

1993

## McGinty v. McGinty : Brief of Appellee

Utah Court of Appeals

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930569

IN THE UTAH COURT OF APPEALS

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| SELVA EUGIN MCGINTY, | :                    |
| Plaintiff/Appellant, | :                    |
| vs.                  | : Case No. 930569-CA |
| LEE MCGINTY,         | :                    |
| Defendant/Appellee   | :                    |

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\* \* \* \*

BRIEF OF APPELLEE

\* \* \* \*

Appeal from the Seventh Judicial District Court  
in and for Grand County, State of Utah  
Honorable Lyle R. Anderson, presiding  
Priority No. 15

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**FILED**  
Utah Court of Appeals

APR 27 1994

IN THE UTAH COURT OF APPEALS

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TABLE OF CONTENTS

|   | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES .....  | iv          |
| JURISDICTION .....  | 1           |
| STATEMENT OF ISSUES .....   | 1           |
| STANDARD OF REVIEW .....  | 2           |
| STATUTORY PROVISIONS .....  | 2           |
| RECORD ON APPEAL .....  | 3           |
| STATEMENT OF THE CASE .....   | 3           |
| STATEMENT OF FACTS .....  | 3           |
| SUMMARY OF ARGUMENT .....   | 11          |
| ARGUMENT .....  | 13          |
| I.    SINCE THE APPELLANT FAILED TO<br>MARSHALL ALL OF THE EVIDENCE<br>IN SUPPORT OF THE TRIAL COURT'S<br>FINDINGS AND, DESPITE SUCH EVI-<br>DENCE, DEMONSTRATE THAT THE<br>FINDINGS WERE CLEARLY ERRONEOUS,<br>THE APPELLATE COURT SHOULD RE-<br>FUSE TO CONSIDER AN ATTACK ON<br>THE TRIAL COURT'S DISTRIBUTION<br>OF PROPERTY..... | 13          |
| II.   THE TRIAL COURT FOUND THAT THE<br>PRE-MARITAL PORTION OF THE<br>MCGINTY RANCH WAS A JOINT VEN-<br>TURE AND, AS SUCH, DIVIDED THE<br>PRE-MARITAL INTEREST EQUALLY<br>BETWEEN THE PARTIES.....  | 18          |
| III.  THE TRIAL COURT MADE AN EQUITABLE<br>DISTRIBUTION OF THE MARITAL POR-<br>TION OF THE PROPERTY WHICH SHOULD<br>BE AFFIRMED UNLESS CLEARLY ERRON-<br>EOUS.....  | 24          |

|  |    |
|--|----|
| IV. APPELLANT URGES A PRO RATE DISTRIBUTION OF MARITAL PROPERTY WHICH IS NOT CONSISTENT WITH CURRENT CASE LAW..... | 27 |
| V. APPELLEE SHOULD BE AWARDED HER COSTS AND ATTORNEY'S FEE ON APPEAL.....  | 33 |
| CONCLUSION .....   | 37 |
| CERTIFICATE OF SERVICE .....   | 40 |
| ADDENDA:   |    |
| A. Court's Memorandum Decision   |    |
| B. Findings of Fact, Conclusions of Law and Decree of Divorce.   |    |
| C. Affidavit of Counsel  |    |
| D. Exhibits 36, 37, 38 & 39 tracing funds which paid off ranch.  |    |
| E. Rule 33, Utah Rules of Appellate Procedure  |    |

## TABLES OF AUTHORITIES

| <u>CASES</u>  | <u>PAGE</u> |
|---|-------------|
| <u>Allred v. Allred</u> , 797 P.2d 1108 (Utah App. 1990).....                                   | 18          |
| <u>Bartell</u> , 776 P.2d at 886 (quoting <u>Walker</u> , 743 P.2d at 193).....                 | 14          |
| <u>Burt v. Burt</u> , 799 P.2d 1166 ..... 18,24,27,38 (Utah App. 1990)                          |             |
| <u>Eames v. Eames</u> , 735 P.2d 395 (Utah 1987).....   | 34,36       |
| <u>Hall v. Hall</u> , 858 P.2d 1018 (Utah App. 1993)..  | 18,27       |
| <u>Hansen v. Hansen</u> , 736 P.2d 1055 (Utah app.) cert denied, 756 P.2d 1217 (Utah 1987)..... | 18          |
| <u>Harker v. Condominiums, Forest Glen Inc.</u> , 740 P.2d 1361, 1362 (Utah App. 1987)...       | 14          |
| <u>Hoagland v. Hoagland</u> , 852 P.2d 1025 (Utah App. 1993).....                               | 24          |
| <u>Jackson v. Jackson</u> , 617 P.2d 338 (Utah 1980).   | 24          |
| <u>Maughan v. Maughan</u> , 770 P.2d 156 (Utah App. 1989).....                                  | 14          |
| <u>Myers v. Myers</u> , 768 P.2d 979 (Utah App. 1989).  | 14          |
| <u>Naranjo v. Naranjo</u> , 751 P.2d 1144 (Utah App. 1988).....                                 | 24          |
| <u>Riche v. Riche</u> , 784 P.2d 465..... 14,15,18,34 (Utah App. 1989)                          |             |
| <u>Scharf v. BMG Corp.</u> , 700 P.2d 1068, 1070 (Utah 1985).....                               | 14          |
| <u>Shioji v. Shioji</u> , 712 P.2d 197 (Utah 1985)...   | 14,15       |
| <u>Sukin v. Sukin</u> , 842 P.2d 922 (Utah App. 1992).  | 14          |
| <u>Watson v. Watson</u> , 837 P.2d 1 (Utah App. 1992).  | 24,27       |

**RULES**

|   |                   |
|---|-------------------|
| Rule 33, Utah Rules of Appellate<br>Procedure.....                | 2, 33, 34, 37, 39 |
| Rule 52(a) Utah Rules of Civil Procedure,<br>1953 as Amended..... | 2, 13, 14         |

## JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Annotated, Section 78-2(a)-3(2)(h) as this is an appeal from a final judgment and order in a domestic relations action.

## STATEMENT OF ISSUES

1. Has the Appellant marshalled all of the evidence and, despite such evidence, demonstrated that the Trial Court's distribution of property was clearly erroneous or an abuse of discretion?

2. In Arguendo, did the Trial Court err in determining that the premarital portion of the McGinty Ranch was a joint venture between the parties and, therefore, the Court equally divided the premarital portion.

3. With respect to that portion of the ranch acquired during the marriage, should the Trial Court have utilized the presumption of equal distribution and, from the evidence, determined that each of the parties had contributed substantial time and money to the ranch such as to justify an equal distribution?

4. Does any legal authority exist which would justify a pro rata distribution of the ranch and, even if such authority existed, would it be utilized when Appellant relies upon misstatements of fact as a basis for his argument?



5. Is the appeal frivolous and intended to delay a recovery of the ranch from the defaulting buyer so as to deprive the Appellee of her portion of the proceeds and, if so, is she entitled to an award of her costs and attorney's fee pursuant to Rule 33 of the Utah Rules of Appellate Procedure?

#### STANDARD OF REVIEW

As more fully discussed in Point I of the Argument, the sound discretion of a Trial Court in the distribution of property will not be overturned unless it is clearly erroneous or a clear abuse of discretion. Rule 52(a), Utah Rules of Civil Procedure; also see authorities cited in Point I of this brief.

With respect to Issue 5, Appellee urges this Court to award her costs and attorney's fee on this appeal pursuant to Rule 33 of the Utah Rules of Appellate Procedure which confers original determination of the merits of the appeal to this Court.

#### STATUTORY PROVISIONS

With the exception of the Rules previously cited, there are no statutory or constitutional provisions that are determinative of the issues on appeal in this case.

## RECORD ON APPEAL

References to the Trial Transcript will be made as follows: (TT \_\_\_\_). Such reference will be utilized because the District Court Clerk did not paginate the Trial Transcript.

## STATEMENT OF CASE

This is an appeal from a Decree of Divorce entered by the Seventh Judicial District Court of Grand County, State of Utah. The case at bar was tried before the Honorable Lyle R. Anderson on the 11th day of June, 1993. The Court entered its Memorandum Decision (Addendum A) on June 18, 1993. After several motions, the Court entered its Findings of Fact (hereafter "FF"), Conclusions of Law and Decree of Divorce on August 11, 1993 (Addendum B). Plaintiff/Appellant filed Notice of Appeal in the present case on September 3, 1993 (ROA 369-370).

## STATEMENT OF FACTS

Appellee offers the following statement of relevant facts in the present case:

1. The Plaintiff/Appellant (hereinafter referred to as "Cotton") and the Defendant/Appellee (hereinafter referred to as "Lee") met in 1963 in Saudi Arabia at a time when both were employed by the Arabian American Oil Company ("ARAMCO"). (FF 3).

2. A romance blossomed almost immediately but marriage was not possible because of the nepotism policies of ARAMCO and because Lee, a devout Catholic, could not marry Cotton unless the church granted a dispensation pertaining to Cotton's earlier divorce (TT 147-149; FF 3).

3. After approximately seven (7) years of working on the dispensation, it was finally received in late 1975 (TT 151-152; FF 3).

4. Both of the parties were also in the process of retiring from ARAMCO so that the nepotism policies of the company would no longer prevent their marriage (FF 3).

5. The parties were married on June 18, 1976 at Palo Alto, California and immediately moved to the McGinty ranch in Castle Valley, Utah (FF 2). The marriage was Lee's first and Cotton's second marriage.

6. Almost from the beginning of their relationship, Cotton and Lee had planned to spend their lives together (TT 154-155). While in Saudi Arabia, the parties could not marry because of the nepotism policies of ARAMCO (TT 149-150; FF 3) and they could not live together because of the cultural problems that could have subjected Lee to "stoning" (TT 150-151), but the parties maintained a close personal relationship and planned for their future (TT 154-157).

7. By the late 1960's, Lee and Cotton were searching for investment properties to provide them both with future retirement monies and a retirement home (TT 154-155; FF 7).

8. From the late 1960's until the time of the parties' marriage in 1976, Lee consistently provided Cotton with monies to be utilized in the acquisition of joint venture properties and a retirement home in the belief that the parties would ultimately marry and retire together (FF 7).

9. Although approximately \$3,000.00 was transferred by Lee to Cotton for investment purposes prior to 1970 (TT 154), Lee's documentary evidence was vague during this time period (TT 154).

10. Both parties made numerous trips to the Grand County, Utah area for purposes of locating investment and/or retirement properties and, on one such trip in 1970, Cotton located what would become known as the McGinty ranch (TT 154-157).

11. Since Lee was still in Saudi Arabia at that time, she made plans for immediate transfers of funds to Cotton for the purpose of completing the \$10,000.00 down payment on the McGinty ranch in December of 1970. She transferred a total of \$6,200.00 to him for that purpose. (TT 180; Exhibit 9; FF 7).

