

1998

# Jeroldene Bayles nka Jeroldene Bailey v. Randee Bayles : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JEROLDENE BAYLES, nka :  
JEROLDENE BAILEY, :  
 :  
Plaintiff/Appellant/ :  
Petitioner, :  
 :  
vs. : Case No. 980347-CA  
 :  
RANDEE BAYLES, : Priority 10  
 :  
Defendant/Appellee/ :  
Respondent. :

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BRIEF OF RESPONDENT

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INTERLOCUTORY APPEAL FROM THE ORDER  
DENYING PETITIONER'S MOTION TO DISMISS  
RESPONDENT'S MOTION FOR MODIFICATION,  
IN THE SEVENTH DISTRICT COURT  
IN AND FOR SAN JUAN COUNTY, STATE OF UTAH  
THE HONORABLE LYLE R. ANDERSON, PRESIDING

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 980347-CA

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Defendant/Appellee/ :  
Respondent. :

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BRIEF OF RESPONDENT

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Rule 5 of the Utah Rules of Appellate Procedure because the Appellate Court granted Appellant's Motion for Permission to Appeal from an Interlocutory Order on the 30th day of July, 1998. [R. 136]

STATEMENT OF THE ISSUES PRESENTED

Appellant appeals from an interlocutory order in which the trial court denied a motion to dismiss a petition to modify a decree of divorce, stating that Appellee may bring a claim that fraud occurred in the settlement of a divorce action in a petition to modify. [R. 130]

The issues raised are:

Whether as a matter of law the issue of fraud or secreting of assets was raised in the divorce action, and whether the issue was

waived in the Stipulation, thereby precluding the trial court from hearing evidence on that issue (res judicata)[R.129]; and

Whether an action in fraud or secreting of assets may be heard in a petition to modify a decree of divorce. [R. 129, 130]

**A. STANDARD OF APPELLATE REVIEW**

In this case the Court is presented with a question of law regarding whether the Appellee may file a Petition to Modify a Divorce Decree based on an allegation of fraud or the secreting of assets. Questions of law are reviewed for correctness. State v. Leyva, 951 P.2d 738, 739-742 (Utah 1997). The issue of whether the question of fraud was already raised or whether it was waived by the Stipulation is a question of fact which the court reviewed for an abuse of discretion. Toone v. Toone, 952 P.2d 112, 114 (Utah App. 1998) (quoting Hill v. Hill, 841 P.2d 722, 724 (Utah App. 1992)). The trial court's decision on a question of fact is entitled to a presumption of validity (Ruhsam v. Ruhsam, 742 P.2d 123, 124 (Utah App. 1987)).

**B. ISSUES PRESENTED ON APPEAL**

It is unclear what issues Appellant intended to appeal. Appellant's Motion to Dismiss [R. 97] raises only the issue of whether Plaintiff's failure to respond to discovery requests regarding financial records constitutes a basis for a Petition to Modify. The motion then states that the issues raised in the Memorandum [R. 99] are incorporated as additional reasons to dismiss the Petition. The issues raised in the Memorandum are:

A. Did the Appellee by entering into a stipulation waive the issue of fraud or secreting of assets? [R.99, Introduction]

B. Is the property settlement modifiable? [R.100, 101]

C. Has the Appellee failed to show a substantial change of circumstances? [R. 101]

D. Can a party's failure to provide documents be a consideration as to change of circumstances in a Petition to Modify? [R. 103]

The trial court made its own interpretation of the issue and in its ruling [R. 129] focused only on the issue of whether the allegation of fraud by secreting of assets was waived in the stipulation that preceded entry of the decree. [R.129-130]

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

**A. UTAH CODE ANNOTATED §30-3-5(3):**

The court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary.

**B. RULE 6-404(1):**

**Modification of divorce decrees.**

(1) Proceedings to modify a divorce decree shall be commenced by the filing of a petition to modify in the original divorce action . . . "



## STATEMENT OF THE CASE

### A. NATURE OF THE CASE

Respondent, Randee Bayles (hereinafter "Randee" and Jeroldene Bayles, now known as Jeroldene Bailey (hereinafter "Jeroldene"), were married on March 13, 1971. During a substantial portion of their married life, the parties engaged in a drilling exploration business, namely "Bayles Exploration". Shortly after the parties were married, Jeroldene became the bookkeeper and maintained the various records of the business. The parties became estranged, which resulted in the filing of a divorce complaint, dated January 27, 1997.

