

2001

IN THE MATTER OF THE \ ESTATE AND
GUARDIANSHIP OF JOAN OELERICH,
Incompetent. HELEN D. OELERICH v. Joan
Oelerich : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

George M. McMillan; Attorney for Petitioner and Appellant .

James B. Lee; Attorney for Respondent .

Recommended Citation

Brief of Appellant, *IN THE MATTER OF THE \ ESTATE AND GUARDIANSHIP OF JOAN OELERICH, Incompetent. HELEN D. OELERICH v. Joan Oelerich*, No. 10005.00 (Utah Supreme Court, 2001).

https://digitalcommons.law.byu.edu/byu_sc2/663

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT
BRIEF



T NO. 10005A

COURT
OF THE STATE OF UTAH

IN THE MATTER OF THE
ESTATE AND GUARDIAN-
SHIP OF JOAN OELERICH,
Incompetent.
HELEN D. OELERICH,
Petitioner and Appellant,

Case No.
10005

vs.

JOAN OELERICH,
Respondent.

BRIEF OF APPELLANT

Appeal From a Judgment of the Third District Court
For Salt Lake County
Honorable Stewart M. Hanson, Judge

George M. McMillan
1020 Kearns Bldg.
Salt Lake City 1, Utah
Attorney for Petitioner and
Appellant

James B. Lee
1006 Kearns Bldg.
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	3
DISPOSITION IN LOWER COURT	3
RELIEF SOUGHT ON APPEAL	4
STATEMENT OF FACTS	4
ARGUMENT	
POINT I. THE COURT ERRED IN DISMISSING THE PETITION ON THE GROUNDS OF FAILURE TO PROSECUTE WITH DILIGENCE.	11
POINT II. THE COURT ERRED IN DISMISSING THE PETITION ON THE GROUNDS THAT A TRUST AGREEMENT WAS ENTERED INTO WITH FIRST NATIONAL BANK OF CHICAGO.	14
A. The court erred in failing to determine whether the alleged trust agreement was a valid substitute for a guardianship procedure insofar as the assets of the ward are concerned.....	14
B. Even assuming the trust instrument adequately safeguarded the property during the term of the trust, it was inadequate in failing to supply the needs of a guardian for the person of the respondent.	17
POINT III. PETITIONER IS ENTITLED TO AN ADJUDICATION OF THE ISSUES IN HER PETITION ON ITS MERITS. FAILURE TO ADJUDICATE SUCH ISSUES	

	Page
DENIES PETITIONER DUE PROCESS OF LAW.	22
SUMMARY AND CONCLUSION	23

INDEX OF AUTHORITIES

Adoption of Frasch (1949) 165 Pa. Sup. 75, 67 Atl(2d) 830	18
Christensen v. Harris (1945) 109 Ut 1, 163 P(2d) 314	23
Crystal Lime and Cement Co. v. Robbins (1959) 8 Ut(2d) 389, 335 P(2d) 624	12
General Investment Co v. Inter Borough Rapid Transit Co. (1923) 235 N.Y. 133, 139 N.E. 216	22
Jensen v. U.P. R.R. Co. (1889) 6 Ut. 253, 21 P.994	23
Kidman v. White (1963) 14 Ut(2d) 142, 378 P(2d) 898	16
King Bros. Inc. v. Utah Dry Kilne Co. (1962) 13 Ut(2d) 399, 374 P(2d) 254	11
Lindsey v. Leavy (CCA 9, 1945) 149 F(2d) 899, cert. den. (1946) 326 U.S. 783, 90 L.Ed. 474, 66 S. Ct. 331	22
6 Moore's Federal Practice, pp 2037-2042	22
O'Hare's Guardianship (1959) 9 Ut(2d) 181, 341 P(2d) 205	18
Samms v. Eccles (1961) 11 Ut(2d) 289, 358 P(2d) 344	16, 17
State ex rel v. Standefer (Mo. App. 1959) 328 SW(2d) 739	18
U.C.A. 1953, 75-13-31, 75-13-32	17
U.C.A. 1953, 75-13-20, 29	19
Utah Rules of Civil Procedure	14, 15, 22, 23
Wright v. Howe, et al. (1915) 46 Ut. 588, 150 P. 956	12

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE
ESTATE AND GUARDIAN-
SHIP OF JOAN OELERICH,
Incompetent.

