

1990

Michele McIverBell v. Harold Freeman Bell : Brief of Appellant

Utah Court of Appeals

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Freeman Harold Bell; Defendant/Respondent.

Lyle W. Hillyard; Hillyard, Anderson and Olsen; Attorney for Plaintiff-Appellant.

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO.

900183-CA

MICHELE McIVER BELL,

)

Plaintiff/Appellant,

)

BRIEF OF APPELLANT

vs.

)

HAROLD FREEMAN BELL,

)

Case No. 900183-CA

Trial Court No. 89148

Defendant/Respondent.

)

entry #16

Appeal of a Decree of Divorce
By the Honorable F. L. Gunnell
First Judicial District Court
Cache County, Utah

LYLE W. HILLYARD (USB #1494)
HILLYARD, ANDERSON & OLSEN
175 East First North
Logan, Utah 84321

Attorney for Plaintiff/Appellant

FREEMAN HAROLD BELL
1509 Pinon Drive
Alamogordo, New Mexico 88310

Defendant/Respondent

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vs.)	
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IN THE UTAH COURT OF APPEALS

MICHELE McIVER BELL,)	
Plaintiff/Appellant,)	BRIEF OF APPELLANT
vs.)	
HAROLD FREEMAN BELL,)	Case No. 900183-CA
Defendant/Respondent.)	Trial Court No. 89148

JURISDICTION OF THE COURT

The final divorce decree from which this appeal is taken was signed by the court on March 8, 1990. The Notice of Appeal was filed on April 3, 1990.

This court has jurisdiction over the appeal in this matter by virtue of the Constitution of Utah, Article VIII, Section 1 et seq., Section 78-2A-1, et seq. Utah Code Ann. (1953 as amended), and Rule 3 R. Utah Ct. App.

NATURE OF THE PROCEEDINGS

This is an appeal from a final divorce decree signed and entered by Judge F.L. Gunnell of the First Judicial District Court of Cache County, State of Utah.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court committed error, given the length of the marriage, the earning of a Master's degree by respondent during their marriage with appellant's help, the disparate financial circumstances and earning ability of the parties, needs of the parties and relative standards of living of the parties, in awarding appellant only \$6,000 in alimony(

calculated at 250 per month for a period of two years) payable by awarding appellant the personal property in her possession which the court valued at \$6,000.

2. Whether the trial court committed error in the valuation and distribution of the personal property of the parties, because the trial court failed to fully account for the personal property acquired during the marriage, and failed to make a proper finding as to its value.

3. Whether the trial court committed error in not awarding appellant all of her attorney fees and cost presented at the trial court, respondent clearly having the greater income and income earning capacity.

4. Whether appellant is also entitled to an award of attorney fees and cost on appeal.

STATEMENT OF THE CASE

NATURE OF THE CASE

This is a divorce case.

COURSE OF THE PROCEEDINGS

Both parties were awarded a divorce on November 15, 1989. A final divorce decree was entered on March 8, 1990. An appeal of the alimony, property division and attorney fees and cost award was filed on April 3, 1990.

DISPOSITION OF THE TRIAL COURT

Trial was held on November 15, 1989. After the finding of jurisdiction, the presentation of evidence, and the hearing of

testimony from both parties, the trial court granted both parties a divorce on the ground of irreconcilable differences.

The court awarded custody of the parties minor child to the appellant, Michele McIver Bell (hereinafter mother), subject to reasonable visitation rights awarded to the respondent, Harold Freeman Bell (hereinafter father). The father was also ordered to maintain current accident, health, and life insurance on the child, and awarded any savings bonds currently being maintained for the child.

The court ordered the father to continue to pay the mother \$450.00 in child support, an amount previously agreed upon by the parties, which court noted was higher than the child support guidelines. The father is allowed to claim said child as a dependent on his income tax which is contrary to the child support guidelines.

The court awarded the parties real property to the father, after finding that the said real property really has no equity.

The trial court awarded the mother \$6,000.00 in alimony, payable at \$250.00 per month for two years. In making the order, the court stated that it found this divorce to be unusual in that the parties pursued separate careers and has had a history of marital problems. The court found the parties standard of living was "artificially established" and not helpful in its guidance. Also, the court found that due to depleted assets and significant debts, their individual earning capacities was their only asset. In arriving at the above stated alimony figure, the court found

the mother's needs to be a "great deal", and the father's ability to provide "essentially nothing". The court explained that the two year period was to provide the mother with a period of time to adjust to the fact that she will be solely dependant on her income thereafter. However, in lieu of the awarded alimony, the court awarded Ms. Bell all personal property in her possession as described by Mr. Bell's exhibit number 14, with the exception to three items in Mr. Bell's possession. The court, in making such an arrangement did not determine the value of all of the parties personal property, and acknowledged that there was some question as to the value of the property. However, the court stated that the values assigned by the parties were not challenged, and there were no other alternatives. The effect was to distribute the parties personal property according to possession.