A hearing on an Order to Show Cause was held on February 6, 1997, in which the trial court awarded the home and business property, which included the office of Bayles Exploration, to Randee. As Randee began reviewing the business records in an attempt to take over the financial management of the business and file tax returns, he became aware of certain irregularities in the business transactions, which included payment of all marital debts out of corporate accounts, a practice which had not occurred until the months just prior to the filing of the divorce. He observed the outlay of double utility payments and car payments, apparently done by Jeroldene in anticipation of being awarded the home and other property.

At this time, Randee began requesting missing business records. A letter dated May 7, 1997 [R. 105, 106], was sent to

Douglas Terry, then counsel for Jeroldene, outlining some of the difficulties in the case. [R. 105,106] Randee had been able to establish as of the date of the writing of the letter, irregularities which are set forth on the second page of the letter. Randee further stated that "at the current time we do not have all of the necessary information with regard to necessary adjustments, however, some of the noteworthy items are. . ."

Prior to a hearing of the matter, the parties entered into negotiations in which the various aspects then known to Randee were discussed and the parties ultimately entered into a stipulation. The corporate records of Bayles Exploration had still not been transferred by Jeroldene even though numerous requests were made through counsel and directly by Randee. [R. 84, 86] [R. 89-94] Specific items which were known by Randee to be problematic at the time of the divorce are set forth verbatim in the Stipulation [R. 45, 46 (paragraph 17)], the Findings of Fact [R. 53,54 (paragraph 17)] and the Decree [R. 61,62 (paragraph 17)].

The parties stipulated [R. 46 (paragraph 19)] that Jeroldene would provide the records of the corporation, which provision of the stipulation was adopted in the Findings of Fact [R.54 (paragraph 19)] and the Decree [R.62 (paragraph 19)].

At the time of the proceeding before the trial court, none of the information had been turned over to Randee. Subsequent to the entry of the Decree, Randee discovered that numerous checks had been drawn and/or signed by Jeroldene, which Jeroldene had not

divulged, nor had these funds been considered in the divorce proceeding.

As of the date of this writing, the corporate records have still not been turned over to Randee. Randee obtained banking records and photo copies of checks which indicated that various business checks had been forged. [R.91 (paragraph 11)]. Based upon this information Randee filed a Petition to Modify asking that the court consider that there were substantial funds which were not considered in the original divorce action.

The Appellant requested that the court dismiss the Petition to Modify and contends that the matter of fraud was already adjudicated. The District Court denied the motion on June 16, 1998, from which this appeal was taken.

#### **B. COURSE OF THE PROCEEDINGS**

Appellee adopts the Course of Proceedings as outlined in the Appellant's brief and believes that the dates and documents as set forth are accurate.

#### **C. DISPOSITION IN THE COURT BELOW**

No evidentiary hearing has been held nor any evidence taken to determine whether the Petition to Modify has merit. No findings have been made with regard to any of the allegations of Randee, the Appellee. The Petition was verified and supported by affidavits. Upon denial of the Motion to Dismiss the proceedings were stayed pending outcome of the appeal on the interlocutory order.

#### **D. STATEMENT OF FACTS**

The Divorce Complaint was filed in this matter on January 27, 1997, and Defendant's verified Answer and Counterclaim were filed on February 3, 1997. A hearing was held on reciprocal Orders to Show Cause on February 6, 1997. At the time of the hearing Randee requested that he be allowed to remain in the home as the office for the business was in the marital residence and this was the repository of the business records. [R. 18 (paragraphs 4, 5)] Randee was granted temporary possession of the home and discovered that the business ledgers and records had been removed.

