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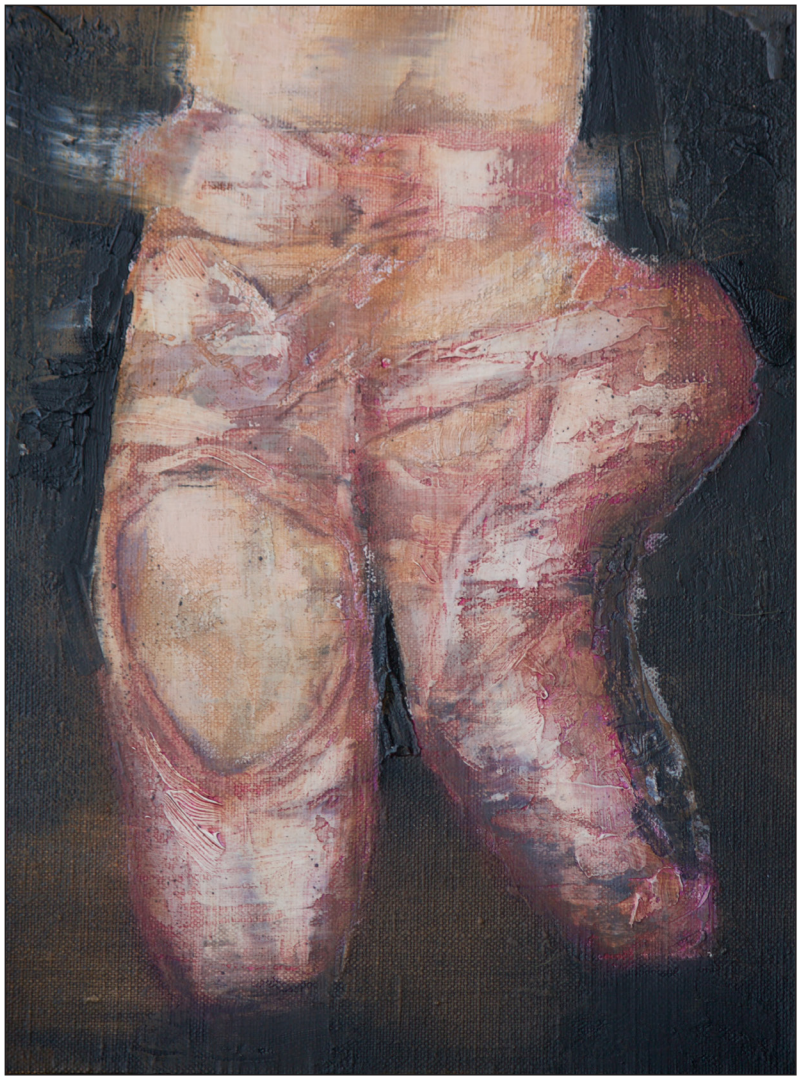
Bar Bulletin

August 15, 2018 • Volume 57, No. 33



Forgotten Slippers by Ann-Marie Brown www.annmariebrownpaintings.com

Inside This Issue

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22
Consumer Debt/Bankruptcy
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5
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Civil Legal Clinic
10 a.m.–1 p.m., First Judicial District Court, Santa Fe, 1-877-266-9861

About Cover Image and Artist: Ann-Marie Brown is a Canadian painter who lives on the edge of a forest with her husband, son, dog and the occasional bear. Her encaustic and oil paintings have been exhibited across Canada and the United States.

Notices

Court News

New Mexico Supreme Court Supreme Court Law Library

Hours and Information

The Supreme Court Law Library is open to anyone in the legal community or public at large seeking legal information. The Library has a comprehensive legal research collection of print and online resources, and a staff of professional librarians is available to assist. Search the online catalog at https://n10045.eos-intl.net/N10045/OPAC/Index.aspx. Call 505-827-4850, Click https://lawlibrary.nmcourts.gov or email libref@nmcourts.gov for more information. Visit the Law Library at the Supreme Court Building, 237 Don Gaspar, Santa Fe, NM 87501. The Library is open Monday-Friday, 8 a.m.–5 p.m. Reference and circulation is open Monday–Friday 8 a.m.–4:45 p.m.

Sixth Judicial District Court

Judicial Vacancy Nominees

The Sixth Judicial District Court Nominating Commission convened on July 27 in Silver City and completed its evaluation of the one applicant for the vacancy on the Sixth Judicial District Court. The Commission recommends the following applicant to Governor Susana Martinez: **William Perkins**.

Bernalillo County Metropolitan Court

Court Closure Notice:

Bernalillo County Metropolitan Court will be closed from 11 a.m.-5 p.m. on Aug. 24 for the Court's annual employee conference. Misdemeanor Custody Arraignments will commence at 8:30 a.m. and will be immediately followed by Felony First Appearances. Traffic Arraignments and Preliminary Hearings will not be held that day. The outside Bonding Window will be open from 11 a.m.-5 p.m. for the filing of emergency motions and for posting bonds. The conference is sponsored by the New Mexico Judicial Education Center and paid for by fees collected by state courts.

Professionalism Tip

With respect to the courts and other tribunals:

I will refrain from filing frivolous motions

State Bar News

Appellate Practice Section

Court of Appeals Candidate Forum

The Appellate Practice Section will host a Candidate Forum for the eight candidates running for the New Mexico Court of Appeals this November. Save the date for 4-6 p.m., Oct. 18, at the State Bar Center in Albuquerque.

Committee on Women and the Legal Profession

Aaron Wolf Honored with Justice Pamela B. Minzner Outstanding Advocacy for Women Award

Join the Committee on Women and the Legal Profession for the presentation of the 2017 Justice Pamela B. Minzner Outstanding Advocacy for Women Award to Aaron Wolf for his work providing legal assistance to women who are underrepresented or under served and for his egalitarian approach towards working with women colleagues. The award reception will be held from 5:30–7:30 p.m., Aug. 30, at the Albuquerque Country Club. Hors d'oeuvres will be provided and a cash bar will be available. R.S.V.P.s are appreciated. Contact Committee co-chair Quiana Salazar-King at salazar-king@law.unm.edu.

New Mexico Judges and Lawyers Assistance Program

Attorney Support Groups

- Aug. 20, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets the third Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Sept. 10, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Oct. 1, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group normally meets the first Monday of the month but will skip September due to the Labor Day holiday.)

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

UNM School of Law

Law Library

Summer 2018 Hours

Through Aug. 19

Building and Circulation

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	noon–6 p.m.

Reference

Monday–Friday	9 a.m.–6 p.m.

Other Bars

New Mexico Black Lawyers Association

Annual Poolside Brunch

The New Mexico Black Lawyers Association invites members to attend its annual poolside brunch on Aug. 25, 11 a.m.-2 p.m. at 1605 Los Alamos Ave. SW, Albuquerque, N.M., 87104. Join NMBLA for food, drinks and fun! Tickets are only $35 and can be purchased on the New Mexico Black Lawyers Association Facebook page or by emailing nmblacklawyers@gmail.com. Each brunch ticket comes with an entry into our raffle for $500. There will only be 100 tickets sold, act fast. NMBLA also accepting sponsorships for this event. For information about sponsorships, email nmblacklawyers@gmail.com.

New Mexico Defense Lawyers Association

Save the Date—Women in the Courtroom VII CLE Seminar

The New Mexico Defense Lawyers Association proudly presents Part VII of "Women in the Courtroom," a dynamic seminar designed for New Mexico lawyers. Join us Aug. 17, at the Jewish Community Center of Greater Albuquerque for this year's full-day CLE seminar. Register online at nmdla.org. For more information contact nmdefense@nmdla.org.

New Mexico Criminal Defense Lawyers Association

Defending Sex Offense Cases: Tips, Trials and Legal Update

This comprehensive seminar will teach attendees how to successfully litigate cases involving sexual assault and related allegations. On the schedule: state and federal law updates on sex offenses, exploitation and human trafficking; dissecting safehouse interviews and sane exams; sex offenders supervision and the first amendment; and trial tips. A special defender wellness presentation will help prepare you for handling trial and these kinds of cases. A membership party will follow. The event will be held Aug. 17, in Las Cruces for 5.5 G, 1.0 E.P., CLE credits. Visit www.nmcdla.org for more info.

Other Bars

Workers' Compensation Administration

Judicial Reappointment

The director of the Workers' Compensation Administration , Darin A. Childers, is considering the reappointment of Judge Reginald "Reg" Woodard to a five-year term pursuant to NMSA 1978, Section 52-5-2 (2004). Judge Woodard's term expires on Nov. 24. Anyone who wants to submit written comments concerning Judge Woodard's performance may do so until 5 p.m. on Aug. 31. All written comments submitted per this notice shall remain confidential. Comments may be addressed to WCA Director Darin A. Childers, PO Box 27198, Albuquerque, New Mexico 87125-7198 or faxed to 505-841-6813.

The Oliver Seth American Inn of Court

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from September to May. The meetings always address a pertinent topic and conclude with dinner. Attorneys who or reside/practice in Northern New Mexico and wish to enhance skills and meet some pretty good lawyers too, send a letter of interest to Honorable Paul J. Kelly, Jr. U.S. Court of Appeals - Tenth Circuit Post Office Box 10113 Santa Fe, New Mexico 87504-6113.

Submit announcements for publication in the *Bar Bulletin* to **notices@nmbar.org** by noon Monday the week prior to publication.

New Mexico Commission on Access to Justice

The next meeting of the Commission On Access to Justice is at Noon-4 p.m. on Sept. 7, at the State Bar of New Mexico. Commission goals include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness, and encouraging and supporting pro bono work by attorneys. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at www.accesstojustice.nmcourts.gov

Legal Education

August

15 **Joint Ventures Agreements in Business, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

15 **Discover Hidden and Undocumented Google Search Secrets**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

17 **Practice Management Skills for Success (2018)**
5.0 G, 1.0 EP
Webcast/Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Where the Rubber Meets the Road: The Intersection of the Rules of Civil Procedure and the Rules of Professional Conduct (2017)**
1.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Lawyers' Duty of Fairness and Honesty (Fair or Foul: 2016)**
2.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

17 **Time's Up! Women in the Courtroom—VII: Power In Numbers**
5.0 G, 1.0 EP
Live Seminar, Albuquerque
New Mexico Defense Lawyers Association
www.nmdla.org

21 **Trust and Estate Update: Recent Statutory Changes that are Overlooked and Underutilized**
1.0 G
Webcast/Live Seminar, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

21 **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Technology: Time, Task, Document and Email Management**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Selling to Consumers: Sales, Finance, Warranty & Collection Law, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

22 **Gross Receipts Tax Fundamentals and Strategies**
6.0 G
Live Seminar, Albuquerque
NBI, Inc.
www.nbi-sems.com

23-24 **11th Annual Legal Service Providers Conference: Poverty and the Law**
10.0 G, 2.0 EP
Live Seminar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Advanced Google Search for Lawyers**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

24 **Women's Leadership Summit**
5.0 G
Live Seminar, Albuquerque
New Mexico Society of CPAs
505-246-1699

28 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 1**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **Construction Contracts: Drafting Issues, Spotting Red Flags and Allocating Risk, Part 2**
1.0 G
Teleseminar
Center for Legal Education of NMSBF
www.nmbar.org

29 **The Exclusive Rights (and Revenue) You Get With Music**
1.0 G
Live Webinar
Center for Legal Education of NMSBF
www.nmbar.org

29 **2017 Real Property Institute**
6.0 G, 1.0 EP
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **New Mexico Liquor Law for 2017 and Beyond**
3.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

29 **Risky Business: Avoiding Discrimination When Completing the Form I-9 or E-Verify Process**
1.5 G
Live Replay, Albuquerque
Center for Legal Education of NMSBF
www.nmbar.org

Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

Mark Reynolds, Chief Clerk New Mexico Court of Appeals
PO Box 2008 • Santa Fe, NM 87504-2008 • 505-827-4925

Effective August 3, 2018

PUBLISHED OPINIONS

A-1-CA-35930	Gandydancer v. Rock House	Affirm	07/30/2018

UNPUBLISHED OPINIONS

A-1-CA-34681	State v. R Houston	Reverse/Remand	07/30/2018
A-1-CA-34930	State v. V Gallegos	Affirm	07/31/2018
A-1-CA-35021	State v. A Martinez	Affirm	07/31/2018
A-1-CA-36497	State v. D Sanchez	Affirm	07/31/2018
A-1-CA-36859	B Dunn v. L Dunn	Affirm	07/31/2018
A-1-CA-36864	Pennymac Mortgage v. P Salazar	Dismiss	07/31/2018
A-1-CA-36892	A Tolaymat v. M A Tarakji	Affirm	07/31/2018
A-1-CA-36998	HSD v. J Huffman n/k/a N Lachey	Affirm	07/31/2018
A-1-CA-37164	M Boehmer v. Project Management	Dismiss	07/31/2018
A-1-CA-35695	State v. F Rangel-Vasquez	Affirm	08/01/2018
A-1-CA-36854	J Wilcox v. Management Training	Reverse	08/01/2018
A-1-CA-36938	State v. N Candia	Affirm	08/01/2018

Slip Opinions for Published Opinions may be read on the Court's website:
http://coa.nmcourts.gov/documents/index.htm

Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

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Recent Rule-Making Activity

As Updated by the Clerk of the New Mexico Supreme Court

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Effective August 15, 2018

Pending Proposed Rule Changes Open for Comment:

Comment Deadline

Please see the summary of proposed rule amendments published in the July 11, 2018, issue of the Bar Bulletin. The actual text of the proposed rule amendments can be viewed on the Supreme Court's website at the address noted below. The comment deadline for those proposed rule amendments is August 1, 2018.

Recently Approved Rule Changes Since Release of 2018 NMRA:

		Effective Date
Rules of Civil Procedure for the District Courts		
1-003.2	Commencement of action; guardianship and conservatorship information sheet	07/01/2018
1-079	Public inspection and sealing of court records	07/01/2018
1-079.1	Public inspection and sealing of court records; guardianship and conservatorship proceedings	07/01/2018
1-088.1	Peremptory excusal of a district judge; recusal; procedure for exercising	03/01/2018
1-104	Courtroom closure	07/01/2018
1-140	Guardianship and conservatorship proceedings; mandatory use forms	07/01/2018
1-141	Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records	07/01/2018
Civil Forms		
4-992	Guardianship and conservatorship information sheet; petition	07/01/2018
4-993	Order identifying persons entitled to notice and access to court records	07/01/2018
4-994	Order to secure or waive bond	07/01/2018
4-995	Conservator's notice of bonding	07/01/2018
4-995.1	Corporate surety statement	07/01/2018
4-996	Guardian's report	07/01/2018
4-997	Conservator's inventory	07/01/2018
4-998	Conservator's report	07/01/2018
Rules of Criminal Procedure for the District Courts		
5-302A	Grand jury proceedings	04/23/2018

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov. To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.