Finding that the parties have essentially established separate identities, financially and otherwise, and the parties individual debts to be roughly equal, the court ordered each party to assume all debts and obligations in their own name.

The mother was awarded half of the father's retirement in the military acquired during the marriage to be divided when withdrawn, subject to a deduction of \$3,800.00 which represents the father's share of the mother's retirement fund that she liquidated just prior to the divorce proceeding to support herself.

Finding the father to have a limited ability to generate money, but acknowledging that the court has not required him to

pay many of out-of-pocket expenses in the decree, the court ordered him to pay \$800.00 of the mother's attorney fees and cost.

The court found the mother's salary to be \$1,500 per month, based upon her past earnings as a teacher which she has had to forego for approximately two years while she pursued her Master's degree at Utah State University where she received \$863.00 per month as a teaching assistant.

STATEMENT OF THE FACTS

1. The parties were married on June 5, 1979 in Logan, Utah. The mother filed for divorce on March 3, 1989. A decree granting the parties a divorce was entered on March 8, 1990.

2. During the course of the marriage, one child was born on August 28, 1990 to the parties, to wit. Stephanie Bell. Now six years of age.

3. The father is currently a Major in the Air Force, stationed at Holloman Air Force Base located in New Mexico, (Transcript, page 4, lines 12-15) with a current monthly salary of \$3,660.00, or approximately \$40,000.00 yearly. (Transcript, page 14, lines 11-16.)

4. The mother was completeing a Masters degree at Utah State University in education, (Transcript, page 9, lines 11-13; and page 11, lines 24-25.) receiving \$863.00 per month as a teaching assistant. (Transcript, page 9, lines 14-16)

5. During the course of the parties approximately eleven year marriage, Mr. Bell earned a Masters Degree, (Transcript, page 13, lines 5-6.), which assisted him in the advancement of his military career. (Transcript, page 165, lines 15-19.) The earning of the degree was a result of a joint effort from both parties. While Mr. Bell continued to work and provide for the family financially, Ms. Bell assisted Mr. Bell with his school work. (Transcript, page 13, line 5-13, and page 165, lines 9-14.) The parties agreed the mother would assist the father with his course work, and when the mother decided to return for her graduate degree, the father would help her. (Transcript, page 13, lines 5-13.)

6. The mother began that effort to earn her Master's degree while the parties were married, but she did not receive any support from the father. (Transcript, page 14, lines 1-6.)

7. The mother wants to continue her education and earn her Ph.D., which would allow her more flexibility in a work schedule and increase her potential salary, both of which would be beneficial to the child of the parties. (Transcript, page 12, lines 9-16.)

8. The parties were seperated several times during their marriage because of the fathers abusive action, and due to military assignments overseas. (Transcript, page 40, lines 5-8.)

9. The mother started classes at Utah State approximately in the fall of 1988. (Transcript, page 41, lines 8-11.)

11. While Mr. Bell was stationed in Korea from 1987 to 1988 he gave the mother between \$1,600.00 to \$1,800.00 per month. (Transcript, page 166, lines 16-18.) After the father returned from Korea, he refused to provide Ms. Bell with any further financial support because she had decided on attending Utah State without any discussion with him, (Transcript, page 154, line 23.). By agreement he did pay her \$450.00 per month in child support for their daughter.

12. Prior to Ms. Bell coming to Utah State University, she taught school in North Carolina for seven years where she had accumulated \$7,600.00 in a retirement fund. In February, 1990, she needed money for living expenses and was forced to liquidate her retirement fund. (Transcript, page 32, lines 12-17.) \$4,000.00 of the fund she used for living expenses incurred prior to arriving in Logan to attend Utah State. The balance was used for living expenses she incurred while in Logan, Utah, because she was receiving no support from Mr. Bell. (Transcript, page 33, lines 9-18.)

13. While in Korea Mr. Bell purchased a dining room suite. When he returned to New Mexico he purchased a stereo, refrigerator, washer and dryer, (Transcript, page 158, lines 5-9.), which he did not list as marital property. (Transcript, page 169, lines 18-22.) Mr. Bell was also awarded a 1986 truck purchased during the marriage. (Transcript, page 182, lines 24-25.)

14. The personal property in Ms. Bells' possession is largely furniture approximately years old, being purchased when the parties were married. (Transcript, page, 23, lines 19-21.) A list of the furniture is shown on Ms. Bell's exhibit 10. Ms. Bell also has two automobiles one of which is no longer operating, and was purchased for \$500.00 when she arrived in Logan, Utah. (Transcript, page 16, line 5-14.) Her other vehicle, the 1982 Datsun, is located in North Carolina, being untrustworthy to drive across the country in. (Transcript, page 22, lines 19-23.)

