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Connie L. Mower; Attorney for Respondent.
Richard L. Bird, Jr.; Richards, Bird and Kump P.C.; Attorneys for Appellant.

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DOCKET NO. 880615-CA

IN THE UTAH COURT OF APPEALS

ANITA L. BARBER (DUMESNIL), :

Plaintiff-Appellant, :

Case No. 880615-CA

vs. :

Category No. 14(b)

EUGENE L. BARBER, :

Defendant-Respondent. :

PETITION FOR REHEARING

APPEAL FROM THE FINAL DECREE AND JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE PAT B. BRIAN, JUDGE

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To have what counsel believed was a well-founded, fully documented appeal declared frivolous was a shock. The Court's opinion makes short shrift of appellant's arguments and statement of the case and ignores what appellant believed to be a clear error of law.

A short analysis of the Court's opinion and comparison with the issues as appellant believed they were presented is made under a separate heading for the reason that the tone of the Court's opinion is such that this analysis may be considered by the Court to be a waste of time.

Appellant petitions the Court to reconsider and rehear appellant's position that the Judgment rendered in favor of the defendant against the appellant in the amount of $12,500 is excessive and contrary to the evidence and the findings of fact. This is one of the arguments which the Court's footnote disposes of by stating,

> These arguments clearly lack merit and do not warrant discussion in this opinion.

This matter was addressed at pages 26-28 of appellant's Brief and mentioned briefly at pages 6, 12 and 24 of respondent's Brief with no explanation or justification of an amount of $12,500 as against the amount of $5,996 which was expended by the defendant on improvements to appellant's home, some of which added no value to the home.

This matter was brought to the attention of the trial court in plaintiff's Memorandum of January 5, 1988 (R. 164-189) as Point I in that Memorandum.

It is true that the main thrust of plaintiff's appeal was the failure to distinguish between equities arising during a period prior to cohabitation, during cohabitation, and after marriage. In reference to these matters, appellant's Brief states at page 26:

> But if plaintiff is wrong on both of the foregoing points, the judgment of the trial court still must be reversed because it is not supported by the evidence.

An analysis of the evidence and of the findings is then made which are herein stated.

The Second Amended Findings of Fact (R. 285 at 288-289) include Findings 12e, f, g, h and i in the following language:

> e. Defendant, with plaintiff and plaintiff's sons' assistance doing much of the work, paid for the finishing of three rooms and partial bath in the basement of the home at a cash cost of $4,496.00.
>
> **f.** After the three rooms were finished, defendant's son Corey lived in one of those rooms, also his son Michael did so part of the time and in the summer months, the other three children of the defendant lived in the said rooms part of the time.

> g. Defendant without plaintiff's objection caused a patio to be added at a cost of $650.00 for the kit, with the help of plaintiff and plaintiff's sons, which added a value of $1,500.00 to the appraisal of the home.
>
> h. Defendant without objection by plaintiff replaced a portion of the fence at a cost of $350.00, which added nothing to the appraised value of the home.
>
> i. Defendant without objection by plaintiff replaced some shrubs and trees at a cost of $500.00, which added nothing to the appraised value of the home.

This same document, originally dated August 19, 1988 and signed by the Court October 4, 1988, included the following conclusions of law:

> 6. Plaintiff should be ordered to pay the defendant $7,500.00 for improvements made in the basement of the home during the time the parties lived together prior to marriage.
>
> 7. Plaintiff should be ordered to pay to the defendant $5,000.00 for improvements made to the property at 5999 Monaco Circle prior to marriage or during marriage, consisting of the deck, the replacement of a portion of the fence and replanting portions of the landscaping.

Since there is no explanation in the record of the jump in figures from the cash investment to the amount of the judgment against the appellant, who will have to sell her home to pay the judgment, the Court should either amend the judgment

or remand the case for evidence as to why the incongruity between the findings, conclusions and judgment exists.

There cannot be much doubt that the judgment must be supported by the findings of fact and that the conclusions of law are entitled to no particular deference and will only be reviewed for correctness in light of the findings of fact. Western Kane County District v. Jackson Cattle Company, 744 P.2d 1376 at 1377-1378 (Utah Sup. Ct. 1987); Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah Sup.Ct. 1985); Stewart v. Coffman, 748 P.2d 579, 580-581 (Utah App. 1988).

DISAGREEMENT WITH THE COURT'S STATEMENTS

The Court's opinion, appellant submits, does not distinguish between the relationship between the parties before the defendant moved into plaintiff's home, the situation which existed while they were living together and while defendant's children were utilizing the improvements made in the basement, and the period of their short-lived marriage. Before the trial court plaintiff took the position that there was a difference in consequences depending on during which of those three periods the event occurred. There was never a challenge to the right of the Court to make a disposition of property including premarital or separate property and the trial court never recognized any distinction.

This Court's opinion gives the impression that when gifts are made prior to cohabitation, more gifts are made and improvements to the plaintiff's separate property are made during cohabitation and those and occurrences during the marriage are all lumped together without any distinction. The opinion does not quite say that, but definitely gives that impression. This was the plaintiff's experience with the trial court. It was never stated by the Court that there is no distinction between consequences during cohabitation and during marriage, and yet no distinction was ever recognized. The Court cites Layton vs. Layton, 77 P.2d 504, and Mattes vs. Olearain, 79 P.2d 1177, which were cited by the plaintiff, as distinguishing between distribution of the property of unmarried cohabitants and distribution in divorce actions. The Court goes on to suggest, although it does not precisely say so, that if cohabitants later marry, the distinction is erased. The appellant cited cases where cohabitation was followed by marriage and where the distinction was not erased. Jorgensen v. Jorgensen, 667 P.2d 22 (Utah 1983); Crouch v. Crouch, 88 Ill.App.3d 426, 410 N.E.2d 580; Feliciano v. Roseman Silver Co., 514 N.E.2d 1095 (Mass. 1987).

