

1990

Michele McIver Bell v. Harold Freman Bell : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. ~~900183-CA~~ IN THE UTAH COURT OF APPEALS

MICHELE McIVER BELL,

Plaintiff-Appellant,

vs.

Case No. 900183-CA

HAROLD FREEMAN BELL,

Defendant-Respondent.

BRIEF OF RESPONDENT

Appeal from a Judgment by the
Honorable F. L. Gunnell,
First Judicial District Court,
Cache County, Utah

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IN THE UTAH COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

MICHELE McIVER BELL,

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vs.

Case No. 900183-CA

HAROLD FREEMAN BELL,

Defendant-Respondent.

BRIEF OF RESPONDENT

Respondent concurs with the statement contained in the "Jurisdiction of the Court" and the "Nature of the Proceedings" contained in Appellant's Brief.

ISSUES PRESENTED FOR APPEAL

1. Did the trial court abuse its discretion in its award of alimony to the appellant? Davis v. Davis, 749 P.2d 647, 649 (Utah 1988); Elmer v. Elmer, 776 P.2d 599, 602 (Utah 1989).

2. Did the trial court abuse its discretion in the distribution and valuation of property. Munns v. Munns, 131 Utah Adv. Rep. 88, 89 (Ct. App. 1990); Noble v. Noble, 761 P.2d 1369, 1372 (Utah 1988).

3. Did the trial court abuse its discretion as to an award of attorneys' fees to Appellant? Asper v. Asper, 753 P.2d 978, 982 (Utah Ct. App. 1988); Porco v. Proco, 752 P.2d 365, 368 (Utah Ct. App. 1988).

4. Is the appellant entitled to an award of attorneys' fees on appeal? Ostler v. Ostler, 131 Utah Adv. Rep. 15, 17

(Utah Ct. App. 1990); Bagshaw v. Bagshaw, 788 P.2d 1057, 1061 (Utah Ct. App. 1990).

STATEMENT OF THE CASE

Respondent basically agrees with the "Statement of the Case" contained in Appellant's Brief pages 2-5. Essentially the reasoning of the Court is contained in the decision given from the bench on the day of trial. This portion of the trial transcript as it pertains to the issues in this case is contained in the Appendix to this Brief. The Findings of Fact, Conclusions of Law and Decree which are contained in Appellant's Appendix also reflect the lower court's decision. The reasoning of the lower court and its decision will be discussed infra in the Argument portion of this Brief.

STATEMENT OF FACTS

The appellant complains that the lower court abused its discretion in its award of alimony, property distribution, and attorneys' fees. This appeal does not involve any question as to child support, visitation, or custody and therefore no reference will be made to these unrelated issues. The "Statement of the Facts" contained in Appellant's Brief, (Appellant's Brief, pp. 5-8) while directly reciting some of the evidence available to the lower court failed to give this Court a total view of all of the evidence presented at trial. Basically, Appellant relies upon her own case in establishing a "fact" without reference to the evidence presented by Respondent. Thus, Appellant has failed to marshal all of the evidence relevant to the findings and then to show the findings to be clearly erroneous as is required under

the appellate standard of review. Barber v. Barber, 134 Utah Adv. Rep. 26 (Utah Ct. App. 1990); Davis v. Davis, 749 P.3d 647, 648 (Utah 1988).

Since the lower court was not required to merely view this divorce in light of the contentions and evidence offered by the appellant but was required to view the evidence as a whole, it is submitted that when the entire record is reviewed there is ample justification for the lower court's decision. Respondent shall not attempt to "marshal" all of the evidence in this case which is clearly the burden of Appellant but will instead list significant factors which have been omitted from the Statement of Facts contained in Appellant's Brief which undoubtedly affected the lower court's judgment.

While it is true that the parties were married in 1979 it is also true that during the eleven years of marriage they lived together for less than five years. (Tr. pp. 38, 131). Both parties have family ties and other roots in the state of North Carolina. Respondent joined the United States Air Force and has been a career officer since the early days of the marriage. Appellant obtained a teaching certificate with a bachelor's degree and taught high school in North Carolina. Before leaving her teaching position she was making approximately \$18,000 for nine months of work which equates to \$22,000 a year. (Tr. pp. 10, 12).

The parties purchased a home in North Carolina where the appellant and her daughter lived. (Tr. p. 21). They resided at this house between 1983 and 1987. Because of marital

differences Respondent frequently moved out of the house for extended periods of time and lived with various relatives. Respondent admitted that the parties during their marriage sometimes came to minor physical altercations but denied ever physically abusing or harming his wife. (Tr. p. 131). According to him Mrs. Bell took care of the family finances on a regular basis and wrote checks to the various creditors from a joint account. This included making house payments as well as credit card payments. (Tr. p. 102-103). According to her, her husband was responsible for making household payments during the course of the marriage. (Tr. p. 25). The parties have a joint account in which Respondent deposited all of his Air Force earnings as well as a sole account in the name of Appellant in which Appellant would randomly deposit her teaching income. (Tr. pp. 41-42).

During the period of time that the parties lived together Appellant obtained a master's degree while working full time with the Air Force. Appellant testified that there was a mutual agreement that each one would help the other obtain an advanced degree. She stated that without her help he would not have been able to receive his degree while working. (Tr. p. 13). Respondent, on the other hand, acknowledged that she assisted him during the time period he was obtaining his degree but stated unequivocally that he could have obtained it without her help had he been required to do so. (Tr. pp. 165-66).

The parties sharply disagreed as to the spending habits of the other. Mrs. Bell stated that her husband insisted that they

spend money in order to maintain his image as an officer even though it was more than they could afford. She stated she wanted to buy a much cheaper house but he would not hear of it. She stated that he would frequently buy their daughter \$50 or \$60 dresses even though she argued it was too much for a growing girl. (Tr. pp. 35-6). He, on the other hand, contended that his wife was always over spending money and running them into debt. He testified that he would frequently complain about her spending \$75 for his daughter's dress when she was clearly going to be grown out of it in a short period of time. (Tr. pp. 114, 151). During their period in North Carolina the parties had incurred several long-term obligations including loans, car payments, and credit cards which consumed the majority of their income.