15. Mr. Bell agreed that Ms. Bell's attorney fees and cost are reasonable, and that the case was "unduly" complicated, but refused to assume her fees and cost asserting that, essentially, the divorce is her fault. (Transcript, page 132, lines 3-19.)

SUMMARY OF THE ARGUMENT

1. As a result of the courts failure to adequately and fairly consider the financial circumstances of the parties, and the contribution of each party to the marriage, the court abused its discretion by awarding Ms. Bell only \$6,000 in alimony. Such abuse of discretion was compounded by the fact that in lieu of cash payments of \$250 per month for a two year period, which equals \$6,000, Ms. Bell was awarded the personal property in her possession, which the court found to be valued at \$6,000.

2. Due to the trial courts failure to make a full account and valuation of the marital property involved in this

case, the courts ordered distribution of the ma inequitable and constitutes an abuse of its discretion.

3. The courts award of only \$800.00 in attorney fees and cost constitutes an abuse of its discretion in that all the evidence presented sufficiently demonstrated that fees and cost were reasonable, Ms. Bells' need, and that Mr. Bell was able to provide for that need.

4. Because the final decree was grossly inequitable, Ms. Bell was forced to appeal the decree to defend her interest. Such actions constitute reasonable and good faith grounds upon which the appeal is pursued, and since Mr. Bell is able to provide and Ms. Bell is not, she should be awarded fees and cost on appeal.

ARGUMENT

I.
BECAUSE OF THE PARTICULAR CIRCUMSTANCES OF
BOTH PARTIES, WITH MR. BELL CLEARLY
HAVING THE GREATER EARNING ABILITY,
MS. BELL SHOULD HAVE BEEN AWARDED
MORE THAN \$6,000 IN ALIMONY.

In 1985, the Utah Supreme Court, in the case of Jones v. Jones, 700 P.2d 1072 (Utah 1985), following precedent set forth in the case of English v. English, 565 P.2d 409 (Utah 1977), firmly established and thoroughly analyzed the three factors that must be considered in determining whether an alimony award is fair and reasonable. The three factors are: 1) the financial conditions and needs of the wife; 2) the ability of the wife to

produce a sufficient income for herself; and 3) the ability of the husband to provide support.

In applying these three factors to this case it become clear that the trial court failed the adequately consider the facts of this case in light of the three factors. Moreover, the record makes apparent that as to Mr. Bells' ability to pay, the trial courts abuse of discretion is obvious.

Ms. Bells present financial circumstance is depressed and even after the completion of her schooling will not be anywhere comparable in earnings to what she could have had had she not sacraficed to help Mr. Bell during their eleven year marriage her needs are great. Nevertheless the court awarded her only \$6,000 in alimony. Ms. Bell is a single parent and a graduate student at Utah State University. Her budget, plaintiff's exhibit 9, reflects that her monthly expense is approximately \$2,493.00. To put this figure in context, it is proper to reduce the figure by \$450.00, the amount of child support awarded, as the figure contemplates the expenses for the parties child. This would leave Ms. Bell with a monthly expense of \$2043.00.

Ms. Bell's income amounts to only \$863.00 a month from her job as a graduate teaching assistant. The figures balanced, leave Ms. Bell with a monthly debt of \$1180 per month. This order substantially reduces the standard of living Ms. Bell and the child once enjoyed during the course of the eleven year marriage.

Further compelling is that some of the debts which appear on Ms. Bell's monthly budget are debts that she incurred in the remaining year and a half of the marriage in order to maintain herself while completing her Masters degree. This is so, because during the last year and half the the father refused to provide the her with any support except \$450.00 per month which the father made clear was solely intended as child support.

Considering the second factor. The trial court found that Ms. Bell's salary to be \$1,500 per month. Such a figure is a historical salary based on what she made as a high school teacher in North Carolina. While this may reflect her earning ability, it is improper and unfair to use the historical figure based on the circumstance of the marriage and Ms. Bells' current particular situation.

In Martinez v. Martinez, 754 P.2d 69 (Utah App. 1988), the appellant, inter alia, appealed an alimony award. During the course of the parties marriage, the defendant husband secured a medical degree. The court found that the degree enabled him to earn approximately \$100,000 per year. Prior to the earning of the medical degree, the parties endured a poor standard of living. This court found that relatively small alimony award could be justified based on the Ms. Bells' previous standard of living, however, "But such a result is unfair. A divorce court is a court of equity. It is not equitable to preserve the status of limited income for one party and affluence for the other when the one sacrificed to help the other achieve such affluence."

