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Verda S. Blotter v. Ernest Fred Blotter : Brief of Appellant

Utah Supreme Court

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Curtis E. Calderwood; Harvey A. Sjostrom; Attorneys for Defendant and Appellant;

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In the Supreme Court of the State of Utah

VERDA S. BLOTTER,
Plaintiff and Respondent

-vs-

ERNEST FRED BLOTTER,
Defendant and Appellant.

APPELANT'S
BRIEF
Case No. 8075

**Appeal from the District Court of the First
Judicial District of the State of Utah
In and for the County of Cache**

Hon. Lewis Jones, Judge

**Curtis E. Calderwood
Harvey A. Sjostrom
Attorneys for Defendant
and Appellant.**

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STATEMENT OF FACTS

Plaintiff and defendant were married May 11, 1932 at Logan, Utah and from that marriage 3 children were born, all boys, and their respective ages are 18 years, 14 years and 12 years (R 22). All the property of the parties was substantially acquired during their marriage.

The plaintiff received a divorce from the defendant on the 9th day of April, 1938 (R 9), but an Order of the Court on the same date kept the Decree from becoming final until the further order of the Court (R 9). On September 24, 1952, plaintiff petitioned the Court for an order dismissing the divorce action (R 11) and on

the 23rd of December, 1952 the decree was vacated (R 16).

Defendant filed his Answer and Counter-claim for divorce denying the cruelty alleged against him in plaintiff's complaint and requested that a divorce be granted him and that certain property be awarded him. (R 17) Plaintiff filed her reply to counter-claim denying cruelty R 18). Defendant filed amended Counter-claim charging plaintiff with cruelty during their entire married life (R 19). To this plaintiff filed her Amended Reply to Counter-claim in which is contained the 2nd and 3rd defenses; the second defense pleads condonation by defendant, and the third defense pleads recrimination. (R 20).

Plaintiff having petitioned for and received an order vacating the decree of divorce granted her some 14 years previous, the proceedings were as to whether defendant was entitled to a decree of divorce on his Counter-claim. Plaintiff does not ask for one.

The Court among other things granted defendant a divorce, awarded the 3 children to plaintiff with support consisting of \$25.00 per month per child during non-school months and \$35.00 per child during school months; granted plaintiff \$25.00 per month for herself as alimony; awarded plaintiff a tenancy in common with the defendant of the parties' real property which is valued at approximately \$16,000.00 (R 23) with orders that lots not needed in connection with the home be sold

and proceeds applied to payment on mortgage of said real property; that the car be also sold and proceeds applied on payment of mortgage and that defendant pay the balance of mortgage; defendant also to pay taxes and keep up the home on the outside until the parties' child reached majority which would be in 9 years, with the further provision that plaintiff and the children should have exclusive possession and custody of the home until the youngest child should reach its majority, which, as we have mentioned before would be 9 years (R 25). Plaintiff was also awarded all household furniture and equipment valued at \$1,500.00 (R 23).

The defendant makes between \$3,300.00 and \$4,500.00 per year gross, before his living expense when away from home are taken out (R 22, 143, 194). Plaintiff had control of family money (R 48). Defendant would get \$5.00 or \$10.00 out of each check for allowance (R 43).

We shall show further facts in our discussion of the points which we believe should have a bearing upon the awards made in the decree of divorce. To avoid redundancy or duplicity certain of the points will be discussed together.

ARGUMENT

Point No. 1. The Court erred in finding that defendant stayed out late hours, had ignored his wife and paid some attention to another woman during coverture, and even if true, in not finding that such conduct was not blameworthy.

Point No. 2. The Court erred in that part of paragraph 1 of its conclusions which held that defendant had been guilty of any misconduct whatsoever.

It is respectfully submitted that the making of such a finding and arriving at such conclusion is unjustified by the record. It is true that defendant did stay out late at night but it was justifiable. Here the plaintiff, from 1933, almost from the time of marriage, commenced a loose life with other men. In the year 1933, while in California, she tried to get into the bathroom while the husband of another lady was taking a bath (R 78, 184) and said bather had to lock the door to keep her out. She was also found in a very compromising position with the same sought after bather afterward (R 78). From such a beginning emerged other incidents such as dancing unbecomingly close with other men (R 47), kissing other men (R 48), fooling with other men since her marriage (R 54), associated with a fruit man (R 84), saying to one Mr. Wuthrich that one of them may as well sleep with her and that "I'll keep my pants on, there won't be anything done." (R 91), playing leap frog with men and offering to wrestle them (R 91), saying to defendant she wished he were dead (R 50), keeping a filthy house (R 59, 133), nagging defendant (R 9), feeding him sandwiches for the most part of their married life (R 59) saying to one Don Campbell after he had done some electrical work for plaintiff and defendant that: "I don't know just when

I can pay you for your services, Don, other than for the material. Maybe we'll have to arrange to take it out in trade'' (R 181). That such conduct, constituting cruelty as the Court found, would not keep a man out late in evenings and somewhat ignore his wife then nothing would, nor could there ever be any excuse if this is not one for a husband so doing. So defendant says his conduct in this regard is entirely excusable and justified (R 187). These evenings were not spent with other women but were spent playing pool and cards (R 187, 195).