12. After transferring \$6,200.00 for the original down payment, Lee continued to transfer sums of money into Cotton's accounts to facilitate the operation and improvement of the ranch (TT 181; FF 7, 8, 9 and 10).

13. Cotton held title to the McGinty ranch, as well as various other parcels of joint venture property, as trustee for the partnership, and he collected all rents and income from the investment properties and returned same into the development of the properties (TT 181-192; FF 10).

14. Both of the parties made numerous trips to Utah and utilized the McGinty ranch as their home in the United States prior to the time of their marriage (TT 155-157).

15. The ranch earned approximately \$5,000.00 per year from the time of its acquisition in 1970 until the time of the parties' marriage in 1976 and all of that income was utilized to make payments on the ranch and improve the property (TT 43, 83).

16. Following the purchase of the ranch, Lee continued to transfer funds to Cotton in the sums of at least \$1,800.00 in June of 1971 (TT 182) for a payment on the ranch, \$1,500.25 in March of 1972 (TT 186-189) for the acquisition of the Brown/Terry property which would ultimately become the Jenks property, and \$7,000.00 in

1973 (TT 189-192) for the acquisition of the Miller property (FF 7).

17. In September of 1976, the Miller property was sold and Lee received one-half ( $\frac{1}{2}$ ) of the proceeds from the sale, namely \$9,965.30, all of which she deposited back into the family accounts (TT 191-192).

18. The Brown/Terry property was subsequently sold to Mr. Jenks in 1988 and both Lee and Cotton executed documents for the sale. They received approximately \$33,000.00 from Mr. Jenks over a two and one-half ( $2\frac{1}{2}$ ) year time period and all of the proceeds were deposited into the ranch and household accounts (TT 188-189).

19. Prior to her marriage in 1976, Lee also utilized her personal funds to purchase furniture and appliances for the ranch house and caused same to be delivered to the ranch house so that it would be functional by the time the parties arrived to set up house hold (TT 157-158) (FF 7).

20. As of the date of their marriage in June of 1976, Lee had substantial cash savings in excess of \$35,000.00 (TT 164-179, 194-198) and Cotton had no cash savings (TT 87-89, 198).

21. Following the date of the marriage, each of the parties contributed their social security checks and pension checks into their joint ranch and family

accounts (TT 192-195), and all of the monthly payments for the ranch from the date of the marriage until the payoff of the ranch in 1983 came from those accounts (FF 8).

22. Immediately preceding the payoff of the ranch, Lee withdrew \$15,000.00 from her sole and separate premarital accounts and deposited said sum into the joint ranch account so that Cotton could write check #1437 on September 23, 1983 in the sum of \$13,638.47 to pay off the entire remaining balance on the McGinty ranch (TT 199-204; Exhibits 36, 37, 38 and 39 [Addendum D]; FF 8).

23. Following their marriage, the parties made substantial improvements to the ranch including the remodeling of the ranch house and bunk house, the installation of a piped irrigation system and the doubling of hay production. They also acquired additional equipment for the operation of the ranch (TT 132; FF 9).

24. The parties frequently listed the ranch for sale in an attempt to realize a significant return on their investment and, Cotton acted as though Lee were a joint owner of the ranch by having her sign and participate in all listing agreements and deeds for the sale of portions of the property, like the Jenks property (TT 135-136, 238; FF 10).

25. Lee utilized much of her pre-marital savings to improve and make lump sum payments on the ranch (TT 208,213).

26. Lee was never repaid for any of the transfers of money that went into the McGinty ranch or the Jenks property and she placed all of her return from the Miller property back into the ranch accounts (TT 189, 191-192, 199-203; FF 7).

27. The ranch was purchased in 1970 for \$80,000.00 and was worth \$425,000.00 at the time of trial. Though most of the appreciation had occurred in the two (2) years prior to the trial and was due to recent market increases, marital improvements also effected the value of the ranch (TT 129-132; FF 7).

28. Cotton filed for divorce on December 26, 1991 (ROA 1).

29. Cotton's attorney drafted a restraining order against the disposition of any property during the pendency of the action which was in full force and effect at the time that Cotton sold the ranch to Darr Hatch (FF 12).

30. Without notifying attorney Sandy Dolowitz, trial counsel for Cotton, Cotton accompanied Darr Hatch to Utah County so that Mr. Hatch's law firm could prepare the documents which transferred ownership of the ranch to Mr. Hatch pursuant to a Contract of Sale. Cotton and



Hatch also contended the sale included all of the household goods, farm equipment and vehicles that had been previously owned by Cotton and Lee, although no inventories were included on the sales contract and no security interests in the personal property were ever perfected (TT 100-110, 117-124).

31. On June 11, 1993 trial was held and Judge Anderson received testimony and numerous exhibits. He entered his Memorandum Decision (Addendum A) on June 18, 1993 and Findings of Fact, Conclusions of Law and Decree of Divorce were entered on August 11, 1993 (Addendum B).

32. At the time of trial, Darr Hatch was substantially delinquent in the payments on the ranch and Cotton had made no attempt whatsoever to collect the past due payments or foreclose on the property (TT 108-110).

33. At the time of trial, Cotton contended that he had no vehicle left but was driving a little red sports car "on loan" from Darr Hatch. (TT 102).

34. As of the time of this appeal, the defaulting buyer remains in possession of the property although no payments whatsoever have been made since the time of the trial. All attempts to remove the defaulting buyer from the property have been met with delaying tactics by Cotton and counsel. (Affidavit of Counsel, Addendum C).

## SUMMARY OF ARGUMENT

Lee contends that Cotton has failed to meet the standard of review required in this case. He has failed to present any legal basis for an appeal and he has not even attempted to marshall all of the evidence that supported the Trial Court's Findings. As such, this Court should refuse to consider his attack upon the Trial Court's distribution of property.

In Arguendo, Lee contends that the Court applied the correct legal standard and first determined that the premarital portion of the McGinty ranch was really a joint venture between the parties. Since the parties had several joint venture properties, all in Cotton's name, the Court had ample evidence to support its determination that the parties had functioned together as a joint venture partnership. The Court's equal distribution of the premarital portion of the ranch was in conformity with that Finding of Fact.

The Court further determined that payment for the marital portion of the McGinty ranch had come from the joint monies and efforts of the parties. The Court found that Lee McGinty had withdrawn \$15,000.00 of her premarital money and deposited same into the joint ranch account so that Selva McGinty could write check number 1437 on September 23, 1983 in the sum of \$13,638.47 to pay off the entire remaining balance on the McGinty

ranch. Applying the presumption favoring an equal distribution between married persons, the Court then divided the marital portion of the McGinty ranch on a fifty-fifty (50/50) basis. Such a division is in complete conformity with all current caselaw.

By contrast, Cotton argues this Court to make a pro rata distribution of the ranch. He ignores the Court's Findings of Fact, argues only one (1) side of disputed testimony and blatantly misrepresents facts to this Court. His argument for a pro rata distribution rests solely upon erroneous mathematics concerning the source of the funds which made the payments on the McGinty ranch.

Finally, Lee asks this Court to award costs and attorney's fee on the grounds that this appeal has been frivolous and has been intended solely to delay the recovery of the ranch from Cotton's friend, the defaulting buyer, in a collusive attempt to deny Lee her share of the marital proceeds.

## ARGUMENT

### I

SINCE THE APPELLANT FAILED TO MARSHAL ALL OF THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS AND, DESPITE SUCH EVIDENCE, DEMONSTRATE THAT THE FINDINGS WERE CLEARLY ERRONEOUS, THE APPELLATE COURT SHOULD REFUSE TO CONSIDER AN ATTACK ON THE TRIAL COURT'S DISTRIBUTION OF PROPERTY.

The Trial Court's numerous and express Findings of Fact in the case at bar should be reviewed in light of the guidelines found in Rule 52(a), Utah Rules of Civil Procedure. Rule 52(a) provides, in relevant part, as follows:

Rule 52: Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury..., the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A;...Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court...

[Emphasis added by Order of the Utah Supreme Court on October 30, 1986 and became effective on January 1, 1987.]

An analysis of the 1987 modification of Rule 52(a) demonstrates a clear intent to avoid retrying the

facts of the case at the Appellate level. Since a divorce action is an equitable case, the Trial Courts has been given broad discretion in making awards. Riche, v. Riche, 784 P.2d 465 (Utah App 1989); Sukin v. Sukin, 842 P.2d 922 (Utah App 1992); Maughan v. Maughan, 770 P.2d 156 (Utah App 1989); Myers v. Myers, 768 P.2d 979 (Utah App 1989); Shioji v. Shioji, 712 P.2d 197 (Utah 1985). Appellate Courts have traditionally granted great deference to the Trial Court's Findings of Fact and do not overturn them unless they are clearly erroneous. Additionally Appellate Courts have traditionally deferred to the Trial Court for purposes of judging the credibility of witnesses. Rule 52(a), Utah Rules of Civil Procedure; Myers, supra; Shioji, supra; Riche, supra.

In Riche v. Riche, supra, this Court stated:

Husband, in his brief on appeal, refers this court to evidence which conflicts with the trial court's findings and supports his contention that he should have been awarded custody of the four children. However, Husband does not "marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" Bartell, 776 P.2d at 886 (quoting Walker, 743 P.2d at 193). See also Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985); Harker v. Condominiums Forest Glen, Inc., 740 P.2d 1361, 1362 (Utah Ct. App. 1987). Therefore, we decline to further consider Husband's attack

on the court's findings as to custody. (Riche, supra p. 468).

In Shioji, the Supreme Court has also expressly provided:

On appeal from a judgment of the Trial Court, our [Appellate Court] role is not to substitute our own findings for those of the Trial Court, but to examine the record for evidence supporting the judgment.  
(Shioji, supra, at 201.)  
[Emphasis added]

Given that express statement of the role of the Appellate Court, the Appellant is charged with the responsibility of (1) marshalling all the evidence in support of the Findings, and (2) demonstrating that despite that evidence, the Trial Court's Findings are so lacking in support as to be against the clear weight of the evidence.