Id. at 74. While Martinez is factually distinguishable from this case, the inequity of using appellants historical earnings to mitigate the alimony award is analogous to the rational used in Martinez.

During the parties ten year marriage Mr. Bell earned a Masters degree. While he did so at night and on the weekends so that he could continue to work full time, such luxury was only possible due to Ms. Bells' enormous contribution of taking care of the household, their child, and assisting Mr. Bell in his course work. In other words, the efforts that went into earning Mr. Bell's Masters degree was a joint effort from both parties. Undoubtedly, as a result of Mr. Bell's Masters degree his earning ability has increased as well as his ability to move up in rank in the military.

Now Ms. Bell is completing her Masters degree, and desires to continue to earn a doctorate degree so that both her and the child's future will be promising. While she is completing her Masters degree she did not receive the same support from Mr. Bell. Without any financial support from her husband and no time to maintain employment, Ms. Bell incurred debts and even had to withdraw her retirement from her past employment in order to meet living expenses.

Now the parties are divorced. Mr. Bell and the trial court deem it fair that Ms. Bell should only receive \$6,000 in alimony based, among other things, on her past earning ability. While such an equation may work in most cases, here, because Ms. Bells'

current needs are significantly comprised of debts she incurred while in graduate school, during which time Mr. Bell provided no financial support, to use her earning ability to mitigate the alimony award overlooks Ms. Bells' contribution to Mr. Bell's Masters degree and his neglect in failing to providing any financial support while she was earning her Masters degree. Certainly, \$6,000 would not cover the expenses Ms. Bell incurred for the year and a half Mr. Bell neglected to provide her with financial support. In other words, it "preserve[s] the status of limited income for one party and affluence for the other..." Id. at 74. Thus, since Ms. Bell "sacrificed to help" Mr. Bell achieve his personal and career growth, he in turn should at least be required to support her in achieving hers. Ms. Bell deserves at least an amount equal to the costs she incurred in gaining her degree, which surely would be greater than the \$6,000 awarded.

As to the third factor, the ability of Mr. Bell to provide support, the court's error and abuse could not be clearer. The trial record reflects that Mr. Bell indicated that his current salary is \$3,660 per month or roughly \$40,000 per year. As far as monthly expenses, Mr. Bell purports to have a monthly expense of \$5,090. The accuracy of this figure is suspect. In regards to a balance Mr. Bell owes on a debt to the Air Force for a salary advance, he listed a balance of \$2,000 in his exhibit. However, in questioning, his response was \$1,200.(Transcript page 160, lines 11-17.) He qualified the

conflict in figures by stating that deductions have been coming out directly every month from his salary. This leads one to believe that perhaps the \$5,090 is quite inflated. Nevertheless, when itemized, the figure seems unreasonable.

In any event, the trial court concluded that Mr. Bell could pay "essentially nothing". (Transcript page 182, lines 8-9.) In Jones, 700 P.2d 1072 (Utah 1985), the Utah Supreme Court stated that the trial court should have taken into account the "legitimate and reasonable needs" as they relate to the defendant and his ability to pay. Although in Jones the cost pertained to respondent's business expenses as they related to his ability to pay, here the situation is no different. Mr. Bell's expenses relate to his personal cost as they relate to his ability to pay. The fact that the court concluded that Mr. Bell could pay "essentially nothing" from a \$40,000 per year salary undoubtedly makes questionable whether the trial court made a "reasonable and legitimate" assessment of his cost, and consequently, his ability to pay alimony.

Considered collectively, these factors can only lead to the belief that the trial court, through oversight or mistake, abused its discretion and awarded an alimony amount far below a reasonable and justified figure.

More disturbing, is that in lieu of a cash award, the court awarded Ms. Bell all the personal property in her possession thereby negating the alimony award altogether.

The trial court distributed the personal property of the marriage according to who had possession. The court valued the personal property in Ms. Bell's possession at \$6,000.00, but did not value the property in Mr. Bell's possession. The court then used the personal property awarded, half of which belonged to Ms. Bell as full satisfaction of the alimony payments.

By doing so, the trial court used in the personal property distribution twice, which consequently, had the effect of not awarding any alimony at all.

Therefore, not only did the trial court improperly evaluate the three factors articulated in English and Jones to arrive at an inequitable alimony award, but moreover, by using Ms. Bell's share of the personal property to satisfy the alimony award, such arrangement had the effect of denying Ms. Bell any of the alimony award that the court just awarded.

II.

BECAUSE THE COURT FAILED TO ACCURATELY
ACCOUNT FOR AND VALUE THE INVOLVED MARITAL PROPERTY,
AND FAILED TO CONSIDER MS. BELL'S EXHIBITS
IN THE ASSESSMENT OF THE VALUES OF THE
SAID PROPERTY, THE COURT ABUSED ITS
DISCRETION IN THE VALUATION AND DISTRIBUTION
OF THE PROPERTY OF THE MARRIAGE.