In respect to the other part of the finding that defendant paid some attention to another woman, there is no proper evidence to support such a finding. Plaintiff complained in this regard that she found lip stick on Mr. Blotter's handkerchief. To this Mr. Blotter replied that it came from Mrs. Blotter's lip stick which she knew was in his pocket (R 188), and that he never had any improper relations with said lady (R 187) nor did he ever take the lady from any dance (R 188). The plaintiff testified that it was only the last six months that she really had any complaint (R 152) to make, but the finding covers the whole of their coverture which is certainly wrong and is not supported by the evidence.

Point No. 3. The Court erred in finding that it would be reasonable for defendant to pay plaintiff \$25.00 per month alimony; to award her a tenancy in common with the defendant in the real property of the parties with exclusive possession in her until the youngest child

reached the age of his majority; to have lots sold that were not needed for the home and proceeds applied to the payment of mortgage as also the proceeds from the sale of the car and that defendant pay any balance on the mortgage after these moneys were paid; to pay all taxes on the real property until the youngest child reached the age of majority and to maintain the outside of the home during the minority of the youngest child and in not finding defendant should have $\frac{2}{3}$ of all property. **OR VALUE THEREOF.**

Point No. 4. The Court erred in its conclusions of law, paragraphs 3 to 7 inclusive, (R 22, 23) in concluding that plaintiff was entitled to \$25.00 per month alimony, all furniture and equipment in home; that she further was entitled to a tenancy in common with defendant in the home with exclusive right of occupancy of said home for herself and children until youngest child should reach his majority; and that lots not necessary for the home be sold and car be sold and proceeds applied to payment of mortgage on home; and further, that defendant should be made to pay any balance owing on home after aforesaid proceeds were applied; that he should pay all taxes on home and maintain the outside of home until the majority of the youngest child, then 12 years of age, be reached; and that alimony payments payable to plaintiff by defendant should be secured by a lien upon defendant's interest in the real property and in not concluding that defendant should be awarded $\frac{2}{3}$ of all property. **OR VALUE THEREOF.**

Point No. 5. The Court erred in its Decree of Divorce paragraphs 3 to 8 inclusive (R 25, 26) which decreed and adjudged that plaintiff have judgment against defendant for \$25.00 per month alimony; of being awarded all furniture and equipment and further awarded a tenancy in common with defendant in the home of the parties with the provision that plaintiff and the children of the parties have exclusive possession of home until youngest child reaches his majority; that lots not need-

ed for the home be sold and car be sold and proceeds applied to payment of mortgage on home, and further, that defendant pay any balance owing on home after said proceeds from sale of lots and car had been applied, and that defendant pay all taxes on home during the minority of youngest child and that he keep and maintain the outside of the home and that alimony payments be secured by a lien upon defendant's interest in the real property and in not awarding defendant $\frac{2}{3}$ of all property. *OR VALUE THEREOF.*

These three points of error we will discuss together. They all go to what defendant maintains is a most inequitable awarding of property and alimony to the plaintiff.

Here we have a man and woman whom have accumulated this property during their 20 years of married life. It is true that Mrs. Blotter has brought some income into the home, but it is negligible when compared to that of Mr. Blotter, and earned by him when in a most precarious state of health. Mrs. Blotter never worked during their marriage until December of 1944 (R 141) and then she cooked at a school off and on for about 4 years, between 1945 and 1949. As far as the record shows she made about \$452.00 per year and that at the expense of having an unkept house and against Mr. Blotter's will (R 186). She has good health—so the findings show (R 22) and is very capable of working much more than Mr. Blotter is. Though she did work and bring in some money, yet her mother lived with them for some years (R 155) without any payment for her board and room. None is disclosed by the re-

cord. So it is only fair to say that her mother lived, at least in part, on the income of Mr. Blotter. It can be fairly said that all the property of the parties was acquired by the labor and earnings of Mr. Blotter.

The income of the older boy is almost if not sufficient to take care of himself. In 1951 he made \$700.00 (R 92) and we believe it is only fair to assume his income will increase. The other boy of 14 years also works in the summer time and comes into some income therefrom. (R 92).