In the case at bar, Cotton has failed to present any of the evidence upon which the judge based his very detailed Findings. Instead, he has chosen to make conclusionary statements, many of which are flagrant misrepresentations of the actual testimony, and has further chosen to base those conclusionary statements on only his side of the disputed testimony. For example, in paragraph 8 of the Court's Findings of Fact, the Court finds "that the remaining debt on the ranch of approximately \$14,000.00 was paid off in 1983 with Lee's separate funds". The Court's Findings of Fact were based

upon detailed testimony by Lee tracing her sole and separate funds through various certificates of deposit into the ranch account for the sole purpose of paying off the ranch (TT pages 199 through 203). In addition to her testimony, Lee introduced into evidence each document that demonstrated every transfer of money from its origin in her pre-marital account to the exact check which paid off the ranch in the total sum of \$13,638.47. By comparison, Cotton directs you to pages 46 and 47 of the Trial Transcript and asserts that those pages will demonstrate that Cotton paid Lee back \$9,111.00. A review of those pages indicates that no such statement was ever made and that Cotton was confused and disoriented and had no documentation whatsoever for most of the statements he made. Cross-examination on those issues (TT 96-97) clearly demonstrated that Cotton had no memory of the events surrounding the final payoff of the ranch and no documentation of any alleged repayment to Lee. He couldn't remember the payoff amount for the ranch, where the money came from, how it got into the joint account to make the ranch payment, or how much money, if any, had ever been paid back to Lee. By contrast, Lee testified that she had never received any repayment of the funds which paid off the ranch nor did she ever expect any. Yet in Cotton's brief, this highly disputed and inconsistent testimony was ignored and only a small

portion of Cotton's contradictory and self-serving testimony was included in his brief. It was also presented to this Court as though it had been fact (Paragraph 21, Statement of Facts, Appellant's Brief, page 7), and check number 1437 from the ranch account was included in Appellant's Brief (Addendum D) but Lee's withdrawal (Exhibit 36) from her separate account and her deposit to the ranch account (Exhibit 37) were ignored.

An additional example of presenting disputed evidence as though it were fact occurs when Cotton makes the representation that Lee received \$9,965.30 from the sale of the Miller property (Appellant's Brief, page 6, Statement of Facts, Paragraph 13) but fails to point out that the testimony and documentary evidence clearly established that all of those funds were deposited back into the family's joint personal and ranch accounts and were utilized for the support of the family and for improvements and general operating funds for the ranch (TT 191-192).

Appellant's burden of proof requires that he marshal, not ignore, the evidence which supports the Trial Court's ruling. In the case at bar, Appellant has presented only isolated portions of confusing and contradictory disputed testimony. Since he has failed to meet his burden of proof for Appellate review, Appellee



urges this Court to renew the position which it stated in Riche, supra, and declined to further consider Appellant's attack on the Trial Court's Findings with respect to property distribution.

## II

THE TRIAL COURT FOUND THAT THE PRE-MARITAL PORTION OF THE MCGINTY RANCH WAS A JOINT VENTURE AND, AS SUCH, DIVIDED THE PRE-MARITAL INTEREST EQUALLY BETWEEN THE PARTIES.

Trial Courts have always had considerable discretion in determining the financial interests of divorced parties. Allred v. Allred, 797 P.2d 1108 (Utah App. 1990). A property distribution between parties in a divorce action should be done in a fair and systematic fashion. Burt v. Burt, 799 P.2d 1166 (Utah App. 1990). In Burt, supra, this Court noted that the Trial Court should first properly categorize the parties' property as part of the marital estate or as separate property. The Court also pointed out that each party is presumed to be entitled to all of his or her separate property and 50% of the marital property. Burt, supra at 1172.

In the case at bar, the distribution of the Trial Court is entitled to a presumption of validity and should not be overturned unless it is clearly erroneous or an abuse of discretion. Hansen v. Hansen, 736 P.2d 1055 (Utah App), cert. denied, 756 P.2d 1217 (Utah 1987); Hall v. Hall, 858 P.2d 1018 (Utah App. 1993).

Applying those standards to the case at bar, an examination of the Trial Court's analysis indicates that the Court separated the pre-marital interests of the parties from the marital interests. The Court made express Findings about the expectations and contributions of each of the parties to the McGinty Ranch prior to the date of their marriage on June 18, 1976. The Court found that the parties began looking for a retirement home and retirement investments during the late 1960's. (FF 7). The Court emphasized Lee's testimony with respect to the conversations and agreements between she and Cotton about the acquisition of various parcels of real estate for investment and also the acquisition of real estate for their future marital home. (TT 154, 155, 181). Lee provided detailed testimony, supported by documentary evidence, of her deposits to Cotton's accounts to purchase not only the ranch but, also, other joint investment properties such as the Miller property (TT 190-192) and the Brown/Terry property (TT 188-189) which ultimately becomes the Jenks property (TT 186-187). The Court completely discounted Cotton's testimony about the alleged repayment of those transfers of money from Lee because he could not provide any supporting documents for his claims and because his testimony had been totally contradictory. Judging the credibility of witnesses was solely the discretion and prerogative of the Trial Court.

The Trial Court made a decision to rely upon Lee's detailed knowledge and documentary evidence rather than Cotton's confused, disoriented and spiteful testimony. The Trial Court's reasoning is spelled out clearly in very specific Findings of Fact (FF 7, 8, 9, 10, 11, and 15). After reconciling all of the evidence, the Court found that the ranch was a joint venture before the marriage and a marital asset during the marriage (FF 10). Although Cotton's name was the only name on the title to the ranch, the Court expressly refused to find that the ranch was his sole and separate property or that it was his pre-marital asset (FF 10). The Court's Finding was based upon substantial evidence about the agreements of the parties concerning their mutual investments in several properties. In each case, Lee had transferred funds into Cotton's accounts and Cotton had purchased the property in his name. (TT 182-203). Cotton received all of the rents and/or incomes generated by the properties and utilized same to make payments and maintain the properties as the trustee of the joint venture investments. When a joint venture property was disposed of, such as the Miller property, Lee was always given one-half of the total return from the property although she always invested all of her proceeds back into the marriage and marital accounts. From this testimony, the Court entered a Finding that Lee had contributed

significant sums of money to the acquisition and payment of the ranch prior to the date of marriage. (FF 7, 8, 10). One example of the transfer of funds centered on the original down payment of the ranch. Contrary to the misstatement of fact in Appellant's Brief, Lee's testimony and the documentary evidence established that all of the original \$6,200.00 which was paid as a down payment by the parties toward the ranch in December of 1970 came from Lee's accounts. Even Cotton had to acknowledge the transfer of three (3) separate amounts from Lee's accounts into Cotton's personal checking account. He admitted that the transfers had occurred and his check ledger, in his own handwriting, reflects that the funds came from Lee. (TT 70 - 74). In short, at the time of the execution of the Ernest Money Agreement, more of the money for the original \$10,000.00 down payment came from Lee than from Cotton. Additionally, the Court received sworn testimony that Cotton was the only party who was present in the United States for purposes of executing the contract as Lee was still in the middle east. The transfers and the documentary evidence also establish that Lee was overseas at the time the documents were actually signed for the acquisition of the ranch. (TT 70-74 and the exhibits associated therewith). Lee testified that Cotton held ownership to many of the properties and that she trusted him explicitly as trustee

for their future plans. (TT 155). After the initial \$10,000.00 down payment, the evidence showed that the ranch began earning its own income and, even Cotton admitted that when the first annual payment of more than \$20,000.00 came due, the ranch had actually earned part of that next payment. (TT 182 - 183). Since Lee had contributed substantially to the original down payment and was an equitable owner in the joint venture, she was also entitled to credit for her share of the rents and proceeds which had been earned by the ranch. Those rents and proceeds were always reinvested back into the payments and the taxes on the ranch. (TT 83).

The Court also received testimony about transfers of money from Lee to Cotton for improvements to the ranch, the acquisition of appliances and furnishings for the ranch and funds for other joint venture properties. (TT 154, 157, 158, 179-192). Having received said testimony, the Court entered a Finding that "Lee contributed to the acquisition and the maintenance of the ranch both before and during the marriage and that she did so utilizing her own money as well as her efforts." (FF 9). The Court further found that before the marriage Lee had also made substantial contributions by way of maintenance, preservation and protection of the ranch in addition to her substantial contributions of her sole and separate funds. (FF 10). The Court also found

"Lee has demonstrated that she provided the funds for half of the lump sum payments and the Court finds that the installment payments ultimately came from joint funds." (FF 10).

The Trial Court had before it forty-four (44) exhibits, the majority of which were presented by Lee. Those exhibits support the Court's Findings of Fact. By comparison, the Plaintiff offered almost nothing. After a thorough examination of the supporting documentation and the preparation of a detailed set of Findings of Fact, the Trial Court concluded that the pre-marital portion of the McGinty ranch was a joint venture between these parties and awarded each of them fifty (50%) percent. The Court also had before it documentation that showed that the parties had other joint venture properties such as the Miller property and the Jenks property. In each case, Cotton held the property in his name but substantial funds had come from Lee for the acquisition of the property. When each of those properties were sold, Lee was given fifty (50%) percent of the gain, evidencing her equitable ownership interest in the property. When the funds came from the sale of the Miller property and the Jenks property, Lee contributed all of her funds back into the ranch without ever reimbursing her sole and separate accounts for the original monies which she had expended for the

acquisition of the joint venture properties. The Court's Findings were based upon solid and consistent evidence. Absent a clear abuse of discretion or evidence that the Findings were clearly erroneous, the Appellate Court should affirm the Trial Court's findings.

### III

**THE TRIAL COURT MADE AN EQUITABLE DISTRIBUTION OF THE MARITAL PORTION OF THE PROPERTY WHICH SHOULD BE AFFIRMED UNLESS CLEARLY ERRONEOUS.**

Both the Court of Appeals and the Utah Supreme Court have long held that once a Court has determined that something is marital property, the Court may distribute it equitably, notwithstanding which party's name appears on the title. Jackson v. Jackson, 617 P.2d 338 (Utah 1980); Naranjo v. Naranjo, 751 P.2d 1144 (Utah App. 1988); Hoagland v. Hoagland, 852 P.2d 1025 (Utah App 1993). In Jackson, supra, the Supreme Court stated, "the Trial Court is empowered to make such distributions as are just and equitable and may compel such conveyances as are necessary to that end." In Burt, supra, the Court held that each party is presumed to be entitled to fifty (50%) percent of the marital property unless unusual circumstances require otherwise. (See also Watson v. Watson, 837 P.2d 1 (Utah App. 1992).

In the case at bar, the Trial Court had already determined that the pre-marital interest in the ranch was that of a joint venture between the two (2) parties.

Irrespective of the fact that Cotton held title to the property in a trust capacity for the joint venture, the Court looked for further indications that the parties continued to deal with the property as a joint asset. The Court entered a Finding that the payments made on the ranch from the time of the marriage until the time of final payment were made from accounts into which each party deposited his or her social security checks and retirement benefits (192-202). The evidence also showed that the parties worked hand-in-hand to improve and beautify the ranch (TT 132-133, 198-199, 239). Lee testified about remodeling and decorating the ranch house, the bunk house and the yard. Lee described participating in planting fields and installing irrigation lines. Her testimony was supported by witnesses Joe Kingsley and Mr. Jenks. Lee also provided all of the accounting and bookkeeping services for the ranch. (FF 8). The Court entered a Finding that the money that paid off the ranch in the sum of almost \$14,000.00 came exclusively from Lee's sole and separate funds (FF 8). The Court further entered Findings that during the marriage Lee had utilized her own separate money, all of her retirement funds and income and all of her efforts in improving the ranch and, due to Lee's substantial contributions, both before and during the marriage, she had enhanced the value of the ranch (FF 7, 8, 9, 10, 11).