In Boyle v. Boyle, 735 P.2d 669 (Utah App. 1987), this court stated that in some cases, failure to include property valuations constitute an abuse of discretion sufficient to require remand for determination of values. This was an agreement with the rationale articulated by the Utah Supreme Court in the case of Jones, 700 P.2d 1072 (Utah 1985). However, in both cases the

courts refused to remand the determination of the property values because in each case it was appellant's counsel that failed to include valuation figures for the property, a condition precedent to appellate review regarding the equity of the distribution.

Here, Ms. Bell's counsel submitted property valuations as evidence of the value of the property in Ms. Bells' possession as well as values, to the best of Ms. Bells' knowledge, of that property in Mr. Bells' possession. Nonetheless, the court stated that it had only one exhibit regarding property valuations, Mr. Bell's. See Transcript, page 183, lines 8-10. Therefore, the court forgot Ms. Bell's exhibit and determined the value of her property solely from Mr. Bell's exhibit. Moreover, the court failed to scrutinize the accounting of the marital property and determine a value for the personal property awarded Mr. Bell.

The collective effect of the courts actions was an inaccurately value the personal property in possession of the parties. Accordingly, without an accurate accounting, and valuation of all the marital property, the distribution thereof was inequitable.

Mr. Bell maintained, however, that the property he acquired in New Mexico and Korea was not marital property. This is incorrect, and contrary to statute and established law. Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980). According to Fletcher, property acquired during the course of the marriage is considered marital property subject to equitable distribution upon divorce.

In total, not only did the trial court fail to make a finding as to the value of the property in Mr. Bell's possession; but moreover, ignored the testimonial evidence presented at trial, and failed to make a full account of all of the marital property acquired by the parties during the marriage. Property that was in Mr. Bells' possession that he did not list but should have. The conclusion can only be that the property distribution was inequitable, and an abuse of discretion by the trial court afforded it pursuant to 30 U.C.A. 30-3-5 (1984). Accordingly, such clear abuse of discretion calls for a remand for a full accounting and determination of the value of the property. Boyle, 735 P.2d 669 (Utah App. 1987)

III.

BECAUSE ALL THE REQUIRED EVIDENCE WAS PRESENTED, AND THAT EVIDENCE PRESENTED WAS REASONABLE, AND BECAUSE MS. BELL HAS ESTABLISHED HER NEED, THE AWARDED ATTORNEYS FEES IS CLEARLY INADEQUATE.

In Kerr v. Kerr, 610 P.2d 1380 (Utah 1980), Utah Supreme Court provided a thorough discussion of the principles that a trial court should concern itself with in determining the award of attorney fees. The award must rest "on a basis of evidence of need and reasonableness" Id. at 1384. In elaborating on the *"reasonableness" of the fees, the court articulated several particular factors: number of hours dedicated, reasonableness of the hourly rate in light of the difficulty of the case, results accomplished, and the comparative rate charged. While the court did not go so far as to make these figures a condition precedent

for review of the award, the court did note that the hourly rate should not be examined independently, but in the context of the facts and emotion of the case. As applied to this case, these factors too clearly show that, an award of \$800.00 for attorney fees and cost for total bill of \$2,350.00 in fees and \$91.50 in cost was inadequate.

Ms. Bell has adequately demonstrated her need. Her monthly budget demonstrates a need of \$2,043, excluding child expenses which is covered by child support. Even with her earning ability of \$1500.00 per month runs a monthly debt of \$500.00. Based on this it can only be said that her need is great, or in the words of the trial court, a "great deal". Nevertheless, while noting that "I am not really ordering the defendant to make a lot of out-of-pocket payment in this particular case", the trial court ordered Mr. Bell to pay only \$800.00 in fees and cost from a \$40,000.00 year salary. Moreover, because Ms. Bell was not awarded any cash alimony award, rather in lieu of cash, was awarded the personal property in her possession, the balance of her fees only makes her financial position more compromising.

As to the reasonableness of the fees and cost, the inadequacy is no less compelling. This divorce was not "usual". At the time of the divorce the parties lived in separate states. Mr. Bell filed a motion to stay proceedings because of the Soldier's and Sailor's Relief Act, which was contested. Much of their personal property was spread throughout various locations. The parties, for at least the two years prior to the action,

created numerous loans by several lenders. The collective effect of all this made the Discovery, organization, and strategy of the case difficult and complex. Indeed, the services rendered ran "the gamut of the complexities of the human condition." Id. at 1385.

