

Appellant’s Brief in Chief in Appeal from Judgment Modifying Alimony

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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Statement Regarding References to the Recorded Transcript:

References to the recorded transcript in this brief are by Time and Date of recording, according to the time stamp given by the *For the Record*TM application given to Appellant’s counsel along with the recording of the trial (e.g., “Tr. 9:56:53AM, April 5, 2007” indicates that the material referenced begins at that time stamp in the *For the Record*TM application).

TABLE OF AUTHORITIES

NEW MEXICO CASES:

Berry v. Meadows, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986).
Cherpelis v. Cherpelis, 121 N.M. 500, 914 P.2d 637 (Ct. App. 1996).
Compton v. Lytle, 2003 NMSC 31, 134 N.M. 586, 591 (N.M. 2003)
Gilmore v. Gilmore, 106 N.M. 788, 750 P.2d 1114, (Ct. App. 1988).
Foutz v. Foutz, 110 N.M. 642, 798 P.2d 592 (Ct. App. 1990).
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Weldon v. Comm. Union Assurance Co., 103 N.M. 522 (N.M. 1985)

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STATUTES

N.M. Stat. Ann. § 40-4-7 (2007).

SUMMARY OF PROCEEDINGS

██████████ (Wife) appeals from the decision of the district court which decreased the amount of alimony she was to receive from ██████████ (Husband); modified the division of Husband's retirement benefits between Husband and Wife; allocated the attorney's fees between the parties; and ordered a judgment against Wife for Husband's overpayment of alimony due to the modification (R.P. 275 – Notice of Appeal; R.P. 272 – Order & J. decreasing alimony, modifying retirement benefits, allocating attorney's fees, and awarding Husband judgment against Wife).

A final decree of divorce was entered in 2000, which incorporated the Marital Settlement Agreement negotiated between the parties (R.P. 12 – Final Decree of Dissolution of Marriage; R.P. 4 – Marital Settlement Agreement, hereinafter MSA). Husband was ordered to pay Wife alimony in the amount of \$3,000 every month so long as Husband's salary did not decrease significantly (R.P. 8). In the event that Husband's salary decreased significantly, the MSA stated that monthly alimony would be adjusted to 30% of Husband's monthly income from his employment (R.P. 8). In addition, the MSA stipulated that Husband's obligation to pay Wife would continue regardless of any future changes in Wife's marital status (R.P. 8). Husband also testified that at the time of the signing of the MSA, he was aware that Wife planned to remarry shortly after the divorce was finalized. (Tr. 9:56:53AM, April 5, 2007)

The parties also agreed to divide Husband's retirement benefits as follows:

“Upon [Husband]'s retirement, [Wife] shall be entitled to 50% of all monetary benefits accruing from [Husband]'s 401K plan as well as 30% of any and all future income resulting from [Husband]'s retirement. For purposes of this agreement, [Husband] shall be deemed to be retired when [Husband] begins to receive benefits from his 401K plan, regardless of whether [Husband] engages in post-retirement employment.” (R.P. 6).

This division of Husband's retirement benefits was also reiterated later in the Marital Settlement Agreement:

“As a compromise distribution of the community property, [Husband] shall receive as his separate property all property mutually agreed, and the following...All of [Husband]'s retirement benefits to which [Wife] is not entitled as provided in this Agreement. In any event, [Husband] shall be entitled to no more than 50% of the monetary benefits from his 401K plan and no more than 70% of all other future benefits resulting from his retirement.” (R.P. 6-8).

In February of 2006, Husband filed his Motion for Modification of the Marital Settlement Agreement to decrease his monthly alimony obligation to Wife and to modify/clarify the division of retirement benefits between the parties (R.P. 18). Husband asserted a substantial change in circumstances as the basis for the modification. In November of 2006, Wife filed her Motion for Upward Modification of Spousal Support due to Husband's increased income (R.P. 119). The trial court heard arguments by counsel for both motions at a trial on the merits on April 5th and 6th, 2007. Both Husband and Wife submitted proposed findings of fact and conclusions of law in accordance with the above arguments in May, 2007 (R.P. 199 – Wife's Findings of Fact and Conclusions of Law; R.P. 208 – Husband's Findings of Fact and Conclusions of Law).

