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

Utah Supreme Court

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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

RESPONDENT'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.

Honorable Lewis Jones, Judge

BULLEN & OLSON
E. F. ZIEGLER
Attorneys for Respondent.

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STATEMENT OF FACTS

Plaintiff's statement of facts will be brief, for the reason that due to the nature of defendant's appeal it will be necessary for the court to search the record in determining whether or not the appeal is meritorious, and for the further reason that defendant's brief sets out the salient facts which need not be repeated.

At the trial plaintiff testified that she did not want a divorce (R. 151, 152, 153) and since plaintiff felt at that time that the marriage might be saved, she asked the court to vacate the previous award in her favor and dismiss her complaint (R. 11) which was done by the court. (R. 16, 30). Following the trial, the court indicated that he felt a divorce was necessary in this case even though plaintiff did not want one, but that the court would withhold its decision until *Hendricks vs. Hendricks*, 257 P (2)

366, was decided by this court. (R. 197, 198). Following this court's opinion in the Hendricks case to the effect that the doctrine of recrimination is not an absolute one to be applied in all cases, the court (R. 201) awarded defendant a divorce on his counter-claim even though the court found the defendant partially at fault. (R. 22, 23, 198).

ARGUMENT

At the trial, plaintiff testified that she did not want a divorce to be granted. However, because of subsequent development indicating that it will be impossible for the parties to live together as husband and wife, plaintiff has not cross-appealed herein, although in our opinion, the record shows defendant guilty of such unconscionable conduct as to warrant the court refusing him equitable relief. (R. 66, 67, 68 and Exhibit "A"). Plaintiff so moved the court at the close of defendant's case, but this motion was denied by the court. (R. 99, 100). Since it subsequently became apparent that the marriage will not work out, plaintiff does not ask this court to interfere with the divorce granted.

We agree with the District Court that this is a case covered by the doctrine announced in *Hendricks vs. Hendricks*, (May 15, 1953), 257 P (2) 366, and we further agree with this Court's decision in said case, that in many instances, a divorce should be awarded even though both parties are at fault. This is such a case.

The sole question seems to be: When a court grants a divorce where both parties are at fault, and minor children are involved, how should matters of alimony, support and property settlement be determined?

The parties have been married 20 years. Plaintiff secured a divorce in 1938, when the parties had one child. A reconciliation followed, and the parties have lived together until the present difficulty. They now have three children. The defendant now wants and has secured a divorce, even though he is not blameless. In addition, he now wants two-thirds of the property and claims plaintiff is not entitled to alimony. Amazingly, defendant does not complain at paying \$25.00 and \$35.00 per month per child for child support. It is to be noted that the court in making this award stated (R. 205): "This is the lowest I've ever fixed it." Apparently defendant does not want to take this fact into consideration on the over all award.

In the Hendricks case, this court points out that in situations of this sort, where both parties are at fault, the practical thing to do is grant a divorce and settle the property rights of the parties, giving due consideration to the applicable factors outlined by this Court in MacDonald vs. MacDonald, (Nov. 1, 1951) 236 P (2) 1066.

The point to be determined is whether or not the District Court settled the property matters in such a manner.

In the MacDonald case this Court said:

"This appears to be one of those cases where the marriage had so far deteriorated that there was nothing for the court to do except to recognize the failure, and to use the fairly common phrase, "pronounce a benediction on the wreck;" then proceed to make the

best arrangement of the property and income of the parties so that they could readjust their lives to the new situation as well as possible.

It is true, as plaintiff maintains, that this court has announced the doctrine that in divorce cases it will weigh the evidence and may substitute its judgment for that of the trial court. (Citing cases). Nevertheless, this court should not do so lightly, nor merely because its judgment may differ from that of the trial Judge. We adhere to the qualifications set forth in the more recent expressions of this Court: that the judgment will not be disturbed unless the evidence clearly preponderates against the finding of the trial court; or there has been a plain abuse of discretion; or where a manifest injustice or inequity is wrought. *Anderson vs. Anderson*, 104 Utah 104, 138 P. 2d 252; *Allen vs. Allen*, 109 Utah 99, 165 P. 2d 872. See discussion of this point by Mr. Justice Turner in the latter case."

We submit that the evidence does not clearly preponderate against the finding of the trial court; nor has there been a plain abuse of discretion; nor has there been a manifest injustice or in equity wrought by the trial courts decision. See also *Pfaff vs. Pfaff*, Utah, 241 P (2d) 156.

This court further says in the *MacDonald* case:

"Although the question of fault is not by any means to be entirely disregarded in determining the rights to property and alimony, it is settled that a spouse against whom a divorce is granted may under some circumstances be awarded adequate alimony."

We could continue on and reiterate the various factors discussed by this court to be considered, but since the court has so recently had occasion to discuss this at length, little good would be accomplished by restating them here.

As to the evidence concerning these various points, the record shows that practically all of the property has been acquired during the marriage as a result of their joint efforts. (R. 160, 161, 165, 166, 167, 169). One exception seems to be the piano, which plaintiff purchased before marriage. (R. 161).

In his brief, defendant uses as one of his arguments favoring an award of most of the property to him the fact that plaintiff never worked until 1944. (Appellant's brief P. 7). Yet at the trial he complained bitterly that she was always wanting to work over his objection. (R. 41).

The fact is that it was necessary for plaintiff to go to work in 1948 or 1949, at defendant's request in order to help pay for the home. (R. 155). The record bears out the fact that plaintiff was willing to work, but apparently defendant would not let her. In fact, plaintiff had taught school for many years before marriage, (R. 155) and apparently gave this job up for the marriage. Now the defendant wants this court to deprive plaintiff of her property settlement and alimony because she didn't work.

The record also discloses that a good deal of plaintiff's inherited funds went toward the payment of the home. (R. 169).

In short, the record seems to bear out the justification of the trial court's award. In the MacDonald case the trial

court's award to the wife was much greater in proportion than in the present case, and the court in the present case made an express finding supported by the evidence, that the husband was not blameless, but was guilty of misconduct, which factor was apparently not present in the MacDonald case.

CONCLUSION

We contend that more than a preponderance of the evidence supports the trial Court's findings and decision relating to the division of the parties property and as to alimony.

Respectfully submitted,

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