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In the

Supreme Court of the United States

HAROLD EUGENE HUFFMAN,
Petitioner,

vs.

FAYE I. BOERSON,
Respondent.

No. 71-5097

Washington, D. C.
April 19, 1972

Pages 1 thru 44

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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Respondent.

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Wednesday, April 19, 1972

The above-entitled matter came on for argument at 10:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LEO EISTATT, ESQ., 707 City National Bank Building, Omaha, Nebraska 68102, for the Petitioner.

VINCENT L. DOWDING, ESQ., 216 North Cedar Street, Grand Island, Nebraska, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-5097, Huffman against Boersen.

Mr. Eisenstatt, you may proceed whenever you're ready.

ORAL ARGUMENT OF LEO EISENSTATT, ESQ.,

ON BEHALF OF THE PETITIONER

MR. EISENSTATT: Mr. Chief Justice, and may it please the Court:

This case is on petition for writ of certiorari from the Supreme Court of the State of Nebraska and involves in its essence several questions involving the annulment of a marriage, a determination of paternity, and the allowance or granting or the violation thereof, of the right to be present at trial.

These proceedings now before the Court commenced by the filing of a petition for annulment in the District Court of Hall County, Nebraska, Grand Island, approximately in the middle of the state. The defendant in that case, the petitioner here, Harold Eugene Huffman, was at that time incarcerated in the state penitentiary in Lincoln, Nebraska, approximately 110 miles away.

Throughout the proceedings, Mr. Huffman appeared pro se until the appointment of counsel by this Court in response to his request for a writ of certiorari.

The essential facts as we view them would be that on March 5, 1969 these two parties, Harold Eugene Huffman and Faye Boersen, were married in Las Vegas, Nevada. At that time the parties had been living in Hamilton County, adjoining Hall County, in a small town known as Giltner, Nebraska.

At that time there had been filed by Faye a petition for divorce from a marriage contracted, according to the record, with a Richard A. Boersen and with respect to whom there were two children at that time of the marriage. And I will get into the facts in a little more detail.

The petitioner's view of the issues in this case are in two general areas and that is, was the equal protection of the laws violated with respect to the petitioner by reason of the dismissal of his appeal in that annulment case by the Nebraska Supreme Court because he failed to file a seventy-five dollar cost security bond or cash in lieu thereof? And, secondly, were his rights to be present at the trial violated when he was incarcerated at the state penitentiary at the time of the trial?

The facts are not in dispute; and although there are lengthy pleadings on file, a distillation of those facts, in our opinion, do not make the facts very complicated.

Before referring to these additional facts, I would like to footnote Nebraska provisions dealing with the matter

of appeal. Since its founding, the State of Nebraska has had in its Bill of Rights a provision guaranteeing the right of appeal in all civil cases; Article I, Section 24 provides the right to be heard in all civil cases in the court of last resort by appeal or otherwise shall not be denied. And as announced by a long line of Nebraska cases, more particularly as it applies to this case, and we've cited in our brief the case of Ferber v. Leise which held that this right of appeal exists irrespective of the merits or the lack thereof in the court or in the record.

In other words, they take the position that our Supreme Court should not consider a case until it has been properly presented and not try to anticipate whether or not the appeal is frivolous or has some substance.

Now, the record shows that Faye had been married or entered into a marriage ceremony with Richard Boersen in June of '64, and she had filed an action for divorce--well, there were two of them, but the one involved was in February of '69. And in that action Boersen had filed a countersuit. Then on March 5th, as I stated, she married the petitioner in Las Vegas, Nevada. And about a month and a half later, April 24th, the divorce decree was entered. In October of that year, '69, she gave birth to a child, a child which the petitioner claims paternity and is also one of the issues involved in this case.

In November of 1970, Faye filed the petition for annulment in the Hall County District Court. Huffman was incarcerated in the state penitentiary on November 9th. The sheriff of Lancaster County, pursuant to our local procedure, served a summons. He was allowed in to serve a summons on the petitioner and service in return was made of that fact.

In the pleadings that followed--as I said, all filed by Huffman pro se--by the way, Mr. Huffman is the inmates' legal assistant at the Nebraska penitentiary. A review of the record in this case would indicate some expertise and knowledge on his part that might not be possessed of an ordinary layman.

Among the pleadings filed, he raised the issue of denial of a right to annulment; he raised the issue and claimed the right to be found the father of his child born in October of '69; and he also demanded in several pleadings the right to be present at any trial. He had also advised the court that he was without funds and had no counsel.

The record is undisputed that at about that time Mr. Huffman had approximately $114 of resources, and this has been stipulated and admitted.

The case, as I said, was filed in November. In March of '71, Faye's attorney ex parte asked the court to set the case for trial, which was perfectly in line with open procedure. The case was set for trial on March 26th. Huffman

was given notice of that trial again by the Sheriff of Lancaster County, who served this upon him on the 22nd day of March. On that same day Mr. Huffman wrote a letter to the judge, which appears in the appendix on page 48, stating that he had just received this service, which was four days prior to the trial, that he had no counsel, and again renewed his demand to be present.

In a prior document which he filed, called a motion for appearance, he had advised the court of the same facts and further advised the court that all it took was a simple order by the court to have the warden produce Mr. Huffman at his trial on the annulment in Grand Island.