In April of 1987 Respondent was ordered to Korea for a one-year tour of duty. Appellant did not wish to accompany him there and in fact stated that she was considering quitting her teaching position and moving to a city in which she could obtain an advanced degree. (Tr. p. 39). Appellant stayed at the North Carolina home during Respondent's tour of duty in Korea and continued her high school teaching job.

Immediately prior to leaving for Korea Respondent received a \$1,200 check for damage sustained to his car in an accident as well as a check for \$10,200 as settlement for his personal injuries in that accident. (Tr. p. 104). At that time Respondent also received an advanced of \$5,000 on his military pay and placed \$1,500 of that in the joint checking account. He used the remaining money for uniform expenses and for

supplemental income in Korea during his one-year stay. Some of this money went to buying gifts, clothes, and a brass bed for his wife and daughter. (Tr. p. 110). Respondent testified that to his knowledge when he left for Korea all of the bills were current and there was no financial problem existing. (Tr. p. 108).

Appellant, contrary to Respondent, stated that when Respondent left for Korea there were many unpaid bills which had to be paid. She acknowledged that her husband wanted the \$10,000 check put into a savings certificate but stated she could not do this because of the bills that had to be paid and therefore placed it into the joint checking account. (Tr. p. 67).

The record is undisputed that as of April 20, 1987 there was \$11,528 placed in the joint account and that the following month \$9,574 was withdrawn by the appellant leaving a balance of only \$3,171. (Tr. pp. 61-62). Further, the record is undisputed that during this period that Respondent was in Korea he automatically paid to her each month approximately \$1,600. This, together with her own salary gave her approximately \$2,500 a month of disposable income. (Tr. pp. 71-2). Appellant acknowledged that she did not tell her husband that his settlement money had been spent since she was afraid it would upset him. (Tr. p. 69).

Respondent testified that as far as he knew the debts were current when he left for Korea. He did not authorize his wife to use the settlement money to pay bills. (Tr. p. 103). Furthermore, he had no explanation as to how \$9,500 could have

been spent within thirty days after his leaving for Korea. (Tr. p. 120). While Respondent was in Korea Appellant allowed her nephew to move in the residence although he paid no rent or board and room during his stay. (Tr. p. 57).

While Respondent was still in Korea Appellant did three acts without the permission or knowledge of the respondent. First, she cashed in the couple's mutual funds for approximately \$4,500. She admitted she did not tell her husband about this withdrawal. (Tr. p. 66). Second, she took out a \$4,000 loan from her credit union in order to protect herself from her husband's anger when he returned home and would find no money in the joint account. (Tr. p. 73). Finally, she loaned \$1,800 to her sister to prevent a foreclosure on their home. (Tr. p. 73). Respondent testified that he was not aware of the mutual fund withdrawal and did not authorize it. (Tr. p. 106). He also stated that he has never seen evidence that the loan to the sister has ever been repaid and that he would not have agreed to it had he known. (Tr. p. 120).

After returning home the parties had serious disputes concerning the financial status of their account. At this time Appellant announced that she was going to move to Logan, Utah to continue her education at Utah State. Appellant told her that he could not afford two households and that she should move with him to New Mexico with the Air Force accommodations. She told him not to worry about the bills that she could take care of herself and Stephanie. (Tr. p. 116). After arriving in Logan Appellant obtained a teaching assistant job for \$863 a month. During the

interim between the move to Logan and the divorce Respondent had been paying \$450 a month as child support. At the time of trial Appellant projected that she would graduate with her master's degree by May of 1990. At that time she would either go back to North Carolina and teach school or stay in Logan to obtain a Ph.D. She testified that this would require an additional three years of study. (Tr. pp. 4, 11).

Appellant testified as to her anticipated costs of living including such items as \$100 a month for her child's various lessons, \$200 a month to accumulate air fare for two trips to North Carolina each year, \$250 per month for car needs, \$160 a month for utilities and \$4,000 for anticipated dental work for Appellant. (Tr. pp. 16-20, 46-48; Exhibits 9, 10). In February of 1990 she liquidated her school retirement fund of approximately \$7,600. (Tr. p. 32). Appellant presented a list of debts (Exhibit 11) which contained a number of accounts and loans which were solely in her name. (Tr. pp. 85-90).

Respondent testified that during their marriage they acquired a considerable amount of furniture. In Exhibit 14 he evaluated the furniture that was acquired, depreciated it, and concluded that Appellant had approximately \$6,200 worth of furniture still in her possession. (Tr. pp. 117-19). He further testified that he is presently in charge of the North Carolina residence and is attempting to sell it while it is being rented. While his income from the rental is approximately \$450 a month his expenses exceed this amount by approximately \$175. (Tr. p. 123). Exhibit 4 offered by Respondent lists the existing debts

and the monthly payments incurred by Respondent as to his various needs and encumbrances. He stated that since arriving in New Mexico it was necessary for him to take out nearly \$13,000 in loans in order to meet living expenses, provide minimal furniture, pay for travel costs to see his daughter, and pay for attorney and litigation fees. (Tr. pp. 158-61). He further stated that he did not believe there was any equity in the home if it could be sold and that his present furniture had no equity in view of the debt service which was required. (Tr. pp. 137, 171).

Respondent maintained that no alimony was due to Appellant since the parties were essentially living together for only four or five years, that she was capable of working in a gainful employment status, and that she had previously taken a large share of the marital assets while he was in Korea. (Tr. pp. 130-31). He maintained that she should be given the furniture that she had in her possession together with a ring which he paid \$2,500 when new (Tr. p. 173) and that each party assume their own debts which had been incurred. In addition, Respondent agreed to take control of the house and to sell it for whatever price he could obtain. Finally, he agreed to pay \$450 a month child support which was above the state guideline.

Appellant, on the other hand, wanted her husband responsible for almost all of her own privately incurred bills, her attorneys' fees, and wanted \$1,500 for alimony and child support. (Tr. pp. 52, 132-34).

