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Community Property - Appreciation of Community Interests and Investments in Separate Property in New Mexico: Portillo v. Shappie

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COMMUNITY PROPERTY—APPRECIATION OF COMMUNITY INTERESTS AND INVESTMENTS IN SEPARATE PROPERTY IN NEW MEXICO: *PORTILLO V. SHAPPIE*

I. INTRODUCTION

In *Portillo v. Shappie*,[1] the New Mexico Supreme Court addressed the issue of the community's interest in the appreciation of separate property when the appreciation is the result of investment of community funds and labor. The court held that the marital community was entitled to a lien in an amount equal to any increase in the value of the improved property that was attributable to the expenditure of community monies and labor.[2] *Portillo* provided the New Mexico Supreme Court its first opportunity to determine the extent of the community's interest in the appreciation of separate property. Therefore, the decision is an important guideline for domestic relations practitioners. This Note will discuss the *Portillo* decision, the conformity of the decision with holdings of other jurisdictions, the New Mexico Supreme Court's reasoning, and the impact the decision will have on New Mexico community property law.

II. STATEMENT OF THE CASE

When Manuel Portillo married Frances Montano in 1950, Montano owned a small, two-room adobe house as her separate property. The newly married couple moved into the house and resided there continuously during their twenty-six years of marriage. Mr. Portillo invested community funds and his own labor in order to double the size of the home and to build a detached apartment.[3]

Mrs. Portillo died intestate, and Mr. Portillo inherited all of her community property.[4] Prior to her death, however, Mrs. Portillo deeded her separate real property residence to Ida Shappie. Therefore, Mr. Portillo did not inherit an interest in the house.[5] Mr. Portillo sued the owners of the property in order to obtain an interest in the separate property residence. At trial, Mr. Portillo sought an equitable lien against the property

1. 97 N.M. 59, 636 P.2d 878 (1981).
2. *Id.* at 60, 636 P.2d at 879.
3. *Id.* at 59-60, 636 P.2d at 878-79.
4. N.M. Stat. Ann. § 45-2-102(B) (1978) provides:
   "[T]he one half of community property as to which the decedent could have exercised the power of testamentary disposition passes to the surviving spouse."
5. 97 N.M. at 60, 636 P.2d at 879.

in an amount equal to the value of the community improvements.[6] Mrs. Portillo could not have deeded away such a community interest without first obtaining Mr. Portillo's consent.

The district court heard expert testimony that the increase in the value of the home attributable to the community improvements was approximately $25,000. Testimony estimated the value of Mr. Portillo's labor at $2,800.[7] The district court found that any amount owed to the community for the improvements was more than offset by the rent which the community owed Mrs. Portillo for the use of her separate property house as a family residence.[8] Despite this finding, the court granted Mr. Portillo a lien in the amount of $2,800, the value of Mr. Portillo's labor.[9] This award was based on a policy, established by Spanish civil law, which allowed the community a return of only community funds expended. Under that policy, there were no allowances for interest or appreciation.[10]

Mr. Portillo appealed. The New Mexico Court of Appeals held that Mrs. Portillo's separate estate was not entitled to any offset for rental payments owed by the community. The court reasoned that such an offset would be contrary to public policy in light of both spouses' duty of support and incapacity to deny each other access to their residence.[11] This part of the holding was not appealed and is, apparently, now the law in New Mexico. Two of the judges on the court of appeals agreed that Mr. Portillo was entitled to a lien against the property but disagreed as to the amount of the lien.[12] The New Mexico Supreme Court granted certiorari to decide the proper measure of recovery.[13]

6. *Id.* at 59-60, 636 P.2d at 878-879.

7. *Id.* at 60, 636 P.3d at 879.

8. *See id.* at 60, 64, 636 P.3d at 879, 883.

9. *Id.* at 60, 636 P.3d at 879.