Certiorari Denied, May 4, 2018, No. S-1-SC-36945

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-042

No. A-1-CA-34523 (filed January 31, 2018)

JOHNNY A. GABRIELE,
Petitioner-Appellant,
v.
DEBORRAH L. GABRIELE, a/k/a
DEBBIE GABRIELE,
Respondent-Appellee.

APPEAL FROM THE DISTRICT COURT OF COLFAX COUNTY
Sarah C. Backus, District Judge

Michael L. Danoff
Michael Danoff & Associates, P.C.
Albuquerque, New Mexico
for Appellant

Terrence R. Kamm
Kamm & McConnell, L.L.C.
Raton, New Mexico
for Appellee

Opinion

J. Miles Hanisee, Judge

{1} The formal opinion filed in this case on January 3, 2018, is hereby withdrawn, and this opinion is substituted in its place. **{2}** Husband appeals the district court's division of property that resulted from the parties' dissolution of marriage. Specifically, Husband contends the district court erred by failing to distribute all property and finding that four sole and separate property agreements that Husband signed shortly before Husband filed for divorce were valid. For the reasons discussed below, we affirm in part, reverse in part, and remand for further proceedings.

BACKGROUND

{3} Johnny Gabriele (Husband) and Deborrah Gabriele (Wife) were married on February 15, 2006. Husband filed a petition for divorce on July 22, 2013. A trial was held to determine how the marital property would be divided, after which the parties submitted proposed findings of fact and conclusions of law. The district court issued its decision and order in which it granted dissolution of the parties' marriage and distributed the marital property, including real estate, cash, other assets, and liabilities. **{4}** Husband appealed and makes the following claims: (1) the district court erred by concluding that the sole and separate property agreements (SSPAs) that Husband signed were valid, enforceable contracts; (2) the district court erred in its distribution of the parties' marital residence—known as the Francis Home—which Husband had acquired prior to marriage; and (3) the district court failed to address Husband's claimed interests—both separate and community—in various other property, including a 1955 Chevrolet that Wife had given him as a birthday gift, a property located in Texas (the Texas property), and Wife's income earned during the marriage. We address each of Husband's claims in turn, reserving discussion of more specific facts when pertinent to our legal analysis.

I. Whether the Four SSPAs Are Valid, Enforceable Contracts

A. Additional Facts

{5} In 2007, Wife—who had a background as a nursing home administrator and a Master's degree in business—started an assisted living business called Colfax Senior Care, LLC (CSC), a limited liability company (LLC) in which Wife was the single registered member. CSC purchased a residential property (262 Francis) out of which to operate an assisted living facility for $92,000. Wife testified that the "start-up money" for CSC came from $50,000 of her separate savings and a $20,000 loan from her children. Husband testified that he contributed $29,000 from his smaller retirement fund for the down payment on 262 Francis and that he participated in the business by helping to remodel and maintain the facility. Wife disputed that Husband contributed any funds to purchase 262 Francis. The district court resolved this dispute in Husband's favor, finding that Husband "contributed approximately $29,000 of his separate funds to [the] purchase [of 262 Francis]."

{6} CSC was expanded in 2009-10 in order to meet growing demand in the community, and the business purchased a lot (251 Francis) on which to construct a new, larger facility. Both parties agree that Husband contributed $10,000 from his retirement savings to purchase 251 Francis and loaned CSC $80,000 to construct the new facility. CSC took out a $528,000 bank loan to finance the remainder of the construction project. 262 Francis was sold after 251 Francis opened.

{7} In July 2012, Wife started making plans to expand the business again, including construction of a new, $1.5 million facility. According to Wife, when she discussed her expansion plans with Husband, he was "adamant that [she] not do it" because he was concerned about "[s]o much liability[,]" both financial and legal. Wife consulted a business lawyer about forming a new LLC for the expanded business that could be Wife's separate property in order to release Husband from all liability associated with the new business. The lawyer helped Wife "draw up the new LLC" and informed her that she "could create a document" that would put "all the liability, financial, legal" on Wife. Wife testified that Husband was "very pleased that there was . . . a way that we could both have what we wanted. It was a good compromise."

{8} On April 25, 2013, the parties signed four SSPAs. In addition to two SSPAs designating, respectively, the new LLC (Colfax Senior Living, LLC (CSL)) and the property for the new facility (the State Street property) as the separate property of Wife, there were two SSPAs that designated CSC (the existing LLC) and 251 Francis (the existing assisted living facility) as Wife's separate property. The SSPAs provided that Husband "expressly waives, relinquishes, and releases any and all right, title, claim, or interest in and to" both pieces of real property as well as the LLCs'

[1]The record does not specify CSL's date of creation.

"Membership Interest." After Husband and Wife signed the SSPAs, Wife continued with the development of CSL.[1] She purchased the State Street property in May 2013 for $120,000 with money from "[her] business" and two bank loans. However, once divorce proceedings commenced in July 2013, Wife decided not to go forward with the expansion project.

{9} At the time of trial, CSC was under contract for sale for $620,000. Subsequent to trial, after the sales transaction was completed and CSC's debts were paid off, $257,461.26 was placed in the registry of the court. Regarding CSL, Wife testified that she believed the plans for the State Street project that she had commissioned were sellable but that she was not aware of anyone who was interested in purchasing the project. She also described CSL's outstanding debts, but the district court did not make any specific findings or conclusions regarding the amount of those debts.

{10} Husband argued to the district court that he "received no consideration" under the SSPAs, thereby invalidating them, and that Wife "breached her fiduciary duty to [Husband] by her conversion of community property to her sole and separate property." Wife contended that "[t]he consideration for the [SSPAs] was to free [Husband] of all liability and debt associated with the business then and in the future, which was considerable." The district court found that Husband "desired to be relieved of responsibility for existing debt and liability of both companies, and future debt and liability of the businesses and the property" and concluded that "[b]y signing the agreements [Husband] was relieved of responsibility for the debt as well as the liability."[2] As such, the district court awarded Wife, among other things, 251 Francis, the State Street property, CSL and its assets, and CSC—including the entire $257,461.26 of proceeds from the sale of CSC—all subject to debt thereon.

B. Analysis

{11} Husband relies on general principles of contract law and argues that the district court erred in concluding that the SSPAs are valid because (1) they lacked mutual assent, and (2) Wife's promise of releasing Husband from liability was illusory, thus they also lacked valid consideration. Wife relies on the definition of "separate property" contained in NMSA 1978, Section 40-3-8 (1990), to support the validity of the designation of the businesses and properties identified in the SSPAs as Wife's separate property.[3] Neither party has addressed the import of NMSA 1978, Section 40-2-2 (1907), wherein the Legislature statutorily set forth the contract rights of married persons. We begin with the statute. *See Hughes v. Hughes*, 1981-NMSC-110, ¶ 19, 96 N.M. 719, 634 P.2d 1271 ("In New Mexico, transactions between husbands and wives are governed by Section 40-2-2[.]"); *Primus v. Clark*, 1944-NMSC-030, ¶ 13, 48 N.M. 240, 149 P.2d 535 (explaining that "[t]ransactions between husband and wife are controlled by the . . . statute" and analyzing the challenged agreement within the context of the statute).

1. Section 40-2-2: Contract Rights of Married Persons

{12} In New Mexico, "[e]ither husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might, if unmarried[.]" Section 40-2-2. However, such transactions between spouses are subject to "the general rules of common law which control the actions of persons occupying confidential relations with each other." *Id.* Interpreting this statute, our Supreme Court has held that transactions between spouses in which one spouse "secured a decided advantage over the [other]" are "presumptively fraudulent." *Beals v. Ares*, 1919-NMSC-067, ¶¶ 73, 82, 90, 25 N.M. 459, 185 P. 780. That is because a husband and wife are fiduciaries upon whom are imposed " 'the obligation of exercising the highest good faith towards [each other] in any dealing between them, and [which] preclude[s each] from obtaining any advantage over [the other] by means of any misrepresentation, concealment, or adverse pressure.' " *Id.* ¶ 76 (quoting with approval *Dolliver v. Dolliver*, 30 P. 4, 5 (Cal. 1892) (in bank)); *see Primus*, 1944-NMSC-030, ¶ 15 (explaining that the statute governing the contract rights of married persons "creates in law a fiduciary relationship between husband and wife"). In such cases, in order to overcome the presumption of fraud, it is the duty of the spouse who has gained the advantage "to show (a) the payment of an adequate consideration, (b) full disclosure by him [or her] as to the rights of the [other] and the value and extent of the community property, and (c) that the [other] had competent and independent advice in conferring the benefits upon [him or her]." *Beals*, 1919-NMSC-067, ¶ 90. Where the advantaged spouse fails to make this showing, the district court is to "set aside the [agreements] . . . in question, to ascertain the value and extent of the community property, . . . and to divide the community property between the parties[.]" *Id.* ¶ 93.

2. Whether Wife Gained a Decided Advantage Over Husband, Thereby Creating a Presumption of Constructive Fraud

{13} Where one spouse receives grossly inadequate consideration for forfeiting his or her interest in community property, the other spouse is considered to have gained a decided advantage through constructive fraud,[4] rendering the transaction voidable. *See Primus*, 1944-NMSC-030, ¶¶ 12, 21, 22 (concluding that there existed a "legal presumption of constructive fraud" where the wife received only $1,000 from the community estate worth $50,000); *Beals*, 1919-NMSC-067, ¶¶ 72, 82 (concluding that the husband had "secured a decided advantage over the wife" where the wife received only $4,000 and her interest in

[2]The district court made these findings in its amended decision and order as a result of this Court's order of limited remand for entry of detailed findings of fact concerning whether each of the four SSPAs was supported by consideration.

[3]As this Court has previously explained, Section 40-3-8 merely "deals with classes of property and not with how property may be changed to a different class." *Estate of Fletcher v. Jackson*, 1980-NMCA-054, ¶ 45, 94 N.M. 572, 613 P.2d 714; *see* § 40-3-8(A)(5) (defining one type of "separate property" as "property designated as separate property by a written agreement between the spouses, including a deed or other written agreement concerning property held by the spouses . . . [,] in which the property is designated as separate property"). Wife fails to explain how coming within the statutory classification of "separate property" alone renders the SSPAs—which attempted to transmute community property to separate property—valid, enforceable contracts. To the extent Wife argues that Section 40-3-8(A)(5) is dispositive of the question whether the properties identified in the SSPAs are Wife's separate property, we reject such argument as unsupported by any authority. *See Curry v. Great Nw. Ins. Co.*, 2014-NMCA-031, ¶ 28, 320 P.3d 482 ("Where a party cites no authority to support an argument, we may assume no such authority exists.").

[4]Constructive fraud is "a breach of a legal or equitable duty irrespective of the moral guilt of the fraud feasor, and it is not necessary that actual dishonesty of purpose nor intent to deceive exist." *Snell v. Cornehl*, 1970-NMSC-029, ¶ 8, 81 N.M. 248, 466 P.2d 94.

the subject property was between $35,000 and $75,000). Our Supreme Court has also found constructive fraud where one spouse "had and took an advantage in the matters surrounding the conveyance of . . . property." *Trujillo v. Padilla*, 1968-NMSC-090, ¶ 6, 79 N.M. 245, 442 P.2d 203. The main question we are concerned with is whether the parties were "bargaining on an equal footing" in satisfaction of their fiduciary duties to one another. *Primus*, 1944-NMSC-030, ¶¶ 15, 21. Where the evidence indicates they were not, we may find constructive fraud.

{14} Here, the record indicates that the net value of CSC was $257,461.26 as reflected by the proceeds placed in the registry of the court following the sale and payment of debts of CSC. Thus, Husband's one-half community interest was approximately $128,000. Under the SSPAs, Husband received $0 in exchange for conveying his interest to Wife. Even assuming Husband received the non-monetary "consideration" of being relieved of all financial and legal liability by signing the SSPAs as the district court found, Husband's considerable forfeiture supports a presumption of constructive fraud. Additionally, we note that prior to asking Husband to sign the SSPAs, Wife had consulted a divorce attorney as well as a business attorney, and it was Wife who drafted and provided Husband with the SSPAs. The record contains no indication that Husband—though he had a chance to review the SSPAs prior to signing them—had independent counsel regarding the agreements. Based on the foregoing facts, along with our statutory authority and legal precedent, we conclude that Wife gained a decided advantage over Husband through the SSPAs. We, therefore, next consider whether Wife met her burden to show (a) provision of adequate consideration, (b) full disclosure to Husband as to his rights and extent of the community property, and (c) that Husband had competent and independent legal advice prior to signing the SSPAs. *See Beals*, 1919-NMSC-067, ¶ 90.

3. Whether Wife Met Her Burden of Proving She Met Her Fiduciary Duties in Entering Into the SSPAs With Husband

{15} The parties primarily focus their arguments on whether there was sufficient evidence of consideration to support the contract. However, we need not decide the question of consideration because, even assuming arguendo that the district court properly concluded that the SSPAs were supported by adequate consideration, there is no evidence that (1) Wife disclosed to Husband the value of the properties and businesses to be conveyed or Husband's rights—and, importantly, potential liability[5]—therein; and (2) Husband had received competent and independent advice prior to signing the SSPAs. *See Beals*, 1919-NMSC-067, ¶ 90. The undisputed facts of this case are that Wife had a Master's degree in business, was an experienced business woman, and was in charge of managing and decision-making for the business. It is also undisputed that Husband had a high school education and was not involved in the management of the business, other than providing general maintenance work at the assisted living facility. Particularly in light of this power imbalance and Wife's dominant position respecting the business, it was imperative that Wife disclose to Husband the business's assets and his rights therein and that Husband have independent counsel in considering the ramifications of entering into the SSPAs. *See Fate v. Owens*, 2001-NMCA-040, ¶ 25, 130 N.M. 503, 27 P.3d 990 ("[A] fiduciary[] is required to fully disclose material facts and information relating to the [fiduciary relationship] . . . even if the [one to whom the duty is owed] ha[s] not asked for the information. . . . The duty of disclosure is a hallmark of a fiduciary relationship." (internal quotation marks and citations omitted)). *Cf. Unser v. Unser*, 1974-NMSC-063, ¶¶ 16-17, 86 N.M. 648, 526 P.2d 790 (explaining that in order for there to be presumptive fraud, one party must be "in the dominant position[,]" and finding no presumption of fraud because it was "questionable as to whether the relationship of dominance" existed where the wife had been "advised by independent legal counsel" prior to signing the agreement).