On March 26th trial took place, and a decree or order of annulment was entered. Huffman's pleadings were all dismissed, held for naught. On April 9th Huffman filed his notice of appeal, and this is all in accordance with Nebraska procedure; and he paid a twenty-dollar docket fee, which is also required by our statute. He also filed precipes for the preparation of a transcript, preparation of a bill of exceptions, which were prepared. The transcript by the clerk, the bill of exceptions by the court reporter, and these all appear in the appendix.

Section 25-1914 of our Nebraska statutes, among other things, requires that the cost security of $75 be filed. Our Nebraska statutes have, as I think most states do,

requirements which must be followed in order to lodge an appeal in the Nebraska Supreme Court. The notice of appeal and the twenty-dollar docket fee are denominated as jurisdictional.

Q Was there any argument before the Supreme Court of Nebraska?

MR. EISENSTATT: No, Your Honor.

Q This is all on papers?

MR. EISENSTATT: This was all on documents. Well, I wish to withdraw that. Mr. Dowding did appear at the argument in the Supreme Court, but Mr. Huffman did not. He was in the penitentiary. I haven't gotten to that point, but in the Supreme Court the--

Q Was Boddie v. Connecticut argued to the--

MR. EISENSTATT: No, sir. It was raised, however, by Mr. Huffman in his pleadings.

As I said, he filed the precipes, he filed the notice of appeal and the twenty-dollar docket fee. Statute requires within 30 days of that date the cost security be filed.

On May 19th Faye's attorney filed a motion in the Supreme Court of Nebraska to dismiss the appeal for failure to file the cost security.

Q Mr. Eisenstatt, as a matter of practicality, how much protection is a seventy-five dollar bond in a

Nebraska practice? What do the average costs amount to, in excess of that?

MR. EISENSTATT: Very much in excess of that, Your Honor. In my own personal experience even a small brief is over $200, and most of the time they are three and four hundred dollars at present prices. The Supreme Court has a rule which provides for reimbursement at $2.60 a page, which comes to $1.95.

Q Can the appellee tax the cost of his brief on the Supreme Court of Nebraska?

MR. EISENSTATT: The winning party in the appeal gets reimbursement for 75 pages times $2.60, which is taxed as cost. Only the appellant, however, must file a cost security.

Q And the purpose of the cost inures to the benefit of the other party, the appellee in this case?

MR. EISENSTATT: That's right, because statutory costs as far as the state are concerned in appeal are taken care of with the twenty-dollar docket fee.

Q What is the actual cost of printing a brief per page out in Omaha and Lincoln?

MR. EISENSTATT: In excess of $3, three and a quarter and then out to four, depending on which printer, at least in Omaha where I practice.

Q As a rule, $2.60 a page is reasonably moderate.

MR. EISENSTATT: Very moderate.

Q What about the seventy-five dollar statute which Mr. Justice White raised; how old or new is that statute?

MR. EISENSTATT: That statute has been on our books since the turn of the century.

Q We have interrupted you.

MR. EISENSTATT: That's quite all right. I would like to respond to the questions as they're raised.

Q Could I ask one more, then? Somewhere in here, I have the impression that there is a statement that relief from printing cannot be obtained in the Supreme Court practice. Is this a rule in your state?

MR. EISENSTATT: There is a provision, Your Honor, in the rules of the Nebraska Supreme Court which provide that the--Rule 9a of the Supreme Court, which is quoted on page 5 of our brief provides in part, "All briefs shall be printed unless otherwise allowed by the Court on good cause shown."

Q I think perhaps in the opposition's papers there was an intimation that at least she had to have her briefs printed and could get no relief, and I wondered about the accuracy of that statement.

MR. EISENSTATT: I agree with that statement, based upon the background and the experience of our Nebraska Court to date. The provision for waiver or some kind of

amendment that that refers to, I have no knowledge of any case where that has been waived or there has been any change about it or even a provision for payment on the installment plan, for example. It wouldn't be for payment on the installment plan; that would be up to the printer in the petition or the appellant. But the waiver to provide typed briefs has not, to my experience, been permitted and in my own knowledge, as far as the Bar Association is concerned, we've attempted on several occasions to get that rule amended without success. That, of course, is outside the record.

When Faye's attorney filed the motion to dismiss the appeal for failing to supply the cost security, Huffman was given notice by mail and he at that time filed an objection, a document entitled an objection, he filed a motion to proceed in forma pauperis; he filed an affidavit and also filed a motion to stay the mandate if the court ruled against him so he could lodge a petition for writ of certiorari in this Court.

The appeal was dismissed without opinion; just an order entered in their journal. And on June 14th there was a hearing at which Faye's attorney was present. And I might advise the Court that at the time involved, Mr. Huffman had ordered a brief from the Gant Publishing Company in Lincoln, Nebraska at a cost of $88.58, which had to be paid in advance.

So, after he paid the twenty-dollar docket fee and after he had paid the printer his $88.58, he had less than $5 left to his name, which is set forth in his affidavit.

Q Mr. Eisenstatt, did the Nebraska decision indicate that dismissal is automatic upon failure to file the seventy-five dollar bond, or does the Supreme Court on occasion exercise some sort of discretion?

