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IN THE SUPREME COURT OF THE STATE OF UTAH

CONSTANCE H. BARRETT,
Plaintiff and Respondent,

— vs. —

ROBERT MICHAEL BARRETT,
Defendant and Appellant.

Case No. 10268

BRIEF OF APPELLANT

FILED
MAR 2
Clerk, Supreme Court

Appeal From a Decree of Divorce Granted by the Third District Court of Salt Lake County,
HONORABLE A. H. ELLETT, *Judge*

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IN THE SUPREME COURT OF THE STATE OF UTAH

CONSTANCE H. BARRETT, *Plaintiff and Respondent,* — vs. — ROBERT MICHAEL BARRETT, *Defendant and Appellant.*	Case No. 10268

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action for divorce wherein the plaintiff by her complaint seeks a divorce, custody of the minor child of the parties, support money, alimony, and a division of property.

DISPOSITION IN THE LOWER COURT

The lower court determined that the plaintiff was entitled to and granted her a divorce, awarded her custody of the minor child of the parties, the sum of $200.00 each month as support money for the minor child, the sum of $250.00 until her death or remarriage as alimony,

judgment in the sum of $15,000 as a division of property, and $1,750.00 as attorney's fees.

RELIEF SOUGHT ON APPEAL

This appeal is taken by the defendant and seeks a determination by this court that the plaintiff has not proved grounds for divorce in the manner required by law, and that her complaint should have been dismissed; or in the alternative, that the award to the plaintiff of the sum of $250.00 each month as alimony and $5,000 of the $15,000.00 judgment awarded to the plaintiff was excessive as a matter of law and should be vacated and set aside.

STATEMENT OF FACTS

The parties to this action were married on October 21, 1961, at Acapulco, Mexico (R. 94, L. 20). The plaintiff at the time of this marriage had four children by a previous marriage between the ages of nine and two years (R. 96, L. 1-5), having been divorced from her former husband in April of 1960 (R. 131, L. 11-15). The defendant had had two prior marriages, and had three children by his first marriage and one child by the second (R. 96, L. 25). At the time of this marriage, the plaintiff was 32 years of age, and the defendant was 49 years of age (R. 115, L. 11-14). Following the marriage, the parties took up residence in Las Vegas, Nevada (R. 99, L. 2-5). The parties separated little more than three months following their marriage, in the latter part of January or the first part of February of 1962 (R. 136, L. 17-22), and the

plaintiff returned to Salt Lake City, Utah. The parties have been separated since Mrs. Barrett left Las Vegas (R. 136, L. 23-25). A child was was born to the parties on June 19, 1962 (R. 99, L. 19). This action was commenced on May 8, 1963, in the District Court of Salt Lake County. Following the framing of issues and employment of discovery procedures by the parties, a pretrial was held May 18, 1964, the pretrial order reciting in part (R. 48):

> "In this case the defendant will not offer contradictory evidence if the plaintiff can show grounds for divorce, provided that his failing to so offer will not be considered by the court as a basis for any punitive measures to be taken against him in the division of property or awarding of alimony or support."

The pretrial order also recited that the property agreement entered into by the parties at the time of the marriage and written in Spanish (R. 29) was correctly interpreted in English in the defendant's Objection to Plaintiff's Motion for Production of Documents (R. 35, 36).

The matter was tried August 6, 1964. The plaintiff commenced her testimony, and in support of her claim of cruelty testified in generalities which were primarily conclusions (R. 99, L. 26 to R. 100, L. 20) as to the "inconsiderate, tyrannical and dictatorial" behavior of the defendant, then qualified her testimony with justification of the defendant's behavior (R. 100, L. 21-24) and his problems leading to it. When asked to testify specifically, the plaintiff refused (R. 100, L. 26-29, 30; R. 101, L. 29; R. 102, L. 6, 21-22; R. 103, L. 1, 2, 18-20). When pressed

by her counsel and by the Court for specific testimony concerning her claimed grounds, the plaintiff stated that she did not want a divorce (R. 103, L. 14; R. 104, L. 10). The Court then stated that the complaint was dismissed (R. 104, L. 12). After further conversation, a recess was taken and upon resumption of testimony the plaintiff was asked again if she wanted a divorce. At this time she repeated that she did not (R. 104, L. 30; R. 105, L. 20-22, L. 30). After discussion between the Court and her counsel, the plaintiff again testified as to the justification of the defendant's claimed acts of cruelty (R. 108, L. 30 to 109, L. 4; R. 109, L. 28 to R. 110, L. 3). The plaintiff then testified as to an occasion (R. 111, L. 22 to R. 112, L. 12) which apparently was being developed as a claimed act of cruelty. However, when asked by her counsel the somewhat leading question (R. 113, L. 4):

> Q. Did you feel that you were frequently imposed upon sexually in your home?