In light of the above, the fees totaled \$2,350.00. This was based on an hourly rate of \$100.00 out of court, and \$110.00 in court, of which 16.0 hours and 6.0 hours were expended respectively. A signed affidavit describing the above figures including a break down of the specific action taken, by date rendered, was submitted to support the charged fees. The reasonableness of the fees is evident. It is not uncommon, as the above cited case demonstrates, for fees in divorce actions to reach upwards of \$10,000 or more. Concededly, the above cited case was more involved, but proportionately, the fees charged in this case would likely fall well below if the cases were factually similar.

Based upon the circumstances of the parties at the time of the divorce, and the difficulties that such circumstances created in the litigation of the case as they substantiate the reasonableness in the fees and cost charged, and the financial situation of both parties with Ms. Bell showing a true need and Mr. Bell showing an ability to contribute, Ms. Bell as a matter of equity, should be entitled to a remand for a more equitable determination of the awarded fees and costs.

IV.

BECAUSE OF MS. BELL'S DEMONSTRATED NEED,
MR. BELL'S ABILITY TO PROVIDE, AND THE
REASONABLE AND GOOD FAITH GROUNDS UPON
WHICH THIS APPEAL IS BASED, MS. BELL SHOULD
BE AWARDED ATTORNEY FEES AND COST ON APPEAL.

Not unlike the principles which guide a trial court in the award of attorney fees and cost at the trial level, an award of attorney fees and cost on appeal should also consider the appealing party's needs and the opposing party's ability to pay. In addition, however, because of the implicit potential abuse of the appellate procedure, especially in divorce proceedings, appellate courts have also required that in order to prevail in such a request, there must be a showing of good faith and reasonableness upon which the appeal is pursued. Re Marriage of Davis, 141 Cal.App.3d 71 (1st. Dist. 1983).

The Utah Supreme Court has generally espoused the same principles. Where a party was required to defend an appeal, later to be found without merit, the defending party, upon a reasonable and proper showing, was afforded a remand to the trial court for the determination of attorney fees and cost on appeal. See, Ehninger v. Ehninger, 569 P.2d 1104 (1977); and Carter v. Carter, 584 P.2d 904 (Utah 1978).

Although in the above cited cases, the requesting party was the defendant, the principles of equity are no different in this case simply because the requesting party is the appellant. Here, Ms. Bell, in a sense, is defending her interest to a divorce

decree which she asserts and has argued above to be unfair.

Thus, she is a appellant by procedure, but a defendant by nature.

The reasonableness and good faith grounds upon which this appeal is based has been fully discussed above. Briefly, Ms. Bell has demonstrated that she is clearly the disadvantaged party financially. The court finding her needs to be a "great deal", awarded her \$6,000.00 in alimony. However, in lieu of cash payments, she was awarded all the personal marital property in her possession, which she should have been entitled to anyway as her fair share of the said marital property. The effect was to negate the awarded alimony altogether. Additionally, the trial court distributed the personal marital property without first making a full account and valuation of said property thereby resulting in an inequitable distribution. It is upon these reasonable and valid grounds, that Ms. Bell now appeals.

As to Ms. Bells' needs, and Mr. Bells' ability to pay, the current circumstances of the parties provide an adequate illustration. Ms. Bell is a graduate student with an earning ability of \$1,500.00 per month. She is a single parent, with a significant amount of debt which was largely due to her student status. She has relatively few assets. Mr. Bell, on the other hand, has an established military career as an Officer with a current yearly salary of \$40,000. Such disparity demonstrates the needs and ability of each party respectively.

In both Ehninger and Carter, due to the fact that the requesting party was forced to defend the appeal, which in the

later was found to be without merit, and in the former was affirmed in the later, said party was entitled to have such request remanded to the trial court for a reasonable and proper amount of fees and cost on appeal. Here, Ms. Bell was "forced" to institute this action. Negotiations to settle failed, leaving only the appellate process as a viable means of protecting her interest from an improper and inequitable divorce decree. A fortiori, Ms. Bell should be entitled to the same remedy as the requesting parties were in the above cited cases.

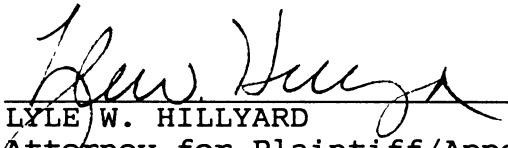
CONCLUSION

Based on the aforementioned reasons, Ms. Bell respectfully request this court to remand the final divorce decree entered in this case to the trial court for a review of the alimony award, property distribution and awarded attorney fees and cost contained within said decree.

Ms. Bell further request that she be awarded attorney fees and cost on appeal.

Dated this 21st day of June, 1990.

