29812

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

NOEL O. ONTIVEROS,

Petitioner-Appellee

VS. **NO.DM-2008-157-M**

ERICA SILVA,

Respondent-Appellant

BRIEF IN CHIEF OF RESPONDENT-APPELLANT

An appeal from the Fifth Judicial District
Court County of Lea State of New Mexico,
The Honorable Don Maddox, presiding.

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RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

In referring to the transcript of proceedings, counsel for the Respondent-Appellant, 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 from the Fifth Judicial District Court at *http://www.fifthdistrictcourt.com/*

References are therefore noted as follows: TP, hearing of May 26, 2009. When citing the exhibits, counsel for the Respondent-Appellant will refer to the number of such exhibit, e.g.

When citing, to the record proper, counsel for the Respondent- Appellant uses the numbers assigned by the Clerk of the Trial Court in preparing the record for transmission to the Court of Appeals, e.g. R.P., Pages.

III

STATEMENT OF THE CASE

The law applicable to the Parties controversy is the Law of the State of New

Mexico, with regard to how property is held by each individual party, in the State of New Mexico. The Parties have never been married and therefore the community property laws of the State of New Mexico are not applicable.

The Parties resided and lived with each other for a period of over eight (8) years. T.P., Hearing of May 26, 2009, (11:17:13 AM). During that time, the Parties were engaged in buying and selling property together with the benefit and help of the Respondent-Appellant's Mother and Father. T.P., May 26, 2009, (11:18:28 AM) (11:52:35 AM) The Parties raised two (2) minor children together. T.P., Hearing May 26, 2009, (11:17:54 AM)

The law applicable to this case is the Law of Partnership, Joint Venture or Enterprise, in the State of New Mexico.

During the time that the Parties were together, Ms. Silva took care of Mr. Ontiveros' every day needs and the needs of the minor children, born from the relationship. T.P. Hearing of May 26, 2009, (12:00:32 PM) Mr. Ontiveros worked day to day and supported Ms. Silva, and the minor children. T.P., Hearing of May 26, 2009, (12:00:32PM). The Parties and children resided together. Id., The Parties shared a joint checking account, in which both Parties could write checks there from, and Respondent-Appellant, was responsible for paying the monthly bills of the Parties, during their relationship or enterprise. T.P., Hearing of May 26, 2009,(12:00:32 PM). The Petitioner-Appellee testified that the only reason that the property located at 101 East Glorietta, Hobbs, New Mexico, which is at issue, was titled in his name, was for the reason that his credit could qualify for the loan and hers could not qualify. T.P., Hearing of May 26, 2009, (12:43:53 PM)

The Parties essentially operated as a married couple, buying and selling property together, maintaining the residence, and maintaining the care, custody, and control of the Parties minor children, together. T.P., Hearing of May 26, 2009, (11:17:13 AM), (11:17:54 AM). It is the Respondent-Appellant's position that the property acquired by the Parties during their relationship is jointly held property as acquired by their joint venture, enterprise or partnership, and should be divided equally between the Parties, even though they were not married during their relationship. The property would necessarily include all the personal property of the Parties, residence of the Parties, and the business started by the Parties during their relationship.

VI

STATEMENT OF THE PROCEEDINGS

On April 4th, 2008, the Petitioner-Appellee filed a Petition to Establish Paternity, Future Responsibility, Custody and Child Support, against the Respondent-Appellant-Erica Silva. R.P., Page 001. The Petitioner filed her Answer to Petition for Paternity and Counter-Petition for Paternity and A Determination and Division of Joint Tenancy Property Held by the Parties. R.P., Page 007-010. The Answer and Counter-Petition was filed on May 15, 2008. Id. The Parties attended the Fifth Judicial District Court's Mediation Program and entered into a Stipulated Parenting Plan, filed of record on July 25, 2008. R.P. Pages 027-028. The Stipulated Parenting Plan was regarding the Parties minor children, NOEL OMAR ONTIVEROS, JR., a male born July 7, 2000, and DAISY ONTIVEROS, a female born July 7, 2000. Id.

A Judgment of Paternity was entered on March 20, 2009, filed of record, and disposed of the legal issues of paternity, joint legal and physical custody over the minor children, child support, arrearage in child support, payment of medical and health insurance premiums and uncovered medical expenses. R.P. Page. 049 Any and all other issues including a division of joint tenancy property, and separate property were deferred, until Final Hearing upon the merits, and until the Parties filed a Statement of Assets and Liabilities pursuant to the Rules of Civil Procedure for Domestic Cases. Id.

On or about May 21, 2009, the Respondent-Appellant filed her Exhibit "A", Property Held as Joint Tenants in Common. T.P., Hearing on May 26, 2009, (12:45:32 P.M.) On or about May 26, 2009, the Petitioner Appellee filed his Petitioner's Statement of Assets and Liabilities. T.P., Hearing of May 26, 2009 (12:45:32 PM)

The case was tried through the Fifth Judicial District Court, County of Lea, State of New Mexico the Honorable Don Maddox, presiding, on May 26, 2009. T.P., Hearing of May 26, 2009, (11:14:31AM), (12:49:22 P.M.)