The Court also entered an express Finding that the course of conduct between the parties evidenced a joint ownership of the property. (FF 10). Joe Kingsley, a local realtor testified that Cotton had always listed Lee's name on any listing agreements concerning the sale of the ranch. He further testified that the parties showed the ranch together and had actually disposed of a portion of the ranch, namely, the Jenks property, by mutual agreement. The entire testimony of witness Kingsley supports the Court's Findings of Fact.

Based upon the Court's very specific Findings of Fact, the reasoning evidenced by same and the overwhelming weight of the evidence, the Court then ordered the ranch sold and the proceeds divided equally between the parties.

A review of the entire property distribution will also show that the Court awarded Cotton the entire marital savings account and the funds that he had removed from same even though he had removed the funds in violation of the Court's prior order (FF 18). The Court entered a Finding that Cotton should have the account, even though it is marital property, "in order to foster an equitable distribution of all of the assets of the parties". Even if there had been some minor discrepancy in the amounts paid by each of the parties before the marriage, awarding Cotton the entire family savings

account, including the sums he had withdrawn in violation of the Court order, more than equalled any additional payments he claimed to have made prior to the marriage.

Since the Trial Court has followed the presumption that marital property should be equally divided and since the Appellant has failed to demonstrate any abuse of discretion and has also failed to marshal all of the evidence in support of the Court's Findings and then demonstrate, in light of that evidence, that the Findings are clearly erroneous, the Trial Court's distribution of marital property should be affirmed.

#### IV

**APPELLANT URGES A PRO RATA DISTRIBUTION OF MARITAL PROPERTY WHICH IS NOT CONSISTENT WITH THE PRESUMPTIONS CURRENTLY ESTABLISHED BY CASE LAW.**

In the event this Court determines that the McGinty ranch is marital property, then Appellant urges this Court to divide the property based upon the pro rata contribution of each. First, it should be noted that Appellant cites no case law at all in support of his argument. Second, most of the reasoning contained in Appellant's argument is based upon erroneous or misstated facts. Current case law makes it clear that marital property should be distributed on an equal basis unless unusual circumstances, memorialized in adequate findings, require otherwise. Burt, supra at 1172; Hall, supra at 1022; Watson, supra at 5. Given a clear presumption in

favor of equally dividing marital property, the Trial Court has not found any unusual circumstances that would justify overriding the presumption of equality between the parties. A review of the accurate facts indicates that Cotton did not pay \$30,000.00 of the original \$80,000.00 purchase price prior to the marriage of the parties. The facts established that Lee provided sixty (60%) percent of the original down payment, one-half of all of the accumulated rents and proceeds that were placed back into the ranch after its acquisition and various other sums of money which were transferred into Cotton's accounts from 1970 until the time of the parties' marriage. The exhibits demonstrated to the Trial Court that a flow of cash from Lee's personal accounts into Cotton's accounts occurred on a steady basis. Cotton admitted most of those transfers during his testimony. Based upon Appellant's argument, Lee would have been a sixty (60%) percent owner of the ranch as of the date of the execution of the Ernest Money Agreement. The ranch then started earning its own income and that income was contributed into the next annual payment. Lee is certainly entitled to a portion of the earned income for her partnership interest. Cotton contributed the remaining balance of the first annual payment which would have been the sum of approximately \$15,000.00. The ranch then continued to earn approximately \$5,000.00 a year

and, from its earnings, made its monthly payments and paid the taxes. The Court entered a Finding that the parties were equal owners in a joint venture agreement and the evidence demonstrates an almost fifty-fifty (50/50) ownership in the McGinty ranch prior to the date of the marriage. Cotton's argument completely disregards the fact that all of the monthly payments and earnings from the ranch were as much Lee's acquired income as Cotton's. It also ignores the fact that numerous checks to pay for the ranch and the improvements to the ranch had been funded by transfers from Lee's accounts.

Cotton then makes a representation to this Court that Lee was repaid the sum of \$9,111.00. He further asserts that the Defendant never denied the repayment of that sum of money. Recognizing that counsel on appeal was not the trial counsel in this matter, it must be assumed that these statements were unintentional misrepresentations. In reality, Lee expressly denied the repayment to her of any of the \$13,637.47 that paid off the ranch (TT 199 - 203). The Court also entered a Finding based upon the evidence that the payoff of the ranch came solely from Lee's pre-marital funds. Cotton merely asserts a sum of money in pages 46 and 47 of the Trial Transcript which, when added, total \$9,111.00. But he fails to point out that during his cross-examination, he admitted that he could remember any of the details,

including any amounts of money that may have been repaid to Lee. He further admits that he has no documentation whatsoever for his allegations of repayment (96-97). The Court obviously disregarded Cotton's testimony with good reason.

Cotton made numerous assertions at trial which were not supported by any evidence. He even alleged that he made all of the monthly payments on the ranch after the marriage; however, the overwhelming weight of evidence showed that all of Lee's social security checks, retirement pension checks and considerable sums from her sole and separate account flowed into the personal and ranch accounts for the day-to-day operation of the ranch and the Court so found (FF 7 and 8). Of particular note is the fact that Lee provided detailed evidence to the Court as to her cash assets, which were substantial, at the time of her marriage to Cotton, while Cotton himself admitted that he had no cash assets at the time of the marriage. The testimony also established that considerable improvements were made to the ranch after the time of the parties' marriage. Obviously the funds for the ranch improvement had to come from either marital income or Lee's sole and separate funds.

The Court found that much of the value of the ranch had come from recent (during the marriage) appreciation of the property (FF 9). This Finding is

based upon the testimony of witness Joe Kingsley, a local real estate broker, who listed the McGinty ranch for many years. The testimony established that the ranch had not appreciated much in value from the time it was acquired in 1970 until the time of the parties' marriage in 1976 but that the majority of appreciation had occurred during the last couple of years of the marriage due to dramatic economic changes in the Grand County area (TT 132). The Court's Finding was intended to show that much of the appreciation of the ranch had occurred during the time of the marriage and, while it was based upon the mutual efforts of the parties, it was also based upon the fortuitous economic climate. Certainly Lee was as much entitled to that fortuitous economic increase on her investment as was Cotton on his.

Finally, Cotton's arguments with respect to the contributions made by each of the parties are inaccurate. Even if one ignores the Court's express Findings of Fact with respect to the contributions from each of the parties, an examination of the Trial Transcript would provide the following undisputed evidence from the testimony: (1) Lee contributed \$6,200.00 of the original \$10,000.00 toward the purchase of the ranch by depositing same directly into Cotton's accounts so that he could write the down payment check; (2) Lee is entitled to be credited with at least one-half

( $\frac{1}{2}$ ) of the earnings of the ranch from the time of its purchase until the date of the marriage in 1976 as she had an express equitable ownership interest, and the ranch earned approximately \$5,000.00 per year and all of the money went back into the ranch; (3) amounts of \$1,500.25 and \$1,800.00 were transferred from Lee to Cotton just prior to the time of the second annual payment; (4) from the date of the parties' marriage, all of Lee's social security checks and retirement income went into the family and ranch accounts as did Cotton's and those accounts were used to make all of the monthly payments on the ranch; (5) Lee conveyed substantial amounts of money for the purchase of furniture and appliances for the ranch prior to the time of her marriage; (6) Lee entered into the marriage with substantial cash holdings while Cotton had none; (7) all of the almost \$14,000.00 final payoff of the ranch came directly from Lee. In short, if one totals the figures outlined above, Lee had more of an interest in the ranch than did Cotton; however, due to the mutual efforts of these parties and the continual contributions over the years, the Court favored the presumption that marital property should be awarded equally to the parties. The Court then compensated any possible pre-marital interest to Cotton by awarding him all of the \$16,000.00 family savings account. When the entire property distribution

is considered, the Trial Court's distribution is in compliance with the caselaw, with the presumption of equal distribution and with the facts as they actually exist in the record.

**V**

**APPELLEE SHOULD BE AWARDED HER COSTS AND ATTORNEY'S FEE ON APPEAL.**

Rule 33, Utah Rules of Appellate Procedure, provides, in relevant part, as follows:

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

Lee requests that she be awarded her costs and attorney's fee on this appeal on the grounds that the



appeal is frivolous and without merit and was intended solely to delay the resale of the ranch. Even though the Trial Court did not award costs and attorney's fee at the trial level, this Court has made it clear that it has the authority to award costs and attorney's fee under appropriate circumstances. Riche, supra. The recent substantial revisions of Rule 33 define a frivolous appeal as one that is not grounded in fact or warranted by existing law or which is interposed for purposes of delay. In Eames v. Eames, 735 P.2d 395 (Utah 1987), the Supreme Court stated that a husband's appeal from a judgment relating to the distribution of marital property was frivolous where there was no basis for the argument presented and the evidence and law were mis-characterized and misstated.

In the case at bar, a review of the testimony of Darr Morrell Hatch, Jr., the defaulting buyer of the McGinty ranch, and Cotton McGinty will show a collusive relationship intended to deprive Lee of her share of the marital property. Cotton's actions in intentionally circumventing his trial counsel to sell the McGinty ranch in clear violation of the existing restraining order was found to be an intentional contempt of court (FF 12, 20). Since the time of Mr. Hatch's testimony, not one additional payment has been made on the property (See Affidavit of Counsel, Addendum C, Appellee's Brief).

Additionally, Lee's attempts to regain control of the property from the defaulting buyer and proceed with the resale of the ranch have been blocked by endless delays and lack of cooperation by Cotton and the appeal has created a cloud on title that makes the resale of the ranch impossible (See Affidavit of Counsel, Addendum C, Appellee's Brief).

Appellant has failed to provide this Court with any rational basis for overturning the Trial Court's decision. It does not even attempt to marshal the evidence in support of the Court's Findings and then argue that the Trial Court's Findings are clearly erroneous or an abuse of discretion. Further, Cotton has argued only disputed facts to this Court and has not only ignored evidence that supported the Trial Court Findings but has failed to even point same out to the Court and has, on occasion, misrepresented facts. Finally, Cotton has failed to provide this Court with any legal theory that would give it grounds for overturning the Trial Court or to provide any caselaw that would support his proposed pro rata distribution. Such "lack of meritorious issues supports Lee's contention that the sole purpose of this appeal was to delay the disposition and resale of the ranch as directed by the Court.