Randee began requesting the records for the purpose of carrying on the ongoing operations of the business and preparing taxes. Jeroldene never complied with those requests. (See Affidavit in Support of Motion in Re Contempt R. 39, paragraph 15)

Jeroldene changed counsel and Douglas Terry entered his appearance by filing a Motion to Bifurcate on May 1, 1997. It was anticipated that the court would take evidence with regard to granting the divorce and hold all property issues for a later time. The parties then entered into discussions to resolve the property issues; Mr. Terry then expressed his desire to resolve all of the issues at one time rather than making two trips from St. George to Monticello. At this time Randee had been in possession of the marital residence and had recognized that there were personal and business items and records which were missing.

Randee discovered that various personal bills had recently been paid from corporate accounts, which had not been the business

practice. These items were addressed in the letter of May 7 [R.105]. It was clear, however, that Randee had additional concerns and did not have the ability to resolve them because he did not have the business records. At no place in the letter does he mention forgery nor did he express the amount of \$17,000 which he believes was removed by Jeroldene from the business assets by way of forgery. There is an indication that Jeroldene made had kept all her income and accepted substantial income from the company, yet paid all of the marital bills from the Bayles Exploration. The letter further states that the lack of having the necessary documentation has caused Mr. Bayles to be unable to make appropriate decisions with regard to the vitality of the business or necessary adjustments to be made in the settlement, wherein the letter states:

"We have made several requests that Jeroldene turn over the business records but have failed to receive these documents and so have drafted discovery to force the issue. I don't believe Jeroldene is entitled to retain the original business records and we may bring this before the court. At the current time we do not have all the necessary information with regard to the necessary adjustments, however, some of the noteworthy items are:

\$3000 cash kept in the safe in the home  
double payments on the car  
double utility payments  
frozen beef worth approximately \$750 which  
Jeroldene took  
telephone charges for February, March and  
April charged to Randee's card  
credit card charges involving personal items  
which were paid from business funds  
cost of preparation of tax returns  
liability for corporate taxes for 1996"

The only items known to Randee were the items set forth in the letter and appear verbatim in the Stipulation [R.45], Findings

[R.53] and Decree [R.61], wherein it states that "Defendant waives any claims with respect to those items listed in Defendant's attorney letter dated May 7, 1997, to-wit: . . ." (Emphasis added).

In the Stipulation [R.46], Findings of Fact [R.54] and the Decree [R.62], the court found that it was reasonable and the court ordered that the business records be turned over to Randee. Randee filed a subpoena to obtain banking records on July 22, 1997, for the purpose of trying to determine the status of Bayles Exploration. Based upon the obtention of some records, he was able to discover that additional funds not contemplated in the letter, Stipulation, Findings or Decree had been fraudulently removed from the business through Jeroldene's forgery. The first allegation regarding these funds was set forth in the Petition for Modification filed on November 19, 1997 [R.76 - 78] and Affidavit of Defendant [R.89-94].

No testimony or evidence has ever been given with regard to the merits of Randee's Petition to Modify. Before the action was set for hearing Jeroldene filed a motion for an interlocutory appeal contesting the court's determination that Randee could file a petition to modify a divorce decree, wherein he alleged that there had been fraud in the original divorce proceeding, with the opposing party secreting assets.

### SUMMARY OF ARGUMENTS

This appeal comes before the Court on a narrow issue. The district court determined that Randee's Petition to Modify alleging fraud or the secreting of assets was appropriately brought in a Petition to Modify. From that decision Jeroldene has appealed alleging that the court made an improper decision that there was a substantial change of circumstances. The district court did not make any finding or hear any evidence with regard to whether there was a substantial change of circumstances. There was no hearing, there is no evidence and there are no findings of fact from which this Court can determine whether an appropriate decision was made on the issue of change of circumstances. For this reason the claims of Jeroldene are premature and must be remanded to the district court with regard to whether Randee's allegations constitute a substantial change of circumstances sufficient for the property settlement in the decree to be modified.

The issue of fraud, forgery or secreting of assets, if allowed to be shown at a proper hearing, is appropriately brought in a petition to modify.

If the district court were to determine, after hearing evidence, that fraud, forgery or secreting of assets had occurred and had not been litigated in the original proceedings, this issue would not be res judicata and would be appropriate for the court to consider in a petition to modify the divorce decree.