The plaintiff replied:

> A. That's very a difficult question. I enjoyed for the most part my . . .
>
> Q. Did you find . . .
>
> A. . . . sexual encounters with Mr. Barrett. I did feel on a few occasions that he was animal . . . rather animal like in his approaches, but that's . . .
>
> Q. All right.

On this state of the record, the Court interposed as follows (R. 113, L. 22):

> The Court: It may be that counsel will stipulate that grounds for divorce have now been shown.

Mr. Beless: I will stipulate — what was that, Your Honor?

The Court: That the lady has shown grounds which would support and sustain a divorce.

Mr. Beless: Yes, I will so stipulate.

The Court: All right. Let's get on to the matter of finances.

Mr. McMurray: The real problem.

The plaintiff then testified that at the time of her marriage to the defendant she had been employed as secretary to the department head of the State Department of Public Instruction and was earning $350 a month (R. 115, L. 4). Prior to that she had been the Assistant Manager of the Alpine Rose Lodge earning $400 a month, together with $50 a month expenses (TR. 114, L. 26). At this time she had a daughter two years of age—"Old enough to put in the nursery" (R. 134, L. 1). She owned an interest in certain real property acquired in the divorce from her former husband, which she valued at about $7,000 (R. 114, L. 10). She was receiving, and presently receives $50 per month support money for each of her four children by her previous marriage, or $200 each month. In addition she receives $50 each month if and when she moves from the property owned by herself and her former husband jointly (R. 115, L. 25). The plaintiff testified that her present living quarters were "socially a devastating situation" (R. 120, L. 6) and that she had found an apartment which she felt was adequate for "large family" (R. 122, L. 9, 18) which rented for $200 a month. Realizing that this was not all Mr. Bar-

rett's family (R. 122, L. 10) she felt that it would be reasonable that he contribute only three-fourths or $150 (R. 122, L. 29) of this rent. She then testified that was she really needed was a home adequate for herself and Michelle "and the other children" (R. 123, L. 2) and requested that the court award her sufficient monies to purchase one. The plaintiff then testified to her modest needs, which included, among other items, (R. 123, 124, 125), $150 a month for food for she and the minor child (R. 123, L. 26) and $50 to $100 for miscellaneous activities, recreation, etc. (R. 125, L. 4-6). However, it is significant that the plaintiff testified that as to her four children by the previous marriage "their father provides for them adequately" by paying the sum of $50 for each child as child support (R. 121, L. 3). Apparently, the plaintiff is in good health, and she testified that the child was in good health (R. 139, L. 22). Although she was employed prior to this marriage, she does not feel at this time that she has any reason to seek employment (R. 133, L. 7, 13). The plaintiff then testified as to the acquisition of a diamond ring (R. 126, L. 10-24). The ring was purchased January 12, 1962, (R. 159, L. 4) apparently, a matter of two to four weeks (R. 136, L. 17-22) before the plaintiff left the defendant and returned to Salt Lake City. The defendant's version of this purchase was somewhat different than that of the plaintiff. When asked if the ring had been purchased as a wedding ring, he stated (R. 158, L. 21):

> "No. It was purchased against my will. I owed money, and that was more or less one of these unkind things, buying big homes and big rings."

Evidence was then adduced with reference to the financial situation of the defendant (Exhibits P-4, P-5). While the defendant has substantial assets, the record does not indicate that he is the "retired multimillionaire" that the plaintiff assumed she was marrying (R. 115, L. 29). These exhibits show that Barrett Investment Company, of which the defendant is for practical purposes the sole stockholder, had a negative net worth and was indebted to the defendant in an amount slightly less than one and one-half million dollars. Exhibit P-5 listed various assets owned by the defendant, all of which are shown by the Exhibit to be pledged as security for a loan. The net assets have a book value or $255,084.87, subject to the note of the defendant in the amount of $141,624.72. The defendant testified as to his lack of a regular income (R. 150, L. 23), his obligations (R. 151, L. 6-29), and the lack of present values in the real estate described in Exhibit P-5 (R. 153, L. 2-8). The court found as a Finding of Fact that the defendant "had property interests and holdings exceeding $1,250,000." (R. 75). Plaintiff's counsel questioned the defendant at some length concerning voluntary provisions he had made for his children by his previous two marriages (R. 144, L. 3 to R. 146, L. 12). These provisions for his older children had been made years previous to the trial of this present action and under different financial, as well as personal, circumstances, the most recent being in April of 1955 (R. 146, L. 2). While it would appear that these matters were entirely immaterial, nevertheless they were relied upon by the court and received its first attention in a determination of the issues upon the parties sub-