MR. EISENSTATT: There is no case in the state where a waiver has been granted. There are one or two decisions only, Your Honor, that have ruled on this and other requirements, and all have been to the effect that these are reasonable requirements and that the appeal be dismissed.

Q So that so far as Nebraska law is concerned, the failure to file the bond would be an automatic ground for dismissal?

MR. EISENSTATT: Yes. Although it isn't classified as jurisdictional, as the notice of appeal and the twenty-dollar docket fee, it has the same effect. You are dismissed from your appeal if you do not comply with it. And there has been at least one case where a dismissal has occurred because of this. There are very few decisions, one or two at most.

The rule involved in this case, for which petitioner seeks redress at this Court, stems mainly from the rule in Boddie v. Connecticut decided by this Court in March of last year. The Court in Boddie was careful to announce that it

was deciding the case only on the basis of the fact that it was a marital situation, allowance of an indigent to file a divorce petition. And because the state exercised control over the marital relationship and its dissolution, it held that this case then merited the application of the rule that had long been effect with respect to criminal cases. On that basis alone, we have a similarity here in our Huffman case. We have an annulment and a matter of determination of paternity. The issue, of course, goes one step further, and that is the matter of appeal, and it is petitioner's opinion that the rule of Griffin v. Illinois, decided in 1956, is applicable here and also in the cases which have followed Griffin. Griffin held that an indigent in a criminal case was entitled to have a transcript furnished by the state if he could not afford it, in order to provide him with an appeal.

As the Court pointed out, appeal is not required. But if the state allows appeals as a general practice and in its rules and procedures, then it cannot as a matter of equal protection of the law deny the same rights to indigents. And there has been a host of cases following Griffin in the criminal field, and the rule has been amplified. For example, Williams v. Oklahoma City, decided in '69 by this Court extended the Griffin rule to a quasi-criminal case, which was a violation of a city ordinance, 90-day jail

sentence and a small fine. It also involved the issue of free transcript. And then in December of this year, in Mayer v. Chicago, this Court extended the Griffin rule to a misdemeanor case which involved a fine only. And based upon Boddie, which extended the right of access to the courts in a marital situation, we feel mandates the application of Griffin and its progeny to this case.

Q Do you see any legal significance in what at least appears to be a factual distinction here, that this bond is not something that is going to pay for something that the appellant has but is to reimburse the other party for an expense that they have incurred?

MR. EISENSTATT: I realize that this is a distinction, but in our opinion this is a distinction without a difference. First of all it is state action. Secondly, it is a minimal protection. Thirdly, it makes no difference, as we see it, whether the cost requirement in the handling of the case is to pay a fee which is state action or to pay a printer, which again is individual action, or to pay a cost security.

In Lindsey against Normet which was just recently decided by this case, I think this Court has answered that question, and we must keep in mind in Lindsey that there were--

Q Which way did we decide it?

MR. EISENSTATT: You decided that the double appeal

is not valid and as a matter of equal protection of the law could not be imposed upon attempt.

Q A double bond, yes.

MR. EISENSTATT: Yes.

Q But didn't we decide that the litigant could be forced to protect a landlord against loss of rent?

MR. EISENSTATT: That's right--

Q To protect the landlord against loss, he would have to pay money into court to protect the landlord against the loss--

MR. EISENSTATT: The court was addressing itself to protection of property--that is, the tenant was occupying the--

Q Oh, it was protecting the landlord against financial loss from the litigation.

MR. EISENSTATT: Well, but it did not address itself--you're talking about the initial requirement of paying rent during the pendency of the action.

Q That's right, in the court, yes. And the only reason to do it was to protect the landlord from economic loss.

MR. EISENSTATT: But it applied to a particular situation, Your Honor, and dealt with property that the tenant was occupying. This case and the matter of cost are not opposites, are not consistent with the same. There you

have protection or, as the rule stated, protection of the property of the landlord or to protect a judgment secured. You don't have that here.

Q You say that it's not unconstitutional or that it's unconstitutional for the state to insist that litigants proect those whom they sue against the costs the other parties will--where the plaintiff at least is an indigent.

MR. EISENSTATT: That's right, if it denies him access to the courts. This has already been the Court's position in Boddie. There was no requirement there so far as protecting the other party. And here in Boddie there is a waiver of the filing fees which the state may require as well as what the sheriff requires.

Q Do you think the state would also have to relieve non-indigents from the obligation to pay the other party's costs?

MR. EISENSTATT: Not necessarily. And there is another thing, Your Honor, I'd like to point out in that regard. In the filing of the original petition, the State of Nebraska does not require a bond to protect the defendant if the plaintiff loses. In the appeal only the appellant must file this. There is no cost security given to the appellee.

Q Isn't that a fairly common practice among all

the states though to say that once the litigation has come to a decision in the trial court that then the burden shifts in effect so far as securing cost?

MR. EISENSTATT: Yes, it's very common, and it is a--and we do not attack the essential validity of that. We agree that this is a valid exercise of state rights. But when it prevents the indigent from coming into court or getting their rights of appeal without any regard to the merits, then it is an invidious discrimination which the Constitution proscribes.

Q But couldn't they allow both sides to proceed on typewritten papers under that rule?

MR. EISENSTATT: They could, Your Honor. And that was suggested by Mr. Dowding in his answer brief.