As is evidenced by the judge's bench ruling the Court took

the position that both parties had been wreckless in their standard of living by incurring debts in order to maintain an artificial level of affluence. He concluded that basically the parties had lived their separate lives during the course of the marriage and that each one should be responsible for their own debts and liabilities since both were capable of self-support. He awarded Appellant \$250 a month alimony for a two-year period but, because of the financial circumstances of the respondent, credited her this amount in the furniture which she had in her possession. In addition, the Court required Respondent to pay \$800 of Appellant's attorneys fees as well as \$450 a month child support. The Court also awarded Appellant an interest in Respondent's military retirement fund based upon the "Woodward Formula" subject to a reduction of \$3,800 which was half of the amount removed by Appellant from her retirement fund.

It is from this order that the present appeal is taken.

SUMMARY OF THE ARGUMENT

1. The Court did not abuse its discretion in awarding \$250 per month for alimony during a two-year period to the appellant wife in view of the nature of this marriage in which each party essentially maintained their own life, where the parties have lived separately for over half of the marriage, and where Appellant has already expended a large portion of the marital assets for her own purposes.

2. The lower court did not abuse its discretion in the property distribution in light of the circumstances of the marriage, the almost non-existent equity of any property acquired

during the marriage, and the high debt service incurred by both parties.

3. The lower court did not abuse its discretion in its award of attorneys' fees to Appellant in light of the financial circumstances of each party as well as the expenses incurred in litigation by each party.

4. Appellant should not be awarded attorneys' fees on this appeal since her arguments are without merit and she cannot be a prevailing party.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN ITS AWARD OF ALIMONY TO THE APPELLANT.

Trial courts have broad discretion in awarding alimony. An appellate court will not disturb the trial court's alimony award so long as the trial court exercises its discretion within the standards set by the appellate court. Osguthorpe v. Osguthorpe, 131 Utah Adv. Rep. 21, 22 (Utah Ct. App. 1990).

"The purposes of an alimony award include enabling the receiving spouse to maintain, as nearly as possible, the standard of living enjoyed during the marriage," and preventing him or her from becoming a public charge. Munns v. Munns, 131 Utah Adv. Rep. 88, 90 (Utah Ct. App. 1990; Noble v. Noble, 761 P.2d 1369, 1372 (Utah 1988)). The standard for alimony as noted by Appellant has been established by the Utah Supreme Court and by this Court in numerous cases. (Appellant's Brief, pp. 9-10). If the trial court considers these factors in setting an award of

alimony this Court will not disturb its award absent a showing that such a serious inequity has resulted as to manifest a clear abuse of discretion. Munns v. Munns, 131 Adv. Rep. at 90. These facts may be derived from the actual factual findings of the court or from the record itself when it is clear and uncontroverted and capable of supporting only a finding in favor of the judgment. Acton v. Delirian, 737 P.2d 996, 999 (Utah 1987).

Before addressing the arguments raised by Appellant it is well to note the observations made by the trial court concerning the uniqueness of this marriage. The Court stated:

As to alimony, I need to make an observation. As you have indicated both of you, this is not an ordinary situation. Each of you have had and pursued separate careers or there has been a history of marital problems. It appears to me that the only thing you really have in common is the child. And you have both quarreled over financial affairs. And I have to observe that whatever standard of living that you have had is one that has been based on borrowed money and depleted assets on both parts. And as I sit here and look at both of your financial statements and your debt structure and your obligations that you have, the bulk of it is repaying loans and you dissipated savings, you've dissipated settlements, you've dissipated apparently every asset that you ever had, and your only source now is your individual earning capacity.

I find that unfortunate, but it's a reality. I observe that because to make an alimony award requires that you find a number of things, at least three. And the courts have said that you have to find the financial conditions--needs of the receiving spouse in this case. The ability of the receiving spouse to provide an income for herself, and then the ability of the providing spouse to do so. Certainly, and there has been reference to a standard of living.

The standard of living I find to have been established artificially. To note be realistic in any way, shape or form for either of the parties. It appears to me that if you wanted something, you bought

it and waited to see what tomorrow brought. And tomorrow comes right now. And this is the time of accountability. And so the standard of living I find has really not been very helpful and to not have existed over an extended period of time because of the fact that you have essentially maintained separate households, coming together for convenience from time to time. And that's a troubling thing for the court, but it's a reality that I am faced with.

So what I will do is, as far as alimony, is in lieu of alimony, and I sat down and computed what the defendant could pay, which is essentially nothing, what the plaintiff needed, which is a great deal, and asked how it could be paid. (Tr. pp. 180-82).

Thus, the lower court specifically found that the parties in this case lived greatly beyond their means both jointly and individually and that therefore the "standard of living" which they acquired was an artificial one which could not be practicably maintained by either party. The observations of the trial court together with the basic undisputed evidence in the record explain the award given.

Appellant argues that the court had to accept Plaintiff's monthly projected expense of \$2,493.00 as contained in Exhibit 9. Based upon that projection and based upon her then current income as a teaching assistant Appellant argues that she is substantially in debt each month. (Appellant's Brief, pp. 10-11). The court, however, essentially stated that this projected standard of living was not realistic in light of the capacities of the parties. This is especially true since Plaintiff contemplated such luxuries as extensive lessons for her daughter, \$2,400 in travel each year, and nearly \$3,600 in automobile expenses. It can hardly be stated that Exhibit 9 contains either a bare-boned or a realistic budget of Appellant's

needs.

As to the second factor of Appellant's ability to support herself the lower court specifically found her earning capacity to be \$1,500 a month. This figure was based upon her previous nine-month salary as a school teacher with a bachelor's degree. This amount would be much lower than the new salary she would receive should she return to teaching with a newly acquired master's degree which she should have obtained at the time this appeal is argued. Appellant acknowledged that it is her own choice to pursue full-time education rather than to obtain an advanced degree on a part-time basis while teaching school. It is her choice if she wishes to remain a full-time student with no substantial source of income for another three year period rather than returning to North Carolina, obtaining a well-paying job, and pursuing a part-time education.

The reference to the Martinez case contained in Appellant's Brief (Appellant's Brief, p. 11) is inappropriate. First, this case has questionable validity at the moment since certiorari has been granted by the Utah Supreme Court to review the decision. (98 Utah Adv. Rep. 3). More importantly, however, in Martinez the parties lived a very meager life while the wife worked and the husband went to school. Here, to the contrary, the parties lived a standard of living well beyond their means with both parties working and with the husband only attending school on a part-time basis.