{16} Because the record indicates that Wife failed to meet her burden to overcome the presumption of constructive fraud, we hold that the SSPAs—even if validly formed—were voidable at Husband's election and must be set aside. *See Trujillo*, 1968-NMSC-090, ¶ 7; *Beals*, 1919-NMSC-067, ¶ 93. We reverse the district court's distribution of the properties covered by the SSPAs and remand for further proceedings in light of this opinion.

II. Whether the District Court Erred in Distributing the Equity in the Francis Home

{17} Husband argues that the district court erred in its distribution of the Francis Home by failing to award him his $30,000 separate property interest in the home, which was the down payment he made when he purchased the home prior to meeting Wife. Wife argues that there was substantial evidence to support the district court's findings and conclusions regarding distribution of the Francis Home, which were premised upon the conclusion that whatever separate interest Husband possessed in the Francis Home was transmuted to a community interest. We agree with Husband that the district court erred.

A. Standard of Review

{18} To the extent Husband argues that there is an insufficient factual basis to support the district court's findings of fact regarding the Francis Home, "we review the evidence in the light most favorable to support the [district] court's findings, resolving all conflicts and indulging all permissible inferences in favor of the decision below." *Jones v. Schoellkopf*, 2005-NMCA-124, ¶ 8, 138 N.M. 477, 122 P.3d 844. However, to the extent Husband attacks the district court's conclusions of law respecting the Francis Home—including those findings that function as conclusions—our review is de novo. *See id.*; *see*

[5]Given that CSC and CSL were set up as single-member LLCs with Wife as the member and that the real property at issue (251 Francis and the State Street property) was the property of the LLCs, we fail to see—and the parties fail to explain—how Husband had any personal financial responsibility or legal liability for any of the subject properties to begin with. *See* NMSA 1978, § 53-19-13 (1993) (providing that "the debts, obligations and liabilities of a [LLC], whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the [LLC]"). To the extent he did not, this would support Husband's argument that the district court erred in concluding that the SSPAs were supported by consideration. *See Hurley v. Hurley*, 1980-NMSC-067, ¶ 16, 94 N.M. 641, 615 P.2d 256 (explaining that "a promise to do what a party is already obligated by contract or law to do is not sufficient consideration for a promise made in return"), *overruled on other grounds by Ellsworth v. Ellsworth*, 1981-NMSC-132, ¶ 6, 97 N.M. 133, 637 P.2d 564.

also Benavidez v. Benavidez, 2006-NMCA-138, ¶ 21, 140 N.M. 637, 145 P.3d 117 ("We are deferential to facts found by the district court, but we review conclusions of law de novo."). We also review de novo questions of law, including threshold determinations regarding whether property is separate or community or whether the community has acquired an interest in separate property. *See Arnold v. Arnold*, 2003-NMCA-114, ¶ 6, 134 N.M. 381, 77 P.3d 285 (explaining that "the threshold question of whether [the h]usband's accumulated vacation leave and sick leave are community property is a question of law, which we review de novo"); *Ross v. Negron-Ross*, 2017-NMCA-061, ¶ 7, 400 P.3d 305 (explaining that "[w]hether the district court erred in finding no community lien on the Spring Creek residence [(separate property)] is a question of law that we review de novo").

B. The District Court Erred in Concluding That the Francis Home Was Transmuted From Husband's Separate Property to Community Property

{19} The district court entered the following findings of fact regarding the Francis Home:

> 5. Prior to the marriage, in 2004, [Husband] had purchased [the Francis Home]. The purchase price was $147,000 and [Husband] had made an approximate $30,000 down-payment.
>
> . . . .
>
> 14. Soon after the marriage, [Husband] transferred the [Francis Home] to himself and [Wife]. The parties refinanced the debt on the house to get a more favorable interest rate. [Husband] testified that the reason he did so was because he believed marriage was "sacred." This act transmuted the [Francis Home] into community property.
>
> 15. During the marriage, the parties made the mortgage payments and made approximately $40,000 worth of improvements to the house. At the time of trial the value of the [Francis Home] was $150,000. No appraisal was offered. ([Husband] estimated the value at $140,000 and [Wife] estimated the value at $160,000.) There is $94,000 owing on the mortgage. The equity in the property is approximately $56,000.

From these findings, the district court concluded, "The Francis [Home] is community property. The parties are entitled to one-half each of the $56,000 equity in the house."

{20} The first flaw in the district court's conclusion is that Wife never contended that Husband's separate interest in the Francis Home had been transmuted into community property. Wife's claims and contentions—as well as her opening and closing arguments to the district court—reveal that Wife believed she was entitled to either (1) reimbursement of one-half of the $40,000 of improvements the community made to the Francis Home, or (2) one-half of the remaining "community equity" in the home after Husband was repaid his down payment.[6] In other words, the position Wife took and her proposed distribution of property evince her belief that the Francis Home was Husband's separate property.[7] *See Trego v. Scott*, 1998-NMCA-080, ¶ 5, 125 N.M. 323, 961 P.2d 168 (explaining that the wife had "conceded, by her chosen method of calculating the monies due her, that the properties in dispute remained separate" because the wife's "own computations" revealed that she assumed the community's interest was an apportioned interest in the increased value of the separate property). As we discuss below, Wife only contended that there was a community lien on the Francis Home, which would entitle Wife to a different, lesser interest in the Francis Home than would the conclusion that a transmutation occurred.

{21} The second and more problematic flaw in the district court's conclusion that a transmutation had occurred is that it is contrary to New Mexico case law, which establishes a high legal standard for proving transmutation. "Transmutation is a general term used to describe arrangements between spouses to convert property from separate property to community property and vice versa." *Allen v. Allen*, 1982-NMSC-118, ¶ 13, 98 N.M. 652, 651 P.2d 1296. While New Mexico recognizes transmutation, this Court has explained that "[t]he spouse who argues in favor of transmutation carries what has been variously described as a 'difficult' or a 'heavy' burden[.]" *Macias*, 1998-NMCA-170, ¶ 12. Transmutation must be proven by "clear and convincing evidence of spousal intent to do so." *Id.* A deed, other document showing joint title, or mortgage note alone is not conclusive of intent to transmute. *See id.* ¶ 13 (explaining that "a deed or other document showing joint title does not transmute separate property if there is no intent to do so" and that "a mortgage may be evidence of such intent to transmute, but it is not conclusive and is not, by itself, substantial evidence of intent to transmute" (omission,

[6]We note that two days after submitting her written closing argument, Wife filed a document titled "Supplement to Closing Argument" in which she cited in her "list of authorities" this Court's decision in *Macias v. Macias*, 1998-NMCA-170, 126 N.M. 303, 968 P.2d 814, and provided the following parenthetical explanations: "(Separate property, the [Francis Home], placed in joint ownership along with intent to transmute results in transmutation) and (Court should consider factors 1) deed to community, 2) mortgage by community, 3) intent of grantor, 4) community payment of mortgage, taxes, maintenance and upgrades) and (property acquired during marriage presumed to be community and burden rests with protesting spouse to prove otherwise)." However, Wife cited no other authority and offered no additional argument or analysis to support a finding of transmutation. Wife's appellate arguments—which make no reference to transmutation or cite any relevant authority to defend the district court's conclusion that a transmutation occurred—further support our understanding that it was never Wife's position that the Francis Home was transmuted. *See State ex rel. Human Servs. Dep't v. Staples* (*In re Doe*), 1982-NMSC-099, ¶¶ 3, 5, 98 N.M. 540, 650 P.2d 824 (explaining that appellate courts should not reach issues that the parties have failed to raise in their briefs).

[7]Even though Wife asserted in her proposed findings that Husband deeded the Francis Home to himself and Wife "with the intent to make the property community property[,]"within that same proposed finding Wife suggests the inherently contradictory conclusion that "[i]f [Husband] gets credit for his $32,000 down payment there is still $34,000 in community equity." In other words, Wife's assertion as to Husband's intent cannot be reconciled with the way in which she calculated her claimed interest in the Francis Home, i.e., as a community lien rather than an undivided one-half interest. If Wife was truly claiming that Husband intended to transmute the Francis Home from his separate property to community property, Wife would have claimed one-half interest in the full equity of the home rather than the full equity minus Husband's down payment (separate property).

emphasis, internal quotation marks, and citation omitted)). Proving "transmutation requires evidence of intent on the part of the grantor spouse." *Id.*

{22} Here, the district court's findings make clear that it relied on three things to support its conclusion that transmutation occurred: (1) that soon after marriage, Husband "transferred the [Francis Home] to himself and [Wife;]" (2) that Husband and Wife "refinanced the debt on the house to get a more favorable interest rate[;]" and (3) Husband's statement that he "thought being married was kind of a sacred thing" when asked by his attorney what his intention was when he added Wife's name to the deed. Nowhere did the district court find that Husband intended to make a gift to Wife or create in her an undivided one-half interest in the Francis Home. And indeed, under New Mexico transmutation law and given (1) the absence of evidence in the record indicating that Husband had the requisite intent to effect transmutation, (2) the fact that Wife conceded that the Francis Home was Husband's separate property, and (3) that Wife employed a litigation strategy designed to protect only her interest in the community lien on the property, it could not have. We hold that the district court's conclusion that the Francis Home was transmuted from Husband's separate property into community property is incorrect as a matter of law. Thus, we reverse the district court's award to Wife of an automatic one-half interest in the Francis Home's equity. The question that remains, then, is to what portion—if any—of the equity in the Francis Home is Wife entitled?

C. Acquisition of a Community Interest in Separate Property and Apportionment Thereof

{23} As previously noted, Wife's position during trial was that the marital community had acquired an interest in the Francis Home of which Wife was entitled to one-half. Wife's primary argument in this regard was that the community had contributed $40,000 to various home improvements—including the addition of "hardwood floors, a large nice deck, some new doors, new window treatments, kitchen, bathroom, sinks, countertops, kitchen appliances, furniture"—that Wife believed increased the value of the home. Wife initially contended she should "recover [one-half] of the remodel cost to" the Francis Home, or $20,000. In her closing argument, Wife added a claim for one-half "the community equity" in the home, which she calculated to be $17,000. Wife arrived at the figure of $17,000 by first assuming the district court would find that there was $66,000 in total equity in the home,[8] then subtracting what Wife described as Husband's "down payment as sole and separate property ($32,000)," which would leave $34,000 in "community equity" to which Wife would be entitled to one-half, or $17,000. Wife continued to seek one-half of the $40,000 remodel cost in addition to the $17,000 of community equity. As stated, the district court awarded Wife one-half ($28,000) of the total equity it determined to exist in the Francis Home ($56,000) based on its conclusion that a transmutation occurred.

{24} Where, as here, a party claims that appreciation during marriage of separate property is owing to community contributions, apportionment is the proper method of determining the respective interests—i.e., separate and community—in the asset upon dissolution. *See Dorbin v. Dorbin*, 1986-NMCA-114, ¶ 15, 105 N.M. 263, 731 P.2d 959. "[A]pportionment is a legal concept that is properly applied to an asset acquired by married people with mixed monies—that is, partly with community and partly with separate funds." *Id.* ¶ 29 (internal quotation marks omitted). An "asset acquired" may include the increased equity in one spouse's separate real property. *See id.* ¶¶ 11, 24, 27 (apportioning the "appreciation equity" in the wife's separately owned townhouse between the wife's separate interest and the community's interest); *see also Michelson v. Michelson*, 1976-NMSC-026, ¶¶ 20-22, 89 N.M. 282, 551 P.2d 638 (affirming the district court's apportionment of the equity in the parties' home—which was originally acquired with the husband's separate property—between "community expenditures of time, effort and money" (the community's interest) and "the normal appreciation of property" (the husband's separate interest)).

{25} To determine whether apportionment is appropriate, the district court must first decide whether the community has, in fact, acquired an interest in the separate property. *See Martinez v. Block*, 1993-NMCA-093, ¶ 13, 115 N.M. 762, 858 P.2d 429 ("Apportionment is appropriate only when an asset has been acquired or its equity value increased through the use of both separate and community funds."). If there is no evidence of a community interest in the equity of separate property, the separate interest is entitled to the full value of the property and apportionment is not proper. *See Hertz v. Hertz*, 1983-NMSC-004, ¶¶ 22-23, 99 N.M. 320, 657 P.2d 1169 (holding that the husband was entitled to the full value of appreciation of his separate property rather than only "proportionate appreciation" where there was no evidence to support apportionment of the appreciation).

{26} In general, when property is "acquired as separate property, it retains such character even though community funds may later be employed in making improvements or discharging an indebtedness thereon." *Campbell v. Campbell*, 1957-NMSC-001, ¶ 80, 62 N.M. 330, 310 P.2d 266. However, the community may acquire an interest in—specifically a lien on—separate property where the community's contributions have enhanced the value of the separate property. *See Ross*, 2017-NMCA-061, ¶ 8 ("The community is . . . entitled to a lien against the separate property of a spouse for the contributions made by the community that enhanced the value of the property during marriage."). Contributions by the community do not, alone, give rise to a community interest. *See Martinez*, 1993-NMCA-093, ¶ 12 (explaining that "the simple fact that the community has expended funds or labor on a separate asset does not, by itself, give rise to either a community interest in the asset or a right to reimbursement for money spent on the asset"). Rather, it is only the increase—if any—in the value of the asset attributable to community contributions that is apportioned among separate and community interests. *See Jurado v. Jurado*, 1995-NMCA-014, ¶ 10, 119 N.M. 522, 892 P.2d 969; *Martinez*, 1993-NMCA-093, ¶ 11 ("[U]nder New Mexico law the community is entitled to an equitable lien against [a spouse's] separate property only to the extent that the community can show that its funds or labor enhanced the value of the property or increased the equity interest in the property."). "Any increase in the value of separate property is presumed to

[8]This figure is based on an assumption that the Francis Home was valued at $160,000 at the time of trial per Wife's testimony and that there remained a balance of $94,000 on the mortgage.

be separate unless it is rebutted by direct and positive evidence that the increase was due to community funds or labor." *Jurado*, 1995-NMCA-014, ¶ 11. The party claiming the existence of a community lien on separate property bears the burden of proving that the property's appreciation is attributable to the expenditure of community, rather than separate, funds. *See Trego*, 1998-NMCA-080, ¶ 8.

