

1969

Kirk B. Bowman v. Janice S. Bowman : Appellant's Brief

Utah Supreme Court

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Gustin & Richards; Attorney for Respondent

Recommended Citation

Brief of Appellant, *Bowman v. Bowman*, No. 11534 (Utah Supreme Court, 1969).
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IN THE SUPREME COURT
OF THE STATE OF UTAH

KIRK B. BOWMAN,
Plaintiff-Appellant,

vs.

JANICE S. BOWMAN,
Defendant-Respondent.

Case No.

1752

APPELLANT'S BRIEF

Appeal from the Judgment of the Third District Court
for Salt Lake County, State of Utah
HONORABLE JOSEPH G. JEFFERSON, District Judge

BISHOP & FLEMING

Alan H. Bishop

343 South State Street

Salt Lake City, Utah

Attorneys for

Plaintiff-Appellant

GUSTIN & RICHARDS

1610 Walker Bank Building

Salt Lake City, Utah

Attorney for Respondent

FILED

AUG 4

Clk. Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KIRK B. BOWMAN,
Plaintiff-Appellant,

vs.

JANICE S. BOWMAN,
Defendant-Respondent.

} Case No.
11534

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for divorce and associated relief.

DISPOSITION IN LOWER COURT

On January 9, 10 and 13 of 1969, a trial was held before the Honorable Joseph G. Jeppson, Judge, which resulted in the defendant being awarded a decree of divorce on her counterclaim and various items of property in the total value of \$119,751.63 which included cash, insurance policies, bonds, stocks, equity in real property and various other assets. The award was based on the Court's valuation of the total estate of \$346,474.90, as shown in the Minute Order dated January 15 and 17, 1969 (R-38-42).

RELIEF SOUGHT ON APPEAL

Appellant asks that the award be re-evaluated and reduced or, in the alternative, that a new hearing be granted to establish the true value of the parties' holdings and reasonable division thereof.

STATEMENT OF FACTS

The above action came on for hearing on January 9, 10, and 13 of 1969 before the Honorable Joseph G. Jeppson, Judge of the Third Judicial District Court. Exhibits P-1 and P-3, together with Exhibits D-2, D-4 and D-5, were introduced and received in evidence. The Court made a written Minute Order giving its decision on January 15 and 17, 1969. The Decree of Divorce, Findings of Fact and Conclusions of Law were signed by the Court on the 29th day of January, 1969. Notice of Appeal and Notice that the Transcript had been ordered were filed in due time.

Both plaintiff and defendant were sworn and testified as to the marriage of the parties and the three children born as issue of the marriage.

Plaintiff testified that the oldest child of the parties, a girl of the age of 17 years, was residing with him by her own choice and that the two younger children were residing with the defendant. Plaintiff further testified that defendant had spent nights and weekends in various local motels where she relaxed in the bars, swam in the pools, and struck up acquaintances with men. He further testified that on one particular occasion defendant brought

one of the men to the parties' home where the daughter observed defendant "making out" with the man. (T-95 and T-111).

Plaintiff's Exhibit P-1 was identified, offered and received in evidence, which exhibit showed Plaintiff had assets over and above liabilities in the sum of \$3,319.00 which included the equity of the parties in the family home and, in addition, showed holding in various corporations which had no set market value. Plaintiff further testified that certain United States Bonds, Series "H" and "E", were included in the exhibit and that the bonds were, *in their entirety*, derived from plaintiff's mother's and father's estates.

Plaintiff testified also that he had current liabilities as of 90 days in the amount of \$20,900.00 and long term liabilities in the amount of \$43,700.00.

On cross-examination the plaintiff testified that he had made a financial statement (Exhibit D-2) on April 30, 1968 which stated that the surplus and undivided profits in the corporation of which he was the major stockholder were as of January 31, 1968 \$296,693.00. Plaintiff also testified that a large portion of the stock he held in the corporation was encumbered and held by the seller for the purchase price of \$60,000.00, and that he personally owed the corporation the sum of \$4,000.00. Plaintiff testified that he received a bonus from the company in February or March of 1968 in the amount of \$7,089.00.