The argument made by Appellant that she is entitled to Respondent's support for a degree just as she supported him is

also flawed. (Appellant's Brief, pp. 12-13). First, Respondent did not have the luxury of quitting his full-time job and devoting his whole effort to that of a student. Rather, he was required to work full time and to go to school part time. Appellant wishes a different result by requiring Respondent to support her while she has the luxury of attending school without any full-time job responsibilities.

Second, since Appellant has already obtained her master's degree and has helped pay for it from funds acquired during the marriage she cannot now expect Respondent to pay for an additional three years or more of college. Respondent did not obtain a Ph.D. degree as is now being requested by Appellant.

Third, it was Appellant's own choice to move to Utah to obtain the master's degree. The evidence is uncontroverted that she could have remained in North Carolina or have gone to a school in that proximity which would have substantially reduced her living expenses. In fact, she could have joined Respondent in New Mexico and pursued a degree there. Since the court noted that each individual has basically pursued their own life independent of the other it is certainly not Respondent's obligation to now support her for this optional education effort.

A review of the record clearly shows that Respondent is in deep financial trouble even though he currently makes \$40,000 a year with the Air Force. The North Carolina house together with his own living expense requirements as well as the loans and other debts he incurred during his marriage and outside of his

marriage has basically consumed all of his income. While Appellant argues that his monthly expenses are "suspect" (Appellant's Brief, pp. 13-14) they are no more suspect than those claimed by Appellant. In fact, however, a review of Exhibit 4 showing Respondent's expenses as compared with Exhibit 11 showing Appellant's expenses reveals that his are much more realistic and less likely to be inflated. The present debts of Respondent, the requirement to pay \$450 in child support, plus the costs of the litigation do not permit him to support his otherwise self-sustaining wife. The award of \$250 a month for a two-year period was essentially all that Respondent could have borne under the best of circumstances.

In awarding Appellant the furniture items valued at \$6,000 the court accomplished the goal of giving her something of value for her alimony award without further draining the resources of Respondent. It should also be remembered that while the court officially awarded her the furniture and ring in her possession it also allowed her to keep all of the money which she expended during Respondent's absence in Korea which was a sum over \$15,000. This result was certainly more equitable than requiring her to pay to him either \$6,000 or \$3,000 for the value of the furniture and then requiring him to pay to her \$250 a month for a two-year period. The lower court was entitled to great latitude in determining the most equitable method of alimony distribution.

POINT II

THE PROPERTY DISTRIBUTION MADE BY THE LOWER COURT WAS NOT AN ABUSE OF DISCRETION.

Utah Code Annotated §30-3-5(1) (1989) requires that the property distribution in a divorce be "equitable". See also, Noble v. Noble, 761 P.2d 1369, 1373 (Utah 1988). The general purpose of the property distribution is to enable the former spouses to pursue their separate lives as well as possible. Burke v. Burke, 733 P.2d 133, 135 (Utah 1987). Appropriate considerations in dividing property include the amount and kind of property to be divided, the source of the property, the parties' health, the parties' standard of living and respective financial conditions, their needs and earning capacities, the duration of the marriage, and the relationship the property has with the amount of alimony awarded. Naranjo v. Naranjo, 751 P.2d 1144, 1147-48 (Utah App. 1988).

A review of the undisputed record in this case shows that while the parties incurred tremendous debt they have little tangible property to show for it. The North Carolina residence is a drain of some \$200 a month upon Respondent with little hope that any equity will ever be realized if the house should be sold. The only other property which is free and clear of debt consists of the furniture in Appellant's possession together with the items of personal clothing, etc. that each party and the child now maintain. In essence, Appellant received the only unencumbered marital property from the marriage.

While Respondent stated that he did not believe the property he acquired in New Mexico and Korea was marital property such statement has no legal effect regardless of its accuracy since there was no equity contained in this property because of the debt which Respondent had incurred and was still paying on at the time of divorce. Since the lower court specifically found that the parties have been living essentially separate lives with marriage as a mere convenience it is not unreasonable to divide the encumbered personal property in such a way that each person should receive both the property and the accompanying debt.

One other item should be mentioned in this regard. The lower court specifically required Respondent to divide his military pension at the appropriate time in accordance with the Woodward formula. Since Respondent was technically married to the Appellant for approximately eleven years it is very probable that at the time the pension vests Appellant will receive a fairly substantial sum. While this amount cannot be realized at the moment by Appellant it is essentially money in the bank which Appellant can count on for her future needs. The retirement benefit therefore will prove to be a substantial property distribution in the future even though the parties essentially have nothing at the present to divide.

Finally, it should be noted that while Appellant complains about the distribution of the lower court she makes no suggestion for an alternative resolution. It is submitted that based upon the high debt involved in this marriage as compared with the low asset value that the lower court did everything it could in

equitably providing for the parties. There was simply nothing left to distribute. The court did not abuse its discretion.

POINT III

THE AWARD OF ATTORNEYS FEES BY THE LOWER COURT WAS NOT AN ABUSE OF DISCRETION.

A trial court has the authority to award attorneys' fees in divorce proceedings. Rasband v. Rasband, 752 P.2d 1331, 1336 (Utah Ct. App. 1988). The decision to award fees rests within the sound discretion of the trial court, but must be based on evidence of financial need and reasonableness. Huck v. Huck, 734 P.2d 417, 419 (Utah 1986).

Respondent acknowledges that the hourly rate charged by Appellant's attorney was reasonable under the circumstances. He, in fact, incurred nearly an identical amount of fees of \$2,500 for his attorneys. He did maintain, however, that much of the expenses involved in the case occurred because of the unreasonable demand of his wife in requesting a \$1,500 child support and alimony monthly payment which was clearly beyond any reasonable means of Respondent. (Tr. pp. 132-35).