It should not be overlooked that the income of Mr. Blotter for the last year while in reached \$4,500.00, it was made only by his working 10 hours a day and 7 days a week (R 59, 194). Obviously such a thing cannot be continued, nor should be required. Certainly a little recreation should yet be a part of Mr. Blotter's life. Mr. Blotter's work, too, is of such a nature, being a bull dozer operator, that it will be only a few years at the most that he will be suited for such work, for such work is not for men over 50 years of age.

From the facts that appear under our discussion of point 1 and 2, and the facts appearing under this discussion on points 3, 4 and 5, the question may then be asked: Was the award made in this matter fair and equitable to both parties? That Mrs. Blotter got almost everything they had accumulated during their married life is apparent, plus future taxes to be paid

for the next 9 years on the real property, and alimony of \$25.00 per month. Added to this is the order of the lower Court that Mr. Blotter must come around and maintain the outside of the premises which would naturally include keeping the weeds down, cutting the grass, watering the lawn and making repairs on the house and buildings. The Court even went so far as to take an old jalopy of 1940 vintage that Mr. Blotter used in getting to work and order the same sold. In dollars and cents this is what Mrs. Blotter was awarded:

1. One half of house and lot \$8,000.00
2. Nine years of use of defendant's part of house and lot, worth in rent we should say \$50.00 per month, Total 5,400.00
3. Taxes paid over 9 year period would be about \$200.00 per year. Total 1,800.00
4. After lots are sold, there would be at least \$1,900.00 to pay on mortgage 1,900.00
5. Furniture and household equipment 1,500.00
6. Upkeep of outside of home would run at at least \$200.00 per year. Total for 9 years 1,800.00
7. Alimony \$25.00 per month would equal \$200.00 per year. As her life expectancy is 20 years, Total 6,000.00

Now what was awarded Mr. Blotter? His largest income has been \$4,500.00 which seemingly was for a single year, 1952 (R 194). This was earned by working 10 hours a day and 7 days a week (R 59). This is a schedule that not even the most robust man can keep up. This being so, his true income must be figured

not from abnormal working hours and days, but from normal working hours and days. Thus figured, he should not work 70 hours a week but 48 hours per week, which would make his income approximately 5/7th of \$4,500.00 or \$3,214.00 per year. Out of this he must pay \$300.00 a year to plaintiff as alimony; \$1,020.00 for support money per year; about \$200.00 as taxes on home per year. \$200.00 to keep and maintain the appearance of the outside of the home; about \$200.00 per year on mortgage payments after \$900.00 is applied on it from sale of the lots. This leaves Mr. Blotter approximately \$1,200.00 for his years work. After paying his living expense he would have nothing left.

Beside the \$1,200.00 he has to live on, he has an equity in the house of the approximate value, after 9 years, of \$2,600.00. This for 21 years of his working married life, a married life that was anything but happy as seen from our discussion of points 1 and 2 which we would have the court reflect on. Compare this \$2,600.00 with the total given to Mrs. Blotter which amounts to \$24,500.00 distributed to her during her expectancy of life and we have something which shows, in our opinion, anything but an equitable and fair settlement of property rights—stripping Mr. Blotter of almost everything.

While it is recognized that property division and alimony awards rest in the sound legal discretion of the trial court, appellant feels that in this particular case

there was no sound basis for the trial court's award. The general rule is the award of one-third to the wife as proper, and citations of this holding we deem superfluous. There is nothing appearing from the evidence of this case to justify taking it out of the general rule.

It should not be forgotten that the large or older boy is capable of making substantial money when not in school (in 1951 he made \$700.00 as has heretofore been observed). And the smaller or 14 year old boy also works. These boys could very well have taken care of maintaining the grounds around the home, but the Court below saw fit to impose even that duty on Mr. Blotter.

Not only does the evidence indicate a most inequitable award, but the trial court, after defendant had refused certain proposed awards or settlement, recognized the severity of the matter when it spoke thus: "They'll be much harsher now than they were before. Do you want to think it over? He's going to pay more support money and the mortgage off after the lots are sold, and she's going to get the property" (R 203, 204).

CONCLUSION

It is respectfully submitted that the award made by the trial court failed to justly divide the property between the parties to this action and was an abuse of discretion. It would have been reasonable for the court to have ordered the sale of the home and lots, and the

net proceeds divided, one-third to plaintiff and two-thirds to defendant, or at the very most, divided the money received evenly between plaintiff and defendant. In that case Mrs. Blotter could have purchased a home for herself that would be suitable for herself and the minor children. That, defendant feels, is the most she should have received. Under such an arrangement no alimony should have been awarded to the offending plaintiff, and appellant respectfully requests this court to modify said award of property and alimony as here outlined and in conformity with the equities.

Respectfully submitted

Curtis E. Calderwood
Harvey A. Sjostrom
Attorneys for Defendant
and Appellant.