{27} Here, in order to be entitled to a community lien on the Francis Home, it was Wife's burden to prove that some portion (up to the full amount) of the home's appreciation equity at the time of dissolution was attributable to the home improvements made with community funds and/or the community's contributions to paying down the principal balance on the mortgage. *See Dorbin*, 1986-NMCA-114, ¶ 21; *cf. Mitchell v. Mitchell*, 1986-NMCA-028, ¶¶ 48-49, 104 N.M. 205, 719 P.2d 432 (affirming the district court's calculation of the community's lien and its refusal "to credit the community with any appreciation in the value of [the husband's separate] property" where there was "no evidence as to the value of [the claimed] improvements"). However, the district court's findings—which addressed the non-issue of transmutation rather than the disputed issue of whether the community had acquired an interest in (to wit, a community lien on) the Francis Home—are insufficient to allow us to decide whether Wife met her burden. *See Green v. Gen. Accident Ins. Co. of Am.*, 1987-NMSC-111, ¶ 21, 106 N.M. 523, 746 P.2d 152 ("When findings wholly fail to resolve in any meaningful way the basic issues of fact in dispute, they become clearly insufficient to permit the reviewing court to decide the case at all." (alterations, internal quotation marks, and citation omitted)). As such, we remand to the district court for the entry of findings of fact on the question of the existence of a community lien on the Francis Home. *See Green*, 1987-NMSC-111, ¶ 22 ("Where the ends of justice require, [an appellate court] may remand a case to district court for the making of proper findings of fact."). If the district court determines that the community acquired an interest in the Francis Home, it must then proceed to apportion the equity in the Francis Home between Husband's separate interest and the community's interest in accordance with New Mexico case law.[9] *See Ross*, 2017-NMCA-061, ¶ 12.

{28} We emphasize that we do not pass on (1) whether the community acquired an interest in Husband's separate property, or (2) the proper apportionment of such interest, assuming the evidence supports a finding that one exists. Those determinations must be made in the first instance on remand. We hold only that the district court erred in concluding that the Francis Home was transmuted from Husband's separate property to community property and in distributing the equity in the Francis Home in accordance with that conclusion.

III. Whether the District Court Properly Addressed and Distributed Other Property The 1955 Chevrolet

{29} Husband argues that the district court failed to make a determination about and properly distribute Husband's interests in a 1955 Chevrolet. At trial, Husband testified that Wife had given him the car for his birthday in either 2009 or 2010 and that because Husband was busy, Wife registered the car in her name. Wife objected to Husband's testimony based on Husband's failure to include the property in his claims and contentions, but the district court overruled the objection and allowed the testimony. Husband then testified that the vehicle was worth anywhere from $14,000 to $20,000 and that he had invested $5,000 of separate property to install a new engine in the car. The only other testimony regarding the 1955 Chevrolet was made during Husband's explanation of his basis for believing that Wife was laying groundwork "to finally get rid of [him,]" a plan that he stated included, "Everything that happened throughout the marriage now that I opened my eyes. The [SSPAs], the giving her daughter the house, *the '55 Chevy leaving*, the Duramax leaving, the mule leaving." (Emphasis added.) Husband offered no other testimony regarding the 1955 Chevrolet nor did he cross-examine Wife about the car.

{30} Husband's proposed findings included the following related to the 1955 Chevrolet:

> 24. [Wife] gave [Husband] the 1955 Chevrolet as a gift.
> 25. The engine installed into the 1955 Chevrolet was the separate property of [Husband].
> 26. The value of the 1955 Chevrolet was $20,000.
> 27. [Wife] appropriated the 1955 Chevrolet and re-gifted it to her children or sold it.
> 28. [Husband] did not relinquish or consent to the removal of the 1955 Chevrolet.
> 29. [Husband] did not receive compensation for the loss of the 1955 Chevrolet.

Husband's requested conclusions of law included that he is entitled to compensation for the value of the 1955 Chevrolet and reimbursement for the value of his separate property in the car. Wife's proposed findings and conclusions did not contain any mention of the 1955 Chevrolet. The district court did not include any findings or conclusions regarding the 1955 Chevrolet in its order, which Husband argues constituted error and requires remand.

{31} We first observe that the district court was under no obligation to take evidence regarding property that Husband conceded at trial was not listed in his claims and contentions. *See Rutter v.*

[9]See, e.g., *Trego*, 1998-NMCA-080, ¶ 13 ("No one method of apportionment is favored above all others; the trial court may use whatever method will achieve substantial justice, and is supported by substantial evidence in the record."); *Dorbin*, 1986-NMCA-114, ¶¶ 23-24, 31-33 (discussing two formulas for apportioning property, one that the *Dorbin* Court adopted and applied (the *Moore* formula) and one that our Supreme Court had applied in earlier cases ("fair return" formula)); *see also Chance v. Kitchell*, 1983-NMSC-012, ¶ 6, 99 N.M. 443, 659 P.2d 895 (explaining that a party claiming a community interest in separate property is entitled only to "the value of the improvements to the property, *not* the cost of the improvements" and that "when determining a community interest in community funds expended on behalf of property purchased by a spouse before marriage, the rule has commonly excluded payments for taxes, insurance and interest"); *Michelson*, 1976-NMSC-026, ¶¶ 20-22 (affirming the trial court's calculation of the value of the community lien on the parties' home (the husband's separate property) where the trial court first deducted from the home's value at the time of trial $14,000 of the husband's separate property used to purchase the lot on which the home was built); *Dorbin*, 1986-NMCA-114, ¶ 21 (explaining inethat the community is "entitled to a lien for mortgage payments made with community money, but only to the extent that the mortgage principal was reduced").

Rutter, 1964-NMSC-242, ¶ 17, 74 N.M. 737, 398 P.2d 259 (holding that the district court properly rejected evidence related to an issue "outside of the issues raised by the pleadings"). Once the district court allowed Husband to testify regarding the 1955 Chevy, however, the question is whether it erred by not entering findings or a conclusion about the vehicle. It is well-established that a district court's failure to make a specific requested finding of fact constitutes a finding against the requesting party. *See Olivas v. Olivas*, 1989-NMCA-064, ¶ 15, 108 N.M. 814, 780 P.2d 640. Particularly where the requesting party has the burden of proof as Husband did here, *cf. Wallace v. Wanek*, 1970-NMCA-049, ¶ 9, 81 N.M. 478, 468 P.2d 879 (explaining that "[h]e who alleges the affirmative must prove"), "the district court properly could have decided that [the] husband did not meet his burden . . . and therefore could reject [the] husband's proposed findings of facts and conclusions of law on this matter." *Olivas*, 1989-NMCA-064, ¶ 15. Here, the district court—presented with little more than Husband's stand-alone testimony about "the '55 Chevy leaving" and his assertion regarding its engine—could have decided that Husband was not credible and failed to meet his burden of proving that there were property interests in the 1955 Chevy that required distribution. "It is the sole responsibility of the trier of fact to weigh the testimony, determine the credibility of the witnesses, reconcile inconsistencies, and determine where the truth lies, and we, as the reviewing court, do not weigh the credibility of live witnesses." *N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-NMCA-099, ¶ 23, 336 P.3d 436 (alteration, internal quotation marks, and citation omitted).

{32} Not only do we conclude that the district court did not err in refusing to adopt Husband's proposed findings and conclusions regarding the 1955 Chevrolet, it would have been error to adopt Husband's proposed findings number twenty-seven, twenty-eight, and twenty-nine given that there was no evidence to support them. There was no testimony that Wife appropriated or re-gifted the car, that Husband did not consent to removal of the car, or that he had never received compensation for it. As such, the district court's effective conclusion that Husband failed to meet his burden of claiming and proving that he had separate and community property interests in the 1955 Chevrolet supported its rejection of Husband's proposed findings. *See Russell v. Russell*, 1990-NMCA-080, ¶ 17, 111 N.M. 23, 801 P.2d 93 ("A trial court is only required to make findings of such ultimate facts as are necessary to determine the issues."). We hold that the district court did not err by entering no findings or conclusions regarding the 1955 Chevrolet in its order.

The Texas Property

{33} Husband makes a markedly similar argument with respect to the Texas property which he and Wife co-signed for and acquired during the marriage. Husband acknowledges that the district court made the following finding regarding the Texas property:

> 24. The parties co-signed a purchase for [Wife]'s daughter . . . . They were named on the deed and mortgage. The money for the purchase came from [Wife's daughter]. When they were no longer co-signers, the parties quitclaimed the property to [Wife's daughter]. The parties had no real interest in the property.

But Husband contends that the district court "fail[ed] to determine the community interest in the Texas [p]roperty," which we understand to be a challenge to the sufficiency of the evidence to support the district court's finding. We review for substantial evidence to determine whether there is "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *State ex rel. King v. B & B Inv. Grp., Inc.*, 2014-NMSC-024, ¶ 12, 329 P.3d 658 (internal quotation marks and citation omitted). "[W]e review the evidence in the light most favorable to support the trial court's findings, resolving all conflicts and indulging all permissible inferences in favor of the decision below." *Jones*, 2005-NMCA-124, ¶ 8.

{34} Wife testified that she and Husband co-signed a note in order for her daughter to purchase the Texas property and that Wife's daughter paid the down payment. Wife and Husband eventually deeded the house to Wife's daughter after Wife's daughter had been working for a while and "felt like she . . . could handle it [by] herself[.]" Husband testified that he did not know the source of the funds used for the down payment for the Texas property. This, alone, is substantial evidence to support the district court's finding that the parties had no real interest in the Texas property, thus making it unnecessary for the district court to distribute anything related thereto.

Wife's Income

{35} Husband argues that the district court erred by failing to address and distribute Wife's $283,000 of earnings during the marriage. In support of this argument, Husband cites to this Court's decision in *Irwin v. Irwin* in which we explained 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." 1996-NMCA-007, ¶ 13, 121 N.M. 266, 910 P.2d 342. But *Irwin* does not stand for the proposition that any money earned during the marriage was community property that needed to be divided between the parties at the time of divorce as Husband contends. *Irwin*, in fact, applied the limiting principle to the general rule regarding income earned during marriage that "once community . . . earnings are expended, rather than being converted into an asset, there is no community asset to be shared or managed, and the spouse making the expenditure has no duty to reimburse the community absent some special circumstance." *Id.* This Court rejected the wife's argument in *Irwin* that she was entitled to an automatic one-half interest in the husband's income earned during their separation period when the husband had already expended all of the funds. *Id.* ¶ 14.

{36} Here, Husband presented no evidence regarding the status of Wife's $283,000 in earnings, i.e., what portion, if any, had not been expended or converted to assets and would thus be available for distribution. His theory—that Wife "converted community assets to her own use and the community is entitled to reimbursement for the value of those assets"—was not supported by substantial evidence, or any evidence for that matter. We thus hold that the district court properly rejected Husband's request and did not err by not distributing Wife's income earned during the marriage.

CONCLUSION

{37} We reverse the district court's judgment with respect to the SSPAs and the Francis Home and remand for further proceedings consistent with this opinion. We affirm the district court's distribution of all other property.

{38} IT IS SO ORDERED.
J. MILES HANISEE, Judge

WE CONCUR:
LINDA M. VANZI, Chief Judge
TIMOTHY L. GARCIA, Judge

Certiorari Granted, June 25, 2018, No. S-1-SC-36999

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-043

No. A-1-CA-35471 (filed February 28, 2018)

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JEFFREY ASLIN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF LOS ALAMOS COUNTY
T. Glenn Ellington, District Judge

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BENNETT J. BAUR,
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Santa Fe, New Mexico
for Appellant

Opinion

Linda M. Vanzi, Chief Judge

{1} Defendant Jeffrey Aslin raises two issues on appeal challenging the district court's decision revoking his probation. First, he argues that there was insufficient evidence of willfulness to support the finding that he violated probation. Second, he argues that the district court abused its discretion in ruling that the violation was not a "technical violation" under the First Judicial District's technical violation program (TVP). We affirm on the first issue and reverse and remand on the second.

BACKGROUND

{2} In November 2013, Defendant was charged with trafficking of a controlled substance (methamphetamine), conspiracy to commit trafficking of a controlled substance, and possession of drug paraphernalia. Defendant subsequently pleaded guilty to one count of trafficking for which the district court imposed a suspended sentence of nine years imprisonment and a three-year term of probation. In September 2014, a month after entering his plea, Defendant signed an order of probation that, among other things, listed the conditions of Defendant's release and his understanding of them. Of particular relevance, condition five of the probation order required Defendant to "follow all orders and instructions of [his p]robation . . . [o]fficer including actively participating in and successfully completing any . . . treatment program . . . as deemed appropriate by the [p]robation . . . [o]fficer."

{3} Defendant admitted to violating his probation on December 15, 2014, after he tested positive for alcohol. The district court reinstated him to probation and Defendant opted into the TVP. As we explain in greater detail below, the TVP in effect at the time, was a program established at the First Judicial District Court for sanctioning adult probationers for "technical violations of their probation[.]"[1] The program provided progressive discipline, including days in jail, for certain "technical violations" up to and including removal from the TVP after a fourth violation.

{4} Defendant tested positive for methamphetamine twice while under the TVP and received jail sanctions of three and seven days, respectively. In October 2015, two months after his second sanction, Defendant was arrested and charged with possession of a stolen motor vehicle and altering or changing engine or other numbers. Defendant's probation officer, Mary Ann Sarmiento, filed a probation violation report alleging that Defendant had committed new criminal offenses and that he had failed to enter a drug treatment program.

{5} The district court held an evidentiary hearing on November 13, 2015, at which two witnesses testified. New Mexico State Police Officer Jessie Whittaker testified regarding the new criminal offenses, and Sarmiento testified regarding the probation violations. Sarmiento stated that she instructed Defendant "multiple times" that he had to find and complete an outpatient drug treatment program "as soon as possible" before Community Corrections would accept him. Defendant told Sarmiento that he would pursue treatment through the Los Alamos Family Council (LAFC), but Sarmiento later learned that LAFC would not be able to provide treatment for him. On September 10, 2015, Sarmiento advised Defendant that he could not get treatment from LAFC and provided him with alternatives, including Presbyterian Medical Services and Hoy Recovery, both located in Española, New Mexico. Defendant never enrolled or participated in those programs or any other outpatient drug treatment program between the time of his conversation with Sarmiento on September 10th and his arrest on October 6th.

{6} At the conclusion of the hearing, the district court found that the State had not proven a violation based on new charges; however, the court found that Defendant had failed to "enter into, participate, and successfully complete drug treatment" in

[1]Admininistrative Order, Case No. D-101-CS-2012-00010, In re Establishing a Technical Violation Program for Adult Probationers. The later-enacted local rule was not in effect at the time this case was under consideration. *See* LR1-306 NMRA (adopted by Supreme Court Order No. 16-8300-015 and effective for all cases pending or filed on or after December 31, 2016). The local rule varies from the administrative order in some measurable respects particularly with regard to the definition of "technical violations" and a probationer's removal from the program.

violation of his probation agreement. The district court rejected Defendant's argument that the infraction was a technical violation stating that "failing to find a program and enter is not the same thing as testing positive. It is more than a mere technical violation." The court revoked Defendant's probation and imposed a sentence of time served, plus two years, seven months, and seven days in prison, to be followed by four years, eight months, and twenty-seven days on probation. This appeal followed.