A review of Cotton's actions throughout the trial indicates the extent to which he will go to keep

Lee from getting her share of the proceeds from the sale of the ranch. In violation of an express Court order, and circumventing his trial counsel Sandy Dolowitz, Cotton accompanied Mr. Hatch to Mr. Hatch's counsel's office in Utah County for the purpose of selling the ranch in violation of the restraining order that was in place during the pendency of the action (TT 100-110, 118-122). Cotton received a \$25,000.00 payment from Mr. Hatch but did not disclose same to his counsel until it was discovered accidentally by Lee and a Motion for Order to Show Cause in Contempt had to be filed in order to force the disclosure of the sale agreement and freeze the proceeds from the ranch (ROA 97 and 98). The sale purported to convey every piece of household furniture, the vehicles, the farm equipment and all other personal property owned by the parties even though the contract did not have an inventory list and no security agreement was ever perfected with respect to the personal property (TT 100-110, 118-122). Since the date of the entry of the Decree of Divorce, anything concerning the attempted recovery of the property from the defaulting buyer has been met with continued delay and acts intended to subvert the Trial Court's order. (Affidavit of Counsel, Addendum C, Appellee's Brief).

As in the Eames case, Lee contends that Cotton has presented no basis in law for this Court to consider

overturning the Trial Court's decision and his appeal is based on evidence and/or law which has been mischaracterized or completely misstated. It genuinely appears that the current appeal exists for the sole purpose of thwarting Lee's attempts to regain control of the ranch and re-market same. Both parties to this action are elderly people and such delays could clearly deprive Lee of any enjoyment of her share of the proceeds from the sale of the ranch. Additionally, from the minor assets Lee received at the Trial Court level, she has incurred substantial costs and attorney's fees in responding to this appeal and, therefore, she requests that this Court find that the current appeal is without merit and either establish a time for hearing pursuant to Rule 33 or, alternatively, remand to the Trial Court for a determination of reasonable attorney's fees and Court costs on appeal.

#### CONCLUSION

Since Appellant has failed to marshal all of the evidence in support of the Trial Court's Findings and, despite such evidence, demonstrate that the Findings were clearly erroneous, this Court should refuse to consider an attack on the Trial Court's distribution of property and should summarily dismiss this Appeal. In arguendo, a review by this Court of the Trial Court's Findings will result in the discovery that the Trial


Court applied the standards as outlined in Burt, supra, and determined that the premarital portion of the McGinty ranch was a joint venture. An examination of the record will show that the Trial Court had ample evidence from the parties' relationships with one another on the acquisition of various parcels of property to support the Court's conclusion that the parties functioned as partners in various joint venture partnerships prior to their marriage and, thus, the Trial Court's decision to equally divide the premarital portion of the property equally between the parties was not an abuse of discretion. Additionally, further analysis of the record will show that the Trial Court then analyzed the relationship of the parties toward the ranch during the time of their marriage and found that each of the parties had treated the ranch as a marital asset. Each party contributed all of his or her income and time and Lee contributed much of her premarital cash into the daily operation of the ranch. As such, the Trial Court's finding that the marital portion of the McGinty ranch should be divided equally between the parties was not erroneous and was in compliance with all current caselaw which favors an equal distribution of marital assets between the parties.

Appellant urges this Court to ignore all of the presumptions outlined by the caselaw and, instead,

overturn the Trial Court in favor of a pro rata distribution of the ranch. Such a position finds no support in the caselaw and relies upon misstatements and misinterpretations of fact taken only from one side of disputed testimony. In short, Appellant's appeal has failed to provide any legal or factual basis to attack or overturn the Trial Court's property division.

Finally, Appellee argues that the entire appeal has been maintained solely to delay the recovery and resale of the ranch and, thus, deprive her of her fair share of the proceeds from its sale. She requests that the Court set a time for hearing on the issue of an award of her costs and attorney's fee pursuant to Rule 33 of the Utah Rules of Appellate Procedure or, alternatively, that this Court determine that she is entitled to an award of her costs and attorney's fee and remand to the Trial Court for a determination of the amount of such costs and fees.

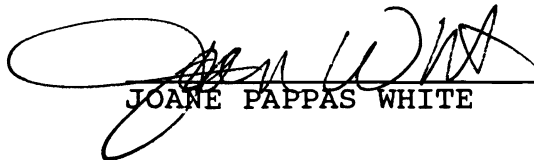
Respectfully submitted this 27th day of April,  
1994.

  
JOANE PAPPAS WHITE  
Attorney for Appellee

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLEE, by depositing same in the United States Mail, posted at Price, Utah, postage prepaid, on this 27<sup>th</sup> day of April, 1994 to the following:

James "Tucker" Hansen  
Attorney for Appellant  
HARDING & ASSOCIATES, P.C.  
306 West Main Street  
American Fork, Utah 84003



JOANE PAPPAS WHITE

**ADDENDUM A**  
**COURT'S MEMORANDUM DECISION**





SEVENTH DISTRICT COURT  
Grand County

FILED JUN 18 1993

CLERK OF THE COURT  
BY \_\_\_\_\_  
Deputy

IN THE SEVENTH DISTRICT COURT IN AND FOR GRAND COUNTY

STATE OF UTAH

SELVA EUGIN McGINTY,  
Plaintiff,

vs

LEE McGINTY,  
Defendant.

MEMORANDUM DECISION

Case No. 91-145  
Judge Lyle R. Anderson

This case was tried on June 11, 1993.

The principal issue before the Court is whether a ranch in Castle Vally, Utah (the "Ranch"), purchased by plaintiff Selva Eugin McGinty ("Cotton") in 1970 is marital property. Cotton met defendant Lee Nash McGinty ("Lee") in 1963, in Saudi Arabia, at a time when both were employed by the Arabian American Oil Company ("ARAMCO"). A romance blossomed almost immediately, but marriage was not possible because of nepotism policies of ARAMCO, and because Lee, a devout Catholic, could not marry Cotton unless the church granted a dispensation pertaining to his earlier marriage. In 1975, the dispensation was received. By June, 1976, Cotton and Lee had both retired from ARAMCO, and were married.

Lee presented substantial evidence of her contributions to the purchase of the Ranch. Although Cotton claims that she only loaned him money, which he subsequently repaid, he presented little or no supporting documents for his claims. Furthermore,

monthly payments for the Ranch between 1976 and 1983, when it was paid off, came out of the ranch account, an account frequently supplemented by deposits from the joint accounts of the parties. The debt on the Ranch was paid off in 1983 with separate funds of Lee.

Lee contributed to the marriage and the Ranch both with her own money and her own effort. The parties lived on the Ranch during all of their married life and made substantial improvements to it. The Ranch, purchased for \$80,000 in 1970, is now estimated to be worth \$425,000. Though most of the appreciation is due to the market, improvements have doubled hay production from the Ranch.

In previous efforts to sell the Ranch, Cotton acted as if Lee were a joint owner of the Ranch. Lee has demonstrated that she provided the funds for half of all lump sum payments, and installment payments came ultimately from joint funds. The Court accordingly concludes that the Ranch is marital property even though the title is in Cotton alone.

The parties agree that, at the time of separation, there was \$16,000 in a joint account and that Lee had a \$14,000 certificate of deposit. Cotton took control of the \$16,000 and has consumed it, apparently in violation of the Court's order.<sup>1</sup>

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<sup>1</sup>Cotton claims to have expended the monies from day to day operation of the Ranch, a use authorized by the Court. However, he paid his attorneys over \$7,000 during the same

The Court finds that Cotton intentionally violated the Court's restraining order and finds him in contempt of the Court.

Lee maintains that her share of household goods is worth \$4,000 and that Cotton has disposed of those goods without accounting to her for them.

The Court finds that each of the parties is entitled to a decree of divorce because irreconcilable differences have arisen between them. The Court awards to each of the parties an undivided one-half interest in the Ranch.

Both parties have agreed that the existing contract for sale of the Ranch should be honored. If, however, the contract purchaser has not brought his obligations under the contract current by August 1, 1993, the Court directs that action be taken to recover the Ranch from the defaulting purchaser. In that event, the Court will designate Lee as the party with the power to control those efforts, and the power to enter into negotiation for the resale of the Ranch. The Court has seen both parties on the stand and has more confidence in the ability of Lee to handle the sale in a business-like manner. If Cotton fails to agree to another sale, Lee may seek approval of a sale from the Court.

The Court finds that the California home once owned by Lee was transferred to her brother and sister before the marriage

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time, with no apparent source of that payment.

and is therefore not subject to the jurisdiction of the Court. The Court awards to Lee her certificate of deposit, which it finds to be her sole and separate property. The Court awards to Cotton the \$16,000 account, or its residue, even though it is marital property, to foster an equitable distribution of all assets of the parties. The Court awards Lee \$4,000 from Cotton for household goods that have disappeared, the car she is now driving, and all other personal property in her possession. Cotton is awarded personal property in his possession.

For his contempt of the Court, Cotton is required to pay a civil fine of \$200, and to pay Lee, pursuant to Section 78-32-11, the sum of \$1,000 for the expense she incurred in seeking to redress the noncompliance.

The \$25,000 held in escrow is divided equally between Lee and Cotton. The civil fine and the amounts awarded to Lee herein shall be deducted from Cotton's share before distribution to him.

Neither party is awarded alimony, as each has a pension from ARAMCO and social security benefits that are adequate, when supplemented with the assets awarded hereunder, to provide support. Neither party is awarded attorney's fees except as provided above.

MEMORANDUM DECISION  
McGinty v. McGinty  
Page 5

Counsel for Lee is directed to prepare findings,  
conclusions and a decree in conformity with this ruling.

DATED this 18<sup>th</sup> day of June, 1993.

Lyle R. Anderson  
*Per telephone authorization 6-18-93 by Sue Batch*  
Lyle R. Anderson, District Court Judge

Case No: 910700145 DA

Certificate of Mailing

I certify that on the 18<sup>th</sup> day of June, 1993,

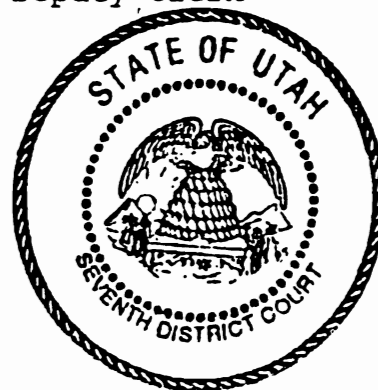
I sent by first class mail a true and correct copy of the  
attached document to the following:

DAVID S. DOLOWITZ  
Atty for Plaintiff  
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P. O. BOX 11008  
SALT LAKE CITY UT 84147

JOANE PAPPAS WHITE  
Atty for Defendant  
FIFTH STREET PLAZA, SUITE 1  
475 EAST MAIN STREET  
PRICE UT 84501

District Court Clerk

By: *Lee Batchelder*  
Deputy Clerk



**ADDENDUM B**

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND  
DECREE OF DIVORCE**

File  
COPY

JOANE PAPPAS WHITE #3445  
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Telephone: (801) 637-0177

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IN THE SEVENTH JUDICIAL DISTRICT COURT  
IN AND FOR GRAND COUNTY, STATE OF UTAH

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|                      |   |                      |
|----------------------|---|----------------------|
| SELVA EUGIN MCGINTY, | ) |                      |
|                      | ) |                      |
| Plaintiff,           | ) | FINDINGS OF FACT AND |
|                      | ) | CONCLUSIONS OF LAW   |
| vs.                  | ) |                      |
|                      | ) |                      |
| LEE MCGINTY          | ) |                      |
|                      | ) |                      |
| Defendant.           | ) | Civil No. 91-145     |

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The above-entitled matter came on regularly for trial before the Court on the 11th day of June, 1993, the Honorable LYLE ANDERSON, District Court Judge, presiding. Plaintiff was personally present and represented by his counsel, DAVID S. DOLOWITZ. Defendant was personally present and represented by her counsel, JOANE PAPPAS WHITE. The Court received sworn testimony and exhibits and, having taken the matter under advisement and having entered a Memorandum Decision herein, the Court now finds as follows:

FINDINGS OF FACT

1. The parties hereto are residents of Grand County, State of Utah, and had been for more than three (3) months immediately prior to the filing of this action.