10. See *infra* notes 50-52 and accompanying text for a discussion of the historical basis for this policy.

11. 19 N.M. St. B. Bull. 603, 609 (Ct. App. May 27, 1980). To support his position that a claim for rental value was contrary to public policy, Judge Wood cited two statutes, N.M. Stat. Ann. § 40-2-1 (1978), which provides that "[h]usband and wife contract toward each other obligations of mutual respect, fidelity and support," and N.M. Stat. Ann. § 40-3-3 (1978), which provides that "[n]either husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." 19 N.M. St. B. Bull. 603, 609 (Ct. App. May 27, 1980).

12. Judge Wood's opinion was published in 19 N.M. St. B. Bull. 603 (Ct. App. May 27, 1980), but was not published in either the New Mexico Reports or Pacific Reporter Second. Judge Andrew's and Judge Sutin's opinions were not published but are on file at the University of New Mexico Law Library, Albuquerque, New Mexico. Chief Judge Wood and Judge Andrews concurred on the imposition of an equitable lien but disagreed on the value of the lien. The controlling opinion of Chief Judge Wood limited the amount of recovery to the actual cost of community improvements invested and denied the community any right to the enhanced value of the property that was directly attributable to the improvements. Judge Andrews dissented from this portion of Judge Wood's opinion. Judge Andrews stated that where a spouse, acting as part of the community, puts time, muscle, and money into separate property, that spouse is entitled to share in the "matrimonial gain" and should have a right to the enhanced value of the property. Judge Andrews rejected Judge Wood's limitation on the amount of recovery and took the position eventually adopted by the New Mexico Supreme Court. Judge Sutin believed that Mr. Portillo had made a gift and was therefore not entitled to the cost of the improvements nor the enhanced value of the property.

13. 97 N.M. at 59, 636 P.2d at 878.

A unanimous New Mexico Supreme Court determined that the correct measure of the community's lien against the property was any increase in value of the separate property that was the direct result of the expenditure of community funds and labor. The lien was not limited to the cost of the improvements.[14] The court calculated the present value of the community interest in the following manner:

(1) the court used expert testimony to establish that the value of the realty, unimproved by community funds and labor, would have been $8,500 at Mrs. Portillo's death;

(2) the court again used expert testimony to establish that the value of the improved property was $33,400 on the date of Mrs. Portillo's death;

(3) the court then determined that the present value of the improvements which were the result of the expenditure of community funds and labor was the difference between the present value of the unimproved separate property and the present value of the improved property.[15]

The New Mexico Supreme Court rejected the district court's holding that the community was entitled to reimbursement for community expenditures without regard to interest and appreciation. The court stated that its award "represent[ed] the rents, issues and profits of community property, and to deny the community the right to a lien for that amount would do substantial injustice under the facts of this case."[16]

III. HISTORICAL BACKGROUND

A. Previous New Mexico Cases

The New Mexico Supreme Court considered the measure of reimbursement to the community to be an issue of first impression.[17] Several previous cases had addressed the reimbursement issue and had held that a right of reimbursement existed. New Mexico courts, however, had never decided on a single method of determining the proper amount of such reimbursement.[18]

In *Laughlin v. Laughlin*,[19] the New Mexico Supreme Court considered the status of the proceeds from a farm that the wife owned as separate property. The husband and wife had operated the farm together for three years and then leased it to third parties. Upon divorce, the husband claimed that he had a lien against the farm for his portion of the community expenditures. The supreme court held that the rent received from leasing the farm was the wife's separate property, and that the balance of the

14. *Id.* at 64, 636 P.2d at 883.
15. *Id.*
16. *Id.*
17. *Id.* at 61, 636 P.2d at 880.
18. *Id.* at 62, 636 P.2d at 881.
19. 49 N.M. 20, 155 P.2d 1010 (1944).

income produced by the labor, skill, and management of the parties was community property.[20]

The *Laughlin* court gave some indication that the reimbursement owed to the community did not include interest or appreciation, stating that "[t]he burden was upon appellant [husband] to establish the amount of community funds that were used in paying the mortgage debts and in making improvements on the appellee's farm. . . ."[21] The *Laughlin* case, however, did not consider the amount of community interest in the proceeds from the sale of the crops or the increased value of the separate property produced by community efforts.[22]