HELEN D. OELERICH,

Petitioner and Appellant,

vs.

JOAN OELERICH,

Respondent.

Case No.
10005

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal from an order in the guardianship proceeding dismissing the petition for appointment of a guardian of the estate and person of Joan Oelerich, alleged to be incompetent.

DISPOSITION IN LOWER COURT

The District Judge dismissed the petition of Helen D. Oelerich, mother of Joan Oelerich, for appointment

of Walker Bank & Trust Company as guardian on the grounds that the petitioner had not been diligent in proceeding with the action, and that a Trust Agreement had been executed whereby the First National Bank of Chicago had been appointed Trustee of certain property received by Joan Oelerich from her father's estate. The order was granted without a hearing on the merits of the petition and without any determination of the incompetency of Joan Oelerich.

RELIEF SOUGHT ON APPEAL

The appellant seeks an order vacating and setting aside the order of dismissal of the petition for appointment of guardian and requiring the District Court to determine the issues of fact raised by such petition, and upon such determination, that a guardian of the person and property of Joan Oelerich be appointed.

STATEMENT OF FACTS

Most of the relevant facts pertinent to a consideration of the issues raised on appeal are contained in the verified Petition for Appointment of Guardian (R. 5-6) and the Affidavit of Helen D. Oelerich filed on or about March 14, 1962 (R. 35-38).

The first four paragraphs of this Statement of Facts are substantiated by these portions of the Record on Appeal.

The Petitioner, Helen D. Oelerich, is the mother of the respondent, Joan Oelerich. Petitioner is a resident of Cook County, Illinois. Joan was born February 17, 1938. At the age of 16, after having become pregnant by one Burtis Bishop, she was married to Bishop on November 27, 1954. A child was born to her on May 5, 1955. She was divorced from Bishop in 1955 at the age of 17. In the latter part of 1956, respondent became pregnant again by a person whose name was not known to the mother. She was examined at that time by Dr. Ernest M. Solomon, a licensed physician, and Dr. Jules Gelperin, a psychiatrist. Dr. Solomon reported to the Highland Park Hospital at Highland Park, Illinois that Joan was suicidal, withdrawn, acutely depressed and hard to contact. Dr. Gilperin reported to the same committee that she was suicidal and pre-psychotic and that unless an abortion was performed, either suicidal or severe suicidal depression would occur. Upon their recommendations an abortion was performed by Dr. Solomon on August 14, 1956. Subsequently Joan was referred by Dr. Solomon to Dr. Gilperin for psychotherapy. Dr. Solomon reported that she was not likely to recover without such treatment. Joan received psychotherapy from Dr. Gilperin for a short period but apparently abandoned her treatment.

During the last few days of September, 1959, Joan met one George Holle in an elevator in a Chicago hotel. Approximately a week later, on October 4, 1959, she suddenly took her four-year-old child, left her mother's home and went with Holle to Indiana where she lived

with Holle's wife and his children. Soon after her arrival in Indiana, Joan was induced by Holle to deliver to him the sum of \$10,000, which he used to repay a debt owed by him. On March 9, 1962, when her affidavit was filed, Joan's mother stated on information and belief that no part of that money had ever been returned to Joan.

On November 19, 1959, less than six weeks after Joan's arrival in Indiana, her mother visited her and Holle at Holle's home. At that time Holle assaulted Joan's mother and knocked her unconscious. When she recovered, Mrs. Oelerich saw her daughter, Joan, standing nearby, laughing hysterically and saying "I didn't see a thing." On several subsequent occasions Joan told various persons that she was "extremely confused and unhappy and did not know what strange influence was keeping her in Indiana." During Joan's stay in Indiana she became pregnant by Holle. In or about October, 1960, Holle brought her to Salt Lake City. Holle was a truck driver commuting between Salt Lake City and Indiana. While he was in Salt Lake City he lived with Joan and while he was in Indiana he lived with his lawful wife and children.

On or about March 16, 1961, the child of Joan and Holle, then only a few weeks old, died, apparently from suffocation or a respiratory ailment.