HILLYARD, ANDERSON & OLSEN



LYLE W. HILLYARD
Attorney for Plaintiff/Appellant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing APPELLANT'S BRIEF was mailed, postpaid, to Defendant/Respondent Freeman Harold Bell, at 1509 Pinon Drive Alamogordo, New Mexico 88310, this 21st day of June, 1990.


Lyle W. Hillyard

ADDENDUM

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DECREE AND ORDER FOR DIVORCE	A 6-9

Lyle W. Hillyard #1494
HILLYARD, ANDERSON & OLSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
175 EAST FIRST NORTH
LOGAN, UTAH 84321
TELEPHONE (801) 752-2610

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

MICHELE McIVER BELL,)	
Plaintiff,)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.)	
FREEMAN HAROLD BELL,)	Civil No. 890000148
Defendant.)	

This matter came on for hearing on the 15th day of November, 1989, before the Honorable F. L. Gunnell, District Court Judge. Personally appeared the Plaintiff and her attorney, Lyle W. Hillyard, and the Defendant and his attorney, Tim W. Healy. The parties were sworn and testified and evidence was presented. The Court having heard the testimony and reviewed the evidence, and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. That Plaintiff is now and has been for more than three months immediately preceding the filing of this action, a resident of the County of Cache, State of Utah.

2. That the Plaintiff and Defendant were married to each other on the 5th day of June, 1979, in Logan, State of Utah, and ever since that time have been and now are husband and wife.

3. That one child has been born as issue of this marriage, namely: STEFANIE BELL, born August 28, 1983, and no more children are expected.

4. That Plaintiff is the fit and proper person to be awarded the care, custody, and control of the said minor child subject to reasonable visitation rights of the Defendant to include 30 continuous days each summer, with the Plaintiff to decide by May 1st of each year, in consultation with Defendant, when those 30 days will begin and Defendant to pay all costs of transportation. The parties were advised that if Stefanie becomes really homesick and staying further with Defendant will be seriously disruptive, she should be sent back to Plaintiff and the parties should work with each other maturely and allow telephone calls and contacts. Further, Defendant is allowed to telephone the child at 10:00 a.m. at the child's residence Saturday or Sunday and to speak for up to 20 minutes. The child should call Defendant and is encouraged to call whenever the child wants to. Defendant is to give Plaintiff 48 hours notice if he is in the area and wants to visit with the child. That neither party is to discuss the other negatively before the child.

5. That during the course of the marriage, irreconcilable differences have arisen between the parties making it impossible to continue the marriage and each party should be granted a divorce, one from the other.

6. That this marriage had deteriorated and there is no possibility of reconciliation; therefore, the statutory waiting periods before this divorce is made final should be waived.

7. That for the purposes of child support, Plaintiff's income is set at \$1,500.00 a month and Defendant's is set at \$3,660.00 a month, and child support should be \$450.00 a month, which Defendant is currently paying and is in excess of the Uniform Child Support Schedule with this support abated one-half for the 30 days visitation each summer.

8. That a Withhold and Deliver Order in favor the Plaintiff should be prepared and issued by the Clerk of this Court, who is authorized to deliver it immediately to Defendant's employer pursuant to Utah Code Annotated, Section 78-45b-5, upon the filing of Plaintiff's Affidavit that the Defendant is over 30 days delinquent in his monthly obligation to pay child support.

9. That Plaintiff should be allowed to claim the child as a dependent for income tax purposes, but the parties may calculate the net advantage of allowing Defendant to claim the child and if there is a net savings and they qualify under IRS rules, then Defendant may claim the child and reimburse the Plaintiff for the income tax she has to pay because of the loss of the child as a dependent and split the net savings between the parties.

10. That Defendant should be awarded the real property the parties have acquired at 3908 Foster Drive in Fayetteville, North Carolina, subject to his assuming all the debts, and Plaintiff shall sign any necessary papers and Defendant shall hold Plaintiff harmless therefrom.

11. That regarding alimony, because the standard of living is based on debt and wasted assets and not established by the lifestyle and in lieu of any alimony, Plaintiff is awarded all the personal property now in her possession which the Court places a value of \$6,000.00 based on the husband's Exhibit No. 14.

12. That each party should be ordered to assume the debts in their own name.

13. That regarding retirement, Plaintiff should be awarded an interest in Defendant's military retirement based on the Woodward formula, subject to a reduction of \$3,800.00 when that retirement is paid as being Defendant's one-half of Plaintiff's retirement that she cashed in in February of 1989.

14. That Defendant should maintain all insurance at its current level for the child's benefit so long as there is a child support obligation; provided, however, that in the event Defendant has additional natural children, they may be included as co-beneficiaries on the existing life insurance and death benefit plans. In the event that Defendant acquires additional life insurance or death benefit plans in the future

and names after-born children as beneficiaries, he shall also include Stefanie as a co-beneficiary.