The following year, in *McElyea v. McElyea,*[23] the New Mexico Supreme Court dealt with a case in which the husband purchased a farm with his separate funds. The community made improvements and some mortgage payments on the farm. Although the issue before the court concerned the status of the title to the farm, dictum suggested that the court would have allowed a lien against the husband's separate property "in the amount so expended" out of community assets.[24] The court referred back to *Laughlin* and asserted that, "[i]f any part [of the mortgage debt] was subsequently paid by the community, or if the land was subsequently improved with community funds, then appellee became indebted to the community in the amount so expended. But the community did not, by reason thereof, become part owner of the property."[25]

In a later case, *Campbell v. Campbell,*[26] the only question before the New Mexico Supreme Court was whether substantial evidence supported the trial court's finding that the family residence was community property. In holding that the residence was not community property, the supreme court, again referring to *Laughlin v. Laughlin,*[27] noted that the community had a right to reimbursement for community funds expended on separate property.[28] Once again, however, the amount of the lien was not an issue in the case.

The following year, in *Galloway v. White,*[29] the New Mexico Supreme Court dealt with the amount of a community lien against separate property. The husband owned an adobe house and a two-unit duplex at the time of his marriage. The community added extensive improvements during

20. *Id.* at 40, 155 P.2d at 1022-23.
21. *Id.* at 36, 155 P.2d at 1020.
22. 97 N.M. at 60, 636 P.2d at 879.
23. 49 N.M. 322, 163 P.2d 635 (1945).
24. *Id.* at 326, 163 P.2d at 637.
25. *Id.*
26. 62 N.M. 330, 310 P.2d 266 (1957).
27. 49 N.M. 20, 155 P.2d 1010 (1944).
28. 62 N.M. at 362, 310 P.2d at 287.
29. 64 N.M. 470, 330 P.2d 553 (1958).

the marriage, and the evidence introduced at trial established the amount spent on such improvements. The supreme court upheld the trial court's grant of a lien in that amount. However, as the *Portillo* court noted, the *Galloway* court did not have to decide on the proper amount of reimbursement:

> [T]he question was not whether the community claim was limited to the amount of funds and labor expended, but merely whether there was *substantial evidence* to support the trial court's finding that the community was entitled to a lien based on a $7,170 expenditure for improvements to the separate realty.[30]

Thus, the issue of whether the community was entitled to a lien against separate property in an amount greater than the actual funds and labor expended was not reached by the New Mexico Supreme Court.

In *Michelson v. Michelson,*[31] the trial court awarded the wife a lien against the separate property of the husband, distinguishing between the appreciation attributable to community expenditures and normal appreciation.[32] The New Mexico Supreme Court upheld the trial court's finding as to the lien. There was no ruling on the amount of the lien because the parties already had agreed on the amount if the court found that a lien existed.[33]

The New Mexico Supreme Court decided *Corley v. Corley*[34] two years before the *Portillo* case. *Corley* concerned apportionment with respect to residential property and possibly could have settled the issue of how to calculate the amount of a community lien on separate property. In *Corley,* the unchallenged findings of the trial court were that the wife had contributed labor and talent to the benefit and improvement of the husband's separate residential property.[35] The court held that the wife "should be given credit for the value of her share of these contributions," and remanded the case for the trial court to consider, inter alia, "the value of Mrs. Corley's interest in the community labors which were expended" on the husband's separate property.[36] The opinion offered no guidelines

30. 97 N.M. at 61, 636 P.2d at 880 (emphasis added).

31. 89 N.M. 282, 551 P.2d 638 (1976).

32. *Id.* at 288, 551 P.2d at 644. In *Michelson,* there was no question that the couple's home was the separate property of the husband. The trial court took the current value of the house ($100,000) and subtracted the current balance due on a mortgage ($53,560) plus the original monies paid by the husband ($14,000). Of the remaining amount ($32,440), the trial court found 50% was the result of community expenditures of time, effort, and money, and the other 50% resulted from normal appreciation. The court awarded the wife a lien of $8,110 against the husband's separate property; this amount was equal to one-half of the community's portion.

