

1965

## Constance H. Barrett v. Robert Michael Barrett : Brief of Respondent and Petition for an Award of Attorneys Fees in Connection With Appeal

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

CONSTANCE H. BARRETT,  
*Plaintiff-Respondent,*

vs.

ROBERT MICHAEL BARRETT,  
*Defendant-Appellant.*

Case

No.

10268

**FILED**

MAR 31 1965

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**BRIEF OF RESPONDENT  
AND**

*Clk. Supreme Court Utah*

**PETITION FOR AN AWARD OF ATTORNEY'S  
FEES IN CONNECTION WITH APPEAL**

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Appeal from the Judgment of the Third District Court  
of Salt Lake County, Hon. A. H. Ellett, District Judge.

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Appeal from the Judgment of the Third District Court  
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**RESPONDENT'S STATEMENT  
OF THE NATURE OF THE CASE**

As stated by the appellant, 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 monetary award.

## DISPOSITION IN THE LOWER COURT

The lower court granted the plaintiff the divorce, awarded her custody of the minor child of the parties, the sum of \$200 each month as support money for the minor child, the sum of \$250 per month until her death or remarriage as alimony, and judgment in the sum of \$15,000 as a division of property and \$1,750 as attorney's fees. From the decree in favor of the plaintiff the defendant has appealed.

## RELIEF SOUGHT ON APPEAL

The respondent seeks to have this court affirm the judgment and decree of the trial court, and award her an additional attorney's fee in the amount of \$990.<sup>00</sup> for legal services rendered by her attorney in connection with this appeal.

## IDENTIFICATION OF THE PARTIES AND EXPLANATION OF ABBREVIATIONS

Constance H. Barrett is the plaintiff and respondent. Robert Michael Barrett is the defendant and appellant. For practical purposes Constance H. Barrett is sometimes referred to by her own name or as the plaintiff and Robert Michael Barrett is sometimes referred to by his own name or as the defendant. The foregoing is consistent with the appellant's identification of the parties.

"T....." refers to a page reference in the transcript of the trial proceedings. "R....." refers to a page reference in the record of the case.

## RESPONDENT'S STATEMENT OF FACTS

The defendant's statement of facts up to the point of the trial (p. 2 and 3 of appellant's brief) is substantially correct. Thereafter, the appellant launches into matters which are more appropriately a part of his argument. Respondent will therefore make no other statement at this point in her brief but will in the course of the argument point out other additional pertinent facts which amply support the findings and decree of the trial court.

## SCOPE OF REVIEW

"There are numerous decisions of this court holding that the Supreme Court will not substitute its judgment in a divorce proceeding relative to alimony and division of property for that of the trial court unless the record clearly discloses that the trial court's decree in such matters is plainly arbitrary." *Allen v. Allen*, 109 Utah 99 (1946), 165 P.2d 872.

See also *Anderson v. Anderson*, 104 Utah 104, 138 P.2d 252, 254, *Stewart v. Stewart* 66 Utah 366, 242 P. 947; *Adamson v. Adamson*, 55 Utah 544, 188 P. 635; *Pinney v. Pinney*, 66 Utah 612, 245 P. 329; *Bullen v. Bullen*, 71 Utah 63, 262 P. 292; *Blair v. Blair*, 40 Utah 306, 121 P. 19, Ann. Cas. 1914D 989, 38 L.R.A., N.S. 269; *Friedli v. Friedli*, 65 Utah 605, 238 P. 647; *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265, 267.

## ARGUMENT

### POINT I

THE FINDINGS OF THE TRIAL COURT IN REFERENCE TO THE PLAINTIFF'S GROUNDS FOR DIVORCE ARE AMPLY SUPPORTED BY THE EVIDENCE AND PLAINTIFF WAS ENTITLED TO THE DECREE OF DIVORCE AS GRANTED.

The findings of the trial court in reference to the plaintiff's grounds for divorce are amply supported by the evidence. The following excerpts from her testimony clearly indicate the respondent's grounds for divorce: (T. 7, 8)

“A I prefer not to give the sordid details. However, I found shortly after my marriage that I was no longer the object of Mr. Barrett's love and affection. In fact, I was primarily a mistress in marriage. He totally rejected me in most cases and particularly after the — we found out we were expecting our little girl.

“Q How soon after your marriage to Mr. Barrett was it before you found out that you were expecting the birth of a child?

“A I'm not entirely sure. I visited doctors in Las Vegas, and they determined that I was with child. I suppose the record would be there if you would care to secure that record.

“Q It was immediately after your marriage. Is that correct?

“A Yes. A very short time after we moved to Las Vegas.

“Q Now, could you indicate just generally what you observed about his attitude changing? You alluded to that previously. Indicate to the court what you observed in that respect, his attitude toward you.

“A Well, he just became inconsiderate, tyrannical, and dictatorial in his behavior.