The trial court issued its Findings of Fact and Conclusions of Law on August 23, 2007 (R.P. 260 – Ct.’s Findings of Fact and Concl. of Law). In it, the trial court granted Husband’s motion for modification on the basis of a substantial and material change in circumstances and ordered a reduction in Husband’s spousal support obligation from \$3,000 to \$1,750 per month as for an indefinite duration (R.P. 270). In addition, the court issued Husband a judgment against Wife for the \$1,250 per month overpayment of his spousal support obligation dating back to March of 2006, offsetting his overpayment with his \$8,000 arrearage in spousal support payments plus \$3,791 in interest.

The trial court also granted Husband’s motion to modify or clarify the provision of the Marital Settlement Agreement dividing Husband’s retirement income, finding that the provision was ambiguous (R.P. 269), and that Wife should not be entitled to any portion of any contribution to Husband’s retirement after the date of divorce (R.P. 271). Finally, the trial court ordered the parties to pay their respective attorney’s fees and costs (R.P. 271).

ARGUMENT

I. REDUCTION OF HUSBAND'S ALIMONY OBLIGATION WAS AN ABUSE OF DISCRETION

Under Section 40-4-7, the Court has the discretion to modify orders of spousal support, but only “whenever the circumstances render such [a] change proper.” NMSA § 40-4-7 (2007). Generally, courts retain modification power over support orders when changes are “justified by a substantial change in circumstances.” *Cherpelis v. Cherpelis*, 121 N.M. 500, 504, 914 P.2d 637 (Ct. App. 1996). In this case, the Court abused its discretion in reducing Husband’s alimony obligation because the Court based its assertion that substantial changes had occurred on erroneous considerations. Most importantly, the court considered changes that had clearly been contemplated by the parties in their original Marital Settlement Agreement, and therefore should not have been considered “material” to any request for a change in the support order. In addition, the Court based its consideration of both Wife’s need and Husband’s ability to pay support on facts that were not supported by substantial evidence.

A. Finding of Fact Number 67 that there had been material and substantial changes in circumstances was not supported by substantial evidence.

In finding that there had been “material and substantial changes in circumstances...which warrant[ed] a reduction in Respondent’s spousal support obligation,” the Court failed to specify to what changes in circumstances it was referring. (Ct.’s Findings of Fact and Concl. of Law, Finding # 67). It merely stated that such circumstances existed. Careful review of the record, however, makes it clear that the only substantial changes in circumstances were Wife’s remarriage and changes in Husband’s ability to pay due to changes in his employment and family circumstances. With regard to both of these circumstances, however, the Court made serious errors with respect to its consideration of the evidence. These errors constitute an abuse of discretion in the trial court’s decision to reduce Husband’s alimony obligation.

With respect to Wife’s need, circumstances have not changed substantially since the divorce. The terms on which the parties negotiated her support continue to be true. During the 27 years that the parties were married, the Wife never worked outside of the home, while Respondent was able to earn his doctoral degree in engineering during the marriage. It remains true, as the trial court found, that the Wife “has minimal earning capacity,” and that “[g]iven [her] difficulties with the English language her health, her education, her training and her prior work experience, [she] is only capable of working part time for minimum wage.” (Ct.’s Findings of Fact and Concl. of Law, Finding # 33).

In fact, the only substantial change that has occurred since the parties divorced is the Wife’s remarriage, but that change was foreseen and taken into account in the express terms of the Marital Settlement Agreement (MSA). In considering Wife’s need for spousal support, the trial court considered multiple pieces of evidence about her remarriage, including the length of that marriage (Ct.’s Findings of Fact and Concl. of Law, Finding # 62), the capability of her current husband of supporting her (Finding # 63), and her current husband’s legal duty to support her (Finding # 64). The trial court abused its discretion in considering this evidence, however, since Wife’s remarriage had been contemplated by the parties in the MSA, and therefore could not have risen to the level of a substantial change in circumstances from the time of the original decree.

When the parties negotiated the MSA and decided the amount of spousal support to be paid, there is no question that they contemplated the possibility that Wife would remarry. The Court found that under the explicit terms of the MSA, Husband agreed to pay Wife “alimony in the amount of \$3,000.00 every month as long as Respondent’s salary [did] not decrease significantly,” and that “[Husband’s] obligation to pay alimony to [Wife] [would] remain in effect *regardless of any future changes in [Wife]’s marital status.*” (Ct.’s Findings of Fact and Concl. of Law, Finding # 7) (emphasis added).