On December 21, 1961, petitioner filed her "Petition for Appointment of Guardian" in the District Court of Salt Lake County alleging that Joan was a

resident of Salt Lake County, approximately 23 years of age, and "is . . . by reason of her mental condition . . . unable, unassisted, to properly manage and take care of her property; and is likely to be deceived or imposed upon by artful or designing persons . . ." The petition alleged that Joan's mother had approximately \$14,000 which belonged to respondent, and in addition, Joan was going to receive a sum in excess of \$250,000 as a result of the probate of the estate of her father, Joseph F. Oelerich. The petition alleged that ". . . it is necessary and convenient that this court appoint a fit and suitable person to be the guardian of her person and estate and to properly care for, control and manage her person and estate." Inasmuch as she had no immediate relatives in the state of Utah, petitioner nominated Walker Bank & Trust Company and alleged that it was willing to act as the guardian of Joan's person and estate." (R. 5-6).

Joan appeared, through attorneys, and moved that the petition be dismissed (R. 7). She also filed an answer in which she admitted the fact that she was to receive assets from her father's estate and denied most of the other allegations of the petition (R. 7-10). The matter was referred to the trial calendar on January 10, 1962.

Ray S. McCarty and his associates were the original attorneys for the petitioner. They filed a notice to take the deposition of Joan upon oral interrogatories in February, 1962, but it does not appear from the file that her deposition was ever taken. In March, 1962, they filed a motion for an order to compel Joan to submit to a

mental examination (R. 25-26). On March 6, counsel served upon the attorney for respondent a notice that depositions would be taken of the keeper of records of the Highland Park Hospital, Highland Park, Illinois, in Chicago. A notice to take the depositions of Dr. Jules Gilperin, Dr. Ernest M. Solomon and Dr. H. H. Garner in Chicago was filed and apparently a motion to vacate the notice was filed by the respondent. The motion to vacate was denied by an order dated February 5, 1962 (R. 30). It appears from the records in the District Court that these depositions were taken, but they are not published and are not before the court in the instant proceeding. There was a hearing on March 16, 1962 on petitioner's objections to certain requests for admissions.

In a "Reply Affidavit" dated March 14, 1962, Joan denied many of the allegations of her mother's prior affidavit. She denied that she was in need of psychiatric treatment or examination and stated that she had "divested herself of control of her property through the creation of an irrevocable trust and she has appointed the Honorable J. Bracken Lee of Salt Lake City, as Trustee, and that he is now entitled to act as her Trustee, on her behalf and in her stead, until removed by order of the Court or otherwise."

At that time Joan still claimed to be domiciled in Indiana but that "she still resides in Salt Lake County, State of Utah" (R. 57-58). In April, 1962, Joan filed, through her attorneys, various motions, one of which

was to continue the lawsuit without date and to "dismiss the motions presently before the court in this matter" and to approve the trust agreement with J. Bracken Lee and its supplement, and "to require an annual accounting of the same before this Court under whose jurisdiction it shall remain unless otherwise ordered by the Court." Joan's attorneys withdrew October 8, 1962, and Ray S. McCarty and H. G. Metos withdrew as attorneys for petitioner April 16, 1963. Merlin O. Baker, an associate of the firm of Ray, Quinney and Nebeker, appeared as counsel for petitioner on July 9, 1963. During the four or five months preceding August 26, 1963, there were settlement negotiations between counsel for the parties (R. 135). After approval by the attorneys, the settlement proposal was rejected by Joan (R. 136). No showing was made or proffered by respondent that a delay in the hearing was prejudicial to her in any manner (R. 136). On June 28, 1963, present counsel for Joan appeared and filed a motion to dismiss the petition on the ground that "Petitioner has not been diligent in proceeding with the action" and that the First National Bank of Chicago had been named trustee in an agreement "which completely protects the property of Joan Oelerich . . . from artful or designing persons" (R. 74-75).

On June 28, 1963, Virginia Kelly, a cousin of Joan, executed an affidavit to the effect that she had lunch with Joan in Chicago in February. (R. 86).

"During the course of said luncheon, Joan Oelerich caused a scene by screaming 'They are

trying to call me a murderer,' referring to the death of her illegitimate daughter, Dawn Holle, in Utah. During the course of this luncheon, Joan Oelerich repeatedly made irrational statements, and her conduct and manner was such that it appeared to affiant that, in the opinion of affiant, Joan Oelerich was then mentally or emotionally disturbed.

