1967

# Fern K. Bader v. William A. Bader : Brief of Appellant

# IN THE SUPREME COURT

# of the

# STATE OF UTAH



FERN K. BADER,
*Plaintiff-Respondent,*

vs.

WILLIAM A. BADER,
*Defendant-Appellant.*

Case No.
10691

BRIEF OF APPELLANT

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

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## BRIEF OF APPELLANT

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### STATEMENT OF THE NATURE OF THE CASE

This case is an action for divorce brought against the appellant, William A. Bader, by the respondent, Fern K. Bader.

## DISPOSITION IN THE LOWER COURT

The Third District Court, Hon. A. H. Ellett presiding, granted the respondent an interlocutory decree of divorce, awarded her the custody of two minor children subject to visitation privileges, provided for the award of property to the parties, provided for child support, and awarded her two lump sums as satisfaction of attorney fees, arrearage in temporary support, and in lieu of alimony.

## RELIEF SOUGHT FROM THE COURT

That the $935.13 held by the clerk of the lower court be released to the appellant. That the order to pay the respondent $1456.00, payable at the rate of $40.00 per month commencing on the 1st day of January, 1967, be voided. That the child support be reduced from $200.00 per month to $150.00 per month, and for such other relief as may appear equitable and just.

## STATEMENT OF MATERIAL FACTS

The parties were married on December 6, 1958, and had two children during the marriage .The respondent had three children by a previous marriage, the oldest married and became self-supporting approximately a year and half after this marriage was consummated. (Tr. 32, 53) The other two children by the former husband were solely supported by the appellant during three years of the marriage period, this being the time between which the respondent stopped working and the

time when social security became payable due to the death of father of the children by the former marriage (Tr. 53, 54).

At the time of entry of the interlocutory decree, the parties owed to a credit union, bank, finance company, doctors, etc., the sum of $5,195.00. (Tr. 39)

The property was distributed between the parties with the appellant receiving a 1961 Rambler station wagon, a 28-foot trailer house, two boats and motors, a shotgun, three rifles, and the equity in a house. (Tr. 38 & 39) The value of this property not including the shotgun and rifles was routinely estimated at approximately $2,765.00 (Tr. 69, 86); however, with the current market for used personal property, and particularly in the case of the estimated $1,500.00 equity in the house (Tr. 33 & 56) after considering the expenses involved in a sale, it is extremely doubtful that anywhere near this sum could be realized.

The respondent received all furniture and fixtures, a 4-grave burial plot including two vaults and headstones, and a 1960 Chevrolet with the provision that she assume the responsibility for the $950.00 remaining due thereon. The respondent was awarded $200.00 per month child support and $935.13 (the proceeds of income tax refund checks) in lieu of alimony until January of 1967 (Tr. 77, 78). She was also awarded a further lump sum of $1,456.00 payable at the rate of $40.00 per month commencing on the 1st day of January, 1967. This sum

was broken down as $300.00 attorney fees, $196.27 arrearage on temporary support, and $959.73 in lieu of alimony. (Tr. 38 and 39).

The appellant was required to assume and discharge debts of the parties in the amount of $4,245.00. (Tr. 39)

Appellant's average "take-home" pay from his primary job is $435.00 per month, (Tr. 50) (The average of $471.40 as outlined on page 34 of the transcript is inflated by wages paid 2 January 1966 for work during December, 1965), plus $94.00 per month from a part-time job, plus $40.00 per month from the Veterans Administration due to a disability (Tr. 34), for a total average of $569.00 per month. Out of this sum he is initially required to pay in fixed amounts the $200.00 child support (Tr. 35), $120.00 house payment (Tr. 85), $65.00 to a credit union as payment on $3,500.00 of the debts he is required to discharge (Tr. 34), plus $80.00 additional child support for children of a previous marriage (Tr. 73). A mathematical computation reveals that he has left the sum of $104.00 per month without considering any payments on the additional $745.00 in debts he was charged to assume. (Tr. 39)

During this same period, respondent will receive $200.00 per month support money for the children of this marriage (Tr. 39), $194.00 per month from social security for children of her previous marriage (Tr. 53) and the equivalent of approximately $155.00 per month from the lump sum in lieu of alimony ($935.13 spread

over six months) (Tr. 38), for a total sum of $550.00 per month. She is of course required to assume responsibility under the decree for $950.00 due on the Chevrolet automobile plus a token rent payment of $75.00 (Tr. 38).

