

1980

# Aleane Strong v. Alexander D. Strong : Brief of Appellant

Utah Supreme Court

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JANE A. MARQUARDT; Attorney for Respondent JANE A MARQUARDT; Attorney for Appellant

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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LEANE STRONG,

Plaintiff and  
Respondent,

Case No. 16880

ALEXANDER D. STRONG,

Defendant and  
Appellant.

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BRIEF OF APPELLANT

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Appeal from a final order of the Honorable Calvin Gould of  
the Second Judicial District Court of Weber County, Utah.

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JANE A. MARQUARDT  
WARNER, MARQUARDT & HASENYAGER  
Attorneys for Appellant  
543 Twenty-Fifth Street  
Ogden, Utah 84401

W. HEALY  
Attorney for Respondent  
543 Twenty-Fifth Street  
Ogden, Utah 84401

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TABLE OF CASES AND AUTHORITIES

CASES CITED

Bennett v. Bennett . . . . . 11  
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DeRose v. DeRose . . . . . 10  
426 P.2d 221,222 (Utah 1976)

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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ALEANE STRONG, :  
 :  
 Plaintiff and :  
 Respondent, :  
 :  
 vs. : Case No. 16880  
 :  
 ALEXANDER D. STRONG, :  
 :  
 Defendant and :  
 Appellant. :

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BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an action in divorce in which Appellant appeals from the property distribution award made by the trial court. Appellant contends that the trial court erred in its valuation of the marital assets, thereby preventing an equitable distribution of the properties.

DISPOSITION IN LOWER COURT

This divorce action was tried in the Second Judicial District Court for Weber County, State of Utah, before the Honorable Calvin Gould, on September 21, 1979. On October 24, 1979, Judge Gould issued a Memorandum Decision (Record, p.54) dividing the marital properties bet-

ween Respondent and Appellant. The terms of this Decision were incorporated into the final Decree of Divorce (R., pp.66,67) which was signed by Judge Gould on December 31, 1979.

#### RELIEF SOUGHT ON APPEAL

Appellant asks this Court to rule that the trial court incorrectly valued the marital assets, and that these errors substantially prejudiced Appellant. Appellant requests this Court to remand the matter to the trial court in order that it can make a more equitable distribution of the property and award him a greater share of the marital assets.

#### STATEMENT OF FACTS

Appellant and Respondent were formerly husband and wife, having been married approximately sixteen years. There were no children born as issue of the marriage. Both parties had been employed outside of the home, although Appellant has a superior earning capacity. The issues at trial focused on the values of the various items of property owned by the parties and on reaching an equitable distribution of these items.

In its Memorandum Decision of October 24, 1979, (R., p.54) the lower court made the following valuation and

award of the marital properties:

To Respondent:

1. The parties' home in North Ogden, Utah, (valued at \$33,500.00), subject to the \$8,000.00 mortgage balance, for an equity value of \$25,500.00.
2. Respondent's retirement rights of \$2,000.00.
3. The household goods valued at \$1,500.00.
4. Respondent's automobile.
5. Tape recorder.

To Appellant:

1. The West Ogden real estate valued at \$14,900.00.
2. The business known as "Transactions Transmissions" worth \$5,000.00-\$6,000.00, and all the paraphenalia and accouterments connected therewith including all autos not awarded to Respondent,
3. Appellant's retirement rights of \$5,000.00.
4. Miscellaneous firearms valued at \$250.00.
5. The van and motorcycle which were the subject of the security transaction between Appellant and his mother.

The only witnesses who testified at trial were Appellant, Respondent and Appellant's mother, Mrs. Ruth E. Cato. The parties stipulated that written appraisals on the value of the West Ogden real estate (R., p.52) and on the value of the parties' residence (R., p.30) would be received into evidence. The valuations which Appellant is raising on appeal concern the value attributed to the West Ogden real estate and the value attributed to the "Transactions Transmissions" business. Both of these were awarded to Appellant, and Appellant believes they were both overvalued,

thereby causing him to receive a disproportionately low share of the marital estate.

#### ARGUMENT

POINT I - THE TRIAL COURT, IN FAILING TO CONSIDER THE FACT THAT A THIRD PARTY OWNS ONE-HALF OF THE WEST OGDEN REAL ESTATE, OVERVALUED APPELLANT'S INTEREST IN THE PROPERTY.

The West Ogden real estate is the land and building in which the Transactions Transmissions business is located. Appellant and Respondent agreed that the appraised value of the property is \$57,000.00 (R., p.52), that there is a balance owing on it of \$39,000.00 (R., p.132, lines 27-29) and that Appellant's mother, Ruth E. Cato, made an initial downpayment in the property of approximately \$3,600.00. The court took these figures and concluded that the property has an equity value of \$14,900.00. It viewed this equity as a marital asset and awarded it to Appellant.