"4. Several years ago, before she moved to Utah, Joan Oelerich received psychiatric treatment in Illinois.

"5. Affiant is informed and believes that since moving to Utah, Joan Oelerich has been cohabiting illicitly with one George Holle, despite the fact that her young daughter, Star Bishop, lives in the same home."

The file does not reflect the present alleged marital status of George Holle. At a hearing held in April, 1962, respondent's counsel referred to her as Miss Oelerich and she gave her name as Joan Oelerich (R. 156), but upon cross-examination she admitted that the bills she had presented into court were in the name of George Holle and she used the names Joan Holle, Joan Oelerich and Joan Oelerich Holle (R. 163).

There was no hearing on the merits of the petition for letters of guardianship. The court made no determination as to whether the trust agreement between the Chicago bank and respondent was subject to revocation by agreement of the trustee and the beneficiaries. There was no determination as to whether Joan had any assets other than those allegedly delivered to the trustee. There

was no determination as to whether Joan was competent to determine her own needs for support, maintenance or education which presumably may be satisfied by the distributor of trust income.

And it is undisputed that there is nothing in the trust instrument or otherwise in the record in this proceeding to indicate that there is any fiduciary acting for Joan which would serve as a substitute for a guardian of her person. The court made no effort to determine whether a guardianship of her person was required under the circumstances in this proceeding.

ARGUMENT

POINT I.

THE COURT ERRED IN DISMISSING THE PETITION ON THE GROUNDS OF FAILURE TO PROSECUTE WITH DILIGENCE.

This court said, in *King Bros. Inc. v. Utah Dry Kilne Co.* (1962), 13 Ut(2d) 399, 374 P(2d) 254:

“From the standpoint of the administration of justice, it is wise and desirable to adhere to a policy of being reluctant to turn a party out of court without trial. It can justifiably be done only if the party could not in any event establish a right to recover.” Citing *Morris v. Farnsworth Motel* (1953), 123 Ut. 289, 259 P.(2d) 297.

Sustaining the action of the trial court for refusing to dismiss an action which had been on file for three

years, this court held in *Wright v. Howe, et al.* (1915), 46 Ut. 588, 150 P. 956 that:

“This court, in a number of decisions, has clearly indicated that it is the policy of the law to have cases tried and determined upon the merits whenever such a course is possible, and where it does not clearly invade the rights of one of the parties.”

The court indicated that where failure to obtain a hearing speedily was not prejudicial, and particularly where the hearing might be held at the instance of the movant, dismissal without a hearing was improper.

“Merely failing to prosecute an action is not sufficient to show prejudice. This is especially true where the defendant may himself press the action to trial.”

In *Crystal Lime and Cement Co. v. Robbins* (1959), 8 Ut(2d) 389, 335 P. (2d) 624, this court held that the dismissal of an action which had been pending for eight years for failure to prosecute constituted an abuse of discretion where there had been equal opportunity for both parties to keep it moving.

“Since any party to this action could have obtained the relief to which it was entitled at any time it had wanted, but both parties chose to dally a number of years, it was an abuse of discretion for the court to grant respondent’s motion to dismiss with prejudice.”

In the instant case, the record reflects the fact that any delay in a determination of the issues on their merits

was prompted more by delaying tactics of the respondent than by lack of aggressiveness of the petitioner. Petitioner took three depositions after respondent's motion to vacate notice of their taking was denied (R. 14-15). The respondent filed two motions to dismiss the petition, both of which were denied (R. 22). Respondent resisted petitioner's motion for an order to compel the alleged incompetent to submit to a mental examination. The record reflects that on April 11, 1962, respondent filed a motion for an order "to continue this lawsuit without date" (R. 69). It appears that this motion and others came on for hearing on April 17, 1962 and were taken under advisement (R. 68). It does not appear that any further orders were made in the case until the end of June, 1963, when new counsel for the respondent filed a motion to dismiss upon the grounds of lack of diligence and execution of the trust agreement (R. 74-75). In this posture, who is to say which party failed to move with reasonable diligence? The court had taken under advisement certain motions of the respondent. At the time the respondent filed her motion, she had been negotiating through her attorneys for four or five months with the attorneys for the petitioner to work out a settlement of the matter, and the record is that the settlement was rejected by the respondent after it had been approved by her attorneys (R. 135-136).