Q What happens to your argument then? If they had done that, you wouldn't have your argument, would you?

MR. EISENSTATT: Well, then there wouldn't be a need for a cost security either. The only purpose that the cost security--

Q That was my whole point. If you allowed both sides to proceed on typewritten papers, the problem wouldn't arise because they wouldn't dismiss it then, would they?

MR. EISENSTATT: No, Your Honor.

Q But they did. They did dismiss it for failure to file to the bar.

MR. EISENSTATT: Right. But the court does not permit the filing of typewritten briefs in the State of Nebraska.

Q I thought the rules said under extreme circumstances or something they would.

MR. EISENSTATT: I know that the rule says that, Your Honor, but I know of no case where the court has ever done it.

Q My whole point is that the court had a choice, it seems to me, of exercising its discretion under its own rules not to print. And if they exercised that discretion, then there would be no need for the security bond.

MR. EISENSTATT: That's right. The only thing that the bond protects is the brief printing costs of the appellee.

Q Did you ask for a waiver?

MR. EISENSTATT: My client did not, Your Honor. He asked to proceed in forma pauperis in a general way without specifically referring to this provision.

Q Without specifically asking for a waiver of the cost bond.

MR. EISENSTATT: Right. He asked generally for the right to proceed in forma pauperis.

Q Is it possible, then, that this case comes down to the claim of abuse of discussion of the Supreme Court of Nebraska rather than the constitutional issue?

MR. EISENSTATT: I would say no, Your Honor, on the basis of the experience of the Nebraska court not ever varying from its rule requiring printed briefs.

Q The rules permit them to do it.

MR. EISENSTATT: They could, yes, Your Honor, they could.

Q So that there would be no problem if they had been asked to exercise their discretion to waive and had granted the request; is that correct?

MR. EISENSTATT: No. As to the cost bond, there is no discretion. As to the printing of the briefs, there would be.

Q But if there is no printed brief, would they need the cost bond?

MR. EISENSTATT: The statute 25-1914 does not give them that discretion.

Q What if the motion had been made? Suppose you had been there. You would have made such a motion, I am sure. And then assume for the moment what we do not know, and that is that the Supreme Court of Nebraska would grant the waiver of printing and you were allowed to file typewritten briefs. Would you then need a cost bond?

MR. EISENSTATT: No, Your Honor, you would not need a cost bond. The statute does not give that discretion.

Q The motion is a kind of odd one that we're

talking about. Basically it would be the appellant moving that the appellee be permitted to proceed on a typewritten brief.

MR. EISENSTATT: Right.

Q His motion might well be that both parties--I had assumed in my hypothetical that your motion would be that both parties be permitted to do so, first for your client's problem and second to remove him of the need to file the bond.

MR. EISENSTATT: Your Honor, the only way that I see that the Nebraska Supreme Court could have done that would have been to have denied the application of a statute. There is no discretion in that statute. They would have had to do it on the basis of constitutional issues--

Q Are you saying, Mr. Eisenstatt, that even where they do waive the requirement for printing the briefs, even where they do that for both parties, the bond would still have had to be filed even though since they had been filed not printed, there would be no occasion ever to pay a bond; is that right?

MR. EISENSTATT: That's right.

Q What is this bond? Is it a cash bond or what form does it take?

MR. EISENSTATT: It can be a surety bond or a cash security in lieu thereof.

Q Is it a bond? When you file, is it automatically collected on? Say the appellant files and loses. What happens then?

MR. EISENSTATT: If the appellant, the losing party, does not pay the brief costs--

Q So, $75 automatically doesn't go to the appellee.

MR. EISENSTATT: No, Your Honor. It's only if it doesn't pay the taxation of costs that are included in the mandate.

Q And you could not tax the cost unless there was a printing as distinguished from a typewriting.

MR. EISENSTATT: Right, Your Honor.

Q Is it not possible to construe that--not for us but for the Nebraska Supreme Court--to construe its own statute as meaning that the waiver of printing would permit the waiver of the filing of the $75 by bond or cash?

MR. EISENSTATT: I see no discretion allowed the court. It's an absolute requirement.

Q You mean the statute would require them to do a useless thing.

MR. EISENSTATT: Yes, Your Honor.

Q You think the Supreme Court of Nebraska would probably construe it that way, nearly as you can judge now.

MR. EISENSTATT: I would assume, sir, that it would.

Q Incidentally, it costs to get the briefs typed as well as printed.

MR. EISENSTATT: Yes, Your Honor, I--

Q Suppose the appellant loses, does the cost bond go to reimburse the appellee for the cost of typing when he submits a typewritten--

MR. EISENSTATT: All that the statute says is that it is conditioned that the appellant shall pay all costs adjudged against him in the Supreme Court without specification.

Q Does Nebraska ever decide in a real close case that each side shall bear its own costs?

MR. EISENSTATT: Yes, sir.

Q What happens to the $75 then?

MR. EISENSTATT: Then it would not--

Q The state keeps it, I guess.

MR. EISENSTATT: Well, no, it's released.

Q In a surety bond, what's the premium?

MR. EISENSTATT: It would be a minimum of $20.

Q For a seventy-five dollar bond?

MR. EISENSTATT: Minimum. In some cases there are some companies that do permit a ten-dollar fee. But it's a minimum up to a thousand dollars.