The Uniform Real Estate Contract through which this property was purchased (R., pp.45,46) illustrates that the land was purchased on December 13, 1976 by Appellant and Ruth Cato as tenants in common. It was purchased for \$45,000.00 with interest at 9% per annum. The contract required an initial downpayment of \$3,500.00 and monthly payments, beginning January 15, 1977, of \$373.39. Testimony at trial indicated that Mrs. Cato made the initial down-

payment and that Appellant has been making the monthly payments. (R., p.105, lines 6-19).

The lower court's finding that Mrs. Cato's only interest in the property is the amount of her downpayment is contrary to the testimony at trial and to general principles of joint ownership. As a tenant in common, Mrs. Cato would have the right to bring a partition action and be reimbursed for one-half the value of the property. Moreover, several statements were made at trial indicating that Appellant and Mrs. Cato view themselves as equal owners of the land.

These statements include:

1. Q. (Appellant's counsel) - "Do both of you own half of that property?"  
A. (Appellant) - "Yes, we do."  
(R., p.105, lines 18-19).
2. Q. (Appellant's counsel) - "Of course, any equity there is half her's too?"  
A. (Appellant) - "Yes." (R., p.107, lines 4,5).
3. Appellant stated that, while he is not in partnership with Mrs. Cato in the business located on the land, they do jointly own the real estate itself.  
(R., p.117, lines 19-25).
4. Q. (Appellant's counsel) - "And you and Alex own that property together?"  
A. (Mrs. Cato) - "Right." (R., p.145, lines 29,30).
5. Q. (Appellant's counsel) - "And it is like you own one-half of the property?"

A. (Mrs. Cato) - "Right."

Q. "And you are on the deed and all the contracts?"

A. "Right, because I haven't took any allowance off of it. I let them take the depreciation off. I let them count it. I figure I am entitled to half of it; half of whatever there is in the property." (R., p.147, lines 2-8).

Based on this evidence, there was no basis for the court's determination that Mrs. Cato's sole interest in the property is the amount of her downpayment. Using that type of logic, one could equally find that Appellant's sole interest in the property is the total of the monthly payments of principal which he has made, and that all remaining equity value in the property belongs to Mrs. Cato.

A correct interpretation of the evidence would have been that the real property, appraised at \$57,000.00 with a mortgage balance of \$39,000.00, has an equity value of \$18,500.00 which is owned jointly by Appellant and Mrs. Cato. Appellant's equity interest is then \$9,250.00, not \$14,900.00 as stated by the lower court.

POINT II - IN VIEW OF THE EVIDENCE PRESENTED AT TRIAL, THE LOWER COURT OVERVALUED THE BUSINESS WHICH IT AWARDED TO APPELLANT.

Since 1975, Appellant has operated a transmission repair business known as "Transaction Transmissions." This business, located on the West Ogden real estate discussed in

POINT I above, is operated by Appellant on a part-time basis and is in addition to his regular full-time employment at Hill Air Force Base. The trial court valued this business together with its accompanying paraphenalia and the automobiles not awarded the Respondent at \$5,000.00-\$6,000.00. (R., pp.54,55). Appellant believes that no evidence presented at trial would justify the court's finding that the business and automobiles have a value this high, and asks this Court to remand the case in order that a property award can be made in line with the true value of these items.

Appellant testified that he suffered an actual loss of approximately \$3,000.00 per year on the operation of this business. (R., p.105, lines 24-29). The only tax return that was introduced at trial was for the year 1978 and that document showed a loss of \$1,229.00. (R., p.36). Respondent at one point testified that she thought the business was worth \$16,000.00. (R., p.141, lines 16-19). However, upon questioning from the court (R., p.141, lines 20-29), and questioning from her attorney, (R., p.141, line 30; p.142, lines 1-8), her figure was obviously based on what she thought the real estate was worth, not the business itself. This was the total of testimony presented on the value of the business alone. With this evidence, there was no basis for finding that "Transaction Transmissions" had

much, if any, recognizable value.

The trial court stated that the value of the business paraphenalia and all automobiles not awarded to Respondent also were a factor in reaching this \$5,000.00-\$6,000.00 value. However, the only "business paraphenalia" which was discussed at trial were Appellant's tools. Appellant testified that most of these were acquired approximately 16½ years ago and that he had taken full depreciation on them. (R., pp.83,84). Taking this into account, there was again no basis for finding they had much, if any, recognizable value.

This leaves only the value of the automobiles to comprise the court's valuation of \$5,000.00-\$6,000.00. Appellant testified that the business owned a 1966 Buick Riveria worth \$200.00 (R., p.94, lines 3-15); and a 1965 Corvair worth \$700.00 (R., p.96, lines 27-30; p.97, lines 1-27). He also testified that there was a 1965 Buick worth \$600.00 (R., p.87, lines 19-24); a 1949 Studebaker worth \$200.00 (R., p.87, lines 25-27); and a 1963 International truck worth \$200.00 (R., p.87, lines 28-30). Respondent's only testimony on the value of any of these cars was that Appellant allegedly told her at one time that the Corvair was worth \$2,000.00. (R., p.126). She produced no other testimony to refute the values assigned by Respondent.