The defendant was sworn and testified that she had checked into motels and had brought a man she had met at a motel to her home when plaintiff was not present but denied any wrong-doing or impropriety whatsoever. Defendant further testified that plaintiff had left the home in October or November to go to Nebraska and had not returned to the home of the parties after that time.

Plaintiff was recalled and testified regarding Exhibit P-3, which Exhibit was an agreement restricting transfer of stock in the corporation in which he held a major part of the stock. He further testified that Exhibit D-2 was not a true statement of the conditions as they existed on the dates of the trial (TR-187). He further testified that the company was in an extremely precarious position financially and threatened with involuntary bankruptcy (TR-189).

The lower Court awarded defendant a divorce on her counterclaim and awarded custody of the two younger children to her. The Decree provided that plaintiff pay to defendant the sum of \$100.00 per month as support for each of the two minor children, the sum of \$350.00 per month as alimony, and the award of the following property:

- a. \$1,000.00 in cash.
- b. \$250.00 in an account at Continental Bank & Trust Company.
- c. \$7,500.00 in cash from cash surrender value of Plaintiff's insurance.

- d. \$7,800.00 which was the bonus received by plaintiff in March, 1968.
- e. Tax refunds totaling \$1,141.91.
- f. All stock, bonds and mutual funds owned by the parties except stock in engineering corporations.
- g. All Series H and E United States Savings bonds.
- h. The equity in the family home and all furniture, furnishings and appliances in said home.
- i. The Ford station wagon.
- j. The sum of \$69,166.73 with interest thereon at the rate of eight percent (8%).
- k. The \$30,000.00 insurance policy with payment to be made thereon by plaintiff.
- l. \$718.75 attorney fees, \$7.50 court costs, and \$58.84 deposition costs.

ARGUMENT

THE COURT ABUSED ITS DISCRETION IN THE DIVISION OF THE PROPERTY OF THE PARTIES.

It is obvious that the division of the property of the parties as made by the Court will, when interest is considered and support *and alimony* are added, leave the plaintiff herein with no ready cash to pay the large obligations of his company; saddle him with the further obligation to repay the cash surrender value of his insurance, and undoubtedly reward the defendant for indulg-

ing in conduct which is very questionable, to say the least.

There was no showing that the company itself was actually worth the amount shown on the financial statement but, on the contrary, very logical testimony that the book value was based on the supposed value of equipment which was very difficult to dispose of and depreciating in value very rapidly.

The trial Court should have considered *all* of the *circumstances* of the parties and where, as in a case like this, there has been an abuse of discretion, the Supreme Court has the authority to, and should, modify the award.

CONCLUSION

Plaintiff-Appellant requests that this Court substitute its judgment for that of the lower Court and render a just and equitable decision in accordance with the facts and evidence.

Respectfully submitted,

BISHOP & FRANSEN

Alan H. Bishop

343 South State Street
Salt Lake City, Utah

*Attorneys for
Plaintiff-Appellant*

The Court awarded Defendant 1/3 of the "marital estate" which it determined to be \$348,254.90, however the following mathematical errors resulted in an excess award to Defendant of \$24,606.67:

Liabilities of \$64,600.00 (Ex. P-1) were not deducted in arriving at "marital estate" (R. 41, item K). (\$67,919.00 assets on Ex. P-1 plus \$280,716.00 value of corporations on Ex. D-2 approximates "marital estate" of \$348,254.90 used by the Court without considering liabilities) 1/3 of omitted \$64,600.00 liab. = \$ 21,533.33

Error in computing 1/3 of \$348,254.90 "marital estate" caused excess award to Defendant (\$119,158.30 less \$116,084.96) of \$3,073.34 = 3,073.34

TOTAL EXCESS AWARD TO DEPENDANT \$ 24,606.67

The court also used the value of business corporations shown on financial statement furnished to a bonding company over a year before in arriving at the value of the "marital estate," although Plaintiff had testified that it did not show the true values as of the time of trial. (R. 187-189). The case should be remanded for a hearing to determine the true value of the marital estate and to make a distribution of assets based upon true values. It appears that approximately \$68,000.00 excess award to Defendant resulted from overvaluation of business corporations.