2. The parties were married on June 18, 1976 at Palo Alto, California, and have been husband and wife since that time.



3. The Plaintiff (hereinafter referred to as "Cotton") and the Defendant (hereinafter referred to as "Lee") met in 1963 in Saudi Arabia, at a time when both were employed by the Arabian American Oil Company ("ARAMCO"). A romance blossomed almost immediately, but marriage was not possible because of the nepotism policies of ARAMCO and because Lee, a devout Catholic, could not marry Cotton unless the church granted a dispensation pertaining to Cotton's earlier divorce. In 1975, the dispensation was received and by June of 1976, Cotton and Lee had both retired, or were in the process of retiring, from ARAMCO and were finally married.

4. There have been no children born as the issue of this marriage and none are expected.

5. The Court finds that irreconcilable differences have occurred between the parties which makes it impossible for them to reconcile their differences and, therefore, the Court finds that each of the parties is entitled to a Decree of Divorce from the other.

6. The Court finds that the principle issue before the Court is whether a ranch in Castle Valley, Utah (the "Ranch"), purchased by Cotton in 1970 is a marital asset.

7. The Court finds that the parties began looking for a retirement home and retirement investments during the late 1960's. Lee presented substantial evidence of her contributions to the purchase of the Ranch with the understanding and belief that the Ranch would be her retirement home. Although Cotton claims that she only loaned him the money, which he claims he subsequently

repaid, he presented little or no supporting documents for his claim.

8. The Court finds that the monthly payments for the Ranch between 1976 and 1983, when the Ranch was paid off, came out of the Ranch account, an account frequently supplemented by deposits from the joint accounts of the parties. The Court further finds that the remaining debt on the Ranch of approximately FOURTEEN THOUSAND (\$14,000.00) DOLLARS was paid off in 1983 with Lee's separate funds.

9. The Court finds that Lee contributed to the acquisition and the maintenance of the Ranch both before and during the marriage and that she did so utilizing her own money as well as her efforts. The parties lived on the Ranch during all of their married life and made substantial improvements to it. The Ranch, purchased for EIGHTY THOUSAND (\$80,000.00) DOLLARS in 1970, is now estimated to be worth FOUR HUNDRED TWENTY-FIVE THOUSAND (\$425,000.00) DOLLARS. Though most of the appreciation is due to recent market increases, marital improvements have also doubled hay production from the Ranch.

10. In previous efforts to sell the Ranch, Cotton acted as if Lee were a joint owner of the Ranch. Lee has signed and participated in Listing Agreements and Deeds for the sale of portions of the property. Lee has demonstrated that she provided the funds for half of the lump sum payments and the Court finds that the installment payments ultimately came from joint funds. The Court finds that even though the title to the Ranch was held in

Cotton's name alone, the Ranch was a joint venture and a marital asset and that Lee has made substantial contributions, both before and during the marriage, by way of the maintenance, preservation and protection of the Ranch in addition to substantial contributions of her sole and separate funds.

11. At the time of separation, the parties agree that there was SIXTEEN THOUSAND (\$16,000.00) DOLLARS in a joint marital account and that Lee had a FOURTEEN THOUSAND (\$14,000.00) DOLLAR Certificate of Deposit. The FOURTEEN THOUSAND (\$14,000.00) DOLLAR Certificate of Deposit in Lee's name is the remainder of Lee's pre-marital savings. The Court finds that Cotton took control of the SIXTEEN THOUSAND (\$16,000.00) DOLLAR joint family savings account and that he has consumed it, apparently in violation of the Court's order. Although Cotton claims to have expended the monies on the day-to-day operation of the Ranch, a use authorized by the Court, the Court finds that he paid his attorneys over SEVEN THOUSAND (\$7,000.00) DOLLARS during the same time and had no apparent source of that payment other than the SIXTEEN THOUSAND (\$16,000.00) DOLLAR account.

12. From the evidence, the Court finds that Cotton intentionally violated the Court's Restraining Order with respect to the disposition of marital assets and finds him in contempt of Court.

13. The Court finds that Lee testified that household goods, in addition to those conveyed to the buyer, were disposed of by Cotton and that her valuation on those household goods, which

were marital assets, was the total sum of EIGHT THOUSAND (\$8,000.00) DOLLARS. She claims that she was entitled to an award of FOUR THOUSAND (\$4,000.00) DOLLARS for her portion of those marital goods. Cotton testified that all of the household goods were included in the sale, whether or not listed specifically in the sales documents, and, therefore, the Court finds that the parties have received fair value for same as part of the sale of the ranch. The Court will accept Cotton's testimony on this point and will find that the equal division of the proceeds from the sale of the ranch would also cover the household goods.

14. The Court finds that each of the parties should be awarded an undivided one-half interest in the Ranch and the improvements and appurtenances thereto appertaining and/or an undivided one-half interest in the Contract of Sale and Trust Deeds or mortgages thereon.

15. The Court finds that Cotton entered into a Contract of Sale and that both parties agree that said Contract of Sale for the Ranch should be honored. The Court further finds that the purchaser of the property is currently in default of his obligations. In the event that the contract purchaser has not brought his obligations under the contract current by August 1, 1993, then the Court finds that actions should be taken to recover the Ranch from the defaulting purchaser. In that event, the Court finds that Lee is the more appropriate party to exercise the power to control the enforcement of the contract and that she should be authorized to take all steps necessary to enforce the contract or

recover the property and further that she be empowered to enter into negotiations for the resale of the Ranch, should that be necessary. The Court has seen both parties on the stand and finds that it has more confidence in the ability of Lee to handle the sale in a business-like manner. If Cotton fails to agree to another sale of the Ranch or to enforcement of the Contract of Sale, the Court finds that Lee should be authorized to seek approval for enforcement or a sale directly from the Court.

16. The Court finds that Lee's one-half interest in the California home was transferred by Lee to her brother and sister before her marriage to Cotton and, therefore, is not subject to the jurisdiction of this Court and is not a marital asset.

17. The Court finds that Lee should be awarded her Certificate of Deposit which the Court finds to be her sole and separate property.

18. The Court finds that Cotton should be awarded the SIXTEEN THOUSAND (\$16,000.00) DOLLAR joint family savings account, or its residue, even though it is marital property, in order to foster an equitable distribution of all of the assets of the parties.

19. The Court finds that Lee should be awarded the Lincoln automobile which she is now driving and all of the other personal property in her possession. Cotton should be awarded those items of personal property in his possession at this time.

20. For his contempt of Court, the Court finds that Cotton should be required to pay a civil fine in the of TWO HUNDRED

(\$200.00) DOLLARS and that he should further be required to pay to Lee the sum of ONE THOUSAND (\$1,000.00) DOLLARS for the expenses she has incurred in seeking to address his non-compliance with the Court order pursuant to Section 78-32-11, Utah Code Annotated.

21. The Court finds that there is a sum in excess of TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS currently being held in an escrow account in the names of the attorneys of record herein on behalf of their respective parties. The funds in said escrow represent funds received from the sale of the Ranch. Additionally, the parties have deposited the 1991 tax refund in the sum of EIGHT HUNDRED FIFTY-FIVE (\$855.00) DOLLARS and have additional earned interest on the account. The Court finds that the escrow account should be equally divided between Lee and Cotton but that the civil fine and the amounts owed to Lee from Cotton should be deducted from Cotton's share before distribution to him of his share of the escrow account.

22. The Court finds that each of the parties hereto has a pension from ARAMCO and social security benefits and that each of the parties has received an equal share of the assets awarded herein and, therefore, each party is self-supporting. Neither party is awarded alimony.

23. Based upon the distribution of assets herein, the Court finds that each of the parties is able to meet his or her respective Court costs and attorney's fees and neither party is awarded same herein.

24. The Defendant desires to have her prior name of Lee Nash restored to her and it is appropriate for the Court to do so.

Based on the foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

1. The Plaintiff is granted a divorce from the Defendant and the Defendant is granted a divorce from the Plaintiff on the grounds of irreconcilable differences.

2. No alimony is awarded herein to either party.

3. The parties hereto have accumulated certain real and personal property during this marriage and in the years leading up to same and said property is awarded as follows:

A. Each of the parties hereto is awarded an undivided one-half interest, as tenants-in-common, in the McGinty Ranch located in Castle Valley, Grand County, State of Utah and all of the appurtenances thereto appertaining and/or in the Contract of Sale and security instruments concerning said Ranch and all of the proceeds which result therefrom. In the event that the purchaser of the Ranch brings the contract current no later than August 1, 1993 and keeps same in good standing, then the parties hereto are each awarded one-half of all of the benefits from said contract. In the event that the purchaser under the contract fails to bring his obligations current by August 1, 1993 or subsequently defaults in the terms of the agreement, then Defendant Lee McGinty is authorized to assume control and take all steps necessary to reclaim the Ranch and/or enforce the sale contract on behalf of the

parties hereto. She is further empowered to enter into negotiations for the resale of the Ranch if that should be necessary. In the event that the Plaintiff fails to agree to the terms of a future sale, Defendant may seek approval of the Court to confirm a resale or enforce the Contract of Sale.

B. The Plaintiff is awarded the SIXTEEN THOUSAND (\$16,000.00) DOLLAR joint family savings account, or the residue thereof.

C. The Defendant is awarded her time Certificate of Deposit in the sum of approximately FOURTEEN THOUSAND (\$14,000.00) DOLLARS.

D. The Defendant is awarded the Lincoln automobile in her possession and the Plaintiff is awarded the vehicles which were left in his possession at the time of separation but which he has apparently sold. Each party is awarded those items of personal property in his or her possession as of the date hereof.

