in his name only, had paid virtually all household expenses from his earnings, and was solely liable on a note secured by a mortgage on the Residence, the trial court refused to recognize the existence of a joint venture or partnership. RP 70 through 76.

C. Summary of Facts

When hearings were held, the Father and Mother had cohabited for about eight and a half (8 ½) years but were never married. TP, hearing of May 26, 2009, 12:44 p.m. to 12:47 p.m.; hearing of October 16, 2008, 11:30 a.m. to 11:35 a.m.; RP 62, ¶ 6; RP 65, ¶ 8; and RP 70, ¶ 8. They are the parents of a son and daughter who are twins. TP, hearing of May 26, 2009, 11:17 a.m. to 11:19 a.m. The Father alone holds title to the Residence and Personal Property, all of which can be traced to the earnings of the Father or to proceeds of the sale of property owned by the Father before the parties began cohabiting. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; RP 70 through 73. The Father is solely liable on the note secured by a mortgage on the Residence. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end. There was a period of three months when during the pendency of the paternity proceedings the mortgage note on the Residence was not being paid and it was occupied by the Mother but not the Father; both parties attempted to cure the default. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; RP 70 through 73.

The Father has paid virtually all household expenses during the course of the relationship. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; RP 70 through 73. The Mother was employed briefly by Applebee's for three months midway through the relationship but has not otherwise worked; she has made no significant financial contributions to the relationship. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; RP 70 through 73. The parties do not operate a business. TP, all hearings; RP all pages.

D. Findings Supported by Substantial Evidence

The trial court found that the parties were not married, had been involved in a relationship for eight and a half (8 ½) years, had two children, and had cohabited as though they were married. RP 70 through 73, ¶¶ 7, 8, 27, and RP 74 through 76, ¶¶ 2, 4, 9, A and B. These facts are supported by the record. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end.

Although the Mother claimed that she held property in joint tenancy or tenancy in common with the Father, the Residence and Personal Property was purchased by the Father in his name only, and he has sole title to such property. RP 7 through 13,

RP 70 through 73, and RP 74 through 76. The Residence is subject to a mortgage that secures repayment of a note, and the Father is solely liable on the note. RP 70 through 73 and RP 74 through 76. These facts are supported by the record. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end.

The parties have no written partnership or joint venture agreement. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits. There is no express evidence, oral or written, that the parties intended to create a partnership or joint venture. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits. The parties did not place title to the Residence or Personal Property in joint tenancy or in tenancy in common. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits. The Mother had poor credit and —except for a loan from Lea Community Federal Credit Union cosigned with her father, which was more symbolic than real, and in any event represented a lender-borrower relationship under which the Father was liable— she shared with the Father no liability for debts created incurred by the Father. TP, hearing of October 16, 2008,

11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits. There was no evidence that Mother had a contractual right to prevent other partners from being admitted to the partnership she claims exists between her and the Father. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits. There was no evidence that the Mother and Father had equal rights to control and manage property. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits. There was no evidence that the Mother had shared in losses. In fact, it appears that her inability to do so —her poor credit— was undisputed. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits.

IV. ARGUMENTS

A. The Mother's brief fails to attack the trial court's findings of fact and fails to include the evidence bearing on the findings; reviewed under a standard of substantial evidence, the decision of the trial court must be affirmed.

Under subparagraphs (3) and (4) of Rule 12-213(A) of the Rules of Appellate Procedure the trial court's findings of fact are conclusive unless the appellant in his summary of proceedings includes the substance of the evidence bearing upon the

proposition and in his argument identifies with particularity the fact or facts that are not supported by substantial evidence. Failure to do so can be fatal on appeal. *Sánchez v. Saylor*, 2000-NMCA-099, ¶¶ 83 and 84, 129 N.M. 742, 760, 13 P.3d 960, ___.

In this case, the trial found that there existed between the parties no partnership and no joint venture. RP 70 through 73, ¶¶ 22 and (RP 72) ¶ 5; RP 74 through ¶¶ 4, 9, B, and G. These findings are supported by substantial evidence. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits.