“Q Were you subject to any physical abuse?

“A Yes, on occasion”\*\*\*

“Q Give the court some indication of what threats you were exposed to.

“A The night before I left, Bob had been drinking part of the day, and he had been disappointed in a legal problem; and although I understand that he had been drinking and was disappointed and had his share of problems in his position —

“Q And what happened?

“A Macoy, I would like not to talk about it, please.

“Q I’m not asking, Mrs. Barrett, that you go into what you indicate sordid details.

“A I submitted you a piece of paper. May I have your permission to read it in court? . . . (T. 7, 8)

It is apparent that she was imposed upon and abused in their intimate personal life (T. 9). In addition, (T. 9, 10)

“ . . . He threatened me that he was going to beat my g. d. head off and in fact attempted to do so on the day I left him.

“Q What did he do on that day?

“A He came at me like — told me he was going to beat my g. d. head off and came toward me. I went out through the door, and he slammed the door and I screamed. I didn't feel that I could take a possible chance of the destruction of our unborn baby regardless of anything.

“Q Now, you stated as I believe a little earlier that you observed after your marriage and after it was discovered that you were pregnant that he was I think you used the words dictatorial, maybe domineering. Would you indicate briefly what you were objecting to in that respect?

“A Just vulgar language and untrue accusations and suspicions.”\*\*\*

“Q Did he ever strike you?

“A No. He attempted to. He did grab me by the arm on one occasion and throw me into the bed, but apart from that, he didn't ever strike me, no, but I know he would have on that particular day.” (T. 9, 10)

It was only when counsel for the plaintiff in the trial of the case unduly pressed for further sordid details in regard to the problems in the marriage that the plaintiff understandably expressed some reluctance in responding (T. 10, 11) which caused some annoyance to the court (T. 11). Plaintiff did make the statement that she did not want a divorce (T. 11) and even said that she

loved the defendant (T. 11) which prompted the court to say, "Why don't we go home." (T. 12) Plaintiff was so distraught, upset and beside herself that the court granted a short recess (T. 12) and thereafter in a discussion between plaintiff, her counsel and the court she was able to convey to the court that in stating that she did not want a divorce she was really stating that she regretted that her marriage was ending as it was; that this was not really what she "wanted" but that she certainly did want the court to grant the decree she was seeking. (T. 13-15) That the plaintiff certainly did want a decree of divorce was then clarified for the record (T. 15-16) and the plaintiff then proceeded to state additional problems and difficulties that had occurred in their marriage (T. 17-21).

It was only after listening to such an elaboration of sordid details and seeing the plaintiff so emotionally upset and beside herself that the court in an obvious effort to terminate an unnecessary elaboration of such details, spare her feelings and get on with other important matters in the trial of the case that the court stated "It may be that counsel will stipulate that grounds for divorce have now been shown." (T. 21) Pursuant to that suggestion Mr. Beless who conducted the trial of the case and had seen all that had unfolded had no hesitation in stating, "Yes, I will so stipulate." (T. 21)

In the light of the record and the emotion filled trial of the case which could not possibly be reflected in full measure on the record there is no question that the plaintiff has shown ample grounds for the divorce she is seeking. The suggestion that she has not shown such grounds should only be interpreted as a prelude to the defendant's argument that the award of alimony to the plaintiff should be diminished. The defendant's real argument has always been "dollars" and not "grounds."

## POINT II

THE TRIAL COURT DID NOT ERR IN ACCEPTING THE STIPULATION OF COUNSEL THAT THE PLAINTIFF HAD BY HER TESTIMONY SHOWN GROUNDS FOR DIVORCE.

The argument under Point I clearly demonstrates the suggestion of the trial court that "It may be that counsel would stipulate that grounds for divorce have now been shown," was most appropriate; was an obvious effort to shorten the trial and not to prolong the record when in the court's mind grounds had already been shown. Certainly the defendant having stipulated that grounds for divorce had then been shown is not now on this appeal in any position to raise the question. If nothing else he is estopped.

### POINT III

THE TRIAL COURT DID NOT ERR IN AWARDING THE PLAINTIFF ALIMONY IN THE SUM OF \$250 PER MONTH UNTIL HER DEATH OR REMARRIAGE.

The award of alimony to the plaintiff in the sum of \$250 per month until her death or remarriage was amply justified by the evidence.

Matters to be considered in awarding alimony and settling property rights are well established. *Allen v. Allen*, 109 Utah 99, 165 P.2d 872; *Anderson v. Anderson*, 104 Utah 104, 138 P.2d 252; *Pinion v. Pinion*, 92 Utah 255, 67 P.2d 265.