Commencing January 1, 1967, the appellant is in a somewhat better position. With the cessation of $80.00 child support for children by his previous marriage (Tr. 77) and the commencement of the $40.00 per month payment of the $1,456.00 lump sum awarded the respondent (Tr. 38 and 39) he is left with the munificient sum of $144.00 per month after fixed obligations, and this only if he continues to work at the rate of 56 hours per week. (Tr. 68) If he should work at what is becoming the above average rate of 40 hours per week, he would have remaining a total of $50.00 per month.

At the same time, the respondent would be receiving $434.00 a month without working. She has worked in the past as a telephone company supervisor at an excellent salary. (Tr. 54) But as she states (Tr. 62) is not "actively attempting" to get employment though she does have an application in with the telephone company.

## POINT ON APPEAL

THAT THE AWARD OF THE TRIAL COURT IS UNJUST AND UNREASONABLE CONSIDERING THE CIRCUMSTANCES OF THE PARTIES.

## ARGUMENT

From the facts outlined above, it appears obvious that the appellant is being placed in an almost untenable position if he discharges his obligations and attempts to maintain even a minimum standard of living on the amounts left therefor. That he should be forced to such extreme circumstances even while working 56 hours per week is considered so unreasonable and unjust as to strain the conscience.

At the same time, the respondent has had two children by a former marriage supported by the appellant for at least three years of this marriage; she has had all property she brought to the marriage, plus a share of that accumulated, returned to her, and more than generous provision for the support of the children of this marriage has been provided. Thus, in view of the circumstances of the appellant, it would appear that some effort on her part to contribute to her own and her family's support, would be appropriate.

The law on the subject appears clear —

> Amount of alimony is measured by wife's needs and requirements, considering her station in life, and upon husband's ability to pay. *Hendricks v. Hendricks,* 91 Utah 553, 63 P.2d 277, followed in *Porter v. Porter,* 109 Utah 444, 166 P.2d 516.

and while —

> If the amount of the award is reasonable and

> not excessive under the facts and circumstances of the particular case, it will not be disturbed. *Anderson v. Anderson,* 110 Utah 300, 172 P.2d 132, 136.

Still in all fairness the —

> Decree as to alimony must be determined upon the facts, conditions, and circumstances of parties in each particular case, and if, upon examination of record, Supreme Court holds that award of trial court is inequitable and unjust, it should direct such decree as it finds to be just and equitable. *Hendricks v. Hendricks,* supra.

And as further amplified —

> The kind of division or the amount of an allowance to be made is dependent upon the facts, circumstances of each particular case, and, if upon a consideration of them the division or allowance as made by the court below is inequitable or unjust, the Supreme Court will interfere, even though court below did not abuse its discretion, it being sufficient that court below erred in making the division or allowance, and that equity and justice require an interference and a modification thereof. The question thus is as to whether on the facts found the division and allowance were equitable and just. *Dahlberg v. Dahlberg,* 77 Utah 157, 162, 292 P. 214.

## CONCLUSION

It is our contention that under the facts of this case, and in view of the situation of the parties, that the division of the property, allocation of responsibility for

debts acquired during the marriage, amount of child support, and the award of lump sums in lieu of alimony leaves the appellant in a position so inequitable and unjust as to require the Supreme Court in the interest of fairness and justice, and in the exercise of its clear power in such cases, to modify the decree of the lower court and give relief as prayed for herein.

Respectfully submitted,

SUMNER J. HATCH &

L. E. RICHARDSON