mitting the matter (R. 163, L. 21). At the conclusion of the evidence the court awarded the plaintiff the sum of $15,000, $250 a month alimony, $200 a month support money, attorneys' fees in the sum of $1,750. The diamond ring was awarded to the defendant.

Following the entry of judgment, counsel for the defendant filed his withdrawal (R. 82). Present counsel entered his appearance (R. 79), and a Motion for New Trial was filed (R. 81). Plaintiff's Motion for a New Trial was denied (R. 87), and the plaintiff was allowed to reopen and give testimony concerning the antenuptial agreement entered into by the parties at the time of the marriage (R. 168-201). The court found the issues in favor of the plaintiff (R. 196, 197), finding that the agreement was unfair "for the wealth Mr. Barrett had" (R. 196, L. 28), and further that the plaintiff did not understand the agreement (R. 197, L. 1). The defendant thereupon filed this appeal.

ARGUMENT

POINT I.

THE COURT ERRED IN ACCEPTING THE STIPULATION OF COUNSEL THAT THE PLAINTIFF HAD, BY HER TESTIMONY, SHOWN GROUNDS FOR DIVORCE; AND IN THE ABSENCE OF SUCH STIPULATION, THE EVIDENCE FAILS TO SHOW THAT THE PLAINTIFF WAS ENTITLED TO A DIVORCE.

The controlling statute, with reference to grounds for divorce and proving of the same, 30-3-4 Utah Code Annotated 1953, as amended, is as follows:

> "30-3-4 PLEADINGS — FINDINGS — DECREE. — The complaint shall be in writing and signed by the plaintiff or plaintiff's attorney. No decree of divorce shall be granted upon default, *or otherwise, except upon legal evidence taken in the cause,* and all hearings and trials for divorce shall be had before the court, and not before a master, referee or any other delegated representative, and the court in all divorce cases shall make and file its findings and decree *upon the evidence.*" (Emphasis added)

Upon the evidence adduced in this matter, as reflected in the transcript herein, the court entered its Findings of Fact and Conclusions of Law. The finding made by the court with reference to the plaintiff's grounds for divorce is as follows (R. 74, 75):

> "5. The plaintiff and defendant resided together as husband and wife for a period of approximately five months following their marriage. Almost immediately following the marriage, and particularly when it became apparent that the plaintiff was pregnant, the defendant's attitude towards her took on a marked change. No longer was the plaintiff the object of the defendant's love, affection and attention, but instead she found herself rejected, cast aside and treated with contempt. The defendant on more than one occasion threatened the plaintiff with physical harm and injury which he was quite capable of inflicting. The defendant has refused to continue to reside with the plaintiff, has insisted upon a divorce and wants nothing more to do with the plaintiff. All of the

> foregoing conduct on the part of the defendant has and does constitute cruel treatment of the plaintiff and has caused her great mental distress and anguish. Counsel for the parties stipulated that the foregoing constituted grounds for divorce."

It is submitted that the foregoing facts, as found, are not supported, and in fact are in large measure negated by the record in this case. Further, it is submitted that the concluding statement of this finding, to-wit, "Counsel for the parties stipulated *that the foregoing* constituted grounds for divorce" enlarges upon the purported stipulation which was stated by the court as follows (R. 13, L. 22):

> "THE COURT: It may be that counsel will stipulate that grounds for divorce have now been shown."

It would seem apparent that the attempted stipulation was not and was not intended to be an agreement by the parties, that the plaintiff had, in fact, made out the grounds for divorce as cited in this finding, but was rather in fact an admission by the court and counsel that grounds for divorce had not been made out, could not be made out at this stage of the record unless the plaintiff were to impeach her own testimony, and that the stipulation was in lieu of evidence rather than an acknowledgment that evidence had been produced. The court itself appeared to acknowledge this state of the record, in halting cross-examination of the plaintiff by counsel for the defendant concerning her trips to Salt Lake City during the marriage as follows (R. 136, L. 5):

> "THE COURT: Why are we leading into this? Are we trying to show that she is not entitled to divorce? You could talk me out of it if you want to.
>
> MR. BELESS: I just want to show that her relationship is still in Salt Lake City and really what this marriage was . . .
>
> MR. MCMURRAY: Well then, I object to it because he has already stipulated there is grounds for divorce so all we ought to be talking about are matters that pertain to property matters.
>
> THE COURT: I think so."