Q Are there any statutory costs as such to the Nebraska practice?

MR. EISENSTATT: None other than the twenty-dollar docket fee which must be paid in advance.

Q And he did pay that?

MR. EISENSTATT: Yes, Your Honor.

Q Out of the $114 that you said he had in his pocket.

MR. EISENSTATT: He paid $20 to the state for his docket fee and $88.58 to the Gant Publishing Company of Lincoln.

Q Does the appellee pay a docket fee also?

MR. EISENSTATT: No. He pays a five-dollar appearance fee.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Eisenstatt.

Mr. Dowding?

ORAL ARGUMENT OF VINCENT L. DOWDING, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. DOWDING: Mr. Chief Justice, and may it please the Court:

I would like to address myself to two points that were raised in the questioning. First of all, the statute involved, as I read it, does permit discretion. Page 5 of respondent's brief quotes this statute, and it says that the appeal may be dismissed on motion and notice in the Supreme

Court if no bond has been given and certified in the transcript or within such additional time as may be fixed by the Supreme Court for good cause shown. So that even the failure to file this bond or undertaking, and it can be cash, would not necessarily be an automatic dismissal. So, there is discretion here, but I am assuming, as is Mr. Eisenstatt, that they did dismiss this simply because the money was not posted.

Q Do you disagree with Mr. Eisenstatt's statement that the Nebraska case law indicates that dismissal will follow virtually automatically?

MR. DOWDING: I respect his decision on that. You can't tell from the record why they dismissed it here, but I think we're all assuming it was because he didn't come up with the $75.

I'd like to address myself to a question Mr. Justice Douglas raised with reference to whether or not the Boddie case was raised in the Nebraska Supreme Court. My colleague, Mr. Beltzer, argued that motion for dismissal in the Nebraska Supreme Court, and I was informed and it was our point that the Boddie case is distinguishable herein because the purpose of this bond statute inures to the benefit of a private litigant and not to the state.

There was no written opinion issued by the Nebraska Supreme Court when they dismissed. I don't know.

But that basically was the only argument that was made, because Mr. Huffman did raise that case very well in his objections to our motion to dismiss.

Q As long as it's state action, I don't suppose that would make any difference what the purpose may have been.

MR. DOWDING: No. I really don't know whether they went off on that ground or not. I think, as Mr. Eisenstatt said, it's--

Q Are there any other decisions of the Nebraska Supreme Court on this?

MR. DOWDING: No, there isn't, Your Honor.

It is our basic contention that the statute which barred Harold Huffman from an appellate hearing is constitutional for the basic reason that it gives the respondent herein, Faye Boersen, financial protection on appeal and is therefore not in violation of the due process clause and the equal protection clause of the 14th Amendment.

Q Could I ask you a question? There is now an act which has been passed in Nebraska, and if that statute had been in effect, you wouldn't be here?

MR. DOWDING: No, it would cover it. It has passed.

Q Would that act be applicable or of any relief if this case were remanded for reconsideration in the light of that statute?

MR. DOWDING: Well, if it were remanded for

reconsideration, I would file a motion to proceed pursuant to that statute. And then the question would be whether or not it would apply retroactively.

Q If it was retroactive, here is a case that isn't final yet.

MR. DOWDING: But the problem is, Your Honor, that new statute says that before you can proceed in forma pauperis on appeal, the trial court must say that the appeal is taken in good faith. So, they may not apply it to this specific case.

Q That may raise another question but not this one.

MR. DOWDING: Yes. Yes, they could apply it, and we'd certainly ask them to--

Q Does the statute on its face--

MR. DOWDING: It covers it, Your Honor. It says that--

Q Is that the statute--

MR. DOWDING: Yes, it's in effect now, passed--

Q No, is it in your brief?

MR. DOWDING: Yes. It's attached as an appendix to my brief.

Q As a matter of fact, the statute was passed pursuant or as a result of the grant served in this case, was it not?

MR. DOWDING: I don't know, Your Honor, whether it was or not. I wouldn't be surprised. But it is now in effect, and we will make every attempt to proceed pursuant to that statute in order to save the expenses, because my client is also a pauper.

Q I suppose the Supreme Court of Nebraska, if this case were remanded, might in turn remand to the trial court for appropriate finding as to whether the appeal were taken in good faith.

MR. DOWDING: Yes, they certainly could.

With reference to the due process clause and its application here, we attempt to distinguish the Boddie case and say that it does not stretch to reach this case at bar. We say this for two basic reasons, and here I am just attempting to address myself to the due process clause only. In the Boddie case the Court was very careful to limit it to its facts and it was careful to state that it was not holding that in some cases access to courts would not be denied.

Q Would you distinguish annulment from divorce in terms of the basic approach of the Boddie case?

MR. DOWDING: No, I do not.

Q The state has exclusive control of each?

MR. DOWDING: I do not. I do not distinguish it--

Q Do you distinguish the initiation of the suit in Boddie from the right to an appeal?

MR. DOWDING: Yes, that's right, Your Honor. It's our theory that the right to appeal is not a fundamental right, as defined in the Boddie case, under the due process clause, because as I understand the law, the due process clause does not require a state to afford an appeal. And, therefore, we argue from that that the right to appeal is not a fundamental right, as defined by Boddie.