While it is true that Respondent makes a greater salary each year than does Appellant it is also true that the debt service now carried by Respondent is much greater especially in light of having to subsidize the North Carolina house. Since it was necessary for Respondent to borrow money just to pay his own attorneys (Tr. p. 161) it was not unreasonable for the court to decline to require additional loans to be taken by Respondent in order to pay for Appellant's attorney. Proportionately, each

party is in the exact financial situation based upon their income and obligations. The court found neither party to be at fault in this marriage and therefore it is fair that both parties share the burden of litigation.

For this reason, the award was in fact reasonable and should be allowed to stand.

POINT IV

APPELLANT SHOULD BE DENIED ATTORNEYS' FEES ON THIS APPEAL.

This Court may order either party to pay attorneys' fees under Utah Code Annotated §30-3-3 (1989) including attorneys' fees incurred on appeal. Ostler v. Ostler, 131 Utah Adv. Rep. 15, 17 (Utah Ct. App. 1990); Bagshaw v. Bagshaw, 788 P.2d 1057, 1061 (Utah Ct. App. 1990).

Before an appellate attorneys' fee can be awarded the requesting party must prevail on at least a majority of the issues raised on appeal. Further, it must be shown that the appellate fees are reasonable and that the requesting party is in need of financial assistance. Bagshaw, 129 Utah Adv. Rep. at 55.

Here, it is submitted that Appellant will not prevail in this appeal since the alimony award was fair under the circumstances of this case as was the property distribution. Moreover, the lower court attorneys' fees were well within the discretion of the lower court.

Even assuming arguendo that she prevails on any issue in this appeal the record is clear that her financial situation

especially now that she has presumably graduated with her master's degree does not establish a greater financial need than that of Respondent with his numerous debts and encumbrances. The reasonableness of any attorney fee would, of course, have to be determined in an evidentiary hearing even if the previous two conditions were deemed satisfied.

For these reasons, therefore, attorneys' fees on appeal should be denied.

CONCLUSION

The appellant in this case has selectively plucked the record to fit her own needs and arguments. She has failed to marshal the evidence as is required in order to allow this Court to review the entire scope of evidence available to the trial court at the time the award was made. This fact alone should require affirmance of the decision.

In addition, even a cursory review of the record as outlined by Respondent shows that this has been a troubled marriage from its inception and that the parties are not entitled to the normal presumptions and benefits of a harmonious marriage relationship. The mere fact that the parties were physically separated through their own choice for over half of the term of the marriage indicates a serious problem. In addition, the finances of the parties in maintaining separate accounts and in buying separate assets indicates the unusual nature of this relationship.

When these factors are considered together with the observation of the trial court that the parties created an artificial standard of living by digging themselves into a

debtors' grave the lower court did everything it could to resolve the financial dilemma facing it. It is unfortunate that both parties through their actions incurred enormous debts with little to show for it.

While Appellant is upset because she did not receive more support from her former husband it must be remembered that many of the choices in this matter were her own and that she is certainly not deserving of better treatment than her husband. Neither party in this divorce will benefit from the award of the court. In fact, the divorce decree becomes one of basically cutting the losses rather than dividing the gains.

For these reasons, therefore, the lower court did an admirable job in fashioning this divorce decree and it should be affirmed by this Court.

DATED this _____ day of September, 1990.

Craig S. Cook
Attorney for Respondent

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Respondent to Lyle W. Hillyard, Attorney for Appellant, 175 East First North, Logan, Utah 84321 this _____ day of September, 1990.

APPENDIX

1 MR. HEALY: SOMETIME BETWEEN CHRISTMAS AND NEW
2 YEAR'S?

3 THE COURT: THAT'S RIGHT.

4 MR. HILLYARD: JUST LET US KNOW.

5 THE COURT: FOR AN EXTENDED PERIOD OF TIME.

6 MR. HILLYARD: OKAY.

7 THE COURT: AND THEN ANY SPECIAL -- ANY VISITATION
8 OTHER THAN THE SCHEDULED -- PREVIOUSLY SCHEDULED VISITATION
9 SHOULD BE NO LESS THAN 48 HOURS ADVANCE NOTICE. IF YOU'RE IN
10 TOWN OR YOU'RE TRAVELING FROM ONE BASE TO ANOTHER, OR YOU HAVE
11 SOME LEAVE TIME OR WHATEVER, A MINIMUM OF 48 HOURS NOTICE TO
12 MOM SO THAT SHE WILL UNDERSTAND, SO SHE WILL KNOW AND BE ABLE
13 TO MAKE THAT. AND I'LL -- I WOULD ALSO PUT A RESTRAINING
14 ORDER THAT YOU BOTH BE RESTRAINED FROM DISCUSSING IN A
15 NEGATIVE WAY THE OTHER PARENT IN THE PRESENCE OF THE CHILD.

16 NOW, AS TO YOUR REAL PROPERTY, I FIND THAT THERE REALLY
17 IS NO EQUITY IN THAT HOME. AND I RECOGNIZE IT'S PROBABLY BEEN
18 A LIABILITY UP TO THIS POINT. I THINK CONVENIENCE WOULD
19 INDICATE THAT OUGHT TO BE AWARDED TO THE DEFENDANT, AND I'LL
20 AWARD THE PROPERTY, REAL PROPERTY, TO THE DEFENDANT SUBJECT TO
21 THE INDEBTEDNESS AND TO HOLD THE PLAINTIFF HARMLESS THEREFROM.
22 AND THE PLAINTIFF IS TO SIGN WHATEVER DOCUMENTS MAY BE
23 NECESSARY TO TRANSFER TITLE.