33. *Id.*

34. 92 N.M. 716, 594 P.2d 1172 (1979).

35. *Id.* at 720, 594 P.2d at 1176.

36. *Id.*

for computing the value of the wife's interest, however, and the wife did not argue the issue of appreciation in her brief.[37]

B. General Principles of Community Property Law

Because the New Mexico Supreme Court in *Portillo* approached the reimbursement issue as one of first impression, it first looked to general principles of New Mexico community property law for guidance.[38] The definitions of separate and community property, in effect for more than seventy-five years, are statutory. Rents, issues, and profits of separate property remain separate property; rents, issues, and profits of community property belong to the community.[39] Although the language in the statute seems clear, the *Portillo* court noted that "[t]he courts of New Mexico have long struggled with the meaning of 'rents, issues and profits' of property in the context of community investments of funds and labor in the separate income-producing property of one of the spouses."[40] In New Mexico, it has long been the rule that when labor, a community asset, is applied to improve separate property, the community should be compensated.[41] Apportionment of income resulting from a mixture of separate and community property, however, can be extremely difficult. The New Mexico Supreme Court considered the problem in various factual settings, never adopting a single method of apportionment. The court used a "substantial justice" standard and decided each case on its own facts.[42]

When faced directly with the apportionment question, the *Portillo* court first reviewed the civil law of Spain and Mexico. The New Mexico community property system was derived from Spanish law and was retained by New Mexico when it adopted the English common law in 1876.[43] New Mexico shortly thereafter enacted its own community property laws.[44] New Mexico courts have noted, however, that basic principles of the original community property system should be considered in interpreting New Mexico's statute.[45]

37. Brief for Appellee, Corley v. Corley, 92 N.M. 716, 594 P.2d 1172 (1979). (Available at the University of New Mexico Law School Library, Albuquerque, New Mexico.)

38. 97 N.M. at 62, 636 P.2d at 881.

39. N.M. Stat. Ann. § 40-3-8 (1978).

40. 97 N.M. at 62, 636 P.2d at 881.

41. Katson v. Katson, 43 N.M. 214, 89 P.2d 524 (1939).

42. 97 N.M. at 62, 636 P.2d at 881. *See, e.g.*, Hayner v. Hayner, 91 N.M. 140, 141, 571 P.2d 407, 408 (1977); Campbell v. Campbell, 62 N.M. 330, 310 P.2d 266 (1957); Laughlin v. Laughlin, 49 N.M. 20, 35, 155 P.2d 1010, 1019 (1944).

43. McDonald v. Senn, 53 N.M. 198, 201, 205, 204 P.2d 990, 991, 994 (1949).

44. N.M. Comp. Laws, §§ 1410-1422 (1884).

45. Barnett v. Barnett, 9 N.M. 205, 212-13, 50 P. 337, 339 (1897), *appeal dismissed*, 178 U.S. 612 (1900).

Under the Spanish law of community property, the fruits and profits of separate property belonged to the community.[46] This provision can be found as early as 1255 in the Spanish royal code of laws.[47] Where the separate property of a spouse increased in value for some intrinsic reason such as natural appreciation, the increase was not shared by the other spouse and remained separate property. Similarly, improvements to the separate property of one spouse made wholly at the expense of the owner of the property remained the property of the spouse making the improvements. But if improvements to the separate property of either spouse resulted from the industry or labor of the community or were funded by the community, each spouse owned a one-half interest in the value of such improvements or was entitled to reimbursement to that extent if the property was sold or transferred.[48]