The net effect of the court order was to hold petitioner responsible for a continuance of the lawsuit without date upon respondent's motion. It is little wonder that the respondent was able to demonstrate any privi-

lege as a result of the court having taken her motion for continuance under advisement.

It is submitted that reasonable fairness required that at the least, petitioner should have been given an opportunity to take additional steps in preparation for hearing or to prosecute the case in some other manner before an order of dismissal was entered. The ruling of the trial court constituted a flagrant abuse of discretion under Rule 41(b), and conflicts with the cases cited by this court before and after the adoption of the Rule.

POINT II.

THE COURT ERRED IN DISMISSING THE PETITION ON THE GROUNDS THAT A TRUST AGREEMENT WAS ENTERED INTO WITH FIRST NATIONAL BANK OF CHICAGO.

A. The court erred in failing to determine whether the alleged trust agreement was a valid substitute for a guardianship procedure insofar as the assets of the ward are concerned.

Insofar as reference to the Trust Agreement was concerned, it is not clear whether the court considered the respondent's motion of June 28, 1963 as the equivalent of a motion for summary judgment or as a motion to dismiss for failure to state a claim. In either event,

the granting of the motion was in flagrant violation of the Rule. The motion may be regarded as one for a summary judgment in the light most favorable to the respondent. If Rule 56 had been followed, petitioner would have had an opportunity to submit affidavits or to make any other appropriate showing essential to justify her opposition. See Rule 56, Utah Rules of Civil Procedure, paragraphs (e) and (f). Petitioner would have had an opportunity to take respondent's deposition. The depositions of the three doctors taken in Chicago could have been published. There could have been appropriate opportunity to explore the provisions of the trust and the possibility of revocation by the trustee and beneficiary without the consent of the petitioner or the court. It should be noted in this respect that during the spring of 1962, respondent's counsel represented to the court that an irrevocable trust agreement had been entered into between respondent and J. Bracken Lee, yet this instrument must have been revoked by the parties before the trust agreement with the Chicago bank could have been effected. The record is silent upon the disposition of the earlier trust instrument.

The trial judge ruled upon the respondent's motion in the face of the holdings by this court that a summary judgment "which turns a party out of court without an opportunity to present his evidence, is a harsh measure that should be granted only when, taking the view most favorable to the parties' claim and any proof that might properly be adduced thereunder, he could in no event prevail." *Kidman v. White* (1963), 14 Ut(2d) 142,

378 P(2d) 898. To the same effect is *Samms v. Eccles* (1961), 11 Ut(2d) 289, 358 P(2d) 344.

The trial court's assumption that the trust agreement "completely protects the property of Joan Oelerich from artful or designing persons" is gratuitous and and is unsupported by the record. Aside from the fact that no hearing was held to make a determination of such fact, it is apparent from the instrument itself that the agreement is applicable only to the assets theretofore held by the conservator of Joan's father's estate (R. 76-83). Petitioner alleged in her original petition that there was at least \$14,000 belonging to Joan which was held outside of the estate (R. 5). There is nothing in the record to indicate that Joan does not own other assets or that she will not acquire other assets during the ten-year term of the trust, either from her mother or gift from any other person, or otherwise. Is it unreasonable to suppose that Joan is not now or will not become, in the next ten years, the beneficiary of gifts from her mother or from other persons? In view of the means within the family, is it not likely that Joan's mother or other persons may desire to make direct gifts to her in view of possible savings in inheritance taxes, estate taxes and other applicable consideration of modern day estate planning? Moreover, is the court to engage in the presumption in these circumstances without any support in the record that Joan may not have or acquire property of her own independent of any activities of other members of the Oelerich family? Is the trust vested? If the trust is vested, what is to prevent the beneficiary from

conveying her interest? It is true that article 4 contains some restrictive agreements with respect to alienation. It is submitted, however, that the ruling of the court below precludes any inquiry as to the application of these provisions to factual possibilities which may exist during the term of the trust.

The point is that the ruling of the trial court negated any opportunity for exploration of the relevant facts and circumstances involved. There was no occasion afforded to present any evidence, either by way of affidavit of examination of witnesses, or otherwise. It is submitted that Judge Hanson's ruling was in direct opposition to the admonition of this court in *Samms v. Eccles, supra*, to the effect that the parties' "contentions must be considered in the light most to her advantage and all doubts resolved in favor of permitting her to go to trial; and only if the whole matter is so viewed, she could, nevertheless establish no right of recovery, should the motion be granted."