At the time of the plaintiff's marriage to the defendant she owned a one-third interest in property in Salt Lake City having an equity value of approximately \$7,000 (T. 22). She had had previous employment where by she earned \$400 per month and \$50 a month traveling expense (T. 23). She had also worked as a secretary earning \$350 per month (T. 23). During the year prior to her marriage to Mr. Barrett she had worked at the Alpine Rose Lodge earning \$400 per month (T. 23).

It is true that she had children by a former marriage and was receiving \$50 per month for the support of each of those children (T. 23).

On the other hand, the plaintiff's testimony that at the time of the marriage of the parties the defendant was a multi-millionaire was undisputed (T. 23). He was the owner of the Solitude Ski Resort (T. 24). Since the marriage of the parties, Michele, their daughter, was

born, and that terminated her ability to work and her opportunity for employment (T. 24-25). On the other hand, the defendant has been most successful and made the undisputed statement to the plaintiff that "Making a million dollars is the easiest thing in the world. . . ." (T. 25)

At the time of the trial the only income the plaintiff had was the temporary support allowance required to be paid by the defendant and the support that came to her for the benefit of her children by the prior marriage (T. 25). As for the defendant, the plaintiff's statement that he, the defendant, had put two and one-half million dollars into his ski lifts and that if he advertised in the New York Times he believed that he could easily sell it for 4 million dollars is undisputed. (T. 27)

As for the plaintiff's living conditions at the time of the trial the same were very inadequate (T. 27). She gave a room by room description of where she was living (T. 27) all of which indicated justification of her statement that her place was "Just inadequate in every respect. Socially is a devastating situation." (T. 28) Her furnishings were likewise inadequate (T. 28) and much was borrowed (T. 29).

With respect to her current living needs she stated that what she really needed was a home (T. 31). For her immediate quarters it was stated that it would be nec-

essary to rent an apartment for which she would be required to pay \$200 per month. She stated that the defendant ought to pay \$150 of this amount (T. 30). As for the home which she really needs the plaintiff stated that with the present equity she has in her property she could with an additional \$17,000 obtain one (T. 31). Food and household items require \$150 per month (T. 31). Medical needs amount to \$25 per month (T. 32). With respect to clothing, she needs \$50 per month (T. 32). As for transportation for her and Michele she needs \$40 per month (T. 32). This, of course, includes insurance (T. 32). \$50 per month is necessary for her to pay for such furniture as she needed. With respect to miscellaneous items such as education and recreational activities, etc. it is her best judgment that she will require from \$50 to \$100 per month (T. 32-33). If she were awarded a sufficient amount to obtain a home she would need for maintenance and utilities about \$100 per month (T. 33).

The foregoing living requirements for the plaintiff and Michele, all of which were undisputed, total \$615.

The plaintiff was seeking to have the court award her the sum of \$200 per month for the child of the parties the same to be fortified by a trust arrangement similar to that provided for the defendant's earlier child, Tina (R. 68). She was seeking \$500 per month as alimony (R. 69) and further sought to have the court award her the diamond ring in addition the sum of \$17,500. (A sufficient sum to purchase a modest home.) (R. 69).

The trust providing \$200 per month for Tina the child of his second marriage is still operating (T. 52, 54). File No. 105959 was marked and received as Exhibit D3. The file was received only for the purpose of the trust agreement (T. 54).

The trial court did not secure the payment of the \$200 per month support money by the establishment of a trust as was requested but instead made an award of support and alimony and cash in the amount of \$15,000. The court was no doubt concerned with the indifferent attitude that has been exhibited by the defendant ever since the pregnancy of the plaintiff and subsequent birth of Michele (T. 7, 8). The plaintiff did not even know where the defendant was when the child was born (T. 46). He never even came to see the plaintiff immediately before or after the birth of the child and has never come to see the plaintiff since she has been separated and has never been to see Michele (T. 46). He has never sent Michele anything other than money, which he has been required to pay by reason of the order of the court (T. 47). He has never so much as even seen Michele (T. 47), nor has he made any inquiries to the plaintiff as to how she is getting along (T. 47).

It is evident, therefore, that the record supports the alimony award of \$250 which was substantially less than the plaintiff was seeking. As a matter of fact, the undis-

puted testimony would have supported a combined award of at least \$615 per month for alimony and support. There was certainly nothing arbitrary in what the court granted unless it was to grant a combined alimony and support money award of only \$450 when the undisputed evidence was that she needed at least \$615.

There is, of course, no dispute in regard to the \$200 per month to be paid as support for the child Michele.

The trial court's concluding remarks aptly sum up the situation. The trust agreement for the former child, Tina, contemplated \$200 per month which was the standard he had set for that child. The trial court thought he ought to do as well for the child of this marriage (T. 71). The court was impressed that the plaintiff's status had substantially changed, that whereas prior to the marriage she was employed and able to earn a substantial salary, now, she "is still a baby sitter. There is no way for her to get out of that and she is entitled to something in that regard. I think she ought to be entitled to \$250 a month as alimony until she remarries or until her death, and I think the man ought to have that ring. I think that ring is all beyond the lady's means and capacity, and if she goes around showing that, somebody will be taking it away from her and leaving her with a tap on the head to remind her that she owned a diamond ring." (T. 72)

#### POINT IV

THE TRIAL COURT DID NOT ERR IN AWARDING TO THE PLAINTIFF THE SUM OF \$15,000 BY WAY OF A DIVISION OF PROPERTY.