The failure of Jeroldene to provide appropriate corporate records in the face of numerous requests by Randee prevented Randee

from presenting his case fully or from having all of the information needed to allow him to pursue effectively his claims in the original divorce proceedings, and thus prevented Randee from receiving a determination on the merits with regard to the assets he believes were obtained by deception.

#### ARGUMENT

POINT 1: APPELLEE IS ENTITLED TO A HEARING TO DETERMINE IF THE ISSUES RAISED IN HIS PETITION TO MODIFY HAVE ALREADY BEEN LITIGATED AND TO DETERMINE IF THERE HAS BEEN A SUBSTANTIAL CHANGE OF CIRCUMSTANCES. FINDINGS ARE REQUIRED.

The central theme of Jeroldene's brief is that no substantial change of circumstances exists to justify a modification of the Decree of Divorce. Jeroldene correctly states the burden of Randee to establish a substantial change of circumstances before the trial court may make a determination to modify the property division of the Decree of Divorce. This argument ignores the procedural context in which this case is before the Court - Randee filed a petition to modify, Jeroldene moved to dismiss, the court denied the motion from which Jeroldene took this appeal. There was no hearing. The only evidence before the court are the verified pleadings. Based on these pleadings, Jeroldene would have the Court determine that Randee has not made a showing of a substantial change of circumstances. The case law allows the party moving for a petition to modify to have a hearing in which those issues may be heard. In Osmus v. Osmus, 198 P.2d 233,236 (Utah 1948), on a petition to modify support, the Court stated:



"It is a principle now firmly established in this jurisdiction that to entitle either party to modification of a decree of alimony or support money, that such a party plead and prove a change in circumstances such as to require, in fairness and equity, a change in the terms of the decree." (Emphasis added)

Similarly, in the Utah case of Gale v. Gale, 258 P.2d 986 (Utah 1953) the Court stated:

"The legal principle controlling in this case is that a divorce decree may not be modified unless it is alleged, proved and the trial court finds that the circumstances upon which it is based have undergone a substantial change (Quoting Chaffee v. Chaffee, 63 Utah 261, 225 P. 76; Osmus v. Osmus, 114 Utah 212, 198 P.2d 233)

In our situation, the change of circumstances has only been alleged. The remaining legs of proof and findings await a hearing. In Thompson v. Thompson, 709 P.2d 360, 361 (Utah 1985), the Court has stated:

"The party seeking a modification of a decree must demonstrate to the Court below that a substantial change of circumstances has occurred since the entry of the decree. Adams v. Adams, Utah 593 P.2d 147 (1979), Haslam v. Haslam, Utah 657 P.2d 757 (1982). While the court did not specifically state there was 'substantial change of circumstances' it's findings and supporting evidence are sufficient indica in this case that such a substantial change had taken place since the decree which was not within the original contemplation of the parties or the court at the time the original decree was rendered. CF Stettler v. Stettler --- P.2d ---, 18 Utah Advance Report 15 (September 20, 1985). It is clear the court so found considering all of the relevant factors the record below supports a finding of substantial change of circumstances and the modification made by the trial court." (Emphasis added)

In Thompson it is clear that the person seeking modification of the decree shall have an opportunity to demonstrate to the court below that a change of circumstances has occurred. This contemplates a hearing, evidence and findings. Jeroldene's

numerous references to what the trial court "found" are erroneous as there are no findings in this case because there was no hearing. Randee is not stating in this argument that the trial court erred in not making findings, but that the Jeroldene made an error in not allowing the process to proceed to a point where findings could be made. Had Jeroldene asked for a bifurcated hearing, allowed the Court to make a determination of whether there was a change of circumstances, then presumably there would be findings which this Court could review to determine whether Randee had shown an adequate and substantial change of circumstances, allowing him to proceed. Thompson speaks in terms of a "showing". Indeed, the same requirement was set forth in Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah App. 1988) requiring a showing before the court could determine whether a substantial change of circumstances existed. Quoting Naylor v. Naylor, 700 P.2d 707, 710 (Utah 1985).