B. Even assuming the trust instrument adequately safeguarded the property during the term of the trust, it was inadequate in failing to supply the needs of a guardian for the person of the respondent.

Our statutes contemplate different powers and responsibilities for guardians of persons and property. Duties of guardians of persons are described in 75-13-31, UCA 1953, and 75-13-32, describes the duties of guardians of property. A case recognizing typical differences between the duties of guardians for these dif-

ferent problems is recognized in *O'Hare's Guardianship* (1959), 9 Ut(2d) 181, 341 P(2d) 205. It is submitted that in this connection there is no relevant difference in the guardianship of children and adults; no difference in the status or powers of guardianship of children and adults is made by the statute in this respect. cf. *In Re Adoption of Frasch* (1949), 165 Pa. Sup. 75, 67 Atl (2d) 830.

Substantially in point is the case of *State ex rel. v. Standefer* (Mo. App. 1959), 328 SW(2d) 739 where a petition was filed for the appointment of a guardian of the person and estate of Standefer. Standefer was an adult charged with a felony in the magistrate's court. The probate judge dismissed the petition. The Appellate Court reversed and held that while the probate judge under these circumstances had no authority to conduct a hearing with respect to the appointment of a guardian because of the criminal jurisdiction of the magistrate's court over Standefer's person, it was error to refuse to hold a hearing with respect to the appointment of a guardian of the property. The Appellate court noted that the Missouri statute contemplated guardians of persons and property with two distinct characteristics.

"We are of the opinion that the judge of the probate court had not only the power but also the duty to inquire into (only) whether Standefer was so incompetent as to require the appointment of a guardian over his estate to the end that his property might be gathered and preserved."

The instant petition prayed for letters of general guar-

dianship under Section 75-13-29. Thus the issue was presented as to whether a guardian should be appointed for the person as well as the property of Joan.

It is submitted that the trial court could not reasonably have determined as a matter of law on the basis of the present record that Joan was not incompetent within the meaning of 75-13-20 UCA 1953 as amended. It certainly appears obvious on the other hand that there was a considerable amount of evidence already in the file to indicate that she was unable "unassisted, to properly manage and take care of [her] self . . . and by reason thereof would likely be deceived or imposed upon by artful or designing persons." The file indicates that at the age of 23 she had become pregnant three times without having been married at the time of intercourse when the children were conceived. (R. 35-36). Three Illinois doctors presumably have diagnosed and treated Joan for mental or emotional illness or instability. (R. 35-36). She was characterized by one of these doctors as being "suicidal, withdrawn, acutely depressed and hard to contact." (R. 35). A licensed Illinois psychiatrist stated that in his opinion she was "suicidal and pre-psychotic." These doctors stated that she was unlikely to become well without psycho-therapy. While she received psycho-therapy treatment for a short period of time, she soon abandoned it. When her mother was knocked unconscious by George Holle, by whom Joan became pregnant, Joan stood nearby "laughing hysterically and saying 'I didn't see a thing.'" (R. 36). Her mother believed that she was mentally ill and in need of mental care and

treatment, and "she is unable, unassisted, to properly manage and take care of herself or her property, that by reason thereof, she is likely to be deceived and imposed upon by artful or designing persons, and has been so imposed upon by George Holle."

The facts adduced at a hearing on one of respondent's motions held April 17, 1962, point toward the need of a guardian. Respondent admitted that all the expenses which she was claiming were represented by bills sent to George Holle. (R. 161). Holle received a bill from the Manhattan Club. He received the light and gas bill; the bill from the landlord, and for groceries. (R. 161-162). Holle had arranged that Joan borrow \$1500 from the bank of Iron County about two months previously. (R. 162-163). Joan substantially admitted that she was unable to cope with her problems with the following explanation: "The problem is, have you ever been a woman alone, trying to sign a lease for a house or trying to get some sort of credit." (R. 162).

