

1979

# Michael W. McBride v. Terry Lynne Jones (Formerly Known As Terry Lynne McBride) : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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MICHAEL W. McBRIDE, :

Plaintiff-Appellee, :

vs. :

Case No. 16650

TERRY LYNNE JONES (formerly :

known as Terry Lynne McBride) :

Defendant-Appellant.

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Appellant's Brief

Appeal from the Third Judicial District Court  
of Salt Lake County, Utah  
The Honorable Christine M. Durham, Judge

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Defendant-Appellant. :

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NATURE OF THE CASE

This is an action brought by Defendant for modification of the final Decree of Divorce entered in Civil No. D-24327 to award Defendant a share in assets of the marriage or the proceeds derived therefrom which were concealed by Plaintiff prior to and during the course of the divorce proceeding.

DISPOSITION IN THE LOWER COURT

The lower court granted Defendant's Motion for Summary Judgment which was based upon two arguments set forth in Plaintiff's Memorandum in Support of his Motion, (1) Plaintiff did not in fact commit any fraud or misrepresentation and the information given by Plaintiff to Defendant concerning the real property in question was truthful and accurate; and (2) even if Plaintiff's representations with respect to Land and Cattle Funding, Inc., were fraudulent or misrepresentations, that said representations constitute intrinsic fraud

and therefore the Court has no jurisdiction to reopen the cause of action between the parties after the final Decree of Divorce was entered.

#### RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks to have the decision of the lower court reversed, vacating the Summary Judgment granted to Defendant, and to have the case remanded for trial to the lower court.

#### STATEMENT OF FACTS

Plaintiff and Defendant were husband and wife and the parents of six minor children when a Decree of Divorce in the Third Judicial District Court of the State of Utah was entered on the 13th day of January, 1977. Said decree was final upon being signed by the Judge and filed with the Clerk of the Court. In the Decree of Divorce the Court provided for all aspects incidental to the severance of a marriage including specifically, property division as follows:

"6. The following properties are awarded to the Defendant [wife]:

a. 24 acres of land in Alpine, Utah to be located in the southern most part.

b. Household furnishings presently in the residence at 809 Edgehill, Salt Lake City, Utah with the exception of the desk and chair which shall be awarded to the Defendant; and

c. The 1976 GMC truck.

7. The following properties are awarded to the Plaintiff [husband]:

a. The residence at 809 Edgehill, Salt Lake City, Utah.

b. 23 and 3/10ths acres of land in Alpine, Utah.

c. Shoshone Associates Partnership Interests.

d. Stock in land and cattle funding and

e. 1976 Porsche (TR30).

On February 15, 1979, Defendant filed a petition for an Order to Show Cause specifically petitioning the Court to equitably divide assets of the marriage alleged by Defendant to have been undisclosed by Plaintiff at the time of the divorce proceeding. The Petition makes specific reference to 5,000 acres of real property located in the northern part of Utah and southern part of Salt Lake County. Said petition is supported by the affidavit of Defendant stating (1) it was represented by Plaintiff during the course of the divorce proceedings that all properties of the marriage were listed in the stipulation or in the family trust and that said properties were all the properties owned by the parties and, (2) Plaintiff had failed to disclose all of his assets including specifically an interest owned by Plaintiff in 5,000 acres of land located near Alpine, Utah and that Defendant believed she was entitled to 1/2 of said real property or the proceeds therefrom. (TR 36-37).

In 1979 the 5,000 acres were sold for \$7.5 million. The issue herein involves the question of whether Plaintiff adequately disclosed his ownership interest in the property at the time of the divorce.



It is not disputed by the parties that in 1973 there was a limited partnership formed by the name of Alpine Limited. The general partner in that limited partnership was a general partnership known as Geodyne II. Plaintiff owned one-third of Geodyne II; Geodyne II owned approximately one-half of Alpine Limited. Alpine Limited owned some 5,000 acres of land located at approximately the boundary between Salt Lake County and Utah County. Thus, Plaintiff effectively owned an approximate 16% interest in the profits and/or losses of Alpine Limited. In May of 1973 Plaintiff apparently sold a 6% interest in the right to receive the net profits of Alpine Limited for \$25,000.00 leaving him with a 10% interest in the assets of Alpine Limited. (TR 209-211)

About 18 months after the divorce the assets of Alpine Limited were purchased for \$7.5 million dollars (TR 215).