If there is substantial evidence to support the trial court's decision, an appellate court will not disturb that decision on appeal. *Sánchez v. Saylor*, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing Insure New Mexico, LLC v. Robert McGonigle*, 2000-NMCA-18, ¶ 8, 128 N.M. 611, 995 P.2d 1053. Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion. Id. In reviewing a claim that the trial court's decision was not supported by substantial evidence, the appellate court views the evidence in the light most favorable to the decision below, resolving all conflicts in the evidence in favor

of that decision and disregarding evidence to the contrary. Id. The appellate court will reverse only when the evidence, or reasonable inferences from the evidence, cannot support the trial court's findings and conclusions. Id.

The appellate court indulges every presumption in favor of the correctness of the findings, conclusions, and judgment of the district court. *Sánchez v. Saylor*, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing Esquibel v. Hallmark*, 92 N.M. 254, 256, 586 P.2d 1083, 1085 (1978). When the appellate court reviews a substantial evidence claim, "the question is not whether substantial evidence would have supported an opposite result; it is whether [the] evidence supports the result reached." *Sánchez v. Saylor*, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing Hernández v. Mead Foods, Inc.*, 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct. App. 1986). There may be other facts that, if believed, might support a different result, but the appellate court disregards them. *Sánchez v. Saylor*, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing Salter v. Jameson*, 105 N.M. 711, 713, 736 P.2d 989, 991 (Ct. App. 1987). "It is for the trial court to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent statements, and determine where the truth lies." *Sánchez v. Saylor*,

2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing López v. Adams*, 116 N.M. 757, 758, 867 P.2d 427, 428 (Ct. App.1993). "The appellate court may not reweigh the evidence [or] substitute its judgment for that of the trier of fact." *Sánchez v. Saylor*, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing Sánchez v. Homestake Mining Co.*, 102 N.M. 473, 476, 697 P.2d 156, 159 (Ct. App.1985). If a finding is made against the party with the burden of proof, the appellate court can affirm if it was rational for the district court to disbelieve the evidence offered by that party. *Sánchez v. Saylor*, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing Sosa v. Empire Roofing Co.*, 110 N.M. 614, 616, 798 P.2d 215, 217 (Ct. App.1990).

Summarized, the evidence is that the parties cohabited for eight and a half (8 ½) years, that they are the parents of twins about eight (8) years old at the time of hearing, that the Mother made no significant contributions to income from employment outside the home, that the Father purchased the Residence and Personal Property from his earnings, that title to the Residence and Real Property is in the Father's name, and that the Father has by himself incurred debt associated with the Residence and Personal Property, the responsibility for which is not shared by the

Mother because of her poor credit. The evidence, reduced to findings of fact and conclusions of law, is supported in the record. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits; RP 70 through 73, ¶¶ 22 and (RP 72) ¶ 5; RP 74 through 76, ¶¶ 4, 9, B, and G.

The evidence and the record supports the result reached by the trial court; its judgment should therefore be affirmed. *Sánchez v. Saylor*, 2000-NMCA-099, ¶ 12, 129 N.M. 742, 748, 13 P.3d 960, ___, *citing Hernández v. Mead Foods, Inc.*, 104 N.M. 67, 71, 716 P.2d 645, 649.

B. The parties did not jointly hold title to property, parties did not jointly incur debt, the Mother contributed no capital, and under their loose association each of them was free to establish a new companionship or to marry outside the relationship —these facts, supported by substantial evidence, combined with the rule against circumventing the prohibition on common-law marriage, justify affirmance of the decision by the trial court.

New Mexico does not recognize common-law marriages. *Merrill v. Davis*, 100 N.M. 552, 553, 673 P.2d 1285, ___ (1983); *Hazelwood v. Hazelwood*, 89 N.M. 659, 661, 556 P.2d 345, ___ (1976); *In re Gabaldón's Estate*, 38 N.M. 392, 393-394, 34

P.2d 672, ___ (1934). Common-law marriage arises from consent and cohabitation, without solemnization before an official. *In re Gabaldón's Estate*, 38 N.M. 392, 392-394, 34 P.2d 672, ___ (1934).