Present counsel is concededly in the unhappy position of attacking a purported stipulation made by his predecessor, and apparently relied on by the court. However, it is submitted that the matters attempted to be stipulated to in this instance are not the type of matter ordinarily stipulated to by counsel and to which stipulations counsel, his client, and any successor counsel should as a matter of proper practice be bound. The attempted stipulation in this instance was one which, under the statute, counsel is without authority to enter into, and the court is without authority to accept. Such a stipulation is not as in the ordinary case, an agreement by all parties as to existing facts, but under the circumstances of the instant case is an admission that the necessary facts do not exist, or in any event have not been proven, and is contrary to the wording as well as the spirit of the statute, which requires as a matter of public policy that no decree of divorce shall be granted other than "upon legal evidence taken in the cause." The plaintiff having completely failed to prove, either that she was

entitled to or wanted a divorce, was not entitled to the granting of one, and the complaint should have been dismissed as the court itself indicated in the early stages of the proceedings (R. 104, L. 12).

POINT II.

THE COURT ERRED IN AWARDING TO THE PLAINTIFF ALIMONY IN THE SUM OF $250.00 EACH MONTH UNTIL HER DEATH OR REMARRIAGE.

This court has on numerous occasions made the observation that on the question of alimony, while each case relies substantially on its own facts, and that the decision of the trial court should be given great weight, that neverthelees, this court has authority to modify a decree in appropriate cases. See *Pinion* v. *Pinion*, 67 Pac. 2nd 265, 92 Utah 265, *McDonald* v. *McDonald*, 236 Pac. 2nd 1066, 120 Utah 573, and the numerous cases therein cited. In each of the cases cited, this court has set out the elements which should be taken into consideration by the Court as governing its discretion in this regard. In applying these elements in turn to the facts of the instant case, no authority is found for the granting of alimony, and particularly permanent alimony, under a fact situation as is here presented.

The elements to be considered in determining the question of alimony include the amount and kind of property owned by each of the parties and whether the property belonged to the parties before coverture or was accumulated jointly, the ability and opportunity of each of

the spouses to earn money, the financial station and necessities of each party, the health of the parties, the duration of the marriage, what the wife might have given up by the marriage, and age of the parties when they married.

In this case, the court found the defendant to have a net worth of $1,250,000. The plaintiff owns an undivided interest with her former husband in certain Salt Lake County real property, which she valued at $7,000. All of the property of each of the parties was accumulated prior to the marriage, and no property was accumulated by the parties during the marriage. At the time of the marriage, the plaintiff was employed as Secretary to the department head of the State Department of Public Instruction, and was earning $350.00 per month (R. 115, L. 4). Prior to that she had been the assistant manager of the Alpine Rose Lodge and was earning $400.00 per month, together with $50 a month expenses (R. 114, L. 126). At this time she had a daughter two years of age — "old enough to put in the nursery" (R. 134, L. 1). The standard of living enjoyed by the plaintiff during the brief period that the parties lived together, does not appear clear from the record, though as the court stated in *Pinion* v. *Pinion*, supra, "He would not be obligated in this sort of a marriage to keep her for the duration of her life to this standard." The marriage in *Pinion* v. *Pinion* lasted four years, this marriage lasted less than four months. With reference to the other elements to be considered in the determination of the question of alimony, the plaintiff gave up nothing other than

The plaintiff came into this marriage a woman who was required to work to support her four children by a marriage that had ended in divorce. Within four months she left this marriage and returned to Salt Lake City.

With reference to what the plaintiff might have "given up" for this marriage, during the short period of time that the parties resided in Las Vegas, the plaintiffmade an undetermined number of trips to Salt Lake City (R. 135, L. 1). The plaintiff could not recall that the defendant objected "a great deal" to these trips though as to her trips during the Christmas holidays he "may have been offended" (R. 135, L. 25-28). Also, on the day that the plaintiff and defendant separated, the plaintiff telephoned her former husband in Salt Lake City (R. 110, L. 9-14) and requested that he send her car down. The Court refused to allow the defendant's counsel to examine the plaintiff concerning these trips, the plaintiff's relationship in Salt Lake City, and the actual status of this marriage for the reason that grounds for divorce had been stipulated to (R. 136,, L. 5-15).