Community property states in the United States have followed Spanish community property law with respect to increases in the value of the separate property of one spouse when such increases occur during marriage. Therefore, in most community property jurisdictions, increases which flow from general economic forces, and not from any labor or industry of the community, belong to the owner of the separate property. If the community's labor, industry, or property has contributed to the increase in the value of separate property, and the separate property produces rents and profits, the community will share in the rents and profits in the proportion to which the community contributed to the increase. The community is entitled, however, only to reimbursement of actual expenditures upon a sale of the property.[49]

New Mexico and four other states expressly changed one of the Spanish law principles by enacting statutes which provide that the fruits and profits of separate property remain separate property.[50] California first adopted this "American rule," and New Mexico subsequently based its statute on

46. W. deFuniak & M. Vauhn, Principles of Community Property § 60 (1971). "Let the fruits of the separate property of the husband or of the wife be common." Novisima Recopilacion, Book 10, Title 4, Law 3 (1805), *reprinted in* 1 W. de Funiak, Principles of Community Property § 15 (1943).

47. *See* 1 W. deFuniak, Principles of Community Property § 180 (1943).

48. *Id.* at § 168.

49. "[W]hen the owner of separate property participates in its operation to an extent that he may be said to be responsible for a portion of the proceeds arising from it, the proceeds shall then be apportioned as separate and community property." Campbell v. Campbell, 62 N.M. 330, 360-61, 310 P.2d 266, 286 (1957).

50. Arizona, California, Nevada, New Mexico, and Washington departed from the Spanish law and enacted statutes setting forth the principle that the rents, issues, and profits of separate property belong to the separate property owner. Ariz. Rev. Stat. Ann. § 25-213 (Repl. 1976); Cal. Civ. Code §§ 5107, 5108 (West Repl. 1983); Nev. Rev. Stat. § 123, 130 (1979); N.M. Stat. Ann. § 40-3-8 (1978); Wash. Rev. Code Ann. § 26.16.010 (1951).

the California model.[51] Although the community is not entitled to fruits and profits of separate property under the American rule, community funds and labor expended on separate property remain community property. The community must be compensated for its investment.

In *Portillo,* the trial court and the court of appeals calculated Mr. Portillo's interest by awarding him a lien in the amount of his expended funds and labor. The community's interest did not include the enhanced value of the property resulting from these expenditures.[52]

IV. OTHER JURISDICTIONS

All American community property states have considered the classification of the community's interest in expenditures on separate property. Although in *Portillo* the New Mexico Supreme Court did not cite case law from other jurisdictions, its method of measuring the community recovery is not unique.

Texas, Louisiana, and Idaho treat the rents and profits of separate property as community property. They follow the Spanish rule that when the community has contributed to an improvement of separate property, the nonowner spouse is entitled to reimbursement of community funds and labor upon the dissolution of the community.[53]

In Texas, the measure of the community interest is the increased value of the property at the time of the termination of the community.[54] Recovery is not limited to the amount of community property expended but rather is measured by the value of the contribution.[55] Louisiana is the only community property state with a statute governing the rights of the community to a portion of the value of community-improved separate prop-

51. In 1850, the California Legislature followed the Spanish law and provided that the rents and profits of separate property belonged to the community. Act of April 17, 1850, Ch. 103, § 9, 1850 Cal. Stat.254. In 1860, the California Supreme Court held that this provision was unconstitutional when applied to the wife's separate property. George v. Ransom, 15 Cal. 322, 76 Am. Dec. 490 (1860). The court explained that the framers of the constitution were more familiar with the common law than with the Spanish civil law system and that they had applied those common law principles to the civil law based community property statute. That mixture of civil law and common law lead the California court to the conclusion that the profits of the wife's separate property should belong to her. The court also misunderstood the theory behind community property and stated that because the system was adopted to protect the wife, its decision did not apply to the profits of the husband's separate property. The California Legislature, wishing to put the husband and wife on an equal basis, enacted a statute providing that the rents and profits of all separate property remained separate property. The other states mentioned based their statutes on California law. *See supra* note 50 and accompanying text; *see also* 1 W. deFuniak, Principles of Community Property §§ 48, 50, 51, 52, 53 & 71 (1943).