E. Each of the parties is awarded one-half of the escrow account which holds the proceeds from the down payment for the Ranch and the 1991 tax refund provided, however, that the Plaintiff's share shall be reduced as follows:

(1) TWO HUNDRED (\$200.00) DOLLARS to be paid to the Court for and as Plaintiff's civil fine for contempt; and

(2) The sum of ONE THOUSAND (\$1,000.00) DOLLARS to be paid to the Defendant for and as reimbursement for her costs incurred in readdressing Plaintiff's contempt; and




4. Neither party is awarded Court costs or attorney's fees herein.

5. The Court concludes from the findings that the Plaintiff has committed a civil contempt of Court and fines the Plaintiff the sum of TWO HUNDRED (\$200.00) DOLLARS by way of civil contempt fee to be paid from Plaintiff's share of the escrow proceeds awarded herein.

6. The Defendant's prior name of Lee Nash is hereby restored to her.

DATED this 18th day of August, 1993.

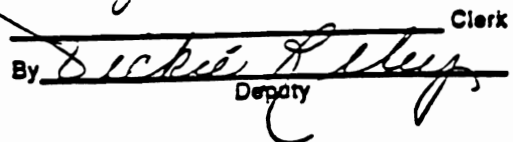
  
LYLE R. ANDERSON  
District Court Judge

**CERTIFICATE**

STATE OF UTAH  
COUNTY OF GRAND } ss

I, the undersigned Clerk of the Seventh Judicial Court in and for Grand County, State of Utah, do hereby certify that the annexed and foregoing is a true, full and correct copy of an original document on file in my office as such Clerk.

WITNESS my hand the seal of said Court this 12<sup>th</sup>  
day of August 19, 93

By  Clerk  
Deputy

COPY

JOANE PAPPAS WHITE #3445  
Attorney for Defendant  
Fifth Street Plaza, Suite 1  
475 East Main Street  
Price, Utah 84501  
Telephone: (801) 637-0177

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IN THE SEVENTH JUDICIAL DISTRICT COURT  
IN AND FOR GRAND COUNTY, STATE OF UTAH

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|                      |   |                   |
|----------------------|---|-------------------|
| SELVA EUGIN MCGINTY, | ) |                   |
|                      | ) |                   |
| Plaintiff,           | ) | DECREE OF DIVORCE |
|                      | ) |                   |
| vs.                  | ) |                   |
|                      | ) |                   |
| LEE MCGINTY          | ) |                   |
|                      | ) |                   |
| Defendant.           | ) | Civil No. 91-145  |

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The above-entitled matter came on regularly for trial before the Court on the 11th day of June, 1993, the Honorable LYLE ANDERSON, District Court Judge, presiding. Plaintiff was personally present and represented by his counsel, DAVID S. DOLOWITZ. Defendant was personally present and represented by her counsel, JOANE PAPPAS WHITE. The Court received sworn testimony and exhibits and, having taken the matter under advisement and having entered a Memorandum Decision herein and having entered the foregoing Findings of Fact and Conclusions of Law now, therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiff is granted a divorce from the Defendant and the Defendant is granted a divorce from the Plaintiff on the grounds of irreconcilable differences.

2. No alimony is awarded herein to either party.

3. The parties hereto have accumulated certain real and personal property during this marriage and in the years leading up to same and said property is awarded as follows:

A. Each of the parties hereto is awarded an undivided one-half interest, as tenants-in-common, in the McGinty Ranch located in Castle Valley, Grand County, State of Utah and all of the appurtenances thereto appertaining and/or in the Contract of Sale and security instruments concerning said Ranch and all of the proceeds which result therefrom. In the event that the purchaser of the Ranch brings the contract current no later than August 1, 1993 and keeps same in good standing, then the parties hereto are each awarded one-half of all of the benefits from said contract. In the event that the purchaser under the contract fails to bring his obligations current by August 1, 1993 or subsequently defaults in the terms of the agreement, then Defendant Lee McGinty is authorized to assume control and take all steps necessary to reclaim the Ranch and/or enforce the sale contract on behalf of the parties hereto. She is further empowered to enter into negotiations for the resale of the Ranch if that should be necessary. In the event that the Plaintiff fails to agree to the terms of a future sale, Defendant may seek approval of the Court to confirm a resale or enforce the Contract of Sale.

B. The Plaintiff is awarded the SIXTEEN THOUSAND (\$16,000.00) DOLLAR joint family savings account, or the residue thereof.

C. The Defendant is awarded her time Certificate of Deposit in the sum of approximately FOURTEEN THOUSAND (\$14,000.00) DOLLARS.

D. The Defendant is awarded the Lincoln automobile in her possession and the Plaintiff is awarded the vehicles which were left in his possession at the time of separation but which he has apparently sold. Each party is awarded those items of personal property in his or her possession as of the date hereof.

E. Each of the parties is awarded one-half of the escrow account which holds the proceeds from the down payment for the Ranch and the 1991 tax refund provided, however, that the Plaintiff's share shall be reduced as follows:

(1) TWO HUNDRED (\$200.00) DOLLARS to be paid to the Court for and as Plaintiff's civil fine for contempt; and

(2) The sum of ONE THOUSAND (\$1,000.00) DOLLARS to be paid to the Defendant for and as reimbursement for her costs incurred in readdressing Plaintiff's contempt; and

4. Neither party is awarded Court costs or attorney's fees herein.

5. The Court concludes from the findings that the Plaintiff has committed a civil contempt of Court and fines the Plaintiff the sum of TWO HUNDRED (\$200.00) DOLLARS by way of civil contempt fee to be paid from Plaintiff's share of the escrow proceeds awarded herein.

6. The Defendant's prior name of Lee Nash is hereby restored to her.

DATED this 14th day of August, 1993.

Lyle R. Anderson  
LYLE R. ANDERSON  
District Court Judge

**CERTIFICATE**

STATE OF UTAH } ss 1  
COUNTY OF GRAND }

I, the undersigned Clerk of the Seventh Judicial Court in and for Grand County, State of Utah, do hereby certify that the annexed and foregoing is a true, full and correct copy of an original document on file in my office as such Clerk.

WITNESS my hand and the seal of said Court this 14th  
day of August 19. 93  
Clerk  
By Debbie Riley  
Deputy

**ADDENDUM C**  
**AFFIDAVIT OF COUNSEL**

JOANE PAPPAS WHITE #3445  
Attorney for Defendant/Appellee  
Fifth Street Plaza, Suite 1  
475 East Main Street  
Price, Utah 84501  
Telephone: (801) 637-0177

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IN THE UTAH COURT OF APPEALS

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|                      |   |                        |
|----------------------|---|------------------------|
| SELVA EUGIN MCGINTY, | ) |                        |
|                      | ) |                        |
| Plaintiff/Appellant, | ) | AFFIDAVIT OF JOANE     |
| Vs.                  | ) | PAPPAS WHITE, ATTORNEY |
|                      | ) | FOR LEE NASH           |
| LEE MCGINTY,         | ) |                        |
|                      | ) | Case No. 930569-CA     |
| Defendant/Appellee.  | ) |                        |

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STATE OF UTAH        )  
                          : ss.  
County of Carbon    )

I, Joane Pappas White, being first duly sworn upon  
oath hereby depose and state as follows:

1. I am attorney for Lee Nash formerly known as  
Lee McGinty and have been her attorney throughout the trial  
and appellate stages of this case.

2. The Decree of Divorce entered on August 11,  
1993 authorized Lee Nash to takes steps necessary to reclaim  
the McGinty ranch in the event that the defaulting buyer did  
not cure the default by August 1, 1993.

3. The defaulting buyer, Darr Morell Hatch, Jr.  
has failed to make any additional payments whatsoever since  
the time of trial and yet he still remains in possession of  
the McGinty ranch as of the date hereof.

4. Lee Nash has retained the services of Southeastern Utah Title Company for purposes of proceeding with a foreclosure of the trust deed on the property but that said title company, as well as others contacted, would not proceed without the written authorization of Selva McGinty.

5. Requests were made by me to Mr. McGinty's current counsel with respect to signing documents necessary for the foreclosure but such documents were not forthcoming.

6. An Order to Show Cause requiring Selva McGinty to execute documents for the foreclosure was filed with the court on December 8, 1993. Just prior to the date of the hearing, I received notification from Mr. McGinty's attorney that he would sign a stipulation agreeing that Mr. McGinty would execute documents to facilitate the foreclosure. A delay of thirty-four (34) days existed from the filing of the Order until the signing of the Stipulation.

7. Documents authorizing the foreclosure were prepared by the title company and were forwarded to attorney Tucker for the signature of Selva McGinty on March 21, 1994. In my letter of March 28, 1994 I requested that attorney Hansen return the materials for the Title Company within ten (10) days. The documents have never been returned and the title company sent the attached letter indicating that they are unable to proceed with the foreclosure due to the failure by Mr. McGinty to return the Substitution of Trustee document. From the date of the Order to Show Cause until the current



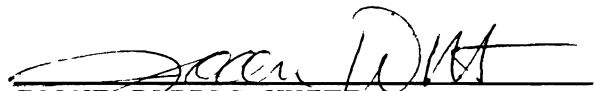
time almost five (5) months have passed and neither Mr. McGinty nor his lawyer have made any attempt to get the documents to the title company even though a Stipulation and Order requiring them to do so was entered months ago. (See attached letter from South Eastern Utah Title Company).

8. To the best of our information and belief Mr. McGinty has made no attempt to regain control of the McGinty ranch and he remains a close personal friend of Darr Hatch and is residing in a trailer park which Mr. Hatch manages.

9. For a period of the past six (6) months, an alternative buyer has been waiting for the opportunity to purchase the McGinty ranch and stands ready, willing and able to execute purchase agreements immediately for the ranch property.

10. In my opinion, Mr. McGinty has done everything possible to delay the foreclosure proceeding and to stall the execution of documents necessary to reclaim the property from Darr Hatch.

DATED this 26<sup>th</sup> day of April, 1994.

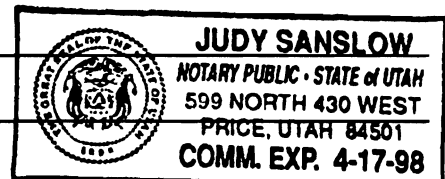
  
JOANE PAPPAS WHITE  
Attorney for Appellee

Subscribed and sworn to before me this 26<sup>th</sup> day of April, 1994.