A distinguishing factor in this case is that there is a child born of the marriage. However, the defendant has never denied his obligation to support this child, and has, in fact, agreed to pay an amount as child support substantially in excess of the amount which the plaintiff feels is adequate for the support of her children by the first marriage. It would seem obvious that the child of this marriage will not be raised in the same household with her half sisters with a pecuniary standard of living four

times that of the other children, and the defendant is well aware that his contribution to the support of this child will undoubtedly, in fact, contribute to the welfare of the plaintiff's children by her former marriage as well as the plaintiff herself. This would appear inevitable, and an attempt to arrange the situation otherwise would probably not be in the best interest of this child or anyone else involved.

However, under the circumstances and the facts of this case, the award granted by the trial court goes far beyond doing equity to the parties and instead attempts to apply a pecuniary balm to the sensitivities of the plaintiff, apparently found by the trial court to have been bruised in some manner which the record leaves far from clear.

POINT III.

THE COURT ERRED IN AWARDING THE PLAINTIFF THE SUM OF $15,000.00 AS A DIVISION OF PROPERTY.

The plaintiff testified (R. 123, L. 4-20) that because of her circumstances she needed a home and that (R. 123, L. 10).

> "I suppose with the equity I have in Spring Lane, it is possible to obtain, that our determination of $17,000 should be enough."
>
> Q. You are asking the court to award you a suffificent amount which coupled with the equity you now have to give you a home?
>
> A. Yes, I would appreciate it, yes.

The court in rendering a decision (R. 164, L. 26) stated:

> "I thought he ought to give her $10,000 towards the buying of a home. She has a $7,000 equity in this duplex that she now has, and maybe a little more than that with these parcels of land because she owns half of two parcels and only a third in the one."

After further discussion and argument the court stated as follows (R. 165, L. 17):

> "THE COURT: I think I ought to give her $15,000. That would pay her well. Her station in life has been changed by marrying him, the hopes she had of living and shining and wearing this diamond around. I think she is well taken care of if I give her $15,000, $250 a month alimony while she is single, $200 a month support for the child, give the gentlemen the ring, and give her counsel fees, costs in the amount of $1750, ano wish them God speed. I would do about as well as I could do this. That will be the order of the Court."

In *Foreman* v. *Foreman*, 176 Pac. 2nd 144, 111 Utah 72, this court set out in its opinion the language of the trial judge as follows:

> "As far as I am concerned, she has $1,800 in cash and I think that would well pay the lady for such heart balm as she might be in need of, and that would avoid the necessity for my going into that."

To this and other language of the trial court quoted, this court observed:

> "It would seem from a reading of the above statements that what the court was attempting to do

> here was compensate Mrs. Foreman for her suffering of the pangs of unrequited love— heart balm — and teach Mr. Foreman a lesson in marriage. Neither task is properly within the issues of a divorce case such as this."

The language of the trial judge quoted above has a striking similarity to the statement of the same trial judge in the instant case. The $10,000 award first contemplated by the court was construed by the court to be payment for the value of the diamond ring acquired by the parties during the marriage. While the circumstances under which the ring was acquired were somewhat in dispute (Cf. R. 164, L. 22; R. 126, L. 17), conceding for the purpose of argument that the court acted within the bounds of its discretion in awarding the plaintiff the value of this ring, or $10,000, the reconsideration by the court, and the gratuitous increase of this amount to $15,000, notwithstanding that the plaintiff herself had testified that the amount needed by her to purchase a home was $10,000, was an attempt to (as the court itself stated) "pay her well," similar to that criticized and reversed by this court in *Foreman* v. *Foreman.*

CONCLUSION

In conclusion, it is submitted that the record in this case does not support the finding of the trial court that the plaintiff had established grounds for divorce and accordingly, the complaint of the plaintiff should have been dismissed. In the alternative, this record does not support a finding that the plaintiff was entitled to an

award of alimony nor an award of property to the plaintiff as was awarded by the trial court. The matter should be remanded with directions to dismiss the complaint of the plaintiff. In the alternative, the award to the plaintiff of the sum of $250 each month as alimony should be vacated and set aside, and the award of $15,000 given the plaintiff as a division of property should be reduced to the sum of $10,000.

Respectfully Submitted,

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