1967

Fern K. Bader v. William A. Bader : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

FERN L. BADER,
Plaintiff-Respondent,

vs.

WILLIAM A. BADER,
Defendant-Appellant,

Case No. 10691

BRIEF OF RESPONDENT

Appeal from a Judgment
of the District Court of Salt Lake County, Utah
Honorable A. H. Ellett, Presiding

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action by the plaintiff, Fern L. Bader, against the defendant, William A. Bader, for a divorce.

DISPOSITION IN LOWER COURT

The respondent was granted an interlocutory decree of divorce awarding her custody of two minor children of the parties, subject to visitation privileges

for the appellant, providing for child support and distribution of the property of the parties, and awarding her a lump sum to be paid in monthly installments by the appellant in satisfaction of her attorney fees, arrearage in temporary support, and in lieu of alimony.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the decree of divorce as granted by the lower Court and the granting of respondent's motion on file in this Court for attorney's fees in connection with this appeal.

STATEMENT OF FACTS

The statement of facts set forth by appellant is not entirely accurate, contains mathematical computations based upon these inaccuracies and certain argument and conclusions with which respondent does not agree. Therefore, respondent presents the following:

The parties were married on December 6, 1958, at which time respondent was employed by the Mountain States Telephone & Telegraph Company in a responsible position, (Tr. 54). The respondent continued this employment for a year and half after the marriage, contributing all of her earnings toward the family expenses, which earnings when she was forced to leave her employment because of advanced pregnancy were between $80.00 and $85.00 per week, (Tr.

54, 62). At the time of the marriage she had three children by a former marriage. One of these married and left the home when she quit working, (Tr. 54), and three years prior to the divorce now being reviewed her former husband died and the remaining two children have each been receiving $97.00 per month from Social Security which has been applied toward the family expenses, (Tr. 53). That these two children, "were solely supported by the appellant during three years of the marriage", as stated in appellant's brief, Statement of Facts, page 2, is nowhere supported in the record.

The lower Court awarded the custody of the two minor children to respondent with $200.00 per month child support, and in lieu of alimony respondent was awarded $40.00 per month for two years commencing on January 1, 1967, to this was added $300.00 for her attorney fees and $196.27 to be paid in the same manner, (Tr. 88).

In addition to $504.68 which appellant received from the cash value of an insurance policy on the lives of the four members of this family, which he awarded himself, (Tr. 58), the appellant was given as a property award the property as enumerated in the appellant's Statement of Facts, page 3. His argument as to its value, such as a 28 foot trailer house at "Oh, possibly $400.00", (Tr. 69), are his estimates of value and not necessarily the lower Court's in view of the appellant's testimony that he has been paying $65.00 a month for

four years on the loan which was obtained to purchase just part of this property, (Tr. 72).

Respondent was given as a property award her furniture which she brought to the marriage eight years prior to the divorce and also some burial property which she owned prior to the marriage, (Tr. 57), and a 1960 Chevrolet upon which was owing $950.00, (Tr. 57). The Court also awarded her $935.13 in the form of tax refund checks payable to both parties, (Tr. 77 & 80).

Respondent was ordered to assume and discharge the $950.00 obligation of the parties due on the Chevrolet, (R. 36). Appellant, in addition to the satisfaction of the credit union indebtedness which was incurred to purchase some of the property awarded him, and the payments for which are made by a deduction from his gross income and not included in his take-home pay, (R. 50), was ordered to pay obligations of $745.00 of which $550.00 is the balance due for storm doors and windows installed on the home which he was also awarded by the Court, (Tr. 59).

Appellant's take-home net pay from American Oil Company averages $406.40 per month, computed by the Court from the last, or right hand, column of Plaintiff's Exhibit 1, (R. 50), by subtracting from the total $2,243.19 the $211.16 shown for the period ending January 2, 1966, and dividing by 5. His take-home pay from the Bar is $23.50 per week, (Tr. 68), or $101.83 per month ($23.50 X 4-1/3). He also re-

ceives $40.00 per month which is not taxable from the Veterans Administration, (Tr. 69). A total of $548.23.

The remainder of appellant's Statement of Facts consists of erroneous mathematical computations, argument and conclusions which will be discussed in respondent's brief under Argument.

ARGUMENT

POINT I.

THE AWARD TO THE RESPONDENT OF $935.13 IN WITHHOLDING TAX REFUND CHECKS ENDORSED BY BOTH PARTIES AND HELD BY THE COURT CLERK.