It is further stated in Throckmorton at 124 that:

"It is reversible error if the trial court fails to make findings on all material issues unless the facts and the record are 'clear, uncontroverted and capable of supporting only a finding in favor of the judgment'". Quoting Acton v. Deliran, 737 P.2d 996, 999 (Utah 1987)(Quoting Kinkella v. Baugh, 660 P.2d 233, 236 (Utah 1983)).

Utah courts have consistently found an abuse of discretion in setting alimony when the trial court failed to make findings on the financial conditions and needs of the receiving spouse. See Higley v. Higley, 676 P.2d 379, 382 (Utah, 1983) (Remanded since the trial court made no findings with regard to the receiving spouse's ability to work; Ruhsam v. Ruhsam, 742 P.2d 123, 126 (Ut. Ct. App.

1987)(Trial court failed to adequately address the financial needs of the claimant's spouse making it necessary for the reviewing court to remand the issue for further findings)

Jeroldene consistently speaks in terms of a failure to demonstrate a substantial change of circumstances. Randee concedes that no such demonstration was ever made because a hearing was not held. If Randee's Petition to Modify, which was verified, and the accompanying affidavits to the Order to Show Cause and Petition, make out a prima facia case, then Randee should have been allowed to proceed with evidence to show a substantial change of circumstances. The filing of the appeal in this action has procedurally blocked that process. There is no decision of the trial court determining whether there was a substantial change of circumstances that this Court can review.

**POINT 2: THE ISSUE OF FRAUD (FORGERY OR SECRETING OF ASSETS) IS APPROPRIATE BROUGHT IN A PETITION TO MODIFY.**

In the case of Glover v. Glover, 242 P.2d 298 (Utah 1952) a husband, shortly before obtaining a divorce, had induced the wife to quit-claim to him her interest in property held by them as joint tenants. Because of the transfer, the wife did not present fully the property issues to the court when a decree of divorce was obtained. The Court in Glover was faced with a determination of what constituted extrinsic fraud. The Court settled on a definition which included a statement that extrinsic fraud exists where a party was prevented from presenting his case or was induced not to present it by the actions of the other party so that there was no adversary trial or decision of the issue. The Court

determining that relief is granted on the theory that such fraud has prevented the unsuccessful party from fully presenting his case and hence, that there had never been a real contest before the court on the subject matter. Quoting Glover at 300:

"We are simply affording plaintiff an opportunity to invoke the powers of a court of general jurisdiction to include within a prior divorce decree the property rights of the parties normally included therein but omitted in this case because of the alleged fraud of the defendant."

Randee has alleged in this case that he sought on numerous occasions to obtain the financial information on the company which the parties had jointly operated. That information was never provided by Jeroldene. It wasn't until after the decree was entered that Randee became aware that substantial assets of the corporation had been withdrawn by forgery or theft and that these assets are alleged to not have been within the contemplation of the court when the property settlement was made. The secreting of these assets, the failure to put them "on the table" in the property settlement and the withholding of the financial information constitutes a fraud upon Randee and prevented him from fully litigating the property issues before the court. If it can be shown that Jeroldene actually did remove and convert the funds by fraud or forgery, those funds would be subject to consideration of the trial court in the allocation of marital property rights of the parties in the divorce. The ability to make this proof were omitted because of the actions of the Jeroldene. The holding of the Court in Glover at 300 was that this matter may be adjudicated under the general jurisdiction of the district court initiated by:

"a pleading entitled a petition to show cause why the prior divorce decree should not be modified so as to include within it the property rights of the parties omitted therefrom because of extrinsic fraud".

**POINT 3: THE COURT HAS CONTINUING JURISDICTION TO MAKE SUBSEQUENT CHANGES TO DISTRIBUTIONS OF PROPERTY.**

It is clear pursuant to Utah Code Annotated §30-3-5(3) that the district courts of the State of Utah have continuing jurisdiction to

"make subsequent changes or new orders for the custody of the children and their support, maintenance, health and dental care and for distribution of the property and obligations or debts as is reasonable and necessary." U.C.A. §30-3-5(3)

Case law has interpreted the statute:

"A party seeking modification of a divorce decree must demonstrate that 'a substantial change of circumstances has occurred since the entry of the decree', Thompson v. Thompson, 709 P.2d 360, 362 (Utah 1985) and 'a trial court has continuing jurisdiction to make subsequent changes or new orders for . . . distribution of the property . . . as is reasonable and necessary.'" Toone v. Toone, 952 P.2d 112, 114 (Utah App. 1998).