In addition to the fact that the plain language of the MSA clearly contemplated Wife’s remarriage, Husband testified at trial that when he signed the Agreement, he was aware that Wife was planning to be married shortly after the divorce was finalized. (Tr. 9:56:53AM, April 5, 2007). Thus, not only did the parties contemplate Wife’s remarriage in the abstract, as an event possible at some distant time in the future, but they negotiated the agreement on spousal support with the knowledge that her remarriage was imminent. Husband had the opportunity at the time of the original Agreement to renegotiate the terms of his spousal support with this knowledge in mind. He failed to do so at the time, or to request modification after Wife was actually remarried, which he testified he knew occurred within 30 days of the divorce decree. (Tr. 3:23:09PM, April 5, 2007). In addition, the trial court had the opportunity to take into consideration this same knowledge when it explicitly incorporated the terms of the MSA into the Final Decree of Dissolution of Marriage. (R.P. 12).

The fact that the parties were aware of the not only real, but imminent, possibility of Wife’s remarriage when they negotiated the original MSA renders the Court’s consideration of this remarriage as a “substantial change in circumstances” *seven years later* a clear abuse of discretion.

In addition to the Wife’s remarriage, the trial court considered certain aspects of the Husband’s earning capacity in determining his ability to pay. The trial court considered factors such as the job stability in his present position (Ct.’s Findings of Fact and Concl. of Law, Finding # 40), and the fact that in Dubai, where the Husband is presently employed, people over 60 may be terminated because of their age (Finding # 41). The Court failed, however, to consider the husband’s future earning capacity, including the possibility of his employment well past the age of 60, as well as the possibility of his continued employment elsewhere even if he were unable to work in Dubai.

The terms of the MSA are clear that Husband’s support obligation will continue “as long as [his] salary does not decrease significantly,” and under those terms, nothing about the Husband’s employment situation has changed substantially enough to warrant a modification of the support order. In fact, his salary has in fact *increased* substantially. The trial court found that at the time of the original decree, husband’s annual income was \$144,000, while his current income is \$155,331. This increase in income would normally weigh in favor of an *increase* in alimony, and certainly does not constitute a substantial change of the kind that would warrant a *reduction* in Husband’s support obligations.

The trial court’s erroneous consideration of Wife’s remarriage, in addition to its errors in assessing certain aspects of Husband’s employment status under the terms of the MSA, lead to the conclusion that the court’s finding of “material and substantial changes” since the time of divorce were unsupported by substantial evidence. This erroneous finding substantially contributed to the court’s abuse of discretion in reducing Husband’s alimony obligations.

B. Finding of Fact Number 46 that Wife had retirement benefits was not supported by substantial evidence.

In considering Wife’s need for the purposes of determining alimony, the Court considered the property division between the parties. In listing Wife’s assets, the Court asserted that Wife had access to her own retirement benefits, apart from her interest in Husband’s 401K. (Ct.’s Findings of Fact and Concl. of Law, Finding # 46), a fact which was not supported by substantial evidence. No evidence was presented indicating that Wife had access to retirement benefits other than the percentage of Husband’s to which the parties agreed in the MSA. Wife does not in fact have *any* retirement benefits of her own, and thus the Court erred in considering these assets in determining her need for the purposes of support payments.

C. Finding of Fact Number 55 that Husband’s disposable income was less than \$500 was not supported by substantial evidence.

In addition to erroneously considering Wife’s nonexistent retirement income in its consideration of her need, the Court also erred in its findings regarding Husband’s ability to pay support. The trial court made an erroneous finding that Husband’s disposable income amounted to less than \$500 after making all of the payments required by the Final Decree of Dissolution of Marriage, as well as providing all necessary expenses for his family. Husband’s testimony, along with his 2006 W-2 form, both presented at trial, indicated otherwise.

According to Husband’s testimony, his monthly expenses are those found in *Figure 1*, which total \$10,573.59, while his income, accounting for deductions, totals \$11,449.84. (Tr. 10:27:32AM to 10:55:46AM, April 5, 2007). This leaves a total of nearly \$900.00 disposable income each month, even after paying Wife the original support amount (see *Figure 1*). During the trial the Court calculated that Husband’s remaining disposable income net of monthly expenses was \$322.48, (Tr. 10:54:33AM, April 5, 2007). Presumably the Court was referring to this amount when it determined in Finding of Fact Number 55 that Husband’s disposable income was less than \$500. This Finding is clearly erroneous, as it is unsupported by the evidence presented at trial, and the Court’s consideration of this Finding in its contemplation of Husband’s ability to pay support contributed to the Court’s error in reducing Husband’s alimony payment.