24 AS TO ALIMONY, I NEED TO MAKE AN OBSERVATION. AS YOU'VE
25 INDICATED, BOTH OF YOU, THIS IS NOT AN ORDINARY SITUATION.

1 EACH OF YOU HAVE HAD AND PURSUED SEPARATE CAREERS OR THERE HAS
2 BEEN A HISTORY OF MARITAL PROBLEMS. APPEARS TO ME THAT THE
3 ONLY THING YOU REALLY HAVE IN COMMON IS THE CHILD. AND YOU
4 HAVE BOTH QUARRELLED OVER FINANCIAL AFFAIRS. AND I HAVE TO
5 OBSERVE THAT WHATEVER STANDARD OF LIVING THAT YOU HAVE HAD IS
6 ONE THAT HAS BEEN BASED ON BORROWED MONEY AND DEPLETED ASSETS
7 ON BOTH PARTS. AND AS I SIT HERE AND LOOK AT BOTH OF YOUR
8 FINANCIAL STATEMENTS AND YOUR DEBT STRUCTURE AND YOUR
9 OBLIGATIONS THAT YOU HAVE, THE BULK OF IT IS REPAYING LOANS
10 AND YOU'VE DISSIPATED SAVINGS, YOU'VE DISSIPATED SETTLEMENTS,
11 YOU'VE DISSIPATED APPARENTLY EVERY ASSET THAT YOU HAD, AND YOUR
12 ONLY SOURCE NOW IS YOUR INDIVIDUAL EARNING CAPACITY. AND I
13 FIND THAT UNFORTUNATE, BUT IT'S A REALITY. I OBSERVE THAT
14 BECAUSE TO MAKE AN ALIMONY AWARD REQUIRES THAT YOU FIND A
15 NUMBER OF THINGS, AT LEAST THREE. AND THE COURTS HAVE SAID
16 THAT YOU HAVE TO FIND THE FINANCIAL CONDITIONS -- NEEDS OF THE
17 RECEIVING SPOUSE IN THIS CASE. THE ABILITY OF THE RECEIVING
18 SPOUSE TO PROVIDE AN INCOME FOR HERSELF. AND THEN THE ABILITY
19 OF THE PROVIDING SPOUSE TO DO SO. CERTAINLY, AND THERE'S BEEN
20 REFERENCE TO A STANDARD OF LIVING. THE STANDARD OF LIVING I
21 FIND TO HAVE BEEN ESTABLISHED ARTIFICIALLY. TO NOT BE
22 REALISTIC IN ANY WAY, SHAPE OR FORM FOR EITHER OF THE PARTIES.
23 IT APPEARS TO ME THAT IF YOU WANTED SOMETHING, YOU BOUGHT IT
24 AND WAITED TO SEE WHAT TOMORROW BROUGHT. AND TOMORROW COMES
25 RIGHT NOW. AND THIS IS THE TIME OF ACCOUNTABILITY. AND SO

1 THE STANDARD OF LIVING I FIND HAS REALLY NOT BEEN VERY
2 HELPFUL. AND TO NOT HAVE EXISTED OVER AN EXTENDED PERIOD OF
3 TIME BECAUSE OF THE FACT THAT YOU HAVE ESSENTIALLY MAINTAINED
4 SEPARATE HOUSEHOLDS, COMING TOGETHER FOR CONVENIENCE FROM TIME
5 TO TIME. AND THAT'S A TROUBLING THING FOR THE COURT, BUT IT'S
6 A REALITY THAT I'M JUST FACED WITH. SO WHAT I WILL DO IS, AS
7 FAR AS ALIMONY, IS IN LIEU OF ALIMONY. AND I SET DOWN AND
8 COMPUTED WHAT THE DEFENDANT COULD PAY, WHICH IS ESSENTIALLY
9 NOTHING, WHAT THE PLAINTIFF NEEDED, WHICH IS A GREAT DEAL, AND
10 ASKED HOW IT COULD BE PAID. AND I FEEL LIKE IN LIEU OF
11 ALIMONY, I COMPUTED IF YOU PAID ALIMONY FOR TWO YEARS TO GIVE
12 THE PLAINTIFF SOME TIME TO ADJUST TO THE FACT THAT SHE'S GOING
13 TO BE LIVING ON HER OWN INCOME, EVEN THOUGH THERE'S BEEN A
14 PERIOD OF TIME THAT THAT HAS BEEN BEING DONE ALREADY, DISPUTED
15 TESTIMONY, BUT ACCORDING TO THE TESTIMONY BY AGREEMENT AND BY
16 THE PLAINTIFF, SHE'S SAID BECAUSE OF NEGLECT ON HIS PART, AND
17 I RECOGNIZE THE DIFFERENCE IN TESTIMONY ON THAT ISSUE, BUT
18 \$250 A MONTH FOR TWO YEARS IS \$6,000. IN LIEU OF -- THAT'S
19 WHAT I WILL ORDER, BUT IN LIEU OF THAT, I WILL REQUIRE THAT IT
20 BE PAID BY THE PLAINTIFF RECEIVING -- THERE'S TWO WAYS THAT IT
21 COULD BE -- COME OUT. THE PLAINTIFF RECEIVE -- PROBABLY THE
22 BEST WAY IS BY AWARDING HER ALL THE PERSONAL PROPERTY THAT'S
23 IN HER POSSESSION. THAT'S INCLUDED ON THE DEFENDANT'S EXHIBIT
24 14, WITH THE EXCEPTION OF THE ITEMS THAT ARE ON THE -- THERE
25 AS INDICATED IN THE PERSONAL CONTROL OF THE DEFENDANT. NOW, I

1 REALIZE THERE'S SOME QUESTION ON VALUES, BUT THE VALUES WERE
2 NOT CHALLENGED NOR IS THERE AN ALTERNATIVE THAT I HAVE. OTHER
3 THAN THOSE VALUES. AND TYPICALLY, I DON'T GO TOO MUCH ON
4 VALUES BECAUSE YOU CAN PUT WHATEVER VALUES YOU WANT TO ON
5 THOSE. BUT JUST MY LOOKING AT THEM, I DON'T FIND THIS TO BE
6 UNREASONABLE, AT LEAST NOT PATENTLY UNREASONABLE AS I LOOK AT
7 THEM.

8 SO IN LIEU OF ALIMONY, I GRANT ALL OF THE PROPERTY THAT
9 THE -- THAT IS LISTED ON THE PLAINTIFF'S -- ON DEFENDANT'S
10 EXHIBIT 14 TO THE -- TO THE PLAINTIFF WITH THE EXCEPTION OF
11 THE THREE ITEMS THAT ARE ALREADY MARKED AS IN THE PRESENCE OF
12 THE CUSTODY AND CONTROL OF THE -- OF THE DEFENDANT.