As for the cash award of \$15,000 this is a pittance insofar as the defendant is concerned. Exhibit "1", the balance sheet of Barrett Investment Company, gives some indication of the net worth of the defendant. The defendant of course, is the sole stockholder of Barrett Investment Company (T. 56). Exhibit "1", the balance sheet, shows among the liabilities of Barrett Investment Company an amount of \$1,444,178.28 payable to the defendant himself. Exhibit P-5, the R. M. Barrett Agency account gives some further indication of the defendant's substantial wealth. Likewise, Exhibit P-4, defendant's answers to plaintiff's interrogatories, gives further enlightenment as to the means and resources of the defendant.

Now the ring, which was acquired *for the plaintiff*, (T. 33-34) was thought by the court for the reasons noted above to be best awarded to the defendant. The ring had a value of approximately \$9,500 (R. 48).

The court's first impression insofar as a cash award was concerned was to give the plaintiff \$10,000 (T. 72) which would have essentially been cash in lieu of the ring which the trial court though would be much to her ad-

vantage. It was in the "further argument" noted on page 73 of the transcript that it was pointed out to the court that considering the wealth of the defendant as evidenced by Exhibit 1 and P-5, that the defendant himself personally had a claim of \$1,444,198.28 against Barrett Investment Company and that Barrett Investment Company was still able to show a net worth in excess of one million dollars; that is was therefore not inappropriate in view of the plaintiff's needs and circumstances that the plaintiff should be awarded her ring and a greater sum than \$10,000. The trial court then agreed that the plaintiff should be awarded \$15,000 but still felt the defendant should be awarded the ring.

Counsel for the defendant who was not present at the trial has misconstrued the intent and purpose of the court's words "I think I ought to give her \$15,000. That would pay her well." (T. 73) This statement was not made with any vindictiveness nor with any thought of penalizing the defendant but was simply the court's observation that the award that was being made was sufficient.

#### POINT V

THE PLAINTIFF IS ENTITLED TO AN ADDITIONAL AWARD AS A REASONABLE ATTORNEY'S FEE FOR LEGAL SERVICES RENDERED IN CONNECTION WITH THE APPEAL OF THE CASE IN THE AMOUNT OF \$9,900.....

The defendant is not contesting the award of \$1,750 to the plaintiff as a reasonable attorney's fee. The stip-

ulation of the parties at the trial with respect to the time spent in handling the case and the reasonable charge for time spent precludes any such argument on that point.

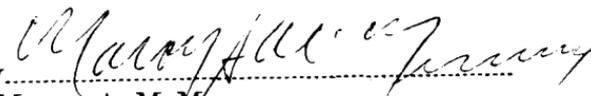
Now, of course, the plaintiff has been required to have the assistance of counsel in representing her on the appeal. The plaintiff is herewith filing a petition in connection with the appeal supported by an affidavit indicating the appropriateness of the award she is seeking. Based on her petition and supporting affidavit and the stipulation of the parties at the trial of the case that \$20 would be a reasonable charge per hour (T. 68), the plaintiff should be awarded by this court an additional attorney's fee in the amount of \$290.....

### SUMMARY

In summary, the plaintiff contends that the record clearly reveals ample grounds for divorce; that the award of \$250 per month as alimony is justified by the evidence. The defendant is not contesting the award of \$200 per month as support money for the child, Michele. As for the award of \$15,000 as has been pointed out the plaintiff was not awarded her diamond ring worth approximately \$9,500 but instead was given a cash award in the amount indicated which in view of the relative circumstances of the parties was modest to say the least. The plaintiff is not able to pursue her employment but is now a "baby sitter." She is only seeking to assume

her role as a mother and give the proper care and attention to a child of Mr. Barrett whose unwillingness to pay the amount awarded by the trial court without direction from this court is certainly not justified in view of his wealth. It is difficult to imagine that he would, under the circumstances, be willing for the plaintiff to have the amount awarded by the trial court which would permit the plaintiff to acquire a much needed home for her and Michele, and yet it must be conceded that this attitude is quite consistent with the attitude he has demonstrated in the past, an attitude of a total lack of concern for the well-being of either the plaintiff or the child of the parties (T. 46-47). The judgment and decree of the trial court should be affirmed and the plaintiff should be awarded the additional sum of \$~~990~~<sup>990</sup> as a reasonable fee for legal services rendered in connection with the appeal of the case.

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