Wages		Monthly Expenses			
Annual wages	\$ 155,331.41	Rent in Dubai	\$ 1,803.65	License Fee	\$ 14.00
		Mortgage on Condo in L.A.	\$ 900.00	Spousal Support	\$ 3,000.00
Medicare Tax Withheld	\$ 2,252.31	Taxes on rent in Dubai	\$ 94.23	Groceries	\$ 420.00
Soc. Sec. Tax Withheld	\$ 5,840.40	Taxes on Condo in L.A.	\$ 152.96	Meals Out	\$ 150.00
12a Deductions	\$ 9,840.66	Utilities	\$ 120.00	Clothing	\$ 85.00
Total Annual deductions	\$ 17,933.37	Yard Maintenance	\$ 27.00	Daycare	\$ 375.00
		Phone	\$ 79.00	Met Life	\$ 59.08
Annual Wages / 12 months	\$ 12,944.28	Internet	\$ 68.76	Babysitting	\$ 109.58
Annual Deductions / 12 months	\$ 1,494.45	Furniture	\$ 131.00	Personal Care	\$ 60.00
Monthly Income After Deductions	\$ 11,449.84	Rental car	\$ 500.00	Entertainment / Vacations	\$ 275.00
		Auto Insurance	\$ 68.49	Miscellaneous	\$ 11.00
		Gasoline	\$ 175.34	Elder Parent Care	\$ 300.00
Monthly Income Minus Monthly Expenses	\$ 876.25	Maintenance & Repairs	\$ 32.00	Atty's Fees	\$ 1,542.00
		Parking	\$ 20.50	Total Expenses	\$ 10,573.59

Figure 1.

II. MODIFICATION OF THE RETIREMENT BENEFITS PROPERTY DIVISION PROVISION OF THE MARITAL SETTLEMENT AGREEMENT WAS AN ABUSE OF DISCRETION.

The Supreme Court of New Mexico has held that “a voluntary property settlement between divorcing spouses, dividing their community property as they see fit, is sacrosanct and cannot be upset by the court granting the divorce, absent fraud, duress, mistake, breach of fiduciary duty, or other similar equitable ground for invalidating an agreement.” *Ruggles v. Ruggles*, 116 N.M. 52, 70, 860 P.2d 182 (N.M. 1993). Notwithstanding the fact that none of these grounds were present in this case, the trial court modified the provision of the Marital Settlement Agreement dividing Husband’s retirement income, holding that Wife was “not entitled to any portion of any contribution to Respondent’s retirement made subsequent to the date of divorce” (Ct.’s Findings of Fact and Concl. of Law, Concl. of Law # 9), despite clear language to the contrary. In doing so, the trial court abused its discretion by unnecessarily violating the parties’ “sacrosanct” agreement and overreaching its jurisdiction under Section 40-4-7.

Even if the trial court retained any jurisdiction over the provisions regarding property, its finding that Article II was ambiguous was unsupported by substantial evidence, and thus its modification of the MSA remained an abuse of discretion.

A. The Court lacked jurisdiction under Section 40-4-7 to modify the Marital Settlement Agreement with respect to the division of property.

Section 40-4-7 outlines very specific situations in which the court retains jurisdiction to modify its judgments in divorce proceedings. It allows the court to modify “any order *in respect to spousal support*” awarded under certain circumstances, NMSA § 40-4-7(B)(2)(a) (2007) (emphasis added), and allows the court to retain jurisdiction over proceedings that involve periodic spousal support payments where the parties were married more than twenty years. *Id* § 40-4-7(E)(10). With respect to the division of property, however, the statute gives the court no such continued jurisdiction, and New Mexico courts have generally held that “while a court has jurisdiction after the judgment to enforce that judgment, it lacks jurisdiction to modify the judgment except under limited circumstances.” *Hall v. Hall*, 114 N.M. 378, 388, 838 P.2d 995 (N.M. Ct. App. 1992).

In this case, the trial court found that the plain language of the MSA entitled the Wife to “50% of all monetary benefits accruing from Respondent’s 401K plan as well as 30% of any and all *future* income resulting from Respondent’s retirement.” (Ct.’s Findings of Fact and Concl. of Law, Finding # 5) (emphasis added). Despite this clear language, however, the Husband filed a Motion for Modification of Marital Settlement Agreement (R.P.) which requested that the trial court modify Article II of the MSA regarding the division of his retirement income. In granting that motion, the trial court determined that the Wife was “not entitled to any portion of any contribution to Respondent’s retirement made subsequent to the date of divorce.” (Concl. of Law # 9). Although the trial court claimed that it was granting a motion “to modify *or clarify*” the provision, the conclusion was clearly a *modification*, and *not* a clarification or enforcement, of an original judgment regarding property, and hence fell beyond the court’s jurisdiction under Section 40-4-7.