In answer to Plaintiff's Interrogatories and at Defendant's deposition Defendant stated that Plaintiff had made representations prior to the divorce to her that his interest in an investment known as Alpine Limited was worthless. (TR 69, 246, 259, 262-264, 269-270, 309-311).

Plaintiff claims however, that in 1974 he contributed all of his interest in the net profits of Alpine Limited to an Idaho corporation known as Land and Cattle Funding, Inc. He further claims that his contribution was valued at \$125,000.00. Plaintiff alleges that by the fall of 1975 Land and Cattle Funding, Inc. lost everything and at the time of the divorce

in December of 1976 the corporation was worthless. (TR 109-110, 210-212).

Plaintiff testified in his deposition that he owned 100% of the stock of Land and Cattle Funding, Inc. at the time the corporation ceased doing business, that he has personally paid some \$30,000.00 of the liabilities of Land and Cattle Funding, Inc. and that he intends to pay an additional \$20,000.00 of the debts of this corporation and as sole shareholder he is entitled to any proceeds derived from the assets of Land and Cattle Funding, Inc. which consist of the aforementioned interest in Alpine Limited and the name Land and Cattle Funding, Inc. (McBride deposition pp. 35-38, 46-50).

It is the position of Plaintiff McBride that: (a) his statements and representations to Defendant were true to the effect that the family interest in Alpine Limited was worthless; (b) that even if the information supplied by Plaintiff to Defendant concerning the assets of the marriage was inaccurate and/or fraudulent that Defendant did not rely on said statements and representations, and (c) if his statements and representations were fraudulent that inasmuch as the statements were made in December 1976 and a final Decree of Divorce was entered in January 1977 that any fraud perpetrated by Plaintiff is to be characterized as intrinsic fraud rather than extrinsic fraud and that according to case law a judgment may not be overturned be-

cause of intrinsic fraud.

It is Defendant's position that (1) Defendant had presented an issue of fact which precluded the entry of summary judgment on the issues before the Court; (2) that in fact Plaintiff McBride had never placed the Alpine Limited asset into the corporation or that if he had actually contributed this asset to the corporation he had misrepresented the value of the Land and Cattle Funding, Inc. at the time of the divorce. (See TR 109-110); (3) that Plaintiff's fraudulent misrepresentations and concealment of assets constitute extrinsic fraud which may be the basis for setting aside a final judgment; and, (4) the fiduciary relationship between Plaintiff and Defendant required full disclosure and entitled Defendant as the spouse in the weaker position to rely upon the representations of the party with superior knowledge.

#### ISSUE

The district court erred in finding that extrinsic fraud could not possibly have been committed by Plaintiff on Defendant in misrepresenting the value of the assets of the marriage and in concealing assets of the marriage from Defendant.

#### ARGUMENT

##### POINT I

THERE IS A GENUINE DISPUTE AS TO WHETHER OR NOT PLAINTIFF MADE A FRAUDULENT MISREPRESENTATION TO DEFENDANT.

Although Plaintiff contends that he contributed his

interests in Alpine Limited to a corporation called Land and Cattle Funding Inc., it is important to point out that Defendant has never admitted that such a transfer in fact took place. Whether the Alpine Limited interests belonged to Land and Cattle Funding Inc., a corporation owned entirely by Plaintiff or whether the interest was owned by Plaintiff directly makes little difference. Either Plaintiff McBride never placed the Alpine Limited asset in the corporation Land and Cattle Funding, Inc., and thereby concealed that asset from Defendant or if he did contribute the asset to the corporation he misrepresented the value of the corporation to Defendant. The point of Defendant's claim is that this interest in whatever form was represented to Defendant by Plaintiff as being worthless and Defendant has produced evidence to support the proposition that the property did indeed have value in 1973, in 1975 and in 1978.