The Supreme Court has divided separate property of one spouse only upon a special showing. Burke v. Burke, 733 P.2d

133, 135 (Utah Sup.Ct. 1987); Preston v. Preston, 646 P.2d 705 (Utah 1982).

No special showing was made in this case and this Court finds none and ignores these precedents.

At appellant's first divorce, she was given a completely furnished and landscaped home, adequate for herself and her children, together with alimony and support money and she had earnings from occasional employment. During cohabitation she continued to receive alimony and support money and gave the defendant the benefit of a fine home with a small mortgage and a low interest rate. Defendant knew appellant had not worked and was not expected to work and cannot complain that the balance of support for himself and the appellant was his burden.

The District Court with Judge Dee presiding, awarded temporary alimony, which was never paid by the defendant. Appellant was forced to find work and no bills incurred after the separation (except mortgage payments) were paid by the defendant.

At the divorce the home was awarded to the plaintiff but with a judgment against her in the amount of $12,500, which, it is submitted, she has no means of paying without selling the home. This Court has frequently held that a division of

property will be examined to determine if it is equitable as to the parties and leaves them able to enjoy substantially the standard of living they enjoyed previously (Appellant's Brief, pp. 33-38). Appellant requested this review by the Court and it was not given in the opinion. Appellant filed a Motion to Reopen to present financial evidence to aid the Court in this type of determination (R. 62-65); the motion was first granted and later refused (R. 266-267) and this Court has affirmed that refusal.

In the matter of cohabitation by the appellant with one Joseph Garcia, it is true that the appellant admitted that Joseph Garcia moved in with her in December 1986 when she was receiving no support money from the defendant and was working at low wages. It is not the fact of cohabitation which the appellant argued but the time of it. Prior to December appellant and Joseph Garcia had been friends and he had stayed in her home some nights but had never lived there, for the meaning of which appellant looked to this Court's decision in Haddow v. Haddow, 707 P.2d 669 (Utah 1985). These facts are set out in appellant's Brief at pages 30-33.

Judge Dee awarded temporary alimony and gave a judgment for temporary alimony in March 1985, with no suggestion of termination at that time. Fixing the date thereafter was the

purpose of appellant's motion for new trial (R. 140, 142-143, 150-163) giving evidence from other persons, some of them definitely not interested persons, bearing on the date that Joseph Garcia moved into the home at Monaco Circle. The testimony of Kounalis is analyzed at pages 11-12, 18-19, 30-31 of appellant's Brief. It was general, referred only to the coming and going of Joseph Garcia (Finding 24), and nothing to indicate that he was anything but a friend with limited privileges. Why was this question examined and the requirements analyzed in Haddow v. Haddow and not in this case?

The divorce was granted in March 1985 with a judgment for temporary alimony to that date. Finding 25 says:

> * * * After the parties separation in 1983 and Divorce in 1985, plaintiff began to cohabit with Joe Garcia * * *

It is admitted that it was "after" those dates and fixing the date was important. The plaintiff, her sons and Joseph Garcia testified that moving in and living in occurred in December 1986 (Tr. 57, 26-28, 176-177, 189-190) There is no other fixing of a date. Because of the absence of impartial evidence that it was not before December 1986, plaintiff filed a motion for partial new trial supported by affidavit of neighbor, sister, and friends of Joseph Garcia including a former girl friend (R. 140, 142-143, 150-163).

Appellant submits that these distinctions in relationships are meaningful in the law. Cohabitation without marriage has become common and the distinction between living together and marriage has been preserved by most courts. Some cases rely on an agreement made between the parties; some rely on compensation for services rendered; and none that we have found simply put the parties at risk.

Appellant's counsel submits that his efforts to obtain a decision distinguishing between these various relationships is not frivolous but is important.

If the Court's holding that this is a frivolous appeal is based on the belief that it was filed for an extension of time, it is ironic. During the entire trial plaintiff was battling against time to bring the matter to a conclusion and the delays were on the part of the other side. A cash bond has been posted to protect the defendant. The judgment is bearing twelve percent interest and there is only disadvantage to the appellant in this appeal and in this Petition.

DATED this 29th day of May, 1990.

Respectfully submitted,

RICHARDS, BIRD & KUMP, a P.C.

RICHARD L. BIRD, JR

By: _____

Richard L. Bird, Jr.
Attorney for Appellant

I hereby certify that this Petition is not filed for delay, but in the good faith belief and opinion that defendant's judgment should be reduced and that the Court should reconsider the denial of other relief to the appellant.

RICHARD L. BIRD, JR

RICHARD L. BIRD, JR.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITION FOR REHEARING was served on the defendant-respondent this 29th day of May, 1990, by mailing a true and correct copy thereof via United States Mail with postage prepaid thereon to Connie L. Mower, Esquire, 623 East 100 South, Salt Lake City, Utah 84102.

RICHARD L. BIRD, JR