DISCUSSION

{7} Defendant makes two arguments on appeal. First, he argues that there was insufficient evidence to support the district court's finding that he violated probation. In particular, he contends that the evidence presented at the evidentiary hearing did not prove that he "willfully avoided treatment." Second, Defendant argues that his failure to enter and complete an outpatient drug treatment program was a technical violation that should have been sanctioned in accordance with the TVP, and the district court abused its discretion when it revoked his probation. Although we conclude that the district court did not err in finding that Defendant's failure to enter and complete treatment constituted a probation violation, we agree that Defendant should have been sentenced under the TVP for a third technical violation.

{8} We review the district court's decision to revoke probation under an abuse of discretion standard. *State v. Leon*, 2013-NMCA-011, ¶ 36, 292 P.3d 493. The state "bears the burden of establishing a probation violation with a reasonable certainty." *Id.* Moreover, "[t]o establish a violation of a probation agreement, the obligation is on the [s]tate to prove willful conduct on the part of the probationer so as to satisfy the applicable burden of proof." *In re Bruno R.*, 2003-NMCA-057, ¶ 11, 133 N.M. 566, 66 P.3d 339.

{9} We pause to address the State's request for clarification of the law governing the willfulness analysis in probation revocation hearings. Citing to a plethora of mostly unpublished opinions, the State contends that our case law "spans several decades and while not contradictory, is at times inconsistent." Although we see no consequential split or inconsistency in our authority, we nevertheless reiterate that,"[o]nce the state offers proof of a breach of a material condition of probation, the defendant must come forward with evidence to excuse non-compliance." *Leon*, 2013-NMCA-011, ¶ 36 (internal quotation marks and citation omitted). Thus, while the burden of proving a willful violation always remains on the state, after the state presents a prima facie case of a violation, the burden shifts to the defendant to come forward with evidence that the failure to comply was through no fault of his own. *State v. Martinez*, 1989-NMCA-036, ¶ 8, 108 N.M. 604, 775 P.2d 1321; *see also State v. Parsons*, 1986-NMCA-027, ¶ 25, 104 N.M. 123, 717 P.2d 99 (noting that it was the state's burden to prove that the defendant violated probation by not paying probation fees and costs, and once the state did so, it was the defendant's responsibility to demonstrate that non-compliance was not willful). As we explained in *Leon*, there is no shifting of the burden of proof, but a shifting of the burden of going forward with evidence to meet or rebut a presumption that has been established by the evidence. 2013-NMCA-011, ¶ 36. In other words, once the state establishes to a reasonable certainty that the defendant violated probation, a reasonable inference arises that the defendant did so willfully, and it is then the defendant's burden to show that failure to comply was either not willful or that he or she had a lawful excuse. *See id.* ¶¶ 36, 39 (noting that the defendant did not present any evidence to rebut the reasonable inference that he willfully violated his probation); *see also In re Bruno R.*, 2003-NMCA-057, ¶ 9 (stating that we indulge all reasonable inferences to uphold a finding that there was sufficient evidence of a probation violation). Having reiterated the law, we now turn to the issues in this case. We begin with whether Defendant's conduct constituted a "willful violation."

{10} At the November 13, 2015 evidentiary hearing, the State presented evidence that Defendant had failed to enter into, participate in, and complete outpatient drug treatment. The probation order—which Defendant acknowledged and signed—required him, among other things, to follow his probation officer's orders, including "actively participating in and successfully completing" a drug treatment program. Defendant's probation officer, Sarmiento, testified that she told Defendant "multiple times" that he had to find and complete an outpatient drug treatment program but he failed to do so. Although Defendant told Sarmiento that he would pursue treatment through LAFC, Sarmiento later found out that Defendant was unable to obtain treatment at that facility. Sarmiento then provided Defendant with two outpatient drug treatment alternatives to LAFC, but he never entered those or any other programs. We agree with the district court that through Sarmiento's testimony the State established a prima facie case that Defendant willfully violated a term of his probation agreement. Accordingly, to rebut this presumption Defendant was required to come forward with evidence showing that his non-compliance was not willful.

{11} On appeal, Defendant contends that his "failure to get treatment resulted from factors beyond his control." However, Defendant does not direct us to anything in the record that provides evidence to support this statement. Indeed, Defendant did not present any evidence at the hearing to rebut the reasonable inference set forth by Sarmiento's testimony that his non-compliance was willful. Accordingly, we conclude that the district court did not abuse its discretion in determining that the State met its burden of establishing that, to a reasonable certainty, Defendant willfully violated a term of his probation. *Cf. Leon*, 2013-NMCA-011, ¶¶ 38-39 (concluding that "the evidence was sufficient for a reasonable mind to conclude that [the d]efendant had violated [a] condition of his probation" when the probation officer testified that the defendant did so and the defendant did not come forward with any evidence to rebut this presumption).

{12} Although we hold that the district court did not abuse its discretion in finding that Defendant violated probation, we nonetheless conclude that the court erred in revoking Defendant's probation on the basis that the violation was "not a mere technical violation." As we have noted, we review a district court's revocation of probation under the abuse of discretion standard. *Id.* ¶ 36. However, "our review of the application of the law to the facts is conducted de novo. Accordingly, we may characterize as an abuse of discretion a discretionary decision that is premised on a misapprehension of the law." *Harrison v. Bd. of Regents of Univ. of N.M.*, 2013-NMCA-105, ¶ 14, 311 P.3d 1236 (internal quotation marks and citations omitted). We begin with the provisions of the TVP.

{13} In August 2012, the First Judicial District established the TVP by administrative order (Order) pursuant to Rule 5-805(C) NMRA. Rule 5-805(C) allows a district court to "establish a program for sanctions for probationers who agree to automatic sanctions for a technical viola-

tion of the conditions of probation." The Order, which was subsequently replaced by LR1-306, was the version that was in effect at the time the district court entered its judgment revoking Defendant's probation. We therefore analyze Defendant's argument under the provisions of the Order.

{14} Pursuant to the Order, a probationer who was placed into the TVP and who committed a technical violation of his or her order of probation, waived the right to due process procedures as provided by Rule 5-805 and would instead be sanctioned based on a progressive disciplinary scheme. For example, the probationer would receive up to three (3) days in jail for the first technical violation, up to seven (7) days in jail for a second violation, and up to fourteen (14) days for the third technical violation. Section E of the Order provided that "[a]fter a fourth technical violation, a probationer may be subject to removal from the TVP and subsequent violations may be prosecuted pursuant to Rule 5-805."[2] Technical violations included:

> (1) having a positive urine or breath test or other scientific means of detection for drugs or alcohol;
>
> . . . .
>
> (2) possessing alcohol;
>
> (3) missing a counseling appointment;
>
> (4) missing a community service appointment;
>
> (5) missing an educational appointment; or
>
> (6) the failure to comply with any term of, or to complete, any treatment program or any other program required by the court or probation.

{15} In this case, the district court found that Defendant "violated his conditions of probation by failing to enroll in treatment as ordered by probation." The court further found that the violation was "not a mere technical violation" and granted the motion to revoke probation on that basis. Defendant contends that contrary to the district court's finding, his probation violation came within the ambit of either technical violation number three or six, above, and because this would be his third violation, the court could only impose a fourteen-day jail sanction. We agree.

{16} As an initial matter, we acknowledge that judicial districts have the authority to promulgate local rules and, pursuant to Rule 5-805(C), the First Judicial District had the authority to enact the TVP at issue here. However, it is well-established that local rules may not conflict with statewide rules. Rule 5-102(A) NMRA ("Local rules and forms shall not conflict with, duplicate, or paraphrase statewide rules or statutes."); Rule 5-805(C) (stating that a judicial district may establish a TVP in accordance with Rule 5-102). As Defendant points out, Rule 5-805(C)(3) clearly and unambiguously defines a "technical violation" as "any violation that does not involve new criminal charges." The State does not respond to Defendant's argument nor does it address the plain language of Rule 5-805(C).

{17} Notwithstanding the general rule that "it is not the function of a reviewing court to substitute its own interpretation of a local rule for that of the court which promulgated the rule[,]" *State v. Cardenas*, 2003-NMCA-051, ¶ 10, 133 N.M. 516, 64 P.3d 543 (alteration, internal quotation marks, and citation omitted), the plain language of Rule 5-805(C) provides that a technical violation is limited to violations that do not involve new criminal charges. The district court in this case specifically found that there was "insufficient evidence that . . . Defendant violated the conditions of probation by committing new offenses." Without a finding that he committed a "new violation of state law," Defendant's failure to enter and complete outpatient drug treatment must therefore be construed as a "technical violation" under Rule 5-805(C). *See Fogelson v. Wallace*, 2017-NMCA-089, ¶ 75, 406 P.3d 1012 (noting that we give effect to the plain meaning language of a statute when its language is clear and unambiguous); *see also Frederick v. Sun 1031, LLC*, 2012-NMCA-118, ¶ 17, 293 P.3d 934 ("When construing our procedural rules, we use the same rules of construction applicable to the interpretation of statutes." (internal quotation marks and citation omitted)). In sum, because local rules should not conflict with statewide rules, Rule 5-102(A), the district court erred in finding that Defendant's probation violation was "not a mere technical violation" under the TVP and by granting the State's motion to revoke probation on that basis. Instead, the district court should have imposed the sanction for a third violation of the Order and imposed a fourteen-day jail sentence for the violation. We vacate the court's order revoking probation and remand with instructions to reinstate probation.

CONCLUSION

{18} We affirm the district court's finding that Defendant violated probation. We reverse the district court's finding that Defendant's violation was not a technical violation and remand for sentencing consistent with the automatic sanctions of the TVP.

{19} IT IS SO ORDERED.
LINDA M. VANZI, Chief Judge

WE CONCUR:
JULIE J. VARGAS, Judge
STEPHEN G. FRENCH, Judge

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[2]This provision differs materially from LR1-306(E) which provides that "[o]n a fourth technical violation, a probationer shall be removed from the TVP, and subsequent violations that would constitute technical violations under this rule may be prosecuted under Rule 5-805 . . . . The court may also remove a probationer from the TVP at any time on a probation violation that is not defined as a technical violation by this rule."

From the New Mexico Court of Appeals

Opinion Number: 2018-NMCA-044

No. A-1-CA-35204 (filed April 24, 2018)

STATE OF NEW MEXICO ex rel.
HECTOR BALDERAS, Attorney General,
Plaintiff-Appellee,
v.
ITT EDUCATIONAL SERVICES, INC.,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Valerie A. Huling, District Judge

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Opinion

Julie J. Vargas, Judge

{1} In this consolidated appeal, ITT Educational Services, Inc., d/b/a ITT Technical Institute (ITT) appeals the district court's order denying its motion to compel arbitration, as well as its order compelling compliance with subpoenas served on counsel for ITT students by the Attorney General. On appeal, ITT claims that the Attorney General is bound by provisions in student enrollment agreements requiring that any dispute related to a student's enrollment be arbitrated and further requiring that any information related to the arbitration remain confidential. We conclude that under the specific circumstances of this case, enforcement of the agreement to arbitrate and accompanying confidentiality clause against the Attorney General is contrary to public policy and we affirm.

BACKGROUND

{2} The State of New Mexico, through its Attorney General (State) filed suit against ITT, claiming violations of the New Mexico Unfair Practices Act (UPA) arising out of alleged misrepresentations to students about ITT's nursing program and its financial aid process. ITT filed a motion to compel arbitration, asking the district court to order the State to arbitrate individually for each student, "all claims seeking restitution or other relief on behalf of any ITT students in accordance with the arbitration provision in the students' enrollment agreements with ITT[.]" ITT's enrollment agreement requires that "any dispute arising out of or in any way related" to the agreement, "including without limitation, any statutory, tort, contract or equity claim" be resolved by binding arbitration. ITT argued that, notwithstanding that the State was not a party to the enrollment agreement, it was required to arbitrate because its claims were derivative of student claims or alternatively, were brought in a representative capacity on behalf of students. Following a hearing, the district court denied ITT's motion to compel arbitration. ITT appealed the district court's denial pursuant to the New Mexico Uniform Arbitration Act, allowing for an appeal from an order denying a motion to compel arbitration. NMSA 1978, § 44-7A-29(a)(1) (2001).

{3} During discovery, the State served subpoenas duces tecum on two private attorneys (attorneys) who had each represented ITT students in prior arbitration proceedings against ITT conducted in accordance with the requirements of the enrollment agreements. The subpoenas served on the attorneys required that, for any proceeding against ITT in which they were counsel for an ITT student, they produce the following material:

> 1. All pleadings, decisions, or verdicts, filed, entered or issued in any arbitration proceeding involving [ITT] and ITT students in New Mexico;
> 2. All written discovery, including but not limited to, answers to interrogatories, and admissions and accompanying requests for admissions, produced or provided by [ITT] during arbitration between ITT and ITT students;
> 3. All testamentary evidence gathered or produced during arbitration proceedings between [ITT] and [ITT] students . . . including but not limited to, transcripts of depositions, transcripts of hearings or the contact information of any court reporter transcribing any hearings if the transcripts were not delivered or provided to you, affidavits, and written statements;
> 4. All documents produced or provided by [ITT];
> 5. All documents produced or provided by your clients[.]

ITT objected to the subpoenas pursuant to Rule 1-045(C) NMRA, asserting that disclosure of the requested materials would violate the confidentiality clauses of the enrollment agreements, requiring that "[a]ll aspects of the arbitration proceeding, and any ruling, decision or award by the arbitrator, will be strictly confidential." ITT instructed the attorneys to refrain from disclosing the materials listed in the subpoenas absent a court order.

{4} The State filed a motion to compel the production of the documents requested by the subpoenas, arguing that, as an investigative agency, it is entitled to discover information relating to the arbitration proceedings that could constitute impeachment or pattern or practice evidence, notwithstanding the confidentiality clause. **{5}** ITT raised two objections to the release of the information. First, ITT asserted that allowing discovery of materials arising from the arbitration could lead to a violation of its students' right to privacy. Further, ITT claimed that the informal nature of arbitration rendered parties less guarded than those engaged in litigation, creating a public interest in keeping arbitration proceedings confidential. In considering ITT's concerns at the hearing on the State's motion to compel, the district court acknowledged the importance of student privacy, but noted, "I understand confidentiality agreements. I understand arbitration agreements between parties. . . . I don't have a problem with the concept of the confidentiality agreement, but I do have a problem with using it as a shield." When ITT was unable to provide authority supporting the district court's power to enforce a confidentiality clause to deprive an investigative or enforcement agency like the Attorney General of discovery that may be relevant to a claim brought pursuant to its statutory authority, the district court granted the State's motion to compel.