In PINNEY v. PINNEY, 66 Utah 612, 245 P 329 (1926) this Court held: "The division of property is a matter that rests largely within the sound discretion of the trial Court. Unless it appears from the finding that the division made is not equitable under all the circumstances of the case, an appellate Court could not and will not disturb the order of the trial Court."

Did the trial Court abuse its discretion in making this award to respondent? In deciding this matter the lower Court gave careful consideration to the division which had been made of the other property.

Respondent received property which she had owned prior to, and brought into the marriage plus a 1960

Chevrolet which is not valued at $950.00, the balance due upon it.

Appellant received all of the property acquired during the marriage. He received the home, two boats, their two motors, a 28 foot trailer house, a 1961 Rambler Station Wagon, and four guns. In addition, he had terminated a life insurance policy on the lives of the four members of the family just prior to the divorce hearing for which he received $754.68 as its cash value. He had made the determination and had appropriated $504.68 as his one-fourth interest in that amount.

Had respondent received these checks, they would have helped her to survive and enabled her to pay something toward her attorney's fees, however, they were ordered paid into the clerk of the trial Court.

POINT 2.

THE ORDER OF THE LOWER COURT THAT APPELLANT PAY RESPONDENT $1,456.00, PAYABLE $40.00 PER MONTH, WITHOUT INTEREST, COMMENCING JANUARY 1, 1967.

The figure of $1,456.00 was arrived at by the lower Court by combining $196.27 for arrearage on temporary support, the twenty-seven cents getting lost in the process of the computation; $300.00 toward respondent's attorney fees; and, 24 monthly payments of $40.00 in lieu of any alimony.

There should be no argument about respondent being entitled to the arrearge in temporary support, since there was no dispute about its being due. In fact, good argument could be made that she was entitled to a judgment for that amount which would draw 8% interest if not collected by legal process or paid.

The "$300.00 towards her attorney's fees, that she can pay the rest of it." (Tr. 78), could hardly be so unconscionable as to require reversal, in view of the testimony by respondent that she had been told her attorney's fees would be $450.00, and that she felt they were reasonable, which the record would support, since no attorney's fees had been previously awarded but had been reserved until final determination of the divorce action. Especially is this the case, since the $300.00 was to be paid at the rate of $40.00 per month, the payments commencing more than six months in the future. However, on these two matters, as throughout the entire proceeding, the trial Court, in its wisdom, saw fit to show appellant every consideration in spite of the inconvenience caused respondent, and on the latter issue, the distress to her counsel.

With regard to the award of $960.00 to be paid respondent at the rate of $40.00 per month commencing January 1, 1967 (more than six months after the granting of the decree), is this so unreasonable and unconscionable and such an abuse of the trial Court's discretion as to require alteration by this appellate Court?

This Court early decided in **REED** v. **REED**, 28 Utah 297, 78 P. 675, (1904) that:

> "The awarding of alimony and fixing the amount thereof are questions the determination of which rests within the sound discretion of the trial Court; and, unless it is made to appear that there has been an abuse of discretion on the part of the Court in dealing with one or both of these questions, its judgment and orders granting and fixing the alimony will not be disturbed."

This Court has repeatedly followed and reaffirmed this doctrine up to the presenet date. **BLAIR** v. **BLAIR**, 40 Utah 306, 121 P. 19 (1912); **ADAMSON** v. **ADAMSON**, 55 Utah 544, 188 P. 635 (1920); and, **WILSON** v. **WILSON**, 5 Utah 2d 79, 296 P. 2d 977 (1956).

Respondent in this case asks the trial Court for an award of $75.00 per month permanent alimony. This she felt she was entitled to since, as a result of this marriage, she has given up a life as a successful business woman at which she earned, as appellant's counsel has so aptly put it, "an excellent salary". (Page 5, Appellant's Brief). Her children by her former marriage were all of such ages as to be able to take care of themselves to a considerable degree and to assist their mother in numerous ways in maintaining a home. She now finds herself with two small children, one 3 and one 5 years of age, who require her constant supervision and control. She is unemployed and her

ability to earn has been reduced to temporary work in a department store during rush seasons, (Tr. 62). However, while acknowledging that, "and he is getting rid of a wife cheap." (Tr. 78), the trial Court made no award of permanent alimony so that appellant can in 24 convenient monthly installments of $40.00 completely shed the responsibility which he has toward respondent. This Honorable Court's attention is called to the fact that because of this appeal and the resultant impounding with the clerk of the lower Court of the tax withholding checks, respondent has had no funds available to her for her support and has been obligated to borrow funds for her maintenance during this appeal which will have to be repaid.