Statute and case law allows a court to reconsider property distributions if not previously adjudicated and if a substantial change of circumstances is shown. See Naylor v. Naylor, 700 P.2d 707, 710 (Utah 1985); McCrary v. McCrary, 599 P.2d 1248 (Utah 1979); Throckmorton v. Throckmorton, 767 P.2d 121, 123 (Utah App. 1988).

**POINT 4: THE ISSUE OF FRAUD, FORGERY OR SECRETING OF ASSETS WAS NOT LITIGATED IN THE ORIGINAL PROCEEDING.**

It is clear that the district court has the jurisdiction to hear petitions to modify divorce decrees, but will not change a decree if the parties had previously litigated the issues. The

courts have so held in Throckmorton at 121 and 123, where the Court stated:

"The moving party must establish a substantial change or circumstances 'which was not within the original contemplation of the parties or the court at the time the original decree was ordered'". Quoting Thompson v. Thompson, 709 P.2d 360, 362 (Utah 1985) and stated similarly in Toone v. Toone, 952 P.2d 112, 115 (Utah App. 1998) wherein the court stated that a decree of divorce shall not be modified and the matters previously litigated and incorporated therein cannot be collaterally attacked in the face of the doctrine of res judicata."

The issue of whether Jeroldene fraudulently secreted assets from the business was not reviewed in the initial proceeding. Jeroldene has appealed the ruling of the court denying her motion. Any findings of the court are to be found in the ruling on the Motion to Dismiss. [R. 129] The court makes its ruling on a fairly narrow issue where it states:

"Jeroldene has moved the court to dismiss the petition for modification . . . on the grounds that the issue raised by Randee were expressly waived in the stipulation that proceeded entry of the divorce decree."

The court then ruled, quoting Glover, that it is appropriate for a party to raise the issue of fraud in a petition to modify and denied the motion to dismiss. Arguably, this could be said to be a finding by the court that the fraud issue was not expressly waived in the stipulation, and therefore was not considered by the court in the divorce hearing. Were the court to have made a determination that the fraud issue was raised in the original proceeding, or that the claims in the petition to modify were waived by the stipulation, the court could have made a ruling dismissing the petition. The court did not make such a ruling and

it can thereby be inferred that the court is finding that the issues raised by Randee in the petition were not expressly waived in the stipulation nor were they part of the proceedings in the original decree.

Events leading to the May 13, 1997, hearing included the May 7, 1997 letter, [R. 105], followed Jeroldene's filing of a petition to bifurcate the proceeding. The court placed the matter on the calendar on the 13th day of May, 1997, for the purpose of hearing whether a divorce should be granted, not for hearing the property issues. The May 7, 1997, letter raised the issue that perhaps a settlement could be reached and when Mr. Terry appeared on that day, it was his desire to have the whole matter heard so that he would not have to make a return trip. The effect of this was that discovery, which had already been drafted by Randee's counsel, was never filed. However, Randee had made numerous informal requests for discovery, including the request in the May 7 letter. Both Ms. Riley and Mr. Terry had agreed to provide the material. The matters which were known to Randee were set forth. This list of items was carried forward into the Stipulation, Findings and Decree. There is no reference to any other assets which were known to Randee at the time. The lists within the Stipulation, Findings and Decree are specific wherein it states that:

"Defendant waives any claims against Plaintiff with respect to those items listed . . . to-wit:" [R.45,53,61]

The list is specific and contains no reference to the \$17,000 or to fraud, forgery and other assets which may have been secreted by Jeroldene. These issues were not contemplated by the parties or

the court at the time of the original divorce hearing. Randee initiated investigation in July to attempt to uncover the financial circumstances of his business. This being an additional indication that he didn't have sufficient documentation or knowledge at the time of the hearing to even raise the issue. In any event, these issues should be heard by the lower court, not only for a determination of whether they were raised in the lower court or had the ability to be, but also from the standpoint of whether or not they would constitute a change of circumstances.