It is admitted by the parties that in 1973 an interest in Alpine Limited equalling less than half of the property was sold for \$200,000.00 plus an agreement to pay all contract balances. (McBride depo. pp. 7-8). This supports Defendant's contention that the entire Alpine Limited interest was worth approximately \$3,000,000.00 in 1975. Likewise it is uncontested that in 1978 the property was purchased for \$7,500,000.00 and Plaintiff McBride will receive 10% of that sale.<sup>1</sup>

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<sup>1</sup> Alpine Limited did not receive \$7.5 million. Approximately \$2.5 million is or way to be paid to Plaintiff as a sales commission. Defendant's claim relates only to the amount received by Alpine Limited.

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Plaintiff produced no evidence of the value of the property as of the time when the divorce was granted. As the party moving for summary judgment he has the burden of taking all the evidence before the Court, considering it in a light most favorable to Defendant and proving that the representations made by him to Defendant at the time of the divorce proceeding and prior thereto were truthful and accurate. Defendant has no duty to present evidence as to this value until the time of trial. Defendant has failed by affidavit or other sworn averment to controvert the allegations in sworn averments submitted by Defendant in support of her petition.

Summary judgment for Defendant as granted by the lower court was improper and contrary to Rule 56(c) U.R.C.P. and the large body of opinion supplementing that rule.

The Utah Supreme Court in the case, Sandberg vs. Klein, 576 P.2d 291, (Utah 1978) stated:

"A summary judgment can only be granted under Rule 56(c), U.R.C.P., when it is shown there is no genuine issue as to any material fact, and the moving party is entitled to judgment, as a matter of law, under the operative facts. The Court cannot consider the weight of testimony or the credibility of witnesses in considering a motion for summary judgment. Herein although the parties were not in complete conflict as to certain facts, the understanding, intention, and consequences of those facts were vigorously disputed. These matters can only be resolved by a trial. Pg. 291.

In the case of Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975) this Court held:

"It only takes one sworn statement under oath to dispute the averments on the other side of the controversy and create an issue of fact. . . . If there is any dispute as to any issue, material to the settlement of the controversy, the summary judgment should not be granted. Pg. 193.

In the instant matter Plaintiff has submitted by Affidavit (TR 36-37) by Answers to Interrogatories (TR 68-71, 114-121, and by Deposition (TR. 246, 259, 262-264, 269-270, and 309-311) sworn averments disputing the issues and allegations raised by Plaintiff. Defendant has averred under oath that she relied upon statements made to her during the course of marriage and also communications between counsel all setting forth as a fact the negative net worth financial condition of Alpine Limited. Defendant submits that in such a situation the lower court could not find as a matter of law that no extrinsic fraud could have been committed by Plaintiff. (The issues of extrinsic v. intrinsic fraud will be discussed supra).

In light of the foregoing, Defendant submits that the Court holding in Western Pacific Transport Co. v. Beehive State Agricultural Co-op, No. 16056 (Utah, filed June 26, 1979) states the applicable law with respect to this case.

"We are entirely cognizant of the advantages of the summary judgment procedure in saving the time, effort and expense of trial when it clearly appears that there are no disputed issues of material facts and the Court can therefore move for the moving parties as a matter of law. However, the granting of such a motion fails of that objective and hoped for advantages are not only lost, but there actually results a greater

expenditure of time and effort if there are such disputed issues to be resolved and the granting of such a motion is not justified. From what has been set forth above, it should be plain that in this case there are such disputed issues which ought to be tried. The motion was improperly granted and it is necessary that the case be remanded for trial. Cost to Appellant (Defendant).

## POINT II

### PLAINTIFF'S ALLEGED FRAUDULENT MISREPRESENTATIONS AND CONCEALMENT OF ASSETS PRIOR TO THE DIVORCE PROCEEDING CONSTITUTE EXTRINSIC FRAUD.