13 AS TO THE DEBTS AND OBLIGATIONS, I'M BACK TO THE FACT
14 THAT YOU HAVE REALLY MAINTAINED TWO IDENTITIES, TWO LIVES, AND
15 -- AND HAVE CONDUCTED YOURSELVES ESSENTIALLY AS INDIVIDUALS,
16 WITH SOME EXCEPTIONS. AND IT'S A CONFUSING THING TO THE
17 COURT, BUT I FIND IT INTERESTING THAT BOTH OF YOU HAVE
18 SEPARATE CHARGE ACCOUNTS, BOTH OF YOU HAVE INCURRED SEPARATE
19 DEBTS, YOU HAVE NOT COSIGNED ON ANYTHING, YOU'VE MAINTAINED
20 SEPARATE IDENTITIES. THE ONLY MINGLING THAT HAS BEEN DONE WAS
21 WITH THE PAYCHECKS ESSENTIALLY FROM TIME TO TIME. AND SO IF
22 YOU TAKE AWAY THE NORTHWESTERN BANK AND THE NORTHWEST FINANCE,
23 WHICH IS \$12,000 ROUGHLY, WHICH WERE, IF THE COURT'S MEMORY IS
24 CORRECT, FAIRLY RECENT DEBTS AND OBLIGATIONS INCURRED BY THE
25 DEFENDANT, YOU HAVE ROUGHLY EQUIVALENT EQUIVALENT DEBTS AND

1 OBLIGATIONS THAT WERE INCURRED BY THE PARTIES.

2 SO THE ORDER WILL BE FOR THAT REASON, AND BECAUSE OF HOW
3 THE DEBTS WERE INCURRED AND WHOSE NAME THEY WERE INCURRED IN
4 AND THE CIRCUMSTANCES SURROUNDING THEM, I WILL ORDER THAT EACH
5 PAY WHATEVER DEBTS AND OBLIGATIONS WERE INCURRED IN THEIR
6 NAME. AND I THINK IF YOU LOOK AT THE PLAINTIFF'S EXHIBIT 11,
7 THAT ESSENTIALLY LISTS THEM. AND IT MAY NOT BE ACCURATE IN
8 ALL RESPECTS AS TO AMOUNTS, BUT I THINK THAT COVERS ALL OF THE
9 DEBTS AS I RECALL THE TESTIMONY OF THE PARTIES WITH SOME
10 DIFFERENCE IN AMOUNT.

11 OKAY. THE RETIREMENT TO BE -- TO BE DIVIDED ACCORDING TO
12 THE WOODWARD FORMULA WITH THE -- A CREDIT BEING GIVEN UPON
13 DISTRIBUTION FOR THE -- FOR ONE-HALF OF THE PLAINTIFF'S
14 RETIREMENT ALREADY TAKEN OUT, WHICH IS \$3,800.

15 THE INSURANCE, I WOULD -- WILL ORDER THE DEFENDANT TO
16 MAINTAIN INSURANCE ON THE CHILD AND FOR THE CHILD'S BENEFIT AS
17 IT PRESENTLY EXISTS AND NOT TO FALL BELOW THE LEVEL THAT NOW
18 EXISTS FOR THE BENEFIT OF THE CHILD. AND THAT'S THE HEALTH
19 AND ACCIDENT, MEDICAL AND LIFE INSURANCE.

20 MR. HEALY: YOUR HONOR, COULD THERE BE A PROVISION
21 THAT IF HE WERE TO REMARRY, HE WOULD BE ABLE TO INCLUDE ANY
22 ADDITIONAL CHILDREN?

23 THE COURT: HE MAY, BUT NOT TO DIMINISH THE
24 PROPORTIONATE AMOUNT -- NOT THE PROPORTIONATE -- THE DOLLAR
25 AMOUNT AS IT NOW EXISTS FOR THE CHILD. SO IF HE'S GOT \$50,000

1 LIFE INSURANCE ON THE CHILD, THAT'S TO CONTINUE. IF HE HAS
2 ANOTHER CHILD, HE IS TO MAINTAIN AT LEAST 50 ON THIS CHILD,
3 NOT TO DIVIDE THAT BY THREE OR FOUR OR WHATEVER NUMBER OF
4 OTHER CHILDREN THAT HE MAY HAVE. APPRECIATE THAT AND THAT'S A
5 VALID QUESTION, COUNSEL.

6 OKAY. AS FAR AS ATTORNEY'S FEES, THAT'S A DIFFICULT
7 QUESTION BECAUSE I REALIZE THAT THERE'S A VERY LIMITED
8 ABILITY, BUT IN VIEW OF THE FACT THAT I AM REALLY NOT ORDERING
9 THE DEFENDANT TO MAKE A LOT OF OUT-OF-POCKET PAYMENTS IN THIS
10 PARTICULAR CASE, I'LL ORDER THAT HE PAY \$800 TOWARD THE
11 PLAINTIFF'S ATTORNEY'S FEES, AND EACH PARTY TO BEAR THE
12 DIFFERENCE IN AMOUNT PERSONALLY.

13 MR. HILLYARD: WHAT ABOUT COSTS?

14 THE COURT: AND COSTS. NOW, HAVE I COVERED
15 EVERYTHING? I'VE GONE DOWN WHAT I THOUGHT WAS EVERYTHING.

16 MR. HILLYARD: THE THING ABOUT THE SAVINGS BONDS, I
17 THINK THERE'S --

18 THE COURT: I THINK THE TESTIMONY WAS THAT HE HAS
19 THOSE IN FAVOR OF THE CHILD, AND I'LL INCLUDE THE SAVINGS
20 BONDS BEING MAINTAINED IN THE LEVEL THAT THEY NOW EXIST FOR
21 THAT CHILD. THAT WOULDN'T REQUIRE YOU TO INCREASE THOSE, BUT
22 I UNDERSTAND YOU HAVE THEM AND IT'S YOUR TESTIMONY, SIR, THAT
23 YOU PLAN ON MAINTAINING THEM FOR THE BENEFIT OF --

24 MR. BELL: I'LL STILL BUY --

25 MR. HEALY: YOUR HONOR, IT WAS 14 INSTEAD OF 15.

1 THE COURT: WHATEVER NOW EXISTS, THEY BE MAINTAINED
2 AT AT LEAST THAT LEVEL. YOU CAN ADD TO THEM BUT YOU CAN'T
3 TAKE FROM THEM.