This appeal presents significant difficulties arising from the evolution of the law on marriage and community property and from the strong public policy against the recognition of common-law marriage in New Mexico, as expressed in *Hartford Ins. Co. v. Cline*, 2006-NMSC-033, 140 N.M. 16, 139 P.3d 176:

> Although Executive Order No. 2003-010 may be viewed as some evidence of the public policy in New Mexico, the Order alone, without parallel action by the legislature, is not sufficient proof of the public policy of New Mexico. The predominant voice behind the declaration of public policy of the state must come from the legislature, with an additional supporting role played by the courts and the executive department:
>
> > [I]t is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the legislature. The judiciary, however, is not as directly and politically responsible to the people as are the legislative and executive branches of government. Courts should make policy . . . only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the legislature.

Torres v. State, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995). In addition, "[w]e also have recognized the unique position of the Legislature in creating and developing public policy." *State ex rel. Taylor v. Johnson,* 1998-NMSC-015, ¶ 21, 125 N.M. 343, 961 P.2d 768.

As evidence of legislative intent to extend benefits to domestic partners, Cline and Davis cite to the Uniform Health-Care Decisions Act, NMSA 1978, Sections 24-7A-1 to -18 (1995, as amended through 2000). This Act sets forth in priority order the persons lawfully entitled to make health-care decisions for a patient if the patient has been determined to lack capacity and no agent or guardian has been appointed or is not reasonably available. Section 24-7A-5. The priorities begin with (1) the spouse, followed by (2) "an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being." Section 24-7A-5(B)(2). Other persons authorized through the Act to make health-care decisions in descending priority order include: (3) an adult child, (4) a parent, (5) an adult brother or sister, or (6) a grandparent. See § 24-7A-5(B)(3) - (6). We agree with Cline and Davis that this statute evinces the willingness of the legislature to permit domestic partners to make health care decisions for one another. However, we do not believe this Act demonstrates that the legislature intended to confer general contractual rights to domestic partners similar to those rights enjoyed by married couples, such as automatic inclusion as Class I insureds in automobile policies.

While there have been indications, as cited by Defendants Cline and Davis and noted above, that the executive department and the judiciary might be willing to recognize domestic partners as "family members," the legislature has not given a clear indication that it is ready to define "family members" as including domestic partners for the

purposes of automobile insurance policies. In fact, there have been several failed attempts in recent legislative sessions to pass legislation intended to extend the rights, protections and benefits enjoyed by spouses in a marriage to domestic partners, such as the "Domestic Partner Rights and Responsibility Act" and the "Domestic Partner Benefits" bills, which were both introduced in the 2005 legislative session. See S.B. 576, 47th Legislature, 1st Sess. (N.M. 2005); H.B. 86, 47th Legislature, 1st Sess. (N.M. 2005). These bills enjoyed some level of success in the legislature, with H.B. 86 passing the state House and the Senate Judiciary Committee, but both bills died when the legislature adjourned...

Furthermore, New Mexico does not recognize common law marriage. *Hazelwood v. Hazelwood*, 89 N.M. 659, 556 P.2d 345 (1976). *The absence of the legal state of marriage here means that the presumptions, rights and responsibilities enjoyed by legal spouses do not automatically extend to domestic partners. "If we were to say that the same rights that cannot be gained by common-law marriage may be gained by the implications that flow from cohabitation, then we have circumvented the prohibition of common-law marriage." Merrill v. Davis,* 100 N.M. 552, 554, 673 P.2d 1285, 1287 (1983). Legal rights and responsibilities, such as insuring a domestic partner as a named insured under an automobile insurance policy, must be created by contract when domestic partners cohabit outside the marital relationship. Indeed, Hartford and Interstate concede as much when they state, "if Cline had intended Davis to be covered as a Class I insured under his policies, he could have easily achieved that result by simply listing her as a second named insured," indicating that an informed consumer could easily modify his or her insurance contract to provide the coverage expected for a domestic partner.

(Emphasis added.) *Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶¶ 8, 9, 10, and 13, 140 N.M. 16, ___, 139 P.3d 176, ___. Under the reasoning of our highest court, the recognition of domestic partnerships in New Mexico is hence a matter for the legislature. Id. That reasoning also suggests that until the legislature speaks, rights accorded to married couples should not extend to cohabitants inasmuch as such an action is inconsonant with prohibitions against common-law marriage. Id.