Plaintiff's position as set forth in pleadings to the lower court is that the divorce decree entered by the Court January 13, 1977 can be modified only if the alleged fraudulent misrepresentations of Plaintiff constitute extrinsic fraud rather than intrinsic fraud. Defendant, contends that a statement contained in the correspondence from James A. Murphy, counsel for Plaintiff to Joseph L. Henriod, counsel for Defendant, dated December 6, 1976:

"Stock in Land and Cattle Funding. At this time the corporation is in very poor condition and has a negative net worth".

could only constitute extrinsic fraud, namely in so responding to Defendant's request for information regarding assets, made through her counsel, Plaintiff's counsel responded with the above quoted statement which constitutes misrepresentation and extrinsic fraud in that either the Alpine Limited interest was not contributed to Land and Cattle Funding, Inc., and thereby concealed or if it was contributed the value of the corporation was misrepresented.

It is clear that said alleged misrepresentation consists of a statement in a letter exchanged between counsel and that it is not perjured testimony or a false answer to an interrogatory. Nevertheless Plaintiff claims said misrepresentation constitutes intrinsic fraud and as such is insufficient to enable this Court to set aside the divorce decree.

Careful examination of the case law setting forth elements of extrinsic and intrinsic fraud shows that that alleged misrepresentation contained in correspondence between counsel constitutes extrinsic fraud and there is no question but that the representations made by Plaintiff to Defendant during the course of the marriage concerning said asset constitute extrinsic fraud.

The Utah Supreme Court in the case of Haner v. Haner, 13 U.2d 299, 373 P.2d 577, (1962), Plaintiff appealed from an order denying her motion to set aside or modify a divorce decree which had been granted to Defendant. The court stated that:

"In order to justify granting relief the alleged wrong would have to be of the type characterized as extrinsic fraud:"

The Court then defined "extrinsic fraud" as:

"Fraud based on conduct or activities outside of the court proceedings themselves; which is depriving the other party of the opportunity to present his claim or defense. This type of fraud which is regarded as a fraud not only upon the opponent, but upon the court itself, can be accomplished in a number of ways, such as making false statements or representations to the other party or to witnesses to prevent them from con-



testing the issues; or by that means or otherwise preventing the attendance of parties or witnesses or by destroying or secreting evidence; so that a fair trial of the issues is effectively prevented. 373 P.2d at 578, 579.

This is precisely the issue presented to the Court by Defendant in her petition. Defendant has specifically alleged that Plaintiff made false statements to her and that through his counsel he made a false representation to her counsel concerning the value of an asset with the intent to prevent her from examining that asset more closely in order to secrete an asset which should have been divided between the parties.

In Haner the court found that the Defendant had "admitted that accusations in his pleadings and at that trial . . . were not true . . ." (373 P.2d at 579). The court held that

"Inasmuch as the parties and their witnesses were present and these issues were contested during the trial, if there were in fact mis representations and fraud, . . . they would have occurred within the trial itself (thus intrinsic to it) and therefore would not have been of the type of fraud characterized as extrinsic fraud explained above. (emphasis added). 373 P.2d at 579.

The question of the value of the asset of the marriage in Alpine Limited was not contested during the trial specifically because of the representations which constitute the basis for Defendant's petition. It is clear that the alleged fraudulent misrepresentations are based on conduct outside of the Court proceeding itself. Plaintiff in this case fraudulently prevented the matter of settlement of the parties interest in all of Plaintiff's assets to be contested and prevented Defendant from the opportunity to make a claim to the concealed assets.

In Glover v. Glover, 242 P.2d 298, 121 Utah 362 (1952) the Plaintiff brought an action seeking to modify a prior divorce decree on the basis that due to the misrepresentations and conduct of the Defendant certain real property was not included in the property settlement. Plaintiff claimed that the Defendant "fraudulently and deceitfully prevented the matter of settlement of the parties property rights to come before the Court . . ." 242 P.2d at 299.

In defining extrinsic fraud in Glover the Utah Supreme Court quoted A.L.R. Annotation, Vol. 113, p. 235 as follows:

"Extrinsic fraud must consist of some act ulterior to the merits of the proceedings out of which the the judgment arose, by which the party attacking the judgment was prevented from presenting his case of was induced not to present it. Such fraud consists of something done by the successful party preventing the adverse party from presenting all of his case to the court, so that there was, in fact, no adversary trial or decision of the issue in that case. 242 P.2d at 299.