In June, 1963 Joan had lunch with a cousin in a fashionable restaurant in Chicago. During the course of the luncheon Joan became hysterical and began screaming: "They are trying to call me a murderer," referring to the death of her illegitimate daughter by George Holle, born in Utah. She made irrational statements and it appeared to her cousin that she was emotionally and mentally disturbed. She has been living and cohabiting illicitly with George Holle since moving to Utah, despite the fact that her young daughter, Star, lives in

the same home. (R. 86). It is submitted that the credibility of the court would be taxed by an assertion that the relationship between Holle and Joan Oelerich does not, under the circumstances, amount to an imposition upon Joan. The fact that Joan is presently heiress to a quarter of a million dollars and prospective heiress of at least another quarter million cannot be ignored. It is suggested that if the law enforcement agencies of Salt Lake County turn their heads at such circumstances, that the steady eyes of a court of law should not fail to penetrate them. The applicable statutes impose upon the judiciary a duty to determine the relevant facts in the circumstances herein presented.

Neither the provisions of the trust agreement nor the circumstances in which it was executed provide any mechanics for the safeguard of the person of Joan Oelerich. The trustee bank is in Chicago. According to the present record, although having lived in Utah for approximately three years, Joan claims to be a resident of Indiana. The petition here alleges that Joan resides in Salt Lake County. (R. 5). No provisions of the trust pretend to authorize the trustee to take care of Joan. It has, in fact, never been contended by respondent's counsel that the trust instrument was an effective substitute for a guardian of her person if in fact one was required. It is submitted that even if the trust is a valid substitute for a claim insofar as Joan's assets are concerned, it is totally and completely inadequate to supply the needs of a guardian for her person.

POINT III.

PETITIONER IS ENTITLED TO AN ADJUDICATION OF THE ISSUES IN HER PETITION ON ITS MERITS. FAILURE TO ADJUDICATE SUCH ISSUES DENIES PETITIONER DUE PROCESS OF LAW.

It is suggested that the circumstances of the respondent's motion, the granting of which is the subject of this appeal, in effect deprives the petitioner of due process of law. It is not suggested here that Rule 56, when followed, deprives a party of due process. That question has long since been decided. The principles of summary judgment have been approved when they apply to a situation where there is no genuine issue as to any material fact. See 6 *Moore's Federal Practice*, pp. 2037-2042, and see *General Investment Co. v. Inter Borough Rapid Transit Co.* (1923), 235 N.Y. 133, 139 N.E. 216; *Lindsey v. Leavy* (CCA 9, 1945), 149 F(2d) 899, cert. den. (1946) 326 U.S. 783, 90 L.Ed. 474, 66 S.Ct. 331.

In the instant case, however, Rule 56 was not followed. Petitioner was not afforded an opportunity to even define the issues of fact, let alone presenting evidence upon them by affidavit or other appropriate procedure. Although denying defendant's motion to dismiss the petition on the ground that it failed to constitute a claim for relief—a ruling, parenthetically, which was obviously correct—the probate court arbitrarily determined without a hearing that the petition should

be denied. None of the recognized procedural safeguards were followed. No testimony was taken. Even the depositions on file were totally ignored. It is submitted that these circumstances constitute a denial of the right of a litigant to be heard. If such a ruling was permitted to stand, it would constitute a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States and Article I, Section 7 of the Constitution of the State of Utah. In *Jensen v. Union Pacific R.R. Co.* (1889), 6 Ut. 253, 21 P. 994, this court held that due process of law means:

“. . . that a party shall have his day in court, — trial; which means the right of each party, plaintiff and defendant, to introduce evidence to establish his defense upon the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not ‘due process of law.’ Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial.”

See also *Christiansen v. Harris* (1945), 109 Ut. 1, 163 P (2d) 314.

SUMMARY AND CONCLUSION

The ruling of the trial court in dismissing the petition under the circumstances of this proceeding constituted the denial of a reasonable opportunity for a hearing on the merits. The petition was granted without compliance with Rule 56 and without any determination

of the issues of fact, notwithstanding the ruling of the trial judge that the petition stated a claim for relief. The grounds given by the trial court in the order of dismissal are without any merit or validity. The order of dismissal should be reversed and the case remanded for appropriate additional proceedings.

Respectfully submitted, this 2nd day of March, 1964.

GEORGE M. McMILLAN

1020 Kearns Building
Salt Lake City, Utah

Attorney for Petitioner