52. 97 N.M. at 60, 64, 636 P.2d at 79, 83.

53. Azevedo, No. 4 to Novisima Recopilacion, Book 10, Title 4, Law 5 (1805), 2 W. deFuniak Community Property § 272-73 (1943).

54. Burton v. Bell, 380 S.W.2d 561 (Tex. 1964).

55. *See* Waheed v. Waheed, 423 S.W.2d 159, 163 (Tex. Civ. App. 1967).

erty. The Louisiana statute does not limit the amount of the community interest to the amount of community funds actually expended but entitles the nonowner spouse to one-half of the value of the increase of ameliorations.[56] Idaho uses an approach similar to Texas and compensates the community for the appreciated value of the separate property. Idaho places the burden on the party seeking reimbursement to show that community expenditures have enhanced the value of the property and to demonstrate the amount of the enhancement.[57]

Washington, Arizona, and California have rejected the Spanish rule, treating income from separate property as separate property. The problem of community improvement of separate property has been resolved by imposition of an equitable lien or by the presumption of a gift.

Washington imposes an equitable lien, which attaches as improvements are made (equal to the amount of actual expenditures made by the community).[58] However, Washington also allows the community to recover interest on its investment.[59] Arizona also imposes an equitable lien on the community-improved separate property. The appreciated value of the improvements is not limited to the amount of community funds expended. The measure of reimbursement is the increase in value of the property due to the improvements.[60] California generally provides for concurrent ownership by community and separate estates. California "gives to the community a pro tanto community property interest in such property in the ratio . . . which separate and community payments bear to each other."[61] In a recent case, however, the husband used community funds to benefit the wife's separate property and the California Court of Appeals presumed it to be a gift, absent an agreement to the contrary.[62]

V. DISCUSSION AND ANALYSIS

A. The New Mexico Supreme Court's Decision in Portillo

The New Mexico Supreme Court did not follow the traditional Spanish community property law view that the community should be reimbursed

56. La. Civ. Code Ann. art.2408 (West Repl. 1971), provides as follows:
> When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one half of the value of the increase or ameliorations, if it be proved that the increase or of ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

57. Suter v. Suter, 97 Idaho 461, ___, 546 P.2d 1169, 1173 (1976).
58. *See* Conley v. Moe, 7 Wash. 2d 355, 110 P.2d 172 (1941).
59. *See* Baker v. Baker, 80 Wash. 2d 736, ___, 498 P.2d 315, 321 (1972).
60. Tester v. Tester, 123 Ariz. 41, 597 P.2d 194 (Ct. App. 1979).
61. Forbes v. Forbes, 118 Cal. App. 2d 324, ___, 257 P.2d 721, 722 (1953).
62. *In re* Marriage of Camire, 105 Cal. App. 3d 859, ___, 164 Cal. Rptr. 667, 671 (1980).

only for the cost of improvements for two reasons. First, the American rule classifying the rents, profits, and issues of separate property as separate property has put the community at a disadvantage. The court ameliorated the effect of the American rule by allowing the community to recover the increased value of separate property that was directly attributable to community investment. Second, the goals of New Mexico community property law differ from the goals of the Spanish system. The Spanish system attempted to protect the family as an economic partnership and to protect family property. Because Spanish law expressly limited the testamentary right of a spouse to dispose of separate property, a family was assured of retaining its ancestral property.[63] In contrast, New Mexico is not greatly concerned with protecting ancestral property and permits greater leeway in testamentary disposition of property.[64]

Under Spanish law, the community was compensated for the cost of improvements rather than for the increased value of the property resulting from the improvements. Under the American rule, however, the income of separate property remains separate, and the community therefore receives no return for its capital. Since the American rule was adopted in New Mexico, case law has made several changes which has moved the balance back toward the Spanish philosophy.[65] The supreme court in *Portillo* extended the Spanish philosophy in seeking to remedy the obvious injustice that was present in a situation like that in *Portillo*. The court awarded the increase in the value of the separate property that was improved by community funds and labor, explaining that to deny the community the right to a lien would do substantial injustice.[66]

The New Mexico Supreme Court in *Portillo* was free to give the community the appreciated value of the community labor and funds expended because there was no compelling New Mexico precedent and because it had determined that the Spanish civil law provided no guidance. The court's new rule was in keeping with its previously announced standard of doing substantial justice.[67]

63. 97 N.M. at 63, 636 P.2d at 882.