The Mother apparently does not seek recognition of domestic partnership but instead the kind of contractual partnership between cohabitants alluded to in *Domínguez v. Cruz*, 95 N.M. 1, 617 P.2d 1322 (Ct. App.1980), of questionable effect today, unless the parties have expressly contracted, in view of the language in *Hartford, supra*:

> It is well-established that this state does not recognize "common law marriage." *Hazelwood v. Hazelwood*, 89 N.M. 659, 556 P.2d 345 (1976). We note, however, that the presence or absence of the marital state is not relevant in this action. Marriage is a form of civil contract between parties which, in New Mexico, must be licensed. *State v. Lard*, 86 N.M. 71, 519 P.2d 307 (Ct. App.1974). Yet marriage is only one type of civil relationship and the possibility of others clearly exists. *See Marvin v. Marvin*, 18 Cal.3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976), stating:

> '[A]dults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights.... They may agree to pool their earnings and to hold all property acquired during the relationship.' [Citation omitted.] In effect, in this appeal, we are asked to treat an arrangement for mutual support, joint purchase of personal property and distribution of incomes differently than we would treat any other civil relationship because the arrangement is "like a marriage." In our view, if an agreement such as an oral contract can exist between business associates, one can exist between two co-habitating adults who are not married if the essential elements of the contractual relationship are present.'

Domínguez v. Cruz, 95 N.M. 1, 1-2, 617 P.2d 1322, ___ (Ct. App.1980). However, the decision in *Domínguez* rested on findings of fact and conclusions of law as well as a peculiar procedural posture: there, the trial court found that the parties had agreed to own property jointly, and the Court of Appeals observed that on appeal the male cohabitant failed to attack the findings of the trial court. *Domínguez v. Cruz*, 95 N.M. 1, 2, 617 P.2d 1322, ___ (Ct. App. 1980). In this case, the female cohabitant has failed to attack findings and, as in *Domínguez, supra*, such failure justifies affirmance.

In addition, the arrangement between cohabitants described in *Domínguez* contrasts strongly with the arrangement in this case: the Mother cannot assert, in view

of clear documentary and oral evidence to the contrary, that she and the Father intended to own property jointly. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end; all exhibits.

The Mother has cited several authorities that set forth the elements of a partnership or joint venture, which is a partnership formed for a single transaction. *Hansler v. Bass*, 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987), *citing Bard v. Hanson*, 159 Neb. 563, 68 N.W.2d 134 (1955). The law under the authorities cited by the Mother may be summarized as follows:

> a partnership is present when partners have an intent to form a partnership, *Hannett v. Keir*, 30 N.M. 277, 231 P. 1090 (1924); when all partners agree that they are partners, *Anderson Hay & Grain Co. v. Dunn*, 81 N.M. 339, 467 P.2d 5 (1970); when, on appeal with a record where the appellant has not attacked findings, cohabitants have arranged by contract to share, pool, and divide rights and responsibilities, agreeing to own property jointly, *Domínguez v. Cruz*, 95 N.M. 1, 617 P.2d 1322 (Ct. App.1980); when new partners can be admitted only if all existing partners consent to the new admission, *Daily v. Fitzgerald,* 17 N.M. 137, 125 P. 625 (1912), see, also, N. M. Stat. Ann. § 54-1A-401(i) (1996); when between partners [or coventurers] there exists a community of interest, greater than would be present between a lender and borrower merely, in the performance of a common purpose, a joint proprietary interest in the subject matter, a mutual right to control, a right to share in the profits, and a duty to share in any losses which may be sustained, *Hansler v. Bass*, 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987); when partners share equally in the right to control and

> manage partnership business, *Fullerton v. Kaune*, 72 N.M. 201, 382 P.2d 529 (1963); and when partners have a common proprietary interest, a mutual right of control, and share in profits and losses, *Cooper v. Curry*, 92 N.M. 417, 589 P.2d 201 (Ct. App. 1978).

There is some support for the view that a duty to share in losses may be implied from a right to share in profits; however, that view was announced by a court that decided the appeal on principles of substantial evidence. *Quirico v. López*, 106 N.M. 169, 740 P.2d 1153 (1987). Consent appears to be the standard by which status as a partner is determined, both in a new and in an existing partnership:

> A person may become a partner only with the consent of all of the partners.