Q But it is a right under the law of Nebraska; it's an absolute right. It's not a discretionary right.

MR. DOWDING: No, it isn't, but under the Nebraska law, the right to put some requirements on it is also specified, and we will further state that the due process--

Q Is that specified in the Constitution?

MR. DOWDING: No, that's case--

Q The Constitution says that you have an absolute right to appeal in a civil case.

MR. DOWDING: That's right, Your Honor, it does. The only way we can distinguish that is to say that we're talking about a federal, fundamental right under the due process clause. That's the only way I can distinguish that, I feel.

Q And how do you distinguish it?

MR. DOWDING: What?

Q Just by saying federal due process law doesn't help me. How do you say that's not a part of the proceeding?

MR. DOWDING: I'm sorry, Your Honor, I didn't hear you.

Q Isn't that just as integral a part of the proceeding as the original trial where it's a matter of right?

MR. DOWDING: I will concede that except that under the case law at the time, this particular statutory requirement had been held to be valid.

Q Valid under your Nebraska Constitution?

MR. DOWDING: Yes, that's right.

Q The Supreme Court's decisions had said that the legislature could put conditions on this.

MR. DOWDING: That's right.

Q But certainly my Brother Marshall is right in the implication of his question, is he not, that a domestic relations action such as this under Nebraska law as it is, is not final one way or the other until the appeal process has been made.

MR. DOWDING: That would then make the right to appeal in Nebraska a fundamental right under Boddie. Perhaps my distinction would not be valid.

Q What you say is Nebraska says you have an absolute right to appeal in any civil case if you have $75?

MR. DOWDING: That's what it amounts to, Your Honor, in Nebraska; that's right. And the reason--

Q That squares with the Federal Constitution?

MR. DOWDING: We feel that it does. We feel that the Boddie case is distinguishable basically because this particular cost bond requirement is for the benefit of a private civil litigant and does not go into the state coffers. In the Boddie case, there were two policies set up by the State of Connecticut, two reasons. One, to recoup the costs; and, two, to deter frivolous litigation.

Q In order to be correct, to recoup part of the costs.

MR. DOWDING: Yes, that's right, Your Honor.

Q Isn't it adequate protection for other parties to make sure that the action isn't frivolous?

MR. DOWDING: I agree. I agree that the policy behind this statute, one of which is--

Q Or it isn't any longer the policy of the state anyway.

MR. DOWDING: I feel that it is still one of the policies for this particular statute to deter frivolous appeals. I don't rest on that distinction. I rest on the distinction that the state--this is a reasonable purpose, a constitutional, permissible purpose for state legislatures to protect civil litigants on appeal such as in Lindsey v. Normet.

Q But that isn't the policy of the State of Nebraska anymore, is it?

MR. DOWDING: Not now under the in forma pauperis.

So that distinguishing Boddie on policy grounds, we feel that it's different that the state has power to protect the private civil litigants on appeal. We feel that that distinction alone lightens the impact of Boddie as precedent under the due process clause.

With reference to the equal protection clause--and that's Griffin v. Illinois and the cases that have followed it--to my knowledge the Griffin case has not been applied to a civil litigation on the appeal level. We attempt to go to some standard tests under the equal protection clause to determine whether or not this particular legislation is valid. Is the purpose of the statute constitutionally permissible and, two, is the statute rationally set up to reach that need?

In Lindsey v. Normet the Court said that at least on its face the standard bond requirement in there was constitutional. So, we feel that it is constitutionally permissible for a state to set up this type of financial protection in civil litigation.

Q Do you know of any bonding company in Nebraska to give a bond to a prisoner in the state penitentiary?

MR. DOWDING: No. I agree that Mr. Huffman was indigent and was unable to make this bond because of his poverty.

Q Suppose the case came into equity court or some court in Nebraska and it seized all of the money that the man had, every dollar he had in the bank, his house, his clothes, his car, and everything. And he wanted to appeal.

MR. DOWDING: I think you might have a different case.

Q Why?

MR. DOWDING: I think you've got to judge each case--when you're at the appeal level, unlike Boddie, when you're at the appeal--

Q My case is that they would agree that they are in violation of the 14th Amendment of the Constitution. The Court gave all of this to the plaintiff in the case and left the defendant broke. The defendant has no redress at all. He's broke.

MR. DOWDING: That's right. That's exactly right.

Q And that also squares with the Federal Constitution?

MR. DOWDING: This is why I am asking the Court to draw the line. I am not going to object to appellate fees that are set up and going to the state treasury. I think it's a fairly fine line, and I'll admit that; but I feel that when you judge this legislation against the equal protection clause, that the state does have the right to protect private litigants. And I think the state can come in and say

probably that the appellee also has to post a bond on appeal.

Q They don't say you post a cost bond. They just say a seventy-five dollar bond.

MR. DOWDING: No, it's cost bond.

Q If the case involved 14 constitutional points and $16 million and the brief cost $4000, 75 bucks. If there is a very simple point and they require six pages of briefing, $75.

MR. DOWDING: That's right. In some cases perhaps this statute is not adequate. Perhaps we need more protection. But again getting back to the point, that is the line that the respondent is asking the Court to establish at this point. When we state establishes reasonable financial requirements to protect private litigants in civil cases, then it is constitutional; that's the line we ask you to draw. And I'm willing to concede the twenty-dollar docket fee because I don't think the state's policy--in Boddie the Court pointed out that the state's policy in recouping part of the cost does not outweigh this right to access.