There is some New Mexico case law that indicates that a court may retain jurisdiction over retirement benefits divided in a certain manner, but even that law does not allow a court to make the modifications that the trial court did in this case. In *Palmer v. Palmer*, the Court of Appeals outlined two different methods for the division of retirement benefits between spouses upon divorce. 2006 NMCA 112, 142 P.3d 971 (N.M. Ct. App. 2006). The first it called the “lump sum” method, which entails an “attempt to determine the value of the retirement benefits at the

time of divorce and divide the assets of the community taking that value into account.” *Id* at 975. The second method is the “pay as it comes in” method, under which the court “distribute[s] the benefits when the employee spouse actually receives them.” *Id* ¶ 14. The second method is also known as the “reserved jurisdiction” method, because the court reserves jurisdiction to distribute the benefits as they are received.

Although it seems clear that under *Palmer*, the MSA in this case clearly intended that the division of retirement benefits be through the “pay as it comes in” method, rather than the “lump sum” method, the jurisdiction reserved to the court is solely for the *distribution* of benefits, since the “*formula for division* is determined at the time of divorce.” *Id* ¶ 15 (emphasis added). Thus it is clear that even if the court maintained this “reserved jurisdiction” over the retirement benefits, the court overstepped that jurisdiction by modifying the parties’ original agreement with respect to the division of Husband’s retirement income.

B. Finding of Fact Number 71 was not supported by substantial evidence because the language of the Marital Settlement Agreement was unambiguous with respect to the division of Respondent’s retirement income.

“A contract is deemed ambiguous only if it is reasonably and fairly susceptible of different constructions.” *Ruggles v. Ruggles*, 116 N.M. 52, 69, 860 P.2d 182 (N.M. 1993). In this case, the language of MSA could not have been clearer. The plain language of the Agreement, as noted by the trial court, read as follows:

Upon Respondent’s retirement Petitioner shall be entitled to 50% of all monetary benefits accruing from Respondent’s 401K plan as well as 30% of any and all future income resulting from Respondent’s retirement. For purposes of this agreement, Respondent shall be deemed to have retired when Respondent begins to receive benefits from his 401K plan, regardless of whether Respondent engages in post-retirement employment. (Ct.’s Findings of Fact and Concl. of Law, Finding # 5).

The trial court deemed this language “ambiguous” in a later finding because it found the language to conflict with Article VI of the MSA, which provided that “[a]ny property acquired by either party after the effective date shall be the sole and separate property of the party acquiring the same.” (R.P. Finding # 72).

The trial court’s finding that this language was “ambiguous” finds no support in the evidence. The plain language itself makes it clear that the parties intended that Wife should be entitled to Husband’s retirement income not only as it was valued at the time of the divorce, but as it would be valued at the time of retirement. Both the use of the term “benefits *accruing*” (emphasis added) and the term “future income” clearly indicate the intent of the parties for Wife’s entitlement to be prospective in nature. In addition, the trial court found that the MSA further states that “[i]n any event, [Husband] shall be entitled to *no more than 50%* of the monetary benefits from his 401K and *not more than 70%* of *all other future benefits* resulting from his retirement.” (R.P. Finding # 9) (emphasis added). This language further clarifies the intent of the parties that Wife’s entitlement should extend into the future, further undermining any argument of ambiguity.

Furthermore, the trial court’s finding of ambiguity runs contrary to settled principles of contract interpretation, which hold that a court will “not interpret a contract such that [its]

interpretation of a particular clause or provision will annul other parts of the document, unless there is no other reasonable interpretation.” *Public Serv. Co. v. Diamond D Constr. Co.*, 2001 NMCA 82, ¶ 19, 131 N.M. 100 (N.M. Ct. App. 2001). In this case, there was clearly another reasonable interpretation: that the specific provisions regarding retirement income served as an exception to the general language regarding property acquired after the divorce.

The trial court’s finding of ambiguity was also inconsistent with general principles of interpretation which hold that where provisions conflict, and one is more specific, the specific governs over the general. *See, e.g., Compton v. Lytle*, 2003 NMSC 31, ¶ 16, 134 N.M. 586, 591 (N.M. 2003) (applying the specific-general principle to statutory interpretation); *Weldon v. Comm. Union Assurance Co.*, 103 N.M. 522, 524 (N.M. 1985) (applying the specific-general rule to insurance policies); *Gies v. City of Gering*, 13 Neb. App. 424, 440 (Neb. Ct. App. 2005) (“general contract interpretation recognizes the rule that a more specific provision controls over a general term”).