According then to Appellant's testimony, the sum total of these cars was \$1,900.00.

There was other testimony at trial about a 1959 Van, a 1972 motorcycle, an eighteen foot boat and two power motors. (R. pp.88,89). Appellant testified that he had sold them to his mother in May, 1977 for \$550.00. (R., pp.15, 41-43). Respondent's counsel, in questioning Appellant, suggested that these items were actually worth more than \$550.00. (R., pp.15,16). In making its final property award, the trial court mentioned the Van and the motorcycle as having been the subject of a security transaction between Appellant and his mother. It did not consider their value in computing the \$5,000.00-\$6,000.00 figure on the business since they were awarded to Appellant in a separate order of the Memorandum Decision. (Item #5 - R., p.55). As to the boat and the motors, the court must have agreed that they had been sold to Appellant's mother in 1977, and their value is also not included in the \$5,000.00-\$6,000.00.

Given this testimony, it does not seem possible that the trial court could have valued the business, tools and automobiles as it did. Appellant asks this Court to direct the trial court to distribute the marital assets in accordance with their actual values.

One other error in valuations was made by the trial court. It valued the household goods which were awarded to Respondent at \$1,500.00. (R., p.54). However, Appellant testified they were worth over \$2,000.00 (R., p.107, lines 14-16) and Respondent testified they were worth \$1,700.00 (R., p.128, lines 6-8). In view of this testimony, there was no basis for the finding of \$1,500.00. Certainly this is a minor error, but is one more example of a valuation inaccuracy which prejudiced Appellant. Appellant asks that this also be considered in remanding the case for a more equitable property distribution.

POINT III - BECAUSE THIS EVIDENCE CLEARLY PREPONDERATED AGAINST THE TRIAL COURT'S FINDINGS, AND BECAUSE THE RESULTING PROPERTY AWARD SUBSTANTIALLY PREJUDICED APPELLANT, THIS ACTION SHOULD BE REMANDED FOR A MORE EQUITABLE DISTRIBUTION OF PROPERTY.

This Court has repeatedly affirmed the principle that trial courts in divorce actions have wide latitude in distributing the marital assets. However, as pointed out in DeRose v. DeRose, 426 P.2d 221,222 (Utah 1976), this

. . . discretion is not without limit, nor immune from correction or review, if that is warranted. Due to the seriousness of such proceedings and the vital effect they have upon people's lives, it is also the responsibility of this court to carefully survey what is done. . . .

In cases where " . . . the evidence clearly preponderated against the findings . . . " English v. English, 565 P.2d 409,410 (Utah 1977), this Court has the obligation to review those findings. As noted in Ross v. Ross, 592 P.2d 600 (Utah 1979), this Court may review the facts as well as the law in divorce appeals, and may overturn the district court's findings where the evidence clearly preponderates against them. If it appears that the findings were in error, and resulted in substantial prejudice to one of the parties, the trial court should be reversed.

In the instant case, the trial court was bound to first make an accurate finding as to the value of each of the marital properties before it could possibly make an equitable division between Appellant and Respondent. The recent case of Bennett v. Bennett, 607 P.2d 839 (Utah 1980) illustrates this requirement. There the court incorectly considered as one of the marital assets that portion of the husband's retirement fund which had been contributed by his employer and had no present value. Because this Court ruled it was error for the lower court to consider it as one of the assets of the parties, the case was remanded to the trial court in order that a more equitable property distribution could be made. Similarly, the instant case should be remanded in order that a property division can be made in

accordance with the true value of the West Ogden real estate and the Transactions Transmissions business.

### CONCLUSION

The lower court erred in ruling that the West Ogden real estate had an equity value of \$14,900.00, all of which was a marital asset. Because the property is owned by Appellant and a third person as tenants in common, only one-half of the property's equity value can properly be considered as a marital asset.

The lower court also erred in finding that the Transactions Transmissions business, together with the business paraphernalia and miscellaneous automobiles, had a value of \$5,000.00 to \$6,000.00. None of the evidence presented at trial substantiates a finding that the value is this great.

Both of these assets were overvalued, and both were awarded to Appellant. As a result, Appellant was substantially prejudiced in the amount he actually received in the divorce settlement. Accordingly, Appellant asks this Court to remand the matter to the trial court in order that it can award him a more equitable share of the marital properties.

DATED this 28th day of May, 1980.

Respectfully submitted,

  
\_\_\_\_\_  
Jane A. Marquardt  
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on this 29th day of May, 1980, I hand delivered a copy of the foregoing document to the office of Respondent's attorney, Tim W. Healy, 863 Twenty-Fifth Street, Ogden, Utah 84401.

  
Tori H. Thurston