Q Ironically he paid the twenty-dollar docket fee.

MR. DOWDING: Yes, he did. And he also paid for the printed brief. I don't know if he were to come in and move to ask for a typewritten brief whether or not it would have been granted; but if he could have got a typewritten brief, then he would have had enough money to make the bond.

And that's the problem. But he just came down to this last point and couldn't come up with the money.

Q Do you agree that the Nebraska Supreme Court could not waive the filing of the $75 if they waived the printing brief?

MR. DOWDING: I think they could waive them both.

Q You disagree with your friend.

MR. DOWDING: Yes, well, on the face of the statute they're both discretionary.

Q But they just never have.

MR. DOWDING: They never have.

Q And they didn't in this case.

MR. DOWDING: I defer to Mr. Eisenstatt. He says it and I believe it on this point. He has had more experience there than I.

Q Would you say the same thing if a plaintiff in the trial court--he not only had to pay his docket fee but he had to file a cost bond to protect the defendant.

MR. DOWDING: As Cohen v. Beneficial Industrial Loan Company, Your Honor; and the question is, Would that case be decided different today if that plaintiff were broke in that case?

Q How would it be decided differently if it were a domestic relations--

MR. DOWDING: This is right. If the Court, of course,

follows this line of marital relations being the crucial line here, of course then--

Q It would be decided differently if it were.

MR. DOWDING: That's right.

Q Only the state could determine the status of a marriage or paternity of a child.

MR. DOWDING: That's basically where we're at on this.

Q And you would say the same thing if the state required him to post a bond to get into the trial court to pay the defendant's attorney's fees?

MR. DOWDING: I would. I think that the state again, if they're protecting the private civil litigants, and it has got some reasonable basis in fact to the purpose they're trying to accomplish.

Q You would say the same even if admittedly the case was not frivolous?

MR. DOWDING: Yes, I would. Here's what would happen in Lindsey v. Normet. Suppose that all you had was the standard bond requirement there and the tenant was absolutely broke and had a meritorious appeal. Then you would have basically the same question you've got here except that it's outside the scope of domestic relations. And it would be my contention in that case that that standard bond requirement would be valid, even though it

denies access, because it's set up as a valid state purpose to protect the private litigant.

Q Do you think it would be an appropriate solution of this case if the Court were to decide to remand it to the Nebraska Courts and let them reconsider the whole problem in the light of the new statute?

MR. DOWDING: I do. I certainly could not object because the purpose behind this appeal statute was to give my client financial protection. If I were given permission to file a typewritten brief without coming up with the costs, I could not complain. Mr. Huffman would then have a hearing and my client would have the same protection she had under this statute. And that's the alternative relief that I asked.

I do feel, however, that if the Court reverses and holds this statute unconstitutional, that you have thereby probably, unless you stick to domestic relations situations, granted an indigent a free pass on basically all litigation, because it's a lot tougher, I feel--it's easier to say that the state can afford to absorb the loss, and that's not a valid purpose to reimburse the state treasury. But I think it's a lot harder to say when you've got two individuals and the protecting one in litigation, that that's unconstitutional. I feel that once you say that, that it's unconstitutional in this case, I think about all financial

requirements are out as far as an indigent is concerned unless you stick again to the domestic relations area.

Q I suppose your case here is somewhat stronger because you have had a hearing in the trial court and it's on appeal than it would be if you simply had a cost bond requirement in the trial court before there had been any determination.

MR. DOWDING: I feel that's right. Again state policy, once the litigant is a winner perhaps they are entitled not to be hauled into appeals court without some protection, and that's the basis behind it, which I feel is a valid statement of purpose.

Q Mr. Dowding, let me go to the other issue. You've whet my curiosity. Doesn't Nebraska ever let a prisoner out to defend in a trial court of the state an action of this kind brought against him?

MR. DOWDING: Yes, and Mr. Eisenstatt furnished that for the record. There's a letter from the warden in there saying that all they require is an order from the court directing that he be present and they will deliver him.

Q Do you know why such an order was issued in this case?

MR. DOWDING: No, Your Honor. The court just overruled it. There was no argument on it or anything. And

I felt at that point that all Faye Boersen was after was an annulment, and I felt that the law was clear. She was married to Mr. Boersen when she married Mr. Huffman, and the record in this case is maybe two pages.

Q Was there any dispute on the facts at all?

MR. DOWDING: Not on the marriage issue, an annulment issue. There's a dispute on whether or not Mr. Huffman is foreclosed from determining that he's the father of Faye's child.

Q Was that a proper issue in this case?

MR. DOWDING: I would say it probably was under Nebraska pleading because Huffman set it up in a cost petition. I personally do not feel it was validly determined, and I am willing to stipulate at any later litigation that Mr. Huffman can come in and determine it.

I didn't intend to have that issue determined; let's put it that way. Harold filed though a lot of pleadings, and they weren't under any description or name allowed by Nebraska law, and he did raise the paternity issue in there, and it was rejected.

Q Isn't that a rather unusual procedural device to determine a paternity issue in an annulment suit?