After conclusion of the Court receiving evidence and hearing testimony and being fully advised in the premises, the Court required both Parties to submit required Proposed Findings of Fact and Conclusions of Law. T.P., Hearing of May 26, 2009, (12:48:36 PM) The Respondent-Appellant submitted her Proposed Findings of Fact and Conclusion of Law on June 25, 2009. R.P., Page 061. The Petitioner-Appellee submitted his Proposed Findings of Fact and Conclusions of Law on the July 6, 2009. R.P., Pages 065. The Court also asked, prior to a decision by the Court, to submit each Party's position of law as applied to the facts and circumstances presented to the Court. T.P., Hearing of May 26,

2009, (12:48:36 PM). The Respondent-Appellant submitted her Position of Law together with cases as applied to the facts and circumstances, on June 1, 2009.

The Court, by Decision Memo, entered its judgment on June 15, 2009. The Court's Findings of Fact and Conclusions of Law were entered on August 6, 2009 and a Final Judgment was entered on or about August 12, 2009. R.P., Pages 070-074.

A Notice of Appeal was filed on September 10, 2009. R.P., Page 082. The District Court found that the residence that the Parties had been residing in was the sole and separate property of the Petitioner-Appellee as well as the Petitioner's vacuum truck business. R.P., Pages 074-077. The Court then divided household goods and furnishings by and between the Parties and incorporated its Finds of Facts and Conclusions of Law in its Final Judgment. R.P., Pages 074-077.

The residence located at 101 East Glorietta was adjudged the sole and separate property of the Petitioner-Appellee and the Respondent-Appellant was ordered to leave the residence no later than August 1, 2009. R.P., Pages 074-077.

The Respondent-Appellant appeals the District Court's Judgment including Findings of Fact and Conclusions of Law as it is not consistent with or supported by the Law of the State of New Mexico with regard to the facts and circumstances of the Parties.

V

ARGUMENT AND AUTHORITIES INTRODUCTION

POINT 1: The District Court Judge misapplied the law to the facts and circumstances of the Parties in not awarding a division of property by and between the Parties pursuant to the law partnership, joint venture or joint enterprise.

The decision of this case will impact, substantially, a large segment of the population in the State of New Mexico, under same or similar circumstances. The Parties involved have never been married and therefore the community property laws of the State of New Mexico are not applicable. The State of New Mexico does not recognize common law marriage, so therefore the Parties cannot be said to have had a common law marriage within the State of New Mexico.

There is a significant population by and between the ages of 18 to 30 in the State of New Mexico, at the present time, who are not married, are not common law married, but reside with each other, have accumulated property, and have had children together.

Such is the case, in the above entitled cause, and some type of relationship has been created by and between the Parties.

As stated by the Trial Judge, these Parties are acting like married people, but are not married. T.P., Hearing May 25, 2009, (12:47:42 PM) The Parties lived together for eight (8) years, accumulated property together during that period, had children together, acted necessarily like husband and wife until the Parties decided to separate and go their separate ways. Id.

As a result of the Parties separation, the Parties left minor children, who were born during their relationship, and left property accumulated by the Parties to be divided by the Court.

It is irrefutable that there has been some type of relationship between the Parties in the last eight and one half (8 ½) years.

The Court's decision to award the residence of the Parties, because it was in the name of the Petitioner-Appellee, to the Petitioner-Appellee, makes no common sense under the fact and circumstances of the Parties relationship. Furthermore, the Court's decision to award the family business to the Petitioner-Appelle, because vehicles were in his sole name, and or indebtedness was in his sole name, makes no common sense under the facts and circumstances of the Parties relationship. Under the circumstances, of the Parties and the far reaching effect of the Trial Court's decision, this Court should recognize that a relationship of the Parties existed, ie., that being in the nature of a partnership, a joint venture, or business enterprise during the eight and one half (8 ½) years of the Parties relationship.

The facts are not in dispute, regarding that the Respondent-Appellant and the Petitioner-Appelle, acted as husband and wife, accumulating property, raising children, and residing in the residence of the Parties. T.R., Hearing on May 27, 2009 (12:43:53 PM). The Parties even filed income tax returns as set forth in Respondent's Exhibit 1., Copies of Tax Returns 2003-2007, evidencing their relationship as husband and wife and or, involved in a partnership or business enterprise. R.P., Filing of Respondent's Exhibits 1., Copies of Tax Returns 2003-2007, December 4, 2009. The declaration by the Parties in their 1040 Federal Internal Revenue Service Reporting Forms shows that the Parties

intention was to share expenses, accumulate income, and receive refunds over the course of their relationship. See Respondent's Exhibit 1., Copy of Tax Returns 2003-2007.