{6} The parties stipulated to the entry of a protective order, protecting information related to ITT's students and staff, trade secrets, and sensitive commercial, proprietary, or financial information. The order established extensive measures to safeguard the integrity and confidentiality of the information disclosed through discovery, requiring that all confidential materials be labeled and protected from disclosure to anyone not intimately involved in the case. ITT obtained the district court's certification for an interlocutory appeal of its order compelling discovery and timely sought relief in this Court. Alternatively, ITT sought review through a writ of error.

{7} This Court initially granted ITT's writ of error. A writ of error is the procedural vehicle used to invoke the collateral order doctrine in New Mexico. *See Carrillo v. Rostro*, 1992-NMSC-054, ¶ 25, 114 N.M. 607, 845 P.2d 130. The collateral order doctrine is generally disfavored, and as a result, courts have limited its application in an attempt to avert piecemeal appeals. *See Williams v. Rio Rancho Pub. Schs.*, 2008-NMCA-150, ¶ 7, 145 N.M. 214, 195 P.3d 879. Pretrial orders concerning discovery, particularly orders compelling discovery, are not collateral orders warranting review under a Rule 12-503 NMRA writ of error. *King v. Allstate Ins. Co.*, 2004-NMCA-031, ¶ 19, 135 N.M. 206, 86 P.3d 631. Because this matter is more properly raised by interlocutory appeal, we now quash the writ of error, grant ITT's application for interlocutory appeal, and affirm the district court.

DISCUSSION

Standard of Review

{8} ITT's appeal requires us to consider the enforceability of the arbitration provision and accompanying confidentiality clause in its student enrollment agreement with respect to the State's UPA claims. We review the interpretation of any relevant contract terms de novo. *Shah v. Devasthali*, 2016-NMCA-053, ¶ 10, 371 P.3d 1080. Further, "[w]hether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case," considering both statutory and judicial expressions of public policy. *Castillo v. Arrieta*, 2016-NMCA-040, ¶ 15, 368 P.3d 1249 (alteration, internal quotation marks, and citation omitted). Questions of law are also reviewed de novo. *See Davis v. Devon Energy Corp.*, 2009-NMSC-048, ¶ 12, 147 N.M. 157, 218 P.3d 75. Finally, "[w]e apply a de novo standard of review to a district court's denial of a motion to compel arbitration[,]" as well as to the applicability and construction of a contractual provision requiring arbitration. *Piano v. Premier Distrib. Co.*, 2005-NMCA-018, ¶ 4, 137 N.M. 57, 107 P.3d 11.

Discovery

{9} ITT challenges the district court's order granting the State's motion to compel compliance with its subpoenas. Specifically, ITT argues that the Federal Arbitration Act (FAA) and public policy favoring arbitration require that the arbitration provision, including its confidentiality clause, be enforced to protect the subpoenaed materials from discovery, notwithstanding the State's statutory authority to investigate probable violations of the UPA and enforce its provisions. The State argues that the district court's ruling was proper under our broad discovery rules and that it would be inappropriate to allow ITT to use the confidentiality clause to shield itself from the State's investigation. We emphasize that we are not being asked to consider whether the information that was the subject of the State's motion to compel is admissible, or in what way the State might be able to use the subpoenaed information, if at all. Our review is limited to whether the information requested in the State's subpoenas is discoverable under our Rules of Civil Procedure. We conclude that under the specific circumstances of this case, it is.

A. Privileges and Confidentiality

{10} Before we address the merits of the parties' arguments, we note that the parties have conflated the legally distinct concepts of confidentiality and privilege. "[F]or a privilege to exist in New Mexico, it must be recognized or required by the Constitution, the Rules of Evidence or other rules of this Court." *Republican Party of N.M. v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 35, 283 P.3d 853 (internal quotation marks and citation omitted). Thus, information that is confidential is not necessarily protected by a legally recognized privilege. *See Lakeland Times v. Lakeland Union High Sch.*, 2014 WI App 110, ¶ 52, 357 Wis. 2d 722, 855 N.W.2d 904 (distinguishing confidentiality and privilege by defining privilege as "a legal right to refuse a valid subpoena for certain information" and confidentiality as a method of "ensur[ing] that sensitive information is kept secret, a goal that may be reached with appropriate protective orders"); *see also Salerian v. Md. State Bd. of Physicians*, 932 A.2d 1225, 1242 (Md. Ct. Spec. App. 2007) (defining privilege as "legal protection given to certain communications and relationships" and acknowledging that because confidentiality is broader than privilege, information that is not protected by privilege can still be confidential information (internal quotation marks and citation omitted)); 81 Am. Jur. 2d *Witnesses* § 273 (2018) (" 'Confidentiality' and 'privilege' are not synonymous, and are two compatible, yet distinct, concepts[.]"). "Information can be confidential and, at the same time, nonprivileged." *Id.* This case does not implicate a constitutionally created or rule-based privilege, but rather contracted-for confidentiality.

B. ITT's Confidentiality Clause is Unenforceable as Against Public Policy in the Context of the State's UPA Claims

{11} ITT contends that the FAA and policy favoring arbitration mandate that we enforce the terms of the arbitration provision, including the confidentiality clause, to prevent the release of the information

sought by the State. The State argues that it would be improper to allow ITT to use its confidentiality clause with students to shield itself from the State's statutorily mandated investigation and enforcement obligations, authorized by the UPA.

{12} The Supreme Court of the United States has recognized that the purpose of the FAA is "to reverse the longstanding judicial hostility to arbitration agreements" and "to place arbitration agreements upon the same footing as other contracts." *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (internal quotation marks and citation omitted); *Strausberg v. Laurel Healthcare Providers, LLC*, 2013-NMSC-032, ¶ 51, 304 P.3d 409 (acknowledging same); *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 16, 150 N.M. 398, 259 P.3d 803 (acknowledging "the fundamental principle that arbitration is a matter of contract" (internal quotation marks and citation omitted)). "[T]he FAA preempts not only state laws that prohibit arbitration outright, but also state laws that stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Strausberg*, 2013-NMSC-032, ¶ 55 (quoting *Rivera*, 2011-NMSC-033, ¶ 17). It does not, however, "entirely displace state law governing contract formation and enforcement." *Strausberg*, 2013-NMSC-032, ¶ 52; *see Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135 (stating that the FAA's purpose is "to make arbitration agreements as enforceable as other contracts, but not more so" (internal quotation marks and citation omitted)). As a result, arbitration provisions are subject to "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Rivera*, 2011-NMSC-033, ¶ 17 (internal quotation marks and citation omitted).

{13} In New Mexico, the enforceability of a contract balances an individual's freedom to enter into contracts with the public interest in restricting a person's ability to enter into a contract that is contrary to public policy. *See First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2015-NMSC-004, ¶ 12, 345 P.3d 310; *see also Berlangieri v. Running Elk Corp.*, 2003-NMSC-024, ¶ 20, 134 N.M. 341, 76 P.3d 1098 (recognizing New Mexico's "strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals" (internal quotation marks and citation omitted)); *Acacia Mut. Life Ins. Co. v. Am. Gen. Life Ins. Co.*, 1990-NMSC-107, ¶ 1, 111 N.M. 106, 802 P.2d 11 ("The right to contract is jealously guarded by [the C]ourt, but if a contractual clause clearly contravenes a positive rule of law, it cannot be enforced[.]"). "Public policy favoring the invalidation of a [contract] can be furnished either through statutory or common law." *Berlangieri*, 2003-NMSC-024, ¶ 38.

{14} We have recognized public policy violations where the terms of a contract have been contrary to statutory provisions. *See First Baptist Church of Roswell*, 2015-NMSC-004, ¶ 15 (holding that contract waiving statutorily required interest on oil and gas proceeds payments was unenforceable as against public policy); *Berlangieri*, 2003-NMSC-024, ¶ 53 (concluding that contract for liability release was contrary to the public policy established by the Equine Liability Act and therefore unenforceable): *Acacia Mut. Life Ins. Co.*, 1990-NMSC-107, ¶ 11 (stating that a partnership agreement requiring indemnification of general partners by limited partner contravenes the Uniform Limited Partnership Act and is therefore unenforceable as against public policy); *DiGesu v. Weingardt*, 1978-NMSC-017, ¶ 7, 91 N.M. 441, 575 P.2d 950 (finding a contract for a partial lease of a liquor license to violate public policy where partial leasing was prohibited by applicable regulations and statute expressly limited the number of liquor licenses to be issued by the state). "Whether a contract is against public policy is a question of law for the court to determine from all the circumstances of each case." *Berlangieri v. Running Elk Corp.*, 2002-NMCA-060, ¶ 11, 132 N.M. 332, 48 P.3d 70 (internal quotation marks and citations omitted).

{15} In this case, the question is whether enforcement of a confidentiality clause in a contract between parties violates public policy expressed by the Legislature in the UPA, where the confidentiality clause would prevent the State's efforts to investigate and enforce the UPA against one of the parties to the contract. "Every statute is a manifestation of some public policy." *First Baptist Church of Roswell*, 2015-NMSC-004, ¶ 12. In interpreting the UPA, "our primary goal is to give effect to the Legislature's intent." *Berlangieri*, 2003-NMSC-024, ¶ 42. "The starting point in statutory construction is to read and examine the text of the act and draw inferences concerning the meaning from its composition and structure." *Meridian Oil, Inc. v. N.M. Taxation & Revenue Dep't*, 1996-NMCA-079, ¶ 12, 122 N.M. 131, 921 P.2d 327 (internal quotation marks and citation omitted).

{16} The UPA represents New Mexico's public policy in favor of preventing consumer harm and resolving consumer claims. *See Fiser v. Dell Comput. Corp.*, 2008-NMSC-046, ¶ 9, 144 N.M. 464, 188 P.3d 1215. In furtherance of that policy, the State has been given broad statutory authority to investigate violations and enforce the provisions of the UPA. *Id.* ¶ 11 (identifying Consumer Protection Division of the Attorney General's Office and its duty to "investigate suspicious business activities, informally resolve the complaints of dissatisfied consumers, educate citizens about their consumer rights, and file lawsuits on behalf of the public" as an example of "New Mexico's fundamental public policy in ensuring that consumers have an opportunity to redress their harm"). Under the UPA, the State is responsible for enforcement of the Act. NMSA 1978, § 57-12-15 (1967). To that end, the Legislature has authorized the State, without the need to file a lawsuit, to serve an investigative demand for the production of documents on any person who might be in possession, custody or control of documents "relevant to the subject matter of an investigation of a probable violation of the [UPA.]" NMSA 1978, § 57-12-12(A) (1967) (allowing the state to request documentary evidence, including "any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription or other tangible document or recording). While an investigative demand cannot be made for privileged matters, or matters which would not be required to be produced by a subpoena duces tecum, *see* § 57-12-12(C)(2), the Legislature's authorization of such demands without litigation signals its intent to sanction the State's broad authority to investigate violations of the UPA. Finally, the UPA allows the State to bring actions in its name, alleging violations of the UPA, if such "proceedings would be in the public interest[.]" NMSA 1978, § 57-12-8 (1977). Taking all of these things into account, including the fact that the information requested by the State does not implicate any privilege, we conclude that, under the circumstances of this case, it would be contrary to public policy to allow ITT to use the confidentiality clause with its students to shield itself from the State's investigation and litigation authorized under the UPA. We also note that the district court entered a stipulated protective order to prevent any unwarranted disclosure of the confidential

information produced in response to the State's subpoenas. Consequently, the district court properly declined to enforce the confidentiality clause and granted the State's motion to compel the production of the subpoenaed information.

Arbitration

{17} ITT also appeals the district court's denial of its motion to compel arbitration, arguing that the State is bound by the enrollment agreement between ITT and its students because any claims the State has are brought in its derivative or representative capacity. We find no error on the part of the district court as ITT's appeal of the order denying its motion to compel arbitration fails for the same reason as its appeal of the district court's discovery order. The State's broad authority to enforce the provisions of the UPA includes the statutory right to bring actions in its name, alleging violations of the UPA, if such "proceedings would be in the public interest[.]" Section 57-12-8(A). To compel the State to arbitrate actions for which the Legislature has granted it specific statutory authority "clearly contravenes a positive rule of law, [and] it cannot be enforced" under such circumstances. *Acacia Mut. Life Ins. Co.*, 1990-NMSC-107, ¶ 1. In light of our holding, we need not reach ITT's argument that the State's claims were derivative or representative, making it subject to the arbitration provision. The district court properly denied ITT's motion to compel arbitration.

{18} In reaching our decision, we stress that our ruling in this case is based on the specific powers granted by the Legislature to the State under the UPA. We neither consider nor decide the propriety of a defendant's use of an arbitration provision to compel arbitration or a confidentiality clause to prevent the disclosure of information sought in a private suit brought under NMSA 1978, Section 57-12-10 (2005) of the UPA.

CONCLUSION

{19} For the reasons set out herein, we affirm the decision of the district court.

{20} IT IS SO ORDERED.
JULIE J. VARGAS, Judge

WE CONCUR:
MICHAEL E. VIGIL, Judge
J. MILES HANISEE, Judge

Classified

Positions

Attorney Position - for New Mexico Legal Group

Contact: Anita Foster 505-843-7303; afoster@newmexicolegalgroup.com. Divorce Lawyers – Incredible Opportunity w/ New Mexico Legal Group. New Mexico Legal Group, a cutting edge divorce and family law practice is adding one more divorce and family law attorney to its existing team (David Crum, Cynthia Payne, Twila Larkin, Bob Matteucci, Kim Padilla and Amy Bailey). We are looking for one super cool lawyer to join us in our mission. Why is this an incredible opportunity? You will build the very culture and policies you want to work under; You will have access to cutting edge marketing and practice management resources; You will make more money yet work less than your contemporaries; You will deliver outstanding services to your clients; You will have FUN! (at least as much fun as a divorce attorney can possibly have). This position is best filled by an attorney who wants to help build something extraordinary. This will be a drama free environment filled with other team members who want to experience something other than your run of the mill divorce firm. Interested candidates: send whatever form of contact you think is appropriate, explaining why you are drawn to this position and how you can be an asset to the team, to Dcrum@NewMexicoLegalGroup.com. All inquiries are completely confidential. We look forward to hearing from you!