64. *Id.* at 63-64, 636 P.2d at 882-83.

65. *Id.* at 63, 636 P.2d at 882. *See* Corley v. Corley, 92 N.M. 716, 594 P.2d 1172 (1979), Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010 (1944), Katson v. Katson, 43 N.M. 214, 89 P.2d 524 (1939).

66. 97 N.M. at 64, 636 P.2d at 883.

67. *Id.* In reaching its decision, the court seemed to treat the community as an investor, rather than as a lender. The court explained that "[a]warding plaintiff a mere $2,800, rather than his share of the full community interest of $24,900, would not reflect the real value of the community investment, and would give the separate property owners far more than the value of their naturally increased property ($8,500)." *Id.*

B. Implication of Portillo

The major thrust of *Portillo* is the determination of the proper measure of recovery when the community has invested its labor and funds in improving separate property. The policy of returning only the amount spent by the community is particularly unfair in an inflationary economy. Viewing the expenditures as an investment in the improved property and thereby requiring both spouses to share in the increased value or losses is a far better answer to the apportionment problem. The *Portillo* court carefully limited its decision to situations in which the separate property was improved.[68]

In *Portillo,* the community was living in the house, the value of which was at issue, and the court of appeals held that the separate estate was not entitled to rent from the community.[69] It is logical to assume that the *Portillo* analysis would extend to separate property which is not the community residence. In *Laughlin v. Laughlin,*[70] however, the New Mexico Supreme Court stated that the reasonable rental value of a farm could be charged as an offset to community expenditure.[71] Additionally, the court of appeals in *Portillo* held such rental offset could clearly be charged in a nonresidence separate property situation.[72] If this is the case, the rental might consume most of the income when profits are small. In *Portillo,* if rent had been calculated at only $100 per month, the total due the wife would have been $31,200, almost the current value of the property.

VI. CONCLUSION

It is difficult to determine how broadly courts will apply *Portillo*. The New Mexico Supreme Court stressed that apportionment methods should remain flexible,[73] enabling the courts to reach equitable results. It should be noted, however, that neither the separate nor the community property owner is assured of receiving a definite amount because of the obstacles of presenting adequate evidence on community contribution. The husband

68. *Id.* at 64, 636 P.2d at 883. Additionally, in deciding *Portillo,* the New Mexico Supreme Court reiterated the concept that the community's investment establishes an equitable lien. *Id.* at 60-61, 636 P.2d at 879-880. The community lien has priority over subsequent attachments by creditors and is permitted to act defensively in asserting its rights in separate property.

69. The court of appeals based its decision on N.M. Stat. Ann. §§ 40-2-8 and 40-3-3 (1978). 19 N.M. St. B. Bull. 603, 609 (Ct. App. May 27, 1980).

70. 49 N.M. 20, 155 P.2d 1010 (1944).

71. *Id.* at 40, 155 P.2d at 1022.

72. 19 N.M. St. B. Bull. 603, 609 (Ct. App. May 27, 1980).

73. 97 N.M. at 64, 636 P.2d at 883.

in *Portillo* presented a careful and detailed case clearly showing the amount the property increased due to his efforts and expenditures. More often it is difficult for even a professional real estate appraiser to determine the amount of the community contribution.

In the long run, *Portillo* may prove to be conclusive only as to its particular facts. This uncertainty will be lessened as applications of the *Portillo* principle evolve. The New Mexico Supreme Court brought New Mexico into line with other community property states which grant a community lien for the enhanced value of the property attributable to community expenditures and efforts. The court addressed the problem of providing the community with a return on its investment and reached an equitable and practical solution.

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