At set forth in ***Anderson Hay and Grain Co. vs. Dunn, 81 N.M. 339 467 P 2 d 5 (1970),*** The intent to create a partnership, a joint venture, maybe implied from the Parties conduct, therefore it is immaterial that the Parties did not designate their relationship as a partnership or joint venture, or even realize that they are partners or joint venturers. By the very filing of the Internal Revenue Service Reporting Forms, together, the Parties have impliedly, by their actions, designated their relationship as a partnership or a joint venture.

As set forth in ***Fullerton vs. Kaune 72 N.M. 201-382 P 2d 529;1963***, The definition of a joint enterprise, joint venture, is whereby there is an agreement between the Parties and the joint venture of the Parties combine their money, property, or time in a conduct of some particular business deal agreeing to share jointly in the profits and losses of the venture, and with the right of mutual control of the subject matter and the enterprise or over the property. One may review the facts and circumstances as set forth in the R.P, and Transcripts of the Proceedings, which shows in fact that the Parties for eight and one half (8 ½) years, combined their money, property, time, and shared jointly in the profits and losses of their venture with the right of mutual control over the subject matter, over their enterprise or over their property during their relationship.

As set forth in ***Cooper vs. Curry, 92 N.M. 417, 421, 589 Pd 201, 205 (Ct. App.)cert. quashed, 92 N.M. 353 588 P2nd 554(1978)***, Elements of a joint venture are as follows:

a. A community of interest to perform a common purpose;

b. A joint proprietary interest in the subject matter;

c. A mutual act of control;

d. A right to share in the profits;

e. An obligation to share in the losses.

Clearly, the Parties, under the facts and circumstances, of this case, as set forth in the Record Proper, combine all elements of a joint venture during their eight and one half (8 ½) years of their relationship. The Respondent- Appellant's relatives even supplied monies and sold property to the Parties for the Parties best interest. The Parties also filed Internal Revenue Service Reporting 1040 Forms, together setting forth expenses, and income of their joint venture. During the eight and one half (8 ½) years of their relationship, the Parties shared profits, they also shared the losses of their venture, and they each had a mutual right to control, as evidenced by the writing of negotiable instruments of the Parties joint checking accounts.

As set forth in ***Quirico vs. Lopez, 106 N.M. 169; 740 P 2d 1153; (1987)*** The absence of an express agreement to share losses is not fatal to a determination that the transaction was a joint venture; mutual liability for losses will be implied from the agreement to share profits. There is no greater evidence as set forth, that the Parties had a joint venture by their 1040 Internal Revenue Service Reporting Forms, as set forth in Respondent's Exhibit 1., Copies of Tax Returns 2003-2207. The Court must view intention of the Parties as disclosed by their actions and in connection with the entire transaction turning into a joint venture or a business enterprise during the eight and one

half (8 ½) years of the Parties relationship. ***Hannett v. Kier, 30 N.M. 277, 231 P 1090 (1924)*** .

As set forth in ***NMSA 54-1A-101 Entitled***, Definitions (6) (7) Uniform Partnership Act (1994) {541A-1202 NMSA 1978}

6. "partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under Section 54-1A-202 NMSA 1978;
7. "partnership agreement" means the agreement, whether written, oral or implied, among the partners concerning the partnership, including amendments to the partnership agreement.

Because of the actions of the Parties impliedly, the Court erroneously held that the residence of the Parties and the business of the Parties was the sole and separate property of the Petitioner-Appellee.

As a consequence of the Court's rulings, the residence of the Parties was awarded to the Petitioner-Appelle, and as a further consequence thereto the Respondent-Appellant was to remove herself and the Parties minor children from the residence, resided in by the Parties over eight and one half year (8 ½) period.

In view of the facts and circumstances of the Parties relationship, the ruling of the Court makes no common sense, if based only on the premise that the Parties (were not married, there was no common law marriage, and therefore there was no community property to be divided by and between the Parties.) The better and more reasoned

premise should have been that the Parties owned properties together during the relationship as joint partners, joint ventures, or accumulated as a joint enterprise by and between the Parties.

The intention of the Parties as disclosed by their actions and in connection with their entire transactions during the eight and one half years (8 ½) of the Parties relationship, evidences a joint venture or business enterprise, which should be divided equally by and between the Parties as to profits, losses, and equity in assets.

CONCLUSION

The Trial Judge misapplied the law to the facts of this case. Clearly the Parties were not married pursuant to the laws of the State of New Mexico, nor had a common law relationship, pursuant to the laws of the State of New Mexico. However by the facts and circumstances of their relationship engaged in a (marital-type) relationship for the period of eight and one half (8 ½) years, bearing children, accumulating property, sharing in the profits and losses of their endeavor or enterprise during their eight and one half (8 ½) years of relationship.

This Court should remand the above entitled case to the Trial Judge, for the entry of an order recognizing that the Parties engaged in a partnership/relationship, joint enterprise relationship, joint venture relationship, and divide the properties in accordance with that business relationship.

RESPECTFULLY SUBMITTED:

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Respondent-Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *BRIEF IN CHIEF* was mailed on this 14th day of January, 2010 to the following:

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I hereby certify that on this 14th day of January, 2010, a true and correct document of the *Brief in Chief* was mailed to:

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