  
NOTARY PUBLIC

Residing At:

My Commission Expires:



# **SOUTH EASTERN UTAH TITLE COMPANY**



☐ SAN JUAN COUNTY  
P.O. BOX 579  
MONTICELLO, UTAH 84535  
(801) 587-2588  
FAX (801) 587-2582

**ABSTRACTS AND TITLE INSURANCE  
CARBON, EMERY, GRAND, & SAN JUAN COUNTIES**

☐ CARBON/EMERY COUNTY  
175 EAST 100 SOUTH  
P.O. BOX 855  
PRICE, UTAH 84501  
(801) 637-4455  
FAX (801) 637-4459

☐ GRAND COUNTY  
150 EAST 100 NORTH  
P.O. BOX 700  
MOAB, UTAH 84532  
(801) 259-7635  
FAX (801) 259-7637

April 21, 1994

Joane Pappas White Esq.  
475 East Main, Suite 1  
Price, Utah 84501

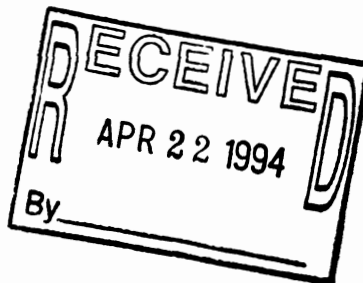
RE; McGinty

Dear Joane:

As of this date, I have not received the Substitution of Trustee document signed by Mr. McGinty. From your letter of March 28, you gave McGinty's attorney 10 days to return the Substitution to me. It may be a good time to urge Mr. McGinty's attorney to send that to me. As soon as I get the Substitution, we will proceed with the foreclosure.

Best Regards

Jerry Frandsen



**ADDENDUM D**

**EXHIBITS 36, 37, 38 & 39  
TRACING FUNDS WHICH PAID OFF RANCH**

DEFENDANT'S  
EXHIBIT  
#36  
97-145

NON-NEGOTIABLE  
NON-TRANSFERABLE  
THIS IS TO CERTIFY THAT  
HEREIN CALLED REGISTERED OWNER(S)  
THE SUM OF

SAVINGS CERTIFICATE  
FIRST WESTERN NATIONAL BANK  
1988  
Lee Nash McNulty  
June 24  
1988  
No. 7453

FIRST WESTERN NATIONAL BANK  
MILWAUKEE, WISCONSIN  
15000 DOLLARS  
15,000.00

THIS DEPOSIT IS NON-NEGOTIABLE  
DOLLARS

1285 97-145  
PAY AND CASH  
FIRST WESTERN  
NATIONAL BANK  
MILWAUKEE, WISCONSIN  
97-185 97-185  
SEP 73 03  
1285 97-145

SAVINGS CERTIFICATE  
**FIRST WESTERN NATIONAL BANK**  
 1327172-37  
 No 7145

NON-NEGOTIABLE  
 NON-TRANSFERABLE

Moab, Utah March 24, 1983 \$ 15,000.00

THIS IS TO CERTIFY THAT Lee Nash McGinty  
 HEREIN CALLED REGISTERED OWNER(S) HAS DEPOSITED IN THE FIRST WESTERN NATIONAL BANK  
 NATIONAL BANK 150000 00

THE SUM OF \_\_\_\_\_ DOLLARS  
 payable to the registered owner(s) upon presentation and surrender of this certificate properly endorsed 91 Days after date, with interest  
 at the rate of 8.25 percent per annum from date.

This certificate will be automatically renewed at maturity for additional successive periods of N/A each, unless presented for payment by  
 the registered owner(s) within 10 days after a maturity date for payment as of such maturity date. The bank reserves the right to renew this certificate  
 at any maturity date upon mailing to the registered owner(s) at his address last shown on the back of this certificate a notice of election to renew.

*Lee Nash McGinty*  
 (Signature)

THIS DEPOSIT IS NOT SUBJECT TO CHECKS \$000 150000 00

Lee Nash McGinty  
 1327172-37  
 97-185 97-185

PAY ANY BANK PER  
 FIRST WESTERN  
 NATIONAL BANK  
 A. C. C. 97-185

for record - new  
 cut # 7453 / 100



SELVA E. MC GINTY  
RANCH ACCOUNT

1437

P.O. BOX 224 259-7714

MOAB, UTAH 84532

23 September 1983

97-185/1243

Pay to the  
order of

First Western National Bank \$13,638.47

Thirteen thousand six hundred thirty-eight and 47/100 Dollars

SEP 23 1983  
FIRST WESTERN  
NATIONAL BANK  
P.O. BOX 249 UTAH 84532

Handwritten signature: Selva E. McGinty  
3 00001363847

Principal 13,589.21 Int 855.26

Escrow

To: Bob & Wilene Shumway

September 23, 1983

We have collected for your account and placed  
to your credit the following:

Paid by Selva E. McGinty

XX Interest on Contract or Note 9/1-9/23/83

XX Payment on Contract or Note

New

Principal Balance

Interest \$ 55.26

\$ -0-

Pd on Princ. \$ 13,583.21

Other Chg. \$

\$ 13,638.47

Less Charges \$ 1.00

Other Chg. \$

We Credit \$ 13,637.47

First Western National Bank

By

Handwritten signature: [Signature]

DEPOSITION  
EXHIBIT  
21  
L.M.

DEFENDANT'S  
EXHIBIT

RECORD ALL CHARGES OR CREDITS THAT AFFECT YOUR ACCOUNT

OMB No. 1545-0112  
Statement for Recipients of **1983**  
Interest Income  
Copy B For Recipient

First Western National Bank  
P.O. BOX 249  
MOAB, UTAH 84532  
87-0257659

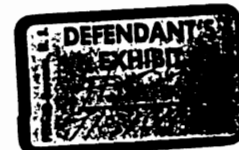
Type or print PAYER'S name, address, ZIP code, and Federal identifying number.

Recipient's identifying number: **399 14 3217**  
1 Earnings from savings and loan associations, credit unions, bank deposits, bearer certificates of deposit, etc.: **308.52**  
2 Amount of forfeiture: **0.00**  
3 Federal income tax withheld

Type or print RECIPIENT'S name, address, and ZIP code below  
**LEE NASH MCGINTY**  
**BOX 224**  
**MOAB, UTAH**  
**84532**  
ACCT NO **13277240**  
CD NO **7453**  
This information is being furnished to the Internal Revenue Service.

Form 1099-INT

| NUMBER | DATE | DESCRIPTION OF TRANSACTION | PAYMENT/DEBIT | FEE (FANY) | DEPOSIT/CREDIT | BALANCE |
|--------|------|----------------------------|---------------|------------|----------------|---------|
| 2254   | 9/23 | Transfer to ranch          |               |            | 308.52         | 1307.24 |
| 2255   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2256   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2257   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2258   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2259   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2260   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2261   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2262   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2263   | 9/23 | Transfer to ranch          |               |            |                |         |
| 2264   | 9/23 | Transfer to ranch          |               |            |                |         |



RECORD ALL CHARGES OR CREDITS THAT AFFECT YOUR ACCOUNT

First Western National Bank  
P.O. BOX 249  
MOAB, UTAH 84532  
87-0257659

Type or print PAYER'S name, address, ZIP code, and Federal identifying number.

Recipient's identifying number: **399 14 3217**  
1 Earnings from savings and loan associations, credit unions, bank deposits, bearer certificates of deposit, etc.: **308.52**  
2 Amount of forfeiture: **0.00**  
3 Federal income tax withheld

Type or print RECIPIENT'S name, address, and ZIP code below  
**LEE NASH MCGINTY**  
**BOX 224**  
**MOAB, UTAH**  
**84532**  
ACCT NO **13277240**  
CD NO **7453**  
This information is being furnished to the Internal Revenue Service.

Form 1099-INT

| NUMBER | DATE | DESCRIPTION OF TRANSACTION | PAYMENT/DEBIT | FEE (FANY) | DEPOSIT/CREDIT | BALANCE |
|--------|------|----------------------------|---------------|------------|----------------|---------|
| 1431   | 9/23 | Transfer to ranch          |               |            | 308.52         | 1307.24 |
| 1432   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1433   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1434   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1435   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1436   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1437   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1438   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1439   | 9/23 | Transfer to ranch          |               |            |                |         |
| 1440   | 9/23 | Transfer to ranch          |               |            |                |         |



**ADDENDUM E**

**RULE 33, UTAH RULES OF APPELLATE PROCEDURE**



### Rule 33. Damages for delay or frivolous appeal; recovery of attorney's fees.

(a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.

(b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

(c) **Procedures.**

(1) The court may award damages upon request of any party or upon its own motion. A party may request damages under this rule only as part of the appellee's motion for summary disposition under Rule 10, as part of the appellee's brief, or as part of a party's response to a motion or other paper.

(2) If the award of damages is upon the motion of the court, the court shall issue to the party or the party's attorney or both an order to show cause why such damages should not be awarded. The order to show cause shall set forth the allegations which form the basis of the damages and permit at least ten days in which to respond unless otherwise ordered for good cause shown. The order to show cause may be part of the notice of oral argument.

(3) If requested by a party against whom damages may be awarded, the court shall grant a hearing.

**Advisory Committee Note.** — Rule 33 is substantially redrafted to provide definitions and procedures for assessing penalties for delays and frivolous appeals.

If an appeal is found to be frivolous, the court must award damages. This is in keeping with Rule 11 of the Utah Rules of Civil Procedure. However, the amount of damages — single or double costs or attorney fees or both — is left to the discretion of the court. Rule 33 is amended to make express the authority of the court to

impose sanctions upon the party or upon counsel for the party. This rule does not apply to a first appeal of right in a criminal case to avoid the conflict created for appointed counsel by *Anders v. California*, 386 US 738 (1967) and *State v. Clayton*, 639 P.2d 168 (Utah 1981). Under the law of these cases, appointed counsel must file an appeal and brief if requested by the defendant, and the court must find the appeal to be frivolous in order to dismiss the appeal.

#### NOTES TO DECISIONS

##### ANALYSIS

Frivolous appeal.

—Defined.

—Sanctions.

Cited.

##### Frivolous appeal.

A husband's appeal from a judgment relating to alimony and distribution of marital property was frivolous, where there was no basis for the argument presented and the evidence and law was mischaracterized and misstated. *Eames v. Eames*, 735 P.2d 395 (Utah 1987).

Plaintiff's counsel violated rule and was therefore subject to sanction when, after he investigated plaintiff's malpractice action against defendant orthodontist and found that he could not prove breach of duty or causation,

the record was devoid of any relevant, admissible evidence showing negligence, and after losing on summary judgment, he persisted in filing an appeal. *Hunt v. Hurst*, 785 P.2d 414 (Utah 1990).

An appeal brought from an action that was properly determined to be in bad faith is necessarily frivolous under this rule. *Utah Dep't of Social Servs. v. Adams*, 806 P.2d 1193 (Utah Ct. App. 1991).

##### —Defined.

For purposes of this rule, a "frivolous" appeal is one having no reasonable legal or factual basis. Lack of good faith is not required. *O'Brien v. Rush*, 744 P.2d 306 (Utah Ct. App. 1987).

A frivolous appeal is one without reasonable legal or factual basis. *Backstrom Family Ltd.*