N. M. Stat. Ann. § 54-1A-401(i) (1996). In addition, black-letter partnership law traces partnership interests to the *capital* contributions of partners and recognizes no credit to a partner for unreimbursed services during the term of the partnership. N. M. Stat. Ann. §§ 54-1A-202(a)(1) and 54-1A-401(h) (1996).

Moreover, the presumptions relating to the right to manage, control, and dispose of property coming into a familial or quasifamilial relationship apply to married couples only. N. M. Stat. Ann. §§ 40-3-12, 40-3-13, and 40-3-14 (1978). Under New Mexico's community property law, earnings attributable to the labor and

talent of a spouse are community property. *DeTevis v. Aragón*, 104 N.M. 793, 798, 727 P.2d 558, 563 (Ct. App. 1986), *citing Douglas v. Douglas*, 101 N.M. 570, 686 P.2d 260 (Ct. App.1984). *See, also*, N. M. Stat. Ann. § 40-2-1 (1978). An unmarried cohabitant, in contrast, has no claim to the earnings of the other cohabitant. *Lozoya v. Sánchez*, 2003-NMSC-009, ¶ 23, 133 N.M. 579, 588, 66 P.3d 948, ___.

Substantial evidence supports the decision of the trial court, and, because the question of how the parties held title to property is a factual rather than a legal issue, the Father believes that this case should be reviewed under that standard. However, even a *de novo* review of the trial court's conclusions of law —flowing from findings of fact unattacked on appeal and firmly supported by substantial evidence— discloses no error of law. *See, e.g., Ramírez v. Ramírez*, 1996-NMCA-116, 122 N.M. 590, 591, 929 P.2d 982, 983. It is undisputed that the parties did not jointly hold title to property as consenting partners, that they did not jointly incur debt, that the Mother contributed no capital, and under their loose association that each of them was free to establish a new companionship or to marry outside the relationship. TP, hearing of October 16, 2008, 11:30 a.m. to end; hearing of May 26, 2009, 11:14 a.m. to end;

all exhibits. See, also, RP 70, ¶ 7; RP 71 ¶¶ 9, 10, 11, 23,24 and 27; RP 75, ¶9; and RP 76, ¶ G.

Under the law set forth in the authorities cited above, an implied partnership or joint venture is not present. A determination to that effect in the Court of Appeals would comport with the restraint exercised by the New Mexico Supreme Court in deferring to the legislature on the recognition of domestic partnerships in this state. *Hartford v. Cline, supra.*

V. CONCLUSION

The decision of the trial court was supported by substantial evidence; the Mother has failed to attack findings, which are therefore conclusive on appeal; New Mexico has a strong policy against common-law marriage and against extending rights of married couples to cohabitants; and the legal requirements for the formation of partnerships and joint ventures include jointly held title, jointly incurred debt, contribution of capital from more than one person, and a constraint on the admission of new partners unless other partners agree. The Mother has failed to carry her burden on appeal. The decision of the trial court should for these reasons be affirmed.

VI. PRAYER FOR RELIEF

For the reasons set forth above, the Husband requests that the Court of Appeals affirm the decision of the trial court and remand this cause for further proceedings, including enforcement of the trial court's decision.

Respectfully submitted,

REAGAN & SÁNCHEZ, P.A.

by Mark Terrence Sánchez

Mark Terrence Sánchez
Attorneys for the Father
1819 North Turner, Suite G
Hobbs, New Mexico 88240-3834
Telephone: (575) 397-6551

FREDLUND, BRYAN & CASTILLO

by Laura K. Castillo

Laura K. Castillo
Attorneys for the Father
616 East Bender Blvd.
Hobbs, NM 88240
Telephone: (575) 393-5400

VII. PROOF OF SERVICE

I hereby certify that I served the foregoing Appellee's Answer Brief on the following persons by placing true and correct copies thereof addressed to them as their addresses appear below in the United States mails, first-class postage prepaid, on February 26, 2010.

Ms. Gina Maestas, Chief Clerk
New Mexico Court of Appeals
237 Don Gaspar Avenue, Room 116
Santa Fe, NM 87501
(by Federal Express with request to file)

Laura K. Castillo
Fredlund, Bryan & Castillo
616 East Bender Blvd.
Hobbs, NM 88240

Max Houston Proctor, Esq.
728 West Silver
Hobbs, NM 88240-2231

Mark Terrence Sánchez