Entry level NM Attorney

Aldridge Pite, LLP is a multi-state law firm that focuses heavily on the utilization of technology to create work flow synergies with its clients and business partners. Aldridge Pite is a full-service provider of legal services to depository and non-depository financial institutions including banks, credit unions, mortgage servicing concerns, institutional investors, private firms, and other commercial clients. Aldridge Pite seeks an entry level attorney for its small uptown office. Duties include managing high-volume real estate and collection cases from inception to completion, attend court hearings and participate in mediation and arbitration hearings. Must be detail oriented, have excellent communication skills be able to manage and prioritize large caseloads. For full job requirements and to apply please see www.aldridgepite.com click on Careers.

Multiple Trial Attorney Positions Available in the Albuquerque Area

The Thirteenth Judicial District Attorney's Office is seeking entry level as well as experienced trial attorneys. Positions available in Sandoval, Valencia, and Cibola Counties, where you will enjoy the convenience of working near a metropolitan area while gaining valuable trial experience in a smaller office, which provides the opportunity to advance more quickly than is afforded in larger offices. Salary commensurate with experience. Contact Krissy Saavedra ksaavedra@da.state.nm.us or 505-771-7400 for an application. Apply as soon as possible. These positions will fill up fast!

Program Director Regulatory Programs Department

The State Bar of New Mexico seeks a full-time Program Director for its Regulatory Programs Department. The Regulatory Programs Department includes the MCLE, IOLTA, and Bridge the Gap Mentorship Programs, along with other regulatory functions. The successful applicant must be able to work as part of a busy team and have experience in project management, staff management, financial management, and marketing. Excellent customer service and computer skills are also required. Minimum education required is a Bachelor's degree. Juris Doctor or other advanced degree preferred. This position offers great career potential. Beginning salary $50,000 to $55,000 plus an excellent benefits package. Please email cover letter and resume to hr@nmbar.org, EOE.

Attorney

Madison, Mroz, Steinman & Dekleva, P.A., an AV-rated civil litigation firm, seeks an associate attorney with two to four years' experience to assist with all aspects of our civil litigation practice. We offer a collegial environment and opportunity to grow within the profession. Salary is competitive and commensurate with experience, and we offer an excellent benefit package. All inquiries will be kept confidential. Please forward CVs to: Hiring Director, P.O. Box 25467, Albuquerque, NM 87102.

Attorney

Attorney. Team, Talent, Truth, Tenacity, Triumph. These are our values. Parnall Law is seeking an attorney to help advocate and represent the wrongfully injured. You must possess confidence, intelligence, and genuine compassion and empathy. You must care about helping people. You will receive outstanding compensation and benefits, in a busy, growing plaintiffs personal injury law firm. Mission: Fighting Wrongs; Protecting Rights. To provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients the attention needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Keys to success in this position Litigation experience (on plaintiff's side) preferred. Strong negotiation skills. Ability to thrive in a productive and fast-paced work environment. Organized. Independent / Self-directed. Also willing / unafraid to collaborate. Proactive. Detail-oriented. Team player. Willing to tackle challenges with enthusiasm. Frequent contact with your clients, team, opposing counsel and insurance adjusters is of paramount importance in this role. Integrate the 5 values of Parnall Law. Compelled to do outstanding work. Strong work ethic. Interested in results. Barriers to success: Lack of fulfillment in role. Not enjoying people. Lack of empathy. Not being time-effective. Unwillingness to adapt and train. Arrogance. We are an established personal injury firm experiencing steady growth. We offer competitive salary and benefits, including medical, dental, 401k, and performance bonuses or incentives – all in a great team-based work environment. We provide a workplace where great people can do great work. Our employees receive the training and resources to be excellent performers – and are rewarded financially as they grow. We want people to love coming to work, to take pride in delivering our vision, and to feel valued for their contributions. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Child Support and Domestic Relations Hearing Officer (FT At-Will)

The Eleventh Judicial District Court is accepting applications for a full-time, At-Will Child Support and Domestic Relations Hearing Officer. This position is under the supervision of the presiding Chief District Court Judge. Successful candidate will be assigned caseloads to include child support matters, domestic violence and domestic relations, consistent with Rule 1-053.2. Qualifications: Juris Doctorate from an accredited law school, New Mexico licensed attorney in good standing. Minimum of (5) five years of experience in the practice of law, with at least 20% of practice having been in family law or domestic relations matters. Ability to: establish effective working relationships with judges, the legal community, and staff; and to communication complex rules clearly and concisely, respond with tact and courtesy both orally and in writing. Extensive knowledge of: New Mexico and federal case law, constitution and statutes; court rules, policies and procedures; manual and computer legal research and analysis. Must be able to demonstrate a work record of dependability and reliability, attention to detail, accuracy, confidentiality, and effective organizational skills. A post-offer background check will be conducted. SALARY: $46.902 hourly, plus a full benefits package. Wages are set by the Supreme Court and are not negotiable. Please send an application with your resume, and proof of educations to the Eleventh Judicial District Court, Human Resources Office, 103 S. Oliver Drive, Aztec, NM 87410, or email to 11thjdchr@nmcourts.gov, or fax to 505-334-7761. A complete application can be found on the Judicial Branch web page at www.nmcourts.gov. Resumes will not be accepted in lieu of application. Incomplete applications, without all required documentation will not be considered. CLOSES: Friday, August 17, 2018; 5:00 p.m.

Lawyer Position

Guebert Bruckner Gentile P.C. seeks an attorney with up to five years' experience and the desire to work in tort and insurance litigation. If interested, please send resume and recent writing sample to: Hiring Partner, Guebert Bruckner Gentile P.C., P.O. Box 93880, Albuquerque, NM 87199-3880. All replies are kept confidential. No telephone calls please.

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Terry & deGraauw P.C., a divorce and family law firm, is seeking a qualified associate attorney with strong work ethic, compassion and commitment to teamwork. One to three years of experience preferred but not required. Benefits offered include competitive salary, as well as health, dental, vision and disability insurance, 401(k) plan and performance-based bonuses. Replies are confidential. Please email resume to Jennifer deGraauw at jmd@tdgfamilylaw.com.

Attorney

Attorney. Team, Talent, Truth, Tenacity, Triumph. These are our values. Parnall Law is seeking an attorney to help advocate and represent the wrongfully injured. You must possess confidence, intelligence, and genuine compassion and empathy. You must care about helping people. You will receive outstanding compensation and benefits, in a busy, growing plaintiffs personal injury law firm. Mission: Fighting Wrongs; Protecting Rights. To provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients the attention needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Keys to success in this position Litigation experience (on plaintiff's side) preferred. Strong negotiation skills. Ability to thrive in a productive and fast-paced work environment. Organized. Independent / Self-directed. Also willing / unafraid to collaborate. Proactive. Detail-oriented. Team player. Willing to tackle challenges with enthusiasm. Frequent contact with your clients, team, opposing counsel and insurance adjusters is of paramount importance in this role. Integrate the 5 values of Parnall Law. Compelled to do outstanding work. Strong work ethic. Interested in results. Barriers to success: Lack of fulfillment in role. Not enjoying people. Lack of empathy. Not being time-effective. Unwillingness to adapt and train. Arrogance. We are an established personal injury firm experiencing steady growth. We offer competitive salary and benefits, including medical, dental, 401k, and performance bonuses or incentives – all in a great team-based work environment. We provide a workplace where great people can do great work. Our employees receive the training and resources to be excellent performers – and are rewarded financially as they grow. We want people to love coming to work, to take pride in delivering our vision, and to feel valued for their contributions. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Assistant Attorney General

The Office of the New Mexico Attorney General is recruiting for an Assistant Attorney General position in the Special Prosecutions in Criminal Affairs. The job posting and further details are available at www.nmag.gov/human-resources.aspx.

Supreme Court Chief Counsel

The Supreme Court of New Mexico is accepting applications to serve as its Chief Counsel, which is a full-time, at-will position located in Santa Fe, New Mexico. Applications will be accepted until the position is filled. Under the administrative direction of the Chief Justice, the Supreme Court's chief counsel manages the operations of the Supreme Court's Office of Legal Counsel and serves as a member of the Court's management team working in a close, collaborative environment with the Clerk of Court to provide advice and support to the Chief Justice and Justices of the Supreme Court on all aspects of the Supreme Court's caseload and administrative responsibilities as the highest court in the state with superintending control over the New Mexico bench and bar. The successful candidate will demonstrate an exceptional breadth and depth of legal knowledge, excellent legal research and writing skills, superior management and supervisor skills, fluency with the Court's rulemaking and committee processes, the ability manage a substantial workload involving a wide variety of complex matters under tight deadlines, and the highest ethical standards. The position requires a law degree from an ABA-accredited law school, a license to practice law, a minimum of 7 years of experience in the practice of law, including appellate law experience, and at least 3 years of supervisory experience. To apply, interested applicants should submit a Letter of Interest, Resume, Writing Sample, and New Mexico Judicial Branch Application for Employment to Agnes Szuber Wozniak, NM Supreme Court, 237 Don Gaspar, Santa Fe, NM 87501. The full job description and the New Mexico Judicial Branch Application for Employment form can be accessed online at https://www.nmcourts.gov/careers.aspx

Associate Attorney

Geer Wissel & Levy, P.A., a family law firm, seeks an experienced family law attorney for an immediate opening in its downtown Albuquerque office. Willing to consider an attorney with an established practice. Excellent benefits including health, dental, life insurance, and 401(k) plan. Must be licensed to practice law in New Mexico. If interested, please send resume and salary requirement to GWLH, P.O. Box 7549, Albuquerque NM 87194 or email to chwilliams@gwlpa.com. All replies are kept confidential.

Associate Attorney – AV Rated Estate Planning Firm

Albuquerque Law Firm seeks an attorney who is licensed and in good standing with 3-5 years of experience preferably in estate planning, probate law and transactional law. Please Email resume to resume@kcleachlaw.com.

Eleventh Judicial District Attorney's Office, Div II

The McKinley County District Attorney's Office is currently seeking immediate resumes for two (2) Assistant Trial Attorneys and one (1) Senior Trial Attorney. Former position is ideal for persons who recently took the NM bar exam and persons who are in good standing with another state bar. Senior Trial Attorney position requires substantial knowledge and experience in criminal prosecution, rules of criminal procedure and rules of evidence. Persons who are in good standing with another state bar or those with New Mexico criminal law experience in excess of 5 years are welcome to apply. The McKinley County District Attorney's Office provides regular courtroom practice and a supportive and collegial work environment. Enjoy the spectacular outdoors in the adventure capital of New Mexico. Salaries are negotiable based on experience. Submit letter of interest and resume to Paula Pakkala, District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail letter and resume to PPakkala@da.state.nm.us by 5:00 p.m. August 30, 2018.

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Pay range $28.128 - $35.160; To apply please go to nmcourts.gov website – position #10107773; Manage the statewide program for Alternative Dispute Resolution (ADR), including supervision of the Children's Court Mediation Program (CCMP) and the Magistrate Court Mediation Program (MCMP). Coordinate the work of volunteers, contract personnel and outside entities. Work with statewide district courts to implement or enhance ADR programs. May supervise judicial branch program staff and provide professional support to judicial commission(s). Under general direction, as assigned by a supervisor, review cases, perform legal research, evaluation, analysis, writing and make recommendations concerning the work of the Court or Judicial Entity.

Position Announcement

WildEarth Guardians seeks two public interest-focused staff attorneys with a minimum of 5 years experience to join our legal team. Experience with at least some of the laws governing management, land use, and resource protection on public lands is essential. Applications should include, in a single pdf: cover letter; resume; one legal writing sample; and contact information for three professional references. The hiring committee will review applications on a rolling basis, with an ideal start date of no later that September 28. For more information and to apply, go to http://bit.ly/2AziPpq.

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The Supreme Court of New Mexico is seeking applicants to serve as a Law Library Reference Attorney in the Supreme Court Law Library, which is a full-time, at-will position. The position is located in Santa Fe, New Mexico, in the historic Supreme Court Building. Applications will be accepted until the positions are filled. The successful candidate will be a person of high ethical standards, with strong legal research and writing skills, who will bring a service-first orientation to the New Mexico Supreme Court Law Library. Our law library reference attorneys will be thorough and responsive to requests for legal research assistance from judges and court staff throughout New Mexico. The successful candidate will demonstrate the ability to take initiative and exercise independent judgment when appropriate, to work in a collaborative, courteous, diplomatic, and organized manner, and to provide prompt and courteous service to all library patrons who call or visit the Supreme Court Law Library. The position requires law degree from an ABA-accredited law school and a license to practice law. A Master's Degree in Library/Information Science from an American Library Association accredited college or university is desirable. One (1) year of experience in the practice of law or as a law clerk is required. Experience as a librarian is highly desirable. To apply, interested applicants should submit a Letter of Interest, Resume, Writing Sample, and New Mexico Judicial Branch Application for Employment to Agnes Szuber Wozniak, NM Supreme Court, 237 Don Gaspar, Santa Fe, NM 87501. The full job description and the New Mexico Judicial Branch Application for Employment form can be accessed online at https://www.nmcourts.gov/careers.aspx

Assistant City Attorney – Land Use and General City Representation City of Santa Fe

The Santa Fe City Attorney's Office seeks a full-time lawyer to advise and represent multiple City departments, including but not limited to the City's Land Use Department. The City is seeking someone with good people skills, strong academic credentials, excellent written and verbal communications skills, and an interest in public service. Experience in land use, administrative law, litigation, appellate practice, and related law, particularly in the public context, is preferred. Evening meetings are required. The pay and benefits package are excellent and are partially dependent on experience. The position is located in downtown Santa Fe at City Hall and reports to the City Attorney. This position is exempt and open until August 17, 2018. Qualified applicants are invited to apply online at https://www.santafenm.gov/job_opportunities.

Attorney

Butt Thornton & Baehr PC seeks an attorney with at least 3 years' legal experience. Our growing firm is in its 59th year of practice. We seek an attorney who will continue our tradition of excellence, hard work, and commitment to the enjoyment of the profession. Please send letter of interest, resume, and writing samples to Ryan T. Sanders at rtsanders@btblaw.com.