The trial court’s finding that Article II of the MSA was ambiguous is unsupported by substantial evidence, and constitutes an abuse of discretion that should be reversed in favor of maintaining the parties’ “sacrosanct” voluntary agreement.

III. THE TRIAL COURT’S DENIAL OF WIFE’S REQUEST FOR ATTORNEY FEES WAS AN ABUSE OF DISCRETION.

“The award of attorney fees under *Section 40-4-7(A)* rests within the sound discretion of the trial court. That discretion is not unrestrained however, and the trial court, in determining whether to award attorney fees, should consider various factors, including the most important one of economic disparity between the parties.” *Gomez v. Gomez*, 119 N.M. 755, 759, 895 P.2d 277 (Ct. App. 1995) (citing *Gilmore v. Gilmore*, 106 N.M. 788, 750 P.2d 1114, (Ct. App. 1988); *Roberts v. Wright*, 117 N.M. 294, 297, 871 P.2d 390 (Ct. App. 1994); and *Foutz v. Foutz*, 110 N.M. 642, 798 P.2d 592 (Ct. App. 1990).

In this case, the economic disparity between the two parties is extreme. As the court itself found, Wife’s “sole source of financial support” is Husband’s spousal support payment of \$3,000 per month. (R.P. , ¶ 26). The trial court went on to find that Wife “has a minimal earning capacity,” and her “difficulties with the English language, her health, her education, her training and her prior work experience” mean that she is “only capable of working part time for minimum wage.” (R.P. , ¶ 33). Husband, on the other hand, holds a Ph.D and earns an annual salary of \$155,331 as an engineer (Findings #'s 35, 36, & 39).

As the Court of Appeals pointed out in *Berry v. Meadows*, “the supreme court [has] emphasized the need for the trial court to consider the relative financial status of the parties and the ability of the parties to employ counsel.” 103 N.M. 761, 713, P.2d 1017 (Ct. App. 1986) (citing *Henderson v. Lekvold*, 95 N.M. 288, 621 P.2d 505 (N.M. 1980)). “Thus it is appropriate for the trial court to consider the parties’ access to financial resources when exercising its discretion in awarding attorneys’ fees.” *Monsanto v. Monsanto*, 119 N.M. 678, 681, 894 P.2d 1034 (Ct. App. 1995).

In reducing Husband’s spousal support obligation by over forty percent, however, the trial court considerably reduced Wife’s access to the financial resources necessary to pay her attorneys’ fees. The trial court also awarded Husband a judgment against Wife in the amount of

\$5,709, which served to further increase the economic disparity between the parties and reduce Wife's ability to pay her attorneys' fees.

The fact that the trial court ordered Wife to pay attorney's fees, and then essentially took away her ability to pay them in the same judgment, constitutes an abuse of discretion.

In addition, the trial court considered both parties' abilities to pay when deciding the issue of attorney fees. As discussed earlier, however, the trial court's findings of facts were erroneous on issues that directly impact the parties' abilities to pay. First, the trial court erred in its determination of how much disposable income Husband has available, and its findings on that issue were unsupported by the evidence (see Section I(C) above). Second, the trial court erred in its finding that Wife's assets include her retirement benefits (see Section I(B) above). Since both of these erroneous findings impact the parties' abilities to pay, and both, when corrected, tend to run against the trial court's denial of Wife's request for attorney fees, the trial court's errors on these findings also contribute to its abuse of discretion in failing to award Wife attorney fees.

IV. THE TRIAL COURT'S CALCULATION OF THE JUDGMENT AGAINST WIFE WAS ERRONEOUS

Because the trial court's reduction of Husband's spousal support payment was retroactive effective March 1, 2006, the court awarded Husband a judgment against Wife for the amount of his overpayment. (R.P., ¶ 7 & 8). The court proceeded to offset that judgment, however, by the amount of Husband's accrued arrearage in support payments, which totaled \$8,000, as well as the interest that had accrued on those arrearages, totaling \$3,791. The balance that the trial court ended with, however, was erroneous. Instead of \$5,709, which was the total awarded to Husband (R.P. , ¶ 8), the balance should have been \$4,459 (see *Figure 2* below).

Amount of "overpayment" (\$1,250 x 13 months)	\$ 16,250.00
Total Husband owed Wife (\$8,000 + \$3,791)	\$ 11,791.00
Difference =	\$ 4,459.00

Figure 2