15. That Defendant should pay Plaintiff \$800.00 on her attorney fees plus costs.

16. That the 15 savings bonds that Defendant has acquired to date should be maintained for the child.

17. That the Defendant should maintain health and accident insurance on the minor child as long as there is a child support obligation and that all uninsured medical bills will be paid 50 percent by each party, except the custodial parent will pay the routine office calls.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

That an order should be entered in accordance with the foregoing Findings of Fact.

DATED this 8 day of March, 1990.

BY THE COURT:

/s/ F. L. Gunnell
F. L. GUNNELL
District Court Judge

APPROVED AS TO FORM:

Tim W. Healy
Tim W. Healy
Attorney for Defendant

Lyle W. Hillyard #1494
HILLYARD, ANDERSON & OLSEN
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IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Plaintiff is awarded a decree of divorce from the Defendant and the Defendant is awarded a decree of divorce from the Plaintiff to become final upon signing.

2. That Plaintiff is awarded the care, custody, and control of the minor child of the parties, to-wit: STEFANIE BELL, born August 28, 1983, subject to reasonable visitation

rights of the Defendant to include 30 continuous days each summer with the Plaintiff to decide by May 1st of each year, in consultation with Defendant, when those 30 days will begin and Defendant to pay all costs of transportation. The parties were advised that if Stefanie becomes really homesick and staying further with Defendant will be seriously disruptive, she should be sent back to Plaintiff and the parties should work with each other maturely and allow telephone calls and contacts. Further, Defendant is allowed to telephone the child at 10:00 a.m. at the child's residence Saturday or Sunday and to speak for up to 20 minutes. The child should call Defendant and is encouraged to call whenever the child wants to. Defendant is to give Plaintiff 48 hours notice if he is in the area and wants to visit with the child. That neither party is to discuss the other negatively before the child.

3. That Defendant is ordered to pay to Plaintiff as and for child support, the sum of \$450.00 a month, which support shall be abated one-half for the 30 days visitation each summer.

4. That a Withhold and Deliver Order in favor the Plaintiff shall be prepared and issued by the Clerk of this Court, who is authorized to deliver it immediately to Defendant's employer pursuant to Utah Code Annotated, Section 78-45b-5, upon the filing of Plaintiff's Affidavit that the

Defendant is over 30 days delinquent in his monthly obligation to pay child support.

5. That Plaintiff is allowed to claim the child as a dependent for income tax purposes, but the parties may calculate the net advantage of allowing Defendant to claim the child and if there is a net savings and they qualify under IRS rules, then Defendant may claim the child and reimburse the Plaintiff for the income tax she has to pay because of the loss of the child as a dependent and split the net savings between the parties.

6. That Defendant is awarded the real property the parties have acquired at 3908 Foster Drive in Fayetteville, North Carolina, subject to his assuming all the debts, and Plaintiff shall sign any necessary papers and Defendant shall hold Plaintiff harmless therefrom.

7. That in lieu of any alimony, Plaintiff is awarded all the personal property now in her possession.

8. That each party is ordered to assume the debts in their own name.

9. That Plaintiff is awarded an interest in Defendant's military retirement based on the Woodward formula, subject to a reduction of \$3,800.00 when that retirement is paid as being Defendant's one-half of Plaintiff's retirement that she cashed in in February of 1989.

10. That Defendant is ordered to maintain all insurance at its current level for Stephanie's benefit so long as there is a child support obligation; provided, however, that in the event Defendant has additional natural children, Defendant may include them as co-beneficiaries on the existing life insurance or death benefit plans. In the event that Defendant acquires additional life insurance or death benefit plans in the future and names after-born children as beneficiaries, Defendant is ordered to also include Stefanie as a co-beneficiary.


11. That Defendant is ordered to pay Plaintiff \$800.00 on her attorney fees plus costs.

12. That Defendant is ordered to maintain for the said minor child the 15 savings bonds that Defendant has acquired to date.

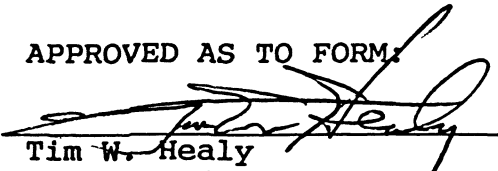
13. That the Defendant is ordered to maintain health and accident insurance on the minor child as long as there is a child support obligation, and that Plaintiff and Defendant are ordered to pay 50 percent of all uninsured medical bills, except the custodial parent will pay the routine office calls.

DATED this 8 day of March, 1990.

BY THE COURT:


F. L. GUNNELL
District Court Judge

APPROVED AS TO FORM:


Tim W. Healy
Attorney for Defendant