MR. DOWDING: Yes, it is, Your Honor, but our Nebraska Court has held that either party can raise that issue in an annulment if it's alleged that there are issue

of the marriage. And, as far as I'm concerned, that issue has not been foreclosed.

Q That's established Nebraska law, then.

MR. DOWDING: I believe it is, Your Honor, and Mr. Eisenstatt cites a case in his reply brief which indicates as such.

In closing, then, we contend that the statute which barred Harold Huffman from access to the appeals court is constitutional. If the Court finds that it is not, we ask for alternative relief to afford us the same financial protection.

Q What is that new bill? Is it legislative bill 1120?

MR. DOWDING: Yes. It's attached to our brief as an appendix.

Q But, as I read it, it's not retroactive.

MR. DOWDING: This is right, Your Honor. We'd probably have to go back in and ask them to apply it; and if both parties agree, they might.

Q It doesn't need to be retroactive. This is still a live case.

MR. DOWDING: We might have to go back and ask the trial court to certify that the appeal was taken in good faith before the appeal rules applied, because that's what the statute says.

Q You'd have to do that in every case.

MR. DOWDING: This is true. I think the Nebraska Supreme Court would apply this, if Mr. Eisenstatt went in and said that we both want relief under the statute.

Q If they didn't, it would be back.

MR. DOWDING: Yes.

Q You say in your brief, as I understand it, in your argument, that it was not taken in good faith.

MR. DOWDING: I feel the appeal is frivolous on the annulment issue. If paternity was decided and validly against, I think that the appeal has merit.

Q You told us today that you concede that the determination of the paternity question was insufficient, invalid I think is the word you used..

MR. DOWDING: Yes, I'm willing to agree that Mr. Huffman did not have his day in court on the paternity issue.

Q And we could say so on a remand?

MR. DOWDING: Yes. So stipulate.

Q But the basic question is the validity of the marriage, as I read your brief.

MR. DOWDING: Yes. It has been decided.

Q And that is, by your standards, a frivolous question.

MR. DOWDING: Yes, because Nebraska law was clear

on that point, that if a party is married and they enter into another marriage contract, then the marriage is void. But there is a Nevada statute which I didn't offer into evidence, and so it's outside the record. But it says that if parties are married when they enter into marriage in Navada, it's null and void even without an annulment action.

I feel that Faye Boersen is entitled to an annulment; no question about that.

Q And if you did introduce on the record a certified copy of her divorce decree from the first husband which came after her marriage to this man, Mr. Huffman.

MR. DOWDING: Yes.

Q You think that the issue of annulment stands on a separate ground?

MR. DOWDING: I feel that it does. I am willing to say that the paternity issue was not decided against Harold Huffman. I feel that's the only issue validly decided, and his appeal in my opinion is frivolous.

Q Of course, it's all one lawsuit, isn't it?

MR. DOWDING: Yes, it is.

Q Wouldn't it be considered so by Nebraska? There's a complaint and there's a--

MR. DOWDING: That gets into the pleading laws. I'm willing to say the man didn't have a fair hearing on that paternity and ought to be able to litigate it.

Q And that's part of all one lawsuit because again it's an action for annulment.

MR. DOWDING: Yes, it is.

Q Then you shouldn't say, as you do in your brief, that the appeal was frivolous.

MR. DOWDING: All right, Your Honor, I'll even concede that. If, in fact, the paternity issue was decided. But I am again willing to open up the courts and remander anything to help them decide this issue.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Dowding.

If there is any important factor you wish to make, we'll give you a minute or two.

REBUTTAL BY MR. EISENSTATT

MR. EISENSTATT: Just two minutes, if we may, Your Honor. First, you can't in Nebraska stipulate your jurisdictions as far as the paternity issue. He said he'd be willing to stipulate it. I just wanted the Court to know that a stipulation of counsel will not vest any court with--

Q Jurisdiction.

MR. EISENSTATT: --jurisdiction to hear the matter.

Q But it may have something to do with whether or not this appeal is a substantial appeal or a privileged one.

MR. EISENSTATT: Right. And as to one point with respect to the Lindsey v. Normet case, I would like to call

the Court's attention to the distinguishing characteristic of that bond or payment provision for rent, pending appeal, and the Court said there are unique factual or legal characteristics of the landlord-tenant relationship that justify special statutory treatment in applicable to other litigants, and then goes on to refer to the fact that the landlord is incurring expenses and the tenant would be getting reoccupation. So, I reiterate my statement in my original presentation that the original or bond covering the payment of the actual note is distinguishable from this case.

Q Do you agree with Mr. Dowding that a remand to the Nebraska courts would be an appropriate solution to the problem?

MR. EISENSTATT: I would hope it would. I would want this Court to I think give it a bit of a nudge, Your Honor; if they could have a chance to interpret this, contrary to applying LB 1120, they might do it.

Q You say give them a nudge. Do you mean by that to make it clear that we expect Nebraska to solve this problem?

MR. EISENSTATT: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Eisenstatt. You appeared here by our request and by appointment of the Court. And on behalf of the Court I want to thank you for

your assistance not only to your client but to our Court.

And thank you, Mr. Dowding.

The case is submitted.

[Whereupon, at 11:05 o'clock a.m. the case was submitted.]

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