4 MR. HEALY: YOUR HONOR, I PRESUME THAT THOSE ORDERS
5 WITH RESPECT TO LIFE INSURANCE, BONDS, ET CETERA, WOULD
6 CONTINUE UNTIL THE MATURITY OF THE CHILD, LEGAL AGE?

7 THE COURT: THEY WILL UNTIL LEGAL AGE. AND I ASSUME
8 THAT'S FAIRLY STANDARD ACROSS THE COUNTRY REGARDLESS OF WHERE
9 YOU LIVE. I'LL SAY AGE 18 IN CASE THERE'S SOME DISPUTE, IN
10 CASE ONE OF THEM LIVES IN A JURISDICTION WHERE THAT'S A
11 DIFFERENT AGE. SAY 18. ANYTHING ELSE THAT I MISSED, COUNSEL,
12 MR. HILLYARD, THAT YOU CAN THINK OF? MR. HEALY?

13 MR. HILLYARD: JUST LOOKING. ARE YOU GOING TO MAKE A
14 FINDING WHAT HER SALARY IS? ACTUALLY, THE STATEMENT WE PUT IN
15 THERE'S --

16 THE COURT: WELL, I ATTRIBUTE TO HER -- IF WE NEED TO
17 MAKE A FINDING, I'LL ATTRIBUTE TO HER AT LEAST THE SALARY THAT
18 SHE WAS MAKING AT THE TIME SHE QUIT.

19 MR. HILLYARD: 1,500 --

20 THE COURT: WHICH -- WELL --

21 MR. HEALY: 18,000.

22 THE COURT: I THINK IT WAS 18 --

23 MR. HILLYARD: 1,500 A YEAR --

24 THE COURT: -- AS A TEACHER, 15 A MONTH, 18,000 A
25 YEAR --

1 MR. HEALY: RIGHT.

2 THE COURT: -- IS WHAT MY NOTES SHOW. I'LL ATTRIBUTE
3 AT LEAST THAT AMOUNT TO HER. AND I MIGHT INDICATE I'M NOT --
4 I'M NOT MAKING A -- THESE FINDINGS ARE NOT REALLY BASED ON THE
5 FACT THAT SHE'S DISSIPATED A LOT OF THOSE ASSETS. I -- I FIND
6 THAT UNFORTUNATE AND -- BUT THAT HASN'T BEEN THE BASIS OF THE
7 RULING HERE TODAY. JUST TROUBLESOME AS THAT MAY VERY WELL BE,
8 AND CERTAINLY IT'S IRRESPONSIBILITY, THE WAY I CONSIDERED
9 THAT, SO I UNDERSTAND THE FACT THAT THERE'S BEEN A DISSIPATION
10 OF THOSE ASSETS THAT HAVE SET THIS STANDARD OF LIVING THAT I
11 FIND TO BE REALLY UNREALISTIC FOR EVERYBODY, AND SO I DON'T
12 GIVE IT AS MUCH WEIGHT AS TO WHAT THE NEEDS AND ABILITIES OF
13 THE PARTIES MIGHT BE BECAUSE THEY DISSIPATED AND LIVED ON
14 CREDIT. SO THAT'S MY RULING. COURT WILL BE IN RECESS.

15 MR. HEALY: THANK YOU, YOUR HONOR.

16 THE COURT: ARE THERE ANY OTHER DOCUMENTS YOU'D LIKE
17 TO MAKE COPIES OF AND THEN WITHDRAW THE ORIGINALS?

18 MR. HEALY: I WOULD THINK MAYBE TAKE THE I.T.T.
19 PAYMENT BOOK, SINCE IT'S A COUPON TYPE OF THING --

20 THE COURT: I WONDERED ABOUT THAT. IF YOU'D LIKE TO
21 HAVE THAT, WE'LL HAVE THE BAILIFF GO OUT AND MAKE A COPY OF
22 IT, THEN WE'LL SUBSTITUTE IT.

23 MR. HEALY: APPRECIATE THAT.

24 THE COURT: MR. HEALY, DO YOU WANT TO TELL HIM HOW
25 YOU WANT THAT COPIED OR -- IS THERE ANYTHING ELSE THAT YOU --

1 THAT MAY BE A LITTLE DIFFICULT FOR US.

2 MR. HILLYARD: YOUR HONOR, ONE THING I DID THINK OF,
3 YOU'RE NOT JUST SIMPLY GIVING HIM THE PROPERTY IN ARIZONA OR
4 NEW MEXICO, THERE'S NO FINDING ON --

5 THE COURT: I'M JUST FINDING THERE'S NO EQUITY IN
6 IT. I'M GIVING IT TO HIM.

7 MR. HILLYARD: OKAY.

8 MR. HEALY: I JUST WONDER, ONE OTHER QUICK THING I
9 HAVE BEFORE THE JUDGE LEAVES, JUST TALKING WITH MR. BELL AND
10 HE INDICATED THAT THE PERIOD FROM 15 JUNE TO 15 JULY WOULD BE
11 A GOOD TIME. CAN WE SET THAT WHILE WE'RE HERE TODAY?

12 MR. HILLYARD: SHE NEEDS TO LOOK AT HER SCHEDULE. SEE
13 WHAT SUMMER'S GOING TO BE LIKE.

14 MR. HEALY: MAYBE YOU COULD TALK TO EACH OTHER ON THE
15 PHONE AND INCLUDE THAT.

16 MR. HILLYARD: SHE WILL KNOW SHORTLY, BUT SHE DIDN'T
17 WANT TO MAKE A DECISION NOW.

18 MR. HEALY: OKAY. FINE.

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CERTIFICATE

STATE OF UTAH)
) SS
COUNTY OF WEBER)

THIS IS TO CERTIFY THAT THE FOREGOING 188 PAGES OF
TRANSCRIPT CONSTITUTE A TRUE AND ACCURATE RECORD OF THE
PROCEEDINGS TO THE BEST OF MY KNOWLEDGE AND ABILITY AS A
CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH.

DATED AT OGDEN, UTAH THIS 8TH DAY OF JANUARY 1990.



DEAN C. OLSEN