City of Rio Rancho Request for Proposals (RFP) RFP 19-AD-002 Public Defender Services

The City of Rio Rancho, Department of Financial Services, will receive sealed proposals for the above mentioned project, no later than Thursday, August 23, 2018, at 10:00 a.m. local time. Sealed proposals shall be delivered to the City Clerk's Office, located at 3200 Civic Center Circle, Suite 150, Rio Rancho, New Mexico 87144. The City of Rio Rancho (City) requests proposals from qualified attorneys licensed in the State of New Mexico to provide independent legal counsel to indigent defendants facing misdemeanor charges in Rio Rancho Municipal court. RFP packages may be obtained through the contact information listed below or on the City's website at: www.rrnm.gov/bids. Issuing Office: City of Rio Rancho, Department of Financial Services; 3200 Civic Center Circle NE; Rio Rancho, NM 87144; (505) 891-5044

Deputy City Attorney

City of Las Cruces - Deputy City Attorney. Closing date: September 10, 2018. Salary: $78,142.05 -- $117,213.07 annually. Fulltime regular, exempt position that plans, coordinates, and manages operations, functions, activities, staff and legal issues in the City Attorney's Office to ensure compliance with all applicable laws, policies, and procedures. Minimum requirements: Juris Doctor Degree AND seven (7) years of experience in a civil and criminal legal practice; at least one (1) year of experience in municipal finance, land use, and public labor law is preferred. Member of the New Mexico State Bar Association, licensed to practice law in the state of New Mexico; active with all New Mexico Bar annual requirements. Valid driver's license may be required or preferred. Visit website http://agency.governmentjobs.com/lascruces/default.cfm for further information, job posting, requirements and online application process.

Associate Attorney

Trenchard & Hoskins in Roswell, NM is seeking a New Mexico licensed associate attorney with experience in plaintiff litigation in our Roswell, NM office. Please send your cover letter, resume, writing sample and transcripts to royce.hoskins@gmail.com. All inquiries will be kept confidential.

Assistant Trial Attorney to Deputy District Attorney

The Office of 11th Judicial District Attorney, Division I, in Farmington, NM is Equal Opportunity Employer and is accepting resumes for positions of Assistant Trial Attorney to Deputy District Attorney. Salary DOE, please send resume to: Jodie Gabehart jgabehart@da.state.nm.us

Associates

Mounce, Green, Myers, Safi, Paxson & Galatzan, a full-service law firm in El Paso is searching for associates to work in our civil trial practice. The ideal candidates will have 1 – 7 years of defense litigation experience, including but not limited to, insurance defense, construction defects, premises liability and products liability. Mounce, Green, Myers will also consider recent graduates. Candidates should possess a desire to succeed and advance his or her career by demonstrating an ability to handle case files, in their entirety, with some autonomy while developing client relationships. Candidates must have excellent written and oral communication skills as well as being a team player. Our competitive salary structure will match the ideal candidate's knowledge and experience. Mounce Green Myers offers a health insurance package and other benefits. Anyone interested should send their resume and writing sample to: Andres E. Almanzán, 100 N. Stanton, Suite 1000, El Paso, TX 79901 or e-mail to almanzan@mgmsg.com.

Senior Associate Attorney

AV Preeminent Rated litigation law firm in El Paso, Texas with significant practice in Texas and New Mexico seeks a Senior Associate attorney with five or more years of experience in litigation and/or healthcare law and strong research and writing skills. Prefer someone with first chair experience. The position requires detail-oriented and self-motivated participation in all stages of medical malpractice and other civil litigation matters. Must be licensed in Texas and New Mexico. Introductory letter, resume, and writing sample required. Salary is dependent upon experience. Contact us via email at: lawfirmmgt@gmail.com

Junior to Mid-Level Associate Attorney

Ray McChristian & Jeans, P.C. is seeking a hard-working junior to mid-level associate attorney with strong academic credentials and 2-5 years of experience in medical malpractice, insurance defense, insurance law, and/or civil litigation, to join our expanding insurance defense firm. Excellent writing and communication skills required. Competitive salary, benefits, and a positive working environment provided. Please submit resume, writing sample and transcripts to palvarez@rmjfirm.com.

Administrative Office of the Courts Letters of Interest

The Administrative Office of the Courts invites letters of interest from attorneys interested in representing parents or custodians that are parties to abuse and neglect cases arising under the Children's Code in the Eleventh Judicial District (McKinley County). Compensation is tied directly to caseload. Letters of interest: Please include name, street address, phone number, email address, and a brief statement describing your background and understanding of abuse and neglect cases, years of experience, a statement of your ability to perform duties, and the available date to begin case assignments. Interested attorneys must be licensed to practice in the state of New Mexico, have professional liability insurance, and must attach a resume to the letter of interest. Contracting attorneys will submit monthly logs, have access to email, meet with the Court or AOC if requested, participate in related CLE's, and submit invoices as required by AOC and Department of Finance protocols. Please send questions to Sarah Jacobs at aocsej@nmcourts.gov or (505) 827-4887. Letters of interest and accompanying resumes should be emailed to aocsej@nmcourts.gov.

Paralegal Position - for New Mexico Legal Group

Contact: Anita Foster 505-843-7303; afoster@newmexicolegalgroup.com; Divorce Paralegal – Incredible Opportunity w/ New Mexico Legal Group; New Mexico Legal Group, a cutting edge divorce and family law practice is looking for one more paralegal to join our team. Why is this an incredible opportunity? You will be involved in building the very culture and policies that you want to work under. We are offer great pay, health insurance, automatic 3% to your 401(k), vacation and generous PTO. And we deliver the highest quality representation to our clients. But most importantly, we have FUN! Obviously (we hope it's obvious), we are looking for candidates with significant substantive experience in divorce and family law. People who like drama free environments, who communicate well with clients, and who actually enjoy this type of work will move directly to the front of the line. Interested candidates should send a resume and cover letter explaining why you are perfect for this position to DCrum@NewMexicoLegalGroup.com. com The cover letter is the most important thing you will send, so be creative and let us know who you really are. We look forward to hearing from you!

Paralegal

Paralegal. Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) We are a growing plaintiffs personal injury law firm. Candidate must be enthusiastic, confident, a great team player, a self-starter, and able to multi-task in a fast-paced environment. Mission: To work together with the attorneys as a team to provide clients with intelligent, compassionate and determined advocacy, with the goal of maximizing compensation for the harms caused by wrongful actions of others. To give clients and files the attention and organization needed to help bring resolution as effectively and quickly as possible. To make sure that, at the end of the case, the client is satisfied and knows Parnall Law has stood up for, fought for, and given voice and value to his or her harm. Success: Litigation experience (on plaintiff's side) preferred. Organized. Detail-oriented. Meticulous but not to the point of distraction. Independent / self-directed. Able to work on multiple projects. Proactive. Take initiative and ownership. Courage to be imperfect, and have humility. Willing / unafraid to collaborate. Willing to tackle the most unpleasant tasks first. Willing to help where needed. Willing to ask for help. Acknowledging what you don't know. Eager to learn. Integrate 5 values of our team: Teamwork; Tenacity; Truth; Talent; Triumph. Compelled to do outstanding work. Know your cases. Work ethic; producing Monday – Friday, 8 to 5. Barriers to success: Lack of fulfillment in role. Treating this as "just a job." Not enjoying people. Lack of empathy. Thin skinned to constructive criticism. Not admitting what you don't know. Guessing instead of asking. Inability to prioritize and multitask. Falling and staying behind. Not being time-effective. Unwillingness to adapt and train. Waiting to be told what to do. Overly reliant on instruction. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Legal Secretary

Domenici Law Firm is seeking a part-time Legal Secretary. Hours are flexible. The position requires excellent communication and organizational skills, knowledge of State and Federal court rules, and proficient in Odyssey and CM/ECF e-filing. Job duties include preparing correspondence, filing with the court, and requesting medical records from providers, communicating with clients, transcribing dictation. Please send a letter of interest and resume by fax to 505-884-3424 Attn: Tammy Culp, or by e-mail to tculp@domenicilaw.com

Intake Specialist

Intake Specialist: Team, Talent, Truth, Tenacity, Triumph. These are our values. (Please read below concerning how to apply.) We are a growing plaintiffs personal injury law firm. Candidate must be enthusiastic, confident, a great team player, a self-starter, and able to multi-task in a fast-paced environment. Parnall Law is seeking an Intake Specialist to talk to prospective clients when they call for help. You will be talking to people who have experienced a recent injury and are looking for help. You must possess confidence, intelligence, and genuine compassion and empathy. You must care about helping people. Keys to success in this position: A successful Intake Specialist requires outstanding interpersonal communication skills. You must have experience in customer service, inside sales or personal injury law. Spanish fluency is a plus. Strong organizational skills, attention to detail, and basic computer and data entry skills are required. You must be able to track and monitor the progress of each Inquiry. This job requires that you do more than just follow a script: you must be able to identify and ask the important questions, and convey care and concern to our clientele. The Intake Specialist will also be providing other types of assistance in the office. Barriers to success: Lack of drive and confidence, inability to ask questions, lack of fulfillment in role, procrastination, not being focused, too much socializing, taking shortcuts, excuses. Being easily overwhelmed by information, data and documents. We are an established personal injury firm experiencing steady growth. We offer competitive salary and benefits, including medical, dental, 401k, and performance bonuses or incentives – all in a great team-based work environment. We provide a workplace where great people can do great work. Our employees receive the training and resources to be excellent performers – and are rewarded financially as they grow. We want people to love coming to work, to take pride in delivering our vision, and to feel valued for their contributions. If you want to be a part of a growing company with an inspired vision, a unique workplace environment and opportunities for professional growth and competitive compensation, you MUST apply online at www.HurtCallBert.com/jobs. Emailed applications will not be considered.

Full-Time Biller

Full-time biller for mid-size, Uptown law firm. Knowledge of ProLaw beneficial; knowledge of Word & Excel required. Experience with electronic billing required. Minimum 3-5 years' experience. Strong bookkeeping and accounting background a plus. Must be a conscientious and dedicated professional with a good attitude and work ethic and work well as a team player. Excellent Benefits Package. Compensation DOE. Send resume to glw@sutinfirm.com

Litigation Paralegal

Litigation paralegal needed for Albuquerque plaintiff's law firm, McGinn, Montoya, Love & Curry PA. Medical malpractice experience preferred but not required. Must be able to work in a busy, fast-paced litigation practice. 3-5 years relevant experience required. Experience obtaining & organizing medical records, compiling and reviewing records, and strong skills in Adobe PDF and Microsoft Office Suite a plus. The right candidate needs strong writing, communication and organization skills. Excellent benefit package included. Salary commensurate with experience. Spanish speaking helpful. Please send a resume and writing sample to MCMLAdmin@mcginnlaw.com

Senior Program Coordinator

The State Bar of New Mexico seeks a full-time Senior Program Coordinator for its Regulatory Programs Department. The Regulatory Programs Department includes the MCLE, IOLTA, and Bridge the Gap Mentorship Programs. The successful applicant must be able to work as part of a team and have excellent project management, customer service and computer skills. Prior work experience in the legal environment is a plus. Degree (Bachelor's or Associate's) preferred. Compensation $35,000 to $40,000 plus an excellent benefits package. Please email cover letter and resume to hr@nmbar.org, EOE.

Services

Board Certified Orthopedic Surgeon

Board certified orthopedic surgeon available for case review, opinions, exams. Rates quoted per case. Owen C DeWitt, MD, odewitt@alumni.rice.edu

Legal Writing and Research

Need help with writing? Legal writing on a contract basis – briefs, motions, etc. Strong record of writing winning legal arguments. Writing samples, resume, & references available upon request. 206.693.1765 catezjd@gmail.com

Office Space

2040 4th St., N.W.

Three large professional offices for rent at 4th and I-40, Albuquerque, NM. Lease includes on site tenant and client parking, two (2) conference rooms, security, kitchen and receptionist to greet clients and answer phone. Call or email Gerald Bischoff at 505-243-6721 and gbischof@dcbf.net.

New Offices For Rent

New offices for rent in an established firm walking distance to the courthouse. Office includes parking, shared receptionist, copier, fax, telephone system, conference rooms and internet. Contact Lucia Erickson at billing@roybalmacklaw.com and (505)288-3500.

620 Roma N.W.

The building is located a few blocks from Federal, State and Metropolitan courts. Monthly rent of $550.00 includes utilities (except phones), fax, copiers, internet access, front desk receptionist, and janitorial service. You'll have access to the law library, four conference rooms, a waiting area, off street parking. Several office spaces are available. Call 243-3751 for an appointment with David Duhigg.

Office Space

Office space for rent with an established law firm at 20 First Plaza downtown Albuquerque. Space consists of one large office, one medium size office with outside area that is perfect for an assistant's desk/office. Prefer to rent total space. Convenient location that includes parking, receptionist, high speed internet, copier, fax, telephone system, office furniture (optional). Call Carol at 505-243-1733.

Plaza500

Fully furnished, IT-enabled office space that can grow with your business. Visit our professional office suite located on the 5th floor of the prestigious Albuquerque Plaza office building at 201 Third Street NW. Contact Sandee at 505-999-1726.

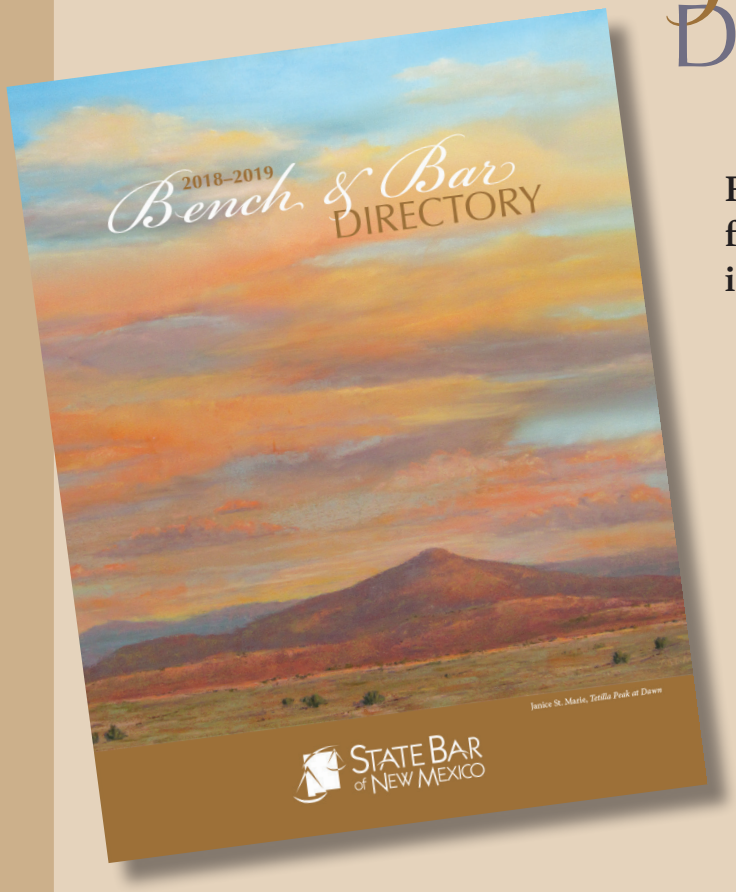
Miscellaneous

Want To Purchase

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

Check your mail for your copy of the

2018–2019 Bench & Bar DIRECTORY



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Don't forget the extra copies for your staff!

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STATE BAR of NEW MEXICO