The court then quoted Vol. 88 A.L.R. p. 1201 which states in pertinent part:

[I]n the case of extrinsic fraud, relief is granted on the theory that such fraud has prevented the unsuccessful party from fully presenting his case, and hence that there has never been a real contest before the court on the subject matter of this suit. 242 P.2d at 300.

In Glover, the Plaintiff did not bring the property to the Court's attention because of her reliance upon a private agreement which as it later turned out, Defendant had no intention of keeping. The court then quoted the leading United States Supreme Court case of United States v. Throckmorton, 96 U.S. 61, 25 L.Ed 93,

"Where the unsuccessful party has been presented from exhibiting fully his case, by fraud or deception practiced on him by his opponent . . . in similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing. 242 P.2d at 300.

based on the foregoing the Court in Glover found that the misrepresentations of the Defendant constituted extrinsic fraud.

The Utah Supreme Court in Clissold v. Clissold, 519 P.2d 242 (Utah 1974) defined extrinsic fraud as "those actions asserted to be fraudulent which prevent a fair submission of the controversy . . .". The Court defined intrinsic fraud as "conduct asserted to be fraudulent which occurs during the course of the proceedings . . ." 519 P.2d at 242.

The Court in Clissold was careful to point out that "exceptions [to the rule requiring extrinsic fraud] exist in divorce cases where there has been a gross misrepresentation of assets by a party." 519 P.2d at 242.

It is clear that the alleged fraudulent misrepresentations of Plaintiff Michael McBride occurred outside of any Court or other adversary hearing or proceeding. Certain assets were concealed from Defendant prior to preparation of the stipulation and hence she was deprived of the opportunity to contest her interest in such concealed assets. The alleged fraudulent misrepresentations are clearly extrinsic.

### POINT III

THE FIDUCIARY RELATIONSHIP BETWEEN HUSBAND AND WIFE REQUIRES FULL DISCLOSURE AND ENTITLES THE SPOUSE IN THE WEAKER POSITION TO RELY UPON THE REPRESENTATIONS OF THE PARTY WITH SUPERIOR KNOWLEDGE.

The rule of law is firmly established in Utah that a husband who is in a superior and stronger position to have knowledge of the assets of the marriage has a fiduciary duty to fully and fairly disclose this information to his wife. In *Glover supra*, the court held

"Plaintiff [was entitled to] 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. As stated in *Peterson v. Budge*, 35 Utah 596, 102 Pac. 211, 215: "there is no rule of law more fully established than that which holds that transactions between persons occupying fiduciary or confidential relations with each other, in which the stronger or superior party obtains an advantage over the other, cannot be upheld." 242 P.2d at 300.

In *Palmer v. Palmer*, 26 Utah 31, 72 Pac. 3 (1903), the Utah Supreme Court found that the husband had kept his wife in ignorance of the value and amounts received as proceeds from certain property and that the execution of the separation agreement by the wife would not be binding upon her because it had been obtained through unfair advantage and unwarranted coercion.

A review of the record on appeal shows that Plaintiff kept Defendant misinformed and uninformed concerning the assets of the marriage and his business dealings. (See Jones Deposition, TR 309-311).


Speaking of the fiduciary duty owed by a husband to his wife in that case the Supreme Court stated:

"Not only the law, but a man's most sacred honor, as well as every principal of justice and equity demands that he treat his wife at all times, and under all circumstances, respectfully, fairly, and openly. . . . [the husband] had no right to conceal himself or anything relating to their affairs from her. 26 Utah at 48, 49.

#### CONCLUSION

Defendant-Appellant submits that based upon the sworn averments, evidence, and argument presented to the lower court it was improper for the court to rule as a matter of law either that all representations made by Plaintiff to Defendant prior to and during the divorce proceedings were accurate and truthful or that there was no extrinsic fraud committed by Plaintiff in making misrepresentations as to the existence or value of assets of the marriage to Defendant prior to and during the divorce proceeding.

RESPECTFULLY SUBMITTED this 30 day of November, 1979.

  
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct  
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