POINT 3

THE LOWER COURT'S ORDER FOR CHILD SUPPORT AND APPELLANT'S ABILITY TO COMPLY WITH IT.

The trial Court awarded $200.00 per month for the support of the two minor children of the parties. At the trial and at the pretrial conference in chambers respondent asked for this amount and at no time was any objection made to this award. On the contrary, appellant seemed to feel a great amount of affection for these two children, as shown by the time spent by the Court in arriving at visitation periods suitable to him, and appeared to agree with the reasonableness

of this amount for their support. The two children of the respondent, by her former marriage, had for a 3 year period during this marriage received from the government $97.00 each for their support. No contention was made by appellant that this was too much money for their support and that he was receiving any benefit over and above the cost of their support. No objection to this amount of child support was made at the trial but it is now opposed in appellant's brief to this Honorable Court. (Although under the heading "RELIEF SOUGHT FROM THE COURT", in appellant's brief, an objection is raised, at no place in the "ARGUMENT", is any explanation made to this Court why the trial Court's decree on this matter should be disturbed.)

Possibly this award for the children's support will allow them to be housed, fed, clothed, educated, and their medical and dental expenses paid. It will not permit them to be reared in grandeur. Their childhood will not be such as to permit them the luxury of two boats each, hardly any 28 foot trailer houses, and probably their home will not be of the quality of splendor requiring a $120.00 per month payment. However, because of the unfortunate position in which these two children are placed as a result of this divorce and the broken home, it can only be hoped that each of the parties to this appeal will do all in their power to promote their welfare.

Can appellant comply with this obligation which

he has toward these two small children? It is submitted that he can, and it is to be hope that he will!

Prior to the granting of this divorce defendant's monthly take-home pay was $548.23, as explained in the next to the last paragraph of the "STATEMENT OF FACTS", in respondent's brief. In addition to this amount he has an additional yearly take-home pay of $935.13, as the result of an improper declaration, from his withholding taxes. This amounts to an additional tax free incomeof $78.00 per month regardless of whether appellant chooses to correct his withholding declaration and receive it monthly or continue to use it as a savings account and receive it annually. Under the terms of the decree he will receive another $14.00 per month due to the decrease in his hospital insurance withheld, (Tr. 85 and 86). These two items alone present appellant with a net take-home pay of $640.23 each month. If it is possible for these two children to exist on $100.00 a month each, which must pay their medical and hospital expenses and their life insurance premiums, all of which are already paid for appellant by deductions from his gross earnings, (Plaintiff's Exhibit No. 1, R. 50), surely appellant should be able to live on the remaining net of $440.23. The respondent will not be receiving that amount with which to support four children and herself. "The criterion for determination of support money is the need of the persons supported and the defendant's ability to pay." ANDERSON v. ANDERSON, 110 Utah 300, 172 P. 2d 132 (1946).

This Honorable Court's attention is called to the fact that the respondent has received nothing for her support and expenses since the entry of this decree and that she has been required to retain counsel to respond to defendant's appeal and to represent her in this Court. Under the provisions of Sec. 30-3-3, U.C.A. (1953), plaintiff should be allowed a reasonable sum with which to pay her counsel for his appearance in this Court. PARISH v. PARISH, 84 Utah 390, 35 P. 2d 999 (1934) and HENDRICKS v. HENDRICKS, 91 Utah 564, 65 P. 2d 642 (1937).

CONCLUSION

It is submitted that this Honorable Court has repeatedly held that the trial judge has considerable latitude in matters of this kind and that his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion. Nowhere in the record does it appear that defendant and appellant was unfairly treated, or that there was any abuse of the discretionary power of the trial Court.

Respondent urges this Court affirm the decree of the lower Court and award to plaintiff and respondent her costs and a reasonable attorney's fee for the use and benefit of her counsel. (This Honorable Court's attention is called to the Utah State Bar's Advisory Schedule of Minimum Fees which prescribes the fee

of $500.00 for representing either appellant or respondent in the Supreme Court of Utah.)

Respectfully submitted,

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