**POINT 5: THE REFUSAL OF JEROLDENE TO PROVIDE THE REQUESTED DOCUMENTATION PLACED RANDEE IN A POSITION OF NOT HAVING THE ABILITY TO FULLY LITIGATE THE ISSUES OR TO HAVE THE ISSUES DETERMINED ON THEIR MERITS.**

Two cases are on point to regard with the failure of a party to provide needed documents or to allow one of the parties to have an adequate opportunity of presenting their case in full. In the case of Christensen v. Christensen, 619 P.2d 1372, 1374 (Utah, 1980) a party had made a written demand for the production of various divorce records. Defense counsel agrees that he had agreed to produce the necessary documents without the necessity of subpoena, but failed to do so at trial. Defense counsel also admitted the existence of the documents which concerned the income of the plaintiff. The court found that since the documents dealt directly with an issue which the plaintiff was trying to establish, the conduct of withholding the documents from the defendant was unjustified and resulted in prejudicial error to the plaintiff in that she was unable to pursue effectively her claim for modification of alimony. The case was remanded to allow the



plaintiff a hearing on her claims for additional alimony. Similarly, in the case of Glover v. Glover, 242 P.2d 298, 300 (Utah 1952), one party's obtention of a deed to marital property, and then not including that property as part of the marital estate was deemed by the court to be extrinsic fraud and it was said:

"When its effect is to prevent the unsuccessful party from having a trial or from presenting his case fully, as for instance keeping him away from the court by false promise, or compromise, or purposefully keeping him in ignorance of the pendency of the action"

then, the court determined, that the party could bring a petition to modify including those property rights which had been ignored or not allowed to proceed because of the action of the other party. In our case this is exactly what has occurred. Randee has alleged in his Petition to Modify that substantial amounts of money were secreted by fraud or forgery and those items would have been part of the marital estate and should have been considered by the court and would have been had they been disclosed by Jeroldene.

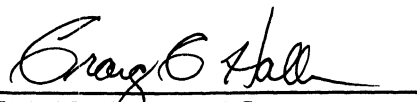
Randee requested personally and through counsel that the records be surrendered. Both attorneys Reilly and Terry agreed to provide them without the necessity of formal discovery, but never did. The court ordered that they be turned over; they were not. The failure to provide the records prevented Randee from effective access to the courts.

#### CONCLUSION

If there are any findings, they must be gleaned from the court's ruling on the motion to dismiss. From the court's ruling it must be determined that the court found that the issues raised

by Randee were not waived in the Stipulation that preceded the entry of the divorce decree, and thereby the court did not have these issues before it. The court further ruled that an issue brought before it claiming fraud in the original proceeding was specifically authorized in Glover. This being the case, this Court does not have to get to the issues raised by the Jeroldene wherein she alleges that Randee failed to meet his burden showing that there had been a substantial change of circumstances. The trial court simply did not reach these issues. There was no hearing, the lower court simply has not reviewed, on the merits, any of the allegations contained in Randee's Petition to Modify the divorce decree. If the Court of Appeals upholds the district court's ruling, the lower court would simply set the matter for hearing, during which Randee would be required to put on his proof that a substantial change of circumstance had occurred which was not contemplated in the original divorce proceeding. Upon such a showing or non-showing, the court would be free to take the next step to either deny Randee's Petition to Modify or to proceed to determine whether the property settlement should be modified. The Order of the District Judge should be upheld.

DATED this 18<sup>th</sup> day of November, 1998.

  
CRAIG C. HALLS  
Attorney for Appellee

CERTIFICATE OF SERVICE

Two copies of the foregoing Brief of Appellee were <sup>Delivered</sup> ~~mailed~~,  
~~postage prepaid~~, to Petitioner's attorney, Rosalie Reilly, P. O.  
Box 404, Monticello, Utah 84535, this 18<sup>th</sup> day of November, 1998.

  
CRAIG C. HALLS